

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

GUY WARLOP, et al.,

Plaintiff,

v.

JO LERNOUT, et al.,

Defendants.

Civil Action No. 1:05-12058 (PBS)

**LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR RECONSIDERATION AND/OR TO AMEND JUDGMENT**

**I.**  
**PRELIMINARY STATEMENT**

Lead Plaintiffs Guy Warlop, Luc Vangansbeke and Reginald Pauwels pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 7.1, respectfully submit this memorandum in support of their motion for reconsideration of and/or to amend the Court's February 12, 2007 Opinion and Order (the "Order"). Lead Plaintiffs seek reconsideration or amendment of the Court's finding that Belgium is an available and adequate alternative forum for this action. For the reasons discussed below, Lead Plaintiffs believe that Belgium is not an available forum for the claims of the EASDAQ class. Even so, Lead Plaintiffs merely request that the Court not dismiss the EASDAQ class claims *until* Belgium is demonstrated to be an available forum. This request is based on three critical factors which already strongly suggest that Belgium will ultimately not provide an available forum for Lead Plaintiffs and the putative class of EASDAQ purchasers of L&H common stock to seek recourse against some or all Defendants:

1. Belgian courts will likely be unable to assert jurisdiction over KPMG US<sup>1</sup>;
2. Because of these very jurisdictional concerns, KPMG US is not a party under investigation in the Belgian criminal action. As such, it will likely never be indicted, nor will findings be made regarding KPMG US's culpability. Without such a finding, under Belgian law, the availability of a civil action against KPMG US is uncertain; and
3. The entirety of the Belgian proceedings may be dismissed as contrary to European Union ("EU") human rights laws. Because one of the Defendants in the Belgian action (Cauwelier)<sup>2</sup> serves as a trial judge in the Belgian court

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<sup>1</sup> See Transcript of January 23 2007 Hearing on Defendants' Motions to Dismiss ("Transcript") at 8-9, attached herewith as Exhibit 1 to Declaration of David Nalven in Support of Lead Plaintiffs' Motion for Reconsideration ("Nalven Decl.").

<sup>2</sup> Cauwelier is also a Defendant in the action before this Court. Mr Dirk Cauwelier is a lawyer from Poperinge (Belgium) and currently serves as a "commercial judge" (rechter in handelszaken) at the Commercial first instance

system,<sup>3</sup> the trial of both the criminal and civil actions will be removed and heard at the appellate court level.<sup>4</sup> Accordingly, the risk exists that denial of this right of an appeal violates EU Human Rights Law (which guarantees such a right to an appeal), forcing the Belgian court to dismiss the action in its entirety.

Although there has been no decision on any of these issues to date, if the Belgian courts were to dismiss the entire action as violative of EU Human Rights law, or dismiss KPMG US for lack of jurisdiction or failure to offer criminal findings, then Belgium would be neither an available nor adequate forum, leaving the EASDAQ class with no remedy at all or, at the very least, no remedy against a primary wrongdoer. Lead Plaintiffs acknowledge that availability of a forum does not guarantee success on the merits in that forum. Availability does, however, require that a party actually be allowed to meaningfully present its case. *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 426 n.7 (1st Cir. 1991).

If, as the Court has indicated in the Order, Belgium is adequately able to adjudicate this action on the merits, then Belgium will have shown itself to be an available forum and dismissal of this case under the *forum non conveniens* would not be error. If, however, Lead Plaintiffs are unable to proceed in Belgium because of procedural or due process concerns unrelated to the merits of the case, then such dismissal would be erroneous. Accordingly, Lead Plaintiffs respectfully request the Court to reconsider or amend its dismissal and stay such judgment until

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Tribunal (Rechtbank van Koophandel) in Ieper (Belgium). This tribunal handles commercial conflicts and has its offices at 8900 Ieper (Belgium), Grote Markt 10.

<sup>3</sup> See Transcript at 14. At the hearing, counsel for Lead Plaintiffs mistakenly identified Defendant De Pauw as being employed as a judge. This mistake was due to a miscommunication made by counsel for plaintiffs in the Belgian action. Counsel for the Belgian-action plaintiffs have now confirmed that Defendant Cauwelier is the defendant who serves as a judge.

<sup>4</sup> See *id.*

after the Belgian action has concluded, or at least until after forum-related risks such as those identified above and herein have been resolved. *Compare Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 427 (1st Cir. 1991) (finding that District Court should “conduct additional factual inquiry, and perhaps -- should the district court conclude it is appropriate -- fashion a conditional dismissal that will ensure the [plaintiffs’] ability to prosecute their claim”); *see also* Transcript at 9-11 (this Court suggesting a deferment of the *forum non conveniens* issue “until we get a stronger feel on whether there’s a civil case to be had in Europe”).<sup>5</sup>

## **II.** **ARGUMENT**

Under Rule 59(e) of the Federal Rules of Civil Procedure, an order may be amended to correct a clear error of law or prevent manifest injustice. *United States v. Rafael*, 349 F. Supp. 2d 84, 99 (D. Mass. 2004) (“Under Fed. R. Civ. P. 59(e), a court may alter or amend a judgment based on a ‘manifest error of law or fact’ or newly discovered evidence.”) (quoting *Zukowski v. St. Lukes Home Care Program*, 326 F.3d 278, 282 n.3 (1st Cir. 2003)).<sup>6</sup>

### **A. Status Of the Potential Belgian Action**

As the Court has noted, there currently is no ongoing action in Belgium regarding the

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<sup>5</sup> In requesting reconsideration, if Belgium is rendered an available forum, then Lead Plaintiffs consent to entry of the Order for the reasons stated therein. If, however, Belgium does not permit litigation either of the subject matter of this dispute or against the parties named in this dispute, then Defendants’ defenses and Lead Plaintiffs’ responses to those defenses could still be properly considered by the Court. Moreover, so as to keep the Court well-apprised of the events in Belgium, Lead Plaintiffs propose to provide the Court with quarterly status reports as to the progress of that litigation.

<sup>6</sup> Lead Plaintiffs recognize that this Rule should be narrowly construed and strictly applied in order to discourage litigants from trying to re-litigate through repetitive arguments issues that have already been decided. As set forth herein, Lead Plaintiffs do not seek to re-litigate the motions to dismiss but, instead, merely seek to demonstrate that the Court has overlooked factual matters or controlling precedent that were earlier presented and that would have changed its decision.

claims asserted in this action.<sup>7</sup> Instead, there is only a criminal investigation, which has been ongoing for more than five years, the outcome of which will dictate whether there will be criminal indictments and, subsequently, a civil action on behalf of purchasers of Lernout & Hauspie (“L&H”) common stock injured by the fraud at issue.<sup>8</sup> *See also* Declaration of Didier Matray (“Matray Decl.”) ¶¶20-22, attached as Exhibit 2 to Nalven Decl.; Lead Plaintiffs’ Opp. to Motions to Dismiss at 37 n.39. Under Belgian procedural law, prosecution of the criminal action must await the outcome of the investigation and, in turn, prosecution of the civil action cannot proceed until the completion of the criminal action. *See* Matray Decl. ¶¶20-22.

Prosecution of both the criminal action and the civil action is further complicated by three issues. First, because one of the Defendants likely to be indicted at the conclusion of the investigation (Cauwelier) serves as a Belgian trial-level judge at the commercial court of Ieper (rechter in handelszaken bij de Rechtbank van Koophandel te Ieper), both the criminal action and any subsequent civil action will not be heard in Belgium’s trial-level courts, but will instead be heard in the court of appeals, eliminating all parties’ right to appeal to the court of appeals

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<sup>7</sup> Transcript at 9.

<sup>8</sup> In an October 6, 2006 confidential letter sent to Mr. Christian Van Buggenhout, attorney for the plaintiffs in the Belgian action, the Belgian prosecutor’s office at the Court of Appeal of Gent (Belgium) (Parket bij het Hof van Beroep te Gent) indicated that the prosecutor’s office will issue indictments (dagvaarding met kennisgeving van tenlasteleggingen) around mid-April 2007, stating the criminal offenses committed by the defending parties. Only by this formal notification will the pending criminal investigation by the investigating magistrate (onderzoeksrechter) be concluded.

In this same letter, the prosecutor’s office has indicated to Mr. Van Buggenhout that, taking into account the legal formalities and terms for notification, the introductory hearing of the criminal action will take place no earlier than the end of May or beginning of June 2007. However, that this timing could not be confirmed, and depends on the court’s workload and the availability of the place where the introductory hearing will take place. Also in this letter, the prosecutor’s office stated that hearings will likely not take place before the end of the year 2007 or the beginning of the year 2008, depending on the agenda of the parties and of the court of appeal of Gent. To the plaintiffs’ best knowledge, no other formal or official information has been given to the parties in the on-going criminal investigation in Belgium.

following judgment and possibly rendering the Belgian courts unavailable to hear this action.

Furthermore, as KPMG US is a non-Belgian entity, it is possible that Belgium lacks jurisdiction over KPMG US, at least as to class members' injuries not suffered in Belgium. *See* Matray Decl. ¶¶16-19; *see also* Lead Plaintiffs' Opp. to Motions to Dismiss at 30 n.28 (noting that KPMG US's failure to assert a *forum non conveniens* defense was a concession that this forum (rather than Belgium) is the proper forum for claims against KPMG US). Consequently, to the best knowledge of the Lead Plaintiffs, the criminal investigation has excluded KPMG US from its enquiry, meaning that there will be no criminal proceedings against KPMG US at the conclusion of the investigation.<sup>9</sup> Without the possibility of formal criminal findings against KPMG US, the ability to prosecute a civil action (which, under Belgian law, must await the outcome of the criminal action) against KPMG US is doubtful. *See* Matray Decl. ¶¶20-22. Accordingly, each of these procedural issues stand as possible impediments to Belgium even being an available forum for this litigation.

**B. Dismissal for *Forum Non Conveniens* Requires that an Alternative Forum Be Available**

Dismissal under the doctrine of *forum non conveniens* is premised on the existence of an alternative forum. *See Iraborri v. International Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000) (“When a defendant moves for dismissal on *forum non conveniens* grounds, it bears the burden of showing . . . *that an adequate alternative forum exists* . . .”) (emphasis added). This requirement is met only if “the alternative forum *addresses the types of claims that the plaintiff*

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<sup>9</sup> This has been confirmed by Mr. Van Buggenhout, who received on August 1, 2006 a confidential draft indictment notification (kennisgeving van ontwerp van tenlasteleggingen) prepared by the prosecutor's office at the court of appeal of Gent (Parket bij het Hof van Beroep van Gent). In this draft indictment notification, 22 individuals or legal entities are cited for criminal offences. This list does *not* include KPMG US or any of its officials, partners or representatives.

has brought **and** that the *defendant is amenable to service of process* there.” *Id.* (emphasis added) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)). As the Supreme Court in *Piper* has made clear, “dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute” nor would it be appropriate where the defendants were not “amenable to process.” *Piper*, 454 U.S. at 254 n.22.

If the risks identified by Lead Plaintiffs both prior to the Order and herein are realized, then Belgian courts would not permit litigation of the subject matter of the dispute, nor would all Defendants be amenable to process. Therefore, dismissal of this action prior to resolution of these issues would be both premature and in error. *See, e.g., Marriott v. Sedco Forex Int'l Resources, Ltd.*, 827 F. Supp. 59, 71 (D. Mass. 1993) (By “fail[ing] to establish amenability to process in England, and perhaps because England does not permit litigation of the subject matter of the plaintiffs’ dispute, [defendant] has failed to establish that England is an adequate alternative forum.”), Accordingly, Lead Plaintiffs respectfully request this Court reconsider and amend its Order and stay entry of the judgment therein until the availability of the Belgium forum has been confirmed.

**C. If Belgium Lacks Jurisdiction Over KPMG US or if KPMG US Is Not Named in the Criminal Proceeding,, Belgium Would not Be an Available Forum**

KPMG US’s headquarters and principal place of business is in the U.S., not Belgium. *See* <http://www.us.kpmg.com/about/statistics.asp>. Accordingly, whether KPMG is amenable to service of process in Belgium is in doubt. *See* Matray Decl. ¶¶16-19; *see also* Lead Plaintiffs’ Opp. to Motions to Dismiss at 32-33 (noting Belgium’s lack of compulsory process). The risk that Belgium lacks jurisdiction over KPMG US is borne out by the fact that the criminal investigator has declined to name KPMG US as part of its investigation because of such risk,

insuring that no attempt will likely be made to even include KPMG US as a criminal defendant.

KPMG US itself appears to have acknowledged that Belgium is not the proper forum for claims against it. As noted in Lead Plaintiffs' Opposition to the Motions to Dismiss, only the Belgian Defendants moved for dismissal based on *forum non conveniens*. See Lead Plaintiffs' Opp. to Motions to Dismiss at 30 n.28 (asserting that KPMG US's failure to assert such a defense was a concession that this forum (rather than Belgium) is the proper forum for claims against KPMG US). KPMG US offered no response to this in its Reply Brief and has never consented to the jurisdiction of the Belgian courts.<sup>10</sup>

Irrespective of the fact that KPMG US was named in the Belgian civil action, it is highly unlikely that the case against it can ever be prosecuted there. In Belgium, no civil proceedings can commence until the criminal investigation has concluded and indictments made. See Matray Decl. ¶¶20-22. Even then, the civil proceedings must wait until the conclusion of the criminal proceedings. See Lead Plaintiffs' Opp. to Motions to Dismiss at 33 n.35. This Court is well aware that for more than six years now such a protocol has kept the Belgian civil action from proceeding.

Critically, the claims in the civil proceedings must conform their claims to the findings made in the criminal proceedings. See Matray Decl. ¶21. Because of jurisdictional concerns, KPMG US is not a target of the criminal investigation, and will not, therefore, be a defendant in any criminal proceedings. Without any criminal findings on which to base a civil claim, any civil action against KPMG US (even assuming that jurisdiction exists over KPMG US in

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<sup>10</sup> Even if the Court does not amend its judgment and stay entry of its February 12, 2007 order pending the outcome of the Belgian proceedings, Lead Plaintiffs respectfully request the Court condition such dismissal on KPMG US submitting to the jurisdiction of the Belgian courts. See *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 427 (1st Cir.

Belgium) will be severely hobbled, of not rendered impossible. *See Matray Decl.* ¶¶20-22.

Ultimately, if the Belgian civil court cannot adjudicate claims against KPMG US because either KPMG was not named in the criminal proceeding or the Belgian courts lack jurisdiction over KPMG US, then KPMG US would not be amenable to process in Belgium and the Belgian Courts would be unable to adjudicate the subject matter of this litigation, rendering Belgium neither an adequate nor available forum and dismissal for *forum non conveniens* erroneous. *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 424 (1st Cir. 1991) (“[A] finding that there is a satisfactory alternative forum requires that (1) *all parties* can come within that forum’s jurisdiction . . . .”) (emphasis added); *see also Piper*, 454 U.S. at n.22 (1981); *Marriott*, 827 F. Supp. at 71.

**D. Dismissal of the Belgian Action as Violating EU Human Rights Law Would Render Belgium an Unavailable Forum**

Belgian courts may bar litigation of the subject matter of this dispute if such litigation violates EU Human Rights laws guaranteeing the parties a right to appeal judgment to the court of appeals. One of the Defendants in the Belgian action (Cauwelier) serves as a judge in the Belgian courts’ equivalent of the trial court. This conflict of interest means that once the criminal and civil actions finally begin in Belgium, such actions will necessarily be heard at the appellate court level, removing all parties’ right to later appeal to the appellate court. *See Matray Decl.* ¶6. Accordingly, the risk exists that denial of this right of an appeal violates EU Human Rights Law which guarantees such right to an appeal, which may force the courts to dismiss the action in its entirety. *See Matray Decl.* ¶¶6-15. If the Belgian courts do not permit the litigation

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1991) (finding such conditional dismissal to be appropriate remedy).

of the subject matter of this dispute, Belgium would be neither an available nor adequate forum, and dismissal for *forum non conveniens* would be erroneous. *Piper*, 454 U.S. at n.22 (1981); *Marriott*, 827 F. Supp. at 71.

### **III. CONCLUSION**

For the reasons set forth above, Lead Plaintiffs respectfully request that the Court reconsider and amend its February 12, 2007 Order dismissing Lead Plaintiffs' claims based on *forum non conveniens* and stay such judgment until after the Belgian civil action has concluded, or at least until after the availability of Belgium as an adequate forum has been resolved.

Respectfully submitted,

**/s/ David S. Nalven**

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Dated: February 27, 2007

**CERTIFICATE OF SERVICE**

I, David S. Nalven, hereby certify that I am Liaison Counsel For Lead Plaintiffs and the Class and that, on February 27, 2007, I caused copies of the papers annexed hereto to be served on all counsel of record in this proceeding via CM/ECF filing.

/s/ David S. Nalven

Dated: February 27, 2007