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

IN RE CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION

THIS DOCUMENT APPLIES TO:

ALL CASES

MDL DOCKET NO. 1935

(Civil Action No. 1:08-MDL-1935)

(Judge Christopher C. Conner)

ELECTRONICALLY FILED

MEMORANDUM IN SUPPORT OF INDIRECT PURCHASERS FOR RESALE'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONSOLIDATED CLASS COMPLAINT OF INDIRECT PURCHASERS FOR RESALE

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTUAL BACKGROUND 2

Price Increases by Chocolate Candy Manufacturers 2

Cooperation Among the Chocolate Candy Manufacturers 3

LEGAL STANDARD ON MOTION TO DISMISS 4

ARGUMENT 6

I. THE INDIRECT PURCHASER PLAINTIFFS – RULE 8(a) PLEADING STANDARDS UNDER *TWOMBLY* 6

A. The Historical Context of the Pre-Conspiracy Market and Subsequent, Unusual Pricing Practices State a Claim 8

B. Pretextual Reasons for Rising Prices and Increased Profits in the Face of an Industry with Declining Demand State a Claim 10

C. Defendants' Request for Judicial Notice of Documents Which Are Neither the Basis of the IPR Plaintiffs Claims Nor Undisputedly Authentic Should be Denied 13

D. Defendants' Collaboration Under Licensing Agreements and Within Trade Associations State a Claim 16

II. STANDING 18

A. The Standing Issues Raised by the Motion Should Not be Considered Until Class Certification 18

B. The IPR Plaintiffs Request Leave to Amend the Complaint to Allege Treat America's Business in Kansas, Nebraska and Iowa 20

C. The IPR Plaintiffs Request Leave to Amend the Complaint to Add Representative Plaintiffs in Alabama, Arizona, California, District of Columbia, Florida, Hawaii, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin 21

III. UNJUST ENRICHMENT 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 18

Behrend v. Comcast Corp.,
532 F.Supp.2d 735 (E.D. Pa. 2007) 6

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955 (2007) .... passim

Cima Labs, inc. v. Actavis Group HF,
2007 U.S. Dist. LEXIS 41516 (D.N.J. 2007) 13

City of Moundridge v. Exxon Mobil Corp.,
250 F.R.D. 1 (D.D.C. 2008) 7, 10

Clark v. McDonald's Corp.,
213 F.R.D. 198 (D.N.J. 2003) 19

Cosmetic Gallery, Inc. v. Schoeneman Corp.,
495 F.3d 46 (3rd Cir. 2007) 6

Evancho v. Fisher,
423 F.3d 347 (3d Cir. 2005) 5

Foman v. Davis,
371 U.S. 178 (1962) 20

Georgine v. Amchem Prods.,
83 F.3d 610 (3rd. Cir. 1996),
aff'd, 521 U.S. 591 (1997) 19

Illinois Brick 22

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) 13, 20

In re Buspirone Patent Litig.,
185 F. Supp. 2d 363 (S.D.N.Y. 2002) 19

In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,
536 F. Supp. 2d 1129 (N.D. Cal. Jan. 29, 2008)... 22

In re Graphics Processing Units Antitrust Litig.,
527 F. Supp. 2d 1011 (2007) 7, 9, 22

In re Hypodermic Products Antitrust Litigation,
2007 WL 1959224 (D.N.J. June 29, 2007)... 19

In re K-Dur Antitrust Litig.,
338 F. Supp. 2d 517 (D.N.J. 2004).. 18, 21

In re Linerboard Antitrust Litig.,
504 F. Supp. 2d 38 (E.D. Pal. 2007).. 12

In re OSB Antitrust Litig.,
2007 WL 2253419 (E.D. Pa. 2007) (E.D. Pa. Aug. 3, 2007)...................... 16, 17

In re Pharmaceutical Industry Average Wholesale Price Litig.,
263 F. Supp. 2d 172 (D. Mass. 2003).. 19

In re Relafen Antitrust Litig.,
221 F.R.D. 260 (D. Mass. 2004).. 18, 20

In re Static Random Access Memory (SRAM) Antitrust Litig.,
2008 U.S. Dist. LEXIS 15826 (N.D. Cal. Feb. 14, 2008)............................... 22

In re TFT-LCD (Flat Panel) Antitrust Litig.,
2008 WL 3916309 (N.D. Cal. Aug. 25, 2008) 8, 9, 12

Kanter v. Barella,
489 F.3d 170 (3d Cir. 2007)... 5

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999).. 18, 19

Payton v. County of Kane,
308 F. 673 (7th Cir. 2002) 18

Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,
998 F.2d 1192 (3d Cir. 1993).. 13, 14, 15

Richardson v. Richardson,
2008 U.S. Dist. LEXIS 55436 (E.D. Pa. July 21, 2008)............................ 13, 14

Shapiro v. UJB Fin. Corp.,
954 F. 2d 272 (3d Cir. N.J. 1992) 21

Stratechuk v. Bd. of Educ.,
200 Fed. Appx. 91 (3d Cir. 2006) 13

Wallace v. Systems & Computer Tech. Corp.,
1997 U.S. Dist. LEXIS 14677 (E.D. Pa. 1997) 14

Statutes

Fed. R. Civ. P. 12(b) (6) § 1 5

Fed. R. Civ. P. 12(b)(6) 4, 5

Fed. R. Civ. P. 15(a) 20

Fed. R. Civ. P. 8 .... 8, 17

Fed. R. Civ. P. 8(a)(2) 5

Haw. Rev. Stat. § 480-13.3 1

Haw. Rev. Stat. § 480-2 1

Haw. Rev. Stat. § 480-3 1

Other State Cases

Article III 18

INTRODUCTION

This case arises out of an international conspiracy among the four major chocolate candy manufacturing conglomerates to artificially inflate the price of chocolate bars and other chocolate candy from December 2002 through December 2007. The Indirect Purchaser for Resale Plaintiffs ("The IPR Plaintiffs") are those people and entities who purchase chocolate candy from distributors and resell it, principally to consumers – the Indirect Purchaser End Users. The case is brought under the laws of Alabama, Arizona, California, District of Columbia, Florida, Hawaii,[1] Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin,[2] and seeks recovery of the overcharges and other losses resulting from those practices.

---

[1] The IPR Plaintiffs concede that Hawaii's antitrust statute provides the Hawaii Attorney General the first opportunity to prosecute the class actions on their behalf. See Haw. Rev. Stat. § 480-13.3. Therefore, the IPR Plaintiffs withdraws without prejudice its claim brought under Haw. Rev. Stat. § 480-3. However, the IPR Plaintiffs do proceed under Hawaii's unfair competition laws. Haw. Rev. Stat. § 480-2. The "rights of consumers to bring class actions against any person based on unfair or deceptive acts or practices declared unlawful by section 480-2" are not limited by Haw. Rev. Stat. § 480-13.3.

[2] The IPR Plaintiffs withdraw without prejudice their claim to the extent it is based upon the antitrust statutes of New York and Illinois.

FACTUAL BACKGROUND

Price Increases by Chocolate Candy Manufacturers

In December 2002, within days of each other, the major chocolate manufacturers announced price increases for chocolate candy ranging from 10.3-10.7% for regular sized chocolate bars, and other similar and higher increases on other bars and packages. In November and December of 2004, the chocolate manufacturers announced a second, coordinated round of price increases on their chocolate bars and bags. And in March and April of 2007, the chocolate manufacturers announced another round of coordinated price increases. With each round of increases, the chocolate manufacturers' profits soared.

Contrary to the manufacturers' stated reasons for the increased prices, it appears the manufacturers were in fact exchanging their pricing information and monitoring each other's price increases, so that none would get too far above the others, and so that artificially high prices were maintained. Research shows that the price increases cannot be attributed to changes in consumer demand since demand decreased during the period. And the increased prices cannot be attributed to increased costs of raw materials because the manufacturers had forward contracts for the raw materials, and because the increases in the manufacturers' profits far outpaced the increases in raw material costs.

Cooperation Among the Chocolate Candy Manufacturers

During the relevant period, there was a substantial amount of cooperation among the chocolate candy manufacturers. For example, Hershey has a licensing agreement with Cadbury that required senior management to meet each quarter to review the marketing, promotion and sale of the licensed products. Trade association meetings also provided the venues to discuss plans related to the pricing of chocolate candy.

The Canadian Competition Bureau (the Canadian equivalent of the United States Department of Justice, Antitrust Division) has uncovered numerous other facts that show cooperation among the manufacturers in raising prices. For example, at the June 2005 Confectionery Manufacturers Association of Canada annual meeting, the President of Nestlé Canada gave an envelope containing a list of planned price increases on chocolate candy to an informant whose company is cooperating with the Canadian Competition Bureau. The informant's company distributed its own letter announcing planned price increases the next month to align with those of Nestlé. Hershey and Mars also prepared letters to align their prices with Nestlé's prices the next month.

In 2007, the President of Nestlé Confectionery met with the informant and requested that the informant's company lead a round of price increases. In mid-2007, another Nestlé employee contacted the informant's company and stated that

Nestlé was planning on taking a price increase in early March 2008, and that if the two companies did so, Mars would likely do so as well. Hershey representatives made similar contacts and discussed with a Hershey competitor taking its prices up to meet those of other manufacturers.

The agreements and discussions concerning price increases follow a history of coordinated efforts to contain trade spend – money that chocolate companies spend to promote their products – another way to artificially increase profits.

While the misconduct discovered so far principally concerned acts of price-fixing that occurred in Canada, substantial integration of the companies, and the involvement of the same management and operations in the United States, compel the conclusion, and at a minimum the inference, that this anticompetitive behavior easily crossed between Canada, the United States and Mexico. The international effect also exists because in 2004 to 2006, Canada was the largest exporter of chocolate to the United States.

LEGAL STANDARD ON MOTION TO DISMISS

As the Supreme Court explained last year in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-1966 (2007), a complaint will survive a Rule 12(b)(6) motion to dismiss if it states any plausible ground for plaintiffs' entitlement to the relief sought. This plausibility standard requires only that an antitrust plaintiff plead "enough factual matter (taken as true) to suggest that an agreement was

made," "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," and "facts that are suggestive enough to render a § 1 conspiracy plausible." *Twombly*, at 1965. The Court's explanation did not alter the "short and plain statement" requirement specified in Rule 8(a)(2) nor impose "any 'heightened' pleading standard." *Id.* at 1973 n. 14. *Twombly* only requires that the short and plain statement have "enough heft" to show a plausible entitlement to relief. *Id.* at 1965. Plaintiffs are not required to plead in detail the facts upon which their claims are based. *See Id.* at 1964. Dismissal is warranted only where the complaint fails "*in toto* to render plaintiffs' entitlement to relief plausible." *Id.* at 1973 n. 14. None of this changes the requirement that when ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept as true all factual allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005)).

"In applying this standard, an antitrust complaint would certainly meet the *Twombly* criteria if the complaint constitutes notice to the defendant of the legal claims asserted and includes a statement of the elements of those claims, along with allegations of the defendant's underlying conduct that, if proven, would plausibly demonstrate such elements." *See Behrend v. Comcast Corp.,* 532

F.Supp.2d 735, 741-42 (E.D. Pa. 2007). Taken together, "An antitrust complaint must include 'enough factual matter (taken as true) to suggest that an agreement was made…[I]t simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.'" *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3rd Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1965).

The matters alleged here rise well above the speculative level, *Twombly*, 127 S.Ct. at 1965, and amply state plaintiffs' entitlement to the relief sought. Accordingly, the motion to dismiss should be denied.

ARGUMENT

I. THE INDIRECT PURCHASER PLAINTIFFS – RULE 8(a) PLEADING STANDARDS UNDER *TWOMBLY*

Defendants' Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Class Action Complaint and Individual Plaintiffs' Amended Consolidated Complaint ("Concurrent Motion"), as incorporated by reference in Defendants' Motion to Dismiss Indirect End Users' Consolidated Amended Complaint and Indirect Purchaser for Resale's Consolidated Amended Complaint ("Motion"), ignores key allegations in the Consolidated Class Complaint of the IPRs ("Complaint") in an attempt to fit within the narrow findings of *Twombly*. A cursory review of the Complaint reveals that the IPR Plaintiffs have pled

allegations that meet or exceed the *Twombly* standard as well as the courts in this district, and others, interpreting the Supreme Court's decision.

Under *Twombly*, the "requirement of plausible grounds to 'infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement.'" *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 4 (D.D.C. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1965). As stated by Defendants in the Concurrent Motion, plausible grounds can be found by allegations of parallel conduct "placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1966; *see* Concurrent Motion p. 10; Motion p. 9.

Specifically, as here, allegations of "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason would support a plausible inference of conspiracy." *Id.* at 1966, n. 4; *accord In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1019-1020 (2007). "But a complaint need not be dismissed where it does not exclude the possibility of independent business action." *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. at 5. The *Twombly* court recognized that "such a requirement at this stage in the litigation would be

counter to Rule 8's requirement of a short, plain statement with 'enough heft to show that the pleader is entitled to relief.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1966).

A. The Historical Context of the Pre-Conspiracy Market and Subsequent, Unusual Pricing Practices State a Claim

Here, the existence of an agreement to fix prices is demonstrated by the historical context of the price increases. For example, in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2008 WL 3916309 (N.D. Cal. Aug. 25, 2008), plaintiffs, direct and indirect purchasers, brought claims against defendant manufacturers of thin film transistor liquid crystal display (TFT-LCD) panels and products for allegations of a horizontal conspiracy to fix prices. *Id.* at *1. Plaintiffs' complaint alleged complex and unusual pricing practices by defendants which could not be explained by the forces of supply and demand. *Id.* at *3. Rather, "in the pre-conspiracy market, the industry faced declining TFT-LCD panel prices, which industry analysts attributed to advances in technology and improving efficiencies." *Id.* However, beginning in 1996, the TFT-LCD product market was characterized by "unnatural and sustained price stability, as well as certain periods of substantial increase in prices" which were all inconsistent with natural market forces. *Id.* The Court then concluded, citing *Twombly*, that "Allegations of such unusual pricing practices state a cause of action under *Twombly*." *Id.* (citing *Twombly*, 127 S.Ct. at 1965 n. 4 (noting that "complex and historically unprecedented changes in pricing

structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy"). See also *In re Graphics Processing Units Antitrust Litig.*, 540 F.Supp.2d 1085, 1092-1093 (N.D.Cal.2007)).

The IPR Plaintiffs here have similarly alleged Defendants' unusual pricing practices in the class period. In the Complaint, the IPR Plaintiffs allege that "from the mid-1990s until December 2002, prices for Chocolate Candy were stable in the United States." Compl. at ¶ 44. However, in "2002, defendants began announcing a series of unprecedented parallel price increases for Chocolate Candy," price increases which all occurred within a week of each other. Compl. at ¶¶ 45-47. As with the price increases in *In re TFT-LCD,* chocolate price increases during the period of 2002-2007 were inconsistent with natural market forces. During the class period, the demand for chocolate candy actually decreased as a result of: (1) consumers' growing preferences for more expensive gourmet chocolate brands, and (2) a growing public preference for nutritious snacks. Compl. at ¶ 57. In fact, sales were in such a decline during the class period that some of the Defendants were forced to close plants throughout the United States and Canada as well as make significant cuts in their workforce. Compl. at ¶ 59. Though Defendants' Motion and Concurrent Motion both avoid discussion of these unusual pricing

practices and unnatural reactions to a declining market, they are nevertheless pled in the Complaint and state a claim that meets the *Twombly* standard.

B. Pretextual Reasons for Rising Prices and Increased Profits in the Face of an Industry with Declining Demand State a Claim

Here, the existence of an agreement to fix prices is demonstrated by pretextual reasons for rising prices and increased profits in the face of declining demand. These pretexts imply the existence of an agreement.

For example, in *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1 (D.D.C. 2008), plaintiffs alleged that defendants agreed to artificially raise natural gas prices among other antitrust violations. *Id.* at 2. Their complaint alleged that the natural gas total resource base had not decreased, that the prices had risen and never fallen below an agreed-upon price, that defendants had reported high profits, and that hurricanes should not have affected the market as defendants claimed as that was only a pretextual reason to justify withholding market supply to create an artificial shortage. *Id.* at 4. Plaintiffs further alleged circumstantial facts (including historical supply and consumption levels, market prices and profit levels) to support inferences that defendants contributed false information regarding gas supplies to industry reports, withheld supply, and engaged in price-fixing. *Id.* The Court held these allegations adequate under *Twombly*.

The IPR Plaintiffs have similarly pled facts that support the inference that Defendants conspired to raise chocolate prices, reaped enormous benefits, and falsified statements about the rising cost of raw materials to increase their profits. The IPR Plaintiffs allege that "from the mid-1990s until December 2002, prices for Chocolate Candy were stable in the United States." Compl. at ¶ 44. However, in "2002, defendants began announcing a series of unprecedented parallel price increases for Chocolate Candy," which all occurred within a week of each other. Compl. at ¶¶ 45-47. This lock-step movement was again repeated in December 2004 and then again in April 2007. Compl. at ¶¶ 49-55. In 2002, Defendants falsely justified the price increase as being necessitated by the *rising* cost of raw materials, labor and transportation. Compl. at ¶¶ 45-46. However, Defendants' false industry reports were soon thereafter exposed as a calculated pretext when Hershey's released an oddly contradictory July 2003 report which, in addition to stating that "its second quarter net profit rose to $71.5 million, an increase of $8.4 million over the prior year," also attributed the increased profits to "*decreasing* raw materials costs." Compl. at ¶ 48.

The IPR Plaintiffs further allege the falsity of Defendants' pretextual reasons for price-increases and soaring profits by citing the historical supply and consumption levels and market prices reported by independent analysts. During the period of Defendants' lock-step price increases, the price of raw materials such

as cocoa beans or sugar either decreased or remained stable. Compl. at ¶ 58. And as stated above, rather than an increase in demand in the market which would explain a rise in the price of a commodity, the demand for chocolate candy actually decreased during the period of 2002-2007 as a result of consumer preference for gourmet brands and attitudes toward "sugar and obesity." Compl. at ¶ 57. In fact, sales were so depressed that they resulted in "the closure of several Hershey manufacturing plants throughout the United States and Canada" and a correlating reduction in "its workforce by 11.5%" in 2007. Compl. at ¶ 59.

Despite Defendants' numerous pretextual explanations, these "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors," are fundamentally inconsistent with a competitive market for a product facing declining demand. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1966, n. 4; *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, at 3. It is therefore, not only plausible but reasonable to infer that these lock-step price increases were made for no other discernable reason than to support Defendants' price-fixing conspiracy. *Twombly*, 127 S. Ct. at 1966, n. 4; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, at 3; *see also In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 53 (E.D. Pal. 2007). Although the motion glosses over the factual allegations of pretext, they are alleged and cannot be ignored on this motion.

C. Defendants' Request for Judicial Notice of Documents Which Are Neither the Basis of the IPR Plaintiffs Claims Nor Undisputedly Authentic Should be Denied

To contradict the IPR Plaintiffs' allegations of pretext, Defendants' Concurrent Motion improperly requests that the Court take judicial notice of certain reports, data and articles. *See* Concurrent Motion, p. 22. However, the records cited by Defendants are not proper subjects of judicial notice.

A "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are *based* on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (emphasis added). Such an exhibit must be "integral to or explicitly relied upon in the complaint." *Stratechuk v. Bd. of Educ.*, 200 Fed. Appx. 91, 94 (3d Cir. 2006) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (holding that even where an official policy is public record, a court cannot consider it when ruling on a motion to dismiss where the policy was not integral or explicitly relied upon in the complaint); *Richardson v. Richardson,* 2008 U.S. Dist. LEXIS 55436, *6 (E.D. Pa. July 21, 2008); *Cima Labs, inc. v. Actavis Group HF,* 2007 U.S. Dist. LEXIS 41516, *12 (D.N.J. 2007). If the plaintiff questions both the authenticity and veracity of the document, which plaintiffs do, it cannot be considered undisputedly

authentic and cannot be the subject of judicial notice. *Richardson v. Richardson,* 2008 U.S. Dist. LEXIS 55436 at *7.

Courts may also consider matters of public records. *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. "Courts have defined a public record, for purposes of what properly may be considered on a motion to dismiss, to include criminal case dispositions such as convictions or mistrials,...letter decisions of government agencies,...and published reports of administrative bodies." *Id.*; *See also Wallace v. Systems & Computer Tech. Corp.*, 1997 U.S. Dist. LEXIS 14677 (E.D. Pa. 1997) (holding press releases are not public records).

First, though Defendants' attach several documents in the Concurrent Motion relating to the input costs for chocolate, the IPR Plaintiffs' claims are not based on these documents much less integral to or explicitly relied upon in the Complaint. Compl. at ¶ 58-59; Concurrent Motion pp. 22-23. While the IPR Plaintiffs allege facts about stable cocoa and sugar prices and decreasing demand in the chocolate market, Defendants attempt to steer the Court towards wages, gas and milk prices, none of which are even mentioned in the Complaint.[3]

Furthermore, though Defendants do cite a webpage from the International Cocoa Organization for the price of chocolate, not only is the document's authenticity and veracity in question, but the information found within reaffirms

---

[3] While the Direct Purchaser Plaintiffs' Consolidated Class Action Complaint does reference these inputs, they are never discussed in the IPR Plaintiffs' Complaint.

that Defendants' public statements are pretext. As stated above, in 2003, Defendants announced a second quarter profit which exceeded the previous year's profit by $8.4 million. Compl. at ¶ 48. Defendants publicly claimed that this windfall was a result of "decreasing raw material costs." Compl. at ¶ 48. Yet, based on Defendants' exhibits, the median second quarter price of cocoa in 2003 actually *increased* slightly from the price in 2002 (up $1,752.17 from $1,611.08). See Concurrent Motion, Exhibit E. And in the same period, wage, milk and gas prices stayed virtually stable. *See* Concurrent Motion, Exhibit C, D and F. At the very least, Defendants' unauthenticated and unverified documents demonstrate that there are substantial factual disputes that cannot be resolved within the confines of a motion to dismiss and are better left for further discovery and expert evaluation.

Second, Defendants cite data and articles which courts do not consider to be "public records." *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. Defendants cite to the International Cocoa Organization for cocoa prices and the homepage of the University of Wisconsin Dairy Marketing and Risk Management Program for milk prices, neither of which are case dispositions, decisions of government agencies or reports of administrative bodies. *See* Concurrent Motion, pp. 22-23. Such sources of information are not "public records," and are not proper subjects of judicial notice. Rather, Defendants' reliance on these records indicates that the IPR

Plaintiffs have pled enough facts to raise a reasonable expectation that discovery will permit them to obtain evidence to support their claims.

The Court should refuse to take judicial notice of these exhibits which have not been authenticated, verified or demonstrated to be public records.

D. Defendants' Collaboration Under Licensing Agreements and Within Trade Associations State a Claim

In *In re OSB Antitrust Litig.*, 2007 WL 2253419 (E.D. Pa. 2007) (E.D. Pa. Aug. 3, 2007), plaintiffs alleged that defendants, nine major manufacturers of Oriented Strand Board (OSB), together controlled 95% of the OSB market in North America and tacitly agreed to raise OSB prices so as to revitalize the stagnating OSB market. *Id.* at *3. Plaintiffs further alleged that defendants discussed price fixing at industry events and monitored their competitors through published price lists in industry periodicals to ensure that no member of the conspiracy "cheated" by offering significantly different prices. *Id.* at *3. Based on these allegations, the court found that plaintiffs had raised plausible grounds and met the *Twombly* standard. *Id.* at *5.

Similarly, in the instant matter, the IPR Plaintiffs have alleged that Defendants collectively control over 76% of the chocolate candy market. Compl. at ¶ 35. Furthermore, during the period of lockstep price increases, "there was a high degree of cooperation among Defendants...as evidenced by various product licensing agreements." Compl. at ¶ 61. These licensing agreements required

"senior management representatives of Hershey and Cadbury to meet each quarter to review the marketing, promotion and sale of the licensed products." Compl. at ¶ 61. A similar licensing agreement existed contemporaneously between Hershey and Nestle. Compl. at ¶ 62. Additionally, Defendants collaborated through shared memberships in several trade associations. Compl. at ¶ 64. As in *In re OSB*, parallel conduct alone "may or may not be Defendants' natural reactions to the failing" market, but taken in combination with allegations of defendants' mutually beneficial licensing agreements and memberships in trade associations, such conduct is "certainly 'enough to raise a right to relief above the speculative level." *In re OSB Antitrust Litig.*, at *5 (quoting *Twombly*, 127 S. Ct. at 1965).

In light of the abundance of allegations found in the Complaint regarding: (1) the pre-conspiracy market and the subsequent unnatural price increases and profit growth; (2) the pretextual explanations provided by Defendants for the price increases; and (3) the close collaborations and symbiotic relationships developed through licensing agreements, the IPR Plaintiffs' allegations far exceed the standards of *Twombly* and Federal Rule of Civil Procedure 8. As such, Defendants' Motion and Concurrent Motion should be denied in their entirety.

II. STANDING

A. The Standing Issues Raised by the Motion Should Not be Considered Until Class Certification

Contrary to Defendants' assertion (Motion p. 13), the standing issues raised should not be considered before class certification. Rather, the Supreme Court has expressly stated that "class certification issues are... 'logically antecedent' to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem Prods. v. Windsor,* 521 U.S. 591, 612 (1997) (affirming Third Circuit view that class certification issues are dispositive where their resolution is logically antecedent to the existence of any Article III issues)).

Numerous lower courts have followed *Ortiz*, finding that it "rest[s] on the long-standing rule that, once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Payton v. County of Kane*, 308 F. 673, 680 (7th Cir. 2002); *See also In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 268 (D. Mass. 2004); *In re K-Dur Antitrust Litig.,* 338 F. Supp. 2d 517, 544 (D.N.J. 2004) (declining to address defendant's argument plaintiffs lack Article III standing for jurisdictions in which plaintiffs did not allege to have been purchasers before determining class certification); *Clark v. McDonald's Corp.*, 213

F.R.D. 198, 205 (D.N.J. 2003) (declining to address defendant's argument that plaintiff has no standing to assert claims on behalf of class members regarding restaurants in states that plaintiff, himself, has not visited, and reasoning that such an issue "would not arise but for Clark's capacity as a putative class representative"); *In re Hypodermic Products Antitrust Litigation*, 2007 WL 1959224 at *6-9 (D.N.J. June 29, 2007) (declining to address standing challenges because state antitrust claims were brought only by the indirect class, and should the class not be certified, all defendant's concerns regarding state antitrust claims would be moot); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002) (opting to decide class certification before standing challenge because "[i]f certification is granted, the proposed class would contain plaintiffs who have personal standing to raise claims under the laws governing purchases in all of the fifty states"); *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 193-94 (D. Mass. 2003) (citing *Ortiz* and deferring decision about representative plaintiffs' standing to bring state antitrust claims because alleged problems of standing would not arise but for class certification); *Georgine v. Amchem Prods.*, 83 F.3d 610, 612 (3rd. Cir. 1996), *aff'd*, 521 U.S. 591, 612 (1997) (declining to reach standing issue on appeal by objectors to class certification).

Here, the standing issues raised would not exist but for the class certification issue. If the representative Indirect Purchaser Plaintiff had brought its claims alone in the states in which it resides or conducts business, there would be no standing issue. Determining standing issues at this point in the litigation would serve no purpose but to deprive absent, but injured, putative class members of the right to be heard. As in *In re Relafen Antitrust Litigation*, 221 F.R.D. at 267-269, issues of standing should be determined as to the class as a whole, not just as to the one representative plaintiff. Thus, the standing issue should not be considered until the time of class certification.

B. The IPR Plaintiffs Request Leave to Amend the Complaint to Allege Treat America's Business in Kansas, Nebraska and Iowa

The current named Indirect Purchaser Plaintiff in this action, Treat America Limited ("Treat America") is a business entity incorporated under the laws of Missouri, with its principal place of business in Kansas and warehouses in Nebraska and Iowa. The IPR Plaintiffs request leave to amend the Complaint to allege these additional facts.

Rule 15(a) states that "leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citing Fed. Rules Civ. Proc. 15(a)). Thus, leave to amend is routinely granted to allow a plaintiff to plead with more particularity. *In re Burlington Coat*

Factory Sec. Litig., 114 F.3d at 1435; *Shapiro v. UJB Fin. Corp.*, 954 F. 2d 272, 276 (3d Cir. N.J. 1992). "The most important factor in deciding whether to grant leave to amend is whether the non-moving party will suffer prejudice as a result of the amendment." *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d at 528. As this is Defendants' first motion to dismiss and they have not demonstrated any prejudice, the Court should grant Indirect Purchaser Plaintiffs leave to amend the complaint to plead these additional facts.

C. The IPR Plaintiffs Request Leave to Amend the Complaint to Add Representative Plaintiffs in Alabama, Arizona, California, District of Columbia, Florida, Hawaii, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin

The IPR Plaintiffs have identified, and continue to identify, additional representative plaintiffs in the states identified in the complaint. Indirect Purchaser Plaintiffs request leave to amend to add these additional parties, some of which have already retained the IPR Plaintiffs' lead counsel. For judicial economy and the ease and efficiency of administration, Indirect Purchaser Plaintiffs propose that the Court set a February 2, 2009 deadline for such an amended complaint to be filed so that repetitive amendments need not be made for each new representative.

III. UNJUST ENRICHMENT

Contrary to Defendants' argument in the Motion (at 34), courts have held that nationwide unjust enrichment claims should not be dismissed merely because

some members of the class may be circumventing *Illinois Brick*. *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 2008 U.S. Dist. LEXIS 15826, *68 (N.D. Cal. Feb. 14, 2008). While certain states without *Illinois Brick* repealer statutes "might be precluded from recovering damages on an unjust enrichment theory, they do not provide grounds for dismissing the claim for all Plaintiffs." *Id.*; *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1146 (N.D. Cal. Jan. 29, 2008); *In re Graphics Processing Units Antitrust Litig.,* 527 F. Supp. 2d 1011, 1029 (N.D. Cal. 2007).

Here, however, each of the state antitrust laws pled contains an *Illinois Brick* repealer. *See* Complaint ¶ 102. Therefore, Defendants' argument that the IPR Plaintiffs are attempting to circumvent *Illinois Brick* is unavailing and cannot survive a state-by-state analysis. Only plaintiffs in states which allow indirect purchaser recovery for antitrust violations are included in the proposed class. Therefore, the reach of *Illinois Brick* remains undisturbed.

Nevertheless, the IPR Plaintiffs agree that the Complaint may be pled more specifically with regard to the unjust enrichment claims and request leave to amend to identify under which states' unjust enrichment laws Plaintiffs will proceed. *Id.*; see *also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d at 1146; *In re Graphics Processing Units Antitrust Litig.,* 527 F. Supp. 2d at 1029.

CONCLUSION

For all the foregoing reasons, the IPR Plaintiffs respectfully request that the Court deny the motion to dismiss and grant the requested leave to amend.

Dated: November 13, 2008

Respectfully submitted,

/s/ Michael A. Geibelson

Michael A. Geibelson (CA179970)
Roman M. Silberfeld (CA62783)
Bernice Conn (CA161594)
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2049 Century Park East, Suite 3400
Los Angeles, CA 90067-3208
Telephone: (310)552-0130
Fax: (310) 229-5800
E Mail: *mageibelson@rkmc.com*

Steven R. Maher (CA132140)
THE MAHER LAW FIRM
631 West Morse Blvd.
Winter Park, FL 32789
Telephone: (407) 839-0866
Fax: (407) 425-7958
E Mail: *smaher@maherlawfirm.com*

Joseph U. Metz (PA32958)
DILWORTH PAXSON LLC
112 Market Street, Suite 800
Harrisburg, PA 17101
Telephone: (717) 236-4812
Fax: (717) 236-7811
E Mail: *jmetz@dilworthlaw.com*

Attorneys for The Class of Indirect Purchasers For Resale

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2008, I caused to be served on all counsel of record via ECF, except those listed below who were served via U.S. Mail, true and correct copies of **MEMORANDUM IN SUPPORT OF INDIRECT PURCHASERS FOR RESALE'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONSOLIDATED CLASS COMPLAINT OF INDIRECT PURCHASERS FOR RESALE**

CADBURY SCHWEPPES AMERICAS
5301 Legacy Drive
3rd Floor
Plano, TX 75024

Arthur N. Bailey
ARTHUR N. BAILEY & ASSOCIATES
111 West Second Street, Suite 4500
Jamestown, NY 14701

William A. Isaacson
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., N.W.
Washington, D.C. 20015

Allen D. Black
FINE KAPLAN & BLACK, R.P.C.
1835 Market Street, Suite 2800
Philadelphia, PA 19103

Joseph Goldberg
FREEDMAN BOYD HOLLANDER GOLDBERG & IVES, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102

Thomas A. Muzilla
THE MUZILLA LAW FIRM LLC
Tower at Erieview
1301 East 9th Street, Suite 1100
Cleveland, OH 44114

Joseph C. Kohn
KOHN SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107

Christopher Lovell
LOVELL STEWART HALEBIAN, LLP
500 Fifth Avenue, Floor 58
New York, NY 10110

Michael C. Maher
J. Brent Smith
THE MAHER LAW FIRM
631 West Morse Blvd., Suite 200
Winter Park, FL 32789

Bradley H. Blower
Katherine A. Gillespie
RELMAN & DANE, PLLC
1225 19th Street, N.W., Suite 600
Washington, DC 20036

Brian M. English
TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102

Jennifer Mara
GIBBONS P.C.
One Gateway Center
Newark, NJ 07 102

Peter E. Moll
Joseph A. Ostoyich
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Hershey Canada, Inc.
2350 Matheson Blvd., E
Mississauga ON
L4W 5E9 Canada

Nestle Canada Inc.
25 Sheppard Avenue West
North York, Ontario M2N 6S8
Canada

Nestle S.A.
Avenue Nestle 55
CH-1800 Vevey, Vaud
Switzerland

Nestle Suisse S.A.
Avenue Nestle 55
CH-1800 Vevey, Vaud
Switzerland

/s/ Michael A. Geibelson