IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Automobile Holding SE, f/k/a Dr. Ing. h.c. F. Porsche AG; Wendelin Wiedeking; and Holger P. Haerter, Defendants.	10 Civ. 04155 (HB)(THK) Oral Argument Requested

PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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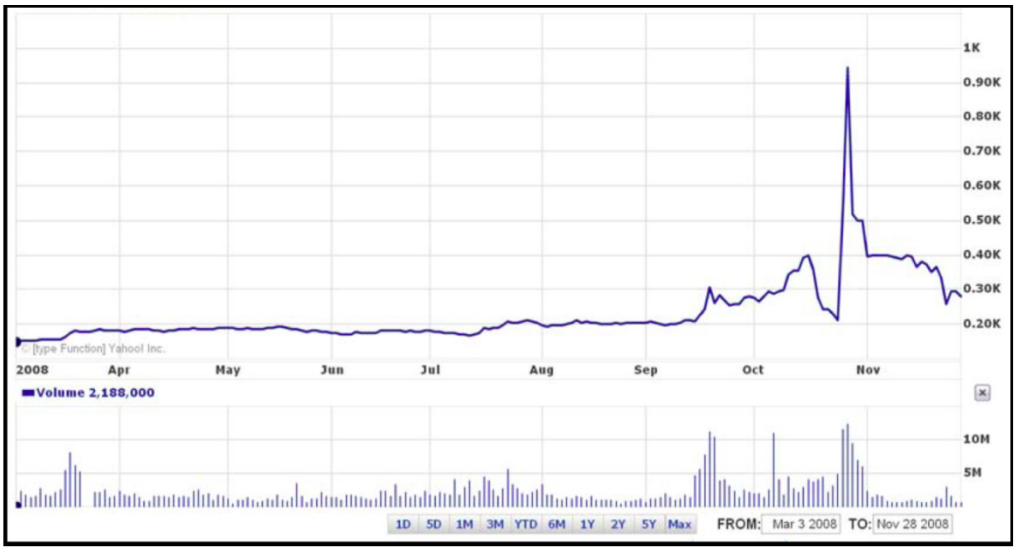
INTRODUCTION

In *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), protects "transactions in securities listed on domestic exchanges, and *domestic* transactions in other securities." 130 S. Ct. at 2884 (emphasis added). As *Morrison* observes, "the focus of the Exchange Act is *not* upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 2884 (emphasis added). *Morrison* does not insulate Defendants from liability here, because Plaintiffs' § 10(b) claims arise from domestic transactions in securities-based swap agreements.

Plaintiffs are American investment funds and other funds whose investments are managed from the United States. *See* Third Amended Complaint ("TAC") filed by Elliott Associates, L.P., *et al.* (the "*Elliott* Plaintiffs") at ¶¶ 149–53; Amended Complaint ("AC") filed by Black Diamond Offshore Ltd., *et al.* (the "*Black Diamond* Plaintiffs") at ¶ 39. Plaintiffs suffered over $2 billion in losses when Defendants triggered what the financial press has called "a massive short squeeze" (Reuters) and "a short squeeze of historic proportions" (*New York Times*).[1] This short squeeze resulted when, on October 26, 2008, Defendant Porsche Automobil Holding SE ("Porsche") revealed what it long had hidden from the market: Defendants had cornered the market in the ordinary shares of Volkswagen AG ("VW Shares") and intended to use its corner to take total control of Volkswagen AG ("VW"). The following chart illustrates that Defendants' short squeeze resulted in a sharp spike in the price of VW Shares:

[1] In a short squeeze, "the price of a stock is inflated to levels at which the short seller can no longer accept the costs associated with maintaining the short position, or at which the risk of loss is increased beyond acceptable levels, forcing the short seller to 'cover' his position" at dramatically inflated prices. *Rocker Mgmt., L.L.C. v. Lernout & Hauspie Speech Prods. N.V.*, No. 00-5965 (JCL), 2005 WL 1365465, at *2 n.5 (D.N.J. June 7, 2005).



TAC at ¶ 4; AC at ¶ 10.

Defendants were unapologetic and astonishingly frank about how they had intentionally misled investors, telling the press: "We are a very small company buying into a very big company. That is not something you can afford if everybody is able to read your strategy in the newspaper." TAC at ¶ 8; AC at ¶ 119. This candor contrasted sharply with Defendants' statements just days earlier, when, for example, Defendants dismissed as "complete bullshit" an analyst's report speculating that Porsche might secretly have acquired a much larger stake in VW Shares than the market thought. TAC at ¶ 15b.

Defendants expressed only disdain for the investors who lost billions in Defendants' short squeeze: "A couple of gamblers on the market got their odds wrong. And now they are pointing a finger at us." *Id.* at ¶ 33. Even today, Defendants act as if the events of 2008 were all just a

game, saying that Plaintiffs "gambled" and "lost." Porsche Mem. at 1;[2] *see also* Haerter Mem. at 1 ("They lost their bets. Now they want someone to blame."); Wiedeking Mem. at 1 (Plaintiffs "hav[e] lost their bets").

These taunts ring hollow. Defendants admit they are currently under criminal and civil investigation for the events at issue in this lawsuit. Porsche Mem. at 3, 7–8. Indeed, Defendants barely challenge Plaintiffs' allegations on the merits, hoping instead to persuade the Court that this case—involving numerous American funds and investment advisers and transactions on American soil—is somehow "too German" to proceed in an American court under American law.

The Court should deny Defendants' motions to dismiss. First, Plaintiffs have stated claims for securities fraud and manipulation under United States law as to their domestic transactions in securities-based swap agreements. Second, Defendants cannot meet their heavy burden to show that Plaintiffs, 17 of whom are American, should be denied their right to litigate their claims in an American forum. And third, there is personal jurisdiction over Porsche's former Chief Executive Officer and Chief Financial Officer, Defendants Wendelin Wiedeking ("Wiedeking") and Holger P. Haerter ("Haerter"), respectively, who remain individually responsible for their role in Porsche's fraud and manipulation; for its part, Porsche does not contest personal jurisdiction.

[2] "Porsche Mem." refers to the "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*"; "Wiedeking Mem." refers to "Defendant Dr. Wendelin Wiedeking's Memorandum of Law in Support of His Motion to Dismiss the Elliott Plaintiffs' Third Amended Complaint and the Black Diamond Plaintiffs' Amended Complaint"; and "Haerter Mem." refers to the "Memorandum of Law in Support of Defendant Mr. Holger P. Haerter's Motion to Dismiss for Lack of Personal Jurisdiction and Pursuant to Rule 12(b)(6) or on the Basis of *Forum Non Conveniens*."

BACKGROUND

A. Plaintiffs

Plaintiffs are investment funds managed by American investment managers located in New York, New York and Dallas, Texas. *See* TAC at ¶¶ 34–68 (35 funds under the direction of 9 investment managers); AC at ¶¶ 15–19 (4 funds under the direction of 1 investment manager). Seventeen Plaintiffs are Delaware limited partnerships and the rest are organized under the laws of other countries.[3] From 95% to 100% of the investors in the Delaware limited partnerships were located in the United States.[4] Of the 18 *Elliott* Plaintiffs that are non-U.S. legal entities, 16 had American resident investors, representing up to 100% of their investors.[5] With respect to the *Black Diamond* Plaintiffs, between 41% and 100% of their assets represent funds invested by American resident investors. AC at ¶¶ 15–19.

B. Defendants' Intentional Misrepresentations and Manipulative Acts

This case arises from the Defendants' efforts to corner the market in VW Shares as a way of taking control of VW. On December 31, 2007, Porsche was already VW's largest shareholder, with approximately 31% of VW's shares. TAC at ¶ 109; AC at ¶ 59. The German State of Lower Saxony held 20.1% of VW's shares. TAC at ¶ 109. On February 25, 2008, Defendants' representatives held a secret meeting in Berlin with a high-ranking officer of Lower Saxony. TAC at ¶ 6; AC at ¶ 89. At that meeting, these representatives privately informed Lower Saxony of its intention to acquire at least 75% control of VW Shares. *Id.* But Defendants' plan faced a hurdle: more than 25% of existing VW Shares were controlled by

[3] TAC ¶¶ 34, 38, 40–41, 42–44, 45, 47–48, 50–51, 54, 56–57, 60–61, 68.

[4] TAC ¶¶ 89.a, e, g, h, i, k, l, n, o, q, r, u, w, x, z, aa, hh.

[5] TAC ¶¶ 89.c, d, f, j, m, p, s, t, v, y, bb, cc, dd, ee, ff, gg.

shareholders (including Lower Saxony) who would not or, effectively, could not sell their VW Shares to Porsche. TAC at ¶ 20.

Short sellers were the answer to Defendants' problem. Short sellers like Plaintiffs could effectively increase the supply of VW Shares by borrowing shares to sell. TAC at ¶ 21; AC at ¶ 70. Defendants could then buy call options from counterparties who, in turn, hedged the call options by buying the very shares that Plaintiffs were selling short. *Id.* The shares hedging the call options sat available for delivery to Porsche whenever Porsche chose to exercise the call options. *Id.*

1. Defendants' intentional misrepresentations

Without the additional supply of VW Shares that short sellers could create, Defendants could never have achieved 75% ownership in VW Shares. TAC at ¶ 90. But no reasonable investor would have sold VW Shares short (or entered into the short side of securities-based swap agreements) if it knew of Defendants' plan to acquire 75% of VW Shares, because those short sellers would inevitably suffer a short squeeze. TAC at ¶ 139; AC at ¶ 70.

Therefore, from March 4, 2008, until just days before it revealed the truth, Defendants consistently denied that they were seeking to take over VW. TAC at ¶ 8; AC at ¶¶ 2–5. Defendants made statements on March 4, 2008, May 29, 2008, July 28, 2008, October 2, 2008, October 5, 2008, and October 22, 2008, that explicitly or implicitly denied that Porsche sought to acquire 75% ownership of VW Shares. TAC at ¶¶ 111, 120, 122, 127, 130, 137; AC at ¶¶ 33, 87–89, 94–100, 105–13.

These statements were false and misleading because (1) as described above, by no later than February 25, 2008, Porsche had privately shared its plans to obtain at least 75% ownership of VW Shares with officials of the government of Lower Saxony, and (2) as Ferdinand Piëch ("Piëch"), who resigned as a member of the Executive Committee of Porsche's Advisory Board

because "vital information" about Porsche's options in VW Shares was concealed from him, admitted in a May 2009 interview, even he knew as early as mid-year 2008 of Porsche's plan to increase its stake in VW Shares up to 75%. TAC at ¶ 125. Piëch is a member of one of the two families that control Porsche. Porsche Mem. at 7. And, as described immediately below, Porsche had already locked up most of its near-75% position, although it lied about this fact, too.

Defendants also made statements on March 10, 2008, and September 18, 2008, that implicitly or explicitly denied that Porsche even had the ability to acquire 75% ownership of VW Shares. TAC at ¶¶ 114, 124; AC at ¶¶ 90–93, 101–104. These statements, too, were false and misleading, because by March 10, 2008, Porsche had already entered into options contracts for many of the VW Shares it needed to achieve 75% domination, TAC at ¶ 116; AC at ¶¶ 91–93, and by mid-2008 had achieved control of nearly 75% of VW Shares through outright positions and call options that Porsche could settle by taking physical delivery of VW Shares. TAC at ¶ 8; AC at ¶ 93.

2. Defendants' manipulative acts

Defendants combined their misrepresentations with market activity aimed at deceiving investors. Defendants acquired Porsche's position in VW Shares through options contracts it entered in 2007 and 2008. TAC at ¶ 10; AC at ¶¶ 60–61. Defendants did two things in connection with Porsche's options trades that were manipulative. First, Defendants disguised physical options contracts as cash-settled options contracts to avoid the disclosures Porsche would have had to make in connection with physical options contracts. TAC at ¶ 11; AC at ¶ 8. Second, Defendants methodically parceled out Porsche's options contracts in an effort to make sure that no single counterparty accumulated too large a position in shares to hedge the contracts, since too large a position by the counterparty would trigger a disclosure obligation by the counterparty of its large position. TAC at ¶ 12; AC at ¶ 8. As to this second form of market

activity, Defendants have admitted that Porsche did not want to "put all eggs in one basket" because that made it "easier for us [*i.e.,* Porsche] to not be visible, not be too visible in the market," TAC at ¶ 13—*i.e.*, to hide the truth.

C. Plaintiffs' Short Positions in Reliance on Defendants' Fraud and Manipulation

Plaintiffs are managed by professional investors and at all relevant times took into account all statements that Defendants made, privately and publicly, about their plans with respect to VW and Porsche's ownership of VW Shares. TAC at ¶ 140; AC at ¶¶ 19, 144–45, 164–65.

During 2008, VW Shares appeared increasingly overvalued relative to the shares of other publicly traded automobile companies. TAC at ¶ 2; AC at ¶ 6. In determining that VW Shares did not reflect fundamental value, all Plaintiffs relied on Defendants' public statements with regard to Porsche's ownership of VW Shares, and Plaintiffs relied on the absence of any disclosed accumulation of VW Shares. TAC at ¶ 14; AC at ¶¶ 144–45, 164–65. Given the facts available to them, Plaintiffs determined that the price of VW Shares was too high. TAC at ¶ 14; AC at ¶ 7. Certain Plaintiffs also relied on various private statements that Defendants made to them, as detailed in TAC at ¶ 15 a–e. Plaintiffs would not have sold VW Shares short (or entered into the short side of securities-based swap agreements) had they known of Defendants' plans to acquire 75% of VW Shares, because—combined with Porsche's control of VW Shares through options—Defendants' purchases guaranteed that short sellers would suffer a short squeeze in VW Shares. *Id.*

The materiality of Defendants' statements about the extent of Porsche's ownership of VW Shares and the distorting effect of Defendants' manipulative activities are reflected in the

huge price spike that resulted after a corrective disclosure on October 26, 2008. The *Wall Street Journal* reported on events immediately following Porsche's October 26, 2008, announcement:

> When financial markets opened Monday Oct. 27, all hell broke loose. Funds that had borrowed VW shares and sold them, expecting no takeover offer and betting the stock would decline, raced to purchase shares to unwind the bets. There weren't enough to go around. Part of the reason is that underwriters of cash-settled options typically hedge their risk by owning the shares of the company involved. The shares they owned, combined with those Porsche had acquired, added up to 74.1%, and Lower Saxony state owned 20.1%. The result was that while some 12.8% of VW shares were on loan, mostly to short sellers, those that for practical purposes were in circulation amounted to only 6% of VW shares. As hedge funds fought for the remaining VW shares, they drove the stock's price ever higher—deepening their losses. At the height of the short squeeze on Oct. 28, VW stock briefly topped €1,000, nearly five times as high as on Oct. 24, making VW the biggest company by stock-market value for a few hours.

TAC at ¶ 31 (quoting Mike Esterl and Edward Taylor, "As Giant Rivals Stall, Porsche Engineers a Financial Windfall," *Wall Street Journal*, A1, November 8, 2008.)

ARGUMENT

I. SECTION 10(B) APPLIES TO PLAINTIFFS' DOMESTIC TRANSACTIONS IN SECURITIES-BASED SWAP AGREEMENTS.

Section 10(b) prohibits fraud and manipulation in connection with the purchase or sale of "any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j(b). On its face, the prohibition has no geographic limits. However, in *Morrison*, the Supreme Court explained that the presumption against extraterritoriality requires courts to interpret § 10(b) so that it applies only to "transactions in securities listed on domestic exchanges, and *domestic transactions* in other securities." 130 S. Ct. at 2884 (emphasis added). After *Morrison*, whether § 10(b) applies to a transaction depends *only* on where the transaction occurs. "[I]t is the foreign location of the *transaction* that establishes (or reflects the presumption of) the [Exchange] Act's inapplicability …." *Id.* at 2885 (emphasis in original).

Therefore, § 10(b) applies any time the transaction at issue occurs "in the United States." *Id*. at 2888.

Morrison does not insulate Defendants from liability here, because Plaintiffs' § 10(b) claims arise from domestic transactions in securities-based swap agreements. Defendants do not contest that *Morrison* determines the scope of § 10(b) protection for securities-based swap agreements. *See* 15 U.S.C. § 78j(b) (Section 10(b) applies equally to securities "registered on a national securities exchange," "any security not so registered," and "any securities-based swap agreement"). After *Morrison*, § 10(b) protects any domestic transaction in securities-based swap agreements, and so applies to Plaintiffs' transactions here.

A. *Morrison* Does Not Preclude Plaintiffs' Securities-Based Swap Agreements from § 10(b) Protection.

Defendants acknowledge that securities-based swap agreements are "privately negotiated contracts that are not traded on any exchanges." Porsche Mem. at 2 (citing TAC at ¶ 2 n.2). In these contracts, Plaintiffs and their counterparties agree to exchange cash flows that depend on the price of a reference security, here VW Shares. TAC at ¶ 2 n.2. From Plaintiffs' perspectives, the swap agreement generated gains as the price of VW Shares declined and generated losses as the price of VW Shares rose, achieving an economic result similar to a short sale. *Id.* As the securities-based swap agreements at issue here are not traded on any foreign exchange, the only question presented by Defendants' motion is whether these transactions are "domestic."

Defendants acknowledge the Complaints' allegations that Plaintiffs "'signed confirmations' [in the United States] and [in some cases] 'took all steps necessary to transact'

their swap agreements in the United States." Porsche Mem. at 14 (footnote omitted).[6] As Defendants also acknowledge, Plaintiffs "selected New York as the governing law and forum in their [securities-based swap] agreements with their counterparties." *Id.*

Defendants concede that "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." *Id.* at 3. But the reason these facts have significance as between Plaintiffs and their swap counterparties is that they demonstrate where the transactions took place. These facts of admitted significance as between Plaintiffs and their swap counterparties for the same reasons demonstrate the substantial domesticity of Plaintiffs' swap transactions and confirm that, after *Morrison*, they are protected by § 10(b).[7]

Try as they might, Defendants cannot make Plaintiffs' domestic, off-exchange securities-based swap transactions look like the foreign purchases of foreign exchange-traded stock at issue in *Morrison*. Here, Plaintiffs' transactions in securities-based swap agreements are substantially domestic for the reasons explained above and, therefore, fall within the scope of § 10(b) after *Morrison*. In *Morrison*, on the other hand, "all aspects of the purchases complained of … occurred outside the United States." *Morrison*, 130 S. Ct. at 2888. What Defendants refuse to admit, but what other courts have recognized, is that *Morrison* "unfortunately does not directly address what is meant by 'domestic transactions.'" *Stackhouse v. Toyota Motor Co.*, 2010 WL

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[6] *Cf. Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09-23248-civ, 2010 WL 3119908, at *2 (S.D. Fla. Aug. 6, 2010) (concluding that an off-exchange stock transaction was not domestic because the stock-purchase "agreement itself was *not* signed in the United States but was executed in duplicate, apparently signed in…Spain and Uruguay respectively") (emphasis added).

[7] Defendants' objection that Plaintiffs' transactions were not with Porsche carries no weight. It is uncommon for actionable transactions in a misrepresentation case under § 10(b) to occur between plaintiffs, on one side, and defendants, on the other. *See, e.g., Ross v. A.H. Robins Co.*, 607 F.2d 545, 547 (2d Cir. 1979); *In re Carter-Wallace, Inc. Sec. Lit.,* 150 F.3d 153, 155 (2d Cir. 1998).

3377409, at *1 (C.D. Cal. July 16, 2010). Where the transaction at issue "does not involve securities purchases or sales executed on a foreign exchange, it presents a novel and more complex application of *Morrison*'s transactional test." *Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 0118, 2010 WL 3341636, at *19 (S.D.N.Y. Aug. 18, 2010). Adherence to *Morrison*'s transactional test requires a finding that Plaintiffs' securities-based swap transactions in this case are domestic.

B. Defendants' Proposed Test Is Inconsistent with *Morrison*.

Attempting to avoid the applicability of § 10(b) to Plaintiffs' claims based on domestic securities-based swap agreement transactions, Defendants ask the Court to ignore *Morrison*'s focus on the location of the transaction in favor of an alternative, non-transactional, non-locational test that is squarely at odds with *Morrison*.

Defendants ask the Court to hold that § 10(b) "covers [securities-based swap] agreements only when the referenced security is traded on a U.S. exchange or otherwise purchased or sold in the United States." Porsche Mem. at 2. Defendants thus tell the Court to ignore the location of the transaction at issue and to look instead at the location where the *referenced* security most frequently trades.

But that question is not the one that *Morrison* requires this Court to ask, which is whether Plaintiffs' transactions that are the basis for their claims are "domestic" and occurred "in the United States." Defendants acknowledge that Plaintiffs' securities-based swap agreements "do *not* require actual ownership of the referenced security and are *not* 'traded on any exchange, foreign or domestic.'" Porsche Mem. at 9 (quoting TAC at ¶ 2, n.2) (emphasis added). Nothing in *Morrison* or § 10(b) permits the view that § 10(b) applies to only those domestic transactions that *also* reference domestic securities. A court in this District recently rejected Defendants' reasoning pre-*Morrison*, refusing a defendant's request to focus on a foreign security referenced

in a domestic swap agreement rather than the swap itself as the relevant financial instrument.[8] Defendants' position is no more tenable now.

Cases involving American Depository Receipts ("ADRs") and American Depository Shares ("ADSs") demonstrate the flaw in Defendants' proposal. ADRs and ADSs are securities that reference foreign-exchange-traded shares and are functionally equivalent to ownership of foreign shares. *See* Bruce L. Hertz, *American Depository Receipts,* 600 P.L.I./Comm. 237, 241 (1992). ADRs are far more similar to foreign shares than are the swap agreements at issue in this case, because ADRs reflect a right to exchange ownership of the ADR for shares in the foreign security. *Id.* at 242. Defendants do not—and cannot—argue that § 10(b) does not protect domestic transactions in ADRs and ADSs referencing shares traded on a foreign exchange. Defendants' own cases establish the opposite conclusion. *See Stackhouse*, 2010 WL 3377409, at *2 (recognizing, post-*Morrison*, the viability of the claim of lead plaintiff ADR purchaser) (cited in Porsche Mem. at 11, 15); *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758, 2010 WL 3069597 (S.D.N.Y. July 27, 2010) (post-*Morrison* decision leaving undisturbed a prior ruling in the same case, 689 F. Supp. 2d 629 (S.D.N.Y. 2010), which denied a motion to dismiss the claims of purchasers of ADRs referencing foreign securities) (cited in Porsche Mem. at 11, 15). *Stackhouse* and *Cornwell* are both inconsistent with Defendants' proposal that any domestic transaction in a financial instrument tied to a foreign security is outside, *per se*, the protection of § 10(b) after *Morrison*. If § 10(b) applies to claims involving domestic transactions in ADRs

[8] *See SEC v. Rorech*, 673 F. Supp. 2d 217, 226 (S.D.N.Y. 2009) ("Mr. Rorech argues that this is a case about foreign bonds, issued by a foreign company, in a foreign market, to foreign investors. He urges that the SEC would not have jurisdiction over the underlying bonds, and, therefore, it should not have jurisdiction over the CDSs [*i.e.*, credit default swaps, which are securities-based swap agreements] based on those bonds. However, the CDSs, not the bonds, are the financial instruments at issue in this case and 'at the heart of' the alleged fraud.")

and ADSs referencing foreign securities, as *Stackhouse* and *Cornwell* recognize, then it must also apply to Plaintiffs' domestic transactions in swaps that reference foreign securities.[9]

Defendants' attempts to circumvent the transactional test set forth in *Morrison* find no support in their reflections on what they say are *Morrison*'s "[g]oals," Porsche Mem. at 14, and what they proffer as a "sensible reading" of *Morrison*, *id.* at 2. On that basis, Defendants imply that securities-based swap agreements do not qualify as "domestic transactions" if they are marked by *any* foreign characteristics. *Morrison* does not support such an extreme result. *Morrison*'s basis for limiting the geographic reach of § 10(b) is the presumption against extraterritoriality, a "canon of construction, or a presumption about a statute's meaning" that assumes Congress did not intend § 10(b) to regulate transactions that take place abroad. *Morrison,* 130 S. Ct. at 2877 (citing *Blackner v. United States*, 284 U.S. 421, 437 (1932)). Just as the "presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case," *Morrison*, 130 S. Ct. at 2884, it also does not, as Defendants would have it, deprive American law of all effect upon a showing of the slightest foreign involvement. Defendants' misreading of *Morrison* is hardly "sensible."

As a final refuge, Defendants posit a slippery-slope argument that rests on a false premise. Defendants contend that, if the Court applies § 10(b) to domestic transactions in securities-based swaps referencing foreign securities, then "issuers all over the world could be

[9] At one point, Porsche discusses cases about whether a given swap references a security or group of securities, as is required for § 10(b) to cover securities-based swap agreements. *See* Porsche Mem. at 12–13 (discussing *Caiola v. Citibank, N.A.*, 295 F.3d 312, 327 (2d Cir. 2002), and *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)). These cases are not relevant to the question here, because it is undisputed that a VW Share is a "security" within the meaning of the Exchange Act. *See* 15 U.S.C. § 77b(a)(1).

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." Porsche Mem. at 13; *see also* Haerter Mem. at 5. But the plain language of § 10(b) allows no such conclusion. Section 10(b) requires not only that the fraud be "in connection with" a domestic transaction, but also that it be accomplished "by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange." 15 U.S.C. § 78j. No revision of the Supreme Court's transactional test in *Morrison* is thus required, because no defendant can ever be liable under § 10(b), as Defendants suggest, "simply by virtue of a contract entered into between private parties."

Lurking behind Defendants' arguments is an attempt to resurrect the conduct and effects test that *Morrison* replaced. Defendants invite this Court to focus not on the location of Plaintiffs' swap transactions, but instead on the location of Defendants' fraudulent conduct. *See*, *e.g.*, Porsche Mem. at 6 (arguing that Plaintiffs "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"); *id.* at 11 ("Plaintiffs cannot evade [*Morrison*] by using swap agreements … to support misstatement and manipulation claims that have nothing to do with the United States"). Defendants are invoking exactly the reasoning that *Morrison* expressly rejected—that it is domestic fraudulent conduct that makes a § 10(b) claim cognizable. As *Morrison* observes, "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Morrison*, 130 S. Ct. at 2884. The statute requires the transactional approach set forth in *Morrison*, not the pre-*Morrison* examination of the location of Defendants' misconduct.

* * *

Morrison replaced longstanding case law with a simple transactional test for the applicability of § 10(b). After *Morrison*, whether § 10(b) applies to Plaintiffs' swap transactions depends only on whether they occurred "in the United States." As shown above—and as Defendants do not seriously dispute—Plaintiffs' transactions did occur in the United States. Indeed, the only way Defendants could establish the inapplicability of § 10(b) would be to show that Plaintiffs' swap transactions occurred somewhere outside the United States, but Defendants have nothing to offer on that score. Plaintiffs have thus adequately pled facts which demonstrate that their securities-based swap agreements are domestic transactions, and Defendants' motions to dismiss on this ground must be denied.

II. DEFENDANTS DO NOT SHOW THAT THIS COURT IS AN INCONVENIENT FORUM.

Contrary to Defendants' position, the *forum non conveniens* analysis "starts with 'a strong presumption in favor of the plaintiff's choice of forum.'" *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)). Thus, "it is generally understood that, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

Here, Porsche does not contest that it is properly subject to suit in this Court. Seventeen Plaintiffs are United States entities.[10] The investment decisions of each of the *Elliott* Plaintiffs are managed from New York, New York, TAC at ¶¶ 34–68, while every *Black Diamond*

[10] TAC at ¶¶ 34, 38, 40–42, 44, 45, 47, 48, 50, 51, 54, 56, 57, 60, 61, 68. From 95% to 100% of the investors in those United States entities were located in the United States. TAC at ¶¶ 89.a, e, g, h, i, k, l, n, o, q, r, u, w, x, z, aa, hh. Of the 18 *Elliott* Plaintiffs that are non-U.S. legal entities, 16 had U.S. investors with interests ranging from 15% to 100%. TAC at ¶¶ 89.c, d, f, j, m, p, s, t, v, y, bb, cc, dd, ee, ff, gg. With respect to the *Black Diamond* Plaintiffs, between 41% and 100% of their assets represent funds invested by American residents. AC at ¶¶ 15–19.

Plaintiff is managed from Dallas, Texas, AC at ¶ 19. No Plaintiff has any relevant ties to Germany.

On these facts, Defendants cannot establish that this is the exceptional case in which it would be proper for the Court to disturb Plaintiffs' legitimate choice of this forum.

A. Plaintiffs' Chosen Forum Is Entitled to Great Deference.

While Defendants tell the Court that Plaintiffs' choice of this forum is entitled to "no deference," Porsche Mem. at 16, they do not even cite the Second Circuit's landmark decision in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc), which sets forth the test that governs the degree of deference a court must give a plaintiff's choice of forum in this Circuit:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens.*

Id. at 71–72; *see also*, *e.g.*, *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006).

Plaintiffs' decision to sue in this forum rather than in Germany "has been dictated by reasons that the law recognizes as valid" and so is entitled to the greatest deference. *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 230 (2d Cir. 2004). Seventeen Plaintiffs are American entities suing at home, "present[ing] a situation in which courts should initially be at their most deferential." *Id.* at 231. Some Plaintiffs are not U.S. entities, but their decision to proceed with affiliated American Plaintiffs is also a legitimate one. All of the foreign *Elliott* Plaintiffs are under common American management with the American Plaintiffs, and most of

their investors are located here.[11] Their decision to join the American Plaintiffs in this action, rather than to sue in distant Germany, is likewise entitled to deference. *E.g.*, *Bigio*, 448 F.3d at 179 ("the more that a plaintiff, even a foreign plaintiff, chooses to sue in a United States court for 'legitimate reasons,' the more deference must be given to that choice"); *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002) (error not to accord proper deference when, "[a]lthough less than all of the named plaintiffs … reside in" this District, "no evidence suggests they had an improper motive in bringing suit here").[12]

B. Defendants Do Not Show that the Relevant Private and Public Interest Factors Render this Court an Inconvenient Forum.

Given the deference due Plaintiffs' legitimate choice to sue in New York rather than in Germany, "the starting point" of the *forum non conveniens* analysis "will be one that substantially favors the plaintiff[s]." *Gross*, 386 F.3d at 231. Even when, as here, Plaintiffs do not disagree that a proposed alternative forum satisfies the minimum standards for "availability"

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[11] *See* n.10, *supra.*

[12] All but two of the cases on which Defendants rest their deference argument, Porsche Mem. at 16–17, predate and have been superseded by *Iragorri*. And none of Defendants' cases supports their conclusion that Plaintiffs' legitimate choice of this forum is entitled to "no deference" simply because some evidence is in Germany and some relevant transactions occurred outside the U.S. To the extent relevant at all, those courts merely found it appropriate to accord a somewhat reduced level of deference—but not "no deference"—based on the particular facts of those cases. *See In re EADS Sec. Litig.*, 703 F. Supp. 2d 348, 361 (S.D.N.Y 2010) (when case's connection to the U.S. was "gossamer" and "[m]ost, if not all, of the witnesses and evidence [were] abroad," choice of forum received "less deference"); *LaSala v. Bank of Cyprus*, 510 F. Supp. 2d 246, 266–67 (S.D.N.Y. 2007) (even when "the operative facts of this litigation unquestionably took place" abroad, "plaintiff's choice of forum is entitled to some deference"); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992) (on facts of case dismissal was proper even if "plaintiffs at bar are entitled to array themselves in the fully panoply of a home state litigant"). Other cases that Defendants rely on do not even address the deference question before this Court. *See Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1001 (2d Cir. 1993) (recognizing a "strong presumption in favor of a plaintiff's choice of forum" without further discussion of deference due); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 158–59 (2d Cir. 1980) (no discussion of deference due choice of forum); *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 129 (S.D.N.Y. 1986) (not addressing deference due choice of forum and noting that "extended negotiations" related to action took place abroad).

and "adequa[cy]," "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the [alternative] forum significantly preferable." *Iragorri*, 274 F.3d at 74–75; *see also Bigio*, 448 F.3d at 179 (applying the same standard even "where the degree of deference is reduced").

Thus, Defendants must make a "clear showing that a trial in the United States would be so oppressive and vexatious to them as to be out of all proportion to plaintiffs' convenience." *DiRienzo*, 294 F.3d at 30; *see also Iragorri*, 274 F.3d at 75 (courts must "arm themselves with an appropriate degree of skepticism" in evaluating defendants' claims of inconvenience). Defendants cannot carry this heavy burden with the unsupported generalizations they offer here. In fact, all of the relevant public and private interest factors identified in the case law either weigh against dismissal or are neutral and do not support Defendants' request for dismissal.

1. The private interest factors weigh against dismissal.

The private interest factors the Court must consider focus on "the convenience of the litigants" and "include 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses … and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Iragorri*, 274 F.3d at 73–74 (quoting *Gulf Oil*, 330 U.S. at 508); *see also Piper*, 454 U.S. at 241 n.6.

Factors such as the relative ease of access to sources of proof, compulsory process, and the cost of bringing witnesses to trial are at most neutral. Nearly all of Plaintiffs' evidence is in the United States, where the Plaintiff investment funds are managed. Evidence in the United States includes many witnesses and documents relating to Plaintiffs' investment decisions, their reliance on Defendants' misstatements and misleading omissions, and their damages from Defendants' fraud and market manipulation. The inconvenience to Plaintiffs of bringing their

witnesses and evidence to Germany is clear, while Defendants offer nothing to suggest any disproportionate hardship to them from litigation in the United States. As for Defendants' reference to a general preference for live witness testimony, Porsche Mem. at 20, the primary German witnesses are Porsche employees and officers, whom Porsche can bring to an American trial. Moreover, the Second Circuit has recognized that this consideration is insufficient to justify dismissal, as deposition testimony may serve as a satisfactory substitute for live testimony, even in fraud cases. *Bigio*, 448 F.3d at 179–80; *DiRienzo*, 294 F.3d at 30 (fraud action).

Turning to the "other practical problems that make trial of a case easy, expeditious and inexpensive," which Defendants ignore, these factors also weigh against dismissal or are neutral. While Porsche does not argue that it would face any excessive inconvenience from litigation in the United States, Plaintiffs would face practical problems in German litigation. For example, the burdens of translation favor litigation in the United States, as all of Plaintiffs' documents are in English, as are many of Defendants' most relevant business documents, including the website on which Porsche made many of the misstatements on which this case turns. TAC at ¶ 86. The limited discovery mechanisms available in Germany would make the collection of evidence regarding Defendants' intent far more cumbersome. Declaration of Professor and Judge Christian Armbruester at ¶¶ 22–26 ("Armbruester Decl."); *see Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 185 n.12 (3d Cir. 1991) ("When viewed in conjunction with … other factors, the unavailability of civil discovery … highlights and provides cumulative evidence of the serious

impediments" plaintiff would face in foreign forum).[13] And Plaintiffs would have to retain litigation counsel in Germany, while all parties already have sophisticated attorneys here who are familiar with the case.

Defendants make just one attempt to provide a concrete example of inconvenience they would suffer from litigating in the United States. If the Court were to find no personal jurisdiction over Wiedeking and Haerter, Defendants argue, the individuals could not be part of an American case. Porsche Mem. at 21. But of course Plaintiffs, not Defendants, would be the ones burdened by any inconvenience resulting from simultaneous cases in the United States and Germany, and Plaintiffs would need to weigh that inconvenience when deciding whether to initiate a new German case against the individual Defendants. Such hollow "claims of inconvenience" to Defendants only "raise questions as to their underlying motives." *DiRienzo*, 294 F.3d at 29.

2. The public interest factors weigh against dismissal.

Of the numerous public interest factors that the case law enumerates, *see*, *e.g.*, *Piper*, 454 U.S. at 241, n.6; *Iragorri*, 274 F.3d at 74, Defendants rely on just two: the "'local interest in having localized controversies decided at home'" and "'an appropriateness … in having the trial … in a forum that is at home with the state law that must govern the case.'" *Iragorri*, 274 F.3d at 74 (quoting *Gulf Oil*, 330 U.S. at 508–09). Neither factor supports Defendants' position.

[13] While the unavailability of discovery in a foreign forum may not make the forum "inadequate," *e.g.*, *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1123–24 (S.D.N.Y. 1992), it can be an important private interest factor weighing against dismissal where discovery mechanisms are particularly important to a party's ability to make out its case. *Macedo v. Boeing Co.*, 693 F.2d 683, 690–91 (7th Cir. 1982). Under either German or U.S. law, Plaintiffs must prove Defendants' intent. Armbruester Decl. at ¶ 13; *see also* Wagner Decl. at ¶ 17. Defendants are unlikely to concede their intent to deceive investors, requiring Plaintiffs to make this showing through Defendants' internal documents that demonstrate their scheme to defraud Plaintiffs and other investors. But German procedure allows the compelled production of documents in a case such as this only when an opposing party can identify with specificity an individual document that it already knows exists. Armbruester Decl. at ¶¶ 24–25.

To be sure, Germany has a legitimate interest in the regulation of German securities markets and in holding accountable German citizens and companies who, like Defendants, engage in fraud and market manipulation. What Defendants do not attempt to explain, however, is how Plaintiffs' pursuit of this action in the United States might interfere with Germany's vindication of those public interests through its own regulatory mechanisms and the ongoing investigations of Defendants' misconduct by German criminal prosecutors and securities regulators.

The irregular letter submitted to the Court by a German consular official reflects a more pernicious German interest in this litigation. The letter was evidently prepared in coordination with Defendants and their lawyers, as it was sent to the Court in support of a motion that had not yet been filed, and Plaintiffs received a copy of the letter from defense counsel several days before the Court distributed it to the parties. The letter highlights that Porsche and its prospective merger partner VW are large German employers and, in VW's case, in part publicly-owned. TAC at ¶ 6; AC at ¶ 5. Plaintiffs can hardly be faulted for preferring to litigate their dispute in an American forum away from the political pressures that this letter reflects.

Also missing from Defendants' discussion is any mention of the public interest of the United States in these actions. This controversy concerns whether the American courts may hold foreigners responsible when they direct a fraudulent scheme at investors and investment managers in the United States and cause transactions, and therefore injuries, in the United States. Any question about the American interest is answered by the Supreme Court's decision in *Morrison*, which, as explained above, clarifies the applicability of the American securities laws to Plaintiffs' claims. The Second Circuit has noted the American "interest in enforcing United States securities laws." *Allstate*, 994 F.2d at 1002; *see also DiRienzo v. Philip Servs. Corp.*, 232

F.3d 49, 65 (2d Cir. 2000) ("the district court failed to give sufficient weight to the United States' interest in having its securities laws govern the protection of U.S. investors").

The United States' interest in these actions is not diminished by Defendants' interpretation of German law. *See* Porsche Mem. at 18. Defendants offer the opinion of a retained expert that a German statute provides for exclusive jurisdiction in a German court in any securities case against a German defendant. But a German statute obviously cannot deprive this Court of jurisdiction. And Defendants' expert's expansive statutory interpretation is questionable, not supported by German case law and—as even the expert admits—controversial. Armbruester Decl. at ¶¶ 34–35; *see* Wagner Decl. at ¶ 33. The view of Defendants' expert that a German court would not enforce a judgment of this Court is likewise unsupported by German cases, Armbruester Decl. ¶¶ 27, 36, but it is also irrelevant: this Court can enforce its own judgments. *Gryphon Domestic VI, LLC v. App Int'l Fin. Co.*, 41 A.D.3d 25, 34–35, 836 N.Y.S.2d 4, 7–8 (N.Y. Ct. App. 1st Dept. 2007) (under N.Y. C.P.L.R. 5225, the court can order defendant to turn over property outside New York); *see* Fed. R. Civ. P. 69(a) (federal judgments enforced through state law execution procedures). And of course, if Defendants actually believed they were immune from a U.S. judgment, but not a German one, they would not be seeking dismissal in favor of a German forum.

Finally, Defendants gain no ground when they ask the Court to dismiss because, they say, New York's choice-of-law rules would have this Court apply German law. Porsche Mem. at 19–20. But there is no reason to think that is so. A New York court can apply German law only upon a showing of "a conflict between the laws of the relevant jurisdictions." *Haywin Textile Prods., Inc. v. Int'l Fin. Inv.*, 137 F. Supp. 2d 431, 434 (S.D.N.Y. 2001). Yet Defendants say nothing about any relevant conflict between local law and German law. And even where there is

a conflict, in a fraud case New York's "interests" test looks to the parties' domiciles and the locus of the fraud. *H.S.W. Enters. v. Woo Lae Oak, Inc.*, 171 F. Supp. 2d 135, 142 (S.D.N.Y. 2001) (Baer, J.). When the parties are domiciled in different jurisdictions, as here, "the locus of the tort will almost always be determinative." *Id.* (quoting *Krock v. Lipsay*, 97 F.3d 640, 646 (2d Cir. 1996)). And the "locus" of a fraud is "the place where the injury was inflicted and not the place where the fraudulent act originated." *Id.* Accordingly, under no circumstances would this Court apply the German fraud law to Plaintiffs' claims; New York law will apply.[14]

Moreover, any problems related to the application of unfamiliar law would not be solved by sending this litigation to Germany. In a German court, each Plaintiff would be entitled to elect the application of either German law or the law of the jurisdiction where Defendants' misconduct had its consequences. Armbruester Decl. at ¶ 17. A German court hearing this case could thus find itself required to apply the law of a foreign jurisdiction, just as Plaintiffs claim (incorrectly) this Court would have to. At the very most, then, considerations regarding the application of foreign law are neutral and do not support dismissal. *See DiRienzo*, 294 F.3d at 31 ("interest in avoiding the application of foreign law … does not favor either forum" when both U.S. and foreign courts would apply the other jurisdiction's law).

[14] Defendants' choice-of-law argument, Porsche Mem. at 19–20, ignores this Court's on-point decision in *H.S.W.* and instead relies on cases in which exceptional circumstances, which are not present here, caused the courts to deviate from the acknowledged rule that "[f]or claims based on fraud, the locus of the fraud is the place where the injury was inflicted, as opposed to the place where the fraudulent act originated." *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) (quotation and citation omitted); *see id.* at *52 ("injury in this case has occurred in locations with only limited connection to the conduct at issue") (quotations and citation omitted); *LaSala*, 510 F. Supp. 2d at 264–65 ("reputability of [Cyprus]'s banking system" at stake in case). The court in *Chase Manhattan Bank v. N.H. Ins. Co.*, 749 N.Y.S.2d 632, 634 (Sup. Ct. 2002), applied New York law, not foreign law, to claims involving "fraudulent conduct."

III. THE COMPLAINTS ADEQUATELY PLEAD MISREPRESENTATIONS AND SCIENTER FOR SECURITIES FRAUD CLAIMS UNDER § 10(B).

The elements of a § 10(b) claim are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (citation omitted). In addition, a plaintiff must demonstrate the defendant's "use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange …." 15 U.S.C. § 78j.

Defendants challenge only elements (1) a material misrepresentation or omission by the defendant and (2) scienter.[15]

A. Defendants' Misstatements Are Actionable Because Defendants Made Specific Supporting Statements of Fact and Did Not Genuinely Believe the Statements They Made.

Defendants made statements on March 4, 2008, May 29, 2008, July 28, 2008,[16] October 2, 2008, October 5, 2008, [17] and October 22, 2008, that implicitly or explicitly denied that

[15] Porsche moves to dismiss the common law fraud claims on reliance grounds, Porsche Mem. at 29, but not the §10(b) fraud claims. This argument is addressed below. Wiedeking argues that the Complaints do not plead reliance for purposes of § 10(b) only as to the two statements attributed directly to him and only as to the claims against him. Wiedeking Mem. at 6–7.

[16] The July 28, 2008, statement is the only statement attributed directly to Defendant Haerter. He acknowledges Plaintiffs' allegation that the statement "was misleading because he was *implicitly* suggesting that Porsche's *only* interest was in crossing the 51% threshold and then stopping." Haerter Mem. at 6. While Haerter argues that his statement was not misleading, *id.* at 5, the Complaints allege that Porsche had already decided to go to 75% by February 25, 2008, and had the ability to do so by mid-2008. *See, e.g.*, TAC at ¶ 123; AC at ¶ 89. Further, on a conference call with investors on October 2, 2007, Porsche's head of investor relations referred to Haerter as the "mastermind" behind its options strategies related to the VW ownership stake. TAC at ¶ 25. In light of all the allegations in the Complaints and given his role, and considering that Porsche continued to deny any intention to go to 75% following Haerter's statement, his individual statement was highly misleading.

Porsche sought to acquire 75% ownership of VW Shares. TAC at ¶¶ 111, 120, 122, 127, 130, 137; AC at ¶¶ 33, 87–89, 94–100, 105–13. Defendants also made statements on March 10, 2008, and September 18, 2008, that explicitly or implicitly denied that Porsche had the ability to acquire 75% ownership of VW Shares. TAC at ¶¶ 114, 124; AC at ¶¶ 90–93, 101–104.

Defendants concede that 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." Porsche Mem. at 22 (quoting *In re IBM Corporate Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998)). But Defendants argue that their statements regarding their intentions with respect to VW Shares "did not foreclose the possibility that Porsche would decide to seek a 75% stake in VW Shares," Porsche Mem. at 3, so their statements "cannot be considered a guarantee" and thus are not actionable, *id*. at 22.

Defendants overlook the rest of the test: Defendants' statements also are actionable if they "are supported by specific statements of fact" or if Defendants did "not genuinely or reasonably believe" their statements. *IBM*, 163 F.3d at 107. The Complaints plead both (1) that Defendants supported their statements with specific statements of fact about whether it was

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[17] The October 2, 2008, statement is one of two relevant statements that Defendant Wiedeking made. TAC at ¶ 127; AC at ¶ 105. Wiedeking said, only 21 days before Porsche's announcement of the truth, that domination of VW (requiring at least 75% ownership) was a "purely theoretical option." *Id.* To any reasonable person, such language suggests that domination was not a practical possibility at the time. On October 5, 2008, he said that while a domination agreement was "a long term possibility," 75% ownership "is out of the question at present." TAC at ¶ 130; AC at ¶ 110. Wiedeking's offer of a plausible competing inference to his bad intent is merely "that circumstances changed between October 2, 2008, and October 26, 2008, when Porsche officially declared its intent to reach 75% in 2009." Wiedeking Mem. at 7. That is not enough to support dismissal of Plaintiffs' claims against him. The Complaints allege 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. *See*, *e.g.*, TAC at ¶¶ 6, 9, 128–29; AC at ¶ 113. Plaintiffs relied on Wiedeking's statement. *See* TAC at ¶ 140; AC at ¶ 144. Changed circumstances are not a plausible inference on these facts.

possible for Porsche to acquire 75% ownership of VW Shares and (2) that Defendants did not genuinely believe that Porsche would not acquire 75% ownership of VW Shares—because Defendants had already decided to acquire 75% ownership of VW Shares at the time they made these statements.

First, Defendants supported their statements that Porsche would not acquire 75% ownership of VW Shares with specific statements of fact when Defendants denied that Porsche had the ability to acquire 75% ownership of VW Shares on March 10, 2008, September 18, 2008, and even as late as October 2, 2008, and October 5, 2008, just weeks before Defendants revealed the truth. TAC at ¶¶ 114, 124, 127, 130–31; AC at ¶¶ 90, 101, 105, 110. These statements were false. TAC at ¶¶ 8, 11, 113, 116; AC at ¶¶ 87–89, 93. Second, the Complaints also plead facts demonstrating that Defendants did not genuinely believe their statements that Porsche would not acquire 75% ownership of VW Shares. In fact, as the Complaints allege, Defendants had already decided to acquire 75% ownership of VW Shares. TAC at ¶¶ 113, 125; AC at ¶¶ 89, 100.

This case contrasts sharply with the Defendants' authorities, none of which contain factual allegations establishing that the Defendants did not believe their statements. In the *IBM* case, for example, IBM cut its dividend after giving guidance that it would try to maintain the dividend. But there was "no evidence in the record to support a finding that these statements were made in bad faith or that the speakers did not genuinely and reasonably believe that they were accurate." *IBM*, 163 F.3d at 109. And in contrast to the *Covance* case, Plaintiffs here have alleged that Defendants "were aware of contrary information at the time they expressed their opinions regarding Porsche's ownership of VW Shares, so the misstatements are actionable under § 10(b) and Rule 10b-5." *Elliott Assocs., L.P. v. Covance, Inc.*, No. 00 Civ. 4115, 2000 WL 1752848, at *9 (S.D.N.Y. Nov. 28, 2000). The Complaints here plead in considerable detail

specific facts which demonstrate that Defendants did not believe the statements they made denying that Porsche sought to acquire 75% ownership of VW Shares, and denying that Porsche had the ability to acquire 75% ownership of VW Shares.

B. The Complaints Adequately Plead Scienter Because They Allege Facts More Consistent with the Intent to Deceive than Any Inference Defendants Suggest.

The inference of scienter must be at least as compelling as any opposing inference that could be drawn from the alleged facts. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Here, the Complaints plead facts that establish an inference of scienter—*i.e.*, that Defendants intended to deceive—that is much more compelling than the opposing inference that Porsche proposes—*i.e.*, that Defendants' misrepresentations were innocently or inadvertently uttered:

- Defendants continued to make strong and unequivocal denials of their intention to go to 75% ownership of VW Shares despite having come to a contrary decision not later than February 25, 2008, TAC at ¶ 113; AC at ¶ 89, a decision that Piëch separately has admitted was reached by mid-year 2008, TAC at ¶ 125; AC at ¶ 100.
- After the short squeeze, Porsche's head of investor relations, Frank Gaube ("Gaube"), publicly admitted that Porsche had intentionally kept its true strategy secret: "We are a very small company buying into a very big company. That is not something you can afford if everybody is able to read your strategy in the newspaper." TAC at ¶ 8; AC at ¶ 119.
- On October 20, 2008, just six days before Defendants announced the truth, Gaube expressly disavowed the speculation of one analyst, Max Warburton ("Warburton") of Alliance Bernstein, who, on October 17, 2008, had offered a seemingly speculative

argument in an analyst report that Porsche might be accumulating additional control of VW Shares. Gaube claimed to have "talked to a number of investors and analysts" to refute Warburton's theory, which Gaube called "complete bullshit." TAC at ¶ 15b.

- Defendants spread Porsche's options trades around various counterparties because, in Gaube's words, that made it "easier for us [*i.e.*, Porsche] to not be visible, not be too visible in the market." TAC at ¶ 13.

In an attempt to exclude these allegations from consideration, Defendants first complain that the Complaints do not sufficiently identify the sources upon which Plaintiffs base their allegations about the February 25, 2008, meeting, while simultaneously identifying—from Plaintiffs' allegations—the exact source for Plaintiffs' allegations. *See* Porsche Mem. at 25 n.16 (Plaintiffs "appear to rely on an article that appeared in the online version of *WirtschaftsWoche*, a German weekly magazine, on May 8, 2009"). And Defendants do not deny that the meeting of February 25, 2008, took place, or that Porsche representatives were at the meeting. Plaintiffs have thus adequately pleaded that the February 25, 2008, meeting took place. Contrary to Defendants' assertion, there is no requirement that Plaintiffs name the attendee at the February 25, 2008, meeting who provided information to the weekly magazine—something it is impossible for Plaintiffs to do prior to discovery—"provided [he is] 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). 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.

Defendants attempt to get support from *In re MSC Indus. Direct Co., Inc. Sec. Litig.*, 283 F. Supp. 2d 838, 847 (E.D.N.Y. 2003), in which a "former employee with high-level corporate duties" was insufficiently described. That case involved the plaintiff's own confidential witness, not a witness under the control of the defendant. The court found the allegations inadequate because the allegations did not support that the unnamed former employee would have the information alleged. *Id.* But here, Plaintiffs refer to the Porsche representatives who attended a meeting with VW's largest shareholder to discuss Defendants' plans with respect to VW Shares. It is plausible that being in attendance at that meeting would require knowing the details of Defendants' plans with respect to VW. *Cf. Whalen v. Hibernia Foods PLC*, No. 04 Civ. 3182, 2005 WL 1799370, at *4 (S.D.N.Y. Aug. 1, 2005) (Baer, J.) ("For each [source], the Complaint details their role and responsibilities. The confidential sources here are easily distinguished from the cases on which [defendant] relies such as [*MSC*], where plaintiffs identified confidential witnesses as former corporate or executive employees without any description of positions, work assignments, or any other information.").

Defendants' objections to allegations in the Complaints regarding Piëch's admissions about Porsche's early plans to acquire 75% of VW are even harder to understand. Defendants admit that the source exists, *see* Porsche Mem. at 26 n.17 ("It appears to have originated from [the newspaper article] *Demonstration of Power in Sardinia*, Welt Online, May 13, 2009"), and sets forth the article's indirect quote from Piëch that "Porsche's decision to increase its holding in Volkswagen to 75 percent was made at the end of the first half of 2008." Porsche Mem. at 26. Once again, Defendants do not deny that the interview took place, and do not deny that Piëch's statement was accurately reported.

Defendants incorrectly cite *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993), for the proposition that "[a]llegations derived from indirect quotes cannot give rise to a strong inference of fraudulent conduct." Porsche Mem. at 26. The case says nothing of the sort. In *Time Warner*, the Second Circuit observed that a newspaper report was inadequate because it did not fix the date on which the defendant had begun to consider a rights offering. When the defendants proposed to identify the date to be "as early as November 1990," the court observed that the "amendment may well be adequate." *Time Warner*, 9 F.3d at 271 & n.7. Here, as Defendants acknowledge, the news article specifies that "Porsche's decision to increase its holding in Volkswagen to 75 percent was made at the end of the first half of 2008." Porsche Mem. at 26. That is the kind of allegation that the Second Circuit observed "may well be adequate," not the kind that is too general to give risk to a strong inference of scienter.

And though the February 25, 2008, and May 2009 admissions are enough on their own to establish Defendants' scienter, Plaintiffs have more. Defendants do not even try to explain how Plaintiffs' other allegations are consistent with lack of intent to deceive — including Defendants' admission that disclosing their true plans was "not something you can afford if everybody is able to read your strategy in the newspaper," demeaning an analyst's report as "complete bullshit" just days before confirming it via an admission of the truth, and spreading around trades so as to "not be too visible in the market." TAC at ¶¶ 8, 13, 15(b); AC at ¶ 119. Defendants merely assert, without argument or authority, that "[t]he 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." Porsche Mem. at 24.

But the inference Defendants propose is barely plausible on its face given the alleged facts and does not come close to being as strong as the inference Plaintiffs urge. If the decision to go to 75% depended merely upon unspecified "economic conditions," Defendants would have said so from the beginning instead of attributing Porsche's inability to go to 75% to "the probability of acquiring the necessary shares from the free float [being] very small indeed," TAC at ¶ 114 (March 10, 2008), the idea being "totally unrealistic," *id.* at ¶ 124 (September 18, 2008), and a "purely theoretical option," *id.* at ¶ 127 (October 2, 2008). If the decision to go to 75% was within a week of being a "determined and resolved business goal," then—absent a fraudulent intent—Porsche would not have characterized as "complete bullshit" the view of one analyst that Porsche might be accumulating additional control of VW Shares. *Id.* at ¶ 15b; *cf. Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 709 (7th Cir. 2008) ("The critical question, therefore, is how likely it is that the allegedly false statements … were the result of merely careless mistakes at the management level based on false information fed it from below, rather than of an intent to deceive or a reckless indifference to whether the statements were misleading. It is exceedingly unlikely.").

IV. THE COMPLAINT ADEQUATELY PLEADS SECURITIES MANIPULATION UNDER § 10(B).

A short squeeze is a form of market manipulation and it is illegal. *See*, *e.g.*, *CIBC World Mkts., Inc. v. Deutsche Bank Sec., Inc.*, 309 F. Supp. 2d 637, 648 (D.N.J. 2004) ("one of the ways in which Defendants allegedly manipulated the price of Genesis stock in violation of the Securities Exchange Act was by promoting a 'short squeeze'''); AC at ¶ 12 (citing SEC, Amendments to Regulation SHO, 17 CFR Part 242, Release No. 34-56212; File No. S7-12-06, n.34 ("Although some short squeezes may occur naturally in the market, *a scheme to manipulate*

the price or availability of stock in order to cause a short squeeze is illegal.") (emphasis in original)).

To plead a claim for market manipulation, a plaintiff must allege "(1) manipulative acts; (2) damage; (3) caused by reliance on an assumption of an efficient market free of manipulation; (4) scienter; (5) in connection with the purchase or sale of securities; (6) furthered by the defendant's use of the mails or any facility of a national securities exchange." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 101 (2d Cir. 2007) (citations omitted).

Defendants challenge only element (1), whether Plaintiffs have adequately alleged manipulative acts.

Under Second Circuit law, Plaintiffs sufficiently allege manipulative acts when they plead the existence of "market activity [by Defendants] aimed at deceiving investors … [such that] investors are misled to believe that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators." *Id.* at 100 (quotations and citations omitted). A plaintiff must plead "what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue." *Id.* at 102 (quotations and citations omitted).

The Complaints plead these facts in abundance. Defendants acknowledge that "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." Porsche Mem. at 27. As to the secret acquisition of VW Shares, the Complaints provide considerable detail, as set forth below. Defendants took specific, affirmative steps to corner the market in VW Shares with derivative securities—options contracts that counterparties hedged

with shares that then became deliverable to Porsche. The Complaints allege two forms of market activity that deceived investors in connection with these options contracts and therefore enabled Defendants to corner the market in VW Shares.

First, Defendants amassed control over VW Shares by disguising physical options contracts as cash-settled options contracts to avoid the disclosures Porsche would have had to make in connection with physical options contracts. TAC at ¶ 11; AC at ¶ 8. The TAC alleges at ¶ 126 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." Porsche asserts at note 18 of its Memorandum that the allegation "fails to state with particularity that the unnamed 'Porsche' representative possessed the information alleged, so it insufficient as a matter of law." Porsche Mem. at 27 n.18 (citing *Novak*, 216 F.3d at 314). Contrary to Porsche's assertion, there is no requirement that Plaintiffs allege separately and with particularity that the Porsche representative knew that Porsche could take delivery in physical stock when it exercised the options. It is a plausible inference that someone speaking so specifically on the subject "would possess the information alleged." *Novak*, 216 F.3d at 314.

That Defendants did not really consider Porsche's options contracts to be cash-settled is clear from what Defendants said when they revealed the truth to the market on October 26, 2008. Defendants admitted that day that Porsche's options actually reflected part of its "74.1%" control, TAC at ¶ 11, and, lest anyone doubt Porsche's control over the shares represented by the option contracts, minimized the cash-settled nature of the contracts by calling them the "so called" cash-settled options, *id*. Porsche used the options as a means to acquire control over VW Shares, not as a means to benefit, in cash, from a rise in the price of VW Shares. *Id*. In response, Defendants asserts that "[u]nder German law, cash-settled options need not be

disclosed." Porsche Mem. at 6. But what the Complaints allege is that Defendants disguised what were effectively physical options contracts as cash-settled options specifically to avoid disclosure by invoking that very rule. TAC at ¶ 11. This conduct is manipulative.

Second, Defendants methodically parceled out Porsche's option contracts to evade counterparty-disclosure requirements that counterparties would otherwise have had when they bought shares to hedge the contracts. TAC at ¶ 13; AC at ¶ 8. As to this second form of market activity, Defendants admitted they did not want to "put all eggs in one basket" because that made it "easier for us [*i.e.,* Porsche] to not be visible, not be too visible in the market." TAC at ¶ 13.[18] A court in this District recently recognized the deceptive nature of intentional efforts to parcel out trades to evade the need for a counterparty to disclose shares it held as hedges. *See CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y.), *aff'd*, 292 Fed. App'x 133 (2d Cir. 2008). Defendants engaged in the same deception here.

Defendants' actions distorted the true extent of supply and demand for VW Shares and, therefore, were manipulative. TAC at ¶¶ 16–17; AC at ¶¶ 8–9, 70–75. The demand for VW Shares was in truth greater than market prices indicated because Defendants wrongfully concealed the efforts of Porsche and its options-contract counterparties to corner the market in VW Shares during 2008. TAC at ¶ 17; AC at ¶ 72. At the same time, the supply of VW Shares was in truth less than market prices indicated, because Defendants' manipulation hid the extent to which Porsche had cornered the market for VW Shares. *Id.* Defendants' carefully

[18] Defendant Haerter asserts that the Complaints fail to allege manipulative activity. Haerter Mem. at 6–7. But Porsche itself stated that Haerter, its Vice President of Finance, was responsible for the options strategies that, for reasons set forth herein, contained manipulative elements. On a conference call with Porsche investors on October 2, 2007, Gaube referred to Haerter as the "mastermind" behind Porsche's options strategies related to the VW ownership stake. TAC at ¶ 25. Haerter, according to Gaube, was a specialist in the derivatives markets and in the mathematics of options and other derivatives. *Id.*

orchestrated fraud and manipulation had the effect of keeping the price of VW Shares artificially low, and much lower than what VW Shares would have traded at had all of the true facts behind Defendants' scheme been made public. *Id.* This exposed Plaintiffs to the risk of a massive short squeeze that materialized in late October 2008. *Id.* This form of market manipulation has been documented in peer-reviewed academic finance literature for more than a decade. *See, e.g.,* Robert A. Jarrow, "Derivative Security Markets, Market Manipulation, and Option Pricing Theory," 29(2) J. Fin. & Quant. Analysis 241, 242 (1994) (establishing the possibility of market manipulation "through market corners, obtained using derivatives to avoid aggregate stock holding constraints.").

Defendants seem to suggest that their efforts to keep their manipulative activity secret somehow turn this from a manipulation claim into a claim of nondisclosure. But to say that Defendants did not disclose their actions (*i.e.*, their secret acquisition of VW Shares through options) is not to say that Defendants took no actions, as Defendants suggest. Secrecy and fraud are always a part of a successful attempt to corner a market, because it takes fraud to lure victims into a short squeeze, primarily by misrepresenting the true extent of supply and demand for the squeezed security. *Cf.* Frank H. Easterbrook, Monopoly, Manipulation, and the Regulation of Futures Markets, 59(2) J. Bus. S103, S119 (1986) ("When there is no fraud, there is no manipulation."). Defendants are thus wrong to suggest that a claim for manipulation is invalid when it also involves nondisclosure of the manipulative acts. And because this is not a case where the "sole basis" of the manipulation claim is misrepresentations or omission, Defendants' reliance on *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005), Porsche Mem. at 3, is misplaced.

Similarly, Defendants misconceive the nature of manipulation when they trumpet the fact that they set off the short squeeze by disclosing Porsche's total ownership, including its options contracts. *See* Porsche Mem. at 28 n.20 ("To 'execute' the short squeeze, Plaintiffs allege that Porsche *disclosed* its options contracts.") (emphasis in original). Defendants' manipulative acts made the short squeeze possible, but it was necessary in the end for Defendants to reveal Porsche's position in order to set the short squeeze in motion.[19] That is how short squeezes work. "The manipulation may be secret at the start but cannot be secret at the end. An undisclosed manipulation is an unsuccessful manipulation." Easterbrook 59(2) J. Bus. at S107.

V. THE COMPLAINT ADEQUATELY PLEADS CLAIMS FOR COMMON LAW FRAUD.

To plead a claim for common law fraud under New York law, a plaintiff must allege "[1] a misrepresentation or a material omission of fact which was false and known to be false by defendant, [2] made for the purpose of inducing the other party to rely upon it, [3] justifiable reliance of the other party on the misrepresentation or material omission, and [4] injury."[20] *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (N.Y. 1996)).

In addition to incorporating their objections to the elements of a common law fraud claim that overlap with a claim under § 10(b), Defendants make the new argument that Plaintiffs have not alleged element (3), justifiable reliance.

"In pleading reliance, Plaintiffs need only allege that 'but for the claimed representations or omissions, the plaintiff would not have entered into the detrimental securities transactions.'"

[19] As described in detail in the Complaints, Defendants triggered the short squeeze to avoid the risk of a Porsche bankruptcy, a risk Defendants created through their complex derivatives-based strategy to lock up the supply of VW Shares. TAC at ¶¶ 26–30, 142; AC at ¶ 73–74.

[20] Of course, Defendants' arguments concerning Plaintiffs' federal claims and *Morrison*'s interpretation of the Exchange Act have no bearing on Plaintiffs' separate state-law claims.

Anwar, 2010 WL 3341636, at *37 (quoting *Lentell*, 396 F.3d at 172). Courts in this District have observed the general rule that "whether an investor reasonably relied on a defendant's misrepresentations is a fact-intensive inquiry" that often "cannot be decided on [a] motion to dismiss." *AIG Global Sec. Lending Corp. v. Banc of Am. Sec., LLC*, No. 1 Civ. 11448, 2005 WL 2385854, at *9 n.5 (S.D.N.Y. Sept. 26, 2005) (citing *Waltree Ltd. v. ING Furman Selz LLC*, 97 F. Supp. 2d 464, 469 (S.D.N.Y. 2000)); *DIMON Inc. v. Folium, Inc.*, 48 F. Supp. 2d 359, 372 (S.D.N.Y. 1999).

The Complaints adequately plead justifiable reliance. 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. TAC at ¶ 140; AC at ¶¶ 38, 70–71, 152, 165.

During 2008, VW Shares appeared increasingly overvalued relative to the shares of other publicly traded automobile companies. TAC at ¶ 2; AC at ¶ 66. In determining that VW Shares did not reflect fundamental value, all Plaintiffs relied on Porsche's public statements with regard to its ownership of VW Shares, and Plaintiffs relied on the absence of any disclosed accumulation of VW Shares. TAC at ¶ 14; AC at ¶ 67. Given the facts available to them, Plaintiffs determined that the price of VW Shares was too high. TAC at ¶ 14; AC at ¶¶ 66–67. Absent any compelling rationale why VW Shares would trade at such high levels, and in reliance on Defendants express denials that Porsche would take over VW in the near future, Plaintiffs believed that their short positions would be profitable. *Id.* Certain Plaintiffs also relied on various private statements that Gaube made to them, as detailed in TAC at ¶ 15. Plaintiffs would not have sold VW Shares short (or entered into the short side of securities-based swap agreements) had they known of Defendants' plans to acquire 75% of VW, because—combined

with Porsche's control of VW Shares through options—Porsche's purchases guaranteed that short sellers would suffer a short squeeze in VW Shares. TAC at ¶ 140; AC at ¶ 70.

Defendants' assertion that Plaintiffs "could not reasonably have relied on the alleged statements in light of the total mix of publicly available information," Porsche Mem. at 30, is conclusively refuted by what happened after Porsche announced the truth on Sunday, October 26, 2008. Immediately following that announcement, the *Wall Street Journal* reported, "all hell broke loose." TAC at ¶ 31. By Tuesday, October 28, 2008, VW Shares had reached €1,005.01 (477% above the close on Friday, October 24, 2008). Under these circumstances, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *ECA, Local 134 v. JP Morgan Chase Co.*, 533 F.3d 187, 197 (2d Cir. 2009) (quotations and citations omitted). Any doubt as to whether the truth about Porsche's actions would affect the "total mix of publicly available information" is resolved by one look at the chart in the Introduction to this memorandum.

VI. THIS COURT HAS SPECIFIC PERSONAL JURISDICTION OVER DEFENDANTS WIEDEKING AND HAERTER.

Porsche's former CEO and CFO, Defendants Wiedeking and Haerter—but not Porsche itself—move to dismiss under Fed. R. Civ. P. 12(b)(2), arguing that this Court lacks personal jurisdiction over them. As Wiedeking and Haerter bring "a Rule 12(b)(2) motion, which assumes the truth of the plaintiff's factual allegations … and challenges their sufficiency," Plaintiffs "need persuade the court only that [their] factual allegations constitute a *prima facie* showing of jurisdiction." *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). The Court must "construe the pleadings … in the light most favorable to plaintiffs,

resolving all doubts in their favor." *Chloé v. Queen Bee of Beverly Hills, LLC*, -- F.3d --, 2010 WL 3035495, at *2 (2d Cir. Aug. 5, 2010) (quotations and citations omitted).[21]

Because personal jurisdiction here is based upon § 27 of the Exchange Act, 15 U.S.C. § 78aa, it extends to the fullest extent permitted by the Due Process Clause of the Fifth Amendment. *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990).[22] The due process analysis for personal jurisdiction has "two related components: the 'minimum contacts' inquiry and the 'reasonableness' inquiry." *Chloé*, 2010 WL 3035495, at *3.

Plaintiffs' allegations satisfy both the "minimum contacts" and "reasonableness" tests for the exercise of specific personal jurisdiction.[23] Wiedeking's and Haerter's arguments to the contrary ignore most of the relevant allegations, which demonstrate their deep involvement in Defendants' fraudulent scheme and their related contacts with the United States.

A. Wiedeking and Haerter Have Sufficient Minimum Contacts with the United States for Specific Personal Jurisdiction.

1. Plaintiffs need allege only a minimal level of contacts related to their claims against Wiedeking and Haerter.

The minimum contacts inquiry asks whether a defendant has "sufficient contacts with" the United States "to justify the court's exercise of personal jurisdiction," considering "the totality of Defendants' contacts." *Id.* When § 27 of the Exchange Act provides the basis for

[21] Wiedeking and Haerter could have moved for summary judgment on personal jurisdiction under Fed. R. Civ. P. 56 or requested an evidentiary hearing to resolve disputed questions of fact regarding personal jurisdiction, *Ball*, 902 F.2d at 197, but they elected not to. *See* Wiedeking Mem. at 3 n.5.

[22] Certain Plaintiffs also bring New York common-law fraud claims against Wiedeking and Haerter, for which the Court has pendant personal jurisdiction. *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056–57 (2d Cir. 1993).

[23] Because Wiedeking and Haerter are both subject to specific personal jurisdiction in this Court, it is not necessary to address Wiedeking's separate argument regarding general jurisdiction. *See* Wiedeking Mem. at 4–5.

jurisdiction, as here, the Court must consider Defendants' contacts throughout the United States. *Pro-Fac Co-op., Inc. v. Alpha Nursery, Inc.*, 205 F. Supp. 2d 90, 99–100 (W.D.N.Y. 2002).

Specific personal jurisdiction "merely requires the cause of action to 'relate to' defendant's minimum contacts with the forum"; the cause of action need not arise directly from the minimum contacts. *Chloé*, 2010 WL 3035495, at *6. It is enough that Defendants' contacts have just "some connection" to Plaintiffs' claim, *id*. at *5, and the contacts may arise from acts done outside the forum that cause effects inside the forum, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972) (Friendly, J.), *overruled on other grounds by Morrison*, 130 S. Ct. 2869.

2. Plaintiffs' factual allegations satisfy the minimum contacts test.

Taking the Complaints' allegations as true and drawing all reasonable inferences in Plaintiffs' favor, as the Court must, the allegations easily establish this Court's personal jurisdiction over both Wiedeking and Haerter.

The Complaints contain extensive allegations regarding Porsche's fraudulent activities directed at the United States, including misstatements and omissions during phone calls with Plaintiffs' representatives in the United States and emails sent to the United States. TAC at ¶¶ 15, 83, 84; AC at ¶¶ 29–45. Porsche also maintained an English-language version of its website, where it translated into English announcements related to its VW investments, which are directly connected to Plaintiffs' claims. TAC at ¶ 86; AC at ¶ 36. In light of these contacts, Porsche does not contest that the Court has personal jurisdiction over it.

Defendants Wiedeking and Haerter were not just Porsche's CEO and CFO, but were also active participants in Porsche's fraud and market manipulation. They directed the entire scheme, including all of the U.S.-focused conduct described above. TAC at ¶ 2; AC at ¶¶ 44–45. Porsche itself calls Haerter the "mastermind" behind the options strategies that underlie the fraud

and market manipulation. TAC at ¶ 25; AC at ¶ 50. These allegations support a finding of personal jurisdiction. *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 23–24 (2d Cir. 1988) (finding personal jurisdiction over CEO and CFO who, "through [the company], reached into New York"); *see also Leasco*, 468 F.2d at 1343 (questions about defendant's delegation and supervision of activities related to fraud precluded dismissal for lack of personal jurisdiction).

In addition, Wiedeking and Haerter personally made fraudulent misstatements on which Plaintiffs relied. TAC at ¶¶ 122–23, 127–28, 130–31; AC at ¶¶ 97, 105, 110. And they knew full well that their 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 City. TAC at ¶¶ 90–91; AC at ¶ 40. It is well established that Wiedeking's and Haerter's fraudulent conduct outside of the United States with such "direct and foreseeable" domestic effects subjects them to personal jurisdiction here. *E.g.*, *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 304–06 (E.D.N.Y. 2002); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 399–401 (S.D.N.Y. 2005); *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 40–41 (D. Conn. 1996).[24]

Wiedeking and Haerter also made in-person visits to the United States connected to Plaintiffs' claims. In October 2005, Haerter spoke on Porsche's behalf in New York with American investors about Porsche's investment in VW. Haerter's American meeting was part of a road show about which the *Financial Times* reported: "Conscious of the market's skepticism, Porsche will from this week meet UK and US investors to try to convince them of the merits of

[24] Wiedeking complains that Plaintiffs' allegations are insufficient to show "systematic contact" that creates "continuing obligations" between him and Americans. Wiedeking Mem. at 4. The Second Circuit has rejected this line of argument because—as Defendant Haerter concedes—it is enough that Defendants' conduct elsewhere had "direct and foreseeable effects" in the United States. Haerter Mem. at 3; *see Chloé*, 2010 WL 3035495, at *10 ("while it may be sufficient to provide a basis for asserting jurisdiction, a continuing relationship is not necessary for conduct to be purposefully directed at the forum").

its plan." TAC at ¶¶ 85(a), 100; AC at ¶ 34. The visit was thus related to Porsche's VW plans and Haerter's ongoing role in its VW investment. TAC at ¶ 101.

In January 2007, Wiedeking held an hour-long interview with reporters at the Detroit Auto Show at which 64 of the 69 questions pertained to VW. TAC ¶ at 85(b); AC at ¶ 35. Also in January 2007, *Business Week* reported an interview with Wiedeking in Detroit during which he responded to a question about why Porsche was not paying a premium for VW Shares with a response directly related to Defendants' fraudulent scheme: "Why should I pay a premium? No. I don't see any reason for this, 29% is enough for Porsche. We won't acquire more than 50%." TAC at ¶¶ 85(c), 104; AC at ¶ 35. Wiedeking's U.S. interviews, too, were related to Porsche's VW plans and his ongoing role in Porsche's VW investment. TAC ¶ 106; AC at ¶ 35.

Wiedeking and Haerter make too much of the fact that their conduct during these trips is not itself the direct basis for Plaintiffs' claims. The Second Circuit has explained that such an argument "too narrowly construes the nexus requirement, which merely requires the cause of action to 'relate to' defendant's minimum contacts with the forum." *Chloé*, 2010 WL 3035495, at *6. Thus, in a trademark case involving counterfeit handbags, the contacts necessary for personal jurisdiction were supported by the defendant's shipment into the forum of *any* handbags, regardless of whether they used the plaintiff's trademark or could serve as the basis of the plaintiff's claims. *Id.*; *see also id.* at *5 n.3

Taken together, the Complaints' allegations regarding Wiedeking's and Haerter's participation in Porsche's fraudulent scheme directed at the United States and their individual contacts with the United States related to Plaintiffs' claims are more than enough to establish a *prima facie* showing of personal jurisdiction. But also, beyond these allegations, the Second Circuit's recent analysis in *Chloé* imputes to Wiedeking and Haerter *all* of Porsche's own

contacts with the United States, which Porsche does not contest are sufficient for personal jurisdiction over it.

In *Chloé*, the court found personal jurisdiction in New York over one defendant, Ubaldelli, based on his employment-like relationship with another defendant, Queen Bee. While Queen Bee had "substantial business activity" in New York, Ubaldelli's own direct contacts were limited to shipping a single item to New York. *Chloé*, 2010 WL 3035495, at *1, *7. Ubaldelli "shared in the profits" from Queen Bee's business, used its money to pay business expenses, and "shared in the decision-making and execution" of the business. *Id.* at *7. Even though it was uncertain whether his one shipment to New York could be the basis for any liability, *id.* at *5 n.3, *6, the Second Circuit held that "Queen Bee's activities in the State of New York may be imputed to Ubaldelli in the course of analyzing whether the court may exercise personal jurisdiction …." *Id.* at *7.

Like the defendant in *Chloé*, Wiedeking and Haerter exercised important decision-making authority at Porsche related to the fraudulent scheme, and their remarkable compensation depended on Porsche's profitability. *See* TAC ¶ at 72; AC at ¶¶ 22–23. Under *Chloé*, their own direct contacts with the United States, coupled with their roles in Porsche's scheme, are sufficient to impute all of Porsche's American contacts to them for purposes of personal jurisdiction.

B. There Is Nothing Unreasonable about the Exercise of Personal Jurisdiction over Wiedeking and Haerter.

When the minimum contacts requirement is satisfied, a defendant must "present[] 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable'" to defeat personal jurisdiction. *Chloé*, 2010 WL 3035495, at *4 (quoting *Burger*

King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)). Neither Wiedeking nor Haerter makes any such "compelling case" here.

First, Haerter says litigation in the U.S. would cause him hardship, Haerter Mem. at 4–5, although Wiedeking does not assert any difficulty. While there may be some burden on Haerter if he must travel to New York for trial, the "argument … provide[s] defendant only weak support, if any, because 'the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.'" *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129–130 (2d Cir. 2002) (quotations and citation omitted). Haerter is an individual of very substantial means. TAC at ¶ 72; AC at ¶ 23. Moreover, as the court found in *Chloé*, "[t]he inconvenience … cuts both ways," since Plaintiffs' managers and witnesses would have to travel to Germany if the case were brought there. *Chloé*, 2010 WL 3035495, at *11.

Second, Wiedeking and Haerter claim incorrectly that no witnesses or evidence related to this litigation is in the United States and that this country has no interest in the litigation. Wiedeking Mem. at 5; Haerter Mem. at 5. These arguments are no more persuasive in the context of personal jurisdiction than they were in the context of Defendants' *forum non conveniens* motion. They remain incorrect for the reasons discussed above. *See supra* at 18–19.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' motions to dismiss.

DATED: September 28, 2010

Respectfully submitted,

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