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)

SUPPLEMENTAL REPLY BRIEF OF APPELLANT SUSAN M. QUINN ON REHEARING EN BANC

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I. INTRODUCTION

At the foundation of this nation's federal judicial system is the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Objector–appellant Susan M. Quinn respectfully submits this supplemental reply brief on rehearing en banc to assist this Court in its return to reality from the journey to jurisprudential fantasyland on which Class Counsel's supplemental Brief for Appellee embarked.

In response to Ms. Quinn's argument that a nationwide indirect purchaser antitrust overcharge settlement class cannot satisfy Federal Rule of Civil Procedure 23(b)(3)'s "predominance" requirement because the laws of many states preclude such indirect purchasers from asserting antitrust, consumer protection, or unjust enrichment claims, Class Counsel's supplemental brief advances the following contentions:

- Class members do not need to possess a claim that applicable law authorizes them to assert in order to satisfy Rule 23(b)(3)'s "predominance" requirement;

- Applicable law could change, transforming what is today a non–existent claim into a claim that the law recognizes tomorrow; a defendant may legitimately choose to settle weak or non–existent claims; and the scope of a class action release does not depend on what claims have been certified;

- Even if the adherence of various states to the standing limitations of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), would preclude a finding that common questions predominated on state law antitrust or consumer protection claims, either a nationwide claim founded on the law of a single state or a nationwide claim for unjust enrichment would enable a nationwide class of indirect purchasers to be certified here;

- A district court's approval of a class action settlement is merely the judicial ratification of a private agreement, and thus the approval of a class action settlement does not constitute the granting of relief on account of claims that the law of various states refuses to recognize in contravention of the Rules Enabling Act and principles of federalism; and

- Determining whether a given state adheres to the standing limitation of *Illinois Brick* and thus prohibits indirect purchasers from pursuing antitrust overcharge claims under state antitrust, consumer protection, and unjust enrichment law requires an inquiry into the merits of those claims, which Federal Rule of Civil Procedure 23 does not authorize.

Below, Ms. Quinn addresses each of these arguments and demonstrates why each and every one of them lacks merit and cannot salvage affirmance of the district court's class certification. Before concluding this reply, Ms. Quinn also identifies some of the more egregious instances where Class Counsel's supplemental brief cites case law for propositions that the cases in question clearly fail to support.

The three–judge panel that originally decided this case, although disagreeing over certain specifics of the district court's deficiencies in certifying a nationwide settlement class of indirect purchasers, was united in its view that the district court abused its discretion and that the class certification had to be vacated. *Sullivan* v. *DB Investments, Inc.*, 613 F.3d 134 (3d Cir. 2010). Judge Jordan, joined by Judge Ambrose (W.D. Pa.), concluded that the nationwide indirect purchaser class failed the predominance test because it included those whose claims were governed by the laws of states that have refused to allow indirect purchasers to maintain such claims. *Id.* at 145–54.

Judge Rendell, concurring in the judgment, opined that a remand was necessary "because the District Court failed to analyze the issues of commonality and predominance." *Id.* at 159. Importantly, however, Judge Rendell "agree[d] with the majority that Rule 23 'presupposes that everyone in the class at least has a cause of action,'" *id.* at 164; Judge Rendell agreed that "the class simply should not include" those "persons without any 'viable' claim," *id.* at 164; and Judge Rendell further agreed that "[t]he District Court has the duty to ensure that the class includes only those with real 'claims,'" *id.*

In sum, Class Counsel's astounding argument that a nationwide indirect purchaser settlement class may be certified notwithstanding that various states refuse to permit indirect purchasers to assert the claims being certified gains no support from anyone on the original three–judge panel, nor from any earlier ruling of this Court, any other federal appellate court, or the Supreme Court of the United States.

The settlement that Class Counsel have reached of De Beers' antitrust liability in the United States may be historic and deserving of many of the plaudits that Class Counsel have bestowed on themselves during the course of briefing these consolidated appeals. It may even be on par with the historic effort to resolve the nationwide asbestos crisis at issue in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). But, as *Amchem* itself demonstrates, no matter how fair, ambitious, or historic a given class action settlement may be, it must satisfy Rule 23's prerequisites in order to withstand appellate review. Because, as all three judges on the original panel recognized, a settlement class cannot contain members who lack the ability to pursue the claims being certified under governing state law, the trial court's certification of this settlement class cannot be upheld.

II. ARGUMENT IN REPLY

A. Class Counsel's Contention That Class Members Need Not Possess Any Claim That Governing Law Would Allow Them To Pursue In Order To Satisfy Rule 23(b)(3)'s Predominance Requirement Is Utterly Without Merit

In *Amchem*, the Supreme Court explained that "[w]e granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." 521 U.S. at 619. The Court then proceeded to explain 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 622–23 (emphasis added). In a footnote that immediately followed the just–quoted passage, the Court wrote:

> In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context—just as in the context of Rule 24(b)(2) governing permissive intervention—manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.

Id. at 623 n.18 (final set of internal quotations omitted).

Approximately 13 months after the Supreme Court issued its ruling in *Amchem*, this Court issued a lengthy opinion considering the

propriety of the certification of a settlement class in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (Scirica, J.).

After referencing the passages from *Amchem* that we have quoted just above, this Court's opinion in *Prudential* explained that the Supreme Court in *Amchem* acknowledged that:

> the "claims and defenses" relevant to both the predominance test and the Rule 23(a)(4) adequacy of representation inquiry "refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit."

In re Prudential, 148 F.3d at 314.

Class Counsel's supplemental Brief for Appellee does not contend that the laws of all 50 states allow indirect purchasers to assert antitrust overcharge claims, nor does Class Counsel's supplemental brief assert that the laws of all 50 states allow indirect purchasers in *Illinois Brick* non–repealer states to circumvent *Illinois Brick* by instead pursuing consumer protection act claims. Thus, Ms Quinn's consistent argument that these claims cannot be asserted on a nationwide basis by class members in all 50 states stands unrebutted.

Although the district court in this case did not consider whether a claim for unjust enrichment could be certified under the laws of all 50

states, for reasons that we discuss below, that claim is likewise incapable of being certified on a nationwide basis because not all 50 states allow an unjust enrichment claim to be used to circumvent *Illinois Brick*'s limitation on standing.

Because — as the Supreme Court recognized in *Amchem* and this Court recognized soon thereafter in *Prudential* — Rule 23(b)(3)'s "predominance" test "refer[s] to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit," *Amchem*, 521 U.S. at 623 n.18; *In re Prudential*, 148 F.3d at 314, the indirect purchaser settlement class in this case does not satisfy the "predominance" test because class members in *Illinois Brick* non–repealer states *do not possess* "the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit," *id.*

Class Counsel's argument that a nationwide settlement class can include members from states whose laws do not authorize class members to assert any of the claims being certified under Rule 23(b)(3) lacks any support in the rulings of this Court, any other federal appellate court, or the Supreme Court of the United States. Undeterred, Class Counsel argue that where a defendant has engaged in a common

course of conduct that injured others, the predominance test is often readily satisfied. Class Counsel further rely on *Amchem*'s dicta that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625; *but see Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 190 (3d Cir. 2001) (Scirica, J.) (affirming district court's refusal to certify securities fraud class action, recognizing that *Amchem* states that predominance test is readily met only in *certain*, rather than in *all*, securities fraud and antitrust cases).

To begin with, if Class Counsel's arguments were correct and all that were needed to certify any settlement class under Rule 23(b)(3) was a common course of conduct combined with, under *Amchem*'s dicta, an antitrust claim, then not even *Illinois Brick* would stand as an impediment to the nationwide certification of an indirect purchaser antitrust overcharge settlement class seeking damages under federal law. Yet not even Class Counsel are seriously advancing that argument here, nor have Class Counsel pointed to any decision from any federal appellate court upholding a settlement class of indirect purchasers asserting antitrust overcharge damages claims under federal law.

In the course of approving the certification of the settlement class challenged in *Prudential*, this Court explained that Rule 23(b)(3)'s "predominance" requirement was satisfied because the district court had correctly concluded that "*the elements of these common law claims* are substantially similar and any differences fall into a limited number of predictable patterns." *In re Prudential*, 148 F.3d at 315 (emphasis added).

Similarly, in *Newton*, this Court explained that "[t]o determine whether the claims alleged by the putative class meet the requirements for class certification, we must first examine *the underlying cause of action* * * *." *Newton*, 259 F.3d at 172 (emphasis added). This Court further recognized that the predominance inquiry in particular required analysis of the *elements* of the supposedly common claim, because "[i]f proof of *the essential elements of the cause of action* requires individual treatment, then class certification is unsuitable." *Id.* (emphasis added).

This Court's more recent rulings are in accord. In *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) (Scirica, J.), this Court explained that to evaluate a federal district court's consideration of Rule 23(b)(3)'s predominance requirement, this Court will "examine

the elements of plaintiffs' claim 'through the prism' of Rule 23 to determine whether the District Court properly certified the class." *Id.* at 311; *see also In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (Rendell, J.) ("The predominance inquiry is especially dependent upon the merits of a plaintiff's claim, since the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual.") (internal quotations omitted).

What Class Counsel's supplemental brief entirely ignores is that a district court cannot evaluate the elements of an indirect purchaser's antitrust overcharge damages claim under federal law, or under the law of those many states that apply *Illinois Brick* to preclude indirect purchasers from asserting antitrust, consumer protection, or unjust enrichment claims under state law. It requires an active imagination, untethered from reality, to evaluate the elements of a claim that governing law does not recognize.

Class Counsel's argument that the supposedly common issues of (i) whether De Beers is subject to the jurisdiction of United States courts and (ii) whether any judgment can be recovered from De Beers sufficiently unite this settlement class fares no better, because these too

are issues that only affect class members who possess actionable claims against De Beers under applicable law. In other words, class members from a state that applies *Illinois Brick* to preclude an indirect purchaser from bringing an antitrust, consumer protection, or unjust enrichment claim against an alleged monopolist do not have any common interest in whether that monopolist can be subjected to the laws of the United States or whether damages can in fact be recovered from that monopolist, because they do not possess any claim entitling them to seek relief from that defendant.

In *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008), the Second Circuit quoted with approval a federal district court's acknowledgement in *Velez* v. *Novartis Pharm. Corp.*, 244 F.R.D. 243, 257 (S.D.N.Y. 2007), that "when a claim cannot succeed as a matter of law, the Court should not certify a class on that issue." This is precisely the flaw in the district court's certification of a nationwide class of indirect purchaser antitrust overcharge damages claimants notwithstanding that the laws of many states fail to authorize antitrust, consumer protection, or unjust enrichment damages claims asserted by indirect purchasers.

As all three judges on the original panel recognized, a district court cannot certify a settlement class under Rule 23(b)(3) consisting of indirect purchasers from all 50 states if the laws of certain states do not authorize indirect purchasers to assert any of the claims being certified. For that reason, and because as Judge Rendell recognized the district court's analysis of the predominance issue was plainly insufficient in any event, the district court's certification of this settlement class must be vacated.

B. The Possibility That Applicable Law Could Change, Or That A Defendant May Choose To Settle Weak Or Non–Existent Claims, Are Considerations Pertaining Solely To Settlement, And Not To Predominance

The type of indirect purchaser antitrust overcharge claims at issue in this case are at the heart of the U.S. Supreme Court's holding in *Illinois Brick*. Although Class Counsel correctly note in their supplemental brief that *Illinois Brick* may not preclude every conceivable sort of indirect purchaser antitrust claim, Class Counsel do not dispute that the indirect purchaser antitrust claims at issue in this case are within the heartland of *Illinois Brick* and are thus precluded under the U.S. Supreme Court's holding in that case.

Contrary to Class Counsel's assertions, the rule of *Illinois Brick* is a standing rule, as this Court has repeatedly recognized. *See Link* v. *Mercedes–Benz of North Am., Inc.*, 788 F.2d 918, 929 (3d Cir. 1986) (indirect purchaser does not have standing to recover for alleged price fixing); *see also A.D. Bedell Wholesale Co.* v. *Philip Morris Inc.*, 263 F.3d 239, 247 (3d Cir. 2001) ("the Supreme Court has determined that direct buyers are the only parties with standing to assert damage claims under the antitrust laws for overcharges"); *McCarthy* v. *Recordex Serv., Inc.*, 80 F.3d 842, 847–48 (3d Cir. 1996) ("direct purchaser" rule is an antitrust standing doctrine that bars downstream indirect purchasers from bringing an antitrust claim); *Gulfstream III Assocs., Inc.* v. *Gulfstream Aerospace Corp.*, 995 F.2d 425, 439 (3d Cir. 1993) (only the direct purchaser of an aircraft, and not a downstream buyer or assignee, had standing to pursue an antitrust claim); *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958, 966–69 (3d Cir. 1983) (indirect purchaser, even if a "direct target" of an antitrust conspiracy, lacked standing under *Illinois Brick*).

Moreover, because *Illinois Brick* represents a rule of standing, it is not subject to waiver. This is because a party may never waive

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.").

In any event, the doctrine of judicial estoppel would preclude Class Counsel from denying the applicability of *Illinois Brick* to the claims asserted in this class action. In Class Counsel's Memorandum of Points and Authorities to Special Master in Support of Plaintiff's Application for an Award of Attorneys' Fees, filed in the district court on January 11, 2008, Class Counsel acknowledged on page 3 of that memorandum that "indirect purchasers cannot recover damages under federal antitrust laws," citing *Illinois Brick* in a footnote to that statement.

In ruling that Class Counsel were entitled to the generous award of attorneys' fees allowed in this case, the district court explained in its opinion filed May 22, 2008 (the very same opinion that certified the settlement classes) that "[c]lass 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)." Trial court opinion of May 22, 2008 at page 55.

Judicial estoppel would prevent Class Counsel from now arguing that *Illinois Brick* did not preclude indirect purchaser class members from asserting federal antitrust overcharge claims (or antitrust overcharge, consumer protection, or unjust enrichment claims under the laws of those states that observe *Illinois Brick*'s limitations) because Class Counsel have already admitted the standing bar of *Illinois Brick* as a ground for receiving a large award of attorneys' fees, and the district court here relied on the standing bar of *Illinois Brick* as a ground for awarding the attorneys' fees being sought. *See Chao* v. *Roy's Const., Inc.*, 517 F.3d 180, 186 n.5 (3d Cir. 2008) (discussing doctrine of judicial estoppel).

Class Counsel are thus relegated to arguing that the limitation on standing recognized in *Illinois Brick* could change if the U.S. Supreme Court were to overrule that decision or limit its breadth. Although no one can definitively predict the future, *Illinois Brick* has remained good law for more than 30 years, and the Supreme Court does not appear to

be on the verge of reconsidering that especially important decision on the issue of indirect purchaser standing. Moreover, as the U.S. Supreme Court has repeatedly recognized, the doctrine of *stare decisis* is of particular relevance in matters of statutory interpretation, because the legislature retains the ability to overturn or modify any incorrect or disfavored judicial interpretation of a statute. *See Illinois Brick*, 431 U.S. at 736 ("we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *see also John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) ("*stare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done") (internal quotations omitted).

Class Counsel's supplemental brief has failed to cite any relevant authority for the proposition that a court should consider anything other than what the law currently is in deciding whether Rule 23(b)(3)'s predominance requirement is met. Nor have Class Counsel offered any explanation for why potential changes in governing law might be relevant to the issue of predominance when certifying a settlement

class, even though potential changes in governing law cannot be considered when a district court is deciding whether to certify a litigation class. Under *Amchem*, the predominance inquiry focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem*, 521 U.S. at 623. Thus, potential changes in governing law are equally irrelevant to the question of whether to certify either a litigation or a settlement class.

The only decision that Class Counsel have cited in which a federal district court has intentionally certified a nationwide settlement class of indirect purchasers asserting federal law antitrust overcharge claims that the class members lack standing to assert under *Illinois Brick* is *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 269 F.R.D. 80 (D. Me. 2010). That is a most curious decision to say the least. Whether the class certification decision in that case will be upheld by the First Circuit on appeal remains to be seen, as the district court in that case has yet to conduct a fairness hearing on the proposed settlement. But, according to the certification ruling, the settlement that the parties

have reached would "provid[e] for cash payments only to purchasers in the twenty states that allow damages recovery." *Id.* at 93.

Thus, class members in *In re New Motor Vehicles* would receive no damages on account of the federal indirect purchaser antitrust overcharge claim that was certified for class treatment, and class members would only be entitled to receive monetary compensation if their claim was governed by the law of an *Illinois Brick* repealer state. In essence, the settlement that the parties have reached in that case recognizes that the one and only claim that has been certified for class treatment under Rule 23(b)(3) — an indirect purchaser overcharge claim arising under federal law — lacks merit and does not entitle any class member to relief. For these reasons, it is most doubtful that the class certification in *In re New Motor Vehicles* will survive appellate review.

The question of what type of claims might a defendant legitimately elect to settle is distinct from the question of what type of claims satisfy the "predominance" requirement and thus qualify for class certification under Rule 23. Ms. Quinn does not dispute that a defendant may choose to settle a weak claim or even a non–existent

claim, whether simply for the sake of expediency or out of a concern that the law might change in the future. Ms. Quinn also does not deny that a defendant such as De Beers has the right to refuse to settle a lawsuit alleging antitrust violations for anything less than a 50 state release, even though under existing law De Beers faces no liability to indirect purchasers in those states that deny indirect purchasers any cause of action against De Beers. Of course, even if this flawed class action settlement were somehow upheld on appeal, there is nothing that can prohibit De Beers from being subjected to frivolous litigation throughout the United States.

Nevertheless, that a class action release may release claims that are broader than those claims that have been certified for class treatment is irrelevant to determining whether any of the claims asserted in this case satisfy Rule 23(b)(3)'s predominance requirement. Determining who is in the class necessarily precedes determining what claims may be released in the settlement of a given class action.

Although reasonable minds may differ over what the U.S. Supreme Court's decision in *Amchem* stands for, at a minimum that decision establishes that the desirability of a settlement to address

otherwise intractable problems cannot override the requirements of Federal Rule of Civil Procedure 23, including Rule 23(b)(3)'s "predominance" requirement. Here, Class Counsel's overarching argument is that if claims are capable of being settled on a classwide basis, then the claims necessarily must satisfy the requirements for class certification. If that argument were meritorious, the Supreme Court would have reversed, instead of affirming, this Court's judgment in *Amchem*.

For these reasons, the fact that applicable state law could change, transforming what is today a non–existent claim into a claim that state law recognizes tomorrow; the fact that a defendant may legitimately choose to settle weak or non–existent claims; and the fact that the scope of a class action release does not depend on what claims have been certified are all issues that are irrelevant to the "predominance" requirement found in Rule 23(b)(3). We can understand why Class Counsel, unable to satisfy the predominance requirement, would wish to focus this Court's attention elsewhere, but the questions that this Court has promulgated have directed the parties to focus their supplemental briefing directly on the requirement of "predominance."

C. The District Court Certified Neither A Nationwide Unjust Enrichment Class Nor A Nationwide Class Under The Law Of A Single State, And Thus Those Theories Cannot Salvage Certification Of This Settlement Class

In their supplemental Brief for Appellee, Class Counsel argue that the district court properly could have certified the settlement class either under the law of a single state or on a nationwide claim for unjust enrichment, because the law of unjust enrichment supposedly does not vary greatly among the various states.

Although the predominance inquiry that the district court previously conducted in this case did not evaluate plaintiffs' unjust enrichment claim, Ms. Quinn in her earlier briefing has demonstrated that no nationwide unjust enrichment class could be certified due to *Illinois Brick* concerns. *See*, *e.g.*, *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 542 (E.D. Pa. 2010) (Brody, J.) ("where an antitrust defendant's conduct cannot give rise to liability under state antitrust and consumer protection laws [due to *Illinois Brick*], Plaintiffs should be prohibited from recovery under a claim for unjust enrichment"); *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1189–92 (N.D. Cal. 2009) (listing various states that refuse to allow unjust

enrichment claim to be used to circumvent unavailability of indirect purchaser antitrust or consumer protection claims); *In re Sears, Roebuck & Co. Tools Marketing & Sales Practices Litig.*, 2007 WL 4287511, at *9 & n.7 (N.D. Ill. 2007) (disagreeing with the conclusory assertion of class counsel in that case that the law of unjust enrichment is uniform throughout the nation).

Class Counsel's supplemental brief filed in this case is likewise conclusory in arguing that unjust enrichment law is uniform throughout the nation. One would expect that the decisions Class Counsel has cited for that proposition would provide the strongest possible support for Class Counsel's position, but that is not even the case. To establish the supposed uniformity of unjust enrichment law throughout all 50 states, Class Counsel cited in their supplemental brief the ruling of a California–based federal district court in *In re Abbott Labs. Norvir Anti–Trust Litig.*, 2007 WL 1689899 (N.D. Cal. 2007). But, in that case, the district court held that "[t]he class, however, will not include any indirect purchasers who were citizens of Indiana and Ohio at the relevant time," *id.* at *10, because the opposing parties agreed

that those two states "preclude indirect purchasers from asserting claims for unjust enrichment * * *," *id.* at *8.

Judge Jordan's opinion for the three–judge panel in this very case included a lengthy paragraph, containing numerous case citations, evaluating the extent to which the common law of unjust enrichment varies among the states. *See Sullivan*, 613 F.3d at 150–51. Class Counsel's supplemental brief entirely ignores that paragraph and the cases cited therein, notwithstanding that paragraph's conclusion that, "[i]n short, 'the claim of unjust enrichment is packed with individual issues' and therefore precludes a finding of predominance in this nationwide class action context." *Id.* at 151 (quoting *Clay* v. *Am. Tobacco Co.*, 188 F.R.D. 483, 501 (S.D. Ill. 1999)).

Last but not least on the issue of unjust enrichment, in this case Class Counsel are seeking to hold De Beers liable for having inflated the cost of diamonds purchased from non–conspiring competitors of De Beers under an "umbrella" theory that this Court rejected in the antitrust context in *Mid–West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 580–87 (3d Cir. 1979). Under this discredited "umbrella" theory, Class Counsel maintain that De Beers would be

liable in damages even to purchasers who bought diamonds from third–party competitors of De Beers because the allegedly illegal conduct of De Beers caused the overall market prices of diamonds to inflate.

This "umbrella" theory of liability is itself fatal to Class Counsel's contention that a nationwide class of indirect purchasers could be certified on an unjust enrichment theory. If a class member purchased diamonds from a third–party competitor of De Beers, under no possible view of the facts can De Beers be said to have been unjustly enriched by that purchaser's payment to the competitor.

The district court in this case did not even purport to consider whether a nationwide class of indirect purchasers could be certified under the law of a single state, and thus it is inappropriate for Class Counsel to now suggest that the certification of this settlement class of indirect purchasers may be affirmed on that basis. As the Ninth Circuit observed in *Zinser* v. *Accufix Research Institute, Inc.*, 253 F.3d 1180 (9th Cir. 2001), "[o]ur review, however, is limited to assessing the district court's exercise of discretion based on the actual request for class certification advanced by the plaintiff." *Id.* at 1192 n.8. Because the district court in this case did not consider whether a nationwide

settlement class could be certified under the law of a single state, let alone conclude that such certification would be appropriate, this Court may not affirm on that theory.

Class Counsel's supplemental brief also argues that a common law fraud claim could have been certified on a nationwide basis. This, likewise, was not a ground on which the district court relied in certifying a nationwide class in this case, nor is it a ground on which the district court could have relied based on applicable class certification law.

As this Court recently recognized in its ruling in *Malack* v. *BDO Seidman, LLP*, 617 F.3d 743, 745 (3d Cir. 2010), in the absence of a classwide method for dealing with the requirement of reliance, fraud claims are particularly unsuitable for class certification. In *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004), where the misrepresentation claim of all class members arose under Delaware's Consumer Fraud Act, this Court's opinion explained that under that particular Delaware statute "no proof of individual reliance on the fraud or misrepresentation is required." *Id.* at 529 n.11.

By contrast, the Supreme Court of Illinois applying Illinois law ruled in *Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005), that each member of the class must prove that he or she was deceived: "[T]o meet the causation element of a Consumer Fraud Act claim, the members of the class must have actually been deceived in some manner by the defendant's alleged misrepresentations of fact." *Id.* at 52. In this case, there is no showing that all class members saw, heard, or read any of De Beers' advertisements, let alone were deceived by them.

Decisions in which courts have refused to certify fraud or misrepresentation claims for class treatment are commonplace, so we only cite a few such rulings here. *See Thorogood* v. *Sears Roebuck & Co.*, 547 F.3d 742, 747–48 (7th Cir. 2008) (predominance necessary to certify class action did not exist for sales of clothes dryer allegedly deceptively labeled and advertised as containing stainless steel drum and "resists rust" in violation of states' consumer protection laws); *In re Light Cigarettes Marketing Sales Practices Litig.*, 2010 WL 4901785, at *13 (D. Me. 2010) (whether a class member was damaged because of the defendants' false advertising was an individualized inquiry that could not be proved on a class–wide basis); *Benedict* v. *Altria Group, Inc.*, 241

F.R.D. 668, 679 (D. Kan. 2007) (under the Kansas Consumer Protection Act, plaintiff must show reliance by each class member to prevail).

And, if that were not enough, in *Leider* v. *Ralfe*, 387 F. Supp. 2d 283 (S.D.N.Y. 2005), one of the several class actions against De Beers that were consolidated into this case for purposes of settlement, the New York–based federal district court ruled that plaintiffs' deceptive practices and false advertising claims arising under New York law failed to even state a proper claim and thus had to be dismissed rather than certified for class action treatment. *Id.* at 294–99.

In sum, the district court did not rely on the nationwide law of unjust enrichment, the law of a single state, or common law fraud in certifying this settlement class of indirect purchasers, nor would certification of that class been proper had the district court in fact relied on any of those theories.

D. The Rules Enabling Act Unquestionably Applies To Settlement Class Certification

In an effort to minimize the troubling federalism and Rules Enabling Act concerns that the district court's certification of the indirect purchaser damages settlement class under Rule 23(b)(3) gives

rise to, *see Sullivan*, 613 F.3d at 151–52, Class Counsel in their supplemental brief advance the argument that approval of a class action settlement does not equate to a court's granting relief on a claim.

Class Counsel's argument that the Rules Enabling Act and principles of federalism do not apply to certification of a settlement class directly conflicts with the U.S. Supreme Court's decisions in *Amchem* and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999).

In *Amchem*, which involved a challenge to the certification of a settlement class, the Supreme Court wrote that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. §2072(b)." *Amchem*, 521 U.S. at 613.

Similarly, in *Ortiz*, which likewise involved a challenge to the certification of a settlement class, the Supreme Court reiterated, citing *Amchem*, that "no reading of [Federal Rule of Civil Procedure 23] can ignore the [Rules Enabling] Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right." *Ortiz*, 527 U.S. at 845 (internal quotations omitted).

Class Counsel cannot seriously maintain that allowing an indirect purchaser whose claim is governed by Ohio law to recover monetary relief in a federal court settlement class when that purchaser would have no right or ability to recover monetary relief in an Ohio state court does not constitute the enlargement or modification of a substantive right in violation of the Rules Enabling Act. *See*, *e.g.*, *In re Rhone–Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) ("[t]he diversity jurisdiction of the federal court is, after *Erie*, designed merely to provide an alternative forum for the litigation of state–law claims, not an alternative system of substantive law for diversity cases").

By asking this Court to hold that the Rules Enabling Act and principles of federalism do not apply to the certification of a settlement class based on an unpersuasive argument that approval of a class settlement does not equate to a court's granting of relief, Class Counsel are in fact asking this Court to issue a ruling contrary to the U.S. Supreme Court's binding precedents in *Amchem* and *Ortiz*. This Court should resist Class Counsel's invitation to err in this manner.

E. A Federal District Court Does Not Impermissibly Inquire Into The Merits Of A Class Action When It Ascertains The Elements Of A Claim Or Whether Governing Law Allows Class Members To Assert Such A Claim

In examining whether a claim sought to be asserted in a class action exists under governing law or ascertaining the elements of such a claim, a federal district court does not impermissibly inquire into the merits of the claim. The proposition that a federal district court should not inquire into the merits of a claim as a precondition to class certification applies equally regardless of whether certification is sought for a litigation class or a settlement class.

In Ms. Quinn's previous briefing of this case, she has cited numerous cases standing for the proposition that Rule 23(b)(3) only allows state law indirect purchaser antitrust claims to be certified under the laws of those states that have statutorily or judicially repealed *Illinois Brick*. In not one of those cases has a court concluded that resolving whether a given state allows indirect purchasers to maintain an antitrust claim constitutes an impermissible inquiry into the merits of a claim as a prerequisite to class certification.

As this Court has repeatedly recognized, the predominance inquiry focuses on whether the elements of the claim or claims to be certified for collective treatment in a class action are susceptible of being established by common proof. *See Hydrogen Peroxide*, 552 F.3d at 311 ("In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof."); *see also Constar Int'l Inc. Sec. Litig.*, 585 F.3d at 780 ("The predominance inquiry is especially dependent upon the merits of a plaintiff's claim, since the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual.").

This Court explained in *Newton*, 259 F.3d at 172, that the predominance inquiry requires analysis of the *elements* of the supposedly common claim, because "[i]f proof of *the essential elements of the cause of action* requires individual treatment, then class certification is unsuitable." *Id.* (emphasis added).

What Class Counsel fail to address is how can a federal district court determine what constitutes the elements of an indirect

purchaser's antitrust overcharge claim under Ohio law when Ohio law refuses to recognize any such cause of action. As the Seventh Circuit explained in *Rhone–Poulenc*, 51 F.3d at 1302, "[t]he diversity jurisdiction of the federal court is, after *Erie*, designed merely to provide an alternative forum for the litigation of state–law claims, not an alternative system of substantive law for diversity cases."

Federal district courts, when confronted with requests to certify multistate class actions for indirect purchasers in antitrust overcharge cases, routinely examine whether applicable state law allows such claims to be pursued in court, and no court has ever ruled that this inquiry constitutes the impermissible consideration of the merits at the class certification stage. Likewise, it does not constitute the impermissible consideration of the merits in this case.

This Court has recognized, in *Constar*, *Hydrogen Peroxide*, *Newton*, and numerous other cases, that the merits of a claim are relevant to the predominance inquiry under Federal Rule of Civil Procedure 23(b)(3). As those rulings have explained, for common questions to predominate, a court must examine whether establishing the elements of a claim is susceptible to common proof. For claims that

do not even exist under applicable law, no such inquiry involving the elements of those "claims" can be undertaken. For these reasons, Class Counsel are incorrect in contending that considering whether a claim proposed for class treatment may even be maintained in court is an impermissible inquiry at the class certification stage.

F. Class Counsel's Supplemental Brief Improperly Overstates The Significance Of Many Decisions Cited In That Brief

Faced with a paucity of authority in support of the many remarkable positions advanced in Class Counsel's supplemental Brief for Appellee, Class Counsel have regrettably resorted to overstating or misrepresenting the significance of many of the decisions cited in that brief. Here are some of the more noteworthy examples:

1. *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010). Class Counsel cite *Reed Elsevier* for the proposition that "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." CC Supp. Br. at 51–52. In actuality, however, the Supreme Court's ruling in *Reed Elsevier* does not discuss

the requirement of predominance or cite to Federal Rule of Civil Procedure 23(b)(3). The Supreme Court's order granting review in that case stated that the grant of review was "limited to the following question: Does 17 U.S.C. §411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?" *Reed Elsevier, Inc.* v. *Muchnick*, 129 S. Ct. 1523 (2009) (order granting certiorari). That is the only question that the Supreme Court's opinion in *Reed Elsevier* purports to resolve, and the decision does not address whether or how the inclusion of persons in a settlement class who lack standing to sue affects the predominance inquiry.

2. *In re Pet Food Products Liab. Litig.*, 2010 WL 5127661 (3d Cir. Dec. 16, 2010). This Court's recent decision in *Pet Food* expressly states that "[n]o one has challenged the District Court's findings that the proposed class satisfied the numerosity, commonality, typicality, predominance, and superiority requirements * * *." *Id.* at *6. As a result, that decision contains no actual holding of relevance concerning differences in state law. *See id.* at *11 n.25 ("Although normally differences in state law are raised as a challenge to Rule 23(b)(3)'s predominance requirement, Rule 23(a)(2)'s commonality of law or fact

prerequisite, or both, *see*, *e.g.*, *Warfarin*, 391 F.3d at 529, objectors do not argue that variations in state laws 'are so significant so as to defeat commonality and predominance,' *id.*").

3. *Ehrheart* v. *Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010). This Court's decision in *Ehrheart* does not deal with any class certification issues. Rather, it analyzes a district court's role under Federal Rule of Civil Procedure 23(e) in determining whether a settlement is fair, reasonable, and adequate. In *Ehrheart*, defendant Verizon agreed to settle a class action in which the plaintiffs asserted a claim that actually existed at the time the settlement was reached. Later, a new federal law was enacted that retroactively deprived all plaintiffs of their cause of action. By a vote of 2–1, this Court refused to allow Verizon to evade the settlement that it had voluntarily entered into at a time when it knew that legislation depriving plaintiffs of their claims could be enacted into law.

By contrast, the issue in this case is the propriety of nationwide class certification under Rule 23(b)(3) of antitrust claims when some indirect purchaser class members purchased diamonds in states that have always substantively allowed indirect purchaser recovery while

others purchased in states that have always substantively denied indirect purchaser recovery. To permit class members — who as individual claimants never could recover under their state's substantive law — to recover in this class action defeated predominance and improperly created substantive rights in violation of the Rules Enabling Act. Those legal principles and corresponding precedents, which properly prove dispositive here, were not cited or discussed in this Court's decision in *Ehrheart*.

4. *In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001). Class Counsel's supplemental brief cites *Cendant* for the proposition that "[v]ariations in state law do not preclude certification of a settlement class unless they create intra–class conflicts that are 'severe.'" CC Supp. Br. at 51 (citing *Cendant*, 264 F.3d at 244 n.25). Unfortunately for Class Counsel, *Cendant* was a federal securities law class action, and this Court's opinion contains no discussion of any state law claims whatsoever, not even in footnote 25. Thus, footnote 25 of this Court's ruling in *Cendant* most emphatically does not say that only severe variations in state law preclude certification of a settlement class. Of course, even if that were *Cendant*'s holding, Ms. Quinn has already

demonstrated above that this case involves the most severe variations in state law imaginable — whereby class members from certain states possess the causes of action in question while class members from other states do not possess those causes of action.

5. *Wilson* v. *General Motors Corp.*, 921 A.2d 414 (N.J. 2007) (per curiam). The New Jersey Supreme Court's actual holding in *Wilson* was:

> Even if the complaints can be said to allege an "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact . . . in connection with the sale or advertisement" of a motor vehicle to a putative plaintiff, in violation of [New Jersey's Consumer Fraud Act (CFA)], we agree with the Appellate Division majority that the allegations in the complaints, which essentially assert an anticompetitive scheme in violation of the Antitrust Act without any allegation of a direct or indirect statement or communication with any plaintiff, are precluded under *Illinois Brick*. However, we leave for another day whether a CFA action would be precluded 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.

Id. at 417. At most, the ruling in *Wilson* states that New Jersey's highest court is open to considering in the future whether *Illinois Brick* would bar indirect purchasers from asserting 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." But the ruling in *Wilson* does not hold that allegations under New Jersey's Consumer Fraud Act of the sort that class members whose claims are governed by New Jersey law have alleged in this case are not precluded under *Illinois Brick*, nor have Class Counsel identified anywhere in their complaint where such allegations may be found.

* * * * *

For the reasons set forth above, in Ms. Quinn's opening supplemental brief, in her response to the amicus briefs filed on rehearing en banc, in her opposition to the rehearing petition, and in her original Brief for Appellant and Reply Brief for Appellant, this Court sitting en banc should adhere to the conclusion of all three judges on the original panel that the district court's order certifying a settlement class of indirect purchasers must be vacated and remanded.

III. CONCLUSION

For the reasons set forth above and in Ms. Quinn's previously filed appellate briefs, this Court should vacate the district court's approval of the class action settlements and should vacate the district court's approval of Class Counsel's attorneys' fee request.

Respectfully submitted,

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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: January 25, 2011 /s/ *Howard J. Bashman*

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

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

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel for Objector/Appellant Susan M. Quinn hereby certifies that the electronic copy of this Supplemental Reply Brief for Appellant Susan M. Quinn is identical to the paper copies filed with the Court.

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