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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re:	)	**Civil Action No. 04-374 (JAP)**
	)	**(Consolidated Cases)**
IN RE ROYAL DUTCH/SHELL TRANSPORT SECURITIES LITIGATION	)	**Judge Joel A. Pisano**
	)	**RETURN DATE: November 5, 2007**
	)	***(Document Electronically Filed)***

ROYAL DUTCH/SHELL TRANSPORT'S OPPOSITION TO LEAD PLAINTIFF'S OBJECTIONS TO SPECIAL MASTER NICHOLAS H. POLITAN'S REPORT AND RECOMMENDATION

On September 18, 2007, Special Master Nicholas H. Politan issued a Report and Recommendation (the "Report") in which he urged that the Court "conclude that it lacks subject matter jurisdiction" over "Non-U.S Purchasers" of the stock of defendants Royal Dutch Petroleum Company and The "Shell"

Transport and Trading Company, p.l.c. (collectively, "Shell"). [Report at 2] The Special Master also recommended that the Court exclude the Non-U.S. Purchasers from any class it might certify in this case "because the federal securities laws do not apply to their claims." [*Id*.]

On October 11, 2007, Shell moved the Court to adopt the Report, including its findings and recommendations, and to direct entry of judgment under Fed. R. Civ. P. 54(b) on its ruling that plaintiff Peter M. Wood's and other Non-U.S. Purchasers' claims cannot be litigated in this case.

On that same date, Lead Plaintiff filed objections to the Report, asking the Court to reject the Report and to hold that the Court has subject matter jurisdiction over the Non-U.S. Purchasers' claims. Lead Plaintiff argued that the Special Master erred in "repeatedly conclud[ing] that Lead Plaintiff had presented 'no evidence' in support of its arguments." As evidence of the Special Master's alleged error, Lead Plaintiff attached to its objections a chart citing evidence of U.S. conduct relating to several of the Shell operating units at issue that purportedly refutes the Special Master's findings of no evidence. Lead Plaintiff also argued that the "issue before the Court . . . is not whether Lead Plaintiff has submitted *any* evidence of U.S.-based conduct . . . but whether that evidence is sufficient under the Third Circuit's articulation of the conduct test."

Lead Plaintiff's assertions are based on a misreading of the Special Master's findings that attempts to divorce the Special Master's factual discussion from the legal framework within which the Special Master considered those facts. A careful review of the Report makes clear that the Special Master did not find that Lead Plaintiff presented *no* evidence of U.S. conduct. Rather, he specifically considered Lead Plaintiff's evidence of such conduct but found that it was not *legally significant* under the conduct test – or, to use Lead Plaintiff's own characterization, was *not sufficient* under the Third Circuit's articulation of the conduct test. The Special Master thus ruled that Lead Plaintiff had presented "no evidence" satisfying the conduct test – not that it had presented "no evidence" of any U.S. conduct at all.

The Legal Framework

Lead Plaintiff does not purport to disagree with the Special Master's formulation of the conduct test. Nor could it do so, inasmuch as the Special Master repeatedly cited Lead Plaintiff's submissions in explicating that test.

The Special Master observed that, "if conduct in this country contributed to securities fraud on foreign investors, then courts should exercise subject matter jurisdiction over these investors' fraud claims." [Report at 26] However, "not any domestic conduct suffices to establish jurisdiction." [*Id.* (internal citations omitted)] "[T]he federal securities laws do not apply to actions

or a failure to prevent fraudulent actions where the bulk of the activity was performed in foreign countries" and where the U.S. conduct at issue is "merely preparatory" and "relatively small in comparison to [the conduct] abroad" [*id.* at 28, 27 (internal citations and quotation marks omitted)].

As the Special Master observed, the critical question is whether Shell had "'engaged in material and substantial conduct in the United States that was part and parcel of the fraud'" and [whether] the "'U.S. participants in this conduct acted with an awareness of the scheme to book or retain improper proved reserves.'" [Report at 5 (quoting Lead Plaintiff's Proposed Finding of Facts & Conclusions of Law ¶¶ 391-92)] The Special Master found that Lead Plaintiff had not submitted evidence meeting this standard.

The Special Master's Consideration of Facts
Within the Legal Framework

The Report makes clear that the Special Master carefully examined the "voluminous submissions" from the parties to determine whether Shell had engaged in the requisite conduct in the United States. [Report at 3] He disagreed, however, with Lead Plaintiff's conclusion that the evidence met that standard. Although he found evidence of U.S. conduct, the Special Master concluded that the conduct was not "material and substantial . . . part and parcel of the fraud" but, rather, was, "at best, merely preparatory to, and was insignificant and immaterial to any alleged fraud directed towards the Non-U.S. Purchasers." [*Id*. at 5, 35] *If* any

such alleged fraud occurred in connection with Shell's statements about its proved reserves (and the Special Master did not find that it did), "it was planned and executed in Europe, not the United States." [*Id.* at 35]

The Special Master examined the *totality* of conduct that led to the alleged fraud in this case and concluded that the overwhelming amount of conduct relevant to Shell's reporting of its proved reserves occurred *outside* the United States. Lead Plaintiff does not attempt to object to any of the Special Master's findings that:

- "[T]he Shell Companies, their executives, and key employees are predominantly based in Europe" [*id.* at 6];
- The Exploration and Production ("EP") business, whose alleged activities are at issue in this case, was based in and operated from Europe [*id.* at 7-8];
- EP operating units throughout the world reported their proved reserves to the Group Reserves Coordinator (the "GRC"), who was based in the Netherlands and who "compiled, reviewed, and approved [Shell's] aggregate proved reserves in the Netherlands" [*id.* at 10];
- The aggregate proved reserves were audited by the Group Reserves Auditor (the "GRA") in the Netherlands [*id.*];
- The GRC, the GRA, Shell's external auditors, and the Deputy Group Controller, and EP's Executive Committee reviewed and challenged the aggregate proved reserves in Europe [*id.* at 11];
- Shell ultimately reported its proved reserves and other financial information "to the investing public and the SEC from the Netherlands or the United Kingdom" [*id.* at 10].

The Special Master therefore concluded that "all meaningful steps taken in preparing and approving Shell['s] aggregate proved reserves occurred outside the United States" and that "all key individuals involved in such steps were either based in Europe and/or performed their reserves-related functions in Europe." [*Id.*]

Against this backdrop, the Special Master then considered the specific evidence of U.S. conduct that Lead Plaintiff sought to use to satisfy the conduct test. The evidence that Lead Plaintiff claims the Special Master ignored related to the actions of two U.S.-based Shell service entities – SDS and SEPTAR – and a single U.S. employee named Rod Sidle.

The Special Master, however, did not ignore any of this evidence. He simply found it insufficient under the conduct test, in light of the overwhelming amount of *non-U.S.* conduct that led to the reporting of Shell's proved reserves.

For example, the Special Master specifically considered Lead Plaintiff's evidence about SDS's and SEPTAR's alleged conduct [*see id*. at 14-22] but found that those entities had provided

> mere technical assistance that presumably aided non-US operating units in booking or maintaining provided reserves. But that is the extent of their involvement. . . . At best, this conduct is merely preparatory, but not significant or material in promoting the alleged fraud.
>
> [*Id.* at 37]

Thus, the Special Master did not find a complete absence of evidence of conduct by those entities; instead, he concluded that their actions did not satisfy the conduct test.

The Special Master meticulously went through SDS's and SEPTAR's conduct in connection with each of the relevant Shell operating units and, in each case, found no evidence sufficient to meet the conduct test's requirements:

SNEPCO: The Report acknowledged that SDS did work for SNEPCO but concluded that such work was not related to the proved reserves ultimately recategorized in 2004. [*Id*. at 17-18] The Report also concluded that "SNEPCO, with its headquarter in Nigeria, was responsible for estimating and reporting to the GRC its own proved reserves." [*Id*. at 18]

SDAN: Similarly, the Special Master found that SDS had provided "preliminary input into SDAN's proved-reserves reporting in Angola" but that there was "no evidence to substantiate any additional SDS involvement" and that SDAN "solely controlled its proved reserves calculations and its ARPR submission to the GRC." [*Id*. at 18-19]

BSP: Respecting BSP (Brunei), the Special Master noted Lead Plaintiff's evidence of U.S. conduct – indeed, the Report cited the same pages of Lead Plaintiff's Fact Submission that Lead Plaintiff now cites in its objections –

but rejected such evidence as "proof that SDS and BSP engaged in any form of communications regarding any type of reserves." [*Id*. at 19]

SBEP: While acknowledging that Lead Plaintiff presented evidence "seek[ing] to connect SDS to SBEP (Brazil)," the Special Master concluded that the evidence did not establish that "Shell ever booked proved reserves for SBEP, including the particular fields for which SDS provided technical services." [*Id*.] In fact, Lead Plaintiff had argued only that "Shell offers no evidence to show that proved reserves were *not* booked or restated in the fields for which SDS performed technical and economic services." [Pl. Reply Mem. at 23 (emphasis added).] However, Lead Plaintiff had admitted in the very next sentence that "Shell does *not* bear the burden of proof here" [*id.* (emphasis added)], and the Special Master made the same point elsewhere in his Report, *see* Report at 24 ("[E]ven though Plaintiffs claim that 'Shell cites no evidence . . . ,[']this is, indeed, not Shell's burden. Rather, Plaintiffs bear the burden to prove that [the alleged U.S. conduct] played sufficient part in the allegedly fraudulent scheme that resulted, and Plaintiffs do not and can not otherwise dispute this burden.").

PDO: The Report cited some of the same evidence that Lead Plaintiff cites in its objections regarding the conduct of AGH (SEPTAR's U.S.-based arm) in connection with PDO (Oman). [*Id*. at 20 (citing Pl. Fact Rebuttal and Pl. Reply Mem)] The Report described in some detail the "technical" services that AGH

provided to PDO (including AGH's investigations regarding "the scope for improved recovery," enhanced oil recovery studies, and reservoir modeling) but found that, contrary to Lead Plaintiff's assertions, (*i*) AGH's work had not included recommendations for proved reserves, (*ii*) there is "no evidence that AGH, as opposed to PDO, played any role . . . regarding reserves," and (*iii*) the enhanced oil recover studies conducted by AGH did "not estimate or report proved reserves." [Report at 20-21] The Special Master thus concluded that Lead Plaintiff had "not sufficiently established that AGH's technical service work contributed to PDO's decisions to book proved reserves or to maintain allegedly overstated proved reserves on its fields." [*Id*. at 21]

SVSA: Regarding Shell's Venezuela operating unit (SVSA), the Special Master once again cited some of the same evidence of SEPTAR conduct that Lead Plaintiff cites in its objections [*id*. at 22 (citing Pl. Fact Stmt)] but rejected that evidence because (*i*) some of that work could not have been done by SEPTAR because the work predated SEPTAR's existence, and (*ii*) a "critical" study by AGH that Lead Plaintiff cited took place after SVSA had booked the relevant reserves [*id*. at 22].

Lead Plaintiff also objects to the Special Master's finding that "[o]verall, proof is lacking that [U.S.-based employee Rod] Sidle violated or influenced others at Shell to violate SEC rules and regulations." [*Id*. at 24] Once

again, this finding is *not* based on the Special Master's failure to review Lead Plaintiff's evidence of Mr. Sidle's conduct but, rather, on the Special Master's careful review of that evidence and his conclusion that Lead Plaintiff did not "meet the burden [of proving] that Sidle's conduct played sufficient part in the allegedly fraudulent scheme that resulted." [*Id*. at 24-25, 37]

In sum, Lead Plaintiff might disagree with the Special Master's findings on the various issues, but Lead Plaintiff is simply incorrect in stating that the Special Master failed to consider the evidence that Lead Plaintiff had presented. Indeed, the Special Master's Report reflects his careful consideration of all the evidence and his conclusion that, even taking that evidence into account, none of it was sufficient to meet the requirements of the conduct test. The chart attached to Lead Plaintiff's objections is nothing more than a list of the evidence that the Special Master already considered, coupled with a request that the Court reach a different conclusion than the Special Master recommended. The Court should reject that request for the same factual and legal reasons that the Special Master so carefully explained.

CONCLUSION

For the reasons set out above, the Court should reject Lead Plaintiff's objections to the Special Master's Report. Instead, the Court should adopt the Report, including its findings and recommendations, and direct entry of judgment under Fed. R. Civ. P. 54(b) on its ruling that the claims of plaintiff Peter M. Wood and other Non-U.S. Purchasers cannot be litigated in this case.

October 15, 2007

Respectfully submitted,

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