

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
Civil No. 04-374 (JAP)

In re: :  
: TRANSCRIPT OF  
ROYAL DUTCH/SHELL TRANSPORT : PROCEEDINGS  
SECURITIES LITIGATION :  
: **COPY**

United States Courthouse  
50 Walnut Street  
Newark, New Jersey  
July 9, 2007

B E F O R E:

NICHOLAS H. POLITAN  
Special Master

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Reported by: Stanley B. Rizman, C.S.R.

1 THE SPECIAL MASTER: Good morning,  
2 gentlemen.

3 Mr. Bernstein, ready to proceed?

4 MR. BERNSTEIN: Yes, your Honor.

5 THE SPECIAL MASTER: This is a special  
6 hearing held by the Special Master in the Royal  
7 Dutch Transport case to hear oral argument. The  
8 voluminous -- and I use the word "voluminous" with  
9 capital letters -- presentation that had been made  
10 to me in writing -- literally 24 boxes, which are  
11 the size of drawer boxes of exhibits, depositions,  
12 papers and documents concerning this matter.

13 I have about six inches of briefs, both  
14 factual statements as well as legal arguments, and I  
15 have another book which is full of cases that were  
16 cited by one side or the other. It is perhaps the  
17 most complete work record that I ever had before me  
18 in the 15 years I spent on the bench and the five  
19 years afterward doing mediation.

20 Indeed, counsel has presented every  
21 possible argument in support of and in derogation of  
22 the Court having jurisdiction in this matter over  
23 foreign investors. I appreciate the effort -- both  
24 the effort of lead counsel who, obviously, could not  
25 do without the aid and assistance of very capable

1 people who work with them. I thank you all for the  
2 presentations and I only hope that the way things  
3 are presented to us can be reflected in the opinion  
4 which I am going to give.

5 MR. BERNSTEIN: Good morning, Judge  
6 Politan.

7 THE SPECIAL MASTER: Good morning.

8 MR. BERNSTEIN: Stanley Bernstein for  
9 the lead plaintiff and the class.

10 I know you've had an opportunity to go  
11 through that entire record. So what I'd like to do  
12 this morning is highlight some of the key issues.  
13 Try not to tread over things that have been laid out  
14 already. But, on the other hand, try and put a  
15 context on this and try to pull it all together for  
16 the Court.

17 Our agenda this morning. I plan to  
18 doing the opening presentation. Then the defendants  
19 will go and then we would like to reserve some  
20 rebuttal time and that probably will be handled as a  
21 tag team by either myself, Mr. Baber, Mr. Millkey or  
22 others, depending on what issues come up and active  
23 expertise each team member may have.

24 As your Honor knows, this case arises  
25 from the January 2004 announcement by Shell that it

1 will be categorizing approximately 20 percent of its  
2 oil and gas reserves. Nearly four million barrels  
3 of oil equipment -- four billion barrels of oil and  
4 equipment.

5 Subsequently, they recategorized  
6 additional, approximately, half a billion barrels.  
7 The key issue with respect to the oil and gas  
8 reserves is the amount of proved reserves that are  
9 reflected in the financial statement.

10 "Proved reserves" is an accounting term  
11 which basically means if it was reasonably  
12 certain -- in quotes, "reasonably certain" -- that  
13 the oil and gas can be recovered under the existing  
14 economic conditions, in an economically viable way.

15 Then it can be categorized as an  
16 approved reserve. The approved reserve, as you read  
17 in the papers, is something that investors consider  
18 to be a very important benchmark in measuring the  
19 financial strength of an oil and gas company such as  
20 Shell, one of the largest oil and gas companies.  
21 Indeed, one of the largest oil companies -- one of  
22 the largest companies in the world. of.

23 For the recategorization Shell Oil  
24 Company retained one of the most prominent law firms  
25 in the world, David, Polk & Wardwell, to conduct an

1 investigation as to how Shell could have  
2 miscategorized 20 percent of its oil and gas. And  
3 Shell basically concluded -- and the report is in  
4 the record -- that there was a deliberate attempt by  
5 Shell to mislead investors after the report was  
6 prepared and presented to Shell formally, a-l-l-y,  
7 formally accepted the finding of the Davis Polk  
8 report. The stock dropped upon the announcement of  
9 this recategorization and lawsuits on behalf of  
10 investors worldwide were commenced in this court.

11 Shell moves to dismiss on many, many  
12 grounds, one of which is the 12(b)(1) motion with  
13 respect to the foreign investors and the subject  
14 matter jurisdiction for foreign investors who  
15 purchased on foreign markets of the foreign Shell  
16 securities.

17 That was before Judge Bissell. And  
18 Judge Bissell made evidentiary findings which are in  
19 the record which, to a certain extent -- the  
20 question is what extent -- found there was subject  
21 matter jurisdiction.

22 THE SPECIAL MASTER: He didn't make  
23 evidentiary findings. What did he hold?

24 MR. BERNSTEIN: Evidently --

25 THE SPECIAL MASTER: What did he hold?

1 MR. BERNSTEIN: Shell services were  
2 involved in all aspects of resource definition.

3 THE SPECIAL MASTER: What evidence did  
4 he have as to that?

5 MR. BERNSTEIN: We had taken  
6 depositions. We got at least one deposition, an  
7 extensive documentary record which was all submitted  
8 to him. Not from the evidence. Evidentiary records  
9 with evidentiary findings that SPDS Shell was  
10 involved in the estimation of the reserves.

11 Portions of the reserves calculated by  
12 Shell were overstated and categorized. This is all  
13 in the record at page 542 and 543 it he did  
14 sequence.

15 THE SPECIAL MASTER: To cut to the  
16 chase on that one. Didn't Judge Pisano suggest to  
17 you that while he had the greatest respect for Judge  
18 Bissell and his decision on the 12(b)(1), he was  
19 entitled to reevaluate that based on the full  
20 evidentiary record which went in a heck of lot more  
21 detail than the 12(b)(1) and determined and made a  
22 determination as to whether or not there was or was  
23 not sufficient conduct in the United States for  
24 which jurisdiction would attach concerning foreign  
25 investors?

1 I mean, I respect Judge Bissell's  
2 opinion. Don't misunderstand me. In the context of  
3 what we're doing here, quite frankly, it has very  
4 little weight because Judge Pisano has already said  
5 it doesn't take us any place in this hearing.

6 On the question of class certification  
7 I'm entitled to revisit the issue of jurisdiction  
8 over foreign investors and I will do that with a  
9 complete record and, God, you folks have created a  
10 record that I'm sure Judge Bissell did not have  
11 before him. He didn't have 25 boxes.

12 MR. BERNSTEIN: He did not have the  
13 record we have now.

14 THE SPECIAL MASTER: No.

15 MR. BERNSTEIN: Based on the record we  
16 had before, we believe we can only build on that  
17 record. We can't detract from the record. We  
18 believe there were evidentiary findings that are  
19 entitled to law-of-the-case protection. That the  
20 only issue here now is whether Judge Bissell applied  
21 the right evidentiary standard as to how much  
22 evidence we needed to establish subject matter  
23 jurisdiction -- what quantum of the evidence we  
24 needed. But that what he did find got us at least  
25 part of way. We believe it got us all the way. We

1 believe he used a preponderance-of-the-evidence  
2 standard when he took all these pieces and added  
3 them up.

4 Judge Pisano did say no, he believes  
5 Judge Bissell made evidentiary findings but he used  
6 less than a preponderance of the evidence standard.  
7 So we believe the reason we're here is that we've  
8 taken the football from the goal line towards the  
9 50-yard line. We thought we went over the 50-yard  
10 line before Judge Pisano said: No, you did not get  
11 over the 50-yard line, but that the evidentiary  
12 standards and findings should not be revisited. We  
13 can only look at them and see if they reach that  
14 50-yard line.

15 THE SPECIAL MASTER: If they withstand  
16 the test whether the record supports -- does the  
17 record -- what is today? July 9th, 2007.

18 Does it support that which Judge  
19 Bissell said, frankly, I think in a preliminary way  
20 under 12(b)(1). I realize you disagree with me. He  
21 didn't elucidate the way we're to go it here today.  
22 He made a finding. Almost like 12(b)(6).

23 Of course, maybe there is a little  
24 smattering of evidence here and there that was put  
25 before me. It certainly was the quality or quantity



1 we have here. I'm suggesting the quantity or  
2 quality doesn't also support your position. I can't  
3 in good judgment, in good faith -- I can't put all  
4 that emphasis on what Judge Bissell said in a very  
5 preliminary way because so much water has gone over  
6 the bridge since then. And Judge Pisano, who is the  
7 judge here, has indicated pretty clearly he's doing  
8 it almost on a de novo basis.

9 I'll let you refer to Judge Bissell.  
10 But I don't think that -- I don't think Judge  
11 Bissell carries your day here.

12 MR. BERNSTEIN: No. You made that  
13 clear.

14 THE SPECIAL MASTER: If it is in the  
15 record, that is one thing. I don't think Judge  
16 Bissell's opinion as well as what was written  
17 carries the day for you here today.

18 MR. BERNSTEIN: No. It does not carry  
19 the day under Judge Bissell's reading of the  
20 opinion. I was trying to point out the factual  
21 findings should stand undisturbed. The legal  
22 conclusion from those findings is what I believe  
23 Judge Pisano has asked us to revisit.

24 THE SPECIAL MASTER: I don't agree with  
25 that. I simply do not agree with that. I think

1 this is almost a start fresh. I think the record is  
2 much more fully developed. Clearly, it is much more  
3 fully developed than it was when Judge Bissell had  
4 it.

5 You know, I, frankly, agree 100 percent  
6 with what Judge Pisano. Said and were I the one who  
7 was sitting then, as I used to sit a long time ago,  
8 I would have made the same determination.

9 That is not to suggest that today's  
10 hearing is just a fruitless endeavor. All it is is  
11 to suggest that opinion doesn't carry you, as you  
12 say, over the 50-yard line.

13 Let's talk about what the the evidence  
14 is now on this record and does that carry you over  
15 the 50-yard line. That is the key.

16 MR. BERNSTEIN: Let's do that for now.

17 THE COURT: Sure. I'm interested in  
18 knowing how you articulate what the test is -- the  
19 conduct test that I have to apply today.

20 MR. BERNSTEIN: That seems to be one of  
21 the -- there are two dividing lines here; what is  
22 the law and how do the facts apply to the law.

23 THE SPECIAL MASTER: That seems to be  
24 in every case.

25 MR. BERNSTEIN: I think in this

1 particular case we should be talking about one of  
2 those acts. How do the facts apply to the law.

3 The law is as we concede and I believe  
4 it was -- the defendants would have to candidly  
5 acknowledge in the Third Circuit there is one  
6 controlling case. S.E.C. versus Kasser.

7 There is a lot written primarily by the  
8 defendants trying to bring in law from other  
9 Circuits. Were we in another circuit, I believe the  
10 law would be articulated differently.

11 In this Circuit and in this case,  
12 because Judge Bissell made a finding which we  
13 believe is still the law of the case, as to the law,  
14 but it is a finding of the law to be read with  
15 Kasser or Kasser is still the controlling law.

16 It says that "Federal securities laws,  
17 in our view, do grant jurisdiction in transnational  
18 securities cases where at least some activity  
19 designed to further a fraudulent scheme occurs  
20 within this country."

21 That goes back to 1977. The law has  
22 not changed. We acknowledge that activity cannot be  
23 so minimal as to be immaterial or merely prefatory  
24 to the fraud. That is what Kasser says as well.  
25 That is the law in the Third Circuit. Basically,

1 the test is whether there was material and  
2 substantial conduct in furtherance of or in pursuit  
3 of the fraud in the United States. That is the law  
4 in the Third Circuit.

5 THE SPECIAL MASTER: But it can't be  
6 prefatory -- have you found --

7 MR. BERNSTEIN: Correct. It cannot be  
8 merely prefatory. It cannot be immaterial to the  
9 fraud.

10 THE SPECIAL MASTER: I think you and  
11 Mr. Ferrara differ because he says it also must be  
12 causation.

13 MR. BERNSTEIN: Correct.

14 THE SPECIAL MASTER: Am I correct, Mr.  
15 Ferrara, without stealing any of your thunder?

16 MR. FERRARA: Your Honor, we think the  
17 question of materiality and direct causation are  
18 inextricably linked.

19 MR. BERNSTEIN: We do not believe on  
20 the law there has to be causation. We do not  
21 believe in the Third Circuit the fraudulent activity  
22 has to be essential to the loss. Those are not the  
23 requirements under Kasser. We don't believe the  
24 United States has to be the base of operation.

25 We do believe you take all of the

1 conduct that is in the briefs and which we'll sketch  
2 over today together. You don't look at any  
3 individual fact in isolation. And you look at what  
4 did happen in the United States and you don't look  
5 at what else happened outside the United States.

6 That is our view. But, fundamentally,  
7 to answer the question you asked a few minutes ago,  
8 the law isn't that complicated. It is whether there  
9 was material substantial conduct in furtherance of  
10 the fraud in the United States which simply  
11 requires -- no pun intended since we have submitted  
12 20 boxes of material to you collectively -- simply  
13 requires a fact-driven analysis.

14 Whether the facts on this record, with  
15 or without the finding from Judge Bissell, because  
16 the same evidence is before your Honor, whether  
17 those facts support a finding that there was  
18 material and substantial conduct in furtherance of  
19 the fraud in the United States.

20 We recognize and we almost apologize  
21 that there are so many facts that have to be brought  
22 together that the record is so large. It is a huge  
23 record. We'll sketch over it today rather than go  
24 point-by-point, barrel-by-barrel.

25 THE SPECIAL MASTER: I have six inches

1 of it in the papers.

2 MR. BERNSTEIN: To find out where they  
3 messed up on four billion barrels of oil and gas it  
4 took a wheel to put that into paper. There are  
5 policy purposes here that Kasser espouses.

6 You want to discourage the United  
7 States from being a base of fraudulent operations.  
8 I mentioned that. That is the test. Whether the  
9 base of operations was here. That seems to be some  
10 confusion created by the defendants.

11 While Kasser says you want to  
12 discourage the United States as being a base of  
13 fraudulent operation. Kasser did not require, in  
14 our view, that the United States be the base of the  
15 fraudulent operations.

16 Additional policy purposes are to  
17 protect American investors who want to sue overseas  
18 if the same issue happens with respect to a foreign  
19 company.

20 So there are good reasons that the  
21 United States should exercise jurisdiction.

22 THE SPECIAL MASTER: In Kasser the  
23 Court quoted the ITT case, the Second Circuit case.  
24 It said the ITT court did narrow the decision  
25 somewhat by saying, quote: Our ruling on this basic

1 jurisdiction is limited to perpetration of  
2 fraudulent acts, themselves, and does not extend to  
3 mere prefatory activities or the failure to prevent  
4 fraudulent acts where the bulk of the activities are  
5 performed in foreign countries.

6 That is what it says. Cited at 548  
7 F. 2d at 109.

8 MR. BERNSTEIN: We think that actually  
9 helps us, Judge.

10 THE SPECIAL MASTER: How does that help  
11 you?

12 MR. BERNSTEIN: Because the Third  
13 Circuit after the Bersch case, IIT case,  
14 specifically came up with a narrower ruling which  
15 did not require the conduct become essential.

16 THE SPECIAL MASTER: Give me that  
17 again.

18 MR. BERNSTEIN: The Kasser ruling, even  
19 after the Second Circuit espoused its more stringent  
20 test, came out with a more lenient test which only  
21 emphasizes that the Third Circuit is more lenient  
22 than the Second Circuit. It does not allow merely  
23 prefatory work. That's true. And it doesn't allow  
24 a finding of jurisdiction. It is the only thing  
25 that happened in the United States. The conjunctive

1 from what you just read was the failure to prevent  
2 fraud overseas. But what we have here is what we  
3 believe is not merely prefatory, but that I will  
4 acknowledge is a bona fide issue to be determined by  
5 the Court and we do not have only a failure to  
6 correct fraud that was masterminded overseas, though  
7 we acknowledge that the bulk of the fraud did take  
8 place overseas.

9 Mr. Ferrara can pound and pound and  
10 pound as if that is a disputed issue. We don't  
11 dispute that the bulk of the fraud was masterminded  
12 by the senior level executives over at Shell. That  
13 is just not the Kasser test.

14 With respect to materiality. I think  
15 your Honor needs to understand how important proved  
16 reserves are to investors. Because not all the  
17 reserves were infected by the United States  
18 fraudulent conduct. A relatively small percentage  
19 of the reserves that were recategorized were  
20 affected by U.S. conduct. But for us to establish  
21 on a factual basis this was material for investors,  
22 I just would like to spend a minute to explain to  
23 your Honor how important proved reserves are to  
24 investors.

25 Whether it is a couple of hundred



1 million barrels or a couple of billion barrels, the  
2 Shell reserves Guidelines, which are in the record,  
3 state, quote: A key factor taking into account by  
4 analysts when issuing advice to investors, this  
5 advice can directly influence the share price. That  
6 is how Shell has characterized the reserves  
7 analysis. And the Wall Street Journal calls  
8 Reserves the life blood measure of future prospects  
9 Of an energy company.

10 Because proved reserves are so  
11 important to an energy company, the actual number,  
12 numerical amount of reserves that were recategorized  
13 based on U.S. conduct is not that important. It is  
14 determined by the context, by the feel. Not  
15 necessarily just by the numbers.

16 In the Ganino case, which is a Second  
17 Circuit case, the Court held that a restatement of  
18 just 1.8 percent of revenues can be material. A  
19 relatively small number. When the conduct is really  
20 nefarious, when it is bad and it is fraudulent --  
21 when investors think the conduct was bad, it doesn't  
22 matter so much oil and gas was recategorized based  
23 on activities outside the United States.

24 We look at what happened within the  
25 United States and was that material to the totality

1 of the fraud.

2 Examine what happened here. Shell will  
3 say: Look at what happened worldwide.

4 The glass is either half full or half  
5 empty.

6 THE SPECIAL MASTER: What if there was  
7 99 percent -- let's take an example. Ninety-nine  
8 percent is done worldwide. One percent is done  
9 here.

10 MR. BERNSTEIN: I say look at the one  
11 percent and say: Would that be material to  
12 investors?

13 THE SPECIAL MASTER: How do you  
14 determine that?

15 MR. BERNSTEIN: That is your job.

16 THE SPECIAL MASTER: No. You. How do  
17 you determine whether it is material? What evidence  
18 do you give me other than the raw figures? You give  
19 me figures. Okay. In my example it is 99 and one.  
20 Okay? Those are the figures which you give me.

21 Now, based on those figures, how do you  
22 draw the inference, if you would, or make the  
23 determination that the one percent was a material  
24 factor in causing the market to react adversely to  
25 the announcement of the 100 percent?

1 MR. BERNSTEIN: In this particular case  
2 everything was part of one big master fraud. It is  
3 one big fraud that was orchestrated out of the  
4 highest levels of Shell in Europe.

5 THE SPECIAL MASTER: I'm on to that.  
6 I'm assuming for purposes of our argument -- and  
7 we'll not get into the question of whether there was  
8 or was not a fraud. Let's assume there was a fraud.  
9 Let's assume there was a fraud committed on the  
10 market.

11 The real question that I get to -- it  
12 would seem to me in analyzing this, and in terms of  
13 analyzing the part that was played by the American  
14 activity, if you would, on that is I look to say:  
15 Well, okay, first of all, who reported the wrong  
16 figures?

17 I'm being very basic about it. Who  
18 reported the wrong figures and where were they  
19 reported?

20 MR. BERNSTEIN: The records were done  
21 by the Shell Company -- I'll use that combined name  
22 for simplistic purposes. They were reported. The  
23 final reports came out of Europe --

24 THE SPECIAL MASTER: Now the next  
25 question.

1 MR. BERNSTEIN: -- based on information  
2 gathered around the world.

3 THE SPECIAL MASTER: Who are the person  
4 or persons that are responsible for generating those  
5 reports?

6 MR. BERNSTEIN: All over the world  
7 operating units would report the information  
8 upstream.

9 THE SPECIAL MASTER: The information  
10 that is gathered in. But who makes the final  
11 decision as to what the number is; whether 2, 20, 50  
12 or zero?

13 MR. BERNSTEIN: The ultimate  
14 responsibility -- the pen is in Europe. The Kasser  
15 test doesn't look at who has ultimate  
16 responsibility, in our view.

17 THE SPECIAL MASTER: I understand your  
18 position on Kasser. I don't have a problem  
19 understanding. I know where you stand on it. What  
20 I'm saying is take my example. I'm engaging in a  
21 factual inquiry because I must, as you say, find  
22 facts.

23 The question that I have is who is  
24 responsible for the decision? You tell me it is  
25 ultimately decided in Europe. Now, the question

1 that I have is -- let's assume that someone in --  
2 I'm going to be -- nothing to do with this case.  
3 Let's assume someone in the United States made a  
4 mistake whether it be negligent or just -- negligent  
5 or stupid. Okay? A mistake was made. They  
6 reported the wrong number or they did the wrong  
7 calculation. Okay.

8 Would you say in that kind of a case  
9 that the United States has jurisdiction?

10 MR. BERNSTEIN: If there is liability  
11 for negligence, yes.

12 THE SPECIAL MASTER: Not liability.  
13 This is fraud. Got to be fraud. Come on.

14 MR. BERNSTEIN: In your hypothetical,  
15 your Honor, the locus is irrelevant because there is  
16 no liability from mere negligence.

17 THE SPECIAL MASTER: There was 99  
18 percent fraud but this one thing in the United  
19 States was negligent?

20 MR. BERNSTEIN: No. There would be no  
21 jurisdiction because there was no fraudulent conduct  
22 in the United States in furtherance of the fraud.

23 THE SPECIAL MASTER: What makes the  
24 conduct in the United States fraudulent in this  
25 case?

1 MR. BERNSTEIN: In this case the record  
2 is replete with evidence of attempts to manipulate  
3 the oil and gas reserves. We'll go through that.  
4 Meetings and meetings and meetings and documentation  
5 and effort primarily in Houston to manipulate the  
6 oil and gas reserves. That ultimately were  
7 recategorized and, I might say for this particular  
8 record, the liability of the act being fraudulent is  
9 a given. It is not even challenged.

10 THE SPECIAL MASTER: What is that?

11 MR. BERNSTEIN: The only factual  
12 question, I believe, is whether there was conduct  
13 here that led to the fraudulent recategorization or  
14 to the recategorization.

15 Whether it was fraudulent or not at  
16 this point is, I don't believe, something that has  
17 to be determined on this record. That is for the  
18 ultimate trier of fact whether that conduct was  
19 fraudulent. Right now was their conduct here in  
20 furtherance of that fraud?

21 THE SPECIAL MASTER: In furtherance of  
22 the fraud doesn't assume innocent acts.

23 Furtherance of the fraud. Every piece  
24 of paper that went through anybody's hands could be  
25 alleged to be a furtherance of the fraud.

1 The question is does the individual who  
2 creates a document -- does a particular act, is he  
3 acting in furtherance of the fraud which requires,  
4 it seems to me, some sort of state of mind?

5 I use the word "scienta" in its  
6 broadest test. Just because somebody wrote down a  
7 number on a piece of paper in Houston, Texas and it  
8 was wrong can't transmute that into an act in  
9 furtherance of the conspiracy without more.

10 John Jones called him and said: Fake  
11 the records.

12 You've seen those cases over and over  
13 again. Or John Jones says: Can't we boost up the  
14 number because we need such-and-such?

15 There has to be some -- I use the words  
16 "material activity" that would give off some sort of  
17 inference that it is in furtherance of the fraud as  
18 distinguished from an act which is done which is  
19 immaterial to the fraud -- immaterial in the  
20 fraudulent sense.

21 I think you got to do that.

22 MR. BERNSTEIN: I don't believe you  
23 could on this particular record. I believe once I  
24 take a break, I'll be able to establish why on this  
25 record the conduct only needs to be, in our view, as

1 part of the recategorized reserves and the --

2 THE SPECIAL MASTER: You mean I don't  
3 have to make any determination -- I have to make no  
4 determination as to whether or not that which was  
5 done was in furtherance of the conspiracy in a  
6 conspiratorial sense or in a fraudulent sense?

7 MR. BERNSTEIN: I don't think it is  
8 necessary for this. I think it is assumed for the  
9 purpose of this exercise that if we can establish  
10 the quantum of evidence that was not merely  
11 prefatory. It was substantial but not immaterial.

12 THE SPECIAL MASTER: Kasser says, in  
13 distinguishing the Bersch case, where Bersch doesn't  
14 apply. They say; nevertheless, there was much more  
15 United States banks activity in the present case  
16 including, inter alia, the execution of a key  
17 investment contract in New York as well as the  
18 maintenance of records in this contract by both  
19 American and foreign corporations. Records that  
20 were crucial -- the word "crucial" is used -- to the  
21 consummation of the fraud. Not only do we believe  
22 that the sum total of defendants' international  
23 actions were substantial, but we also question  
24 whether they can be convincingly maintained if such  
25 acts in the United States did not directly cause an



1 extraterritorial loss.

2 What they're saying -- what they're  
3 saying there is you got to show some activity that  
4 ties in. In that case it was the creation of fake  
5 documents, I think, where a Canadian corporation was  
6 defrauded. You got to show something. You can't  
7 just say -- look, if what you're saying is true,  
8 anything that Shell did in the United States, ipso  
9 facto, creates jurisdiction over foreign investors  
10 on the foreign markets because it was part of the  
11 record.

12 MR. BERNSTEIN: Only if it is related  
13 to the recategorized oil and gas reserves which are  
14 alleged to have been fraudulently manipulated.

15 THE SPECIAL MASTER: I don't think I  
16 saw -- maybe I missed it. I'd like to see it, if  
17 you get a chance, to tell me where in the in the  
18 record there are such evidence that shows it was  
19 part of.

20 I mean, I read a lot of this record and  
21 a lot of this record seems to say -- you can correct  
22 me if I'm wrong, Mr. Bernstein -- seems to say a  
23 couple of things.

24 Number one, it says that the major  
25 domo, the guys who really did the, quote, fraud --

1 and, again, we're using fraud in the context of this  
2 hearing, were all The Netherlands or in some other  
3 place; that the things that were recategorized were  
4 all outside of the United States. There were no  
5 U.S. wells or whatever you call them recategorized.  
6 That the decision to do this -- the decision process  
7 in taking this raw material which came from all over  
8 the world. Not just the United States, but came  
9 from all over the world was done -- compiled in the  
10 Netherlands, put together in the Netherlands and  
11 they ultimately exercised their judgment as to what  
12 they wanted to put in the financial statements.  
13 These folks I think pretty clearly, unless there is  
14 something in the record that I missed, has nothing  
15 to do with the ultimate creation of things in the  
16 financial statements which were false.

17 MR. BERNSTEIN: The word "ultimate" I  
18 dispute. I think they were critical to the  
19 preparation of the financial statements.

20 THE SPECIAL MASTER: Why was it  
21 critical?

22 MR. BERNSTEIN: Because they start from  
23 the bottom and work up. The ultimate decision --

24 THE SPECIAL MASTER: What if the guy  
25 down below says ten -- uses the number 10, okay, and

1 they ultimately decide they want to put 12? Would  
2 that be activity?

3 MR. BERNSTEIN: Not if ten was correct  
4 because it wouldn't have been in furtherance of the  
5 fraud.

6 THE COURT: Assume the ten was correct.

7 MR. BERNSTEIN: If ten was correct --

8 THE SPECIAL MASTER: And they put 12.

9 MR. BERNSTEIN: That would be okay.

10 That is not what happened here.

11 Let me sketch it through, let me sketch  
12 it through. Certainly, with respect to the investor  
13 relations when the European executives came to the  
14 United States and were puffing about the proved  
15 reserves, there can be no serious dispute that that  
16 was -- they had knowledge of the fraud and they were  
17 puffing about the proven reserves directly in the  
18 United States.

19 I believe standing under International  
20 Nesmont is enough. International relations office  
21 here that puffed reserved and coming into the United  
22 States.

23 THE SPECIAL MASTER: Is it enough to  
24 assert jurisdiction over the foreign investors?

25 MR. BERNSTEIN: That is our position

1 and we read International Nesmont --

2 THE SPECIAL MASTER: Because they came  
3 to the United States and made a presentation to the  
4 United States?

5 MR. BERNSTEIN: International Nesmont  
6 was enough in having an office. That is a District  
7 Court case in New Jersey. In New Jersey.

8 THE SPECIAL MASTER: What judge was  
9 that?

10 MR. BERNSTEIN: Bassler.

11 THE SPECIAL MASTER: He's retired now.

12 MR. BERNSTEIN: Retired judges are very  
13 good.

14 Let me give the highlights of the  
15 fraudulent conduct in the United States and maybe  
16 save some of the specific questions for after Mr.  
17 Ferrara speaks so we can give a well-thought-out  
18 answer.

19 Basically, two major categories of  
20 conduct in the United States that we assert  
21 jurisdiction on. One is the calculation of the oil  
22 and gas reserves where we believe the record shows  
23 that the U.S. based part of Shell were involved in  
24 either the booking or the maintenance of the  
25 bookings of over 330 million barrels of energy that

1 were recategorized. Which represents eight percent  
2 of the initial recategorization and approximately  
3 one and a half percent of Shell's entire oil and gas  
4 reserves. Investor relations in the United States  
5 was extensive.

6 THE SPECIAL MASTER: Stay with the  
7 calculation of the oil reserves. Were those  
8 calculations fraudulent?

9 MR. BERNSTEIN: Yes.

10 THE SPECIAL MASTER: Why were they  
11 fraudulent?

12 MR. BERNSTEIN: Because they had all  
13 part of the play-for-time scheme. They were all  
14 part of the efforts to goose up the reserves to  
15 compete with other oil companies.

16 THE SPECIAL MASTER: I'm not  
17 questioning what you're saying about those elements.  
18 Why do you say what was done here was fraudulent?  
19 What proof here is that it it was fraudulent?

20 That is my question. Not because you  
21 say there was an ultimate fraud. For purposes of  
22 this argument we assume that.

23 What I'm saying is there was work that  
24 was done in the United States. The work that was  
25 done -- what was fraudulent about it?

1 MR. BERNSTEIN: What I would like to do  
2 is respond to that question after a break.

3 THE SPECIAL MASTER: Very good. That's  
4 fine. I'm being pretty specific with you now.

5 MR. BERNSTEIN: We believe --

6 THE SPECIAL MASTER: I have no problem.  
7 Don't respond to it. After a break feel free.

8 Do you want to take a break now for  
9 five minutes, please?

10 MR. BERNSTEIN: Let me go for --

11 THE SPECIAL MASTER: I'm interested in,  
12 A, a complete record and, B, a complete  
13 understanding of both your position and Mr.  
14 Ferrara's position.

15 MR. BERNSTEIN: Our position is that  
16 Shell Deep Water Services and SEPTAR. They and  
17 SEPTAR were intimately involved in the booking or  
18 maintenance of bookings of about eight percent of  
19 the initial recategorization. That they were  
20 instructed from above to participate in the  
21 manipulation of these reserves.

22 THE SPECIAL MASTER: What group did  
23 that?

24 MR. BERNSTEIN: That is what we'll pull  
25 together for you.

1 THE SPECIAL MASTER: That's what I'd  
2 like to see.

3 MR. BERNSTEIN: I'd like to push ahead  
4 to the investor relations. We'll do all the  
5 reserves in Angola and Nigeria.

6 THE SPECIAL MASTER: No problem.

7 MR. BERNSTEIN: Investor relations.  
8 What is important to recognize is the United States  
9 was a key market for Shell. Twenty-five to 30  
10 percent of oil shares were held here by Americans.  
11 About 90 percent of all the voting worldwide was  
12 done by Americans. And in the middle of the class  
13 period in 2002, Shell made an extra push to market  
14 itself to investors in the United States. To do  
15 that it needed to puff up and make its reserves look  
16 great for investors. It was not looking good  
17 compared to pier groups, the record will show.

18 Shell only had three investor relations  
19 offices worldwide. In U.S. and the Netherlands,  
20 where it was headquartered, and in the United  
21 States. It had extensive and scheduled and planned  
22 investor relations presentations in the United  
23 States or outreach. It had analysts' presentations  
24 by defendants Watson and Wharton in the United  
25 States that addressed the reserves. It had

1 presentations to investors in London and then in New  
2 York on a schedule basis. It had one-on-one  
3 investor meetings in the United States that Watson  
4 and Wharton frequently attended. At all these  
5 meetings the record shows the proved reserves were  
6 highlighted.

7 We believe that even information that  
8 was disseminated in London was simultaneously  
9 sent -- if it was simultaneously sent to the United  
10 States is sufficient conduct in the United States to  
11 establish jurisdiction.

12 THE SPECIAL MASTER: Under what theory?

13 MR. BERNSTEIN: Under the theory that  
14 information around the world flowed to the United  
15 States in an efficient marketplace. It got here  
16 simultaneously. They knew it was getting here  
17 simultaneously. They wanted the market in the  
18 United States to be part of the big Shell investor  
19 family. And under International Nesmont we believe  
20 the law would support a finding of jurisdiction  
21 based just on the investor relations actions alone.

22 THE SPECIAL MASTER: There is certainly  
23 solid jurisdiction over Shell for purpose of suing  
24 on behalf of Americans. There is more than adequate  
25 presence.



1 I mean, putting to the side the fact  
2 that the Act, itself, gives -- they are subject to  
3 the Act because they're registered here and  
4 everything else. let's assume you didn't have that.  
5 There is more than adequate activity in the United  
6 States to support a finding of jurisdiction in the  
7 United States over Shell for purposes of American  
8 investors. i don't know how it helps you get  
9 jurisdiction over foreign investors. If people come  
10 from The Netherlands to boost the American market.  
11 God bless them. You know, but what does that have  
12 to do with the jurisdiction over these foreign  
13 investors?

14 That is what I'm trying to figure out.  
15 I've been struggling with is.

16 MR. BERNSTEIN: I understand the  
17 dilemma. It doesn't just affect the American  
18 investors nor does Kasser's conduct in the United  
19 States affect the European investors. Kasser, as we  
20 read, it, only requires the conduct in the United  
21 States. You alluded to it earlier this morning. It  
22 does not require that that conduct caused any effect  
23 upon the European investor.

24 THE SPECIAL MASTER: I didn't concede  
25 causation is not one of the tests. All I said, that

1 is where you differ from Mr. Ferrara. Whether or  
2 not causation is or is not is something I have to  
3 decide.

4 Put that aside for the moment. The  
5 activity -- what does that have to do -- what proof  
6 do you have -- I'll get to proof again.

7 What proof do you have that that which  
8 was done in the United States by investor  
9 presentations caused people on the European market  
10 to do something or even knew about it?

11 MR. BERNSTEIN: I don't believe we have  
12 to establish it caused it. I believe the record  
13 shows the information was disseminated worldwide.  
14 Imputed worldwide. And an efficient market. Judge  
15 Bissell made a finding to that effect early on in  
16 the case.

17 THE SPECIAL MASTER: What did he say?

18 MR. BERNSTEIN: What he said was -- I  
19 think I have it right in front of me, I hope.

20 (Pause.)

21 MR. BERNSTEIN: Why don't we find the  
22 quote during our break rather than spend the time?

23 THE SPECIAL MASTER: Sure.

24 MR. BERNSTEIN: I have the findings  
25 communicated for market information throughout the

1 world on page 545. On page 44 of our moving brief  
2 is the quote that I was referring to.

3 Judge Bissell writes, "It would be  
4 difficult to contend that the London and Amsterdam  
5 stock exchanges do not qualify, within the ambit of  
6 the doctrine's definition, as efficient markets."

7 Then he goes on to write, "Just as  
8 foreign stock exchange data and information is  
9 pertinent to the United States investors, the  
10 reverse is also true. Moreover, the alleged  
11 fraudulent activity which occurred in the United  
12 States was in no way confined to the United States  
13 market, which, because of the SEC's stringent  
14 Guidelines and regulations, has become an example  
15 for foreign investors and exchanges. The Companies'  
16 alleged fraudulent conduct which took place in the  
17 United States would, therefore, affect foreign as  
18 well as domestic investors." At page 545 of the  
19 opinion."

20 THE SPECIAL MASTER: The problem I  
21 have -- I disagree with the statement. Put that  
22 aside for the moment.

23 The problem I have with it is what  
24 proofs did he have before him at that time to make  
25 such a statement?

1 I agree that the world is an efficient  
2 market, Mr. Bernstein. I don't argue that point at  
3 all. The world is an efficient market. I'm not  
4 suggesting it is not.

5 All I'm saying is -- that doesn't take  
6 me to a conclusion about whether or not there is  
7 jurisdiction in the United States over foreign  
8 investors on a foreign market.

9 Look, I wake up in the morning and the  
10 television got the Yangtze market. The Chinese  
11 market. Every market in the world is on the news in  
12 the morning. It doesn't mean a heck of a lot to me  
13 because I'm not, quote, a sophisticated investor.  
14 So I can never get into any of those good tax  
15 shelters and things like that. But, in any event,  
16 it doesn't make any sense to me. Apparently, there  
17 are people that keep track of it.

18 Then I got into the bad habit of  
19 putting Bloomberg's station on the radio when I  
20 drive the car. All I hear is all the markets  
21 throughout the world. I'm not suggesting I wouldn't  
22 suggest in the least they all don't keep track of  
23 one another. Of course they do.

24 My question is: What makes that fact a  
25 coaching fact or a fact that's essential -- that

1 helps me decide there is jurisdiction?

2 MR. BERNSTEIN: I think the easiest way  
3 for me to answer that question is to refer your  
4 Honor to the report of our expert economist, Greg  
5 Jarrow in the record, who is the former Chief  
6 Economist of the SEC who addressed the worldwide  
7 efficiency of the market and the interplay of  
8 information from one side of the world to another.  
9 That is in the record now. You can almost take  
10 judicial notice of that. I can say that it is all  
11 over the area, over the commentators. If you listen  
12 to anything on the television, it is all there.  
13 They keep talking about the interplay of the  
14 markets. Now the experts are all looking at all the  
15 markets.

16 MR. FERRARA: I think that is --

17 THE SPECIAL MASTER: You know, I still  
18 have a question of how that impact impacts on the  
19 question of the decision of the jurisdiction. If  
20 you find something AT the break, please bring it to  
21 my attention.

22 MR. BERNSTEIN: With respect to the  
23 investor relations interplay, I think the Jarrow  
24 report will be the most help for that. I certainly  
25 would not want to paraphrase.

1 THE SPECIAL MASTER: I'll take a  
2 re-look at that one.

3 MR. BERNSTEIN: I'd like to look for a  
4 moment before I conclude for the break and maybe  
5 we'll come back even before defendants -- I'd like  
6 to consult with respect to the European settlement.

7 We recognize the reality that the  
8 European settlement has been announced and.  
9 Negotiated some of the largest European investors  
10 have voted with their feet to go to Europe. That  
11 may tip the scale against the finding of subject  
12 matter jurisdiction.

13 We believe that the European settlement  
14 at least helps us to the following extent with  
15 respect to subject matter jurisdiction.

16 THE SPECIAL MASTER: The forecast I  
17 wrote on the question on the piece of paper. What  
18 is the impact of the settlement in the Netherlands?  
19 You've thrown it out.

20 MR. BERNSTEIN: The practical impact,  
21 certainly, perhaps, takes away some of the sympathy  
22 that a court might have that European investor might  
23 not have any alternative means of relief other than  
24 this Court.

25 On the other hand, the glasses are

1 either half full or half empty. You can make  
2 lemonade out of lemons.

3 As we point out in, I believe, our  
4 reply brief, part of the European settlement is that  
5 the moneys paid by Shell to the SEC are to be  
6 distributed according to the European settlement  
7 worldwide. Investors worldwide, based on a request  
8 from, among others, Royal Dutch Shell to the SEC --  
9 that is money to be distributed worldwide.

10 As we read the SEC jurisdiction and  
11 letters, the SEC only has interest in a fraud if it  
12 was perpetrated in the United States and the Fair  
13 Fund Distribution Act says it can only distribute  
14 funds that are paid as a penalty to victims of the  
15 fraud.

16 So since the SEC staff, at least based  
17 on Shell's recommendation, which we believe for this  
18 purpose is an admission because Shell has said the  
19 money should be distributed worldwide, we would  
20 argue that establishes or certainly helps to  
21 establish that Shell believes that the acts that  
22 took place in the United States victimized  
23 shareholders worldwide because, otherwise, the SEC  
24 should not be distributing these funds to investors  
25 worldwide.

1 THE SPECIAL MASTER: Has the SEC  
2 decided to distribute those funds?

3 MR. BERNSTEIN: The Commission, to the  
4 best of my knowledge, has not made any  
5 determination.

6 THE SPECIAL MASTER: They have the  
7 ultimate discretion over those funds, don't they?

8 I do think they do. I do think -- what  
9 if -- let's assume, arguendo, that notwithstanding  
10 the eloquence with which Mr. Ferrara presents that  
11 to the SEC, the SEC says: Mr. Ferrara, thank you  
12 very much, but, no, thank you; we're going to  
13 distribute it in the United States?

14 How does that help or hurt you at this  
15 point? Isn't that within the discretion of the SEC?

16 MR. BERNSTEIN: Yes.

17 THE SPECIAL MASTER: I guess you can  
18 argue there is a tacit admission by him that the  
19 U.S. Securities & Exchanged Commission has some  
20 authority to send money to a foreign country. But  
21 there is no question that Mr. Ferrara cannot direct  
22 that money.

23 MR. BERNSTEIN: He can't direct it. We  
24 quibble with the word "tacit." We believe it is  
25 admission by Shell that they view --



1 THE SPECIAL MASTER: Needless to say, I  
2 admit jurisdiction.

3 He tacitly says -- your argument, at  
4 best, is he tacitly admits to jurisdiction because  
5 he says that money should go to the foreign  
6 countries.

7 MR. BERNSTEIN: Right. The SEC can  
8 only give money to victims of the fraud. The SEC  
9 handles jurisdiction over fraud perpetrated here.  
10 It is an admission that the fraud here victimized  
11 investors worldwide. That is the best he can make  
12 of the European settlement.

13 I'd like one minute.

14 THE SPECIAL MASTER: What about the  
15 European settlement as it relates to the fact it has  
16 taken care, from a judicial point of view, U.S.  
17 judicial point of view -- why should this Court --  
18 why should this Court, assuming there is  
19 jurisdiction -- even assuming there is jurisdiction  
20 in the primary sense, why should this Court exercise  
21 that jurisdiction?

22 MR. BERNSTEIN: Well, that would be --

23 THE SPECIAL MASTER: Forum non  
24 conveniens?

25 MR. BERNSTEIN: That would be an issue

1 to address if subject matter jurisdiction is found.  
2 In other words, we're not here on that motion.

3 THE SPECIAL MASTER: I look at it and I  
4 say, you know, here is 85 percent of the investors  
5 who are in a foreign market. Fifteen percent are in  
6 the U.S. The U.S. people are going to be protected  
7 by your class action here. The 85 percent are,  
8 presumably, going to be protected by a settlement  
9 which is going to be processed by the courts in The  
10 Netherlands. And I say to myself -- I say: You  
11 know, why should I be concerned? I, the judicial  
12 officer, why should I be concerned about those 85  
13 who are being taken care of in their own country  
14 under their own laws where they actually did the  
15 transaction -- they actually did the economic  
16 transaction? Why should I exercise my jurisdiction  
17 in the long arm of the United States and bring them  
18 all into this court when they already had that  
19 settlement, number one. And, number two, why should  
20 I nullify a settlement which was apparently reached,  
21 I guess, at arm's length, and is subject to approval  
22 by the courts in the Netherlands? Why should I?

23 MR. BERNSTEIN: We believe that the  
24 investors here would have done better in the absence  
25 of that settlement. And that settlement is

1 conditioned upon a finding of no jurisdiction and a  
2 class not being certified here.

3 As I said a few moments ago, we  
4 recognize the realities that would confront any  
5 Court with that European settlement being  
6 spearheaded by very, very large and sophisticated  
7 investors.

8 THE SPECIAL MASTER: In Europe. That  
9 is the one thing. -- that is one thing which,  
10 factually, putting aside all allegations about fraud  
11 and everything else.

12 From a judicial administration point of  
13 view or court administration point of view should  
14 they follow the -- who was the judge? Judge Sweet's  
15 decision/

16 I don't remember what case it was.  
17 Where he declined to accept jurisdiction on a forum  
18 non conveniens situation. He felt the shares were  
19 in a foreign market.

20 You're not here on that. It struck me  
21 as being, perhaps -- excuse the expression --  
22 another arrow in the quiver of the defendants here.  
23 I'm not sure it was shot or not shot at this point.

24 MR. BERNSTEIN: Ultimately, the  
25 decision today would come down to whether the

1 actions were fraudulent. Were they merely prefatory  
2 and were they material to the entirety of the fraud?

3 We think the answers support  
4 jurisdiction and this is a factual investigation.  
5 The record is pretty extensive. A lot of  
6 depositions were taken.

7 THE SPECIAL MASTER: I'll attest to  
8 that. I got the records.

9 MR. BERNSTEIN: I'd like one minute.

10 THE SPECIAL MASTER: Why don't you  
11 do -- can I make a suggestion? Let's take a  
12 five-minute break. My court reporter needs it.

13 Why don't you either decide whether you  
14 want to continue or wait until Mr. Ferrara makes his  
15 presentation and then rebut? Either way.

16 MR. BERNSTEIN: Thank you.

17 (Recess.)

18 THE SPECIAL MASTER: Please be seated.

19 Yes, Mr. Bernstein. What is your  
20 pleasure?

21 MR. BERNSTEIN: My pleasure is to right  
22 now for a few moments --

23 THE SPECIAL MASTER: Sure.

24 MR. BERNSTEIN: If your Honor has any  
25 specific questions, we may start our tag team right

1 now because some of my colleagues have some exhibits  
2 right at their fingertips if you need them. He can  
3 refer you to a few.

4 Basically, as your Honor can see, we  
5 have Mr. Haber Mr. Millkey and Mr. Bigin behind me  
6 and Ann Englar in the pews is the Assistant Deputy  
7 Chief Counsel of Mr. PSERS.

8 We had the opportunity to chat during  
9 the short break. Virtually all of the reserves that  
10 we talked about in our briefing, we believe there is  
11 evidence in the record that supports the conduct was  
12 either fraudulent or reckless.

13 With respect to an Angola Black 18,  
14 which got most of the paper. There was over 120  
15 million barrels recategorized. The record is there  
16 were key meetings in Houston with respect to the  
17 booking of those reserves with both U.S. and foreign  
18 Shell executives. And that the evidence establishes  
19 that they affirmatively decided to violate  
20 Section -- Rule 4-10 and use what are referred to as  
21 "sweet spot" and "cherry-picked field" in order to  
22 calculate the reserves.

23 THE SPECIAL MASTER: What rule is that?

24 MR. BERNSTEIN: 4-10 of the SEC  
25 regulation how you calculate reserves. We refer you

1 to Exhibit 119 in the record. In Brunei, where  
2 about 48 million barrels was recalculated, we refer  
3 you to Exhibit 78, where the evidence establishes  
4 that they maintained certain reserves. They didn't  
5 book them, but they maintained them based on conduct  
6 in the United States as part of the play-for-time  
7 scheme.

8 In other words, to try and keep these  
9 reserves on the books and hope that they can buy  
10 hamburger today and pay for it Tuesday. That they  
11 would be able to catch up on those reserves later  
12 on.

13 That is a major part of the scheme  
14 alleged in the Complaint. In Oman there was 78  
15 million barrels recalculated. Again, the conduct  
16 there was mostly with respect to maintaining the  
17 bookings, Legacy bookings, not necessarily the  
18 booking, per se, and Exhibit 52 establishes the  
19 fraudulent conduct because the Shell representatives  
20 say they wanted to protect the already -- protect  
21 the already booked reserves.

22 The Group Reserves auditor before  
23 Berendreg, who was involved in all the calculations,  
24 the evidence establishes he has no formal training  
25 in being an auditor. He had an inadequate chain of

1 command as found by the Davis Polk report accepted  
2 by Shell.

3 We believe the responsibility for the  
4 entire calculation of all the reserves at the hands  
5 of Mr. Berendregt was reckless by putting this  
6 responsibility on an employee who was not adequately  
7 trained, not adequately supervised and also was a  
8 part-time employee. For a company the size of  
9 Shell --

10 THE SPECIAL MASTER: You get help  
11 wherever you can get it.

12 MR. BERNSTEIN: We believe that infects  
13 all the bookings. So with that, we certainly go  
14 into great detail on every one of these issues to  
15 espouse and supplement and explain whatever is in  
16 the record. But I think for a morning's work I've  
17 tried to skim over.

18 THE SPECIAL MASTER: As long as you  
19 gave us those citations to the record that you say  
20 support your position, that is all we really need.

21 Thank you, Mr. Bernstein.

22 MR. BERNSTEIN: Thank you.

23 THE SPECIAL MASTER: Mr. Ferrara, are  
24 you ready?

25 MR. FERRARA: Well, after all of that

1 barely so, but I'll do my best.

2 Ralph Ferrara appearing on behalf of  
3 the Shell defendants.

4 Your Honor, first forgive me. I'm  
5 going to try to use some electronics here today to  
6 advance the discussion. I'm doing that --

7 THE SPECIAL MASTER: If you don't know  
8 how to use the electronics, we will get somebody  
9 else to use them.

10 MR. FERRARA: They'll do a fine job.  
11 What I hope to do with the electronics is actually  
12 bring some of the evidence into the court so the  
13 Court can see firsthand.

14 I'll talk about each of the issues that  
15 this Court raised in questions to Mr. Bernstein.  
16 I'll talk about the legal standard. I'll talk about  
17 the application. Conduct test to the facts of this  
18 case. I particularly will talk about SPDS and  
19 SEPTAR; those two service entities that the  
20 plaintiffs rely on so heavily. I'll talk to the  
21 Court about what they did and didn't do. I'll be  
22 very clear on the record.

23 Finally, I'll touch on the investor  
24 relations and talk about that.

25 THE SPECIAL MASTER: You can skip that



1 issue.

2 MR. FERRARA: Okay.

3 THE SPECIAL MASTER: I'm interested in  
4 your factual presentation. I'm interested in a  
5 small presentation as to the law because I thought  
6 Mr. Bernstein, pretty much, accurately defined it  
7 except for what you claim is causation. But I am  
8 interested in the facts.

9 Investor relation. I've had enough in  
10 the papers on that. I'll read it. I'll use it as I  
11 see fit.

12 MR. FERRARA: Your Honor, I think  
13 perhaps before I begin, though, with my  
14 presentation, I thought to kind of freshen up my  
15 recollection of Mr. Bernstein's comments this  
16 morning because he said many things today that I  
17 think are important to the final resolution of this  
18 case.

19 First, he said the bulk of the fraud  
20 was manufactured overseas. That is the first time  
21 I've heard him say that. I don't believe it appears  
22 in his papers. I'm delighted that he did.

23 Secondly, he said that the fraud was  
24 masterminded by Shell senior officials overseas.

25 Third, he said there was a massive

1 fraud. Of course, we disagree with that. But it  
2 was orchestrated in Europe.

3 Fourth, he said that the European  
4 settlement tips the scale against subject matter  
5 jurisdiction. Then he says one percent adjustment  
6 in reserves would be important to investors.

7 I'll speak to this point, briefly.  
8 I'll elaborate a bit when I get to the legal  
9 standard.

10 I believe Mr. Bernstein commented, more  
11 importantly, and his briefs are confusing two  
12 terribly important but different materiality  
13 standards. What is material for purposes of what an  
14 investor would like to know. Two Supreme Court  
15 decisions. TKV versus Northway (phonetic).  
16 Quantitate and quantitative analysis. None of that  
17 has anything to do with what the Court has to  
18 decide. We are talking about what is material for  
19 subject matter jurisdiction. A pure quantum test.  
20 Nothing to do with it. They were subjectively one  
21 percent which would make a difference in the reserve  
22 replacement ratio to an investor. Talking quantum.  
23 How much.

24 THE SPECIAL MASTER: What if there was  
25 a one percent and it was fraudulent? Are you

1 suggesting that is not a basis upon which  
2 jurisdiction could be asserted if the Court so  
3 chose?

4 MR. FERRARA: Let me address that in  
5 two ways, your Honor.

6 First, there has been alleged by Mr.  
7 Bernstein in his papers, in the volume of papers,  
8 that SPDS and SEPTAR, the two service entities,  
9 engaged in conduct in the United States; that he  
10 thinks was important for the Court to notice. But  
11 he has never said, until today, that the conduct by  
12 SPDS or SEPTAR was fraudulent.

13 What SPDS and SEPTAR did they did. No  
14 one ever called it fraudulent. If there was a fraud  
15 here, it was committed by those who the Court  
16 respectfully and correctly observed -- it was  
17 committed by those who posted the numbers in the  
18 annual review of petroleum resources, who posted the  
19 numbers according to Guidelines that were set by  
20 Shell outside of this country.

21 If the ARPR's Guidelines were  
22 fraudulent, they were done by people overseas. If  
23 the reporting was fraudulent, the report was done by  
24 people overseas. If the SEC statements and press  
25 releases were fraudulent, it was done by people

1 overseas. Nothing occurred here that was  
2 fraudulent.

3 Let me get to your --

4 THE SPECIAL MASTER: Answer my  
5 question.

6 I'll get back to you. You threw  
7 something else out.

8 MR. FERRARA: Your Honor, if there was  
9 something that was fraudulent here in the United  
10 States, would that make the test?

11 Unfortunately, the answer to that is  
12 no. The Court doesn't look to whether there is any  
13 conduct in this country that would further the  
14 fraud. They're looking for at a minimum significant  
15 and material conduct that has to be in furtherance  
16 of the fraud. It is a dual test. It is a quantum  
17 test and a further reasons of the fraud test. It is  
18 a weight test.

19 THE SPECIAL MASTER: Is the second  
20 qualitative?

21 MR. FERRARA: You mean the fraudulent  
22 issue? In furtherance of the fraud has to look to  
23 whether a fraud was ultimately committed. That is  
24 an issue to be resolved at a later day. But we have  
25 to show for purposes of today's hearing -- let's do

1 it this way.

2 If we assume -- they cite me for this  
3 in the past. If we assume for purposes solely for  
4 today's hearing that there was a fraud manufactured,  
5 as Mr. Bernstein says, overseas -- was this conduct  
6 in furtherance of that fraud? That is a key  
7 question. It has to be quantitatively significant  
8 or material, at least. It has to be in furtherance  
9 of a fraud which, for purposes of this proceeding,  
10 we can presume occurred overseas.

11 But nowhere in this record --

12 THE SPECIAL MASTER: It got to be  
13 qualitatively fraudulent in nature. Not -- the  
14 fraud committed overseas. We're assuming that for  
15 the purposes of our hearing. That fraud is over  
16 there. The question is whether this act over here  
17 qualitatively was fraudulent. Not negligent. Not  
18 anything else. But fraudulent. If it is  
19 fraudulent, it gets back to my question.

20 MR. FERRARA: You are correct.

21 THE SPECIAL MASTER: Assume it is the  
22 fraudulent. If they find one percent of the reserve  
23 is fraudulent, does that give sufficient  
24 jurisdictional towage in the United States?

25 MR. FERRARA: The answer is no.

1 THE SPECIAL MASTER: Why?

2 MR. FERRARA: I'll explain. This all  
3 gets into the Kasser test that you drilled the  
4 plaintiffs on earlier today.

5 Let's go back. I planned to get to  
6 this later in my comments. Let me get a response to  
7 our question. Let's go back to what Kasser calls  
8 "the mother." I think at that time word -- Kasser  
9 uses in the Third Circuit all cases, IIT and Bersch  
10 cases, decided by Judge Friendly in 1975.

11 What Judge Friendly said was the  
12 conduct must be not merely prefatory and directly  
13 caused the loss. What courts have done -- every  
14 court that has considered this question post-1975  
15 has turned to the Second Circuit as the mother lode.  
16 Every court has attempted to articulate a  
17 formulation of that standard in each Circuit. That  
18 standard has varied slightly.

19 What Judge Friendly said directly  
20 caused the loss some courts have come back and said  
21 we think that means the conduct has to be material.  
22 That is the same thing as directly caused the loss.  
23 Some courts have come and said it means it has to be  
24 in furtherance of the fraud; i.e., directly caused  
25 the loss. Some courts have said the fraud must be

1 completed in the United States. That is, directly  
2 caused the loss.

3 So when you say to me, your Honor, is  
4 one percent of the conduct that is fraudulent in  
5 this country enough, I come back to you and say the  
6 rational basis for all of these decisions and in all  
7 of these Circuits is directly caused losses not  
8 merely prefatory. Directly caused the loss. You  
9 need to show in furtherance. Fraud, direct  
10 causation -- completed in the United States or  
11 materiality in a quantitative sense in order to be  
12 able to satisfy that standard.

13 If all you had was one percent of the  
14 conduct -- one percent of the fraudulent activity  
15 that occurred here, that did not directly cause the  
16 loss, was not material, was not completed here. You  
17 don't make the test. That is what distinguishes the  
18 test here from the TKV versus Northway and the Basic  
19 versus Levinson case which were identified go to the  
20 merits of the case. That is whether or not there  
21 was a fraud is a merits question.

22 What do I mean by that? Stop on that  
23 for a moment. The merits was there a statement.  
24 Was it material? Was it in connection with the  
25 purchase and sale of securities? Was there reliance

1 and causation?

2 With respect to the 12(b)(6) or the  
3 merits issue, you look to the TKV versus Northway  
4 and Basic versus Levinson standards. The fraud for  
5 purposes of the 12(b)(1) subject matter jurisdiction  
6 choice of law has nothing to do with that. That is  
7 a hopeless set of complexities they introduced in  
8 their briefs that caused confusion but, frankly, the  
9 confusion does not cast light on the issue. You  
10 can't take a merit standard and import it into a  
11 12(b)(1) case. The courts wouldn't do it. Judge  
12 Friendly wouldn't do it.

13 With that --

14 THE SPECIAL MASTER: You really think  
15 that in 1975 when Judge Friendly made the  
16 decision --

17 MR. FERRARA: 1975.

18 THE COURT: 1975. Do you really  
19 believe that the state of the international economy  
20 and the state of the international collection of  
21 things that are going on in 2007 was ever thought of  
22 in his mind?

23 He was thinking of little cases --  
24 which little things like Bernie Cornfeld. He was  
25 thinking of frauds that were executed on very, very



1 small little things. He wasn't thinking of  
2 international companies. None of these people did.

3 MR. FERRARA: Your Honor --

4 THE SPECIAL MASTER: Nor was Judge  
5 Adams.

6 MR. FERRARA: With respect to -- I  
7 think maybe we're selling Judge Friendly a bit  
8 short.

9 THE SPECIAL MASTER: I'm not selling  
10 him short. I'm giving the length of the state of  
11 the record as it existed in 1975 respect.

12 MR. FERRARA: In IET versus Cornfeld  
13 and he did have the Vesco case.

14 THE SPECIAL MASTER: You're talking  
15 about guys who were committing frauds. It was  
16 singular frauds. They weren't the sophisticated  
17 frauds that we've seen in the '90s.

18 I daresay, with all due respect to  
19 Judge Friendly who I have the utmost respect for and  
20 Judge Adams who I have the utmost respect for who is  
21 still alive. I don't think he believed anything  
22 about what the markets are today and the way this  
23 whole business works. We were talking about guys  
24 that just committed straight-out frauds. Kasser is  
25 the same.

1 MR. FERRARA: Let me unpack that, your  
2 Honor.

3 THE SPECIAL MASTER: Unpack what?

4 MR. FERRARA: What you just said.

5 THE SPECIAL MASTER: What do you mean  
6 by "unpack it"?

7 MR. FERRARA: Unpack and respond.

8 THE SPECIAL MASTER: Respond is okay.  
9 Don't unpack anything I do. If I unpack it, it is  
10 mine.

11 MR. FERRARA: Let's look at what Judge  
12 Friendly said in Kasser v. IIT.

13 THE COURT: IIT?

14 MR. FERRARA: IIT. First, he said when  
15 he concluded the case -- he said, you know, "I have  
16 to give some thought to what future courts may do in  
17 looking at cases when there is a class action  
18 involved."

19 The Court should take care that the  
20 tail doesn't wag the dog. Judge Friendly knew that  
21 he was entering into an area where people would be  
22 struggling from that day forward.

23 Second, he was dealing with an issue  
24 that, frankly, was worrying Judge Adams in the  
25 Kasser case as well.

1 In the Cornfeld and IIT cases, what we  
2 had was substantial fraudulent conduct where  
3 Americans were hurt. Not just overseas people.  
4 When the Kasser case --

5 THE SPECIAL MASTER: He was worried  
6 about the Barbary Coast. He was saying, you know,  
7 "We can't let people come to this country, defraud  
8 all these foreign investors and then seek sanctuary  
9 in our courts."

10 MR. FERRARA: But there were, your  
11 Honor, Americans that were defrauded in that case.  
12 When Kasser came out -- the Kasser District Court  
13 was befuddled. The Third Circuit straightened it  
14 out.

15 THE SPECIAL MASTER: Judge Whipple was  
16 never befuddled.

17 MR. FERRARA: Okay. In the Kasser  
18 District Court case the Court said: I don't know  
19 reading IIT and Bersch whether when there is no  
20 conduct in the United States and only one defrauded  
21 investor who was a Canadian -- whether I can  
22 exercise jurisdiction.

23 The Court looking at Bersch and IIT  
24 said: I'm not sure that is what Judge Friendly  
25 meant.

1 The Third Circuit said we have to  
2 distinguish between the effects test and the conduct  
3 test. For the effects test -- that works when  
4 Americans have been hurt. We are being faced with a  
5 case of first impression. Kasser. This is with the  
6 SEC as the plaintiff.

7 I wonder if we can exercise  
8 jurisdiction under the Friendly standard where there  
9 are no Americans who are hurt, where the conduct  
10 occurs here and occurs, blatantly, in the Kasser  
11 case here but with no Americans.

12 The Third Circuit says: We read  
13 Friendly saying "mother court" -- we read Friendly  
14 as saying even when no American is hurt, if there is  
15 sufficient conduct in the United States this Court  
16 is going to have jurisdiction.

17 Kasser was the first to use this  
18 extension, if I can call it that.

19 IIT, to bring this into the Second  
20 Circuit -- I think in doing so what the Court did in  
21 Kasser was look at that from the Friendly opinions  
22 and use all of it. It had great respect for the  
23 Friendly court. It called it "the mother court."

24 It said its decision was, in part,  
25 driven by the fact that the Second Circuit used the

1 direct causation point.

2 Let me stop on that point because it  
3 raised so many issues. The Court said -- what  
4 distinguishes me from Bernstein is the direct  
5 causation part of the test. Let me follow up on  
6 that again.

7 I said a moment ago when a court talks  
8 about significant material -- the significant part  
9 is functioning on direct causation. Why didn't the  
10 Third Circuit use the direct causation colloquy?  
11 Why didn't they use that locution when it expressed  
12 itself?

13 Very simple. In the Kasser case the  
14 plaintiff was the Securities & Exchange Commission.  
15 The Kasser court noted that the Securities &  
16 Exchange Commission to bring a law enforcement  
17 action does not have to show there was injury or  
18 causation. Period. End of report. That is the  
19 only reason why the Kasser Court chose not to use  
20 the direct causation; having said that the direct  
21 causation language was, in part, on which it was  
22 relying when it decided the case.

23 Well, let me, your Honor, return if I  
24 may, then --

25 THE SPECIAL MASTER: Give me again, Mr.

1 Ferrara --

2 MR. FERRARA: Sure.

3 THE SPECIAL MASTER: -- the last part  
4 of what you said.

5 MR. FERRARA: What I said was that the  
6 reason we believe that the Third Circuit's was using  
7 the law-of-the-case standard is eschewing the direct  
8 causation language of the Second Circuit is that it  
9 said and I note in the case and recognized that the  
10 SEC does not have to prove injury or causation.

11 So for the Kasser court significant and  
12 material, not merely prefatory, was going to be  
13 adequate so long as it was in furtherance of the  
14 fraud.

15 When you read those cases -- when you  
16 read the facts of that case and the decision of  
17 Friendly together, what you see is the materiality  
18 issue that both the Second Circuit and the Third  
19 Circuit are looking for is driven by either in  
20 furtherance of the fraud, completion of the fraud or  
21 direct causation, which is the Second Circuit  
22 standard.

23 This Court doesn't have to make that  
24 choice for the Third Circuit because we think and --  
25 we think we have demonstrated in our papers that

1 this record does not even support the standard that  
2 the plaintiffs says -- the appropriate standard  
3 which is significance, material, not merely  
4 prefatory and furtherance of the fraud.

5 I think this rhetoric about the  
6 decision between us and then on the direct causation  
7 point is not something the Court should get to. If  
8 it chooses to get to it, there is a roughly  
9 synonymous standard in materiality, furtherance of  
10 the fraud and direct causation.

11 I'd like to, if I may, your Honor, put  
12 through -- now I'll have to skip over a number of  
13 these screens.

14 We have dealt with them in response.  
15 On the first screen I'd like to focus on the  
16 demographics of this case and, frankly, even though  
17 demographics aren't dispositive in this case, they  
18 are highly relevant and add color to this case.

19 We have 92 percent of the shares of  
20 this class period which are registered and available  
21 for trading on a foreign exchange. 88 percent of  
22 that volume from that 92 percent of registered  
23 shares -- 88 percent of that volume is on foreign  
24 exchanges or foreign markets. Only three percent of  
25 that 88 volume comes from Americans.

1           There is a lot of rhetoric in the  
2 plaintiffs' brief about this. In their rebuttal  
3 fact submission -- we, Shell, hired both Constant  
4 Financial, which is the world's premier traffic  
5 engineers in the lexicon of economic consulting  
6 firms. We sent literally boxes of paper over to the  
7 plaintiffs demonstrating why these demographic  
8 numbers were direct. They had the opportunity to --

9           THE SPECIAL MASTER: Doesn't make a  
10 difference whether 88, 98 or 85 percent. Does it  
11 really make a difference?

12           MR. FERRARA: If it is 85 to 98 doesn't  
13 make much difference to me at all. The point is I  
14 want to make sure the Court understands the record  
15 and does not have any contest to the plaintiffs by  
16 this data. They have complaints about it. They  
17 question it but they have no evidence to refute the  
18 data we got.

19           THE SPECIAL MASTER: Does that have any  
20 significance in terms of the exercise of  
21 jurisdiction, percentages? I raised the point. I'm  
22 sure you heard me when I raised the point about that  
23 in connection with forum non conveniens. But does  
24 it have any relevance to the question of  
25 jurisdiction -- exercise of jurisdiction?



1 MR. FERRARA: It is not dispositive of  
2 that question.

3 THE SPECIAL MASTER: That is Kasser.  
4 Because Kasser says 100 percent outside the United  
5 States you can exercise jurisdiction because of the  
6 actions that were taken by the parties in the United  
7 States?

8 MR. FERRARA: That's correct.

9 THE SPECIAL MASTER: I don't know  
10 whether or not numbers for purposes of this, of  
11 jurisdiction, necessarily dictate that there is  
12 none. I think it is a strong, strong point in terms  
13 of judicial administration and judicial economy, as  
14 to whether or not you should or should not exercise  
15 jurisdiction. But exercise -- it could be one  
16 percent. What is the difference if there is one  
17 percent in the United States or three percent or two  
18 percent?

19 MR. FERRARA: I think I said, as I said  
20 before, your Honor, it is not dispositive. It lends  
21 color and gives an environmental sense to what the  
22 case is about.

23 THE SPECIAL MASTER: Al Gore. I'm not  
24 Al Gore. I'm not into the environment. I'm in the  
25 case.

1 MR. FERRARA: Enough said. I'm not  
2 going any further with it.

3 THE SPECIAL MASTER: You'll have a good  
4 tough time with me, Mr. Ferrara. When we're in this  
5 position, that is.

6 MR. FERRARA: I'll tell you. We have a  
7 lot of things in this record that we are contesting  
8 with the plaintiffs. I thought it would be helpful,  
9 though, at the beginning of my comments to remind  
10 the Court what there is no dispute on. They have  
11 the burden of a preponderance. They --

12 THE SPECIAL MASTER: This I've seen in  
13 your brief.

14 MR. FERRARA: There is one issue on  
15 this law-of-the-case point that the Court raised  
16 this morning.

17 What is very clear in this Circuit is  
18 that there is no law of the case when the issue that  
19 is being decided is decided under a different burden  
20 of proof.

21 Judge Bissell made his findings on what  
22 he explicitly said was a like burden to be sustained  
23 at the pleading stage. The burden now is a  
24 preponderance.

25 If you look at the United States versus

1 Sencar Agency, 424 F. Supp. 313, in 1989, that is in  
2 the District of New Jersey, and United States versus  
3 Local, 974 F. 2d, 315, in the Second Circuit I think  
4 you'll find the law that says -- puts the law behind  
5 the disquiet that you have on relying on what Judge  
6 Bissell did. It simply didn't work. The law of the  
7 case has a different burden to be sustained.

8 THE SPECIAL MASTER: I don't think it  
9 applies. I mean --

10 MR. FERRARA: It does not.

11 THE SPECIAL MASTER: I'll tell you.  
12 Jurisdiction can be raised at any point in any  
13 context. Just like you could raise it in class  
14 certifications.

15 MR. FERRARA: What is different here  
16 than what the judge did as the burden of proof.

17 THE SPECIAL MASTER: There is no  
18 question about that. Whether or not the thing was  
19 going forward. It was going forward. He did not  
20 hold the kind of hearing we're talking about here.  
21 The kind of hearing that would be required on class  
22 certification.

23 In class certification the judge would  
24 be free to examine the issue of jurisdiction, which  
25 Judge Pisano said in this case on the record. I

1 read it. I don't disagree with Judge Pisano in that  
2 regard at all.

3 MR. FERRARA: I think I'd like to also  
4 focus a little bit on this business of what the  
5 standards are. I'm skipping through a lot of this  
6 argument because we dealt with it already. I think  
7 the Court, though, may want to bear in mind as it  
8 launches into this area that most recently the  
9 Supreme Court in the patent case -- the Supreme  
10 Court in Microsoft said there is also a presumption  
11 against the extraterritorial application of the  
12 securities statutes.

13 The Supreme Court has also in the Neely  
14 case commented. So we're starting with a burden of  
15 preponderance of the evidence to show sufficient  
16 conduct to warrant the exercise of jurisdiction and  
17 environment where the Supreme Court of the United  
18 States and the Third Circuit has said there is a  
19 presumption against it.

20 Now let's get into this issue of --

21 THE SPECIAL MASTER: Is that a rebuttal  
22 presumption?

23 MR. FERRARA: It is a rebuttable  
24 presumption if you can show the conduct is not  
25 really prefatory and directly caused the loss.

1 THE SPECIAL MASTER: I don't think that  
2 helps us one way or the other. I think the standard  
3 is preponderance. That would undercut -- go ahead.  
4 I don't want to get into that. I think we're  
5 getting much more esoteric than this case requires.

6 Go ahead.

7 MR. FERRARA: I want to comment on  
8 something said in the briefs. Mr. Bernstein said  
9 we're trying to change the standard by talking about  
10 having to demonstrate -- the plaintiffs having to  
11 demonstrate the fraud was based in the United States  
12 -- the operation was in the United States. The  
13 United States can't be a place that exports fraud.  
14 I think those were issues all raised in Kasser.  
15 Those aren't the test. There is a rational basis  
16 for the test. However this Court articulates the  
17 test, it should bear in mind that every court that  
18 has considered formulating the test has had to deal  
19 with those policy considerations. That is all we're  
20 saying in our brief and that is drawn right out of  
21 Kasser.

22 Each of the other cases we have in the  
23 brief -- I'll skip over those.

24 They arise in the Seventh, Eighth and  
25 Ninth Circuits. All the Circuits are consistent

1 with what I have just said.

2 Let me stop on the causation issue. I  
3 covered it. Let me stop on this point, your Honor,  
4 for a moment. This is one that I walk into with  
5 some hesitation because I know from prior comments  
6 this morning the Court does not want to get into it  
7 at this point and should not get into it at this  
8 point. The forum non conveniens. I'll not get into  
9 that.

10 What I'd like to do is switch between  
11 forum non conveniens and choice of law issues. To  
12 be sure, every court that has considered this issue,  
13 including the Third Circuit and the Second Circuit  
14 and the Fifth, Seventh and Eighth and Ninth have all  
15 dealt with this as the question of subject matter  
16 jurisdiction with the basic Second Circuit test  
17 formulated one, which or the other recently -- both  
18 the Supreme Court and the Third Circuit have said  
19 "We have another way of looking at this same issue."  
20 That is to look at it as an international  
21 choice-of-law issue.

22 I think to be very careful and to  
23 perfect the record of this proceeding this Court  
24 should at least acknowledge that the choice of law  
25 issue was there. But in acknowledging that one goes

1 into the choice-of-law issue, you get into the  
2 Restatement of Foreign Relations Third, upon which  
3 these cases have turned, and you see that in order  
4 for the Court to exercise jurisdiction in a choice  
5 of law context two requirements are there. First,  
6 their would be prescriptive jurisdiction. Did  
7 Congress have a legislative interest in legislating  
8 in the area?

9 No question about that here.

10 Second, would the exercise of  
11 jurisdiction be reasonable?

12 Then the Restatement goes right into  
13 the very conduct test that the subject matter cases  
14 use.

15 Also, when you look at the Restatement  
16 I think it is section 416 of the Restatement of  
17 Foreign Regulations -- there is a special provision  
18 that says for securities cases the conduct must  
19 occur predominantly in the United States.

20 Now, I don't raise choice of law to  
21 befuddle the record. I don't raise it to get into  
22 the issue of forum non conveniens. I think it is a  
23 doctrinal question. This Court should consider  
24 choice of law and under the Restatement as well as  
25 subject matter and then come to the conclusion that

1 either -- you don't have to make a choice. Either  
2 way it is the conduct test that prevails.

3 I want to focus on forum non conveniens  
4 and choice-of-law issue. I think it is an important  
5 issue that we have to cover.

6 All right. With that, your Honor, I  
7 think what we need to do is spend a little time.  
8 This will be a bit of fun. At least fun for me.

9 What this case is all about -- let's  
10 talk about, first, the approval process for booking  
11 reserves. We're now talking about the conduct test

12 First of all, there are two companies  
13 involved here. Royal Dutch Shell and Shell  
14 Transport Trading. They both have boards of  
15 directors that meet periodically -- actually pretty  
16 regularly in something called a conference. Just an  
17 aggregation.

18 Directors of these two companies --  
19 that conference of the directors is about 15 or  
20 maybe a dozen directors from each company. They are  
21 almost exclusively European. Non U.S. residents. I  
22 think maybe one U.S. resident and they always meet  
23 in Europe. The conference has oversight of the two  
24 parent companies. The two parent companies have  
25 operating companies underneath them. The operating



1 companies are managed a committee of managing  
2 directors. That committee of managing directors  
3 meets in Europe and consists of senior executives of  
4 these two companies.

5 The committee of managing directors  
6 overseas a broad range of activities of Shell  
7 operations. The one we're concerned about in this  
8 case is energy -- exploration of production. They  
9 are the people exploring for the oil. Get it out of  
10 the ground and produce it. That exploration of  
11 production business is headquartered in Europe. Not  
12 here.

13 The exploration of production business  
14 is overseen by an executive committee called ExCon,  
15 as you will see that in the record. That ExCon met  
16 exclusively in Europe. Never met here. ExCon  
17 turned to the Group Reserves Coordinator both to  
18 create the Guidelines and to oversee the reporting  
19 process of proved reserves.

20 The Group Reserves Coordinator and the  
21 Group Coordinator, himself, is in Europe. He  
22 published the Guidelines which the plaintiff said  
23 are birth mother fraudulent.

24 Nobody said SSD and SEPTAR was  
25 fraudulent. Fraud comes from the Guidelines. Those

1 are prepared and updated in The Netherlands. Not  
2 here. Then the Guidelines are reviewed by the Group  
3 Reserves Auditor and the Group Reserves Auditor is  
4 entirely in Europe. Those Guidelines are then  
5 submitted back to the Executive Committee of E&M.

6 The Executive Committee, which meets  
7 exclusively in Europe -- they approve the Guidelines  
8 that give rise to the proved reserves deemed to be  
9 fraudulent here. All in Europe. Those Guidelines  
10 are given to KPMG, the outside auditor in Europe,  
11 who reviewed them in Europe. They also then go --  
12 when the Guidelines are created -- they then go to  
13 the operating units for their approval for the  
14 operating units to prepare the reports on petroleum  
15 reserves.

16 Operating units -- there is no doubt  
17 about this in any of the record. They're the ones  
18 who make the decisions and they report the decisions  
19 on what is going to be approved to Europe. AAPR.  
20 Those OUs around the world do it. They're the ones  
21 who signed the document and make the final  
22 determination most critically. Make the economic  
23 decisions whether they can be produced economically.

24 The AAPR results go over to the Group  
25 Reserves Administrator in the Hague to be

1 scrutinized before they're actually reported to the  
2 public.

3 The Group Reserves Coordinator then  
4 goes and drafts a report supporting or adjusting  
5 what comes up from the operating units. That goes  
6 to the Group Reserves Auditor in the Netherlands for  
7 the Group Reserves Auditor to view in the  
8 Netherlands. The Group Reserves Auditor then issues  
9 an opinion in the Netherlands of approved reserves  
10 in the report.. That report from the Group Reserves  
11 Auditor then goes to KPMG and to Pricewaterhouse in  
12 Europe for their final review so they see not only  
13 the Guidelines in Europe but also the Group Reserve  
14 Auditor's report on the reserve report.

15 Now what happens to it? There is a  
16 challenge session when that is all over. There is a  
17 challenge session what these OUs have reported in  
18 accordance with Guidelines drafted in Europe,  
19 reviewed by Group Reserves in Europe, reviewed by  
20 the Group Auditor in Europe and the outside auditors  
21 in Europe, whether or not they should be reported to  
22 the public and that challenge session takes place in  
23 Europe.

24 Only after that is completed do you get  
25 to a reserve that will be reported.

1 What happens to that?

2 First, it goes to the I.R. group. The  
3 I.R. group is headquartered in London. They're the  
4 ones who get it first. The I.R. Group has all the  
5 information released first in Europe. Disclosed in  
6 four principal ways -- if I can continue with this  
7 for the moment?

8 I'll get into the whole I.R. thing.

9 I'd like you to see the process.

10 They are delivered as fourth quarter  
11 results released in Europe first. They also are  
12 delivered in press conferences in the fourth  
13 quarter. Only held in Europe. Never in the U.S.  
14 The results then are also included in analysts'  
15 presentations in the fourth quarter. They're held  
16 first in the U.S. -- actually, usually only in the  
17 U.S.

18 If they're going -- sorry. First in  
19 Europe. Usually, only in Europe. Occasionally if  
20 done in the U.S., it is done the next day. Then  
21 there is a group strategy session. That is always  
22 held first in Europe. Then in THE U.S. the next  
23 day. Then there is an EMT business presentation.  
24 Again, that is always held in Europe.

25 Present -- I should say first. Then

1 presented the next day. Only one exception to that.  
2 That is in April of 1999 where the EMT business  
3 presentation was held first in New York. At that  
4 time all the reserve information, which was the most  
5 important part of that issue for purposes of this  
6 case, had already been released in Europe first.  
7 Annual reports and 20-Es. That is where the  
8 publication of these approved results occurred.  
9 Printed in New York. Listed in Europe. Sent to  
10 shareholders in Europe. No conduct in the United  
11 States whatsoever. Also could be given out on  
12 one-on-one meetings when there were one-on-one  
13 meetings in the U.S. held only with U.S. investors.

14 Your Honor, when you see --

15 THE SPECIAL MASTER: I want to get a  
16 copy of this.

17 MR. FERRARA: There is no new  
18 information on here.

19 THE SPECIAL MASTER: But the  
20 presentation is completely --

21 MR. FERRARA: It lays it out.

22 THE SPECIAL MASTER: Absolutely.

23 MR. FERRARA: I will make sure I get a  
24 copy of the presentation to the Court.

25 THE SPECIAL MASTER: Usually these

1 things -- when you use this, you give us copies.

2 MR. FERRARA: With apologies to the  
3 Court. As I was pouring through all of this in the  
4 last four days, I was thinking we repeat in so many  
5 different places where all this conduct occurred.  
6 So I asked my colleagues if we could sit down and do  
7 a schematic of it. Basically, the schematic was  
8 done -- literally completed in the car on the way  
9 over here to the courthouse.

10 THE SPECIAL MASTER: Are you saying  
11 here, if I might just capsulize what you're saying,  
12 without you admitting any fraud? If there was any  
13 fraud committed, it was committed in the context of  
14 what you have as the base of operations. It wasn't  
15 committed by John Jones down in Houston. Is that  
16 what you're saying?

17 MR. FERRARA: If there was a fraud --  
18 the Complaint says the Guidelines --

19 THE SPECIAL MASTER: The purple people  
20 are the key people to the fraud, if there is a  
21 fraud, right? If there is a fraud. I'm not asking  
22 you to admit it. For purposes of our hearing, I am  
23 saying assume there is a fraud.

24 MR. FERRARA: We hadn't used purple in  
25 that way but the answer is correct.

1 THE SPECIAL MASTER: Usually people  
2 come into me for sentencing and have orange suits  
3 on.

4 MR. FERRARA: Your Honor, what this  
5 does show is that all of the conduct -- any part of  
6 which might be considered fraudulent -- indeed, what  
7 was alleged to be friendly Guidelines, all done in  
8 Europe.

9 THE SPECIAL MASTER: If we have some  
10 connection between these folks or someone there and  
11 the people who do the field work, if I might use  
12 that expression -- if they're told to hype up the  
13 numbers -- I'm analogizing this to the classic  
14 securities case Restatement. The statement cases  
15 where somebody goes into the head bookkeeper and  
16 says, you know, Can't we make the number this month?  
17 Can't we have sales of 120 million?

18 Stuff it by doing this. Stuff it by  
19 doing that.

20 Do we have any of that in this case?  
21 That is the question.

22 MR. FERRARA: No. No. What I'd like  
23 to do is have enough time to go through the eight  
24 OUs where they say there was conduct that gives rise  
25 to jurisdiction in this case. I'll go through one

1 slide for each OU and show --

2 THE SPECIAL MASTER: Quickly.

3 MR. FERRARA: What I'm going to have to  
4 do, your Honor, is not go through all this wonderful  
5 evidence we have here.

6 THE SPECIAL MASTER: You want pictures  
7 of the exhibition?

8 MR. FERRARA: What I'd like to get is  
9 get through this and see if I can get down to --  
10 okay. Let me give the prelude. Let me turn to each  
11 of the issues where the plaintiffs say there was  
12 conduct in the United States that was, quote, in  
13 furtherance of the fraud.

14 First of all, I'm going to focus on  
15 2002 year-end results where we booked 19 billion  
16 barrels -- sorry -- 19 billion barrels of oil  
17 equivalent.

18 Why 2002?

19 Well, I'm going to focus on year end  
20 2002 because that is what the plaintiffs focused on.  
21 They focused on it in their submissions. More  
22 importantly, they focused on it in the Complaint.

23 Only the 2002 statements that were  
24 disclosed in the class period. It was that  
25 disclosure which the plaintiffs allege caused the



1 problem.

2 The 2000 statements couldn't have  
3 disclosed the loss because they were made after the  
4 period ended. There were 27 OUs that we cited.  
5 Only eight of those OUs are plaintiffs. Eight U.S.  
6 people had something to do with. If you look at  
7 what the plaintiffs' position is, no more than 3.44  
8 percent of the restated reserves ever touched the  
9 U.S.

10 How did I get the number?

11 I took the logical way of saying how  
12 much was restated that touched the U.S. versus what  
13 were the total amount of barrels booked. That is  
14 3.44 percent.

15 The plaintiffs, on the other hand, I  
16 think, tried, understandably -- tried to boost the  
17 numbers and say: Look at the total reserves  
18 restated that touched the U.S. in comparison to the  
19 total amount restated. Not the total amount  
20 originally booked. That gets them to 15 percent.

21 The margin is somewhere between three  
22 percent and 15 percent. Let's start unbundling that  
23 15 percent. Let me put it on the screen. These are  
24 the eight OUs that the plaintiffs were looking at  
25 for Nigeria, Angola, Oman, Brunei, Migeria,

1 Venezuela, Brazil and China.

2 If you look at that, you'll see -- if  
3 you look at the total of reserves as a fraction of  
4 total reserves booked, it is 3.44.

5 If you look at the set amount restated,  
6 it is 3.44.

7 Let's, first of all, look at SPDC, SPDC  
8 is Nigeria onshore. Not Nigeria offshore. They say  
9 or try to say that 300 million barrels were booked  
10 by SPDC with the involvement of SPDS. They have now  
11 admitted in their briefs they were mistaken. We  
12 flatly refuted. They say we're right. 300 million  
13 barrels of what -- of Mr. Pringle's argument. They  
14 say we're right.

15 What do they now say?

16 They say: The mere fact you're right  
17 doesn't exclude the possibility that SPDS was  
18 somehow involved.

19 I'll tell you it does not exclude the  
20 possibility. It shifts the burden to us. They're  
21 the ones who have to show it was in furtherance of  
22 the fraud. The fact that does not exclude the  
23 possibility doesn't overcome the fact the barrels  
24 were not there.

25 What we're now saying was 47 percent of

1 all U.S. proved reserves that were touched by the  
2 U.S. now reduces the number down to 1.89 percent.

3 To go back to the chart. If you take  
4 the allegations that they dropped on SDA. the number  
5 now goes down to 1.89 percent of the total reserves  
6 that were -- the total reserves booked and eight  
7 percent of the reserves. That says: Care of SPDS  
8 off the rock.

9 Help is needed at that point. Let's go  
10 to SNEPCO, which is the Nigerian operation. Deep  
11 water side of this. Now they concede in there  
12 briefs for the first time that we did not restate 34  
13 million barrels to Bongo, 702 reserves.

14 They say -- I quote from their brief.  
15 "Shell is correct about Bongo."

16 They say, however, the conduct is  
17 nevertheless representative of the involvement of  
18 SPDS in reserve reporting to SNEPCO. If the  
19 reserves weren't restated, then SPDS's conduct is  
20 representative of nothing.

21 Certainly, it is not representative of  
22 something that furthered the fraud. There was  
23 nothing restated. There was no fraud. Not  
24 representative of anything. You must throw out 34  
25 million of the 46 million barrels in Bongo

1 Northwest. And, frankly, with respect to the other  
2 12 million barrels, they have no evidence at all of  
3 what SPDS did or didn't do.

4 They're whole evidence is 3.44, which  
5 they have admitted in the brief they were incorrect  
6 about.

7 Let's take a look at other SNEPCO work.  
8 12 million barrels. They said in the brief, "field  
9 development."

10 We will deliver, planning and prepare.

11 Look at any of the four things. Let  
12 anyone tell me what that has to do with proven  
13 reserves. The technical work SPDS -- how to keep  
14 the local and in what direction?

15 Field development. Well delivery.

16 How do you get it off the OU planning  
17 and preparing or evaluating new technology that is  
18 not working that has anything to do with the  
19 reporting of proved reserves?

20 If it does, it is certainly not more  
21 than anything that is merely prefatory.

22 The McFadden declaration, which is  
23 undisputed in this case, says SPDS was not  
24 responsible for approved reserves for SNEPCO and did  
25 not report. In the record and uncontradicted.

1 SPDS.

2 Let me go to Angola.

3 THE SPECIAL MASTER: Judge Cavanaugh,  
4 do you want to go to Angelo?

5 JUDGE CAVANAUGH: You go to Angola.

6 MR. FERRARA: Angola is pretty big for  
7 the plaintiffs, right?

8 What they described is the misconduct  
9 by SPDS in Angola is that we reduced the quantity of  
10 proved identified reserves that reported to the  
11 Group Coordinator for Angola.

12 SPDS recommended the reduction of those  
13 reserves by 75 percent. It is inconceivable that  
14 conduct by SPDS that went to reducing proved  
15 reserves that were ultimately restated by 75 percent  
16 is conduct in furtherance of the fraud.

17 What they're looking to is a document  
18 in the record that says SPDS provided the  
19 ammunition; Angola OU pulled the trigger. That is  
20 prefatory conduct. Indeed, it is reminiscent of  
21 exactly the same metaphor and analogy that Judge  
22 Friendly used in the Bersch case.

23 He said if what happened in the United  
24 States is the making of the gun, the bullet is fired  
25 abroad; that is merely prefatory.

1 Exactly what the e-mail says in this  
2 case. Ammunition versus trigger. If they're citing  
3 that as authority, what they have to do is concede  
4 the point. Because Judge Friendly has already used  
5 the same metaphor the opposite way.

6 Okay. I've got here -- I'll skip over  
7 the evidence in the record. Let it suffice to say  
8 what I'm telling you here is exactly what the  
9 evidence supports in the record.

10 Let's go to Oman. The next biggy for  
11 the plaintiff is Oman. PDO here. There is restated  
12 reserves for 37 of 125 fields in Oman. They assert  
13 SEPTAR Houston is a bad affiliate. Another  
14 technical service group in Houston affiliated with a  
15 London based operation performed technical  
16 services -- tech services -- and the record is clear  
17 on the particular tech services performed in Oman by  
18 the Houston based technical services operation was  
19 something called enhance EOR.

20 These were studies that showed Oman to  
21 figure petroleum reserves out of the ground 15, 20  
22 30 years hence. It has nothing to do with proved  
23 reserves that are going to be reported at the end of  
24 the year. Absolutely nothing to do.

25 To say PDO Oman belongs to the list as

1 having been touched by us in Houston is nonsensical.

2 Let me go to Venezuela. Another one  
3 raised by them. They get a document and they put in  
4 their brief that the work done by the Houston  
5 technical services was a prerequisite to booking of  
6 the reserves. That is their point. If it was a  
7 prerequisite, then it is merely prefatory. So by  
8 definition it is not sufficient.

9 THE SPECIAL MASTER: Mr. Ferrara, I was  
10 very, very clear when Mr. Bernstein was arguing for  
11 proof things. I read all of this stuff in your  
12 papers that you submitted. Six inches of papers.

13 My question is -- it might be  
14 beneficial for me and it might be beneficial for you  
15 to hear from Mr. Bernstein or Mr. Haber, whoever is  
16 going to tell me what the proofs are, so that you  
17 can give me your position on that. I really want to  
18 be clarified on that.

19 MR. FERRARA: Fine.

20 THE SPECIAL MASTER: I understand all  
21 of this. I went through all of this in your brief.  
22 I read it. I read how you did each and every one of  
23 them. But the question that I really have is what,  
24 if any, evidence -- what, if any, evidence is there  
25 of proof of the fraudulent activity?

1 We can argue about what is prefatory or  
2 precatory or what is in furtherance. He can do  
3 that. I have no problem with that. I want to find  
4 out. I am in here with a question on my mind. I  
5 want to know from the plaintiff where the proofs are  
6 and what your reasons are.

7 MR. FERRARA: Your Honor, I'll sit  
8 down. This last chart only shows you the eight OUs.  
9 You may want to go over all the OUs -- 48 OUs they  
10 are relying on.

11 If you take out what they have conceded  
12 and what they have no evidence for, all that is  
13 left, at most, is point 7/10s of a percent versus  
14 three percent. That's it. That is the list. I  
15 might leave that screen up there. Perhaps you can  
16 ask them what the proof is. It doesn't exist.

17 THE SPECIAL MASTER: You can leave it  
18 up if you want.

19 Mr. Haber, will you speak or Mr.  
20 Bernstein will speak?

21 MR. BERNSTEIN: I'll nominate Mr. Haber  
22 for this, your Honor.

23 MR. HABER: Good morning, your Honor.

24 THE SPECIAL MASTER: Good morning.

25 MR. HABER: I wish I had --



1 THE SPECIAL MASTER: You know how to  
2 run that thing?

3 MR. HABER: I wish I had this kind of  
4 thing. It is pretty cool.

5 THE SPECIAL MASTER: If you had that  
6 kind of thing -- I would probably give it to you  
7 because I don't want it.

8 What I'm saying is -- yes, Judge  
9 Cavanaugh.

10 (Pause.)

11 THE SPECIAL MASTER: Sorry. Go ahead,  
12 Mr. Haber.

13 MR. HABER: Your Honor, let me address  
14 some of these OUs. We have addressed them in our  
15 papers. Let me point out one thing with regard to  
16 the papers. I know that you're very interested in  
17 the proof. Our papers, the memoranda, the fact  
18 statements -- all of the proof is cited in those  
19 papers. I'll highlight some of those now so I can  
20 address some of your concerns.

21 THE SPECIAL MASTER: Please.

22 MR. HABER: I want the record to  
23 reflect the fact that our submissions are  
24 supported -- unlike what counsel said, they're  
25 supported by documents and testimonial evidence.

1 Let me address SPDC first. The SPDC  
2 number came from testimony given by John Hoppe who I  
3 believe was the Chief Reservoir Engineer in Nigeria  
4 for their particular operating unit.

5 Mr. Hoppe had testified that he  
6 recalled that there was a Houston operation that had  
7 assisted SPDC in connection with fields called the  
8 "EA Fields."

9 We had done some research. We had  
10 believed it was SPDS. In fact, it was not SPDS.  
11 They put in the self-serving declarations to show it  
12 was performed by the Rijswijk, which is in the  
13 Netherlands operation of SEPTAR.

14 Now, for purposes of this proceeding  
15 there are two operations in SEPTAR. There is  
16 Rijswijk and there is Houston. Rijswijk is  
17 represented by AGI. Houston is represented by AGH.

18 The one thing that is clear is what we  
19 had said these declarations did not answer is  
20 whether or not there was any interaction, any  
21 overlap, overlapping work between AGH and AGI  
22 because, in fact, the record does show that with  
23 respect to certain operating units AGH and AGI did  
24 perform services together on the four particular  
25 operating units.

1 THE SPECIAL MASTER: On the operating  
2 units we're talking about here?

3 MR. HABER: Certainly Oman. Certainly  
4 Oman. We don't know because the record on that  
5 issue -- we only learned about it in this particular  
6 proceeding. We don't have more information on the  
7 interaction of AGH and AGI with SPDS.

8 Certainly, there is a document -- a  
9 report that was co-written in Venezuela, for  
10 instance, as well as Oman. So we know that there is  
11 interaction working on the same -- for the same  
12 operating unit between AGH and AGI.

13 Let me address Angola. It is  
14 interesting because in Angola they concede -- Shell  
15 concedes in its papers that SPDS played a central  
16 role in the reduction of the number to the number  
17 that was ultimately reported which was 74 million  
18 BOE.

19 Let's take a look at the facts. If you  
20 look at the facts, the facts show there was a lot of  
21 pressure coming from senior management to book  
22 reserves.

23 Why?

24 They needed the reserves to offset a  
25 shortfall in reserves in SPDC. Approximately 300

1 million BOE was targeted for booking. And because  
2 Shell had placed the moratorium on booking reserves  
3 in SPDC because of production problems and other  
4 related issues, there had to be an offset. They had  
5 to make up that number. So they started out with a  
6 number of approximately 293 million BOE.

7 As Mr. Ferrara points out, through  
8 SPDS's work they do come up with a 74 million BOE  
9 number. Let's not forget the 74 million BOE number  
10 was, in fact, restated.

11 Now let's take a look at why it was  
12 restated. Mr. Ferrara keeps pointing to the  
13 Guidelines. The Restatement pertained to the  
14 booking of reserves that were not compliant with  
15 Rule 4-10. The Guidelines were not compliant with  
16 Rule 4-10. Davis Polk, Gaffney Cline --

17 THE SPECIAL MASTER: You say the  
18 Guidelines were not compliant with Rule 4-10?

19 MR. HABER: That's correct.

20 THE SPECIAL MASTER: Who prepared the  
21 Guidelines?

22 MR. HABER: The Guidelines were  
23 prepared, as Mr. Ferrara said --

24 THE SPECIAL MASTER: I don't care what  
25 Mr. Ferrara said. I'm asking you.