UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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

**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***

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**Rules**

Defendant Mr. Holger P. Härter moves to dismiss the Third Amended Complaint ("TAC") filed by Elliott Associates, L.P., *et al.*, and the Amended Complaint ("AC") filed by Black Diamond Offshore Ltd., *et al.*, for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), *forum non conveniens,* and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

**ARGUMENT**

Plaintiffs are sophisticated hedge funds that knowingly chose to engage in an aggressive high-risk, high-reward investment scheme involving the stock of a German company traded only in Europe. They engaged in a massive short-selling campaign and orchestrated complicated synthetic transactions to bet against VW's common share price. Pursuing this high-risk gambit, Plaintiffs chose to make themselves vulnerable to immense losses. They lost their bets. Now they want someone to blame.

As the allegations in the Complaints show, Plaintiffs' grievances cannot be aired in a U.S. court. The Supreme Court's landmark *Morrison v. National Australia Bank* decision makes it unavoidably clear that § 10(b) of the Exchange Act does not apply to Plaintiffs' claims. Plaintiffs ask this Court to apply the United States Exchange Act to a German corporation and its German former officers for claims concerning German securities listed only in Europe and traded primarily on a German exchange. *Morrison* bars such application.[1]

Mr. Härter himself is a German citizen and resident as to whom Plaintiffs allege a single contact with the United States which occurred years before Plaintiffs claim that any alleged wrongdoing began. Accordingly, Plaintiffs have failed to plead the minimum contacts required by the Due Process Clause to allow a U.S. court to exercise personal jurisdiction over Mr. Härter. Plaintiffs also have failed to state a claim against Mr. Härter under § 10(b) or § 20(a) of the Exchange Act because, among other reasons, the sole alleged misstatement attributed to him is true on its face.

[1] Mr. Härter incorporates herein by reference the arguments made in the memoranda of law filed herewith by Defendant Porsche Automobil Holding SE and Defendant Dr. Wendelin Wiedeking.

## I. THE COMPLAINTS AGAINST MR. HÄRTER SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

The Court may exercise personal jurisdiction over a defendant only if doing so comports with due process. The ground rules are well known. Each defendant's contacts with the forum must be assessed individually, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984), and independently of allegations of liability, *City of Monroe Employ. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 667 (6th Cir. 2005). Plaintiffs bear the burden of making a prima facie showing of facts that, if credited by the Court, would suffice to establish jurisdiction. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566-67 (2d Cir. 1996). In addition, Plaintiffs must allege specific facts supporting personal jurisdiction; they may not rely upon conclusory allegations. *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008). Plaintiffs have failed to meet this burden.

### A. Jurisdiction over Mr. Härter Would Not Comport with Due Process

A court's exercise of personal jurisdiction under the Exchange Act is constrained by the Due Process Clause of the Fifth Amendment. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir. 1975).[2] A court may not exercise jurisdiction over a defendant unless (1) the defendant has sufficient "minimum contacts" with the forum, and (2) the exercise of jurisdiction is reasonable and does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[3]

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[2] The Black Diamond Plaintiffs assert a claim for common law fraud against Mr. Härter. *See* AC ¶¶ 161-66. Jurisdiction for state law claims is assessed under New York's long-arm statute, "which does not extend as far as federal due process permits." *Wing Shing Prods., Ltd. v. Simatelex Mfg. Co.*, 479 F. Supp. 2d 388, 396 (S.D.N.Y. 2007). Because there can be no jurisdiction over Mr. Härter on Plaintiffs' Exchange Act claims, there is no jurisdiction under the more stringent requirements of New York's long-arm statute.

[3] Because Plaintiffs have failed to allege facts sufficient to establish that exercising jurisdiction over Mr. Härter would be consistent with the requirements of due process, they cannot establish jurisdiction on the basis of Fed. R. Civ. P. 4(k)(2). *See Porina v. Marward Shipping Co.*, 521 F.3d 122 (2d Cir. 2008) (finding that Rule 4(k)(2) jurisdiction was lacking because foreign defendant did not have requisite contacts with forum to satisfy due process).

A defendant purposefully directs his activities towards a forum by conducting business within the forum or by committing an act which has direct and foreseeable effects in the forum. *See Bersch*, 519 F.2d at 998, 1000; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). Plaintiffs' allegations show neither (1) that the litigation arises out of Mr. Härter's contacts with the forum, nor (2) that Mr. Härter purposefully directed his activities towards the United States. *See AstraZeneca*, 559 F. Supp. 2d at 467.[4]

Plaintiffs allege that Mr. Härter had only one contact with the United States that is related to Porsche's acquisition of a stake in VW: a road-show presentation to investors in New York in October 2005. *See* TAC ¶ 85.a; AC ¶ 34. However, this meeting occurred roughly *two and a half years* before the period in which Plaintiffs allege that the fraud began and they initiated their short-selling scheme and swaps (March 4, 2008 through October 31, 2008). *See* TAC ¶ 176; AC ¶ 124. Plaintiffs do not allege that they attended the road show, nor that it led to their transaction of any business. Accordingly, this single meeting cannot serve as a basis for specific personal jurisdiction. *See Walther v. Maricopa Int'l Invs. Corp.*, 1998 WL 186736, at *8 (S.D.N.Y. Apr. 17, 1998) (Baer, J.) ("A single meeting in New York does not constitute the transaction of business for purposes of jurisdiction if the activities engaged in were not substantial in nature.").[5]

Second, Plaintiffs have failed to plead that Mr. Härter took any action that was specifically directed at the United States. *See In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 354 (D. Md. 2004). Plaintiffs' unsupported allegations that "Defendants knew

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[4] Plaintiffs do not attempt to assert that there is a basis for general jurisdiction over Mr. Härter.

[5] Plaintiffs' allegations concerning Mr. Härter's board membership on three of Porsche's U.S. subsidiaries cannot establish jurisdiction because Plaintiffs fail to plead that Mr. Härter's duties as a director of these subsidiaries were related in any way to Porsche's acquisition of a stake in VW. *See* TAC ¶ 76.i; AC ¶ 44. Nor is it relevant that Mr. Härter is alleged to be a control person of Porsche. *See* TAC ¶ 77; AC ¶ 45. Such allegations impermissibly attempt to conflate liability with amenability to suit in a particular forum. *See City of Monroe*, 399 F.3d at 667. A person's status as a board member or control person is not an independent basis for establishing personal jurisdiction. *AstraZeneca*, 559 F. Supp. 2d at 467. Finally, Plaintiffs' generalized allegations against "Defendants," *see, e.g.*, TAC ¶¶ 90-91; AC ¶¶ 29, 37, 40, cannot support the exercise of specific jurisdiction over Mr. Härter individually. *Keeton*, 465 U.S. at 781 n.13.

that the primary victims of their scheme would be hedge funds" and that "Defendants knew that hedge funds and the managers who make their investments decisions are concentrated in a small number of locations" including New York, TAC ¶¶ 90-91; *see also* AC ¶ 40, are far too conclusory and attenuated to give rise to personal jurisdiction over Mr. Härter. *See AstraZeneca*, 559 F. Supp. 2d at 467 (conclusory allegations are insufficient to confer jurisdiction); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 456 (S.D.N.Y. 2005) (noting that an attenuated impact in the United States which is foreseeable only "in a very general sense" is insufficient to confer jurisdiction). Indeed, Plaintiffs' unsubstantiated claims that Defendants were targeting New York-based hedge funds are contradicted by the Black Diamond Plaintiffs' allegation that the effect of the "short squeeze" was not limited to U.S. funds, but extended also to British funds and German investors. AC ¶ 82.[6]

**B. The Exercise of Jurisdiction over Mr. Härter Would Be Contrary to Notions of Fair Play and Substantial Justice**

Plaintiffs' solitary allegation regarding Mr. Härter's contact with the United States fails to meet the constitutional requirement of minimum contacts and is insufficient to make the assertion of jurisdiction over him reasonable. Multiple additional factors also weigh against the exercise of jurisdiction. *See Metro. Life Ins. Co.*, 84 F.3d at 573. First, as a German citizen and resident who is no longer employed by Porsche, defending a lawsuit in New York would place an heavy burden on Mr. Härter.[7] In addition to being required to travel to the United States, Defendants will be burdened by the delay and high cost of translating an enormous number of discovery and trial documents from German into English. These and other burdens placed on a defendant in a foreign legal system must be given "significant weight in

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[6] Such allegations reveal that the United States cannot be the "focal point" of the alleged harm because the alleged conduct was felt "globally" and not specifically in the United States, as required for the exercise of specific jurisdiction. *In re Royal Ahold*, 351 F. Supp. 2d at 354.

[7] *See City of Monroe*, 399 F.3d at 666 (dismissing claim against retired Japanese President and CEO of corporation; exercise of personal jurisdiction over individual defendant was not reasonable because the litigation would place a substantial burden on defendant and the countervailing interests were relatively light).

assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Indus. v. Superior Ct. of Cal.*, 480 U.S. 102, 114 (1987).

Moreover, the United States has no interest in adjudicating a case against a German corporation and its German former officers when the alleged wrongful conduct originated in Germany, was legal under German law, and was connected to the United States only tenuously at best. *Morrison* itself compels the conclusion that the United States has no interest in this case. Allowing this action to go forward in a New York court will not advance any social policies; to the contrary—it would violate *Morrison*.

## II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST MR. HÄRTER UNDER § 10(b) OR § 20(a) OF THE EXCHANGE ACT

Plaintiffs' allegations do not satisfy the transactional test adopted by the Supreme Court in *Morrison v. National Australia Bank*, 561 U.S. ---, 130 S. Ct. 2869 (2010). Plaintiffs hoped to make money betting on a German stock traded in Europe. There is no question that had they bought that stock directly, they could not state a claim under *Morrison*. Plaintiffs attempt to conjure up a domestic transaction by alleging that swap agreements with undisclosed counterparties were transacted in the United States. *See, e.g.*, TAC ¶¶ 149-53; AC ¶ 141. But these swap agreements do not themselves constitute a purchase or sale of a security in the United States and do not "involve[] a security listed on a domestic exchange." *Morrison*, 130 S. Ct. at 2886. Entering into a private letter agreement with an unknown third party for a synthetic swap transaction relating to a foreign stock (an allegation that only appeared for the first time in the most recent version of the Complaints) does not satisfy *Morrison*. *See Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 2010 WL 3119908, at *3 (S.D. Fla. Aug. 6, 2010) (finding that plaintiffs' agreements with a third party did not create a domestic transaction). If it were otherwise, any would-be plaintiff could readily engineer the circumvention of *Morrison*.

In addition, the sole alleged misstatement attributed to Mr. Härter fails to state a claim because it was not misleading. *See Cohen v. Stevanovich*, --- F. Supp. 2d ---, 2010 WL 2670865, at *6 (S.D.N.Y. Jul. 1, 2010) (a "defendant must actually make a false and misleading

statement" in order to give rise to liability under § 10(b)). According to Plaintiffs, on July 28, 2008, Mr. Härter told a German newspaper, the *Frankfurter Allgemeine Zeitung*, that Porsche was "determined to cross the 51% threshold this year," *i.e.*, in 2008. TAC ¶ 122; AC ¶ 97.[8]

Plaintiffs also cite a Reuters article that appeared the same day and summarized Mr. Härter's interview. TAC ¶ 122; AC ¶ 97. Reuters reported that Mr. Härter "said he anticipates gradually expanding Porsche's voting stake [in VW] . . . to over 51% starting in September." *See* Ex. B to Chepiga Declaration. Plaintiffs do not claim that Porsche was not intent on crossing the 51% threshold in 2008. Therefore, Plaintiffs resort to arguing that Mr. Härter was misleading because he was *implicitly* suggesting that Porsche's *only* interest was in crossing the 51% threshold and then stopping. *See* TAC ¶ 123; AC ¶ 98. But Plaintiffs do not allege that Mr. Härter actually said any such thing, and there is nothing in the news reports to support Plaintiffs' specious interpretation. Such pleading by baseless insinuation falls far short of *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007) (An "inference of scienter . . . must be cogent . . . and at least as compelling as any opposing inference.").[9] Plaintiffs cannot manufacture a securities fraud claim by reading into Mr. Härter's statement words he did not say.

Similarly, Plaintiffs have failed to allege an actionable market manipulation claim against Mr. Härter. There are no allegations that Mr. Härter has engaged in any activity designed

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[8] Plaintiffs take out of context a one-sentence fragment from a lengthy newspaper interview, which is described as Mr. Härter speaking about "the takeover of Volkswagen." *See* Ex. A to Chepiga Declaration. The full sentence reads: "We definitely intend to cross the 51 percent boundary this year and an entire series of antitrust agencies must agree to this." Ex. A at 2. The interview further reports Mr. Härter stating that after regulatory approval, "**we will try to continue to buy**." Ex. A at 2 (emphasis added). No limit of any kind on future purchases of VW ordinary shares is mentioned or suggested. Indeed, the article, when read in its entirety, shows that the planned "takeover of Volkswagen" was contingent on external factors. Accurate statements about tentative plans do not give rise to § 10(b) liability. *See Vladimir v. Bioenvision Inc.*, 606 F. Supp. 2d 473, 493 (S.D.N.Y. 2009) (finding that defendants had not misrepresented their interests in a contemplated merger where the plan was merely tentative and not yet definite).

[9] Plaintiffs refer vaguely to unspecified statements Mr. Härter made at a road-show presentation to investors in the United States in October 2005—roughly two and a half years before their swap transactions. TAC ¶ 85.a; AC ¶ 34. However, Plaintiffs do not allege that any statements made during this presentation were misleading.

to inflate market activity artificially, such as wash sales, matched orders, or rigged prices. *See Cohen*, 2010 WL 2670865, at *3.[10] Because Plaintiffs have failed to state a claim against any Defendant under § 10(b) of the Exchange Act, their § 20(a) claims against Mr. Härter necessarily fail. *See Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 160 (2d Cir. 2010) (A "claim for control person liability under § 20(a) of the Exchange Act must be predicated on a primary violation of securities law."); *Hammerstone NV, Inc. v. Hoffman*, 2010 WL 882887, at *11 (S.D.N.Y. Mar. 10, 2010) (Baer, J.) ("Since Plaintiffs fail to allege a primary violation under section 10(b) and Rule 10b-5, their cause of action under section 20(a) . . . must also fail.").[11]

**CONCLUSION**

For the reasons set forth above, and in the memoranda filed herewith by Porsche and Dr. Wiedeking, Mr. Härter respectfully requests that the Court dismiss the Complaints against him with prejudice.

Dated: New York, New York
August 31, 2010

Respectfully submitted,

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[10] These and other reasons why Plaintiffs have failed to state a claim under § 10(b) of the Exchange Act are more completely set out in Porsche's Memorandum of Law.

[11] Because Plaintiffs' federal claims fail, there is no basis for the Court to exercise supplemental jurisdiction over the Black Diamond Plaintiffs' common law fraud claim against Mr. Härter. *See Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) ("if the federal claims are dismissed before trial . . . the state claims should be dismissed as well"). Even if the Court were to exercise supplemental jurisdiction, the common law claim would fail for the same reasons that Plaintiffs' § 10(b) claims fail.