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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE ROYAL DUTCH/SHELL TRANSPORT SECURITIES LITIGATION	Civ. No. 04-374 (JAP) (Consolidated Cases) Hon. Joel A. Pisano **RETURN DATE:** **May 22, 2007 at 10:00 a.m.** (such date having been specially designated by the Court) (*Document electronically filed*) **ORAL ARGUMENT REQUESTED**

LEAD PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER ENJOINING ROYAL DUTCH/SHELL DEFENDANTS AND OPT-OUT PLAINTIFFS FROM SEEKING APPROVAL OF SETTLEMENT CONTRACT

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INTRODUCTION

On April 11, 2007, Shell[1] informed Lead Plaintiff[2] that, without Lead Plaintiff's knowledge or consent, Shell had entered into a contract in The Netherlands that would seek to settle all claims in this action that were advanced by non-U.S. investors who purchased Shell stock on foreign exchanges, notwithstanding the absence of any pending litigation in Holland. Because the proposed settlement threatens this Court's jurisdiction over the current litigation and violates United States public policy, Lead Plaintiff seeks an order enjoining Shell and certain of the settling investors from pursuing final approval of their proposed settlement.

In January 2004, Shell announced it would recategorize its oil and natural gas proved reserves, characterizing the change as necessary to comply with American regulations. The move prompted a sharp drop in the price of Shell securities around the world. Following the announcement, several investors filed complaints in this Court alleging violations of the United States federal securities laws. In March 2004, PSERS and SERS were appointed Lead Plaintiff under the Private Securities Litigation Reform Act, charged with sole responsibility to oversee the litigation on behalf of all putative class members and to represent their interests. In January 2006, several foreign members of the putative class filed individual actions in this Court, Civ. Act. Nos. 06-067 (JAP) and 06-095 (JAP), (the "Opt-Out Plaintiffs," identified in Attachment A to the Letter of Jay Eisenhofer, dated April 19, 2007),[3] also alleging violations of the United

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[1] As used herein, "Shell" shall refer to Royal Dutch Petroleum Company together with The "Shell" Transport and Trading Company p.l.c.

[2] As used herein, "Lead Plaintiff" or the "Funds" shall refer to the Pennsylvania State Employees' Retirement System ("SERS") and the Pennsylvania Public School Employees' Retirement System ("PSERS").

[3] *See* Civil Action Nos. 06-067 and 06-095. The Opt-Out Plaintiffs consist of twenty five Dutch pension funds, two German pension funds and one Luxembourg pension fund.

States federal securities laws. These actions were consolidated with the class action, subject to the Court's order that the Opt-Out Plaintiffs would have authority to communicate with Shell solely on their own behalf, and not on behalf of the putative class.

During the three years since the appointment, Lead Plaintiff has vigorously represented the interests of all putative class members by undertaking substantial discovery efforts both in the United States and in Europe, briefing and arguing complex motions, engaging in settlement negotiations, and preparing for a mini-trial/evidentiary hearing scheduled to begin in two months. This Court has also invested substantial resources in this litigation: it has issued several lengthy rulings and has generally overseen the parties' conduct. Notably, since this case was first filed, no claims have been brought against Shell arising from the same conduct in any other venue; thus, other than the individual actions filed by the Opt-Out Plaintiffs, this action represents the only private fraud litigation that has ever been brought against Shell arising out of the recategorization of its reserves, and it alleges claims exclusively under American law.

Despite the fact that this action and the individual actions filed by the Opt-Out Plaintiffs are the only private fraud actions that have ever been brought against Shell, and despite the clear command of this Court granting Lead Plaintiff sole responsibility to negotiate on behalf of the putative class, Shell and the Opt-Out Plaintiffs now purport to have settled this American class action in The Netherlands, at least as it pertains to the foreign members of the putative class. Moreover, they have done so pursuant to a Dutch statute that does not allow litigation of class claims; therefore, the proposed settlement literally has no legal effect, and could have no legal effect, other than to dispose of the claims brought in this action. The proposed settlement thus represents a clear affront both to this Court's jurisdiction and to United States policy regarding the conduct of securities class actions. Therefore, this Court is justified in taking the

extraordinary step of enjoining the settling parties from pursuing final approval of their settlement contract.

By its terms, the proposed settlement will terminate if this Court decides to exercise jurisdiction over the foreigners' claims after the mini-trial and certifies a worldwide class. Thus, if this Court decides the issues of subject matter jurisdiction and class certification before the Amsterdam Court of Appeal approves the proposed settlement, an injunction will not be necessary. However, Lead Plaintiff has no assurance that this Court will be able to issue its rulings, or that any appellate review will be resolved, before the Amsterdam court takes action. Because American courts may be obligated to accord more deference to final foreign judgments than to ongoing proceedings, *see Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 127 n.7 (3d Cir. 2002), should the Amsterdam court approve the proposed settlement, Lead Plaintiff and the members of the putative class may be substantially prejudiced. Therefore, Lead Plaintiff seeks an injunction preventing Shell and the Opt-Out Plaintiffs from pursuing approval of the proposed settlement until after this Court rules on the motion for class certification and on Shell's various motions to dismiss the claims of the foreign members of the putative class.

STATEMENT OF FACTS

On January 9, 2004, Shell announced that it would reduce its previously-reported proved oil and natural gas reserves by 20%, claiming the move was necessary to comply with United States federal regulations. ¶ 6.[4] In reaction to that disclosure, the price of Shell securities dropped worldwide for a total loss of approximately $13.84 billion of market value. *Id.* Shell

[4] "¶ ___" shall refer to paragraphs in the Second Consolidated Amended Class Action Complaint, filed on September 19, 2005.

later reduced its estimated reserves three additional times, on March 18, April 19, and May 24, 2004. ¶ 8.

On February 2, 2004, the Funds filed a complaint on behalf of all those who purchased or acquired Shell's securities from December 3, 1999 to January 9, 2004, alleging violations of the federal securities laws.[5] On March 26, 2004, the Funds moved for appointment as Lead Plaintiff under 15 U.S.C. § 78u4-a. Six other entities also moved for lead plaintiff status. After briefing and oral argument, by order dated June 30, 2004, this Court consolidated several actions that had been filed alleging similar claims, appointed the Funds Lead Plaintiff for the putative class, and approved its selection of Bernstein Liebhard & Lifshitz, LLP ("Bernstein Liebhard") as Lead Counsel. In its opinion, the Court ruled that the Funds were "able to adequately represent the interests of all investors: those who purchased in both domestic and foreign markets." *In re Royal Dutch/Shell Transp. Litig.*, No. 04-374 (JWB) (June 30, 2004) slip. op. at 41. Lead Plaintiff and Lead Counsel were given "sole authority" for management of the consolidated litigation, including "the scope, order, and conduct of all discovery proceedings," "such work assignments to other plaintiffs' counsel as they may deem appropriate," "the timing and substance of any settlement negotiations with defendants," and "other matters concerning the prosecution or resolution of their respective cases." Consolidation Order, dated June 30, 2004, ¶ 10.

On September 13, 2004, Lead Plaintiff filed its First Consolidated Amended Class Action Complaint. After Shell (and the other defendants) moved to dismiss the complaint in December 2004 on various grounds, including lack of subject matter jurisdiction over the claims of the foreign members of the class who purchased Shell securities on foreign exchanges, discovery

[5] The Class Period was eventually changed to run from April 8, 1999 to March 18, 2004.

commenced on March 4, 2005. On August 9, 2005, this Court denied Shell's (and most of the other defendants') motions to dismiss, concluding, among other things, that Lead Plaintiff had supported its allegations that Shell "engaged in material and substantial fraudulent conduct in the United States." *In re Royal Dutch/Shell Transp. Secs. Litig. ("Shell")*, 380 F. Supp. 2d 509, 548 (D.N.J. 2005). Relying on Lead Plaintiff's evidence, this Court held that it had "a sufficient interest in the claims of the foreign investors" to support the exercise of jurisdiction. *Id.*

On January 6, 2006, the Opt-Out Plaintiffs, through counsel which included the law firm of Grant & Eisenhofer, P.A. ("Grant & Eisenhofer"), filed two individual actions against Shell, Civil Action Nos. 06-067 and 06-095, alleging substantially similar claims to those advanced by the Lead Plaintiff. Eventually, all of the Opt-Out Plaintiffs came to be represented by Grant & Eisenhofer. After negotiations among counsel, Lead Plaintiff and these entities agreed that the individual actions would be consolidated with the class action. The resulting amendment to this Court's consolidation order provided that the Opt-Out Plaintiffs would have access to the discovery materials obtained in the class case, and that they would "retain the right to communicate with defendants' counsel and the Court on their own behalf, solely regarding issues unique to the individual actions, without prior authorization from Lead Counsel." Amended Consolidation Order, dated February 7, 2006, ¶ 7 (hereafter, the "Amended Consolidation Order").

On April 12, 2006, this Court granted Shell's request that the issue of subject matter jurisdiction be revisited in a separate mini-trial. Since that time, discovery has continued on an aggressive schedule. To date, Lead Plaintiff has taken approximately forty-nine fact depositions and five expert depositions both in the United States and in Europe, and has received more than two million pages of documents from defendants and non-parties. Simultaneously, Lead

Plaintiff and Shell have attempted to mediate their dispute. Beginning on July 17, 2006, Judge Politan moderated a two-day mediation session, but the parties were unable to reach a settlement.

On April 11, 2007, Lead Plaintiff was informed for the first time that Shell had negotiated a contract for settlement with the Opt-Out Plaintiffs, as well as a group of other foreign institutions, under a 2005 Dutch law that permits mass settlement of claims but does not permit class action litigation. These foreign investors were principally represented by Grant & Eisenhofer,[6] and the terms of the settlement, which will not become final until approved by the Amsterdam Court of Appeal, purport to extinguish claims arising out of Shell's recategorization of its proved reserves on behalf of persons who both resided and purchased their shares outside the United States (the "Foreign Purchasers"). The contract also extends an offer of settlement to United States Purchasers – those who bought their shares on the NYSE or resided in, or were American citizens, at the time of purchase. However, under the terms of the settlement contract, United States Purchasers would receive only approximately 20% of the overall settlement fund, with the balance reserved for Foreign Purchasers. Thus, the proposed settlement distinguishes between Americans who purchased on foreign exchanges, and foreigners who purchased on foreign exchanges: an American who suffered losses on shares purchased abroad – such as the Lead Plaintiff and many institutional American buyers – would receive a smaller payment than a

[6] Lead Plaintiff notes its concern about the legal and ethical implications arising from the employment in January 2007 by Grant & Eisenhofer of a former Bernstein Liebhard & Lifshitz senior partner who had actively worked on the case before leaving the firm. *See In re Gabapentin Patent Litig.*, 407 F. Supp. 2d 607 (D.N.J. 2005) (disqualifying side-switching attorneys and their new firm), *reconsideration denied*, 432 F. Supp. 2d 461 (D.N.J. 2006); *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243 (N.J. 1988) (forfeiting fees due to unethical employment of conflicted attorney). Lead Plaintiff reserves all rights in this regard.

foreigner who made the exact same purchase and suffered an identical loss.[7] The settlement also contains a "most favored nation" clause that requires Shell to increase its payments to foreign investors should it ultimately settle the claims of United States Purchasers for a greater amount at any time within the next three years.

Though Shell describes the proposed settlement as covering "the asserted and unasserted claims arising out of the recategorization of its proved reserves," Letter from Ralph Ferrara to the Court dated April 11, 2007, in fact, other than the class and opt-out plaintiff actions, there are no securities claims pending anywhere in the world arising out of the recategorization of Shell's proved reserves. (Ex. 1 at 25:5-16.)[8] Thus, as a practical matter, the only claims resolved by the proposed Dutch settlement are the securities claims advanced by Foreign Purchasers in this action under American law. However, the proposed settlement, by its terms, becomes void if this Court exercises jurisdiction over the claims of Foreign Purchasers.

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[7] Shell justifies the disparity in the size of the fund available to foreign and United States purchasers by contending that only a small number of United States purchasers traded Shell shares. Shell bases this conclusion in part on the fact that most of its shares traded on foreign exchanges. *See* Declaration of Alexandra K. Skelley, dated April 18, 2007. However, the location of the trade does not establish the residency of the purchaser; as explained above, many United States purchasers, including the Lead Plaintiff, traded on foreign exchanges. Shell also claims that an analysis performed by Thomson Financial using "proprietary" methods establishes that "no more than 3%" of foreign trading was conducted by United States Purchasers. *Id.* ¶ 10. Leaving aside the obvious fact that Shell's summary of Thomson's conclusions represents inadmissible hearsay, without access to Thomson's "proprietary" methods, neither Lead Plaintiff nor this Court can assess the accuracy of the 3% figure. It is possible, for example, that Thomson assumed that all trades conducted through foreign brokers and held in the foreign brokers' street names were made on behalf of foreign purchasers – a dubious assumption, as Lead Plaintiff itself conducted foreign trades through foreign brokers.

[8] The exhibits cited herein are attached to the Declaration of Ann M. Lipton dated April 30, 2007, submitted herewith.

ARGUMENT

Ordinarily, when two courts have concurrent *in personam* jurisdiction over parallel actions, litigation may proceed in both until one reaches a judgment. *See Stonington Partners*, 310 F.3d at 127 n.7. However, a federal court may enjoin parties from litigating in a foreign forum "to protect jurisdiction or an important public policy." *Gen. Elec. Co. v. Deutz Ag*, 270 F.3d 144, 161 (3d Cir. 2001). This standard, first explored in *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), has been adopted by the Third Circuit. *See, e.g.*, *Stonington Partners*, 310 F.3d at 126-27 & n.5 (endorsing *Laker*); *Gen. Elec.*, 270 F.3d at 161 & n.7 (same); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 77 (3d Cir. 1994) (same). According to *Laker*, a court is obligated to enjoin parties from litigating in a foreign forum when the foreign proceeding threatens to "interfere with an in personam action before the domestic court," *Laker*, 731 F.2d at 929, or "when necessary to prevent litigants' evasion of the forum's important public policies," *id.* at 931. Here, an injunction forbidding Shell and the Opt-Out Plaintiffs from pursuing approval of the proposed settlement – at least until this Court has ruled upon outstanding issues of subject matter jurisdiction and class certification – is necessary both to protect this Court's ability to enforce its orders and oversee the current litigation, and to effectuate important federal policies regarding the conduct of securities class actions in general.[9]

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[9] In an ordinary motion for an injunction, the movant must demonstrate irreparable injury and a likelihood of success on the merits of his claim. However, because a motion for an anti-suit injunction involves special comity concerns, "if the requirements for an anti-suit injunction are met, these supplant the need for proof under Rule 65." *Stonington Partners*, 310 F.3d at 129; *see E. & J. Gallo Winery v. Andina Licores S.A*, 446 F.3d 984, 991 (9th Cir. 2006) (anti-suit injunction "involves different considerations from the suitability of other preliminary injunctions"; movant need only "demonstrate[] that the factors specific to an anti-suit injunction weigh in favor of granting that injunction") (quoting *Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 n.19 (5th Cir. 2003)).

I. AN INJUNCTION IS NECESSARY TO PROTECT THIS COURT'S JURISDICTION

"[A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). As described above, this Court has entered orders appointing the Funds as Lead Plaintiff and specifically ordering the Opt-Out Plaintiffs and Shell not to discuss any matters other than the individual actions. Consol. Order ¶ 8; Amended Consol. Order ¶ 7. As a result of those orders, and with the understanding that Lead Plaintiff and Lead Counsel would control the litigation, the Opt-Out Plaintiffs were permitted to benefit from the discovery efforts undertaken by Lead Plaintiff and to coordinate their own cases with the larger class case.[10] Nonetheless, in disregard of this Court's express orders, Shell and the Opt-Out Plaintiffs secretly negotiated a settlement that purported to cover the claims entrusted to the oversight of the Lead Plaintiff. The pursuit by Shell and the Opt-Out Plaintiffs of approval of the proposed settlement abroad represents a continuing violation of the Amended Consolidation Order and an attempt to interfere with this Court's ability to resolve the claims properly before it. For that reason alone, an injunction is proper. *See Laker*, 731 F.2d at 927 ("[W]hen the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings."); *see generally* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 620-623 (1990)

[10] For instance, attorneys for the Opt-Out Plaintiffs attended depositions noticed and taken by Lead Plaintiff, and ordered copies of all the transcripts and exhibits. They also were permitted to comment on and make changes to discovery requests served by the Lead Plaintiff. They thus had access to all of the witness testimony, as well as to the documents that had been selected by Lead Plaintiff – out of the millions of pages produced – as having particular significance.

(explaining that injunctions are particularly appropriate when a party is under a legal obligation not to pursue the foreign action, such as where the party has agreed to arbitrate or otherwise forbear from suit).

Indeed, this case bears a striking resemblance to *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chemical Co.*, 441 F. Supp. 1385 (C.D. Cal. 1977), which was cited with approval in *Laker*, 731 F.2d at 929 n.64. There, parallel actions were proceeding in California and in France, and the California court ordered that any discovery materials obtained by the plaintiff from the defendant be limited for use in that action. In defiance of the court's order, the plaintiff used the documents in its French litigation, and the California court enjoined the plaintiff from conducting any further proceedings in France in which the discovery materials had been used. *See* 441 F. Supp. at 1390-91.

Here, the proposed settlement was negotiated in part by the Opt-Out Plaintiffs, who were subject to the restrictions contained in the Amended Consolidation Order. Moreover, by virtue of that Order, the Opt-Out Plaintiffs had special access to discovery materials and witness testimony. Because there is no way to unscramble the contributions made by the Opt-Out Plaintiffs from the overall settlement terms, an injunction preventing pursuit of approval of the proposed settlement is the only available remedy.

Even apart from Shell's and the Opt-Out Plaintiffs' violation of the terms of the Amended Consolidation Order, the purported settlement interferes with this Court's management of the pending action by undermining its selection of the Funds as Lead Plaintiff. Under similar circumstances, the Eighth Circuit affirmed a district court's injunction of state court proceedings that threatened to resolve federal securities claims without the approval of the court-appointed lead plaintiff. *See In re BankAmerica Corp. Secs. Litig.*, 263 F.3d 795, 804 (8th Cir. 2001). In

so doing, the Eighth Circuit explained that the parallel state settlement proceedings were being used to "frustrate an important federal right" – namely, the right of the lead plaintiff to control litigation of the federal claims – and rejected the argument that the lead plaintiff appointment was merely a procedural move.[11] Instead, the court explained that the lead plaintiff position carries various exclusive rights and responsibilities, including "control over aspects of litigation such as discovery, choice of counsel, assertion of legal theories, retention of consultants and experts, and settlement negotiations." *Id.* at 801. These rights, the Eighth Circuit explained, are "meaningless" if another party may "seize control of the litigation of the federal claims" by resolving it in another jurisdiction. *Id.* at 803. Here, even more so than in *BankAmerica*, if the proposed settlement is declared binding by the Dutch court and is accorded *res judicata* effect – a settlement which is not associated with any litigation, which has a practical effect of only settling the specific claims advanced in this action under American law, and which was negotiated by American securities class action attorneys on behalf of clients who opted out of the American class case to advance individual claims under American law – it would impede this Court's "orderly resolution of the federal claims" and "subvert[] the PSLRA." *Id.* at 804. "Where, as here, a party institutes a foreign action in a blatant attempt to evade the rightful

[11]In *BankAmerica*, the enjoined parties contended that the district court's injunction violated the Anti-Injunction Act ("AIA"), 22 U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in limited circumstances. The Eighth Circuit found that the injunction was proper because it was expressly authorized by the PSLRA, but could not be categorized as having been issued "in aid of the district court's jurisdiction" because, under the AIA statute, only *in rem* actions could be termed jurisdictional. *See* 263 F.3d at 801. Whether or not the Eighth Circuit's restricted view of the AIA is correct, the AIA does not apply to injunctions issued to halt foreign litigation, and it is now firmly established that even *in personam* actions in foreign courts can threaten American jurisdiction. *See Laker*, 731 F.2d at 929-30; *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (cited with approval in *General Electric*, 270 F.3d at 161 & n.7).

authority of the forum court, the need for an antisuit injunction crests." *Laker*, 731 F.2d at 929-30.

The need for an injunction is only heightened by the fact that the proposed Dutch settlement has no practical effect other than to resolve claims under American law. As a result, the proceedings in The Netherlands are not even parallel in the ordinary sense of the term; instead, they were instituted "simply to terminate the U.S. action." *Stonington Partners*, 310 F.3d at 128 n.8 (citing *Laker*). In fact, as the *Laker* court pointed out, an injunction is particularly appropriate where the foreign forum does not offer the relief sought in the domestic forum. *See Laker*, 731 F.2d at 930. Here, of course, the Dutch forum does not offer any opportunity for an adjudication on the merits of the foreigners' monetary claims, at least on a classwide basis.

Nor can it be said, as Shell argues, that this Court has no interest in the claims of foreigners. *See* Memorandum in Support of Motion to Sever and Dismiss at 4-5. This Court has already determined that it has "a sufficient interest in the claims of the foreign investors" to support the exercise of jurisdiction. *Shell*, 380 F. Supp. 2d at 548; though the Court intends to reexamine that issue, for now, that ruling is controlling.[12] As the Third Circuit explained in *SEC v. Kasser*, 548 F.2d 109, 114-16 (3d Cir. 1977) – and as this Court recognized in its earlier ruling, *Shell*, 380 F. Supp. 2d at 540-41 – extraterritorial jurisdiction under the federal securities laws is inextricably bound with an assessment of congressional intent and federal policy. Therefore, a finding that jurisdiction exists is, necessarily, a conclusion that the conduct in question is a matter of federal concern. *Cf. Laker*, 731 F.2d at 921-26 (equating the existence of

[12] Typically, if a plaintiff advances a claim under federal law, it will be dismissed for lack of subject matter jurisdiction only if "it is not colorable, *i.e.*, if it is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous." *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1244 n.10 (2006) (quotations omitted).

antitrust jurisdiction over extraterritorial conduct with federal policy in favor of regulating the conduct).[13] Thus, because "[c]ourts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants," *id.* at 927, an injunction is necessary and appropriate here.[14]

II. AN INJUNCTION IS NECESSARY TO EFFECTUATE IMPORTANT FEDERAL POLICIES

An injunction to protect the court's jurisdiction is also appropriate to "prevent litigants' evasion of the forum's important public policies." *Laker*, 731 F.2d at 931; *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1358 (6th Cir. 1992) (same) (cited with approval in *General Electric*, 270 F.3d at 161 & n.7). In this case, the PSLRA and its procedures for the selection of a lead plaintiff were carefully designed to ensure that the class would receive proper representation. *See In re Cavanaugh*, 306 F.3d 726, 738 (9th Cir. 2002); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 261-68 (3d Cir. 2001) (discussing the role and importance of lead plaintiff and lead counsel). These procedures were followed when the Funds were appointed Lead Plaintiff, and this Court has had continuing oversight of the conduct of the litigation, but no

[13] Notably, the jurisdictional ruling here was apparently based on more evidence than the one that formed the basis for the *Laker* injunction; in that action, the D.C. Circuit noted that the jurisdictional assessment was based only on the "initial pleadings and papers filed," *Laker*, 731 F.2d at 930, and without "findings of fact by the district court or a thorough development of the factual underpinnings" of the claims, *id.* at 916 n.1. Here, Lead Plaintiff opposed (and the Court decided) Shell's jurisdictional motion based upon the thousands of relevant pages Shell had produced to that point, as well as the deposition testimony of one of its senior officers.

[14] Importantly, Shell has submitted a letter from the Securities and Exchange Commission representing that the Staff intends to recommend that the Commission distribute the fine it obtained from Shell in 2004 to all shareholders worldwide; and, under the terms of the proposed settlement, Shell is required to request such a distribution. Therefore, the SEC Staff – with Shell's support – is apparently of the view that the harm to all of these shareholders, domestic and foreign alike, falls within the purview of the federal securities laws.

similar protections were in place when the Opt-Out Plaintiffs self-selected themselves as representatives for the foreign investors.

Moreover, in the securities context, Congress has expressed a policy against permitting parallel claims to proceed in different fora. In 1998, it enacted the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. §§ 77p, 78bb(f) (2000), which preempts state law private securities class actions. The purpose of the statute was to prevent plaintiffs from evading the strictures of the PSLRA through state litigation. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1511 (2006) (quoting legislative history). With only federal claims available for class cases, the potential for piecemeal, parallel litigation in the securities context has been virtually eliminated.

Finally, for class actions generally, Congress has recently enacted the Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA"). The Act, which makes it easier to remove state class actions to federal court, was enacted in part to eliminate duplicative class action litigation intended to "wrest the potentially lucrative lead role away from the original lawyers." S. Rep. No. 109-14, at 23 (2005), *as reprinted in*, 2005, 2005 U.S.C.C.A.N. 3, 23. Congress was concerned that such duplicative litigation would result in harmful competition among lawyers for control of the case, and noted that removal to federal court would permit consolidation under "one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues involved." *Id.* In short, in recent years Congress has expressed a policy of resolving class actions generally, and federal securities claims in particular, in a single, federal proceeding.

Here, both Shell and the Opt-Out Plaintiffs are openly attempting to evade United States policy regarding the conduct of class actions. As explained above, there are no other actions

pending against Shell, and the Dutch statute permits only settlement, not litigation. Thus, the sole practical effect of the proposed settlement, if it is finalized and given *res judicata* effect, will be to resolve the claims advanced under United States law by foreign members of the putative class in this case. Therefore, Shell's only reason even to enter into negotiations with these investors regarding the class claims, let alone purport to reach an agreement, was to evade the provisions of the PSLRA and shop for malleable plaintiffs' counsel. Similarly, with no ability to file class actions in Europe, and with a lead plaintiff already in control of the American litigation, the only reason for the settling investors to negotiate a global settlement was, again, to avoid United States law. Thus, because the proposed Dutch settlement is "but an end run around the PSLRA," *BankAmerica*, 263 F.3d at 804, an injunction is appropriate.

Indeed, the proposed settlement risks the very abuses that Congress – and courts – have been working to eliminate from class actions procedures for years. For instance, any negotiations for settlement under Dutch law were necessarily conducted without a corresponding threat of litigation. Settlement negotiations conducted without threat of litigation have long been observed in this country to be ripe for abuse, thus animating the Supreme Court's ultimate ruling that even settlement actions meet Rule 23 requirements. *See Amchem Prods v. Windsor*, 521 U.S. 591 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1136 (1996) ("licensing settlements when no class action trial is possible gives all the leverage in the settlement negotiation to one side, the defendant"); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851, 853-54 (1995) (same). Moreover, SLUSA and CAFA were enacted to eliminate the type of parallel class action proceeding that encourages defendants to shop among competing plaintiffs' attorneys. *See* Coffee, *supra*, at 853 (stating that "defendants can effectively conduct a reverse

auction among plaintiffs' attorneys, seeking the lowest bidder from the large population of plaintiffs' attorneys"). Thus, because the proposed settlement represents an attempt to "evade compliance with a statute ... that effectuates important public policies," an injunction is appropriate. *China Trade*, 837 F.2d at 37.

III. CONCERNS OF COMITY ARE MINIMAL

The Third Circuit has emphasized that considerations of international comity must inform a court's decision whether to issue an anti-suit injunction. *See, e.g.*, *Gen. Elec.*, 270 F.3d at 161. In this case, however, comity concerns are at their nadir because of the Dutch courts' comparatively minimal interest in the proposed settlement.

As explained above, this Court's conclusion that it has subject matter jurisdiction over the claims of foreign purchasers necessarily carries with it the conclusion that Congress intended to regulate Shell's conduct as it pertains to such investors. This conclusion is reinforced by the SEC staff's conclusion that the fines extracted from Shell in 2004 should be distributed to investors worldwide. By contrast, there is no litigation pending in The Netherlands regarding Shell's conduct and no allegation by any entity that Shell violated any Dutch law. Under such circumstances, it cannot even be said that the proposed settlement effectuates a Dutch policy of clearing court dockets by coordinating resolution of claims; there are simply no claims in The Netherlands in need of resolution. Indeed, it is difficult to imagine why a Dutch court would have much of an interest in overseeing a settlement that essentially does no more than resolve claims brought in an American court under American law.

Further, there is no reason why Dutch courts should have any greater interest in resolving claims of non-Dutch foreigners than American courts do; and, without any pending claims under Dutch law, it is impossible to tell what extraterritorial reach such hypothetical claims might have. In fact, Shell's own experts in Dutch law opined that the Amsterdam Court of Appeal would be

unlikely to approve a settlement on behalf of foreign claimants (Ex. 2 at 37). Even Shell's status as a Dutch entity does not automatically translate to a comparatively strong Dutch interest in overseeing a settlement relative to the American interest in overseeing litigation; as the *Laker* court made clear, although nations have a legitimate interest in regulating the conduct of their citizens, they have an equally strong interest in regulating the activities of foreigners that occur within, or have effects within, their territories. *Laker*, 731 F.2d at 921-23. And, in fact, throughout the Class Period, and until July 2005, Shell Transport was a London company.

The terms of the proposed settlement further minimize Dutch interest in this matter by automatically terminating the settlement in the event that this Court exercises jurisdiction over the foreigners' claims. Shell has stated that it believes this Court may make that determination before the Amsterdam Court of Appeal has had an opportunity to approve the proposed settlement. If Shell is correct, the Dutch courts do not have an independent interest in overseeing the settlement at all; any interest they have is already contingent on the actions of this Court. Therefore, an injunction merely to permit this Court to determine its jurisdiction and rule upon class certification will not invade Dutch interests.

Finally, as Prof. Bermann pointed out, comity concerns are lessened when a party is under a legal obligation not to pursue the foreign proceeding: "Given their independent bases in prior commitments by the parties, such claims simply do not connote the intrusiveness and insult to foreign nations to which courts entertaining issuance of international anti-suit injunctions need to be alert." Bermann, *supra*, at 623. So, for example, in *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, 475 F.3d 56 (2d Cir. 2007), the Second Circuit affirmed a district court's issuance of an anti-suit injunction to enforce a contractual obligation clause with only minimal concern that such an injunction would violate principles of international comity. *See id.* at 65. Here, as

described above, Shell and the Opt-Out Plaintiffs are subject to a court order forbidding them from pursuing resolution of the claims of absent foreign investors; this is precisely the sort of situation in which comity concerns are reduced.

CONCLUSION

For the above reasons, Lead Plaintiff requests that this Court enjoin Shell and the Opt-Out Plaintiffs from pursuing final approval of their proposed settlement until after the Court has ruled on Lead Plaintiff's motion for class certification and Shell's motions to dismiss the foreigners' claims or such other time thereafter as the Court deems appropriate.

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Respectfully submitted,

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