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:	
Indirect Purchaser Actions:	

DEL MONTE'S SUPPLEMENTAL MEMORANDUM CONCERNING MANAGEABILITY OF PUTATIVE INDIRECT PURCHASER CLASS

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INTRODUCTION

In opposition to the indirect purchasers' class certification motion, Del Monte demonstrated that the putative class is unmanageable for a number of irrefutable reasons.

Perhaps most important, the members of the putative class – millions of consumers who purchased pineapples during the last decade – simply cannot be identified. Plaintiffs have not produced a single document that identifies even one member of the class or that verifies even one purchase of a Del Monte Gold pineapple during the class period. Not even the named plaintiffs are certain what brand of pineapple they purchased and when. As the Court recognized at the August 1, 2006 hearing on the manageability of the indirect purchaser class (hereinafter "August hearing"), "probably" the "most important" issue with respect to the certification of the indirect class is "the nature of evidence supporting the individual claims." (8/01/06 Tr., Ex. 1, at 12.) Because the plaintiffs had not addressed this issue in their motion and reply papers, the Court asked them to do so in a supplemental written submission.

In response to the Court's very specific and focused inquiries, however, plaintiffs have produced no facts or evidence. Instead, they offer only the unsupported generalization that some class members will have "sales receipts or other documentary evidence." (Plaintiffs' Memorandum of Law In Response to the Court's Order Seeking Further Information as to the Manageability of the Indirect Purchaser Class ("Pls.' Mem.") at 9.) Plaintiffs' inability to answer the "most important" question involved in the Court's manageability determination demonstrates that there is no way that the members of the class, and their purchases of Del Monte Gold pineapples, can be identified with any degree of certainty. Accordingly, the class cannot be certified for this reason alone.

Apparently recognizing this deficiency in identifying putative class members and their actual pineapple purchases, plaintiffs now propose, for the first time, two closely-related plans for distributing damages that seek to evade plaintiffs' otherwise fatal evidentiary void in

identifying class members. Plaintiffs propose that damages should be distributed to *future* purchasers of Del Monte pineapples, either by distributing discount coupons or by reducing the price. Both proposals, however, amount to fluid recovery of the same type that the Second Circuit struck down in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974), as "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." Plaintiffs do not even acknowledge, let alone attempt to distinguish, *Eisen* and other Second Circuit authority following it, which hold that fluid recovery is impermissible in contested actions to overcome otherwise insuperable manageability problems.

Plaintiffs' argument that even a flawed distribution plan is "far preferable to the alternative of allowing a tortfeasor to simply keep its ill gotten gains" (Pls.' Mem. at 10) is ridiculous. As the Court knows, a putative class of direct purchasers is suing Del Monte for the identical alleged antitrust violations. If the direct purchasers were to succeed, Del Monte would be liable to them for all of its alleged overcharges, and that award would be trebled. Thus, the indirect purchaser action is totally unnecessary to ensure that Del Monte gives up its alleged "ill gotten gains." Rather, the second, cumulative award of treble damages that the indirect purchasers seek would be purely punitive. There is no basis in law or policy or fundamental fairness for such an award. Plaintiffs have failed to meet the burden of proving manageability, and the class should not be certified.

Moreover, plaintiffs have failed to present a methodology for computing damages on a class-wide basis. The damage model that plaintiffs propose is so obviously defective as to amount to no method at all. The fatal flaw in plaintiffs' damage methodology is that it cannot solve the intractable difficulties of computing what portion of any alleged price overcharge was actually passed on to particular retail customers. The only evidence before the Court shows that plaintiffs' expert irrationally assumed the pass-through to be 100% throughout the ten-year class

period and under all circumstances – an assumption that is untested and that is flatly contradicted by both common sense and the record evidence. Plaintiffs' failure to offer any remotely plausible method for calculating class-wide damages is a further, independent reason why the class is unmanageable.

Finally, the action is unmanageable because individual issues will necessarily predominate over common ones with respect to state law causes of action asserted by the indirect purchaser plaintiffs. Indeed, the putative class is asserting no less than 116 different claims in all. The Litigation Plan ("Plan") that plaintiffs submitted with their supplemental papers offers no meaningful answer to the question of how a jury trial of such a multitude of claims can possibly be conducted in an efficient or manageable manner.

ARGUMENT

I. THE PROPOSED CLASS IS UNMANAGEABLE.

Plaintiffs do not dispute that they bear the burden of demonstrating that the proposed class meets the prerequisites of Rule 23(a), and that it will be manageable under Rule 23(b)(3).[1] *See Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 226 (2d Cir. 2006); *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 133 (2d Cir. 2001); *see also Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002).[2] Having once again failed to meet their burden, plaintiffs have struck out and certification should be denied.

A. Plaintiffs Have Failed To Show That There Are Documents To Evidence Pineapple Purchases And Identify Class Members.

Not one of the named plaintiffs has any records to substantiate alleged purchases of Del Monte Gold pineapples. (*See* Opp. Br. at 8.) Nor do plaintiffs identify a single one of the

[1] Plaintiffs contend Del Monte did not oppose their request for certification under Rule 23(b)(2). (Pls.' Mem. at 1 n.1.) However, plaintiffs did not move for certification under Rule 23(b)(2) (*see* Pls. Br. at 21), as Del Monte's opposition pointed out. (Opp. Br. at 4 & n. 2.)

[2] Internal citations and quotations are omitted from the citations in this memorandum.

admitted millions of putative class members who has documentary evidence of purchases. Plaintiffs have effectively admitted that they cannot fulfill the Court's direct and "most important" request "for the nature of evidence supporting the individual claims." (8/01/06 Tr., Ex. 1, at 12.) The Court suggested several alternatives: "[I]f you're saying it is internet purchases I'm going to want to know how many purchases you think were made" (*id.* at 12-13); and "[H]ow many people you think and why you think have receipts for the pineapples they bought in [the class] period." (*Id.* at 13.) Despite these specific, repeated requests, plaintiffs have produced nothing but empty rhetoric: "[S]ome class members will be capable of proving their entitlement to damages through sales receipts or other documentary evidence, and others by reference to admissible evidence of their Del Monte Gold purchasing customs and habits." (Pls.' Mem. at 9.)

Without any records, the class is unmanageable because it is impossible to identify class members or to calculate damages for individual members through application of a uniform formula. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, (1974) (manageability determination "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit"); *Dumas v. Albers Medical, Inc.*, No. 03-0640-CV-W-GAF, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005) ("[T]he proposed class must be both ascertainable in theory and readily identifiable (thus, administratively manageable) in fact. . . . [I]dentifying the putative class members is simply not possible without an individualized inquiry into the facts and circumstances surrounding each purchase of Lipitor during the class period.").

B. Plaintiffs Have Failed To Meet Their Burden Of Identifying Reliable Evidence That Putative Class Members Made Actual, Identifiable Purchases Of Del Monte Gold Pineapples.

In view of the utter lack of documentary evidence of purchases, the Court questioned at the August hearing the reliability of sworn statements by putative class members regarding their

pineapple purchases: "I'm just trying to figure out realistically who in the world could attest that they bought a pineapple or two or four, and what kind of pineapple it was." (8/1/06 Tr., Ex. 1, at 9-10.)

The record here demonstrates that even the named plaintiffs cannot meet the eminently reasonable concerns expressed by the Court. For example, the named plaintiffs, none of whom has documentary records, (Opp. Br. at 8 & n. 5), cannot reliably attest to their alleged purchases.

- **Neil Schwam**: "To the best of plaintiff's recollection and within his ability to estimate based upon his habits and customs, on average plaintiff purchased one (1) whole, fresh, extra-sweet variety pineapple every month. . . . Plaintiff believes, to the best of his recollection, that the brands of such whole, fresh extra-sweet pineapples which he has purchased include both Del Monte and Dole." (Resp. to Interrog. No. 2.)

- **Carrie Pardy**: "To best of plaintiff's recollection at this time, on average over the last 5 years, plaintiff has purchased approximately 2-3 whole, fresh, extra sweet variety pineapples per month. . . . The great majority of the extra sweet pineapples purchased were of the Del Monte brand." (Resp. to Interrog. No. 2.)

- **Gary Freed**: "I estimate that I bought 6 pineapples per year and that 2 or 3 of those were brands other than Del Monte." (Resp. to Interrog. No. 3.)

- **Brenda Caldarelli**: "To the best of plaintiff's recollection, and within her ability to estimate based upon her habits and customs, on average plaintiff purchases a minimum of one (1) whole, fresh, extra-sweet variety pineapple every three months. . . . Plaintiff believes to the best of her recollection, that the whole, fresh, extra-sweet pineapples she purchased were Del Monte brand pineapples." (Resp. to Interrog. No. 2.)

(See Composite Ex. 2.) Of course, the fact that the class period goes back ten years, to 1996, adds another layer of uncertainty to their testimony. For example, when asked what variety of whole pineapple she purchased between 1996 and 2000, Ms. Caldarelli testified, "To be honest, it was so long ago, I don't remember exactly. I really don't. It was just too many years ago." (Caldarelli Dep., Ex. 3, at 30.)[3]

[3] Ms. Caldarelli also testified that she "believes" she bought Del Monte Gold pineapples between 1996 and 2000, (*id.* at 30-31), and that the first time she specifically remembers buying a pineapple labeled Del Monte Gold extra sweet was in 2000 or 2001, (*id.* at 33-34).

With no meaningful actual evidence of pineapple purchases, plaintiffs turn to Fed. R. Evid. 406. They contend that evidence as to named plaintiffs' "habit and custom" of purchasing extra sweet pineapples is admissible under Rule 406 "to determine individual damages and/or create a plan of allocation to distribute those damages to the class." (Pls. Br. at 14.) This claim is unavailing. Under Rule 406, evidence of a routine practice is admissible to show that an individual acted "*on a particular occasion* in conformity with [his] habit or routine practice." Fed. R. Evid. 406 (emphasis added). As stated in *Torah Soft Ltd. v. Drosnin*, No. 00 Civ. 0676 (JCF), 2003 U.S. Dist. Lexis 16273, at *14 (S.D.N.Y. Aug. 28, 2003), the sole Rule 406 case cited by plaintiffs (Pls.' Mem. at 14): "The conduct at issue must constitute a regular response to a repeated specific situation." Here, plaintiffs simply cannot prove the necessary predicate to invoke Rule 406 even as to themselves. And they have cited no case that allows Rule 406 evidence from four named plaintiffs to prove facts applicable to millions of absent class members. The alternative of millions of mini-trials necessary to lay the Rule 406 predicate as to each class member is patently impracticable. At best, plaintiffs present a classic case of circular logic – they want to use evidence about general purchasing patterns to prove general purchasing patterns.

Given the dearth of documents, the equivocal testimony, and the inherent unreliability of sworn statements regarding pineapple purchases as long as a decade ago, neither Rule 406 (nor any other device) can be used to deny Del Monte its Due Process right to question putative class members about their purchases, both to deter fraud and to weed out unreliable testimony based on flawed memory.[4] *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614,

[4] Testimony about purchases of inexpensive, perishable goods as long as ten years ago is apt to be inaccurate under the best of circumstances. For example, while Del Monte was the only company selling a hybrid pineapple during the early years of the class period (1996-1998), it also sold non-hybrid varieties of sweet pineapples. It sold "Jet Fresh" pineapples, which are champaka pineapples left in the field longer to sweeten more; and also sold "High Shell Color" pineapples, which are champaka pineapples treated with a chemical to give their shells a more golden color. (8/13/02 P. White Dep., Ex. 11, at 25,

617-19 (W.D. Wash. 2003) (sworn statements do not suffice to establish injury given and uncertain equivocal testimony of named plaintiffs); *Davies v. Philip Morris U.S.A., Inc.*, No. 04-2-08174-2 SEA, 2006 WL 1600067, at *4-*5 (Wash. Super. Ct. May 26, 2006) ("where it is unlikely consumers will have receipts or any method of proving prior purchases, Defendant should have an opportunity and be entitled to challenge each and every individual as to his or her claimed damages"; "there is no manageable method by which to handle the individual issues the Defendant is entitled as a due process matter to raise in this case"). Such questioning of tens of millions of class members would, of course, be utterly impractical and unmanageable.

C. Second Circuit Precedent Bars Fluid Recovery In This Action.

Plaintiffs attempt to sidestep their inability to identify members of the putative class by proposing closely-related fluid recovery plans that would automatically award damages to future Del Monte Gold patrons without any verification of class membership. Those plans are doubly flawed. Legally, fluid recovery cannot be used to circumvent Rule 23's requirement that a class be manageable. Factually, their proposal rests on an erroneous contention – that coupon and price reduction plans would direct damages to past purchasers of Del Monte Gold pineapples, who purportedly paid the alleged overcharge, and that they would do so in proposition to their injuries.

1. Fluid Recovery Cannot Save An Otherwise Unmanageable Class.

The federal courts have repeatedly denied class certification where plaintiffs have sought to solve manageability problems through fluid recovery schemes. The seminal case is *Eisen v.*

73-75; 10/1/01 M. Pereira Dep., Ex. 12, at 42; 7/24/03 D. Wilson Dep., Ex. 13, at 351; 6/25/02 R. Jimenez Dep., Ex. 14, at 121.) Those pineapples were either extra sweet in flavor or golden in shell color, and sometimes both, and so shared at least one of the distinctive traits of the Del Monte Gold. (*Id.*) Dole also sold a "High Shell Color" pineapple, also a chemically-treated champaka during the class period. (11/11/05 B. Paz. Dep., Ex. 15, at 26-27, 132, and 134-35.) In more recent years, a host of companies have been selling extra sweet hybrid pineapples that not only share characteristics with the Del Monte Gold, but which also have similar brand names– e.g. Del Monte Gold, Dole Gold, Chiquita Gold, Maui Hawaiian Gold, Linda Gold, Fyffes Gold – thus increasing the likelihood that plaintiffs and the putative class members will confuse the competing brands.

Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). There, the court rejected a fluid recovery plan that would have distributed compensation to stock brokerage customers who purchased odd lots in the *future,* because it simultaneously failed to compensate some class members who had made *prior* odd lot purchases but did not trade subsequently, while giving a windfall to future odd lot purchasers who had not traded during the class period. The court denounced that fluid recovery scheme in unequivocal terms: "We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Id.* at 1018.

Plaintiffs fail to acknowledge, let alone distinguish, *Eisen* or the Second Circuit cases following it which precludes a fluid recovery plan here. *See, e.g., Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977) ("We see no reason to change our position, firmly stated in *Eisen*, disallowing a 'fluid class' recovery"); *Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (denying class certification manageability grounds because "the 'fluid' class recovery" has "not found favor in this circuit"); *see also* A. CONTE & H. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:20 (4th ed. 2006) (Second Circuit has "ruled that cy pres or fluid class recovery distributions are not valid in contested actions").

In *In re "Agent Orange" Prod. Liab. Litig., MDL No. 381*, 818 F.2d 179, 185 (2d Cir. 1987), the Court of Appeals endorsed *Eisen* while distinguishing it on several grounds, including that the case before it "was maintainable as a class action regardless of the form of recovery available to the plaintiff class." That, of course, is not true here because Del Monte Gold pineapple purchasers, unlike Vietnam Veterans exposed to Agent Orange, are not ascertainable. But the concerns underlying *Eisen* are clearly present in this case:

> [W]e were particularly concerned in *Eisen* that the availability of "fluid class recovery" would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not. . . . We foresaw that such an unwarranted relaxation of the manageability requirements would have induced plaintiffs to

> pursue "doubtful" class claims for "astronomical amounts" and thereby "generate . . . leverage and pressure on defendants to settle." *Id.* at 1019. . . [and] vastly enlarge the number of class actions in the federal courts . . ..

Id. at 185.

Numerous other courts have followed *Eisen* in prohibiting fluid recovery to resuscitate unmanageable class claims. *See, e.g., American Intern. Pictures, Inc. v. Price Enters., Inc.*, 636 F.2d 933, 935 (4th Cir. 1980) ("The 'fluid recovery' theory which would distribute damages to unspecified parties rather than to specific class members who were actually injured was rejected by us in [*Windam v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977)] as an improper solution to 'the manageability of class actions'"); *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974) (rejecting argument that "many of the individual questions arising from the damage claims can be solved by allowing damages in the form of a fluid recovery"); *Dumas v. Albers Med., Inc.*, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005) ("It is inappropriate to use fluid recovery as a means of rendering manageable – by rendering unnecessary any proof of damages to individual class members – an otherwise unmanageable class action."); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 620 (W.D. Wash. 2003) ("courts have rejected fluid recovery as a solution of the manageability problems of class actions").[5]

More recent Second Circuit law is fully consistent with *Eisen* and its progeny. The Second Circuit has never approved a fluid recovery or *cy pres* award except as part of a settlement, *see Weber v. Goodman*, No. Civ. 97-1376, 1998 WL 1807355, at *5 (E.D.N.Y. Jun.

[5] Several courts have also concluded that use of the fluid recovery to resolve manageability problems would violate the Rules Enabling Act, 28 U.S.C. § 2072, which provides that "such rules shall not abridge, enlarge of modify any substantive right." *See, e.g., Windam*, 565 F.2d 59, 70, 72; *In re Hotel Tel. Charges*, 500 F.2d 90 ("allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes in violation of Enabling Act."); *Eisen*, 479 F.2d at 1014; *Dumas*, 2005 WL 2172030, at *7 (fluid recovery "not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members").

1, 1998), and the decisions approving such plans since *Eisen* involved implementation of settlements, not contested case in which defendants disputed manageability.[6] That distinction is crucial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (with settlement class "court need not inquire whether the case, if tried, would present intractable management problems"); *Agent Orange*, 818 F.2d at 185 ("we have previously recognized that some "fluidity" is permissible in the distribution of settlement proceeds"); *Eisen*, 479 F.2d at 1012 ("[t]here is no settlement. Every issue is contested and litigated.").

Further distinguishing many of the *cy pres* settlements is that they involved *parens patriae* actions where the stringent requirements of Rule 23 do not apply, and so are two steps removed from the contested private class action here. *See State of New York by Vacco v. Reebok Int'l. Ltd.*, 96 F.3d 44, 45 (2d Cir. 1996); *In re CD Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 204 (D. Me. 2003).[7] The fluid recovery cases that plaintiffs cite (Pls.' Mem. at 13, 16-17) are not to the contrary. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), decided before both *Eisen* and *Illinois Brick*, was brought by states, not private individual plaintiffs, included *parens patriae* claims, and was stripped of any relevant precedential value by *Eisen*.[8]

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[6] *See, e.g., In re Holocaust Victim Assets Litig.*, 424 F.3d 158 (2d Cir. 2005); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987); *Fears v. Wilhelmina Model Agency, Inc.*, 2005 WL 1041134 (S.D.N.Y. May 5, 2005); *Jones v. National Distillers*, 56 F. Supp.2d 355 (S.D.N.Y. 1999); *Plotz v. NYAT Maintenance Corp.*, No. 98 Civ. 8860 (RLE), 2006 WL 298427 (S.D.N.Y. Feb. 6, 2006); *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, (S.D.N.Y. 2003). *Schwab v. Philip Morris USA, Inc.*, 2006 WL 2726102 (S.D.N.Y. Sept. 25, 2006), the only exception, is discussed below.

[7] *See, e.g., New York v. Salton, Inc.*, 265 F. Supp.2d 310 (S.D.N.Y. 2003); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 357 (E.D.N.Y. 2000); *New York v. Keds Corp.*, 1994-1 Trade Cas. (CCH) 70,549, 1994 WL 97201 (S.D.N.Y. Mar. 21, 1994); *New York v. Dairylea Cooperative, Inc.*, No. 81 Civ. 1891, 1985 WL 1825 (S.D.N.Y. Jun. 26, 1985).

[8] Plaintiffs twice include the same lengthy quotation from *In re Antibiotic Antitrust Actions* (Pls.' Mem. at 2, 16), while inaccurately attributing it to the Second Circuit. As noted, as a pre-*Eisen* district court decision, that case carries no such weight. In addition, an important element in the *Antibiotic* decision was that the court was "hesitant" to permit manageability concerns to allow defendants to keep "their ill-gotten gains . . . inaccessible to the mulcted consumers because they are many and their individual claims

Plaintiffs heavily rely on *Schwab v. Philip Morris USA, Inc.*, 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005) and 2006 WL 2726102 (S.D.N.Y. Sept. 25, 2006) (Weinstein, J.), which involves alleged RICO violations against the major tobacco companies in the sale of "light" cigarettes. Del Monte respectfully suggests that *Schwab* should not be followed, as it is against the weight of Second Circuit authority insofar as it finds fluid recovery may be used in a litigated action to overcome manageability problems.[9] Significantly, in *Schwab*, as in *In re Antibiotic Antitrust Actions*, the court was deeply troubled that barring a fluid recovery would "reward [defendants] foresight in stealing from the multitude in small amounts." *Id.*, at *3. In this case, as discussed above, such concerns are completely irrelevant, since if liability were to be proven, defendants could be compelled to pay treble damages to the direct purchasers, thereby relinquishing far more than the amount of any allegedly ill-gotten gains. In addition, the fluid recovery plan upheld in *Schwab* involves a claim administration procedure whereby putative class members would be required to establish their entitlement to share in a damage award (2005 WL 3032556, at *1, *18), and so is far different from what plaintiffs propose here, where

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small." 333 F. Supp. at 283. No such concerns apply here, however, since the direct purchasers seek treble damages for the very same conduct underlying the indirect purchasers' claims.

[9] Plaintiffs assert that Judge Weinstein concluded that fluid recovery "has been accepted by nearly all federal circuits that have considered it in both settled and decided cases." (Pls.' Mem. at 17.) This is incorrect. *Schwab* noted that fluid recovery is typically used in settlement classes and stated "courts have also utilized fluid recovery in decided cases." *Schwab*, 2005 WL 3032556, at * 7. It then cited five litigated cases in addition to *In re Antibiotic Antirust Actions.* None arose within the Second Circuit, and none is directly on point. Two cases, *Democratic Cent. Comm. of District of Columbia v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451 (D.C. Cir. 1996) and *Bebchick v. Public Utils. Comm'n*, 318 F.2d 187 (D.C. Cir. 1963), concern use of money collected by a rate-setting body before the roll-back of a rate increase, not antitrust damages. In *American Intern. Pictures, Inc. v. Price Enters, Inc.*, 636 F.2d 933, 936 (4th Cir. 1980), and *L.C.L. Theatres, Inc. v. Columbia Pictures Indusies., Inc.*, 421 F. Supp. 1090, 1104 (D.C. Tex. 1976), the courts stated that the damages sought or awarded did not constitute a fluid recovery. In the last case, *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409 (11th Cir. 1986), the court distinguished *Eisen* because "[p]laintiffs have proven damages based on individual usages and charges and no dispute exists regarding class certification or manageability."

coupons or price reductions contain no means to ascertain whether the *future* Del Monte purchasers who would benefit are in fact members of the putative class of *past* purchasers.[10]

Finally, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 235 F.R.D. 127, 143 (D. Me. 2006), is also distinguishable. In that case, motor vehicle purchasers and lessees allege that automobile manufacturers conspired to prevent imports of lower-priced Canadian cars, thereby boosting U.S. car prices. In that context of major consumer purchases, records are readily available to identify putative class members and how much they paid (*id.* at 141), so that the issues raised by plaintiffs' damage proposal (concerning primarily a claims procedure) were categorically different from the manageability problems here. Moreover, the court did not conduct its own legal analysis, but simply followed the incorrect result in *Schwab*. *Id.* [11]

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[10] The cases plaintiffs cite (Pls. Mem. at 10-11) regarding the appropriateness of coupons and price rollbacks for distributing class recoveries do not support their proposal because those cases all involved settlements. *See Boyd v. Bell Atlantic-Maryland, Inc.*, 887 A.2d 637, 650-51 (Ct. App. Md. 2005) (settlement); *In the Matter of Mexico Money Transfer Litig.*, 267 F.3d , 743 748 (7th Cir. 2001) (coupon settlement); *Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill. 1999) (coupon settlement); *Feldman v. Quick Quality Rests., Inc.*, New York Law Journal, Jul. 22, 1983, p. 12 col. 4 (N.Y. Sup. 1983) (unpublished opinion; settlement as stated in NEWBERG, CLASS ACT, 3 NEWBERG ON CLASS ACTIONS § 10:18 (4th ed.)); *Hoyga v. Superior Ct.*, 75 Cal. App. 3d 122 (1977) (settlement); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972) (settlement); *Bebchick v. Public Utilies Comm'n*, 318 F.2d 187 (D.C. Cir. 1963) (not a class action; settlement); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (Cal. 1967) (settlement); *Reich v. Dominick's Finer Foods, Inc.*, No. 78CH5667 (Ill. Cir. Ct. Cook Co. July 11, 1980) (settlement). *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y. 1996), which plaintiffs cite regarding the permissibility of an aggregate calculating of damages (at 13 & n. 8) is not to the contrary. There the court said there was no need to resort to a fluid recovery because "[d]efendants here are required to maintain detailed computerized records of their transactions."

[11] Plaintiffs claim that nine states permit use of fluid recovery and three have rules permitting its use in class actions. (Pls.' Mem. at 17.) Such state rules may well be procedural in nature and therefore not applicable in federal court. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) ("Cy pres, or fluid, recovery is a procedural device that distributes money damages either through a market system (e.g., by reducing charges that were previously excessive), or through project funding (the project being designed to benefit the members of the class)"; *In re New Motor Vehicles*, 235 F.R.D. at 143 n. 56 ("It is an interesting question where the availability of fluid recovery fits under the Rules Enabling Act, 28 U.S.C. § 2072, and *Erie R.R. Co.*, 304 U.S. at 78. Damages are generally considered substantive law, but fluid recovery is an artifact of the class action procedure, state or federal."). Even assuming state law on fluid recovery were substantive, state law cannot trump the manageability requirements established by Rule 23. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) ("It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law. *See Hanna v. Plumer*, 380 U.S. 460, 469-474

2. Plaintiffs' Purported Distinction Between Fluid Recovery and *Cy Pres* Distribution Cannot Save Their Damage Plan.

Plaintiffs purport to distinguish between a fluid recovery, which would "provide a meaningful benefit either directly or indirectly to the Class" and a *cy pres* recovery, which "flows primarily to persons not in the class." (Pls.' Mem. at 9, 11.)[12] Whatever the label, however, the type of distribution plan that plaintiffs propose is prohibited by binding Second Circuit precedent as a solution to class manageability problems in a contested action.

Plaintiffs argue that a claims administration procedure involving individual claims by putative class members – frequently used as part of fluid recovery plans in class action settlements – *could* be used here, but they do not contend that it *should* be used. (Pls.' Mem. at 9-10.) Indeed, plaintiffs appear to back off from any such procedure by admitting that it "would not likely be the most efficient means of distributing monetary relief to class members in proportion to their injury." (*Id.* at 10.) In any event, plaintiffs fail to meet their burden of proving such a procedure would be manageable. They fail to provide the most basic information requested by the Court: "With respect to a cy pres distribution, I'm going to want to know what percentage is cy pres and what percentage is going to people who can demonstrate they bought a pineapple, and with specificity." (8/1/2006 Tr., Ex. 1, at 12.) There is nothing in plaintiffs' papers addressing the likely number of claims, the anticipated average award, the average processing cost per claim, the comparison between the average cost and the average anticipated award, and the number of consumers with records to support claims. Absent evidence concerning such matters, there is no basis to conclude that any recovery would primarily be paid to class members. It would thus serve no compensatory purpose but it would improperly punish

(1965); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)"). Moreover, by plaintiffs' admission, nearly 40 states have not endorsed fluid recovery.

[12] These terms are generally used without making the distinction plaintiffs purport to draw. *See, e.g.*, *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996) ("In the context of class actions, the cy pres doctrine is referred to as "fluid recovery.").

Del Monte. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (Posner, J.) ("There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy (badly misnamed, but the alternative term – 'fluid recovery'– is no less misleading) is purely punitive.").

3. Plaintiffs' Fluid Recovery Plans Are Based On Critical But Flawed Factual Assumptions.

In addition to the legal deficiencies discussed above, plaintiffs' fluid recovery schemes rest on an unjustified and inaccurate factual assertion that the identity of purchasers of Del Monte Gold pineapples has remained largely constant throughout the entire class period, which stretches from 1996 through the present. That assertion is demonstrably wrong.

Plaintiffs' sole support for the central premise underlying their proposal, the contention that 90% of Del Monte Gold buyers are repeat purchasers (Pls.' Mem. at 10), is a declaration by Joseph M. Fisher, which relies on an article by David Neven of Michigan State University, which relies in turn on a 2004 trade survey, *The Packer's Fresh Trends 2004*. (*See id.*; Ex. A (Decl. Fisher Decl.) at 4 citing Neven at 4.) Nothing in the record supports the reliability of any of these sources, which are not peer-reviewed journals. The *Packer* survey, which lumps all fresh whole pineapples into one group, merely indicates that of the households that purchased fresh pineapples in 2004, 10% do so once a week or more. (*Id.*) It does not purport to address the purchasing habits of Del Monte Gold buyers. And as shown at pp. 21-22 below, Mr. Fisher's assumptions, based on the *Packer* data, result in demonstrably absurd, overstated estimates of the number of Del Monte Gold pineapples that were actually sold, thus demonstrating that his methodology is totally unreliable.

Although some current Del Monte Gold purchasers undoubtedly bought the pineapples during the class period, the evidence indicates that the class of Del Monte Gold purchasers is itself in flux. As a result, plaintiffs' proposed coupon and price rollback schemes would be both