Court File No. CV-16-566618-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

GROWTHQUEST CAPITAL, INC.

Plaintiff

- and -

VOLKSWAGEN AKTIENGESELLSCHAFT

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. It is Volkswagen Aktiengesellschaft's ("**VWAG**") position that this Court should not exercise jurisdiction in this case. VWAG has brought a motion to this Court for determination of jurisdiction *simpliciter* and, in the alternative, that Ontario is *forum non conveniens*.

2. By endorsement dated February 14, 2018, Justice Perell ordered that any subsequent steps taken by VWAG pending the determination of that motion in responding to the plaintiff's action and certification motion are not acts of attornment. Accordingly, nothing in this Statement of Defence shall in any way constitute an act of attornment by VWAG. Furthermore, VWAG took no substantive steps in this proceeding prior to the February 14, 2018 endorsement of Justice Perell and has, therefore, not attorned to this Court's jurisdiction in this action.

3. VWAG admits the allegations contained in paragraphs 4, 15, 20, 25, 60, 80 and 84 of the Fresh as Amended Statement of Claim (the "**Claim**").

4. VWAG denies that the allegations contained in paragraphs 29, 34, 39, 44, 49 and 54 of the Claim present a fair and complete description of the matters described therein, and denies such allegations to the extent that they assert or suggest that VWAG engaged in any actionable conduct. VWAG relies upon the publicly available Annual Reports for a complete and accurate statement of their contents.

5. VWAG denies the allegations contained in paragraphs 9-12 and 73-76 of the Claim, and relies upon the publicly available records of the prices of VWAG's securities for a complete and accurate statement of their contents. VWAG further avers that the reference to "Corrective Disclosure" is incorrect given that no disclosure ever needed to be corrected.

6. VWAG has no knowledge of the allegations contained in paragraphs 68, 69, 72 or 90 of the Claim.

7. VWAG denies that the plaintiff is entitled to the relief claimed in paragraph 2 of the Claim and denies the allegations contained in paragraphs 3, 5-8, 13-14, 16-19, 21-24, 26-28, 30-33, 35-38, 40-43, 45-48, 50-53, 55-59, 61-62, 63-66, 67, 70-71, 77-79, 81-83, 85-89, 91, 92-99 of the Claim.

8. In further response to the Claim, VWAG states as follows:

Overview

9. Given that the jurisdictional issues are both preliminary and determinative of this action, this Statement of Defence will address those issues before pleading the facts relative to VWAG's other and alternative defences.

10. The Claim is for alleged fraudulent misrepresentation against a foreign company and is brought by a plaintiff who claims to have purchased its securities in a foreign market allegedly based on disclosure documents governed by foreign securities regimes and foreign regulators.

11. This action ought not proceed in Ontario given that:

(a) VWAG's Articles of Incorporation contain a choice of forum clause that expressly provides that any action brought by investors against VWAG for misrepresentation claims must be brought in Braunschweig, Germany, where, as here, no statute mandates otherwise;

(b) the Court should not exercise jurisdiction *simpliciter* in this case as there is no real and substantial connection between Ontario, VWAG, and this action; or alternatively,

(c) Ontario is a *forum non conveniens*.

12. In addition, the plaintiff's claim for fraudulent misrepresentation is fatally flawed for numerous reasons, including:

(a) the plaintiff did not, in fact, purchase any VWAG securities and, therefore, can have no cause of action against VWAG;

(b) the plaintiff fails to allege facts supporting the Claim with sufficient particularity;

(c) the alleged representations were not misleading;

(d) in the alternative to (c), above, VWAG had no knowledge that any of the alleged misrepresentations were materially misleading;

(e) VWAG never intended that the plaintiff or any member of the putative class would act in reliance on any of the alleged misrepresentations in purchasing VWAG securities as they are, at most, non-actionable puffery statements;

(f) VWAG denies that the plaintiff acted on any of the alleged misrepresentations and puts the plaintiff and each member of the putative class to the strict proof thereof; and

(g) VWAG denies that the plaintiff suffered any losses and puts the plaintiff and each member of the putative class to the strict proof thereof.

13. The reasons for which the Claim fails to meet each element of the tort of fraudulent misrepresentation are discussed in further detail below.

14. Finally, the plaintiff seeks to have its Claim certified as a class action. However, the jurisdiction and merits issues are determinative that this action cannot be certified. Additionally,

this action cannot be certified given that it does not meet the criteria for certification as set out in section 5(1) of the *Class Proceedings Act*.

VWAG's Articles Contain a Jurisdiction Clause Only Displaced by Statute

15. VWAG operates pursuant to Articles of Association that, among other things, form the organizational constitution of the company and govern the mutual rights and obligations of VWAG and its investors.

16. Article 29 of VWAG's Articles of Association contains the following jurisdiction clause:

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

17. VWAG's "domicile" as referred to in Article 29 is the location of its seat of administration: Wolfsburg, Germany.

18. Article 29 was introduced into VWAG's Articles of Association by approval of the VWAG shareholders at its Annual General Meeting held on May 3, 2011, receiving a majority approval of 99.69% of voting VWAG shareholders.

19. Article 29 mirrors Section 32b of the German Code of Civil Procedure (which provides that the court at the location of a company's registered office has exclusive jurisdiction over claims for false or misleading securities disclosures against the company) for the purpose of declaring shareholders' intention that courts in Germany hear securities misrepresentation claims against VWAG.

20. The amendment to the Articles of Association that established a uniform place of jurisdiction at VWAG's domicile for investor claims was disclosed in VWAG's 2011 Annual Report. VWAG's Articles of Association are referred to and discussed in each of its Annual Reports throughout the class period. These are the same Annual Reports that the plaintiff pleads were read and relied upon in purchases of VWAG securities.

21. The Articles of Association are binding on both VWAG's shareholders and holders of VWAG American Depositary Receipts ("**ADRs**") (as "beneficiaries of … financial instruments relating to [VWAG] shares").

22. An ADR is a U.S. dollar denominated form of equity ownership in a non-US company. It represents the foreign shares of the company held on deposit by a custodian bank in the foreign country and carries the corporate and economic rights of the foreign shares, subject to the terms specified on the ADR certificate.

23. Contrary to the assertion in paragraph 21 of the Claim, VWAG does not issue ADRs. Rather, pursuant to deposit agreements between VWAG, Morgan Guaranty Trust Company of New York ("**J.P. Morgan**") and the holders of ADRs (the "**Deposit Agreements**"), VWAG has two sponsored ADR programs, representing its preference and ordinary shares. Both are sponsored by J.P. Morgan and trade in the U.S. on the Over the Counter Market.

24. Pursuant to the Deposit Agreements, the holders of VWAG ADRs have the same rights and obligations as VWAG's shareholders, including the obligation to address disputes in the jurisdiction of the company's domicile unless mandatory statutory provisions require otherwise, as provided for in Article 29.

25. In an ongoing U.S. securities class action brought on behalf of a global class of VWAG investors who purchased ADRs over the U.S. Over the Counter Market arising out of the same or similar misrepresentations as those alleged in the Claim, the U.S. Court held that those purchases constituted "domestic transactions" such that section 10(b) of the U.S. *Securities Exchange Act of 1934* applied. Section 27 of the *Securities Exchange Act of 1934* provides that U.S. federal courts have exclusive jurisdiction over violations of that Act, thus constituting an overriding statutory provision requiring that the action brought by ADR purchasers in the U.S. be heard in a jurisdiction outside VWAG's domicile.

26. In contrast, no Ontario statute requires that this action be heard by this Court.

This Court Does Not Have Jurisdiction *Simpliciter* in this Case

27. VWAG is a German corporation with its headquarters in Wolfsburg, Germany.

28. VWAG does not rent or own any physical premises in Ontario or elsewhere in Canada.

29. During the proposed class period, VWAG common and preferred shares traded on exchanges in Europe and VWAG ADRs traded on the Over the Counter Market in the U.S. VWAG's securities are not, and have never been, listed for trading on any exchange in Ontario or elsewhere in Canada.

30. VWAG's Annual Reports from the proposed class period were prepared in Germany.

31. During the class period, no member of VWAG's board of management had a primary residence in Canada.

32. At law, there is no real and substantial connection between Ontario, VWAG, and this action:

(a) VWAG is domiciled and resident in Germany – outside of Ontario and Canada.

(b) VWAG does not carry on business in Ontario or elsewhere in Canada.

(c) No securities purchase agreement was made in Ontario or elsewhere in Canada given that VWAG shares traded on European exchanges and VWAG ADRs traded on the U.S. Over the Counter Market.

(d) VWAG denies that the plaintiff received and relied upon the alleged misrepresentations while in Ontario. Even if true, this would be a weak presumptive connecting factor that is rebutted by the fact that VWAG prepared its disclosure documents in Germany in order to comply with the laws of the jurisdictions of the exchanges and Over the Counter Markets on which its securities traded: all of which were outside of Canada.

Ontario is a *Forum Non Conveniens*

33. The *forum conveniens* for investors who obtained VWAG shares from European exchanges is Germany and the *forum conveniens* for investors who obtained VWAG ADRs from the U.S. Over the Counter Market is the U.S.

34. VWAG is defending over 1,800 investor lawsuits in Germany that are pending with the Braunschweig District Court and that are seeking damages of approximately €8.85 billion for alleged securities misrepresentations in connection with the diesel emissions issue.

35. Between September 25, 2015 and November 25, 2015, five plaintiffs filed putative class actions on behalf of ADR holders against, among others, VWAG alleging securities fraud under Section 10(b) of the U.S. Securities Exchange Act and SEC Rule 10b-5 thereunder in connection with the emissions software in affected U.S. vehicles. On December 10, 2015, those five actions were consolidated and transferred to the U.S. District Court for the Northern District of California Court as part of a multidistrict litigation before the Honorable Judge Charles R. Breyer.

36. The first choice of jurisdiction of the plaintiff in this action was the U.S. The George Leon Family Trust was among those who brought a federal securities class action in the U.S. against VWAG and certain of its officers and/or directors arising out of the very same transactions that the plaintiff alleges ground its claim in this action. After Arkansas State Highway Employees' Retirement System was chosen as the lead plaintiff in the U.S., the George Leon Family Trust commenced this parallel action in Ontario and later amended the Claim to, among other things, change the named plaintiff from the George Leon Family Trust to GrowthQuest. George Leon, who is a trustee of the George Leon Family Trust, is the President and Director of GrowthQuest. The George Leon Family Trust is the sole shareholder of GrowthQuest.

37. In addition, the plaintiff's Claim is fatally flawed for the reasons set out below.

GrowthQuest Can Have No Cause of Action against VWAG

38. Contrary to the allegation contained in paragraph 13 of the Claim, GrowthQuest did not purchase "200 shares" of VWAG on each of June 4, 2013, June 19, 2013 and June 21, 2013. In fact, GrowthQuest never purchased and does not own any VWAG securities.

39. Given that GrowthQuest did not acquire VWAG securities during the class period (or ever), it can have no cause of action against VWAG for fraudulent misrepresentation or otherwise. The remainder of this Statement of Defence is pleaded in the further alternative.

VWAG Did Not Engage in Any Actionable Conduct

40. VWAG acknowledges that its affected vehicles were not in compliance with prescribed emissions standards in the U.S., which standards also apply in Canada.

41. The criminal investigations instituted against VWAG in the U.S. by the Department of Justice were concluded by a Plea Agreement entered into on January 11, 2017. The Plea Agreement includes a Statement of Facts (the "**U.S. SOF**"), which is attached to the Plea Agreement as Exhibit 2. For the avoidance of doubt, VWAG does not dispute the accuracy of any of VWAG's admissions in the U.S. SOF. VWAG's responses herein should be read to be consistent with the admissions made by VWAG in the U.S. SOF, and nothing in this Statement of Defence should be construed as a contradiction of the U.S. SOF. Any capitalized terms that are not defined herein shall have the definition used in the U.S. SOF.

42. In the Plea Agreement and U.S. SOF, VWAG admitted to criminal conduct under U.S. law arising from certain of its employees' installation of emissions software in violation of U.S. emissions standards. However, no one who had any role in the production and release of the disclosure documents complained of in the Claim was aware of the criminal behaviour set out in the Plea Agreement and U.S. SOF. Accordingly, no one at VWAG with a role in preparing its public disclosure documents intentionally deceived the plaintiff, the members of the putative class or the capital markets by making the statements alleged in the Claim to be misrepresentations.

43. As detailed below, the plaintiff's Claim does not plead sufficient material facts or particulars to ground a cause of action in fraudulent misrepresentation nor do the facts pleaded satisfy any of the requisite elements of the tort.

The Claim Fails to Plead with Sufficient Particularity to Ground a Cause of Action

44. The plaintiff fails to plead sufficient material facts or appropriately particularize the alleged misrepresentations.

45. In paragraphs 5-8, 13, 17, and 86-88, the plaintiff refers to "core documents" and "non-core documents". However, this distinction is of no assistance as the plaintiff has only asserted a common law claim for fraudulent misrepresentation. The plaintiff must establish each element of the tort of fraudulent misrepresentation for each document which it asserts contains a misrepresentation, regardless of the status of such a document under the *Securities Act* (as a core or non-core document).

46. In paragraphs 5-8, 13, 17, 24, and 86-88, the plaintiff pursues its Claim on the basis of what are described as "core documents", "non-core documents", or "communications" containing representations which allegedly induced the purchase of securities which are neither identified nor otherwise particularized. VWAG asserts that the plaintiff has failed to particularize the existence or content of such documents or the misrepresentations allegedly contained therein. The plaintiff also fails to plead which of those the plaintiff claims that it or any class member allegedly relied upon in making their decisions to purchase VWAG securities. The allegations of individual reliance are baldly pleaded, lack sufficient material facts and particulars, and are therefore untenable.

47. To the extent that the plaintiff has identified particular representations at all, the plaintiff fails to identify which of the misrepresentations each of the members of the class alleges he or she or it relied upon. As such, the pleading is devoid of sufficient material facts and particulars to support a cause of action.

48. Moreover, and as is set out below, the facts pleaded do not satisfy any of the requisite elements of the tort of fraudulent misrepresentation.

VWAG Had No Knowledge Any of the Representations Were Materially Misleading

49. The only knowledge attributable to VWAG for the purposes of this action is that of its corporate representatives responsible for its public disclosure.

50. The Claim fails to identify any corporate representative responsible for VWAG's public disclosure who had any knowledge that the alleged misrepresentations were materially misleading. Nor does the plaintiff allege that any such person was reckless as to the truth of the representations or had no belief in the truth of the representations at the material time.

51. The only "knowledge" of VWAG's corporate representatives that is alleged in the Claim is found at paragraph 58:

> During May 2014, VW's senior executives, including its then CEO Martin Winterkorn, received multiple memoranda advising them that certain industry experts had learned that VW was using emissions defeat-device software on certain of its diesel-powered vehicles.

This allegation, even if true, which is denied, cannot substantiate that VWAG's responsible representatives knew that the alleged misrepresentations were false as of May 2014. They did not.

VWAG Never Intended that the Plaintiff or any Class Member Rely on the Representations

52. In causing VWAG to make the alleged misrepresentations, no corporate representative responsible for VWAG's public disclosure intended to deceive the plaintiff or any class member. Accordingly, no fraudulent intent can be attributed to VWAG as a matter of Ontario law.

53. The alleged false representations of fact that are particularized in the Claim are based on partially excerpted paragraphs selected from thousands of pages of disclosure contained in seven Annual Reports.

54. VWAG never intended that any ADR holder or shareholder rely upon the representations to purchase VWAG shares or ADRs. They are, at most, puffery statements of corporate objective not intended to induce legal reliance.

The Plaintiff and Class Members Did Not Act Upon the Representations

55. At paragraphs 32, 37, 42, 47, 52, 57 and 65, after setting out the representations in each of the 2008-2014 Annual Reports, the Claim alleges that had VWAG disclosed that it had been using emissions software to defeat regulatory testing, that the plaintiff and each class member would "not have purchased securities or additional securities of VW."

56. VWAG denies this allegation and puts the plaintiff and each and every member of the putative class to the strict test of establishing on a balance of probability that but for the representations complained of in the respective Annual Reports, he, she or it would not have purchased securities or additional securities of VWAG.

57. Factors relevant to each putative class members' subjective decision to purchase VWAG securities may include: access to and review of the representations; the import and meaning attributed to those statements by the class members if reviewed; the effect of the total mix of information available to members of the putative class; personal investment strategies; risk profiles; and investment objectives.

58. The allegations contained in paragraphs 57 and 65 are demonstrably false in so far as they allege that had VWAG made proper disclosure regarding the diesel compliance issue in March 2014 and 2015 "the Plaintiff … would not have purchased securities or additional securities of VWAG" [emphasis added]. The plaintiff alleges that it purchased its VWAG ADRs that give rise to its Claim in June 2013. It is temporally impossible that anything contained in Annual Reports released in March 2014 and March 2015 could have influenced that prior decision to purchase VWAG ADRs.

59. In any event, George Leon's own trading behaviour in VWAG ADRs contradicts the repeated allegation that had GrowthQuest known of the diesel compliance issue, it would "not have purchased securities or additional securities of VWAG."

60. As described above, the U.S. Environmental Protection Agency held a press conference on September 18, 2015, in which it made detailed allegations related to the diesel compliance issue.

61. On September 20, 2015 VWAG released a public statement from then CEO Martin Winterkorn stating, among other things, that "The U.S. Environmental Protection Agency and the California Air Resources Board (EPA and CARB) revealed their findings that while testing diesel cars of the Volkswagen Group they have detected manipulations that violate American environmental standards", and that "The Board of Management at Volkswagen AG takes these

findings very seriously. I personally am deeply sorry that we have broken the trust of our customers and the public." The plaintiff relies on this document in the Claim as the first "Corrective Disclosure".

62. On September 21, 2015, at George Leon's direction, the George Leon Family Trust purchased 700 VWAG ADRs, after the diesel compliance issue was publicly known and the very next day after the first alleged Corrective Disclosure. As soon as George Leon became aware of the diesel compliance issue, he immediately caused the George Leon Family Trust to purchase more VWAG securities than it had purchased throughout the class period.

63. The plaintiff's website also touts that it has "a very experienced senior investment manager who is not only educated as a lawyer but has extensive corporate operating experience as a senior officer and director of a large publicly owned Canadian Corporation", being a reference to George Leon. An experienced investment manager implementing a contrarian investment strategy would not have relied upon the corporate puffery contained in the representations when making investment decisions.

The Plaintiff Suffered No Damages as a Result of the Representations

64. Each putative class member purchased a different quantity of securities on different dates at different prices. Some class members may have sold their VWAG securities on different dates at different prices while others may still hold some or all of them.

65. The plaintiff asserts repeatedly throughout the Claim that but for the allegedly false representations, the plaintiff and the class members would not have purchased the VWAG securities during the class period. As set out above, VWAG denies these assertions. Even if the

plaintiff's assertions were true, the plaintiff and class members would only be entitled to be put into the same position they would be in "but for" the allegedly false representations: i.e. having not purchased the VWAG securities.

66. This means that the plaintiff's and any individual class member's damages calculation must take into account, among other things:

(a) the dividends the plaintiff or class member received from owning the VWAG securities that they would not have otherwise owned;

(b) the appreciation of the VWAG securities that the plaintiff or class member would not have otherwise owned during the period that he, she or it held those securities; and

(c) in the case of ADRs, the monies made from holding a U.S. dollar denominated security during a period in which the U.S. dollar materially appreciated compared to the Canadian dollar.

67. When all of these factors are considered in the specific context of the plaintiff, the plaintiff did not lose any money on its VWAG ADR investment, but rather made money on that investment. Even on its own theory of the case, the plaintiff is in a better position having purchased the VWAG ADRs. The application of those factors to other putative class members may lead to similar results.

68. The damages sought by the plaintiff as articulated in paragraph 14 of the Claim represent a windfall to the plaintiff as it is claiming damages for alleged losses it never actually suffered.

69. VWAG denies that the plaintiff or putative class members incurred losses or damages as alleged in the Claim, or at all. Even if the plaintiff or putative class members did incur any losses or damages:

(a) any such losses or damages are excessive, exaggerated and/or too remote to be recoverable at law;

(b) any such losses or damages were not caused by any misrepresentation, negligence, act, omission, breach of duty, or breach of contract on the part of VWAG in fact or in law, but instead were caused by acts, omissions, or negligence of the plaintiff and the class members; and

(c) the plaintiff and class members have failed to take measures to reasonably mitigate their damages.

International Financial Reporting Standards Are Irrelevant

70. At paragraphs 81 through 83 of the Claim, the plaintiff pleads that VWAG violated IAS 37 by failing to recognize contingency reserves relating to use of the emissions software.

71. This is incorrect. There was no known factual basis upon which such a contingency could have been recorded.

72. VWAG has not restated any of its financial statements from the proposed class period because there were no material misstatements.

73. In any event, the allegation is irrelevant to the plaintiff's Claim given that the only cause of action pled is fraudulent misrepresentation and the plaintiff does not allege facts that could

support a finding that the failure to record a contingency constituted an actionable fraudulent misrepresentation. Specifically, the plaintiff does not plead that:

(a) VWAG knowingly or recklessly failed to include the allegedly required contingency;

(b) VWAG intended the plaintiff and class members to rely upon its alleged failure; or that

(c) the plaintiff and class members did rely upon the failure when purchasing VWAG securities.

74. The allegations accordingly do not ground a claim for fraudulent misrepresentation and are in any event wrong.

75. VWAG asks that this action be dismissed, with prejudice, and that VWAG be awarded its costs payable by the plaintiff on an appropriate scale.

May 25, 2018

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PROCEEDING COMMENCED AT
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STATEMENT OF DEFENCE

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