UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PINEAPPLES ANTITRUST LITIGATION This Document Relates To: ALL ACTIONS	Civil Action No. 1:04-MD-1628 (RMB) (MHD)

CORRECTED MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S ORDER SEEKING FURTHER INFORMATION AS TO THE MANAGEABILITY OF THE INDIRECT PURCHASER CLASS

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INTRODUCTION

In its Order of July 26, 2006, the Court requested additional information concerning the manageability of a damages class of indirect purchasers, including: (i) the projected size of the class; (ii) the proposed method of effecting notice to the class; (iii) the nature of evidence supporting individual claims; and (iv) (any) proposed *cy pres* distribution. In response, the indirect purchasers respectfully submit:

(i) the Declaration of Joseph M. Fisher on behalf of The Notice Company, www.notice.com, setting forth proposed notice procedures and distribution plans;

(ii) this brief Corrected Memorandum of Law[1] setting forth legal authority for the notice procedures and distribution plans proposed in the Fisher Declaration; and

(iii) a Litigation Plan setting forth notice procedures, a proposed trial plan that employs the case management tools discussed in *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001), and several options concerning the distribution of any monetary recovery obtained.

As discussed below, the proposed indirect purchaser classes do not present any manageability issues that have not been successfully addressed in numerous other cases. Accordingly, this Court should certify both an injunctive relief/restitution class of indirect purchasers under Rule 23(b)(2) and a damages class of indirect purchasers under Rule 23(b)(3).[2]

ARGUMENT

Claims of manageability difficulties by a defendant seeking to preserve its ill-gotten gains should be viewed with great skepticism. As the Second Circuit made clear in *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278 (S.D.N.Y. 1971):

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[1] The citations to the cases *In re Compact Disc Minimum Advertised Price Litig.*, 216 F.R.D. 197 (D. Me. 2003) and *In re NASDAQ Market Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998) were corrected. The prior memorandum provided temporary Westlaw citations.

[2] Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A., Inc. (collectively, "Del Monte") do not contest certification under Rule 23(b)(2) of an indirect purchaser class on the injunctive relief claim under Section 2 of the Sherman Act.

> Difficulties in management are of significance only if they make the class action a *less* "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important in the present cases where **the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains** which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.

Antibiotic. at 282-83 (emphasis added). The Second Circuit has emphatically recognized that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and `should be the exception rather than the rule.'" *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (quoting MANUAL FOR COMPLEX LITIGATION, § 1.43 n.72 (1977)). Thus, "class action status will be denied on the ground of unmanageability only when it is found that efficient management is nearly impossible." *Visa Check/Mastermoney,* 280 F.3d at 141 (quoting 8 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulations §* 166.03[3][a][i] (2d ed. 1997)).

As set forth below and in the concurrently filed Fisher Declaration and Litigation Plan, this case does not present any management difficulties that would justify allowing Del Monte to keep its ill-gotten gains. To the contrary the manageability issues present in this case have been routinely and successfully addressed in numerous other class actions.

I. THE PROJECTED SIZE OF THE INDIRECT PURCHASER CLASS DOES NOT PRESENT ANY OBSTACLE TO CERTIFICATION.

As explained in detail in the Fisher Declaration, the size of the class is ascertainable through data available from various sources, including the United States Census Bureau, produce industry data concerning sales of fresh pineapple, and data concerning Del Monte's share of the extra sweet fresh pineapple market. *See* Declaration of Joseph M. Fisher ("Fisher

Decl.") ¶¶ 7-13. Utilizing these materials, it can be estimated that the indirect purchaser class is estimated to consist of approximately 21.2 million households.

Although the size of the Class in the aggregate is large, manageability is simplified due to the fact that a large portion of the Class's aggregate damages have been suffered by a much smaller core group of persons. Of the 21.2 million households, approximately 2.12 million purchase one or more of pineapples per week. Fisher Decl. ¶ 9. Similarly, approximately 7.21 million households purchase at least one Del Monte Gold Pineapple per month. Fisher Decl. ¶ 10. Accordingly, of the 21.2 million class members, approximately 2.12 million purchase the majority of all Del Monte Gold Pineapples sold in the United States, and approximately 9.43 million purchase up to 90% of all of all Del Monte Gold Pineapples sold in the United States. Fisher Decl. ¶¶ 12-13. Thus, up to 90% of the Del Monte Gold Pineapples sold in the United States are purchased by the same core group of consumers who buy pineapples at least once a month.

The size and composition of the indirect purchaser class presents no obstacle to class certification.[3] The existence of millions of class members does not render the class unmanageable, as similarly large or even larger classes have been certified in antitrust class actions. *See In re Compact Disc Minimum Advertised Price Litig.*, 216 F.R.D. 197 (D. Me. 2003) (a class of millions of consumers); In re *Microsoft I-V Cases*, 135 Cal. App. 4th 706 (1st Dist.

[3] The size of the proposed class obviously meets the numerosity requirement of Rule 23(a)(1). *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members") (citing Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 30.05 (2d ed. 1985)). Although the Class is concededly very large – though hardly the largest – it must be noted that there is no upper limit that has been recognized to exist in Rule 23, and the size of the Class highlights how the superiority requirement of Rule 23 is overwhelmingly met in this case.

2006) (a class of more than 14 million California purchasers of Microsoft products); s*ee also In re Relafen Antirust Litig.*, 221 F.R.D. 260 (D. Mass. 2004) (millions of class members who purchased Relafen); In re *Cardizem CD Antitrust Litig.*, 200 F.R.D. 297 (E.D. Mich. 2003) (same); *In re NASDAQ Market Makers Antitrust Litig.*, 169 F.R.D. 493, 499 (S.D.N.Y. 1996) (millions of purchasers of approximately 1659 securities); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991) (millions of ticket purchasers for a multitude of city pairs and prices). Not only have Courts certified similarly large or larger classes, but Courts have also devised procedures by which individual members of these exceedingly large classes could submit individual damage claims. *See* Fisher Decl., Exs. D through I (claim forms for the Compact Disc Minimum Advertised Price Litigation, the California Microsoft I-V Cases, and cases alleging unlawful efforts to delay the introduction of generic versions of Taxol, Cardizem, Lorazepam/Clorazepate, and Buspirone).

II. THE NOTICE PLAN OUTLINED IN THE FISHER DECLARATION PROVIDES A PRACTICAL WAY OF PROVIDING NOTICE TO THE CLASS, WHICH COMPLIES WITH RULE 23.

The indirect purchaser plaintiffs submit the Declaration of Joseph M. Fisher of The Notice Company, one of the nation's leading firms providing notice and administration services for class action litigation, to outline a proposed notice program for the indirect purchaser class. In his declaration, Mr. Fisher suggests that adequate notice can be provided to the Class through a campaign of point of sale notices, a targeted media campaign, and maintenance of an informational website. Notification by mail can also be provided to consumers who provided Del Monte with their contact information in connection with marketing promotions.

A. Point of Sale Notice on the Pineapple Hangtags that Del Monte Already Uses for Rebate Promotions.

The product at issue – Del Monte Gold Pineapples – is uniquely suited to the provision of

notice to the class at the point of sale, because they are sold with an attached "hangtag" that can be used to provide a short form notice in this case. *See* Fisher Decl., Exs. B and C. Given that the vast majority of all Del Monte Gold Pineapples sold in retail stores are bought by repeat purchasers who buy pineapples at least once a month, placing the notice on the hangtags that Del Monte already affixes to each and every Del Monte Gold Pineapple sold, would be an extraordinarily effective means of providing notice to the class – the value of which is proven by Del Monte's use of the tags in its marketing.

Del Monte has for many years used the hangtags attached to the Del Monte Gold Pineapples to brand the MD2 variety pineapple it sells as the Del Monte Gold. Fisher Decl., Ex B. Del Monte recently entered into a cross promotion agreement with Disney to use the hangtags to promote the release of Disney animated movies. During this promotion, the front of the hangtags advertise a rebate offer for the home video title "Leroy and Stitch" and the reverse of the hangtag contains the rebate form that consumers complete with their names and addresses and mail back to Del Monte. Fisher Decl., Ex. C.

As discussed by Mr. Fisher, The Notice Company could easily design a hangtag similar in concept to the hangtag currently used by Del Monte to promote the Leroy & Stitch movie. The front of the hangtag would provide a summary notice of this class action, and the reverse would contain a form that can be filled out and returned by anyone wishing to opt out of the 23(b)(3) indirect purchaser damages class. The hangtag would also list a web site and mailing address that consumers could use to obtain additional information concerning the case as well as opt out forms and claims materials that can be downloaded and printed. Given the pineapple purchasing habits of consumers in the Class, placing these hangtags on the Del Monte Gold Pineapples for a period of three months would enable Class Counsel to reach the class members

who are likely responsible for up to 90% of all retail purchases of Del Monte Gold pineapples. Fisher Decl. ¶¶ 17-21.

Such point of sale notice campaigns have been endorsed by both commentators as well as the courts. Point of sale notices are specifically endorsed in the 2003 Advisory Committee notes to Fed. R. Civ. Proc. 23(c)(2), which states: "Informal methods [of notice] 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." Courts have used point of sale notices where the class members cannot be individually identified, but repeatedly purchase the product at issue and are therefore likely to be reached through point of sale displays. For example, in pharmaceutical antirust class actions concerning the misuse of patents to delay generic competition, courts have approved notice plans that include "point of sale" displays to be placed in pharmacies where the drugs are purchased. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.D.R. 369, 378 (D.D.C. 2002) (notice plan included point of sale displays at 55,000 pharmacies and was determined by the Court to be highly effective); *In re Relafen Antitrust Litig.*, slip op. (D. Mass. Sept. 28, 2005) (point of sale displays at pharmacies).

Point of sale notice was also used to provide both notice and a fluid recovery in the form of coupons in a class action on behalf of 16 million Burger King customers who were overcharged one cent on each food purchase. *See Feldman v. Quick Quality Restaurants, Inc.*, New York Law Journal, Jul. 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) ("Notice of the pending action is hereby ordered to be posted in each New York franchise owned and/or operated and/pr managed by [defendants]. In each restaurant three separate notices will be prominently exhibited. One of the three notices will be placed in close proximity to the posted menu and shall be of the same size. Two other notices of like size will be displayed in prominent locations inside the restaurant."); *see also Robinson v. Sears Roebuck & Co.*, No. 98-739 (E.D. Ark. Jan. 9, 2001) (notice in a discrimination class action was ordered to be posted in Sears Roebuck stores

to advise customers that they may be members of the plaintiff class).[4]

B. Notice by Mail and Electronic Mail for Any Class Members Whose Identities Are Known.

Although it is likely to be a small portion of the Class, Del Monte has records identifying some members of the Class, which it obtains in connection with its marketing and promotional activities. For example, the aforementioned "Leroy and Stich" promotion requires consumers to submit their names and addresses along with receipts of purchase. Further names – or at least email addresses -- should be available from Del Monte's website, which allows customers to submit comments or questions concerning Del Monte products. To the extent information exists as to the identity and contact information for these customers, the best practicable means of notifying these class members would be by individual notice by mail. *See* Rule 23(c)(2); *Compact Disc*, 216 F.R.D. at 218-19 (notice by mail to a subclass of 8.1 million members). To the extent Del Monte has email addresses for the class members, they could also be provided notice by email. *See In re Airline Ticket Antitrust Litig.*, 953 F.Supp. 280 (D. Minn. 1997) (electronic notice sufficient); *see also Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001) (notice provided to 2.4 million class members by mail and email); *Fine v. America Online, Inc.*, 743 N.E. 2d 416 (Ohio 2000) (notice provided to America Online customers by first

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[4] In class actions concerning overcharges by phone and credit card companies, notice is often effected by inserting a "stuffer" in with the class members regular billing statements. This is essentially a hybrid notice that provides notice by both mail and at the point of sale, which for all intents and purposes is the monthly billing statement. *See In re AT&T Optional Calling Plan Class Litig.*, No. 96-3527 (D.S.C. Nov. 9, 2000) (notice inserted in monthly bills); *Willmann v. GTE Corp.*, No. 96-492 (S.D. Ill. Dec. 19, 1996) (same); *Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A) (N.Y. Sup. 2005)(notice could be included with the telephone bill); *Beasley v. Wells Fargo Bank, N.A.*, Cal. Super. Ct., San Francisco Co. (Sept. 13, 1989) ("stuffer" inserted in monthly credit card bills); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 436-37 (D.N.M. 1988) (insert in billing statement); *Mountain States Tel. & Tel. Co. v. Dist. Court*, 778 P.2d 667, 674-77 (Colo.) (same), cert. denied, 493 U.S. 983 (1989).

class mail and email was sufficient).

C. Publication Notice Targeted to Reach the Demographic Groups that Purchase Del Monte Gold Pineapples.

In addition to posting the notice on the hangtags, and to the extent practicable, providing notice to individual class members by mail and email, notice would also be effected by publication. As described in the Fisher Declaration, The Notice Company is able to design a targeted publication notice program that targets the demographic groups that purchase Del Monte Gold Pineapples. Fisher Decl. ¶ 22.[5] Publication notice is often used in conjunction with or in lieu of other notice procedures such as point of sale displays, dedicated web sites, and direct mail to provide the best practicable notice to a damages class. *Cf. Reppert v. Marvin Lumber and Cedar Co., Inc.*, 359 F.3d 53 (5th Cir. 2004) (publication of notice in the Boston Globe was sufficient to notify class members who could be individually identified using defendants records); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004) ("When individual notice is infeasible, notice by publication in a newspaper of national circulation . . . is an acceptable substitute."). Here, publication notice would be one of several ways notice would be provided to the class.

D. Internet Based Notice.

"[I]n this age of electronic communications . . . . [t]he World Wide Web is an increasingly important method of communication and, of particular pertinence here, an increasingly important substitute for newspapers [in providing class notice]." *Mirfasihi*, 356 F.3d at 783. Accordingly, it is becoming increasingly common to provide class notices through dedicated web sites as well as posting information on the defendant's web site. *See In re NASDAQ Market Makers Antitrust Litig.*, 187 F.R.D. 465, 471 (S.D.N.Y. 1998) (summary notice

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[5] As described in the Fisher Declaration, the demographic data concerning purchasers of pineapples and readership data from Media Mark Research can be used to create a targeted publication notice campaign. Fisher Decl. ¶ 22.

posted on a web site); *see also In re First Databank Antitrust Litig.*, 2002 WL 257552 (D.D.C. Feb. 14, 2002) (dedicated web site); *In re Lotazepam & Clorazepate*, 2002 WL 246664 (D.D.C. Feb. 1, 2002) (same); *In re Synthroid Marketing Litig.*, 1998 WL 526566 (N.D. Ill. Aug. 17, 1998); *Compact Disc*, 216 F.R.D. at 203-4 (same). Courts have commented on the effectiveness of proving notice through dedicated web sites. *See In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp.2d 1329 (N.D. Ga. 2000) (discussing the large number of class members who visited the web site and downloaded claim forms).

Here, to effect notice to the class via the Internet, the following domain names have already been reserved: www.delmontegoldclassaction.com, www.pineappleclassaction.com, and www.delmontegoldpineappleclassaction.com. Fisher Decl. ¶22. In addition, notice could also be placed on the Fresh Del Monte web site, www.freshdelmonte.com, with a link to the web sites dedicated to this case. *Cf. Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A) (N.Y. Sup. 2005) (notice posted on defendant's web site); *Fine v. America Online, Inc.*, 743 N.E. 2d 416 (Ohio 2000) (used America Online email system to notify class). Finally, press releases that will generate "hits" in web searches concerning Del Monte and pineapples can also be issued in order to guide Internet users to the dedicated web sites for this case. Fisher Decl. ¶22.

III. AUTOMATIC DISCOUNTS FOR CURRENT PURCHASERS COULD DISTRIBUTE ANY RECOVERY WITHOUT REQUIRING AN ALLOCATION PLAN AND THE EXAMINATION OF INDIVIDUAL CLAIMS.

Although some class members will be capable of proving their entitlement to damages through sales receipts or other documentary evidence, and others by reference to admissible evidence of their Del Monte Gold Pineapple purchasing customs and habits, fluid recovery presents the best manner to distribute the benefits of this litigation to the majority of the Class. Through the use of such fluid recovery techniques in this case, it is possible to provide a meaningful benefit either directly or indirectly to the Class – without need to resort to a claims administration process. Fisher Decl. ¶¶ 24-27. While the use of fluid recovery cannot promise distribution of the case proceeds to individual class members in precise mathematical

accordance with their actual damages, it is able to provide a legally acceptable second best solution, which eliminates or greatly reduces the need for class members to submit individual claims. Moreover, it is far preferable to the alternative of allowing a tortfeasor to simply keep its ill gotten gains.

In this case, a claims administration procedure in which absent class members present individual claims -- although practical -- would not likely be the most efficient means of distributing monetary relief to the class members in proportion to their injury. Given that 90% of all purchases of Del Monte Gold Pineapples are made by repeat purchasers (*see* Fisher Decl. ¶¶ 9-13) who buy pineapples at least once a month -- and in many cases once a week -- it is likely that current and future purchasers of Del Monte Gold Pineapples are the same persons who previously purchased those pineapples and were overcharged on those purchases. Thus, a fluid recovery, through imposed price reductions or discount coupon issuance, would compensate the class members for the overcharges they previously paid.

Price rollbacks and coupons are widely accepted as an appropriate means of distributing benefits to a class, where the class consists of repeat purchasers who were overcharged for a product or service. *See Boyd v. Bell Atlantic Maryland, Inc.*, 887 A.2d 637 (Md. App. 2005) (noting that a distribution of discounts to current customers likely provides relief to most of the class members); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (discount coupons were useful to a class of repeat consumers); *see also Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill 1999) (in an action concerning misrepresentations as to the wax content of Turtle Wax car wax, $1 off coupons were distributed to current customers); *Feldman v. Quick Quality Restaurants, Inc.*, New York Law Journal, Jul. 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) (.50 cent discount coupons distributed to current Burger King customers); *Hoyga v. Superior Court*, 75 Cal. App. 3d 122 (1977) (defendant ordered to reduce the price of its product to current purchasers until the savings to consumers equaled the amounts previously overcharged); *Bebchicl v. Public Utli. Comm'n*, 318 F.2d 187 (D.C. Cir. 1963) (transit fare roll back); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1973) (room rate reductions for current customers);

Daar v. Yellow Cab Co., 67 Cal. 2d 695 (Cal. 1967) (reduction in cab fares for current customers); *Reich v. Dominick's Finer Foods, Inc.*, No. 78 CH 5667 (Cook Cty., Ill., Cir. Ct. Jul. 11, 1980) (to compensate class members in a false labeling action, settlement funds used to reduce prices for the mislabeled food).[6]

Such a fluid recovery, which would flow primarily to the Class, should not be confused with a *cy pres* recovery -- which may be used here as well -- but flows to primarily to persons not in the class. Because even current purchasers of Del Monte Gold Pineapples are still being charged a supracompetitive price and are members of the class, they too are suffering harm and

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[6] Courts routinely approve of coupon based relief as opposed to cash as all or a substantial part of the relief to be distributed to class members. *See, e.g., Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 959-61 (E.D. Tex. 2000) (approving settlement in which class members received ""Toshiba Bucks"" good only for purchase of Toshiba products). *See also, In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, at 1018-1019 (N.D. Ill., 2000) (approving settlement that provided for certificates to each class member usable for discounts on future transfers of funds); *In re Superior Beverage/ Glass Container Consol. Pretrial*, 133 F.R.D. 119, 122 (N.D. Ill. 1990) (discount purchase certificates made available to class members upon proof of claim and redeemable for rebates on future glass container purchases); *Cusack v. Bank United FSB*, 159 F.3d 1040, 1041 (7th Cir. 1998) (discount certificates for credits against mortgage closing costs approved); *In re Residential Doors Antitrust Litig.*, Trade Cas. (CCH) ¶¶ 72,113, 1998 WL 151804 (E.D. Pa. 1998) (approving settlement providing class members with $2.4 million in discount certificates applicable toward the purchase of qualifying residential flush doors); *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *57-58 (N.Y. Sup. Ct. Jan. 3, 1997) (approving settlement providing in-kind relief for class members); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996) (approving settlement of a coupon redeemable for $400 off the price of any new Ford car or light truck within one year, with no redemption value for coupon); *Weiss v. Mercedes Benz*, 899 F. Supp. 1297, 1299-1300 (D.N.J. 1995) (approving settlement providing for certificates to each class member usable to off-set the purchase or lease of one of defendant's Mercedes-Benz automobiles); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 313-15 (N.D. Ga. 1993) (court approved a settlement in a price-fixing suit against a group of domestic air carries in which $408 million of the $458 million settlement consideration was in discount certificates applicable toward future air travel); *State v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 679-82 (S.D.N.Y. 1991) (approval of $25 million settlement consisting of $5.00 coupons to five million purchasers); *Langford v. Bombay Palace Restaurants, Inc.*, No. 88 Civ. 5279 (CSH), 1991 U.S. Dist. LEXIS 4730 (S.D.N.Y. Apr. 8, 1991) (approving settlement providing for rebates to each class member, good for use at a variety of restaurants and hotels); *In re Cuisinart Food Processor Antitrust Litig.*, No. M.D.L. 447, 1983 U.S. Dist. LEXIS 12412 (D. Conn. Oct. 24, 1983) (approving settlement that provided for coupon discounts on Cuisinart products).

will benefit from the relief provided to the class. (Stated differently, there is no danger of providing relief to someone who has not suffered injury, because even current purchasers of Del Monte Gold Pineapples are suffering injury.) Amongst the many positive features of the use of fluid recovery in this case, is that it would compensate purchasers in close proportion to their relative share of the aggregate damages suffered. Given that most current purchasers are likely purchasing the same quantity of pineapples they previously purchased and were overcharged for, distributing relief in the form of automatic coupons on current purchases ensures that class members are provided relief in proportion to the overcharges that they paid. (A class member who tends to purchase one pineapple a month will benefit less from the coupons than a class member who tends to purchase one pineapple a week.)

IV. THE PRESNTATION OF EVIDENCE AS TO MEMBERSHIP IN THE CLASS AND DAMAGES

A. Evidence To Be Presented By Named Class Representatives At Trial.[7]

Each of the named class representatives is expected to testify at trial that they are members of the class because they each purchased at least one Del Monte Gold Pineapple, not for resale, during the class period. For example, with respect to membership in the class, class representative Brenda Caldarelli is certain that she purchased at least one Del Monte Gold pineapple because she recognizes the distinctive cardboard hangtag with the Del Monte

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[7] The ability of indirect plaintiffs to prove their claims at trial is not properly at issue as the class certification decision is not an "occasion for examination of the merits of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *see also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974).

logo that is affixed to the pineapples, and as a practical matter, the supermarket she shops at only sells Del Monte Gold Pineapples.[8]

Since the indirect purchasers seek an aggregate award of damages equal to the amount of the overcharge for the Del Monte Gold pineapple, it is not necessary for the named plaintiffs to also testify as to their individual damages. *See Cardizem CD,* 200 F.R.D. at 321-24 ("the use of an aggregate approach to measure class-wide damage is appropriate"); *NASDAQ,* 169 F.R.D. at 525 (aggregate damages methodologies "have been widely used in antitrust, securities and other class actions"); *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 281 (S.D.N.Y. 1971) ("defendants also suggest that they will be prejudiced under the court's plan by an inability to defend against consumers who are unable to prove their purchases. This logic seems somewhat misguided since the very purpose of the court's plan is to eliminate the need for individual proof of purchases. . . . Assuming damages are later awarded on the basis of sales figures and that the total of individual claims then filed is less than the award, the court will then consider what disposition to make of the residue.").[9]

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[8] Prior to the introduction of the Dole Premium Select Pineapple in 2000, the Del Monte Gold Pineapple was the only extra sweet variety widely sold in the United States. Thus, all purchases of extra sweet pineapples in the United States prior to 2000 were purchases of Del Monte Gold brand pineapples.

[9] In *NASDAQ*, this Court upheld the use of an aggregate damage calculation in a highly complicated horizontal price-fixing conspiracy involving a class of more than one million members, stating that such damage analyses have been widely used in antitrust, securities and other class actions. *See* 169 F.R.D. at 525 (citing cases). In its extended discussion of aggregate damages, this Court has explained that such an approach has "obvious case management advantages," including eliminating the need for individual damage proofs at trial. *Id.* at 524-26. *See also In Re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 (D. Me. 2006) (Defendant's effort to determine individual damages was in reality "a dispute over the appropriateness of the plaintiffs' proposal for an 'aggregate award,' sometimes called 'fluid recovery.' Under such an approach, the jury determines the entire damage to the class without deciding how much each individual class member is to receive. Allocation of the award is made later, administratively, upon the submission of claims, and often according to a formula. . . . Judge Weinstein recently canvassed the authorities on this approach and found it permissible. *Schwab v. Philip Morris USA, Inc.*, 2005 U.S. Dist. LEXIS 27469, No. CV 04-1945 at *5-9 (E.D.N.Y. Nov. 14, 2005)").

However, if called upon to do so at trial, each named plaintiff could also testify as to (i) any specific recollection they may have as to the exact number of pineapples they purchased during the class period; (ii) the number of pineapples they are absolutely certain they purchased (which may be less than the actual number purchased); and (iii) their habit with respect to the frequency and quantity of their pineapple purchases. Evidence as to habit and custom concerning the purchase of extra sweet pineapples by the named plaintiffs is certainly admissible to determine individual damages and/or create a plan of allocation to distribute those damages to the class. *See* Fed. R. Evid. 406; *Torah Soft Ltd. v. Drosnin*, No. 00Civ0676, 2003 U.S. Dist. LEXIS16273 (S.D.N.Y. 2003) at *13 (evidence as to habit and custom admissible).

B. Evidence To Be Presented By Unnamed Class Members In A Claims Administration Procedure.

To the extent relief is not provided by automatic price reductions on Del Monte Gold Pineapples or by a *cy pres* distribution, a claims administration procedure can be devised to confirm whether a person is a member of class and obtain data to permit the allocation of the aggregate damages obtained among members of the class. Fisher Decl. ¶¶ 28-34. The size of the class does not present any obstacle to administering claims as individual claim forms have been processed for similarly large or larger classes. *Id.*, Exs. D and E (claim forms for the *In re Compact Disc Minimum Advertised Price Litigation* and *Microsoft I-V Cases).*

As discussed in the Fisher Declaration, a claim form could be designed to first verify that a claimant is a member of the indirect purchaser class, and then obtain data to allocate relief in proportion to the overcharges paid by the class member. Fisher Decl. ¶¶ 30-31. The first part of the claim form could track the form used in the *In re Compact Disc Minimum Advertised Price*

Litigation, and confirm that (i) the class member purchased a Del Monte Gold Pineapple, (ii) the purchase was not made for resale, and (iii) the purchase was made during the class period. Fisher Decl., Ex. C (claim form).

The second part of the claim form could then seek to determine individual damages by asking class members to describe their frequency and quantity of pineapple purchases to assist in allocating relief among the class members in proportion to the harm suffered. Fisher Decl. ¶ 31. Claim forms that solicit data on purchases of products by class members for the purpose of allocating damages are frequently used in antitrust suits. Such inquiries were made on the claim form used in the *Microsoft I-V Cases*, as well as the claim forms used in the indirect purchaser antitrust suits concerning delays in the introduction of generic alternatives to the drugs Taxol, Cardizem, Lorazepam/Clorazepate, and Buspirone. Fisher Decl., Exs. E through I (claim forms information regarding the frequency with which products were purchased).[10]

Alternatively, class members could simply submit claim forms confirming their purchase of the pineapples during the class period and receive a pro-rata cash award or voucher up to a certain value, to be determined based upon the number of claims submitted. *Cf. Compact Disc.*,

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[10] As described in the Fisher Declaration, protection against bogus claims could be achieved by various means, including: (i) requiring that class members sign the claim form under penalty of perjury; (ii) limiting the number of claims and/or amount of relief available per household; (iii) limiting the availability of cash relief above a certain amount to class members who provide receipts; (iv) providing differing amounts and types of relief (i.e., cash, coupons, vouchers, or gift cards) depending upon the degree of proof class members are able to provide; (v) requiring that claim forms seeking cash or vouchers be printed out and submitted by mail rather than through the dedicated web sites maintained for the case; (vi) placing unique numerical or bar codes on the vouchers or coupons to prevent their duplication or repeated use; and (vii) to the extent relief is distributed by the delivery of coupons, vouchers, or checks by email, we could limit the amount of relief provided to each email address or computer i.p. address. Fisher Decl. ¶ 32.

216 F.R.D. at 208-9; Fisher Decl., Ex. D. While less precise in terms of allocating damages among the class members in proportion to the harm they suffered, this pro-rata award is easier and less costly to administer, while still ensuring that class members obtain relief.

V. TO ADDRESS MANAGEABILITY CONCERNS THE COURT CAN ALSO UTILIZE FLUID RECOVERY AND *CY PRES* PRINCIPLES TO DISTRIBUTE RELIEF IN THIS CASE.

It is well settled law that plaintiffs in class actions may seek an aggregate award or "fluid recovery" to be allocated later pursuant to a court approved distribution plan. *See In Re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 (D. Me. 2006) (Defendant's effort to determine individual damages was in reality "a dispute over the appropriateness of the plaintiffs' proposal for an 'aggregate award,' sometimes called 'fluid recovery.' Under such an approach, the jury determines the entire damage to the class without deciding how much each individual class member is to receive. Allocation of the award is made later, administratively, upon the submission of claims, and often according to a formula. . . . Judge Weinstein recently canvassed the authorities on this approach and found it permissible."); *Schwab v. Philip Morris USA, Inc.*, 2005 U.S. Dist. LEXIS 27469, at *5-9 (E.D.N.Y. Nov. 14, 2005) (Weinstein, J.) (collecting and analyzing cases on fluid recovery). In permitting the use of fluid recovery more than thirty years ago, the Second Circuit explained:

> Difficulties in management are of significance only if they make the class action a *less* "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important in the present cases where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains.

Antibiotic at 282-83 (emphasis added).[11] As noted by Judge Weinstein in *Schwab,* Fluid recovery has received wide support from courts and commentators[12], has been accepted by nearly all federal circuits that have considered it in both settled cases and decided cases, and nine of eleven state that have considered the issue have endorsed the use of fluid recovery. In addition, California, New Jersey, and North Dakota have enacted statutes permitting the use of fluid recovery in class actions. *See* Cal. Civ. Proc. Code § 384; N.J.R. Civ. P. 4:32-2(c); N.D.R. Civ. P. 23(o)(3)(E).

In addition, "[t]he Court has broad discretion and equitable powers to permit the use of *cy pres* principles to distribute unclaimed class settlement funds when, as in this case, class members may be difficult to locate, and where notification and distribution would be costly, and the check class members receive would be for a minimal amount." *Plotz v. Nyat Maintenance Corp.*, 20-06 U.S. Dist. LEXIS 4799 at *3 (S.D.N.Y. Feb. 6, 2006) (citing *Jones v. Nat'l*

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[11] The Court went on to explain that proof of individualized damages is not required: "Defendants also suggest that they will be prejudiced under the court's plan by an inability to defend against consumers who are unable to prove their purchases. This logic seems somewhat misguided since the very purpose of the court's plan is to eliminate the need for individual proof of purchases. . . . Assuming damages are later awarded on the basis of sales figures and that the total of individual claims then filed is less than the award, the court will then consider what disposition to make of the residue." A*ntibiotic,* 333 F. Supp. at 281. The same approach has also been endorsed in more recent cases. *See Cardizem CD,* 200 F.R.D. at 321-24 ("the use of an aggregate approach to measure class-wide damage is appropriate"); *NASDAQ,* 169 F.R.D. at 525 (aggregate damages methodologies "have been widely used in antitrust, securities and other class actions").

[12] . *See, e.g., Simer v. Rios*, 661 F.2d 655, 676-78 (7th Cir. 1981) (fluid recovery should be used when it would promote statutory goals of deterrence, disgorgement, and compensation); *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 282-283 (S.D.N.Y. 1971) (without fluid recovery, defendants would have the "freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small"); *California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472, 224 Cal. Rptr. 605, 715 P.2d 564 (Cal. 1986) ("Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.")

Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999)). The Court may direct that residual funds be distributed to a reputable charity or public service organization. *See Jones,* 56 F. Supp. 2d at 359 (S.D.N.Y. 1999). Unclaimed settlement funds may be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members and those similarly situated. *In re Holocaust Victim Assets Litigation*, 424 F.3d 132, 141 n.10 (2d. Cir. 2005). "Use of funds for purposes closely related to their origin is . . . the best cy pres application." *Fears v. Wilhelmina Model Agency, Inc.*, 2005 U.S. Dist. LEXIS 7961 (S.D.N.Y. May 5, 2005).

Applying the foregoing principles, the indirect purchasers propose the following fluid recovery/*cy pres* distribution of any recovery obtained in this action.

A. Distribution Of The Recovery In The Form Of Automatic Discounts On Pineapples For Current Purchasers.

As discussed in Section I, above, the market data we have suggests that current and future purchasers of Del Monte Gold Pineapples are the same persons who previously purchased those pineapples and were overcharged on those purchases. Thus, as discussed in Section III, above, a fluid recovery consisting of price rollbacks or coupons that are automatically applied by retailers for current purchasers of the Del Monte Gold Pineapples, would be an efficient and fair means of distributing any recovery to the persons who suffered damages. *See Boyd v. Bell Atlantic Maryland, Inc.*, 887 A.2d 637 (Md. App. 2005) (noting that a distribution of discounts to current customers likely provides relief to most of the class members); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (discount coupons were useful to a class of repeat consumers); *Feldman v. Quick Quality Restaurants, Inc.*, New York Law Journal, Jul. 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) (.50 cent discount coupons distributed to current Burger King customers); *Hoyga v. Superior Court*, 75 Cal. App. 3d 122 (1977) (defendant ordered to reduce the price of its product to current purchasers until the savings to consumers equaled the amounts previously overcharged).

B. Charitable Distributions.

Funds remaining after the distribution of coupons or a formal claims administration procedure can be distributed to charitable organizations consistent with the principles of *cy pres* relief. Preliminarily, we would suggest distribution of relief to food bank charities throughout the United States such as Second Harvest, www.secondharvest.org, which acts as an umbrella organization that distributes funds to local food banks, as well as other organizations that provide relief to disaster victims, the hungry, the homeless, and the poor. The court could also seek submissions from charitable organizations who would like to obtain a portion of the available *cy pres* relief, and order the distribution of funds based upon those submissions. Distribution of *cy pres* relief will provide much needed assistance to several worthwhile non-profit organizations, while providing the simultaneous salutary benefit of defeasing Del Monte of its ill gotten gains.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Class Certification and enter an order certifying the Indirect Purchaser Class(es) pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Dated: August 22, 2006
New York, New York

Respectfully submitted,

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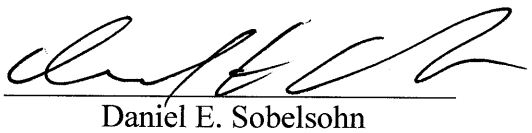
CERTIFICATE OF SERVICE

I, Daniel E. Sobelsohn, certify that on the 31st day of August 2006, I caused a true and correct copy of the **MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S ORDER SEEKING FURTHER INFORMATION AS TO THE MANAGEABILITY OF THE INDIRECT PURCHASER CLASS** to be served electronically and by overnight courier upon the persons listed below.



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