UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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

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PRELIMINARY STATEMENT

Plaintiffs are more than three dozen hedge funds, a majority of which organize themselves on foreign soil, which speculated on an unspecified number of direct or so-called synthetic short sales in German securities traded on foreign exchanges. Now having lost their bets, they seek to prosecute a quintessentially German lawsuit in the United States – "the Shangri-La of . . . litigation for lawyers representing those allegedly cheated in foreign securities markets." Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010).[1] Dr. Wendelin Wiedeking ("Dr. Wiedeking") is a German citizen who was living and working in Germany for a German company which is alleged to have participated in some purported scheme to defraud investors in another German company's stock on various foreign stock exchanges. Dr. Wiedeking's contacts with the United States are tangential at best. Thus, in addition to the reasons set forth in the other defendants' memoranda of law, these actions must be dismissed as to Dr. Wiedeking because Plaintiffs fail to allege that this Court has personal jurisdiction over him. Moreover, Plaintiffs have failed to allege that either of the only two statements attributed to Dr. Wiedeking were deliberately false when made.

FACTUAL BACKGROUND[2]

Dr. Wiedeking was President and CEO of Porsche from 1993 to 2009. (Elliott Plaintiffs' Third Amended Complaint ("TAC") ¶ 70; Black Diamond Plaintiffs' Amended Complaint ("AC") ¶ 22.) Dr. Wiedeking is a German citizen and has never, and is not alleged to have, lived or been employed in the United States.

Porsche initially acquired a stake in Volkswagen AG ("VW") in 2005 and incrementally increased its stake in VW from 2005 to 2008. (TAC ¶¶ 97-107; AC ¶¶ 55-62.) During this time period, Dr. Wiedeking made one trip to the United States to attend the Detroit

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[1] None of the Elliott Plaintiffs have ever asserted a common law fraud claim against Dr. Wiedeking or Mr. Härter. In addition, after Morrison was decided, 19 of the current Elliott Plaintiffs dropped their federal securities claims against all defendants. Therefore, only 16 Elliott Plaintiffs bring claims against Dr. Wiedeking or Mr. Härter at all, and those claims must be dismissed for the reasons stated herein.

[2] Only well-pleaded allegations of fact in the Complaints – and not conclusory assertions – are accepted as true for purposes of this motion. See Freund v. Lerner, No. 09 CV 7117 (HB), 2010 WL 3156037, at *5, *7 (S.D.N.Y. Aug. 10, 2010) (Baer, J.).

Auto Show in 2007. (TAC ¶ 85(b); AC ¶ 35.) Plaintiffs do not allege any other trips by Dr. Wiedeking to the United States, whether as a Porsche employee or in a personal capacity. Dr. Wiedeking served as the director of Porsche Cars North America, Inc., and Porsche Enterprises Inc. (TAC ¶ 76(i); AC ¶ 44), but Plaintiffs do not allege that any of his duties as such required travel to the United States, phone calls to the United States or generally any contact with the United States, and certainly none in connection with the claims at issue here.

ARGUMENT[3]

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DR. WIEDEKING

For claims brought under the Securities Exchange Act of 1934, a U.S. court may exercise personal jurisdiction over a foreign national such as Dr. Wiedeking only to the extent permitted by the Due Process Clause of the Fifth Amendment.[4] See Sedona Corp. v. Ladenburg Thalmann & Co., No. 03 Civ. 3120 (LTS)(THK), 2006 WL 2034663, at *8 (S.D.N.Y. July 19, 2006) (quoting SEC v. Unifund SAL, 910 F.2d 1028, 1033 (2d Cir. 1990)). The Due Process Clause ensures that persons without meaningful ties to the forum state are not subject to binding judgments within that jurisdiction. See Metro. Life Ins. Co. v. Robertson-CECO Corp., 84 F.3d 560, 567 (2d Cir. 1996). The court must first determine whether "minimum contacts" have been established under either a specific jurisdiction or general jurisdiction theory; the court then determines whether exercise of personal jurisdiction is "reasonable." Id. at 567-68. With respect

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

[4] As a preliminary matter, because the federal claims against Dr. Wiedeking should be dismissed both for lack of personal jurisdiction and on the merits, the Court should decline to exercise supplemental jurisdiction of the Black Diamond Plaintiffs' state law claims against him. In any case, the Black Diamond Plaintiffs' common law fraud claims against Dr. Wiedeking fail to satisfy New York's personal jurisdiction requirements in addition to the requirements of federal due process as applied to contacts with New York. See Ljungkvist v. Rainey Kelly Campbell Roalfe/Young & Rubicam, Ltd., No. 01 Civ. 1681 (HB), 2001 WL 1254839, at *4 (S.D.N.Y. Oct. 19, 2001) (Baer, J.) ("'The occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under [New York's long-arm statute] where the underlying events took place outside New York.'" (quoting United Bank of Kuwait v. James M. Bridges, Ltd., 766 F. Supp. 113, 116 (S.D.N.Y. 1991))). The Black Diamond Plaintiffs allege nothing about Dr. Wiedeking's contacts with New York and fail to assert allegations that would overcome the federal due process hurdle as well, as explained below. Indeed, of the 16 Elliott Plaintiffs who assert any claims against Dr. Wiedeking at all, none of them assert common law fraud claims against Dr. Wiedeking. (TAC ¶¶ 191-96.)

to the federal securities laws, the relevant "forum state" is the United States as a whole. See Sedona, 2006 WL 2034663, at *8.[5]

A. Dr. Wiedeking's Single Alleged Contact with the United States Does Not Confer Specific Jurisdiction

Specific jurisdiction requires Plaintiffs to allege that Dr. Wiedeking purposefully directed his activities towards the United States and that the lawsuits arise out of or are related to his contacts with the United States. See TCS Capital Mgmt., LLC v. Apax Partners, L.P., No. 06 Civ. 13447 (CM), 2008 WL 650385, at *11 (S.D.N.Y. Mar. 7, 2008). Neither Complaint satisfies this burden. The only allegation in the Elliott Plaintiffs' Complaint's "Specific Jurisdiction" section related to Dr. Wiedeking is an allegation that he spoke with reporters at the International Auto Show in Detroit on January 9, 2007 (TAC ¶ 85(c)), over a year before any plaintiff even alleges they engaged in any transactions. Notwithstanding any attempt to suggest otherwise, Plaintiffs are not suing Dr. Wiedeking (or anyone else) on the basis of any statement made by him in Detroit on January 9, 2007. Indeed, the Elliott Plaintiffs do not attempt to explain why a statement made in Detroit has any direct relationship to their claims, nor could they, since they do not claim to have been allegedly misled until March 2008. (See, e.g., TAC ¶ 77.) The Black Diamond Complaint alleges that Dr. Wiedeking stated in Detroit that Porsche would not acquire a stake in VW greater than 50% (AC ¶ 35), but nothing in that Complaint alleges that the statement was untrue in January 2007 – over a year before any plaintiff began its short selling campaign. See In re AstraZeneca Sec. Litig., 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008), aff'd sub nom. State Univs. Ret. Sys. v. AstraZeneca PLC, 334 F. App'x 404 (2d Cir. 2009); In re DaimlerChrysler AG Secs. Litig., 247 F. Supp. 2d 579, 585-86 (D. Del. 2003).

[5] "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, see Fed. R. Civ. P. 11, legally sufficient allegations of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). At this stage of litigation and because the burden is on Plaintiffs to demonstrate personal jurisdiction, Dr. Wiedeking does not need to submit an affidavit with respect to his lack of contacts with the United States; nor is he otherwise requesting an evidentiary hearing, as it is clear that the allegations do not suffice to establish a prima facie showing of personal jurisdiction. See, e.g., Credit Lyonnais Secs. (USA), Inc. v. Alcantara, 183 F.3d 151, 153 (2d Cir. 1999) ("[T]he court need only determine whether the facts alleged by the plaintiff, if true, are sufficient to establish [personal] jurisdiction; no evidentiary hearing or factual determination is necessary for that purpose."); Madison Models, Inc. v. Casta, No. 01 Civ. 9323 (LTS)(THK), 2003 WL 21978628, at *2, *6 (S.D.N.Y. Aug. 20, 2003) (dismissing complaint without evidentiary hearing for failure to satisfy prima facie burden of alleging facts establishing personal jurisdiction).

Nor does this single allegation satisfy the requirement that a defendant be shown to have "purposefully directed" his activities at U.S. residents; in other words, that he has "'deliberately' . . . engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (emphases added) (citations omitted). A single interview in Detroit over one year before the relevant time period hardly qualifies as "significant" or an establishment of any "continuing obligations." See Ljungkvist v. Rainey Kelly Campbell Roalfe/Young & Rubicam, Ltd., No. 01 Civ. 1681 (HB), 2001 WL 1254839, at *3-6 (S.D.N.Y. Oct. 19, 2001) (Baer, J.).

Beyond this single allegation, Plaintiffs predictably attempt to inflate their allegations of personal jurisdiction with extensive reliance, both explicit and implicit, on Dr. Wiedeking's status as an officer of Porsche. However, courts consistently reject such blatant bootstrapping as satisfying the specific jurisdiction test. See AstraZeneca, 559 F. Supp. 2d at 467; Sedona, 2006 WL 2034663, at *8-9; In re Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 399 (S.D.N.Y. 2005). Plaintiffs also repeatedly lump all three Defendants together in conclusory fashion. (See, e.g., TAC ¶ 87, AC ¶ 37.) But the law prohibits the abuse of vague, attenuated causation theories in an attempt to cover any unsuspecting foreigner involved in a company that deals with securities traded on a foreign exchange and happens to do business in the United States. See In re Parlamat Sec. Litig., 376 F. Supp. 2d 449, 456 (S.D.N.Y. 2005) (Kaplan, J.) (quoting Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1342 (2d Cir. 1972), abrogated on other grounds by Morrison); see also SEC v. Unifund SAL, 910 F.2d 1028, 1033 (2d Cir. 1990).

B. The Complaints Also Fail to Allege Any "Continuous and Systematic" Contact Between Dr. Wiedeking and the United States

Nor do the Complaints satisfy the more "stringent" standard of alleging "'continuous and systematic'" contact with the United States for purposes of general jurisdiction. Metro. Life, 84 F.3d at 568 (citation omitted). Dr. Wiedeking's single alleged visit to Detroit in January 2007 does not suffice to constitute "continuous and systematic" contact with the United

States, and there is not a single allegation about any other trip, visit or contact by Dr. Wiedeking to the United States during any relevant time period. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). Even the Complaints' allegations concerning Dr. Wiedeking's board membership in Porsche Cars North America, Inc. and Porsche Enterprises Inc. fail to establish a prima facie case of general jurisdiction because Plaintiffs do not allege that his duties as an alleged director of these corporations required him to set foot in the United States, nor is there any allegation that his position there has any connection to the alleged wrongdoing at issue in this case. See Ljungkvist, 2001 WL 1254839, at *6 n.12.

C. Exercising Personal Jurisdiction Over Dr. Wiedeking Would Be Unreasonable Under the Circumstances of This Case

Because Plaintiffs do not even come close to satisfying the required showing for "minimum contacts," Plaintiffs carry an inversely higher burden in attempting to satisfy the "reasonableness" prong of the due process analysis. See Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameris, No. 03 Civ. 1681 (LAP), 2004 WL 2199547, at *16 (S.D.N.Y. Sept. 29, 2004). In any case, Plaintiffs' allegations fail under any standard to demonstrate that asserting personal jurisdiction over Dr. Wiedeking would be reasonable and comport with "traditional notions of fair play and substantial justice," given that all of the witnesses and evidence are likely to be located in Germany and it is Germany that clearly has the strongest interest in this case. See id.; see also Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987). By way of contrast, the interest of the United States is limited, especially where, as here, (a) less than half of the three dozen hedge fund plaintiffs are even based in the United States, see, e.g., Asahi, 408 U.S. at 114; (b) German law applies in these lawsuits as set forth in Porsche's memorandum of law; (c) all of the alleged misconduct took place in Germany or on European soil and (d) Germany is "where witnesses and evidence are likely to be located." Metro. Life, 84 F.3d at 574; see also Northrop, 2004 WL 2199547, at *16; Ljungkvist, 2001 WL 1254839, at *6. Accordingly, the Complaints should be dismissed as to Dr. Wiedeking for lack of personal jurisdiction.

II. PLAINTIFFS FAIL ADEQUATELY TO PLEAD A CAUSE OF ACTION FOR SECURITIES FRAUD AGAINST DR. WIEDEKING

Should Plaintiffs (a) satisfy their prima facie burden of alleging sufficient facts to establish personal jurisdiction, (b) demonstrate conclusively that these actions actually belong in the United States under the doctrine of forum non conveniens and (c) manage to persuade the Court that Section 10(b) covers their swap transactions based on securities traded abroad even under Morrison – none of which Plaintiffs can do – Plaintiffs' claims against Dr. Wiedeking must still be dismissed for failure to plead a securities fraud claim with the requisite particularity.

The heightened standards for pleading fraud under Section 10(b) are well-established. See, e.g., Hammerstone NV, Inc. v. Hoffman, No. 09 Civ. 2685 (HB), 2010 WL 882887, at *4 (S.D.N.Y. Mar. 10, 2010) (Baer, J.) (citing In re Scholastic Corp. Secs. Litig., 252 F.3d 63, 69-70 (2d Cir. 2001)). Among other requirements, the complaint must allege facts that give rise to an inference of scienter that is "'cogent and at least as compelling as any'" competing inference of non-fraudulent intent. Slayton v. Am. Express Co., 604 F.3d 758, 766 (2d Cir. 2010) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007)).

The Second Circuit has made clear the fundamental principle that allegedly misleading statements must be explicitly and specifically attributed to particular defendants in a Section 10(b) action. See Pac. Inv. Mgmt. Co. v. Mayer Brown LLP, 603 F.3d 144, 158 (2d Cir. 2010). Where a plaintiff has failed to allege that an officer defendant had any "discernible role" in issuing the statements and where the complaint failed to show that any plaintiff relied specifically on the individual defendants' roles in issuing those public statements, it should be dismissed. Sgalambo v. McKenzie, No. 09 Civ. 10087 (SAS), 2010 WL 3119349, at *9 (S.D.N.Y. Aug. 6, 2010). Here, of the various statements made between March 4 and October 26, 2008 Plaintiffs allege to have been misleading, only two are specifically attributed to Dr. Wiedeking. They do not allege Dr. Wiedeking's own role in developing any of the other nine statements and do not allege how any of the plaintiffs specifically relied on Dr. Wiedeking's particular role, if any, in the crafting of such statements. Rather, Plaintiffs do nothing more than rely on the fact that Dr. Wiedeking was Porsche's CEO at the time. Therefore, claims premised

on those statements not specifically attributed to Dr. Wiedeking should be dismissed as to him. See Cohen v. Stevanovich, No. 09 Civ. 4003, 2010 WL 2670865, at *6 (S.D.N.Y. July 1, 2010) (to be published in F. Supp. 2d).

The only two alleged misstatements remaining that are actually attributed to Dr. Wiedeking are statements made on October 2 and October 5, 2008. (TAC ¶¶ 127, 130; AC ¶¶ 105, 110.) The Complaints, however, fail adequately to allege why these two vague statements were misleading and also fail to raise an inference – let alone the requisite strong inference – that Dr. Wiedeking himself purposefully sought to mislead investors with these statements. There are no particularized allegations that Porsche did not plan to increase its stake in VW to more than 50% before the end of the year, there are no particularized allegations that Porsche had in fact ruled out the "possibility" of domination in early October and there are no particularized allegations that 75% was actually not "out of the question" "at present" – on October 5. A "possibility" or "purely theoretical option" can or cannot happen – Dr. Wiedeking's statements were nothing more than vague assertions that Porsche as a corporate entity did not know if it intended to seek domination as of early October. Certain of the plaintiffs have sought – and failed – to twist open-ended terms into assertions of fact in other actions and such attempts must again fail here. See Elliott Assocs., L.P. v. Covance, Inc., No. 00 Civ. 4115 (SAS), 2000 WL 1752848, at *10 (S.D.N.Y. Nov. 28 2000) ("If something is 'on track' it is reasonable to assume that it could go 'off track'. Thus, the challenged statements are vague expressions of opinion which are not sufficiently concrete or specific to impose a duty [to disclose].").

There are simply no allegations that can remotely compete with the much stronger non-fraudulent inference that circumstances changed between October 2, 2008, and October 26, 2008, when Porsche officially declared its intent to reach 75% in 2009. The mere fact that these statements were made about three weeks before the October 26 disclosure does nothing to suggest falsity or any inference of scienter. See id. at *7 ("The mere disclosure of adverse information shortly after a positive statement does not support a finding that the prior statement was false at the time it was made."). Moreover, none of the Plaintiffs specifically alleges that they sold short or entered into any swap agreements in that three week period following October

5, 2008. See Serova v. Teplen, No. 05 Civ. 6748 (HB), 2006 WL 349624, at *8 (S.D.N.Y. Feb. 16, 2006) (Baer, J.).[6]

CONCLUSION

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

Dated: New York, New York
August 31, 2010

Respectfully submitted,

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[6] Because Plaintiffs have failed to allege a primary violation against Porsche for the reasons set forth in Porsche's Memorandum of Law, Plaintiffs' Section 20(a) claims against Dr. Wiedeking must be dismissed. See Hammerstone NV, Inc. v. Hoffman, No. 09 Civ. 2685 (HB), 2010 WL 882887, at *11 (S.D.N.Y. Mar. 10, 2010) (Baer, J.). Moreover, although this Court has previously recognized a split on this issue, it is clear that, due to the firmly established culpable participant element of Section 20(a) and the heightened requirements of the PSLRA, culpable participation is a pleading requirement that must be plead with particularity. See In re MBIA, Inc. Secs. Litig., 700 F. Supp. 2d 566, 597-98 (S.D.N.Y. 2010). In any event, Plaintiffs have not alleged anything more than Dr. Wiedeking's status as a corporate officer. See JHW Greentree Capital, L.P. v. Whittier Trust Co., No. 05 Civ. 2985 (HB), 2005 WL 3008452, at *9 (S.D.N.Y. Nov. 10, 2005) (Baer, J.). Lastly, the Black Diamond Plaintiffs' common law fraud claims against Dr. Wiedeking should also be dismissed for, among other reasons, failure to satisfy the particularity requirements of Rule 9(b) as to him. See Hammerstone, 2010 WL 882887, at *11 (Baer, J.) (dismissing common law fraud claims pursuant to Rule 9(b) for same reasons the federal securities claims were dismissed pursuant to PSLRA).