In the United States Court of Appeals for the Third Circuit

No. 08–2785

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

v.

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

SUSAN M. QUINN,
Objector/Appellant.

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

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

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Christopher J. Braun
George M. Plews
Plews Shadley Racher & Braun LLP
1346 North Delaware Street
Indianapolis, IN 46202
(317) 637–0700

Counsel for Objector/Appellant Susan M. Quinn

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

Only minutes before the start of the en banc reargument of this appeal on February 23, 2011, the attorney who would argue this case for Class Counsel presented to the attorney who would argue this case for appellant Susan M. Quinn a "handout" containing four exhibit tabs that Class Counsel's arguing attorney planned to distribute to the judges and use at oral argument.

After Class Counsel's arguing attorney consulted with members of this Court's Clerk's Office present for the oral argument, Class Counsel's arguing attorney informed the attorney who would argue this case for Ms. Quinn that the consent of appellants' counsel would be necessary in order for Class Counsel to be able to distribute the proposed handout to the judges at the oral argument.

Because arguing counsel for Ms. Quinn did not have an adequate opportunity in the remaining minutes to examine the proposed handout, and because arguing counsel for Ms. Quinn did not want the judges to be distracted by any newly distributed handout during his time addressing the Court and responding to the Court's questions,

counsel for Ms. Quinn did not then consent to the distribution of the handout.

Of course, nothing prevented Class Counsel from ascertaining earlier in advance of the en banc reargument that opposing counsel's consent would be needed to use the handout at oral argument, or from presenting the handout to opposing counsel earlier in advance of the oral argument, to give appellants' counsel an adequate opportunity to determine whether or not the handout was indeed objectionable.

Now that Ms. Quinn's counsel has had an adequate opportunity to review the proposed handout, counsel for Ms. Quinn is pleased to report that she has no objection to Class Counsel's motion to lodge the handout with this Court.

Of course, Ms. Quinn's consent to the lodging of the handout should not be construed as any agreement with the arguments that Class Counsel had advanced based on the contents of the handout.

In particular, Judge Chesler's class certification opinion issued May 22, 2008 (App.262) contains no mention whatsoever of the Wilson Tariff Act, and thus it would not be appropriate for this Court to affirm the district court's certification of a nationwide class of indirect

purchasers seeking damages based on any claim asserted under that federal statute. In addition, Class Counsel's supplemental brief filed at the rehearing stage contains no mention of the Wilson Tariff Act.

Even more importantly, Class Counsel's Brief for Appellees filed on June 11, 2009 argues at page 47 that restrictions on indirect purchaser standing to seek damages on federal antitrust claims are "not relevant to the indirect purchaser claims here" because "[a]ll of the indirect purchaser class's damages claims are being asserted under state antitrust and consumer protection laws." *See* Class Counsel's Brief for Appellees filed June 11, 2009 at page 47. Thus, Class Counsel's Brief for Appellees disclaimed any reliance on federal law as a basis for certifying indirect purchaser claims for damages in this case.

And, if that were not enough, Judge Chesler's class certification opinion filed May 22, 2008 offered as a justification for the generous attorneys' fee award in favor of Class Counsel that "Class counsel also faced significant difficulties in this case, including * * * having to rely on diverse state law causes of action for Indirect Purchaser Class damages claims due to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers cannot bring federal antitrust damage claims)."

App. 316 (Judge Chesler's class certification opinion issued May 22, 2008 at 55). This clearly reflects the district judge's view that Class Counsel in fact relied on, and had no alternative but to rely on, "diverse state law causes of action for Indirect Purchaser Class damages claims" due to *Illinois Brick*'s preclusion of such claims under the federal antitrust laws.

It is telling that Class Counsel did not debut their Wilson Tariff Act theory supposedly allowing for the certification of indirect purchaser antitrust damages claims until the time of en banc reargument. The Wilson Tariff Act is codified at 15 U.S.C. §8. An adjoining statutory provision, 15 U.S.C. §12, defines the term "antitrust laws" to include the Wilson Tariff Act. And it is Section 4 of the Clayton Act, 15 U.S.C. §15, that confers on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" the ability to bring a civil action for damages under the federal antitrust laws.

In *Illinois Brick*, the Supreme Court ruled that indirect purchasers lack standing to bring a claim for damages under Section 4 of the Clayton Act. There is no logical basis to conclude, nor has Class

Counsel cited any authority to support the conclusion, that *Illinois Brick*'s prohibition of indirect purchaser damages claims under Section 4 of the Clayton Act would not apply to indirect purchaser claims for damages being asserted under the Wilson Tariff Act. *See Gregory Marketing Corp.* v. *Wakefern Food Corp.*, 787 F.2d 92, 93 & n.3 (3d Cir. 1986) (recognizing that any civil action seeking damages for violation of the federal antitrust laws, which include the Wilson Tariff Act, must be asserted under Section 4 of the Clayton Act).

The U.S. District Court for the Southern District of New York, while presiding over the case known as *Leider* v. *Ralfe*, has already rejected the identical argument that Class Counsel is now advancing. In *Leider,* 2003 WL 22339305 (S.D.N.Y. Oct. 10, 2003) — one of the seven cases consolidated into this appeal — U.S. District Judge Harold Baer, Jr. ruled that indirect purchasers "lack[ ] 'antitrust standing' under Section 4 of the Clayton Act" to pursue any claim for damages under the Wilson Tariff Act. *Id.* at *8; *see also id.* at *6 ("Thus, none of the proposed class members are proper plaintiffs to seek monetary damages under Section 4 of the Clayton Act. Those members of the class who purchased from DeBeers' sightholders are barred by the rule of *Illinois*

Brick. The members of the class who purchased from DeBeers' competitors also lack antitrust standing to bring a claim for monetary damages.").

As then–U.S. District Judge Edward R. Becker recognized in *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1163–64 (E.D. Pa. 1981), the right to relief under the Wilson Tariff Act is no broader than the right to relief under the Sherman Act. Because Judge Chesler's class certification opinion in this very case confirms that Class Counsel lacked the ability to pursue indirect purchaser damages claims under the federal Sherman Act, that opinion's reasoning likewise forecloses Class Counsel from now, at the eleventh hour, seeking to rely on the Wilson Tariff Act. App. 316 (Judge Chesler's class certification opinion issued May 22, 2008 at 55).

The fact that the predominance inquiry that Judge Chesler undertook analyzed only state law antitrust claims, coupled with Class Counsel's concession at oral argument that the predominance requirement could not be satisfied if the laws of at least one state did not confer on indirect purchasers standing to pursue a claim for damages, necessitates vacating the district court's class certification

order, as the State of Ohio and some 20 other states prohibit indirect purchaser antitrust damages recovery in accordance with *Illinois Brick*, thereby defeating the predominance requirement.

For these reasons, Ms. Quinn does not oppose Class Counsel's motion to lodge record excerpts.

Respectfully submitted,

/s/ *Howard J. Bashman*

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Christopher J. Braun
George M. Plews
Plews Shadley Racher & Braun LLP
1346 North Delaware Street
Indianapolis, IN 46202
(317) 637–0700

Counsel for Objector/Appellant
Susan M. Quinn

CERTIFICATE OF SERVICE

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 Notice of Docket Activity:

Bagolie, Ricky E.
Bandas, Christopher A.
Bernstein, William
Biggio, Jessica
Boggio, Andrea
Braun, Christopher J.
Browne, Scott W.
Ciani–Dausch, Francis
Cochran, Edward W.
Cooper, Josef D.
Corbitt, Craig C.
Cramer, Eric L.
Emory, Tara S.
Fastiff, Eric B.
Gardner, Cecilia L.
Gaudet, Robert J., Jr.
Harris, Edward W., III
Hendrickson, Matthew P.
Hicks, James B.
Issacharoff, Samuel
Kupfer, Susan G.
LaRocca, Robert J.
Maher, John A.
Margulies, Robert E.
Nelson, Kenneth E.
Pentz, John J., III
Plews, George M.

Siegel, Edward F.
Skirnick, Robert A.
Stamell, Jared
Sunshine, Steven C.
Tabacco, Joseph J., Jr.
Weinstein, Jeffrey L.
Yoes, Stuart C.
Zack, Joanne

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:

Dishman, Kristen
16 14th Avenue
Wareham, MA 02571

Ms. Marasco, Margaret
#85
14 Lakeview Avenue
Lynn, MA 01904

Dated: February 25, 2011 */s/ Howard J. Bashman*