UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re SOCIÉTÉ GÉNÉRALE SECURITIES LITIGATION	:	No. 1:08-cv-02495-RMB
	:	
		CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SECOND MOTION TO PARTIALLY LIFT THE PSLRA DISCOVERY STAY IN ORDER TO ALLOW DISCOVERY LIMITED TO ISSUES OF SUBJECT MATTER AND PERSONAL JURISDICTION

Plaintiffs submit this memorandum in support of their motion to allow discovery limited to the issues of subject matter and personal jurisdiction.

I. INTRODUCTION

Defendants' motion to dismiss urges the Court to dismiss a portion of this action – claims brought by foreign Plaintiffs who purchased Société Générale ("SocGen") securities on foreign exchanges – on subject matter jurisdiction grounds. *See* Memorandum of Law in Support of the Motion of Defendants Société Générale, Daniel Bouton, Philippe Citerne, Didier Alix, Jean-Pierre Mustier and Robert Day to Dismiss the Second Amended and Consolidated Complaint ("Defs' Mem.") at 9-11. Defendants also move to dismiss all claims against Defendants Citerne and Alix based on personal jurisdiction. *Id.* at 38-39. Both jurisdictional arguments are highly fact-intensive inquiries and should not be resolved prior to discovery and without a complete factual record. *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) (courts "have required that the party asserting jurisdiction be permitted discovery of facts demonstrating jurisdiction"); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, No. 05 Civ. 9016 (SAS), 2006 U.S. Dist. LEXIS 11617, at *27 (S.D.N.Y. Mar. 20, 2006) ("Jurisdictional discovery 'should be granted where pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary.'") (citation omitted).[1]

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[1] The Second Amended and Consolidated Complaint for Violation of the Federal Securities Laws ("Complaint") makes a *prima facie* showing of both subject matter and personal jurisdiction. *See* Plaintiffs' Memorandum of Law in Opposition to Motion of Defendants Société Générale, Daniel Bouton, Philippe Citerne, Didier Alix, Jean-Pierre Mustier and Robert Day to Dismiss the Second Amended and Consolidated Complaint ("Plaintiffs' Opposition to Motion to Dismiss Second Amended Complaint") at 37-40. "[W]here[, as here,] there has been no hearing and no discovery . . . a plaintiff need only make a prima facie showing of jurisdiction." *Leonard v. Garantia Banking, Ltd.*, No. 98 Civ. 4848 (LMM), 1999 U.S. Dist. LEXIS 16046, at *9 (S.D.N.Y. Oct. 19, 1999), *aff'd*, 213 F.3d 626 (2d Cir. 2000). Nevertheless, as Defendants challenge the Complaint's *prima facie*

With respect to subject matter jurisdiction, relevant discovery includes Defendants' U.S. activities – like SocGen's valuations of its subprime-related assets – that caused harm to foreign interests as well as Defendants' extraterritorial activities, including certain of their false and misleading statements, that impacted U.S. investors. With respect to personal jurisdiction, relevant discovery includes U.S. contacts by Defendants Citerne and Alix and their foreign conduct which had an "effect" in the United States. Plaintiffs' proposed discovery is attached to the Declaration of Ryan A. Llorens filed herewith ("Llorens Decl.") as Exs. A-E.

II. PLAINTIFFS SHOULD BE ALLOWED TO CONDUCT DISCOVERY RELATING TO SUBJECT MATTER JURISDICTION

As discussed in Plaintiffs' Opposition to Motion to Dismiss Second Amended Complaint, the Supreme Court is expected to directly address the issue of extraterritorial application of §10(b) in its decision in *Morrison v. Australia Bank Ltd*. The Supreme Court's decision is expected by June 2010. As such, Plaintiffs submit that this Court defer a ruling on this issue until the Supreme Court has ruled on *Morrison* and, based on the reasoning below, permit Plaintiffs to seek discovery on the issue in accordance with the Supreme Court's decision.

Unlike a Fed. R. Civ. P. 12(b)(6) motion to dismiss, in determining whether a court has subject matter jurisdiction, "a district court may consider evidence outside the pleadings." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citing *NRDC v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006)). To the extent it does, Defendants' motion is "assessed by the standards that govern summary judgment motions." *See Semi-Tech Litig., L.L.C. v. Bankers Trust Co.*, 272 F. Supp. 2d 319, 329 (S.D.N.Y. 2003). And where, as here, the jurisdictional facts alleged are

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showing, Plaintiffs should be granted the opportunity to take the discovery sought herein in order to demonstrate jurisdiction. *Kamen*, 791 F.2d at 1011.

challenged on a motion to dismiss (*see* Defs' Mem. at 9-11), or in any case where the question of jurisdiction is a close one, a court should be "mindful of not depriving plaintiffs of their day in court with a premature order dismissing the case." *In re Vivendi Universal*, No. 02 Civ. 5571 (RJH), 2004 U.S. Dist. LEXIS 21230, at *27 (S.D.N.Y. Oct. 22, 2004); *Pension Comm.*, 2006 U.S. Dist. LEXIS 11617, at *26-*30. In fact, courts often ***require*** that a plaintiff be permitted to discover facts establishing subject matter jurisdiction when opposing a motion to dismiss on jurisdictional grounds. *Kamen*, 791 F.2d at 1011.

Defendants nevertheless state in conclusory fashion that "[t]he implied private right of action under Section 10(b) does not cover shares of a foreign issuer traded on a foreign exchange, either under the Second Circuit's subject matter jurisdiction analysis in *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008), *cert. granted* 130 S. Ct. 783 (Nov. 30, 2009), or simply as an interpretation of the reach of Section 10(b)." Defs' Mem. at 9. This statement misconstrues the relevant subject matter jurisdiction standards. The Second Circuit in *Itoba*[2] and *Morrison*[3] has made clear that claims of foreign purchasers on foreign exchanges may satisfy subject matter jurisdiction under either the conduct or effects test. Moreover, in applying those tests, Plaintiffs are entitled to conduct discovery relevant to the issue of jurisdiction so that the determination can be made with a complete factual record. *Kamen*, 791 F.2d at 1011; *see Filus v. Lot Polish Airlines*, 907 F.2d 1328,

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[2] *See Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (finding subject matter jurisdiction over claims made by foreign purchasers on foreign exchanges by applying an "admixture" of the conduct and effects test).

[3] *See Morrison*, 547 F.3d at 170-71 (concluding that jurisdiction over foreign claims is governed by a combination of the conduct and effects test). In fact, the Second Circuit in *Morrison* advocates a fact-specific analysis to determine jurisdiction.

1332 (2d Cir. 1990) (noting that prior to a definitive subject matter jurisdiction determination, "generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue").

Where, as here, Defendants have raised subject matter jurisdiction issues, Plaintiffs should be allowed to conduct discovery limited to those jurisdictional issues, including, for instance, Defendants' U.S. activities that caused harm to foreign interests as well as Defendants' overseas activities which impacted U.S. investors. *See Gudavadze v. Kay*, 556 F. Supp. 2d 299, 308-09 (S.D.N.Y. 2008) ("[t]his Court has broad discretion in considering a party's request for jurisdictional discovery, and should consider compelling such discovery where "'jurisdictional facts are placed in dispute"'") (citations omitted); *see also Inv. Props. Int'l, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 708 & n.4 (2d Cir. 1972) ("discovery may well be needed" in Rule 10b-5 case); *Cromer Fin., Ltd. v. Berger*, 137 F. Supp. 2d 452, 483, 493 (S.D.N.Y. 2001) (allowing jurisdictional discovery). This is especially true where, as here, subject matter jurisdiction is based, at least in part, on the conduct test – an analysis which "is ***intensely fact specific***." *City of Edinburgh Council v. Vodafone Group Pub. Co.*, No. 07 Civ. 9921 (PKC), 2008 U.S. Dist. LEXIS 98888, at *9 (S.D.N.Y. Nov. 24, 2008) (emphasis added).

III. PLAINTIFFS SHOULD BE ALLOWED DISCOVERY RELATING TO PERSONAL JURISDICTION

For the same reasons, the Court should allow Plaintiffs the opportunity to conduct discovery regarding the personal jurisdiction challenge by Defendants Citerne and Alix. In order to allow the Court to rule based on all relevant evidence, this Court has discretion to lift the Private Securities Litigation Reform Act of 1995's ("PSLRA") discovery stay so that Plaintiffs can conduct jurisdictional discovery. In a case such as this, where Defendants challenge Plaintiffs' *prima facie* showing of personal jurisdiction, "a district court has broad discretion to permit the plaintiff to conduct jurisdictional discovery." *Tese-Milner v. De Beers Centenary A.G.*, 613 F. Supp. 2d 404,

417 (S.D.N.Y. 2009); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 401 (S.D.N.Y. 2005) (permitting securities class action plaintiffs to proceed with "jurisdictional discovery on the issue of [the] Court's personal jurisdiction" over defendants); *Tex. Int'l Magnetics, Inc. v. BASF Aktiengesellschaft*, 31 F. App'x 738, 739 (2d Cir. 2002) (noting that a district court is within its discretion to grant discovery on personal jurisdiction where the facts "are simply insufficiently developed at [the motion to dismiss stage] to permit judgment as to whether personal jurisdiction is appropriate").

Plaintiffs should be granted the opportunity to conduct discovery relating to Defendants' contacts in the United States and the effects of their fraudulent conduct in the United States. This is especially true since Defendants Citerne and Alix assert that ***none*** of their conduct which gives rise to Plaintiffs' claims occurred in the United States or had an effect in the United States, despite contrary facts alleged in the Complaint. For example, during the Class Period (August 1, 2005-January 25, 2008) Citerne was a director of Trust Company of the West ("TCW"), SocGen's asset management subsidiary with offices in New York, Los Angeles and Houston. Complaint, ¶55. Such factual discrepancies regarding the Court's personal jurisdiction over Citerne and Alix necessitates jurisdictional discovery on the issue.

In fact, the court in *Pension Comm.* granted personal jurisdiction discovery under very similar circumstances. There, a foreign defendant corporation argued that it was not subject to personal jurisdiction in this District because it had ***no*** presence here, while plaintiffs highlighted several of the defendant's business activities in and contacts with the District, creating a factual dispute as to personal jurisdiction. *Pension Comm.*, 2006 U.S. Dist. LEXIS 11617, at *21-*30. Noting the "sparse factual record" and defendant's challenge of the facts alleged, the court granted plaintiffs permission to "conduct discovery limited to the issue of personal jurisdiction." *Id.* at *27

(providing that "***[j]urisdictional discovery 'should be granted where pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary***'") (citation omitted; emphasis added); *see also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003) (holding that "[g]iven the [fact-specific] nature of [the personal jurisdiction] inquiry, it was premature to grant dismissal prior to allowing discovery on plaintiffs' insufficiently developed allegations regarding" the personal jurisdiction issue); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (a district court has "considerable procedural leeway" in deciding a motion to dismiss for lack of personal jurisdiction and "may permit discovery in aid of the motion"); *see also El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) (holding that plaintiff faced with motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest defendant defeat jurisdiction by withholding information on its contacts with the forum). Personal jurisdiction discovery should be granted here to test Defendants Citerne and Alix's contention that they have ***no*** contact with this District.

Thus, Plaintiffs' proposed jurisdictional discovery is appropriate in order to provide the Court with a more complete factual record upon which to properly resolve personal jurisdiction with respect to Defendants Citerne and Alix.

IV. THE PROPOSED JURISDICTIONAL DISCOVERY IS NARROWLY TAILORED AND REASONABLE

Finally, the proposed jurisdictional discovery is narrowly tailored and reasonable. Specifically, the proposed ***subject matter jurisdiction discovery*** consists of interrogatories, document requests, and a deposition notice pursuant to Fed. R. Civ. P. 30(b)(6) seeking information concerning, for instance, (i) SocGen's U.S. revenues, (ii) Defendants' statements made in, disseminated and/or broadcast to the United States, (iii) meetings attended by Defendants in the United States, and (iv) SocGen's valuations of subprime-related assets in the United States. *See*

Llorens Decl., Exs. A-C. This discovery seeks information regarding Defendants' U.S.-based conduct causing harm to foreign interests as well as the effects of Defendants' overseas conduct on U.S. investors.

Similarly, the proposed ***personal jurisdiction discovery*** consists of interrogatories and document requests concerning (i) trips to New York by Defendants Citerne and Alix, (ii) lawsuits in New York to which Citerne or Alix are a party, witness or claimant, (iii) income earned by Citerne and Alix through their activities conducted in New York, (iv) their investments, holdings or assets of any kind located in New York, (v) meetings attended by Citerne or Alix in New York, and (vi) statements made in New York by, or attributable to, Citerne or Alix. *See* Llorens Decl., Exs. D-E. The proposed personal jurisdiction discovery will help the Court determine whether an exercise of personal jurisdiction over Defendants Citerne and Alix is reasonable by eliciting information concerning their contacts in the United States and the effects in the United States caused by their fraudulent conduct overseas.

Such discovery is narrowly tailored and limited to the threshold issue of jurisdiction – an issue that Defendants raise but which cannot be resolved on the current record.

V. CONCLUSION

For each of the foregoing reasons, Plaintiffs' motion should be granted and the discovery stay lifted in order to allow for jurisdictional discovery, including Plaintiffs' proposed discovery, attached as Exs. A-E to the Llorens Declaration.

DATED: May 28, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 28, 2010.

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