Cattan v Rohner
2023 NY Slip Op 31213(U)
April 10, 2023
Supreme Court, New York County
Docket Number: Index No. 652468/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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EZRA CATTAN, DERIVATIVELY AS A SHAREHOLDER OF CREDIT SUISSE GROUP AG ON BEHALF OF CREDIT SUISSE GROUP AG,

Plaintiff,

- v -

URS ROHNER, JOHN TINER, SEVERIN SCHWAN, IRIS BOHNET, KAI NARGOLWALA, SERAINA MACIA, ALEXANDER GUT, JOAQUIN J. RIBEIRO, ANA PAULA PESSOA, ANDREAS GOTTSCHLING, MICHAEL KLEIN, ANDREAS N. KOOPMANN, RICHARD E. THORNBURGH, NOREEN DOYLE, JAMES L. AMINE, BRADY W. DOUGAN, ERIC VARVEL, DAVID R. MATHERS, ROMEO CERUTTI, DAVID MILLER, LARA J. WARNER, TIMOTHY P. O'HARA, ROBERT S. SHAFIR, PAMELA A. THOMAS-GRAHAM, SEAN T. BRADY, PIERRE-OLIVIER BOUEE, ROBERT JAIN, PHILIP VASAN, THOMAS P. GOTTSTEIN, ANDREAS BACHMANN, CREDIT SUISSE AG, CREDIT SUISSE (USA), INC., CREDIT SUISSE HOLDINGS (USA), INC., and CREDIT SUISSE GROUP AG,

Defendants.

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INDEX NO. 652468/2020

MOTION DATE ____________

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39
were read on this motion to/for DISMISS.

Plaintiff Ezra Cattan, owner of Credit Suisse Group AG (CS) common stock, brings this shareholder derivative action on behalf of nominal defendant CS, a bank holding company formed under Swiss law, with its principal place of business in Switzerland, against present and former members of CS's Board of Directors and Executive Board Officers, and other CS officials named as defendants (collectively,

individual defendants) for breaches of fiduciary duty owed to CS.[1] (*See generally* NYSCEF Doc. No. [NYSCEF] 18, Amended Complaint.) In general, plaintiff alleges that the individual defendants breached "non transferable and inalienable duties" for the "overall management of the company," "in particular with regard to compliance with the law," and failed to act "with all due diligence [to] safeguard the interests of the company in good faith," as required by the Swiss Code of Obligations. (*Id.* ¶ 5.)

Defendants Michael Klein, Timothy P. O'Hara, Robert S. Shafir, Pamela A. Thomas Graham, Sean T. Brady, Robert Jain, Philip Vasan, CS, Credit Suisse AG, Credit Suisse (USA), Inc., and Credit Suisse Holdings (USA), Inc. (collectively, Moving Defendants) now move, pursuant to CPLR 327 and 3211 (a) (2), (3), (5) and (7), for an order dismissing the amended complaint with prejudice.

For the reasons set forth below, the Moving Defendants' motion is granted based on the doctrine of forum non conveniens, and the amended complaint is dismissed.

Background

CS is a global financial services company, organized under Swiss law, with its principal place of business in Switzerland. (NYSCEF 21, Berli[2] aff ¶ 2.) Defendant Credit Suisse AG is a wholly owned subsidiary of CS, also organized under Swiss law, with its principal place of business in Switzerland. (*Id.* ¶¶ 6-7). Defendants Credit Suisse (USA), Inc. and Credit Suisse Holdings (USA), Inc. are both indirect subsidiaries of CS. (*Id.* ¶ 9). Plaintiff alleges that Credit Suisse (USA), Inc. and Credit Suisse

[1] Plaintiff also asserts causes of action against all defendants for "Participating in a Common Course of Conduct and Concerted Action" and aiding and abetting breach of fiduciary duty.

[2] Martina Berli is the "Head of Litigation and Investigations Swiss Universal Bank and International Wealth Management of [CS]." (NYSCEF 21, Berli aff ¶ 1.)

Holdings (USA), Inc. operate out of offices located at 11 Madison Avenue, New York, New York. (NYSCEF 18, Amended Complaint ¶ 94.) The individual defendants in this action are 30 current and former directors and senior executives of CS, the vast majority of whom are not alleged to, and do not, reside in New York. (*Id.* ¶¶ 106-135, 140.) Plaintiff concedes that Swiss law governs his claims. (*Id.* ¶ 142.)

Plaintiff brings this action derivatively to recover damages for the benefit of CS, based on alleged breaches of fiduciary duties by individual directors and executives. (*Id.* ¶¶ 413-31.) The 220-page amended complaint does little more than recite a long list, taken from press reports and CS's own disclosures, of unrelated investigations, lawsuits, and business challenges that CS has confronted over more than a decade. (*Id* ¶¶ 184-351.) These include:

> Losses and subsequent settlements resulting from the subprime mortgage crisis of 2007- 2008 (*id.* ¶¶ 203-12);
>
> A tax-evasion investigation by U.S. authorities that resulted in a 2014 guilty plea and fines (*id.* ¶¶ 229-37);
>
> The Bank's 2015 restructuring and fourth quarter write-downs (*id.* ¶¶ 251-60);
>
> The conduct of three rogue employees in connection with Mozambican loans and certain payments to officials (*id.* ¶¶ 288-323);
>
> A 2019 incident involving surreptitious monitoring of a former employee (*id.* ¶¶ 333-41); and
>
> 2021 losses involving certain Credit Suisse counterparties (*id.* ¶¶ 65-74).

Discussion

A shareholder derivative action brought in this court on behalf of a foreign corporation implicates two distinct bodies of law: (1) the substantive law of the jurisdiction of the company's incorporation and (2) the procedural law of New York.

> "The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. Stated another way, [u]nder the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation."

(*New Greenwich Litig. Trustee, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 22 [1st Dept 2016] [internal quotation marks and citations omitted].) Thus, substantive matters are governed by the law of the jurisdiction of incorporation, while procedural matters are governed by New York law.

As a threshold issue, the court must address the Moving Defendants' request to dismiss based on the doctrine of forum non conveniens before addressing their arguments based on substantive Swiss law. The doctrine of forum non conveniens is "'procedural rather than substantive.'" (*Cammon v City of New York*, 95 NY2d 583, 595 [2000] [citation omitted].)

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum.'" (*National Bank & Trust Co. of N. Am. v Banco De Vizcaya*, 72 NY2d 1005, 1007 [1988] [citation omitted]; CPLR 327 [a] ["When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just"].) This doctrine reflects the basic principle that "our courts need not entertain causes of action lacking a substantial nexus with New York." (*Martin v Mieth*, 35 NY2d 414, 418 [1974].)

When deciding whether to retain jurisdiction, "New York courts must consider an array of factors, including the residence of the parties, the situs of the underlying transaction, the existence of an adequate alternative forum, the location of potential witnesses and relevant documents, potential hardship to the defendant, and the burden on New York courts." (*Fortinvest Invs. Holding S.A. SPF v Oblonsky*, 2021 NY Slip Op 32300[U], *10 [Sup Ct, NY County 2021]), citing *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984].) "No one factor is controlling. At bottom, the analysis is about whether the action has a 'substantial connection to this State.'" (*BSR Fund, S.A., v Jagannath*, 2020 NY Slip Op 30810[U], *6 [Sup Ct, NY County 2020], quoting *Blueye Navigation, Inc. v Den Norske Bank*, 239 AD2d 192, 192 [1st Dept 1997].) Where, as here, these factors weigh in favor of an alternative forum, "forum non conveniens relief should be granted." (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972].)

As more fully set forth below, this action must be dismissed on the ground of forum non conveniens, because the number and weight of the relevant factors in this action center in Switzerland and not in New York. Indeed, plaintiff concedes that the purported wrongdoing at issue in this case—the management of CS's affairs by its directors and senior executives—occurred in Switzerland. (NYSCEF 18, Amended Complaint ¶ 393 [tortious conduct of the Directors and Officers of Credit Suisse Group AG named as Defendants "took place at corporate headquarters in Switzerland"].) Accordingly, this litigation lacks a "substantial" nexus to New York. (*See Islamic Republic of Iran v Pahlavi,* 62 NY2d at 483 [affirming dismissal on forum non conveniens grounds where, inter alia, "the record does not demonstrate a substantial nexus between this State and plaintiff's cause of the action"].)

1. Residency of the Parties

The residence of the parties weighs strongly in favor of dismissal. While plaintiff alleges that he is a New York resident, he brings his claims on behalf of CS, which is organized under Swiss law, with its principal place of business in Switzerland. Thus, CS, the true party in interest, resides in Switzerland not New York. (*Bader & Bader v Ford*, 66 AD2d 642, 645 [1st Dept 1979] ["In a stockholders derivative action . . . the real party in interest is the corporation"].) The residence of a nominal plaintiff in a derivative action is irrelevant where, as here, "New York has no real or substantial relationship with the issues in dispute." (*Id.* at 647.)

Moreover, individual defendants reside in Switzerland and outside of New York. (NYSCEF 18, Amended Complaint.) The predominance of foreign residents "is entitled to . . . substantial weight" in the forum non conveniens analysis. (*Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 270 [1st Dept 2005] [dismissing action where five of nine defendants were German residents]; *see also BSR Fund*, 2020 NY Slip Op 30810[U], * 7 [dismissing action, even where defendants included residents of New Jersey and New York, one of whom worked out of a New York office, because "many of the parties to this action, including the alleged masterminds behind the Fund as well as its alleged victims, are located outside New York"]; *Bluewaters Comm. Holdings, LLC v Ecclestone*, 2014 NY Slip Op 30123[U], * 13 [Sup Ct, NY County 2014] [dismissing action where "(n)one of the individual or corporate defendants are United States citizens"], *affd* 122 AD3d 426 [1st Dept 2014].)

2. Situs of the Transaction

The fact that the "transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction" also weighs strongly in favor of dismissal on the ground of forum non conveniens. (*Pahlavi*, 62 NY2d at 479; *see also World Point Trading PTE v Credito Italiano*, 225 AD2d 153, 159 [1st Dept 1996] [dismissing action, inter alia, because of "foreign locus of the alleged breach"].)

This case bears no meaningful connection to New York. In the amended complaint, plaintiff alleges that the individual defendants breached a statutory duty under Swiss law (NYSCEF 18, Amended Complaint, ¶ 155) by failing to adequately supervise the operations and subsidiaries of a Swiss bank. (*Id.* ¶ 362.) With respect to derivative claims, both the breach of duty and the economic injury occur where the company (i.e., the real party in interest) resides. (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529-30 [1999] ["When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss"]; *Stevenson v AMP Solar Group, Inc.*, 2015 NY Slip Op 30771[U], * 5 [Sup Ct, NY County 2015] [the "actual alleged wrongdoing—failure to transfer profits . . . took place in Canada," where the company was incorporated]; *Oddo Asset Mgt. v Barclays Bank PLC*, 36 Misc 3d 1205[A], 2010 NY Slip Op 52449[U], * 8 [Sup Ct, NY County] ["Plaintiff is a French company operating in France, and thus France is the place where it would have sustained any economic impact"], *affd* 84 AD3d 692 [1st Dept 2011], *affd* 19 NY3d 584 [2012].) Accordingly, the proper forum for plaintiff's claims is Switzerland, where CS is organized and maintains its principal place of business.

Although plaintiff seeks to implicate New York's interest in this case by pointing to a decade of global regulatory investigations and litigations involving CS, plaintiff's claims, in reality, center on the individual defendants' alleged failure to adequately

oversee CS's operations. Again, plaintiff concedes that this oversight occurred in Switzerland. (NYSCEF 18, Amended Complaint ¶ 393.) This compels dismissal. (*See Primus Pacific Partners 1, LP v Goldman Sachs Group, Inc.*, 2017 NY Slip Op 32383[U], *12 [Sup Ct, NY County 2017] ["'The fact that the transaction(s) out of which the cause of action arose occurred primarily in a foreign jurisdiction weighs strongly in favor of dismissal on the ground of forum non conveniens'"] [citation omitted], *affd* 175 AD3d 401 [1st Dept 2019].) As the critical events at issue here are not alleged to have taken place in New York, the underlying transaction here exhibits a "strong foreign nexus." (*Wyser-Pratte Mgt. Co.*, 23 AD3d at 270; *Pahlavi*, 62 NY2d at 479.)

In *Primus*, the plaintiff sought to bring his claims in New York, largely on the basis of subsequent New York-based investigations into the underlying conduct of a Singaporean company and plaintiff's suggestion that "employees in New York may have participated in the [challenged] transaction and the alleged fraud." (2017 NY Slip Op 32383[U], *11-12.) The court rejected the plaintiff's argument, explaining that the existence of investigations in New York did not demonstrate a substantial nexus to New York. Rather, it was the primary location of the alleged misconduct, there Malaysia, that drove the forum non conveniens inquiry. (*Id.*) Such is also the case here. (*See* NYSCEF 18, Amended Complaint ¶¶ 403-404 [relying upon "regulatory and criminal investigations and prosecutions by federal authorities and state authorities in New York" by the New York State Attorney General and federal prosecutors]; *id.* ¶ 393 [defendants' alleged conduct took place in Switzerland].)

Plaintiff also attempts to create a nexus to New York by alleging that the individual defendants' Swiss-based management and supervision targeted New York and its residents. (*See id.* ¶ 393 ["The tortious, i.e., negligent/reckless/intentional

conduct of the Directors and Officers of Credit Suisse Group AG named as Defendants that took place at corporate headquarters in Switzerland was ***targeted at New York and New York residents, investors and customers as New York was one of the most important markets in the world to Credit Suisse Group AG***. New York is the ***"center" "liaison"—"hub"—"headquarters"—"main office"*** of Credit Suisse AG's United States operations, including its Wealth Management/Investment Banking operations that are central to this case"] [emphasis in original].)

However, that is not the proper inquiry. The relevant injury for the purposes of a derivative action is the harm to the nominal plaintiff, CS, which necessarily would have occurred in Switzerland, not any alleged incidental injury in New York or the New York-based plaintiff. (*See Rafiy v Javaheri*, 32 Misc 3d 734, 739 [Sup Ct, Nassau County 2011] ["The fact that an individual closely affiliated with a corporation (for example, a principal shareholder, or even a sole shareholder), is incidentally injured by an injury to the corporation does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation"].)

As CS's place of incorporation, Switzerland "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 General Motors Corp.*, 129 AD2d 179, 185 [1st Dept 1987]; *see also Bluewaters Comm. Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 [1st Dept 2014] [affirming dismissal on the basis of forum non conveniens, in part because "Germany has an interest in how BLB—a German bank—was run"].) By contrast, "New York's interest" in the internal affairs of a foreign corporation "is minimal." (*Bluewaters*, 122 AD3d at 428; *see also Fernie v Wincrest Capital Ltd.*, 2019 NY Slip Op 30510[U], *7 [Sup Ct, NY County 2019] [dismissing "dispute over the internal affairs of a Bahamian

corporation" in "defer(ence) to the Bahamian interest in resolving that country's own corporate governance issues"].) Indeed, recognizing that the jurisdictions where companies are incorporated have the greatest interest in controversies concerning those companies' internal affairs, New York courts have repeatedly granted forum non conveniens dismissal of shareholder derivative actions brought on behalf of foreign corporations. (*See Gutstadt v National Fin. Partners*, 2013 NY Slip Op 32733[U] [Sup Ct, NY County 2013]; *Alden Global Distressed Opportunities Master Fund L.P. v Smulyan*, 2011 NY Slip Op 33828[U] [Sup Ct, NY County 2011]; *Sumers v AmBase Corp.*, 1991 WL 11764876 [Sup Ct, NY County 1991]; *see also* NYSCEF 38, Grolimund[3] aff ¶ 16 [Swiss law expressly provides that "disputes concerning company law should primarily be brought to the Swiss courts in which the relevant company is incorporated"].)

Plaintiff also seeks to label operations of CS's subsidiaries (and the fact that some CS shareholders reside in New York) as a nexus to support litigation in this court. However, these facts are irrelevant to the forum non conveniens inquiry. The fact that certain CS subsidiaries operate in New York has no bearing on whether this case has a New York nexus. (*See Bader & Bader*, 66 AD2d at 646-647 [finding both "'the substantial amount of business done by the Company in New York'" and the "meaningful number of shares of the Company" held by New York residents insufficient where claims asserted had a "patently tenuous" connection to New York] [citation omitted].) Plaintiff brings this suit "on behalf" of a Swiss corporation, for "damages caused" in Switzerland, based on conduct that allegedly "took place at [CS's] corporate

[3] Professor Pascal Grolimund was engaged by the Moving Defendants to opine on issues of Swiss law.

headquarters in Switzerland." (NYSCEF 18, Amended Complaint ¶¶ 2, 393].) In contrast to the decision on which plaintiff relies, *Mason-Mahon v Flint*, where "the allegations of wrongdoing occurred in New York" (166 AD3d 754, 759 [2d Dept 2018]), here, "the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction"—Switzerland—making New York an improper forum. (*Pahlavi*, 62 NY2d at 479; *see also Silver*, 29 NY2d at 361 [cautioning New York courts against overburdening themselves with foreign litigation].)

3. Location of Witnesses/Documents

Litigating this action in New York would also likely impose substantial burdens on both defendants and nonparty witnesses. New York courts dismiss actions where, as here, key fact witnesses are non-residents. (*See e.g. Finance & Trading Ltd. v Rhodia S.A.*, 28 AD3d 346, 347 [1st Dept 2006] [dismissal favored under CPLR 327 because "(t)he majority of . . . witnesses would be French"]; *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 295 [1st Dept 2005] [dismissal granted where "the majority of the witnesses (were) in France or Vietnam"]; *Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 178 [upholding dismissal because "(a)ny witness with personal knowledge of the (transaction) is located overseas"]; *Tilleke & Gibbins Intl. v Baker & McKenzie,* 302 AD2d 328, 329 [1st Dept 2003] [affirming forum non conveniens dismissal as, inter alia, "most of the material witnesses" were in Thailand]; *Bluewaters*, 2014 NY Slip Op 30123[U] at * 13 [dismissing case where "most, if not all, of the key fact witnesses are located in Europe"], *affd* 122 AD3d 426 [1st Dept 2014].)

Plaintiff's claims revolve around CS's corporate governance at senior levels. The vast majority of witnesses, including the vast majority of the individual defendants, are located outside of New York. Indeed, this court will likely lack subpoena power over

many of the foreign witnesses. (*Matter of Alcon Shareholder Litigation*, 719 F Supp2d 263, 276 [SD NY 2010] [stating that "substantial risk that other key third-party witnesses" in Switzerland and Europe "would not be within this Court's subpoena power"].) According to Professor Hans Caspar von der Crone[4], law faculty, University of Zurich, even assuming that foreign witnesses could be compelled to testify, the process for obtaining deposition testimony from them would likely result in significant burdens for the parties. (NYSCEF 22, Crone aff ¶¶ 84-87].)

The bulk of relevant documentary evidence is also located in Switzerland, including records related to Board of Directors meetings, Executive Board meetings, Annual General Meetings of Shareholders, Board compensation, and the Bank's finances (NYSCEF 35, Crone reply aff ¶ 38].) This also weighs in favor of dismissal. (*See e.g. Alcon*, 719 F Supp2d at 276 [dismissing on basis of forum non conveniens, in part, due to difficulty of obtaining evidence, "largely in Switzerland," through foreign means]; *Braspetro Oil Serv. Co. v UK Guar. & Bonding Corp., Ltd.*, 18 AD3d 291, 291 [1st Dept 2005] [favoring dismissal where most documents were "located in Brazil and Singapore"]; *Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 178 [same holding where "(t)he complete written record of th(e) transaction (was) located in India, as (were) all documents and correspondence"]; *see also* NYSCEF 22, Crone aff ¶¶ 84-89 [describing burdens of producing Swiss evidence for use in a New York litigation, including compliance with Swiss criminal procedures].)

The fact that some relevant witnesses or documents may be available in New York is outweighed by the fact that the bulk of the witnesses and documents are located

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[4] Professor Hans Caspar von der Drone was retained by the Moving Defendants to opine on Swiss law.

abroad. (*See Hanwha Life Ins. v UBS AG*, 127 AD3d 618, 619 [1st Dept 2015] [dismissing action where other factors outweighed the fact that defendants have a New York office and that certain documents and witnesses . . . may be located in New York"].)

4. Burden on the New York Courts/Applicability of Foreign Law

"[O]ne factor which weighs in favor of dismissal on forum non conveniens grounds is the applicability of foreign law." (*Phat Tan Nguyen*, 19 AD3d at 294; *Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 178 ["(t)he applicability of foreign law is an important consideration in determining a forum non conveniens motion" and weighs against retention of the action]). For this reason, New York courts commonly dismiss actions that may require interpretation of foreign law. (*See e.g. Pahlavi*, 62 NY2d at 480 ["likely applicability of Iranian law" supports dismissal on forum non conveniens grounds]; *National Bank & Trust Co. of North Am. v Banco de Vizcaya, S.A.*, 72 NY2d 1005, 1006 [1988] [affirming dismissal where court would be obligated to apply Spanish law]; *PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.*, 25 AD3d 470, 471 [1st Dept 2006] [dismissal favored where "resolution of plaintiffs' claims would involve consideration of Indonesian law"]). Thus, plaintiff's concession that his claims are governed by Swiss substantive law also weighs in favor of dismissal. (NYSCEF 18, Amended Complaint ¶ 142 ["The substantive claims made are based on Swiss law"]).

For instance, in *Tilleke & Gibbins*, the First Department affirmed the dismissal of an action against a Thai company where adjudicating the action would require application of Thai law and involve "numerous Thai witnesses and documents." (302 AD2d at 329). The Court held that allowing the action to proceed in New York would have resulted in the imposition of an "inordinate burden upon New York's courts," given

the availability of the more convenient Thai forum. (*Id.*; *see also Carlstrom v Livforsakring*, 2020 WL 7342753, * 8, 2020 US Dist LEXIS 234350, * 21 [SD NY 2020] [Sweden "best equipped" to decide "significant questions of Swedish law looming in the background of this litigation"]; *Schertenleib v Traum*, 589 F2d 1156, 1165 [2d Cir 1978] [affirming forum non conveniens dismissal as, inter alia, the application of Swiss law "necessitates the introduction of inevitably conflicting expert evidence on numerous questions of Swiss law, and it creates the uncertain and time-consuming task of resolving such questions by an American judge unversed in civil law tradition"].)

Likewise here, if this action were to proceed in New York, this court would be required to resolve complex issues of substantive Swiss law, including, inter alia, the merits of allegations concerning a breach of fiduciary duty under the Swiss Code of Obligations. Consideration of these issues would likely entail extensive expert submissions, as evidenced by the Swiss expert affirmations already filed, as well as the interpretation and translation of foreign legal statutes, texts, and treatises. (*See Troni v Banca Popolare Di Milano*, 129 AD2d 502, 503-504 [1st Dept 1987] [affirming dismissal where court considered, among other things, "the need to translate documents from a foreign language"].) Interpreting key documents and testimony in foreign languages would likely add substantial time and expense to the litigation.

Accordingly, this factor also weighs in favor of dismissal.

5. Adequate Alternative Forum

While New York law does not require that the parties identify an adequate alternative forum in order to obtain dismissal on the basis of forum non conveniens, the existence of such a forum further supports dismissal here. (*Pahlavi*, 62 NY2d at 483 [an adequate alternative is an "important," but not necessary factor]). Switzerland is an

adequate alternative forum. Indeed, there are numerous New York cases dismissing civil actions in favor of Swiss proceedings. (*See e.g. Estate of Kainer v UBS AG*, 37 NY3d 460, 468, n 3 [2021] [granting forum non conveniens dismissal because of, inter alia, "the potential availability of Switzerland as an alternative forum"]; *Swissgem S.A. v M&B Ltd.*, 193 AD3d 472, 472-473 [1st Dept 2021] [Switzerland is an "adequate alternative forum"]; *Kainer v UBS AG*, 2017 NY Slip Op 32316[U], ** 24 [Sup Ct, NY County 2017] [Swiss courts will "afford plaintiffs a fair forum and 'adequate process'"], *affd* 175 AD3d 403 [1st Dept 2019], *affd* 37 NY3d 460 [2021].)

In contesting the application of the doctrine of forum non conveniens, "'the burden of demonstrating that [no alternative forum is available] . . . fall[s] on plaintiff'" (*Flame S.A. v. Worldlink Intl. (Holding) Ltd.*, 107 AD3d 436, 438 [1st Dept 2013] [alteration in original] [citation omitted].) Plaintiff offers no plausible argument that Switzerland is an inadequate forum. Although plaintiff objects to certain Swiss procedures for shareholder derivative suits, including associated court fees and the inability to maintain an action on a contingent fee basis (NYSCEF 18, Amended Complaint ¶ 409), the lack of jury trials in civil cases (*id.*, ¶ 411), and the inability to compel production of documents from certain parties/non-parties (*id.*, ¶ 412), none of these factors renders Switzerland an inadequate forum. (*Rushaid v Pictet & Cie*, 2019 WL 120612, at * 2 [Sup Ct, NY County 2019] ["the differences in New York and Swiss pre-trial and trial procedures do not render Switzerland an inadequate alternative forum], *affd* 180 AD3d 577 [1st Dept 2020] ; *see also* NYSCEF 22, Crone aff ¶¶ 83-84 [Swiss courts provide various discovery mechanisms for civil litigants and have the power to compel witness testimony and enforce discovery obligations].)

Although plaintiff also argues that "[b]ecause Cattan is a NY (non-Swiss) resident, to sue there he must advance and/or post security for court costs/legal fees of up to $55 million" (NYSCEF 26, plaintiff's memorandum in opp at 18), CS's Swiss law experts assert that no Swiss court would require a plaintiff to post this sum, and that a fee even approaching this amount is "unprecedented" in Swiss courts. (*See* NYSCEF 22, Crone aff ¶¶ 76-82 [challenging plaintiff's bare allegation that a Swiss court would demand the $55 million deposit theorized by plaintiff, as "(a)ccording to the Swiss Federal Tribunal, costs must not render court access prohibitive or excessively cumbersome" and "(t)he cantonal tariffs must respect the constitutional principle of proportionality and cannot be arbitrary"]; *see also* NYSCEF 38, Grolimund aff ¶¶ 21-41 [costs are not determined "exclusively based on the amount in dispute"; Swiss courts have "wide discretion" to reduce costs; and there is a Swiss "constitutional guarantee of access to justice"].) Indeed, Swiss courts look to a variety of facts and circumstances in determining the amount of a plaintiff's advance, and would not impose an excessive fee by rote, as plaintiff suggests (*See* NYSCEF 22, Crone aff ¶¶ 77-82.)

Upon balancing the appropriate factors, defendants have met their burden of showing that the ends of justice and the convenience of the parties will be best served if this action is heard in Switzerland. Every significant aspect of this case – which is based on board-level and executive level decisions of a Swiss corporation – boils down to Switzerland: the party in interest, the location of the alleged wrongdoing, the applicable law, and the majority of witnesses and documents. (*Peters v* Peters, 101 AD3d 403, 403 [1st Dept 2012] [motion to dismiss on forum non conveniens grounds granted where "(t)he transaction out of which the cause of action arose occurred in Switzerland, all the meetings described by plaintiff that involved UBS AG personnel took

place in that country, nearly all of the nonparty witnesses are there, Swiss law would apply to the claims and plaintiff may bring suit in Switzerland"].) The tenuous connection to New York is outweighed by these factors, including the fact that a more convenient forum may be available. As such, defendants' motion to dismiss on the ground of forum non conveniens is granted without prejudice.[5]

Given this determination, it is unnecessary to reach defendants' other arguments for dismissal.

Accordingly, it is

ORDERED that the motion of defendants Michael Klein, Timothy P. O'Hara, Robert S. Shafir, Pamela A. Thomas Graham, Sean T. Brady, Robert Jain, Philip Vasan, CS, Credit Suisse AG, Credit Suisse (USA), Inc., and Credit Suisse Holdings (USA), Inc. to dismiss the amended complaint herein is granted, without prejudice, and the amended complaint is dismissed in its entirety as against the moving defendants, with costs and disbursements to the moving defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the moving defendants; and it is further

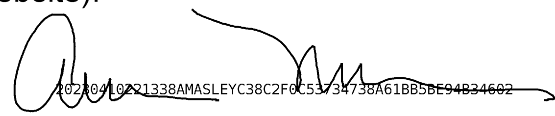
ORDERED that the action is severed and continued against the remaining defendants; and it is further

[5] The court is mindful of *California State Teachers' Retirement System v Alvarez*, 175 A3d 86 (Del Supr, 2017), *cert denied*, 139 SCt 177 (2018). This decision is without prejudice and limited to the named plaintiff. To be clear, this decision is without prejudice to the City of Providence, which sought to intervene in this action, or other Credit Suisse stockholders in the *Emps. Ret. Sys. for the City of Providence v Rohner,* Sup. Ct., NY County, Index No. 651657/2022. In light of this decision, City of Providence's motion to intervene in this action and stay this action will be granted in a separate decision.

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).



4/10/2023					**ANDREA MASLEY, J.S.C.**
DATE					
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	