UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWMARKETS PARTNERS LLC, et al.,

Plaintiffs,

vs.

SAL OPPENHEIM JR. & CIE. S.C.A., et al.,

Defendants

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Case No. 08-CV-4213 (WHP)

NOTICE OF MOTION BY BVT TO DISMISS THE AMENDED COMPLAINT

PLEASE TAKE NOTICE that for the reasons set forth in the attached Memorandum of Law, the attached declaration and the various exhibits attached and incorporated herein by reference BVT Beratungs-, Verwaltungs- und Treuhandgesellschaft für Internationale Vermögens-Anlagen mbH (hereinafter "BVT" or "defendant BVT"), by and through its undersigned counsel, hereby moves pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6), to dismiss the First Amended Verified Complaint ("Compl."), Dkt. 10.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court ordered briefing schedule any responses are due by October 31, 2008, any replies are due by November

11, 2008 and the Court will hear Oral Argument on any motions to dismiss on November 21, 2008.

Dated: New York, New York
October 15, 2008

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWMARKETS PARTNERS LLC,
In its own capacity and derivatively;
As a limited partner in, in the right, and
For the benefit of:
CAM NEWMARKETS PARTNERS LP,

Case No. 08 CV 4213 (WHP)

TOMOKO TATARA
Individually and derivatively as a member,
And for the benefit of:
NEWMARKETS PARTNERS, LLC,
In the right and for the benefit of
CAM NEWMARKETS PARTNERS LP,

Plaintiffs,

BVT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

-against-

SAL. OPPENHEIM JR. & CIE. S.C.A.

CAM PRIVATE EQUITY CONSULTING & VERWALTUNGS GmbH,

BVT BERATUNGS-, VERWALTUNGS- UND TREUHANDGESELLSCHAFT FÜR INTERNATIONALE VERMÖGENS-ANLAGEN MBH, and

MARIE-FRANCE MATHES,

Defendants.

----------X

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWMARKETS PARTNERS LLC,
In its own capacity and derivatively;
As a limited partner in, in the right, and
For the benefit of:
CAM NEWMARKETS PARTNERS LP,

Case No. 08 CV 4213 (WHP)

TOMOKO TATARA
Individually and derivatively as a member,
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MARIE-FRANCE MATHES,

Defendants.

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BVT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6), BVT Beratungs-, Verwaltungs- und Treuhandgesellschaft für Internationale Vermögens-Anlagen mbH (hereinafter "BVT" or "defendant BVT"), by and through its undersigned counsel, hereby moves to dismiss the First Amended Verified Complaint ("Compl."), Dkt. 10, for the reasons set forth below.

I. Background

BVT is organized under the laws of the Federal Republic of Germany, with its principal place of business in Munich, Bavaria. Declaration of Robert List [CEO of BVT] in Opposition to Motion for Preliminary Injunction, Dkt. 35-2, filed Oct. 2, 2008 ("List Decl. I") ¶3; Second Declaration of Robert List in support of Motion to Dismiss, filed herewith ("List Decl. II") ¶2. BVT promotes and markets investment funds. With one exception—a fund marketed to Austrian investors—all of its funds are marketed to Germany, pursuant to BVT's deliberate policy to stringently limit its business to funds regulated under German law and to attract only investors subject to German tax jurisdiction. List Decl. II ¶¶7-8.

Defendant BVT does not market to or conduct business in New York State or the United States, and it never has. It has no investors from the United States, and it has never solicited investments from the United States. List Decl. II ¶2. For the two funds at issue here (the BVT-CAM Private Equity New Markets Fund, and the BVT-CAM Private Equity Global Fund VI), its hundreds of investors come from Germany—except for four, who now reside in Switzerland, Austria, The Netherlands, and Mozambique. List Decl. II ¶7. Nor has it an office, phone number, address, employees, or bank accounts in New York. Except for the conclusory allegation, discussed below, that BVT is part of a "conspiracy" with the other Defendants, the First Amended Verified Complaint suggests no factual basis for jurisdiction over BVT. Plaintiffs also argue that Defendant BVT somehow is present in the United States, because there are companies with "Bvt," or "bvt," or "BVT," in their names in Atlanta. *See* Plaintiffs' Reply Brief in Support of Their Motion for Preliminary Injunction. Dkt. 37 at 6-7. These companies are entirely separate and independent of Defendant BVT, which neither controls, nor owns, nor is controlled by, nor is owned by, any of them. List Decl. II ¶5. The fact that a web site for an

American company with "bvt" in its name says that it has a "headquarters" in Munich does not, ipso facto, turn that company into a defendant in this case. Similarly, Plaintiffs argue that Defendant BVT invests in projects in the United States. It does not. It markets German investment funds in Germany. *See* List Decl. I ¶7; List Decl. II ¶6.

II. Motion to Dismiss for Lack of Personal Jurisdiction

An examination of the First Amended Verified Complaint discloses that the Plaintiffs' theory of personal jurisdiction over BVT is spurious. They claim that, because they have alleged a conspiracy between all Defendants, with one Defendant owning a subsidiary in New York, BVT as "conspirator" has acted constructively in New York. Following this facile approach, Plaintiffs do not actually allege anything factual or objective, such as BVT doing business in New York, or having employees or agents acting on its behalf within the Court's jurisdiction.

On a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), a court must analyze two questions: (1) whether there is jurisdiction over the defendant under the law of the forum state, and (2) whether the exercise of jurisdiction is consistent with federal due process requirements. *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 240 (2d Cir. 1999). Plaintiffs here allege that jurisdiction exists through BVT and BVT's co-conspirators' "contacts with this judicial district and pursuant to New York's long-arm statute, N.Y. C.P.L.R. §§301-302." The Plaintiffs are wrong. There is no personal jurisdiction over BVT pursuant to either §301 or §302, as set forth just below.

A. The Court Lacks §301 Personal Jurisdiction over BVT

To obtain §301 general jurisdiction over BVT, BVT must have been "doing business" on a continuous, permanent, and substantial basis in New York at the time the action was brought. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000); *Hoffritz for Cutlery,*

Inc. v. Amajac, Ltd., 763 F. 2d 55, 58 (2d Cir. 1985) (factors for "doing business" include the existence of an office, employees, bank accounts, or property, or the solicitation of business in the forum state); *MedPay Sys., Inc. v. MedPay USA, LLC,* 2007 U.S. Dist. LEXIS 30201, at *16 (E.D.N.Y. Mar. 29, 2007) (where defendant "neither owns property nor maintains an office in New York . . .[nor possesses] a New York telephone number. . . [nor has] employees or agents located in the state[,]" §301 jurisdiction does not exist). Plaintiffs here have not alleged that BVT itself did *any* business in New York, let alone on a continuous, permanent, and substantial basis. Nor could they so allege, for as Mr. List confirms, BVT has done *no* business in New York, and is a German corporation, doing and soliciting business only in Germany, and, in one unique instance, in Austria. BVT also has no office, phone number, address, employees, bank account, or other property in New York. List Decl. I ¶¶3-12; List Decl. II ¶2; *see AI Trade Fin., Inc. v. Petras Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993) (affidavits may be used in determination of personal jurisdiction).

Rather than allege continuous business conduct by BVT itself, Plaintiffs allege that BVT "conducts business throughout the United States, including this District through a wholly-owned subsidiary BVT Equity Holdings. . ., which has a regular place of business at 400 Interstate North Parkway, Atlanta, Georgia 30339." Compl. ¶6. As Mr. List declared, however, BVT Equity Holdings is *not* a subsidiary of BVT (nor is it a parent). Rather, it is a separate company organized under the laws of Georgia. List Decl. I ¶3; List Decl. II ¶4.

Even if it were a subsidiary of BVT (which it is not), Plaintiffs do not allege that the supposed business that BVT Equity Holdings conducts in New York is done on a continuous, permanent, and substantial basis. Significantly, Plaintiffs may not rely on BVT Equity Holding's Atlanta-based conduct. *See First Capital Asset Mgmt, Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d

369, 392 (S.D.N.Y. 2002) ("The Court must focus on the defendants' contacts with the forum state, not the United States as a whole."). Plaintiffs also don't allege–because it would be untrue—that BVT Equity Holdings conducts business in New York as an agent of BVT or as a "mere department" of BVT in New York. *See Jizini v. Nissan Motor Co.,* 148 F.3d 181, 184 (2d Cir. 1998) ("For New York courts to have jurisdiction [based on a subsidiary's activities], the subsidiary must be either an 'agent' or a 'mere department' of the foreign parent."); *Scott v. NASCAR,* 2008 U.S. Dist. LEXIS 5039, at *21 (S.D.N.Y. Jan. 17, 2008) (same). The existence of BVT Equity Holdings is, in short, of no relevance to BVT or to this lawsuit; it is a separate entity not controlled by, or controlling, BVT; and thus it cannot serve as a basis for personal jurisdiction.

Plaintiffs further allege that "BVT markets its financial products in the U.S., including this District, through, among others, wallstreet:online.com and fondsclick.com." Compl. ¶6. According to Mr. List, however, both Wall Street Online and fondsclick.com are independent web sites, not run by or any in way connected with BVT. List Decl. I ¶10; List Decl. II ¶4.[1]

And even if the web sites *were* run by BVT, being a party that simply operates a web site accessible by New York citizens is insufficient to confer §301 jurisdiction. *Unique Indus v. Sui & Sons Int'l Trading Corp.,* 2007 U.S. Dist. LEXIS 83725, at *18 (S.D.N.Y. Nov. 9, 2007) (holding that "Defendant's maintenance of a web site which is accessible to New Yorkers may not, by itself, be sufficient to confer personal jurisdiction over Defendant[,]" and citing cases on the same point); *MedPay Sys.,* 2007 U.S. Dist. LEXIS 30201, at *16-17 (same). The question is whether the web site generates any New York sales. *See MedPay Sys.,* 2007 U.S. Dist. LEXIS 30201, at *18. In this case, as Mr. List has declared, even if a New York-based customer

[1] Indeed, if one visits Fondsclick, one is immediately redirected to https://banking.lzo.com/cgi/anfang.cgi, which is a German language web site of what appears to be a local German savings bank. Declaration of Frederick W. Reif,

attempted to invest in a BVT financial product through Wall Street Online or fondsclick.com, that person would be unsuccessful, given that BVT "does not intend to accept any investor who is not subject to German tax jurisdiction." List Decl. I ¶10; *see also* List Decl. II ¶3. The web sites, therefore, also provide no basis for §301 jurisdiction.

B. The Court Lacks Personal Jurisdiction Pursuant to §302

1. §302(a)(1)

Personal jurisdiction also does not exist pursuant to §302(a)(1), which requires: (1) that the defendant transacted business within the state, and (2) that the claim asserted arose from that business activity. *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC,* 450 F.3d 100, 103 (2d Cir. 2006). As discussed above, BVT has transacted *no* business in New York, and the alleged conduct took place in Germany, aimed exclusively to Germans, in the German language. List Decl. I ¶¶3-10, 13-15; List Decl. II ¶¶ 3, 5-7. Even if BVT Equity Holdings were a subsidiary of BVT – which it is not – Plaintiffs have not alleged, other than conclusorily, in what capacity it transacted business in New York, or that the claims asserted arose from any New York business activity. With regard to the two web sites, Plaintiffs have alleged only that BVT "markets its financial products," not that BVT actually transacted any business in New York using these web sites, nor that the claims asserted herein arose from use of these sites.

2. §302(a)(2)

Plaintiffs' main ground for personal jurisdiction seems to be based on BVT's alleged acts as co-conspirator pursuant to §302(a)(2), *see* Compl. ¶11, which, under certain circumstances, permits jurisdiction over a defendant who commits a tortious act in New York and over the defendant's foreign co-conspirators.

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filed Oct. 2, 2008 ("Reif Decl."), Dkt. 35, ¶10.

To find jurisdiction under the co-conspirator theory, Plaintiffs must demonstrate that at least one member of the alleged conspiracy committed a tort in New York. *Kramer v. Vogl,* 17 N.Y.2d 27 (1966);[2] *see also E-Z Bowz, LLC v. Prof. Prod. Research Co., Inc.,* 2005 U.S. Dist. LEXIS 3453, at *52 (S.D.N.Y. Mar. 9, 2005) (plaintiff bears the burden of showing that the primary tort was committed by a co-conspirator in New York). In addition, plaintiffs must: (1) make a prima facie showing of conspiracy, and (2) allege specific facts to warrant an inference that defendant was a member of the conspiracy. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir. 1999). Further, a plaintiff must show that (1) the foreign co-conspirators were aware of the effects of the activity in New York, (2) the New York co-conspirators' activity was for the benefit of the foreign co-conspirator, and (3) the co-conspirators in New York acted at the behest of, or on behalf of, or under the control of the foreign conspirators. *BHC Interim Funding, LP, v. Bracewell & Patterson,* 2003 U.S. Dist. LEXIS 10739, at *15-16 (S.D.N.Y. June 25, 2003); *Ivy Mar Co., Inc. v. C.R. Seasons, Ltd.,* 1997 U.S. Dist. LEXIS 897, at *14 (E.D.N.Y. Jan. 24, 1997). A "bland assertion of conspiracy or agency is insufficient to establish jurisdiction for the purposes of section 302(a)(2)." *Id.* (citations omitted).

Plaintiffs fail to meet any of the above requirements. Plaintiffs have not alleged that the Defendants which they assert have New York contacts – namely Oppenheim (allegedly through its New York subsidiary), and CAM (which is a German company) – committed any tortious acts in New York. In fact, they do not allege that Oppenheim's New York-based subsidiary committed *any* tortious conduct anywhere, let alone in New York. (The remaining Defendant, Mathes, is alleged to be a resident of Washington, D.C., and a citizen of Luxembourg). The

[2] *Superseded by statute on other grounds, as recognized in People v. Concert Connection,* 629 N.Y.S.2d 254, 256 (N.Y. App. Div. 2d Dep't 1995).

conduct, on which the Plaintiffs base the claims against BVT, occurred in Germany, and therefore personal jurisdiction is lacking under this theory. List Decl. I ¶¶3-10, 13-15. *See Bensusan Rest. Corp. v. King,* 126 F.3d 25, 29 (2d Cir. 1997) (lack of personal jurisdiction because alleged infringing acts were conducted outside of New York).

Also, Plaintiffs allege only conclusory allegations of conspiracy, which are insufficient to make out a proper prima facie case. *Tapp v. Champagne*, 164 Fed. Appx. 106, 108 (2d Cir. 2006); *Savitsky v. Mazzella,* 210 Fed. Appx. 71, 72 (2d Cir. 2006); *Galerie Gmurzynska v. Hutton,* 257 F. Supp. 2d 621, 628 (S.D.N.Y. 2003). The four elements of conspiracy are: (1) a corrupt agreement between two or more parties, (2) an overt act in furtherance of the agreement, (3) the parties' intentional participation in furtherance of a plan, (4) which resulted in damage or injury. *See Cofacredit S.A. v. Windsor Plumbing Supply Co.,* 187 F.3d 229, 240 (2d Cir. 1999); *Best Cellars, Inc. v. Grape Finds at Dupont, Inc.,* 90 F. Supp. 2d 431 (S.D.N.Y. 2000). Here, other than conclusory use of the word "conspired" in several headers and allegations, *see, e.g.,* Compl. ¶83, Plaintiffs have alleged no actual "corrupt agreement," nor any intentional participation in furtherance of a plan. At most, Plaintiffs allege that BVT acted "with CAM's knowledge and approval" Compl. ¶61, *see also* Compl. ¶80 (alleging that CAM "knew of and approved" BVT's conduct). Acting with the knowledge and approval of one's business partners does not rise to the level of a "corrupt agreement" to commit a tort, nor does it suggest any intentional participation in furtherance of a corrupt plan. *See Grove Press, Inc. v. Angleton,* 649 F.2d 121, 123 (2d Cir. 1981) (holding that allegations of a defendant's approval or failure to approve certain projects is "extremely weak" evidence to support conspiracy); *Team Obsolete Ltd. v. A.H.R.M.A. Ltd.,* 2002 U.S. Dist. LEXIS 10737, at *19 (E.D.N.Y. Mar. 15, 2002) (mere professional relationship will not support an inference that a corrupt agreement and conspiracy

existed between them). Further, no part of the so-called conspiracy was alleged to have taken place in New York.

Plaintiffs also have not alleged that BVT had any awareness that its Germany-based activities would have any effect in New York, nor that any alleged acts by a New York co-conspirator was for the benefit of BVT, nor that any New York co-conspirator acted at the behest of, or on behalf of, or under the control of BVT. *See Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1046 (2d Cir. 1990) (a "business relationship with a New York entity does not provide a sufficient basis for jurisdiction at least in the absence of showing that the company has become an agent or division of the company. . ."); *BHC Interim Funding, LP*, 2003 U.S. Dist. LEXIS 10739, at *16-17 (allegations that implicate only a normal business relationship, and not a principal-agent relationship were insufficient to support the co-conspirator theory of personal jurisdiction).

3. §302(a)(3)

Section 302(a)(3) does not apply either. Under that section, a defendant that commits a tortious act outside of New York which causes injury to a person or property within New York may be subject to the court's jurisdiction so long as the defendant has "an active interest in interstate or international commerce coupled with a reasonable expectation that the tortious conduct in question could have consequences within the State." *Hanly v. Powell Goldstein, LLP*, 2008 U.S. App. LEXIS 18601, at *3 (2d Cir. Aug. 26, 2008). Here, Plaintiffs fail to allege that BVT has an active interest in international commerce or that it had a reasonable expectation that its acts would have consequences in New York. In fact, the opposite is true. Its business is limited to Germany and German investors, save the one instance of marketing in Austria. List Decl. I ¶¶3-12. *See Bensusan Rest. Corp.*, 126 F.3d at 29.

4. §302(a)(4)

BVT does not own, or use, or possess any real property situated within New York, and the Planitiffs have not alleged that they do.

C. Federal Due Process Requirements Are Not Met

Even if the New York long-arm requirements were satisfied, Plaintiffs fail to demonstrate that personal jurisdiction over BVT comports with federal due process principles. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 567 (2d Cir. 1996) ("The due process requirement for personal jurisdiction . . . protects a person without meaningful ties to the forum state from being subjected to binding judgments within its jurisdiction" and requires "fair warning" that a person's activities in a state may subject him to suit there). In a due process determination, a court must assess minimum contacts and reasonableness. *Id.* BVT has no minimum contacts with New York. BVT is a German company, which conducts all of its business in Germany, save for one transaction in Austria. Further, the alleged conduct took place in Germany. List Decl. I ¶¶3-12; List Decl. II ¶¶ 7-9. This case is therefore akin to *Galerie Gmurzynska,* which involved a German resident who was a Norwegian citizen who conducted no business activity in New York and whose alleged wrongful act occurred in Germany. 257 F. Supp. 2d at 627.

> When a court bases personal jurisdiction on effects in a state caused by acts done elsewhere, it must proceed with caution, particularly in an international context. Any connection between Schwitters alleged activity in Germany (which primarily involved German entities), and the injuries allegedly sustained by Plaintiff in the United States are tenuous at best. . . .It does not remotely provide Schwitters with the 'fair warning' required by the *due process clause.*

Id. (citations omitted).

Also, it is unreasonable to subject BVT, a German corporation conducting no business in the United States, to the jurisdiction of the courts of New York. *Metropolitan Life Ins.,* 84 F.3d

at 573-75 (setting forth relevant factors to consider in reasonableness test, including burden to defendant, interests of the forum, plaintiff's interests, efficiency, and public policy interests); *see also Galerie Gmurzynska,* 257 F. Supp. 2d at 628 (finding, under *Met Life* factors, that it would be unreasonable to exercise jurisdiction over the defendants because it would be a burden for them to litigate in New York, given that they are German and have done no business in New York, and given that New York has little interest compared to Germany in resolving the case). Litigation of this suit in New York will impose a substantial burden on BVT; New York has minimal, if any, interest in litigating this case; and, as argued with regard to forum non conveniens below, part VII, Plaintiffs have another fair forum available to them – Germany, whose interest in litigating this case involving alleged wrongs by a German company, German witnesses, and German evidence, is significant. These factors outweigh any of Plaintiffs' interest in selecting this forum.

III. Motion to Dismiss for Lack of Subject Matter Jurisdiction under Rule 12(b)(1), and Failure to State a Claim under Rule 12(b)(6)

A. Count 2 - Tortious Interference by All Plaintiffs, against BVT

Under New York law, a claim of tortious interference requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) intentional procurement by defendant of the third-party's breach of the contract without justification, and (4) resulting damages. *Highland Capital Mgmt. LP v. Schneider,* 198 Fed. Appx. 41 (2d Cir. 2006).

First, as argued in the accompanying memoranda of Defendants CAM, Oppenheim, and Mathes, there is no derivative standing to sue on behalf of NMP or the Joint Venture ("JV"), and therefore Plaintiffs' claims for tortious interference must be dismissed. BVT joins and adopts this argument.

Even assuming NMP and/or the JV have standing and have alleged a "valid contract" (the JV Agreement) between itself and a third party, CAM, Compl. ¶130, there is no allegation that the contract was between *Tatara* and CAM, and therefore Tatara's individual tortious interference claim under Count 2 also must be dismissed. *See, e.g.,* Compl. ¶132 (alleging damages to Tatara as a result of the tortious interference).

Further, although Plaintiffs have alleged that BVT knew of the JV Agreement, they have not alleged, other than as the sheerest conclusion, *see, e.g.,* Compl. ¶132, that BVT intentionally procured CAM's alleged breach of that contract.

BVT also adopts the arguments advanced by co-Defendant CAM in support of its motion to dismiss the tortious interference claim.

B. Count 3 - Unfair Competition by All Plaintiffs, against "Original Defendants"

Under New York law, a claim of unfair competition requires essentially the same elements as a Lanham Act claim except with the additional element of bad faith. *Genesee Brewing Co., Inc. v. Stroh Brewing Co.,* 124 F.3d 137, 149 (2d Cir. 1997). Because Plaintiffs failed to allege bad faith, even conclusorily, *see* Compl. ¶¶133-137, Count 3 must be dismissed.

Even assuming bad faith has been alleged, the claim also fails for the same reasons as discussed with regard to the Lanham Act, discussed below.

BVT also adopts the arguments advanced by co-Defendant CAM in support of its motion to dismiss the unfair competition claim.

C. Count 4 - Lanham Act by All Plaintiffs, against BVT and CAM, under 15 U.S.C. §1125

To state a claim under §43 of the Lanham Act, a plaintiff must allege that (1) the defendant made a false or misleading representation regarding the plaintiffs' services, (2) the

representations were made in the context of "commercial advertising or promotion," and (4) the defendants' acts made the plaintiffs believe they would be damaged by the representations. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48 (2d Cir. 2002).

BVT and CAM have addressed the insufficiency of these elements in the Plaintiffs' case, in their Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, filed October 2, 2008, Dkt. 34, at 12-21. BVT re-adopts those arguments here. It bears emphasis, however, that the chief reason for dismissing the Lanham Act claims against BVT is because both BVT, and the conduct of which it is accused, and its alleged effects, and the legal norms governing these issues, all occur outside the U.S. territory. American consumers are unaffected by any of its conduct.

The Plaintiffs bear the burden of demonstrating that subject matter jurisdiction exists in the district court. *Scelsa v. City Univ. of New York*, 76 F.3d 37, at 40 (2d Cir. 1996).[3] Here, the claim fails because, among other reasons, the Lanham Act cannot and does not reach the extraterritorial conduct alleged against BVT.

Whether the Lanham Act reaches extraterritorial conduct is governed by the Second Circuit's decision in *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956), which applied the following factors: (1) whether the defendant is a U.S. citizen; (2) whether there is a conflict between trademark rights under U.S. law and foreign law; and (3) whether the defendant's conduct has a substantial effect on U.S. commerce. 234 F.2d at 642 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952)). *See also Atlantic Richfield Co. v.*

[3] One decision in this Court explains that the question of the extraterritorial application of the Lanham Act "is more appropriately viewed as whether plaintiff has stated a cause of action," than whether subject-matter jurisdiction exists. *Aerogroup Int'l Inc. v. Marlboro Footworks, Ltd*, 955 F. Supp. 220, 222 n. 1 (S.D.N.Y. 1997). Under both rubrics, however, the outcome would be the same here. *See, e.g., id.* at 232. Therefore, here, BVT argues that the Lanham Act claim must be dismissed under both Rule 12 (b)(1), lack of subject matter jurisdiction, and Rule 12(b)(6), failure to state a claim.

Arco Globus Int'l Co., 150 F.3d 189, 192 (2d Cir. 1998); *Totalplan Corp. of Am. v. Colborne*, 14 F.3d 824, 830 (2d Cir. 1994); *Aerogroup Int'l Inc. v. Marlboro Footworks, Ltd,* 955 F. Supp. 220, 226 (S.D.N.Y. 1997). Plaintiffs lack all three criteria.

1. No U.S. Citizenship

United States citizenship of the defendant is the "most significant" factor in determining Lanham Act jurisdiction and thus should be considered first. *Aerogroup,* 955 F. Supp. at 227. Defendant BVT is not a U.S. entity; it does no U.S. business; it has no U.S. parents or subsidiaries; it neither controls nor is controlled by any U.S. company. It is neither a U.S. citizen, nor a U.S. resident, nor a U.S. national. List Decl. II ¶2.

The chief aim of the extraterritorial exercise of any U.S. statute is "to control the conduct of its *citizens*, when it can do so without impinging on the rights 'of other nations and their nationals.'" *Aerogroup*, 955 F. Supp. at 227 (quoting *Vanity Fair*, 234 F.2d at 643, emphasis added). Thus, for example, the *Vanity Fair* court dismissed a Lanham Act claim against the conduct, in Canada, of a Canadian company. 234 F.2d at 641-42. *Accord Space Imagining Europe Ltd v. Space Imaging LP*, 1999 U.S. Dist. LEXIS 10898, at *16-*17 (S.D.N.Y. July 15, 1999) (dismissing Lanham Act claims against Greek citizen and British company; "the fact that the parties' relationship 'arose' in the United States . . . is . . . beside the point").

Plaintiffs also do not claim that BVT participated in any meetings or transactions in the United States. They do not claim that BVT markets funds in the United States. Nor could they; the record establishes BVT's deliberate avoidance of the U.S. market and the lack of any U.S. investors. The only American "connection" that Plaintiffs have been able to confect is the allegation that BVT acted in a "conspiracy" with the other Defendants, one of which (Oppenheim) happens to have a subsidiary in New York, even though that subsidiary does not

appear to have any connection to the conduct at issue here. (Also, as discussed above, in part II(B)(2), the First Amended Verified Complaint is unclear about *how* BVT has become a member of the "conspiracy."). Plaintiffs' argument that there are other companies with "Bvt" in their names in the United States also begs the question. Defendant BVT does no business in the United States, and it does not solicit U.S. investors. It only does business in Germany. List Decl. II ¶ 2, 4.

The Plaintiffs' bare allegations of "conspiracy" are not entitled to any particular weight when analyzing whether the Lanham Act applies. The Court "need not accept as true contested jurisdictional allegations." *Jarvis v. Cardillo*, 1999 U.S. Dist. LEXIS 4310, at *7 (S.D.N.Y. Apr. 5, 1999). Merely "argumentative inferences" should not be drawn in favor of a party asserting subject matter jurisdiction. *Integrated Utils. Inc. v. United States*, 1997 U.S. Dist. LEXIS 12746, at *7 (S.D.N.Y. Aug. 26, 1997) (quoting *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l, Ltd*, 968 F.2d 196, 198 (2d Cir. 1992). Indeed, "no 'presumptive truthfulness attaches to the plaintiff's jurisdictional allegations.'" *Space Imaging*, 1999 U.S. Dist. LEXIS 10898, at *7 (quoting *Guadagno v. Wallack Ader Levithan Assoc.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996). Because BVT is not a U.S. citizen or national, the principal reason for enforcing the Lanham Act against it falls away.

2. The Manifest Risk of Conflict with German Law

If one accepts Plaintiffs' spurious argument that BVT has a conspirator's presence in the United States, and if that presence were sufficient to make BVT a U.S. citizen for Lanham Act purposes, it would be worthwhile to see how the other two *Vanity Fair* factors also go unfulfilled here.

"[T]he absence of one of the other [non-citizenship] factors. . .'might well be determinative and . . .the absence of both is certainly fatal' to applying the Lanham Act to a citizen's activities abroad." *Aerogroup*, 955 F. Supp. at 226 (quoting *Vanity Fair*, 234 F.2d at 643). Here, both other factors still would be lacking.

Extraterritorial application of the Act against BVT would conflict directly with the application of German law to an essentially German controversy. The supposed aim of the scheme alleged in the complaint was to misappropriate and unfairly compete with the Plaintiffs *in the German market*. The violative conduct is alleged to have occurred in the course of government-supervised and regulated activities *in Germany*, in the *German* securities market; to wit, "submitting false and misleading private placement memoranda to *German bank regulators* and distributing and publishing false and misleading private placement memoranda and promotional materials," Compl. ¶146 (emphasis added), thereby making "unauthorized use" of plaintiffs' "names and identities" and "misappropriat[ing]" their "intellectual property and good will," *id.* ¶145. As the Plaintiffs emphasize elsewhere, these Germany-regulated acts were undertaken in the German language. Compl. ¶¶61, 73, 78, 80, 91.

It is difficult to conceive of a better case for withholding extraterritorial application of the Lanham Act, in the interest of avoiding a "conflict with trade-mark rights established under foreign law." *Vanity Fair*, 234 F.2d at 642. The Plaintiffs themselves argue, elsewhere, that the alleged conduct is subject to German law. *See, e.g.,* Plaintiffs' Reply Brief in Support of Their Motion for Preliminary Injunction, Dkt. 37, at 8-9. Germany, therefore, should be permitted the opportunity to enforce its law in this case, without risk of conflicting U.S. court orders and judgments.

3. No Substantial Effect on U.S. Commerce

Nor do Plaintiffs allege a substantial effect on U.S. commerce, the third *Vanity Fair* factor, sufficient to warrant application of the Act.

According to the Second Circuit, the Lanham Act applies to the conduct of a foreign defendant, acting abroad, only if the use of the infringing mark were "*likely* to make [its] way to *American consumers*." *Sterling Drug Inc. v. Bayer AG,* 14 F.3d 733, 746 (2d Cir. 1994) (emphasis added). Indeed, even in cases where the creation of infringing products occurred in the United States, there still was no effect on the U.S. market unless the products were sold in United States as well. American consumers, not foreign customers, are protected by the Lanham Act. *Totalplan Corp.,* 14 F.3d at 830-31.

There cannot be any "likelihood" of American consumer confusion, where Americans have no opportunity to purchase in the U.S. market. *Atlantic Richfield*, 150 F.3d at 191 (no subject matter jurisdiction for use of infringing mark where defendants, though having geographical presence in the United States and far-flung foreign operations, did not sell in American commerce). *Accord Roquette America Inc. v. Amylum N.V.*, 2004 U.S. Dist. LEXIS 12297, at *19 (S.D.N.Y. June 9, 2004) (no subject matter jurisdiction where "no allegation that any of the defendants ever engaged in unfair competition in the United States").

The marketing activity, upon which the alleged unfair competition and deceptive trade practices are premised, occurred entirely in Germany, with the exclusive marketing of German funds, to Germans, in the German language.[4] There are no American investors. There can be no likelihood of substantial effect on U.S. commerce from BVT's alleged conduct. List Decl. II ¶ 6.

[4] The Lanham Act allegations in this case follow the same pattern as those in *Vanity Fair,* which concerned an alleged misappropriation of a U.S. firm's intellectual property, by a Canadian manufacturer, for the sale of goods to Canadians. The *Vanity Fair* court held that Congress did not intend the Lanham Act to reach such commerce, for

Guided by the rules set down in *Vanity Fair* and still applied to extraterritorial Lanham Act claims, the Court should dismiss Count 4.

BVT also adopts the arguments advanced by its co-Defendant CAM for dismissal of the Planitiffs' Lanham Act claim.

D. Count 5 - Civil Conspiracy by All Plaintiffs, against All Defendants

We incorporate here our arguments, set forth in our discussion of ¶ 302(a)(2) of the New York Long-Arm Statute, part II(b)(2) above, that Plaintiffs have failed to allege a corrupt agreement by Defendants as well as any intentional participation in furtherance of a plan. We further note that conspiracy is itself not a tort, and bare conclusory allegation of conspiracy fails to state a cause of action. *Grove Press,* 649 F.2d at 123. This claim must therefore be dismissed.

E. Count 7 - Unjust Enrichment Derivatively against BVT, and by Tatara individually against CAM and BVT

Under New York law, a claim of unjust enrichment requires allegations that (1) the defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience suggest that defendant should not retain what he has unjustly gained. *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.,* 373 F.3d 296 (2d Cir. 2004).

There is no derivative standing for NMP and the Joint Venture, and so the derivative portion of Count 7 must be dismissed. *See* part III(a) above, and part V below (adopting co-Defendants' arguments).

As for Tatara's individual claim, it is fatally flawed because Tatara failed to allege that, even if BVT had received proper authorization for the use of her name, reputation, and good will, any of the monies earned from the BVT-CAM NM Fund would have been due and owing to

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"each nation's law shall have only territorial application." 234 F.2d at 640. The potential for confusion was on the part of Canadian consumers, not of anyone in the U.S. market.

her individually. Compensation from this fund went to NMP. Declaration of Egbert Freiherr von Cramm, filed Oct. 2, 2008 ("Von Cramm Decl."), Dkt. 36, ¶26. BVT therefore cannot possibly be unjustly enriched at Tatara's expense where Tatara would not have had the right to any of the proceeds in the first place.

BVT also adopts the arguments advanced by co-Defendant CAM in support of dismissal of the unjust enrichment claim.

F. Count 11 - Tortious Interference by Tatara Individually against CAM and BVT

As stated above, under New York law, a claim of tortious interference requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) intentional procurement by defendant of the third-party's breach of the contract without justification, and (4) resulting damages. *Highland Capital Mgmt.,* 198 Fed. Appx. 41.

In Count 11, Tatara alleges in skeletal fashion that a valid contract – that is, the NMP LLC Agreement – existed between herself and third party Mathes, Compl. ¶170, and that BVT knew of the Agreement and procured a breach of it, Compl. ¶¶171-172. There are no factual allegations, however, to support the latter two conclusory allegations. The only allegations mentioning the LLC Agreement are Compl. ¶¶12, 18-19, 37, 114, 165-168, and 170-172.[5] In none of those allegations does Tatara allege any facts suggesting that BVT had any knowledge of the LLC Agreement or took any actions to procure a breach of that Agreement. Rather those paragraphs address Mathes' alleged refusal to comply with disclosure obligations under the LLC Agreement, without mention of *any* action taken by BVT in relation to that refusal. Tatara's conclusory claim for tortious interference must fail.

[5] We note here that there are two ¶165's—one under Count 9, and one under Count 10. Here, we refer to the ¶165 under Count 10.

IV. The Principle of International Comity Would Be Violated by This Court Adjudicating a Claim Arising from Conduct Subject to German Jurisdiction, and Governed by German Securities Law

As argued in Opposition to the Plaintiffs' Motion for Preliminary Injunction, *see* Dkt. 34, at 20, 21, 22-23, the relief requested, if granted, would create an unavoidable conflict with German law and regulation, over matters that are German in origin and effect. The Plaintiffs' claims concern the truth or falsity of statements made in German prospectuses and other securities registration statements, for funds sold in Germany. They claim BVT did not comply with German law. They seek compensation for commercial wrongs alleged to have been done at their expense in Germany. They ask this Court to issue orders directing BVT to stop marketing according to the strict requirements of German securities regulations.

Whether BVT's conduct is actionable depends crucially on whether BVT complied with German securities law. As the Second Circuit observed in the seminal *Vanity Fair* case, "it is well-established that the courts of one state will not determine the validity of the acts of a foreign sovereign done within its borders . . . [Judicial] power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." 234 F.2d at 646-647.

All the claims against BVT ask the Court to engage in extraterritorial adjudication of BVT's conduct in Germany. As discussed in the Defendants' Memorandum in Opposition to the Plaintiffs' Motion for Preliminary Injunction, Dkt. 34, at 22-23, and elsewhere, in this brief, *see* part III(C)(2) (discussion of extraterritorial application of the Lanham Act) & part VI below (forum non conveniens discussion), the great potential for unwarranted intrusion into German legal affairs is implicit in the relief that the Plaintiffs seek against BVT.

Even Plaintiffs recognize the German legal interests at stake; they assert that it is their own "point" that "prospectuses are subject to [German] unfair competition and false advertising law and may be enjoined" in Germany. Plaintiffs' Reply Brief in Support of Their Motion for Preliminary Injunction, Dkt. 37, at 8-9. Accordingly, BVT re-submits and re-adopts the comity arguments that it advanced with co-Defendant CAM in their opposition to the Plaintiffs' motion for preliminary injunction.

V. No Diversity Jurisdiction

BVT joins and adopts co-Defendant Mathes's argument, that, with dismissal of the Lanham Act claim, this Court would lack jurisdiction over the entire controversy, there being no diversity of citizenship among the parties under 28 U.S.C. § 1332, and so the complaint must be dismissed.

VI. There Is No Standing to Raise Claims on Behalf of NMP and the Joint Venture

BVT joins co-Defendants Mathes, CAM, and Oppenheim in the position that there is no derivative standing to assert claims on behalf of NMP and the JV, and it moves for dismissal of the complaint on this basis. BVT adopts the arguments advanced by its co-Defendants in support of this basis for dismissal.

VII. The Complaint Should Be Dismissed on Forum Non Conveniens Grounds

The claims against BVT also should be dismissed under the forum non conveniens doctrine. A forum non conveniens dismissal lies wholly within the broad discretion of the district court, and will be reversed only where there has been clear abuse. *See, e.g., Capital Currency Exchange N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998).

Forum non conveniens dismissals should be granted where "the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another

forum." *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 517 (S.D.N.Y. 2006) (quoting 17 J. Moore, *Moore's Federal Practice* §111.70 111-211 (3d ed. 2006). They are guided by "reasons of convenience, judicial economy and justice," *Monegasque Assurances S.A.M. v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 497 (2d Cir. 2002), as well as the interests of "easy, expeditious and inexpensive" litigation, *Turedi*, 460 F. Supp. 2d at 517 (quoting *Gilbert*, 330 U.S. at 508).

This Court may dismiss a complaint on forum non conveniens grounds, in advance of any resolution of jurisdictional issues. *Sinochem Int'l Co. v. Malaysia Int'l Shipp'g Corp.*, 549 U.S. 422 (2007). Here, BVT is a foreign defendant. Jurisdictional issues are significant. Questions of foreign law predominate. Most of the evidence is in Germany. The additional transaction costs associated with translating nearly all documents and defending the case in New York are enormous. The balance of conveniences and efficiencies strongly support dismissal in favor of a German forum, even before the Court decides jurisdictional issues. *Id.*

Forum non conveniens decisions should be reached after applying the two-stage analysis set forth in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *See also Capital Currency*, 155 F.3d at 609-10; *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). In the first stage, the Court should "determine that an adequate alternative forum exists." *Capital Currency*, 155 F.3d at 609 (citing *Piper*, 454 U.S. at 254). Here, the alternative forum would be in Germany. Under *Piper*, it is "adequate" if (1) the defendant is subject to service of process, and (2) the forum permits "litigation of the subject matter in dispute." 454 U.S. at 254 n.22. Plainly service of process would be available against BVT in Germany—BVT, after all, was served (via the Hague Convention process), by a local court in Munich. Resolution of the subject matter of Plaintiffs' claim against BVT also is permitted under German law and procedure, as borne out in the discussions of German law in the Expert Reports of Dr. Voss and Dr. Wieneke. *See* Expert

Report of Dr. Thorsten Voss re Offer of Trust Shares to the Public, filed Oct. 2, 2008 ("Voss Report"), Dkt. 35-3; Expert Report of Dr. Laurenz Wieneke, LL.M., re Provisions of German Securities and Unfair Competition Laws, filed Oct. 2, 2008 ("Wieneke Report"), Dkt. 35-4. For misinformation in the sale of securities law, such as is alleged here, the full force of regulatory enforcement and protection is available from the federal German agency Bundesanstalt für Finanazdienstleistungsaufsicht, or "BaFin." Dr. Voss's Expert Report explains that the requirements for registration and publication of prospectuses from the BaFin are stringent, with violations subject to € 500,000 fines. However, to revise or alter information in a prospectus, as the Plaintiffs ask the Court to order BVT to do here, would violate German securities and capital-markets laws, and subject the issuer to fines. Prospectuses can be legally revised only by following BaFin securities regulations. *See* Voss Report (Dkt. 35-3, at 2, 4-5). Moreover, the Plaintiffs would have a panoply of private law remedies in the civil courts. Dr. Wieneke's Expert Report points out that the German Unfair Competition Act prohibits misleading advertising, including such advertising about products or business circumstances. Indeed, even if not factually incorrect, advertising statements that "may raise erroneous expectations on the part of the targeted consumers/trade circles," are prohibited under the law. The legal remedies include injunctive relief against the advertisement and the advertiser. Wieneke Report, Dkt. 35-4, at 4-5. Elsewhere, the Plaintiffs agree with this assessment: "The Wieneke opinion actually makes Plaintiffs' point that prospectuses are subject to unfair competition and false advertising law and may be enjoined." Plaintiffs' Reply Brief in Support of Their Motion for Preliminary Injunction, Dkt. 37, at 8-9. Plainly, the sale of securities is heavily regulated by German law, and participants in the securities markets have ample recourse to both judicial and administrative review and remedies. Inevitably, in such a highly regulated area of the law, forms of action and

legal remedies will not be identical from jurisdiction to jurisdiction. But the critical question is the adequacy of the available relief, not the closeness of its resemblance to the relief available in the New York forum. *See, e.g., Capital Currency*, 155 F.3d at 610 (unavailability of treble damages in foreign forum does not make forum inadequate).

The second stage is weighing up the relative public and private interests to determine which forum "will be the most convenient and will best serve the ends of justice." *Capital Currency*, 155 F.3d at 609 (quoting *Peregrine Myanmar*, 89 F.3d at 46).

The public-interest factors, identified in *Piper*, include: (1) having local disputes resolved locally, (2) avoiding problems of applying foreign law, and (3) avoiding burdening jurors with cases having no impact on their community. 454 U.S. at 241 n.6 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The sale of securities in Germany, to Germans, in the German language, subject to German law and regulation, allegedly using materials that were false and deceptive to German consumers—and subject to the interpretation of German legal norms—all weigh heavily in favor of the German public interest in adjudicating the case in Germany.

The private-interest factors under *Piper* are: (1) ease of access of evidence, (2) costs for witnesses to attend trial, (3) availability of compulsory process, and (4) factors of economic and temporal efficiency. 454 U.S. at 241 n.6 (citing *Gilbert*, 330 U.S. at 508). The private interests at stake also weigh heavily in favor of bringing the claims against BVT in a German forum. Most of the witnesses reside and work in Germany; travel costs to New York for pretrial and trial purposes would be enormous. Most documentary and other evidence of BVT's conduct is in Germany, where BVT's conduct is alleged to have occurred.

Virtually all of the documentary evidence would need to be translated into English, if the case were to continue in a New York forum. So would practically all witnesses' testimony. All of these burdensome costs would be unnecessary in a German forum. If the litigation were to proceed in the United States, BVT would have no compulsory process over reluctant witnesses—for example, potential German investors who witnessed Ms. Tatara's activities in promoting the BVT funds, German government witnesses involved in the registration of prospectuses and supplements, and witnesses connected with unrelated German entities such as Wall Street Online and Fondsclick.com, about whose conduct the Plaintiffs complain.

In sum, the availability of an adequate alternative forum in Germany, and the balance of public and private interests tilting heavily toward a German forum, strongly favor the dismissal of the claims against BVT, for litigation in Germany.

VIII. Conclusion

For the foregoing reasons, BVT's motion to dismiss should be granted. All counts and claims against BVT in the First Amended Verified Complaint should be dismissed.

Dated: October 15, 2008
New York, NY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWMARKETS PARTNERS LLC,
In its own capacity and derivatively;
As a limited partner in, in the right, and For the benefit of:
CAM NEWMARKETS PARTNERS LP,

Case No. 08 CV 4213 (WHP)

TOMOKO TATARA
Individually and derivatively as a member,
And for the benefit of:
NEWMARKETS PARTNERS, LLC,
In the right and for the benefit of
CAM NEWMARKETS PARTNERS LP,
Plaintiffs,

-against-

DECLARATION OF ROBERT LIST IN SUPPORT OF MOTIONS TO DISMISS ["LIST DECL. II"]

SAL. OPPENHEIM JR. & CIE. S.C.A.

CAM PRIVATE EQUITY CONSULTING & VERWALTUNGS GmbH,

BVT BERATUNGS-, VERWALTUNGS- UND TREUHANDGESELLSCHAFT FÜR INTERNATIONALE VERMÖGENS-ANLAGEN MBH, and

MARIE-FRANCE MATHES,

Defendants.

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SECOND DECLARATION OF ROBERT LIST
IN SUPPORT OF MOTIONS TO DISMISS

Robert List deposes and says:

1. I am CEO of BVT Beratungs-, Verwaltungs- und Treuhandgesellschaft für Internationale Vermögens-Anlagen mbH (hereinafter "BVT" or "defendant BVT"), which has been named as a defendant in this litigation. I submit this declaration I support of BVT's Motion to Dismiss the First Amended Verified

Complaint filed October 15, 2008. My background and qualifications are as described in my first "Declaration of Robert List in Opposition to Preliminary Injunction," filed October 2, 2008 ("first Declaration" or "List Decl. I").

2. Defendant BVT has no office or other form of address in New York. It has no bank account in New York. It has no telephone number in New York. It has no employees in New York. It has no business in New York. It has no real estate in New York, nor does it solicit business in New York, nor does it market or promote funds in New York—nor, contrary to the plaintiffs' assertions, does it do these activities anywhere else in the United States. BVT is incorporated in the Federal Republic of Germany, registered in the federal registry of companies maintained by the Bavarian state government in Munich, pursuant to federal law. List Decl. I ¶ 3. (A copy of BVT's registration statement is attached to my first Declaration as Exhibit A.)

3. I have discussed the plaintiffs' allegations about BVT's relationship with an internet-based information service and distributor call Wall Street Online ("WSOL") in my first Declaration. *See* List Decl. I ¶ 11. I stated that WSOL is an entirely separate and distinct company, over which BVT has no control. BVT's relationship with another online provider, Fondsclick.com ("Fondsclick"), is the same. *See* List Decl. I ¶ 11. Like WSOL, Fondsclick is an independent company, in business for itself, and BVT has no control over what it does. On information and belief, also like WSOL, Fondsclick markets in the German language, to German investors. It is not authorized to market any BVT funds outside the terms upon which they are offered—in the case of the two funds at

issue here, this means that they cannot market to any investor outside Germany. If it should do so, it could be a serious violation of its own legal duties. *See* List Decl. I ¶ 11. Furthermore, as would happen if WSOL were involved, a potential investor from outside Germany, who might be referred to BVT to invest in the funds, would be deemed ineligible to participate and rejected, regardless of any representations made by Fondsclick up to that point. *See* List Decl. I ¶ 12.

4. Plaintiffs recurrently have referred to a company (or, companies), using "BVT" in its name, in Atlanta, Georgia. On information and belief, the Georgia company (or, companies) is an entirely separate and distinct corporation (or, are entirely separate and distinct corporations), organized in the State of Georgia, doing business in the United States, unlike the defendant BVT whose business, the promotion and marketing of investment funds, is confined to the internal German market (with one exception, a fund marketed to Austria, which I described in my first Declaration, at List Decl. I ¶ 5). None of the Georgia companies are parents, or subsidiaries, of defendant BVT, and they neither control, nor own, nor are controlled by, nor are owned by, defendant BVT.

5. Accordingly, none of BVT's marketing and promotional activities—the only business activities defendant BVT engages in—are conducted in the United States, or in New York.

6. As described in detail in my first Declaration, it is virtually impossible for a potential investor outside Germany to invest in the two funds at issue in this case. Particularly, if someone from the United States were to attempt to invest in the two funds, he or she would be deemed ineligible and rejected. As discussed in

my first Declaration, and supported by its Exhibit D, all of the hundreds of investors in the two funds have German addresses, with four exceptions (one each from Switzerland, Austria, The Netherlands, and Mozambique—and none from America). List Decl. I ¶ 7. Accordingly, there is no likelihood that American markets would have been substantially affected by activities related to the BVT funds at issue in this case.

7. As discussed in my first Declaration, the two BVT funds at issue here have been stringently regulated by federal German securities law from the moment BVT started to market them. The registration, sale, distribution, and supplementation of terms, all are governed by German law, which is hardly surprising since they are marketed in Germany, to Germans, only in the German language, in order to raise investment money from Germans that is subject to German taxation jurisdiction. It is respectfully suggested here that, to the extent the plaintiffs seek redress for their grievances against BVT and BVT's conduct in relation to these funds, the appropriate legal, judicial, and administrative mechanisms for so doing are located in Germany as well.

8. The claims against BVT (which BVT vigorously disputes) concern allegations that BVT issued false prospectuses and false supplements to prospectuses in Germany, that BVT allegedly violated German securities regulations in so doing, that BVT allegedly harmed the plaintiffs with respect to sales in the German market, and that BVT allegedly is confusing investors in the German market, with its distribution of German-language materials. I am not a lawyer, but I respectfully suggest that these seem to be inherently German controversies, for

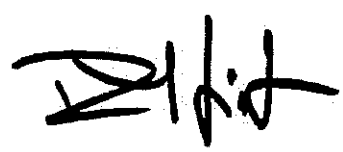
the German legal system to resolve, governed by German legal measures and norms.

9. On information and belief, at no time did BVT, or its officers, or directors, or employees, ever conduct business with the plaintiffs, or with the other defendants, in New York, or anywhere else in America. Accordingly, virtually all of the evidence and witnesses that BVT will need to adduce, to show what BVT did, and what it didn't do, in connection with the plaintiffs' claims, are located in Germany. Practically all of BVT's witnesses—officers, directors, employees, consultants, counsel, potential and actual investors, nonparties who witnessed the transactions alleged to have occurred in Germany, government regulators, and others—are in Germany. Witnesses to the plaintiff Tatara's actions involving BVT are also in Germany, for the plaintiffs met with BVT and them in Germany.

10. BVT's preparations to meet, answer, and test the plaintiffs' allegations will involve the testimony of witnesses who are aware of the underlying transactions, and who observed what the plaintiffs, defendants, and their respective agents did or did not do in Germany. Also, as the plaintiffs themselves have pointed out, virtually all of the documents relevant to the claims against BVT are in German. Extensive translation and interpretation services will be needed for the vast majority of these witnesses, and virtually all of the documentary evidence. Pleadings and legal papers also will need to be translated so that BVT can effectively communicate with the New York court, and instruct and assist their counsel in the preparation of their defense. The translation costs for witnesses, the costs of conducting pretrial discovery on two continents, the transportation of

witnesses to New York, will fall very heavily on BVT, which has no presence at all in New York. So far, such transaction costs, entailed merely in responding to the plaintiff's initial motion for preliminary injunction, have been very high. It is respectfully suggested that the claims that the plaintiffs make against BVT, for marketing German securities, can be more efficiently, inexpensively, and expeditiously resolved in a German forum.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 10 / 15 / 2008
[date]



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