UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: PINEAPPLE ANTITRUST LITIGATION	:	Civil Action No. 1:04-md-1628(RMB)(MHD)
This document relates to all actions	:	

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce N.A., Inc. (collectively "Del Monte") file this memorandum in opposition to plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23.

INTRODUCTION

Del Monte opposes the motion for certification of a class of indirect purchasers in all respects, and opposes certification of a direct purchaser class with respect to the alleged unjust enrichment claims. Based on the present record, Del Monte does not oppose interim certification of a class of direct purchasers with respect to their Sherman Act § 2 claim.

Plaintiffs have failed to meet their burden of justifying certification of a nationwide class of indirect purchasers for many independent reasons. In the terms of the facts, the named plaintiffs who are seeking to represent such a class are consumers who claim to have purchased Del Monte Gold pineapples from grocery stores only in New York, New Jersey and California. According to their discovery responses, none of these plaintiffs knows even the most basic details of the purchases upon which their entire claim rests. None of them has a single document showing that they bought even one pineapple, nor do any of them remember the specifics of when they made their alleged purchases or how much they paid.

But the defects in plaintiffs' showing are not merely its factual inadequacy. Plaintiffs have failed to show how they can possibly meet the "rigorous analysis" required under Rule 23, *see General Tel Co. v. Falcon*, 457 U.S. 147, 161 (1982), when litigation of the claims raised by the proposed class would require application of: (i) the antitrust laws of 23 jurisdictions; (ii) the consumer protection laws of 45 jurisdictions;

(iii) and the unjust enrichment laws of every state and the District of Columbia. Plaintiffs have not cited a single case in any state or federal court certifying a class of this vast scope. Nor do plaintiffs offer any plan for conducting the massive and complex trial that the putative class would entail.

Among other reasons, the proposed class cannot be certified because there is no way to identify the millions of indirect consumers who would be its members. Unlike consumer classes that have been certified for products such as prescription drugs where there are pharmacy records identifying individual consumers, plaintiffs have not offered an iota of evidence that any records of the millions of purchases of pineapples are available. Indeed, the only record evidence shows that even the putative class representatives lack that information. In short, plaintiffs have completely failed to show how the Court could possibly determine membership in the class, provide notice, determine the number of pineapples that each class member purchased and the price they paid, or distribute any recovery in a fair and reliable manner.

But even if the members of an indirect purchaser class could somehow be identified, plaintiffs have failed to show why individualized issues of fact will not predominate and overwhelm any common issues in the litigation. At the heart of the Indirect Purchasers' claim is the assertion that they overpaid for Del Monte Gold pineapples because an alleged anticompetitive overcharge was passed through to them by brokers, wholesalers, jobbers and retailers in the distribution chain. Yet, it was these same complexities associated with calculating the "pass-through" to end consumers that led the Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), to bar indirect purchaser suits under the federal antitrust laws. The same concerns weigh heavily against

certifying an indirect purchaser class in federal court even if a substantive claim may exist under state law.

The calculation of any pass-through to indirect purchasers is extremely complicated and inevitably imprecise, and likely differs widely among members of the class. Although plaintiffs and their expert proffer a method that assumes a constant pass-through rate, this is irrational as a matter of economics (*see* Declaration of Bradley Reiff, submitted as Ex. A),[1] and wrong under the factual record in this case, which establishes that the prices direct purchasers paid for Del Monte Gold pineapple and the markup in the multi-level distribution chain for retailer to consumer (and hence the pass-through rate) varies over time and by geographic area and seller. Because plaintiffs have failed to show that common issues of fact predominate as to any alleged indirect purchaser pass-through damages, certification must be denied.

In addition, class certification must be denied because the Indirect Purchasers allege three distinct theories of recovery, each of which requires state-by-state determinations that make a single trial upon any one theory, let alone all three, unworkable. For example, many of the state consumer protection laws invoked by plaintiffs require a showing of deception or scienter. This element alone renders individual issues predominant. For this reason, federal courts have repeatedly denied certification in cases such as this, where a proposed class makes claims under multiple, differing state laws.

[1] All lettered exhibits to this memorandum are attachments to the declaration of Del Monte's counsel, David A. Barrett.

For similar reasons, the Direct Purchasers have failed to meet their burden to justify class certification on the unjust enrichment claims which they allege on behalf of a nationwide class. Unlike the Sherman Act claim, plaintiffs' unjust enrichment claims will be governed by the differing laws of the 50 states, which destroys commonality. Moreover, plaintiffs have not even attempted to show how they could prove damages for unjust enrichment on a classwide basis. This omission is fatal because, unlike Sherman Act damages, unjust enrichment damages must be reduced by the amount of the alleged overcharge that the direct purchaser passed through to its customers.

Accordingly, plaintiffs' motion for class certification should be denied in its entirety as to the Indirect Purchasers and denied with respect to the Direct Purchaers' unjust enrichment claims.

RELEVANT FACTS

Under Rule 23(b)(3), plaintiffs seek to certify a single nationwide class of Indirect Purchasers under three theories of liability: (1) monopolization under the antitrust laws of 23 states; (2) consumer fraud under the laws of 45 states; and (3) unjust enrichment under the common law of all 50 states and the District of Columbia.[2] The proposed class would encompass all end purchasers of Del Monte Gold pineapples in the United States from March 1, 1996 to present.[3] To support the contention that the indirect purchaser claims can be proven with common evidence, as required by Rule 23(b)(3), plaintiffs rely exclusively upon the report of an economist, Frank D. Tinari.

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[2] Plaintiffs have not moved for certification of a class for purposes of injunctive relief under Rule 23(b)(2).

[3] Plaintiffs have clarified that the class would not include any purchasers such as restaurants and hotels that resell the pineapple in any form.

In his report, Dr. Tinari makes a critical, but flawed, assumption: that Del Monte's alleged overcharge was passed on in its entirety (*i.e.*, 100%) to all end consumers uniformly. (*See* 8/23/2005 Dep. of Frank Tinari, at 88-89 ("it's implied, that there would be 100 percent pass-through"), submitted as Ex. B (hereinafter "Tinari Dep., Ex. B").) At his deposition, however, Dr. Tinari conceded that the pass-through rate could vary: (1) over time as the prices of the Del Monte Gold pineapple changed; (2) depending on the intensity of competition among grocery markets in a given area; (3) depending on whether grocery chains engaged in zone pricing; (4) depending on the type of retail seller involved (*e.g.*, Wal-Mart prices with a low mark-up, as opposed to a high-end retail store); and (5) depending on whether the pineapples were grown in Costa Rica or Hawaii. (*Id.* at 69-72, 77-82.)

Dr. Tinari's deposition admissions that pass-through rates are affected by many variables are supported by plaintiffs' fact witnesses. For example, direct purchaser plaintiff, Just-A-Mere, testified that for pineapples, prices and margins (*i.e.*, the difference between the purchase price and the resale price) shift "every day." (8/25/2005 Dep. of Fred Endy of Just-A-Mere Trading Company, LLC., at 292, 330-31, submitted as Ex. C.) Factors affecting the margin, all of which are plainly subject to substantial variations, include supply and demand (both of which have obvious seasonality), pineapple product quality, the volume being purchased, and the importance and location of the customer. (*Id.* at 330-31.) Moreover, there is evidence that most consumers do not actually purchase from a direct purchaser. In one example, there are at least three layers of sales between Del Monte and the end consumer: (1) sale from Del Monte to a wholesaler (*i.e.*, to a direct purchaser class member); (2) sale from the wholesaler to a

broker; (3) sale from a broker to a retailer; and (4) sale from the retailer to the indirect purchaser. (*Id.* at 90-91; *see also* 9/14/2005 Dep. of Eugene Fabio of J. Bonafede Co., Inc, at 122-23, submitted as Ex. D.) At each of these levels, prices and margins are affected by myriad factors and change constantly. (8/14/2005 Dep. of George Contos of American Banana Co., Inc., at 178-185, 201-203, submitted as Ex. E; *see also* Ex. D., at 108-111.)

In support of certification of a direct purchaser class, plaintiffs submitted the declaration of economist, Ronald W. Cotterill. Dr. Cotterill's report focuses entirely on the Direct Purchasers' antitrust claim, and does not address whether or how damages might be proven on a class-wide basis for unjust enrichment claims. (7/27/2005 Dep. of Ronald W. Cotterill, at 93-94, submitted as Ex. F.)

ARGUMENT

Plaintiffs, as the moving parties seeking certification, bear the burden "of establishing that the class meets the Rule 23 requirements." *Daniels v. City of New York*, 198 F.R.D. 409, 413 (S.D.N.Y. 2001). As demonstrated below, plaintiffs in this case have failed to meet that burden.

Rule 23 requires a "rigorous analysis" to ensure that the requirements for class certification are met. *See General Tel. Co.*, 457 U.S. at 161; *In re Visa Check/ MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001). Under Rule 23(b)(3), certification may be granted only if "rigorous analysis" demonstrates that the plaintiffs have met the burden of showing that: (1) common questions of fact and law predominate, and (2) whether class treatment is the superior form of adjudication. *See* Fed. R. Civ. P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In order for common issues to predominate, plaintiffs must demonstrate that there are classwide issues of fact or law that can be decided with generalized proof, and those issues must be "more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). Plaintiffs also must show that treatment is practical from the standpoint of the manageability of the proposed class. *See* Fed. R. Civ. P. 23(b)(3). "Manageability" is a consideration that "encompasses [the] whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 164 (1974).

I. THE INDIRECT PURCHASER CLASS IS UNMANAGEABLE BECAUSE THERE IS NO MEANS TO IDENTIFY MEMBERS OF THE PUTATIVE CLASS OR THEIR PURCHASES OF DEL MONTE GOLD PINEAPPLES

It is axiomatic that to certify a class the court must be "able to identify and notify the members." *Reifert v. South Central Wis. MLS Corp.*, No. 04-C-969-S, 2005 WL 1206843 (W.D. Wis. May 20, 2005). If class members cannot be identified and their purchases cannot be verified, class certification is improper. *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968) ("[On remand the district] court should explore the problems which individual class members would be likely to encounter in filing and proving their claims. If as a practical matter class members are not likely ever

to share in an eventual judgment, we would probably not permit the class action to continue.").[4]

Here, there is no way to identify the members of the putative indirect purchaser class: consumers who purchased a Del Monte Gold pineapple since 1996. Del Monte has sold millions of Del Monte Gold pineapples throughout the United States since 1996. Plaintiffs have failed to identify any records evidencing the purchases of those pineapples by indirect purchasers. Unlike indirect purchasers of products such as prescription drugs or automobiles, whose purchases are recorded and subject to verification, there is no way to ascertain the identity of these putative class members or the quantities and prices of their purchases.

In striking confirmation of this fatal flaw in plaintiffs' motion, not even the putative class representatives have records of their purchases. Each of the Indirect Purchaser plaintiffs, in response to a document request, acknowledged that he or she has no documents, including receipts, concerning his or her purchase of whole, fresh extra-sweet variety pineapples from Del Monte.[5] Nor do plaintiffs offer any means of identifying the millions of members of the class, the amount of pineapples purchased by each class members, or the prices paid by class members.

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[4] The expression in certain cases that manageability concerns alone rarely warrant the denial of class certification, *see e.g., In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d at 140, is not applicable to cases such as this one where the fundamental issue is that the actual members of the class itself cannot be reliably identified. *See In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir.1974) (reversing certification of antitrust class of estimated 40 million hotel patrons, and recognizing "[a]ctions have been dismissed on the basis of manageability problems alone, particularly in cases involving large numbers of plaintiff class members").

[5] *See* Indirect Purchasers' Responses to Requests 1 & 9 of Del Monte's First Set of Requests for Production (all of the Indirect Purchasers' written discovery responses are submitted as Ex. H.) In fact, plaintiffs' discovery responses are not even certain as to whether they actually purchased Del Monte pineapples. *See, e.g.*, Brenda Caldarelli's Int. An. 2 ("Plaintiff believes, to the best of her recollection, that the whole, fresh, extra-sweet pineapples she purchased were Del Monte brand pineapples.").

Prior to the Supreme Court's seminal 1977 decision in *Illinois Brick* — in which the Court held that the computation of pass-through damages is so problematic that indirect purchasers cannot sue for damages under the Sherman Act — federal courts held that indirect-purchaser consumer classes in antitrust cases were unmanageable and could not be certified when there was no means to identify the actual class members and their purchases. *See, e.g., City of Philadelphia v. Am. Oil Co.*, 53 F.R.D. 45, 72-73 (D.N.J. 1971) (denying certification of class of retail end-purchasers of gasoline, while certifying two classes of large-scale purchasers that had purchase records); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319, 321 (S.D.N.Y. 1970) ("we think it obvious that a class comprising all consumers of eggs in the United States is so large that it is unmistakably beyond the limit of a permissible class action. It would be next to impossible to identify members of the class and to give them appropriate notice.").

A leading federal case detailed the reasoning for rejecting certification of a class — very similar to that proposed here — comprised of indirect purchasers whose identities cannot be ascertained and whose purchases cannot be verified:

> In discussing the motorist who purchased gasoline from retail stations between 1955 and 1965, the Court is speaking by and large of a class that made cash purchases at many different stations, at many different times, at many different prices. Credit card statements would be helpful, but they are not available from either plaintiffs or defendants during most of the relevant period. The proposed committee of counsel, who are supposed to evaluate the claims of each motorist against the damage award, would be given an almost impossible task to resolve. Even if this committee could ultimately relate damage awards to the amount of miles one drove within the trading area between 1955 and 1965, the committee would still need some records upon which to base an award. Affidavits would not be sufficient by themselves. . . . Simply stated, this Court is not satisfied that the motorist who purchased from a retail service station between 1955 and 1965 within the states of Delaware, New Jersey and Pennsylvania has available to him the type of records necessary to make any meaningful

> distribution of damage awards if liability and general damages are established. As a consequence, the Court concludes that this portion of the Philadelphia-New Jersey class is unmanageable, and hence, should not be certified.

City of Philadelphia, 53 F.R.D. at 72-73. The state courts (in which consumer class cases have largely been pursued since *Illinois Brick*) have repeatedly followed this reasoning in cases involving commodity consumer products, like pineapples, where reliable purchase records are unavailable. *See, e.g., Keating v. Phillip Morris*, 417 N.W. 2d 132, 137 (Minn. App. 1987) (denying certification for indirect purchasers of cigarettes because damages analysis showed unmanageability); *Ren v. Phillip Morris*, No. 00-004035-CZ, 2002 WL 1839983, at *18 (Mich. Cir. Ct. June 11, 2002) (same, because of problems calculating actual damages and resulting management problems); *Peridot, Inc. v. Kimberly-Clark Corp.*, No. MC 98-012686, 2000 WL 673933, at*6 (Minn. Dist. Ct. 2000) ("Thus even if plaintiffs could offer a viable mechanical calculation, ascertaining the class [of indirect purchasers of tissue products] would be a highly complex and difficult, if not impossible, task, neither managerially nor administratively feasible."); *Derzon v. Appleton Papers, Inc.*, No. 96-CV-3678, 1998 WL 1031504 (Wis. Cir. Ct. July 7, 1998) (denying certification of class of indirect purchasers of fax paper because trial of such a diverse group of purchasers would be unmanageable); *McCarter v. Abbot Labs., Inc.*, No. Civ.A. 91-050, 1993 WL 13011463, *5 (Ala. Cir. Ct. April 9, 1993) (denying certification of class of indirect purchasers of baby formula where individual questions

related to pass-through "would result in thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment").[6]

Although there have been indirect purchaser classes certified, a careful judicial survey and analysis of these cases identified two situations where certification may be appropriate. *See Ren*, 2002 WL 1839983, at *13-*15. First, there are cases such as the recent Microsoft litigations, where "the plaintiffs of the class made only one or a very small number of [purchases of] products on limited occasions such as in the purchase of computer operating software where there is limited price variation on the retail level." *Id.* at *15. Second, there are cases "where the number of purchasers of the product are readily identifiable and reliable records for individual purchases exist." *Id.* Where the products at issue — like cigarettes in *Ren* or pineapples here — do not fall into either category, class actions are not manageable due to the myriad of individual issues entailed in damages. *See id.* Because the purchase of a pineapple is not a singular event likely to be recalled by a consumer with clarity, and because consumers do not

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[6] Plaintiffs argue (Pls. Br. at 14) that in the "analytically identical" case of *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004), the court certified both indirect and direct purchaser classes. However, Relafen is a prescription drug for which there are available records to identify the end purchasers and the prices that they paid. Thus, the manageability problems that preclude certification here did not exist in *Relafen*.

Indeed, the indirect purchaser suits certified by federal courts have been limited to products such as prescription drugs where there are ascertainable and verifiable records, and to settlement classes. Yet, even settlement classes have experienced significant management problems. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL NO. 1361, 2004 WL 2106612, at *1 (D. Me. Sept. 22, 2004) ("In light of the media reports of criticism over the actual distribution of the CDs in the cy pres portion of the settlement, I shall expect to see that subject and criticism addressed in the Final Report of the Claims Administrator, if not sooner.") (citations and footnote omitted); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL NO. 1361, 2005 WL 1923446, at *3 & n.8 (D. Me. Aug. 9, 2005) (expressing court's "hope" that annual progress reports will be submitted, so the court's "monitoring of funds can come to a timely end"). Plaintiffs have not cited any federal indirect purchaser class case that has gone to trial.

typically keep records of pineapple purchases, plaintiffs cannot meet their burden of showing manageability.

II. INDIVIDUAL ISSUES OF DAMAGES PREDOMINATE AND RENDER THE PUTATIVE CLASS ACTION UNMANAGEABLE

Under the law of this Circuit, the "damage issue turns out to be a major stumbling block for class actions" in antitrust cases, unless plaintiffs propose a viable formula for computing damages. *See Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (quoting 2 Areeda & Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 332c at 157 (1978)). The Second Circuit has particularly cautioned that class damages problems are "compounded" by complications such as "varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five or ten years," *id.,* all of which are present here.

The Indirect Purchasers here are seeking damages measured by that portion of an alleged overcharge that was passed-through to end consumers throughout the United States over a 9-year period of time. (Tinari Report at 2, attached to Pls. Mot. as Ex. A to Lax Decl.) Thus, absent a universally-applicable damages formula, each of the millions of individual class members would have to prove each of his or her multiple pineapple purchases included an alleged overcharge that was passed-on at each layer of a multi-level distribution chain. *See Illinois Brick,* 431 U.S. at 740 (in "treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers"). Such a showing, of course, would be impossible and unmanageable.

A. Plaintiffs Do Not Have A Viable Damages Model

Calculating the rate at which an overcharge is passed through the chain of distribution is "famously difficult." *See In re Brand Name Prescription Drugs Antitrust Litigation,* 123 F.3d 599, 605 (7th Cir. 1997) (Posner, C.J.). As the Supreme Court recognized in rejecting an alleged monopolist's defense that a direct purchaser's damage claim should be reduced by the amount of the overcharge was passed-on to the purchasers' customers:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. . ..

Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481, 492-93 (1968) (footnote omitted). In *Illinois Brick*, the Supreme Court reiterated these difficulties when it held that indirect purchasers injured by pass-through of an overcharge cannot sue under the Sherman Act. *See* 431 U.S. at 732 ("This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-

damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants.").

Of particular relevance here, the Supreme Court recognized that:

> the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.

Id. at 732-33. It is well-established in antitrust cases that pass-through rates and markups are rarely either complete (*i.e.*, rarely 100%) or uniform. *See, e.g., Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170 (8th Cir. 1998) ("Only rarely will a firm be able to pass on the entire amount of a monopoly overcharge to its customers. In the usual case, both the firm and its customers will bear some portion of the overcharge . . . .") (citation omitted); *Stamatakis Indus. v. King*, 965 F.2d 469, 472 (7th Cir. 1992) (Easterbrook, J.,) ("Antitrust law does not assume stable markups. Competition [at the level of distribution] holds markups in check. Unless demand is perfectly inelastic, the producer absorbs part of any increase in costs, with the amount absorbed depending on the ratio between the elasticities of supply and demand.") (citations omitted).

Notwithstanding these well-known deficiencies in pass-through claims, plaintiffs' only theory of damages for indirect purchasers is based upon the assumption of a 100% pass-through. (Tinari Dep., Ex. B at 88-89.) The sole support for this critical assumption is the report of Dr Tinari. Dr. Tinari's report, however, fails to meet plaintiffs' burden under Rule 23 to demonstrate that there is a manageable way to calculate damages.

As a threshold matter, Dr. Tinari's report should be disregarded entirely because it is not sworn, and, at deposition, Dr. Tinari declined to verify the report under oath or affirmation:

> Q. Do you stand by this report as your sworn testimony in this case?
>
> A. My sworn testimony? I've issued a report. I'm now testifying under oath.
>
> Q. Is this report under oath, Dr. Tinari?
>
> A. Not that I'm aware of.

(*Id.* at 15). Class certification is a significant decision that should be made on admissible evidence. *See Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005) (reversing certification of securities class action because finding of efficient market was not based on "adequate admissible evidence"); *Blihovde v. St. Croix Cty.*, 219 F.R.D. 607, 618 (W.D. Wis. 2003) (at the class certification stage, evidence must as least be "the *kind* of evidence that would be admissible if properly authenticated"). The Court should give no weight to a statement that the declarant has refused to verify under oath.

Even if Dr. Tinari's report were considered, it completely ignores the reality of the marketplace. Without a shred of empirical data, or any theoretical support, Dr. Tinari's report proffers a damages formula that is based upon an assumed constant level of pass-through for the entire nationwide class. (Tinari Dep., Ex. B at 57-62.) In other words, his method assumes a single pass-through rate for every one of the millions of pineapples purchased over a 9-year period. Moreover, Dr. Tinari's report assumes that *100%* of the alleged overcharge was passed on to all end consumers. (*Id.* at 88-89.)

Because these are fatal flaws both as a matter of antitrust precedent and as a matter of "real world" economics, the Tinari report cannot serve as a basis for class certification. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 135 (class certification cannot be based upon expert opinion that is "so flawed that it would be inadmissible as a matter of law").[7]

Dr. Tinari offers no factual support for his assumption that 100% of the alleged overcharge was passed-through to the end consumer in every purchase of a Del Monte Gold pineapple since 1996. (*See* Tinari Report at 9.) Nor does he cite any economic literature to support that counter-intuitive and long-rejected proposition, and in fact, acknowledged in his deposition, that he had not read any theoretical literature on pass-through rates before submitting his report. (Tinari Dep., Ex. B. at 88, 113.)

At his deposition, Dr. Tinari conceded that the rate of pass-through must be determined empirically. (Tinari Dep., Ex. B at 69-72, 77-82.) He also acknowledged that the pass-through could well vary with a host of different factors, such as the level of competition in a local retail market and the supply of pineapples, both of which he admitted change over time. (*Id.* at 69-72, 77-82.) He further conceded at his deposition that he has not undertaken any empirical testing of whether direct purchasers passed-on any alleged overcharges and, if so, how much was passed-on. (*Id.* at 58-61.) In addition, he acknowledged that he could not predict, before engaging in empirical analysis, how

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[7] For the reasons discussed below, Dr. Tinari's report is inadmissible under Rule 702 of the Federal Rules of Evidence, which requires that (1) the expert testimony be based upon sufficient facts or data; (2) the expert testimony be the product of reliable principles and methods; and (3) that the witness have applied the principles and methods reliably to the facts of the case.

many different pass-through rates he would have to use when he applied his model. (*Id.* at 62-63) [8]

Dr. Tinari also conceded that his model assumes only one middleman (typically a large retail chain) between Del Monte and the indirect purchaser. (*Id.* at 86-87). In fact, there are often at least two or three middlemen (a retail establishment and one or two distributors or brokers), thereby greatly complicating the pass-though analysis. (Ex. E, at 156-158).

As demonstrated in the affidavit of Del Monte's expert economist, Bradley Reiff, submitted herewith (Ex. A), there is no theoretical or empirical basis for Dr. Tinari's damages model. (*Id.* at ¶¶ 11-19.) Moreover, contrary to Dr. Tinari's arbitrary assumptions of a fixed pass-through, the available empirical evidence demonstrates that the rate of pass-through likely varied. (*Id.* at ¶¶ 20-25.):

> The problem with Dr. Tinari's approach is that it oversimplifies the critical empirical question of obtaining reliable estimates of the direct purchasers' markups and pass-through rates. Instead, the formula itself assumes a uniform markup and therefore a uniform pass-through rate (both defined as P^r/P^w in the Tinari model) of greater than 100 percent.

(*Id.* at ¶ 9.)

Indeed, the testimony of plaintiffs in this case contradicts Dr. Tinari's core assumptions. For example, the record shows that due to competitive pressures and related factors, direct purchasers sometimes sold Del Monte Gold pineapples at reduced profit margins or even at a loss (Ex. E at 108) — both situations which they necessarily

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[8] Dr. Tinari never attempted to account for these likely variations in the pass-through rate in his report. In fact, he spent no more than 20 hours preparing his report (*id.* at 10.), and is not even certain that data are available to do what he considers the necessary empirical work (*id.* at 66.). In neither his report nor his deposition has Dr. Tinari offered any explanation as to how the pass-through rate would be determined, or as to how his formula could be adjusted to account for variations in the pass-through rates. In other words, he has not explained how his methodology could even be applied on a classwide basis.

passed through less than 100 percent of any alleged overcharge. Similarly, plaintiff Meijer, which is one of the largest grocery chains in the United States, testified that it sometimes sells Del Monte Gold pineapples at a loss. (*See* 8/31/2005 Dep. of Steven Momber of Meijer, Inc. and Meijer Distribution, Inc., at 209, submitted as Ex. G.) American Banana Company and J. Bonafede Company also testified that they same thing happened to them. (*Id.* at 279-80; Ex D at 108-111.) In such instances, none of these direct purchasers passed along the entire alleged overcharge, as Dr. Tinari assumes. Another plaintiff, Just-A-Mere, testified that pineapple prices and margins (*i.e.*, the difference between the purchase price and the resale price) shift "every day." (Ex. C at 292, 330-31.) These frequent changes, which likely impact pass-through rates, occur because of factors such as supply and demand, quality of the pineapple, the volume being purchased, and the quality and location of the customer. (*Id.* at 330-34.) Thus, the record directly contradicts plaintiffs' essential assumption that there is a uniform, complete "pass-through" with respect to all pineapple purchases.

Nor, contrary to Dr. Tinari's unsubstantiated assumption, do indirect purchasers always buy pineapples from a direct purchaser. For example, in the case of plaintiff, Just-A-Mere, there would typically be three layers of sales between Del Monte and the consumer: (1) the sale from Del Monte to a wholesaler; (2) the sale from the wholesaler to a broker; (3) the sale from a broker to a retailer; and (4) the sale from the retailer to the indirect purchaser. (Ex. C. at 90-91; *see also* Ex. D at 122-23 (testifying to multi-level distribution)). At each of these levels, the prices and margins were affected by myriad factors and changed constantly. Again, plaintiffs' damage theory completely ignores this fact and is thereby unreliable and must be rejected.

On the basis of antitrust precedent, economic theory, and the record evidence in this case, Dr. Tinari's unfounded assumption of a constant 100% pass-through is insupportable and plaintiffs have failed to meet their burden of demonstrating the feasibility of a class wide damages model or formula. *See In re Methionine Antitrust Litig.*, 204 F.R.D. 161 (N.D. Cal. 2001) (denying certification of indirect purchaser class where expert's "method assumes that there is a single pass-through rate for all direct and indirect resellers, yet [the expert] and plaintiff point to nothing in the record to suggest such an assumption is valid"); *A & M Supply Co. v. Microsoft Corp.*, 654 N.W. 2d 572, (Mich. App. 2002) (reversing certification of indirect purchaser class because expert's methodologies would "essentially require separate trials to determine the different pass-on rates affecting the class as a whole") *Melnick v. Microsoft*, No. CV-99-709, CV-99-752, 2001 WL 1012261, at *16 (Me. Sup. Ct. August, 24, 2001) (denying certification of indirect purchaser class: "Although this is not the time for a battle of experts, the plaintiffs must show that they are armed with more than general, untried economic theory. They are required to show that their proposed methods are workable with real world facts. After months of discovery on the certification issue, the plaintiffs have not shown that they have the means to prove impact or damages on a classwide basis.").

Certification must denied because plaintiffs offer no viable means to overcome the need to trace the alleged overcharge from Del Monte to each individual end consumer — an exercise that involves varying market conditions and distribution processes throughout the United States over a period of nearly a decade and plainly renders individual issues predominant. *See, e.g., In re Brand Name Prescription Drug Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1994 WL 663590, at *7 (N.D. Ill. Nov. 18, 1994)

(denying certification of indirect purchaser class because "tracing the alleged overcharges from manufacturers, to wholesalers, to retailers, to consumers presents individualized issues which would dominate this litigation and preclude certification under rule 23(b)(3)"); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) ("The district court estimated — conservatively, we think — that in the absence of a practical damage formula, determination of damages in this case would consume ten years of its time. The propriety of placing such a burden on already strained judicial resources seems unjustified.").

B. Determination of the Pass-Through of the Alleged Overcharge Also Presents Unacceptable Manageability Problems.

The Supreme Court has long recognized that claims or defenses involving a determination of pass-through damages present courts with "massive evidence and complicated theories." *Hanover*, 392 U.S. at 493; *Illinois Brick*, 431 U.S. at 741. For that reason, in *Illinois Brick* the Supreme Court held that indirect purchasers may not sue for damages under the Sherman Act.

In reaction to *Illinois Brick*, many states enacted laws providing indirect purchasers with a state law antitrust cause of action. Those state laws, however, in no way impact the teaching of *Illinois Brick* that apportionment of an overcharge between direct and indirect purchasers is an administrative and evidentiary thicket that federal courts should eschew. Thus, while the Supreme Court has held that federal courts should not be burdened with an antitrust action by a single indirect purchaser seeking "pass-through" damages, the plaintiffs in this case are seeking to certify a class action involving millions of indirect purchasers, every one of whom presents potentially complex and

different pass-through issues. The considerations that underlie the holdings of *Hanover Shoe* and *Illinois Brick* compel the conclusion that this indirect purchaser action fails the manageability test of Rule 23.

In other words, although a state's legislature is free to impose a burden on its court system by authorizing indirect purchaser actions under state law, that in no way requires that a federal court must certify litigation under Rule 23 that will inevitably entail "massive evidence and complicated theories." *Hanover*, 392 U.S. at 493.[9] In this case, where there are millions of unidentifiable putative class members and the plaintiffs have failed to show any viable way to compute the "pass-through" damages upon which their claims depend, the Court should be guided by *Illinois Brick* and its progeny and deny certification due to the impossibly unmanageable difficulties of apportioning indirect purchaser damages.

III. THE APPLICATION OF MYRIAD STATE LAWS MEANS INDIVIDUAL ISSUES WILL PREDOMINATE.

As demonstrated in Del Monte's pending motion to dismiss, the named plaintiffs cannot meet the standing requirements to bring state law claims pineapple purchasers in states other than California, New York and New Jersey, the only states in which the named plaintiffs allegedly bought Del Monte Gold pineapples.[10] Should the Court grant Del Monte's motion to dismiss that would, of course, moot the Indirect Purchasers' class certification motion. In any event, as explained below, the differences in state law overwhelm any common issues and require denial of class certification. Moreover, those

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[9] As the Court is aware, indirect purchaser claims raising the same allegations are pending against Del Monte in state courts in Tennessee, California, Nevada and Florida.

[10] *See* Del Monte's Mot. to Dismiss Br. at 16-22; Del Monte's Mot. to Dismiss Reply Br. at 11-13.

same differences in state law demonstrate that the named plaintiffs cannot adequately represent putative class members in states other than those where they themselves purchased Del Monte Gold pineapples.

A. Certification Must Be Denied Because Plaintiffs Refuse to Undertake the Necessary Choice of Law Analysis

"In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *see In re Agent Orange Prod. Liability Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (differences in state law should be considered).[11] Accordingly, plaintiffs' burden under Rule 23 includes the presentation of choice of law analysis to "identify the substantive law issues which will control the outcome of the litigation." *Castano* at 741 (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978)); *see, e.g., In re Currency Conversion Fee Antitrust Litig.*, No. 03 Civ. 2843 (WHP), 2004 WL 2750091, at *7-8 (S.D.N.Y. Dec. 2, 2004), *reh'g granted in part*, 2005 WL 142740 (S.D.N.Y. Jun. 20, 2005) (denying class certification because New York choice of law rules required applying substantive laws of all 50 states and "individual questions concerning the substantive laws of other states would overwhelm any potential common

[11] *See also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed.R.Civ.P. 23(a), (b)(3)."); *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law...."); *Kaczmarek v. International Business Machines Corp.*, 186 F.R.D. 307, 312-13 (S.D.N.Y. 1999) ("The prospect of determining the law of all fifty states and then applying the materially different laws that exist for some of the claims in this case would make this class action too complicated and unmanageable. Common questions of law do not predominate in this case.").

issues"); *In re Rezulin Products Liability Litigation*, 210 F.R.D. 61, 70 (S.D.N.Y. 2002) (applying New York choice of law rules to nationwide state-law class action).[12]

Although plaintiffs' complaint cites the statutes of 45 states, plaintiffs' certification motion asserts that the applicable law "remains unknowable" at this time and should not be a factor preventing certification. (*See* Pls. Br. at fn. 18.) That assertion, however, dooms the motion because "[t]he burden of proof lies with the plaintiffs; in not presenting a sufficient choice of law analysis they have failed to meet their burden of showing that common questions of law predominate." *Spence v. Glock*, 227 F.3d 308, 313-14 (5th Cir. 2000)

In any event, choice of law is not "unknowable;" rather, it is evident that the law of every state must be applied.[13] "In determining what substantive law applies, federal courts apply the choice of law rules of the forum state." *In re Rezulin*, 210 F.R.D. at 69.

1. The Consumer Protection and Antitrust Laws of Every State Must Be Applied

In tort cases, "New York applies the law of the state with the most significant interest in the litigation." *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999). For conduct-regulating laws such as antitrust and consumer protection statutes, the state

[12] Although there are decisions in this District stating that choice of law determinations need not be made at the class certification stage, those cases did not involve significant differences in state substantive laws that would affect certification. *See, e.g., Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58, (S.D.N.Y.1993) ("The application of the laws of different states, if necessary, does not preclude class action litigation of this case."). This is not such a case and, if the Second Circuit were to address the issue, it would likely join other Circuits in holding that, at the class certification stage, the plaintiff bears the burden of identifying what state substantive law applies. *See, e.g., Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 674 (7th Cir. 2001); *Castano*, 84 F.3d at 741-42.

[13] Plaintiffs' suggestion that the law of a single state may be applied to a nationwide class (*see* Pls. Br. at fn. 18) raises serious due process concerns. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). Under *Shutts*, for a state's law to apply to a class action consistent with Constitutional Due Process, that state must have a significant contact or significant aggregation of contacts to the claims asserted by each member of the class. Plaintiffs have not made, and cannot make, such a showing in this case.

with the most significant interest is generally the state where the tort occurred. *See id.* "The locus of a tort is generally determined by the place where the plaintiff suffered injury." *La Luna Enterprises, Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 389 n.2 (S.D.N.Y 1999).

In this case, any alleged injury to putative class members occurred when and where they purchased Del Monte Gold pineapples. "Therefore, the laws of all fifty states and the District of Columbia must be applied to ensure proper adjudication of all class member claims." *In re Currency Conversion Fee Antitrust Litig.*, No. 03 Civ. 2843, 2004 WL 2750091, at *7. Plaintiffs' unsupported assertion that a single, unidentified state's law can be applied is meritless.

2. The Unjust Enrichment Laws of Every State Must Be Applied

For quasi-contract claims such as unjust enrichment, New York applies the "center of gravity" approach to determine what forum's law governs. *See Khreativity Unlimited v. Mattel, Inc.*, 101 F. Supp.2d 177, 183 (S.D.N.Y. 2000). "Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties . . . . The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis." *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030-31 (2d Cir. 1996).

Here again, the law of every state and the District of Columbia must be applied. *See In re Currency Fee Antitrust Litig.*, No. 2004 03 Civ. 2843, WL 2750091, at *7. The

only "contacts" between Del Monte and the putative class members occurred at the consumer's place of purchase. [14]

B. Variations in State Law Render Individual Issues of Law Predominant

Plaintiffs bear "the burden of providing an extensive analysis of state law variation to determine whether there are insuperable obstacles to class certification." *In re Rezulin*, 210 F.R.D. at 71 & n.59 (quotation omitted). "Attempts at such 'extensive analysis' often include model jury instructions and verdict[] forms, as well as an attempt to group state laws by their relevant differences." *Id.* Plaintiffs here, however, have submitted only the most superficial review of state law. For instance, plaintiffs' "surveys" of state unfair competition and unjust enrichment laws (Exs. A and B to motion for class certification), contain a paragraph for each state listing elements of a cause of action, but nowhere do they analyze how the elements of a claim differ from state to state. For state antitrust laws, plaintiffs do not even provide descriptions; instead they merely assert that the state law claims "parallel" the federal Sherman Act claim. (Pls. Br. at 22-23.) Such cursory treatment alone compels denial of certification. *See Castano*, 84 F.3d at 743 (reversing certification because the "district court's consideration of state law variations was inadequate. The surveys provided by the

[14] Plaintiffs cite a single case to support the viability of a nationwide standard for unjust enrichment, *Singer v. AT&T Corp.*, 185 F.R.D. 681 (S.D. Fla. 1998). In *Singer*, however, the court expressly refused to consider variations in state law as a premature merits inquiry, *id.* at fn. 5, and it put the burden of proof as to choice of law on the defendant. *See id.* at 691-92. In both respects, *Singer* is contrary to the overwhelming weight of authority discussed *supra* Part III(A). In addition, *Singer* involved both breach of contract and unjust enrichment claims, and the court focused more on general principles of contract law than the actual elements of unjust enrichment. *See id.* at 692 (citing in support of a uniform standard: "*American Airlines v. Wolens*, 513 U.S. 219, 233, 115 S.Ct. 817, 826 n. 8, 130 L.Ed.2d 715 (1995) ('contract law is not at its core diverse, nonuniform and confusing'); *Sollenbarger v. Mountain States Tel. & Tel.*, Co., 121 F.R.D. 417, 428 (D.N.M. 1988)(concluding that a foreign state's law did not conflict with the forum state's law with respect to contract claims)"). In short, *Singer* is an outlier case.

plaintiffs failed to discuss, in any meaningful way, how the court could deal with variations in state law.") In any event, as shown below, variations in state law would swamp any common issues and defeat predominance.[15]

1. Variations in State Consumer Protection Laws Create Individual Issues

"State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1018. Plaintiffs, however, simply ignore numerous state law variations that preclude certification.[16]

For example, many states' consumer protection statutes require some form of deception and/or scienter. (*See* Appendix I attached hereto (setting forth the relevant differences in sate consumer protection laws).) Courts have consistently denied certification of nationwide consumer protection class actions due to individual issues created by these elements. *See, e.g., In re Rezulin*, 210 F.R.D. at 68 (denying certification because "a consumer fraud theory [likely] would require individualized proof concerning reliance and causation, which are hornbook elements of a fraud claim, as prerequisites to recovery by many and perhaps most of the members of the alleged

[15] In addition to the claim-specific differences discussed below, the element of damages creates individual issues for each claim because Dr. Tinari's damages report is proffered for all of the Indirect Purchasers' claims, and, as discussed *supra* Part II(A), that analysis is fatally flawed as a matter of law.

[16] Footnote 32 of plaintiffs' brief purportedly describes the "salient differences between the unfair competition laws of different states" as "(i) some states prohibit 'unconscionable practices' as well as 'unfair and deceptive practices;' and (ii) some states require proof of injury to the public, while others do not." (Pl Br. at 31 n.32.). That discussion is patently inadequate. *See Zapka v. Coca-Cola Co.*, No. 99 CV 8238, 2000 WL 1644539, at *4 (N.D. Ill. Oct. 27, 2000) ("Plaintiff's 10 pages of discussion and analysis in her motion for class certification, including 50 footnotes identifying and explaining the different consumer protection statutes that would be involved in nationwide class, demonstrate the myriad of complicated and sometimes conflicting proofs that would be required with such a class. The differences in the required proofs of the states statutes demonstrate that a nationwide certification would not be manageable because of the multiple and different variables that would have to be proved as to each class member.").

class"); *Dawson v. Dovenmuehle Mortg., Inc.,* 214 F.R.D. 196, 201 (E.D. Pa. 2003) (denying certification of class under Pennsylvania Unfair Trade Practices Act). Plaintiffs ignore issues relating to deception and scienter and fail to show how they could be proven without individual issues overwhelming the case.

In addition, several states effectively prohibit consumer protection class actions. Alaska, Georgia, Kentucky, Louisiana, New York, Tennessee and Montana do not allow class actions under their consumer protection statutes. (*See* Appendix I.) Hawaii, Kentucky, Maryland, New Jersey and Washington preclude consumer protection claims that are duplicative of antirust claims (*see id.*), yet here the claims are identical. Connecticut, Kentucky, Michigan, Missouri and Oklahoma preclude indirect purchasers from bringing consumer protection act claims. (*See id.*)

Defenses to consumer protection claims also vary from state to state. In Georgia, Maine, Massachusetts and Texas (*see id.*), there are pre-suit demand requirements, which can be raised against class members on an individual basis. *See generally Chevron USA, Inc. v. Vermilion Parish School Bd.,* 377 F.3d 459 (5th Cir. 2004) (Louisiana pre-suit demand requirement precluded class certification). Again, plaintiffs have simply ignored these dispositive variations in state law.

In light of the foregoing, it is not surprising that plaintiffs cite no authority certifying for trial a nationwide consumer protection class,[17] and certification should be denied.

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[17] The three cases that plaintiffs do cite (Pls. Br. at 31) are inapposite: *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D 75 (D. Mass. 2005) and *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998) were settlement classes in which "court[s] need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."

2. Variations in State Unjust Enrichment Standards Create Individual Issues

Plaintiffs seek to certify unjust enrichment claims "under the laws of every state." (Pls. Br. at 2.) Certification and trial of such divergent causes of action is an impossible task. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, No. 03 Civ. 2843, 2004 WL 2750091, at * 8 (denying certification "[b]ecause individual questions concerning the substantive laws of other states would overwhelm any potential common issues, [plaintiff's] common law claims [including unjust enrichment] are inappropriate for class certification"); *Auscape International v. National Geographic Enterprises, Inc.*, No. 02 Civ. 6441, 2003 WL 23531750, at * 17 (S.D.N.Y. July 25, 2003) (denying class certification of unjust enrichment claims "because common questions of law and fact do not predominate the action"); *Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 507126, at *2 (N.D. Ill. Apr. 3, 2002) ("Class certification of plaintiffs' claim of unjust enrichment would . . . be unmanageable. . . . The laws of unjust enrichment vary from state to state and require individualized proof of causation."[18]

The definition of unjust enrichment varies significantly from state to state. *See Clay v. American Tobacco Co.*, 188 F.R.D. 483, 500 (S.D. Ill. 1999): "Some states do not specify the misconduct necessary to proceed, while others require that the misconduct include dishonesty or fraud. Other states only allow a claim of unjust enrichment when

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Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). The third case, *Waste Mgmt. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), did not involve consumer protection claims.

[18] As noted above, the Indirect Purchasers' reliance upon *Singer v. AT&T Corp.*, 185 F.R.D. 681, as support for a nationwide unjust enrichment claim is misplaced. *See supra* Note 14.

no adequate legal remedy exists."[19] In addition, several states allow an unjust enrichment claim only when the plaintiff has conferred a benefit directly upon the defendant.[20] Further, in states where indirect purchasers lack standing under consumer protection or antitrust statutes, a common law unjust enrichment claim fails as an impermissible attempt to evade the statutory restrictions.[21]

In addition, statutes of limitations for unjust enrichment vary widely among the states, ranging from two years to ten years. *See, e.g., Corley v. Entergy Corp.*, 220 F.R.D. 478, 488 (E.D. Tx. 2004) ("[T]he statute of limitations for unjust enrichment claims is ten years in Louisiana, three years in Mississippi, and two years in Texas.") Here, plaintiffs seek to certify a class from March 1996 to the present, yet they ignore the variations in statutes of limitations. This is fatal. *See Waste Mgmt.*, 208 F.3d at 296 ("a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3)"). Nor do plaintiffs explain how their

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[19] For example, Delaware, Florida, Illinois, Louisiana, Massachusetts, Minnesota, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma and Washington allow unjust enrichment claims only where there is no adequate remedy at law. (*See* Appendix II attached hereto.)

[20] Connecticut, Florida, Georgia, Idaho, Maryland, Massachusetts, New Hampshire, New Jersey, New York North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Washington, and Wyoming require direct conferral of the benefit. (*See* Appendix II)

[21] *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 241 F. Supp.2d 563, 565 (D. Md. 2003) (Kentucky law bars unjust enrichment claim for antitrust indirect purchasers who could not recover under state antitrust law); *Southard v. VISA U.S.A., Inc.*, No. LACV 031729, 94491, 2004 WL 3030038, at * 5 (Iowa Distr. Nov. 17, 2004) ("It would be illogical and a strange application of the law to rule that the plaintiffs' cause of action is too remote to confer standing under the Iowa Competition Law but to use the same acts and the Iowa Competition Law as a predicate for recovery under a theory of unjust enrichment."); *Stutzle v. Rhone-Poulenc S.A.*, No. 002768OCT, 2003 WL 22250424, *2 (Pa. Ct. Common Pleas Sep. 26, 2003) ("Since the Pennsylvania legislature and the courts have not created a cause of action for damages sustained as a result of the antitrust violations, than plaintiffs failed to allege within their complaint how the benefit to defendants was unjust. Moreover, to allow plaintiffs to use a claim for unjust enrichment as a means for collecting damages which are not allowable by Pennsylvania's antitrust law, is not a proper use of the claim and can only lead to mischief."). *See also* Del Monte's Mot. to Dismiss Br. at 15-16 (collecting cases).

allegations of fraudulent concealment — a doctrine that generally applies to conspiracies — may toll their unjust enrichment claims under the laws of 51 jurisdictions.

Because plaintiffs have made no attempt to address the variations in state law concerning unjust enrichment, certification must be denied with respect to those claims. *See Cavaliere v. Margaretten & Co.*, No. 94CV01928, 1996 571178, at * 4 (D. Conn. July 10, 1996).

3. Variations in State Antitrust Laws Create Individual Issues.

Plaintiffs seek certification of claims arising under the antitrust laws of 23 states. Yet once again, plaintiffs ignore state-by-state variations that preclude certification of their proposed class. Indeed, plaintiffs do not cite a single case that has certified for trial a class involving separate indirect purchaser claims under 23 different state antitrust statutes.

As a threshold matter, the plaintiffs have included three states — Louisiana, Massachusetts, and New Jersey (*see* Pls. Br. at n.2) — that do not even allow indirect purchaser suits.[22] Although Florida and Nevada allow indirect purchaser suits *only* under their consumer protection statutes, the Indirect Purchasers have included them as part of the antitrust claim. (See Pls. Br. at n.2.) In addition, California, Kansas, and Tennessee

[22] *See Free v. Abbott Labs.*, 176 F. 3d 298, 299 (5th Cir. 1999), aff'd 539 U.S. 333 (2000). ("In our best judgment, the Louisiana courts would follow the federal indirect purchaser rule and deny standing to the [indirect purchaser] appellants.); *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 762 N.E.2d 303, 308 (Mass. 2002) ("Because the [Massachusetts] Antitrust Act is to be construed in harmony with judicial interpretations of comparable Federal antitrust statutes, the rule of law established in *Illinois Brick Co. v. Illinois*, *supra*, would apply with equal force to preclude claims brought under G.L. c. 93 by indirect purchasers in Massachusetts. "); *Sickles v. Cabot Corp.*, 877 A.2d 267, 275 (N.J. Sup. Ct. App Div. 2005) ("in the absence of an Illinois Brick repealer or other language by our Legislature evidencing an intent to permit indirect, as well as direct purchasers, to recover for antitrust violations, it is clear New Jersey courts are directed to follow the *Illinois Brick* holding").

do not apply their antitrust statutes to unilateral conduct, and class actions for treble damages are not permitted under New York's statute. (*See* Appendix III attached hereto).

Many states that allow indirect purchaser suits have enacted or judicially imposed limitations on duplicative recoveries and speculative damages, which curtail the availability of class actions. *First*, Arizona and South Dakota prohibit duplicative recovery between direct and indirect purchasers under their antitrust statutes. (*See id.*) Plaintiffs have offered no means to apportion damages between these different categories of purchasers, as these states would require. On the contrary, plaintiffs assume a 100% pass-through of the alleged overcharges, an assumption which guarantees that the prohibited duplicative recoveries will occur.

Second, to combat the problem of remote and speculative damages, courts in several states have applied federal antitrust standing doctrine to bar consumer class actions. "[A]lthough the various states may have 'repealed' *Illinois Brick* under their state schemes, that alone does not mean that they rejected the requirement that a plaintiff demonstrate injury sufficient to confer individual standing." *United States v. Dentsply Intern., Inc.*, 2001 WL 624807, at *14 (D. Del. March 30, 2001). In fact, the District of Columbia, Maine, Michigan, Minnesota, New York, North Carolina North Dakota, South Dakota, Vermont, and Wisconsin have applied the federal antitrust standing doctrine to claims brought under *Illinois Brick* repealer statutes. (*See* Appendix III).

All of the prudential concerns that apply to limit antitrust standing show that the indirect purchasers here are not proper plaintiffs: "(1) 'the directness or indirectness of the asserted injury'; (2) 'the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust

enforcement'; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Volvo North America Corp. v. Men's Intern. Professional Tennis Council,* 857 F.2d 55, 66 (2d Cir. 1988). Especially in a case such as this where there is no means to identify the indirect purchasers, see *supra* Part I, prudential antitrust standing dictates that direct purchasers and/or government agencies are the appropriate plaintiffs. *See In re Copper Antitrust Litigation*, 196 F.R.D. 348, 355-58 (W.D. Wis. 2000) (denying class certification on antitrust standing grounds because "this is not a situation in which a significant antitrust violation will go undetected or unremedied if plaintiffs and their class are not allowed to proceed").

Third, "Florida, Maine, Michigan, and Minnesota require a somewhat stronger and more precise showing of individual impact" or injury in fact in indirect purchaser cases. *See In re Ralafen Antitrust Litig.*, 221 F.R.D. 260, 282 (D. Mass. 2004). This showing requires a "rigorous analysis" of individual impact, which is not satisfied by economic methodologies that fail "to bridge the gap between economic theory and the reality of economic damages." *Id.* (quoting *A & M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572 (Mich. App. 2002)). Here, plaintiffs rely only on the utterly inadequate and unsupported report of Dr. Tinari to support a showing of classwide impact. *See supra* Part II(A). Under the laws of these states, Dr. Tinari's report is clearly insufficient to establish the required individual impact. *See In re Ralafen Antitrust Litig.*, 221 F.R.D. at 282.

IV. INDIVIDUAL ISSUES OF LAW AND FACT PRECLUDE CERTIFICATION OF THE DIRECT PURCHASERS' UNJUST ENRICHMENT CLAIMS

As discussed above with respect to the Indirect Purchasers' claims, individual questions of law preclude certification of a nationwide unjust enrichment class. *See supra* Part III(B)(2). The Direct Purchasers, like the Indirect Purchasers, offer no plan to overcome the individual issues created by the state-by-state variations in the law of unjust enrichment. Moreover, for the direct purchasers, individual defenses, such as unclean hands, create additional individual issues.[23]

Certification of the Direct Purchasers' unjust enrichment claims also must be denied because they have offered no methodology to calculate damages for such claims. Dr. Cottterill, the Direct Purchasers' damages expert, has conceded he made no attempt to develop a method to apportion the alleged overcharge between direct and indirect purchasers:

> I wasn't asked to deal with the issue of price transmission and the issue of apportionment of economic damages between the retailers or direct purchasers and consumers in this case. I simply didn't look at that stuff.
>
> Yes, it's an issue. Really, it's an issue, but I simply did not look at that as — you won't find that anyplace in my expert report.

(7/27/2005 Dep. of Ronald W. Cotterill, at 93-94.)

Under *Hanover Shoe*, of course, no apportionment is required for plaintiffs' Sherman Act claim; the Direct Purchasers would be entitled to recover the full amount of a proven overcharge. Under the law of unjust enrichment, in many states, however, one

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[23] Direct Purchaser Just a Mere, for example, will be subject to a defense of unclean hands. This plaintiff has testified that it passed on rumors that Del Monte had a patent on the Gold pineapple because it was doing well selling the Del Monte product and did not want Dole to enter the market. (*See* Ex. C at 218-221.)

element of the claim is that the benefit was conferred on the defendant "at the plaintiff's expense."[24] Accordingly, if a direct purchaser passed on 100% of an alleged overcharge — as Dr. Tinari and the indirect purchaser plaintiffs contend occurred here — then any "enrichment" of Del Monte did not occur "at the [direct purchaser] plaintiff's expense," because the direct purchaser recovered the full amount of the overcharge from its customer. Thus, an apportionment of the pass-through of must be made for each member of a direct purchaser class in order to determine whether it may recover for unjust enrichment. Because the Direct Purchasers have offered no method to perform this apportionment on a classwide basis, the required purchaser-by-purchaser analysis would certainly overwhelm any common issues related to the unjust enrichment.

CONCLUSION

For the foregoing reasons, Del Monte respectfully requests that plaintiffs' motion for certification of a class of indirect purchasers be denied in its entirety, and that the

[24] *See, e.g., Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004) ("The basic elements of an unjust enrichment claim in New York require proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.").

motion for certification of a direct purchaser class be denied with respect to the unjust enrichment claims.

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