UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce N.A., Inc. (collectively "Del Monte") file this memorandum in opposition to plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23.

INTRODUCTION

Del Monte opposes the motion for certification of a class of indirect purchasers in all respects, and opposes certification of a direct purchaser class with respect to the alleged unjust enrichment claims. Based on the present record, Del Monte does not oppose interim certification of a class of direct purchasers with respect to their Sherman Act § 2 claim.

Plaintiffs have failed to meet their burden of justifying certification of a nationwide class of indirect purchasers for many independent reasons. In the terms of the facts, the named plaintiffs who are seeking to represent such a class are consumers who claim to have purchased Del Monte Gold pineapples from grocery stores only in New York, New Jersey and California. According to their discovery responses, none of these plaintiffs knows even the most basic details of the purchases upon which their entire claim rests. None of them has a single document showing that they bought even one pineapple, nor do any of them remember the specifics of when they made their alleged purchases or how much they paid.

But the defects in plaintiffs' showing are not merely its factual inadequacy. Plaintiffs have failed to show how they can possibly meet the "rigorous analysis" required under Rule 23, *see General Tel Co. v. Falcon*, 457 U.S. 147, 161 (1982), when litigation of the claims raised by the proposed class would require application of: (i) the antitrust laws of 23 jurisdictions; (ii) the consumer protection laws of 45 jurisdictions;

(iii) and the unjust enrichment laws of every state and the District of Columbia. Plaintiffs have not cited a single case in any state or federal court certifying a class of this vast scope. Nor do plaintiffs offer any plan for conducting the massive and complex trial that the putative class would entail.

Among other reasons, the proposed class cannot be certified because there is no way to identify the millions of indirect consumers who would be its members. Unlike consumer classes that have been certified for products such as prescription drugs where there are pharmacy records identifying individual consumers, plaintiffs have not offered an iota of evidence that any records of the millions of purchases of pineapples are available. Indeed, the only record evidence shows that even the putative class representatives lack that information. In short, plaintiffs have completely failed to show how the Court could possibly determine membership in the class, provide notice, determine the number of pineapples that each class member purchased and the price they paid, or distribute any recovery in a fair and reliable manner.

But even if the members of an indirect purchaser class could somehow be identified, plaintiffs have failed to show why individualized issues of fact will not predominate and overwhelm any common issues in the litigation. At the heart of the Indirect Purchasers' claim is the assertion that they overpaid for Del Monte Gold pineapples because an alleged anticompetitive overcharge was passed through to them by brokers, wholesalers, jobbers and retailers in the distribution chain. Yet, it was these same complexities associated with calculating the "pass-through" to end consumers that led the Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), to bar indirect purchaser suits under the federal antitrust laws. The same concerns weigh heavily against

certifying an indirect purchaser class in federal court even if a substantive claim may exist under state law.

The calculation of any pass-through to indirect purchasers is extremely complicated and inevitably imprecise, and likely differs widely among members of the class. Although plaintiffs and their expert proffer a method that assumes a constant pass-through rate, this is irrational as a matter of economics (*see* Declaration of Bradley Reiff, submitted as Ex. A),[1] and wrong under the factual record in this case, which establishes that the prices direct purchasers paid for Del Monte Gold pineapple and the markup in the multi-level distribution chain for retailer to consumer (and hence the pass-through rate) varies over time and by geographic area and seller. Because plaintiffs have failed to show that common issues of fact predominate as to any alleged indirect purchaser pass-through damages, certification must be denied.

In addition, class certification must be denied because the Indirect Purchasers allege three distinct theories of recovery, each of which requires state-by-state determinations that make a single trial upon any one theory, let alone all three, unworkable. For example, many of the state consumer protection laws invoked by plaintiffs require a showing of deception or scienter. This element alone renders individual issues predominant. For this reason, federal courts have repeatedly denied certification in cases such as this, where a proposed class makes claims under multiple, differing state laws.

[1] All lettered exhibits to this memorandum are attachments to the declaration of Del Monte's counsel, David A. Barrett.

For similar reasons, the Direct Purchasers have failed to meet their burden to justify class certification on the unjust enrichment claims which they allege on behalf of a nationwide class. Unlike the Sherman Act claim, plaintiffs' unjust enrichment claims will be governed by the differing laws of the 50 states, which destroys commonality. Moreover, plaintiffs have not even attempted to show how they could prove damages for unjust enrichment on a classwide basis. This omission is fatal because, unlike Sherman Act damages, unjust enrichment damages must be reduced by the amount of the alleged overcharge that the direct purchaser passed through to its customers.

Accordingly, plaintiffs' motion for class certification should be denied in its entirety as to the Indirect Purchasers and denied with respect to the Direct Purchaers' unjust enrichment claims.

RELEVANT FACTS

Under Rule 23(b)(3), plaintiffs seek to certify a single nationwide class of Indirect Purchasers under three theories of liability: (1) monopolization under the antitrust laws of 23 states; (2) consumer fraud under the laws of 45 states; and (3) unjust enrichment under the common law of all 50 states and the District of Columbia.[2] The proposed class would encompass all end purchasers of Del Monte Gold pineapples in the United States from March 1, 1996 to present.[3] To support the contention that the indirect purchaser claims can be proven with common evidence, as required by Rule 23(b)(3), plaintiffs rely exclusively upon the report of an economist, Frank D. Tinari.

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[2] Plaintiffs have not moved for certification of a class for purposes of injunctive relief under Rule 23(b)(2).

[3] Plaintiffs have clarified that the class would not include any purchasers such as restaurants and hotels that resell the pineapple in any form.

In his report, Dr. Tinari makes a critical, but flawed, assumption: that Del Monte's alleged overcharge was passed on in its entirety (*i.e.*, 100%) to all end consumers uniformly. (*See* 8/23/2005 Dep. of Frank Tinari, at 88-89 ("it's implied, that there would be 100 percent pass-through"), submitted as Ex. B (hereinafter "Tinari Dep., Ex. B").) At his deposition, however, Dr. Tinari conceded that the pass-through rate could vary: (1) over time as the prices of the Del Monte Gold pineapple changed; (2) depending on the intensity of competition among grocery markets in a given area; (3) depending on whether grocery chains engaged in zone pricing; (4) depending on the type of retail seller involved (*e.g.*, Wal-Mart prices with a low mark-up, as opposed to a high-end retail store); and (5) depending on whether the pineapples were grown in Costa Rica or Hawaii. (*Id.* at 69-72, 77-82.)

Dr. Tinari's deposition admissions that pass-through rates are affected by many variables are supported by plaintiffs' fact witnesses. For example, direct purchaser plaintiff, Just-A-Mere, testified that for pineapples, prices and margins (*i.e.*, the difference between the purchase price and the resale price) shift "every day." (8/25/2005 Dep. of Fred Endy of Just-A-Mere Trading Company, LLC., at 292, 330-31, submitted as Ex. C.) Factors affecting the margin, all of which are plainly subject to substantial variations, include supply and demand (both of which have obvious seasonality), pineapple product quality, the volume being purchased, and the importance and location of the customer. (*Id.* at 330-31.) Moreover, there is evidence that most consumers do not actually purchase from a direct purchaser. In one example, there are at least three layers of sales between Del Monte and the end consumer: (1) sale from Del Monte to a wholesaler (*i.e.*, to a direct purchaser class member); (2) sale from the wholesaler to a

broker; (3) sale from a broker to a retailer; and (4) sale from the retailer to the indirect purchaser. (*Id.* at 90-91; *see also* 9/14/2005 Dep. of Eugene Fabio of J. Bonafede Co., Inc, at 122-23, submitted as Ex. D.) At each of these levels, prices and margins are affected by myriad factors and change constantly. (8/14/2005 Dep. of George Contos of American Banana Co., Inc., at 178-185, 201-203, submitted as Ex. E; *see also* Ex. D., at 108-111.)

In support of certification of a direct purchaser class, plaintiffs submitted the declaration of economist, Ronald W. Cotterill. Dr. Cotterill's report focuses entirely on the Direct Purchasers' antitrust claim, and does not address whether or how damages might be proven on a class-wide basis for unjust enrichment claims. (7/27/2005 Dep. of Ronald W. Cotterill, at 93-94, submitted as Ex. F.)

ARGUMENT

Plaintiffs, as the moving parties seeking certification, bear the burden "of establishing that the class meets the Rule 23 requirements." *Daniels v. City of New York*, 198 F.R.D. 409, 413 (S.D.N.Y. 2001). As demonstrated below, plaintiffs in this case have failed to meet that burden.

Rule 23 requires a "rigorous analysis" to ensure that the requirements for class certification are met. *See General Tel. Co.*, 457 U.S. at 161; *In re Visa Check/ MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001). Under Rule 23(b)(3), certification may be granted only if "rigorous analysis" demonstrates that the plaintiffs have met the burden of showing that: (1) common questions of fact and law predominate, and (2) whether class treatment is the superior form of adjudication. *See* Fed. R. Civ. P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In order for common issues to predominate, plaintiffs must demonstrate that there are classwide issues of fact or law that can be decided with generalized proof, and those issues must be "more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). Plaintiffs also must show that treatment is practical from the standpoint of the manageability of the proposed class. *See* Fed. R. Civ. P. 23(b)(3). "Manageability" is a consideration that "encompasses [the] whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 164 (1974).

I. THE INDIRECT PURCHASER CLASS IS UNMANAGEABLE BECAUSE THERE IS NO MEANS TO IDENTIFY MEMBERS OF THE PUTATIVE CLASS OR THEIR PURCHASES OF DEL MONTE GOLD PINEAPPLES

It is axiomatic that to certify a class the court must be "able to identify and notify the members." *Reifert v. South Central Wis. MLS Corp.*, No. 04-C-969-S, 2005 WL 1206843 (W.D. Wis. May 20, 2005). If class members cannot be identified and their purchases cannot be verified, class certification is improper. *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968) ("[On remand the district] court should explore the problems which individual class members would be likely to encounter in filing and proving their claims. If as a practical matter class members are not likely ever

to share in an eventual judgment, we would probably not permit the class action to continue.").[4]

Here, there is no way to identify the members of the putative indirect purchaser class: consumers who purchased a Del Monte Gold pineapple since 1996. Del Monte has sold millions of Del Monte Gold pineapples throughout the United States since 1996. Plaintiffs have failed to identify any records evidencing the purchases of those pineapples by indirect purchasers. Unlike indirect purchasers of products such as prescription drugs or automobiles, whose purchases are recorded and subject to verification, there is no way to ascertain the identity of these putative class members or the quantities and prices of their purchases.

In striking confirmation of this fatal flaw in plaintiffs' motion, not even the putative class representatives have records of their purchases. Each of the Indirect Purchaser plaintiffs, in response to a document request, acknowledged that he or she has no documents, including receipts, concerning his or her purchase of whole, fresh extra-sweet variety pineapples from Del Monte.[5] Nor do plaintiffs offer any means of identifying the millions of members of the class, the amount of pineapples purchased by each class members, or the prices paid by class members.

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[4] The expression in certain cases that manageability concerns alone rarely warrant the denial of class certification, *see e.g., In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d at 140, is not applicable to cases such as this one where the fundamental issue is that the actual members of the class itself cannot be reliably identified. *See In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir.1974) (reversing certification of antitrust class of estimated 40 million hotel patrons, and recognizing "[a]ctions have been dismissed on the basis of manageability problems alone, particularly in cases involving large numbers of plaintiff class members").

[5] *See* Indirect Purchasers' Responses to Requests 1 & 9 of Del Monte's First Set of Requests for Production (all of the Indirect Purchasers' written discovery responses are submitted as Ex. H.) In fact, plaintiffs' discovery responses are not even certain as to whether they actually purchased Del Monte pineapples. *See, e.g.*, Brenda Caldarelli's Int. An. 2 ("Plaintiff believes, to the best of her recollection, that the whole, fresh, extra-sweet pineapples she purchased were Del Monte brand pineapples.").

Prior to the Supreme Court's seminal 1977 decision in *Illinois Brick* — in which the Court held that the computation of pass-through damages is so problematic that indirect purchasers cannot sue for damages under the Sherman Act — federal courts held that indirect-purchaser consumer classes in antitrust cases were unmanageable and could not be certified when there was no means to identify the actual class members and their purchases. *See, e.g., City of Philadelphia v. Am. Oil Co.*, 53 F.R.D. 45, 72-73 (D.N.J. 1971) (denying certification of class of retail end-purchasers of gasoline, while certifying two classes of large-scale purchasers that had purchase records); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319, 321 (S.D.N.Y. 1970) ("we think it obvious that a class comprising all consumers of eggs in the United States is so large that it is unmistakably beyond the limit of a permissible class action. It would be next to impossible to identify members of the class and to give them appropriate notice.").

A leading federal case detailed the reasoning for rejecting certification of a class — very similar to that proposed here — comprised of indirect purchasers whose identities cannot be ascertained and whose purchases cannot be verified:

> In discussing the motorist who purchased gasoline from retail stations between 1955 and 1965, the Court is speaking by and large of a class that made cash purchases at many different stations, at many different times, at many different prices. Credit card statements would be helpful, but they are not available from either plaintiffs or defendants during most of the relevant period. The proposed committee of counsel, who are supposed to evaluate the claims of each motorist against the damage award, would be given an almost impossible task to resolve. Even if this committee could ultimately relate damage awards to the amount of miles one drove within the trading area between 1955 and 1965, the committee would still need some records upon which to base an award. Affidavits would not be sufficient by themselves. . . . Simply stated, this Court is not satisfied that the motorist who purchased from a retail service station between 1955 and 1965 within the states of Delaware, New Jersey and Pennsylvania has available to him the type of records necessary to make any meaningful

> distribution of damage awards if liability and general damages are established. As a consequence, the Court concludes that this portion of the Philadelphia-New Jersey class is unmanageable, and hence, should not be certified.

City of Philadelphia, 53 F.R.D. at 72-73. The state courts (in which consumer class cases have largely been pursued since *Illinois Brick*) have repeatedly followed this reasoning in cases involving commodity consumer products, like pineapples, where reliable purchase records are unavailable. *See, e.g., Keating v. Phillip Morris*, 417 N.W. 2d 132, 137 (Minn. App. 1987) (denying certification for indirect purchasers of cigarettes because damages analysis showed unmanageability); *Ren v. Phillip Morris*, No. 00-004035-CZ, 2002 WL 1839983, at *18 (Mich. Cir. Ct. June 11, 2002) (same, because of problems calculating actual damages and resulting management problems); *Peridot, Inc. v. Kimberly-Clark Corp.*, No. MC 98-012686, 2000 WL 673933, at*6 (Minn. Dist. Ct. 2000) ("Thus even if plaintiffs could offer a viable mechanical calculation, ascertaining the class [of indirect purchasers of tissue products] would be a highly complex and difficult, if not impossible, task, neither managerially nor administratively feasible."); *Derzon v. Appleton Papers, Inc.*, No. 96-CV-3678, 1998 WL 1031504 (Wis. Cir. Ct. July 7, 1998) (denying certification of class of indirect purchasers of fax paper because trial of such a diverse group of purchasers would be unmanageable); *McCarter v. Abbot Labs., Inc.*, No. Civ.A. 91-050, 1993 WL 13011463, *5 (Ala. Cir. Ct. April 9, 1993) (denying certification of class of indirect purchasers of baby formula where individual questions

related to pass-through "would result in thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment").[6]

Although there have been indirect purchaser classes certified, a careful judicial survey and analysis of these cases identified two situations where certification may be appropriate. *See Ren*, 2002 WL 1839983, at *13-*15. First, there are cases such as the recent Microsoft litigations, where "the plaintiffs of the class made only one or a very small number of [purchases of] products on limited occasions such as in the purchase of computer operating software where there is limited price variation on the retail level." *Id.* at *15. Second, there are cases "where the number of purchasers of the product are readily identifiable and reliable records for individual purchases exist." *Id.* Where the products at issue — like cigarettes in *Ren* or pineapples here — do not fall into either category, class actions are not manageable due to the myriad of individual issues entailed in damages. *See id.* Because the purchase of a pineapple is not a singular event likely to be recalled by a consumer with clarity, and because consumers do not

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[6] Plaintiffs argue (Pls. Br. at 14) that in the "analytically identical" case of *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004), the court certified both indirect and direct purchaser classes. However, Relafen is a prescription drug for which there are available records to identify the end purchasers and the prices that they paid. Thus, the manageability problems that preclude certification here did not exist in *Relafen*.

Indeed, the indirect purchaser suits certified by federal courts have been limited to products such as prescription drugs where there are ascertainable and verifiable records, and to settlement classes. Yet, even settlement classes have experienced significant management problems. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL NO. 1361, 2004 WL 2106612, at *1 (D. Me. Sept. 22, 2004) ("In light of the media reports of criticism over the actual distribution of the CDs in the cy pres portion of the settlement, I shall expect to see that subject and criticism addressed in the Final Report of the Claims Administrator, if not sooner.") (citations and footnote omitted); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL NO. 1361, 2005 WL 1923446, at *3 & n.8 (D. Me. Aug. 9, 2005) (expressing court's "hope" that annual progress reports will be submitted, so the court's "monitoring of funds can come to a timely end"). Plaintiffs have not cited any federal indirect purchaser class case that has gone to trial.

typically keep records of pineapple purchases, plaintiffs cannot meet their burden of showing manageability.

II. INDIVIDUAL ISSUES OF DAMAGES PREDOMINATE AND RENDER THE PUTATIVE CLASS ACTION UNMANAGEABLE

Under the law of this Circuit, the "damage issue turns out to be a major stumbling block for class actions" in antitrust cases, unless plaintiffs propose a viable formula for computing damages. *See Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (quoting 2 Areeda & Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 332c at 157 (1978)). The Second Circuit has particularly cautioned that class damages problems are "compounded" by complications such as "varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five or ten years," *id.,* all of which are present here.

The Indirect Purchasers here are seeking damages measured by that portion of an alleged overcharge that was passed-through to end consumers throughout the United States over a 9-year period of time. (Tinari Report at 2, attached to Pls. Mot. as Ex. A to Lax Decl.) Thus, absent a universally-applicable damages formula, each of the millions of individual class members would have to prove each of his or her multiple pineapple purchases included an alleged overcharge that was passed-on at each layer of a multi-level distribution chain. *See Illinois Brick,* 431 U.S. at 740 (in "treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers"). Such a showing, of course, would be impossible and unmanageable.

A. Plaintiffs Do Not Have A Viable Damages Model

Calculating the rate at which an overcharge is passed through the chain of distribution is "famously difficult." *See In re Brand Name Prescription Drugs Antitrust Litigation,* 123 F.3d 599, 605 (7th Cir. 1997) (Posner, C.J.). As the Supreme Court recognized in rejecting an alleged monopolist's defense that a direct purchaser's damage claim should be reduced by the amount of the overcharge was passed-on to the purchasers' customers:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. . ..

Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481, 492-93 (1968) (footnote omitted). In *Illinois Brick*, the Supreme Court reiterated these difficulties when it held that indirect purchasers injured by pass-through of an overcharge cannot sue under the Sherman Act. *See* 431 U.S. at 732 ("This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-

damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants.").

Of particular relevance here, the Supreme Court recognized that:

> the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.

Id. at 732-33. It is well-established in antitrust cases that pass-through rates and markups are rarely either complete (*i.e.*, rarely 100%) or uniform. *See, e.g., Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170 (8th Cir. 1998) ("Only rarely will a firm be able to pass on the entire amount of a monopoly overcharge to its customers. In the usual case, both the firm and its customers will bear some portion of the overcharge . . . .") (citation omitted); *Stamatakis Indus. v. King*, 965 F.2d 469, 472 (7th Cir. 1992) (Easterbrook, J.,) ("Antitrust law does not assume stable markups. Competition [at the level of distribution] holds markups in check. Unless demand is perfectly inelastic, the producer absorbs part of any increase in costs, with the amount absorbed depending on the ratio between the elasticities of supply and demand.") (citations omitted).

Notwithstanding these well-known deficiencies in pass-through claims, plaintiffs' only theory of damages for indirect purchasers is based upon the assumption of a 100% pass-through. (Tinari Dep., Ex. B at 88-89.) The sole support for this critical assumption is the report of Dr Tinari. Dr. Tinari's report, however, fails to meet plaintiffs' burden under Rule 23 to demonstrate that there is a manageable way to calculate damages.

As a threshold matter, Dr. Tinari's report should be disregarded entirely because it is not sworn, and, at deposition, Dr. Tinari declined to verify the report under oath or affirmation:

> Q. Do you stand by this report as your sworn testimony in this case?
>
> A. My sworn testimony? I've issued a report. I'm now testifying under oath.
>
> Q. Is this report under oath, Dr. Tinari?
>
> A. Not that I'm aware of.

(*Id.* at 15). Class certification is a significant decision that should be made on admissible evidence. *See Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005) (reversing certification of securities class action because finding of efficient market was not based on "adequate admissible evidence"); *Blihovde v. St. Croix Cty.*, 219 F.R.D. 607, 618 (W.D. Wis. 2003) (at the class certification stage, evidence must as least be "the *kind* of evidence that would be admissible if properly authenticated"). The Court should give no weight to a statement that the declarant has refused to verify under oath.

Even if Dr. Tinari's report were considered, it completely ignores the reality of the marketplace. Without a shred of empirical data, or any theoretical support, Dr. Tinari's report proffers a damages formula that is based upon an assumed constant level of pass-through for the entire nationwide class. (Tinari Dep., Ex. B at 57-62.) In other words, his method assumes a single pass-through rate for every one of the millions of pineapples purchased over a 9-year period. Moreover, Dr. Tinari's report assumes that *100%* of the alleged overcharge was passed on to all end consumers. (*Id.* at 88-89.)

Because these are fatal flaws both as a matter of antitrust precedent and as a matter of "real world" economics, the Tinari report cannot serve as a basis for class certification. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 135 (class certification cannot be based upon expert opinion that is "so flawed that it would be inadmissible as a matter of law").[7]

Dr. Tinari offers no factual support for his assumption that 100% of the alleged overcharge was passed-through to the end consumer in every purchase of a Del Monte Gold pineapple since 1996. (*See* Tinari Report at 9.) Nor does he cite any economic literature to support that counter-intuitive and long-rejected proposition, and in fact, acknowledged in his deposition, that he had not read any theoretical literature on pass-through rates before submitting his report. (Tinari Dep., Ex. B. at 88, 113.)

At his deposition, Dr. Tinari conceded that the rate of pass-through must be determined empirically. (Tinari Dep., Ex. B at 69-72, 77-82.) He also acknowledged that the pass-through could well vary with a host of different factors, such as the level of competition in a local retail market and the supply of pineapples, both of which he admitted change over time. (*Id.* at 69-72, 77-82.) He further conceded at his deposition that he has not undertaken any empirical testing of whether direct purchasers passed-on any alleged overcharges and, if so, how much was passed-on. (*Id.* at 58-61.) In addition, he acknowledged that he could not predict, before engaging in empirical analysis, how

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[7] For the reasons discussed below, Dr. Tinari's report is inadmissible under Rule 702 of the Federal Rules of Evidence, which requires that (1) the expert testimony be based upon sufficient facts or data; (2) the expert testimony be the product of reliable principles and methods; and (3) that the witness have applied the principles and methods reliably to the facts of the case.

many different pass-through rates he would have to use when he applied his model. (*Id.* at 62-63) [8]

Dr. Tinari also conceded that his model assumes only one middleman (typically a large retail chain) between Del Monte and the indirect purchaser. (*Id.* at 86-87). In fact, there are often at least two or three middlemen (a retail establishment and one or two distributors or brokers), thereby greatly complicating the pass-though analysis. (Ex. E, at 156-158).

As demonstrated in the affidavit of Del Monte's expert economist, Bradley Reiff, submitted herewith (Ex. A), there is no theoretical or empirical basis for Dr. Tinari's damages model. (*Id.* at ¶¶ 11-19.) Moreover, contrary to Dr. Tinari's arbitrary assumptions of a fixed pass-through, the available empirical evidence demonstrates that the rate of pass-through likely varied. (*Id.* at ¶¶ 20-25.):

> The problem with Dr. Tinari's approach is that it oversimplifies the critical empirical question of obtaining reliable estimates of the direct purchasers' markups and pass-through rates. Instead, the formula itself assumes a uniform markup and therefore a uniform pass-through rate (both defined as P^r/P^w in the Tinari model) of greater than 100 percent.

(*Id.* at ¶ 9.)

Indeed, the testimony of plaintiffs in this case contradicts Dr. Tinari's core assumptions. For example, the record shows that due to competitive pressures and related factors, direct purchasers sometimes sold Del Monte Gold pineapples at reduced profit margins or even at a loss (Ex. E at 108) — both situations which they necessarily

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[8] Dr. Tinari never attempted to account for these likely variations in the pass-through rate in his report. In fact, he spent no more than 20 hours preparing his report (*id.* at 10.), and is not even certain that data are available to do what he considers the necessary empirical work (*id.* at 66.). In neither his report nor his deposition has Dr. Tinari offered any explanation as to how the pass-through rate would be determined, or as to how his formula could be adjusted to account for variations in the pass-through rates. In other words, he has not explained how his methodology could even be applied on a classwide basis.