UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT ASSOCIATES, L.P., et al.,	:	
Plaintiffs,	:	
- against -	:	10 Civ. 0532 (HB)(THK)
PORSCHE AUTOMOBIL HOLDING SE, F/K/A DR. ING. H.C. F. PORSCHE AG, WENDELIN WIEDEKING, and HOLGER P. HAERTER,	:	ECF Case Electronically Filed
Defendants.	:	Oral Argument Requested

BLACK DIAMOND OFFSHORE LTD., et al.,	:	
Plaintiffs,	:	
- against -	:	10 Civ. 4155 (HB)(THK)
PORSCHE AUTOMOBIL HOLDING SE, WENDELIN WIEDEKING, and HOLGER P. HAERTER,	:	ECF Case Oral Argument Requested
Defendants.	:	

REPLY MEMORANDUM OF LAW OF DR. WENDELIN WIEDEKING IN FURTHER SUPPORT OF HIS MOTION TO DISMISS

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PRELIMINARY STATEMENT

The following key facts – none of which is, or could be, altered by Plaintiffs' opposition brief – dictate dismissal. With respect to personal jurisdiction, Plaintiffs admit that Dr. Wiedeking did not have, and cannot be alleged to have had, "continuous and systematic" contact with the United States sufficient to establish general jurisdiction. As to specific jurisdiction, Plaintiffs cite to a mélange of vague allegations that impermissibly fail to differentiate Dr. Wiedeking from the other defendants, see Rush v. Savchuk, 444 U.S. 320, 331-32 (1980) (requirements of personal jurisdiction "must be met as to each defendant" and it is "plainly unconstitutional" to consider "'defending parties' together" (citation omitted)), and they do not point to a single allegation of significant contact by Dr. Wiedeking with the United States that arises out of or is related to their actual lawsuits. They do not allege that Dr. Wiedeking ever did or said a single thing in connection with any of the private securities-based swap agreements purportedly transacted in the United States,[1] much less knew anything about their existence. And while Plaintiffs attempt to reassert vague allegations of wrongdoing having nothing to do with Dr. Wiedeking's actual contact with the United States, the only allegation of such contact remains a single visit to the Detroit Auto Show in January 2007. As previously made plain, however, no misstatement is alleged to have been made at an event that occurred over a year before Plaintiffs allegedly began their short selling campaign in March 2008.

Should the Court look beyond the lack of personal jurisdiction, the application of forum non conveniens and the application of Morrison v. National Australia Bank Ltd., 561 U.S. ---, 130 S. Ct. 2869 (2010), the Court should still dismiss the Complaints for the failure of each plaintiff to state a claim as to Dr. Wiedeking, based on alleged facts specifically addressing him. See Cohen v. Stevanovich, --- F. Supp. 2d ---, 2010 WL 2670865, at *7 (S.D.N.Y. July 1, 2010) ("'conclusory statements of associations' or generalized allegations of scienter against groups of defendants will not state a claim for securities fraud" (citation omitted)). Plaintiffs admit that as

[1] Dr. Wiedeking does not at all concede (and asserts to the contrary) that Plaintiffs have adequately alleged that their transactions took place in the United States such that Morrison v. National Australia Bank Ltd., 561 U.S. ---, 130 S. Ct. 2869 (2010) would be satisfied.

to Dr. Wiedeking, they are focused on the two statements he made on October 2 and October 5, 2008 concerning the uncertainty of acquiring 75% of VW. (Opp'n at 25 n.17.) Plaintiffs do not deny that Porsche would not decide to aim to acquire the 75% stake unless: 1) Porsche believed that the new "VW Act" was going to be revoked; and 2) Prof. Piëch, chairman of VW's Supervisory Board and a major Porsche shareholder, supported Porsche's domination (see Porsche Mem. at 24). Plaintiffs do not and cannot dispute that it was not until weeks after the statements that these obstacles were diminished (see id.) and that Porsche then announced its intent to achieve a 75% stake in 2009. Nothing about the above raises an inference, much less a strong inference, that Dr. Wiedeking's October 2 and October 5 statements were deliberately false when made.

Lastly, Section 10(b) is only available for those who actually purchased or sold securities as a result of an alleged misstatement. Because there is no allegation in either Complaint that any particular plaintiff conducted a single short sale or "synthetic" short sale after either of Dr. Wiedeking's statements, Plaintiffs' claims may be dismissed on that basis as well.

ARGUMENT[2]

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DR. WIEDEKING

In order to determine whether personal jurisdiction exists over a particular defendant, the court must first determine whether "minimum contacts" have been established under either a general or specific jurisdiction theory for that defendant, and then determine whether exercise of personal jurisdiction is "reasonable" as to him. See Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567-68 (2d Cir. 1996).

A. General Jurisdiction

Plaintiffs concede that they have not alleged "'continuous and systematic'" contact with the United States sufficient to create general jurisdiction. (See Opp'n at 39 n.23.)

[2] Dr. Wiedeking incorporates herein by reference all applicable arguments set forth in the other defendants' reply memoranda of law in further support of their motion to dismiss.

B. Specific Jurisdiction

Specific jurisdiction requires Plaintiffs to put forth allegations establishing that Dr. Wiedeking purposefully directed his activities towards, and that the lawsuits arise out of or are related to his contacts with, the United States.[3] See TCS Capital Mgmt., LLC v. Apax Partners, L.P., No. 06 Civ. 13447 (CM), 2008 WL 650385, at *11 (S.D.N.Y. Mar. 7, 2008). Yet, Plaintiffs' opposition confirms that there are simply no allegations of Dr. Wiedeking's contact with the United States where the contact gave rise, or is actually related, to these lawsuits. Neither the October 2 nor the October 5, 2008 statements by Dr. Wiedeking was alleged to have been made in the United States, nor was any conduct related to market manipulation (assuming there is even a single allegation tying Dr. Wiedeking specifically to any alleged market manipulation, which there is not) alleged to have taken place in the United States. The only allegations that bear any purported connection to the United States are the allegations concerning Plaintiffs' securities-based swap agreements supposedly transacted in the United States, but Plaintiffs do not and cannot allege that Dr. Wiedeking ever said or did anything in connection with these privately transacted securities-based swap agreements, much less knew that they even existed.[4]

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[3] Plaintiffs suggest in a footnote that Dr. Wiedeking has argued that personal jurisdiction does not exist solely because Plaintiffs failed to show "systematic contact" creating "continuing obligations" between him and persons in the United States. (Opp'n at 41 n.24 (citing Dr. Wiedeking Mem. at 4).) However, Dr. Wiedeking never argued that "continuing obligations" were the only method of demonstrating specific jurisdiction. (See Dr. Wiedeking Mem. at 4 (specific jurisdiction exists if defendant has "deliberately engaged in significant activities within a State, or has created continuing obligations" (citation and alterations omitted) (emphasis added)).) Plaintiffs have demonstrated neither condition. Furthermore, the phrase "systematic contact" was used in connection with the entirely separate section concerning general jurisdiction, which Plaintiffs concede does not exist. (See id. ("Nor do the Complaints satisfy the more 'stringent' standard of alleging 'continuing and systematic' contact with the United States for purposes of general jurisdiction." (citation omitted)).) Plaintiffs' blatant distortion of Dr. Wiedeking's position underscores the lack of merit in their arguments.

[4] Plaintiffs' conclusory assertions that Dr. Wiedeking "knew full well that [his] primary victims would be investment funds that took short positions (direct and via swap) in VW Shares, a large majority of which are managed in and around New York" (Opp'n at 41) and that Dr. Wiedeking "directed the entire scheme, including all of the U.S.-focused conduct described above" (Opp'n at 40) are breathtakingly audacious in that they are nothing more than entirely conclusory statements based on allegations that reference all Defendants together without differentiation and fail to specifically link any assertion of alleged wrongdoing to Dr. Wiedeking let alone to the United States. (See Opp'n at 40, 41 (citing TAC ¶¶ 2, 90-91; AC ¶¶ 40, 44-45).)

In that connection, Plaintiffs' citation to Retail Software Services, Inc. v. Lashlee, 854 F.2d 18, 23-24 (2d Cir. 1988) (Opp'n at 41), wherein the Second Circuit held that personal jurisdiction existed over a chief executive officer and a chief financial officer in a New York forum, is inapposite. There, the CEO allegedly filed a

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Plaintiffs also cite the principle that foreign conduct may be construed as contact with the forum for personal jurisdiction purposes if its effects in the forum state are a "'direct and foreseeable result of the conduct outside the territory.'" Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972) (citation omitted), rev'd on other grounds by Morrison. Plaintiffs utterly ignore, however, the Second Circuit's admonition that "this is a principle that must be applied with caution, particularly in an international context." Id. "[A]ttaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support in personam jurisdiction. The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him." Id. Indeed, every case cited by Plaintiffs in which personal jurisdiction was established by virtue of "direct and foreseeable" effects in the forum state involved the specific and purposeful signing or approval of registration statements or other statements filed directly with the United States Securities and Exchange Commission.[5] Such conduct is much more indicative of "purposeful availment" of the United States laws than the two oral statements made by Dr. Wiedeking to reporters in Europe on October 2 and October 5 concerning a foreign corporation whose stock traded on a foreign exchange. See Leasco, 468 F.2d at 1342 (flatly rejecting the notion that a defendant who has publicly reported on a particular corporation "must have known that its reports on [a corporation] would be relied on by anyone interested in buying

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misleading prospectus in New York and advertised franchise sales in New York, and the CFO was alleged to have personally made misrepresentations directly to the plaintiff, a New York corporation, in inducing the plaintiff to purchase franchises in New York. See id. at 20; see also Time, Inc. v. Simpson, No. 02 Civ. 4917 (MWM), 2003 WL 23018890, at *5 (S.D.N.Y. Dec. 22, 2003) (Retail Software holding not premised on officer titles but detailed allegations of personal involvement with wrongful conduct in connection with forum state). No such similar allegations exist here.

[5] See, e.g., In re CINAR Corp. Sec. Litig., 186 F. Supp. 2d 279, 304-06 (E.D.N.Y. 2002) (defendant signed an SEC Registration Statement in connection with a secondary stock offering designed to attract American investment); In re Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 399-400 (S.D.N.Y. 2005) ("signing of documents filed with the SEC which form the basis for Plaintiffs' claims is sufficient contact"); Itoba Ltd. v. LEP Group PLC, 930 F. Supp. 36, 40-41 (D. Conn. 1996) (defendant approved Form 20-F that was filed with the SEC). (See Opp'n at 41 (citing these cases).)

[that corporation's] shares").[6] Such comments could not have any "direct" or "foreseeable" effect in the United States – much less on parties allegedly in the United States secretly entering into private securities-based swap agreements that reference VW stock – for personal jurisdiction purposes. See also In re Parmalat Sec. Litig., 376 F. Supp. 2d 449, 456 (S.D.N.Y. 2005).

After spending several pages trying to distract the Court from focusing on actual allegations of Dr. Wiedeking's contacts with the United States (Opp'n at 39-42), Plaintiffs finally get around to discussing the only allegation of such contact – his statement at the Detroit Auto Show in January 2007. Plaintiffs argue that his statement was "related to Porsche's VW plans and [Dr. Wiedeking's] ongoing role in Porsche's VW investment." (Id. at 42.) However, the test for specific jurisdiction is not whether the United States contact is "related to" some generalized business activity happening at any time, but whether the United States contact is "related to" *the claim asserted*. Here, Plaintiffs cannot even articulate the relationship between this single interview and the substance of Plaintiffs' claims for relief. Instead, Plaintiffs simply cite to two allegations in the Complaints (see id. (citing TAC ¶ 106 and AC ¶ 35)): the first allegation simply explains that Porsche increased its stake from 27.3 to 31% in March 2007 (TAC ¶ 106), and the second allegation simply describes the Detroit Auto Show interview (AC ¶ 35).

These actions, however, are premised entirely on Porsche's alleged plans to *dominate* VW, which Porsche is not even conclusorily alleged to have intended to do until February 2008. And Plaintiffs are not alleged to have been harmed by Porsche's alleged scheme until March 2008. Both of these latter events did not allegedly occur until well over a year after the January 2007 interview. Any connection is therefore tangential or attenuated at best, and there is simply no articulable "'relationship among the defendant, the forum, and the litigation.'" Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (citation omitted). See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998 (2d Cir. 1975), rev'd on other grounds by Morrison; Ljungkvist v. Rainey Kelly Campbell Roalfe/Young & Rubicam, Ltd., No. 01 Civ.

[6] See also Leasco, 468 F.2d at 1342 ("Although such worldwide reliance may be, in a sense, foreseeable, it is not sufficiently so to constitute a basis of personal jurisdiction consonant with due process.").

1681 (HB), 2001 WL 1254839, at *6 (S.D.N.Y. Oct. 19, 2001) (defendants' sending of personnel to New York for advertising business purposes was "not related to" plaintiff's claims that defendants used plaintiff's art in advertisements without payment). Because Plaintiffs' claims do not arise out of and are not related to Dr. Wiedeking's single visit to the United States in January 2007, no specific jurisdiction exists.

Not even Chloé v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158 (2d Cir. 2010) (Opp'n at 42), to which Plaintiffs cling so tightly, supports their conclusory assertion that the Detroit Auto Show interview is meaningfully related to their claims. In that case, the plaintiffs brought a trademark infringement claim against, inter alia, a limited liability company named Queen Bee for allegedly selling counterfeit "Chloé" bags into New York. The Second Circuit held that Queen Bee's sales of handbags to New York were sufficiently related to the plaintiffs' claims, as the sale of an allegedly infringing counterfeit Chloé bag was "part of a larger business plan purposefully directed at New York consumers." Id. at 167. Unlike Chloé, however, where the alleged wrongful act (selling a counterfeit Chloé handbag to New York) was a subset of the actions taken in the forum state (selling handbags to New York), the alleged wrongful acts in the instant actions comprise statements allegedly made and detrimentally relied upon between March 2008 and October 2008, which are entirely separate from Dr. Wiedeking's single January 2007 contact with the United States. Neither is a subset of the other. There is no allegation, for instance, that Dr. Wiedeking traveled to the United States throughout 2007 and into 2008, making numerous statements in the United States of which the alleged misstatements were but a subset. Plaintiffs therefore cannot seek refuge in any tortured analogy derived from Chloé.

C. Porsche's Actions Cannot Be Automatically Imputed to Dr. Wiedeking for Personal Jurisdiction Purposes Solely Because of His Position as Chief Executive Officer

Knowing that Dr. Wiedeking's January 2007 contact is simply insufficient to establish specific jurisdiction, Plaintiffs invoke Chloé again, this time for the proposition that this Court must impute *all* of Porsche's actions directly to Dr. Wiedeking solely by virtue of the fact that Dr. Wiedeking was then Porsche's CEO. Under Plaintiffs' theory, as long as there is

jurisdiction over a public corporation, there is automatic jurisdiction over its senior executive. That is simply not the law.

Unsurprisingly, Chloé stands for no such proposition, as that would run wholly afoul of the basic rule that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him . . . . Each defendant's contacts with the forum State must be assessed individually." Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984) (citation omitted); see also In re Rhodia S.A. Sec. Litig., 531 F. Supp. 2d 527, 542 (S.D.N.Y. 2007) ("Being a corporation's control person of itself does not . . . merit personal jurisdiction").

Rather, Chloé simply held that, under the facts of that case, the actions of the limited liability company at issue could be imputed to its principal, where: (i) the principal was alleged to be the "'conscious dominant and active force behind the wrongful acts of Queen Bee complained of,'" Chloé, 616 F.3d at 167 (citation omitted) (emphasis added); (ii) the company regularly transacted business in the forum; (iii) the company's business transactions in the forum state were actually related to the lawsuit at hand; and (iv) the principal was intimately involved in these business transactions into the forum state. See id. at 165-67.[7] Chloé involved an essentially one-man operation whereby the principal and the company were virtually the same person, and the principal was deeply involved with the type of business transaction – the selling of handbags into New York – of which the allegedly infringing acts were a part. See id. at 168 (noting how principal directly profited from each sale of a handbag, had joint access to company's account, used company revenues to pay his Beverly Hills rent, decided what handbags to sell and personally decided whether each handbag should be shipped to particular clients); compare with Sedona Corp. v. Ladenburg Thalmann & Co., No. 03CIV3120 (LTS)(THK), 2006 WL 2034663, at *8 (S.D.N.Y. July 19, 2006) (defendants' involvement consisted of nothing more than various control relationships). The Second Circuit's limited

[7] The Second Circuit further noted that the principal "neither raised the issue in his motion to dismiss nor appealed from that part of the district court's decision attributing Queen Bee's contacts to him." Id. at 169.

imputation simply cannot be applied under the allegations here to the chief executive officer of a multi-billion dollar, multinational, public corporation.

D. The Exercise of Personal Jurisdiction Over Dr. Wiedeking Would Be Unreasonable

Plaintiffs furthermore fail to carry their burden of demonstrating how exercising personal jurisdiction over Dr. Wiedeking would be reasonable. Plaintiffs seize principally on the assertion that Dr. Wiedeking did not argue that he would face any difficulty in flying to New York. To be sure, buying a plane ticket from Germany to New York may not be unduly onerous, but forcing Dr. Wiedeking to litigate in the United States including possibly participating in discovery and sitting through a lengthy trial in New York would be immensely onerous. Indeed, Plaintiffs' blithe argument about flying to the United States could be applied to any foreign citizen and eliminate the reasonableness analysis completely. The "reasonableness" inquiry, however, also examines where witnesses and evidence are likely to be located and competing public interests. See Metro. Life, 84 F.3d at 575.[8] Plaintiffs cannot dispute that the heart of their claims – alleged misstatements and market manipulation – concern conduct that happened entirely in Germany. Therefore, and for the reasons set forth in Porsche's papers, Germany is clearly a more convenient forum and, as the German government states, has a greater public interest in this litigation than the United States.

II. PLAINTIFFS FAIL TO RAISE A STRONG INFERENCE OF SCIENTER AS TO DR. WIEKDEING

Notwithstanding Plaintiffs' repeated references to "Defendants" without differentiation (see, e.g., Opp'n at 25-28), Plaintiffs have confirmed that as to Dr. Wiedeking Plaintiffs are focused on two statements that he made in October 2 and October 5, 2008. (See Opp'n at 25 n.17 ("The October 2, 2008, statement is one of two relevant statements that

[8] Plaintiffs baldly attempt to set as low a bar as possible to satisfy their burden of demonstrating reasonableness by suggesting that exercise of personal jurisdiction in the United States is reasonable if any witnesses or evidence are in the United States or if the United States has any interest in the litigation. (Opp'n at 44 (falsely portraying Dr. Wiedeking's argument as asserting that "no witnesses or evidence related to this litigation is in the United States and that this country has no interest in the litigation" (emphasis added).) This, however, is not the law, which requires an overall comparison of convenience and public interests. See, e.g., Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameries, No. 03 Civ. 1681 (LAP), 2004 WL 2199547, at *17 (S.D.N.Y. Sept. 29, 2004).

Defendant Wiedeking made.").) Focusing on these two statements, then, it is all the more apparent that the Complaints fail utterly to raise a strong inference of Dr. Wiedeking's scienter.

According to the Complaints, on October 2, 2008, Dr. Wiedeking allegedly stated that Porsche planned to increase its stake to more than 50% before the end of the year and that as to reaching 75% stated: "We do not want to rule out this possibility at the end of the day, some point in the future," but for now, domination was a "purely theoretical option." (TAC ¶ 127; AC ¶ 105.) On October 5, 2008, Wiedeking allegedly stated that 75% was "out of the question at present" (emphasis added) and that domination was a "long term possibility." (TAC ¶ 130; AC ¶ 110.) Plaintiffs' inference, however, cannot compete with the much more plausible competing inference that, as of early October 2008, Dr. Wiedeking did not know whether the obstacles to achieving 75% would be eradicated in the near term and, as a result, it remained only a "possibility" at that point in time. Indeed, so long as the VW Act remained intact, and so long as Prof. Piëch, a member of Porsche's Supervisory Board and chairman of VW's Supervisory Board, remained unsupportive of Porsche's domination of VW, domination would remain out of reach. (Porsche Mem. at 24.) Though Plaintiffs make much ado about the fact that these statements were made "only 21 days before Porsche's announcement" on October 26 (Opp'n at 25 n.17), Plaintiffs do not and cannot deny that circumstances fundamentally changed during these "21 days." On October 24, it was publicly announced that Prof. Piëch supported Porsche's takeover of VW. On October 25, it was reported that Germany would not resist the ECJ's ruling. Only after these significant events transpired did Porsche announce that they would seek to achieve 75% in 2009. Even then, 75% was never obtained but, instead, remained a "long term possibility" that, like many things that are deemed "possibilities," did not transpire.

Plaintiffs do not dispute the above, but instead assert conclusorily that "Porsche had already decided to achieve domination of VW Shares by October 2, 2008, and also had the ability to obtain sufficient shares to achieve domination." (Opp'n at 25 n.17.) However, for the reasons set forth in Porsche's papers, these assertions are insufficiently supported by particularized allegations. Therefore, Plaintiffs cannot overcome the stronger competing

inference that circumstances simply changed after Dr. Wiedeking made the statements in early October 2008.

III. PLAINTIFFS FAIL TO PLEAD THAT THEY SHORT SOLD IN RELIANCE ON DR. WIEDEKING'S OCTOBER 2 AND OCTOBER 5 STATEMENTS

Lastly, Section 10(b) is only available for those who actually purchased or sold securities as a result of an alleged misstatement, not for those who allege that they would have bought (i.e., covered their shorts) or sold securities had some alleged misstatement not been made. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735-45 (1975); Gruary v. Winehouse, 235 F.3d 792, 798-99 (2d Cir. 2000). Plaintiffs simply allege vaguely that they sold short or entered into securities-based swap agreements as a result of the alleged misstatements sometime between March and October 2008. (TAC ¶ 165, AC ¶ 124.) There is no indication that any of the over three dozen plaintiffs actually entered into a securities-based swap agreement after, or in reliance upon, the October 2 and October 5, 2008 statements. Plaintiffs' claims must accordingly be dismissed. See, e.g., Elliott Assocs., L.P. v. Covance, Inc., No. 00 Civ. 4115 (SAS), 2000 WL 1752848, at *6 (S.D.N.Y. Nov. 28, 2000) (citing Blue Chip Stamps, 421 U.S. at 749).

CONCLUSION

For all the foregoing reasons, and those set forth in the memoranda of law filed by the other defendants, the Complaints should be dismissed with prejudice as to Dr. Wiedeking.

Dated: New York, New York
October 26, 2010

Respectfully submitted,

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