IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION	MDL DOCKET NO. 1935 (Civil Action No. 1:08-MDL-1935) (Judge Christopher C. Conner) **CLASS ACTION**
THIS DOCUMENT APPLIES TO: **ALL INDIRECT END USERS' ACTIONS**	**CONSOLIDATED COMPLAINT** **JURY TRIAL DEMANDED** ***ELECTRONICALLY FILED***
Michael McNamara, Plaintiff, v. Cadbury Schweppes PLC, et al., Defendants;	Civil Action No. 1:07-cv-02335
Craig Stephenson, Plaintiff, v. The Hershey Company, et al., Defendants;	Civil Action No. 1:08-cv-00858
Kevin Tierney, Plaintiff v. The Hershey Company, et al., Defendants;	Civil Action No. 1:08-cv-00859

Lisa Blackwell, Plaintiff v. The Hershey Company, et al., Defendants	)	Civil Action No. 1:08-cv-00862
Debra L. Damaske, et al., Plaintiffs, v. The Hershey Company, et al., Defendants;	)	Civil Action No. 1:08-cv-00897
Judith Bishop, et al., Plaintiffs, v. The Hershey Company, et al., Defendants.	)	Civil Action No. 1:08-cv-00996

Indirect End User Plaintiffs, on behalf of themselves and all other indirect purchasers similarly situated, bring this action for injunctive relief, damages, and/or restitution pursuant to the antitrust and consumer protection laws set forth below against The Hershey Company, Hershey Canada Inc., Mars, Incorporated, Mars Canada, Inc., Mars Snackfood US, LLC, Nestlé S.A., Nestlé USA, Inc., Nestlé Canada, Inc., Cadbury plc, Cadbury Holdings Ltd. (formerly known as Cadbury Schweppes plc), and Cadbury Adams Canada, Inc. (collectively, "Defendants"). Plaintiffs allege as follows upon information and belief:

NATURE OF THE ACTION

1. This action arises out of a conspiracy among the world's leading manufacturers of chocolate candy to fix, raise, maintain, and/or stabilize prices for those products in Canada and the United States. This action follows the initiation

and announcement of governmental investigations by United States and Canadian competition authorities into alleged price fixing of chocolate confectionery products in these jurisdictions. Some of the Defendants, including Mars and Nestlé, have confirmed in news reports that they have received inquiries from the United States Department of Justice into alleged price fixing.

2. As stated more fully below, Plaintiffs allege a conspiracy among Defendants and certain unnamed co-conspirators to fix, raise, maintain, and/or stabilize prices for Chocolate Products (as defined in this Complaint) sold in, or sold for delivery in, the United States and its territories beginning in 2002 and continuing through the present.

3. At all relevant times, Defendants manufactured and sold Chocolate Products. During the Class Period (as defined in this Complaint), Defendants and their co-conspirators agreed, combined, and conspired with each other to fix, raise, maintain, and/or stabilize prices for Chocolate Products sold in, or sold for delivery in, the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the state antitrust statutes identified below, and various other state laws.

4. As a result of Defendants' unlawful conduct, Plaintiffs paid artificially inflated prices for these products, and therefore have suffered injury to their business and property. Plaintiffs seek damages and injunctive relief.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (commerce and antitrust regulation), as this action arises under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26.

6. The Court has supplemental subject matter jurisdiction of the pendent state law claims under 28 U.S.C. § 1367.

7. The Court also has diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d), in that this is a class action in which the matter or controversy exceeds the sum of $5,000,000, exclusive of interest and costs, and in which some members of the proposed class are citizens of a state different from some Defendants.

8. Venue is proper in this District because Defendants reside, are found, have agents, and transact business in this District as provided in 28 U.S.C. § 1391(b) and (c), and in Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22. Additionally, a substantial part of the interstate trade and commerce involved and affected by the alleged violations of the antitrust laws was and is carried on in part within this District. Finally, the litigation was transferred to this District for pretrial purposes pursuant to 28 U.S.C. § 1407.

DEFINITIONS

9. Chocolate is a confectionary product created by processing cocoa beans and mixing the processed beans with milk, sugar, and other ingredients. As used in this Complaint, the term "Chocolate Products" includes chocolate bars and other chocolate confectionery products packaged for retail sale (*e.g.*, Snickers, Kit Kats, 3 Musketeers, Hershey Bars, Hershey's Kisses, M&Ms, etc.).

10. As used herein, the term "Class Period" means the time period December 9, 2002 to the present.

PLAINTIFFS

11. Within the Class Period, each Plaintiff purchased Chocolate Products in the state in which he or she resides for his or her own use and not for resale, and suffered injury as a result of Defendants' illegal conduct described in this Complaint.

12. Plaintiff Judith Bishop is an Arizona resident.

13. Plaintiff Eric Rodman Cohen is an Arizona resident.

14. Plaintiff James Miles is an Arkansas resident.

15. Plaintiff Darla Jackson is an Arkansas resident.

16. Plaintiff Lisa Blackwell is a California resident.

17. Plaintiff Frank Gerencser is a California resident

18. Plaintiff David Levy is a California resident.

19. Plaintiff Kelsey French is a District of Columbia resident.

20. Plaintiff Sarah Allder is a Florida resident.

21. Plaintiff Pernell Larsen is a Florida resident.

22. Plaintiff Timothy Duffy is a Hawaii resident.

23. Plaintiff Korey James Christensen is an Iowa resident.

24. Plaintiff Susan Jones is a Kansas resident.

25. Plaintiff Abbie Soule is a Maine resident.

26. Plaintiff Stephanie Aceto is a Massachusetts resident.

27. Plaintiff Michael McNamara is a Michigan resident.

28. Plaintiff Donna Siler is a Michigan resident.

29. Plaintiff Timothy Emmer is a Minnesota resident.

30. Plaintiff Sarina Vlock is a Nebraska resident.

31. Plaintiff Robert Allder is a Nevada resident.

32. Plaintiff Kevin Tierney is a Nevada resident.

33. Plaintiff Michelle Bounderate is a New Hampshire resident.

34. Plaintiff Amy K. Luminoso is a New Jersey resident.

35. Plaintiff Katherine Mary Ferlic is a New Mexico resident.

36. Plaintiff W. Craig Stephenson is a New Mexico resident.

37. Plaintiff Mark Moynahan is a New York resident.

38. Plaintiff Douglas Dillard Glenn is a North Carolina resident.

39. Plaintiff Monica Browne is a Rhode Island resident.

40. Plaintiff Mike Carrels is a South Dakota resident.

41. Plaintiff Layna M. Rose is a Tennessee resident.

42. Plaintiff James Veneziano is a Vermont resident.

43. Plaintiff Linda Davis is a West Virginia resident.

44. Plaintiff Mike Davis is a West Virginia resident.

45. Plaintiff Marlene Smith is a West Virginia resident.

46. Plaintiff Debra L. Damaske is a Wisconsin resident.

47. Plaintiff Shirley A. Dresen is a Wisconsin resident.

48. Plaintiff Arnie Enz is a Wisconsin resident.

DEFENDANTS

The Hershey Defendants

49. Defendant The Hershey Company is a Delaware corporation with its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania. The Hershey Company is the leading North American manufacturer of chocolate and non-chocolate confectionery and grocery products. During the Class Period, The Hershey Company manufactured and sold Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

50. Defendant Hershey Canada Inc. ("Hershey Canada") is a Canadian

corporation with its principal place of business at Airport Corporate Centre, 5750 Explorer Drive, Suite 500, Mississauga, Ontario. Hershey Canada is a wholly-owned subsidiary of The Hershey Company that manufactures, distributes, and sells confectionery, snack, refreshment, and grocery products in Canada. During the Class Period, Hershey Canada sold and/or had available for purchase Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

51. Defendants Hershey Canada and The Hershey Company collectively are referred to as "Hershey" in this Complaint. Hershey manufactures a variety of Chocolate Products under the Hershey's, Hershey's Kisses, and Reese's brand names. In addition, it manufactures and distributes in the United States certain Chocolate Products under license, such as York Peppermint Patties and Peter Paul Mounds under a license from Defendant Cadbury and the Kit Kat bar under a license from Defendant Nestlé S.A. Hershey also manufactures and distributes various other Chocolate Products, such as the 5th Avenue bar, the Krackel bar, Milk Duds, the Special Dark bar, and the Harmony Bar.

The Mars Defendants

52. Defendant Mars, Incorporated is a Delaware corporation with its principal place of business at 6885 Elm Street, McLean, Virginia. From its origins in candy and confectionery products, it has diversified to become a world leader in

53. Defendant Mars Canada, Inc. ("Mars Canada") is a Canadian corporation with its principal place of business at 37 Holland Drive, Bolton, Ontario. Mars Canada is the Canadian subsidiary of Mars, Incorporated. Before May 8, 2007, Mars Canada was known as Effem Inc. During the Class Period, Mars Canada sold and/or had available for purchase Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

54. Defendant Mars Snackfood US, LLC ("Mars Snackfood") is headquartered at 800 High Street, Hackettstown, New Jersey. It is a subsidiary of Defendant Mars, Incorporated, and is responsible for the manufacture and sale of chocolate and non-chocolate confectionery products across various facilities located throughout the United States. During the Class Period, Mars Snackfood manufactured, distributed, and/or sold Chocolate Products in the United States directly or through its predecessors, affiliates, and/or subsidiaries.

55. Defendants Mars, Incorporated, Mars Canada, and Mars Snackfood collectively are referenced as "Mars" in this Complaint. Mars manufactures and distributes various Chocolate Products, such as 3 Musketeers, Mars, Snickers, Twix, Dove, and Milky Way candy bars.

The Nestlé Defendants

56. Defendant Nestlé S.A. is a Swiss company with its principal place of business at Avenue Nestlé 5, CH-1800, Vevey, Vaud, Switzerland. It is the world's largest food and beverage company. Nestlé S.A. participates in numerous markets, including coffee, water, other beverages, ice cream, infant nutrition, health food, pet food, soups, seasonings, pasta sauces, frozen food, refrigerated products, confectionery, and biscuits. During the Class Period, Nestlé S.A. manufactured and sold Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

57. Defendant Nestlé USA, Inc. ("Nestlé USA") is a Delaware corporation with its principal place of business at 800 North Brand Boulevard, Glendale, California. Nestlé USA is a wholly-owned subsidiary of Nestlé S.A. Nestlé USA is grouped into various divisions, including chocolate and confectionery, coffee, water, other beverages, food services, ice cream, nutrition, and pet care. During the Class Period, Nestlé USA manufactured and sold Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

58. Defendant Nestlé Canada Inc. ("Nestlé Canada") is a Canadian corporation with its principal place of business at 25 Sheppard Avenue West, Floors 18-22, North York, Ontario. Nestlé Canada is a wholly-owned subsidiary of

Switzerland's Nestlé S.A. Nestlé Canada is grouped into various divisions, including chocolate and confectionary, coffee, water, other beverages, food services, ice cream, nutrition, and pet care. During the Class Period Nestlé Canada sold and/or had available for purchase Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

59. Defendants Nestlé S.A., Nestlé USA, and Nestlé Canada collectively are referred to as "Nestlé" in the Complaint.

The Cadbury Defendants

60. Defendant Cadbury plc is a British company with its principal executive offices at 25 Berkeley Square, London, England. Cadbury plc is the world's largest confectionery company, with a 10% share of the global confectionery market. During the Class Period, Cadbury plc manufactured, sold, and/or distributed Chocolate Products in the United States.

61. Defendant Cadbury Holdings Ltd. (formerly known as Cadbury Schweppes plc) ("Cadbury Holdings") is an English company, with its principal executive offices at 25 Berkeley Square, London, England. Cadbury Holdings is a wholly-owned subsidiary of Cadbury plc. During the Class Period, Cadbury Holdings licensed The Hershey Company to manufacture and distribute York Peppermint Patties, Peter Paul Mounds, and Peter Paul Almond Joy worldwide, as well as Cadbury and Caramello branded products in the United States. During

the Class Period, Cadbury Holdings sold and/or had available for purchase Chocolate Products to purchasers in the United States, directly or through its predecessors, affiliates, and/or subsidiaries.

62. Defendant Cadbury Adams Canada, Inc. ("Cadbury Adams Canada") is a Canadian corporation with its principal place of business at 5000 Yonge Street, Suite 2100, Toronto, Ontario. Cadbury Adams Canada is a subsidiary of Defendant Cadbury Holdings. Cadbury Adams Canada manufactures and sells a wide array of confectionery products. During the Class Period, Cadbury Adams Canada sold and/or had available for purchase Chocolate Products to purchasers in the United States and Canada, directly or through its predecessors, affiliates, and/or subsidiaries.

63. Defendants Cadbury plc, Cadbury Holdings, and Cadbury Adams Canada collectively are referred to as "Cadbury" in this Complaint.

CO-CONSPIRATORS

64. Whenever in this Complaint reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of the corporation's business or affairs.

65. The acts alleged in this Complaint to have been done by Defendants were authorized, ordered, and condoned by their parent corporations and authorized,

ordered, and performed by their officers, directors, agents, employees, or representatives while engaged in the management, direction, control, or transaction of their business affairs.

66. Various other persons, firms, and corporations not named as Defendants have participated as co-conspirators in the violations alleged herein and have performed acts and made statements in furtherance thereof.

CLASS ACTION ALLEGATIONS

67. Plaintiffs bring this action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of the following class (the "Class"):

> All persons and/or entities residing in the United States who indirectly purchased Chocolate Products, at any time during the period from December 9, 2002 to the present, for their own use and not for resale. Excluded from the Class are Defendants, their co-conspirators, all present or former parents, predecessors, subsidiaries or affiliates of Defendants, and all governmental entities.

68. Plaintiffs also bring this action on behalf of themselves and as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure and/or respective state statute(s), on behalf of all members of the following state classes or subclasses: Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan,

Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

69. Due to the nature of the trade and commerce involved, Plaintiffs believe that Class members number at least in the millions and thus are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all members is impracticable. The precise number of Class members is unknown to Plaintiffs.

70. Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs and all members of the Class are similarly affected by Defendants' wrongful conduct in violation of the antitrust laws in that they paid artificially inflated prices for Chocolate Products purchased indirectly from Defendants or their co-conspirators. Therefore, Plaintiffs' claims arise from the same common course of conduct giving rise to the claims of the members of the Class and the relief sought is common to the Class.

71. Plaintiffs will fairly and adequately protect the interests of the members of the Class in that they have no interests that are antagonistic to other members of the Class and have retained counsel competent and experienced in the prosecution of class actions and antitrust litigation.

72. Common questions of law and fact exist as to all members of the

Class and predominate over any questions solely affecting individual members of the Class. Such common questions of law and fact include:

a. Whether Defendants and their co-conspirators engaged in a conspiracy to fix, raise, maintain, or stabilize the price of Chocolate Products;

b. Whether Defendants' combination or conspiracy caused prices for Chocolate Products to be higher than they would have been in the absence of Defendants' conduct;

c. Whether Defendants' combination or conspiracy caused injury to the business or property of Plaintiffs and the other members of the Class;

d. Whether Defendants' conduct violates Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged in Count I;

e. Whether Defendants' conduct violates the state antitrust statutes as alleged in Count II;

f. Whether Defendants' conduct violates the state consumer protection statutes as alleged in Count III;

g. The appropriate Class-wide measure of damages; and

h. The appropriate nature of Class-wide equitable relief.

73. Plaintiffs know of no difficulty that would prevent this case from being maintained as a class action. Class action treatment is a superior method for the fair and efficient adjudication of this controversy. Class action treatment

will, among other things, allow a large number of similarly situated persons and/or entities to prosecute their common claims in a single forum, thus avoiding the unnecessary duplication of resources that numerous individual actions would require. Moreover, class action treatment allows injured persons the ability to seek redress on claims that might be impracticable to pursue individually.

74. Defendants have acted, and/or refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

75. In the absence of a class action, Defendants would be unjustly enriched because they would be able to retain the benefits and fruits of their wrongful conduct.

INTERSTATE TRADE AND COMMERCE

76. Throughout the Class Period, the Chocolate Products purchased from Defendants by Plaintiffs or other Class members created a continuous and uninterrupted flow of transactions between Defendants and their customers through the United States, including this District. Defendants' unlawful conduct took place within the flow of interstate commerce and affected customers located throughout the United States, including this District, as well as throughout the world. Defendants' unlawful conduct had a direct, substantial, and reasonably foreseeable effect in restraint of trade on both interstate and international commerce.

THE CHOCOLATE INDUSTRY

77. Chocolate constitutes a distinct product market recognized by Defendants, the trade associations that serve the confectionery industry, and other bodies that have examined the industry. According to statistics reported by the United States Department of Agriculture, wholesale sales of chocolate candy in the United States totaled approximately $10.2 billion, while retail sales totaled $15.6 billion. A June 2007 report published in Matrade New York, entitled *Trends in USA the USA Cocoa and Cocoa Product Market*, reported that United States chocolate candy sales in 2006 totaled approximately 56% of all United States candy sales.

78. Important characteristics of the chocolate market facilitate anticompetitive collusion among the Defendants.

79. Chocolate is a commodity-like product. Thus, any Defendant can and does produce and sell, for example, a certain type of chocolate candy bar, seasonal novelty chocolate, or boxed chocolate that is similar to a chocolate candy bar, seasonal novelty chocolate, or boxed chocolate offered by another Defendant, respectively.

80. The market for Chocolate Products is highly concentrated. Defendants collectively control more than 40% of the global chocolate confectionery products market, with Hershey controlling 8.2%, Nestlé 12.6%, Cadbury 7.5%, and Mars

14.8%. Defendants Hershey, Mars, and Nestlé collectively possess approximately 80% of the United States chocolate market, with Hershey possessing about 45%, Mars about 27%, and Nestlé about 9%. Defendants Hershey Canada, Mars Canada, Nestlé Canada, and Cadbury Adams Canada collectively possess about 64% of the Canadian chocolate market. By contrast, the buyer side of the market for Chocolate Products is diffuse, comprised of many buyers without the ability to influence pricing significantly.

81. The chocolate industry is conducive to price fixing agreements. First, the industry is highly concentrated with Hershey, Mars, and Nestlé controlling more than 75% of the United States market for chocolate candy.

82. Second, that concentration is substantially exacerbated by licensing agreements between Defendants. Hershey and Cadbury have a licensing arrangement whereby Hershey has the exclusive right to manufacture and/or sell Cadbury products in the United States. In addition, Hershey has a licensing agreement with Nestlé whereby Hershey has a right to sell and/or manufacture certain Nestlé products (*i.e.*, Kit Kat bars and Rolo candy) in the United States.

83. As a result, Hershey and Cadbury control 45% of the market, and Hershey's share is further increased by sales of certain Nestlé products. For Herfindahl-Hirschman Index ("HHI") purposes, a concentration in the market greater than 1,800 in the market is indicative of oligopolistic market power. The

chocolate industry has a HHI rating based on the three firms (Hershey, Mars, and Nestlé) of 2,835.

84. The terms of the licensing agreements between Hershey and Cadbury, and also Hershey and Nestlé, are similar in that both agreements contain terms that allow Hershey to manufacture and sell their competitors' products in the United States in exchange for Hershey paying quarterly royalty payments based upon net sales of the licensed products.

85. Both licenses also contain a right for Cadbury and Nestlé, respectively, to audit Hershey's sales of the licensed products. The audit rights allow Cadbury and Nestlé to obtain key information from Hershey pertaining to the licensed products.

86. The exchange of data among multiple competitors provides the Defendants with opportunities to collude on product pricing.

87. The exchange of pricing and cost data also provides a mechanism where, for at least the licensed products, the Defendants can insure compliance with any conspiratorial price fixing agreements. It also further enhances the Defendants' ability to enforce price fixing agreements on non-licensed products as well.

88. Hershey's licensing agreements with Cadbury and Nestlé also provide Hershey with pricing control over a larger percentage of the United States

chocolate market than it would possess in the absence of such licensing agreements, also resulting in further concentration of the United States chocolate market.

89. In addition, there are high barriers to entry into the chocolate market in the form of technical know-how, advertising, and access to distribution channels. The manufacture of confectionery products is highly technical, requiring considerable understanding of food technology, including hardware (processing machinery and computers), software, and formulation technology. There is significant spending on advertising and access to supply channels is critical to gain a foothold, as wholesale distributors, chain grocery stores, mass merchandisers, chain drug stores, vending companies, wholesale clubs, convenience stores, dollar stores, concessionaires, and department stores form the most significant distribution channel for confectionery sales. Because of their high collective market share globally, as well as in the United States and Canada, Defendants collectively are able to exercise market power in each of these markets, including the ability to raise prices and erect barriers to entry. Pricing for Chocolate Products in the United States and Canada, during the Class Period was characterized by industry-wide price increases. Moreover, during the Class Period, price increases in the same or similar amounts for Chocolate Products were announced by multiple Defendants and/or became effective at or near the same

time.

90. The United States is the leading exporter of Chocolate Products to Canada as well as the leading importer of Chocolate Products from Canada. A 2004 United States Department of Agriculture report noted that in 2003, 46% of United States confectionery exports were to Canada. A 2005 United States Department of Agriculture report noted that "the United States supplied 45% of Canadian chocolate candy imports by value." The 2007 Matrade New York report, referenced above, indicated that Canada was the largest exporter of chocolate food products to the United States in 2004 through 2006, with annual total customs values ranging from $690 to $705 million United States dollars.

DEFENDANTS' CONSPIRACY

91. The market for Chocolate Products was ripe for collusion. In addition to the collective market power exercised by the Defendants, as detailed above, demand for these products has stagnated in recent years because of increasing health concerns and changing consumer preferences with respect to chocolate consumption.

92. The Canadian and United States operations of the Defendants are tightly interwoven. For example, sales of Hershey's chocolate in the United States and Canada are overseen by its North American Commercial Group. Likewise, Cadbury's confectionery sales in the United States and Canada are overseen by its

Americas Confectionery operating unit. Similarly, Nestlé conducts its chocolate business through a Chocolate, Confectionery and Biscuits Strategic Business Unit, and Nestlé also organizes its businesses by geographic zone, with its "Zone Americas" including the United States and Canada. The Defendants' geographically integrated operations for their Canadian and U.S. operations suggest that decisions related to Defendants' pricing in Canada either affected or reflected pricing decisions applicable to the Defendants' U.S. operations.

93. The prices of Chocolate Products in North America had been generally stable from 1996 to 2002. In the face of waning demand, Defendants responded by instituting uniform parallel price increases during the Class Period in the United States and Canada.

94. In the United States, for example:

a. On or about December 9, 2002, Mars (via its Masterfoods USA division) increased wholesale prices on standard-size chocolate bars by approximately 10.7%. A few days later, on or about December 11, 2002, Hershey announced a price increase (which was effective January 1, 2003) for the wholesale price of its domestic standard size, king size, variety pack, six-pack, and ten-pack candy bar lines. The increase raised the price of standard-size candy bars in particular by approximately 10.7%. Hershey spokeswoman Christine Dugan said Hershey raised prices after rival Mars recently raised its prices. On or about December

13, 2002, Nestlé announced a price increase of approximately 10.3% on its standard-size chocolate bars.

b. On or about December 15, 2004, Hershey again increased the wholesale prices for many of its Chocolate Products. Hershey increased the price of its standard-size bars by approximately 5.5% and also increased prices for king-size bars, six-packs, variety packs, and peg bags. Significantly, Hershey's increase came weeks after Mars (via its Masterfoods USA division) raised its prices for its chocolate confectionery product baglines by similar amounts on or about November 19, 2004. On or about December 17, 2004 (only two days after Hershey's price increase), Mars increased the price of its standard-size bars by approximately 5.5% and also increased prices for its king-size bars and six-packs. Nestlé then increased prices on its standard-size bars by approximately 5.7% on or about December 22, 2004, and also increased prices on its king-size bars, six-packs, and peg bags.

c. On or about March 23, 2007, Mars announced price increases of approximately 5.3% on its standard-size bars, six-packs, and variety packs and also increased prices for other Chocolate Products, citing the need to help offset costs. Hershey then announced price increases on or about April 4, 2007, purportedly due to rising costs, particularly cocoa. Hershey increased its prices for standard-size bars, six-packs, and variety-packs by approximately 5.2% and also increased

prices for other Chocolate Products. Mars and Hershey both publicly noted that their previous price increases were more than two years ago. Nestlé also raised prices for its chocolate confectionery products on or about April 5, 2007, by an average of approximately 5%, including a 5.4% increase in the price of its standard-size bars, purportedly due to rising commodity, packaging, and energy costs.

95. In Canada, for example, on July 19, 2005, Nestlé Canada announced a chocolate price increase for 5-8%, effective October 31, 2005, for base confectionery, and April 18, 2006, for seasonal confectionery. Cadbury Adams Canada announced a price increase on average of 5.2% on its chocolate portfolio soon thereafter, effective October 31, 2005. In addition, Hershey announced a price increase on most chocolate, also effective October 31, 2005. Mars announced a price increase on average of 6% on select items in its chocolate confectionery portfolio, effective November 7, 2005.

96. Defendants falsely asserted that these price changes were fully justified by increases in costs. The price increases were instead the product of a conspiracy among Defendants, and cannot be explained solely by purported changes in the price of raw materials for these products.

97. Defendants offered various explanations in the media for their price increases on chocolate confectionary products, including rising costs in commodity prices such as cocoa, sugar, milk, or fuel prices. However,

examination of commodity prices throughout the Class Period show that these prices cannot explain price increases on Chocolate Products as commodity and raw material costs remained relatively constant throughout periods when Defendants claimed a price increase was necessary.

98. For example, as discussed above, Defendant Hershey announced a price increase on standard-size candy bars of approximately 5.5% in December 2004. Defendant Mars had also raised prices around the same time. Hershey blamed the increase at least in part on higher fuel prices. However, an examination of the United States On-Highway Diesel Fuel Price Index published by the United States Energy Information Administration shows that fuel prices were relatively stable at less than $2.00 per gallon at the time this price increase was announced.

99. Similarly, in April 2007, Defendant Hershey announced an approximate 5.2% increase in the price of standard-size chocolate candy bars and other Chocolate Products. Defendants Nestlé and Mars also announced similar price increases at approximately the same time. Hershey stated that the price increase was necessary to "help offset the company's input costs, including raw and packaging materials . . . While there has been no change in list prices on these impacted items since December 2004, over this period costs have continued to rise." However, the raw material prices for the key

ingredients in chocolate, *i.e.*, cocoa, sugar, and milk, showed virtually no net increase in the commodity prices between December 2004 and April 2007.

100. Defendants' other purported reasons for price increases, such as increased packaging and employee benefit costs, were also only pretextual reasons for their price increases during the Class Period.

101. In a competitive market operating free of Defendants' conspiracy, cost increases would have resulted in decreases to Defendants' profit margins because Defendants would have been able to only partially offset any cost increases by increasing prices.

102. However, due to Defendants' price fixing agreement, Defendants were able to raise prices repeatedly to maintain their margins at or about the same levels. For example, Hershey's gross margins from 2001 through 2007 were 35.5%, 37.8%, 39.0%, 39.5%, 38.7%, 37.8%, and 33% respectively. Nestlé's Chocolate, Confectionary and Biscuits operating segment reported EBIT margins from 2001 through 2007 of 11.0%, 10.9%, 10.3%, 11.2%, 11.7%, 11.4%, and 11.4% respectively.

103. Moreover, during the Class Period, demand for Chocolate Products was declining or stagnant. Defendants were nonetheless able to maintain their profit margins as a result of their price fixing conspiracy.

104. From at least January 1, 2002 through the present, Defendants and their

co-conspirators engaged in a continuing contract, combination, or conspiracy with respect to the sale of Chocolate Products in the United States or for delivery in the United States in unreasonable restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

105. The contract, combination, or conspiracy consisted of an agreement among the Defendants and their co-conspirators to fix, raise, stabilize, or maintain at artificially high levels the prices they charged for Chocolate Products in the United States or for delivery in the United States.

106. In formulating and effectuating this conspiracy, Defendants and their co-conspirators did those things that they combined and conspired to do, including:

a. Participating in meetings and conversations among themselves during which they agreed to charge prices at certain levels, and otherwise to fix, increase, maintain, or stabilize prices of Chocolate Products in the United States;

b. Issuing price announcements consistent with, and selling Chocolate Products at, the agreed upon prices; and

c. Participating in meetings and conversations among themselves to implement, adhere, and police the agreements they reached.

107. The Canadian Competition Bureau ("Bureau") currently is investigating Defendants for alleged price fixing of Chocolate Products and recently

108. The search warrants were based in part on information obtained from a "Cooperating Party," which according to news reports is believed to be Cadbury. Cadbury is believed to be the party cooperating with Canadian authorities because Cadbury is not named in the warrants as one of the companies under investigation, despite its large Canadian market share.

109. The Information of Daniel Wilcock, sworn November 19, 2007 ("November 19, 2007 Information"), details many meetings and communications regarding pricing of Chocolate Products beginning at least as early as February 2004, including meetings at coffee shops, restaurants, conventions, and the offices of Nestlé, amongst Hershey, Mars, Nestlé, and the "Cooperating Party." In the November 19, 2007 Information, the Bureau set forth the following:

a. "Cooperating Individual 1" attended a breakfast meeting with the President and CEO of Nestlé Canada, Bob Leonidas, on February 23, 2004, at which time the parties discussed the topic of "trade spend" (the industry practice of providing discounts, rebates, and allowances to customers, often linked to promotions). According to the November 19, 2007 Information,

> Cooperating Individual 1 indicated that it was known in the industry that he disagreed with the industry's prevailing approach to trade spend and that the Cooperating Party was going to reduce trade spend on chocolate. Cooperating Individual 1 indicated that he left the meeting with the impression that Leonidas "sees the world the way" that he did. Cooperating Individual 1 also understood that he had an open line to call Leonidas if there were any issues in the market, including trade spend practices.

b. "Cooperating Party" informed the Bureau of an internal email exchange, which began on June 1, 2005, regarding a discussion with their customer, ITWAL Limited, a distributor, concerning chocolate pricing:

> Cooperating Individual 11 sent an email with the subject heading "Chocolate pricing" to Cooperating Individual 12 and Cooperating Individual 13 stating: "At ITWAL I was informed by a reliable source that both Nestlé and Effem have been to customers hinting at 2005 price increases. No details or confirmation. I suggested that we would seriously consider appropriate actions once firm details known, and that I would be concerned about the other leading player not following Which [sic] my contact said they would inquire about. This is similar to info we had picked up a couple of months ago. Martin I would send out a note to ADM's to start digging."

c. "Cooperating Individual 1" met Leonidas of Nestlé at Manoir Richelieu during a Confectionary Manufacturers Association of Canada annual meeting, held from June 2 to 5, 2005. According to the November 19, 2007 Information,

> Cooperating Individual 1 stated that Leonidas said words to him to the effect of "I want you to hear it from the top – I take my pricing seriously" or "[w]e are going to take a price increase and I want you to hear it from the top." Leonidas handed Cooperating Individual 1 an envelope. Cooperating Individual 1 accepted the envelope without objection. Cooperating Individual 1 said "I may have said 'we like to take pricing too, we take it seriously.' I don't think [Leonidas] took a negative impression. I just don't

> know if he thought it was favorable." Cooperating Individual 1 agreed that Leonidas would have left the meeting with the idea that the Cooperating Party would follow a price increase led by Nestlé.

d. "Cooperating Individual 1" informed the Bureau that the envelope contained information concerning Nestlé's planned price increases for chocolate in 2005. He understood that there was a problem with him receiving this information, and advised the Bureau that "you shouldn't talk about pricing. I didn't want to be rude to Bob [Leonidas] so I said OK, was neutral, but I didn't want him to think, in any way, that I was coordinating with him." Cooperating Individual 1 also stated that the letter was similar to another Nestlé price increase letter he had received.

e. An email exchange provided by the Cooperating Party, dated July 6, 2005, indicates that by at least that date a letter containing confidential Nestlé price increase information was circulating around the Cooperating Party's office:

> One of the emails observed that the letter was a draft, as it was dated July 15, 2005 . . ., was unsigned and contained spelling mistakes. The information was that Nestlé was increasing the price of its confectionery portfolio by approximately 5 to 7%, effective October 31, 2005 for base confectionery and April 18, 2006 for seasonal confectionery. This pricing information was discussed among the Cooperating Party's leadership team and prompted the Cooperating Party to consider and announce a price increase on chocolate. The Cooperating Party has also provided the Bureau with a copy of a letter located in its files that appears to be the July 15 letter.

f. Cooperating Individual 2 stated that

> Cooperating Individual 1 called her on July 6, 2005 from Europe and instructed her to go to the Nestlé [Canada] offices to pick up something from Leonidas. Cooperating Individual 2 got Leonidas' phone number from Cooperating Individual 1's contacts and called Leonidas to arrange a time. Cooperating Individual 2 went to the Nestlé [Canada] offices with a colleague and was met by Leonidas downstairs. He said something to the effect that it was better not to be seen in his office and handed Cooperating Individual 2 an envelope. Cooperating Individual 2 subsequently opened the envelope and it contained information about a planned price increase by Nestlé [Canada]. Counsel for the Cooperating Party provided the Bureau with a copy of the document that Cooperating Individual 2 had retrieved from the files and Cooperating Individual 2 believes it is the document that was contained in the envelope from Leonidas. The document is an unsigned letter on Nestlé letterhead announcing a chocolate price increase to the trade and was forward dated July 19, 2005. . . . The July 19 letter is substantively the same as the July 15 letter, except that spelling mistakes had been corrected and the percentage price increase had been increased to "5 to 8%."

g. Cooperating Individual 2 stated that

> when she returned to the office on July 6, 2005, she called Cooperating Individual 1 in Europe, as he had requested, and left a voice-mail reading the contents of the letter. Cooperating Individual 2 also states that she sent an email message to Cooperating Individual 1 informing him that she had left him a voice-mail regarding the Nestlé letter. The Cooperating Party has provided the Bureau with a copy of an email from Cooperating Individual 2 to Cooperating Individual 1 dated July 6, 2005 that states "[s]ent voice-mail re Nestlé letter."

h. Regarding the email from Cooperating Individual 2 dated July 6, 2007, Cooperating Party 1 explained

> that earlier that day he had got a confirmation on voice-mail that Nestlé [Canada] was going to have a price increase. Cooperating Individual 1 thinks he sent a voice-mail or email message to Cooperating Individual 2 and asked her to forward the message by voice-mail to others in the Cooperating Party along the lines of "[i]f Nestlé is going to take a price increase then we will too."

i. Counsel for the Cooperating Party gave the Bureau a price increase letter from the Cooperating Party dated July 29, 2005:

> The Cooperating Party announced a price increase on average of 5.2% on its Chocolate portfolio, effective October 31, 2005. The price increase for the Cooperating Party was such as to align its prices on a number of common formats with those of Nestlé [Canada].

j. Counsel for the Cooperating Party gave the Bureau a

> Hershey [Canada] price increase letter dated August 23, 2005 that was located in the files of Cooperating Party. . . . Hershey [Canada] announced a price increase of an unknown percentage on most chocolate and candy products effective 31 October, 2005.

k. Counsel for the Cooperating Party gave the Bureau a "Mars [Canada] price increase letter dated September 6, 2005 . . . . Mars [Canada] announced a price increase on average of 6% on select items in its confectionery portfolio, effective November 7, 2005."

l. Counsel for the Cooperating Party stated that

> Cooperating Individual 3 was contacted by Nestlé [Canada] employee Lynn Hashinsky in late fall 2005 regarding pricing at a key account. Cooperating Individual 3 reported this to the Cooperating Party's in-house counsel who in turn informed Cooperating Individual 1 of the incident.

m. Counsel for the Cooperating Party provided the Bureau with

> an email exchange between Leonidas and Cooperating Individual 1 beginning on January 18, 2006 . . . . Cooperating Individual 1 congratulated Leonidas on his promotion to President and CEO of Nestlé [Canada]. Leonidas responded on January 19, 2006: "Thanks [first name of Cooperating Individual 1], still want to see you Feb 7th 8am to TALK."

n. Counsel for the Cooperating Party gave the Bureau a "copy of an entry from Cooperating Individual 1's calendar dated February 15, 2006 showing a meeting scheduled for 7:30am with Leonidas at a Second Cup coffee shop." Cooperating Individual 1 met Leonidas in February 2006, at a Second Cup coffee shop in Toronto:

> During this meeting they discussed the price of seasonal chocolate. Leonidas said he wanted Cooperating Individual 1 to take a price increase. Cooperating Individual 1 states that he refused to commit to taking a price increase. . . . On October 30, 2006 the Cooperating Party announced a price increase on seasonal chocolate to take effect February 5, 2007 – 5% for Halloween products and 4% for Easter products.

o. Cooperating Individual 1 received a phone call from Sandra Martinez de Arevalo, the new President of Nestlé Confectionery, in mid 2007, and stated that

> Martinez wanted to meet and talk. Cooperating Individual 1 and Martinez met for lunch at Auberge du Pommier on July 4, 2007 in Toronto. The discussion covered a number of issues, both personal and professional. Martinez suggested that the Cooperating Party lead a price increase in 2007, as Nestlé wanted to take a price increase in the third quarter. Cooperating Individual 1 replied that he was not prepared to take a price increase in 2007, but indicated that the Cooperating Party might take one in 2008. Cooperating Individual 1 said he would follow on chocolate but not lead. Martinez said she would call him back in two weeks. Cooperating Individual 1 said that he was of the view that the discussion did not matter because he was leaving the Cooperating Party; he could lead her down the garden path because he would not be making the decisions. Martinez could "say whatever she wants and hear whatever she wants" because Cooperating Individual 1 would not be making pricing decisions. Cooperating Individual 1 also states that Martinez would have understood that "they were on the same page." Counsel for the Cooperating Party provided the Bureau with a copy of the receipt and expense report for the lunch on July 4, 2007.

p. Cooperating Individual 5 received a call from Nestlé [Canada] employee Steve Morris on July 5, 2007:

> Morris told Cooperating Individual 5 that Nestlé [Canada] was thinking about taking a price increase in early March 2008. Cooperating Individual 5 said that the Cooperating Party was thinking of taking a price increase too. They also discussed that if Nestlé [Canada] and the Cooperating Party took a price increase, Mars would probably follow too. Cooperating Individual 5 provided this information to his supervisor, Cooperating Individual 6, Cooperating Individual 7 and Cooperating Individual 8. Cooperating Individual 8 informed in-house counsel of the Cooperating Party, who in turn informed Cooperating Individual 1.

q. Martinez left a voice-mail for Cooperating Individual 1 on August 30, 2007, and stated that

> she wanted to say goodbye before he left the Cooperating Party and requested a meeting with him during the week of September 11th to 14th[, 2007]. Cooperating Individual 1 believes that Martinez wanted to meet to follow up on the pricing discussions that took place on July 4, 2007. This meeting never occurred due to scheduling issues. Counsel for the Cooperating Party provided the Bureau with a transcribed copy of the voice-mail that was sent by Martinez to Cooperating Individual 1 on August 30, 2007.

r. Counsel for the Cooperating Party told Andrew Burke that

> on September 19, 2007 both Cooperating Individual 1 and Leonidas were in Vancouver attending an event hosted by Overwaitea, a mutual customer. Cooperating Individual 1 said that during this event, Leonidas encouraged Cooperating Individual 1 to attend an upcoming meeting of the Food and Consumer Products of Canada ("FCPC"). Leonidas said that it was "public news" that Nestlé [Canada] was taking a price increase in February 2008 of 4-6% on everything and that they had told their customers. Cooperating Individual 1 did not reply and Leonidas said to him words to the effect of: "[y]ou don't need to say anything." Leonidas also encouraged Cooperating Individual 1 to contact Martinez.

s. In emails dated November 7, 2005, February 27, 2006, and February 6, 2007, Cooperating Individual 4 refers to discussions with Martin Lebel, an employee of Effem (now Mars Canada). In the November 7, 2005 email, Cooperating Individual 4 referred to a discussion with Lebel regarding "Mars [Canada]'s 'dead net cost' on chocolate singles and trade spend issues." In the February 27, 2006 email, Cooperating Individual 4 referred to a discussion with Lebel regarding the level of margins on certain chocolate products. In the February 6, 2007 email, Cooperating Individual 4 referenced a discussion with Lebel indicating that "Cooperating Individual 4 obtained information from Effem and Hershey [Canada] about presentations made to one of their common customers."

t. Counsel for the Cooperating Party gave the Bureau a copy of an email sent on January 3, 2007, by Bert Alfonso, the Senior Vice President and Chief Financial Officer of The Hershey Company in the United States, to Eric Lent and Cooperating Individual 1. The email stated:

> As we discussed, Hershey has recently appointed Eric Lent as VP/GM for the Canada business. In keeping with the good advice from "The Godfather," keep close to your competition, I am including contact info below in an effort to introduce you both. All kidding aside, I know Eric is looking forward to meeting you.

In subsequent emails between Lent and Cooperating Individual 1 on January 3, 2007, they arranged a phone call between the two for 3:30 p.m. on January 4, 2007. Prior to becoming VP/GM of Hershey's Canada business in 2006, Lent had

been Vice-President of Refreshment, Snacks, and Confectionery for Hershey's United States Commercial Group, and he had pricing authority in the United States during a portion of the Class Period.

u. Counsel for the Cooperating Party gave the Bureau a copy of an email sent on March 15, 2007, by Lent to Cooperating Individual 1, containing the subject heading "Interesting times" and the text, "I'm back in town the week after next. Let's get together!"

v. Cooperating Individual 9 first met Lent during a dinner hosted by the FCPC trade association at Niagara-on-the-Lake on September 27, 2007:

> As he was getting ready to sit down at a dinner table, Cooperating Individual 9 was approached by Lent. Lent said words to the following effect to Cooperating Individual 9: "Hey [Cooperating Individual 9], welcome back to Canada. Congratulations on your new job. Hey, by the way, Nestlé is taking a price increase." Lent continued with either "[s]o we should take advantage" or "we should increase our prices too." Cooperating Individual 9 replied either "[w]e should not be having this conversation" or "I am not comfortable having this conversation." Lent continued: "Don't worry we can talk about it. Bob and I talk all the time [Lent pointed to an individual that Cooperating Individual 9 later identified as Bob Leonidas, President of Nestlé [Canada]]. It's public knowledge that Nestlé [Canada] is taking its prices up." Cooperating Individual 9 contacted a member of the Cooperating Party's in-house counsel after the dinner and left a message detailing the conversation.

w. Cooperating Individual 9 received a message from Lent on October 17, 2007, requesting a meeting. That same day, Cooperating Individual 9 emailed a reply to his assistant and also the assistant general counsel for the Cooperating Party with the following comment, "our friend at Hershey

[Canada] seems to need a reminder re: Competition Act." On October 19, 2007, counsel for the Cooperating Party alerted the Bureau of this issue in light of its obligations under the Immunity Program.

110. In the Information of Daniel Wilcock, sworn November 28, 2007 ("November 28, 2007 Information"), the Bureau stated, among other things, the following:

> a. [] That Hershey, [Canada], ITWAL, Mars [Canada], Nestlé [Canada] and other persons known and unknown, during the period commencing at least as early as February 2002, and continuing until the present, the exact dates being unknown, did conspire, combine, agree or arrange with each other and with the Cooperating Party to enhance unreasonably the price[, and to unduly prevent or lessen competition in the supply,] of chocolate confectionery products in Canada, and did thereby commit an indictable offense contrary to paragraph 45(1)(b) [and] . . . paragraph 45(1)(c) of the *Competition Act*, RSC 1985, c C-34.
>
> b. [] That ITWAL, while engaged in the business of supplying chocolate confectionery products, during the period commencing as early as February 2002, and continuing until at least February 2004, the exact dates being unknown, did by agreement, threat, promise or like means, attempt to influence upward, or to discourage the reduction of, the price at which Cadbury [Adams Canada], Hershey [Canada], Mars [Canada] and Nestle [Canada] supplied or offered to supply or advertised chocolate confectionery products within Canada, and did thereby commit an indictable offense contrary to paragraph 61(1)(a) of the *Competition Act*, RSC 1985, c C-34.
>
> c. [] That ITWAL, during the period commencing at least as early as February 2002, and continuing until at least February 2004, the exact dates being unknown, did by threat, promise or like means, attempt to induce suppliers, namely Cadbury [Adams Canada], Hershey [Canada], Mars [Canada] and Nestle

[Canada], as a condition of ITWAL doing business with the suppliers, to refuse to supply chocolate confectionery products to a particular person or class of persons because of the low pricing policy of that person or class of persons, and did thereby commit an indictable offense contrary to subsection 61(6) of the *Competition Act*, RSC 1985, c C-34.

* * *

d. [] The alleged conspiracy arises from communications between employees of the Cooperating Party, Hershey [Canada], Mars [Canada], Nestlé [Canada], ITWAL and others known and unknown, who exchanged confidential pricing information. The information reveals a pattern of communications via email, telephone, private meetings and meetings on the margins of industry association conferences, from at least February 2002 to the present. The relevant industry associations are the Confectionery Manufacturers Association of Canada ("CMAC") and the Food and Consumer Products of Canada ("FCPC"). Information obtained by the Commissioner provides reason to believe that the above mentioned parties entered an agreement or arrangement to fix prices and control discounts relating to the supply of chocolate confectionery products in Canada contrary to paragraphs 45(1)(b) and 45(1)(c) of the Act, and that ITWAL has engaged in price maintenance contrary to section 61 of the Act. The Commissioner became aware of the matter after a participant in these alleged offenses (the "Cooperating Party") approached the Bureau under its Immunity Program.

* * *

e. [T]here was a course of communications, both direct and indirect, about trade spend for chocolate confectionery products between ITWAL, Cadbury [Adams Canada], Hershey [Canada], Mars [Canada], Nestle [Canada] and others commencing at least as early as February 2002, and continuing until at least October 2003. Based on these communications, it is [the Bureau's] opinion that this course of communications was for the purpose of eliminating, controlling or reducing trade spend in the chocolate confectionery industry.

f. [The] filing cabinet in the office of Ms. Elizabeth Cloran, assistant to Mr. Ross Robertson, the Vice President and General Manager, and Mr. Glenn Stevens, the President and CEO of ITWAL, . . . contained letters dated February 21, 2002 from D. Glenn Stevens addressed to each of Bob Leonidas (Nestlé [Canada]), Rick Meyers (Hershey [Canada]), Don Robinson (Mars [Canada]) and Arthur Soler (Cadbury [Adams Canada]). The letters are substantively the same and the following statement is taken from the letter to Nestle [Canada]: "At the 'end of the day,' it is only the suppliers' control and discipline of the trade spending that can restore the functionality of the marketplace. The problem is very serious and completely out of control on the part of the suppliers. I am being forced to re-examine how we operate in the market and I am not sure it would be in the best interests of Nestle. I urge you to meet and take action before this chocolate bar 'bubble bursts."

g. [] A folder labeled "TAN [Take Action Now] notices" was found in a filing cabinet in the office of Ms Cloran and contained a number of letters from ITWAL addressed to various persons including employees of Hershey [Canada], Cadbury [Adams Canada], Nestle [Canada] and Mars [Canada].

h. [] The TAN notices folder contained a "TAN Information Bulletin" dated March 7, 2002. Accompanying the TAN Information Bulletin was a fax cover sheet to each of Arthur Soler (Cadbury [Adams Canada]), Don Robinson (Mars [Canada]), Rick Meyers (Hershey [Canada]) and Bob Leonidas (Nestle [Canada]). The faxes were all in substantively similar terms. The fax to Cadbury [Adams Canada] contains the following statement: "Further to my letter of February 21, 2002, please find attached information forwarded by Members on product and pricing available from diverters. In view of the seriousness of the problem, I will forward information as received under the acronym, T.A.N., which stands for 'TAKE ACTION NOW!' I trust you will accept the information in the spirit with which it is intended. I look forward to meeting with you to learn what steps Cadbury is taking to address this problem. D. Glenn Stevens"

i. [] The TAN notices folder contained a "TAN Information Bulletin #4" dated April 5, 2002, containing the following statement: ". . . Although I don't want to overreact too soon, it appears your efforts to 'dry up' this activity may be starting to work! . . . I want to take this opportunity to thank each of you for responding to our TAN initiative. It is very positive and encouraging already. That being the case, I want to share with you some of the information that has been discussed and the commitments given. 1. Potential gray marketers have been identified and, in some cases, cut off. Others have had their volumes reviewed and capped or monitored in the situations where buying through a distributor. . . . 2. We feel that part of the solution is that vending customers should not be sold direct and our recommended 'floor price model' will resolve it. 3. I am pleased to hear from you that in some cases, an ongoing internal audit procedure has been set up to monitor account activities with respect to purchases and movement – some of you have hired a third party investigator with results already being achieved. 4. . . . Thank you for your agreement to review. Clean up this and it allows you to clean up the allowances on street dealing through the full-service wholesalers. 5. I also want to thank you for putting in writing your serious concerns about this entire situation and the fact that your representatives are subject to immediate termination if trade spending policies are not adhered to accordingly. Together we can correct this destabilizing, dysfunctional and unprofitable practice. Let's get it done. T.A.N."

j. [] Bulletin #4 was accompanied by fax cover sheets dated April 5, 2002, to each of Arthur Soler (Cadbury), Don Robinson (Mars), Rick Meyers (Hershey), Bob Leonidas (Nestle), Tim Mason (Cadbury [Adams Canada]), Roy Benin (Mars [Canada]), Ross Robertson [Hershey Canada] and Matt Hall (Nestle [Canada]).

k. [] The TAN notices folder contained a "Bulletin #15["] dated December 12, 2002 containing the following statement: "To Whom it May Concern, First of all, I would like to extend congratulations to you all as we wind up the year with respect to

your concerted and committed efforts to clean up the dysfunctional retail trade spending. Your efforts can clearly be seen in the following areas: 1) Significantly less diversion of bars re: []back door at retail grocery[;] dollar stores[; and] vending[;] 2) Reduced unreasonably low retail prices, i.e. 2/99¢ or 3/99¢ (Although I ask you to remain vigilant – see attached 2/99¢ on Kit Kat and Caramilk at Maxi recently) [sic] In talking to each of you, I understand that there is a renewed effort to invest in brands and restore the profitability of this category. This is good news and we share your enthusiasm. Functional trade spending criteria combined with top management discipline, oversight and measurement can achieve this objective in 2003. We are proud as full service distributors to be your partner in this endeavor and look forward to winning together! In closing, we wish everyone a Happy Holiday Season and a fantastic prosperous New Year! T.A.N."

l. [] Accompanying Bulletin #15 was a series of fax cover sheets [dated April 5, 2002] addressed to each of Don Robinson (Mars), Rick Meyers (Hershey), Bob Leonidas (Nestle), Tim Mason (Cadbury), Roy Benin (Mars), Ross Robertson (Hershey), Matt Hall (Nestle), Peter Allen (Cadbury [Adams Canada]), Doug Tyler (Cadbury [Adams Canada]), David Jones (Mars [Canada]), Kurt Hatherly (Mars [Canada]), Marc Morneau [(Hershey) Canada], Todd Hoffman (Nestle [Canada]) and Al Kehoe (Nestle [Canada]).

m. [] The TAN notices folder contained a "Bulletin #19" dated April 25, 2003, that contained the following statement: "We have had considerable discussion on the disfunctionality of 2/99¢ pricing on single bars. Although good progress has been made, please find attached a store outlet and pictures of current such activity at Dollarama. The product in the pictures is fresh, having been shipped and produced in 2003. With a price increase just having been implemented, this situation becomes even more incredible. Please Take Action Now! D.G. Stevens TAN."

n. [] Accompanying Bulletin #19 were separate fax cover sheets dated April 24, 2003 from Glenn Stevens to: David Sculthorpe (Adams) [now part of Cadbury Adams Canada.], Yves Dalcourt

(Mars [Canada]), Don Robinson (Mars), Bruce Brown (Hershey [Canada]), Bob Leonidas (Nestle), Roy Benin (Mars), Ross Robertson (Hershey), Matt Hall (Nestle), Mike Vissers (Hershey [Canada]), Todd Hoffman (Nestle), Tim Mason (Cadbury), Lance Berrisford (Cadbury [Adams Canada]), Doug Ross (Cadbury [Adams Canada]), Shawn Allen (Hershey [Canada]), Al Kehoe (Nestle) and David Jones (Mars [Canada]).

o. [] The TAN notices folder contained a set of letters from Camille Nadeau of ITWAL dated October 7, 2003, in substantively the same terms. The letters were addressed to sales staff of the particular companies and requested the presence of persons in leadership positions at an upcoming meeting. Those named in the letters were Yves [Dalcourt] (Mars), David Jones (Mars), Don Robinson (Mars), David Sculthorpe (Cadbury), Lance Berrisford (Cadbury), Matt Hall (Nestle), Robert Leonidas (Nestle), Al Kehoe (Nestle), Bruce Brown (Hershey), Ross Robertson (Hershey) and Mike Vissers (Hershey). The letter from Camille Nadeau to Mars reads: "October 7, 2003 Yves [Dalcourt] I would like to request the presence of David Jones and Don Robinson at our upcoming October 28th business review. The reason for their presence would be to discuss the inequity in the Market Place when it comes to keeping the full service distributor competitive with the club & cash & carry activity. It would be ITWAL's position to request that in 2004, all club and cash & carry pricing activities be discontinued. The only activities should be around the value added performance that can be offered by your customers and pricing is not perceived by ITWAL as one of these. Regards, Camille Nadeau Business Development Manager Retail Itwal Ltd. CC: Glenn Stevens."

p. [] Covering the October 7[, 2003] letters from Nadeau, there were a set of letters dated October 9, 2003 in substantively the same terms, addressed to persons in leadership positions at Cadbury [Adams Canada], Mars [Canada], Nestlé [Canada] and Hershey [Canada] that read: "Dear [particular addressee], Just a quick note to add that I hope you can attend. Together we have to come to grips with this issue or everybody loses! Yours truly, D. Glenn Stevens."

111. On December 21, 2007, less than one month after the Bureau announced its investigation, the Wall Street Journal reported in an article titled *Chocolate Makers Face Probe Over Pricing* that the United States Department of Justice's Antitrust Division ("DOJ") has begun an inquiry into Defendants' pricing practices for chocolate confectionery products in the United States. On December 20, 2007, Mars spokeswoman Alice Nathanson said the company has been contacted by the DOJ "regarding their inquiry concerning pricing practices in the U.S. chocolate confectionery industry." Nestlé spokeswoman Laurie MacDonald similarly stated that "Nestlé USA is aware of a preliminary investigation into the marketing practices in the U.S. chocolate industry." Cadbury spokeswoman Luisa Girotto would neither confirm nor deny whether Cadbury has been contacted by the DOJ, and Hershey spokesman Kirk Saville declined to comment.

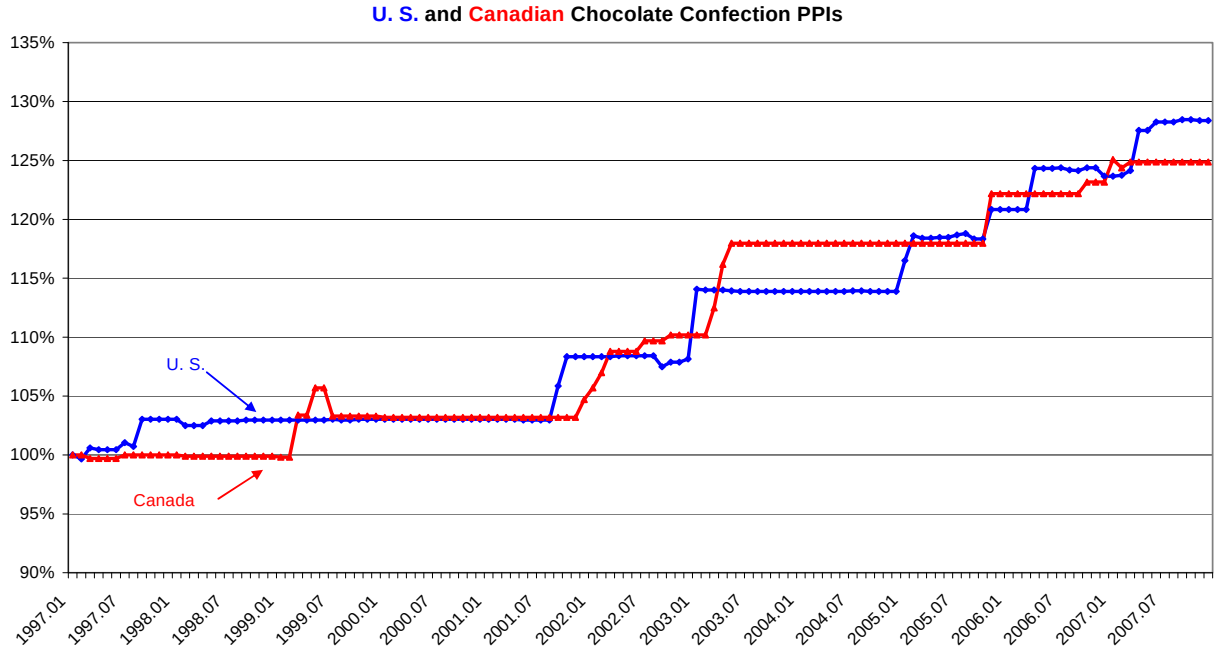
112. Defendants' conspiracy was thus not limited to their conduct in Canada, but extended as well to their pricing practices in the United States, commencing at least as early as 2002 consistent with the initial timing of collusive activity in Canada. This conclusion is supported by (a) the DOJ investigation of pricing practices in this country; (b) the fact that price increases on Chocolate Products in the United States and Canada in 2002, represented a departure from past pricing practices; (c) the fact that the collusive activity in Canada was carried out with the knowledge and active participation of United States executives of

Hershey; (d) the fact that there is substantial import-export trade in Chocolate Products between the United States and Canada; and (e) the fact that the confectionery operations of Defendants in Canada and the United States were closely coordinated.

113. Moreover, without a parallel and interlocking scheme including all of Defendants' North American operations, the conspiracy would be undercut by arbitrage from United States or Canadian products of the conspirators. As noted in the TAN communications, arbitrage is an economic fact in this industry. As reported by the United States Department of Agriculture, 45% of Canadian chocolate imports come from the United States. Also, over $600 million worth of chocolate manufactured in Canada is imported for sale in the United States. Finally, Chocolate Products bearing markings indicating that they were "Made in Canada" have been made available for sale in the United States by Defendants.

114. Allegations surfacing in Canada suggest that increases in chocolate candy prices in Canada were a result of illegal price fixing agreements between competitors. A close examination of the allegations shows that some of the price increases in the United States for chocolate candy also occurred during similar time periods to those when illegal price fixing agreements were made in Canada. Moreover, as shown below, producer price indices for chocolate confectionery products in the U.S. and Canada, respectively, during the Class Period show that

price increases in Canada closely followed those in the U.S. and that the price increases occurred in similar amounts.



Source for U. S. PPI: Bureau of Labor Statistics; bls.gov/ppi, PCU 3113204, Chocolate and Choclate-type Confectionery Products made from Cacao Beans

Source for Canadian PPI: Statistics Canada; cansim2.statcan.ca, Table 329-0040, V 1574720, Chocolate Confectionery

115. In approximately March and April 2007, Defendants Hershey, Cadbury, and Mars raised prices on certain chocolate prices. Shortly before the announcement of these price increases, Defendants' Canadian subsidiaries met to discuss price increases; the resulting price increases in the United States strongly suggest that Defendants' United States entities were also involved in these tacit agreements among Defendants.

116. The Canadian investigation shows testimony that the Cooperating Party obtained confidential information from Hershey and Mars about

presentations made to a common customer in or around February 2007. The contents of the email containing this confidential information are sealed, but Hershey, Mars, and Nestlé raised their prices shortly thereafter.

117. On July 5, 2007, Nestlé and the Cooperating Party had discussions about taking a price increase in 2008. It was also discussed that Mars would follow their lead as well.

118. On October 30, 2007, Hershey employee Lent met with the Cooperating Party, stated that Nestlé was taking a price increase in 2008, and that they should take one too. The Cooperating Party stated to Lent that they should not be having this conversation, presumably because of antitrust concerns. On October 30, 2007, the Cooperating Individual received an email that stated that Hershey's Lent needed a reminder about the Competition Act.

119. Defendants' multilateral price increases at various multiple times during the Class Period cannot be explained absent a tacit agreement among Defendants nearly simultaneously to raise prices on chocolate confectionary products even though Defendants gave public explanations for the price increases.

120. As in Canada, where collusive activities were conducted through trade associations such as CMAC and FCPC, collusive activities in the United States were orchestrated under the auspices of the Chocolate Manufacturers Association (to which Hershey, Mars, and Nestlé belonged), the National

Confectioners Association (to which Hershey, Mars, and Nestlé belonged), and the Pennsylvania Manufacturing Confectioners' Association (to which Hershey, Mars, and subsidiaries of Nestlé and Cadbury belonged).

121. Defendants and their co-conspirators engaged in the actions described above for the purpose of carrying out their unlawful agreements to fix, maintain, raise, or stabilize prices of Chocolate Products.

EFFECTS

122. The above combination and conspiracy has had the following effects, among others:

a. Price competition in the sale of Chocolate Products by Defendants and their co-conspirators has been restrained, suppressed, and eliminated throughout the United States;

b. Prices for Chocolate Products sold by Defendants and their co-conspirators have been raised, fixed, maintained, and stabilized at artificially high and noncompetitive levels throughout the United States; and

c. Purchasers of Chocolate Products from Defendants and their co-conspirators have been deprived of the benefit of free and open competition.

123. As a direct and proximate result of the unlawful conduct of Defendants and their co-conspirators, Plaintiffs, and other members of the Class have been injured in their business and property in that they paid more for

Chocolate Products than they otherwise would have paid in the absence of the unlawful conduct of Defendants and their co-conspirators.

VIOLATIONS ALLEGED

COUNT I

Violation of Section 1 of the Sherman Antitrust Act and Section 16 of the Clayton Act

124. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

125. Beginning at a date unknown to Plaintiffs, but no later than February 2002, and continuing through the present, Defendants and their co-conspirators entered into a continuing agreement, understanding, and conspiracy in restraint of trade to artificially raise, fix, maintain, and/or stabilize the prices for Chocolate Products paid by Plaintiffs and the other Class members in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Such a contract, combination, or conspiracy constitutes a per se violation of the federal antitrust laws and is, in any event, an unreasonable and unlawful restraint of trade.

126. As a result of their unlawful actions, Defendants were able to force coordinated price increases on the United States and Canadian chocolate markets.

127. Defendants' unlawful conduct took many forms, including but not limited to:

a. Attending meetings and/or otherwise exchanging information regarding the pricing and sale of Chocolate Products;

b. Agreeing to sell Chocolate Products at specified, pre-arranged prices;

c. Agreeing not to compete for each other's customers;

d. Announcing price increases for Chocolate Products at or near the same times;

e. Implementing price increases for Chocolate Products in the same or similar amounts and at or near the same times;

f. Selling Chocolate Products to customers at collusive and non-competitive prices;

g. Giving actual and/or apparent authority to employees' participation in furtherance of the wrongful conduct; and

h. Fraudulently concealing the wrongful conduct.

128. Defendants' wrongful conduct in manipulating prices was undertaken in order to charge artificially inflated prices for their Chocolate Products.

129. As a direct result of the unlawful conduct of Defendants and their co-conspirators in furtherance of their continuing contract, combination, or conspiracy, Plaintiffs and other members of the Class have been injured in their business and property in that they have paid more for Chocolate Products than they

would have paid in the absence of Defendants' and their co-conspirators' price fixing.

130. These violations are continuing and will continue unless enjoined by this Court.

131. Pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, Plaintiffs and the Class seek the issuance of an injunction against Defendants, preventing and restraining the violations alleged herein.

COUNT II

Violation of State Antitrust Statutes

132. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

133. Beginning at a date unknown to Plaintiffs, but no later than February 2002, and continuing through the present, Defendants and their co-conspirators entered into and engaged in a continuing unlawful agreement to restrain trade and commerce as described above in violation of the various state antitrust laws outlined below. Each of the Defendants have acted in violation of the state antitrust laws to fix, raise, stabilize, and maintain the prices of, and allocate markets for, Chocolate Products.

134. Defendants' intentional and purposeful anti-competitive acts described above, including, but not limited to, acts of collusion to set prices and the

acts of price fixing, were intended to and did cause Plaintiffs to pay supra-competitive prices for the Chocolate Products purchased by Plaintiffs and Class members in the states for which they reside.

135. Defendants' anticompetitive acts as described above are in violation of the following state antitrust statutes:

136. Defendants have violated Arizona Revised Stat. Code §§ 44-1401 *et seq.*

137. Defendants have violated California Bus & Prof. Code §§ 16700 *et seq.*

138. Defendants have violated District of Columbia Code Ann. §§ 28-4503 *et seq.*

139. Defendants have violated Hawaii Rev. Stat. §§ 480-1 *et seq.*

140. Defendants have violated Iowa Code §§ 553.1 *et seq.*

141. Defendants have violated Kansas Stat. Ann. §§ 50-101 *et seq.*

142. Defendants have violated Maine Rev. Stat. tit. 10 §§ 1101 *et seq.*

143. Defendants have violated Michigan Comp. Laws Ann. §§ 445.773 *et seq.*

144. Defendants have violated Minnesota Stat. §§ 325D.52 *et seq.*

145. Defendants have violated Nebraska Rev. Stat. §§ 59-801 *et seq.*

146. Defendants have violated Nevada Rev. Stat. §§ 598A *et seq.*

147. Defendants have violated New Jersey Stat. Ann. §§ 56:9-1 *et seq.*

148. Defendants have violated New Mexico Stat. Ann. §§ 57-1-1 *et seq.*

149. Defendants have violated New York Gen. Bus. Law §§ 340 *et seq.*

150. Defendants have violated North Carolina Gen. Stat. §§ 75-1 *et seq.*

151. Defendants have violated North Dakota Cent. Code §§ 51-08.1-01 *et seq.*

152. Defendants have violated South Dakota Codified Laws Ann. §§ 37-1 *et seq.*

153. Defendants have violated Tennessee Code Ann. §§ 47-25-101 *et seq.*

154. Defendants have violated Vermont Stat. Ann. 9 §§ 2453 *et seq.*

155. Defendants have violated West Virginia Code §§ 47-18-1 *et seq.*

156. Defendants have violated Wisconsin Stat. §§ 133.01 *et seq.*

157. Class members in each of the states listed above paid supra-competitive, artificially inflated prices for the Chocolate Products they indirectly purchased. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs and Class members in each of the states listed above have been injured in their business and property in that they paid more for Chocolate Products than they otherwise would have paid in the absence of Defendants' unlawful conduct.

158. As a result of Defendants' and their co-conspirators' violation of the antitrust laws in the states listed above, Plaintiffs seek damages, to be trebled

where permitted by a particular State's antitrust law, and costs of suit, including reasonable attorneys' fees, to the extent permitted by the above state antitrust laws.

COUNT III

Violation of State Consumer Protection and Unfair Competition Statutes

159. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

160. Defendants have engaged in unfair competition or unfair, unconscionable, deceptive, or fraudulent acts or practices in violation of the following state consumer protection and unfair competition statutes:

161. Defendants have violated Arkansas Code §§ 4-88-101 *et seq.*

162. Defendants have violated California Bus & Prof. Code §§ 17200 *et seq*.

163. Defendants have violated District of Columbia Code Ann. § 28-3901 *et seq.*

164. Defendants have violated Florida Stat. §§ 501.201 *et seq.*

165. Defendants have violated Kansas Stat. Ann. §§ 50-623 *et seq.*

166. Defendants have violated Maine Rev. Stat. tit. 5 §§ 205-A *et seq.*

167. Defendants have violated Mass. Gen. Laws chapter 93A §§ 1 *et seq.*

168. Defendants have violated Nebraska Rev. Stat. §§ 59-1601 *et seq.*

169. Defendants have violated Nevada Rev. Stat. §§ 598.0903 *et seq.*

170. Defendants have violated New Hampshire Rev. Stat. §§ 358-A:1 *et seq.*

171. Defendants have violated New Mexico Stat. Ann. §§ 57-12-1 *et seq.*

172. Defendants have violated New York Gen. Bus. Law §§ 349 *et seq.* Specifically:

a. Defendants engaged in commerce in New York;

b. Defendants and their co-conspirators secretly agreed to raise prices by direct agreement on bids to customers located in New York and through artificial supply restraints on the entire Chocolate Products market;

c. New York consumers were targets of the conspiracy;

d. The secret agreements were not known to New York consumers;

e. Defendants made public statements about the price of Chocolate Products that Defendants knew would be seen by New York consumers; such statements either omitted material information that rendered these statements that they made materially misleading or affirmatively misrepresented the real cause of price increases for Chocolate Products; and Defendants alone possessed material information that was relevant to consumers, but failed to provide the information;

f. Because of Defendants' unlawful trade practices in the State of New York, there was a broad impact on New York consumer class members who

indirectly purchased Chocolate Products; and consumer class members have been injured because they have paid more for Chocolate Products than they would have paid in the absence of Defendants' unlawful trade acts and practices;

g. Because of Defendants' unlawful trade practices in the State of New York, New York consumer class members who indirectly purchased Chocolate Products were misled to believe that they were paying a fair price for Chocolate Products or that the price increases for Chocolate Products were for valid business reasons; and similarly situated consumers were potentially affected by Defendants' conduct;

h. Defendants knew that their unlawful trade practices with respect to pricing of Chocolate Products would have an impact on New York consumers and not just Defendants' direct customers;

i. Defendants knew that their unlawful trade practices with respect to pricing of Chocolate Products would have a broad impact, causing consumer class members who indirectly purchased Chocolate Products to be injured by paying more for Chocolate Products than they would have paid in the absence of Defendants' unlawful trade acts and practices; and

j. Defendants' consumer-oriented violations adversely affected the public interest in the State of New York.

173. Defendants have violated North Carolina Gen. Stat. §§ 75-1.1 *et seq.*

174. Defendants have violated Rhode Island Gen. Laws §§ 6-13.1-1 *et seq.* Specifically:

a. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in the sale of Chocolate Products that were indirectly purchased primarily for personal, family, or household purposes;

b. Defendants engaged in commerce in Rhode Island;

c. Defendants and their co-conspirators unscrupulously and secretly agreed to raise Chocolate Product prices by direct agreement on prices Defendants charged their customers located in Rhode Island and through artificial supply restraints on the entire Chocolate Products market;

d. The secret agreements were not known to Rhode Island natural persons who indirectly purchased Chocolate Products primarily for personal, family, or household purposes;

e. Defendants made public statements that Defendants knew would be seen by Rhode Island natural persons who indirectly purchased Chocolate Products primarily for personal, family, or household purposes; such statements created a likelihood of confusion or misunderstanding with respect to the real reasons that the prices of Chocolate Products were rising; and such statements either omitted material information that rendered the statements

materially misleading and confusing, or affirmatively deceived such consumers about the real cause of price increases for Chocolate Products;

f. Because of Defendants' unlawful and unscrupulous trade practices in Rhode Island, natural persons in Rhode Island who indirectly purchased Chocolate Products primarily for personal, family, or household purposes were misled or deceived to believe that they were paying a fair price for Chocolate Products or the price increases for Chocolate Products were for valid business reasons;

g. Natural persons who indirectly purchased Chocolate Products primarily for personal, family, or household purposes have been injured because they have paid more for Chocolate Products than they would have in the absence of Defendants' unlawful and unscrupulous trade acts and practices;

h. Defendants knew that their unscrupulous and unlawful trade practices with respect to pricing Chocolate Products would have an impact on Rhode Island natural persons who indirectly purchased Chocolate Products primarily for personal, family, or household purposes, and not just Defendants' direct customers;

i. Defendants knew that their violations with respect to pricing of Chocolate Products would have a broad impact, causing natural persons who indirectly purchased Chocolate Products primarily for personal, family, or

household purposes to be injured by paying more for Chocolate Products than they would have paid in the absence of Defendants' unlawful trade acts and practices; and

j. Defendants' violations adversely affected public policy in Rhode Island.

175. Defendants have violated Vermont Stat. Ann. 9 §§ 2451 *et seq.*

176. Defendants have violated Wisconsin Stat. §§ 100.20 *et seq.*

177. Defendants' intentional and purposeful anti-competitive acts described above, including, but not limited to, acts of collusion to set prices and the acts of price fixing, were intended to and did cause Plaintiffs to pay supra-competitive, artificially inflated prices for the Chocolate Products purchased in the states listed above.

178. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs and Class members have been injured in their business and property in that they paid more for Chocolate Products than they otherwise would have paid in the absence of Defendants' unlawful conduct.

179. Plaintiffs and Class members are therefore entitled to all appropriate relief as provided for by the laws of the states listed above, including but not limited to, actual damages, injunctive relief, attorneys' fees, and equitable relief, such as restitution and/or disgorgement of all revenues, earnings, profits,

compensation, and benefits which may have been obtained by Defendants as a result of their unlawful conduct.

COUNT IV

Restitution or Unjust Enrichment

180. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

181. By reason of their unlawful conduct, Defendants should make restitution to the Plaintiffs and the Class.

182. Defendants have been unjustly enriched through overpayments by Plaintiffs and Class members and the resulting profits enjoyed by Defendants as a direct result of such overpayments. Plaintiffs' detriment and Defendants' enrichment were related to and flowed from the conduct challenged in this Complaint.

183. It would be inequitable for Defendants to retain the benefit of these overpayments that were conferred by Plaintiffs and the Class.

184. Plaintiffs and the Class are entitled to return of these overpayments caused by the willful acts of the Defendants either as damages or restitution.

185. Plaintiffs and the Class seek disgorgement of all profits resulting from such overpayments and establishment of a constructive trust from which Plaintiffs and Class members may seek restitution.

COUNT V

Common Law Restraint of Trade for Class Members for State of New York Only

186. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

187. Defendants have a vast majority of worldwide and New York market share of Chocolate Products.

188. Defendants have maintained their monopoly in the State of New York over Chocolate Products through a series of purposeful and intentional acts since at least December 9, 2002.

189. These intentional acts include, but are not limited to, artificially fixing, raising, maintaining, and stabilizing the prices paid by consumers for Chocolate Products.

190. The intentional and unlawful acts of Defendants were designed to and actually caused Defendants to fix, maintain, and stabilize prices of Chocolate Products within the State of New York.

191. Defendants' intentional and unlawful acts to restrain trade in the prices charged for Chocolate Products proximately and directly caused Plaintiffs to pay supra-competitive prices for Chocolate Products.

192. Plaintiffs and the Class seek actual damages in an amount to be determined at trial for injuries suffered as a result of the allegations stated herein.

FRAUDULENT CONCEALMENT

193. Throughout the Class Period, Defendants affirmatively and fraudulently concealed their unlawful conduct against Plaintiffs and the Class.

194. Plaintiffs and the members of the Class did not discover, and could not have discovered through the exercise of reasonable diligence, that Defendants were violating the antitrust and consumer protection laws as alleged herein until the governmental investigations of their actions were first announced. Nor could Plaintiffs and the members of the Class have discovered the violations earlier than that time because Defendants conducted their conspiracy in secret, concealed the nature of their unlawful conduct and acts in furtherance thereof, and fraudulently concealed their activities through various other means and methods designed to avoid detection. The conspiracy was by its nature self-concealing.

195. Defendants engaged in a successful price fixing conspiracy with respect to Chocolate Products, which they affirmatively concealed, in at least the following respects:

a. By agreeing among themselves not to discuss publicly, or otherwise reveal, the nature and substance of the acts and communications in furtherance of their illegal scheme; and

b. By giving false and pretextual reasons for their Chocolate Products price increases during the relevant period and by describing such

increases falsely as being the result of external costs, namely the rising cost of dairy, oil, and cocoa, rather than collusion.

196. As a result of Defendants' fraudulent concealment of their conspiracy, Plaintiffs and the Class assert the tolling of an applicable statute of limitations affecting the rights of action of Plaintiffs and Class members in the states for which they reside.

DAMAGES

197. During the Class Period, Plaintiffs and the other members of the class purchased Chocolate Products for end use and not for resale produced by Defendants, and by reason of the anticompetitive conduct herein alleged, paid more for such products than they would have paid in the absence of such antitrust violations. As a result, Plaintiffs and the other members of the Class have sustained damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

A. That the Court determine that the claims alleged herein under the Sherman Act, the state antitrust laws, and the state consumer protection and/or unfair competition laws may be maintained as a class action under Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure;

B. That the Court adjudge and decree that the unlawful conduct, contract, combination and conspiracy alleged herein constitutes:

i. A violation of the Sherman Act, 15 U.S.C. § 1, as alleged in Count I;

ii. A violation of the state antitrust laws as alleged in the Count II;

iii. A violation of the state consumer protection and unfair competition laws as alleged in Count III;

iv. Acts of unjust enrichment as set forth in Count IV; and

v. A common law restraint of trade under New York law as set forth in Count V.

C. That Plaintiffs and the Class members recover damages, as provided by the state antitrust laws and the state consumer protection and unfair competition laws, and that a joint and several judgment in favor of Plaintiffs and the Class members be entered against the Defendants in an amount to be trebled in accordance with such laws;

D. That Plaintiffs and the relevant Class members obtain any penalties, punitive or exemplary damages, and/or full consideration, where the laws of the respective states identified herein so permit;

E. That Plaintiffs and the relevant Class members recover damages and/or all other available monetary and equitable remedies under the state consumer protection and/or unfair competition laws identified above;

F. That Defendants, their co-conspirators, successors, transferees, assigns, parents, subsidiaries, affiliates, and the officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on behalf of Defendants, or in concert with them, be permanently enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations, conspiracy, agreement, understanding or concert of action, or adopting or following any practice, plan, program, or design having a similar purpose or effect in restraining competition;

G. That Plaintiffs and Class members be awarded restitution, including disgorgement of profits obtained by Defendants as a result of their acts of unfair competition and acts of unjust enrichment;

H. That Plaintiffs and Class members be awarded pre-judgment and post-judgment interest as permitted by law;

I. That Plaintiffs and Class members recover their costs of suit, including reasonable attorneys' fees as provided by law; and

J. That Plaintiffs and Class members be awarded such other and further relief as may be necessary and appropriate.

JURY TRIAL DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure and the Constitution of the United States, Plaintiffs demand a trial by jury of all issues so triable.

Dated: August 13, 2008

Respectfully submitted,

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