SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EZRA CATTAN, derivatively as a shareholder of UBS GROUP AG on behalf of UBS GROUP AG, Plaintiffs, v. SERGIO P. ERMOTTI, OSWALD J. GRÜBEL, KASPAR VILLIGER, CARSTEN N. KENGETER, AXEL A. WEBER, DAVID H. SIDWELL, MARKUS U. DIETHELM, JOHN A. FRASER, LUKAS GÄHWILER, PHILIP J. LOFTS, ROBERT J. McCANN, THOMAS C. NARATIL, ROBERT B. KAROFSKY, ROBERT W. SCULLY, JEANETTE KAI JUAN WONG, DIETER WEMMER, ISABELLE ROMY, JEREMY ANDERSON, JULIE G. RICHARDSON, WILLIAM C. DUDLEY, BEATRICE WEDER di MAURO, RETO FRANCIONI, CHRISTIAN BLUHM, KIRT GARDNER, SUNI P. HARFORD, MARKUS RONNER, WILLIAM G. PARRETT, AXEL P. LEHMANN, ANDREA ORCEL, UBS AG, UBS AMERICAS HOLDING LLC and UBS AMERICAS INC., Defendants, - and - UBS GROUP AG, Nominal Defendant.	Index No. 652270/2020 Commercial Division Hon. Jennifer G. Schecter Part 54 **ORAL ARGUMENT REQUESTED** **Motion Sequence No. __**

MEMORANDUM OF LAW OF UBS AMERICAS HOLDING LLC, UBS AMERICAS INC., JULIE RICHARDSON, ROBERT SCULLY, DAVID SIDWELL, AND ROBERT KAROFSKY IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

PRELIMINARY STATEMENT

This lawsuit does not belong in this busy Court. Plaintiff Ezra Cattan—purportedly a shareholder of UBS Group AG ("UBS"), which is organized and headquartered *in Switzerland*—proposes to litigate in New York derivative claims on behalf of UBS for breach of fiduciary duty under *Swiss* law. The complaint names as defendants three UBS affiliates and 29 current and former members of UBS's Board of Directors ("Board") and Group Executive Board ("GEB") (the "Individual Defendants"), 25 of whom are not New York residents. Plaintiff bases his claims on unconnected events involving different UBS businesses over a 12-year period, which he lumps together as proof of supposed mismanagement by a seemingly random subset of UBS's Board and GEB members. His action should be dismissed for several independent reasons:

First, UBS's Articles of Association designate Switzerland as the exclusive forum for "disputes arising out of the corporate relationship." (*See* Affirmation of Prof. Hans Caspar von der Crone ("Crone Aff.") ¶53.) That provision squarely governs this derivative action.

Second, this lawsuit should be dismissed in favor of Switzerland under the *forum non conveniens* doctrine. This is an entirely Swiss dispute, asserting *Swiss* law claims on behalf of a *Swiss* company for breaches of fiduciary duty that occurred, if at all, in *Switzerland*, and resulted in injury, if at all, in *Switzerland*. New York has no meaningful connection to this action. The Complaint alleges 12 years' worth of incidents, most of which had no connection to New York, involving various global UBS affiliates.

Crucially, even if Plaintiff were to obtain a judgment in New York, it would not be enforceable under Swiss law against any defendants residing in Switzerland or elsewhere outside the United States. By contrast, a Swiss court could issue an enforceable judgment against all Defendants and has by far the greater interest in overseeing derivative lawsuits about the internal affairs of a Swiss bank. (*See* Crone Aff. ¶¶52-65.) "Where, as here, the action is almost entirely

concerned with the events, institution and law of a foreign nation, the action cannot be said to have a substantial nexus with New York, and must be dismissed." *Citigroup Glob. Mkts.* v. *Metals Holding*, 2006 WL 1594442, at *6 (Sup. Ct., N.Y. Cnty. June 8, 2006) (quotations omitted).

Third, Swiss substantive law bars Plaintiff's claims. UBS's shareholders have voted to "discharge"—or release—nearly all of Plaintiff's claims, thereby extinguishing them under Swiss law. A discharge vote for a particular year releases all claims based on publicly known facts, including facts disclosed by the company itself. UBS's shareholders voted to discharge all claims based on alleged conduct by the Individual Defendants, except for conduct in 2018 and 2019 (in relation to a French tax trial, which is not a valid basis for a derivative action). Most of Plaintiff's claims are also barred by the governing Swiss five-year statute of limitations, and Plaintiff cannot invoke the doctrine of continuous wrongdoing under Swiss law to save them.

Finally, the Complaint does not satisfy New York's own procedural requirements for derivative actions because Plaintiff engages in impermissible group pleading, failed to make a demand to initiate suit on the UBS Board, and does not allege that he owned stock in UBS for the entirety of the period of alleged misconduct.

FACTUAL BACKGROUND[1]

A. Parties

i. Plaintiff

Plaintiff alleges that he is a "citizen" of New York (¶44)[2] and "shareholder of UBS" who has "continuously held shares of UBS at [unspecified] times relevant" to the Complaint. (Compl. at Verification.) Plaintiff is a serial filer, who has recently brought derivative actions, filed by the same counsel, in this Court, purportedly on behalf of Novartis AG, Credit Suisse AG, and Barclays PLC. *See Cattan* v. *Vasella*, Index No. 650463/2021; *Cattan* v. *Rohner*, Index No. 652468/2020; *Ezrasons, Inc.* v. *Rudd*, Index No. 656400/2020.

ii. UBS and UBS AG

Nominal Defendant UBS is a banking and financial services holding company organized in 2014 under the laws of Switzerland as an Aktiengesellschaft, or public corporation, which primarily conducts business through its various subsidiaries. (¶45; Affirmation of Markus Baumann dated February 12, 2021 ("Sec'y Aff.") ¶¶2-4.) It is headquartered and has its principal place of business in Zurich, Switzerland. (¶45; Sec'y Aff. ¶¶2-3.)

UBS AG, a wholly-owned subsidiary of UBS, is a Swiss banking corporation organized as an Aktiengesellschaft. (¶45; Sec'y Aff. ¶4.) In 2014, UBS AG underwent a reorganization, whereby UBS became the ultimate parent corporation of the UBS group of

---

[1] These facts are taken primarily from the Complaint and assumed to be true for this motion, but generally denied otherwise. *Churches United for Fair Housing* v. *de Blasio*, 2018 WL 3646976, at *4 n.1 (Sup. Ct., N.Y. Cnty. Aug. 1, 2018) ("court may consider those facts alleged in the complaint" and documents "incorporated by reference" or "integral to the plaintiffs' claims" (citation omitted)).

[2] Citations to (¶_) are to the Complaint.

affiliated entities, including UBS AG. (¶280, n.5.) Prior to 2014, UBS AG was the ultimate parent company. (¶¶45, 280 n.5; Sec'y Aff. ¶4.)

iii. **UBS Americas Holding LLC and UBS Americas Inc.**

Defendant UBS Americas Holding LLC ("UBS Americas Holding") is a limited liability company headquartered in New York, and a wholly owned subsidiary of UBS AG. (¶45.) It is a non-operating holding company for UBS's U.S. subsidiaries. (Sec'y Aff. ¶5.) UBS Americas Inc. ("UBS Americas"), a subsidiary of UBS Americas Holding, is a Delaware corporation with its principal place of business in New York. (¶46; Corp. Sec'y Aff. ¶5.)

iv. **Individual Defendants**

The Complaint names as Individual Defendants 29 current and former UBS Board and GEB members. (Sec'y Aff. ¶¶16, 23 & App'x 1 & 2.) The Board has responsibility for the direction, supervision, and control of UBS, but has formally delegated executive management responsibilities to the GEB, which is responsible for developing and implementing the strategies of the UBS group and its business divisions. (Sec'y Aff. ¶¶11-12.)

Each Individual Defendant served as either a Board or GEB member during the span of the Complaint's allegations. (¶¶60-88.) Of those 29 individuals, 19 live outside the United States, including 13 who reside in Switzerland. (Sec'y Aff. ¶¶17, 24.) Only four Individual Defendants—Julie Richardson, Robert Scully, David Sidwell, and Robert Karofsky (the "moving Individual Defendants")—reside in New York. (*Id.*)

B. The Complaint

Plaintiff brings this action derivatively, purportedly on behalf of UBS, against the Individual Defendants, UBS AG, UBS Americas Holding, and UBS Americas. He seeks "at least $10 billion" on behalf of UBS (¶99), based on broad allegations of misconduct stemming from public settlements and investigations involving various UBS entities over the past 12 years. To

try to plead this misconduct, Plaintiff largely repeats verbatim contemporary public reporting from UBS's own corporate filings and news articles on these incidents (*e.g.*, ¶¶40-41, 120-22, 132, 148-53, 157-59), which include:

- Losses incurred during the subprime mortgage crisis of 2007-2008 (¶¶118-23, 160);
- A tax-evasion investigation by U.S. authorities that resulted in a 2009 settlement (¶¶124-34);
- A 2011 incident involving a rogue trader in London in UBS AG's Investment Bank that resulted in significant losses (¶¶134-44);
- Investigations by U.S. and Puerto Rican authorities in 2012 and 2014 concerning alleged municipal bond manipulation (¶¶145-48, 162, 177);
- UBS AG employees' involvement in benchmark manipulation that came to light in 2012 (¶¶149-53, 164-65, 170); and
- A tax-evasion investigation by French authorities that began in 2013 and resulted in a fine in 2019 that is subject to an ongoing appeal. (¶¶182, 184, 188-90, 231.)

Plaintiff's allegations quote public reporting in detail, but rarely identify any conduct by any specific Defendant. Indeed, *25* of the 29 Individual Defendants, including all four moving Individual Defendants, are mentioned *only once* in the Complaint, when Plaintiff gives their names and titles. The only references to the other four Individual Defendants—former CEOs Sergio Ermotti and Oswald Grübel, and current and former Chairmen Axel Weber and Kaspar Villiger—are cites to their public statements about the various incidents and general expressions of commitments to improve. (*E.g.*, ¶¶115, 123, 139, 151-52, 261.)

The Complaint alleges liability against UBS Americas Holding and UBS Americas solely "because their directors/officers/employees participated in the wrongdoing and each was an

instrumentality" used by other Defendants to "commit the misconduct" and alleged "violations of duty." (¶47.) Plaintiff seeks no damages from these entities. (*Id.*)

Plaintiff tries to sweep the various episodes described in the Complaint into a single course of alleged wrongdoing by Defendants. Based on that amalgamation of these unconnected incidents over more than a decade, Plaintiff brings three claims, each under Swiss law: (1) that the Individual Defendants breached their duties to UBS (¶¶287-92); (2) that all Defendants "participat[ed] in a common course of conduct and concerted action damaging UBS" (¶¶293-97); and (3) that all Defendants aided and abetted each other's alleged breaches (¶¶298-305).

ARGUMENT

I. UBS's Articles of Association Expressly Bar This New York Derivative Action.

As a threshold matter, this action is not properly filed in this Court because, for more than 20 years, UBS's Articles of Association ("Articles") have contained an exclusive and mandatory forum selection clause providing that "disputes arising out of the corporate relationship," such as this purported derivative action, must be filed in Switzerland. (*See* Crone Aff. ¶¶53-54.) Forum selection clauses are "prima facie valid and enforceable" under New York law. *Grant* v. *United Odd Fellow*, 129 N.Y.S.3d 785, 785 (1st Dep't 2020). To invalidate such a clause, a party must show that trial in the contractual forum would be "so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court," or that the clause is "unreasonable, unjust, in contravention of public policy," or "invalid due to fraud or overreaching." *Id.* (citation omitted).

UBS's Articles, which constitute binding law on UBS and its shareholders (Crone Aff. ¶56), state that "[j]urisdiction for ***any*** *disputes arising out of the corporate relationship* shall

solely be at the registered office of the Corporation"—*i.e.*, in Zurich, Switzerland.[3] (Ex-1 at Article 48, p. 26 (emphasis added).) Plaintiff's claims clearly arise out of the "corporate relationship" because they are brought "on behalf of the corporate entity" and allege that the Individual Defendants are "liabl[e] to UBS" for breaches of their duties under Swiss law *to UBS*. (¶¶92, 96-97). As explained by Swiss company law expert Professor von der Crone, this derivative action is exactly the type of dispute arising out of the "corporate relationship" covered by UBS's forum selection clause. (*See* Crone Aff. ¶54.) Indeed, this Court recently dismissed an action against a company where its bylaws, "approved by shareholders," provided that "internal-affairs claims" be brought in Delaware. *See Massoumi* v. *Ganju*, 2020 WL 7692211, at *1 (Sup. Ct., N.Y. Cnty. Dec. 23, 2020) (Schecter, J.).

Moreover, enforcement of UBS's forum selection clause will not "deprive" Plaintiff of his day in court, because he allegedly bought UBS shares subject to all the rights and conditions that accompany share ownership (¶¶44, 285), and, as explained below, Switzerland is a more than adequate forum for his claims. *See Rubens* v. *UBS AG*, 5 N.Y.S.3d 55, 56 (1st Dep't 2015) (party who "assented" to forum selection clause had no "unmitigated right to litigate his claims in New York"); *see also Collins* v. *Santoro*, 2014 WL 5872604, at *1-2 (Sup. Ct., N.Y. Cnty. Nov. 10, 2014) (dismissing derivative action based on forum selection clause in certificate of incorporation).

Nor would enforcement of UBS's forum selection clause violate public policy. As Plaintiff concedes (¶¶92, 97), whether litigated in Switzerland or New York, Swiss substantive law governs his claims. *See Rubens*, 5 N.Y.S.3d at 56. Moreover, there is no allegation that UBS misrepresented its Articles such that they are "permeated with fraud" and should not be enforced,

---

[3] The "registered office" of UBS Group is in Zurich, Switzerland. (Ex-1 at Article 1, p. 4.)

id.—nor could there be, as only UBS's *shareholders*, a group to which Plaintiff purportedly belongs, can amend UBS's Articles. (*See* Crone Aff. ¶52.)

II. This Swiss-Law Derivative Action Should Be Dismissed Under the Doctrine of *Forum Non Conveniens*.

Beyond UBS's binding forum selection clause, this is a textbook example of a case that should be dismissed based on the *forum non conveniens* doctrine, which "permits a court to stay or dismiss [an] action[] where it is determined" that the action "would be better adjudicated elsewhere." *Islamic Republic of Iran* v. *Pahlavi*, 62 N.Y.2d 474, 478-79 (1984). In making this determination, New York courts consider: (1) whether the cause of action arose from a transaction that occurred primarily in a foreign jurisdiction; (2) the burden on New York courts; (3) potential hardship; (4) the unavailability of an alternative forum; (5) New York's interest in adjudicating the matter; and (6) the parties' residencies. *See*, *e.g.*, *id.* at 479. All of these factors overwhelmingly support dismissal here.

A. The Alleged Breach Occurred in Switzerland, *Not* New York, and Switzerland Has the Far Greater Interest in Adjudicating This Matter.

New York courts hold that a breach of duty and economic injury occur where the *plaintiff* resides—here, Switzerland, home to UBS, on whose behalf this action is brought. *See Glob. Fin. Corp*. v. *Triarc Corp.*, 93 N.Y.2d 525, 527-28 (1999) ("When an alleged injury is purely economic, the place of injury is usually where the plaintiff resides and sustains the economic impact."); *Oddo Asset Mgmt.* v. *Barclays Bank*, 2010 WL 8748135, at *4 (Sup. Ct., N.Y. Cnty. Apr. 21, 2010).

On behalf of UBS, Plaintiff alleges that the Individual Defendants "fail[ed] to fulfill their duties of due care, diligence, prudence, and loyalty, as required under the Swiss Code of Obligations/Company law." (¶32.) And as Plaintiff acknowledges, the challenged "conduct of the Directors and Officers" "took place at corporate headquarters in Switzerland." (¶274.) While

Plaintiff lards up his Complaint with incidents involving UBS affiliates that occurred in various countries, the actual conduct on which Plaintiff bases his claims is the Individual Defendants' performance of their duties in Switzerland—including risk-management and oversight responsibilities (¶109), avoiding conflicts of interest (¶111), and directing UBS's global strategy (¶114)—all of which, in Plaintiff's telling, resulted in "damages" to *UBS* in *Switzerland* (*id.*).

These allegations of Swiss-based mismanagement alone support dismissal of this action in favor of Switzerland. *See Rushaid* v. *Pictet & Cie*, 2019 WL 120612, at *2 (Sup. Ct., N.Y. Cnty. Jan. 7, 2019) (FNC dismissal where "tortious conduct occurred in Switzerland"). To try to escape his admission that the challenged conduct occurred in Switzerland, Plaintiff alleges that this Swiss conduct was somehow "*targeted* at New York." (¶274 (emphasis added).) But Plaintiff's unsubstantiated "targeting" theory, which finds no support in New York law, is contradicted by his own allegations because Plaintiff never explains how the alleged breaches could have "targeted" (or did target) New York when their purported victim, UBS, is in Switzerland.

As the First Department has emphasized, "where a foreign forum has a substantial interest in adjudicating an action, such interest is a factor weighing in favor of dismissal." *Shin-Etsu Chem. Co.* v. *3033 ICICI Bank*, 777 N.Y.S.2d 69, 75 (1st Dep't 2004). Switzerland undeniably has a substantially greater interest than New York in enforcing duties owed under Swiss law to UBS, a Swiss corporation. *See Garmendia* v. *O'Neill*, 847 N.Y.S.2d 563, 564 (1st Dep't 2007) (affirming dismissal of claims against directors of Uruguayan bank because "Uruguay has an interest in adjudicating claims involving its own banking institutions").

UBS is the largest and most systemically important Swiss financial institution (*see* Ex-19 at 43), and the Complaint accuses its Board and GEB members of violating *Swiss* company

law. (¶96.) As the First Department has held, the place of incorporation "has an interest superior to that of all other states in deciding issues concerning directors' conduct of the internal affairs" of the corporation. *Hart* v. *Gen. Motors*, 517 N.Y.S.2d 490, 494 (1st Dep't 1987). By contrast, "New York's interest" in the internal affairs of a non-New York corporation such as UBS "is minimal." *Bluewaters Commc'ns Holdings* v. *Ecclestone*, 996 N.Y.S.2d 232, 234 (1st Dep't 2018); *see Fernie* v. *Wincrest Capital*, 2019 WL 978483, at *4 (Sup Ct., N.Y. Cnty. Feb. 28, 2019) (FNC dismissal of case involving "internal affairs of a Bahamian corporation" in "defer[ence] to the Bahamian interest in resolving that country's own corporate governance issues"). Because this action centers on the internal affairs of a Swiss company governed by Swiss law about events in Switzerland, the jurisdiction with the most "substantial interest" here is plainly Switzerland, not New York. *Shin-Etsu*, 777 N.Y.S.2d at 75.

B. This Case Would Impose an Undue and Unnecessary Burden on New York Courts, Which Would Have To Interpret and Resolve Complicated Swiss Law Issues.

Resolving moving Defendants' arguments for dismissal under Swiss law would require this Court to interpret and apply complex issues of Swiss substantive law, including the legal effect of corporate discharges granted by UBS shareholders to the Individual Defendants. (*Infra* Section III.) Adjudicating the case on the merits would require this Court to delve further into Swiss company law to resolve each element of a breach of duty, a sufficient causal connection between the alleged breach and damages, and damages. Each of these issues is a distinct aspect of Swiss company law, with its own intricacies and rules. (Crone Aff. ¶¶23-33.)

Regardless of this Court's competence to adjudicate these issues—and Defendants' position that, on the merits, Swiss law requires dismissal—it will undeniably be less burdensome for a Swiss court to decide those issues. (*See id.* ¶61.) Thus, here, as in other cases dismissed by New York courts, "[t]he applica[tion] of foreign law is an important consideration in the forum

non conveniens analysis and weighs in favor of dismissal." *Hanwa Life Ins.* v. *UBS AG*, 2014 WL 1978768, at *3 (Sup. Ct., N.Y. Cnty. May 16, 2014); *see also Tilleke & Gibbins Int'l* v. *Baker & McKenzie*, 756 N.Y.S.2d 179, 180 (1st Dep't 2003) (affirming FNC dismissal of action involving "Thai law" and "numerous Thai witnesses and documents"); *New Media Holding Co.* v. *E. W. United Bank*, 2020 WL 1679242, at *5 (Sup. Ct., N.Y. Cnty. Apr. 6, 2020) (dismissing action requiring "application of the laws of England, Luxembourg, the Cayman Islands, and Switzerland").

C. Litigating in New York Would Impose Substantial Hardships on Defendants and Third-Party Witnesses.

The litigation of this undeniably Swiss-based case in New York would severely burden the corporate and Individual Defendants alike. *See id.*, at *6-7 (FNC dismissal despite defendant possessing "the resources as an international bank"). The actual alleged misconduct on which Plaintiff bases his claims—purported oversight failures and breaches of their duties under Swiss law (¶¶109-115, 287-305)—occurred, if anywhere, in Switzerland (*see supra* II.A), where UBS, the Board, and GEB are all based. The relevant witnesses include the Individual Defendants as well as other UBS officers and employees involved with Board and GEB activities in Switzerland. Of the 29 Individual Defendants, only four reside in New York, while 13 reside in Switzerland, six reside in other countries, and another six reside in States other than New York. (Sec'y Aff. ¶¶17, 24.) New York courts routinely consider a predominance of foreign witnesses to weigh in favor of *forum non conveniens* dismissal. *See BSR Fund* v. *Jagannath*, 2020 WL 1274236, at *4 (Sup. Ct., N.Y. Cnty. Mar. 17, 2020) (FNC dismissal where "material witnesses, relevant documents, and other evidence" are "likely to be located outside of the United States"); *Israel* v. *Dayan-Orbach*, 2015 WL 9595161, at *5 (Sup. Ct., N.Y. Cnty. Dec. 31, 2015) (Schecter,

J.) (FNC dismissal where many witnesses "speak Hebrew" and "would have to be deposed in Israel").

Moreover, the Court would not have subpoena power over key witnesses abroad, including many of the Individual Defendants and other UBS employees familiar with relevant decision-making. *See In re Alcon S'holder Litig.*, 719 F. Supp. 2d 263, 276 (S.D.N.Y. 2010) (FNC dismissal where there was "substantial risk that other key third-party witnesses," including in Switzerland, "would not be within this Court's subpoena power"); *Turner* v. *Bristol-Meyers Squibb Co.*, 2016 WL 355509, at *2 (Sup. Ct., N.Y. Cnty. Jan. 29, 2016) (Schecter, J.) (FNC dismissal where "critical witnesses are located outside the subpoena power of New York"); *see also New Media*, 2020 WL 1679242, at *6. Even if these non-U.S. witnesses' testimony could be obtained through the Hague Convention, coordinating depositions abroad would impose a significant burden on the parties.

Similarly, the fact that key documents relating to Plaintiff's allegations are located in Switzerland supports dismissal. *See*, *e.g.*, *Viking Glob. Equities* v. *Porsche Automobil Holding*, 958 N.Y.S.2d 35, 36 (1st Dep't 2012) (FNC dismissal where "many of the witnesses and documents [were] located in Germany"). Board and GEB presentations and minutes, which likely will be key evidence here, are maintained in Switzerland (*see* Sec'y Aff. ¶20), and producing them in compliance with Swiss law would pose significant expense and time for UBS and UBS AG. *See Alcon*, 719 F. Supp. 2d at 276 (FNC dismissal based, in part, on complications of obtaining evidence through foreign means); *Church* v. *Glencore PLC*, 2020 WL 4382280, at *5 (D.N.J. July 31, 2020) (FNC dismissal where evidence located in Switzerland would "burden [d]efendants with additional costs and implicate compulsory process for unwilling witnesses"). For example, production from Switzerland for a New York litigation would require compliance with

burdensome Hague Convention procedures to avoid running afoul of Swiss criminal law provisions. (*See* Crone Aff. ¶¶73-76.)

By contrast, if this case proceeds in Switzerland, a Swiss court could compel all Swiss-domiciled witnesses to testify and produce relevant documents. (*Id.* ¶73.)

D. Swiss Courts Provide a More Than Adequate Alternative Forum.

In granting *forum non conveniens* dismissals, New York courts have repeatedly held that Swiss courts provide an adequate alternative forum. *See*, *e.g.*, *Kainer* v. *UBS AG*, 2017 WL 4922057, at *13 (Sup. Ct., N.Y. Cnty. Oct. 31, 2017), *aff'd*, 106 N.Y.S.3d 309 (1st Dep't 2019) (Swiss courts will "afford plaintiffs a fair forum and 'adequate process'" (citation omitted)); *Peters* v. *Peters*, 955 N.Y.S.2d 315, 316 (1st Dep't 2012) (same). Switzerland is unquestionably a suitable forum for the resolution of this dispute for several reasons.

First, all of the Individual Defendants would be subject to suit in Switzerland, unlike in New York, because Swiss law permits Swiss courts to exercise jurisdiction over non-resident defendants whose liability is based on Swiss company law. (*See* Crone Aff. ¶¶58-59, 64.) And, as corporations formed under Swiss law and headquartered in Switzerland, UBS and UBS AG are likewise subject to suit there. (*Id.* ¶¶60, 81.)

Second, Plaintiff's derivative claims, which he brings under Swiss law, can be litigated in a Swiss court. (*Id.* ¶¶8-13.) Such actions may be commenced before the Swiss Court where the corporation is headquartered and would be tried before the judges of the Commercial Court of Zurich. (*Id.* ¶¶5, 60-61.) In that Swiss court, civil commercial actions, including derivative suits, typically proceed with efficiency and without administrative obstacles. (*Id.* ¶61.)

Underscoring the *inadequacy* of New York compared to Switzerland, a New York civil judgment would be enforceable in a Swiss court only against the 10 U.S.-resident defendants—and not against the 19 defendants domiciled in Switzerland or elsewhere outside the

United States. (*See id.* ¶¶79-84); *Alcon*, 719 F. Supp. 2d at 276 (FNC dismissal where "[q]uestions surround[ed] the enforceability of a judgment [in Switzerland] rendered by this Court"). The United States and Switzerland have no treaty providing for reciprocal recognition and enforcement of judgments. Under Swiss law, a U.S. judgment would therefore be enforceable only if, among other things, the U.S. court had jurisdiction to adjudicate the matter *from a Swiss perspective* and its judgment did not violate Swiss public policy. (*See* Crone Aff. ¶¶79-80.) Here, those conditions would not be met, both because of UBS's exclusive forum-selection clause and because New York is neither the "domicile or habitual residence" of the non-U.S. defendants nor the "registered office" of UBS or UBS AG. (*Id.* ¶¶81-83.) The "possibility that [a] judgment may be ineffectual" favors dismissal. *Pahlavi*, 62 N.Y.2d at 482. It makes no sense for this busy New York court to adjudicate Swiss law issues when those same issues would have to be relitigated in Switzerland to be enforceable against all Defendants.

While the Complaint claims supposed procedural advantages to litigating in New York, such as the claimed ease of obtaining discovery and absence of deposit requirements for bringing suit (¶¶249-50, 283-86), "the differences in New York and Swiss pre-trial and trial procedures do not render Switzerland an inadequate alternative forum." *Rushaid*, 2019 WL 120612, at *2. Swiss courts provide various discovery mechanisms for civil litigants and have the power to compel witness testimony and enforce discovery obligations. (*See* Crone Aff. ¶73.) Plaintiff is also wrong in claiming that a Swiss court would demand an absurd $100 million deposit. (¶¶99, 249). To the contrary, such a deposit requirement would infringe upon the principle of proportionality under Swiss law. (Crone Aff. ¶¶66-71.)

E. This Swiss Derivative Action Lacks a Nexus to New York, and New York Public Policy Opposes Hearing This Litigation.

This case is part of a recent influx of derivative actions brought in New York state courts on behalf of major European banks and other companies. It is one of seven such suits brought by Plaintiff's counsel purportedly on behalf of Barclays, Bayer, Credit Suisse, Deutsche Bank, Novartis, UBS, and Volkswagen in the last year,[4] with other counsel filing similar actions against Carnival, Société Générale, and Standard Chartered in 2019 and 2020, respectively.[5] Allowing such cases to proceed risks turning New York into a magnet for derivative actions on behalf of foreign corporations in which New York has no substantial interest.

This action has no meaningful connection to New York except for the residency of a plaintiff who is *not* the real party in interest. While normally an "important factor," *Likhachev* v. *Strukov*, 2017 WL 3084992, at *3 (Sup. Ct., N.Y. Cnty. July 19, 2017), Plaintiff's residence is all but irrelevant here because Plaintiff is suing solely in a *representative* capacity. *Bader & Bader* v. *Ford*, 414 N.Y.S.2d 132, 135 (1st Dep't 1979) ("Other stockholders . . . could lay similar if not equal claim to maintenance of the suit in their home jurisdiction."). There is no reason to defer to the forum choice of "a mere phantom plaintiff with interest enough to enable him to institute the action and little more." *Koster* v. *(Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 525 (1947); *see also Pahlavi*, 62 N.Y.2d at 482 ("plaintiff must be able to show more than its own convenience").

---

[4] *See* Index No. 656400/2020 (Barclays); Index No. 651500/2020 (Bayer); Index No. 652468/2020 (Credit Suisse); Index No. 651578/2020 (Deutsche Bank); Index No. 653303/2020 (Volkswagen); Index No. 650463/2021 (Novartis).

[5] *See* Index No. 656212/2019 (Carnival); Index No. 605452/2020 (Société Générale); Index No. 601438/2020 (Standard Chartered).

Moreover, New York has a stated policy against derivative actions on behalf of foreign banks. Both New York's Business Corporation Law ("BCL") and Banking Law—which allow derivative actions—expressly preclude derivative actions on behalf of foreign entities registered as banks under New York law. *See* BCL § 103(a); *Commonwealth Bank & Tr. Co.* v. *Tioga Mills*, 433 N.Y.S.2d 519, 520 (3d Dep't 1980); Banking Law §§ 1002; 1001(1), (3); 9002. Although UBS is not registered as a "foreign bank," its *sole purpose* is as a holding company for a foreign bank—UBS AG—and thus it is within the Legislature's clear intent to bar derivative actions regarding such entities from being heard in New York.

Busy New York courts "should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Shin-Etsu*, 777 N.Y.S.2d at 73 (citation omitted); *see JTS Trading* v. *Asesores*, 2018 WL 4407550, at *2 (Sup. Ct., N.Y. Cnty. Sept. 17, 2018) (FNC dismissal where "New York ha[d] very little nexus to th[e] action"); *Turner*, 2016 WL 355509, at *2 (same).

III. Even If This Action Could Proceed in New York, Swiss Law Requires Dismissal.

Swiss law bars nearly all of Plaintiff's claims because: (1) UBS shareholders "discharged" any actionable alleged misconduct; (2) most of the claims are untimely; and (3) UBS Americas Holding and UBS Americas are not proper defendants.

A. Under Swiss Company Law, Nearly All Claims Should Be Dismissed Because They Have Been Discharged.

All of Plaintiff's claims—except those based on alleged 2018 conduct or alleged 2019 conduct relating to the French tax trial—have been released by UBS under the Swiss company law of "discharge" ("*décharge*"), such that Plaintiff cannot assert those claims (which no longer exist). *See Centro Empresarial Cempresa* v. *Am. Móvil*, 17 N.Y.3d 269, 276 (2011) ("valid release constitutes a complete bar" to "claim which is the subject of the release" (quotations

omitted)). Under Swiss company law, directors' and officers' liability may be waived through a "discharge resolution" at the shareholders' annual meeting. (Crone Aff. ¶¶34-38.) This release covers specific conduct provided the relevant facts have been disclosed or are widely known among the public. (*Id.* ¶¶44-45.)

Swiss company law of discharge is substantive in nature. Under the "internal affairs doctrine," the jurisdiction of incorporation has the "greatest interest in regulating" a corporation's affairs, and therefore its substantive corporate law should be applied regardless of venue. *City of Aventura Police* v. *Arison*, 2020 WL 6108148, at *1 (Sup. Ct., N.Y. Cnty. Oct. 15, 2020). Indeed, from a Swiss law perspective, the discharge bars a director or officer liability action whenever the action is governed by Swiss law, irrespective of where such action is brought. (Crone Aff. ¶¶38, 47.) *See Arison*, 2020 WL 6108148, at *11 (requirement that "can negate a plaintiff's right to ever bring an action in court" is substantive (quotations omitted)).

Here, UBS's shareholders passed a discharge resolution covering each year at issue in the Complaint except 2018 and 2019 (for the latter, only excluding issues regarding the French tax trial).[6] (*See* Sec'y Aff. ¶9.) The Complaint alleges that the discharges were ineffective because the directors and officers did not make "full and complete disclosures" about the discharged conduct and because Plaintiff never voted in favor of discharge. (¶262.) Plaintiff is wrong for two reasons:

First, the relevant facts were both directly disclosed and widely reported in global news sources, on which the Complaint itself almost exclusively relies. (*See* Crone Aff. ¶45 (facts

[6] While shareholders did not vote for discharge in 2007, a discharge resolution given for a subsequent business year without reservation covers incidents from previous years. (Crone Aff. ¶¶41-42.) Thus, discharges for later years are effective as to any alleged misconduct in 2007. (*See id.*)

are deemed disclosed where they are "made known at the general meeting of shareholders itself" "or outside the general meeting of shareholders []*e.g.* press release . . ."); Appendix A (Ex-23) (listing disclosures applicable to each category of alleged misconduct).) As Professor von der Crone explains, these disclosures were more than adequate under Swiss law to constitute a release of claims based on that disclosed conduct. (Crone Aff. ¶43 ("[A]ll liability claims from 2007 to 2017 and for 2018 (with the exception of the French cross-border matter) and 2019 have been validly waived and released.").

Second, while Plaintiff alleges that he voted against discharge (¶262), under Swiss law, a shareholder who opposes discharge has six months to sue; otherwise his claim is extinguished. (*See* Crone Aff. ¶39.) That six-month period is not subject to tolling for any reason. (*Id.*) As a result, the lapse of this deadline extinguishes not only the possibility to sue but also the claim itself. (*Id.*)[7] Here, the only conduct not discharged is from 2018 and (regarding the French tax trial) 2019.

Plaintiff does not claim that any underlying misconduct occurred in 2018. He cites settlements and fines based on alleged conduct related to the financial crisis, anti-money-laundering compliance, and rate-fixing—conduct that was previously discharged. (*E.g.*, ¶¶198-206.) And the conduct excluded from the 2019 release cannot support a claim because: (i) it actually occurred in 2013 or earlier, beyond the Swiss-law five-year statute of limitations (*see infra* § II.B); (ii) the French judgment has been appealed, and thus UBS has yet to suffer damages (Ex-21 at 3; Ex-22 at 5); *see Druck Corp.* v. *Macro Fund*, 290 F. App'x 441, 443 (2d Cir. 2008)

[7] Plaintiff suggests that the UBS shareholder discharges were ineffective because "shares owned or controlled by involved wrongdoers were voted in favor of discharges." (¶262.) But even assuming that were the case, the discharge resolution must be challenged on that basis within two months of the vote (Crone Aff. ¶40), which Plaintiff does not allege he did.

("[Shareholder] cannot prevail without showing injury to [company] itself."); and (iii) Plaintiff fails to plead that the directors' refusal to settle is not protected by the Swiss business judgment rule. (*See* Crone Aff. ¶¶28-29.)

B. Most of Plaintiff's Claims Are Time-Barred Under Switzerland's Statute of Limitations.

On their face, the majority of Plaintiff's claims are barred by the applicable five-year Swiss statute of limitations. New York's borrowing statute requires that a cause of action be timely "under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Triarc Corp.*, 93 N.Y.2d at 528 (citing CPLR 202). Here, the claims accrued where the corporation (UBS) resides—Switzerland. *See Brinckerhoff* v. *JAC Holding Co.*, 692 N.Y.S.2d 381, 382 (1st Dep't 1999) (applicable SOL for derivative suit is "that of Georgia, since that is where [the company] had its principal office and where [its] alleged monetary damages would be felt"). Under Swiss law, then, the relevant statute of limitations is five years, running from the time that Plaintiff, through the UBS shareholder meeting, had "sufficient knowledge" of the alleged wrong and injury. (*See* Crone Aff. ¶¶48-51.)

Here, Plaintiff's claims are largely based on alleged conduct and injury that occurred prior to June 4, 2015. Specifically, Plaintiff alleges actionable conduct related to: the ***2008*** subprime mortgage crisis (¶¶118-23); a ***2008*** tax-evasion investigation by U.S. authorities resulting in a fine in ***2009*** (¶¶124-31); losses caused by a rogue trader in London in ***2011*** (¶¶135-43); municipal-bond rate rigging in Puerto Rico in ***2012*** (¶¶144-48); and benchmark manipulation scandals in ***2012*** with purported fallout through ***early 2015*** (¶¶149-56, 164-72).[8] Because nearly

[8] To the extent any of these claims would not be deemed under Swiss law to have accrued prior to June 4, 2015, New York's six-year limitations period would still bar Plaintiff's claims based on conduct that occurred *before June 4, 2014*, including claims relating to the subprime

all of Plaintiff's allegations are lifted from contemporaneous press reports and UBS disclosures, Plaintiff cannot genuinely dispute that he knew or should have known of the alleged conduct at the time of these reports. (*See* Crone Aff. ¶¶49, 51.)

Nor can Plaintiff's allegation that the alleged misconduct was "part of a continuing course of conduct," which supposedly is still "continuing" (¶95), save his untimely claims. As Professor von der Crone explains, an exemption for a "continuing wrongdoing" (¶44) would not apply because "[t]he decisive moment" for determining when that "development" concludes is when the shareholders learn of each fine, settlement, or other alleged injury to the company. (*See* Crone Aff. ¶51.) Here, Plaintiff alleges various, unrelated wrongs by a number of disconnected business units and across numerous countries and time periods that resulted in distinct fines or penalties which were contemporaneously *disclosed* to shareholders. (*See* Appendix A.) Accordingly, the relative limitations period started to run separately for each fine or penalty once it was publicly announced. (*See* Crone Aff. ¶51.) Plaintiff's conclusory allegation that these disparate events are connected (¶237) identifies no actual link and would be insufficient to allege a continuing wrong under Swiss law. (*See id.*)

C. UBS Americas Holding and UBS Americas Are Not Proper Defendants Under Swiss Law.

Under Swiss law, UBS Americas Holding and UBS Americas are not proper defendants in this derivative action, in which only directors and managers can be sued. (*See* Crone Aff. ¶¶16-22.) Plaintiff does not plausibly allege that these entities manage their ultimate parent company, UBS, such that they would qualify as *de facto* directors or managers under Swiss law. (*Id.* ¶¶18-19.) Nor does Plaintiff seek damages from these entities. (¶47.)

---

mortgage crisis, U.S. tax investigation, rogue trading incident, municipal bonds, and benchmark manipulation. (*See* Appendix A at 1-5.)

IV. New York Procedural Rules Also Compel Dismissal of This Action.

Even if this action were properly brought in this Court, Plaintiff's claims do not meet New York's pleading requirements because: (1) the Complaint does not adequately allege that *each* defendant breached a fiduciary duty to UBS; (2) Plaintiff fails to plead demand futility; and (3) Plaintiff fails to plead that he held shares throughout the entire period of alleged misconduct.

A. The Complaint Fails To Meet New York's Pleading Standard for Breach of Fiduciary Duty Under Swiss Law by Any Defendant.

Under Swiss law, a plaintiff must show proof that *each* defendant caused injury through a negligent or intentional breach of fiduciary duty. (*See* Crone Aff. ¶23.) Before a Swiss company director or officer may be held liable, the plaintiff must establish a causal connection between his acts or omissions and foreseeable harms suffered by the corporation. (*Id.* ¶32.) As to this Swiss requirement, Plaintiff completely fails to satisfy New York's heightened pleading standard and engages in impermissible group pleading. CPLR 3016(b). Most of the Individual Defendants are mentioned only once in the Complaint (as Defendants), and Plaintiff fails to allege what role each had during the relevant time period and what specifically each did wrong. *Greenberg* v. *Acme Folding Box Co.*, 374 N.Y.S.2d 997, 1001 (N.Y. Sup. Ct., Kings Cnty. 1975) ("as the complaint alleges a breach of trust duty on the part of the officers and directors of a corporation, 'the circumstances constituting the wrong shall be stated in detail'") (quoting CPLR 3016(b)).

Moreover, UBS Americas Holding and UBS Americas are not alleged to have specifically engaged in *any* wrongdoing. The Complaint alleges only that UBS Americas Holding and UBS Americas do business in New York and are subsidiaries of UBS AG, and repeats the same insufficient, conclusory allegations. (*See* ¶¶45-47.) *See Berardi* v. *Berardi*, 969 N.Y.S.2d

444, 446 (1st Dep't 2013) (dismissing "vague," "conclusory" claims "made without any specific instances of the alleged misconduct").

B. The Complaint Does Not Allege Facts To Excuse Pre-Suit Demand Under New York Law.

Plaintiff concedes that he made no pre-suit demand on UBS's Board; thus, he must allege with particularity that a pre-suit demand would have been futile. (¶251.) *See Wandel ex rel. Bed Bath & Beyond.* v. *Eisenberg*, 871 N.Y.S.2d 102, 104 (1st Dep't 2009); *see generally* BCL § 626(c); *Bezio* v. *Gen. Elec.*, 114 N.Y.S.3d 595, 600 (Sup. Ct., N.Y. Cnty. 2019) ("This is, in effect, a heightened pleading standard."). Plaintiff fails to plead demand futility for several reasons:

First, Plaintiff's boilerplate allegation that "[a]ll or a majority" of current directors lacked independence because "[t]here is a substantial likelihood that a majority of the Directors could be found liable in this action" does not excuse demand under New York law. (¶256.) *Eisenberg*, 871 N.Y.S.2d at 105 ("[I]f we were to find demand futility wherever it was asserted that a majority of directors were 'substantially likely to be held liable,' then 'all well-pled complaints would be able to establish demand futility.'").

Second, the mere allegation that Defendants received bonuses, without any particularized allegations that they were improperly awarded (let alone in what amounts), does not make any director or officer an interested party. *See Marx* v. *Akers*, 88 N.Y.2d 189, 202-03 (1996) (declining to find demand futility based upon conclusory allegations of excessive executive compensation). Indeed, UBS Board members receive fixed compensation and no bonuses. (Corp. Sec'y Aff. ¶15; Sec'y Aff. Ex-13 at pp. 34-36.)

Third, Plaintiff's allegation that UBS's now-former CEO, who was not a director, was "deeply implicated" in the underlying misconduct is irrelevant to whether a *majority of the*

current Board is interested. *See Marx*, 88 N.Y.2d at 200 (must allege "with particularity" that "a majority of the directors are interested").

Finally, Plaintiff's conclusory allegation that Board members "participated in, approved of, and/or permitted" misconduct is insufficient to allege that Board members are interested. *See Gammel* v. *Immelt*, 2019 WL 2869378, at *6 (Sup. Ct., N.Y. Cnty. July 3, 2019) (failure to plead demand futility where "complaint [was] silent as to the specific, fraudulent conduct on the part of the Director Defendants").

Plaintiff's remaining conclusory allegations that the directors failed to inform themselves adequately regarding the challenged actions and that their decisions could not have been the product of sound business judgment similarly fail. *See Eisenberg*, 871 N.Y.S.2d at 105, 106 ("[C]omplaint fails to plead with the requisite particularity that the directors had specific information or reason to inform themselves . . . , and failed to do so" and "fails to allege with sufficient specificity a purposeful and egregious . . . scheme where the directors had significant reason to question or investigate . . . and failed to do so.").

C. Plaintiff Fails To Allege That He Owned Shares in UBS During the Entire Relevant Period as Required for Derivative Standing.

BCL § 626(b) requires Plaintiff to allege that he owned stock both when the lawsuit was brought and at the time of the challenged transaction(s). *Pessin* v. *Chris-Craft Indus.*, 586 N.Y.S.2d 584, 586 (1st Dep't 1992). Plaintiff fails to do so, and instead claims only that he currently "owns shares of UBS common stock" and "has owned them *during times* of the continuing wrongdoing and wrongful course of conduct." (¶44 (emphasis added).) This allegation is insufficient to satisfy the continuous ownership requirement. *See Smith* v. *Stevens*, 957 F. Supp. 2d 466, 469 (S.D.N.Y. 2013) (plaintiff failed to allege "that he owned shares 'throughout' the alleged wrongdoing").

CONCLUSION

The moving Defendants respectfully request that the Court dismiss the Complaint with prejudice.

Respectfully,

/s/ Robert J. Giuffra, Jr.

Robert J. Giuffra, Jr.
Amanda F. Davidoff
Justin J. DeCamp
Matthew A. Peller
Elizabeth V. Young
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Tel: (212) 558-4000
Fax: (212) 558-3588

Attorneys for Defendants UBS Americas Holding LLC, UBS Americas, Inc., Robert B. Karofsky, Julie G. Richardson, Robert W. Scully, and David H. Sidwell.

February 15, 2021

PRINTING SPECIFICATIONS STATEMENT

1. Pursuant to N.Y.C.R.R. § 202.70(g), Rule 17, I hereby certify that the foregoing brief was prepared using Microsoft Word. A proportionally spaced typeface was used as follows:

   Name of Typeface: Times New Roman
   Point Size: 12
   Line Spacing: Double

2. The total number of words in the brief, inclusive of point headings and exclusive of the caption, prefatory tables, the signature block, and this Statement is 6,962 words.

Dated: New York, New York
February 15, 2021

/s/ Robert J. Giuffra, Jr.
Robert J. Giuffra, Jr.