UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: PINEAPPLE ANTITRUST LITIGATION (RMB)(MHD) This document relates to all actions	:	Civil Action No. 1:04-md-1628

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO THE DIRECT PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Dated: July 26, 2006

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Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce N.A., Inc. (collectively "Del Monte") supplement their opposition to the direct purchaser plaintiffs' motion for class certification on the basis that Milberg Weiss Bershad & Schulman LLP ("Milberg Weiss"), the law firm that has acted as pre-certification lead counsel in the consolidated direct purchaser cases, and which presently seeks appointment as lead counsel for the putative direct purchaser plaintiff class, has been indicted by a federal grand jury because it allegedly paid kickbacks to lead plaintiffs and class representatives in approximately one hundred and eighty actions between 1981 and 2005.

FACTUAL BACKGROUND

This litigation involves antitrust actions brought by direct and indirect purchasers of the Del Monte Gold pineapple. The Court has consolidated four putative class action lawsuits brought by direct purchasers and has separately consolidated two putative class action lawsuits brought by indirect purchasers. The Court has further ordered that both sets of consolidated actions be "treated jointly solely for the purpose of coordinating all pretrial discovery…." *See* Pre-Trial Order No. 1, ¶ A(3).

As part of its pre-trial organization of the litigation, the Court appointed a lead counsel in the two sets of consolidated cases. Milberg Weiss was appointed lead counsel for the named direct purchaser plaintiffs.[1] *See id.* at ¶ E(14). There is pending a motion by the direct purchaser plaintiffs for class action certification. Defendants have not previously opposed the appointment of Milberg Weiss as counsel for any class of direct purchasers that may be certified.

[1] In their motion for class certification, the direct purchaser plaintiffs assert that the court "has already appointed [Milberg Weiss as] counsel for the Direct Purchaser Class." *See* Plaintiffs' motion for class certification at 21. However, the order appoints Milberg Weiss only as lead counsel for the named plaintiffs in the consolidated direct purchaser actions. Because no class has been certified to date, the Court has not had occasion to appoint class counsel or make inquiry into or findings concerning the adequacy of counsel for the putative class.

For practical purposes, although Milberg Weiss was appointed lead counsel for the named direct purchaser plaintiffs, it appears that the law firm of Berman DeValerio Pease Tabacco Burt & Pucillo ("Berman DeValerio") has effectively functioned as co-lead counsel for those plaintiffs. It appears that the two law firms have shared the work associated with representing the direct purchaser plaintiffs, for example by sharing responsibility for taking and defending depositions and for arguing at hearings, and by jointly working on discovery and written submissions. In addition, six other law firms have appeared and acted as counsel for the various direct purchaser plaintiffs. No trial date has been set.

<u>The Indictment of Milberg Weiss</u>

On May 18, 2006, Milberg Weiss and two of its most senior (and name) partners, David Bershad and Steven Schulman, were indicted by a federal grand jury in California. *See* First Superseding Indictment, *United States v. Milberg Weiss Bershad & Schulman LLP*, *et al.*, No. 05-587 (C.D. Cal. 2006) (the "Indictment"), attached as Ex. 1.[2] The indictment, which followed a six-year federal probe and failed negotiations to reach a deferred prosecution agreement with the firm, alleges that over a twenty-four year period ending in 2005, Milberg Weiss made illegal payments to lead plaintiffs and class representatives in approximately one hundred and eighty cases. *Id*. at pp. 10-11. The indictment further suggests that three unidentified senior partners of Milberg Weiss are under continuing investigation in connection with the alleged illegal kickback scheme. *Id.* at pp. 3-4, 24, 51. The indictment alleges that in order to hide the illegal payments, Milberg Weiss and others "made and caused others to make false and misleading statements, and omitted and caused others to omit material facts" in submissions filed with various courts and in discovery taken in the approximately 180 lawsuits mentioned in the indictment. *Id*. at p.12.

[2] All exhibits are appended to the Declaration of Carl E. Goldfarb in Support of Defendants' Supplemental Opposition to Direct Purchaser Plaintiffs' Motion for Class Certification.

The Suitability of Milberg Weiss to Serve As Lead or Class Counsel
Is At Issue in Other Cases

Other courts have considered Milberg Weiss's suitability to serve as lead counsel because of the indictment. In *In re Meditronic, Inc. Implantable Defibrillator Products Liab. Litig*., 05-MDL-1726 (D. Minn.), the Honorable James M. Rosenbaum *sua sponte* raised the question of the firm's continued service on the plaintiffs' steering committee. *See* Ex. 2 at p. 1. After considering the question, Judge Rosenbaum exercised his discretion and relieved Milberg Weiss of its duties on the plaintiffs' steering committee.[3]

Judge Rosenbaum noted that in cases such as MDL and class actions, the court "bears a particularly heavy burden" to protect the plaintiffs, "irrespective of, and in addition to, the duty owed to these clients by their respective attorneys."[4] *Id*. at p. 2 He stated that in MDL litigation lead counsel is not the original choice of "many, if not most," transferee plaintiffs, and suggested that "few [plaintiffs] would select as their counsel an attorney whose law firm had been indicted for violating its duties to the court and to its clients." *Id*. at p. 6.

Judge Rosenbaum considered whether removal of Milberg Weiss violated the Constitutional presumption of innocence, which applies to criminal cases, and noted that for "a Grand Jury's indictment means that it found probable cause to believe a criminal act has taken place." *Id*. Judge Rosenbaum found it "inexplicable" that Milberg Weiss and the partner working on the case, had not disclosed the investigation, which had been long-pending, until the indictment was returned. *Id*. at p. 4. In the instant case, Milberg Weiss has not formally

[3] Judge Rosenbaum also removed from the committee Milberg Weiss partner Mitchell Breit, who is not mentioned in the indictment.

[4] *In re Medtronic* is an MDL proceeding and not a class action. Judge Rosenbaum found that the court's "duties to protect the transferee plaintiffs to be fully co-extensive with those owed in a class action." *Id*. at 2 n.1.

informed the Court of the investigation or of the indictment, notwithstanding its potential relevance to the pending motion for class certification.

In a hearing concerning appointment of lead class counsel in *In re Chaparral Resources, Inc. Shareholders Litig*., C.A. No. 2001-N (Del. Ch.), which took place before the indictment was issued but after reports that it was imminent, Vice Chancellor Stephen P. Lamb stated that he would "have difficulty if the outcome [of discussions between plaintiffs' law firms] were the appointment of Milberg Weiss as the sole lead counsel." *See* Ex. 3 at p. 35. Vice Chancellor Lamb expressed respect for the Milberg Weiss lawyer on the case, but concluded that "times being what they are, and stories being what we see in the newspapers, that [appointing Milberg Weiss] would not be an acceptable outcome to me." *Id.*

Milberg Weiss's suitability to serve as class counsel is being briefed in *In Re New Motor Vehicles Canadian Export Antitrust Litigation*, MDL Docket No. 03-md-1532 (D. Me.). After Milberg Weiss was indicted, the defendants in that action moved on the basis of the indictment to disqualify Milberg Weiss from continuing to serve as class counsel on the Plaintiffs' Executive Committee and from representing class members in that litigation. Milberg Weiss, represented in that action by Michael M. Buchman and J. Douglas Richards, the same Milberg partners representing the firm in this action, filed a detailed opposition to that motion on July 14, 2006; defendants' reply is due on August 4, 2006.[5]

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[5] In its opposition to defendants' disqualification motion in *In Re New Motor Vehicles Canadian Export Antitrust Litigation*, Milberg Weiss cites three cases for the proposition that since the indictment of the firm a number of courts in other cases "have expressed confidence in the firm's ability to represent the interests of class members in ongoing actions and/or have appointed Milberg Weiss to represent class members." None of those cases -- *Schoenbaum et al. v. E.I. DuPont de Nemours & Co., et al.,* No. 4:05-cv-1108 (E.D. Mo. Filed 7/15/2005); *In re Zyprexa Products Liabiliy Litigation*, No. 04-md-1596 (E.D.N.Y. filed April 4, 2004); *Simon et al. v. KPMG et al*., No. 05-cv-3189 (D.N.J. filed 6/24/2005) – addressed how the indictment of Milberg Weiss affects the firm's qualification to serve as class counsel.

Even two of the firms representing direct purchaser plaintiffs in this case have in other litigation opposed the appointment of Milberg Weiss as lead plaintiff counsel or the appointment of William Lerach, who headed Milberg Weiss' West Coast office until 2004, as lead plaintiff counsel, because of the indictment. In addition to the opposition filed by Berman DeValerio in the *In re Converse Technology, Inc. Derivative Litigation*, the firm of Cohen Milstein Hausfeld & Toll filed a memorandum in *Martin v. GMH Communities Trust et al*., CA No. 2-06-CV-01444 (E.D. Pa.), in which it stated that to "propose such counsel [former Milberg Weiss partner Lerach] be put in a fiduciary capacity to protect the interests of the putative class in this case demonstrates poor judgment if not outright inadequacy."[6] *See* Ex. 5 at p. 10.

ARGUMENT

I. MILBERG WEISS SHOULD NOT BE APPOINTED AS CLASS COUNSEL.

A. The Adequacy of Representation of the Class.

"The role of class counsel is akin to that of a judicially appointed fiduciary, not that of a privately retained attorney." *Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945 (JBW), 2005 WL 2467766, at *3 (E.D.N.Y. Oct. 6, 2005). The "ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court." *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995). The "court must scrutinize the character, competence and quality of counsel retained' by the plaintiff." *Kingsepp v. Wesleyan University*, No. 89 Civ. 6121

In another case, the court in *In re Converse Technology, Inc. Derivative Litigation*, Supreme Court of the State of New York, New York County, Index No. 601272/2006 recently appointed Milberg Weiss as co-lead counsel for plaintiffs in a consolidated action over the objections of the plaintiff represented by the firm of Berman DeValerio which, according to the court's July 13, 2006 Decision And Order, Attached as Ex. 4, "question[ed] Milberg Weiss' ability to devote resources to the effective and efficient prosecution of this matter, as problems currently plague the law firm."

[6] Cohen Millstein later withdrew its opposition.

(DNE), 1992 WL 230136, at *1 (S.D.N.Y. Sept. 3, 1992) (internal quotations and citations omitted).

Rule 23 includes the requirement to determine that competent counsel will adequately represent the class. *See* Fed. R. Civ. P. 23(g). This requirement protects the rights of absent class members because they are bound by the judgment in the action. *See, e.g., London v. Wal-Mart, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003); *see also* 7A Charles Alan Wright et al., Federal Practice and Procedure: Civil 3d § 1769.1 (3d ed. 2006) ("because of the broad binding effect of class-action judgments, serious attention is given to the adequacy of representation of those absent class members who will be bound by the judgment").

"Under Rule 23 the trial judge has a constant duty, as trustee for the absent parties in the class litigation, to inquire into the professional competency and behavior of class counsel." *In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980). The conduct of putative class counsel is relevant to the question of adequacy of representation. *See, e.g.*, *Brame v. Lefkowitz*, 85 F.R.D. 568, 577 (N.D. N.Y. 1979); *see also Hall v. Midland Group*, No. CIV.A. 99-3108, 2000 WL 1725238, at *3 (E.D. Pa. Nov. 20, 2000). Examination may be made of the conduct of counsel in prior litigation in determining adequacy of counsel. *See, e.g., Kingsepp v. Wesleyan University*, 142 F.R.D. 597, 599 (S.D.N.Y. 1992) (court must "scrutinize the character" and consider counsel's conduct in prior litigations).

B. Milberg Weiss's Indictment For Criminal Acts Committed In Connection With Its Service As Class Counsel Undermines the Basis for Its Appointment As Class Counsel.

The acts with which the indictment charges Milberg Weiss are pertinent to the adequate representation requirement which "lies at the heart" of class actions. *Id*. (internal citations and quotations omitted). The allegations involve a pattern of criminal activity spanning two decades

and involving 245 overt acts in furtherance of its criminal conspiracy. The alleged architects of that pattern include two of the firm's senior partners, who are also named partners (one of whom founded the firm), and who have served on the firm's governing committees.[7] *See* Ex. K to the Declaration of Michael Buchman, Esq., in support of Direct Purchaser Plaintiffs' motion for class certification. One of the indicted lawyers, David Bershad, participated for the direct purchaser plaintiffs group in a settlement conference with defendants in this case.

The indictment alleges that beginning in 1981 and continuing through 2005, Milberg Weiss "secretly" paid millions of dollars "in kickbacks to named plaintiffs in class action and shareholder derivative actions in which Milberg Weiss served as counsel." *See* Ex. 1 at p. 10. To conceal that criminal conduct, the indictment alleges, Milberg Weiss "made, and caused others to make false and misleading statements … in complaints, motions, certifications, declarations, and other documents filed in the Lawsuits and in depositions and other discovery … taken in the lawsuits." *Id*. at p. 12.

One lawyer referred to in the indictment has admitted participation in the criminal scheme. Richard Purtich, a lawyer identified as an intermediary for the payment of some of the kickbacks, recently entered into a plea agreement admitting that "he and certain law firms with which he was associated received checks from Milberg Weiss totaling more than $3.5 million for the benefit of Cooperman [a class representative] between 1992 and 1996." *See* May 22, 2006 Department of Justice Press Release, attached as Ex. 6. Purtich further admitted that "he and his law firms never made any referrals, performed any work, or did anything else to earn these payments from Milberg Weiss," and that "all these Milberg Weiss payments were in fact payments from Milberg Weiss to Cooperman, pursuant to the law firm's agreement with

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[7] The indictment also asserts that three other unidentified partners of Milberg Weiss participated in the criminal activity. *See* Ex. 1 at pp. 3-4, 24, 51.

Cooperman to pay him a portion of the attorneys' fees that Milberg Weiss obtained in class actions in which Cooperman served as or provided a named plaintiff." *Id.* It is clear that, while Milberg Weiss and its indicted partners are entitled to a presumption of innocence in their criminal case, the Court should not ignore those criminal charges when it appoints class counsel. As noted by Judge Rosenbaum, *see* Ex. 2 at 6, the presumption of innocence afforded by the Constitution to criminal defendants does not require ignoring the underlying facts that may be proven to support the allegations detailed at length in the indictment.

It does not appear that the putative class would be prejudiced by the grant of this motion. The law firm of Berman DeValerio has effectively acted as co-lead counsel for the direct purchaser plaintiffs. For example attorneys from Milberg Weiss have taken or defended 16 depositions in this case, while attorneys at Berman DeValerio have taken or defended 19 depositions. *See* Goldfarb Decl. at ¶¶ 2-3. In addition to Milberg Weiss and Berman DeValerio, several other law firms also serve as counsel for the direct purchaser plaintiffs. At the argument of plaintiffs' motion to compel production of privileged documents based on the crime-fraud exception before Magistrate Judge Dolinger, Milberg Weiss did not argue but attorneys from two other firms, including Berman DeValerio, did. *See* 6/2/06 Tr., attached as Ex. 7, at 1-2, 12. Because fact discovery has been completed in this case and a trial date not yet set, there will be ample time for other firm(s) to formally step into the class counsel role.

C. Possible Prejudice to Defendants.

The appointment of Milberg Weiss as class counsel could also prejudice the defendants because it could give disgruntled class members a basis to challenge the resolution of this action. *See*, *e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 804 (3d Cir. 1995) (vacating settlement class based upon, *inter alia*, objections to the

adequacy of class counsel). As recognized by the Second Circuit, "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented." *Stephenson v. Dow Chemical*, 273 F.3d 249, 258 (2d Cir. 2001) (*quoting Van Gemert v. Boeing Co*., 590 F.2d 433 (2d Cir. 1978), *rev'd on other grounds*, 539 U.S. 111 (2003)); *see also Wolfert v. Transamerica Home First, Inc*., 439 F.3d 165, 171-72 (2d Cir. 2006).

Given the indictment, the adequacy of Milberg Weiss' representation may be vulnerable to attack no matter how vigorously its attorneys prosecute this action. Dissatisfied class members could, for example, question whether Milberg Weiss was impeded in its work by the pending indictment, the personal and financial consequences of the indictment, or the ensuing departure of some its lawyers; such class members might question whether Milberg Weiss' strategy in the litigation was affected by its serious legal problems. If Milberg Weiss were to be convicted, the potentially crippling consequences to the firm could further be used to call into question the adequacy of its representation of the class. The defendants ought not be subjected to the risk that dissatisfied class members, asserting that indicted counsel was imposed upon them, would later use that as a basis for challenges, direct or collateral, to a settlement or judgment.

CONCLUSION

The motion to appoint Milberg Weiss as class counsel for the direct purchaser plaintiffs should be denied.

Dated: July 26, 2006

Respectfully submitted,

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