Lambinet v Potsch
2026 NY Slip Op 31383(U)
April 6, 2026
Supreme Court, New York County
Docket Number: Index No. 652830/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FLORIAN LAMBINET AND ROBERT C. ANDERSEN, DERIVATIVELY AS SHAREHOLDERS OF VOLKSWAGEN AKTIENGESELLSCHAFT ON BEHALF OF VOLKSWAGEN AKTIENGESELLSCHAFT,

Plaintiffs,

- v -

HANS DIETER POTSCH, WOLFGANG PORSCHE, FERDINAND OLIVER PORSCHE, BABETTE FROHLICH, PETER MOSCH, BERND OSTERLOH, ESTATE OF FERDINAND PIECH, HANS MICHEL PIECH, ANNIKA FALKENGREN, STEPHAN WOLF, HANS-PETER FISCHER, STEPHAN WEIL, HERBERT DIESS, MARTIN WINTERKORN, MATTHIAS MUELLER, MICHAEL HORN, RICHARD DORENKAMP, HEINZ-JAKOB NEUSSER, JENS HADLER, BERND GOTTWEIS, OLIVER SCHMIDT, DETLEV VON PLATEN, KLAUS ZELLMER, THIERRY KARTOCHIAN, JOSEPH LAWRENCE, MICHAEL BARTSCH, JURGEN PETER, MICHAEL HENNARD, LEONARD KATA, JAMES R. LIANG, PORSCHE AUTOMOBIL HOLDING SE, VOLKSWAGEN GROUP OF AMERICA, INC.,AUDI OF AMERICA, LLC,PORSCHE CARS NORTH AMERICA, INC.,VOLKSWAGEN GROUP OF AMERICA FINANCE LLC,VOLKSWAGEN AKTIENGESELLSCHAFT, NOMINAL DEFENDANT

Defendants.

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INDEX NO. 652830/2021

MOTION DATE 08/21/2025, 09/22/2025, 09/22/2025, 09/22/2025

MOTION SEQ. NO. 001 002 003 004

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 76, 88, 91, 92, 93, 94, 104

were read on this motion to STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 77, 89, 95, 96, 97, 98, 105

were read on this motion to STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 78, 90, 99, 100, 101, 102, 103
were read on this motion to STRIKE PLEADINGS.

This putative derivative action posits a dispute between a German corporation and certain of its current and former board members and controlling shareholders concerning corporate decisions made in Germany. Although those decisions related in part to the company's business in New York (and elsewhere in the United States), this dispute does not. It is a purely intra-corporate dispute concerning the internal affairs of a German company and economic harm purportedly suffered *by the company*, in Germany. No party to this action is a New York resident or citizen. In closely analogous cases involving German corporate governance claims, New York courts have dismissed similar derivative actions on grounds of forum non conveniens (*Haussmann v Baumann*, 73 Misc 3d 1234(A) [Sup Ct, NY County 2021], *affd* 217 AD3d 569 [1st Dept 2023], *affd* 44 NY3d 1007 [2025]) and under the internal affairs doctrine for lack of standing under German law to assert derivative claims (*Ezrasons, Inc. v Rudd*, 44 NY3d 532, 544 [2025]).

For the reasons described below, the same result is warranted here, including on the additional ground that the Amended Complaint in this case also does not adequately plead that the Court has personal jurisdiction over the moving defendants.[1] The Amended Complaint is, therefore, dismissed without prejudice to seeking to assert viable claims in a German court consistent with German substantive law.

[1] It appears that certain named defendants, Estate of Ferdinand Piëch, Martin Winterkorn, Michael Horn, Richard Dorenkamp, Heinz-Jakob Neusser, Jens Hadler, Bernd Gottweis, Oliver Schmidt, Jürgen Peter, and James R. Liang, were not served with the original or Amended Complaint (collectively, the "Unserved Defendants") and thus are not parties to this action or movants on the instant motion to dismiss.

BACKGROUND

Plaintiffs Florian Lambinet and Robert C. Andersen ("Plaintiffs"), owners of shares of Nominal Defendant Volkswagen Aktiengesellschaft ("VWAG"), bring this derivative action for the benefit of VWAG against (a) its controlling shareholders; (b) certain current and former members of VWAG's Supervisory Board; and (c) certain current and former officers and executives, including members of the Board of Management, for breaches of statutory, fiduciary, and other duties to VWAG in connection with the so-called "Clean Diesel" scheme (described below).

The VW Defendants[2] have moved to dismiss Plaintiffs' Amended Complaint (Mot. Seq. 001) on numerous grounds, including: (i) forum non conveniens (CPLR 327); (ii) lack of personal jurisdiction over the VW Defendants (CPLR 302 [a][1]); and (iii) Plaintiffs lack of standing to assert their derivative claims under the substantive law of VWAG's state of incorporation (Germany). Plaintiffs oppose that motion and separately move to strike the affirmations and affidavits submitted by the VW Defendants' German law experts, employees, and counsel (Mot. Seqs. 002-004) in support of the motion to dismiss.

The Parties

According to the sprawling 209-page Amended Complaint (not including exhibits), Plaintiff Lambinet is a citizen of Germany who owns shares of "VWAG preferred and common

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[2] VW Defendants are Porsche Automobil Holding SE, Volkswagen Group of America, Inc., Audi of America, LLC, Porsche Cars North America, Inc., Volkswagen Group of America Finance LLC, Michael Bartsch, Herbert Diess, Annika Falkengren, Hans-Peter Fischer, Babette Fröhlich, Michael Hennard, Thierry Kartochian, Leonard Kata, Joseph Lawrence, Peter Mosch, Matthias Müller, Bernd Osterloh, Hans Michel Piëch, Detlev von Platen, Ferdinand Oliver Porsche, Wolfgang Porsche, Hans Dieter Pötsch, Stephan Weil, Stephan Wolf, and Klaus Zellmer and Nominal Defendant Volkswagen AG (collectively, the "VW Defendants"). As noted above, this list does not include the Unserved Defendants.

stock/ADRs and has owned them during the period of alleged wrongdoing. His share ownership is reflected on VWAG's share registry" (NYSCEF 24 ["Am. Compl."] ¶ 115). Plaintiff Andersen is a U.S. citizen residing in the State of Georgia. "He owns and has continued to own shares of VWAG common stock/ADRs during the period of alleged wrongdoing. His share ownership is reflected on VWAG's share registry" (*id.* ¶ 116).

VWAG is a corporation organized under the German Stock Corporation Act ("GSCA"), headquartered in Wolfsburg, Lower Saxony, Germany. VWAG is in the business of designing, developing, manufacturing, and selling automobiles (*id.* ¶¶ 3, 125). According to Plaintiffs, VWAG Group is the consolidated integrated worldwide corporate enterprise (VWAG and its subsidiaries) under the direct supervision and managerial control of its Controlling Shareholders (defined below) via the Supervisory Board they direct and a Board of Management whose members oversee and enforce uniform standards and conduct for the VWAG Group worldwide, including in New York where it has substantial business operations (*id.*).

Defendants Volkswagen Group of America, Inc. ("VWGoA"), Audi of America, LLC ("Audi America"), Porsche Cars North America, Inc. ("Porsche America"), and Volkswagen Group of America Finance, LLC ("VWGoAF") are wholly-owned or majority-owned VWAG subsidiaries (*id.* ¶¶131–35). VWGoA is a New Jersey corporation headquartered in Virginia. It is registered to conduct business in New York (*id.* ¶ 131). Audi America and VWGoAF are Delaware LLCs headquartered in Virginia; and Porsche America is a Delaware corporation headquartered in Georgia (*id.* ¶¶132–35; NYSCEF 40 ["Green Affirm"] ¶¶4, 13, 21; NYSCEF

41 [“Feygin Affirm”] ¶ 4).[3] Defendant Porsche Automobil Holding SE (“Porsche SE”) is the “holding company of the Porsche and Piëch families” (*id.* ¶¶ 146; *see also* ¶¶ 37–44).

The remaining VW Defendants include eleven current and former VWAG Supervisory Board members, two former VWAG Management Board members, and seven current or former VWAG or subsidiary employees. Specifically, Plaintiffs allege that defendants Hans Dieter Pötsch, Ferdinand Oliver Porsche, Wolfgang Porsche, Hans Michel Piëch, Babette Fröhlich, Peter Mosch, Bernd Osterloh, Annika Falkengren, Stephan Wolf, Hans-Peter Fischer, and Stephan Weil were members of the VWAG Supervisory Board during the relevant times periods of the Amended Complaint (*see id.* ¶¶141–42, 144–45, 147–152, 337). Plaintiffs allege that nine of these ten defendants “frequently traveled to the United States and New York in connection with [their] VWAG positions and duties, which travel was reimbursed by VWAG” (*see id.* ¶¶ 141–42, 144–45, 147–151).[4]

Similarly, Plaintiffs allege that defendants Herbert Diess, Matthias Müller, Detlev von Platen, Klaus Zellmer, Thierry Kartochian, Joseph Lawrence, Michael Bartsch, Michael Hennard, and Leonard Kata were managers, executives, or members of the Board of Management during the relevant times alleged in the Amended Complaint, and that these defendants “frequently traveled to the United States and New York in connection with [their] VWAG positions and duties, which travel was reimbursed by VWAG” (*id.* ¶¶ 154, 166–173).

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[3] Plaintiffs state in their Amended Complaint that “[n]o damages are sought from these American subsidiaries of VWAG. They are named as Defendants because they were used by the VWAG Supervisors, Managers, their deputies, and executives and engineers to implement the ‘Defeat Device’ scheme—used as instrumentalities in the course of Defendants’ breaches of duties to VWAG” (Am. Compl. ¶ 136).

[4] As to defendant Stephan Weil, Plaintiffs allege only that he “frequently traveled to the United States and New York” (*id.* ¶ 152).

None of the individual VW Defendants are alleged to reside in New York (*see* Am. Compl. ¶¶ 141–42, 144–45, 147–151, 154, 166–173); five are alleged to reside in other states in the United States (*id.* ¶¶ 168–170, 172–73). For the fifteen other individual VW Defendants, Plaintiffs do not allege their domicile.[5]

In sum, as noted above, no Plaintiff or Defendant is alleged to be a resident or citizen of New York.

VWAG and its Supervisory Board

Plaintiffs allege that through Porsche SE, the Piëch-Porsche Families collectively hold approximately 53 percent[6] of the VWAG company voting rights, which they vote together via a family agreement, "giving them effective control of the Board and all corporate actions" (*id.* ¶¶ 37–44, 146). Porsche SE, Ferdinand Oliver Porsche, Wolfgang Porsche, Hans Michel Piëch, Ferdinand Piëch (deceased) are collectively referred to as the "Controlling Shareholders" (*id.* ¶1 n1). For decades, Hans Michel Piëch, Ferdinand Oliver Porsche, and Wolfgang Porsche occupied seats on the VWAG Supervisory Board (*id.* ¶¶ 142–44).

In 2015, these Controlling Shareholders installed Hans Dieter Pötsch as Board Chairman. Plaintiffs allege that Pötsch is the Families' longtime confidant and VWAG's CFO during the Clean-Diesel Scheme (*id.* ¶ 141; *see also* ¶¶ 37–44). According to Plaintiffs, the Board's

[5] Plaintiffs allege that Michael Bartsch has a residence in Georgia (*id.* ¶ 171), and that Detlev von Platen has a residence in Georgia and Florida (*id.* ¶ 167) but does not allege their domicile. Based on the affirmations submitted on behalf of the VW Defendants, the fifteen other defendants reside in Australia, Austria, Germany, Sweden, and Switzerland (*see* NYSCEF 27 ["Rein Affirm"] ¶ 6, citing Feygin Affirm, ¶ 9; NYSCEF 38 ["Piep Affirm"] ¶ 22; NYSCEF 35 ["Nottebaum Affirm"] ¶ 19).

[6] Paragraphs 40 and 146 of the Amended Complaint state that the Piëch-Porsche Families hold 53.3 percent of VWAG shares; paragraphs 37, 38, 57 and footnote 1 state that it is 53.1 percent; and paragraphs 347 and 392 state that it is 53.19 percent.

structure—including the Families' control and Pötsch's lack of independence— "deviat[es]" from the German Corporate Governance Code standards for proper corporate governance (*id.* ¶ 43).

The Clean-Diesel Scheme

According to Plaintiffs, to help make VWAG the "largest car manufacturer in the world by 2018," the Controlling Shareholders directed a major corporate expansion via the production and sale of supposedly Clean-Diesel vehicles to enter the markets in the United States, including New York, by 2007–08 (Am. Compl. ¶¶ 71–72). However, according to Plaintiffs, the applicable emissions standards were "too stringent" for VWAG's engines, so the Controlling Shareholders implemented a scheme to design and install a "Defeat Device" to evade those standards in purported Clean Diesel vehicles to be sold in the United States (*id.* ¶¶ 72–82). Plaintiffs further allege that "VWAG's then-CEO Ferdinand Piëch created '***a culture where performance was driven by fear and intimidation***.' His leadership was characterized as '***a reign of terror***.' Employees were told, '[***y***]***ou will sell diesels in the U.S.***, ***and you will not fail***. ***Do it***, ***or I'll find somebody who will***'" (*id.* ¶ 72 [emphasis in original]). Plaintiffs allege that later investigations revealed that the multi-year scheme was an "open secret" which "involved both VWAG's CEO, Audi's CEO, and over 100 managers and engineers . . . that violated the laws of the United States, New York, and other nations" (*id.* ¶¶ 50, 73).

Between 2009 and 2015, Plaintiff alleges that VWAG manufactured and sold 11 million "Altered Vehicles" worldwide—over 600,000 in the United States—and over 26,000 in New York (*id.* ¶ 75).

The Clean Diesel Scheme was publicly exposed by U.S. prosecutors on September 18, 2015 (*id.* ¶¶ 45, 46, 75, 98). The New York Attorney General (NYAG), along with other

regulators, brought civil and criminal actions against VWAG, its subsidiaries, and their employees (*id.* ¶¶ 98, 102, 229–231). VWAG's market capitalization "collapsed" by over $60 billion (*id.* ¶¶ 46, 98).

Plaintiffs further allege that VWAG and the Controlling Shareholders obstructed the investigations by 47 state attorneys general, including the NYAG (*id.* ¶¶ 308–09). Before the scandal broke, a high-level official in VWAG's legal department directed colleagues to delete "incriminating material" concerning the Scheme (*id.* ¶ 302). VWAG later admitted that "***at least 40 individuals destroyed thousands of documents relating to the diesel emissions issue***" (*id.* ¶¶ 306, 311 [emphasis in original]). According to Plaintiffs, the *Financial Times* wrote that in the summer of 2015, "'VW executive management authorised [the] continued concealment'" of the Scheme (*id.* ¶ 307), and that corporate governance experts concluded that the Clean-Diesel scandal was caused by "a colossal failure in leadership at the highest levels of [VWAG] management" and that VWAG's "corrupt corporate culture" allowed "senior managers … to [break] fundamental moral and legal standards" to maximize "quick profit." (*id.* ¶¶ 66; 60).

Ultimately, VWAG entered into a criminal plea agreement with the United States, dated January 11, 2017 (*see generally United States* v *Volkswagen*, No. 16 Cr. 20394 (SFC) (APP) [ED Mich March 10, 2017]), and settled with the NYAG and several other state attorneys general (*see People v Volkswagen AG*, Index No. 0655159/2016, NYSCEF 21 [Sup Ct, NY County 2016]). As a result of these various proceedings, Plaintiffs allege that VWAG has "been put on criminal probation and required to accept the placement of a government monitor (with 50-plus enforcers) inside the Company to oversee the behavior of its executives and try to force the Supervisors to adopt adequate legal and regulatory compliance controls, and hold the perpetrators accountable; and [] paid or will pay over $70 billion to resolve the governmental

proceedings and civil suits on behalf of 'Clean Diesel' purchasers, VWAG dealers, and VWAG ADR/ADS (common stock) purchasers in the United States and elsewhere" (*id.* ¶ 102).

VWAG's Independent Investigation

When the scandal was publicly exposed in 2015, Plaintiffs allege that the Supervisory Board "promised an independent investigation of '***who knew or did what***, ***when***, ***and why***,' promising that the prestigious, U.S.-headquartered Jones Day law firm would conduct a 'thorough' investigation, that its report would be made available to the public shareholders of VWAG, and that ***anyone responsible for damaging VWAG would be held responsible***" (*id.* ¶ 48 [emphasis in original]). Plaintiffs allege, however, that the Controlling Shareholders obstructed VWAG's investigation by Jones Day (*id.* ¶¶ 363–79) by, among other things, "**terminating Jones Day and quashing its ongoing investigation and halting completion of the nearly** complete report, admitting disclosure of the Jones Day findings would be '***too damaging***'" (*id.* ¶ 50 [emphasis in original]). According to Plaintiffs, German criminal prosecutors raided Jones Day's offices and used this material to indict, convict, and fine VWAG and to indict and convict Pötsch, Piëch, and several other VWAG officials (*id.* ¶ 53).

After terminating Jones Day, Plaintiffs allege that the Controlling Shareholders and Pötsch caused VWAG to hire a law firm in Germany to conduct a new investigation (*id.* ¶ 51). Based on this new investigation, "the Controlling Shareholders and Pötsch then orchestrated corporate action to settle claims against these 'sacrificial lambs,'" —former VWAG CEO (Winterkorn) and Audi CEO (Stadler) and other subordinates—"for small, individual contributions by them—amounts far less than these individuals pocketed from participating in the scheme and far less than all available insurance coverage. Under this arrangement, all VWAG's claims were to be ended" (*id.* ¶ 51). While criticized by "outraged, but out-voted,

public shareholders," the settlement, which had an aggregate value of approximately $351 million, was approved by VW shareholders in July 2021 (*id.* ¶ 113). The VW Defendants have submitted the Settlement Agreements between VWAG, Audi, and Porsche with Winterkorn, Stadler, and D&O insurers (NYSCEF 36) and the Voting Results of VWAGs 2021 Annual General Meeting (NYSCEF 37).

According to an affidavit submitted by the VW Defendants in connection with their forum non conveniens motion, "[t]he parties to the coverage settlement agreement [] agreed that no further claims could be asserted against the D&O insurers in connection with the diesel emissions matter. Additionally, VWAG, Audi AG, and Porsche AG agreed not to assert claims in connection with the diesel emissions matter against the current and former members of the Management Boards of the companies and any other individuals insured by the D&O insurance policies" (Nottebaum Aff ¶ 12). On August 21, 2021, two shareholders challenged those votes in the Hanover Regional Court in Germany (*id.* ¶ 18). Specifically, the shareholders challenged the resolutions that approved the settlement with Winterkorn and Stadler, and the coverage settlement between VWAG, Audi AG and Porsche AG, and insurance companies that are or were involved in the existing D&O insurance for the Volkswagen Group (*id.*). The Hanover Regional Court and the Higher Regional Court of Celle affirmed the votes' validity (*id.*).

However, on September 30, 2025, the Federal Court of Justice reversed that decision and remanded the decisions upholding shareholder approvals of settlement agreements that purported to release claims against VWAG Board members (*see* NYSCEF 87). The Federal Court of Justice stated in its press release that "the resolution approving the coverage settlement is contestable due to a legal violation and must be declared null and void" because "[t]he agenda, which was provided in the invitation to the Annual General Meeting, did not disclose . . . that the

coverage settlement involved a waiver vis-à-vis all current and former members of the defendant's executive bodies, which required the approval of the Annual General Meeting" under German corporate law (NYSCEF 86 at 3 [translated]). The press release further noted that "[t]o the extent that the Annual General Meeting resolutions approving liability settlements with former members of the Management Board have been challenged, the Higher Regional Court must hear and decide the case again" (*id.*).

Procedural History

Plaintiffs brought this action in April 2021, derivatively on behalf of VWAG, against the present and former members of VWAG's Supervisory Board and Board of Management, as well as other actors purportedly involved in the "Clean Diesel Engine Defeat Device" scandal, for, among other things, breaches of fiduciary duties owed to VWAG (NYSCEF 1, 2). Plaintiffs did not pursue or otherwise move this action forward until the Court scheduled a mandatory in-person status conference on April 8, 2025 (NYSCEF 16). At that conference, the Court agreed to stay this action pending resolution of the final appeals in *Haussmann v Baumann* (73 Misc 3d 1234(A) [Sup Ct, NY County 2021], *affd*, 217 AD3d 569 [1st Dept 2023]) and *Ezrasons, Inc. v Sir Nigel Rudd* (2022 WL 20476314 [Sup Ct, NY County 2022], *affd*, 217 AD3d 406 [1st Dept 2023]) (NYSCEF 18).

In June 2025, the parties advised the Court that the aforementioned appeals had been decided (with defendants prevailing at the Court of Appeals in both cases) and requested time to meet and confer on next steps, which was granted (NYSCEF 20). In July 2025, the Court granted Plaintiffs' request to file their Amended Complaint (NYSCEF 23).

In the Amended Complaint, Plaintiffs bring four claims against the VW Defendants: (1) breach of fiduciary duty under New York law; (2) breach of fiduciary duty under German law;

(3) "participat[ion] in a common course of conduct and concerted action harming VWAG" in violation of New York and German law; and (4) aiding and abetting breaches of fiduciary duties in violation of New York and German law (Am. Compl. ¶¶ 399–424). Plaintiffs seek to recover (a) damages, losses, and other harm caused VWAG due to the "Clean Diesel" scheme, including the mismanagement, misuse, or waste of its assets caused by the intentional misconduct or lack of due care, prudence, and abuses of control and breaches of duties of loyalty by the VWAG Controlling Shareholders, their "handpicked" Supervisors and Managers; and (b) disgorgement of all monies, compensation, bonuses, and pension benefits paid to any Defendant as a misuse, mismanagement, and waste of VWAG's corporate assets (*id.* ¶ 2).

Thereafter, the VW Defendants filed their motion to dismiss the Amended Complaint. In response, Plaintiffs filed three motions to strike the affirmations and affidavits filed by the VW Defendants in support of their motion to dismiss.

DISCUSSION

I. VW Defendants' Motion to Dismiss (Mot. Seq. 001)

A. Forum non conveniens

An action may be dismissed when "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]). "The relevant factors include: (1) the burden on the New York courts; (2) potential hardship to the defendant; (3) the unavailability of an alternative forum; (4) whether both parties are nonresidents; and (5) whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction The court may also consider the location of potential witnesses and documents and potential applicability of foreign law" (*Estate of Kainer v UBS AG*, 175 AD3d 403, 404-05 [1st Dept 2019] [citations omitted], *affd,* 37 NY3d 460 [2021]). "In general, a decision to grant or deny a motion to dismiss on

forum non conveniens grounds is addressed to a court's discretion" (*Haussmann v Baumann*, 44 NY3d 1007, 1008 [2025] [citation omitted]).

The trial court and Court of Appeals decisions in *Haussmann v Baumann* (73 Misc 3d 1234(A) [Sup Ct, NY County 2021] [*Haussman I*]), *affd* 217 AD3d 569 [1st Dept 2023] [*Haussman II*], *affd* 44 NY3d 1007 [2025] [*Haussman III*]) are directly on point. In *Haussman I*, this Court (Borrok, J.) dismissed fiduciary duty claims brought on behalf of defendant Bayer AG because, *inter alia*: (i) "German law applies to this derivative action involving a German company where the decisions at issue and where the alleged breach of fiduciary duty took place in Germany"; (ii) "[n]one of the individual defendants [is] located in New York"; and (iii) "Germany has a significant interest in adjudicating a dispute involving an old and major German company." (*id.* *2). The Court of Appeals unanimously affirmed dismissal on forum non conveniens grounds, noting that the trial court "considered all relevant factors and made no legal error in doing so" (*Haussmann III*, 44 NY3d at 1008).[7] Plaintiffs are unable to distinguish *Haussmann* from this present action.

First, although Plaintiffs' choice of forum is entitled to deference, here that deference is less impactful because none of the parties (including the named Plaintiffs) are New York residents (*Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 270 [1st Dept

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[7] As discussed *infra*, the trial court in *Haussmann I* separately granted dismissal on the ground that the plaintiff failed to comply with German corporate law requirements that were controlling in that derivative action under the "internal affairs" doctrine. The Appellate Division affirmed on that ground (217 AD 3d at 570), without reaching the issue of forum non conveniens. The Court of Appeals, in turn, decided the case on forum non conveniens grounds, without reaching the internal affairs doctrine issue (which it had done ten days earlier in *Ezrasons*). With respect to forum non conveniens, the Court of Appeals noted that Plaintiffs in *Haussmann* had not preserved for review the argument that CPLR 327(b), also discussed *infra*, precluded dismissal on forum non conveniens grounds (44 NY 3d at 1008 n*)

2005]). Indeed, there is less connection to New York in this case than there was in *Haussmann*, where one of the Plaintiffs was a New York resident (*Haussmann III*, 47 NY 3d at 1008-09 ["The fact that one plaintiff is a New York resident does not mandate a contrary result"]). Moreover, "plaintiffs' choice of forum is of even less significance in a shareholder's derivative suit," (*Foster v Litton Indus., Inc.*, 431 F Supp 86, 87 [SDNY 1977]), where "the real party in interest is the corporation" (*Bader & Bader v Ford*, 66 AD2d 642, 645 [1st Dept 1979]).

Second, as in *Haussmann*, the challenged corporate conduct from which Plaintiffs' claims arise occurred in Germany. Specifically, Plaintiffs assert claims on behalf of VWAG for alleged fiduciary duty breaches in Germany related to an ill-fated scheme that damaged the company. The VWAG Supervisory and Management Boards, whose actions are challenged, convened in Germany, and the non-party witnesses and key documents are predominantly located in Germany (*see Haussmann I,* 73 Misc 3d 1234(A)*3).

As to the burden on the New York courts, "[w]hile the Commercial Division, New York County regularly hears disputes involving the application of foreign law and could certainly do so here, it is a greater burden on the New York court than it would be on a German court" (*Haussmann I*, 73 Misc 3d 1234(A)*1).

Next, as in *Haussman*, "defending this action in New York would hoist a substantial and unnecessary burden on the defendants" (*id.*). And contrary to Plaintiffs' contentions, the fact that some of the Defendants may have previously been sued in New York does not minimize that burden (*Globalvest Mgt. Co. L.P. v Citibank, N.A.*, 7 Misc 3d 1023(A) [Sup Ct, NY County 2005]). Moreover, the need to translate relevant documents into English during what would no doubt be an extensive pretrial discovery process would substantially increase the expense of the litigation for the parties, particularly the Defendants.

Nor can Plaintiffs credibly contest that Germany is an available—and indeed the most logical—alternative forum. The suggestion that Germany is not an adequate forum because Plaintiffs cannot bring their putative New York law claims in Germany is a marvel of circular logic. Even assuming New York's substantive law *would* apply in this Court (it would not under *Ezrasons*, see *infra*), the only reason one would ever *think* of applying New York's Business Corporation Law standards to the governance of a German corporation is if the action were pending in a New York court. Thus Plaintiffs effectively argue that they are entitled to a New York forum because they are, in their view, entitled to a New York forum.

To the contrary, a German corporation (or more aptly, shareholders suing derivatively on its behalf) cannot seriously contend that its counterintuitive proposal to hold its officers and directors to the standards of *New York's Business Corporation Law* in governing the company is so critical that a German court applying German corporate law standards would not not a viable "alternative forum." Thus, it is hardly surprising that New York state and federal courts have repeatedly determined that Germany does present an adequate forum to adjudicate such claims (*e.g., Haussmann*, 73 Misc 3d 1234(A)*1; *Viking Glob. Equities, LP v Porsche Automobil Holding SE*, 101 AD3d 640, 641 [1st Dept 2012]; *Wyser-Pratte Mgt. Co.*, 23 AD3d at 270; *NCA Holding Corp. v Norddeutsche Landesbank Girozentrale*, 96 CIV. 9321 (LMM), 1999 WL 39539, at *2 [SDNY 1999]).

Finally, not only is Germany an adequate forum, it is also one that "has a significant interest in adjudicating a dispute involving an old and major German company" (*Haussmann I*, 73 Misc 3d 1234(A) *2). Plaintiffs' conclusory and speculative allegations that they would face impossible barriers in a German "company town" are unavailing, as "tactical considerations" do "not favor deference" (*see In re Optimal U.S. Litig.*, 886 F Supp 2d 298, 307 [SDNY 2012]).

And in any event, this speculative concern is belied by the German Federal Court of Justice's recent decision reversing and remanding lower court rulings that released claims against VWAG Board members in connection with the very conduct that is at issue in this case (*see* NYSCEF 87). Those proceedings will now continue in Germany, further bolstering the determination that Germany is an adequate and effective forum for disputes such as this one, and that Germany has a significant interest in doing so.

In sum, every factor guiding the Court's discretion under CPLR 327(a) counsels in favor of dismissing this action and referring the parties, if Plaintiffs choose to continue this fight, to the German courts where related matters are already pending.

Finally, Plaintiffs' strained reliance on CPLR 327(b) to keep this case in New York is equally misplaced. That section provides that "the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part" (CPLR 327[b]). Plaintiffs' contention that this action "relates to" and "arises from" various unrelated agreements with non-parties and, thus comes within the scope of CPLR 327(b), is easily dispatched.[8]

The clear and obvious purpose of CPLR 327(b) is to prevent a party from using general forum non conveniens principles to evade an agreed-upon forum-selection provision with respect

[8] The agreements upon which Plaintiffs rely are: (1) VWAG's agreements with JP Morgan Chase with respect to issuance of ADRs, (2) settlements between the NYAG and VWAG and Bosch, (3) VWAG auto-sales and servicing agreements, and (4) agreements for VWAG's NYC-flagship store and nearly 100 other New York dealerships.

to claims within the scope of the applicable agreement. Here, however, Plaintiffs' claims have nothing at all to do with any of the cited agreements. This case is about the impact of Defendants' conduct *on the corporation*, not on New York residents represented by the NYAG, or New York vehicle service customers, or the company store in New York, or the mechanics of the ADR agreement. The fact that the NYAG settlement agreement relates to the Clean Diesel Scheme does not mean that claims in this case have anything to do with that agreement, which is for the protection of New York consumers and residents, *not* corporate shareholders or VWAG itself.

Moreover, Plaintiffs (acting on behalf of VWAG) cannot invoke these contractual forum selection provisions against VW Defendants who are not parties to those agreements (*Freeford v Pendleton*, 53 AD3d 32, 38 [1st Dept 2008] [noting that "generally only parties in privity of contract may enforce terms of the contract such as a forum selection clause."]).

Accordingly, Plaintiffs' claims are dismissed under CPLR 327.[9]

[9] While New York courts have, in appropriate circumstances, conditioned a *forum non conveniens* dismissal on defendants agreeing to waive certain service of process and/or statute of limitations arguments (*see Al Rushaid Parker Drilling Ltd. v Byrne Modular Buildings L.L.C.*, 180 AD3d 577, 578 [1st Dept 2020]; *Lublinie SA v MS Glob. Funding LLC*, 2024 WL 349047 [Sup Ct, NY County 2024]), the Court declines to do so here. The record reflects that Plaintiffs brought this action in 2021 and failed to move this case forward until the Court brought Plaintiffs into court in April 2025 (*see* NYSCEF 18). In any event, "although federal courts require an alternative forum for a forum non conveniens dismissal, New York courts do not where the New York connection to the litigation is minimal" (*Wyser-Pratte*, 23 AD3d at 270, citing *Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 179 [1st Dept 2004] [same]; *see also Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 481 [1984] [availability of another forum is not a prerequisite for applying the *forum non conveniens* doctrine as "[t]hat would place an undue burden on New York courts forcing them to accept foreign-based actions unrelated to this State merely because a more appropriate forum is unwilling or unable to accept jurisdiction . . . even if we were to hold that the motion should be denied if no alternative forum is available, then the burden of demonstrating that fact should fall on plaintiff. Its presence in the New York courts is a matter of choice and permitted because of comity and the public and private burden of its action appearing, it should justify the need for New York to assume jurisdiction"]). And

B. Internal Affairs Doctrine

Next, as the Court of Appeals recently held, under the internal affairs doctrine "foreign substantive law controls in the event of any conflict between New York law and the law of a company's place of incorporation on matters relating to its internal affairs" (*Ezrasons*, 44 NY3d at 544). Consistent with that decision, Plaintiffs' action must be dismissed because, as in *Ezrasons*, Plaintiffs do not have standing to pursue their derivative claims under controlling substantive German law.

Section 626 of the BCL, the statute governing "derivative action[s] brought in the right of the corporation" provides that "[a]n action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates" (BCL § 626). Section 1319 of the BCL lists certain "provisions, to the extent provided therein, [that] shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders" (BCL § 1319).

The Court of Appeals in *Ezrasons* confirmed that section 626 and section 1319 of New York's Business Corporation Law collectively do not "displace the internal affairs doctrine as it applies to shareholder derivative standing" (*Ezrasons,* 44 NY3d at 542). The Court noted that "[t]he text of section 626 (a) does not clearly indicate that it was intended to serve as both a New York standing rule *and* a choice-of-law directive. The fact that it authorizes actions to be brought on behalf of either 'a domestic or foreign corporation' may set the stage for a conflict between

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finally, because the internal affairs doctrine (discussed *infra*) supplies an independent basis for dismissing this action, there is no need for a separate statute of limitations dispensation to account for the forum non conveniens dismissal.

New York and foreign standing law, but it does not suggest that New York law should prevail in the event of such conflict . . . The statutory text does not imply that the legislature intended to allow persons who would otherwise have no legal authorization to nonetheless bring a derivative suit on behalf of a foreign corporation" (*id.* at 544). *Ezrasons* also rejected the argument that "[BCL] 1319 (a) (2) supplies the missing manifestation of legislative intent to displace the doctrine" because "section 1319 is not a choice-of-law provision either" but rather indicates that the "referenced provisions have only limited applicability to foreign corporations" (*id.* at 545).

To avoid this holding, Plaintiffs seek to deploy a reconfigured combination of BCL sections 626, 1317 (rather than 1319), and 720 (referenced in 1317), to override the result otherwise mandated by *Ezrasons* (NYSCEF 63 at 16). While creative, this argument is not persuasive. Because Plaintiffs' claims are brought derivatively, section 626 is the starting place. "An action may be brought against directors and officers of a corporation for their misconduct by a shareholder under the Business Corporation Law [,but] [a]ny such action must be commenced pursuant to the provision of the Business Corporation Law pertaining to a shareholder's derivative action brought in the right of the corporation to procure a judgment in its favor" (20 Carmody-Wait 2d § 121:239 [updated March 2026]).

BCL § 720, on which Plaintiffs' claims are now premised, provides that "[a]n action may be brought for the relief provided in this section . . . by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof, or, under section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), by a shareholder, voting trust certificate holder, or the owner of a beneficial interest in shares thereof" (BCL § 720). Thus, for purposes of this derivative action, section 720 merely points back to BCL § 626.

Nor does Plaintiffs' creative deployment of BCL § 1317 more generally suffice to override the internal affairs doctrine or the result in *Ezrasons*. Section 1317(a)(2) provides that "the directors and officers of a foreign corporation doing business in this state" are subject to BCL § 720 "to the same extent as directors and officers of a domestic corporation[.]" (BCL § 720).[10] Though the Court of Appeals in *Ezrasons* did suggest, in dicta, that section 1317 contains language suggestive of legislative intent for *its* (that is section 1317's) "regulation to apply notwithstanding conflicting foreign law" (*Ezrasons*, 44 NY3d at 545), the Court did not suggest that a plaintiff's mere citation of section 1317 would have changed the result in that case (or any other case), which is what Plaintiffs here effectively argue. This Court will not lightly presume that the Court of Appeals intended its ruling to be so fragile and fleeting. Indeed, if simply swapping in the cite of section 1317 for the cite of 1319 is deemed sufficient to supplant the internal affairs doctrine as to any foreign corporation that does business in New York, *Ezrasons* effectively would be a dead letter. It would also mean that the directors of all foreign corporations that do business in New York, not matter how far from this forum or different their governing laws, would have to comply with whatever the fiduciary duty laws or statutes that might now or hereafter be applicable in New York (or any other State adopting a similar reading of the internal affairs doctrine, for that matter). The Court does not believe such a result is

[10] Section 1317, titled "Liabilities of directors and officers of foreign corporations," provides that: "(a) Except as otherwise provided in this chapter, the directors and officers of a foreign corporation doing business in this state are subject, to the same extent as directors and officers of a domestic corporation, to the provisions of: (1) Section 719 (Liability of directors in certain cases) except subparagraph (a)(3) thereof, and (2) Section 720 (Action against directors and officers for misconduct.) (b) Any liability imposed by paragraph (a) may be enforced in, and such relief granted by, the courts in this state, in the same manner as in the case of a domestic corporation" (BCL § 1317).

consistent with the *Ezrasons* decision, the thrust of which is deference to the substantive law of the corporation's single and immutable state of incorporation rather than to the varying laws of the many random jurisdictions (including New York) in which a derivative plaintiff or its counsel might decide to bring suit.[11]

Thus, under the internal affairs doctrine, German substantive law controls in the event of a conflict between New York law and the German law on matters relating to VWAG's internal affairs. Once again, *Haussmann* is directly on point. In *Haussman I*, the Court noted that under section 148 of German Stock Corporation Act ("GSCA"), "shareholders whose aggregate shareholdings equal or exceed one percent of the registered share capital may request the court's permission to assert claims, and leave shall be granted if (i) the shareholders provide evidence that they purchased the shares prior to the point in time they became aware of the alleged breaches or alleged damages, (ii) the shareholders provide evidence that they called upon the company to take legal action, (iii) there are facts justifying the suspicion that the damages were incurred due to dishonest conduct or gross violation of the law or the articles of association, and (iv) there are no overriding reasons that the company's interests would preclude the assertion of the claim for compensatory damages" (*Haussman I*, 73 Misc 3d 1234(A)*4). The Court held that "[t]he Plaintiffs have not alleged that they own a sufficient number of shares to assert their claims, that they made a demand upon the company to take legal action, or that they have sought permission from a German court to assert their claims. The Plaintiffs thus, under applicable German law, lack standing to bring this action" (*id.*).

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[11] Plaintiffs' reliance on *Culligan Soft Water Co. v Clayton Dubilier & Rice LLC* (118 AD3d 422 [1st Dept 2014]) is similarly unavailing. The Court of Appeals in *Ezrasons* observed that *Culligan* "has not been followed and was firmly disavowed by the Appellate Division in this case" (44 NY3d at 547).

The First Department affirmed and noted that "[t]he internal affairs doctrine is a conflict of laws principle providing that 'claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation'—in this case, Germany" (*Haussmann II*, 217 AD3d at 570). The First Department further noted that it has "consistently invoked the internal affairs doctrine in derivative actions to apply foreign law on substantive issues, including those affecting a party's right to sue" (*id. citing Lerner v Prince*, 119 AD3d 122, 126 [1st Dept 2014]; *Hart v Gen. Motors Corp.*, 129 AD2d 179, 183 [1st Dept 1987]) and went on to hold that "the internal affairs doctrine applies to this shareholder derivative action on behalf of a foreign corporation to make applicable relevant substantive German laws" (*id.* at 570–71). Finally, the *Haussmann II* court held that "the German Stock Corporation Act § 148 is a substantive law rather than a procedural one and requires plaintiffs to seek leave from the German court to bring a derivative action. As plaintiffs concede, they failed to satisfy section 148; thus, they lack standing to maintain this action" (*id.* at 571).

Likewise, Plaintiffs concede in their Amended Complaint that they cannot satisfy the requirements of section 148 of German Stock Corporation Act ("GSCA") (Am. Compl. ¶ 256 ["Plaintiffs cannot satisfy the procedural requirements of GSCA § 148 as pleaded earlier"]). Plaintiffs concede that they have not met the demand requirement (Am. Compl. ¶ 347 ["Plaintiffs have not made a demand on the current VWAG Supervisors to bring suit asserting the claims set forth herein"]). Nor have Plaintiffs alleged that they have complied with the leave-of-court requirement, or that they meet the minimum shareholding requirement. The bottom line, again, is that the standards for determining when and under what circumstances a shareholder of a German corporation can initiate litigation on behalf of the company is governed by German law.

A contrary rule would embroil German companies and their directors in litigation thousands of miles away and subject their directors and officers to differing standards of conduct depending on where the shareholder chose to sue. That type of forum-centric approach was rejected by the appellate courts in *Hausman II* and *Ezrasons*.[12]

In sum, Plaintiffs' arguments to avoid the decisions in *Haussmann II* and *Ezrasons* are misplaced, and this action must be dismissed. Given the Court's rulings above, the Court need not address the VW Defendants' alternative arguments that Plaintiffs failed to allege standing under New York law or that Plaintiffs have failed to state a viable claim for relief.

C. Personal Jurisdiction

Finally, Plaintiffs have failed to demonstrate that the Court has personal jurisdiction over the VW Defendants with respect to the claims asserted in this case. Specifically, Plaintiffs' contention that the VW Defendants are subject to personal jurisdiction under CPLR 302(a)(1), which requires that defendants "transact[ed]…business" in New York and that the claims "'aris[e] from' such…transaction" (*Licci v Lebanese Can. Bank*, 20 NY3d 327, 334 [2012]), is unavailing.

Plaintiffs argue that the VW Defendants caused VWAG and its subsidiaries to "design a 'Defeat Device Plus' specifically to meet New York's emissions standards" (NYSCEF 63 at 19, 25), accessed New York's financial markets by selling multi-billion-dollar bonds, and operated

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[12] Further ignoring *Haussmann II*, Plaintiffs argue that GSCA § 148 does not apply to Germany's pre-suit leave requirement, relying on *Davis v Scottish Re Group Ltd.* (30 NY3d 247, 252 [2017]). That case discussed whether a Cayman Islands rule requiring pre-suit leave of court was procedural or substantive and found it was procedural. Here, as noted, the First Department has already held that GSCA § 148 (which goes well beyond a pre-suit leave of court requirement, and includes among other things quantitative shareholder minimums) is a substantive law, a ruling that was not disturbed on appeal in *Haussman III*.

ADR programs through NYC-based depositories. Plaintiffs also argue that the controlling shareholders signed SEC filings, and that VWAG bought real estate in NYC, and sold cars though its dealerships in New York. While those allegations might trigger jurisdiction with respect to claims alleging harm *incurred in New York* arising from the VW Defendants' conduct, they do not suffice to subject those Defendants to personal jurisdiction with respect to corporate governance malfeasance that purportedly harmed VWAG in Germany.

Nor are allegations that some VW Defendants "regularly traveled" to New York on unidentified "VWAG[] business" or participated in marketing or award events here (NYSCEF 63 at 19) sufficient to trigger personal jurisdiction on the claims at issue. First, for 12 of the 20 individual defendants, regular travel to New York for unidentified VWAG business is the only New York contact that is alleged (*see* Rein Affirm ¶ 6). Second, as to those defendants who are alleged to have participated in marketing or award events, "'the transitory presence of a corporate official' does not support jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 488 [1st Dept 2017]).

Plaintiffs do not and cannot explain how their specific claims against the VW Defendants arise from the cited New York contacts, as required by CPLR 302(a)(1). To be clear, there is no dispute that VWAG *generally* transacted business in New York, and that there were downstream effects of such business in New York. But Plaintiffs' claims in this case are not about transactions that occurred in New York, or about the effects of the Clean-Diesel scheme on New Yorkers, which the NYAG has already pursued and prosecuted. Instead, Plaintiffs assert harms

to VWAG arising out of alleged breaches of fiduciary duty *in Germany*. That conduct does not give rise to personal jurisdiction under New York's long-arm statute.[13]

Plaintiffs' alternative agency-jurisdiction theory also fails (NYSCEF 63 at 20). Plaintiffs argue, somewhat incongruously, that VWAG is an "agent" of the individual VW Defendants who were the "primary actors" behind the Scheme and the related financing activities, and "[t]hey authorized those activities, which constitute VWAG's doing business in New York and thus their own business transactions in New York" (*id.*). However, even assuming the Court were to accept this reverse agency theory of jurisdiction, Plaintiffs only allege that VWAG "consented to continuing jurisdiction here through the NYAG settlement" (*id.*)—an argument that the Court has already found insufficient as the claims here do not arise from that settlement. Thus, having failed to allege specific jurisdiction over VWAG as the "agent," Plaintiff has failed to allege jurisdiction over the "principals" (the individuals).

Plaintiffs also assert that VWAG's subsidiaries' actions are imputed to VWAG because VWAG reports consolidated financials, characterizes its operations as "global," and has a role in the employment decisions of its subsidiaries' chief executives (NYSCEF 64 ["Gales Affirm"] ¶¶ 4–35). But these are common characteristics of *all* parent-subsidiary relationships, and New York courts have long recognized "the existence of an agency upon which a finding of jurisdiction may be predicated may not be inferred from the mere existence of a parent-subsidiary relationship." *(Ins. Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004]).

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[13] Plaintiffs' citation to *Mucha v Volkswagen AG*. (540 F Supp 3d 269 [EDNY 2021], *affd sub nom*. *Mucha v Winterkorn*, 2022 WL 774877 [2d Cir 2022]) is inapposite since the court there found that signing SEC filings supported specific jurisdiction because the securities-fraud claims arose from those filings (*see Mucha*, 540 F Supp 3d at 283–84).

In short, Plaintiffs have failed to allege a "articulable nexus or substantial relationship" between New York and the alleged breaches of fiduciary duties challenged in their Amended Complaint (*see generally Licci*, 20 NY3d at 340). Accordingly, the claims against the VW Defendants must be dismissed for lack of personal jurisdiction.

* * * *

For each of the independent reasons discussed above, the VW Defendants' motion to dismiss is granted.

II. <u>Plaintiffs' Motions to Strike (Mot. Seqs. 002–004)</u>

Plaintiffs' motions to strike affirmation of Prof. Dr. Mathias Habersack, the VW Defendants' German law expert, the affirmations and affidavits of the VW Defendants' employees and counsel (Benjamin Piep, George Feygin, Peter Green, David M.J. Rein, Teresa Bopp, and Dennis Nottebaum) are denied.

First, these motions, which repeat—and at times, improperly expand upon—arguments made by Plaintiffs in their opposition to the motion to dismiss, appear to be an attempt to circumvent the Corut's denial of an expansion of the word limit in the motion to dismiss briefing (NYSCEF 23; *see also IHS Dialysis Inc. v Davita, Inc.*, 2013-1 Trade Cases P 78330, 2013 WL 1309737 [SDNY 2013] ["[I]t appears from the content of Defendant's papers that the separately briefed 'Motion to Strike' is simply an attempt to assert additional arguments in support of Defendant's Motion to Dismiss, and to evade the page limits for motions"]). Therefore, the Court declines to consider any such additional arguments.

Second, courts have often considered affidavits "in addressing the merits of a forum non conveniens and jurisdictional" arguments. (*e.g.*, *Serov ex rel. Serova v Kerzner Intern. Resorts, Inc.*, 52 Misc 3d 1214(A) [Sup Ct, NY County 2016] [collecting cases]; *Robins v Procure*

Treatment Centers, Inc., 179 AD3d 412, 413 [1st Dept 2020] [considering affidavits in support of motion to dismiss for lack of personal jurisdiction]; 6A Carmody-Wait 2d § 38:162 [updated March 2026] ["Affidavits are [] permissible on a motion to dismiss for lack of jurisdiction of the person of the defendant"]).[14] Moreover, "[e]xpert affidavits interpreting the relevant legal provisions can be a basis for [construing] foreign law when accompanied by sufficient documentary evidence" (*City of Aventura Police Officers' Retirement Fund v Arison*, 70 Misc 3d 234, 255 n4 [Sup Ct, NY County 2020] [citation omitted]).

Plaintiffs argue that Dr. Mathias Habersack's affirmation is irrelevant because German Stock Corporation Act § 148 does not apply. The Court (relying upon binding First Department precedent) has rejected that conclusion, see *supra*, and thus this ground for striking the affidavit fails.

Plaintiffs' arguments seeking to "strike" the affirmations and affidavits from Defendants' employees and counsel addressing personal jurisdiction and forum non conveniens considerations are equally unpersuasive. Declarations are common in connection with personal jurisdiction motions, and sometimes lead to a request by plaintiffs for discovery to rebut the facts asserted. That does not mean they are impermissible. Nor does the fact that Plaintiffs disagree

[14] Moreover, it is well-established that "[o]n a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast*, 149 AD3d at 486) and "unrefuted allegations that there is no basis for the Supreme Court to assert jurisdiction" will result in dismissal of a plaintiff's action (*Sanchez v Major*, 289 AD2d 320, 321 [2d Dept 2001] [holding that where the defendants submitted "unrefuted allegations that there is no basis for the Supreme Court to assert jurisdiction over them, their motion should have been granted"]). Thus, a plaintiff must refute a challenge to jurisdiction by at the very least making a "substantial start" (*see Robins v Procure Treatment Centers, Inc.*, 179 AD3d 412, 412 [1st Dept 2020]). In determining whether a plaintiff has done so, the court must consider the submissions made by both sides while assuming the truth of plaintiff's allegations.

with their substance (*see Peschmann v BlogTalkRadio, Inc.*, 15 CIV. 9504 (PGG), 2017 WL 11696659, at *1 [SDNY 2017] ["Plaintiff may not object to the declarations on the grounds that they do not contain information favorable to her position. It is typical for parties to submit declarations and affidavits that support their position in a litigation, and they are not excludable on that basis."]).

* * * *

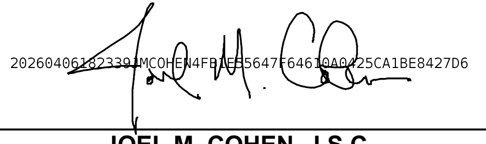
Accordingly, it is

ORDERED that Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Mot. Seq. 001) is **GRANTED**, and the First Amended Complaint is hereby dismissed in its entirety without prejudice to seeking to assert viable claims under German law in a German Court, with taxable costs and disbursements to the VW Defendants as fixed by the Clerk of the Court, and the Clerk is respectfully directed to enter judgment accordingly in favor of the VW Defendants; it is further;

ORDERED that Plaintiffs' Motions to Strike (Mot. Seqs. 002–004) are **DENIED**; and it is further

ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.[15]



4/6/2026
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE

[15] Since the forum non conveniens and internal affairs doctrine grounds for dismissal discussed herein apply to this entire action, the Amended Complaint is dismissed in its entirety without the need for any further action, under CPLR 306-b or otherwise, with respect to the Unserved Defendants.