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AIRBUS HELICOPTERS, S.A.S.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	Chapter 11
CHC GROUP LTD., <i>et al.</i> ,	Case No. 16-31854 (BJH)
Debtors.	(Jointly Administered)
ECN CAPITAL (AVIATION) CORP.,	
Plaintiff,	
v.	Adv. Pro. No. 16-3151 (BJH)
AIRBUS HELICOPTERS, S.A.S.,	
Defendant.	

**DEFENDANT AIRBUS HELICOPTERS, S.A.S.'S
MOTION FOR PROTECTIVE ORDER**



**I.
INTRODUCTION**

Airbus Helicopters S.A.S. (“AH”), by and through its counsel, moves the Court for a protective order pursuant to Federal Rule of Civil Procedure 26(c), applicable through Federal Rule of Bankruptcy Procedure 7026, to protect AH and its witnesses, who are located in France, from being forced to engage in merits-based discovery in the United States when AH has objected to the Court’s subject matter and personal jurisdiction in this case.¹ In an obvious forum shopping attempt, Plaintiff ECN Capital (Aviation) Corp. (“ECN”), a Canadian company, brought this product liability lawsuit against AH in Texas even though *nothing* about ECN’s lawsuit has anything to do with Texas, or even the United States. The Super Puma helicopters at issue were designed, manufactured and sold by AH in France to original purchasers from the United Kingdom and Ireland, who later sold them to ECN, and ECN keeps the helicopters in Canada, Poland and Scotland. Despite this, ECN is attempting to have this complex product liability lawsuit heard as an adversary proceeding in this Bankruptcy Court based solely on the fact that the helicopters were once leased by ECN to one of the debtors in the underlying bankruptcy proceeding.

AH has filed a Fed. R. Civ. P. 12(b)(1) and 12(b)(2) motion to dismiss for lack of subject matter and personal jurisdiction, and on the grounds of *forum non conveniens*. Since filing that motion, AH has made clear to ECN that it would respond to discovery reasonably-tailored to the jurisdictional issues. ECN, however, has not served any jurisdictional discovery. Instead, it has served full-blown merits discovery, including 53 requests for production and 32 Fed. R. Civ. P. 30(b)(6) deposition topics, and it insists that AH and its witnesses come to the United States for

¹ AH brings this motion for a protective order to address the specific scope of the pending discovery. AH has separately moved the Court for a continuance and stay of proceedings pending resolution of its jurisdictional challenges requesting, *inter alia*, that the Court quash the deposition notices of non-party witnesses Kevin Cabaniss and Jeff Trang. [Dkt. 56.]

depositions. After AH's several attempts to have ECN limit the discovery to jurisdictional issues failed, AH seeks the Court's protection.

II. STATEMENT OF FACTS

ECN filed its adversary proceeding on November 17, 2016. [Complaint, Dkt. 1.] AH filed its Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction, and on the Ground of *Forum Non Conveniens* on January 3, 2017. [Dkt. 32.] On December 30, 2016, even before AH appeared with its motion to dismiss, ECN served its First Request for Production of Documents with 53 requests. [Decl. of Eric Strain ("Strain Decl."), Ex. 1 (ECN's Request for Prod. of Docs., Ex. A at Appx. AH 000005).] After the motion to dismiss was filed, counsel for AH notified counsel for ECN that discovery should be limited to jurisdictional issues. [Strain Decl., Ex. 1 (January 18, 2017 email from Eric Strain to Martin Flumenbaum, Ex. B at Appx. AH 000033).] ECN's counsel responded that "we do not believe that Airbus has the right to limit its initial disclosures and its responses to only those requests Airbus deems relevant to jurisdictional issues. Airbus has an obligation to provide full disclosures and to respond to all of ECN Capital's discovery requests in a timely manner." [Strain Decl., Ex. 1 (January 19, 2017 email from Martin Flumenbaum to Eric Strain, Ex. C at Appx. AH 000036).]

On January 24, 2017, ECN served AH with a deposition notice for Michel Gouraud, an AH employee in France who submitted a declaration in support of AH's motion to dismiss, and a Rule 30(b)(6) deposition notice with 32 topics. [Strain Decl., Ex. 1 (Notice of Deposition of Michel Gouraud and Notice of Deposition Airbus Helicopters S.A.S. pursuant to 30(b)(6), Exs. D-E at Appx. AH 000037-54).] The depositions were noticed for New York. [*Id.*] In a February 1, 2017 email to ECN's counsel, AH's counsel advised that AH would not agree to produce its witnesses in the United States due to its pending jurisdiction objection, and asked that ECN limit

the Rule 30(b)(6) deposition to jurisdictional topics only. [Strain Decl., Ex. 1 (February 1, 2017 email from Eric Strain to George Barber et al., Ex. F at Appx. AH 000055).] ECN's counsel refused both requests. [Strain Decl., Ex. 1 (February 2, 2017 Email from Martin Flumenbaum to Eric Strain et al., Ex. G at Appx. AH 000058).]

III. ARGUMENT

A. A Protective Order is Proper to Stop Merits Discovery When a Jurisdictional Objection Is Pending.

Federal Rule of Civil Procedure 26(c) allows this Court to enter a protective order for good cause to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” A court may grant a protective order as to merits discovery pending resolution of a personal jurisdiction objection. *Wyatt v. Kaplan*, 686 F.2d 276, 283-84 (5th Cir. 1982) (finding the lower court acted within its discretion to grant a protective order instead of allowing discovery on the merits when jurisdictional issues were present); *see also Klayman v. Obama*, No. 3:16-CV-2010-L, 2016 WL 5942227, at *5 (N.D. Tex. Oct. 12, 2016) (denying plaintiffs’ request to conduct discovery on the merits of their claim because the court had to first determine whether it had subject matter jurisdiction over the action and personal jurisdiction over defendants). The Court should grant a protective order in this case for these same reasons.

B. Essentially None of ECN’s Requests for Production and Deposition Topics Bear on Jurisdictional Issues

ECN has asserted in prior filings that the merits and jurisdictional issues in this case are intertwined, and that AH should therefore have to respond to all of the requests for production and deposition topics. [Opp. To Mtn. for Continuance, Dkt. 66, 4-5.] ECN, however, has the burden of “identify[ing] the discovery needed, the facts expected to be obtained thereby, and how such information would support personal jurisdiction.” *Nat’l Sur. Corp. v. Ferguson Enterprises, Inc.*,

No. 3:13-CV-2045-M, 2014 WL 5472436, at *1 (N.D. Tex. Oct. 29, 2014). ECN has never explained how any of its discovery informs the general or specific jurisdictional analysis in this case.

This is not surprising as to general jurisdiction. In *Daimler v. Bauman*, the United States Supreme Court explained general jurisdiction exists only where a defendant is “at home”, which is where it is incorporated and maintains its principal place of business. 134 S. Ct. 746, 761 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Fifth Circuit recognizes that after *Daimler* it is “incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.” *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014). AH has affirmatively shown that it is a French corporation headquartered in France. ECN has never explained how its merits discovery could conceivably challenge those facts or establish that AH could be subject to general jurisdiction in the United States.

Nor does ECN’s discovery inform the specific jurisdiction analysis. The record is already clear that all of ECN’s claims arise out of AH’s conduct in other countries. [Brief in Support of Mtn. to Dismiss, Dkt. 32, 14-16.] As a matter of law, ECN’s design and manufacturing defect claims arise out of AH’s actions in France where the helicopters were designed and manufactured. *See Sulak v. American Eurocopter Corp.*, 901 F. Supp. 2d 834, 837, 844 (N.D. Tex. 2012). ECN’s failure to warn claim arises where the helicopters are located, which is not the United States (a fact in ECN’s control, since it owns the helicopters). *Id.* To the extent ECN can assert a warranty claim as a subsequent purchaser of used goods, it would be for a breach of warranty that allegedly occurred when the helicopters left AH’s possession as part of their original sale in France. *See, e.g., Shows v. Man Engines & Components, Inc.*, 364 S.W.3d 348, 354 (Tex. App. 2012). ECN’s

claims for negligent misrepresentation and fraud also arise outside the U.S – even if ECN could show that AH made a false statement in the U.S., ECN is located in Canada, and none of the relevant transactions occurred in or involved parties from the U.S. *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869-70 (5th Cir. 2001).

In the very case that ECN has relied upon in its opposition to the motion for continuance, [Dkt. 66, 5.], to argue that merits discovery should proceed because it is “intertwined” with jurisdictional discovery, *Wyatt v. Kaplan*, the Fifth Circuit upheld the lower court’s decision to deny discovery when the lack of personal jurisdiction was clear and the discovery would serve no purpose and add no “significant facts.” 686 F.2d 276, 284 (5th Cir. 1982). Discovery on matters of personal jurisdiction, therefore, need not be permitted unless the motion to dismiss raises issues of fact. *Id.* (“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.). Despite having been in possession of AH’s Motion to Dismiss for nearly a month and being fully informed of the specific legal and factual challenges AH has made to the Court’s personal jurisdiction, ECN has never identified a single need for the discovery other than as it pertains to the merits.

Only one of the requests for production could conceivably be relevant to personal jurisdiction. Request 47 asks for “[d]ocuments sufficient to show Airbus’s business activities in the United States, including documents regarding any sales by Airbus occurring in the United States, any sales of Helicopters in the United States, and any Airbus offices, facilities, employees, or products located in the United States.” [Strain Decl., Ex. 1 (Pl.’s Request for Prod. of Docs., Ex. A at Appx. AH 000025).] And only two of the deposition topics arguably pertain to the

jurisdictional issues: topic 3 (“Airbus’s business activities in the United States”) and topic 17 (“Airbus’ marketing or advertisement of the Helicopters”). [Strain Decl., Ex. 1 (Notice of Depo. of Airbus Helicopters S.A.S, Ex. E at Appx. AH 000050-51).] While AH would argue that even these three areas of inquiry fall outside the relevant scope of the jurisdictional inquiry under the authorities cited above, the Court should issue a protective order limiting AH’s obligations as to the pending discovery to request for production 47 and deposition topics 3 and 17 and relieve AH of having to respond to the remainder of the merits requests and topics. *See In re Am. Int’l Refinery*, No. 04-21331, 2009 WL 8602809, at *4 (Bankr. W.D. La. Dec. 22, 2009) (the Court limited deposition topics and discovery to jurisdictional issues).

C. A Protective Order is Needed to Stop AH from Having to Produce its French Witnesses in the United States.

There is a general presumption that the deposition of a corporation by its agents and officers should be taken at its principal place of business, especially when the corporation is the defendant, and even more so when the defendant has objected to the court’s personal jurisdiction. *Gearbox Software, LLC v. Apogee Software, Ltd.*, No. 3:14-CV-710-L, 2014 WL 3109868, at *1 (N.D. Tex. July 8, 2014) (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)). This presumption satisfies the Rule 26(c) requirement of good cause for a protective order. *Id.* To overcome this presumption, ECN would have to show that peculiar circumstances justify conducting the deposition at a location other than the corporation’s principal place of business. *Id.*

ECN has taken the position:

With regard to your request to change the location of the depositions noticed in New York to Paris, Airbus’s Initial Disclosures included a New York contact address for Mr. Gouraud. Further, Mr. Gouraud has participated in this adversary proceeding in Texas by filing a declaration there, and in related litigation in Texas by filing a declaration in *Era Group Inc. v. Airbus Helicopters Inc.*, et al., DC-16-15017 (Tex. Dist. Ct.).

[Decl. of Eric Strain, Ex. 1 (February 2, 2017 Email from Martin Flumenbaum to Eric Strain, Ex. G at Appx. AH 00059).] These are highly dubious arguments. The “New York contact address” ECN’s counsel is referring to is the New York address for AH’s attorneys. When Mr. Gouraud was identified as a possible witnesses in AH’s initial disclosures, his address was listed as c/o counsel, just like any other party witness would be. Mr. Gouraud himself, however, resides in France. Moreover, if by submitting a declaration in support of a personal jurisdiction objection means that the defendant has submitted to the jurisdiction of the court, then the objection itself is rendered meaningless.

ECN’s counsel cited two cases in support of its position that AH should be forced to the United States for depositions, neither of which, unlike *Gearbox Software*, involve circumstances where the defendant had objected to personal jurisdiction. In *Paletria La Michoacana, Inc.*, the court agreed that there is a general presumption that the deposition will occur at the corporation’s principal place of business, but found that having the depositions of defendant’s employees in the United States was more favorable on balance for various reasons, but particularly because the defendant had effectively started the litigation at issue in the U.S. and had taken steps to expand its direct operations into the U.S. 292 F.R.D. 19, *passim* (D.D.C. 2013). AH did not start this adversary proceeding and has no business operations in the U.S. In *New Medium Technologies LLC*, the defendant had stalled on picking deponents and a location for the depositions when Plaintiffs were willing to travel internationally; the defendant had offered to send some deponents to locations in the U.S.; the deponents regularly traveled to the United States, some as much as 13 times in 18 months; Japan was more than a dozen time zones away making the resolution of disputes difficult; and defendant had availed itself of the discovery rules in the U.S. by bringing a counterclaim. *New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, *passim* (N.D. Ill. 2007).

These cases do not support forcing AH to present its witnesses in the United States while its jurisdictional objection is pending.

**IV.
CONCLUSION**

For the foregoing reasons, Airbus Helicopters S.A.S. requests that this Court grant its protective order, limit discovery to jurisdictional issues and direct that the depositions of Michel Gouraud and Airbus Helicopters S.A.S. via the 30(b)(6) deposition take place at its principal place of business in France.

Dated: February 3, 2017.

Respectfully submitted,

HIERSCHE, HAYWARD, DRAKELEY & URBACH, P.C.

By: /s/ Jason M. Katz

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**ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF CONFERENCE

On February 3, 2017, the undersigned attorney had a conference via e-mail with counsel for Plaintiff to discuss the relief sought in this opposed motion. At that time, an agreement could not be reached among the parties.

/s/ Eric C. Strain
Eric C. Strain

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 3, 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
Jason M. Katz

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

CHC GROUP LTD., *et al.*,

Debtors.

ECN CAPITAL (AVIATION) CORP.,

Plaintiff,

v.

AIRBUS HELICOPTERS SAS,

Defendant.

Chapter 11

Case No. 16-31854 (BJH)

(Jointly Administered)

Adv. Pro. No. 16-3151 (BJH)

**ORDER GRANTING DEFENDANT AIRBUS HELICOPTERS, S.A.S.'S MOTION FOR
PROTECTIVE ORDER**

CAME ON FOR CONSIDERATION, the Motion Protective Order, (the "Motion") filed herein by Airbus Helicopters, S.A.S. ("AH"). The Court finds good cause that discovery should be limited to jurisdictional issues and ECN Capital (Aviation) Corp.'s ("ECN's") Request for Production should be limited to Request 47 and deposition topics pursuant to Fed. R. Civ. P.

30(b)(6) should be limited to topics 3 and 17. The Court also finds good cause that the depositions of Michel Gouraud and AH's 30(b)(6) witness(es) occur in France where AH has its principal place of business. The Court finds that notice of the Motion is proper and that good cause exists for the Motion to be granted. It is therefore:

ORDERED, ADJUDGED AND DECREED that the Motion is hereby **GRANTED**

End of Order

SUBMITTED BY:

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