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)**
THIS DOCUMENT APPLIES TO: **ALL CASES**	***ELECTRONICALLY FILED***

MEMORANDUM IN FURTHER SUPPORT OF THE MOTION BY DEFENDANTS CADBURY PLC, CADBURY HOLDINGS LTD. AND CADBURY ADAMS CANADA INC. TO DISMISS DIRECT PURCHASER PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT, INDIRECT END USERS' CONSOLIDATED COMPLAINT, INDIRECT PURCHASERS FOR RESALE'S CONSOLIDATED COMPLAINT AND INDIVIDUAL PLAINTIFFS' AMENDED CONSOLIDATED COMPLAINT

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I. INTRODUCTION

Defendants Cadbury plc, Cadbury Holdings Ltd. and Cadbury Adams Canada Inc. (collectively, the "Cadbury Defendants") submit this Memorandum in Further Support of their Motion to Dismiss the Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("Direct Purchaser Class Compl."), the Indirect End Users' Consolidated Complaint ("Indirect Purchaser End User Compl."), the Indirect Purchasers for Resale's Consolidated Complaint ("Indirect Purchaser Resale Compl.") and the Individual Plaintiffs' Amended Consolidated Complaint ("Individual Plaintiffs' Compl."). The Cadbury Defendants have signed on to and respectfully refer the court to all of the arguments made in Defendants' Briefs in Support of the Motion to Dismiss, dated September 28, 2008 (collectively, the "Joint Briefs"). While the allegations in the various complaints are clearly insufficient to state a claim against all of the defendants, they are, as set forth below, particularly deficient as to the Cadbury Defendants. Accordingly, the Cadbury Defendants submit this additional Memorandum of Law to separately address those issues.

Plaintiffs attempt to allege a conspiracy among the defendants to fix, raise, maintain and stabilize the price at which they sold "chocolate products" in the United States in violation of the United States federal and state antitrust laws. *See* Direct Purchaser Class Compl. ¶ 1; Indirect Purchaser End User Compl. ¶ 1;

Indirect Purchaser Resale Compl. ¶ 1; Individual Plaintiffs' Compl. ¶ 1.[1] Yet, plaintiffs fail to allege a single meeting, piece of correspondence or other communication between two or more of the defendants that relates in any way to the pricing of chocolate products in the United States. This glaring deficiency bears repetition and emphasis: ***None of the complaints allege a single communication among any of the defendants to discuss or agree on the price of any chocolate products in the United States.*** As such, the complaints all fail to state a claim for price-fixing in violation of the United States antitrust laws.

As to the three Cadbury Defendants, the complaints are even more deficient. The longest alleged conspiracy period runs from some unspecified time in 2002 until August 13, 2008. *See* Indirect Purchaser End-User Compl. ¶ 2; Individual Plaintiffs' Compl. ¶ 2. Yet, none of the complaints allege any sales by any of the Cadbury Defendants of any chocolate products in the United States during the conspiracy period. In fact, the complaints concede that the Cadbury Defendants did not sell any chocolate products in the United States during the relevant time

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[1] Chocolate products are uniformly defined in the various complaints as "chocolate bars and other chocolate confectionary products (*e.g.*, 3 Musketeers, Hershey's Kisses, Dove Chocolates, M&M's, etc.)" *See* Direct Purchaser Class Compl. ¶ 4; Indirect Purchaser End User Compl. ¶ 9 ("chocolate bars and other chocolate confectionary products packaged for retail sales (*e.g.*, Snicker's, Kit Kats, 3 Musketeers, Hershey Bars, Hershey's Kisses, M&M's, etc.")); Indirect Purchaser Resale Compl. ¶ 1 ("chocolate bars and other chocolate candy"); Individual Plaintiffs' Compl. ¶ 57 ("chocolate bars and other chocolate confectionary products (*e.g.*, 3 Musketeers, Hershey's Kisses, Dove Chocolates, M&M's, Miniatures etc., as well as boxed chocolates and novelty chocolates")).

period. *See* Direct Purchaser Class Compl. ¶ 57 (the Cadbury Defendants' chocolate products are sold in the United States pursuant to a long-standing license agreement with Hershey); Indirect Purchaser End User Compl. ¶ 82 (pursuant to a license agreement, "Hershey has the exclusive right to manufacture and/or sell Cadbury [chocolate] products in the United States"); Individual Plaintiffs' Compl. ¶ 50 (the Cadbury Defendants licensed their chocolate products to Hershey and "manufactured, sold and/or distributed via license chocolate candy products in the United States"). Given the lack of sales by the Cadbury Defendants in the United States, it is not surprising that the complaints also fail to allege that any of the Cadbury Defendants announced, sought or implemented a single price increase for any chocolate product in the United States during the alleged conspiracy period.

Accordingly, not only are there no allegations that the Cadbury Defendants discussed or agreed with their competitors upon the price of chocolate products in the United States, there also are no allegations that the Cadbury Defendants even sold such products in the United States during the relevant time period, much less participated in any of the pricing activities otherwise alleged in the complaints.

II. PROCEDURAL HISTORY

These antitrust actions were consolidated before this Court pursuant to Order of the Multidistrict Litigation Panel, dated April 7, 2008. On or about August 13, 2008, plaintiffs filed their four consolidated complaints.

III. STATEMENT OF QUESTIONS INVOLVED

Whether plaintiffs' claims for monetary and injunctive relief under the Sherman Act (*see* Direrct Purchaser Class Compl. ¶¶ 119-23; Individual Plaintiffs' Compl. ¶¶ 132-40; Indirect Purchaser End User Compl. ¶¶ 124-31) should be dismissed because their factual allegations fail to support a plausible inference that the Cadbury Defendants, which did not sell chocolate products in the United States during the alleged conspiracy period, entered an agreement to fix prices for Chocolate Products in the United States.

Suggested Answer: Yes.

IV. ARGUMENT

The Cadbury Defendants Could Not Conspire to Fix the Price of Chocolate Products in the United States Between 2002 and 2008 as Cadbury had Exited the Chocolate Business in the United States in 1988

Defendant Cadbury Adams Canada Inc. is an indirect, wholly owned subsidiary of defendant Cadbury Holdings Ltd., a private company organized under the laws of the United Kingdom. Cadbury Holdings Ltd., in turn, is wholly owned by Cadbury plc, a recently formed, publicly traded company also organized

under the laws of the United Kingdom. *See* Am. Rule 7.1 Corporate Disclosure Statement for Cadbury Adams Canada Inc., Cadbury Adams USA LLC and Cadbury Schweppes plc, dated June 13, 2008. Cadbury Adams Canada Inc. sells products in Canada but did not sell any chocolate products to in the United States during the alleged conspiracy period. *See* Decl. of John Mills in Supp. of the Mot. by Defs. Cadbury Holdings Ltd. and Cadbury plc to Dismiss for Lack of Personal Jurisdiction, dated September 26, 2008 ("Cadbury Jurisdictional Decl."), ¶ 13. Similarly, neither Cadbury Holdings Ltd., nor its corporate predecessor Cadbury Schweppes plc, sold any chocolate products in the United States during the alleged conspiracy period. *Id.* ¶ 7. The third Cadbury Defendant, Cadbury plc, is a recently created holding company that has never sold any products in the United States. *Id.* ¶ 10.

The lack of chocolate product sales by the Cadbury Defendants is not merely attributable to some technicality of corporate separateness or because plaintiffs named the wrong Cadbury corporate entity. Rather, it is a direct result of a decision made over two decades ago by Cadbury Schweppes Inc. ("CSI") to exit the chocolate business in the United States. On August 25, 1988 – some fourteen years before the purported conspiracy is alleged to have begun – CSI sold its United States chocolate business to the Hershey Foods Company ("Hershey"). *See* Cadbury Jurisdictional Decl. ¶27-29 and Ex. 1 (Hershey Foods Corporation Form

8-K, dated August 25, 1988 ("Form 8-K")). As part of the sale of its U.S. chocolate business, CSI agreed to sell to Hershey an exclusive license to produce, manufacture, market, advertise, promote, sell and distribute CSI's chocolate products in the United States. *See* Form 8-K at 2 and Ex. 2(a) (the Asset Purchase Agreement between Cadbury Schweppes Inc., Cadbury Schweppes Public Limited Company and Hershey Foods Corporation, dated July 1988 ("Asset Purchase Agreement")).[2] Accordingly, during the relevant time period, Cadbury was simply

[2] The Form 8-K and the attached Asset Purchase Agreement, the Peter Paul/York Domestic Trademark and Technology License Agreement between Cadbury Schweppes Inc. and Hershey Foods Corporation, dated August 25, 1988 (the "PPY Agreement") and the Cadbury Trademark and Technology License Agreement between Cadbury Limited and Hershey Foods Corporation, dated August 25, 1988 (the "Trademark License Agreement") are public records. Moreover, plaintiffs cite to and rely on the license agreements in their complaints. *See* Direct Purchaser Class Compl. ¶¶ 57, 91; Indirect Purchaser End User Compl. ¶¶ 61, 82, 84-88; Individual Plaintiffs' Compl. ¶¶ 49-53. Accordingly, the Court may take judicial notice of the terms of the Asset Purchase Agreement, PPY Agreement and Trademark License Agreement on a motion to dismiss. *Anspach ex rel. Anspach v. Philadelphia Dep't of Public Health*, 503 F.3d 256, 273 n.11 (3d Cir. 2007) ("Courts ruling on Rule 12(b)(6) motions may take judicial notice of public records.") (citing *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000)); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000) (taking judicial notice of publicly available stock prices and citing Fed. R. Evid. 201 for proposition that court may take judicial notice "of a fact not subject to reasonable dispute that is capable of accurate and ready determination by resort to a source whose accuracy cannot be reasonably questioned"); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (stating exception to general rule that court may not consider matters outside the pleadings for documents integral to or explicitly relied upon in the complaint); *see*, *e.g.*, *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002) (finding no error in district court taking judicial notice of (1) documents relied upon in complaint; (2) documents filed with the SEC, but not relied upon in complaint; and (3) stock price data compiled by news service).

not a competitor of the Hershey, Mars or Nestle defendants in the sale of chocolate products in the United States and, thus, could not have conspired to fix the price of chocolate products in the United States.[3]

A. The Cadbury Defendants had No Access to, Input on, or Control Over the Pricing of Chocolate Products in the United States During the Alleged Conspiracy Period

The Cadbury Defendants' lack of chocolate product sales in the United States during the purported conspiracy period makes the inclusion of a Cadbury entity in the alleged conspiracy not only implausible, but impossible. Adding unnecessary participants to a conspiracy that is necessarily dependant upon secrecy is not only irrational, but makes no sense from the view of the alleged co-conspirators. *Cf. Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) (conspiracy cannot be inferred where plaintiff's conspiracy theory is implausible or makes no economic sense); *Rosefielde v. Falcon Jet Corp.*, 701 F. Supp. 1053,

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[3] Commencing only in March 2007, Cadbury Adams USA LLC, an indirect, wholly owned subsidiary of Cadbury Holdings Ltd. and not a named defendant, began to sell a new, small premium brand of chocolate, Green & Black's, in the United States. Between March and December 2007, sales of Green & Black's in the United States totaled approximately $12.2 million. Accordingly, for all but the last year of the alleged conspiracy period, no Cadbury-related entity whatsoever, including the U.S. entity which is not even a defendant here, sold any chocolate products in the United States. *See* Mills Decl. ¶¶ 7, 10, 13, 30-32. No plaintiff has included Green & Black's in its complaint, nor has any plaintiff suggested any involvement of Green & Black's or non-defendant Cadbury Adams USA LLC in the alleged price-fixing conspiracy that is the supposed subject of this case.

1061-62 (D.N.J. 1988) (same). For that matter, none of the Cadbury Defendants sold any chocolate products in the United States during the alleged conspiracy period. Mills Decl. ¶ 30-31. Accordingly, the Cadbury Defendants did not compete with Mars, Hershey or Nestle for the sale of chocolate products in the United States. Thus, the Cadbury Defendants were incapable of conspiring in violation of the Sherman Act to fix the price of chocolate products in the United States. *Cf. Evans v. S. S. Kresge Co.*, 394 F. Supp. 817, 847 (W.D. Pa. 1975). (concluding that alleged price-fixing agreement did not violate Sherman Act because it was not made between competitors and stating, "before we may say that such agreements . . . are inherently unlawful, we must find that the agreements were made between competitors, actual or potential, dealing in competing products in a relevant market."); *Mastandrea v. Gurrentz Int'l Corp.*, 65 F.R.D. 52, 56 (W.D. Pa. 1974) ("in order for a conspiracy to exist within the meaning of the antitrust laws, it must be alleged that there was a conspiracy *between competitors*") (emphasis in original).

In an attempt to overcome this fatal flaw in their theory, plaintiffs focus on CSI's consultation rights under its License Agreements with Hershey. *See* Direct Purchaser Class Compl. ¶¶ 57, 91; Indirect Purchaser End User Compl. ¶¶ 61, 82, 84-88; Individual Plaintiffs' Compl. ¶¶ 49-53. Yet, those consultation rights do

not grant the Cadbury Defendants access to Hershey's pricing of the licensed products, nor do they give the Cadbury Defendants any input on such pricing.

Under the terms of the PPY Agreement and the Trademark License Agreement, Hershey was granted a twenty-five year license and assumed exclusive authority to produce, market, advertise, promote, sell and distribute the licensed products in the United States. *See* PPY Agreement, as amended Jan. 1, 1999 (the "Amended PPY Agreement") §§ 2.1, 7.1; Trademark License Agreement §§ 2.1, 7.1. In other words, none of the Cadbury Defendants had the right to manufacture or sell the licensed chocolate products in the United States during the term of the license.

Both the PPY Agreement and the Trademark License Agreement grant CSI a royalty based on a percentage of Net Sales, which is defined as follows:

> "Net Sales" shall mean the total of the invoiced sales of the Licensed Products produced and sold to customers by the Licensee and any of its affiliates and sublicensees under the Trademarks in the Territory during each Annual Period, less the following allowances, discounts, and charges used by [CSI][the Licensor] in the business of CUSA as of the date hereof to reduce gross sales to net sales for accounting and reporting purposes:
>
> > (i) actual lost goods, actual damaged goods and allowances for returned goods, all in respect of the sale of the Licensed Products under the Trademarks;
> >
> > (ii) all cash discounts, carload and pickup allowances, liquidation allowances, and off-invoice promotional allowances limited to trade activities.

> In no instance shall there be a reduction from the amount of invoiced sales for the cost of consumer promotions or consumer advertising.

See Trademark License Agreement § 1.1(f); PPY Agreement § 1.1(e). The definition of Net Sales is identical in the PPY Agreement. *See* PPY Agreement 1.1(d).[4]

Both license agreements also provide schedules that demonstrate the methodology of calculating Net Sales. *See* Trademark License Agreement Schedule B; PPY Agreement Schedule A. Both schedules demonstrate that, as the licensee, CSI is only entitled to annualized numbers for gross sales, returns, off-invoice promotion allowances, liquidation allowances and "other" allowances to arrive at an annualized Net Sales figure. *Id.*

The Trademark License Agreement and PPY Agreement provide that Cadbury has the right to request reasonable quantities of random samples of the Licensed Products for quality audit purposes. Trademark License Agreement

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[4] The PPY Agreement was amended in 1999. *See* Amended and Restated Sublicense Agreement of Peter Paul/York Domestic Trademark and Technology License Agreement by and among Hershey Chocolate & Confectionary Corporation, Hershey Foods Corporation and Cadbury Beverages Delaware, Inc., dated January 1, 1999. Pursuant to the Amended PPY Agreement, Hershey agreed to pay Cadbury an annual royalty based on a percentage of Net Sales, subject to a minimum annual royalty. *Id.* §§ 5.2(a) and (c). Net Sales is defined in the Amended PPY Agreement as "total of the invoiced sales of the Licensed Products produced and sold to customers by the Licensee and any of its affiliates and sublicensees under the Trademarks in the Territory during each Annual Period, less seven percent (7%) of such invoiced sales." *Id.* § 1.1(d). For the Court's convenience, a redacted copy of the Amended PPY Agreement is attached as Exhibit 2 to the Cadbury Jurisdictional Declaration.

§ 4.2; PPY Agreement § 4.2; *see also* Amended PPY Agreement § 4.2. Cadbury also is entitled to a quarterly summary and an annual audited report of the Net Sales and the calculation of royalties to which Cadbury would be entitled. *Id.* § 5.4, respectively. The License Agreement, PPY Agreement and Amended PPY Agreement each also provide that Hershey and Cadbury representatives shall meet once each quarter to review: (i) "*subject to compliance with applicable law*, the marketing, promotion and sale of Licensed Products and New Licensed Products in the Territory, including the provision of annual marketing plans"; (ii) quality control issues; (iii) "*subject to compliance with applicable law*, the potential for the successful introduction of New Licensed Products"; and (iv) "*subject to compliance with applicable law*, significant advertising campaigns and materials and designs for packaging proposed to be used in relation to the Licensed Products and New Licensed Products." *Id.* § 6.1(a), respectively (emphasis added).

The license agreements did not grant CSI access to, much less input on, the pricing of the licensed chocolate products in the United States. Indeed, under the terms of these license agreements, Hershey has sole and exclusive control over the pricing of any licensed chocolate products. The calculation of the royalty due to Cadbury from Hershey's sales is not based on the price at which Hershey sells or Hershey's cost structure for the Licensed Products, but rather on Hershey's Gross Sales minus certain allowances. Accordingly, Cadbury was only entitled to receive

summaries and audited reports setting forth the Net Sales (*i.e.*, defined as annual total invoiced sales) and the calculation of the royalty due to Cadbury, but not pricing or cost data pertaining to the Licensed Products.

B. The License Agreements Cannot Support Claims for Violations of Either Federal or State Antitrust Laws

The terms of the license agreements are standard and entirely unexceptional licensing terms. If, as plaintiffs assert, such standard terms give rise to an antitrust claim, then virtually any license agreement would violate the antitrust laws. Indeed, defendants have not found a single case in which such standard licensing terms have been held to violate the antitrust laws, in particular, the price-fixing bar of Section 1.

Moreover, the terms of sale of Cadbury's U.S. chocolate business to Hershey, including the terms of the license agreements outlined above, were reviewed and cleared by the United States Department of Justice pursuant to a Hart-Scott-Rodino filing. *See* Asset Purchase Agreement § 9.4 (setting forth the need to obtain HSR approval of the entire transaction). Such clearance by the country's top antitrust enforcement agency should put to rest any notion that the terms of the license agreements somehow violate any aspect of the antitrust laws.

Accordingly, plaintiffs' allegations that Cadbury's consultations with Hershey under the terms of the License Agreement are somehow inappropriate or in violation of the antitrust laws are entirely without merit.

V. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Joint Briefs, each of the complaints fails to state a claim against the Cadbury Defendants under the Federal or any applicable State antitrust laws. Accordingly, each of plaintiffs' complaints should be dismissed in their entirety as to each of the Cadbury Defendants with prejudice.

Respectfully submitted,

Dated: September 29, 2008

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