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.").

C. The Direct and Indirect Purchaser Classes Satisfy the Requirements of Rule 23(a).

The four requirements for certification under Rule 23(a) are as follows: (i) the class is so numerous that joinder of all members is impractical; (ii) there are questions of law and fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); *Visa*, 280 F.3d at 132-33. As demonstrated below, the Direct and Indirect Purchaser Classes meet each of the requirements of Fed. R. Civ. P. 23(a).

1. The Classes Are So Numerous that Joinder is Impracticable.

Rule 23(a)(1) "does not require that joinder of all parties is impossible, only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *Oxford Health,* 191 F.R.D. at 374. With regard to the Direct Purchaser Plaintiffs, the parties have stipulated that there are numerous members of the Class. *See* Buchman Decl., Exhibit J.[15] Thus, with regard to the direct purchaser plaintiffs, the parties agree that the numerosity requirement has been met.

Based upon Del Monte's sales of more than $1 billion of "Del Monte Gold" pineapples during the class period, the proposed Indirect Purchaser Class is alleged to number in the thousands. Compl. ¶¶ 32, 107-108. "[P]recise quantification of the class members is not necessary because the court may make 'common sense assumptions' to support a finding of

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[15] *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members") (citing 1 Herbert B. Newberg, Newberg On Class Actions, § 30.05 (2d ed. 1985)); *see also Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972).

numerosity." *NASDAQ,* 169 F.R.D. at 509 (quoting *German v. Fed. Home Loan Mortgage Corp.,* 885 F. Supp. 537, 552 (S.D.N.Y. 1995)).

Here, given that Del Monte sold more than $1 billion worth of MD-2 pineapples during the class period, the estimate that the Indirect Purchaser Class consists of thousands of members that are geographically dispersed throughout the United States is more than sufficient to satisfy the requirements of Rule 23(a)(1).[16]

2. There Are Common Questions of Law or Fact Concerning the Claims of the Direct and Indirect Purchaser Classes.

"The commonality requirement is met if the plaintiffs' claims share a common question of law *or* fact." *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 562 (.S.D.N.Y.2004) (emphasis added); *see Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987). "[T]he commonality requirement does not require that each class member have identical claims as long as at least *one common question of fact or law* is evident." *Currency Conversion,* 224 F.R.D. at 562 (emphasis added). The commonality requirement is satisfied by a common nucleus of operative facts or an issue that affects all members of the class.[17] Thus, the commonality requirement has been described as a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 206 n.8 (S.D.N.Y. 1995). Numerous courts have held that allegations concerning antitrust violations present important common questions that satisfy the

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[16] *See Relafen*, 221 F.R.D. at 267 (numerosity requirement satisfied in light of millions of Relafen prescriptions); *Cardizem CD.*, 200 F.R.D. at 334-35 (numerosity requirement satisfied in light of millions of Cardizem CD prescriptions).

[17] *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987), *cert. denied*, 125 S. Ct. 34 (2004); *Dajour B. v. City of N.Y.*, No. 00 Civ. 2044, 2001 WL 1173504, at *5 (S.D.N.Y. Oct. 3, 2001); *see also* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.10, at 3-50 (3d ed. 1992).

commonality requirement of Rule 23(a)(2). *See Magnetic Audiotape*, 2001 U.S. Dist. LEXIS 7303, at *7; *Auction Houses*, 193 F.R.D. at 164.

a. Common Questions of Law and/or Fact Exist With Respect to the Antitrust Claims of the Direct and Indirect Purchaser Classes.

It is well settled law that "[i]n an antitrust action on behalf of purchasers who have bought the defendants' products at prices that have been maintained above competitive levels by unlawful conduct, the courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite." 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.10 (4th ed. 2002) ("Newberg"). Thus, in analytically identical cases in which direct and indirect purchaser classes were certified, questions of market definition, market power, and whether market power was illegally obtained or maintained were found to be common to all members of a class. *See Relafen*, 221 F.R.D. at 267. As explained in *Jennings Oil Co., Inc. v. Mobil Oil Corp.*, 80 F.R.D. 124, 129 (S.D.N.Y. 1978):

> "[T]he monopolization and attempted monopolization charges set forth in count two of the complaint also raise significant common questions. For example, the monopolization claim raises the question of the relevant product market . . . . Clearly this is a question common to all members of the putative class, the resolution of which will affect the entire class."

see also Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 427 (D.N.M. 1988) ("The common questions of law, the elements of a monopolization claim . . . dwarf, rather than merely predominate over, any individual questions").

As set forth in the Complaint, these common questions include: (a) whether Defendants unfairly or unlawfully monopolized or attempted to monopolize the U.S. market for fresh, whole, extra-sweet pineapples during the Class Period; (b) whether Defendants engaged in anti-competitive conduct in order to unlawfully maintain a monopoly; (c) whether the geographic

market for the anti-competitive activity is the United States market for fresh, whole, extra-sweet pineapple market; (d) whether the product market is the market for fresh, whole, extra-sweet pineapple; (e) whether Defendants had monopoly power in the relevant market for purposes of the monopolization claims set forth herein; (f) whether pro-competitive reasons exist for Defendants' actions; (g) the effects of the monopolization on the prices of the fresh, whole, extra-sweet pineapple sold in the United States during the Class Period; (h) whether Defendants fraudulently concealed the existence of the antitrust violations alleged herein; (i) whether Defendant's exclusion of competitors from the market and charging of supracompetitive prices various state antitrust and unfair trade practices laws; (j) whether Defendants unjustly enriched themselves by charging supracompetitive prices; (k) the appropriate measure of damages to be awarded; and (l) the relief Plaintiffs are entitled to. *See* Compl. ¶¶ 101, 107, Buchman Decl., Exhibit A.

The state law damages claims of the Indirect Purchaser Class under various *Illinois Brick* repealer statutes present the same common questions of law and fact as the federal claims of the Direct Purchaser Class. As explained by the court in *Relafen* in certifying an indirect purchaser class, "[u]nder both federal and state law, the essential elements of a private antitrust action are the same: proof of a violation by the defendant, a demonstration of injury to the plaintiff, and an approximation of the plaintiff's damages." 221 F.R.D at 275. [18]

[18] Of course, the question of the choice of law – or laws -- to be applied to Del Monte's anticompetitive and deceptive conduct, remains unknowable at this early stage of the litigation. New York choice of law rules require courts to apply the law of the state that has the most "significant contacts with the matter in dispute." *Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219 (1993); *Auten v. Auten*, 308 N.Y. 155, 160 (1954). *See also In re Ski Train Fire in Kaprun, Austria*, 230 F. Supp. 2d 392, 399 (S.D.N.Y. 2002) (the forum state in an MDL proceeding is the district court where the action was originally filed, and that state's choice of law rules must therefore be applied.) In this case, which involves allegedly anticompetitive and deceptive conduct that was principally planned and implemented within Del Monte's principal place of

b. Common Questions of Law and/or Fact Exist With Respect to the State Unfair Competition Claims of the Indirect Purchaser Class.

As discussed in detail in Appendix A, the statutory unfair competition claims of the Indirect Purchaser Class all require proof of identical or similar elements and therefore present the common questions of whether Del Monte, by using deception, threats, and sham litigation to exclude competitors and charge supracompetitive prices, engaged in unlawful, unconscionable, deceptive, or unfair acts or business practices.[19] This question is common for every member of

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business in the State of Florida, there is a strong possibility that this Court will choose to apply Florida law to plaintiff's state law claims. *See e.g., In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 (N.D. Cal. 1986) (likelihood of applying California law to nationwide class where defendant was a California corporation, acts complained of emanated from California, and monies relating to unjust enrichment collected in California); *see also Simon v. Philip Morris*, 124 F. Supp. 2d 46 (E.D.N.Y. 2000) (applying New York law to claims of nationwide class regarding claims against New York corporation).

[19] **Alaska** Alaska Stat. § 45.50.471(a) (2005) (unfair methods of competition and unfair and deceptive practices); **Arizona** Ariz. Rev. Stat. § 44-1522 (LexisNexis 2004) (deceptive acts, fraud, material misrepresentations and omissions); **Arkansas** Ark. Code §§ 4-88-107(a), 4-88-108, 4-88-113(f) (LexisNexis 2004) (unconscionable, false and deceptive acts); **California** Cal. Bus. & Prof. Code § 17200 (Deering 2005) (unlawful, unfair, and fraudulent acts); **Colorado** Colo. Rev. Stat. § 6-1-105 (2005) (deceptive and unfair acts); **Connecticut** Conn. Gen. Stat. § 42-110b(a) (2005) (unfair methods of competition and unfair and deceptive acts); **Delaware** Del. Code Ann. tit. 29 § 2517 (2005) (deceptive acts, fraud, material misrepresentations and omissions); **District of Columbia** D.C. Code Ann., §§ 28-3901, 28-3902, 28-3903, 29-2904 (LexisNexis 2005), (unfair trade practices); **Florida** Fla. Stat. Ann. § 501.204(1) (LexisNexis 2005) (unfair methods of competition, unconscionable acts, deceptive and unfair practices); **Georgia** Ga. Code Ann. § 10-1-393 (2004) (unfair or deceptive acts); **Hawaii** Haw. Rev. Stat. Ann. § 480-2(a) (LexisNexis 2004) (unfair methods of competition, unfair or deceptive acts); **Idaho** Idaho Code Ann. § 48-603 (unfair methods of competition, unfair or deceptive acts), § 48-603(18) (2005) (unconscionable acts); **Illinois** 815 Ill. Comp. Stat. Ann. 505/2 (LexisNexis 2005) (unfair methods of competition, unfair or deceptive acts); **Kansas** Kan. Stat. Ann. § 50-626, 627 (2005) (deceptive and unconscionable acts); **Kentucky** Ky. Rev. Stat. Ann. § 367.170 (LexisNexis 2004) (unfair, false, misleading, and deceptive acts); **Louisiana** La. Rev. Stat. Ann. § 51:1405A (2005) (unfair methods of competition, unfair or deceptive acts); **Maine** Me. Rev. Stat. Ann. tit. 5 § 207 (2005) (unfair methods of competition, unfair or deceptive acts); **Maryland** Md. Code Ann., Com. Law §13-301, 303 (LexisNexis 2005) (unfair or deceptive acts); **Massachusetts** Mass. Ann. Laws ch. 93A, § 2 (LexisNexis 2005) (unfair methods of competition, unfair or deceptive acts); **Michigan** Mich Comp. Laws Serv. § 445.903 (LexisNexis

the Indirect Purchaser Class because it can be answered by evaluating only Del Monte's conduct, and the answer would be the same for every member of the Indirect Purchaser Class.

c. Common Questions of Law and/or Fact Exist With Respect to the Unjust Enrichment Claims of the Direct and Indirect Purchaser Classes.

Common law claims for unjust enrichment "are universally recognized causes of action that are materially the same throughout the United States." *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998). An unjust enrichment claim exists when a party is enriched at

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2005) (unfair, unconscionable, or deceptive acts); **Minnesota** Minn. Stat. Ann. § 325D.13 (West 2005) (fraud, false statement, deceptive trade practices, misrepresentation); **Missouri** Mo Ann. Stat. § 407.020 (West 2005) (deception, fraud, unfair practice, misrepresentation, material omission); **Montana** Mont. Code Ann. § 30-14-103 (2003) (unfair methods of competition, unfair or deceptive acts); **Nebraska** Neb. Rev. Stat. Ann. § 59-1601 (2005) (unfair methods of competition, unfair or deceptive acts); **Nevada** Nev. Rev. Stat. Ann. § 598.0915-0923-3 (LexisNexis 2004) (deceptive acts including violation of state or federal statute relating to sale of goods); **New Hampshire** N.H. Rev. Stat. Ann. § 358-A:2 (LexisNexis 2004) (unfair methods of competition, unfair or deceptive acts); **New Jersey** N.J. Stat. Ann. §56:8-2 (West 2005) (deception, fraud, misrepresentation, knowing concealment of material fact, unconscionable commercial practice); **New Mexico** N.M. Stat. Ann. § 57-12-3 (LexisNexis 2005) (unfair or deceptive act, unconscionable act); **New York** N.Y. Gen. Bus. Law §§ 349, 350 (Consol 2005) (deceptive acts); **North Carolina** N.C. Gen Stat. § 75-1.1(a) (2005) (unfair and deceptive acts, unfair methods of competition); **North Dakota** N.D. Cent. Code § 51-15-02 (2005) (deceptive acts, fraud, misrepresentation); **Ohio** Ohio Rev. Code. Ann. § 1345.02A (LexisNexis 2005) (unfair or deceptive acts); **Oklahoma** Okla. Stat. tit. 15 § 753 (2004) (unfair or deceptive acts); **Oregon** Or. Rev. Stat. §§ 646.605(9), 646.607, 646.608(u) (2005) (unconscionable tactics, unlawful trade practices, unfair or deceptive conduct); **Pennsylvania** 73 Pa. Stat. §§ 201-1, 201-2 (2005) (fraud, unfair or deceptive acts); **Rhode Island** R.I. Gen Laws § 6-13.1-1 (2004) (unfair methods of competition, unfair or deceptive acts); **South Carolina** S.C. Code Ann. § 39-5-10 (2004) (unfair methods of competition, unfair or deceptive acts); **South Dakota** S.D. Codified Laws § 37-24-6(1) (2005) (knowing and intentional use of deceptive practice, fraud, misrepresentation, or material omission); **Tennessee** Tenn. Code Ann. § 47-18-102 (2004) (unfair or deceptive acts); **Texas** Tex. Bus. & Com. Code Ann. §§ 17.45(5), 17.46 (Vernon 2004) (unconscionable acts, false, misleading or deceptive acts); **Utah** Utah Code Ann. § 13-11-4(1) (2005) (unconscionable or deceptive acts); **Vermont** Vt. Stat. Ann. tit. 9, §§2453, 2465 (2004) (unfair methods of competition, unfair or deceptive acts); **Virginia** Va. Code Ann. §§ 59.1-200, 59.1-200(14) (2005) (deception, fraud, misrepresentation); **Washington** Wash. Rev. Code Ann. § 19.86.020 (LexisNexis 2005) (unfair or deceptive acts); **West Virginia** W. Va. Code Ann. § 46A-6-104 (LexisNexis 2005) (unfair methods of competition, unfair or deceptive acts).

another's expense and it would be unjust to permit the party to retain the benefit received. *See* Restatement (First) Restitution, Section 1, cmt. a (a "person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust").[20]

Thus, the question of whether defendants were unjustly enriched is susceptible to proof using common, generalized evidence. Here, the common questions on the issue of unjust enrichment are: (i) whether Del Monte obtained a benefit by charging supracompetitive prices for the MD-2 pineapples, and (ii) whether it would be unjust to permit Del Monte to retain that benefit. As with the other claims of the Direct and Indirect Purchaser Classes, these questions are common to every member of the classes and can be answered solely with reference to Del Monte's conduct.

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[20] *See Jordan v. Mitchell*, 705 So.2d 453, 458 (Ala. Civ. App. 1997); *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 107 (Ak. 2001); *Lectrodryer v. SeoulBank*, 91 Cal. Rptr. 2d 881, 883 (Cal. Ct. App. 2d Dist. 2000); *Salzman v. Bachrach*, 996 P.2d 1263, 1265-6 (Colo. 2000); *Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co.*, 649 A.2d 518, 522 (Conn.1994); *Schock v. Nash*, 732 A.2d 217, 232-3 (Del. 1999); *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005); *St. Paul Mercury Ins. Co. v. Meeks,* 508 S.E.2d 646, 648 (Ga. 1998); *Durette v. Aloha Plastic Recycling, Inc.*, P.3d 60, 74 (Haw. 2004); *F.H. Prince & Co. v. Towers Fin. Corp.*, 656 N.E.2d 142, 151 (Ill. App. Ct. 1st Dist. 1995); *Community Builders v. Indian Motocycle Assocs.*, 692 N.E.2d 964, 979 (Mass. App. Ct. 1998); *Barber v. SMH (US) Inc.*, 509 N.W.2d 791, 798 (Mich. Ct. App. 1993); *Omnibank of Mantee v. United Southern Bank*, 607 So. 2d 76, 92 (Miss. 1992); *Brown v. Brown*, 152 S.W.3d 911, 916 (Mo. Ct. App. 2005); *Lawrence v. Clepper*, 865 P.2d 1150, 1156 (Mont. 1994); *Ahrens v. Dye*, 302 N.W.2d 682, 684 (Neb. 1981); *Mainor v. Nault*, 101 P.3d 308, 317 (Nev. 2004); *Pella Windows & Doors v. Faraci*, 580 A.2d 732 (N.H. 1990); *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994); *Wiener v. Lazard Freres & Co.,* 672 N.Y.S.2d 8, 12 (N.Y. App. Div. 1st Dep't 1998); *N.C. Corff Partnership v. OXY USA, Inc.,* 929 P.2d 288, 295 (Okl. Civ. App 1996); *Hitchcock v. Delaney,* 86 P.3d 73, 76 (Or. Ct. App. 2004); *Bouchard v. Price*, 694 A.2d 670, 673 (R.I. 1997); *Duckworth v. First Nat'l Bank of S.C.*, 176 S.E.2d 297, 304 (S.C. 1970); *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App. 2004); *Brookside Mem'ls, Inc. v. Barre City*, 702 A.2d 47, 49 (Vt. 1997); *Mut. Funding, Inc. v. Collins*, 62 Va. Cir. 34, 38 (Va. Cir. Ct. 2003); *Dunlap v. Hinkle*, 317 S.E.2d 508, 512 (Va.1984); *Jacoby v. Jacoby*, 100 P.3d 852, 855 (Wyo. 2004).

3. The Named Plaintiffs' Claims Are Typical of the Classes They Represent.

The "typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993); *see also Indus. Diamonds,* 167 F.R.D. at 379; 1 Newberg & Conte, *supra* note 8, § 3.13 at 3-77 (the typicality requirement is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented."). "Typicality does not require that the situations of the named representatives and the class members be identical." *Oxford Health*, 191 F.R.D. at 375; *see Visa Check/MasterMoney*, 280 F.3d at 139.

Thus, "allegations concerning the existence, scope and efficacy of an alleged antitrust conspiracy are sufficient to show that the commonality and typicality requirements of Rule 23(a)(2) are met." *Currency Conversion*, 224 F.R.D. at 562. Indeed, antitrust claims "generally satisfy Rule 23(a)(3)'s typicality requirement, even if members purchase different quantities and pay different prices." *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 297, 304 (E.D. Mich. 2001) (citing cases).[21] So long as any differences between the class members' claims and the representatives' claims "are minor in comparison to the bulk of the claims at issue," the typicality requirement is satisfied. *Jennings Oil,* 80 F.R.D. at 129 n.7.

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[21] *See, e.g., In re Domestic Air Transp. Antitrust Litig.,* 137 F.R.D. 677, 699 (N.D. Ga. 1991) (typicality requirement satisfied, notwithstanding fact that the 12.5 million class members purchased tickets for an enormous number of different routes, at diverse times, at a multitude of varying prices, and on diverse terms); *see also* 1 Newberg, § 3.13 at 3-79 & n.208 (explaining that "differences in the methods of purchase of kinds of products purchased among class members have been held not to a bar a finding of typical claims" in price-fixing actions, and that "in class actions charging defendants with a conspiracy to fix prices, the claims of the named plaintiff were held typical of the claims of the class members despite variations in the manner in which members of the class purchased from the defendants, variations in the kinds of products purchased, differences in price, and other factors.").

Here, the claims of the representative plaintiffs and every member of the Direct and Indirect Purchaser Classes arise from the same antitrust conspiracy — Del Monte's unlawful elimination of competition in the market for fresh, whole, extra-sweet pineapples and the supracompetitive price Del Monte charged for those pineapples. In addition, the representative plaintiffs and every member of the Direct and Indirect Purchaser Class suffered the same type of injury — having to pay higher prices for MD-2 pineapples. Finally, the relief sought by the representative plaintiffs is common to the class. Thus, the typicality requirement is easily satisfied here. *Cf. Buspirone,* 210 F.R.D. at 57; *Cardizem,* 200 F.R.D. at 304.

4. Representative Plaintiffs and Counsel Will Fairly and Adequately Protect the Interests of the Class.

The adequacy requirement of Rule 23(a)(4) consists of two parts: (1) the interests of the class representatives not be in conflict with those of the absent class members; and (2) counsel for the class must be qualified, experienced and able to conduct the litigation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); *Currency Conversion*, 224 F.R.D. at 562; *NASDAQ*,, 169 F.R.D. at 512.

Here, there are no actual or potential conflicts between the named class representatives and the members of the class they represent. The central issues in this case — whether Defendants unlawfully obtained and maintained a monopoly over the propagation, marketing and sale of whole, fresh, extra-sweet pineapples (also known as "MD-2" or "73-114") and marketed to consumers as the "Fresh Del Monte Gold™" pineapple — are common to the claims of the named class representatives and the members of the classes they represent. Furthermore, each member of the Direct and Indirect Purchaser Class, including the named class representatives, suffered the same type of injury as a result of Del Monte's conduct – having to pay higher prices

for MD-2 pineapples. Finally, each member of the Direct and Indirect Purchaser Class also has the same interest in obtaining injunctive relief, damages, and restitution from Del Monte.[22]

The Court has already appointed counsel for the Direct Purchaser Class, Milberg Weiss Bershad & Schulman LLP ("Milberg Weiss"), and the Indirect Purchaser Class, Robert I. Lax & Associates, who have extensive experience and expertise in antitrust and class actions. *See* Buchman Decl., Exhibit K.

D. The Direct and Indirect Purchaser Classes Satisfy The Requirements For Certification Under Rule 23(b)(3).

Rule 23(b)(3) requires (1) that the Court find that common questions of law or fact predominate over individual questions; and (2) that a class action is superior to other available methods of adjudication. *See Amchem Prods.*, 521 U.S. at 615; *Visa Check/MasterMoney*, 280 F.3d at 133. The proposed Direct and Indirect Purchaser Classes easily meet these requirements.

"[T]o meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.'" *Visa,* 280 F.3d at 136 (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc.,* 211 F.3d 1228, 1233 (11th Cir. 2000)). The predominance requirement is generally satisfied "unless it is clear that individual issues will overwhelm the common questions." *NASDAQ,* 169 F.R.D. at 517.

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[22] It is well settled in the Second Circuit that "factual differences in the . . . size or manner of purchase . . . and other such concerns will not defeat class action certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class." *In re Sumitomo Copper Litig.,* 182 F.R.D. 85, 92 (S.D.N.Y. 1998) (citing *Green,* 406 F.2d at 299-301). All that is required is that the "interests of the named plaintiffs must be co-extensive with the interests of the proposed class members, and the plaintiffs' interests may not be antagonistic or adverse to [the] interests of the class." *Robertson,* 389 F. Supp. at 898.

See Stephenson v. Bell Atl. Corp., 177 F.R.D. 279, 286 (D.N.J. 1997); *Milberg v. Lawrence Cedarhurst Fed. Sav. & Loan Ass'n*, 68 F.R.D. 49, 52 (E.D.N.Y. 1975).[23]

The predominance requirement "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Oxford Health*, 191 F.R.D. at 377 (quoting *Amchem*, 521 U.S. at 624); *see also Jennings Oil Co. v. Mobil Oil Corp.*, 80 F.R.D. 124, 130 (S.D.N.Y. 1978) ("Where an antitrust conspiracy has been at issue, the courts have tended to find that common questions predominated despite the existence of individual questions."); *Relafen*, 221 F.R.D. at 288 (finding common issues predominated and certifying class of direct and indirect purchasers); *Cardizem CD*, 200 F.R.D. at 352 (same). At this stage, Plaintiffs need only make a threshold showing that common proof will predominate at trial with respect to the essential elements of their claims. *See NASDAQ*, 169 F.R.D. at 517; *Indus. Diamonds*, 167 F.R.D. at 381. The analysis here is straightforward.

1. Common Questions Predominate as to Whether Del Monte's Conduct Violated the Antitrust Laws.

To prevail on the merits of a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, a plaintiff must establish: (i) possession of monopoly power in the relevant market; (ii) willful acquisition or maintenance of that power; and (iii) antitrust injury or impact. *Geneva Pharms. Tech. Corp., v. Barr Labs., Inc.*, 386 F.3d 485 (2d Cir. 2004) (citing *United States v. Grinell Corp.*, 384 U.S. 563, 570-71 (1966). The various *Illinois Brick* repealer statutes

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[23] Indeed, by requiring only that common issues predominate, Rule 23(b)(3) contemplates certification when there are some issues that are not common to the class as a whole. *See In re Playmobil Antitrust Litig*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998) ("[S]ome factual variation among class members' specific grievances will not prevent certification of claims on behalf of a class of plaintiffs"); *Shelter Realty Corp. v. Allied Maint. Corp.*, 75 F.R.D. 34, 37 (S.D.N.Y. 1977) ("[t]he predominance requirement calls only for predominance, not exclusivity, of common questions").

under which the Indirect Purchaser Class is seeking damages parallel the Sherman Act in this regard.[24] *See Relafen*, 221 F.R.D at 275 ("Under both federal and state law, the essential elements of a private antitrust action are the same: proof of a violation by the defendant, a demonstration of injury to the plaintiff, and an approximation of the plaintiff's damages.").

The same evidence would be introduced to prove these elements regardless of whether the claims against Del Monte proceed as a class action or as thousands of individual cases. Thus, whether Del Monte's conduct violated the antitrust laws is a common question that predominates over any individual questions. *See Buspirone*, 210 F.R.D. at 58 ("common issues of fact and law . . . clearly predominate . . . [because] [p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs").[25]

2. Common Questions Predominate as to Whether the Direct and Indirect Purchaser Classes Suffered Antitrust Injury.

To prove antitrust injury, Plaintiffs must demonstrate that their loss — the supracompetitive prices paid for the MD-2 pineapples — resulted from Del Monte's antitrust

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[24] The various *Illinois Brick* repealer statutes parallel the federal antitrust laws in this regard. *See, e.g., Bunker's Glass Co. v. Pilkington PLC,* 75 P.3d 99, 106 (Ariz. 2003); *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.,* 973 P.2d 527, 543 (Cal. 1999); *Mack v. Bristol-Myers Squibb Co.,* 673 So. 2d 100, 104 (Fla. Dist. Ct. App.1996); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.,* 998 F.2d 1073, 1081 (1st Cir. 1993) (Maine); Mass. Ann. Laws ch. 93A, § 2(b) (LexisNexis 2005); Mich. Comp. Laws Serv. § 445.778 (LexisNexis 2005); *Minn. Twins P'ship v. State ex rel. Hatch,* 592 N.W.2d 847, 851 (Minn. 1999); N.Y. Gen. Bus. Law § 349 (Consol. 2005); *Hyde v. Abbott Labs., Inc.,* 473 S.E.2d 680 (N.C. Ct. App. 1996); Tenn. Code Ann. § 47-18-115 (2004); Vt. Stat. Ann. tit. 9 § 2453(b) (2004).

[25] *See also Rohlfing v. Manor Care, Inc.,* 172 F. R. D. 330, 336-37 (N. D. Ill. 1997) ("The weight of authority in antitrust cases indicates that the question of the existence of a conspiracy in restraint of trade is one that is common *to* all potential plaintiffs, and the importance of this question usually warrants treating them as a class.") (emphasis added); *B.W.I. Custom Kitchen v. Owens-Ill.. Inc.,* 235 Cal. Rptr. 228, 233 (Ct. App. 1987) ("Most courts hold that when a conspiracy to fix prices has been alleged, common questions predominate over any questions affecting only individual class members.").

violations. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 114 n.9 (1969); *In re Nine W. Shoes Antitrust Litig.,* 80 F. Supp. 2d 181, 189-90 (S.D.N.Y. 2000) (if plaintiffs pay higher prices than they would have absent the conspiracy, antitrust injury will lie).

At the class certification stage, "[p]laintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *Currency Conversion,* 224 F.R.D. at 565. Thus, the impact element may be proven on a class-wide basis if common evidence or methodologies exist for demonstrating widespread impact to the Class. *Cardizem,* 200 F.R.D. at 307 ("[i]f generalized evidence exists which will prove or disprove this injury element on a simultaneous class-wide basis, then there is no need to examine each class members' [sic] individual circumstance . . . . Such an examination will relate to the quantum of damages; not the fact of injury") (citing *Zenith,* 395 U.S. at 114 n.9). Widespread injury or impact, is shown by presenting evidence of anticompetitive conduct which artificially inflates prices generally. *In re Master Key Antitrust Litig,,* 528 F.2d 5, 12 n.11 (D. Conn. 1975). Once the *existence* of injury is established, the proof necessary to set the *amount* of damages need not be exact. *J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 565-68 (1981). Indeed, many courts have presumed impact to class members in antitrust cases where, as here, the basis of the complaint is that "the price in a given market is artificially high." *In re Potash Antitrust Litig.,* 159 F.R.D. 682, 695 (D. Minn. 1995); *Auction Houses,* 193 F.R.D. at 166; *New Castle,* 131 F.R.D. at 41-42.

Finally, Plaintiffs need not demonstrate that "the fact of injury actually exists for each class member" or that their theory of antitrust injury will prevail at trial. *Cardizem CD,* 200 F.R.D. at 307. As this Court explained, "on a motion for class certification, the [c]ourt only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such

impact, not whether plaintiffs in fact can prove class-wide impact." *Magnetic Audio Tape,* 2001 U.S. Dist. LEXIS 7303, at *15-16; *see also Panache Broad. of Pa., Inc. v. Richardson Elecs., Ltd.*, No. 90 C 6400, 1999 WL 342392, at *6 (N.D. Ill. May 14, 1999) ("the issue in the common impact analysis is the fact, not the amount of injury"); *In re Screws Antitrust Litig.,* 91 F.R.D. 52, 56 (D. Mass. 1981) (fact of injury was a distinct question from quantum of injury).[26]

The gravaman of antitrust impact in this case is that Defendants intentionally and successfully delayed one or more competitors from entering the whole, fresh, extra-sweet pineapple market with a product in competition with the Del Monte Gold Pineapple, thereby allowing Defendants to maintain a monopoly and charge artificially high prices. As a result, Plaintiffs allege that they and the members of the Direct and Indirect Purchaser Classes they represent suffered damages in the form of an "overcharge," *i.e.,* the difference between the price that was actually paid and the price that would have been paid "but for" Defendants' anticompetitive conduct. *See N.Y. v. Hendrickson Bros.,* 840 F.2d 1065 (2d Cir. 1988). Proving impact in the form of overcharges here, therefore, will not involve individualized evidence.

To assess the impact of delayed entry on the Direct Purchaser Class — that is, whether class members were overcharged on their Del Monte Gold pineapple purchases — Dr. Coterrill, the expert for the Direct Purchaser Class, identified five basic forms of class wide evidence that could be relied upon: (i) evidence of delay of competitive entry; (ii) evidence of supply

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[26] Indeed, "[e]ven if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class." *NASDAQ,* 169 F.R.D. at 523; *see also Auction Houses,* 193 F.R.D. at 166-68.

restriction; (iii) evidence concerning terms of trade; (iv) evidence to ascertain the product market; and (v) evidence to ascertain the geographic market.

Similarly, to assess the impact of delayed entry on the Indirect Purchaser Class — that is, whether the overcharge for the Del Monte Gold pineapples incurred by the direct purchasers was passed on to the indirect purchases — Dr. Tinari, the expert for the Indirect Purchaser Class, proposes an economic methodology that relies on class-wide evidence in the form of data concerning aggregate dollar volume and quantity of pineapples sold at the wholesale and/or retail level during the class period and presently to demonstrate antitrust impact (*i.e.*, inflated retail prices) for the Indirect Purchaser Class. *See* Tinari Report, Lax Decl., Exhibit A.

The fact that the MD-2 pineapples were sold to the members of the Direct and Indirect Purchaser Classes at a various prices, or even negotiated prices, is not an impediment to class certification if it appears that plaintiffs may be able to prove at trial that the price range was affected generally. [27]

Courts repeatedly have held that the predominance requirement of Rule 23(b)(3) will be deemed to be satisfied, even though individualized inquiry may be necessary on the quantum of damages.[28] Indeed, to the extent the Defendants argue that the fruit industry is unique, or

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[27] *See NASDAQ,* 169 F.R.D. at 523 ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected."); *see also Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 455 (3d Cir. 1977) (If . . . the conspiratorially affected prices at the wholesale level fluctuated within a range which . . . was higher . . . than the range which would have existed . . . under competitive conditions, it would be clear that all members of the class suffered some damage"); s*ee also, e.g., In re Fine Paper Antitrust Litig.,* 82 F.R.D. 143, 154 (E.D. Pa. 1979) (rejecting defendants' contention that damages could not be calculated on a generalized basis despite "the existence of a wide multiplicity of different fine paper products, pricing practices, and selling entities"); *Bogosian,* 561 F.2d at 455 (citation omitted).

[28] *E.g., In re Catfish Antitrust Litig.,* 826 F. Supp. 1019, 1042-43 (N.D. Miss. 1993); *Potash,* 159 F.R.D. at 697-98; *Master Key,* 70 F.R.D. at 25-26. Indeed, the courts in this circuit have

involves market complexities that render class certification impracticable, such arguments have been flatly rejected. *See Northwestern Fruit Co. v. A. Levy & J. Zentner Co.,* 116 F.R.D. 384, 385-86 (E.D. Cal. 1986) (court certified Rule 23(b)(3) class where plaintiffs alleged a conspiracy among processors to fix and maintain surcharges for the cantaloupes themselves).[29]

3. Common Questions Predominate in Determining the Magnitude of Antitrust Damages Suffered by the Direct and Indirect Purchaser Classes.

Plaintiffs' burden at the class certification stage with respect to showing that common questions predominate on the issue of antitrust damages is a "limited" one. *Cardizem,* 200 F.R.D. at 321. This is due, in part, to the long standing antitrust doctrine that "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. S. Photo Materials Co.,* 273 U.S. 359, 379 (1927). Indeed, even the theoretical need to determine damages individually would not pose an obstacle to class certification. *NASDAQ,* 169 F.R.D. at 524; *Indus. Diamonds,* 167 F.R.D. at 382. "[T]he inquiry focuses *not* on validity of the proposed methods for proving damages on a class-wide basis, but on the availability of those methods." *Currency Conversion,* 224 F.R.D. at 566 (emphasis added). So long as the methodology proffered by plaintiffs to

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recognized that if individual damage questions were a barrier to class certification, "there would be little if any place for the class action device in the adjudication of antitrust claims." *Shelter Realty Corp. v. Allied Maint. Corp.,* 75 F.R.D. 34, 37 (S.D.N.Y. 1977); *see also, e.g., Maywalt,* 147 F.R.D. at 56; *New Castle,* 131 F.R.D. at 42.

[29] With only one product line in issue, this case is a far better candidate for class treatment than many other cases that have been routinely certified despite a multiplicity of diverse products. *See, e.g., NASDAQ,* 169 F.R.D. at 493 (certifying a class of millions of purchasers of approximately 1658 securities); *Domestic Air Transp.,* 137 F.R.D. at 687-88 (certifying a class of millions of ticket purchasers for a multitude of city pairs and prices).

determine damages on a class wide basis is viable and not "so insubstantial and illusive as to amount to no method at all," certification should be granted. *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 268 (D.D.C. 2002).[30]

Thus, it is well settled law that where methodologies are reasonably available to determine the quantum of damages on a class-wide basis, plaintiffs may determine damages on an aggregate basis:

> If this court were to adopt defendants' argument and deny [the] class actions because the computation of damages on . . . an individual basis destroys the 'predominance' requirement of Rule 23(b)(3), it would be tantamount to encouraging wrongdoers to commit great antitrust violations on many consumers in small amounts so as to raise the spectre of unmanageability to defeat a class action.

Coleman v. Cannon Oil Co., 141 F.R.D. 516, 526 (M.D. Ala. 1992) (quoting *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 354 (E.D. Pa. 1976)); *see also Cardizem CD*, 200 F.R.D. at 321-24 ("the use of an aggregate approach to measure class-wide damage is appropriate"); *NASDAQ*, 169 F.R.D. at 525 (aggregate damages methodologies "have been widely used in antitrust, securities and other class actions"); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 154 (3d Cir. 2002) (affirming grant of class certification where expert relied on multiple regression analysis and the benchmark or yardstick approach to demonstrate antitrust

[30] The acceptability of uncertainty in the quantum of damages is consistent with the well settled rule that "'doubts as to the certainty of damages will be resolved against the wrongdoer, as the wrongdoer must bear the uncertainty which [its] conduct has created.'" *Sumitomo*, 182 F.R.D. at 92-93 (quoting 22 Am. Jur. 2d Damages § 491 (1988)).

impact); *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 281 (S.D.N.Y. 1971) (approving use of aggregate damages); *Sugar,* 73 F.R.D. at 351 (same).[31]

Dr. Cotterill, the expert for the Direct Purchaser Class concludes that it will be feasible to calculate aggregate damages to the Class as a whole using at least four well established methodologies. Cotterill Decl., at ¶ 49. The proposed methodologies include: (i) an accounting approach to measure the per unit overcharge as the difference between price and the long run marginal cost; (ii) a yardstick approach that compares pricing in the MD-2 market to pricing in the Champaka market in North America; (iii) an opportunity cost approach that compares MD-2 prices in North America to MD-2 prices in Europe where the antitrust violation had less effect; and (iv) a "during and after" approach that measures the price impact of entry by Dole and others to identify the per unit overcharge over time. These are widely accepted methodologies for measuring damages in antitrust cases. ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002) at 873-80, and cases cited therein. Buchman Decl., Exhibit L.

Dr. Tinari, the expert for the Indirect Purchaser Class, proposes the following widely accepted methodologies for determining the damages suffered by the Indirect Purchaser Class: (i) a "top down" methodology that relies upon the aggregate dollar amount and quantity of MD-2 pineapples sold at the wholesale level during the class period and presently; (ii) a "bottom across" methodology that relies that relies upon the aggregate dollar amount and quantity of MD-2 pineapples sold at the retail level during the class period and presently; and (iii) a "yardstick"

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[31] In *NASDAQ*, this Court upheld the use of an aggregate damage calculation in a highly complicated horizontal price-fixing conspiracy involving a class of more than one million members, stating that such damage analyses "have been widely used in antitrust, securities and other class actions." 169 F.R.D. at 525 (citing cases). In its extended discussion of aggregate damages, this Court has explained that such an approach has "obvious case management advantages," including eliminating the need for individual damage proofs at trial. *Id.* at 524-26.

approach that compares pricing for MD-2 pineapples and pricing for Champaka pineapples, which is a competitive market. *See* Tinari Report.

While Defendants may disagree with the conclusions of Drs. Cotterill and Tinari, there can be no dispute that their proposed methodologies are reasonable. *See Antitrust Law Developments* at 787-91.

4. Common Issues Predominate With Respect To the State Law Unfair Competition Claims of the Indirect Purchaser Class.

The Indirect Purchaser Class is also seeking redress for Del Monte's misconduct under the unfair competition laws of the following states: 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. *See* Appendix A "Survey of State Unfair Competition Law" and fn.7 *supra* (listing the relevant statutory provisions under which the Indirect Purchaser Class is proceeding).

Each of the foregoing statutes imposes liability on a defendant for engaging in unconscionable, unlawful, unfair, or deceptive business practices that result in economic loss or damage. *See* Appendix A. Common issues predominate with respect to these claims as they each prohibit similar conduct and provide similar remedies. Indeed, the Indirect Purchaser Plaintiffs, whether proceeding as representatives of a class or individually, would present the same evidence to prove that Del Monte's conduct constituted an unconscionable, unlawful, unfair, or deceptive business practice that resulted in loss or damage to their money or property. Thus, whether Del Monte's anticompetitive, monopolistic, and deceptive conduct also violated various state

laws prohibiting unfair competition and deceptive acts and practices, is a question common to the class that predominates over any questions concerning the conduct of individual class members. *Cf. Buspirone*, 210 F.R.D. at 58 ("common issues of fact and law . . . clearly predominate . . . [because] [p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs").

To the extent there are differences among the unfair competition statutes at issue, the common questions of law and fact still predominate and those differences present no obstacle to certification.[32] *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, No. 01-CV-10861, 2005 U.S. Dist. LEXIS 9027, at *56 n.33 (D. Mass. May 12, 2005) ("Intervenors finally note some differences in the state consumer protection laws plead by various members of the class. These differences, however, do not pose a serious obstacle to certification."); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit."); *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 292, 296-97 (1st Cir. 2000) (variations in twenty states' laws concerning reliance, waiver, and statutes of limitations did not cause individual issues to predominate). Finally, since these statutes provide for damages or restitution equivalent to the amount of the overcharge passed on to the Indirect Purchaser

[32] The salient differences between the unfair competition laws of different states are that (i) some states prohibit "unconscionable practices" as well as "unfair and deceptive practices;" and (ii) some states require proof of injury to the public, while others do not. These differences do not require individualized inquiry and may be proven with reference to class wide evidence concerning Del Monte's conduct. *See Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142 (Colo. 2003); *Lynas v. Williams*, 454 S.E.2d 570 (Ga. Ct. App. 1995); Haw. Rev. Stat. Ann. § 480-13(a) (LexisNexis 2004); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29 (Neb. 2004); *Svendsen v. Stock*, 23 P.3d 455 (Wash. 2001).

Class, the magnitude of damages for these claims can be determined in the same manner as the state law antitrust claims.

5. Common Issues Predominate With Respect To the Common Law Unjust Enrichment Claims of the Direct and Indirect Purchaser Classes.

"Unjust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." 66 Am. Jur.2d, Restitution and Implied Contracts, Section 9; *see also* Restatement (First) Restitution, Section 1, cmt. a ("[A] person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust."); Appendix C "Survey of Unjust Enrichment Claims" (collecting cases in every state setting forth the elements of the claim). A minority of states also require the additional element of "realization," "appreciation," or some kind of knowledge on the part of the defendants that a benefit was conferred by the plaintiff.[33]

To establish liability, Plaintiffs must show: (i) that Del Monte obtained a benefit by charging supracompetitive prices for the MD-2 pineapples; (ii) that it would be unjust to permit Del Monte to retain that benefit; and (iii) with respect to some states, that Del Monte knew it had

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[33] *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997); *BHA Invs., Inc. v. State*, 63 P.3d 474, 481 (Idaho 2003); *Haz-Mat Response v. Certified Waste Servs.*, 910 P.2d 839, 827 (Kan. 1996); *Bogan v. Finn*, 298 S.W.2d 311, 314 (Ky. 1957); *Tucci v. City of Biddeford*, 864 A.2d 185, 189 (Me. 2005); *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996); *Credit Inst. v. Veterinary Nutrition Corp.*, 62 P.3d 339, 344 (N.M. 2002); *Booe v. Shadrick*, 367 S.E.2d 554, 556 (N.C. 1988); *Hlc Trucking v. Harris*, 2003 Ohio 694 (Ct. App. 2003); *Walter v. Magee Womens Hosp. of UPMC Health Sys.*, No. 817 WDA 2004, 2005 Pa. Super. LEXIS 859 (Apr. 12, 2005); *Bouchard v. Price*, 694 A.2d 670, 673 (R.I. 1997); *Hofeldt v. Mehling*, 658 N.W.2d 783 (S.D. 2003); *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc.*, 160 S.W.3d 874 (Tenn. Ct. App. 2004); *Desert Miriah, Inc. v. B&L Auto, Inc.*, 12 P.3d 580, 583 (Utah 2000); *Bailie Communications, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12, 14 (Wash. Ct. App. 1991); *Lawlis v. Thompson*, 405 N.W.2d 317, 319 (Wis. 1987).

received a benefit from charging supracompetitive prices. There can be no doubt that common issues predominate with respect to these issues, because establishing liability requires proof only as to Del Monte's conduct and does not require any inquiry into the conduct of individual members of the Direct and Indirect Purchaser Classes. Plaintiffs, whether proceeding as representatives of a class or individually, would present the same common evidence as to Del Monte's conduct to prove their unjust enrichment claim. *See* Newberg § 10,03 n.9 (3d ed. 2001) ("Restitution recovery for a class not only lends itself to management efficiency by avoiding the need for individual proofs of claims to demonstrate the defendants' aggregate liability to the class, but also restitution may avoid problems of lack of antitrust standing under *Illinois Brick* . . .").

Since common law claims for unjust enrichment "are universally recognized causes of action that are materially the same throughout the United States", common questions of law also predominate over any variations as to the elements of the claim. *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998).[34] This Court should reach the same conclusion.

6. A Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of this Action.

Rule 23(b)(3) requires "that a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." Courts consider four nonexclusive factors in determining whether the class action is a superior device: (1) the class members' interests in litigating individually in separate actions; (2) the extent and nature of any related litigation

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[34] Courts have certified multi-state indirect purchaser classes that assert unjust enrichment claims even though there are minor variations in the elements of the claim. *Cf. Cardizem CD*, 105 F. Supp. 2d at 668-69 (certifying unjust enrichment claims for indirect purchasers in Alabama, California, District of Columbia, Illinois, Michigan, Minnesota, New York, North Carolina, Tennessee, and Wisconsin); *see also In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 543-44 (D.N.J. 2004) (holding that disgorgement was permissible in the case of indirect purchasers in all fifty states, the District of Columbia, and Puerto Rico).

already commenced by class members; (3) the desirability of concentrating litigation of the claims in a particular forum; and (4) the manageability of the litigation as a class action. Fed. R. Civ. P. 23(b)(3); *Amchem,* 521 U.S. at 615-16. These factors favor certification of the Direct and Indirect Purchaser Classes.

Class treatment of antitrust suits, such as this case, is inherently appropriate. *See In re Brand Name Prescription Drugs Antitrust Litig.,* Nos. 94 C 897, MDL 997, 1994 U.S. Dist. LEXIS 16658, at *12-13 (N.D. Ill. Nov. 15, 1994); *Catfish,* 826 F. Supp. at 1045. Neither the parties nor the judicial system would benefit from redundant litigation in these matters. *Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 189 (N.D. Ill. 1992) ("[w]hat would be unmanageable is the institution of numerous individual lawsuits."); *see Brand Name Prescription Drugs,* 1994 U.S. Dist. LEXIS 16658, at *15-16. Prosecution of these claims as class actions will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Fifth Moorings Condo., Inc. v. Shere,* 81 F.R.D. 712, 719 (S.D. Fla. 1979) (quoting 1966 Advisory Committee Notes to Rule 23). Furthermore, "[t]he public at large likewise will benefit from a class action and expeditious adjudication of the issues involved, since class actions 'reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement.'" *In re Folding Carton Antitrust Litig.,* 75 F.R.D. 727, 733 (N.D. Ill. 1977), quoting *Hackett v. Gen. Host Corp.*, 455 F.2d 618, 623 (3d Cir. 1972).

Difficulties in management of class actions weigh against certification only if they make the class action less fair and efficient than other available techniques. *Domestic Air Transp.*, 137 F.R.D. at 693. Thus, mere speculation about manageability is insufficient to defeat

certification; courts adapt to management problems as they arise. *See Yaffe* v. *Powers,* 454 F.2d 1362, 1365 (1st Cir. 1972); *Screws,* 91 F.R.D. at 58; *Shelter Realty,* 75 F.R.D. at 38-39.

Moreover, the class-wide damages are large in the aggregate but, for most members of the Direct and Indirect Purchaser Classes, the individual damages do not justify undertaking complex antitrust litigation. Maintenance of a class action suit will provide class members with their "day in court" without overburdening the judicial system with a multiplicity of duplicative lawsuits. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985) ("class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually," where small individual damages claims would ensure that "most of the plaintiffs would have no realistic day in court if a class action were not available"); *Indus. Diamonds,* 167 F.R.D. at 386 (certification is favored when "purchasers may have insufficient economic justification for commencing expensive litigation").[35]

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Class Certification and enter an order certifying the Direct and Indirect Purchaser

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[35] In addition, the large size of the Indirect Purchaser Class makes a class action the superior method for the fair and efficient adjudication of the controversy. "[T]he size of the class militates in favor of, not against, certification" because "[d]efendants should not be permitted to avoid responsibility for the magnitude of their alleged conspiracy." *NASDAQ,* 169 F.R.D. at 528-529 (class involving millions of transactions); *see also Domestic Air Transp.,* 137 F.R.D. at 694 (class consisting of at least 12.5 million people and 400 million transactions was certified); *In re Disposable Contact Lens Antitrust Litig.,* 170 F.R.D. 524 (M.D. Fla. 1996) (class of up to 18 million replacement contact lens purchasers).

Classes pursuant to Fed. R. Civ. P. 23(b)(3).

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