UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Elliott Associates, L.P. et al., Plaintiffs, v. Porsche Automobil Holding SE, f/k/a Dr. Ing. h.c. F. Porsche AG; Wendelin Wiedeking; and Holger P. Haerter, Defendants.	10 Civ. 0532 (HB)(THK) Oral Argument Requested
Black Diamond Offshore Ltd. et al., Plaintiffs, v. Porsche Automobil Holding SE, f/k/a Dr. Ing. h.c. F. Porsche AG; Wendelin Wiedeking; and Holger P. Haerter, Defendants.	10 Civ. 4155 (HB)(THK) Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT PORSCHE AUTOMOBIL HOLDING SE'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) OR ON THE BASIS OF *FORUM NON CONVENIENS*

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Porsche Automobil Holding SE ("Porsche") submits this memorandum in support of its motion to dismiss the Third Amended Complaint ("TAC") filed by Elliott Associates, L.P. et al. ("*Elliott*") and the Amended Complaint ("AC") filed by Black Diamond Offshore Ltd. et al. ("*Black Diamond*") (collectively, the "Complaints") for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and lack of pendent jurisdiction or, alternatively, on the basis of *forum non conveniens*.

SUMMARY INTRODUCTION

Plaintiffs—an international collection of sophisticated hedge funds—gambled on foreign stock exchanges and lost. By establishing short positions through short sales and private "swap" agreements relating to the ordinary shares of Volkswagen AG ("VW") from March 4, 2008 through October 31, 2008 (the "Relevant Period"), Plaintiffs bet that the price of this security issued by a German company and traded only on foreign exchanges would decline. (TAC ¶¶ 2, 154; AC ¶¶ 7, 133.) But when the price of VW ordinary shares ("VW Shares") "shot upwards" instead, Plaintiffs allege they were forced to cover their short positions at artificially high prices, and now seek to recover their alleged losses because their "safe bets" did not "return significant profits." (TAC ¶¶ 2, 3; AC ¶¶ 1, 7, 9.)

Plaintiffs claim that Porsche—a German company—"lured" them "into a trap" by "cornering the market" for VW Shares through secret transactions—none of which is alleged to have occurred in the United States—resulting in a massive "short squeeze" on German stock markets. (TAC ¶¶ 2, 5; AC ¶¶ 1, 8-9.) Plaintiffs chose to speculate on German share prices and all the misstatements and market manipulation they allege occurred outside the United States, but they attempt to invoke U.S. law by asserting claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b) (2010), and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Their attempt fails because Section 10(b) does not apply to their patently foreign claims.

In *Morrison* v. *National Australia Bank Ltd.* ("*NAB*"), the Supreme Court recently issued a landmark decision addressing the "merits question" of "what conduct § 10(b) prohibits." 130 S. Ct. 2869, 2877 (2010). Sounding the death knell for the long-established "conduct and effects" test, the Court adopted a "transactional test" that limits Section 10(b) to the "use of a manipulative [ ] device or contrivance . . . in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Id*. at 2888. Plaintiffs try to satisfy *NAB* by contending that they entered into security-based swap agreements referencing VW Shares by (i) signing so-called confirmations in the United States, and (ii) designating New York as the governing law and forum in these agreements with unidentified counterparties—none of which is alleged to be located in the United States.

Under Plaintiffs' theory, even though the alleged fraud and manipulation occurred abroad, Section 10(b) would regulate foreign markets in foreign securities traded solely on foreign exchanges and subject to foreign law, as long as private parties signed confirmations in the United States for swap agreements referencing those foreign securities. Plaintiffs can find no support in *NAB* for this expansive reading of Section 10(b) and there is none. As the Supreme Court made clear in *NAB*, the Exchange Act does not reach "conduct in this country affecting exchanges or transactions abroad." *Id*. at 2885. The security-based swap agreements at issue here are privately negotiated contracts that are not traded on any exchanges. The most sensible reading of *NAB* is that Section 10(b) covers these agreements only when the referenced security is traded on a U.S. exchange or otherwise purchased or sold in the United States. Any other construction would result in the "probability of incompatibility with the applicable laws of other countries" disavowed by the Court in *NAB*. *Id*. VW Shares are not traded on a U.S. exchange, and Plaintiffs do not allege that they transacted in such shares in the United States.

Moreover, signing confirmations in the United States and electing U.S. law and submitting to U.S. jurisdiction may have significance as between Plaintiffs and their swap counterparties—none of which included any of the Defendants—but do not suffice to establish that Plaintiffs' swap agreements were "domestic transactions," *i.e.*, purchases or sales of securities in the United States, as required by *NAB*.

Not only have Plaintiffs failed to state a claim under Section 10(b), the Complaints should also be dismissed under the doctrine of *forum non conveniens*, which recognizes that there is no "talismanic significance to the citizenship or residence of the parties." *Alcoa S.S. Co*. v. *M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir. 1980) (en banc). There is no question that Germany is an adequate forum. Moreover, German law governing securities fraud cases expressly provides for exclusive jurisdiction in German courts, and a U.S. judgment against Porsche would not be enforceable in Germany. German authorities are also investigating allegations similar to those alleged here. Because this action involves German law, German securities, German markets, and German conduct, Germany "has a far greater interest in this litigation than the United States." *Alfadda* v. *Fenn*, 159 F.3d 41, 46 (2d Cir. 1998).

While the Court need not reach this point, Plaintiffs have also failed to meet the pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, and Fed. R. Civ. P. 9(b) as to either their misstatement or market manipulation claims under Section 10(b). As to Plaintiffs' misstatement claims, viewed against all information in the public domain—most of it cited in the Complaints—Porsche's statements regarding its VW stake simply did not foreclose the possibility that Porsche would decide to seek a 75% stake in VW Shares. With respect to Plaintiffs' market manipulation claims, because they are based on "alleged misrepresentations or omissions," Plaintiffs "have not made out a market manipulation claim" under Section 10(b). *Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005).

Having failed in their effort to contrive federal claims, Plaintiffs' sweeping common law fraud claims—the bulk of all their claims and the only claims asserted by half of the Plaintiffs in this federal lawsuit—must be dismissed as well for want of jurisdiction. But even if jurisdiction existed, they would have to be dismissed for failure to state a claim. Under New York choice of law rules, these claims are governed by German law and, even under New York law, they suffer from the same pleading defects as the purported federal fraud claims.

BACKGROUND[1]

A. The Parties

Plaintiffs in the *Elliott* action are 35 global hedge funds, 18 of which are organized outside the United States. (TAC ¶¶ 34-68.) Plaintiffs in the *Black Diamond* action are four hedge funds, all of which are organized under the laws of foreign jurisdictions. (AC ¶¶ 15-18.)

Porsche is organized under and subject to the laws of the European Union ("EU") and Germany, and is headquartered in Stuttgart, Germany. (AC ¶ 21; Declaration of Peter O. Mülbert, dated August 26, 2010 ("Mülbert Decl.") ¶¶ 14-15.) Although Porsche is a public company, with its non-voting preference shares publicly traded in Germany, all of its ordinary voting shares during the Relevant Period were owned by members of the Porsche and Piëch families, the descendants of the company founder. (Exs. 1, 2 at 27.)[2]

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[1] In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider "any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). The Court may also consider press releases, financial reports and newspaper articles cited by Porsche, which Plaintiffs specifically allege were relied upon in bringing the suit. (TAC introduction; AC introduction); *see Garber* v. *Legg Mason Inc.*, 347 Fed. Appx. 665, 669 (2d Cir. 2009) (taking judicial notice of press articles and SEC filings to determine what information was publicly available). In addition, the Court may take judicial notice of books and other "authoritative text[s]." *Garb* v. *Republic of Poland*, 440 F.3d 579, 594 n.18 (2d Cir. 2006) (internal quotations omitted).

[2] Unless otherwise indicated, all references to "Ex." are to the exhibits accompanying the Declaration of Gandolfo V. DiBlasi, dated August 31, 2010.

During the Relevant Period, Dr. Wendelin Wiedeking served as Porsche's Chief Executive Officer, and Mr. Holger P. Haerter served as Porsche's Chief Financial Officer. (TAC ¶¶ 70-71; AC ¶¶ 22-23.) Both individual defendants are German citizens residing in Germany.

B. VW

VW is a German corporation, headquartered in Wolfsburg, Germany. (AC ¶ 52.) During the Relevant Period, the German State of Lower Saxony owned slightly more than 20% of VW Shares. (TAC ¶ 6; AC ¶ 65.) VW Shares are not traded on any U.S. stock exchange, and its ADRs are traded over-the-counter in the United States but not on any U.S. stock exchange. (TAC ¶¶ 92, 95; AC ¶ 54.) VW has always played a significant role in Porsche's business, which due to Porsche's limited size and manufacturing capability, depends upon VW for components and technical support to control costs. (AC ¶ 56; Ex. 3 at 4.) The two companies share a corporate history that dates back to Porsche's founder, Ferdinand Porsche, who developed the "VW beetle" for VW. (Ex. 4.) The "technical and strategic collaboration between Porsche and Volkswagen" has produced "benefits for both partners" (*id.*), and by 2005, Porsche's collaborative projects with VW accounted for more than one-third of Porsche's sales volume. (Ex. 3 at 4.)

Under the VW Act, a German law enacted in 1960 to shield VW from a hostile takeover (Ex. 5), any holder of VW Shares was limited to 20% of the voting power, and approval by 80% of VW Shareholders was required to impose a "domination and profit-transfer" agreement,[3] instead of the typical 75% threshold under German law. (TAC ¶ 6.) The VW Act effectively prevented VW from being the target of a takeover attempt, because the State of Lower Saxony held minority blocking power. In 2004, the European Commission ("EC") requested that Germany amend the VW Act because it violated EU law. (Ex. 7.) If the VW Act were invalidated, Porsche's most vital business partner would become a potential takeover target. (Ex.

[3] A domination agreement between an acquiring firm and a target firm allows the acquiring firm to control the target firm's decisions. (TAC ¶ 6.) A profit transfer agreement requires the target firm to transfer its profits (and any losses) to the acquiring firm, facilitating the financing of takeover costs. (Ex. 6 at 134.)

8.) Porsche, therefore, decided to acquire a significant shareholding in VW and thus protect its basic industrial logic and cooperative relationship with VW. (TAC ¶ 9; AC ¶ 56.)

C. Porsche's Initial Acquisition of a Stake in VW

Porsche continually increased its stake in VW in response to various factors, including the status of the VW Act, the support of the Porsche and Piëch families, and general economic conditions. (TAC ¶¶ 97-107; AC ¶¶ 55-59; Exs. 4, 8, 9.) In 2005, Porsche began acquiring VW Shares "to secure [its] business relations with" VW (Ex. 8), initially acquiring a 10.26% stake in September 2005, then publicly announcing shareholdings of 18.5% in October 2005, 21.2% in June 2006, 27.4% in November 2006, and 30.9% in March 2007. (Exs. 10, 11; TAC ¶¶ 97, 99, 102, 106.)

In addition to purchasing VW Shares, Porsche bought cash-settled options relating to VW Shares, which did not entitle Porsche to purchase VW Shares but protected Porsche against increasing prices of VW Shares, if it later decided to purchase such shares, by providing Porsche with cash equal to the difference between the strike price and a higher market price. (Exs. 9, 12 at 3.) Plaintiffs allege that Porsche "concealed its plan" to acquire a 75% stake in VW through these options (TAC ¶ 10; AC ¶ 8), but do not allege that Porsche entered into the cash-settled options in the United States or that they had any connection with the United States. Under German law, cash-settled options need not be disclosed. (TAC ¶ 11; Mülbert Decl. ¶¶ 34-35.) Nonetheless, even before the Relevant Period, Porsche disclosed that it held such options relating to VW Shares and continued to do so during the Relevant Period, including disclosing that it had "secured cash-settled stock options which provide for settlement in cash and not share subscriptions" on March 4, 2008. (Exs. 12 at 3, 13 at 167, 14 at 2.)

D. Porsche Decides To Pursue a Majority Position in VW and Subsequently Announces its Decision To Aim To Increase its Stake to 75% in 2009.

On March 3, 2008, Porsche decided and announced its intention to acquire "more than [a] 50%" VW stake. (TAC ¶ 83(l); AC ¶ 32.) On March 10, 2008, in responding to media speculation and referring to the March 3, 2008 decision, Porsche denied any plans to go to 75%, noting that Lower Saxony's 20% VW ownership made "the probability" of acquiring 75% "very small indeed." (TAC ¶ 114; AC ¶ 90; Ex. 15.) After widespread reports of opposition to Porsche's takeover attempt by Prof. Ferdinand K. Piëch ("Prof. Piëch"), chairman of VW's Supervisory Board and at the same time a member of Porsche's Supervisory Board (Exs. 16, 17; AC ¶ 113), Porsche publicly announced on October 24, 2008 that its controlling families, including Prof. Piëch, were firmly behind its acquisition of VW. (Ex. 18.)

On October 26, 2008, Porsche announced that, due to distortions in the market, it had decided to disclose its holdings of 42.6% of VW Shares and "31.5 percent in so called cash settled options relating to" VW Shares "to hedge against price risks, representing a total of 74.1 percent." (Ex. 9; TAC ¶ 30; AC ¶ 75.) Porsche made clear that the options would be settled "in cash" with Porsche receiving "the difference between the then actual Volkswagen share price and the underlying strike price in cash." (Ex. 9; TAC ¶ 30.) Porsche said it would increase its position to above 50% in November/December 2008, and had decided to aim to increase its VW stake "to 75% in 2009, paving the way to a domination agreement," economic conditions permitting. (TAC ¶ 30; Ex. 9.) According to Plaintiffs, by "reveal[ing] the vast extent of its holdings of VW shares" in the October 26, 2008 announcement, Porsche's "intended consequence was a short squeeze in which the price of VW shares shot upwards." (TAC ¶ 3; AC ¶ 9.)

E. Related German Proceedings

Following Porsche's October 26, 2008 announcement, Germany's Federal Financial Supervisory Authority (the "BaFin"), whose role is similar to that of the SEC, began an "investigation into VW's share-price movements for signs of market manipulation" by Porsche. (Ex. 19.)[4] At the end of March 2009, BaFin concluded that it had found no wrongdoing by Porsche, and in May 2009, BaFin launched a second investigation. (Ex. 21.) The Stuttgart Public Prosecutor is now leading a related investigation. (Ex. 22.)

Finally, private parties from various countries have taken steps to commence civil law-based "conciliatory proceedings" (*i.e.*, mediation anticipating litigation) in Germany against Porsche by disclosing their intent to claim damages based on allegations of market manipulation and misstatements similar to those alleged in the Complaints. (Declaration of Gerhard Wagner, dated August 27, 2010 ("Wagner Decl.") ¶ 14.)

F. Plaintiffs' Claims and Alleged Transactions

Plaintiffs allege that Porsche "misled [them] with regard to its ownership of VW shares and its intentions regarding acquisition of 75% of VW shares." (TAC ¶ 14; AC ¶ 86.) *Elliott* Plaintiffs concede that all 11 of Porsche's alleged misstatements on which they predicate their misrepresentation claims were made in Germany (TAC ¶¶ 111, 114, 118, 120, 122, 124, 130, 132, 135, 137) or, in one instance, in France (*id.* ¶ 127). *Black Diamond* Plaintiffs base their claims on seven of the same alleged misstatements, none of which they allege was made in the United States. (AC ¶¶ 87-113.) These statements are subject to EU and German securities law. (Mülbert Decl. ¶¶ 19-20, 31-33; Wagner Decl. ¶¶ 15-20.) Plaintiffs also allege that Defendants "manipulat[ed] the market in VW shares" (TAC ¶ 10; AC ¶ 14), which trade only on foreign exchanges (TAC ¶ 92; AC ¶ 54).

According to Plaintiffs, "Porsche's intentional misrepresentations and manipulative acts induced [them] to sell VW shares short and to enter securities-based swap agreements that would increase in value as the price of VW shares declined." (TAC ¶ 14; AC ¶ 7.) Both types of

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4 An affiliate of one of the Elliott Plaintiffs, Elliott Advisors (UK) Limited (Ex. 20 at 1, 6, 7), urged the BaFin on October 29, 2008, to investigate Porsche's trading in VW Shares. (Mülbert Decl. ¶ 45.)

transactions involved VW Shares. Through short sales, Plaintiffs "borrowed VW shares and sold them, undertaking an obligation to repurchase the shares and return them at a future date." (TAC ¶ 2.) The *Black Diamond* Plaintiffs and 16 of the 35 *Elliott* Plaintiffs allege that they also entered into security-based swap agreements—contracts in which "Plaintiffs and their counterparties agree[d] to exchange cash flows that depend on the price of a reference security, here VW shares." (TAC ¶ 2 n.2; AC ¶ 7 n.1.) Because these Plaintiffs had "swap based short positions," they were entitled to receive payments when the price of VW shares decreased, and required to make payments when the price of VW shares increased, "achieving an economic result similar to a short sale." (TAC ¶ 2 & n.2; AC ¶ 7 n.1.) Swap agreements, which are privately negotiated and generally non-transferrable, last for fixed terms, during which the counterparties exchange periodic payments. (Ex. 23 at 59.) These agreements do not require actual ownership of the referenced security and are not "traded on any exchange, foreign or domestic." (TAC ¶ 2 n.2.)

The Plaintiffs who entered into swap agreements referencing VW Shares assert claims as to alleged losses from those agreements under Section 10(b): false and misleading statements (Count I) and market manipulation (Count II), as well as violations of Section 20(a) of the Exchange Act (Count III). Those are the only federal claims asserted. All Plaintiffs bring common law fraud claims (Count IV).

ARGUMENT

I. SECTION 10(b) DOES NOT APPLY TO PLAINTIFFS' CLAIMS.

Plaintiffs' allegations regarding short sales of VW Shares and security-based swap agreements referencing VW Shares do not satisfy *NAB*'s transactional test. Plaintiffs' short sales cannot form the basis for Section 10(b) claims under either prong of this test, because Plaintiffs do not—and cannot—allege that such short sales were "made in the United States" or "involve[d] a security listed on a domestic exchange." *NAB*, 130 S. Ct. at 2886. Recognizing the futility of a Section 10(b) claim premised on such short sales, 19 of the *Elliott* Plaintiffs have dropped their federal claims. But now in a last-ditch effort to frame a U.S. case for their German claims, 16 *Elliott* Plaintiffs and the *Black Diamond* Plaintiffs allege that they transacted in security-based swap agreements referencing VW Shares in the United States. Like their short sale allegations, Plaintiffs' swap allegations fail because (i) these swaps referenced a German security traded exclusively on foreign exchanges and not covered by Section 10(b), and (ii) Plaintiffs cannot create a domestic transaction simply by alleging that certain conduct related to a foreign transaction occurred in the United States.

A. Under *NAB*, This Court Must Dismiss Plaintiffs' Claims Based on Swap Agreements Referencing VW Shares.

In *NAB*, the Supreme Court affirmed the Second Circuit's dismissal of Section 10(b) claims asserted by Australian shareholders who purchased shares of an Australian bank on the Australian Stock Exchange. Although plaintiffs in *NAB* were Australian, this fact was in no way material to the Court's analysis. The Court made clear that *only* domestic transactions in securities fall within the reach of Section 10(b) and Rule 10b-5: "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 130 S. Ct. at 2884. In doing so, the Court repudiated over 30 years of Second Circuit jurisprudence that relied on the "conduct and effects" test, finding that such test was incompatible with the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 2877 (internal quotations omitted). As the Court made clear, "[w]e know of no one who thought that the [Exchange Act] was intended to 'regulat[e]' *foreign* securities exchanges—or indeed who even believed that under established principles of international law Congress had the power to do so." *Id*. at 2884 (emphasis in original). By restricting Section 10(b) to "purchases and sales of securities in the United States," the Court emphasized that the transactional test would avoid "interference with foreign securities regulation that application of §10(b) abroad would produce," and prevent the United States from turning into "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Id.* at 2884, 2886.

District courts following *NAB* have uniformly rejected applications of the "transactional test"—for both American and foreign plaintiffs—that would "entail the type of interference with foreign securities regulation that [*NAB*] sought to avoid." *In re Banco Santander Sec.-Optimal Litig.*, No. 09-MD-02073-CIV, 2010 WL 3036990, at *6 (S.D. Fla. July 30, 2010) (rejecting the argument that because the purchase of a foreign fund was "in connection with" a U.S. fund, the transactions were domestic); *see, e.g.*, *Quail Cruises Ship Mgmt. Ltd.* v. *Agencia de Viagens CVC Tur Limitada*, No. 09-23248-CIV, 2010 WL 3119908, at *3 (S.D. Fla. Aug. 6, 2010) ("[*NAB*]'s central holding would be undermined if parties could elect United States securities law merely by designating the law offices of one of the parties' counsel, located in the United States, as the place of closing the transaction when the transaction otherwise has no relationship with the United States."); *Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758, 2010 WL 3069597, at *5 (S.D.N.Y. July 27, 2010) (Section 10(b) does not apply "even if some aspects of the transaction occurred in the United States."); *Stackhouse* v. *Toyota Motor Co.*, No. CV 10-0922, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010) ("United States securities laws should defer to the law of the country where the security is exchanged.").

The same result is required here, where the allegedly misinformed and manipulated market is in Germany.

B. Because Section 10(b) Does Not Reach VW Shares, Section 10(b) Does Not Reach Plaintiffs' Swap Agreements Referencing VW Shares.

Plaintiffs cannot evade *NAB* by using swap agreements that have nothing to do with any of the Defendants to support misstatement and manipulation claims that have nothing to do with the United States. Because transactions in VW Shares are not within the territorial reach of Section 10(b), neither are Plaintiffs' swap agreements referencing such shares.

In enacting the Commodity Futures Modernization Act of 2000 ("CFMA"), Pub. L. No. 106-554, 114 Stat. 2763, Congress expressly extended the coverage of Section 10(b) to security-based swap agreements to prevent circumvention of the rules prohibiting insider trading.[5] Congress realized that "functionally, through a total return swap, one can do something that is the equivalent of purchasing a share of stock," and "[i]t would not . . . be an acceptable outcome for an individual who had benefitted from insider information and who would be legally prohibited from buying a stock . . . to be able to engage in a total return swap that was the functional equivalent of buying that stock."[6] There is absolutely nothing in the language of this statute or its legislative history to suggest that Congress sought to extend the territorial reach of Section 10(b) or to regulate foreign markets merely because private parties who entered into swap agreements referencing foreign securities chose to conduct certain acts in the United States. Just as Congress enacted the CFMA to prevent violators from avoiding liability by entering into swap agreements that are "functionally" the same as stock purchases and sales, Plaintiffs cannot end-run *NAB* by entering into security-based swap agreements when the "functionally . . . equivalent" purchaser of securities traded on foreign exchanges could not recover because Section 10(b) does not reach transactions in those securities.

Courts have consistently looked to the "material term" referenced in a swap agreement to determine whether Section 10(b) applies to a swap-holder's fraud claims—if the referenced term is not a "security," then Section 10(b) does not cover fraud in connection with the swap. *See Caiola* v. *Citibank, N.A., New York*, 295 F.3d 312, 327 (2d Cir. 2002); *Sch. Dist. of Erie* v. *J.P. Morgan Chase Bank*, No. 08 CV 07688, 2009 WL 234128, at *1 (S.D.N.Y. Jan 30, 2009). Just as the purchaser of a swap is not entitled to Section 10(b)'s protection unless the

5 *See* 147 Cong. Rec. S11, 946-01 (2001) (statement of Sen. Sarbanes).

6 *The Commodity Futures Modernization Act of 2000: Joint Hearing on S. 2697 Before the Comm. on Agric., Nutrition, and Forestry and* the *Comm. on Banking, Hous., and Urban Affairs*, 106th Cong. 14 (2000) (statement of Lawrence Summers, Sec'y of the U.S. Dep't of the Treasury) ("*CFMA Hearings*").

"material term" is a security covered by Section 10(b), a purchaser of a swap agreement referencing a security traded exclusively on a foreign exchange is not entitled to such protection because its "material term," *i.e.*, the referenced security, is not within Section 10(b)'s territorial reach.

The clear rationale of *NAB* further confirms that the focus must be on the referenced security. By adopting a transactional test, the Supreme Court made clear that the Exchange Act was not intended to "'regulat[e]' *foreign* securities exchanges:"

> The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application it would have addressed the subject of conflicts with foreign laws and procedures. Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.

130 S. Ct. at 2884-85 (internal quotations and citation omitted). Plaintiffs' theory of liability—that Plaintiffs can recover under Section 10(b) on the basis of swap agreements referencing VW Shares merely because of their own acts in the United States—would render *NAB* meaningless.

It would no longer matter whether the security in question was traded or bought or sold here, because under Plaintiffs' theory, Section 10(b) would regulate foreign markets in foreign securities traded solely on foreign exchanges and subject to foreign law, so long as investors signed confirmations or took other unspecified steps related to swaps in the United States. By this logic, issuers all over the world could be subjected to Section 10(b), no matter where their shares traded and regardless of their adherence to local law, simply by virtue of a contract entered into between private parties. Such a result would interfere with the sovereign authority of other nations—the precise conflict *NAB* sought to avoid—and cannot be supported by any reading of *NAB*.

Here, such interference is unquestionable in light of the fact that all the alleged misstatements were made abroad and the alleged market manipulation occurred solely in German markets.[7] Moreover, in Section 13(d) of the Exchange Act, Congress has expressly limited its specific regulation of the conduct challenged here—disclosures during the accumulation of substantial or controlling share positions—to shares of companies listed on an American exchange. *See* 15 U.S.C. § 78m(d). Porsche's purchases of VW Shares and cash-settled options relating to VW Shares were thus not covered by Section 13(d) but instead by the corresponding provisions of EU and German law. (Mülbert Decl. ¶¶ 20, 34-35.) Accordingly, both Congress and the Supreme Court have abjured the extraterritorial incursion Plaintiffs seek.

C. Plaintiffs' Allegations of "Domestic Transactions" in Swaps Are Insufficient and Ignore the Goals of *NAB*'s Transactional Test.

Plaintiffs' allegations that they (i) "signed confirmations"[8] and "took all steps necessary to transact" their swap agreements in the United States and (ii) selected New York as the governing law and forum in their agreements with their counterparties (none of which is alleged to be located in the United States) do not suffice to support their conclusory assertion that they transacted in such swaps in the United States. (TAC ¶¶ 149-53; AC ¶¶ 39, 141.)[9] The mere fact that some Plaintiffs performed certain acts in the United States does not locate their transactions here in the case of foreign security-based swap agreements any more than in the case of a purchaser who places an order in the United States to buy a foreign security through a foreign exchange. As the Supreme Court noted, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against

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[7] Extending Section 10(b) to Plaintiffs' claims would impede Germany's authority to regulate disclosures and trading activities of a German company regarding German securities. *See infra* at 18-19.

[8] *Black Diamond* Plaintiffs merely allege that the confirmations were "addressed to" the funds' investment manager located in the U.S. "on behalf of" the individual funds. (AC ¶ 141.)

[9] The choice of law and forum selection provisions are wholly irrelevant. Parties can—and do—include such provisions in contracts concerning transactions all over the world. They have nothing to do with the location of a purchase or sale, and this is not an action on the contracts.

extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *NAB*, 130 S. Ct. at 2884 (emphasis in original). As one court following *NAB* has recognized, "domestic transactions" do *not* refer to "transactions in foreign-traded securities where the ultimate purchaser or seller has physically remained in the United States." *Stackhouse*, 2010 WL 3377409, at *1.[10]

Plaintiffs' emphasis on U.S. acts is an attempt to resurrect the "conduct and effects" test in the guise of trying to domesticate their foreign transactions. In expressly rejecting this test, the Supreme Court "manifested an intent to weed the doctrine at its roots and replace it with a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency" that the "conduct and effect[s]" test lacked. *Cornwell*, 2010 WL 3069597, at *3. Plaintiffs' version of the transactional test would require this Court to parse each swap agreement to determine (i) which aspects occurred domestically and which occurred abroad, and (ii) whether any of those aspects are sufficient to justify the application of Section 10(b). Under *NAB*, however, courts are not to engage in:

> extensive analysis required to parse foreign securities trades so as to assess quantitatively how many and which parts or events of the transactions occurred within United States territory, and then to apply value judgments to determine whether the cluster of those activities sufficed to cross over the threshold of enough domestic contacts to justify extraterritorial application of § 10(b).

Id. at *4. "The complexity inherent in such far-reaching inquiries and fine-line judgments in practice formed a central element of [*NAB*'s] 'damning indictment' of the conduct and effect tests." *Id*. What is crystal clear is that the swap agreements at issue here pertain to VW Shares traded in Germany and regulated in Germany.[11]

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10 Indeed, Congress explicitly recognized that U.S. law does not apply in cases where an investor in the United States places an order to effectuate a trade on a European exchange, noting that during the CFMA hearings an individual had "transacted a trade right in front of us on his computer on a European market and demonstrated . . . [that] the benefit of our regulation . . . was irrelevant to all of that." *CFMA Hearings*, at 42.

11 Because Plaintiffs have failed to state a claim under Section 10(b), their Section 20(a) claim fails. *See Pac. Inv. Mgmt. Co.* v. *Mayer* Brown *LLP*, 603 F.3d 144, 160 (2d Cir. 2010).

II. THIS COURT SHOULD DISMISS THE COMPLAINTS UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*.

Aside from Plaintiffs' failure to state a claim, this Court should exercise its "broad discretion" to dismiss the Complaints in their entirety under the doctrine of *forum non conveniens*. *Usha (India), Ltd.* v. *Honeywell Int'l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005). It is hard to imagine a case more appropriate for such disposition than this: the issues relate to disclosures in Germany made by a German company about its accumulation of shares of another German company traded in Germany, and the alleged manipulation of German securities in German markets. Plaintiffs, highly sophisticated global hedge funds, voluntarily speculated in German securities. German statutory and regulatory policy requirements are central to the legal and factual issues. The doctrine's "central notions"—"the convenience of the parties and their witnesses and that justice be served" in the other forum—are fully satisfied here. *Id.* (internal quotations omitted).[12]

A. Plaintiffs' Chosen Forum Is Entitled to No Deference.

The Court "must determine the level of deference to accord the plaintiff's choice of forum." *Id*. When the dispute involves "transactions, witnesses, and evidence abroad," the plaintiff's choice commands less deference. *In re European Aeronautic Defence & Space Co. Sec. Litig.* ("*EADS*"), No. 08 Civ. 5389, 2010 WL 1191888, at *10 (S.D.N.Y. Mar. 26, 2010). Where, as here, "the operative facts upon which the litigation is brought bear little material connection to the chosen forum," a plaintiff's "choice of forum is also given reduced emphasis." *LaSala* v. *Bank of Cyprus Pub. Co.*, 510 F. Supp. 2d 246, 257 (S.D.N.Y. 2007) (internal quotations omitted). Nothing material to the claims in these actions relates to the United States.

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12 In a motion to dismiss for *forum non conveniens*, the Court may consider materials outside of the Complaints. *See, e.g.*, *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir. 1956) ("in the determination of a motion to dismiss for forum non conveniens, the court may consider affidavits submitted by the moving and opposing parties"); *see also Base Metal Trading SA* v. *Russian Aluminum*, 253 F. Supp. 2d 681, 699-700 & n.13 (S.D.N.Y. 2003) (relying on declarations outside the pleadings in deciding a motion to dismiss on *forum non conveniens* grounds), *aff'd*, 98 Fed. Appx. 47 (2d Cir. 2004).

Plaintiffs' choice of a U.S. forum is also not entitled to deference because they *chose* to engage in transactions outside the United States relating to securities traded only on foreign exchanges. "In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere." *Alcoa S.S. Co.*, 654 F.2d at 156 (internal quotations omitted). Although 17 of the 39 individual hedge funds claim to be organized under U.S. law, this makes no difference. Where U.S. Plaintiffs choose to invest abroad and then allege fraudulent acts and manipulation occurring abroad, this "ability to rely upon citizenship as a talisman against forum non conveniens dismissal is diminished." *Sussman* v. *Bank of Isr.*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd per curiam*, 990 F.2d 71 (2d Cir. 1993). Accordingly, courts in this Circuit have denied U.S. plaintiffs their choice of forum in fraud actions with strong connections to other countries. *See, e.g.*, *Allstate Life Ins. Co*. v. *Linter Group Ltd.*, 994 F.2d 996, 1001 (2d Cir. 1993); *Sussman*, 801 F. Supp. at 1073-78 (common law fraud); *Diatronics, Inc*. v. *Elbit Computers, Ltd*., 649 F. Supp. 122, 127-30 (S.D.N.Y. 1986) (Section 10(b)), *aff'd*, 812 F.2d 712 (2d Cir. 1987).

B. Germany Is an Adequate Alternative Forum.

"An alternative forum is adequate if: (1) the defendants are subject to service of process there; and (2) the forum permits litigation of the subject matter of the dispute." *Alfadda*, 159 F.3d at 45 (internal quotations omitted). "Whether the law of the foreign forum differs from American law 'should ordinarily not be given conclusive or even substantial weight' in assessing the adequacy of the forum." *EADS*, 2010 WL 1191888, at *9 (quoting *Piper Aircraft Co*. v. *Reyno*, 454 U.S. 235, 249 (1981)). Nor does "the prospect of a lesser recovery" justify denial of dismissal. *Alcoa S.S. Co*., 654 F.2d at 159.

Both prongs of this test are easily met here. Defendants are subject to service of process in Germany. German law provides a private cause of action on the basis of allegations similar to those in the Complaints and full recovery of damages for established financial losses. (Wagner Decl. ¶¶ 15, 20.) Numerous federal courts have already held Germany to be an adequate alternative forum,[13] and its adequacy is further highlighted by the fact that several institutional investors have already taken steps to initiate civil law-based proceedings in Germany against Porsche, seeking damages and alleging facts similar to those alleged by Plaintiffs. (*Id.* ¶ 14.)

C. The Public and Private Interest Factors Compel Dismissal.

The next step in the *forum non conveniens* analysis requires the Court to balance public and private interest factors. *See Piper Aircraft*, 454 U.S. at 241 n.6 (listing public and private interest factors); *Turedi* v. *Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006) (private interest factors include enforceability of judgment).

The public interest factors overwhelmingly favor Germany. Where, as here, the alleged actions "undertaken by the [defendants] in furtherance of the alleged fraud were carried out in [a foreign country] by [a foreign] corporation[], there is a strong local interest in trying this case in [the foreign forum]." *Allstate*, 994 F.2d at 1002.

Germany has established robust statutory and regulatory regimes prohibiting the conduct that Plaintiffs allege in the Complaints, including misstatements and market manipulation. Porsche is subject to German disclosure rules, as well as substantive rules governing trading. (Mülbert Decl. ¶¶ 15, 18-20, 28-33.) Germany's clear and strong interest in redressing any wrong regarding trading in securities listed on its stock exchanges is underscored by 2002 legislation

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13 *See, e.g.*, *Carey* v. *Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004) (Germany adequate); *BlackRock, Inc*. v. *Schroders PLC*, No. 07 Civ. 3183, 2007 WL 1573933, at *7 (S.D.N.Y. May 30, 2007) ("courts in this District have repeatedly found Germany to be an adequate alternative forum"); *von Spee* v. *von Spee*, 514 F. Supp. 2d 302, 314-15 & n.27 (D. Conn. 2007) ("multiple published decisions within the Second Circuit" have found Germany to be an adequate forum); *Kirch* v. *Liberty Media Corp.*, No. 04 Civ. 667, 2006 WL 3247363, at *6-7 (S.D.N.Y. Nov. 8, 2006); *Mackley* v. *Gruner & Jahr, A.G. & Co.*, No. 93 Civ. 6521, 1995 WL 417069, at *1 (S.D.N.Y. July 13, 1995).

introducing special liability for damages caused by misstatements in the capital markets. (Wagner Decl. ¶ 34.) This law was enacted "to strengthen the capital markets of Germany and to increase their competitiveness across Europe and the world," and to enhance "investor protection by increasing the transparency of securities markets and by creating the prerequisites for enforcing the prohibition of market manipulations and abuses of ad hoc disclosures." (*Id*. ¶¶ 34-35.)

German law governing securities fraud cases provides for exclusive jurisdiction in German courts, rendering a U.S. judgment against Porsche unenforceable in Germany. (Wagner Decl. ¶¶ 28-33.) This law is intended "to prevent forum shopping" and "to avoid the 'regulatory function' of the German law of civil procedure from being pushed aside." (*Id*. ¶ 38.) Germany's interest is confirmed by the fact that its government authorities are investigating allegations similar to those raised here (Exs. 21, 22), and by its recent letter to the Court. *Cf. NAB*, 130 S. Ct. at 2885-86 (recognizing views of foreign governments). As mentioned above, because investors have taken steps to initiate proceedings in Germany against Porsche seeking damages, adjudicating Plaintiffs' claims in the U.S. would run the risk of inconsistent judgments and encourage forum shopping by potential plaintiffs. *See Bank of Cyprus*, 510 F. Supp. 2d at 267.

Moreover, the "mere likelihood of the application of foreign law weighs in favor of dismissal." *Id.* at 263; *see also Adamowicz* v. *Barclays Private Equity Fr. S.A.S.*, No. 05 Civ. 0961, 2006 WL 728394, at *3 (S.D.N.Y. Mar. 22, 2006) (Baer, J.) (dismissing on grounds of *forum non conveniens*, in part because "it is likely that, in any event, [foreign] law would govern [plaintiff's] supplemental common law claims"). Under New York's "interest analysis," *Sussman*, 801 F. Supp. at 1074, which selects the "law of the jurisdiction which . . . has the greatest concern with the specific issue raised in the litigation," *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481 (1963), it is clear that New York law would not govern here.

Plaintiffs' fraud claims are the only claims relevant to the bulk of Plaintiffs' transactions. When "conduct-regulating" rules such as fraud are at issue, the law of the jurisdiction where the alleged fraud occurred applies because "[t]he interest in regulating *behavior* taking place within a state's borders[] is not vindicated by applying the law of a jurisdiction in which the *behavior* being regulated *did not occur*." *Chase Manhattan Bank* v. *N.H. Ins. Co.*, 749 N.Y.S.2d 632, 634 (Sup. Ct. 2002); *see also San Diego County Employees Ret. Ass'n* v. *Maounis*, No. 07 Civ. 2618, 2010 WL 1010012, at *18 (S.D.N.Y. Mar. 15, 2010) (when the injury "has occurred in locations with only limited connection to the conduct at issue, while a substantial portion of the fraudulent conduct has occurred in another locus . . . the plaintiffs' location is not a dispositive factor") (internal quotations omitted). Because Germany has the "greatest interest" in "regulating the conduct of [companies] within its borders," German law applies to Plaintiffs' fraud claims. *Bank of Cyprus*, 510 F. Supp. 2d at 265.

In sum, as recognized in *NAB*, Germany has a compelling interest to decide how alleged securities fraud and manipulation that occurred there should be addressed and to apply its own laws to claims against a German company regarding transactions in German securities on German exchanges. *See F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004) (antitrust laws); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1987) ("a state should defer to the other state if that state's interest is clearly greater.").

The private interest factors barely require the traditional balancing because they all favor Germany. Porsche's allegedly fraudulent and manipulative conduct occurred in Germany, and most of the relevant documents and witnesses are located there. *Allstate*, 994 F.2d at 1001. The "cost for witnesses to attend trial will be significantly lessened if trial is held in" Germany, and "compulsory process is available in [Germany] to secure the live testimony of necessary foreign witnesses outside the reach of United States process." *Alfadda*, 159 F.3d at 47-48; (Wagner Decl. ¶ 25.). Live witness testimony "takes on added importance" in fraud actions "so that the trier of fact can assess the witnesses' demeanor." *Alfadda*, 159 F.3d at 48 (citation omitted). Moreover, because most, if not all, of the "documentary evidence is in the [German] language, as would be trial or deposition testimony, requiring translation to English [ ] would result in significant cost to the parties and delay to the court." *Blanco* v. *Banco Indus. de Venez., S.A.*, 997 F.2d 974, 982-83 (2d Cir. 1993) (finding the need for translation a factor that "militates strongly in favor" of the foreign forum).

Finally, this case cannot be tried here in its entirety. For the reasons stated in their respective motions to dismiss, the Court lacks personal jurisdiction over Defendants Wiedeking and Haerter and any lawsuit against them must be brought in Germany. Dismissing this case in favor of a German forum would therefore eliminate the need to try the identical, expensive and time-consuming case in two different jurisdictions and the possibility of inconsistent results. *See Piper Aircraft*, 454 U.S. at 259; *Banco Santander*, 2010 WL 3036990, at *25.

Taken together, all relevant factors unquestionably favor Germany as the appropriate forum and warrant dismissal of these actions.

III. PLAINTIFFS DO NOT SUFFICIENTLY ALLEGE THAT PORSCHE MADE ACTIONABLE MISSTATEMENTS.

Plaintiffs' Section 10(b) misstatement claims should be dismissed for the additional reason that they fail on the merits. To state a Section 10(b) claim under the PSLRA, a plaintiff must not only allege that a defendant "made an untrue statement of a material fact" or "omitted to state a material fact," but must also specify "the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1); *Rombach* v. *Chang*, 355 F.3d 164, 170 (2d Cir. 2004). Under Fed. R. Civ. P. 9(b), also applicable here, pleading with particularity is required. Plaintiffs have failed to satisfy any of these pleading requirements.[14]

[14] Of the 11 alleged misstatements, seven refer to underlying documents, which correspond to the following exhibits: TAC ¶¶ 111-13 (Ex. 12 at 2); TAC ¶¶ 114-17 (Ex. 15); TAC ¶¶ 120-21 (Ex. 37); TAC ¶¶ 122-23 (Ex. 14 at 2); TAC ¶¶ 124-26 (Ex. 24); TAC ¶¶ 127-29 (Ex. 32); TAC ¶¶ 130-31 (Ex. 31 at 4).

A. Porsche's Challenged Statements Were True at the Time They Were Made and Porsche Reasonably Believed Them at That Time.

Plaintiffs' allegations regarding the falsity of Porsche's statements are inadequate. "Statements regarding projections of future performance may be actionable under Section 10(b) or Rule 10b-5 if they are worded as guarantees or are supported by specific statements of fact, or if the speaker does not genuinely or reasonably believe them." *In re Int'l Bus. Machs. Corporate Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998) (internal citations omitted). Given Porsche's actions and statements regarding its acquisition of VW Shares—which depended in part on factors beyond its control—Porsche's statements "could not possibly be understood as anything but opinions" and cannot be considered a guarantee. *Elliott Assocs., L.P.* v. *Covance, Inc.*, No. 00 Civ. 4115, 2000 WL 1752848, at *9 (S.D.N.Y. Nov. 28, 2000).

Plaintiffs allege that by announcing that Porsche intended to "acquire the majority shareholding" in VW, Porsche was telling "a reasonable investor" it intended to go to "slightly more than [] 50%" and no higher. (TAC ¶¶ 112, 121, 123; AC ¶¶ 95, 98, 102, 106.) Plaintiffs also allege that several statements by Porsche to the effect that a 75% stake and domination agreement were "totally unrealistic," "purely theoretical" and "out of the question at present" precluded such a course. (TAC ¶¶ 114, 124, 127, 130; AC ¶¶ 90, 101, 105, 110.) Moreover, Plaintiffs allege that Porsche denied to four *Elliott* hedge fund groups that it intended to go to 75%. (TAC ¶¶ 118, 132, 135, 137.)[15]

In light of all the information available to the market, however, "[a]ny reasonable investor reading these statements, or any of the other statements regarding" Porsche's acquisition in VW "would recognize that the Defendants could not and did not guarantee" that Porsche would never acquire 75% "either in the near term or at all." *In re Bristol-Myers Squibb Sec. Litig.*, 312 F.

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15 To the extent that any of the misstatements made during private telephone conversations are found to be "false" or "misleading," only the Plaintiffs party to those phone calls can rely on the alleged misstatements. *See Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008) ("under the fraud-on-the market doctrine, reliance is presumed when the statements at issue become public").

Supp. 2d 549, 558 (S.D.N.Y. 2004); *see also Int'l Bus. Machs. Corp.*, 163 F.3d at 109 ("[N]o reasonable investor would rely on this discussion given the cautious language and qualifying terminology."); *Faulkner* v. *Verizon Commc'ns, Inc.*, 156 F. Supp. 2d 384, 400 (S.D.N.Y. 2001) ("mere predictions or statements of opinion" concerning an uncertain future event insufficient).

To recap the public record:

- **Porsche's Continually Increasing Goals**: Porsche initially sought 20% of VW Shares saying it would not reach 30% (TAC ¶¶ 97-98; Ex. 8), but then on November 15, 2006, based on the "assum[ption] that the VW law will be overturned," Porsche decided to increase its stake "to a maximum [of] 29.9%" because 30% would trigger a mandatory bid obligation under German law. (Ex. 11; TAC ¶ 103; AC ¶ 55.) On January 10, 2007, its CEO said that "29% is enough" and that Porsche "won't acquire more than 50%." (TAC ¶ 104; AC ¶ 58.) On February 13, 2007, the Advocate General of the European Court of Justice ("ECJ") opined that the VW Act violated EU law and in March 2007 Porsche decided to increase its stake up to 31%. (Ex. 4.) On March 3, 2008, Porsche announced its intention to increase its "stake in VW to more than 50%" (TAC ¶ 83(l)), although it had previously stated "[w]e don't want a majority." (TAC ¶ 105; AC ¶ 59.)

- **Porsche's Attacks on the VW Act**: On October 23, 2007, the ECJ ruled that the VW Act violated EU law. (TAC ¶ 83(j); Ex. 5.) As reported by the media, "[o]nly if the new VW Law is revoked and the blocking minority is raised to 25 percent does Porsche have a chance to push through a domination and profit transfer agreement," which, as Plaintiffs recognize, would "require *at least* 75% ownership." (Ex. 24; TAC ¶ 113; AC ¶ 108.) And Porsche made it clear in early 2008 that it sought to nullify the minority blocking provision of the VW Act, the effect of which would be to permit imposition of a domination and profit transfer agreement with a 75% stake. (Exs. 25, 26.)

- **Porsche's Statements Warned That Its Goals Could Change**: Market analysts concluded in 2007 that Porsche had never ruled out a 75% stake. One stated that "Porsche is striving for 50% of VW for now, but fundamentally wants to acquire a majority of more than 75%" (Ex. 27), and a second stated that "we wouldn't be surprised if Porsche eventually announced it owns 70% or more." (Ex. 28 at 5; AC ¶¶ 15(b), 132.) Another analyst focused on Porsche's use of "words like 'currently not, not at the moment or not at present'" in reaching the same conclusion as to Porsche's "ultimate goal." (Ex. 29 at 1, 4.)

  While forsaking any intention of going to 75% and calling such a goal "unrealistic" prior to its October 26, 2008 announcement, (TAC ¶¶ 124, 130; AC ¶ 101), Porsche continued to put investors on notice in 2008 that it might seek to do so in the future by plainly stating that Porsche did "not want to rule out th[e] possibility" of going to 75% "at the end of the day, some point in the future" or "obstruct our path for this." (TAC ¶ 127; AC ¶ 105; Exs. 30, 31 at 4, 32.)

- **Porsche's October 26, 2008 Announcement**: Porsche made plain that (i) its 2008 objective for VW Shares remained, as it had been, "above 50 percent," (ii) it had not yet reached that goal but would do so over the next two months, and (iii) cash-settled options were not equivalent to physical shares, but to be settled in cash. (Ex. 9.) Indeed, were they equivalent, Porsche would not only have achieved "above 50%" in October 2008 or earlier, rather than intending to do so "in November/December 2008," but would have been within a hair's breadth of 75%. Porsche, however, made clear that it was not there. Porsche decided to aim to increase its VW stake "to 75% in 2009" if "the economic framework conditions are suitable." The timing of this announcement that Porsche *might* seek a 75% position *the next year* was hardly surprising. On October 24, 2008, Porsche announced that its owning families, including Prof. Piëch, were united in supporting its control of VW and, on October 25, 2008, it was reported that the German government was unlikely to resist an EC action to strike the 80% provision from the VW Act. (Exs. 9, 18, 33.)

Nor do Plaintiffs plead a strong inference of Porsche's scienter (aside from their insufficiently pled allegations next discussed). Under the PSLRA, Plaintiffs "must plead facts rendering an inference of scienter at least as likely as any plausible opposing inference." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328 (2007). Under Plaintiffs' theory, Porsche orchestrated "a massive short squeeze" by acquiring "control over virtually the entire free float of VW shares by entering into derivatives contracts." (TAC ¶¶ 1, 25.) This theory implausibly assumes that Porsche was able to acquire 42.6% of VW Shares and 31.5% in cash-settled options relating to VW Shares unbeknownst to some of the world's most sophisticated hedge funds, and that Porsche would not adapt its VW acquisition strategy to evolving circumstances.

The stronger inference is that circumstances changed just prior to the October 26, 2008 announcement, when Porsche's decision to aim to go to 75% if economic conditions permitted—an aim never realized—moved the option to go to 75% from a "theoretical possibility" to a determined and resolved business goal. *See Elliott Assocs.*, 2000 WL 1752848, at *7 ("The mere disclosure of adverse information shortly after a positive statement does not support a finding that the prior statement was false at the time it was made."). As reflected in the public record, Porsche's acquisition strategy *could* change at any time and Plaintiffs thus have not sufficiently pled, as they must for the challenged statements to be actionable, that the "speakers were aware of contrary information at the time they expressed their opinions" regarding the status of the attempted takeover of VW. *Id.* at *9.

B. The Two Sources Cited To Support Plaintiffs' Misstatement Claims Do Not Suffice for That Purpose, and the Attack on Options Disclosure Fails As Well.

According to Plaintiffs, contrary to its October 26, 2008 announcement and its earlier statements, Porsche actually sought a 75% stake in February 2008. In support of this claim, Plaintiffs rely on two articles from the German press (*see, e.g.*, TAC ¶¶ 113, 125; AC ¶¶ 112-13) whose allegations lack adequate support. A complaint "must identify sufficiently the sources upon which [plaintiffs'] beliefs are based and those sources must have been likely to have known the relevant facts." *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 689 (S.D.N.Y. 2008) (internal quotation omitted). Plaintiffs have failed to satisfy this requirement.

First, Plaintiffs allege that during a "secret meeting in Berlin on February 25, 2008," with an unnamed official of the State of Lower Saxony, Porsche "stated its intention to implement a domination and profit transfer agreement . . . ." (TAC ¶ 113; AC ¶ 89.) The sole basis for this allegation is a German magazine article published in May 2009 that refers to an unnamed "participant in the meeting in Berlin" who claims that unnamed "Porsche representatives coughed up the fact that Porsche was striving for a domination and profit transfer agreement."[16]

Unidentified sources cannot support allegations of fraud unless they are "described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." *Novak* v. *Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). Neither the Complaints nor the article upon which Plaintiffs rely contains sufficient facts to show that the unnamed "high-level Porsche representatives" were "likely to

16 Plaintiffs do not identify the article but appear to rely on an article that appeared in the online version of *WirtschaftsWoche*, a German weekly magazine, on May 8, 2009 (Ex. 34). The Complaints fail to mention that a Lower Saxony representative responded in writing to this magazine to clarify that Porsche did not "expressly or impliedly declare[] in this meeting that Porsche intends to enter into a domination agreement with Volkswagen." (Ex. 35.)

have known the relevant facts" about Porsche's investment plans in VW. *Optionable*, 577 F. Supp. 2d at 689; *compare In re MSC Indus. Direct Co. Sec. Litig.*, 283 F. Supp. 2d 838, 847 (E.D.N.Y. 2003) ("former employee with high-level corporate duties" was insufficiently described), *with Whalen* v. *Hibernia Foods PLC*, No. 04 Civ. 3182, 2005 WL 1799370, at *4 (S.D.N.Y. Aug. 1, 2005) (Baer, J.) (description of sources sufficient where "the Complaint details their role and responsibilities"). Therefore, Plaintiffs have not met the stringent pleading standards of Rule 9(b) and the PSLRA.

Second, Plaintiffs rely on a May 2009 article to claim that Prof. Piëch admitted that Porsche's decision to go to 75% had been made several months prior to its October 26, 2008 announcement. (TAC ¶ 9; AC ¶ 100.) The article stated in relevant part:

> Porsche's decision to increase its holding in Volkswagen to 75 percent was made at the end of the first half of 2008. "Everything was still OK then," says Piëch. No financial crisis in sight, and Porsche CFO Holger Härter obviously had a handle on the latest credit lines for ten billion Euros. "In October, the interest rate increased to almost double," says Piëch. "From that time on, it could be expected that things would get tighter on the markets." But the Porsche management did not find any answer for this.[17]

This is a slender reed on which to peg a charge of fraud—there is no basis to link the "Everything was still OK then" quote to the time of decision other than the reporter's having done so.

Allegations derived from indirect quotes cannot give rise to a strong inference of fraudulent conduct. *See In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 271 (2d Cir. 1993) (newspaper report insufficient to "give rise to a strong inference that Time Warner began to consider the rights offering significantly before it was announced."); *Ferber* v. *Travelers Corp.*, 785 F. Supp. 1101, 1108 (D. Conn. 1991) ("indirect quote" in newspaper insufficient to support a

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[17] Plaintiffs do not cite to a specific article for this quotation. It appears to have originated from *Demonstration of Power in Sardinia*, Welt Online, May 13, 2009. (Ex. 36.) Based on Porsche's review of other German articles, none attributes to Prof. Piëch any statements regarding Porsche's alleged decision to go to 75% prior to the October 26, 2008 announcement.

strong inference of fraud). Accordingly, Plaintiffs' attempt to rely on unattributed and indirect quotes to show that Porsche had decided to acquire a 75% stake in VW in early- or mid-2008 fails.

Finally, Plaintiffs also allege in conclusory fashion that Porsche secretly surpassed its announced goals for VW Share ownership by using cash-settled options, and that "Porsche did not really consider its options contracts to be cash settled." (TAC ¶¶ 8, 11.) Porsche, however, repeatedly disclosed its use of such options (Exs. 12 at 3, 13 at 167, 14 at 2), and its October 26, 2008 announcement made clear that cash-settled options were not functionally equivalent to share ownership. (Ex. 9.) Although Plaintiffs allege that Porsche attempted to "minimize[] the cash settled nature of the contracts by calling them the 'so-called' cash-settled options" (TAC ¶ 11), this is nothing other than a flag for the use of specialized terminology, *i.e.*, jargon.[18]

IV. PLAINTIFFS FAIL TO ALLEGE A MARKET MANIPULATION CLAIM UNDER SECTION 10(b).

Ignoring the Supreme Court's admonition in *NAB* that the Exchange Act does not apply outside the United States or "'regulat[e]' *foreign* securities exchanges," 130 S. Ct. 2884, Plaintiffs seek to apply U.S. securities law to their claim that Porsche manipulated German securities markets. Even if such extraterritorial application of Section 10(b) were permitted, Plaintiffs have failed to allege manipulative conduct cognizable under Rule 10b-5. For all the complex descriptions of financial instruments in the Complaints, the "manipulative" conduct that Plaintiffs allege is actually straightforward: according to Plaintiffs, Porsche secretly acquired VW Shares through cash-settled options and failed to disclose them. (TAC ¶¶ 10-13; AC ¶ 8.) Although Plaintiffs label this claim as market manipulation, their allegations actually boil down to an omission claim.

[18] The allegation that "Porsche told analysts at the Frankfurt Auto Show in September 2007 that it could take delivery in physical stock when it exercised these types of options" (TAC ¶ 126) fails to state with particularity that the unnamed "Porsche" representative possessed the information alleged, so it is insufficient as a matter of law. *See Novak*, 216 F.3d at 314.

To state a market manipulation claim, "plaintiffs must identify wash sales, matched orders, rigged prices, or some other manipulative act intended to mislead investors by artificially affecting market activity." *Cohen* v. *Stevanovich*, No. 09 Civ. 4003, 2010 WL 2670865, at *3 (S.D.N.Y. July 1, 2010) (citing *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 476 (1977)); *see also SEC* v. *Masri*, 523 F. Supp. 2d 361, 366-67 (S.D.N.Y. 2007) (explaining that because wash sales and matched orders are "fictitious transactions" with no "change of beneficial ownership," they create a fake appearance of trading activity). No such allegations are made here.

According to *Elliott* Plaintiffs, "Porsche disguised physical options contracts—contracts that it should have *disclosed* but did not—as cash-settled options contracts that did not have the same *disclosure* requirements," and "Porsche methodically parceled out its option contracts to evade counterparty-*disclosure* requirements." (TAC ¶¶ 11, 12 (emphasis added).)[19] *Black Diamond* Plaintiffs allege that Porsche "secretly acquir[ed] a significant synthetic long position in VW stock through the purchase of . . . cash-settled option positions," which Porsche "concealed from the public, and accomplished in a way so as to specifically avoid any *disclosure*." (AC ¶¶ 8, 60, 72 (emphasis added).) Plaintiffs' allegations have nothing to do with manipulative *conduct* within the meaning of Rule 10b-5.[20]

Where, as here, "[m]ost of the allegedly fraudulent conduct was perpetrated directly, in the form of misstatements," courts in this Circuit have rejected misstatement claims masquerading as market manipulation claims. *Catton* v. *Def. Tech. Sys., Inc.*, No. 05 Civ. 6954, 2006 WL 27470, at *6-7 (S.D.N.Y. Jan. 3, 2006) (dismissing manipulation claim alleging "pump and dump" scheme based mostly on misrepresentations); *In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d 621, 640 (S.D.N.Y. 2008) ("because Plaintiffs allege no deceptive course of conduct going

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19 Plaintiffs fail to plead a sufficient basis to support either of these assertions.

20 To "execute" the short squeeze, Plaintiffs allege that Porsche *disclosed* its options contracts. (TAC ¶¶ 29-30; AC ¶ 75.) *Elliott* Plaintiffs' allegation that Porsche "balanc[ed]" VW's share price by "carefully feeding inaccurate information to the marketplace" (TAC ¶ 28) is also a misstatement allegation. These allegations are insufficient to state a market manipulation claim.

beyond misrepresentations or omissions, their market manipulation claims must be dismissed"); *Collier* v. *Aksys Ltd.*, No. 3:04 CV 1232, 2005 WL 1949868, at *15-16 (D. Conn. Aug. 15, 2005) (rejecting short sellers' claim of "manipulatively rapid accumulation of" stock that was not promptly disclosed and kept the price "below the level it would have achieved *had investors been aware of defendants' accumulation*") (emphasis added), *aff'd*, 179 Fed. Appx. 770 (2d Cir. 2006).

In short, an examination of Plaintiffs' "market manipulation" allegations reveals that they are based on omissions—a "sleight of hand" that "does not magically transform its disclosure claim into a market manipulation claim." *TCS Capital Mgmt., LLC* v. *Apax Partners, L.P.*, No. 06-CV-13447, 2008 WL 650385, at *22-23 (S.D.N.Y. Mar. 7, 2008) (citations omitted). Thus, even if these allegations had pertained to a U.S. rather than a German market, they would fail.

V. PLAINTIFFS' COMMON LAW FRAUD CLAIMS SHOULD BE DISMISSED.

Because none of the Plaintiffs has stated a claim under Section 10(b), there is no basis for this Court to exercise pendent jurisdiction over their common law fraud claims. *See Shalam* v. *KPMG, LLP*, No. 05 Civ. 3602, 2005 WL 2139928, at *3 (S.D.N.Y. Sept. 6, 2005) (Baer, J.). Even if the Court were to exercise jurisdiction and assuming that New York law applies, Plaintiffs' common law claims fail for the same reasons that their Section 10(b) claims fail. The elements are "essentially the same" for both types of claims, and common law fraud claims are subject to the heightened pleading requirements of Rule 9(b). *Serova* v. *Teplen*, No. 05 Civ. 6748, 2006 WL 349624, at *8 (S.D.N.Y. Feb. 16, 2006) (Baer, J.).

Plaintiffs' common law fraud claims also fail because they do not adequately plead reliance. "Fraud on the market" does not apply to these claims, *Sec. Investor Prot. Corp.* v. *BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000), and therefore a showing of "actual reliance" and "justifiable reliance" on the misrepresentation is required. *Banque Arabe et Internationale D'Investissement* v. *Md. Nat'l Bank*, 850 F. Supp. 1199, 1221 (S.D.N.Y. 1994), *aff'd*, 57 F.3d 146

(2d Cir. 1995). Plaintiffs do not meet this test because they fail to plead which of the 11 alleged misstatements each of them relied upon, or whether each of them was even aware of the alleged misstatements. *Am. Fin. Int'l Group-Asia, L.L.C.* v. *Bennett*, No. 05 Civ. 8988, 2007 WL 1732427, at *9-10 (S.D.N.Y. June 14, 2007). Nor do Plaintiffs plead that their reliance was reasonable, as they must under New York law. *See Granite Partners, L.P.* v. *Bear, Stearns & Co.*, 58 F. Supp. 2d 228, 259 (S.D.N.Y. 1999). Plaintiffs—who are highly sophisticated "professional investors" (TAC ¶ 140)—could not reasonably have relied on the alleged statements in light of the total mix of publicly available information. *See Emergent Capital Inv. Mgmt., LLC.* v. *Stonepath Group, Inc.*, 343 F.3d 189, 195-96 (2d Cir. 2003); *Granite Partners*, 58 F. Supp. 2d at 259-60.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaints with prejudice for failure to state a claim and lack of pendent jurisdiction or in the alternative, under the doctrine of *forum non conveniens*.[21]

Respectfully submitted,

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[21] Because Plaintiffs have already been given ample opportunity to craft sufficient pleadings, the Court should not allow any further leave to replead. *See In re Starter Corp. Sec. Litig.*, No. 94 Civ. 718, 1996 WL 406624, at *7 (S.D.N.Y. July 19, 1996) ("Since it is evident that plaintiffs have had ample opportunity to specify their claims, leave to further amend the complaint will not be allowed.").