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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**: March 27, 2006 *(Document electronically filed)*

MEMORANDUM IN SUPPORT OF JOINT MOTION BY LEAD PLAINTIFF AND PETER M. WOOD FOR THE INTERVENTION OF PETER M. WOOD AS AN ADDITIONAL CLASS REPRESENTATIVE

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Lead plaintiffs the Pennsylvania State Employees' Retirement System ("SERS") and the Pennsylvania Public School Employees' Retirement System ("PSERS" and, together with SERS, "Lead Plaintiff") and Peter M. Wood ("Wood") respectfully submit this memorandum in support of their joint motion for Wood to intervene as an additional proposed class representative in this action.

INTRODUCTION

PSERS, SERS, and Wood jointly move for Wood to intervene as an additional class representative: (a) to add protection to members of the class who purchased or otherwise acquired the ordinary shares of Royal Dutch Petroleum Company ("Royal Dutch") and/or The "Shell" Transport and Trading Company, PLC ("Shell Transport" and, together with Royal Dutch, "Shell" or the "Companies") on foreign markets ("Foreign Domiciliaries"); (b) to promote judicial efficiency; and (c) to avoid delay.[1] Wood has an independent basis for subject matter jurisdiction, his motion is timely, there are common questions of law and fact between his claims and this action, and intervention will not unduly delay or prejudice the Defendants.

In connection with Lead Plaintiff's motion for class certification, it is expected that Defendants will argue that Lead Plaintiff does not have any interest in protecting the rights of the Foreign Domiciliaries. Lead Plaintiff believes that such an argument is without merit, especially since Judge Bissell has already found that PSERS and SERS can adequately represent all

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[1] Together, SERS, PSERS, and Peter Wood are referred to herein as the "Proposed Class Representatives." "Defendants" shall refer to Royal Dutch, Shell Transport, KPMG Accountants N.V. ("KMPG NV"), PricewaterhouseCoopers LLP ("PwC UK"), KPMG International ("KPMG-I"), Sir Philip Watts ("Watts"), Walter van de Vijver ("van de Vijver"), and Judith Boynton ("Boynton"). "Individual Defendants" shall refer to Watts, van de Vijver, and Boynton. "Corporate Defendants" shall refer to Royal Dutch, Shell Transport, KPMG NV, PwC UK, and KPMG-I.

members of the class, both foreign and domestic, and since each fund purchased ordinary shares on foreign markets. *See* June 30, 2004 Opinion (the "June 30, 2004 Op.") at 41.[2] However, to fulfill its duties as Lead Plaintiff and to ensure that the Court's attention is not diverted to non-issues, such as Lead Plaintiff's domicile, Lead Plaintiff jointly moves with Wood, a citizen of the United Kingdom (and resident and domiciliary of Andorra), for the latter's intervention as an additional class representative.

As discussed below, Wood stands ready, willing, and able to serve as a class representative, and will provide reasonable, non-objectionable, non-privileged discovery, including deposition testimony, upon Defendants' request. *See* the accompanying Declaration of Peter M. Wood, dated February 28, 2006, ¶ 5. Moreover, Wood understands his duties and responsibilities as a class representative and is committed to serving the class to the best of his ability. *Id.* ¶¶ 4-5.

This motion will not affect any of the upcoming class certification proceedings or impact any of the proceedings set forth in the Joint Scheduling Order dated January 3, 2006 (the "January 3rd Scheduling Order"). The motion is being made contemporaneously with Lead Plaintiff's motion for class certification. Under the January 3rd Scheduling Order, class discovery is not scheduled to conclude for another five months. Thus, Wood's intervention as a proposed additional class representative will not delay class certification proceedings or, for that matter, any other proceeding in this action.

Although Lead Plaintiff believes that any argument concerning its typicality with respect to Foreign Domiciliaries to be without merit, *now* is the appropriate time for Wood to intervene to forestall future delay, not if and when Defendants choose to assert the argument in opposition

[2] The June 30, 2004 Op. is attached as Exhibit H to the Declaration of Jeffrey M. Haber, dated March 1, 2006, submitted in support of Lead Plaintiff's motion for class certification.

to class certification. If Defendants were to assert such an argument, and the Court were to agree with Defendants, then the Court would have to entertain applications of one or more new proposed class representatives. That process – as well as discovery of new class representatives – would delay the case by months. It is also uncertain who would step forward at a later time to serve as an additional class representative. With Wood willing to step in now, the Court avoids uncertainty and delay.

Therefore, PSERS, SERS, and Wood move to intervene Wood in this action as an additional class representative.

ARGUMENT

I. INTERVENTION IS APPROPRIATE IN THIS CASE

Rule 23(d) permits intervention for purposes of improving or strengthening the representation of the class. *See* Fed. R. Civ. P. 23(d)(2). Indeed, in class actions, intervention is "highly desirable" "to ensure adequate class representation." *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 202 (S.D.N.Y. 1992) (rejecting the defendants' arguments that intervention was untimely). *See also Gatter v. Cleland,* 87 F.R.D. 66, 71 (E.D. Pa. 1980) (noting that Rule 23(d) permits intervention to improve and strengthen representation of the class).

The decision in *Shields v. Washington Bancorporation*, Civ. A. No. 90-1101(RCL), 1992 WL 88004 (D.D.C. Apr. 7, 1992), is instructive. In *Shields*, the court denied a motion for class certification because the plaintiff was not an adequate class representative. *Id.* at *1. Later, a new plaintiff moved to intervene as the class plaintiff. *Id.* Granting intervention, the court found that the underlying action "appears appropriate for resolution through a class action suit" and that "judicial economy will be preserved if this action continues as a class action; denial [of the intervention] motion will trigger a slew of interventions or individuals suits." *Id.* at **2-3.

As in *Shields*, this action is an appropriate case for class certification. And, like *Shields*, it is proper to add parties who have standing to represent the class, in the event that Defendants successfully challenge Lead Plaintiff's standing to represent the interests of Foreign Domiciliaries. *See Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 929 (3d Cir. 1986) (Third Circuit reversed the district court, holding that "[i]f the class representatives did not adequately represent the subclass, the proper remedy was to amend the class certification order or to permit additional plaintiffs to intervene"); *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 960 (D.C. Cir. 1985) (Court of Appeals reversed district court's decision because it did not even "consider[] appointing a class representative other than [representatives who posed Rule 23 problems]").

Intervention in class actions is also important because "members of a class are normally bound by the judgment in the class action." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 149 F.R.D. 55, 58 (S.D.N.Y. 1993). It is not uncommon that "replacement of the class representative may become necessary," in which event courts should "permit intervention by a new representative." David Herr, *Annotated Manual For Complex Litig.* § 30.17 at 228 (3d ed. 1999).

Accordingly, Wood should be allowed to intervene to protect the interests of the Foreign Domiciliaries.

II. WOOD'S INTERVENTION IS PERMISSIBLE UNDER RULE 24(b)

Federal Rule of Civil Procedure 24(b) permits intervention when:

> *an applicant's claim or defense and the main action have a question of law or fact in common* . . . [and] the intervention will [not] unduly delay or prejudice the adjudication of the rights of the original parties. [Emphasis added.]

Courts allow permissive intervention if: 1) the intervenor shows an independent basis for subject matter jurisdiction; 2) the motion is timely; 3) there exists a common question of law or fact between the intervenor's claim and the main action; and 4) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. *See In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 338-39 (E.D. Pa. 2004); *Shanghai Meihao Elec., Inc. v. Leviton Mfg. Co.*, 223 F.R.D. 386, 387 (D. Md. 2004).

The decision whether to allow intervention under Rule 24(b)(2) lies in the sound discretion of the district court. *See Contawe v. Crescent Heights of Am., Inc.*, No. Civ. A. 04-2304, 2005 WL 1400383, at *2 (E.D. Pa. June 14, 2005) ("The grant or denial of permissive intervention is a 'highly discretionary decision.'") (quoting *Brody v. Spang*, 957 F. 2d 1108, 1115, 1124 (3d Cir. 1992)); *Bradburn Parent/Teacher Store, Inc. v. 3M*, No. Civ. A. 02-7676, 2004 WL 2900810, at *5 (E.D. Pa. Dec. 10, 2004). *See generally* 7C C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure Civil* § 1911 at 355 (2d ed. 1986).

As demonstrated below, Wood satisfies each of these requirements.

A. Wood Has Independent Grounds For Jurisdiction

It has long been settled that independent grounds for jurisdiction are not required for intervention by a member of a class who will be bound by the judgment, either in general or with regard to a particular fund. 7C C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure Civil* § 1917 (2d ed. 1986). However, even if it were required, Wood satisfies this element.

In the August 9th Opinion, Judge Bissell found that "Lead Plaintiff has adequately pled that Defendants have engaged in material and substantial fraudulent conduct in the United States," and that, as a result, the "Court has a sufficient interest in the claims of the foreign investors" necessary for the Court to "invoke its jurisdiction and deny Defendants' Rule 12(b)(1)

motion." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 548 (D.N.J.), *on reconsideration*, 404 F. Supp. 2d 605 (D.N.J. 2005). As described by the Court, the fraudulent conduct alleged in the Complaint stems from, among other things, the dissemination of false public reports that overstated (and later concealed the truth about) the Companies': (a) proved oil and natural gas reserves by billions of barrels of oil equivalent, (b) reserves replacement ratio ("RRR"), and (c) future cash flows. *Id.* at 515-16.

Wood's claims against Defendants are identical in all material respects to those considered by Judge Bissell and alleged in the Second Amended Complaint.[3] Therefore, pursuant to Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), and 28 U.S.C. § 1331(a), and pursuant to this Court's earlier order, the Court has subject matter jurisdiction over Wood's claims, just as it has jurisdiction over the claims asserted in the action.[4]

B. The Motion is Timely and Will Not Cause Delay or Prejudice

In considering the timeliness issue, courts consider three factors: (i) the stage of the proceeding at the time the applicant seeks to intervene; (ii) prejudice to the existing parties from the applicant's delay in seeking leave to intervene; and (iii) any reason for the length of delay in seeking intervention (how long the prospective intervenor knew or reasonably should have known of his/her interest in the litigation). *See AMS Constr. Co. v. Reliance Ins. Co.*, No. Civ. A. 04-CV-2097, 2004 WL 2600792, at *3 (E.D. Pa. Nov. 15, 2004) (citing *Mountain Top Condo.*

[3] *See Gatter v. Cleland,* 87 F.R.D. 66, 71 (E.D. Pa. 1980) (intervention permitted where intervenors' claims were "virtually indistinguishable" from those asserted by the original plaintiffs).

[4] Section 27 of the Exchange Act, 15 U.S.C. § 78aa, provides that any actions brought under the Exchange Act may be brought in the district where the defendant is found or transacts business, or in the district where the offer or sale took place. *See* Section 27. Similarly, 28 U.S.C. § 1391(b) provides for jurisdiction where a defendant is located and/or a substantial part of the events or omissions giving rise to the plaintiff's claims occurred. *Id.*

Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995)); *Delaware Valley Citizens' Council For Clean Air v. Commonwealth of Pa.*, 674 F.2d 970, 974 (3d Cir. 1982). When considering the foregoing, there can be no question that Wood's motion is timely and will not cause delay of the action or prejudice to the parties.

Wood will abide by the January 3rd Scheduling Order and all prior proceedings. Wood's intervention and appointment will not delay class certification proceedings,[5] or any of the deadlines in the January 3rd Scheduling Order. In fact, not only does the instant motion not cause any delay, it ensures that the Court will avoid future delay.

Further, Defendants will not be prejudiced by the intervention, as they are already on notice of the claims alleged against them. As noted, Wood does not seek to add new claims to the action. *Gatter*, 87 F.R.D. at 71.

Finally, there has been no unnecessary delay in seeking intervention in this action. Wood is making this motion in connection with the class certification motion, which is being filed contemporaneously herewith, and before the conduct of class discovery and the filing of Defendants' opposition to the certification motion.

It should also be noted that the Private Securities Litigation Reform Act ("PSLRA") "does not in any way prohibit the addition of named plaintiffs to aid the lead plaintiff in representing a class." *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 83 (2d Cir. 2004); *cf. In re PMA Capital Corp. Sec. Litig.*, No. 03-6121, 2005 WL 1806503, at *18 (E.D. Pa. July 27, 2005) (PSLRA does not require that lead plaintiffs have standing to sue on every available cause of action). Indeed, lead plaintiffs, such as SERS and PSERS, have a "responsibility" to add named

[5] Class certification discovery is scheduled to conclude on July 28, 2006.

plaintiffs who have standing at the class certification stage. *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 204 (S.D.N.Y. 2003).[6]

C. Common Questions of Law and Fact Exist Between Wood's Claims and The Underlying Action

Wood's claims are the same as those that Judge Bissell sustained in August of last year: claims based upon Defendants' misconduct in artificially inflating the Companies' proved reserves (and the related misstatements and omissions), which artificially inflated the value of Shell's ordinary shares and ADRs and caused losses to plaintiffs and the Class.[7] It is indisputable, therefore, that Wood's claims and the claims asserted in the underlying action have common – indeed identical – questions of law and fact. *See Cureton v. Nat'l Collegiate Athletic Ass'n*, No. Civ. A. 97-131, 1998 WL 961387, at *2 (E.D. Pa. Dec. 13, 1998) (intervention granted where the intervenors were "members of the putative class and share[d] common questions of law and fact" and were "alleging claims identical to those of the named plaintiffs"); *Ardrey v. Fed. Kemper Ins. Co.*, 142 F.R.D. 105, 117 (E.D. Pa. 1992) (intervention granted where "proposed intervenors have raised the identical legal claims as the named plaintiffs").

III. ALTERNATIVELY, WOOD CAN INTERVENE UNDER RULE 24(a)

Fed. R. Civ. P. 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims

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[6] *See also In re Oxford Health Plans*, 191 F.R.D. 369, 380-381 (S.D.N.Y. 2000) (court has power to designate a class representative under Rule 23 who is not a lead plaintiff); *Carson v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. Civ. 97-5147, 1998 WL 34076402, at *12 (W.D. Ark. Mar. 30, 1998) (granting leave to file an amended complaint to substitute a new named plaintiff with standing to pursue a section 10(b) claim).

[7] Wood purchased 1,519 Shell Transport ordinary shares through the company's dividend reinvestment program during the Class Period. As a result of these purchases and the revelation of the truth, Wood suffered an economic loss.

> an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"The Third Circuit has interpreted Rule 24(a)(2) to include four requirements for intervention as of right: (1) the intervention must be timely; (2) the intervenor must have a sufficient interest relating to the subject of the action; (3) the action must potentially impede the applicant's ability to protect its interest; and (4) the existing parties must not adequately represent the applicant's interest." *AMS Constr. Co. v. Reliance Ins. Co.*, No. Civ. A. 04-CV-2097, 2004 WL 2600792, at *2 (E.D. Pa. Nov. 15, 2004); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995). Wood readily satisfies these criteria.[8]

A. The Motion Is Timely

As discussed above, Wood's motion is timely and will cause neither delay nor prejudice to Defendants.

B. Wood Has Sufficient Interests Relating To The Action

Wood has a keen interest in this action. Wood purchased Shell Transport ordinary shares during the Class Period, is a member of the putative Class, and suffered economic losses resulting from the disclosure of the truth about Shell's proved reserves and financial condition.

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[8] As a general matter, "the requirements for intervention as of right are satisfied where an 'applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.'" *Ass'n for Fairness in Bus., Inc. v. New Jersey*, 193 F.R.D. 228, 231 (D.N.J. 2000) (quoting *Mountain Top Condo. Ass'n*, 72 F.3d at 368 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Representation will be considered inadequate if: (1) the interests of the applicant and of the representative party diverge; (2) the representative party and the opposing party collude; or (3) the representative party does not diligently pursue the lawsuit. *Id.* Moreover, "the burden of establishing inadequacy of representation by existing parties varies with each case." *Ass'n for Fairness in Bus.*, 193 F.R.D. at 231. However, as the Third Circuit concluded, "Rule 24 demands flexibility when dealing with the myriad situations in which claims for intervention arise." *Kleissler v. U. S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998).

In *Kleissler v. United States Forest Service,* 157 F.3d at 969-70, the Third Circuit found a sufficient interest when economic interests are directly at stake. Accordingly, Wood, like PSERS and SERS, has a sufficient interest in this action.

C. If Defendants Were to Succeed in Arguing that PSERS and SERS Lack Standing To Represent Foreign Domiciliaries, Then Wood's Ability To Protect His Interests Would Be Impeded

Although PSERS and SERS believe that they are adequate and typical of all members of the Class, as Judge Bissell found (*see* June 30, 2004 Op. at 41), if Defendants were to argue and succeed in convincing the Court that SERS and PSERS are atypical of Foreign Domiciliaries (though SERS and PSERS believe such an argument is groundless), then a portion of the class would be without a class representative. Therefore, the threat to Wood's interests and those of the Foreign Domiciliaries exists now. Such a "real and substantial risk of impairment" satisfies the third prong of 24(a). *CSX Transp., Inc. v. City of Phila.*, No. Civ. A. 04-CV-5023, 2005 WL 1677975, at *4 (E.D. Pa. July 15, 2005).

D. Wood's Interests May Be at Risk

Although SERS and PSERS believe that any typicality (or standing) argument concerning the claims of Foreign Domiciliaries would be without basis, in an abundance of caution, Wood is moving to intervene with SERS and PSERS' support, to avoid future delay and disruption of the case. *See Hartman v. Duffy*, 158 F.R.D. 525, 530-31 (D.D.C. 1994) (court granted motion to intervene under 24(a) when naming additional class representatives solved Rule 23 impediments).

That Defendants have not yet asserted this defense to class certification, or may not even assert this defense, does not render this motion premature. The parties are well aware that such a challenge has been asserted in other securities class actions involving a world-wide class and, therefore, the risk of impairment of Wood's interests exists now, even if Defendants do not assert

this argument. The Court need not wait until the impairment actually occurs to prevent impairment. A "risk" of impairment – not actual impairment – will suffice to satisfy Rule 24(a). *See CSX*, 2005 WL 1677975, at *4.

As noted, this is the most efficient time for intervention. The discovery needed of Wood will be conducted during the same period that discovery will be conducted of SERS and PSERS. Briefing on the class certification motion will be governed by the January 3rd Scheduling Order, and the class certification hearing or mini-trial (as the Court determines to be appropriate) will be conducted as scheduled. *See In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 (S.D.N.Y. 2002) (granting leave to add new named plaintiffs after the lead plaintiff's standing to bring certain claims was challenged).

CONCLUSION

Wood satisfies the criteria for intervention set forth in Rule 24(b) or, alternatively, Rule 24(a) of the Federal Rules of Civil Procedure. Accordingly, PSERS, SERS, and Wood's motion for Wood's intervention as a proposed class representative should be granted.

DATED: March 1, 2006

Respectfully submitted,

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