UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Elliott Associates, L.P., *et al.*,	:	
Plaintiffs,	:	10 Civ. 0532 (HB)(THK)
v.	:	
	:	Oral Argument Requested
Porsche Automobil Holding SE, f/k/a Dr. Ing. h.c. F. Porsche AG; Wendelin Wiedeking; and Holger P. Haerter,	:	
Defendants.	:	

Black Diamond Offshore Ltd., *et al.*,	:	
Plaintiffs,	:	10 Civ. 4155 (HB)(THK)
v.	:	
	:	Oral Argument Requested
Porsche Automobil Holding SE, f/k/a Dr. Ing. h.c. F. Porsche AG; Wendelin Wiedeking; and Holger P. Haerter,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW OF MR. HOLGER P. HAERTER IN FURTHER SUPPORT OF HIS MOTION TO DISMISS

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Plaintiffs' opposition does nothing to advance their cause. Rather than address Defendants' arguments, Plaintiffs resort to mischaracterization and misdirection. Plaintiffs' tactic of lumping together all three Defendants' alleged contacts with the United States cannot, as a matter of law, justify the exercise of specific jurisdiction over Mr. Härter. Each defendant's contacts with the forum must be assessed individually and independently of allegations of liability. With respect to Mr. Härter, Plaintiffs allege only a single contact with the forum: an appearance at a road show presentation in New York in 2005. This one contact predates by more than two years the alleged fraud and the commencement of Plaintiffs' swap scheme. It is irrelevant here and cannot support an exercise of jurisdiction.

Plaintiffs have also failed to state a claim against Mr. Härter under Section 10(b). As a threshold matter, *Morrison v. National Australia Bank*, 561 U.S. ---, 130 S. Ct. 2869 (2010), prevents Plaintiffs from bringing their claims in this Court because Plaintiffs' swap transactions are not domestic transactions under *Morrison*. In addition, Plaintiffs' allegation that Mr. Härter's interview with the *Frankfurter Allgemeine Zeitung* was implicitly misleading is directly undercut by the interview itself.[1]

I. PLAINTIFFS FAILED TO MAKE THE REQUIRED PRIMA FACIE JURISDICTIONAL SHOWING

Plaintiffs do not dispute that this Court cannot exercise general jurisdiction over Mr. Härter. They further agree that to demonstrate specific jurisdiction, they have the burden of making a prima facie showing that their claim "arises out of or relates to" Mr. Härter's contacts with the forum and that any assertion of jurisdiction must "comport[] with traditional notions of fair play and substantial justice" by being "reasonable under the circumstances." *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 242-43 (2d Cir. 1999); *see* Opp. at 39-40. Plaintiffs' allegations satisfy none of these requirements.

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[1] Mr. Härter incorporates by reference the arguments made in his co-Defendants' reply briefs.

Plaintiffs' attempt to lump together all of the Defendants' alleged contacts with the United States does not, and cannot, as a matter of law, amount to a prima facie showing of specific jurisdiction with respect to Mr. Härter. Porsche's alleged contacts cannot be "imputed" to Mr. Härter; each defendant's contacts with the forum must be assessed individually, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984), and independently of allegations of liability. *City of Monroe Employ. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 667 (6th Cir. 2005).

A. Plaintiffs' Factual Allegations Do Not Establish Minimum Contacts

Mr. Härter's appearance at a road show presentation in New York in 2005 did not give rise to Plaintiffs' claims. That presentation occurred two and a half years before both the alleged commencement of the fraud and the time that Plaintiffs initiated their private swap scheme. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (defendant's contacts three years prior to the period of alleged misrepresentations insufficient to confer personal jurisdiction). Plaintiffs do not allege that any misrepresentation was made at the road show presentation, that any Plaintiff attended the presentation, or that any Plaintiff relied on statements made there. Indeed, the Complaints do not even quote anything Mr. Härter said at the presentation. Therefore Plaintiffs' claims do not arise out of or relate to the road show presentation and it is of no consequence. *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 104 (2d Cir. 2006) (noting that when a claim has "at best, a tangential relationship" to defendant's contacts with forum, "the dispute[] [cannot] be characterized as having arisen from [activity within the forum]").

Plaintiffs' reliance on *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010), only highlights the immateriality of Mr. Härter's alleged contact. In *Chloé*, the plaintiff sought relief for trademark infringement. Defendant Ubaldelli shipped handbags from California to New York, including one counterfeit handbag bearing the plaintiff's trademark, an act which the court concluded "might well be sufficient, by itself, to subject [Ubaldelli] to the jurisdiction of a New York court." *Id.* at 170. Thus, the defendant's contact with the forum was

the essence of the plaintiff's claim. Here, Mr. Härter's single presentation in New York is not alleged to have anything to do with Plaintiffs' claims. *See Walther v. Maricopa Int'l Invs. Corp.*, No. 97 Civ. 4816, 1998 WL 186736, at *8 (S.D.N.Y. Apr. 17, 1998) (Baer, J.).

B. Plaintiffs' Factual Allegations Do Not Establish Foreseeable Effects

Plaintiffs fare no better with Mr. Härter's single alleged misrepresentation on July 28, 2008, because that statement had no foreseeable effect in the United States. Foreseeability in the context of personal jurisdiction does not carry with it the same "low floor" that governs tort liability; rather, a defendant "must know, or have good reason to know, that his conduct will have effects in the [forum]." *Leasco Data Processing Equip. Corp.*, 468 F.2d at 1341. Nothing in Plaintiffs' allegations suggests that Mr. Härter had any reason whatsoever to know that his July 28, 2008 interview with the *Frankfurter Allgemeine Zeitung*—given in German to a German newspaper in Germany regarding a German company—would have an effect in the United States.

None of the cases on which Plaintiffs rely supports the proposition that Mr. Härter's interview had foreseeable effects in the United States. *See* Opp. at 41 (citing *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 304-06 (E.D.N.Y. 2002); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 399-401 (S.D.N.Y. 2005); *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 40-41 (D. Conn. 1996)). All of these cases concern defendants who signed or approved allegedly false or misleading SEC filings, which is "a sufficient contact with the jurisdiction to justify this Court's exercise of [personal] jurisdiction," *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 399, because "SEC filings generally are the type of devices that a reasonable investor would rely on in purchasing securities," *Itoba Ltd.*, 930 F. Supp. at 41, and are "enough to put the defendant on notice of potential suit in the United States," *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d at 306. Giving an interview in German to a German newspaper does not remotely equate to signing a registration statement filed with the SEC in the United States.

And, of course, it is not enough that an act committed outside the forum have global effects. Nor is it enough that acts ultimately have an impact in the United States if, as

here, "the U.S. cannot fairly be characterized as the focal point of either [the defendant's] acts or the harm suffered." *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 354 (D. Md. 2004). Lastly, a complaint must plead a "factual basis" to support its allegations that acts were targeted at the forum. *Id.* at 355. Plaintiffs' conclusory allegations that Defendants were targeting New York-based hedge funds are insufficient to meet any of these standards. *Id.*; *see also* Haerter Mem. at 3-4. Indeed, Plaintiffs' unsubstantiated assertions are nothing short of mystifying since 22 of the 39 Plaintiffs are not even in the United States and Plaintiffs failed to plead any facts suggesting that Mr. Härter was even aware of their existence.

C. Porsche's Alleged Contacts Cannot Be Imputed to Mr. Härter

In their zeal to avoid dismissal, Plaintiffs skim over analogous Section 10(b) cases, such as *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008) (finding no personal jurisdiction over individual directors despite company's contacts with forum), and *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 457 (S.D.N.Y. 2005) (dismissing claims of nine plaintiffs for lack of personal jurisdiction over an individual defendant despite company's contacts with forum), and focus instead on a trademark infringement case involving a closely-held company, *Chloé v. Queen Bee of Beverly Hills, LLC*, and a dispute involving the sale of New York franchises to a New York-based company, *Retail Software Services, Inc. v. Lashlee*, 854 F.2d 18 (2d Cir. 1988).

These cases are, naturally, inapposite. The corporate structure of defendant Queen Bee and its relationship to individual defendant Ubaldelli bear no similarity to the structure of Porsche or the relationship between Porsche and Mr. Härter. The simple structure of the small closely-held companies in *Chloé* and *Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d 460 (1988) (relied on by *Chloé* and *Retail Software Services*), allowed the courts in those cases to look through the corporate forms to the individuals controlling their actions. *See, e.g.*, *Chloé*, 616 F.3d at 169 (describing the agency relationship between Ubaldelli and Queen Bee). There

are no such allegations here.[2]

Nor does Plaintiffs' allegation that a single investor relations employee opined that Mr. Härter was the "mastermind" of Porsche's alleged options strategy change the fact that Mr. Härter did not personally control a multinational automobile manufacturer such that any actions taken by Porsche could be imputed to him for the purpose of establishing personal jurisdiction. *See In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d at 323 ("jurisdiction must be based on individual contacts, not contacts imputed from the corporation").[3] In fact, Plaintiffs' invitation to impute Porsche's alleged conduct to Mr. Härter is just another invalid attempt to confuse jurisdiction and control person liability. *See In re Parmalat Sec. Litig.*, 376 F. Supp. 2d at 454; *City of Monroe Employ. Ret. Sys.*, 399 F.3d at 667 ("[L]iability is not to be conflated with amenability to suit in a particular forum.").

D. Exercising Personal Jurisdiction over Mr. Härter Would Be Unreasonable

Mr. Härter's lack of sufficient contacts with the forum makes an exercise of jurisdiction unreasonable. In the reasonableness analysis, which is conducted only if minimum contacts are established (which Plaintiffs have failed to do), the strength of a defendant's contacts bears a direct relationship to the exercise of personal jurisdiction. A plaintiff who makes a "weak showing of minimum contacts" must provide a "stronger demonstration of reasonableness" in order to satisfy due process. *Stolt Tankers B.V. v. Geonet Ethanol, LLC*, 591 F. Supp. 2d 612, 618 (S.D.N.Y. 2008). Under the circumstances of this case, no exercise of jurisdiction over Mr. Härter could be reasonable.

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[2] Similarly, in *Retail Software Services*, the court found jurisdiction over two individual defendants who were directly involved in the sale of New York franchises to the New York-based plaintiff and who were alleged to have personally made misleading representations in order to induce the plaintiff to purchase the New York franchises. *See* 854 F.2d at 20-22 (concluding that the individual defendants "are 'primary actor[s] in the transaction in New York' that is the source of this litigation") (quoting *Kreutter*, 71 N.Y. 2d at 470).

[3] As further evidence that Plaintiffs are making it up as they go along, they simultaneously argue that Mr. Härter was the "mastermind" of Porsche's alleged option strategy and that Dr. Wiedeking "directed the entire scheme." Opp. at 40. Clearly Plaintiffs do not consider themselves bound by the normal rules of fact pleading, or logic.

Plaintiffs' claimed interests in proceeding here, in what they assert is a convenient forum for them, are belied by the fact that the majority of Plaintiffs are not actually in the United States. Plaintiffs are a loose affiliation of mostly non-United States hedge funds that believe suing in the United States gives them a tactical advantage. *See Morrison*, 130 S. Ct. at 2886 (observing that the United States "has become the Shangri-La" for plaintiffs "allegedly cheated in foreign securities markets"). This group of Plaintiffs has very little legitimate connection to the United States. Moreover, it cannot seriously be disputed that the evidence is more convenient to Germany than the United States, *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996) (discounting claimed interests of plaintiff in obtaining convenient and effective relief in Vermont where plaintiff was not a Vermont citizen and had not identified witnesses or other evidence more convenient to that forum), and that a core issue here is the legality under German law of Porsche's accumulation of VW shares.

On the other hand, defending an action in a foreign jurisdiction would place an extreme burden on Mr. Härter, who is no longer an employee of Porsche. *See City of Monroe Employ. Ret. Sys.*, 399 F.3d at 666 (giving "significant weight" to the "substantial burden" that "defend[ing] oneself in a foreign legal system" would place on a retired Japanese President and CEO of corporation). In addition to being required to travel to the United States to attend trial, Mr. Härter would be burdened by the delay and high cost of translating from German into English an enormous number of discovery and trial documents, all of which are located in Germany, and the difficulty of seeking the testimony of German witnesses. Accordingly, because Plaintiffs have failed to show that Mr. Härter possesses the requisite minimum contacts with the United States or that the exercise of jurisdiction over him would be reasonable, the claims against him must be dismissed for lack of personal jurisdiction.

II. PLAINTIFFS FAILED TO STATE A CLAIM UNDER SECTION 10(b)

A. *Morrison* Precludes Plaintiffs' Section 10(b) Claims

Plaintiffs admit that to avoid dismissal under *Morrison*, they need to show a transaction in a security listed on a domestic exchange or a domestic transaction in a security.

Opp. at 1. They have shown neither. By their own admission, they engaged in a "domestic, off-exchange *securities-based* swap transaction" that "achiev[ed] an economic result similar to a short sale" of VW stock. *Id.* at 9-10 (emphasis added).

Off-exchange transactions in securities-based swap agreements referencing German shares are not "domestic transactions" within *Morrison*. *See* Opp. at 14 (noting the "focus of the Exchange Act" is on the "purchases and sales of securities in the United States" (citing *Morrison*, 130 S. Ct. at 2884)). There is no "*national* public interest" in agreements between private parties, many of whom do not even reside in the United States. *Morrison*, 130 S. Ct. at 2882 (emphasis in original). When an off-exchange transaction references a foreign security, as Plaintiffs say their transactions do, *see* Opp. at 9, the transaction is a "predominantly foreign securities transaction" for which a claim does not exist in the United States. *See In re Société Générale Sec. Litig.*, No. 08 Civ. 2495, 2010 WL 3910286, at **6-7 (S.D.N.Y. Sept. 29, 2010) (applying *Morrison* to dismiss Section 10(b) claims of plaintiffs who purchased SocGen ADRs traded on the over-the-counter market in New York).[4] And, while Plaintiffs try to analogize their transactions to ADRs, *see* Opp. at 12-13, private swaps are plainly not ADRs.

Plaintiffs ultimately admit that their transactions are not in fact "domestic" but only "*substantially* domestic." Opp. at 10 (emphasis added). *Morrison*, of course, does not recognize "substantially domestic" transactions. Plaintiffs' admission still mischaracterizes their transactions, which are not actually "substantially domestic." Signing confirmations in the United States and opting for New York choice of law and forum selection provisions does not turn a foreign transaction into a domestic one. *See Plumbers' Union Local No. 12 Pension Fund v. Swiss Reins. Co.*, No. 08 Civ. 1958, 2010 WL 3860397, at *9 (S.D.N.Y. Oct. 4, 2010) (transaction was *not* domestic even though purchaser was a United States resident, who made the

[4] Section 10(b) reaches only "deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Morrison*, 130 S. Ct. at 2884 (quoting 15 U.S.C. § 78j(b)). Thus, Section 10(b) protects transactions in U.S.-registered securities and unregistered U.S. securities. *Id.* at 2885 n.10 (applying the presumption against extraterritoriality to interpret "any security not so registered" to mean domestic purchases and sales of unregistered securities). Section 10(b) does not protect transactions in foreign-registered securities.

decision to invest in the United States, placed the order in the United States, and suffered harm in the United States).

Plaintiffs rely on a single case that predates *Morrison* to assert that "[a] court in this District recently rejected Defendants' reasoning . . . refusing a defendant's request to focus on a foreign security referenced in a domestic swap agreement rather than the swap agreement itself as the relevant financial instrument." Opp. at 11-12 (relying on *S.E.C. v. Rorech*, 673 F. Supp. 2d 217, 226 (S.D.N.Y. 2009)). However "recent" *Rorech* is, it pre-dates *Morrison* and applies the now-discredited conduct and effects tests. *Rorech*, 673 F. Supp. 2d at 226; *see also* Porsche Reply at 3-4. In considering the extension of Section 10(b) to securities-based swap agreements, *Rorech* reasoned that when Congress explicitly intended a purchase or sale of a security to be covered by Section 10(b), it intended a swap transaction referencing that security to be covered. 673 F. Supp. 2d at 225. Applying this same reasoning, when Congress did *not* intend a direct purchase or sale of a security to be covered by Section 10(b), it similarly did not intend a swap transaction referencing that security to be covered. Thus, even if *Rorech* were still good law, it would not support a claim here, where the alleged fraud relates to a German stock, not the allegedly "substantially domestic" swap scheme. The intent behind the conclusion that individuals should not be able to evade insider trading laws by using swaps is diametrically opposed to the intent behind Plaintiffs' belief that a party can create its own jurisdiction using swaps, *i.e.*, to evade case law to gain a private litigation advantage. Plaintiffs' conclusion is all the more bizarre (and subversive of *Morrison*) considering that Plaintiffs themselves are mostly non-United States entities and seek by their swap transactions to create United States jurisdiction over Defendants who were not party to those swaps. *See Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09 Civ. 23248, 2010 WL 3119908, at *3 (S.D. Fla. Aug. 6, 2010) ("[T]he Defendants were not parties to the share purchase agreement and Quail fails to offer any persuasive reason why the Defendants should be bound by Quail and Flameck's agreement that the transaction close in the United States. Quail's securities fraud claims are

therefore insufficient under *Morrison*'s transactional test because the Amended Complaint does not allege the requisite domestic transaction.").

Plaintiffs also do not, and could not, argue that their swap transactions were explicitly solicited by either VW or Porsche within the United States. *See In re Société Générale Sec. Litig.*, No. 08 Civ. 2495, 2010 WL 3910286, at *5 (defining "domestic transactions" under Section 10(b) as securities transactions "explicitly solicited by the issuer within the United States") (citing *Stackhouse v. Toyota Motor Co.*, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010)); *see also Plumbers' Union Local No. 12 Pension Fund*, No. 08 Civ. 1958, 2010 WL 3860397, at *8. Accordingly, Plaintiffs' off-exchange swap transactions referencing German shares do not satisfy *Morrison*'s transactional test.

B. Mr. Härter's July 28, 2008 Interview Was Not Misleading

The sole alleged misstatement attributed to Mr. Härter fails to state a claim for relief. By selectively quoting Mr. Härter's July 28, 2008 interview, Plaintiffs imply that Porsche's intent was to stop its acquisition of VW shares as soon as the 51% threshold was crossed. The interview itself, which refers to "the targeted takeover of Volkswagen," negates this implication:

> We definitely intend to cross the 51 percent boundary this year and an entire series of antitrust agencies must agree to this. . . . In the first step we will execute the forward contract, the earliest date for which is September 2, but which requires the approval of the antitrust authorities for its completion. Delays by two, three weeks are not a problem for us and are rather normal. *Then we will try to continue to buy*.

Ex. A to Chepiga Decl. at 2 (emphasis added). There is nothing in the record to support Plaintiffs' conclusory speculation that this statement was misleading.

The text of the interview further contradicts Plaintiffs' allegation that Porsche had the ability "to go to 75% . . . by mid-2008." *See* Opp. at 24 n.16. During the interview, which was given in July 2008, Mr. Härter stated that Porsche needed the approval of several antitrust agencies before it could cross the 51% boundary and that some of these approvals had not been

received and were not expected until September. Ex. A at 2. In addition, the consequences of the European Court of Justice's ruling on the legality of the VW Act were still unresolved. *Id.* at 2-3.

Moreover, no Plaintiff alleges that it entered into any short sale or swap agreement on the basis of—or even after—Mr. Härter's July 28 interview. The dates of Plaintiffs' alleged short sales and swap transactions are noticeably absent from the Complaints. Plaintiffs' failure to allege that they took any affirmative action in reliance on, or even following, Mr. Härter's July 28 interview is another ground on which to dismiss the misrepresentation claim against him. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975).[5]

CONCLUSION

For the reasons set forth above, in Mr. Härter's opening brief, and in the briefs filed by Porsche and Dr. Wiedeking, Mr. Härter respectfully requests that the Court dismiss the Complaints against him with prejudice.

Dated: New York, New York
October 26, 2010

Respectfully submitted,

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[5] Plaintiffs also fail to state a market manipulation claim against Mr. Härter. *See* Porsche Reply at 14-15; Haerter Mem. at 6-7. Moreover, Plaintiffs here pleaded no facts that demonstrate that Mr. Härter acted with scienter or that Plaintiffs relied on anything Mr. Härter said. *See* Wiedeking Reply at 9-10.