UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

REPLY MEMORANDUM OF LAW IN FURTHER 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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SUMMARY INTRODUCTION

Plaintiffs' Opposition ("Opp.") postulates a legal and factual context for this case that is contrary to reality. This case involves German securities issued, traded and regulated in Germany under German and EU law. Plaintiffs knew that full well when they bet on massive short positions, just as they knew full well that Porsche could at any time announce that it was aiming to increase its VW Share ownership goal, this time to 75%.

Morrison v. National Australia Bank ("NAB"). Plaintiffs' effort to shoehorn their VW swap claims into Section 10(b) would produce a truly absurd result: While transactions in VW Shares would not be covered by Section 10(b), swap agreements referencing those same shares and supposedly "located" here would be, arbitrarily creating the "interference with foreign securities regulation" and "the unpredictable and inconsistent application of Section 10(b) to transnational cases" rejected by the Supreme Court in *NAB*. 130 S. Ct. 2869, 2880, 2886 (2010). Under *NAB*'s rationale, because VW Shares are not covered by Section 10(b), neither are Plaintiffs' swap agreements. In any event, Plaintiffs' bare-bones allegations regarding the U.S. nexus of their agreements fail completely to satisfy *NAB*'s "domestic transactions" requirement.

Forum Non Conveniens. Plaintiffs do not dispute that Germany is an adequate forum and cannot deny that their alleged losses arose from speculation in German—not American—securities markets. Germany's interest in determining Plaintiffs' claims is paramount and undeniable, as recognized in *NAB*. The connection between the alleged misconduct and the U.S. and its markets is *de minimis* at best. Plaintiffs cannot overcome these factors by pointing to the U.S. domicile of a minority of their number and claiming the "greatest deference" to their choice of forum. Indeed, their complaints about the German system reflect their motivation to forum shop.

Substantive Insufficiency. Plaintiffs bluntly state, "Plaintiffs are professional investors and at all times relevant here took into account *all* statements that Defendants made, privately and publicly, about Porsche's plans with respect to VW and Porsche's ownership of VW

Shares." (Opp. at 37 (emphasis in original).) But they never acknowledge the public facts, marshaled at pages 23 and 24 of Porsche's Memorandum ("Porsche Mem."), showing that Porsche continually increased its announced VW Share ownership goals depending upon various factors and disclosed its purchase of cash-settled options for VW Shares. Instead, Plaintiffs peg their case to two insufficient press articles and attach pejorative labels to legitimate business practices in a futile attempt to state misrepresentation and market manipulation claims.

Plaintiffs apparently cannot confront the reality that, with full knowledge of "*all* statements that Defendants made," they simply made a huge losing bet—a bet that was unreasonably risky given the total mix of information in the market, particularly for professionals managing other people's money.

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

Ignoring *NAB*'s admonition that the Exchange Act was not intended to "'regulat[e]' *foreign* securities exchanges," 130 S. Ct. at 2884, Plaintiffs seek to apply Section 10(b) to swap agreements referencing VW Shares that trade exclusively on foreign securities exchanges. Their proposed test fails to recognize that the economic consequences of these privately negotiated contracts depend solely upon the performance of VW Shares. By taking short positions through these swap agreements referencing VW Shares, Plaintiffs, in effect, transacted on a foreign exchange. As *NAB* makes clear, "transactions conducted upon *foreign* exchanges and markets" do not affect the "*national* public interest" and thus are not covered by Section 10(b). *Id.* at 2882.

Plaintiffs try to satisfy *NAB* by arguing that their swap agreements are "domestic transactions" because they signed confirmations in the United States and selected New York as the governing law and forum in their agreements. (Opp. at 10.) Under *NAB*, Plaintiffs' attempt fails for two independent reasons. First, Section 10(b) does not reach Plaintiffs' swap agreements because the referenced securities are not within its territorial reach. Second, Plaintiffs' allegations simply do not demonstrate that their swap agreements are "domestic transactions" in any event.

A. Under *NAB*, Section 10(b) Does Not Reach Plaintiffs' Swap Agreements.

Plaintiffs do not dispute that if the "material term" referenced in a swap agreement is not a "security" within the meaning of the Exchange Act, then Section 10(b) does not apply to the swap-holder's claim. (Porsche Mem. at 12-13.) Nor do they dispute that the referenced securities for the swap agreements at issue here—VW Shares—trade only on foreign exchanges and are not covered by Section 10(b). Under *NAB*'s rationale, Section 10(b) does not apply to Plaintiffs' swaps.

Plaintiffs urge this Court to adopt a test that would bar Section 10(b) claims for transactions relating to VW Shares but allow such claims for swap agreements referencing those same shares. *NAB* did not intend such a perverse result that would allow parties to evade its sweeping new rule merely by entering into a private swap agreement. *NAB*'s bright-line transactional test "does not leave open any of the back doors, loopholes or wiggle room to accommodate the distinction Plaintiffs urge to overcome the decisive force" of such test. *Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758, 2010 WL 3069597, at *2 (S.D.N.Y. July 27, 2010).

In a futile effort to show that Porsche's "non-locational test" is "squarely at odds with" *NAB* (Opp. at 11), Plaintiffs raise two arguments, both of which are unavailing. *First*, Plaintiffs rely on *SEC* v. *Rorech*, 673 F. Supp. 2d 217 (S.D.N.Y. 2009), which was decided before *NAB*. In that case, the SEC brought an action for alleged insider trading in credit default swaps ("CDSs") referencing foreign bonds, but involving no foreign parties. Defendant argued that "the SEC would not have jurisdiction over the underlying bonds, and, therefore, it should not have jurisdiction over the CDSs based on those bonds." *Id.* at 226. Applying the now-defunct "conduct and effects" test, the court rejected defendant's argument because "CDSs, not the bonds, are the financial instruments at issue in this case and 'at the heart of' the alleged fraud." *Id.* Plaintiffs' reliance on *Rorech* is thus misplaced because that decision was based on factors, such as the location of the defendant's conduct, that the Supreme Court rejected in *NAB*, 130 S. Ct. at 2884, and on other factors, such as the defendant's U.S. citizenship, that are not applicable here.

Under *NAB*, the focus here must be on the referenced security. Plaintiffs allege that Porsche made misstatements about VW Shares and manipulated the market for VW Shares. These allegations do not relate in any way to Plaintiffs' swap agreements with their counterparties—none of whom included any of the Defendants. Nowhere in the Complaints do Plaintiffs claim that the alleged misstatements and manipulation were directed to a "market" in swap agreements referencing VW Shares, that Porsche knew of any such "market," or that such a "market" even existed. The only relevant market is the German market for VW Shares. Contrary to Plaintiffs' argument, Porsche is not asking the Court to "ignore the location of the transaction at issue." (Opp. at 11.) Under *NAB*, the transaction at issue relates to VW Shares.

Second, Plaintiffs argue that "[i]f §10(b) applies to claims involving domestic transactions in ADRs and ADSs referencing foreign securities . . . then it must also apply to Plaintiffs' domestic transactions in swaps that reference foreign securities." (Opp. at 12-13.) This argument is flawed because it fails to recognize the critical difference between swap agreements and ADRs/ADSs. Unlike swap agreements, ADRs/ADSs are themselves securities traded in organized markets—by their very name, "American" markets—and the existence of those markets is well known to both issuers and those who may through market activity have disclosure or other obligations regarding an issuer's securities.[1] That is a far cry from imposing Section 10(b) liability on issuers and others anywhere in the world who simply have no way of knowing—because there are no defined markets for swaps—that private parties entered into agreements referencing securities traded only on foreign exchanges and signed confirmations in the United States. Thus, the correct approach here is to refer to the market for the referenced security.

This approach is wholly consistent with *NAB*'s goal of avoiding "interference with foreign securities regulation." 130 S. Ct. at 2886. As Plaintiffs concede, the primary market for

[1] Moreover, Plaintiffs' argument that Section 10(b) applies to ADRs has been rejected by courts in this District. *See, e.g., In re Société Générale Sec. Litig.* ("*SocGen*"), No. 08 Civ. 2495, 2010 WL 3910286, at *6-7 (S.D.N.Y. Sept. 29, 2010).

VW Shares is the Frankfurt stock exchange, and "Germany has a legitimate interest in the regulation of German securities markets." (Opp. at 21.) Indeed, Plaintiffs do not dispute that Germany has enacted robust regulatory and statutory regimes directed to the conduct alleged in the Complaints. (Porsche Mem. at 18; Mülbert Decl. ¶¶ 16-22, 29-32.) Nor do they dispute that Porsche's transactions relating to VW Shares were subject to EU and German law—not Section 13(d) of the Exchange Act. (Porsche Mem. at 14, 18; Mülbert Decl. ¶¶ 15, 20, 34-35.) Applying Section 10(b) to swap agreements referencing securities traded solely on foreign exchanges would thus result in the "probability of incompatibility with the applicable laws of other countries" expressly disavowed by *NAB*. 130 S. Ct. at 2885.

Plaintiffs argue that issuers all over the world need not be concerned about being subject to Section 10(b) by virtue of a private contract, because Section 10(b) requires that the fraud be "accomplished 'by the use of any means or instrumentality of interstate commerce or of the mails.'" (Opp. at 14.) Foreign issuers can hardly take comfort in this provision because, as a practical matter, the "instrumentality of commerce" requirement is not a high bar for most plaintiffs. Indeed, *NAB* disproves Plaintiffs' argument. There, plaintiffs alleged facts that presumably satisfied the "interstate commerce" element and yet the Supreme Court held that Section 10(b) did not apply to their claims. *See* 130 S. Ct. at 2875-76. Thus, because this element does not weed out foreign claims, it is not a sufficient safeguard against extraterritorial application of Section 10(b).

Rather than explaining how their test is consistent with *NAB*'s rationale, Plaintiffs accuse Porsche of misreading *NAB* by "imply[ing] that securities-based swap agreements do not qualify as 'domestic transactions' if they are marked by *any* foreign characteristics." (Opp. at 13.) But this twisting of Porsche's position ignores the undisputed facts. This case is not merely "marked by *any* foreign characteristics": it involves German securities issued by a German company, traded and regulated in Germany under German and EU law, and Plaintiffs' attempt to profit from what they believed was a misvaluation of those securities in Germany.

In addition to the clear rationale of *NAB*, Congress's expressed purpose in extending Section 10(b) to swaps leads to the conclusion that the law should cover swaps only if they reference securities that are themselves covered. (Porsche Mem. at 12-13.) The focus on the referenced security ensures that the Exchange Act does not regulate foreign exchanges and markets, and prevents attempts to profit from inside information regarding American securities by "locating" swap agreements referencing such securities abroad.

B. Plaintiffs' Allegations Do Not Suffice To Establish that Their Swap Agreements Are "Domestic Transactions" in Any Event.

Putting aside the swaps' reference to VW Shares, in addition to the confirmations, Plaintiffs argue that the U.S. law and forum provisions in the swap agreements "have significance as between Plaintiffs and their swap counterparties" because they "demonstrate where the transactions took place." (Opp. at 10.) They also argue that "[t]hese facts of admitted significance as between Plaintiffs and their swap counterparties for the same reasons demonstrate the substantial domesticity of Plaintiffs' swap transactions." (*Id.*) Plaintiffs, however, do not bother to explain what these "same reasons" are, and their conclusion is a *non sequitur*. Parties can and do enter into contracts to buy and sell coffee or gold or finance the construction of refineries in Singapore or Cairo and provide for English law and London courts or New York law and New York courts. Such provisions do not airlift the transaction to the place chosen for judicial jurisdiction. Plaintiffs' bare allegation that their swap transactions were located in the United States simply begs the question.

It is telling that Plaintiffs' allegations regarding the steps they took in the United States to initiate the swap transactions (e.g., sign confirmations) apply equally to their short sales regarding VW Shares. But Plaintiffs concede that the latter transactions are not "domestic." Even more telling are the allegations—peculiarly within Plaintiffs' own knowledge—that are missing from the Complaints: the identities of their swap counterparties, in what countries their counterparties are located, in what countries their counterparties signed the swap agreements and confirmations, the location where the parties' agreed payments would be exchanged, and the

currency of payment. The Complaints' silence on these points speaks volumes and confirms that Plaintiffs' swap transactions are not "domestic transactions." *See Norex Petroleum Ltd*. v. *Access Indus., Inc*., No. 07-4553-cv, 2010 WL 3749281, at *3 (2d Cir. 2010) ("simply alleging that some domestic conduct occurred cannot support a claim of domestic application").

Under *NAB*, courts have consistently resisted extraterritorial application of Section 10(b) to avoid interference with foreign securities regulation.[2] As these courts have recognized, where a plaintiff "happened to be located at the time that it placed its purchase order is immaterial." *Swiss Re*, 2010 WL 3860397, at *10; *see also* Porsche Mem. at 14-15. "By asking the Court to look to the location of the act of placing a buy order," Plaintiffs seek to apply a fact-bound, case-by-case inquiry. *SocGen*, 2010 WL 3910286, at *6 (internal quotations omitted). They do not dispute that their test would require this Court to focus on U.S. conduct by parsing each swap agreement to determine which aspects occurred domestically and which occurred abroad. (Porsche Mem. at 15.) In short, it is Plaintiffs—not Porsche—who seek to revive the "conduct and effects test."

II. CONSIDERATIONS OF CONVENIENCE DO NOT FAVOR LITIGATION IN THE UNITED STATES.

A. Plaintiffs' Choice of Forum Is Not Entitled to the "Greatest Deference."

Because 17 out of 39 Plaintiffs are organized under U.S. law, Plaintiffs argue that this Court "should initially be at [its] most deferential" with respect to their choice of forum. (Opp. at 16.) And because 22 non-U.S. Plaintiffs "are under common American management with the American Plaintiffs, and most of their investors are located here," Plaintiffs argue that their "decision to sue in this forum" was "dictated by reasons that the law recognizes as valid." (*Id*. at 16-17.) Plaintiffs' flawed analysis does not entitle them "to the greatest deference." (*Id*. at 16.)

First, it is beyond dispute that "the choice of a United States forum by a foreign plaintiff is entitled to less deference." *Iragorri* v. *United Techs. Corp*., 274 F.3d 65, 71 (2d Cir.

[2] *See* Porsche Mem. at 11; *Plumbers' Union Local No. 12 Pension Fund* v. *Swiss Reinsurance Co.* ("*Swiss Re*"), No. 08 Civ. 1958, 2010 WL 3860397, at *8-9 (S.D.N.Y. Oct. 4, 2010); *SocGen*, 2010 WL 3910286, at *6-7; *In re Alstom SA Sec. Litig*., No. 03 Civ. 6595, 2010 WL 3718863, at *2-3 (S.D.N.Y. Sept. 14, 2010).

2001).[3] The 22 non-U.S. Plaintiffs organized themselves under foreign law to avoid the obligations imposed by U.S. law. They should not be able to piggyback off the U.S. Plaintiffs—even if they have American managers and investors. Plaintiffs' arguments to the contrary can find no support in the cases they cite. In *Bigio* v. *Coca-Cola Co*., the Second Circuit held that foreign plaintiffs' decision to sue in the United States rather than Egypt was "legitimate" because plaintiffs were "unable to obtain relief in the Egyptian courts," and the Egyptian Government had "never raised the slightest objection to adjudication of the instant controversy by United States courts." 448 F.3d 176, 178-79 (2d Cir. 2006). Likewise, in *DiRienzo* v. *Philip Servs. Corp.*, the Second Circuit rejected defendants' claim that litigating in New York was inconvenient because earlier in the case, defendants had successfully moved to transfer the case here. 294 F.3d 21, 29 (2d Cir. 2002). But the German Government has expressed its compelling interest in this case, and Defendants had no role at all in selecting the forum, much less procuring a transfer here.

Second, Plaintiffs do not dispute that they chose to engage in transactions relating to securities traded only on foreign exchanges. (Porsche Mem. at 17.) Nor do they dispute that their allegations focus on Porsche's alleged misstatements regarding VW Shares and its alleged manipulation abroad of the market for VW Shares. Aside from the fact that fewer than half of them are organized under U.S. law, Plaintiffs have no meaningful basis to argue that their lawsuit's supposed connection to the United States warrants the "greatest deference." *See Online Payment Solutions Inc.* v. *Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 382 (S.D.N.Y. 2007) ("Plaintiffs' choice of forum deserves less than substantial deference because the allegations giving rise to this lawsuit focus on activity that occurred in Sweden and England."). Where, as here, "the plaintiff sought out the transaction giving rise to the suit, when suit in the international forum was foreseeable in light of the transaction, and when the plaintiff is an organization—rather than an

[3] Although Plaintiffs argue that Porsche did not cite to *Iragorri*, they ignore the fact that Porsche did apply that case's "sliding scale" of deference accorded to a plaintiff's choice of forum. In arguing that they are entitled to the "greatest deference," Plaintiffs incorrectly apply *Iragorri*.

individual—that can easily handle the difficulties of engaging in litigation abroad," less deference is due. *Cortec Corp*. v. *Erste Bank Ber Oesterreichischen Sparkassen AG*, 535 F. Supp. 2d 403, 408 (S.D.N.Y. 2008); *see also LaSala* v. *Bank of Cyprus Pub. Co. Ltd.*, 510 F. Supp. 2d 246, 257 (S.D.N.Y. 2007) (when a plaintiff "is a corporation doing business abroad and can expect to litigate in foreign courts," deference is "diminished") (citation omitted).

Third, although Plaintiffs concede that Germany is an adequate forum, their objections about the German system indicate that they seek more favorable treatment in the United States. For example, Plaintiffs complain about the "limited discovery mechanisms available in Germany." (Opp. at 19.) Their "decision to sue here rather than [in Germany]" appears to be "at least in part, motivated by the availability of . . . procedural devices not available [there]," which is one of the "indicia of forum-shopping." *Gilstrap* v. *Radianz Ltd.*, 443 F. Supp. 2d 474, 481 (S.D.N.Y. 2006); *see also Iragorri*, 274 F.3d at 72 ("forum-shopping reasons" include "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case").

Furthermore, Plaintiffs unabashedly admit that they "prefer[] to litigate their dispute in an American forum away from the political pressures" that they perceive exist in Germany. (Opp. at 21.) As *NAB* explained, "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction." 130 S. Ct. at 2885. Not surprisingly, the German Government has affirmed its "strong interest in the conduct of German business and trade in German securities being controlled by the German courts." (August 20, 2010 Letter from the Consulate General of the Federal Republic of Germany, attached as Ex. 38.)[4] Plaintiffs interpret such affirmation as a "pernicious German interest in this litigation." (Opp. at 21.) Such a baseless accusation can only be interpreted to mean that Plaintiffs seek to gain a tactical advantage by avoiding a forum in which they perceive Defendants to be more popular.

[4] All references to "Ex." are to the exhibits accompanying the Declaration of Gandolfo V. DiBlasi, dated October 26, 2010.

See Iragorri, 274 F.3d at 72 ("forum-shopping reasons" include the parties' "popularity" or "unpopularity in the region"). In sum, because the facts point to a decision motivated by invalid forum-shopping reasons, Plaintiffs' choice should be accorded minimal, if any, deference.

B. The Public and Private Interest Factors Compel Dismissal.

Since it relies on conclusory statements, misconstrues the facts, and employs faulty reasoning, Plaintiffs' attempt to tilt the balance of public and private interests in their favor fails.

Private interest factors. The key documents in this case are written in German, and as Plaintiffs recognize, they are located in Germany. (Opp. at 19, 20 n.13 (arguing that to demonstrate Porsche's "intent to deceive investors" they need its "internal documents" and discussing "German procedure" for compelling production of those documents).) Plaintiffs simply have no basis to conclude that "many of Defendants' most relevant business documents" are written in English. (Opp. at 19.) Likewise, Plaintiffs incorrectly argue that Porsche will be able to bring the "primary German witnesses" to testify in the United States (*id*.), as several of these witnesses no longer work for Porsche and may be beyond the reach of this Court's jurisdiction. As emphasized by the primary case on which Plaintiffs rely, deposition testimony is not a satisfactory substitute because "live testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor." *Iragorri*, 274 F.3d at 75 (citation omitted). Finally, although Plaintiffs curiously claim that only they—and not Defendants—would be burdened by duplicative proceedings in the United States and Germany if no jurisdiction existed over Dr. Wiedeking and Mr. Haerter (Opp. at 20), "the inability to try this entire case in the United States" is a "textbook example" of a "factor favoring forum non conveniens dismissal." *In re Banco Santander Sec.-Optimal Litig.*, No. 09-MD-02073-CIV, 2010 WL 3036990, at *3 (S.D. Fla. July 30, 2010).

Public interest factors. Plaintiffs' analysis of the relevant policy considerations turns *NAB* on its head: *NAB* makes clear that Germany has the paramount interest in regulating German securities markets. As Professor Mülbert's uncontested declaration explains, "Given Germany's

extensive statutory and regulatory framework that reflects its policy choices about how best to regulate its financial markets, a U.S. court's application of U.S. laws . . . would interfere with Germany's sovereign powers to regulate and police . . . its capital markets." (Mülbert Decl. ¶ 3.) Germany's compelling interest is underscored by German law providing for exclusive jurisdiction in German courts, which would render a U.S. judgment against Porsche unenforceable in Germany.[5] Because German regulators are investigating allegations similar to those raised here (Porsche Mem. at 7-8), proceeding with a U.S. litigation would also run the risk of inconsistent results. *See Online Payment Solutions Inc.*, 638 F. Supp. 2d at 392 ("Sweden has a strong interest in resolving civil disputes that arise out of the same acts on which a criminal complaint is based.").

By contrast, the United States has a much less significant interest in this lawsuit. Tellingly, the case on which Plaintiffs rely focuses on factors that are not present here. In *DiRienzo* v. *Philip Servs. Corp.*, "many of the plaintiffs' securities transactions were conducted entirely in the United States, by Americans, in American dollars, on American stock exchanges . . . [and] plaintiffs bought shares on the NYSE or NASDAQ and relied on statements filed with the SEC, disclosing that most of [defendant's] business was conducted in the United States." 232 F.3d 49, 63 (2d Cir. 2000). In any event, a U.S. court's interest in enforcing U.S. securities law "does not prohibit [courts] from dismissing a securities action on the ground of forum non conveniens." *Allstate Life Ins. Co*. v. *Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993).[6]

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[5] *See* Porsche Mem. at 18-19; Wagner Decl. ¶¶ 28-33; Supplemental Declaration of Gerhard Wagner, dated October 26, 2010 ("Wagner Suppl. Decl.") ¶¶ 16-18.) The contrary arguments of Plaintiffs' retained expert, Mr. Armbruester, are not persuasive. Moreover, as reflected in Section D of his list of publications, Mr. Armbruester's area of expertise does not appear to include international and comparative civil procedure. An English translation of the titles of the publications from this section is attached as Exhibit 39.

[6] With respect to choice of law, the "mere likelihood of the application of foreign law weighs in favor of dismissal," *LaSala*, 510 F. Supp. 2d at 263. The "substantial disagreements between the parties' respective experts" provide the Court "a preview of even thornier problems to come if the Court must apply foreign law in trying the merits of this case." *Banco Santander*, 2010 WL 3036990, at *26. Moreover, contrary to Mr. Armbruester's argument, under German choice-of-law analysis, if Plaintiffs were to bring a lawsuit in Germany, German law would apply there. (Wagner Suppl. Decl. ¶¶ 13-15.)

III. PLAINTIFFS' OPPOSITION CONFIRMS THAT THEIR MISSTATEMENT AND MANIPULATION ALLEGATIONS ARE INSUFFICIENT TO STATE A CLAIM.

In trying to bolster their misrepresentation and manipulation claims, Plaintiffs accuse Porsche of orchestrating a plan to take over VW that was "long [] hidden from the market." (Opp. at 1.) As the undisputed facts show, however, Porsche's accumulation of VW Shares was hardly a secret. Against this backdrop of publicly available information, it is clear that Plaintiffs have failed to allege any actionable claims.

Porsche publicly announced over the course of several years that it would acquire VW Shares and did continually increase its stake in response to various factors. (Porsche Mem. at 23-24.) Porsche also publicly announced that it would seek to invalidate the provision of the VW Act requiring more than 75% for domination, and that its goals regarding VW Shares could change. (*Id.*) Plaintiffs do not dispute any of these facts. Nor do Plaintiffs dispute that Porsche publicly announced that it was purchasing cash-settled options referencing VW Shares. Porsche even publicly disclosed information sufficient to calculate the amount of options in 2007. In fact, nine days before Porsche's October 26, 2008 announcement, a market analyst, relying on data that Porsche had disclosed *in November 2007*, was able to approximate the percentage of VW Shares corresponding to Porsche's cash-settled options. (Porsche Mem. Ex. 28 at 5-6.)

Despite the public record, Plaintiffs point to a momentary spike in VW Share prices (when Plaintiffs—and perhaps others—sought simultaneously to cover huge short positions) in support of their claim that a fraud had occurred. But as even Plaintiffs recognize, "short squeezes may occur naturally in the market." (Opp. at 31 (citing SEC, Amendments to Regulation SHO).)

Misrepresentation Claim. As Plaintiffs concede, the sufficiency of their claim hinges on their allegation that, contrary to its October 26, 2008 announcement, Porsche actually sought a 75% stake in VW in February 2008. (Opp. at 26.) Plaintiffs rely on two media articles—both of which are inadequate as a matter of law. As an initial matter, Plaintiffs confuse the issue by arguing that Porsche has been able to learn specific details about the *articles* themselves, such as

when and in what publications they were published. (Opp. at 28-29.) These facts are irrelevant under *Novak* v. *Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000).

Regarding the article about Prof. Piëch (Porsche Mem. at 26-27), *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993), is on point. There, the Second Circuit held that an article containing an unattributed statement about when Time Warner began contemplating certain financing was insufficient to "give rise to a strong inference" of scienter. *Id.* at 271. Plaintiffs attempt to distinguish this case by arguing that when the *Time Warner* plaintiffs "proposed to identify the date to be 'as early as November 1990,' the court observed that the 'amendment may well be adequate.'" (Opp. at 30.) This argument misses the point. Plaintiffs there sought the amendment to add a reference to a report that specifically supported the allegation at issue. *Time Warner*, 9 F.3d at 271 n.7. Based on their misreading of *Time Warner*, Plaintiffs argue that, like "as early as November 1990," their allegation "first half of 2008" is adequate. (Opp. at 30.) The critical difference is that the latter allegation is not expressly attributable to a reliable source.

Regarding the article about the meeting with unnamed Porsche and Lower Saxony representatives (Porsche Mem. at 25-26), Plaintiffs argue that the "allegations of the Complaints and Defendants' concession that the meeting took place are sufficient to support the probability that the magazine's source possessed the information alleged." (Opp. at 28.) They are wrong. Even if the meeting did take place, Plaintiffs have no basis to equate the source's mere attendance with his or her possession of the information alleged. Plaintiffs have failed to make any allegations showing that the Porsche representative was in a position to know when Porsche intended to "implement a domination and profit transfer agreement," as they must under *Novak*. (Porsche Mem. at 25-26.)

With respect to scienter, contrary to Plaintiffs' characterization, Porsche does not argue that "Defendants' misrepresentations were innocently or inadvertently uttered." (Opp. at 27.) Against the factual background available to the public, the more compelling inference is that Porsche's circumstances changed just prior to October 26, 2008. None of Porsche's statements

foreclosed the possibility that Porsche would decide to seek a 75% stake in VW Shares. As noted in the press release, Porsche did not announce that it had reached 75% but only that it hoped to do so the following year. (Porsche Mem. at 24.) Indeed, Porsche never realized the 2009 goal of 75%—the amount Plaintiffs claim it had already locked up in the first half of 2008. (TAC ¶ 8.)

Market manipulation claim. As an initial matter, Plaintiffs do not dispute that their manipulation claim relates solely to German markets and do not allege any manipulation regarding their swap agreements. On this basis alone, *NAB* requires dismissal of this claim. Moreover, Plaintiffs' Opposition confirms that they have failed to allege a deceptive course of conduct going beyond misrepresentations or omissions (such as wash sales, matched orders, rigged prices) "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). Both types of "market activity" that they claim Porsche committed to "corner[] the market in VW shares" (Opp. at 33-34) are simply dressed-up misrepresentation and omission claims (Porsche Mem. at 27-29), which, as Plaintiffs concede, cannot be converted into claims of market manipulation. (Opp. at 35.)

First, assuming their allegations are true, Plaintiffs merely equate proper business activities, such as keeping one's affairs confidential and order-splitting,[7] with manipulative practices like wash sales. (Opp. at 33-35.) They are simply not the same. Market participants may keep their plans confidential unless they are subject to disclosure requirements like Section 13(d) of the Exchange Act—which does not apply to Porsche. (Porsche Mem. at 14.)[8] Rejecting a claim similar to Plaintiffs', a court in this Circuit dismissed a "manipulation" claim where the defendants

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[7] "The practice of distributing orders over time to minimize trade impact is perhaps one of the most common strategies used in practice." Joel Hasbrouck, EMPIRICAL MARKET MICROSTRUCTURE 61 (Oxford Univ. Press 2007). "Traders often split their large orders to avoid showing the market the full size of their interest. They also split large orders to price-discriminate as they push prices up or down." Larry Harris, TRADING AND EXCHANGES 428 (Oxford Univ. Press 2003).

[8] Plaintiffs' reliance on *CSX Corp.* v. *Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511, 552 (S.D.N.Y. 2008) is misplaced. (Opp. at 34.) *CSX* is not a manipulation case; it concerns the issue of disclosure under Section 13(d). Plaintiffs' reliance on this case confirms that their "manipulation" claim is really a misrepresentation claim.

did not disclose their accumulation of shares until reaching 77%, and the plaintiffs alleged that "defendants' manipulative activity" "constrained" supply and kept the price of the security "below the level it would have achieved had investors been aware of defendants' accumulation." *Collier* v. *Aksys Ltd.*, No. 3:04-CV-1232, 2005 WL 1949868, at *4, *15-16 (D. Conn. Aug. 15, 2005), *aff'd*, 179 Fed. Appx. 770 (2d Cir. 2006).

Second, Plaintiffs' allegation—that Porsche's cash-settled options were actually physical options (Opp. at 6, 33)—is a misrepresentation claim with no specified basis. Plaintiffs rely on an anonymous Porsche employee who allegedly spoke during the Frankfurt Auto Show in September 2007. (Opp. at 33; TAC ¶ 126.)[9] However, Plaintiffs claim that, as professional investors, they "at all times relevant here took into account *all* statements that Defendants made, privately and publicly." (Opp. at 37.) Accordingly, Plaintiffs, by their own admission, had been aware of the supposed nature of Porsche's options *since 2007*.[10]

CONCLUSION

For the foregoing reasons and the reasons set forth in Porsche's Memorandum, 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*.

Respectfully submitted,

/s/ Gandolfo V. DiBlasi
Gandolfo V. DiBlasi

[9] Plaintiffs' reliance on this unidentified source is insufficient for the same reasons discussed above. That the unnamed employee allegedly spoke "specifically" about options (Opp. at 33) does not ensure that the source's statements were correct or that he or she was in a position to know the information attributed to him or her.

[10] Plaintiffs do not dispute that if the Court dismisses their federal claims, there is no basis to exercise pendent jurisdiction over their common law fraud claims. (Porsche Mem. at 29.) Even if the Court were to reach those latter claims, they should be dismissed. *See, e.g.*, *Clark* v. *Nevis Capital Mgmt., LLC*, No. 04 Civ. 2702, 2005 WL 488641, at *18-19 (S.D.N.Y. March 2, 2005) (granting motion to dismiss where plaintiff made "only conclusory, non-specific allegations of reliance."). Plaintiffs do not explain on which statements they relied or whether they were aware of the alleged misstatements, except to say that they "at all times relevant here took into account *all* statements that Defendants made." (Opp. at 37.) This is insufficient. (Porsche Mem. at 29-30); *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). Moreover, for the reasons stated above, in light of the total mix of information publicly available to Plaintiffs, their alleged reliance was unreasonable as a matter of law. (*See also* Porsche Mem. at 29-30.)

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