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February 16, 2011

Office of the Clerk  
U.S. Court of Appeals for the Third Circuit  
21400 U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106

Re: *Sullivan, et al. v. DB Investments, Inc., et al.*,  
No. 08-2785 (3d Cir.)

Dear Clerk of Court:

Objector/appellant Susan M. Quinn respectfully files this letter pursuant to Federal Rule of Appellate Procedure 28(j) in response to Class Counsel's letter filed on February 10, 2011 drawing to this Court's attention the ruling in *United States v. Keyspan Corp.*, 2011 WL 338037 (S.D.N.Y. 2011).

In their ongoing quest to identify even a single claim for damages possessed by every class member that could facilitate the certification of a settlement class pursuant to Federal Rule of Civil Procedure 23(b)(3), Class Counsel have offered up their latest claim *du jour*: the equitable remedy of disgorgement.

Class Counsel's reliance on *Keyspan* is flawed in numerous respects. To begin with, *Keyspan* only recognizes that the United States as plaintiff may seek the remedy of disgorgement in an antitrust case. The United States indisputably had standing in *Keyspan*. Furthermore, *Keyspan* does not hold that indirect purchasers prohibited from seeking antitrust overcharge damages under federal law and the laws of

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numerous states can instead seek monetary recovery under a disgorgement theory.

Equally as important, the district court in this case against De Beers did not certify a disgorgement claim for class treatment, nor did Class Counsel ask the district court to certify a disgorgement claim for class treatment. Although this Court's powers on en banc review are wide-ranging, the requirement that a party must raise arguments in a timely manner in the district court to preserve them for appellate review remains applicable.

We respectfully urge this Court to carefully examine the second case cited in Class Counsel's recent letter, *FTC v. Mylan Labs.*, 62 F. Supp. 2d 25 (D.D.C. 1999). Therein, Judge Hogan ruled that disgorgement cannot be used to circumvent *Illinois Brick's* standing requirement under federal law. *Id.* at 41–42. *Mylan* further holds that state law claims for restitution or disgorgement are barred unless state law specifically allows indirect purchasers in an antitrust case to recover damages. *Id.* at 43. Finally, *Mylan* dismissed damages and disgorgement claims for indirect purchasers whose claims were governed by the laws of 15 specified states that adhere to *Illinois Brick*. *Id.* at 44–52.

Respectfully submitted,

*/s/ Howard J. Bashman*

Howard J. Bashman

HJB/ns

cc: See attached Certificate of Service

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I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this document is being served electronically on them by the

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In addition, I hereby certify that I have served a paper copy of this document today by first class U.S. Mail on the following two *pro se* litigants who have entered their appearances in these appeals:

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Dated: February 16, 2011

/s/ Howard J. Bashman

Howard J. Bashman