UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

THE DIRECT PURCHASER AND INDIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR CLASS CERTIFICATION PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

Plaintiffs American Banana Co., Inc., J. Bonafede Co., Inc., Just-A-Mere Trading Company, LLC, Meijer, Inc., and Meijer Distribution, Inc. (the "Direct Purchaser Plaintiffs") and Brenda Caldarelli, Gary Freed, Alberta Lopez, Carrie Pardy, and Neil Schwam (the "Indirect Purchaser Plaintiffs"), respectfully submit this memorandum in support of their Joint Motion for Class Certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.[1]

The Direct Purchaser Plaintiffs seek to certify a class of persons who purchased whole, fresh, extra-sweet pineapples directly from Defendants Del Monte Fresh Produce Company and/or Del Monte Fresh Produce, N.A., Inc., (collectively referred to as "Del Monte" or "Defendants") in order to pursue the following class claims for:

(i) treble damages under the Federal antitrust laws for Defendants' unlawful monopolization of the market for MD-2 pineapples;

(ii) injunctive relief under the Federal antitrust laws to prevent Defendants from continuing or repeating their unlawful elimination of competition in the market for MD-2 pineapples; and

(iii) restitution and/or damages on account of Defendants' unjust enrichment under the common law of every state.

The Indirect Purchaser Plaintiffs are the end-payors, *i.e.*, the consumers who are the last persons in the chain of distribution for the MD-2 pineapple. The Indirect Purchaser Plaintiffs seek to certify a class of consumers (*i.e.*, end purchasers) who purchased MD-2 pineapples to pursue the following class claims against Defendants for:

(i) injunctive relief to prevent Defendants from repeating their violations of Section 2 of the Sherman Act by unlawfully maintaining a monopoly and eliminating competition in the wholesale market for whole, fresh, extra-sweet pineapples;

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[1] All "Compl. ¶" references are to the [Corrected] Consolidated Direct Purchaser and Indirect Purchaser Class Action Complaint ("Complaint") attached as Exhibit A to the Declaration of Michael M. Buchman, dated June 29, 2005 ("Buchman Decl.").

(ii) damages suffered by the Indirect Purchaser Plaintiffs under the antitrust laws of states that enacted *Illinois Brick* repealer statutes to permit indirect purchasers to pursue damages claims for antitrust violations;[2]

(iii) damages or restitution for Defendants' violation of state unfair competition statutes;[3] and

(iv) restitution and/or damages on account of Defendants' unjust enrichment under the common law of every state.

As described in the Complaint, Del Monte, for at least seven years, has reaped supracompetitive prices for extra-sweet pineapples by preventing competitors from entering the market. Specifically, Del Monte: (i) fraudulently obtained a patent for a pineapple variety it now admits could not be patented; (ii) falsely informed competitors that the patent it fraudulently obtained covered the MD-2 pineapple; (iii) threatened litigation and commenced sham litigation to prevent potential market entrants from cultivating or selling MD-2 pineapples; and (iv) the Indirect Purchaser Plaintiffs allege that to this day Del Monte is engaged in a deceptive marketing campaign in which it falsely represents to consumers that Del Monte's MD-2 pineapple is a "unique" variety, even though competitors now also produce and sell MD-2 pineapples.

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[2] The Indirect Purchaser Plaintiffs are pursuing damages claims under the antitrust laws of Arizona, California, District of Columbia, Florida, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

[3] The Indirect Purchaser Plaintiffs are pursuing damages claims under the unfair competition laws of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia.

Through this scheme, Del Monte succeeded in intimidating pineapple growers, including, but not limited to, Dole Fresh Fruit Company ("Dole") and Maui Land and Pineapple Company, Inc. ("Maui Pineapple"), from cultivating or selling their own versions of extra-sweet pineapples. It was not until May of 2003, after years of sham litigation against Dole and Maui, that Del Monte finally admitted it had no exclusive right to the MD-2 pineapple and conceded that its MD-2 pineapple is neither proprietary nor unique.

Del Monte has used its unlawfully obtained market power to charge supracompetitive prices for the MD-2 pineapple. The Direct Purchaser Class seeks to recover as damages the entire overcharge caused by Del Monte's illegal monopolistic practices. The Indirect Purchaser Plaintiffs contend that this overcharge for the MD-2 pineapple was passed on to them and seek to recover as damages and/or restitution the overcharge they were forced to pay. *California v. Arc America Corp.*, 490 U.S. 93 (1989). Between 1995 and 2003, Defendants' sales of MD-2 pineapples at the wholesale level exceeded $1 billion.

Federal courts have routinely certified direct and indirect purchaser classes in analytically identical cases that allege a defendant falsely asserted patent rights to eliminate competition in a market and charge supracompetitive prices. *See In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004) (certifying class of direct and indirect purchasers who paid supracompetitive prices for a prescription drug because defendant unlawfully eliminated generic competition); *see also In re Relafen Antitrust Litig.*, 225 F.R.D. 14 (D. Mass. 2004) (certifying direct and indirect purchaser settlement class that overpaid for prescription drug due to exclusion of generic competition from the market); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231 (D. Del. 2002) (same), *aff'd,* 391 F.3d 516 (3d Cir. 2004); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) (same); *In re Buspirone Antitrust Litig.*, MDL 1413, Order No. 40 (S.D.N.Y. Apr. 2, 2003) (same); *In re*

Cardizem CD Antitrust Litig., 200 F.R.D. 326 (E.D. Mich. 2001) (same). These class certification decisions, which address conduct, claims, and damages theories that are almost identical to those at issue in this case, provide a detailed blueprint for the certification of the Direct and Indirect Purchaser Classes herein.

The class action device was designed to facilitate the class-wide adjudication of similar claims and to achieve economies of time, effort and expense while promoting uniformity of decision as to all persons similarly situated. The class action mechanism is not only the superior method to adjudicate claims such as those alleged here, but it is the only viable method of doing so. As set forth more fully below, Plaintiffs satisfy all of the foregoing requirements. Accordingly, Plaintiffs respectfully request certification of the proposed Classes.

II. BACKGROUND

A. The Revolutionary MD-2 Pineapple and Del Monte's Control of the Pineapple Market.

The MD-2 pineapple is a genetically engineered hybrid pineapple that was developed in 1972 by the Pineapple Research Institute ("PRI"). The MD-2 hybrid, known as PRI 73-114, is superior to a standard Champaka pineapple in that it is sweeter, less acidic, highly resistant to parasites and internal rotting, and has a much longer shelf-life. The PRI dissolved in 1987, and the seedlings of PRI 73-114 were turned over to Del Monte and Maui Pineapple, who were the only two remaining members of the PRI. In the 1990's, Del Monte began expanding production of the MD-2 pineapple and selling it under the trade name "Fresh Del Monte Gold.™" Because of its superiority to the standard Champaka variety pineapple, the "Fresh Del Monte Gold™" pineapple was an immediate commercial success. In 1996, Del Monte started to distribute the

Del Monte MD-2 pineapple nationwide. These MD-2 pineapples sold at a substantial price premium to Champaka pineapples at the both the wholesale level and retail level.

Through the deceptive and coercive conduct described below, Del Monte maintained a controlling share of the market for fresh, whole, extra-sweet pineapples during the class period and used its unlawfully obtained market power to charge a supracompetitive price for MD-2 pineapples.

B. Through Fraud and Coercion, Defendants Excluded Competitors from the Market for MD-2 Pineapples.

Del Monte's scheme had two parts: *First*, through false representations to the Patent and Trademark Office, Del Monte obtained a patent that would appear to cover the MD-2 pineapple. *Second*, through threats and sham litigation asserting a patent on the MD-2 pineapple, Del Monte intimidated and prevented other pineapple producers from cultivating MD-2 pineapples and competing in the whole, fresh, extra-sweet pineapple market.

Defendants retained lawyers at Fitzpatrick, Cella, Harper & Scinto ("Fitzpatrick") in 1992 to obtain a plant patent on the MD-2 pineapple. Del Monte learned from Fitzpatrick that Defendants' commercialization of the MD-2 pineapple five years prior in 1987 made the MD-2 pineapple *unpatentable.*[4] Defendants and their in-house lawyers, thereafter, launched a scheme to restrict competition by fraudulently patenting the CO-2 or the PRI 73-50, which is a sibling hybrid of the MD-2. The MD-2 and CO-2 were both created by PRI in 1970 by crossing

[4] A patent could not be obtained because MD-2 fresh pineapples were apparently sold in the U.S. with the crowns attached. Since a pineapple's crown is planting material usable for propagation purposes, plant material was within the public domain and readily available to competitors when Defendants commercialized the product in the U.S. in 1987.

the same plants and they share some of the same characteristics.[5] Defendants obtained a patent on the CO-2 even though they would later admit during litigation with Maui Pineapple that the CO-2 was unpatentable for the *same reasons* the MD-2 was unpatentable. Armed with this CO-2 patent, Defendants implemented the second part of their scheme to create confusion and uncertainty in the marketplace by asserting the patent on the CO-2 pineapple applied to the MD-2 pineapple. The result was that competitors did not enter this highly lucrative new market.

This scheme, which would allow Defendants to obtain and maintain a monopoly over fresh, whole, extra-sweet pineapple sales in the U.S., was rather straightforward. As articulated by Del Monte's Vice President of North American Sales and Marketing, Michael Pererira, Defendants would intentionally create a publicity campaign designed to confuse competitors into thinking the CO-2 patent was actually a patent of the MD-2:

REDACTED

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[5] The PRI 73-50 was also jointly owned with Maui Pineapple Co. Del Monte could not get Maui's permission to jointly patent this product. Del Monte's lawyers stripped the PRI 73-50 reference from the draft patent application because PRI 73-50 had the same seed parents. They changed the name to Calvin Oda-2 or CO-2 to prevent anyone from discovering the patent did not cover the MD-2. DM-NY-0153286 **REDACTED**

Buchman Decl., Exhibit B. This confusion would also allow them to circumvent Maui's ownership rights by secretly obtaining an assignment of patent rights from David Williams who was a retired Maui Executive and former PRI plant breeder. When Defendants obtained the assignment from Williams, they did not disclose the true PRI identity of the CO-2 (PRI 73-50) to Mr. Williams. Deposition of Dr. David Williams taken on October 7, 2002 at 261:14-18. Buchman Decl., Exhibit C. He later testified in the Maui litigation that he never would have signed the patent application had he been told the CO-2 was PRI 73-50.

REDACTED

DM-NY-0153083 (emphasis added). Buchman Decl., Exhibit D. During this deposition in the Del Monte and Maui litigation, Mr. Pereira also confirmed the "intent" of the scheme was to impede competition by discouraging competitors from growing the MD-2 because they would think it was a **REDACTED** Deposition of Michael Pereira taken on January 7, 2003 at 104:5-106:14. Buchman Decl., Exhibit E. Del Monte deliberately engaged in this campaign creating fear, uncertainty and doubt in the marketplace in order to cause potential competitors to forego or delay market entry, thereby preserving market exclusivity for years. Notably, it takes several years for a competitor to cultivate commercially significant quantities of MD-2 pineapple.

Shortly after the CO-2 patent was obtained, Defendants also engaged in patent misuse by issuing carefully crafted patent infringement threat letters to seed propagation labs in Costa Rica where MD-2 seeds were being developed. Defendants threatened to institute patent infringement actions unless the recipients of the letters ceased propagation activity:

REDACTED

DM-NY-0153084, Buchman Decl., Exhibit F.[6] The letters contain false statements. *First*, Del Monte claims it developed the PRI 73-114 or MD-2 plant material. This statement is false because this material was developed by the PRI and jointly owned with Maui. *Second*,

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[6] *See also* DM-NY-0153085 – 89, Buchman Decl., Exhibit F.

Defendants impliedly assert that the Costa Rican plant material (PRI 73-114) is the subject of the CO-2 patent. This intentionally misleading assertion of patent coverage of the PRI 73-114 variety violates the competition laws.[7] Defendants made similar threats to competitors. *See* DM-NY-0075607 – 08, Buchman Decl., Exhibit I.

Del Monte also engaged in sham litigation against potential market entrants. When Dole launched its own MD-2 pineapple, under the name "Dole Premium Select," Del Monte immediately filed suit against Dole alleging that its new competitor did not have a legal right to produce, distribute, or sell the MD-2 pineapple. Similarly, in 2001, in response to Maui Pineapple's efforts to sell a MD-2 pineapple under the name "Hawaiian Gold," Del Monte sued Maui Pineapple for patent infringement contending that Maui's use, cultivation, distribution and sale of MD-2 pineapples violated Del Monte's patent.[8]

It was not until January 31, 2003, that Del Monte finally admitted that the patent it had used to coerce competitors was invalid due to pre-patent sales.[9] Del Monte finally withdrew its patent on May 6, 2003. Since then, both Dole and Maui Pineapple have begun cultivating and selling MD-2 pineapples to compete with the "Del Monte Gold™" pineapple. As a direct and

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[7] It appears that Del Monte's in house legal department participated in the drafting of these letters. *See* DM-NY-0001819-23, Buchman Decl., Exhibit G. Indeed, a federal court has already determined that Del Monte used its lawyers to carry out its fraudulent letter-writing campaign. Order at 9-11, *Del Monte v. Dole*, Case No. 00-1171-CIV-GOLD, Buchman Decl., Exhibit H.

[8] *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).

[9] *See* Defendants' Notice of Motion and Motion to Dismiss Patent Counterclaim in *Maui Pineapple Co., et al. v. Del Monte Co., et al.*, Northern District of California, Case No. C0-1449 ("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.")

proximate result of Del Monte's anticompetitive conduct, both the Direct and Indirect Purchaser Plaintiffs have been denied the benefits of free and unrestrained competition in the whole, fresh, extra-sweet pineapple market. The Direct and Indirect Purchaser Plaintiffs have suffered injury as a result of this anticompetitive conduct by having to pay supracompetitive prices for "Fresh Del Monte Gold™" pineapples.

C. Class Wide Injury and Damages Suffered by the Direct and Indirect Purchaser Classes.

The Direct and Indirect Purchaser both contend that they suffered antitrust injury by paying supracompetitive prices for the MD-2 pineapple. The Direct and Indirect Purchaser Plaintiffs have each concurrently filed expert reports that propose methodologies to measure impact and damages caused by Del Monte's anticompetitive conduct. *See* Declaration of Ronald W. Cotterill Ph.D., dated June 27, 2005 ("Cotterill Decl."), for the Direct Purchaser Class, and Report of Frank D. Tinari Ph.D., dated June 28, 2005 ("Tinari Report."), for the Indirect Purchaser Class.

III. ARGUMENT

A. Antitrust Class Actions Are Favored Because of Their Importance in Enforcing the Antitrust Laws.

Courts in the Second Circuit regularly certify class action claims involving restraints of trade under Section 1 of the Sherman Act,[10] 15 U.S.C. § 1, and monopolization under

[10] *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237 (S.D.N.Y. 2005); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911, 2003 U.S. Dist. LEXIS 11897 (S.D.N.Y. July 15, 2003) (Baer, J.); *Arden Architectural Specialities, Inc. v. Wash. Mills Electro Minerals Corp.*, 2002-2 Trade Cas. (CCH) ¶73,818 (W.D.N.Y. Sept. 17, 2002); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000); *In re Magnetic Audiotape Antitrust Litig.*, No. 99 Civ. 1580, 2001 U.S. Dist. LEXIS 7303, at *25-26 (S.D.N.Y. June 1, 2001); *In re Master Key Antitrust Litig*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 164 (S.D.N.Y. 2000) (Kaplan, J.); *In re NASDAQ Market-*

Section 2 of the Sherman Act, 15 U.S.C. § 2, finding that a class action provides *the only* efficient means for many purchasers to seek recoveries.[11] *See In re Buspirone,* 210 F.R.D. 43.

As this Court noted in *Town of New Castle v. Yonkers Contracting Co.,* 131 F.R.D. 38, 41 (S.D.N.Y. 1990): "Since private enforcement of antitrust laws provides a supplement to governmental enforcement, *it is our view that class action treatment of alleged antitrust violations is appropriate and desirable." Id.* (emphasis added). Thus, "because of the important role that class actions play in the private enforcement of the antitrust statutes, courts resolve doubts about whether a class should be created in favor of certification." *In re Inds. Diamonds Antitrust Litig.,* 167 F.R.D. 374, 378 (S.D.N.Y. 1996).[12]

Makers Antitrust Litig., 169 F.R.D. 493, 501 (S.D.N.Y. 1996) (Sweet, J.); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374 (S.D.N.Y. 1996); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971), *amended by* 333 F. Supp. 291 (S.D.N.Y.), *mandamus denied sub nom. Pfizer, Inc. v. Lord*, 449 F.2d 119 (2d Cir. 1971).

[11] *Bradburn Parent/Teacher Store, Inc. v. 3M*, 2004-2 Trade Cas. (CCH) ¶ 74,523 (E.D. Pa. Aug. 17, 2004) (certifying a direct purchaser class under Section 2 of the Sherman Act); *In re Relafen Antitrust Litig.*, 218 F.R.D. 337 (D. Mass. 2003)(same); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 225 F.R.D. 208 (S.D. Ohio 2003) (same); *In re Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43 (S.D.N.Y. 2002) (Koeltl, J.) (same); *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174 (E.D. Mich. 2002) (same); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12 (D.D.C. 2001) (same); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000) (same); *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279 (D.N.J. 1997) (same); *Jennings Oil Co. v. Mobil Oil Corp.*, 80 F.R.D. 124 (S.D.N.Y. 1978) (same); *Du Pont Glore Forgan, Inc. v. Am. Tel. & Tel. Co.*, 69 F.R.D. 481 (S.D.N.Y. 1975) (same); *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (same).

[12] *See also In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 419 (S.D. Tex. 1999); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998); *New Castle*, 131 F.R.D. at 41; *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688-89 (D.Minn.1995); *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *3 (N.D. Fla. Jan. 13, 1992); *Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.*, 120 F.R.D. 642, 645 (E.D. Pa.1988); *In re So. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 252 (S.D. Tex. 1978).

B. The Standard for Class Certification Under Rule 23.

A class will be certified where a movant satisfies the four requirements of Fed. R. Civ. P. 23(a) — numerosity, commonality, typicality and adequacy of representation — plus the requirements of one of the subparts of Fed. R. Civ. P. 23(b). In this motion, Plaintiffs seek certification under Fed. R. Civ. P. 23(b)(3).

In applying Rule 23's criteria, the substantive allegations in a plaintiff's complaint are accepted as true[13] and it is inappropriate for a court to conduct a preliminary inquiry into the merits of the plaintiff's claims.[14] "[T]he Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation." *NASDAQ*, 169 F.R.D. at 504; *see In re Oxford Health Plans, Inc., Sec. Litig.*, 191 F.R.D. 369, 373 (S.D.N.Y. 2000) ("[o]ur Court of Appeals has directed district courts to avoid applying Rule 23 under a restrictive interpretation."). As the Second Circuit stated, "if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968) (quoting *Esplin v. Hirschi,* 402 F.2d 94, 99 (10th Cir. 1968)). The Second Circuit has held that there are powerful policy considerations that favor certification of antitrust class actions. *See In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 132-33 (2d Cir. 2001). To certify a class under Rule 23, plaintiffs must satisfy each requirement set forth in Rule 23(a), as well as at least one of the provisions of Rule 23(b). *Id.*, at 132-33 (2d Cir. 2001).

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[13] *Magnetic Audiotape,* 2001 U.S. Dist. LEXIS 7303, at *5; *Indus. Diamonds.*, 167 F.R.D. at 378; *Maywalt v. Parker & Parsley Petroleum Co.,* 147 F.R.D. 51, 54 (S.D.N.Y. 1993), *aff'd*, 67 F.3d 1072 (2d Cir. 1995).

[14] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Caridad v. Metro.-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) ("In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class.").