UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PINEAPPLE ANTITRUST LITIGATION This Document Relates To: All Actions	: :	Civil Action No. 1:04-MD-1628 (RMB) (MHD)

THE INDIRECT PURCHASER PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The Indirect Purchaser Plaintiffs ("Plaintiffs") submit this brief reply memorandum to address Del Monte's contentions that (i) the allocation methods proposed by Plaintiff constitute an impermissible fluid recovery; and (ii) the Court must evaluate the merits of Dr. Tinari's conclusion as to the "but for" price and the pass-through ratio in deciding whether common issues predominate as to the harm suffered by the class.

I. THE ALLOCATION METHODS PROPOSED ARE NOT AN IMPERMISSIBLE FLUID RECOVERY.

As a method of distributing any relief obtained, Plaintiffs propose a formal claims procedure used in many consumer class actions in which class members could submit claim forms to obtain a share of any recovery. Recognizing that such a claims procedure may not result in the complete distribution of all amounts recovered, Plaintiffs also propose two additional possible methods to distribute the recovery: (i) automatic coupons on the pineapples that would likely benefit many class members; and (ii) a *cy pres* distribution to charities. Del Monte's claim that *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *rev'd on other grounds*, 471 U.S. 156 (1974) prohibits the distribution of any funds by way of a fluid recovery in a contested case is completely misplaced. *Eisen* concerned the use of a fluid recovery to avoid providing individual notice to all of the identifiable class members in accordance with Rule 23, and as a result precluded certification of a class action that contemplated a fluid recovery. Del Monte ignores numerous cases decided during the past 33 years that permit fluid recovery, and urges the Court to adopt a overly broad and nonsensical reading of *Eisen,* as prohibiting the distribution of *any* relief through fluid recovery or *cy pres* principles in contested cases. This is not now nor has it ever been the state of the law on fluid recovery in the Second Circuit. *See Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1268 (E.D.N.Y. 2006) (Post-*Eisen*, Courts in the Second Circuit have regularly approved of fluid recoveries).

As noted by Judge Weinstein in *Schwab*, fluid recovery "has been used in federal and state courts in both decided and settled cases." 449 F. Supp. 2d at 1256. Also, Judge Weinstein noted that most courts have refused to interpret *Eisen* in the manner Del Monte does by stating, "While the broadest possible reading of *Eisen* would bar all applications of fluid recovery in non-settled cases, such a reading is not justified." *Id.* at 1264; *see also*, *id.* at 1265 ("courts in the Second Circuit have shown themselves open to the application of fluid distribution in decided as well as settled cases, casting doubt upon any interpretation of *Eisen* that would completely prohibit such remedies"). As explained in *Jones v. National Distillers*, 56 F. Supp. 2d 355 (S.D.N.Y. 1999):

> "The Second Circuit has noted, however, that *Eisen* does not forbid all fluid recoveries based on cy pres principles; it only cautions against going to excess in creating class funds that do not meaningfully benefit the class as a whole."
>
> "Distributing funds outside the class is permissible where the funds 'primarily' benefit class members . . . especially where non-class distribution is not an initial purpose of the fund, but only an eventual way to dispose of the unclaimed portion."

Jones, 56 F. Supp. 2d at 357. As such, the automatic coupon allocation method proposed by Plaintiffs does not constitute an impermissible fluid recovery, but rather provides the Court with a proposed method of distributing to many of the class members the funds that are not distributed through the claims procedure. Based upon data indicating that many class members are repeat purchasers of Gold Pineapples, Plaintiffs contend that the automatic coupons will primarily benefit class members who purchased Gold Pineapples during the class period, and not

consumers who purchase Gold Pineapples for the first time after the close of the class period.[1] Further, there can be no doubt that the distribution of unclaimed funds to charitable causes is permissible and is used in consumer antitrust cases to distribute recoveries obtained from defendants. *See, e.g., In re Motorsports Merchandise Antitrust Litig.*, 160 F. Supp. 2d 1392, 1393-94 (N.D. Ga. 2001) (In an antitrust case concerning overcharges for souvenirs, the court noted that it is a common situation for residual funds to exist after paying identifiable claims and ordered *cy pres* distribution of those funds.)

Del Monte's further assertion that aggregate damage methodologies and fluid recovery violate its right to due process by permitting relief without requiring proof of damages by each class member is also without merit. As observed by a leading commentator on class actions: "Aggregate computation of class monetary relief is lawful and proper. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis." 2 NEWBERG ON CLASS ACTIONS, Chapter 10, § 10.05 at 10-8, 10-13 (3d ed. 1992).[2]

Finally, Del Monte's effort to draw a distinction in the permissible use of fluid recovery in settled as opposed to contested cases is contrary to the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In *Amchem*, the Supreme Court held that the only difference in certifying a class in a contested as opposed to a settled case is the inquiry of "whether the case, if tried would present intractable management problems . . . ." Thus, fluid

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[1] This is in contrast to the scenario in *Eisen* in which most of the relief would have been distributed to persons who were not members of the class. *See* 479 F.2d at 1010-11.

[2] *See also In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 350 (E.D. Mich. 2001) (citing Newberg); *In re NASDAQ Market Makers Antitrust Litig.*, 169 F.R.D. 493, 525 (S.D.N.Y. 1996) (aggregate damages methodologies "have been widely used in antitrust, securities and other class actions").

recovery can be properly used in both settled and contested cases when it seeks to distribute unclaimed funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141, n.10 (2d. Cir. 2005).

II. DR. TINARI'S CONCLUSIONS AS TO THE PASS THROUGH RATIO AND "BUT FOR" PRICE ARE MERITS ISSUES, AND COURTS HAVE REPEATEDLY REJECTED THE MANAGEABILITY ARGUMENTS RAISED BY DEL MONTE.[3]

Del Monte asserts that Dr. Tinari's conclusion that the pass-through ratio is close to 100% must be invalid, and that Dr. Tinari's damages model should have better accounted for the effect of increased output on damages.[4] These are obviously merits issues that concern the quantum of damages suffered by the class, not whether common issues predominate as to the type of injury suffered by the class. As explained by the court in *In re Foundry Resins Antitrust Litigation* in declining to consider attacks on the merits of an opinion proffered by plaintiffs' damages expert:

> For purposes of class certification, this Court need not entertain Defendants' arguments that essentially question whether Plaintiffs' expert is correct in his assessment of these market characteristics as to whether they do, in fact, show that every plaintiff suffered a common impact. Rather, this is for the trier of fact to later decide. . . . In considering a

[3] Dr. Tinari's use of the "top down" approach and a "but for" price to determine damages is well accepted, and Del Monte does not attack the admissibility of the report.

[4] In ruling on class certification, "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and . . . 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 re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

> class certification motion, a court must not decide the merits but instead must consider only whether plaintiffs have made a threshold showing "that what proof they will offer will be sufficiently generalized in nature that . . . the class action will provide a tremendous savings of time and effort."

No. 2:04md1638, 2007 U.S. Dist. LEXIS 32302 at *62 (S.D. Ohio May 2, 2007). *See also In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y. 1996) (finding that "it is for the jury to determine what weight to be given to the experts' conclusions" and declining to consider in detail defendant's expert affidavit challenging the methodology and conclusions of plaintiffs' expert concerning existence of generalized evidence of class-wide impact); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 487 (W.D. Pa. 1999) ("In light of the conflicting expert evidence presented, such arguments go to the weight of the testimony and must be resolved by the finder of fact"). Even assuming *arguendo* that Dr. Tinari's approach may have significant weaknesses, those weaknesses are not relevant at the class certification stage. *See In re Foundry Resins,* 2007 U.S. Dist. LEXIS 32302 at *23 ("it is irrelevant here that Beyer's reliable approach may indeed have significant weaknesses"); *see also In re Scrap Metal Antitrust Litig.*, No. 1:02 CV 0844, 2006 U.S. Dist. LEXIS 75873 at *52-53 (N.D. Ohio Sept. 30, 2006) (Affirming the admission of expert testimony, even though defendant claimed it was based on incomplete data and the conclusion was inaccurate); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 241 F.R.D. 77, 2007 U.S. Dist. LEXIS 20563 at *23-24 (D. Me. Mar. 21, 2007) (declining to decide a battle of the experts at the class certification stage). Indeed, "courts routinely reject such arguments, observing that they are improper at this stage of the litigation." *In re Foundry Resins,* 2007 U.S. Dist. LEXIS 32302 at * 71.

Del Monte's further argument that this case will require individual inquiries to determine whether each class member suffered some or all of the alleged overcharge has also been routinely rejected. *See In re Foundry Resins,* 2007 U.S. Dist. LEXIS 32302 AT *59 ("Where, as here, Plaintiffs have alleged a conspiracy to fix-prices and allocate markets, courts have presumed class-wide impact."); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 346 (E.D. Mich. 2001) ("The arguments that Defendants present here, that diversity in the ultimate price each class member paid for Cardizem CD and Cartia XT destroys predominance, are similarly unavailing."); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 242 (E.D.N.Y. 1998) ("Differences in the damages sustained by individual class members does not preclude a showing of typicality, nor defeat class certification.").

Accordingly, the Court should reject Del Monte's argument that the allocation methods proposed by Plaintiffs would result in an impermissible fluid recovery, and decline to consider Del Monte's criticism of the merits of Dr. Tinari's damages estimate in determining the manageability of class.

Dated: May 25, 2007
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel E. Sobelsohn, certify that on the 25th day of May 2007, I caused a true and correct copy of the THE INDIRECT PURCHASER PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW to be served electronically upon the persons listed below.

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