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)

RESPONSE OF APPELLANT SUSAN M. QUINN TO THE AMICUS BRIEFS ON REHEARING

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RESPONSE OF APPELLANT SUSAN M. QUINN TO THE AMICUS BRIEFS ON REHEARING

I. Introduction

On September 24, 2010, three organizations submitted motions for leave to file proposed amicus briefs in this matter. On the evening of October 14, 2010, this Court entered an order that authorized the filing of those amicus briefs. In accordance with Third Circuit Local Appellate Rule 29.1(a), objector/appellant Susan M. Quinn hereby files this response to those amicus briefs.

Ms. Quinn assumes this Court's familiarity with the arguments presented in her previously filed Brief for Appellant and Reply Brief for Appellant. Ms. Quinn also assumes this Court's familiarity with the three–judge panel's ruling in this case, which is reported at *Sullivan* v. *DB Investments, Inc.*, 613 F.3d 134 (3d Cir. 2010) (vacated on granting of rehearing en banc). And lastly, Ms. Quinn assumes this Court's familiarity with her answer in opposition to Class Counsel's petition for rehearing en banc. Ms. Quinn endeavors to avoid repeating herein the arguments that she has already advanced in those earlier filings, which the members of the en banc Court already have at hand.

II. The Amicus Brief Of The American Antitrust Institute Seeks To Defeat A Straw Man Instead Of Confronting Ms. Quinn's Actual Arguments Or The Panel's Actual Decision

Although it makes for an interesting read, the amicus brief that the American Antitrust Institute (AAI) has submitted is irrelevant, because it fails to confront the actual facts and circumstances that gave rise to the three–judge panel's decision in this case.

Contrary to AAI's amicus brief, it is not Ms. Quinn's argument that class certification was impermissible because defendants agreed to pay too much in settlement or some of the claims certified for class treatment were too weak. Rather, it is Ms. Quinn's objection that Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement cannot be satisfied where, as here, a nationwide class is settled in which class members in a sizeable number of States possess no claim whatsoever against the defendants under applicable state law. In setting aside the district court's class certification under Rule 23(b)(3) as an abuse of discretion due to the absence of predominance, the panel majority agreed with precisely this argument. *See Sullivan*, 613 F.3d at 145–51.

Persisting in its characterization of the impediment to predominance as involving weak rather than non–existent claims, the AAI's amicus brief next maintains that neither the Rules Enabling Act nor principles of federalism are implicated by allowing the settlement of weak claims (or a defendant's overpayment in settlement) because weak or even potentially invalid claims are settled all the time. Once again, however, AAI is seeking not only to alter the facts of this case, but also to focus on something other than predominance.

As the panel's opinion recognizes, in this case, in approximately half of the States, class members possessed a valid antitrust claim as indirect purchasers, while in the remaining half of the States, class members did not possess a valid antitrust claim as indirect purchasers. *See Sullivan*, 613 F.3d at 146–50. As a result, common issues do not predominate in this case because approximately half of the class of indirect purchasers does not possess any valid claim against the defendant, while the remaining half does possess a valid antitrust claim. *See id.* at 146–49.

Thus, contrary to the AAI's caricature of Ms. Quinn's objection and the panel's decision, this case does not involve a scenario where

some class members possess weak claims while others possess strong claims, nor does this case involve a scenario where a court paternalistically believes that a defendant may have paid too much in settlement. Neither Ms. Quinn nor the panel was concerned that defendants may have paid too much in settlement. Rather, here a substantial portion of class members possess no claim whatsoever against defendants under applicable law, whereas others do possess such claims. This gives rise to the predominance defect that the panel's decision recognized.

Although AAI pays lip service to the Supreme Court's requirement that the element of predominance must be established with at least the same, if not greater, rigor for purposes of a settlement class, AAI proceeds to contend that the predominance requirement should only be rigorously enforced when doing so would protect the interests of absent class members. Although the Supreme Court may have explained that the purpose of enforcing the predominance requirement at least as stringently when certifying a settlement class is to protect the interests of absent class members, the Supreme Court did not hold that the predominance requirement should *only* be enforced stringently in a

settlement class when doing so protected the interests of absent class members. *See Amchem Prods. Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). Rather, the Supreme Court held that the predominance requirement must be stringently enforced when certifying any settlement class, without regard to what effect enforcing that requirement has on absent class members. *See id.*

In any event, even if AAI were correct in contending that the predominance requirement should only be enforced when doing so protects the interest of absent class members, Ms. Quinn's objection to predominance in this case does protect the interest of absent class members who actually possess valid claims under applicable law. Under the terms of the settlement that the district court approved, class members without any valid claim under applicable law will receive the same amount of recovery as class members who possess valid claims under the law applicable to their indirect purchases. AAI's argument rests on the unproved and unprovable assertion that defendants paid more to settle all claims (valid and invalid, existing and non–existent) than defendants would have paid to settle only valid, existing claims.

Yet neither Class Counsel nor De Beers has ever argued during the course of this case that defendants paid more to settle all claims than defendants would have paid to settle only valid, existing claims. As this Court has repeatedly recognized when adjudicating challenges to class action attorneys' fee awards, defendants are mainly concerned about the bottom line of how much a settlement will cost and consequently are indifferent concerning how the settlement is divided between the class and counsel for the class. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001) (citing cases). Similarly, once a defendant agrees to settle a class action, the defendant will of course want to achieve the broadest possible preclusive effect. Yet, notwithstanding AAI's repeated assertions to the contrary, there is nothing in this record to establish that defendants agreed to pay anything more to settle invalid, non–existent claims than defendants were willing to pay to settle only the valid, existing claims that class members in *Illinois Brick* repealer states possess.

What makes this case unusual, and perhaps unique, is that Class Counsel obtained defaults against defendants before these cases settled, and therefore no contested litigation preceded the settlement whereby

the defendants could have easily obtained the dismissal of claims brought by indirect purchasers arising under the law of States that have not authorized such claims.

Taken to its logical extreme, the laissez faire approach to the settlement of class actions that the AAI advocates in its amicus brief would have disastrous results. Assume, hypothetically, that De Beers were sued in a nationwide class action on a clearly non–existent claim, such as one alleging that De Beers should be liable to a nationwide class of indirect diamonds purchasers in damages, and for injunctive relief, due to De Beers' alleged misapplication of the Federal Sentencing Guidelines. That case would unquestionably present common legal questions, such as "whether a private defendant may be held civilly liable for misapplication of the Federal Sentencing Guidelines" and "has De Beers in fact misapplied the Federal Sentencing Guidelines." Assume further that the release that De Beers negotiated in settling that class action also discharged the company from any liability to the diamond purchaser class members for antitrust violations, consumer protection violations, and unjust enrichment.

In this hypothetical scenario, according to AAI's approach, federal courts should ignore for purposes of class certification that the lawsuit actually being settled did not allege even a single valid claim for relief on behalf of anyone, because defendants are free to settle invalid claims if they so desire. In actuality, however, Rule 23's repeated mention of the term "claims" presupposes a scenario in which the claims being certified for collective treatment at least have some arguable validity. *See Sullivan*, 613 F.3d at 149 ("That [predominance] test presupposes that everyone in the class at least has a cause of action."). That is precisely what is lacking here.

In any event, this case does not involve the scenario where no class member has a valid claim, nor does it involve the scenario where all class members have valid claims, some of which are stronger than others. Rather, this case involves the scenario where a district court has certified a nationwide class in which the law of approximately half of the States do not authorize indirect purchaser recovery for antitrust violations. As all three judges on the original panel recognized, notwithstanding their other differences, if the laws of a given State do not authorize any recovery against defendants, then indirect purchasers

whose claims arise under the laws of that State should not be included in the settlement class. *See id.* at 145–54 (majority opinion); *id.* at 164 (Rendell, J., concurring in the judgment). For that reason, the panel correctly vacated the district court's approval of the settlement class and remanded for a more probing class certification inquiry.

III. The Amicus Brief Of Diamond Manufacturers & Importers Association Of America Errs In Arguing That Defendants' Agreement To The Entry Of Injunctive Relief Deprives This Court Of The Ability To Set Aside That Injunction

The amicus brief that the Diamond Manufacturers & Importers Association of America (DMIAA) has filed begins with a defense of injunctions and equitable decrees that a federal district court has entered with the consent of the parties. Ms. Quinn does not contend that injunctive orders can never be entered with the consent of the parties, nor does Ms. Quinn contend that injunctive orders entered with the consent of the parties are not a permissible means for settling a class action suit.

Nevertheless, as this case demonstrates, merely because the parties to a lawsuit are willing to stipulate to the entry of injunctive relief does not automatically mean that a federal district court's entry of

an injunction is beyond reproach or immune from being vacated on appeal. Although the parties are free to stipulate to facts that remain within their control, they are powerless to stipulate about facts outside their control in a manner that contradicts other objective facts already of record before the district court.

As is relevant in the circumstances of this case, the record before the district court established that De Beers no longer possessed monopoly power in the diamonds market when the parties entered into a stipulated injunction by means of which De Beers pledged to not exercise monopoly power in a manner that was anticompetitive. *See Sullivan*, 613 F.3d at 156–58. Whether De Beers possessed monopoly power at the time it entered into that stipulated injunction was not a fact that either De Beers or Class Counsel had within their power to control, and thus the stipulation of De Beers could not overcome the objective evidence before the district court demonstrating that De Beers no longer possessed monopoly power within the diamonds market when the stipulated injunction issued. *See id.*

A hypothetical helps prove this point. Assume that the Beatrice Foods Company owned and operated a tannery located in Woburn,

Massachusetts that was accused of leaking toxic chemicals that contaminated a nearby source of drinking water. Assume further that a class action was brought by nearby residents of Woburn who rely on that drinking water source seeking, among other things, an injunction prohibiting the continued discharge of toxic chemicals from the tannery.

If Beatrice Foods Company sold the tannery to a completely separate third–party, and thus no longer owned or operated the tannery at the time Beatrice settled the class action, it would assuredly be improper for the district court, as part of the settlement of this hypothetical class action, to enjoin Beatrice from continuing to discharge toxic chemicals from the tannery because at the time the injunction was issued, Beatrice no longer owned or operated the tannery.

The bottom line is that a federal district court acts improperly in entering an injunction at the stipulation of the parties if the evidence before the district court establishes that the party being enjoined lacks the power to commit the offense being enjoined when the injunction issues. In the hypothetical discussed above, Beatrice was no longer discharging toxic chemicals into the groundwater because it no longer

owned or operated the tannery. And, in the context of this case, as the evidence before the district court showed, De Beers no longer possessed the capability to exercise monopoly power when the injunction issued because of the competitive nature of the diamonds market that had emerged due to the entry into the market of many additional competitors. *See Sullivan*, 613 F.3d at 156–58.

As the Supreme Court has recognized, the element of "threatened injury" is a standing requirement. *See Davis* v. *Federal Election Comm'n*, 128 S. Ct. 2759, 2769 (2008) ("A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct."). A party may never waive the requirement of standing. *See United States* v. *Hays*, 515 U.S. 737, 742 (1995); *see also Animal Legal Defense Fund* v. *Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded.").

Lastly on this point, it is Ms. Quinn's understanding that De Beers' agreement to settle this case depends on obtaining court approval not only of the stipulated injunction, but also of the monetary settlement of the damages claims that have been asserted. If either

aspect of the settlement is rejected, then the entire settlement dissolves, subject to the possibility of further settlement negotiations and the ability to seek court approval of any new settlement agreement that is reached.

After seeking to defend the stipulated injunction that the district court issued, DMIAA's amicus brief proceeds to argue that this Court's ruling in *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 318, 324 (3d Cir. 1998), undermines Ms. Quinn's argument that the settlement approved here violates the Rules Enabling Act. Yet, contrary to DMIAA's argument, this Court's ruling in *Prudential* is distinguishable. In *Prudential*, an objector argued that the Rules Enabling Act prohibited the district court from authorizing relief in a class action settlement that differed from the relief that was available under state law. *See id.* at 324. But, in *Prudential*, those class members awarded such relief at least possessed valid claims for relief under applicable state law.

Here, by contrast, the Rules Enabling Act is directly implicated, because the settlement that the district court approved in this case awards relief to class members who have no claim for relief under

applicable state law, thereby disregarding and overriding the refusal of applicable state law to recognize such claims. As the Supreme Court has recognized, Congress never gave, nor did the federal courts ever claim, the power to create substantive rights denied by state law. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Sullivan*, 613 F.3d at 151–53.

Ms. Quinn has already addressed the other matters raised in DMIAA's amicus briefs in her merits briefing and in her brief in opposition to Class Counsel's petition for rehearing en banc.

IV. The Amicus Brief Of The Jewelers Vigilance Committee Is Directing Its Frustration About This Flawed Class Action Settlement Toward The Wrong Party

The Jewelers Vigilance Committee (JVC), in its amicus brief, expresses frustration that the implementation of a settlement that many of its members find satisfactory has been delayed due to objections involving flaws in the class certification process. Although Ms. Quinn believes that the settlement can and should be improved for the benefit of herself and others who actually have valid claims against

defendants, Ms. Quinn can sympathize with the frustration voiced in JVC's brief.

Although a settlement's popularity may be relevant in judging the adequacy of the voluntary resolution of a class action, popularity is not relevant in examining whether a case satisfies the predominance prong that every federal court settlement class must satisfy before qualifying for certification.

In any event, JVC's frustration would be better directed toward Class Counsel, which has attempted the seemingly expedient but unprecedented settlement of a nationwide indirect purchaser antitrust class action. Had class counsel followed the usual approach and merely sought to certify subclasses for those states that allow for indirect purchaser recovery, this Court would not be confronted with having to decide whether a federal district court may permissibly certify a nationwide class of indirect purchasers asserting antitrust claims where such claims are recognized as valid in only approximately half of all States.

Although JVC may understandably feel thankful toward Class Counsel for having engineered a recovery that JVC's members find

satisfactory, the class certification flaw that continues to delay the approval of this settlement is also itself something for which Class Counsel bears responsibility.

Lastly, the panel has already correctly adjudicated and unanimously rejected Class Counsel's challenge to the standing of the objectors, including Ms. Quinn. *See Sullivan*, 613 F.3d at 143 n.9. Ms. Quinn believes that she possesses a valid claim against defendants as an indirect purchaser under Texas law, and she also recognizes that it is not the law of the State in which she resides, but rather the law of the States in which she has purchased diamonds, that would determine the validity of her claims against defendants.

V. Conclusion

The requirement of predominance applies with special force in the settlement of a class action, the Supreme Court has cautioned. And federal courts cannot issue injunctions based merely on the stipulation of the parties where the facts before the court establish that injunctive relief is not appropriate. These two principles demonstrate why this

Court, sitting en banc, should adhere to the panel's resolution of this case.

Respectfully submitted,

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Dated: November 4, 2010 */s/ Howard J. Bashman*