

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re:)	Civil Action No. 04-374 (JAP)
IN RE ROYAL DUTCH/SHELL)	Judge Joel A. Pisano
TRANSPORT SECURITIES)	
LITIGATION)	
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DEKA INVESTMENT GMBH)	
v.)	Civil Action No. 06-067 (JAP)
N.V. KONINKLIJKE)	Judge Joel A. Pisano
NEDERLANDSCHE)	
PETROLEUM MAATSCHAPPIJ)	
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STICHTING PENSIOENFONDS)	
ABP)	Civil Action No. 06-095 (JAP)
v.)	Judge Joel A. Pisano
ROYAL DUTCH SHELL plc)	
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**OPT-OUT PLAINTIFFS' OPPOSITION TO LEAD PLAINTIFF'S MOTION FOR AN
ORDER ENJOINING ROYAL DUTCH/SHELL DEFENDANTS AND OPT-OUT
PLAINTIFFS FROM SEEKING APPROVAL OF SETTLEMENT CONTRACT**

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The “Opt-Out Plaintiffs,”¹ by and through their undersigned counsel, submit the following brief in opposition to Lead Plaintiff’s Motion for an Order Enjoining Royal Dutch/Shell Defendants and Opt-Out Plaintiffs From Seeking Approval Of Settlement Contract.

PRELIMINARY STATEMENT

Although Lead Plaintiff has attempted to present its motion as one to protect this Court’s jurisdiction and U.S. policy interests, what Lead Plaintiff really seeks is to prevent European investors from utilizing a uniquely European solution to insure their recovery for securities fraud claims brought against a European company. The unstated, but underlying premise of Lead Plaintiff’s Motion – that the United States has a monopoly on the appropriate resolution of securities fraud claims – is *hubris* of the highest order and ignores all principles of international comity. Lead Plaintiff’s Motion also ignores or glosses over numerous other salient facts, including: (a) that no class has yet been certified in this action; (b) that public policy *favours* settlements; (c) that the settlement Lead Plaintiff seeks to enjoin in no way threatens this Court’s jurisdiction, in part because it is designed to protect against the possibility that this Court will

¹ The Opt-Out Plaintiffs are the following twenty five Dutch pension funds: Stichting Pensioenfonds ABP, Stichting Bedrijfspensioenfonds voor de Landbouw, Stichting De Samenwerking, pensioenfonds voor het Slagersbedrijf, Stichting Bedrijfstakpensioenfonds voor de Detailhandel, Stichting Pensioenfonds Interpolis, Interpolis Pensioenen Europa Pool, Interpolis Pensioenen Nederland Pool, Stichting bedrijfstakpensioenfonds voor het Schoonmaaken Glazenwassersbedrijf, Stichting bedrijfspensioenfonds voor Kappersbedrijf, Stichting Bedrijfstakpensioenfonds voor het levensmiddelenbedrijf, Stichting Bedrijfstakpensioenfonds voor het Melk-en Zuiveldetailhandelsbedrijf, Stichting Pensioenfonds Dutch Space, Stichting Bedrijfspensioenfonds voor de Schoenmakerij, Stichting Pensioenfonds voor fysiotherapeuten, Stichting Uittreding werknemers Agrarische sectoren, Stichting pensioenfonds voor de Tandtechniek, Stichting Pensioenfonds Wonen, Stichting Pensioenfonds Holland Casino, Stichting Bedrijfstakpensioenfonds voor de Metalektro, Stichting Bedrijfstakpensioenfonds Zorgverzekeraars, Stichting Spoorwegpensioenfonds, Stichting Bedrijfstakpensioenfonds voor het Horecabedrijf, Stichting Pensioenfonds Openbaar Vervoer, Stichting Pensioenfonds Metaal En Techniek, and Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (a/k/a Stichting PGGM); two German pension funds —Deka Investment GmbH and Frankfurt-Trust Investmentgesellschaft mbH (n/k/a Frankfurter Service KAG); and one Luxembourg pension fund—Deka International S.A. (Luxembourg).

not exercise jurisdiction over the claims at issue; and (d) that the European settlement proceedings will go forward regardless of whether or not the Opt-Out Plaintiffs are enjoined. All of these facts render the requested injunction unnecessary, improper and ineffective. Opt-Out Plaintiffs respectfully request that Lead Plaintiff's Motion be denied.

BACKGROUND

A. Involvement Of The Opt-Out Plaintiffs In This Case

The Opt-Out Plaintiffs are a group of European pension funds who collectively hold assets representing the retirement benefits of a significant portion of the labor force in The Netherlands, as well as significant assets from investors in Germany and Luxembourg. During the Class Period, the Opt-Out Plaintiffs purchased over 200 million shares of Shell securities. Given the size of their Shell holdings and the extent of their losses, the Opt-Out Plaintiffs sought to protect their interests by pursuing their own cases independent of the purported class action.

Accordingly, the Opt-Out Plaintiffs filed the ABP Action (Stichting Pensioenfond ABP v. Royal Dutch Shell PLC, Civ. A. No. 06-095) and the Deka Action (Deka Investment GMBH v. N.V. Koninklijke Nederlandsche Petroleum Maatschappij, Civ. A. No. 06-067) so they could separately prosecute their claims against Shell, represented by counsel of their own choosing.

Faced with the possibility that this Court might decline to exercise jurisdiction over their federal securities claims and those of other European investors, the Opt-Out Plaintiffs, as part of a pan-European coalition, successfully negotiated the settlement of the claims of all persons outside of the United States who purchased Shell securities on foreign exchanges ("Foreign Purchasers"). This landmark settlement, which will be null and void should this Court exercise jurisdiction over the claims of Foreign Purchasers, is essentially a negotiated insurance policy, guaranteeing Foreign Purchasers well over \$450 million in settlement of their claims if this Court declines to exercise jurisdiction over their claims.

B. The Settlement Agreement

On April 11, 2007, the Stichting Shell Reserves Compensation Foundation (the “Foundation”) – on behalf of a broad coalition of European institutional investors including the Opt-Out Plaintiffs and two dozen other institutional investors from numerous European nations – entered into an agreement with Shell, which it filed that same day in the Amsterdam Court of Appeals of The Netherlands, settling all claims raised by the Opt-Out Plaintiffs in their Actions and resolving the claims of all other Foreign Purchasers on a class-wide basis (the “Settlement Agreement”). Under the Settlement Agreement, Shell will pay \$359.75 million to Foreign Purchasers and further has committed to use its best efforts to persuade the Securities and Exchange Commission (the “SEC”) to distribute \$120 million of the fine it imposed upon Shell as a result of its overstatement of “proved” reserves to all purchasers of Shell securities in a non-discriminatory fashion (*i.e.*, without regard to the residence of such purchasers or the location of the securities exchanges on which such purchasers acquired their Shell securities). This distribution would provide \$94.8 million to Foreign Purchasers as 80% of Shell securities were purchased on foreign exchanges. In the event the SEC declines to distribute the \$120 million in this fashion, the Settlement Agreement provides for Shell to guarantee that \$94.8 million will be distributed to Foreign Purchasers. Thus, the Settlement Agreement provides a guaranteed payment of over \$450 million to Foreign Purchasers.²

The Settlement Agreement grew out of discussions between the Opt-Out Plaintiffs and Shell regarding the settlement of their claims against Shell that are pending before this Court.

² The Settlement Agreement provides that Shell shall pay the expenses of the settlement and reasonable attorneys’ fees to counsel for the Opt-Out Plaintiffs separate and apart from the \$359.75 million payable to Foreign Purchasers. Thus, the true value of the settlement is well in excess of \$500 million.

Recognizing that many foreign investors were in the same position as the Opt-Out Plaintiffs regarding the possibility that the Court could decline to exercise jurisdiction over their federal securities claims, the parties began to explore the possibility of resolving this case on behalf of all entities that both resided outside of the United States and purchased Shell on non-U.S. exchanges. These negotiations ultimately resulted in the Settlement Agreement.

The Settlement Agreement represents the first-ever class-wide settlement of a securities fraud claim in Europe. Beginning with an initial group of pension funds who opted out of the class action, Plaintiffs were able to form a coalition of fifty-one institutional investors from nine nations across Europe—namely, Denmark, Germany, Ireland, Luxembourg, Norway, Sweden, Switzerland, The Netherlands and the United Kingdom—to negotiate a class-wide settlement of the claims of all Foreign Purchasers of Shell securities. The participants to the Settlement Agreement collectively held significant amounts of Shell Trading and Transport Company (“Shell Transport”) and Royal Dutch Petroleum Company (“Royal Dutch”) securities.³ In fact, the participants to the Settlement Agreement collectively held over 535 million shares of Shell

³ The individual participants to the Settlement Agreement include some of the largest holders of Shell securities in their respective countries. In The Netherlands alone, three of the top nine holders of Shell securities—Stichting Pensioenfonds ABP (“ABP”), Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (“PGGM”), and Robeco Groep N.V. (“Robeco”)—are participants. ABP alone held 5.4 million Royal Dutch shares and 76 million Shell Transport shares, while PGGM held 16.9 million Royal Dutch shares and Robeco held 9.9 million Royal Dutch shares and 21.1 million Shell Transport shares. Similarly, two of the top ten holders of Shell securities in the United Kingdom—namely, Morley Fund Management Ltd. (“Morley”) and AXA Investment Managers UK, Ltd. (“AXA”)—are participants to the Settlement Agreement. Morley held approximately 4.5 million Royal Dutch shares and approximately 188.6 million Shell Transport shares, while AXA held approximately .121 million Royal Dutch shares and approximately 168.7 million Shell Transport shares. In addition, one of the top six holders of Shell securities in Switzerland—namely, UBS Global Asset Management (“UBS Global”)—is a participant in the Settlement Agreement. UBS Global held 11.5 million Royal Dutch shares and 21.7 million Shell Transport shares. Finally, Deka Investment GmbH (“Deka”)—one of the top six holders of Shell securities in Germany—is a participant to the Settlement Agreement. Deka held 12 million Royal Dutch shares and 10.7 Shell Transport shares.

Transport—valued at over £2 billion as of January 8, 2004—and over 89 million shares of Royal Dutch—valued at over €3.74 billion as of January 8, 2004.

In deference to the pending Class Action, the Settlement Agreement provides that if this Court “determines that it has jurisdiction over, or that it will otherwise consider, the claims of shareholders who both resided and purchased their shares outside of the United States and that decision is issued before the date on which a binding declaration on the Amsterdam Court of Appeal becomes final, *th[e] Settlement Agreement shall automatically be deemed to be null and void.*” (Settlement Agreement (Statement of Intention) at p. 2) (emphasis added).

C. Approval Of The Settlement Agreement By A Dutch Court

Before it will become binding on Foreign Purchasers, the Settlement Agreement will be reviewed by the Amsterdam Court of Appeals under the provisions of the 2005 Collective Financial Settlement Act (the “Dutch Law”). The Dutch Law allows a foundation representative of a group of injured persons to contract with the alleged wrongdoer to provide compensation to the injured group. The Court of Appeals must then find (1) that the foundation is sufficiently representative of the injured group; and (2) that the proposed compensation is reasonable. After making those determinations, the Court of Appeals can issue a “binding declaration” making the contract binding on all injured persons who do not exclude themselves within a prescribed period of time. Dutch Civ. Code arts. 7:907, 7:908 (for the Court’s convenience, the cited portions of the Dutch Code are attached hereto as Exhibit A).

Opt-Out Plaintiffs anticipate that it will be at least April 2008 (one year from filing) before the Amsterdam Court of Appeal takes the action necessary for a binding declaration to become final. This estimate is based upon Opt-Out Plaintiffs’ understanding of two previous settlements administered through the Dutch process, the most analogous of which took more than

one year to complete. Only in the unlikely event that the Dutch court acted first would this contingency disappear.⁴

ARGUMENT

I. AN “ANTI-SUIT” INJUNCTION IS WHOLLY UNWARRANTED

Lead Plaintiff terms its requested relief an “anti-suit” injunction. A more appropriate name would be an “anti-settlement” injunction. Even assuming, however, that the requested injunction is properly considered under the standards governing an “anti-suit” injunction,⁵ as Lead Plaintiff urges, the requested injunction must be denied.

The Third Circuit takes a “restrictive approach” to determining whether or not “anti-suit” injunctions are appropriate with regard to actions pending in foreign tribunals, “rarely permitting injunctions against foreign proceedings.” *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001) (reversing grant of injunction). The case law “unequivocally directs courts to exercise restraint in enjoining foreign proceedings” *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 129 (3d Cir. 2002) (remanding case to lower court for consideration of applicable principles). In the Third Circuit, such an injunction is appropriate only “on the rare occasions when needed ‘to protect jurisdiction or an important public policy.’” *Id.* at 127 (citation omitted). Courts using the “restrictive approach” have “interpreted these exceptions narrowly.” *Id.* Here, there is no need for an injunction to protect this Court’s

⁴ As opposed to the proceedings in Amsterdam, this Court is moving on a fast track. The evidentiary hearing on class certification issues is set to begin in June, with briefing to be completed in August. Presumably the Court will rule shortly thereafter.

⁵ As Lead Plaintiff admits, under the traditional requirements for an injunction it would be required to establish irreparable injury and a likelihood of success on the merits. Lead Plaintiff has not even attempted to meet this standard (see Motion at 8, n. 9) and in fact could not meet it if it tried given that the negotiated settlement: (1) does not resolve Lead Plaintiff’s claims (nor those of any other named plaintiff); and (2) will be null and void should this Court exercise jurisdiction over the claims of Foreign Investors.

jurisdiction or to further any important public policy. On the contrary, issuing an injunction would undermine the important public policy favoring settlement, particularly in connection with complex class action suits such as the instant case.

A. The Settlement Does Not Threaten This Court's Jurisdiction

As the Sixth Circuit (which follows the “restrictive approach” utilized in the Third Circuit) has explained, “threats to a court’s jurisdiction . . . are quite unusual” and there are only two situations where a proceeding pending in another court has “been held to threaten a court’s jurisdiction.” *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1356 (6th Cir. 1992) (reversing lower court’s grant of anti-suit injunction). The first situation where a “threat to jurisdiction” has been held to be sufficient to justify an injunction of a court proceeding is when there are concurrent proceedings *in rem* or *quasi in rem*. *Id.* That situation obviously is not present here. The second situation justifying injunctive relief because of a threat to jurisdiction is where “a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action.” *Id.* Clearly the Settlement Agreement, which explicitly references and respects the possibility that this Court could exercise jurisdiction, presents no such threat.

Lead Plaintiff has not cited a single Third Circuit case in which an anti-suit injunction was upheld on the basis that the foreign action threatened the U.S. Court’s jurisdiction. In fact, the *only* case cited by Lead Plaintiff where an anti-suit injunction was upheld under this exception to the “restrictive approach” adopted by the Third Circuit is *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). *Laker Airways*, however, presents facts almost directly opposite to those presented by the instant Motion. In *Laker Airways*, the foreign action sought to be enjoined was “instituted . . . for the sole purpose of terminating the United States claim.” *Id.* at 915. In stark contrast, the Settlement Agreement

was entered into not to force termination of the United States claim, but in order to protect the Foreign Purchasers *in the event this Court should independently determine their claims could not be pursued here.*

Even in the unlikely event the Settlement Agreement were to be approved by the Dutch Court and become binding before this Court rules on the jurisdictional questions, the Settlement Agreement still does not “threaten” this Court’s jurisdiction in the manner required to support an anti-suit injunction. Under that scenario, all the Settlement Agreement does is provide Foreign Purchasers with the choice of accepting the terms of the Settlement Agreement or continuing to pursue their claims before this Court. Such a choice in no way threatens this Court’s jurisdiction. “The possibility that a holding of a [foreign] court might [secure an advantage to a party] is not a threat to the jurisdiction of the United States courts; rather, it is merely a threat to [the opposing party’s] interest in prosecuting its lawsuit” and does not warrant an injunction. *Gau Shan*, 956 F.2d at 1356. Such a distinction is appropriately drawn here – an injunction is unwarranted because the Court’s jurisdiction is simply “not threatened by the possibility that a ruling of a foreign court might eventually result in the voluntary dismissal of [certain] claims before the United States court.” *Id.*

B. The Settlement Does Not Violate Any Important Public Policy

Like the exception for threats to jurisdiction, the exception allowing anti-suit injunctions in order to protect an important public policy is “narrowly drawn,” *Stonington Partners*, 310 F.3d at 127, and is wholly inapplicable here. Lead Plaintiff has not cited a single Third Circuit case in which an anti-suit injunction was upheld on the basis that the foreign action violated an important public policy.⁶ Further, while Lead Plaintiff vaguely refers to “United States policy

⁶ The **only** cases cited by Lead Plaintiff where anti-suit injunctions were upheld under this exception to the “restrictive approach” are *Laker Airways* and *Ibeto Petrochemical Industries*

regarding the conduct of class actions” in support of their argument that the public policy exception supports the requested injunction, and suggests that Opt-Out Plaintiffs somehow circumvented that policy or this Court’s Consolidation Orders (Motion at 10-14), their argument is wholly without merit. Instead, public policy considerations strongly weigh against any injunction in this case.

1. There Are No Public Policy Considerations Related To The Conduct Of Class Actions That Support An Injunction

The first flaw in Lead Plaintiff’s argument that public policy somehow mandates an injunction is that no provision of U.S. law prohibited Opt-Out Plaintiffs or their counsel from engaging in the challenged settlement discussions on their own behalf or on behalf of other Foreign Purchasers.⁷ Under Rule 23, it is clear that prior to certification of a class, there is “[no] 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.” *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int’l, Inc.*, 455 F.2d 770,

Ltd. v. M/T Beffen, 475 F.3d 56 (2d Cir. 2007). The instant case is in no way analogous to either. In *Laker Airways*, the litigants (defendants in the U.S. action) were attempting to use a foreign proceeding to “escape application of the antitrust laws to their conduct of business here in the United States.” *Laker Airways*, 731 F.2 at 932. By contrast, the Opt-Out Plaintiffs are not attempting to escape liability under any law – they are simply attempting to protect themselves in the event this Court determines their claims are not properly before it. In *Ibeto Petrochemical*, the Court allowed an injunction against litigation in Nigeria only after finding that the parties were bound by the terms of an arbitration agreement to pursue the matter through arbitration. The Court noted that “due regard for principles of international comity and reciprocity require a delicate touch in the issuance of anti-foreign suit injunctions [and] that such injunctions should be used sparingly,” but recognized a strong “general federal policy favoring arbitration” in order to uphold a narrowed form of the anti-suit injunction. 475 F.3d at 64-65.

⁷ Lead Plaintiff also suggests that counsel for the Opt-Out Plaintiffs may have committed an ethical violation by virtue of the fact that an attorney formerly a partner in lead counsel’s firm is now a member of the firm representing Opt-Out Plaintiffs. This argument hardly deserves the dignity of a response, but counsel for the Opt-Out Plaintiffs merely notes that the attorney at issue has not worked on this matter at his new firm and an appropriate ethical wall has been in place at all relevant times.

773 (2d Cir. 1972). A “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 Ann. § 21.33, Author’s Comments (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.”). The PSLRA’s “lead plaintiff” provisions do not change these fundamental provisions of Rule 23.

The next flaw in Lead Plaintiff’s argument is that not every public policy is important enough to trigger the narrow exception allowing anti-suit injunctions. As the Sixth Circuit explained:

If any advantage in law was sufficient to justify application of the public policy exception, antisuit injunctions would become common and international comity a consideration of secondary importance. Procedural or substantive advantages offered by forum law do not, of themselves, provide grounds for an antisuit injunction.

Gau Shan, 956 F.2d at 1357. The Sixth Circuit went on to explain that the considerations in evaluating whether there exist public policy concerns sufficient to permit an antisuit injunction were similar to those used in determining whether public policy concerns were a sufficient basis for refusing to enforce a foreign judgment. The court noted that “courts rarely resort to public policy as a basis for refusing to enforce a foreign judgment.” *Id.* at 1358. The court then held “that only the evasion of the most compelling public policies of the forum will support the issuance of an antisuit injunction.” *Id.* Vague allegations about violations of procedural “lead plaintiff” provisions, especially when the end result is a fair settlement agreement, simply are not “repugnant to fundamental notions of what is decent and just” such that they justify resort to an anti-suit injunction. *Id.*

Finally, as to Lead Counsel’s suggestion that the Opt-Out Plaintiffs somehow violated the Consolidation Order entered by the Court on February 7, 2006 (modifying the earlier Order of

June 30, 2004), there is nothing in either Order precluding the Opt-Out Plaintiffs from negotiating with Shell about and settling their own cases, nor is there anything in either Order that precludes the Opt-Out Plaintiffs from settling claims of other Foreign Purchasers, all of whom potentially have claims based upon the laws of their individual nations. While lead counsel seems to feel that its appointment for an uncertified putative class somehow gives it absolute control over all matters related to Shell world-wide, that simply is not so and the Court should reject this argument.

Neither of the Court's Consolidation Orders prohibits the settlement discussions engaged in by the Opt-Out Plaintiffs or their counsel. The Court's June 30, 2004 Order gave lead counsel the power to speak on behalf of "all plaintiffs" in the cases consolidated by that Order. Those plaintiffs did not include plaintiffs in the ABP Action or the Deka Action, which actions had not yet been filed. Additionally, the reference to "all plaintiffs" did not and could not apply to unnamed and absent members of the putative class (over which the Court did not yet have jurisdiction). The Court's February 14, 2006 Order makes these conclusions abundantly clear as that Order specifically authorized counsel in the ABP Action and Deka Action to "communicate with defendants' counsel . . . on their own behalf" (Feb. 14, 2006 Order, ¶ 7) and explicitly recognized that "[n]othing in this Order shall make 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" (*id.* at ¶ 3). Moreover, the February 14, 2006 Order provided that conflicts between the two Orders were to be resolved in favor of the later Order. Nothing in the Orders prohibited counsel for the Opt-Out Plaintiffs from engaging in discussions with Shell in order to resolve claims in a procedure authorized by the laws of another country.⁸

⁸ Lead Plaintiff has conceded that the Opt-Out Plaintiffs were "free to negotiate" a settlement with Shell.

There simply are no public policy concerns implicated by the proposed settlement and thus no injunction can or should issue on that ground.

2. The Public Policy Favoring Settlement Of Complex Class Actions Strongly Weighs Against The Issuance Of An Injunction

In the case currently before the Court, the strong “general federal policy” cuts in favor of the Settlement Agreement. That the law favors negotiated settlements has been a well-established principle of U.S. law for over a century. *See Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) (compromises of disputed claims are favored by the courts) (citing *Hennessy v. Bacon*, 137 U.S. 78 (1890)). This Court has previously recognized this policy in the context of complex securities class actions. *See, e.g., AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 113 (D.N.J. 2002). Noted commentators on securities law have also acknowledged this settled proposition. *See* Louis Loss and Joel Seligman, 10 SECURITIES REGULATION 4635 (3d ed. Rev. 2005) (stating that the “law favors settlements by the parties rather than by court disposition”).

In light of this policy favoring settlements, as a rule, settlements should be encouraged, not enjoined. It would be a remarkable set of circumstances that could justify enjoining a settlement procedure. Those circumstances simply do not exist here, where the settlement is the subject of arms-length negotiations, is more than reasonable, and will be endorsed by an objective tribunal prior to becoming binding on the parties.

II. LEAD PLAINTIFF’S ARGUMENTS IGNORE FUNDAMENTAL NOTIONS OF COMITY

Lead Plaintiff argues that comity concerns are “at their nadir because of the Dutch courts’ comparatively minimal interest in the proposed settlement.” Motion at 16.⁹ This “minimal

⁹ Lead Plaintiff’s arguments concerning the relative interests of the two *fora* may be appropriate for consideration in opposition to Shell’s *forum non conveniens* motion, but are not relevant here. In any event, the Opt-Out Plaintiffs in no way endorse Shell’s position on its *forum non conveniens* motion and do not purport to address that issue here.

interest” argument is not a sufficient basis for ignoring principles of comity and enjoining a party from pursuing its remedy in a foreign forum.

Comity is not concerned with the relative strength of jurisdictional claims, but rather with respect for foreign tribunals. The “proper exercise of comity demonstrates confidence in the foreign court’s ability to adjudicate a dispute fairly and efficiently. Failure to accord such deference invites similar disrespect for our judicial proceedings.” *General Elec.*, 270 F.3d at 160 (internal citations omitted). As the court in *Gau Shan* explained:

The days of American hegemony over international economic affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could. The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations. In an increasingly international market, commercial transactions involving players from multiple nations have become commonplace. Every one of these transactions presents the possibility of concurrent jurisdiction . . .

Gau Shan, 956 F.2d at 1354 (6th Cir. 1992). As explained in *Laker Airways*, “the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations.” 731 F.2d at 937.

Lead Plaintiff’s requested injunction wholly disrespects the procedure set up by the Dutch government for settling class-wide claims. It denies Foreign Purchasers the ability to protect their rights in another forum should this Court decline to exercise jurisdiction over their claims. It assumes that only Lead Plaintiff, and not the Dutch courts, is capable of protecting the interests of Foreign Purchasers. It is exactly this type of arrogance that principles of comity were designed to guard against and why “[c]omity dictates that foreign antisuit injunctions be issued

sparingly and only in the rarest of cases.” *Gau Shan*, 956 F.2d at 1354. This is not one of the rare occasions that justifies putting concerns of comity aside. The injunction should be denied.

**III. AN INJUNCTION AGAINST THE OPT-OUT PLAINTIFFS
WOULD NOT STOP THE SETTLEMENT**

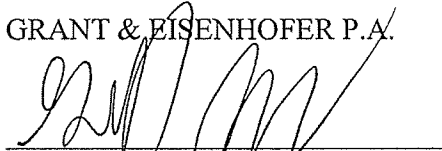
Even if the Court were to grant the Motion, an injunction against the Opt-Out Plaintiffs would not halt the proceedings in the Netherlands. Under Netherlands procedure, the administration of the Settlement Agreement is now controlled by the Stichting Shell Reserves Compensation Foundation (the “Foundation”) – a separate and independent legal entity. Although the Opt-Out Plaintiffs are participants in the Foundation, there are also many other participants, including two dozen other institutional investors (among them Morley Fund Management Ltd., AXA Investment Managers UK, Ltd., and UBS Global Asset Management) and Euroshareholders (a confederation of national shareholder associations from 29 countries). The Foundation has a Board of Directors composed of distinguished academics and jurists (two professors of corporate law at Dutch universities, including one who is a part-time judge, and a substitute member of the Enterprise Chamber of the Amsterdam Court of Appeals). The Opt-Out Plaintiffs do not have exclusive control over the Foundation and their absence from the Dutch process from here on out simply will not stop the Foundation from requesting that the Amsterdam Court of Appeal declare the settlement binding. As the Court need not and should not engage in futile acts, it should deny the requested injunction for this independent reason.

CONCLUSION

For the reasons set forth herein, Opt-Out Plaintiffs respectfully request that this Court deny Lead Plaintiff's request for an injunction.

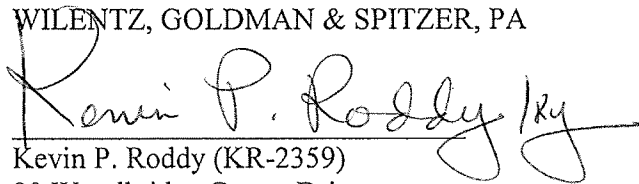
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EXHIBIT

A

Art. 906

Article 906.

1. The provisions of this Title apply, *mutatis mutandis*, where a settlement has its juridical basis elsewhere than in a contract.
2. Article 904 applies, *mutatis mutandis*, where one of the parties to a juridical relationship or a third person has been given the right to supplement or modify the rules governing the relationship.
3. Paragraph 2 does not apply to a supplement or modification pursuant to a resolution of a constituent body of a legal person, if the resolution may be nullified pursuant to article 15 of Book 2, where standards of reasonableness and fairness have been violated.
4. Paragraphs 1 and 2 do not apply to the extent that, in the context of the nature of the juridical relationship, the necessary implication of the provision concerned prevents such application, *mutatis mutandis*.

Article 907. (in effect from 27 July 2005)

1. A contract for the compensation of damage caused by an event or by similar events, entered into by a foundation or association possessing full legal capacity with one or more other parties, who undertake thereby to compensate this damage, may, upon the joint request of the parties that have entered into the contract, be declared binding by the court upon persons to whom the damage has been caused, provided the foundation or association, by virtue of its articles, represents the interests of such persons. Persons to whom the damage has been caused also comprise those who have acquired a claim with respect to this damage by general or particular title.
2. The contract shall in any case include:
 - a. a description of the group or groups of persons in whose favour the contract has been entered into, according to the nature and the seriousness of their damage;
 - b. a description, as accurately as possible, of the number of persons belonging to this group or these groups;
 - c. the compensation awarded to these persons;
 - d. the conditions with which these persons must comply to be eligible for that compensation;
 - e. the manner in which that compensation is determined and can be obtained;
 - f. the name and address of the person to whom the written communication referred to in article 908, paragraphs 2 and 3, can be made.
3. The court shall disallow the request, if
 - a. the contract does not comply with paragraph 2;
 - b. the amount of the compensation awarded is not reasonable, also taking into account the extent of the damage, the ease and speed with which the compensation may be obtained and the possible causes of the damage;
 - c. insufficient security has been furnished to pay the claims of those in whose

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- favour the contract has been entered into;
- d. the contract does not provide for an independent determination of the compensation to be paid pursuant to its terms;
 - e. the interests of the persons in whose favour the contract has been entered into are otherwise insufficiently safeguarded;
 - f. the foundation or association referred to in paragraph 1 is not sufficiently representative of the interests of those in whose favour the contract has been entered into;
 - g. the group of persons, in whose favour the contract has been concluded, is not large enough to justify a declaration to make the contract binding;
 - h. there is a legal person who, pursuant to the contract, provides compensation, but is not a party to the contract.

4. Before deciding the case, the court may give the parties the opportunity to supplement or modify the contract.

5. The request referred to in paragraph 1 shall interrupt the prescription of a right of action to compensate damage against the persons who are parties to the contract, to the extent that the contract provides for the compensation of this damage. If the request has been irrevocably granted, a new period of prescription shall start to run upon the commencement of the day following the one on which the compensation to be awarded has been definitively decided. Furthermore, a new period of prescription starts to run upon the commencement of the day following the one on which a communication as referred to in article 908, paragraph 2 has been made. If the request is not granted, a new period of prescription shall start to run upon the commencement of the day following the one on which this is irrevocably determined. If the contract is cancelled as a result of article 908, paragraph 4, a new period of prescription shall start to run upon the commencement of the day following the one on which cancellation takes place according to that paragraph. Article 319, paragraph 2 of Book 3 applies *mutatis mutandis*.

6. The contract may provide that a right to compensation pursuant to the contract shall lapse where the person so entitled has not claimed it within a period of at least one year from the commencement of the day following the one on which he has taken cognizance of the exigibility of his compensation.

Article 908. (in effect from 27 July 2005)

1. As soon as the request to declare the contract binding has been irrevocably granted, the contract referred to in article 907 shall have, as between the parties and those entitled to compensation, the effects of a contract of settlement to which each of those so entitled shall be deemed to be a party.

2. The declaration shall have no effect upon a person entitled to compensation who, within a period to be determined by the court of at least three months from the announcement of the decision referred to in article 1017, paragraph 3 of the Code of

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Civil Procedure, has notified the person, referred to in article 907, paragraph 2, subparagraph f, by written communication that he does not intend to be bound.

3. A person entitled to compensation who, upon the announcement referred to in paragraph 2, could not be aware of his damage, is not bound by the declaration if, after his damage has become known, he has notified the person referred to in article 907 paragraph 2, subparagraph f by written communication that he does not intend to be bound. A party who has bound himself by contract to compensate damage, may give a person entitled to compensation, as referred to in the first sentence, a period of at least six months for the latter to make it known that he does not intend to be bound. In doing so, the name and the address of the person, referred to in article 907, paragraph 2, subparagraph f shall also be communicated.

4. A stipulation exempting a party to the contract from an obligation to the detriment of those entitled to compensation, is null upon the contract being declared binding, unless it gives the parties who have jointly bound themselves to compensate the power to cancel the contract, within six months from the expiration of the period referred to in paragraph 2, to be determined by the court, on the basis that the declaration affects too few persons entitled to compensation. In that case cancellation shall take place by announcement in two newspapers and by a written communication to the foundation or association referred to in article 907, paragraph 1. The parties having cancelled the contract shall ensure that such cancellation be communicated as soon as possible, in writing, to those who are known to be entitled to compensation, for the purpose of which the parties may use the last known address of those entitled to compensation.

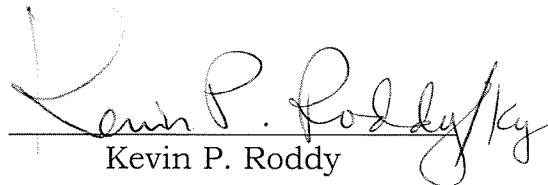
5. After the contract has been declared binding, the parties that have entered into it may not invoke the grounds of annulment as referred to in articles 44, paragraph 3 of Book 3 and 228 of Book 6, and a person entitled to compensation may not invoke the ground of annulment referred to in article 904, paragraph 1.

Article 909. (in effect from 27 July 2005)

1. A final decision taken pursuant to the contract on the compensation owed to a person entitled is binding. However, if this decision or the manner in which it has been reached is unacceptable according to standards of reasonableness and fairness, the court has jurisdiction to decide upon the compensation.
2. If a decision to award compensation is not reached within a reasonable period set for that purpose, the court has jurisdiction to decide upon the compensation.
3. The foundation or association referred to in article 907, paragraph 1 may, after the contract has been declared binding, claim performance by a person entitled to compensation, unless the latter opposes this.
4. A person entitled to compensation pursuant to the contract may not receive such compensation as would put him into a clearly more favourable position.
5. If the party or parties having bound themselves by the contract to compensate damage, can perform their obligations pursuant to the contract by payment of an

Certificate of Service

I hereby certify that on May 9, 2007, I caused the foregoing document to be electronically filed using the Court's CM/ECF system, which will send notification of such filing to all counsel registered to receive such notice.


Kevin P. Roddy