

EXHIBIT 1

Guy Warlop et al v. Lernout et al

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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

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4 GUY WARLOP, et al, : Civil Action
5 Plaintiffs : No. 05-12058-PBS
6 V. : Courtroom No. 19
7 JO LERNOUT, et al, : 1 Courthouse Way
8 Defendants : Boston, MA 02210
9 : 3:00 p.m., Tuesday
10 : January 23, 2007
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8 Motion Hearing

11 Before:

13 THE HONORABLE PATTI B. SARIS
14 UNITED STATES DISTRICT JUDGE
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23 Marie L. Cloonan
24 Federal Court Reporter
25 1 Courthouse Way - Room 7200
Boston, MA 02210- 617-439-7086
Mechanical Steno - Transcript by Computer

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1 APPEARANCES:

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3 Hagens Berman Sobol Shapiro LLP,
4 (by David S. Nalven, Esquire),
One Main Street - 4th Floor,
Cambridge, MA 02142,
On behalf of the Plaintiffs.

Guy Warlop et al v. Lernout et al

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6 Cohen, Milstein, Hausfeld & Toll, P. L. L. C.,
7 (by Mark S. Willis, Esq. and Matthew K. Handley, Esq.),
8 1100 New York Avenue, N.W.,
Washington, D.C. 20005-3964,
On behalf of the Plaintiffs.

9 Spector & Roseman, (by Robert M. Roseman, Esq.),
10 1818 Market Street, Suite 2500,
Philadelphia, PA 19103,
On behalf of the Plaintiffs.

11 Davis, Polk & Wardwell,
12 (by Michael S. Flynn, Esq. and
Sheila Vera Barrett, Esq.),
13 450 Lexington Avenue, New York, NY 10017,
On behalf of the Defendant, KPMG US.

14 Hogan & Hartson, LLP, (by George A. Salter, Esq.),
15 875 Third Avenue, New York, NY 10022,
On behalf of the Defendant, Klynveld Peat Marwick
16 Goerdeler.

17 Peabody & Arnold LLP, (by Michael J. Cedrone, Esq.),
18 30 Rowes Wharf, Boston, MA 02110,
On behalf of the Defendant, KPMG-B.

19 Clifford Chance US LLP,
20 (by James B. Weidner, Esq. and Kara Morrow, Esq.),
31 West 52nd Street, New York, NY 10019-6131,
On behalf of the Defendant, Dexia Bank Belgium.

21 Mintz, Levin, Cohn, Ferris Glovsky & Popeo, PC,
22 (by Peter M. Saporoff, Esq. & Breton Leone-Quick, Esq.)
One Financial Center, Boston, MA 02111,
23 On behalf of the Defendant, Dexia Bank Belgium.

24 Yurko Salvesen & Remz, P. C., (by Sanford F. Remz, Esq.)
25 One Washington Mall, Boston, MA 02108,
On behalf of the Defendant, Nico Willeaert.

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1 APPEARANCES CONTINUED:

2 Conn, Kavanaugh, Rosenthal, Peisch & Ford, LLP,
3 (by Thomas J. Gallitano, Esq.),
Ten Post Office Square, Boston, MA 02109,
4 On behalf of the Defendants, Francis Vanderhoydonck,
Dirk Cauwelier and Marc G.H. De Pauw.

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Guy Warlop et al v. Lernout et al

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1 THE CLERK: The case of Guy Warlop, Et Al v.
2 Jo Lernout, Et Al, Civil Action No. 05-12058, will now be
3 heard before this Court.

4 Will counsel please identify themselves for
5 the record.

6 MR. NALVEN: Your Honor, David Nalven from
7 Hagens Berman Sobol Shapiro, seated with co-counsel from
8 Washington and Philadelphia, who can introduce themselves.

9 MR. WILLIS: Good afternoon, your Honor. Mark
10 Willis from Cohen, Milstein, Hausfeld & Toll, for the
11 plaintiffs.

12 MR. HANDLEY: Good afternoon, your Honor.
13 Matthew Handley from Cohen, Milstein, Hausfeld & Toll, for
14 the plaintiffs.

15 Guy Warlop et al v. Lernout et al
MR. ROSEMAN: Good afternoon, your Honor.
16 Robert Roseman, from Spector & Roseman, Philadelphia, for
17 the plaintiffs.

18 MR. FLYNN: Your Honor, Michael Flynn from
19 Davis, Polk & Wardwell, on behalf of KPMG US.

20 MS. BARRETT: Sheila Barrett, also from Davis,
21 Polk, on behalf of KPMG, LLP US.

22 MR. SALTER: George Salter from Hogan &
23 Hartson, on behalf of Klynveld Peat Marwick Goerdeler
24 Bedrijfsrevisoren, which we will refer to as KPMG Belgium.

25 MR. CEDRONE: Michael Cedrone, your Honor,

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1 from Peabody & Arnold, also for KPMG B.

2 MR. WEIDNER: James Weidner, Clifford Chance,
3 for Dexia Bank Belgium.

4 MS. MORROW: Kara Morrow from Clifford Chance,
5 also on behalf of Dexia Bank Belgium.

6 MR. SAPAROFF: Peter Saparoff, Mintz, Levin,
7 on behalf of Dexia Bank Belgium.

8 MR. LEONE-QUICK: Breton Leone-Quick, Mintz,
9 Levin, also for Dexia.

10 MR. REMZ: Sanford Remz, Youko, Salvesen &
11 Remz, for defendant Nico Willeaert.

12 MR. GALLITANO: Good afternoon, your Honor.
13 Tom Gallitano from Conn, Kavanaugh, Rosenthal, Peisch &
14 Ford, on behalf of the outside directors, Erwin
15 Vandendriessche, Dirk Cauwelier and Marc DePauw.

16 THE COURT: In this never ending series of
17 lawsuits, let me ask you, what is happening with the
18 criminal case in Belgium? Anyone know?

19 MR. WILLIS: Your Honor, I think -- Mark

20 Guy Warlop et al v. Lernout et al
Willis. I think we can at least speak to that a bit.

21 As you know, the criminal case has been going
22 on since 2000.

23 THE COURT: Yes.

24 MR. WILLIS: It is still going on.

25 As we understand it, from contacts in Belgium,

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1 there is no indication of when that case might end.

2 THE COURT: Well, begin.

3 MR. WILLIS: Well, the --

4 THE COURT: Have they done the equivalent of
5 charged or indicted?

6 MR. WILLIS: Yeah. The criminal case has been
7 proceeding. The resolution of that case has not
8 occurred. There's no indication of when it might.

9 THE COURT: There is no trial date?

10 MR. WILLIS: As far as I know.

11 And, as I think your Honor understands, that
12 the civil case over there cannot begin until the
13 criminal case ends and as long as there is a finding
14 against the defendants.

15 So, the sole cases that have been filed are
16 basically holder cases until the criminal case ends,
17 which, again, could mean ...

18 THE COURT: I still have a part, believe it or
19 not, of the original cases that were pending, but
20 stayed, this criminal case.

21 The three principals have never had any kind
22 of civil proceeding come to resolution against them.
23 So, I was curious as to whether or not ...

24 MR. WILLIS: To the best of our knowledge,

25 Guy Warlop et al v. Lernout et al
your Honor, that is where it stands, which is --

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1 THE COURT: That was ripe, yet. No?

2 MR. WILLIS: Yeah. Unfortunately, we can't
3 give you a better answer. But, we understand that it is
4 ongoing. There's no indication as to when it might end.

5 THE COURT: Anything from your side?

6 MR. WEIDNER: Actually, I'm not sure I can
7 contribute a lot more. But, I think you know that
8 indictments were filed. But, in Belgium, an indictment
9 is the beginning of the process, not the end. It just
10 means you're placed under suspicion. No formal charges
11 have actually been filed as of yet. And, I'm not sure
12 that anyone knows exactly when that will happen. The
13 best guess is sometime in the middle of this year. But,
14 really, that's only a guess.

15 THE COURT: Well, the reason I start with that
16 is actually the forum nonconvenience issue. I did rule
17 on it once upon a time, but it was a very different
18 situation. It was American investors on the American
19 Stock Exchange, and I was not going to give up their
20 class action rights. It was, I think, inappropriate to
21 do as a matter of law and as a matter of discretion.

22 This feels different to me because they're
23 Europeans suing on a European stock exchange. It
24 doesn't mean there aren't some Americans, but they take
25 certain risks by suing on a European exchange.

8

1 I don't know if anyone knows how many
2 Americans? Are there any?

3 MR. FLYNN: No. They haven't identified how
Page 6

Guy Warlop et al v. Lernout et al

4 many Americans there are. They say that if they are
5 allowed to proceed, that they think they'll find some.

6 Mr. Salter is going to address the forum
7 nonconvenience argument after we go through the statute
8 of limitations and --

9 THE COURT: Well, let me just ask this
10 question.

11 MR. FLYNN: -- and jurisdiction issues.

12 THE COURT: What would the statute of
13 limitations be in Belgium for the equivalent charge?
14 Anyone know?

15 MR. FLYNN: I don't know an answer. Does
16 anyone?

17 MR. WILLIS: One thing that's quite
18 considerable and sort of brush fires, it appears that to
19 the extent that KPMG US could even be served as a
20 defendant in the Belgium action, which it appears it
21 cannot based on jurisdictional issues, it appears that
22 the statute would have run for them anyway. So --

23 THE COURT: What's the statute of limitations
24 in Belgium?

25 MR. WILLIS: It is not clear. We actually

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1 inquired about that within the last week and got
2 different views on whether the statute would actually
3 lapse. But, what didn't become very clear was that KPMG
4 US would not be likely a defendant.

5 THE COURT: Well, I just want to -- well, let
6 me ask you another question.

7 If you were going to tell me that this case
8 could proceed in Belgium, I was quite interested in

Guy Warlop et al v. Lernout et al

9 shipping it to Europe, which is what makes some sense.

10 However, if, in fact -- I have been perturbed,
11 I must say, by the fact that this criminal case has
12 taken so long and it basically puts all civil
13 proceedings on hold -- everything. And so, I'm
14 wondering whether I should just defer deciding that
15 until we get a stronger feel on whether there's a civil
16 case to be had in Europe.

17 MR. WILLIS: Your Honor, I think it's a fair
18 point. Perhaps a couple of things might illuminate
19 where the action is and how it impacts the current class
20 and that may inform the way your Honor views the
21 situation. We certainly understand that your Honor
22 dealt with forum issue in the last case.

23 We think that there are many things that
24 haven't changed that make it equally as important for
25 the case to be here. A part of that, to be quite frank,

10

1 is the extensive experience your Honor has in this case,
2 not you want it.

3 THE COURT: I'm not holding onto it.

4 MR. WILLIS: I understand. I understand

5 THE COURT: I mean, I --

6 MR. WILLIS: I understand.

7 THE COURT: True, I have a lot of experience
8 in the case. It's also been a time monster.

9 MR. WILLIS: True.

10 THE COURT: I can't remember. You've probably
11 all counted. I've done at least a dozen opinions. I'm
12 backlogged on one. I look over here and I feel guilty.
13 The truth is that it's been huge for me and so it's not

Guy Warlop et al v. Lernout et al

14 like I'm holding onto it for dear life because I love
15 the case.

16 But, I think those are irrelevant
17 considerations, really. It's a very different forum
18 nonconvenience article. If I thought there was a forum
19 that was realistic, I would be very much opening on a
20 clean slate because I view the other issues very
21 different, but not at this -- if it's literally no case,
22 if it's on hold for the indefinite future. They
23 promised me two years ago this case would be tried in
24 Belgium.

25 MR. WILLIS: Your Honor, we talked -- if I

11

1 might. We talked to people and asking the same kind of
2 questions before our case was filed and we got the same
3 response and we've had that same response for a number
4 of years, now.

5 When we spoke to people this week, we again
6 got the same response, that we can't tell them, though,
7 that when a criminal case is going to end, we have no
8 idea what the prosecutors are going to do at the end of
9 the case, whenever it does end.

10 And, again, the civil case can't proceed until
11 the criminal case completely ends.

12 THE COURT: But, why don't I defer dealing on
13 forum nonconvenience and, then, we get some status
14 report and, if there's a real case that can go forward,
15 I'll think about it.

16 MR. SALTER: Your Honor, just a couple of
17 points.

18 THE COURT: Yes.

Guy Warlop et al v. Lernout et al

19 MR. SALTER: George Salter for KPMG Belgium.

20 I think the public record over there is a
21 little more developed in terms of the stage of the
22 proceeding. It's our understanding that, based on the
23 public record, that the investigating magistrate has
24 completed his investigation, which involves extensive
25 discovery and collection of documents and interviews or

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1 like depositions. And, that has been turned over to the
2 prosecutor.

3 The procedures, as they are set forth over
4 there, are being followed. It is moving on course in
5 accordance to Belgium procedure. It is obviously
6 different than what we're accustomed to in the US.

7 It's our understanding that the prosecutor has
8 the file and will make a determination on who to charge.

9 There have been suspects identified and that's
10 what you were familiar with when this case started.

11 There were certain individuals, certain entities, that
12 were identified, which created certain rights for those
13 parties and individuals and certain obligations. At
14 some point, the prosecutor will decide and we are told
15 and I think it's reported over there that that's likely
16 to be this year.

17 Now, to the extent the civil cases are on
18 hold, it's also our understanding that this entire
19 criminal record that's being developed, and has been
20 developed, is -- and all of the facts that are
21 determined as part of the criminal prosecution become
22 the basis, then, for the civil case.

23 In fact, it's my understanding that if the

Guy Warlop et al v. Lernout et al

24 criminal prosecution succeeds, that as part of that, the
25 civil claimants can file damage awards.

13

1 THE COURT: I'm just trying to figure out the
2 chicken and the egg.

3 Let's say I thought that it was time-barred.
4 I don't know that I do, by the way. I think it's a
5 close call. But, I also thought there was a good
6 argument for forum nonconvenience. But, I was also
7 worried about the fact that it's the slowest case I've
8 -- I fully expected it to be resolved by now. I think
9 everyone did. People thought it would be resolved
10 within three to five years. Even under Belgium
11 standards, this is slow.

12 So, the big issue is: Why wouldn't I just
13 defer deciding the forum case, if I thought it was
14 timely, just do the exchange of documents and
15 depositions. This has been explored to death.

16 Have you already done all those things?

17 MR. WILLIS: We haven't --

18 THE COURT: And, then, if I decided to ship it
19 over there, you're at least ready to go.

20 MR. WILLIS: Well, your Honor, we would even
21 prefer, certainly using your best judgment, to do
22 whatever we can in this case so that it doesn't become
23 stale and we recognize your Honor's concerns.

24 There's two things I'd want to point out, just
25 to keep in mind. We did learn in the last few weeks

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1 that it appears that what's going to happen in the

2 Guy Warlop et al v. Lernout et al
3 Belgium civil action, once it finally occurs -- and, we
4 have not heard that the criminal action is going to be
5 wrapped up this year. I don't think anyone really
6 knows. But, that's certainly going to be heard.

7 When it does wrap up, there is a strong
8 indication that that case is going to have to be -- the
9 civil case is going to have to be litigated in the court
10 of first instance because one of the defendants in this
11 action apparently is a judge on the trial level in
12 Belgium and there is apparently a --

13 THE COURT: One of the defendants in this?

14 MR. WILLIS: Yes. DePauw is apparently a
15 judge at the trial level there, which is forcing the
16 case over there to go outside the trial and the trial
17 level could be heard, in the first instance, in the
18 court of first instance. The ramifications of that
19 appear to be that there will be no appeal, no right of
20 appeal for the defendants or the plaintiffs.

21 One of the concerns expressed by members of
22 the ESDAQ class is if that that's the case, that may
23 leave open the possibility that defendants can argue,
24 based on European union and rights law that the co-case
25 had to be thrown out because they do not --

THE COURT: Well, listen. As far as I'm

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1 concerned, you trade on the AP NASDAQ. You at least are
2 in a different legal position than if you trade on the
3 NASDAQ.

4 If, in fact, I've been told that you could go
5 straight away and sue in Europe, even if there's no
6 class action, they chose their forum to invest it. They

7 Guy Warlop et al v. Lernout et al
8 chose their market would be probably better way of
9 saying it. I think it's a very different issue.

10 I think what I'm going to do is I'm going to
11 hear argument on the motion to dismiss on timeliness.
12 I'll take the rest under advisement. It's going to take
13 me forever to get to this.

14 In the meantime, you'll exchange all the
15 documents and depositions that occurred in the last
16 cases, without any new discovery being taken. And, I'll
17 get to it, or, you'll get better updates from me. And,
18 I won't resolve the forum nonconvenience until we find
19 out a little bit more about what's going on.

20 Mr. FLYNN: Your Honor, I --

21 THE COURT: Now, if I knock this out on
22 statute of limitations ground, what does that do with
23 the suit if they want to go to Belgium?

24 MR. FLYNN: I think it would depend on Belgium
25 law, your Honor. No one in this room is, I think,
expert enough to decide that.

16

1 Could I make a suggestion, your Honor.

2 THE COURT: Yeah.

3 MR. FLYNN: I think it follows up on what you
4 were just saying.

5 THE COURT: Yes.

6 MR. FLYNN: Because, I think there are serious
7 problems about whether this case can proceed in this
8 United States Court on statute of limitation grounds.
9 And, I would like to make that argument. Because --

10 THE COURT: Well, we're going to do that right
11 now.

12 Guy Warlop et al v. Lernout et al
13 MR. FLYNN: The suggestion, your Honor, that
14 we should engage in even a limited discovery that your
15 Honor just suggested I think is fundamentally unfair, as
16 I'll explain to KPMG US.

17 We welcome, your Honor, deferring, and we
18 appreciate your Honor's consideration of ultimately,
19 even if the Court were to find timeliness, deferring the
20 forum nonconvenience argument.

21 But, as I think you'll hear me explain, your
22 Honor, it would be fundamentally unfair for this case to
23 proceed at all against the defendants in this action,
24 particularly my client KPMG US.

25 THE COURT: Well, that's why I asked the
question: Is it timely in Belgium? Because, let's

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1 assume I ultimately agreed with you that it was untimely
2 here, that there was a viable cause of action in
3 Belgium. It would not be wasted time or money.

4 MR. FLYNN: Well, I think, your Honor --

5 THE COURT: So, I don't know. We're just
6 going to have to -- it's a very late filed suit, and so
7 I first have to get -- you could easily get bounced out
8 in Belgium.

9 MR. WILLIS: Absolutely.

10 THE COURT: So, that would support their
11 argument that if I found it untimely here, it would be a
12 waste of resources.

13 On the other hand, this stuff has been
14 produced so many times. This is like, it's like let
15 them -- if they want to go spend the money, it's no
16 sweat off your back. I wouldn't require any new

17 discovery. I'm sure there's been hundreds of thousands
18 more, maybe, pages of documents produced -- Right? --
19 tens of dozens of depositions?

20 MR. FLYNN: There's no basis, your Honor, on
21 this record to go past the stay that's in place in this
22 case under the PSLRA. In fact, because the proceedings
23 are proceeding in Belgium, to the extent there's a case
24 that proceeds in Belgium, it will proceed on the basis
25 of that record and the record here is still preserved.

18

1 There is no prejudice. And, there's no reason that --

2 THE COURT: Well, we'll see, we'll see.

3 All right. Let's go on, because I have,
4 believe it or not, a four o'clock. So ...

5 MR. FLYNN: We're going to proceed, your
6 Honor. Thank you.

7 Again, Michael Flynn on behalf of KPMG US.

8 Your Honor, well over six years ago -- your
9 Honor just asked for the date -- this litigation started
10 here. We litigated the case on behalf of KPMG US for
11 many years.

12 Ultimately, our client decided to settle the
13 securities action for \$115 million. We've paid \$115
14 million to settle the NASDAQ securities action and we
15 paid that money well over three years after it was
16 unmi stakeable and undisputed that the only pending
17 securities action in this country was on behalf of
18 NASDAQ purchasers. Plaintiffs do not dispute that.
19 Well over two-year statute of limitations, three years
20 after, that case was settled.

21 Now, after all this, the Warlop plaintiffs

22 Guy Warlop et al v. Lernout et al
23 have arrived looking to reopen this whole history, this
24 whole case, again, on the basis of a tolling theory that
25 has absolutely no application here, your Honor. They
want you to extend American Pipe and Crown Cork in ways

19

1 that it has not been extended.

2 THE COURT: Is there any case in the United
3 States of America that's dealt with this situation
4 directly?

5 MR. FLYNN: Yes, your Honor, and I'll get to
6 them. I mean, not all the history here of Belgium and
7 so forth, but on this very issue of whether or not
8 American Pipe applies to members of a class who are
9 excluded during the course of proceedings, whether that
10 be through settlement negotiations, whether that be
11 through the filing of an amended complaint, whether that
12 be through the voluntary decision of the plaintiffs'
13 counsel in that class action.

14 In any case in which that has happened,
15 tolling has never been applied under American Pipe to
16 the excluded class members.

17 The reason is obvious, your Honor. American
18 Pipe, by its own terms, only applies to those members of
19 the class who would have been members of the class had
20 the case been allowed to proceed to judgment.

21 Plaintiffs do not deny it is undisputed that
22 as of September 21, 2001, the NASDAQ consolidated class
23 action complaint, the operative complaint in this
24 matter, the first consolidated complaint after all the
25 cases were brought to your Honor, was unmistakably clear

Guy Warlop et al v. Lernout et al

1 that this was an action brought on behalf of NASDAQ
2 purchasers alone. No doubt about that.

3 No case has ever extended American Pipe to
4 cover those who are excluded as of that date.

5 THE COURT: You know, we checked. This was
6 before we had CMECF. So, you couldn't easily just go
7 on-line and get it.

8 What would have given someone a heads-up that
9 it had been amended to exclude them?

10 MR. FLYNN: Your Honor, let me get to why that
11 doesn't matter.

12 American Pipe made clear, your Honor, itself,
13 its emanating principle that it announced, made clear
14 that that doctrine had to respect the functional
15 operation of statutes of limitation and the policies in
16 showing essential fairness to the defendants. A core
17 emanating principle, your Honor, was not only that
18 defendants were aware of the substantive claims being
19 brought against them, but they were aware of the
20 identity of the potential litigants who could go to
21 judgment.

22 So, in this case, your Honor, the complaint is
23 filed, the NASDAQ consolidated class action, the
24 defendants in that case only know that they are facing
25 NASDAQ purchasers. They are entitled to that.

21

1 And, as the cases make clear, your Honor, to
2 the extent that the plaintiffs have a gripe with anyone,
3 they can't shift the burden and the risk to us. They
4 have a gripe perhaps against the lead plaintiffs in the
5 NASDAQ class action for voluntarily not pursuing the

Guy Warlop et al v. Lernout et al

6 case against them -- a whole other action as to whether
7 or not, a whole other issue, your Honor, as to whether
8 or not that NASDAQ class action even included them to
9 begin with.

10 But, even assuming that it did, the
11 consolidated complaint in 2001 made clear that it didn't
12 and they don't dispute that.

13 All of the cases, your Honor --

14 THE COURT: At some point, KPMG US, maybe
15 other defendants, fought pretty vigorously for forum
16 nonconvenience and we had a whole briefing back and
17 forth about why this was appropriate because they were
18 US investors.

19 Was all that on-line?

20 MR. FLYNN: All that was on-line, your Honor.

21 The lead plaintiff in this case, at the
22 beginning of the case, when you appointed the quack
23 group who proceeded on the NASDAQ class --

24 THE COURT: It sounds wrong, doesn't it?

25 (Laughter.)

22

1 MR. FLYNN: -- the NASDAQ class action. It's
2 interesting, your Honor. If you go back and look at
3 that -- and, again, I don't think it's dispositive here
4 for the other reasons I'll get to, which -- and I'll go
5 through some cases which I think are directly on point,
6 as your Honor asked, as to why American Pipe tolling
7 doesn't apply here.

8 But, in that lead plaintiff fight, the
9 investors in that -- the group that actually got
10 appointed lead plaintiffs -- were Europeans.

Guy Warlop et al v. Lernout et al

11 And, there was a fight before your Honor as to
12 whether or not they were -- they were good lead
13 representatives. And, some other lead plaintiff came in
14 and argued that you can't count their trades because
15 they were on -- some of them were on ESDAQ.

16 And, the lead plaintiffs in the quack group,
17 in the lead plaintiff fight before your Honor, said:
18 Well, your Honor, we agree that we can't count the
19 damages that occurred on ESDAQ, but, nonetheless, they
20 had purchased a lot of their shares on NASDAQ.

21 Your Honor went on to finally --

22 THE COURT: Was that included in written
23 motion work or was that --

24 MR. FLYNN: Yes.

25 THE COURT: -- or was it added in at a

23

1 hearing?

2 MR. FLYNN: No, it was in written motion work,
3 your Honor.

4 Then, your Honor consolidated the cases. The
5 consolidated complaint was filed. We cite cases, your
6 Honor, just as an initial principle, that the filing of
7 a consolidated complaint supersedes all prior complaints
8 and makes those prior complaints have no legal effect.

9 So, the complaint that has any legal effect in
10 the NASDAQ case makes clear that it's on behalf of
11 NASDAQ purchasers and that happens in 2001. This suit
12 is not brought until October of 2005, four years after
13 that fact.

14 The statute of limitations here, your Honor,
15 under anybody's view of the world -- and plaintiffs

Guy Warlop et al v. Lernout et al

16 don't dispute it -- was triggered as of November of
17 2000, possibly earlier. The last alleged misstatement
18 occurs in the June of 2000 time period. That's more
19 than five years later this suit is filed and I'll get,
20 in a moment, your Honor, to the statute of repose,
21 which, again, is another problem. But, let me go
22 through a couple of quick cases, your Honor -- I know
23 your Honor wants to move on -- but, addressing the very
24 point.

25 The Hunter case, your Honor, deals with this

24

1 very issue, 2005 case, in which the issue was whether or
2 not --

3 THE COURT: The site is -- I know it's in your
4 brief.

5 MR. FLYNN: It's in our brief, your Honor.

6 THE COURT: Is it a District Court or --

7 MR. FLYNN: District Court. 384 F. Supp. 2d.

8 At 888.

9 That --

10 THE COURT: So, the best case is our District
11 Court cases. There's no appellate case on what the
12 effect of an amendment is. Is that right?

13 MR. FLYNN: Your Honor, I believe -- and, I'll
14 get to it in a second -- that the -- the main cases that
15 we cite, one in this district, and the Hunter case and
16 the Ganousis case are District Court cases.

17 THE COURT: Sure.

18 So, this really is -- I saw you cited one case
19 and I noticed it was a District Court case. Not that
20 the person wasn't brilliant.

Guy Warlop et al v. Lernout et al

21 (Laughter.)

22 THE COURT: But, we don't yet have that much
23 appellate law.

24 MR. FLYNN: Well, let me get to the appellate

25 --

25

1 THE COURT: Is that right?

2 MR. FLYNN: Not yet, your Honor. But, I will
3 get to the appellate level decisions which present
4 another sort of insurmountable hurdle here, I believe,
5 for the plaintiffs.

6 The issue in Hunter, your Honor, was whether
7 or not the action should be tolled when members of a
8 class were excluded based on voluntary settlement
9 discussions by plaintiff's counsel. Should American
10 Pipe be extended? The answer was no, your Honor. The
11 Court said no.

12 The Lindner case, Lindner dividend case, in
13 the District of Massachusetts, is strikingly on point,
14 your Honor. In that case, a defendant, who had been
15 named in the earlier class action that the plaintiffs in
16 the Linder case were going to rely on for American Pipe
17 purposes, a defendant had in the consolidated complaint
18 been dropped from the case. And, then, the later filed
19 plaintiffs tried to say: Well, we never got formal
20 notice of the fact that this defendant had been dropped.
21 So, American Pipe tolling applies to that defendant when
22 we're trying to bring this next action against him.

23 The Court in the District of Massachusetts
24 said there was no authority for that proposition and
25 went on to say, and I quote: "A ruling tolling

Guy Warlop et al v. Lernout et al

26

1 limitations period until a potential plaintiff
2 discovered that a potential defendant was no longer a
3 party to a class action unfairly penalizes that
4 defendant for the plaintiff's failure to stay informed
5 of proceedings to which the plaintiff is a party."

6 Ganousis, your Honor, goes on.

7 District of Illinois case. And, it actually
8 addresses, again, a very similar issue. But it actually
9 deals with and addresses some of the underlying issues
10 which I think make it even more abundantly clear that
11 plaintiff's position has no merit.

12 Let me tell you what happened in Ganousis. In
13 Ganousis, again, when the case was originally filed, it
14 was a product liability action on behalf of a medical
15 device, TMJ implants. And, it was filed initially on
16 behalf of all purchasers in the United States.

17 When the plaintiffs moved for class
18 certification, they limited the class to Minnesota
19 plaintiffs only. People outside Minnesota, later on,
20 said: Whoa! We can't -- we can't possibly have been on
21 notice of that. No formal notice went out.

22 The Court said no, your Honor. And, here's
23 why. And, the language in the case is extremely
24 instructive. It went on to say, referring to the
25 animated principle of American Pipe that I talked about

27

1 a moment ago, that defendants are entitled to rely on
2 those who are potential litigants who can bring the case
3 to judgment based on the operative complaint in the case

4 Guy Warlop et al v. Lernout et al
-- the Court talked about that and said, your Honor,
5 there are two -- there's a double fiction going on here
6 with respect to American Pipe tolling.

7 THE COURT: These are all District Court
8 cases?

9 MR. FLYNN: They are, your Honor.

10 THE COURT: Is there any District Court case
11 that went the other way?

12 MR. FLYNN: No, there are not. There is not,
13 your Honor.

14 And, plaintiff will cite a few cases that
15 dealt with motions to amend and, in certain
16 circumstances, Courts have said: Well, if we're going
17 to let you amend, maybe we should send out a notice.

18 Those are cases from the late '70s and early
19 '80s in the Southern District of New York.

20 Those cases, themselves, recognize, though,
21 your Honor, notwithstanding the discretionary decision
22 to send out an additional notice -- those cases
23 recognize that the very fact of the amendment would have
24 ended the tolling that would have existed once the
25 members of that class are excluded on the basis of that

28

1 amendment.

2 So, those cases, themselves --

3 THE COURT: Did we have a motion to amend here
4 or was it an amendment as of right.

5 MR. FLYNN: It was an amendment as of right.
6 It was the consolidated amended complaint after all the
7 filings.

8 Let me just read you from Ganousis because I

9 Guy Warlop et al v. Lernout et al
10 want to emphasize the language when your Honor reads the
11 case. "As soon as his or her claim can no longer be
12 embraced within the period of class action, he or she is
13 automatically deemed to be aware of that effect.

14 "Based on that double fiction, the limitations
15 clock stops ticking for the individual when the
16 defendant is put on notice by the filing of the class
17 action" and resumes when noncoverage occurs, when the
18 person is out on its own.

19 "It must be remembered that courts are dealing
20 in fictions here, that the concepts on both sides
21 involve constructive and not actual notice. In
22 fairness, such doctrines must be employed consistently,
23 both when they are amiable fictions that benefit a
24 plaintiff and when they rise up to bite the same
25 plaintiff."

Let me get to the appellate decisions, your

29

1 Honor, because I think in --

2 THE COURT: We don't have that much time.

3 MR. FLYNN: Just about two minutes, your
4 Honor.

5 THE COURT: Okay, two minutes, you've got.

6 And, then, I'm going to jump to them. And, then, we'll
7 see what other issues when we get through.

8 Mr. FLYNN: Your Honor, even if you get over
9 all of those hurdles, plaintiffs in the First Circuit --
10 and, we still are in the First Circuit -- have a
11 problem.

12 The Basch case in the First Circuit says, your
13 Honor, and holds that in connection with the application

14 Guy Warlop et al v. Lernout et al
of American Pipe, it cannot be applied to a successive
15 class action. It can only be applied -- individuals can
16 only have the benefit of American Pipe.

17 So, if your Honor even reaches the issue
18 which, for the reasons I've just discussed you need not
19 reach because of the amendment here, here, when they're
20 trying to bring a separate class action, American Pipe,
21 in the First Circuit, is not allowed.

22 To quote Basch, "Plaintiffs may not stack one
23 class action on top of another and continue to toll
24 statutes of limitations indefinitely. Permitting such
25 tactics would allow a lawyer to file successive class

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1 actions with the hope of attracting more potential
2 plaintiffs and perpetually tolling the statute of
3 limitations."

4 Now, they'll say, your Honor, that there are
5 some cases in the Third Circuit and some other places
6 that have started to allow American Pipe to be applied
7 in some situations in which there's a successive class
8 action.

9 THE COURT: What if this is a totally separate
10 class, it's not the same class?

11 MR. FLYNN: They are relying on that prior
12 class to stack and get over. They concede, your Honor,
13 that if you do not apply American Pipe, they are out of
14 luck. They have to have this tolling in order to
15 proceed. It's undisputed, your Honor, that the statute
16 of limitations has run here.

17 THE COURT: Well, suppose you have one that's
18 the NASDAQ class and one that's the ESDAQ class. Why is

Guy Warlop et al v. Lernout et al

19 that?

20 MR. FLYNN: Well, your Honor, what they're
21 saying, they're arguing here, is that the NAS -- what we
22 know as the NASDAQ class action really was a NASDAQ-
23 ESDAQ class action. That's why they say they get the
24 benefit of American Pipe tolling.

25 They say that their statute of limitations

31

1 didn't begin running again until your Honor sent out
2 notice of the settlement with respect to KPMG US and the
3 other defendants that settled.

4 They say that the consolidated amended
5 complaint that made it clear it was on behalf of NASDAQ
6 purchasers is of no relevance to when their statute of
7 limitations began running again. That is for the --

8 THE COURT: Okay. I understand. I understand
9 your position.

10 Okay.

11 MR. WILLIS: Thank you, your Honor.

12 THE COURT: Do you have any case on your side?

13 MR. WILLIS: I think we have actually a number
14 of cases, including some that the defendant cited.

15 The way the Circuit Courts have approached
16 this -- and, they have, a number of Circuit Courts,
17 including the First -- is to deny American Pipe tolling
18 to subsequent class actions where there's been a prior
19 determination for the same class in a prior proceeding.
20 It makes perfect sense. We don't disagree with that at
21 all.

22 THE COURT: The thing I'm worried about is why
23 weren't you on some inquiry notice to check out what was

24 Guy Warlop et al v. Lernout et al
going on here? I mean, it was really, really early on
25 in this case when that -- the operative consolidated

32

1 complaint was filed, you had battles over forum
2 nonconvenience, we knew this wasn't ESDAQ. I mean, this
3 was no secret. We had battles over the lead plaintiff.
4 I mean, they were asleep at the switch over there.

5 MR. WILLIS: That's a fair point. Let me try
6 to address that, your Honor.

7 The way we look at it, the case began --
8 because it's a PSLRA case, the case began, as it had to,
9 with actual notice.

10 What counsel is talking about, in the Ganousis
11 case, for example, is constructive notice. That case
12 began with constructive notice and it continued with
13 constructive notice.

14 What the defendants are suggesting is you can
15 begin a case with an actual notice and then switch over
16 to constructive notice and those who were notified with
17 the actual notice are deemed to understand that they are
18 somehow kicked out of the class with constructive
19 notice.

20 What we're arguing is that is inherently
21 unfair. It is not what the case law suggests. You
22 start with actual notice. Ganousis says the fundamental
23 issue --

24 THE COURT: Well, what's the actual notice
25 here?

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1 MR. WILLIS: The actual notice were the 18
2 notices that went out in 2000 when, according to the

Guy Warlop et al v. Lernout et al

3 PSLRA, which identified for both investors in Europe and
4 investors in the US that a class had been filed, a class
5 action had been filed that protected their rights.

6 Each of these notices described the class the
7 same way, as all purchasers. And, it goes to the
8 purchase on ESDAQ and NASDAQ. Therefore, ESDAQ
9 purchasers could fairly assume that their rights were
10 being protected by counsel in the first action. They've
11 learned nothing else about that until 2004 when the
12 notice went out.

13 THE COURT: The thing that's worrying me is --
14 at least in this country it's standard fair to have
15 either an amended or a consolidated complaint. And, it
16 strikes me that somebody needed to have been watching.

17 MR. WILLIS: Your Honor, again, it's a very
18 different system in Europe.

19 I would point out that ECF I don't believe
20 started, actually, until 2004.

21 THE COURT: No. You're right. I checked. We
22 checked beforehand. It was not on-line, but --

23 MR. WILLIS: It's --

24 THE COURT: -- there were thousands of
25 lawyers. And, this was not -- this is not atypical of

34

1 what the room would look like. It just took a phone
2 call. In fact, the three plaintiffs from Europe.

3 MR. WILLIS: We do. We have a lot of clients
4 who do a lot of business in Europe. I can tell you,
5 based on personal experience, that the landscape is
6 quite different with respect to how lawyers and how
7 plaintiffs understand class actions.

Guy Warlop et al v. Lernout et al

8 There is -- I don't think there was any
9 expectation that once they looked at their rights of
10 being protected by this US action that there was a need
11 for them to continue to follow to see if their rights
12 had changed. I don't think there was an expectation
13 that they would be excluded from the class at some
14 point.

15 When that was provided, when actual notice of
16 that was provided, they did take steps within the
17 relevant period to protect their rights.

18 So, I think they were -- they are very
19 concerned about making sure that they understand what
20 their rights are and being thoughtful and thorough about
21 it. But I don't think that there was an expectation
22 that they could have done -- that they would have known
23 that.

24 Now, certainly, plaintiff's counsel in the
25 first case could have provided that kind of notice. No

35

1 criticism. But, it didn't happen. And, basically, the
2 ESDAQ purchasers are left with the ramifications of
3 whatever decisions were made earlier, that they were not
4 -- they were only put on constructive notice. And, they
5 were put on constructive notice. We're not arguing that
6 the amended complaint wasn't filed. We're not arguing
7 that it didn't include ESDAQ purchasers any longer.
8 That's the fact.

9 All we're saying is these members of the
10 class, the ESDAQ class, were told at the beginning of
11 the case that they were in, very publicly. These
12 notices were disseminated in Europe, not just in the US.

Guy Warlop et al v. Lernout et al

13 And, then, subsequent to that, they were taken
14 out of the class, which is fine, but no one told them.
15 So, they had no reason to assume that they needed to
16 take steps to protect their rights. Once they did learn
17 about that through the second actual notice, they did do
18 that.

19 Back on notice, that's clearly the point.

20 And, even Ganousis --

21 THE COURT: So, you're saying because the
22 original was an actual notice rather than a constructive
23 notice, you needed an actual notice to change it?

24 MR. WILLIS: Absolutely.

25 THE COURT: And, you're arguing based on

36

1 logic, not based on any case.

2 MR. WILLIS: Well, the Ganousis court, for
3 example, talks about the need to have consistent notice.
4 It talks about the fiction --

5 THE COURT: There's no case.

6 Basically, this is -- this would be a
7 significant extension of -- maybe you should add them.
8 There's no post-PSLRA kind of situation like this.

9 MR. WILLIS: I'm not aware, your Honor, of a
10 securities case where American Pipe has been extended.
11 There are certainly securities cases where notice has
12 been required to be sent out once the composition for
13 the class is subsequently altered. That's not there.

14 But, your Honor is correct. I don't know of a
15 case out there where it is precisely on point with this
16 case -- certainly, Hunter isn't, I hope. But, I can't,
17 in fairness, tell your Honor that there are cases out

Guy Warlop et al v. Lernout et al

18 there which say that in a securities case you start with
19 actual notice, it's okay to end with constructive
20 notice. There are no cases that I know of that suggest
21 that. And, I think that's fundamentally unfair.

22 But, at the same time, I can't tell you either
23 that there are cases which underscore the position that
24 you start with actual notice and, now, if you end with
25 actual notice, otherwise, the statute remains tolled.

37

1 In part, if you look at the cases that you
2 expressed in explaining this issue, where courts have
3 denied American Pipe extension of tolling, it has been
4 because there was a prior determination with respect to
5 the same class in the prior litigation.

6 And, then, if you look at every one of
7 defendant's cases --

8 THE COURT: Well, that's the second point.

9 MR. WILLIS: Exactly. Every one of the cases
10 reflects that except for Hunter and we think, timing
11 what it is, there are several ways to distinguish
12 Hunter.

13 But, again, from our perspective, your Honor,
14 one of the critical issues is the notice, the
15 fundamental affairs of getting the same kind of notice
16 that would have alerted them in the first place and
17 alerted them their rights had changed.

18 THE COURT: And, because you're standing here,
19 do you know if there are any Americans or people who
20 live in the United States among the plaintiff class that
21 you're speaking of?

22 MR. WILLIS: There are. I cannot quantify

Guy Warlop et al v. Lernout et al

23 that for you. But, we did investigate that to try and
24 determine if there were any. There are. But, I can't,
25 unfortunately, your Honor, quantify that --

38

1 THE COURT: Are we talking in terms of two or
2 are we talking in terms of a thousand?

3 MR. WILLIS: I don't know. I can tell you
4 that based on our experience, it's not unusual for US
5 investors, who purchase a particular stock that's traded
6 on multiple exchange, to purchase on different
7 exchanges.

8 We saw that in the Shell case, for example,
9 where some of our clients purchased both in Europe.
10 They purchased in Amsterdam. They purchased in London.
11 That's not uncommon.

12 So, it wouldn't surprise me if the US base or
13 it would be a portion of the ESDAQ class that consists
14 of US citizens and US residents is larger than we might
15 think.

16 THE COURT: Are the named plaintiffs in this
17 case members of both classes?

18 MR. WILLIS: No. The named plaintiffs, the
19 ESDAQ plaintiffs did not purchase on the NASDAQ. They
20 purchased on the ESDAQ.

21 THE COURT: And, how about the flip side?

22 MR. WILLIS: In the prior case, the lead
23 plaintiffs purchased on both. They purchased on both.

24 THE COURT: I must say, I think it's an
25 exceptionally close call. It would be a real push on

39

1 Guy Warlop et al v. Lernout et al
2 American Pipe to do it that way and, yet, I understand
3 it's somewhat distinguished from some of the other cases
4 because there was actual notice.

5 MR. FLYNN: Could I finish that one point,
6 your Honor?

7 THE COURT: Yeah.

8 MR. FLYNN: It's a complete misnomer to say
9 that there was actual notice. We know very well what
10 actual notice means. You get a piece of mail to your
11 home or some -- to a direct address.

12 In both cases, we're talking constructive
13 notice. Publication notice is constructive notice.

14 THE COURT: What did we do in the lead
15 counsel, the -- I don't even remember.

16 MR. FLYNN: It's all constructive notice, your
17 Honor.

18 THE COURT: What did we do? Did we publish it
19 in the newspaper?

20 MR. FLYNN: The plaintiffs, when they filed
21 the suit, initially, published a newspaper article.
22 Those publications were US publications here, your
23 Honor. Plaintiffs don't dispute that.

24 Here, your Honor, many of those -- and, this
25 goes to the issue, again, of whether or not there's even
a basis to begin with here, that the first class was

40

1 ever an ESDAQ class, which they have to prove, but they
2 haven't.

3 Those notices, the majority of them, identify
4 NASDAQ. I will concede that some of them say "all
5 investors." None of them say "ESDAQ investors." ESDAQ

6 Guy Warlop et al v. Lernout et al
is not included in any of those notices.

7 They say that the fact that they said "all
8 investors" includes ESDAQ. But, once the consolidated
9 complaint is filed, that no longer is an issue.

10 Let me just disabuse the Court of any sort of
11 belief that there was actual notice to any members to
12 begin this whole process. There was not.

13 MR. WILLIS: Your Honor, we disagree
14 vehemently. From the plaintiff's side, is we're the
15 ones who actually disseminated that notice when we filed
16 the case. That notice goes out on PR news wire. And,
17 in the original case, it went out PR news wire, it went
18 out on business wire, it hit the Financial Times. What
19 happens when it does that is it then goes to Internet
20 sites and is picked up there.

21 But, the fact that you had all the lead
22 plaintiffs in the original case, European purchasers,
23 purchasing on both exchanges, they got the notice.
24 They're domiciled in Europe. They saw it in Europe.
25 They took action on it based on what they saw in Europe.

41

1 So, it's very clear that "actual notice"
2 means actual notice. We're not suggesting that every
3 single member of the class sees actual notice. No one
4 is suggesting that. But, it is notice that is
5 disseminated very widely.

6 We see that in our cases. We get contacted by
7 clients in Europe all the time who see notices and want
8 to know whether their rights are impacted by suits
9 brought here.

10 THE COURT: But, the policy ramifications of

11 Guy Warlop et al v. Lernout et al
12 what you're saying are that under the PSLRA, it
13 routinely happens that notice is sent out on the lead
14 counsel battle. There's an initial set of complaints,
15 multiple ones, often. And, eventually, a consolidated
16 complaint is filed, which looks very different. They
17 file some claims and they add some claims, maybe change.
18 It means that, essentially, unless you individually
19 notice everyone of the changes, it tolls it forever.

19 MR. WILLIS: No. I would disagree with that,
20 your Honor.

21 THE COURT: Why?

22 MR. WILLIS: For the reasons, say, the
23 difference is if a claim is dropped, if a defendant is
24 dropped, or if a defendant is added, that's something
25 that applies to all class members. That doesn't affect

42

1 one particular portion of a class and not the other.

2 When you redefine the class to exclude members
3 who had been a part of that class -- and, here, the
4 notices did say: All those who purchased L and H stock
5 -- it didn't differentiate. People recognize if you're
6 in Europe, you know that the trade is on the ESDAQ, on
7 the ESDAQ; in the US, you know trade is on the NASDAQ;
8 some people who have traded on both.

9 But, here, there very clearly was that kind of
10 a notification, that kind of a reliance on that.

11 The plaintiffs in the original case took the
12 steps to --

13 THE COURT: Well, just for purposes of the
14 lead counsel battle -- right? -- lead plaintiff battle.
15 Right?

16 Guy Warlop et al v. Lernout et al
MR. WILLIS: The notice?

17 THE COURT: Yeah.

18 MR. WILLIS: Yeah -- the notice goes out to
19 inform investors that a class action has been filed and
20 whether or not they are part of it.

21 Now, the distinction --

22 THE COURT: No, it doesn't. It says who is
23 going to be the lead plaintiff.

24 MR. WILLIS: Actually, your Honor, when the
25 notice initially goes out, what the PSLRA requires is

43

1 notice to identify the action that's been filed and the
2 notices say an action had been filed against L and H or
3 whoever the defendants are at that time. This is the
4 class period. This is the form in which -- the venue in
5 which it's filed.

6 Now, it's one thing to, again, drop a
7 defendant, drop a claim. That impacts the entire
8 class. But, when one portion of the class is
9 specifically affected by a decision, that's what we're
10 arguing requires notice.

11 We're not suggesting that in every case where
12 you have a defendant dropped, or a claim dropped, claim
13 added or a defendant added, that notice has to go out.
14 That's excessive. Again, that -- we don't think that
15 comports with fairness. But, when you do have investors
16 who have relied potentially to their detriment on rights
17 that they were informed about, and then those rights are
18 changed, then, yes, that kind of notice is important if
19 you're going to have to have the statute of limitations
20 running again.

21 Guy Warlop et al v. Lernout et al
22 So, yes, absolutely.

23 THE COURT: Well, it's a case of first
24 impression, as far as I'm concerned.

25 Did you want to say something?

MR. WEIDNER: If I could, Judge, although, I

44

1 don't quite have to argue this exact point. But, I do
2 want to make it clear that Dexia, my client, is in a
3 very different position. Actually, for once in these
4 proceedings, I feel like I have a bit part in a third
5 act in a play.

6 Our people were never named in a class action
7 brought by ESDAQ plaintiffs -- ever. They weren't named
8 in the original complaints here. They weren't in the
9 notices that the plaintiffs are talking about.

10 The first time that Dexia Bank -- actually, it
11 was Dexia SA. But, the first time Dexia was named by an
12 ESDAQ class is in this ESDAQ class that's pending before
13 this Court.

14 So, unlike what we're talking about between
15 the folks at the front tables here, the law for my
16 client is actually quite clear. And, really, it goes
17 back to a --

18 THE COURT: Do you oppose their motion to
19 dismiss?

20 MR. WILLIS: Yes, absolutely.

21 THE COURT: Why?

22 MR. WILLIS: For the same reason, your Honor.

23 THE COURT: No. But, doesn't that fall in
24 your exception if it's not the same defendant?

25 MR. WILLIS: No, your Honor.

Guy Warlop et al v. Lernout et al

45

1 In 2000, when the notice went out, it didn't
2 delineate all the defendants in the action. It said:
3 The action's been filed.

4 THE COURT: I don't know. I --

5 MR. WEIDNER: But, Judge, we weren't a
6 defendant.

7 THE COURT: I understand that.

8 I don't see how you press it against Dexia.

9 MR. WILLIS: Well, we certainly think the case
10 is stronger against the KPMGs. But, you know, in our
11 view.

12 THE COURT: Okay. I understand.

13 MR. WEIDNER: Judge, if I may.

14 The reason he may have overlooked it is we're
15 relegated to one footnote in their 50-page brief on this
16 point.

17 I'm just saying the law here really is clear.
18 It's in our brief. But, it goes back to what is now, I
19 guess, an old case, a Second Circuit case from 1977,
20 which is the Arneil case at 550 F.2d 774, stating that
21 "Nothing in American Pipe suggests that the statute be
22 suspended from running in favor of person not named as
23 a defendant in the class suit. A different conclusion
24 would not comport with reason."

25 We also cited a Tyco case in our brief which

46

1 is probably the best collection of cases on this
2 subject, at least that we could find. The law is quite
3 clear, if a defendant hasn't been named in a prior class
4 action, American pipe simply doesn't apply. That's our

Guy Warlop et al v. Lernout et al

5 circumstances.

6 THE COURT: What do you say?

7 MR. FLYNN: But, one point in rebuttal, your
8 Honor. For the reasons I've stated, I don't believe
9 this is a case of first impression. I think you'll find
10 in our briefs, your Honor, that there are numerous cases
11 that we feel are now -- defeat plaintiff's position.

12 THE COURT: Here's what the issue would be. I
13 understand. I sort of read -- I haven't sat, I admit,
14 and looked up all the cases, but I did read the briefs.
15 And, the big difference is that here, there was an
16 actual notice as to what the class was, whereas, in the
17 other cases, there was just a complaint. That's what
18 makes it harder.

19 MR. FLYNN: Well, in the other cases, your
20 Honor, here, in the PSLRA circumstance, when the notice
21 went out, there is no case out there that suggests that
22 the Court was required, or anyone else was required, to
23 send out a subsequent notice when the consolidated
24 complaint went out.

25 In the cases I cite to you, your Honor, those

47

1 were cases where there had been an initial notice of a
2 class, a pendency of a class.

3 In the Lindner Funding case, your Honor,
4 there's notification that there's a class action
5 pending. Publication, newspaper notice, notice out
6 there. Not actual mailed notice. And, that didn't
7 occur here.

8 And, then, when it turns out that in the
9 course of proceedings someone is dropped, then, it's

Guy Warlop et al v. Lernout et al

10 different. There's nothing about the PSLRA that makes
11 this any different, your Honor.

12 One final point, let me add. To the extent
13 that your Honor concludes that this is a case of first
14 impression, it would require an extension of American
15 Pipe. Both the First Circuit and American Pipe itself
16 said this kind of tolling doctrine should not be
17 extended to invite the type of abuse that plaintiffs are
18 suggesting and bringing it to --

19 THE COURT: Well, the PSLRA contemplates a
20 consolidated complaint.

21 MR. FLYNN: It does, your Honor. Of course,
22 it does.

23 THE COURT: It contemplates that there's going
24 to be something else. And, that's what makes it
25 difficult. Because, if these people had exercised any

48

1 kind of diligence, they would have looked at what it
2 was. And, you're saying: Yeah, but they're Europeans
3 and they don't understand this.

4 MR. FLYNN: Well, with respect to them,
5 they're Europeans and they live under a different
6 system.

7 I think you're right, your Honor, in respect
8 -- looking at it from our perspective. We may
9 anticipate that we need to take more proactive action.
10 Although, perhaps in the US, we would disagree with
11 that. But, in Europe, it is a different system.

12 Again, the Lindner case, that the defendants
13 are citing, in that case, it was the dropping of a
14 defendant, dropping a claim, not a redefinition of the

Guy Warlop et al v. Lernout et al

15 class. That's a very different -- we're not ...

16 We're trying to draw a very clean line so that
17 we're not suggesting that repeated notices have to go
18 out over and over again. We don't think that comports
19 with judicial economy.

20 But, we do have an entire portion of a class
21 that is disenfranchised, the rights were impacted by the
22 initial notice that they saw, and had actual notice of,
23 and, in this case, the next time.

24 THE COURT: With this?

25 Let me just say this. No such thing in the

49

1 rules is a preliminary approval of a class action
2 settlement. I've looked in vain for it. It just turned
3 out to be good practice. All right? So, the manual on
4 complex litigation tells you to do it -- yah-de-da.

5 So, wouldn't that have been the point at which
6 it would have made sense for people to come in and say
7 no, don't approve this class, you know, you should have
8 -- you dropped us and we didn't know and this isn't
9 fair?

10 MR. WILLIS: Well, what -- I mean, for
11 example, what could have been --

12 THE COURT: I hadn't, if I'm remembering
13 correctly, actually approved the class until the final
14 settlement approval.

15 So, wouldn't that be that preliminary point
16 where it would say it is prejudicing us?

17 MR. WILLIS: Exactly, your Honor.

18 What could have happened here is defendants
19 could have, in the negotiation process, said: We want

Guy Warlop et al v. Lernout et al

20 to get rid of this case, we want to extinguish our
21 liability, we demand that in your release language --
22 because there is that contingent liability sitting out
23 there -- you include in that definition all purchasers,
24 not just NASDAQ purchasers. Then, when that notice goes
25 out, ESDAQ purchasers are going to see "I'm not in this

50

1 class anymore. I didn't realize that. I'm going to
2 object. "

3 THE COURT: So, you're saying your people
4 didn't get any notice of the preliminary order of
5 approval?

6 MR. WILLIS: They got the notice that was
7 ordered by your Honor at the end of -- in October of
8 2004.

9 THE COURT: Because it was to everyone who
10 purchased. Right?

11 MR. WILLIS: Right.

12 THE COURT: So, they did get the notice
13 before I approved the final class action settlement?

14 MR. WILLIS: Right.

15 THE COURT: So, why wouldn't they have come in
16 at that point?

17 MR. WILLIS: Well, they could have come in and
18 objected.

19 THE COURT: Yeah. That's what I'm referring
20 to.

21 MR. WILLIS: Yeah. I suppose they could have,
22 your Honor. But, the -- you know, again, based on
23 distances and travel, based on the understanding of our
24 system, many of them may not have known the likelihood

Guy Warlop et al v. Lernout et al

25 --

51

1 THE COURT: It's just almost as fast to get
2 between London and Boston as it is Boston and San
3 Francisco.

4 MR. WILLIS: Oh, believe me. I do it all the
5 time. It is -- yeah.

6 MR. FLYNN: Your Honor, he keeps talking about
7 -- on one hand, he says we have Americans who are part
8 of this class. And, then, when it's convenient, he just
9 says: Oh, it's a different system. They're Europeans,
10 and so forth. So, they can't have it both ways, your
11 Honor.

12 To the extent that they are claiming that
13 there are American investors here, then, those American
14 investors clearly understood that this action was
15 pending and could have done just what anyone else did;
16 and, I think your Honor has demonstrated by the fact
17 that the lead plaintiffs in the prior class action were
18 Europeans, that these arguments -- and, there's no
19 basis, no factual allegation to support any of these
20 claims, that that can't salvage their claims here.

21 THE COURT: So, when we did the preliminary
22 order of approval, did we send to all investors or just
23 to investors who were --

24 MR. FLYNN: There was no actual mailed notice,
25 your Honor, as in that settlement. There was a

52

1 publication notice that went out to national US
2 publications. And, that is what they claim should have

3 Guy Warlop et al v. Lernout et al
happened when the consolidated complaint occurred.

4 THE COURT: It did go out to a European
5 publication.

6 MR. FLYNN: Yeah.

7 They're not claiming that that would have --
8 that that was necessary. All they're saying, your
9 Honor, is that the notice of the amended complaint
10 should have gone out in US publications. They concede
11 that if that had happened, they're out of luck.

12 THE COURT: I'm talking about the preliminary
13 order of approval. Where did that go?

14 MR. FLYNN: I think it went to publications in
15 the US, but I think they're disseminated all over the
16 world, Your Honor, as counsel has indicated.

17 THE COURT: I just don't remember how we did
18 it.

19 MR. FLYNN: I think that's right. I don't
20 recall the details of every publication that it went
21 into. But, it's PR news wire and all those types of
22 publications.

23 THE COURT: Do you know?

24 MR. SALTER: It was picked up, your Honor, in
25 wires in -- I know it was in Belgium.

53

1 THE COURT: I think I read --

2 MR. SALTER: And, I thought it was -- I
3 thought it went into the Financial Times.

4 But, in any event, it was picked up by the
5 wires over there because we had a number of press
6 inquiries in Belgium to KPMG Belgium as to what's going
7 on. So, it was reported that a settlement had been

8 Guy Warlop et al v. Lernout et al
approved at that point.

9 THE COURT: I just don't remember whether we
10 gave individual notice or just publication notice.

11 MR. FLYNN: No there was not individual
12 notice.

13 MR. WILLIS: Yeah. I think it had been
14 reported and approved. I think there was some
15 dissemination in Europe about that. I think it was a
16 different level of notice than what the investors in
17 Europe initially saw.

18 THE COURT: Well, it was about the same,
19 right? It was publication notice?

20 MR. WILLIS: Well --

21 THE COURT: It may not have been -- we have to
22 figure that out by the record. I don't know. But, in
23 neither case was it individual notice. It was
24 publication notice.

25 MR. WILLIS: Correct.

54

1 THE COURT: Whether I know it was the exact
2 same publication, I don't know. I'm sure somebody could
3 supplement the record on that point.

4 MR. WILLIS: Correct.

5 But, I think one point I was making, your
6 Honor, is the defendants can protect themselves against
7 this by insisting on a broader release so that members
8 of classes being disenfranchised can object to that.
9 They can then see they still have a contingent liability
10 out there and they can decide whether it's worth it for
11 them to go ahead with the settlement, whether to
12 renegotiate the settlement to protect their interest.

13 Guy Warlop et al v. Lernout et al
That didn't happen here. But, they did
14 negotiate a release that would be broader than the class
15 that was litigated. So, they certainly thought about
16 protecting themselves. They didn't do it against ESDAQ,
17 with respect to the ESDAQ class. But, we weren't
18 involved in that case. So, I can't explain any further
19 than that.

20 Your Honor, if I --

21 THE COURT: Just, when you came in, you were
22 shot out of the blue, like who are you, where were you?
23 So, I -- not you, personally.

24 MR. WILLIS: I understand.

25 THE COURT: This has been so heavily

55

1 litigated, up and down the Circuit three times. I mean
2 -- in terms of -- four times.

3 So -- Right? The original PI that KPMG US was
4 looking for. There was the interlocutory

5 MR. WILLIS: Belgium. Belgium, your Honor.

6 And, I'm sure I will hear about that later
7 from my colleagues.

8 THE COURT: There was the interlocutory appeal
9 and, then, there were two trustee-type suits. So,
10 there's been at least four circuit involvements.

11 I issued myself half a dozen to a dozen
12 opinions. So, I'm feeling that it wasn't an under-the-
13 radar-screen kind of thing.

14 MR. WILLIS: It was not. And, as
15 sophisticated as European investors are, they're not
16 necessarily sophisticated about our system. And, they
17 don't -- they wouldn't contact Court Link. They

18 Guy Warlop et al v. Lernout et al
18 would n't go to some of those sites that maybe we would.
19 Both as lawyers and investors in the US, we may think to
20 do that because we are much more familiar with our
21 system.

22 THE COURT: Okay. I understand the issue.
23 I'll take it under advisement. I know there are a slew
24 of other issues raised and ...

25 MR. FLYNN: We'll rest on our papers, your

56

1 Honor, on the subject matter jurisdiction and on our
2 other arguments.

3 THE COURT: Yeah. A lot of them are sticky
4 and horny. But, this first issue is timeliness.

5 Now, here's the issue. If I decide it's not
6 timely, does that bind you in Belgium? You don't know?

7 MR. WILLIS: I can't say definitively. It
8 very well may. It very well may.

9 THE COURT: If I say that it's timely, but
10 then I decide that it really belongs in Europe?

11 MR. WILLIS: You still have time to decide.
12 That gives the freedom, your Honor -- if it saves time,
13 that gives the protection for us to at least
14 determine --

15 THE COURT: I've got to think about it.
16 Because, truthfully, it's a -- there are Europeans on a
17 European exchange. It may well be European law. I
18 mean, it's a very different situation than my original
19 suit. So, I'm trying to figure out whether -- I must
20 say, if I find it's really tight on timeliness, I draw
21 six of one and a half of arguments, both sides, and I do
22 think it's close, why wouldn't it make sense just to

23 Guy Warlop et al v. Lernout et al
ship it back to Belgium and let them worry about it?

24 MR. WILLIS: If we could direct your Honor to
25 Judge Kaplan in the Southern District, we have a problem

57

1 case before him where all lead plaintiffs are Europeans
2 who purchased on a European exchange. A large portion
3 of the class consisted of European purchasers.

4 That case has gone past the motion to dismiss
5 stage. That case is going forward. It's not -- your
6 point is fair. European purchasers who purchase in
7 Europe certainly can utilize both the remedies. But, US
8 law also permits them to utilize our courts and our
9 federal securities laws if the appropriate tests were
10 met.

11 THE COURT: Did he decide the forum
12 nonconvenience?

13 MR. WILLIS: He did not. That wasn't even
14 raised, your Honor.

15 And, there is an Italian action going on,
16 parallel Italian action, which some of the class members
17 --

18 THE COURT: He may have grabbed for it. No?
19 (Laughter.)

20 MR. WILLIS: Possibly, possibly.

21 THE COURT: It probably is a big suit.

22 MR. WILLIS: It is.

23 Thank you, your Honor.

24 THE COURT: Thank you very much.

25 I have another big suit, speaking of which,

58

1 coming up right now.

Guy Warlop et al v. Lernout et al

2 So, thank you. It's a really excellent
3 issue. I always am reluctant when I'm the first to
4 decide something. It's a little different than the
5 earlier cases.

6 Thank you.

7 MR. WILLIS: We appreciate your time. Thank
8 you.

9 (Whereupon the hearing was concluded.)

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CERTIFICATE

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