UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE TESCO PLC SECURITIES LITIGATION	14 Civ. 8495 (RMB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT

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PRELIMINARY STATEMENT

This case involves a company incorporated in England and headquartered in England, disclosures issued in England and prepared under the law of England, allegations of a fraud in England, allegedly committed by personnel in England, with defendants in England, witnesses in England, documents in England—and claims, brought by buyers of derivatives of stock that trades virtually entirely in England, concerning events that are being investigated by authorities in England, and that are the subject of multiple threats of civil litigation in England. This case belongs in England.

1. The case belongs in England, first and foremost, because plaintiff's claims exceed the territorial scope of Section 10(b) under *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), and the powerful presumption against extraterritoriality that *Morrison* applies. Indeed, this Court has actually already decided this case: not long after *Morrison*, this Court held that *precisely the same type of securities at issue here*—unlisted ADRs of a foreign issuer that trade over-the-counter—could not serve as the basis for Section 10(b) claims under *Morrison*. *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6–*7 (S.D.N.Y. Sept. 29, 2010) ("*SocGen*") (Berman, J.).

The correctness of this Court's holding in *SocGen*—that trades in such ADRs are "'predominantly foreign securities transaction[s],'" *id.* at *6—has since been confirmed by the Second Circuit. In *Parkcentral Global Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014), which similarly involved allegedly domestic transactions in derivatives of a foreign security, the Court of Appeals agreed that *Morrison*'s domestic-transaction test is but a threshold test: "a domestic transaction is necessary *but not necessarily sufficient* to make § 10(b) applicable." (Emphasis added.) After applying that threshold test, courts must still look to the "character" of the "security at issue," and also the "relevant actions" at issue, to decide whether sufficient domestic activity exists to overcome the presumption against extraterritoriality. *Id.* at 202, 216. Here, as the Second Circuit held in *Parkcentral*, the claims are "so predominantly foreign as to be impermissibly extraterritorial," *id. at* 216: the character of Tesco's ADRs are

clearly foreign, as they are derivative of a foreign security; and the relevant actions upon which plaintiff's claims are based all took place abroad. *See* Point I, below.

2. And even if plaintiff could properly state a domestic claim, the case would still belong in England. The *forum non conveniens* doctrine all but compels dismissal. Plaintiff's choice of forum deserves no deference, because all the witnesses and evidence are abroad, and thus "the connection between [his] claims and the United States is gossamer." *In re European Aeronautic Defence & Space Co. Sec. Litig.*, 703 F. Supp. 2d 348, 361 (S.D.N.Y. 2010). An adequate alternative forum unquestionably exists in England, because "the defendants are amenable to service of process there; and … the forum permits litigation of the subject matter of the dispute." *In re Herald, Primeo, & Thema Sec. Litig.*, No. 09 Civ. 289 (RMB), 2011 WL 5928952, at *13 (S.D.N.Y. Nov. 29, 2011) (Berman, J.) (citation omitted), *aff'd*, 540 F. App'x 19 (2d Cir. 2013).

The private and public interest factors, moreover, all favor litigation in England: among other things, the witnesses are all there, or elsewhere abroad; certainly none are in the U.S., and indeed many will be beyond this Court's power to reach; the documents are all there; the underlying events all occurred there; Tesco's ordinary shares (upon which the ADRs' value depends) trade there; English authorities are investigating there; multiple civil suits have been threatened there. And of course England has "an undeniably significant interest"—far greater than ours—"in policing conduct within [its] borders," *id.* at *16, and in deciding whether English personnel at one of England's largest companies in fact committed fraud in England. In short, all of the "practical problems that make trial of a case easy expeditious and inexpensive," as well as "the interest in having … local disputes decided at home," weigh strongly in favor of a *forum non conveniens* dismissal here. *Carey* v. *Bayerische Hypo-und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004). *See* Point II, below.

3. But even apart from whether American law and an American forum should govern and preside here, the complaint fails to state a claim for relief. As for the Section 10(b) claims against the individuals, the complaint does not even allege that any of them made any

misstatement. *See* Point III.A, below. And as to all the defendants, including Tesco, the complaint utterly fails to plead particularized facts raising a "strong inference" of scienter, 15 U.S.C. § 78u-4(b)(2), an inference that is "more than merely plausible or reasonable—[but that is] cogent and at least as compelling as any opposing inference of nonfraudulent intent," *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). The complaint alleges no motive on the part of any of the individual defendants to commit fraud; no specific facts suggesting that any of them engaged in any wrongdoing or knew of any wrongdoing; and no basis to impute scienter to the corporation. *See* Point III.B, below. And plaintiff's failure to state a Section 10(b) claim, along with his failure to plead scienter on the part of any individual defendant, dooms his Section 20(a) control-person claim as well. *See* Point IV, below.

4. Finally, the claims against the individuals also must be dismissed because this Court lacks personal jurisdiction over them. Certainly general personal jurisdiction cannot lie: All three individual defendants reside in England; none are "essentially at home" in the United States. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011). And specific personal jurisdiction over the individuals does not exist: the complaint alleges no "suit-related conduct" on their part that "create[s] a substantial connection" with the United States, *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121–22 (2014), and certainly not enough of a connection "that [they] should reasonably anticipate being haled into court" here, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). *See* Point V, below.

For all of these reasons and those set out below, the complaint must be dismissed.

BACKGROUND[1]

A. The Parties

Tesco is a multinational grocery and general merchandise retailer formed under the laws of the United Kingdom and headquartered in Cheshunt, Hertfordshire, England. Second Consolidated Amended Complaint ("2AC") ¶ 26. It is the largest retailer in the United Kingdom, with over 3,500 stores and over 315,000 employees. It maintains significant operations elsewhere in Europe and Asia, but currently has no operations in the United States. *See* Ex. 2 (Tesco 2015 annual report) at 156; Morris Decl. ¶¶ 4–5.[2]

The individual defendants are Philip Clarke, Laurie McIlwee, and Sir Richard Broadbent. All three reside in the United Kingdom and are former officers and/or directors of Tesco. Morris Decl. ¶ 11. Mr. Clarke got started at Tesco in 1974, and he served as Tesco's CEO and a member of its board of directors from 2011 through September 2014. 2AC ¶ 27. Mr. McIlwee served as Tesco's CFO and a member of Tesco's board from January 2009 until April 2014. 2AC ¶ 29. Mr. Broadbent acted as the non-executive chairman of Tesco's board from December 2011 through October 2014. 2AC ¶¶ 30, 74.

Plaintiff Stephen F. Klug claims to have bought Tesco's American Depository Receipts—ADRs—at various times on the over-the-counter market. He seeks to bring this

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[1] The materials upon which defendants rely here include "documents incorporated into the complaint by reference, … matters of which a court may take judicial notice," *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), "legally required public disclosure documents … and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit," *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007), all of which the Court may consider under Rule 12(b)(6). In addition, as "[t]his Court may decide motions to dismiss for … forum non conveniens on the basis of affidavits or other materials outside the pleadings," *Otor, S.A.* v. *Credit Lyonnais, S.A.*, No. 04 CV 6978 (RO), 2006 WL 2613775, at *2 (S.D.N.Y. Sept. 11, 2006), defendants have submitted declarations addressing the locus of underlying events, the location of principal witnesses and evidence, and the adequacy of an alternative forum (here, England).

[2] "Ex." refers to the exhibits to the transmittal declaration of George T. Conway III, and "Morris Decl." refers to the declaration of Adrian Morris, both submitted on this motion.

action "on behalf of all persons or entities who purchased or otherwise acquired … [Tesco ADRs] between April 18, 2012 and September 22, 2014." 2AC ¶ 1.

B. Tesco's Ordinary Shares, ADRs, and Public Filings

Tesco's ordinary shares—what we in the United States call common stock—are listed primarily on the London Stock Exchange and are also listed on the Irish Stock Exchange. Tesco's ordinary shares are not listed or traded on any United States exchange. Morris Decl. ¶ 6.

Tesco has also sponsored the issuance of ADRs by Deutsche Bank Trust Company Americas. 2AC ¶¶ 20, 26. An ADR is a derivative security that represents an ownership interest in the shares of a non-U.S. company, like Tesco here. Securities and Exchange Commission, *Investor Bulletin: American Depository Receipts* 1–2 ("*SEC ADR Bulletin*"), *available at* http://1.usa.gov/1KrLwNw. Each Tesco ADR represents three of Tesco's ordinary shares, which remain custodied outside the United States in the London office of Deutsche Bank.[3] Tesco's ADRs are not listed or traded on any United States exchange; instead, they trade only on the OTC, the over-the-counter, market. Morris Decl. ¶ 7. A small fraction of Tesco's capitalization, the ADRs correspond to only about two percent of Tesco's outstanding shares. *Id.*

Tesco is not required to—and does not—file annual or periodic reports with the SEC. Indeed, it made *no* filings with the SEC during the class period. In 2004, long before that period, Tesco did file a Form F-6 registration statement with the SEC, but only to register the ADR facility. 2AC ¶ 20; *see* Ex. 4 (Tesco Form F-6). That filing contained no substantive disclosures about Tesco: As the SEC explains, "[d]isclosure under Form F-6 relates only to the contractual terms of deposit under the deposit agreement …. A Form F-6 contains *no* information about the non-U.S. company." *SEC ADR Bulletin* at 2 (emphasis added); *see* Ex. 4 (Tesco Form F-6).

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[3] An ADR holder may surrender the ADRs to the depositary in exchange for receiving the ordinary shares that the ADR represents. *SEC ADR Bulletin* at 1. Thus, in Tesco's case, that means that one ADR may be exchanged for three ordinary shares, ten ADRs may be exchanged for thirty ordinary shares, and so on.

There are three "levels" of ADR facilities, which are "categorized … depending on the extent to which the foreign company has accessed the U.S. markets." *SEC ADR Bulletin* at 2. Level 2 ADRs may be listed and traded on a U.S. securities exchange, and Level 3 ADRs permit the foreign company to raise capital here as well. Given the extent of these contacts with U.S. markets, a foreign company with Level 2 or 3 ADRs must file, in addition to a Form F-6, annual reports with the SEC "contain[ing] extensive financial and non-financial information about the issuer." *Id.* Tesco's ADRs, by contrast, are *Level 1*, which reflect the *least* contact with the U.S.—and accordingly do *not* require *any* such disclosures. *Id.*

Accordingly, Tesco's disclosures—including the disclosures at issue here—are not made under any U.S. securities law obligation, but rather under obligations found in U.K. law, including the Companies Act 2006. 2AC ¶ 85. U.K. law requires Tesco's financial disclosures to be prepared in accordance with IFRS, the International Financial Reporting Standards as adopted by the European Union, as well as in accordance with U.K. Accounting Standards. 2AC ¶ 85; Morris Decl. ¶ 8. Tesco is also subject to additional financial reporting regulations set forth in The U.K. Corporate Governance Code, as established by the FRC, the Financial Reporting Council, a U.K. regulator. 2AC ¶ 85.

C. The Second Amended Complaint's Allegations

According to the Second Amended Complaint, Tesco experienced unprecedented growth between the late 1990s and 2007, with its stock price (like that of so many others) hitting record highs. 2AC ¶ 32. The complaint asserts that Tesco's business suffered and its stock declined, however, in the wake of the global recession that began in 2008, that Tesco's business has since been weakened by discount retailers, and that its U.K. market share has declined. 2AC ¶¶ 32–34.

The complaint alleges that, in the U.K. grocery business, it is quite typical for retailers to earn income from suppliers through the use of premiums, rebates, and discounts. 2AC ¶ 36. The subject of negotiation between the parties, these can take a variety of forms, with suppliers paying the retailer for favorable shelf-positions or the display of supplier-provided signage, and

the retailer receiving discounts and rebates from suppliers for agreeing to purchase and sell certain quantities of products. 2AC ¶ 36. As plaintiff concedes, there is nothing wrongful about these customary practices. They are only improper if the income earned or costs accrued through these arrangements are not appropriately accounted for. 2AC ¶¶ 35–36, 57.

In April 2014, amid poor sales and declining profitability, Tesco announced that Mr. McIlwee had resigned as CFO. 2AC ¶ 63. A few months later, in July 2014, after issuing its second profit warning of the year, Tesco announced that David Lewis would replace Mr. Clarke as CEO on October 1, 2014. 2AC ¶ 64. And after another round of disappointing profit guidance in late August, Tesco announced that Mr. Lewis would replace Mr. Clarke on September 1, 2014, a month sooner than planned. Ex. 5 (Aug. 29 trading update). The complaint makes no allegation that these announcements had anything to do with the accounting issues that were later discovered, or were the result of anything other than disappointing results.

On September 22, 2014, several months after the announcements of Messrs. McIlwee's and Clarke's departures, Tesco announced that it had identified an overstatement of its expected profit for the first half of the year, principally due to "the accelerated recognition of commercial income and delayed accrual of cost." 2AC ¶ 65. The press release explained that:

> On the basis of preliminary investigations [into] the UK food business, the Board believes that the guidance issued on 29 August 2014 for the Group profits for the six months to 23 August 2014 was overstated by an estimated £250m. Some of this impact includes in-year timing differences. Work is ongoing to establish the extent of these issues and what impact they will have on the full year.

2AC ¶ 65. According to plaintiff, this announcement came after a Tesco whistleblower on September 19, 2014 brought certain accounting issues to the attention of Tesco's general counsel, who then apprised the new CEO, Mr. Lewis. Referring to news articles from *The Sunday Times* and *International Business Times*, plaintiff alleges that the same whistleblower had earlier raised concerns to unidentified Tesco managers "while Defendant Clarke was still

CEO." 2AC ¶¶ 11, 51, 66. There is no well-pled allegation that the whistleblower raised any concerns directly to Mr. Clarke or any other individual defendant.[4] Indeed, the complaint is entirely silent as to whom the whistleblower allegedly informed, let alone what the whistleblower said.

On October 23, 2014, Tesco announced interim results as well as the findings of an independent review "into the matters which had come to light in [its] UK food business." 2AC ¶ 74; Ex. 6 (Oct. 23 interim results) at 4. The review confirmed that there was an overstatement in Tesco's profit expectations of £263 million in the first half of 2014/15 (that is, £13 million more than the September 22 estimate), of which £118 million related to first half trading profit, with the balance relating to the 2013/14 fiscal year (£70 million) and a pre-2013/14 period (£75 million). The overstatement resulted from "amounts [that] have been pulled forward or deferred, contrary to Tesco Group accounting policies." 2AC ¶ 74; Ex. 6 (Oct. 23 interim results) at 1, 4. Tesco also announced that Mr. Broadbent, the board's chairman, would resign. *Id*.

As alleged in the complaint, the accounting practices that gave rise to the profit misstatements were "discovered primarily in the Company's UK grocery operations." 2AC ¶ 81. Eight Tesco executives who worked in Tesco's UK operations were asked to resign. 2AC ¶ 81.[5] Plaintiff quotes a press story that "the scandal" allegedly involved "a 'small group' [who] knew [that conditional sales] targets would not be reached and struck deals with suppliers to make the

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[4] Near the end of his complaint, plaintiff seemingly contradicts his earlier allegations that the whistleblower only raised concerns to an unidentified party "*while* Defendant Clarke was still CEO," but not "to" him directly. *Compare* 2AC ¶¶ 11, 51, 66 (emphasis added) *with* 2AC ¶¶ 200, 229. As these later paragraphs merely summarize the prior allegations without giving any new factual support and purport to rely on two news articles which state only that the whistleblower's concerns were raised *while* Mr. Clarke was CEO, they appear to be a drafting error and should be disregarded. *See, e.g.*, *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405–06 (S.D.N.Y. 2001); Exs. 7–8.

[5] All of the individuals identified in paragraph 81 of the complaint reside either in England or Ireland; *none* reside in the United States. In addition, all of those individuals, with the exception of Mr. Simister, no longer work for Tesco. Morris Decl. ¶ 13.

payments currently," 2AC ¶ 235, but pleads no specifics about them. Plaintiff also describes an email Mr. McIlwee allegedly sent in April 2012 to Tesco's finance team concerning "a problem with the recognition of commercial income in Tesco's Polish business," 2AC ¶ 47, but pleads no specifics connecting any issues there to the September and October 2014 announcements.

Stripped of its prolixity, the complaint alleges essentially two categories of allegedly false or misleading statements: (1) reported financial results or profit expectations that were allegedly inaccurate or inconsistent with IFRS and U.K. Accounting Standards (*see, e.g.*, 2AC ¶¶ 86–87, 181–82, 193–96), and (2) various generalized statements regarding Tesco's strategic plan, improved performance, and focus on internal compliance and controls (*see, e.g.*, 2AC ¶¶ 126–27, 142–43, 154–55, 160–61). Both of these categories of alleged misstatements—all of which were disseminated in the U.K.—are alleged to have been false or misleading for the same reason: the accounting issues that gave rise to the overstatement of profit identified in the September and October 2014 announcements.[6]

D. U.K. Investigations and Litigation

The matters alleged in the complaint are now the subject of investigation by U.K. regulators. After the September 22, 2014 announcement, the U.K. Financial Conduct Authority notified Tesco that it had commenced an investigation of the overstatement of expected profit described in that announcement. 2AC ¶ 72. On October 29, 2014, the Serious Fraud Office, which investigates complex frauds in England, Wales, and Northern Ireland, announced that it had opened a criminal investigation into accounting practices at Tesco. 2AC ¶ 213; Morris Decl. ¶¶ 18–20. And on December 22, 2014, the U.K. Financial Reporting Council also announced its

[6] *See, e.g.*, 2AC ¶¶ 126–27 (statement that Tesco "expect[s] to deliver a stronger sales performance in the months ahead" allegedly false and misleading because "beginning no later than its 2011/12 fiscal year, Tesco began to misrepresent profits and losses, violating IFRS reporting requirements for commercial income by material amounts"); ¶¶ 181–82 (sales and profits figures in 2014 annual report allegedly false and misleading because "[a]s later admitted … Tesco improperly accounted for £53 million in commercial income [that year]").

own investigation into the preparation, approval, and audit of Tesco's accounts. 2AC ¶¶ 5, 75.

In addition, private civil litigation is also threatened in England. Several groups of lawyers and litigation funders have announced their intention to commence group actions in the High Court in London on behalf of Tesco's current and former shareholders in connection with the very same accounting issues alleged here. *See* Exs. 9–18; Morris Decl. ¶ 21.[7]

E. Procedural History

In October 2014, the first of several putative class action lawsuits was filed in this Court by a law firm that has announced that it is organizing litigation against Tesco in England.[8] By order dated March 19, 2015, the Court appointed Mr. Klug lead plaintiff, and on May 6, 2015, he filed his first consolidated amended complaint. On May 21, 2015, defendants submitted a letter outlining the bases for their motion to dismiss, and in response, plaintiff filed his second consolidated amended complaint on June 18, 2015. Like its predecessor, that complaint asserts claims against all defendants under Section 10(b) of the Securities and Exchange Act and Rule 10b-5, and against the individual defendants under Section 20(a) of that Act.

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS EXCEED THE TERRITORIAL REACH OF SECTION 10(b).

Over and over again in recent years, the Supreme Court has emphasized the importance of "a canon of statutory interpretation known as the presumption against extraterritorial[ity]"—"the 'presumption that United States law governs domestically but does not rule the world.'" *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Microsoft Corp.* v.

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[7] The procedural aspects of such a group action are discussed below and in paragraphs 34–37 of the declaration of Lord Anthony Grabiner QC ("Grabiner Decl.") submitted by defendants.

[8] That first action, brought by Scott+Scott on behalf of Irving Firemen's Relief and Retirement Fund, was voluntarily dismissed in April 2015, apparently so that Scott+Scott or its client could bring litigation against Tesco in England. *See* docket entries 60, 62; Exs. 13–15.

AT&T Corp., 550 U.S. 437, 454 (2007)). Under that "longstanding principle of American law," "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (citation and internal quotation marks omitted)).

The presumption embodies a simple, core idea: "Foreign conduct is generally the domain of foreign law." *Microsoft*, 550 U.S. at 455 (citation, alteration marks, and internal quotation marks omitted). It recognizes that "foreign law may embody different policy judgments about the relative rights" of various parties, *id.* (citation and internal quotation marks omitted)—as illustrated by how, in securities law, "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters," *Morrison*, 561 U.S. at 269.

And so the "presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248). It thus requires "courts [to] 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'" *Microsoft*, 550 U.S. at 455 (quoting *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004)). Ambiguities over a law's territorial scope must accordingly be resolved against extraterritorial application: "to rebut the presumption," a statute must "evince a 'clear indication of extraterritoriality.'" *Kiobel*, 133 S. Ct. at 1665 (quoting *Morrison*, 561 U.S. at 265). "[U]ncertain indications do not suffice." *Morrison*, 561 U.S. at 265.

Morrison applied the presumption to Section 10(b). The Supreme Court found "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," and thus concluded that "it does not." *Morrison*, 561 U.S. at 255. Analyzing the statutory text in light of the presumption, the Court adopted a threshold "transactional test" to determine Section 10(b)'s

territorial scope. *Id.* at 269. Under that test, "it is … only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.* at 267; *see also*, *e.g.*, *Parkcentral Global Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198, 210 (2d Cir. 2014); *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 179–81 (2d Cir. 2014). In other words, "the foreign location of the transaction … establishes … the Act's inapplicability." *Morrison*, 561 U.S. at 268; *see*, *e.g.*, *City of Pontiac*, 752 F.3d at 181.

But the converse is *not* true: the domestic location of a transaction does *not* establish that Section 10(b) applies to foreign conduct. Given that "[f]oreign conduct is generally the domain of foreign law," *Microsoft*, 550 U.S. at 455 (citation, alteration marks, and internal quotation marks omitted), and given the need "'to protect against unintended clashes between our laws and those of other nations,'" *Kiobel*, 133 S. Ct. at 1664 (citation omitted), foreign conduct does not come within Section 10(b)'s scope just because a domestic transaction is involved. Indeed, to hold otherwise "would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application," as it would mean that American law would "apply … to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction." *Parkcentral*, 763 F.3d at 215.

> "For all these reasons" and more, the Second Circuit in *Parkcentral* squarely
>
> conclude[d] that, while a domestic transaction or listing is *necessary* to state a claim under § 10(b), a finding that … transactions were domestic would not *suffice* to compel the conclusion that plaintiffs' invocation of § 10(b) was appropriately domestic.

Id. at 216 (emphasis in original). In short, "a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable." *Id.* As the Second Circuit explained, many cases may involve domestic securities transactions, and yet, because of the presumption against extraterritoriality, may *still* involve *insufficient domestic activity* to permit Section 10(b) to apply. *Id.* at 215-16. As a result, *Morrison*'s bright-line transactional test is only the threshold inquiry; courts must engage in a second, fact-intensive analytical step to decide whether Section 10(b) does indeed apply. As *Parkcentral* holds, "courts must carefully make their way with

careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases"—by focusing on both (1) the "character" of the security at issue and (2) the "relevant actions" on which the claim of securities fraud is based. *Id.* at 202, 216–18.

Applying that framework, the Second Circuit in *Parkcentral* dismissed claims of securities fraud strikingly similar to plaintiff's claims here. The plaintiffs there had purchased "securities-based swaps" in the United States that "referenced" the securities of a German company (Volkswagen) that traded only on foreign exchanges. Just like the Tesco ADRs at issue here, the swaps' value turned upon the price at which the *foreign* security traded *abroad*. *Id.* at 205–07. The Second Circuit held that, even assuming that the swaps were "domestic transactions" under *Morrison*, Section 10(b) still did *not* apply to "the claims in [that] case," because the claims were "*so predominantly foreign as to be impermissibly extraterritorial*." *Id.* at 216 (emphasis added). The claims were "predominantly foreign," the Court held, because they (1) "concern[ed] statements made primarily in Germany with respect to stock in a German company traded only on exchanges in Europe," (2) in connection with "fraudulent acts" alleged to have taken place in Germany, (3) which were "the subject of investigation by [German] regulatory authorities and adjudication in German courts." *Id.* These "relevant actions" were thus "so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality." *Id.*

Even more directly on point is a decision of *this* Court that perceptively presaged *Parkcentral*. In its *SocGen* decision, issued not long after *Morrison*, this Court dismissed Section 10(b) claims involving *precisely* the kind of securities at issue here—*unlisted ADRs of a foreign issuer*. *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6–*7 (S.D.N.Y. Sept. 29, 2010) ("*SocGen*") (Berman, J.). At issue were unlisted ADRs of a French investment bank whose ordinary shares, like Tesco's and Volkswagen's, traded only on foreign exchanges. *Id.* at *5–*7. Just like the claims here and in *Parkcentral*, the *SocGen* claims were based on statements disseminated abroad, and "revolve[d] around" activities that took place

abroad: a massive and highly publicized trading scandal in France. *Id.* at *2, *4. On these familiar facts, this Court had no trouble concluding that the claims were so "predominantly foreign" as to exceed the territorial reach of Section 10(b). *Id.* at *6–*7.

The Second Circuit's decision in *Parkcentral* and this Court's decision in *SocGen* compel the conclusion that the claims alleged here are "so predominantly foreign"—so predominantly English—as to constitute an "impermissibly extraterritorial" invocation of Section 10(b). *Parkcentral*, 763 F.3d at 216; *SocGen*, 2010 WL 3910286, at *6–*7.

First, the "character" of the securities at issue here are "predominantly foreign." *Parkcentral*, 763 F.3d at 202, 216. Plaintiff's claims involve, like those in *SocGen*, unlisted, Level 1 ADRs—and thus, as this Court recognized even before *Morrison*, "predominantly foreign securities transaction[s]." *SocGen*, 2010 WL 3910286, at *6; *Copeland* v. *Fortis*, 685 F. Supp. 2d 498, 506 (S.D.N.Y. 2010) (Chin, J.). An ADR simply represents "the right to receive a specified number" of the foreign issuer's "ordinary shares"—securities that, in Tesco's case, are listed and traded only on "foreign exchange[s]." *SocGen*, 2010 WL 3910286, at *6 (quoting *Morrison*, 561 U.S. at 250); *see SEC ADR Bulletin* at 1–2; p. 5, above. ADR prices thus track the prices at which a foreign issuer's shares trade in its home, foreign market. *See* American Depositary Receipts, SEC Release No. 33-6894, 1991 WL 294145, at *6 (May 23, 1991). Like the swaps referencing Volkswagen shares in *Parkcentral*, Tesco's ADRs are merely "derivative securities" that derive value "based on changes in the value of a [foreign] stock." *Parkcentral*, 763 F.3d at 214; *see id.* at 205–07.

And just as in *SocGen*, Tesco's ADRs are "not traded on an official American securities exchange," but instead are traded over-the-counter—"a less formal market with lower exposure to U.S.-resident buyers." *SocGen*, 2010 WL 3910286, at *6 (citing *Copeland*, 685 F. Supp. 2d at 506). The SEC has itself recognized that critical distinction. As noted above, Level 2 and Level 3 ADRs, which are *listed and traded* on national securities *exchanges*, require the issuer to

register with the SEC, file annual reports with the SEC,[9] and comply with U.S. accounting standards.[10] *Not* so with *Level 1* ADRs, like Tesco's, which may *not* be traded in such fashion, and do *not* require the foreign issuer to do *any* of those things. *See SEC ADR Bulletin* at 2.[11] As a result, Tesco's disclosures were *not* made pursuant to the U.S. legal regime; they were made pursuant to the securities laws of its home country—*England*. *See* pp. 5-6, above.

Second, the "relevant actions" on which plaintiff's claims are based, *Parkcentral*, 763 F.3d at 216, all point away from the United States and toward a foreign jurisdiction—*England*:

- This lawsuit involves statements made by an *English* company, which were disseminated in *England*, including through annual reports and periodic disclosures governed by *English* law. *See* pp. 5–6, 9, above; *Parkcentral*, 763 F.3d at 216 (German company, German disclosures, and German law).
- All of the alleged fraudulent conduct is alleged to have taken place abroad, primarily in the U.K., expressly including the alleged revenue practices that gave rise to the September and October 2014 announcements. *See* pp. 7–9, above; *Parkcentral*, 763 F.3d at 216 (fraudulent conduct alleged to have taken place in Germany).
- Plaintiff touts that that alleged conduct is the subject of ongoing investigations, not by the SEC or other U.S. regulators, but by the U.K. Financial Conduct Authority, the U.K.

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[9] As noted above, the only SEC filing required in connection with a Level 1 ADR facility is Form F-6, which contains disclosures about the ADR facility, but "nothing about the company or its businesses." *In re European Aeronautic Defence & Space Co. Sec. Litig.*, 703 F. Supp. 2d 348, 358 (S.D.N.Y. 2010); *accord SEC ADR Bulletin* at 2.

[10] Not before the Court is the question of Section 10(b)'s application to Level 2 and Level 3 ADRs, which might require a different analysis. *See United States* v. *Martoma*, No. 12 Cr. 973 (PGG), 2013 WL 6632676, at *3 (S.D.N.Y. Dec. 17, 2013) (concluding that Section 10(b) applied to ADRs listed and traded on a national securities exchange, and distinguishing *SocGen* as having involved unlisted ADRs traded only over-the-counter).

[11] *See also* Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1249 (2012) ("The lesser importance of OTC trading of a foreign issuer's shares, as opposed to exchange trading of such shares, is suggested by the SEC's exemption for OTC-traded foreign issuers from the periodic disclosure requirements under the Exchange Act.").

Serious Fraud Office, and the U.K. Financial Reporting Council. *See* p. 9, above. The Court may also take judicial notice of the group litigation on behalf of Tesco investors threatened in the High Court in London. *See* p. 10, above; *Parkcentral*, 763 F.3d at 216 (German investigation and adjudication in German courts).

On these facts, the answer to whether Section 10(b) applies consistent with the presumption against extraterritoriality is simple: *it does not*. These are *foreign* disclosures, of a *foreign* issuer, alleged to have been false and misleading as a result of an alleged fraud committed on *foreign* soil, which are the subject of ongoing investigations by *foreign* authorities and adjudication in *foreign* courts. To apply Section 10(b) on these facts would, as the Second Circuit has explained, impermissibly "subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges, in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law nearly certain to arise." *Parkcentral*, 763 F.3d at 216–17.

Indeed, to apply Section 10(b) on these facts would do so *solely* on the basis that Tesco has unlisted ADRs that trade over-the-counter in the United States—securities that do not trade on any official American exchange, do not subject the issuer to any U.S. disclosure requirement, and at bottom are nothing more than a "receipt" evidencing a beneficial ownership interest in a certain number of Tesco's *ordinary shares*, which are issued abroad, listed only on exchanges abroad, and which themselves are unquestionably not subject to the reach of Section 10(b). The presumption against extraterritoriality is not so "craven [a] watchdog" to permit this result. *Morrison*, 561 U.S. at 266. As the Second Circuit has recognized, ADRs are but a "slim connection" to the United States, "the sort of 'fleeting' connection that 'cannot overcome the presumption against extraterritoriality.'" *Liu Meng-Lin* v. *Siemens AG*, 763 F.3d 175, 179–80 (2d Cir. 2014) (quoting *Morrison*, 561 U.S. at 263).

For these reasons, plaintiff's claims fall outside the reach of Section 10(b), and the complaint must accordingly be dismissed.

POINT II

THE COURT SHOULD DISMISS THIS ACTION UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*.

Even if Section 10(b) applied to plaintiff's claims, they should be dismissed under the *forum non conveniens* doctrine. That doctrine allows dismissal "even if the court is a permissible venue with proper jurisdiction over the claim." *Carey* v. *Bayerische Hypo-und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004). "The central purpose of a *forum non conveniens* inquiry is to determine where trial will be most convenient and will serve the ends of justice." *LaSala* v. *UBS, AG*, 510 F. Supp. 2d 213, 221–22 (S.D.N.Y. 2007). The decision to dismiss on *forum non conveniens* grounds "lies wholly within the broad discretion of the district court." *USHA (India), Ltd.* v. *Honeywell Int'l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005) (citations omitted).

The Second Circuit's *forum non conveniens* analysis entails a three-step inquiry: "At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum." *In re Herald, Primeo, & Thema Sec. Litig.*, No. 09 Civ. 289 (RMB), 2011 WL 5928952, at *11 (S.D.N.Y. Nov. 29, 2011) (Berman, J.) (quoting *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005)), *aff'd*, 540 F. App'x 19 (2d Cir. 2013).

This Court should exercise its broad discretion to send this case to a fully available forum, convenient to all the percipient witnesses, where the public interest in the case is much greater, and where litigation against the same defendants arising out of the same facts will be proceeding—the High Court in London.

A. Plaintiff's choice of forum is entitled to little deference.

The Court must determine "whether the plaintiff's choice [of forum] is entitled to more or less deference." *Pollux Holding Ltd.* v. *Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003).

The Second Circuit has made clear that it "does not assign talismanic significance to the citizenship or residence of the parties, and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for *forum non conveniens*." *Id.* at 73. Indeed, "[c]ourts in this Circuit have numerous times dismissed suits by an American citizen or entity in favor of a foreign jurisdiction." *LaSala*, 510 F. Supp. 2d at 225 (collecting cases).

Where, as here, "the operative facts upon which the litigation is brought bear little material connection to the chosen forum," a plaintiff's choice of forum must be given "reduced emphasis." *Id.* at 224. Where "[m]ost, if not all, of the witnesses and evidence are abroad," "the connection between [plaintiff's] claims and the United States is gossamer" and thus "deserves less deference," even if the "putative class consists entirely of U.S. residents." *In re European Aeronautic Defence & Space Co. Sec. Litig.*, 703 F. Supp. 2d 348, 361 (S.D.N.Y. 2010) ("*EADS*"). So here, where *all* of the witnesses are abroad, and the operative facts bear *no* material connection to this country, plaintiff's choice of forum is entitled to little weight. *Id; see also*, *e.g.*, *Allstate Life Ins. Co.* v. *Linter Grp. Ltd.*, 994 F.2d 996, 1001 (2d Cir. 1993) (dismissing securities fraud action by U.S. plaintiff); *First Union Nat'l Bank* v. *Paribas*, 135 F. Supp. 2d 443, 447–48 (S.D.N.Y. 2001) (same; fraud); *Sussman* v. *Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993) (same; fraud); *Diatronics, Inc.* v. *Elbit Computers, Ltd*, 649 F. Supp. 122, 127–30 (S.D.N.Y. 1986) (same; securities fraud), *aff'd*, 812 F.2d 712 (2d Cir. 1987).

B. An adequate alternative forum exists in England.

"[T]he court must [next] determine that there is an adequate alternative forum somewhere." *Alfadda* v. *Fenn*, 159 F.3d 41, 45 (2d Cir. 1998). "An alternative forum is adequate if: (1) the defendants are subject to service of process there; and (2) the forum permits 'litigation of the subject matter of the dispute.'" *Herald, Primeo*, 2011 WL 5928952, at *13 (quoting *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (1981)). "Whether the law of the foreign forum differs from American law 'should ordinarily not be given conclusive or even

substantial weight' in assessing the adequacy of the forum." *EADS*, 703 F. Supp. 2d at 360 (quoting *Piper Aircraft*, 454 U.S. at 249).

Accordingly, "an alternative jurisdiction is not rendered inappropriate simply because not all of the contemplated causes of action are available there, so long as the general subject matter of the litigation can be heard there." *Abert Trading, Inc.* v. *Kipling Belgium N.V./S.A.*, No. 00 Civ. 0478 (RMB), 2002 WL 272408, at *3 (S.D.N.Y. Feb. 26, 2002) (Berman, J.) (citation and internal quotation marks omitted). Nor does "the prospect of a lesser recovery … justify refusing to dismiss on the ground of forum non conveniens." *Alcoa S.S. Co.* v. *M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980). And the fact that plaintiff sues under the federal securities laws does not bar dismissal: "federal courts possess the power to invoke the *forum non conveniens* doctrine in a private action claiming a violation of American anti-fraud securities statutes." *Howe* v. *Goldcorp Invs., Ltd.*, 946 F.2d 944, 945, 952 (1st Cir. 1991) (Breyer, C.J.). It thus would be "clearly wrong" to assert "that *forum non conveniens* dismissal is never appropriate when a plaintiff alleges a federal securities ... cause of action." *Alfadda*, 159 F.3d at 47.

The courts of England unquestionably provide an adequate forum here. Tesco is an English company amenable to service of process in England. Grabiner Decl. ¶¶ 9, 38. All of the individual defendants reside in England, and are likewise subject to process there. *See* Morris Decl. ¶ 11; Grabiner Decl. ¶¶ 10, 38. And as demonstrated by Lord Anthony Grabiner QC, a respected English barrister, the English courts permit litigation of the subject matter of the dispute. *See* Grabiner Decl. ¶¶ 25–31, 39 (describing the elements of the tort of deceit and remedy therefor to the extent that English law applies). Not surprisingly, our courts have long recognized English courts as adequate, including in securities-fraud cases. *E.g.*, *Pollux*, 329 F.3d at 75; *Roby* v. *Corporation of Lloyd's*, 996 F.2d 1353, 1363, 1365–66 (2d Cir. 1993); *Lindner Fund, Inc*. v. *Polly Peck Int'l PLC*, 811 F. Supp. 133, 135 (S.D.N.Y. 1992). Indeed, the obvious adequacy of the English courts is underscored by the announcements by several groups of lawyers and litigation funders that, on behalf of Tesco investors, they will assert similar claims in

the High Court in London. *See* p. 10, above; *Herald, Primeo*, 2011 WL 5928952, at *13.[12]

C. The private and public interest factors weigh heavily in favor of dismissal.

The final step of the *forum non conveniens* analysis requires the court to "balance private and public interest factors to ascertain whether the case should be adjudicated in plaintiff's chosen forum or in the alternative forum proposed by defendant." *Pollux*, 329 F.3d at 74–75. Here, the private and public interests factors all point in favor of England.

Private interest factors. The private interest factors—such as "the relative ease of access to sources of proof," "the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses," and "all other practical problems that make trial of a case easy, expeditious and inexpensive," *Carey*, 370 F.3d at 237 (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947))—plainly weigh in favor of an English forum.

To begin with, "the presence of the vast majority of witnesses in one forum weighs in favor of that forum." *LaSala*, 510 F. Supp. 2d at 227. Where "[t]here are few if any potential witnesses in New York or, for that matter, in the United States … [and] substantially all of the likely willing witnesses reside … in England or [elsewhere abroad] … there simply is no denying the fact that the cost and inconvenience for these individuals of a trial in London would be far less than that of a trial in New York." *Paribas*, 135 F. Supp. 2d at 449. Here, it is clear that *all* the likely witnesses—party and non-party, inside and outside the company—reside in England or elsewhere in Europe, and that *none* reside in the United States. Morris Decl. ¶¶ 11–15. As a result, the "cost for witnesses to attend trial will be significantly lessened if trial is held

[12] As explained by Lord Grabiner, the High Court has the power to issue a Group Litigation Order, which, like the class action device here, permits a large number of claims involving common or related issues of fact or law to be grouped into a single action. *See* Grabiner Decl. ¶¶ 34–37. And even were that not the case, the Second Circuit has made clear that the fact that a foreign forum may not "recognize class actions … is not so burdensome as to deprive the plaintiffs of an effective alternative forum." *EADS*, 703 F. Supp. 2d at 360–61 (quoting *Aguinda* v. *Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002)).

in [England]." *Alfadda*, 159 F.3d at 47–48.[13]

In addition, compulsory process is available in England to "secure the live testimony of necessary foreign witnesses outside the reach of United States process," a fact that also favors dismissal in favor of an English forum. *Alfadda*, 159 F.3d at 47–48; *accord Herald, Primeo*, 2011 WL 5928952, at *15. A number of those witnesses are former Tesco employees who are no longer under control of the company, *see* Morris Decl. ¶ 13, and because they are "located in England, not the United States," "this Court would be powerless to command their presence here," *Lindner*, 811 F. Supp. at 136. Live witness testimony "takes on added importance" in fraud actions "so that the trier of fact can assess the witnesses' demeanor." *Alfadda*, 159 F.3d at 48 (quoting *Allstate*, 994 F.2d at 1001). "Compulsory process would seem especially important where, as here, fraud and subjective intent are elements of the claim[s], making the live testimony of witnesses for the purposes of presenting demeanor evidence essential to a fair trial." *Herald, Primeo*, 2011 WL 5928952, at *15 (citation and internal quotation marks omitted); *accord*, *e.g.*, *Howe*, 946 F.2d at 952 (Breyer, C.J; same).[14]

Additionally, this Court lacks personal jurisdiction over the individual defendants. *See* Point V, below. That provides a substantial additional reason for a *forum non conveniens* dismissal here, as dismissal in favor of an English forum would eliminate the need to try identical, expensive and time-consuming cases in two different jurisdictions and would avoid the

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[13] *Accord*, *e.g.*, *Scottish Air Int'l Inc.* v. *British Caledonian Group, PLC*, 81 F.3d 1224, 1232–33 (2d Cir. 1996) (affirming district court's *forum non conveniens* dismissal where the vast majority of potential witnesses were residents of the U.K., and thus "the difficulty, cost, and disruption of requiring the attendance of such witnesses in New York—whether they were willing to appear or not—would be considerable").

[14] Most of the relevant documents are located in the United Kingdom and subject to U.K. data privacy laws. *See* Morris Decl. ¶¶ 16–17. While the physical location of documents has taken on somewhat less importance given various technological advances, courts in the district have continued to cite the burdens imposed on parties, and the court, where "the majority of relevant evidence is located abroad," *Online Payment Solutions Inc.* v. *Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 388 (S.D.N.Y. 2009), including the burdens of complying with foreign data privacy laws, *see, e.g.*, *Herald, Primeo,* 2011 WL 5928952, at *15.

possibility of inconsistent results. *E.g.*, *In re Banco Santander Securities-Optimal Litig.*, 732 F. Supp. 2d 1305, 1313–14 (S.D. Fla. 2010); *see also Piper Aircraft*, 454 U.S. at 259.

Public interest factors. The public interest factors—such as "the interest … in having local disputes decided at home," and "the interest in having issues of law decided by courts of the nation whose law is involved," *Carey*, 370 F.3d at 237 (citing *Gilbert*, 330 U.S. at 508–09)—likewise weigh powerfully in favor of dismissal here.

In particular, "the interest in having local disputes settled locally weighs heavily against the United States as a forum." *Alfadda*, 159 F.3d at 46. As the Second Circuit has recognized, where the case involves an "alleged fraud … carried out in [a foreign country] by [a foreign] corporation[], there is a strong local interest in trying [the] case in [the foreign country]." *Allstate,* 994 F.2d at 1002. Here, Tesco is an English corporation; the alleged fraud was carried out primarily in England; the disclosures at issue were governed by English law; and the matter is the subject of an ongoing investigation by U.K. authorities and threatened civil litigation in the English courts. *See* pp. 9-10, above. There can be no doubt that England has "an undeniably significant interest in policing conduct within [its] borders," *Herald, Primeo*, 2011 WL 5928952, at *16, and a "far greater interest in this litigation than the United States," *Alfadda*, 159 F.3d at 46.[15] "If, to quote *Gilbert,* it is preferable that 'localized controversies' be 'decided at home,' [England] is home for the controversies generated by the plaintiffs' complaint." *LaSala*, 510 F. Supp. 2d at 230 (quoting *Gilbert*, 330 U.S. at 508).

Accordingly, the private and public interest factors strongly support litigation in England. *See*, *e.g.*, *EADS*, 703 F. Supp. 2d at 362 (dismissing Section 10(b) class action brought by U.S.

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[15] "The fact that plaintiff[] ha[s] alleged claims based on the securities laws of this country is not compelling in this analysis." *Otor*, 2006 WL 2613775, at *5; *see Allstate,* 994 F.2d at 1002 (holding that the United States courts' interest in enforcing U.S. securities laws "alone does not prohibit [U.S. courts] from dismissing a securities action on the ground of *forum non conveniens*"); *Alfadda,* 159 F.3d at 46–49 (affirming *forum non conveniens* dismissal of U.S. securities law claims in favor of a French forum). *A fortiori* is that the case where, as here, Section 10(b) does not apply to the claims. *See* Point I, above.

plaintiff where company was European, alleged fraud was committed in Europe, the key documents and witnesses were in Europe, and European authorities were investigating).

* * *

As a matter of public policy, the application of the *forum non conveniens* doctrine to securities and other complex business litigation plays an important role in "help[ing] the world's legal systems work together, in harmony, rather than at cross purposes" in today's interdependent international economy. *Howe*, 946 F.2d at 950. As then-Chief Judge Breyer explained in affirming a *forum non conveniens* dismissal of a Section 10(b) action (*id.*):

> To insist that American courts hear cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy.

Here, all of the relevant factors favor England as the appropriate forum. This case should be dismissed on *forum non conveniens* grounds.

POINT III

EVEN APART FROM EXTRATERRITORIALITY, PLAINTIFF HAS FAILED TO ADEQUATELY PLEAD A CLAIM UNDER SECTION 10(b).

To state a claim under Section 10(b) and Rule 10b-5, a complaint must allege that "each defendant (1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff's reliance was the proximate cause of its injury." *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 100 (2d Cir. 2015) (citation and internal quotation marks omitted).

In pleading these elements, the complaint must not only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)), but it must also meet the "heightened pleading requirements" imposed by Rule 9(b) and the PSLRA, *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). Among

other things, those standards require a plaintiff to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach* v. *Chang*, 355 F.3d 164, 170 (2d Cir. 2004).

Plaintiff has failed to meet these standards here: He has failed to sufficiently allege that any of the individual defendants has made an actionable misstatement; and he has also failed to sufficiently allege that any defendant, including Tesco, acted with scienter.

A. The complaint fails to allege that the individual defendants made actionable misstatements.

Although the complaint does allege that *Tesco* made misstatements—the incorrect results that the company has acknowledged—the claims against the *individual* defendants must be dismissed because plaintiff has failed to plead that any of them made any misstatement.

Plaintiff does not allege that Messrs. Broadbent or McIlwee made *any* misstatements at all.[16] And the statements attributed to Mr. Clarke (2AC ¶¶ 138, 142, 150, 160, 187, 191) are inactionable because they were merely good faith expressions of corporate optimism, *see, e.g.*, *Rombach*, 355 F.3d at 174; accurate statements about past performance, *see, e.g.*, *Pollio* v. *MF Global, Ltd.*, 608 F. Supp. 2d 564, 571 (S.D.N.Y. 2009); or puffery, *see, e.g.*, *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 632–33 (S.D.N.Y. 2005) ("generalizations regarding integrity, fiscal discipline and risk management" not actionable).

Equally insufficient are the complaint's allegations that each individual defendant, together with every other then-member of Tesco's board,[17] "confirmed that the Company's

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[16] Plaintiff alleges that Mr. McIlwee made statements on Tesco's behalf about the expansion and ultimate sale of the company's "Fresh & Easy" business in the U.S. 2AC ¶ 29. But none of these statements is alleged to be false—and this action has nothing to do with that line of business or Tesco's withdrawal from it.

[17] Mr. McIlwee was not a director when the 2014 annual report was issued, *see* Ex. 3 (Tesco 2014 annual report) at 26 ("Laurie resigned from the Board on 4 April 2014"), and therefore could not in any event be held responsible for the statement in that annual report. And as to both

financial statements were prepared in accordance with IFRS" in statements of directors' responsibilities in the 2013 and 2014 annual reports. 2AC ¶¶ 27, 29, 30, 156, 185. Even if those allegations could survive recent limitations on the group-pleading doctrine (which they should not[18]), these statements were expressions of belief—made "to the best of [the directors'] knowledge." 2AC ¶ 156. So with the requisite particularity, plaintiff must either allege facts showing that the statements were "disbelieved by the [individual] defendant[s] at the time," *Fait* v. *Regions Fin. Corp*., 655 F.3d 105, 110 (2d Cir. 2011), or identify facts the individual defendants then knew that "call into question [their] basis for offering" their belief, *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1332 (2015). But that is something plaintiff has not done—his complaint omits any allegation undermining any individual defendant's subjective belief in the accuracy of Tesco's financial statements. *See* Point III.B.2. The board's statements thus cannot serve as a basis of liability.

B. The complaint does not adequately plead scienter as to any defendant, including Tesco.

In any event, the complaint must be dismissed in its entirety because it fails to plead that *any* of the defendants acted with scienter. The complaint must allege particularized facts giving rise to a "strong inference," 15 U.S.C. § 78u-4(b)(2), that each defendant acted with scienter—namely, an "intent to deceive, manipulate, or defraud," *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976). A "strong inference" of scienter is one that is "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of

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annual reports, and the other Tesco corporate reports identified in the complaint, plaintiff fails to allege that Mr. Broadbent had "direct involvement in the everyday business" of Tesco such that general statements may be imputed to him. *In re GeoPharma, Inc. Sec. Litig.*, 399 F. Supp. 2d 432, 445 (S.D.N.Y. 2005).

[18] *E.g.*, *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012) (rejecting attempt to assert liability on a group-wide basis for alleged misstatements in corporate documents after the Supreme Court's decision in *Janus*), *aff'd*, 752 F.3d 173 (2d Cir. 2014); *see Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2303–05 (2011).

nonfraudulent intent." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). This exacting standard requires plaintiff to plead, as to each defendant, specific facts "(1) showing … both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *In re Molycorp, Inc. Sec. Litig.*, No. 13 Civ. 5697 (PAC), 2015 WL 1097355, at *7 (S.D.N.Y. Mar. 12, 2015) (quoting *ATSI*, 493 F.3d at 99). Plaintiff has not done that here.

1. The complaint fails to allege any motive to commit fraud.

To raise a strong inference of scienter through "motive and opportunity" to defraud, plaintiff must allege that defendants "benefitted in some concrete and personal way from the purported fraud." *ECA, Local 134 IBEW Joint Pension Trust* v. *JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009) (citation omitted). But the complaint does not allege that any individual defendant engaged in any stock sales or received any other direct benefits from the supposed wrongdoing. Instead, as to Messrs. McIlwee and Clarke, plaintiff contends only that they were motivated to misrepresent Tesco's financial condition to earn additional income, which depended in part on the Company's performance. *See, e.g.*, 2AC ¶¶ 54, 239. But as countless cases have held, this allegation fails as a matter of law: "Motives that are common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do *not* constitute 'motive' for purposes of this inquiry." *ECA*, 553 F.3d at 198 (emphasis added)). "Incentive compensation can hardly be the basis on which an allegation of fraud is predicated," because if the rule were otherwise, "virtually every company … that experiences a downturn in stock price could be forced to defend securities fraud actions." *Acito* v. *IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995).

And the complaint does not even try to allege that Mr. Broadbent had a motive to defraud. Nor could it. Mr. Broadbent served exclusively as non-executive (outside) chairman of the board; is not alleged to have had any involvement in managerial actions; and accordingly was "not entitled to participate in annual bonus or long-term incentive agreements," but instead

received a fixed fee that was "set at the time of his appointment" and was not increased thereafter. *See* Ex. 3 (Tesco 2014 annual report) at 53.

2. The complaint fails to plead strong circumstantial evidence of conscious misbehavior or recklessness.

Nor can plaintiff establish scienter through evidence of conscious misbehavior or recklessness. To do that, plaintiff must plead particularized facts demonstrating conduct that, at the very least, is "highly unreasonable and [that] represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant[s] or so obvious that [they] must have been aware of it." *S. Cherry St., LLC* v. *Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (emphasis omitted). Mere negligence is not enough—rather, recklessness under the securities laws requires "'a state of mind approximating actual intent.'" *Stratte-McClure*, 776 F.3d at 106 (quoting *S. Cherry St.*, 573 F.3d at 109 (citation and internal quotation marks omitted)); *ECA*, 553 F.3d at 198–99. And with no motive, the burden imposed by the PSLRA becomes even heavier: "'the strength of the circumstantial allegations must be correspondingly greater' if there is no motive." *ECA*, 553 F.3d at 198–99 (quoting *Kalnit* v. *Eichner*, 264 F.3d 131, 142 (2d Cir. 2001) (citation omitted)).

Here, plaintiff pleads no specific facts suggesting that any individual defendant actively engaged in any alleged wrongdoing. Plaintiff offers two "confidential witnesses," but their allegations are utterly off-topic—neither "CW" says *anything at all* about the alleged accounting practices at issue here.[19] So that leaves plaintiff with nothing but the fact that the individual

[19] "CW1" recalls that some unidentified Tesco employees, somewhere in Central Europe, "ignored the pricing guidance of the legal team" there (2AC ¶¶ 10, 48). He or she says nothing about misstatements of profit (or even the U.K. food business), and there is no allegation that any individual defendant was made aware of that alleged fact (even if it had relevance). Plaintiff's impossibly generalized allegation that "management" supposedly endorsed this practice is plainly insufficient. *See*, *e.g.*, *Teamsters Local 445 Freight Div. Pension Fund* v. *Dynex Capital Inc.*, 531 F.3d 190, 196 (2d Cir. 2008). "CW2" fares no better. He or she says nothing about accounting practices at all, and appears to simply describe hard bargaining with Tesco's suppliers. 2AC ¶¶ 41–42.

defendants held leadership positions at Tesco. But that doesn't suffice, as the cases have held over and over and over again: "It is well established that boilerplate allegations that defendants knew or should have known of fraudulent conduct based solely on their board membership or executive positions are insufficient to plead scienter." *In re Sotheby's Holdings, Inc.*, No. 00 Civ. 1041 (DLC), 2000 WL 1234601, at *7 (S.D.N.Y. Aug. 31, 2000) (collecting cases).

Likewise insufficient is plaintiff's assertion that an unidentified whistleblower raised unspecified accounting concerns to unidentified Tesco managers in July 2014. 2AC ¶¶ 11, 51, 66; Ex. 8. That conclusory claim fails to establish recklessness akin to actual fraudulent intent. Plaintiff must "specifically allege[] *defendants*' knowledge of facts or access to information contradicting their public statements." *Doscher* v. *Sobel & Co.*, No. 14 Civ. 646 (RMB), 2015 WL 774695, at *6 (S.D.N.Y. Feb. 11, 2015) (Berman, J.) (emphasis added). His complaint must show that the "individual defendants actually possessed the knowledge highlighting the falsity of public statements." *Glaser* v. *The9, Ltd.*, 772 F. Supp. 2d 573, 590–91 (S.D.N.Y. 2011). But the complaint fails to allege facts demonstrating that anyone told any individual defendant of the whistleblower's concern. To the contrary, plaintiff merely asserts, without elaboration, that concerns were raised *while* Mr. Clarke was CEO. *See* pp. 7-8, above. And Mr. McIlwee had already resigned as CFO and Board member three months earlier. *See* 2AC ¶ 29; Ex. 3 (Tesco 2014 annual report) at 15, 26. Assertions that the whistleblower's concerns were "known or common knowledge within the company … are too vague and conclusory to support a finding that defendants knew they were making false statements or made those statements with reckless disregard for their truth." *In re Citigroup Inc. Sec. Litig.*, 753 F. Supp. 2d 206, 245 (S.D.N.Y. 2010). Plaintiff's failure to "establish what specific contradictory information the Individual Defendants received or when they received it" is fatal. *Local No. 38 Int'l Bhd. of Elec. Workers Pension Fund* v. *Am. Express Co.*, 724 F. Supp. 2d 447, 461 (S.D.N.Y. 2010).

Plaintiff's allegation that Tesco's auditor, PricewaterhouseCoopers, in the 2014 annual report, focused on commercial income in reviewing the Company's financials similarly fails to

establish scienter. *See, e.g.*, 2AC ¶¶ 12, 52, 124. At the threshold, plaintiff fails to allege that PwC ever told any individual defendant of any misreporting, and, as noted above, Mr. McIlwee had resigned as CFO and a board member on April 4, 2014, before the 2014 report issued.

In any event, PwC's identification of a generic risk of commercial income "manipulation" does not support an inference of scienter. *See Citigroup*, 753 F. Supp. 2d at 245; *see also Tellabs*, 551 U.S. at 314. Contrary to plaintiff's strained allegations, PwC's omission of equivalent language regarding "risk of manipulation" in Tesco's 2013 annual report does not create any inference that PwC discovered some new Tesco-specific problem.[20] To the contrary, that Tesco's own auditors did not identify any manipulation in Tesco's commercial income recognition practices contradicts plaintiff's suggestion that any of the individual defendants "knew [of] or recklessly disregarded" any of the alleged wrongdoing. *See, e.g.*, 2AC ¶ 226.

The allegation that Mr. Clarke "pushed [Tesco employees] to the limit to improve [their] performance" (2AC ¶¶ 50, 234) also fails to give rise to a strong inference of scienter, because plaintiff does not contend that Mr. Clarke ever knew of or in any way condoned—implicitly or explicitly—the purported wrongdoing. Seeking to maximize performance is hardly a nefarious purpose; to the contrary, it is a legitimate goal of many business organizations and executives. No adverse inference can be drawn based on such allegations. *See Tellabs*, 551 U.S. at 324.

And even that inadequate allegation is not made as to the other individual defendants.

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[20] In 2014, PwC restructured the format of its report and added many new sections, including "What we have audited," "Overview of our audit approach," "Overview of the scope of our audit," and "Areas of particular audit focus," and corresponding new language. *See* Ex. 3 (Tesco 2014 annual report) at 65–68. No inference can be drawn from PwC preparing its report in a new format. Nor is there any indication that PwC was giving Tesco an "ultimatum" and "urg[ing] Tesco to make commercial income adjustments in 2013/14," as plaintiff contends. 2AC ¶¶ 53, 125, 200. Surely if PwC wanted to communicate a commercial income manipulation problem to Tesco, it would not have stated—in that very same section of the report—that Tesco's commercial income properly correlated to "contractual evidence with suppliers, with particular attention to the period in which the income was recorded." *See* Ex. 3 (Tesco 2014 annual report) at 66.

Indeed, the complaint alleges nothing tying Mr. Broadbent to the recognition of commercial income or deferral of costs, the subjects of this action. And the sole statement concerning that subject attributed to Mr. McIlwee is an April 2012 email that he allegedly sent warning about "a problem with the recognition of commercial income in Tesco's Polish business." 2AC ¶ 47; *see also id*. ¶¶ 10, 228. This allegation *undercuts*, rather than supports, scienter because it shows that Mr. McIlwee was seeking to address—not fraudulently conceal—the purported issue. Faced with such "illogical allegations," "[c]ourts often refuse to infer scienter." *In re GeoPharma, Inc. Sec. Litig.*, 411 F. Supp. 2d 434, 446 n.83 (S.D.N.Y. 2006) (collecting cases).

3. The complaint fails to plead corporate scienter as to Tesco.

These failures to plead motive and to plead conscious misbehavior or recklessness compel the conclusion that plaintiff has failed to plead scienter not only as to the individual defendants, but also as to Tesco as a whole. To plead a corporation's scienter, a plaintiff must allege particularized facts that create a strong inference that "someone whose intent could be imputed to the corporation acted with the requisite scienter." *Teamsters Local 445 Freight Div. Pension Fund* v. *Dynex Capital Inc.*, 531 F.3d 190, 195 (2d Cir. 2008). Here, plaintiff's failure to plead that any of the individual defendants who are alleged to have made the false or misleading statements at issue acted with scienter requires dismissal of the claims against Tesco. *Id.*; *see Molycorp*, 2015 WL 1097355, at *14–*15 ("Plaintiffs' insufficient allegations of individual scienter extend to its allegations of corporate scienter."); *Oklahoma Firefighters Pension & Ret. Sys.* v. *Student Loan Corp.,* 951 F. Supp. 2d 479, 503 (S.D.N.Y. 2013) (same).

And while it is occasionally "possible to raise the required inference with regard to a corporate defendant without doing so with regard to a specific individual defendant," that requires a corporate statement so obviously and blatantly false that it creates a strong inference that the statement was approved by a corporate officer who *must* have known that the statement was false. *Dynex*, 531 F.3d at 195. The "'dramatic'" example given by the Second Circuit in *Dynex*, the controlling case on corporate scienter—"'Suppose General Motors announced that it

had sold one million SUVs in 2006, and the actual number was zero'"—makes plain that no such strong inference exists here. *Id.* at 195–96 (quoting *Makor Issues & Rights, Ltd.* v. *Tellabs, Inc.*, 513 F.3d 702, 710 (7th Cir. 2008)).[21]

Beyond this, plaintiff's allegation that a "small group" within Tesco carried out the alleged fraud does not change the result—*it confirms it*. At best, the complaint alleges a "rogue fiefdom" within Tesco, *see In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 358 (S.D.N.Y. 2011), not—as required—that a Tesco officer who *made or was otherwise responsible* for the alleged misstatement knew about the alleged wrongdoing. As *Dynex* holds, when the more compelling inference is that inaccurate financial disclosures were "based on false information fed [to management] from below," corporate scienter has not been pleaded. 531 F.3d at 197. The complaint must be dismissed as to all defendants for failure to plead scienter.

POINT IV

THE COMPLAINT FAILS TO STATE A SECTION 20(a) CLAIM AGAINST ANY INDIVIDUAL DEFENDANT.

The Section 20(a) control-person claims against the individual defendants must be dismissed as well. A claim for control-person liability must allege "(1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *ATSI*, 493 F.3d at 108. Here, for the reasons set out in Points I and III, the complaint

[21] Only in such an extreme case would "[t]here … be a strong inference of corporate scienter, since so dramatic an announcement would have been approved by corporate officials sufficiently knowledgeable about the company *to know* that the announcement was false." *Dynex*, 531 F.3d at 195–96 (quoting *Makor*, 513 F.3d at 710) (emphasis added). By contrast, "[i]t is well settled that mere fact of a restatement … does not support a strong, or even a weak, inference of scienter." *Molycorp*, 2015 WL 1097355, at *14–*15; *accord*, *e.g.*, *In re China N.E. Petroleum Holdings Ltd. Sec. Litig.*, No. 10 Civ. 4577 (MGC), 2015 WL 223779, at *3 (S.D.N.Y. Jan. 15, 2015) (rejecting claim that "sheer size of [company's] restatement bespeaks [d]efendants' scienter").

fails to show a primary violation by Tesco. And the complaint also fails to allege that any individual defendant was a "culpable participant" in the alleged fraud. Culpable participation requires scienter, pled with particularity. *E.g.*, *Cohen* v. *Stevanovich*, 722 F. Supp. 2d 416, 435 (S.D.N.Y. 2010). As discussed in Point III, the complaint fails to plead particularized facts creating a "strong inference" that any of the individual defendants acted with an intent to deceive or defraud. The Section 20(a) claim must accordingly be dismissed.

POINT V

THE COMPLAINT FAILS TO ESTABLISH PERSONAL JURISDICTION OVER THE INDIVIDUAL DEFENDANTS.

In addition, plaintiff has failed to allege a prima facie case that any individual defendant is subject to personal jurisdiction. To satisfy his pleading burden, plaintiff must allege "facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 673 (2d Cir. 2013). Due process "requires a plaintiff to allege (1) that a defendant has certain minimum contacts with the relevant forum, and (2) that the exercise of jurisdiction is reasonable in the circumstances." *Id*. Plaintiff has failed to do so as to the individual defendants here.

A. Plaintiff has not established sufficient minimum contacts to satisfy due process.

The Due Process Clause permits general personal jurisdiction to be asserted only over defendants whose "affiliations" with the forum "are so continuous and systemic as to render them essentially at home" in New York or in the United States more generally. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011) (citation and internal quotation marks omitted). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." *Id*. at 2853. All three individual defendants are citizens and residents of the U.K.; plaintiff cannot, and does not, plead that any is domiciled in the U.S. Plaintiff indeed pleads no U.S. contacts at all on Mr. Broadbent's part. As to Mr.

McIlwee, plaintiff pleads only that he made statements about the expansion and eventual sale of Tesco's U.S. business. 2AC ¶ 29. As for Mr. Clarke, plaintiff alleges only that he served on the board of a global consumer goods organization with a regional office in Washington, D.C. 2AC ¶ 28. These scant allegations fail to establish "affiliations" rendering any individual defendant "essentially at home," and subject to general jurisdiction, here. *Goodyear*, 131 S. Ct. at 2851.

The complaint also fails to plead facts supporting specific personal jurisdiction against any individual defendant. To do that, "the defendant's suit-related conduct must create a substantial connection with the forum State," and "the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121–22 (2014) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985)). Plaintiff must allege facts showing that the individual defendants purposefully availed themselves of the privilege of doing business here. *J. McIntyre Mach., Ltd.* v. *Nicastro,* 131 S. Ct. 2780, 2785 (2011). The defendant must personally "create a substantial connection with the forum," *Burger King*, 471 U.S. at 475, and that connection must be extensive enough that he "could foresee being 'haled into court' there," *Chaiken* v. *VV Publ'g Corp.*, 119 F.3d 1018, 1028 (2d Cir. 1997) (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)).

The complaint contains no allegations establishing that any individual defendant did anything of the sort. For example, plaintiff alleges that the individual defendants, and the other board members of Tesco, a U.K. company, confirmed "to the best of their knowledge" that the company's financial statements were prepared in accordance with IFRS. But plaintiff does not plead that this confirmation of compliance with non-U.S. accounting standards was made in the U.S. or was "expressly aimed at" U.S. investors. *Calder* v. *Jones*, 465 U.S. 783, 789 (1984).[22]

[22] Nor does the complaint's allegation that Mr. Broadbent (and the other individual defendants) confirmed the financial statements "[a]s a Board member" (2AC ¶ 30) have any jurisdictional significance, because it is well settled that board membership does not create jurisdiction, even if there is jurisdiction over the company. *E.g., Alki Partners, L.P.* v. *Vatas Holding GmbH,* 769 F. Supp. 2d 478, 490 (S.D.N.Y. 2011).

Nor can plaintiff's allegation that Mr. Clarke signed Tesco's April 22, *2004* Form F-6 registration statement establish specific jurisdiction over him. 2AC ¶ 27.[23] Plaintiff does not allege that this form—filed some *eight years before the start of the class period*—was fraudulent in any respect; plaintiff's claims thus cannot possibly "arise out of" this limited, and dated, contact with the forum. *J. McIntyre*, 131 S. Ct. at 2787–88. And plaintiff does not allege, nor is it reasonable to infer, that Mr. Clarke signed the 2004 Form F-6 in the U.S.; on the contrary, the form itself expressly states that it was executed in England. *See* Ex. 4 (Tesco Form F-6) at 7–8. Even when an SEC filing incorporates alleged material misstatements—which is not the case here—the filing is "insufficient for personal jurisdiction" if it is signed abroad. *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008).

B. Exercising personal jurisdiction over the individual defendants would be unreasonable.

Even if plaintiff had alleged the requisite "minimum contacts"—which he has not—as to any individual defendant, the exercise of personal jurisdiction in this action would still be unreasonable under the factors identified by the Supreme Court in *Asahi Metal Industry Co., Ltd.* v. *Superior Court*, 480 U.S. 102, 113–16 (1987). *See Met. Life Ins. Co.* v. *Robertson-Ceco Corp.*, 84 F.3d 560, 573–75 (2d Cir. 1996) (affirming dismissal on this basis).

The first *Asahi* factor—the burden on the defendant—is especially significant where, as here, the moving defendants are domiciled abroad. "The unique burdens placed upon one who must defend oneself in a foreign legal system *should have significant weight* in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114–15 (emphasis added). "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 115. The *Asahi* factors thus weigh strongly against the exercise of personal jurisdiction here: as explained in

[23] No such allegation was, or could be, made against Messrs. Broadbent or McIlwee. Mr. Broadbent joined the Tesco board in 2011 and Mr. McIlwee joined the board, and became CFO, in 2009. *See* Ex. 3 (Tesco 2014 annual report) at 26.

defendants' discussion of *forum non conveniens*, the burdens that the individual defendants would face in defending a suit here, the location of witnesses and evidence, and the more significant interests of the U.K. (as opposed to the U.S.) in this matter substantially outweigh any interest plaintiff may claim he has in proceeding before this Court. *See* Point II, above.

CONCLUSION

It is respectfully submitted that the Second Amended Complaint should be dismissed with prejudice.

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