SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS Justice PART 53

Index Number : 650678/2011
GLENHILL CAPITAL LP
vs.
PORSCHE AUTOMOBIL HOLDING
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/6/2012

CHARLES E. RAMOS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

VIKING GLOBAL EQUITIES, LP, VIKING GLOBAL EQUITIES II LP, AND VGE III PORTFOLIO LTD.,

Plaintiffs,

- against -

Index No. 650435/11

PORSCHE AUTOMOBIL HOLDING SE, f/k/a DR. ING. H.C.F. PORSCHE AG,

Defendant.

GLENHILL CAPITAL LP; GLENHILL CAPITAL OVERSEAS MASTERS FUND LP; GLENHILL CONCENTRATED FUND LP; GLENVIEW CAPITAL PARTNERS, LP; GLENVIEW INSTITUTIONAL PARTNERS, LP; GLENVIEW CAPITAL MASTER FUND, LTD.; GCM LITTLE ARBOR PARTNERS, LP; GCM LITTLE ARBOR INSTITUTIONAL PARTNERS, LP; GCM LITTLE ARBOR MASTER FUND, LTD.; GCM OPPORTUNITY FUND, LP; GLENVIEW CAPITAL OPPORTUNITY FUND, LP; GLENVIEW OFFSHORE OPPORTUNITY MASTER FUND, LTD.; GREENLIGHT CAPITAL, LP; GREENLIGHT CAPITAL QUALIFIED, LP; GREENLIGHT CAPITAL OFFSHORE PARTNERS; GREENLIGHT REINSURANCE, LTD.; ROYAL CAPITAL VALUE FUND, LP; ROYAL CAPITAL VALUE FUND (QP), LP; ROYALCAP VALUE FUND, LTD; ROYALCAP VALUE FUND II, LTD; TIGER GLOBAL, LP; TIGER GLOBAL II, LP; TIGER GLOBAL, LTD,

Plaintiffs,

- against -

Index No. 650678/11

PORSCHE AUTOMOBIL HOLDING SE, f/k/a DR. ING. H.C.F. PORSCHE AG,

Defendant.

Charles Edward Ramos, J.S.C.:

The motions are consolidated for disposition in these related fraud actions, *Viking Global Equities LP v Porsche Automobil Holding SE*, Index No. 650435/11 (the "Viking Action")

and *Glenhill Capital LP v Porsche Automobil Holding SE*, Index No. 650678/11 (the "Glenhill Action").

The plaintiffs in the Viking and Glenhill Actions[1] allege that they sustained substantial losses as a result of material misrepresentations and market manipulations by the defendant Porsche Automobil Holding SE, f/k/a Dr. Ing. h.c.F. Porsche AG ("Porsche"), relating to its intentions to acquire shares in nonparty Volkswagen AG ("VW").

Porsche moves, pursuant to CPLR 327, 3211(a)(7), and 3212, to dismiss the complaints in the Viking and Glenhill Actions. Alternatively, Porsche moves, pursuant to CPLR 3211(a)(4), to dismiss or stay the actions in light of an appeal pending in a

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[1] Viking Global Equities LP, and Viking Global Equities II LP are limited liability partnerships established under the laws of Delaware. VGE III Portfolio Ltd. is a limited liability company established under the laws of the Cayman Islands.

Glenhill Capital LP, Glenhill Concentrated Fund, LP, Glenview Capital Partners, LP, Glenview Institutional Partners, LP, GCM Little Arbor Partners, LP, GCM Little Arbor Institutional Partners, LP, GCM Opportunity Fund, LP, Glenview Capital Opportunity Fund, LP, Greenlight Capital, LP, Greenlight Capital Qualified, LP, Royal Capital Value Fund, LP, Royal Capital Value Fund (QP), LP, Tiger Global, LP, and Tiger Global II, LP are Delaware limited liability partnerships with their principal offices in New York, New York. Glenhill Capital Overseas Masters Fund, LP is a Cayman Islands limited partnership with its principal place of business in Camana Bay, Cayman Islands. Glenview Capital Master Fund, Ltd., GCM Little Arbor Master Fund, Ltd., Glenview Offshore Opportunity Master Fund, Ltd., Greenlight Reinsurance, Ltd., RoyalCap Value Fund, Ltd., and RoyalCap Value Fund II, Ltd. are Cayman Islands companies with their principal offices in the Cayman Islands. Greenlight Capital Offshore Partners is a British Virgin Islands partnership with its principal offices in Tortola, British Virgin Islands. Tiger Global, Ltd. is a Cayman Islands company with its principal offices in Curacao, Netherlands Antilles.

related federal action (*Elliott Assocs. v Porsche Automobil Holding SE*, 759 F Supp 2d 469 [SD NY 2010]).

BACKGROUND

The plaintiffs are a group of global hedge funds who invest in a variety of companies through, *inter alia*, short sales of securities.[2]

Porsche, a public company, is a car manufacturer organized under the laws of the European Union and Germany, and is headquartered in Stuttgart, Germany. VW is also a public company, headquartered in Lower Saxony, Germany. The German State of Lower Saxony owns approximately 20% of VW shares. The shares of VW are traded on stock exchanges globally, including in New York. It sells its products under brand names including VW, Audi, Scania, Skoda, Seat, Bentley, Lamborghini and Bugatti.

In 1960, the German government enacted legislation (the "VW Act") to shield VW from a hostile takeover. Under the VW Act, any acquirer, such as Porsche, needed to own 80% of VW's shares in order to effectuate a takeover, rather then the typical 75% threshold under German law.

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[2] According to the complaints, the plaintiffs accomplish short sales by either: (1) borrowing the securities from a broker, selling the borrowed shares for the prevailing market price, and returning the borrowed shares to the broker, or (2) entering into security-based swap agreements, which are privately negotiated contracts that provide for the exchange of payments based on the value of the securities, and the transfer of the financial risks associated with changes in the value of the securities without the conveyance of any ownership interest.

In 2004, the European Commission determined that the VW Act violated European Union law because it effectively made VW shares less attractive to investors throughout Europe, thereby hindering the free movement of capital.

In 2005, based upon its expectation that the VW Act would be amended, Porsche decided to increase its share ownership in VW. According to plaintiffs, Porsche secretly sought to acquire 75% of VW's shares so that it could take control of VW. However, Porsche purportedly believed that it would not be able to achieve this 75% ownership level unless it deceived the market about its intentions and holdings.

By September 2005, Porsche had secretly acquired 10.26% interest in VW. By the end of 2007, Porsche was VW's largest shareholder, owning approximately 31% of its shares. By October 2008, Porsche's position in VW shares grew to 42.6%.

Throughout 2008, Porsche issued several press releases and made direct statements to plaintiffs in telephone conversations and e-mails concerning its intentions regarding its ownership interest in VW. For instance, on March 3, 2008, Porsche announced its intention to acquire more than a 50% interest in VW, with the caveat that it did not seek a controlling stake in VW, and only sought a simple majority. On March 10, 2008, Porsche purportedly denied any plans to increase its holdings in VW to 75%, noting that Lower Saxony's 20% ownership of VW made it

very unlikely that Porsche could ever accumulate such a significant percentage of VW shares.

Between March and October 2008, Porsche continued to make public statements reaffirming its March 10 declaration that its authority and intention was to hold "only" a simple majority of VW and that any intention of its achieving 75% ownership was mere speculation.

In reliance upon Porsche's representations that it did not intend to attempt a takeover of VW, and thus believing that the share price of VW would decline, plaintiffs decided to short VW's stock. Plaintiffs became concerned when VW's stock price began to increase unexpectedly and significantly. Although Porsche never corrected or changed its policy, declared publicly on March 10, 2008 concerning its intentions vis a vis VW, plaintiffs sought to speak directly to the head of investor relations at Porsche, Frank Gaube.

The Viking plaintiffs' lead analyst, Andrew Immerman, scheduled a call with Gaube, which took place on August 29, 2008 and lasted 41 minutes (Immerman Aff., ¶ 24).[3] Immerman took contemporaneous notes, which indicated that Gaube reaffirmed Porsche's March 10 statement, and that it was "unrealistic" for

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[3] Immerman testifies that he e-mailed Porsche's Investor Relations Department indicating that he was from a "money management firm based in New York ... doing some research on Porsche" (Immerman Aff., ¶ 23). Immerman provided Viking's midtown office address and its New York telephone number. After several e-mail exchanges, Immerman was able to speak with Gaube directly.

Porsche to acquire a controlling stake in VW and that, in any event, the State of Lower Saxony would never sell its shares.

The Glenhill plaintiffs additionally allege that its New York-based analysts engaged Gaube in at least six separate telephone calls, during which he verified that Porsche did not intend to seek a controlling stake in VW.

Throughout September, Porsche continued to make public statements that it did not intend to seek a 75% stake in VW. However, on October 26, 2008, Porsche made an announcement that shocked the markets. In a press release titled "Porsche Heads for Domination Agreement," which Porsche e-mailed directly to plaintiffs, it disclosed that it had already accumulated a total of 74.1% of VW shares. The press release stated, in part:

> Due to the dramatic distortions on the financial markets Porsche ... has decided over the weekend to disclose its holdings in shares and hedging positions related to the takeover of [VW]. At the end of last week Porsche ... held 42.6 percent of [VW] ordinary shares and in addition 31.5 percent in so called cash settled options relating to [VW] ordinary shares to hedge against price risks, representing a total of 74.1 percent. Upon settlement of these options Porsche will receive in cash the difference between the then actual [VW] share price and the underlying strike price in cash. The Volkswagen shares will be bought in each case at market price.
>
> Assuming the economic framework conditions are suitable, **the aim is to increase to 75 percent in 2009, paving the way to a domination agreement.** The intention to increase the Volkswagen stake to above 50 percent in November/December 2008 remains

unchanged (emphasis added) (October 26, 2008 Press Release).

According to plaintiffs, Porsche's misrepresentations that it did not intend to seek a controlling stake in VW had an effect on the price at which they entered into short positions in VW shares. By hiding the true extent of its control over VW shares and its intention to acquire additional shares up until the October 26, 2008 announcement, Porsche led plaintiffs to believe that the natural interplay of supply and demand had been determining the prices of VW shares. In fact, the supply and demand for VW's shares had been skewed by Porsche's fraud.

Following the October 26, 2008 press release, the price of VW spiked so high that VW briefly became the most valuable corporation in the world by stock market value, as a result of the short squeeze prices prevailing in the market. Plaintiffs allege that the price reaction following Porsche's announcement demonstrates that the market was unaware of Porsche's true intention and actual holdings. In order to cover its short positions, plaintiffs had to pay markedly more for VW shares, suffering more than a billion dollars in losses, while Porsche achieved massive profits on its trading in VW.

Procedural History

In 2010, thirty-five global hedge funds, including the plaintiffs, commenced an action in the United States District Court for the Southern District of New York against Porsche and

two of its executive officers. The complaint in the federal action alleged violations of §10 (b) of the Securities Exchange Act and common law fraud. Noting that the issuer of the reference securities and the perpetrator of the alleged fraud were both located in Germany, the court granted Porsche's motion to dismiss the §10 (b) claim on the grounds that the subject transactions, securities-based swap agreements, constituted a foreign securities exchange, and thus were not within the purview of the Securities and Exchange Act (*Elliot Assocs. v Porsche*, 759 F Supp 2d 469, 475-77 [SD NY 2010]). Having dismissed the federal claims, the court declined to exercise supplemental jurisdiction over the common law fraud claim (*id.*). The plaintiffs' appeals are pending before the Second Circuit.

Meanwhile, Germany's Federal Financial Supervisory Authority and the Stuttgart Public Prosecutor began investigating whether Porsche had manipulated the German markets by failing to disclose information relating to its holdings in VW shares. Private investors have also commenced actions in Germany alleging market manipulation and fraud by Porsche.

Plaintiffs commenced these actions in March 2011 alleging claims for fraud and unjust enrichment. Porsche now seeks to dismiss the complaints in the Viking and Glenhill Actions under the doctrine of *forum non conveniens*, and for failure to state a claim. The motions to dismiss were converted into summary

judgment, and the parties permitted to conduct limited discovery solely on the issue of reasonable reliance.

Discussion

I. Forum Non Conveniens

The common law doctrine of forum non conveniens, codified in CPLR 327, permits a court to dismiss an action if it would more appropriately be heard in another forum. Whether to dismiss in favor of another forum is left to the sound discretion of the court (*Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank*, 9 AD3d 171, 175-176 [1st Dept 2004]).

Although no one factor is controlling, courts should balance factors including the factual nexus between New York and the action, the burden on New York courts, the potential hardship to the defendant of litigating here, the availability of an alternative forum in which the plaintiff may bring suit, and the residency of the parties (*Kinder Morgan Energy Partners, L.P. v Ace American*, 55 AD3d 482 [1st Dept 2008], *lv denied* 12 NY3d 714 [2009]; *Kuwaiti Engineering Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 600 [1st Dept 2008]).

In addition, private and public interest considerations must be factored, including the forum's interest in litigating the controversy, and the need, if any, to apply foreign law (*Fox v Fusco*, 4 AD3d 313, 313-14 [1st Dept 2004]; *Shin-Etsu Chemical Co., Ltd.*, 9 AD3d at 178).

Ultimately, the plaintiff's choice of forum is afforded great weight and should not be disturbed unless the balance strongly favors the jurisdiction in which the defendant seeks to litigate the claims (*Anagnostou v Stifel*, 204 AD2d 61 [1st Dept 1994]).

A balancing of the relevant factors reveals that Porsche has not met the heavy burden of demonstrating that this action should be dismissed on the ground of forum non conveniens.

First, plaintiffs establish a factual nexus between this action and New York. Plaintiffs are an international collection of hedge funds whose principal places of business are in New York. At issue in this action are the multiple representations that Porsche purportedly made directly to plaintiffs in New York. For instance, plaintiffs allege that Porsche's head of investor relations, Gaube, participated in at least ten telephone conversations with plaintiffs in New York during which he misrepresented Porsche's intent to acquire VW stock and the extent of its current holdings (Immerman Aff., ¶¶ 23-24, 40). At the time, plaintiffs' analysts, who spoke with Gaube, identified themselves as representing "hedge funds based in New York." In an effort to arrange the calls, Gaube and his assistant exchanged numerous e-mails with plaintiffs.

In addition, Porsche representatives transmitted by e-mail press releases and newspaper articles, with Porsche itself

providing plaintiffs with the English translations of the documents.

Plaintiffs allege that they evaluated all of Porsche's public statements and oral communications, sent or made directly in New York, in their New York headquarters, conducted their due diligence and made their investment decisions in New York.

As for the location of potential witnesses, all five of the critical witnesses that plaintiffs identify from their side either reside or have offices in New York. Plaintiffs' due diligence documents, pertinent to Porsche's defense on the claim for fraud, are located in New York. Although the critical witnesses that it identifies all reside in Germany, large corporations such as Porsche with ample resources have minimal difficulty bringing foreign witnesses or documents to New York courts (*Mionis v Bank Julis Naer & Co.*, 9 AD3d 280, 282 [1st Dept 2004]; *Intertec Contr. v Turner Steiner Intl.*, 6 AD3d 1, 4 [1st Dept 2004]).

Further, Porsche and its wholly-owned affiliates, regularly transact business in New York, and in general, have extensive operations in the United States with sales in excess of $1.5 billion, employ over two hundred people here, and provide vehicles, parts, services, marketing and training for more than 200 dealers (*compare IFS Intl. Inc. v SLM Software Inc.*, 224 AD2d 810 [3d Dept 1996]).

Porsche has also not established that litigating this action here would burden New York courts. Although the choice-of-law issue in this action has not yet been adjudicated, even if it were concluded that German law applies, this would not be an inconvenience attributable to the forum (*see Mionius,* 9 AD3d at 282; *Yoshida Printing Co. v Aiba,* 213 AD2d 275, 275 [1st Dept 1995])). The Commercial Division of this county is fully capable, and frequently called upon, to apply another country's laws.

Finally, the Court rejects Porsche's characterization of the issues in this action as the manipulation of the German stock market and the trade of German securities. At the core of plaintiffs' claims are whether New York courts may hold responsible a foreign entity, who conducts business globally, for fraudulent misrepresentations purportedly aimed at New York plaintiffs. New York clearly has a vested interest in such an action. The issue of market manipulation is of interest, but not dispositive of the fraud claims.

Therefore, the branch of the motions that seek to dismiss the complaints on the grounds of *forum non conveniens* is denied.

II. Fraud

Porsche moves to dismiss the claim for fraud on the grounds that its statements were clearly not predictive in nature, which

cannot form the basis of an actionable fraud claim.[4] In addition, Porsche argues that plaintiffs are highly sophisticated investors who should have recognized that Porsche might seek a 75% stake in VW if circumstances allowed, and knowingly assumed the risk of the potential for unlimited loss associated with short selling, and thus, their reliance on its statements was unreasonable as a matter of law.

Plaintiffs' claims are premised on allegations that between March and October 2008, Porsche made, in public announcements and, on at least ten separate occasions during telephone conversations, material misrepresentations that it was not seeking to raise its stake in VW above a simple majority. Porsche's statements concerning its present intent as to the amount of VW shares that it was attempting to acquire were intentionally false, because it allegedly decided to take over VW at least as early as February 2008, and as early as mid-2008 had already achieved control of 74.1% of VW shares through outright positions and call options, despite its denials.

As part of its plan to hide the extent to which it was already controlling VW shares, Porsche allegedly engaged in a series of manipulative derivatives trades. According to the complaints, Porsche knew that, as a practical matter, it was

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[4] In support of this argument, Porsche points to an interview with its CEO wherein he stated, "We do not want to rule out this possibility [of acquiring a 75% share in VW] at the end of the day, some point in the future," but "for the moment," domination remains a "theoretical possibility."

impossible to acquire 75% of VW stock[5] in the open market without short sellers such as plaintiffs, who could increase the supply of VW shares by borrowing shares to sell. Accordingly, Porsche sought to target short sellers in the market in order to induce them, through its public and private representations, to borrow VW shares and short them.

Porsche then purchased call options, while the counter-parties to those options agreements bought the shares that plaintiffs were selling short to hedge Porsche's call options. Porsche purportedly disguised these options as cash-settled options that did not have the same disclosure requirements.[6] As soon as Porsche disclosed that it was headed for a domination agreement with VW in its October 26, 2008 press release, the price of VW shot upwards, and while Porsche made massive profits, plaintiffs lost close to a billion dollars covering short positions at artificially inflated prices.

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[5] At the time, more than 25% of VW shares were controlled by shareholders who would not, or effectively could not, sell their shares to Porsche. The State of Lower Saxony controlled 20% of VW shares, and other investors including index funds owned approximately 5% of VW shares.

[6] Plaintiffs allege that Porsche's options were not actually cash settled options, which is demonstrated by the words Porsche chose when it finally revealed the truth to the market of its intent and holdings on October 26, 2008. At the time, Porsche admitted that its options actually reflected part of its "74.1%" stake, and minimized the cash-settled nature of the contracts by calling them "so called" cash-settled options. According to Plaintiffs, Porsche used the options in order to acquire control over VW shares, not as a means to benefit in cash from a rise in the price of VW shares, but as a means to convert these options into actual share ownership, which it was otherwise obligated to disclose under German law.

The elements of a fraud claim are a false representation concerning a material fact, scienter, reasonable reliance and damages (*McGhee v Odell*, 96 AD3d 449 [1st Dept 2012]).

At the outset, the Court is persuaded that plaintiffs sufficiently allege an actionable misrepresentation of material fact. Plaintiffs allege that between March and October 2008, Porsche knowingly made false statements regarding its present intent to obtain a controlling stake in VW and the extent of its current holdings, on repeated occasions and directly to plaintiffs. A statement of one's present intention is a statement of a material existing fact, sufficient to support a fraud claim (*see Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 [1958]).

Furthermore, the Court rejects the contention that plaintiffs' reliance on Porsche's statements was unreasonable as a matter of law. In assessing the reasonableness of a plaintiff's alleged reliance, courts should consider the entire context of the transaction, including the sophistication of the parties, the information available at the time of the operative decision, and the plaintiff's ability to discover the truth with due diligence (*Emergent Capital Inv. Mgt., LLC v Stonepath Group, Inc.*, 343 F 2d 189, 195 [2d Cir 2003]; *JP Morgan Chase Bank v Winnick*, 350 F Supp 2d 393, 405-409 [SD NY 2004]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99-100 [1st Dept 2006]).

Sophisticated business entities are indeed held to a higher standard. Where a sophisticated plaintiff enjoys access to critical information but fails to take advantage of that access, New York courts are particularly disinclined to entertain claims for fraud (*Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 404 [1st Dept 2008]; *UST Private Equity Investors Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]).

On the other hand, where the facts allegedly misrepresented were within the exclusive knowledge of the defendant, or where one party's superior knowledge of essential facts renders the transaction without disclosure inherently unfair, a sophisticated plaintiff's reliance on the defendant's representations is not unreasonable as a matter of law (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147 [2010]; *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373 [1st Dept 2003]; *Harbinger Capital Partners Master Fund I, Ltd. v Wachovia Capital Markets, LLC*, 27 Misc3d 1236[A] [Sup Ct, NY county 2010], *appeal withdrawn* 90 AD3d 544 [1st Dept 2012]).

Nonetheless, the question of what constitutes reasonable reliance is fact-intensive (*DDJ Mgt.*, 15 NY3d at 155). For this reason, it is an element that is not generally subject to summary disposition, unless reasonable reliance is so conspicuously absent (*see Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d at 99-100).

Here, plaintiffs allege that there was no public information, or other available information to them, that would have allowed them to ascertain the truth. All of Porsche's public statements, and representations made directly to plaintiffs in telephone conversations, consistently stated that Porsche would not seek to raise its stake in VW to 75%, while Porsche was concealing that it already controlled significantly more than a simple majority of VW shares by the amount of options it possessed. As alleged in the complaint, only Porsche knew of its actual VW holdings and its present intent to expand its holdings to achieve a controlling stake. In response to inquiries as to whether it intended to increase its stake in VW to a controlling one, Porsche quickly and repeatedly dismissed such "speculation" as the "mind games of analysts and investors" (Sundheim Aff., ¶ 7).

Plaintiffs also allege that they carefully reviewed all available information and spoke with reliable sources of information. They submit affidavits testifying to the extensive due diligence that they performed in an effort to accurately evaluate the risks associated with the potential investment. Plaintiffs testify that they scrutinized Porsche's and VW's public statements, press releases and financial statements, consulted with independent experts in accounting to review its financial disclosures and with German-licensed counsel to analyze German corporate law as it related to the VW Law, and conducted extensive market analysis (*see* Immerman, Sundheim, Chandra,

Einhorn, Fergang, Goodman, Robbins Affidavits). Plaintiffs also submit the affidavit of a due diligence expert, who states that he is prepared to testify that a reasonable sophisticated investor would infer from Porsche's public and private statements that it sought only a slight, simple majority of VW shares and not a controlling stake (Zask Affidavit).

Significantly, plaintiffs sought to verify Porsche's public statements by making direct inquiries to Porsche itself. Seven of plaintiffs' analysts spoke separately and directly with Porsche's head of investor relations, Gaube, concerning its plans with respect to VW. When plaintiffs' analysts asked Gaube if he could verify Porsche's public statements that it did not intend to acquire a controlling stake in VW, Gaube confirmed this, while repeating Porsche's false plans.

Consequently, this is not a situation where the plaintiffs "failed to make use of the means of verification that were available to it" (*compare HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]; *UST private Equity Investors Fund, Inc.*, 288 AD2d at 88-89; *Ventur Group, LLC*, 68 AD3d at 639; *Dragon Inv. Co. II LLC*, 49 AD3d at 494; *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 496 [1st Dept 2006]; *Valassis Communications, Inc. v Weimer*, 304 AD2d 448, 449 [1st Dept 2003], *appeal denied* 2 NY3d 794 [2004]).

Finally, plaintiffs sufficiently allege that Porsche's misrepresentations were material to their decision to take short-

term positions in VW shares. According to the complaints, only after Porsche confirmed its intent not to take over a controlling stake in VW and conducting its own due diligence, did plaintiffs conclude that there was no reason for VW's stock to move up.

Premised upon allegations that Porsche gave oral confirmation of misleading factual information, coupled with the extensive efforts purportedly taken to verify that information, the Court is persuaded that plaintiffs sufficiently state the element of reasonable reliance in order to survive the pleading stage. Ultimately, the determination of whether plaintiffs had a right to rely on Porsche's public and private statements as to its intent to acquire VW is an issue of fact which must be explored in discovery.

II. Unjust Enrichment

Porsche moves to dismiss the claim for unjust enrichment on the ground that the alleged connection between Porsche's enrichment and plaintiffs' loss is too attenuated to state a claim.

A plaintiff claiming unjust enrichment must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Georgia Malone & Co. v Ralph Rieder,* 86 AD3d 406 [1st Dept 2011], *affirmed* _NY3d_, 2012 WL 2428246 [2012]). Although privity is not required, a claim will not be supported unless there is a connection or

relationship between the parties that could have caused reliance or inducement on the plaintiff's part (*Id.*).

Plaintiffs sufficiently state a claim for unjust enrichment premised upon allegations that Porsche induced plaintiffs to borrow VW shares and short them, thereby undertaking an obligation to repurchase them and return them at a future date, by misrepresenting its intent to acquire a controlling stake in VW. Porsche purportedly targeted its scheme at plaintiffs, as short sellers, because it could not obtain the percentage of VW shares it needed to achieve domination. In a series of telephone calls to plaintiffs' representatives, Porsche purportedly lied about its true intent and the extent of its VW holdings. Once Porsche revealed its true intent and that it had already acquired 74.1% of VW's shares, it triggered a short squeeze in the market, and permitted Porsche to make massive profits at the expense of plaintiffs, who lost tremendous amounts of money covering their short positions at artificially high prices (*see Cox v Microsoft Corp.*, 8 AD3d 39, 40 [1st Dept 2004]).

Finally, the branch of motions that seeks alternatively to stay the actions on other grounds is also denied. Although there are undoubtedly overlapping facts between this action and the federal action pending appeal to the Second Circuit, the causes of action and judgment sought are distinct (*952 Associates, LLC v Palmer,* 52 AD3d 236, 236-37 [1st Dept 2008]).

Accordingly, it is

ORDERED that the motion by the defendant to dismiss the complaints in *Viking Global Equities LP v Porsche Automobil Holding SE*, Index No. 650435/11, and *Glenhill Capital LP v Porsche Automobil Holding SE*, Index No. 650678/11, on the grounds of *forum non conveniens* is denied and; and it is further

ORDERED that the remaining motions to dismiss or stay these actions are denied; and it is further

ORDERED that defendant *Porsche Automobil Holding SE* is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: August 6, 2012

ENTER:

J. S. C.

CHARLES E. RAMOS