IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JONATHAN MANLOVE, Individually, and on behalf of others similarly situated	)	No. 1:18-cv-145
Plaintiff,	)	
v.	)	
VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., and VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC	)	Judge McDonough Magistrate Judge Steger
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT VOLKSWAGEN AKTIENGESELLSCHAFT'S MOTION TO COMPEL ARBITRATION AND DISMISS PLAINTIFF'S AMENDED COMPLAINT AND, IN THE ALTERNATIVE, TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND INSUFFICIENT SERVICE OF PROCESS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statute

I. INTRODUCTION

Plaintiff Jonathan Manlove files this Memorandum of Law in Opposition to Defendant Volkswagen Aktiengesellschaft's ("VW AG") Motion to Compel Arbitration and Dismiss Plaintiff's Amended Complaint and, in the alternative, to Dismiss for Lack of Personal Jurisdiction and Insufficient Service of Process ("Motion"). VW AG's Motion is misplaced and should be denied in all respects.[1]

First, VW AG's argument that the Court lacks personal jurisdiction over it falls flat. VW AG maintains substantial contacts with this jurisdiction, and deliberately availed itself of its reach into this forum when it directed its U.S. subsidiaries—including Defendant Volkswagen Group of America Chattanooga Operations, LLC ("VW Chattanooga")—to implement the Company's Pact for the Future by targeting and phasing out older workers in Tennessee. VW AG even dispatched a new head of HR directly from Germany to ensure that VW Chattanooga followed suit. Plaintiff and the class have suffered and are likely to suffer substantial harm as a result, and are entitled to declaratory and injunctive relief against VW AG's corporate policy and practice of unlawful age discrimination. Indeed, Volkswagen's argument that it is entitled as a non-signatory to enforce the Arbitration Agreement between Plaintiff Manlove and its U.S. subsidiaries only cements the close relationship between the entities and supports the exercise of jurisdiction. At minimum, the Court should permit targeted jurisdictional discovery.

Second, service of process on VW AG is more than sufficient under Rule 4. In any event, failure of appropriate service is at most a technical defect that may easily be corrected.

[1] Plaintiff files this Opposition as a counterpart to his contemporaneously-filed Memorandum of Law in Opposition to Dkt. 29, the remaining Defendants' Motion to Compel Arbitration. In that filing, Plaintiff addresses Defendants' common arguments in favor of arbitration; Plaintiff incorporates his companion opposition by reference here. This brief focuses on arguments specific to Defendant VW AG raised in Dkt. 32.

II. COUNTERSTATEMENT OF FACTS[2]

Plaintiff, a resident of Hamilton County, Tennessee, is an employee of Defendant VW Chattanooga, where he has worked since April 2011. Dkt. 12 ¶¶ 13, 37. VW Chattanooga is a wholly-owned subsidiary of Defendant Volkswagen Group of America, Inc. ("VWGoA"), Plaintiff's joint employer, which is in turn a wholly-owned subsidiary of VW AG. *Id*. ¶¶ 10, 15-16. Defendant VW AG operates VWGoA and VW Chattanooga with a unity of interest and ownership such that they are a mere instrumentality of their parent VW AG. *Id*. ¶ 10.

As part of its global operations, VW AG operates 122 production plants, including its wholly-owned production plant in Chattanooga. *Id*. ¶ 14. In the course of his employment at the Chattanooga plant, Plaintiff has been a direct victim of discriminatory policies and practices directed and implemented by the corporate parent VW AG. *Id*. ¶¶17, 36-66.

Plaintiff filed his Amended Complaint on September 18, 2018, in which he brought class and collective action claims under the Age Discrimination in Employment Act ("ADEA") and Tennessee Human Rights Act ("THRA"). Plaintiff brought this action to correct unlawful employment practices on the basis of age, and to seek appropriate injunctive relief for himself and the class of employees who have been adversely affected by Defendants' unlawful employment practices. Dkt. 12 ¶ 1. Plaintiff served all Defendants, including VW AG, on September 26, 2018. Dkts. 15-17. Plaintiff effected service of process on VW AG through service on VW AG's alter ego, VWGoA. Dkt. 15. Specifically, Plaintiff served VWGoA's registered agent, Corporate Service Company ("CSC"), thereby effecting service of process on VW AG. *Id*.

III. ARGUMENT

A. This Court Has Personal Jurisdiction Over Defendant VW AG

[2] Plaintiff also incorporates by reference herein the Procedural History set forth in his contemporaneously-filed Memorandum of Law in Opposition to Dkt. 29, the remaining Defendants' Motion to Compel Arbitration.

Plaintiff's Amended Complaint adequately alleges that VW AG maintains sufficient "minimum contacts" with the State of Tennessee, such that the Court's exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). While "[t]he Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant[,]" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011), the Sixth Circuit has observed that "'notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product[,]'" *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1238-39 (6th Cir. 1981) (quoting *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973)). "Otherwise, a foreign corporation could commit serious torts or contract breaches without ever having enough contacts with any one forum to give those injured an opportunity to seek redress." *Id.* at 1239 (quotation marks and citation omitted); *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437, 441 (1st Cir. 1966) (finding that "Defendant could not carry on substantial economic activities within this country and at the same time claim to be absent when distasteful consequences ensued[]"). Due process merely requires "fair warning" that a defendant's activities or conduct may subject it to the Court's jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

Given that Tennessee law is co-extensive with federal constitutional law, this Court need only determine whether exercising personal jurisdiction over Defendant VW AG is consistent with federal due process requirements. *See Bd. of Forensic Document Examiners, Inc. (BFDE) v. Am. Bar Ass'n*, No. 16-CV-2641, 2017 WL 549031, at *3 (W.D. Tenn. Feb. 9, 2017) (citing *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 477 (6th Cir. 2003)). The federal Due Process

inquiry consists of two types of personal jurisdiction: specific and general, "either one of which is an adequate basis for personal jurisdiction[.]" *Conn v. Zakharov*, 667 F.3d 705, 718 (6th Cir. 2012). Specific jurisdiction exists "where the suit [arises] from the defendant's contacts with the forum state." *Id.* at 713. General jurisdiction, on the other hand, does not arise from the defendant's contacts with the forum state, and instead allows a plaintiff to sue a defendant on any claims "regardless of the connection (or lack thereof) between the claim and the forum." *BFDE*, 2017 WL 549031, at *3.

When a defendant challenges personal jurisdiction, as here, the plaintiff need only make a prima facie showing of the court's personal jurisdiction. *BFDE*, 2017 WL 549031, at *4 (citing *Intera Corp. v. Henderson*, 428 F.3d 605, 615 (6th Cir. 2005)). Absent an evidentiary hearing, a court may not consider facts offered by defendant that conflict with those offered by the plaintiff and must construe the facts in the light most favorable to the nonmoving party—here, Plaintiff. *Id.* at *4 (quoting *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir. 2002)).

Plaintiff makes such a prima facie showing under both types of jurisdiction.

1. Plaintiff Has Made a Prima Facie Showing of Specific Jurisdiction Over Defendant VW AG

Specific jurisdiction arises out of or relates to a defendant's contacts with the forum. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014). This form of jurisdiction "depends on an affiliation between the forum and the underlying controversy . . . activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (quotation marks and citation omitted). Courts inquire "whether there is some act by which defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id*. at 924 (quotation marks

and citation omitted). A defendant's contacts with a forum may support the exercise of specific jurisdiction even if they fall short of being "continuous and systematic." *See id*. at 923.

The Sixth Circuit applies a three-part test, outlined in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968):

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Moore v. W. Carolina Treatment Ctr., Inc., No. 2:12-CV-394, 2016 WL 4870487, at *3 (E.D. Tenn. Jan. 19, 2016) (quoting *Southern Machine*, 401 F.2d at 381). Put otherwise, the "fair warning" requirement is satisfied "if the defendant has 'purposefully directed' [its] activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472-73 (citations omitted).

Defendant VW AG does not specifically argue these factors, but instead points to "three general allegations" which it urges "fail as a matter of law." Dkt. 32 at 11. In particular, it states: 1) Plaintiff's allegations regarding VW AG's global policies "fail to show that Plaintiff's claims arise out of VW AG's actions in Tennessee[;]" 2) VW AG's contacts with Tennessee do not "[give] rise to Plaintiff's age discrimination claims[;]" and 3) VW AG's transfer of employees to VW Chattanooga "fail to show that VW AG created contacts with Tennessee sufficient to give rise to specific jurisdiction." Dkt. 32 at 12-13. Defendant concludes that "Plaintiff has failed to make any showing that his age discrimination claims arise from any of these alleged contacts." *Id*. at 14. In sum, Defendant argues that Plaintiff has failed to satisfy the second *Southern Machine* factor.[3]

[3] Defendant does not argue that the first or third *Southern Machine* factors are unsatisfied, and accordingly, any argument to the contrary is waived. *Jones v. Nat. Essentials, Inc.*, 740 F. App'x 489, 494 (6th Cir. 2018)

But, these contentions are misplaced and run aground against the Sixth Circuit's clarification of the second factor: "The 'arising from' requirement . . . is satisfied when the operative facts of the controversy arise from the defendant's contacts with the state. Only when the operative facts . . . are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contract." *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 723-24 (6th Cir. 2000) (citations omitted). This factor is "lenient" and not formalistic; "[it] may be met where the cause of action [is] made possible by, related to, or connected with the defendant's contacts." *Moore*, 2016 WL 4870487, at *6 (citing *Lanier v. Amer. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1998); *Youn v. Track, Inc.*, 324 F.3d 409, 419 (6th Cir. 2003)).

Here, Plaintiff alleges that VW AG acted directly in Tennessee, exerting control through:

> daily production plans directing Chattanooga worker activities and labor productivity set by and sent by German management; requiring weekly reports sent from Chattanooga to Germany so that AG employees can set worker activity and labor production; regular meetings held by Volkswagen AG employees in Chattanooga to set directly personnel work activities and production; directing operating hours of the Chattanooga facility, including plant shut-downs; maintaining a common international standards organization implemented in Chattanooga through regular audits conducted by AG employees; directing the method of promotions for workers in Chattanooga, including through the elimination of the management assessment centers; and maintaining a common internal employee platform through which open positions and job transfers are conducted.

Dkt. 12 ¶ 10(f). Against the backdrop of VW AG's comprehensive control, Plaintiff alleges that VW AG implemented and forced through its "Pact for the Future"—a plan designed to target and phase out older workers across the globe, including in Tennessee. *Id*. ¶ 25. Plaintiff details how the Pact was implemented against him in Tennessee, specifically, beginning with a demotion and

(holding that plaintiffs waived an argument when they did not specifically support a theory of relief); *Cooper v. Commercial Sav. Bank*, 591 F. App'x 508, 509 (6th Cir. 2015) (holding an argument was waived when appellant referenced one case but did not otherwise "provide even a modicum of legal argument as to why the district court erred").

then a transfer in the summer of 2017. *Id*. ¶¶ 34-35. Plaintiff alleges that other members of the Tennessee class were similarly affected. Plaintiff and the class' claims thus arise from VW AG's deliberate attempts to reach into this jurisdiction to control its Chattanooga subsidiary's policies and practices and to enforce its Pact for the Future. Plaintiff clearly alleges that his claims arise from VW AG's contacts with VWGoA and VW Chattanooga and that VW AG specifically implemented the "Pact for the Future" *in Tennessee*. *Id*. ¶¶ 10, 30-35. Plaintiff's causes of action plainly arise from, and would not exist without, VW AG's contacts with Tennessee.

Hence, because VW AG purposely directed its unlawful activities towards forum residents—older workers in the Chattanooga plant—it could have "reasonably anticipate[d] being haled into court [in this jurisdiction]" to defend its conduct towards the class. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). It thus falls upon Defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Defendant has failed to do so.

Defendant's arguments to the contrary are inapposite. VW AG's claim that its alleged misdeeds occurred "in Germany", not Tennessee, is an overly-narrow parsing contrary to applicable law. *See* Dkt. 32 at 12. VW AG may not evade specific jurisdiction and liability for its discriminatory practices towards Tennessee residents by asserting that the *idea* for those practices was hatched in Germany. The second *Southern Machine* factor focuses on a defendant's *contacts* in the forum state and where the operative facts of the controversy arose. *See, e.g.*, *Calphalon*, 228 F.3d at 723-24; *Encore Med., L.P. v. Kennedy*, 861 F. Supp. 2d 886, 892-93 (E.D. Tenn. 2012) (citing cases). Defendant's scheme may have begun in Germany, but it was enacted and came to fruition in Tennessee through VW AG's deliberate contacts with this forum.

Defendant's citation to *G.C. ex rel. Conner v. Disney Destinations, LLC*, No. 3:12-CV-54,

2012 WL 1205637, at *4 (E.D. Tenn. Apr. 11, 2012), is clearly distinguishable. In *Conner*, unlike this case, defendant did not purposely target any of its activities to the forum jurisdiction. Rather, the sole asserted basis for jurisdiction was that defendant—a retail store at Disney World in Florida—placed its goods in the stream of commerce and the plaintiff consumer brought one of its products to Tennessee. *Id*. at *3. No other connection to Tennessee existed. The customer's unilateral act was too tenuous a basis for specific jurisdiction. *Id*. at *4.[4] Plaintiff's claims could not be more different, as they concern Defendant's effort to instill discriminatory practices at *a Volkswagen plant in Tennessee*. *Cf. Blayde v. Harrah's Tunica Corp.*, No. 08-2798, 2009 WL 10698646, at *4 (W.D. Tenn. Nov. 16, 2009) (finding that the act of *advertising* in Tennessee was not alone sufficient to establish specific jurisdiction where the plaintiff's claim arose from his employment in Mississippi), cited by Defendant VW AG (Dkt. 32 at 14 n.1).

Defendant also argues that Plaintiff's claims do not arise out of VW AG's contacts in Tennessee because he failed to allege specific control or awareness of his "employment situation" by a particular VW AG employee. Dkt. 32 at 13. This is both legally irrelevant and factually misplaced. The gist of Plaintiff's allegations is that Defendants' adverse actions against him—as well as the resulting harm—are a direct and immediate result of the purposeful implementation of Volkswagen's Pact for the Future in the Chattanooga plant. Moreover, Plaintiff clearly alleges that VW AG directs the method of promotion for VW Chattanooga employees, directs personnel work activities and production, dictates the salaries and bonuses of VW Chattanooga workers, and sets the terms of their contracts, all of which unequivocally give rise to Plaintiff's employment

[4] Likewise, *McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), on which *Conner* is largely premised, is a products liability case in which defendant engaged in no meaningful contacts with the forum and the only link was that the machine in question happened to end up in the State.

discrimination claims. Dkt. 12 ¶¶ 10(f), (i). As alleged, the terms of Plaintiff's employment and the discrimination he suffered arose directly from VW AG's contacts in Tennessee.

Defendant's third argument concerns VW AG's transfer of two employees from VW AG to VW Chattanooga. Dkt. 32 at 13. VW AG glosses over the substance of Plaintiff's allegation—namely that VW AG posted a new head of HR from its German headquarters for the specific purpose of implementing the Pact for the Future in Tennessee. *See id.* Defendant's semantic posturing that the employees ceased being VW AG personnel at the moment of transfer is beside the point. They were sent by VW AG to perform a task on its behalf. Plaintiff has clearly alleged common employment and personnel management between VW AG and its subsidiaries. Dkt. 12 ¶¶ 10(a)-(i). Plaintiff's claims arise directly from VW AG's contacts with Tennessee, particularly its efforts to carry out the Pact and phase out older workers in the Chattanooga plant.

Defendant's final two cases are inapposite or actually support specific jurisdiction here. *Blayde* indicates that, absent other pertinent contacts with the forum state, jurisdiction in an employment discrimination action is proper in the state where the plaintiff worked and experienced the employer's discriminatory workplace practices. *See* 2009 WL 10698646, at *4. This action concerns the implementation of "allegedly discriminatory employment practices at [VW's Chattanooga plant]," where Plaintiff has worked at all relevant times. *Id. Nixon v. Celotex Corp.*, 693 F. Supp. 547 (W.D. Mich. 1988), likewise reinforces the Court's exercise of specific jurisdiction over VW AG. The *Nixon* court held that the plaintiff had adequately alleged the foreign parent's active participation in its domestic subsidiary's employment, pension, and sales decisions, and that the subsidiary's contacts with the forum state "may fairly be attributed to [the foreign parent] for purposes of an action arising out of the employment relationship and relating to employment and personnel decisions made jointly by [the entities.]" *Id.* at 551. Here, Plaintiff has

similarly alleged VW AG's active role in VWGoA's and VW Chattanooga's employment decisions, including the discriminatory policies and practices from which his claims arise.

2. Plaintiff Has Made a Prima Facie Showing of General Jurisdiction Over Defendant VW AG

Defendant VW AG argues that because it is neither incorporated in, nor principally based in Tennessee, this Court may not exercise general jurisdiction over it. Dkt. 32 at 15. As is clear from *Daimler*, however, general jurisdiction is also present when a corporation's "affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State." 571 U.S. at 138-39 (quotation marks and citations omitted). Courts in this Circuit have elaborated that the contacts with the forum state must be "more substantial than their relationship with any of the other numerous forums in which they do business." *Bobick v. Wyndham Worldwide Operating, Inc.*, No. 3:18-CV-00514, 2018 WL 4566804, at *5 (M.D. Tenn. Sept. 24, 2018) (citation omitted). As alleged in Plaintiff's complaint, VW AG's contacts with Tennessee meet this threshold.

"[A] corporation's activities in the forum state must be weighed against its activities in every other forum, as a corporation that operates in many places can scarcely be deemed at home in all of them." *Dochnal v. Thomson Reuters Corp.*, No. 2:18-CV-00044, 2018 WL 5045205, at *3 (E.D. Tenn. Oct. 17, 2018). In *Bobick*, for example, the plaintiffs failed to contend that the corporate defendant's contacts were "atypical relative to the companies' contacts in other states[,]" rendering their allegations insufficient to establish that the defendant was subject to general jurisdiction in Tennessee. 2018 WL 4566804, at *5

Unlike the plaintiffs in *Bobick*, Plaintiff alleges that Volkswagen operates a wholly-owned production plant in Chattanooga, Tennessee. Dkt. 12 ¶¶ 14, 16. The Chattanooga facility is VW AG's principal manufacturing plant in the United States. Specifically, per Volkswagen's own company location map, the Chattanooga location is the Company's U.S. Manufacturing Plant and

North American Engineering and Planning Center.[5] Under Volkswagen's own conception, then, Chattanooga hosts the Company's primary manufacturing, engineering, and planning center in the United States. Consequently, VW AG's contacts in Tennessee are clearly "atypical relative to [VW AG's] contacts in other states[.]" *See Bobick*, 2018 WL 4566804, at *5.

3. Defendant VW AG's Argument that it is Entitled to Enforce its Subsidiary VWGoA's Arbitration Agreement with Plaintiff Supports the Exercise of Jurisdiction by Suggesting its Status as Plaintiff's Joint Employer and/or the Alter Ego of VWGoA

VW AG's assertions with regard to the putative Arbitration Agreement at issue in this case only bolster the Court's exercise of personal jurisdiction.

It is axiomatic that arbitration is a matter of consent and that parties cannot be compelled to arbitrate those claims that they have not agreed to arbitrate. *See, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Accordingly, "[a]s a general rule, non-signatories to an arbitration agreement lack standing to enforce the agreement." *Lowrey v. Tritan Grp. Ltd*., No. 3:08-CV-00779, 2009 WL 2136159, at *2 (M.D. Tenn. July 14, 2009). There must be a contractual basis for determining that a party agreed to arbitrate such claims. *Cf. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

Relying on *Mounts v. Midland Funding LLC*, 257 F. Supp. 3d 930 (E.D. Tenn. 2017), VW AG claims it can enforce the Arbitration Agreement between VWGoA and Plaintiff, even as a non-signatory. *See* Dkt. 32 at 4-5. But VW AG does not dispute that the Agreement in no way identifies the foreign corporate parent, VW AG. *See id*. Indeed, the Agreement is one distributed by VWGoA to Volkswagen's U.S. workers, including those employed through VWGoA's U.S. affiliates such as VW Chattanooga. The Agreement begins by stating that it is made "in

[5] *See* "Volkswagen Group of America Locations," Volkswagen Group of America, http://www.volkswagengroupofamerica.com/locations (last visited on Dec. 6, 2018).

consideration of my [the employee's] employment with VWGoA or any of its affiliated entities (collectively, VWGoA)" and is limited to claims related to the employee's employment with VWGoA.

VW AG argues that, for purposes of the Arbitration Agreement, it is so closely affiliated with its subsidiary VWGoA that it is properly regarded as a party to the contract and may avail itself of the Agreement's arbitration requirements. *See* Dkt. 32 at 4-5. As the Agreement relates strictly to Plaintiff's employment claims, VW AG essentially maintains that it bears such a nexus to his employment at Volkswagen as to be covered by any provisions deemed to shield VWGoA from employment suits in favor of compulsory arbitration. This assertion stands in inherent tension with VW AG's argument that it is wholly independent from VWGoA for purposes of personal jurisdiction and liability on Plaintiff's employment claims. VW AG should not be able to have it both ways.[6]

B. Alternatively, the Court Should Permit Targeted Jurisdictional Discovery on the Nature and Extent of Defendant VW AG's Contacts in Tennessee

If the Court determines that Plaintiff has not made the requisite showing of personal jurisdiction over Defendant VW AG, it should defer ruling on Defendant's Rule 12(b)(2) Motion at this time and grant Plaintiff leave to conduct jurisdictional discovery. In the absence of an evidentiary hearing or other discovery, the burden on the Plaintiff is "relatively slight[,]" *MAG*

[6] In any event, regardless of whether VW AG is found to be a proper Defendant liable on Plaintiff's employment claims, this court would have jurisdiction to enjoin its conduct—specifically the Plan for the Future—under the All Writs Act, 28 U.S.C. § 1651. In order to meaningfully address Defendants' discriminatory conduct, it is necessary to enjoin VW AG (even as a third party) from maintaining and implementing its policy in the United States. *See United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977) ("The power conferred by the Act extends, under appropriate circumstances, to [non-liable third parties] in a position to frustrate the implementation of a court order or the proper administration of justice[.]"); *Kemp v. Peterson*, 940 F.2d 110, 113 (4th Cir. 1991) ("[A] court is authorized to issue all orders necessary to enforce orders it has previously issued. . . . We find no abuse of discretion, since the order bears a direct relationship to the district court's purpose of monitoring compliance with the freeze order."); *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993) (Section 1651 provides courts "broad powers" to issue injunctions "in aid of their jurisdiction[]" or "to protect or effectuate their judgments.").

IAS Holdings, Inc. v. Schmuckle, 854 F.3d 894, 899 (6th Cir. 2017), and dismissal is proper only if all the specific facts which Plaintiff alleges "collectively fail to state a prima facie case for jurisdiction." *Bridgeport*, 327 F.3d at 478 (citations omitted). On the facts alleged, Plaintiff has made a prima facie case for jurisdiction. Thus, dismissal would be improper.

In the alternative, this Court has discretion to order discovery to aid its review of Defendant's 12(b)(2) motion. *See Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991); *Bus. Aircraft Leasing, Inc. v. Brian Carn Ministries, Inc.*, No. 3:16-CV-01577, 2017 WL 9807433, at *1 (M.D. Tenn. July 18, 2017) (concluding that "jurisdictional discovery is appropriate in this case and that any motions to dismiss or transfer should incorporate that discovery"); *Breaking Glass Pictures v. Does 1-283*, No. 3:13-CV-75, 2013 WL 5936669, at *3 (E.D. Tenn. Nov. 4, 2013) ("The Court has reviewed the parties' filings, and the Court cannot say, at this juncture, that the Court lacks personal jurisdiction over Defendant DeArmond. Moreover, based upon the ruling set forth below, the Court finds that decision on this issue is premature at this time.").[7]

This Court would benefit from the development of a more complete factual record upon which it can base its determination regarding jurisdiction. In jurisdictional discovery, Plaintiff would seek the production of documents from Defendants relating to VW AG's contacts in Tennessee. Plaintiff believes that agendas and minutes from Board meetings, memoranda, correspondence, communications, and other records in the possession of VW AG will establish that it was aware of and directed implementation of the "Pact for the Future" in the United States, as well as the discriminatory practices that flowed therefrom. Such evidence would provide further

[7] *See also, e.g., LGT Enterprises, LLC v. Hoffman*, No. 1:08-CV-578, 2008 WL 5744180, at *3-4 (W.D. Mich. Dec. 17, 2008) (denying motion to dismiss for lack of personal jurisdiction and granting motion for jurisdictional discovery); *1st Fed. S & L Ass'n of Van Wert v. U.S. Sterling Capital Corp.*, 2005 WL 548932, at *2 (N.D. Ohio Mar.7, 2005) ("U.S. Sterling also contests this court's *in personam* jurisdiction and venue. None of these disputes can properly be decided simply based on the back-and-forth contentions of the parties' briefs. Discovery as to each is essential to fair adjudication.").

support for a determination that Plaintiff's claims "arise" from VW AG's contacts in Tennessee and that VW AG's contacts in Tennessee are atypical of its contacts in the United States. *See Calphalon*, 228 F.3d at 723-24; *Bobick*, 2018 WL 4566804, at *5.

Accordingly, if inclined to grant Defendant VW AG's Rule 12(b)(2) Motion, this Court should grant Plaintiff leave for the limited purpose of conducting jurisdictional discovery and defer ruling on Defendant VW AG's Motion to Dismiss until such discovery has been completed.

C. Plaintiff Properly Effected Service of Process on VW AG

Defendant VW AG argues in the alternative that Plaintiff's claims should be dismissed for insufficient service of process. However, Defendant's aberrant reading of Tennessee Rule of Civil Procedure 4A(3) invalidates the clear language and expressed purpose of the law, ignores applicable case law ruling on this very question, and leads to an absurd and untenable result. Defendant's argument that service of process was insufficient because "[VWGoA's] agent rejected Plaintiff's attempted service of [Defendant] VW AG" is also unavailing. Dkt. 32 at 21. VWGoA is VW AG's alter ego for purposes of service; hence service of process on VW AG through VWGoA's registered agent, CSC, was appropriate and sufficient.

Federal Rule of Civil Procedure 4(h) governs the service of process on a corporation, domestic or foreign. A foreign corporation may be served in a judicial district of the United States or in a foreign country. Fed. R. Civ. P. 4(e); Fed. R. Civ. P. 4(f). If service is effected in a judicial district of the United States, as here, it may be done by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Fed. R. Civ. P. 4(e)(1); Fed. R. Civ. P. 4(h)(1)(A). In Tennessee, the applicable state law is Tennessee Rule of Civil Procedure 4A(3), which governs service upon a defendant corporation located in a foreign country. Primarily at issue in this matter is the language of Rule 4A(3), which provides that service "may be effected in a place not within any judicial

district of the United States . . . by service as provided in 4.04(4) upon any corporation that has acted as the corporate defendant's agent in relation to the matter that is subject to the litigation."

Notably, "[c]ourts construe provisions of Rule 4 liberally in order to uphold service, requiring only 'substantial compliance.'" *Young's Trading Co. v. Fancy Import, Inc*., 222 F.R.D. 341, 343 (W.D. Tenn. 2004) (citation omitted). Plaintiff certainly meets this lenient standard.

1. Applicable Tennessee Law Permits Substituted Service on a Foreign Corporation's Domestic Agent

Although Defendant VW AG concedes that Plaintiff's proof of service represents that it was served with process (Dkt. 32 at 20), it argues that Plaintiff did not effect *sufficient* service because service was not "effected in a place not within any judicial district of the United States." Dkt. 32 at 3, 20. This argument is unavailing.

First, service was compliant with the plain text of Rule 4A(3), which governs how service can be effected upon a defendant corporation located in a foreign country. The Rule states:

> Service upon . . . a corporation . . . may be effected in a place not within any judicial district of the United States . . . by service as provided in 4.04(4) upon any corporation that has acted **as the corporate defendant's agent** in relation to the matter that is the subject of the litigation **or the stock of which is wholly owned by the corporate defendant**.

Tenn. R. Civ. P. 4A(3) (emphasis added). Pursuant to Rule 4.04(4), a foreign corporation doing business in Tennessee may be served:

> by delivering a copy of the summons and of the complaint to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent authorized by appointment or by law to receive service on behalf of the corporation.

Tenn. R. Civ. P. 4.04(4). According to this plain language, VW AG—a foreign corporation doing business in Tennessee—may be served via its agent, i.e. "any corporation . . . the stock of which is wholly owned by" VW AG, in relation to the matter that is the subject of the litigation. Plaintiff followed Tennessee's Rules of Civil Procedure by effecting service on VW AG's agent, VWGoA.

This interpretation is not only consistent with the plain language of the Rules, it is clearly and unequivocally supported by the Advisory Commission Comments to Rule 4A(3).[8] The Comments state:

> Subpart 4A(3) provides specific direction to the courts on a question that has not yet been addressed by Tennessee law. The provision establishes that a subsidiary corporation that is simply the alter ego of a foreign corporation may be the agent for service of process under appropriate circumstances. Given the hostility to litigation in American courts that may be found in some foreign countries, **such a provision will allow an attorney in some cases to avoid the expense and inconvenience of having to attempt service in a foreign country.**

Tenn. R. Civ. P. 4A(3), Advisory Commission Comments (emphasis added). As the Comments affirm, Rule 4A(3) was drafted to provide "specific direction to the courts" about proper service of process in cases involving subsidiary corporations that are simply alter egos of foreign corporations. *Id**Error! Bookmark not defined.***. Because VWGoA is a wholly owned subsidiary corporation and alter ego of VW AG (*see infra*), it may serve as VW AG's agent for service of process. *Id.*

Defendant's argument would lead to an absurd and nonsensical result. As it concedes, Rule 4A(3) provides for substituted service of process, "allowing a corporate defendant to be served through its 'wholly owned' subsidiary corporation." Dkt. 32 at 19-20. But, under Defendant's interpretation, such service is only effective when "effected in a place not within any judicial district of the United States." *Id*. Under this incantation, a statute designed to permit substituted service *within* the United States actually requires service *outside* of the United States. This would undermine the purpose and utility of the statute. The more sensible reading is that service on the American subsidiary-agent is considered the legal equivalent of service on the foreign corporate

[8] Courts in this Circuit routinely turn to the Advisory Commission Comments to inform their analyses of the Tennessee Rules of Civil Procedure. *See e.g., Hunley v. Glencore, Ltd., Inc.*, No. 3:10-CV-455, 2012 WL 1071271, at *3 (E.D. Tenn. Mar. 29, 2012), *aff'd*, 602 F. App'x 326 (6th Cir. 2015); *McGrath v. Lowe's Home Centers, Inc.*, No. 3:06-0989, 2009 WL 151567, at *2 (M.D. Tenn. Jan. 21, 2009).

parent at its international location. *See United States v. Ninety Three Firearms*, 330 F.3d 414, 420 (6th Cir. 2003) ("When interpreting the plain language of a statute, we make every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous") (quotation marks and citations omitted). In other words, serving VWGoA in Tennessee allows service to "be effected in a place not within any judicial district of the United States" pursuant to Tenn. R. Civ. P Rule 4A.

In sum, Plaintiff properly effected service on VW AG via its domestic alter ego, VWGoA, and in so doing, realized the Rule's intent to allow parties to "avoid the expense and inconvenience of having to attempt service in a foreign country." Tenn. R. Civ. P. 4A, Advisory Commission Comments.

2. Defendant VWGoA is Defendant VW AG's Alter Ego and Agent for Purpose of Service of Process

Plaintiff has adequately alleged that VW AG controls VWGoA to such a degree that VWGoA is the agent of VW AG. Plaintiff has alleged that VW AG maintains control of VWGoA's finances as well VWGoA's policies and business practices, which squarely concern Plaintiff's claims (*see* Dkt. 12 ¶¶ 10a-i.). *See Gordon v. Greenview Hosp.*, Inc., 300 S.W.3d 635, 653 (Tenn. 2009) (holding that "the presumption of corporate separateness may be overcome by demonstrating that the parent corporation 'exercises complete dominion over its subsidiary, not only of finances, but of policy and business practice in respect to the transaction under attack'") (quoting *Cont'l Bankers Life Ins. Co. of the S. v. Bank of Alamo*, 578 S.W.2d 625, 632 (Tenn. 1979)).

Defendant does not counter, or interact with, any of the facts in Plaintiff's Amended Complaint, in which Plaintiff clearly alleges far more than a mere parent-subsidiary relationship. Rather, Defendant states in conclusory fashion that Plaintiff has failed to meet his burden. Dkt. 32

at 21. The Court should reject Defendant's attempt to both subvert Rule 4A(3)'s plain language and stymie the will of the Tennessee legislature.

Indeed, in a legion of case law going all the way to the Supreme Court, courts have routinely held against Defendant *on this very issue*—determining that VWGoA is a proper agent for service of process on VW AG. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Supreme Court affirmed a judgment of Illinois courts that substituted service was proper because "the relationship between VWAG and [VWGoA] is so close that it is certain that VWAG 'was fully apprised of the pendency of the action' by delivery of the summons to [VWGoA]."[9] *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988) (citation omitted); *see also, e.g.*, *Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 101 (S.D. Fla. 1985), *aff'd*, 835 F.2d 1369, 1373 (11th Cir. 1988) (concluding that "the relationship [between VW AG and VWGoA] goes far beyond that of simply parent and subsidiary . . . VWAG determines on a day-to-day basis exactly how [VWGoA] is to operate[,]" and that it was "more than reasonably certain that [VWGoA] [would] turn over the process served on it for VWAG to VWAG, and that the service of process on [VWGoA] . . . was sufficient to give adequate notice to the parent corporation"); *Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 513 (D.N.J. 2008) ("[I]t is apparent that the relationship between VWAG and [VWGoA] is so close that [VWGoA] operates as an agent of VWAG by law for the purpose of service of process.").[10]

[9] As the *Schlunk* court stated: "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends . . . Whatever internal, private communications take place between the agent and a foreign principal are beyond the concerns of this case. . . . And, contrary to VWAG's assertion, the Due Process Clause does not require an official transmittal of documents abroad every time there is service on a foreign national." 486 U.S. at 707; *see also Norrenbrock Co. v. Ternium Mexico, S.A. De C.V.*, No. 3:13-CV-00767-CRS, 2014 WL 556733, at *1 (W.D. Ky. Feb. 12, 2014) (affirming that the internal law of the forum state dictates whether service of process requires transmittal of documents abroad).

[10] *See also, e.g., Luciano v. Garvey Volkswagen, Inc.*, 131 A.D.2d 253, 255 (N.Y. App. Div. 1987)

Defendant's cited case, *Jones v. Volkswagen of Am., Inc.*, 82 F.R.D. 334 (E.D. Tenn. 1978), (Dkt. 32 at 21-22) is supplanted by this body of law. *Jones* did not go into any depth regarding its reasoning, nor did it discuss the evidence (if any) the plaintiff had put forth to establish the agency relationship. *Id.* at 334-35. Rather, the court merely stated that an uncontroverted affidavit established that VWGoA was not an agent of VW AG for service of process. *Id.* at 335. At the very least, it is apparent that the relationship between the entities has evolved in the forty years since *Jones*. In accordance with superseding precedent, Plaintiff has clearly alleged more than a simple parent-subsidiary relationship between VWGoA and VW AG: Plaintiff pleads facts that demonstrate the requisite degree of control, ranging from high-level policy decisions to control of day-to-day matters. Dkt. 12 ¶¶ 10(a)-(i). Given Plaintiff's well-pled allegations and the body of intervening law, *Jones* neither binds this Court nor provides meaningful guidance.

Lastly, Defendant contends that Plaintiff's service of process was insufficient because VWGoA's agent rejected Plaintiff's service of VW AG. *See* Dkt. 32 at 21-22. This, however, is premised entirely on its argument that VWGoA is not VW AG's agent. As set forth above, VWGoA is an alter ego of VW AG for purposes of service, and service on an alter ego's registered agent is sufficient to effect service on the parent corporation. *See, e.g.*, *Lamb*, 104 F.R.D. at 98 ("Since the agency of C.T. Systems for purposes of service of process on [VWGoA] is not disputed, this Court remains firm in its belief that if [VWGoA] can be considered the alter ego of VWAG, then the service of VWAG's summons and complaint through C.T. Systems would indeed be valid."). Moreover, VWGoA's attempt to evade service of process does not alone render that

("[VWGoA] is so dominated by its parent that [VWGoA] represents VWAG for purposes of service[.]"); *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 885 (Ala. 1983) (concluding "that service performed on [VWGoA] as the agent in fact of VWAG was good and sufficient service on VWAG[]"); *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437, 441 (1st Cir. 1966) ("Defendant was subject to personal jurisdiction in Puerto Rico, and was properly served by service upon [Volkswagen de Puerto Rico's] managing agent.").

service insufficient. Tenn. R. Civ. P. 4.04 (11) ("When service of a summons, process, or notice is provided for . . . and the addressee or the addressee's agent refuses to accept delivery . . . the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing.").[11] Further, it is undisputed that VWGoA was properly served with Plaintiff's Complaint and Summons. *See generally* Dkt. 17, 29-30. Since service on VWGoA was proper, so too was service in its capacity as a proxy of VW AG.

IV. CONCLUSION

As set forth above, dismissal of this action would be inappropriate under the circumstances, and Defendant VW AG's motion should be denied. First, for the reasons stated in Plaintiff's contemporaneously-filed opposition, Plaintiff and the class members are entitled to pursue injunctive relief in this Court and cannot be compelled to arbitrate this injunction-only action. Second, Plaintiff establishes both specific and general personal jurisdiction over Defendant VW AG. Finally, under applicable Tennessee rules, service has been properly effected on VW AG.

[11] Should there be any doubt as to the validity of service, Plaintiff may re-effectuate service on Defendant VW AG in Germany. *See, e .g., Stern v. Beer*, 200 F.2d 794, 795 (6th Cir. 1953) ("[I]f the first service of process is ineffective, a motion to dismiss should not be granted, but the case should be retained for proper service later."). On its face, Rule 4(m) would not apply. *See, e.g., Young's Trading Co*., 222 F.R.D. at 343; *Global Lift Corp. v. Hiwin Corp.*, No. 14–cv–12200, 2014 WL 4536743, at *3-4 & n.4 (E.D. Mich. Sept. 11, 2014) (declining to dismiss and providing 90 days to re-serve complaint on foreign corporations).

Dated: December 6, 2018

Respectfully submitted,

s/*Kevin Sharp*

Kevin H. Sharp (TN BPR 016287)
Leigh Anne St. Charles (TN BPR 036945)
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, Tennessee 37203
Telephone: (615) 434-7000
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com
lstcharles@sanfordheisler.com

Andrew Melzer (*pro hac vice)*
Sanford Heisler Sharp, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Telephone:(646) 402-5657
Facsimile: (646) 402-5651
amelzer@sanfordheisler.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 6, 2018, a true and correct copy of the foregoing document has been furnished to the following individuals via the Court's ECF System:

Bradford G. Harvey
Charles B. Lee
Megan Welton
Miller & Martin, PLLC
832 Georgia Avenue
1200 Volunteer Building
Chattanooga, TN 37402
423-756-6600
bharvey@millermartin.com
clee@millermartin.com
megan.welton@millermartin.com

Attorneys for Defendants
Volkswagen Aktiengesellschaft,
Volkswagen Group of America, Inc.,
and Volkswagen Group of America
Chattanooga Operations, LLC

s/Kevin Sharp
Kevin H. Sharp (TN BPR 016287)
SANFORD HEISLER SHARP, LLP
611 Commerce St., Ste. 3100
Nashville, TN 37203
(615) 434-7001
ksharp@sanfordheisler.com