2017 WL 2378369
United States District Court, C.D. California.

VANCOUVER ALUMNI
ASSET HOLDINGS INC., et al.
v.
DAIMLER AG, et al.

Case No.: CV 16–02942 SJO (KSx)
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PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' CONSOLIDATED SECURITIES CLASS ACTION COMPLAINT [Docket Nos. 58, 62]

S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Defendants Daimler AG, Mercedes–Benz USA, LLC ("MBUSA"), Dieter Zetsche, Bodo Uebber, and Thomas Weber's (collectively, "Defendants") Motion to Dismiss Consolidated Class Action Complaint for Lack of Personal Jurisdiction ("Motion 1"), and concurrent Motion to Dismiss Consolidated Class Action Complaint for Failure to State a Claim ("Motion 2"), both filed on January 20, 2017. Lead Plaintiff Vancouver Alumni Asset Holdings, Inc. ("Vancouver Alumni" or "Lead Plaintiff") on behalf of all others similarly situated (collectively, "Plaintiffs") opposed both Motions ("Opposition 1" and "Opposition 2") on March 20, 2017. Defendants replied ("Reply 1" and "Reply 2") on April 3, 2017. The Court found these matters suitable for disposition without oral argument and vacated the hearings set for May 15, 2017. *See* Fed. R. Civ. P. 78(b). For the reasons stated below, the Court **DENIES** Defendants' Motion to Dismiss for Personal Jurisdiction, and **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to Dismiss for Failure to State a Claim.

I. PROCEDURAL AND FACTUAL BACKGROUND

This is a federal securities action concerning damages resulting from allegedly fraudulent material statements, and related course of conduct, pertaining to the emission control systems of Mercedes–Benz diesel vehicles.

A. Procedural Background

On April 29, 2016, the first of two securities class action complaints was filed in this Court. (Class Action Compl., ECF No. 1.) On July 20, 2016, the Court consolidated the existing cases into a single action, pursuant to Federal Rule of Civil Procedure 42, and appointed Plaintiff Vancouver Alumni as Lead Plaintiff for the Class. (July 20, 2016 Min. Order, ECF No. 30.)

On October 11, 2016, Lead Plaintiff filed a Consolidated Class Action Complaint ("CCAC" or "Complaint") against Daimler AG, MBUSA, Dieter Zetsche, Bodo Uebber, and Thomas Weber (the latter three, the "Individual Defendants") on behalf of itself and all persons and entities who purchased or otherwise acquired Daimler American Depositary Receipts [1] in the United States from February 22, 2012 to April 21, 2016, inclusive (the "Class Period"). (*See* CCAC ¶ 1, ECF No. 38.)

Plaintiffs bring two (2) causes of action in their Complaint: (1) violation of Section 10(b) of the Securities Exchange Act ("Section 10b") and Securities Exchange Commission ("SEC") Rule 10b–5 ("Rule 10b–5"),17 C.F.R. § 240.10b–5, alleged against all named Defendants; and (2) violation of Section 20(a) of the Securities

Exchange Act ("Section 20(a)"), alleged against Daimler AG and the Individual Defendants. (*See* CCAC ¶¶ 186–203.) The gravamen of Plaintiffs case is that Daimler AG, maker of Mercedes–Benz vehicles, made material misrepresentations regarding its diesel vehicles' emissions controls systems that led to the decline in value of their ADRs. (*See generally* CCAC.)

B. Factual Background

***2** Daimler AG is a German corporation, with its principal executive offices in Stuttgart, Germany. (CCAC ¶ 20.) MBUSA is a wholly owned subsidiary of Daimler AG, incorporated in the State of Delaware with its principal office in Atlanta, Georgia.[2] (CCAC ¶ 21.) MBUSA is responsible for distributing, marketing, and providing customer service for, *inter alia*, all sales of Mercedes–Benz cars in the United States. (CCAC ¶ 21.) Dr. Dieter Zetsche ("Zetsche") is Head of Mercedes–Benz Cars Division, Bodo Uebber ("Uebber") is Head of Mercedes–Benz Financial Services Division, and Dr. Thomas Weber ("Weber") is Head of Mercedes–Benz Cars Development. (*See* CCAC ¶¶ 22–28; *see also* Mot. 2 at 8–9, 13.) All of the Individual Defendants are on the Board of Management of Daimler AG, with Zetsche serving as the Chairman. (*See* CCAC ¶¶ 22–28)

Plaintiffs allege Defendants violated Section 10(b) and Rule 10b–5 by carrying out a plan to deceive the investing public regarding the intrinsic value of Daimler ADRs, and that Daimler AG and the Individual Defendants violated Section 20(a) as "control persons" in this operation. (CCAC ¶¶ 187, 198–199.) Plaintiffs claim that because Defendants knew or recklessly disregarded that Daimler AG "BlueTEC" diesel vehicles emitted pollutants "many multiples higher than permitted under applicable regulations" when measured under conditions that deviated from those used in regulatory testing, their statements otherwise were materially false and misleading. (CCAC ¶¶ 8, 94–98.) Plaintiffs allege that Defendants' statements caused the Daimler ADRs to trade at artificially inflated levels, which in turn caused the Class to suffer economic loss when the ADR price dropped after the truth, concealed by Defendants' false and misleading statements and omissions, was revealed. (*See generally* CCAC.) In support, Plaintiffs propose the following:

Diesel vehicles emit high levels of harmful pollutants, leading regulators in the U.S. and E.U. to implement stringent emissions regulations aimed at reducing vehicles' emissions and fuel consumption. (CCAC ¶ 40.) Diesel vehicles represent a large portion of the Mercedes–Benz market, and therefore compliance with these increasingly strict regulations presented the potential for material losses to Daimler AG—and therefore, to investors—because if Daimler AG could not convince regulators that its diesel cars met the applicable standards, it would not be able to sell those vehicles. (CCAC ¶¶ 42, 46, 49.) Compliance with U.S. regulations was especially important to Daimler AG in light of the Company's long-term business plan to make its diesel cars more popular in the United States. (CCAC ¶¶ 37, 46, 50–52.) In the U.S., the Environmental Protection Agency ("EPA") ensures compliance with these regulations through highly-regulated and openly-publicized emissions testing protocols, conducted indoors in a testing facility, at temperatures between 68 and 86 degrees Fahrenheit.[3] (CCAC ¶¶ 7, 56.)

The Class Period began on February 22, 2012, when Daimler AG released its 2011 Annual Report, signed by each of the Individual Defendants. (CCAC ¶ 100.) In it, Daimler AG stated that its "BLUETEC automobiles fulfill the strictest emission standards and are the cleanest diesel cars in the world." (CCAC ¶ 101.) It further assured investors that Daimler AG "continue[d] to develop our vehicles with state-of-the-art internal-combustion engines and are optimizing them to achieve significantly lower... emissions." (CCAC ¶ 101.) Defendants repeated these claims from February 2012 through September 2015 in various financial reports and statements, even claiming that BlueTEC made its "diesel [cars] as clean as a state-of-the-art gasoline engine." (CCAC ¶ 2.)

***3** In September 2015, diesel emissions were thrust into the public spotlight when the the EPA issued a notice of violation of the Clean Air Act to Volkswagen after finding its diesel vehicles used a "defeat device" to pass requisite regulatory testing.[4] (CCAC ¶ 5.) Soon after, reports surfaced that Daimler AG had also "manipulated the software governing its diesel passenger car emissions control systems such that they were engaged (*i.e.*, actually reducing raw diesel emissions) under conditions present in controlled regulatory testing, but were disengaged or deactivated under many conditions present during on-road, normal use driving." (CCAC ¶ 6.) When

Daimler AG was scrutinized publicly regarding rumors of these practices, Defendants denied ever using a defeat device, despite knowing that BlueTEC vehicles' emissions control systems had been **specifically engineered** to be fully operational only in temperatures above 50 degrees Fahrenheit, "i.e., in an ideal testing environment divorced from the realities of on-road, normal use driving conditions." (CCAC ¶¶ 4, 73.)

On September 21, 2015, the European Federation for Transport and Environment, a non-governmental organization comprised of 42 member organizations across 27 countries, published an article observing that Mercedes–Benz vehicles were polluting at significantly higher levels than previously believed. (CCAC ¶¶ 141–42.) The article confirmed that Daimler AG diesel vehicles emitted pollutants many multiples higher than permitted under applicable regulations when measured under conditions that deviated from those used in formal, regulatory testing. (CCAC ¶¶ 8, 94–98, 142.) In response to this partial disclosure, on September 22, 2015 the prices of the Daimler ADRs fell approximately 7% on heavy trading volume; shares of DDAIF fell $5.38 per share and DDAIY fell $5.44 per share. (CCAC ¶ 144.) While this partial disclosure removed some of the artificial inflation in the Daimler ADRs, the prices remained artificially inflated due to Defendants' vehement protestations that Mercedes–Benz diesel vehicles did not utilize a defeat device, as well as their continued false statements relating to the allegations. (CCAC ¶ 145.)

On February 2, 2016, Forbes reported that Daimler AG had finally admitted that it had specifically designed BlueTEC to deactivate or disengage diesel emissions controls when temperatures fell below approximately 50 degrees Fahrenheit. (CCAC ¶¶ 7, 84–85, 130.) However, Daimler AG denied that this was a defeat device, citing a regulatory exception that allows limited deactivation of emission control systems "when necessary to protect the engine from damage." (CCAC ¶¶ 85, 130.) Daimler AG continued to deny use of a defeat device in its financial disclosures through February 2016 and Zetsche personally refuted the mounting allegations during the Annual Shareholders' Meeting on April 6, 2016, (CCAC ¶¶ 86, 133–34,136–140.) As Defendants' denials continued, regulatory scrutiny increased. (CCAC ¶¶ 12, 81.)

On April 21, 2016, the truth and foreseeable risks concealed by Defendants' misleading statements and omissions were further revealed when Daimler AG announced that the U.S. Department of Justice had requested Daimler AG "conduct an internal investigation to 'review its certification and admissions process related to exhaust emissions in the United States.' " (CCAC ¶ 12.) On the same day, the German Federal Motor Transport Authority (the "KBA") announced that at least two different Mercedes–Benz models used defeat devices, and "the authority believed that those defeat devices were not justified by [Daimler AG's] previous excuses that those defeat devices were necessary to protect the vehicles' engines." (CCAC ¶ 13.)

***4** On April 22, 2016, Daimler AG recalled 247,000 vehicles in Germany to "fix emissions issues by 'tweak[ing] diesel engine software [ ] blamed for causing high pollution.' " (CCAC ¶ 14.) The recall was "intended to 'fix a device that turns off emissions controls at particular temperatures as a means to protect the engine,' " but that the "temperature thresholds at which the controls shut down weren't justified." (CCAC ¶ 14.) In response to these revelations, in just two days, shares of Daimler ADRs fell approximately 5%, with DDAIF falling $3.79 per share and DDAIY failing $3.94 per share. (CCAC ¶ 14.)

II. DISCUSSION

Defendants move to dismiss on two grounds. First, Defendants move to dismiss Plaintiff's CCAC against Daimler AG and the Individual Defendants pursuant to Federal Rule of Civil Procedure 12(b)(2) ("Rule 12(b)(2)") for lack of personal jurisdiction. (*See generally* Mot. 1, ECF No. 58.) In a separate and concurrent motion, all Defendants move to dismiss the Complaint for failure to state a claim pursuant to the Private Securities Litigation Reform Act of 1995 and Federal Rules of Civil Procedure 9(b) and 12(b)(6). (*See generally* Mot. 2, ECF No. 63.)

A. Incorporation of Documents by Reference and Judicial Notice

As a threshold matter, the Court discusses the parties' Requests for Judicial Notice. (Defs.' RJN, ECF No. 65; Pls.' RJN, ECF No. 71.)

Defendants request judicial notice of three (3) documents not attached to the CCAC: (1) Daimler AG's 2015 Annual Report ("Ex. A"); (2) an English translation of the April

22, 2016 report issued by the German Federal Motor Transport Authority (the "KBA Report") ("Ex. C"); and (3) an April 22, 2016 press release issued by the KBA announcing the KBA Report ("Ex. D"). (*See* Defs.' RJN; Decl. of Paul J. Collins in Supp. of Mot. 2 ("Collins Decl."), ECF No. 64.)

Federal Rule of Evidence 201(b)(2) permits courts to take judicial notice of facts "not subject to reasonable dispute" in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). In securities cases, "courts must consider the complaint in its entirety, as well as other sources ..., in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007). A court "may take judicial notice of court filings and other matters of public record," *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006), along with documents "whose contents are alleged in [the] complaint and whose authenticity nobody questions." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (internal quotes and citations omitted). The documents submitted by Defendants are matters of public record and proper subjects of judicial notice. Accordingly, Defendants' RJN is **GRANTED**.

As for Plaintiff's RJN, Plaintiff seeks notice of six (6) documents: (1) Daimler AG's Form F–6 ADR Registration Statement dated September 16, 2010; (2) Daimler AG press release "Daimler Establishes Sponsored Level 1 ADR Program in The United States," dated September 23, 2010; (3) Trade Confirmations for Class Period purchases of Daimler ADRs made by Lead Plaintiff; (4) European Federation for Transport and Environment, "Dieselgate: Who? What? How?," dated September 2016; (5) excerpts from Mercedes–Benz E–Class Operator's Manual for model years 2012–2016; and (6) European Federation of Transport and Environment, "VW's cheating is just the tip of the iceberg," dated September 21, 2015. (*See* Pls.' RJN; Decl. of Michael H. Rogers in Supp. of Defs.' Mot. ("Rogers Decl."), ECF No. 24–2.)

***5** Defendants object to Exhibit 5, excerpts from Mercedes–Benz Operator's Manuals, primarily on the grounds that Plaintiffs "seek to introduce evidence and add new factual allegations to their Complaint" by asking the Court to take judicial notice of information that is not "generally known" with "documents [that] were not cited, referenced, or otherwise alluded to in their Complaint." (Defs.' Opp'n to Pls.' RJN at 1–2, ECF No. 73.) The Court agrees. Plaintiffs seek to utilize these operation's manuals to support their claim that AdBlue solution freezes at a temperature of approximately twelve (12) degrees Fahrenheit and that "[w]inter operation is also guaranteed at temperatures below" that threshold. (Pls.' Opp'n to Mot. Dismiss for Pers. Jurisdiction ("Opp'n 2") at 12, ECF No. 69.) As noted, under Rule 201(b), a fact may only be judicially noticed if it is not subject to reasonable dispute or can be accurately determined from trustworthy sources. *See* Fed. R. Evid. 201(b)(2). The freezing temperature of AdBlue solution is not clearly discernable "by resort to sources whose accuracy cannot reasonably be questioned." Plaintiffs also have not referenced these manuals in their Complaint. Defendants' objection to Exhibit 5 is **SUSTAINED**. Plaintiff's RJN with respect to all other exhibits is **GRANTED**.

B. Legal Standards

1. Personal Jurisdiction

A defendant may move to dismiss a suit for lack of personal jurisdiction pursuant to Rule 12(b)(2). Fed. R. Civ. P. 12(b)(2). However, to avoid the granting of the motion, a plaintiff need only make a *prima facie* showing of jurisdictional facts. *See* *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir. 1995). When evaluating a challenge to personal jurisdiction, a plaintiff's uncontradicted assertions are taken as true, and all conflicts of facts are resolved in plaintiff's favor. *See* *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (citations omitted). The Securities Exchange Act provides for nationwide service of process and thus "the question becomes whether the party has sufficient contacts with the United States, not any particular state." *See* 15 U.S.C. § 78aa; *Sec. Inv'r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985) (citation and internal quotation marks omitted). In other words, "so long as a defendant has minimum contacts with the United States, Section 27 of the Act confers

personal jurisdiction over the defendant in any federal district court." *Id.* at 1316.

There are two bases for personal jurisdiction over nonresident defendants: (1) "general jurisdiction" which arises when a defendant's contacts with the forum state are so pervasive as to justify the exercise of jurisdiction over the defendant in all matters; and (2) "specific jurisdiction" which arises out of the defendant's contacts with the forum state giving rise to the subject litigation.[5] *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). In this case, Plaintiff invokes specific jurisdiction. In the Ninth Circuit, a court may exercise specific jurisdiction over a non-resident defendant when:

> "(1) the non-resident defendant purposefully directs his activities or consummates some transaction with the forum or resident thereof; **or** performs some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)) (emphasis added).

"The plaintiff bears the burden of satisfying the first two prongs of the test." *Schwarzenegger*, 374 F.3d at 802. If the plaintiff succeeds in satisfying both of these prongs, the burden then shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985). While all three requirements must be met, in considering the first two prongs, "[a] strong showing on one axis will permit a lesser showing on the other." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1210 (9th Cir. 2006) (en banc).

2. Failure to State a Claim

***6** Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. The Court construes the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory). The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Guerrero v. Gates*, 357 F.3d 911, 916 (9th Cir. 2004); *Balistreri*, 901 F.2d at 699. Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)).

a. Particularity Under Rule 9(b) and the PSLRA

"Securities fraud class actions must meet the higher, exacting pleading standards of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (PSLRA)." *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.* ("*OPERF*"), 774 F.3d 598, 604 (9th Cir. 2014). Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Fed. R. Civ. P. 9(b).

Moreover, "the enactment of the [PSLRA] in 1995 significantly altered pleading requirements in private securities fraud litigation by amending the 1934 Exchange Act to require that a complaint 'plead with particularity both falsity and scienter.' " *In re Daou Sys., Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005) (quoting *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002)). A securities fraud complaint must now "specify each statement alleged

to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Gompper*, 298 F.3d at 895 (quoting 15 U.S.C. § 78u–4(b)(1)).

The complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* (quoting 15 U.S.C. § 78u–4(b)(2)). This means a plaintiff "must provide, in great detail, all the relevant facts forming the basis of her belief" that the defendant has acted with "deliberate recklessness or intent." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 985 (9th Cir. 1999), *abrogated on other grounds by* *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776 (9th Cir. 2008). The inference must be that "the defendant[ ] made false or misleading statements either *intentionally* or with *deliberate recklessness.*" *Reese v. Malone*, 747 F.3d 557, 569 (9th Cir. 2014) (citation omitted).

b. Section 10(b) of the Exchange Act and Rule 10b–5

Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it unlawful "for any person ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe[.]" 15 U.S.C. § 78j(b). SEC Rule 10b–5, promulgated under the authority of section 10(b), in turn, provides it shall be unlawful for any person ...

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

***7** (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5. Section 10(b) and Rule 10b–5 create a private right of action "which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). "The basic elements of a Rule 10b–5 claim, therefore, are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss." *In re Daou Sys.*, 411 F.3d at 1014 (citing *Dura Pharms.*, 544 U.S. at 336).

"[I]t is well established that claims brought under Rule 10b–5 and section 10(b) must meet the particularity requirements of Federal Rule of Civil Procedure 9(b)" and the PSLRA. *Id.* (citing *Semegen v. Weidner*, 780 F.2d 727, 729, 734–35 (9th Cir. 1985)); *OPERF*, 774 F.3d at 604.

c. Section 20(a) of the Exchange Act

Section 20(a) provides joint and several liability for "controlling persons" who aide or abet violations of other sections of the Exchange Act. The relevant statute states in part: "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or any rule of regulation thereunder shall also be liable jointly and severally with and to the same extent as the controlled person to any person to whom such controlled person is liable ...." 15 U.S.C. § 78t(a). To establish a claim under § 20(a), a plaintiff must show: (1) "a primary violation of federal securities law"; and (2) "that the defendant exercised actual power or control over the primary violator." *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

C. Analysis

1. Motion to Dismiss for Lack of Personal Jurisdiction

Defendants' first motion to dismiss challenges jurisdiction over the Individual Defendants and Daimler AG. (*See generally* Mot. 1.)

a. Purposeful Availment and Purposeful Direction

A defendant has "availed himself of the privilege of conducting business" in a forum "where the defendant 'deliberately has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum" and it is not "unreasonable to require him to submit to the burdens of litigation in that forum." *Burger King*, 471 U.S. at 475–76 (citations omitted). For purposes of securities fraud, defendants "purposefully avail[ ] themselves of the forum by taking advantage of this nation's laws and its capital markets." *In re LDK Solar Sec. Litig.*, No. CV 07–05182 WHA, 2008 WL 4369987, at *6 (N.D. Cal. Sept. 24, 2008) (explaining that personal jurisdiction is of key importance where U.S. "securities markets would be undermined if foreign corporations and executives could fleece those capital markets while standing just beyond the water's edge").

Purposeful direction, on the other hand, requires defendants to have "1) committed an intentional act, 2) expressly aimed at the forum state, 3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). The Court examines Daimler AG's and the Individual Defendants' conduct independently.

i. Daimler AG

***8** Defendants argue that the exercise of personal jurisdiction is inappropriate because Daimler AG delisted from the New York Stock Exchange and deregistered its stock with the SEC, "purposefully cho[osing] not to avail itself of the U.S. securities markets." (Mot. 1 at 3.) Defendants do not persuade. The fact that Daimler ADRs were not listed on an American stock exchange does not demonstrate that Daimler AG did not seek to avail itself of the American securities market. *See* *Schwarzenegger*, 374 F.3d at 802.

Contrary to Defendants' assertion that Daimler AG played no role in issuing the ADR certificates or administering the ADR program, (Mot. 1 at 5), Plaintiffs' allegations establish that Daimler AG actively and voluntarily contracted with an American depository bank to sell ADRs to American investors. (Opp'n 1 at 9.) Additionally, Plaintiffs contend that Daimler AG entered into a deposit agreement with an American bank, registered its ADRs with the SEC, and complied with SEC Rule 12g3–2(b)'s obligation to provide information to American investors. (Opp'n 1 at 9; *see In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.* ("*In re Volkswagen*"), No. CV 15–2672 CRB, 2017 WL 66281, at **4–6 (N.D. Cal. Jan. 4, 2017) (finding that these same acts constituted "affirmative steps to make Volkswagen's securities available to investors here in the United States.").)

Defendants next argue that Daimler AG did not manipulate the American market because Daimler AG's activities relevant to Plaintiffs' securities claims were not purposefully directed at the U.S., and instead were directed at "Daimler AG's global investors" in general. (Mot. 1 at 6.) Defendants again do not persuade. Daimler AG specifically stated that it was "pleased to offer the sponsored ADR program as a service to U.S. investors." (Pls.' RJN Ex. 2; Opp'n 1 at 9.) Further, Daimler AG clearly took "action," by sponsoring ADRs to solicit American capital, that was "purposefully directed toward the [United States]." *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 102, 112 (1987). Daimler AG then marketed those ADRs directly to U.S. investors, made allegedly false statements to U.S. investors via documents published in English as required by applicable U.S. securities regulations, and promoted the allegedly fraudulent Daimler AG products to U.S. consumers. *See* *In re Volkswagen*, 2017 WL 66281 at *21 (finding that false statements contained in market disclosures "were expressly directed at United States investors as part of Volkswagen's compliance with SEC Rule 12g3–2(b)"); *see also* *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 372 (3d Cir. 2002) ("[A] foreign corporation that has created an American market for its securities can fairly expect that that market will rely on reports and media releases issued by the corporation.").

Plaintiffs have established sufficient affiliation between Daimler AG and the United States to support a finding that Daimler AG purposefully availed itself of, and purposefully directed its activities towards, the United

States. *See* *Pinker*, 292 F.3d at 372 ("A foreign corporation that purposefully avails itself of the American securities market has adequate notice that it may be haled into an American court for fraudulently manipulating that market.").

ii. Individual Defendants

Defendants also contend that the Individual Defendants, personally, have no contacts with the United States, and that an individual's forum activities carried out on behalf of the corporate defendant cannot sustain personal jurisdiction over that individual. (Mot. 1 at 7.) However, the Ninth Circuit has held that personal jurisdiction under Section 20(a) "exists if the plaintiff makes a non-frivolous allegation that the defendant controlled a person liable for the fraud." *San Mateo Cty. Transit Dist. v. Dearman, Fitzgerald & Roberts, Inc.*, 979 F.2d 1356, 1358 (9th Cir. 1992). Further, allegations that a foreign defendant exercised a significant degree of control over a corporate entity can provide a basis for personal jurisdiction. *See, e.g.*, *Kairalla v. Advanced Med. Optics, Inc.*, No. CV–07–05569 SJO (PLAx), 2008 WL 2879087, at *15 (C.D. Cal. June 6, 2008) (finding personal jurisdiction over an officer of a corporation, despite the fact that the officer lived and worked in Germany). Courts regularly assert personal jurisdiction over foreign individual defendants who sign or, as control persons, approve the filing or dissemination of particular forms required by the SEC which they knew or should have known would be relied upon by investors based in the United States. *See, e.g.*, *MTC Elec. Techs. Co. v. Leung*, 889 F. Supp. 396, 399–400 (C.D. Cal. 1995) (finding such conduct indicates elements of both purposeful availment and purposeful direction); *In re LDK Solar Sec. Litig.*, 2008 WL 4369987, at **5–6.

***9** Here, the Individual Defendants, as officers and Members of the Board of Management of Daimler AG, are alleged to have taken affirmative steps directed at the United States on Daimler AG's behalf, including: (1) participating in establishing and offering the Daimler ADRs by signing a Form F–6 Registration Statement filed with the SEC; (2) making intentionally false and misleading statements directed at the United States by signing market disclosures that were translated into English to comply with U.S. securities regulations; (3) and making numerous trips to the United States to solicit business in the U.S. by touting Daimler AG's BlueTEC technology and its securities offerings. (Opp'n 1 at 12.)

Because the Court concludes that Plaintiffs have sufficiently pled a "control person" relationship, personal jurisdiction over the Individual Defendants is proper. *See* *In re Volkswagen*, 2017 WL 66281, at *21.

b. Defendants' Forum–Related Activities

The Ninth Circuit employs a "but for" test in order to determine whether a claim arises out of a nonresident defendant's activities in the forum. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). This prong can only be met if the plaintiff would not have been injured "but for" Daimler AG's conduct directed toward the United States. *See* *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1075 (9th Cir. 2001); *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 864 (9th Cir. 2003).

In the case at hand, the "but for" test is satisfied because Plaintiffs have established a direct nexus between their causes of action for securities fraud and Defendants' contacts with the United States, i.e., the false statements they made regarding the capabilities of their BlueTEC emissions control technology and in response to allegations of manipulating that technology to trick regulatory agencies. *In re Volkswagen*, 2017 WL 66281, at *22. Accordingly, the instant cause of action arises out of Defendants' contacts with the United States.

c. Reasonableness

Plaintiffs have carried their burden with respect to the first two prongs of the specific jurisdiction analysis. The burden now shifts to Defendants to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable in order to defeat personal jurisdiction." *Dole Food*, 303 F.3d at 1114 (internal quotation marks omitted) (citing *Burger King*, 471 U.S. at 477). A court must balance seven factors in weighing reasonableness, none of which are dispositive:

(1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *See* *Core–Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487–88 (9th Cir. 1993).

The first factor regarding purposeful interjection is dependant on the same analysis regarding purposeful direction and purposeful availment. *See* *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991). For the reasons previously discussed, this factor weighs in favor of a finding of reasonableness.

As to the second factor, Defendants argue that the burden to defend themselves in the U.S. is significant, as Daimler AG is a German company doing business in Germany, and the Individual Defendants are German citizens residing in Germany. (Mot. 1 at 9.) However, Ninth Circuit jurisprudence dictates that "[u]nless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction." *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1481 (9th Cir. 1986) (citation omitted). Defendants do not claim deprivation of due process if forced to defend suit here. (*See* Mot. 1 at 10.) Further, "modern advances in communications and transportation have significantly reduced the burden of litigation in distant forums." *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988). Moreover, Defendants have secured competent counsel in this District. *Openwave Sys. Inc. v. Fuld*, 2009 WL 1622164 at *13 (N.D. Cal. June 6, 2009) (finding the second factor does not favor foreign defendants who are represented by domestic counsel).

***10** Under the third factor, ordinarily, "[w]here, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction." *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d 848, 852 (9th Cir. 1993). However, the facts of this case mirror those presented in *In re Volkswagen*, a class action securities fraud suit related to Volkswagen's allegedly deliberate use of a defeat device in its diesel vehicles. *In re Volkswagen*, 2017 WL 66281, at *1. Similar to the instant case, Volkswagen sponsored its ADRs in the U.S. through a deposit agreement with a U.S.–based bank, and the court was presented with a question of whether there was personal jurisdiction where the ADRs represented foreign shares on a foreign exchange in Germany. *Id.*, at *23. There, the court found no conflict with the sovereignty of Germany because "the plaintiffs br[ought] th[e] case for Defendants' violations of U.S. securities law based on conduct that is sufficiently tied to the United States." *Id.* Since no significant conflict has been shown to exist, this factor does not weigh against a finding of reasonableness.

Under the fourth factor, the United States has a clear and obvious domestic interest in protecting U.S. investors, and the federal court has an equally clear localized interest in enforcing federal securities laws. Defendants argue that the interests of Plaintiffs and the United States is particularly "light" against the Individual Defendants because their addition would likely add very little to the potential recovery, (Mot. 1 at 10), but this does not mitigate the national interest in furthering the policies of the American securities regulatory system or the forum state's "substantial interest in adjudicating the dispute of one of its residents who alleges injury due to the tortious conduct of another." *CE Distribution, LLC v. New Sensor Corp.*, 380 F.3d 1107, 1112 (9th Cir. 2004); *see also* *Gordy v. Daily News, L.P.*, 95 F.3d 829, 836 (9th Cir.1996) ("California maintains a strong interest in providing an effective means of redress for its residents tortiously injured."). The United States' clear interest in protecting U.S. investors favors a finding of reasonableness.

The fifth factor requires the Court to consider the most efficient judicial resolution of the controversy. Defendants claim resolution should occur in Germany because the critical evidence and witnesses relevant to the case are located there. (Mot. 1 at 11.) *See* *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1176 (9th Cir. 2006) ("The site where the injury occurred and where evidence is located usually will be the most efficient forum."). However, this weighs only marginally against a finding of reasonableness, as this factor is "no longer weighed heavily given the modern advances in communication and

transportation." *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998).

The sixth factor, the inconvenience of the forum to the plaintiff, nominally remains part of this test. The Ninth Circuit has cast doubt on its significance. *See e.g.*, *Core–Vent*, 11 F.3d at 1490 (explaining that "[a] mere preference on the part of the plaintiff for its home forum does not affect the balancing" test). Thus, although inconvenience of the forum favors Plaintiffs, it "is not of paramount importance." *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1133 (9th Cir. 2003).

Finally, the seventh factor is neutral as there is no dispute that Germany exists as an adequate alternative forum. (*See* Mot. 1 at 10; *see also* Opp'n 1 at 18.)

In sum, Defendants have not presented a "compelling case" demonstrating that the Court's exercise of jurisdiction would be unreasonable. The Court may properly exercise personal jurisdiction over both Daimler AG and the Individual Defendants. Defendants' motion to dismiss for lack of personal jurisdiction is **DENIED**.

B. Motion to Dismiss for Failure to State a Claim

1. Rule 10b–5 and Section 10(b) Claims

***11** In Defendants' motion to dismiss for failure to state a claim, Defendants argue that Plaintiffs' claims are deficient because: (1) ADRs are predominately foreign securities that cannot serve as the basis for suit against Defendants because the Federal Exchange Act does not apply extraterritorially; (2) Plaintiffs have not adequately alleged facts showing that statements regarding BlueTEC were false when made; (3) Plaintiffs have not pleaded sufficient facts giving rise to a strong inference that each defendant acted with scienter; and (4) Plaintiffs fail to plead sufficient facts to show a casual connection between their investment losses and Defendants' allegedly false statements. (*See generally* Mot. 2.) The Court addresses each argument.

a. ADRs Within the Scope of the Securities Exchange Act

In *Morrison v. National Australia Bank*, the Supreme Court addressed the extraterritorial application of the Securities Exchange Act, concluding that it is "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." 561 U.S. 247, 267 (2010). After *Morrison*, courts have applied a two-prong test to determine whether a particular securities transaction is properly within the territorial reach of Section 10(b): (1) whether the transaction is in "securities listed on domestic exchanges"; or (2) whether the transaction is a "domestic transaction[ ] in other securities." *In re Volkswagen*, 2017 WL 66281, at *3 (quoting *Morrison*, 561 U.S. at 267).

Defendants claim that Plaintiffs cannot meet either prong of *Morrison*, arguing that the domestic restrictions preclude claims brought by investors in ADRs.[6] (Mot. 2 at 7–9.) Defendants principally argue that trades in Daimler ADRs fall outside of *Morrison*'s scope, despite taking place in the U.S., because they are "predominantly foreign in nature." (Mot. 2 at 8.) They further contend that although a domestic transaction is *necessary* for a claim under 10(b), "such a transaction is not alone *sufficient* to state a properly domestic claim under the statute." (Mot. 2 at 8 (quoting *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 215 (2d Cir. 2014)).) Defendants' reliance on *Parkcentral* is misplaced—not just because the "predominately foreign" test is not binding on this Court—but also because the securities at issue in *Parkcentral* were securities-based swap agreements, and the plaintiffs did not allege that the defendant was a party to the agreements nor that it participated in the market for the swaps. *See* *Parkcentral*, 763 F.3d at 201, 207.

Here, in contrast, the ADRs are not independent from Daimler AG's foreign securities or from Daimler AG itself; instead, Daimler AG sponsored the ADRs and was directly involved in the domestic offering of the ADRs. Further, Plaintiffs allege that "all broker-dealers, settling agents, and clearing houses associated with the transactions were U.S. institutions," and that Daimler AG took affirmative steps to make its securities

available to investors in the United States. (Opp'n 2 at 5.) Plaintiffs' allegations establish a connection between Daimler AG's ADRs and the United States that satisfies the second prong of *Morrison*, even under the non-binding "predominantly foreign" test put forth in *Parkcentral.* Plaintiffs' Daimler ADR purchases are domestic transactions subject to Section 10(b) liability *See* *In re Volkswagen*, 2017 WL 66281, at *5; *cf.* *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1095 (C.D. Cal. 2016) ("Plaintiffs have not pled that Toshiba listed its securities in United States or sponsored, solicited, or engaged in any other affirmative act in connection with securities sales in the United States; thus, § 10(b) does not apply.")

***12** In sum, Plaintiffs' Daimler ADR purchases are domestic transactions in United States securities sales. Applying Section 10(b) here is not an impermissible extraterritorial application of the Securities Exchange Act as prohibited by *Morrison.* The Court **DENIES** Defendants' motion to dismiss on this ground.

b. False Misstatements Pled with Sufficient Particularity

Plaintiffs' Complaint alleges that Defendants made material misrepresentations and omissions to investors regarding the BlueTEC "clean diesel" vehicles' purported compliance with U.S. and E.U. emissions regulations throughout the Class Period. (*See generally* CCAC.) Defendants argue that dismissal is warranted because: (1) the statements Plaintiffs allege to be false and/or misleading are all "inactionable puffery" or opinion statements; and (2) Plaintiffs have not alleged facts showing that the statements regarding BlueTEC were false when made because there has not yet been a finding of any regulatory violations, and Plaintiffs have not shown why the BlueTEC device falls outside of the regulatory exception permitting valid reasons to use a shut-off device. (*See* Mot. 2 at 10–12.)

i. Defendants' Statements Are Not "Inactionable Puffery"

Defendants argue that certain statements concerning BlueTEC diesel emissions were simply corporate boasting, belying the fact that the statements were subject to objective verification and were capable for measurement against an objective standard—*i.e.*, competitors' vehicles and environmental regulations. *See* *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014) ("Statements by a company that are capable of objective verification are not 'puffery' and can constitute material misrepresentations."); *see also* *SEC v. Todd*, 642 F.3d 1207, 1216–17 (9th Cir. 2011) (finding that a defendant's accounting calculation of the financial impact of a transaction was objective and a material misrepresentation).

However, Defendants made objective and material misrepresentations regarding compliance with emissions regulations.[7] (*See, e.g.*, CCAC ¶¶ 105 ("Our BLUETEC automobiles fulfill the strictest emission standards".... Daimler AG is "optimizing [its diesel engines] to achieve significantly lower ... emissions"); 108 ("To ensure the E250 BlueTEC meets exhaust emission regulations in all 50 U.S. states, the BlueTEC system uses AdBlue injection to make the diesel as clean as a state-of-the-art gasoline engine"); 112, 116 ("Automobiles equipped with [BlueTEC] technology conform to the strictest emissions standards"); 137 ("[T]he cars with [BlueTEC] already comply with the strictest emission standards").) Further, Plaintiffs emphasize that the development of diesel emissions control systems, namely, the BlueTEC technology in these "clean diesel" vehicles, was central to Defendants' core business strategy. (*See, e.g.*, CCAC ¶¶ 49 ("If Daimler could not convince emissions regulators that the Company's diesel vehicles were as clean as they claimed and as clean as new regulations required, Daimler would not be allowed to sell vehicles in the U.S. and E.U."); 52 ("Daimler's overall corporate strategy was heavily dependent on the adoption of its 'clean diesel' cars").)

***13** Defendants' contention their statements constitute mere "puffery" fails due to the objective materiality of the alleged misrepresentations as well as Defendants' overall business strategy regarding their "clean diesel" vehicles. Given the alleged importance of the BlueTEC vehicles to Defendants' business, it is plausible that a reasonable investor would view Daimler AG's failure to live up to this environmentally friendly claim as significantly altering the "total mix" of information available. *See* *In re Volkswagen*, 2017 WL 66281, at *17.

ii. Defendants' Statements are Material and Misleading

Defendants' claim that the disputed statements cannot be false or misleading without a finding of a regulatory violation. "[P]laintiffs admit Daimler AG stated that the way the [BlueTEC] systems functioned 'was necessary to protect the engine from damage caused by operating in excessively cold temperatures,' " and further "concede that under U.S. regulations, a device that 'reduces the effectiveness of the emission control system' is allowed to 'protect[ ] the vehicle against damage.' " (Mot. 2 at 11 (quoting CCAC ¶¶ 74, 84–85).) Based on these concessions, Defendants argue that in order to allege the falsity of Daimler AG's statements regarding their compliance with emissions standards, Plaintiffs must demonstrate BlueTEC's functionality was illegal and operating outside the exception permitting deactivation of emission control systems to protect the engine. (*See* Mot. 2 at 11–13.)

As a threshold matter, the Court's findings do not depend on Defendants' technical compliance with a regulatory exception or violation of government regulations. The issue is whether Defendants' made **misleading** statements as to any material fact. *See* 15 U.S.C. § 78u–4(b)(1). Courts make this determination through "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him." *See* *Basic Inc. v. Levinson*, 485 U.S. 224, 236 (citation omitted).

Defendants' statements made during the Class Period can be distilled into two principal categories: (1) those made before the defeat device allegations, in which Defendants were touting the merits of the BlueTEC "clean diesel" vehicles (*e.g.* that they "fulfill the strictest emission standards" and that BlueTEC made its "diesel [cars] as clean as state-of-the-art gasoline engine[s]") (*See* CCAC ¶¶ 100–118); and (2) those made after the defeat device allegations, in which Defendants were vehemently denying the allegations (*e.g.* "a defeat device ... has never been and will never be used at Daimler") (*See* CCAC ¶¶ 119–140). The Court addresses both.

A. Statements Praising BlueTEC

The Complaint alleges that statements praising BlueTEC were materially false and misleading because Defendants knew or were deliberately reckless in not knowing that the Daimler AG's diesel cars emitted significantly higher quantities of pollutants under normal operation than Defendants disclosed in their publicly announced emissions testing results, and that these excessive emissions were caused by BlueTEC's emissions control system's software that intentionally shut-down that emissions control system under certain conditions. (*See, e.g.*, CCAC ¶ 102.) Though Defendants argue that, due to the regulatory exception, their statements were not technically false. The Ninth Circuit has made clear that public statements literally true may nevertheless mislead:

> Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors. For that reason, the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers.

***14** *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 886 (9th Cir. 2008); *see also* *Kaplan v. Rose*, 49 F.3d 1363, 1372 (9th Cir.1994).

Further, Defendants ignore Plaintiffs allegations that Defendants' **omission** of information also caused their statements to be misleading. To succeed on a claim under § 10(b) and SEC Rule 10b–5, a plaintiff must establish that the defendant made a "material misrepresentation **or** omission." *Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc.* 552 U.S. 148, 156 (2008) (emphasis added). Here, Plaintiffs contend that Defendants omitted to inform investors: (1) that the BlueTEC system only controlled emissions at temperatures above 50 degrees; (2) that BlueTEC's compliance with emissions regulations was based on a legally questionable regulatory loophole; and (3) that, in reality, BlueTEC vehicles tested in on-road conditions under normal use were actually emitting significantly more exhaust emissions than permitted by emissions regulations. (*See, e.g.*, CCAC ¶¶ 3–7.)

The Court concludes that the alleged statements and omissions created a false impression of Daimler AG's diesel vehicles as environmentally friendly, which differed in a material way from the truth—that the vehicles often emitted large, impermissible amounts of pollutants. *See* *Reese v. Malone*, 747 F.3d 557, 570 (9th Cir. 2014) ("By omitting information regarding BP's detection of high corrosion levels, [defendant] affirmatively created an 'impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed].' ") In light of importance of "clean diesel" vehicles to Defendants' business strategy, it is plausible that a reasonable investor would be misled by Defendants' statements and omissions concerning the BlueTEC technology.

B. Statements Denying "Defeat Device" Allegations

The Complaint alleges that these statements were false when made, as Defendants knew or were deliberately reckless in not knowing that Daimler AG's diesel cars did, in fact, use a defeat device, because Daimler AG intentionally calibrated its emissions control system to be operational under testing conditions but non-operational for significant periods of time under normal vehicle use. (*See, e.g.*, CCAC ¶ 122.) Plaintiffs allege that Daimler AG acknowledged the shut-off device in February 2016 and that regulations agencies verified that: (1) the vehicles produced much higher levels of emissions in temperatures below 50 degrees; (2) the manipulation ensured that emissions controls were working during regulatory testing protocols; and (3) Daimler AG's claim that this was necessary to protect the vehicle's engine was not justified. (Opp'n 2 at 10–11; *See, e.g.*, CCAC ¶¶ 102.)

A defeat device is anything that "reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use," unless the need to protect the engine is justified. (CCAC ¶ 74.) Taking Plaintiffs' allegations as true, Defendants' claim that BlueTEC shut off in order to protect the engine was not justified, as evidenced by Daimler AG's recall of 247,000 BlueTEC vehicles "to fix a device that turns off emissions controls at particular temperatures as a means to protect the engine," which thresholds the German Transport Minister found were not justified. (CCAC ¶¶ 14, 89, 153–54, 170.) Though Defendants primarily argue that there are **permissible** uses for defeat devices—noting that the German regulators did not expressly find the presence of an impermissible defeat device in the KBA report, (Mot. 2 at 12–13)—Defendants' statements during the Class Period specifically denied that Daimler AG ever used **any** defeat device. It is plausible that a reasonable investor would be misled by Defendants' Class Period statements and omissions concerning the BlueTEC technology and draw the untrue conclusion that the vehicles do not utilize any technology that disables emissions controls. Given the prominence of BlueTEC and Defendants' business strategy centered around "clean diesel" vehicles, the truth would have significantly altered the mix of information available.

***15** Suffice it to say, Plaintiffs have sufficiently pleaded that Defendants made statements that were "misleading as to a material fact," regardless of the as of yet unresolved inquiry into regulatory violations. *See* *Basic Inc.*, 485 U.S. at 238. Accordingly, the Court **DENIES** Defendants' motion to dismiss on these grounds.

c. Scienter Pled with Sufficient Particularity

Though Plaintiffs' have successfully alleged that Defendants made false and misleading statements, demonstrating that Defendants made those statements intentionally or were deliberately reckless in making them is a separate matter. The key to pleading intentional or reckless conduct is pleading facts that show that when Defendants made the allegedly false statements, they knew they were false, or knew facts "so obvious that they must have been aware" that they were misleading the public. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). The inquiry is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007).

Defendants argue that Plaintiffs' allegations are insufficient to meet this "exacting standard" as they pertain to: (1) the Individual Defendants; and (2) Daimler AG and MBUSA. (*See generally* Mot. 2 at 14–18.) The Court addresses these points in turn.

i. Individual Defendants

The Complaint alleges that these individuals, by virtue of their positions of management and control within Daimler AG, had access to undisclosed adverse information about the capabilities of BlueTEC diesel engines to produce "clean diesel" emissions and the use of a defeat device to comply with emissions testing. (CCAC ¶ 172.) Specifically, Plaintiffs allege that each of the Individual Defendants: (1) "directly participated in the management of the Company;" (2) was "directly involved with day-to-day operations of the Company;" (3) was "privy to confidential propriety information concerning the Company and its business operations;" (4) was "involved in drafting, producing, reviewing and/or disseminating the false and misleading statements;" (5) was "aware of, or with deliberate recklessness disregarded, the fact that the false and misleading statements were being issued;" and (6) "approved or ratified these statements in violation of the federal securities laws." (CCAC ¶ 29.)

The crux of Defendants' argument is that Plaintiffs' scienter claims based on this "core operations theory" are not sufficient to establish the "requisite strong inference that any of the individuals was aware of every detail relating to the workings of various BlueTEC emissions control systems at various ambient temperatures." (Mot. 2 at 15.) "Were it otherwise," Defendants surmise, "every executive would be charged with knowledge of every fact at every company, eviscerating the PSLRA's heightened pleading requirements." (Mot. 2 at 15.) However, the Ninth Circuit has found that "allegations regarding management's role in a company may be relevant and help to satisfy the PSLRA scienter requirement" when "used in any form along with other allegations that, when read together, raise an inference of scienter that is 'cogent and compelling, thus strong in light of other explanations.' " *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008) (citation omitted). With this in mind, the Court addresses the allegations lodged against the individual defendants.

A. Defendant Dr. Thomas Weber

***16** The Complaint alleges that, as "Head of Mercedes Research and Development," Weber "was instrumental to the development of BlueTEC and the Company's efforts to meet emissions standards." (CCAC ¶ 27.) Plaintiffs note that the Chairman of Daimler AG's Supervisory Board stated that Weber "shaped Research and Development" at Mercedes–Benz Cars for "more than thirteen years," and that Weber has "laid important foundations, [ ] renewed the entire product portfolio of passenger cars, and has prepared the company for the future of mobility." (CCAC ¶ 27.) Given his intimate knowledge of the BlueTEC technology, Plaintiffs' claim that Weber intentionally made "several false and misleading statements throughout the Class Period as signatory of numerous Company annual financial reports." (CCAC ¶ 28.)

Falsity itself can be indicative of scienter when allegations as to falsity are "combined with 'allegations regarding a management's role in the company' that are 'particular and suggest that the defendant had actual access to the disputed information." *Zucco*, 552 F.3d at 1000 (quoting *S. Ferry LP, No.2*, 542 F.3d at 785–86). As Head of Mercedes Research and Development, Weber's role was to develop the BlueTEC technology and ensure Daimler AG met regulatory emissions standards. Thus, one can infer that Weber knew that the BlueTEC technology is operational only when the ambient temperature is above 50 degrees, and that such a limitation is at odds with regulations aimed at reducing diesel emissions. Additionally, he was aware of the importance of "clean diesel" vehicles to Daimler AG's business strategy, as Daimler AG's 2013 Annual Report noted that the "main projects" of the Research and Development department, headed by Weber, "were the continuous further development of engines with a focus on optimizing fuel consumption and complying with new emissions standards." (CCAC ¶ 48.) Weber himself emphasized the importance of Daimler AG's focus on diesel in the American market when he remarked at the 2008 New York Auto Show that Daimler AG "want[ed] to make diesel driving popular here [in the U.S.] again." (CCAC ¶ 46.)

Thus, it is reasonable to infer that Weber had the requisite knowledge—far before the allegations of a defeat device surfaced—that Daimler AG's BlueTEC cars often emitted many multiples of the maximum regulatory limits for emissions of exhaust pollutants, and that his statements otherwise intentionally presented investors with an "impression of a state of affairs that differs in a material way from the one that actually exists." *Bernson*, 527 F.3d at 985.

B. Defendants Dieter Zetsche and Bodo Uebber

Plaintiffs rely heavily on the "core operations" theory in the scienter allegations against Defendants Zetsche and Uebber. However, the Complaint alleges not only that these defendants were in a position to receive information about BlueTEC's inability to produce consistent "clean diesel" emissions, but also that they in fact **did** receive such information, and thus made knowing material misrepresentations to investors. For example, Plaintiffs' claim that Daimler AG recalled around 11,000 vehicles in June 2015 "to change the software of an emissions-related device," and "to avoid possible trouble with authorities and test organizations." (CCAC ¶ 82.) Zetsche and Uebber, as officers of Daimler AG, were responsible for executing the vehicle recalls, and therefore knew "that at least some of its vehicles had emissions control systems that violated governmental emissions regulations." (CCAC ¶ 83.) After this recall, Uebber stated: "Daimler does not use and never has used defeat devices, which illegally limit the effectiveness of the emission control system." Similarly, Zetsche refuted mounting allegations of a defeat device at Daimler's Annual Shareholders' Meeting, explaining that deviations can occur between regulatory test results and actual emissions in normal use. (CCAC ¶ 133.)

***17** In isolation, the allegations against these two defendants "are thin reeds upon which to construct an inference of scienter. Missing from the complaint are facts indicating that [these defendants] [were] in possession of concrete knowledge" that would have led them to conclude that their statements were deliberately misleading to investors. *In re Am. Apparel, Inc. S'holder Litig.*, 855 F. Supp. 2d 1043, 1079 (C.D. Cal. 2012). However, as noted, even if individual allegations of scienter are not sufficient to give rise to a "strong inference" of knowledge or recklessness, the Court must "conduct a 'holistic' review of the same allegations to determine whether the insufficient allegations combine to create a strong inference of intentional conduct or deliberate recklessness." *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1095 (9th Cir. 2011).

When viewed holistically, the allegations against Zetsche and Uebber, at this early phase of the proceedings, present "at least as strong an inference of scienter as any competing innocent inference." *N.M. State Inv. Council*, 641 F.3d at 1102–1103. Several factors support an inference of scienter here when coupled with Zetsche and Uebber's roles as "control persons" at Daimler AG: (1) Daimler AG's reliance on revenue from its passenger and light-duty vehicles (CCAC ¶¶ 35–37); (2) the implementation of strict emissions controls in the U.S. and the E.U., which made compliance therewith a Daimler AG priority (CCAC ¶¶ 41–43); (3) Daimler AG's goal to "make diesel driving popular [in the U.S.] again" (CCAC ¶ 46); (4) BlueTEC's "key role in making diesel-operated vehicles more environmentally friendly than ever before" (CCAC ¶ 47); (5) the prioritization of Daimler AG's compliance with new emissions standards (CCAC ¶ 48); and (6) Daimler AG's above-mentioned recall of 11,000 vehicles that used a substantially similar emissions control system (CCAC ¶ 82).

The scienter standard is met here, where, accounting for all of the circumstances, "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324. It is reasonable to infer that Zetsche and Uebber, "control persons" with engineering backgrounds who were involved in the marketing of BlueTEC vehicles, were aware that statements claiming BlueTEC vehicles met the strictest emissions standards were misleading. Further, after the publication of reports that BlueTEC vehicles' emission controls were not fully operational below 50 degrees, it is implausible that the highest-ranking individuals at Daimler AG were not aware that their continued statements to the market were misleading, given the weight and implication of the allegations against Volkswagen for use of a similar "defeat device" and the prominence of BlueTEC in Daimler AG's diesel vehicles. *See* *No. 84 Employer–Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, n. 21 (9th Cir. 2003) (finding it "absurd to suggest that the Board of Directors would not discuss" issues involving the company's maintenance problems, given the government's investigation and threat of penalties).

Although some of Plaintiffs' allegations are arguably lacking, the allegations against Defendants Uebber and Zetsche in their totality are sufficient to meet the stringent pleading standard set forth in the PLSRA. The Court concludes Plaintiffs have adequately alleged

that **all** of the Individual Defendants "made false or misleading statements either intentionally or with deliberate recklessness." *Zucco*, 552 F.3d at 991.

ii. Daimler AG

Because the Court concludes that Plaintiffs have adequately alleged scienter with respect to the Individual Defendants, such allegations are also sufficient to raise an inference of scienter as to Daimler AG.[8] *See* *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 743 (9th Cir. 2008); *see also* *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 475 (9th Cir. 2015) ("A corporation can only act through its employees and agents and can likewise only have scienter through them") (internal quotations and citation omitted).

iii. MBUSA

***18** Defendants contend that Plaintiffs make no scienter allegations against MBUSA, as all three Individual Defendants are directors and officers of Daimler AG, not MBUSA. (Mot. 2 at 17 (citing *Cheung v. Keyuan Petrochemicals, Inc.*, No. 11–CV–9495 PSG (JCGx), 2012 WL 5834894, at *3 (C.D. Cal. Nov. 1, 2012)).) Plaintiffs merely claim that "[b]y virtue of the fact that MBUSA was Daimler's wholly owned subsidiary, and by virtue of Daimler's direct participation in and/or awareness of MBUSA's day-to-day operations," Daimler AG influenced and controlled the decision-making of MBUSA and its executives, "including the content and dissemination of the various [false and misleading] statements." (CCAC ¶ 202.)

The Court agrees that this is not sufficient to support a claim that MBUSA acted with scienter. In the analogous case, *In re Volkswagen*, the plaintiffs alleged that the U.S. entities "acted with scienter because they were centrally involved in the process for acquiring all necessary approvals and certifications" for which they "regularly and frequently interacted with regulators, and were responsible for understanding and complying with emissions limits and regulations." 2017 WL 66281, at *15 ("The entities were responsible for submitting numerous applications and made detailed representations to regulators and the public confirming the vehicles' compliance with governing regulations, evidencing a high degree of knowledge of the vehicles' emissions and compliance.") No such allegations have been made here. There is nothing in the CCAC to support a claim that MBUSA knew or should have known about BlueTEC turning off at temperatures below 50 degrees or the use of an alleged "defeat device" to skirt emissions regulations. Thus, MBUSA's statements may very well have been made without culpable intent.

For the reasons stated above, the Court **GRANTS** with leave to amend Defendants' motion to dismiss for failure to adequately plead scienter as to MBUSA. Defendants' motion to dismiss on scienter grounds is otherwise **DENIED**.

c. Loss Causation

Finally, Defendants contend that Plaintiffs fail to "demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the [Plaintiff]." (*See* Mot. 2 at 18–20 (quoting *Ambassador Hotel Co., Ltd. v. Wei–Chuan Inv.*, 189 F.3d 1017, 1027 (9th Cir. 1999)).) Defendants argue, specifically, that Plaintiffs' Complaint lacks the particularized facts required under Rule 9(b). (Mot. 2 at 18.) "At the pleading stage, however, the plaintiff need only allege that the decline in the defendant's stock price was proximately caused by a revelation of fraudulent activity rather than by changing market conditions, changing investor expectations, or other unrelated factors." *Loos v. Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014).

Here, the Court concluded that Plaintiffs sufficiently pleaded the material misstatements that allegedly led to inflated stock prices. Plaintiffs then claim that this fraudulent activity became known to the market on several occasions. First, Plaintiffs allege that the September 21, 2015 article partially disclosed to the market that Daimler AG's BlueTEC vehicles emitted significantly higher levels of pollutants during normal use, and indicated use of a defeat device. (CCAC ¶ 143.) Plaintiffs claim to have suffered losses as a result, when prices of the Daimler ADRs fell approximately 7% on heavy trading volume on September 22, 2015. (CCAC ¶

144.) Next, the Complaint alleges that there were three corrective events between April 21 and April 22, 2016 that resulted in losses to Plaintiffs in the form of an additional 5% drop in the price of Daimler ADRs: (1) the announcement that the U.S. Department of Justice had requested Daimler AG perform an internal investigation (CCAC ¶ 12); (2) the issuance of the KBA Report stating that at least two of the BlueTEC models improperly adjust the efficiency of their emission control system to driving conditions and environmental conditions which corresponded to a defeat device according to regulations (CCAC ¶ 150); and (3) the announcement of a voluntary recall of 247,000 Daimler AG BlueTEC vehicles to quell "doubts as to the lawfulness of the defeat device for reasons of engine protection" (CCAC ¶¶ 152–53).

***19** Defendants address only Plaintiffs allegations regarding the publication of the article, and the internal investigation announcement. (*See* Mot. 2 at 19.) Defendants claim that these two revelations do not properly constitute a "corrective disclosure," arguing that the Ninth Circuit specifically rejected them in finding that: (1) "[t]he announcement of an investigation does not 'reveal' fraudulent practices to the market"; and (2) that an "expression of concern ... does not constitute corrective disclosure and a public admission of ... fraud." (*See* Mot. 2 at 19–20 (quoting *Loos*, 762 F.3d at 887–88; also quoting *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 608 (9th Cir. 2014).) However, "a securities fraud plaintiff is not required to allege an outright admission of fraud" by the defendants to survive a motion to dismiss. *Loos*, 762 F.3d at 888–89. In the Ninth Circuit, "[a] plaintiff properly pleads loss causation by alleging that the market learned of and reacted to the allegedly fraudulent practices and by alleging that this reaction caused the plaintiff's loss." *Paddock v. Dreamworks Animation SKG, Inc.*, No. CV 14–06053 SJO (EX), 2015 WL 12711653, at *13 (C.D. Cal. Apr. 1, 2015), *aff'd sub nom. Roofers Local No. 149 Pension Fund v. DreamWorks Animation SKG, Inc.*, No. 15–55945, 2017 WL 655789 (9th Cir. Feb. 17, 2017) (citation omitted).

Thus, the foregoing allegations, if assumed to be true, are sufficient to provide some indication that the drop in the Daimler ADR price was causally related to Daimler AG's false representations regarding its emissions controls systems that were revealed to shut off below 50 degrees as is seen in "defeat devices." *See* *Dura Pharms.*, 544 U.S. 336, 342 (requiring "a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind").

The Court **DENIES** Defendants' motion to dismiss for failure to adequately plead facts demonstrating loss causation.

2. Section 20(a) Claim

Defendants move to dismiss Plaintiffs' Section 20(a) claim on the grounds that Plaintiffs have failed to state facts sufficient to establish either condition as to any of the defendants. (Mot. 2 at 20.) For the reasons stated above, the Court finds: (1) Plaintiffs have adequately pleaded primary violations of Section 10(b) and SEC Rule 10b–5; and (2) Plaintiffs have alleged sufficient facts that Defendants Zetsche, Weber, and Uebber exercised actual control over Daimler AG. However, the Court finds Plaintiffs' control person allegations with respect to Daimler AG are insufficient because, in contrast to the allegations regarding the Individual Defendants, Plaintiffs have not provided anything beyond MBUSA's existence as a wholly-owned subsidiary of Daimler AG to support their claim that Daimler AG or the Individual Defendants were control persons of MBUSA. Plaintiffs allege in a conclusory fashion that, "by virtue of the fact that MBUSA was Daimler's wholly owned subsidiary, and by virtue of Daimler's direct participation in and/or awareness of MBUSA's day-to-day operations... Daimler had the power to influence and control... the decision-making of MBUSA." (CCAC ¶ 202.) However, the Court has already found that, without additional allegations plausibly supporting this assertion, these allegations of control are lacking. *See* *In re Volkswagen*, 2017 WL 66281, at *19.

Therefore, Defendants' motion to dismiss Plaintiffs' Section 20(a) claim motion is **GRANTED** with leave to amend as to Daimler AG's control person relationship over MBUSA; however it is **DENIED** as to the Individual Defendants' role as control persons of Daimler AG.

III. RULING

To summarize, for the reasons discussed above, the Court ORDERS as follows:

(1) Defendants' request for judicial notice of Exhibits A, C and D of the Collins Declaration is **GRANTED**;

(2) Defendants' opposition to Plaintiffs' Exhibit 5 of the Rogers Declaration is **SUSTAINED**, Plaintiffs' request for judicial notice of Exhibits 1–4 and 6 is otherwise **GRANTED**;

***20** (3) Defendants' motion to dismiss for lack of personal jurisdiction is **DENIED**;

(4) Defendants' motion to dismiss Plaintiffs' Section 10(b) claims under the Supreme Court's *Morrison* decision is **DENIED**;

(5) Defendants' motion to dismiss Plaintiffs' Section 10(b) and Rule 10b–5 claims for failure to sufficiently plead Defendants' statements and omissions were false when made is **DENIED**;

(6) Defendants' motion to dismiss Plaintiffs' Section 10(b) and Rule 10b–5 claims for failure to adequately plead scienter is **GRANTED IN PART** as to MBUSA and is otherwise **DENIED**;

(7) Defendants' motion to dismiss Plaintiffs' Section 10(b) and Rule 10b–5 claims for failure to adequately plead facts demonstrating loss causation is **DENIED**; and

(8) Defendants' motion to dismiss Plaintiffs' Section 20(a) "control person" claims is **GRANTED IN PART** as to Daimler AG and is otherwise **DENIED**.

Because it is not a certainty that Plaintiffs cannot allege facts sufficient to address the deficiencies identified above, the Court gives Plaintiffs leave to amend their complaint. Plaintiffs shall file a new amended complaint within 15 days of this Order. Defendants have 15 days thereafter to respond.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2378369, Fed. Sec. L. Rep. P 99,732

Footnotes

1 An American Depository Receipt ("ADR") is a U.S. dollar denominated form of equity ownership in a non–U.S. company; *i.e.* a foreign share held on deposit by a custodian bank in the company's home country, carrying the corporate and economic rights of the foreign shares, and subject to the terms specified on the ADR certificate. (CCAC. ¶ 1 n. 2.) Daimler AG established its sponsored Level I ADR program, which trades on over-the-counter ("OTC") markets in the United States, by contracting with U.S.–based Deutsche Bank Trust Company Americas to serve as the acting depository bank for the ADRs at issue here: those utilizing the ticker symbols DDAIF and DDAIY (the "Daimler ADRs"). (CCAC ¶ 1.)

2 Prior to 2015, and throughout the majority of the Class Period, MBUSA maintained its principal offices in Montvale, New Jersey.

3 European regulators test vehicles in a similar, highly regulated laboratory environment. (CCAC ¶ 57.) Like the EPA testing, the parameters of the test are also publicly available and well-known to automakers and their engineers. (CCAC ¶ 57.)

4 A defeat device is any motor vehicle hardware, software, or design that interferes with or disables emissions controls under real world driving conditions, even if the vehicle passes formal emissions testing. (CCAC ¶ 4.) The term appears in the Clean Air Act and European Union ("E.U.") regulations, and describes anything that prevents an emissions control system from working. (*See* CCAC ¶¶ 72–78.) U.S. and E.U. regulations permit deactivation of variable emissions control systems under an extremely limited set of circumstances, though neither permit an emissions control system to perform materially better in a testing scenario than in the real world. (CCAC ¶¶ 72.)

5 Plaintiffs do not dispute Defendants' argument that general jurisdiction is absent. (Opp'n 1 at n. 5.)

6 Plaintiffs' securities claims need only satisfy one prong of *Morrison*, therefore the Court does not address prong one, and instead looks immediately to the **second** prong.

7 The Court notes one exception: Defendants' statements that the BlueTEC vehicles are "the cleanest diesel cars in the world." (CCAC ¶¶ 101, 105, 112, 116.) This statement arguably is so general that it is unlikely to have induced customer reliance. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) ("Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim."); *City of Monroe Emps.*

Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 670 (6th Cir. 2005) (finding the claim that Bridgestone has "the best tires in the world" to be inactionable puffery).

8 The Court does not address the parties' "collective scienter" arguments beyond noting that Plaintiffs are not precluded from such an argument. *See* *In re Volkswagen*, 2017 WL 66281, at *14. Defendants contend that "[t]he Ninth Circuit has 'not... adopted a theory of collective scienter.' " (Mot. 2 at 18 (quoting *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 744–45 (9th Cir. 2008)).) However, Ninth Circuit law does not categorically prohibit collective scienter. *Glazer* specifically clarifies that "in certain circumstances, some form of collective scienter pleading might be appropriate," such as when a "company's public statements were so important and so dramatically false that they would create a strong inference that at least some corporate officials knew of the falsity upon publication." 549 F.3d at 744.

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