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)

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(1)(b) Predominance is satisfied if class members have different claims as long as each contains elements requiring resolution of common issues of fact. 23

(1)(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. 28

(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. 31

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Introduction

The questions in this Court's November 10, 2010 Order raise important issues emerging from the Supreme Court's defining class action settlement cases of the late 1990s — *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("*Amchem*"), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) ("*Ortiz*"). At issue in both of these cases were the benchmarks that lower courts should use to define the scope of settlement authority under Federal Rule of Civil Procedure 23, and the fit between the certification criteria aimed at litigation classes and the fact that the overwhelming majority of class actions are settled rather than tried.

In the context of Objectors' arguments, this Court's questions seek clarification of the jurisprudence governing the post-CAFA[1] settlement procedures employed by federal district courts to resolve claims under state antitrust and consumer protection statutes and the common law of fraud, deceit and unjust enrichment. The answers lie in settlement class predominance concepts that date back to the 1966 amendment of Rule 23 and come forward in an unbroken line of authority to the present day.

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[1] The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 ("CAFA"). Although these cases were filed before CAFA, the parties complied with the CAFA notice provisions.

Under this authority, the predominance inquiry focuses on whether the claims to be aggregated for release by a class action settlement arise from a common nucleus of operative facts pre-existing the settlement and whether the class members seek redress for economic injury of the same nature. All of Plaintiffs' responses to the Court's questions flow from this basic principle. Before turning to these responses, we provide a brief review of this litigation and settlement.

A. The Seven Settled Cases.

As an initial matter, Objectors are incorrect that the indirect purchaser class includes purchasers who lack the ability to file *any* colorable claim against De Beers. The settlement encompasses seven actions, filed in two federal districts and the state courts of California, Illinois and Arizona, that commonly allege a single course of conduct involving both anticompetitive acts and false communications to the public.[2]

Two of these cases, *Leider v. Ralfe*, No. 01-3137 (S.D.N.Y.) ("*Leider*"), and *Null v. DB Investments, Inc.*, No. 3:05-cv-00516 (S.D. Ill.) ("*Null*"), allege a shared cause of action for damages on behalf of all diamond purchasers in the United States. The nationwide claim in *Leider*

[2] The District Court discussed these claims in *Sullivan v. DB Investments, Inc.*, No. 04-2819, 2008 U.S. Dist. LEXIS 81146, at *3-7 (D.N.J. May 22, 2008) ("*Sullivan*") (JA 00263–00265).

was asserted under Section 2 of the Sherman Act, 15 U.S.C. § 2. (JA 00569–00571.) This claim was grounded in allegations that De Beers' monopolistic practices and concerted refusal to deal with any diamond resellers other than its longstanding distributors targeted and injured diamond end-purchasers throughout the United States. (JA 00538–00543.) *See Leider v. Ralfe*, No. 01-3137, 2003 U.S. Dist. LEXIS 18270 (S.D.N.Y. Oct. 10, 2003). The district court in *Leider* certified a nationwide Rule 23(b)(2) injunctive relief class. *Id*. at *30-33. *Sullivan v. DB Investments, Inc.*, No. 04-2819 (D.N.J.), like *Leider*, asserted a federal Clayton Act claim for injunctive relief (a shared cause of action) on behalf of a nationwide class. (JA 00641–00642, 00648–00651.)

The nationwide consumer protection and common law claims in *Null* arose under the laws of all states and drew upon allegations that De Beers falsely advertised scarcity in the global supply of diamonds. (JA 00602–00611.) The Illinois state court in *Null* certified a litigation class to pursue these claims consisting "of all persons residing in the United States who purchased diamonds not for resale . . . ." (JA 00264.)

The seven settled cases also include two actions brought on behalf of classes of industry resellers. *Anco Industrial Diamond Corp. v. DB Investments, Inc., et al.*, No. 01-cv-04463 (D.N.J.) ("*Anco*"), alleging

Sherman Act claims on behalf of direct purchasers of gem diamonds, was certified to proceed as a Rule 23 class action in 2003. (JA 00264–00265.) *British Diamond Import Company v. Central Holdings Ltd., et al*., 04-cv-04098 (D.N.J.) ("*British Diamond*"), was filed in 2004 on behalf of a broader group of purchasers — the hundreds of distributors that purchased diamonds from the approximately one hundred De Beers-selected distributors known as "sightholders." (JA 00452–00482.) At the time of settlement, the *British Diamond* plaintiffs' motion for class certification was pending before the New Jersey District Court.

Settlement negotiations began in May 2005 and consummated first with a settlement of the *Null*, *Sullivan*, *Hopkins* and *Cornwell* actions. *See Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *10-11 (JA 00267). Further negotiations yielded the Amended Settlement Agreement resolving the *Leider*, *Anco* and *British Diamond* actions. *Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *11-13 (JA 00267–00268). The settlement totals $295 million, providing $22.5 million to direct purchasers and $272 million to indirect purchasers. It also provides significant injunctive relief, restricting for five years after final settlement approval certain De Beers activities regarding the

pricing, purchase and sale of diamonds.[3] The injunction requires De Beers — for the first time — to submit to the jurisdiction of a U.S. court for enforcement and to comply with all federal and state antitrust laws. De Beers agreed to comply with the injunction beginning in April 2006, thirty days after preliminary approval of the settlement. (JA 01144.)

B. Defendants' Common Conduct Creates a Cohesive Class.

Contrary to the picture painted by Objectors, Plaintiffs had asserted and were prosecuting claims on behalf of all domestic diamond purchasers when the settlement was reached. This is not a situation where a defendant facing limited claims insists on obtaining releases from persons not previously represented or involved in the litigation as the price of settlement. The single, organizing fact underlying this litigation is the De Beers cartel's common course of monopolistic and deceitful conduct, which is alleged to

[3] The injunction: (1) limits purchases from third-party producers ("TPP") (defined at JA 00358); (2) prohibits De Beers from setting the price of rough diamonds sold by a TPP; (3) prohibits De Beers from determining the quality or quantity of a TPP's rough diamond production or sale; (4) prohibits De Beers from requiring sightholders to resell or purchase diamonds at a fixed price; (5) prohibits De Beers from restricting the persons to and from whom gem diamonds could be resold or purchased; and (6) prohibits De Beers from imposing geographic restrictions on a sightholder's purchase or resale of gem diamonds. (JA 00358-00361.) In addition, the injunction bars De Beers from buying rough diamonds in the United States for the purpose of restraining supply. (JA 00361.)

have driven up the prices paid for diamonds by every purchaser, not only in the United States but worldwide.

For over a century, the cartel used its control of African diamond mining to manipulate and dictate every aspect of the world diamond market. De Beers' practices constitute a veritable how-to manual of the ways in which competitive pressures are squeezed out of a market. De Beers controlled production, warehoused the diamond reserves, controlled release of supply onto the market, disciplined intermediaries and retailers through access to inventory, required secondary market price restraints, prevented price competition by intermediaries, fiercely drove out all competitors who did not adhere to its policies, and justified the high price of diamonds through a false and fraudulent advertising campaign. In effect, De Beers fashioned a textbook cartel and the result was a textbook cartelized market. The District Court correctly found that this behavior, from which all asserted and settled claims emanate, comprises the nucleus of "common operative facts" required to satisfy Rule 23's commonality and predominance requirements. *Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *24-25 (JA 00276).

The District Court further concluded that another set of predominating common questions, relating to "whether Defendants are subject to the

jurisdiction of the courts of the United States," also bound the settlement class together. *Id*. at *25. The De Beers cartel was organized, managed and operated outside the United States. Although the effects of the cartel were demonstrably felt here, the central issue in confronting this cartel was whether any American law could protect U.S. consumers. This is no mere technicality; it is a profound, and profoundly common, question. At the outset of this litigation, the effort to control De Beers through American antitrust law seemed about as promising as the effort to take on the OPEC cartel through American antitrust law. It is not that De Beers' practices did not have the effect on U.S. diamond prices that the antitrust and consumer protection laws were designed to remedy. They did. Instead, there was the initial and fundamental question of whether American law could reach the foreign perpetrator.

Significantly, the U.S. Department of Justice had neither indicted nor convicted De Beers for monopolizing the gem diamonds market. This was not a situation in which private plaintiffs were proving up harm after the DOJ or the Federal Trade Commission had already secured a determination of an antitrust violation. Rather, the present civil actions sought to bring legal accountability to a foreign actor that so dominated its market it could

impose its cartel rules in the United States without any oversight from U.S. regulators, and seemingly without any overt domestic conduct.

For years the DOJ had been reluctant to take on De Beers. Its reasons for caution are readily apparent. In 1945, the Supreme Court vacated an order obtained by the DOJ to sequester De Beers' property on the grounds that U.S. courts lacked jurisdiction over De Beers' extraterritorial conduct. *De Beers Consol. Mines, Ltd., et al. v. United States*, 325 U.S. 212 (1945).

More recently, the Supreme Court has repeatedly constrained the application of U.S. law to foreign conduct. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Court warned against imposing U.S. antitrust concepts on conduct undertaken abroad. Similarly, in *Microsoft Corp. v. AT & T Corp*., 550 U.S. 437 (2007), the Court refused to allow American intellectual property laws to reach products in foreign markets. Even American labor regulations must stop at the border, including for American employers. *See EEOC v. Arabian Am. Oil Co*., 499 U.S. 244 (1991). A firestorm was also brewing over the applicability of American securities laws to overseas actors alleged to have engaged in fraudulent conduct in the United States. Indeed, after the settlement of this matter the Supreme Court, in *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869

(2010), unanimously affirmed the presumption against extraterritorial application of *any* U.S. statute with potential overseas reach.

All told, the prospects for this litigation were daunting. And they were daunting for each and every settlement class member alike, for one overwhelming common reason: De Beers unfailingly and uniformly denied that any American court had jurisdiction to apply American law to harness the cartel's behavior. It was uncertain that personal jurisdiction for the conduct in question could attach in the United States. It was unclear whether service of process would stick in the United States. It was unclear whether principles of international comity would allow the market-protection laws of the United States to apply substantively. And it was unclear whether a litigated judgment, as opposed to a settlement, could even be enforced and collected in any American jurisdiction. For each purchaser, the central question — indeed, the dispositive question — in every legal claim was whether American law could apply to De Beers. The District Court analyzed this situation in connection with predominance:

> [A]ll class members are confronted with the difficulty of De Beers' refusal to submit to the jurisdiction of any court in the United States and the resulting burden of establishing that De Beers' nationwide contacts satisfy the constitutional requirements of due process. Plaintiffs' allegations of conspiracy arise from a single course of conduct by De Beers and raise a jurisdictional issue common to all class members, so the allegation of

> conspiracy falls within the category of cases described in *Amchem* and satisfies the predominance test.

Sullivan, 2008 U.S. Dist. LEXIS 81146, at *30 (JA 00279).

Objectors do not challenge these District Court findings. Rather, to Objectors, the fortuity of purchase location (Objector Quinn) or residence (Objector Murray) in an *Illinois Brick* "repealer" or "non-repealer" state[4] is enough to derail a settlement that provides remedies for the harm suffered by all class members. Objectors assert that persons who reside or made their diamond purchases in non-repealer states have no valid cause of action and therefore it does not matter that they were injured by De Beers' common course of conduct. Objectors are wrong. They ignore that the common alleged economic harm gives rise to multiple avenues of recovery. The division of the country into repealer versus non-repealer states does not dictate a finding that some De Beers class members lack claims.

In this regard, Objector Quinn's assertions are self-defeating. Quinn stands before this Court claiming that the settlement should be unwound because as a resident of Texas, a non-repealer state, she should not be

[4] Repealer states are those that have repudiated by statute or judicial decision the rule set forth in *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*"), which prevents indirect purchasers from recovering damages under federal antitrust law in most circumstances. Non-repealer states are those that have adopted *Illinois Brick* by judicial decision.

included in the settlement class. However, the record is bereft of evidence of where Quinn bought her diamond. (JA 1983.) Did she travel to New York, where the largest share of diamond transactions occurs? Did she buy her diamond on the Internet, subject perhaps to the laws of the seller's forum? And, even if she never crossed into the rest of country, Quinn's assertion that her fellow Texans lack any remedy and that this somehow defeats predominance is undercut by her admission that she "has an unjust enrichment claim, which entitles her to monetary relief." (Quinn Br. filed March 27, 2009, at 63 (Docket No. 00318139675).) There is no reason in case law or logic why De Beers cannot settle Quinn's claim, and settle it in conjunction with all other claims alleging harm from the same anticompetitive and deceptive course of conduct.

The District Court's Rule 23 inquiry was rigorous and thorough, consistent with this Court's subsequent admonition in *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305 (3d Cir. 2008) ("*Hydrogen Peroxide*"), that a court should not "relax its certification analysis" in antitrust, consumer or securities cases, even though in such cases predominance is a "test readily met." *Id*. at 322 (quoting *Amchem*, 521 U.S. at 625). The District Court's analysis and conclusions are also fully consistent with *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516 (3d Cir.

2004) ("*Warfarin II*"), and with current settlement jurisprudence in this Circuit, as articulated in *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241 (3d Cir. 2009) ("*Insurance Brokerage*"), *Ehrheart v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010) ("*Verizon*"), *In re Community Bank of Northern Virginia*, 622 F.3d 275 (3d Cir. 2010) ("*Community Bank II*"), and *In re Pet Food Products Liability Litigation*, -- F.3d --, 2010 WL 5127661 (3d Cir. Dec. 16, 2010) ("*Pet Food*"). The District Court should be affirmed.

C. Summary of Plaintiffs' Responses to the Court's Questions and Assertions.

In *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996) ("*Georgine*"), this Court opened the modern era of class action settlement review by rejecting the argument that the parties' desire to settle could suffice as the basis for judicial approval. Instead, this Court demanded that all Rule 23 requirements be met as a precondition for approval of a class settlement.

In *Amchem*, the Supreme Court agreed that a fairness analysis based on a "gestalt" or "chancellor's foot" assessment could not stand. 521 U.S. at 621. Even as the Supreme Court rejected the concept that settlement, by itself, was sufficient to satisfy Rule 23, it declined to follow this Court in requiring application of the same criteria for trial and settlement classes.

The Supreme Court took note of the distinctions between certifying a class for settlement rather than for further litigation, and held that, at the very least, questions of proof, *i.e.*, manageability of the case for trial, would not be a factor in assessing the propriety of a settlement. *Amchem*, 521 U.S. at 620. Previously, in *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367 (1996) ("*Matsushita*"), the Court held that even a jurisdictional bar on litigating the settled claims in the forum court could not preclude that court from approving a binding class action settlement and, in the process, releasing claims it could never have tried.

In place of *Georgine*'s approach of applying identical criteria to requests for litigation and settlement certification, *Amchem* endorsed a functional approach that assesses settlement from the vantage point of whether the absent class members to be bound by the outcome are protected through what the Court termed "structural assurances of fairness." *Id.* at 627. First and foremost, the Court looked to the adequacy of representation, the touchstone for any preclusive binding of absent parties dating back at least to *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940). The Supreme Court found adequate representation wanting where counsel for claimants who had already sustained injuries sought to apportion either a litigation fund (or, as in *Ortiz*, a limited insurance fund) between their clients and statistically

known but presently unidentified future claimants. Second, the Court looked to what held together the class whose claims would be released. The asbestos cases failed because they were exclusively about apportioning limited settlement funds between present and future claimants, and drew together wildly disparate fact patterns as to different offending defendants, exposure and types of injuries. *Ortiz* involved disparities even in eligibility for coverage under the insurance policies likely to provide the bulk of the financing. 527 U.S. at 852-58.

Left unaddressed in the unique settings of *Amchem* and *Ortiz* was the extent to which the Court's cautions about the "adventuresome" use of the class action would translate into the more quotidian economic harm cases that have formed the mainstream of class action practice for decades. *See Amchem*, 521 U.S. at 616-17. Justice Ginsburg in *Amchem* cabined the concerns of that opinion by distinguishing the economic harm cases as ones in which the Court anticipated that a common core of factual issues would continue to "predominate." *Id*. at 625. *Amchem* was a *de facto* settlement before it was a case. Its viability, its organizing principle, and its conception of preclusive closure — all were a product of settlement only and lacked antecedents in actual litigation. 521 U.S. at 598-99; *Georgine*, 83 F.3d at 618-19. To the extent that courts need to offer a bill of peace in class action

settlements as in all litigation, the troubling feature of *Amchem* was ultimately that the lower courts were without any benchmarks for when it is proper to include claims that exist only in the domain of dispute resolution.

Many of this Court's questions advance or assume the possibility that a proposed settlement class includes putative class members who lack "a cause of action" or "a valid claim." However, determining whether an individual plaintiff has a "cause of action" or "a valid claim" often requires a full and final merits adjudication, either through trial or under the standards of Federal Rules of Civil Procedure 12 or 56. A standard requiring a court to evaluate the strength of each absent class member's claims is both unworkable and contrary to this Court's admonition that "evaluation of . . . the strength of plaintiffs' case is not a part of a Rule 23 analysis . . . ." *Hydrogen Peroxide*, 552 F.3d at 317 n.17 (citation omitted). A district court faced with a class certification motion must not "predict which party will prevail on the merits." *Id*. Applying such a standard in the settlement class context would vitiate the presumption favoring class action settlements and burden both litigants and lower courts with the need to create a fact record that would begin to resemble a merits trial.

Instead, the district court's task at final approval is to determine whether every member of a putative settlement class alleges harm from the

same factual predicate. This requirement is embedded in the Rule 23 fairness analysis, in which the court, acting as a fiduciary for absent class members, analyzes whether the private settlement contract negotiated by the class representatives provides fair, adequate and reasonable compensation to the class.

The language and structure of Rule 23 direct this inquiry. The requirement that common questions predominate is satisfied in the settlement class context if all of the class members share a common core of operative facts. This is not a new or radical answer. It is just another way of describing the scope of a permissible class action release: the claims being settled are all claims that arise from the common nucleus of operative facts pleaded in the class action complaint, whatever law the facts may implicate. *See Insurance Brokerage*, 579 F.3d at 269.

It would be paradoxical and wrong to burden cases that arise from a single course of conduct causing economic harm with a standard for settlement that is predicated on identity of claims or a prediction of the legal viability of individual class members' claims. To do so would run contrary to *Amchem*, *Ortiz* and *Matsushita*, none of which requires or invites a flyspecking of class actions to investigate variance in the positions of

putative class members to try to quantify the unquantifiable.[5] It is for this reason that *Amchem* takes pains to discuss the troubling features of the asbestos settlement, particularly the claimants with disparate injury (past, present and future), and then contrasts that situation with those contexts, especially antitrust, consumer and securities litigation, in which the Supreme Court expects no such difficulties will arise.

The operative words of Rule 23 are common questions, common issues, predominance, superiority — terms not requiring an absolute of Aristotelian perfection but an analysis of the factual allegations underpinning the case, the settlement's structure, the relief it provides, and whether common resolution is appropriate to achieve the ultimate objectives of the class, the parties and the courts. The thrust of Objectors' arguments is that some class members purchased diamonds (and therefore were injured) in states that do not permit indirect purchasers to recover under their antitrust laws, and that this means they lack an avenue for recovery. Objectors never reach the question of whether such persons could or did file complaints against De Beers in which they advance alternate colorable

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[5] In *Pet Food*, many forms of harm, and many types of claims involving many defendants and the law of many states as well as Canada, were united by a common fact pattern, the pet food contamination and recall, and properly settled on a class-wide basis. 2010 WL 5127661, at *5-6, 11.

claims under existing law, or whether they could make nonfrivolous arguments that federal and state law should be extended, modified or reversed to permit them to recover for the economic injury they suffered. *See* Fed. R. Civ. P. 11(b)(2). De Beers is entitled to settle, rather than be forced to fight, and potentially lose, these battles.

Plaintiffs' Responses to the Court's Questions and Assertions

(1)(a) The predominance inquiry requires that each potential class member share at least one identical claim.

Plaintiffs disagree. No provision of Rule 23 requires that each potential class member share at least one identical claim.[6] The Rule 23(b)(3) predominance language is inherently comparative, and tied to a "find[ing] that common questions of law or fact" predominate "over any questions affecting only individual members . . . ." By its use of the disjunctive "or" in the phrase "common questions of law or fact," Rule 23(b)(3) presupposes that class members may possess different claims so long as the claims raise common questions of fact or law that singly or collectively predominate over questions affecting only individuals.

This Court in *In re Prudential Insurance Company America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 310 (3d Cir. 1998), *cert.*

[6] However, as described above, the De Beers class members do have identical damage and injunctive relief claims under the federal antitrust laws.

denied, 525 U.S. 1114 (1999) ("*Prudential I*"), held that a "finding of commonality does not require that all class members share identical claims." *Prudential I* presents the scenario in which common issues predominate without identity of claims. At issue were deceptive practices in the sale of insurance products. This Court approved a nationwide settlement class based on the uniformity of the defendant's conduct across the country and the systematic pattern of the alleged fraud. Although the practices and the nature of the harm were uniform across the class, the plaintiffs asserted a panoply of disparate state-law claims under contract, tort, consumer protection and common law. This Court saw through the superficial variety to the underlying unity of interest and entitlement: "Because of the extraordinary number of claims, fairness counsels that plaintiffs similarly injured by the same course of deceptive conduct should receive similar results with respect to liability and damages." *Id*. at 290.

Imposing an identity-of-claim requirement would create a formalistic bar to the efficient resolution of all claims arising out of a common course of conduct alleged to have harmed all class members in a similar way. *Prudential I* stands for the fundamentally fair and reasonable proposition that it is a virtue of one settlement, as opposed to many suits, that similarly injured claimants receive similar recompense. The Court in *Prudential I*

declined to superimpose an "identical claim" requirement onto Rule 23. *Id*. at 314-15. This Court should decline to do so again.

Class certification should "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness . . . ." Advisory Committee Notes to Rule 23(b)(3) (1966 Amendments). Structural assurances of fairness draw their strength from function, not form. Thus, certification is appropriate where "different claims or issues are subject to different bodies of law that are the same in functional content," or where "different claims or issues are subject to different bodies of law that are not the same in functional content but nonetheless present a limited number of patterns that the court . . . can manage by means of identified adjudicatory procedures." American Law Institute, *Principles of the Law: Aggregate Litigation* § 2.05(b), at 129 (2010).

Rule 23(b)(3) "only requires a predominance of common questions, not a unanimity of them." *Sharp v. Coopers & Lybrand*, 70 F.R.D. 544, 547 (E.D. Pa. 1976). "[I]diosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate . . . ." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998) ("*Hanlon*"). In *Hanlon*, the common problem was Chrysler's use of a

defective door latch on a variety of minivans sold nationwide. Its common solution was the replacement of all class members' door latches with safe ones. The common problem, calling for a common solution, predominated over variations in the legal claims. *Id.*

The most significant problem presented by certification of a nationwide class based on disparate state-law claims is grouping them for trial according to their elements of proof. But, even with claims arising under states' tort laws, courts have found that "state law does not need to be universal in order to justify nationwide class certification." *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 292 (S.D. Ohio 1997). In *Telectronics*, the court addressed variations in state laws invoked for redress by looking for substantial similarity in the "important/meaningful/ significant/pivotal" issues raised by the respective claims to designate trial subclasses. The same technique was applied to organize common issues arising in all cases for class-wide trial in *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 465-67 (D. Wyo. 1995).

With a class action settlement, problems of trial manageability relating to disparate state-law requirements of proof have no bearing on the certification decision. *Amchem*, 521 U.S. at 620. Objectors' arguments lose

sight of this basic distinction.[7] Judicial analysis in the settlement context does not concern elements of proof at trial, but rather due process and the adequacy of representation and redress for absent class members. *Id*. at 621. In the wake of *Amchem*, final approval focuses "on the adequacy of representation and the fair treatment of class members relative to each other and to the potential value of their claims." ALI, *Principles of the Law: Aggregate Litigation* § 3.06, at 216.

What matters is whether the proposed settlement encompasses claims arising from a common core of operative facts and extinguishes the claims of absent class members only in return for fair and reasonable compensation. This is the situation here. All De Beers class members were injured in the

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[7] Objector Quinn relies on an array of cases that have one thing in common: they concerned classes proposed to be certified for trial. For example, this Court considered certification of a trial class in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 192 (3d Cir. 2001), and observed that analysis of a class action settlement is "far different" than in the trial context. Similarly, the court in *Agostino v. Quest Diagnostics Inc*., 256 F.R.D. 437, 466 n.16 (D.N.J. 2009), weighing certification of a litigation class, distinguished a settlement precedent as inapposite under *Amchem*. Plaintiffs sought certification of litigation classes — not settlement classes — in virtually all the decisions on which Quinn relies, including *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305 (3d Cir. 2008); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159 (11th Cir. 2010); *Klay v. Humana, Inc*., 382 F.3d 1241 (11th Cir. 2004); *Stirman v. Exxon Corp*., 280 F.3d 554 (5th Cir. 2002); *Castano v. American Tobacco Co*., 84 F.3d 734 (5th Cir. 1996); and *Walsh v. Ford Motor Co*., 807 F.2d 1000 (D.C. Cir. 1986).

same way, by paying too much for diamonds, and "no state-by-state disparity in overcharging is claimed." *Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *37 (JA 00283).

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

Plaintiffs agree. In 1968, the Tenth Circuit held that predominance under Rule 23(b)(3) turns on whether the class members' individual claims involve a "common nucleus of operative facts." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). While the complaint frames the class issues and channels the grievances into "causes of action," the cohesion of the class does not arise from pleading common causes of action. "The Tenth Circuit formulation of the (b)(3) predominance standard in *Esplin* of a common nucleus of facts is consistent with the explanation by the Advisory Committee to the 1966 revisions of Rule 23 on when a common law fraud class action is appropriate." *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 433 (D.N.M. 1988).

This standard has received widespread approval. In December 2010, this Court found that a district court acted "well within" its discretion in finding predominance satisfied because the "same set of core operative facts and theory of proximate cause apply to each member of the class." *Pet*

Food, 2010 WL 5127661, at *6 (citation omitted). There was "no merit in objectors' argument that state law differences create[d] conflicts among class members," where the claims arose from the same factual nucleus. *Id*. at *11.

For litigation and settlement certification alike, courts in the Third Circuit have long "look[ed] to the 'common nucleus of operative facts' to determine predominance of common questions." *In re Lucent Tech., Inc., Sec. Litig*., 307 F. Supp. 2d 633, 640 (D.N.J. 2004) (quoting *Safran v. United Steelworkers of Am., AFL-CIO*, 132 F.R.D. 397, 401 (W.D. Pa. 1989)). Defendants in *In re Asbestos School Litigation*, 107 F.R.D. 215 (E.D. Pa. 1985), asserted that predominance cannot be satisfied in the absence of "an independent determination of the elements of proof necessary to establish a *prima facie* case of liability under the plaintiffs' claims . . . ." *Id*. at 217-18. The district court disagreed, explaining that potential variations in elements of proof were insufficient to defeat predominance in light of the shared facts. *Id*. at 218 ("What the courts generally look to in evaluating a predominance question is the existence of a 'common nucleus

of operative facts.'").[8] This Court subsequently affirmed the Rule 23(b)(3) class certification order. *See In re School Asbestos Litig*., 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 915 (1986).

In the litigation setting, case management concerns have sometimes defeated certification even when the grievances rest on common facts. *See, e.g*., *In re Bridgestone/Firestone, Inc*., 288 F.3d 1012, 1018-19 (7th Cir. 2002). Courts frequently analyze as part of predominance whether common questions of fact can be answered with proof that is sufficiently applicable on a class-wide basis to make a class trial feasible.[9] This inquiry falls within

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[8] *See, e.g*., *In re Nassau County Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006) ("*Nassau County*"); *Rogers v. Khatra Petro, Inc*., No. 2:08-cv-294, 2010 WL 3894100, at *5 (N.D. Ind. Sept. 29, 2010) (citing *Ziemack v. Centel Corp*., 163 F.R.D. 530, 535-36 (N.D. Ill. 1995)); *Harlow v. Sprint Nextel Corp*., 254 F.R.D. 418, 421 (D. Kan. 2008) (quoting *Heartland Communications, Inc. v. Sprint Corp*., 161 F.R.D. 111, 117 (D. Kan. 1995)); *In re Enron Corp*., 2006 WL 1662596, at *16 (S.D. Tex. June 7, 2006); *Bentley v. Honeywell Int'l, Inc*., 223 F.R.D. 471, 487 (S.D. Ohio 2004); *Bradberry v. John Hancock Mut. Life Ins. Co*., 217 F.R.D. 408, 414 (W.D. Tenn. 2003); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc*., 209 F.R.D. 159, 167 (C.D. Cal. 2002) (quoting *Siegel v. Chicken Delight, Inc*., 271 F. Supp. 722, 726 (N.D. Cal. 1967)); *Iron Workers Local Union No. 17 Ins. Fund & Its Trustees v. Philip Morris Inc*., 182 F.R.D. 523, 540 n.29 (N.D. Ohio 1998); *Jackson v. Rapps*, 132 F.R.D. 226, 231 (W.D. Mo. 1990) (quoting *TBK Partners v. Chomeau*, 104 F.R.D. 127 (E.D. Mo. 1985)); *Lessard v. Metropolitan Life Ins. Co*., 103 F.R.D. 608, 614 (D. Maine 1984).

[9] Recently, the same courts that previously rejected class certification based on manageability concerns have begun to endorse the propriety of staging class trials such that common questions and individual questions are

(Footnote continues.)

the manageability prong of predominance and plays no role in the certification of a settlement class. *Amchem*, 521 U.S. at 620.

Amchem clarifies the nature of the Rule 23(b)(3) predominance inquiry to be conducted in the settlement class context. The inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id*. at 623. Thus, predominance for settlement class certification is not predicated on the establishment or proof of identical "claims," but on the assertion of allegations that raise real and common legal or factual controversies, which are properly resolved through common settlement.

In the practical application of the *Amchem* predominance inquiry to a class settlement, predominance is satisfied so long as "all the claims arise from the same factual predicate, i.e. all potential class members suffered from the same alleged injury." *Hanlon v. Aramark Sports, LLC*, 2010 WL 374765, at *4 (W.D. Pa. Feb. 3, 2010). This comports with the efficient and equitable preclusion achieved by common treatment of factual matters that should bind the defendant to all class members, and vice versa. Further, this approach synchronizes the meaning of predominance in the settlement

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bifurcated, with common liability questions tried jointly and follow-on trials limited to individual issues. *See, e.g.*, *Koral v. Boeing Co.*, -- F.3d --, 2011 WL 9350, at *2 (7th Cir. Jan. 04, 2011).

context with a well-drafted litigation release. Class action defendants invariably seek a global release that will eliminate their risk of future exposure under *any* legal theory that could arise from the facts at hand. *See* Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 6:28, at 141 (5th ed. 2009) (noting that "a settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the transaction or conduct at issue.").

Common issues necessarily predominate if the settled claims are transactionally related, or arise from the same core of operative facts. This rule aligns the predominance requirement with both the incentives in class settlement negotiations and the preclusive effect such settlements accomplish. The rule also harmonizes the scope of a settlement class with: (1) the established *res judicata* standard that "bar[s] claims arising from the same transaction even if brought under different statutes," *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481 n.22 (1982); and (2) the standard that governs when a federal court is constitutionally empowered to exercise supplemental jurisdiction over a state-law claim, *see Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 105 (3d Cir. 1988) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

(1)(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.

Plaintiffs agree. Predominance will generally be satisfied where the claims arise out of a uniform course of wrongful conduct. "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007).[10] In *Chiang v. Veneman*, 385 F.3d 256 (3d Cir. 2004) ("*Chiang*"), this Court, in an opinion by Judge Becker, found predominance "easily met" based on allegations of

> a uniform course of conduct common to all class members subject to common proof in a single trial. In *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir. 1992), we held that a "uniform scheme" or "uniform course of conduct" would support a finding of predominance even where injuries resulting from a fraudulent securities scheme were different for each class member.

Chiang, 385 F.3d at 266, 273.

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[10] *See also Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 412 (E.D. Pa. 2010) ("The predominance requirement is normally satisfied where plaintiffs have alleged a common course of conduct on the part of the defendant."); *Barel v. Bank of Am.*, 255 F.R.D. 393, 399 (E.D. Pa. 2009) ("[T]he predominance inquiry focuses a common course of conduct by which the defendant may have injured class members.") (citing *Prudential I*, 148 F.3d at 314); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 113 (E.D. Pa. 2005) ("As Plaintiffs have alleged such a common course of conduct here, the Court finds that the predominance requirement is satisfied.").

Here, all claims being settled, regardless of the federal or state laws under which they were or could be brought, seek redress for De Beers' "uniform scheme" and "uniform course of conduct" that affected prices and supply in the entire United States gem diamond market. The scope of De Beers' conduct created a natural class. A uniform course of conduct ordinarily forms the basis for antitrust and consumer protection class actions, in which "[p]redominance is a test readily met . . . ." *Amchem*, 521 U.S. at 625. There are three reasons why this is so.

First — liability and redress in antitrust and consumer protection cases normally depend on proof of the defendant's violations. Individually-tailored defenses usually do not apply, and variations in damages are sorted out through the claims process. Thus, "common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues." 6 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 18.25 (4th ed. 2002). *See Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 795 (10th Cir. 1970) (monopolization cases focus on the defendant's conduct and, as a result, are "superbly suited" for class treatment); *In re Southeastern Milk Antitrust Litig.*, No. 2:08-md-1000, 2010 WL 3521747, at *10 (E.D. Tenn. Sept. 7, 2010) ("[A]llegations

of a per se violation of the antitrust laws are exactly the kind of allegations which may be proven on a class wide basis through common proof.").

Second — because the injury alleged in such cases is purely economic, damages to the class can generally be calculated using economic or financial analysis. There is no need for burdensome individualized procedures such as medical examinations, and no need to evaluate subjective and individualized claims of pain and suffering. *See Prudential I*, 148 F.3d at 315 (distinguishing between the satisfaction of Rule 23(b)(3) predominance in class actions involving economic harm and the obstacles to predominance in class actions involving physical harm).

Third — in contrast to class actions involving mass torts and idiosyncratic personal injuries, class actions to redress economic injuries nearly always implicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem*, 521 U.S. at 617 (citation omitted). Class actions in these areas therefore serve a vital deterrent function. *See Hackett v. General Host Corp*., 455 F.2d 618, 623 (3d Cir. 1972) (supporting "a hospitable attitude toward such class actions" because they furnish "an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement."); *Reiter v. Sonotone Corp*., 442 U.S. 330, 344 (1979).

The De Beers settlement approved by the District Court releases claims based on a single course of anticompetitive and deceptive conduct. The settled complaints allege that for decades De Beers controlled production, warehoused diamond reserves, kept a tight grip on the release of supply into the market while advertising that diamonds were naturally scarce, imposed secondary market price restraints, and suppressed price competition by intermediaries and retailers, disciplining them by limiting access to inventory while ruthlessly driving out all but the most compliant competitors. *See, e.g.*, Leider Compl. ¶¶ 1-5 (JA 00538–00542); *Null* Compl. ¶¶ 35, 45 (JA 00607–00608); *Sullivan* Compl. ¶¶ 35-36 (JA 00649). There are no factual issues affecting only individual class members with regard to the core issue of De Beers' cartel behavior, making these claims ideally suited for settlement class certification.

(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.

Plaintiffs agree. The predominance inquiry does not examine claims as such, but instead "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "There is no rigid test of predominance; rather, it simply requires a finding

that 'a sufficient constellation of issues binds class members together.'" *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 26-27 (D. Mass. 2003) (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000)). For predominance to be satisfied, "the common issues must constitute a 'significant part' of the individual cases." *Chiang*, 385 F.3d at 273 (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)); *accord* 7AA Wright, Miller & Kane, *Federal Practice & Procedure* § 1778, at 121 (3d ed. 2005). "[A]ll factual or legal issues that are common to the class inform the analysis." *Nassau County*, 461 F.3d at 227.

In considering a motion to certify a class for trial, the court also "consider[s] how a trial on the merits would be conducted if a class were certified . . . ." *Hydrogen Peroxide*, 552 F.3d at 311 n.8 (citation omitted). If De Beers were tried in any of the settled actions, it is indisputable that the bulk of trial time, energy and expense would be spent on common evidence and testimony about how De Beers' conduct affected diamond supply and pricing.

Apart from the factual issues arising from De Beers' violations, these settled actions implicate two additional common issues that are not generally present in economic injury cases. They are not only significant, but logical antecedents to all other issues facing the class: the twin difficulties of

convincing an American court to assert jurisdiction over De Beers, and of collecting any judgment against De Beers. Undertaking this litigation was daunting. It was far from clear that American law could harness the behavior of the De Beers cartel. To begin, it was at least uncertain whether De Beers was properly served in some or all of the settled cases. *See* Fed. R. Civ. P. 4(h). It was also unclear whether personal jurisdiction for the conduct in question could attach in the United States. *See Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987). Indeed, the Supreme Court had previously held that an injunction against De Beers could not be enforced for lack of jurisdiction.[11] *De Beers Consol. Mines, Ltd., et al. v. United States*, 325 U.S. 212 (1945). It was likewise unclear whether American courts would decline to entertain the suits under *forum non conveniens* principles. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). And, it was far from clear whether principles of international comity

[11] The ability of the shadowy, seemingly impervious De Beers cartel to evade extraterritorial legal sanction for the better part of a century is the stuff of legend. A second DOJ investigation into De Beers' practices in the early 1970s went nowhere. *See* Edward Jay Epstein, *The Rise and Fall of Diamonds: The Shattering of a Brilliant Illusion* (New York: Simon & Schuster, 1982); *see also* www.edwardjayepstein.com/diamond/chap18.htm.

would even permit substantive application of American competition law.[12] *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

These interlocking dispositive questions of whether American law could apply to De Beers' conduct, whether American courts could exercise jurisdiction over the actors, whether American courts would hear the suits, and whether the class could collect any potential judgment equally confronted each class member from every state in every one of the underlying class actions.

The ostensibly successful service on De Beers unified the class, and, absent a class action, the service on De Beers would need to be successfully replicated by every purchaser who wished to pursue a claim under whatever species of American law, in any American court: a vanishingly small prospect. Because of the challenging prospects of replicating service and surviving jurisdictional dismissal motions, it would have been highly irrational for any class member to have opted out. For each purchaser, the

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[12] It was clear, by contrast, that all purchasers of gem diamonds in the United States — irrespective of where they reside or made their purchases, what they bought, the number of their transactions, or any other personal feature — were passive victims of a cartelized market. The market-wide restraints implemented by De Beers resulted in artificially high prices in every transaction in the integrated national market. *See, e.g.*, JA00831, JA00432-35, JA05020 (expert economist concluded that all U.S. diamond prices were inflated as a result of De Beers' cartel behavior).

central, dispositive questions in any legal claim were whether any American law could apply to the De Beers cartel and whether any potential judgment could be collected.

These readily apparent, shared challenges account for why the settlement and consent order received praise as an excellent outcome against De Beers, "one of the business world's great white whales." *Even Global Crises Have a Bright Side*, NATIONAL LAW JOURNAL (Oct. 6, 2008). In light of the formidable litigation risks, there can be no doubt that the $295 million settlement reasonably compensates the settlement class for the released claims, and that De Beers acted reasonably in demanding a nationwide release in exchange for the unprecedented jurisdictional concession embodied in the consent order.

District Judge Chesler stated at the final approval hearing that he was "more than satisfied that the achievement in this settlement, both in monetary terms and in injunctive terms, is indeed a remarkable one." (JA 04953–04954.) As he recognized, litigation of these cases in the absence of an indictment or guilty plea posed a "very, very substantial risk" for Plaintiffs. (JA 04954.) Had De Beers not settled, all Plaintiffs, even those who purchased diamonds in repealer states, would "be litigating for an

extraordinary length of time with a very, very extraordinary risk and likelihood of not prevailing in practical terms." (JA 04954.)

District Judge Baer, who presided over the *Leider* case before it was transferred to the District of New Jersey for settlement, recognized these same challenges, observing that defendants "have proven extremely successful at evading U.S. antitrust law for more than half a century," and "may be unreachable." *Leider*, 2003 U.S. Dist. LEXIS 18270, at *38-39.

In like vein, the District Court in *Sullivan* emphasized the critical, common issues of jurisdiction and collectability that bound together all class members in the underlying actions and created a cohesive settlement class:

> [A]ll class members are confronted with the difficulty of De Beers' refusal to submit to the jurisdiction of any court in the United States and the resulting burden of establishing that De Beers' nationwide contacts satisfy the constitutional requirements of due process. . . . Plaintiffs offer the Court a compendium of declarations from individuals with expertise in the law of enforcing foreign money judgments regarding the enforcement of such judgments in the United Kingdom, Switzerland, Luxembourg, Canada, and South Africa. [citations.] The conclusion in all declarations was that foreign enforcement of the judgments would be problematic at best, based on Defendants being served outside the United States, their denying doing business in the United States, their lack of substantial assets in the country, and their refusal to submit to United States jurisdiction beyond . . . the limited purpose of settlement. (*Id.*) . . . [T]he monetary judgments by this Court would quite possibly be viewed as beyond its authority in the eyes of the foreign jurisdictions and be effectively void.

Sullivan, 2008 U.S. Dist. LEXIS 81146, at *30, 56-57 (JA 00279, 00295) (citing *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353-54 (1920)).

The cluster of threshold issues implicating the ability and willingness of American courts to entertain claims arising from De Beers' course of conduct present overarching common questions that unite the settlement class at a far more profound and practical level than claimed state-law variations on damages ever could divide them. These are common questions, for which, had the cases not settled, there would have been common answers. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009).

(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?

Plaintiffs' answer is neither. In litigation, defendants have multiple opportunities under other Federal Rules of Civil Procedure to deal with plaintiffs who do not have a cause of action. Defective claims are subject to dismissal for failure to state a claim under Rule 12(b)(6), at judgment on the pleadings under Rule 12(c), and under Rule 56 summary judgment

procedures.[13] "[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision . . . ."[14] Advisory Committee Notes to Rule 23 (2003 Amendments). Settlement case law has long recognized the ability to settle claims of questionable validity, even claims dismissed on the merits.

In every class action, the possibility exists that there may be persons within the class definition who ultimately may be shown to lack a meritorious claim. Yet, if the class action device could not tolerate such a possibility, then Rule 23 would require that class certification follow summary judgment and/or trial rather than be decided "[a]t an early

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[13] *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.133, at 253 (4th ed. 2004) ("The court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification. . . . Most courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment. Precertification rulings frequently dispose of all or part of the litigation.") (footnotes omitted).

[14] The extent to which a court may examine or decide the merits of a claim at the class certification stage remains a live issue of dispute. On January 7, 2011, the Supreme Court granted *certiorari* to review the decision in *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010), *cert. granted sub nom. Erica P. John Fund v. Halliburton Co.*, -- U.S. --, 2011 U.S. LEXIS 9 (2011). In *Halliburton*, the Fifth Circuit held that "[i]n order to obtain class certification on its claims, Plaintiff was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." 597 F.3d at 334.

practicable time after a person sues . . . ." Fed. R. Civ. P. 23(c)(1)(A). Limiting the class to persons for whom the trier of fact has affirmatively adjudicated a cause of action would trigger the very "one-way' intervention" the modern Rule was designed to avoid. Advisory Committee Notes to Rule 23 (1966 Amendments).

If a finding that class members lack a cause of action were to defeat commonality and predominance, then a loss on the merits would dictate class decertification, stripping Rule 23 of its preclusive utility. However, Rule 23(c)(3) contemplates that judgment may be entered *against* as well as in favor of a certified class. Thus, the existence of common questions of law or fact does not depend on the ultimate resolution of merits questions in favor of the plaintiffs.

As stated in *Hydrogen Peroxide*: "When a district court properly considers an issue overlapping the merits in the course of determining whether a Rule 23 requirement is met, it does not do so in order to predict which party will prevail on the merits."[15] 552 F.2d at 318. Objectors' argument contradicts this principle. They argue that a district court must

[15] Moreover, "[a]lthough its findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits. *Id.*

make a merits determination to predict if a claim is sufficiently valid to be settled.

Objectors wrongly assume that the validity of an indirect purchaser's cause of action turns entirely on whether the purchase occurred in a repealer state, even though De Beers' conduct was illegal in all 50 states. While diamond purchasers in non-repealer states may have more difficulty recovering damages, their recovery is not precluded under all circumstances and they are not "facially" without a valid cause of action for damages. Even assuming *arguendo* that some of the class members could not have recovered damages under federal or state antitrust law, they possessed live and active damage claims under other state laws — including common law claims providing remedies similar to the competition laws of non-repealer states.[16]

As discussed above, one of the cases settled here, *Leider*, asserted a damage claim under Section 2 of the Sherman Act on behalf of a nationwide indirect purchaser class. (JA 00569–00571.) That claim is certainly colorable, for *Illinois Brick* does not "announc[e] a strict prohibition against

[16] Indeed, as noted, Objector Quinn herself maintained in a brief to this Court that she had standing in this case precisely because she had a common law restitutionary claim under Texas state law. (Quinn Br. filed March 27, 2009, at 63 (Docket No. 00318139675).)

recovery by indirect purchasers." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1167-68 & n.21 (3d Cir. 1993) ("*Lower Lake Erie*"); *see also Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hosp.*, 604 F.3d 1291, 1303-07 (11th Cir. 2010) (holding that the plaintiff, a competitor of the defendant, had standing to assert a Section 2 claim even though the plaintiff never dealt directly with the defendant).

Neither Congress nor any state legislature has enacted a statutory ban on indirect purchasers' recovery for antitrust injury. The rule of *Illinois Brick* is not a jurisdictional bar and it is not absolute. Application of the rule depends on "the remoteness of injury" — which is "analytically distinct from the issue of standing." *Lower Lake Erie*, 998 F.2d at 1164 n.10. Thus, indirect purchasers everywhere have standing to litigate whether *Illinois Brick* applies to their claims.

Illinois Brick's pragmatic rule defining antitrust injury under federal law (431 U.S. at 726-29) explicitly allows for circumstances in which indirect purchasers may argue successfully for recovery (*id*. at 736 & n.16). The effect of *Illinois Brick* on any individual antitrust claim, federal or state, is a matter that must be raised by defendants and litigated. *See, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982). Whether *Illinois Brick* precludes claims depends on the circumstances of each case. And whether

the injury to indirect purchasers is sufficiently direct to avoid application of *Illinois Brick* often entails a fact-intensive inquiry. *See Lower Lake Erie*, 998 F.2d at 1165-72 (conducting an intensive inquiry into the facts to gauge the remoteness of the injury caused by defendants' conduct, which then enabled the Court to determine whether *Illinois Brick* barred plaintiffs' claims). Because Plaintiffs have a factual basis for alleging an injury proximately caused by De Beers, they may assert claims whose survival depends on an extension, modification, or reversal of existing law.[17]

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[17] This includes an argument to the U.S. Supreme Court that it should overrule *Illinois Brick*. The leading antitrust treatise opposes *Illinois Brick*, because consumers "are injured, often more than the intermediary, who may also be injured but for whom recovery of the entire overcharge is typically a windfall. Thus the indirect purchaser rule greatly overcompensates intermediaries and greatly undercompensates consumers . . . ." IIA Areeda & Hovenkamp, *Antitrust Law* ¶ 346k, at 189 (3d ed. 2007). As a result of CAFA, federal courts now hear the same exact "pass-on" based claims that *Illinois Brick* sought to banish, but in a context that requires federal courts to apply the entire panorama of often-undeveloped state antitrust law to multidistrict indirect purchaser suits. "This proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact with cases pending in federal court has created a logistical nightmare for the courts." Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 30 (2004); *see also* Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 99 (2007) (criticizing *Illinois Brick* for "creating a confusing mosaic of antitrust litigation."). Overruling *Illinois Brick* so that federal law can govern all claims — of direct purchasers, resellers, and end-purchasers alike — would go a long way toward easing this situation. Plaintiffs are not claiming in any fashion that the ability of the underlying class actions to proceed depended on a repudiation of current law, but are simply pointing out an example of a

(Footnote continues.)

It cannot be assumed on the basis of *Illinois Brick* alone that "certain indirect purchaser plaintiffs do not have a cause of action." Like all law, antitrust law changes with the times.[18] And, as with any other challenge or defense to a plaintiff's claim, the defendant may waive application of *Illinois Brick*, either because the defendant does not argue for dismissal or, as here, to avoid the risks, costs and uncertainties of litigation by settling.

In *Verizon*, this Court approved a class settlement despite the post-agreement passage of a Congressional statute depriving the named plaintiff and all members of the class of standing to sue. 609 F.3d at 594-96. At the time of final approval in *Verizon*, it was clear that no class member had a cause of action, a fact that did not affect the Rule 23 analysis: "Verizon bet on the certainty of settlement instead of gambling on the uncertainties of future legislative action." *Id*. at 594.

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scenario in which a defendant could decide to settle claims in the face of uncertain or changing law.

[18] *See, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (holding horizontal market allocation schemes *per se* unlawful even though no court had ever made this holding); *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 877 (2007) (holding that vertical price-fixing — previously treated as *per se* unlawful — would henceforth be judged under the antitrust rule of reason).

(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 law or fact predominate under Federal Rule of Civil Procedure 23(b)(3)?

Plaintiffs' answer is no. Under established law, a fair and adequate settlement can extinguish *all* potential claims arising out of the operative facts pleaded on behalf of the putative class. This includes diverging valid claims, and claims that could not even be maintained in the settlement forum court. In *Matsushita,* the Supreme Court held that a class action settlement approved by a Delaware court could extinguish exclusively federal claims not cognizable in Delaware state court, precluding their re-litigation in a federal forum. 516 U.S. 367. The De Beers settlement does not pose such a challenge to the court's authority.

Class settlements fulfill the function of Rule 23 by providing a final common answer, class-wide relief and a class-wide release of all conceivable legal claims arising from common operative facts. As the Second Circuit held:

> As long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object to the fairness of the release, we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action. We have previously "assume[d] that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal

> theory different from that relied upon in the class action complaint but depending upon the very same set of facts." *National Super Spuds, Inc. v. N.Y. Mercantile Exchange*, 660 F.2d 9, 18 n.7 (2d Cir. 1981) [Friendly, J.] . . . We therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.

TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982) (footnote omitted) ("*TBK Partners*"). This Court agreed in *In re Prudential Insurance Company of America Sales Practice Litigation*, 261 F.3d 355 (3d Cir. 2001) ("*Prudential II*"):

> It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself. . . . Admittedly, it "may seem anomalous at first glance . . . that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment." *Grimes v. Vitalink Communications Corp*., 17 F.3d 1553, 1563 (3d Cir. 1994). However, we have endorsed the rule because it "serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action.'" *Id*. (quoting *TBK Partners*, 675 F.2d at 460).

Prudential II, 261 F.3d at 366.[19] The *Sullivan* District Court followed this law in defining and approving the settlement's release of claims:

> The release does not extend to unrelated claims. ([Amended Settlement Agreement, Ex. H] at 30-31.) It only encompasses claims "arising from or relating to facts alleged in any of the Class Actions . . . whether known or unknown, asserted or unasserted . . . ." by members of the Settlement Classes who did not timely exclude themselves based on conduct up to the date of settlement class certification. (*Id*. at 29.)
>
> Claims arising from the same facts but not asserted in a class action may be released by a class action settlement. *Prudential II*, 148 F.3d at 326 n.82 ("[I]t is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment."). Additionally, as demonstrated by the quoted text above, despite objectors' assertion to the contrary, the proposed settlement's release only applies to the class period and to claims arising out of or relating to the underlying Class Actions. Finally, a settlement

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[19] *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 106 (2d Cir. 2005) ("Plaintiffs' authority to release claims is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines. Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement."); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) ("The weight of authority holds that a federal court may release not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action*.'") (quoting *TBK Partners*, 675 F.2d at 460) (emphasis in original); *Nottingham Partners v. Trans-Lux Corp*., 925 F.2d 29, 34 (1st Cir. 1991) (gathering decisions that approved class action settlements "embodying terms which the court would ordinarily have no power to promulgate.").

> release can include non-parties. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005); 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 12:16 (4th ed. 2007). Objectors, therefore, fail to demonstrate that the proposed settlement's scope of release is overly broad.

Sullivan, 2008 U.S. Dist. LEXIS 81146, at *73-74 (JA 00305).

This unequivocally resolves Objector Quinn's perplexity about which claims the District Court certified. The answer is evident on the face of the settlement agreement in addition to the Final Approval Order: the court certified for release and dismissal any and all claims arising from the facts alleged in the settled actions.

Likewise, the record demonstrates that the compensation De Beers agreed to pay after hard-fought negotiations took into account the scope of the claims being released, and benefited all class members. Objector Murray claims "there is no basis for presuming that the defendants paid more to settle both valid and invalid claims than they would have paid to settle only the valid ones." (Murray Suppl. Br. at 19 n.6.) To the contrary, the District Court explicitly found that "De Beers, in the pursuit of a global settlement, demanded a release of potential damage claims in all 50 states; without class member releases from all 50 states, the settlement amount likely would have been less." *Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *31 (JA 00279). The Special Master made the identical findings. (JA 01449.) The import of

these findings is unambiguous: (1) no deal could have been reached without the release of every potential claim arising from the facts underlying the settled litigation; and (2) the presence of state-law consumer fraud and antitrust claims from all 50 states expanded rather than diminished the settlement pie. So too, the presence of counsel representing different groups of plaintiffs in different class actions provided precisely the "structural assurances of fairness" that the Supreme Court demanded in *Amchem*. 521 U.S. at 627.

(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)?

Plaintiffs' answer to this question is yes if the absence of a shared claim coincides with the absence of a predominating shared issue (or issues) of fact or law relevant to class members' different claims. If, however, this question turns on the use of the word "valid," asking whether in order for common issues of fact to predominate they also must be shown to be "relevant to . . . valid claims," then for all of the reasons given in response to Questions 2 and 3(a), *supra*, the answer is no. Predominance depends on common questions, not valid claims. *Matsushita, TBK Partners, Prudential II* and *Verizon* establish that it is perfectly acceptable for a class action

settlement to release claims that may prove to be invalid. Under these decisions, a common valid claim on behalf of all class members is not necessary for a settlement to win final approval.

(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)?

Plaintiffs' answer is no. As explained above, where the defendants' common course of conduct gives rise to an injury allegedly suffered by each member of the class, the predominance requirement is satisfied. The existence of different legal claims does not change the fact that "plaintiffs similarly injured by the same course of deceptive conduct should receive similar results with respect to liability and damages," *Prudential I*, 148 F.3d at 290, or that the De Beers cartel injured all class members by stifling competition and disseminating false information to increase and maintain the price of diamonds. Given these circumstances, the District Court properly concluded that it could release all related claims. *See Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *73-74 (JA 00304–00305).

(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?

Plaintiffs' answer to the first question is no because, as discussed above, Rule 23's use of the disjunctive indicates that common issues of fact alone can be sufficient to satisfy predominance. Moreover, there is no state that does not extend some right of relief to its purchasers under the facts of this litigation. In no state are the acts allegedly perpetrated by De Beers legal. In no state is the possibility of redress categorically foreclosed. Beyond antitrust violations, the settled cases allege that De Beers violated consumer protection and consumer fraud statutes, committed fraud at common law, and unjustly enriched itself at Plaintiffs' expense. These allegations give rise to causes of action under one or more existing legal theories in all 50 states.

Regarding the second question, in the settlement context, a "situation[] where variation in state laws are so significant as to defeat commonality and predominance" could potentially arise if the settlement class were relying on common issues of law to supply class cohesion. However, because both Rules 23(a)(2) and 23(b)(3) contain the disjunctive phrase common issues of "law *or* fact," variations in settlement class

members' state-law theories do not defeat predominance as long as there are predominating factual issues arising from a common core of operative facts.

Variations in state law do not preclude certification of a settlement class unless they create intra-class conflicts that are "severe." *In re Cendant Corp. Litig.*, 264 F.3d 201, 244 n.25 (3d Cir. 2001) (Becker, J.); *Pet Food*, 2010 WL 5127661, at *7. The state-law variations argued by Objectors between class members who purchased in states that have repealed *Illinois Brick*, and those who purchased in states that have not, are not severe. Even leaving aside the shared federal antitrust claims, no class member from any state is left by her state's law without a statutory or common law compensatory or restitutionary remedy. The state-law antitrust variations pertain only to one subset of the released claims, all of which arise from the same facts.

(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?

Plaintiffs' answer to the first question is no. Determining the validity of claims as part of the Rule 23 settlement inquiry has no basis either in the Rule or any case law interpreting it. Such a requirement would improperly read a Rule 12 or Rule 56 standard into Rule 23. Case law overwhelmingly

permits class-wide settlement of doubtful claims, even claims that could be or have been dismissed due to any number of defects, including lack of standing. *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010) ("*Reed Elsevier*"). Indeed, "settlements are designed to resolve doubtful claims." *Ramirez v. DeCoster*, 203 F.R.D. 30, 33 (D. Me. 2001).

Claims may be difficult to maintain for a variety of reasons, including inability to establish personal jurisdiction, standing, liability, causation or damages. But the existence of doubtful claims presents no obstacle to settlement class certification. In *Reed Elsevier*, the certified settlement class included members who did not have standing to sue for copyright infringement because they had not registered their copyrights as required by 17 U.S.C. § 411(a). The Supreme Court nevertheless held that the district court had jurisdiction to approve the class-wide settlement. 130 S.Ct. at 1249. Consider also three other recent cases:

- In *Insurance Brokerage*, this Court affirmed certification of a settlement class based on Sherman Act, RICO and other claims, despite the dismissal of identical or nearly identical claims brought against non-settling defendants. 579 F.3d at 249-50, 285. Notably, the district court also approved a separate settlement with another group of defendants *after* it had granted that group's motion to

dismiss the claims that were settled. *See In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2009 U.S. Dist. LEXIS 17754, at *39, 79 (D.N.J. Feb. 17, 2009).

- In *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 269 F.R.D. 80 (D. Me. 2010), the district court certified a Rule 23(b)(3) settlement class of indirect purchasers whose Sherman Act claims had been previously dismissed on *Illinois Brick* grounds.[20] The court stated that "it was open to [the defendants' ability] to demand compromise of that nationwide [Sherman Act] claim (as well as claims for states where I had ruled that damages could not be recovered) as part of their willingness to settle with the plaintiffs, despite my rulings." *Id.* at 88. The court found that "whether these plaintiffs and the class they represent have any right to recover" by appealing the dismissal of their Sherman Act claim constituted a question common to the class that supported certification for settlement purposes. *Id.*

[20] The district court certified the settlement classes for the purpose of disseminating notice to the class. The certification decision is subject to final approval after a hearing scheduled for February 2011.

- In *In re Air Cargo Shipping Services Antitrust Litigation*, MD-06-1775, 2008 U.S. Dist. LEXIS 107882, *124, 206 (E.D.N.Y. Sept. 26, 2008), *rec. adopted*, 2009 U.S. Dist. LEXIS 97365 (E.D.N.Y. Aug. 21, 2009), the court dismissed plaintiffs' state antitrust claims with prejudice, as preempted by the Airline Deregulation Act. The court also dismissed antitrust claims brought under foreign law. 2008 U.S. Dist. LEXIS 107882, at *206. Subsequently, the court certified a settlement class and approved a settlement of these dismissed claims. *In re Air Cargo Shipping Services Antitrust Litig.*, MD-06-1775, 2009 U.S. Dist. LEXIS 88404 (E.D.N.Y. Sept. 25, 2009). In so doing, the court rejected an objector's argument that it was improper to allocate any settlement money to foreign purchasers, noting that "in the settlement context, it is not necessary to determine which party would have prevailed on the underlying claim being settled. Rather, the essential question is whether the settlement reflects a reasonable compromise."[21] *Id*. at *82-83.

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[21] These cases are not anomalous. Federal courts routinely approve class action settlements releasing previously-dismissed claims. *See, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 153 (2d Cir. 2003) (holding that, although the plaintiffs' antitrust claims were precluded by the federal securities laws, the district court had jurisdiction to approve their settlement); *Ramirez v. DeCoster*, 203 F.R.D. 30, 33 (D. Me. 2001)

(Footnote continues.)

This case in no way delineates the margins of permissible class certifications. Indeed, it is settled that a class action based on economic harm may include class members without a common injury, let alone a valid claim.[22] Antitrust classes, for instance (though not this one), often include large purchasers who received volume discounts giving them the equivalent of a free-market (or lower) price for price-fixed goods or services. It is appropriate to include such businesses in classes, whether for litigation or settlement purposes.

The "*Bogosian* short-cut" recognizes that alleged horizontal, market-wide restraints of trade need not have harmed *all* class members for common issues to predominate, because the proof will depend on predominating common evidence of the defendant's anticompetitive acts. Thus, class

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(court's prior dismissal of claim and party created no "obstacle to certifying a settlement class and enforcing the settlement. After all, settlements are designed to resolve doubtful claims.") (footnote omitted); *In re Chipcom Corp. Sec. Litig.*, No. CIV. A. 95-11114-DPW, 1997 WL 1102329, at *22 (D. Mass. June 26, 1997) (certifying settlement class and approving settlement of previously-dismissed claims); *In re CP Ships Ltd. Sec. Litig.*, No. 8:05-MD-1656-T-27TBM, 2008 WL 4663363 (M.D. Fla. Oct. 21, 2008) (same).

[22] Here, one of Plaintiffs' expert economists, Dr. Gary L. French, found that De Beers injured "all members" of the class through its "exercise of market power in the markets for rough and polished diamonds," which resulted in "supracompetitive prices" at all levels of the distribution chain at all relevant times. (JA 00831, 05020.) Dr. John Pisarkiewicz, who was called upon to perform the damage analysis, found overcharges to the settlement class during each year of the class period. (JA 04368.)

certification may be warranted "[e]ven if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price[.]" *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151-52 (3d Cir. 2002) (quoting *Bogosian v. Gulf Oil Corp*., 561 F.2d 434, 455 (3d Cir. 1977)). In *Linerboard*, this Court upheld certification of a litigation class despite its inclusion of unharmed "purchasers whose contracts were tied to a factor independent of the price of linerboard[.]" 305 F.3d at 158.

No matter what substantive body of law is at issue, in order to have standing to represent a class, the named plaintiffs must "show that they personally have been injured, *not* that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Gratz v. Bollinger*, 539 U.S. 244, 289 (2003) (citations omitted) (emphasis added). Nor is class-wide injury a prerequisite for a class-wide remedy. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), a class comprised of all minority voters in Texas challenged the state's redistricting. Only one of the districts was found to have violated the Voting Rights Act, yet the Court deemed a class action the proper vehicle for relief. *Id*. at 447. Thus, "the "possibility or indeed inevitability" that a class will "include persons who have not been

injured by the defendant's conduct . . . does not preclude class certification." *Kohen v. Pac. Inv. Mgmt. Co. LLC,* 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.); *see also Mims v. Stewart Title Guar. Co*., 590 F.3d 298, 308 (5th Cir. 2009).

Objector Quinn's proposed rule that courts must ensure only "valid" claims are settled finds no support in legal precedent. This is not surprising; such a rule could never be consistently or fairly applied. Whether a claim is "valid" depends on numerous factors, including how the district court defines "valid" in any particular case. Quinn uses the term "valid" to mean whether indirect purchasers may assert an antitrust claim for damages in light of *Illinois Brick*. But Quinn gives no reasoned basis for requiring the district court to determine the *Illinois Brick* issue on the merits, as opposed to any other aspects of class members' claims which may be difficult or impossible to prove. Here, all class settlement members confront the issue of whether American courts have jurisdiction over De Beers. Must the district court weigh which obstacle — *Illinois Brick* or personal jurisdiction — is more important in determining who has a valid claim? This would be an impossible line-drawing exercise. Quinn has offered no reasoned standard that district courts could apply when conducting such an analysis.

Entering the thicket of a state-by-state antitrust analysis would raise an almost unending series of legal and factual questions. For example, Objector Quinn argues that a diamond purchaser's claim is governed by the law of the state in which the diamond was purchased. (Quinn Suppl. Br., at 4-5.) Texas is a non-repealer state, so Quinn must think it is facially apparent that a purchase made in Texas does not give rise to a valid antitrust claim. But which law would govern an Internet purchase ordered in Texas that ships from a California or New York business? Which law governs if a retailer's headquarters is in a repealer state, but the warehouse from which the jewelry ships is in a non-repealer state? The answers to these and other vexing questions do not matter where, as here, De Beers has agreed to pay the residents of all states reasonable compensation for all of their purchases.

Even where the location of the purchase is clear-cut, the exercise of determining valid claims would not be. For example, in Quinn's view, purchasers in California have valid antitrust claims, while purchasers in Ohio do not — simple as that. But where, as here, the complaints allege claims beyond statutory antitrust violations, the inquiry cannot end by sorting states into repealer and non-repealer categories. Federal courts regularly certify nationwide consumer classes under the law of a single

state.[23] *See, e.g.*, *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46 (D.N.J. 2009), *Rule 23(f) pet. denied*, 2009 U.S. App. LEXIS 12478 ("*Mercedes Benz*"); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365 (N.D. Cal. 2010); *Mazza v. American Honda Motor Co.*, No. 07-7857, 2009 WL 6025547, 2009 U.S. Dist. LEXIS 125691 (C.D. Cal. Jan. 8, 2009); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Requiring district courts to determine the validity of class members' claims as a prerequisite to settlement would usurp defendants' own evaluations of their litigation exposure, and in large measure wrest away their control of their own defenses. De Beers elected settlement in the face of: (1) a certified injunctive class under Rule 23(b)(2) in the *Leider* action; (2) a certified nationwide damage class of direct purchasers in the *Anco*

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[23] Were this litigation to be tried, the court would likely confront a choice-of-law question. A very significant percentage of diamonds purchased in America either pass through New York or are purchased in Manhattan. These facts could support an argument that New York's antitrust and consumer protection laws, codified at New York General Business Law sections 340 through 350, could be applied to a nationwide class of diamond purchasers. New York has repealed *Illinois Brick* by statute. *See* N.Y. Gen. Bus. Law § 340(6). The Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010) ("*Shady Grove*"), forecloses any argument that New York's prohibition on class actions affects the viability of New York class action claims in federal court. Moreover, *Shady Grove*'s sudden rehabilitation of Plaintiffs' New York claims illustrates the uncertainty that accompanies complex litigation and defendants' interest in avoiding risk through settlement even when existing law would suggest they have no exposure to liability.

action with default judgments; (3) a certified nationwide indirect-purchaser class in Illinois state court in the *Null* action; (4) default judgments entered in the *Sullivan* and *British Diamond* actions, with class certification motions pending; (5) default judgments and a certified class of California residents in the *Hopkins* action filed in California Superior Court (*see Hopkins v. De Beers Centenary AG*, No. CGC-04-432954, 2005 WL 1020868 (Cal. Super. Ct. Apr. 15, 2005)); and (6) active litigation in Arizona state court in the *Cornwall* action.

These seven cases brought a phalanx of claims for damages and injunctive relief, including claims for false advertising and deception, violations of federal and state antitrust and unfair competition laws, and unjust enrichment. De Beers evaluated the risks, and the parties negotiated this settlement with the assistance of two nationally-recognized mediators. The courts are not well-equipped to second-guess the parties' informed judgment of litigation risk. *See Verizon*, 609 F.3d at 595 (policy and presumption favoring settlements is "especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation,'" and where the district court plays a "circumscribed role") (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)).

Objectors place undue reliance on the Supreme Court's statement that the Rule 23(a)(3) typicality analysis, like the analysis for permissive intervention under Rule 24(b), partly considers "the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." (Murray Suppl. Br. at 6, 8, 11 (quoting *Amchem*, 521 U.S. at 623 n.18).) Here, typicality is no obstacle. All class members share one or more of three "kinds of claims" based on the same legal theories (antitrust, deceptive practices, and unjust enrichment), all of which arise from a single course of anticompetitive and deceptive conduct.

Rule 23(b)(3) predominance speaks to questions, not claims. The *Amchem* predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy," and requires these common questions to "preexist any settlement." 521 U.S. at 623. The District Court's analysis of the allegations in the seven settled cases constitutes just such a predominance inquiry. It trains on the existence of predominating common factual and legal questions raised as matters of genuine controversy in these cases long before settlement. *Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *3-39 (JA 00263–00284).

Moreover, Objectors' proposed requirement of determining the apparent validity of each settled claim misconstrues the obligations of a

district court at settlement. Courts owe a fiduciary duty to the absent class members to ensure that their rights are not compromised without sufficient consideration. *Verizon*, 609 F.3d at 593. Courts, by contrast, owe no fiduciary duty to the defendant, who is present. *Id*. at 594. If a defendant wants to avoid the risk that an appellate court or the Supreme Court might revive apparently invalid claims because of an altered view of the law, the defendant is free to do so. A court is in no position to second-guess independent decisions on how to manage litigation risk by sophisticated parties such as De Beers. A court must not "interfere with the exercise of . . . business discretion in the settlement of a dispute in which the corporation is interested by substituting . . . its independent judgment as to the adequacy of the settlement." *Feldman v. Pennroad Corp*., 155 F.2d 773, 775-76 (3d Cir. 1946).

On the heels of the now-vacated Panel decision in this case, a new class action against De Beers was filed in state court in Indiana, a non-repealer state. *Richards v. De Beers Consolidated Mines, Ltd*., Marion Super. Ct., No. 49C01 10-07-CT-031150 (filed July 15, 2010). As this new filing demonstrates, a defendant's willingness to pay to release a claim necessarily reflects a business judgment that the claim poses some threat of liability, or at least disruption, *i.e*., that the claim has some value.

(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?

Plaintiffs' answer is no. There are seven settled cases that together allege multiple causes of action falling into three general areas:

1. Antitrust claims — for both injunctive relief and damages under both federal and state law;
2. State statutory consumer protection claims; and
3. Common law claims for fraud, deceptive practices and unjust enrichment.

All indirect purchaser class members have colorable antitrust damage claims under federal and New York law in *Leider*.[24] (JA 00568–00577.) All indirect purchaser class members also have a federal Clayton Act claim for injunctive relief, asserted in both *Sullivan* (JA 00641–00642, 00648–00651) and *Leider* (JA 00543, 00571), and certified for litigation in *Leider*. 2003 U.S. Dist. LEXIS 18270, at *30-33. In addition, all indirect purchaser class members have claims certified for litigation in *Null* under Illinois consumer protection law, the common law of unjust enrichment, and the laws of the states where diamonds were purchased. (JA 00264.) Most important, the factual predicate and injury pled on behalf of settlement class members in

[24] Although the *Leider* court dismissed the federal damage claim, the *Leider* plaintiffs and the putative class retain their appeal rights.

the seven complaints implicate the antitrust laws, consumer protection statutes,[25] and common law remedies for fraud, deceit and unjust enrichment[26] available to all U.S. citizens.

The thrust of Objectors' argument raises a narrower question: whether viable state-law claims exist in states that lack an *Illinois Brick* repealer statute or whose courts have not allowed indirect purchasers to recover antitrust damages. Yet ascertaining which states do not permit indirect

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[25] The "Little FTC Acts" reach beyond antitrust violations to proscribe incipient violations and dishonest or unscrupulous behavior, as asserted here. *See, e.g.*, *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977) (the Texas Deceptive Trade Practices-Consumer Protection Act aims "to encourage aggrieved consumers to seek redress and to deter unscrupulous sellers who engage in deceptive trade practices.") (citation omitted). The Federal Trade Commission Act, 15 U.S.C. § 45 — the model for most consumer protection statutes — is "not limited to" conduct "likely to have anticompetitive consequences after the manner of the antitrust laws," but instead "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *F.T.C. v. Sperry & Hutchinson Co*., 405 U.S. 233, 244 (1972); *see, e.g.*, *Schubach v. Household Fin. Corp*., 376 N.E.2d 140, 142 (Mass. 1978) (Massachusetts General Law 93A "created new substantive rights by making conduct unlawful which was not unlawful under the common law or any prior statute.") (citation omitted).

[26] Unjust enrichment is a "universally recognized cause[] of action that [is] materially the same throughout the United States." *Singer v. AT&T Corp*., 185 F.R.D. 681, 692 (S.D. Fla. 1998); *see Mercedes-Benz*, 257 F.R.D. at 58 (agreeing there is "no material conflict relating to the elements of unjust enrichment"). Application of the unjust enrichment doctrine has a "universal thread," *Schumacher v. Tyson Fresh Meats, Inc*., 221 F.R.D. 605, 612 (D.S.D. 2004), and is well-suited for multi-state class treatment by virtue of its uniform availability and focus on the defendant's gain. *See* 3 *Newberg on Class Actions* § 10.3 ("[R]estitution lends itself inherently to easier calculation of classwide monetary relief").

purchasers to recover statutory damages is much easier said than done. This is evidenced by the fact that none of Objectors' Supplemental Briefs or earlier briefs to the panel actually lists the non-repealer states. While it is easy to categorize as repealer states those whose legislatures have enacted statutes expressly permitting indirect purchasers to pursue antitrust claims (*e.g.*, section 340(b) of New York's General Business Law), no state legislature has amended its antitrust laws to *prohibit* indirect purchaser suits. In fact, a number of states have joined the growing ranks of repealer states via judicial decision, such as Tennessee,[27] Nebraska,[28] Arizona,[29] Iowa[30] and North Carolina.[31]

The so-called non-repealer states are those whose courts have ruled that indirect purchasers cannot recover based on state-law antitrust claims. However, those rulings do not mean that consumers victimized by

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[27] *Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9-CV, 2003 WL 21780975, at *23-30 (Tenn. Ct. App. July 31, 2003) ("Clearly *Illinois Brick* addressed only federal law.").

[28] *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 38 (Neb. 2004) (noting that "[d]irect purchasers may not be inclined to jeopardize their major source of supply" by suing Microsoft, particularly when they avoided much of the harm by passing on overcharges to their own customers).

[29] *Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 110 (Ariz. 2003).

[30] *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 451 (Iowa 2002).

[31] *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 688 (N.C. Ct. App. 1996).

anticompetitive behavior are *ipso facto* without a state-law remedy. Some states, while applying *Illinois Brick* to their antitrust statutes, permit indirect purchasers to recover for antitrust injury under their consumer protection laws. For example, in *Ciardi v. F. Hoffman-La Roche, Ltd*., 762 N.E.2d 303 (Mass. 2002), the Massachusetts Supreme Judicial Court read Massachusetts consumer protection law to allow for indirect purchaser recovery in a vitamin price-fixing case even though the Massachusetts Antitrust Act provides that it is to be "construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable."[32] Prior to *Ciardi*, courts assumed incorrectly that indirect purchasers had no cause of action in Massachusetts. *Boos v. Abbott Labs*., 925 F. Supp. 49, 51 (D. Mass. 1996).

Any proposal to disentangle the De Beers settlement would not lead to a simple nose count of purchases made in some states on one side and purchases made in different states on the other. In the real world of antitrust and economic injury litigation, once personal jurisdiction and adequate service of process have been established, state and federal claims combine to

[32] Florida is another example. *See Mack v. Bristol-Meyers Squibb Co*., 673 So.2d 100, 103 (Fla. 1st Dist. Ct. App. 1996), *review denied*, 689 So.2d 1068 (holding that consumers harmed by unlawful restraints of trade can pursue claims under the Florida Deceptive and Unfair Trade Practices Act, though not under the state's antitrust statute).

create a complex web aimed at the same underlying conduct. Unraveling the web in a settlement would be complicated and unnecessary.[33]

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[33] If there is an inquiry arising from the inclusion of repealer and non-repealer state claims in the same class, it relates not to predominance but to the crafting of the procedures for distributing the settlement proceeds. Here, the District Court adopted a *pro rata* plan of distribution recommended by the Special Master after considering the views of all counsel in the settled cases. In concluding that a distribution that treated all purchases on a *pro rata* basis was fair and reasonable, the District Court specifically considered — and rejected — weighting distribution according to some scale of the strength of state antitrust laws vis-à-vis indirect purchaser recovery. At the final approval hearing, in response to objectors urging the adoption of the claims-weighting scale from *In re Relafen Antitrust Litigation*, 346 F. Supp. 2d 349 (D. Mass. 2004), the court took note of the fact that diamond resellers in California, a repealer state, opposed a weighting plan along these lines. They felt that a single nationwide *pro rata* distribution, far from causing them prejudice, in fact constituted "the best approach." (J.A. 04930.) The court also found undeniable practical difficulties that would result from weighting: it would have been impossible to reliably determine which of multiple state laws would have applied to claims submitted by many large purchasers, with State Farm — an insurance company that provided replacement diamonds to policyholders in both repealer and non-repealer states — being a prime example. (J.A. 04931-32.) Based on these and other case-specific facts, the District Court concluded that processing claims from class members *pro rata*, in accordance with the diamond content of their purchases, was eminently fair, and that state-by-state weighting "would be imprecise at best" and could "potentially complicate the claims process to an extraordinary degree." *Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *31 (JA 00279, 04932). A weighting procedure "would greatly add to the cost . . . of processing claims, and would diminish the funds available for claimant recovery." *Id.* (JA 00279). This conclusion was in keeping with Circuit precedent under which courts have employed *pro rata* distributions in indirect purchaser settlements. *See In re Remeron End-Payor Antitrust Litig.*, No. 02-2007, 2005 WL 2230314, at *21 (D.N.J. Sept. 13, 2005) (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 260 (D. Del. 2002), *aff'd*, 391 F.3d 534; *Nichols v. SmithKline Beecham Corp.*, 2005

(Footnote continues.)

Many of the same people who are "indirect purchasers" in antitrust parlance are "consumers" for purposes of the state consumer laws, and the conduct antitrust law condemns as anticompetitive or monopolistic may often be (and here is) actionable as violative of statutory mandates of full disclosure of material fact, truth in advertising, and fair dealing in business transactions. De Beers allegedly violated the consumer statutes outlawing unfair and deceptive trade practices by committing dishonest and unscrupulous trade practices that injured the class, such as advertising campaigns alleged to have falsely advertised the scarcity of diamonds. State law uniformly, expressly and unequivocally proscribes such conduct.

To take one example, New Jersey's Consumer Fraud Act prohibits:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . whether or not any person has in fact been misled, deceived or damaged thereby . . . .

N.J. Stat. 56:8-2. Plaintiffs asserted this New Jersey claim at paragraph 47(ee) of the *Sullivan* complaint. (JA 00653.) Objector Quinn, relying on

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WL 950616, at *18-19 (E.D. Pa. Apr. 22, 2005); *see also Hanlon*, 150 F.3d at 1021.

Sickles v. Cabot Corporation, 877 A.2d 267 (N.J. Super. App. Div. 2005), contends that the claim amounts to an impermissible "end-run" around New Jersey's adoption of *Illinois Brick* for state antitrust actions. (Quinn Br. filed March 27, 2009, at 46 (Docket No. 00318139675).) Quinn is wrong. In a post-*Sickles* decision, the New Jersey Supreme Court, while continuing to reject the wholesale engrafting of a consumer claim onto an antitrust violation, refused to preclude a Consumer Fraud Act claim "when the allegations of a violation of the Antitrust Act include communications with, or statements to, New Jersey consumers that are clear violations of the CFA." *Wilson v. General Motors Corp*., 921 A.2d 414, 416-417 (N.J. 2007) (citation omitted). Such consumer deception and communications were alleged here, and constitute an independent basis for liability under state law.[34]

[34] Quinn also contends that Ohio law bars any form 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* by bringing a claim under the Ohio Consumer Sales Practices Act ("CSPA") that is "predicated upon monopolistic pricing practices . . . ." Still, *Johnson* does not necessarily bar a consumer claim based on fraud or deception: the type of illegal conduct De Beers is alleged to have carried out. 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).

Objectors erroneously assert that class members cannot have legitimate unjust enrichment claims simply because they did not purchase diamonds directly from De Beers. To the contrary, the unjust enrichment doctrine "evolved largely to provide relief where, in the *absence* of privity, a party cannot claim relief in contract and instead must seek refuge in equity." *Ontiveros Insulation Co., Inc. v. Sanchez*, 3 P.3d 695, 698-99 (N.M. App. 2000) (emphasis added). "If one has money belonging to another, which, in equity and good conscience, he ought not to retain, it can be recovered although there is no privity between the parties." *Smith v. Whitener*, 856 S.W.2d 328, 330 (Ark. Ct. App. 1993). Thus,

> [w]hen price fixers move to dismiss consumers' unjust-enrichment claims on the basis that privity is required, they, not surprisingly, can't provide authority for this proposition because none exists. And this authority's absence stands to reason, since if the parties *were* in privity, consumers would bring contractual, not *quasi*-contractual, claims in state court; or, as direct purchasers, would have standing to [pur]sue Clayton Act claims for Sherman Act violations in federal court.

Daniel R. Karon, *Undoing the Otherwise Perfect Crime: Applying Unjust Enrichment to Consumer Price-Fixing Claims*, 108 W. VA. L .REV. 395, 421 (2005) (emphasis in original). In reality, "unjust enrichment always has applied to situations like consumer price-fixing claims . . . [and] provides consumers — particularly in states having arguably inapplicable antitrust

and consumer-fraud statutes — a powerful remedy against price fixers."[35] *Id*. at 431.

Even in jurisdictions where legal precedent suggests a plaintiff must have dealt directly or semi-directly with a defendant to receive restitutionary damages or disgorgement, such a privity bar will not necessarily apply in *every* case. Unjust enrichment law does not comprise a fixed body of jurisprudence that sets in stone rigid rules which definitively foreclose certain claims in equity. Flexibility is the hallmark of equitable claims — courts sitting in equity "mould each decree to the necessities of the particular case." *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *see also Young v. Higbee Co*., 324 U.S. 204, 209 (1945) (equity regards substance rather than form); *Independent Wireless Tel. Co. v. Radio Corp. of Am*., 269 U.S. 459, 472 (1926) (equity will not suffer a wrong without a remedy).

Objectors' argument that settling these unjust enrichment claims amounts to an impermissible dodge of *Illinois Brick* suffers from four major flaws, and should be rejected. First, the argument contradicts Quinn's own

[35] For example, in *In re Abbott Laboratories Norvir Anti-Trust Litigation*, 2007 WL 1689899, at *8-10 (N.D. Cal. June 11, 2007), the court certified an unjust enrichment litigation class of indirect purchasers in 48 states who alleged harm from an anticompetitive scheme concerning the pricing of prescription drugs that treat AIDS.

representation to this Court that, despite residing in Texas, a non-repealer state, she "has an unjust enrichment claim, which entitles her to monetary relief." (Quinn Br. filed March 27, 2009, at 63 (Docket No. 00318139675).)

Second, unjust enrichment and other common law doctrines provided remedies to indirect purchasers long before enactment of state antitrust statutes. In fact, American antitrust statutes largely grew out of the common law's protection of economic competition and its proscription of unfair business practices.

Third, neither federal antitrust law nor the *Illinois Brick* decision purports to preempt or alter other substantive remedies available to redress anticompetitive conduct. *See California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the states."); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-94 (9th Cir. 2000) (holding that federal antitrust law does not preempt California competition and consumer protection law despite the existence of remedies not available under federal law).

Fourth, the elements of unjust enrichment differ materially from the elements of monopolization or price-fixing. Objectors' argument "confuses

Plaintiffs' right to recover an equitable remedy under a common law claim based upon principles of unjust enrichment with [their] right to recover a remedy at law for an alleged violation of a state's antitrust laws." *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000) (permitting indirect purchasers who alleged an anticompetitive scheme to maintain unjust enrichment claims).

All settlement class members have colorable claims. While those claims may fly under different colors — common law or otherwise — nothing prevents their settlement for valuable consideration.[36]

(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?

Plaintiffs' answer is no. This Court answered its own question in *Prudential I*, where an objector claimed "the district court's fairness determination violated . . . the Rules Enabling Act by altering the substantive contractual and statutory insurance rights of the class." 148 F.3d at 318. The Court rejected the argument, because "approval of a settlement under Rule 23 'merely recognizes the parties' voluntary compromise of their

[36] Any holding that these claims cannot be aggregated and settled would conflict with this Court's admonition in *Community Bank II* that adequacy requires class counsel to explain a failure to pursue colorable claims. 622 F.3d at 303-04.

rights' and does not itself affect their substantive state law rights." *Id*. at 324 (quoting district court findings). The Court cited with approval a law review article that concluded it is "fundamentally fallacious and misleading" to assert that courts create new substantive rights when they approve class action settlements. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 624 (1997) (cited in *Prudential I*, 148 F.3d 324 n.76).

The Rules Enabling Act provides that federal rules of practice and procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Objectors claim that the De Beers settlement, by compensating class members for purchases made in non-repealer states, impermissibly enlarges class members' substantive rights. As with all of Objectors' claims grounded in the *Illinois Brick* repealer/non-repealer dichotomy, this claim fails as a factual matter because the settlement compensates every indirect purchaser class member in exchange for releasing De Beers from the potential federal antitrust liability it faced in *Leider* (JA 00543, 00571) and *Sullivan* (JA 00641–00642, 00648–00651), as well as the potential liability it faced for fraud, deceit, unfair competition and unjust enrichment under the statutory and/or common laws of all states.

Furthermore, as *Prudential I* held, the Rule 23(e) settlement approval process does not effectively grant relief against the defendant. 148 F.3d at 324. A grant of relief ensues when a litigant prevails on the merits and the court, exercising its power, compels another litigant to do something involuntarily, *e.g.*, pay damages. The rights and obligations of settling parties arise not from a grant of relief, but from a private contract. Without the De Beers settlement contract, neither Plaintiffs nor the absent class members would be entitled to monetary compensation or an injunction at this time. Their current right to recover derives from De Beers' voluntary decision to compensate them. The District Court neither abridged, enlarged nor modified any of their substantive rights.

In *Verizon*, this Court explained that the reason for judicial approval of class action settlements is not to grant or ratify substantive rights already conferred in the agreement. 609 F.3d at 594. This was the basis for the Court's holding that the mootness doctrine did not preclude the district court from approving the settlement under Rule 23: "'The mootness doctrine is centrally concerned with the court's ability to grant effective relief.' . . . We

find nothing in the Clarification Act that would moot the parties' settlement agreement."[37] *Id*. at 596 (citations omitted).

(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?

Plaintiffs' answer is no. The question at final approval is not whether the claims should be aggregated for the purpose of "grant[ing] relief." Rather, the question is whether the claims are sufficiently cohesive to be released and whether the agreed-to compensation fairly and adequately protects the interests of absent class members.

Moreover, a state court's adoption of the *Illinois Brick* rule does not evidence a state interest in depriving indirect purchaser businesses and private citizens of all avenues of redress. Every state recognizes statutory and common law remedies for harm resulting from fraudulent, deceptive, inequitable and anticompetitive conduct.

No state has articulated an interest in indirect purchaser claims not being settled in its courts. *Illinois Brick* is a rule of convenience for

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[37] The dissent in *Verizon* disagreed that jurisdiction to complete the Rule 23(e) procedures could survive Congress' mooting of the named plaintiffs' entire cases. However, this position was *not* based on the view that Rule 23 settlement approval effectively grants relief either to the named plaintiffs or to the absent class members. *See id*. at 597-609. In contrast to the named plaintiffs in *Verizon*, Plaintiffs here alleged live, cognizable claims under the common law and a host of federal and state statutes.

litigation. It evinces no tolerance for *per se* illegal anticompetitive schemes.[38] To the extent that the adoption of *Illinois Brick*'s indirect purchaser rule manifests any state policy, it is simply a preference for a certain method of antitrust case management. The rule does not relate to settlement of claims.

Not only has no state "foreclosed" indirect purchaser relief, no state refuses to allow plaintiffs to settle because of doubts about the merits of their claims. All individuals in this indirect purchaser settlement class have the right to settle and release claims under the laws of the states in which they purchased diamonds. Aggregating those claims for settlement and release in a single judicial proceeding does not alter any substantive state rights.

It is noteworthy that all 50 state Attorneys General were given individual notice of the De Beers settlement, which included a description of the claims to be released and the proposed *pro rata* allocation plan. If state officials had believed that the settlement or allocation plan expanded or infringed on their state laws, they could have brought this to the District

[38] All states share the same interest in redressing and deterring *per se* illegal restraints of trade, because of their "pernicious effect on competition and lack of any redeeming virtue." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 461 (3d Cir. 1998) (citation omitted).

Court's attention. None did. *See Sullivan*, 2008 U.S. Dist. LEXIS 81146, at *31-32 (JA 00279–00280).

(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?

Plaintiffs' answer is no. First, *Shady Grove* confirmed that a federal court acting within the confines of Rule 23 does not violate the Rules Enabling Act. 130 S.Ct. at 1442-42. Similarly, the compromise of "rights" that any settlement agreement reflects cannot run afoul of the Act. The parties' contract is the source of any recoveries and releases in a class action settlement, just as in any settlement of a private dispute. Thus, the "approval of a settlement under Rule 23 merely recognizes the parties' voluntary compromise of their rights and does not itself affect their substantive law rights." *Prudential I*, 148 F.3d at 324.

Second, although *Amchem* famously declared that "settlement is relevant to a class certification," 521 U.S. at 619, the decision to settle does not implicate the Rules Enabling Act. The class cohesion necessary to fulfill Rule 23(b)(3) predominance in the settlement context derives not from a presumed common interest in settlement, but from the settlement of pre-existing common "legal or factual questions." 521 U.S. at 622-23. As a result, in cases resolving economic loss claims that arise from a common

course of conduct, the court focuses on whether the settlement class has "sufficient unity" such that its members "can fairly be bound" by the decisions of the class representatives. *Id*. at 621. The court fills a "restricted, tightly focused role" at final approval, examining the sufficiency of the consideration and asking whether the settlement is fair, reasonable and adequate for the absent class members. *Verizon*, 609 F.3d at 593. The merits of the settlement, while critical to the approval process, do not supply the commonality or predominance required of the underlying litigation.

Conclusion

The De Beers settlement is more than adequate. It is historic, and remarkable in the recovery it secures from a foreign conglomerate that has long operated outside the purview of U.S. law.

Viewing the De Beers settlement from an *Amchem* perspective demonstrates the presence of the required "class cohesion." 521 U.S. at 621-24. The common factual questions faced by each claimant in proving De Beers' cartelization of the market and deceptive communications, and the twin obstacles of jurisdiction and collectability, presented the District Court with overwhelming evidence that common issues predominate. The court's inquiry established common factual and legal questions, arising directly from De Beers' conduct and pre-existing the settlement, that "qualify each

class member's case as a genuine controversy" and supply "the class cohesion that legitimizes representative action in the first place." *Id.* at 623. Unity was not imposed upon this class by the negotiating parties. The settlement did not deprive any class member of compensation and did not abandon anyone affected by De Beers' course of conduct. Considering the jurisdictional and sovereignty hurdles raised by De Beers' foreign ownership and assets, it is no wonder that no diamond reseller or consumer with any significant economic interest in the settlement opted out — a virtually unheard-of statistic in modern class actions.

The existence here of the class cohesion at the heart of the *Amchem* predominance analysis warrants affirmance of the District Court's final approval order.

This landmark settlement and consent decree pass scrutiny under Rule 23 and are fully consistent with the longstanding public policy favoring global settlement of disputes. De Beers' uniform course of conduct caused every class member economic injury. The inclusion in the settlement of class members from non-repealer states does not prejudice class members or unfairly favor some over others, as the findings below confirm.

The District Court properly exercised its discretion in certifying the settlement class and finding the settlement to be fair, adequate and

reasonable. The lengthy, well-reasoned final approval order fully complies with the precedents of the Circuit. The judgment should be affirmed.

Date: January 11, 2011

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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.

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Dated: January 11, 2011

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CERTIFICATE OF SERVICE

I, Tracy R. Kirkham, hereby certify that true and correct copies of foregoing plaintiffs' supplemental brief were served via the Court's ECF system on January 11, 2011, upon all counsel of record listed on the ECF System.

Dated: January 11, 2011 */s/ Tracy R. Kirkham*
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