UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. FABRICE TOURRE, Defendant.	10 Civ. 3229 (BSJ)(MHD) ECF Case

SEC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TOURRE'S MOTION FOR RECONSIDERATION OF MOTION TO DISMISS AMENDED COMPLAINT

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Plaintiff U.S. Securities and Exchange Commission ("SEC") submits this memorandum of law in opposition to the motion of defendant Fabrice Tourre for reconsideration of the Court's Memorandum and Order dated June 10, 2011 ("Order") ruling on his motion to dismiss the Amended Complaint. For the reasons set forth below, Tourre's motion for reconsideration should be denied.

PRELIMINARY STATEMENT

In its June 10 Order, the Court ruled that the Amended Complaint stated an actionable "offer" of securities in the United States in violation of Section 17(a) of the Securities Act of 1933 (the "Securities Act") based on marketing efforts by Tourre and Goldman Sachs & Co. ("GS & Co.") in New York and directed to IKB Deutsche Industriebank AG ("IKB") and ABN AMRO Bank N.V. ("ABN"). Order at 39. The Court observed that the Amended Complaint alleges that "Tourre, acting in and from New York City, offered ABACUS notes to IKB and solicited ABN's participation in an ABACUS CDS via direct and indirect communications.

These communications included phone calls Tourre participated in from New York City and/or emails he sent from New York City to IKB and ABN regarding ABACUS." Id. (internal citations omitted). The Court held that these New York-based marketing efforts directed by Tourre and GS & Co. to IKB and ABN were actionable "offers" in violation of Section 17(a). Id. at 38-39. In so ruling, the Court rejected Tourre's argument that an "'offer,' even if made in the United States," is not actionable under Section 17(a) if "made to a foreign party." Id. at 38.

Tourre seeks to renew that same argument on this motion for reconsideration. He contends that, under Morrison v. National Austl. Bank Ltd., 130 S. Ct. 2869 (2010), a fraudulent "offer" of securities made from New York is not actionable under Section 17(a) unless made to "prospective parties to domestic transactions." Mem. at 1 (internal quotation marks and emphases omitted). According to Tourre, "offers" are not actionable under Section 17(a) if they are "'offers' to . . . enter into . . . foreign transactions" or result in "consummated foreign transactions." See id.

Tourre's motion for reconsideration should be rejected for the following reasons:

First, Tourre's argument is inconsistent with the plain language of Section 17(a), which makes the fraudulent "offer" of securities in the United States independently actionable regardless of whether there is a consummated transaction. Section 17(a) makes it unlawful for a person to engage in fraud "in the offer or sale of any securities or security-based swap agreement." 15 U.S.C. § 77q(a) (emphasis added). Tourre's argument also is inconsistent with the statutory definition of "offer" set forth in the Securities Act – defined to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." Id. § 77b(a)(3). This definition focuses on the location of the marketing activity, not the location of any contemplated or actual sale. Applying this definition, the Amended

Complaint plainly alleges the fraudulent "offer" of securities in the United States based on the Abacus 2007-AC1 marketing and solicitation efforts of Tourre and GS & Co. in New York.

Second, Tourre misreads Morrison as, in effect, removing the "offer" prong from Section 17(a) and changing the definition of "offer" under the Securities Act. Morrison did not hold that a federal securities law violation is only actionable if and where a sale occurs. Rather, Morrison held that the operative language of the statute at issue should determine where a violation occurred. Here, the actionable statutory violation at issue – the "offer" of securities – took place in the United States. In addition, Tourre's argument would lead to the absurd result that an actionable fraudulent offer of securities in New York would become inactionable if a sale to a foreign party were to be consummated.

Finally, Tourre's reconsideration motion is improper because it seeks to relitigate issues already presented to and decided by the Court.

STATEMENT OF FACTS

A. The Amended Complaint Alleges that Tourre and GS & Co. Engaged in the Unlawful Offer of Securities in the United States

The Amended Complaint alleges that Tourre made false and misleading statements and omissions in connection with a synthetic collateralized debt obligation known as Abacus 2007-AC1. Amended Complaint ¶ 1. Operating from GS & Co. headquarters in New York, Tourre and GS & Co. sent false and misleading Abacus 2007-AC1 marketing and offering materials to IKB and other potential investors. Id. ¶¶ 55-58, 66.

These false and misleading offering materials included the term sheet, flip book and offering memorandum for Abacus 2007-AC1 notes. Id. ¶¶ 37-44, 56-57. From New York, Tourre personally spoke with IKB to solicit the purchase of Abacus 2007-AC1 securities and maintained direct and indirect contact with IKB in an effort to close the deal. Id. ¶¶ 59-60. GS

& Co. and Tourre also made false and misleading statements to ABN concerning the Abacus 2007-AC1 transaction. Id. ¶¶ 67-70. For example, Tourre sent an email from New York to ABN soliciting its participation in a "supersenior swap trade" on the Abacus 2007-AC1 reference portfolio, which Tourre misleadingly represented had been "selected by ACA." Id. ¶ 69. In addition, GS & Co. sent ABN copies of the false and misleading term sheet, flip book and offering memorandum. Id. ¶ 70.

B. The Court's Memorandum and Order

On June 10, 2011, the Court issued a Memorandum and Order denying in part and granting in part Tourre's motion to dismiss the Amended Complaint. Dkt. 92. With regard to the SEC's claims against Tourre under Section 17(a), the Court held that, consistent with Morrison, an "offer" or "sale" of securities in the United States is actionable. Order at 36-37. The Court further observed that, because Section 17(a) refers both to an "offer or sale," "'actual sales [are] not essential' for a Section 17(a) claim." Id. at 37 (quoting SEC v. American Commodity Exch., Inc., 546 F.2d 1361, 1366 (10th Cir. 1976)).

Applying the term "offer" as defined in the Securities Act – including "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value," 15 U.S.C. § 77b(a)(3) – the Court observed that "the focus" of the definition of an "'offer,' under the Securities Act, is on the person or entity 'attempt[ing] or offer[ing] to dispose of' or 'solicit[ing] . . . an offer to buy' securities or security-based swaps." Id. at 38. After noting that the Amended Complaint alleges that "Tourre, acting in and from New York City, offered ABACUS notes to IKB and solicited ABN's participation in an ABACUS CDS via direct and indirect communications," id. at 39, the Court properly concluded that these marketing activities were "offers" as defined in the Securities Act. Id.

ARGUMENT

I. STANDARD OF REVIEW.

Tourre seeks reconsideration of the Court's ruling on the SEC's Section 17(a) claims relating to the "offer" of securities from New York to IKB and ABN. A motion for reconsideration pursuant to Local Rule 6.3 may be granted only when "the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); Aktiebolag v. Andrx Pharm., Inc., 695 F. Supp. 2d 21, 33 (S.D.N.Y. 2010) (same). "[A] motion to reconsider should not be granted where the moving party is solely attempting to relitigate an issue that already has been decided." Lesch v. United States, 372 Fed. App'x. 182, 183 (2d Cir. 2010).[1]

II. THE COURT CORRECTLY RULED THAT THE AMENDED COMPLAINT ALLEGES ACTIONABLE "OFFERS" OF SECURITIES IN NEW YORK IN VIOLATION OF SECTION 17(a).

The Court correctly ruled that the Amended Complaint alleges actionable "offers" of securities under Section 17(a) based on Tourre's fraudulent Abacus 2007-AC1 marketing activities undertaken in New York and directed to IKB and ABN. Order at 38-39. The Court

[1] Although this Court has discretion to reconsider its ruling if there is relevant case law and legislative history that it failed to consider, see Shrader, 70 F.3d at 257, reconsideration is not warranted where, as here, a party merely seeks to relitigate the motion to dismiss, Lesch, 372 Fed. App'x. at 183. Although Tourre claims that "the Court's ruling with respect to 'offers' to IKB and ABN was based solely on grounds and case law that neither party briefed or argued," Mem. at 2, the SEC argued from the outset that the Court should deny Tourre's motion based on the definition of "offer" in the Securities Act and the fraudulent Abacus 2007-AC1 marketing scheme undertaken by Tourre and GS & Co. in New York, see Dkt. No. 54 at 3, 11; Feb. 14, 2011 Tr. at 30 (SEC Counsel: "It's easy to unhinge . . . because you don't need a completed sale to violate Section 17(a) of the Securities Act."). Tourre's counsel also addressed this precise issue at oral argument on the motion to dismiss. See Feb. 14, 2011 Tr. at 26 ("The Court: Your position is, you can't have an untethered offer. Mr. Davies: Correct, your honor."). That the Court agreed with the SEC's position is not a development that warrants reconsideration.

properly analyzed both the statutory language of the Securities Act and the Morrison decision in concluding that the SEC's Amended Complaint alleges "offers" in the United States within the scope of Section 17(a). Accordingly, there is no proper basis for Tourre's motion for reconsideration.

A. The Text of Section 17(a).

The plain language of Section 17(a) makes clear that a fraudulent "offer" of securities, standing alone, gives rise to a claim under the statute. Section 17(a) is stated in the disjunctive, prohibiting fraud in the "offer or sale" of securities. 15 U.S.C. § 77q(a) (emphasis added). Thus, the unambiguous statutory language establishes that an "offer" is actionable apart from any completed sale. In accordance with this unambiguous statutory language, courts consistently have recognized that a fraudulent "offer" of securities is independently actionable under Section 17(a). See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 n.6 (1975) (explaining that Section 17(a) "provide[s] a remedy to those who neither purchase nor sell securities"); SEC v. Tambone, 550 F.3d 106, 122 (1st Cir. 2008) (holding that because Section 17(a), in contrast to Section 10(b), "applies to both sales and offers to sell securities, the SEC need not base its claim of liability on any completed transaction at all"). A "sale" of securities is not required to state a claim under Section 17(a). SEC v. Wolfson, 539 F.3d 1249, 1264 (10th Cir. 2008) (noting that "actual sales [are] not essential for liability to attach under § 17(a)" (internal quotation marks omitted)); SEC v. American Commodity Exch., Inc., 546 F.2d at 1366 (same).

Tourre contends that the term "offer" as used in Section 17(a) does not extend to "offers to enter into non-domestic transactions." Mem. at 3. The Securities Act, however, defines an "offer" as including "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(a)(3) (emphasis added). This

definition makes no mention of the recipient of the offer or the location of any resulting or intended transaction. To the contrary, as this Court observed, "the focus of 'offer,' under the Securities Act, is on the person or entity" making the offer. Order at 38. Thus, the Court correctly determined that, under Morrison, the relevant consideration is whether the person or entity making the offer did so from the United States. See id. at 38-39.

Tourre also contends that "offers that have been consummated by completed transactions" are not separately actionable. Mem. at 6. Tourre cites no authority for this proposition, which contradicts the plain language of Section 17(a). Tourre contends that the language of Section 17(a)(2) requiring that a defendant obtain money or property to violate that subsection demonstrates that an "offer" is not independently actionable. Mem. at 6. But Tourre's premise, that a person cannot obtain money or property except through a completed sale, is incorrect. See Wolfson, 539 F.3d at 1264 (holding that "obtaining money" element satisfied where defendant received a fee for preparing fraudulent offering documents).

Tourre also attempts to rely on Regulation S to support his contention that an "offer" is not actionable if "not made to a person in the United States." Mem. at 4 (quoting 17 C.F.R. § 230.902(h)). As this Court already has observed, however, Regulation S, by its express terms, is inapplicable to the antifraud provisions of the federal securities laws and "does not apply to [a] Section 17(a) claim." Order at 38 n.22. Nor does the decision in Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166 (S.D.N.Y. 2010), advance Tourre's position. Mem. at 3-4. That case did not involve allegations of an unlawful offer of securities under Section 17(a). It was limited solely to the meaning of "purchase" or "sale" under Section 10(b) and did not interpret either Section 17(a) or the definition of "offer" under the Securities Act. See Plumbers' Union, 753 F. Supp. 2d at 170, 177. In sum, the unambiguous language of

Section 17(a), the statutory definition of "offer" and applicable case law fully support the Court's conclusion that Section 17(a) prohibits the fraudulent "offer" of securities in the United States, regardless of where or to whom a U.S.-based offer is directed.

B. The *Morrison* Decision.

Tourre's motion for reconsideration hinges on his assertion that Morrison "limits the applicability of the federal securities laws to 'parties or prospective parties' to 'purchases or sales of securities in the United States.'" Mem. at 3 (quoting Morrison, 130 S. Ct. at 2884) (emphasis added). Tourre's argument both misreads and misapplies Morrison.

The Morrison decision did not establish a "purchase or sale" test universally applicable to all of "the federal securities laws." Rather, as this Court correctly observed, Morrison requires courts to consider the operative language of the relevant statute to determine where the securities law violation at issue took place. The language quoted by Tourre, taken in context, makes that clear:

> [W]e think 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. Section 10(b) does not punish deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to "regulate"; it is parties or prospective parties to those transactions that the statute seeks to "protec[t]". And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.

Id. at 2884 (internal citations omitted).

Thus, Morrison established that the actionable statutory violation – in that case, the fraudulent purchase or sale of securities under Section 10(b) – must occur in the United States as a matter of proper statutory construction. Since Section 17(a) applies to an "offer or sale" of

securities, 15 U.S.C. § 77q(a), applying the principles of Morrison, either an offer or a sale may occur in the United States in order to be actionable.

C. Legislative History.

Tourre's attempt to rely on the legislative history of the Securities Act for the proposition that "'offers' were not intended to be divisible from 'sales,'" Mem. at 5, fails for at least three reasons.

First, Section 17(a) on its face applies to an "offer" or a "sale." The Supreme Court has made clear that where statutory language is unambiguous, legislative history is not appropriately considered. See Ex parte Collett, 337 U.S. 55, 61 (1946) ("[T]here is no need to refer to the legislative history where the statutory language is clear."); see also Desiderio v. National Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 204 (2d Cir. 1999) ("Where the text of a statute is unambiguous, we need not look at the legislative history."). As discussed above, Section 17(a) establishes an independent actionable claim arising from the fraudulent "offer" of securities. Tourre cannot properly rewrite the statutory language with legislative history arguing that Congress did not "mean in [the] statute what it says." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) ("Our role is to interpret the language of the statute enacted by Congress . . . We have stated time and again that courts must presume a legislature says in a statute what it means and means in a statute what it says") (internal quotation marks omitted).

Second, even if considered, the legislative history provides no support for Tourre's claim that "offers" and "sales" are not independently actionable under Section 17(a). As originally enacted in 1933, Section 17(a) prohibited fraud in the "sale" of securities. Pub. L. No. 73-22, 48 Stat. 74, Title I, § 17(a) (May 27, 1933). "Sale," however, was defined as including a "contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a

security." Pub. L. No. 73-22, 48 Stat. 74, Title I, § 2(3) (May 27, 1933) (emphasis added). Thus, even as originally enacted, Section 17(a) was violated by fraud in an "attempt or offer to dispose of" securities regardless of any consummation of that attempt or offer.

Third, the legislative history surrounding the 1954 amendments to the Securities Act make clear that the purpose of the amendments was "to distinguish between 'offers' and 'sales.'" H.R. Rep. No. 83-1542 (1954), reprinted in 2 United States Code Congressional and Administrative News, 1954, at 2993 (1954). Thus, while Tourre claims that Congress did not intend in Section 17(a) for offers "to be divisible from sales," Mem. at 5, the legislative history states precisely the opposite. If anything, then, the legislative history confirms that a fraudulent "offer" is independently actionable under Section 17(a).

D. Policy Arguments.

Tourre also offers several policy arguments in support of his claim that fraudulent "offers" in the United States are not independently actionable under Section 17(a) when those offers are directed to non-U.S. purchasers. Tourre argues that this Court's ruling will lead to "the regulatory multiplicity that the Supreme Court has directed courts to avoid." Mem. at 4 (citing Plumbers' Union, 753 F. Supp. 2d at 177-78). Tourre's concern about "regulatory multiplicity," however, cannot supersede the plain language of Section 17(a), which makes the fraudulent offer of securities unlawful. In addition, the policy concerns expressed in Morrison arose in the context of ubiquitous private class action litigation, see 130 S. Ct. at 2875-76, and are not applicable in the context of a Section 17(a) claim, which can be brought only by the SEC and for which there is no private right of action.[2] Still further, the regulatory multiplicity

[2] Cf. United States v. First Nat. City Bank, 396 F.2d 897, 904 (2d Cir. 1968) ("[T]he protection of the foreign economic interests of the United States must be left to the appropriate

argument is of little force when the unlawful conduct at issue – here, the "offer" – occurred in the territory of the United States. See Restatement (Third) of Foreign Relations Law of the United States § 403(2)(a) (1987) (explaining that, where party is subject to conflicting laws of two nations, court should consider "the link of the activity to the territory of the regulating state").

Finally, Tourre repeats his baseless argument that the SEC unfairly has deprived him of access to foreign documents over which it purportedly has control. Mem. at 7. This Court and Magistrate Judge Dolinger repeatedly have rejected this argument, which continues to be meritless. See, e.g., Dkt. Nos. 84, 91. Contrary to Tourre's assertion, the SEC has produced all of the materials that IKB produced to the SEC. That includes over 7,000 pages of documents that IKB produced in response to the SEC's request for broad categories of materials. There is no basis for Tourre's suggestion that the SEC has selectively obtained or withheld foreign discovery materials.

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departments of our government, especially since the government is the moving litigant in these proceedings.").

CONCLUSION

For the reasons described above, Tourre's motion for reconsideration should be denied.

Dated: Washington, D.C.
July 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 11, 2011, I electronically filed the foregoing SEC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TOURRE'S MOTION FOR RECONSIDERATION using the CM/ECF system, which will send notification of such filing to the following email address:

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