UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE JOINT MOTION FOR CLASS CERTIFICATION PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A., Inc. (collectively, "Del Monte") concede that certification of a Direct Purchaser Class is appropriate on the treble damages and injunctive relief claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. Del Monte also implicitly concedes, by lack of any argument in opposition, that certification of an Indirect Purchaser Class is appropriate on the injunctive relief claim under Section 2 of the Sherman Act. Del Monte opposes certification of any indirect purchaser classes under *any* of the *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), repealer statutes and under *any* of the state unfair competition laws. Del Monte also opposes certification of Direct and Indirect purchaser classes to pursue unjust enrichment claims.

Del Monte contends that: (i) the indirect purchaser class is unmanageable; (ii) the expert report of Dr. Frank Tinari, Professor Emeritus of Economics at Seton Hall University, contains an incorrect analysis regarding the portion of overcharges which were passed through to the indirect purchasers; (iii) individual issues would predominate if the Court had to apply the laws of several different states; (iv) the Direct Purchasers failed to propose a methodology to apportion any unjust enrichment between themselves and the Indirect Purchasers; and (v) and affirmative defenses exist to the unjust enrichment claim of one of the Direct Purchaser plaintiffs. These arguments are without merit and both Direct and Indirect Purchaser Classes should be certified as to all claims.

II. THE PROPOSED INDIRECT PURCHASER CLASS IS MANAGEABLE.

Del Monte asserts that the indirect purchaser claims are unmanageable, based upon the assertion that "there is no way to identify the members of the putative . . . class." (Def. Br. at 8). Del Monte does not dispute that the class members are unidentifiable – indeed they can identify themselves - or that the class definition is entirely objective and ascertainable. Rather, Del Monte casts doubt regarding the weight of the evidence available to retail purchasers, and whether extrinsic documentary evidence exists for class members to prove their claims at trial. Thus, Del Monte's

arguments are in fact directed at the ability of indirect plaintiffs to ultimately prove their claims, and as such, are inapposite at the class certification stage. Moreover, case management tools endorsed in this Circuit can be utilized to address any "manageability" concerns of Del Monte, and allow courts to properly certify classes such as this one.

A. The Weight of the Evidence Is Not Properly at Issue At the Class Certification Stage.

The ability of indirect plaintiffs to prove their claims at trial is not properly at issue, and 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). There is no reason to believe that the indirect class members, like the indirect purchaser class representatives, could not attempt to prove their claims by providing receipts, purchase records from supermarket discount cards, or sworn statements as to their purchases of extra-sweet pineapples based on their habits and customs, all of which would be admissible to prove damages.[1]

While Del Monte may question the weight of the evidence that the indirect class members present concerning damages at the merits stage, it cannot do so at the class certification stage. Nor can Del Monte argue that the evidence presented as to damages for the indirect class would be any different if the claims were to proceed on an individual, rather than a class basis. Thus, the ability of indirect class members to prove their entitlement to damages and the weight of the evidence they can present in that regard is not a "manageability" issue posed by class action litigation, but rather an inherent aspect of any claim – regardless of how it is litigated.

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[1] Del Monte's suggestion that the indirect class representatives cannot demonstrate that their pineapple purchases during the class period were Del Monte Gold Pineapples is disingenuous since Del Monte Gold pineapples were the only variety of extra-sweet pineapple available during the class period, precisely due to the anticompetitive conduct complained of this case.

B. Denial of Certification on Manageability Grounds Is Disfavored As Case Management Tools Exist to Address Any Challenges Presented in this Case.

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.'" *Visa Check/MasterMoney*, 280 F.3d at 140 (quoting *Manual for Complex Litigation*, § 1.43 n.72 (1977)). The amount of individual damages is almost invariably an individual issue - particularly in antitrust actions - and as such do not defeat class action treatment. *Visa Check/Mastermoney*, 280 F.3d at 139; *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). 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)). Individualized damages issues are not an obstacle to class certification because:

> a number of management tools [are] available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Visa Check/Mastermoney, 280 F.3d at 141 (internal footnotes omitted)(citing Fed. R. Civ. P. 23(c)(4)(stating that "[w]hen appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class"); *In re Master Key Antitrust Litig.*, 528 F.2d 5, 12 n.11, 14 (2d Cir. 1975)(discussing use of a separate liability and damages trials and subclasses to facilitate damages determination).

As this case seeks the disgorgement of Del Monte's unjust enrichment for its wrongful actions, such tools as *cy pres* relief are also available to allay Del Monte's manageability concerns. *See, e.g., New York ex rel. Koppell v. Keds Corp.*, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. Mar. 21, 1994)(requiring defendant, among other things, to pay $5.7 million to be distributed to

charities in lieu of distribution to consumers.). Indeed, *cy pres* relief fulfills the remedial purposes of the consumer protection statutes underlying the indirect purchaser's claims, as "defendants may [otherwise] 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." *California v. Levi Strauss & Co.*, 715 P.2d 564, 610 (Cal. 1986).[2]

III. DR. TINARI'S REPORT CONFIRMS THAT METHODOLOGIES EXIST FOR DETERMINING THE DAMAGES SUFFERED BY THE INDIRECT PURCHASERS.

At the class certification stage, "[p]laintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *See In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 565 (S.D.N.Y. 2004). "[T]he inquiry focuses not on validity of the proposed methods for proving damages on a class-wide basis, but on the availability of those methods." *Id.* at 566. So long as the methodology proffered by plaintiffs to determine damages on a class wide basis is not "so insubstantial and illusive as to amount to no method at all," certification should be granted. *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 268 (D.D.C. 2002). Dr. Tinari's Report certainly satisfies this criteria.

Del Monte does not dispute that there exist widely accepted methodologies to determine the quantum of damages suffered by indirect purchasers in antitrust cases, and that indirect purchaser classes are regularly certified on that basis. Del Monte, however, contends that no indirect purchaser claims for damages should be certified here because it disagrees with Dr. Tinari's working assumption that the chain of distribution for the Del Monte Gold Pineapples is competitive such that 100% of the overcharge for the Del Monte Gold pineapples was passed through to the

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[2] *See also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)(fruit growers' failure to pay wages to migrant workers); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 184-85 (2d Cir. 1987)(court approved use of portion of settlement fund to fund assistance programs for the class as a whole); *Daar v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967)(certifying class of taxi cab customers in restraint of trade action); Stewart R. Shepard, *Damage Distributions in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972).

indirect purchasers. Del Monte's criticism provides no basis to deny certification and should be addressed at the merits phase as it relates to the validity of Dr. Tinari's empirical analysis, not to whether methodologies exist to demonstrate class-wide damages.

As a threshold issue, Del Monte has not produced any empirical data to dispute Dr. Tinari's preliminary assumption. Del Monte's assertion that there may be several steps in the chain of distribution for pineapples (Def. Br. at 17-18) does not necessarily lead to the conclusion that the pass-through rate is less than 100%. Indeed, Del Monte's own expert, Bradley Reiff, conceded in his deposition that it is possible that 100% of the overcharge was passed through, and that reference to empirical data is necessary to determine the pass-through ratio. (*See* Declaration of Daniel E. Sobelsohn ("Sobelsohn Decl."), Ex. A (excerpts of Reiff Transcript.))[3] Del Monte cannot defeat class certification simply because it *believes* that the initial pass-through ratio proposed by Dr. Tinari *might* be incorrect.

Moreover, as Dr. Tinari explained in his deposition and reiterates in his concurrently filed Reply Declaration, his use of a 100% pass-through rate was a working assumption that he could revisit once empirical data was obtained. (*See* Declaration of Frank Tinari ("Tinari Decl.") ¶¶ 1-3.) The pass through rate of 100% assumes a competitive distribution chain in which all overcharges for the Del Monte Gold are passed-through to the indirect purchasers. With the benefit of data concerning retail and wholesale sales of the Del Monte Gold pineapple Dr Tinari can, using commonly accepted economic methodologies such as incident or regression analysis, determine the pass-through rate with more certainty, which may be 100%, or a lower number.[4] (Tinari Decl. ¶¶ 4-

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[3] Reiff has also offered expert opinions in which he also made working assumptions. *See Currency Conversion Fee*, 224 F.R.D. at 566 n.3 (Reiff assumed that but for the antitrust violation, there would be no charge for currency conversion fees so that any fee charged, even just 1%, harmed the class.).

[4] Nor can there be any doubt that sufficient data exists for Dr. Tinari to determine the actual pass-through ratio at the merits phase. Since 1996 Del Monte has placed UPC Codes on the hang-tags attached to each Del Monte Gold pineapple sold in the United States. (Sobelsohn Decl. ¶ 3, Ex. B.) The UPC Codes permit the date, location and price paid for these pineapples at the retail level to be tracked. AC Neilsen, a leading provider of consumer

5.) After determining the pass-through rate from empirical data, Dr. Tinari could plug that number into his damages equation, which would permit the damages to be calculated. (Tinari Decl. ¶ 5.)

Recognizing that a dispute as to the amount of the overcharge passing through to indirect purchasers concerns the *validity of a damages methodology*, rather than the *availability of a damages methodology*, courts have certified indirect purchaser classes based on expert reports that assumed a competitive chain of distribution, which resulted in 100% of the overcharges being passed through to the indirect purchasers. *See Howe v. Microsoft Corp.*, 656 N.W.2d 285 (N.D. 2003)(indirect purchasers of Microsoft software); *In re So. Dakota Microsoft Antitrust Litig.*, 657 N.W.2d 668 (S.D. 2003); *Bellinder v. Microsoft Corp.*, 2001-2 Trade Cas. (CCH) ¶ 73,438 (Kan. Dist. Ct. Johnson County Sept. 7, 2001); *Gordon v. Microsoft Corp.*, 2001-1 Trade Cas. (CCH) ¶ 73,254 (Minn. Dist. Ct. Hennepin County Mar. 30, 2001); *Gordon v. Microsoft Corp.*, 2004-1 Trade Cas. (CCH) ¶ 74,272 (Minn. Dist. Ct. Hennepin County Mar. 14, 2003).[5] Courts certified indirect purchaser classes in these cases even though the product at issue, computer software, was incorporated into other products before being sold, and the determination of the pass-through ratio was more complicated than in this case, in which the product, whole pineapples, stays in the same form throughout the distribution chain.[6] If Del Monte contends Dr. Tinari's conclusions

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research has been tracking sales of Del Monte Gold pineapples since 1996, and can provide such data. (*Id.* at ¶ 4.)

5 *See also Charles I. Friedman P.C. v. Microsoft Corp.*, CV2000-000722 (Ariz. Super. Ct. Maricopa County Nov. 15, 2000); *Coordination Proceedings, Microsoft I-V Cases*, No. J.C.C.P. 4106 (Cal. Super. Ct. San Francisco County Aug. 29, 2000); *In re Florida Microsoft Antitrust Litig.*, No. 99-27340 CA 11 (Fla. Cir. Ct. Miami-Dade County Aug. 26, 2002); *Comes v. Microsoft Corp.*, No. CL82311 (Iowa Dist. Ct. Polk County Sept. 16, 2003); *Gordon v. Microsoft Corp.*, No. MC00-5994 (Minn. Dist. Ct. Hennepin County Dec. 15, 2003)(denying motion for decertification); *In re New Mexico Indirect Purchasers Microsoft Antitrust Litig.*, No. D-0101-CV-2000-1697 (N.M. Dist. Ct. Santa Fe County Oct. 2, 2002); *Sherwood v. Microsoft Corp.*, No. 99C-3562 (Tenn. Cir. Ct. Davidson County Dec. 20, 2002); *Capp v. Microsoft Corp.*, No. 00-CV-0637 (Wis. Cir. Ct. Dade County Sept. 12, 2001).

6 This is a simple indirect purchaser case as it concerns only one product, which stays in the same form throughout the entire distribution chain. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996)(millions of purchasers of approximately

as to the pass-through ratio are invalid, it can contest their validity at the merits phase with admissible empirical evidence, as opposed to the purported "antitrust precedent" and "economic theory" that it relies on here (*see* Def. Br. at 19).[7]

IV. THE POSSIBILITY THAT THE COURT MAY APPLY THE LAWS OF DIFFERENT STATES IS NOT A BASIS TO DENY CERTIFICATION.

A. Choice of Law Need Not Be Considered at the Class Certification Stage.

On a motion for class certification, "the court need not anticipate that variance may exist between the laws of the various states involved, nor hypothesize about what state law will be relevant." *Somerville v. Major Exploration, Inc.*, 102 F.R.D. 500, 504-505 (S.D.N.Y. 1984). As the court in *In re Crazy Eddie Securities Litigation*, explained:

> [a]long with other district courts in this circuit, this court declines to decide choice of law issues on a class certification motion and holds that the application of the laws of the different states, if necessary, does not preclude class action litigation of this case. . . . Issues relating to defendants' conduct will be common to the class regardless of the law to be applied.

135 F.R.D. 39, 41 (E.D.N.Y. 1991). Here too, proof at trial of Del Monte's unlawful monopolization of the whole, fresh, extra-sweet pineapple market will be common to the class regardless of what law is applied to determine liability for that illegal conduct. Accordingly, there is no need at this stage of the proceeding to address choice of law issues. *See In re Synthroid Mktg. Litig.*, 188 F.R.D. 295, 301-02 (N.D. Ill. 1999); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58 (S.D.N.Y. 1993). Indeed, it is impossible at this stage of the case to definitively address the choice of law question. *Cf., In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 (N.D. Cal. 1986) (likelihood of applying California law to nationwide class where monies relating

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different 1658 securities); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 687-88 (N.D. Ga. 1991)(millions of ticket purchasers for a multitude of city pairs and prices).

[7] Del Monte's argument that class wide harm cannot be demonstrated because the pineapples at issue were sometimes sold as "loss leaders" is completely irrelevant. *See NASDAQ*, 169 F.R.D. at 523 ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected").

to unjust enrichment collected in California); *Simon v. Philip Morris*, 124 F. Supp. 2d 46 (E.D.N.Y. 2000) (applying New York law to claims of nationwide class against New York corporation).

B. Assuming that the Laws of Every State Apply, the Court Cannot Simplify this Case By Declining to Certify an Indirect Purchaser Class.

Del Monte's argument that the application of numerous individual state laws will cause individual issues to predominate is also inapposite in light of the removal provisions of the Class Action Fairness Act of 2005, codified at 28 U.S.C. § 1332 *et seq.* If the Court were to deny certification of any indirect purchaser class in this case, the claims of the indirect purchasers would be filed in numerous new individual state court class actions, each of which would be removable to federal court under the Class Action Fairness Act. 28 U.S.C. § 1332(d). These removed cases would likely be referred to the Multidistrict Litigation Panel, which would likely transfer those new cases to this Court in light of the progress already made in this case. Thus, this Court would still be faced with the task of addressing class certification of the indirect purchaser claims and coordinating those claims for discovery and trial, presumably with the direct purchaser case already pending. Denying certification would only result in the delay of this case and greater complexity.

C. Numerous State Laws Will Not Cause Individual Questions to Predominate.

Del Monte's argument that the potential application of numerous state laws will cause individual questions to predominate is without basis. *First*, proof at trial of Del Monte's monopolization of the whole, fresh, extra-sweet pineapple market will be common to the class, regardless of what laws are eventually applied to determine whether Del Monte's conduct should result in liability. *In re Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002)("common issues of fact and law . . . clearly predominate . . . [because] [p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs"); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 18.25 at 18-81 (2002)("[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues.").

Second, the state law claims asserted here have many common elements. The various *Illinois Brick* repealer statutes are consistent with the Sherman Act as far as determining liability. *See In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275 (D. Mass. 2004)("Under both federal and state law, the essential elements of a private antitrust action are the same: proof of a violation by the defendant, a demonstration of injury to the plaintiff, and an approximation of the plaintiff's damages."). Del Monte's assertion that there are significant differences among the various *Illinois Brick* repealer statutes is simply incorrect. *See* Appendix A.[8] The same is true with respect to the unfair competition claims of the Indirect Purchasers and the unjust enrichment claim of the Direct and Indirect Purchasers.[9]

Third, if the Court holds that the determination of the substantive law is relevant for purposes of certification, state laws containing identical or similar legal standards can be grouped together. *Cf. Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998); *Steinberg*, 224 F.R.D. at 78–79. *See* Appendix B (chart grouping unjust enrichment claims by state). The Court could also use any of the case management tools described in *Visa Check/MasterMoney*, 280 F.3d 124, to address any differences in the state laws to be applied. *See* discussion *supra* Part I.

D. The Direct Purchasers' Unjust Enrichment Claim Should be Certified.

Del Monte contends, without citing any supporting authority, that the Direct Purchaser's must articulate a methodology that apportions the damages pass-through to determine whether they

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[8] Del Monte relies heavily upon the federal antitrust decision of *Illinois Brick*. The court should decline the defendant's invitation to violate the Erie doctrine, which mandates that plaintiffs' pendant state law claims be adjudged with exclusive reference to state - not federal - law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[9] *See In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 92 (D. Mass. 2005)("Intervenors finally note some differences in the state consumer protection laws plead by various members of the class. These differences, however, do not pose a serious obstacle to certification."); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998)(common law claims for unjust enrichment "are universally recognized causes of action that are materially the same throughout the United States"). Nor do variances in statutes of limitations preclude certification. *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 78 (E.D.N.Y. 2004)

may recover for unjust enrichment. The Direct Purchaser's contend that Del Monte is incorrect - the benefit derived by Defendants is the overcharge, and a methodology to determine the amount of this overcharge, through common evidence, is all that is required. *See Relafen*, 221 F.R.D. at 287 (Any enrichment derived by the defendant came directly from the direct purchasers). [10] Direct Purchasers offer the concurrently filed Supplemental Report of Dr. Ronald Cotterill, containing this methodology.

Del Monte also argues that an affirmative defense against one of the Direct Purchasers precludes class certification. This argument is without merit. Defendants offer no such defenses against the other three direct purchasers.[11] Further, it is well settled that certification is appropriate, even if affirmative defenses may require individualized inquiry. *See, e.g., Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39-40 (1st Cir. 2003)(certification is appropriate even if individual issues are present in affirmative defenses); *Lupron*, 228 F.R.D. at 91 (In pricing fraud cases courts have found predominance, despite individual differences concerning knowledge of the fraud)(citations omitted).

V. 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 Direct and Indirect Purchaser Classes pursuant to Rule 23 of the Federal Rules of Civil Procedure.

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[10] Defendants' argument concerning an apportionment methodology is misplaced. Proof that a defendant was benefited at a plaintiff's expense is used to determine standing, not the quantum of damages. *See Clark v. Daby*, 300 A.D.2d 732 (N.Y. App. Div. 2002)(They are issues when plaintiffs lack privity or have conferred a benefit under a mistake of fact or law).

[11] Defendants' assertion of an unclean hands defense against Direct Purchaser Just-A-Mere Trading Co. is misplaced and unsupported. (Def. Br. at 33 n. 23). Just-A-Mere testified that if the extra-sweet varieties sold by Del Monte's competitors, were equal in quality and cost to the DM Gold, it would have been interested in selling those brands and would have equally benefited from such sales. (Sobelsohn Decl. Ex. C (excerpts of Deposition of Fred Endy of Just-A-Mere Trading Co.)).

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CERTIFICATE OF SERVICE

I, Ryan G. Kriger, certify that on the 26th day of September, 2005, I caused a true and correct copy of PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE JOINT MOTION FOR CLASS CERTIFICATION PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE to be served electronically upon the following:

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