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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: CHC GROUP LTD., *et al.* Debtors,	**Chapter 11** **Case No. 16-31854(BJH)** **(Jointly Administered)**
ECN CAPITAL (AVIATION) CORP., Plaintiff, v. AIRBUS HELICOPTER (SAS) Defendant	**Adv. No. 16-03151-bjh** **Plaintiff's Opposition To Defendant's Motion for Continuance of Trial and <u>Stay of Deadlines</u>**

Plaintiff ECN Capital (Aviation) Corp. (f/k/a Element Capital Corp.) ("ECN Capital"), by its undersigned attorneys, files this Omnibus Memorandum of Law in Opposition to (1) Defendant Airbus Helicopters S.A.S.'s ("Airbus") Motion for Continuance of Trial and Stay of Deadlines ("Motion for Stay") and (2) Airbus's First Supplement to Motion for Continuance of Trial and Stay of Deadlines ("Supplemental Motion for Stay"), and respectfully would show the Court as follows:

PRELIMINARY STATEMENT

The schedule in this adversary proceeding currently is governed by the Alternative Scheduling Order, which calls for trial on ECN Capital's claims against Airbus to begin in April 2017. The parties have agreed in principle to a postponement of certain dates in Alternative Scheduling Order, but the parties have not yet reached agreement on alternative dates for the deadlines in the Alternative Scheduling Order. ECN Capital has expressed to Airbus and to the Court its desire to proceed expeditiously on a timeline for trial in September 2017, which would be seven months after the Court hears argument on the jurisdictional issues raised in Airbus's Motion to Dismiss. Airbus, on the other hand, has stated its intent to drag out the schedule through the end of 2018.

While the parties continue to negotiate a schedule, Airbus seeks to grind this case nearly to a halt by unnecessarily staying the trial date and all deadlines in this case on the sole ground that Airbus has filed a motion to dismiss raising arguments regarding jurisdictional issues. That is not a legitimate basis for staying all proceedings in this matter, especially considering that the jurisdictional issues are intertwined with the merits of ECN Capital's claims. Plaintiff thus opposes Airbus's request that all deadlines in the case be stayed indefinitely.

Further, although Airbus agrees to provide to ECN Capital discovery that Airbus deems to be "related to the jurisdictional issues raised" in Airbus's Motion to Dismiss, Airbus attempts to impermissibly limit such discovery by seeking to quash the deposition notices of witnesses with relevant knowledge of those jurisdictional issues. ECN Capital opposes Airbus's request that discovery in this case be limited to what Airbus unilaterally determines to be jurisdictional evidence, as distinct from merits evidence. To the extent that the Court entertains Airbus's request for a limitation of discovery at this stage in the case, ECN Capital specifically opposes Airbus's attempt to prevent ECN Capital from obtaining discovery relevant to jurisdictional issues.

FACTUAL BACKGROUND

ECN Capital filed the Complaint in this adversary proceeding on November 17, 2016. [Dkt. No. 1]. On November 18, 2016, this Court issued the Order Regarding Adversary Proceedings Trial Setting (the "Order") and Alternative Scheduling Order. [Dkt. No. 4]. The Order set trial in the above-referenced adversary proceeding for the week of April 10, 2017. *See id.* The Order further required that initial disclosures pursuant to Federal Bankruptcy Rule 7026(a) be made by January 17, 2017. *See id.* at pt. II § 1.

The Order allowed the parties to submit a proposed scheduling order, but stated that "[i]f the parties do not submit a proposed scheduling order or do not schedule a status conference with the Court to discuss the provisions and deadlines of a scheduling order within forty-five days of the filing of this adversary proceeding," then they "are deemed to have consented to the terms of the Alternative Scheduling Order." ([Dkt. No. 4] at pt. II § 3.) The parties did not submit a proposed scheduling order or schedule a status conference with the Court

by January 3, 2017.[1] The Alternative Scheduling Order thus went into effect, by consent of the parties, on January 3, 2017. The Alternative Scheduling Order requires discovery to be completed by February 14, 2017. ([Dkt. No. 4] at pt. III § 1.)

On December 29, 2016, pursuant to Rules 7026 and 7034 of the Federal Rules of Bankruptcy Procedure, ECN Capital served its First Requests for Production of Documents ("Document Requests") on Airbus. Pursuant to the Order, ECN Capital served its initial disclosures on Airbus on January 17, 2017. [Dkt. No. 4, 54]. Airbus served initial disclosures to ECN Capital on the same date, but Airbus unilaterally chose to limit its disclosures only to "the jurisdiction issues before the Court."

On January 20, 2017, Airbus filed the Motion for Stay. [Dkt. No. 56]. Airbus requested in the Motion for Stay that all deadlines in the Alternative Scheduling Order be stayed indefinitely. On January 23, 2017, pursuant to Rules 7030 and 9016 of the Federal Rules of Bankruptcy Procedure and Rules 30(b)(6) and 45 of the Federal Rules of Civil Procedure, ECN Capital served Airbus with notices of deposition for (1) Airbus employee Michel Gouraud, (2) Airbus representative Kevin Cabaniss, (3) a corporate representative of Airbus Helicopters (SAS) pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, and (4) Airbus Helicopters, Inc. employee Jeff Trang. On January 24, 2017, Airbus filed the Supplemental Motion for Stay. [Dkt. No. 60]. In its Supplemental Motion for Stay, Airbus seeks to quash the deposition notices of Kevin Cabaniss and Jeff Trang, and to limit the depositions of Michel Gouraud and Airbus Helicopters (SAS) "solely to the threshold subject matter and personal jurisdictional issues that are presently before the Court." ([Dkt. No. 60] at § 6.)

[1] Forty-five days from the filing of the adversary proceeding was a Sunday, January 1, 2017, and Monday, January 2, 2017 was a federal holiday. Thus, the deadline for filing a proposed scheduling order or scheduling a status conference with the Court was Tuesday, January 3, 2017. *See* Fed. R. Bankr. P. 9006 (time periods in any court order should be computed to "run until the end of the next day that is not a Saturday, Sunday, or legal holiday").

ARGUMENT

I. The Court Should Not Stay Indefinitely All Deadlines in the Alternative Scheduling Order

As described above, the parties had the option to file a proposed scheduling order with the Court by Tuesday, January 3, 2017, or to consent to the terms of the Alternative Scheduling Order. ([Dkt. No. 4] at pt. II § 3.) The parties did not submit a proposed scheduling order with the Court by Tuesday, January 3, 2017, and thus the Alternative Scheduling Order went into effect on that date, by consent of the parties.

ECN Capital does not oppose an adjournment of some deadlines in the Alternative Scheduling Order, and is continuing to negotiate with Airbus regarding a proposed revised schedule for discovery, pre-trial deadlines, and a trial date in this adversary proceeding. In correspondence with the Court, on which counsel for Airbus was copied, counsel for ECN Capital expressed ECN Capital's intention to proceed in this case in a time frame that would have the parties ready for trial in September 2017. In the same correspondence, counsel for Airbus stated its position that trial should not proceed until the end of 2018—more than 18 months after the Court will have heard argument on Airbus's Motion to Dismiss.

As the parties continue to negotiate an appropriate schedule in this case, Airbus seeks to stay all deadlines in the Alternative Scheduling Order. Airbus provides no authority for the overbroad and unnecessary relief it seeks, and its request therefore should be denied.

II. The Court Should Allow Discovery To Progress, Since Jurisdictional Issues Are Intertwined with the Merits of this Case and other Actions Pending Against Airbus

Airbus also requests that ECN Capital be prohibited from pursuing discovery on its claims until the Court resolves the jurisdictional issues raised in Airbus's Motion to Dismiss. This request too is overbroad and should be denied.

ECN Capital should be permitted to pursue discovery that relates to jurisdictional issues and the merits of its claims, which are intertwined. The Fifth Circuit and other circuits have acknowledged that when "the jurisdictional question intertwines with the merits of the case . . . some discovery on the merits may be necessary, and general discovery may be permitted." *Wyatt* v. *Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982); *see also In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 334 (4th Cir. 2014) (noting that "when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes only after appropriate discovery") (quoting *Kerns* v. *United States*, 585 F.3d 187, 193 (4th Cir. 2009)). Further, when "the jurisdictional facts are intertwined with the facts central to the merits of the complaint, 'a presumption of truthfulness should attach to the plaintiff's allegations,' and . . . the court 'should resolve the relevant factual disputes only after appropriate discovery.'" *Rich* v. *United States*, 811 F.3d 140, 145 (2015) (internal citations omitted) (quoting *In re KBR*, 744 F.3d at 334; *Kerns*, 585 F. 3d at 193)).

Appropriate and necessary jurisdictional discovery in this case must cover the extent of Airbus's contacts in the United States and the effect of this adversary proceeding on the cases being administered in this Court under the caption *In re CHC Group Ltd., et al.*, No. 16-31854 (BJH) ("Bankruptcy Cases"). Jurisdictional discovery will thus cover a variety of issues, which may include but are not limited to evidence and information regarding: Airbus's design, manufacturing, marketing, and sale of the EC225 and AS332 L2 helicopters owned by ECN Capital; the connection between Airbus and its United States affiliates; Airbus's direct and indirect marketing, sale, distribution and delivery of helicopters and other products in the United States; Airbus's involvement in litigation in the United States and Texas, including Airbus's availment of this Court's jurisdiction and Airbus's defense in the state of Texas of other product

liability claims brought by owners or operators of EC225 and/or AS332 L2s; and Airbus's involvement in the Bankruptcy Cases, including as a member of the Creditors' Committee. These categories are in keeping with the broad scope of general jurisdiction inquiry courts have recognized in federal bankruptcy proceedings. Given the expected breadth of jurisdictional discovery, combined with the extent to which the jurisdictional question intertwines with the merits of this case, this Court should allow general discovery to continue.

In its Supplemental Motion for Stay, Airbus also tries to draw a line between "discovery on the merits" and discovery that relates "solely to the threshold subject matter and personal jurisdictional issues." But Airbus ignores that these categories are intertwined, and impermissibly attempts to limit even the scope of jurisdictional discovery to which Airbus agrees that ECN Capital is entitled.

The scant authority Airbus provides in its Motion for Stay is insufficient to support the overbroad relief Airbus seeks. Airbus points to a few cases in which courts addressed jurisdictional issues before merits discovery progressed, *see* Mot. at ¶ 10, but in none of those cases did the court stay *all* proceedings before jurisdictional issues were resolved. Rather, the cases Airbus cites stand for the limited proposition that motions to dismiss on jurisdictional grounds "must be considered by [courts] before *other challenges*," or "'before *determining the validity of a claim*.'" *Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (emphases added) (quoting *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988)); *see also Klayman* v. *Obama* , No. 3:16-CV-2010-L, 2016 WL 5942227, at *6 (N.D. Tex. Oct. 12, 2016) ("A court must address a motion to dismiss for lack jurisdiction before *considering other challenges* or *reaching the merits of any case* because, without jurisdiction, the court has no power to entertain the case.") (emphases added). Further, the

circumstances in the cases cited by Airbus are readily distinguishable from those in this case. For example, in *Klayman* v. *Obama*, No. 3:16-CV-2010-L, 2016 WL 5942227 (N.D. Tex. Oct. 12, 2016), the court denied plaintiffs an emergency evidentiary hearing and expedited discovery, which would have required the court to address *the merits* of plaintiff's claims before making a determination on the defendant's motion to dismiss. *See id.* at *6. Here, ECN Capital does not seek to expedite discovery or have the Court address merits issues before jurisdictional issues are resolved. Rather, ECN Capital seeks only to pursue discovery in accordance with the case schedule that was consented to by the parties, rather than delay all proceedings indefinitely.

Airbus also cites *Wyatt* v. *Kaplan*, 686 F.2d 276 (5th Cir. 1982), in which the Fifth Circuit denied a plaintiff's requests for discovery only because the defendant's motion to dismiss for lack of personal jurisdiction "entailed no dispute concerning material facts" and it was clear that "[d]iscovery would therefore not have advanced the plaintiff's position on the jurisdictional issue." *Wyatt*, 686 F.2d at 286. That is not the case here, where the briefing on Airbus's Motion to Dismiss demonstrates that there are critical disputes concerning material facts, and where discovery will support ECN Capital's jurisdictional case. And Airbus cites *Johnson* v. *PPI Tech. Servs., L.P.*, No. CIV.A. 11-2773, 2012 WL 5449636 (E.D. La. Oct. 18, 2012), which stands for the proposition that it is within the Court's discretion to stay discovery "to conserve the resources of the parties." *Id.* at *2. But *Johnson* has little relevance to the dispute here, where Airbus already is engaged in active litigation in Texas concerning the same set of facts that underlies ECN Capital's claims and that is the subject of ECN Capital's discovery requests.

III. The Court Should Deny Airbus's Request To Quash the Deposition Notices of Airbus Witnesses with Relevant Knowledge of Jurisdictional Issues

Even if the Court limits discovery to jurisdictional discovery until reaching a decision on Airbus's Motion to Dismiss, Airbus's attempt to quash the deposition notices of Kevin Cabaniss or Jeff Trang still should be denied. Airbus bears the burden of proving that depositions of Mr. Cabaniss or Mr. Trang should be quashed. *See* Fed. R. Civ. P. 45(d); *Choice, Inc. of TX* v. *Graham*, No. CIV.A. 04-1581, 2005 WL 1431689, at *1 (E.D. La. May 31, 2005). Airbus has failed to meet its burden. ECN Capital should be permitted to depose each of these witnesses because they have crucial knowledge relevant to the issues of personal and subject matter jurisdiction raised in Airbus's Motion to Dismiss.

Pursuant to Rule 7030 of the Federal Rules of Bankruptcy Procedure, a party may depose another party without leave of court. Airbus is a member of the Creditors' Committee in the Bankruptcy Cases, and Kevin Cabaniss is Airbus's representative on the Creditors' Committee. As a representative of Airbus, Mr. Cabaniss is a party who may be deposed under Rule 7030 of the Federal Rules of Bankruptcy Procedure. With respect to the jurisdictional issues, Mr. Cabaniss is an Airbus representative who is intimately involved with the Bankruptcy Cases and can speak to subject matter jurisdiction issues surrounding the adversary proceeding's "relation to" the Bankruptcy Cases and to the personal jurisdiction issues regarding Airbus's availment of this Court's jurisdiction. Airbus's motion to quash the deposition of Mr. Cabaniss therefore should be denied.

Jeff Trang, an employee of Airbus Helicopters, Inc. ("AHI"), a United States affiliate of Airbus, was served with a deposition subpoena Pursuant to Rule 7030 and Rule 9016 of the Federal Rules of Bankruptcy Procedure. As an AHI employee, Mr. Trang is a nonparty. However, Mr. Trang has relevant jurisdictional information regarding Airbus's marketing, sale,

delivery, and distribution of EC225 and AS332 L2 helicopters in the United States. AHI produced Mr. Trang as its corporate representative to speak to issues regarding Airbus-manufactured EC225s that are the subject of similar product liability claims brought by the plaintiff in *Wells Fargo Bank Northwest N.A.* v. *Airbus Helicopters Inc.*, DC-16-09090 (Tex. Dist. Ct., filed Jul. 28, 2016). In another case filed in Texas by a different owner of EC225s, Airbus admitted that it sold EC225 helicopters to AHI, its Texas-based distributor, with final delivery in Texas, and that Airbus-manufactured EC225s passed through Texas on their way to Louisiana-based purchasers. *See* Special Appearance ([Dkt No. 20] *Era Group Inc.* v. *Airbus Helicopters Inc., et al.*, DC-16-15017 (Tex. Dist. Ct., filed Nov. 21, 2016) at p. 4.). This Court should allow ECN Capital to depose Mr. Trang on these issues, which are highly relevant to the jurisdictional arguments Airbus raises in its Motion to Dismiss. Airbus's motion to quash the deposition of Mr. Trang should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's Motion for Continuance of Trial and Stay of Deadlines.

Dated: February 2, 2017
Dallas, Texas

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 2, 2017, I caused the foregoing Opposition to Defendant's Motion to Dismiss to be served via electronic mail and First Class U.S. Mail, postage prepaid, to the following counsel of record for the Defendant:

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