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

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION	: MDL DOCKET NO. 1935 : (Civil Action No. 1:08-MDL-1935)
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	: (Judge Conner)
THIS DOCUMENT APPLIES TO:	:
	:
ALL ACTIONS	:
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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE CADBURY DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Cadbury plc, Cadbury Holdings Ltd. ("Cadbury Holdings") and Cadbury Adams Canada Inc. ("Cadbury Adams Canada") (collectively, "Cadbury") have filed motions to dismiss raising overlapping issues that despite the repetition, remain unavailing.[1]

With respect to personal jurisdiction, Cadbury plc and Cadbury Holdings spend pages disavowing their participation in the Chocolate Candy business, asserting that they are simply holding companies. However, Cadbury plc, among other things, raises capital through the New York Stock Exchange ("NYSE") and makes filings with the Securities and Exchange Commission ("SEC") to comply with American securities laws. Cadbury Holdings has prosecuted and received numerous U.S. patents related to Chocolate Candy products and continued to apply for U.S. patents related to Chocolate Candy throughout the class period.

[1] Cadbury plc and Cadbury Holdings have filed and joined in three separate motions to dismiss and Cadbury Adams Canada has filed and joined in two separate motions. Plaintiffs, by the undersigned counsel, submit this memorandum of law in opposition to Cadbury plc and Cadbury Holdings Ltd.'s Motion to Dismiss For Lack Of Personal Jurisdiction (Docket Nos. 466 and 467) and Cadbury plc, Cadbury Holdings Ltd. and Cadbury Adams Canada, Inc.'s Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Class Action Complaint, Individual Plaintiffs' Amended Consolidated Class Action Complaint, Indirect End Users' Consolidated Complaint and Indirect Purchasers for Resale's Consolidated Complaint (Docket Nos. 464 and 465).

Additionally, Cadbury plc and Cadbury Holdings[2] (formerly Cadbury Schweppes plc) and their U.S. subsidiaries[3] operate as a single functional and organic entity. In its SEC filings, Cadbury plc refers to the "Cadbury Group," blurring the lines between subsidiary and parent. Cadbury plc also exercises enormous control over its subsidiaries, forbidding them from making certain decisions without the approval of the Cadbury plc Board of Directors. Despite these contacts with the U.S., and other contacts discussed below, Cadbury plc and Cadbury Holdings have moved to dismiss, claiming this Court lacks personal jurisdiction over them.

Exercising jurisdiction over Cadbury plc and Cadbury Holdings is particularly appropriate in light of Plaintiffs' allegations that these defendants acted jointly to fix the prices of Chocolate Candy. Plaintiffs[4] specifically allege that Cadbury participated in the U.S. market for Chocolate Candy through a licensing agreement with the Hershey Company (formerly Hershey Foods Corporation) ("Hershey") whereby Hershey manufactured and sold several popular

[2] The members of the Boards of Directors of Cadbury plc and Cadbury Holdings are identical. *See* Dun & Bradstreet Report, at 6-10 attached as Exh. A, compared with Cadbury plc's listed Board of Directors, attached as Exh. B. Cadbury plc and Cadbury Holdings also share the same physical address and Cadbury plc owns 100 percent of Cadbury Holdings' stock.

[3] Cadbury plc has several U.S. subsidiaries, but Cadbury Adams USA LLC is the operating subsidiary.

[4] "Plaintiffs" means the direct purchaser class plaintiffs, both groups of indirect purchaser class plaintiffs, and the individual direct purchaser plaintiffs.

Cadbury Chocolate Candy brands, including York Peppermint Pattie, Mounds and Almond Joy. The licensing agreement requires that Cadbury be an active participant in the manufacturing and sale of these Chocolate Candy products in the U.S. and provides for senior management representatives of Hershey to meet with Cadbury at least once every calendar quarter to review and consult on the marketing, promotion and sale of the licensed products in the U.S. *See* Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("Dir. Compl.") (Docket No. 418) at ¶¶ 89, 91; Individual Plaintiffs' Amended Consolidated Complaint ("Indiv. Compl.") (Docket No. 448) at ¶¶ 55, 107(g); Indirect End User Consolidated Complaint ("Indir. End User Compl.") (Docket No. 420) at ¶¶ 82-88; Indirect Purchasers for Resale Consolidated Complaint ("Indir. Resale Compl.") (Docket No. 422) at ¶¶ 61, 63. As Cadbury stood to profit from royalties under the license agreement, there was both an incentive and an opportunity for them to participate in the alleged price-fixing conspiracy.

In addition to strong, publicly-available evidence that the Cadbury Group functions as a single organic business entity, Plaintiffs have documented substantial and continuous contacts between the U.S. and Cadbury plc and Cadbury Holdings. Should the Court require further information, however, Plaintiffs request that Cadbury plc and Cadbury Holdings be ordered to respond to Plaintiffs' jurisdictional discovery, and that this Court allow related depositions of

corporate designees to be taken, after which Plaintiffs request that they be allowed to supplement their response.[5] At the very least, jurisdictional discovery is warranted on this record under the rationale underlying *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003).[6]

In the additional motion to dismiss filed by Cadbury as a supplement to the Rule 12(b)(6) motion to dismiss filed jointly by all Defendants, they do little more than repeat their contention that they do not participate in the U.S. market for Chocolate Candy and contend that Plaintiffs have not alleged enough facts to keep Cadbury in the case. In so arguing, they misapprehend the allegations in the Complaints and the teachings of the Third Circuit.

In accordance with Third Circuit law, Plaintiffs clearly allege that Cadbury

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[5] Plaintiffs submit this Memorandum based on the public record available as to Cadbury plc and Cadbury Holdings' contacts with the U.S., prior to an opportunity to complete the kind of targeted jurisdictional discovery that is regularly provided in this Circuit. Plaintiffs believe that the publicly available information is sufficient to demonstrate personal jurisdiction. However, should the Court find the public record inconclusive, Plaintiffs request permission to undertake targeted jurisdictional discovery. Plaintiffs served document requests relating to jurisdiction on October 7, 2008. *See* Plaintiffs' First Request for Production of Documents Related to Jurisdiction, attached as Exh. C. All Defendants have declined to respond. *See* Letter from Stefan Meisner, attached as Exh. D.

[6] Defendants' refusal is improper under Third Circuit law, which allows "jurisdictional discovery unless the plaintiff's claim is clearly frivolous." *Toys "R" Us*, 318 F.3d at 456. "If a plaintiff presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state,' *Mellon Bank (East) PSFS, Nat'l Ass'n. v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992), the plaintiff's right to conduct jurisdictional discovery should be sustained." *Toys "R" Us*, 318 F.3d at 456.

and Hershey conspired pursuant to several agreements between the companies. *See* Dir. Compl. at ¶¶ 57, 89, 91; Indiv Compl. at ¶¶ 55, 107(g); Indir. End User Compl. at ¶¶ 82-88; Indir. Resale Compl. at ¶ 61, 63. These include an Asset Purchase Agreement, the Peter Paul/York Domestic Trademark and Technology License Agreement and the Cadbury Trademark and Technology License Agreement. *See generally Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 376 (3d Cir. 2005). Plaintiffs have made detailed allegations about Cadbury's relationship with Hershey and how that relationship facilitated the fixing of prices of Chocolate Candy products in the U.S.

Accordingly, as set forth more fully below, Plaintiffs respectfully request that this Court deny the motions to dismiss filed by Cadbury plc, Cadbury Holdings Ltd. and Cadbury Adams Canada, Inc.

PROCEDURAL HISTORY

In accordance with Case Management Order No. 4, each Plaintiff group filed a consolidated complaint on August 13, 2008. Defendants Cadbury plc and Cadbury Holdings filed a motion to dismiss under Fed.R.Civ.P. 12(b)(2) on September 29, 2008, and Defendants Cadbury plc, Cadbury Holdings and Cadbury Adams Canada filed an additional motion to dismiss under Fed.R.Civ.P. 8, 12(b)(1) and (6) on the same day.

STATEMENT OF QUESTIONS INVOLVED

Can this Court exercise personal jurisdiction over Cadbury plc and Cadbury Holdings Ltd. where, as here, each Defendant has significant contacts with the U.S. sufficient to establish both general and specific jurisdiction?

Suggested Answer: Yes.

Have Plaintiffs sufficiently alleged that Cadbury was involved in an antitrust conspiracy to fix prices for Chocolate Candy where Cadbury is affirmatively alleged to be conspiring with Hershey?

Suggested Answer: Yes.

ARGUMENT

I. THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER CADBURY PLC AND CADBURY HOLDINGS, LTD.

A. The Controlling Legal Standard

In *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004), the Third Circuit held that:

> [W]hen the court does not hold an evidentiary hearing on the motion to dismiss, the plaintiff need only establish a *prima facie* case of personal jurisdiction and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor.

To overcome a plaintiff's *prima facie* case, a defendant "'must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Deangelo Brothers, Inc. v. Riley, Inc.*, C.A. No. 4:05-

CV-00526, 2005 WL 2216575, at *1 (M.D. Pa. Sept. 12, 2005) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

This Court may exercise either general or specific personal jurisdiction. *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 n.1 (3d Cir. 2002) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). General jurisdiction exists when a defendant's contacts with the forum are "continuous and systematic." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Specific jurisdiction exists when the claim at issue "arises out of" or "relates to" a defendant's contacts with the forum. *Id.* at 414.

"[P]ersonal jurisdiction in federal antitrust cases is assessed on the basis of a defendant's aggregate contacts with the United States as a whole." *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 298 (3d Cir. 2004); *Pinker*, 292 F.3d at 369; *In re Polyester Staple Antitrust Litig.*, MDL Docket No. 3:03CV1516, 2008 WL 906331, at *12 (W.D.N.C. Apr. 1, 2008). Exercising personal jurisdiction over Cadbury plc and Cadbury Holdings is appropriate so long as those defendants have sufficient contacts with the U.S. "because the claims at issue in this case are federal question claims arising under a statute that provides for world-wide service of process." *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, C.A. No. 05-6042 (JBS), 2008 WL 4126602, at *2 (D.N.J. Aug. 27, 2008) (citing 15 U.S.C. § 22).

To determine "the sufficiency of a defendant's contacts with the [national] forum, a court should look at the extent to which the defendant availed himself of the privileges of American law and the extent to which he could reasonably anticipate being involved in litigation in the United States." *Pinker*, 292 F.3d at 370 (internal quotation omitted). The Court should "approach each case individually and tak[e] a 'realistic approach' to analyzing a defendant's contacts with a forum." *Miller Yacht*, 384 F.3d at 100 (internal quotations omitted). Further, the Supreme Court has often warned against taking a mechanical approach to jurisdiction. *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 320 (3d Cir. 2007) (citing *Int'l Shoe*, 326 U.S. at 319).

General personal jurisdiction is established when the defendant's contacts with the forum, are "'continuous and systematic.'" *Pinker*, 292 F.3d at 369 n.1 (quoting *Int'l Shoe*, 326 U.S. at 317). The contacts between the forum and the defendant need not be related to the underlying litigation in order for assertion of jurisdiction to be proper. *Provident Nat'l Bank v. Cal. Fed. Savings & Loan Ass'n.*, 819 F.2d 434, 438 (3d Cir. 1987) (finding zero balance bank account sufficient evidence of continuous and systematic contact with forum).

Cadbury plc and Cadbury Holdings Ltd. repeatedly assert their complete lack of involvement in both the Chocolate Candy market, specifically, and the U.S., generally. They provide a lengthy list of contacts with the U.S. that Cadbury

plc and Cadbury Holdings claim not to have – real property, bank accounts, and telephone numbers – while omitting the numerous contacts that they *do* have.

In fact, Cadbury plc and Cadbury Holdings have numerous contacts with the U.S. and seek the protections of U.S. laws to sell securities on the NYSE and to prosecute and obtain U.S. patents. They also assert substantial control over their U.S. subsidiaries, such that the Cadbury parents and subsidiaries, which are referred to collectively in SEC filings as the "Cadbury Group," operate as a single functional and organic entity. Personal jurisdiction over Cadbury plc and Cadbury Holdings is therefore warranted.

B. Cadbury plc and Cadbury Holding's Pervasive Contacts with the U.S. are Sufficient to Sustain General Personal Jurisdiction

1. Cadbury plc's Issuance and Marketing of American Depositary Receipts

Cadbury plc has purposefully availed itself of the benefits of U.S. law and has subjected itself to jurisdiction in U.S. federal courts by virtue of its many years[7] of issuing and trading of American Depositary Receipts ("ADRs")[8] on the

[7] ADRs issued by either Cadbury Schweppes or Cadbury plc have been traded on the NYSE since May 1996. *See* Cadbury Schweppes plc Report on Form 20-F, dated April 10, 2008, at 72, attached as Exh. E. Only the cited excerpts from this voluminous document are attached, but Plaintiffs will provide the entire document upon the Court's request.

[8] ADRs are "financial instruments that allow investors in the U.S. to purchase and sell stock in foreign corporations in a simpler and more secure manner than trading in the underlying security in a foreign market." *Pinker*, 292 F.3d at 365. "An ADR is a receipt that is issued by a depositary bank that represents a specified amount of a foreign security that has been deposited with a foreign branch or agent

NYSE.

Cadbury plc actively seeks investment from the U.S. For instance, as Cadbury Schweppes'[9] 2007 Annual Report (attached as Exh. G) informs, "Cadbury Schweppes ordinary shares are quoted on the New York Stock Exchange in the form of American Depository Shares, or ADSs. ADSs are represented by American Depository Receipts, or ADRs, under a sponsored ADR facility with JPMorgan Chase Bank N.A." The report further stated that inquiries regarding ADRs should be directed to JPMorgan Chase Bank N.A.'s ("JPMorgan") Service Center in South Hackensack, New Jersey. *See* 2007 Annual Report, at 149.[10] Further, Cadbury plc prominently displays the price of its ADRs in the U.S. next to its share price on the London Stock Exchange on the opening page of its corporate website. *See* Cadbury Webpage, attached as Exh. H. Cadbury plc's website also provides tax basis information for American investors. *See* Cadbury Webpage,

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of the depositary, known as the custodian . . . . The holder of an ADR is not the title owner of the underlying share; the title owner of the underlying share is either the depositary, the custodian or their agent . . . . ADRs are tradable in the same manner as any other registered American security, may be listed on any of the major exchanges in the United States or traded over the counter, and are subjected to the Securities Act and the Exchange Act." *Id.* at 367.

[9] While Defendant Cadbury Holdings is the successor to Cadbury Schweppes for most purposes, Defendant Cadbury plc became the successor corporation to Cadbury Schweppes with respect to the ADRs and the attendant reporting obligations. *See* Cadbury plc Report on Form 6-K, dated May 9, 2008 at 3, attached as Exh. F.

[10] Only the cited excerpts from this voluminous document are attached, but Plaintiffs will provide the entire document upon the Court's request.

attached as Exh. I. The website also provides a document that may be downloaded for the reference of American investors. *See* Tax Basis Information, attached as Exh. J.

Cadbury plc has been extremely successful attracting investors from the U.S. On September 29, 2008, the day that it filed its motion to dismiss, the volume of over-the-counter trading of Cadbury plc ADRs was 239,172, and the daily trading volume exceeded 1,000,000 three times in October. *See* Google Finance Report at Exh. K. According to Bloomberg, nearly 40 percent of Cadbury plc is owned by American investors. *See* Bloomberg Ownership Summary for Cadbury plc, attached as Exh. L.

As noted above, Cadbury plc works closely with U.S.-based JPMorgan concerning the issuance of its ADRs. Cadbury plc's website links directly to a website maintained by JPMorgan, which describes the benefits of ADR investments and provides detailed information about Cadbury plc. *See* http://www.adr.com.[11] After Cadbury plc's recent corporate restructuring in 2008 (detailed in the Declaration of John Mills at ¶¶ 5-6, Docket No. 468), Cadbury plc

[11] Intentional "commercial interactivity" between a website host and customers in the forum jurisdiction has been held sufficient to support a finding of personal jurisdiction. Here, Cadbury plc specifically used its interactive website as a vehicle to encourage American investors to purchase Cadbury plc ADRs through JPMorgan. This type of commercial use of the internet supports a finding of personal jurisdiction over Cadbury plc. *See Toys "R" Us*, 318 F.3d at 452 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

and JPMorgan entered into a Deposit Agreement concerning ADRs for the newly created "Cadbury plc," in which Cadbury plc consented to the jurisdiction of the state and federal courts of New York, New York and waived any objections to personal jurisdiction. *See* Deposit Agreement, at 7, attached as Exh. M. The Deposit Agreement further appoints Cadbury Adams USA LLC as Cadbury plc's Authorized Agent in the U.S.[12] The agreement to submit to the jurisdiction of U.S. courts has been held to be a relevant consideration in questions of personal jurisdiction. *See Polyester Staple*, 2008 WL 906331, at *13 (citing *S.E.C. v Overseas Mgmt., Inc.*, C.A. No. 04-302, 2005 WL 3627141, at *6 (D.D.C. Jan. 7, 2005).

In *Pinker*, the Third Circuit found specific jurisdiction existed over a foreign defendant that sponsored ADRs traded on the NYSE. In doing so, the Third Circuit reasoned that a foreign defendant took "action" in a "deliberate attempt to solicit American capital," thus purposefully availing itself of the "privilege of conducting activities" in the U.S. such that it had "adequate notice that it may be haled into an American court." 292 F.3d at 371-73.

Although the *Pinker* Court found it unnecessary to address whether the foreign defendant had the "continuous and systematic" contacts needed to establish

[12] Support for personal jurisdiction is found when a subsidiary functions, as Cadbury Adams USA LLC does here, as an "agent" of its parent. *In re Latex Gloves Prods. Liability Litig.*, No. MDL 1148, 2001 WL 964105, *3 n. 10 (E.D. Pa. Aug. 22, 2001) (citing cases).

general jurisdiction under the facts of that case, the court reasoned that it was not "unfair or inconsistent with 'traditional notions of fair play and substantial justice'" to require the defendant to appear in federal court to defend the plaintiff's claims on the merits. *Id*. at 373.

Consistent with *Pinker's* analysis, courts have held when analyzing general jurisdiction that the use of ADRs by a defendant provides a sufficient basis to exercise personal jurisdiction:

> The Court believes that by registering with, and transacting business under the auspices of, the United States Securities and Exchange Commission, NEC has availed itself of the privileges and protections of the United States and its government. These benefits . . . constitute one form of "systematic and continuous" contact with the United States as a whole. Given the obvious benefits the use of ADRs provide to NEC, and in light of the fact that these securities are actively traded in the United States, and regulated by federal law, the Court believes it is proper to consider the trading of these securities for purposes of establishing personal jurisdiction.

Newport Components, Inc. v. NEC Home Electronics (USA), Inc., 671 F. Supp. 1525, 1540 (C.D. Cal. 1987). In *Newport*, an antitrust case in which a Japanese defendant corporation allegedly operated through its subsidiaries as a worldwide manufacturer and distributor of computers and communications equipment, the defendant's issuance of ADRs that were traded on the over-the-counter market in the U.S. was therefore sufficient to confer jurisdiction. So too here, where Cadbury plc issues ADRs that are traded on the NYSE in the U.S., jurisdiction over them is appropriate.

The compelling logic expressed by the courts in *Pinker* and *Newport* applies directly to Cadbury plc in this litigation.

In soliciting and using capital obtained from American investors, Cadbury plc has voluntarily subjected itself to the reporting requirements of the Securities and Exchange Act of 1934, the Sarbanes-Oxley Act of 2002 and the rules of the NYSE. *See* 2007 Annual Report, at 58. ("We comply with all the NYSE rules which apply to non-US issuers.") Many of the specific disclosures provided by Cadbury plc in its filings with the SEC reflect its efforts to satisfy its mandatory obligations to comply with American securities laws and regulations.

Considered alone, or in conjunction with Cadbury plc's other abundant "continuous and systematic contacts" with the U.S., Cadbury plc's issuance and trading of ADRs in the U.S. demonstrates the propriety of this Court exercising personal jurisdiction over Cadbury plc in this litigation.

2. Cadbury Holdings' Ownership of U.S. Patents

Another important factor establishing personal jurisdiction over foreign-based defendants is the ownership of U.S. patents. *In re Automotive Refinishing Paint Antitrust Litig.*, No. 1426, 2002 WL 31261330, at *9 (E.D. Pa. July 31, 2002), *aff'd*, 358 F.3d 288 (3d Cir. 2004). Cadbury Holdings holds at least thirty-

six patents issued by the U.S. Patent Office ("USPTO").[13] *See* Print-out from USPTO Database, attached as Exh. N. Further, Cadbury Holdings has five additional patent applications pending. *See* Print-out from USPTO Application Database, attached as Exh. O. The Cadbury Group considers its intellectual property to be "important" and such rights "may require significant resources to protect and defend."[14] *See* 2007 Annual Report at 23.

Importantly, several of Cadbury Holdings' patents relate to chocolate or confectionary making. *See, e.g.,* Patent 5,989,619, Process for manufacture of reduced fat chocolate; Patent 5,882,709, Process for manufacture of reduced fat and reduced calorie chocolate, jointly attached as Exh. P. Cadbury Holdings also has a patent application pending relating to the application of chocolate coating to confectionary bars. *See* U.S. Patent Application 20040163586, attached as Exh. Q. Cadbury Holdings thus remains connected with the U.S. to the extent it has sought the protections of U.S. intellectual property law.

With the grant of these U.S. patents, Cadbury Holdings obtained certain exclusivity rights, which are founded in the U.S. Constitution. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 599 (Fed. Cir. 1989) (citing 35 U.S.C. § 154). "A

[13] The USPTO lists "Cadbury Schweppes plc" as the patent holder and Cadbury Schweppes plc is now known as Cadbury Holdings. Thus, it appears that the U.S. patents are now held by Cadbury Holdings. Plaintiffs have requested discovery on this issue as part of the targeted jurisdictional discovery served on October 7, 2008.

[14] While the current holder of the U.S. patents is Cadbury Holdings, the 2007 Annual Report does not bother with such corporate distinctions.

patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions." *Id.* Cadbury Holdings could not be deprived of its U.S. patents without due process of law. *Id.* (citing *Johnson & Johnson, Inc. v. Wallace A. Erickson & Co.*, 627 F.2d 57, 59 (7th Cir. 1980)).

By choosing to protect its intellectual property by prosecuting and obtaining U.S. patents (which Cadbury Holdings has done throughout the Class Period), Cadbury Holdings has plainly established continuous and systematic contacts with the U.S.

3. Cadbury plc and its Subsidiaries in the U.S. Operate as a Single Functional and Organic Entity

Cadbury plc and Cadbury Holdings erroneously argue that conducting business in the U.S. through separately incorporated subsidiaries creates a barrier to the exercise of jurisdiction over them by American courts.

In order to determine whether the Cadbury entities function as a single organic entity, Third Circuit law requires an examination of the relationship between Cadbury plc and Cadbury Holdings and their American subsidiaries. The examination is performed "in terms of the legal interrelationship of the entities, the authority to control and the actual exercise of control, the administrative chains of command and organizational structure, the performance of functions, and the public's perception." *Simeone v. Bombardier-Rotax GMBH*, 360 F. Supp. 2d 665,

675 (E.D. Pa. 2005).

Courts[15] have developed certain "factors" that should be used as a "non-exhaustive guide to help resolve the broader issue of whether the companies have a 'single functional and organic entity.'" *Simeone*, 360 F. Supp. 2d at 676 (quoting *Directory Dividends, Inc. v. SBC Comm., Inc.*, C.A. No. 01-CV-1974, 2003 WL 21961448, at *3 (E.D. Pa. July 2, 2003)): (1) ownership of all or most of the stock of the subsidiary; (2) common officers and directors; (3) a common marketing image; (4) common use of a trademark or logo; (5) common use of employees; (6) an integrated sales system; (7) interchange of managerial and supervisory personnel; (8) performance of business functions by the subsidiary which the principal corporation would normally conduct through its own agents or departments; (9) marketing by the subsidiary on behalf of the principal corporation, or as the principal's exclusive distributor; and (10) receipt by the officers of the subsidiary corporation of instruction from the principal corporation. *Simeone*, 360 F. Supp. 2d at 675-76 (citing *Directory Dividends*, 2003 WL 21961448, at *3).

[15] In *ZenithRadio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, the court identified a set of factors to consider in determining whether a corporation, though superficially absent from a district, is in fact transacting business there through a subsidiary or corporation. 402 F. Supp. 262, 327-28 (E.D. Pa. 1975). At least one court in the Middle District of Pennsylvania has indicated that it would apply the *Zenith* test to antitrust actions. *Clark v. Matsushita Elec. Indus. Co., Ltd.*, 811 F. Supp. 1061, 1068 n. 5 (M.D. Pa. 1993) (Rambo, J.) ("The *Zenith* approach appropriately is limited to the antitrust context.").

Here, Cadbury plc, Cadbury Holdings and their American subsidiaries constitute "a single functional and organic entity" in which Cadbury plc and Cadbury Holdings exercise control of their subsidiaries' "day-to-day operations" in such a way that the subsidiaries conduct business as a "mere department" of Cadbury plc and Cadbury Holdings. *Directory Dividends*, 2003 WL 21961448, at **3-4, 8 (citing *Latex Gloves*, 2001 WL 964105, at **3-4). *See also Simeone*, 360 F. Supp. 2d at 678. Exercising jurisdiction on this basis is thus also appropriate.

a. Cadbury Holdings Owns 100 Percent of the Stock of Cadbury Adams USA LLC

Cadbury Holdings concedes its 100 percent ownership of its operative U.S. subsidiary, Cadbury Adams USA LLC ("Cadbury Adams USA"), in ¶ 17 of the Declaration of John Mills, attached to the motion to dismiss for lack of jurisdiction. Such ownership of the shares of a subsidiary is a factor supporting personal jurisdiction. *Directory Dividends, Inc.*, 2003 WL 21961448, at *4 and *Simeone*, 360 F. Supp. 2d at 676. Cadbury plc is the ultimate parent company of Cadbury Adams USA.[16]

b. The Cadbury Group Has a Worldwide Corporate Image

Cadbury plc's marketing of ADRs and other products in the U.S. is achieved

[16] Although Cadbury plc and Cadbury Holdings tout the corporate distinction of Cadbury Adams USA, the website for Cadbury Adams USA – www.cadburyadams.com – merely forwards directly to Cadbury plc's website – www.cadbury.com.

through a common corporate image, which is reflected consistently in Cadbury plc's public reports filed with the SEC and its global website. This common corporate image effectively obscures corporate distinctions between the entities that comprise what Cadbury plc universally refers to as the "Cadbury Group."[17]

As the *Simeone* court held, personal jurisdiction over a corporate parent is supported when the parent's "representations to the public" indicate that the parent viewed the subsidiary "as simply a department of itself" and when the parent's annual reports regularly employed "[p]hrases blurring the two companies together." 360 F. Supp. 2d at 678.

Throughout its most recent Annual Report, the Cadbury Group blends every component of its network of subsidiaries into one entity, and it presents the business, operations, finances and financial performance of those subsidiaries as though they were indistinguishable from Cadbury plc and Cadbury Holdings themselves. *See, e.g.*, 2007 Annual Report, at 35-39 (discussing geographical areas, but not subsidiaries).

When the Cadbury Group does acknowledge a special "Americas" dimension in its globally integrated operation, it does so in the context of emphasizing how

[17] The Group is defined to include the Confectionery and Americas Beverages businesses. *See* 2007 Annual Report, at 10. After the demerger, the Cadbury plc Group became the "four Confectionery operating regions: Britain, Ireland, Middle East and Africa (BIMA); Europe; Americas Confectionery; Asia Pacific (an integrated confectionery and beverages business) and the Central functions." *Id.*

critically important the U.S. is to the corporate parent in London. For example, in 2007, a substantial amount of the Cadbury Group's total revenue was derived from its Americas confectionery business. *See* 2007 Annual Report at 37.

Cadbury plc's website prominently describes the contributions that the U.S. market makes, with no mention of its U.S. subsidiaries. *See* Cadbury Webpage, attached as Exh. R. The strength and popularity of various Cadbury products among U.S. consumers is also specifically mentioned. *Id.*

Cadbury plc's global website describes its corporate culture as "We work as **one team across geographic and functional boundaries** to be the best." *See* Cadbury Webpage, attached as Exh. S (emphasis supplied). The website further indicates that it does business in "the Americas" without mentioning its U.S. subsidiaries – the corporate distinction upon which Cadbury plc now seeks to rely. *See* Cadbury Webpage, attached as Exh. T. As the court held in *Automotive Refinishing Paint*, 2002 WL 31261330, at *9, a website highlighting a foreign-based defendant's "significant market position in North America" affirmatively supports a finding of personal jurisdiction.

While its Declarations and motion papers ignore these facts and relevant precedent, the record and case authorities demonstrate that the Court's exercise of jurisdiction over Cadbury plc and Cadbury Holdings as part of a single functional entity is warranted. *See, e.g.*, *Directory Dividends*, 2003 WL 21961448, at *4

(personal jurisdiction is proper where a "single, unified brand" identity makes it "easier for customers to find and do business . . . across geographic boundaries and product lines").

c. Cadbury plc Exercises Ample Control Over its Subsidiaries

Measured from the vantage-point of the public's perception, the formal legal distinctions emphasized by Cadbury plc do not exist. Instead, the "legal interrelationship" of the Cadbury entities, Cadbury plc's Board of Directors' "authority to control" the activities of its subsidiaries and its "actual exercise of control" over those activities and Cadbury plc's "performance of functions" throughout the globally integrated Cadbury organization demonstrate that Cadbury plc and its subsidiaries operate as a prototypical "single functional and organic entity." *Simeone*, 360 F. Supp. 2d at 675 (citations omitted).

The Cadbury Group centralizes important business functions, specifically Supply Chain, Commercial, Science & Technology, Human Resources, Finance and Legal & Secretariat. *See* 2007 Cadbury Annual Report at 20. The Cadbury Group uses this organization in order to "develop and **drive global strategies and processes** towards best in class performance." *Id.* (emphasis supplied). Supply Chain is responsible for managing the fixed assets of the Cadbury Group's manufacturing facilities and warehouses and ensuring the reliable supply of products, whether manufactured within the Cadbury Group or by a third party. *Id.* For a consumer

goods company, Supply Chain is one of the most important areas. Cadbury has chosen to place responsibility for these decisions with the Cadbury plc Board of Directors and the Chief Executive's Committee.[18] *Id.* It is Cadbury plc that decides for all Cadbury entities where ingredients and packaging materials are obtained, how customer services are handled, and product safety and product quality. This alone sufficiently demonstrates Cadbury plc's control over its subsidiaries.

Human Resources[19] is also managed by Cadbury plc's Board of Directors. *See* 2007 Annual Report, at 20. The exercise of authority in personnel decisions is a relevant factor in considering personal jurisdiction. *See, e.g., SGI Air Holdings II LLC v. Novartis Int'l A.G.*, 239 F. Supp. 2d 1161, 1168 (D. Colo. 2003).

Importantly, the shared Finance sector of the Cadbury Group has "low cost, IT-enabled common internal processes and standards for financial reporting and control . . . . It is responsible for setting the Group's annual contracts (or budgets),

[18] The Chief Executive's Committee, which was comprised of Cadbury Schweppes' CEO (now, likely Cadbury plc's CEO), the leader of each region and function and the Group Strategy Director, is responsible for the day to day management of the operations and implementation of strategy.

[19] Cadbury plc offers compensation packages directed to its American employees, entitled "Cadbury Schweppes plc US Employees Share Option Plan 2005" and "Cadbury Schweppes plc Americas Employees Share Option Plan 2005" *See* Cadbury Schweppes plc Report on Form 6-K, dated April 11, 2008, at 6, attached as Exh. U. Each of these plans existed prior to the demerger and Cadbury Schweppes issued ordinary shares to be granted to employees. *See* Cadbury Schweppes plc Report on Form 6-K, dated Dec. 3, 2007, at 5, attached as Exh. V. The U.S., of course, has enacted laws governing how stock option and related plans are governed. *See, e.g.*, 26 U.S.C. § 401, *et seq*.

for developing longer-term strategy and for managing acquisitions and disposals. It is also responsible for managing financial communications and the Group's relationship with the investment community." *See* 2007 Annual Report at 20. This language indicates that Cadbury plc exercises control over the budgets and general finances of its subsidiaries, including Cadbury Adams USA. *Simeone*, 360 F. Supp. 2d at 676-77. This is precisely the kind of control and domination that gives rise to personal jurisdiction. *Id.*

Under the Legal and Secretariat sector, the Cadbury Group centralizes its compliance with U.S. securities regulations; management of intellectual property (presumably including the U.S. patents discussed *supra* I.B.2); and litigation management. *See* 2007 Annual Report, at 20.

Cadbury plc imposes other restrictions upon its subsidiaries' abilities to make independent decisions. Certain matters can only be decided by Cadbury plc's Board of Directors – even if they concern what Cadbury plc terms "independent subsidiaries:"

- Overall management and performance of the Group and the approval of its long term objectives and commercial strategy;
- Any material change to the Company's listings on the London and New York Stock Exchange;
- Transactions and contracts, such as any acquisition or disposal of investment that exceeds £10 million by the Company or any of its subsidiaries; entry into a joint venture or partnership by the Company or any of its subsidiaries; and entry into any "material contract" by the Company or any of its subsidiaries;
- Approval of any capital or development expenditures exceeding

£10 million;

- Appointment of any person to a "senior management position"; and
- Prosecution, defense, arbitration or settlement of "material litigation" of the Company and its subsidiaries.

See Matters Reserved to the Board, attached as Exh. W.[20]

Leaving so many of the subsidiaries' important decisions to Cadbury plc's Board of Directors eliminates the formalistic corporate distinctions between Cadbury plc and its subsidiaries. This type of line blurring establishes that personal jurisdiction is appropriate. *See Simeone*, 360 F. Supp. at 676-78; *Polyester Staple*, 2008 WL 906331, at *16; *Directory Dividends*, 2003 WL 21961448, at **4-5; *Latex Gloves*, 2001 WL 964105, at **4-5.

d. The Cadbury Group Enforces Worldwide Corporate Policies

Other corporate policies imposed by Cadbury plc upon its subsidiaries evince the kind of control and domination that give rise to personal jurisdiction. Cadbury plc has an overarching ethics policy entitled "Our Business Principles," attached as Exh. X.[21] It explains: "These principles sit at the heart of our governance, policies, and management processes and inform how we work, **all over the world**. Through them we can protect and sustain the ethical standards

[20] This document is available on the Cadbury website at http://www.cadbury.com/SiteCollectionDocuments/MattersReservedtotheBoard.pdf.

[21] This document is available on the Cadbury website at http://www.cadbury.com/SiteCollectionDocuments/English%20Booklet.pdf.

that make Cadbury a great company – to work for and to work with." *See id.* Although an individual subsidiary may have additional standards, Cadbury employees are instructed to use "Our Business Principles" as a general guideline for behavior – it is the "floor" for employee conduct. *See id.* at 20, 22. "Our Business Principles" is available in eight different languages. Failure to comply with "Our Business Principles" has severe consequences for Cadbury employees, including the possibility of termination. *Id.* at 20.

Cadbury also has a global program called "Speaking Up" which is a helpline that allows "colleagues around the world" to raise concerns relating to Cadbury's ethical business practices. Our Business Principles at 21. Any such concerns are forwarded to the Cadbury Global Director of Security for investigation. *Id.*

In addition to "Our Business Principles," Cadbury also implements a "Marketing Code of Practice" which applies to advertisements in "all forms of media." *See* Marketing Code of Practice, attached as Exh. Y.[22] Cadbury management undertakes a periodic review "to ensure that interpretation of the code is aligned locally, regionally and globally." *Id.* The "Marketing Code of Practice" is also reviewed annually by the Cadbury Group's President of Commercial Strategy and is approved by the company's Sustainable Strategy Group. *Id.*

All of these plans govern the Cadbury Group as a whole – not as

[22] This document is available on the Cadbury website at http://www.cadbury.com/SiteCollectionDocuments/Our%20Marketing%20Code.pdf.

independent subsidiaries. Cadbury plc also insists that its subsidiaries adhere to firmly established "common standards" that apply throughout the entire worldwide corporate organization. A corporate parent's control of a business at the subsidiary level through the subsidiaries' required adherence to a code of business conduct supports the court's exercise of personal jurisdiction. *See Directory Dividends*, 2003 WL 21961448, at *6; *Simeone*, 360 F. Supp. 2d at 677.

Such heavy operational influence exercised by Cadbury plc's Board of Directors (whose members are identical to Cadbury Holdings' Board of Directors)[23] is precisely the kind of control and domination that gives rise to personal jurisdiction. As the court held in *Simeone*, 360 F. Supp. 2d at 676, jurisdiction over a corporate parent is appropriate when (a) the parent maintains a "supervisory board" that serves as the parent's "vehicle for exchanging information" with and influencing the business decision-making of the subsidiary; (b) the parent's executives exercise control over the finances of the subsidiary; (c) the parent determines the subsidiary's budget (*id.* at 676-77); (d) the parent institutes company-wide policy manuals; (e) inability to dispose of or acquire assets (in Cadbury's case in excess of £10 million) (*id.* at 677); and (f) representations to the public. *Id.* at 678.

As enumerated above, each of these indicia of operational control is

[23] *See* Dun & Bradstreet Report, at 6-10, attached as Exh. A, compared with Cadbury plc's listed Board of Directors, attached as Exh. B.

demonstrated by Cadbury plc's public record and amply justifies this Court's assertion of jurisdiction.

e. The Cadbury Group Has a Unified Job Posting Program

In addition, the Cadbury Group has a unified job posting program on its website. *See* Cadbury Webpage, attached as Exh. Z. Certain posted jobs do not differentiate between Cadbury plc, Cadbury Holdings, or any subsidiary to which a potential applicant may actually be applying. For instance, one available position seeking a Contract-Compensation Manager only notes that the position entails working for the "North American Business Unit." *See* Job Detail, attached as Exh. AA. This position requires the potential applicant to be familiar with **both** U.S. and Canadian law regarding compensation and requires the successful applicant to travel back and forth between the U.S. and Canada. *Id.* *See also* Job Details, attached as Exh. BB (discussing Rockford, Illinois position).

There is language in these postings further underscoring how the Cadbury Group holds itself out as one company in marketing itself to potential applicants as a safe workplace and as an employer committed to the environment. *Id.* Each job posting also proclaims that "[w]e offer a competitive salary, an outstanding benefits package and a great work environment." *Id.*

Applicants for a Cadbury job perceive the Cadbury Group as a single organic entity. Potential employees seeking a position through the unified job

posting website are unable to determine which specific Cadbury entity is soliciting applicants or that the Cadbury Group is comprised of several subsidiaries.

f. The Cadbury Group Has Participated in Merger and Acquisition Activity in the U.S.

In recent years, Cadbury Schweppes plc (now known as Defendant Cadbury Holdings) ("Cadbury Schweppes") has been active in merger and acquisition activity in the U.S. market. During the course of the alleged price-fixing conspiracy underlying this case, in a U.S.-centered transaction, Defendant Cadbury Holdings' predecessor, Cadbury Schweppes, acquired Adams from Pfizer for $4.2 billion.[24] Public reports and information about this 2003 transaction demonstrate extensive contacts with the U.S. for more than a year.

In connection with this colossal transaction, Cadbury Schweppes made use of the benefits of U.S. law and markets and relied heavily on U.S. legal counsel. In a transaction governed by New York law, the New York-based law firm of Shearman & Sterling, using over fifty lawyers, assisted with critical legal and business considerations of the transaction, including regulatory approvals and compliance with state and federal laws and regulations:

[24] Notably, in its press release announcing this transaction, Cadbury Schweppes described its unified global business in stark contrast to the Declaration of John Mills (Docket No. 468) supporting this motion: "Cadbury Schweppes is a major global company that manufactures, markets and distributes branded beverages and confectionary products." *See* Press Release, attached as Exh. CC.

> Shearman & Sterling[25] advised Cadbury Schweppes on the US law aspects of the acquisition of Adams. Cadbury has been a client of Shearman & Sterling's for about 20 years.
>
> Creighton Condon of Shearman & Sterling's New York office led a team of about 50 lawyers. Even though Cadbury is a UK company, New York was the driving seat for several reasons: the seller was a US company; the majority of the assets being bought were in the Americas; and the sale and purchase contract was governed by New York law.

See "Sweets to the Sweet," Global Counsel, June 2003, at 33-34, attached as Exh. EE. Cadbury Schweppes also relied on U.S. attorneys for critical analysis and counsel on both legal and business issues underlying the $4.2 billion transaction:

> Due diligence. In a departure from normal practice, a team of about five in-house lawyers and about 40 to 50 Shearman & Sterling lawyers tested Cadbury's business case for Adams against the information in Pfizer's New York data room.

Id. at 33. Cadbury had prepared for the potential acquisition for "well over a year" and the consummation of the transaction included the following steps, among others:

- Carrying out extensive due diligence.
- Negotiating the terms of the sale and purchase agreement.[26]
- Obtaining competition clearance in the U.S., Canada and Mexico and individual European countries.

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[25] The web pages of several Shearman & Sterling attorneys that reference their work for one or more Cadbury entities on various matters are attached as Exh. DD. "Representation by the same attorney indicates that a parent and wholly owned subsidiary are acting as a single entity." *Directory Dividends*, 2003 WL 21961448, at *5 (citing *Genesis Bio Pharm., Inc. v. Chiron Corp.*, C.A. Nos. 00-2981, 2983, 2002 WL 27261, at *4 (3d Cir. Jan. 10, 2002)).

[26] "The master agreement was governed by New York law, in line with Pfizer's original draft. Cadbury had no objection to this." *Id.* at 34.

- Obtaining the approval of Cadbury's shareholders.
- Arranging acquisition finance in the form of a new facility.
- Transferring employees from Adams to Cadbury.

Id. at 32.

The closing reportedly included: the assignment of thousands of trademarks and a transition services agreement that survived closing and covers "the provision of services by Pfizer to Cadbury and vice versa in the areas of information technology, human resources, finance, sales, distribution, warehousing and logistics." *Id.* at 35-36.

Such a substantial acquisition in the U.S., the use of U.S. counsel (and a twenty year relationship with that counsel), combined with Cadbury Schweppes' concession to allow the acquisition to be governed by New York law is further evidence of the jurisdiction of this Court.

C. This Court may also Exercise Specific Jurisdiction over Cadbury plc and Cadbury Holdings

The inquiry concerning specific jurisdiction is divided into three parts. First, Cadbury plc and Cadbury Holdings must have "purposefully directed [their] activities" at the forum. *Burger King*, 471 U.S. at 472. Second, the underlying litigation must "arise out of or relate to" at least one of those activities. *Helicopteros*, 466 U.S. at 414; *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1559 (3d Cir. 1994). Finally, a court may consider whether the exercise of jurisdiction otherwise "comport[s] with 'fair play and substantial justice.'" *Burger*

King, 471 U.S. at 476 (quoting *Int'l Shoe*, 326 U.S. at 320).

Cadbury plc and Cadbury Holdings have sufficient contacts with the market for Chocolate Candy in the U.S. to give rise to specific jurisdiction, particularly arising from several agreements with Hershey.[27] The agreements guarantee that Cadbury plc and Cadbury Holdings remain involved in the U.S. market.[28]

First, as part of the Asset Purchase Agreement, Cadbury Schweppes plc (now Cadbury Holdings) executed a Supply Agreement with Hershey for the Cadbury Crème Egg. *See* Asset Purch. Agmnt. at 24, ¶ 3.3 (Docket Nos. 478 – 478-4). Second, Cadbury plc and Cadbury Holdings meet with Hershey several times each year to discuss the sales and marketing of Cadbury-branded chocolate products in the U.S. *See* Trademark Lic. Agmnt. at 42-43, ¶ 6.2(a)(i) (Docket Nos. 478-4 – 478-7); PPY Agmnt. at 27, ¶ 6.1(a)(i) (Docket Nos. 478-7 – 478-9). Third, Cadbury plc and Cadbury Holdings receive royalties based on Hershey's Net Sales of Cadbury-branded products in the U.S., allowing Cadbury plc and Cadbury Holdings to reap financial benefits from the conspiracy to fix prices. *See* Trademark Lic. Agmnt. at 38, ¶ 5.2(b); PPY Agmnt. at 23, ¶ 5.2(b). Fourth,

[27] The agreements with Hershey include: the Asset Purchase Agreement ("Asset Purch. Agmnt."), Peter Paul/York Domestic Trademark and Technology License Agreement ("PPY Agmnt.") and the Cadbury Trademark and Technology License Agreement ("Trademark Lic. Agmnt.").

[28] The Cadbury Group "carefully control[s]" its license agreements with third parties in an effort to avoid damage to the Group's reputation. 2007 Annual Report, at 23.

Cadbury plc and Cadbury Holdings receive regular reports demonstrating how its royalties are calculated – based on Hershey's Net Sales of Cadbury-branded Chocolate Candy products. *See* Trademark Lic. Agmnt. at 40-41, ¶ 5.4; PPY Agmnt. at 25-26, ¶ 5.4. Fifth, Cadbury plc and Cadbury Holdings have consented to jurisdiction in the Southern District of New York for the purposes of each of these agreements. *See* Asset Purch. Agmnt. at 85-86, ¶ 16.1; Trademark Lic. Agmnt. at 70-71, ¶ 15.8; PPY Agmnt. at 44, ¶ 11.8.

In addition to the economic provisions of the agreements, there is other language giving the two companies time and reason to collude. Cadbury plc and Cadbury Holdings are obligated to provide Hershey with technical assistance in the manufacture and marketing of Cadbury-branded products. *See* Trademark Lic. Agmnt. at 21, ¶ 2.7; PPY Agmnt. at 13-14, ¶ 2.7. This technical assistance includes inspections of and visits to Hershey's facilities. *Id*. Any proposed changes to Cadbury-branded products require Cadbury's written consent and Hershey is required to provide samples of the proposed product. *See* Trademark Lic. Agmnt. at 29-30, ¶ 4.1; PPY Agmnt. at 19-20, ¶4.2. Cadbury is also entitled to random samples of Hershey manufactured products on a monthly basis, for "quality audit purposes." *See* Trademark Lic. Agmnt. at 29-30, ¶ 4.2; PPY Agmnt. at 19, ¶ 4.2.

It is Cadbury's decision how to dispose of any Hershey manufactured

products not conforming to quality control standards. *See* Trademark Lic. Agmnt. at 35, ¶ 4.7(c). Further, Cadbury determines when Hershey may resume production, shipping and sale of Cadbury-branded products after discovery of a quality control problem, and may even require improvements to Hershey's equipment to ameliorate the situation. *See* Trademark Lic. Agmnt. at 35, ¶ 4.7(d). Finally, Cadbury plc and Cadbury Holdings can institute recalls on Hershey's behalf, apparently without Hershey's agreement. *See* Trademark Lic. Agmnt. at 35-36, ¶ 4.7 These provisions disprove Cadbury plc and Cadbury Holdings' view of their purportedly non-existent involvement in the U.S. Chocolate Candy market.

Additionally, the allegations in Plaintiffs' complaints alone suffice to determine whether Cadbury plc and Cadbury Holdings purposefully directed their activities at the forum. *See Emerson Elec.*, 2008 WL 4126602, at **3-4 (holding that exercise of personal jurisdiction is appropriate where plaintiffs allege that a foreign defendant conspired with others to manipulate the prices of goods sold in the U.S.); *MM Global Servs. Inc. v. Dow Chem. Co.*, 404 F. Supp. 2d 425, 435 (D. Conn. 2005).

The Complaints allege sufficient facts establishing specific jurisdiction over Cadbury plc and Cadbury Holdings. Plaintiffs allege herein that:

- During the Class Period, Cadbury plc and Cadbury Holdings directly and/or through its predecessors, affiliated companies, subsidiaries, and licensees sold, manufactured and/or distributed Chocolate Candy in the U.S. *See* Dir. Compl. at ¶¶ 30, 31; Indiv. Compl. at ¶¶ 51,52;

Indir. End User Compl. at ¶¶ 60, 61; Indir. Resale Compl. at ¶¶ 13, 15.

- Cadbury plc and Cadbury Holdings have a licensing agreement with Hershey that creates a financial incentive to participate in the conspiracy to fix the price of Chocolate Candy. *See* Dir. Compl. at ¶¶ 89, 91; Indiv. Compl. at ¶¶ 55, 107(g); Indir. End User Compl. at ¶¶ 82-88; Indir. Resale Compl. at ¶¶ 61, 63.

- Cadbury plc and Cadbury Holdings' conduct caused antitrust injuries in the U.S. that are the subject of this action. *See* Dir. Compl. at ¶ 108; Indiv. Compl. at ¶¶ 140, 141; Indir. End User Compl. at ¶ 123; and Indir. Resale Compl. at ¶¶ 106, 108.

- Cadbury plc and Cadbury Holdings' conduct had the effect of eliminating competition in the U.S. *See* Dir. Compl. at ¶ 107; Indiv. Compl. at ¶ 140(c); Indir. End User Compl. at ¶ 122; and Indir. Resale Compl. at ¶ 107.

These contacts meet the parameters described in *Sandy Lane*, 496 F.3d at 323, where the Third Circuit explained "with each purposeful contact by an out-of-state resident, the forum state's laws will extend certain benefits and impose certain obligations." *See also Coté v. Wadel*, 796 F.2d 981, 984 (7th Cir. 1986) ("Personal jurisdiction over nonresidents of a state is a quid for a quo that consists of the state's extending protection or other services to the nonresident."). The relationship between the litigation and the contacts need only be strong enough to "keep the *quid pro quo* proportional and personal jurisdiction reasonably foreseeable." *Sandy Lane*, 496 F.3d at 323.

As Cadbury plc and Cadbury Holdings clearly meet the "minimum contacts" test, jurisdiction is presumptively constitutional and Defendants must present a compelling argument that renders jurisdiction unreasonable. *Sandy Lane*, 496 F.3d

at 324 (citing *Penzoil Prods. Co. v. Colelli & Assoc., Inc.*, 149 F.3d 197, 207 (3d Cir. 1998) (noting that such cases where jurisdiction is unreasonable are rare)).[29]

Plaintiffs have alleged that Cadbury plc, Cadbury Holdings and Hershey were conspirators in a scheme to charge supra-competitive prices for Chocolate Candy products in the U.S. through their contractual relationship. Asserting personal jurisdiction over them is appropriate.

II. CADBURY WAS PART OF THE CONSPIRACY TO FIX THE PRICE OF CHOCOLATE CANDY IN THE U.S.

A. The Controlling Legal Standard

Cadbury improperly asks the Court to dismiss Plaintiffs' complaints under Rule 8, which Rule says nothing about dismissing a pleading. Its motion also fails to provide the standards for potentially dismissing a complaint under Federal Rules of Civil Procedure 12(b)(1) or 12(b)(6). Although Cadbury nominally claims to be

[29] The Court should consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate [and international] judicial system's interest in obtaining the most efficient resolution of controversies," *Burger King*, 471 U.S. at 477, (quotation marks omitted), and "[t]he procedural and substantive interests of other nations." *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987).

Plaintiffs have alleged a violation of the U.S. antitrust laws; thus, no other jurisdiction would have a greater interest than the U.S. in adjudicating this case. Additionally, as recognized in *Sandy Lane*, requiring an American plaintiff to litigate in a foreign country balances any potential burden placed on a foreign defendant litigating in the U.S. 496 F.3d at 325. Cadbury plc and Cadbury Holdings cannot meet their high burden to demonstrate that this is one of those "rare" and "compelling" cases where jurisdiction is unreasonable.

seeking relief under Rule 12(b)(1)[30] – a motion to dismiss for lack of subject matter jurisdiction – it fails to make an even colorable argument under Rule 12(b)(1) and in fact does not cite a single case involving Rule 12(b)(1).[31] In actuality, Cadbury is only seeking relief under Rule 12(b)(6), as it challenges the sufficiency of Plaintiffs' allegations, specifically arguing that Plaintiffs have not pled enough facts connecting Cadbury to the conspiracy to fix prices in the U.S. market for Chocolate Candy.

Under Rule 12(b)(6)[32], Plaintiffs are required only to make a "'short and

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[30]Cadbury also fails to explain whether their Rule 12(b)(1) argument is a facial or factual challenge. *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 300 n.4 (3d Cir. 2002). Either way, the argument fails.

[31] Challenges to subject matter jurisdiction in antitrust cases are almost always based on purported violations of the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"). *See e.g., In re Graphite Electrodes Antitrust Litig.*, C.A. Nos. 10-md-1244, 00-5414, 2007 WL 137684 (E.D. Pa. Jan.16, 2007) (dismissing case under Fed.R.Civ.P. 12(b)(1) because allegedly anti-competitive transactions were wholly foreign); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437 (D.N.J. 2007) (dismissing claims under rule 12(b)(1) where purchases were made overseas). Here, Plaintiffs' complaints do not violate that Act, and Cadbury waives any argument to the contrary by failing to raise it in its opening brief. *De Los Santos Mora v. Brady*, C.A. No. 06-46-JJF, 2007 WL 981605, at *1 n. 2 (D. Del. Mar. 30, 2007) (considering the defendant's Rule 12(b)(1) defense waived for failure to offer any support until the reply brief).

All Defendants make a specious argument under the FTAIA in Defendants' Motion to Dismiss (1) Direct Purchaser Plaintiffs' Consolidated Class Action Complaint and (2) Individual Plaintiffs' Amended Consolidated Complaint. Plaintiffs address those arguments in the Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 43-48.

[32] For a full discussion of the Rule 12(b)(6) standard post-*Twombly*, *see generally* Memorandum of Law in Opposition to Defendants' Motion to Dismiss (1) Direct

plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (citing *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1964 (2007)). "Detailed factual allegations" are not required. *Id.*

The Court "should be extremely liberal in construing antitrust complaints." *Knuth v. Erie-Crawford Dairy Co-op. Ass'n.*, 395 F.2d 420, 423 (3d Cir. 1968); *see also In re Hypodermic Prods. Antitrust Litig.*, No. 05-CV-1602 (JLL/CCC), 2007 WL 1959225, at *6 (D.N.J. June 29, 2007). This is because "motive and intent play leading roles" in "complex antitrust litigation," where "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia B'casting Sys., Inc.*, 368 U.S. 464, 473 (1962); *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976). It is well established that an alleged antitrust conspiracy is "not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

In *Twombly*, the Supreme Court confirmed that on a Rule 12(b)(6) motion to dismiss, the facts alleged must be taken as true and a complaint may not be dismissed solely because it seems unlikely that the plaintiff can prove those facts

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Purchaser Plaintiffs' Consolidated Class Action Complaint and (2) Individual Plaintiffs Amended Consolidated Complaint.

or prevail on the merits. *Twombly* 127 S.Ct. at 1964-65, 1969 n. 8. The Third Circuit has recognized that *Twombly* did not change the longstanding rule that the Court must draw all reasonable inferences in favor of the plaintiff on a motion to dismiss. *Phillips*, 515 F.3d at 231.

In sum, Plaintiffs are not required to demonstrate a "probability" of success at the pleading stage, but instead need only plead enough facts to raise a plausible inference that discovery will reveal an antitrust violation. *Id.* at 234. Plaintiffs' complaint should not be dismissed if they allege enough facts to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 127 S.Ct. at 1974.

B. Cadbury Participates in the Chocolate Candy Business in the U.S.

Cadbury vastly understates its stake and involvement in the U.S. Chocolate Candy market. Plaintiffs do not dispute that Cadbury Schweppes, Inc. and Cadbury Schweppes plc (now Cadbury Holdings) executed agreements with Hershey to license Hershey as the sole U.S. seller of Cadbury-branded products. The agreements at issue, however, did not render Cadbury absent from the U.S. market for Chocolate Candy.

To the contrary, as alleged in the Complaints, each agreement demonstrates that Cadbury remained highly involved in the U.S. market – holding regular meetings with Hershey to consult on marketing and sales of Cadbury-branded products in the U.S., receiving regular royalty payments based on the Net Sales of

Cadbury-branded products in the U.S., and supplying Hershey with Cadbury's best-known product – the Cadbury Crème Egg – for sale in the U.S.

The receipt of royalties based on Net Sales of Cadbury-branded products ties the amount of royalty received by Cadbury directly to the price charged by Hershey for Cadbury-branded products. Under the contracts, "Net Sales" means "the total of the invoiced sales of the [Cadbury-branded] products produced and sold to customers by [Hershey] and any of its affiliates and sublicensees" less certain allowances.[33] *See* Trademark Lic. Agmnt. at 5-6, ¶ 1.1(f); PPY Agmnt. at 4-5, ¶ 1.1(e). Thus, the higher the price set by Hershey for Cadbury-branded Chocolate Candy products, the higher the royalty payment Cadbury would receive.

1. Cadbury Retained a Direct Interest in, and Leverage Over, the Price of Its Products in the U.S.

The terms of the license agreements gave Cadbury significant leverage over Hershey's pricing practices in the U.S. The royalty payments received by Cadbury gave it a direct stake in the U.S. sales of its products, with Hershey acting as a middleman. The quarterly meetings between executives of Cadbury and Hershey on sales – required by the license agreements – demonstrate the economic realities of the two companies' arrangement. Hershey gained an economic benefit as the sole U.S. distributor of Cadbury-branded products, and Cadbury still maintained

[33] The allowances related to lost, damaged or returned goods or cash discounts, carload allowances or liquidation allowances. *See* Trademark Lic. Agmnt. at 6, ¶ 1.1(f)(i) and (ii); PPY Agmnt. at 4, ¶ 1.1(e)(i) and (ii).

control over the pricing and marketing of its brand in the U.S. In short, the Complaints indicate that Cadbury and Hershey were economically interdependent, and it thereby raises the inference that Cadbury participated in the conspiracy to fix Chocolate Candy prices in the U.S. "As long as the complaint alleges that the alleged co-conspirators had a plausible reason to participate in the conspiracy, the complaint is sufficient." *Trans World Tech., Inc. v. Raytheon Co.*, No. 06-5012 (RMB), 2007 WL 3243941, at *4 (D.N.J. Nov. 1, 2007).

The PPY Agreement and the Trademark License Agreement each provide that Cadbury shall receive quarterly royalty payments and accounting reports detailing the royalty payments. *See* Trademark Lic. Agmnt. at 38, ¶ 5.2(b); PPY Agmnt. at 23, ¶ 5.2(b). Cadbury also receives unaudited summaries showing the calculations of Hershey's Net Sales, from which Cadbury's royalty payments are determined. *See* Trademark Lic. Agmnt. at 40-41, ¶ 5.4; PPY Agmnt. at 25-26, ¶ 5.4.[34] Cadbury is therefore fully informed regarding the "total of the invoiced sales of the Licensed Products produced and sold to customers by [Hershey]" as well as certain discounts, allowances and charges. *See* Trademark Lic. Agmnt. at 5-6, ¶ 1.1(f); PPY Agmnt. at 4-5, ¶ 1.1 (e).

[34] Hershey is also required to provide Cadbury with an annual audited report of Hershey's Net Sales, "showing the royalties to which the Licensor is entitled for such Annual Period and the calculation thereof." *See* Trademark Lic. Agmnt. at 41, ¶ 5.4; PPY Agmnt. at 26, ¶ 5.4.

The agreements further mandate that Hershey shall consult with Cadbury at least **four times per year** regarding the "**marketing, promotion and sale** of the Licensed Products in the Territory (including the review of promotional or point of sale materials for the Licensed Products)." *See* Trademark Lic. Agmnt. at 42-43, ¶ 6.2(a)(i); PPY Agmnt. at 27, ¶ 6.1(a)(i) and Dir. Compl. at ¶¶ 57, 89, 91; Indiv. Compl. at ¶¶ 55, 107(g); Indir. End User Compl. at ¶¶ 82-88; Indir. Resale Compl. at ¶¶ 61, 63. The quarterly meetings undermine Cadbury's contention that they have absolutely no input into Hershey's U.S. prices. Considered in the light of Hershey's required reporting of Net Sales to Cadbury and the calculation of Cadbury's royalties based upon those Net Sales, Hershey and Cadbury's regular meetings support the inference that Cadbury has had ample motive and opportunity to collude with Hershey in the pricing of Chocolate Candy in the U.S. market.[35]

[35]Cadbury misses the point when it argues that Plaintiffs do not enumerate a meeting during which Cadbury and Hershey made plans to fix prices. Cadbury and Hershey have met at least four times per year for the *past twenty years* to discuss marketing and sales. In addition, Plaintiffs have named numerous trade organizations of which all Defendants are members and attended meetings. *See* Dir. Compl. at ¶ 92-97; Indiv. Compl. at ¶¶ 55, 106, 120, 134; Indir. End User Compl. at ¶ 77, 120; Indir. Resale Compl. at ¶ 64. *Twombly* does not require Plaintiffs to plead the amount of detail Cadbury suggests. *See In re Pressure Sensitive Labelstock Antitrust Litig.*, 356 F. Supp. 2d 484, 493 (M.D. Pa. 2005) ("Details as to when and how [defendants] engaged in parallel conduct and the precise contours of any agreement or understanding would likely be known only by the alleged co-conspirators, and hence should not be required in the complaint.").

Other agreements incorporated into the Complaints show that Cadbury manufactured specific products for sale in the U.S. In conjunction with the Asset Purchase Agreement, Cadbury Schweppes executed a Supply Agreement with Hershey for the Cadbury Crème Egg. *See* Asset Purch. Agmnt. at 24, ¶ 3.3. (Cadbury did not attach this exhibit to the Asset Purchase Agreement for the Court's review). Under the Supply Agreement, Hershey apparently pays Cadbury to manufacture the Cadbury Crème Eggs that Hershey sells in the U.S.

The Supply Agreement provided Hershey and Cadbury with additional motive and opportunity to conspire. It is common for such agreements to be amended from time to time, reflecting continuing negotiations between the parties that are driven largely by market power and potential as well as convenience and practicality. It is inconceivable that Cadbury and Hershey never discussed the price at which Hershey ultimately sold Cadbury Crème Egg in the U.S. during the Class Period, and plausible that they did precisely that. The royalties Hershey pays Cadbury are primarily dictated by demand and the price that Hershey charges Plaintiffs. This created a strong motive for Cadbury to agree to supra-competitive prices for Cadbury Crème Eggs and other products as part of the industry-wide conspiracy.

The fact that Hershey and Cadbury inserted the language "subject to compliance with applicable law" means very little in the face of such obvious opportunity to conspire to fix prices in the market for chocolate products. Such language is *pro forma*.

The Complaints raise a plausible inference that Cadbury conspired with Hershey to fix prices for Chocolate Candy products in the U.S. *First*, the Complaints describe Cadbury's agreements and mutually dependent relationship with Hershey. *See* Dir. Compl. at ¶¶ 57, 89, 91; Indiv Compl. at ¶¶ 55, 107(g); Indir. End User Compl. at ¶¶ 82-88; Indir. Resale Compl. at ¶¶ 61, 63. *Second*, the Complaints enumerate the dates and amounts of the price increases on Cadbury products that Hershey instituted. *See* Dir. Compl. at ¶¶ 61, 66, 70; Indiv. Compl. at ¶¶ 80, 84, 88; Indir. End User Compl. at ¶¶ 94, 99; Indir. Resale Compl. at ¶¶ 46, 50, 54. Considered together, as they must be,[36] these two factual points succeed in stating a claim – especially when viewed alongside the Complaints' detailed recounting of the other defendants' conspiratorial meetings and coordinated price increases.

2. Cadbury is not Immune from Liability

Plaintiffs are entitled to proceed against Cadbury with respect to the sales of its products in the U.S. at supra-competitive prices, even though no U.S. purchaser bought directly from Cadbury. A plaintiff may successfully state a price-fixing claim against two defendants by alleging that the first defendant conspired with the second defendant regarding a product the plaintiff bought only from the second.

[36] "[A] district court must consider a complaint in its entirety without isolating each allegation for individualized review." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008).

Babyage.com, Inc. v. Toys "R" Us, Inc., 558 F. Supp. 2d 575, 580 n.2 (E.D. Pa. 2008) (motion to dismiss denied where purchases only made from one of the conspirators). An antitrust conspirator may be held liable for its misconduct irrespective of whether it sold its goods or services directly to plaintiffs or through an intermediary that participated in the conspiracy. *Howard Hess*, 424 F.3d at 376 (citing *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 631-32 (7th Cir. 2002) (Easterbrook, J.).

Nor are the claims against Cadbury barred because it is a foreign company or because its misconduct may have occurred only abroad. The jurisdictional analysis focuses on the U.S. effects of an antitrust conspiracy and their foreseeability, not where the defendant resides or where the conduct occurred. In *United Phosphorus, Ltd. v. Angus Chem. Corp.*, CA. No. 94 C 2078, 1994 WL 577246, at **8-10 (N.D. Ill. Oct. 18, 1994), the court applied this principle to deny a motion to dismiss claims against a foreign defendant, where the complaint alleged facts suggesting misconduct and "broad, conclusory allegations . . . of antitrust injury in the United States." *See generally U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945) (asserting U.S. jurisdiction over wholly foreign conduct based on anticompetitive economic effects in the U.S.); U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995), 4 Trade Reg. Rep. (CCH) ¶

13,107, § 3.11 ("anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.").

Thus, Cadbury need not have sold products in the U.S. during the Class Period to be held liable. All that is required are facts plausibly suggesting that Cadbury conspired with Hershey in violation of the U.S. antitrust laws and that Hershey sold Chocolate Candy in the U.S. The facts in the Complaints satisfy this standard. *See* Dir. Compl. at ¶¶ 57, 89, 91; Indiv. Compl. at ¶ 55, 107(g); Indir. End User Compl. at ¶¶ 82-88; Indir. Resale Compl at ¶¶ 61, 63.

Cadbury cites two cases, both of which were decided following discovery at the summary judgment stage, and neither of which is relevant to the present case. In *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998), the Third Circuit actually *reversed* a grant of summary judgment to certain defendants. The court rejected the defendants' argument that the relevant market was too large and complex for a conspiracy to fix prices at supra-competitive levels to be possible, given the "comprehensive nature of the evidence covering all elements of the group boycott" alleged by the plaintiff. *Id*. at 466-67, 478-79. The court affirmed the grant of summary judgment as to the other defendants because "it would be unreasonable to infer that" that they colluded with the ringleader "to do what [the ringleader] could do unilaterally." *Id*. at 481. Hershey could not price Cadbury's

products unilaterally (given the quarterly information exchange), so the reasoning of *Rossi* does not apply here.

Defendants' reliance on *Rosefielde v. Falcon Jet Corp.*, 701 F. Supp. 1053 (D.N.J. 1988) is equally misplaced. There, the court denied the defendants' motion for summary judgment in large part, finding that "a genuine issue of material fact exists as to whether the information exchange facilitated a tacit agreement among business jet manufacturers to adhere to the exchanged prices." *Rosefielde,* 701 F. Supp. at 1064.[37]

The facts alleged in the Complaints suggest that it is plausible, indeed likely, that Cadbury conspired with Hershey to fix the prices of Chocolate Candy products in the U.S., and this is sufficient.

3. The License Agreements Provide the Context in Which Cadbury Violated the U.S. Antitrust Laws

Contrary to Cadbury's assertion, antitrust liability may be imposed as a result of its anticompetitive conduct arising from the license agreements. In *In re Nifedipine Antitrust Litig.*, for example, the court preserved antitrust claims brought against defendants who had executed a supplier-seller agreement similar to the one at issue here. 335 F. Supp. 2d 6, 14 (D.D.C. 2004). Similarly, a license

[37]Cadbury is likewise incorrect that the Court should change its analysis because the terms of the license agreements are standard. Instead, the Court should look at the terms. And Cadbury cannot be serious when it suggests that the Department of Justice's review of one of the agreements *twenty years ago* implies that Hershey and Cadbury could not have violated the antitrust laws since then.

agreement allegedly enabled a price-fixing cartel in *Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust*, C.A. No, 95-9426(SAS), 1996 WL 601705, at *1 (S.D.N.Y. Oct. 18, 1996), where the court denied in part a motion to dismiss.

It cannot be disputed that, through their licensing arrangement, Cadbury and Hershey shared risks, profits, and control; contributed materials (Cadbury-branded candy) and services (Hershey's distribution and marketing); and had an incentive to share and discuss sensitive business information (*e.g.*, raising the prices of Cadbury-branded products in coordination with the rest of the market players). Cadbury and Hershey are major competitors in a highly concentrated industry characterized by oligopoly. "[A]ny agreement among major horizontal competitors in a concentrated industry to collaborate and jointly market their products or services raises potential antitrust concerns." DOJ Press Release, "Justice Department Closes Antitrust Investigation into the Movielink Movies-on-Demand Joint Venture," June 3, 2004, attached as Exh. FF.

Courts consistently preserve antitrust claims grounded in well-pled allegations that the parties to joint selling arrangements engaged in anticompetitive conduct. Such claims are particularly viable when the market structure is oligopolistic. *See, e.g.*, *U.S. v. American Smelting & Ref. Co.*, 182 F. Supp. 834, 856 (S.D.N.Y. 1960) (joint selling arrangement between two largest miners of

lead, whereby one acted as the exclusive seller of a portion of the production of the other in a designated territory, held to constitute illegal price fixing and horizontal market allocation); *U.S. v. American Radio Sys. Corp.*, C.A. No. 96-2459, 1997 WL 226227, at *5 (D.D.C. Jan. 31, 1997) (final judgment requiring two competing radio stations to terminate joint sales agreement).

The Complaints raise the inference that Cadbury exerts substantial control over its U.S. products sold by Hershey. As a result, Cadbury may properly be sued in U.S. federal court for participation in the anticompetitive scheme alleged.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that this Court deny the Cadbury Defendants' Motions.

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Respectfully submitted,

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