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U.S. DISTRICT COURT SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FRESH DEL MONTE PINEAPPLES ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS

Civil Action No. 03-CV-10230 (RMB)

CONSOLIDATED DIRECT PURCHASER AND INDIRECT PURCHASER CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

This Consolidated Class Action Complaint ("Complaint") supersedes all earlier complaints filed in this District in the above actions. The plaintiffs identified in paragraphs 20-23 herein, on behalf of themselves and all others similarly situated, hereby bring this action on behalf of a class of "direct purchasers" seeking treble damages, other monetary relief and equitable relief for Defendants' violations of federal antitrust law and state common law principles of restitution/disgorgement/unjust enrichment. The plaintiffs identified in paragraphs 24-28 herein, on behalf of themselves and all others similarly situated, hereby bring this action on behalf of a class of "indirect purchasers" seeking federal injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 15, treble damages and other relief for Defendants' violations of federal and state antitrust laws, state consumer protection laws and state common law principles of restitution/disgorgement/unjust enrichment.[1] Plaintiffs' claims as to themselves and their

[1] Defendants have moved before the Judicial Panel on Multidistrict Litigation (MDL No. 1628) to transfer several later filed indirect purchaser cases to this Court. Unlike this case, which asserts claims under the laws of every state that permits damages actions by indirect purchasers, the various later filed indirect purchaser cases assert damages claims only under the laws of the particular states in which they were filed. Thus, each of the later filed indirect

own actions are based upon their own knowledge. All other allegations are based upon information and belief pursuant to the investigation of counsel. As and for their Complaint, Plaintiffs allege as follows:

NATURE OF THE ACTION

1. This case arises from the actions taken by Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A., Inc., (collectively, "Del Monte" or "Defendants") to unlawfully obtain and maintain a monopoly over the propagation, marketing and sale of whole, fresh, extra sweet pineapples known in the trade as the "Gold" pineapple (also known as "MD-2" or "73-114") and marketed to consumers as the " Fresh Del Monte Gold™" pineapple.

2. The "Fresh Del Monte Gold™" pineapple is the best-selling pineapple in the world. It is superior in color, taste, sweetness, vitamin C content, brick content, texture, smell, and durability in storage to the traditional fresh whole pineapple variety known in the United States as the "Champaka," which is a species of the Smooth Cayenne variety.

3. Plaintiffs allege that Defendants have improperly obtained and maintained a monopoly over the propagation, marketing, and sale of fresh, whole, extra-sweet pineapple in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, by: (i) securing a patent, through the

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purchaser cases is duplicative of this action. The later filed indirect purchaser cases that are the subject of the motion before the Judicial Panel on Multidistrict Litigation are as follows: *Williams v. Del Monte Fresh Produce Co.*, (MD. Tenn., Case No. 04-CV-320); *Conroy v. Fresh Del Monte Produce, Inc.*, (N.D. Cal., Case No. 04-CV-1520 (SBA)); *Weiss v. Del Monte Fresh Produce Co.*, (C.D. Cal., Case No. 04-CV-2708 (RSWL)); *Linden v. Del Monte Fresh Produce Co.*, (C.D. Cal., Case No. 04-CV-2708 (RSWL)); *Vassilatos v. Del Monte Fresh Produce Co.*, (S.D. Fla., Case No. 04-CV-80450); and *Churosh v. Del Monte Fresh Produce Co.*, (D. Ariz., Case No. CV-2004-008384).

prosecution of a fraudulent patent application with the United States Patent and Trademark Office ("PTO") for a pineapple variety it knew, and has now admitted, was unpatentable (*Walker-Process Fraud*); (ii) issuing intentionally false and misleading letters to competitors and others stating that the "Fresh Del Monte Gold™" pineapple was patented by Defendants and threatening litigation if they engage in the propagation, marketing, or sale of that pineapple (*Anticompetitive Letters*); (iii) commencing and pursuing sham patent litigation in order to foreclose competition in the fresh, whole, extra-sweet pineapple market (*Sham Patent Litigation*).

4. *Walker-Process Fraud* — In an attempt to obtain legal rights to a variety of fresh, whole, extra-sweet pineapple, and to prevent competitors from raising and selling that variety of pineapple, Defendants filed a patent application for the "Fresh Del Monte Gold™" pineapple in 1992. The PTO rejected Defendants' patent application on the ground that the "Fresh Del Monte Gold™" variety was already within the public domain by virtue of pre-patent sales in the United States. The application also was rejected because the rights to the "Fresh Del Monte Gold™" pineapple were co-owned with another entity which refused to accede to Defendants' demand for a joint patent.

5. On August 16, 1994, Defendants improperly and fraudulently obtained a patent on the Calvin Oda or "CO-2" pineapple.

6. *Anticompetitive Letters* — Knowing the "Fresh Del Monte Gold™" pineapple was unpatented and unpatentable and utilizing the new CO-2 patent, Defendants engaged in an anticompetitive campaign designed to stifle competition and maintain a monopoly over the fresh, whole, extra-sweet pineapple market.

7. This anticompetitive campaign included issuing false, misleading, and threatening letters to Dole Food Company, Inc. and Dole Fresh Fruit Company (collectively "Dole"), Costa Rican growers, and others within the trade, claiming proprietary rights over varieties of fresh, whole, extra-sweet pineapple when, in fact, no such legal rights existed.

8. For example, Defendants wrote letters claiming that some of their material had been *stolen* and that the recipients of the letters might be in possession of some of the *stolen* material. Defendants also improperly claimed the *patent covered the "Fresh Del Monte Gold™" pineapple*, thereby causing recipients to believe incorrectly that Defendants had *a legally protected interest* in the "Fresh Del Monte Gold™" pineapple and to fear that Defendants would commence a patent infringement action against those asserted to have misused Defendants' purported property.

9. *Sham Patent Litigation* - In addition to issuing false, misleading, and threatening letters to competitors, and instilling fear that competitors would be sued if they attempted to grow or sell "Fresh Del Monte Gold™" pineapples, Defendants also filed sham patent litigation against Dole, as well as Maui Land and Pineapple Company, Inc. and its subsidiary Maui Pineapple Company, Ltd. (collectively "Maui Pineapple"), in order to prevent them from entering the fresh, whole, extra-sweet pineapple market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Specifically, Defendants claimed that these two competitors, not surprisingly Defendants' two largest potential competitors, infringed a claimed patent on the "Fresh Del Monte Gold™" pineapple.

10. Defendants pursued these claims for several years. It was not until May of 2003, that *Defendants admitted the CO-2 patent was obtained improperly*. Defendants withdrew the patent for the same reason the PTO had rejected the "Fresh Del Monte Gold™" patent

application: the pineapple was within the public domain prior to the patent application by virtue of pre-patent sales of the pineapple in the United States.

11. As a direct and proximate result of Defendants' anticompetitive conduct, competitors did not produce competing fresh, whole, extra-sweet pineapple because Defendants, through their actions, convinced the competitors that the "Fresh Del Monte Gold™" was successfully patented when Defendants knew, in fact, that it was not. Thus, for more than seven years, by relying upon a fraudulently obtained patent, Defendants managed to prevent any competitor from entering the market for whole, fresh, extra sweet pineapples.

12. As a direct and proximate result of Defendants' anticompetitive conduct, Defendants have been able to maintain a monopoly in the market for whole, fresh, extra sweet pineapples. Defendants used their unlawfully obtained monopoly power to charge supracompetitive prices for the Gold pineapples, thereby causing both direct and indirect purchasers of the Gold pineapples to sustain injury to their business and property.

13. This antitrust class action is brought on behalf of two classes of plaintiffs that have suffered injury as a result of Defendants' unlawful conduct – a class of "direct purchasers" and a class of "indirect purchasers".

14. The "Direct Purchaser Class", represented by the Plaintiffs identified in Paragraphs 20-23 herein is comprised of all persons and entities who purchased a pineapple commonly referred to within the trade as the "Fresh Del Monte Gold™" (also known as "MD-2" or "73-114") directly from Defendants Del Monte Fresh Produce Company or Del Monte Fresh Produce, N.A., Inc. (collectively "Fresh Del Monte" or "Defendants") from March 1, 1996 and continuing to present (the "Class Period").

15. The "Indirect Purchaser Class", represented by the Plaintiffs identified in Paragraphs 24-28 herein, is comprised of all end-payors, *i.e.*, consumers, the last persons and entities in the chain of distribution, that purchased a pineapple commonly referred to within the trade as the "Fresh Del Monte Gold™" (also known as "MD-2" or "73-114"), other than for resale, during the Class Period.

16. This action is brought under federal and state antitrust laws, state consumer protection laws, and state common law, and seeks damages and other declaratory and injunctive relief. The absence of competition in the fresh, whole, extra-sweet pineapple market forced Plaintiffs to pay supracompetitive prices, thereby causing them to sustain injury to their business and property.

JURISDICTION AND VENUE

17. The claims of the Direct Purchaser Class are brought pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to recover treble damages and costs of suit, including reasonable attorneys' fees as well as declaratory and injunctive relief against Defendants for injuries the Direct Purchaser Class sustained by reason of Defendants' violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. The claims of the Indirect Purchaser Class are brought pursuant to Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, to obtain injunctive relief to prevent Defendants' violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, as well as attorneys fees, and costs.

18. Subject matter jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1337, and by Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Diversity jurisdiction exists pursuant to 28 U.S.C. § 1332 as the amount in controversy as to the

claims of each named plaintiff representing each of the Classes and the other members of each Class exceeds the sum or value of $75,000, exclusive of interest and costs, as each class member has a common and integrated interest in Defendants ill-gotten gain, for which each Class seeks the remedy of disgorgement.

19. Venue is proper in this District pursuant to the provisions of 15 U.S.C. § 22 and 28 U.S.C. § 1391. Defendants transact business, maintain offices, or are found within this state. The interstate commerce described hereinafter is carried on, in part, within this District.

THE DIRECT PURCHASER PLAINTIFFS

20. Plaintiff American Banana Co., Inc. ("American Banana"), is a New York corporation with its principal place of business at 250 Coster Street, Bronx, New York. During the time period covered by this Complaint, Plaintiff American Banana purchased "Fresh Del Monte Gold™" pineapple directly from a Defendant.

21. Plaintiff J. Bonafede Co., Inc. ("J. Bonafede") is a Massachusetts corporation with its principal place of business at 29 N.E. Produce Center, Chelsea, Massachusetts. During the time period covered by this Complaint, Plaintiff J. Bonafede purchased "Fresh Del Monte Gold™" pineapple directly from a Defendant.

22. Plaintiff Just-A-Mere Trading Company, LLC ("JAMTC"), is a limited liability company, formed under the laws of Maryland, and with its principal place of business at 4784 Ferry Neck Road, Royal Oak, Maryland. During the time period covered by this Complaint, Plaintiff JMTC purchased "Fresh Del Monte Gold™" pineapple directly from a Defendant.

23. Plaintiffs Meijer, Inc. and Meijer Distribution, Inc. (collectively "Meijer") are corporations organized under the laws of the State of Michigan, with their principal places of business at 2829 Walker NW, Grand Rapids, Michigan. During the time period covered by this

Complaint, the Meijer Plaintiffs purchased "Fresh Del Monte Gold™" pineapple directly from a Defendant.

THE INDIRECT PURCHASER PLAINTIFFS

24. Plaintiff Brenda Caldarelli is a resident of Los Angeles County, California who purchased a Fresh Del Monte Gold™ pineapple in California during the class period other than for resale and was injured by the illegal conduct alleged herein.

25. Plaintiff Alberta Lopez is a resident of Los Angeles County, California who purchased a Fresh Del Monte Gold™ pineapple in California during the class period other than for resale and was injured by the illegal conduct alleged herein.

26. Plaintiff Carrie Pardy is a resident of Los Angeles County, California who purchased a Fresh Del Monte Gold™ pineapple in California during the class period other than for resale and was injured by the illegal conduct alleged herein.

27. Plaintiff Gary Freed is a resident of Monmouth County, New Jersey who purchased a Fresh Del Monte Gold™ pineapple in New Jersey during the class period other than for resale and was injured by the illegal conduct alleged herein.

28. Plaintiff Neil Schwam is a resident of New York County, New York who purchased a Fresh Del Monte Gold™ pineapple in New York during the class period other than for resale and was injured by the illegal conduct alleged herein.

DEFENDANTS

29. Defendant Del Monte Fresh Produce Company is a Delaware Corporation, with its principal place of business at 241 Sevilla Avenue, Coral Gables, Florida.

30. Defendant Del Monte Fresh Produce, N.A., Inc., is a Florida Corporation, with its principal place of business at 241 Sevilla Avenue, Coral Gables, Florida.

31. Defendants' sale of the "Fresh Del Monte Gold™" pineapple has enabled them to dominate the fresh, whole extra, sweet or pineapple market. Defendants shipped over 40 million 40 pound boxes of the "Fresh Del Monte Gold™" pineapples from plantations in Costa Rica to markets in the United States and Europe between May of 1996 until December of 2000. Defendants' total pineapple sales increased from approximately $150 million in 1995 to around $350 million in 2000 and $440 million in 2002. Nearly all of that growth is attributable to "Fresh Del Monte Gold™" pineapple sales.

TRADE AND COMMERCE

32. During the Class Period, Defendants propagated, marketed, and sold "Fresh Del Monte Gold™" pineapple in a continuous and uninterrupted flow in interstate commerce to customers located in states other than the state in which Defendants resided or produced the pineapple.

33. The business activities of Defendants that are the subject of this Complaint were in the flow of and substantially affected interstate trade and commerce. Defendants frequently use interstate transportation and communications in connection with their business.

FACTUAL BACKGROUND

The Fresh Pineapple Trade

34. Del Monte is the largest marketer and seller of fresh pineapple in the world, and has been engaged in, and currently engages in interstate commerce in fresh whole pineapple throughout the United States.

35. The fresh whole pineapple market has very few participants, even relative to the fresh fruit market in general, and there are significant barriers to the entry of new competitors. The three principal competitors in the market are Del Monte, Dole, and Maui Pineapple. These companies compete directly for the same wholesalers, distributors, and retail customers in the United States fresh, whole, pineapple market, and more specifically, in the market for fresh, whole, extra-sweet pineapple — the hybrids at issue in this litigation.

36. Del Monte has controlling shares in both the general market for fresh, whole pineapple and the more specialized market for fresh, whole, extra-sweet pineapple. As of April 2001, Del Monte had approximately a 60% share of the United States fresh whole pineapple market, compared with an estimated 30% share for Dole, an estimated 5% share for Maui Pineapple, and an estimated 5% share for the few other competitors in the market. As for the specialized fresh, whole, extra-sweet pineapple market, Del Monte has an even larger market share: more than 75%.

The Development of the Gold Pineapple

37. The pineapple that has come to be known as "Del Monte Gold" was developed by scientists at the Pineapple Research Institute ("PRI"). The PRI was a Hawaiian unincorporated trade organization formed in 1941 as a department of the Pineapple Producers Cooperative Associated, Ltd. ("PPCA"), a corporation organized and existing under the laws of the Territory of Hawaii. In February 1944, following the dissolution of PPCA, the PRI was reorganized under the same name and existed until its dissolution in 1987.

38. The PRI was a trade group of growers that conducted joint research in a hot house laboratory on the island of Maui, Hawaii. One of the activities of the PRI was the

experimental cultivation and creation of new pineapple varieties. Scientists at the PRI conducted experiments to improve the standard variety of pineapple known as the "Champaka."

39. In 1972, the PRI developed a new pineapple hybrid, known as PRI 73-114 and PRI 73-50. This new hybrid was bright "Gold" in color, sweeter, less acidic, and highly resistant to parasites and internal rotting. In addition, this new hybrid could survive cold storage for up to two weeks while the Champaka began to rot after a week. While standard pineapples were green, this pineapple turned "Gold" when ripe. The former research head of the Pineapple Research Institute described this new hybrid pineapple as "remarkable" because it was superior to the Champaka pineapple in so many respects. This new variety of pineapple came to be known as the MD-2 variety.

40. The PRI dissolved in 1987. Seedlings of PRI 73-114 and PRI 73-50 were turned over to Del Monte and Maui Pineapple. These companies were the two remaining members of the PRI.

Del Monte Begins Developing and Selling the "Fresh Del Monte Gold™" Before Applying for a Patent

41. In the late 1980's or early 1990's, Del Monte began selling small amounts of the MD-2 fruit in the United States under the name "Fresh Del Monte Gold.™" Some of these pineapples were shipped to Publix stores in Florida and some to Stop and Shop stores in Boston. By at least as early as 1992, Del Monte was also selling hundreds of boxes of the MD-2 fruit to other regional markets, including Detroit, Michigan.

42. Because of its superiority to the standard Champaka variety pineapple, the "Del Monte Gold™" pineapple quickly became an enormous commercial success and has remained the pineapple of choice in this country and around the world. Some restaurants and hotels began to specify "Del Monte Gold™" pineapples in their food supply contracts and recipes would

often recommend using "Del Monte Gold™" pineapples. "Del Monte Gold™" pineapple is unique and created a market unto itself, a market that from 1996 through 2003 was almost 100% controlled by Del Monte.

43. Although Defendants previously sold the "Del Monte Gold™" pineapple in discrete locations in the United States prior to 1994, it was not "rolled out" nationwide until early 1996.

Defendants Fraudulently Obtain the 8863 Patent to Exclude Competitors

44. Because the MD-2 pineapples marketed by Defendants as the "Del Monte Gold" pineapple proved to be so popular and could be sold for a substantial premium over standard Champaka variety pineapples, Defendants sought to prevent competitors from entering the market and eroding the price premium for the MD-2 variety pineapple by attempting to patent that variety.

45. In 1992, Del Monte tried to obtain a patent on the MD-2 (PRI 73-114). The patent application was rejected for two reasons. First, Defendants did not own the PRI 73-114 specimen. The rights to that specimen which produced the Gold Pineapple were jointly owned by Defendants and Maui Pineapple, which refused Defendants' terms for a joint patent. Second, both Defendants and Maui Pineapple had already begun to commercially exploit pineapples derived from the PRI 73-114 seedling before attempting to patent that plant, which would prevent them from obtaining a patent. Defendants had already begun growing these pineapples in Costa Rica and distributing them to major supermarket chains in the United States, while Maui Pineapple had already begun growing these pineapples in Hawaii and distributing them to hotels on Maui and other local customers.

46. Undeterred by their inability to obtain a patent on the Gold pineapple by legitimate means, Defendants launched a scheme to unlawfully and unfairly prevent competitors from producing and selling MD-2 variety pineapples.

47. Knowing that the PRI 73-114 pineapple was unpatentable, Defendants sought to obtain a patent on the PRI 73-50 pineapple, a genetic sibling to the PRI 73-114 pineapple. (As genetic siblings, the PRI 73-114 specimen and the PRI 73-50 specimen are genetically equivalent as they were both derived by cross-pollinating a flower from the PRI 58-1184 plant with pollen from the PRI 59-443 plant.)

48. In 1993, Del Monte approached Maui Pineapple with a proposal to patent the PRI 73-50 pineapple. In accordance with the plan, Del Monte would obtain the patent in its name and grant Maui Pineapple an exclusive license to the pineapple variety. Del Monte proposed this plan knowing that it had no immediate intention to market the PRI 73-50 variety and knowing that the PRI 73-50 variety was unpatentable as a result of prior sales. The plan was designed to prevent competitors, including Maui Pineapple, from entering the fresh whole extra sweet pineapple market.

49. In 1992, Del Monte tried to obtain a patent on the MD-2 (PRI 73-114). The patent application was rejected for two reasons. First, Maui Pineapple co-owned the rights and refused Del Monte's terms for a joint patent. Second, this variety of pineapple had been for sale in the United States for several years before Del Monte applied for a patent, thus violating the rule against issuance of patents on inventions previously sold or already within the public domain. Del Monte, thereafter, launched a scheme in which it would fraudulently seek to patent an ambiguous pineapple variety so that it could represent to potential competitors that its patent covered the MD-2 variety, as well as similar fresh, whole, extra-sweet varieties.

50. In 1993, Del Monte approached Maui Pineapple with a proposal to patent the PRI 73-50 pineapple. In accordance with the plan, Del Monte would obtain the patent in its name and grant Maui Pineapple an exclusive license to the pineapple variety. Del Monte proposed this plan knowing that it had no immediate intention to market the PRI 73-50 variety and knowing that the PRI 73-50 variety was unpatentable as a result of prior sales. The plan was designed to prevent competitors, including Maui Pineapple, from entering the fresh whole extra sweet pineapple market.

51. On August 23, 1993, during continuing negotiations with Maui Pineapple over the terms of the proposed exclusive license, Del Monte, without informing Maui Pineapple, filed a patent application for a variety of pineapple it referred to as the "CO-2." Del Monte named this pineapple after Calvin Oda, one of Del Monte's researchers who helped develop the PRI 73-50 variety. On August 16, 1994, the PTO issued U.S. Patent No 8,863 (the "8863 patent") to Del Monte for this variety, which Del Monte has subsequently claimed is the PRI 73-50 variety. According to the patent application, the CO-2 was distinguishable from the traditional variety in that it had a "greater sugar and higher vitamin C content, distinctive mixed tropical flavor, greater pigmentation, and fiber content of the edible flesh, higher resistance to internal browning development, and good crown and shell appearance following refrigerated storage."

52. Del Monte intentionally and fraudulently misrepresented and omitted material information in its application to the PTO for the CO-2 patent. Among other things, Del Monte:

(a) failed to disclose the fact that the MD-2 (PRI 73-114) was prior art;

(b) failed to disclose the PRI number for the CO-2 (PRI 73-50);

(c) misrepresented the characteristics of the CO-2;

(d) failed to distinguish the MD-2 from the CO-2;

(e) failed to disclose that Maui Pineapple held ownership interests in the PRI 73-50 variety;

(f) failed to disclose that Del Monte had fraudulently secured the signature on Del Monte's patent application of Maui Pineapple employee David Williams purporting to assign Maui Pineapple's interest in the PRI 73-50 variety;

(g) failed to disclose Maui Pineapple's pre-patent sales of the PRI 73-50 variety; and

(h) misrepresented that it did not have photographs of a ripe aged CO-2 specimen in avoidance of one of the filing requirements of the PTO, in order to minimize the risk that an examiner would realize that a patent application had been made previously and rejected.

53. The foregoing misrepresentations and omissions were material because, among other things, the MD-2 (PRI 73-114) and CO-2 (PRI 73-50) varieties are genetic siblings. The pineapple hybrid varieties PRI 73-50 and PRI 73-114 have the same "parents", which are known and identified on the patent application by their PRI hybrid nomenclature: PRI 58-1184 (the "seed parent") and PRI 59-443 (the "pollen parent"). In other words, the hybrids at issue both were developed by cross-pollinating a flower from the PRI 58-1184 plant with pollen taken from the PRI 59-443 plant.

54. Despite the plants' common lineage, Del Monte never made the distinction between either of the varieties to the PTO, and thus never permitted the Patent Examiner to consider those varieties (or the use and sale of those varieties) by Del Monte and/or Maui Pineapple as "prior art." While Del Monte represented to Maui Pineapple that the CO-2 was the PRI 73-50 hybrid, it never disclosed that fact to the Patent Examiner, nor did it disclose the PRI

73-114 hybrid as prior art, or inform the Patent Examiner about Maui Pineapple's rights to the PRI 73-50 hybrid. Moreover, Del Monte's "Detailed Plant Description" of the hybrid clone in the 8863 patent — including such things as "resistance to internal browning development," leaf characteristics from texture to size and color, "inflorescence" (flower) descriptions, and fruit characteristics from size to shape to disease resistance, among other things — does not accurately describe the characteristics of the PRI 73-50 variety.

55. Del Monte drafted and prosecuted the patent application so that it encompassed characteristics of both of the PRI 73-50 and PRI 73-114 varieties, in an attempt to secure proprietary rights to both varieties. Even the inventors of the PRI 73-50 variety have acknowledged that, as prepared by Del Monte, the patent appeared to cover both varieties. During his deposition in the *Dole* case,[2] David Williams, a former Maui Pineapple employee and co-inventor of the PRI 73-50 variety, acknowledged that both varieties fell within the partial description contained in the patent, making it difficult to determine which one was, or was not, covered by the patent. Moreover, in a September 26, 1994 internal memorandum to Hans Sauter, one of Del Monte's plant scientists, Calvin Oda stated that the 8863 patent indirectly covered the PRI 73-114 variety.

56. Moreover, Del Monte intentionally removed references to the PRI nomenclature for the CO-2, PRI 73-50, from drafts of its patent application in order to foster ambiguity about the scope of the patent.

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[2] Del Monte filed suit against Dole on March 27, 2000 for violation of the Lanham Act, misappropriation of trade secrets, conversion, and violation of Florida's Deceptive and Unfair Trade Practices Act. *Del Monte Fresh Produce Company, et al. v. Dole Food Company, Inc., et al.,* Case No. 00-1171-CIV-Gold (S.D. Fla., filed March 27, 2000) (the "*Dole* case").

57. In furtherance of Del Monte's scheme to defraud the PTO and the public, on February 1, 1994, in response to the Patent Examiner's invitation to submit a sectional photograph of the ripe aged pineapple to help clarify which specific plant Del Monte was attempting to patent, Del Monte affirmatively misrepresented to the Examiner that "such a view is not presently available," and requested that "the drawings be published in the form originally filed." In fact, Del Monte had both specimens and photographs of the PRI 73-50 and PRI 73-114 hybrids available at that time, and it also had the photographs of every other stage of development of those plants. Del Monte's statement to the Patent Examiner was thus false, and was intended to deceive the PTO in furtherance of Del Monte's plan to fraudulently procure the 8863 patent and to stifle competition in the fresh, whole, extra-sweet pineapple market.

58. Del Monte also failed to disclose to the PTO that Maui Pineapple held ownership interests in the PRI 73-50 variety, stemming from its membership in PRI and rights under PRI by-laws, to all varieties that were discovered by PRI. Del Monte also failed to inform the PTO that Maui Pineapple had not consented to Del Monte obtaining a patent solely in Del Monte's name.

59. Unbeknownst to Maui Pineapple, Del Monte secretly obtained David Williams's signature on the patent application as co-inventor of the PRI 73-50 variety. David Williams, however, was not aware of the specific variety of pineapple for which Del Monte was seeking a patent. Rather, as David Williams stated during his deposition in the *Dole* case, he signed the application "as a favor," and "assumed, on good faith, that the guy [Calvin Oda] wasn't lying to me."

60. Del Monte was aware that Maui Pineapple had not authorized David Williams to assign its rights to the PRI 73-50 variety.

61. Del Monte was also aware and intentionally failed to disclose to the PTO that Maui Pineapple had cultivated, marketed, and sold the PRI 73-50 variety within the United States prior to the submission of the patent application.

62. In 1994, through fraud and acting in violation of its duty of candor, Del Monte secured the 8863 patent. Despite its knowledge that the 8863 patent had been fraudulently procured, Del Monte continued its fraud upon the PTO until May 6, 2003, when it finally disclaimed its rights to the patent. In the meantime, Del Monte had used the patent to suppress competition in the market for fresh, whole, extra-sweet pineapples through, among other things, the dispatch of threatening letters and the commencement of sham litigation against its competitors.

63. In May of 1996, after obtaining the 8863 patent, Del Monte officially launched the Del Monte Gold pineapple in selected markets in the United States, followed by a launch in more markets in early 1997. Because it was able to exclude competitors from the market, Del Monte was able to charge a premium for the Del Monte Gold™ pineapples, which was reflected in the retail price for the Del Monte Gold pineapples.

64. Del Monte continued its fraud on the PTO by failing to withdraw its patent, even after notification in 1996 from Maui Pineapple that the 8863 patent is invalid. On August 14, 1996, Maui Pineapple's Director of Agricultural Research, Herve Pleisch, wrote a memorandum to Calvin Oda discussing, among other things, the 8863 patent. In that memo, Mr. Fleisch itemized three main problems with Del Monte's contention that this patent was valid. Mr. Fleisch explained:

(a) ". . . in 1993 David Williams was not an employee nor an officer of Maui Pineapple. Only his name appears on the patent and there is no mention of Maui Pineapple Co.

As it reads, this patent is not a joint patent but a Del Monte Patent. However, Maui Pineapple was the only co-owner with Del Monte of the joint PRI hybrids, not David Williams."

(b) ". . . 73-50 is described by its parents, the code CO-2 and various phenotypes rather than by its PRI number . . . . As you know there are 96 hybrids in that lot number that have the same parents and share many of the phenotypic characteristics mentioned in the patent. Therefore, it appears as though the entire lot has been patented and this included 73-114 or 73-90 which all were identified as good fresh fruit varieties."

(c) ". . . you indicated that a plant patent cannot be issued for a variety that is already being commercialized. If that is so, how could this patent be issued since Maui Pineapple has been commercializing the 73-50 and other hybrids to the West Maui Hotels and other customers for many years before 1993."

65. Defendants ignored this memorandum and armed with their fraudulently obtained patent, engaged in a campaign of threats and sham litigation to exclude competitors from the market for the Gold pineapple.

Del Monte Uses the 8863 Patent to Confuse the Public and Competitors, and Thwart Attempts by Competitors to Participate in the Extra-Sweet Pineapple Market

66. Del Monte used the CO-2 patent to convince competitors that it had patented the "Fresh Del Monte Gold™" pineapple. As Del Monte's former Vice President of North America, Mike Pereira, admitted in an internal memorandum, Del Monte would maintain its monopoly power in the market for Gold pineapples by using the patent on the CO-2 pineapple to "confuse [the] competition" into thinking that " Del Monte Gold™" is a "proprietary variety."

67. Armed with the patent on the CO-2 pineapple, Del Monte attempted to stop various persons and entities from growing "Del Monte Gold™" pineapple by sending out a

series of threatening letters. A March 23, 1995 letter to Oscar Arias, an agri-biologist in Costa Rica, written on Del Monte letterhead and signed by Dan Funk, Del Monte's Vice President of Research and Development, is a representative example:

> Del Monte Fresh Produce Company is aware that your company has acquired pineapple plant material and is researching the growth and production of pineapple plants. Del Monte has also learned of an organized effort to *steal* this planting material from the Del Monte plantation for propagation.
>
> Be advised that Del Monte is the *developer of this plant material* and *intends to protect its interests as necessary*. In addition, be advised that Del Monte owns U.S. Patent No. Plant 8,863, dated August 16, 1994. Please govern yourself accordingly. (emphasis added).

68. This and other threatening letters like it were attempts by Del Monte to mislead growers in Costa Rica and other places into mistakenly believing that Del Monte had a United States Patent on the "Del Monte Gold™" pineapple. Del Monte knew that it did not have a valid patent on the "Del Monte Gold™" pineapple and thwarted competition by implying that Del Monte would take legal action to protect its allegedly patented pineapple.

69. Indeed, in a judicial order issued on January 10, 2002, by The Honorable Andrea M. Simonton, United States Magistrate Judge for the Southern District of Florida, this and other threatening letters like it were found to be attempts by Del Monte to mislead growers in Costa Rica and other places in to believing that Del Monte had a United States Patent on the "Gold" pineapple, when Del Monte knew it did not have a patent on the "Gold" pineapple.

70. These actions by Del Monte caused competitors to refrain from taking steps necessary to grow the "Del Monte Gold™" pineapple, thereby giving Fresh Del Monte a monopoly and a long-term competitive advantage.

71. Pineapple is notoriously difficult to grow and building a pineapple plantation can take years. Pineapple is grown from the top or crown of a mature pineapple or from pieces of an existing plant. Each plant produces only one fruit at a time, often at a rate of less than one ripe fruit per year. By engaging in the anti-competitive acts alleged in this Complaint, Fresh Del Monte attempted to and has been able to maintain a monopoly on the "Del Monte Gold™" pineapple.

Del Monte Engages in Sham Litigation to Exclude Competition from Dole Pineapple

72. In addition to using its patent as a pretense to send threatening letters, Del Monte also relied on this patent to assert sham litigation against potential competitors in the fresh, whole, extra-sweet pineapple market.

73. In early 2000, Dole launched its extra-sweet pineapple, under the name "Dole Premium Select." Del Monte immediately sued Dole in federal court in the Southern District of Florida, alleging that Dole did not have a legal right to produce, distribute, or sell the PRI 73-114, because Del Monte was the sole owner of the rights to the variety.

74. In its suit, Del Monte took the position that Dole had no legal right to produce, distribute, or sell any MD-2 pineapple.

75. Dole responded to this lawsuit by contending that Del Monte's MD-2 pineapple monopolizes the pineapple market, and that Del Monte attempted to maintain an unlawful monopoly over the MD-2 pineapple by claiming proprietary rights where it has none. Dole claimed that in order to deceive Dole and others in the trade, Del Monte took the position that the CO-2 patent also covered the MD-2 pineapple. In furtherance of this monopoly, Dole contended that Del Monte:

(a) sent threatening letters to others in the trade which stated that some of Dole's pineapple materials had been stolen from Del Monte, that the recipients of the letters might be in possession of some of the stolen material, and implied that Del Monte had patented the "Fresh Del Monte GoldTM" pineapple;

(b) made false and fraudulent statements through newspapers and the United States mail in furtherance of its scheme to defraud; and

(c) defrauded the PTO in obtaining the patent on the CO-2 pineapple by not including in the application the PRI designation of the CO-2 pineapple, and by not mentioning the MD-2 pineapple and distinguishing it from the CO-2, in the prior art section of the application.

76. Magistrate Judge Simonton of the United States District Court for the Southern District of Florida, the Magistrate Judge assigned to the *Dole* case, ruled on January 10, 2002, that Del Monte had used these threatening letters to intentionally mislead and defraud its competitors into "believing that Del Monte had a United States patent on the MD-2 pineapple," and that "Del Monte would take legal action to protect the allegedly patented MD-2 material" if its competitors ignored its demands to cease production of this variety.[3]

77. Del Monte knew that it did not have a reasonable basis for its claims against Dole, because it was not, in fact, the originator or sole owner of the PRI 73-114 variety and did not possess a valid patent for this or the PRI 73-50 variety. Nonetheless, Del Monte commenced

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[3] Magistrate Judge Simonton issued this ruling in an order granting in part Dole's Motion to Compel Del Monte to Produce Documents and Testimony Because Del Monte's Assertion of the Attorney-Client Privilege Has Been Vitiated by the Crime-Fraud Exception (entered on January 10, 2002). This order was later vacated pursuant to the parties' settlement agreement.

and continued sham litigation against Dole in order to suppress competition in the fresh, whole, extra-sweet pineapple market.

78. Del Monte's campaign of misinformation and sham litigation caused its competitors to cease production, marketing, and sales of the PRI 73-114 variety, thereby solidifying Del Monte's grip on the market for fresh whole extra-sweet pineapples in the United States.

Del Monte Further Stifled Competition With Sham Litigation Against Another Potential Competitor, Maui Pineapple

79. In addition to asserting the 8863 patent against Dole improperly to stifle competition, Del Monte also used the same patent to threaten and prevent Maui Pineapple from competing in the fresh, whole, extra-sweet pineapple market.

80. Like Del Monte, Maui Pineapple was also a member of the PRI.

81. In 1981, the PRI released to its members for production the two hybrid pineapple varieties known as PRI 73-50 and PRI 73-114 (i.e., MD-2). Maui Pineapple was a PRI member of good standing on the date when these two hybrids were released, and as such, was given a proprietary interest in both these hybrids. That interest included the right to develop, grow, market, and sell both hybrids without the consent of the PRI or any other entity, including, but not limited to Del Monte.

82. After PRI dissolved in 1987, Maui Pineapple continued growing and marketing both PRI 73-50 and 73-114. The PRI 73-50 hybrid is marketed by Maui Pineapple in the United States under the trademark "Hawaiian Gold".

83. After obtaining its patent, Del Monte used it to thwart competition from Maui Pineapple in the fresh, whole, extra-sweet pineapple market. According to Maui Pineapple, Del Monte asserted to Maui Pineapple's customers, potential customers, and other members of the

pineapple trade that Maui Pineapple was not a legal supplier/owner of the PRI 73-50 variety pineapple. Del Monte made it known that should certain suppliers or wholesalers purchase from Maui Pineapple, Del Monte would no longer do business with them.

84. Del Monte also kept Maui Pineapple from actively competing with Del Monte by representing to Maui Pineapple that it could share in Del Monte's illicit monopoly profits through an exclusive license to the PRI hybrids. Del Monte engaged Maui Pineapple in ongoing license negotiations over this exclusive license for many years, even though Del Monte knew any license would be invalid because its patent was invalid.

85. In March of 2001, after Maui Pineapple announced its intention to begin selling PRI 73-50 pineapples, Del Monte sent Maui Pineapple a letter, representing that Del Monte was the sole owner of the PRI 73-50 and the 73-114. Del Monte demanded that Maui Pineapple "immediately cease and desist the marketing of the CO-2," and threatened a suit for infringement of the 8863 patent if Maui Pineapple failed to comply with its demand.

86. In June of 2001, Del Monte brought a claim against Maui Pineapple for patent infringement in the United States District Court, Northern District of California, contending that Maui Pineapple's use, cultivation, distribution and sale of the 73-50 hybrid plant variety violated that patent.[4]

87. In response, Maui Pineapple filed a cross-claim against Del Monte for, among other things, conspiracy to monopolize, attempt to monopolize, monopolization, and restraint of trade. Specifically, Maui Pineapple contended that Del Monte used its fraudulently-procured

[4] This suit was brought as a cross-claim to Maui Pineapple's trademark infringement cause of action against Del Monte for use of the term "Hawaiian Gold." *See Maui Pineapple Co., et. al. v. Del Monte Co., et al.*, Northern District of California, Case No. C0-1449 (filed on April 27, 2001).

patent rights to restrict competition by telling Maui Pineapple's customers and potential customers that Maui Pineapple was not a legal supplier of the PRI 73-50 hybrid pineapple, and that Del Monte was the only legal supplier of the PRI 73-50 hybrid; and /or by indiscriminately publicizing its objectively baseless infringement allegations to wholesalers, distributors, retailers, and other participants in the United States pineapple trade, and to the general public.

88. In the *Maui* case, Del Monte filed a Disclosure of Asserted Claims and Preliminary Infringement Contentions ("Disclosure") that furthered the illusion that the 8863 patent covered other extra-sweet varieties in addition to the PRI 73-50 variety. In granting Maui Pineapple's motion to compel Del Monte to amend its Disclosure, Judge Breyer stated that Del Monte's Disclosure was so "equivocal and open-ended" that it left "open the possibility that other plant varieties, in addition to the PRI 73-50 are covered by . . . [Patent] '63."

89. Del Monte prosecuted its patent infringement lawsuit for almost two years. Throughout this time, Maui Pineapple was not permitted to create or sell a competing fresh, whole, extra-sweet pineapple because of the 8863 patent.

Despite Its Suits Against Competitors for Alleged Patent Misuse and/or Infringement, Del Monte Withdraws the 8863 Patent

90. Despite its suits against its two main competitors, Dole and Maui Pineapple, on January 31, 2003, Del Monte filed a Motion to Dismiss its patent infringement claim against Maui Pineapple. In this motion, Del Monte finally admitted that the patent was invalid due to pre-patent sales by Maui Pineapple.[5]

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[5] *See* Defendants' Notice of Motion and Motion to Dismiss Patent Counterclaim, *Maui Pineapple Co., e. al. v. Del Monte Co., et al.*, Northern District of California, Case No. C0-1449 (Filed January 31, 2003) ("Maui's pre-patent sales invalidate Del Monte's patent. Accordingly, pursuant to Rule 41 of the Federal Rules of Civil Procedure, Del Monte's counterclaim for patent infringement should be dismissed.") (internal citations omitted).

91. Del Monte waited several more months before contacting the PTO, finally formally withdrawing its patent on the CO-2 pineapple on May 6, 2003.

92. The lawsuits with Dole and Maui Pineapple were settled, but the terms of the settlements have been kept confidential. After the settlements, however, both Dole and Maui Pineapple have begun cultivating and selling Gold pineapples to compete with the "Del Monte Gold™" pineapple.

93. By using an improperly obtained patent on a CO-2 pineapple to keep viable competitors out of the marketplace for fresh, whole, extra-sweet pineapple, Del Monte has unlawfully attempted to and eventually did maintain a monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Only recently, after Del Monte withdrew the 8863 patent, has the price for "Fresh Del Monte Gold™" pineapple begun to fall.

94. Once Del Monte obtained this unlawful monopoly, it used its stronghold position to further harm customers by "tying" other products with the "Del Monte Gold™" pineapple in order to force customers to purchase products they did not necessarily want or need, or at prices higher than those otherwise available, given market conditions and the quality of the other Del Monte products. For example, Del Monte mandated that in order for certain wholesalers and distributors to be able to order "Del Monte Gold™" pineapples, they also had to purchase Fresh Del Monte bananas. Due to a variety of factors, including damages caused by Del Monte's shipping and handling practices, Fresh Del Monte bananas were inferior in quality to the bananas of Del Monte's competitors, and as a result generally commanded a lower price due to market forces. Because of Del Monte's unlawful monopoly on the Fresh Del Monte Gold pineapple, and because of its market power in the fresh whole extra sweet pineapple market, Del Monte told certain large wholesalers and distributors that they would not be able to purchase

"Del Monte Gold™" pineapples unless they also purchased Fresh Del Monte bananas (that those wholesalers and distributors would not have otherwise purchased) at an inflated price not justified by market conditions. This coercive policy was formulated by Del Monte senior management, who instructed Del Monte's employees to carry out this policy in connection with its dealings with certain large wholesalers and distributors.

PRODUCT MARKET/GEOGRAPHIC MARKET

95. The relevant product market consists of the market for fresh, whole, extra-sweet pineapple.

96. The relevant geographic market is the United States.

FRAUDULENT CONCEALMENT

97. Fresh Del Monte has fraudulently concealed the existence of the antitrust violations alleged herein. Plaintiffs have exercised due diligence to learn of their legal rights and, despite such diligence, failed to uncover the existence of the alleged violations until May 6, 2003. Defendants affirmatively concealed the existence of the violations alleged through the following actions, among others:

(a) by fraudulently obtaining a patent on the CO-2 pineapple in 1994;

(b) by falsely representing that the CO-2 patent covered the MD-2 pineapple when in fact it did not;

(c) by sending letters to potential competitors asserting trademark and patent violations when Del Monte knew it had no rights under the patent and trademark laws in the MD-2 pineapple;

(d) by later admitting that the CO-2 patent was obtained improperly and never could have been obtained because of prior sales;

(e) by maintaining sham patent litigation against Dole and Maui Pineapple, asserting patent rights for the MD-2 and CO-2 pineapple that it knew did not exist;

(f) by keeping settlement terms of its litigation with Dole and Maui Pineapple secret; and

(g) by placing incriminating documents under seal in its litigation with Dole and Maui Pineapple.

98. Plaintiffs exercised due diligence to learn of their legal rights, and, despite the exercise of due diligence, did not discover and could not have discovered the antitrust violations alleged above until May 6, 2003, the date when Del Monte withdrew the 8863 patent.

DIRECT PURCHASER CLASS ACTION ALLEGATIONS

99. Plaintiffs identified in paragraphs 20-23 herein, bring this action on their own behalf and as a class action under Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the following class of direct purchasers (the "Direct Purchaser Class"):

> All persons or entities (excluding governmental entities, Defendants, their parents, subsidiaries and affiliates) who purchased a "Fresh Del Monte Gold™" pineapple directly from Del Monte Fresh Produce Company or Del Monte Fresh Produce, N.A., Inc., in the United States (including the District of Columbia and Puerto Rico,), from March 1, 1996 and continuing to the present.

100. The exact number of members of the Direct Purchaser Class in unknown to Plaintiffs, because such information is in the exclusive control of Defendants. Due to the nature of the trade and commerce involved, however, Plaintiffs believe that the members of the Direct

Purchaser Class are sufficiently numerous and geographically dispersed throughout the United States that joinder of all members of the Direct Purchaser Class is impracticable.

101. Except as to the amount of damages each member of the Direct Purchaser Class by itself has sustained, all other questions of law and fact are common to the Direct Purchaser Class, including, but not limited to:

(a) whether Defendants unlawfully monopolized or attempted to monopolize the United States' fresh, whole, extra-sweet pineapple market during the Class Period;

(b) whether Defendants engaged in anti-competitive conduct in order to unlawfully maintain a monopoly;

(c) whether the geographic market for the anti-competitive activity is the United States fresh, whole, extra-sweet pineapple market;

(d) whether the product market was the market for fresh, whole, extra-sweet pineapple;

(e) whether pro-competitive reasons exist for Defendants' actions;

(f) the effects of the monopolization on the prices of the fresh, whole, extra-sweet pineapple sold in the United States during the Class Period;

(g) the appropriate measure of damages sustained by Plaintiffs identified in paragraphs 20-23, herein, and other members of the Direct Purchaser Class;

(h) whether Defendants fraudulently concealed the existence of the antitrust violations alleged herein;

(i) whether Defendants were unjustly enriched to the detriment of the plaintiffs identified in paragraphs 20-23, herein, and other members of the Direct Purchaser Class; and

(j) whether Plaintiffs are entitled to declaratory, injunctive or other relief.

102. Plaintiffs identified in paragraphs 20-23, herein, are members of the Direct Purchaser Class, and Plaintiffs' claims are typical of the claims of other Direct Purchaser Class members. Plaintiffs identified in paragraphs 20-23, herein, will fairly and adequately protect the interests of the Direct Purchaser Class. Plaintiffs identified in paragraphs 20-23, herein, are typical purchasers of "Fresh Del Monte Gold™" pineapple grown by Defendants for sale in the United States and their interests are coincident with and not antagonistic to those of other members of the Direct Purchaser Class. In addition, Plaintiffs identified in paragraphs 20-23, herein, are represented by counsel who are competent and experienced in the prosecution of antitrust and class action litigation.

103. The prosecution of separate actions by individual members of the Direct Purchaser Class would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

104. Questions of law and fact common to the members of the Direct Purchaser Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

105. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of claims by many Direct Purchaser Class members who could not afford individually to litigate an antitrust claim such as is asserted in this Complaint. This action presents no difficulties in management that would

preclude maintenance as a class action. Finally, the Direct Purchaser Class is readily ascertainable.

THE INDIRECT PURCHASER CLASS ACTION ALLEGATIONS

106. Plaintiffs identified in paragraphs 24-28, herein, bring this action on their own behalf and as a class action under Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the following class of indirect purchasers (the "Indirect Purchaser Class"):

> All persons and entities in the United States who, at any time from March 1, 1996 to the present, purchased Del Monte Gold Pineapples in the United States other than for re-sale. Excluded from the Class are the Defendants, its subsidiaries and affiliates, government entities and any person or entity that purchased Del Monte Gold Pineapples directly from any Defendant. For purposes of the Class definition, persons and entities "purchased" Del Monte Gold Pineapples if they paid some or all of the purchase price.

107. The Indirect Purchaser Class is so numerous and geographically dispersed that joinder of all members is impracticable. While the exact size of the Indirect Purchaser Class is unknown to Plaintiffs identified in paragraphs 24-28, herein, at the present time, the members of the Indirect Purchaser Class are believed to number in the thousands.

108. Common questions of law and fact exist as to all members of the Indirect Purchaser Class. Among those questions are the following:

(a) whether Defendants unfairly or unlawfully monopolized or attempted to monopolize the U.S. market for fresh, whole, extra-sweet pineapples during the Class Period;

(b) whether Defendants engaged in anti-competitive conduct in order to unlawfully maintain a monopoly;

(c) whether the geographic market for the anti-competitive activity is the United States market for fresh, whole, extra-sweet pineapple market;

(d) whether the product market is the market for fresh, whole, extra-sweet pineapple;

(e) whether Defendants had monopoly power in the relevant market for purposes of the monopolization claims set forth herein;

(f) whether pro-competitive reasons exist for Defendants' actions;

(g) the effects of the monopolization on the prices of the fresh, whole, extra-sweet pineapple sold in the United States during the Class Period;

(h) whether Defendants fraudulently concealed the existence of the antitrust violations alleged herein;

(i) whether Defendant's conduct, as alleged herein, violated the state antitrust and unfair trade practices laws set forth in Counts IV and V herein;

(j) whether Defendants unjustly enriched themselves at the expense of the members of the Indirect Purchaser Class;

(k) the appropriate measure of damages to be awarded to the Indirect Purchaser Class; and

(l) whether Plaintiffs identified in paragraphs 24-28, herein, and other members of the Indirect Purchaser Class are entitled to declaratory, injunctive or other relief.

109. These and other questions of law and fact are common to the members of the Indirect Purchaser Class and predominate over any questions affecting only individual members.

110. The claims of the Plaintiffs identified in paragraphs 24-28, herein, are typical of the claims of the members of the Indirect Purchaser Class because they and all other Indirect

Purchaser Class members sustained damages in the same way, as a result of Defendants' wrongful conduct complained of herein, and the claims of each Indirect Purchaser Class member arise out of the same nucleus of operative facts and are based on the same legal theories.

111. Plaintiffs identified in paragraphs 24-28, herein, will fairly and adequately protect the interest of the other Indirect Purchaser Class members. Plaintiffs identified in paragraphs 24-28, herein, are represented by counsel that is experienced in class action and antitrust litigation, and they have no interest in this litigation that is adverse to or in conflict with the interest of the other members of the Indirect Purchaser Class.

112. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by many members of the Indirect Purchaser Class are expected to be relatively small, so that the expense and burden of prosecuting an antitrust damages case such as this one will almost certainly preclude individual litigation by such members. Plaintiffs identified in paragraphs 24-28, herein, know of no difficulty that will be encountered in the management of this litigation that will preclude its maintenance as a class action.

CAUSES OF ACTION

COUNT I
Monopolization

113. Plaintiffs incorporate by reference each of paragraphs 1 through 112, above, as if fully set forth herein.

114. The fresh, whole, extra-sweet pineapple market in the United States constitutes a relevant geographic and product market.

115. At all times relevant herein, Defendants possessed or possess monopoly power over the fresh, whole, extra-sweet pineapple market in the United States.

116. At all times relevant herein, Defendants willfully acquired, maintained, and exercised monopoly power over the fresh, whole, extra-sweet pineapple market in the United States.

117. At all times relevant herein, Defendants exercised monopoly power over the fresh, whole, extra-sweet pineapple market in order to exclude meaningful competition within that market.

118. Defendants monopolized the market for fresh, whole, extra-sweet pineapple by engaging, *inter alia,* in the following anti-competitive actions:

(a) by falsely obtaining a patent on the CO-2 pineapple in 1994;

(b) by fraudulently representing that the CO-2 patent covered the MD-2 pineapple when it did not;

(c) by sending letters to potential competitors threatening trademark and patent violations when it knew it had no rights under the patent and trademark laws for protecting the MD-2 pineapple;

(d) by later admitting that the CO-2 patent was obtained improperly and could never have been obtained lawfully because of prior sales; and

(e) by maintaining sham patent litigation against Dole and Maui Pineapple asserting patent rights for the "Del Monte Gold™" pineapple that Del Monte knew did not exist.

119. Certain of the foregoing misrepresentations and omissions were made or omitted by Defendants with the intention of deceiving the Patent Examiner and the PTO. Each of

Defendants' misrepresentations and omissions of material information before the PTO, as alleged above, was knowing and willful.

120. The patent examiner and the PTO justifiably relied upon the foregoing fraudulent misrepresentations and omissions by Defendants in granting the CO-2 patent.

121. Were it not for the foregoing fraudulent misrepresentations and omissions by Defendants, the CO-2 patent would not have been granted.

122. By reason of the foregoing facts, at the times when Defendants sought to enforce the CO-2 Patent in their litigation against Dole and Maui Pineapple, Defendants knew that the CO-2 Patent was invalid and unenforceable.

123. No reasonable litigant in Defendants' position at the time of its lawsuits against Dole and Maui Pineapple could have expected to secure a favorable outcome in that litigation, in light of the facts alleged above. Defendants' patent litigation against Dole and Maui Pineapple concealed an attempt to interfere directly with competitors' sale and marketing of competing pineapples, was intended by Defendants to serve as an anticompetitive weapon and serve anticompetitive purposes, and was not a genuine effort to vindicate a lawfully-obtained patent. Defendants' patent litigation against Dole and Maui Pineapple was, therefore, a sham.

124. Through their frauds on the PTO, threats against competitors and their sham patent litigation as alleged above, Defendants unlawfully monopolized the fresh, whole, extra-sweet pineapple market.

125. Defendants' actions are in violation of 15 U.S.C § 2 *et seq.*, in that they serve to restrain competition in order to allow Defendants to stabilize or raise the price of fresh, whole, extra-sweet pineapple sold in the United States during the Class Period, at a level that would not exist in a competitive market.

126. There is no pro-competitive justification for Defendants' actions.

127. Defendants acted with an anticompetitive purpose resulting in an anticompetitive effect.

128. Defendants' acts and conduct have been done for the following purposes:

(a) to prevent entrants into the fresh, whole, extra-sweet pineapple market;

(b) to maintain a monopoly over the propagation, marketing and sale of fresh, whole, extra-sweet pineapple; and

(c) to monopolize and attempt to monopolize the propagation, marketing and sale of fresh, whole, extra-sweet pineapple.

129. The foregoing acts and conduct by Defendants have restrained or prevented competition and threaten and continue to restrain or prevent competition.

130. Plaintiffs and members of both the Direct Purchaser Class and Indirect Purchaser Class have been injured in their business or property by reason of Del Monte's antitrust violation. Their injury consists of paying higher prices for fresh, whole, extra-sweet pineapple in the United States than would otherwise predominate in a truly competitive market. Such injury is of the type the antitrust laws were designed to prevent and flows from that which makes the Defendants' conduct unlawful.

131. Plaintiffs are therefore entitled to a permanent injunction, restraining Defendants from engaging in additional anticompetitive conduct, to judgment pursuant to 15 U.S.C. § 15 awarding them costs and expenses of this action, including reasonable attorneys' fees. In addition, Plaintiffs identified in paragraphs 20-23 herein, who are asserting claims on behalf of the Direct Purchaser Class, are also entitled to three-fold the damages sustained by their business or property.

COUNT II
Attempted Monopolization

132. Plaintiffs incorporate by reference each of paragraphs 1 through 131 above as if fully set forth herein.

133. Defendants possessed and acted with specific intent to achieve an anticompetitive purpose, including intent to prevent competitors from entering the market to grow, market, and sell fresh, whole, extra-sweet pineapple.

134. Defendants engaged in the predatory and anticompetitive acts alleged above.

135. There is a dangerous probability that Defendants will be successful in achieving monopoly power in the fresh, whole, extra-sweet market.

136. Plaintiffs are therefore entitled to a permanent injunction, restraining Defendants from engaging in additional anticompetitive conduct, to judgment pursuant to 15 U.S.C. § 15 awarding them costs and expenses of this action, including reasonable attorneys' fees. In addition, Plaintiffs identified in paragraphs 20-23 herein, who are asserting claims on behalf of the Direct Purchaser Class, are also entitled to three-fold the damages sustained by their business or property.

COUNT III
Restitution/Disgorgement/Unjust Enrichment

137. Plaintiffs incorporate by reference each of paragraphs 1 through 136 above as if fully set forth herein.

138. Defendants benefited from their unlawful acts through the receipt of overpayments by Plaintiffs and other members of the Direct and Indirect Purchaser Classes. It would be inequitable for Defendants to be permitted to retain the benefit of these overpayments,

which were conferred by Plaintiffs and members of the Direct and Indirect Purchaser Classes and retained by Defendants.

139. Plaintiffs and members of the Direct and Indirect Purchaser Classes are entitled to the establishment of a constructive trust consisting of the benefit to Defendants of such overpayments from which Plaintiffs and other members of the Direct and Indirect Purchaser Classes may make claims on a pro-rata basis for restitution.

COUNT IV
Restraint Of Trade Under State Law

(Only on Behalf of the Plaintiffs Identified in Paragraphs 24-28, herein, and the Indirect Purchaser Class)

140. Plaintiffs incorporate by reference each of paragraphs 1 through 139 above as if fully set forth herein.

141. As described above, Defendants knowingly and willfully engaged in a course of conduct designed to unlawfully obtain and maintain monopoly power in the market for "Gold" pineapples. This course of conduct included fraudulently obtaining the 8863 patent, and armed with that patent, proceeding to prevent competitors from entering the market for "Gold" pineapples through threats of litigation and the prosecution of sham patent infringement actions.

142. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Cal. Bus. & Prof. Code § 16700, *et seq.* and Cal. Bus. & Prof. Code § 17200, *et seq.* with respect to purchases of "Gold" pineapples in California by members of the Class.

143. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Arizona

Revised Stat. § 44-1401, *et seq.*, with respect to purchases of "Gold" pineapples in Arizona by members of the Class.

144. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of D.C. Code Ann. § 28-45031, *et seq.*, with respect to purchases of "Gold" pineapples in the District of Columbia by members of the Class.

145. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Fla. Stat. § 501. Part II, *et seq.*, with respect to purchases of "Gold" pineapples in Florida by members of the Class.

146. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Kan. Stat. Ann. § 50-101, *et seq.*, with respect to purchases of "Gold" pineapples in Kansas by members of the Class.

147. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of La. Rev. Stat. § 51:137, *et seq.*, with respect to purchases of "Gold" pineapples in Louisiana by members of the Class.

148. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Me. Rev. Stat. Ann. 10, § 1101, *et seq.*, with respect to purchases of "Gold" pineapples in Maine by members of the Class.

149. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Mass. Ann. Laws ch. 93A, *et seq.*, with respect to purchases of "Gold" pineapples in Massachusetts by members of the Class.

150. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Mich.Comp.Laws Ann. § 445.771, *et seq.*, with respect to purchases of "Gold" pineapples in Michigan by members of the Class.

151. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Minn. Stat. § 325D.52, *et seq.* with respect to purchases of "Gold" pineapples in Minnesota by members of the Class.

152. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Miss. Code Ann. § 75-21-1, *et seq.*, with respect to purchases of "Gold" pineapples in Mississippi by members of the Class.

153. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Nev. Rev. Stat. Ann. § 598A., *et seq.*, with respect to purchases of "Gold" pineapples in Nevada by members of the Class.

154. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of the New

Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 *et seq.*, with respect to purchases of "Gold" pineapples in New Jersey by members of the Class.

155. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of N.M. Stat. Ann. § 57-1-1 *et seq.*, with respect to purchases of "Gold" pineapples in New Mexico by members of the Class.

156. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of New York General Business Law § 340, *et seq.*, with respect to purchases of "Gold" pineapples in New York by members of the Class.

157. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of N.C. Gen. Stat. § 75-1, *et seq.*, with respect to purchases of "Gold" pineapples in North Carolina by members of the Class.

158. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of N.D. Cent. Code § 51-08.1-01, *et seq.*, with respect to purchases of "Gold" pineapples in North Dakota by members of the Class.

159. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of S.D. Codified Laws Ann. § 37-1, *et seq.*, with respect to purchases of "Gold" pineapples in South Dakota by members of the Class.

160. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Tenn. Code Ann. § 47-25-101, *et seq.*, with respect to purchases of "Gold" pineapples in Tennessee by members of the Class.

161. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Vt. Stat. Ann. 9, § 2453, *et seq.*, with respect to purchases of "Gold" pineapples in Vermont by members of the Class.

162. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of W.Va. Code § 47-18-1, *et seq.*, with respect to purchases of "Gold" pineapples in West Virginia by members of the Class.

163. By the foregoing conduct, Defendants have intentionally and wrongfully obtained and maintained monopoly power in the market for "Gold" pineapples in violation of Wis. Stat. § 133.01, *et seq.*, with respect to purchases of "Gold" pineapples in Wisconsin by members of the Class.

164. Plaintiffs and members of the Class have been injured in their business or property by reason of Defendants' anticompetitive conduct. Their injury consists of paying higher prices for "Gold" pineapples than they would have paid in the absence of those violations. Their injury is of the type the antitrust and consumer protection laws of the above States were designed to prevent and flows from that which makes Defendants' conduct unlawful.

COUNT V

Unfair And Deceptive Practices Under State Law

(Only on Behalf of the Plaintiffs Identified in Paragraphs 24-28, herein, and the Indirect Purchaser Class)

165. Plaintiffs incorporate by reference the each of the preceding paragraphs 1 through 164 as though fully set forth herein.

166. Defendants engaged in unfair competition or unfair, unconscionable, deceptive or fraudulent acts or business practices in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, as well as the state consumer protection statutes listed in ¶¶ 142-163 when they unlawfully obtained and maintained a monopoly in the market for "Gold" pineapples. As a result, other companies did not enter the market for "Gold" pineapples, and Plaintiffs identified in paragraphs 24-28, herein, and members of the Indirect Purchaser Class were forced to pay higher prices for "Gold" pineapples than they otherwise would have.

167. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*

168. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Alaska Stat. § 45.50.471, *et seq.*

169. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ariz. Rev. Stat. § 44-1522, *et seq.*

170. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ark. Code § 4-88-101, *et seq.*

171. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of West Virginia Code § 46A-6-101, *et seq.*

172. Defendants have engaged in unfair competition or unfair or deceptive acts or practices or have made false representations in violation of Colo. Rev. Stat. § 6-1-105, *et seq.*

173. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Conn. Gen. Stat. § 42-110b, *et seq.*

174. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 6 Del. Code § 2511, *et seq.*

175. Defendants have engaged in unfair competition or unfair or deceptive acts or practices or made false representations in violation of D.C. Code § 28-3901, *et seq.*

176. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Fla. Stat. § 501.201, *et seq.*

177. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ga. Stat. §10-1-392, *et seq.*

178. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Haw. Rev. Stat. § 480, *et seq.*

179. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Idaho Code § 48-601, *et seq.*

180. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 815 ILCS § 505, *et seq.*

181. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Kan. Stat. § 50-623, *et seq.*

182. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ky. Rev. Stat. § 367.110, *et seq.*

183. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of La. Rev. Stat. § 51:1401, *et seq.*

184. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 5 Me. Rev. Stat. § 207, *et seq.*

185. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Md. Com. Law Code § 13-101, *et seq.*

186. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mass. Gen. L. Ch. 93A, *et seq.*

187. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mich. Stat. § 445.901, *et seq.*

188. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Minn. Stat. § 8.31, *et seq.*

189. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Vernon's Missouri Stat. § 407.010, *et seq.*

190. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mont. Code § 30-14-101, *et seq.*

191. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Neb. Rev. Stat. § 59-1601, *et seq.*

192. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nev. Rev. Stat. § 598.0903, *et seq.*

193. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.H. Rev. Stat. § 358-A:1, *et seq.*

194. Defendants have engaged in unfair competition or unfair, unconscionable or deceptive acts or practices in violation of N.J. Rev. Stat. § 56:8-1, *et seq.*

195. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.M. Stat. § 57-12-1, *et seq.*

196. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.Y. Gen. Bus. Law § 349 *et seq.*

197. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, *et seq.*

198. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.D. Cent. CODE § 51-15-01, *et seq.*

199. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ohio Rev. Stat. § 1345.01, *et seq.*

200. Defendants have engaged in unfair competition or unfair or deceptive acts or practices or made false representations in violation of Okla. Stat. 15 § 751, *et seq.*

201. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Or. Rev. Stat. § 646.605, *et seq.*

202. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 73 Pa. Stat. § 201-1, *et seq.*

203. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of R.I. Gen. Laws. § 6-13.1-1, *et seq.*

204. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of S.C. Code Laws § 39-5-10, *et seq.*

205. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of S.D. code Laws § 37-24-1, *et seq.*

206. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Tenn. Code § 47-18-101, *et seq.*

207. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Tex. Bus. & Com. Code § 17.41, *et seq.*

208. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Utah Code. § 13-11-1, *et seq.*

209. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 9 Vt. § 2451, *et seq.*

210. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Va. Code § 59.1-196, *et seq.*

211. Defendants have engaged in unfair competition or unfair, deceptive or fraudulent acts or practices in violation of Wash. Rev. Code. § 19.86.010, *et seq.*

212. Plaintiffs identified in paragraphs 24-28, herein, and members of the Indirect Purchaser Class have been injured in their business and property by reason of Defendants' anticompetitive, unfair or deceptive acts alleged in this Count. Their injury consists of paying higher prices for "Gold" pineapples than they would have paid in the absence of these violations. Their injury is of the type the state consumer protection statutes were designed to prevent and directly results from Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request judgment as follows:

A. Certifying this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Declaring that Defendants violated and are in violation of Section 2 of the Sherman Act as well as the state statutes alleged herein;

C. Awarding three-fold damages sustained by the plaintiffs identified in paragraphs 20-23 herein and members of the Direct Purchaser Class as a result of the allegations alleged herein under applicable federal or common law;

D. Awarding damages sustained by the plaintiffs identified in paragraphs 24-28, herein, and members of the Indirect Purchaser Class, and for any additional damages, penalties and other monetary relief provided by applicable law, including treble damages;

E. Providing for disgorgement/restitution of Defendant's unjust enrichment;

F. Ordering injunctive relief, preventing and restraining Defendants and all persons acting on their behalf from further engaging in the unlawful acts alleged herein;

G. Awarding Plaintiffs and members of the both the Direct and Direct Purchaser Classes costs, interest, expenses, and reasonable attorneys' fees and experts' fees incurred in connection with this action; and

H. Awarding such further relief as the Court may find necessary and appropriate.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a trial by jury.

Dated: August 2, 2004
New York, New York

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CERTIFICATE OF SERVICE

I, Jennifer Dent, certify that on the 2nd day of August, 2004, I caused a true and correct copy of Consolidated Direct Purchaser and Indirect Purchaser Class Action Complaint to be served by first class mail upon the following:

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