SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FLORIAN LAMBINET and ROBERT C. ANDERSEN, derivatively as shareholders of VOLKSWAGEN AKTIENGESELLSCHAFT on behalf of VOLKSWAGEN AKTIENGESELLSCHAFT,	:	Index No. 652830/2021
	:	The Honorable Joel M. Cohen
Plaintiffs,	:	
	:	Part 3
vs.	:	
	:	Commercial Division
HANS DIETER PÖTSCH, *et al.*,	:	
	:	Motion Sequence No. 001
Defendants,	:	
- and -	:	(Oral Argument Requested)
VOLKSWAGEN AKTIENGESELLSCHAFT,	:	
Nominal Defendant.	:	

Plaintiffs' Memorandum of Law in Opposition to the VW Defendants' Motion to Dismiss the Amended Consolidated Verified Shareholder Derivative Complaint

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Dated: September 22, 2025

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Table of Defined Terms

ADR*	American Deposit Receipt (¶¶247–253)
AG	Aktiengesellschaft
Altered Vehicles	The approximately 11 million vehicles equipped with the Defeat Device that were produced and sold by VWAG between 2009 and 2015 (*E.g.*, ¶¶75–78, 94, 98)
Article 13	New York Business Corporation Law Article 13 (§§1301–1320), entitled "Foreign Corporations"
AudiAmerica	Defendant Audi of America, LLC (¶132)
BCL	Business Corporation Law
Board	VWAG Supervisory Board (¶1 & n.1; ¶¶125, 138–152, 335–344)
Bopp Affidavit	Affidavit of Dr. Teresa Bopp, dated August 14, 2025
Bosch	Robert Bosch GmbH and Robert Bosch LLC (¶¶174–175)
CEO	Chief Executive Officer (a.k.a. Chairman of the Board of Management)
CFO	Chief Financial Officer
Clean-Diesel Scheme†	The Volkswagen emissions scandal, also known as "Dieselgate" (*E.g.*, ¶¶1–4, 45–46)
Complaint‡	Amended Consolidated Verified Shareholder Derivative Complaint Dated July 22, 2025 (NYSCEF No. 24)
Controlling Shareholders	Defendants Porsche Automobil Holding SE, Ferdinand Oliver Porsche,Wolfgang Porsche, Hans Michel Piëch, and Ferdinand Piëch (deceased) (¶1 & n.1; ¶¶141–144, 146)

* The citations refer to the allegations in the Complaint that are relevant to the defined terms.

† "Volkswagen Emissions Scandal," WIKIPEDIA, *available at* https://en.wikipedia.org/wiki/Volkswagen_emissions_scandal (last visited Sept. 1, 2025).

‡ The allegations in the Complaint are cited as "¶___."

CPLR	New York Civil Practice Law and Rules
DOJ	The United States Department of Justice
Defeat Device	The software code designed by Volkswagen and Bosch and installed in Clean-Diesel vehicles to evade emission regulations (¶¶77, 175, 214)
Defendants (also "VW Defendants")	Nominal Defendant Volkswagen Aktiengesellschaft and Defendants 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 (¶¶125, 131–135, 141–145, 147–149, 150–152, 154, 166–173)
Diess	Defendant Herbert Diess, former Chief Executive Officer of Volkswagen AG who has been criminally indicted in Germany for his role in the Clean-Diesel Scheme (¶¶54, 154)
Falkengren	Defendant Annika Falkengren, a member of Volkswagen AG's Board from 2011 to 2018 and a member of the Board's Audit Committee from 2012 to 2016 (¶149)
F. Piëch	Defendant Ferdinand Piëch (now deceased and named as Estate of Ferdinand Piëch), a grandson of Volkswagen's co-founder Ferdinand Porsche, was Volkswagen AG's Chief Executive Officer in the 1990s and Chairman of the Supervisory board between 2002 and 2015 (¶¶63, 72, 140)
Families	The Piëch-Porsche families (¶1 & n.1; ¶¶36–44, 332–348)
FNC	*Forum Non Conveniens*
GalesAff.	Affirmation of Anthony Gales, dated September 22, 2025

GCGC	German Corporate Governance Code (¶¶41–43)
GSCA	German Stock Corporation Act (¶¶3, 31–34)
GOL	General Obligations Law (¶¶41, 273)
Habersack Affirmation	Affirmation of Prof. Dr. Mathias Habersack, dated August 21, 2025
Haussmann I	*Haussmann v. Baumann*, 2022 N.Y. Misc. LEXIS 36899 (Sup. Ct. N.Y. Cnty. Oct. 20, 2022)
Haussmann III	*Haussmann v. Baumann*, 2025 N.Y. LEXIS 686 (N.Y. May 20, 2025)
Horn	Defendant Michael Horn, Chief Executive Officer and President of Volkswagen Group of America, Inc., who had admitted that Volkswagen lied and cheated in the Clean-Diesel Scheme (¶164)
HSBC	*Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018)
Jones Day	A Cleveland, Ohio-based global law firm with over 2,500 lawyers in 40 offices worldwide, including New York (*E.g.*, ¶¶48, 50, 56, 93, 227, 364–379)
Joint Report	Bill Jacket, L 1961, Ch. 855, *Joint Report of the Committees on Corporate Law of the New York State and New York City Bar Association* (Jan. 25, 1961) (¶¶17–18, 22)
K&E	Kirkland & Ellis LLP, an international law firm with offices worldwide, including New York (¶227 & n.8)
Lawrence	Defendant Joseph Lawrence, Executive Vice President and Chief Operating Officer for Porsche Cars North America, Inc. (¶170)
Neusser	Defendant Heinz-Jakob Neusser, the head of Development at Volkswagen AG from 2013 to 2015 (¶158)
Nottebaum Affidavit	Affidavit of Dennis Nottebaum, dated August 20, 2025

NYAG	Office of the New York State Attorney General (*E.g.*, ¶¶197–200, 214, 221, 229–231)
NYC	New York City
Officers	Members of Volkswagen AG's Board of Management
Plaintiffs	Plaintiff Florian Lambinet and Plaintiff Robert C. Andersen (¶¶115–116)
PorscheAmerica	Defendant Porsche Cars North America, Inc.
PorscheSE	Porsche Automobil Holding SE (¶1 & n.1; ¶146)
Pötsch	Hans Dieter Pötsch (¶1 & n.1; ¶141)
S&C[§]	Sullivan & Cromwell LLP, counsel for the VW Defendants, is a New York-based global law firm with over 900 lawyers in 13 offices worldwide, including Frankfurt, Germany (*E.g.*, ¶227 & n.8)
Scheme	The Clean-Diesel Scheme
SEC	The United States Securities and Exchange Commission
SS	The *Schutzstaffel*, a major paramilitary organization under Adolf Hitler and the Nazi Party in Nazi Germany, and later throughout German-occupied Europe during World War II[**]
Supervisors	Members of the VWAG Supervisory Board
Volkswagen (also Volkswagen Group)	Nominal Defendant Volkswagen AG and its subsidiaries, including Defendants Volkswagen Group of America,

[§] *See generally* Nancy & Lisagor & Frank Lipsitus, A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM OF SULLIVAN AND CROMWELL (William Morrow & Co. Jan. 1, 1988). This 344-page book detailed Sullivan & Cromwell's history, including its decades-long representation of German interests dating back to the pre-World War II era when the Dulles brothers—John F. Dulles and Allen W. Dulles—worked at the storied law firm, which at the time maintained a Berlin office. *See also* "John Foster Dulles," WIKIPEDIA, *available at* https://en.wikipedia.org/wiki/John_Foster_Dulles#cite_note-9 (last visited Sept. 15, 2025); "Allen Dulles," WIKIPEDIA, *available at* https://en.wikipedia.org/wiki/Allen_Dulles (last visited Sept. 15, 2025).

[**] "*Schutzstaffel*," WIKIPEDIA, *available at* https://en.wikipedia.org/wiki/Schutzstaffel (last visited Sept. 15, 2025).

	Inc., Audi of America, LLC, Porsche Cars North America, Inc., and Volkswagen Group of America Finance LLC (¶¶125, 131–136)
von Platen	Defendant Detlev von Platen, President and Chief Executive Officer of Porsche Cars North America, Inc. from 2008 to 2015 (¶167)
VWAG	Nominal Defendant Volkswagen AG (¶125)
VWGoA	Defendant Volkswagen Group of America, Inc. (¶131)
VWGoAF	Defendant Volkswagen Group of America Finance LLC (¶135)
Winterkorn	Defendant Martin Winterkorn, who became Volkswagen AG's Chief Executive Officer in 2007 and resigned in 2015, and who has been criminally indicted in both the United States and Germany for his central role in the Clean-Diesel Scheme (¶155)
Zellmer	Defendant Klaus Zellmer, President and Chief Executive Officer of Porsche Cars North America, Inc. from 2015 to 2020 (¶168)

INTRODUCTION

Invoking jurisdiction conferred in BCL §720 and Article 13 (§1314 and §1317), Plaintiffs sue derivatively on VWAG's behalf in connection with the Clean-Diesel Scheme. They allege violations of New York and German statutes by VWAG's Controlling Shareholders—members of the Piëch-Porsche Families sitting on its Supervisory Board—and certain of their handpicked Supervisors and Officers.

Defendants have transmogrified a motion to dismiss into a premature summary-judgment motion. While ignoring the verified allegations in Plaintiffs' Complaint, Defendants submit "speaking" affidavits from employees of Volkswagen, its counsel, and a German-law expert. As demonstrated in Plaintiffs' motions to strike, Defendants' submissions are improper, irrelevant and contain hearsay and legal conclusions. The Court must reject Defendants' attempt to contest —at the pleadings stage—the truth of Plaintiffs' allegations. And the Court has no need for any German-law expert opinion because §1317 overrides the internal-affairs doctrine. Defendants are mistaken to rely on these submissions. However, should the Court consider Defendants' submissions, it must consider Plaintiffs' motions to strike.

Equally misguided is Defendants' attack on Plaintiffs' counsel and their prosecution of this case. The Controlling Shareholders are descendants of VWAG co-founders (Anton Piëch and Ferdinand Porsche) who built and ran VWAG as an armaments factory for the Third Reich, using forced laborers confined in concentration camps on the Wolfsburg property. ¶126 & n.7. Thousands died at the hands of SS guards. Perpetuating a corporate culture built on this Nazi past, the Controlling Shareholders ran VWAG "through 'a reign of terror'" and "'by fear and

intimidation.'" ¶¶72, 287. This corrupt culture led to the Clean-Diesel Scheme and defrauded regulators and car-buyers. While VWAG paid tens of billions in fines and settlements, the Controlling Shareholders and other Defendants have not paid a single penny for the harm they have caused. By this derivative action, Plaintiffs seek to hold these wayward fiduciaries to account.[1]

Asserting statutory claims under New York law, Plaintiffs' action belongs in the New York courts. *Ezrasons, Inc. v. Rudd* validates Plaintiffs' legal theory: notwithstanding the internal-affairs doctrine, shareholders are entitled to bring derivative §720 claims on behalf of foreign corporations doing business in New York. 2025 N.Y. LEXIS 717, at *12 (N.Y. May 20, 2025). *Ezrasons* confirms that the Legislature has the power to "override" any "judicially created rule[.]" *Id.* Here, the Legislature has done so by enacting §1317(a)(2)—subjecting "the directors and officers of a foreign corporation doing business in this state" to §720, "*to the same extent as directors and officers of a domestic corporation*[.]" As *Ezrasons* explains, the phrase "to-the-same-extent-as…a-domestic-corporation" removes "room for doubt" as to the Legislature's intent to override the internal-affairs doctrine. *See id.*, at *18. The "to-the-same-extent-as…a-domestic-corporation" phrase puts §1317 and §1319 on different footings. *Id.* That phraseology in §1317 displaces the internal-affairs doctrine and confers upon New York courts jurisdiction over §720 claims against directors and officers of foreign corporations doing business in New York. *See id.*

[1] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (recognizing the importance of derivative actions).

In addition to extending §720's reach to foreign corporations doing business here, Article 13 (*i.e.*, §1314(b)) authorizes non-residents to bring actions against foreign corporations. Read in conjunction, §1314 and §1317 confer upon New York courts jurisdiction over §720 claims brought by *both* residents and non-residents.

The text of §720 supports a broad interpretation of its remedies. Referencing §626, subsection (b) authorizes *all* shareholders, including "owner[s] of a beneficial interest in shares[,]" to bring derivative actions. Subsection (c) serves as a "savings clause" to preserve "[all] liability otherwise imposed by law[.]" *See Platt Corp. v. Platt*, 21 A.D.2d 116, 120 (1st Dep't 1964) (§720 "remedies … are *in extension*, and not in exclusion, of existing remedies"). In light of this broad interpretation of §720, as well as §1314 and §1317's explicit conferrals of jurisdiction, the Court should exercise jurisdiction here because "[t]he existence of the jurisdiction creates an implication of duty to exercise it[.]" *Second Emp'rs' Liab. Cases*, 223 U.S. 1, 58 (1912).

Urging the Court to relinquish its jurisdiction, Defendants seek an *FNC* dismissal by ignoring the overwhelming nexus between New York and the Volkswagen Group. And CPLR 327(b) prohibits an *FNC* dismissal because Plaintiffs' action "arises out of" or "relates to" multiple agreements falling within GOL §5-1402's purview, including VWAG's agreement with its NYC-based depositories for ADRs. In fact, VWAG's ADR agreements mandate jurisdiction and venue in New York. *See* ¶¶1, 115–117, 247–253. And Defendants' claim of inconvenience is outweighed by this action's substantial New-York nexus, including VWAG's sale—through its 97 New York dealerships—of over 25,000 Defeat-Device-Plus Altered Vehicles to New

Yorkers, its multi-billion-dollar bond offerings in New York and its New York-centered ADR programs.

There is no merit to Defendants' contest to personal jurisdiction. Many Defendants travelled repeatedly to New York to conduct VWAG business. And the allegations of their purposeful availment of New York satisfy CPLR §302's single-transaction requirement. As Plaintiffs' accounting expert, Anthony Gales, CPA MBT, explains, under VWAG's corporate structure, its subsidiaries are generating $750 million a year in car-sales revenues in New York, while consistently raising billions in operating capital by selling VWAG-guaranteed bonds in New York. GalesAff. ¶35.

Defendants' attempt to hide behind VWAG's holding-company status must fail. The business activities of VWAG's four wholly-owned subsidiaries in New York are imputed to VWAG—the consolidated corporate parent—bringing it within §1317's definition of "a foreign corporation doing business in this state."

Because this action is brought under New York law and in a New York court, GSCA §148's leave-of-German-court requirement is inapplicable. Moreover, under *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247 (2017), §148 is procedural.

The Complaint is replete with particularized allegations of domination and control by the Controlling Shareholders. Their voting-rights abuses are detailed in Plaintiffs' motions to strike the Nottebaum and Bopp Affidavits. VWAG's corrupt culture—present from its founding in Nazi Germany—allowed the Controlling Shareholders to orchestrate the Clean-Diesel Scheme and the subsequent cover-up. Using their voting control, they devised the purported "Settlement" to absolve

themselves of liability. That tainted Settlement does not bar Plaintiffs' claims, but instead supports a finding that demand on the Board is futile.

But Demand is futile not only because the Controlling Shareholders control the Board; their misconduct—causing the "worst industrial scandal" in history (¶¶64, 94)—is egregious on its face. *See* ¶¶45–47, 309. In addition to satisfying §626's demand requirement, Plaintiffs have sufficiently alleged their contemporaneous ownership of VWAG stock.

In asserting German exclusivity and supremacy, Defendants ignore precedents precluding foreign law from divesting New York courts of jurisdiction,[2] and they have no answer to BCL's statutory conferrals of jurisdiction:

- Subject-matter jurisdiction exists because VWAG is a foreign corporation doing business in New York under Article 13, under which even non-residents may sue foreign corporations (§1314);
- §1317 subjects VWAG's Supervisors and Officers to §720 liability "*to the same extent as directors and officers of a domestic corporation*[,]" and such liability may be enforced in "*the courts in this state, in the same manner as in the case of a domestic corporation*;
- §720 creates a cause of action to be asserted derivatively in New York by "owner[s] of a beneficial interest," with a "savings clause" preserving all other remedies, including remedies under the GSCA;
- §720's reference to §626—New York's "gatekeeper rules"—renders GSCA §148 inapplicable; and
- The BCL (§720) and the GSCA (§§76–77, 91, 93, 111, 116–117) prohibit the same fiduciary misconduct and can be enforced in harmony, consistent with the internal-affairs doctrine as modified.

Defendants' motion is meritless and should be denied.

[2] *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980) (refusing to enforce a foreign statute divesting New York courts of jurisdiction).

BACKGROUND

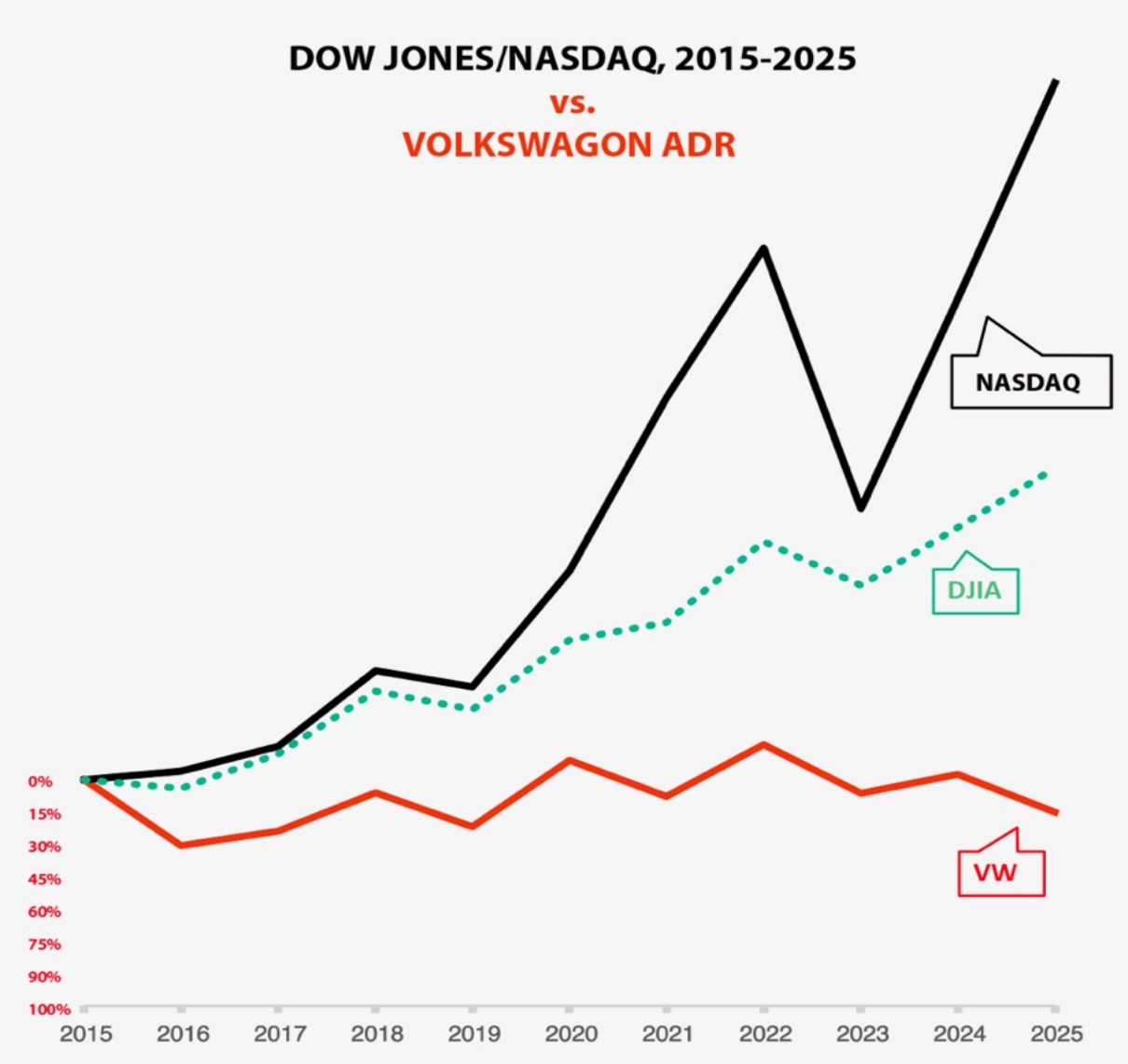
I. The Controlling Shareholders Perpetrated the Clean-Diesel Scheme, Inflicting Severe Damage on VWAG

To make VWAG into the world's largest carmaker, the Controlling Shareholders directed a major corporate expansion in 2006–07 via the production and sale of Clean-Diesel vehicles to penetrate the markets in the United States, including New York. ¶71. But the emissions standards were too stringent for VWAG's engines. ¶72. To carry out their directives at all costs—including employing illegal means—the Controlling Shareholders implemented a scheme to design and install the Defeat Device in Clean-Diessel vehicles to be sold in the United States. ¶¶73–82. Made possible by VWAG's authoritarian corporate culture, the Scheme—which involved hundreds of managers, engineers, and other employees—was an "open secret." *Id.* At the helm of this "reign of terror" were F. Piëch and CEO Winterkorn, who instructed employees to design, manufacture, and sell cars by illegal means (¶72).

In September 2015, U.S. regulators caught VWAG for violating emissions standards. ¶75. The NYAG, along with other regulators, brought civil and criminal actions against VWAG, its subsidiaries, and their employees. ¶¶98, 102, 229–231.

The Controlling Shareholders obstructed the investigations. In the summer of 2015, "'VW executive management authorized [the] continued concealment'" of the Scheme. ¶307. Before the scandal broke—a high-level official in VWAG's legal department directed colleagues to delete "incriminating material" concerning the Scheme. ¶302. VWAG later admitted that 40 employees destroyed thousands of incriminating documents. ¶¶306, 311. VWAG also blocked the investigations by 47

state attorneys general, including the NYAG. ¶¶308–309. The Controlling Shareholders obstructed VWAG's investigation by Jones Day. ¶¶363–379. Three years later, VWAG "remain[ed] dominated by longtime insiders, and there ha[d] been few visible legal or disciplinary consequences for people involved in the emissions cheating." ¶360. But the government proceedings ultimately resulted in guilty pleas and multibillion-dollar fines. ¶102. VWAG's market capitalization collapsed by over $60 billion (¶¶46, 98):



II. The Families Control VWAG and Its Supervisory Board

The New York Times reported in 2015 that "[t]he governance of Volkswagen was a breeding ground for scandal"—"an accident waiting to happen." ¶47. Corporate-governance experts concluded the Clean-Diesel scandal was caused by "a colossal failure in leadership at the highest levels of [VWAG] management." ¶66. VWAG's "corrupt corporate culture" allowed "senior managers … to [break] fundamental moral and legal standards" to maximize "quick profit." ¶¶60, 66.

The Piëch-Porsche Families hold 53.1% of the voting rights of all shares, giving them control of the Board and all corporate actions. ¶1 n.1; ¶¶37–44. For decades, Piëch, F. Porsche, and W. Porsche—who inherited VWAG shares from its Nazi founders—occupied Board seats. ¶¶142–144. In 2015, these Controlling Shareholders installed Pötsch—the Families' longtime confidant and VWAG's CFO during the Clean-Diesel Scheme—as Board Chairman.[3] ¶141.[4] The Board's structure—including the Families' control and Pötsch's lack of independence—"deviat[es]" from the GCGC's standards for proper corporate-governance. ¶43.[5] Enabled by GCGC violations, the Controlling Shareholders perpetrated the Scheme, while accumulating multi-billion-dollar personal fortunes. ¶¶3, n.3., 332–398.

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[3] Pötsch—the Families' long-time confidant and advisor—spent decades working in the Families' businesses, including VWAG and PorscheSE. ¶141.

[4] As a "measure of Mr. Piëch's influence," the Families installed his fourth wife, a former kindergarten teacher, to the Board in 2012 over shareholder protest of "her lack of qualifications and independence[.]" ¶63.

[5] Piech—well into his 80s—is disqualified to serve on the Board under the 75-year-old age limitation of the GCGC. ¶43.

ARGUMENT

I. Plaintiffs State BCL §720 Claims Under Article 13

A. VWAG Does Business in New York and Thus Falls Within the Purview of BCL §1317 and §1314

AirTran New York, LLC v. Midwest Air Group, Inc. confirms that the provisions in Article 13 employ two standards for "doing business in [New York]":

- §1312's "heightened 'doing business' standard [that] is a higher hurdle than CPLR §302's [single-transaction standard]"; and
- the "traditional standard of [BCL] §§1314 and 1317[,]" which is consistent with CPLR §302.

46 A.D.3d 208, 214–15 (1st Dep't 2007).

Applying the traditional, lower standard to §1315, *AirTran* holds that a subsidiary's business activities can be imputed to a parent to determine whether the parent is "doing business" in New York. *Id.* at 218. In finding an agency relationship between the subsidiary and the parent, *AirTran* considers several factors, including that the parent (1) provides the subsidiary with operating capital and insurance coverage, (2) services the subsidiary's debts, and (3) derives 70% of its annual revenues from the subsidiary's operations. *Id.* at 210. Based on these facts, the subsidiary's New York activities are imputed to the parent supporting a finding that the parent is "doing business in [New York.]" *Id.* at 220.

Under *AirTran*, VWAG is "doing business in this state" through its wholly owned subsidiaries, including VWGoA, VWGoAF, AudiAmerica, and PorscheAmerica. ¶¶131–136. As Plaintiffs' accounting expert explains, VWAG "a

holding company … that operates … in large part via controlled (and often 100% owned) subsidiaries." GalesAff. ¶4. VWAG's subsidiaries operate as "*divisions*" of the "Volkswagen Group." *Id.* ¶9. The Volkswagen Group issues a single "consolidated financial statement" and "presents the assets, liabilities, income, revenue, expenses, and cash flows of these consolidated, controlled entities *as a unified legal and economic entity*." *Id.* ¶26. Just like the subsidiary in *AirTran*, the New York activities of VWAG's subsidiaries must be imputed to VWAG for purposes of §1317. *See* 46 A.D.3d at 220.

Relying on *dicta* in *AirTran*, Defendants argue that §1312's heightened "doing business" standard—which is equivalent to the standard for general jurisdiction—applies to §1317. *AirTran*'s *dicta* references a federal trial court's decision in *Air India v. Pennsylvania Woven Carpet Mills*, which denied summary judgment on a §720 claim due to the absence of any "evidence sufficient to warrant an inference that [defendant] is or was doing business in New York." 978 F. Supp. 500, 503 (S.D.N.Y. 1997). *Air India* stated, also in *dicta*, that §1317's "doing business" requires "far more significant presence" than "transact[ing] business." *Id.* n.16. But this *dicta*-on-*dicta* by a federal court interpreting state law carries no weight. Moreover, *Air India* conflicts with other federal decisions requiring only an allegation of "transacting business in this state" to invoke similar statutory provisions. *See Jacobs v. Mfrs. Trust Co.*, 81 F. Supp. 394, 397 (S.D.N.Y. 1948). The Court should reject Defendants' *dicta*-laden argument.

B. Plaintiffs' Complaint Is Sufficiently Particularized

Plaintiffs can state a §720 claim based on negligence—without alleging intent or fraud. *Rapoport v. Schneider*, 29 N.Y.2d 396, 400 (1972). They can also state a negligent breach-of-the-duty-of-care claim under the GSCA. ¶32. "In a stockholder's suit to hold the directors liable for negligence[,] the acts of negligence need not be set out with great particularity." *Bown v. Ramsdell*, 227 A.D. 224, 225 (4th Dep't 1929); *see also Erie Cnty. Emps.' Ret. Sys. v. NN, Inc.*, 2021 N.Y. Misc. LEXIS 2404, at *5 (Sup. Ct. N.Y. Cnty. May 14, 2021) ("a heightened pleading standard need not be satisfied"). Thus, Defendants are wrong to assert that CPLR 3016(b)'s heightened standard applies to Plaintiffs' negligence-based claims. Equally wrong is their "group-pleading" argument because it is a subset of the CPLR 3016(b) requirement.

Even if particularity is required, it should "not to be interpreted so strictly as to prevent an otherwise valid cause of action." *Pludeman v. N. Leasing Sys., Inc.*,10 N.Y.3d 486, 492 (2008). CPLR 3016(b) is satisfied where "the facts are sufficient to permit a reasonable inference of the alleged conduct." *Sargiss v. Magarelli*, 12 N.Y.3d 527, 531 (2009). Here, the Complaint alleges that the Scheme resulted in criminal prosecutions, including VWAG's own guilty plea and indictments against the highest-level VWAG executives—Pötsch, Diess, and Winterkorn. *E.g.*, ¶¶39, 50, 95–96. Allegations of criminal conduct are sufficient to state a breach-of-fiduciary-duty claim. *See Roth v. Robertson*, 64 Misc. 343, 345 (Sup. Ct. Erie Cnty. 1909). Group pleading is likewise permissible because it is reasonable to infer that each Defendant participated in the same wrongful conduct (*see*, *e.g.*, ¶¶412–416). *See MDK Hijos Trust v. Nordlicht*, 2020 N.Y. Misc. LEXIS 1248, at **28–29 (Sup. Ct. N.Y. Cnty. Mar.

10, 2020); *see also Arena Riparian LLC v. CSDS Aircraft Sales & Leasing Co.*, 184 A.D.3d 509, 510 (1st Dep't 2020) (permitting group-pleading against "closely related defendants" in one transaction).

Finally, the Complaint is replete with allegations of waste. *E.g.*, ¶¶353–362. For example, Plaintiffs allege that the "Board wasted $9 million of VWAG's corporate assets by using corporate funds to allow [Pötsch and Diess] to buy their way out of their personal criminal exposure." ¶108. *Aronoff v. Albanese* is thus inapposite. *See* 85 A.D.2d 3, 5 (2d Dep't 1982).

In sum, Plaintiffs state claims under §720. Because Defendants do not contest the pleading sufficiency of Plaintiffs' GSCA claims, those claims are also well stated.

II. Plaintiffs Have Derivative Standing Under New York Law

A. Plaintiffs Sufficiently Allege Contemporaneous Ownership

To plead contemporaneous ownership under §626(b), a plaintiff is only required to allege stock ownership "at the time of the transaction of which [they] complain[]." Both Plaintiffs allege that they owned VWAG shares "during the period of [the] alleged wrongdoing." ¶¶115–116. These allegations are sufficient under "the liberal 'notice pleading' standard of CPLR 3013[.]" *Pressley v. City of New York*, 233 A.D.3d 932, 935 (2d Dep't 2024). In *Karfunkel v. USLIFE Corp.*, the court held that plaintiff sufficiently alleged her standing based on an "*inference*" of contemporaneous and continuance ownership because defendants are barred from "rebutt[ing]" her allegations at the pleadings stage. 116 Misc. 2d 841, 843 (Sup. Ct. N.Y. Cnty. 1982), *aff'd*, 98 A.D.2d 628 (1st Dep't 1983).

Defendants attack Plaintiffs' allegations as vague. But this is an

impermissible attempt to impose a stock-ownership-particularity requirement that is nowhere to be found in §626(b)'s text. The word "particularity" appears only in subsection (c)—which governs pleading demand futility—not stock ownership. Under identical text in §626's federal counterpart, stock-ownership allegations are subject only to a notice-pleading requirement. *Galdi v. Jones*, 141 F.2d 984, 992 (2d Cir. 1944). No law requires Plaintiffs to plead more.

Latching onto Andersen's statement that he had owned VWAG shares "since 2015," Defendants challenge his ability to satisfy the contemporaneous-ownership requirement because the underlying claims arose in part from pre-2015 events. But §626(b) speaks to holding shares at the time of the "transaction"—a onetime event that does not fit situations where, as here, fiduciaries engaged in a years-long course of misconduct and then spent more years to cover it up. *E.g.*, ¶¶92, 183, 350, 394–396. Thus, New York courts apply the "continuing-wrong" doctrine to permit shareholders to bring derivative claims so long as their stock ownership coincides with the "continuing" course of misconduct. *See, e.g.*, *Ripley v. Int'l Rys. of Cent. Am.*, 8 A.D.2d 310, 324 (1st Dep't 1959); *Roy v. Vayntrub*, 15 Misc. 3d 1127(A) (Sup. Ct. Nassau Cnty. 2007). Under this rule, Andersen's allegations are sufficient.

B. Demand Is Excused

Demand is excused when "a complaint alleges with particularity" that:

- "'a majority of the board … [lacks] independence because … director[s] with no direct interest in [the] transaction [are] 'controlled' by a self-interested director'"; and
- "'the challenged transaction was so egregious on its face that it could not

have been the product of sound business judgment of the directors." *Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003) (quoting *Marx v. Akers*, 88 N.Y.2d 189, 200–01 (1996)). Both situations are present here.

1. Fact-Specific Allegations Demonstrate the Piëch-Porsche Families' Control and Domination and Their Participation in Both the Scheme and the Cover-up

The Families—with 53.1% of the VWAG stock's voting power and Pötsch installed as Chairman—control VWAG's Board. ¶¶37–38, 57, 332–333, 347, 392. They handpicked all other Supervisors. For example, in 2025, the Families re-appointed to the Board Olaf Lies, a supervisor from 2013–17 who participated in the Scheme. ¶¶344, 346, 364, 368, 371, 374–375. Lies sat on the Executive Committee that halted the Jones-Day investigation. ¶364. The Families' 2012 installation of F. Piech's kindergarten-teacher wife to the Board is another example of their control. ¶47. Indeed, VWAG "has drawn flak from investors for governance shortcomings that are partly related to its ownership structure[.]" ¶40. Specific and particularized, these allegations stand in stark contrast to the conclusory allegations of control in *Health-Loom Corp. v. Soho Plaza Corp.*, 209 A.D.2d 197, 198 (1st Dep't 1994).[6]

The Complaint alleges the Controlling Shareholders, Pötsch, and their handpicked Supervisors directly participated in, and personally benefited from, the Scheme. *E.g.*, ¶¶71–72, 85. The Controlling Shareholders also orchestrated a cover-up, halting the Jones-Day investigation (¶¶363–379) and obstructing regulatory

[6] Equally inapposite is *Wandel v. Eisenberg* because plaintiff there failed to allege that the "[disinterested] directors were controlled by the [interested] directors." *See* 60 A.D.3d 77, 80 (1st Dep't 2009).

investigations (¶¶302–311). *E.g.*, ¶¶93, 108. The Controlling Shareholders even allowed Pötsch and Diess to remain as Board Chair and CEO *after they were indicted*. ¶¶52–54, 353–383. They misused corporate funds to pay criminal fines for Pötsch and Diess (¶357) and pay Winterkorn tens of millions of dollars (¶362)—to prevent them from cooperating with the prosecutors. ¶357. By abusing their voting power, the Controlling Shareholders secured shareholder approval of the purported "Litigation Settlement," which effectively halted all further investigations and blamed their underlings for the scheme. ¶¶382, 392.

The foregoing allegations are similar to what was alleged in *Bansbach*. Control and domination in *Bansbach* were evidenced in the board's decision to indemnify the wrongdoing director for defense costs even after he admitted guilt in the related criminal proceedings. 1 N.Y.3d at 12. Here, ample allegations demonstrate that the Controlling Shareholders—self-interested participants in the Scheme and the cover-up—handpicked every other Supervisor and controlled the entire Board. Under *Bansbach*, demand is futile. *See id.*

2. Fact-Specific Allegations Demonstrate That the Scheme and the Cover-up—So Egregious on Their Face—Could Not Have Been a Product of Sound Business Judgment

"[T]he [DOJ] insist[ed] on a guilty plea given the egregiousness of Volkswagen's misconduct and the fact [that] it reached very high in the company." ¶311. In March 2017, VWAG pled guilty in federal court to fraud and obstruction of justice. ¶313. In May 2018, the United States indicted Winterkorn for "conspiracy and wire fraud." ¶314. And in April 2019, Winterkorn, together with four Volkswagen executives, were prosecuted for fraud in Germany. ¶¶318–320. In May

2025, four VWAG executives were convicted of crimes for the scheme: Jens Halder, Hanno Helden, Heinz-Jakob Neusser, and Barbara Fröhlich. ¶52.

In October 2016, Volkswagen paid $15 billion to settle civil claims by owners of nearly 500,000 diesel cars in the United States—"one of the biggest consumer settlements in history." ¶323. In October 2016, Volkswagen paid $1.2 billion to settle lawsuits filed by U.S.-based dealers. ¶324. In June 2018 and May 2019, Volkswagen was fined over €1.5 billion by German regulators. ¶¶316–317.

The Scheme presents a worse fact pattern than that in *HSBC*, where demand was excused based on the egregiousness of the alleged wrongdoing. *See Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018). Plaintiff in *HSBC* alleged a decade-long pattern of admitted oversight failures that resulted in a $1.5 billion penalty. *Id.* at 758–59. Here, the wrongdoing—resulting in "the worst industrial scandal in Germany since World War II"—is more egregious than what was alleged in *HSBC*. *See* ¶¶3, 46, 97, 310–331. Demand ought to be excused here.

III. German Law on Derivative Standing Is Inapplicable

A. Under *Ezrasons*, §1317 Overrides the Internal-Affairs Doctrine

BCL §1317(a) clearly confers jurisdiction upon New York courts over §720 claims against "directors and officers of … foreign corporation[s] doing business" in New York, "*to the same extent as directors and officers of a domestic corporation*[.]" *Both* §720(b) and §626(b) authorize "owner[s] of a beneficial interest in shares" to bring derivative actions. The texts of §1317, §720, and §626 reflect the Legislature's intent to authorize shareholders to bring §720 derivative claims in New York courts. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

In light of the statutory text, §1317 displaces the common-law internal-affairs doctrine and requires the application of §626 to derivative §720 claims. *See Meeker v. Wright*, 76 N.Y. 262, 267 (1879) ("[t]he statute and the rule of the common law cannot stand together, and the latter must give way"). If there is any doubt that the Legislature intended to displace the internal-affairs doctrine in §1317, legislative history removes it. As detailed in the motion to strike the Habersack Affirmation, in 1961, before enacting Article 13, the Legislature considered and rejected the objection of the corporate establishment that §1317 attempted "to regulate the internal affairs of foreign corporations." Joint Report, at 32–35.

Ezrasons confirms that §1317 displaces the internal-affairs doctrine. *See* 2025 N.Y. LEXIS 717, at *18. Defendants' argument to the contrary ignores the textual difference between §1317 and §1319. *Ezrasons* holds that the Legislature expressed a different intent in §1317 by employing the phrase "to-the-same-extent-as…a-domestic-corporation." *Id*. at *18. Defendants' argument conflicts with this holding.

Defendants' reliance on pre-*Ezrasons* trial-court decisions is misplaced because they do not analyze §1317 or discuss a *shareholder's* standing. *See Acacia Invs., B.S.C.(C) v. W. End Equity I, Ltd.*, 66 Misc. 3d 1224(A), at *25 (Sup. Ct. N.Y. Cnty. 2020); *Potter v. Arrington*, 11 Misc. 3d 962, 969 (Sup. Ct. Monroe Cnty. 2006). *Graczykowski v. Ramppen* is inapposite because it involves a *director's* standing to sue and says nothing about §626. *See* 101 A.D.2d 978, 980 (3d Dep't 1984).

B. Under *Davis*, German Procedural Rules Are Inapplicable

German law is inapplicable to Plaintiffs' §720 claims because they arise under New York law. Nor are German procedural rules applicable to Plaintiffs' GSCA claims because New York's procedural rules apply here. *See Davis*, 30 N.Y.3d at 252.

In *Davis*, a shareholder derivative action involving a Cayman Islands corporation, defendants sought application of a Cayman Islands rule requiring a pre-suit leave-of-court. 30 N.Y.3d at 249–50. Looking to the "plain language" of the rule, the court found it to be a "procedural" rule serving a "gatekeeping" function. *Id.* at 253. The court refused to apply the rule in a New York court because there was "no provision that would suggest that it applies … in derivative actions brought … outside the Cayman Islands." *Id.* at 254.

Just like the Cayman Islands rule in *Davis*, §148's title identifies §148 as *procedural*: "Court *Procedures* for Petitions Seeking Leave to File an Action for Damages." Subsection (2) of §148 authorizes only "[t]he regional court of the company's registered seat"—and no other court—to "decide on the petition seeking leave to file [a derivative] action." And §148 employs terms specific to German practice—"petition[ing]" to sue as part of seeking "leave-to-file" an action. The plain language of §148 dictates the outcome: it is a procedural rule applicable only in Germany and not in New York. *See HSBC*, 166 A.D.3d at 756–57.

IV. This Court Possesses Personal Jurisdiction over Defendants

Under BCL §1317, all individual Defendants are subject to jurisdiction as "directors and officers of … foreign corporation[s] doing business in this state[.]" In addition, all Defendants are subject to jurisdiction under CPLR §302.

A. Defendants' Contacts with New York Satisfy §302's Two Prongs

Under CPLR §302(a)(1), even if a non-domiciliary "never enters [New York]," he is subject to jurisdiction of a New York court if (1) he "transacted business" here; and (2) "the claims … arise from the transactions." *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 323 (2016). This "is a single-act statute requiring but one transaction … to confer jurisdiction[.]'" *State of New York v. Vayu, Inc.*, 39 N.Y.3d 330, 335 (2023).

As part of the Scheme, Defendants caused VWAG and its subsidiaries and affiliates to design a "Defeat Device Plus" specifically to meet New York's emissions standards. *E.g.*, ¶¶72, 84, 214. They caused VWAG to sell over 25,000 Altered Vehicles to New Yorkers. ¶214. To fund the Scheme and to provide liquidity to survive the scandal, Defendants accessed New York's financial markets by selling multi-billion-dollar bonds (¶¶237–246) and operating ADR programs through NYC-based depositories (¶¶247–253). To that end, the Controlling Shareholders signed SEC filings. ¶247. VWAG bought real estate in NYC to develop a multi-million-dollar flagship store (¶¶233–235), and sold cars through nearly 100 dealerships in New York (¶197). Defendants regularly traveled here on VWAG's business. ¶¶140–163. Plaintiffs' Jurisdictional Vinettes show multiple Defendants, including Pötsch, Falkengren, Diess, Winterkorn, Horn, Neusser, von Platen, Zellmer, and Lawrence, conducting VWAG's business in New York. Compl. Ex. A.

These New York contacts satisfy §302(a). Defendants conducted "purposeful activit[ies]" in New York. *See Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). And there is an articulable nexus between their activities and Plaintiffs' claims. *See Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339 (2012). In *Mucha v. Volkswagen Aktiengesellschaft*, a class action against VWAG, Pötsch, and others on behalf of VWAG ADR holders arising from the Scheme, the court found jurisdiction because, like the Controlling Shareholders (¶247), defendants signed SEC filings for VWAG's ADRs. 540 F. Supp. 3d 269, 284 (S.D.N.Y. 2021). *Mucha* applies here.

Moreover, under §302(a)(1), a corporation is the "agent" of its officers and directors, who are "primary actors" in the corporation's transaction of business. *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). VWAG is a consolidated, integrated entity doing business through subsidiaries. GalesAff. ¶¶11–13. VWAG and Defendants have availed themselves of New York by marketing and selling the Altered Vehicles in New York, obtaining billions in revenue for VWAG. ¶214. VWAG consented to continuing jurisdiction here through the NYAG settlement. ¶199; *see also Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, 280 (1944) (recognizing foreign corporation's involuntary consent). Thus, the Supervisors were "primary actors" behind the Scheme and the related financing activities. *See Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017). They authorized those activities, which constitute VWAG's doing business in New York and thus their own business transactions in New York. *See In re Renren Inc. Derivative Litig.*, 2020 N.Y. Misc. LEXIS 2132, at **57–78 (Sup. Ct. N.Y. Cnty. May 20, 2020).

B. Exercising Jurisdiction Here Does Not Offend Due Process

For the same reasons that personal jurisdiction is proper under New York law, that jurisdiction comports with due process. *See Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 71 (1984). The Scheme and the cover-up "arise out of" and "relate to" Defendants' New York contacts. VWAG and Defendants must "reasonably anticipate being hauled into court" in New York, where they have sued and been sued many times. *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 299–300 (2017). The due-process analysis is no different when jurisdiction is based on an individual's actions in a corporate capacity. *Kreutter*, 71 N.Y.2d at 470–71. Due process is satisfied where §302 extends jurisdiction for corporate acts over a fiduciary who was a "primary actor." *See Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221, 260–264 (S.D.N.Y. 2019). The court in *Mucha* found just that. *See* 540 F. Supp. 3d at 283–84.

Defendants fail to carry their "burden to present a compelling case that … some other considerations would render jurisdiction unreasonable." *D&R*, 29 N.Y.3d at 300. New York's strong policy interests are implicated here: Defendants violated New York law and defrauded New Yorkers. ¶¶229–230. New York has a strong interest in maintaining its "status as the pre-eminent commercial … nerve center of" the world and assuring "ready access to a forum for redress of injuries arising out of" here. *Ehrlich-Bober*, 49 N.Y.2d at 581.

V. An *FNC* Dismissal Is Prohibited by Subsection (b) of CPLR 327 and Improper Under Subsection (a)

A. CPLR 327(b) Bars Dismissal of This Action Based on *FNC*

FNC was codified in the 1970s. But experience quickly showed that courts were granting CPLR 327(a) dismissals even where the disputes related to agreements that provided for New York jurisdiction. Bill Jacket, L 1984, ch. 421, The Assembly Bill No. 7307-A, *Memorandum in Support by Senator John J. Marchi*, at 1 (June 25, 1984). Because such dismissals "ero[ded]" New York's status as "the world's leading center for international finance," the Legislature in 1984 passed CPLR 327(b) and GOL §5-1402 to restrict the power of the courts to grant *FNC* dismissals. Bill Jacket, L 1984, ch. 421, The Assembly Bill No. 7307-A, *Note on Voting*, at 5-9 (June 25, 1984).

CPLR 327(b) and GOL §5-1402 prohibit courts from granting *FNC* motions in cases that either arise from or relate to any agreement, valued at $1 million or more, that contains a consent to the jurisdiction of New York courts and to the application of New York law. This "statutory mandate … preclude[s] a New York court from declining jurisdiction even where the only nexus is [an] agreement." *Nat'l Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 230 (1st Dep't 1999).

This action falls within CPLR 327(b) because multiple agreements satisfy GOL §5-1402's requirements. ¶¶196–214. VWAG and its subsidiaries and affiliates have entered into agreements that involve over $1 million and contain a consent to New York jurisdiction and the application of New York law:

- VWAG's agreements with JP Morgan Chase for ADRs (¶249);
- settlements between the NYAG and VWAG and Bosch (¶¶199–202);

- VWAG auto-sales and servicing agreements (¶¶203–208); and
- agreements for VWAG's NYC-flagship store and nearly 100 other New York dealerships (¶¶210–211).

CPLR 327(b) applies so long as an action "relates to" or "arises from" a qualified agreement. "Relates-to" is a broad term and covers the meaning of "pertain-to," "affects," "involves," and "touches[.]" BLACK'S LAW DICTIONARY at 1288 (6th ed. 1990). "Arises-out-of" is synonymous with "originate," "flow," "emanate," and "stem-from[.]" *Id*. at 108. It means "incident to" or "having connection with[.]" *Worth Constr. Co. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 415 (2008). These terms have "the broadest and most comprehensive" meaning. *In re Potoker*, 286 A.D. 733, 736 (1st Dep't 1955).

Under this broad construction, Plaintiffs' action "relates to" and "arises from" the foregoing agreements—and presumably many more.[7] VWAG's depository agreements relate to this action because Plaintiffs claims are brought on behalf of VWAG, and to benefit its shareholders, including ADR holders. *See Batchelder v. Kawamoto*, 147 F.3d 915, 917–19 (9th Cir. 1998). VWAG's New York dealership-and-service agreements relate to this action because they are "associated with" the Scheme. *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128–29 (2d Cir. 2001).

Arguing the contrary, Defendants cite *Haussmann I* for the proposition that, to trigger CPLR 327(b), the "*gravamen* of the alleged conduct" must be related to the underlying agreements. *Haussmann v. Baumann*, 2022 N.Y. Misc. LEXIS 36899, at *2 (Sup. Ct. N.Y. Cnty. Oct. 20, 2022). But neither CPLR 327(b) nor GOL §5-1402

[7] Plaintiffs seek discovery of all agreements relevant to CPLR 327(b). ¶213.

requires any Defendant to be a party to the underlying agreements, or refers to the "*gravamen*" of the action. In fact, subsection (b) prohibits dismissal of an "action" without reference to any "party" to the action. So long as Plaintiffs' "*action*" "arises out of" or "relates to" these agreements, CPLR 327(b) prohibits an *FNC* dismissal. Defendants' argument betrays statutory text.

B. An *FNC* Dismissal Is Improper in Light of This Action's New York Nexus and Defendants' Failure to Establish Inconvenience

FNC "rests on considerations of public policy." *Strand v. Strand*, 57 A.D.2d 1033, 1034 (3d Dep't 1977). New York's policy—as reflected in Article 13—is to exercise jurisdiction over derivative actions asserting §720 claims on behalf of foreign corporations doing business here. Specifically, §1314 confers jurisdiction over actions involving foreign corporations brought by non-residents, demonstrating the Legislature's intent to regulate foreign corporations for the protection of New York-residents and non-residents alike. *See Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 437 (1916) (exercising jurisdiction over foreign corporations registered to do business here). The policy of exercising jurisdiction conferred by Article 13 is consistent with New York courts' centuries-old tradition of entertaining derivative actions[8] and regulating foreign corporations doing business here.[9]

[8] *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389 (N.Y. Ch. 1817) (recognizing the jurisdiction over corporate fiduciaries for "breach of trust").

[9] *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 64 (1915) (applying New York law to a foreign corporation doing business here).

1. Plaintiffs Have a Presumptive Right to Access to New York Courts in Light of the Scheme's Nexus to New York

The Scheme has substantial New York nexus. NYC "has always been a vital market for Volkswagen in achieving long-term U.S. growth." ¶236. In addition to owning the hundred-million-dollar flagship store in NYC, VWAG developed nearly 100 dealerships in New York. ¶¶197, 214, 235. The Scheme targeted New York, causing over 25,000 Altered Vehicles to be sold to New Yorkers. ¶214. To that end, VWAG and its subsidiaries devised a "Defeat Device Plus" specifically to meet New York's emissions standards. *Id.* As detailed by the NYAG, VWAG and its subsidiaries purposefully availed themselves of New York. ¶¶229–230.

To fund the Scheme and to provide liquidity to survive the scandal, VWAG issued billions in bonds in 2014–15 through New York-based intermediaries to U.S. investors, including New Yorkers. ¶¶245–246.

In addition, VWAG operates New York-centered ADR programs. ¶¶247–253. Thousands of ADRs owned by New York-residents trade daily in New York. ¶248. The depository for VWAG ADRs is the NYC-based JP Morgan Chase. ¶249. VWAG's depository agreements provide a consent to New York jurisdiction. *Id.* VWAG ADRs are settled through the NYC-based Depository Trust Company. ¶253.

Scheme-related litigation spread across the country, including in courts in New York. ¶225. Because the law firms retained by Volkswagen to defend the litigation—including S&C, K&E, and Jones Day—all maintain offices here, the evidence of

Defendants' liability is located here.[10] ¶227. Moreover, VWAG and its subsidiaries have repeatedly appeared in courts in New York. ¶¶254–255.

In light of the substantial New York nexus, Plaintiffs' choice of a New York forum is entitled to substantial deference. *Rocha Toussier y Asociados, S.C. v. Rivero*, 91 A.D.2d 137, 141 (1st Dep't 1983). In *Rocha*, the First Department reversed an *FNC* dismissal of a derivative action involving Mexico-resident parties because of New York's "'substantial nexus' with the action" and defendants' failure to rebut it. *Id*. Deference to Plaintiffs' choice finds further support in §1314(b)'s authorization of non-residents' right to sue. *See Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006) (according deference to a foreigner's choice). Moreover, Plaintiffs' choice of forum must be accorded extra weight here because the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950).

2. Defendants Cannot Satisfy their "Heavy Burden" to Show Significant Inconvenience or Hardship in Defending in New York or to Establish an Adequate Alternative Forum

Plaintiffs' choice of forum can be overcome only by an evidentiary showing that the *FNC* factors "strongly favor" the alternative forum. *Elmaliach v. Bank of China, Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013).[11] This evidentiary burden is "heavy." *Id*.

[10] In a derivative action, company counsel's files are discoverable notwithstanding any attorney-client privilege. *See generally Garner v. Wolfinbarger*, 430 F.2d 1093, 1103–04 (5th Cir. 1970). Any privilege has been waived because materials relating to the Scheme have been seized from, and provided to regulators by, Jones Day (¶¶53, 369, 377) to the DOJ (¶376).

[11] *Haussmann III*'s one-paragraph ruling does not disturb this analysis. *See Haussmann v. Baumann*, 2025 N.Y. LEXIS 686, at **1–2 (N.Y. May 20, 2025).

In *Mucha*, the court refused to dismiss a class action against VWAG, Pötsch, and others on behalf of VWAG ADR holders arising from the Scheme. 540 F. Supp. 3d at 291. Citing the public interest in securing redress for the Scheme's victims and defendants' purposeful availment of the U.S. financial markets, the court held that defendants failed to carry their heavy burden to overcome plaintiffs' choice of forum—even though they were non-resident forum-shoppers who agreed to the adequacy of a Germany forum. *Id.* at 290. Likewise, New York courts have consistently denied *FNC* motions to dismiss derivative actions involving foreign corporations brought by non-residents, where sufficient New York nexus is alleged. *See*, *e.g.*, *HSBC*, 166 A.D.3d at 759; *Broida v. Bancroft*, 103 A.D.2d 88, 91–92 (2d Dep't 1984).

Here, dismissal would be the end of the lawsuit. ¶¶256–264. A Wolfsburg forum imposes a leave-of-court procedure, creates an impossible pre-discovery proof barrier, exposes Plaintiffs to fee-shifting, and leaves them with no right to a jury trial or opportunity to retain contingency-fee counsel. ¶¶261–264. And Wolfsburg is VWAG's "company town" where the Controlling Shareholders and the Supervisors are powerful figures. ¶¶256–260. Defendants' *FNC* motion should be denied.

VI. The Purported "Settlement" Is Invalid and Cannot Bar Plaintiffs' Derivative Claims Because No Consideration Was Paid, No Release Given, and No Court Approval Obtained

Defendants bear "the initial burden of establishing that it has been released from any claims." *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011). They cannot satisfy this burden because the purported "Settlement" is invalid. *Cf. id.* at 277–80 (enforcing a *valid* release negotiated and signed by "sophisticated principle[s]").

Here, the "Settlement" was orchestrated by the Controlling Shareholders and Pötsch, after they halted the Jones-Day investigation, suppressed the investigation report that implicated them, and procured a new whitewashed investigation report that blamed others for the Clean-Diesel Scheme. *See* ¶¶36–40, 48–52, 126, 138–144, 332–398. The shareholder approval of the "Settlement" is meaningless because the Families controlled "90% of the voting power." ¶392.

At the pleadings stage, these allegations must be deemed as true and cannot be refuted. *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980). Nor can Defendants produce any "documentary evidence utterly refut[ing] [these] factual allegations, conclusively establishing a defense as a matter of law." *See Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002). Any arguments based on German law are of no moment because they form no basis to bar Plaintiffs' New-York-law claims.

CONCLUSION

For all the foregoing reasons, Defendants' motion should be denied.

Dated: New York, New York
September 22, 2025

Respectfully submitted,

s/ Albert Y. Chang

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Certification Pursuant to Commercial Division Rule 17

In accordance with Rule 17 of the Rules of Practice for the Commercial Division, 22 N.Y.C.R.R. 202.70(g), I hereby certify that this memorandum of law complies with Rule 17's word-count limitation and contains 6,992 words, exclusive of the caption, table of contents, table of authorities, table of defined terms, and signature block.

Dated: New York, New York
September 22, 2025

s/ Albert Y. Chang
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