

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

SHAWN SULLIVAN, *et al.*, on behalf of
themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

DB INVESTMENTS, INC., *et al.*,

Defendants-Appellees.

Nos. 08-2784; 08-2785; 08-2789;
08-2799; 08-2817; 08-2818; 08-
2819; 08-2831; 08-2881

**MOTION OF THE AMERICAN ANTITRUST INSTITUTE
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

1. Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and Local Appellate Rule 29.1, the American Antitrust Institute (“AAI”) respectfully seeks leave to file an *amicus curiae* brief in support of the Plaintiffs-Appellees. A copy of AAI’s proposed *amicus curiae* brief is attached.

2. By Order dated August 27, 2010, the United States Court of Appeals for the Third Circuit granted Plaintiffs-Appellees’ petition for re-hearing en banc and vacated the Court’s previous judgment, dated July 13, 2010. By letter dated August 30, 2010 the parties were ordered to resubmit their previously filed briefs in this case. Pursuant to Local Appellate Rule 29.1, all *amicus curiae* submissions must be submitted by September 24, 2010. The *en banc* hearing has not yet been scheduled.

3. AAI is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 100 prominent antitrust lawyers, law professors, economists, and business leaders.

4. As an independent organization devoted to enhancing competition in the United States and throughout the world, AAI promotes the vigorous enforcement of the antitrust laws as a vital component of national and international competition policy. It pursues this goal in part through monitoring developments in both public enforcement proceedings and private antitrust litigation around the country, including acting as amicus curiae when appropriate. AAI's amicus program—though which it has filed nearly forty amicus briefs since 2001—is an important component of its advocacy work. Indeed, in just the last two years, AAI has filed amicus briefs in *Stolt-Nielson A.A. v. Animalfeeds Int'l Corp.*, No. 08-1198 (U.S.) (filed Oct. 27, 2009); *Arkansas Carpenters Health and Welfare Fund, Paper, A.F. of L v. Bayer AG*, No. 07-11974 (U.S.) (filed Aug. 17, 2009); *Messner v. NorthShore Univ. Health Sys.*, No. 10-2514 (7th Cir.) (filed Aug. 9, 2010); *New York Regional Interconnect, Inc. v. FERC*, No. 09-1309 (D.C. Cir.) (filed July 29, 2010); *American Banana, Inc. v. Del Monte Fresh Produce, Co.*, No. 09-4561-cv

(2d Cir.) (filed Mar. 16, 2010); *Princo Corp. v. ITC*, No. 2007-1386 (Fed. Cir.) (filed Jan. 22, 2010); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 09-40506 (5th Cir.) (filed Aug. 14, 2009); and *In re: Dynamic Random Access Memory Antitrust Litig.*, No. 08-16478 (9th Cir.) (filed Mar. 5, 2009). In the 2008-09 term of the U.S. Supreme Court, AAI participated in the oral argument in *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, No. 07-512, a rare honor for a non-profit amicus curiae. AAI's experience in working to ensure that the antitrust laws are properly enforced through private litigation, allows it to provide an unique perspective that can assist the Court beyond what the parties are able to do. *See* Fed. R. App. P. 29(b)(2).

5. As part of its mission, AAI seeks to ensure that the antitrust laws are properly enforced through private actions, allowing competition to thrive and preventing anticompetitive abuses from damaging consumers. An efficient, fair and effective means for settling antitrust class actions is therefore central to AAI's mission.

6. Without an effective, fair, and efficient means for settling class actions brought pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Rule will cease to serve the purpose of providing redress to plaintiffs without the economic ability or incentive to pursue individual claims. This is particularly true in the antitrust context where the erection of additional hurdles to class

certification and resolution of meritorious antitrust cases will surely de-incentivize capable counsel from making the investments and taking the risks necessary to support vigorous private antitrust enforcement. Given the federal government's inability to prosecute all antitrust violations—or to seek redress for victims even in cases in which the government does get involved—weakening of private enforcement could result in less deterrence of anticompetitive conduct, and enhanced harm to consumers and economic competitiveness.

7. As such, ensuring that class action settlements continue to be properly evaluated to ensure that current litigants receive redress and future cases move forward is vitally important to AAI's mission. AAI's interest in ensuring vigorous competition in the United States and effective private enforcement of the antitrust laws is directly affected by the issues before the Court in this case. *See* Fed. R. App. P. 29(b)(1).

8. AAI's accompanying brief will assist the Court in its ruling (*see* Fed. R. App. P. 29(b)(2)) because it highlights several issues that are essential in establishing the appropriate standard for evaluating a class action settlement and the flaws in the vacated panel decision in this matter. *Id.*

9. Because AAI is a proper *amicus* pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the Court should grant this motion for leave and permit AAI to file the accompanying brief.

Dated: September 24, 2010

Respectfully submitted,

/s/ Eric L. Cramer

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I caused a true and correct copy of the foregoing Motion of the American Antitrust Institute for Leave to File an *Amicus Curiae* Brief to be served on the following:

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