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08-2817; 08-2818; 08-2819; 08-2831; 08-2881

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellees

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE*, IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. App. R. 26.1 and Local Rule 26.1.1, *Amicus Curiae* American Antitrust Institute, a non-profit corporation, hereby certifies that it has no parent corporation and has not issued any shares of stock to any publically traded company.

January 11, 2011

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("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.[1] AAI is managed by its Board of Directors with the guidance of an Advisory Board,[2] consisting of over 110 prominent antitrust lawyers, law professors, economists and business leaders. AAI frequently appears as *amicus curiae* in cases raising important competition issues. *See* antitrustinstitute.org for a complete description of AAI's activities. AAI previously submitted an *amicus* brief in this appeal by motion dated September 24, 2010, which motion was granted by the Court on October 14, 2010. *See* Brief for The American Antitrust Institute as *Amicus Curiae* Supporting Appellees in *Sullivan v. DB Invs. Inc.*, 613 F.3d 134, *vacated and rehearing granted*, 619 F.3d 287 (3d Cir. 2010), dated September 24, 2010 (hereinafter "AAI Initial Brief").

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[1] AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

[2] Certain members of the Advisory Board serve as counsel for Plaintiffs in this matter. However, pursuant to Fed. R. App. P. 29(c), AAI states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than the AAI or its counsel herein—has contributed money that was intended to fund the preparation or submission of this brief.

The Supreme Court has long recognized the important role private litigation plays in the enforcement of the federal antitrust laws. *See, e.g.*, *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). The federal government cannot be expected to prosecute all violations of federal antitrust laws. Nor has the federal government traditionally seen its role as compensating the victims of antitrust violations. The private mechanism was designed to fill these significant gaps.[3] The same points apply to claims arising under state antitrust and other laws. Private enforcement plays a crucial role in deterring violations of the law and compensating victims.

[3] *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 897, 906 (2008), *available at* http://ssrn.com/abstract=1090661 (reviewing forty recent successful private antitrust cases and finding that of the $18–19.6 billion recovered for victims in those cases, almost half of the total recovery came from fifteen cases that did not follow government actions); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. __ (forthcoming 2011), *available at* http://ssrn.com/abstract=1565693 (showing important deterrent effect of private enforcement of antitrust laws).

Further, given the economic disparities between typical class action defendants and their victims, the often diffuse nature of the harms, and the costs involved in complex litigation, the class mechanism is integral to private enforcement of antitrust and other consumer protection laws. *See, e.g.*, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions . . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions[.]").

As discussed below, resolution of the class settlement and class certification issues in this matter will affect not only the members of the proposed class in this case, but also consumers and victims of anticompetitive violations generally, and therefore could have the potential for far-reaching effects on consumers and competition throughout the United States.

INTRODUCTION

As referenced above, AAI previously submitted a brief in support of Plaintiffs/Appellees in this matter. *See* AAI Initial Brief. Below, AAI elaborates

on the principles and points set out in the AAI Initial Brief as a preface to addressing the specific questions raised by the Court in its November 10, 2010 Order. We begin by setting out the general framework of the predominance inquiry pursuant to Fed. R. Civ. P. 23(b)(3). We then apply that framework to answer certain of the Court's questions.

Our focus, as an initial matter, is on how the predominance analysis is affected by whether the class is to be certified for litigation or settlement purposes. The Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), made clear that the predominance test must be satisfied whether the class is being certified for litigation or for settlement. But the Court also plainly recognized that "settlement is relevant to a class certification[,]" *id*. at 619, and specifically stated that the portion of the predominance analysis that typically focuses on the management of the trial becomes unnecessary and irrelevant when a class is being certified in light of settlement. *Id*. at 620.

This is no minor qualification. If the class is being certified for litigation purposes, the *focus* of the predominance requirement, as this Court has most recently emphasized in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 n.8 (3d Cir. 2008), is to "consider how a trial on the merits would be conducted if a class were certified." (quoting *Sandwich Chef, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003)); *see also id.* at 317 (noting that

a court may, at the class certification stage, "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take") (quotation omitted); *id.* at 319 (referring to the concept of a "trial plan" for class certification purposes in order to focus attention on "the likely shape of a trial on the issues"). So important was this proposition that in *Hydrogen Peroxide*, this Court quoted the following 2003 advisory committee note to Rule 23 not once, but *twice*: "A critical need is to determine how the case will be tried." *In re Hydrogen Peroxide*, 552 F.3d at 312, 319. Taking trial off the table is not, therefore, a minor factor in the analysis: it necessarily and materially alters the focus of the predominance inquiry.

Accordingly, in cases certified for *litigation* purposes, predominance is satisfied if common issues of fact or law would predominate over individual ones at (or leading up to) trial. In that instance, the court is required to decide, based on the claims alleged and the certification motion papers presented by the parties, how the litigation and trial will ultimately play out and whether factual or legal issues common to the class will predominate over any individual ones.

But what of certification in light of settlement? It is not appropriate simply to say that because all class members have a common interest in a fair compromise, predominance is satisfied merely because of the settlement. The Supreme Court squarely rejected that approach in *Amchem*. *See* 521 U.S. at 623

(concluding that "[i]f a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context"). Rather, *Amchem* requires something more robust, namely that common issues predominate over individual ones in the settlement approval process, and more specifically in the course of evaluating the fairness and adequacy of the settlement.

According to the Supreme Court, predominance must be evaluated in the context of certifying a settlement-only class so that courts can manageably and competently perform their crucial role in protecting the interests of absent class members. Although the Supreme Court in *Amchem* makes clear that courts may disregard trial management issues in approving settlement classes—because there will be no trial—courts must still attend to those aspects of Rule 23(b)(3) that were "designed to protect absentees[.]" 521 U.S. at 620. According to the Supreme Court, Rules 23(a) and (b) "are not impractical impediments—checks shorn of utility—in the settlement-class context." *Id*. at 621. Rather, these rules, including predominance, persist "for the protection of absent class members" because they "serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Id*. The point of predominance in the settlement-only certification context, therefore, is to ensure that the class is sufficiently cohesive

such that the court can evaluate the fairness of the settlement to absent class members efficiently and adequately. In other words, predominance is satisfied where the fairness inquiry in the settlement context presents the court with predominantly common questions of fact or law—not issues that vary from individual class member to individual class member.

It is instructive in this regard to examine the process district courts use to perform their role of deciding whether a proposed class settlement is "fair, reasonable[,] and adequate." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534 (3d Cir. 2004). This Court has identified nine factors in evaluating proposed class settlements. *Id*. Known as the *Girsh* factors (*see Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)), they include:

> (1) [t]he complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Warfarin, 391 F.3d at 534–35 (quoting *Girsh*, 521 F.2d at 156–57). Although the settlement approval process is not designed to have courts second guess arm's-

length resolutions of proposed class settlements,[4] it is certainly true that evaluating factors (4), (5), (8), and (9) presupposes that courts have at least some reasonable ability and opportunity to assess the underlying merits of the claims and defenses. What Rule 23 requires under the predominance test in the settlement-only context is that the merits analysis can be done mainly with common facts or law.

Perhaps the most important consideration in determining whether predominance is satisfied in the settlement-only context is whether the focus of the fairness inquiry—which necessarily involves an evaluation of the strengths and weaknesses of the various claims and defenses—is on the defendants and their alleged conduct rather than on the individual plaintiffs or class members. In *Amchem*, the Supreme Court quoted with approval the Third Circuit's finding of "disparate questions undermining class cohesion" in that case—nearly all of which related to how differently situated each of the plaintiffs and class members were from each other. 521 U.S. at 624 (observing that "[t]he [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular

[4] *See Ehrheart v. Verizon*, 609 F.3d 590, 593 (3d Cir. 2010) (holding that "there is a restricted, tightly focused role that *Rule 23* prescribes for district courts, requiring them to act as fiduciaries for the absent class members, but that does not vest them with broad powers to intrude upon the parties' bargain").

circumstances and individual medical histories." (quotation omitted)). Thus, the facts in *Amchem* appear to reflect that each class member presented individualized questions related to his or her respective physical injuries and claims. Under such circumstances, a court may find it more difficult to perform its role of protecting the absent members of the class.

In stark contrast to the settlement at issue in *Amchem*, evaluation of the settlement in *Warfarin* focused mainly *on the defendant and its conduct*, not the class members and their conduct or experiences. As this Court stated, "liability depends on the conduct of DuPont [the defendant], and whether it conducted a nationwide campaign of misrepresentation and deception[;] it does not depend on the conduct of individual class members." *In re Warfarin*, 391 F.3d at 528. This Court went on to note that proof of liability "does not depend on evidence that DuPont made deceptive communications to individual class members or of class members' reliance on those communications[.]" *Id*. at 528–29. And, as to proving injury to class members, this Court highlighted in *Warfarin* "the fact that plaintiffs allege purely an economic injury as a result of DuPont's conduct (*i.e.*, overpayment for warfarin sodium), and not any physical injury," which the Court found, "further supports a finding of commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims." *Id*. at 529.

In sum, the predominance inquiry for settlement-only classes focuses on whether common issues predominate over issues unique to individual class members in the process of evaluating the reasonableness, fairness, and adequacy of a settlement. As in *Amchem*, settlement approvals requiring the assessment of disparate claims of differently situated class members may fail the test of predominance because each class member may be situated differently in terms of, *e.g.*, proving violation, causation, and fact of injury.

On the other hand, in settlement approvals where the evaluation of the merits of a settlement focuses largely on the conduct of the defendant, rather than the actions or circumstances of individual class members, the predominance requirement is more likely satisfied. This is true even if class members reside in different states with varying laws. Indeed, the fact that claims are brought under the laws of different states is not a bar to class certification or class settlements in part because questions about the standing or relative strengths of class member claims in a particular state—which can include tens of thousands of class members or more—typically present common questions among those class members and often, among all class members in states with similar laws or overlapping elements of claims.

Before turning to the specific responses, a final point of policy is important. Whatever standard for certification of a settlement class this Court articulates, it

should be practical. It should be clear and predictable so that courts and parties can conserve resources through sensible class action settlements and not be forced to litigate class certification as if in litigation when settlement is desired by all parties. The standard should also not lend itself to exploitation by those objectors who seek financial gain at the expense of the very class members that the settlement certification decision is designed to protect. *See* AAI Initial Brief at 19-20.

SPECIFIC RESPONSES

This brief responds only to the Court's inquiries that are most related to the *amicus curiae*'s interests as described above.

Question 1

The parties are directed to address the following assertions:

(a) the predominance inquiry requires that each potential class member share at least one identical claim;

(b) predominance is satisfied if class members have different claims as long as each contains elements requiring resolution of common issues of fact;

(c) predominance is satisfied if class members have related, but different, claims that all arise out of the same course of conduct on the part of the defendant;

(d) predominance does not examine the 'claims,' as such of all potential plaintiffs, but focuses on

> **the 'predominance' of common, versus individualized, issues of fact or law that will be presented by a certain class action, as framed in the complaint, and as anticipated to be tried.**

The assertions given in sections (c) and (d) above come closest to the appropriate standard. However, assertion (d) refers to issues of fact or law "as anticipated to be tried," which, as we already discussed, is irrelevant in the settlement class context. As described above and as required by *Amchem*, the relevant inquiry in this case is whether common issues predominate in evaluating the fairness and adequacy of the settlement.

In the case at hand, the key common facts relate solely to the defendant. Both direct and indirect purchasers made various claims against De Beers based on anticompetitive conduct including price-fixing and monopolization. The direct purchasers brought their claims under sections 1 and 2 of the Sherman Antitrust Act, and the indirect purchasers "brought their claims under state antitrust, consumer protection, and unjust enrichment law." *Sullivan v. DB Invs. Inc.*, 613 F.3d 134, 140 *vacated and rehearing granted*, 619 F.3d 287 (3d Cir. 2010). All plaintiffs asserted claims under § 16 of the Clayton Act for injunctive relief. *Id.* Although the legal theories may present various nuances, all the claims are based on common facts that relate solely to the defendant: whether the defendant created

an artificial scarcity through fraudulent statements and anticompetitive conduct, which thereby caused artificially inflated prices.

Moreover, a court evaluating the reasonableness and adequacy of the settlement at issue here would simply need to compare one overwhelmingly common fact pattern (*i.e.*, De Beers's conduct and the effect of that conduct on market prices) with an overlapping set of elements of a variety of state laws.[5] That is precisely what this Court did in *Warfarin*. *See In re Warfarin*, 391 F.3d at 530–31 (stating that "[w]e agree with the District Court that the fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance[]").

[5] There is another critical common issue in this case focusing solely on the defendants. DeBeers initially refused to appear in court, claiming that the United States courts lacked personal jurisdiction over it, and that any judgment against it would be a "legal nullity." *Sullivan*, 613 F.3d at 140. This resulted in default judgments against De Beers in six out of seven cases in September 2004, after which De Beers approached the indirect purchasers to discuss a settlement. *Id.* In March 2006, the district court conditionally certified both the direct and indirect purchaser classes, and preliminarily approved a combined settlement fund of $295 million. *Id.* at 141. The settlement also included a stipulated injunction and De Beers's agreement to "to subject itself to personal jurisdiction in the United States for enforcement of the combined settlement agreement." *Id*. Thus, apart from the underlying merits of the anticompetitive conduct-based claims, the common facts related to De Beers's appearance in U.S. courts relate solely to the actions of the Defendants, and are common to all potential class members.

Questions 3 & 5

> **(3)(a) Does including class members in a settlement-only class who do not have a common valid claim under the applicable substantive law preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?**
>
> **(3)(b) Does including class members in a settlement-only class who do not have either a shared valid claim under the applicable substantive law, or a shared issue of fact relevant to different valid claims, preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?**
>
> **(3)(c) If class members do not have a shared claim, does the existence of related, but different claims, all arising out of the defendants' course of conduct preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?**
>
> **(5) In a settlement class, is the District Court required to assure itself that each class member has a valid claim under the applicable substantive law? If so, what standard should the District Court apply? If a "facially apparent" standard applies, how should a district court determine whether it is facially apparent that some class members have no valid claim?**

Even if it were the case that certain indirect purchasers in the class do not have valid claims under the applicable substantive laws, that would not be a bar to a finding of predominance or to class certification.

First, whether a subset of class members has or does not have a valid claim is not, by itself, pertinent to the predominance issue. What *is* pertinent instead is whether or not the strength of those claims—for purposes of evaluating the adequacy and fairness of the settlement—*can be evaluated with predominantly*

common evidence. As to that point, here, there is a common set of facts (regarding De Beers's conduct) that applies to all class members and predominates over issues unique to individual class members. A court need simply compare De Beers's conduct with the overlapping elements of a limited set of federal and state laws to evaluate the adequacy and fairness of the settlement to absent class members. Critically, none of the claims depends on evaluating the individual circumstances of individual class members of the sort that confronted the Court in *Amchem*.

Second, as pointed out in the AAI Initial Brief, the fact that there may be class members without any apparent means of legal redress is neither a bar to certification of a settlement class nor particularly remarkable. *See* AAI Initial Brief at 15-19. This is so for three reasons.

(1) As pointed out at length in the AAI's Initial Brief, the presence of class members without legal injury within a class is simply not a bar to class certification, even of a litigation class. *Id*. (citing, *e.g.*, *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (stating that the "possibility or indeed inevitability" that a class will include uninjured parties "does not preclude class certification); *see also In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 U.S. Dis. LEXIS 36719, at 41–42 (E.D. Pa. May 2, 2008) (stating that "[e]ven if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust

violation has caused widespread injury to the class") (quotation and citation omitted); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007) ("In order to demonstrate that common evidence exists to prove class-wide impact or injury, plaintiffs do not need to prove that every class member was actually injured[]")).[6]

(2) As pointed out above, the purpose of the predominance inquiry in the context of certifying a settlement-only class is primarily to ensure that courts can manageably and competently protect the interests of absent class members. *Amchem*, 521 U.S. at 620 (in the settlement context courts must attend to those aspects of Rule 23(b)(3) that were "designed to protect absentees"). In this regard, the court adjudicating the settlement should determine whether absent class members are getting enough from the defendant, not too much. *See* AAI Initial Brief at 9–12. Thus, even if there are class members that have weak or non-existent claims, any material recovery these class members may be allocated from the settlement is, presumably, in their interests to receive. Accordingly, it is hard

[6] *See also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977) (vacating district court's denial of class certification even though class contained some unharmed members for whom "the free market price would be no lower than the conspiratorially affected price"); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 158 (3d Cir. 2002) (upholding class certification despite recognizing the existence of some unharmed "[class] purchasers whose contracts were tied to a factor independent of the price of linerboard"); Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969 (2010), available at http://ssrn.com/abstract=1578459 (discussing "common impact" requirement).

to see why a court should be concerned about the possible presence of class members with weak or potentially non-existent claims in determining whether predominance is satisfied in the context of an arm's length settlement.

Arguably, one objection that could be raised is that if a court certifies a class with claimants with multiple weak or non-existent claims, it could redound to the detriment of claimants with legitimate or stronger claims. But this issue is best addressed through other facets of Rule 23 and the settlement process. For instance, if the concern is that the named plaintiffs are not adequate (because of a fundamental conflict) or atypical of the class they seek to represent, those issues are best addressed through Rule 23(a)'s adequacy and typicality provisions. Fed. R. Civ. P. 23(a)(3), (4).

Furthermore, concerns about the process and methods by which the settlement funds will be allocated among class members are considered when the court evaluates the plaintiffs' proposed plan of allocation. It is in that context that questions of fairness with respect to claimants with stronger claims vis-à-vis those with weaker claims are best resolved. Those with weak or non-existent claims could receive a small or nominal recovery (in exchange for their having released all potential claims in order to satisfy a defendant's interest in getting total peace and finality), while those with stronger claims could receive proportionately more.

One last response to this objection. As a practical matter, if the settlement class is not certified, and the settlement is not approved, class members with weak and strong claims alike may lose. In setting the standard here, therefore, this Court should be wary of engaging in the proverbial "burning down the village in order to save it."

The important point here, however, is that there is nothing about the presence or absence of class members with weak or non-existent claims that has a necessary or logical connection to a court's determination of whether common issues predominate over individual ones in adjudicating a class settlement.

(3) Finally, if the anticompetitive conduct alleged by Plaintiffs is true, all of the class members paid inflated prices for diamonds, even if their respective states do not provide them an antitrust remedy. Whether or not a litigated remedy is available under current state or federal law, the indirect purchasers in this case are alleged to be the victims of illegal price fixing (precisely the type of injury that antitrust law is intended to deter and rectify) and may be able to obtain relief—either by seeking an injunction under federal law or perhaps through a change in the law—and the defendants by their settlement recognize this. A court's review of the fairness of the settlement should certainly take this into consideration.

For all of the reasons set forth above, this case is not materially different from *Warfarin*. In *Warfarin*, this Court recognized there were certain class

members (namely the consumers whose co-pays were unaffected by the challenged conduct) that may have suffered no economic injury. *In re Warfarin*, 391 F.3d at 530. This Court held that that possibility posed no bar to a finding of predominance, in part, because even without economic harm, these class members "did possess viable equitable and common law claims for unjust enrichment as well as claims for injunctive relief against DuPont." *Id*. Similarly, here, indirect purchaser class members who may lack a remedy for their injury or even standing under a state's repealer antitrust statute may still possess a federal antitrust claim for injunctive relief, and various statutory or common law claims for fraud, deceptive trade practices, or unjust enrichment.

Finally, it is worth noting that the anticompetitive conduct alleged by Plaintiffs here is illegal in every federal and state jurisdiction within the United States. This is so even if states do not have indirect repealer statutes or cases because other claims, such as deceptive marketing claims or unjust enrichment claims, also provide a viable cause of action for plaintiffs and class members in those states.

Question 4

> **Where some states provide a right to relief, while others do not, does there exist, as we wrote in *In re Warfarin*, a "situation[] where variations in state laws are so significant as to defeat commonality and predominance?" If not, what kind of variation would defeat commonality and predominance?**

The fact that state laws may vary to such an extent that some states provide a right to relief and some states do not for the very same conduct, by itself, is not a bar to satisfying predominance. This is so for two reasons. First, as discussed above, classes certified for litigation and settlement purposes may contain class members who have no legal right to recover any damages. Thus, there is nothing remarkable about settlement classes containing class members from some states with laws that provide class members residing in those states with a legal remedy and some that do not.

Second, where all a court need do in adjudicating a class settlement would be to take a common set of facts about the conduct of the defendant and compare it to the elements of multiple state laws, there is nothing particularly difficult about that procedure. Indeed, that is precisely what this Court allowed in approving the settlement and class certification in *Warfarin*, 391 F.3d at 530–31 (stating that "[w]e agree with the District Court that the fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance").

Variations in state laws may defeat predominance for settlement-only classes where, like in *Amchem*, evaluation of the strength of a settlement requires multiple individualized inquiry into the situations of individual class members. *See Amchem*, 521 U.S. at 624 ("Differences in state law . . . compound these disparities

[between the circumstances of individual class members]"). In other words, if the court assessing the adequacy of a settlement would need not merely to compare the defendant's conduct against a set of state law elements—even multiple state laws—but rather to evaluate the particularized individual circumstances of hundreds or thousands of individual class members, predominance is unlikely to be satisfied. Here, the relative strength or weakness of class members' claims depends largely on De Beers's conduct (like in *Warfarin*), and not on the individual circumstances, injuries, or acts or omissions of individual class members (like in *Amchem*).

It is instructive to compare two hypothetical cases. The first is a proposed settlement of a nationwide class of millions of persons brought to recover damages under a single universally applicable federal law. In this hypothetical, this law requires a class member to prove that it relied to its detriment on the defendant's misconduct in order to state a claim. The second hypothetical is a case brought under the laws of fifty states as well as one or more federal laws. In this second example, on the other hand, none of the applicable laws requires proof of reliance or of any particular act or omission other than a purchase during a particular period of time. Under the principles set out herein, the first hypothetical is far less likely to satisfy predominance than the second.

The case at bar resembles the second.

Question 8 and Part of Question 9

> **(8) Did the District Court's order effectively grant relief under claims from states that had foreclosed such relief? If so, did the District Court run afoul of principles of federalism?**
>
> **(9) Is De Beers's decision to voluntarily enter into a settlement relevant to any issue regarding the Rules Enabling Act or the requirements of commonality or predominance under Federal Rule of Civil Procedure 23?**

Approving a settlement class that includes class members with weak or no claims violates neither principles of federalism nor the Rules Enabling Act. On the other hand, denying settlement approval could violate both principles.

The primary reason that such a settlement is consistent with federalism principles and the Rules Enabling Act is that no state in the United States prevents defendants from paying for a release from plaintiffs who may have weak claims or even no claims. AAI made this point in its previous *amicus curiae* brief and objectors have not cited to any state law to the contrary. *See* AAI Initial Brief at 11–12. It seems—or seems to be conceded—that under the laws of every state a defendant may pay for the extinction of a plaintiff's right to sue over an incident, event, or the like, even if the plaintiff may have no viable claim under existing law. There are several reasons for this. First, the law may change either by legislative action or court decision. Second, defendants prefer settlement to the risk that if the case proceeds to discovery and trial, plaintiffs will discover additional information

to support additional causes of action that apply federally (RICO, for example) or to other previously unpleaded state law claims.

Approving a settlement, therefore, that allows De Beers to pay for some weak or even meritless claims, then, simply abides by current state law. In approving the settlement here, the Court would merely be permitting what every state allows defendants to do in the non-class context.

Denial of approval of a settlement that compensates class members with weak or meritless claims, in contrast, would upset state law, creating a tension with principles of federalism and the Rules Enabling Act. That does not mean that such a denial would necessarily be impermissible, just that it should be considered very carefully. If Federal Rule of Civil Procedure 23, in fact, provided a sound basis for preventing defendants from overpaying for a release, concerns for federalism might well give way and the Rules Enabling Act might be violated. After all, the Supreme Court has recently recognized that federal courts may apply Rule 23 in a way that produces different outcomes than would occur in state court. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010) (holding that Rule 23 is valid under the Rules Enabling Act, and that a state cannot limit Rule 23 by imposing additional requirements).

Rule 23, however, provides no basis whatsoever for a court to reject a settlement in which a defendant pays too much. The purpose of settlement

approval under Rule 23 is to protect absent class members from a settlement that fails to treat them fairly, adequately, and reasonably, not from one that treats them too well. The general rule is that parties to litigation—or potential participants in litigation—may settle on whatever terms they choose. To be sure, the law has created a few exceptions to this general rule to protect especially vulnerable litigants, such as minors and absent class members. But these exceptions do not extend to the adversaries of vulnerable litigants. Just as a court would not act properly if it were to disapprove a settlement with a minor because it concluded the minor had weak or non-existent claims and the defendant had chosen to pay an excessive amount, so a court does not act properly if a defendant is willing to pay for the release of rights in a class action that the court determines are weak or even entirely lacking in merit.

A court's judgment about what is good for a sophisticated defendant, like De Beers, would be a questionable form of governmental paternalism. A court should not readily substitute its speculation about what is best for De Beers for De Beers's own more informed view.

There is no dispute that De Beers made the voluntary decision to settle with the class, whether or not objectors are right that it includes members with no claims; the court has not awarded a remedy to plaintiffs or class members over De Beers's objection. Under these circumstances, even if the court were approving a

settlement in which some class members have weak or no claims, the court would not be creating substantive legal rights. It would simply be deferring to the substantive legal right of every defendant under what appears to be the law of every state to pay for a release of potential claims, whether or not those potential claims have merit. In contrast, refusing to approve a settlement would alter the substantive rights of all defendants under state law and would do so in a way that finds no support in Rule 23 jurisprudence. That would be an affront both to principles of federalism and to the Rules Enabling Act.

Dated: January 11, 2011

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because is contains 6,139 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATIONS PURSUANT TO LOCAL APPELLATE RULE 31.1(C)

I certify that his brief complies with Local Appellate Rule 31.1(c) in that prior to it being filed by ECF was scanned using Symantec Endpoint Protection version 11.6 and Kaspersky Security Suite 2010, and no virus was detected. I further certify that the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical, except insofar as the paper copies contain physical signature and the PDF version contains electronic signatures.

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I hereby certify that all counsel listed below are Filing Users of the Third Circuits'CM/ECF system and that a copy of the foregoing was served upon each of them via the CM/ECF system this 11th day of January, 2011.

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Also on this date, twenty copies of this document were dispatched for filing by hand delivery to the Clerk's Office of the U.S. Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

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