

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER

IN RE: VOLKSWAGEN "CLEAN DIESEL")
MARKETING, SALES PRACTICES, AND) No. C 15-MD-2672 CRB
PRODUCTS LIABILITY LITIGATION)
_____) San Francisco, California
Friday.
December 16, 2016
2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

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CourtConnect and as reflected in the minutes.)

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1 DECEMBER 16, 2016

2:07 P.M.

2 P R O C E E D I N G S

3 ---000---

4 **THE COURT:** This is the Volkswagen case. I think we
5 do need appearances, so would you identify yourself yourselves,
6 please.

7 **MS. CABRASER:** Good afternoon, your Honor. Elizabeth
8 Cabraser, plaintiffs' lead counsel, for the PSC.

9 **Mr. VAN EATON:** Good afternoon, your Honor. Josh
10 Van Eaton, the Justice Department for the United States, with
11 my colleague Anna Grace.

12 **MR. AKERS:** Good afternoon, your Honor. Nick Akers
13 for the California Air Resources Board and the California
14 Attorney General.

15 **MR. COHEN:** Good afternoon, your Honor. Jonathan
16 Cohen for the Federal Trade Commission.

17 **THE COURT:** Good afternoon.

18 **MR. GIUFFRA:** Good afternoon, your Honor. I'm Robert
19 Giuffra from Sullivan and Cromwell for the Volkswagen
20 defendants, along with Sharon Nelles and, also, Suhana Han.
21 Good to you see.

22 **THE COURT:** Good to see you.

23 **MS. DAWSON:** Good afternoon, your Honor. Cari Dawson,
24 Alston and Bird, for the Porsche defendants.

25 **THE COURT:** Good afternoon.

1 **MR. SLATER:** Matthew Slater from Cleary Gottlieb on
2 behalf of Robert Bosch, GmbH and Robert Bosch, LLC, your Honor.

3 **THE COURT:** Thank you.

4 This is -- before we get to the securities action, as
5 everyone here knows, the hearing this morning, the status
6 conference on the three liters, was postponed until now because
7 the parties were in intensive negotiations.

8 I'm pleased to report that there has been substantial
9 progress and I'm optimistic that there will be a resolution of
10 these matters, and I am now continuing it to Monday at 8:00
11 a.m. to receive a report from the parties as to whether or not
12 they have been able to achieve a resolution.

13 So with that, I want to thank the parties and tell them to
14 resume their discussions. And I look forward to at 8:00
15 o'clock -- the parties can participate by telephone. And I
16 look forward to a report at 8:00 o'clock, west coast time; west
17 coast time.

18 Thank you very much.

19 And now we will call the matter for hearing which is in
20 the securities litigation. The lawyers are free to leave, not
21 leave, whatever they want to do.

22 (Brief pause.)

23 Okay. So this matter is relating to the consolidated
24 securities class action complaint, the docket numbers 1705,
25 1706 and 1708. And if there are attorneys who have not made an

1 appearance this afternoon, would they identify themselves,
2 please?

3 **MR. HARROD:** Good afternoon, your Honor. James Harrod
4 for the plaintiffs. Thank you.

5 **THE COURT:** Good afternoon.

6 **MR. PFAEHLER:** Good afternoon. Ken Pfaehler, Dentons
7 (US), LLP for defendant Jonathan Browning, and with me is my
8 colleague Tom Kelly.

9 **THE COURT:** Good afternoon.

10 **MR. JOSEPH:** Gregory Joseph for Martin Winterkorn,
11 your Honor.

12 **MR. SCHERTLER:** Your Honor, good afternoon. David
13 Schertler on behalf of Michael Horn.

14 **THE COURT:** Good afternoon.

15 This is what I would like to hear argument on. There are
16 a lot of issues, obviously, but I think that I want to confine
17 the argument this afternoon to the following issues.

18 First, whether these ADRs -- is that what they are called?

19 **MR. GIUFFRA:** Yes, your Honor.

20 **THE COURT:** Whether these ADRs, is the name of a
21 certificate that can be purchased in the United States, whether
22 they are domestic transactions in other securities as set forth
23 in the *Morrison* case.

24 I'd like to also hear argument on the forum non conveniens
25 issue, and I would like to hear argument on the personal

1 jurisdiction issue.

2 What I don't want to hear are arguments on all the other
3 issues at this time. Okay?

4 So maybe I should go to the defendants and ask them to
5 comment on those issues in any order. Maybe we'll deal with
6 the domestic transactions first, and then go to the
7 forum non conveniens, and then I will ask the individual
8 counsel if they want to say something on behalf of the personal
9 jurisdiction issues.

10 Mr. Giuffra.

11 **MR. GIUFFRA:** Thank you, your Honor.

12 We believe, your Honor, that this case does not belong in
13 a U.S. court. While the consumer case clearly belongs here,
14 the securities cases do not. And the basic propositions, your
15 Honor, are two-fold.

16 Under the Supreme Court decision in *Morrison versus*
17 *National Australia Bank*, the Supreme Court establishes the
18 presumption against the extraterritorial application of U.S.
19 law. The key question here is whether these Level I ADRs,
20 American Depository Receipts, fall within the scope of the
21 territorial jurisdiction of the United States.

22 Now, let me just say a word about what a Level I ADR is.
23 I think that's an important issue.

24 Now, the buyer of a Level I ADR, that's the least contact
25 you can possibly have to the United States. That's a receipt

1 that's issued not by Volkswagen. It's issued by a depository
2 bank. The shares are deposited by that bank not in the United
3 States, but in Germany, and they are purchased in Germany and
4 they are held by the bank.

5 The receipt gives the owner the ability to get access to
6 those shares and the value of the ADRs goes up and down based
7 on stock price in Germany.

8 Volkswagen had no securities that were issued in the
9 United States and Volkswagen didn't have any direct dealings
10 with the ADR holders.

11 Now, Volkswagen was a sponsor of an ADR program and it
12 entered into filings back in 1998 and a separate one in 2003.
13 In all those filings -- and those filings are in the record as
14 Exhibits B, C and D to my declaration. All -- they contain no
15 substantive discussion of Volkswagen. All they do is attach
16 the depository agreement between Volkswagen and in this case
17 JPMorgan.

18 Now, what the plaintiffs would like to do here is to
19 ignore the fact that the challenged disclosures are disclosures
20 that were made by Volkswagen in Germany. There were no direct
21 communications between Volkswagen and the ADR holders, other
22 than the fact that Volkswagen would have put on its website in
23 Germany its German securities disclosures.

24 Now, the most important point, your Honor, is that those
25 German securities disclosures were issued in Germany pursuant

1 to German law.

2 Now, there are different -- other types of ADRs, which are
3 Level II and Level III ADRs. And a Level II ADR is an ADR
4 where you actually have to have it listed on an actual
5 exchange. And a Level III ADR is one that you actually raise
6 capital in the United States. Volkswagen raised no capital by
7 setting up the program.

8 Now, under SEC Rule 12g3-(b)(2) Volkswagen was entirely
9 exempt from registration and reporting requirements under the
10 securities laws.

11 So, for example, it didn't have to file quarterly filings
12 with the SEC, annual filings with the SEC. *Sarbanes Oxley*
13 didn't apply. The Foreign Corrupt Practices -- excuse me, the
14 FCPA did not apply. And that was done because we were doing
15 just a Level I ADR and our disclosures, again, were subject to
16 German law, international accounting standards. No U.S. GAAP.
17 Absolutely no connection to the United States, other than that
18 the ADR holder had this receipt that they received from
19 JPMorgan that gave them the right, if they wanted to, to get
20 the shares that were in Germany.

21 Now, the *Morrison* case stands for the following basic
22 proposition. It's got to be a transaction, a domestic
23 transaction in securities. And the issue that we've presented
24 to the Court is one that -- there are very few decisions that
25 are on point.

1 There is Judge Berman's decision in SocGen, which involved
2 a Level I ADR. And he ruled that *Morrison* precluded the
3 application of 10(b) to that Level I ADR, as opposed to a --
4 there are cases that the plaintiffs cite, which are Level II
5 and Level III.

6 And, of course, the difference is that those companies
7 that have their ADRs trading in the United States are filing
8 disclosures with the SEC, annual reports, quarterly reports,
9 something that Volkswagen, obviously, did not do.

10 There is a case by Judge Pregerson, *Toshiba*. Now, that
11 deals with sponsored -- unsponsored ADRs. Sponsored ADRs you
12 have to do something.

13 And the reason why people do sponsored versus unsponsored
14 is if you do unsponsored ADRs, banks can just set up ADR
15 programs and you have absolutely no ability to control it. If
16 you do sponsored, you can just limit it to one bank.

17 **THE COURT:** And these were sponsored?

18 **MR. GIUFFRA:** These were sponsored, no question.

19 **THE COURT:** JPMorgan?

20 **MR. GIUFFRA:** Yes.

21 **THE COURT:** But the securities were actually
22 purchased, I thought, from -- not from JPMorgan.

23 **MR. GIUFFRA:** Well, they would be -- the securities
24 would have been purchased by -- originally, presumably, it
25 would have been purchased -- the receipt would have been

1 purchased from JPMorgan.

2 **THE COURT:** They were traded further, is that what
3 happened?

4 **MR. GIUFFRA:** And then it would be traded further on
5 the secondary market.

6 And so the question, really, that the Court is presented
7 to -- now, Courts have said: Is it facially a domestic
8 transaction? One could argue that it is and that's a point
9 that Courts that have looked at this issue have said.

10 Now, there is an important case called *Parkcentral versus*
11 *Porsche*, which is a Second Circuit decision. Judge Leval was
12 on the panel. Peter Hall was on the panel. And Judge Sack was
13 on the panel. A distinguished panel in the Second Circuit.
14 And they made the point that when -- and that case involved
15 something called a swap agreement, a securities based swap
16 agreement, and they were entered into in the United States by
17 big hedge funds and they were essentially betting on Volkswagen
18 AG stock, ironically enough.

19 And in that case the Second Circuit held the mere fact
20 that -- and in that case the allegation was that Porsche SE,
21 which is the holding company that owns VW, had actually had
22 direct communications with the hedge funds. The Court said
23 that that wasn't still sufficient to trigger the application of
24 Section 10(b) --

25 **THE COURT:** Well, at the time of the purported

1 transactions which were at issue, wasn't Porsche like a third
2 party?

3 **MR. GIUFFRA:** Correct.

4 **THE COURT:** So they weren't the controlling entity of
5 VW at that time?

6 **MR. GIUFFRA:** That is correct, your Honor.

7 **THE COURT:** Looking at that case, it appeared to me
8 that that is sort of like a discussion, well, if a third party
9 is doing something --

10 **MR. GIUFFRA:** Correct.

11 **THE COURT:** -- that then affects VW, that affects the
12 shares of VW or the disclosure or whatever, then, you know,
13 it's hard to see whether that's necessarily a domestic
14 transaction. As distinct from here, it was VW who did whatever
15 they did.

16 **MR. GIUFFRA:** There is no question --

17 **THE COURT:** That's a distinction that I see between
18 the -- is it Peachtree? Oh, *Parkcentral*, sorry.

19 **MR. GIUFFRA:** *Parkcentral*.

20 There is no question, your Honor. They don't have a case
21 on the other side when you're dealing with these Level I ADRs,
22 which are different, again, than Level II and Level III. And
23 when a company has a Level II and Level III, they are buying
24 into our regime.

25 And, in fact, your Honor, the SEC's rules make it quite

1 clear that it's -- if you want to do a Level I ADR, there needs
2 to be a foreign securities regulator that is principally
3 responsible for making sure the company is abiding by the
4 foreign company's -- the foreign country's securities laws.

5 And so one of the principal propositions in *Morrison* is to
6 avoid conflicts between, say, U.S. securities law and non-U.S.
7 securities laws.

8 So in this case Volkswagen had to comply with German
9 securities laws and the application of our securities laws
10 would put Volkswagen in a position of there is a conflict
11 between those laws.

12 And given that there is this presumption against the
13 extraterritorial application of U.S. law, we think, your Honor,
14 that the wiser course is to say: Not in Level I ADRs.
15 Level II and Level III, no question. The company is doing far
16 more than what Volkswagen did in this case.

17 The only case that deals with the exact issue is that
18 SocGen case that I referenced before.

19 Now, another point, and this is one that the Court looked
20 at in the *Parkcentral* case. What actions did Volkswagen
21 actually take toward the United States? And other than setting
22 up the facility in 1998, nothing. Absolutely nothing. Didn't
23 deal directly with the -- with the ADR holders, other than
24 posting its German disclosures pursuant to German securities
25 laws on the website in Germany.

1 Now, this is a -- you know, this is an arcane issue of
2 securities law. And last night, actually, I was looking to see
3 and literally there is this case, there was another case that
4 settled, and then there is the SocGen case and that's it, other
5 than the *Toshiba* case, which, as I said before, was an
6 unsponsored ADR. So you're dealing with something which is a
7 novel issue.

8 But we believe, your Honor, that when you look at the
9 presumption against the extraterritorial application of U.S.
10 law, when you think about: Well, what was Volkswagen doing?
11 It was buying into German -- and if someone was a receipt
12 holder, they were buying into Volkswagen's German disclosures,
13 German law, and Volkswagen was not dealing directly with them.
14 They were -- Volkswagen at all was dealing with the bank.

15 And there is a reason why the shares were kept at JPMorgan
16 in Germany, and that's because people who were doing Level I
17 ADRs are trying to not be subject to U.S. law and their home
18 country law, which is what Volkswagen was trying to do.

19 So we believe, number one, your Honor, that under *Morrison*
20 10(b) should not apply to Level I ADRs even if sponsored.

21 The second argument, your Honor, why we think the Court
22 should dismiss is that even if 10(b) applies, we believe that
23 the Court should exercise its discretion and dismiss this case
24 on the basis of --

25 **THE COURT:** Forum non conveniens.

1 **MR. GIUFFRA:** -- forum non conveniens.

2 **THE COURT:** Well, I want to hear their response.

3 **MR. GIUFFRA:** Okay.

4 **THE COURT:** In other words, I want to go back and
5 forth and go through the issues.

6 **MR. HARROD:** Thank you, your Honor.

7 I think if I could, I would like to go back to sort of a
8 discussion about first principles and what -- why this
9 discussion under *Morrison* is happening. Because what happened
10 in *Morrison* was it superseded what was the prevailing test in
11 this area, which was articulated in the Second Circuit.

12 And what Justice Scalia, who wrote the majority opinion in
13 *Morrison*, was concerned about was basically the subjectivity of
14 that analysis. There was conducts and effects and what he
15 basically announced in the decision was we need to establish
16 principles that make for greater clarity as to when 10(b) will
17 apply to transactions.

18 And so he -- there is a first prong and a second prong.
19 Your Honor, we made some arguments in our brief about the first
20 prong. We believe that because Volkswagen itself has described
21 these securities as trading in New York on the OTC exchange,
22 that that's sufficient to satisfy the first prong. And I
23 understand that that's perhaps an uphill battle for my
24 argument.

25 **THE COURT:** It is.

1 **MR. HARROD:** But I want to talk about the second
2 prong. And I think what *Morrison* said was:

3 "We focus on the location of the transaction, not
4 on the place where the deception originated."

5 That's a quote from the case. And that's what, I think,
6 *Morrison* has embodied.

7 And what we say is if you look at the Second Circuit's
8 decision in the *Absolute Activist* case, you look at the
9 transactions as we've alleged them in the complaint, every
10 aspect of those transactions has occurred in the United States.

11 What happens in cases like *Porsche* is there are concerns
12 about, I think your Honor described it as third parties.
13 Anybody could enter into a derivative agreement that references
14 a security in Japan, in Germany, in France, and then if they
15 settle that transaction in the United States, suddenly they
16 could be subjected to 10(b) liability here.

17 And I think what the cases, *Porsche* in particular, is
18 talking about is a situation -- and *Toshiba* to a lesser extent,
19 is talking about a situation that is fundamentally unfair and
20 is too much of an extension of 10(b) that's in conflict with, I
21 guess, the principles of *Morrison*.

22 We don't think that exists here because *Porsche* is a very
23 different situation. Here, as much as -- as much as counsel
24 would like to diminish the role that Volkswagen had, they came
25 to the United States. They sponsored these ADRs.

1 Repeatedly I heard something to the effect that they did
2 nothing with the ADR holders. Well, they did though. They
3 were obligated under the rule that Mr. Giuffra cited to provide
4 their financial disclosures in English on their website. At
5 the time that the original registration occurred, they were
6 required to actually mail those to the SEC and they changed the
7 rules. So now it's just to make them available on the internet
8 in light of the sort of technology that's available to most
9 people now.

10 And, in fact, under the Second Circuit's test when they
11 registered those securities, it's undoubtedly true that they
12 would have been subjected to 10(b) under the effects test.

13 So if you look at those factors and you consider that they
14 clearly engaged in some benefit. They are a rational company.
15 They wanted to come to the United States. They wanted to
16 broaden their investor base. They wanted to be able to raise
17 capital and use it for transactions in the United States. They
18 wanted to make available a dollar denominated security. These
19 are not simply passive things.

20 And when I hear something like, "They didn't do anything
21 with the ADR holders," well, are they really doing anything
22 with their German investors? They are not knocking on their
23 doors and delivering the statements to them personally. They
24 are making them available through whatever means they are
25 available.

1 ADRs are really more of a pass through than a derivative.
2 They are not like what was happening in *Porsche* in that regard
3 either. They are entitled to voting rights. They receive
4 dividends. It's basically a way of owning shares in the United
5 States that Volkswagen brought here.

6 And so I want to read something because I think it's
7 important to notice that in the *Porsche* case the parties --
8 *Porsche* itself noted the distinction between the swaps that
9 were at issue there and the ADRs that are at issue here. And
10 this is a quote from their brief, which -- in which defense
11 counsel in this case was counsel of record. And they wrote:

12 "Unlike swaps, moreover, ADRs trade in the United
13 States on national securities exchanges and in public
14 over the counter markets and clear and settle with
15 U.S. dollars in the United States. ADRs, thus, do not
16 implicate *Morrison's* concerns about extraterritorial
17 application of Section 10(b) in interference with the
18 regulation of foreign securities markets.

19 "In addition, the existence of these American
20 markets for ADRs is known to issuers, investors and
21 those who, through market activity, may have
22 disclosure obligations regarding the issue of
23 securities."

24 I'm happy to -- I have copies of the brief, if you'd like
25 it. It's actually available on Westlaw as well,

1 2011-WL-3437863.

2 We believe that all of those distinctions are operative
3 here and necessitate a different outcome because the
4 transactions here are uniquely settled in the United States.
5 If Volkswagen didn't sponsor these ADRs and didn't want to make
6 them available here, they would not have been subject to this
7 case.

8 And just one more note on *SocGen*, which was the Judge
9 Berman case from the Southern District of New York. Very odd
10 circumstance there. The defendants did not seek dismissal
11 under *Morrison* of the ADR claims. Judge Berman did that
12 himself.

13 And I don't know why and I could only speculate as to
14 maybe the ADR part of that case was very small, but it also
15 involved claims on behalf of investors who had purchased *SocGen*
16 shares in Europe. But if the parties had briefed that issue or
17 if they had appealed it, there might be a different outcome.

18 But we believe *SocGen*, which was decided right after
19 *Morrison* came down, is wrong and clearly is a District Court
20 decision from New York and is not binding on your Honor.

21 Thank you.

22 **THE COURT:** Thank you.

23 So let me hear about forum non conveniens.

24 **MR. GIUFFRA:** Your Honor, just one quick comment.

25 **THE COURT:** Sure.

1 **MR. GIUFFRA:** On the question of the Porsche -- it's
2 always great when your briefs get read back at you.

3 **THE COURT:** I actually don't allow lawyers to cite my
4 earlier opinions to me.

5 (Laughter.)

6 **MR. GIUFFRA:** But the point, your Honor -- and I think
7 this is an important one -- is that was talking about, you
8 know, ADRs generally and there is the distinction that I talked
9 about between Level I, Level II and Level III.

10 The other thing that counsel said was that Volkswagen was
11 looking to raise capital. Had it done a Level III ADR, it
12 would have been in that position. But importantly, under the
13 SEC's rules if you're doing a Level I ADR, you're exempting
14 yourself from the regular -- the reporting and registration
15 regime.

16 And so that's the -- look, there is no question. It's a
17 difficult legal issue that your Honor has to decide or maybe
18 not decide. But as to how you treat Level I ADRs, because they
19 are a different form of security -- and, in fact, counsel
20 referenced what Volkswagen said about them.

21 What Volkswagen said was that these ADRs represent the
22 foreign shares of the company held on deposit by the custodian
23 bank in the company's home country and carries the corporate
24 and economic rights of the foreign shares. And that's --
25 that's Exhibit C to plaintiffs' counsel's declaration.

1 Now, your Honor, obviously, can potentially avoid this
2 issue if your Honor were to decide this case based on
3 forum non conveniens. There is no question that your Honor can
4 dismiss a securities case on forum non conveniens grounds.

5 There is actually a First Circuit case by another Judge
6 Breyer holding quite clearly that one can -- the Court can
7 dismiss a 10(b) case based on forum non conveniens.

8 The plaintiff concedes that Germany is an adequate forum
9 for the litigation of their claims. And, in fact, ADR holders
10 have brought litigation in Germany.

11 And right now, your Honor, in the context of the
12 Volkswagen matter, there are literally 280 institutional
13 investors -- and the number went up between our opening brief
14 and reply brief -- litigating with Volkswagen.

15 These are U.S. institutional investors, just like
16 plaintiffs. There are 280 -- there are 280 litigating against
17 Volkswagen in Germany.

18 And we think, your Honor, when you look at this, any kind
19 of balancing of the public and the private factors that one
20 considers in doing the forum non analysis clearly indicates the
21 Court should apply -- should send this case to Germany.

22 Number one, because these are Level I ADRs, the Court
23 would have to apply German securities laws because Volkswagen
24 was trying to comply with German securities laws. That's what
25 the SEC allowed it to do by doing Level I ADRs. So you have

1 this problem of having to apply German law because the
2 disclosures were made in Germany pursuant to German law, German
3 accounting standards.

4 There is no question that the investor disclosures, as
5 opposed to the consumer disclosures -- and the plaintiff's
6 brief conflates the two, but the investor's disclosures were
7 made from Germany. No question about that. There is no
8 question that all of the people who were involved in making
9 these disclosures were located in Germany. Some of them are
10 former officers of the company. And there is going to be --
11 there will be issues trying to bring them to a litigation in
12 this court.

13 All of the documents in Germany. All of the -- all of
14 the -- many of those documents, your Honor, would be in German
15 and there would be translation issues that would have to be
16 dealt with. And that also favors Germany.

17 In addition, as individual counsel will talk about, the
18 lack of personal jurisdiction over the defendants is another
19 reason to send the case to Germany. And, clearly, the public
20 interest factors support Germany.

21 And your Honor look no further, again, than this SEC Rule
22 12g3-(2)(b), which deals with these Level I ADRs, which says:

23 "The purpose of the foreign listing condition is
24 to assure that there is a non-U.S. jurisdiction that
25 principally regulates overseas the trading of the

1 issue or securities and the issuer's disclosures --
2 disclosure obligation."

3 And that's 73 Fed. Reg. 52752.

4 That's because when these Level I ADRs were -- when the
5 SEC allowed issuers to do -- to put -- to at least have their
6 shares be -- be the shares in Germany, in this particular case,
7 to have a bank set up a level ADR program -- Level I ADR
8 program, you knew that the regulation was going to be German,
9 in this case, securities laws, not U.S.

10 And so the public interest, the public factors clearly
11 favor Germany as the forum to look at this matter. German
12 securities regulators are looking at the Volkswagen situation.
13 Germany clearly has a far greater interest than the U.S. does
14 in ensuring that its companies comply with German law.

15 And, your Honor, in another case also arising out of the
16 *Porsche* matter, it's called *Viking Global versus Porsche*. This
17 is a case in the First Department, the Intermediate Appellate
18 Court in New York. That Court dismissed the case in favor of
19 litigation in Germany.

20 And, your Honor, 99.1 percent of all of VW -- trading of
21 VW AD shares, if you want to treat the ADRs as being U.S.,
22 99 percent occurred outside of the United States. So it's a
23 really -- it's a tail wagging a very big dog that's in Germany.

24 So we believe, your Honor, that the private interest
25 factors, which are figuring out where the witnesses are, where

1 were the disclosures made, issues about personal jurisdiction,
2 issues about translation of documents, all favor Germany.
3 Public interest factors overwhelmingly favor Germany because,
4 clearly, Germany has a far greater interest than this country
5 does in regulating a company like VWAG's disclosures.

6 And your Honor would be stuck with the knotty problem of
7 figuring out: Well, did they comply with German law? Did they
8 comply with U.S. law? When, clearly, because these were a
9 Level I ADRs, unregistered in the United States, no U.S.
10 disclosure obligations, you would be in the position of trying
11 to evaluate whether Germans, you know, doing disclosures in
12 Germany were complying with U.S. law, German law.

13 And as counsel said a moment ago, all VW did was take its
14 German disclosures and put them up in English on its German
15 website. That's it. No communications into the United States.

16 So we think, your Honor, that the Court should -- you
17 know, you can dismiss the case on the *Morrison* ground or you
18 can exercise your considerable discretion and dismiss the case
19 based on a forum non under a basic application under the public
20 and private interest analysis.

21 Thank you.

22 **MR. HARROD:** Thank you, your Honor.

23 One point on *Porsche*, which is that it -- the decision
24 multiple times explicitly limits its holding to the facts of
25 that case. So I think we have to be careful about -- the

1 concern there was the one I expressed earlier, which is that
2 they could entrap anybody in 10(b) who created a derivative
3 referencing some other security and have them be sued in the
4 United States.

5 **THE COURT:** Well, let me ask you about the -- the
6 German forum is perfectly adequate, isn't it?

7 **MR. HARROD:** I -- we concede it's adequate.

8 **THE COURT:** Pardon?

9 **MR. HARROD:** I wouldn't necessarily concede that it's
10 perfectly adequate. There are decisions that we cite that I
11 can talk about that say that there is under forum non a
12 preference, that it's considered a factor that there is no
13 class action or other device there.

14 We cite in our brief the fact there have been very limited
15 investor recoveries in Germany.

16 I can talk more about foreign non, unless your Honor --

17 **THE COURT:** Well, I do want you to talk more about
18 forum non conveniens, but I'm trying to figure out, you know,
19 one factor. If, in fact, the German forum was not even -- it
20 was imperfect in meaningful ways, I don't think you go any
21 further.

22 I think that's -- perhaps there isn't any convenient -- if
23 it turns out that the United States is a more convenient forum
24 because there isn't an adequate forum elsewhere, I think that's
25 sort of the end of the inquiry.

1 They can get up from, you know, noon to dusk and talk
2 about all these other factors, but if they -- but if it's not
3 adequate -- I must tell you, I approached it from the point of
4 view, it seemed to me, that it was an adequate forum. Is it
5 the same forum we have here? Of course not.

6 I mean, no two courts -- even England isn't the same
7 forum. But it seems to me it passes the test of being an
8 adequate forum.

9 Now, what counsel didn't address, but it's obvious, is one
10 of the most significant factors is the plaintiffs' choice of
11 forum. So I understand that. And that -- and by their failure
12 to -- by their tacit -- to me, it's a tacit admission that they
13 are not -- they are not going to argue that point. Because the
14 plaintiffs have chosen this forum, it's entitled to deference.

15 So then I start with: Okay. Germany is an adequate
16 forum, but the plaintiffs have chosen the United States. The
17 United States, by the way. It doesn't make any difference if
18 it's San Francisco, or California, or the Ninth Circuit, or the
19 First Circuit. It doesn't make any difference. It's a
20 national case.

21 So they decided. They chose this forum. That's a factor
22 that weighs in their favor -- I mean, in your favor.

23 **MR. HARROD:** Yes.

24 **THE COURT:** Okay. So you don't have to address that.

25 I am a little bit more concerned about the other factors.

1 They say, just to paraphrase: Look, Judge, you're really going
2 to have to apply German law here, and I'm interested in that
3 aspect of it.

4 Two, all the witnesses are there. You know, they are not
5 here. What about that? You know, you're going to create sort
6 of a multiplicity of litigation and cost and expense and
7 confusion and potentially inconsistent results as a result of
8 proceeding here.

9 So why don't you address those factors?

10 **MR. HARROD:** I can address those. Let me clarify one
11 thing. There's a lot of things in the briefing about the
12 interests of the United States in this litigation, and I
13 presume from your Honor's question that you're less interested
14 in hearing about those aspects of it.

15 **THE COURT:** Well, I have to assume there is an
16 interest in the United States in this litigation. That is, if
17 somebody avails themselves of a market, now we're talking about
18 a securities market for the investor, of course, the United
19 States is interested in its -- in its, quote, domestic market,
20 which may consist of international securities.

21 You know, but still, you know, it's the -- it's the
22 resident citizen of the United States who is being offered a
23 security here in the United States. The security, of course,
24 is a foreign security. But does the United States have some
25 interest? Of course they do. Of course they do.

1 **MR. HARROD:** So, your Honor, on the -- I'll take the
2 German law; that your Honor will have to apply German law in
3 this case. I don't agree with that.

4 Our -- this is not a question of -- the securities laws
5 cover many things in the United States. 10(b) covers
6 materially false and misleading statements. There is an
7 enormous body of U.S. law on what that means.

8 We are not alleging -- and Mr. Giuffra would be right if
9 he were to stand up and say that we're not alleging this --
10 that there is a requirement under one of the regulations of the
11 34 Act that requires a certain disclosure; that that was the
12 materially false and misleading statement here.

13 And we're not alleging that those statements exist as
14 false under German law. We're saying that they came. They
15 made -- they issued securities here, or made them available
16 here I think is probably the better way of putting it, and
17 those statements operated in the U.S. market for the ADRs and
18 they were false under 10(b) and the law that describes what
19 that means.

20 We're not saying that, you know, the equivalent disclosure
21 regime in Germany has been violated. We're saying that the
22 principles of 10(b) had been violated as articulated under U.S.
23 law.

24 So I do not think it's correct that your Honor will have
25 to apply German law at all in this case.

1 As to the questions about witnesses and evidence, we
2 believe that many of the documents are already present in the
3 United States because they have been produced or are being
4 produced in the MDL proceeding before your Honor.

5 As to the existence of witnesses, we understand that there
6 are going to be witnesses who are party witnesses who, if the
7 case is sustained, we will be able to control and get them here
8 or we'll have to make arrangements and take their depositions
9 or testimony some other way.

10 We also understand and we chose this forum; that to the
11 extent that there are burdens placed upon us to go through the
12 Hague to obtain testimony or documents from third parties, that
13 that is a burden that we have voluntarily taken upon.

14 And, honestly, in these cases you see that the plaintiff
15 has the burden of proof on most of the issues. Most of the
16 issues that we will have to prove will be through the documents
17 and testimony that we obtain from people at Volkswagen. I
18 haven't heard them say that there are any unwilling witnesses.
19 So we believe that there are witnesses that we'll be able to
20 preserve testimony from and present at trial one way or
21 another.

22 As to the existence of cases in Germany, I find that a
23 little bit of an ironic point because the reality is is that
24 those people who don't have claims here under 10(b), so they
25 couldn't bring their claims based on shares they bought in

1 Germany in the United States, to the extent that they tried to
2 bring those claims here, even as individual actions, the
3 provisions of SLUSA, the Securities Litigation Uniform
4 Standards Act, say that once you have 50 of those and they are
5 consolidated, they are barred.

6 So if those many investors who are litigating in Germany
7 tried to bring their cases here, I'm sure that Volkswagen would
8 be here saying that they can't do that. So they don't have
9 another option but to bring those claims in Germany.

10 As to the idea that 99 percent of the trading volume
11 occurs outside the United States, I think that's a fact
12 question. It's one that I think requires more analysis, but I
13 would tell you that we have analyzed what the damages are in
14 this case and they are into the many hundreds of millions of
15 dollars.

16 And so despite the fact that there may be 99 percent of
17 the trading here, this is not, you know, an insignificant claim
18 in its own right. Volkswagen is a very large company, has a
19 very significant market capitalization, so it doesn't require
20 50 percent of the shares to be represented in ADR trading in
21 the United States.

22 You know, there are a number of cases we cite where under
23 similar circumstances ADR claims were sought to be dismissed
24 under the forum non conveniens doctrine. They were dismissed.
25 There were numbers of them involving British Petroleum,

1 involving companies in Brazil, involving companies in Spain.

2 The U.S. has a clear interest in this case and we don't
3 believe that the extraordinary remedy of dismissal under form
4 non is appropriate here.

5 Thank you, your Honor.

6 **MR. GIUFFRA:** Your Honor, just one --

7 **THE COURT:** Sure.

8 **MR. GIUFFRA:** -- comment.

9 I probably should have mentioned this. On the plaintiff's
10 choice of forum, yes, that's something the Court looks to. But
11 when the plaintiff elects, as here, to invest in a security
12 that is a predominantly foreign security -- again, the --
13 counsel for the plaintiffs made the point. We somehow made the
14 ADRs, the stock available in the United States.

15 What Volkswagen did was it set up a facility with a bank.
16 The ADR receipts were issued by a -- by a bank. Those ADR
17 receipts were -- gave the holder of the receipt the ability to
18 have a right to shares located in Germany.

19 And Courts have held -- and there is a decision we cite on
20 Page 20 of our opening brief, one from the Central District of
21 California -- where an American plaintiff chooses to invest in
22 a foreign country and then complains about fraudulent acts
23 occurring primarily in that country, one wouldn't give
24 deference.

25 This is effectively what the plaintiffs did here. They

1 were buying Level I ADRs, which were essentially like investing
2 in VWAG shares in Germany. And there are multiple cases that
3 we cite at Page 21 of our brief where Courts have dismissed ADR
4 claims on foreign grounds.

5 So, your Honor, there's that difficult *Morrison* legal
6 issue about whether these Level I ADRs should have been treated
7 like Level II and Level III ADRs where you're actually raising
8 capital and you're actually, you know, making filings with the
9 SEC, but when someone invests in a Level I ADR when they know
10 that the company is not going to comply with U.S. securities
11 laws, is going to not file -- is just filing with German
12 disclosure obligations, making the filings available in
13 Germany, that's a different situation. That's like investing
14 in a foreign security.

15 And we think, your Honor, that the predominantly foreign
16 nature of these securities is a reason why, when your Honor
17 does the balancing, you should look to Germany.

18 In addition, in terms of document production, we've
19 produced millions of pages of documents related to the consumer
20 issues in this case. We have not done a production that I'm
21 aware of related to the investor issues. And those are
22 different and your Honor, in fact, denied the motion to lift
23 the PSLRA discovery stay.

24 And there are many people who are involved in this case
25 who were on the securities side who no longer work for the

1 company. And so it would be difficult to get them to be
2 witnesses in this case, potentially, if it were in the United
3 States. Different story if the case goes to Germany.

4 And there are 280 U.S. plaintiffs, including the U.S.
5 Government Pension Fund, that are litigating against VW in
6 Germany. And it's clear that the German government has a far
7 stronger interest than the United States in whether VW is
8 complying with its obligations under German securities laws,
9 particularly when the plaintiffs invest in a security that --

10 **THE COURT:** Well, I don't doubt that. I don't doubt
11 that Germany -- that -- Germany has a much greater interest in
12 enforcing its own security laws, but is that the original
13 question?

14 Isn't the question whether American security laws, to what
15 extent do they relate to these transactions. And if that's the
16 question, then, you know, the argument cuts against you,
17 doesn't it? Because if Germany has a great interest in
18 enforcing its security laws, I think probably the United States
19 has a great interest in enforcing its security laws.

20 So I think it's -- you know, isn't it a question in a
21 sense of what security laws will we be talking about at the
22 trial? Will we be talking about only German security laws? I
23 don't think so.

24 I think we'll be talking about -- if it goes that far.
25 I'm not deciding this. But as to a theoretical argument,

1 wouldn't we then be discussing the American securities laws or
2 not?

3 **MR. GIUFFRA:** Well, I think you would probably have to
4 try to meld those together.

5 But the important point to keep in mind, your Honor, is
6 that the SEC itself -- again, these are hyper technical, you
7 know, types of ADRs, these Level I ADRs. The SEC has said you
8 don't have -- with Level I ADRs you don't have to follow. They
9 can only be registered securities, you don't have to report.
10 But what you do need is your home country has to be the
11 principal regulator.

12 So the SEC itself, when Volkswagen set up this Level I ADR
13 program, all of the guidance, all the regulations say you need
14 to have your home country securities regulator and securities
15 laws and accounting laws be the operative controlling laws.

16 And so when folks bought these securities, they knew that.
17 Okay? This is different than when someone is filing -- say, if
18 you do a Level III ADR where the company is actually raising
19 money in the United States, you've got to file registration
20 statements. You've got to file documents.

21 The only document that Volkswagen ever filed with the
22 Securities and Exchange Commission was a cover sheet that
23 attached the depository agreement. No substantive information
24 about the company was ever filed with the U.S. SEC.

25 **THE COURT:** Thank you.

1 **MR. GIUFFRA:** Thank you, your Honor.

2 **MR. HARROD:** Your Honor, just one point?

3 **THE COURT:** Go right ahead.

4 **MR. HARROD:** The idea under *Morrison* about
5 predominantly foreign totally gets away from the test the
6 Supreme Court announced. And the outlier cases that we're
7 talking about where that has been applied are different than
8 here.

9 If Volkswagen didn't want to ever have to be subject to
10 jurisdiction or the U.S. securities laws, it didn't have to
11 sponsor these. It didn't have to talk about them on its
12 website. It didn't have to make an instrument available for
13 U.S. investors.

14 Our clients are U.S. pension funds. There are many types
15 of investors who, for whatever reason, won't buy shares in
16 Germany. Volkswagen decided to do this.

17 It's a little bit disingenuous, I think, to me for them to
18 now say: Well, we did it, but it's -- you know, I mean, isn't
19 it a little bit splitting hairs to say: We can come here and
20 we can offer an ADR. We can make it available for U.S.
21 investors, but it's of such minimal importance that we
22 shouldn't be subject to any, you know, litigation liability in
23 the United States.

24 If that was what they wanted to do, they never should have
25 done this. They could have been like *Toshiba* and had an

1 unsponsored one that they had nothing to do with. But they
2 did, and I think that -- I don't want to lose sight of that.

3 Okay. I appreciate that. Thank you.

4 **THE COURT:** Thank you.

5 Let me hear about jurisdiction. I think that's the next
6 point.

7 **MR. JOSEPH:** Thank you, your Honor. May it please the
8 Court, Gregory Joseph for Martin Winterkorn.

9 Under *Schwarzenegger* the plaintiffs have a burden to show
10 two things. They have to show either purposeful direction or
11 purposeful availment. And they have to show that their claims
12 arise out of forum related conduct by Mr. Winterkorn.

13 There is no purposeful availment. He, by definition,
14 hasn't signed SEC statements. He had nothing to do with ADRs
15 becoming available here. He has not tried to raise capital
16 here.

17 And under *Keeton* the context of a corporate officer has to
18 be assessed independently of the context of the corporation.
19 There is no automatic flow-over.

20 And for Winterkorn there is no purposeful availment and
21 there is no purposeful direction because what he hasn't done is
22 directed statements at the U.S.

23 Their theory of liability as to Winterkorn is that this
24 German individual made statements in German that were relied on
25 by the German investment community that affected the price of

1 German securities and the U.S. ADRs traded based on those
2 prices, but they don't identify any statement that he directed
3 at the United States.

4 **THE COURT:** But what if it's -- what if it's
5 reasonable to assume if he knew that there were these
6 securities that were listed or so offered in the United States,
7 that whatever he said about the German securities or that would
8 affect the German securities would also have an impact on the
9 ADRs?

10 **MR. JOSEPH:** I think we know under *Walden* that's not
11 enough, because under *Walden* the Court said that specific
12 jurisdiction depends on contacts that the defendant himself
13 creates and it's not enough simply to know that there is going
14 to be an effect in another jurisdiction.

15 *Walden* was the case in which the DEA agent stopped people
16 from Nevada and held them there, improperly they alleged, and
17 then kept their money away from them by having it confiscated
18 for nine months. And the Court said that his contact did not
19 create contacts with Nevada.

20 The fact that there are -- ADRs are listed was a fact and
21 it is a fact that they translated into English on the internet
22 all of the German disclosure documents, but that's being
23 completely mischaracterized by the plaintiffs. And that is
24 that the principle underlying that exemption is that a non-U.S.
25 company does not have to direct statements into the U.S. which

1 would be regulated by the SEC as long as U.S. investors have
2 access to those statements that are made to their investors in
3 their primary trading market.

4 The SEC calls these non-U.S. disclosure documents. That's
5 73 Federal Register at 52753. And here is an example they give
6 of an exemption. They say in Canada they have a system called
7 SEDAR, which is -- I think it's SEDAR, right, which is just
8 like EDGAR. And that means that a Canadian issuer
9 automatically reports electronically to the Canadian
10 authorities. They say that there is no need then to make any
11 disclosures subject to SEC regulation, but that doesn't mean
12 that they are targeting U.S. investors when they file the
13 reports with their own regulators. It just means that U.S.
14 investors have access to them. And mere access isn't enough.

15 What I would also say, your Honor, you have to separate
16 under *Keeton* the activities of Volkswagen from the activities
17 of Winterkorn. And Winterkorn has nothing to do with these
18 things being put on the internet for this exemption, which
19 isn't sufficient, in our view, to create jurisdiction anyway.
20 But he, at most, is giving German statements which he knows may
21 be affecting trading in the U.S., the UK, Canada, other places
22 in the world. The mere fact that you're aware that you have an
23 impact isn't sufficient. That is what *Walden* teaches.

24 And then their theory on control person liability
25 extenuates this because on control person liability they want

1 to hold him responsible for all of VW -- VWAG'S statements; not
2 statements that he directed at the United States, but all of
3 VWAG's statements.

4 They have a couple of press releases in Paragraphs 412 and
5 384, which are arguably directed at the U.S. because one was
6 issued in New York the other is issued by U.S. subsidiaries,
7 but they don't plead that he had any role in making them.

8 **THE COURT:** Well, he's not -- isn't he a control
9 person?

10 **MR. JOSEPH:** Well, your Honor, that is the entire
11 point; that for control person purposes -- we're now talking
12 about for jurisdiction for control person purposes.

13 Under *Keeton* his direction of statements into the United
14 States has to be assessed independently of the company's. He
15 had nothing to do with those statements. He's sworn he had
16 nothing to do with them.

17 He was the chairman of a U.S. subsidiary, and we
18 acknowledge that. It's in his affidavit. He never even
19 visited the offices of that subsidiary during the class period.
20 He had nothing to do with statements of that subsidiary or its
21 stated operations. He was the chairman of subsidiaries in
22 China, the UK, the Czech Republic, Germany and Austria. There
23 are a thousand subsidiaries. He's got to be charged with what
24 his conduct is. Contacts that he created.

25 They say for control person liability, that they don't

1 even have to show scienter. That's on Page 74 of their
2 opposition brief. Well, that's irreconcilable with personal
3 jurisdiction under the Fiduciary Shield Doctrine. They have to
4 show he's a primary actor.

5 And they say, if you take a look at the November of 2014
6 memo where he's told that this problem could be a 20 euro
7 million -- 20 million euro problem, that if he relied on that,
8 that that would be, quote, unreasonable and severely reckless.

9 Well, I'm going to put aside whether that's enough under
10 the securities laws. It's not enough to state personal
11 jurisdiction under the Fiduciary Shield Doctrine. You've got
12 to be a primary actor, and that he's not.

13 They point to the 1992 decision of the Ninth Circuit in
14 *San Mateo*, which is a two-page decision which dealt with a U.S.
15 citizen. And they say that means you automatically have
16 jurisdiction over a control person as long as it's a
17 non-frivolous allegation. Putting aside you have 24 years of
18 personal jurisprudence -- personal jurisdiction jurisprudence,
19 which that doesn't take into account. *San Mateo* was dealing
20 with a U.S. citizen.

21 We put in Judge Smith's order, because it was appealed
22 from Judge Smith, which identifies that and there is always
23 jurisdiction anywhere in the U.S. under 28 for a U.S. citizen.
24 Every case that they have cited that applies control person
25 liability to an individual who's a foreigner has actually had

1 somebody who is engaged personally in the United States.

2 There are only three cases, *Chassin*, *Ficeto* and *Kairalla*,
3 and all three personally engaged. And in *Chassin*, which is the
4 only one decided since *Walden*, they did not simply say it was
5 automatic. They said you have to go through and assess
6 reasonableness as to this defendant. And it isn't reasonable
7 as to Winterkorn, who is speaking in German for a German
8 audience. And he may know that the rest of the world is
9 listening, but that's not enough under *Walden* to create
10 liability.

11 They also wanted to assess liability for all of the
12 statements that were made by other subsidiaries in the U.S.
13 that he's not even an officer or director of, but he had
14 nothing to say about what their disclosures were. He doesn't
15 even read business documents in English, and they want to
16 charge him with the U.S. disclosures of those companies.

17 In terms of his actual forum related conduct, which is
18 point two of *Schwarzenegger*, he made 22 trips to the U.S. over
19 that five-year period for about 53 days. Not one claim arises
20 out of anything that happened on those trips. They rely on
21 nothing in their complaint for that. And these transitory
22 trips that aren't tied under the *Picot* or the *Picot* decision of
23 the Ninth Circuit are not sufficient to create jurisdiction.

24 But let's assume for a moment, your Honor -- and I don't
25 believe this, but assume they allege personal -- purposeful

1 direction or availment and that something happened in
2 connection with his forum related conduct. Then it's my burden
3 to show why it would be unreasonable to exert jurisdiction.
4 And there's seven factors under *Silver*.

5 The first one is the minimal interjection in the U.S,
6 those 22 trips for test drives that they are not relying on.

7 The second one is the burden on Winterkorn, who is subject
8 to a number of investigations by German securities regulators,
9 by German criminal authorities and a whole lot of lawsuits in
10 Germany, 5,000 miles away from home. The defendant is here.
11 And under *Asahi* that's to be given significant weight, having
12 to defend in a foreign country.

13 And the comity issues. Putting aside what it may mean for
14 forum non conveniens, Winterkorn is being the subject of German
15 prosecutors and regulators application of German securities
16 laws. And German securities laws as to him ought to be the
17 primary driving force since he was speaking in German to a
18 German investment community affecting a German stock.

19 Fourth factor is the countervailing interests of the U.S.
20 And, your Honor, as to Winterkorn, as opposed to the company,
21 it may be different because under *City of Monroe*, the Supreme
22 Court said: What is it adding to bring the CEO in? It's just
23 going to be joint and several liability with the company
24 anyway. That's not a very heavy burden -- very heavy factor
25 for the plaintiff. Of course, the evidence is all in Germany.

1 The witnesses are in Germany. They are not in the United
2 States.

3 And they are -- as *Silver* says, they are the ones that
4 decided to buy a foreign security. So for jurisdictional
5 purposes that may have different weight, but it's not a heavy
6 weight for personal jurisdiction purposes, whatever it may be
7 for forum non conveniens.

8 And Germany is an adequate forum. I think your Honor has
9 already addressed that.

10 Thank you very much, your Honor.

11 **MR. HARROD:** Your Honor, I think I can address some of
12 these points pretty quickly, I hope.

13 We allege that Winterkorn and Defendant Diess, who has
14 also made a personal jurisdiction motion, who are both the
15 senior officers, the CEO and a member of the management board
16 of Volkswagen, signed the interim reports and annual reports
17 that were then translated into English and put on the website.

18 They knew -- and, in fact, as I recall, Mr. Winterkorn's
19 declaration doesn't address whether or not -- his awareness of
20 how that operated into the U.S. market. But they signed those
21 documents. Volkswagen took on the obligation under the deposit
22 agreement and under the SEC regulation to make them available
23 to U.S. investors. They did not have to do that.

24 Certainly, Mr. Winterkorn, as the long-term CEO of
25 Volkswagen, could have decided: Well, we don't need this U.S.

1 ADR facility. Let's get rid of this. Why do I need this?

2 Obviously, the way they are telling the story today they gained
3 absolutely no benefit from it.

4 So it begs the question of why was it ever done. But they
5 did it and so I don't think we can just say they didn't do it.
6 Those statements then operated on the U.S. market.

7 Mr. Joseph in -- in Mr. Winterkorn's brief said something
8 about those statements only operated on the market in Europe.
9 That's not true. We allege in Paragraph 446, Subpart A and
10 Subpart B, that there is an efficient market for the ADRs and
11 that the statements made by the defendants operated to inflate
12 the price of the ADRs in the U.S. market.

13 So to say that there is no impact, if there really needs
14 to be a question of what the impact was, we should get
15 jurisdictional discovery on that question. If there's really a
16 question as to what Mr. Winterkorn's awareness of his -- of his
17 conduct and how it affected the U.S. securities market, we
18 should get jurisdictional discovery on that question.

19 So we look at the cases and we just have a very different
20 view. It's clear under the cases that by making these
21 statements and bringing them to the U.S. market, which
22 Volkswagen was obligated to do, Mr. Winterkorn and Mr. Diess
23 signed those statements. They were available.

24 He talked about *Keeton*, which is a case, as I understand
25 it, involving the Fiduciary Shield Doctrine. We're not arguing

1 that we have jurisdiction over either of these two defendants
2 as a result of their role simply as corporate officers, but
3 what they did. They made statements. They are primary
4 violators of Section 10(b).

5 And the one thing I would just emphasize once more is that
6 this was not passive. It was an obligation that the
7 corporation had that these defendants participated in, and so
8 they ought to be subject to jurisdiction in the United States.

9 Thank you.

10 **MR. GIUFFRA:** Your Honor?

11 **THE COURT:** Yes, Mr. Giuffra.

12 **MR. GIUFFRA:** We're representing Herbert Diess, who
13 was mentioned, and so I feel as if I should just make a couple
14 points.

15 **THE COURT:** He's not a control person, is he?

16 **MR. GIUFFRA:** Well, I think they are a little confused
17 about his position. He joined the company on July 1, 2015. He
18 came over from BMW. He's now head of the Volkswagen brand.

19 Now, number one, the allegation of supposedly purposefully
20 availing himself of the U.S. forum are one second quarter 2015
21 filing that gets posted on the German website and then one in
22 the third quarter, which was in October of 2015. As your Honor
23 well knows, that's after the whole diesel issue becomes well
24 known.

25 And then in the complaint -- and I'm not looking to argue

1 scientist, but, your Honor, the main focus on him is Paragraph
2 206. That's a meeting on July 27th, 27 days after he starts,
3 where the complaint says:

4 "VW employees discussed the diesel issue" --
5 whatever that meant -- "on periphery of regular
6 meeting about damage and product issues in the
7 presence of Diess and Winterkorn."

8 That's not enough --

9 **THE COURT:** Isn't it reasonable to conclude that the
10 diesel issue is the -- is the whole -- is the defeat device. I
11 don't know how to characterize it.

12 Because isn't there -- my recollection is at some later
13 meeting the exact same words were used, "diesel issue." And
14 then it's absolutely clear what they are talking about, because
15 they are talking about fines and penalties and so forth that
16 can be assessed.

17 So, I mean, maybe diesel issue on day one conceivably
18 could be almost anything. But on day two, when they use the
19 word "diesel issue," it's clear that they are talking about
20 this issue. And why isn't it a reasonable inference that just
21 a month earlier or two months earlier, whatever that period of
22 time, it was the same thing. I mean, there is an inference.

23 You know, I -- it's not overwhelming evidence, you know.
24 I mean, I guess you could -- if there were discovery allowed,
25 which there isn't, but, I mean, if there were, you would ask

1 the author: What was diesel? What was the diesel issues? Any
2 different from the other one?

3 **MR. GIUFFRA:** Your Honor, this is a PSLRA securities
4 case; strong inference, particularized facts.

5 He starts on July 1st. There is no question that going
6 back in time, in May 2014, there was a study done in West
7 Virginia that raised an issue about cars, Volkswagen vehicles
8 exceeding emission standards.

9 What the complaint is missing -- okay, they cited to
10 documents where people are discussing the West Virginia study,
11 but the whole question about whether there actually was a
12 defeat device, that was the cause of it?

13 There is one document involving Mr. Tuch, which
14 Dr. Winterkorn receives, which says: Well, the U.S.
15 authorities may look into this. It doesn't say that there is a
16 defeat device. It says, you know, that might be something that
17 was there.

18 But to say that, number one -- and then there is a later
19 document, your Honor, which is a November 2014 document, where
20 the cost of this so-called diesel issue is put at 20 million
21 euro, for a company that was making 12 billion euro.

22 So, you know, yes, we now know with the benefit of
23 hindsight what happened. Okay? But what this complaint lacks
24 are any particularized allegations that the CEO,
25 Dr. Winterkorn, you know, at various points in time knew that

1 there was a problem.

2 The best they have against Dr. Winterkorn is he was the
3 CEO. He appointed senior people, who they claim were involved
4 in the defeat device. But they don't have confidential
5 informants. They don't have particularized evidence. All they
6 have are two documents they cite. One says: Well, U.S.
7 authorities may look into this. And, in fact, by July U.S.
8 authorities were looking into this. There is no question about
9 that.

10 But that doesn't mean you knew the two things that they
11 have to prove on the scienter ground to get -- I'm sort of
12 digressing. Number one, you've got to show that these people
13 knew there was a defeat device, as opposed to that was
14 something that people were looking into.

15 And, number two, that you knew that it was going to have a
16 material effect on the company.

17 And the one document that they cite -- and, in fact, I
18 think it's -- take a look at Paragraph 205. They described --
19 in Paragraph 205 they allege that Dr. Winterkorn thought that
20 the diesel issue could be a cost of doing business fine and
21 20 million euro.

22 So the issue that they have to establish is that he
23 understood that this problem was going to be a very, very
24 difficult one for the company to deal with. And in this
25 subsequent document they -- the November 2014 document, there

1 is discussion of how it can be resolved.

2 So they don't have -- they can't connect knowledge of the
3 fact of the West Virginia study, knowledge that we may have a
4 problem, to what ultimately happens in September.

5 Now, in the case of Dr. Diess, again, he starts on July 1.
6 The fact that they are discussing the diesel issue doesn't
7 mean, number one, that he knows there is a defeat device.

8 Number two, that he knows the consequences of it.

9 But in any event -- and this is where you have an
10 interesting question under U.S. law versus German law. Under
11 the U.S. securities laws there is no obligation for a company
12 to accuse itself of wrongdoing. You have to make statements if
13 you have to correct a statement that you already have that's
14 out there.

15 They say, well -- and, in fact, they allege this in their
16 complaint; that under International Accounting Standards you
17 had certain obligations to report contingent liabilities and
18 the like. Not under GAAP. But that just goes to the whole
19 issue of how are you going to deal with this case were it to
20 stay here.

21 But German securities laws and ad hoc disclosure rules are
22 different than U.S. disclosure rules.

23 But more importantly, getting to the main point with
24 respect to Dr. Diess, they don't allege that he said anything
25 in the United States, did anything in the United States, other

1 than two filings, a second quarter one, which they claim, well,
2 it doesn't disclose the defeat device right after he gets
3 there; and then on the third -- the third quarter filing in
4 2015 is in October after the company has announced the defeat
5 device.

6 So it's hard to see what he did as a new employee that
7 should subject him to being before the Court. And, again, we
8 don't think so.

9 But on the scienter allegations in this complaint, if you
10 actually look at them and you take out, you know, Volkswagen
11 from the caption and everything we know about Volkswagen and
12 you actually parse the specific allegations of scienter in this
13 case, they are very thin. They are allegations about, you
14 know, someone being the CEO; someone -- guilt by association
15 because of close relationships to senior managers; the
16 company's culture; he must have known. That's not sufficient.
17 And that's the whole purpose of the PSLRA, is you have to plead
18 particularized facts that support a strong inference that
19 someone actually had scienter, knew or was severely reckless.
20 And they don't even have that.

21 But as to Dr. Diess, they have nothing other than
22 attendance at a meeting where the diesel issue gets announced
23 in July right after he starts work. And then they cite another
24 meeting in August, where, again, there is no allegation that
25 there was discussion of the fact that there was a defeat device

1 and what the consequences of it were ultimately going to be for
2 the company.

3 And in any event --

4 **THE COURT:** Well, maybe I'm -- in a sense I've
5 certainly misquoted it because there was no discussion of
6 diesel device or defeat device. But it was generically -- it
7 was referred to as a diesel problem; is that the right word?

8 **MR. GIUFFRA:** No question.

9 **THE COURT:** So -- so maybe the -- the details of the
10 problem weren't known, but the problem -- the problem was that
11 there was an issue as to the emissions that were -- that were
12 being collected, being tested. How it happened, the device
13 that was used isn't discussed or doesn't appear in the minutes
14 or the information, but the problem appears. That is to say,
15 they are talking about an diesel problem, and I just wonder
16 whether that's enough.

17 **MR. GIUFFRA:** I don't think it is --

18 **THE COURT:** And you say it isn't.

19 **MR. GIUFFRA:** It isn't, your Honor. And there are
20 many situations where public companies will have a problem,
21 right? They look into the -- and, in fact, by July it's a
22 matter of public record. The company was dealing with ARB. It
23 was dealing with the EPA.

24 So the fact that there was a problem with emissions and
25 how the company was going to deal with it was something --

1 there's no question that the company was dealing with it.

2 But, you know, their claim is he supposedly became -- this
3 is Dr. Diess, became aware of the diesel issue as a result of
4 meetings on August 24th and 25th. Now, that's after the second
5 quarter interim report that gets published in Germany and
6 that's Paragraph 207 and 282 of the complaint. So as to Dr.
7 Diess, you know, it seems to me that they are really stretching
8 it.

9 Similarly as to Dr. Winterkorn, you take away Volkswagen
10 and all of the issues surrounding Volkswagen and you actually
11 parse the allegations, the allegations are: CEO, guilt by
12 association, the fact that he -- the culture of the company,
13 but very little in the way of the kinds of scienter allegations
14 one would need to establish, one, that he knew there was a
15 defeat device, as opposed to in the Tuch memo, there is a
16 discussion that might be something that the regulators will
17 look into, but we really don't know what's going on right now.

18 And there is no document that they cite. The only one
19 they do cite is that Paragraph 205, where as far as Winterkorn,
20 according to their pleading, he thought there would be a
21 \$20 million -- 20 million euro resolution here. That would be
22 the cost of dealing with this and it would be a cost of doing
23 business.

24 So that doesn't indicate that that's something that has to
25 be disclosed to shareholders. And that's taking their own

1 complaint as true. We know, obviously, what's happened, but
2 that's not the test under the PSLRA.

3 **THE COURT:** I don't think he was a good predictor of
4 cost, do you, Mr. Giuffra?

5 **MR. GIUFFRA:** Well, but, of course, your Honor,
6 there's many cases that say that you have to look at what the
7 exact --

8 **THE COURT:** No. I know that. I know. I'm just
9 saying it was a prediction.

10 **MR. GIUFFRA:** It was a prediction.

11 **THE COURT:** I see predictions all the time. The good
12 thing about a prediction is that ultimately you find out how
13 good your prediction was.

14 All I'm saying is his prediction didn't seem to be
15 particularly good.

16 **MR. GIUFFRA:** Not particularly good, but in terms of
17 being securities fraud --

18 **THE COURT:** It may be enough. It's not forward
19 speaking.

20 **MR. GIUFFRA:** But if someone says to you -- if the
21 allegation of the complaint is the man was told in November,
22 2014 this was a 20 million euro problem and they don't have an
23 allegation saying to him: Oh, it's going to be, you know,
24 billions and billions of dollars.

25 Now, my colleague here will stand up and say: Oh, there

1 was a document someone else received that talked about
2 potential fines.

3 But Dr. Winterkorn, the document they cite as to him is
4 20 million euro, the cost of doing business.

5 **THE COURT:** All right. I understand that argument.

6 **MR. HARROD:** Your Honor, I would appreciate the
7 indulgence of just responding to some of these points.

8 One, we only have to make our prima facie case under
9 jurisdiction under *Schwarzenegger*.

10 And my colleague, Mr. Chandrasekhar, reminds me that the
11 trips count under *Yahoo*. The trips -- Mr. Winterkorn says he
12 only made 22 trips. That sounds like a lot of trips to me. So
13 he made 22 trips to the United States.

14 What we have to think about is the strategy 2018. This is
15 something we talked about in the complaint. Winterkorn devised
16 the strategy. He wanted to make Volkswagen the biggest car
17 maker in the world. He wanted to increase the company's market
18 share. He wanted to do that by introducing the clean diesel
19 vehicles into the United States.

20 So his trips here were to sell clean diesel vehicles. So
21 to say -- and that's the underlying issue in this case. To say
22 that that has nothing to do with the fraud is not right.

23 I'd like to address the Diess point. We allege that he
24 was in a meeting two days before that interim report came out
25 where they discussed the diesel issue. We're entitled to an

1 inference. I don't know what the diesel issue is if it wasn't
2 the diesel issue that affected the 11 million cars that
3 Volkswagen put out into the world that were polluting much more
4 than they said they were. So that was the diesel issue.

5 If there is another inference that can be reasonably drawn
6 from that based on what we know now, that's fine, but I don't
7 think that there is one.

8 On Winterkorn, again, we're going back to 1999. His two
9 closest confidantes, Hatz and Hackenberg, there is allegations
10 in the complaint that they came up with the idea of the defeat
11 device, which they called the acoustic function, in 1999 when
12 they were with Audi. When they got rid of doctor --
13 Mr. Bernard, when they decided to abandon the SCR technology,
14 he appointed those two guys as his people in charge of the
15 clean diesel program. That happened before the class period in
16 this case started.

17 The idea that Mister -- or Dr. Winterkorn, who is, you
18 know, maniacally attention to detail. The stories of what his
19 personality are like and his attention to detail are legendary.
20 They are in the complaint. But he missed this.

21 That he believed they sold somewhere in the neighborhood
22 of 10- or 11 million cars and that their exposure would be
23 20 million euros is not a reasonable thing. If that's -- if
24 that's a whitewash, I'm not sure, but certainly he's a
25 sophisticated guy and could have understood that the potential

1 exposure was probably much greater than that and required some
2 investigation to not be reckless.

3 And then I would just point to one other thing. There was
4 a lot of facts. We identify them in our brief. We identify
5 them in the complaint. But there was a recall that was
6 conducted in December of 2014 that was completely misleading to
7 both the U.S. car owners and users and to the regulators. They
8 knew that there was a defeat device in the car at that point.
9 They conducted this recall under completely false pretenses.
10 It was authorized by Germany assuming -- I assume
11 Mr. Winterkorn knew about that or was involved in that, and
12 that's what we allege.

13 So for them to make the statement that he was completely
14 oblivious to this, that this March memo which does talk about
15 there is no explanation for the emissions -- that's the Tuch
16 memo Mr. Giuffra mentioned. There is no explanation for the
17 emissions increase or being above what they are supposed to be
18 is part of that memo, and we assume that there is knowledge of
19 the defeat device.

20 One last point. Courts apply International Accounting
21 Standards in U.S. cases all the time. I have had numerous
22 cases that we have done it. And this argument that you're
23 going to have to apply German law in this case is not one
24 that's been briefed. I don't think it's accurate. And if your
25 Honor is interested, we're happy to submit some additional

1 material.

2 Thank you.

3 **THE COURT:** Thank you.

4 Mr. Giuffra.

5 **MR. GIUFFRA:** Your Honor, in fact, plaintiff's counsel
6 actually just made my point.

7 **THE COURT:** Then you don't have to make it.

8 **MR. GIUFFRA:** No. But when he had his opportunity to
9 point to the scienter allegations against Dr. Diess, what did
10 he say? Well, his two closest confidantes were involved in the
11 defeat device.

12 Guilt by association does not survive under the PSLRA.
13 Pleading standard, we have to have particularized facts that he
14 actually was told or knew what they were doing. Doesn't work.

15 Secondly, he said he had attention to detail. Attention
16 to detail. That's not sufficient to plead fraud under the
17 PSLRA. It's not.

18 Then he said: Well, there was a recall notice at the end
19 of 2014. We assume he knew. Well, assume he knew is not
20 particularized allegations that he did know. And you've got to
21 plead particularized allegations that he did know.

22 And this Tuch memo, what it says is: We don't know what
23 the situation is at this point. It's possible they may say
24 defeat device. That's the best evidence they have.

25 But they don't have the kind of particularized allegations

1 that he actually knew, one, there was a defeat device and, two,
2 what the extent of the problem was, other than their own
3 allegation at Paragraph 205.

4 As to Dr. Diess, it's even worse. Because he said: Well,
5 the diesel issue was discussed. Yes, the diesel issue was
6 discussed. They had -- they were dealing with CARB and the EPA
7 by July 2014 -- 2015, excuse me. No question about that.

8 But the issue is: Is there an allegation that says he
9 knew; that Diess knew or Winterkorn knew. Because that's the
10 other allegation. There are these meetings where they have --
11 they don't have the specifics of what was discussed pled in the
12 complaint. All they plead is the diesel issue was discussed at
13 the periphery of a meeting.

14 And the point, your Honor, is they don't plead that they
15 knew there was a defeat device and they don't, most
16 importantly, plead that the defeat device issue and the costs
17 of it were such that it was going to cause the company's
18 disclosures with respect to what its contingent liabilities to
19 be false.

20 They don't have an allegation in this entire complaint
21 saying that they knew that the contingent -- that the
22 liabilities were going to be billions and billions of dollars.
23 The allegations they do have is the 20 million euro allegation.

24 So, your Honor, I think that the plaintiff's counsel,
25 guilt by association, position, attention to detail, that's not

1 the kind of stuff that gets you past a PSLRA, the standard
2 of -- of strong inference of particularized facts to establish
3 scienter.

4 Thank you.

5 **THE COURT:** Yes.

6 **MR. PFAEHLER:** Your Honor, may it please the Court.
7 Ken Pfaehler for Jonathan Browning.

8 We are happy to submit on the pleadings, if you prefer.
9 Happy to answer any questions.

10 **THE COURT:** Submitted on the pleadings. Thank you.

11 **MR. PFAEHLER:** Yes. Just would say that there's even
12 less particularized facts.

13 **THE COURT:** Not quite submitted on the pleadings.

14 (Laughter.)

15 **THE COURT:** Almost submitted on the pleadings.

16 Mr. Joseph, of course.

17 **MR. JOSEPH:** When I was last here, we were talking
18 about jurisdiction. Things moved on since then, but I just
19 want to respond to a couple of things my friends said on the
20 plaintiffs' side.

21 **THE COURT:** Sure. Go ahead.

22 **MR. JOSEPH:** What the *Yahoo* case says is not all trips
23 are relevant, but that the claims have to arise out of the
24 foreign-related activity. So all trips may be relevant.
25 Nothing happened on any of these trips.

1 What we really have to keep in mind is there are two
2 frauds we're talking about. There is the fraud effected which
3 has been settled in the consumer cases, which is selling the
4 cars. That's a different fraud than the securities fraud,
5 which requires purposeful direction to statements into the U.S.
6 So those are two different things which my friend conflates a
7 good deal of the time.

8 They say they are not relying on the Fidiciary Shield
9 Doctrine. The Fidiciary Shield Doctrine is a defense. They
10 can't get beyond the Fidiciary Shield Doctrine because they
11 can't show that he's a primary violator. They haven't shown a
12 primary violation directing any statements into the U.S.

13 We have the issue about the internet. I would simply say,
14 your Honor, if you analyze it under *Walden*, the internet is
15 available. It's a passive site. Access is something that the
16 plaintiff does. It's making a directed statement to something
17 that the defendant does.

18 Winterkorn didn't direct any statements here. He directed
19 statements that were sufficient to avoid the need to direct
20 statements in the U.S. That's what the exemption is. There is
21 no need to direct statements into the U.S. that would be
22 regulated.

23 And that's why the Canadian example is the telling
24 example. Simply filing with your own regulator is enough for
25 the exemption, but it doesn't mean you're directing the

1 statements here.

2 **THE COURT:** Thank you very much. Matter is under
3 submission. Appreciate it.

4 Thank you.

5 (Proceedings adjourned.)

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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, December 19, 2016