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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO ROYAL DUTCH/SHELL DEFENDANTS' MOTION TO SEVER AND DISMISS NON-U.S. PURCHASERS' CLAIMS

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INTRODUCTION

On April 11, 2007, Shell[1] informed Lead Plaintiff[2] that, without Lead Plaintiff's knowledge, Shell had entered into a contract in The Netherlands, with the Opt-Out Plaintiffs,[3] among others, that would seek to settle all claims in this action that were advanced by non-U.S. investors who purchased Shell stock on non-U.S. exchanges ("Foreign Purchasers"). Now, three years after this litigation was first initiated, two years after discovery commenced, and one year after Shell asked for an evidentiary proceeding to re-examine the existence of subject matter jurisdiction over the Foreign Purchasers' claims, Shell argues for the first time that it would be inconvenient to litigate the claims of the Foreign Purchasers in this forum. It also argues that notwithstanding the absence of any pending litigation in The Netherlands – and the apparent absence of any official action by any court in The Netherlands – international comity requires dismissal of the Foreign Purchasers' claims. Shell's arguments should be rejected.

Shell's motion for dismissal on *forum non conveniens* grounds is too little too late. The Third Circuit has made it quite clear that such motions should be made at the outset of litigation, and that dismissal is inappropriate after there has been a significant amount of discovery. Shell fails to acknowledge this point; indeed, it does not even cite to any Third Circuit authority. Moreover, the claims of U.S. purchasers will still remain in this forum; whatever inconveniences are associated with transporting documents and witnesses to this country (inconveniences that

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

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

[3] As used herein, "Opt-Out Plaintiffs" refers to the investors who filed separate actions against Shell in this Court in January 2006, Civ. Act. Nos. 06-067 (JAP) and 06-095 (JAP).

the parties have cooperatively overcome during the intensive discovery efforts thus far) will exist regardless of whether the Foreign Purchasers' claims are dismissed. Shell has not even attempted to explain why it will reap any convenience advantages – let alone advantages sufficient to meet its heavy burden for *forum non conveniens* dismissal – by litigating the Foreign Purchasers' claims in multiple lawsuits while simultaneously litigating the American claims in this jurisdiction.

Similarly, Shell has not come close to meeting the standards necessary for dismissal on comity grounds. As a threshold matter, courts will not dismiss claims on the ground of international comity unless there is a parallel litigation adjudicating substantially the same claims. Here, no such litigation exists, because the proposed Dutch settlement proceeding does not seek an adjudication on the merits. Moreover, because parallel lawsuits normally proceed until one forum reaches a judgment that is *res judicata*, dismissal in favor of a parallel action is appropriate only where there exist "exceptional circumstances" over and above the inconveniences ordinarily associated with simultaneous proceedings. Here, not only has Shell failed to identify a single exceptional circumstance that justifies dismissal, but the fact that the Dutch proceeding is not an adversarial proceeding makes dismissal even *less* appropriate, if only because there is no risk of burdensome and duplicative presentations of evidence.

Finally, there are strong policy reasons for this Court to retain jurisdiction. In the three years since Shell first announced the recategorization of its proved reserves, the only private litigations that have ever been filed against Shell have occurred in this forum; thus, the sole practical effect of the proposed settlement will be to resolve the claims advanced under United States law by foreign members of the putative class in this case. The proposed settlement thus represents a blatant attempt to avoid negotiation with the court-appointed Lead Plaintiff and to

effect an "end-run" around the PSLRA.

Therefore, this Court should deny Shell's motion, and proceed with the trial that Shell itself requested take place.

STATEMENT OF FACTS

Shell is an international oil and gas conglomerate with offices around the globe. During the Class Period, from April 8, 1999 to March 18, 2004, it had headquarters in both The Netherlands and in London, England, and its securities traded on at least nine different exchanges in nine different countries.[4]

Beginning January 9, 2004, Shell announced that it would restate its previously-reported proved oil and natural gas reserves by 20%, claiming the move was necessary to comply with United States federal regulations. ¶ 6.[5] In reaction to that disclosure, the price of Shell securities dropped worldwide for a total loss of approximately $13.84 billion of market value. *Id.* Shell later restated its proved reserves three additional times, on March 18, April 19, and May 24, 2004. ¶ 8.

On February 2, 2004, the Funds filed a complaint on behalf of all those who purchased or acquired Shell's securities from December 3, 1999 to January 9, 2004, alleging violations of the federal securities laws.[6] On March 26, 2004, the Funds moved for appointment as Lead Plaintiff under 15 U.S.C. § 78u4-a. Several other actions were also filed in this district alleging similar claims. By order dated June 30, 2004, this Court consolidated the actions and appointed the

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[4] In July 2005, the Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company p.l.c. merged into a single entity with headquarters in The Netherlands.

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

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

Funds Lead Plaintiff for the putative class. The Court observed that the Funds had purchased securities both in the U.S. and abroad, and were "able to adequately represent the interests of all investors: those who purchased in both domestic and foreign markets." *In re Royal Dutch/Shell Transp. Litig.*, No. 04-374 (JWB) (June 30, 2004) slip op. at 41 ("June 30, 2004 Op.").

In August 2004, the United States Securities and Exchange Commission filed a civil lawsuit against Shell and issued a cease and desist order in which it declared that Shell had violated United States law by issuing false and misleading statements regarding its reserves. ¶ 38. Ultimately, Shell paid a $120 fine to settle the SEC's claims.

On September 13, 2004, Lead Plaintiff filed its First Consolidated Amended Class Action Complaint, alleging claims not only against Shell and its officers, but also against Shell's auditors, accountants KPMG NV and PwC UK.[7] Shell and the other defendants moved to dismiss the complaint in December 2004 on various grounds, including lack of subject matter jurisdiction over the claims of the Foreign Purchasers. The motion did not, however, seek dismissal on the ground of *forum non conveniens*.

Discovery commenced on March 4, 2005. Lead Plaintiff used the information obtained to respond to Shell's dismissal motion. After briefing and oral argument, on August 9, 2005, this Court denied the motions to dismiss by Shell, KPMG NV, and PwC UK. In so doing, this Court concluded, among other things, that Lead Plaintiff had provided factual support for its allegations that Shell "engaged in material and substantial fraudulent conduct in the United States." *In re Royal Dutch/Shell Transp. Sec. Litig. ("Shell")*, 380 F. Supp. 2d 509, 548 (D.N.J. 2005) *on reconsideration*, 404 F. Supp. 2d 605 (D.N.J. 2005). Relying on Lead Plaintiff's evidence, this Court held that it had "a sufficient interest in the claims of the foreign investors" to

[7] Also named were KPMG International and PwC International. Both of these entities were dismissed from the action by court order.

support the exercise of jurisdiction. *Id.*

On January 6, 2006, the Opt-Out Plaintiffs filed two individual actions against Shell in this district, alleging substantially similar claims to those advanced by the Lead Plaintiff. After negotiations among counsel, Lead Plaintiff and these entities agreed that the individual actions would be consolidated with the class action for discovery purposes. The resulting amendment to this Court's consolidation order provided that the Opt-Out Plaintiffs would have access to the discovery materials obtained in the class case, and that they would "retain the right to communicate with defendants' counsel and the Court on their own behalf, solely regarding issues unique to the Individual Actions, without prior authorization from Lead Counsel." Amended Consolidation Order, dated February 7, 2006, ¶ 7. The Opt-Out actions, with the individual actions that were consolidated in June 2004, represent the only private fraud litigations that have been filed against Shell arising out of the recategorization of its proved reserves three years ago.

On April 12, 2006, this Court granted Shell's request that the issue of subject matter jurisdiction be revisited in a separate "mini-trial." Since that time, discovery has continued on an aggressive schedule. To date, Lead Plaintiff has taken approximately 49 fact depositions and 6 expert depositions both in the United States and in Europe, and has received more than two million pages of documents from defendants and non-parties. Simultaneously, Lead Plaintiff and Shell have attempted to mediate their dispute. Beginning on July 17, 2006, Judge Politan moderated a two-day mediation session, but the parties were unable to reach a settlement.

On April 11, 2007, Lead Plaintiff was informed for the first time that Shell had negotiated a contract for settlement with the Opt-Out Plaintiffs, as well as a group of other foreign institutions, under a 2005 Dutch law that permits mass settlement of claims but does not permit class action litigation. Shell and the Opt-Out Plaintiffs are seeking approval of their

proposed settlement before the Amsterdam Court of Appeals. In connection with the proposed settlement, Shell has sought and received a statement from the SEC's Staff that it intends to recommend that the fines paid to settle the United States's lawsuit be used to reimburse damages to investors worldwide.

ARGUMENT

I. SHELL'S MOTION TO SEVER IS INAPPROPRIATE

Shell has requested that this Court sever and dismiss the claims of the Foreign Purchasers. Though it does not identify the basis for the motion, presumably Shell is contending that there has been a misjoinder of parties under Rule 21. *Cf. Norwood Co. v. RLI Ins. Co.*, No., CIV.A. 01-6153, 2002 WL 523946, at *2 (E.D. Pa. Apr. 4, 2002) (explaining that Rule 21 is typically invoked for severance motions). If so, Shell has cited no authority to support the proposition that absent class members may be "severed" from an action before a ruling on class certification, nor has Shell argued that any party has failed to satisfy the standard for permissive joinder under Rule 20. Instead, Shell is using the motion to sever as a vehicle for manipulating the allegations in this action and isolating the claims of the Foreign Purchasers from the other claims in this action. For this reason alone, Shell's motion should be denied. *Cf. Camasso v. Dorado Beach Hotel Corp.*, 689 F. Supp. 384, 387 (D. Del. 1988) (denying a motion to sever as an "end-run" around the requirements of 28 U.S.C. §1404). When Shell's request that foreign claims be severed is considered for what it really is – an effort to isolate the Foreign Purchaser's claims from the identical claims of U.S. purchasers –severance and dismissal are inappropriate.

II. DISMISSAL OF THE FOREIGN PURCHASERS' CLAIMS ON THE GROUND OF *FORUM NON CONVENIENS* IS NOT WARRANTED

Ordinarily, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

However, in rare instances, a district court may dismiss an action in favor of an alternative forum "when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience...." *Lacey v. Cessna Aircraft Co. ("Lacey I")*, 862 F.2d 38, 42 (3d Cir. 1988) (quotations omitted).

In assessing whether *forum non conveniens* dismissal is appropriate, courts engage in a two-step process. "The defendant must establish, initially, that an adequate alternative forum exists as to all defendants." *Lacey v. Cessna Aircraft Co. ("Lacey II")*, 932 F.2d 170, 180 (3d Cir. 1991) (citations omitted). To do so, the defendant must "submit sufficient information to allow the district court properly to undertake the *forum non conveniens* analysis," typically in the form of certifications or affidavits from foreign attorneys or legal experts. *Lacey I*, 862 F.2d at 44. If the defendant carries this burden, the defendant must then show that relevant private and public interest considerations "weigh heavily in favor of dismissal." *Lacey II*, 932 F.2d at 180. When the private considerations are "at equipoise (or tipped toward the defendant)," the district court must retain jurisdiction over the action. *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991). Because "dismissal for *forum non conveniens* is the exception rather than the rule," *Lacey I*, 862 F.2d at 46, "a plaintiff's choice of forum should rarely be disturbed." *Lony*, 935 F.2d at 608 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)). A defendant's claim of inconvenience must not be accepted uncritically; "just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal ... not because of genuine concern with convenience but because of similar forum-shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism . . . ." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001) (en banc)

(quoted in *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 29 (2d Cir. 2002) (en banc)).

Here, Shell has ignored the standards laid down by the Third Circuit and thus fails to carry its burden.[8] Shell has not even attempted to discuss whether this action can be brought against all of the defendants in a single forum, and has barely submitted any evidence as to whether the alternative fora it proposes provide a meaningful remedy to aggrieved investors. Moreover, given that this Court will retain jurisdiction over the claims of U.S. purchasers – and that those plaintiffs will rely on the same evidence as would the Foreign Purchasers – Shell has not explained why there are any "convenience" advantages associated with splitting one litigation into countless duplicative trials spanning different countries.

Finally, Shell's motion comes far too late. If a defendant raises a *forum non conveniens* objection "for the first time after the defendant has answered, taken depositions, proceeded to pretrial and caused the plaintiff to incur expense in preparing for trial, such delay should weigh against granting the motion." *Lacey II*, 932 F.2d at 177 (quotations omitted). Here, though Shell attempts to portray the proposed settlement in The Netherlands as a new development that prompted its motion; in truth, the facts that actually underlie Shell's arguments were in existence long before the proposed settlement was reached.

A. Shell Has Not Demonstrated that Adequate Alternative Fora Exist

For the alternative forum to be adequate, the defendant must be amenable to process, and the alternative forum must "permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 255 n.22. "If the alternative forum offers a clearly unsatisfactory remedy," such as "when the subject matter of the suit is not cognizable," it will be deemed inadequate. *Lacey II*,

[8] Indeed, one can search Shell's brief in vain for even a mention of the relevant Third Circuit standards, for Shell does not cite a single Third Circuit opinion in its entire discussion of *forum non conveniens*. A reader relying on Shell's memorandum of law would be forgiven for coming away with the (false) impression that the Third Circuit has never decided these issues.

932 F.2d at 180. As with "all elements" of the *forum non conveniens* inquiry, Shell has the burden of establishing the adequacy of any alternative forum. *Lacey I*, 862 F.2d at 43.

Shell claims that The Netherlands and England are adequate alternative fora because Shell is amenable to process there and because fraud claims are cognizable in each country. Shell Br. at 22-25. Contrary to Shell's representations, it is not clear that the Foreign Purchasers can bring their claims in either country. [9]

Assuming that a foreign court would, in fact, apply its local law rather than recognize the Foreign Purchasers' claims under American law, Shell addresses only claims against itself, and not whether the Foreign Purchasers' claims are cognizable against PwC and KPMG. Dismissal on the grounds of *forum non conveniens* is not available unless *all* defendants may be sued in the alternative forum. *Lacey II*, 932 F.2d at 180.[10] Given the difficulties the Foreign Purchasers are likely to encounter suing Shell in England and The Netherlands (as discussed further below), it is not at all obvious that claims against auditors are even possible in these fora.

Nor has Shell met its burden with respect to the allegations against itself. First, the proposed settlement does not establish that The Netherlands is an adequate forum because, by

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[9] It is of no moment that in other cases, and for other types of claims, England and The Netherlands have been found to be adequate fora. The relevant question is whether *these* claims can be brought in those jurisdictions, under these facts. *See, e.g., Triple Crown Am., Inc. v. Biosynth AG*, No. CIV.A. 96-7476, 1998 WL 227885, at *2 (E.D. Pa. Apr. 30, 1998) (defendant cannot show alternative forum's adequacy merely by relying on case law in which forum was previously determined to be adequate); *Fiscus v. Combus Fin. AG*, No. 03-1328 (JBS), 2006 WL 1722607, at *13 (D.N.J. June 20, 2006).

[10] To the extent Shell is suggesting that litigation continue against PwC and KPMG in the United States, while the claims against Shell are pursued in other jurisdictions, such a proposal could not be more inefficient. The claims against PwC and KPMG are intimately intertwined with the claims against Shell and would rely on much of the same evidence; separating any trials would heighten the inconveniences, not minimize them. *Cf. Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993) (granting *forum non conveniens* dismissal to allow claims against all relevant defendants to proceed in a single forum).

definition, an adequate forum is one that "permit[s] litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 255 n.22; *see Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 159 (2d Cir. 2005) (adequate alternative forum must be "presently capable of hearing the merits of plaintiff's claim"). A settlement, of course, is not a litigation, and the Dutch law permitting the proposed settlement, by Shell's own admission, does not permit resolution of the merits of the claims. Shell Br. at 10. There are no assurances that the settlement will be approved by the Amsterdam Court of Appeals, and even if it is approved, investors may not accept its terms and may choose to opt-out. A prepared remedy, pre-arranged by Shell and a limited group of investors simply is not an adequate alternative to litigation.[11]

An additional critical consideration is the availability of the fraud-on-the-market theory to satisfy the reliance element of a fraud claim. Shell has not discussed whether the theory is available in either England or The Netherlands and, as is clear from the attached declaration of Charles Hollander, (Ex. 2 at ¶¶ 6-7),[12] fraud-on-the-market is not recognized in England. The fraud-on-the-market theory is a fundamental underpinning of a securities law claim in this country, and even plaintiffs in individual actions may use the theory to satisfy the element of reliance. *See Black v. Finantra Capital, Inc.*, 418 F.3d 203, 203 (2d Cir. 2005).[13]

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[11] This is not to say that class settlements, approved and finalized by a court, are not fair or entitled to *res judicata* effect with respect to those investors who do not opt-out. But this fact alone does not mean that the existence of a proposed settlement with no possibility of associated litigation represents an adequate alternative to a merits adjudication for the purposes of a *forum non conveniens* inquiry.

[12] The exhibits cited herein are attached to the Declaration of Ann M. Lipton dated May 9, 2007, submitted herewith.

[13] Shell argues that fraud claims would be cognizable against it under the English Misrepresentation Act of 1967. Shell Br. at 24. As shown in the attached declaration, however, the Misrepresentation Act applies only when there is privity of contract; it is unlikely to apply to shareholders who purchase on the open market. (Ex. 2 at ¶ 5).

The lack of effective class action procedures also contributes to the inadequacy of the proposed fora. The purpose of a class action is to facilitate litigation by investors with smaller claims that are, as a practical matter, impossible to litigate individually. If no class action procedures exist, smaller investors may find it impossible to bring their claims. *See Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1007-09 (D.N.J. 1996) (lack of class action procedures may make remedy inadequate in foreign forum). Even if the lack of a class action procedure is not dispositive, it is, at minimum, something the court should consider when evaluating the adequacy of the alternative forum. *In re Lernout & Hauspie Sec. Litig.*, 208 F. Supp. 2d 74, 92 (D. Mass. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 132 (E.D.N.Y. 2000) ("the fact that there is not a functional equivalent in France of class-based judicial review strengthens plaintiffs' claim that France is not an adequate forum"); *cf. Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478, 480 (2d Cir. 2002) (lack of class action did not render a forum inadequate because there still existed the possibility of joining thousands of claims in single action; also noting new rules permitted discounted filing fees for poorer litigants).

Here, Shell contends that certain kinds of group and representative actions may substitute for class actions, but these devices are not sufficient to permit most small claimants to have their cases heard in a securities fraud action. If the fraud-on-the-market theory is not available in these jurisdictions, group litigation may be impossible. *Derensis*, 930 F. Supp. at 1008 (noting that the class action device is "virtually meaningless without having fraud-on-the-market substitute for individual reliance" (quotation omitted)). Shell has not submitted any evidence on this issue, and, indeed, it is telling that the group litigation procedures in England do not appear to have ever been used for a securities fraud class action, suggesting that the procedure may be impractical, at best. (Ex. 2 at ¶¶ 10-11).

As for The Netherlands, Shell claims that in that country, organizations can bring collective actions to obtain a "declaration of liability." Shell Br. at 26. However, such a declaration would not include an award of damages, and Shell does not explain how this "declaration of liability" would assist individual investors seeking compensation. Indeed, Shell does not even indicate whether the "declaration of liability" would have *res judicata* effect in subsequent actions under Dutch law for investors seeking compensation. Shell also mentions an organization called "Deminor" that it describes as helping to "bundle individual shareholders' claims so they can be pursued collectively." Shell Br. at 26. In fact, Deminor's website informs European investors that it will provide them with information on participating in, and recovering from, *United States* class actions; indeed, the service itself appears to be offered through two U.S. based law firms. *See* Deminor, *Recovery of Damages*, *available at* http://deminor.org/articles.do?id=3545 (last visited May 9, 2007).

In short, Shell's bare bones description of foreign procedures, without any expert submissions regarding the practical availability of these procedures to foreign plaintiffs, is insufficient to meet its burden of demonstrating that adequate alternative fora exist. *See Technology Dev. Co., Ltd. v. Onischenko*, No. Civ. A. 05-4282(MLC), 2007 WL 1202412, at *6 (D.N.J. Apr. 25, 2007).

B. The Balance of Factors Favors Retention of Jurisdiction

Even assuming that an adequate alternative forum exists, the defendant still has the burden of demonstrating that a balance of interests of the parties, the public, and the court "weigh[s] heavily on the side of trial in the foreign forum." *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1164 (5th Cir. 1987), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989) (quoted in *Lacey II*, 932 F.2d at 180). Because dismissal for *forum non conveniens* "is the exception rather than the rule,"

the district court must evaluate these various factors while according the plaintiff a considerable amount of deference in its forum choice. *Lony*, 935 F.2d at 609. "If, when added together, the relevant private and public interest factors are in equipoise, or even if they lean only slightly toward dismissal, the motion to dismiss must be denied." *Lacey II*, 932 F.2d at 180.

1. Lead Plaintiff's Forum Choice is Entitled to Deference

Before a court balances the relevant private and public interest considerations, the court must determine the "amount of deference to be accorded the plaintiff's choice of forum" *Lacey I*, 862 F.2d at 45. "In a case involving international parties, the domestic plaintiff's choice of forum is generally given great deference when the plaintiff has brought suit in its home country." *Fiscus*, 2006 WL 1722607, at *11. Deference is accorded because "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Piper*, 454 U.S. at 255-56. Here, the two Pennsylvanian public pension funds are the Lead Plaintiff, and the class includes American shareholders. For that reason alone, Lead Plaintiff's choice to litigate in this forum is entitled to great deference.

Contrary to Shell's argument, it is not relevant that Lead Plaintiff, organized under the laws of Pennsylvania, selected a New Jersey forum in which to litigate. Leaving aside the question whether a Pennsylvania forum would have been a proper venue for this dispute, when it comes to an international *forum non conveniens* inquiry, the "home forum" of an American citizen is the United States, not the particular district in which the citizen resides. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000); *Fiscus*, 2006 WL 1722607, at *11; *cf. Burke v. Quartey*, 969 F. Supp. 921, 928 (D.N.J. 1997) ("it is reasonable to assume that this forum [New Jersey] is convenient for the plaintiff in light of the regional proximity between his home state, Maryland, and New Jersey").

Shell contends that because this is a representative action, less deference is due, and that

the Foreign Purchasers' claims should be evaluated separately from the Lead Plaintiff's. Shell Br. at 36-37. Though Shell presents this as settled law, it is, in fact, an open question, *see DiRienzo*, 294 F.3d at 28 (declining to reach the issue because even with lessened deference, dismissal was inappropriate), and under the circumstances here, deference is appropriate.

This Court has already determined that the Lead Plaintiff is "able to adequately represent the interests of all investors: those who purchased in both domestic and foreign markets," June 30, 2004 Op. at 41, because the Lead Plaintiff, like many U.S. class members, purchased on foreign exchanges in addition to purchasing on the NYSE. Therefore, Lead Plaintiff's interest in this dispute is identical to the interests of both U.S. and Foreign Purchasers, and there is no logical reason why Lead Plaintiff's forum choice should not receive the Court's deference.

Nor does it follow that the mere fact that this is a representative action should lessen this Court's deference; the Lead Plaintiff's choice to litigate in this forum is its own, and the evidence necessary to prove its case is similar or identical to the evidence that any other class member would rely upon. If the Lead Plaintiff would receive deference litigating on its own behalf, there is no reason why that deference should be lessened merely because identical claims will also be resolved in the same action.

Moreover, the Third Circuit has explained that even a foreign plaintiff may be given the same deference due an American plaintiff where it has made a "strong showing of convenience" in the chosen forum. *Lacey II*, 932 F.2d at 179; *cf. Iragorri*, 274 F.3d at 71-72 ("The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice."). In this case, there are overwhelming justifications for Foreign Purchasers to litigate here. First, and most obviously, Americans are litigating here, based on the same conduct, and

relying on the same evidence. It makes far more sense for the foreigners to join their claims with the claims of American purchasers than to institute duplicative litigation in foreign fora.

Additionally, as the *DiRienzo* court made clear in another securities class action involving both American and foreign investors, "plaintiffs offered a quite valid reason for litigating in federal court: this country's interest in having United States courts enforce United States securities laws." *DiRienzo*, 294 F.3d at 28. Though Shell disputes that United States securities laws actually apply to the Foreign Purchasers' claims, this is precisely what the mini-trial is meant to determine. At this point in the litigation, there has already been one determination that this country's laws apply to Shell's actions, *Shell*, 380 F. Supp. 2d at 548, and the SEC's Staff has indicated that it believes the claims of foreign investors are governed by United States law by proposing (at Shell's request) that the fines paid to the SEC by Shell be distributed to investors worldwide. Therefore, at this stage, the applicability of U.S. law to the Foreign Purchasers' claims provides an overwhelming justification for their choice of forum, which entitles them to considerable deference.

Further, even if lessened deference is due to the Foreign Purchasers, they still are entitled to some deference in their choice of forum. As the Third Circuit has repeatedly explained, "reduced deference is 'not an invitation to accord a foreign plaintiff's selection of an American forum *no* deference since dismissal for *forum non conveniens* is the exception rather than the rule.'" *Lony*, 935 F.2d at 609 (quoting *Lacey I*, 862 F.2d at 45-46); *see also DiRienzo*, 294 F.3d at 28 ("Affording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum.").

Shell finally argues that no deference is due because there has been no "choice" by Foreign Purchasers to litigate in this forum at all. Shell argues that the named foreign purchaser,

Peter Wood, did not "choose" this Court because he joined the litigation in January 2006. Shell Br. at 36. Shell insists that the "choice" of the Opt-Out Plaintiffs and other foreign investors to pursue a Dutch settlement suggest that an American forum is disfavored by foreign investors. Shell has no support for these arguments.

That Mr. Wood chose to intervene in the litigation in January 2006 hardly suggests that he was compelled to litigate in this forum. Shell claims that foreign investors are capable of litigating in England and The Netherlands; if so, Mr. Wood was free to file his claims there. As for the Opt-Out Plaintiffs, as Shell admits, they did, in fact, choose to *litigate* in this forum – they filed complaints here and sought to rely on the evidence gathered in the class case to press their claims. They chose a Dutch forum for *settlement* purposes only. Tellingly, since March 2004 when this case was first filed, *no* fraud claims have been filed anywhere else in the world arising out of the same conduct; this fact alone indicates that the foreign members of the class are pleased with the American forum, and that – contrary to Shell's arguments – litigation in foreign fora is neither feasible nor desirable. Indeed, if there were no claims in this forum, it is difficult to imagine that a settlement would even have been reached. Without this action, there would have been *no* claims filed anywhere against Shell; without any pending litigation, Shell would hardly have offered to pay $359 million to settle nonexistent claims three years after the announcement that led to class member losses.

2. Shell's Motion is Untimely

As the Third Circuit has explained, an "overriding" factor in favor of retaining jurisdiction is whether significant amounts of discovery have been completed. *See Lony*, 935 F.2d at 613. The progress of discovery bears on both on the public and private interest balancing "because of the parties' investment in time and money in discovery, and … because the district court and court personnel already have expended resources in connection with this litigation."

Id. Thus, "whenever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal on the grounds of *forum non conveniens* greatly increases." *Id.* at 614.

Here, over 2 million pages of documents have been produced, Lead Plaintiff has taken 55 depositions, and Shell has taken 10 – far more than the "several thousand" pages that had been produced, and five witnesses that had been deposed, in *Lony*. *See* 935 F.2d at 613. In addition to taking the depositions of 10 fact witnesses who reside in this country, Lead Plaintiff's counsel has traveled to Europe on several occasions to take depositions, and Shell has transported 33 of its own witnesses to the United States. And yet, in the three plus years since this case was first filed, Shell has never before moved for dismissal on *forum non conveniens* grounds; instead, it has not only voluntarily transported its witnesses to this country, but has urged that this Court hold a separate mini-trial – which necessarily required an aggressive discovery schedule – to address some of the threshold issues involved in the case.

Shell contends that its motion is timely because it was brought within seven days of the proposed Dutch settlement, and argues that this satisfies the requirement that *forum non conveniens* motions be brought within a reasonable time after the "facts or circumstances which serve as the basis of the motion … become known or reasonably knowable." *Air Crash*, 821 F.2d at 1165. Even assuming that the Third Circuit – rather than the Fifth, to which Shell cites – permits *forum non conveniens* motions to be brought on the basis of late-stage developments,[14] the proposed settlement has nothing to do with the reasons Shell advances for seeking dismissal.

[14] In *Lony*, the Third Circuit frowned upon the use of later-discovered facts as forming the basis for a motion to dismiss for *forum non conveniens*, explaining that "considerations of judicial efficiency and expediency counsel that the extent of discovery on the merits already completed must be weighed in favor of retention of jurisdiction in the forum. Otherwise we may be faced with the situation presented here, where allegedly new facts uncovered in discovery are used to initiate reconsideration of what should be a preliminary motion." 935 F.2d at 614.

Shell maintains that dismissal is appropriate because relevant witnesses and documents are located outside the United States, Shell Br. at 28, foreign investors have alternative causes of action in foreign fora, Shell Br. at 23-26, and this forum has little connection to the litigation, Shell Br. at 34-35. These facts have nothing to do with the proposed settlement and have existed from the outset of this litigation. Shell does not explain how the proposed settlement bears on these considerations or why it took three years for Shell to first make the argument that litigation would be inconvenient in this forum because documents are located in The Netherlands.

Moreover, at the end of the day, Shell's fault in failing to file the motion at an earlier date, or lack thereof, is not the issue; as the Third Circuit has explained, even a timely motion will be denied after substantial discovery has been completed because "the question is not one of fault but one of expedition." *Lony*, 935 F.2d at 614. In short, in light of the "substantial merits discovery already underway," *id.* at 615, dismissal would be inappropriate.

3. The Private Interests Favor Retaining Jurisdiction

In evaluating the relative interests of the parties in litigating in the competing fora, the court must consider such factors as

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). District courts must be "alert to the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternative forum." *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983); *Murray v. BBC*, 81 F.3d 287, 292 (2d Cir. 1996) (court must be alert to financial and other "practical problems"); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1354 (1st Cir. 1992). Moreover, it is the defendant's burden to "provide enough information to enable the District

Court to balance the parties' interests." *Lacey I*, 862 F.2d at 44 (quoting *Piper*, 454 U.S. at 258). Here, Shell has not provided basic information about discovery rules in various jurisdictions and the location of evidence; moreover, available information heavily favors retention of jurisdiction.

a. All Claims Should be Tried in a Single Forum

Shell has moved to dismiss only the claims of the Foreign Purchasers. Thus, this litigation will go forward on the U.S. purchasers' claims whether or not the Foreign Purchasers are included in the action. Thus, the evidence Shell contends would be "inconvenient" to transport to the United States, Shell Br. at 28,[15] will necessarily be brought to this forum no matter how this Court rules on Shell's motion to dismiss. Shell has not identified any added inconveniences that will result from the inclusion of the Foreign Purchasers' claims in this litigation. Indeed, it is difficult to imagine what the inconveniences would be. To the contrary, dismissal of the Foreign Purchasers' claims would result in severe inefficiencies, because those investors would be forced to bring duplicative litigation in various jurisdictions around the world. *Cromer Fin., Ltd. v. Berger*, 158 F. Supp. 2d 347, 362 (S.D.N.Y. 2001) (in securities fraud class action, lack of class action mechanism considered as factor weighing against dismissal because of possibility of "[m]ultiplicitous global litigation"). Shell is simply not put to any additional inconvenience by the inclusion of foreigners' claims in this action.

By contrast, the foreign members of the class would be put at a tremendous disadvantage if forced to litigate abroad. Shell proposes that all foreign claimants bring actions in England or The Netherlands; however, Shell stock traded on at least nine different exchanges and its shareholders reside around the globe. Shell is thus demanding that all of these investors either

[15] As discussed further below, Shell fails to acknowledge the considerable amount of evidence that is already located in the United States, or that will have to be transported no matter where litigation is conducted.

bring their lawsuits to England or The Netherlands – which may substantially burden anyone who does not reside in those countries – or bring suit in their home jurisdictions.[16] But it is unclear whether Shell will even be amenable to process in the various jurisdictions in which Shell shareholders reside, and Shell refuses to provide any assurances on this point. Shell Br. at 23. Moreover, as a practical matter, it is unlikely that these shareholders will be able to bring individual actions far from their home jurisdictions, and there is no obvious reason why their doing so would contribute to any efficiencies. *See Lernout & Hauspie*, 208 F. Supp. 2d at 92 (private interests weigh against dismissal when shareholders would have to travel to foreign forum to litigate on an individual basis). And, once again, Shell neglects even to mention whether these foreign investors would be able to obtain jurisdiction over the auditor defendants if forced to litigate in their home jurisdictions. Indeed, the burdens on foreigners attempting to bring individual actions worldwide are so immense that "the real issue … [is] not whether the case should be tried [in the alternative fora], but whether it would be tried at all." *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984). Thus, because dismissal would not provide any additional conveniences to Shell, but would substantially burden foreign shareholders, dismissal is unwarranted.

b. The Actual Locations of Documents and Witnesses Do Not Favor Any Particular Forum

Shell has not demonstrated that the location of evidence renders the U.S. a less convenient forum. Shell has informed Lead Plaintiff that a substantial number of documents have been gathered electronically and stored in a centralized computer server. Shell has responded to Lead Plaintiff's document requests in large part by retrieving copies of documents

[16] As discussed above, Shell has not demonstrated that procedures for group litigation in The Netherlands or England would obviate the need for individual actions.

from this server. There is no reason to believe that electronic retrieval is any less convenient for a U.S. trial than for a European one. Indeed, Shell has already demonstrated the relative ease of discovery in this forum with its voluminous electronic production over the past two years.

Additionally, unlike such cases cited by Shell as *Warlop v. Lernout*, 473 F. Supp. 2d 260, 263 (D. Mass. 2007), *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991), *Alfadda v. Fenn*, 159 F.3d 41, 47 (2d Cir. 1998), *In re Royal Group Techs. Sec. Litig.*, No. 04 Civ. 9809 HB, 2005 WL 3105341, at *2 (S.D.N.Y. Nov. 21, 2005), and *Otor, S.A. v. Credit Lyonnais, S.A.*, No. 04 CV 6978(RO), 2006 WL 2613775, at *4 (S.D.N.Y. Sept. 11, 2006), the relevant documents and evidence are not concentrated in the proposed alternative fora. Shell securities traded on at least nine exchanges.[17] Lead Plaintiff has already sought and received evidence from Shell operating units in the United States, Nigeria, Australia, England, and The Netherlands, and anticipates that additional documents and witnesses may be required from these countries as well as from Oman, Brunei, Kazakhstan, Nigeria, Angola and Russia, among others, where Shell had operating units and where local KPMG and PwC offices may have assisted with audits. Lead Plaintiff has already taken the depositions of 10 fact witnesses who reside in the United States, and documents have been sought from several United States entities, such as Shell service organizations and United States-based financial analysts. Given the "various countries involved," Shell has "failed to demonstrate why bringing suit in the United States is so much more expensive or oppressive than litigating in" its proposed alternative fora. *Lexington Ins. Co. v. Forrest*, 263 F. Supp. 2d 986, 1001 (E.D. Pa. 2003); *see E.I. duPont de Nemours and Co. v.*

[17] In *Warlop*, the U.S. purchasers had settled their claims; therefore, dismissal in favor of the pending actions in Belgium decreased the number of duplicative proceedings. By contrast, as discussed above, dismissal of the Foreign Purchasers' claims here can only increase inefficiencies because the U.S. purchasers' claims will continue to be litigated in this forum while the Foreign Purchasers may be forced to institute duplicative proceedings abroad.

Rhodia Fiber and Resin Intermediates, S.A.S., 197 F.R.D. 112, 125 (D. Del. 2000) (dismissal denied because evidence and witnesses are located in three countries and will need to be transported no matter where trial occurs); *ICIPA S.R.L. v. Learjet, Inc.*, No. Civ. A. 97-2725, 1997 WL 539714, at *3 (E.D. Pa. Aug. 7, 1997) (dismissal denied because "certain documentary and testimonial evidence will require international transportation" no matter where litigation occurs). And, unlike in *Alfadda* and *Otor*, the documents are mostly in English, which means they need not be translated for the purposes of an American litigation – but might need to be translated for a litigation conducted in The Netherlands.

Shell does not even address these points. Instead, it offers two (stale) affidavits attesting that public information was compiled in The Netherlands. Shell Br. at 28 n.25. But these affidavits do not discuss the more relevant question whether essential documents exist in other locations; indeed, the affidavit of John Darley concedes that Shell's Group Reserves Auditor conducted reviews in various countries. Darley Aff. ¶ 8. Thus, once again, Shell has failed to meet its burden to show that trial in the United States would cause "oppressiveness and vexation ... out of all proportion to plaintiff's convenience." *Lacey I*, 862 F.2d at 42 (quotations omitted)

c. Shell Has Not Addressed the Availability of Compulsory Process and Access to Third Parties

The Third Circuit has emphasized that defendants seeking dismissal for *forum non conveniens* must demonstrate that the plaintiff will have access to "essential sources of proof." *Lony*, 935 F.2d at 611 (quoting *Lacey II*, 932 F.2d at 182). In particular, courts must consider whether evidence is in the hands of third parties, and whether plaintiffs will have access to such evidence when litigating in foreign fora. *See id.* at 612. Shell has failed to provide any information about access to evidence, let alone evidence in the hands of third parties.

In this action, relevant evidence is in control of numerous third parties around the globe.

For example, KPMG and PwC have insisted throughout this litigation that their international and regional offices are separate and distinct entities. Lead Plaintiff intends to show that the regional offices of KPMG and PwC assisted with the audits of various Shell operating units in countries such as Nigeria. Therefore, any fair adjudication of the claims against Shell and against the auditor defendants will require that the plaintiffs be able to obtain documents from these alleged third parties. Lead Plaintiff has sought, and will seek, documents from market analysts in several different countries, including the United States. Nowhere in its motion does Shell address whether litigants in foreign fora will have access to these sources of proof. For instance, third party evidence may be difficult to obtain in England, which requires that documents sought from third parties be specifically described (Ex. 2 at ¶¶ 12-18); "absent at least some means to *discover* this essential information," plaintiffs may, as a practical matter, be unable to obtain such evidence. *See Lacey II*, 932 F.2d at 185 n.12.

4. The Public Interest Factors Favor Retaining Jurisdiction

A court considering a *forum non conveniens* motion must also evaluate public factors, such as "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty," *Piper*, 454 U.S. at 241 n.6, as well as "the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to plaintiff's chosen forum." *Lacey I*, 862 F.2d at 48. Again, Shell has not met its heavy burden.

As explained above, this litigation will proceed for U.S. purchasers whether or not the Foreign Purchasers' claims are dismissed. Therefore, there is little additional burden to the U.S. court system by including the Foreign Purchasers' claims in the same action. Shell, however,

proposes that the Foreign Purchasers bring actions in England, The Netherlands, and possibly other jurisdictions, in *addition* to the American litigation. Dismissal would therefore necessarily *add* to court congestion worldwide.

The local interest in this case is strong, as well. This Court has already determined that it has subject matter jurisdiction over the foreigners' claims – a finding that itself depended on the conclusion that Congress intended to regulate the conduct at issue in this case, and that federal policy favored adjudication of the Foreign Purchasers' claims. *See Shell*, 380 F. Supp. 2d at 540-41; *see also SEC v. Kasser*, 548 F.2d 109, 114-16 (3d Cir. 1977) (jurisdiction turns on assessment of congressional intent and federal policy). And, because this is a federal question case alleging claims solely under federal law, this Court has not been called upon to apply foreign law. Finally, this Court has already determined that Shell "engaged in material and substantial fraudulent conduct in the United States." 380 F. Supp. 2d at 548.

Shell contends that the public factors favor dismissal in part because this Court is scheduled to preside over a "complex, four-week bench trial" regarding subject matter jurisdiction, which is unique to the Foreign Purchasers' claims. Shell Br. at 30-31. Shell overlooks that, after discovery, briefing, and oral argument, this Court *already* determined that it has jurisdiction over the Foreign Purchasers' claims; the only reason that there is a bench trial on the issue scheduled is that *Shell* requested that the issue be reopened. Moreover, discovery in preparation for the trial is nearly complete; the added burden of allowing the mini-trial to proceed as scheduled is simply not equal to the burdens on foreign courts were litigation to begin anew in various jurisdictions with new plaintiffs and judges unfamiliar with the cases.

Shell also contends that if the class were certified, this Court would be confronted with the additional burdens of managing such a complex litigation. But management issues are part

of the class certification determination; if this Court believes that such a class will be unmanageable, it can decline to certify, after it receives the evidence it is scheduled to receive at the June mini-trial and evidentiary hearing. There is no reason to preempt this Court's receipt of evidence on the issue by dismissing the claims before the hearing even occurs.

Finally, Shell reprises its arguments that the U.S. has little interest in the dispute and the claims in this action are more properly heard in foreign fora. Once again, these are precisely the issues that this Court has already resolved in Lead Plaintiff's favor, and, at minimum, should not be decided *against* Lead Plaintiff until after it has had the opportunity to present additional evidence regarding the United States's interest in this litigation at the mini-trial.

Shell cites several cases for the unremarkable proposition that public interests may weigh in favor of dismissal even when subject matter jurisdiction attaches. Shell Br. at 34-35. Lead Plaintiff does not dispute this proposition as a matter of law; the question is whether Shell has met its burden to show that the particular facts in this case "weigh heavily on the side of dismissal," *Lacey I*, 862 F.2d at 44. It is on this critical point that Shell finds no support. For example, Shell cites *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 940 F. Supp. 528 (S.D.N.Y. 1996), as a situation in which securities claims were dismissed despite the presence of subject matter jurisdiction. In fact, the district court (affirmed by the Second Circuit, 147 F.3d 118 (2d Cir. 1998)) found there was no jurisdiction, and turned to the *forum non conveniens* analysis as an alternative holding. *Id.* at 535-36. Moreover, the only connection to the U.S. was the "fortuitous presence of plaintiff's shareholder in Florida at the time of some of the purchases underlying this action." *Id.* at 539. This is a far cry from the situation here, where the Lead Plaintiff has already submitted evidence that, among other things, Shell engaged in fraudulent conduct in this country. 380 F. Supp. 2d at 548. And in *Alfadda*,

the transaction in question not only had minimal connection to the U.S., but was also deeply associated with French law, and had been the subject of litigation in other fora. *See* 159 F.3d at 44, 46-47.[18] Here, by contrast, relevant conduct spanned the globe – indeed, Shell has repeatedly argued that reserves overstated in each country were determined by the operating unit in that particular country; thus, there is no other forum with a greater interest in the dispute.[19]

Warlop is similarly distinguishable. Because the U.S. purchasers involved in that case settled their claims, the proposed class consisted solely of Foreign Purchasers, and the district court noted that a single forum – Belgium – had a greater interest in the dispute. The case concerned shares traded on a Belgium exchange only, and there were several pending actions in Belgium, including a criminal action and a civil action filed by the same lead plaintiff pursuing the American action. *Warlop,* 473 F. Supp. 2d at 262. Here, of course, there is no concentration of activity in a foreign forum, and not only has the U.S. government filed litigation here, but the only private litigations have occurred here.

III. INTERNATIONAL COMITY DOES NOT WARRANT DISMISSAL

It has repeatedly been recognized that parallel litigation may proceed in different jurisdictions without offending notions of comity. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods N.V.*, 310 F.3d 118, 127 n.7 (3d Cir. 2002); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987). Because federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado River Water*

[18] It should be noted that the *Alfadda* court merely affirmed a district court's holding under an abuse of discretion standard, noting that its review of the district court's decision was "severely cabined." 159 F.3d at 45.

[19] The proposed Dutch settlement does not indicate that The Netherlands has a greater interest in the dispute; it was instituted solely by private parties who, to the extent they have shown any interest in actual litigation of their claims, filed their complaints in this Court.

Conservation Dist. v. United States, 424 U.S. 800, 817 (1976), dismissal due to a parallel proceeding is only appropriate when there exist "exceptional circumstances" such that dismissal in favor of the alternative forum "would clearly serve an important countervailing interest." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983).[20]

First, a court must determine whether the alternative proceeding is truly "parallel." *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). If there is no parallel proceeding, dismissal on grounds of international comity is appropriate only if there is a "true conflict" between the laws of the respective jurisdictions, which is defined to mean that it is impossible to comply with the directives of both countries. *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996) (cited with approval in *Stonington*, 310 F.3d at 129-30).

Even if the proceedings are parallel, the propriety of dismissal depends upon an assessment of several factors first developed in *Colorado River* and *Moses H. Cone*, including "(1) the desirability of avoiding duplicative litigation, (2) the inconvenience of the domestic forum, (3) the governing law, (4) the order in which jurisdiction was obtained in each forum, (5) the relative progress of each proceeding, and (6) the contrived nature of the domestic claim." *Hay*, 2005 WL 1017804, at *12. "In assessing whether exceptional circumstances are present, a district court must identify considerations which are not generally present as a result of parallel litigation...." *Klonis v. Nat'l Bank of Greece, S.A.*, No. 05 Civ. 6289 PKC DF, 2006 WL 3851146, at *2 (S.D.N.Y. Dec. 27, 2006) (internal quotations omitted).

Here, there is no parallel proceeding. "An action is parallel to another action where

[20] Though the tests in *Colorado River* and *Moses H. Cone* were originally developed in the context of federal-state parallel proceedings, they have been generally recognized as equally applicable in the international context. *See, e.g., Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 93-94 (2d Cir. 2006); *Hay Acquisition Co., I, Inc. v. Schneider*, No. Civ.A. 2:04-CV-1236, 2005 WL 1017804, at *12 (E.D. Pa. Apr. 27, 2005).

substantially all the same parties are contemporaneously litigating substantially the same issues in another forum." *Hay*, 2005 WL 1017804, at *11 (quoting *Paraschos v. YBM Magnex Int'l, Inc.*, No. Civ A 98-6444, 2000 WL 325945, at *5 (E.D. Pa. Mar. 29, 2000)). Here there is only a proposed settlement, which does not involve the basic hallmarks of litigation, such as the presentation of evidence and the sorts of interlocutory rulings that might create conflicting obligations between jurisdictions. Moreover, the conclusion of a litigation – whoever prevails – binds all parties; here, if the proposed settlement is not finally approved, nothing has been accomplished, and there is no binding judgment against anyone. Because there is no parallel litigation, then, dismissal on grounds of comity is appropriate only if there is a true conflict of laws. However, by Shell's own admission, there is no conflict; Dutch law forbids fraud, and Shell has not identified any conflicting obligations placed on it by Dutch and American law.

Even if the process of having the proposed settlement approved is a "parallel" proceeding, Shell still cannot show that there exist "exceptional circumstances" warranting dismissal. Shell contends that there are "duplicative" proceedings, but because the parallel action is not a true litigation, nothing will be duplicated; there will be no witnesses or evidence or merits determinations of any kind in The Netherlands. Additionally, as discussed above in the context of *forum non conveniens*, there is no particular inconvenience to Shell if this Court retains jurisdiction, if only because the U.S. claims will still have to be litigated in this forum.

As Shell acknowledges, this action is brought under federal law, and thus does not require this Court to apply a foreign country's law. Shell nonetheless baldly asserts that the claims "really should" be governed by foreign law. Shell Br. at 43. Shell also argues that the claims are "without merit" because there is "no basis" for foreigners' invocation of this Court's jurisdiction. Shell Br. at 44. Shell has offered no substantive support for these contentions and,

as discussed above, this Court – not to mention the Staff of the SEC – has already determined that the U.S. securities laws apply to the conduct in question. Thus, there can be no serious argument that the claims here are "contrived."[21]

Perhaps most critically, this forum has had jurisdiction over the action for three years, during which time extensive discovery has occurred and several important pretrial matters have been resolved; the Dutch proceeding, by contrast, was only instituted a few weeks ago and to the best of Lead Plaintiff's knowledge, there has been no action at all from the Dutch courts. Though Shell contends that the Dutch action is "further in terms of resolving the Non-U.S. Purchasers' claims," Shell Br. at 43, it does not explain how this can be so, given that its own expert has expressed doubt that a Dutch court would approve a settlement that benefits non-Dutch citizens, (Ex. 1 at 37), and the time has not yet even arrived for foreigners ostensibly covered by the settlement to offer their objections.

Thus, not only do *all* of the factors counsel in favor of this Court retaining jurisdiction, but Shell has failed to identify a single factor that distinguishes the Dutch proceeding from any other parallel litigation, let alone identified "exceptional circumstances" warranting dismissal.

Moreover, as Lead Plaintiff explained in its motion for an antisuit injunction, there are important American interests at stake, because in reaching the proposed settlement, Shell is openly attempting to evade U.S. policy regarding the conduct of class actions. As explained above, there are no other actions pending against Shell, and the Dutch statute does not permit litigation. Thus, the sole practical effect of the proposed settlement, if it is finalized and given *res judicata* effect, will be to resolve the claims advanced under United States law by foreign

[21] By contrast, claims might be "contrived" if a plaintiff sought a declaratory judgment to forestall parallel proceedings in a foreign country. *See, e.g.*, *Basic v. Fitzroy Eng'g, Ltd.*, 949 F. Supp. 1333, 1339 (N.D. Ill. 1996), *aff'd*, 132 F.3d 36 (7th Cir. 1997).

members of the putative class in this case. Shell's only reason even to enter into negotiations with these investors regarding the class claims, let alone purport to reach an agreement, was to evade the provisions of the PSLRA and shop for malleable plaintiffs' counsel.

By contrast, Dutch interests in the proposed settlement are minimal. Because there is no Dutch "litigation," there is no allegation by any entity that Shell violated any Dutch law. Under such circumstances, it cannot even be said that the proposed settlement effectuates a Dutch policy of clearing court dockets by coordinating resolution of claims; there are simply no claims in The Netherlands in need of resolution. Indeed, the only effect of the proposed Dutch settlement is to purport to resolve claims under American law.

Finally, there is no reason why Dutch courts should have any greater interest in resolving claims of non-Dutch foreigners than American courts do, and the terms of the proposed settlement further minimize Dutch interest in this matter by automatically terminating the proposed settlement in the event that this Court exercises jurisdiction over the foreigners' claims. Shell has stated that it believes this Court may make that determination before the Amsterdam Court of Appeals has had an opportunity to approve the proposed settlement. If Shell is correct, the Dutch courts do not have an independent interest in overseeing the proposed settlement at all; any interest they have is already contingent on the actions of this Court. Therefore, the relevant comity considerations do not warrant dismissal.

CONCLUSION

For the above reasons, Shell's motion to sever and dismiss should be denied.

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Respectfully submitted,

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