UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. FABRICE TOURRE, Defendant.	:	Civil Action No.: 10-cv-3229 (BSJ) (MHD) ELECTRONICALLY FILED

MEMORANDUM OF LAW OF FABRICE TOURRE IN SUPPORT OF HIS MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendant Fabrice Tourre respectfully submits this memorandum of law in support of his motion, pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), to dismiss the SEC's Amended Complaint.

PRELIMINARY STATEMENT

On September 29, 2010, Mr. Tourre moved for judgment on the pleadings because the SEC's original Complaint failed to allege any domestic securities transaction, which, under the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2869 (2010), is an indispensable element of the federal securities claims asserted in this action. Mr. Tourre demonstrated that the only two transactions alleged in the Complaint—a note purchase by a German bank, IKB Deutsche Industriebank AG ("IKB"), and a swap entered into by a Dutch bank, ABN AMRO N.V. ("ABN")—were overseas transactions entered into by non-U.S. entities. *See* Mem. of Law of F. Tourre in Support of Mot. for Judgment on the Pleadings, D.E. No. 31 ("Tourre Sept. Mem."); Reply Mem. of Law of F. Tourre in Further Support of Mot. for Judgment on the Pleadings, D.E. No. 39 ("Tourre Oct. Reply").

In its opposition, the SEC insisted that those transactions were "domestic" for *Morrison* purposes because Mr. Tourre was based in New York when he worked on the ABACUS 2007-AC1 transaction, and because, in the SEC's view, a transaction is "domestic" if any part of the "entire selling process" takes place in the United States. *See* SEC Op. to Mot. for Judgment on the Pleadings, D.E. No. 35 ("SEC Oct. Op."), at 3, 9.

Tacitly conceding, however, that the Complaint did not really pass muster under *Morrison,* the SEC sought leave to file an amended Complaint, in which it said it would provide "additional pleading detail . . . to confirm that the unlawful securities transactions alleged in the Complaint took place in the United States." *See id.* at 12. In particular, the SEC undertook to plead that ABACUS 2007-AC1 securities were offered to potential investors in the United States, and even attached to its opposition papers documents that it said evidenced offers made to specific potential domestic investors. *See id.* at 3, 12-13. On November 1, 2010, the Court ordered the SEC to file an amended pleading by November 22, 2010.

The SEC duly filed its Amended Complaint, which adds, broadly, three sets of new allegations. First, the SEC alleges another securities transaction—a purchase of ABACUS 2007-AC1 notes by ACA Capital Holdings, Inc. ("ACA")—apparently in the hope that it, unlike the IKB and ABN transactions, constitutes a domestic transaction for *Morrison* purposes. *See* Am. Compl. ¶ 71. Second, the SEC adds a paragraph that alleges, without any specificity, that securities or security-based swaps "were marketed to additional investors through [Goldman, Sachs & Co.'s] structured products syndicate desk located in New York." *See* Am. Compl. ¶ 66. Third, consistent with its position that a transaction is "domestic" for *Morrison* purposes if any part of the "entire selling process" takes place in the United States, the SEC peppers the Amended Complaint with allegations of U.S.-based conduct in connection with the ABACUS 2007-AC1 transactions.

Mr. Tourre now moves to dismiss the Amended Complaint because the amendments fail utterly to remedy the fatal defects in the original Complaint. First, the SEC pleads no plausible claim that Mr. Tourre defrauded ACA in connection with the ABACUS 2007-AC1 transaction. Second, the SEC's generic allegation that ABACUS 2007-AC1 securities were offered to unidentified potential investors does not plead any claim under the applicable pleading standard. Third, as the *Morrison* court could not have been clearer that the federal securities laws do not apply simply because there is U.S.-based conduct in connection with an offer or sale of securities, the claims relating to the overseas securities transactions entered into by IKB and ABN fail to state a claim under the federal securities laws.

THE SEC'S CLAIMS

The SEC brings this action under the antifraud provisions of the federal securities laws, Sections 10(b) and 20(e) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b), 78t(e), SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, and Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a). *See* Am. Compl. ¶¶ 6, 74-83.

The Amended Complaint alleges that, in early 2007, Goldman, Sachs & Co. ("Goldman") structured and marketed a synthetic collateralized debt obligation ("CDO") known

as "ABACUS 2007-AC1," whose reference portfolio consisted of subprime residential mortgage-backed securities. *See* Am. Compl. ¶ 1.[1] Very broadly, as alleged in the Amended Complaint, in exchange for its investment, an investor in a CDO receives a note that entitles it to payments calculated by reference to the performance of the reference portfolio. Am. Compl. ¶ 14.

According to the SEC, Goldman's ABACUS 2007-AC1 offering materials were false and misleading because they identified ACA Management LLC as "Portfolio Selection Agent," without specifying that another entity, Paulson & Co. ("Paulson"), also had involvement in selecting the reference portfolio. *See* Am. Compl. ¶¶ 37-39.

Although the SEC concedes that the ABACUS 2007-AC1 transaction was approved by Goldman's senior management, it seeks to hold Mr. Tourre, who was a 28-year old employee at the time of the events alleged, responsible for the alleged deficiencies in Goldman's offering documents, on the basis that he had "primary responsibility" for the transaction. *See* Am. Compl. ¶¶ 10, 40-41. As to the extent of Mr. Tourre's personal involvement in the preparation of the 178-page ABACUS 2007-AC1 Offering Circular, the SEC alleges only that Mr. Tourre reviewed "portions of the offering memorandum, including the Summary section." *See* Am. Compl. ¶¶ 42-43.

STANDARD OF LAW

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint's well-pled, non-conclusory, factual allegations must create a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). To avoid dismissal, the complaint must plead "factual allegations sufficient 'to raise a right to relief above the

[1] Mr. Tourre disputes the SEC's allegations, *see* Answer of Def. F. Tourre filed July 19, 2010, D.E. No. 24, and, indeed, as a non-resident, non-U.S. citizen, appeared voluntarily before the United States Senate eleven days after the filing of the original Complaint in order to respond to these allegations. For purposes of this motion only, however, the well-pled, non-conclusory allegations of the Complaint are assumed to be true. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

Claims that sound in fraud, including those asserted by the SEC, must also comply with the heightened standard set forth in Federal Rule of Civil Procedure 9(b). *See*, *e.g.*, *SEC v. Kueng*, No. 09 Civ. 8763 (BSJ) (AJP), 2010 WL 3026618, at *2 (S.D.N.Y. Aug. 2, 2010). Rule 9(b) requires allegations of fraud to be supported by an "ample factual basis," including facts that give rise to a "strong inference" of fraudulent intent. *See*, *e.g.*, *O'Brien v. Nat'l Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991) (citations omitted). Fraud claims are "too speculative even on a motion to dismiss," when they are premised on "'distorted inferences and speculations.'" *ATSI*, 493 F.3d at 104 (quoting *Segal v. Gordon*, 467 F.2d 602, 606, 608 (2d Cir. 1972)).

ARGUMENT

I. THE AMENDED COMPLAINT STATES NO PLAUSIBLE CLAIM THAT MR. TOURRE DEFRAUDED ACA

As noted above, the SEC has now added an allegation that Mr. Tourre defrauded ACA in connection with its purchase on April 26, 2007 of ABACUS 2007-AC1 Class A-2 notes. *See* Am. Compl. ¶ 71. This new allegation does not save this case from dismissal, however, because there is absolutely no plausible claim that ACA was defrauded.

The alleged "fraud" in this case is that Goldman represented to investors in the ABACUS 2007-AC1 transaction that ACA was the "Portfolio Selection Agent," without disclosing Paulson's involvement in portfolio selection. *See* Am. Compl. ¶¶ 2, 3, 37-39, 42. Only two investors, German bank IKB and ACA, purchased the ABACUS 2007-AC1 notes. *See* Am. Compl. ¶¶ 61, 71. In the allegedly fraudulent Offering Circular pursuant to which the notes were sold to IKB and ACA, ACA itself took "sole responsibility" for certain disclosures concerning the Portfolio Selection Agent, including a representation that ACA "will be the portfolio selection agent." *See* Decl. of Pamela Rogers Chepiga dated December 9, 2010 ("Chepiga Decl."), Ex. A (Offering Circular dated Apr. 26, 2007, at 84-85). The SEC, on the

other hand, alleges that ACA co-selected the portfolio with Paulson. *See* Am. Compl. ¶¶ 28, 32-36.

Either ACA did, in fact, select the reference portfolio, as it represented in the Offering Circular, or, as the SEC alleges, it co-selected the portfolio with Paulson. Either way, ACA was fully aware of Paulson's involvement in the portfolio selection process. Thus, any claim that ACA was a victim of the fraud underlying this case would be absurd, which is obviously why the SEC did not claim in its original Complaint that ACA's note purchase was a fraudulent transaction. For the same reason, when the SEC distributed Sarbanes-Oxley "Fair Fund" payments to "victims" of the fraud following the Goldman settlement, ACA received nothing. After making payments to IKB, the other note purchaser, and Dutch bank ABN, which participated in a credit default swap, the SEC paid the remaining funds to the United States Treasury, unambiguously confirming the SEC's view that there were no other victims. *See* Chepiga Decl., Ex. B (Final Judgment dated July 20, 2010, at 2-4).

To assert, contrary to reality, that ACA was victimized, the SEC invents an entirely different fraud—that Mr. Tourre "misled ACA into believing that Paulson invested approximately $200 million in the equity of ABACUS 2007-AC1," and that "ACA continued to believe through the course of the transaction that Paulson would be an equity investor in ABACUS 2007-AC1." *See* Am. Compl. ¶¶ 4, 51.

The SEC speculates that statements made by Mr. Tourre in January 2007 caused ACA to be under a "misimpression" that Paulson intended to buy the $200 million equity notes. *See* Am. Compl. ¶¶ 46, 48-49. The SEC fails to plead that ACA's alleged confusion in January 2007 was, in fact, the result of a misrepresentation by Mr. Tourre,[2] but the Court need not even reach that issue.

[2] The SEC contends that ACA was under a "misimpression" that Paulson would buy the $200 million equity notes: (1) because of something Mr. Tourre might have said to ACA in a telephone call on January 12, 2007, and (2) because ACA was allegedly confused by a reference to "[0]%-[9]%: pre-committed first loss" in a Transaction Summary Mr. Tourre emailed to ACA on January 10, 2007. *See* Am. Compl. ¶¶ 46, 48-49.

The SEC conspicuously fails to plead any facts about ACA's knowledge in the period between these preliminary events and ACA's investment, months later. In fact, long before ACA purchased the ABACUS 2007-AC1 notes on April 26, 2007, *i.e.*, three-and-a-half months after it developed its alleged "misimpression," *see* Am. Compl. ¶ 71, and well before it entered into the credit default swap on May 31, 2007, *see* Am. Compl. ¶ 67, ACA understood very well that Paulson was not buying the $200 million equity notes. Thus, even assuming, *arguendo*, that ACA was confused in January 2007 about Paulson's intention to buy the $200 million equity notes, the SEC's claim that "ACA continued to believe through the course of the transaction that Paulson would be an equity investor in ABACUS 2007-AC1," *see* Am. Compl. ¶ 51, is demonstrably false.

The February 26, 2007 Preliminary Termsheet, *see* Am. Compl. ¶ 38,[3] contains a chart reflecting the anticipated capital structure of the ABACUS 2007-AC1 transaction. *See* Chepiga Decl., Ex. C (Preliminary Termsheet dated Feb. 26, 2007, at 1). The chart incorporates

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Even after a two-year investigation during which it has collected massive numbers of documents and taken testimony from everyone involved, the SEC cannot plead what, if anything, Mr. Tourre said on the January 12 call. The SEC simply speculates that Mr. Tourre might have made a misstatement, based solely on an ambiguous three-word phrase in an email that an unidentified person at ACA sent to an unidentified person at Goldman two days after the call. *See* Am. Compl. ¶ 49. This kind of rank conjecture in no way complies with Rule 9(b), which requires the SEC to: "(1) specify the statements, oral or written, that the [SEC] contends were fraudulent, either as misrepresentations or containing fraudulent omissions; (2) identify the speaker or the writer; (3) state where, when and to whom the statements were made; and (4) explain why the statements were fraudulent." *Verus Pharmaceuticals, Inc. v. Astrazeneca AB*, No. 09 Civ. 5660 (BSJ), 2010 WL 3238965, at *11 (S.D.N.Y. Aug. 16, 2010) (citation and internal quotation omitted).

The SEC's claim that ACA was confused by the language in the January 10, 2007 Transaction Summary, *see* Am. Compl. ¶ 48, equally fails to state a claim of fraud. Even assuming, *arguendo*, that ACA was confused, the SEC makes no attempt to plead that Mr. Tourre actually intended those words to convey that Paulson was buying the $200 million equity tranche or even that that was the plain or likely meaning of the words. Rather, the SEC simply opines that ACA "reasonably believed" that that was what they meant. *See* Am. Compl. ¶ 48. This plainly falls far short of the required "ample factual basis" for charges of fraud, including facts that give rise to a "strong inference" of fraudulent intent. *See O'Brien v. Nat'l Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991).

[3] When ruling on a motion to dismiss under Rule 12(b)(6), the Court may consider "any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citing *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000)).

a column headed "Initial Issued Amount," signifying the amount of each tranche of notes that was to be sold to investors. For each of the non-equity tranches, that column contains empty brackets, reflecting that, as of the end of February, it was not yet known how much of each tranche would be sold. For the $200 million "First Loss" tranche, however, *i.e.*, the equity tranche that the SEC says ACA believed Paulson would buy,[4] the column contains the letters "NA," *i.e.*, not applicable, clearly disclosing that the $200 million equity notes were not, in fact, being sold.

Similarly, the Summary Section of the April 26, 2007 Offering Circular, which the SEC alleges Mr. Tourre reviewed, *see* Am. Compl. ¶¶ 42-43, contains a chart reflecting the actual amount of ABACUS 2007-AC1 notes of various tranches that were being sold. *See* Chepiga Decl., Ex. A (Offering Circular dated Apr. 26, 2007, at 3). That chart makes clear that $192 million of Class A-1 and Class A-2 notes were being sold (*i.e.*, those bought by IKB and ACA, *see* Am. Compl. ¶¶ 61, 71), but in the column headed "FL," *i.e.*, "First Loss" appears the figure "$0," once again disclosing unambiguously that Paulson was not buying the $200 million notional equity tranche.[5]

The Second Circuit has long recognized that sophisticated investors like ACA do not rely on extra-contractual representations such as those alleged against Mr. Tourre, certainly not when the documents provide that the only representations being made are those contained in the offering documents. *See, e.g., ATSI,* 493 F.3d at 105 (citing *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.,* 343 F.3d 189, 196 (2d Cir. 2003)). The ABACUS 2007-AC1 Offering Circular contained just such a provision. *See* Chepiga Decl., Ex. A (Offering Circular dated Apr. 26, 2007, at (ii)) ("No person has been authorized to give any information or to make

[4] As the SEC explains, the "equity" tranche is at the bottom of the capital structure, and is the first to experience losses associated with the reference portfolio. *See* Am. Compl. ¶ 45.

[5] A second chart in the Offering Circular similarly reflects that $0 of "Class FL Notes" were being sold. *See* Chepiga Decl., Ex. A (Offering Circular dated Apr. 26, 2007, at 88-89).

any representation other than those contained in this Offering Circular, and, if given or made, such information or representation must not be relied upon as having been authorized.").

Finally, ACA's own SEC filings demonstrate conclusively that it absolutely understood that Paulson did not buy the $200 million equity notes. In its 10-Q filing for the second quarter of 2007, ACA disclosed that a total of $192 million of ABACUS 2007-AC1 notes were sold to investors, *i.e.*, those bought by IKB and ACA only. *See* Chepiga Decl., Ex. D (ACA's SEC Form 10-Q for the quarter ended June 30, 2007, at 9) (highlighting added). ACA's filing also demonstrates that it knew that only "Investment Grade" notes, *i.e.*, those rated BBB- or better, were sold in the ABACUS 2007-AC1 transaction, which would, of course, exclude equity notes. Thus, there is no plausible claim that ACA believed Paulson had purchased the $200 million equity notes.

As documents that are properly considered on this motion show the SEC's claim to be false, the Amended Complaint plainly does not "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 129 S.Ct. at 1949. Much less, therefore, does it satisfy Rule 9(b), which requires allegations of fraud to be supported by an "ample factual basis." *See*, *e.g.*, *O'Brien* 936 F.2d at 676; *see also ATSI*, 493 F.3d at 104 (holding that fraud claims are "too speculative even on a motion to dismiss," when they are premised on "'distorted inferences and speculations.'") (quoting *Segal v. Gordon*, 467 F.2d 602, 606, 608 (2d Cir. 1972)). All claims arising from ACA's alleged investments—both its note purchase and credit default swap—should, therefore, be dismissed because there is no plausible claim that ACA was defrauded.

II. THE GENERIC ALLEGATION THAT GOLDMAN OFFERED ABACUS 2007-AC1 SECURITIES TO OTHER POTENTIAL INVESTORS DOES NOT STATE A CAUSE OF ACTION

As noted above, the SEC promised to amend the Complaint to plead that ABACUS 2007-AC1 notes were offered to specific investors in the United States, and even attached to its opposition brief documents that it claimed evidenced offers made to specific

domestic investors. *See* SEC Oct. Op. at 3, 12-13. In his reply, Mr. Tourre demonstrated that those documents could not, in fact, remedy the Complaint's defects, and that the SEC had, moreover, utterly misunderstood them. *See* Tourre Oct. Reply at 12-16.

When it actually filed its Amended Complaint, the SEC was unable, consistent with its Rule 11 obligations, to live up to its bold promise. Instead of pleading specific domestic offers, it opted for a generic allegation that "[s]ecurities or security-based swap agreements relating to ABACUS 2007-AC1 were marketed to additional investors through [Goldman's] structured products syndicate desk located in New York." *See* Am. Compl. ¶ 66. This alleges, at most, securities-related conduct in the United States, which not only does not satisfy the *Morrison* transactional test, *see Morrison*, 130 S.Ct. at 2884, but also violates Rule 9(b).

Rule 9(b) requires that every alleged misstatement be pleaded with specificity to ensure that the defendant receives "fair notice of the claim to enable preparation of a reasonable defense." *SEC v. Parnes*, No. 01 Civ. 0763 (LLS) (THK), 2001 WL 1658275, at *4 (S.D.N.Y. Dec. 26, 2001) (citation and internal quotation omitted); *see also Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) ("'The primary purpose of Rule 9(b) is to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based.'") (quoting *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990)).

Thus, in *Parnes*, the court dismissed SEC claims based on non-specific allegations that failed to notify defendants of the conduct alleged against them, noting that, after "three years' discovery and access to records and documents," the SEC had no excuse for its inability to comply with Rule 9(b). *See Parnes*, 2001 WL 1658275 at *5. Similarly, in *SEC v. Espuelas*, 579 F. Supp. 2d 461, 473 (S.D.N.Y. 2008), the court held that an allegation that defendants "played a wholly unspecified role in StarMedia's negotiations with BellSouth . . . fail[ed] utterly to provide these defendants with 'fair notice of the specific conduct with which [each] is charged.'" *Id.* at 473 (alteration in original) (quoting *Parnes*, 2001 WL 1658275 at *4-5). The *Espuelas* court refused, therefore, to consider that allegation in determining the sufficiency of the SEC's complaint.

The SEC offers nothing but a generic allegation about other offers that does not provide Mr. Tourre fair notice of the conduct alleged against him, and that does not allow him to conduct discovery or otherwise to defend himself. As a result, the allegation does not state a claim under the pleading standard of Rule 9(b), and the Court should disregard it when evaluating the sufficiency of the Amended Complaint.

III. THE SEC FAILS TO PLEAD THAT THE TRANSACTIONS ENTERED INTO BY IKB, A GERMAN BANK, AND ABN, A DUTCH BANK, ARE DOMESTIC SECURITIES TRANSACTIONS

A. Under *Morrison,* The Federal Securities Laws Apply Only To Domestic Securities Transactions

The Amended Complaint fails to remedy the defects in the original Complaint as to the note purchase by German bank IKB pursuant to SEC Regulation S ("Reg. S"), and the English law-governed swap entered into by Dutch bank ABN. These are unambiguously foreign transactions that do not state a claim under *Morrison.*[6]

On June 24, 2010, the United States Supreme Court issued its opinion in *Morrison*, holding that the federal securities laws apply only to domestic securities transactions. The Supreme Court held that Congress made "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," and therefore concluded that it has no extraterritorial application. *Morrison*, 130 S.Ct. at 2883. Also, held the Supreme Court, as Rule 10b-5 extends no further than Section 10(b), "if § 10(b) is not extraterritorial, neither is Rule 10b-5." *Id.* at 2881.

The Supreme Court also noted that "[t]he same focus on domestic transactions is evident in the Securities Act of 1933," which was "enacted by the same Congress as the Exchange Act, and [forms] part of the same comprehensive regulation of securities trading." *Id.*

[6] To the extent the Court permits the claim based on ACA's investment to proceed, Mr. Tourre reserves the right to demonstrate that it, like the investments of IKB and ABN, fails to meet the *Morrison* transactional test.

at 2885 (citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994)).[7]

In identifying those transactions to which the federal securities laws do apply, the Supreme Court first repudiated four decades of case law that had applied the federal securities laws to foreign securities transactions that were accompanied by some level of "conduct" or "effects" in the United States. *See id.* at 2878-81. The Supreme Court criticized the conduct and effects test for disregarding the presumption against extraterritoriality and establishing a standard "complex in formulation and unpredictable in application" that attempted, by means of "judicial-speculation-made-law," to "'discern' whether Congress would have wanted the statute to apply." *See id.* at 2878, 2881 (internal citation omitted).

Holding that Section 10(b) prohibits not the making of deceptive statements in the United States, but only the making of deceptive statements in connection with securities transactions that take place in the United States, *id.* at 2884-85, 2887-88, the Supreme Court announced a clear "transactional test"—"whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 2886 (emphasis added). Thus, post-*Morrison*, Section 10(b) and Rule 10b-5 apply only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 2884 (emphasis added).

Since *Morrison*, courts in this district and elsewhere have uniformly dismissed federal securities claims where the plaintiffs failed to allege a domestic securities transaction—that, post-*Morrison*, being an essential element of any such claim.[8]

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[7] Like the Exchange Act, the Securities Act contains no indication of any extraterritorial application, and, indeed, the Court of Appeals has held that the anti-fraud provisions of the Securities Act have no greater geographical reach than those of the Exchange Act. *See Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 n.10 (2d Cir. 1998) (affirming this court's dismissal of claims arising from a foreign securities transaction, holding that "§ 12 [of the Securities Act] does not reach further than § 10(b) [of the Exchange Act]."), *abrogated on other grounds by Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2869, 2879-83 (2010).

[8] *See, e.g.*, *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reins. Co.*, --- F.R.D. ----, No. 08 Civ. 1958 (JGK), 2010 WL 3860397 (S.D.N.Y. Oct. 4, 2010) (dismissing Exchange Act claims based on purchases of stock on a European stock exchange); *Terra Securities Asa Konkursbo v. Citigroup, Inc.*, No. 09 Civ. 7058 (VM), 2010 WL 3291579 (S.D.N.Y. Aug. 16, 2010) (dismissing Exchange Act claims

B. The IKB Note Purchase And ABN Swap Are Unambiguously Foreign Transactions

1. IKB, A German Bank, Purchases ABACUS 2007-AC1 Notes Overseas Pursuant To Reg. S

IKB, a German bank based in the city of Düsseldorf, Germany, purchased $50 million of Class A-1 ABACUS 2007-AC1 notes, and $100 million of Class A-2 notes. *See* Am. Compl. ¶¶ 53, 61. In his motion for judgment on the pleadings, Mr. Tourre demonstrated that IKB purchased those notes overseas pursuant to Reg. S, 17 C.F.R. §§ 230.901-230.905. *See* Tourre Sept. Mem. at 7-8; Chepiga Decl., Exs. E, F. The trade confirmations for those purchases, recently produced by the SEC to Mr. Tourre, *see* Chepiga Decl., Exs. G, H,[9] confirm that IKB, acting through affiliates based on the island of Jersey (a dependency of the British Crown, located off the coast of France), purchased these notes from Goldman Sachs International in London under Reg. S. Such transactions cannot plausibly be considered domestic.[10]

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arising from a total return swap that defendants sold to plaintiffs in Europe and from plaintiffs' purchases of notes on European stock exchanges); *Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens Cvc Tur Limitada*, --- F. Supp. 2d ----, No. 09-23248-CIV, 2010 WL 3119908 (S.D. Fla. Aug. 6, 2010) (granting a motion to dismiss Exchange Act claims arising from a stock purchase agreement between two foreign entities involving the stock of a foreign corporation); *Cornwell v. Credit Suisse Group*, --- F. Supp. 2d ----, No. 08 Civ. 3758 (VM), 2010 WL 3069597 (S.D.N.Y. July 27, 2010) (dismissing Exchange Act claims based on purchases made on a foreign exchange); *Sgalambo v. McKenzie*, No. 09 Civ. 10087 (SAS), 2010 WL 3119349 (S.D.N.Y. Aug. 6, 2010) (same). The Court of Appeals has also applied *Morrison* in dismissing RICO claims. *See Norex Petroleum Ltd. v. Access Industries, Inc.*, --- F.3d ----, No. 07-4553-cv, 2010 WL 4968691, at *3 (2d Cir. Dec. 8, 2010) (applying *Morrison* and affirming the dismissal under Rule 12(b)(6) of RICO claims arising from transactions that took place primarily overseas, holding that "simply alleging that some domestic conduct occurred cannot support a claim of domestic application [of the RICO statute].").

[9] The Court may consider "documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *See ATSI*, 493 F.3d at 98.

[10] Testament to the foreign nature of the IKB transaction, Mr. Tourre faces severe difficulties in obtaining discovery from IKB to defend himself against the SEC's allegations. Mr. Tourre has asked the Honorable Michael H. Dolinger to issue a letter of request to the German central authority under the 1970 Hague Evidence Convention. *See* Mem. of Law of F. Tourre in Support of Mot. for Issuance of a Letter of Request and an Order Requiring the SEC to Seek Documents Pursuant to its International Agreements, D.E. No. 47, at 5. But, as Germany refuses to provide pre-trial discovery of documents under the Hague Evidence Convention, Mr. Tourre has explained to Judge Dolinger that it seems very unlikely that process will yield any documents from IKB. Mr. Tourre has also, therefore, asked Judge Dolinger to order the SEC to seek the assistance of its German counterpart in obtaining documents from IKB, under available bilateral and multilateral inter-agency agreements. *See id.* at 5-7. Although the SEC has obtained IKB documents that it may use against Mr. Tourre, the SEC has nevertheless opposed this effort by Mr. Tourre to obtain exculpatory documents from IKB. *See* SEC's Mem. of Law in Resp. to Def. Tourre's Mot. for

Reg. S, issued by the SEC and effective May 2, 1990, exempts "offers and sales that occur outside the United States" from the Securities Act's registration requirements. 17 C.F.R. § 230.901. As the Preliminary Notes to Reg. S make clear: "Regulation S is available only for offers and sales of securities outside the United States." *See* 17 C.F.R. § 230 (Preliminary Note, ¶ 6). The SEC argued in its opposition to the motion for judgment on the pleadings that the IKB note purchases were nevertheless a domestic transaction for *Morrison* purposes because Reg. S does not purport to limit the territorial scope of the antifraud provisions of the federal securities laws. *See* SEC Oct. Op. at 10-11. That position is unsupportable in light of *Morrison*.

In *Morrison*, the Supreme Court cited Reg. S as evidence that the Securities Act as a whole, and not merely its registration provisions, shares "[t]he same focus on domestic transactions" as the Exchange Act. *See Morrison*, 130 S.Ct. at 2885. Further, the SEC explained in its Release accompanying the adoption of Reg. S in 1990 that its decision not to extend the "territorial approach" of Reg. S to the antifraud provisions was made in reliance on the now-discredited conduct and effects test.[11] Certainly, the SEC has offered no principled explanation for the proposition that a transaction that takes place outside the United States between two foreign entities and pursuant to Reg. S can be a domestic transaction for *Morrison* purposes. Indeed, the same policy considerations—international comity and the wish to avoid exposing participants in the global securities industry to overlapping and potentially conflicting regulatory requirements—animated both the adoption of the Reg. S "territorial approach" and the *Morrison*

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the Issuance of a Letter of Request and an Order Requiring the SEC to Seek Documents Pursuant to its International Agreements, D.E. No. 48.

[11] *See* Offshore Offers and Sales, Securities Act Release No. 33-6863, 1990 WL 311658, at *5 (Apr. 24, 1990) ("While it may not be necessary for securities sold in a transaction that occurs outside the United States, but touching this country through conduct or effects, to be registered under United States securities laws, such conduct or effects have been held to provide a basis for jurisdiction under the antifraud provisions of the United States securities laws.") (emphasis added), *abrogated by Morrison*, 130 S.Ct. at 2877-81.

"transactional test." *See* Offshore Offers and Sales, Securities Act Release No. 33-6863, 1990 WL 311658, at *5 (Apr. 24, 1990); *Morrison*, 130 S.Ct. at 2885-86.[12]

2. ABN, A Dutch Bank Acting Through Its London Branch, Enters Into An English Law-Governed Swap

The ABN swap is likewise a definitively foreign transaction. ABN Amro, a Dutch bank, was, as stated in the Amended Complaint, "one of the largest banks in Europe during the relevant period." *See* Am. Compl. ¶ 69. As demonstrated by Mr. Tourre's prior briefing, ABN, acting through its London branch, entered into an English-law governed swap with London-based Goldman Sachs International on May 31, 2007, more than a month after the IKB note purchase. *See* Chepiga Decl., Exs. I, J; Tourre Oct. Reply at 5. This swap was executed pursuant to a Master Agreement entered into in 1996 by these two European entities, more than ten years before ABACUS 2007-AC1. Chepiga Decl., Exs. K, L. The SEC pleads no facts that suggest this was in any sense a domestic transaction.[13]

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[12] In its Release accompanying the adoption of Reg. S, the SEC explained that a "territorial approach" to the registration provisions was appropriate because "[p]rinciples of comity and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore." Securities Act Release No. 33-6863, 1990 WL 311658 at *5. Similarly, in *Morrison*, the Supreme Court observed that other countries regulate securities transactions within their territorial jurisdictions, that regulatory approaches often differ from country to country, and that its "transactional test" was calculated to avoid the "interference with foreign securities regulation that application of § 10(b) abroad would produce." See *Morrison*, 130 S.Ct. at 2885-86.

[13] Even if the ABN swap were subject to the federal securities laws, the SEC has articulated no plausible claim that Mr. Tourre misled ABN about ACA's role in portfolio selection. The only misstatement alleged against Mr. Tourre was made on April 5, 2007, *see* Am. Compl. ¶ 69, almost two months before ABN entered into the swap, *see* Am. Compl. ¶ 67. Just as ACA could not have relied on alleged extra-contractual statements made months before it entered into its transactions, *supra* at 7, nor could ABN, particularly in light of the ISDA Master Agreement between Goldman Sachs International and ABN, which states that: "This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communications and prior writings with respect thereto." *See* Chepiga Decl., Ex. K (ISDA Master Agreement, at 12). Moreover, the Amended Complaint is notably devoid of any allegation that ACA's identity as "Portfolio Selection Agent" was material to ABN, but even if, *arguendo,* it was, ABN and ACA entered into a direct contractual relationship, so it is wholly implausible that Mr. Tourre is at fault for ACA's alleged misstatement as to its role in portfolio selection. *See* Am. Compl. ¶ 69.

C. *Morrison* Makes Clear That The SEC Cannot Plead A Domestic Transaction By Peppering The Amended Complaint With References To U.S. Conduct

Consistent with its unsupportable position that a transaction is "domestic" for *Morrison* purposes if any part of the "entire selling process" takes place in the United States, *see* SEC Oct. Op. at 9, the SEC peppers the Amended Complaint with references to U.S.-based conduct. For example, it adds catch-all allegations that "[t]he conduct of [Goldman and Mr. Tourre] alleged herein took place in New York, New York unless otherwise specifically alleged." *See* Am. Compl. ¶¶ 9, 10. It pleads also that Goldman's structured products correlation desk and Paulson are "located in New York City," *see* Am. Compl. ¶¶ 11, 12, and that ACA has a "principal office in New York." *See* Am. Compl. ¶ 67.

As Mr. Tourre already demonstrated, *see* Tourre Oct. Reply at 9, *Morrison* itself precludes the SEC's position that the federal securities laws apply if any part of the "entire selling process" takes place in the United States. Justice Scalia wrote that the presumption against extraterritoriality would be a "craven watchdog indeed," *Morrison*, 130 S.Ct. at 2884, if the federal securities laws applied to an overseas transaction merely because "*some* domestic activity," *id.* (emphasis in original), could be said to have occurred in the United States. Indeed, the *Morrison* court specifically rejected a test proposed by the Solicitor General, appearing on behalf of the SEC, under which Section 10(b) would be violated when a securities fraud involves significant conduct in the United States that is material to the fraud's success. *See id.* at 2886-88. The SEC's "entire selling process" argument, on the other hand, is even broader than the position the Supreme Court rejected, and would cover domestic conduct that is insignificant, immaterial, and ministerial. *See id.*

Following *Morrison*, the courts have consistently held that allegations of conduct in the United States are insufficient to establish a domestic securities transaction, and that adoption of the test proposed by the SEC here would amount to a restoration of the discredited conduct and effects test. In *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, --- F.R.D. ----, No. 08 Civ. 1958 (JGK), 2010 WL 3860397 (S.D.N.Y. Oct. 4, 2010), for

example, Judge Koeltl held that "the situs of a defendant's allegedly deceptive conduct is irrelevant to the transactional test." *Id.* at *9 (citing *Morrison*, 130 S.Ct. at 2883-84, 2886-87).[14]

The SEC adds an allegation that a closing for ABACUS 2007-AC1 took place in New York on April 26, 2007. *See* Am. Compl. ¶ 62. As to the closing, the SEC pleads no facts supporting a plausible inference that the "closing" was anything more than a ministerial lawyer-driven documentation exercise, but, in any event, a U.S. closing, particularly of a Reg. S transaction, does not make the transaction domestic for *Morrison* purposes. *See Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09-23248-CIV, 2010 WL 3119908, at *3 (S.D.N.Y. Aug. 6, 2010) (holding that the closing of a transaction in the United States does not satisfy *Morrison* because the "purchase or sale of foreign securities . . . occurred abroad"); *see also Plumbers' Union*, 2010 WL 3860397 at *8 (citing *Quail Cruises* with approval for the holding that "a purchase agreement for a foreign corporation's stock is not subject to section 10(b) even if the closing occurred in the United States").

The SEC has also added new allegations regarding Goldman's initial underwriting of the ABACUS 2007-AC1 notes, as well as details of the clearing and settlement mechanics of that underwriting process, which allegedly involved book entries at Depository Trust Company in New York and a transfer of funds to a bank in Chicago. *See* Am. Compl. ¶¶ 62-63. Yet the SEC does not make any allegation that Goldman's initial purchase of the notes in an underwriting capacity from the Cayman Islands issuer is a fraudulent transaction, so these details are irrelevant for *Morrison* purposes. And if incidental contact with the domestic banking system were sufficient to make a transaction "domestic" for *Morrison* purposes, many clearly

[14] *See also Cornwell*, 2010 WL 3069597 at *3 ("to carve out of the new rule a purchase or sale of securities on a foreign exchange because some acts that ultimately result in the execution of the transaction abroad take place in the United States amounts to nothing more than the reinstatement of the conduct test"); *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495, 2010 WL 3910286, at *6 (S.D.N.Y. Sept. 29, 2010) ("By asking the Court to look to the location of the act of placing a buy order, and to . . . the place of the wrong, Plaintiffs are asking the Court to apply the conduct test specifically rejected in *Morrison*.") (internal citations omitted).

foreign transactions would be covered, including, for example, purchases by U.S. investors on foreign stock exchanges.

Finally, the SEC attempts to obfuscate the foreign nature of the IKB note purchases by selectively quoting the ABACUS 2007-AC1 Offering Circular. *See* Am. Compl. ¶ 62. For example, the SEC notes that the Offering Circular states that Goldman, Sachs & Co. was offering the notes "in the United States," *see id.*, but fails to mention that the exact same paragraph states that London-based Goldman Sachs International was offering the notes "outside the United States to non-U.S. Persons in offshore transactions in reliance on Regulation S."[15] Chepiga Decl., Ex. A (Offering Circular dated Apr. 26, 2007, at (i)) (emphases added). As Mr. Tourre has shown, consistent with the language the SEC omitted from the Amended Complaint, IKB, a non-U.S. person, for its own regulatory, tax, or other reasons, bought the ABACUS 2007-AC1 notes outside the United States in reliance on Reg. S. Indeed, the SEC's position would eviscerate its own Reg. S program by making every offshore transaction that has even the most fleeting domestic conduct or effects subject to the U.S. securities laws; such a result, as well as being precluded by *Morrison*, was clearly not intended by the SEC itself when it stated in its Release accompanying Reg. S that U.S. issuers and distributors could initiate "sales communications to non-U.S. persons from the United States" without violating Reg. S.[16]

D. The SEC Cannot Rescue This Case With Policy Arguments That The Supreme Court Has Rejected

Tacitly conceding the weakness of its legal arguments, the SEC defended its original Complaint with a policy argument—that it would be "flatly inconsistent with the settled principle that the antifraud provisions are intended to achieve a high standard of business ethics . . . in every facet of the securities industry" to hold that the U.S. conduct of a U.S. broker-

[15] The SEC's inclusion of the statement that Goldman, Sachs & Co. was making offers "in the United States" is irrelevant as to IKB since, as the SEC admits, IKB is based in Germany. *See* Am. Compl. ¶ 53.

[16] Securities Act Release No. 33-6863, 1990 WL 311658 at *n.65.

dealer and its registered representative is not covered by the antifraud provisions of the federal securities laws. *See* SEC Oct. Op. at 11-12 (internal citations omitted).

The Solicitor General advanced exactly the same argument in *Morrison*, in support of the SEC's proposal that Section 10(b) should cover a securities fraud involving significant conduct in the United States. *See Morrison*, 130 S.Ct. at 2886. The Supreme Court unceremoniously rejected the SEC's position on the ground that it lacks any textual support in the statute, holding: "It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Id.* at 2886. For the same reason, the SEC's policy arguments cannot salvage the Amended Complaint before this Court.

To the contrary, the SEC's "entire selling process" position is not viable because, in addition to being inconsistent with *Morrison*'s clear transactional test, it would directly implicate the Supreme Court's "paramount concern," *Plumbers' Union*, 2010 WL 3860397 at *8, by subjecting all U.S.-based participants in the global securities industry to "regulatory multiplicity," *id.*, under the U.S. securities laws and the laws of the foreign jurisdiction where a transaction takes place, based merely on the occurrence of some part of the "entire selling process" in the United States.[17]

Further, the position advocated by the SEC would result in an anomalous situation, in which foreign investors, like IKB, would be protected by the federal securities laws when entering into a securities transaction overseas in which a U.S. person has some involvement or some ministerial aspect of the transaction touches the U.S., yet American investors investing

[17] The SEC's approach would actually exacerbate the problem the Supreme Court sought to solve in *Morrison*, making the federal securities laws applicable to foreign transactions that would not even have been covered under pre-*Morrison* law. While the "conduct test" required that the U.S. conduct be "more than merely preparatory" to a securities fraud conducted overseas, *see SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003) (internal citation omitted), *abrogated by Morrison*, 130 S.Ct. at 2877-81, the rule the SEC advocates contains no such limitation, so would encompass acts that are "merely preparatory," or purely administrative or ministerial.

overseas, like the plaintiffs in *Cornwell*, *In re Société Générale*, and *Plumbers' Union*, *supra*, would enjoy no such protections.

E. In Contrast To Its Position Before This Court, The SEC Has Elsewhere Recognized the Consequences Of *Morrison*

The SEC's Amended Complaint is equally as deficient under *Morrison* as its original Complaint, as it contains no additional allegations that would change the fundamentally foreign nature of the IKB purchase and the ABN swap. The SEC has moreover acknowledged, in other contexts, that *Morrison* precludes enforcement actions involving foreign transactions such as those at issue here.

On October 25, 2010—twelve days after filing its opposition to Mr. Tourre's motion for judgment on the pleadings—the SEC noted in an Exchange Act Release that *Morrison* "significantly limited the extraterritorial scope of Section 10(b) of the Exchange Act" but that the recently-enacted Dodd-Frank Act "restored the ability of the Commission and the United States to bring actions under Section 10(b) in cases involving transnational securities fraud."[18]

Even prior to this Exchange Act Release, the SEC outlined its view that the Dodd-Frank Act "restored its ability" to bring enforcement actions involving transnational securities fraud. In an August 31, 2010 Report of Investigation, the SEC stated that the Dodd-Frank Act, effective July 21, 2010, gives federal courts jurisdiction over SEC enforcement actions and criminal proceedings alleging violations of the antifraud provisions of those laws involving "'conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only

[18] *See* Study on Extraterritorial Private Rights of Action, Exchange Act Release No. 63174, 2010 WL 4196006, at *1 (Oct. 25, 2010) (emphases added). The Court may take judicial notice of the SEC's Release. *See, e.g., In re UBS Auction Rate Sec. Litig.*, No. 08 Civ. 2967, 2010 WL 2541166, at *12 n.9 (S.D.N.Y. June 10, 2010) (taking judicial notice of an SEC release) (citing Fed. R. Evid. 201(b)(2)).

foreign investors,'" or "'conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'"[19]

This Report of Investigation further described the SEC's inability to bring an enforcement action against Moody's, the New York-based credit ratings agency with headquarters just a few blocks from Goldman, "[b]ecause of uncertainty regarding a jurisdictional nexus to the United States," in a case arising from conduct committed by Moody's in 2007 affecting securities that were arranged by European banks and marketed in Europe.[20] Although the SEC recognized that it could not file suit against Moody's, it warned that, in future, it would consider filing enforcement actions in similar circumstances based on the new authority bestowed by the Dodd-Frank Act.

Of course, the Dodd-Frank Act has no impact on this lawsuit because the relevant provisions of the legislation do not apply retroactively. *See*, *e.g.*, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 307 (1994) (holding that federal statutes apply only prospectively absent a "clear expression of congressional intent to reach cases that arose before [their] enactment"). As such, the Dodd-Frank Act has not "restored the ability" of the SEC to bring its claims against Mr. Tourre, and *Morrison*'s holding that the antifraud provisions of the Exchange Act and Securities Act do not apply extraterritorially is fully applicable.

Even before *Morrison* was decided, the SEC knew it was problematic that this case rests on overseas transactions by non-U.S. entities. The SEC Inspector General recently reported that, as a result of concerns raised by the Commissioners, the meeting to consider authorizing the filing of this case was rescheduled until after Division of Enforcement staff had "traveled to Germany in February 2010 to secure affidavits" from IKB, which apparently had

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[19] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Moody's Investors Service, Inc., Securities Exchange Act Release No. 62802, at *4 (Aug. 31, 2010) ("Moody's Report of Investigation") (quoting 15 U.S.C. §§ 77v(c), 78aa(b)) (Chepiga Decl., Ex. M). The Court may take judicial notice of the SEC's Report of Investigation. *See supra*, note 18.

[20] *See* Moody's Report of Investigation, *supra* note 19, at *4.

refused to provide formal testimony. After the staff obtained an affidavit from IKB, the Commission, in April 2010, authorized the filing of this lawsuit, in a divided 3-2 vote.[21]

[21] *See* United States Securities and Exchange Commission Office of Inspector General, Report of Investigation, Case No. OIG-534, "Allegations of Improper Coordination Between the SEC and Other Governmental Entities Concerning the SEC's Enforcement Action Against Goldman Sachs & Co." at 35, 43-46, 48 (Sept. 30, 2010) (redactions in original) (Chepiga Decl., Ex. N).

CONCLUSION

For all the foregoing reasons, Fabrice Tourre respectfully requests that the Court grant his motion to dismiss the Amended Complaint dated November 22, 2010, and grant such other and further relief as the Court may consider appropriate.

Dated: December 9, 2010
New York, New York

Respectfully submitted,

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