UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' SUR-REPLY ADDRESSING THE IMPACT OF *MORRISON v. NATIONAL AUSTRALIA BANK* AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO TAKE PERSONAL JURISDICTION DISCOVERY

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Plaintiffs submit this sur-reply to address the effect of the Supreme Court's recent ruling in *Morrison v. Nat'l Austl. Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869 (2010), and reply in further support of plaintiffs' motion for leave to take personal jurisdiction discovery.

I. Introduction

The Supreme Court's decision in *Morrison* does not affect the §10(b) claims of plaintiffs Vermont Pension Investment Committee ("Vermont") and Boilermaker-Blacksmith National Pension Fund ("Boilermaker") – two U.S. pension funds – arising from their ***domestic purchases*** of Société Générale ("SocGen") ordinary shares during the class period.[1] In *Morrison*, the Court framed the question presented as "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action ***to foreign plaintiffs*** suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." 130 S. Ct. at 2875.[2] In *Morrison* the Court emphasized that "***all aspects*** of the ***purchases*** complained of . . . ***occurred outside the United States***." *Id.* at 2888. Under those facts, and based on a strict reading of the text of §10(b), the Court held that petitioners, "***all Australians***," who had purchased shares outside of the United States, were precluded from relying on §10(b). *Id*. at 2876, 2888.

Plaintiffs Vermont and Boilermaker, however, are U.S. pension funds that acquired SocGen ordinary shares in the United States, through domestic transactions. This distinction is critical, as

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[1] Following the July 12, 2010 status conference, the remaining plaintiffs include Lead Plaintiff Vermont, Boilermaker and United Food and Commercial Workers Union Local 880 ("UFCW"). At issue here is the availability of claims under §10(b) of the Securities Exchange Act of 1934 ("Exchange Act") to Vermont and Boilermaker. Defendants do not claim that *Morrison* precludes UFCW from bringing §10(b) claims on behalf of ADR purchasers. *See* Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint with Prejudice and Memorandum of Law in Opposition to Plaintiffs' Motion to Partially Lift the PSLRA Discovery Stay ("Defs.' Reply") at 1 n.2.

[2] Emphasis is added and citations are omitted throughout unless otherwise noted.

Morrison clearly contemplates §10(b) claims advanced by U.S. purchasers of foreign-listed securities. Indeed, both the text of §10(b), and the "transactional test" of *Morrison*, confirm that the U.S. pension funds' domestic purchases of SocGen ordinary shares are covered by §10(b). The statute by its terms applies to deception "in connection with the purchase or sale of any security registered on a national securities exchange ***or any security not so registered***." 15 U.S.C. §78j(b). *Morrison*'s transactional test, grounded in §10(b)'s text, provides that the statute applies both to "transactions in securities listed on domestic exchanges, ***and domestic transactions in other securities***." 130 S. Ct. at 2884.

Vermont's and Boilermaker's purchases in SocGen ordinary shares constitute such "domestic transactions," for these plaintiffs both are pension funds located in the United States that placed their buy orders through investment managers located in the United States, for deposit in domestic pension-fund accounts.

As for plaintiffs' motion for leave to take discovery related to personal jurisdiction, the Private Securities Litigation Reform Act of 1995 ("PSLRA") is no bar to such discovery. *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). Nor does the limited discovery which plaintiffs seek overreach as defendants suggest. Each of the proposed discovery requests is narrowly tailored and reasonable. Accordingly, because the Complaint makes a *prima facie* showing of jurisdiction (¶¶50, 57, 87-92, 405, 412)[3], the discovery plaintiffs seek is warranted.

Finally, with respect to defendants' motion to dismiss under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, plaintiffs certainly believe that the Complaint is sufficiently

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[3] Paragraph references ("¶__" or "¶¶__") are to the Second Amended and Consolidated Complaint for Violation of the Federal Securities Laws ("Complaint"), filed January 8, 2010.

detailed. Yet, if the Court finds any aspect of the Complaint infirm, plaintiffs respectfully request leave to amend to allege ***new facts*** that have come to light since the filing of the Complaint, as a result of the criminal trial of Jerome Kerviel which took place between June 8, 2010 and June 25, 2010, well after the filing of the Complaint on January 8, 2010. Plaintiffs attach hereto as Appendix A the facts they would rely on to amend the Complaint, if an amendment becomes necessary.[4]

II. The *Morrison* Decision Does Not Preclude Claims Based on Domestic Transactions

A. *Morrison* Does Not Affect the Claims of ADR Purchasers

Defendants concede that *Morrison* does not affect the claims of purchasers of SocGen American Depository Receipts ("ADRs"). *See* Defs.' Reply at 1 n.2 ("Defendants are not moving to dismiss claims by U.S. purchasers of [SocGen]'s sponsored over-the-counter American Depository Receipts . . . ."). Nor does there appear any argument to advance the contention that *Morrison* precludes application of §10(b) to claims by UFCW and other purchasers of SocGen ADRs, which trade in the United States on the over-the-counter market in New York under the symbol SCGLY. *See* ¶¶39, 41.

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[4] In addition, plaintiffs wish to bring to the Court's attention the recent ruling in *In re CIT Group Inc. Sec. Litig.*, No. 08 Civ. 6613 (BSJ), 2010 U.S. Dist. LEXIS 57467, at *8 (S.D.N.Y. June 10, 2010), in which the court held that defendants' statements that a company's lending standards were "'disciplined'" and "'conservative'" are actionable. *Id.* ("even as CIT was allegedly lowering lending standards, Defendants made written and oral statements indicating that CIT had 'disciplined lending standards' and was 'much more conservative' than other lenders").

B. *Morrison* Permits the Claims of U.S. Purchasers of SocGen Ordinary Shares to Proceed

1. U.S. Purchasers of SocGen Ordinary Shares Fall Within the Transactional Test Created in *Morrison*

Morrison's opening paragraph frames the question to be decided as "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action ***to foreign plaintiffs*** suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." *Morrison*, 130 S. Ct. at 2875. The Court emphasizes that, "***[a]s relevant here, petitioners***," are "***all Australians***," and that "***all aspects*** of the purchases complained of . . . ***occurred outside the United States***." *Id.* at 2876, 2888. The Court held that §10(b) did not apply to foreign petitioners' claims when grounded in their foreign purchases, suggesting the result would be different had the securities been purchased in the United States:

> Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, ***and the purchase or sale of any other security in the United States***. This case involves no securities listed on a domestic exchange, ***and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States***. Petitioners have therefore failed to state a claim on which relief can be granted.

Morrison, 130 S. Ct. at 2888.

Here, plaintiffs Vermont and Boilermaker both are U.S. pension funds that made their purchases of SocGen shares in the United States through U.S. investment managers. The Complaint specifies that Lead Plaintiff Vermont "is a State of Vermont Government entity that holds the combined investment assets of the State Teachers' Retirement System of Vermont, the Vermont State Employees' Retirement System and the Vermont Municipal Employees' Retirement System." ¶36. It did not leave the United States in order to purchase SocGen stock, but rather acquired the security by means of domestic contractual transactions. Boilermaker's American nationality may be

inferred from the fact that the Complaint identifies but a single "Foreign Plaintiff," the Avon Pension Fund (*see* ¶37), which has since dropped from the suit. Headquartered in Kansas, Boilermaker did not leave the United States to purchase SocGen stock, acquiring the security instead by means of domestic contractual transactions, through U.S. investment managers.[5]

Based on plain statutory text, as interpreted in *Morrison*, §10(b) applies to the domestic transactions entered by Vermont and Boilermaker to acquire SocGen ordinary shares. Section §10(b)'s text covers deception "in connection with the purchase or sale of any security registered on a national securities exchange ***or any security not so registered***," 15 U.S.C. §78j(b), if the purchase takes place in the United States. Indeed, *Morrison* holds that it is "only transactions in securities on domestic exchanges, ***and domestic transactions in other securities, to which § 10(b) applies***." 130 S. Ct. at 2884. "Those purchase-and-sale transactions are the objects of the statute's solicitude," and it is "parties or prospective parties to those transactions that the statute seeks to 'protec[t].'" *Id.*

SocGen ordinary shares are not listed in a "national securities exchange" within the Exchange Act's meaning.[6] Yet *Morrison* emphasizes that with respect to "securities ***not*** registered

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[5] Plaintiffs are prepared, if necessary, to amend the Complaint to add specific facts about these plaintiffs' domestic transactions.

[6] Section 6(a) of the Exchange Act (15 U.S.C. §78f(a)) provides for registration of a "national securities exchange," of which there currently are a total of 14: NYSE Amex LLC (formerly the American Stock Exchange); BATS Exchange, Inc.; NASDAQ OMX BX, Inc. (formerly the Boston Stock Exchange); C2 Options Exchange, Incorporated; Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; EDGA Exchange, Inc; EDGZ Exchange, Inc.; International Securities Exchange, LLC; The Nasdaq Stock Market LLC; National Stock Exchange, Inc,; New York Stock Exchange LLC; NYSE Arca, Inc.; NASDAQ OMX PHLX, Inc. (formerly Philadelphia Stock Exchange). *See* http://www.sec.gov/divisions/marketreg/mrexchanges.shtml. Thus, SocGen's listing on the Euronext Paris stock exchange does not qualify as a listing on a "national stock exchange" within the meaning of Exchange Act §§6 and 10(b), 15 U.S.C. §§78f and 78j(b). *See* 15 U.S.C. §78f(a); http://www.sec.gov/divisions/marketreg/mrexchanges.shtml (listing the 14 recognized "national securities exchange[s]"). *Morrison* does not suggest that the phrase

on domestic exchanges," such as SocGen ordinary shares, "the exclusive focus [is] on ***domestic*** purchases." 130 S. Ct. at 2885 (emphasis in original). Section 10(b) applies if this case involves any "domestic purchases" of SocGen ordinary shares. It clearly does.

Morrison's concept of "domestic transactions" or "domestic purchases" encompasses transactions in which United States investors purchase foreign securities in the United States, ***even if the securities happen to be listed on a foreign exchange***. That is why the Court deemed it critical in *Morrison*, which involved a security listed on foreign exchanges, that "***all aspects of the purchases*** complained of by those petitioners who still have live claims ***occurred outside the United States***." *Id.* at 2888. *Morrison* thus clearly contemplates and authorizes the prosecution of §10(b) claims, such as those advanced by Vermont and Boilermaker, as U.S. investors whose domestic purchases satisfy its "'transactional test.'"[7]

The purchase of SocGen ordinary shares by Vermont and by Boilermaker occurred in the United States. *Black's Law Dictionary* defines a "purchase" as "[t]he act or an instance of buying" (*Black's Law Dictionary* 1354 (9th ed. 2009)) and the Exchange Act itself specifies that "[t]he terms

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"other security" applies only to a domestic security. Had the Court wanted to limit the second clause of the transactional test to U.S. purchases and sales of U.S. securities, the Court was free to use the phrase in "other [domestic] securities." Instead, the Court's opinion repeatedly refers to "other securities" while specifically referring to "domestic transactions" and interchangeably, "purchase or sale . . . made in the United States." *Morrison*, 130 S. Ct. at 2884, 2886; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983) ("§ 10(b) makes it unlawful to use '***any*** manipulative or deceptive device or contrivance' in connection with the purchase or sale of ***any*** security") (emphasis in original and added).

[7] *See Morrison*, 130 S. Ct. at 2888. Justice Stevens' separate concurring opinion, to be sure, characterizes the majority's holding as potentially barring claims of "American investor[s]." *Id.* at 2895. But Justice Stevens concurred only in the result and not in the majority's analysis, from which he was actually dissenting. "'Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling.'" *Lee v. Kemna*, 534 U.S. 362, 387 (2002) (quoting *United States v. Travers*, 514 F.2d 1171, 1174 (2d. Cir. 1974)).

'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire" a security. 15 U.S.C. §78c(a)(13). The Second Circuit applying the statutory definition and popular understanding has stated that "[the] generally understood meaning of 'purchase' is to ***acquire something by one's own act or agreement for a price***." *Shaw v. Dreyfus*, 172 F.2d 140, 142 (2d Cir. 1949). Vermont and Boilermaker each did this ***in the United States***.

A buyer such as Vermont or Boilermaker purchases a security when (and where) it voluntarily enters a contract to acquire the security.[8] The act of placing a buy order fits within the statutory definition of "purchase," and the place where it was initiated is the location of the purchase. Thus, when §10(b) imposes liability for employing a manipulative or deceptive device or contrivance "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered" (15 U.S.C. §78j(b)), and the plaintiff's claim is grounded upon its ***purchase*** of the security ***in the United States***, the transaction is a "domestic" one under *Morrison*.

Neither Vermont nor Boilermaker traveled to France to acquire SocGen stock. Each entered contracts in the United States to acquire SocGen ordinary shares. Each acquired SocGen stock by means of domestic contractual transactions falling within the Exchange Act definition of "purchase," satisfying the second clause of *Morrison*'s transactional test.

The mere listing of a security on one (or more) foreign exchanges cannot mean that such U.S. purchases took place outside the United States. That SocGen stock may trade on one or more foreign exchanges does not change the domestic character of the U.S. plaintiffs' contracts to

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[8] *See In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 398 F. Supp. 2d 244, 260 (S.D.N.Y. 2005) (citing *Shaw* for the proposition that ***a purchase occurs when the buyer takes an action that involves decision-making***).

purchase SocGen stock. Under *Morrison*, a foreign listing cannot preempt application of United States law to domestic purchases of a security.

That Vermont and Boilermaker's purchases were indeed domestic transactions is further supported by common-law *lex loci* principles, with which Congress was presumably familiar when it enacted §10(b). *Morrison*'s statement that the focus of the Exchange Act is not upon the "place where the deception originated, ***but upon purchases and sales of securities in the United States***," reflects a *lex loci* approach focusing on the fact that an investor contracted to purchase in the United States, and ultimately suffered an investment injury here.[9] It may be entirely appropriate, then, to look to the common law.[10]

Because "purchase" is defined in the Exchange Act to include a contract to acquire securities, it is appropriate to consider *lex loci contractus* under which the law applicable to contracts ordinarily is the place where the contract was made, or is to be performed unless its terms evidence a contrary intent.[11] Here, the plaintiffs entered their contracts to acquire securities in the United States, and they intended for their transactions to be covered by U.S. law. Nothing in the record suggests they sought to come under foreign law. Their contracts to purchase SocGen ordinary shares were formed upon the initiation of their buy orders to purchase SocGen ordinary shares, which occurred in the

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[9] *See Morrison*, 130 S. Ct. at 2884. Under *lex loci contractus*, the substantive law of the state where the contract is made will apply. Under *lex loci delecti*, which relates to tort cases, the action is governed by the substantive law of the state where a tort was committed, or inflicts injury. In torts of a transitory nature or for fraud, the place of the wrong is the place where the last event occurred necessary to make an actor liable for the alleged tort, *i.e.*, where the injury is sustained.

[10] *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706 (2004) (Supreme Court looked to common law in existence at the time the Federal Tort Claims Act was passed – particularly *lex loci delicti* – to interpret where the statutory tort had occurred).

[11] *See, e.g.*, *Pritchard v. Norton*, 106 U.S. 124, 136 (1882); *Gen. Ceramics v. Firemen's Fund Ins. Cos.*, 66 F.3d 647, 652-53 (3d Cir. 1995).

United States.[12] The place of performance, with respect to the purchase of a security, is the place of ownership, to which any certificates would be delivered, as well as any dividends.

Because a §10(b) action bears a close relation to actions for fraud, the common-law doctrine regarding *lex loci delicto*, the "place of the wrong," also is relevant.[13] Restatement (First) of Conflict of Laws §379 (1934) (for tort actions, the "place of wrong" generally governs). Restatement (First) of Conflict of Laws §377 (1934), explains that "[w]hen a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made." *Id*., n.4. The Restatement demonstrates this principle with two examples that are particularly relevant here:

- "A, in state X, makes false misrepresentations by letter to B in Y as a result of which B sends certain chattels from Y to A, in X. A keeps the chattels. ***The place of the wrong is in state Y where B parted with the chattels***." *Id.*
- "A, in state X, owns shares in M company. B, in state Y, fraudulently persuades A not to sell the shares. The value of the shares fall. ***The place of the wrong is X***." *Id.*

Here, the wrong suffered was the economic injury to Vermont and Boilermaker, which occurred in the United States. Accordingly, applying settled *lex loci* principles, their claims are "domestic" not "foreign."[14]

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[12] *See Shaw*, 172 F.2d at 142.

[13] The Supreme Court has noted that the "common-law roots of the securities fraud action" under §10(b) may be found in "common-law tort actions for deceit and misrepresentation." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341, 344 (2005).

[14] In *N. Am. Philips Corp. v. Am. Vending Sales*, 35 F.3d 1576, 1579 (Fed. Cir. 1994), the court noted that "it is possible to define the situs of the . . . sale . . . as including the location of the seller and the buyer and perhaps the points along the shipment route in between," and citing the Supreme Court's aversion to applying "mechanical tests," the Federal Circuit concluded that, in connection with interstate sales of a product, the tort of patent infringement takes place at the location of the buyer.

This is different, of course, from the Second Circuit's old "conduct" and "effects" test, under which ***any*** conduct by a defendant, and ***any*** effects in the United States, might support claims of foreign investors who both acquired securities in foreign transactions and suffered injury entirely beyond U.S. borders. Where U.S. investors both enter contractual transactions in the United States to acquire foreign securities, and suffer an injury in the United States, *Morrison* mandates that they receive the protection of U.S. law. Vermont and Boilermaker are U.S. investors that purchased SocGen ordinary shares in the United States, and their purchases fit squarely within the transactional test established in *Morrison*.

2. The *Cornwell v. Credit Suisse* Decision Conflicts with *Morrison*

Lacking real support in *Morrison*, defendants turn to the recent district-court ruling in *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (VM), 2010 U.S. Dist. LEXIS 76543 (S.D.N.Y. July 27, 2010), which in fact conflicts with *Morrison*.

Cornwell correctly states that under *Morrison* "[t]he determinant of the first factor is the listing of the security in a domestic exchange, and that of the second factor is the occurrence of the purchase or sale within United States territory." *Id.* at *10. But the district court then incorrectly holds that merely listing a security on a foreign exchange precludes liability for domestic purchases of that security. *Id.* It concludes "***that § 10(b) would not apply to transactions involving*** (1) ***a purchase or sale, wherever it occurs, of securities listed only on a foreign exchange***, or (2) a purchase or sale of securities, foreign or domestic, which occurs outside the United States." *Id.* (emphasis added and in original).

Cornwell thereby contradicts *Morrison*'s interpretation of §10(b)'s text as potentially covering transactions in ***foreign*** securities ***not listed*** on a U.S. stock exchange. For *Morrison* holds that §10(b) applies not only to "transactions in securities listed on domestic exchanges," but also to

"***domestic transactions in other securities***." *Morrison*, 130 S. Ct. at 2884. Nothing in *Morrison* suggests that registration on another nation's securities exchange provides immunity to a suit involving a domestic transaction. Indeed, in *Morrison* itself the fact that National Australia Bank ordinary shares were listed on foreign exchanges, and not in the United States, was ***by itself*** insufficient to foreclose liability. Though the case was one that "involve[d] no securities listed on a domestic exchange," liability could ***still*** be based on a "domestic purchase" of the shares, and was foreclosed only because "***all aspects*** of the purchases complained of by those petitioners who still have live claims occurred outside the United States." *Morrison*, 130 S. Ct. at 2888.

Cornwell improperly displaces *Morrison*'s transactional test under which domestic purchases of foreign securities are covered by §10(b).

Had *Morrison* meant to exempt ***all*** U.S. purchases of stock registered on foreign exchanges, the Court would have said precisely that. *Morrison* clearly holds that domestic transactions in foreign securities may be actionable under §10(b). *Cornwell* holds the contrary, and should not be followed.

C. Alternatively, U.S. Purchasers of SocGen Ordinary Shares Should Be Permitted to Assert French Law Claims

If this Court decides that the §10(b) claims of U.S. purchasers such as Vermont and Boilermaker are no longer viable because their SocGen share purchases are insufficiently "domestic," then these plaintiffs should be permitted to assert French-law claims.

Like §10(b), French law provides remedies for securities fraud that do not require proof of individualized reliance. And raising claims under French law is appropriate at this juncture under Federal Rule of Civil Procedure 44.1, which only requires written notice of intention to raise an issue

of foreign law.[15] As such, if this Court dismisses the §10(b) claims of plaintiffs Vermont and Boilermaker, they intend to rely on French law which provides remedies for securities fraud.

The class has strong claims against SocGen and its former directors and officers under French tort and company law, based on allegations that SocGen – a French company acting through its French directors and officers – perpetrated a scheme to falsify its financial statements, which issued in the first instance from France, to drive up the price of SocGen securities. Under these circumstances, the application of French law by this Court is appropriate.[16]

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[15] *See* Fed. R. Civ. P. 44.1 ("A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing."); *see also* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §2443, at 334-35 (3d ed. 2008) ("The function of the notice is not to spell out the precise contents of foreign law but rather to inform the district court and the litigants that it is relevant to the lawsuit."); *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 585 (2d Cir. 2005) (holding that where party moved for summary judgment, but simultaneously pleaded the applicability of English, Swedish, Korean or Panamanian law and did not settle conclusively on one body of foreign law, notice was nevertheless sufficient under Rule 44.1); *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995) (holding notice proper under Rule 44.1 where party raised issue of foreign law's application in its summary-judgment motion), *aff'd*, 104 F.3d 352 (2d Cir. 1996).

[16] Lead Plaintiffs have been litigating this case on behalf of the class for over two years. The class's claims based on purchases of SocGen's ADRs will be proceeding in this Court. Under these circumstances, transferring the class's claims based on purchases of SocGen's ordinary shares to France would impede judicial efficiency and undermine the interests of justice. *See, e.g.*, *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303, 317 (S.D.N.Y. 2010) (balance of private and public interest factors did not weigh strongly in favor of dismissal, on forum *non conveniens* grounds, of transnational securities fraud claims brought by Norwegian investors against United States and European defendants, even though evidence and witnesses likely located in Europe); *Cromer Fin. Ltd. v. Berger*, 158 F. Supp. 2d 347, 355-57 (S.D.N.Y. 2001) (declining to dismiss, on *forum non conveniens* grounds, foreign investors' New York securities fraud action against Bermuda accounting firms, especially where New York court had already ruled on motions to dismiss and document discovery was complete, and noting that need to apply foreign law is an insufficient basis to dismiss on *forum non conveniens* grounds).

First, article L. 225-251 of the French Commercial Code imposes direct liability on the directors and CEO of a French company for faults committed in their management.[17] Second, the class may institute a liability action against SocGen and/or its directors based on the violation of the requirement of accuracy and honesty resulting from COB Regulation No. 98-07 (also Article 222 and Article 632-1 of the AMF) requiring them not to distort the market and to ensure that equal and accurate information is provided to investors.[18] Third, the class may institute an action under article 1382 of the French Civil Code (as translated), whereby "[a]ny action of man that causes injury to another obligates the person who committed the fault to make reparation for it."

Further, French civil and criminal law proscribe the publication and dissemination of inaccurate or misleading financial information concerning a publicly traded company. Article L. 242-6 of the Commercial Code; Article L. 465-2 of the Monetary and Financial Code; Article 632-1 of the General Regulations of the Financial Markets Authority. Notably, in bringing a claim for damages, the shareholders are not required to show actual reliance on the misleading information. Cour de Cassation (Supreme Court), Mar. 9, 2010, Nos. 08-21547, 08-21793 ("*Gaudriot*" matter). *See* Appendix B hereto (unofficial translation). In addition, a company is vicariously liable for the damage caused by its employees or agents in the exercise of their duties under Article 1384,

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[17] Article L. 225-251 (as translated) states: "The directors and the chief executive officer are liable, individually or jointly as the case may be in relation to the company or in relation to third parties, either with regard to breach of legislative or prescribed provisions applicable to corporations, or for violations of the by-laws, or for faults committed in their management."

[18] Pursuant to the terms of that Regulation (as translated), any listed company must provide "accurate, precise and fair" information (Article 2) to the public and it must inform said public of "any important fact, susceptible, if known, to have a significant impact upon the price of a financial instrument or on the status and the rights of the bearers of such financial instrument." Thus, "providing inaccurate, imprecise or misleading information represents, for any person, an infringement of proper public information" (Article 3).

paragraph 5 of the Civil Code. This liability is concurrent with that of the individual directors and officers at fault.

Finally, Congress itself framed the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to permit the litigation of such claims. SLUSA provides in Exchange Act §28(f)(1) that "[n]o covered class action based on the statutory or common ***law of any State*** or subdivision thereof" may be maintained by a private party alleging either "a misrepresentation or omission of a material fact in connection with the purchase or sale ***of a covered security***," or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale ***of a covered security***." 15 U.S.C. §78bb(f)(1). Because it is not listed on a national securities exchange, SocGen stock clearly is not a "covered security" within the statute's meaning. *See* 15 U.S.C. §78bb(f)(5)(E); 15 U.S.C. §77r(b). Moreover, because "[t]he term 'State' means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States," 15 U.S.C. §78c(a)(16), claims under the laws of France clearly are preserved.

III. Reply in Support of Motion to Partially Lift the PSLRA Discovery Stay

Defendants' assertion that the PSLRA somehow bars the jurisdictional discovery that plaintiffs seek is without merit. The case law is clear that, even in causes of action governed by the PSLRA, "[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.'" *Pension Comm.*, 2006 U.S. Dist. LEXIS 11617, at *27.

As the court explained in *In re Baan Co. Sec. Litig.*, 81 F. Supp. 2d 75 (D.D.C. 2000), "[t]here is no reason to read the [PSLRA] or its legislative history to abolish the case law permitting limited jurisdictional discovery and to create the very unfairness that case law prevents. To the

contrary, . . . limited jurisdictional discovery simultaneously satisfies the statute and the case law." *Id.* at 83-84 (lifting the PSLRA's discovery stay to allow plaintiff to take jurisdictional discovery); *accord In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 401 (S.D.N.Y. 2005) (permitting securities class action plaintiffs to take jurisdictional discovery in spite of PSLRA's discovery stay); *In re DaimlerChrysler AG Sec. Litig.*, 197 F. Supp. 2d 86, 94 (D. Del. 2002) (same). Thus, the PSLRA's discovery stay does not bar plaintiffs from taking the limited jurisdictional discovery that they seek here.

Defendants concede, as they must, that jurisdictional discovery is warranted where a party has made a *prima facie* showing of jurisdiction. *See* Defs.' Reply at 24 ("jurisdictional discovery is only warranted where a party has made a *prima facie* showing of jurisdiction"). However, defendants make a blanket assertion that plaintiffs have not made such a *prima facie* showing. In doing so, they completely ignore the Complaint's jurisdictional allegations as well as plaintiffs' discussion of these allegations in their opposition to defendants' motions to dismiss ("Plaintiffs' MTD Opp." at 37-39), including the following:

- Defendants Citerne and Alix, as co-CEOs of SocGen, were responsible for the creation of materially false and misleading statements that they disseminated in the United States (¶¶50, 57, 87-92);
- Defendant Citerne was a director of SocGen and a director of TCW, SocGen's asset management subsidiary with offices in New York, Los Angeles and Houston (¶¶55, 405, 412); and
- Defendants Citerne and Alix were primary participants in SocGen's contacts with the United States (¶¶87-92).

See John Wiley & Sons, Inc. v. Treeakarabenjakul, No. 09 Civ. 2108 (CM), 2009 U.S. Dist. LEXIS 52819, at *6-*7 (S.D.N.Y. June 18, 2009) ("only a *prima facie* showing is required before discovery" and "the pleadings are to be construed liberally for the benefit of the plaintiffs").

Moreover, the cases relied on by defendants are unavailing. For instance, *In re Rhodia S.A. Sec. Litig.*, 531 F. Supp. 2d 527, 539-42 (S.D.N.Y. 2007), is not instructive because here, unlike in *Rhodia*, the Complaint's personal jurisdiction allegations are based upon defendants' ***U.S. conduct and contacts***, and are not premised solely upon defendants' purported statuses as control persons.

Defendants' assertion that plaintiffs' discovery requests are somehow "overly broad" and constitute improper "merits discovery" is false. Defendants appear to take issue with ***only one*** of the discovery requests submitted by plaintiffs, which seeks information regarding "'SocGen's valuations of subprime-related assets in the United States.'" *See* Defs.' Reply at 24-25. However, this request is narrowly tailored and reasonable in that it only seeks information relating to defendants' ***conduct in and with the United States***, both of which are directly relevant to whether this Court has personal jurisdiction over the claims and parties in this case. Because defendants have raised no legitimate objection to plaintiffs' proposed jurisdictional discovery, and because plaintiffs' proposed discovery is reasonable and narrowly tailored to address the threshold issue of jurisdiction, plaintiffs' proposed jurisdictional discovery should be permitted to ensure that the Court's determinations of personal jurisdiction are made based on 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").

IV. Conclusion

For all the foregoing reasons, plaintiffs Vermont and Boilermaker should be allowed to proceed with their §10(b) claims based on their domestic purchases of SocGen ordinary shares.

Alternatively, they should be permitted to assert French-law claims. In addition, plaintiffs should be granted leave to conduct jurisdictional discovery with respect to defendants Citerne and Alix.

DATED: August 28, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2010, I authorized the electronic filing of 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 caused to be 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 August 23, 2010.

s/ Theodore J. Pintar
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