UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

SEC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TOURRE'S MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

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UNITED STATES DISTRICT COURT
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SEC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TOURRE'S MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

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

PRELIMINARY STATEMENT

In its June 10 Order, the Court ruled that the Amended Complaint stated a claim for a fraudulent "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. 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 directed to a foreign party. Id. at 38.

Tourre now moves the Court for certification of an interlocutory appeal on the question whether a fraudulent "offer" of securities in the United States is actionable under Section 17(a) if that offer culminates in a foreign "sale" of securities. Mem. at 1. Certification of an interlocutory appeal is permissible only where resolution of a controlling question of law as to which there is substantial ground for difference of opinion would materially advance the termination of litigation. 28 U.S.C. § 1292(b). Applying this rigorous standard, Tourre's motion for certification should be rejected for the following reasons:

First, certification of an interlocutory appeal under 28 U.S.C. § 1292(b) is highly disfavored and a rare exception to the final judgment rule. Accordingly, the Second Circuit repeatedly has held that certification should be strictly limited. Tourre has not shown that this is the rare case warranting a departure from the general rule disfavoring piecemeal appeals.

Second, there is no substantial ground for difference of opinion on the question for which Tourre seeks certification. Although Tourre expresses vehement disagreement with the Court's ruling, he cites no legal authority that supports his view. Tourre's argument is premised primarily on a mischaracterization of Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010), as holding that a federal securities law claim under any governing statute is actionable only if a sale of securities occurred in the United States. In fact, Morrison directs a court to look to the operative language of the relevant statute. Section 17(a) prohibits not only the fraudulent "sale" but also the fraudulent "offer" of securities, and the Securities Act expressly defines "offer" broadly to include "every attempt or offer to dispose of, or solicitation of an offer to buy" a security. The Court's decision is firmly grounded in the plain language of Section 17(a), precedents interpreting that provision, the statutory definition of an "offer," the relevant legislative history and the logic of the Morrison decision.

Third, certification of Tourre's proposed question for an interlocutory appeal would not materially advance this litigation. Instead, it would further delay this action, which already has been delayed by Tourre's multiple applications to this Court and Magistrate Judge Dolinger, including several requests for stays or delays of discovery, objections to rulings of the Magistrate Judge, and reconsideration requests. Although Tourre contends that his appeal "would narrow discovery, including problematic foreign discovery," Mem. at 2, that only would be accomplished if discovery were stayed pending appeal. It is hard to see how a stay of discovery near the end of its completion would materially ***advance*** the litigation.

Finally, the proposed question for which Tourre seeks appellate certification highlights the danger and inefficiency of piecemeal interlocutory appeals. Tourre's proposed question assumes that the "sale" of securities at issue here occurred outside the United States. But as the Court is aware, the SEC has contested that point. Certification of Tourre's proposed question for appeal at this point would artificially limit the appellate issue to one he prefers, and that issue could prove moot were the Second Circuit later to rule that the "sale" of securities here by an affiliated agent of GS & Co. was in fact domestic. In order to ensure that these interrelated questions are properly considered in a single appeal, Tourre's motion for a piecemeal interlocutory appeal should be denied.

BACKGROUND

A. The Court's June 10th 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. SEC v. Goldman Sachs & Co., No. 10-cv-3229, 2011 WL 2305988 (S.D.N.Y. June 10, 2011).

In that decision, the Court first held that the Amended Complaint failed to state a claim under Section 17(a)[1] as to the fraudulent "sale" of securities to IKB and ABN. Order at 36-37. The SEC had argued that the sale of securities by an agent of GS & Co., the closing of the Abacus 2007-AC1 transaction in New York, combined with other facts and circumstances, rendered the "sales" domestic for purposes of Morrison. Docket No. 54, at 19-20. The Court rejected that argument. Order at 23-24.

The Court further held that, consistent with Morrison, the SEC had stated a claim under Section 17(a) based on the fraudulent "offer" of securities in the United States. Order at 36-37. The Court 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. Am. Commodity Exch., Inc., 546 F.2d 1361, 1366 (10th Cir. 1976)). Applying the term "offer" as defined in Section 2 of the Securities Act, the Court observed that "the focus" of the definition "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." Order at 38 (quoting 15 U.S.C. § 77b(a)(3)). 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 involved the "offer" of securities in the United States as defined in the Securities Act. Id.

B. Tourre's Motion for Reconsideration

Tourre thereafter filed a motion for reconsideration of the Court's June 10 Order, arguing that "offers" are not actionable under Section 17(a) if they are "'offers' to . . . enter into . . . foreign transactions" or result in "consummated foreign transactions." See Docket No. 96, at 1.

[1] The Commission also asserted claims for the fraudulent "sale" of securities in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

Tourre argued that the Court's decision was "inconsistent with Morrison, and with the language and legislative history of the Securities Act." Id. at 2. In an Order dated August 22, 2011, the Court denied Tourre's motion for reconsideration. Docket No. 101. As the Court explained, Tourre "'point[ed]' to' no 'controlling decisions or data' that 'alter the conclusion reached by the court.'" Id. at 1 (quoting Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)). Tourre subsequently moved the Court to certify for interlocutory appeal the question whether a fraudulent domestic "offer" of securities is actionable under Section 17(a) if it culminates in a foreign "sale" of securities. Mem. at 1.

ARGUMENT

For the reasons discussed below, Tourre's motion should be denied. Under settled law, certification of an interlocutory appeal is highly disfavored. Tourre cannot demonstrate that this case satisfies the stringent statutory requirements for departing from the general rule that appeals are permissible only from final judgments.

I. CERTIFICATION UNDER SECTION 1292(b) IS DISFAVORED, EXCEPTIONAL AND RARE.

The "denial of a motion to dismiss is ordinarily considered non-final, and therefore not immediately appealable." Hill v. City of New York, 45 F.3d 653, 659 (2d Cir. 1995). An order certifying an interlocutory appeal from an order not otherwise appealable may be entered only if the district court is "of the opinion" that the order from which a party seeks an appeal: (1) "involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The standard for Section 1292(b) certification of such a non-final order is extremely high. The Second Circuit has held repeatedly that "use of this certification procedure should be strictly

limited because only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." In re Flor, 79 F.3d 281, 284 (2d Cir. 1996). In other words, Section 1292(b) "is a rare exception to the final judgment rule that generally prohibits piecemeal appeals." Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996). The Court of Appeals has cautioned that "the power [to grant an interlocutory appeal] must be strictly limited to the precise conditions stated in the law." Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 921 F.2d 21, 25 (2d Cir. 1990); see also Westwood Pharm., Inc. v. National Fuel Gas Distribution Corp., 964 F.2d 85, 89 (2d Cir. 1992) ("we urge the district courts to exercise great care in making a § 1292(b) certification").

II. THERE IS NO SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

As noted above, the party seeking certification of an interlocutory appeal must show a "substantial" ground for difference of opinion regarding a controlling legal question. 28 U.S.C. § 1292(b). To determine whether the issue for appeal is one on which there is a substantial ground for dispute, a district court must analyze the strength of the arguments in opposition to the challenged ruling. In re Flor, 79 F.3d at 284 (explaining that "[i]t is the duty of the district judge . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute" (internal quotation marks omitted)). An interlocutory appeal is not warranted simply because a case presents a question of first impression. See id. (holding that "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion").

Here, Tourre's arguments in opposition to the Court's ruling are not strong. In its June 10 Order, the Court determined that the Amended Complaint alleges "offers" of securities in violation of Section 17(a) based on fraudulent Abacus 2007-AC1 marketing activities undertaken in New York and directed to IKB and ABN. Order at 38-39. That decision is well-grounded in the clear language of the statute, which expressly extends to the "offer or sale" of securities. 15 U.S.C. § 77q(a). The Court properly analyzed both the statutory language of the Securities Act and the Morrison decision in holding that the SEC's Amended Complaint alleges "offers" in the United States within the scope of Section 17(a). Order at 37-39. Indeed, the Ninth Circuit recently applied similar reasoning in rejecting a Morrison challenge to a Section 17(a) charge based on a domestic "offer" of securities. See United States v. Sumeru, No. 09-50187, 2011 WL 3915506, at *2 (9th Cir. Sept. 7, 2011) (unpub.). Accordingly, there is no "substantial" basis for a difference of opinion on the question Tourre proposes.

None of the contrary arguments made by Tourre provides a substantial ground for difference of opinion.

First, Tourre argues that the Court's Order is inconsistent with the Supreme Court's decision in Morrison, which he claims "made clear that the federal securities laws apply only to protect 'parties or prospective parties,' *i.e.*, purchasers and offerees, to domestic securities transactions.'" Mem. at 5 (emphasis in original). As explained in the SEC's opposition to Tourre's motion for reconsideration, the Morrison decision did not establish a purchase or sale test universally applicable to all of "the federal securities laws." Docket No. 97, at 8. Rather, the Morrison Court looked to the operative language of the statute at issue – in that case, Section 10(b) – to determine where that particular securities law violation took place. See 130 S. Ct. at 2884. Because Section 10(b) regulates the "purchase or sale" of securities, the Morrison court

looked to the location of the purchases and sales at issue. See id. at 2885. Applying the same reasoning here, this Court, in considering a claim under Section 17(a), looked to the operative statutory language – which speaks of the "offer or sale" of securities – and evaluated whether either an "offer" or "sale" occurred in the United States. Order at 37. There is no room for a substantial difference of opinion as to the appropriateness of this Court's application of Morrison to Section 17(a).

Second, Tourre contends that the definition of "offer" in the Securities Act does not support the Court's focus on the location of the offeror. Mem. at 5. Section 2 of the Securities Act 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). "Attempts," "offers," and "solicitations" are activities in which only the offeror can engage, and thus the Court correctly observed that "the focus of 'offer,' under the Securities Act, is on the person or entity" making the offer.[2] Order at 38. There is simply no mention in Section 2 of any activity of the offeree that would warrant, as Tourre urges, looking to the location of the offeree as controlling the location of the offer.[3]

Third, Tourre argues that the Court's ruling will "create the regulatory multiplicity that Morrison specifically directs the courts to avoid." Mem. at 6 (citing Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010)).

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[2] Tourre's argument that the definition of "offer" in the Securities Act is "unhelpful," Mem. at 5, misinterprets SEC v. National Securities, Inc., 393 U.S. 453 (1969), which was limited to the terms "purchase" and "sale." Id. at 466. As for the statutory definition of "offer," as this Court observed, the definition in the Securities Act "leaves no doubt" as to its focus. Order at 38.

[3] While Tourre once again cites Regulation S, Mem. at 5-6, this Court repeatedly and correctly has ruled that Regulation S – which, by its express terms, is inapplicable to the antifraud provisions of the federal securities laws and thus "does not apply to [a] Section 17(a) claim," Order at 38 n.22 – is simply irrelevant to the analysis here.

Tourre's argument concerning "regulatory multiplicity," however, cannot supersede the plain language of Section 17(a), which makes the fraudulent offer of securities unlawful. In addition, the regulatory multiplicity concerns raised in both Plumbers Union, 753 F. Supp. 2d at 177, and Morrison, 130 S. Ct. at 2885-86, were raised in the context of securities traded on a foreign exchange, a situation not presented here. See In re Optimal U.S. Litig., -- F. Supp. 2d --, No. 10 Civ. 4095, 2011 WL 1676067 at *11 (S.D.N.Y. May 2, 2011) ("[T]he Morrison court seemed most concerned with eliminating 'interference with foreign regulation' – a concern that is somewhat lessened in the context of transactions in securities not traded on foreign exchanges." (quoting Morrison, 130 S. Ct. at 2886)). Still further, the regulatory multiplicity argument is of little force when the unlawful conduct at issue – here, the "offer" – occurs 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").

Fourth, Tourre contends that "the Court's bifurcation of completed transactions into separately-actionable 'offer' and 'sale' components is not supported by any decision in the 78-year history of the Securities Act." Mem. at 6. However, 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"); 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. Am. Commodity Exch., Inc., 546 F.2d at 1366 (same).[4] Tourre cites no case calling into question the notion that the "offer" and "sale" of securities are separately actionable under Section 17(a). And, as noted above, the Ninth Circuit recently recognized that, consistent with Morrison, an "offer" in violation of Section 17(a) is independently actionable. See Sumeru, 2011 WL 3915506, at *2.

Fifth, Tourre also is incorrect that the Court's order "is inconsistent with the legislative history of the statute." Mem. at 6. The legislative history surrounding the 1954 amendments to the Securities Act makes clear that the purpose of those 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 never intended to create two separately-actionable claims under Section 17," Mem. at 6, the legislative history confirms that a fraudulent "offer" is independently actionable under Section 17(a).

In sum, Tourre's accusation that the Court's order "engaged in the kind of judicial lawmaking that has plagued the securities laws and that the Supreme Court disapproved in Morrison," Mem. at 6, is plainly wrong. Section 17(a) on its face applies to an "offer" or a "sale" of securities, and the statutory definition of an "offer" indisputably covers the domestic activities at issue here. The Court's order, which is grounded in the plain language of Section 17(a) and Section 2 of the Securities Act, is the antithesis of "judicial lawmaking," and Tourre's unsupported assertion that the decision is not loyal to the applicable statutes should be rejected.

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[4] Cf. Pinter v. Dahl, 486 U.S. 622, 643 (1988) (explaining that "the Court has made clear, in the context of interpreting § 17(a) of the Securities Act, that transactions other than traditional sales of securities are within the scope of § 2(3)" (internal citation omitted)).

III. AN INTERLOCUTORY APPEAL WILL NOT MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION.

Equally unavailing is Tourre's argument that an interlocutory appeal would, as Section 1292(b) requires, materially advance the ultimate termination of this litigation.

First, it bears noting that this action already has been delayed by Tourre's several requests for a stay or delay of discovery, multiple requests for review of rulings of the Magistrate Judge, and multiple reconsideration requests. See, e.g., 9/30/10 letter from Pamela Chepiga to Magistrate Judge Dolinger (requesting that the Magistrate Judge impose a stay of discovery pending resolution of defendant's motion for judgment on the pleadings); 11/2/10 letter from Pamela Chepiga to Magistrate Judge Dolinger (requesting that the Magistrate Judge vacate the discovery schedule); Docket No. 62 (requesting that the Magistrate Judge stay depositions pending resolution of third-party document discovery issues and Tourre's motion to dismiss the Amended Complaint.); Docket No. 58 (objecting to the Magistrate Judge's discovery ruling.). Tourre's motion for certification of an interlocutory appeal is another groundless attempt by Tourre to delay the proceedings.

Second, an interlocutory appeal would not effectively limit the scope of discovery, as Tourre contends. Mem. at 8. Discovery in this case is nearly completed. Domestic fact discovery ended on May 31, 2011, and the deadline for the completion of foreign discovery is November 18. Logistics presently are being arranged for the relatively modest number of foreign depositions expected to take place. Thus, foreign discovery will be completed before the Second Circuit is likely to rule on the question that Tourre proposes to raise on appeal.

Although Tourre does not state as much, his motion for certification of an interlocutory appeal will, if granted, almost certainly be followed by a motion for a stay of discovery pending appeal. See 28 U.S.C. § 1292(b) (providing that an interlocutory appeal "shall not stay

proceedings in the district court" unless otherwise so ordered). Indeed, a primary reason Tourre advances for an interlocutory appeal is to "narrow" foreign discovery. Mem at 2; see also id. at 8. Of course, the only way in which foreign discovery could be "narrowed" at this late date would be through a stay of discovery. Conveniently, Tourre does not expressly request a stay in the instant motion, perhaps recognizing that a stay would be inconsistent with his claim that an interlocutory appeal would materially ***advance*** this litigation.

Third, reversal of the Court's Order would not result in dismissal of this action. Regardless of how any interlocutory appeal might be resolved with regard to the SEC's Section 17(a) claim relating to the IKB and ABN transactions, the Court also held that the Amended Complaint sufficiently alleges Tourre's violations of Section 17(a) as well as Section 10(b) and Rule 10b-5 thereunder with respect to the offer or sale of securities to ACA. Those claims will proceed regardless of the outcome of an interlocutory appeal.

Fourth, an interlocutory appeal of this matter would be an inefficient manner of resolving the Morrison issues presented by this case. The resolution of the question that Tourre proposes for certification depends on an assumption that the "sale" of securities made by an affiliate of GS & Co. to IKB and ABN were foreign. See Mem. at 1 (proposing the question whether the Securities Act regulates offers "preparatory to a consummated foreign securities transaction"). But whether those "sales" were foreign is an issue the SEC has contested. The Court ruled that the Amended Complaint did not allege the "sale" of securities to IKB and ABN in the United States despite the involvement of an agent of U.S.-based GS & Co. and the closing of the Abacus 2007-AC1 transaction in New York. Order at 23-24, 36-37. The Court's decision in this regard was based largely on the district court's holding in Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 732 F. Supp. 2d 1345 (S.D. Fla. 2010), that a domestic closing did

not render a "sale" of securities domestic. Id. The Eleventh Circuit, however, has since reversed that decision, holding that a domestic closing is a sufficient basis on which to state a claim for a domestic "sale" of securities. Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307, 1310 (11th Cir. 2011).[5] Given the reversal of the district court's Quail Cruises decision, the assumption underlying Tourre's proposed appellate question – namely, that the "sales" of securities here were foreign – is itself open to challenge in a later appeal by the SEC. By requesting certification at this stage of only the "offer" question, Tourre is artificially truncating related issues that may ultimately be presented to the Second Circuit. A clearer example of why "piecemeal appeals" are disfavored could hardly be imagined. See Koehler, 101 F.3d at 865 (noting that the final judgment rule "generally prohibits piecemeal appeals").

Fifth, Tourre's claim that resolution of his appeal would have "wider precedential value" is without merit. Mem. at 9. As an initial matter, Tourre's argument that the decision has "wider" significance is undermined by the relatively few cases either party has cited involving Section 17(a) claims based only on the "offer" of securities. Further, the SEC (and the Justice Department) alone can bring actions under Section 17(a). See 15 U.S.C. §§ 77t(b), 77x; Finkel v. Stratton Corp., 962 F.2d 169, 174 (2d Cir. 1992) (holding that there is no implied private right of action under Section 17(a)). Still further, the question Tourre proposes is one of diminishing

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[5] See also Pinter v. Dahl, 486 U.S. at 644 (explaining that a "sale" is defined "in the sense of transferring title for value"). As the SEC argued in opposing Tourre's motion to dismiss, the securities sold to and paid for by GS & Co. at the New York closing were an essential component of the fraud alleged in the Amended Complaint and are therefore sufficient to support Section 17(a) or Section 10(b) claims. See Romano v. Kazacos, 609 F.3d 512, 521-23 (2d Cir. 2010) (holding that "string of events that were all intertwined" satisfied "in connection with" requirement of Section 10(b)); see also Merrill Lynch, Pierce, Fenner & Smith v. Dabit, 547 U.S. 71, 85 (2006) ("Under our precedents, it is enough that the fraud alleged 'coincide' with a securities transaction – whether by the plaintiff or by someone else"); SEC v. Zandford, 535 U.S. 813, 820 (2002) ("in connection with" should be construed "flexibly" to achieve remedial purposes of statute).

importance because the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929P (2010), repudiated Morrison and restored the conduct and effects test for government actions. 15 U.S.C. § 78aa(b). As a result, the question whether a fraudulent "offer" of securities made in the United States is actionable under Section 17(a) even though the "sale" may take place in a foreign country will be, practically speaking, a moot issue for all securities transactions post-dating the Dodd-Frank Act.

Tourre contends that a Second Circuit ruling on his proposed question could nonetheless be of precedential significance to claims brought under Section 12 of the Securities Act. Mem. at 10. Section 12, however, is phrased differently than Section 17(a) in a material respect. The Supreme Court observed in Pinter v. Dahl, 486 U.S. 622 (1988), that the express language of Section 12 requires not only that a defendant fraudulently "offer or sell" a security, but also that a plaintiff have "purchased" the security. Id. at 643. The Supreme Court noted that "the purchase requirement clearly confines § 12 liability to those situations in which a sale has taken place." Id. at 644. The statutory language of Section 17(a), by contrast, contains no such "purchase" requirement. Therefore, any appellate holding in this case would have little impact on Section 12 claims.

CONCLUSION

For the reasons described above, Tourre's motion for certification of an interlocutory appeal should be denied.

Dated: Washington, D.C.
September 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 12, 2011, I electronically filed the foregoing SEC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TOURRE'S MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL using the CM/ECF system, which will send notification of such filing to the following email address:

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