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, U.S. District Judge)

APPELLANT SUSAN M. QUINN'S REPLY TO CLASS COUNSEL'S BRIEF FILED MARCH 31, 2011

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APPELLANT SUSAN M. QUINN'S REPLY TO CLASS COUNSEL'S BRIEF FILED MARCH 31, 2011

I. Introduction

On March 8, 2011, this Court entered an order allowing Class Counsel to file a response to the seven–page response that objector–appellant Susan M. Quinn had filed on February 25, 2011 to Class Counsel's motion to lodge exhibits.

Approximately five pages of Ms. Quinn's response filed February 25, 2011 addressed the Wilson Tariff Act argument that Class Counsel raised for the very first time at the en banc oral argument of this case as a proposed ground for holding that the district court's conclusion that the predominance requirement found in Federal Rule of Civil Procedure 23(b)(3) was satisfied should be affirmed.

As Ms. Quinn noted in her response filed February 25, 2011, the district court's class certification opinion contained absolutely no mention of the Wilson Tariff Act. Likewise, Class Counsel's briefing of this appeal before the three–judge panel, and supplemental briefing of this appeal before the en banc Court, contained no mention of the Wilson Tariff Act. Although Class Counsel's failure to raise the Wilson Tariff Act in their appellate briefing should lead this Court to hold that

the argument is waived, *see Tyler* v. *Armstrong*, 365 F.3d 204, 212 n.6 (3d Cir. 2004) ("The issue has not been adequately briefed and will therefore not be considered as a possible alternate ground for affirmance."); *Zinniel* v. *Commissioner*, 883 F.2d 1350, 1355 n.8 (7th Cir. 1989) ("a litigant may not raise new arguments during oral argument"), Ms. Quinn in her response wanted to draw to this Court's attention that Class Counsel's newfound Wilson Tariff Act argument suffered from the same predominance defects under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), as did Class Counsel's other federal antitrust claims and many of their state law antitrust claims.

On March 31, 2011, Class Counsel filed what purports to be their response to Ms. Quinn's Wilson Tariff Act argument but which in actuality consists of a 24–page brief that summarizes and reiterates all of the arguments that Class Counsel are currently advancing in support of affirmance. Although Ms. Quinn doubts that this Court's order of March 8, 2011 intended to invite one more comprehensive brief from Class Counsel, Ms. Quinn is now constrained in this reply to address what hopefully represents Class Counsel's final effort to salvage affirmance.

II. Class Counsel's Assertion That Any Claim Capable Of Being Settled Necessarily Qualifies For Class Certification Is Contrary To The U.S. Supreme Court's Ruling in *Amchem* And Disregards That The "Predominance" Inquiry Must Focus On Matters That Preexist Any Settlement

Class Counsel's response seeks to conflate two indisputably separate inquiries: (1) what claims may members of a properly certified class action agree to settle; and (2) what claims, if any, qualify for class certification under Federal Rule of Civil Procedure 23(b)(3), a Rule which includes a predominance requirement that must be satisfied even when a class is being certified for purposes of settlement.

Under the Federal Rules of Civil Procedure, and as a matter of logic and common sense, the determination of whether any claim or claims satisfy Rule 23(b)(3)'s predominance requirement, and may therefore be certified under that Rule, must precede the determination of what claims class members can agree to settle, because unless one or more claims are properly certified, no class members exist who have the ability to settle any claims.

In *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), the Supreme Court explained that Rule 23(b)(3)'s "predominance" requirement "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 (emphasis added). Thus, the fact that a defendant may wish to settle claims, or the fact that a case involves claims that are capable of being settled, does not satisfy the predominance test under *Amchem*. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 314 (3d Cir. 1998) ("*Amchem* rejected the idea that the potential benefits of settlement are relevant to the predominance inquiry").

Class Counsel's proposed "claims capable of being settled" standard for satisfying the predominance test is, in reality, no standard at all. If Class Counsel's proposed standard were indeed the law, then the outcome of *Amchem* itself would have been the opposite of the result that the Supreme Court reached in that case. The claims certified for class treatment in *Amchem* not only were capable of being settled, but in fact they already were the subject of an existing settlement agreement. Nevertheless, the Supreme Court held in *Amchem* that Rule 23(b)(3)'s predominance requirement was not satisfied. Thus, the Supreme Court's ruling in *Amchem* prohibits this Court from adopting

Class Counsel's proposed "capable of being settled" standard to govern Rule 23(b)(3)'s predominance inquiry.

Beyond *Amchem*, the "capable of being settled" standard is in fact no standard at all. Any claim, whether real or imaginary, is capable of being settled. The reason why it is important to prohibit imaginary claims, or claims that class members lack standing to pursue, from providing the basis for class certification is that once someone is within the definition of a properly certified class, then that person unquestionably can be deprived as the result of a settlement of any and all claims that the person has or may have against the defendant.

To reiterate, Ms. Quinn agrees with Class Counsel that someone who is within a properly certified class can settle any and all claims that he or she has or may have against the defendant, no matter how strong, frivolous, or fanciful those claims may be. Ms. Quinn is not asking this Court to impose the requirement that only seemingly legitimate claims may be settled by means of a class action. Indeed, as the U.S. Supreme Court recognized in *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996), the settlement of a Delaware state court class action could release a federal securities law claim that the

Delaware state court lacked subject matter jurisdiction to adjudicate. But the U.S. Supreme Court's decision in *Matsushita* makes clear that the only claims that the Delaware state trial court had certified for class treatment arose under Delaware state law, and the issue that the Supreme Court decided in *Matsushita* did not involve any predominance challenge to class certification under state law. Rather, *Matsushita* merely involved, and rejected, a challenge to the scope of a class action release as too broad. Here, by contrast, Ms. Quinn's objection is focused on the entirely separate matter that only those causes of action for which Rule 23(b)(3)'s predominance requirement — a requirement focusing on issues that preexist any settlement — is satisfied qualify for class certification under that Federal Rule of Civil Procedure.

III. Class Counsel's Assertion That The District Court Certified For Class Treatment All Claims Alleged In All Seven Of The Underlying Lawsuits Gains Absolutely No Support From The District Court's Opinion Or This Court's Precedent

In *Wachtel* v. *Guardian Life Ins Co. of Am.*, 453 F.3d 179 (3d Cir. 2006), a decision that this Court issued nearly two years before the district court filed its opinion approving class certification in this case,

this Court explained that district courts granting class certification are required "to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment." *Id.* at 184.

As the majority opinion of three–judge panel that originally decided this appeal recognized, Judge Chesler's class certification opinion in this case did not comply with that requirement imposed in *Wachtel*. *See Sullivan* v. *DB Investments, Inc.*, 613 F.3d 134, 155–56 (3d Cir. 2010) (vacated on granting of rehearing en banc). Class Counsel, in their response brief, take the position that because Judge Chesler did not identify some subset of claims from the underlying seven actions that he was certifying for class treatment, the assumption must be that Judge Chesler has certified for class treatment each and every cause of action alleged in all seven of the underlying lawsuits.

Although creative, Class Counsel's argument gains no support from Judge Chesler's opinion or from this Court's decision in *Wachtel*. To begin with *Wachtel*, if a class certification ruling that failed to include "a clear and complete summary of those claims, issues, or defenses subject to class treatment" would be presumed to certify *all*

claims being asserted in the case, then this Court would have had no reason to impose the requirement that a class certification ruling must include "a clear and complete summary of those claims, issues, or defenses subject to class treatment." *Wachtel*, 453 F.3d at 184. In other words, the district court's failure in *Wachtel* to include "a clear and complete summary of those claims, issues, or defenses subject to class treatment" was not understood by this Court to represent the district court's decision to certify for class treatment *all claims* being asserted by the plaintiffs in *Wachtel*. *See id.* There is no reason for this Court to reach the contrary conclusion in this case.

This is especially so because Judge Chesler's class certification ruling itself expressly recognized that Class Counsel were required "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. That Judge Chesler was not certifying federal antitrust claims as to indirect purchasers was further evidenced elsewhere in his class certification opinion, when he wrote that "all members of each class have valid claims under state law, albeit not identical claims in all

situations, that they are ceding in exchange for the settlement fund and injunction." App.283. Likewise, Class Counsel's opening brief filed in this Court on June 11, 2009, in arguing why this Court's rejection of "umbrella" liability in *Mid–West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 580–87 (3d Cir. 1979), did not preclude Class Counsel from proving antitrust impact, forthrightly admitted on page 47 that "[a]ll of the indirect purchaser class's damage claims are being asserted under state antitrust and consumer protection laws." Both the district court and class counsel have thus recognized that the claims certified for class treatment were, at most, state law antitrust, consumer protection, and unjust enrichment claims.

As the majority opinion of the original three–judge panel recognized, Judge Chesler's opinion only addressed the predominance inquiry in the context of state law antitrust, consumer protection, and unjust enrichment claims. *See Sullivan*, 613 F.3d at 142, 145. As a result, those were the only claims that Judge Chesler certified for class treatment with regard to indirect purchasers. And as Judge Rendell's concurring opinion recognized, Judge Chesler's predominance inquiry was insufficiently thorough. *See id.* at 162 (Rendell, J., concurring in

the judgment) ("the District Court did not engage in a meaningful analysis or discussion of the issue of predominance"). Judge Rendell's observation is unquestionably correct.

The remainder of Class Counsel's claim–by–claim argument essentially asks this Court to usurp the role of the district court by holding that class certification would be proper based on claims that the district court itself did not consider certifying. Judge Chesler's class certification opinion contains no mention of the Wilson Tariff Act, it contains no mention of certifying a nationwide class under a New York law known as the Donnelley Act, and it contains no mention of disgorgement. Although Class Counsel relies on *United States* v. *Keyspan Corp.*, 2011 WL 338037 (S.D.N.Y. Feb. 2, 2011), in arguing that the remedy of disgorgement should be available even to indirect purchasers, it is noteworthy that even more recently, in *Simon* v. *Keyspan Corp.*, 2011 WL 1046119 (S.D.N.Y. Mar. 22, 2011), the very same federal district court rejected the claims of indirect purchasers against Keyspan as barred under *Illinois Brick*. *See Simon*, 2011 WL 1046119, at *8–*11.

With regard to Class Counsel's argument that this Court should hold that the trial court could certify a nationwide class of indirect purchasers under the Donnelly Act applying New York law, it is important to note that the Donnelly Act was first amended to permit claims by indirect purchasers effective December 23, 1998. The amendment is not given retroactive application. *See State* v. *Daicel Chemical Industries, Ltd.*, 840 N.Y.S.2d 8, 11 (N.Y. App. Div. 2007). The class period in this case began on January 1, 1994. App.266, 270. Even assuming extra–territorial coverage, indirect purchasers who purchased their diamond between January 1, 1994 and December 22, 1998 have no Donnelly Act claim as a matter of New York substantive law.

Further, the Donnelly Act is modeled after the Sherman Act and is generally interpreted in accordance with federal precedent. *See Anheuser–Busch, Inc.* v. *Abrams*, 520 N.E.2d 535, 539 (N.Y. 1988) (recognizing that "the Donnelly Act — often called a 'Little Sherman Act' — should generally be construed in light of Federal precedent"). Thus, class members who purchased their diamond from a competitor of De Beers do not have an antitrust claim under the federal antitrust

laws or the Donnelly Act. *See Mid–West Paper Products*, 596 F.2d at 580–87.

Class Counsel's reliance on state consumer protection laws fares no better. As certified by the district court, the class in this case includes not only indirect purchaser consumers but also indirect purchaser resellers. App.270. Under the laws of many states, consumer protection laws confer rights only on consumers, and not on resellers. *See*, *e.g.*, *Conte Bros. Auto., Inc.* v. *Quaker State–Slick 50, Inc.*, 992 F. Supp. 709, 716 (D.N.J. 1998) (recognizing that "commercial resellers such as plaintiffs do not qualify as 'consumers'" under New Jersey's Consumer Fraud Act); 73 Pa. Stat. Ann. §201–9.2(a) (Pennsylvania's Unfair Trade Practices and Consumer Protection Law provides a private right of action for "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes"); Ohio Rev. Code Ann. §1345.02(A) (Ohio Consumer Sales Practice Act provides that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction"); Kan. Stat. Ann. §50–624(b) (Kansas Unfair Trade and Consumer Protection Act defines "consumer" to mean "an individual, husband and wife, sole proprietor,

or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes"). Accordingly, Class Counsel's reliance on state consumer protection laws fails to support the overbroad class that the district court certified here.

Lastly, Class Counsel's reliance on the class certification of an Illinois state court in the *Null* case filed in the notorious "rubber stamp" class action mill of Madison County, Illinois fails to recognize that the *Null* action standing alone cannot support affirmance. This is because the *Null* case excludes from its class definition anyone who purchased diamonds from third–parties other than De Beers and also excludes from its definition indirect purchaser resellers. App.620, 633. Thus, if the *Null* case was the only basis for affirming class certification, which it cannot be for all the many reasons that Ms. Quinn has argued in her earlier briefing to this Court, the class definition that the district court approved would need to be vacated as overbroad.

In sum, the district court did not certify for class treatment all of the claims asserted in all seven of the underlying lawsuits, nor would affirmance be proper even if that in fact had occurred.

IV. Within The Class As Certified By The District Court, Not All Class Members Were Harmed By The Allegedly Wrongful Acts Of De Beers

At the en banc oral argument, the question was posed whether there was any reason to "doubt that even the indirect purchasers have injury." En banc oral argument transcript at 10–11. That question, of course, implicates the very essence of the U.S. Supreme Court's ruling in *Illinois Brick*, which recognized the impossibility of tracing whether unlawful antitrust overcharges are passed–on to indirect purchasers. Here, there are multiple layers of sales and resales before diamonds reach a consumer. Thus, under *Illinois Brick*, there certainly is reason to doubt whether all indirect purchasers suffered injury.

Even more to the point, because the certified class consists of purchasers of diamonds from third–party non–conspirators, under the "umbrella" liability theory that this Court long ago rejected in *Mid–West Paper Products*, 596 F.2d at 580–87, there certainly is reason to doubt that class members who purchased from those third–party non–conspirators were injured as the result of any wrongful acts of De Beers. Moreover, such class members would likewise not possess any unjust enrichment claim against De Beers, since they did not purchase a

diamond originating from De Beers, and thus De Beers was not enriched by those class members, unjustly or otherwise. As the Second Circuit recognized in *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), "no class may be certified that contains members lacking Article III standing." *Id.* at 264.

The inclusion within the class as certified of consumers who purchased diamonds that originated from competitors of De Beers provides one more important distinction between this case and this Court's earlier rulings in *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004), and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998). In both *Warfarin* and *Prudential*, the classes were defined to include only class members who purchased products originating from the defendant. By contrast, in this case the class is much more sprawling, and has been intentionally defined to include class members who purchased diamonds during the class period that originated from *anywhere*, whether or not De Beers was the source. App.270.

V. The District Court's Grant Of Injunctive Relief Cannot Sustain Class Certification

At the en banc stage, this Court has not focused the parties' attention on the propriety of the injunctive relief that the district court granted. Ms. Quinn believes that the majority on the three–judge panel properly ruled that the record did not support the grant of an injunction, and she relies on the arguments she advanced in her original briefing in support of that point.

What is clear, however, is that the district court's class certification in this case was pursuant to Rule 23(b)(3), because the case predominantly involved a claim for damages. App.273. Under Rule 23(b)(3), the requirement of "predominance" must be satisfied for a class to be certified.

At this late stage in the proceedings, it simply is not possible for this Court to hold that the district court instead could have certified this identical class for injunctive relief under Rule 23(b)(2) and then approved this identical settlement. To begin with, that is most decidedly not what the district court actually did. App.273. Moreover, it would not have been appropriate for the district court to have done that, since this case is predominantly about damages. *Cf. Hohider* v. *United Parcel*

Service, Inc., 574 F.3d 169, 198 (3d Cir. 2009). And, finally, transforming this into a Rule 23(b)(2) class at this very late stage would nullify the opt–outs of those class members who elected to remove themselves from the class as originally certified under Rule 23(b)(3), thereby adversely affecting the due process rights of those opt–outs.

VI. Conclusion

Without question, the arguments in favor of affirmance that Class Counsel has raised in this Court have changed from when this case was pending before a three–judge panel to when this case was pending before the en banc Court, and changed once again at the time of the en banc oral argument. What has not changed, however, is the fact that the state law claims for antitrust violations, consumer protection act violations, and unjust enrichment that the district court certified for class treatment fail to satisfy Rule 23(b)(3)'s predominance requirement.

Class Counsel's plea to avoid a remand is ironic, to say the least, given that Class Counsel's most aggressively pursued grounds for affirmance consist of arguments that the district court has not

previously considered. Rule 23(b)(3)'s predominance requirement, the Rules Enabling Act, and principles of federalism all require that the district court's class certification of state law claims for antitrust violations, consumer protection act violations, and unjust enrichment be vacated. Whether a non–nationwide class alleging those state law claims, or a class alleging some other claim, can be certified are issues that the district court will need to address on remand. As the U.S. Supreme Court's decisions in *Amchem* and *Matsushita* make clear, a properly certified class can settle any and all claims, but the desire to settle any and all potential claims does not, by itself, satisfy Rule 23(b)(3)'s predominance requirement.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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 in 14 point Century Schoolbook font.

Dated: April 15, 2011 /s/ *Howard J. Bashman*

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