[informal translation from Dutch]
Amsterdam Court of Appeal
Date: 24 February 2017
Case number: 200.191.713/01

SUBMISSION OF ADDITIONAL ANNEXES WITH ACCOMPANYING EXPLANATION

in the matter of:

1. **AGEAS SA/NV**,
with its registered office in Brussels, Belgium, electing as address for service in this matter Claude Debussylaan 80, 1082 MD Amsterdam
("**Ageas**")
counsel: H.J. de Kluiver, D. Horeman and J.W.M.K. Meijer

2. **VERENIGING VAN EFFECTENBEZITTERS (DUTCH SHAREHOLDERS' ASSOCIATION**,
with its registered office in The Hague, electing as address for service in this matter Amaliastraat 7, 2514 JC Den Haag
("**VEB**")
counsel: P.W.J. Coenen

3. **DRS BELGIUM CVBA**,
with its registered office in Brussels, Belgium, electing as address for service in this matter Maliesingel 20, 3581 BE Utrecht
("**Deminor**")
counsel: K. Rutten

4. **STICHTING INVESTOR CLAIMS AGAINST FORTIS**,
with its registered office in Amsterdam, electing as address for service in this matter Westermarkt 2-H, 1016 DK Amsterdam
("**SICAF**")
counsel: J.H.B. Crucq

5. **STICHTING FORTISEFFECT**,
with its registered office in Utrecht, electing as address for service in this matter Maliebaan 70, 3581 CV Utrecht
("**FortisEffect**")
counsel: A.J. de Gier

6. **STICHTING FORSETTLEMENT**,
with its registered office in Amsterdam, electing as address for service in this matter Barbara Strozzilaan 101, 1083 HN Amsterdam
(the "**Foundation**")
counsel: M.H. de Boer

1 INTRODUCTION

1. Ageas, VEB, Deminor, SICAF, FortisEffect and the Foundation ("**Petitioners**") have taken cognisance of the statements of defence of 9 February 2017 on the side of Hijmans et al. and André et al. respectively that were filed against the petition presented to this Court of Appeal on 20 May 2016 (the "**Petition**"). In response to the statements of defence, the Petitioners are filing supplementary annexes together with this document as an explanation thereto. Naturally, this document only concerns (and can only concern) a few points in the statements of defence. Furthermore, these matters do not deal with the additional annexes submitted by Hijmans et al. on 23 February 2017.

   The annexes concern:

   Annex 15 Expert opinion of the Analysis Group

   Annex 16 Curriculum vitae of Dr. A. Plantinga

   Annex 17 Press release by Ageas of 21 February 2017 and other publications about support for the settlement by Archand

   Annex 18 Background information regarding ConsumentenClaim B.V.

2. With regard to the statement of defence of Hijmans et al., it is clear that it is de facto a statement of defence of ConsumentenClaim B.V. ("**ConsumentenClaim**"). We refer to chapter 5 of this submission.

3. Both statements of defence were filed by the same lawyer on behalf of two groups of persons. The first group (Hijmans et al.) wishes that the settlement will not be declared binding whilst the second group (André et al.) does wish it to be declared binding but at the same time also wishes to retain the option of litigating further on a single point. This in itself already demonstrates that there is a lack of convincing objections.

4. The objections and supporting arguments that are put forward in the statements of defence cannot lead to the conclusion that the settlement must be declared non-binding. Instead they underline quite the opposite. In particular, none of the objections and arguments affect the fact that the level of the compensation offered is reasonable within the meaning of Article 7:907(3)(b) DCC.

2 THE COMPENSATION OFFERED IS REASONABLE

5. In the Petition, the Petitioners explained with substantiation that the Settlement Agreement makes provision for a reasonable compensation which is reasonably proportionate to the damage that Eligible Shareholders might have suffered. This is expressly supported by a detailed and meticulous economic analysis which is incorporated in the report of the Analysis Group, a very experienced economic legal research bureau with an excellent reputation, and which was submitted by the Petitioners as Annex 10 to the Petition.

6. Hijmans et al. contend on the other hand that the compensation provided by the Settlement Agreement is not reasonable. What the counter-arguments of Hijmans et al. essentially come down to is that the alleged damage to Eligible Shareholders according to their own calculations is higher than the calculations of the Analysis Group and moreover, that the calculations of the Analysis Group are apparently also incorrect.[1] It is explained below that the calculations of Hijmans et al. do not provide any insight into the potential damage to Eligible Shareholders and that the criticism levelled by Hijmans et al. at the report of the Analysis Group is unfounded. The Petitioners submit as **Annex 15** an additional expert opinion of the Analysis Group which will be discussed in more detail below.

2.1 The 'calculation of damages' of Hijmans et al.

7. By way of substantiation of their argument that the damage of Eligible Shareholders is supposedly higher than the Analysis Group has calculated, Hijmans et al. are relying on a summary of exactly four pages of a report from an anonymous source that has allegedly

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1 Statement of defence Hijmans et al., nos. 193-194.

been compiled but has not been submitted together with a single A4 page originating from Dr. Plantinga,[2] an employee of the University of Groningen. It is clear from his CV that he has no expertise whatsoever with regard to the calculation of damages (**Annex 16**). Contrary to what Hijmans et al. contend, there is absolutely no evidence in the submitted summary and the A4 of Plantinga that the potential damage of Eligible Shareholders would be higher than the calculations of the Analysis Group would suggest.

8. Although the submitted summary barely deals with the model used and the calculations made, it is immediately clear that this does not provide any insight whatsoever into the damage that Eligible Shareholders may have suffered as a consequence of the purported misleading reporting by Fortis. The Petitioners have asked the Analysis Group to assess the submitted summary and the A4 page from Plantinga. The most important comments of the Analysis Group from the additional expert opinion in which the Analysis Group has set out its findings are briefly touched on again below (see also Annex 15, Section VI).

- The methodology used by Hijmans et al./ConsumentenClaim is unable to provide a proper calculation of the damage. The Analysis Group explains this further by indicating that the Black-Scholes-Merton model is totally unsuitable for application under the volatile market conditions that were prevalent in the financial crisis.[3]

- The underlying assumptions and the conclusions that are drawn in the anonymous summary are incorrect. This follows from the reservations that Plantinga makes and that are worked out in detail in the expert opinion of the Analysis Group, in particular in paragraph 62 of that expert opinion.

- In the methodology used by Hijmans et al., the entirely incorrect assumption is made that the total difference between the actual rate of exchange of the Fortis share and the expected rate of

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2 Exhibits 9 and 10 to the Statement of defence Hijmans et al.

3 Annex 15, paragraph 63 et seq.

exchange of the Fortis share can be attributed to the purported misleading reporting by Fortis.[4] Even Plantinga does not agree with this: *"It is not possible to establish that the damage calculated in this manner necessarily follows from the incorrect provision of information to the shareholder*"[5] he argues.

9. In view of the points referred to above, there is only one possible conclusion: the summary of the anonymous source enlisted by Hijmans et al./ConsumentenClaim is unusable for calculating damages. Plantinga was explicitly requested to endorse the calculations and not the submitted report.[6] However, Plantinga does not endorse this in his single A4 document as is perfectly clear from the many broad reservations he makes therein. What remains are merely general assertions which do not confirm anything in essence, such as: "*The calculations in the model were performed in accordance with the basic principles that are set out in the model.*"[7] Plantinga states only that calculations were performed on the basis of the premises formulated by Hijmans et al. but ***not*** that this 'calculation of damages' by Hijmans et al. is correct.

2.2 The criticism of the Analysis Group report is unwarranted and unsubstantiated

10. In contrast to the four page summary originating from an anonymous source which contains nothing more than a few unsubstantiated assertions regarding the possible damage of Eligible Shareholders and the single A4 page from Plantinga, is the extensive report of the Analysis Group as submitted with the Petition, a leading authority with more than 30 years of experience in the calculation of damages.[8] The report of the Analysis Group is compiled on the basis of a proven, accepted methodology which finds support in case law and academic scientific literature under the direction of Dr. Van Audenrode. The aforesaid is a renowned expert in the field of the calculation of damages in securities litigation among other things,

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4 Annex 15, paragraph 69.
5 Exhibit 10 to the Statement of Defence Hijmans et al., page 2, under Conclusion no. 2.
6 Exhibit 10 to the Statement of Defence Hijmans et al., page 2, under Introduction.
7 Exhibit 10 to the Statement of Defence Hijmans et al., page 2, under Conclusion no. 5.
8 For more information see: www.analysisgroup.com/practices/damages/

who has acted as expert with regard to calculating damages in 30 lawsuits in the US, Canada and Belgium.[9]

11. Hijmans et al. are nevertheless of the opinion that the report of the Analysis Group may not be used. The criticism of Hijmans et al. is essentially aimed at the following points:

    (i) The calculation of the number of shares that would be eligible for compensation and that have been included in the calculation of damages is incorrect.[10]

    (ii) The price inflation of the Fortis Share was apparently not calculated properly.[11]

    (iii) The dilution risk was apparently incorrectly estimated.[12]

    (iv) Not all of the allegations made against Fortis have been included in the report.[13]

12. The criticism of Hijmans et al. shows that the report of the Analysis Group, whether or not deliberately, has not been examined diligently and in any case has not been properly understood. The Petitioners have therefore asked the Analysis Group to further clarify a number of aspects from its report once again and to respond to the criticism of Hijmans et al. (Annex 15). An explanation as to why the criticism of Hijmans et al. is unfounded is given below on the basis of the additional expert opinion of the Analysis Group and explanatory notes incorporated therein.

(i) The number of shares that would be eligible for compensation and that have been included in the calculation of the damages

13. A large part of the statement of defence of Hijmans et al. is dedicated to criticising the number of shares that were allegedly included in the calculation of the damage by the Analysis Group. The

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9 The CV of Dr. Van Audenrode is included in Annex A of the Analysis Group report.
10 Statement of defence Hijmans et al., nos. 28-40 and nos. 265-285.
11 Statement of defence Hijmans et al., nos. 286-292 and nos. 323-330.
12 Statement of defence Hijmans et al., nos. 160-189 and nos. 331-338.
13 Statement of defence Hijmans et al., nos. 293-322 and nos. 339-341

Analysis Group has explained once again in its supplementary expert opinion that all relevant shares have been included in the calculation. In addition, the way in which this should be economically evaluated is indicated (Annex 15, Section IV). The latter does not affect the former but highlights the reasonableness of the compensation all the more so. The Analysis Group also explains that in assessing the potential dilution risk, it included all Fortis Shares which could be eligible for compensation under the Settlement Agreement (i.e. both Buyer Shares and Holder Shares).

(ii) The calculation of the share price inflation

14. The Analysis Group has explained in its report that a calculation has been made on the basis of the most widely used economic scientific method ("event studies") of the potential price inflation of the Fortis Share that might have been caused by the purported misleading reporting by Fortis.[14] Hijmans et al. are of the opinion that the method used by the Analysis Group to calculate the potential inflation of the Fortis Share is incorrect and is focused mainly on the basic principle that information is assimilated in the price of a share within approximately 15 minutes. The Analysis Group has further clarified the methodology used for calculating the share price inflation and has emphatically refuted the criticism made by Hijmans et al. of the basic principle used by the Analysis Group (Annex 15, Section V under A-C).

(iii) The estimation of the dilution risk

15. Hijmans et al. are of the opinion that the dilution risk by the Analysis Group has been estimated incorrectly and refers by way of substantiation to the calculations that Hijmans et al. has made itself. The Analysis Group has discussed in its additional expert opinion why the calculations of Hijmans et al. are incorrect and has explained once again how the calculations of the Analysis Group on this point came about and what turnout percentage of Non-Active Claimants can be reasonably expected (Annex 15, Section V under D-E).

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14 Analysis Group report, nos. 20-30.

(iv) The allegations made against Fortis

16. Finally, Hijmans et al. asserts that the Analysis Group has wrongly not included certain allegations made against Fortis in its report. Furthermore, the three Relevant Periods have apparently not been determined correctly because on the final dates of these, the market (still) had not provided correct and complete information. It is impossible to understand this argument of Hijmans et al.

17. It must be noted first and foremost that in assessing the reasonableness of the compensation offered, the Analysis Group naturally focused on those matters that Ageas and the interest groups had reached a consensus on in the Settlement Agreement (see also Annex 15**,** paragraph 1). This consensus ensued from the many legal proceedings that were conducted from 2008 onwards in which all facts and circumstances were debated at length. The Analysis Group and the Settlement Agreement rightly take this as a starting point. It is not for the Analysis Group to form a legal opinion about this. As is also apparent from the procedural documents of all the proceedings that have been submitted by the Petitioners, the allegations against Fortis focus on the conduct of Fortis during three periods in 2007 and 2008. All arguments that could be made in connection with this by both sides (the claimants and Ageas) were likewise taken into account during the negotiations between Ageas and the interest groups which resulted ultimately in the Settlement Agreement. Hijmans et al. have ignored that and, in the context of the assessment of the reasonableness of the compensation offered, are now attempting to reopen the debate about the allegations that can or cannot be made against Fortis in connection with the events concerning Fortis that arose in 2007 and 2008 which are provided for by the Settlement Agreement as described in paragraph 5.1 of the Petition (hereinafter in accordance with the definition in the Petition: the "**Events**"). This is however not under discussion in these proceedings. This concerns only the question of whether the compensation offered is reasonable.

Conclusion: the compensation that is being offered is reasonable

18. The criticism expressed by Hijmans et al. of the report of the Analysis Group is unfounded as has been explained above. The Analysis Group has come to the conclusion on the basis of a scientifically proven method and a meticulous analysis of the relevant facts that both the compensation per Fortis Share and the total amount that has been reserved under the Settlement Agreement for Active Claimants and Non-Active Claimants are reasonable.

19. Ageas and the interest groups agree with the conclusion of the Analysis Group that the compensation per Fortis Share for both Active Claimants and Non-Active Claimants is reasonable. They are also of the opinion that the methodology used by the Analysis Group in this concrete case is a suitable method for assessing the reasonableness of the compensation, taking into account the structure of the compensation which is based on a certain amount per Fortis Share per Relevant Period.

20. The fact that the compensation provided for by the Settlement Agreement is reasonable is also apparent from the broad support for the settlement, as has already been explained in the Petition.[15] In addition to this, Archand has also recently agreed to the Settlement Agreement and has expressed its support for it (**Annex 17**).

3 DISTINCTION BETWEEN DIFFERENT CLAIMANTS

21. Hijmans et al. assert that there are no reasonable grounds for the distinction made by the Settlement Agreement between compensation for Active and Non-Active Claimants (with the exception of the incurred costs). As is apparent from the preceding, the compensation that has been made available to Non-Active Claimants is reasonable and the criticism in this regard made by Hijmans et al. is not convincing. The fact that Active Claimants are eligible for a premium does not make this any different.

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15 Petition, chapter 8.7.

22. It should be stated at the outset that without the Active Claimants, no settlement would have come about. Without them, the Non-Active Claimants would not have been eligible for any compensation at all. The Non-Active Claimants have after all not undertaken any action themselves to this end. Thanks to the Active Claimants and their interest groups, there is now a reasonable settlement and compensation in place for the Non-Active Claimants. The total amount that has been made available to Non-Active Claimants thanks to the Active Claimants by itself already exceeds the amount that has been available up until now in the largest WCAM settlement.

23. The distinguishing criterion between Active and Non-Active Claimants is, briefly stated, whether the person concerned has instituted legal proceedings against Ageas, be it directly or via an interest group that the person concerned joined prior to the start of intensive negotiations with the parties that have instituted these legal proceedings. These legal proceedings have resulted in negotiations regarding a settlement and in the conclusion of a settlement which would not have come about without these legal proceedings.

24. Not only persons who themselves have brought legal proceedings against Ageas or who are members of a particular interest group, but also those who have registered with an interest group in connection with the proceedings against Ageas classify as Active Claimants. It is these persons in particular who have brought their weight to bear in the interest groups concerned thereby giving them added status and who in this way have prompted Ageas to make a settlement.

25. Non-Active Claimants are those persons or entities that did not undertake any activities against Ageas from 2008 up until the announcement of the settlement. They have not instituted legal proceedings against Ageas and are not affiliated with interest groups that have done so and have contributed to negotiations regarding the settlement whereby compensation has been stipulated. If they had not done so, then Non-Active Claimants would have had to continue litigating for years, even after the close of any collective actions that do not provide for compensation, before they would have eventually received any compensation. However, there is now a settlement in place under which even those who did not do anything are also

eligible for a reasonable compensation. If a Non-Active Claimant is not satisfied with this, he or she can still opt out.

26. Objectively speaking, Non-Active Claimants are "*free riders*". Hijmans et al. claim that the Petitioners state that this *free rider* behaviour is undesirable and that Non-Active Claimants therefore ought to receive less compensation. However, this is not what the Petitioners conveyed. It should be stated at the outset that Non-Active Claimants will not receive less compensation. They merely do not qualify for the premium that has been made available to Active Claimants. This is reasonable because Non-Active Claimants did not do anything which contributed to the settlement. Active Claimants on the other hand did, as explained above, and that is why it is reasonable that they should receive a bonus. The Petitioners have also not argued that free rider behaviour should not be possible and that they should not have any claim to compensation (the fact that free rider behaviour is possible is also apparent from the compensation for this group in the case at hand), but they argue that this attitude does not give any reason for awarding a bonus.

4 REPRESENTATIVENESS WITH REGARD TO NON-ACTIVE CLAIMANTS

27. Hijmans et al. contend that the interest groups are not representative with regard to Non-Active Claimants. This argument hardly affects the case. The majority of the organisations involved in the settlement instituted a collective action and thereby in fact did concern themselves with the interests of the Non-Active Claimants as well, and they also actively promoted these interests during the proceedings and during the negotiations regarding the settlement. If the inference is that Non-Active Claimants did not join up with them, this argument is naturally also unconvincing. The crux is precisely that Non-Active Claimants were not actively involved and in general accordingly also did not join up with an organisation that was active. Having said that, it is certainly the case that a number of Non-Active Claimants have in the meantime also added their support to the settlement which includes those who joined the active organisations after 31 December 2014.

28. The fact alone that, as has been explained above in paragraph 2, the compensation that has been made available to Non-Active Claimants under the Settlement Agreement is reasonable shows that the interest groups are also representative of Non-Active Claimants. The only reason that there is any compensation, which is moreover reasonable, for Non-Active Claimants is due to the fact that the interest groups also negotiated on behalf of and with a view to the interests of Non-Active Claimants. Furthermore, the interest groups were aware that persons would still come forward afterwards who would qualify as Non-Active Claimants and that a settlement agreement would then only be eligible for a general binding declaration if the amount of the compensation for Non-Active Claimants were to do justice to their situation. In the course of the negotiating process, the reasonableness of the compensation for Non-Active Claimants was also taken as a basic premise and continually taken into consideration.

5 CONSUMENTENCLAIM B.V.

29. In no. 2 of this document, it has already been pointed out that the statement of defence of Hijmans et al. is de facto a statement of defence of the private company with limited liability ConsumentenClaim (**Annex 18**). For example, references are made several times in the statement of defence to this organisation and the same lawyer is acting in the class action that has been initiated by Stichting Fortisclaim (an initiative of ConsumentenClaim). It has also been announced in the media that ConsumentenClaim will conduct a defence and these also refer to the communication from ConsumentenClaim to its followers.[16]

30. ConsumentenClaim is a purely commercially-driven claim organisation. ConsumentenClaim has, in the words of (co-)founder Mr Van Dijk, "*a purely commercial approach*", something that is underlined by the no cure no pay fee structure that ConsumentenClaim is applying in this case (see Annex 18) and the further set-up of this organisation. ConsumentenClaim barely stirred

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16 See Annex 18. It is by the way not clear to the Petitioners why ConsumentenClaim displays the logo of the Judiciary on its website in connection with this (see Annex 18, p. 2).

itself, if at all, in response to the Events. It was only in mid June 2016 (three months after the announcement of the settlement) that it initiated a class action, via Stichting Fortisclaim, against Ageas on the basis of information made available and results achieved through the endeavours of others. ConsumentenClaim has in fact not made a single contribution to the settlement.

6 THE SCOPE OF THE RELEASE

31. André et al. claim that the discharge which is provided for in the Settlement Agreement (the "**Release**")[17] is too broad because the Release should also provide for liability for the supposed claim of André et al.,[18] which pertains mainly to the so-called dismantling of the former Fortis. In making this assertion, André et al. are disregarding the rationale of the Release as well as the existence of an opt-out possibility under the Settlement Agreement.

32. The objective of the Settlement Agreement is that 10 years after the fact, a definite end will be made to the years of litigation in connection with the Events in 2007 and 2008, that further litigation will be prevented to the extent possible and that both Eligible Shareholders and Ageas will be provided with financial security. In line with the objective of the Settlement Agreement, the Release also provides for all Events, including the events on which André et al. are basing their action. On the other hand, the compensation under the Settlement Agreement is not restricted to shareholders who bought or held shares in the Relevant Periods: all Eligible Shareholders can in principle claim a basic compensation and additional compensation for the Fortis Shares that they held in the period between 28 February 2007 c.o.b. and 14 October 2008 c.o.b. André et al. accordingly also fall under this (which is not disputed by André et al.).

33. The compensation which André et al. can claim in principle is furthermore very reasonable taking into account the very slight chance of success of the claim of André et al. Leaving aside the fact

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17 The Release is included in article 5.1 of the Settlement Agreement. André et al. refer to article 5.1.1; The Petitioners assume that article 5.1.2 is meant.

18 Statement of Defence André et al., nos. 10, 16.

that the shareholders at the time agreed to the dismantling of Fortis and that there are considerable legal obstacles to a claim in this matter, shareholders who bought shares after 3 October 2008 have not suffered any damage in economic terms anyway and the shareholders that held shares prior to that did have a claim to compensation (in any case in what is known as 'Period 3'). The allegations of André et al. were moreover previously, and in fact exclusively, put forward by FortisEffect and these allegations have already been dismissed on substantive grounds by the Court of Appeal.[19]

34. If André et al. are nevertheless of the opinion that the Settlement Agreement does not offer any reasonable compensation, then André et al. can make use of the opt-out possibility provided for in the Settlement Agreement. An alteration of the Release cannot serve as an alternative to this. It would not be right for André et al. to collect compensation under the Settlement Agreement without granting Ageas discharge and to subsequently continue litigating even though the settlement and the WCAM proceedings are in fact aimed at putting an end to the uncertainty for the company as well as investors and other stakeholders.

Amsterdam, 24 February 2017

Counsel for Ageas
On behalf of the Petitioners

19 Amsterdam Court of Appeal 29 July 2014, JOR 2014/300.