In the United States Court of Appeals for the Third Circuit

No. 08–2785

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY; JAMES WALNUM, on behalf of themselves and all others similarly situated,

v.

DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.,
Defendants/Appellees.

SUSAN M. QUINN,
Objector/Appellant.

On Appeal from the United States District Court for the District of New Jersey, No. 04–cv–02819
(Honorable Stanley R. Chesler, U.S. District Judge)

SUPPLEMENTAL BRIEF OF APPELLANT SUSAN M. QUINN ON REHEARING EN BANC

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I. INTRODUCTION

Objector/appellant Susan M. Quinn respectfully submits this supplemental brief in accordance with this Court's order dated November 10, 2010. In pertinent part, that order provides:

> (1) The parties are directed to address the following assertions:
>
> (a) the predominance inquiry requires that each potential class member share at least one identical claim;
>
> (b) predominance is satisfied if class members have different claims as long as each contains elements requiring resolution of common issues of fact;
>
> (c) predominance is satisfied if class members have related, but different, claims that all arise out of the same course of conduct on the part of the defendant;
>
> (d) predominance does not examine the 'claims,' as such, of all potential plaintiffs, but focuses on the 'predominance' of common, versus individualized, issues of fact or law that will be presented by a certain class action, as framed in the complaint, and as anticipated to be tried.
>
> (2) Assuming, arguendo, that certain indirect purchaser plaintiffs do not have a cause of action, is this set of facts properly analyzed under Rule 23(a)(2)'s prerequisite that there be "questions of law or fact common to the class," Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members," both, or neither?
>
> (3)(a) Does including class members in a settlement–only class who do not have a common valid claim under the

applicable substantive law preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

(3)(b) Does including class members in a settlement–only class who do not have either a shared valid claim under the applicable substantive law, or a shared issue of fact relevant to different valid claims, preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

(3)(c) If class members do not have a shared claim, does the existence of related, but different claims, all arising out of the defendants' course of conduct preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

(4) Where some states provide a right to relief, while others do not, does there exist, as we wrote in *In re Warfarin*, a "situation[] where variations in state laws are so significant as to defeat commonality and predominance"? If not, what kind of variation would defeat commonality and predominance?

(5) In a settlement class, is the District Court required to assure itself that each class member has a valid claim under the applicable substantive law? If so, what standard should the District Court apply? If a "facially apparent" standard applies, how should a district court determine whether it is facially apparent that some class members have no valid claim?

(6) Does the nationwide settlement class of indirect purchasers certified by the District Court contain class members who do not have a right to relief under any of the three state–law causes of action pled in the complaint?

> (7) Did the District Court run afoul of the Rules Enabling Act because its order effectively granted relief to individuals to whom De Beers had no antitrust liability?
>
> (8) Did the District Court's order effectively grant relief under claims from states that had foreclosed such relief? If so, did the District Court run afoul of principles of federalism?
>
> (9) Is De Beers's decision to voluntarily enter into a settlement relevant to any issue regarding the Rules Enabling Act or the requirements of commonality or predominance under Federal Rule of Civil Procedure 23?

En banc supplemental briefing order dated Nov. 10, 2010.

As this Court is aware, Ms. Quinn is the only objector who raised before the district court and pursued on appeal the specific objections that give rise to this en banc rehearing. Below, Ms. Quinn addresses each of the matters raised in this Court's supplemental briefing order. For ease of comprehension, this supplemental brief at times will address closely related points in tandem.

II. DISCUSSION

(1) The parties are directed to address the following assertions:

(a) the predominance inquiry requires that each potential class member share at least one identical claim;

(b) predominance is satisfied if class members have different claims as long as each contains elements requiring resolution of common issues of fact;

(c) predominance is satisfied if class members have related, but different, claims that all arise out of the same course of conduct on the part of the defendant;

(3)(c) If class members do not have a shared claim, does the existence of related, but different claims, all arising out of the defendants' course of conduct preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

Federal Rule of Civil Procedure 23(b)(3) states, in pertinent part, that "A class action may be maintained if Rule 23(a) is satisfied and if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members * * * ." Fed. R. Civ. P. 23(b)(3).

In this case, indirect purchasers from De Beers have sued to recover the monopoly overcharge, if any, that has been passed–on in the price they paid to purchase diamonds. The parties agree that the law of the state in which the consumer's purchase took place would govern

whether the purchaser had a claim and, if so, what type of claim the purchaser would possess. *See*, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 823 (1985) (recognizing that "the constitutional limitations [involving choice of law] laid down in cases such as *Allstate* and *Home Ins. Co.* v. *Dick*, *supra*, must be respected even in a nationwide class action").

For purposes of definition, it is perhaps best to describe class members in a multistate class action as possessing an "identical claim" when the claim arises under the law of a single state, as was the case in *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004). In *Warfarin,* the district court held that all class members possessed at least one claim in common arising under Delaware's Consumer Fraud statute, because the defendant's unfair or deceptive merchandising practices were conducted in part or in whole within Delaware. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 248 & n.15 (D. Del. 2002).

In this case, by contrast, the district court did not conclude that all class members possessed the identical claim against De Beers arising under the law of a single state, nor has Class Counsel ever identified a

single claim arising under the law of a single state that all members of this nationwide class actually could assert against DeBeers.

Rather, in this case, the district court's opinion only analyzed whether a state law antitrust indirect purchaser claim under the laws of the 50 states could be certified for class action treatment against De Beers. Although that is what happened in the district court, it is not possible to characterize all class members as actually possessing the identical claim, because under the laws of approximately 25 states indirect purchasers are precluded from maintaining antitrust overcharge lawsuits in accordance with the policy concerns expressed in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

Cognizant of the flaws that plagued the district court's certification of a nationwide state law indirect purchaser antitrust class, Ms. Quinn's appellate briefs also proceeded to show that similarly fatal flaws would also plague any effort to certify nationwide consumer protection act or unjust enrichment classes, even though the district court's opinion did not purport to certify those claims for class treatment.

In response to this Court's specific inquiries, Ms. Quinn is not seeking to overturn or alter this Court's decision in *Warfarin*, 391 F.3d at 529–30, recognizing that members in a settlement class need not all possess the *same claim* against the defendant. *See also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 310 (3d Cir. 1998) (recognizing for purpose of Rule 23(a)(2)'s commonality requirement that "[a] finding of commonality does not require that all class members share identical claims"); Fed. R. Civ. P. 23(c)(4) ("[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues").

The fatal flaw with respect to commonality that plagued the district court's class certification decision in this case (as the majority on the three–judge panel recognized) was not that the members of this nationwide indirect purchaser antitrust class failed to possess the identical claim, but that in approximately half of all states class members possessed no valid claim against De Beers whatsoever.

> *(1)(d) predominance does not examine the 'claims,' as such, of all potential plaintiffs, but focuses on the 'predominance' of common, versus individualized, issues of fact or law that will be presented by a certain class action, as framed in the complaint, and as anticipated to be tried.*

Ms. Quinn entirely agrees with this assertion, the correctness of which the plain language of Federal Rule of Civil Procedure 23(b)(3) appears to establish. *See* Fed. R. Civ. P. 23(b)(3) ("A class action may be maintained if Rule 23(a) is satisfied and if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members").

In *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), this Court conducted an in–depth examination of the predominance requirement in the context of a federal law antitrust class action whose certification was being challenged on appeal. In that ruling, this Court recognized that it was the predominance of issues, rather than claims, that mattered for purposes of Rule 23(b)(3). *See* 552 F.3d at 310–311. This Court's ruling in *Hydrogen Peroxide* further recognized that "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Id.* at 320.

Even more recently, a unanimous three–judge panel of the U.S. Court of Appeals for the Eleventh Circuit undertook a thoughtful analysis of Rule 23(b)(3)'s predominance requirement in *Sacred Heart Health Sys., Inc.* v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159 (11th Cir. 2010). In *Sacred Heart*, the Eleventh Circuit explained:

> "Whether an issue predominates can only be determined after considering what value the resolution of the class–wide issue will have in each class member's underlying cause of action." *Rutstein v. Avis Rent–A–Car Sys., Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000). Common issues of fact and law predominate if they "'ha[ve] a *direct impact* on every class member's effort to establish liability' *that is more substantial than the impact of individualized issues* in resolving the claim or claims of each class member." *Vega*, 564 F.3d at 1270 (emphasis added) (quoting *Klay*, 382 F.3d at 1255). * * *
>
> To assess the impact of a common question on the class members' claims, a district court obviously must examine not only the defendant's course of conduct towards the class members, *but also the class members' legal rights* and duties. A plaintiff may claim that every putative class member was harmed by the defendant's conduct, but *if fewer than all of the class members enjoyed the legal right that the defendant allegedly infringed*, or if the defendant has non–frivolous defenses to liability that are unique to individual class members, *any common questions may well be submerged by individual ones*. This principle emerges clearly from our case law and that of other circuits.

Id. at 1170 (emphasis added in final paragraph of quotation).

To paraphrase the words of the Eleventh Circuit's ruling in *Sacred Heart*, in this case far "fewer than all of the class members enjoyed the legal right that the defendant allegedly infringed" so that, consequently, "common questions [are] submerged by individual ones." *Id.*

In sum, Ms. Quinn agrees that only issues of fact or law, rather than entire claims, must predominate to qualify a case for class certification under Rule 23(b)(3). In this case, however, where so very many indirect purchaser members of the putative class possess no claim for damages against De Beers, issues of fact or law fail to predominate under Rule 23(b)(3), necessitating that the district court's class certification be overturned.

> *(2) Assuming, arguendo, that certain indirect purchaser plaintiffs do not have a cause of action, is this set of facts properly analyzed under Rule 23(a)(2)'s prerequisite that there be "questions of law or fact common to the class," Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members," both, or neither?*

Ms. Quinn believes that the correct answer to this question is "both," because Rule 23's repeated mention of the term "claims" presupposes a scenario in which the claims being certified for collective

treatment at least have some arguable validity on a classwide basis. *See Sullivan* v. *DB Investments, Inc.*, 613 F.3d 134, 149 (3d Cir. 2010) (vacated on granting of rehearing en banc) ("That [predominance] test presupposes that everyone in the class at least has a cause of action.").

Under California law, an indirect purchaser would possess a valid overcharge claim against De Beers, whereas, under Ohio law, an indirect purchaser could not maintain any such claim against De Beers. These two indirect purchasers may colloquially have questions of law or fact in common, but those common questions would only be pertinent to the class certification inquiry under Federal Rule of Civil Procedure 23 if both of those states allowed for indirect purchaser recovery.

Although frequently Rule 23(a)(2)'s commonality requirement is viewed as subsumed within Rule 23(b)(3)'s predominance requirement, *see Warfarin*, 391 F.3d at 527–28, for purposes of a multistate class action that purports to combine for class treatment claimants from states that do and do not recognize the cause of action in question, both requirements serve distinct roles.

Thus, putative class members who do not even have an arguable cause of action under applicable law do not qualify for inclusion in a

class action for failure to satisfy Rule 23(a)(2) requirement of "questions of law or fact common to the class." Additionally, in a case such as this in which putative class members without an arguable cause of action make up a large portion of the entire proposed class, the case also fails Rule 23(b)(3)'s predominance requirement.

> *(3)(a) Does including class members in a settlement–only class who do not have a common valid claim under the applicable substantive law preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?*
>
> *(3)(b) Does including class members in a settlement–only class who do not have either a shared valid claim under the applicable substantive law, or a shared issue of fact relevant to different valid claims, preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?*
>
> *(4) Where some states provide a right to relief, while others do not, does there exist, as we wrote in* In re Warfarin*, a "situation[] where variations in state laws are so significant as to defeat commonality and predominance"? If not, what kind of variation would defeat commonality and predominance?*

In the circumstances of this case, in which approximately one–half of all states preclude indirect purchasers from pursuing antitrust overcharge damages claims, the answer to these three questions is a resounding "yes."

Two fairly recent federal appellate court rulings provide strong support for this answer. In *Stirman* v. *Exxon Corp.*, 280 F.3d 554, 564 (5th Cir. 2002), the Fifth Circuit held that "[i]n order for common issues to predominate, each of the states whose law is at issue must recognize an implied covenant to market, which is the heart of this class action." Similarly, in *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1267 (11th Cir. 2004), the Eleventh Circuit held that predominance was lacking in a proposed nationwide class action under state prompt–pay statutes where only 32 states affirmatively recognized the legal duty that the lawsuit sought to enforce.

Focusing more generally on the question of predominance in proposed class actions implicating the laws of numerous states, the Eleventh Circuit, in its recent ruling in the *Sacred Heart* case, explained as follows:

> Although there is no categorical bar to class treatment where the law of multiple states will apply, courts have expressed some skepticism of such treatment, particularly in substantive areas where the content of state law tends to differ. * * *
>
> Notably, in cases implicating the law of all fifty states, "[t]he party seeking certification ... must ... provide an *extensive analysis* of state law variations to reveal whether these pose insuperable obstacles." *Cole v. Gen. Motors Corp.*,

> 484 F.3d 717, 724 (5th Cir. 2007) (emphasis added) (quotation marks and citations omitted); *see also Klay*, 382 F.3d at 1262.

Sacred Heart, 601 F.3d at 1180.

Similarly, in *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit explained:

> In a multi–state class action, variations in state law may swamp any common issues and defeat predominance. *See Georgine v. Amchem Prods.*, 83 F.3d 610, 618 (3d Cir. 1996) (decertifying class because legal and factual differences in the plaintiffs' claims "when exponentially magnified by choice of law considerations, eclipse any common issues in this case"); *American Medical Sys.*, 75 F.3d at 1085 (granting mandamus in a multi–state products liability action, in part because "[t]he district court ... failed to consider how the law of negligence differs from jurisdiction to jurisdiction").
>
> Accordingly, a district court must consider how variations in state law affect predominance and superiority. *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.), *cert. denied*, 482 U.S. 915 (1987).

Id. at 741.

As U.S. District Judge Chesler recently and correctly observed in a different case, *Agostino* v. *Quest Diagnostics Inc.*, 256 F.R.D. 437 (D.N.J. 2009):

> In cases where numerous state laws are potentially applicable to a proposed class, the plaintiffs bear the burden to "creditably demonstrate, through an 'extensive analysis' of

> state law variances, 'that class certification does not present insuperable obstacles.'" *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (quoting *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)).

Id. at 466.

Due to the fact that in approximately half of all states indirect purchaser class members possess no valid antitrust claim against De Beers, this case certainly does present the situation contemplated in *Warfarin*, "where variations in state laws are so significant as to defeat commonality and predominance even in a settlement class certification * * * ." *Warfarin*, 391 F.3d at 529–30.

This Court's actual holding in *Warfarin* is distinguishable because, in that case, this Court did not conclude that class members in approximately half of the states lacked any valid claim against the defendant. Moreover, the district court in *Warfarin* had ruled that all class members possessed at least one claim in common arising under Delaware's Consumer Fraud statute, because the defendant's unfair or deceptive merchandising practices in *Warfarin* were conducted in part or in whole within Delaware. *See Warfarin*, 212 F.R.D. at 248 & n.15. In this case, by contrast, neither the district court nor Class Counsel has

identified any valid common claim that all class members possess against De Beers arising under the law of a single state.

For these reasons, this Court should hold that the indirect purchaser damages class that the district court certified fails to satisfy Rule 23(b)(3)'s predominance requirement.

> *(5) In a settlement class, is the District Court required to assure itself that each class member has a valid claim under the applicable substantive law? If so, what standard should the District Court apply? If a "facially apparent" standard applies, how should a district court determine whether it is facially apparent that some class members have no valid claim?*

A district court is required to assure both that each member of a settlement class has a valid claim under applicable substantive law and that the claim or claims certified for class treatment actually exist under the law that is claimed to give rise to them.

In *Hydrogen Peroxide*, this Court observed that "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." 552 F.3d at 311 (quoting *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001)). And in *Newton* itself, this Court agreed with the district court's conclusion that "individual questions of whether each class

member sustained economic injury presented insurmountable obstacles to certification." *Newton*, 259 F.3d at 187.

In this case, it is not even possible for a court to address whether antitrust impact — an element of an antitrust claim that this Court described as "critically important" to the predominance requirement in *Hydrogen Peroxide*, 552 F.3d at 311 — is capable of being proved by evidence common to the class because such a large proportion of the indirect purchaser overcharge class lacks any ability to assert an antitrust or similar claim under applicable state law. *See Sullivan*, 613 F.3d at 149 ("The variations in state law identified by the objectors preclude the requisite finding of predominance under Rule 23(b)(3) because indirect purchasers do not have a right to recover in all states, and, therefore, no question of law or fact regarding their legal rights is uniform throughout the class.").

This Court's rulings in *Hydrogen Peroxide* and *Newton* establish that a district court must determine that each class member has a valid claim under applicable substantive law, and there is no reason to suspect that the approach should be any different when a settlement

class is involved. *See Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997).

In addition, under no circumstances should a district court grant class certification of claims that simply do not exist under the law that is said to give rise to them. *See Georgine* v. *Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) ("we must apply an individualized choice of law analysis to each plaintiff's claims") (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. at 823), *aff'd sub nom. Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997).

In its recent ruling in *Sacred Heart*, the Eleventh Circuit explained:

> Notably, in cases implicating the law of all fifty states, "[t]he party seeking certification ... must ... provide an *extensive analysis* of state law variations to reveal whether these pose insuperable obstacles." *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007) (emphasis added) (quotation marks and citations omitted); *see also Klay*, 382 F.3d at 1262.

601 F.3d at 1180.

In *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (footnotes omitted), the D.C. Circuit explained: "As the Third Circuit observed in *In re Asbestos School Litigation*, to establish commonality of

the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'"

The opinion of the Court that the original three–judge panel issued in this case illustrates the sort of inquiry that the district court should have undertaken. In the span of a mere five pages of the Federal Reporter (3d ed.), *see Sullivan*, 613 F.3d at 146–51, the panel's opinion convincingly demonstrated the stark lack of commonality with respect to indirect purchaser overcharge claims under antitrust, consumer protection, and unjust enrichment law of the various states.

Although that sort of inquiry is undoubtedly research intensive, it is an inquiry that federal courts have frequently undertaken in multistate class actions in which indirect purchasers are seeking to recover damages for alleged antitrust violations. *See*, *e.g.*, *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 542 (E.D. Pa. 2010) (Brody, J.) ("where an antitrust defendant's conduct cannot give rise to liability under state antitrust and consumer protection laws [due to *Illinois Brick*], Plaintiffs should be prohibited from recovery under a claim for unjust enrichment"); *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 599

F. Supp. 2d 1179, 1189–92 (N.D. Cal. 2009) (listing various states that refuse to allow unjust enrichment claim to be used to circumvent unavailability of indirect purchaser antitrust or consumer protection claims); *In re OSB Antitrust Litig.*, 2007 WL 2253425, at *3 (E.D. Pa. 2007) (listing *Illinois Brick* repealer states); *In re Relafen Antitrust Litig.*, 225 F.R.D. 14 (D. Mass. 2004) (Young, C.J.) (examining the extent to which the laws of various states adhere to the limitations on indirect purchaser antitrust recovery established in *Illinois Brick*); *In re Microsoft Corp. Antitrust Litig.*, 241 F. Supp. 2d 563 (D. Md. 2003) (Motz, J.) (same); *In re Terazosin Hydrochloride Antitrust Litig*, 160 F. Supp. 2d 1365 (S.D. Fla. 2001) (same).

For these reasons, it is well–established that a district court must assure itself that the claims proposed to be certified for class treatment actually exist under the laws that give rise to them before class certification is granted.

(6) Does the nationwide settlement class of indirect purchasers certified by the District Court contain class members who do not have a right to relief under any of the three state–law causes of action pled in the complaint?

(7) Did the District Court run afoul of the Rules Enabling Act because its order effectively granted relief to individuals to whom De Beers had no antitrust liability?

(8) Did the District Court's order effectively grant relief under claims from states that had foreclosed such relief? If so, did the District Court run afoul of principles of federalism?

In response to question (6), and as the panel majority's opinion explained at length, the class as certified by the district court most certainly did contain class members who do not possess any valid claims under the state law that governs their purported causes of action. *See Sullivan*, 613 F.3d at 146–51.

The three state law causes of action at issue in this lawsuit are state law antitrust claims, state law consumer protection claims, and state law unjust enrichment claims. As the three–judge panel's opinion in this case explained, approximately 25 states have *not* extended antitrust standing to indirect purchasers through either *Illinois Brick* repealer statutes or through judicial decisions. *See Sullivan*, 613 F.3d at 147.

Courts in many states that follow *Illinois Brick* have likewise refused to permit an end–run around *Illinois Brick* by permitting consumer protection claims based on the same factual allegations underlying the state antitrust claims. *See*, *e.g.*, *Major* v. *Microsoft Corp.*, 60 P.3d 511, 513, 517 (Okla. Civ. App. 2002) (adopting trial court's decision holding that indirect purchaser cannot avoid *Illinois Brick* by recasting his claims of anticompetitive conduct as a consumer protection act claim); *Vacco* v. *Microsoft*, 793 A.2d 1048, 1063–67 (Conn. 2002) (same); *Blewett* v. *Abbott Labs.*, 938 P.2d 842, 846–47 (Wash. Ct. App. 1997) ("[T]his is the same claim with a different label. * * * We will not interpret the state antitrust law in a matter that 'rewards creative pleading at the expense of consistent application of legal principles.'"); *Sickles* v. *Cabot Corp.*, 877 A.2d 267, 277 (N.J. Super. Ct. App. Div. 2005) (permitting an indirect purchaser to recast his antitrust claim as a consumer fraud violation would essentially permit an end–run around the policies only allowing direct purchasers to recover under the antitrust act).

Furthermore, states that prohibit indirect purchaser standing for state law antitrust claims ordinarily do not allow that prohibition on

standing to be circumvented through state law unjust enrichment claims. *See In re Flonase Antitrust Litig.*, 692 F. Supp. 2d at 542 ("where an antitrust defendant's conduct cannot give rise to liability under state antitrust and consumer protection laws [due to *Illinois Brick*], Plaintiffs should be prohibited from recovery under a claim for unjust enrichment"); *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d at 1189–92 (listing various states that refuse to allow unjust enrichment claim to be used to circumvent unavailability of indirect purchaser antitrust or consumer protection claims).

Ohio is a prime example of a state under whose laws indirect purchasers have no claim for antitrust violations, consumer protection act violations, or unjust enrichment. In *Johnson* v. *Microsoft Corp.*, 834 N.E.2d 791 (Ohio 2005) the Supreme Court of Ohio held:

> [C]onsistent with long–standing Ohio jurisprudence, which has followed federal law in antitrust matters, we adopt and follow *Illinois Brick*'s direct–purchaser requirement and hold that an indirect purchaser of goods may not assert a Valentine Act claim for alleged violations of Ohio antitrust law.

Id. at 798.

> [A]n indirect purchaser cannot assert a common–law claim for restitution and unjust enrichment against a defendant without establishing that a benefit had been

> conferred upon that defendant by the purchaser. The facts in this case demonstrate that no economic transaction occurred between [the plaintiff] and Microsoft, and, therefore, [the plaintiff] cannot establish that Microsoft retained any benefit "to which it is not justly entitled."

Id. at 799.

> [A] complaint that alleges a violation of the Ohio Consumer Sales Practices Act (CSPA) predicated upon monopolistic pricing practices does not state a claim upon which relief can be granted because the Valentine Act[, the Ohio antitrust statute], not the CSPA provides the exclusive remedy for engaging in such conduct.

Id. at 801.

Thus, under the holding of the Ohio Supreme Court in *Johnson*, an indirect purchaser does not have a claim under Ohio's antitrust law or consumer protection law, or for unjust enrichment. Moreover, in most of the states that follow *Illinois Brick*, indirect purchaser class members have no state law claim to recover antitrust overcharges, because allowing any such claim would subvert the central principles of *Illinois Brick*.

The district court's certification of a class of indirect purchasers without regard to whether their claims arose in states that have abrogated *Illinois Brick* is directly contrary to core federalism concerns. As both this Court and the Supreme Court have recognized, although it

may be convenient and expedient in a nationwide class action governed by state law to invent some amalgamation of legal principles that could be applied to everyone, due process requires that the actual law of the states involved be applied. *See Georgine*, 83 F.3d at 627 ("we must apply an individualized choice of law analysis to each plaintiff's claims") (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. at 823).

The many states that follow the U.S. Supreme Court's approach in *Illinois Brick* have made policy choices to deny standing to indirect purchasers seeking to recover antitrust overcharge damages. In violation of core federalism principles, the district court here has disregarded and overridden those choices.

As then–Chief District Judge William G. Young of the District of Massachusetts observed in *In re Relafen*:

> "The modification of rights from those that can be enforced at trial to those that will be measured by weak conjecture [at settlement] effects a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious.... The wealth transfer is most apparent when the court–approved settlement treats diverse class members as if their claims were of equal worth."

225 F.R.D. at 22 (quoting Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of*

Mass–Tort Settlements Negotiated under Federal Rule 23, 39 Ariz. L. Rev. 461, 471 (1997)).

Instead of being willing to cavalierly disregard established limits on recovery and standing established under state law, this Court has been steadfast in its respect for those limits. *See Travelers Indem. Co.* v. *Dammann & Co.*, 594 F.3d 238, 253 (3d Cir. 2010) ("in reaching our conclusion we have exercised restraint in accordance with the well–established principle that where two competing yet sensible interpretations of state law exist, we should opt for the interpretation that restricts liability, rather than expands it") (internal quotations omitted); *City of Philadelphia* v. *Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) ("it is not the role of a federal court to expand state law in ways not foreshadowed by state precedent"); *see also Burris Chemical, Inc.* v. *USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993) ("Under *Erie Railroad v. Tompkins*, *supra*, the federal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion.").

As this Court has recognized, *Illinois Brick* represents a decision regarding which plaintiffs have standing to assert antitrust overcharge

claims. *See Howard Hess Dental Laboratories Inc.* v. *Dentsply Intern., Inc.*, 424 F.3d 363, 370 (3d Cir. 2005). When state law claims are being adjudicated in federal courts, federalism compels federal courts to observe state law limitations on standing. *See AT&T Mobility, LLC* v. *National Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1356, 1360 (11th Cir. 2007); *Myers* v. *Richland County*, 429 F.3d 740, 749 (8th Cir. 2005); *General Technology Applications, Inc.* v. *Exro Ltda*, 388 F.3d 114, 118 (4th Cir. 2004) ("A litigant bringing a diversity action (or seeking removal on that basis) can have no greater ability to assert legal rights created under state law than it would have in the state forum."); *Metropolitan Exp. Services, Inc.* v. *City of Kansas City, Mo.*, 23 F.3d 1367, 1369 (8th Cir. 1994) ("In a diversity case, a court will not address the plaintiff's claims unless the plaintiff has standing to sue under state law.").

For all of these reasons, the district court in this case violated core principles of federalism in certifying for class treatment and settlement claims that do not exist under applicable state law.

The district court's certification of those claims also violated the Rules Enabling Act. Rule 23's requirements must be interpreted in

keeping with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, *enlarge*, or modify any substantive right." *Amchem*, 521 U.S. at 613 (emphasis added) (quoting 28 U.S.C. §2072(b)). No reading of Rule 23 can ignore the Rules Enabling Act's mandate. Congress never gave, nor did the federal courts ever claim, the power to create substantive rights denied by state law. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

Rule 23, like all federal procedural rules, must be interpreted "with sensitivity to important state interests and regulatory policies." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996). Moreover, in *Semtek Intern. Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001), the Supreme Court recognized that the Rules Enabling Act represents a "jurisdictional limitation" on the power of federal courts.

In this case, the district court's certification of a nationwide indirect purchaser antitrust overcharge class recognized as valid, for purposes of Rule 23, claims that are not recognized as valid under applicable state law. Thus, the district court employed Rule 23 to modify and enlarge substantive rights under state law, with the direct

consequence that class members lacking any valid claim were compensated as though they possessed a valid claim. As a result, the district court's certification of a nationwide indirect purchaser damages class unquestionably violates the Rules Enabling Act.

To summarize: The district court in this case indisputably certified for class treatment numerous claims arising under the laws of many states that adhere to the prohibition on indirect purchaser antitrust overcharge claims that the U.S. Supreme Court recognized in *Illinois Brick*. As a result, the class certification not only fails Rule 23's predominance requirement, but it also runs afoul of core federalism principles and the Rules Enabling Act.

(9) Is De Beers's decision to voluntarily enter into a settlement relevant to any issue regarding the Rules Enabling Act or the requirements of commonality or predominance under Federal Rule of Civil Procedure 23?

When confronted with a request for settlement–only certification, a district court need not inquire whether a case, if tried, would present intractable management problems, for the proposal is that there would be no trial. *See Amchem*, 521 U.S. at 620. The manageability problems that a plaintiff typically faces in a multistate class are providing jury

instructions capable of being understood by a jury and a trial plan that adequately sets forth how the trial will proceed. *In re Prempro Products Liability Litig.*, 230 F.R.D. 555, 568 (E.D. Ark. 2005). Yet Ms. Quinn does not challenge the class certification at issue on appeal based on management issues. There are no management issues raised by any party to this appeal.

With the exception of manageability issues, the certification standards are the same for a settlement class as if the court were certifying the class for litigation because, under *Amchem*, manageability is the only aspect of Rule 23 certification that is different in any other way from certifying a litigation class. *See Amchem*, 521 U.S. at 620. *Amchem* states:

> Confronted with a request for settlement–only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems * * * . But other specifications of the Rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context.

Id.

The very definition of an overbroad class is one that includes persons who do not actually have a claim. As explained at length above, that is precisely the situation presented in this case.

The settlement posture of this case does not affect the Rules Enabling Act inquiry. Although parties are free to settle disputes privately outside of the auspices of the federal judiciary, the settlement of this case was achieved with the imprimatur of the federal judiciary, in the aftermath of a class certification that violates the Rules Enabling Act. Although the settlement of lawsuits, including class actions, is to be encouraged, the Supreme Court of the United States has made clear that even the settlement of class actions must abide by the limitations of the Rules Enabling Act. *See Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 613.

III. CONCLUSION

For the reasons set forth above and in Ms. Quinn's previously filed appellate briefs, this Court should vacate the district court's approval of the class action settlements and should vacate the district court's approval of Class Counsel's attorneys' fee request.

Respectfully submitted,

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Dated: December 10, 2010 /s/ *Howard J. Bashman*

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: December 10, 2010 /s/ *Howard J. Bashman*

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

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