IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GREGORY A. STEVENSON, as a shareholder of CREDIT SUISSE GROUP AG on behalf of CREDIT SUISSE GROUP AG shareholders, Plaintiff, vs. RICHARD E. THORNBURGH, *et al*., Defendants.	Case No. 23 Civ. 4458 CM (SLC) Class Action

NICOLE LAWTONE-BOWLES, as a shareholder of CREDIT SUISSE GROUP AG on behalf of CREDIT SUISSE GROUP AG shareholders, Plaintiff, vs. RICHARD E. THORNBURGH, *et al*., Defendants.	Case No. 23 Civ. 4813 CM (SLC) Class Action

BRIEF OF *AMICUS CURIAE* BETTER MARKETS, INC., IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE AMENDED CLASS ACTION COMPLAINT

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INTERESTS OF *AMICUS CURIAE*

Better Markets, Inc. ("Better Markets") is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through participation in the rulemaking process at financial regulatory agencies, congressional testimony, *amicus curiae* briefs, independent research, and public advocacy. It advocates for reforms that stabilize our financial system, prevent financial crises, protect investors and consumers, and reduce fraud and abuse, ultimately so that our financial system serves all Americans more equitably. Better Markets has focused not only on the need for strong rules and laws governing the financial markets but also on the need for strong *enforcement* of those rules and laws through both government actions and private lawsuits by investors seeking recovery for fraud and other types of lawlessness. *See generally* www.bettermarkets.org.

Better Markets has a strong interest in this case. At stake are two of the core objectives of private enforcement in the securities markets. First is the ability of countless investors to recover damages for an extraordinary series of alleged illegal schemes perpetrated by the defendants over more than a decade. Second is the uniquely powerful deterrent effect that such an action can have in disciplining bank behavior, especially where the provisions of the civil RICO statute apply. Both of these goals will be undermined if this case is transferred to a tribunal outside the U.S. under a misapplication of the *forum non conveniens* doctrine. In that event, the remedial and deterrent value of the plaintiffs' claims would be lost or severely eroded, to the detriment of these injured investors and the public interest more broadly.

No party's counsel authored this brief in whole or in part, nor has any person contributed money that was intended to fund preparing or submitting this brief. *Cf.* Fed. R. App. P. 29(a)(4)(E) (requiring similar statement in *amicus* briefs filed in federal courts of appeals).

PRELIMINARY STATEMENT

For more than a decade, Credit Suisse's directors and executives engaged in a brazen pattern of criminal conduct to maximize profits and personal benefits to insiders and to prop up its business. From tax evasion to avoiding anti-terrorism sanctions, Credit Suisse repeatedly crossed the clear line separating aggressive business practices from criminal conduct, paying or suffering more than $30 billion in fines, penalties, payments, and losses—all before the company finally collapsed and was rescued by UBS in a fire-sale acquisition that wiped out Credit Suisse shareholders. This marked the end of a storied financial institution, founded in 1856, which opened its first foreign representative office fourteen years later, in 1870, in New York City, opened its New York Agency in 1940, and in 1951 was the first large Swiss bank to establish a direct telex connection with New York. Credit Suisse, https://www.credit-suisse.com/about-us/en/our-company/who-we-are.html.

Credit Suisse was aided in its criminality by its longtime auditor, KPMG, which improperly certified the adequacy of its internal controls and risk-management practices. As alleged in the complaint, this long-running conspiracy among Credit Suisse's directors and executives, as well as KPMG, was centered in the United States operations of Credit Suisse and KPMG. When the criminal enterprise ultimately resulted in catastrophic failure, Credit Suisse shareholders here in the United States and all over the world were left holding the bag, with billions in losses that cannot be recovered without this class action remedy, available only in New York, the center of both the financial world and securities litigations holding wrongdoers accountable.

Defendants' answer to claims by Credit Suisse shareholders is to attempt to retreat to Switzerland, where the bank and its acquirer are incorporated, by seeking a dismissal on *forum non conveniens* grounds. Foreign companies with significant operations in the United States, such as Credit Suisse, should not, however, be allowed to evade claims by injured shareholders under

the guise of convenience. Companies that engage in racketeering conduct in the United States—grievously injuring investors in the United States and throughout the world—should answer in United States courts.

As explained below, *Amicus* respectfully submits that dismissal on *forum non conveniens* grounds would undermine the important policies underlying the civil RICO statute, including the punitive policy enacted by Congress in the form of treble damages. Indeed, RICO, having been adapted from the antitrust laws, is uniquely designed to punish enterprises engaging in patterns of racketeering. As such, RICO provides investors here with the ability to recover for the net effect of the multiparty scheme before the Court, not merely for isolated and dismembered acts. Indeed, unlike conventional securities claims—whether or not they are available in foreign courts—the RICO statute provides investors with recovery without first-party reliance and based on a multiyear pattern of conduct. Put simply, if Credit Suisse and KPMG are allowed to avoid standing trial for their conduct before a United States court (and jury), those injured in the United States will be left without redress.

Moreover, Credit Suisse's pattern of wrongful behavior is not just a matter aptly resolved in the United States, it is a matter best resolved in New York. Each year, a growing number of foreign companies access American capital markets by listing on exchanges in the United States. Indeed, more than a third of U.S. IPOs in 2022 involved foreign issuers. The availability of a New York court and a New York jury is fundamental to providing redress to investors injured by foreign corporations. This necessity is especially pronounced when multinational financial institutions, such as Credit Suisse, are implicated, as these companies must operate in the financial nerve center of the world—New York and the United States. As such, for many investors, including U.S. pension fund and individual shareholders who held more than 540 million of the 4 billion

outstanding shares of Credit Suisse, New York will often be the only forum here in the United States in which there will be sufficient contacts to assert jurisdiction over such foreign corporations consistent with due process.

Defendants do not—and cannot—dispute that stockholders have been injured here, in the United States. Plaintiffs' claims are all properly before this Court, in New York; and the conduct amounts to racketeering, broadly punished here in the United States under the RICO statute. To allow foreign companies to avoid American laws and an American jury would be providing safe harbor for the most egregious class of conduct by the most powerful multinational entities in the world. Were this litigation to be sent to Switzerland, investors would almost certainly recover nothing, even assuming they could sue there. In short, this case belongs here, in this Court. Defendants' motions to dismiss on *forum non conveniens* grounds should be denied.

ARGUMENT

When determining whether to dismiss a matter on *forum non conveniens* grounds, a district court must assess "(1) the deference to be accorded the plaintiff's choice of forum; (2) the adequacy of the alternative forum proposed by the defendants; and (3) the balance between the private and public interests implicated in the choice of forum." *Rabinowitz v. Kelman*, 75 F.4th 73, 80 (2d Cir. 2023) (citation omitted). The third element is of most concern to *Amicus* here. On this score, it is the party seeking *forum non conveniens* dismissal who "bears the burden of establishing that the balance of private and public interest factors tilts heavily in favor of the alternative forum." *Olin Holdings Ltd. v. State of Libya*, 73 F.4th 92, 110 (2d Cir. 2023) (cleaned up). Setting aside the questions of deference to Plaintiffs' choice of forum and Switzerland's inadequacy as an alternative forum, Credit Suisse and KPMG cannot meet that heavy burden considering the strong public interest in having this case adjudicated in the United States, and particularly in New York.

In applying this balancing test,

> the private factors to be considered are: (1) the relative ease of access to sources of proof; (2) the convenience of willing witnesses; (3) the availability of compulsory process for attaining the attendance of unwilling witnesses; and (4) the other practical problems that make trial easy, expeditious, and inexpensive. The public interest factors are: (1) court congestion; (2) avoiding difficult problems in conflict of laws and the application of foreign law; (3) the unfairness of imposing jury duty on a community with no relation to the case; and (4) the interest of communities in having local disputes decided at home.

Olin Holdings, 73 F.4th at 109-10 (cleaned up) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947)). Though most of these factors are beyond the scope of *Amicus*'s interest in this action, the fourth public interest factor—the "local" interest—weighs strongly against dismissal. Under the circumstances presented here, this local interest should be dispositive.

I. THE RICO STATUTE PROVIDES AN IMPORTANT REMEDY FOR CREDIT SUISSE'S INJURED INVESTORS

The RICO statute allows U.S. civil plaintiffs to recover treble damages, attorneys' fees, and costs. Indeed, viable civil RICO claims are almost always definitionally United States claims, as they provide a civil remedy for United States stockholders. And enforcement in United States Courts ensures that RICO's unique remedy, which provides recovery for patterns of racketeering by multiple actors over a multiyear period, is available to injured United States stockholders. The availability of a New York forum also properly accounts for the United States Congress's expressly punitive policy designed to eradicate organized crime, including by "banksters," by providing civil plaintiffs with treble damages, attorneys' fees, and costs upon recovery. At bottom, providing a RICO defendant with an escape hatch under the doctrine of *forum non conveniens* would subvert clear congressional intent, as well as an important punitive policy designed to eradicate organized crime, and definitionally deprive ***only*** civil plaintiffs in the United States of a

forum in the United States. This case should be heard here—where RICO plaintiffs have been injured by the multiyear criminality of Credit Suisse and KPMG—not in Switzerland.

A. The RICO Statute Provides a Unique Remedy for Precisely the Sort of Long-Running Criminality Perpetrated by Credit Suisse and KPMG

The RICO statute is uniquely designed for multiyear conduct by numerous actors, as it provides a unique remedy in the United States for precisely the sort of long-running scheme perpetrated by Credit Suisse, its executives, and its auditor, KPMG. RICO claims based on mail and wire fraud differ from conventional fraud claims because first-party reliance is not required for a civil plaintiff to recover under the RICO statute. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653 (2008) ("For these reasons, we reject petitioners' contention that the "common-law meaning" rule dictates that reliance by the plaintiff is an element of a civil RICO claim predicated on a violation of the mail fraud statute."). Instead, a RICO plaintiff must show that the overarching scheme—taken as a whole—proximately caused injury to the plaintiff's property, the Credit Suisse shares. Indeed, the civil RICO statute, 18 U.S.C. § 1964, was modeled after the "civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992), which is designed to operate on the causal nexus between a course of related conduct and a plaintiff's injuries. Thus, first-party reliance is not a requirement—proximate cause is.

Conventional fraud-based claims, which may be available in other forums, are far more restrictive. Plaintiffs must plead individual reliance on particular false statements, and the false statements themselves must result in the plaintiffs' injuries. In cases involving a multiparty fraudulent scheme, spanning several years, and based on multiple predicates of mail and wire fraud, conventional fraud-based claims may not be sufficient to address the overarching fraudulent scheme, including related conduct and parties. Indeed, in such circumstances, a RICO plaintiff can

recover based on third-party reliance, such as defendants' efforts to deceive the press, public, regulators, or some other third party, which in turn caused injury. *See, e.g.*, *Bridge*, 553 U.S. at 648 (providing false affidavits to state authority auctioning liens deprived plaintiffs of the "opportunity to acquire valuable liens" at auction). A typical fraud plaintiff in many cases would not be able to recover in the absence of first party reliance.

This is why the RICO statute is uniquely important in a case such as this one, and the United States has a strong interest in applying the RICO statute here. Credit Suisse's multiyear scheme involved its executives and its auditors at KPMG and is based on a sequence of predicate acts. The RICO statute provides the necessary flexibility to recover for the overarching scheme perpetrated by the enterprise, rather than dismembered injury from discrete acts. In this sense, investors may be unable to recover claims for the pattern of racketeering if their claims must be adjudicated in a foreign jurisdiction, under foreign law. Put simply, investors harmed by schemes falling within the RICO statute should be able to obtain redress in United States courts. Any result to the contrary would provide foreign corporations doing business and raising capital in the United States a means to end-run around the protections Congress intended for those harmed in the United States under the RICO statute, simply because they are headquartered abroad.

B. There Is a Strong United States Interest in Enforcing the Expressed Punitive Policy of Congress Against Schemes within the RICO Statute, Including Treble Damages, Attorneys' Fees, and Costs

The civil RICO statute, like the statute enabling civil claims for violation of the federal antitrust laws, provides for treble damages. Congress mirrored the treble-damages provision of the Clayton Act in part as a punitive measure. As the Third Circuit observed:

> Congress supplemented the criminal penalties of RICO with this extraordinary civil provision in furtherance of its concern in protecting the public from the evils of racketeer-influenced enterprises. The criminal and civil penalties in the Act thus comprise sharply-cutting edges of a double-edged sword to strike more

> completely the insidious influences plaguing our nation's enterprises. As the Supreme Court has noted, in addition to the criminal penalties, Congress intended RICO's civil remedies to help eradicate "organized crime from the social fabric" by divesting "the association of the fruits of ill-gotten gains."

Genty v. Resol. Tr. Corp., 937 F.2d 899, 910 (3d Cir. 1991) (quoting *United States v. Turkette*, 452 U.S. 576, 585 (1981)); *accord Bingham v. Zolt*, 823 F. Supp. 1126, 1135 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 553 (2d Cir. 1995) ("RICO's treble damages provision is itself punitive in nature.").

Indeed, Congress enacted the civil RICO provision to prophylactically guard against organized criminal conduct—to eradicate it. *Turkette*, 452 U.S. at 589 ("In light of the above findings, it was the declared purpose of Congress to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." (cleaned up)). The statute evinces a strong United States policy to punish concerted criminal conduct that causes injury. Where, as here, defendants have repeatedly committed criminal conduct in the United States, there is an important interest to enforce the expressed congressional policy embodied by the RICO civil statute.

To allow foreign companies that commit concerted criminal conduct in the United States to retreat to their own courts when sued in the United States by the injured would essentially blot out the punitive regime instituted by Congress to eliminate any tolerance for organized crime. It would also deprive civil plaintiffs of the role Congress intended for them—to serve as private attorneys general. *Rotella v. Wood*, 528 U.S. 549, 557-58 (2000) ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."). In other words, the civil RICO statute embodies a policy framework that includes punitive measures against racketeers—and importantly, the

means to recover from racketeers. Forcing the injured investors here to expend significant resources to navigate the courts and laws of a foreign country to obtain a far more limited recovery than intended by Congress would entirely subvert this framework.

II. UNITED STATES COURTS SHOULD ADJUDICATE CLAIMS BY SHAREHOLDERS INJURED IN THE UNITED STATES BY FOREIGN COMPANIES, SUCH AS CREDIT SUISSE

United States investors are exposed to foreign financial assets at unprecedented levels. Foreign issuers are responsible for a significant number of initial public offerings ("IPOs") in the United States. Indeed, in 2022, foreign IPOs accounted for a staggering 37.2% of the IPOs in the United States. Jay R. Ritter, *IPO Data*, Table 14 (The Market Share of Foreign Companies among U.S. Listings, 1980-2022), https://site.warrington.ufl.edu/ritter/files/IPOs-Foreign.pdf. Special Purpose Acquisition Companies ("SPACs") also provide United States investors with direct access to foreign companies on U.S. exchanges. In 2020 and 2021, SPACs constituted more than 860 of United States IPOs. *Id.*, Table 15a (IPO Volume and Average First-day Returns with Banks, LPs, and ADRs Included). The recent rise in exposure by U.S. investors to foreign companies is unmistakable and significant.

Wrongful conduct by foreign companies—particularly those listed on securities exchanges in New York—can directly injure countless worldwide investors and counterparties. A "strong public interest" favors having these injured investors' claims heard in U.S. courts. *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 33 (2d Cir. 2002) ("A strong public interest favors access to American courts for those who use American securities markets."). This interest is particularly strong with respect to courts located in New York. Companies, such as Credit Suisse and its

auditor, KPMG, conducting significant operations in New York,[1] are often subject to jurisdiction in New York. Cases have held that a plaintiff's selection of the New York forum is entitled to "significant deference" even when securities class actions are available in other forums, *In re Poseidon Concepts Sec. Litig.*, 2016 WL 3017395, at *9 (S.D.N.Y. May 24, 2016), or even when the directors and officers were resident in the alternative forum where the alleged wrongdoing took place, but the alternate forum was rendered inadequate by the absence of Rule 23 class action procedures, *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 176 (D. Mass. 2002). Injured investors or shareholders should almost universally be able to obtain redress in New York courts. This is particularly the case for financial institutions. Indeed, "[a]s an international financial center, New York has a great interest in the integrity of its banking system." *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d 264, 275 (S.D.N.Y. 2012).

Here, Credit Suisse was for years an unmistakable fixture among financial institutions operating here in New York. For Credit Suisse's U.S. stockholders, this Court is the only forum where Credit Suisse's contacts will be sufficient to obtain personal jurisdiction over the company, its directors, executives, and auditors. This Court should find demonstrably persuasive its own analysis more than fifteen years ago denying defendants' motions to dismiss a civil RICO case on facts there presented which were far less compelling for permitting the litigation to proceed in New York than the facts here pled outlining the decade-long criminal conspiracy of Credit Suisse and KPMG. *See Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 450-57 (S.D.N.Y. 2008) (McMahon, J.). In sum, the appropriate forum is here—where investors have been injured, where

[1] Credit Suisse AG is a foreign private issuer in the United States, and like public U.S. companies, is subject to periodic reporting requirements to the Securities Exchange Commission. *See* 17 C.F.R. § 240.3b-4(c) (defining "foreign private issuer"); 17 C.F.R. § 240.13a-16 (setting forth periodic reporting requirements for foreign private issuers).

this Court has jurisdiction over the parties, and where Credit Suisse, its executives, and its auditor, KPMG, perpetrated much of their criminal scheme.

CONCLUSION

For the reasons stated above, this Court should deny Defendants' motions to dismiss to the extent they seek to dismiss the Amended Class Action Complaint on *forum non conveniens* grounds.

Dated: October 27, 2023

Respectfully submitted,

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