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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 HELICOPTERS, S.A.S., Defendant.	Adv. Pro. No. 16-3151 (BJH)

REPLY OF DEFENDANT AIRBUS HELICOPTERS, S.A.S. IN FURTHER SUPPORT OF ITS MOTION FOR CONTINUANCE OF TRIAL AND STAY OF DEADLINES

Defendant Airbus Helicopters, S.A.S. ("AH") submits this reply in support of (1) its Motion for Continuance of Trial and Stay of Deadlines ("Motion for Stay") and (2) First

Supplement to Motion for Continuance of Trial and Stay of Deadlines ("Supplemental Motion for Stay"), and respectfully would show the Court as follows:

SUMMARY OF ARGUMENT

Far from trying to grind this litigation to a halt, AH has been trying to move the threshold jurisdictional issues towards prompt and efficient determination of whether this lawsuit may be heard in this Court. AH filed a timely Rule 12(b)(1) and Rule 12(b)(2) and *forum non conveniens* motion to dismiss, and immediately thereafter offered to work with Plaintiff ECN Capital (Aviation) Corp. ("ECN") on a reasonable schedule for having that motion decided. ECN's unwavering insistence that it should be allowed to proceed to the merits of its lawsuit, including taking merits-based discovery before the jurisdictional issues are resolved, is the sole reason why progress has been impeded and bogged down with unnecessary motion practice, including AH's motion for continuance and for a stay.

AH's motion for continuance of existing deadlines and a stay of proceedings was forced by the fact that ECN seeks unfettered merits discovery under the guise of "jurisdictional" discovery. The arguments ECN has made in its opposition brief to the motion for continuance/stay (Dkt. 66) further reinforce its insistence on a course of action that defies the very clear law of this Circuit. ECN: (1) expects the Court to move into the merits of the action without first finding that it has subject matter jurisdiction, in direct contravention of the same Fifth Circuit precedent that ECN cites to support its position; (2) ignores the very clear Fifth Circuit and Northern District of Texas decisions under which subject matter jurisdiction discovery is not allowed when a defendant has made a facial, not a factual, challenge to the sufficiency of the Complaint in a Rule 12(b)(1) subject matter jurisdiction challenge; and (3) relies on *dicta* from a Fifth Circuit decision to argue that it is entitled to full merits discovery when the holding of that case squarely denied any

discovery under facts like those present here. Because ECN steadfastly refuses to stand down on merits activities while the jurisdictional issues are resolved, the Court should continue all existing deadlines and stay the proceeding for all purposes other than those necessary to determine whether this lawsuit may proceed in this Court.

A. The Court Must Resolve the Jurisdictional Issues Raised in AH's Rule 12(b)(1) and 12(b)(2) Motion to Dismiss First Before Allowing Activity on the Merits

ECN also acknowledges that under *Moran v. Kingdom of Saudi Arabia*, this court must first resolve the subject matter and personal jurisdiction challenges before it prior to turning to the merits of the case. 27 F.3d 169, 172 (5th Cir. 1994) ("A Fed. R. Civ. P. 12(b)(1) motion for lack of subject matter and personal jurisdiction must be considered by the district court before other challenges 'since the court must find jurisdiction before determining the validity of a claim.'") (quoting *Gould, Inc. v. Pechiney Ugine Kuhlmann & Trefimetaux*, 853 F.2d 445, 450 (6th Cir. 1988) (citing *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946))); *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.").

Rather than dispute these authorities, ECN makes the completely illogical argument that it should be allowed to proceed to the merits of the case before these threshold jurisdictional issues are resolved because "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." [Brief in Opposition, 8.] First, the parties cannot agree to allow this Court to forego its obligation of satisfying itself that it has subject matter jurisdiction. Moreover, the parties have *jointly*

requested a status conference with the Court precisely because they recognize that the current Alternative Scheduling Order is unworkable. The problem is that ECN has declined AH's proposals that the parties agree on a schedule that specifically takes into account the need to resolve the jurisdiction issues first before moving on to the merits. Such a schedule could have been agreed on weeks ago had ECN not insisted on moving straight into merits activities, and the motion practice with which the parties and Court are now burdened and which is slowing down the process could have been avoided entirely.

B. Discovery Is Not Permissible When a Defendant Makes a Facial Attack on the Subject Matter Jurisdiction Allegations in the Complaint, as AH Has Done in this Case

ECN's argument for discovery on subject matter jurisdiction ignores very clear precedent of this Circuit. As explained in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Grey*, 2006 U.S. Dist. LEXIS 52848, *12 (N.D. Tex. July 31, 2006):

> The Fifth Circuit distinguishes between a "facial" and "factual" attack on a complaint under Rule 12(b)(1). *Hanson v. Sonic--Frank Parra Autoplex, L.P.*, 2004 U.S. Dist. LEXIS 11856, *3 (N.D. Tex. June 15, 2004) (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)). If a defendant files a Rule 12(b)(1) motion, the attack is presumptively facial and the Court need look only to the sufficiency of the allegations in the complaint, which are presumed to be true. *Id.* If, however, the defendant supports the motion with affidavits, testimony, or other evidentiary materials, then the attack is factual and the burden shifts to the plaintiff to prove subject matter jurisdiction by a preponderance of the evidence by also submitting facts through some evidentiary method. *Id.*

AH's Rule 12(b)(1) motion to dismiss was not supported by affidavits, testimony or other evidentiary materials. It was therefore a "facial" attack on ECN's Complaint. Thus, the Court is to decide its subject matter jurisdiction over this action based only on the allegations of the ECN's Complaint, and discovery is not warranted. *Hunter v. Branch Banking & Trust Co.*, 2012 U.S. Dist. LEXIS 164704, *5 (N.D. Tex. Nov. 19, 2012) (denying motion for leave to conduct limited

discovery where defendant made facial, not factual, challenge to subject matter jurisdiction).[1] ECN has wholly failed to address this precedent.

C. ECN Has Not Met its Burden of Showing How Personal Jurisdiction Discovery Would Make a Difference

The only jurisdictional discovery at issue, therefore, is personal jurisdiction discovery. The Fifth Circuit's decision in *Wyatt v. Kaplan*, makes clear that a plaintiff is not entitled to *carte blanche* discovery just because a defendant has challenged personal jurisdiction. 686 F.2d 276, 284 (5th Cir. 1982). Rather, jurisdictional discovery will be denied if a plaintiff cannot establish a particular need based on the specific jurisdictional theory at issue. *Id.* (denying jurisdictional discovery where plaintiffs could not show that the facts sought would have made a difference to the outcome of the motion); *Nat'l Sur. Corp. v. Ferguson Enterprises, Inc.*, 3:13-CV-2045-M, 2014 WL 5472436, at *1 (N.D. Tex. Oct. 29, 2014) (The plaintiff has the burden of demonstrating the necessity of discovery and should "identify the discovery needed, the facts expected to be obtained thereby, and how such information would support personal jurisdiction.").

ECN acknowledges the restrictions imposed by *Wyatt*, but yet ECN does not explain any specific jurisdictional theory or factual dispute for which the discovery is needed. ECN tries to distinguish Wyatt in one sentence, stating, "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." [Brief in Opposition, 8.] Despite having been in possession of AH's Motion to Dismiss since January 3 and being fully

[1] AH submitted the Declaration of Michel Gouraud in support of its Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, not in support of its Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

informed of the specific legal and factual challenges AH has made to the Court's personal jurisdiction, ECN does not state a single specific fact or theory for which the discovery is needed. If ECN believes that it needs discovery to counter one of the specific facts made in AH's motion to dismiss, it was required to identify it so that the Court can assess whether the discovery will make a difference, as *Wyatt* requires. 686 F.2d at 284 ("Accordingly, this Court affirms denials of discovery on questions of personal jurisdiction in cases where the discovery sought "could not have added any significant facts.") (quoting *Washington v. Norton Manufacturing, Inc.*, 588 F.2d 441, 447 (5th Cir. 1979), cert. denied, 442 U.S. 942.).

ECN rests its argument that it is entitled to full merits discovery on the Fifth Circuit's *dicta* statement in *Wyatt* that when "the jurisdictional question intertwines with the merits of the case . . . ***some*** discovery on the merits may be necessary . . ." *Id.* at 283 (emphasis added). The Court also made very clear, however, that "[d]iscovery on matters of personal jurisdiction, therefore, need not be permitted unless the motion to dismiss raises issues of fact." *Id.* at 284. And again, the Fifth Circuit found no error in the lower court's denial of discovery in *Wyatt* when the plaintiff, like ECN, could not state how the discovery would make a difference, whether or not it is intertwined with the merits. *Id.* ECN states that it wishes to take discovery on a variety of merits topics, but it does not cite a single jurisdictional theory or legal precedent to show how that discovery would make any difference as to the focused jurisdictional arguments AH made in its motion to dismiss. Thus, as in *Wyatt*, the discovery should not be allowed. ECN asserts:

> 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 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.

[Brief in Opposition, 5-6.]

ECN asserts that "[t]hese categories are in keeping with the broad scope of general jurisdiction inquiry courts have recognized in federal bankruptcy proceedings." [*Id.*] ECN, however, has not cited a single authority to show how any of this discovery could establish general jurisdiction over AH, nor could it since, as a matter of United States Supreme Court law, general jurisdiction exists only where a defendant is "at home," which means it principal place of business and place of incorporation. *Daimler v. Bauman*, 134 S. Ct. 746, 761 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)). AH has already submitted affirmative proof that it is a French corporation headquartered in France with its principal place of business in France, and ECN has not contested those facts. Nor has ECN explained how any the facts it seeks to establish through discovery, if true, would support the exercise of specific jurisdiction based on the controlling law cited in AH's motion to dismiss. Furthermore, ECN has already alleged these facts in its Complaint, which, unless controverted by AH's motion to dismiss, are to be taken as true for purposes of deciding the personal jurisdiction question, rendering the need for any discovery unnecessary at this motion to dismiss stage when ECN's burden is only to make a *prima facie* jurisdictional showing. *Luv n' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006). ECN has not cited a single fact asserted by AH in its motion to dismiss that ECN asserts a need to challenge by way of discovery. *Wyatt*, 686 F.2d at 284 ("Discovery on matters of personal jurisdiction, therefore, need not be

permitted unless the motion to dismiss raises issues of fact."). ECN has not met its burden of showing a need for jurisdictional discovery from AH.

For these same reasons, ECN also has not shown why it should be entitled to use the subpoena power of this Court *before this Court has decided that it has subject matter jurisdiction* to force a non-party witness (Jeff Trang) to testify on merits issues in this case. Nor has it shown why deposing the General Counsel of a non-party (Kevin Cabaniss) will add any facts or resolve any factual issues. *Wyatt*, 686 F.3d at 284.

ECN asserts that "it 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." [Brief in Opposition, 9.] As with the other discovery it seeks, however, ECN has made only broad, sweeping statements that these witnesses may have facts about the design, manufacture and sale of the helicopters and AH's involvement with the bankruptcy proceeding. Again, ECN does not contend that it seeks to challenge any of the factual assertions made by AH in its motion to dismiss, and it does not cite any precedent to explain how the facts ECN seeks to elicit from these witnesses would establish a basis for personal jurisdiction over AH as a matter of law.

As to General Counsel Kevin Cabaniss, ECN makes the broad statement that he has knowledge relevant to the "related to" jurisdiction of the bankruptcy court. As already explained, the law does not allow ECN to take subject matter jurisdiction discovery in this case. ECN also claims that he has knowledge about the fact that AH asserted a creditor's claim in the underlying bankruptcy proceeding – a fact which AH has not disputed and in fact concedes in its motion to dismiss. Thus, there is nothing to be gained from allowing his deposition.

As to Mr. Trang, ECN obviously already has a copy of the transcript from his prior deposition in an unrelated commercial lawsuit (which ECN incorrectly characterizes as a "similar product liability claim" in *Wells Fargo Bank Northwest N.A. v. Airbus Helicopters, Inc.*, DC-16-09090 (Tex. Dist. Ct., filed Jul. 28, 2016) – a case in which AH is not even a defendant). Yet it still cannot cite a single specific jurisdictional fact that it wishes to prove or challenge by deposing Mr. Trang. In fact, Mr. Trang's deposition was entirely a merits deposition in *Wells Fargo Bank Northwest N.A.*; personal jurisdiction is not an issue in that case.

CONCLUSION

ECN should not be allowed to continue delaying this Court's obligation to decide its subject matter jurisdiction and AH's constitutional right to have its personal jurisdiction challenge decided while it insists on merits discovery in violation of the law. The Court should grant AH's motion for continuance and stay so that these threshold jurisdictional issues may be resolved in a timely and efficient manner.

Dated: February 2, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 2, 2017, a true and correct copy of the above and foregoing document was filed with the court via CM/ECF and served on all parties requesting electronic notification.

/s/ Jason M. Katz
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