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: Indirect Purchaser Actions	

DEL MONTE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE MANAGEABILITY OF THE PROPOSED INDIRECT PURCHASER CLASS

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INTRODUCTION

Plaintiffs in this consolidated action allege that Del Monte illegally monopolized the market for extra-sweet whole fresh pineapples.[1] Plaintiffs moved for certification on June 29, 2005 of a nationwide class of indirect purchasers of Del Monte Gold pineapples. According to the Complaint, the indirect purchaser claims arise under the antitrust laws of 23 jurisdictions, the consumer protection laws of 45 jurisdictions, and the unjust enrichment laws of every state and the District of Columbia.

Plaintiffs' initial class certification motion was based on the report of an economist, Dr. Frank D. Tinari. Del Monte opposed the motion on September 16, 2005, arguing that the putative class of indirect purchasers was not manageable for several reasons, including Plaintiffs' inability to show that the putative class members could be identified or that their alleged purchases could be substantiated, as well as the significant differences in applicable state law. Plaintiffs submitted a reply brief on September 26, 2005, with a declaration from Dr. Tinari, and proposing, for the first time, use of *cy pres* relief.

By order dated July 26, 2006, the Court requested additional information concerning the "manageability" of the proposed indirect purchaser class, including: "(1) projected size of the Class; (2) proposed method of effecting notice to the Class; (3) nature of evidence supporting individual claims; and (4) (any) *cy pres* distribution proposed by Plaintiffs." Following a conference on August 1, 2006, Plaintiffs submitted a supplemental brief on manageability on August 22, 2006, with a declaration from Joseph M. Fisher, an asserted expert on notice, claims administration and damages allocation. At this time, Plaintiffs for the first time proposed distributing damages through an automatic coupon plan and a claims administration procedure.

[1] The Direct and Indirect Purchaser Plaintiffs filed a joint motion for certification. All references to the class certification motion herein concern the Indirect Purchaser Plaintiffs only.

Del Monte responded on October 4, 2006, arguing *inter alia* that controlling Second Circuit law prohibits use of fluid recovery in a contested class action, and submitting declarations of Dionysios Christou, Del Monte's Vice President of Marketing – North America; Emanuel Lazopoulos, Del Monte's Senior Vice President North American Sales, Marketing and Product Management; and Dr. Bradley Reiff, an expert economist.

The Court held an evidentiary hearing concerning manageability issues on March 23, 2007. As directed by the Court, the parties submitted into evidence the direct testimony of all witnesses by declaration and conducted live cross- and re-direct examinations. Plaintiffs submitted a declaration of counsel regarding the testimony of Mr. Christou and a supplemental declaration by Mr. Fisher as the direct examination for those two witnesses. Del Monte submitted a declaration of counsel (the "Goldfarb Declaration") regarding the testimony of Dr. Tinari as his direct examination. Plaintiffs objected to Goldfarb Declaration on relevance grounds and contended that the declaration contained inadmissible argument. In a written ruling on March 22, 2007, the Court overruled Plaintiffs' objections and stated that the Goldfarb Declaration would be received into the record. Plaintiffs chose not to call Dr. Tinari for live examination at the March 23, 2007 hearing.

Messrs. Christou and Fisher testified at the evidentiary hearing on March 23, 2007. As directed by the Court, Plaintiffs submitted proposed findings of fact and conclusions of law on April 16, 2007. Del Monte's proposed findings and conclusions follow.

FINDINGS OF FACT[2]

Identification Of Class Members And Records Of Purchases

1. None of the named Plaintiffs has receipts or other records to substantiate his or her alleged purchases of Del Monte Gold pineapples. (*See* Del Monte Opp. Br. at 8 & n.5 (citing record).) Plaintiffs have not identified any individual member out of the millions of putative class members who has documentary evidence of purchases of Del Monte Gold pineapples.

2. The lack of any records to substantiate class members' purchases is particularly significant because, as the Court recognized at the August 1, 2006 hearing on the manageability of the indirect purchaser class ("August hearing"), "probably" the "most important" issue with respect to the certification of the indirect class is "the nature of evidence supporting the individual claims." (8/01/06 Tr. at 12.)

3. Despite repeated invitations for Plaintiffs to identify any documentary evidence of purchases that would be available to putative class members, Plaintiffs have not done so, nor have they provided any evidentiary basis for the Court to conclude that any such records exist.

4. The record further shows that even the named Plaintiffs cannot with any degree of certainty or reliability attest to the place, date, volume, or even brand of their alleged purchases of pineapples. When asked by interrogatory for that information, Plaintiffs provided equivocal and unspecific answers:

- Neil Schwam: "To the best of plaintiff's recollection and within his ability to estimate based upon his habits and customs, on average plaintiff purchased one (1) whole, fresh, extra-sweet variety pineapple every month. . . . Plaintiff believes, to the best of his recollection, that the brands of such whole, fresh extra-sweet pineapples which he has purchased include both Del Monte and Dole." (Def. Ex. 19, at response No. 2.)[3]

- Carrie Pardy: "To best of plaintiff's recollection at this time, on average over the last 5 years, plaintiff has purchased approximately 2-3 whole, fresh, extra sweet variety pineapples per month. . . . The great majority of the extra sweet pineapples purchased were of the Del Monte brand." (Def. Ex. 18, at response No. 2.)

- Gary Freed: "I estimate that I bought 6 pineapples per year and that 2 or 3 of those were brands other than Del Monte." (Def. Ex 17, at response No. 3.)

- Brenda Caldarelli: "To the best of plaintiff's recollection, and within her ability to estimate based upon her habits and customs, on average plaintiff purchases a minimum of one (1) whole, fresh, extra-sweet variety pineapple every three

[2] Del Monte respectfully requests that any findings of fact that the Court considers should be a conclusion of law be so treated and vice versa.

[3] Unless otherwise specified, all exhibits refer to the parties' exhibits to the March 23, 2007 evidentiary hearing on the manageability of the putative class of indirect purchasers.

months. . . . Plaintiff believes to the best of her recollection, that the whole, fresh, extra-sweet pineapples she purchased were Del Monte brand pineapples." (Def. Ex. 16, at response No. 2.)

5. The fact that the class period dates back eleven years, to 1996, further persuades the Court that Plaintiffs have not shown that reliable evidence of pineapple purchases is available. When plaintiff Caldarelli was asked at deposition what pineapple variety she purchased between 1996 and 2000 she replied that: "To be honest, it was so long ago, I don't remember exactly. I really don't. It was just too many years ago." (Caldarelli Dep., Ex. 11, at 30.)

Size Of The Putative Class And Mr. Fisher's Credibility

6. Plaintiffs' evidence on the size of the proposed indirect purchaser class comes through Plaintiffs' proferred expert, Mr. Fisher. Mr. Fisher, proposed in turn, based his estimates of class size on data (key aspects of it sharply disputed and not reliable, as discussed below) from 2004, a single year of the eleven-year class period. In his first declaration, Mr. Fisher estimated that there were 21.2 million class members in the putative class. (Fisher Decl., Pl. Ex. 16, at ¶ 8.) He qualified the estimate as a "reasonable approximation subject to further refinements." (Fisher Decl., Pl. Ex. 16, at ¶ 8 and n. 3; 3/23/07 Tr. at 59-61 (Fisher).)

7. In his second declaration, Mr. Fisher admitted that his calculation of the size of the putative class in his first declaration was incorrect and that the class was "considerably smaller than [he] initially projected." He sharply lowered his estimate of the class size to 4,650,000 to 6,522,000 million members. (Supp. Fisher Decl., Pl. Ex. 17, at ¶¶ 4, 6.) Thus, Mr. Fisher's first calculation of the class size was admittedly off by 14,678,000 to 16,550,000 members, or a factor of about three.

8. In his first declaration, Mr. Fisher calculated that Del Monte sold 208 million Del Monte Gold pineapples at retail in 2004. (Fisher Decl., Pl. Ex. 16, at ¶¶ 9-11.) In his second declaration, he changed that number to between 45.8 million and 64.2 million. (Supp. Fisher Decl., Pl. Ex. 17, at ¶ 6.) Thus, Mr. Fisher's first declaration over-estimated the number of pineapples Del Monte sold at retail by 144 million to 163 million, or a factor of about three. (3/23/07 Tr. at 69 (Fisher).)

9. Mr. Fisher acknowledged that the numbers in his first declaration were "substantially off"and "way off." (3/23/07 Tr. at -68 69 (Fisher).) He never adequately explained these discrepancies, which are significant because, as explained below, he relied on the same study of pineapple sales and consumer purchasing patterns to determine the class size in his first declaration as he relied upon in both his first and supplemental declarations to determine the number of core members of the putative class, that is, the number of indirect purchasers who make regular, repeat purchases of Del Monte Gold pineapples. And his contention that a "core" of class members purchase the majority of Del Monte Gold pineapples is the lynchpin for Plaintiffs' proposal to distribute damages through an automatic coupon plan.

10. Mr. Fisher did not conduct any study concerning pineapple sales or purchases. Rather, he relied in his first and supplemental declarations on survey data that was reported in a

graduate student paper prepared for the Michigan State University Partnerships for Food Industry Development, entitled "The United States Market for Fresh Pineapples," by David Neven MBA , ["Neven paper"]. (*See* Ex. A to Fisher Decl., Pl. Ex. 16.) That paper, in turn, relied on a survey of consumption of fresh fruit and vegetables, called the 2004 Fresh Trends survey, published by a trade magazine, named *The Packer*.

11. Mr. Fisher did not review the 2004 Fresh Trends survey itself, but simply and without analysis relied on the Neven paper. (3/23/07 Tr. at 55; 1/18/07 Fisher Dep., Def. Ex. 10, at 149.) Since the Neven paper did not discuss the survey methodology, Mr. Fisher could not determine whether the methodology was flawed or appropriate for use in this case or whether the survey likely misreported the "concentration of repeat purchasers" of Del Monte Gold pineapples. Simple mathematics, however, shows that such a misstatement is likely, as became apparent when Mr. Fisher applied some of the survey's conclusions to calculate the number of putative class members and the number of Del Monte Gold pineapples actually sold in 2004.

12. In his first declaration, Mr. Fisher determined the putative class size by multiplying the number of households in the United States according to the U.S. Census Bureau (112 million) by the percentage of U.S. households that purchased fresh whole pineapples in 2004 (29%). That percentage came from the Neven article, which in turn cited the 2004 Fresh Trends survey. (*See* Ex. A to Fisher Decl., Pl. Ex. 16.) Mr. Fisher said the ensuing sum, 32,480,000, represented the number of households that purchased fresh whole pineapples in the United States in 2004. (Fisher Decl., Pl. Ex. 16, at ¶ 8.) He then multiplied that number by Del Monte's share of the retail market for whole fresh pineapples, as determined by Plaintiffs' putative expert, Dr. Tinari, who based his analysis on data compiled by AC Nielsen. (Fisher Decl., Pl. Ex. 16, at 9; 12/23/05 Tinari Rpt., Def. Ex. 3, at Table 2.) In other words, Mr. Fisher initially calculated the size of the putative class by multiplying three factors: (1) the number of U.S. households in 2004; (2) the percentage of U.S. households that purchased fresh whole pineapples; and (3) Del Monte's market share.

13. Mr. Fisher testified that he has no reason to question the accuracy of two of the three factors that led to his admittedly inaccurate determination of class size: the U.S. Census data on households and Dr. Tinari's calculation (based on AC Nielsen data) of Del Monte's market share. (3/23/07 Tr. at 54, 58, 75.) Thus, the logical conclusion is that the admitted inaccuracy of his "reasonable approximation" of the class size in his first declaration must relate to the third factor: the Neven survey data indicating that 29% of U.S. households bought whole pineapples in 2004, because that was the only other factor in his formula.

14. Mr. Fisher calculated the number of repeat purchasers of Del Monte Gold pineapples, in both his first and supplemental declarations, relying on Neven data regarding the frequency of U.S. households' pineapple purchasing patterns in 2004. (Fisher Decl., Pl. Ex. 16, at ¶¶ 7, 9-13; Supp. Fisher Decl., Pl. Ex. 17, at ¶¶ 5-6 & n.2.) In particular, he used the Neven survey data showing that of the 29% of U.S. households that assertedly bought fresh whole pineapples during 2004, 10% bought pineapples once a week and 34% bought pineapples once a month. (*See* Def. Ex. 21 at pp. 75-76; Fisher Decl., Pl. Ex. 16, at ¶¶ 8-10 and Ex. A.) Mr. Fisher did not examine data for any other year in the class period.

15. Mr. Fisher's admitted gross overestimation in his first declaration of the number of households that purchased Del Monte Gold pineapples in 2004 makes clear that the survey data he relied upon is unreliable. The figures used by Mr. Fisher as the percentage of U.S. households that buy pineapples once a week or once a month (i.e., the repeat purchaser data) come from the same exact survey that provided the necessarily incorrect data about the number of households that purchase pineapples. The Court finds that Plaintiffs cannot pick and choose data from the survey, and that Plaintiffs have not come forward with an explanation as to why some of the survey data should be relied upon while other should not. Because the data concerning repeat purchasing habits was derived from the same survey as the incorrect data concerning the number of households that purchase pineapple, those figures also must be deemed unreliable.

16. Indeed, Mr. Fisher recognized that the Court would have made a "huge mistake" if it had relied on his initial declaration "[w]ith respect to the size of the class." (3/23/07 Tr. at 84 (Fisher).) The Court finds that because of Mr. Fisher's continued reliance on the 2004 Neven survey data in his supplemental declaration despite the flaws discussed above, Plaintiffs have failed to meet their burden of providing a reliable estimate of the size of the putative class and the number of core members of that putative class.

17. The following facts add to the Court's discomfort in relying on Mr. Fisher's testimony regarding the size of the putative class and the number of repeat purchasers and the frequency of their purchases: (1) Mr. Fisher did not seek to review the Defendants' memorandum in opposition to Plaintiffs' motion for class certification before offering his expert opinion on issues regarding class certification even though Defendants argued that the proposed class was not manageable, (3/23/07 Tr. at 45); (2) he did not look at the 2004 Fresh Trends Survey in *The Packer* but rather relied on an article about the results of the survey, and did not attempt to verify the accuracy of the information in that article, (3/23/07 Tr. at 55, 1/18/07 Fisher Dep., Def. Ex. 10, at 149); (3) he based his conclusion only on 2004 data and does not know whether 2004 is "representative" of the time period covered by Plaintiffs' class certification motion, (3/23/07 Tr. at 57, 86); (4) he did not try to determine whether *The Packer* had survey data on pineapple consumption in other years, (1/18/07 Fisher Dep., Ex. 10, at 151-152); (5) the pineapple sales information that Mr. Fisher relied on in his supplemental declaration to revise his earlier declaration was available to Plaintiffs before Mr. Fisher prepared his first declaration (and, in fact, was used by another of Plaintiffs' proffered experts some eight months before), (12/23/05 Tinari Report, Def. Ex. 3, at Table 2), but Mr. Fisher did not use that information (although he testified he is not sure whether he was provided that information at the time by Plaintiffs' counsel), (1/18/07 Fisher Dep., Ex. 10, at 148).

Notice

18. Plaintiffs propose providing notice to the indirect purchaser class in this action by U.S. mail, email, through use of hang tags, point of sale materials, via the internet, and though publication. (Fisher Decl., Pl. Ex. 16, ¶¶ 14-22.)

19. Plaintiffs' proffered notice expert, Mr. Fisher, recognized that Del Monte has addresses for a "very small percentage" of putative class members. (3/23/07 Tr. at 124 (Fisher).)

Mr. Fisher admitted that Del Monte had addresses for at most 42,000 potential class members. (3/23/07 Tr. at 79-80), and perhaps only 7,000 to 15,000. (3/23/07 Tr. at 77-78. (Fisher).)

20. As noted, in his supplemental declaration, Mr. Fisher provided a revised estimate of the size of the putative class, which he opined was composed of between 4.6 and 6.5 million consumers. (3/23/07 Tr. at 80 (Fisher).) Even if the Court accepts the higher estimate of potential class members for whom Del Monte might have addresses (42,000) and the smallest estimate for the class size (4.6 million), Del Monte would have addresses for less than 1% of the putative class members.

21. Plaintiffs' estimate of the number of putative class members for whom Del Monte has contact information is too high, however. Del Monte's records show that as of October, 2006 Del Monte had been contacted through its customer service channels on 7,609 occasions regarding fresh whole pineapples, and that most of those contacts probably concerned Del Monte Gold pineapples. (Declaration of Dionysios Christou in support of Del Monte's Supplemental Memorandum of Law Regarding the Manageability of the Putative Class of Indirect Purchasers (Christou Decl."), Def. Ex. 6, at ¶ 3.) Yet, those customer service records do not indicate whether the person making the contact purchased a Del Monte Gold and, even assuming that was the case, the facts about the purchase.

22. The evidence also established that contact information for a small number of indirect purchasers of Del Monte Gold exists as a result of two limited, special promotions run by Del Monte in conjunction with The Disney Company regarding the Del Monte Gold. For each of those limited promotions, Del Monte created a special promotional tag for the Del Monte Gold. Pl. Ex. 1. The first promotion involved a tie-in with the Disney movie *Leroy & Stitch*, the second, a tie-in with the Disney movie *Pirates of the Caribbean*. (3/23/07 Tr. at 4-6 (Christou).)

23. In the first promotion, individuals who sent in proof of purchase of a Del Monte Gold pineapple received a discount on a *Leroy & Stitch* DVD. That promotion, which ran from June 20, 2006 through August 31, 2006, was fulfilled through Disney. Although Del Monte has requested information regarding the participants in the offer, Disney has not provided it and does not intend to do so. (3/23/07 Tr. at 4-6, 24-25 (Christou); Christou Decl., Def. Ex. 6 at ¶ 4.) There is thus no evidence of the number of purchasers who participated in this promotion and whose contact information is available.

24. Individuals participated in the second and later promotion by registering on a web site maintained by Del Monte, playing a game on that site, and/or ordering a *Pirates of the Caribbean* poster for the cost of shipping and handling. About 15,000 individuals registered on the website, and about 3,000 of them purchased a poster. However, the promotion involved both Del Monte Gold pineapples and Del Monte bananas (for which Del Monte used a sticker instead of a tag) and significantly, did not require a purchase. Del Monte thus cannot ascertain which participants in the promotion bought pineapples rather than bananas. Indeed, because there was no purchase required with this promotion and because the code required for access to the website was plainly visible on the stickers and tags on the fruit, it is not a certainty that those who participated purchased either a pineapple or bananas. Moreover, only about one in five promotional tags or stickers was on a pineapple. Thus, while Del Monte has some contact

information for 15,000 registrants, it is impossible to determine which of those, if any, are members of the putative class. (3/23/07 Tr. at 5-8 (Christou).)

25. In addition to mailing notice to those relatively few putative class members for whom contact information exists, Plaintiffs propose providing notice to potential class members by requiring Del Monte to place a special hang tag on Del Monte Gold pineapples. Plaintiffs submitted such a proposed hang tag. On the front it says in distinct white letters: "**See Important Legal Notice on Reverse Side.**" On the back, instead of the product information customarily included on the tag, the proposed "notice" tag states in part: "A lawsuit concerning the pricing of Del Monte Fresh extra-sweet pineapples has been certified as a class action. **The lawsuit does not raise any concerns about product quality, safety, or wholesomeness.**" (*See* Pl. Ex. 4.)

26. As Mr. Christou, Del Monte's head of marketing, testified, hang tags are a "unique" and "important" marketing tool. They are used exclusively to promote the Del Monte Gold and to build brand loyalty. Requiring Del Monte to place a legal notice on its hang tags, particularly at the certification stage prior to any judicial finding of impropriety by Del Monte, would prejudice Del Monte. As testified to by Mr. Christou, some customers will choose not to buy a product associated with a lawsuit, particularly one alleging overcharging of purchasers. Further, as Mr. Christou also testified, the statement that the lawsuit "does not raise any concerns about product quality, safety, or wholesomeness" could trigger precisely those concerns in the minds of some potential customers. (3/23/07 Tr. at 12-13, 16-17 (Christou).)

27. Plaintiffs' suggestion that a hang tag such as they propose would not prejudice Del Monte because Del Monte, in connection with its *Pirates of the Caribbean* promotion with Disney, willingly "placed a black hangtag with a skull and cross-bones symbol on its pineapples (which from a distance might indicate poison rather than pirates)" is meritless. (Pl. Proposed Findings of Fact and Conclusions of Law at ¶ 27.) As Mr. Christou, testified when asked if a skull and crossbones encourages people to buy a food product: "If it is a blockbuster movie that has attracted millions of consumers, yes." (3/23/07 Tr. at 36 (Christou).)

28. The prejudice to Del Monte from requiring it to include a legal notice on its hang tags prior to any finding of liability would also include potentially tainting the company and its trademark generally in the eyes of some customers, thereby affecting sales of other Del Monte products as well. (3/23/07 Tr. at 17 (Christou).)

29. Use of Plaintiffs' proposed hang tag is unprecedented. Mr. Christou, who has worked in the fresh fruit business for 21 years, including for competitor Chiquita, has never seen a hang tag used to provide legal notice of the pendency of a lawsuit. (3/23/07 Tr. at 4, 12-14.) Mr. Fisher, Plaintiffs' notice expert, is not aware of any case in which notice for a class action was placed on a hang tag. (3/23/07 Tr. at 83-84, 121 (Fisher).)

30. Although Plaintiffs suggest that Del Monte might be required to place a second hang tag on its pineapples, they have produced no evidence that any pineapple company has ever used more than one hang tag or that doing so would not confuse customers or otherwise prejudice Del Monte. (3/23/07 Tr. at 14-15 (Christou).)

31. In testifying about the impact of Plaintiffs' proposals upon Del Monte's marketing and branding efforts, Mr. Christou relied on his years of marketing experience in the fresh produce business (with Del Monte and Chiquita), and the Court finds his testimony credible and persuasive. That Mr. Christou had no personal experience concerning, and had not seen studies showing harm from giving notice of a lawsuit via hand tags is likely a result of the unprecedented nature of Plaintiffs' proposal. Even Plaintiffs' expert, Mr. Fisher, is not aware of any study of the effect on seller or manufacturer of putting a class action notice on the product itself. (1/18/07 Fisher Dep., Def. Ex. 10, at 139.) Plaintiffs have not submitted evidence with respect to the effect of their proposed hang tag notice.

32. Another component of Plaintiffs' notice plan is to provide point of sale notice by posting a legal notice in the produce departments of grocery stores. (Fisher Decl., Pl. Ex. 16, at ¶ 21.)

33. However, point of sale notices require the permission of store management. Stores have become increasingly reluctant to permit point of sale materials because they want to maintain control of the look of their produce departments. (3/23/07 Tr. at 10 (Christou).) During its *Pirates of the Caribbean* promotion, for example, Del Monte was granted permission to use point of sale materials by only about 5% of the stores. (3/23/07 Tr. at 10 (Christou).)

34. Stores are likely to be particularly hesitant to permit posting of a legal notice because they will not "want to associate their stores with any legal proceedings that could prejudice the products that they're carrying." (3/23/07 Tr. at 10 (Christou).) Plaintiffs failed to provide evidence as to whether retail grocery stores are likely to permit the type of point of sales notice they propose in this case.

Damages

35. Plaintiffs contend that the proposed class is manageable because, *inter alia*, damages can be calculated for each class member using a class-wide formula and common evidence. If this is not true, the class would be unmanageable due to the unique and individual damage calculations that would be necessary.

36. Plaintiffs' contention that damages can be calculated for class members using common evidence depends on two fundamental assumptions made by their expert economist, Dr. Tinari: (a) that there is a constant 100% pass-through rate throughout the entire damage period; and (b) that there is a constant but-for price throughout the entire damage period. (6/28/05 Tinari Report, Def. Ex. 1, at 9; 12/23/05 Tinari Report, Def. Ex. 3, at 17-20.) As discussed below, Plaintiffs have failed to meet their burden of proving that either of these assumptions is correct.

37. As an initial matter, there are serious questions as to the qualifications of Dr. Tinari to offer expert opinions on these issues. Dr. Tinari's qualifications and credibility are significant because his expert reports and testimony are Plaintiffs' only evidence on the issue whether damages can be proven using a class-wide evidence and methodology. Before this case, Dr. Tinari had never opined whether a case was appropriate for class certification, had never testified in an antitrust case, and has measured the economic effects of purportedly anti-

competitive conduct in only three cases, none of which is comparable to this one. (8/23/05 Tinari Dep., Def. Ex. 8, at 16, 24, 17-22; 3/7/06 Tinari Dep., Def. Ex. 9, at 124-125.)

Calculation Of Damages: Pass-Through Rate

38. The pass-through rate is defined as the percentage of the potential monopoly overcharge in Del Monte's prices that was passed-through by direct purchasers to indirect purchasers by requiring them to pay a higher price as a result of an increase in the price Del Monte charged to direct purchasers. (10/3/06 Reiff Decl., Def. Ex. 5, at ¶ 6.) Dr. Tinari's assumption of a fixed, 100% pass-through rate throughout the class period means that the alleged overcharge paid by every one of the millions of indirect purchasers of Del Monte Gold pineapples throughout the class period was exactly the same amount as the alleged overcharge purportedly paid by direct purchasers for each pineapple they purchased from Del Monte.

39. Dr. Tinari acknowledged in deposition that the pass-through rate in this case may vary according to a host of variables – source country of the pineapple; number of levels in the distribution chain; date and location of retail sales; degree of competition in the local grocery store market; and the type of retail establishment. (8/23/05 Tinari Dep., Def. Ex. 8, at 59, 72, 61, 69, 78-80, 82-83, 86-87.) Dr. Tinari also acknowledged that the pass-through rate must be determined empirically. (8/23/05 Tinari Dep., Def. Ex. 8, at 58-59, 66, and 88-89; *see also* 10/3/06 Reiff Decl., Def. Ex. 5, at ¶ 6.) He stated he would perform such an empirical analysis. (9/22/05 Tinari Decl., Def. Ex. 2, at ¶¶ 3-7.) He did not do so.

40. The empirical analysis necessary to properly estimate a pass-through rate requires estimation of the relationship between wholesale price changes and retail price changes across time and location. (10/3/06 Reiff Decl., Def. Ex. 5, at ¶ 6.) Dr. Tinari's assumption of a fixed, 100% pass-through rate accordingly requires that the retail prices of Del Monte Gold pineapples rise or fall in tandem with, and by at least as much as, the wholesale price. (3/67/06 Tinari Dep., Def. Ex. 9, at 72-79.)

41. While Dr. Tinari admitted that the pass-through rate must be determined empirically, he reached his conclusion that that the pass-through rate was 100% throughout the entire damage period, January 1, 1999 through December 31, 2005, on the basis of only **four data points**. These were his calculation of the average national retail and wholesale prices for Del Monte Gold pineapples for the years 2002 and 2005. (12/23/05 Tinari Rpt., Def. Ex. 3, at 19 and Table 2; 3/7/06 Tinari Dep., Def. Ex. 9, at 56-57, 69-71.)

42. Dr. Tinari's conclusion of a constant pass-through rate is not credible because, *inter alia*, it is contradicted by **eight other data points** that he referenced in his damage report but that he ignored: namely, retail and wholesale prices in 2001, 2003, and 2004. (12/23/05 Tinari Rpt., Def. Ex. 3, at Table 2; 3/7/06 Tinari Dep., Def. Ex. 9, at 70-79.) Thus, more data points contradict his conclusion than support it. For instance, he ignored retail price data that he had for 2001, admitting that he "had to disregard" it because it "does not support" his claim that wholesale and retail prices move in "the same pattern". (3/7/06 Tinari Dep., Def. Ex. 9, at 70-71.)

43. Dr. Tinari also ignored data which shows that from 2002 to 2003, the wholesale price decreased while the retail price increased. Similarly, from 2004 to 2005, his data show the wholesale price dropped 13 cents while the retail price rose 75 cents. (12/23/05 Tinari Rpt., Def. Ex. 3, at Table 2.) This data not only fails to support Dr. Tinari's conclusions, it undermines them. In fact, Dr. Tinari acknowledged that "out of that five years of data, for three years the data does not support [his] conclusion" that wholesale and retail prices were correlated and moved in tandem. (3/7/06 Tinari Dep., Def. Ex. 9, at 77.) This contradicts his damage report which asserted: "The data reveal that, except for 2001, as the wholesale unit price has dropped, so has the retail price over the same period." (12/23/05 Tinari Report, Def. Ex.3, at 19.)

44. In 2003-04, the one year in which the Tinari data show wholesale and retail prices moving in the same direction, the wholesale price drop was only 4 cents while the retail price fell by $1.50, (12/23/05 Tinari Rpt., Def. Ex. 3, at Table 2), suggesting that significant market factors other than wholesale prices were driving retail price changes.

45. In concluding that there was a constant, 100% pass-through from 1999 to 2005, Dr. Tinari did not take into account retail and wholesale data from 1999 and 2000, which he either ignored or did not have. Nor did he take in account retail or wholesale data from 1996, when the Del Monte Gold pineapple was launched, through 1998, to establish the baseline pass-through rate prior to the alleged monopolization period. (3/7/06 Tinari Dep., Def. Ex. 9, at 68-70; 12/23/05 Tinari Rpt., Def. Ex. 3, at 19-20.)

46. Dr. Tinari did not conduct any empirical analysis to determine if the pass-through rate varied with the source country of the pineapple, number of levels in the distribution chain, date and location of retail sales, or the degree of competition in the local grocery store market. (3/7/06 Tinari Dep., Def. Ex. 9, at 57-59, 68, 70-71, 234-235.)

47. Dr. Tinari did not review the transcripts of the direct purchaser Plaintiffs who were deposed in this action. (3/7/06 Tinari Dep., Def. Ex. 9, at 187-188.) That testimony further demonstrates that Dr. Tinari's assumption of a constant 100% pass-through rate is wrong.

48. For example, Meijer Inc., one of the largest retail chains in the country, has been selling Del Monte Gold pineapples for the same regular price, $3.99 each, since 1996 or 1997. (S. Momber Dep., Def. Ex. 15, at 40.) This flat retail price, during a time of declining wholesale prices, is inconsistent with a constant, 100% pass-through rate. (10/3/06 Reiff Report, Def. Ex. 5, at ¶ 9 and 9/15/05 Reiff Report, Def. Ex. 5 at Ex. 2, at ¶¶ 16-18, 25.)

49. Meijer sometimes sold Del Monte Gold Pineapples at a loss. (S. Momber Dep., Def. Ex. 15, at 29-31, 39.) Clearly, when a retailer does not pass on 100% of its own costs, it can not be passing on 100% of an alleged monopoly overcharge, which would be included in its costs. (9/15/05 Reiff Report, Def. Ex. 5 at Ex. 2, at ¶ 16.)

50. Meijer at times put Del Monte Gold pineapples on sale for $2.99, instead of its regular price of $3.99. Although it did so when it received a promotional price reduction from Del Monte, such reductions were less than the full $1.00 by which Meijer reduced the retail price. (S. Momber Dep., Def. Ex. 15, at 37-38.) Meijer thus sold Del Monte Gold pineapples for

less than its standard mark-up, which is inconsistent with a constant, 100% pass-through rate. (9/15/05 Reiff Report, Def. Ex. 5 at Ex. 2, at ¶¶ 15-17.)

51. To match competitors' prices, Meijer sometimes deviated from its regular price and charged different prices at the same time for Del Monte Gold pineapples in different stores, a practice known as zone pricing. The difference in the per pineapple price in various Meijer stores reached as much as $2. (S. Momber Dep., Def. Ex. 15, at 29-31.) Dr. Tinari admitted such price variation would likely affect the pass-through rate. (8/23/05 Tinari Dep., Def. Ex. 8, at 80. The practice of zone pricing is inconsistent with a constant, 100% pass-through rate. (9/15/05 Reiff Report, Def. Ex. 5 at Ex. 2, at ¶ 24.)

52. Dr. Tinari's pass-through and damage model is based on the assumption that there was only one middleman between Del Monte and the indirect purchasers. Undisputed testimony from direct purchaser Plaintiffs themselves shows that there were sometimes as many as four intermediaries in the distribution chain. (F. Endy Dep, Def. Ex. 13, at 92; E. Fabio Dep., Def. Ex. 14, at 122-23; *see also* G. Contos Dep., Def. Ex. 12, at 157-159.) Dr. Tinari admitted that if there were more than one layer in the distribution chain, he would have to modify his formula for determining damages, (8/23/05 Tinari Dep., Def. Ex. 8, at 87), but he did not do so.

Calculation Of Damages: But-For Price

53. Dr. Tinari's damage calculation depends on a second fundamental assumption, his assumption of a constant but-for price throughout the entire damage period. In his damage report, Dr. Tinari used a constant but for price of $12.87 per 25-pound box at whole-sale for the entire damage period. (12/23/05 Tinari Report, Def. Ex. 3, at 17.)

54. Dr. Tinari assumed that, but for Del Monte's alleged anticompetitive conduct, all competitors would have entered the market for extra-sweet fresh whole pineapples no later than 1999, and would have sold the same quantities in 1999, and every year thereafter, that they actually sold in 2006. (3/7/06 Tinari Dep., Def. Ex. 9, at 92-93, 122-23.) He did not provide any evidence to support that counterintuitive assumption and the assumption is not otherwise supported in the record.

55. Dr. Tinari made what he admitted were several simplifying assumptions as part of his assumptions of a constant but for price, yet he did not investigate empirically whether any of those assumptions was reasonable. (3/7/06 Tinari Dep., Def. Ex. 9, at 104-06, 160-61, 169-70, 210.)

56. For example, Dr. Tinari assumed that in a but-for world, the volume and price of extra-sweet pineapples would have been constant from 1999 to 2006. However, he admitted that even if volume had been constant over those eight years, the price of pineapples would not have remained the same unless aggregate consumer demand, represented by the demand curve, was also constant. Accordingly, he assumed consumer demand for extra sweet pineapples would have reached 2006 levels seven years earlier, in 1999, and then remained unchanged through 2006. Dr. Tinari acknowledged, however, that rising consumer income impacts the demand curve and that in the real world, consumer income rose. This admission fatally undermines his

assumption that consumers' income in 1999 – and hence demand – would have been the same as actual income in 2006. (3/7/06 Tinari Dep., Def. Ex. 9, at 96-97, 99-100, 103-104.)

57. Dr. Tinari further assumed that Del Monte, which actually ramped up its production from 1999 to 2006, would have reached its 2006 volumes by 1999. (3/7/06 Tinari Dep., Def. Ex. 9, at 92-93, 122-23.) Dr. Tinari cited no evidence, however, that such a massive production increase was possible, particularly given that Del Monte's formal launch of the Del Monte Gold brand took place in 1996, only three years earlier. Thus, Dr. Tinari's but-for world assumes that Del Monte would have produced 17.2 million boxes of Del Monte Gold pineapples in 1999, the same amount it sold in 2006. Yet, that is approximately 80% (or 7.7 million boxes) more than Del Monte's actual production of 9.5 million boxes in 1999. (12/23/05 Tinari Report, Def. Ex. 3, at Tables 2 and 3.) When asked if that assumption was realistic, Dr. Tinari replied: "I don't know for sure," and cited no evidence to support it; nor did he investigate whether or how Del Monte could have almost doubled its actual production in 1999. (3/7/06 Tinari Dep., Def. Ex. 9, at 160-161.)

58. Dr. Tinari stated there were no entry barriers to Del Monte's competitors after 2002, but he did not analyze how quickly those competitors actually increased their production at that time. (3/7/06 Tinari Dep., Def. Ex. 9, at 179.) As a result, Dr. Tinari does not "know how the actual ramping up after 2002 compares to [his] assumptions of how things would have ramped up in a 'but for' world." (3/7/06 Tinari Dep., Def. Ex. 9, at 180.)

59. Dr. Tinari was not sure of Dole's 2006 sales volume, but insisted, absent any investigation, that Dole could have sold that same quantity of pineapples, whatever that quantity was, in1999 and every year thereafter. Nor could he answer the question whether "Dole's costs were such that it would have been profitable for them to enter the market in 1999 at the same scale they that they have today if they knew that the future price that they were going to get was only $12.87?" (3/7/06 Tinari Dep., Def. Ex. 9, at 163-154, 169-170, 180.) His conclusion is simply not supported by the evidence.

60. Similarly, Dr. Tinari did not know whether Chiquita was interested in marketing extra-sweet pineapples in 1999, but assumed "[i]n a different world" that Chiquita would have come to market in 1999 with the volume of pineapples it sold in 2006. (3/7/06 Tinari Dep., Def. Ex. 9, at 171.) This conclusion is also not supported by the evidence.

61. Dr. Tinari acknowledged that his damage model was unique and that he was not aware of any precedent in the economic literature for using a damage model like his. (3/7/06 Tinari Dep., Def. Ex. 9, at 123-25.) He testified at deposition as follows:

> Q: "Now, can you point me to any economic literature that says that [when] you are measuring damages in an industry where there's a certain amount of lag time associated with production and certain amount of uncertainty because of market risks, that it's appropriate to use the volumes and prices of a later point in time and transpose them whole cloth to an earlier point to measure damages?"
>
> A: "No."

(3/7/06 Tinari Dep., Def. Ex. 9, at 180.)

Distribution Of Damages: Coupon Plan

62. Plaintiffs propose through Mr. Fisher an automatic coupon plan whereby all future, indirect purchasers of Del Monte Gold pineapples would be given a reduction in the price of Del Monte Gold pineapples for the duration of the plan, regardless of whether they purchased a Del Monte Gold during the class period (or, if so, how many). (Fisher Decl., Pl. Ex. 16, at ¶¶ 24-27; Fisher Supp. Decl., Pl. Ex. 17, at ¶ 24.)

63. Mr. Fisher contended that the coupon distribution plan is appropriate because it would "provide relief directly to a very large portion of the Class." (Fisher Decl., Pl. Ex. 16, at ¶ 25.) At the hearing, however, he acknowledged that the coupon plan would be both under- and over-inclusive, meaning that "some people who were damaged ... will not get compensation and some people that were not damaged ... will be compensated." (Fisher Supp. Decl., Pl. Ex. 17, at ¶ 26; 3/23/07 Tr. at 91, 105 (Fisher).)

64. The proposed coupon plan would be under-inclusive because, among other reasons, some stores that once carried Del Monte Gold pineapples no longer do so (or only buy minimal amounts) and carry instead a competing brand. That means that shoppers who continue to patronize those stores could not purchase Del Monte Gold pineapples there and so would not benefit from the automatic coupon plan. (Declaration of Emanuel Lazopoulos In support of Del Monte's Supplemental Memorandum of Law Regarding Putative Class of Indirect Purchasers ("Lazopoulos Decl."), Ex. 7, at ¶ 3; *see also* 10/3/06 Reiff Decl., Def. Ex. 5, at ¶ 13.)

65. For example, over the past few years, large grocery chains that stopped carrying Del Monte Gold pineapples or began buying minimal amounts, include the Pathmark supermarket chain (New York City, Long Island, New Jersey and part of Philadelphia); the Winn Dixie chain (Florida, Georgia, Alabama, Mississippi and Louisiana); several distribution centers with the Kroger chain (Georgia, South Carolina, Alabama, Tennessee, Houston and San Antonio, Texas, parts of Western Louisiana, Cincinnati, Detroit, Dallas, Memphis, and Louisville); Tom Thumb Food & Pharmacy (Dallas/Fort Worth metroplex); Kings Supermarkets (New Jersey); Stew Leonards (Connecticut); Market Basket Produce (Massachusetts); Stater Brothers chain (Southern California); Save Mart Supermarkets (Northern and Central California). (Lazopoulos Decl., Def. Ex. 7, at ¶ 3.)

66. Plaintiffs' proposed coupon plan would also be under-inclusive because some stores that once carried only Del Monte Gold pineapples now carry both Del Monte Gold pineapples and a competing brand, typically not at the same time. This means that shoppers who continue to patronize those stores will not have the chance to purchase Del Monte Gold pineapples if they do not happen to be on the shelves on the day on which they shop. Large grocery chains that fall into this category, including: Meijer Inc., one of the largest grocery chains in the country with stores in the Midwest; Stop N Shop (New Jersey, Connecticut and Massachusetts); Sam's Clubs; and Wegmans Food Markets (New York, Pennsylvania, New Jersey, Virginia, and Maryland). (Lazopoulos Decl., Def. Ex. 7, at ¶ 4.)

67. Plaintiffs' coupon plan is also likely to be under-inclusive. For example, to the extent that the 2004 Fresh Trends survey in *The Packer* can be considered reliable in any regard, it showed that the likelihood that a household purchased pineapples depended on the age of the

parents, the age of the children, and income level of the household, among other factors. (2004 Fresh Trends Survey, Def. Ex. 21, at pp 75-76.) The study indicates that households with children under six and between 13-17 are "most likely" to buy fresh whole pineapples, while households with children aged 6-12 are "least likely" to do so. This indicates that households will move in and out of the population cohorts that purchase pineapples, and presumably Del Monte Gold pineapples, as their children age, as they age, as their income level changes, and as other factors vary.

68. While Mr. Fisher acknowledged that the coupon plan would be under-inclusive, Plaintiffs did not attempt to quantify the degree to which this would occur, and Mr. Fisher said he could not do so. (3/23/07 Tr. at 89-90 (Fisher)).

69. The coupon plan is also over-inclusive for several reasons. First, plaintiffs' damage report is based on the assumption that Del Monte Gold pineapples were competitively priced in 2006 and that no indirect purchaser paid an overcharge after December 31, 2005; thus, any indirect purchaser who bought a Del Monte Gold pineapple for the first time in 2006 or later is not a member of the putative class. (12/23/05 Tinari Rpt., Def. Ex. 3 at 1719; 3/23/07 Tr. at 87-88 (Fisher); 10/3/06 Reiff Rpt., Def. Ex., 5 at ¶ 11.) Yet, those purchasers would receive automatic coupons and compensation at the expense of class members.

70. Second, it is undisputed that Del Monte sold more Del Monte Gold pineapples in 2005 than in 2004, and was projected to sell more in 2006 than in 2005. (12/23/05 Tinari Rpt., Def. Ex. 3, at Tables 2 & 3.) Some of the additional Del Monte Gold pineapples that Del Monte sold in 2006 and to date in 2007 were inevitably purchased by first-time purchasers, that is, by indirect purchasers who are not members of the putative class. (3/23/07 Tr. at 87-89 (Fisher); 10/3/06 Reiff Rpt., Def. Ex., 5 at ¶ 12.)

71. Third, it is undisputed that by reducing the effective price of Del Monte Gold pineapples, an automatic coupon plan would incentivize the purchase of Del Monte Gold pineapples by all types of purchasers, including first time purchasers. Plaintiffs make no effort to quantify this effect, which would depend on the value of any coupon and on detailed studies of cross-elasticity between Del Monte and competing gold pineapple brands; standard economic principles demonstrate that if the effective price of Del Monte Gold pineapples is reduced, the volume of sales will increase, and first time buyers will be drawn to purchase Del Monte Gold pineapples. (See 10/3/06 Reiff Decl., Ex. 5, at ¶ 12.)

72. Because some persons who would purchase pineapples as a result of such of coupon discounts would be first-time purchasers, they would not be members of the putative class. (3/23/07 Tr. at 18, 20 (Christou); 10/3/06 Reiff Rpt., Def. Ex., 5 at ¶ 12; 1/18/07 Fisher Dep., Def. Ex. 10, at 275.)

73. Mr. Fisher recognized that new purchasers of Del Monte Gold pineapples would benefit under the coupon plan even though they were not injured by buying Del Monte Gold pineapples during the class period. Thus, they would "siphon off" benefits from class members: "Yeah, I think the program would provide compensation to more than people who were in the class." (3/23/07 Tr. at 89-90 (Fisher).) He could not quantify the degree to which it was over-

inclusive. (3/23/07 Tr. at 89-90, 100-101 (Fisher); 1/18/07 Fisher Dep., Def. Ex. 10, at 170-172, 175-176.)

74. Mr. Fisher was not credible in testifying that the proposed coupon plan was a proper way to distribute damages even though the coupons would not benefit only members of the putative class. (3/23/07 Tr. at 49-50, 53 (Fisher) ("[T]hat doesn't mean automatic coupons are a bad thing.").)

75. Although he endorsed use of an automatic coupon plan, Mr. Fisher was not able to identify any case that was not a settlement case in which damages were distributed through coupons. (3/23/07 Tr. at 98, (Fisher); *id.* at 125-126).) The coupon cases that plaintiffs cite in their proposed findings of fact and conclusions of law are all settlement cases. During the evidentiary hearing, Mr.Fisher was asked: "The fact is that you're not aware of any other case in any other court doing what you're asking this court to do here today. Isn't that right?" He replied: "I am not aware of a similar case like this." (3/23/07 Tr. at 129 (Fisher).)

76. Because the coupons would be redeemed automatically under Plaintiffs' plan, there would be no way for a member of the putative class who purchases Del Monte Gold pineapples to opt out of the class. (3/23/07 Tr. at 89, 100 (Fisher); (Pl. Proposed Findings of Fact and Conclusions of Law at ¶ 26.)

77. In addition to these defects, the coupon plan is fundamentally flawed because it depends ultimately on the alleged pattern of repeat purchasers by a core group of customers. Yet, the only evidence of the nature of this core group and their purchases is the consumption evidence cited in the Neven paper. That evidence led Mr. Fisher to significantly over estimate the size of the class, but he continues to rely upon it nevertheless.

Claims Administration Procedure

78. In his first declaration, Mr. Fisher proposed a claims administration procedure whereby only some Del Monte Gold purchasers could submit a claim form and seek a pro-rata cash award or a voucher up to a certain amount. (Fisher Decl., Pl. Ex. 16, at ¶¶ 28, 30-32, and 33.) He stated: "It may be appropriate to provide for a traditional claims administration procedure for consumer who can *document large purchases*." (*Id.* at ¶ 28 (emphasis added).) He further stated that "a claims administration procedure . . . would not likely be the most efficient or effective means of distributing monetary relief to the class members in proportion to their injury." (*Id.* at ¶ 24.) At the hearing, Mr. Fisher claimed that such language in his declaration was not intended to limit the procedure to large purchasers only, and testified that a claims process is appropriate for any purchaser of Del Monte Gold, large or small. Mr. Fisher sought to offer this broad claims administration process as a partial solution to the under-inclusiveness of the automatic coupon plan because it could compensate those who were allegedly damaged but would not be compensated through the automatic coupon plan. (3/23/07 Tr. at 92-93 (Fisher).)

79. Although Mr. Fisher claimed that the claims administration procedure can "to some degree mitigate the under inclusive nature" of the coupon plan (Supp. Fisher Decl., Pl. Ex. 17, at ¶ 27), he had no evidence to quantify the percentage of indirect purchasers who bought Del

Monte Gold pineapples during the damage period but now shop at stores that do not carry Del Monte Gold pineapples and who would likely submit claims forms. Nor does he have evidence showing what percentage of putative class members in general would likely submit claims forms.

80. According to a declaration Mr. Fisher submitted in another case, *Moore v. Sank*, Civil Action No. 3:03 CV 00801 (CFD) (D. Conn.), timely claim forms were submitted by only 11% of the class members to whom notices were sent by direct mail. (*See* Def. Ex. 27 at ¶ 8.) Mr. Fisher said in that declaration, "In my experience administering class action settlements, these are above-average rates of return." (*Id.*)

81. In this case, since less than 1% of putative class members would receive notice by mail, (3/23/07 Tr. at 124 (Fisher)), the percentage of putative class members submitting a claim form would likely be much lower than in *Moore v. Sank*. This deficiency would be exacerbated because the face value of the coupons here would represent only a relatively small percentage of the price of a Del Monte Gold pineapple at retail. (1/18/07 Fisher Dep., Def. Ex. 10, at 265.)

82. In addition, the claim administration process is also likely to be of questionable reliability in this case.

83. Plaintiffs propose coupons be distributed to putative class members based on sworn statements regarding their alleged purchases of Del Monte Gold pineapples. (Fisher Decl., Ex. 14, at ¶ 32-33.) For instance, Mr. Fisher testified that anyone who signed a declaration under oath stating he or she purchased 500 Del Monte Gold pineapples during the class period would be entitled to receive coupons "commensurate with his or her purchases." (3/23/07 Tr. at 98 (Fisher).) The Court, however, is not convinced that testimony by consumers about their purchases of an inexpensive, perishable items as long as eleven years ago is likely to be accurate.

84. Mr. Christou testified that based on his experience with consumer surveys, consumers regularly over report purchases of produce from the market leader in a given field. When he worked for Chiquita, the company found in "dozens" of surveys that the percentage of consumers who claimed that the last banana they purchased was a Chiquita could not be accurate because that percentage consistently exceeded Chiquita's market share. He believed that the same phenomenon would lead to a "significant over estimation" in consumer's self-reporting of their purchases of Del Monte Gold pineapples. (3/23/07 Tr. at 21-24 (Christou).)[4]

85. The Court finds Mr. Christou's testimony to be credible and concludes that in this case, statements by indirect purchasers about their pineapple purchases run a substantial risk of inaccuracy even if made under oath, not because consumers would be likely to commit fraud, but rather because they likely would have difficulty remembering the details of their pineapple purchases and will have a natural tendency to assume they purchased the leading brand of extra sweet fresh whole pineapples.

[4] Mr. Christou testified that consumers might also overstate their purchases of Dole pineapples in "certain areas" of the country where Dole had the strongest visibility. (3/23/07 Tr. at 34-35.)

86. The Court's doubts about the accuracy of self-reporting by putative class members is reinforced by the equivocal testimony provided under oath by the named plaintiffs in this action regarding their pineapple purchases. (*See* Finding of Fact No. 4.)

87. The Court is not persuaded by Mr. Fisher's testimony that statements by indirect purchasers regarding their purchases of Del Monte Gold pineapples would likely be accurate if made under penalty of perjury. (1/18/07 Fisher Dep., Def. Ex. 10, at 233.) Among other reasons, Mr. Fisher had not reviewed the discovery responses of the named indirect purchaser plaintiffs, which were also made under oath. (*Id.* at 234.) Nor did he know to what extent Del Monte's competitors were selling extra sweet pineapples, how long they had been doing so, or what their market share was. (*Id.* at 214-216.) Nor did Mr. Fisher provide any basis for questioning Mr. Christou's testimony, based on years of relevant experience, that consumers have a natural and innocent tendency to over-report their purchases of produce sold by the company with the best known brand.

88. Another shortcoming with the proposed claims administration procedure is that there is nothing to prevent a putative class member from submitting a claim and also taking advantage of the automatic coupons on Del Monte gold pineapples to receive double-compensation. (1/18/06 Fisher Dep., Def. Ex. 10, at 276.) Moreover, a class member who chooses to opt out would still receive compensation if he or she purchased a pineapple during the class period. Plaintiffs do not propose a solution to these problems inherent in the coupon plan they urge the Court to adopt.

89. Mr. Fisher acknowledged that a claim administration procedure can have substantial transaction costs. (3/23/07 Tr. at 95; Fisher Decl., Pl. Ex. 16 at ¶ 27 (automatic coupon plan would "avoid the need for a costly claims administration procedure to evaluate individual claims").) Since Plaintiffs failed to provide any estimate of how much it would cost to administer such a system, the Court has no way to make a meaningful estimate of what percentage of any funds ultimately allocated to a claims administration procedure would likely be distributed through coupons.

90. The Court is troubled by the ever-changing contours of Plaintiffs' plan to distribute any damages. At the August 1, 2006 hearing on manageability, Plaintiffs proposed allocating damages to putative class members who had receipts or other records to document their purchases or who would submit a sworn declaration. (Aug. 1, 2006 Tr. at 8-9.) Plaintiffs did not mention an automatic coupon plan at that hearing. In their supplemental brief on the manageability, Plaintiffs advocated an automatic coupon plan for the first time, and also proposed requiring Del Monte to reduce the price it charges at wholesale. (*See* Corrected Memorandum of Law in Response to Court's Order Seeking Further Information as to the Manageability of the Indirect Purchaser Class at 10 (advocating "a fluid recovery, through imposed price reductions or discount coupon issuance".) Thereafter, Plaintiffs abandoned any price roll back plan. (1/23/07 Fisher Dep., Def. Ex. 10, at 187-188.) Later, they proposed issuance of coupons that could be redeemed against purchasers of pineapples from Dole or Del Monte's other competitors, (1/23/07 Fisher Dep., Def. Ex. 10, at 190-191), but now have apparently dropped that notion. In short, it appears that Plaintiffs have no fixed plan to distribute damages.

91. The Court is also troubled by Plaintiffs' continued failure to provide more details about their proposal. Mr. Fisher endorsed a fluid recovery plan, whereby the amount allocated to coupons or a claims administration procedure would itself be fluid and could be altered during the damage distribution phase, stating: "In addition, the proportion of relief allocated to any particular method of distribution should be somewhat fluid and subject to revision and adjustment to ensure that relief is reaching the class members in a time efficient manner. For example, if it turns out that we have fewer formal claims than anticipated and will not exhaust the funds allocated to that distribution method for many months, we could then shift the remaining amounts as well to the reserve amounts to the distribution of additional automatic coupons." (Supp. Fisher Decl., Pl. Ex. 17, at ¶28.)

***Cy Pres* Distribution**

92. Plaintiffs have not complied with the Court's specific request at the August 1, 2006 hearing: "I'm going to want to know what percentage is *cy pres* and what percentage is going to people who can demonstrate they bought a pineapple, and with specificity." (8/1/2006 Tr. at 12.)

93. Plaintiffs also have not shown why it would be appropriate to award a *cy pres* distribution to food bank charities in the United States, which in their words "provide relief to disaster victims, the hungry, the homeless, and the poor." (Pls. Supp. Manageability Mem. at 19.) While those are certainly worthy causes, Plaintiffs have not shown how providing assistance to those organizations would confer even an indirect benefit on members of the putative class who, if anything, bought a "luxury" food product.

CONCLUSIONS OF LAW

Plaintiffs Have Failed To Show That Class Members Can Be Ascertained

1. Because Plaintiffs have not proven that either they or putative class members have any records to document purchases of Del Monte Gold pineapples during the class period, there is no way to ascertain reliably membership in the putative class. Plaintiffs' inability to identify putative class members permeates this action and causes insuperable manageability problems. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974) (manageability determination "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit"); *Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005) ("Whether addressed under the heading of 'ascertainability' or 'manageability,' the fact remains that in order for a class to be certified, the proposed class must be both ascertainable in theory and readily identifiable (thus, administratively manageable) in fact. . . . [I]dentifying the putative class members is simply not possible without an individualized inquiry into the facts and circumstances surrounding each purchase of Lipitor during the class period.").[5]

[5] State courts – where indirect purchaser actions have typically been litigated following *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) – have regularly denied certification of indirect purchaser classes on manageability grounds. *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

Plaintiffs' Attempt to Sidestep Intractable Manageability Problems

2. Plaintiffs attempt to circumvent manageability problems through a series of unprecedented proposals: requiring Del Monte to provide legal notice on its pineapple hang tags; endorsing an automatic coupon plan that would benefit *future* purchasers of Del Monte Gold pineapples regardless of whether they purchased Del Monte Gold pineapples in the class period; advocating a claims administration process whereby putative purchasers could submit sworn statements regarding alleged pineapple purchases made years ago, without submitting any documentary proof of the purchases; and ignoring that every coupon and claims administration case they cite was a settlement case, while this is a contested action.[6]

3. Plaintiffs' proposals are prohibited by Second Circuit law precluding use of fluid recovery to solve manageability problems, violate Del Monte's constitutional rights, run afoul of the strictures of Federal Rule of Civil Procedure 23, and encounter a host of other difficulties which are discussed below.[7]

Plaintiffs Have Failed To Identify A Viable Means of Notice

4. A class cannot be certified unless the plaintiffs can show that it is manageable in terms of giving adequate notice. *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH)(HBP), __ F.R.D. __, 2007 WL 861147, at *33 (S.D.N.Y. March 22, 2007) ("In determining whether a class action is a superior method of adjudication for a particular action, courts must also consider the management difficulties likely to be encountered if the action is continued as a class suit, such as the burden of complying with Rule 23's notice requirements.").

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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] The one exception, *Schwab v. v. Philip Morris USA, Inc.*, 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005) (Weinstein, J.). is discussed *infra* at pp. at 28 n. 11 and 31-32. The case is currently on appeal before the Second Circuit.

[7] Plaintiffs claim Del Monte has not opposed class certification insofar as they seek injunctive relief. (*See* Pl. Proposed Findings of Fact and Conclusions of Law at 1 n. 3.) As Del Monte has noted, Plaintiffs did not move for certification of a class for injunctive relief and no such class should be certified. (*See, e.g.*, Pl. Class Certification Mem. at 35 (seeking order "certifying the Direct and Indirect Purchasers Classes pursuant to Fed.R.Civ.Proc. 23(b)(3)"; *see also* Del Monte. Class Certification Opp. Mem. at 4 n. 2 and Del Monte's Supp. Mem. on Manageability at 3 n. 1.)

Although other manageability problems preclude certification of this putative class, deficiencies in Plaintiffs' notice proposals bolster the Court's conclusion in this regard.

5. Under Rule 23(c)(2) it is necessary is "to ensure that the plaintiff class receives notice of the action well before the merits of the case are adjudicated." *Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir 1995). As Plaintiffs recognize (Pl. Proposed Findings of Fact and Conclusions of Law at ¶ 55), the purpose of providing notice is to protect the right of absent class members to opt out of an action that may impact their rights or claims. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1977).

6. The "express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle and Jaquelin*, 417 U.S. 156, 176 (1974). In this action, because the overwhelming majority of class members cannot be identified by address, notice to them could not be given by mail.

7. Recognizing that mail notice is impracticable, Plaintiffs propose requiring Del Monte to place a legal notice concerning the lawsuit on pineapple hang tags and posting of point-of-sale legal notices in the produce departments of grocery stores.

8. The Court rejects Plaintiffs' hang tag proposal as unduly prejudicial. Requiring a defendant that denies wrongdoing to place such a notice on its product (particularly a food product), no matter how neutrally the notice is worded, is materially different from providing legal notice by mailing or publication. The hang tag is used by Del Monte to promote its product and its brand. The notice tag proposed by Plaintiffs would be the antithesis of a promotion of Del Monte's product and brand; it would convey, at a stage where there has not been any adjudication of the allegations against Del Monte, that the company violated consumer laws and overcharged consumers. While class notices inherently provide news of claims against a defendant, Plaintiffs essentially seek to replace Del Monte's promotional and marketing tool on the Del Monte Gold with a notice to consumers that Del Monte has been *alleged* to have violated their rights. Plaintiffs, who bear the burden on their Rule 23 motion, have failed to come forward with any evidence that demonstrates a lack of undue prejudice to Del Monte. Because of the tight nexus between a hang tag and the pineapple to which it is attached, the Court concludes this form of notice likely would be prejudicial to Del Monte by causing irreparable injury to its reputation and sales (*see* Finding of Fact Nos. 26-31), which would far outweigh any interest of the Plaintiffs.

9. Plaintiffs have offered no case authority where this type of notice was required in a contested (rather than in a settlement) case. Plaintiffs have not cited a single case in which a class notice has been appended to a product, particularly a food product. Equally important, the hangtag plan would shift much of the cost of the notice to Del Monte – a result that is prohibited by *Eisen*. *See* 417 U.S. at 177.

10. Plaintiffs have also failed to show that their point-of-sale notice plan is feasible. The undisputed evidence is that over 90% of stores do not permit such notices, even to promote

products (*see* Finding of Fact Nos. 33-34), and the Court has does not have jurisdiction over the stores, which are not parties to the actions.[8]

11. Mr. Fisher's testimony that it is presumed appropriate to give notice at point of sale or on the product itself is not supported by the authority he cited. Mr. Fisher testified that the Advisory Committee Notes to the Federal Rules of Civil Procedure "specifically suggest" point of sale notices in consumer cases involving repeat purchasers (3/23/07 Tr. at 102 (Fisher).), and that such notice "is exactly what is recommended". (3/23/07 Tr. at 122 (Fisher).) However, the Advisory Notes simply state: "Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice." Fed.R.Civ.Proc. 23(c)(2) (2003 advisory committee notes.)

12. Plaintiffs' proposal to utilize email and a dedicated website is at best supplementary to notice by publication. *See e.g., Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830, 841 (E.D. La. 2007). Thus, the notice issue here turns on whether Plaintiffs can provide adequate notice by publication. In cases such as this one, where putative class members are widely dispersed, notice by publication often requires publication in one or more newspapers of national circulation and a series of local newspapers or magazines. *See, e.g., Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 277 (S.D.N.Y. 1996) (notice published in over 200 publications, including the *New York Times* and *The Wall Street Journal* and 42,000 notices mailed).

13. Here, Plaintiffs have failed to meet their burden because they have not provided any details of a notice plan, such as what publications they would utilize, how those publications target consumers of Del Monte pineapples, and what frequency of publication would be required. While Plaintiffs say they will provide details later (Fisher Supp. Decl, Pl. Ex. 17, at ¶¶ 21-23), given their inability to identify the members of this putative class, their inability to do so now precludes the Court from concluding that adequate notice via publication could be provided in this action.

[8] While one of the direct purchaser plaintiffs, Meijer Inc., owns retail stores, Meijer is not a party to the indirect purchaser actions and in any event, no other grocery stores are before the Court in any capacity.

Plaintiffs' Failure To Proffer A Viable
Damages Model Renders The Class Unmanageable

14. In a large antitrust class action, plaintiffs must present a damages model that can be used on a class-wide basis based on common proof in order to meet their burden of showing manageability. *See Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (manageability problems may preclude certification if individual damages analysis is required in antitrust class action). Implicitly acknowledging this requirement for certification, Plaintiffs submitted the report of their proposed expert, Dr. Tinari, in an effort to show that damages can be calculated formulaically on the basis of evidence common to the class. Del Monte offered evidence refuting Dr. Tinari's analysis and assumptions through two declarations of its proposed expert, Dr. Bradley Reiff, and through its Declaration Regarding The Testimony of Dr. Frank D. Tinari ("Goldfarb Declaration"), which Del Monte submitted as its direct examination of Dr. Tinari for the March 23, 2007 evidentiary hearing.

15. Plaintiffs objected to the Goldfarb Declaration (*see* The Indirect Purchaser Plaintiffs' Objections To The Declaration of Carl Goldfarb Regarding The Testimony Of Dr. Frank Tinari, Docket No. 163), and chose not to examine Dr. Tinari live at the March 23, 2007 evidentiary hearing. (*See* Joint Witness List and Description of Anticipated Testimony to be Offered at the Evidentiary Hearing on Manageability of the Indirect Purchaser Class, Docket Entry No. 164 ("Plaintiffs filed written objections to the testimony offered by Defendants on the ground that Dr. Tinari's testimony is not relevant to resolving any disputed factual issues concerning manageability that will be addressed at the evidentiary hearing. Accordingly, Plaintiffs will not be presenting any cross-examination of Dr. Tinari in response to the written testimony offered by Defendants.").)

16. The Court overruled Plaintiffs' objections by order dated March 22, 2007 and stated that the Goldfarb Declaration would be received into the record. The factual assertions in the Goldfarb Declaration stand as uncontested since Plaintiffs did not call Dr. Tinari to testify at the evidentiary hearing.

17. As the Second Circuit recently held in *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 33-40 (2d Cir. 2006), clarifying circuit precedent on point, a district court cannot accept an expert's testimony and find that it establishes an element of plaintiffs' required showing under Rule 23 simply because the testimony is not "fatally flawed"; the district court must affirmatively find that Rule 23's requirements have been met, even if to do so it has to resolve disputes over an expert's opinion:

> [W]e reach the following conclusions: (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such

> determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.
>
> In drawing these conclusions, we add three observations. First, our conclusions necessarily preclude the use of a "some showing" standard, and to whatever extent *Caridad* might have implied such a standard for a Rule 23 requirement, that implication is disavowed. Second, we also disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit. Finally, we decline to follow the dictum in *Heerwagen* suggesting that a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits.

Id. at 41-42. Applying these standards, the Court concludes that Plaintiffs have not demonstrated that damages can be calculated formulaically using evidence common to the class; instead, individualized proof will be required to establish damages. Accordingly, the putative class is not manageable.[9]

18. Dr. Tinari's damages methodology relies upon two critical, but unproven, assumptions: (a) that there was a constant 100% pass-through rate throughout the entire damage period; and (b) that there was a constant but-for price throughout the entire damage period.

19. *First*, Dr. Tinari fails to provide an empirical basis for his key assumption of a constant, 100% pass-through rate. He acknowledged that determination of the pass-through rate is an empirical question, requiring careful analysis of the data, and promised to perform such an analysis. (*See* Finding of Fact No. 39.) However, his only actual empirical analysis consisted of using four data points for nationwide, average wholesale and retail prices for Del Monte Gold pineapples that were three years apart. While he acknowledged that more numerous data points during the intervening years actually contradicted his assumption (*see* Finding of Fact Nos. 42-45), he improperly ignored them in reaching his conclusion. He also ignored testimony from the direct purchaser plaintiffs that refute his assumption (*see* Finding of Fact Nos. 47-51). Nor did

[9] Plaintiffs contend that inquiring into the damages calculation at the class certification stage improperly encroaches on the merits of the case. (*See* Plaintiffs' Proposed Conclusions of Law at ¶¶ 66-68.) The Second Circuit, however, has made clear that a viable method of proving class wide damages is a requisite for certification, *see Abrams v. Interco Inc.*, 719 F.2d at 31; and in *In re Initial Public Offering Sec. Litig*, the Second Circuit makes clear that "the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." 471 F.3d at 41.

he take into account the criticism of Del Monte's expert economist that raised concerns about his methodology (*see* Finding of Fact Nos. 40, 48-51).

20. It is established in antitrust jurisprudence that pass-through rates are rarely either complete (*i.e.*, rarely100%) 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).

21. In light of Dr. Tinari's decision to limit his analysis to a cursory review of a limited set of data points, his turning a willful blind eye to the more numerous data points that contradict his conclusion, his failure to consider relevant testimony of other Plaintiffs, and of Del Monte's expert, Dr. Reiff, and the case law recognizing the general variability of pass-through rates, the Court concludes that Dr. Tinari's testimony and other evidence does not provide an adequate basis to find that there was a constant 100% pass-through rate at all relevant times and places.

22. As a result, calculation of damages would require determining the applicable pass-through rate based on a host of variables, and individual issues would overwhelm common issues, rendering this action unmanageable. *See 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."); *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"); *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)"); *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").

23. *Second*, Dr. Tinari makes another crucial but unsupported assumption in his proposed damages methodology: that there was a constant but-for price through the entire damage period, which extends from January 1, 1999 through December 31, 2005. That assumption rests on several underlying assumptions: (1) that in the but-for world, Del Monte, Dole, Chiquita and every other company that sells extra sweet pineapples in the United States would have brought to market in 1999 the same volume of pineapples that each company actually sold seven years later in 2006; (2) that consumer demand for extra-sweet pineapples, which in the real world developed over time, would in the but-for world have reached in 1999

the level that was not actually obtained until 2006; (3) that consumer demand in 1999 would have equaled the demand in 2006, even though the level of actual consumer income was significantly lower in 1999; and (4) that the volume of pineapple sold by all competitors and the aggregate demand for pineapples would have remained unchanged from 1999 through 2006. (*See* Finding of Fact Nos. 54-60.)

24. Dr. Tinari did not provide any of evidence to support such counter-intuitive assumptions, and he admitted that he did not look at the record evidence to determine whether his assumptions were plausible. (See Finding of Fact Nos. 55, 57-60.) For instance, in the real world, Del Monte's decision whether to expand its production of Del Monte Gold pineapples likely depended on the then-current and anticipated price of Del Monte Gold pineapples; the availability of land, seed, and money to expand its production; the actual and anticipated conduct of its competitors; and the projected demand for extra sweet, fresh whole pineapples, among other factors. Dr. Tinari's assumption, without examining the record evidence on any of these factors, that Del Monte would have expanded in the but-for world so rapidly that it would have achieved its 2006 volumes seven years earlier because "[c]ompetition would have forced it," (3/7/06 Tinari Dep., Def. Ex. 9 at 135-136), is not credible.

25. Other significant assumptions made by Dr. Tinari are also contradicted by the record in this action. For example, he assumed that there was only one middleman between Del Monte and the indirect purchasers (a fact he admits impacts his analysis), while the record shows there are frequently multiple intermediaries. This, too, renders his damages model unusable. (Finding of Fact No. 52.)

26. On the basis of these deficiencies in the damages methodology proposed by Dr. Tinari, the Court concludes that plaintiffs have not shown that there is a viable means to compute damages on a class-wide basis using common proof. *See In re Initial Public Offering Sec. Litig.*, 471 F.3d at 41-42. Accordingly, the Court concludes that the proposed class action is not manageable.

Plaintiffs' Coupon Distribution Plan
Constitutes Impermissible Fluid Recovery

27. In contested class actions in this Circuit, fluid recovery is "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Eisen v. Carlisle & Jaquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), *rev'd on other grounds*, 417 U.S. 156 (1974); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 ("We see no reason to change our position, firmly stated in *Eisen v. Carlisle & Jaquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 .S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d (1974)], disallowing a 'fluid class' recovery . . . ")[10] Yet, fluid recovery is precisely what Plaintiffs propose here through their coupon distribution plan.

[10] Numerous courts have followed *Eisen* in prohibiting fluid recovery to resuscitate unmanageable class claims. *See, e.g., American Intern. Pictures, Inc. v. Price Enters., Inc.*, 636 F.2d 933, 935 (4th Cir. 1980) ("The 'fluid recovery' theory which would distribute damages to unspecified parties rather than to specific class members who were actually injured was rejected by us in [*Windam v. American Brands,*

28. "Fluid recovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 526 (S.D.N.Y. 1996). Here, Plaintiffs plan to distribute automatic coupons not to proven class members, but to *future* purchasers of Del Monte pineapples. As Plaintiffs repeatedly and necessarily concede, not all coupons redeemed under their proposal would benefit the class (*see* Pl. Proposed Findings of Fact and Conclusions of Law at ¶26), and the coupon plan would be both under- and over-inclusive (*see id.* at ¶ 28). That is, a significant number of consumers who did purchase Del Monte pineapples during the class period would not be compensated by redeeming coupons (under-inclusive), and many coupons would be redeemed by people who did not purchase Del Monte pineapples during the class period (over-inclusive). (*See* Finding of Fact Nos. 63-67, 69-73.)

29. Plaintiffs cannot quantify the degree to which the coupon distribution plan would be under and over inclusive – that is the degree of mismatch between the actual members of the proposed class and future purchasers of Del Monte Gold pineapples – but the Court concludes it would be significant. (*See* Finding of Fact Nos. 68, 73.)

30. Such a damage distribution plan, providing for "'fluidity' between the class claiming injury and the class receiving recovery," is precisely what the Second Circuit barred in *Eisen* and its progeny: "We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Eisen*, 479 F. 2d. at 1018; *see also id.* at 1010 ("some of the original 6,000,000 claimants will receive nothing, because they have never heard of the case or for other reasons have failed to file claims and have them processed, and many other new traders, who had no transactions in the [class period] will receive some payments.").

31. The Second Circuit has adhered to that ruling in later cases, in part because allowing fluid recovery to overcome Rule 23's manageability requirement would promote vexatious litigation. *See, e.g., In re Agent Orange Product Liability Litigation MDL No. 381,* 818 F.2d 179, 185 (2d Cir. 1987). ("[U]nwarranted relaxation of the manageability requirements [that] would have induced plaintiffs to pursue 'doubtful' class claims for 'astronomical amounts' and thereby 'generate ... leverage and pressure on defendants to settle'").

32. In addition, Plaintiffs' fluid recovery plan would violate the Rules Enabling Act, 28 U.S.C. § 2072, which provides that "such rules [of civil procedure] shall not abridge, enlarge of modify any substantive right." *See, e.g., Windam v. American Brands, Inc.*, 565 F.2d 59, 70, 72 (4th Cir. 1977) "generalized or class-wide proof of damages" in that action would "contravene the mandate of the Rules Enabling Act"); *Eisen*, 479 F.2d at 1014; *Dumas*, 2005

Inc., 565 F.2d 59, 72 (4th Cir. 1977)] as an improper solution to 'the manageability of class actions'"); *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974) (rejecting argument that "many of the individual questions arising from the damage claims can be solved by allowing damages in the form of a fluid recovery"); *Dumas v. Albers Med., Inc.*, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005) ("It is inappropriate to use fluid recovery as a means of rendering manageable – by rendering unnecessary any proof of damages to individual class members – an otherwise unmanageable class action."); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 620 (W.D. Wash. 2003) ("courts have rejected fluid recovery as a solution of the manageability problems of class actions").

WL 2172030, at *7 (fluid recovery "not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members").

33. Plaintiffs' plan also would violate Del Monte's constitutional right to Due Process of law. *See Eisen*, 479 F.2d at 1018 (even if permitted by Rule 23, "courts would have to reject [fluid recovery] as an unconstitutional violation of the requirement of due process of law").

34. Plaintiffs' contention that fluid recovery has been used in many cases is unpersuasive. While Plaintiffs cite numerous cases in which coupons have been used to distribute damages, in all of those cases, the coupon plan was part of a settlement. (*See* Finding of Fact No. 75.) Plaintiffs have not cited a single case in which coupon recovery was required as a remedy in a contested class action. (*See* Finding of Fact No. 75.) [11]

35. The Second Circuit has never approved a fluid recovery or *cy pres* award except as part of a settlement, *see Weber v. Goodman*, No. Civ. 97-1376, 1998 WL 1807355, at *5 (E.D.N.Y. Jun. 1, 1998), and the decisions approving such plans since *Eisen* involved implementation of settlements, not contested case in which defendants disputed manageability. That distinction is crucial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (with settlement class "court need not inquire whether the case, if tried, would present intractable management problems"); *Agent Orange*, 818 F.2d at 185 ("we have previously recognized that some "fluidity" is permissible in the distribution of settlement proceeds"); *Eisen*, 479 F.2d at 1012 ("[t]here is no settlement. Every issue is contested and litigated."). As Mr. Fisher acknowledged, what Plaintiffs are asking the court to do here is unprecedented. (Finding of Fact No. 75.)

36. Cases using coupons in settlements are also distinguishable because a defendant is free as part of a settlement to waive its constitutional and other rights, including its right to due process. Thus, coupon settlement cases provide no authority for imposing a coupon plan upon a defendant in a contested action.

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[11] Plaintiffs claim, citing the *Schwab* decision, that nine states permit use of fluid recovery and three have rules permitting its use in class actions. (Pls.' Proposed Findings of Fact and Conclusion of law at ¶ 57.) That contention is unavailing. Such state rules may well be procedural in nature and therefore not applicable in federal court. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) ("Cy pres, or fluid, recovery is a procedural device that distributes money damages either through a market system (e.g., by reducing charges that were previously excessive), or through project funding (the project being designed to benefit the members of the class)"; *In re New Motor Vehicles*, 235 F.R.D. at 143 n. 56 ("It is an interesting question where the availability of fluid recovery fits under the Rules Enabling Act, 28 U.S.C. § 2072, and *Erie R.R. Co.*, 304 U.S. at 78. Damages are generally considered substantive law, but fluid recovery is an artifact of the class action procedure, state or federal."). Even assuming state law on fluid recovery were substantive, state law cannot trump the manageability requirements established by Rule 23. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) ("It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law. *See Hanna v. Plumer*, 380 U.S. 460, 469-474 (1965); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)"). Moreover, by Plaintiffs' admission, nearly 40 states have not endorsed fluid recovery.

Plaintiffs' Claims Administration Procedure
Cannot Cure the Manageability Problems

37. After first disavowing a claims procedure as inefficient for all but the largest claims, Plaintiffs now also propose allocating damages through an administrative claims procedure. They contend such a procedure would alleviate some of the manageability concerns regarding the under-inclusiveness of automatic coupon plan because individuals who did not benefit from the coupon plan could submit claim forms. For a number of reasons, the Court is not persuaded by this aspect of Plaintiffs' proposal.

38. *First*, experience shows that in consumer class actions "class member response rates are frequently below 20%, and often below even 10%, when individuals are required to take affirmative steps, such as the filing of a proof of claim form, in order to participate in a class action settlement." *Henry v. Sears Roebuck & Co.,* 1999 WL 33496080, at *10 (N.D. Ill. July 23, 1999); *see also In re Mexico Money Transfer Litigation*, 267 F.3d 743, 748 (7th Cir. 2001) (in which "[e]xperts estimated that about half of the coupons would be claimed, and 20% to 30% of those claimed would be used"); *In re Excess Value Ins. Coverage Litigation*, M-21-84 (RMB), Order dated Nov. 3, 2005 (S.D.N.Y.) ("[t]he value of the Voucher Program consists of the total dollar value of redeemed vouchers or $4,863,877, which is 2.4% of Plaintiffs' original estimate of voucher redemptions, i.e., $205 million"); *Titus Moore v. Mark A. Sank*, Civil Action No. 3:03 CV 00801 (CFD.) (D. Conn.) (May 19, 2006) (Plaintiffs' expert Fisher submitted declaration, Finding of Fact No. 80, stating 11% return rates for claim forms mailed to class members were "above-average rates of return."). Thus, Plaintiffs have not shown that a claims administration process would alleviate the under-inclusiveness of their coupon plan.

39. *Second*, since a putative class member could benefit from the automatic coupon plan and submit a claim form (*see* Finding of Fact No. 88), the claim procedure could well exacerbate the mismatch between alleged injury and compensation. Indeed, under Plaintiffs' plan the coupons attached to Del Monte's hang tag are automatically redeemed at the time of purchase of a Del Monte Gold pineapples, (*see* Finding of Fact 76), and accordingly, as a practical matter, putative class members who opt out would still benefit from any class award while retaining their rights as opt outs.

40. *Third*, the cost associated with a claims administration process would likely consume a significant portion of a recovery dedicated to such a procedure. (*See* Pl. Supp. Mem. on Manageability at 10 (claims procedure "would not likely be the most efficient means of distributing relief to class members in proportion to their injury").

41. *Fourth*, given the dearth of documents, the equivocal testimony of the putative class representatives and their inability to state with definitiveness basic facts about their pineapple purchases, and the inherent unreliability of sworn statements regarding pineapple purchases as long as a decade ago, (Finding of Fact Nos. 4-5) a claims procedure threatens to deny Del Monte its Due Process right by, requiring it to pay damages without being able to question putative class members about their purchases, including as part of any claims administration procedure, both to deter fraud and to weed out unreliable testimony based on flawed memory. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 617-19 (W.D. Wash. 2003) (sworn statements do not suffice to establish injury given uncertain

and equivocal testimony of named plaintiffs); *Davies v. Philip Morris U.S.A., Inc.*, No. 04-2-08174-2 SEA, 2006 WL 1600067, at *4-*5 (Wash. Super. Ct. May 26, 2006) ("where it is unlikely consumers will have receipts or any method of proving prior purchases, Defendant should have an opportunity and be entitled to challenge each and every individual as to his or her claimed damages"; "there is no manageable method by which to handle the individual issues the Defendant is entitled as a due process matter to raise in this case"). Such questioning of millions of class members would be unmanageable.

42. *Fifth,* submitting class wide damages to one jury and then asking a second finder of fact – here a claims administrator not even a second jury – to determine the amount of individual claims would raise concerns under the Reexamination Clause of the Seventh Amendment ("no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, [other] than according to the rules of the common law.)" *See, e.g., Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999) (bifurcation with different juries assessing liability and damages violated Seventh Amendment in that "a given issue may not be tried by different, successive juries"); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1114, 1182 (3d Cir. 1993) ("Seventh Amendment problems are inherent when separate juries determine facts of damage and amount of damages"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) ("The right ... conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact.").

Plaintiffs' Reliance Upon Aggregate Damages Is Unavailing

43. Plaintiffs attempt to circumvent criticism of their flawed proposals for allocating damages by arguing that it is permissible to calculate a single, aggregate damage figure for the class, which would then be distributed to putative class members by a variety of means. (*See* Pl. Proposed Findings of Fact and Conclusions of Law ¶ 57.)

44. Although damages sometimes may be calculated on an aggregate basis and then distributed to class members, this is not such a case. The factor that distinguishes a permissible aggregate damages calculation from an impermissible fluid recovery is the ability to derive *and* distribute a class-wide damages amount by application of a damages model to reliable class data or records. *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 526 (S.D.N.Y. 1996) ("Damages in an antitrust class action may be determined on a class wide, or aggregate, basis, without resorting to fluid recovery where the computerized records of the particular industry, supplemented by claims forms, provide a means to distribute damages to injured class members in the amount of their respective damages"); *see also In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("We agree with the decision reached in *Eisen v. Carlisle & Jaquelin*, 479 F.2d 1005 (2d Cir. 1973), that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes."); *Dumas v. Albers Med., Inc.*, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005) (fluid recovery "not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members"); *see generally Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1257-58 & n.13 (11th Cir. 2003) (observing that aggregate damages have been utilized when (1) specifically authorized by statute and (2) when "precise aggregate damages of the class could be ascertained easily by a simple mathematical calculation").

45. Here, Plaintiffs have identified no class-wide data or records or other common evidence to which a damages formula could be applied to determine an accurate aggregate damages figure that could then be distributed to class members in the amount of their injury. The cases on which Plaintiffs rely to support the availability of aggregate damages (Conclusions of law at ¶¶ 57-58) are not persuasive. Three of the cases are inapposite because they involved products for which there were detailed records to which a damages formula could be applied so that class-wide damages that could be distributed in the amount of each member's injury. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 235 F.R.D. 127, 144 (D. Me. 2006) (permitting aggregate damages using standard economic models, computerized data about automobile transactions, and actual prices); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 321-22 (E.D. Mich. 2001) (direct purchasers case permitting aggregate damages based upon actual price data from defendant and "reasonable damage methodologies that are common to the class"); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. at 526 (direct purchaser action, permitting aggregate damages where defendants were "required to maintain detailed computerized records of their transactions, and Plaintiffs propose that those records will provide the means to determine damages on a class wide basis without creating a need to rely on fluid recovery"). In a fourth case, *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), it was not disputed that the aggregate figure could be "accurately computed by reliance on sales figures." *See id.* at 289. In any event, however, the *Antibiotic* decision predates the Second Circuit's 1973 *Eisen* decision and was brought by States, not by individual private plaintiffs. To the extent that *Antibiotic* supports fluid recovery (as opposed to aggregate damage award based upon reliable class wide data) in a contested class action, it is no longer good law in this Circuit. In addition, an important element in the *Antibiotic* decision was the court's "hesita[tion]" to allow manageability concerns to permit defendants to keep "their ill-gotten gains . . . inaccessible to the mulcted consumers because they are many and their individual claims small." *Id.* at 283. No such concerns apply here, however, since Del Monte is subject to the treble damage claims being aggressively persuaded by the direct purchasers for the very same conduct underlying the indirect purchasers' claims.

46. Plaintiffs also cite the recent certification of a RICO class action in *Schwab v. Philip Morris USA, Inc.*, 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005) (Weinstein, J.). The Court notes that *Schwab* is currently before the Second Circuit as part of a permissive interlocutory appeal, granted at the request of the defendants, and concludes that it should not be followed, as it is against the weight of Second Circuit authority insofar as it finds fluid recovery may be used in a litigated action to overcome manageability problems.[12] Significantly, in

[12] Plaintiffs assert that Judge Weinstein concluded that fluid recovery "has been accepted by nearly all federal circuits that have considered it in both settled and decided cases." (Pls.' Mem. at 17.) This is incorrect. *Schwab* noted that fluid recovery is typically used in settlement classes and stated "courts have also utilized fluid recovery in decided cases." *Schwab*, 2005 WL 3032556, at * 7. It then cited five litigated cases in addition to *In re Antibiotic Antirust Actions*. None arose within the Second Circuit, and none is directly on point. Two cases, *Democratic Cent. Comm. of District of Columbia v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451 (D.C. Cir. 1996) and *Bebchick v. Public Utils. Comm'n*, 318 F.2d 187 (D.C. Cir. 1963), concern the distribution of money collected by a rate-setting body before the roll-back of a rate increase, not antitrust damages. In *American Intern. Pictures, Inc. v. Price Enters, Inc.*, 636 F.2d 933, 936 (4th Cir. 1980), and *L.C.L. Theatres, Inc. v. Columbia Pictures Indusies., Inc.*, 421 F. Supp. 1090, 1104 (D.C. Tex. 1976), the courts stated that the damages sought or awarded did not constitute a fluid recovery. In the last case, *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409

Schwab, as in *Antibiotic*, the court was deeply troubled that barring a fluid recovery would "reward [defendants] foresight in stealing from the multitude in small amounts." *Id.*, at *3. In this case, as discussed above, such concerns are irrelevant because there is a direct purchaser action. In addition, the fluid recovery plan upheld in *Schwab* involves solely a claims administration procedure whereby putative class members would be required to establish their entitlement to share in a damage award (2005 WL 3032556, at *1, *18). Thus, it is far different from what Plaintiffs propose here, where most of the benefits would be distributed through an automatic coupon plan, which contains no means to ascertain whether the *future* Del Monte purchasers who would benefit are in fact members of the putative class of *past* purchasers.

The *Cy Pres* Doctrine Is Inapplicable And Cannot Cure the Manageability Problems

47. Plaintiffs also contend that a *cy pres* distribution can be utilized to remedy their inability to locate class members and distribute relief to class members. Again, the Court is not persuaded.

48. As the Second Circuit recently explained, "the purpose of *Cy Pres* distribution is to 'put the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (quoting 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10:17 (4th ed.2002) (alteration omitted)). The Court's comment, however, was made in the context of a class action settlement, where neither the defendant nor identified class members have a right to recover unclaimed settlement funds.

49. In this case, Plaintiffs are not proposing to utilize *cy pres* to distribute unclaimed settlement proceeds. They are proposing to utilize *cy pres* in a contested class action in which they have presented no viable means to compute and allocate the damages of individual class members. In this context, *cy pres* is indistinguishable from the concept of fluid recovery that the Second Circuit has condemned as "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Eisen v. Carlisle & Jaquelin*, 479 F.2d. at 1018. The *cy pres* doctrine is simply not a mechanism for certifying contested class actions, and it cannot be utilized by Plaintiffs to avoid their burden of proffering a viable, manageable method to prove and distribute damages.

50. Moreover, the policy reason for applying *cy pres* to in the class action context does not exist here. "In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to trial) to the class members." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (Posner, J.). Here, as noted above, no such risk exists because Del Monte is facing a direct purchaser class action for treble damages. Nor can a *cy pres* award be justified here on compensatory grounds because it will not compensate putative class members for alleged injuries. "There is no indirect benefit to the class from the defendant's giving the money to

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(11th Cir. 1986), the court distinguished *Eisen* because "[p]laintiffs have proven damages based on individual usages and charges and no dispute exists regarding class certification or manageability."

someone else. In such a case the "*cy pres*" remedy (badly misnamed, but the alternative term – 'fluid recovery'– is no less misleading) is purely punitive." *Id.* at 784.[13]

CONCLUSION

51. For the foregoing reasons, this Court finds the proposed class would be unmanageable and denies Plaintiffs' motion for class certification insofar as it concerns the Indirect Purchaser Plaintiffs.

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Respectfully submitted,
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[13] As indicated in Del Monte's opposition to Plaintiffs motion for class certification (at pp. 21-32) and in Del Monte's supplemental memorandum on manageability (at pp. 23-24), the proposed class is also unmanageable because 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, (*see* Pl. Class Certification Mem. at 2 & nn. 2-3), and Plaintiffs have not provided the necessary analysis of how they could present their myriad of state law claims on liability and damages to a single jury.

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2007, I caused a copy of the foregoing to be served by Notice of Electronic filing on the following:

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