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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 2672 CRB (JSC)
This Document Relates to: Securities Actions *City of St. Clair Shores*, No. 15-6167 *Travalio*, No. 15-6168 *George Leon Family Trust*, No. 15-6166 *Charter Twp. of Clinton*, No. 16-190 *Wolfenbarger*, No. 16-184	**DEFENDANTS VOLKSWAGEN AG, VOLKSWAGEN GROUP OF AMERICA, INC. (D/B/A VOLKSWAGEN OF AMERICA, INC., AUDI OF AMERICA, INC.), HERBERT DIESS, MICHAEL HORN AND JONATHAN BROWNING'S NOTICE OF MOTION AND MOTION TO DISMISS THE CONSOLIDATED SECURITIES CLASS ACTION COMPLAINT; MEMORANDUM OF LAW IN SUPPORT THEREOF** Hearing: December 16, 2016 Time: 10:00 a.m. Courtroom: 6 The Honorable Charles R. Breyer

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 16, 2016 at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102-3489, defendants Volkswagen AG ("VWAG") Volkswagen Group of America, Inc. ("VWGoA") (d/b/a Volkswagen of America, Inc. ("VWoA") and Audi of America, Inc. ("AoA")) (the "Corporate Defendants"), and Herbert Diess, Michael Horn, and Jonathan Browning (together with Martin Winterkorn, the "Individual Defendants" and together with the Corporate Defendants, "Defendants") will and hereby do move this Court to dismiss the Consolidated Securities Class Action Complaint, filed by Lead Plaintiff Arkansas State Highway Employees' Retirement System and named plaintiff Miami Police Relief and Pension Fund, (ECF No. 1510) on the grounds that the claims therein (i) are barred by the Supreme Court's decision in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010); (ii) should be dismissed on grounds of *forum non conveniens*, and (iii) fail to state a claim upon which relief can be granted. This Motion is made pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a) *et seq.*, and Rules 9(b) and 12(b)(3) and (6) of the Federal Rules of Civil Procedure, and is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, all pleadings and papers filed herein, oral argument of counsel, and any matter which may be submitted at the hearing.

Dated: August 1, 2016

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Volkswagen AG ("VWAG"), Volkswagen Group of America, Inc. ("VWGoA") (d/b/a Volkswagen of America, Inc. ("VWoA"), and Audi of America, Inc. ("AoA")), (the "Corporate Defendants"), and Herbert Diess, Michael Horn, and Jonathan Browning (together with Defendant Martin Winterkorn, the "Individual Defendants" and together with the Corporate Defendants, "Defendants") respectfully submit this Motion To Dismiss the Consolidated Securities Class Action Complaint (the "Complaint" or "Compl.") (ECF. No. 1510).

ISSUES TO BE DECIDED

Plaintiffs' claims in this securities action are legally and factually different from the consumer and environmental claims comprising the vast majority of the more than 1,000 other cases in this MDL. As the Court knows, VWAG and VWGoA have entered into settlement agreements to resolve issues surrounding nearly 500,000 2.0-liter diesel vehicles on the road, to compensate consumers, and to remediate any impact on the environment from excess diesel emissions. Reflexively seeking to capitalize on VWAG's and VWGoA's diesel emission issues, Plaintiffs seek recovery under Section 10(b) of the Securities Exchange Act of 1934 for their alleged losses in securities trading by reason of Defendants' purported violations of the disclosure requirements of that provision.

Unlike typical U.S. securities litigation involving domestic transactions, Plaintiffs here allege that they are purchasers of VWAG's American Depositary Receipts ("ADRs"), which represent an ownership interest in ordinary and preference shares issued by VWAG in Germany. This Motion presents two threshold legal issues:

1. Where Plaintiffs' claims over their purchases of VWAG's ADRs arise out of alleged misrepresentations and omissions in disclosures made by a German company in Germany pursuant to German law, do those claims fall outside the territorial reach of Section 10(b) under *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), and its progeny?

2. Whether or not Section 10(b) applies to VWAG's ADRs, should this action be dismissed under the doctrine of *forum non conveniens* where the relevant factors overwhelmingly point to Germany as the superior forum for the resolution of Plaintiffs' claims?

Should the Court rule for Plaintiffs on both of these threshold legal issues, two further legal issues would be presented:

3. Have Plaintiffs adequately pled that the challenged misstatements or omissions to investors were made with scienter, where they have failed to allege the required particularized facts giving rise to a "strong inference" that each of the Defendants acted with scienter?

4. Have Plaintiffs adequately pled that any of the Defendants made misstatements or omissions to investors actionable under Section 10(b), where the challenged general statements were aspirational?

SUMMARY OF ARGUMENT

Plaintiffs seek to bring securities fraud claims against Defendants on behalf of a putative class of purchasers of VWAG's ADRs for what Plaintiffs allege is a "years-long scheme of deception and pollution" (Compl. ¶ 8) that allegedly was devised and orchestrated by *German* engineers and *German* executives in *Germany*. Plaintiffs do not contend that VWAG (or any of the other Defendants) sold ADRs in the United States during the putative class period—much less that they were Plaintiffs' counterparties—but sue solely for alleged violations of VWAG's disclosure obligations as an issuer of ordinary and preference shares in Germany.

VWAG is not obligated to file with the Securities and Exchange Commission ("SEC") any financial reports in the United States pursuant to the reporting requirements of the Exchange Act. ADRs "are negotiable certificates which evidence an interest in securities of a foreign issuer"—here, VWAG. *In re Infineon Techs. AG Sec. Litig.*, 2011 WL 7121006, at *3 n.11 (N.D. Cal. Mar. 17, 2011). VWAG's ADRs are Level 1, which means that they are not subject to SEC reporting requirements and may not be traded on U.S. exchanges. Because VWAG did not seek to raise capital in the United States through the sale of ADRs, the Company is required only to make disclosures pursuant to German law. (*See* SEC Publication, *Investor Bulletin: American Depositary Receipts* ("SEC ADR Bulletin"), Declaration of Robert J. Giuffra, Jr. In Support of Defendants' Motion to Dismiss the Consolidated Securities Class Action Complaint ("Giuffra Decl.") Ex. A.)

The principal Defendants, the relevant securities, the disclosures to investors, and Plaintiffs' allegations of fraud are all overwhelmingly foreign in character. VWAG is incorporated and has its operational headquarters in Germany, and its annual and quarterly reports are issued from Germany and subject to German law. VWAG's ADRs are merely a receipt establishing beneficial ownership of VWAG ordinary and preference shares that are on deposit *in Germany* and listed only on *foreign* securities exchanges. VWAG's ADRs do not trade on any U.S. exchange. Instead, those ADRs are bought and sold only in over-the-counter markets. (Compl. ¶¶ 33-34, 446.)

Moreover, as a result of the disclosure of the existence of a defeat device in Volkswagen diesel vehicles, VWAG faces numerous regulatory investigations and parallel civil litigation in Germany over its disclosures to investors in its securities. The Federal Financial Supervisory Authority ("BaFin") and the German State Prosecutor in Braunschweig are investigating whether German securities laws were violated in connection with VWAG's disclosure obligations relating to the diesel emission issues. And the locus of investor litigation over the diesel emissions issues is Germany: to date, approximately 450 private plaintiffs, including at least 90 U.S. investors in VWAG shares, have filed over 130 lawsuits against VWAG in Germany alleging untimely disclosures and seeking billions of Euros in damages.

Given this undeniable and comprehensive nexus to Germany and Plaintiffs' failure to plead the basic elements of a securities claim under Section 10(b), this Court should dismiss the Complaint in its entirety.

1. Section 10(b) of the Exchange Act Does Not Apply Extraterritorially to Plaintiffs' Claims. As the Supreme Court held in *Morrison* v. *National Australia Bank*, only domestic transactions in securities fall within the reach of Section 10(b) of the Securities Exchange Act: specifically, Section 10(b) covers "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 561 U.S. at 267. The Court emphasized that this transactional test was intended to avoid "interference with foreign securities regulation that application of §10(b) abroad would produce." *Id*. at 269. Under *Morrison*, Plaintiffs' pursuit of this action involving VWAG's ADRs exceeds the territorial reach of Section 10(b).

Shortly after *Morrison*, the Southern District of New York held that the same type of securities at issue here—sponsored and unlisted Level 1 ADRs of a foreign issuer that trade over-the-

counter—could not serve as the basis for a Section 10(b) claim. *In re Société Générale Sec. Litig.*, 2010 WL 3910286, at *6-7 (S.D.N.Y. Sept. 29, 2010) ("*SocGen*"). Indeed, since *Morrison*, no court has found that Section 10(b) applies to Level 1 ADRs. *SocGen's* reasoning that 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 Automobile Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014) (per curiam) ("*Porsche*"). The analysis of the Second Circuit is compelling.

The *Porsche* plaintiffs brought a Section 10(b) claim based on swap agreements referencing VWAG ordinary share prices in Germany, and claimed that these transactions were "domestic" because confirmations were signed in the United States. *Id.* at 207. They also claimed that the swap agreements contained express choice of law provisions stating that New York law governs the agreements and exclusive forum selection provisions designating New York federal and state courts. *Id*. In upholding the district court's dismissal, the Second Circuit (Leval, Sack, Hall, JJ.) held that even if the swaps were "domestic transactions," plaintiffs still failed to state a claim. *Id.* at 216. The Second Circuit held that "a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable," and courts must still look to the "character" of the "security at issue," and also the "relevant actions" to determine whether a Section 10(b) claim is "predominantly foreign." *Id*. at 202, 216 (emphasis added).

Here, the "character" of VWAG's ADRs is clearly "predominantly foreign"—ADRs are nothing more than a "receipt" evidencing a beneficial ownership interest in VWAG's ordinary and preference shares that are deposited abroad and listed only on exchanges abroad. As an issuer under a sponsored Level 1 ADR facility, VWAG is required only to make disclosures to investors *in accordance with German law*—not pursuant to the reporting requirements of the Exchange Act. The "relevant actions" upon which a securities fraud claim might be based took place in Germany: VWAG issued its annual and quarterly reports to investors from Germany and pursuant to German law, and VWAG's disclosures are the subject of investigations by German authorities and parallel civil litigation in German courts. Because Section 10(b) does not apply to Plaintiffs' claims, the Court should dismiss the Complaint on this basis alone.

2. Germany Is the More Appropriate Forum for an Action Based on VWAG's ADRs. Even if Section 10(b) applied to Plaintiffs' claims, this action should be dismissed because Germany is the more appropriate forum for the litigation of those claims. The mere "'presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*.'" *Lockman Found.* v. *Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991) (quoting *Cheng* v. *Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983), *cert. denied* 464 U.S. 1017 (1983)). "Where an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiffs['] ability to rely upon citizenship as a talisman against *forum non conveniens* dismissal is diminished." *Argoquest Holdings, LLC* v. *Israel Disc. Bank Ltd.*, 2005 WL 6070168, at *3 (C.D. Cal. Apr. 8, 2005) (internal quotation marks and citation omitted).

Here, Plaintiffs' Section 10(b) claims primarily involve actions, decisions, and disclosures made in and disseminated from Germany. The ADRs at issue—referencing VWAG ordinary and preference shares—are "predominantly foreign" securities, subject only to Germany's disclosure laws, not the reporting requirements of the Exchange Act. During the putative class period, 99.1% of trading volume in both VWAG ordinary and preference shares occurred on non-U.S. exchanges. (Declaration of Paul Zurek, dated August 1, 2016 ("Zurek Decl.") ¶ 8.) Confirming the foreign character of VWAG ADRs, courts in this Circuit and elsewhere have routinely dismissed on the basis of *forum non conveniens* claims that involve ADRs bought or sold in the United States whose underlying securities are foreign. *See, e.g.*, *Stoyas* v. *Toshiba Corp.*, 2016 WL 3563084, at *13-15 (C.D. Cal. May 20, 2016) (dismissing a putative class of ADR-holders' complaint in favor of Japan); *Sarandi* v. *Breu*, 2009 WL 2871049, at *6-8 (N.D. Cal. Sept. 2, 2009) (dismissing, in the alternative, an American ADR-holder's complaint in favor of Switzerland).

As the Ninth Circuit has held, Germany is an adequate forum. *Mattel, Inc.* v. *Greiner and Hausser GmbH*, 354 F.3d 857, 868 (9th Cir. 2003) ("Germany provides an adequate forum for resolving disputes."). Under German law, U.S. plaintiffs who purchased VWAG's ADRs may bring a securities fraud claim for false and misleading statements and omissions in German courts. (*See* Declaration of Markus Pfüller, dated August 1, 2016 ("Pfüller Decl.").) Indeed, a New York appellate

court has found that Germany is an adequate forum for litigating securities fraud claims involving the very same underlying security at issue here—VWAG shares. *See Viking Global Equities, LP* v. *Porsche Automobil Holding SE*, 958 N.Y.S.2d 35, 36 (1st Dep't 2012) (holding that defendant "met its heavy burden to establish that New York was an inconvenient forum" where "VW stock is traded only on foreign exchanges, many of the witnesses and documents are located in Germany" and allegations of phone calls with and emails sent to plaintiffs in New York "failed to create substantial nexus with New York"). Moreover, the requirement for an adequate alternative forum "'is generally satisfied if the defendant is amenable to service of process in the alternative forum,'" and Defendants here are all amenable to service of process in a German action. *Leetsch* v. *Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001) (quoting *Creative Tech., Ltd* v. *Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 701 (9th Cir. 1995)).

The private and public factors relevant to the *forum non conveniens* analysis point squarely to Germany as the superior forum. Germany's interest is heightened by "the fact that most if not all of the conduct and transactions in this case occurred in" Germany. *See Meridian Seafood Products, Inc.* v. *Flanzas Monterrey, S.A.*, 149 F. Supp. 2d 1234, 1239 (S.D. Cal. 2001). Such interest is evidenced by the multiple investigations being conducted by German government authorities—including the BaFin and the German State Prosecutor in Braunschweig—over whether VWAG violated its disclosure obligations under German law to investors of VWAG shares. And numerous plaintiffs, including at least 90 U.S. investors in those shares, have filed more than 130 lawsuits in Germany alleging untimely disclosures relating to the diesel emissions issues.

Finally, most of the key witnesses are in Germany, and most of the documentary evidence is in the German language, as would be much of the trial or deposition testimony. This consideration "weighs especially heavily in favor of the German courts." *Leetsch*, 260 F.3d at 1105. Were the Court to hear this case, "it would be required to translate a great deal . . . from the German language, with all the inaccuracy and delay that such a project would necessarily entail." *Id.* Where, as here, "most of the witnesses, documents and sources of proof underlying the allegations" are located abroad, "[t]o require these numerous witnesses to travel to California would be unduly burdensome and a waste of the parties' limited resources. Similar waste would result from the parties' need to translate virtually every document and much of the testimony involved in this litigation into English." *Meridian*,

149 F. Supp. 2d at 1239. Thus, while this Court is properly the locus of all litigation involving affected Volkswagen diesel vehicles sold or leased in the United States, any litigation relating to VWAG's disclosures to investors should be conducted in German courts and under the laws of Germany, from which VWAG's disclosure obligations arise.

3. Plaintiffs Fail To Allege Scienter With the Requisite Particularity. Even if Section 10(b) applied and Germany is not an adequate alternative forum, Plaintiffs' claims should be dismissed because they have failed to allege particularized facts giving rise to a "strong inference" that any Defendant acted with scienter, *i.e.*, made a false or misleading statement "either intentionally or with deliberate recklessness." *Zucco Partners, LLC* v. *Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). Because a "corporation is deemed to have the requisite scienter for fraud only if the individual corporate officer making the statement has the requisite level of scienter," Plaintiffs must plead detailed facts giving rise to a strong inference that the specific corporate officer who made the alleged false statement "kn[ew] that the statement [was] false, or [was] at least deliberately reckless as to its falsity, at the time that he or she ma[de] the statement." *In re Apple Computer, Inc., Sec. Litig.*, 243 F. Supp. 2d 1012, 1023 (N.D. Cal. 2002). Here, Plaintiffs allege that only Winterkorn and Diess made misstatements attributable to VWAG. Plaintiffs have failed to allege scienter adequately as to either Winterkorn or Diess, and thus they have failed to plead scienter as to VWAG.

Because Diess only joined VWAG in July 2015, Plaintiffs' scienter allegations boil down to a claim that Winterkorn "must have known" about the defeat device prior to May 2014. (*See, e.g.*, Compl. ¶ 194.) But such "must have known" theories "will only be indicative of scienter where the falsity is patently obvious—where the 'facts [are] prominent enough that it would be "absurd to suggest" that top management was unaware of them.'" *Zucco*, 552 F.3d at 1001 (quoting *Berson* v. *Applied Signal Tech., Inc.*, 527 F.3d 982, 989 (9th Cir. 2008)). Plaintiffs' own allegations belie such an inference. They allege that the defeat device consisted of "lines of software code" in one of the "sophisticated computer systems" that assisted in the operation of the vehicle. (Compl. ¶¶ 13, 142, 153.) But Plaintiffs do not allege that Winterkorn was involved in the creation or installation of the device—instead, they merely speculate that there is a "possibility that a range of employees were involved." (*Id.* ¶ 145.)

Moreover, Plaintiffs rely on a May 23, 2014 memo from Bernd Gottweis, a VW employee, to attempt to demonstrate Winterkorn's scienter. (*Id.* ¶¶ 200-03.) Although Plaintiffs claim that Gottweis advised Winterkorn that "regulators would no doubt find" the defeat device "upon examination" (*id.* ¶ 202), the memo actually says that "[i]t is to be *assumed* that the authorities will subsequently examine VW systems to determine *if* Volkswagen has installed test recognition into the engine control unit software (a so-called defeat device)" (*id.* ¶ 203) (emphasis added). Thus, this memo merely raised the prospect that U.S. regulators would investigate whether a defeat device was in use—it did not state or imply that a defeat device had actually been installed, or what it meant if a defeat device were found by U.S. authorities, much less the potential magnitude of any associated financial risks resulting from such a finding. In fact, Plaintiffs plead two paragraphs later that Winterkorn was informed that any potential financial impact from diesel emission issues was likely to be highly immaterial to VWAG—around €20 million. (*Id.* ¶ 205.)

With respect to the alleged misstatements attributed to VWGoA, VWoA and AoA, none are actionable. The Complaint alleges no statements by any individual corporate officer of AoA. Plaintiffs also do not allege that the corporate officers of VWGoA and VWoA who are named as individual defendants, Browning and Horn, made any of the alleged misrepresentations. (*See* Compl. ¶¶ 428, 470 (alleging only that "Browning and Horn caused VWGoA and VWoA to violate Section 10(b) and Rule 10b-5 by making material misstatements and omissions" without specifically attributing any such statements to Browning or Horn).) Nor are there any particularized allegations of scienter against them. Because the Complaint is devoid of any allegations that a corporate officer of VWGoA, VWoA or AoA had the requisite scienter, any alleged misstatements attributed to these Corporate Defendants are insufficient as a matter of law. *See Pittleman* v. *Impac Mortg. Holdings, Inc.*, 2009 WL 648983, at *3 (C.D. Cal. Mar. 9, 2009).

4. Plaintiffs Fail To Allege an Actionable Misstatement or Omission. Plaintiffs' claims should be dismissed for the additional reason that they have failed to plead adequately false statements or omissions. As the Supreme Court held, "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988). There is no freestanding duty under U.S. law "to disclose uncharged, unadjudicated wrongdoing," *In re Teledyne Def. Contracting*

Deriv. Litig., 849 F. Supp. 1369, 1382 (C.D. Cal. 1993) (citation omitted), and therefore VWAG was not obligated to disclose the use of defeat devices in the diesel vehicles. The alleged misstatements attributed to VWAG are almost all contained within the annual and quarterly reports filed by VWAG in Germany. But these were merely general statements about VWAG's commitment to being "environmentally friendly":

- "With our attractive and *environmentally friendly* range of vehicles, which we are steadily and rationally expanding, and the excellent position of the separate brands in the markets worldwide, we are able to leverage the Group's strengths and to systematically increase our competitive advantage . . . ." (Compl. ¶ 345 (emphasis added).)
- "We offer an extensive range of *environmentally friendly*, cutting-edge, high quality vehicles for all markets and customer groups that is unparalleled in the industry." (Compl. ¶ 369 (emphasis added).)
- "Our attractive and *environmentally friendly* model portfolio impresses customers around the globe. The trust placed in us by customers, as well as our high quality and efficiency standards, allow us to meet and even exceed our financial targets." (Compl. ¶ 374 (emphasis added).)

Because the statements in VWAG's reports were the kind of aspirational statements of corporate culture made by all public companies, they are simply "vague statements of optimism" that are not actionable. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010). For this same reason, the statements made in the annual and quarterly reports cannot form the basis of a misstatement by Individual Defendants Winterkorn and Diess. None of the other Defendants is an issuer or market participant, and none of the statements made by any of those other Defendants was a statement addressed to investors.

BACKGROUND

A. VWAG's Unlisted, Level 1 ADRs Are Not Traded on Any U.S. Exchange.

A multinational automotive manufacturing company, VWAG is headquartered in Wolfsburg, Germany and incorporated in the Federal Republic of Germany. (Compl. ¶ 40.) VWAG's ordinary and preference shares are not listed or traded on any U.S. exchange. (Compl. ¶¶ 34, 446.) VWAG's shares are listed only on foreign exchanges. (*Id.*)

During the putative class period of November 19, 2010 to January 4, 2016 (the "Class Period"), VWAG was the issuer under a sponsored Level 1 ADR facility, which provides for the issuance of unlisted ADRs corresponding to VWAG's ordinary and preference shares. (Compl. ¶ 34.) An ADR represents an ownership interest in the underlying shares of a non-U.S. company. (Compl. ¶ 33; *see* SEC ADR Bulletin, Giuffra Decl. Ex. A.)[1] Holders can exchange their ADRs for the underlying German securities at any time. *See* 17 C.F.R. § 239.36(a). VWAG's ADRs are not listed or traded on any U.S. exchange and instead trade only over-the-counter. (Compl. ¶ 34.) Plaintiffs allege that they purchased the ADRs in 2013 through 2015. (*See* Compl. Exs. A & B.) During the Class Period, the volume of over-the-counter trading in VWAG's ADRs in the United States was small, and 99.1% of trading volume in both VWAG ordinary and preference shares occurred on non-U.S. exchanges. (Zurek Decl. ¶ 8.)

VWAG is not required to, and does not, file annual, quarterly or other reports with the SEC and made no filings with the SEC during the Class Period. (Giuffra Decl. ¶ 3.)[2] 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." (Giuffra Decl. Ex. A, 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 in the United States as well. (*Id.*) 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.*) VWAG's ADRs, by contrast, are Level 1, which reflects the least contact with the United States of the

[1] Every five VWAG ordinary ADRs represent the right to receive one VWAG ordinary share, and every five VWAG preference ADRs represent the right to receive one VWAG preference share. (Compl. ¶ 33.)

[2] Almost two decades ago, in 1998, VWAG signed two Form F-6 registration statements that were filed with the SEC for the limited purpose of registering its two ADR programs. (Giuffra Decl. Exs. B-C.) And more than 12 years ago, in December 2003, VWAG signed a Form F-6 for the purpose of registering additional ADRs. (Giuffra Decl. Ex. D.) Regardless, "[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).)

three levels and does not require disclosures other than pursuant to the laws of Germany.[3] VWAG did not seek to raise capital from ADR sales and arranged for their issuance simply for the convenience of U.S. investors.

B. German Regulatory Investigations and Civil Litigation

In October 2015, the BaFin, the German financial regulator, initiated investigations into whether VWAG violated German capital markets transparency requirements in connection with the diesel emission issues by omitting or delaying the immediate publication of price sensitive inside information. (Giuffra Decl. ¶ 4.) The BaFin's investigation is ongoing. (*Id.*) In June 2016, the German State Prosecutor in Braunschweig initiated an investigation into a current and former member of VWAG's Management Board concerning allegations of market manipulation in connection with the diesel emission issues. (*Id.*)

VWAG is also currently a defendant in over 130 investor lawsuits in Germany alleging untimely disclosures concerning the diesel emission issues and seeking billions of Euros in damages. (Pfüller Decl. ¶ 6.) The approximately 450 plaintiffs in these German lawsuits include at least 90 U.S. institutional investors. (*Id.*)

C. Alleged Knowledge of the "Defeat Device"

1. VWAG, Martin Winterkorn, and Herbert Diess

Plaintiffs allege that Martin Winterkorn, VWAG's CEO and Chairman of VWAG's Management Board from January 1, 2007 until his resignation on September 23, 2015 (Compl. ¶ 45)—and, through him, VWAG—"must have known" about the existence of defeat devices in diesel vehicles prior to May 2014 (s*ee, e.g.*, *id.* ¶ 194) based on allegations that unspecified "engine developers" or "engineers" at Volkswagen and Audi either contemplated using defeat devices or were involved in the design and implementation of such devices. (*See, e.g.*, *id.* ¶¶ 108, 186, 190-91.) Plaintiffs allege that because Winterkorn was "widely regarded as a detail-oriented, micromanaging CEO who retained control over engineering details that many other CEOs would fully relinquish to deputies" (*id.* ¶ 45), he

[3] As the issuer under a sponsored Level 1 ADR facility, VWAG complies with Rule 12g3-2(b) under the Exchange Act, which requires a non-U.S. issuer to post on its website, in English, its reports issued abroad.

must have known that certain vehicles contained defeat devices (*see id*. ¶¶ 17, 45, 311). Plaintiffs further allege that "as early as 1999, [] the idea took root to use defeat devices to evade increasingly strict emissions standards" (Compl. ¶ 108), and that a "PowerPoint presentation prepared by a top Volkswagen technology executive in 2006 la[id] out in detail how Volkswagen could cheat on emissions tests in the United States" (*id.* ¶131; *see also id.* ¶¶ 133, 315). But Plaintiffs do not allege that Winterkorn was aware of the 1999 "idea" or the 2006 presentation.

Plaintiffs further allege that "Winterkorn received a memo on May 23, 2014—16 months before the EPA issued its Notice of Violation—from Bernd Gottweis, a veteran Volkswagen executive whom employees referred to as the 'fireman' for his ability to 'smell trouble' and 'sound the alarm' and address emergent crises at the Company" (Compl. ¶ 201), and that Winterkorn "admitted" that "by May 2014, he was aware of the problems regarding impermissibly high emissions levels in the TDI vehicles" (*id*. ¶ 204). On its face, however, the memo from Gottweis identified only the risk of U.S. authorities investigating whether a "so-called defeat device" had been implemented into the engine software, and stated that Gottweis would "report about further developments and discussions with the U.S. authorities on this issue." (Giuffra Decl. Ex. E, Memorandum from Bernd Gottweis, dated May 23, 2014 ("Gottweis Memo").) The memo did not state or imply that a defeat device had actually been used, nor do Plaintiffs allege that Winterkorn "admitted" that he was aware of the use of a defeat device.

Plaintiffs further allege that in November 2014, Winterkorn received another memo reporting that there was a defect with the "[d]ifferential pressure sensor" on some cars, which resulted in them "[e]xceeding emission limits in 'off-cycle, real world' driving." (Compl. ¶ 205; Giuffra Decl. Ex. F.) Plaintiffs do not plead that this memo mentioned a "defeat device" or other deliberate attempt to deceive regulators, and it clearly did not. (Compl. ¶ 205.) The memo did, however, state that the expected cost for repairing this problem was approximately "ca. € 20 mill." (Giuffra Decl. Ex. F) That amounted to an immaterial 0.16% of VWAG's €12,697 million net operating profit for 2014. (*See* Compl. ¶ 326.) The November 2014 memo on which Plaintiffs rely thus undercuts any suggestion that Winterkorn was on notice that emission issues with diesel engines were likely to be material.

Finally, Plaintiffs allege that "on July 27, 2015, "Volkswagen employees discussed the diesel issue on the periphery of a regular meeting about damage and product issues, in the presence of

Martin Winterkorn and Herbert Diess," without specifying what was allegedly discussed. (*Id.* ¶ 206.) Plaintiffs fail to plead that this discussion concerned any more than the fact that there were problems with the engines (which Winterkorn already knew, according to the Complaint).

2. VWGoA, VWoA, AoA, Michael Horn, and Jonathan Browning

Plaintiffs allege that "VWGoA, VWoA, and AoA, as well as VWGoA and VWoA executives Horn and Browning—acted with scienter because they were centrally involved in the process for acquiring all necessary approvals and certifications so that their vehicles could legally be sold and driven in the United States." (Compl. ¶ 310.) These conclusory allegations, devoid of factual support, are insufficient to satisfy the strict pleading requirements as to scienter.[4] Plaintiffs' further allegations concerning Horn's Congressional testimony in 2015 (*after* Volkswagen publicly disclosed the existence of defeat devices in diesel cars) and his receipt of a memo in 2014 relating to possible, but unconfirmed, emissions compliance issues (*id.* ¶ 15 (memo "concerning the defeat devices and regulatory scrutiny in 2014")) do not raise the required "strong inference" of scienter. Finally, Plaintiffs do not allege that Horn and Browning ever made any false statements or omissions.

D. The Alleged Misstatements

The alleged misstatements in the Complaint fall into four categories. *First*, the Complaint alleges that between 2009 and 2015, VWoA, VWGoA and AoA made 48 false and misleading statements through press kits and marketing brochures representing that Volkswagen and Audi TDI vehicles complied with emissions regulations "in all 50 states," had technology that reduced NOx emissions, were "cleaner than conversional diesels," and had increased fuel economy and reduced "green-house gas emissions" without "performance sacrifices." (Compl. ¶¶ 329-31, 333-37, 382-83, 385, 387, 389-412, 416-24, 428.) The Complaint does not allege that these statements, which are the subject of the separate consumer litigation before this Court, were made by VWAG. (*Id.* ¶ 428.) Nor were these statements directed at investors, as opposed to customers and prospective customers for Volkswagen diesel vehicles.

[4] Browning was the CEO of VWGoA only from October 2010 through December 2013, and thus was not even at the company when the alleged defeat device scheme was conceived and implemented or when the first reports were released that questioned VWAG's emissions testing. *See* Section V, *infra.*

Second, the Complaint alleges that, pursuant to German law, during the Class Period, VWAG issued annual and quarterly reports from Germany, including statements relating to its financials, products, mission, industry recognition, and other forward-looking projections. These reports included general statements about VWAG's commitment to being "environmentally friendly":

- "With our attractive and *environmentally friendly* range of vehicles, which we are steadily and rationally expanding, and the excellent position of the separate brands in the markets worldwide, we are able to leverage the Group's strengths and to systematically increase our competitive advantage. Our activities are oriented on setting *new ecological standards* in the areas of vehicles, powertrains and lightweight construction." (Compl. ¶ 345 (emphasis added).)

- "Chairman of the Board of Management Prof. Dr. Martin Winterkorn stressed that the Group enjoys a strong position thanks to its range of highly efficient and *environmentally friendly* diesel, petrol and natural gas engines . . . ." (*Id.* ¶ 366 (emphasis added).)

- "We offer an extensive range of *environmentally friendly*, cutting-edge, high quality vehicles for all markets and customer groups that is unparalleled in the industry." (*Id.* ¶ 369 (emphasis added).)

- "Our attractive and *environmentally friendly* model portfolio impresses customers around the globe. The trust placed in us by customers, as well as our high quality and efficiency standards, allow us to meet and even exceed our financial targets. . . . We offer an extensive array of attractive, *environmentally friendly*, cutting edge, high-quality vehicles for all markets and customer groups." (*Id.* ¶ 374-75 (emphasis added).)

VWAG's reports to investors were "signed" by members of VWAG's Board of Management, including Winterkorn and/or Diess. (Compl. ¶ 10.) Winterkorn signed VWAG's Annual and Quarterly Reports from 2010 through the second quarter of 2015. (*Id.* ¶ 326.) Diess was a member of the Board of Management when VWAG issued two of the challenged reports: the Second Quarter 2015 Interim Report (issued on July 29, 2015, just four weeks after he joined VWAG) (*id.* ¶¶ 52, 326) and the Third Quarter 2015 Interim Report (which disclosed the emissions issue to investors) (*id.* ¶ 326; Giuffra Decl. Ex. I at 5.).

Third, the Complaint alleges that VWAG, "[a]s a German corporation," is "required to prepare its financial statements in accordance with International Financial Reporting Standards, which include International Accounting Standards (IAS)." (Compl. ¶ 215.) According to Plaintiffs, VWAG under-disclosed contingent liabilities in its annual and quarterly reports, because the Company "should

have recognized provisions relating to its use of the illegal defeat devices in each of its quarterly and annual financial statements issued during the Class Period." (Compl. ¶ 222.) Plaintiffs further allege that "losses relating to the use of defeat devices were 'probable' under IAS 37 because it was more likely than not that the defeat devices would be discovered and that VW AG would incur enormous liabilities to address this self-inflicted problem." (*Id.*)

Fourth, the Complaint alleges that "[e]very 'Clean Diesel' vehicle sold by the Corporate Defendants in the United States during the Class Period bore a sticker falsely representing that the vehicle complied with US EPA and CARB emissions standards" (Compl. ¶ 340), which "were materially false and misleading because the vehicles bearing the stickers actually did not comply with the cited regulatory standards for emissions" (*id.* ¶ 341). But the Complaint does not specify which Defendant allegedly wrote or disseminated these stickers attached to the affected vehicles. (*Id.* ¶¶ 340-41.) Nor do Plaintiffs adequately allege that these stickers were published or disseminated to investors, as is required for pleading reliance through a "fraud-on-the-market" theory.

ARGUMENT

I. BECAUSE PLAINTIFFS SEEK TO APPLY SECTION 10(B) EXTRATERRITORIALLY, THEIR CLAIMS MUST BE DISMISSED.

In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 273 (2010), the Supreme Court affirmed the Second Circuit's dismissal of Section 10(b) claims asserted by Australian shareholders who purchased shares of an Australian bank on the Australian Stock Exchange. The Court held that *only* "transactions in securities listed on domestic exchanges, and domestic transactions in other securities" fall within the territorial reach of Section 10(b) and Rule 10b-5, pursuant to the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 255, 267 (citations omitted).

As the Supreme Court emphasized, "[w]e know of no one who thought that the [Exchange Act] was intended to 'regulat[e]' *foreign* securities exchanges—or indeed who even believed that under established principles of international law Congress had the power to do so." *Id.* at 267 (emphasis in original). The Court stressed the need to avoid "interference with foreign securities

regulation that application of §10(b) abroad would produce," and prevent the United States from turning into "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Id*. at 269-71. In keeping with this admonition, since *Morrison*, no court has held that Section 10(b) applies to the securities at issue here—Level 1 ADRs.

VWAG's ordinary and preference shares are listed exclusively on foreign exchanges. (Compl. ¶ 33.) Although ADRs representing those shares trade over-the-counter in the United States (*id*. ¶¶ 33- 34), OTC markets "are not national securities exchanges within the scope of *Morrison*." *United States* v. *Georgiou*, 777 F.3d 125, 135 (3d Cir. 2015); *see also Stoyas*, 2016 WL 3563084, at *7 ("[T]he OTC market at issue here is likely just that—an OTC market, not an exchange as meant by *Morrison* or as defined and regulated by the statute."). Plaintiffs' claims therefore fail under the first prong of *Morrison*.

Nor can Plaintiffs comply with the territorial limitations of Section 10(b) by arguing that their ADR transactions satisfy the second prong of *Morrison*—"domestic transactions" in other securities—under the "irrevocable liability" test adopted by the Second Circuit and courts in this Circuit. *See*, *e.g.*, *MVP Asset Management (USA) LLC* v. *Vestbirk*, 2013 WL 1726359, at *3, *6 (E.D. Cal. Mar. 22, 2013) (citing to the Second Circuit's test in *Absolute Activist Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012), in which the court held that a domestic transaction exists when the plaintiff has "allege[d] facts leading to the plausible inference that the parties incurred irrevocable liability within the United States"); *Takiguchi* v. *MRI Int'l, Inc.*, 47 F. Supp. 3d 1109-10 (D. Nev. 2014).

The existence of a "domestic transaction" is only a threshold inquiry, and courts still may not apply United States securities laws to "domestic transactions" that are nevertheless "so predominately foreign as to be impermissibly extraterritorial." *Porsche*, 763 F.3d at 216. Identifying a "domestic transaction" in a given security is "*necessary* to state a claim under § 10(b)," but it does not "*suffice* to compel the conclusion" that a particular application of § 10(b) is "appropriately domestic." *Id*. at 216 (emphasis original). Rather, in order to satisfy the concerns articulated in *Morrison*, "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 (i) the "character" of the

security at issue and (ii) the "relevant actions" on which the claim of securities fraud is based. *Id.* at 202, 216-18.

The Second Circuit's decision in *Porsche* is particularly instructive here. In *Porsche*, Plaintiffs brought Section 10(b) claims based on their purchase of securities-based swaps that referenced the very same underlying security at issue here: VWAG shares that trade solely on foreign exchanges. Just like VWAG's ADRs, the value of the swaps in *Porsche* was based on the price at which VWAG's shared traded in Frankfurt. In dismissing the plaintiffs' claims under *Morrison*, the Second Circuit held that, even assuming that the swaps were "domestic transactions," Section 10(b) still did not apply to the claims because—as here—they (i) "concern[ed] statements made primarily in Germany with respect to stock in a German company traded only on exchanges in Europe," (ii) in connection with "fraudulent acts" alleged to have taken place in Germany, (iii) which were "the subject of investigation by [German] regulatory authorities and adjudication in German courts." *Id.* at 216. Thus, as here, the "relevant actions" were "so predominantly German as to compel the conclusion that the complaints fail[ed] to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality." *Id.*

In *SocGen*, 2010 WL 3910286, at *6 n.5, the Southern District of New York applied *Morrison* to dismiss Section 10(b) claims based on precisely the same kind of securities at issue here—Level 1, sponsored and unlisted ADRs of a foreign issuer. There, Judge Berman dismissed claims involving such ADRs of a French bank whose shares, like VWAG's, traded only on foreign exchanges. 2010 WL 3910286, at *5-7. Just like the claims here and in *Porsche*, the *SocGen* claims were based on statements disseminated abroad, and "revolve[d] around" activities that took place abroad. *Id.* at *2, *4. On these facts, the court held that the claims were so "predominantly foreign" as to exceed the territorial reach of Section 10(b). *Id.* at *6-7; *see also Stoyas*, 2016 WL 3563084, at *10 (holding that after *Morrison* over-the-counter sales of unsponsored ADRs referencing foreign stocks do not support domestic application of § 10(b)). Under the same analysis applied in *Porsche* and *SocGen*, Plaintiffs' claims are "so predominantly" German as to constitute an "impermissibly extraterritorial" invocation of Section 10(b).

First, the "character" of the securities at issue here is "predominantly foreign." *Porsche*, 763 F.3d at 202, 216. An ADR simply represents "the right to receive a specified number" of the

foreign issuer's shares—securities that, in VWAG's case, are listed only on "foreign exchange[s]." *SocGen*, 2010 WL 3910286, at *6 (citing *Morrison*, 561 U.S. at 250). ADR prices track the prices at which a foreign issuer's shares trade in its home, foreign market. *See Am. Depositary Receipts*, Release No. 274, 1991 WL 294145, at *6 (May 23, 1991). Like the swaps referencing VWAG's shares in *Porsche*, VWAG's ADRs derive their value "based on changes in the value of a [foreign] stock." *Porsche*, 763 F.3d at 214; *see id*., at 205-07. Further, as the issuer under a sponsored Level 1 ADR facility, VWAG neither seeks to raise capital in the United States nor files periodic or other reports with the SEC. (*See* Giuffra Decl. Ex. A.) VWAG makes disclosures solely in accordance with German law and is not required to adhere to the reporting requirements of the Exchange Act. *Id.* And just as in *SocGen*, VWAG'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 (citation omitted).

Second, as in *Porsche*, the "relevant actions" here all point toward Germany:

- VWAG's statements at issue were made by a German company and were disseminated in Germany, primarily in the form of annual and quarterly reports governed by German law, (*see* Compl. ¶ 428);[5]
- All of VWAG's allegedly fraudulent conduct took place in Germany, including the alleged misstatements and the modification to the engine management software (*see, e.g.*, *id*. ¶¶ 41, 75-76, 144, 187-90, 314, 343-381, 428); and
- VWAG's disclosures are being investigated in Germany by the BaFin and German prosecutors, and challenged in civil litigation brought in Germany (*see* Giuffra Decl. ¶ 4; Pfüller Decl. ¶ 6).

Third, Plaintiffs have not alleged that VWGoA, VWoA or AoA issued the securities underlying Plaintiffs' claims, or that they or their officers prepared reports for investors in VWAG securities. (*See* Compl. ¶¶ 6, 33, 343-81, 428.) Nor do Plaintiffs allege that these Defendants masterminded the installation of defeat devices in Volkswagen diesel vehicles. (*See, e.g., id.* ¶ 81 (conclusorily claiming that the installation of defeat devices was "intentionally engineered by VW AG's

[5] Although Plaintiffs seek to attribute to VWAG statements made by VWGoA, VWoA and AoA in order to bolster their securities fraud claims, the statements of VWAG's subsidiaries are not attributable to VWAG under the Supreme Court's holding in *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011).

senior management").) Because VWAG, not its subsidiaries, was allegedly responsible for the installation of the defeat devices in Volkswagen vehicles and for the reports issued to investors, the allegedly false and misleading statements of VWAG's subsidiaries in the United States were at most tangential to any alleged harm to investors. The allegations concerning false and misleading statements attributed to VWGoA, VWoA and AoA are therefore insufficient to undermine the conclusion that the "relevant actions" are "predominantly foreign."

In sum, to apply Section 10(b) on these facts would impermissibly "subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, [listed] entirely on foreign exchanges, in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law nearly certain to arise." *Porsche*, 763 F.3d at 215-17.

II. THE COMPLAINT SHOULD BE DISMISSED ON THE BASIS OF *FORUM NON CONVENIENS*.

Regardless of whether Section 10(b) applies here, this Court should exercise its broad discretion to dismiss the Complaint under the doctrine of *forum non conveniens*. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981). Dismissal is appropriate where, as here, "an alternative forum has jurisdiction to hear the case," and when trial in the chosen forum would establish "oppressiveness and vexation" to defendants "out of all proportion to plaintiff's convenience." *Piper*, 454 U.S. at 241. "In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere." *Contact Lumber Co*. v. *P.T. Moges Shipping Co. Ltd*., 918 F.2d 1446, 1450 (9th Cir. 1990) (internal citation omitted). Because Plaintiffs' claims relate to a German company's disclosures, issued under German law, regarding securities listed in Germany, "the site of the litigation should be" in Germany—"an alternative forum with jurisdiction to hear the case." *Id*.

A. Plaintiffs' Chosen Forum Is Not Entitled to Deference.

In this Circuit, Plaintiffs' choice of forum is not dispositive for at least two reasons. *First*, Plaintiffs' claims relate almost exclusively to transactions, witnesses, and evidence located in, or

decisions made in and disseminated from, Germany. The mere "presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*." *Lockman*, 930 F.2d at 767 (internal citation omitted). "A citizen's forum choice should not be given dispositive weight," and if "the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Piper*, 454 U.S. at 256 n.23. Where, as in this case, the center of gravity of the litigation clearly lies in Germany, Plaintiffs' chosen forum should not be accorded any deference. *See Leetsch*, 260 F.3d at 1103 (upholding dismissal and finding that the "German court would be more competent than a United States court to hear the claim because of its familiarity with the German language and the governing German law"); *Israel Discount Bank Ltd.* v. *Schapp*, 505 F. Supp. 2d 651, 661-62 (C.D. Cal. Aug. 2, 2007) (applying *forum non conveniens* to dismiss counterclaim because the "center of gravity" lay in Israel).

Second, Plaintiffs elected to invest in "predominantly foreign" securities, subject only to Germany's disclosure laws—not the reporting requirements of the Exchange Act.[6] *See Porsche*, 763 F.3d at 216; *Contact Lumber Co.*, 918 F.2d at 1450. "Where an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiffs[']ability to rely upon citizenship as a talisman against forum non conveniens dismissal is diminished." *Argoquest Holdings, LLC* v. *Israel Disc. Bank Ltd.*, No. CV 04-10292 GAF (RNBx), 2005 WL 6070168, at *3 (C.D. Cal. Apr. 8, 2005) (citation omitted).

[6] Plaintiffs also chose to invest in ADRs in the German-traded shares of VWAG, whose Articles of Association contain a "Place of Jurisdiction" clause, section 29, which states:

> The sole place of jurisdiction for all disputes between shareholders and of the beneficiaries or obligors of financial instruments relating to the Company's shares on the one hand, and the Company on the other, shall be the Company's domicile unless mandatory statutory provisions require otherwise. This also applies to disputes relating to compensation claimed for damage caused by false or misleading public capital market information, or the failure to provide such information. Foreign courts shall not have jurisdiction over such disputes.

(Giuffra Decl. Ex. G.) Sophisticated institutional investors like Plaintiffs should not be permitted to disregard this clause making clear that a claim for "damage caused by false or misleading public capital market information, or the failure to provide such information" must be brought in Germany.

In fact, courts in this Circuit and elsewhere have repeatedly dismissed claims on *forum non conveniens* grounds involving ADRs bought or sold in the United States. *See, e.g.*, *Stoyas*, 2016 WL 3563084, at *13-15 (dismissing, in the alternative, on *forum non conveniens* grounds a putative class of ADR-holders' complaint against a Japanese company, because of the "practical issues" of "taking discovery from and deposing" witnesses and perpetrators of the accounting fraud, which occurred in Japan); *Sarandi*, 2009 WL 2871049, at *6-8 (dismissing, in the alternative, an American ADR-holder's complaint against a Swiss company, because the suit concerned a Swiss entity and the conduct of mainly Swiss residents, and most of the defendants, who also were witnesses, and evidence resided in Switzerland); *Glenn* v. *BP p.l.c.*, 27 F. Supp. 3d 755, 767 (S.D. Tex. 2014), *aff'd* 602 F. Appx. 199, 200 (5th Cir. 2015) (in connection with the Gulf Oil spill, dismissing an American ADR-holder's complaint against an English corporation because the public interest factors weighed "strongly" in favor of England); *see also In re European Aeronautic Defence & Space Co. Sec. Litig.*, 703 F. Supp. 2d 348, 359-62 (S.D.N.Y. 2010) (finding proper, in dicta, but denying as moot Defendants' motion for *forum non conveniens* dismissal of a putative class of American ADR-holders' complaint against a Dutch company, because most of the witnesses and evidence were in Europe, and all of the alleged fraud occurred in Europe).

B. Germany Is an Adequate Alternative Forum To Resolve Plaintiffs' Claims.

An alternative forum is "adequate" where "the other jurisdiction offers a satisfactory remedy" and "the defendant is amenable to process there." *Carijano* v. *Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011); *see also Tuazon* v. *R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178-80 (9th Cir. 2006); *Piper*, 454 U.S. at 254-55. As the Ninth Circuit has repeatedly recognized, Germany easily satisfies this test. *See, e.g.*, *Tuazon*, 433 F.3d at 1180 n.8 (citing approvingly a Third Circuit case recognizing Germany as an adequate alternative forum); *Mattel*, 354 F.3d at 868 ("Germany provides an adequate forum for resolving disputes . . . ."); *Leetsch*, 260 F.3d at 1104 ("[The] German court would be more competent than a United States court to hear the claim because of its familiarity with the German language and the governing German law."); *In re Crash Over the Mid-Atlantic on Jun. 1, 2009*, 792 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (Breyer, J.) (dismissing based on *forum non*

conveniens even though the plaintiffs could not bring "the exact suit filed in the United States in the foreign forum").

VWAG is incorporated, headquartered, and amenable to process, in Germany. *See Lockman*, 930 F.2d at 768 (quoting *Piper*, 454 U.S. at 254 n.22) ("Ordinarily, this requirement [that there is an adequate forum] will be satisfied when the defendant is 'amenable to process' in the other jurisdiction."); *see also Contact Lumber*, 918 F.2d at 1450. Germany also is adequate with respect to the domestic Corporate Defendants and the Individual Defendants, all of whom are amenable to service of process there. *See Lockman*, 930 F.2d at 768 (quoting *Piper*, 454 U.S. at 254 n.22); *Alpine View Co. Ltd.* v. *Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000) (finding district court did not abuse its discretion where it dismissed claims against American subsidiaries of a Swedish corporation because all defendants submitted to Sweden's jurisdiction); *see also Creative Tech., Ltd.* v. *Aztech System Pte., Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995) (upholding district court's decision to dismiss a suit involving competing Singapore companies, notwithstanding the presence of an American wholly-owned subsidiary, because "the key infringing conduct, and the bulk of witnesses are located in Singapore, and the case can best be litigated there").

Pursuant to German tort law, U.S. plaintiffs who purchased VWAG's ADRs may bring a securities fraud claim in German courts against the Company as well as executives and members of the management and supervisory boards for false and misleading statements and omissions in its investor disclosures. (Pfüller Decl. ¶¶ 7-11.) And a New York appellate court dismissed a New York action in favor of Germany because Germany had a greater connection to claims based on the very same underlying security at issue here—VWAG shares. *See Viking Global*, 958 N.Y.S.2d at 36 ("phone calls between plaintiffs in New York and a representative of defendant in Germany, and the emails sent to plaintiffs in New York" failed "to create a substantial nexus with New York, given that the events of the underlying transaction otherwise occurred entirely in a foreign jurisdiction"). The adequacy of Germany as a forum is further demonstrated by the fact that there are currently over 130 similar shareholder lawsuits pending in Germany against VWAG, including one involving at least 90 U.S. institutional investors. (Pfüller Decl. ¶ 6) The amount in controversy in such suits is approximately €3.9 billion, including approximately €762 million in the suits involving U.S. investors. (*Id.*) *See In re European*

Aeronautic Defence & Space Co. Sec. Litig., 703 F. Supp. 2d at 360-61 (plaintiffs' "claims of forum inadequacy are undermined by the fact that at least eleven American institutional investors have sued in Germany").

C. The Public and Private Interest Factors Support Dismissal on *Forum Non Conveniens* Grounds.

The balance of the private and public interest factors also clearly favors dismissal.[7] *See Piper*, 454 U.S. at 241. The public interest factors include: "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." *Carijano*, 643 F.3d at 1232 (internal citations omitted). The private factors include: "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id*. at 1229 (internal citations omitted).

Here, the public interest factors point squarely to Germany as the superior forum. Multiple government authorities in Germany, including the BaFin and the German State Prosecutor, are engaged in ongoing investigations into whether VWAG violated its disclosure obligations. (Giuffra Decl. ¶ 4.) Germany has a demonstrable interest in holding VWAG, a German corporation, accountable, if it is found to have violated Germany's stringent public disclosure and anti-market manipulation regulations. Germany has a similarly compelling interest in adjudicating the claims against the other Defendants, especially those who are German residents. Given the high volume of parallel investor litigation already pending in Germany arising out of the diesel matter, Germany has a clear and strong interest in preventing inconsistent judgments in the German and United States litigation.

[7] Although the Ninth Circuit reversed the district court's dismissal on *forum non conveniens* grounds in *Carijano*, the basis for the reversal was that the central decisions and policies underlying the claims in that case were made in the United States—a fact pattern that is exactly opposite from the situation here, where all of the relevant decisions and actions concerning the development and installation of alleged "defeat devices" were made in *Germany*. *See Carijano*, 643 F.3d at 1227 (finding dismissal improper because "while the case concerns past operations and injury in Peru, the complaint includes claims based on decisions made in and policies emerging from Occidental's corporate headquarters in Los Angeles").

The private interest factors also overwhelmingly favor dismissal in favor of a German forum for this litigation. Germany's local interest is heightened by "the fact that most if not all of the conduct and transactions in this case occurred in" Germany—a fact meriting "particular emphasis." *See Meridian*, 149 F. Supp. 2d at 1239. Plaintiffs' claims revolve around disclosures made from and conduct in Germany, and underlying securities issued in Germany, listed only on foreign exchanges, and subject only to Germany's disclosure laws. Indeed, Plaintiffs expressly rely on international accounting standards, which they allege are different from U.S. standards. (Compl. ¶¶ 215-25.) And during the Class Period, 99.1% of trading activity in VWAG ordinary and preference shares occurred on foreign exchanges. (Zurek Decl. ¶ 7.) Moreover, the Court's "focus should not rest on the number of witnesses . . . in each locale. Rather, a court should evaluate 'the materiality and importance of the anticipated . . . witnesses testimony.'" *Lueck* v. *Sundstrand Corp.*, 236 F.3d 1137, 1146 (9th Cir. 2001). Here, almost all of the key witnesses and evidence are located in Germany, and the allegations concerning the installation of the defeat device relate to conduct that took place entirely in Germany. (*See*, *e.g.*, Compl. ¶¶ 81-85, 119-24, 127-31, 141-47, 186-91, Giuffra Decl. ¶ 5.)

Similarly, most of the documentary evidence is in the German language, as would be much of the trial or deposition testimony. (*See*, *e.g.*, Compl. ¶¶ 92, 94, 103-06, 108-10, 119-24, 141-47, 158, 186-91, 195, 201, 203-04, 206-08, 215, 247-48, 250, 254, 256, 259-62, 278, 303-06, 309.) This consideration "weighs especially heavily in favor of the German courts." *Leetsch*, 260 F.3d at 1105. Were the Court to hear this case, "it would be required to translate a great deal . . . from the German language, with all the inaccuracy and delay that such a project would necessarily entail." *Id.* As the court recognized in *Meridian*, where "most of the witnesses, documents and sources of proof underlying the allegations" were located abroad, "[t]o require these numerous witnesses to travel to California would be unduly burdensome and a waste of the parties' limited resources. Similar waste would result from the parties' need to translate virtually every document and much of the testimony involved in this litigation into English." *Meridian*, 149 F. Supp. 2d at 1239; *see Martinez v. White*, 492 F. Supp. 2d 1186, 1191 (N.D. Cal. 2007) (Breyer, J.) (dismissing based on *forum non conveniens*, in part, because "[a]ll of the evidence is [abroad]," and "[d]iscovery will all take place [abroad] and involve parties and witnesses that, for the most part, will not speak English."). "The compulsory process factor also weighs

in Germany's favor." *Leetsch*, 260 F.3d at 1105. To reach a contrary conclusion "would hamper international investment and cause serious difficulty in securities trading, as foreign corporations allowing investment from the United States would risk litigation in the United States based on foreign transactions." *Meridian*, 149 F. Supp. 2d at 1238-39.

In sum, because all the relevant factors demonstrate that Germany is the superior forum to litigate Plaintiffs' claims, the Court should dismiss the claims on the basis of *forum non conveniens*.

III. AS A MATTER OF LAW, PLAINTIFFS FAIL ADEQUATELY TO PLEAD SCIENTER.

A. Plaintiffs Do Not Plead that VWAG Acted with a Strong Inference of Scienter.

To state a Section 10(b) claim under the Private Securities Litigation Reform Act ("PSLRA"), a plaintiff must allege with particularity "(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss." *In re Daou Sys. Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005) (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341–42 (2005)). The Complaint should be dismissed for the additional reason that Plaintiffs have not sufficiently alleged particularized facts giving rise to a "strong inference" that each of the Defendants acted with scienter, *i.e.*, made a false or misleading statement "either intentionally or with deliberate recklessness." *Zucco Partners, LLC* v. *Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (citation and internal quotation marks omitted). Recklessness only exists when there is "not merely simple, or even inexcusable negligence, but an *extreme departure from the standards of ordinary care* . . . that is either known to the defendant or is so obvious that the actor must have been aware of it." *Hollinger* v. *Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (emphasis added; citation omitted).

Adequately alleging scienter is a "formidable" challenge, *Metzler Inv. GMBH* v. *Corinthian Colleges, Inc.*, 540 F.3d 1049, 1055 (9th Cir. 2008), as a "strong inference" is not "a mere speculative inference . . . or even a reasonable inference." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 985 (9th Cir. 1999). Rather, "[a] court must compare the malicious and innocent inferences cognizable from the facts pled in the complaint, and only allow the complaint to survive a motion to dismiss if the malicious inference is at least as compelling as any opposing innocent inference." *Zucco*, 552 F.3d at 991; *see also Gompper* v. *VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) ("[T]he court must

consider *all* reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs.") (emphasis in original).

1. To Establish Corporate Scienter, the Individual Speaker Must Have Scienter.

"[A] corporation can only act through its employees and agents and can likewise only have scienter through them." *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 475 (9th Cir. 2015) (citation and internal quotation marks omitted). "Because the Securities Exchange Act and accompanying regulations do not contain any explicit instructions on when an employee's acts and intent are to be imputed as those of the company, courts have looked to agency principles for guidance." *Id.*; *see also Makor Issues & Rights, Ltd.* v. *Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008) ("[T]he doctrines of respondeat superior and apparent authority remain applicable to suits for securities fraud."). As the Restatement (Third) of Agency explains, "a principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement." Restatement (Third) of Agency § 5.03 cmt. d(2) (2006).[8]

In other words, agency principles do not allow mixing and matching of one employee's knowledge with another employee's making of the pertinent misstatement, a theory known as "collective scienter." *See Glazer Capital Mgmt., LP* v. *Magistri*, 549 F.3d 736, 745 (9th Cir. 2008) (holding that plaintiff was "required to plead individual scienter with respect to [the CEO] because [the CEO] was responsible for actually making the statements in the merger agreement"; a showing that "a different executive" had the requisite knowledge "would do nothing to resuscitate [plaintiff's] claims"); *Richardson* v. *Oppenheimer & Co. Inc.*, 2014 WL 1304343, at *8 (D. Nev. Mar. 31, 2014) ("[T]o establish fraud on the part of a corporation, it is insufficient to show a corporate officer made a statement, which another officer knew to be false."). Indeed, the Ninth Circuit has refused to adopt the "collective scienter" theory. *See Nordstrom, Inc.* v. *Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir.

[8] The Supreme Court has repeatedly referenced the Restatements when construing federal statutes that create civil liability, including Section 10(b). *See, e.g.*, *Broudo*, 544 U.S. at 343-46 (Section 10(b) loss causation); *The Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (Section 10(b) implied misrepresentation); *Basic*, 485 U.S. at 243 (Section 10(b) reliance).

1995) ("[T]here is no case law supporting an independent 'collective scienter' theory."); *Glazer*, 549 F.3d at 744-45 ("Our circuit has not previously adopted a theory of collective scienter.").

To adequately allege scienter, Plaintiffs must plead particularized facts giving rise to a strong inference that the specific corporate officer who made the alleged false statement had scienter at the time the statement was made. *In re Apple Computer, Inc., Sec. Litig.*, 243 F. Supp. 2d 1012, 1023 (N.D. Cal. 2002) ("A defendant corporation is deemed to have the requisite scienter for fraud only if the individual corporate officer making the statement has the requisite level of scienter, i.e., knows that the statement is false, or is at least deliberately reckless as to its falsity, at the time that he or she makes the statement.").[9]

Here, only Winterkorn and Diess are alleged to have made misstatements attributable to VWAG. (Compl. ¶¶ 10, 322, 343, 428.) Because Plaintiffs have failed to adequately allege scienter as to either Winterkorn or Diess, they have failed to plead scienter as to VWAG. *See, e.g.*, *Infineon Techs.*, 2006 WL 2925680, at *3 ("Plaintiffs have failed to plead facts that support a strong inference the Officer Defendants who made the allegedly false and misleading statements acted with scienter. This necessarily means Plaintiffs also fail to plead scienter with respect to the Entity Defendants.").

2. Plaintiffs Fail To Allege That Any Speaker Had Scienter.

The vast majority of Plaintiffs' scienter allegations concern only Winterkorn. These allegations fall into two categories: Those that concern events prior to May 2014, and those that concern events during and after May 2014, which is when Winterkorn allegedly received a memo that "discussed tests by US agencies in which the NOx output of TDI vehicles exceeded acceptable levels by up to 35 times." (Compl. ¶¶ 200-02.)

Winterkorn's Alleged Knowledge Prior to May 2014. Much of the Complaint is dedicated to speculating that Winterkorn "must have known" about the defeat device prior to May 2014.

[9] *See also In re Infineon Techs. AG Sec. Litig.*, 2006 WL 2925680, at *3 (N.D. Cal. Sept. 11, 2006) (same); *Garcia* v. *Hetong Guo*, 2016 WL 102213, at *12 (C.D. Cal. Jan. 7, 2016) (same); *Cheung* v. *Keyuan Petrochemicals, Inc.*, 2012 WL 5834894, at *3 (C.D. Cal. Nov. 1, 2012) (same); *Pittleman* v. *Impac Mortgage Holdings, Inc.*, 2009 WL 648983, at *3 (C.D. Cal. Mar. 9, 2009) (same); *Weiss* v. *Amkor Tech., Inc.*, 527 F. Supp. 2d 938, 952 (D. Ariz. 2007) (same); *McGuire* v. *Dendreon Corp.*, 2008 WL 1791381, at *9 (W.D. Wash. Apr. 18, 2008) (same).

(*See, e.g.*, Compl. ¶ 194.) But Plaintiffs' evidence consists mostly of vague reports by various media outlets that certain unspecified "engine developers" or "engineers" at VWAG and AoA either contemplated using a defeat device or were involved in the design and implementation of such device. (*See, e.g.*, *id.* ¶¶ 108, 186, 190-91.) Plaintiffs then jump to the conclusion that, because Winterkorn was allegedly "widely regarded as a detail-oriented, micromanaging CEO who retained control over engineering details that many other CEOs would fully relinquish to deputies," he must have known that certain vehicles contained a defeat device. (*Id.* ¶ 45, *see also id.* ¶¶ 17, 311.)

Such "must have known" theories "will only be indicative of scienter where the falsity is patently obvious—where the facts are prominent enough that it would be absurd to suggest that top management was unaware of them." *Zucco*, 552 F.3d at 1001 (citation and internal quotation marks omitted). Here, drawing "all reasonable inferences" from the allegations of the Complaint, *Gompper*, 298 F.3d at 897, it cannot be said that it would be "absurd to suggest" that Winterkorn did not know about the defeat devices prior to May 2014. *Zucco*, 552 F.3d at 1001. As Plaintiffs concede, the defeat device was merely "lines of software code" in a program produced by third party Robert Bosch GmbH and installed in one of the "sophisticated computer systems" that assisted in the operation of vehicles. (Compl. ¶¶ 13, 142, 153.) Plaintiffs do not allege that Winterkorn was involved in the creation or installation of such device—instead, they merely allege that there is a "possibility that a range of employees were involved." (*Id.* ¶ 145.) Plaintiffs then impermissibly speculate that Winterkorn would or should have discovered the defeat device at some point because he allegedly was a "detail-oriented micromanager" (*id.* ¶ 93) who was "known for carrying a micrometer to check the minutest measurements of cars" (*id.* ¶ 95) and "ran around at auto shows with a tape measure and a magnet to examine vehicles" (*id.* ¶ 194).

As a matter of law, such conclusory allegations about Winterkorn's general management style cannot substitute for detailed factual allegations about what he was told. *See S. Ferry LP, No. 2* v. *Killinger*, 542 F.3d 776, 784 (9th Cir. 2008) ("Where a complaint relies on allegations that management had an important role in the company but does not contain additional detailed allegations about the defendants' actual exposure to information, it will usually fall short of the PSLRA standard.") Winterkorn was the CEO of "one of the largest automobile manufacturers in the world" (Compl. ¶¶ 40,

45), and it is not plausible to suggest that he was well versed in every aspect of every vehicle, down to the individual lines of code in the computer systems, because no amount of inspection with a micrometer or tape measure would discover the defeat device.[10]

To the contrary, many of Plaintiffs' allegations suggest that defeat devices were installed in diesel vehicles without Winterkorn's knowledge. Plaintiffs allege that there "are different methods of reducing NOx emissions levels in diesel vehicles," and there was disagreement within Volkswagen over which system to use. (*Id.* ¶ 119.) According to Plaintiffs, Volkswagen initially licensed one such technology named "BlueTec" from a competitor, but later abandoned it in favor of engineering their own system because "Volkswagen's leadership was put off by the cost of the BlueTec system and the fact that it was developed by a competitor." (*Id.* ¶¶ 120-24.) This allegation suggests that senior management was advocating the development of new technology, which is the opposite of an instruction to create a defeat device within the existing software.

Plaintiffs then allege that Volkswagen was managed through a "reign of terror," that its engineers were under a high degree of pressure to manufacture an engine for the 2008 Jetta TDI that would meet emissions standards, and that Volkswagen was forced to delay release of the vehicle. (*Id.* ¶¶ 92, 94, 103, 135-36.) Plaintiffs contend that this was a "breeding ground for scandal" (*id.* ¶ 313), which is precisely the circumstances under which one would expect lower-level employees, such as engineers, to cut corners without prompting from the CEO. In fact, if Winterkorn had simply instructed the engineers to use a defeat device, presumably there would be no pressure at all to finish the Jetta on time, and there would have been no reason to delay its release. And once the engineers created and installed the defeat device, "the surreptitious nature" of the device creates an inference that it "would have deliberately been kept secret—even within the company." *See Glazer*, 549 F.3d at 746-47.

The other allegations in the Complaint concerning the pre-May 2014 time period also fail to raise the required "strong inference" of scienter. Plaintiffs claim that "as early as 1999, [] the idea

[10] The Court should reject Plaintiffs' attempt to transmute Winterkorn's management style into evidence of fraud through the commentary of various industry observers who now state—with the confidence of hindsight—that Winterkorn, as an active manager, would have known about the defeat device. *Compare* Compl. ¶¶ 192-94 (quoting retrospective commentary), *with In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1060 (9th Cir. 2014) ("articles [by outside observers] . . . written in hindsight . . . do not reflect" management or company's knowledge at the time).

took root to use defeat devices to evade increasingly strict emissions standards." (Compl. ¶ 108.) But Plaintiffs merely allege that "engine developers . . . contemplat[ed] installing illegal software," which says nothing about Winterkorn. (*Id.*) Plaintiffs' allegation that "people inside Volkswagen knew that its diesel engines were polluting significantly more than allowed" (*id.* ¶ 131) also says nothing about Winterkorn's knowledge.

The same is true of the alleged "PowerPoint presentation prepared by a top Volkswagen technology executive in 2006 laying out in detail how Volkswagen could cheat on emissions tests in the United States" (*id.* ¶¶ 83, 131, 133, 315), and the letter that Bosch allegedly sent to VWAG's "top circles" stating that the use of Bosch's software to reduce emissions during testing was illegal (*id.* ¶ 158). There are no allegations that Winterkorn saw or knew anything about the PowerPoint or the Bosch letter. Nor would these materials necessarily indicate that VWAG was actually using a defeat device. Similarly non-particularized are Plaintiffs' allegations concerning the whistleblower who allegedly warned VWAG's head of development in 2011 that the company was "manipulating reported emissions" (*id.* ¶ 84)—there are no allegations that this information was in any way communicated to Winterkorn.

Plaintiffs also allege that VWAG's "Management Board, including Winterkorn, had actual knowledge that Volkswagen's diesel cars were unable to comply with emissions standards" in light of the fact that they had "refused to upgrade the [emissions controls] systems because it would be too expensive." (*Id.* ¶ 131-32.) The fact that these proposals were rejected because they would increase costs "without providing a benefit that customers could perceive" (*id.* ¶ 132) provides no basis for an inference that members of the Management Board knew that the existing system was noncompliant.

Winterkorn's and Diess' Alleged Knowledge During and After May 2014. Plaintiffs also fail to adequately allege scienter with respect to the events that transpired during and after May 2014. Plaintiffs allege that on May 23, 2014, Winterkorn received the Gottweis Memo noting that some diesel vehicles had excessive NOx output. (Compl. ¶¶ 201-03; Giuffra Decl. Ex. E.) This memo was not addressed to Winterkorn, but to his subordinate Frank Tuch, who passed it as an addendum to Tuch's memo to Winterkorn. (Giuffra Decl. Ex. E.) Tuch's memo did not allude to the possibility of any defeat device and reported on multiple issues with VWAG vehicles. (Giuffra Decl. Ex. E.)

Plaintiffs focus on a line in the Gottweis Memo that identified the risk of U.S. authorities investigating whether a "so-called defeat device" had been implemented. (Compl. ¶ 203; Giuffra Decl. Ex. E.) But the memo did not state or imply that a defeat device was actually in use or what it meant if one were found by U.S. authorities, let alone the potential magnitude of any associated financial risks resulting from such a finding. Rather, the memo stated that Gottweis would "inform [Tuch] about the further development and discussion with the [U.S.] authorities." (Giuffra Decl. Ex. E.)

The Gottweis Memo was included as an addendum to the Tuch memo that was itself included in Winterkorn's "extensive weekend mail" (Compl. ¶ 200), and it is not clear what, if any, attention Winterkorn paid to it. Even if he read it, he reasonably could have viewed the matter as something his subordinates would address and report back to him about, as they stated they would. The memo is thus consistent with Winterkorn's alleged admission "that by May 2014, he was aware of the problems regarding impermissibly high emissions levels in the TDI vehicles." (*Id.* ¶ 204.) Winterkorn's knowledge that there were problems with some cars at the time is not the same as knowing the cause of those problems, their regulatory significance, or the liabilities VWAG faced. *See NVIDIA*, 768 F.3d at 1064 (allegations that executives learned about "[product] failures, not the root cause of them or [the company's] liability" did not support scienter).

Plaintiffs plead no facts to show that, at the time, Winterkorn knew that a defeat device was actually being used or that he had understood the full ramifications of the diesel emission issues, and therefore do not raise a strong inference that he purposefully or recklessly made misstatements in the annual reports. Indeed, on the question of VWAG's potential liability, Plaintiffs affirmatively plead that Winterkorn was informed in November 2014 that the problems with the diesel engines would cost approximately €20 million to resolve—a small sum for VWAG, which had €12,697 million net operating profit for 2014 (*see* Compl. ¶ 326)—and that he may have operated on the "mistaken belief that Volkswagen could resolve any US legal issues by paying a 'cost-of-doing-business' fine." (*Id.* ¶ 205.)

The same is true of Plaintiffs' allegations regarding the "regular meeting about damage and product issues" on July 27, 2015 attended by Winterkorn and Diess. (Compl. ¶¶ 206, 282.) Plaintiffs conclusorily allege that "the diesel issue" was discussed in the presence of Winterkorn and

Diess, without providing any additional details. (*Id.*) Winterkorn and Diess could well have appreciated that there was an "issue" without understanding that some diesel vehicles had defeat devices or the financial impact that the existence of such devices could ultimately have on VWAG. Moreover, the fact that this was a "regular meeting about damage and product issues" further suggests that Winterkorn and Diess could have reasonably regarded the "diesel issue" as a relatively routine product-related issue.

Plaintiffs also allege that a Volkswagen manager "admitted true emissions levels to a CARB official on August 5, 2015," and that Diess then allegedly "held meetings on August 24 and 25, 2015 to discuss the Company's response to the scandal that was about to break." (Compl. ¶ 207.) But these meetings took place *after* Diess is alleged to have made the purportedly false statements regarding VWAG's liabilities (Compl. ¶ 326) and "environmentally friendl[iness]" (*Id.* ¶ 377) in VWAG's Second Quarter 2015 Interim Report issued on July 29, 2015. Although Diess was a member of the Management Board when VWAG's allegedly false and misleading Third Quarter 2015 Interim Report was issued on October 28, 2011, this Report expressly referenced the EPA's Notice of Violation and the defeat device issue. Such notice had been publicly disclosed even earlier on September 18, 2015.

Finally, Plaintiffs claim that on September 4, 2015, Winterkorn was notified that CARB had been informed that there was a defeat device in some diesel engines. (*Id.* ¶ 209.) But they do not allege that Winterkorn was then informed of the liability Volkswagen faced as a result of this admission. Nor do Plaintiffs allege that any of the Defendants made any false statements between September 4, 2015, and the September 18, 2015 public disclosure that there was a defeat device. (*See id.* ¶ 428.)

The Complaint thus fails to allege particularized facts giving rise to a "strong inference" that either Winterkorn or Diess had scienter with respect to either the challenged statements contained in the annual and quarterly reports, or Winterkorn's comments quoted in the September 13, 2011 press release. Accordingly, Plaintiffs have also failed to adequately allege scienter with respect to VWAG.

B. Plaintiffs Fail to Establish a Strong Inference of Scienter as to VWGoA, VWoA, and AoA.

As discussed above, to adequately allege scienter, a securities plaintiff must plead detailed facts giving rise to a strong inference that a specific corporate officer had scienter at the time he or she made a false or misleading statement. *Apple Computer*, 243 F. Supp. 2d at 1023. Alleging

"corporate scienter relies heavily on the awareness of the directors and officers," so, generally speaking, there is "no way that the defendant could show that the corporation, but not any individual director or officer, had the requisite intent to defraud." *Glazer*, 549 F.3d at 744 (citation and internal quotation marks omitted). As a result, "the PSLRA requires [the plaintiff] to plead scienter with respect to those individuals who actually made the false statements . . . ." *Id.* at 745.

Plaintiffs allege that Winterkorn and Diess "controlled VW AG, which in turn controlled VWGoA, VWoA, and AoA," and that they "direct[ed] their public statements and regulatory actions," (Compl. ¶ 47), even though Plaintiffs concede that neither Winterkorn nor Diess made any of the statements attributed to those Defendants. (*See* Compl. ¶¶ 47, 52, 428.) Plaintiffs fail to allege "particular facts demonstrating" that Winterkorn and Diess—the CEO and a Management Board member, respectively, of "one of the largest automobile manufacturers in the world," headquartered in Germany (*id*. ¶ 40)—were "directly involved in the *preparation of the allegedly misleading statements*" attributed to VWGoA, VWoA, and AoA and directed at customers and prospective customers for Volkswagen diesel vehicles. *In re Tibco Software, Inc.*, No. C 05-2146 SBA, 2006 WL 1469654, at *28 (N.D. Cal. May 25, 2006) (emphasis added, citation omitted). Plaintiffs' speculative allegation that Winterkorn and Diess "direct[ed] [VWGoA, VWoA and AoA's] public statements and regulatory actions" (Compl. ¶ 47), without details connecting them to the statements on which Plaintiffs' claims are based, is plainly insufficient. *See Tibco*, 2006 WL 1469654, at *28 (disregarding "conclusory allegations that defendants were involved in drafting, producing, reviewing and/or disseminating the false and misleading statements, and that they participated in drafting, preparation and/or approval of the various public and shareholder and investor reports") (citation and internal quotation marks omitted).

The Complaint alleges no statements by any individual corporate officer of AoA—instead, Plaintiffs vaguely allege that AoA is "is a wholly-owned subsidiary of Audi AG." (Compl. ¶¶ 44.) Such allegations are "plainly inconsistent with the pleading requirements of the PSLRA." *Glazer*, 549 F.3d 745.

Similarly, the officers of VWGoA and VWoA who are named in the Complaint—Horn and Browning—are not alleged to have been involved in VWGoA's and VWoA's alleged misrepresentations in press releases or emissions regulation compliance stickers. (Compl. ¶¶ 50-51,

340, 428.) The Complaint does not specifically allege that either made or approved any misleading statements.[11] Instead, as with Winterkorn and Diess, Plaintiffs allege in conclusory fashion that Horn and Browning "direct[ed] [VWGoA and VWoA's] public statements and regulatory actions" without providing any factual support for these assertions. (*Id.* ¶¶ 50-51.)

In order to plead that VWGoA and VWoA "had the requisite level of scienter, Plaintiffs must allege the requisite level of scienter with respect to at least one of the Individual Defendants." *Cheung*, 2012 WL 5834894, at *3. "Plaintiffs may not meet the requisite pleading standard by making generalized allegations that group the Individual Defendants together or simply assert what the company did without identifying the actors responsible for those actions." *Id.* at 4.[12] Absent any allegations that these "Defendants signed any of the above-listed statements or authored the press releases," there can be no liability. *Oklahoma Firefighters Pension & Ret. Sys.* v. *IXIA*, 50 F. Supp. 3d 1328, 1355 (C.D. Cal. 2014). Plaintiffs cannot "presume[] that the [allegedly] false, misleading and incomplete information conveyed" in the "press releases and other publications" attributed to VWGoA and VWoA "are the collective actions of all of" Horn and Browning.[13] *Lapiner*, 2011 WL 445849, at *3. Rather, Plaintiffs "must state, with particularity, facts indicating that" Horn and Browning were "directly involved in the

[11] For example, Plaintiffs have failed to allege that Horn and Browning authored, reviewed, or approved the allegedly misleading emissions regulation compliance stickers (Compl. ¶ 340) or press releases (*id.* ¶¶ 406-09, 412) issued by VWGoA and VWoA after September 15, 2014, nor have they given any indication as to why Horn and Browning would have authored, reviewed, or approved such materials.

[12] *See also In re Int'l Rectifier Corp. Sec. Litig.*, No. CV 07-02544-JFW (VBKx), 2008 WL 4555794, at *21 (C.D. Cal. May 23, 2008) ("For scienter to be attributed to [the corporate defendant], Plaintiffs must sufficiently plead that at least one of [the subsidiary's] officers had the requisite scienter at the time they made the allegedly misleading statements.").

[13] To the extent that Plaintiffs rely on the "group pleading doctrine," "the 'majority of district courts within the Ninth Circuit[] have concluded that group pleading is no longer viable under the PSLRA.'" *Lapiner* v. *Camtek, Ltd.*, No. C 08-01327 MMC, 2011 WL 445849, at *3 (N.D. Cal. Feb. 2, 2011) (quoting *In re Impac Mortgage Holdings, Inc. Sec. Litig.*, 554 F. Supp. 2d 1083, 1092 (C.D. Cal. 2008)); *see also In re Nextcard, Inc. Sec. Litig.*, No. C 01-21029 JF (RS), 2006 WL 708663, at *3 (N.D. Cal. Mar. 20, 2006) ("This Court adopts the reasoning of the decisions concluding that the group published pleading doctrine no longer is viable after the PSLRA."); *Tibco*, 2006 WL 1469654, at *27 ("[C]ourts in this district are increasingly finding that the group pleading doctrine is contrary to the PSLRA."); *Oklahoma Firefighters*, 50 F. Supp. 3d at 1354 (collecting cases). Like the "majority of district courts within the Ninth Circuit," this Court should likewise reject any attempt by Plaintiffs to end-run the pleading requirements of the PSLRA.

preparation of the allegedly misleading statements.'" *Tibco*, 2006 WL 1469654, at *28 (citation omitted). The Complaint is devoid of any such allegations.

Because the Complaint fails to allege any facts demonstrating that a particular officer of VWGoA, VWoA, or AoA made an allegedly false or misleading statement, Plaintiffs have failed to allege that any individual with scienter made a false or misleading statement on behalf of VWGoA, VWoA, or AoA, and thus cannot state a claim as to those Defendants.

Even assuming, contrary to Plaintiffs' allegations, that either Browning or Horn made a false statement that could be attributed to VWGoA and VWoA, Plaintiffs have failed to allege particularized facts giving rise to a strong inference that either knew about the defeat device at the time the alleged misstatements were made. There are no allegations whatsoever indicating that Browning knew about the existence of defeat devices in Volkswagen diesel vehicles prior to leaving VWGoA and VWoA in December 2013. (Compl. ¶ 51.) Moreover, Plaintiffs' vague allegations as to Horn rest only on public statements he made *after* Volkswagen's public disclosure of the defeat devices in September 2015 and on a distortion of the content of an email sent to Horn on May 15, 2014, as discussed *infra*. By and large, Plaintiffs make only conclusory allegations that Browning and Horn were "involved in the day-to-day operations of, and exercised power and control over, VWGoA and VWoA" (*id.* ¶¶ 50-51), and "acted with scienter because [VWGoA and VWoA, as well as Horn and Browning] were centrally involved in the process for acquiring all necessary approvals and certifications so that their vehicles could legally be sold and driven in the United States" (*id.* ¶ 310).

As to the first of these allegations, "'corporate management's general awareness of the day-to-day workings of the company's business does not establish scienter . . . .'" *S. Ferry*, 542 F.3d at 784-85 (quoting *Metzler*, 540 F.3d at 1087). As to the second, Plaintiffs allege that VWAG—not VWGoA or VWoA—was responsible for the existence of the defeat device, which, again, comprised merely lines of code in one of the vehicles' computer systems. (Compl. ¶ 153.) Plaintiffs do not allege any facts suggesting that Browning or Horn was involved in acquiring these "approvals and certifications," nor do Plaintiffs explain how or why they would have discovered the defeat devices as a result of these efforts. (Compl. ¶ 310.) To the contrary, Plaintiffs specifically allege that VWAG

"produce[d] manipulated results" during testing, which VWAG then "self-report[ed] to regulators." (Compl. ¶ 153.)

Horn's Alleged Knowledge. The Complaint contains generalized allegations that "[d]efendants," "senior executives" and "management" were aware of the existence of the defeat device. (*See, e.g., id.* ¶ 7, 9, 15.) Some of these vague allegations reference Horn, but none alleges that he was actually aware of the existence or use of any defeat device in diesel vehicles during the proposed Class Period. As already noted, the Complaint contains no allegation that Horn personally made any false or misleading statements to investors. Plaintiffs' allegations therefore fail to support either the existence of a false or misleading statement by Horn or the required "strong inference" of intentional or deliberately reckless conduct by him in connection with any such statement.

To the extent that Plaintiffs' allegations refer to Horn at all, they primarily recite public statements that he made *after* Volkswagen's public disclosure of the defeat device in September 2015. These post-disclosure statements do not evidence Horn's prior knowledge of the defeat device. For example, Plaintiffs refer repeatedly to Horn's testimony before Congress on October 8, 2015—testimony that he provided after Volkswagen had publicly disclosed and acknowledged the defeat device and it had become the topic of widespread media coverage. (*Id.* ¶¶ 145, 199, 252, 253.) Plaintiffs' repeated citations to Horn's congressional testimony also conspicuously omit that he testified under oath that he had *no* knowledge of the defeat device until the days immediately preceding Volkswagen's disclosure to the EPA and CARB on September 3, 2015. *See Volkswagen Emissions Cheating Allegations: Initial Questions, Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 114th Cong. (statement of Michael Horn).

Plaintiffs also allude to Horn's alleged knowledge of an emissions compliance issue at Volkswagen, in particular, based on an email sent to him on May 15, 2014. (Compl. ¶ 15.) Although Plaintiffs refer to this as a "written memo[] concerning the defeat devices and regulatory scrutiny" (*id.*), Plaintiffs do not allege that such memo actually informed Horn of the use of a defeat device. As Plaintiffs concede, Horn was informed of "a possible emissions non-compliance." (Compl. ¶ 199.) Horn's awareness, based on that memo, of possible, but unconfirmed, emissions compliance issues at Volkswagen does not suggest, much less demonstrate, that he had knowledge that an *actual*

compliance issue would ultimately be identified or that it would involve the existence or use of a defeat device. Thus, none of Plaintiffs' allegations gives rise to a "strong inference" that Horn acted either intentionally or with deliberate recklessness

Browning's Alleged Knowledge. Plaintiffs do not plead a single fact showing that Browning, the CEO of VWGoA only from October 2010 through December 2013, had any knowledge of the alleged defeat device or the inaccurate emissions test reports. Browning never had any position with any part of the Volkswagen group prior to June 2010. Plaintiffs' sole allegation concerning Browning's scienter is that he "acted with scienter because [he was] centrally involved in the process for acquiring all necessary approvals and certifications so that [VWGoA, VWoA, and AoA] vehicles could legally be sold and driven in the United States." (Compl. ¶ 310.) This is plainly insufficient. *See Tibco*, 2006 WL 1469654, at *28 ("Plaintiffs must plead that the officer was directly involved not only in the day-to-day affairs of the company in general but also in the preparation of its allegedly misleading statements in particular."). Browning was not even at VWGoA when the alleged defeat device fraud was conceived and implemented. Nor do Plaintiffs plead any facts that would make it plausible that Browning knew of the alleged fraud. To the contrary, Plaintiffs plead that starting in 2008 VWAG "secretly" manipulated the code and that this secrecy was maintained throughout. (*See*, *e.g.*, *id*. ¶¶ 75, 76, 142-47). There are no allegations that this alleged secret was disclosed to Browning or anyone in America. The only alleged internal disclosure of the emissions fraud during Browning's tenure happened in Germany. Plaintiffs allege that in 2011, a VWAG employee in Germany complained about the emissions fraud, and his complaint allegedly was reviewed by a German executive of the German parent. (*Id*. ¶¶ 84, 188-89.) There is no allegation that VWAG told VWGoA about the complaint, or that anyone in Volkswagen's American operations (much less Browning) was aware of the alleged whistleblowing. Indeed, the Complaint is devoid of any specific facts showing that anybody at VWGoA had knowledge of the defeat device prior to the public disclosure.

Because Plaintiffs have failed to allege scienter as to Browning and Horn, they have failed to allege scienter as to VWGoA, VWoA, and AoA.

* * *

In sum, Plaintiffs must plead detailed facts giving rise to a strong inference that a specific corporate officer had scienter at the time he or she made a false or misleading statement. Because Plaintiffs have failed to allege adequately scienter as to either Winterkorn or Diess, they have failed to allege scienter as to VWAG. With respect to the remaining Corporate Defendants, Plaintiffs have not alleged any misstatements by a corporate officer of AoA, nor do they allege that Horn or Browning was involved in VWGoA and VWoA's alleged misrepresentations. Even if Plaintiffs had adequately alleged that Horn or Browning made a false statement, they have failed to allege particularized facts giving rise to a strong inference that either knew about the defeat device at the time the alleged misstatements were made.

IV. PLAINTIFFS FAIL TO ALLEGE ANY ACTIONABLE MISSTATEMENTS OR OMISSIONS.

Even if Plaintiffs' scienter allegations had satisfied the strict pleading requirements of the PSLRA (they did not), Plaintiffs have failed to comply with its "exacting requirements for pleading 'falsity.'" *Metzler*, 540 F.3d at 1070. "A litany of alleged false statements, unaccompanied by the pleading of specific facts indicating why those statements were false, does not meet this standard." *Id.* Instead, the "complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4(b)(1). This requirement "prevents a plaintiff from skirting dismissal by filing a complaint laden with vague allegations of deception unaccompanied by particularized explanation stating *why* the defendant's alleged statements or omissions are deceitful." *Metzler*, 540 F.3d at 1061 (emphasis in original).

Despite its length, the Complaint fails to allege any actionable misstatement or omission by VWAG, Winterkorn or Diess. And as shown above, Plaintiffs do not allege that Horn or Browning made any false statements or omissions. The Complaint dedicates dozens of pages to allegations that VWGoA, VWoA, and AoA made misleading statements, for example, statements in press kits that Volkswagen and Audi vehicles fulfilled emissions requirements "in all 50 states." (*See, e.g.*, Compl. ¶¶ 401-02.) But the American Defendants are not alleged to have known—and could not have known—

that the challenged statements were false, and none of those statements can be attributed to VWAG, which is a separate and distinct legal entity.

Plaintiffs' allegations that VWAG made misrepresentations in annual and quarterly reports fare no better. *First*, the vague statements Plaintiffs cite in the Complaint constitute aspirational statements that cannot form the basis of a Section 10(b) claim. Nor did VWAG have a duty to disclose the use of the defeat device in the challenged reports. *Second*, Plaintiffs' allegation that VWAG understated its liabilities and overstated its profits because the Company did not disclose the possibility that it would be required to pay for consumer relief to fix cars affected by the defeat device are inadequate. (Compl. ¶¶ 215-25.) Even if VWAG were aware of the possibility of such liability (which Plaintiffs have not adequately alleged, see *supra* Section III), it had no obligation to disclose these uncertain risks. *Lastly*, Plaintiffs allege that VWAG made misstatements in connection with the stickers attached to "Clean Diesel" vehicles stating that they complied with US and European emissions standards. This allegation—which is simply attributed to "Defendants"—fails to meet the PSLRA's stringent standard to allege false statements "with particularity."[14]

A. VWAG's Alleged Misstatements Are Not Actionable.

The alleged misstatements in the Complaint actually attributed to VWAG and addressed to investors are almost all contained within the annual and quarterly reports filed by VWAG in Germany. But Plaintiffs fail to allege adequately that VWAG made any misstatements in these German filings because the statements at issue are merely aspirational statements that would be immaterial to reasonable investors. (*See, e.g.*, Compl. ¶¶ 344 ("Our aim ls [sic] to make the Volkswagen Group the leading automaker by 2018—economically and ecologically."), 345 ("We are paying particular attention to our environmentally friendly orientation . . . Our activities are oriented on setting new ecological

[14] Plaintiffs also allege several misstatements by VWAG, VWGoA, VWoA and AoA that concern Volkswagen make and model years that are not alleged to have contained a defeat device. (*Compare* Compl. ¶ 178 (listing all make and model years alleged to be equipped with defeat device) *with* Compl. ¶¶ 333 (statements by VWoA/VWGoA concerning 2010 Beetle and Passat); 383 (statements by VWoA/VWGoA concerning 2011 Passat); 386 (same); 384 (statements by VWAG concerning 2011 Beetle); 385 (statements by VWoA/VWGoA concerning 2011 Beetle); 387 (same); 389 (statements by VWoA/VWGoA concerning 2012 Beetle); 420 (statements by AoA concerning 2012 Porsche Cayenne Diesel). These statements cannot form the basis of a Section 10(b) claim because they are not adequately alleged to have been false. *Metzler*, 540 F.3d at 1070.

standards in the areas of vehicles, powertrains and lightweight construction.").) The Ninth Circuit has held that such general, "feel good monikers," the type of "vague statements of optimism" made by all public companies, constitute "non-actionable puff[ing]." *In re Cutera Sec. Litig.*, 610 F.3d at 1111. "Professional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives . . . ." *In re VeriFone Sec. Litig.*, 784 F. Supp. 1471, 1481 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993).[15]

The Sixth Circuit, in a securities fraud case involving vehicle safety defects, held that a series of statements almost identical to those alleged here constituted non-actionable puffery. *See In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563 (6th Cir. 2004). The *Ford* plaintiffs alleged that Ford made "many misleading statements regarding its commitment to quality, safety, and corporate citizenship," including the following: "Ford has its best quality ever"; Ford has made "quality a top priority"; "Ford is a worldwide leader in automotive safety"; Ford "want[s] to make customers' lives . . . safer"; Ford has "dedicated . . . [itself] to finding even better ways of delivering . . . safer vehicles to [the] consumer"; Ford "want[s] to be clear leaders in corporate citizenship"; and Ford "is going to lead in corporate social responsibility." *Id*. at 570.

In affirming dismissal, the Sixth Circuit held that "[s]uch statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading." *Id*. As the Sixth Circuit explained:

> All public companies praise their products and their objectives. Courts everywhere "have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague, so lacking in specificity, or so

[15] *See also Impac Mortg. Holdings*, 554 F. Supp. 2d at 1096 (acknowledging that "[v]arious circuit courts, including the Ninth Circuit, have held that vague, generalized assertions of corporate optimism or statements of 'mere puffing' are not actionable material misrepresentations under federal securities laws") (collecting cases); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1229 (S.D. Cal. 2010); *Brodsky* v. *Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1113 (N.D. Cal. 2009); *In re Foundry Networks, Inc. Sec. Litig.*, No. C 00-4823 MMC, 2003 WL 22077729, at *15-16 (N.D. Cal. Aug. 29, 2003); *Kane* v. *Madge Networks N.V.*, No. C-96-20652-RMW, 2000 WL 33208116, at *2-4 (N.D. Cal. May 26, 2000), *aff'd sub nom. Kane* v. *Zisapel*, 32 Fed. App'x 905 (9th Cir. 2002); *Allison* v. *Brooktree Corp.*, 999 F. Supp. 1342, 1348-49 (S.D. Cal. 1998); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1095 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996).

> clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."

Id. at 570-71 (internal quotation marks and citations omitted). Winterkorn's supposedly misleading platitude—quoted in a September 13, 2011 press release—that VWAG "supported . . . big emotions but small emissions" (Compl. ¶ 388) is a classic example of puffery.

VWAG's statements in its annual and quarterly reports are materially equivalent to statements that the Ninth Circuit held to be inactionable puffery in *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 931-32 (9th Cir. 1996):

Statements in *Syntex*	**Statements in VWAG's Public Reports**
"We're a company on the move. We're doing well and I think we have a great future . . . Business will be good this year . . . . We expect the second half of fiscal 1992 to be stronger than the first half, and the latter part of the second half to be stronger than the first, because we are incurring expenses in connection with new product introductions, including our expanded sales force, before we have the full benefit of new product sales."	"Our aim ls [sic] to make the Volkswagen Group the leading automaker by 2018—economically and ecologically." (Compl. ¶ 344.) "At Volkswagen, what really matters to us most is that we can satisfy our customers and employees all over the world; that we can drive forward all the technologies needed to make our vehicles even safer and more environmentally friendly; that we can conserve resources and use renewable energy in our plants; and, not least, that we can continue our broad commitment to education, culture and a responsible society." (Compl. ¶ 352.) "The Volkswagen Group aims to increase its unit sales and profitability for the long term. This is why its Strategy 2018—with which Volkswagen intends to become the global economic and environmental leader among automobile manufacturers by 2018—has been anchored in the Company." (Compl. ¶ 373.)

"Based on strong demand for our innovative, cost-effective newer products and our rich product pipeline, we believe we can achieve our goal of sales and earnings growth in the top 50 percent of the industry during the decade of the 1990's. . . . The [stage] we are in right now, is a very rich phase. Everything is clicking. New products are coming in a wave, not in a trickle. Old products are doing very well . . . ."	"Responsibility for the environment[,] for our employees and for society is a core component of our Strategy 2018. Because we are convinced that this is the only way that Volkswagen can grow sustainably and profitably. And because this is an integral part of becoming the leading automobile manufacturer—in every respect." (Compl. ¶ 352.) "Our pursuit of innovation and perfection and our responsible approach will help to make us the world's leading automaker by 2018—both economically and ecologically." (Compl. ¶¶ 344, 351, 357, 367, 372.) "[O]ur goal is to become better and better, more efficient, more environmentally friendly and even more customer-centric—from development through production down to sales." (Compl. ¶ 367.) "Our attractive and environmentally friendly range of vehicles, which we are selectively expanding, and the strong position enjoyed by our individual brands in the markets worldwide, are key factors allowing us to leverage the Group's strengths and to systematically increase our competitive advantages. Our activities are primarily oriented on setting new ecological standards in the areas of vehicles, drivetrains and lightweight construction." (Compl. ¶ 373.)

Moreover, VWAG was not obligated to disclose in the challenged reports the use of defeat devices in the diesel vehicles. "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic*, 485 U.S. at 239 n.17. There is no freestanding duty under U.S. law "to disclose uncharged, unadjudicated wrongdoing." *In re Teledyne*, 849 F. Supp. at 1382 (quoting *Ciresi* v. *Citicorp*, 782 F. Supp. 819, 823 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 1161 (2d Cir. 1992)). Rather, "[c]ourts that have determined that corporations had a duty to disclose uncharged illegal conduct in order to prevent other statements from misleading the public have required a connection between the illegal conduct and the statements beyond the simple fact that a criminal conviction would have an

adverse impact upon the corporation's operations in general or bottom line." *Menkes* v. *Stolt-Nielsen S.A.*, No. 3:03-CV-409(DJS), 2005 WL 3050970, at *7 (D. Conn. Nov. 10, 2005); *see, e.g.*, *In re Sotheby's Holdings, Inc.*, No. 00 Civ. 1041(DLC), 2000 WL 1234601, at *4 (S.D.N.Y. Aug. 31, 2000) (denying motion to dismiss securities fraud claims based upon an anti-competitive agreement and finding that defendants had a duty to disclose the anti-competitive conduct because the corporation stated that competition was "intense" with its "primary auction competitor," which was a party to the anti-competitive agreement). Here, there is no such connection between "the illegal conduct and the statements." Plaintiffs do not allege that VWAG made any material statements in its reports concerning its compliance with U.S. emissions laws. Rather, the statements in VWAG's reports are the kind of aspirational statements of corporate culture made by all public companies, which, for VWAG, Winterkorn and Diess, cannot trigger liability because they are simply "vague statements of optimism."[16] *In re Cutera Sec. Litig.*, 610 F.3d at 1111.[17]

B. Plaintiffs' Allegations That VWAG Understated its Liabilities Are Insufficient.

Plaintiffs allege that VWAG made misleading and materially false statements in its financial statements by understating its liabilities relating to the emissions violations. But VWAG did not have a duty to predict the uncertain risks Plaintiffs allege should have been disclosed as a matter of law. In a similar context involving a recall of motor vehicles, a court concluded that Ford was not obligated to disclose the uncertain costs of recall, because "[c]ompanies are under no duty to disclose predictions that are not substantially certain to hold." *In re Ford Motor Co. Sec. Litig.*, 184 F. Supp. 2d 626, 633 (E.D. Mich. 2001), *aff'd*, 381 F.3d 563 (6th Cir. 2004). Nor are corporations required to predict future litigation risks. *See, e.g.*, *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377

[16] Diess is alleged to have signed only the Second Quarter 2015 and Third Quarter 2015 Interim Reports. (Compl. ¶¶ 343, 428.)

[17] Further, "there is no duty to update vague statements of optimism or expressions of opinion, and no need to update when the original statement was not forward-looking and does not contain some factual representation that remains 'alive' in the minds of investors as a continuing representation, or if the original statements are for some other reason not material." *In re FoxHollow Techs., Inc., Sec. Litig.*, No. C 06-4595 PJH, 2008 WL 2220600, at *17 (N.D. Cal. May 27, 2008) (citing *In re Int'l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998)), *aff'd sub nom. In re Foxhollow Techs., Inc. Sec. Litig.*, 359 F. App'x 802 (9th Cir. 2009). Because the challenged statements in VWAG's annual and quarterly reports were not themselves material, no duty to correct those statements arose.

(S.D.N.Y. 2004) (Defendant "was not required to make disclosures predicting . . . litigation"), *aff'd sub nom. Albert Fadem Trust* v. *Citigroup, Inc.*, 165 F. App'x 928 (2d Cir. 2006); *see also Ciresi*, 782 F. Supp. at 823 ("[T]he law does not impose a duty to disclose uncharged, unadjudicated wrongdoing . . . .").

Moreover, although Plaintiffs seek to hold VWAG to a higher disclosure standard pursuant to international accounting standards (Compl. ¶ 215 ("As a German corporation, VW AG is required to prepare its financial statements in accordance with International Financial Reporting Standards")), Plaintiffs offer no particularized allegations that VWAG violated that duty to disclose. Plaintiffs merely argue that all of VWAG's quarterly and annual statements starting in 2009 contained material omissions because they did not disclose that "it was more likely than not that the defeat devices would be discovered and that VW AG would incur enormous liabilities to address this self-inflicted problem." (Compl. ¶ 222.) But "[t]he notion that IAS 37 obligates companies to disclose any potentially illegal conduct the instant it is committed because future liability is always possible, and that failure to do so may form the basis for a material omission under Rule 10b–5, is unrealistic and contrary to precedent." *Gusinsky* v. *Barclays PLC*, 944 F. Supp. 2d 279, 290 & n.80 (S.D.N.Y. 2013) (citing cases), *aff'd in part, vacated in part on other grounds, remanded sub nom. Carpenters Pension Trust Fund of St. Louis* v. *Barclays PLC*, 750 F.3d 227 (2d Cir. 2014).

And Plaintiffs allege in conclusory fashion that the "losses relating to the use of defeat devices were 'probable' under IAS 37 because it was more likely than not that the defeat devices would be discovered and that VW AG would incur enormous liabilities to address this self-inflicted problem," but they offer no particularized allegations that VWAG estimated these losses to be probable before it disclosed them in its Third Quarter 2015 Interim Report issued on October 28, 2015. (Compl. ¶ 222, Giuffra Decl. Ex. I.) To the contrary, Plaintiffs' arguments are belied by their concession that VWAG officials may have operated on the "mistaken belief that Volkswagen could resolve any US legal issues by paying a 'cost-of-doing-business' fine" (Compl. ¶ 205) and that Winterkorn was informed in November 2014 that the problems with the diesel engines would cost approximately €20 million to resolve (*id.*). Thus, as their own allegations make clear, Plaintiffs have failed to plead a claim under Section 10(b) on the basis of VWAG's alleged underreporting of liabilities.

C. Plaintiffs' Allegations Relating to Emissions Compliance Stickers Are Insufficient.

Plaintiffs allege that "Defendants continued to make materially false and misleading statements about their vehicles' emissions-control technology and compliance with applicable US and European emissions standards" in stickers on the vehicles. (Compl. ¶ 339.) The Complaint claims only that "[e]very . . . vehicle sold by the Defendants in the United States" bore these stickers, but fails to identify which Defendant, if any, was responsible for the stickers. (*Id.* ¶ 340.) Again, these are not statements addressed to investors, and Plaintiffs fail to plead with particularity that any specific Defendant had a role in the distribution of these emissions compliance stickers used for vehicles. *See In re NVIDIA Corp. Sec. Litig.*, No. 08-CV-04260-RS, 2010 WL 4117561, at *5 (N.D. Cal. Oct. 19, 2010) (securities fraud claims must specify the "who, what, where, when, and how"). Absent a particularized allegation that VWAG or any other Defendant "made" the statements contained in the emissions compliance stickers, Defendants cannot be held liable under Section 10(b). *Id.*

In addition to their failure to allege adequately which Defendant purportedly is responsible for making the statements on the vehicle emissions stickers, Plaintiffs also fail to allege that the statements on these stickers were in any way directed toward the investing public—which Plaintiffs must do since they rely on the "fraud-on-the-market" theory for establishing their reliance on the alleged misstatements. (*See* Compl. ¶ 447.) Statements generally held to be available to the public for the purposes of establishing reliance under the fraud-on-the-market theory consist of regulatory filings, public presentations, press releases, and other materials distributed or filed by a defendant. *See, e.g.*, *Provenz* v. *Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996) (finding that false and misleading statements in an SEC filing operated as "fraud on the market"); *Bortel* v. *JHM Mortgage Sec., L.P.*, No. 94-CV-20530 JW (PWT), 1995 WL 7953, at *1 (N.D. Cal. Jan. 5, 1995) (noting, where Plaintiffs sought to invoke the "fraud-on-the-market" doctrine, defendants' "SEC filings, financial statements, [and] public statements" were critical to plaintiffs' case); *DeMarco* v. *Lehman Bros., Inc.*, 309 F. Supp. 2d 631, 636 (S.D.N.Y. 2004) (finding that research reports prepared by defendant were subject to the "fraud-on-the-market" presumption). Here, Plaintiffs do not claim that the emissions stickers were published or disseminated; they merely allege that they were affixed to vehicles sold during the class period. This falls far short of Plaintiffs' pleading burden under the PSLRA. *Cf. Stoneridge Inv.*

Partners, LLC v. *Scientific-Atlanta*, 552 U.S. 148, 166-67 (2008) (holding that allegations that a non-issuer defendant participated in a fraudulent scheme were too remote from the investing public to satisfy the reliance element of Section 10(b), in part, because the defendant's alleged deception "took place in the marketplace for goods and services, not in the investment sphere").

D. The Statements Attributed to VWAG's U.S. Subsidiaries Are Not Actionable Against VWAG.

The bulk of the Complaint concerns alleged misstatements by VWAG's subsidiary VWGoA, as well as VWoA, and AoA. (Compl. ¶¶ 329-31, 333-37, 382-83, 385, 387, 389-412, 416-24). These statements were made only in marketing brochures, press releases and press kits, and generally related to the compliance of Volkswagen and Audi vehicles with the emissions standards of "California and all 50 U.S. states." (*See, e.g.*, Compl. ¶¶ 330-31.) Under the Supreme Court's decision in *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011), however, only the "maker" of a statement can be found liable for misrepresentations under Section 10(b) and Rule 10b-5. In *Janus*, the plaintiff sought to hold both the parent company that created a mutual fund and the mutual fund liable under Rule 10b-5 for alleged misrepresentations made by the mutual fund in its filings with the SEC. *Id.* at 139-40. The Supreme Court held that a maker of a statement is "the entity with authority over the content of the statement and whether and how to communicate it," and found that plaintiffs failed to state a Rule 10b-5 claim against the parent company, as they did not allege that the SEC statements were falsely attributed to the mutual fund or that the statements in the filings came from the parent rather than the subsidiary. *Id.* at 143-144, 147.

To attribute statements made by VWGoA, VWoA and AoA to VWAG, Plaintiffs must plead *specific* facts to show that VWAG had "ultimate authority" over "the content of the statement and whether and how to communicate" each statement alleged to have been made by its subsidiaries. *Id.* at 144; *see also In re CytRx Corp. Sec. Litig.*, No. 14-CV-1956-GHK (PJWx), 2015 WL 5031232, at *6 (C.D. Cal. July 13, 2015) ("Courts since *Janus* have applied it to disallow Rule 10b–5(b) claims against defendants who merely requested, influenced, helped create, or supplied information for the relevant

false or misleading statements.").[18] Plaintiffs' allegation that VWAG "exercised power and control over, VWGoA, VWoA and AoA" during the relevant period (Compl. ¶ 40) is insufficient to establish liability for statements made by these entities under *Janus*.[19] Plaintiffs have not alleged any facts showing VWAG's control over any of the statements attributed to VWGoA, VWoA, or AoA—and certainly none with the required specificity. Accordingly, VWAG cannot be held liable for any of the alleged statements attributed to VWGoA, VWoA, or AoA.

V. EVEN IF A SECTION 10(B) CLAIM HAS BEEN STATED, PLAINTIFFS FAIL TO PLEAD CONTROL PERSON LIABILITY UNDER SECTION 20(A).

To state a claim for control person liability under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), against VWAG and the Individual Defendants, Plaintiffs must show: (1) a primary violation of federal securities laws, and (2) that a particular Defendant exercised actual power or control over the primary violators. *See Zucco Partners*, 552 F.3d at 990. Because Plaintiffs have failed to allege any primary violation of securities laws under Section 10(b), they have failed to allege a Section 20(a) violation. *See Oregon Pub. Employees Ret. Fund* v. *Apollo Grp. Inc.*, 774 F.3d 598, 610 (9th Cir. 2014); *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 711 (9th Cir. 2012); *Howard* v. *Hui*, 2001 WL 1159780 (N.D. Cal. Sept. 24, 2001).

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[18] *See also Reese* v. *BP Exploration (Alaska) Inc.*, 643 F.3d, 681 693 n.8 (9th Cir. 2011) (declining to hold defendant liable for "making" certain statements when there was "no allegation that [defendant] made the filings and falsely attributed them to the [third party publisher] Trust," and the plaintiff only generally alleged that the "Trust Agreement provides that [defendant] is 'authorized to make and shall be responsible for' the Trust's filings"); *In re CytRx Corp. Sec. Litig.*, 2015 WL 5031232, at *7 ("Without *specific allegations* about each . . . Defendants' purported level of control over the drafting and release of each of the fourteen published DreamTeam articles, we cannot conclude that these Defendants had ultimate authority over the potentially actionable false statements or omissions within them." (emphasis added)).

[19] *See McIntire* v. *China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 137-38 (S.D.N.Y. 2013) (finding that claims against the ultimate parent and direct parent of an entity that issued a report containing alleged misstatements were not actionable under *Janus*, even where ultimate parent allegedly "[made] decisions on behalf of [the subsidiary] on major matters," as the plaintiffs failed to allege that either parent entity had "ultimate authority over [the report] or the alleged misstatements contained therein"); *Kerr* v. *Exobox Techs. Corp.*, No. H-10-4221, 2012 WL 201872, at *11 (S.D. Tex. Jan. 23, 2012) (finding, where plaintiffs pleaded that defendant "controlled" the entity that issued allegedly false and misleading statements as an owner of between 88% and 100% of the entity during the relevant times, that plaintiffs nevertheless failed to allege that defendant had "ultimate control" over the statements as required by *Janus*).

Even if Plaintiffs had pled a primary violation, they put forth no specific factual allegations that Diess, Horn or Browning exercised actual control over the alleged violators, as required by Section 20(a). *See In re Invensense, Inc. Sec. Litig.*, 2016 WL 1182063 (N.D. Cal. Mar. 28, 2016). Plaintiffs' allegations are insufficient to show that Diess, Horn or Browning "'directly or indirectly' controlled the violator." *Paracor Fin., Inc.* v. *Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996) (citation omitted). Plaintiffs "must plead the circumstances of the control relationship with sufficient particularity to satisfy rule 9(b)."[20] *Howard*, 2001 WL 1159780, at *4 (citing *In re Oak Tech. Sec. Litig.*, 1997 WL 446168, at *14 (N.D. Cal. Aug. 1, 1997), and *In re Glenfed, Inc. Sec. Litig.*, 60 F.3d 591, 593 (9th Cir. 1995)). "[O]n a motion to dismiss, the Court is required to review plaintiffs' allegations as to the circumstances of the control relationship and determine whether they are sufficient to establish control person liability." *Id*. With respect to Diess, Horn and Browning, there are no such sufficient allegations.

Plaintiffs allege that Diess, Horn and Browning are control persons based on nothing more than their position as a member of VWAG's management board or as an officer of VWGoA. But a board member or corporate officer "is not automatically liable as a controlling person." *Burgess* v. *Premier Corp.*, 727 F.2d 826, 832 (9th Cir. 1984) (citation omitted). Such position alone "does not create any *presumption* of control" and "does not by itself sustain an allegation of control person liability." *Oak Tech.*, 1997 WL 448168, at *14 (emphasis in original).

Rather, there must be a showing of the defendant's actual participation in the alleged securities violation. For example, in *Paracor*, the Ninth Circuit held that a CEO was not a control person with respect to a memorandum distributed by the company to investors. 96 F.3d at 1161. The court found that while the CEO was involved in company management, the plaintiffs had introduced no evidence that he was involved in or authorized to execute the particular acts alleged in the complaint. *Id*. Specifically, the CEO in *Paracor* "did not 'directly or indirectly induce the act or acts constituting

[20] At minimum, the facts supporting control person liability claim must be plead with "facial plausibility." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). In the specific context of a securities action, this Court has held that a Section 20(a) is a fraud allegation and therefore "must be plead with particularity." *Howard*, 2001 WL 1159780, at *4 (citing Fed. R. Civ. P. 9(b)). Here, Plaintiffs have met neither standard.

the violation or cause of action.'" *Id.* at 1164 (citations omitted); *see also Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1065-67 (9th Cir. 2000) (director not liable under § 20(a) because he did not exercise "any specific control over the preparation and release of the financial statements at issue").

With respect to Diess, Plaintiffs allege that Diess faces control person liability for the alleged misstatements of VWAG, VWGoA, VWoA, and AoA solely through his position—starting in July 2015—as "a Member of the Board of Management of VWAG and Chairman of the Board of Management of the Volkswagen Passenger Cars Brand." (Compl. ¶¶ 52, 471). Plaintiffs obviously cannot plead that Diess "controlled" VWAG or any of its subsidiaries *before July 2015*, when Diess assumed his position on the Board of Management. *Berry* v. *Valence Tech., Inc.*, 175 F.3d 699, 706-07 (9th Cir. 1999) (affirming 12(b)(6) dismissal because complaint "contains no allegations of how [defendant] controlled or otherwise significantly influenced the alleged misstatements made by [the company] after his resignation."). Nor have Plaintiffs sufficiently alleged control after this period with respect to VWGoA, VWoA, and AoA—there are no particularized allegations that Diess "directly or indirectly" induced the alleged misstatements attributed to them.

With respect to Horn and Browning, VWGoA did not issue or market the securities at issue and Plaintiffs do not allege otherwise. Nor do Plaintiffs allege that VWGoA, Horn or Browning made misstatements to investors of VWAG's ADRs. Browning, specifically, could not be a control person with respect to any of the alleged emissions fraud because he was not hired by Volkswagen until 2010 and did not become the CEO of VWGoA until October 2010.[21] Prior to 2010, he worked for Ford and General Motors.[22] Browning did not work at any Volkswagen entity when the alleged scheme at VWAG to install a defeat device was allegedly conceived and implemented in 2006 through 2008. (*Cf.* Compl. ¶¶ 75, 76, 81, 83, 84, 142-47.) And Browning did not work at any Volkswagen entity when the "clean diesel" advertising campaign in the United States allegedly was launched in 2008. (*Cf. id.* ¶ 63.)

[21] *See* (Giuffra Decl. Ex. J.) Matters of public record may be considered in determining if dismissal is proper in a federal securities action. *Nguyen* v. *Radient Pharm. Corp.*, 2011 WL 5041959, at * 3 (C.D. Cal. Oct. 20, 2011) (citing *Parks School of Business, Inc.* v. *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)); *Mack* v. *South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

[22] Plaintiffs do not allege that Browning is an engineer or had any experience with diesel engines.

Browning resigned as CEO of VWGoA and left the company in December 2013.[23] Thus, he was not at VWGoA when the ICCT/West Virginia University study was published in May 2014 questioning the emission results and when the Gottweis Memo was allegedly provided to Winterkorn in May 2014. (*Id.* ¶¶ 86, 201.) Even if Browning had remained at VWGoA during that time, his role as CEO did not include any involvement with Volkswagen securities. As with Horn, Plaintiffs have not plead any specific facts that establish a link between the general duties of an executive of VWGoA and the emissions fraud alleged in the Complaint.

Moreover, Plaintiffs have not (and cannot) plead specific facts showing that Horn or Browning "directly or indirectly induced" the making of any of the alleged misstatements. Plaintiffs' claim that Horn and Browning "direct[ed] [VWGoA's] public statements and regulatory actions" is conclusory and unsupported (not to mention incorrect). (Compl. ¶ 50.) The Complaint is devoid of any allegations to support Plaintiffs' claim that Horn and Browning exercised any control over the alleged false statements in their role as CEO of VWGoA. None of the alleged misstatements is attributed to Horn or Browning. There is nothing to indicate that they directed, reviewed or had anything to do with any of the challenged statements. Indeed, Plaintiffs allege (inadequately) that it was VWAG that was "involved in the day-to-day operations of, and exercised power and control over, VWGoA, VWoA, and AoA including by, among other things, appointing their boards of directors and executive officers and *directing their public* statements *and regulatory actions.*" (*Id.* ¶ 40 (emphasis added).)

Nor have Plaintiffs alleged any sufficient facts to demonstrate that Horn and Browning "directed" VWGoA's "regulatory actions." (*Id.* ¶ 51). There is no allegation that VWGoA took any "regulatory action," much less a specific allegation that Horn or Browning directed such action. Browning, specifically, did not work at any Volkswagen entity when Volkswagen was required to be in full compliance with the more stringent emissions standards implemented by the EPA and CARB.[24]

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[23] *See* Giuffra Decl. Ex. K.

[24] The EPA adopted its Tier 2 fuel emissions standards in 2009 and the CARB standards took effect 2004 to 2010. (Compl. ¶¶ 65, 68.) Browning left VWGoA before the new Tier 3 standards were enacted in 2014 and before the new CARB II standards were implemented beginning in 2015. (*Cf. id.* ¶¶ 66, 69.)

Moreover, Plaintiffs allege that it was VWAG—not VWGoA or its CEOs—that performed the emissions testing and provided the results to regulators. (*Id.* ¶¶ 149, 153, 155.)

In sum, the allegations of the Complaint confirm that Plaintiffs have failed to allege sufficiently how Diess, Horn or Browning controlled or otherwise influenced the alleged misstatements upon which the primary Rule 10b-5 claims are predicated. *Berry*, 175 F.3d at 706-07.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint in its entirety.

Dated: August 1, 2016

Respectfully submitted,

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ATTESTATION (CIVIL LOCAL RULE 5-1(i)(3))

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from the signatory.

Dated: August 1, 2016

SULLIVAN & CROMWELL LLP

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