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 FOR LIMITED RECONSIDERATION OF THE COURT'S MEMORANDUM AND ORDER DATED JUNE 10, 2011

Pamela Rogers Chepiga
David C. Esseks
Andrew Rhys Davies
Brandon D. O'Neil

ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

Attorneys for Fabrice Tourre

Dated: June 24, 2011
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

Defendant Fabrice Tourre respectfully submits this memorandum of law in support of his motion for limited reconsideration of the Court's Memorandum and Order dated June 10, 2011 (D.E. No. 92).

PRELIMINARY STATEMENT

Mr. Tourre respectfully requests that the Court reconsider the portion of its June 10 Order in which it partially sustained the claims under Section 17(a) of the Securities Act regarding foreign transactions entered into by German bank IKB Deutsche Industriebank AG ("IKB") and the London branch of Dutch bank ABN Amro N.V. ("ABN") by impermissibly bifurcating those transactions into domestic "offers" and foreign "sales."

Reconsideration is warranted because the Court overlooked the portion of the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010), which made clear that, under the transactional test, the United States securities laws extend only to parties or "prospective parties" to domestic securities transactions. *Id.* at 2884 (emphasis added). As the transactions entered into by IKB and ABN are unquestionably foreign—and this Court correctly dismissed Exchange Act claims and the "sale" portion of the Securities Act claims for that reason—the Court erred in holding that the Securities Act applies to "offers" to IKB and ABN to enter into those foreign transactions.

The Court's bifurcation of the IKB and ABN transactions into domestic offers and foreign sales has the exact effect the *Morrison* court prohibited—applying the federal securities laws simply because of domestic pre-transactional conduct. The Court's ruling is, further, contradicted by the legislative history of the Securities Act. It also is not supported by the cases on which the Court relies, all of which pre-date *Morrison*, and none of which support the application of the federal securities laws to the "offers" to enter into consummated foreign transactions.

Moreover, by holding, in effect, that a transaction can be both domestic and foreign for *Morrison* purposes, the Court's ruling causes the regulatory multiplicity that the Supreme Court directed the lower courts to avoid. It exposes participants in the IKB and ABN

transactions to regulation under the federal securities laws and the laws of the foreign jurisdictions where the transactions actually took place. In addition to being inconsistent with *Morrison*, this result unnecessarily extends the United States securities laws to sophisticated foreign parties that deliberately chose to transact overseas, thereby eschewing those same laws.

STANDARD OF LAW

Reconsideration should be granted where, as here, the Court has overlooked "controlling decisions or data . . . that might reasonably be expected to alter the conclusion reached." *Lesch v. U.S.*, 372 Fed. Appx. 182, 183 (2d Cir. 2010) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). Reconsideration is also appropriate where it is necessary "to correct a clear error of law or to prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (internal quotation omitted). This is not a motion for relitigation, *see*, *e.g.*, *Shrader*, 70 F.3d at 257 (holding that a party may not move for reconsideration solely to relitigate an issue), because the Court's ruling with respect to "offers" to IKB and ABN was based on grounds and case law that neither party briefed or argued.

ARGUMENT

In its June 10 Order, the Court correctly held that the SEC had failed to plead that German bank IKB's purchase of ABACUS 2007-AC1 notes from London-based Goldman Sachs International ("GSI") in an overseas transaction under SEC Regulation S ("Reg. S"), and Dutch bank ABN's entry into an English law-governed credit default swap with London-based GSI, are domestic transactions for *Morrison* purposes. *See* Order at 21-28, 35-37. The Court correctly dismissed the Exchange Act claims relating to those transactions, and dismissed the Securities Act claims to the extent they were based on "sales" to IKB and ABN. *See id.*

On the theory that the Securities Act defines the term "offer" expansively, however, the Court declined to dismiss the Securities Act claims pertaining to "offers" made to IKB and ABN to enter into those foreign transactions. *See id.* at 37-39. For the reasons set forth below, the Court's ruling on that point is inconsistent with *Morrison*, and with the language and legislative history of the Securities Act.

1. *Morrison*

In *Morrison*, the Supreme Court recognized that the Securities Act and the Exchange Act share the "same focus on domestic transactions." *Morrison*, 130 S.Ct. at 2885. The court established a transactional test that limits the applicability of the federal securities laws to "parties or prospective parties" to "purchases and sales of securities in the United States." *See id.* at 2884 (emphasis added). The federal securities laws do not, therefore, apply to parties or "prospective parties" to foreign transactions, such as IKB, which made 27 note purchases under the ABACUS platform that were invariably non-domestic transactions like those at issue here,[1] and ABN, which entered into an English-law governed agreement with GSI in 1996 to govern their mutual transactions.[2]

The *Morrison* court also ruled that preparatory domestic conduct leading to a foreign transaction is not sufficient to transmogrify it into a domestic transaction. *Id.* at 2884 ("it is a rare case of prohibited extraterritorial application [of Section 10(b)] that lacks *all* contact with the territory of the United States") (emphasis original). This Court likewise correctly recognized that U.S.-based conduct is not sufficient to state a claim after *Morrison*. *See* Order at 22 ("The shortcoming of all of this U.S.-based conduct is precisely that—it is just conduct.").

The effect of this Court's ruling as to "offers" to IKB and ABN, however, is impermissibly to extend the federal securities laws to prospective parties to foreign securities transactions, simply because there are allegations of domestic preparatory conduct that meet the Securities Act's open-ended definition of "offer."

When the definition of "offer" is applied in context, as the statute requires, *see* 15 U.S.C. § 77b(a), it is clear that it cannot, for *Morrison* purposes, include offers to enter into non-domestic transactions. In *Plumbers' Union Local No. 12 Pension Fund v. Swiss*

[1] *See* Exhibit E to the Declaration of Pamela Rogers Chepiga in Support of Mr. Tourre's Objections to the Magistrate Judge's Order Denying Mr. Tourre's Motion for an Order Requiring the SEC to Comply With Its Discovery Obligations (D.E. No. 86).

[2] *See* Exhibits I, J, K and L to the Declaration of Pamela Rogers Chepiga in Support of Defendant Fabrice Tourre's Motion to Dismiss the Amended Complaint (D.E. No. 53).

Reinsurance Co., 753 F. Supp. 2d 166 (S.D.N.Y. 2010), the Honorable John G. Koeltl held that, in the context of *Morrison*, "purchase" could not bear the expansive definition set forth in the Exchange Act, because that would mean a transaction would be domestic simply because the purchaser placed a buy order from the United States, which would be contrary to *Morrison*. *See id.* at 177.[3]

In particular, Judge Koeltl noted that giving the term "purchase" its expansive Exchange Act definition for *Morrison* purposes would result in "the regulatory multiplicity that the Supreme Court has directed courts to avoid," by exposing the participants in the transaction to the federal securities laws and the law of the foreign jurisdiction where the transaction actually occurred. *See id.* at 177-78.

In exactly the same way, this Court's ruling results in impermissible regulatory multiplicity—exposing participants in the IKB and ABN transactions to the United States securities laws and the laws of the foreign jurisdictions where those transactions actually took place.

Moreover, in a closely analogous context, the SEC has recognized that it makes no sense to apply the registration provisions of the Securities Act to offers to enter into foreign transactions. In its Release accompanying the promulgation of Reg. S, the SEC confirmed that domestic issuers may initiate "sales communications to non-U.S. persons from the United States" without violating Reg. S. *See* Offshore Offers and Sales, Securities Act Release No. 33-6863, 1990 WL 311658, at *n.65 (Apr. 24, 1990) (emphasis added). Indeed, Reg. S provides that an "offer" of securities "shall be deemed to occur outside the United States" in an "offshore transaction" where the "offer is not made to a person in the United States." *See* 17 C.F.R. §§ 230.903(a), 230.902(h) (emphasis added). Consistent with *Morrison*, then, Reg. S is not violated whenever there is some domestic conduct related to a foreign securities transaction.

[3] The Supreme Court has noted how imprecise and circular the definitions included in the federal securities laws are. *See SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 466 (1969) ("The relevant definitional sections of the 1934 Act are for the most part unhelpful; they only declare generally that the terms 'purchase' and 'sale' shall include contracts to purchase or sell.").

As the court held in *Absolute Activist Value Master Fund Ltd. v. Homm*, No. 09 CV 08862 (GBD), 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010), it would be "illogical, and inconsistent with *Morrison*" to extend the federal securities laws to foreign investors who, like IKB and ABN, deliberately "avoid the regulations imposed by federal securities laws that apply to domestic market transactions." *Id.* at *5.

2. Legislative History

This Court's ruling is also inconsistent with the legislative history of the Securities Act. As originally enacted in 1933, the statute did not regulate "offers" separately from "sales"—Section 17 prohibited fraud only in relation to "sales." Indeed, "sale" was defined to include offers to sell, making clear that "offers" were not intended to be divisible from "sales." *See* H.R. Rep. No. 1542 (1954), *reprinted in* 2 United States Code Congressional and Administrative News, 1954, at 2979-82 (1954).[4]

In 1954, Congress amended the Securities Act. The purpose of the amendment was to encourage the use of preliminary prospectuses, a practice which would create a period of time in the market during which sales of securities were prohibited but offers could be made. Congress added the word "offer" to Section 17(a) to cover this pre-sale period. *See id.* at 2993.[5] Congress did not create, nor intend to create, separate "offer" and "sale" liability for the same transaction. As the House Report noted, the word "offer" was added "to make clear that the civil and penal liabilities and sanctions imposed by the statute shall remain unchanged." *See id.* at 2999.

[4] Specifically, in the Securities Act as enacted in 1933, "sale," "sell," "offer to sell" or "offer for sale" were defined together in Section 2(3) to "include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." *See* Pub. L. No. 73-22, 48 Stat. 74, Title I, § 2(3) (May 27, 1933).

[5] Specifically, in the 1954 amendment, "sale" was redefined to include "every contract of sale or disposition of a security or interest in a security, for value," and "offer" was given a separate definition as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." *See* Pub. L. No. 83-577, Title I, § 1 (Aug. 10, 1954).

The text of the Securities Act as promulgated further reflects the fact that offers that have been consummated by completed transactions do not remain inchoate and separately actionable. Section 17(a)(2), for example, cannot apply to unconsummated offers because it requires that "defendant actually obtained money or property by means of the untrue statements." *SEC v. Norton*, No. 95 Civ. 4451 (SHS), 1997 WL 611556, at *3 (S.D.N.Y. Oct. 3, 1997) (emphasis added) (quoting *SEC v. Glantz*, No. 94 Civ. 5737 (CSH), 1995 WL 562180, at *5 (S.D.N.Y. Sept. 20, 1995)). Similarly, Section 17(a)(3) requires that a violation occur in relation to a "purchaser." 15 U.S.C. § 77q(a)(3). Clearly, "money or property" is not obtained from a "purchaser" when an offer remains inchoate, and this focus on completed sales confirms that "offers" that have been consummated by actual transactions are not actionable separately from the corresponding "sales."

Thus, the legislative history demonstrates that the antifraud provisions of the Securities Act were intended to apply to sales, *i.e.*, consummated transactions such as those entered into by IKB and ABN, and, where appropriate, to unconsummated offers. This focus, however, contradicts the Court's ruling, which bifurcates the "sale" and "offer" components of a completed transaction, with the anomalous result that a single transaction is both foreign and domestic for *Morrison* purposes.

3. Case Law

Further, the cases cited in support of the Court's ruling, which pre-date *Morrison* and which no party cited to the Court, shed no light on the application of *Morrison* to offers to enter into foreign transactions. In *SEC v. American Commodity Exchange, Inc.*, 546 F.2d 1361 (10th Cir. 1976), the Tenth Circuit, without analysis or citation of authority, stated that "actual sales" of securities "were not essential" under Section 17(a). *See id.* at 1366. As it appears that no sales actually occurred in that case, however, *see id.*, it sheds no light on the application of Section 17(a) to offers that culminate in sales, or on the application of *Morrison* to offers that actually result in foreign transactions.

Similarly, in *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008), *vacated en banc*, 573 F.3d 54, *and reinstated in part en banc*, 597 F.3d 436, a First Circuit panel stated that an actual sale is not required under Section 17(a). *See* 550 F.3d at 122. *Tambone* did not, however, address the scenario presented by IKB and ABN, where the alleged offers resulted in completed transactions, and, therefore, does not support the holding that "offers" can be separated from "sales" for *Morrison* purposes.

The *Tambone* court cited *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), but *Blue Chip Stamps* did not involve Section 17(a) at all. In contrasting Section 17(a) with Section 10(b) of the Exchange Act, the court commented that "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly." *Blue Chip Stamps*, 421 U.S. at 734. This proposition, again, does not support the Court's Order, as IKB and ABN actually entered into transactions, although, because those transactions are foreign, as this Court has held, they are not subject to the federal securities laws. To the contrary, *Blue Chip Stamps* supports Mr. Tourre's position that the word "offer" was only intended to cover inchoate offers and extends only to those who "neither purchase nor sell securities."

4. Prejudice

Finally, the Court's rulings of June 10, 2011 would require Mr. Tourre to defend allegations that he defrauded IKB in the course of a foreign securities transaction, while denying him the ability to do so. Although the SEC has used its power to obtain for itself documents that it believes support its case, Mr. Tourre has no access to exculpatory documents, due to Germany's refusal to execute his Hague Convention Letter of Request for documents from IKB and this Court's order affirming the denial of his motion to compel the SEC to obtain documents from IKB.[6] As a result, Mr. Tourre will have no fair opportunity to participate in questioning

[6] *See* Objections of Fabrice Tourre to the Magistrate Judge's Order Denying His Motion for an Order Requiring the SEC to Comply with its Discovery Obligations (D.E. No. 85).

IKB witnesses and, therefore, no fair opportunity to challenge the SEC's claims that IKB was misled.

CONCLUSION

In sum, the Court's bifurcation of the IKB and ABN transactions into domestic "offers" and foreign "sales" is contrary to *Morrison*, contradicted by the legislative history of the Securities Act and not supported by the cases on which the Court relied. Mr. Tourre respectfully requests that the Court reconsider its Memorandum and Order dated June 10, 2011 and grant Mr. Tourre's Motion to Dismiss the SEC's Amended Complaint as to the Section 17(a) allegations pertaining to "offers" to IKB and ABN.

Dated: June 24, 2011
New York, New York

Respectfully submitted,

/s/ Pamela Rogers Chepiga

Pamela Rogers Chepiga
(pamela.chepiga@allenovery.com)
David C. Esseks
(david.esseks@allenovery.com)
Andrew Rhys Davies
(andrew.rhys.davies@allenovery.com)
Brandon D. O'Neil
(brandon.o'neil@allenovery.com)

ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

Attorneys for Fabrice Tourre