In the United States Court of Appeals
For the Third Circuit

Nos. 08-2784, 08-2785, 08-2798, 08-2799, 08-2817, 08-2818, 08-2819, 08-2831 & 08-2881

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

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, Aaron Petrus, Janet Giddings, Frank Ascione, Rosaura Bagolie, Matthew De Long, Sandeep Gopalan, Manoj Kolel-Veetil, Ed McKenna, Matthew Metz, Anita Pal, Deb K. Pal, Jay Pal, Peter Perera, Rangesh K. Shah, Thomas Vaughan, David T. Murray, Marvin L. Union, Tim Henning, Neil Freedman, Kylie Luke, William Benjamin Coffey, Jr., Kristin Dishman, Margaret Marasco, James B. Hicks, Linda Mathews, Brad Boozer and Maurice Kraiem,
Objectors/Appellants.

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

PLAINTIFFS' BRIEF IN RESPONSE TO SUSAN M. QUINN'S RESPONSE TO CLASS COUNSEL'S MOTION FOR LEAVE TO FILE RECORD EXCERPTS REFERRED TO AT ORAL ARGUMENT

Josef D. Cooper
Tracy R. Kirkham
COOPER & KIRKHAM
357 Tehama Street
Second Floor
San Francisco, CA 94103
(415)788-3030

William Bernstein
Elizabeth J. Cabraser
Eric B. Fastiff
Jordan Elias
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

Samuel Issacharoff
40 Washington Square South
New York, NY 10012
(212) 998-6580

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

TABLE OF AUTHORITIES
(continued)

Page

Treatises

Other Authorities

Preliminary Statement

Parties settle cases, not discrete claims. The goal of any litigation is to resolve the entire dispute between the parties. This is why Rule 8 permits pleading in the alternative; this is why Rule 13 makes the assertion of certain counterclaims mandatory; and this is why claim preclusion forecloses litigation of matters that have never been litigated, but which arise out of the same transaction or occurrence as a prior suit between the parties.

In the settlement context, claim preclusion expansively sweeps in all transactionally related claims irrespective of whether the claims were formally presented in the litigation. Class action settlements effect the customary operation of *res judicata*. When courts certify class actions for settlement purposes, the parties typically have agreed that each and every claim potentially related to the facts alleged in the case will be resolved and released on a classwide basis.

Objector Quinn's position rests on the premise that the District Court should have deviated from this time-honored logic. In place of a negotiated resolution of all claims presented in seven *cases*, Quinn would have this Court impose a rule that a district court faced with a class settlement is obligated to disaggregate all the claims presented and selectively approve settlement of only those that the court finds meritorious. Such a position lacks any legal foundation and runs directly counter to the Supreme Court's holding in *Matsushita Electrical Industrial Co.,*

Ltd. v. Epstein, 516 U.S. 367 (1996), that courts may approve a binding settlement of claims over which they did not even have subject matter jurisdiction — and hence were disabled from engaging the merits.

There is nothing extraordinary about settling parties seeking resolution of all transactionally related claims. Such settlements should be encouraged, and are for all intents and purposes mandated by the modern law of claim preclusion. Here, the Record unmistakably establishes that De Beers sought peace with all class members. In order to achieve this modern equivalent of the common law bill of peace, De Beers demanded, obtained and paid for the settlement of all claims that had been asserted or might in the future be asserted based on the transactions and injuries alleged in all seven of the class actions. The District Court and Special Master each found that global peace was a condition of settlement and that De Beers paid a premium to settle all claims in all cases.[1] (JA 01449, 00279.)

The achievement of this global settlement and the division of proceeds among the different class members should stand as a model for future class action

---

[1] Quinn contends Plaintiffs "did not debut" the Wilson Tariff Act claim "until the time of en banc reargument." Appellant Susan M. Quinn's Response to Class Counsel's Motion for Leave to File Record Excerpts Referred to at Oral Argument, at 4 ("Quinn Response"). Quinn is wrong. The claim was debuted in April 2001 with the filing of the *Leider* complaint and has been of public record for ten years. *See Leider, et al. v. Ralfe, et al.*, Case No. 01-3137 (S.D.N.Y.) ("*Leider*") (JA 00568–69; En Banc Handout pages 35–36). *Leider* pleaded a Wilson Act claim on behalf of a nationwide class. *See id.* Quinn was informed by the publication and online Notices, as well as by the District Court's subsequent order from which she appeals, that *Leider* was one of the cases being settled. (JA 00264, 01739, 01755.)

settlements. As this Court recognized in *In re Prudential Insurance Company America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 309-15 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999), the heart of the Supreme Court's concern in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), is the adequacy of representation afforded absent class members. The settlement here was negotiated by class counsel for seven proposed or certified litigation classes comprising direct and indirect purchasers, including classes under the federal antitrust laws (*Leider*, *Sullivan*, *Anco* and *British Diamond*), classes predicated on state laws that protect all U.S. consumers (*Leider* and *Null*), a damage class comprising a subset of states (*Sullivan*), and classes predicated on the laws of a single state (*Hopkins* and *Cornwell*). Each set of counsel contested the recovery the settlement would provide to the purchasers it represented, to the point of litigating the division of the proceeds between the consumer and reseller subclasses before the Special Master and District Court. Counsel's zealous negotiations and advocacy delivered the structural assurances of fairness that are the hallmark of a meritorious class action settlement.

Quinn ultimately asks this Court to recognize one of two untenable propositions to reduce these complex actions to the *Illinois Brick* repealer/ nonrepealer dichotomy on which her position depends. Either she asks the Court to rule that, other than the repealer state antitrust claims, all the claims in all the

settled cases were so frivolous that no court could conceivably entertain them, even for settlement purposes. Or, she asks the Court to find that no defendant may settle a class action on claims that have yet to be conclusively established. Either way, Quinn seeks a ruling that would undermine the very purpose of settlement: resolving claims in the face of legal uncertainty.

Argument

The genuine controversy between the class and De Beers draws support from a series of class action suits presenting a multitude of claims — live and active at the time of settlement — that De Beers chose to settle in exchange for global peace. The District Court summarized all the claims asserted both in law and equity as directed by Circuit precedent. These settled claims are all present, cognizable claims that arise out of the same nucleus of common fact and respond to the common conduct of De Beers toward all class members. The Record belies Objector Quinn's attempt to limit the settled claims to state antitrust claims, and provides ample support for the District Court's finding of predominance. Class cohesion resulted from the overriding focus on De Beers' conduct, the common impact of that conduct on all purchasers of diamonds, and the common challenges the class faced in establishing personal jurisdiction over, and collecting any judgment against, the foreign defendant.

I. The District Court Accurately and Sufficiently Described the Claims It Was Certifying for Classwide Settlement.

Federal Rule of Civil Procedure 23(c)(1)(B) requires a class certification order to "define the class and the class claims, issues, or defenses . . . ." Fed. R. Civ. P. 23(c)(1)(B). The Court analyzed this Rule in *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006) ("*Wachtel*"). Significantly, the Court declined to mandate a particular way of defining the claims, issues, or defenses — or a particular location in a certification order where the Rule 23(c)(1)(B) description must appear. Instead, the Court simply held that "a sufficient certification order must, in some clear and cogent form, define the claims, issues, or defenses to be treated on a class basis." *Id*. at 189.

The District Court's description of the settled claims satisfies *Wachtel*. At oral argument Objector Quinn's counsel claimed the District Court's order violated *Wachtel* on the formalistic ground that it "discusse[d] antitrust claims in the predominance section . . . ." Tr. of Oral Argument, at 74:20–22. But as *Wachtel* made clear, district courts are not obligated to set forth the certified claims in any given section.

The District Court's order plainly describes the claims, issues and defenses it was certifying for classwide settlement: ***all*** of the claims, issues and defenses alleged in each of the seven class actions encompassed by the settlement. Even a cursory reading of the opinion demonstrates the falsity of Quinn's assertion that

certification was limited to state-law antitrust claims. One of the first sections is entitled "**Underlying Class, Cases, & Parties; Actions Included**." It states:

> This case began when several class action suits were filed against the Defendants in various federal and state courts alleging violations of *federal and state antitrust laws, violations of consumer protection laws, deceptive trade practices, unfair competition, and similar claims*.

Sullivan, 2008 U.S. Dist. LEXIS 81146, at *3 (JA 00263) (emphasis added). The court then denoted each of the seven settled cases by name and jurisdiction, briefly describing its procedural history and the general outline of the claims asserted therein. *Id*. at *2-7 (JA 00263–65). After defining the settlement classes in a separate section (*id*. at *14-16; JA 00270–71), the court went on to find that all the allegations and issues in the settled class actions "arise from a single course of conduct" and involve "common operative facts and common questions of law." *Id*. at *24, 30 (JA 00276, 00279).

Furthermore, when responding to objectors' arguments, the District Court explicitly tied its certification analysis to the preliminary section, finding that "the proposed settlement's release only applies to the class period and to claims arising out of or relating to the underlying Class Actions." *Id*. at *74 (JA 00305).

Quinn asserts that the certification order does not mention the Wilson Tariff Act claim by name and therefore it was not among the claims certified. Quinn Response at 2. But Quinn herself concedes that 15 U.S.C. § 12 defines the federal

antitrust laws to include the Wilson Act (*see* Quinn Response at 4); and the District Court's extensive recitation of the settled claims includes a description of the *Leider* complaint and the "violations of federal . . . antitrust . . . laws" that it alleged. *Sullivan*, 2008 U.S. DIST. LEXIS 81146, at *5-6 (JA 00264); *see also* Section II.A, *infra*.

The settlement resolved each of the seven cases in its entirety, extinguishing all claims and issues asserted therein as well as any defenses to those claims. There is no need to list every constituent part to define the totality of something. All means ***all***. The District Court fully complied with *Wachtel*.

II. The Entire Class Had Several Damage Claims at the Time of Settlement.

There can be "no question that every single member of this class, of all the classes, the seven classes, have genuine controversies, have present claims, have live claims against DeBeers." Tr. of En Banc Argument, at 56:1–4.[2] Many of

[2] Contrary to Quinn's assertion, Mr. Issacharoff did *not* concede that predominance "could not be satisfied if the laws of at least one state did not confer on indirect purchasers standing to pursue a claim for damages . . . ." Quinn Response at 6. What he said was that if a hypothetical state had made it clear that no indirect purchaser could ever recover damages, even based on independent allegations of fraud, and if the settlement released only a claim under that state's law, then "you would have a predominance issue." Tr. of En Banc Argument, at 46:6–7. This limited concession is irrelevant, because (1) no case in any state "establish[es] that you can commit consumer fraud as long as it is in furtherance of an antitrust conspiracy"; and (2) the District Court's "certification was of multiple cases on multiple bases." *Id*. at 61:23–62:1, 63:21–22. Predominance here is determined

(Footnote continues.)

these claims stand apart from state antitrust claims based solely on De Beers' anticompetitive behavior. Quinn's effort to reduce these complicated class actions to a single set of state-law antitrust claims contradicts the District Court's express definition of the claims it was resolving, and is wholly at odds with the Record.

A. Damages Under the Wilson Tariff Act.

The first count in the first-filed of the settled complaints, *Leider v. Ralfe*, No. 01-3137 (S.D.N.Y.), alleged violations of the Wilson Tariff Act of 1894, 15 U.S.C. §§ 8–11. (JA 00568–69; En Banc Handout pages 35–36.) The Wilson Act prohibits antitrust violations by importers of goods into the United States. It authorizes actions against entities that imported "any article" with intent to restrain free competition or to increase the article's U.S. price. 15 U.S.C. § 8.

Objector Quinn argues "[t]here is no logical basis to conclude" that *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977), does not apply to Wilson Act claims, the point presumably being that no indirect purchaser can assert a non-frivolous claim under the Wilson Act. Quinn notes that the *Leider* district court held the Wilson Act claim against De Beers to be subject to *Illinois Brick*.[3] Quinn also cites another district court decision, *Zenith Radio Corp. v. Matsushita Elec.*

---

by the weight of multiple issues and would not be defeated even if the law of a given state potentially gave rise to a lone "predominance issue."

[3] Plaintiffs preserved their appeal rights in *Leider*. The trial on the injunction on behalf of a certified class of all purchasers nationwide was proceeding when De Beers agreed to the settlement. No final order issued on any aspect of *Leider*.

Indus. Co., Ltd., 513 F. Supp. 1100 (E.D. Pa. 1981), that treated a Wilson Act claim identically to a parallel Sherman Act claim.

All Quinn has shown is that Wilson Act jurisprudence is not settled — which would seemingly be the very definition of a "genuine controversy" as set forth in *Amchem* and *Prudential*. In fact, not only is the scope of liability under the Act unresolved, but there are several reasons not to apply *Illinois Brick* to it.

First and foremost, barring indirect purchaser recovery under the Wilson Act would not serve the purposes behind *Illinois Brick*. While both the Wilson Act and the Sherman Act reach import commerce, the Wilson Act has a special focus on import trade that results from its different statutory language and Congressional intent.[4] That intent has become increasingly relevant in the new global economy, where effective antitrust enforcement in large part depends on purchasers' ability to sue foreign cartels. Yet, a foreign monopolist such as De Beers can easily place itself beyond the reach of American competition law (and free-market norms) by setting up intermediaries abroad that export price-fixed goods to "indirect" purchasers within the United States. Allowing indirect purchasers to sue the

[4] "We have enacted heretofore the [Sherman] act of 1890 in regard to interstate trusts, and . . . the theory of this amendment is *different from* the theory of that act[.]" 26 CONG. REC. 7118 (1894) (statement of Senator Morgan) (emphasis added). The Wilson Act addresses "the abuse of the importing right and prevents it from entering into such combinations with capital as will enable the importer or the person interested in imports to control the prices in the market." *Id*.

monopolist under the Wilson Act prevents and deters this outcome.[5]

Second, to interpret the Wilson Act as co-extensive with the Sherman Act is to render the former a dead letter. If every Wilson Act claim were analyzed in the exact same manner as a Sherman Act claim, the Wilson Act might as well not exist. Courts disfavor an interpretation of a statute that would render it superfluous. *Rea v. Federated Investors*, 627 F.3d 937, 941 (3d Cir. 2010).

Third, the core rationale of *Illinois Brick* is that the entity dealing directly with an alleged antitrust violator has the greatest incentive to sue for treble damages and thereby enforce the antitrust laws. This rationale has no application in Wilson Act situations like this one, where De Beers' "sightholder" direct purchasers are vassals of a foreign cartel who lack incentives and/or sufficient U.S.

---

[5] Quinn's argument fails to account for the substantive differences between the Wilson Act and the Sherman Act — a major flaw, considering "there are a variety of distinct jurisdictional, analytical, and procedural considerations that arise in foreign commerce settings." ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, at 1187 (6th ed. 2007). Whereas the Sherman Act sought to prevent "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market," *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940), the Wilson Act was "a piece of pro-consumer legislation designed to cut consumer costs by lowering tariffs and outlawing monopolistic prices set by foreign importers," *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 408 (D. Del. 1978). Not surprisingly given the more specific statutory language and different purpose of the Wilson Act, "Congress has invariably treated the anti-trust provisions of the Wilson Act as separate and distinct . . . ." *Adams-Mitchell Co. v. Cambridge Distrib. Co.*, 189 F.2d 913, 920 (2d Cir. 1951) (Frank, J., dissenting). In passing the Wilson Act, Congress "singled out the import trade for special anti-trust treatment," reaching "as far as it could to prevent monopolistic price-fixing of imported articles" and intending "to deal more rigidly, where possible, with restraints of the trade in imported articles." *Id*. at 920-21.

contacts to sue. This Court's seminal interpretation of *Illinois Brick* in *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13 (3d Cir. 1978), supports such a pragmatic approach to civil antitrust enforcement. The Court held that a purchaser of a product (candy) that incorporates a price-fixed component (sugar) has standing to sue the entities alleged to have fixed the price of the component. *Id*. at 15. In a memorable passage, the Court explained:

> [T]o deny recovery in this instance would leave a gaping hole in the administration of the antitrust laws. It would allow the price-fixer of a basic commodity to escape the reach of a treble-damage penalty simply by incorporating the tainted element into another product.

Id. at 18. Recognizing that the purpose of *Illinois Brick* is to consolidate civil antitrust enforcement in an efficient and effective manner, this Court held that *Illinois Brick* must *not* be applied so as to create gaps in civil enforcement. Exempting Wilson Tariff Act claims from *Illinois Brick* — in circumstances where a select network of direct purchasers bought diamonds from De Beers on a take-it-or-leave-it basis in foreign cities — would close such a gap.

All U.S. diamond purchasers have a present and cognizable Wilson Act claim preserved for appeal in *Leider*. De Beers was entitled to settle it regardless of how courts will ultimately construe indirect purchaser claims under the Wilson Act. Despite Quinn's extravagant contention that the Rule 23 inquiry requires the district court to "reach the merits" of every settled claim (Tr. of En Banc

Argument, at 30:8), the question is not how this Court or any other court would rule on the merits of the claims asserted in *Leider*. If it were, then Quinn would be arguing that De Beers could not have settled absent a judicial determination that it was liable to the *Leider* nationwide class. In effect, this would require a defendant facing potential liability under untested law to bear the risk and cost of trial, and any appeals, to resolve legal uncertainty. Neither case law nor logic supports such an argument.

B. Damages Under Statutes Prohibiting False Advertising and Material Misrepresentations.

Leider was not the only settled case in which a court certified a nationwide litigation class of U.S. diamond purchasers prior to the District Court's settlement certification. The court in *Null v. DB Investments, Inc.*, No. 3:05-cv-00516 (S.D. Ill.), certified a nationwide class under the consumer protection laws of the states where purchases occurred. (JA 00264.) Although Objector Quinn tries to limit Plaintiffs' allegations to antitrust violations, the *Null* complaint's first paragraph alleged that De Beers "falsely advertis[ed] the scarceness of diamonds." (JA 00619.) The record before the *Sullivan* District Court contained nearly one hundred pages of suspect De Beers advertisements (JA 03123–03221), and Dr. Pisarkiewicz set forth a damage methodology that applies to the claims for "false advertising, deceptive trade practices, and consumer fraud" (JA 04311).

The factual predicates of *Null* and *Leider* provide clear grounds for De

Beers' liability under state consumer protection laws. No state has held that a business or individual "can commit consumer fraud as long as it is in furtherance of an antitrust conspiracy." Tr. of En Banc Argument, at 61:23–62:1. In *Abbott Laboratories v. Segura*, 907 S.W.2d 503 (Tex. 1995), for example, the Texas Supreme Court foreclosed indirect purchaser claims where a plaintiff seeks relief based on allegations of anticompetitive activity — but not where a claim is based on allegations of another type of wrongdoing. *Id*. at 505, 507 (*Segura* addressed allegations "*virtually identical* to . . . antitrust allegations," and "*only* foreclose[d] . . . damages for seeking a prohibited *antitrust* recovery under the *masquerade* of our consumer protection statute.") (emphasis added).

Thus, post-*Segura*, Texas courts recognize that "the Texas Supreme Court has not held that indirect consumers cannot recover for unconscionability." *Church & Dwight Co., Inc. v. Huey*, 961 S.W.2d 560, 570 n.2 (Tex. App. 1997); *see* Texas Bus. & Com. Code § 17.50 (authorizing recovery if the defendant engaged in "an unconscionable action or course of action" without regard to reliance). It is the underlying allegations, not a mechanical finding that a plaintiff is an indirect purchaser, that dictates whether a consumer protection claim can survive in the non-repealer State of Texas.

The same is true in Ohio. Quinn continues to assert that Ohio law bars any type of indirect purchaser recovery, citing *Johnson v. Microsoft Corporation*, 834

N.E.2d 791, 799 (Ohio 2005), which held that a consumer cannot circumvent *Illinois Brick* with a claim under the Ohio Consumer Sales Practices Act ("CSPA") "predicated upon monopolistic pricing practices . . . ." *Johnson*, however, does not go so far as to bar a consumer claim based on fraud or deception, the type of illegal conduct De Beers is alleged to have carried out. *Johnson* was not predicated on allegations of consumer fraud.[6] By contrast, cases settled here feature such allegations, and the CSPA expressly prohibits a supplier from knowingly making "a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment." Ohio Stat. § 1345.03(B)(6). At the final fairness hearing, an Objector's attorney who practices in Ohio had to "confess" that a plaintiff alleging deception could maintain an Ohio claim. (JA 04901.)

Leider and *Null* alleged a concerted marketing campaign to deceive end-purchasers in furtherance of De Beers' scheme to inflate diamond prices. The allegations of false advertisements are distinct from the antitrust allegations, and supply an independent basis for liability under the consumer protection laws of

[6] Nor was *Sickles v. Cabot Corporation*, 877 A.2d 267 (N.J. Super A.D. 2005), predicated on allegations of fraud. The plaintiff instead "rested" his New Jersey consumer protection claim "on the legal theory that" the defendant's "alleged monopolistic conduct was, by itself, an unconscionable commercial practice" — the *Sickles* complaint, the court stressed, was "bereft of any allegation that defendants used deception, fraud or misrepresentation or concealed material facts[.]" *Id*. at 274, 276. Not only do complaints settled here contain just such allegations, but it is also significant (particularly from De Beers' standpoint) that "the history of the [New Jersey] Act is one of constant expansion of consumer protection." *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 364 (N.J. 1997).

every state. *Compare, e.g.*, Texas Bus. & Com. Code § 17.46(b)(10) (forbidden deceptive practices include advertising "with intent not to supply a reasonable expectable public demand" and without disclosure of a natural supply limitation), *with Leider* Compl. ¶ 29(a) (JA 00557; En Banc Handout page 24) (alleging De Beers "systematically purchased[,] engrossed and stored during the Class Period quantities of diamonds . . . to 'control' diamond supplies . . . and make diamonds seem rare" to match its false advertising campaign); *compare also* Ohio Stat. § 1345.03(B)(6) (prohibiting a supplier from knowingly making "a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment."), *with Leider* Compl. ¶ 24(d) (JA 00552; En Banc Handout page 19) (alleging De Beers engaged in false advertising "by inducing U.S. citizens to mistakenly believe that diamonds are naturally rare, inherently associated with love, beauty and our deepest emotions of tenderness, and intrinsically worth the inflated prices"); *see also id*. ¶ 34(c) (JA 00560–61; En Banc Handout pages 27–28) (specific ads referenced in *Leider* complaint); JA 03123–03221 (specific ads before *Sullivan* District Court at time of settlement).

All U.S. diamond purchasers have present and cognizable claims for deceptive trade practices. Under the *Amchem* standard adopted by this Court in *Prudential*, 148 F.3d at 314, the deception claims in *Leider* and *Null* represent "genuine controversies." De Beers was entitled to settle them.

C. Damages Under New York's Donnelly Act.

In arguing that the settled state claims are "diverse state law causes of action" (Quinn Response at 4), Quinn would have this Court turn a blind eye to the one state claim that is far more consequential than the rest. *Leider* brought a claim under New York's antitrust statute on behalf of a nationwide class based on the strong nexus between the underlying conduct and the State of New York. The Donnelly Act, codified at New York General Business Laws section 340, has deep common law roots and was enacted to "destroy" monopolies. *In re Davies*, 61 N.E. 118, 120-21 (N.Y. 1901); *see also People v. Schwartz*, 1986 WL 55321, at *2 (N.Y. Sup. Ct. Oct. 17, 1986) ("[T]he Donnelly Act is broader than the Sherman Act") (citing *State v. Mobil Oil Corp*., 38 N.Y.2d 460, 464 (N.Y. 1976)). The statute contains an *Illinois Brick* repealer. *See* N.Y. Gen. Bus. Laws § 340(b).

The Donnelly Act makes actionable all monopolistic conduct in New York, no matter where related transactions occur, and reaches even further. Application of the Act extends to all unlawful restraints of trade that have a direct, substantial and reasonably foreseeable effect in New York. *See Global Reins. Corp. U.S. Branch v. Equitas Ltd*., -- N.Y.S.2d --, 2011 WL 135002 (N.Y. App. Div. 2011) (holding that the plaintiff, a German company with a New York branch, could pursue a Donnelly Act claim against a British company alleged to have engaged in an antitrust conspiracy of worldwide scope).

Moreover, the Donnelly Act may be applied extraterritorially to non-New York residents if anticompetitive conduct has significant New York effects. *See Two Queens, Inc. v. Scoza*, 745 N.Y.S.2d 517, 519 (N.Y. App. Div. 2002) (reversing a decision that conduct's interstate effects meant the Sherman Act preempted a Donnelly Act claim). Depending on the nexus between alleged wrongdoing and the state, New York's consumer protection statutes may provide relief to "all consumers . . . regardless of their residency . . . ." *People by Vacco v. Lipsitz*, 663 N.Y.S.2d 468, 580 (N.Y. Sup. Ct. 1997) (citation omitted).

Because De Beers' business is tightly linked to New York City, claims against De Beers may be actionable on a nationwide basis under the Donnelly Act. The *Leider* complaint alleged that De Beers transacted business in Manhattan, employed numerous agents there in furtherance of its cartel behavior, operated phone banks there that facilitated its deceptive conduct, and disseminated false and fraudulent advertisements from there to the rest of the United States. *Leider* Compl. ¶ 10 (JA 00544–46; En Banc Handout pages 11–13). Of any state, New York has by far the largest economic interest in the diamond trade. *Leider* alleged 95 percent of diamonds that enter the United States come in through New York City. *Leider* Compl. ¶ 9(b) (JA 00544; En Banc Handout page 11). Indeed, referring to De Beers' sightholders, Objector counsel conceded that "[t]hese vassals of DeBeers are in New York City." Tr. of En Banc Argument, 37:8–9;

accord, *Leider* Compl. ¶ 10(c)(3) (JA 00545; En Banc Handout page 12).

Given the diamond entry bottleneck in New York, and the substantial and foreseeable effects of De Beers' conduct in New York, a court could have permitted all U.S. diamond purchasers to seek redress using New York law. Quinn previously argued that New York's law barring class actions is what foreclosed relief under the Donnelly Act. *See* Quinn Br. filed July 22, 2009, at 2, 13-14 (En Banc Handout pages 49–51). That argument evaporated once the Supreme Court held that Rule 23 governs class actions in federal court notwithstanding their origins in diversity jurisdiction and the New York class action ban. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

All U.S. diamond purchasers are members of the certified *Leider* class. *See Leider v. Ralfe*, No. 01-3137, 2003 U.S. Dist. LEXIS 18270, at *30-33 (S.D.N.Y. Oct. 10, 2003). The *Leider* court denied class certification under the Donnelly Act on grounds that were preserved for appeal — and ultimately would have been overturned after *Shady Grove*. All U.S. diamond purchasers therefore have a present and cognizable Donnelly Act claim. *Shady Grove* only confirms that De Beers' decision to settle that claim was prudent. Sophisticated parties understand that settlement in the face of uncertainty is a wise form of risk management. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010).

D. Damages Under Section 2 of the Sherman Act.

Objector Quinn mischaracterizes Plaintiffs' position when she suggests we have said that the only indirect purchaser damage claims settled here were asserted under state law. *See* Quinn Response at 3. The section of our brief that Quinn cites addressed the impact of De Beers' conduct on all class members, not the genuine controversies that provide cohesion to the class. While the entire class has *at least* one cognizable state antitrust or consumer protection claim, the entire class also has *more than one* cognizable claim under federal law.

Illinois Brick's case management rule does not *per se* bar indirect purchaser plaintiffs from the federal courthouse gate. Claims under Section 2 of the Sherman Act, in particular, must be scrutinized closely to determine whether they implicate the concerns underlying *Illinois Brick.* In *Mid-West Paper Products Company v. Continental Group, Inc*., 596 F.2d 573, 585 n.47 (3d Cir. 1979), this Court found that monopolization cases raise a "different problem" from price-fixing cases when it comes to determining damages and whether *Illinois Brick* applies. In *Dart Drug Corporation v. Corning Glass Works*, 480 F. Supp. 1091, 1101-02 (D. Md. 1979), the court held that an indirect purchaser could maintain a Section 2 claim against a monopolist based on its alleged discriminatory conduct.

Whether the Clayton Act is invoked to support a claim for violations of Section 1 or Section 2, it must not be "cabin[ed] . . . in ways that will defeat its

broad remedial objective." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 (1982). Antitrust standing depends on an "analysis of the 'factual matrix' presented by each case." *Id*. at 476 n.12 (quoting *Bravman v. Bassett Furniture Indus., Inc.*, 552 F.2d 90, 99 (3d Cir. 1977)). The "remoteness of injury" — an issue "analytically distinct from . . . standing" — determines the viability of any indirect purchaser antitrust claim.[7] *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1164-65 & n.10 (3d Cir. 1993) (conducting "a more complex and differently focused inquiry" and concluding downstream claims were viable).

All U.S. diamond purchasers have a present and cognizable Section 2 claim, which De Beers was entitled to settle for valuable consideration.

III. The Equitable Claims Further Unite the Class.

Notwithstanding Quinn's erroneous belief that *Illinois Brick* precludes the settled state-law claims in non-repealer states, no court has held that *Illinois Brick* applies in any context to a claim for disgorgement or for injunctive relief, or to an unjust enrichment claim where an indirect purchaser complaint includes plausible allegations of fraud. *See* Quinn Response at 4. The equitable relief claims that De Beers elected to settle provide an additional layer of class cohesion.

---

[7] A blanket holding that, as a matter of law, all indirect purchasers in states whose courts have adopted *Illinois Brick* lack colorable antitrust damage claims, would be unnecessary as well as erroneous and contrary to this Court's long-expressed belief that *Illinois Brick* does not impose "a strict prohibition against recovery by indirect purchasers." *Lower Lake Erie*, 998 F.2d at 1167 n.21.

A. Disgorgement.

The decision in *United States v. Keyspan Corp.*, -- F. Supp. 2d --, 2011 WL 338037 (S.D.N.Y. Feb. 2, 2011), illustrates De Beers' potential exposure in equity. There, the court granted a request for equitable disgorgement even though this remedy had never before been used to redress an unlawful restraint of trade. *Id*. at *8. The court suggested that returning disgorged proceeds to consumers constitutes the "optimal" relief,[8] and sent a clear signal that antitrust violators "now face the prospect of disgorgement in addition to other remedies." *Id*.

The *Leider* complaint asserted a claim under federal common law, which recognizes the equitable disgorgement remedy. (JA 00572–74; En Banc Handout pages 39–41.) The *Sullivan* complaint requested "such other, further or different relief as may be just." (JA 00657.) The disgorgement remedies sought in *Leider* and *Sullivan* arise under federal law — as in *Keyspan* — and therefore implicate no state-law issues or conflicts. De Beers was entitled to settle this claim.

B. Unjust Enrichment.

The unjust enrichment of De Beers provides still another classwide claim. The *Null* complaint brought a restitution claim that was certified nationwide. (JA 00264, 00627–28.) "[M]inor variations in the elements of unjust enrichment under

[8] Nowhere did the court suggest that *Illinois Brick* precludes such restitution. While the court discussed disgorgement in the context of government enforcement, it did not foreclose use of that remedy by civil plaintiffs.

the laws of the various states . . . are not material and do not create an actual conflict."[9] *Pennsylvania Emp., Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 477 (D. Del. 2010) (quoting *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. 2009)); *see, e.g.*, *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 697-98 (S.D. Fla. 2004) (certifying multi-state unjust enrichment class of indirect purchasers for trial).

C. Injunctive Relief.

It is undisputed that the federal injunctive relief claim was available to the entire class. *See Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *13-15, 31 (JA 00268–69, 00279). In fact, Judge Baer, who certified a nationwide injunctive relief class under the Clayton Act, was presiding over the trial on the injunction when the settlement suspended the proceedings. *See Leider*, 2003 U.S. Dist. LEXIS 18270, at *30-33. The injunctive relief claim thus was very much alive at the time of

[9] The elements of unjust enrichment are basically uniform, because in every jurisdiction the doctrine follows from the same equitable principle:

> A person who has been unjustly enriched at the expense of another is required to make restitution to the other. A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust. A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money. Ordinarily, the measure of restitution is the amount of enrichment received.

RESTATEMENT (FIRST) OF RESTITUTION § 1 & cmt. a (1937).

settlement.[10] A claim seeking an injunction may be settled for monetary consideration. *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 277 (3d Cir. 2002) (holding that a district court "certainly had the authority" to approve a settlement providing $7 million to plaintiffs who had sought injunctive and declaratory relief only).

Conclusion

Predominance of common questions is readily apparent from the Record. All class members suffered harm; present claims and genuine controversies abound; and all of the claims arise from a common nucleus of operative facts. The relative strength of the antitrust laws of states where class members purchased diamonds relates to only one subset of the claims and raises, at most, an allocation issue. The District Court, however, has already conducted a thorough fairness hearing on the plan of allocation and properly exercised its discretion in the best interests of the class, focusing on "fair treatment for all claimants" in accordance with Circuit precedent. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 242 n.57 (3d

[10] The consent decree, enacted at preliminary approval, imposed a crucial constraint on De Beers' activity at the time of the final fairness hearing. Because the European Commission in 2006 lifted its restriction on De Beers' diamond purchases from the Russian company Alrosa, the consent decree provides the only constraint on De Beers' acquiring rough diamonds from its mining counterparts and reverting to its historical rapacious role. (JA 04319–20.) Notably, while De Beers' market share was diminishing at the time of settlement and final approval, its pipeline was not — De Beers' agents still controlled the vast majority of diamonds entering the United States. (JA 00825–30, 04377–79.)

Cir. 2004) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)); *see* JA 04843–04955. Remand would accomplish nothing for the class; the delay occasioned by a remand (and the inevitable next round of appeals) cannot be justified and would provide no corresponding benefit. The judgment should be affirmed in its entirety.

Date: March 31, 2011

Respectfully submitted,

/s/ Tracy R. Kirkham
Tracy R. Kirkham
COOPER & KIRKHAM
357 Tehama Street, Second Floor
San Francisco, CA 94131
(415) 788-3030

/s/ Elizabeth J. Cabraser
William Bernstein
Elizabeth J. Cabraser
Eric B. Fastiff
Jordan Elias
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

/s/ Samuel Issacharoff
Samuel Issacharoff
40 Washington Square South
New York, NY 10012
(212) 998-6580

/s/ Craig C. Corbitt
Craig C. Corbitt
ZELLE HOFMANN VOELBEL & MASON, LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
(415) 693-0700

/s/ Joseph J. Tabacco, Jr.
Joseph J. Tabacco, Jr.
BERMAN DeVALERIO
425 California Street, Suite 2100
San Francisco, CA 94104
(415) 433-3200

/s/ Stephen Katz
Stephen Katz
KOREIN TILLERY
505 North 7th Street, Suite 3600
St. Louis, MO 63101
(314) 241-4844

/s/ Susan G. Kupfer
Susan G. Kupfer
GLANCY BINKOW & GOLDBERG LLP
One Embarcadero Center, Suite 760
San Francisco, CA 94111
(415) 972-8160

/s/ John A. Maher
John A. Maher
LAW OFFICES OF JOHN A. MAHER
450 Springfield Avenue
Summit, NJ 07901
(908) 277-2444

/s/ Jared Stamell
Jared Stamell
STAMELL & SCHAGER, LLP
One Liberty Plaza, 35th Floor
New York, New York 10006
(212) 566-4047

/s/ Robert A. Skirnick
Robert A. Skirnick
Maria A. Skirnick
MEREDITH COHEN GREENFOGEL & SKIRNICK, P.C.
19 Rockwood Road West
Manhasset, NY 11030
(516) 365-7186

/s/ Edward W. Harris, III
Edward W. Harris, III
TAFT, STETTINIUS & HOLLISTER LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204
(317) 713-3500

Counsel for all of the Plaintiffs-Appellees

Certification

I hereby certify as follows:

(1) I am a member in good standing of the bar of the Third Circuit.

(2) This brief complies with the typeface requirements of Fed. R App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with 14-point Times New Roman.

(3) The text of the electronic version of this brief is identical to the text in the paper copy.

(4) A virus detection program has been run on the file and no virus was detected. The virus detection program used is MacAfee Virus Scan version 4.0.0.1421.

Dated: March 31, 2011

/s/ Tracy R. Kirkham
Tracy R. Kirkham

Certificate of Service

I, Tracy R. Kirkham, hereby certify that true and correct copies of the foregoing document, Plaintiffs' Brief in Response to Susan M. Quinn's Response to Class Counsel's Motion for Leave to File Record Excerpts Referred to at Oral Argument, were served via the Court's ECF system on March 31, 2011, upon all counsel of record listed on the ECF System.

Dated: March 31, 2011 */s/ Tracy R. Kirkham*
Tracy R. Kirkham