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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**
	)	**Oral Argument Requested**
	)	***(Document electronically filed)***

OPPOSITION TO LEAD PLAINTIFFS' MOTION FOR AN INJUNCTION

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INTRODUCTION

On April 11, 2007, Defendants Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. (together "Shell") advised the Court of a proposed settlement in the Netherlands of all reserves-related litigation and claims between Shell and non-U.S. investors who purchased their securities on non-U.S. exchanges (the "Settlement"). Notwithstanding that the Settlement does not seek to bind or have any other effect on any current or potential U.S. plaintiffs, Lead Plaintiffs Pennsylvania State Employees' Retirement System and the Pennsylvania Public School Employees' Retirement System ("Lead Plaintiffs" or the "Pennsylvania Funds") seek to enjoin the Settlement now pending before the Amsterdam Court of Appeals.

Consistent with their American-centric view of the law and general disregard of the interests and circumstances of the non-U.S. investors they are using to inflate their alleged class, Lead Plaintiffs do not – because they cannot – dispute the substantive benefits of the Settlement to the non-U.S. investors or raise any credible argument against the Settlement's merits. Instead, amidst a jumble of factual inaccuracies and unsupported allegations, they complain (incorrectly, it turns out) only of harm or prejudice to U.S. investors like themselves, who are not even covered by the Settlement, and they plead for this Court to block the Dutch proceeding in order to force into a U.S. Court the claims of non-U.S. investors

against a non-U.S. company regarding alleged conduct and transactions that took place almost entirely outside the U.S., even though a substantial and representative group of these non-U.S. investors – who purchased billions of shares of Shell stock – have clearly expressed their preference to proceed in the Netherlands.

Stripped to its essence, the motion for an injunction represents nothing more than a transparent and desperate attempt by Lead Plaintiffs and their counsel to assert control over the claims of non-U.S. investors who are not yet part of any certified class, whom they do not represent, and who have now clearly indicated that they do not want to litigate in the U.S. More likely, it is, as Lead Plaintiffs suggest [at 14], a desperate attempt to preserve "the potentially lucrative lead role" in a U.S. class action. But in this Circuit, the Court's limited power to enjoin foreign proceedings cannot be used to serve such goals, especially where, as here, Lead Plaintiffs would have the Court ignore the facts, the plain language of this Court's Orders, the established law of this Circuit, recognized principles of international comity and, most importantly, the expressed interests of the sophisticated non-U.S. participants in the Settlement. Accordingly, the Court should deny the injunction.

FACTS

The Court only needs to consider a limited set of facts to understand and dispense with Lead Plaintiffs' request for an injunction here.[1]

First, the Settlement was negotiated, executed and filed pursuant to the provisions of the Dutch Collective Financial Settlement Act (Wet Collectieve Afwikkeling Massaschade, Articles 907-910 of the Civil Code of The Netherlands and Articles 1013-1018 of the Code of Civil Procedure of The Netherlands) (the "2005 Law"). The Settlement represents an arm's-length agreement reached in good faith between Shell, which is domiciled in the Netherlands, the Stichting Shell Reserves Compensation Foundation, a foundation formed pursuant to Dutch law to represent the interests of all participating shareholders (the "Foundation"), the Vereniging van Effectenbezitters ("VEB"), an organization representing individual shareholders in the Netherlands, and two large Dutch pension funds (Stichting Pensionfonds ABP ("ABP") and Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen ("PGGM")), which have "opt-out cases" in this Court.

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[1] Because they are not relevant to the issues presently before the Court, Shell will not address, but does not concede, many of the factual inaccuracies in Lead Plaintiffs' motion and supporting memorandum. For example, Lead Plaintiffs' reference to a "$13.84 billion loss of market value" bears no resemblance to any even theoretical estimate of "loss" that could be caused by the alleged fraud or suffered by any potential plaintiff or class of plaintiffs.

Second, the Foundation's participating members include more than fifty sophisticated institutional investors who, collectively, purchased more than one billion shares of Shell stock during the alleged class period. These institutional investors have more than $5 trillion in assets under management, including for example, ABP, the largest pension fund in the Netherlands with over $271 billion in assets under management, UBS AG (over $1.98 trillion), AXA Investment Managers UK Ltd. (over $652 billion), Morley Fund Management (over $334 billion), and Deka (over $137 billion), among others.

Third, in addition to the VEB, the Foundation participants include shareholder advocacy organizations from five other countries as well as Euroshareholders, an association of 29 shareholder advocacy groups from throughout Europe. These advocacy organizations are sophisticated and active members of the investment community. Most recently, VEB intervened in the ABN Amro merger to block the $21 billion sale of LaSalle Bank, an initial step in a $90 billion proposal to acquire ABN Amro. *See* "Dutch Court Freezes ABN's Sale of LaSalle Bank," AP (May 3, 2007) (quoting Peter Paul de Vries, head of VEB).[2]

[2] The article also quotes VEB's outside counsel in the ABN Amro litigation, Jurgen Lemstra of the Pels Rijken firm. Mr. Lemstra is co-counsel to the Foundation in the Settlement.

Fourth, Shell is and has been exposed to claims from non-U.S. investors in Europe. European institutional investors have taken steps pursuant to Dutch law to preserve their ability to initiate lawsuits arising from Shell's reserves recategorization. *See* Letters from institutional investors, attached as Exhibit 1. In addition, U.S. and European counsel have been actively soliciting European institutional investors to pursue European-based litigation or settlements with Shell. *See* Labaton Sucharow e-mail and attached materials, attached as Exhibit 2 (stating that "If litigation is necessary, Dutch courts presently appear to provide the best forum; the law is favorable and offers beneficial procedures"); German newspaper advertisement, attached as Exhibit 3.

Fifth, there is no class certified in this matter. Though appointed Lead Plaintiffs and Lead Counsel by the Court, the Pennsylvania Funds and their counsel do not yet – and may never – "represent" any certified "class" in this matter. Certainly, intervening plaintiff (also represented by Lead Counsel) Peter M. Wood, who purchased a mere 1,519 shares during the alleged class period and was brought in by Lead Counsel several years after the initial complaints were filed to serve as a peremptory class representative for non-U.S. investors, could never adequately represent the interests of the sophisticated non-U.S. investors, who purchased more than one billion shares and who have declared their desire to participate in the Settlement rather to litigate in this Court.

Sixth, and finally, the Settlement expressly contemplates the jurisdiction of this Court. As Lead Plaintiffs acknowledge [at 3 and 7], the Settlement automatically terminates if this Court determines to exercise jurisdiction over the claims of the non-U.S. purchasers covered by the Settlement. Similarly, with respect to U.S. purchasers, the Settlement provides only that a proportional settlement offer will be made to them ***if*** approved by this Court. Finally, Shell expressly recognized the jurisdiction of this Court over Shell and this case by moving, as promptly as possible following the execution of the Settlement and the filing of the Dutch proceeding, to dismiss the claims of the non-U.S. purchasers covered by the Settlement on grounds of *forum non conveniens* and comity. There is nothing in the Settlement or Shell's conduct that seeks to deprive the Court of jurisdiction over this matter.

ARGUMENT

To our knowledge, there is no precedent in which a U.S. court has enjoined a foreign proceeding involving a foreign court settlement of claims between entirely foreign parties – not to mention one that includes foreign parties who are not even before the U.S. court and that has *absolutely no effect* on any U.S. plaintiff before the Court. The absence of precedent is hardly surprising, given the long-established reluctance of U.S. courts to intervene in foreign legal proceedings.

In this case, Lead Plaintiffs ask the Court not only to interject itself into an ongoing Dutch settlement proceeding, but to do so in order to drag more than fifty non-U.S. institutional investors and retail shareholder advocacy groups into this Court to litigate matters that these non-U.S. investors – many of whom are not even parties in this matter – have clearly chosen to resolve in the Netherlands. As legal support for this intrusion into the proceedings of another sovereign nation and disregard for the express wishes of the non-U.S. investors participating in the Settlement, Lead Plaintiffs point primarily to the D.C. Circuit's opinion in *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984). Unlike *Laker*, however, in which the defendants asked a U.K. court to enjoin U.S. proceedings in favor of U.K. proceedings, the Dutch proceedings here do not seek to interfere with this Court's jurisdiction. Instead, the Dutch proceedings involve a settlement that is (i) endorsed by those to whom it applies, (ii) overseen by a qualified foreign court under the terms of a duly authorized foreign statute, and (iii) explicitly made subject to this Court's decision about its own jurisdiction. This matter is not *Laker*.

Further, the Settlement does not bind Lead Plaintiffs or any other potential U.S. plaintiff. In fact, Lead Plaintiffs' and their counsel's sole complaint seems to be that losing the non-U.S. purchasers from their putative class will prevent them only from enjoying the full measure of the "rights" – presumably the reputational

and financial benefits – associated with their lead status. These are simply not grounds on which the Court should overrun the traditional comity concerns that prevent courts from enjoining foreign legal proceedings. Accordingly, Lead Plaintiffs' motion should be denied because (i) established Third Circuit precedent requires the denial of such requests under principles of international comity unless they fall into two "narrow exceptions" that are not applicable here, and (ii) none of Lead Plaintiffs' scattershot arguments justifies the application of either exception or otherwise supports an injunction.

I. ESTABLISHED PRINCIPLES OF INTERNATIONAL COMITY AND THIRD CIRCUIT PRECEDENT REQUIRE THE COURT TO DENY LEAD PLAINTIFFS' REQUEST TO ENJOIN THE SETTLEMENT

Although Lead Plaintiffs' motion is styled as a request to enjoin Shell and the opt-out plaintiffs (ABP and PGGM) from pursuing the approval of the Settlement, the settling parties – which include other non-U.S. investors not before this Court – have already filed the Settlement with the Dutch court and have asked that court to declare the Settlement binding on all non-U.S. investors. Thus, the requested injunction must be considered an injunction of the Dutch proceeding itself. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products*, 310 F.3d 118, 125 (3d Cir. 2002) ("We have often said that enjoining a party from resorting to a foreign court is equivalent to enjoining foreign proceedings."), *citing Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 887 (3d

Cir. 1981) (finding "no difference between addressing an injunction to the parties and addressing it to the foreign court itself"). The Third Circuit observed twenty-five years ago that "[r]estraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore requires that such action be taken only with care and great restraint." *Compagnie des Bauxites de Guinea*, 651 F.2d at 887 n.10.

More recently, the Third Circuit remarked that "[a]lthough [comity] is a consideration in federal and state litigation, it assumes even more significance in international proceedings." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). In *General Electric*, the Third Circuit explained that "comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises. It also encourages the rule of law, which is especially important because as trade expands across international borders, the necessity for cooperation among nations increases as well." *Id.* Likewise, the U.S. Supreme Court has expressed the view that the expansion of American business will be thwarted if "we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), *cited in General Electric*, 270 F.3d at 160.

None of Lead Plaintiffs' arguments comes close to overriding these important comity concerns.

A. The Case Presents Significant Comity Concerns that Cannot Be Dismissed as "Minimal"

Lead Plaintiffs' attempts [at 16-17] to minimize the significant comity concerns presented by their request for an injunction of the Dutch proceeding are misplaced. Ultimately, they demonstrate nothing more than Lead Plaintiffs' lack of concern for the non-U.S. investors and lack of respect for Dutch law.

There can be no question that the Netherlands has a legitimate interest in the resolution of disputes between Shell – which is domiciled in the Netherlands – and Dutch institutional and retail investors, including the largest pension fund in the Netherlands. Further, as a member of the European Union, the Netherlands certainly has a far greater interest in resolution of disputes between a Dutch domiciled company and investors throughout Europe (who constitute the vast majority of the non-U.S. investors) than does the U.S.

The Netherlands also has an interest arising from the fact that Shell, the institutional pension fund investors, ABP and PGGM, the VEB and the Foundation – all citizens of or domiciled in the Netherlands – have chosen the Netherlands as a forum. The Settlement, with the support and participation of dozens more European and other non-U.S. institutional investors and shareholder advocacy

organizations around Europe, is additional clear evidence that these sophisticated investors want to resolve their claims in the Netherlands and in Europe, rather than across the ocean in the U.S. While we believe (and have argued in our motion to dismiss) that this Court should respect the choice of these sophisticated non-U.S. investors and should dismiss claims of non-U.S. investors in favor of the Dutch proceeding, at the very least, there can be no dispute that the Netherlands has a significant interest in providing a forum for its residents and other citizens of the European Union when those persons and entities choose to resolve their claims in a Dutch court.

Finally, the Netherlands has an interest in the Settlement because it has been structured under the 2005 Law and filed in a Dutch appellate court. The 2005 Law was created specifically to provide an efficient means of resolving claims in a collective manner and has now been tested twice. To be sure, the Netherlands has an interest in a matter involving a statute specifically adopted by the legislature to resolve complex, collective matters such as this one.[3] This interest is not

[3] Lead Plaintiffs' reference [at 16-17 and Exhibit 2] to the opinion of Shell's Dutch law expert is incomplete and misleading. Citing only to page 37 of the expert's report, Lead Plaintiffs would have the Court believe that Shell's expert maintains that a Dutch court would not approve a settlement that binds non-Dutch participants. Lead Plaintiffs neglect to tell the Court that the expert report was prepared prior to the Dutch court's January 2007 *Dexia* decision on the 2005 Law and that Shell's expert withdrew the specific paragraph to which Lead Plaintiffs cite in view of the Dutch court's recent decision. *See* Tr. of Prof. Groen deposition at pp. 8-13, attached as Exhibit 4.

diminished by the automatic termination provision in the Settlement. Indeed, the very purpose of the provision is driven by the parties' assumption that the Dutch court would be interested in proceeding with the settlement (even in parallel with the action in this Court) and by Shell's negotiated desire to avoid the prospect of settling the matter in the Netherlands while having to risk litigating the same investors' claims in the U.S.

In contrast to the obvious interest of the Netherlands in this matter, Lead Plaintiffs ignore a basic fact that at least minimizes any U.S. interest in the matter: the Settlement does not bind any U.S. purchaser. To avoid this simple truth, Lead Plaintiffs feebly assert [at 16] that the Court's decision on the subject matter jurisdiction motion to dismiss "carries with it the conclusion that Congress intended to regulate Shell's conduct as it pertains to [non-U.S. investors]."[4] Even if Congress had "intended" to permit this Court to take jurisdiction over claims by non-U.S. investors, that does not mean that the Court should enter an injunction that would have the effect of forcing those investors to litigate their claims *only* in this Court. Regardless of what Judge Bissell's subject matter jurisdiction ruling

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[4] Lead Plaintiffs seek further support for this theory in the SEC staff's determination to distribute Shell's settlement payment to both U.S. and non-U.S. Shell investors. This is nonsense. The SEC staff's determination in a settled matter carries no legal or precedential weight whatsoever. Moreover, the staff's position merely reflects an understanding that Shell received in 2004 in the negotiations for the settlement, when it agreed to make the payment as part of the settlement.

may mean, it certainly does not amount to a prohibition against non-U.S. litigants proceeding elsewhere, if they so choose. Lead Plaintiffs cannot seriously contend that an initial determination under a light burden empowers or compels the Court to override the sovereignty of a Dutch court applying a Dutch statute to a group of non-U.S. investors, or that it gives the Court a basis to ignore the express wishes of the non-U.S. investors in the Settlement.

B. The Third Circuit's "Restrictive Approach" to Enjoining Foreign Proceedings Requires Denial of the Motion

In *General Electric*, the Third Circuit discussed two different standards employed by circuit courts considering requests for injunctions against foreign proceedings: a "lax" standard favored by the Fifth, Seventh and Ninth Circuits and a "restrictive approach" used by the Second, Sixth and District of Columbia Circuits. *General Electric*, 270 F.3d at 160-61. After summarizing its prior holdings declining to interfere in or enjoin foreign proceedings, including *Compagnie des Bauxites de Guinea*, and concluding that "[o]ur jurisprudence thus reflects a serious concern for comity," the Third Circuit held that "[t]his Court may properly be aligned with those that have adopted a strict approach when injunctive relief against foreign judicial proceedings is sought." The court therefore overturned the District Court's grant of an injunction. *Id.* at 161; *see also*

Stonington Partners, 310 F.3d at 126 ("Based on a 'serious concern for comity,' we have adopted a restrictive approach to granting such relief.") (citation omitted).

The Third Circuit described the "restrictive approach" as "rarely permitting injunctions against foreign proceedings" and noted that courts following this approach will "approve enjoining foreign parallel proceedings only to protect jurisdiction or an important public policy." *General Electric*, 270 F.3d at 160-61. Moreover, Courts adopting this restrictive approach "have interpreted these exceptions narrowly." *Stonington Partners*, 310 F.3d at 127. As discussed more fully in the sections below, these exceptions do not apply here, as the Settlement threatens neither the Court's jurisdiction nor any important public policy of the U.S. Accordingly, no injunction is warranted.

1. The Settlement Does Not Threaten the Court's Jurisdiction

Courts applying the "restrictive approach" employed by the Third Circuit have limited the "preservation of jurisdiction" exception to two situations: *in rem* or *quasi in rem* proceedings and cases in which "a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action." *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987). Neither of these exceptions applies here. This putative class action is

not an *in rem* or *quasi in rem* proceeding.[5] Nor is the Dutch proceeding attempting to carve out exclusive jurisdiction over this action. Merely duplicative litigation (as to the non-U.S. investors) does not threaten jurisdiction sufficiently to warrant an injunction. *See China Trade*, 837 F.2d at 36 ("Since parallel proceedings are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a United States court does not, without more, justify enjoining a party from proceeding in the foreign forum."); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1357 (6th Cir. 1992) (stating that if duplication alone were enough for an anti-suit injunction, "parallel proceedings would never be permitted because by definition such proceedings involve the same claim and therefore the same parties and issues"). Even duplicative litigation that becomes "harassing and vexatious" does not satisfy the Third Circuit's restrictive test for granting an injunction against a non-U.S. proceeding. *Compagnie des Bauxites de Guinea*, 651 F.2d at 887.

Courts discussing the "restrictive approach" point primarily to the D.C. Circuit's opinion in *Laker* as the rare example of an injunction that meets the test,

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[5] While some courts have referred to a class action on the verge of settlement as a res, *see, e.g., In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337 (2d Cir. 1985) (class action that had progressed to preliminarily approved settlement was "so far advanced that it was the virtual equivalent of a res"), this case is nowhere near that procedural stage. No class has been certified, and no settlement has been proposed, much less preliminarily approved.

because, in that case, the enjoined foreign court *did* try to oust the U.S. court of jurisdiction. In *Laker*, two of several foreign defendants successfully petitioned the United Kingdom's High Court of Justice ("High Court") to enjoin a pending U.S. antitrust action that Laker had filed against them. Other foreign defendants also petitioned or sought to petition the High Court for a similar injunction. Laker moved for an injunction in the U.S. district court to prevent the remaining defendants from petitioning the High Court, and the district court granted the injunction.

In affirming the district court's order, the D.C. Circuit relied specifically on the fact that the foreign action was not a parallel proceeding, but "[r]ather, the sole purpose of the English proceeding [was] to *terminate* the American action." *Id.* at 930. The Third Circuit and other courts citing *Laker* also find this attempt to *terminate* the U.S. litigation to be the key element in the holding. *See Stonington Partners*, 310 F.3d at 127; *China Trade*, 837 F.2d at 37 ("In the present case, however, there does not seem to be any threat to the district court's jurisdiction. While the Korean court may determine the same liability issue as that before the southern district, the Korean court has not attempted to enjoin the proceedings in New York.").

Unlike in *Laker*, the Dutch proceedings here do not attempt to enjoin the Court in this matter or otherwise "terminate" the proceedings before the Court. In

fact, the Settlement expressly recognizes – and is subject to – this Court's determination of its own jurisdiction over the claims of the non-U.S. investors. In addition, Shell specifically recognized the continued jurisdiction of the Court over Shell and this case in filing its motion to dismiss on *forum non conveniens* and comity grounds. Finally, the Settlement has no effect on the claims of the Lead Plaintiffs – regardless of whether they purchased on U.S. or non-U.S. exchanges – or any other potential U.S. plaintiff.[6] At its theoretical worst, if the Settlement were somehow approved and implemented before the Court ruled on its jurisdiction, the only effect would be that some non-U.S. members of a putative worldwide class, after full notice and an opportunity to opt out in the Dutch

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[6] Lead Plaintiffs' complaint [at 6-7] that "an American who suffered losses on shares purchased abroad . . . would receive a smaller payment than a foreigner who made the exact same purchase and suffered an identical loss" is simply wrong. The Settlement is based on economically modeled, "plaintiff-style" damages estimates of the type typically advanced by plaintiffs in U.S. securities class actions. The per share inflation estimates closely approximate those offered by Lead Plaintiffs' expert in this matter. In negotiating the settlement, the parties reduced the amount to be paid to non-U.S. purchasers on non-U.S. exchanges by the percentage of purchases on those non-U.S. exchanges estimated to originate from U.S. investors. (Contrary to Lead Plaintiffs' speculation, these estimates did not derive from record owners or "street name" owners of the securities purchased on non-U.S. exchanges. As made clear in the Declaration of Frank Scaturro of Thomson Financial Corporate Advisory Services, attached as Exhibit 5, the proprietary methods used by Thomson look through such holders to the beneficial owners.) That amount was then added to the amount to be offered to the U.S. purchasers, so that all purchasers would have the opportunity (if the Court permits Shell to make the offer) to recover the same settlement percentage as agreed in the Settlement.

proceeding, would accept the Settlement, dismissing or releasing their potential claims in this Court. That is not a threat to the Court's jurisdiction or grounds for an injunction. *See Gau Shan*, 956 F.2d at 1356 (stating that the district court's jurisdiction is not threatened "by the possibility that a ruling of the foreign court might eventually result in the voluntary dismissal of the claim before the United States court").

At some point, every discussion of *Laker's* holding always returns to the fact that the U.K. proceedings in that case specifically sought to enjoin the U.S. proceeding. The Settlement poses no such threat to this proceeding. Accordingly, an injunction is neither necessary nor appropriate.

2. The Settlement Does Not Threaten Any Important Public Policy

"Few cases have addressed a situation in which an anti-suit injunction has been appropriately entered to protect important public policy, but the courts that take a restrictive approach have referenced this exception as being narrowly drawn." *Stonington*, 310 F.3d at 127 (citing to no such cases). Only the "most compelling public policies of the forum will support the issuance of an anti-suit injunction." *Id.* (quoting *Gau Shan*, 956 F.2d at 1357). There is no such compelling reason here.

Lead Plaintiffs' only argument on U.S. public policy completely ignores the international aspects of this matter. Citing the Private Securities Litigation Reform Act ("PSLRA"), the Securities Litigation Uniform Standards Act ("SLUSA"), and the Class Action Fairness Act ("CAFA"), Lead Plaintiffs argue [at 14] that "Congress has expressed a policy against permitting parallel claims to proceed in different fora." Lead Plaintiffs claim that "in recent years Congress has expressed a policy of resolving class actions generally, and federal securities claims in particular, in a single, federal proceeding," and they assert that the proposed settlement would undermine that policy.

With respect to *domestic* securities cases, Lead Plaintiffs are correct that Congress has expressed a desire for more uniform federal proceedings. They fail to appreciate, however, that these Congressional actions derive from a desire to limit abuses in the plaintiffs' bar through the filing of competing *state court* cases. In passing these reforms, Congress did not – and could not – restrict the ability of non-U.S. purchasers from bringing claims in courts of other sovereign nations. Accordingly, Congress' desire for uniform proceedings in domestic securities cases has absolutely nothing to do with sophisticated non-U.S. investors' choosing to litigate or settle in another country pursuant to the validly enacted laws of that country. Therefore nothing about the Settlement can be seen as infringing any federal policy important in an international context.

But even if one were to assume that the policy favoring federal over state fora were somehow relevant to this matter, that is precisely the type of "substantive" policy that the Third Circuit has found to be insufficient to warrant enjoining a foreign proceeding. In *Stonington Partners*, the Third Circuit distinguished this type of "substantive" policy from an "important" policy that would warrant an injunction:

> Notably, the policies that the *Laker Airways* court found to justify an anti-suit injunction were not those motivating United States antitrust laws – the substance of the dispute – but instead 'that United States judicial functions have been usurped, destroying the autonomy of the courts.'"

Stonington Partners, 310 F.3d at 128 (citation omitted). The Third Circuit continued:

> This is significant because, rather than focus on the public policies furthered by the substantive law, which presumably are always present, at least to some degree, the [*Laker*] court focused on what made this case unusual – namely, the degree of foreign interference with properly invoked United States concurrent jurisdiction.

Id. Lead Plaintiffs do not – and cannot – argue that anything in this matter approaches "the degree of foreign interference with properly invoked United States concurrent jurisdiction" that the Third Circuit's "restrictive approach" requires. *Id.*

Lead Plaintiffs' subsequent arguments are not policy-based; they are merely unsubstantiated attacks on Shell's motives for entering into the settlement and the conduct and professional reputations of the U.S. counsel, European counsel and sophisticated institutional investors and shareholder associations with whom Shell negotiated the Settlement. These attacks also disregard the interests of the non-U.S. investors whom Lead Plaintiffs purport to include in their class, the oversight role of the independent Foundation created pursuant to the 2005 Law and the importance of the Amsterdam Court of Appeals' approval of the Settlement under the 2005 Law. While Lead Plaintiffs from Pennsylvania and their counsel might try to ignore the wishes of the non-U.S. institutional investors and shareholder advocacy groups and dismiss as unimportant the courts and laws of other sovereign nations, this Court cannot do so.

II. LEAD PLAINTIFFS' ARGUMENTS FAIL TO JUSTIFY THEIR REQUEST FOR AN INJUNCTION

Lacking a legitimate claim that this case resembles *Laker* in any way or that it meets the restrictive requirements for an injunction in this Circuit, Lead Plaintiffs try several different arguments to support their assertion that the Court should

enjoin the Settlement. Although most of the arguments seem more properly aimed at the "public policy" exception than the "jurisdictional" exception, Lead Plaintiffs offer many of the same or similar arguments under both exceptions. As discussed below, none of the arguments has merit because:

(i) the Court should not enjoin non-parties;

(ii) there is no certified class in this matter;

(iii) Shell and the individual opt-out plaintiffs did not violate the Court's Consolidation Orders;

(iv) the appointment of Lead Plaintiffs under the PSLRA does not endow them with "rights" to control the actions and intentions of non-parties;

(v) the Settlement was the result of arm's length negotiations and appropriately resolves potential claims of non-U.S. investors; and

(vi) the Court's initial decision on the subject matter jurisdiction motion to dismiss does not support an injunction.

A. The Court Should Not Enjoin Non-Parties from Pursuing a Settlement in the Dutch Court

Lead Plaintiffs have not cited a single case in which any court ever enjoined a foreign proceeding that did not involve the same parties litigating in the U.S. court. Here, however, the parties to the Dutch proceeding and this action are not the same. Although Shell and the opt-out plaintiffs (ABP, PGGM, and Deka) are

before the Court, none of the other non-U.S. parties to the Settlement is and none of the other participants in the Foundation is.[7] They have neither consented to this Court's jurisdiction nor have they been given notice and an opportunity to opt out of any potential class that the Court may certify. *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 199-201 (3d Cir. 1993); *In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989). With respect to these parties, there is no jurisdiction for this Court to preserve, because it does not yet exist. Indeed, this Court would overreach its jurisdiction – and due process – by issuing an injunction that has the effect of forcing parties who are not before this Court to come to this jurisdiction, and only this jurisdiction, in order to pursue or settle their potential claims. This alone should be reason enough to deny Lead Plaintiffs' request that the Court impose this U.S. action on these non-U.S., non-party institutions.

B. Lead Plaintiffs Do Not Represent a Certified Class of Investors

Lead Plaintiffs acknowledge throughout their motion that there is only a "putative" class at this stage, but fail to appreciate the significance of the absence of a certified class. At this point, when no class has been certified, Lead Plaintiffs

[7] Intervening plaintiff Peter M. Wood, the Andorran citizen who counsel for Lead Plaintiffs also represents, is covered by the Settlement but will have an opportunity under the 2005 Law to opt-out and pursue his potential claims against Shell individually.

and their counsel do not "represent" any certified "class," and Shell was free to negotiate with the potential members of the putative class, particularly the sophisticated institutions and VEB – represented by equally sophisticated counsel of their own choosing – who were involved in the Settlement negotiations. As Judge Friendly observed in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972), he was "unable to perceive any legal theory that would endow a [putative lead] plaintiff…with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this." *Id.* Judge Friendly concluded that "plaintiff has no legally protected right to sue on behalf of other [absent putative class members] who prefer to settle." *Id.* at 775; *see also* Manual for Complex Litigation § 21.33 (4th ed. 2007) ("As a general rule, unnamed members of the class, prior to certification of a class, are not represented by counsel for the class."); Restatement (Third) of Law Governing Lawyers § 99 cmt. l (2000) ("[P]rior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients."); 30 Moore's Federal Practice – Civil § 810.05 ("Courts have been generally reluctant to interpret the no-contact rule to prohibit defense counsel from making contact with putative class members prior to certification. The rationale is that the putative class members are not yet formally 'represented' so the no-contact rule is not yet triggered").

Seeking to avoid this basic flaw in their analysis and argument, Lead Plaintiffs attempt to conflate the initial, limited inquiry under the PSLRA's lead plaintiff selection process (into whether presumptive lead plaintiffs have made a *prima facie* showing of adequacy and typicality) with the more detailed and searching inquiry done in class certification. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d. Cir. 2001); *In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 373 (S.D.N.Y. 2000) *citing In re Party City Sec. Litig.*, 189 F.R.D. 91, 111 n. 21 (D.N.J.1999) ("[T]he appointment of lead plaintiffs occurring as it does in advance of class discovery, is not a final ruling on their appropriateness as Class Representatives."). Although they certainly have a role as Lead Plaintiffs in management and leadership of the consolidated cases now before the Court, that role does not extend to control over the claims and settlement discussions of either the opt-out plaintiffs (which Lead Plaintiffs concede) or non-U.S. investors not yet before the Court as a result of a class certification order, notice and an opportunity to opt out.

C. Shell and the Opt-Out Plaintiffs Did Not Violate the Court's Consolidation Orders

Lead Plaintiffs argue [at 9] that "[t]he 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." Although Lead Plaintiffs pay lip service to *Laker* with a citation and quotation about "paralyz[ing] the jurisdiction of the court," they do not – presumably because they cannot – explain how the Settlement and the purported "violation" of the Consolidation Orders could conceivably "paralyze" the Court's jurisdiction. In any event, Lead Plaintiffs' tortured interpretations of the Consolidation Orders are flatly inconsistent with the plain language of the Orders themselves. The Orders just do not say what Lead Plaintiffs claim they do.

Contrary to Lead Plaintiffs' claims and selective quotations [at 2, 4, 5, and 9-10] the Court's June 30, 2004 and February 7, 2006 Consolidation Orders do not grant Lead Plaintiffs "sole responsibility to negotiate on behalf of the putative class." By its terms, the June 30 Order grants Lead Plaintiffs and their counsel the "sole authority" to act only "on behalf of all *plaintiffs* in their respective cases . . ." (emphasis added). This must be limited to *named plaintiffs* in the existing cases before the Court, because the Order [at ¶2] applies only to "[a]ny action hereafter filed in the Court or transferred to this Court," and only the named plaintiffs would even have "their respective cases." Additionally, because there is no "class" of unnamed plaintiffs yet before the Court pursuant to an order under Fed. R. Civ. P. 23, and because the June 30 Order makes clear [at ¶3] that "[t]he terms of this Order shall not have the effect of making any person, firm or corporation a party to

any action in which he, she or it has not been named, served or added in accordance with the Federal Rules of Civil Procedure," the June 30 Order can only mean at this stage of the proceedings that Lead Plaintiffs were appointed to act on behalf of the other named plaintiffs in the consolidated actions.

The February 7 Order consolidates the individual opt-out cases for "pretrial purposes" and not, as Lead Plaintiffs would have the Court believe, for all purposes, as are the putative class actions subject to the June 30 Order.[8] Apart from making clear [at ¶7] that counsel in the individual cases are free to communicate with Shell on matters involving those cases,[9] the February 7 Order otherwise adds little to the analysis of representation of the unnamed potential members of the putative class and lends no support to Lead Plaintiffs' assertions, because it does not restrict, in any way, counsel for the opt-out plaintiffs from communicating with unrepresented potential members of the putative class.

Significantly, nothing in either Order restricts Shell's ability to communicate with potential members of the putative class alleged by Lead Plaintiffs. There is

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[8] The February 7 Order also states [at ¶12] that "[t]o the extent any provisions in this Order are inconsistent with provisions in the [June 30, 2004 order] as to the handling of Individual Actions, the terms of [the February 7, 2006] Order shall govern." This makes clear that the intent of the Order is to supersede the earlier Order with respect to the individual cases and that the "consolidation" is limited to "pretrial purposes."

[9] As the Order specifically contemplates other such cases [at ¶11], it is clear that the Order would permit communications on those matters as well.

no basis under law or principles of legal ethics for such a restriction in the absence of a certified class, particularly where – as here – the non-U.S. investors involved in the Settlement are sophisticated institutional investors and a sophisticated shareholder advocacy organization, all represented by sophisticated, experienced U.S. or European counsel.

Lead Plaintiffs next shift their focus to the individual opt out plaintiffs' access to discovery materials and try to analogize the Settlement to the French proceedings in *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chemical Co.*, 441 F. Supp. 1385 (C.D. Cal. 1977). In making the comparison and their resulting argument, Plaintiffs ignore the facts of both cases. *Omnium* involved parallel civil actions in California and France (which were not enjoined). A special master in the California action ordered that no discovery materials obtained in that matter could be used in the French actions. Plaintiffs nonetheless used them in France over the objections of the defendant to secure judgments in France against the defendant. The defendant then moved for an injunction against enforcement of the French judgments, and the court granted it.

In this case, however, Shell, unlike Dow, is not objecting to the use of materials it produced in discovery. There is nothing in the Consolidation Orders or in the Confidentiality Stipulation to prevent Shell from permitting the individual plaintiffs to use documents produced by Shell and testimony of witnesses made

available by Shell in connection with the Settlement. The Confidentiality Stipulation specifically provides [at ¶21] that "[n]othing herein shall restrict or preclude any Producing Party from disclosing its own Confidential Information or Highly Confidential Information to any person or entity without regard to the provisions of this Protective Order."

D. The Court's Appointment of Lead Plaintiffs Under the PSLRA Does Not Endow Lead Plaintiffs with "Rights" to Control the Actions of Non-Parties.

Unable to find a *Laker*-worthy issue in the Consolidation Orders, Lead Plaintiffs next turn to the Order appointing them Lead Plaintiffs and argue [at 10] that "the purported settlement interferes with this Court's management of the pending action by undermining its selection of" Lead Plaintiffs, citing to the Eighth Circuit's holding in *In re BankAmerica Corp. Securities Litigation*, 263 F.3d 795 (8th Cir. 2001). Lead Plaintiffs assert [at 11] that, like the lead plaintiff in the *BankAmerica* matter, they enjoy "various exclusive rights and responsibilities" as a result of the PSLRA that would be "frustrate[d]" or rendered "'meaningless' if another party may 'seize control of the litigation of the federal claims' by resolving it in another jurisdiction." (citations omitted).[10]

[10] Lead Plaintiffs' purported quotation from and citation to *Laker* [at 11-12] appear to be mistaken. No such quotation appears in the *Laker* opinion, but it does appear in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004). In *Quaak*, the First Circuit upheld a district court's

Lead Plaintiffs' faulty assertion [at 11] that the PSLRA conveys property-like "rights" to those appointed by the courts as Lead Plaintiff and Lead Counsel contorts both the current status of this case and the holding and rationale in *BankAmerica*. First, Lead Plaintiffs' argument ignores the fact that *BankAmerica* involved a certified class and this case does not. As discussed above, although they have been appointed Lead Plaintiffs under the PSLRA, there is no class certified in this matter, so Lead Plaintiffs do not "represent" any "class" at this point in the litigation.

In addition, *BankAmerica* involved the injunction of a state-court action, not a foreign action and, therefore, did not discuss or address the "serious concerns" presented by issues of international comity. Conversely, the court considered important the subsequent passage of SLUSA, which would have prohibited the very matter that was enjoined. *See BankAmerica*, 263 F.3d at 802 ("Under

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injunction against a Belgian proceeding in which a defendant sought an order forbidding plaintiffs from enforcing the U.S. court's orders to produce documents. In reaching this decision, the First Circuit adopted neither the "lax" or "restrictive" approaches (though it did favor the more conservative standard), but added a new threshold inquiry into whether the parties and issues in the two proceedings are identical. *Id.* at 18. The First Circuit said, "Unless that condition is met, a court ordinarily should go no further and refuse the issuance of an international antisuit injunction." *Id.* Of course, this matter involves different parties, as most of the non-U.S. investors participating in the settlement (and all of the unnamed members of the putative class sought by Lead Plaintiffs) are not yet parties to this case. Also, this is another example of the foreign court's essentially seeking to enjoin the U.S. court or block its orders.

SLUSA, therefore, [the state action] would be preempted altogether, obviating the need for injunctive power of the sort invoked by the district court under the PSLRA."). Of course, no such prohibition exists for foreign securities proceedings; nor could there be any such prohibition consistent with principles of comity.[11] Further, the Court should not interpret either the PSLRA or SLUSA in a manner that offends established principles of international comity. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ("This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.").

The thrust of Lead Plaintiffs' argument, in fact, seems to spring from a notion that they – or more particularly their counsel – have a "right" to the "potentially lucrative lead role" and the Settlement has interfered with that "right." Even if one could read *BankAmerica* as endorsing this sentiment and a strong preference against parallel litigation in the securities field, it clearly fails to meet the threshold for enjoining a non-U.S. proceeding under the Third Circuit's "restrictive approach." The Third Circuit has been clear on several occasions that

[11] Taken to its logical (and absurd) end, Lead Plaintiffs' argument would mean that no court outside the U.S. could even hear a securities-related case if parallel U.S. litigation under the PSLRA has been commenced, for fear of frustrating the "rights" of the appointed Lead Plaintiff. There is absolutely no basis on which this Court can or should invent a SLUSA-like prohibition of foreign securities actions.

parallel litigation alone is not grounds for an injunction. *See Stonington Partners*, 310 F.3d at 127; *General Electric*, 270 F.3d at 161 (discussing *Compagnie des Bauxites de Guinea*, 651 F.2d at 887). Nothing in Lead Plaintiffs' PSLRA argument comes close to suggesting that the Settlement is tantamount to the U.K. court's injunction of U.S. proceedings at issue in *Laker*, particularly as the Settlement does not implicate Lead Plaintiffs' ability to prosecute their claims or, if a class is certified and they are appointed as class representatives, the claims of any other U.S. purchaser.

E. The Settlement Legitimately Resolves Claims of the Non-U.S. Investors and Was Not the Product of Collusion

In a futile effort to diminish the Settlement, Lead Plaintiffs' motion papers are replete with unfounded assertions about the bona fides of the Settlement. For example, they contend [at 2, 7 and 11] that "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," that "the only claims resolved by the proposed Dutch settlement are the securities claims advanced by Foreign Purchasers in this action under American law," and that the Settlement "has a practical effect of only settling the specific claims advanced in this action under American law."

As described above, European and other non-U.S. investors have potential claims outside the U.S. and have threatened to bring them. *See* Exhibits 1, 2 and 3.

The fact that no adversary litigation has yet been commenced in Europe does not mean that these investors would not consider asserting those claims against Shell or that the resolution of those claims (even in combination with all other potential claims, including potential U.S. claims) is not a legitimate settlement with real "legal effect." In fact, the only area in which the Settlement truly has no "legal effect" is with respect to Lead Plaintiffs and all other U.S. purchasers of Shell securities, unless this Court allows Shell to make an equivalent offer to the U.S. investors.

Continuing the effort to discredit the Settlement, Lead Plaintiffs insinuate [at 6] and charge [at 15] that Shell is colluding in the Settlement with counsel for the individual plaintiffs in the opt-out cases. But Lead Plaintiffs completely ignore the dozens of sophisticated non-U.S. institutions and shareholder advocacy groups who have determined to participate in the Settlement, the distinguished European counsel involved in the Settlement, the independent members of the Foundation's Board of Directors and, significantly, the Amsterdam Court of Appeals, which must review and approve the Settlement.[12] Instead, they ask this Court to impose

[12] Investors who may be affected by the Settlement will have an opportunity to present any objections in the Amsterdam Court of Appeals. Lead Plaintiffs certainly cannot suggest that tribunal is incapable of determining whether the proposed settlement is fair, the product of collusion or otherwise inappropriate for approval. Certainly, this Court should not presume, at this stage and on this record, to judge the fairness or adequacy of the proposed settlement by effectively enjoining the Amsterdam Court of Appeals from proceeding with its

the will and judgment of two Pennsylvania Funds – ultimately assisted by a single individual investor from Andorra with 1,500 shares – on some of the most sophisticated investors and shareholder advocates in Europe and elsewhere outside the U.S. The Court should see this for the desperate ploy that it is.

F. The Court's Decision on the Subject Matter Motion to Dismiss Offers No Support for an Injunction

Lead Plaintiffs assert [at 12] that the Court's Order on the subject matter jurisdiction motion to dismiss is "controlling" and that such a "finding that jurisdiction exists is, necessarily, a conclusion that the conduct in question is a matter of federal concern." Lead Plaintiffs are wrong both as a matter of the status of this case and as it pertains to their conclusion that such a finding would support an injunction under the Third Circuit's "restrictive approach."

Lead Plaintiffs' attempts to cling to the initial decision on subject matter jurisdiction ignore both the light burden used by the Court in that decision as well as the Court's subsequent admonitions that the case has moved beyond that stage. In the April 12, 2006 Hearing before the Court on the proposed mini-trial, the Court admonished Lead Counsel to "put Judge Bissel's finding aside because it really doesn't help. He found that you got over the hurdle at the pleading stage. That's history. Let's move forward." April 12, 2006 Transcript of Hearing at 25-

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process for reviewing the settlement and determining whether to approve it, based upon all the facts and the requirements of Dutch law.

26. As a substantive matter, the initial decision does not reflect either a final determination that there is jurisdiction or any "congressional intent [or] federal policy" that the claims of non-U.S. investors can be litigated or settled only in this Court. Moreover, even assuming the initial decision could be seen as some "federal concern" in regulating Shell's conduct, that is precisely the type of "substantive" law issue found by the Third Circuit to be insufficient to support an injunction of a foreign proceeding. *See Stonington Partners*, 310 F.3d at 127 (noting that such substantive policy issues were "presumably . . . always present, at least to some degree" but suggesting that injunctions were appropriate only when "United States judicial functions have been usurped, destroying the autonomy of the courts").

In any event, as this Court well knows, the so-called "jurisdiction" issue has yet to be resolved. That is why the Court has set aside four weeks for the evidentiary hearing scheduled to begin on June 18. The Court also might be interested to know that, in the course of their effort to solicit non-U.S. investors to pursue claims against Shell, a prominent New York plaintiffs' firm has urged those investors to sue *in Europe*, because "[t]here is a significant likelihood that the claims of non-U.S. investors who purchased Shell securities on European exchanges will be dismissed from the pending class action . . . although the original judge presiding over the Shell case found that the conduct within the

United States was sufficient to sustain jurisdiction, his July [sic] 2005 ruling is not, in our assessment, consistent with the ruling of courts in other, similar cases." [Ex. 2, at 5].

CONCLUSION

For the foregoing reasons, this Court should deny Lead Plaintiffs request for an injunction.

Dated: May 9, 2007

Respectfully submitted,

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