UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PINEAPPLES ANTITRUST LITIGATION	Civil Action No.
This Document Relates To:	1:04-MD-1628 (RMB) (MHD)
ALL ACTIONS	

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MANAGEABILITY OF THE INDIRECT PURCHASER CLASS

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INTRODUCTION

This case concerns alleged anticompetitive efforts by Defendants Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A., Inc.'s ("Del Monte" or "Defendants") to unlawfully obtain and maintain a monopoly over the market for whole fresh extra-sweet pineapples from 1996 through at least 2006.[1] The Indirect Purchaser Plaintiffs ("Plaintiffs") are consumers who purchased Del Monte Gold Pineapples for their own consumption and who claim that they were overcharged for those purchases as a result of Del Monte's alleged anticompetitive conduct.[2] Plaintiffs seek to certify a class of consumers who purchased these pineapples between 1996 through at least 2006 for their own consumption to pursue both injunctive relief claims as well as damages claims to recover the amounts by which the class was overcharged.[3]

In its Order of July 26, 2006, the Court requested additional information concerning the manageability of a damages class of indirect purchasers, including: (i) the proposed method of effecting notice to the class; (ii) the nature of evidence supporting individual claims; (iii) (any) proposed *cy pres* distribution; and (iv) the projected size of the class. To address these issues, Plaintiffs submitted the Declaration of Joseph M. Fisher of The Notice Company who has administered numerous class actions as well as Memorandum of Law setting forth legal authority for the notice procedures and distribution plans proposed in the Fisher Declaration.

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[1] These extra sweet pineapples are known in the trade as the "Gold" variety.

[2] The indirect purchasers are Brenda Caldarelli, Gary Freed, Alberta Lopez, Carrie Pardy, and Neil Schwam.

[3] Del Monte has not opposed certification of the class to pursue injunctive relief under Section 2 of the Sherman Act or the state antitrust and unfair competition statutes under which the Plaintiffs assert claims.

In response, Del Monte submitted the Declaration of Carl Goldfarb, an attorney for Del Monte, which attached, among other things, declarations from Del Monte's damages experts, as well as the declaration of Dionysios Christou, the Vice President of Marketing-North America for Del Monte, concerning the number of potential class members that can be identified by name and address or email address. Del Monte did not present any declaration or testimony from a witness experienced in the administration of class actions.

The Court then proceeded to order an evidentiary hearing to address the manageability questions it raised concerning the Indirect Purchaser Class. In advance of this hearing, the parties were to present any direct testimony in writing in the form of a declaration for witnesses within a party's control, or a declaration attaching deposition testimony for adverse witnesses. At the hearing, each side would have an opportunity to conduct cross-examination and re-direct examination of the witnesses for whom written testimony was presented.

The evidentiary hearing was held on March 23, 2007. The Plaintiffs presented written direct testimony in the form of declarations from Joseph Fisher and a declaration from Daniel Sobelsohn (the "Sobelsohn Decl."), which attached excerpts from the transcript of the deposition of Dionysios Christou taken on February 21, 2007. Del Monte presented written testimony in the form of a declaration from Carl Goldfarb, which attached excerpts from depositions of Dr. Frank Tinari, Plaintiffs' damages expert, as well as other materials relating to his damages estimate. Plaintiffs filed written objections to the Goldfarb declaration on the grounds that Dr. Tinari's testimony was not relevant to the issues of manageability raised by the Court and contained inadmissible statements by Mr. Goldfarb. The Court took these objections under submission. Both Mr. Fisher and Mr. Christou testified at the evidentiary hearing held on March 27, 2007. Dr. Tinari did not testify at the hearing.

The Court now makes the following findings of fact and conclusions of law concerning the manageability of the indirect purchaser class:

FINDINGS OF FACT

I. Joseph Fisher's Qualifications

1. Plaintiffs presented written testimony as to the manageability of the class in the form of two declarations from Joseph Fisher dated August 22, 2006 (the "Fisher Decl.") and March 14, 2007 (the "Supp. Fisher Decl."). The Court notes that Mr. Fisher is the founder and President of The Notice Company, Inc., based in Hingham, Massachusetts, which is principally engaged in the administration of class action lawsuits pending in courts around the United States, including the dissemination of notice to class members, administering the claims process, and distributing the proceeds of the litigation to the class. (Fisher Decl. ¶¶ 1-2.) The Court also notes that in his work as President of The Notice Company, Mr. Fisher has developed and implemented notice programs and/or served as settlement administrator in hundreds of class actions, with class membership sizes ranging from a few hundred to several million. (Fisher Decl. ¶ 3; Transcript of March 23, 2007 Evidentiary Hearing ("Tr.") 118:10-13.)[4]

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[4] These cases include: *Abasi v. HCA-The Health Care Company, Inc.* (C.D. Cal.); *Brewer v. Village of Old Field* (E.D.N.Y.); *In re Chi-Chi's, Inc.* (Bankr. D. Del.); *Coco v. Village of Belle Terre* (E.D.N.Y.); *Duronslet v. Transworld Systems, Inc.* (C.D. Cal.); *Fainbrun v. Chex Systems, Inc.* (E.D.N.Y.); *Vega v. CBE Group, Inc.* (E.D.N.Y.); *Fasten v. Dun & Bradstreet Receivable Management Services, Inc.* (E.D.N.Y.); *McCarthy v. Exterra Credit Recovery, Inc.* (S.D.N.Y.); *Moore v. Sank* (D. Conn.); *In re Risk Management Alternatives, Inc. Fair Debt Collection Practices Act Litigation* (S.D.N.Y.); *Rowell v. Voortman Cookies, Ltd.* (N.D. Ill.); *Segelnick v. Risk Management Alternatives, Inc.* (E.D.N.Y.); *Shimada v. Dun & Bradstreet* (C.D. Cal.); *Weber v. Saint John's Health Center* (C.D. Cal); *Weiss v. Regal Collections* (D. N.J.); *Wood v. Village of Patchogue* (E.D.N.Y.); *Boccia v. U.B. Vehicle Leasing, Inc.* (Miami-Dade, FL); *Bonilla v. Starwood Hotels & Resorts Worldwide* (Los Angeles, CA); *Busse v. Motorola, Inc.* (Cook County, IL); *Foster v. Friendly Ice Cream Corporation* (Middlesex, MA); *Friedman v. Samsung Electronics America, Inc.* (Bergen County, NJ); *Kinoshita v. Makena Hawaii, Inc.* (1st Cir., HI); *Klein v. Robert's American Gourmet Foods (Pirate's Booty) & Keystone Food*

2. The Court also takes note of Mr. Fisher's educational and professional background prior to founding The Notice Company that is relevant to his testimony in this case. Mr. Fisher is a graduate of Wesleyan College and after college worked as a research economist at Data Resources. (Tr. 118-1-3.) Mr. Fisher then attended Yale Law School and upon graduating worked as an associate at the law firm Covington & Burling. (Tr. 118:3-5) Thereafter, Mr. Fisher was a visiting Professor of Law and Economics at the University of California at Santa Barbara. (Tr. 118:6-7.) Mr. Fisher is also a practicing attorney and a member in good standing of the bars of the District of Columbia and the states of Virginia and Massachusetts. (Fisher Decl. ¶ 1.)

3. Defendants did not present any evidence to suggest that Mr. Fisher is not qualified to testify as to the questions regarding manageability raised by the Court. Defendants did, however, suggest that Mr. Fisher has a financial conflict of interest in that he might have the opportunity to benefit financially if a class is certified as The Notice Company could be invited to submit a bid or proposal for providing notice or administering a claims procedure. (Tr. 42:16-44:10.) As indicated during the hearing, the Court does not find Defendants' attack on Mr. Fisher's credibility convincing. (Tr. 123:11-13.) Mr. Fisher is being compensated by Plaintiffs' counsel for the time he spends on this case, irrespective of whether a class is ultimately certified. (Tr. 41:21-42:11.)

4. Defendants also suggest that Mr. Fisher's testimony as to manageability issues should be discounted because he did not review the entirety of Defendants' submissions in

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Products, Inc. (Nassau County, NY); *Kong v. Nova Cellular Co.* (Cook County, IL); *Lucca v. Delops, Inc., d/b/a D'Angelo's Sandwich Shops* (Bristol, MA); *Milex Electronics, Inc. v. Pitney Bowes Credit Corp.* (Suffolk County, NY); *Paoli Railroad Yard PCB Litigation* (Chester County, PA); *Schwab v. America Online, Inc.* (Cook County, IL); *Shorb v. Draper & Goldberg, PLLC* (Frederick County, MD); and *Summer v. Toshiba America Consumer Products, Inc.* (Bergen County, NJ). (Fisher Decl. ¶ 3.)

opposition to Plaintiffs' class certification motion. This further attack on Mr. Fisher's credibility is also unconvincing. As noted above, Defendants did not present any testimony as to manageability from a witness experienced in administering class actions. There was no compelling reason for Mr. Fisher to review the portions of Defendants' submissions that were unrelated to the manageability of the class as they do not relate to the subject matter of his testimony.

5. To the extent Defendants' submissions did relate to or take issue with Mr. Fisher's testimony, the record indicates that Mr. Fisher not only reviewed those portions of Defendants' submissions, but also responded to them. For example, with respect to determining whether there are class members that can be notified by mail and the feasibility of point of sale notices and coupon relief, Mr. Fisher reviewed the declaration and deposition testimony of Dionysios Christou, Del Monte's Vice President – Marketing North America, and even discussed that testimony in his own declaration. (Supp. Fisher Decl. ¶¶ 3, 7.) Similarly, when Defendants noted that Mr. Fisher's initial estimate of the class size was too large, and Defendants supplied additional data (i.e., the total number of Gold pineapples sold in 2004) from which the class size might be determined with greater accuracy, Mr. Fisher used that data to provide a revised estimate of the class size, which he presented both at his deposition and in his supplemental declaration. (Supp. Fisher Decl. ¶¶ 4-6.) During cross-examination, Defendants did not point to any specific evidence that related to the subject matter of Mr. Fisher's testimony, which Mr. Fisher did not review and that should have caused him to alter his testimony.

6. Accordingly, the Court finds that Mr. Fisher is qualified to testify as to the questions regarding manageability raised by the Court and rejects Defendants' attacks on Mr. Fisher's credibility.

II. Notice

A. Notice Can Be Provided by Publication.

7. As discussed below, in this case, names and addresses are available for only a small fraction of the class. Mr. Fisher testified that this is the typical situation in consumer class actions, and that in such cases notice is usually provided by publication to reach the class members who cannot be notified by mail. (Tr. 101:23 -102:16.) Defendants do not dispute Mr. Fisher's assessment.

8. Mr. Fisher outlined in his declarations a publication program to provide notice to the class members who cannot be reached by mail or email. Specifically, Mr. Fisher recommends the following:

a. Dedicated web sites concerning the case, including submission to widely used search engines. Plaintiffs' counsel has already reserved the following domain names: www.delmontegoldclassaction.com, www.pineappleclassaction.com, and www.delmontegoldpineappleclassaction.com.

b. Placement of a notice on the Fresh Del Monte web site, www.freshdelmonte.com, with a link to the web sites dedicated to this case.

c. Using demographic data concerning purchasers of pineapples to design a targeted publication/media program.

e. Issuance of press releases and web postings concerning the case that will generate "hits" in web searches concerning Del Monte and pineapples.

(Fisher Decl. ¶ 22.)

9. Mr. Fisher explained that the basic process of designing a publication notice program involves matching the demographic makeup of the class to publications read by that demographic group, and notes that he has data concerning the demographic makeup of the class that can be used to select publications for the class notices that are most likely to be read by class

members.[5] (Supp. Fisher Decl. ¶ 22.) Mr. Fisher has also contacted a media research firm, which confirmed that it could design a publication notice program that would reach many members of the class, including former purchasers of Del Monte Gold Pineapples, and that the fee to design a detailed program, including calculating how many times class members were likely to have been exposed to the notice, and preparing a report for the court on such matters, would be approximately $9500. (*Id*.¶ 23.)

10. Finally, Mr. Fisher prepared an exemplar of a possible "short form" publication notice as well as "long form" notice that would be available on a dedicated web site, and by request for persons who call a dedicated toll-free number, or send a written request by mail or email to the claims administrator. (Supp. Fisher Decl. Exs. B and C.)

11. Defendants did not provide any evidence to refute Mr. Fisher's testimony regarding the practicability of using publication notice in this case, or take issue with the adequacy of the exemplars of the possible notice forms that Mr. Fisher attached to his declaration. Accordingly, the Court finds that the publication notice plan proposed by Mr. Fisher would allow for notice to be provided to the class members who cannot be contacted directly by mail or email.

B. Notice by Mail or Electronic Mail.

12. In addition to publication notice, it appears that a small portion of the class can also be provided individual notice by mail or email. Mr. Christou revealed in his declaration

[5] Mr. Fisher notes that demographic data he obtained indicates that (i) in 2004, only 25-28% of households with an annual income below $60,000 bought pineapples, but 53% of households with an annual income over $85,000 bought pineapples; (ii) Hispanic and Caucasian households are more likely to buy pineapples than African American households; and (iii) households with children between the ages 13-17 are more likely to buy fresh pineapples than households with children between the ages of 6-12. (Fisher Decl. ¶ 22.)

that Del Monte has been contacted through its web site 7609 times concerning the pineapples it sells, that most of these contacts related to the Gold pineapple, and that Del Monte has addresses for most of the people who contacted Del Monte through its web site. (October 3, 2006 Decl. of Dionysios Christou ("Christou Decl.") ¶ 3.) Mr. Christou also revealed in his deposition taken on February 21, 2007 in Miami, Florida that Del Monte also maintains a list of approximately 15,000 people who responded to a promotion conducted with the Walt Disney Company ("Disney") that involved hang tags being placed on the Gold pineapples as well as Del Monte brand bananas advertising the movie *The Pirates of the Caribbean.* It is uncertain how many of the 15,000 people who responded to this promotion purchased pineapples or bananas. (Tr. 8:12-16.) In addition, there may be an additional list of possible class members consisting of persons who responded to a similar hang tag promotion for the Disney movie *Leroy & Stitch.* It appears that Disney maintains the list of the names of persons who responded to the *Leroy & Stitch* promotion, and Mr. Christou has provided conflicting testimony as to whether Disney will voluntarily share that information with Del Monte. (Tr. 24:20-26:19.)

13. Mr. Fisher proposes that to the extent Del Monte has names and addresses of persons who may well have purchased a Del Monte Gold pineapple, whether obtained through Del Monte's web site or through promotions with Disney, those persons should be provided notice by mail and/or email. (Fisher Decl. ¶¶ 14, 18.) The Court agrees that the persons who submitted inquiries on the Del Monte web site or who responded to promotions for the Disney movies *The Pirates of the Caribbean* and *Leroy & Stitch* may well be class members, and to the extent practicable, should be provided individual notice of this case by mail or email.

14. Mr. Fisher testified that it is possible to provide adequate notice to the class in this case using only publication notice and mail (the extent practicable), and that it is not necessary as a matter of due process to also provide notice at the point of sale. (Tr. 123:18-22.) Mr. Fisher also testified that whether or not the class is comprised of repeat purchasers of the Gold pineapples is only relevant to providing notice at the point of sale, and that adequate notice by publication and mail can be provided regardless of whether there are any repeat purchasers in the class. (Tr. 115:20-116:4.) Defendants do not dispute these conclusions, and the Court agrees with Mr. Fisher that adequate notice can be provided by publication and mail alone, irrespective of whether there are repeat purchasers in the class. Indeed, notice by publication and mail (to the extent addresses exist) is the typical means of providing notice in consumer class actions. (Tr. 101:23 -102:16.)

C. Point of Sale Notice.

15. In addition to providing notice by publication and mail, Mr. Fisher also proposes providing notice at the point of sale by placing a short form notice on the pineapple hang tags that Del Monte already attaches to the Gold pineapple as well as potentially posters or other literature to be displayed in grocery stores. (Fisher Decl. ¶¶ 20-21; Supp. Fisher Decl. ¶¶ 11-15.) Mr. Fisher prepared an exemplar of what a short form notice on a pineapple hang tag could look like. (Supp. Fisher Decl. Ex. A.)

16. The basis for this recommendation is Mr. Fisher's conclusion that many of the Del Monte Pineapples are purchased by consumers who buy those pineapples at least once a month and would therefore be exposed to a notice placed on the pineapples or at the point of sale. Mr. Fisher relies upon a research paper prepared by David Neven for the Michigan State University Partnerships for Food Industry Development Fruits and Vegetables, entitled "The

United States Market for Fresh Pineapples," which states that in 2004, approximately 10% of pineapple consumers make purchases once a week or more, 34% make purchases at least once a month but less than once a week, and 56% of such households buy pineapples less often than once a month. (Tr. 116:5-13, Fisher Decl. Ex A. and Supp. Fisher Decl. ¶ 6.) This paper cites *The Packer*, a produce industry publication, for this data. (*Id.*) Mr. Fisher testified that he had no reason to believe the data from *The Packer* contained in the Neven article was not a reliable produce industry source that he could properly rely upon in preparing a notice plan for this case. (Tr. 116:14-17.)

17. Defendants did not produce any direct evidence that *The Packer* is not a reliable source for data concerning produce purchasing patterns. Indeed, Mr. Christou, Del Monte's Vice President Marketing – North America, who testified at the hearing, did not offer testimony on this issue, and did not refute Mr. Fisher's conclusion based upon *The Packer* data that many purchasers of Del Monte Gold Pineapples buy those pineapples on a regular basis. Nor did Defendants contest Mr. Fisher's conclusion that class members would likely be exposed to a notice placed at the point of sale on the pineapple hang tag or in the grocery store.

18. Defendants also concede that there would be no logistical difficulty with placing a short form notice of this case on the hang tags placed on the Del Monte Gold pineapples. (Sobelsohn Decl. ¶ 8.) Mr. Christou did testify that many grocery stores would be unlikely to voluntarily post point of sale notices, but did not suggest that there would be any logistical problem for stores that are willing to post such notices. (Tr. 9:22-11:8.)

19. Mr. Christou did testify that placing a notice at the point of sale will harm sales of the Del Monte Gold pineapples. (Tr. 32:2-23.) However, Mr. Christou also testified that

any notice of this case -- even a publication notice required under Rule 23-- would harm sales of the Del Monte Gold pineapples. (Tr. 33:16 – 34:3.)

20. The Court finds that many members of the class are likely repeat purchasers of Del Monte Gold Pineapples and that those class members would likely be exposed to a point of sale notice placed on a pineapple hang tag or voluntarily displayed in grocery stores. (Depending upon the length of the notice program, class members who buy pineapples on a weekly or monthly basis could be exposed to the point of sale notice on the hang tags multiple times.) The Court also concludes that because many members of the indirect purchaser class purchased the pineapples in grocery stores and may regularly shop at grocery stores, they are also likely to be exposed to a point of sale notice that grocery stores may choose to voluntarily display. Accordingly, the Court finds that point of sale notices, while not required to provide adequate notice, are nonetheless a feasible and desirable means of providing notice to the class in this case, and should be included in a notice plan.

21. The Court also finds that Del Monte's concerns that point of sale notices will harm sales of its Gold pineapples is overstated. The only evidence in the record on this point is Mr. Christou's opinion as to the effect of such a notice based upon his experience in marketing in the produce business. Del Monte does not present empirical data or market research concerning the effect of point of sale notices of any type on product sales. Plaintiffs cited many cases in which point of sale notices were employed, and Del Monte did not present any evidence that such notices had any impact whatsoever on product sales in those cases.

22. The Court also notes that Del Monte altered the pineapple hangtags in connection with promotions for Disney products and there is no evidence that these promotional hang tags had any adverse impact on sales. In connection with the *Pirates of the*

Caribbean promotion, Del Monte even placed a black hangtag with a skull and cross-bones symbol on its pineapples (which from a distance might indicate poison rather than pirates), and there is no evidence in the record that this hang tag had any detrimental impact on product sales. (Supp. Fisher Decl., Ex. E; Tr. 35:19 - 36:20, Ex. 1 at p.2.) Mr. Christou's opinion that simply placing a carefully worded notice with a toll free number and a web site address on the reverse side of the standard pineapple hang tags used by Del Monte would necessarily have a significant detrimental impact on sales of those products is not convincing.

23. The Court also finds that any point of sale notices used in this case can be drafted to minimize any adverse impact on Del Monte's sales of Gold pineapples. (Tr. 37:17-38:21.) The Notice Company can work with Del Monte personnel to create point of sale notices that minimize the potential impact on Del Monte's sales. (Tr. 122:17-123:1.)

III. Allocation of Relief

24. Mr. Fisher testified that he does not have enough information regarding the amount and parameters of any relief that may be obtained to create a formal allocation plan, which would normally be prepared after a settlement or an award after trial. (Supp. Fisher Decl. ¶ 28.) The Court agrees with Mr. Fisher's assessment that a formal allocation plan would be premature, and therefore evaluates only the feasibility of the modes of distributing relief to the class proposed by Mr. Fisher, which include (i) automatic price reductions on Del Monte Gold Pineapples by placing a coupon on the hang tags attached to those pineapples, (ii) a formal claims procedure in which class members could obtain coupons or cash relief, and (iii) a *cy pres* distribution.[6]

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[6] Mr. Fisher proposes that the proportion of relief allocated to any particular method of distribution should be somewhat fluid and subject to revision and adjustment to ensure that relief is reaching the class members in a time efficient manner. For example, Mr. Fisher suggest that if it turns out that fewer formal claims than anticipated are received and will not exhaust the funds allocated to that distribution method, the remaining amounts as well as any reserve amounts

25. Mr. Fisher testified that the Gold pineapples are a low cost product that many class members purchase on a regular basis. (Fisher Decl. ¶¶ 25-26.) For that reason, Mr. Fisher suggests that coupons on future pineapple purchases can be one of several appropriate modes of distributing relief. The Court agrees that members of the class who are repeat purchasers of the Del Monte Gold Pineapples could benefit from coupons on future purchases of that product.

A. Automatic Coupons

26. With regard to the distribution of coupon based relief, Mr. Fisher proposes that some of the relief obtained be allocated to "automatic" coupons that would be placed on the hang tags of all Del Monte Gold Pineapples and would result in an automatic discount on the pineapple at the time of purchase. (Fisher Decl. ¶¶ 25-26; Supp. Fisher Decl. ¶ 8.) Because these coupons are automatically applied, there would be a 100% redemption rate for all such coupons that are issued, through not all of the coupons redeemed would necessarily benefit the class members. (Tr. 99:21-100:16.)

27. There are no logistical issues concerning the distribution of relief through automatic coupons. During the evidentiary hearing, Mr. Christou confirmed that up until the end of 2006, Del Monte conducted automatic coupon promotions for Del Monte Gold pineapples. (Tr. 20:13-18.) The Del Monte Gold Pineapples are already sold with a hang tag attached, and the hang tag could be altered or a second hang tag attached to provide the coupon. (Sobelsohn Decl. ¶ 8.) Mr. Christou testified that he is unaware of any instance in

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could be shifted to the distribution of additional automatic coupons. (Supp. Fisher Decl. ¶ 28.)

which retailers failed to honor coupons for Del Monte Gold pineapples other than as a result of a technical difficulty. (Sobelsohn Decl. ¶ 10.)

28. Mr. Fisher concedes that a price reduction of Del Monte Gold pineapples through automatic coupons is not a mathematically precise means of compensating members of the class in exact proportion to the harm they suffered as it is both an under inclusive and over inclusive method of distributing relief to the class. (Supp. Fisher Decl. ¶ 26.) Mr. Fisher testified that he is unaware of any consumer class action involving the distribution of relief via coupons in which it was possible to be mathematically precise in distributing relief only to class members and in direct proportion to the harm they suffered. (Tr. 106:17-27.)

29. Mr. Fisher testified that given the high incidence of repeat purchasers of the Del Monte Gold pineapples, the automatic coupons would be an efficient means of distributing relief to the those members of the class and that a substantial amount of the relief distributed in that manner would likely benefit the class. (Tr. 105:1-23.) Mr. Fisher's conclusion is based upon the data from *The Packer* indicating that many members of the class purchase pineapples on a regular basis. (Tr. 116:5-17.)

30. Defendants do not present evidence to refute Mr. Fisher's assessment that class members who are repeat purchasers of Del Monte Gold Pineapples would benefit from the automatic coupons and that relief distributed in that manner would benefit the class. Defendants do suggest that the data from *The Packer* may overstate the frequency with which certain members of the class purchase pineapples, and note that persons who purchase the pineapples for the first time after the end of the class period might obtain compensation even though they are not members of the class.

31. Without deciding the precise frequency with which class members purchase Del Monte Gold Pineapples, the Court finds that it is likely that a significant number of class members purchase Del Monte Gold Pineapples on a regular basis, and that the automatic coupons would provide one practical mode of distributing relief to those class members. Given

that the class period is alleged to be ongoing, the Court concludes that most of the relief distributed in this manner will likely benefit class members, though not necessarily in direct proportion to the harm they suffered. (However, during the distribution period for such automatic coupons, class members who purchase a larger number of pineapples will obtain more relief than class members who purchase fewer pineapples.)

B. Claim Forms

32. Mr. Fisher also suggests a formal claims procedure as an additional mode of distributing relief to supplement the automatic coupons. This formal claims process does not require any finding that the class is comprised of repeat purchasers in order to evaluate whether it will benefit the class. (Tr. 116:1-4.) This claims process will allow class members who no longer purchase Del Monte Gold Pineapples to obtain relief and allows repeat purchasers who might not be fully compensated for their loss by the automatic coupons to obtain additional coupons or cash. Mr. Fisher prepared an exemplar of a possible claim form to be used for this purpose, which asks questions to confirm membership in the class, inquires as to the number of pineapples purchased during the class period, and requires that the class member sign the form under penalty of perjury. (Supp. Fisher Decl. ¶ 19, Ex. D.)

33. Defendants contend that consumers who participate in this formal claims procedure might overestimate their purchases of Del Monte Gold Pineapples. Mr. Christou testified that in telephone surveys conducted while he worked for Chiquita, he found that consumers tended to overestimate their consumption of Chiquita products. (Tr. 21:24 -22:24.) Mr. Christou explained that in these surveys consumers tended to associate certain produce items with certain "legacy brands" known for those fruit items, which resulted in an overestimation of purchases of fruit sold under certain legacy brands. (Tr. 23:13-24:4.)

34. The Court does not find Mr. Christou's testimony persuasive on these points. The surveys Mr. Christou conducted in for Chiquita were typically automated telephone

surveys and the participants did not have to attest to their purchases under penalty of perjury. (Tr. 34:9-15.) Moreover, Mr. Christou admitted on cross-examination that Dole is a "legacy brand" for pineapples, which under Mr. Christou's theory could just as easily result in an overestimate of Dole pineapple purchases as Del Monte pineapple purchases. (Tr. 34:19-35:3.)

35. The Court is also persuaded by Mr. Fisher's testimony that in his experience, fraudulent claims in which consumers overestimate their eligibility for relief have never been a problem, and that he has fielded many calls from class members seeking to confirm their eligibility to participate in a settlement because they did not want to submit a claim form under penalty of perjury unless they were certain that they were entitled to the relief they were claiming. (Supp. Fisher Decl. ¶ 19.) Mr. Christou also concedes that his experience is similar in that he is not aware of any fraudulent submissions in connection with any promotions involving Del Monte Gold Pineapples. (Sobelsohn Decl. ¶ 7.)

36. Mr. Fisher also testified that the exemplar of the claim form he designed would minimize the risk of fraudulent claims because it must be signed under penalty of perjury, there could be a limit of one claim form per household, most of the relief distributed will be in coupons and not cash, the coupons will have no cash value and will cover only a fraction of the purchase price of a pineapple so that they would only be of interest to someone who wants to buy pineapples, and the only class members eligible to receive cash relief would be persons with receipts or other documentation to confirm their purchases. (Fisher Decl. ¶ 32; Supp. Fisher Decl. ¶ 20.)

37. The Court also notes that claims procedures in which class members do not have to provide documentation as to their purchases to obtain relief, but must sign the form under

penalty of perjury have been used in other consumer antitrust class actions. (Fisher Decl. ¶¶ 28-34, Exs. D and E (claim forms for the *In re Compact Disc Minimum Advertised Price Litigation* and *Microsoft I-V Cases*)).

38. With regard to the likely redemption rate for coupons distributed through the formal claims procedure, Mr. Fisher testified during the hearing that he anticipates a higher level of redemption of the coupons than occurred in the case *In re Excess Value Coverage Litigation*, MDL no. 1339, 2004 U.S. Dist. LEXIS 14822 (S.D.N.Y. Jul. 30, 2004) (the "UPS case"). Mr. Fisher testified that the coupons distributed through the formal claims procedure he proposes would be distributed to persons who directly stand to benefit. By contrast, in the UPS case, Mr. Fisher suggests that there was a low redemption rate because the person handling the shipping would not directly benefit financially from using the coupon awarded to their employer, and unless required to do so, would not go through the hassle of taking the steps necessary to redeem the coupon. (Tr. 108:14-100:11.)

39. Accordingly, the Court finds that the distribution of coupons or cash relief through a formal claims procedure would allow relief to be distributed to the class and is one of the modes of distributing relief that could properly be included as part of a formal allocation plan. The Court also notes that the feasibility of the formal claims procedure proposed by Mr. Fisher is not dependent upon any finding that members of the class are repeat purchasers of Del Monte Gold Pineapples.

C. *Cy Pres* Distribution

40. The Court also finds that there are no logistical barriers to a *cy pres* distribution of any portion of the relief that may be obtained in this case. To the extent a *cy pres* distribution is appropriate in this case, the Court can award a *cy pres* distribution to Second Harvest as

proposed by Plaintiffs, or solicit applications from various non-profit organizations and public charities for a share of the relief and make a *cy pres* distribution based upon those applications.

IV. The Size of the Class

41. As a threshold issue, the Court finds that a precise estimate of the size of the class is unnecessary to determine the manageability issues raised by the Court, including the feasibility of providing adequate notice to the class and the modes of providing relief to the class. As. Mr. Fisher testified, the procedures he would recommend to provide notice and distribute relief in this case would be the same regardless of whether the class numbers 2 million or 20 million. (Tr. 115:3-15.) Accordingly, the Court finds that regardless of whether the size of the class is 2 million or 20 million, adequate notice can be provided by publication and mail or email to the extent addresses are available. Similarly, relief can be distributed by automatic coupons, a claims procedure, and a *cy pres* distribution regardless of whether the class numbers 2 million or 20 million. Nonetheless, the Court will briefly address this issue.

42. Mr. Fisher provided an initial estimate of the class size by considering only the number of households in the United States in 2004, the percentage of those households that purchased pineapples in 2004, and Del Monte's share of the fresh pineapple market, which resulted in an estimated class size of 21 million persons. (Fisher Decl. ¶ 8.) Mr. Fisher advised in his declaration containing this initial estimate that this methodology could result in an overestimate of the class size. (Fisher Decl. ¶ 8 n.3.)

43. Defendants attacked this estimate of the class size as being too large and pointed to data indicating that during 2004, Defendants sold at most 108 million Del Monte Gold Pineapples in the United States. In response, Mr. Fisher revised his estimate of the class size

so that it would be constrained by retail production figures and described this revised estimate in his deposition and in his supplemental declaration. (Supp. Fisher Decl. ¶¶4 – 6.)

44. This revised estimate of the class size uses data from Dr. Tinari's damages report, which indicates that that in 2004 Del Monte sold between 77,696,000 and 108,774,000 fresh pineapples at wholesale, with up to 59% of these pineapples finding their way to retail outlets.[7] (Supp. Fisher Decl. ¶ 6.) Based upon this data, Mr. Fisher estimated that during 2004, between 45,840,640 and 64,176,660 Del Monte Gold pineapples were sold in retail stores. (*Id.*) Mr. Fisher then relied upon the research paper prepared by David Neven for the Michigan State University Partnerships for Food Industry Development Fruits and Vegetables, entitled "The United States Market for Fresh Pineapples," which states that (a) approximately 10% of pineapple consumers make purchases once a week or more, (b) 34% make purchases at least once a month but less than once a week, and (c) 56% of such households buy pineapples less often than once a month. (*Id.*) Mr. Fisher than calculates sales purchases by frequency of sales, and constrained the result not to exceed the quantity of fresh pineapples supplied by Del Monte, and estimates that there were between 4,650,000 and 6,522,000 retail consumers purchasing Del Monte Gold pineapples in 2004.[8] (*Id.*) Mr. Fisher also estimates that a core group of between

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[7] Del Monte does not track how many individual pineapples it sells, only how many 25 pound boxes of pineapples it sells, which contain between 5 and 7 pineapples. Dr. Tinari multiplied the number of boxes sold by 5 and 7 to determine the total number of individual pineapples sold, depending upon whether there were 5 or 7 pineapples in each 25 lb box sold by Del Monte. (Supp. Fisher Decl. ¶ 6 n.1)

[8] Mr. Fisher used the following equation to add up the number of pineapples purchased by each group of pineapple consumers: .1 *52x + .34 *12x + .56x = 64,176,660, and solved for x, which is the total number of persons who purchased Del Monte Gold pineapples in 2004. With this equation, and assuming 108 million individual pineapples sold, x equals 6,522,018 persons. The 10% of pineapple consumers who buy pineapples at least once a week total 652,201 persons and are responsible for purchasing at least 33,914,495 pineapples. The 34% of pineapple consumers who in 2004 bought pineapples once a month total 2,271,486 persons and are responsible for purchasing at least 26,609,833 pineapples. Based upon this calculation, Mr. Fisher concludes that approximately 94% of the pineapples sold at the retail level in 2004 were purchased by persons who buy pineapples at least once a month. (Supp. Fisher Decl. ¶ 6 n.2.)

465,000 and 652,200 made a majority of pineapple purchases, and nearly 95% of all purchases were made by a group of between 2 to 2.9 million consumers. Finally, Mr. Fisher notes that if sales of Del Monte Gold Pineapples have increased at the retail level in the last three years, it is possible that the size of the class has grown between 2004 and 2007. (*Id.*)

45. Defendants extensively cross-examined Mr. Fisher regarding his initial overestimate of the class size and the method he used to arrive at that estimate. Defendants did not present evidence that Mr. Fisher's revised estimate of the class size is necessarily inaccurate or offer any alternative calculation of the class size. Nor did Defendants offer any empirical evidence to suggest that the data relied upon by Mr. Fisher in his revised calculation was necessarily unreliable or inaccurate, or point to additional or different data that would undermine Mr. Fisher's revised estimate. Nor do Defendants suggest that the class is too large to be manageable.

46. Based upon Mr. Fisher's revised calculations, the Court finds that as of 2004, the class likely numbered at least several million households and possibly as many as 6.5 million households as suggested by Mr. Fisher. The Court also finds that given increasing sales of Del Monte Gold Pineapples between 2004 and 2007, and the ongoing class period, that the class is presently somewhat larger. The size of the class obviously satisfies the numerosity requirements of Rule 23 and does not present and manageability issues. The Court finds that more precise estimates of the class size are unnecessary to determine manageability.

CONCLUSIONS OF LAW

I. The Class Can Be Notified.

47. The record reveals that Del Monte and/or Disney have the names and addresses or email addresses for at least a small portion of the class. The best practicable means of notifying those class members would be individual notice by mail. *See* Rule 23(c)(2) (the court must direct "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"); *In re Compact Disc. Minimum*

Advertised Price Litigation, 2004 WL 22862013 (D. Me. 2003) (notice by mail to 8.1 million of the nearly 70 million class members). To the extent Del Monte also has email addresses for the class members, the best practicable means of notifying those class members would also include notice by email. *See In re Airline Ticket Antitrust Litig.*, 953 F. Supp. 280 (D. Minn. 1997) (electronic notice); *see also Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001) (notice provided to 2.4 million class members by mail and email); *Fine v. America Online, Inc.*, 743 N.E. 2d 416 (Ohio 2000) (notice provided to America Online customers by first class mail and email was sufficient).

48. Given that only a small portion of the class can be notified by mail or email, adequate notice would also include substitute notice by publication. *Cf. Reppert v. Marvin Lumber and Cedar Co., Inc.*, 359 F.3d 53 (5th Cir. 2004) (publication of notice in the Boston Globe was sufficient to notify class members who could not be individually identified using defendants records); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004) ("When individual notice is infeasible, notice by publication in a newspaper of national circulation . . . is an acceptable substitute.").

49. It is becoming increasingly common to provide publication of class notices through dedicated web sites. *See In re NASDAQ Market Makers Antitrust Litig.*, 1998 WL 7872020 (summary notice posted on a web site); *In re First Databank Antitrust Litig.*, 2002 WL 257552 (D.D.C. Feb. 14, 2002) (dedicated web site); *In re Lotazepam & Clorazepate*, 2002 WL 246664 (D.D.C. Feb. 1, 2002) (same); *In re Synthroid Marketing Litig.*, 1998 WL 526566 (N.D. Ill. Aug. 17, 1998); *In re Compact Disc Minimum Advertised Price Litig.*, 216 F.R.D. 197 (D. Me. 2003) (same). Courts have commented on the effectiveness of providing notice through dedicated web sites. *See In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp.2d 1329 (N.D. Ga. 2000) (discussing the large number of class members who visited the web site and downloaded claim forms). It is also becoming common to place notices on defendant's web site that may be visited by class members. *Cf. Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A) (N.Y. Sup. 2005) (notice posted on defendant's web site); *Fine v. America Online, Inc.*, 743 N.E. 2d 416

(Ohio 2000) (used America Online email system to notify class).

50. The record indicates that more than 7,000 potential class members visited the Del Monte web site and that a further 15,000 potential class members visited a web site operated by Del Monte in connection with the *Pirates of the Caribbean* promotion. Accordingly, the Court finds that the class can also be provided notice through dedicated web sites as well as a link to those web sites from the Del Monte web site.

51. The Court finds that adequate notice can be provided through mail and/or email to the extent addresses exist, publication and through dedicated web sites as well as by placing a notice on Del Monte's web site.

52. Point of sale notices are specifically endorsed in the 2003 Advisory Committee notes to Fed. R. Civ. Proc. 23(c)(2), which states: "Informal methods [of notice] may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice." Courts have used point of sale notices where the class members cannot be individually identified, but repeatedly purchase the product at issue and are therefore likely to be exposed to notices placed at the point of sale. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.D.R. 369, 378 (D.D.C. 2002) (notice plan included point of sale displays at 55,000 pharmacies and was determined by the Court to be highly effective); *In re Relafen Antitrust Litig.*, slip op. (D. Mass. Sept. 28, 2005) (point of sale displays at pharmacies).[9]

53. Courts have ordered defendants to provide point of sale notices when doing so would assist in providing notice. *See DeLima v. Exxon Corp.*, No. HUD-L-008969-96 (N.J. Sup.

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[9] For purchases of services such as opposed to goods, point of sale notices are often placed in billing statements. *See In re AT&T Optional Calling Plan Class Litig.*, No. 96-3527 (D.S.C. Nov. 9, 2000) (notice inserted in monthly bills); *Willmann v. GTE Corp.*, No. 96-492 (S.D. Ill. Dec. 19, 1996) (same); *Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A) (N.Y. Sup. 2005)(notice could be included with the telephone bill); *Beasley v. Wells Fargo Bank, N.A.*, Cal. Super. Ct., San Francisco Co. (Sept. 13, 1989) ("stuffer" inserted in monthly credit card bills); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 436-37 (D.N.M. 1988) (insert in billing statement); *Mountain States Tel. & Tel. Co. v. Dist. Court*, 778 P.2d 667, 674-77 (Colo.) (same), cert. denied, 493 U.S. 983 (1989).

Ct., Final Order and Judgment Entered on May 29, 2002) (in a case against Exxon, the court ordered posting of a class notice at Exxon Gas stations); *Robinson v. Sears Roebuck & Co.*, No. 98-739 (E.D. Ark. Jan. 9, 2001) (notice in a discrimination class action was ordered to be posted in Sears Roebuck stores); *Feldman v. Quick Quality Restaurants, Inc.*, New York Law Journal, Jul. 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) (In a case against a Burger King franchisee, the court ordered that "Notice of the pending action is hereby ordered to be posted in each New York franchise owned and/or operated and/or managed by [defendants]".).

54. Here, the evidentiary record indicates that many class members are likely repeat purchasers of Del Monte Gold Pineapples, and purchase those pineapples in grocery stores. It is likely that many members of the class would be exposed to point of sale notices that are voluntarily displayed by grocery stores or placed on the hangtags that Defendants attach to the Del Monte Gold Pineapples. Defendants do not dispute the likely efficacy of point of sale notices, but argue that such notices should not be ordered because they would create adverse publicity that would harm sales of its products.

55. The purpose of providing notice is to protect the rights of the absent class members to opt out of a class action that may impact their claims or rights. As explained by the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997):

> To alert class members to their right to "opt out" of a(b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-177 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

The Court finds no persuasive authority for the proposition that point of sale notices should be avoided in order to spare Defendants the adverse publicity that would result from widespread knowledge of this case among purchasers of their products.

56. Accordingly, the Court concludes that notice in this case should also include point

of sale notices to be placed on the hangtags attached to the Del Monte Gold Pineapples as well as the posting of notices on a voluntary basis by grocery stores.

II. Relief Can Be Allocated to the Class.

57. The recovery of aggregate damages in class actions has long been permitted in the Second Circuit:

> Difficulties in management are of significance only if they make the class action a *less* "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important in the present cases where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains.

In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971). "Under such an approach, the jury determines the entire damage to the class without deciding how much each individual class member is to receive. Allocation of the award is made later, administratively, upon the submission of claims, and often according to a formula." *See In Re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 (D. Me. 2006). As explained by Judge Weinstein in *Schwab v. Philip Morris USA, Inc.*, 2005 U.S. Dist. LEXIS 27469, at *5-9 (E.D.N.Y. Nov. 14, 2005), allowing for an aggregate recovery to be distributed pursuant to an allocation plan has received wide support from courts and commentators[10], has been accepted by nearly all federal circuits that have considered it in both settled cases and

[10] *See, e.g., Simer v. Rios*, 661 F.2d 655, 676-78 (7th Cir. 1981) (fluid recovery should be used when it would promote statutory goals of deterrence, disgorgement, and compensation); *Antibiotic Antitrust Actions,* 333 F. Supp. 278, 282-283 (S.D.N.Y. 1971) (without fluid recovery, defendants would have the "freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small"); *California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472, 224 Cal. Rptr. 605, 715 P.2d 564 (Cal. 1986) ("Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.")

decided cases, and nine of eleven states that have considered the issue have endorsed the use of fluid recovery. In addition, California, New Jersey, and North Dakota have enacted statutes permitting the use of fluid recovery in class actions. *See* Cal. Civ. Proc. Code *§ 384*; N.J.R. Civ. P. 4:32-2(c); N.D.R. Civ. P. 23(o)(3)(E).

58. The Court finds that the use of an aggregate approach to measure class-wide damages is appropriate in this case. *See Cardizem CD Antitrust Litig.,* 200 F.R.D. 297, 321-24 (E.D. Mich. 2003) ("the use of an aggregate approach to measure class-wide damage is appropriate"); *In re NASDAQ Market Makers Antitrust Litig.,* 169 F.R.D. 493, 525 (S.D.N.Y. 1996) (aggregate damages methodologies "have been widely used in antitrust, securities and other class actions").

59. With regard to the allocation and distribution of any damages recovered, the Court finds that the distribution of coupons on Del Monte Gold Pineapples would benefit the class because some members of the class are repeat purchasers of that product. *See* Barbara J. Rothstein and Thomas E. Willing, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (Federal Judicial Center 2005) at p. 12 ("Note that under the proper conditions (e.g., with transferability, a secondary market, and/or a class of repeat users of a low-cost product), coupons might serve both the class and the defendant and thereby increase the overall value of a settlement (see, e.g., *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 748 (7th Cir. 2001) (finding that in-kind transferable coupons useful to a class of repeat consumers had an estimated value of 10%–15% of their face value)).")[11]

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[11] Courts routinely approve of coupon based relief as opposed to cash as all or a substantial part of the relief to be distributed to class members. *See, e.g., Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 959-61 (E.D. Tex. 2000) (approving settlement in which class members received ""Toshiba Bucks"" good only for purchase of Toshiba products). *See also*, *In re Mexico*

60. Providing automatic discounts for current purchasers is widely accepted as an appropriate means of distributing benefits to a class, where the class consists of repeat purchasers who were overcharged for a product or service. *See In re Cosmetics Cases*, Case No. 4:03-VC-03359-SBA (N.D. Cal. Mar 30, 2005) (in an antitrust class action on behalf of consumers who purchased cosmetics from Federated Department Stores it was not possible to identify many members of the class, and the allocation plan approved by the Court involved distributing free cosmetics over a brief time period in Federated Department Stores.)[12] *See also Boyd v. Bell Atlantic Maryland, Inc.*, 887 A.2d 637 (Md. App. 2005) (noting that a distribution of discounts to

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Money Transfer Litig., 164 F. Supp. 2d 1002, at 1018-1019 (N.D. Ill., 2000) (approving settlement that provided for certificates to each class member usable for discounts on future transfers of funds); *In re Superior Beverage/ Glass Container Consol. Pretrial*, 133 F.R.D. 119, 122 (N.D. Ill. 1990) (discount purchase certificates made available to class members upon proof of claim and redeemable for rebates on future glass container purchases); *Cusack v. Bank United FSB*, 159 F.3d 1040, 1041 (7th Cir. 1998) (discount certificates for credits against mortgage closing costs approved); *In re Residential Doors Antitrust Litig.*, Trade Cas. (CCH) ¶¶ 72,113, 1998 WL 151804 (E.D. Pa. 1998) (approving settlement providing class members with $2.4 million in discount certificates applicable toward the purchase of qualifying residential flush doors); *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *57-58 (N.Y. Sup. Ct. Jan. 3, 1997) (approving settlement providing in-kind relief for class members); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996) (approving settlement of a coupon redeemable for $400 off the price of any new Ford car or light truck within one year, with no redemption value for coupon); *Weiss v. Mercedes Benz*, 899 F. Supp. 1297, 1299-1300 (D.N.J. 1995) (approving settlement providing for certificates to each class member usable to off-set the purchase or lease of one of defendant's Mercedes-Benz automobiles); *In re Domestic Air Transp. Antitrust Litig.,*148 F.R.D. 297, 313-15 (N.D. Ga. 1993) (court approved a settlement in a price-fixing suit against a group of domestic air carries in which $408 million of the $458 million settlement consideration was in discount certificates applicable toward future air travel); *State v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 679-82 (S.D.N.Y. 1991) (approval of $25 million settlement consisting of $5.00 coupons to five million purchasers); *Langford v. Bombay Palace Restaurants, Inc.*, No. 88 Civ. 5279 (CSH), 1991 U.S. Dist. LEXIS 4730 (S.D.N.Y. Apr. 8, 1991) (approving settlement providing for rebates to each class member, good for use at a variety of restaurants and hotels); *In re Cuisinart Food Processor Antitrust Litig.,* No. M.D.L. 447, 1983 U.S. Dist. LEXIS 12412 (D. Conn. Oct. 24, 1983) (approving settlement that provided for coupon discounts on Cuisinart products).

[12] One objector filed an appeal of the order approving the settlement, which is pending before the Ninth Circuit Court of Appeals.

current customers likely provides relief to most of the class members); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (discount coupons were useful to a class of repeat consumers); *see also Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill 1999) (in an action concerning misrepresentations as to the wax content of Turtle Wax car wax, $1 off coupons were distributed to current customers); *Feldman v. Quick Quality Restaurants, Inc.*, New York Law Journal, Jul. 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) (.50 cent discount coupons distributed to current Burger King customers); *Hoyga v. Superior Court*, 75 Cal. App. 3d 122 (1977) (defendant ordered to reduce the price of its product to current purchasers until the savings to consumers equaled the amounts previously overcharged); *Bebchicl v. Public Utli. Comm'n*, 318 F.2d 187 (D.C. Cir. 1963) (transit fare roll back); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1973) (room rate reductions for current customers); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (Cal. 1967) (reduction in cab fares for current customers); *Reich v. Dominick's Finer Foods, Inc.*, No. 78 CH 5667 (Cook Cty., Ill., Cir. Ct. Jul. 11, 1980) (to compensate class members in a false labeling action, settlement funds used to reduce prices for the mislabeled food). Accordingly, the Court finds that placing automatic coupons on the hang tags as suggested by Mr. Fisher would efficiently distribute relief to members of the class and could be properly included in any plan of allocation.

61. In addition, the Court finds that a formal claims procedure of the type outlined by Mr. Fisher would also be a practical mode of distributing relief to class members, particularly class members who might not be fully compensated through the distribution of automatic coupons to current purchasers of Del Monte Gold Pineapples. Claims procedures in which class members are asked to swear under penalty of perjury as to their membership in a class and/or the quantity of particular products they purchased have been used in other antitrust class actions. *See* Fisher Decl., Exs. D through I (claim forms that solicit information regarding the frequency with which products were purchased and that must be signed under penalty of perjury).

62. It is well settled that "[t]he Court has broad discretion and equitable powers to permit the use of *cy pres* principles to distribute unclaimed class settlement funds when, as in this case, class members may be difficult to locate, and where notification and distribution would be costly, and the check class members receive would be for a minimal amount." *Plotz v. Nyat Maintenance Corp.*, 20-06 U.S. Dist. LEXIS 4799 at *3 (S.D.N.Y. Feb. 6, 2006) (citing *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999)). Unclaimed settlement funds may be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members and those similarly situated. *In re Holocaust Victim Assets Litigation*, 424 F.3d 132, 141 n.10 (2d. Cir. 2005). The Court may direct that residual funds be distributed to a reputable charity or public service organization. *See Jones,* 56 F. Supp. 2d at 359 (S.D.N.Y. 1999).

63. Here, the Court could effect a *cy pres* distribution of any relief obtained that cannot be efficiently distributed to class members. For example, if a recovery in this case is small, it might not be efficient to distribute coupons or conduct a formal claims procedure as the transaction costs involved might be too high relative to the amount of relief being distributed. In such a situation, *cy pres* distribution would be appropriate and feasible.

64. Defendants seek to distinguish many cases in which a point of sale notice is provided or an aggregate recovery is obtained and distributed pursuant to an allocation plan on the ground that they are settlement cases. This argument is not convincing. As the Supreme Court made clear, the only difference in certifying a class for settlement as opposed to trial is that the trial procedure need not be addressed with a settlement class; all other requirements of Rule 23 must be satisfied:

> "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or

> overbroad class definitions-- demand undiluted, even heightened, attention in the settlement context."

Amchem, 521 U.S. at 620. Thus, even in a settlement case, the class should be provided adequate notice, including notice at the point of sale, if appropriate under the circumstances. In addition, the allocation of funds obtained in a settlement is subject to the proper exercise of the district court's discretion to ensure that the interests of the class are being served. *See In re Holocaust Victim Assets Litig.*, 424 F.3d at 146-147. Accordingly, the Court sees no reason why it should not consider the notice and allocation plans in cases involving settlement classes.

III. The Is Not So Numerous As To Be Unmanageable.

65. The size and composition of the indirect purchaser class presents no obstacle to class certification.[13] The existence of millions of class members does not render the class unmanageable, as similarly large or even larger classes have been certified in antitrust class actions. *See In re Compact Disc Minimum Advertised Price Litig.*, 2004 WL 22862013 (D. Me. 2003) (a class of more than 70 million consumers); *Microsoft Cases I –IV* (a class of more than 14 million California purchasers of Microsoft products); s*ee also In re Relafen Antirust Litig.*, 221 F.R.D. 260, 267 (D. Mass. 2004) (millions of class members who purchased Relafen); In re *Cardizem CD Antitrust Litig.,* 200 F.R.D. 297, 334-35 (E.D. Mich. 2003) (same); *In re NASDAQ Market Makers Antitrust Litig.,* 169 F.R.D. 493 (S.D.N.Y. 1996) (millions of purchasers of

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[13] The size of the proposed class obviously meets the numerosity requirement of Rule 23(a)(1). *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)). Although the Class is concededly very large – though hardly the largest – it must be noted that there is no upper limit that has been recognized to exist in Rule 23, and the size of the Class highlights how the superiority requirement of Rule 23 is overwhelmingly met in this case.

approximately 1658 securities); *In re Domestic Air Transp. Antitrust Litig.,* 137 F.R.D. 677, 687-88 (N.D. Ga. 1991) (millions of ticket purchasers for a multitude of city pairs and prices). Here, the proposed modes of providing notice and allocating any relief obtained are feasible even with a class of millions of consumers. Accordingly, the Court concludes that the class is not so numerous as to make manageability impractical.

IV. The Validity of Dr. Tinari's Conclusions is a Merits Issue Unrelated to Manageability.

66. In ruling on class certification, "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and . . . has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits." *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). The quantum of damages suffered by the class, antitrust impact, and even the ending date for a class period, are all merits issues that cannot be resolved at the certification stage without generating an "unwieldy trial on the merits." *See In re New Motor Vehicles Canadian Export Antitrust Litigation*, MDL No. 1532, 2007 U.S. Dist LEXIS 20563 at * 22-24 (Mar. 21, 2007) (citing *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 17 (1st Cir. 2005)).

67. Here, Del Monte, through the Goldfarb Declaration, argues that (i) Dr. Tinari's conclusion that the pass-through ratio is close to 100% must be invalid, and (ii) Dr. Tinari could have created a more precise damages model that better accounted for the effect of increased output on damages. The validity of Dr. Tinari's conclusion as to the pass through ratio, and whether it is theoretically possible to create a more precise damages model for this case, are

not relevant to any of the issues raised by the Court concerning the manageability of the class. "[C]ertainty is not required for an expert's findings to have probative value." *Dukes v. Wal-Mart Inc.*, 474 F.3d 1214, 1227 (9th Cir. 2007).

68. Similarly, Del Monte's argument that Dr. Tinari's analysis does not take into account the fact that individual class members were charged different prices for the pineapples relates to the quantum of damages suffered, not manageability or certification. *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 generally 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"); *See 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").

69. Accordingly, the Court declines to consider Del Monte's criticism of the merits of Dr. Tinari's estimate of the damages suffered by the class in determining the manageability of class.

V. The Court Sustains Plaintiffs' Objections To The Goldfarb Declaration.

70. Rather than simply paraphrasing what Dr. Tinari testified to in his deposition and citing to the transcript, Mr. Goldfarb in his declaration concerning Dr. Tinari's testimony provides his own commentary and argument on Dr. Tinari's testimony Plaintiffs filed a wrtten objection to these statements and attached a copy of the Goldfarb Declaration in which the

objectionable statements were underlined. The Court took these objectiuons under submission and now sustains Plaintiffs objections on the ground that comments by an attorney on the evidence he is presenting are irrelvant and inadmissible.

Dated:

The Honorable Richard M. Berman
United States District Judge

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I, Daniel E. Sobelsohn, certify that on the 16th day of April 2007, I caused a true and correct copy of the **PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MANAGEABILITY OF THE INDIRECT PURCHASER CLASS** to be served electronically upon the persons listed below.

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