UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

GUSRAE KAPLAN NUSBAUM PLLC AND
RYAN J. WHALEN,

Plaintiffs,

Civil Action No.: 19-cv-06200-AT

-against-

APPLIED ENERGETICS, INC. GREGORY J. QUARLES, BRADFORD ADAMCZYK, JONATHAN BARCKLOW, JOHN SCHULTZ, DAN W. BAER, MASUR GRIFFITTS + LLP, MARY O'HARA, ENTERPRISE COUNSEL GROUP and BEN PUGH,

Defendants.

DEFENDANTS APPLIED ENERGETICS, INC., GREGORY J. QUARLES, BRADFORD ADAMCZYK, JONATHAN BARCKLOW, JOHN SCHULTZ, AND DAN W. BAER'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT

BOND, SCHOENECK & KING, PLLC
Jonathan B. Fellows, Esq. (#101628)
Brendan M. Sheehan, Esq. (#517403)
One Lincoln Center
Syracuse, New York 13202
Attorneys for Applied Energetics, Inc., Gregory J. Quarles, Bradford Adamczyk, Jonathan Barcklow, John Schultz, and Dan W. Baer

TABLE OF CONTENTS

PRELIMINARY STATEMENT 2

RELEVANT FACTS 4

STANDARD OF REVIEW 5

ARGUMENT 6

I. PLAINTIFFS HAVE FAILED TO MAKE A *PRIMA FACIE* SHOWING OF PERSONAL JURISDICTION OVER THE AE DEFENDANTS UNDER THE SECURITIES EXCHANGE ACT 6

A. The Opposition Misapplies Cases Involving Foreign Defendants. 7

B. The Complaint Fails to Allege, And Plaintiffs Cannot Establish, Sufficient Minimum Contacts Between The AE Defendants and New York. 8

C. Plaintiffs May Not Rely On Other Alleged "Contacts" With New York Unrelated To This Litigation. 8

II. NEITHER THE DEMAND LETTER NOR THE SEC REPORTS SUPPORT JURISDICTION OVER THE AE DEFENDANTS. 10

A. Plaintiffs' Claims Relating To The Single Demand Letter Are Indeed Nothing More than Disguised Defamation Claims. 10

B. The Filing Of The SEC Reports In Washington, D.C. Cannot Support Jurisdiction In New York. 12

C. Plaintiffs Fail to Identify Which (If Any) Individual AE Defendants Performed The Acts Constituting The Alleged "Scheme." 14

III. JURISDICTIONAL DISCOVERY WOULD NOT BE PRODUCTIVE IN THIS MATTER 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Alki Partners, L.P. v. Vatas Holding GmbH,
769 F. Supp. 2d 478 (S.D.N.Y. 2011)....................7

In re AstraZeneca Sec. Litig.,
559 F. Supp. 2d 453 (S.D.N.Y. 2008), *aff'd sub nom. State Universities Ret. Sys. of Illinois v. Astrazeneca PLC*, 334 F. Appx. 404 (2d Cir. 2009) 16

In re Banco Bradesco S.A. Sec. Litig.,
277 F. Supp. 3d 600 (S.D.N.Y. 2017)....................6, 7, 15

Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,
305 F.3d 120 (2d Cir. 2002)....................7, 9

Beacon Enters., Inc. v. Menzies,
715 F.2d 757 (2d Cir. 1983)....................10

Best Van Lines, Inc. v. Walker,
490 F.3d 239 (2d Cir. 2007)....................9, 10

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975)....................6

In re Braskem S.A. Securities Litigation,
246 F. Supp. 3d 731 (S.D.N.Y. 2017)....................5, 7

In re CINAR Corp. Sec. Litig.,
186 F. Supp. 2d 279 (E.D.N.Y. 2002) 7

In re Gilbert,
235 N.Y. 390 (N.Y. 1923) 14

Gilson v. Pittsburgh Forgings Co.,
284 F. Supp. 569 (S.D.N.Y. 1968) 8

Gmurzynska v. Hutton,
257 F. Supp. 2d 621 (S.D.N.Y.2003), *aff'd*, 355 F.3d 206 (2d Cir. 2004) 6

Goldman v. Barrett,
733 F. Appx. 568 (2d Cir. 2018)....................11, 12

Grand River Enters. Six Nations, Ltd. v. Pryor,
425 F.3d 158 (2d Cir. 2005)....................5

Hengjun Chao v. Mount Sinai Hospital,
476 F. 11

Investors Funding Corp. v. Jones,
495 F.2d 1000 (D.C. Cir. 1974) 3, 13

Janus Capital Group, Inc. v. First Derivative Traders,
564 U.S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011) 15

Jolivet v. Crocker,
859 F.Supp. 62 (E.D.N.Y. 1994) 2, 10

McGowan v. Smith,
52 N.Y.2d 268 (1981) 9

Molchatsky v. United States,
778 F.Supp.2d (S.D.N.Y. 2011)...17

Nationwide Mut. Ins. Co. v. Morning Sun Bus Co.,
No. 10–CV–1777, 2011 WL 381612 (E.D.N.Y. Feb. 2, 2011) 17

Schlanger v. Flaton,
218 A.D.2d 597 (1995) 14

SEC v. Diversified Industries, Inc.,
465 F.Supp.104 (Dist. D.C. 1979) 13

Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico,
563 F.3d 1285 (Fed. Cir. 2009)...7

In re Terrorist Attacks on Sept. 111, 2001,
714 F.3d 659 (2d Cir. 2013)..5

United States v. Lombardo,
241 U.S. 73 13

Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.,
No. 00 Civ. 5663, 2001 WL 1468168 (S.D.N.Y. Nov. 19, 2001) 6

Statutes

Securities Exchange Act of 1934 Section 27 .... *passim*

Other Authorities

C.P.L.R. 302.. *passim*

Fed. R. Civ. P. 4(k)(2)... *passim*

PRELIMINARY STATEMENT

Defendants Applied Energetics, Inc. ("AE"), Gregory J. Quarles ("Quarles"), Bradford Adamczyk ("Adamczyk"), Jonathan Barcklow ("Barcklow"), John Schultz ("Schultz"), and Dan W. Baer ("Baer") (collectively, the "AE Defendants"; minus AE, the "Individual AE Defendants") hereby submit this Reply Memorandum of Law in further support of the portion of the AE Defendants' motion to dismiss based on lack of personal jurisdiction, only, pursuant to the Order of the Court dated November 19, 2019 [ECF Document 91] and in response to the arguments set forth by the Plaintiffs Gusrae Kaplan Nusbaum PLLC ("GKN") and Ryan J. Whalen ("Whalen") (collectively "Plaintiffs") in their opposition ("Opposition") to the personal jurisdiction arguments raised in the AE Defendants' motion.

For all Plaintiffs' misdirection, Plaintiffs' claims truly are about only one thing: whether they were damaged by, and may maintain a claim based upon, the June 24, 2019 demand letter ("Demand Letter") declaring the transfer of certain of AE's shares to GKN to be rescindable and demanding rescission, which Plaintiffs claim was defamatory and thereby prevented them from selling their remaining AE shares. As a matter of established, unambiguous New York law, the sending (from outside New York) of an allegedly defamatory letter into New York cannot support the exercise of jurisdiction over the AE Defendants. Nor may Plaintiffs circumvent this basic rule by creatively disguising a defamation claim as something else. *Jolivet v. Crocker*, 859 F.Supp. 62, 65 (E.D.N.Y. 1994).

Yet that is exactly what Plaintiff's vague and conclusory arguments about the Demand Letter being part of a broader "scheme" attempt to do. Worse (for Plaintiffs' argument) the "broader scheme" angle completely undercuts Plaintiffs' underlying claim that the sending of the Demand Letter damaged them. In the Opposition, Plaintiffs contend that "Plaintiffs allege that for

over one year, all Defendants intentionally and repeatedly lied to Plaintiffs, securities, professionals, and the general public about the validity[1] of over one million shares of AE common stock." (Opposition, p. 2.) It is these purported "lies," Plaintiffs contend, that extend beyond the mere sending of the Demand Letter – which indisputably cannot support the exercise of jurisdiction over the AE Defendants – into "broader scheme" territory purportedly more amenable to jurisdiction. But now Plaintiffs' argument becomes impossibly inconsistent: If the statements going back over one year (i.e., the April 17, 2018 filing of AE's 10-K, and the May 31, 2019 filing of the S-1 [the "SEC Reports"], neither of which referenced any problem with the validity of the shares in question) were "lies," – in that the shares were not in fact validly issued – then the Demand Letter cannot have harmed Plaintiffs (by interfering with their ability to sell shares they would have had no right to sell). The Opposition thus would only dodge one clear bar to the exercise of personal jurisdiction, by eviscerating their entire claim. Out (they argue) of the jurisdictional frying pan – but right into the failure-to-state-a-claim fire.

In any event, even if the Court were to consider the part of the purported "scheme" not involving the Demand letter – i.e., the SEC Reports – that would not support a finding of jurisdiction in New York either. If Plaintiffs' argument were correct – that any time a corporation submitted a report to the SEC, personal jurisdiction would exist whenever any person read such a report anywhere – there would be virtually no limit on where a securities case could be brought. To the contrary, the rule is that the locus of an allegedly wrongful act associated with the submission of a report to the SEC in Washington, D.C., is the District of Columbia. *Investors Funding Corp. v. Jones*, 495 F.2d 1000, 1003 (D.C. Cir. 1974). Thus, even if the SEC Reports could be considered part of a "broader scheme" to "manipulate" the price of AE's stock,

[1] Here (as set forth in greater detail below) Plaintiffs further elide over the critical legal distinction between whether shares are validly issued, versus whether the issuance may be rescinded.

jurisdiction and venue would not exist in New York.

RELEVANT FACTS

As Plaintiffs admit, the Individual AE Defendants reside and work outside of New York, in Washington State, Hong Kong, Virginia and California. (Complaint, ¶¶18-22).

The Opposition relates that "From March 2018 through summer 2019," the Individual AE Defendants "caused AE to publish several public SEC filings [i.e., the above-referenced SEC Reports] that represented that the GKN Shares were validly issued for services rendered." (Opposition, p. 5) (*citing* Complaint, ¶¶ 88-94.) Plaintiffs contend that, "[r]elying" on these representations in the SEC Reports, Plaintiffs "began taking steps" to sell their shares in AE. (Opposition, pp. 5-6.) Because of the stock sale transfer agent's ("Transfer Agent") statement that it could only remove the restrictive legends on the shares upon their sale, the sale of the first block of 100,000 shares did not clear until June 25, 2019. (Complaint, ¶¶ 99,117.)[2] On June 24, 2019, counsel for AE, Ben Pugh ("Pugh") of the California-based law firm Enterprise Counsel Group ("ECG") (collectively, the "ECG Defendants") sent Plaintiffs the above-defined Demand Letter "demanding that Plaintiffs return all of their shares" of AE stock. (Complaint, ¶ 135.) In the Demand Letter, the ECG Defendants opined that Plaintiffs violated the New York Rules of Professional Conduct in connection with their contractual negotiations with AE's former chief executive officer, Mr. Farley, which resulted in the issuance of AE stock to Plaintiffs because Plaintiffs failed to disclose to AE the conflicts of interest that would arise if Plaintiffs represented AE and acquired shares of AE stock. The Demand Letter stated further that the transfer of AE stock to Plaintiffs is thus "rescindable, and AE hereby elects to rescind it." (Complaint, Ex. 1 at

[2] In the Opposition, Plaintiffs contend it was "Defendants" who "took the position that the restrictive legends could be removed only after the shares were sold" (Opposition, p. 5), whereas the Complaint alleges that this was the non-party Transfer Agent's position.

1.)

On June 25, 2019, the day after receiving the Demand Letter, Plaintiff Whalen emailed AE's New York counsel, Defendant Mary O'Hara. (Complaint, ¶¶ 148-149.) Whalen asked Ms. O'Hara to confirm that AE could provide no legal basis to stop the processing of the stock transfer. Even though his question was only directed to Ms. O'Hara, Whalen also sent this e-mail to the Transfer Agent and representatives of Plaintiff's stockbroker, and asked Ms. O'Hara to "reply all" with her response. (Complaint, ¶149.)

Ms. O'Hara then did "reply all" the following day, attaching the Demand Letter. According to Plaintiffs, "[i]n response to receiving the Demand Letter," Plaintiffs' stockbroker refused to sell further shares of AE stock owned by Plaintiffs. (Complaint, ¶151.)

STANDARD OF REVIEW

"In opposing a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005) (internal quotation marks and citation omitted). This burden varies at different stages of litigation and where, as here, discovery has yet to be conducted, "a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction." *In re Braskem S.A. Securities Litigation*, 246 F. Supp. 3d 731, 751 (S.D.N.Y. 2017) (internal quotation marks and citation omitted). However, a district court should "not draw argumentative inferences in the plaintiff's favor" nor "accept as true a legal conclusion couched as a factual allegation." *In re Terrorist Attacks on Sept. 111, 2001*, 714 F.3d 659, 673 (2d Cir. 2013) (internal quotation marks and citation omitted).

"If the court considers only pleadings and affidavits, the plaintiff's *prima facie* showing must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 630 (S.D.N.Y. 2017) (internal quotation marks and citation omitted). Moreover, it is well established that "conclusory allegations are not enough to establish personal jurisdiction." *Gmurzynska v. Hutton*, 257 F. Supp. 2d 621, 625 (S.D.N.Y.2003) (internal quotation marks and citation omitted), *aff'd*, 355 F.3d 206 (2d Cir. 2004); *see Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, No. 00 Civ. 5663, 2001 WL 1468168, at *3 (S.D.N.Y. Nov. 19, 2001) (same).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO MAKE A *PRIMA FACIE* SHOWING OF PERSONAL JURISDICTION OVER THE AE DEFENDANTS UNDER THE SECURITIES EXCHANGE ACT

Plaintiffs allege that Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), provides this Court with specific jurisdiction over the AE Defendants, based upon the assertion of a cause of action against the AE Defendants for violation of Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder. (Complaint, ¶¶ 176-191.) Even assuming that Plaintiffs' Exchange Act cause of action is adequately pleaded (which it is not, as there has been no sale of securities[3]), Plaintiffs are nevertheless barred from establishing personal jurisdiction over the AE Defendants under the Exchange Act.

Section 27 of the Exchange Act allows for a district court to exercise jurisdiction over matters arising under the Exchange Act, which may be brought in any "district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. §78aa(a). In order for a district court to exercise jurisdiction under the Exchange Act, such jurisdiction must "comport with

[3] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730–31 (1975) (a private action under section 10(b) of the Securities Exchange Act and Rule 10b-5 is "limited to actual purchasers and sellers of securities.")

due process under the Constitution." *In re Banco Bradesco S.A. Securities Litigation*, 277 F. Supp. 3d at 641. "Due process requires that if a defendant is not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 642 (internal quotation marks and citation omitted). To establish such minimum contacts with respect to a nonresident defendant, the plaintiff must show that its "claim arises out of, or relates to, the defendant's contacts with the forum ... [and that] the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002) (internal citation omitted). As with any jurisdictional analysis, conclusory allegations are insufficient to establish personal jurisdiction under the Exchange Act. *See Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 487 (S.D.N.Y. 2011) ("Conclusory allegations lacking factual specificity, however, do not satisfy plaintiff's burden" under the Exchange Act).

A. The Opposition Misapplies Cases Involving Foreign Defendants.

Plaintiffs, in the Opposition, contend that any conduct "designed to violate the securities laws, in and of itself comprises 'minimum contacts' sufficient for this Court to exercise jurisdiction." (Opposition, p. 13) (*citing In re Braskem*, 246 F. Supp. 3d at 768-69 and *In re CINAR Corp. Sec. Litig*., 186 F. Supp. 2d 279, 306 (E.D.N.Y. 2002).) To the extent that Plaintiffs mean to argue that the mere allegation of a securities violation creates personal jurisdiction over a defendant in any federal district court in the United States, that is not the law. *Braskem* and *CINAR Corp*. both involved the question of whether non-U.S. defendants could be sued in the United States (as opposed to Brazil and Canada, respectively). *Cf.* Fed. R. Civ. P. 4(k)(2); *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, 563 F.3d 1285, 1297-98 (Fed. Cir. 2009)

(foreign defendants not otherwise subject to jurisdiction in any state, but who have contacts with the nation as a whole are subject to personal jurisdiction on claims arising under federal law). The more specific issue of which United States district court had jurisdiction, pursuant to 15 U.S.C. §78aa(a), did not arise in those cases. Plaintiffs' argument would read Section 78aa(a)'s requirements that a matter arising under the Exchange Act must be brought where "the defendant is found or is an inhabitant or transacts business" completely out of the law. This erroneous argument would allow such suits in any district regardless of the defendant's contacts with that forum. That is not the law.

B. The Complaint Fails to Allege, And Plaintiffs Cannot Establish, Sufficient Minimum Contacts Between The AE Defendants and New York.

The AE Defendants are neither "found" in New York, nor are inhabitants nor transact business there. The Opposition contends that "[e]xercising jurisdiction over AE is particularly appropriate because New York, its capital markets, and its professionals have been essential to the Company," and because it has "traded on Manhattan-based exchanges." (Opposition, p. 13.) *Gilson v. Pittsburgh Forgings Co*., 284 F. Supp. 569 (S.D.N.Y. 1968) comprehensively refutes that argument. A defendant does not "transact business" in New York merely because its shares are traded on a New York stock exchange, nor because it employs institutional agents in New York to facilitate the trading of shares. *Id*. at 571. As the court in *Gilson* noted, "almost every corporation would be subject to the jurisdiction of New York, without any other jurisdictional requirements, if the plaintiffs' contentions were accepted as meritorious." *Id.*

C. Plaintiffs May Not Rely On Other Alleged "Contacts" With New York Unrelated To This Litigation.

As set forth above, "the plaintiff must show that its "claim arises out of, or relates to, the defendant's contacts with the forum." *Bank Brussels Lambert*, 305 F.3d at 127. The Opposition

lists a number of activities related to litigation and corporate governance activities involving AE that are unrelated to this litigation. (See the Opposition, p. 14 [referencing AE's hiring of Manhattan-based attorneys and accountants, and past hiring of GKN to handle other legal matters].) These activities do not constitute the necessary minimum contacts with New York because the instant claim does not arise out of or relate to those activities.

Similarly, pursuant to C.P.L.R. § 302(a)(1), New York courts may exercise personal jurisdiction over any party who "transacts business within the state" for purposes of adjudicating "a cause of action arising" from that business. CPLR § 302(a)(1); *see also McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981) ("Essential to the maintenance of a suit against a non-domiciliary under CPLR 302 (subd [a], par 1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon."). "New York courts define transacting business as purposeful activity – some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007).

Plaintiffs failed to identify any business allegedly transacted by the AE Defendants in New York. It simply cannot be said that the AE Defendants have purposefully availed themselves of the privilege of conducting business in New York. Plaintiffs do not – and cannot – allege the AE Defendants solicit business or derive revenue in New York. None of the AE Defendants reside or are domiciled in New York, nor do they sell any goods or services or otherwise do business in New York. (*See* Opposition, p. 25) ("[T]he Company is not currently selling any goods or services".) Even if this Court were to consider the supposed single act of sending the Demand Letter to New York, such conduct "does not alone amount to a transaction of business within the state under Section 302(a)(1). *Best Van Lines*, 490 F.3d at 249.

II. NEITHER THE DEMAND LETTER NOR THE SEC REPORTS SUPPORT JURISDICTION OVER THE AE DEFENDANTS.

Plaintiffs are also precluded from establishing personal jurisdiction over the AE Defendants based on the Demand Letter and the SEC Reports. As set forth in the AE Defendants' Motion to Dismiss (and below), the Demand Letter simply cannot support jurisdiction, as a matter of explicit New York law. Plaintiffs' reliance on the SEC Reports is also insufficient to support jurisdiction and, indeed, flatly contradicts Plaintiffs' position with respect to the Demand Letter. If the AE Defendants "lied" in stating in the SEC Reports that the shares issued to Plaintiffs were validly issued, then those shares were not validly issued, and Plaintiffs cannot possibly claim to have been harmed by virtue of not being able to sell what they never validly held.

A. Plaintiffs' Claims Relating To The Single Demand Letter Are Indeed Nothing More than Disguised Defamation Claims.

In a futile effort to avoid New York's clear restriction on predicating long-arm personal jurisdiction on defamatory actions, Plaintiffs point to their other purported "tort" allegations – which, in reality, are merely defamation allegations by another name – and attempt to establish jurisdiction under C.P.L.R. 302(a)(3). That efforts fails as a matter of law.

The law is well established that parties are prohibited from attempting "to convert the alleged tort from defamation to something else" in order to plead around the well-established rule that precludes a New York court from exercising personal jurisdiction over an out-of-state defendant based on an allegedly defamatory letter that was sent into New York. *Jolivet v. Crocker*, 859 F. Supp. 62, 65 (E.D.N.Y. 1994); *see Beacon Enters., Inc. v. Menzies*, 715 F.2d 757, 766 (2d Cir. 1983) (sending a single cease and desist letter into New York fails to support long-arm jurisdiction under CPLR § 302(a).)

Plaintiffs argue that their claims of tortious interference and violation of the Exchange Act

against the AE Defendants are merely related to the defamation claims asserted in the Complaint, such that the Court could still exercise personal jurisdiction over these claims. Plaintiffs base this argument upon the allegation that they "allege concrete economic damage" separate and apart from any "reputational" or "special damages" they have suffered, notwithstanding the fact that the factual circumstances underlying each claim are the same. (Opposition, p. 21.)

However, Plaintiffs utterly mischaracterize the law as to personal jurisdiction over claims of defamation. For example, in one case relied upon by Plaintiffs, the Second Circuit specifically noted that a lower court was correct in dismissing other tort claims as duplicative of defamation claims, noting that "the factual allegations underlying each of Chao's other tort claims are virtually identical to the facts underlying his defamation claim" and that "the harms that Chao contends he suffered as a result of these other torts—attorneys' fees, emotional distress, distraction from his research, and his termination of employment—all flow from the effect on his reputation caused by defendants' alleged defamatory statements." *Hengjun Chao v. Mount Sinai Hospital*, 476 F. .Appx. 892, 895 (2d Cir. 2012).

Similarly, Plaintiffs allege that the case of *Goldman v. Barrett*, 733 F. Appx. 568 (2d Cir. 2018), stands for the proposition that only "tort claims that allege merely 'injury to reputation' are 'disguised defamation claim[s]'". (Opposition, p. 21.) However, Plaintiffs again mischaracterize the holding in this case, where the Second Circuit specifically found that the plaintiff therein had alleged "**converging** claims [] premised on identical underlying factual content" and noted that the alleged defamatory statements "are what is alleged to have harmed their reputation and to have interfered with prospective business advantage." *Goldman*, 733 F. Appx. at 571 (emphasis added);

Thus, the very cases cited by Plaintiffs belie their argument. It is clear from these cases that, to allege claims sufficiently distinct from defamation, a plaintiff is not required to merely

plead "concrete economic damage" as opposed to reputational or special damages; ***rather a plaintiff must allege unique damages arising out of unique facts or circumstances apart from those alleged in the defamation claim.*** Plaintiffs have not met this burden.

Plaintiffs' libel claim alleges that "as a result of the publication of the Demand Letter, Plaintiff's stockbroker refused to sell Plaintiffs' shares, which has caused injury to Plaintiffs." (*See* Complaint, ¶ 206.) Plaintiffs have made nearly identical allegations in all their remaining causes of action against the AE Defendants. (*Cf.* Complaint, ¶¶ 160-61, 194-95, 198.) In short, the allegation at the heart of all of Plaintiffs' causes of action against the AE Defendants is that the Demand Letter purportedly caused Plaintiff's stockbroker to refuse to sell the rest of Plaintiffs' AE shares. It does not matter what legal theory is pleaded based on this fundamental allegation – the factual scenario and the associated damages are exactly the same. Plaintiffs allege that the AE Defendants said something false about them, which caused them damage. The claim is the same, just disguised.

Based upon the foregoing, it is clear that Plaintiffs have not, in fact, pleaded "concrete economic damages" except, of course, to the extent that ***they were directly caused by the same facts underlying their claim for libel per se.*** Similarly, Plaintiffs have failed to allege any supposed non-defamatory statement (or any statement for that matter) other than those contained in the Demand Letter. As such, this Court cannot exercise personal jurisdiction over the AE Defendants pursuant to C.P.L.R. § 302(a)(3).

B. The Filing Of The SEC Reports In Washington, D.C. Cannot Support Jurisdiction In New York.

Plaintiffs are also barred from predicating personal jurisdiction on the filing of the SEC Reports in Washington, D.C. If Plaintiffs' argument is that the AE Defendants made false statements in reports required to be filed with the Securities Exchange Commission in Washington,

D.C., then the District Court for the District of Columbia would be the district with jurisdiction over that claim. See *Investors Funding Corp. v. Jones*, 495 F.2d 1000, 1003 (Dist. D.C. 1974); *United States v. Lombardo*, 241 U.S. 73, 76-77; *SEC v. Diversified Industries, Inc.*, 465 F.Supp.104, 111 (Dist. D.C. 1979).

Moreover, Plaintiffs' reliance on the SEC Reports is directly in conflict with their theory regarding the Demand Letter. Even if Plaintiffs could establish personal jurisdiction based on the SEC Reports (they cannot), their reliance thereon would be facially fatal to their claims against the AE Defendants.[4] Plaintiffs' argument here is essentially that Defendants either "lied" in the Demand Letter, by stating that the issuance of shares to AE's lawyers was rescindable because of the lawyers' violations of their professional obligations, or lied in the SEC Reports when they stated that that share issuance was valid. If Defendants "lied" about GKN's shares being valid (i.e., if they were in fact invalid), then Plaintiffs cannot complain about having been prevented from selling "their" shares because they never actually owned those shares to begin with.

Finally, Plaintiffs are simply wrong in declaring that there is any inconsistency between the SEC Reports (which "represented that the GKN Shares were validly issued," *see* Opposition, p. 5) and the Demand Letter, in which AE's attorneys invoked the remedy of rescission. Plaintiffs apparently fail to grasp the basic distinction between a void and a voidable contract. "A voidable contract…is valid unless it be attacked by the party seeking to avoid it." *In re Gilbert*, 235 N.Y. 390, 393 (N.Y. 1923). Until AE sought to avoid the issuance of shares to Plaintiffs, the issuance

[4] In any event, Plaintiffs' premise of the "scheme" as it relates to the SEC Reports – i.e., apparently that the SEC Reports were designed to allow the AE Defendants to sell their own shares, while simultaneously preventing Plaintiffs from selling theirs and supposedly depressing the share price – is false. **None of the AE Defendants sold any shares following the SEC Reports**. (*See* Affirmations of Gregory J. Quarles, Bradford Adamczyk, Jonathan Barcklow, John Schultz, and Dan W. Baer in Support of Reply to Opposition to Motion to Dismiss, ¶ 1 of all.) Plaintiffs are alleging a "scheme" that simply did not exist, in any respect whatsoever. All Plaintiffs have is a Demand Letter – a single pre-litigation communication by a California attorney on behalf of a Delaware corporation to a New York attorney – and that does not support New York jurisdiction.

of shares was valid, consistent with the statements in the SEC Reports. *Cf. Schlanger v. Flaton*, 218 A.D.2d 597, 602 (1995) (client entitled to rescind issuance of shares to attorney when issuance made in violation of attorney's professional obligations). It is no "lie" when, notwithstanding an (accurate) prior representation that the issuance of shares was valid (i.e., not void), a company's attorney subsequently determines the issuance was voidable and exercises the company's right to rescind.

In sum, Plaintiffs cannot predicate personal jurisdiction over the AE Defendants on the SEC Reports but, even if they could do so, Plaintiffs' reliance on the SEC Reports would nevertheless result in the inevitable conclusion that Plaintiffs' claims against the AE Defendants are facially meritless.

C. Plaintiffs Fail to Identify Which (If Any) Individual AE Defendants Performed The Acts Constituting The Alleged "Scheme."

In the Opposition, Plaintiffs rely on the now-rejected "group pleading" doctrine for the proposition that "Plaintiffs need not plead any 'specific connection between fraudulent representations and particular defendants' at all." (Opposition, p. 18) (*citing Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir. 1986) and *Anwar v. Fairfield Greenwich Limited*., 728 F. Supp. 2d 372, 405-406 [group pleading doctrine applied to securities fraud claims when defendants had high-level positions with the corporate entity].) Plaintiffs are barred as a matter of law from relying on the now defunct "group pleading" doctrine, however.

This court's decision in *In re Banco Bradesco* (cited repeatedly above, and in the Opposition) makes clear that the "group pleading" and "group-published documents" doctrines are no longer viable, in light of the Supreme Court's 2011 decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011). *See In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d at 631, 640-641 ("[T]he group-pleading doctrine

does not survive *Janus*."). There must now be specific allegations that specific defendants "possessed ultimate authority" over the statements at issue, such as by signing, ratifying or approving a company's statement, or attribution of the statement to the executive. *Id*. at 641.

Plaintiffs' allegations in the Complaint fail to meet this standard. There are no non-conclusory allegations tying any of the representations in question to any of the specific Individual AE Defendants. (*See, e.g.*, Complaint, ¶88 ["Over the last fifteen months, AE's new management[5] caused AE to make several public filings with the Securities and Exchange Commission…."]; ¶ 137 ["…for the past 15 months, AE's new management repeatedly represented to AE's shareholders, including Plaintiffs, that the shares were authorized and validly issued for legal services rendered"]. The use of "and/or" in paragraph 178 of the Complaint (in which Plaintiffs allege that "Quarles, Adaczyk, Barcklow, and/or Schultz have all signed one or more Form 10-Ks and Form 10-Qs and/or the S-1") makes clear that Plaintiffs cannot even allege who actually signed the documents in question.

Absent allegations of specific personal involvement by the Individual AE Defendants, Plaintiffs are left trying to impute the simple fact that AE made the statements in question in the SEC Reports to the Individual AE Defendants. Such conclusory and imputed allegations are improper and insufficient to establish personal jurisdiction. (*See* Dkt. No. 87-6 at 15-16) (*citing Pilates, Inc. v. Pilates Inst., Inc.*, 891 F.Supp. 175, 180-181 (S.D.N.Y. 1995).); *see In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008), *aff'd sub nom. State Universities Ret. Sys. of Illinois v. Astrazeneca PLC*, 334 F. Appx. 404 (2d Cir. 2009) (allegations that the defendants "caused the distribution of false and misleading reports and statements to

---

[5] "Management" would typically refer to a company's officers, not its directors. The Complaint indicates that AE's chief executive officer at the time of the first of the SEC Reports – the Form 10-K filed April 17, 2018 – would have been filed by AE's then CEO, non-party Thomas C. Dearmin (now deceased). (*See* Complaint, ¶¶77-79 [Dearmin as CEO] and ¶ 90 [date of filing of the 10-K].)

AstraZeneca investors in the U.S." or "had actual knowledge that each of the representations alleged herein were materially false or misleading" were "merely conclusory statements" incapable of supporting the exercise of personal jurisdiction). Moreover, even if Plaintiffs could assert specific allegations with respect to the signatories of the SEC Reports, Plaintiffs would nevertheless be barred from relying upon the SEC Reports to establish personal jurisdiction in this Court, as established above.

III. JURISDICTIONAL DISCOVERY WOULD NOT BE PRODUCTIVE IN THIS MATTER

Plaintiffs argue that, in the event the Court deems the facts available to it insufficient to determine whether it may exercise personal jurisdiction over the AE Defendants, Plaintiffs should be permitted to obtain jurisdictional discovery "to determine which Defendants participated in the manipulation of AE common stock." (Opposition, p. 29.)

As set forth above, however, even if Plaintiffs could identify which of the AE Defendants were involved with or responsible for (1) filing the SEC Reports and (2) sending the Demand Letter, that information would not permit Plaintiffs to establish personal jurisdiction over the AE Defendants. The mere sending of the single, allegedly defamatory Demand Letter simply cannot support jurisdiction in New York. Nor can the filing of the SEC Reports in Washington, D.C. (and, in any event, reliance on the SEC Reports would be fatal to Plaintiffs' entire case).

"A party seeking jurisdictional discovery…bears the burden of showing necessity." *Molchatsky v. United States*, 778 F.Supp.2d, 421, 438 (S.D.N.Y. 2011). Moreover, "[d]iscovery need not be granted to allow a plaintiff to engage in an unfounded fishing expedition for jurisdictional facts." *Nationwide Mut. Ins. Co. v. Morning Sun Bus Co.*, No. 10–CV–1777, 2011 WL 381612, at *10 (E.D.N.Y. Feb. 2, 2011) (quotation omitted). Plaintiffs have not shown, and cannot show, that any possible facts they might discover can save them from the fundamental

untenability of their argument for jurisdiction in New York.

CONCLUSION

For the foregoing reasons, the AE Defendants respectfully requests that this Court issue an Order: (1) dismissing Plaintiffs' claims against the AE Defendants for lack of personal jurisdiction; (2) denying Plaintiffs' request for jurisdictional discovery as to the AE Defendants; and (3) for such other and further relief as the Court may deem just and proper.

Dated: January 10, 2020
Syracuse, New York

BOND, SCHOENECK & KING, PLLC
Attorneys for Defendants Applied Energetics, Inc., Gregory J. Quarles, Bradford Adamczyk, Jonathan Barcklow, John Schultz, and Dan W. Baer

By: */s/ Jonathan B. Fellows*
Jonathan B. Fellows, Esq. (#101628)