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

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION	**MDL DOCKET NO. 1935** **(Civil Action No. 1:08-MDL-1935)** **(Judge Christopher C. Conner)**
THIS DOCUMENT APPLIES TO: **ALL CASES**	***ELECTRONICALLY FILED***

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION BY DEFENDANTS CADBURY PLC AND CADBURY HOLDINGS LTD. TO DISMISS FOR LACK OF PERSONAL JURISDICTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

Defendants Cadbury Holdings Ltd. and Cadbury plc respectfully submit this Reply Memorandum of Law in further support of the motion to dismiss all of the complaints against them for lack of personal jurisdiction.

I. INTRODUCTION

Plaintiffs have failed to make a prima facie showing that jurisdiction over Cadbury Holdings Ltd. and Cadbury plc would be proper. Plaintiffs can show no connection between Cadbury Holdings Ltd. or Cadbury plc and the United States on which personal jurisdiction over these defendants could be based. Cadbury Holdings Ltd. and Cadbury plc have no significant contacts with the United States and have never manufactured, sold and/or marketed chocolate confectionary products in the United States. Plaintiffs do not – because they cannot – dispute these facts in their opposition brief.

Nevertheless, Plaintiffs contend that the Court may exercise personal jurisdiction over Cadbury Holdings Ltd. and/or Cadbury plc based on (1) Cadbury plc's issuance and marketing of American Depositary Receipts ("ADRs"), (2) Cadbury Holdings Ltd.'s ownership of U.S. patents, (3) Cadbury Holdings Ltd.'s and Cadbury plc's corporate relationship with Cadbury Adams USA LLC, (4) certain license agreements with Hershey and (5) Cadbury Holdings Ltd.'s and Cadbury plc's alleged participation in the alleged price-fixing conspiracy. None of these arguments is sufficient to defeat Cadbury Holdings Ltd. and Cadbury plc's

motion to dismiss for lack of personal jurisdiction. As explained more fully below, Plaintiffs have thus failed to meet their burden of establishing jurisdiction, and the complaints against Cadbury Holdings Ltd. and Cadbury plc should be dismissed.[1]

[1] Plaintiffs' "request that Cadbury plc and Cadbury Holdings be ordered to respond to Plaintiffs' jurisdictional discovery" (Opp. Br. at 3) is improper under the terms of Case Management Order No. 4, dated May 30, 2008, which requires that counsel meet and confer with all parties prior to making a formal motion. *Id.* at ¶ 6. No such formal motion has been made by Plaintiffs, and Defendants, correspondingly, have had no opportunity to brief Plaintiffs' lack of entitlement to such jurisdictional discovery or the appropriate scope of any such discovery.

There is, of course, no absolute right to jurisdictional discovery in this Circuit. *See*, *e.g.*, *Solae, LLC v. Hershey Canada, Inc.*, 557 F. Supp. 2d 452, 461 (D. Del. 2008) ("The Court concludes that [plaintiff] has not adduced 'competent evidence' to demonstrate that personal jurisdiction exists over [defendant]. The Court therefore will deny [plaintiff's] request for jurisdictional discovery." (internal citations omitted)); *Streamlight, Inc. v. ADT Tools, Inc.*, No. 03-1481, 2003 WL 22594316, at *4 (E.D. Pa. Oct. 9, 2003) ("A court can deny jurisdictional discovery where the party that bears the burden of establishing jurisdiction fails to establish a 'threshold prima facie showing' of personal jurisdiction."). Only where a plaintiff's allegations suggest with "reasonable particularity" the possible existence of the requisite contacts between the party and the forum state, should the plaintiff's right to conduct jurisdictional discovery be sustained. *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003). As explained *infra*, Plaintiffs here have not met that threshold. Courts in this Circuit have not hesitated to grant motions to dismiss under Rule 12(b)(2) without ordering jurisdictional discovery. *See*, *e.g.*, *Regan v. Loewenstein*, No. 07-3266, 2008 WL 4173837, at *3 (3d Cir. Sept. 11, 2008); *Parker v. Learn the Skills Corp.*, No. Civ. A. 05-2752, 2006 WL 759693, at *4 (E.D. Pa. Mar. 23, 2006). Indeed, courts frequently caution against allowing jurisdictional discovery to turn into a "fishing expedition" and thereby become a waste of time or a tool for harassing defendants. *Parker*, 2006 WL 759693, at *4.

Because the essential facts are undisputed, and Plaintiffs' proposed discovery would not aid or alter the Court's analysis of personal jurisdiction over

II. CADBURY HOLDINGS LTD. AND CADBURY PLC HAVE REBUTTED PLAINTIFFS' JURISDICTIONAL ALLEGATIONS

In an effort to make a prima facie showing that Cadbury Holdings Ltd. and Cadbury plc are properly before this Court, Plaintiffs rely on five distinct theories of personal jurisdiction. As demonstrated below, Plaintiffs' allegations are insufficient to establish either general or specific jurisdiction over Cadbury Holdings Ltd. or Cadbury plc.

A. Plaintiffs Fail to Show That Cadbury Holdings Ltd. or Cadbury plc are Subject to General Personal Jurisdiction

1. Cadbury plc's Issuance and Marketing of American Depositary Receipts are Insufficient to Sustain General Personal Jurisdiction.

Plaintiffs argue that Cadbury plc's issuance and marketing of ADRs constitute "pervasive contacts" with the U.S giving rise to general jurisdiction.[2]

Cadbury Holdings Ltd. and Cadbury plc, Plaintiffs' improper "request" for jurisdictional discovery should be denied.

[2] Plaintiffs urge in a footnote that the Court should exercise personal jurisdiction over Cadbury plc because "Cadbury plc specifically used its interactive website as a vehicle to encourage American investors to purchase Cadbury plc ADRs through JPMorgan." (Opp. Br. at 11 n.11.) However, the case cited by Plaintiffs in support of this attenuated argument—*Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003)—concerned "whether the operation of a *commercially interactive* website accessible in the forum state is sufficient to support specific personal jurisdiction" and is therefore inapposite. *Id.* at 451 (emphasis added). The Third Circuit defined a "commercially interactive" website as one "allowing users to purchase merchandise online." *Id.* at 450. Here, Plaintiffs concede that U.S. investors cannot purchase ADRs through Cadbury plc's website. (Opp. Br. at 11.) Rather, Cadbury plc's website provides contact

(Opp. at 9-14.) However, courts have consistently held that ADRs (or even direct listings on an exchange) are insufficient as a matter of law to establish general jurisdiction over a foreign corporation.[3] *Telcordia Techs., Inc. v. Alcatel S.A.*, No. Civ. A. 04-874 GMS, 2005 WL 1268061, at *7 (D. Del. May 27, 2005) ("[W]hile [defendant] is listed on the New York Stock Exchange as an American Depository Receipt (ADR), this factor alone does not justify the exercise of jurisdiction."); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000) ("[F]oreign

---

information for JPMorgan, which issues Cadbury plc's ADRs. Accordingly, Cadbury plc's website is insufficient to support a finding of personal jurisdiction.

[3] Plaintiffs concede that the principal case they rely upon, *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361 (3d Cir. 2002), did not concern general jurisdiction. (*See* Opp. Br. at 12-13 ("the court in *Pinker* found it unnecessary to address whether the foreign defendant had the 'continuous and systematic contacts' needed to establish general jurisdiction").) Instead, *Pinker* addressed a situation that is not present here: namely, whether the foreign defendant's U.S. stock listing gave rise to *specific jurisdiction* because the plaintiffs' causes of action for securities fraud arose out of and related to the foreign defendant's U.S. ADR stock listings. *Pinker*, 292 F.3d at 3365 ("plaintiff in this putative securities fraud class action invested in ADRs of the defendant . . . [which is] alleged to have made affirmative misrepresentation that misled its ADR holders"). Thus, *Pinker* offers no guidance here.

Plaintiffs' reliance on *Newport Components, Inc. v. NEC Home Elecs.*, 671 F. Supp. 1525 (C.D. Cal. 1987), is similarly misplaced. In *Newport Components, Inc.*, the district court noted NEC's ADR registration in the context of a host of factors, including that the majority of the subsidiary's directors overlapped with those of the parent; that ninety percent of the subsidiary's sales were of products purchased from the parent; that the parent had been investigated for two decades for selling products into the U.S. below cost; and that the parent had utilized various federal courts to pursue legal claims. *Id.* at 1539-40. None of these factors are even alleged, much less present here.

corporations [are afforded] substantial latitude to list their securities on New York-based stock exchanges and to take the steps necessary to facilitate those listings (such as making SEC filings and designating a depository for their shares) without thereby subjecting themselves to New York jurisdiction for unrelated occurrences"); *Celi v. Canadian Occidental Petroleum Ltd.*, 804 F. Supp. 465, 468 (E.D.N.Y. 1992) ("Plaintiff contends that [defendant] is doing business in New York because [defendant] is traded on the American Stock Exchange in New York. However, this argument was rejected before the turn of the century.").

Plaintiffs' argument that the Deposit Agreement between Cadbury plc and JPMorgan supports a finding of general jurisdiction over Cadbury plc is similarly defective. (*See* Opp. Br. at 12.) First, the Deposit Agreement indicates that Cadbury plc's consent to the jurisdiction of New York state and federal courts is limited to claims "arising out of or based upon this Deposit Agreement or the transactions contemplated hereby." (Opp. Br., Ex. M at 7.) This language cannot be deemed a blanket waiver of *any* objections to personal jurisdiction in *any* U.S. court on *any* claim.

Indeed, the case cited by Plaintiffs for the proposition that consent to the jurisdiction of any U.S. court is "a relevant consideration in questions of personal jurisdiction" proves Cadbury's point. (Opp. Br. at 12 (*citing In re Polyester Staple Antitrust Litig.*, No. 3:03CV1516, 2008 WL 906331, at *13 (W.D.N.C. Apr. 1,

2008)). The court in *Polyester Staple* faced consent by a defendant to the jurisdiction of *multiple* U.S. courts before which the defendant accepted responsibility for *illegal conduct* similar to the conduct alleged in the matter before that court. Plaintiffs here do not—and cannot—allege that Cadbury plc has consented to the jurisdiction of multiple U.S. courts or that Cadbury plc has conceded responsibility (or been found responsible) for any illegal conduct before a U.S. court, much less conduct similar to that alleged in Plaintiffs' complaints.

Second, the Deposit Agreement appoints Cadbury Adams USA LLC as Cadbury's authorized agent in the U.S. for service of process in any suit "arising out of or based upon this Deposit Agreement or the transactions contemplated hereby." (Opp. Br., Ex. M at 7.) The designation of Cadbury Adams USA LLC as Cadbury plc's authorized agent for service of process in these limited circumstances cannot give rise to general jurisdiction over Cadbury plc. Moreover, as the case cited by Plaintiffs makes clear, agency principles cannot be used to establish jurisdiction over a *holding company* parent. *See In re Latex Gloves Prods. Liability Litig.*, No. MDL 1148, 2001 WL 964105, at *2 & n.8 (E.D. Pa. Aug. 22, 2001) ("[T]he agency rule ordinarily does not apply to a holding company inasmuch as the parent could simply use another subsidiary to accomplish the same result."). Plaintiffs do not dispute that Cadbury plc is a holding company. The

Deposit Agreement thus cannot support a finding of general jurisdiction over Cadbury plc.

2. Cadbury Holdings Ltd.'s Ownership of U.S. Patents is Insufficient to Sustain General Personal Jurisdiction.

Plaintiffs argue that an "important factor establishing personal jurisdiction over [Cadbury plc] is the ownership of U.S. patents." (Opp. Br. at 14.) Plaintiffs, however, misrepresent the applicable case law. It is well-established that the "[m]ere ownership of intellectual property rights is not sufficient to establish personal jurisdiction." *Componentone, L.L.C. v. Componentart, Inc.*, No. 02: 05cv1122, 2007 WL 2359827, at *4 (W.D. Pa. Aug. 16, 2007). Moreover, "[o]wnership of a United States patent, without more, cannot support the assertion of personal jurisdiction over a foreign patentee in any state besides the District of Columbia."[4] *Telcordia Techs., Inc.,* 2005 WL 1268061, at *7; *see also XL Specialty Ins. Co. v. Melexis GmbH*, Civ. No. 07-1018 (DRD), 2007 WL 3026683, at *3 (D.N.J. Oct. 16, 2007) (finding defendant's applications for U.S. patents "insufficient" to establish general personal jurisdiction).

Accordingly, Cadbury Holdings Ltd.'s ownership of certain U.S. patents is insufficient to establish general jurisdiction.

[4] 35 U.S.C. § 293 provides the United States District Court for the District of Columbia with jurisdiction over patentees in disputes involving the rights and interests arising under such patents. Given that Plaintiffs' Sherman Act § 1 action does not involve a dispute over patent rights, this jurisdictional provision has no application here.

3. Cadbury Holdings Ltd., Cadbury plc and Cadbury Adams USA LLC are Separate Entities.

Plaintiffs' attempt to apply the "alter ego" doctrine as between Cadbury Holdings Ltd. or Cadbury plc and Cadbury Adams USA LLC also fails.[5] Courts presumptively respect the corporate form, even for jurisdictional purposes. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation is not liable for the acts of its subsidiaries."). It is thus well-established that jurisdiction does not extend "to a parent corporation solely by virtue of its subsidiary's contacts with the forum state unless the subsidiary is an alter ego of the parent." *In re School Asbestos Litig.*, No. 83-0268, 1993 WL 298301, at *3 (E.D. Pa. Aug. 2, 1993) (citing *Botwinick v. Credit Exch., Inc.*, 213 A.2d 349 (Pa. Super. Ct. 1965)). Plaintiffs' allegations are insufficient to support a finding that Cadbury Adams USA LLC is the alter ego or agent of either Cadbury Holdings Ltd. or Cadbury plc such that "the independence of the separate corporate entities

[5] It is important to note that Cadbury Adams USA LLC is not named as a defendant in this action, and Plaintiffs have set forth no allegations concerning Cadbury Adams USA LLC's relationship to the events in question here. Therefore, as a threshold matter, Plaintiffs' argument for "alter ago" jurisdiction over Cadbury Holdings Ltd. or Cadbury plc is without basis and must fail.

[can be] disregarded."[6] *Fisher v. Teva PFC SRL*, 212 Fed. Appx. 72, 76 (3d Cir. 2006).

Courts in this Circuit permit the piercing of the corporate veil only where "the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent." *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir. 1988); *see also Green v. William Mason & Co.*, 996 F. Supp. 394, 398 (D.N.J. 1998); *Arch v. Am. Tobacco Co.*, 984 F. Supp. 830, 837 (E.D. Pa. 1997). In order to satisfy this test, a plaintiff must show that: (1) "the parent controls the day-to-day operations of the subsidiary such that the subsidiary can be said to be a mere department of the parent," *Simeone v. Bombardier-Rotax GmbH*, 360 F. Supp. 2d 665, 675 (E.D. Pa. 2005) (citation omitted); and (2) the parent effectively used the subsidiary as a sham in order to avoid liability for its own conduct. *Arch*, 984 F. Supp. at 839 (dismissing parent where plaintiffs failed to

[6] Plaintiffs also argue, without legal basis, that through the participation of its predecessor company (Cadbury Schweppes plc) in merger and acquisition activity in the U.S. – specifically, the purchase of Cadbury Adams USA LLC – Cadbury Holdings Ltd. has "availed itself of the benefits of United States law" and is therefore subject to the Court's general jurisdiction. (Opp. Br. at 28-30.) According to this logic, any foreign company that buys a U.S. subsidiary is automatically subject to the general jurisdiction of U.S. courts. However, the Supreme Court has long held that maintaining an ordinary parent-subsidiary relationship does not subject a parent company to a court's personal jurisdiction. *See*, *e.g.*, *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities."). Accordingly, Plaintiffs' contention that a foreign company loses the protection of its corporate structure through the act of acquiring a U.S. subsidiary cannot be sustained.

proffer any evidence that foreign parent and U.S. subsidiary used corporate structure for "fraudulent, unjust, or inequitable purposes"). Absent this showing, the Court should not extend personal jurisdiction over the parent company. As will be seen below, Plaintiffs cannot make the requisite showing here.

a. Neither Cadbury Holdings Ltd. Nor Cadbury plc are Alleged To Exercise Greater Than Normal Control Over the Day-To-Day Operations of Cadbury Adams USA LLC

In order to justify piercing the corporate veil, Plaintiffs must allege Cadbury Holdings Ltd.'s and/or Cadbury plc's complete domination of Cadbury Adams USA LLC. *Craig*, 843 F.2d at 152. Plaintiffs' complaints utterly fail to do so. "The degree of control exercised by the parent must be ***greater*** than normally associated with common ownership and directorship." *Arch*, 984 F. Supp. at 837 (emphasis added). Plaintiffs, however, have pleaded no facts sufficient to meet this high standard of control, nor pointed to any such facts in their opposition brief.[7]

In fact, the record shows that Cadbury plc is a non-operating holding company that wholly owns Cadbury Holdings Ltd. Cadbury Adams USA LLC is an indirect, wholly owned subsidiary of Cadbury Holdings Ltd. There are *five*

[7] Plaintiffs' reliance on *Simeone*, 360 F. Supp. 2d 665, is thus misplaced. In *Simeone*, the foreign parent company controlled the day-to-day decisions of its subsidiary. The Court specifically found that "the [parent company's] corporate office, rather than [the subsidiary's] own management team, made major business decisions for [the subsidiary]." *Id.* at 676.

distinct corporate entities between Cadbury Holdings Ltd. and Cadbury Adams LLC. (Opening Br. at 16; Mills Decl. ¶ 17.) Cadbury plc is thus separated from Cadbury Adams USA LLC by *six* distinct corporate entities. (*Id.*) Cadbury Holdings Ltd. and Cadbury plc have established that they respect all corporate formalities of their subsidiaries, including separate corporate officers, independent boards of directors and separate financial statements. (Opening Br. at 16-17; Mills Decl. ¶¶ 33-41.) Cadbury Holdings Ltd. and Cadbury plc have also put forth evidence that Cadbury plc, Cadbury Holdings Ltd. and Cadbury Adams USA LLC operate as independent companies for purposes of day-to-day operations. (Opening Br. at 16-17; Mills Decl. ¶¶ 33-41.)

Plaintiffs do not – and cannot – allege any facts to the contrary. Indeed, the conduct relied upon in Plaintiffs' opposition is entirely consistent with the legitimate conduct of a foreign parent corporation. For example, Cadbury Holdings Ltd. is not subject to general jurisdiction on the basis that it indirectly owns 100 percent of Cadbury Adams USA LLC. (Opening Br. at 14-16 (citing Third Circuit and district court cases).)[8] Nor is the exercise of general jurisdiction

[8] Other Circuits concur, *e.g.*, *Miller v. Honda Motor Co.*, 779 F.2d 769, 771-72 (1st Cir. 1985) (affirming dismissal of foreign parent even though "American Honda is a wholly owned subsidiary of Honda"); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160-61 (5th Cir. 1983) (affirming dismissal of foreign corporation for lack of personal jurisdiction even though "T&N owned 100% of the stock of K&M from 1938 to 1962").

over Cadbury Holdings Ltd. and/or Cadbury plc warranted by references to a collective Cadbury entity (the "Cadbury Group") in public statements and filings. *See Action Mfg. Co., Inc. v. Simon Wrecking Co.*, 375 F. Supp. 2d 411, 423 (E.D. Pa. 2005) ("[R]eferences in the parent's annual report to subsidiaries or chains of subsidiaries as divisions of the parent company do not establish the existence of an alter ego relationship." (citation omitted)); *In re Auto. Refinishing Paint Antitrust Litig.*, No. 1426, 2002 U.S. Dist. LEXIS 15099, at *36-*37 (E.D. Pa. July 31, 2002) (parent and subsidiary's use of common marketing image is a "type of control [that] is no more than what is typically associated with majority ownership") (cited by Plaintiffs).[9] Indeed, setting corporate policies, overseeing the performance of a subsidiary and sharing resources with a subsidiary are all

[9] *See also Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 662 (S.D.N.Y. 1997) (foreign defendant's public relations materials suggesting it is a "global firm or an international network of member firms" does not justify attributing U.S. company's contacts to foreign affiliate); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1254 n.10 (S.D.N.Y. 1984) (documents describing affiliated companies as "a single cohesive worldwide organization" themselves do not contradict plain meaning of agreements outlining separate operations of companies). Plaintiffs' reliance on *Directory Dividends, Inc. v. SBC Commc'ns, Inc.*, No. 01-CV-1924, 2003 U.S. Dist. LEXIS 12214 (E.D. Pa. July 2, 2003), is also misplaced. In *Directory Dividends*, the court found that the U.S. parent company actually "controls business at the subsidiary level" and that in eliminating individual subsidiary websites, the parent was presenting itself and its subsidiary as "serving the nation as a whole rather than several regional companies serving different areas of the country." *Id.* at *14-*16, *20-*21. None of these facts are present here.

aspects of appropriate parental involvement that does not give rise to jurisdiction over the foreign parent company.[10]

Accordingly, Plaintiffs have not alleged that Cadbury Holdings Ltd. or Cadbury plc exercised any control over the day-to-day operations of Cadbury Adams USA LLC, let alone the greater-than-normal control that must be alleged and demonstrated to pierce the corporate veil.

---

[10] For establishment of corporate policies, *see*, *e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) ("Appropriate parental involvement includes: 'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures.'" (citation omitted)); *Joiner v. Ryder Sys., Inc.*, 966 F. Supp. 1478, 1485-1486 (C.D. Ill. 1996) (finding "no problem" with parent's implementation of a safety policy, an environmental policy, a code of conduct, and a code of ethics "throughout its subsidiaries"); *Masterson Pers., Inc. v. The McClatchy Co.*, No. Civ. 05-1274RHKJJG, 2005 WL 3132349, at *5 (D. Minn. Nov. 22, 2005) (parent "approve[d] 'policies on strategic planning and operating budgets, including pricing matters'. . . These activities, however, constitute appropriate parental involvement").

For overseeing the performance of a subsidiary, *see*, *e.g.*, *IDS Life Ins. Co. v. Sun Am. Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998) ("Parents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries. . ."); *Savin Corp. v. Heritage Corp. Prods., Inc.*, 661 F. Supp. 463, 470 (M.D. Pa. 1987) (appropriate that "one CDC officer came once weekly to the United States to oversee CDC's investment in Savin").

For sharing resources, *see, e.g.*, *Action Mfg.*, 375 F. Supp. 2d at 425 (corporate formalities were not ignored where subsidiary and parent shared services, such as human resources, information technology services, office space, and infrastructure, and each company reimbursed the other for the provision of such services).

b. Plaintiffs Do Not Allege That Cadbury Adams USA LLC is a Sham

Piercing the corporate veil also requires a plaintiff to demonstrate that the corporate parent created the subsidiary as a sham in order to avoid liability for its conduct. In determining whether such a sham exists, courts consider the presence of factors such as "gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of a debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484-85 (3d Cir. 2001).

Where, as here, plaintiffs fail to allege the presence of any of the *Pearson* factors, courts dismiss foreign defendants for lack of personal jurisdiction. *See*, *e.g.*, *Hoffman v. Tyco Int'l, Ltd.*, No. 06-2961, 2006 WL 3759709, at *4 (E.D. Pa. Dec. 18, 2006) (no alter ego jurisdiction because plaintiff "fails to address any of the specific *Pearson* factors"); *Action Mfg.*, 375 F. Supp. 2d at 424-25 ("Action Manufacturing does not attempt to rely on the fact that Inc. is undercapitalized or insolvent. . . . Action Manufacturing also does not rely on the fact that Corp. siphons funds from Inc.").

In view of the foregoing, no basis exists for piercing the corporate veil and imputing Cadbury Adams USA LLC's contacts to either Cadbury Holdings Ltd. or Cadbury plc.

B. Plaintiffs Fail to Show That Cadbury Holdings Ltd. or Cadbury plc are Subject to Specific Personal Jurisdiction

1. Plaintiffs Have Not Pleaded Facts Sufficient to Establish Personal Jurisdiction Based Upon the License Agreements With Hershey.

Plaintiffs argue that certain license agreements with Hershey "guarantee" that Cadbury Holdings Ltd. and Cadbury plc have sufficient contacts with the U.S. market and give rise to specific jurisdiction. (Opp. Br. at 31.) Specific jurisdiction is invoked when a cause of action arises from a defendant's forum-related activities, such that the defendant should reasonably anticipate being haled into court in that forum. *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 690 (3d Cir. 1990). For an agreement to serve as the basis for specific jurisdiction, the underlying cause of action must "arise out of or relate to" that agreement. *See*, *e.g.*, *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 304 F. Supp. 2d 663, 666 (W.D. Pa. 2003) ("For that [licensing] relationship to support personal jurisdiction, [plaintiff's] cause of action would have to relate to or arise out of [defendant's] license with [a third party].") Plaintiffs, however, fail to demonstrate how the license agreements, in and of themselves, suffice to establish specific jurisdiction, as Plaintiffs' alleged injuries do not "arise out of or relate to"

the license agreements. Remarkably, Plaintiffs have altogether ignored this critical element of the inquiry into whether specific jurisdiction exists.

Plaintiffs do not—and cannot—allege that this action arises out of or relates to the license agreements with Hershey. As set forth in Cadbury Holdings Ltd. and Cadbury plc's opening brief (Opening Br. at 10), the but-for causation standard used to determine whether a plaintiff's alleged injuries "arise out of or relate to" a defendant's contact with the forum is met when a plaintiff's claim would not have arisen in the absence of a defendant's contacts with the forum. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 320-23 (3d Cir. 2007). Even assuming Plaintiffs' allegations to be true, the license agreements with Hershey do not satisfy the but-for test, as Plaintiffs' purported injuries—paying artificially inflated prices for chocolate products during the relevant time period—would have occurred in the absence of the license agreements.

Plaintiffs' claims center on a purported conspiracy to fix the price of chocolate. These claims are in no way related to the relationship or obligations that exist between Cadbury Holdings Ltd., Cadbury plc and Hershey by virtue of the license agreements. In fact, the only allegation in Plaintiffs' complaints concerning the license agreements is that these agreements create a financial incentive for Cadbury Holdings Ltd. and Cadbury plc to participate in the alleged conspiracy to fix the price of chocolate products. (Opp. Br. at 31-32.) Such

barebones allegations fall far short of showing the necessary nexus to establish specific jurisdiction.

2. Plaintiffs Have Not Alleged Facts Sufficient to Establish Personal Jurisdiction Based Upon a Civil Conspiracy.

Plaintiffs also contend that the Court's exercise of specific personal jurisdiction over Cadbury Holdings Ltd. and Cadbury plc is appropriate because their co-conspirators committed acts within the United States and those acts may be imputed to Cadbury Holdings Ltd. and Cadbury plc.[11] However, personal jurisdiction over a foreign co-conspirator may be asserted only where a plaintiff demonstrates that substantial acts in furtherance of the conspiracy occurred in the forum and that the foreign co-conspirator was aware or should have been aware of those acts. *Santana Prods., Inc. v. Bobrick Washroom Equip.*, 14 F. Supp. 2d 710, 718 (M.D. Pa. 1998); *see also Raymark Indus., Inc. v. Baron*, No. Civ. 96-7625, 1997 WL 359333, at *4 (E.D. Pa. June 23, 1997) ("Pennsylvania law requires proof that the co-conspirator was or should have been aware of the conspiratorial

[11] Plaintiffs' own cases confirm that bare allegations of conspiracy will not suffice to support the exercise of specific jurisdiction; rather, actual evidence of a substantial connection to the relevant forum is required. *See MM Global Servs., Inc. v. Dow Chem. Co.*, 404 F. Supp. 2d 425, 431-432 (D. Conn. 2005) (plaintiffs alleged that foreign defendants had transacted business of a "substantial character" in the relevant forum); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., et al.*, No. 05-6042, 2008 U.S. Dist. LEXIS 72705 (D.N.J. Aug. 27, 2008) (plaintiffs alleged that foreign parent company set prices in the U.S. and directed its U.S. subsidiaries to charge those prices).

acts within the forum state."); *Mass. Sch. of Law at Andover v. Am. Bar Ass'n*, 846 F. Supp. 374, 379-380 (E.D. Pa. 1994) ("[T]here must also be substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state co-conspirator was or should have been aware."). Membership in a civil conspiracy, standing alone, will not properly support an assertion of personal jurisdiction. *Mass. Sch. of Law*, 846 F. Supp. at 379.

Plaintiffs have not alleged facts sufficient to establish personal jurisdiction over Cadbury Holdings Ltd. or Cadbury plc on a co-conspirator contacts theory. As noted in the Cadbury Defendants' Supplemental Brief, "Plaintiffs fail to allege a single meeting, piece of correspondence or other communication between two or more of the defendants that relates in any way to the pricing of chocolate products in the United States." (Supp. Br. at 2.) Plaintiffs' attempt to argue that "there was both incentive and an opportunity for [Cadbury Holdings Ltd. and Cadbury plc] to participate in the alleged price-fixing conspiracy" cannot cure this failure. "Incentive and an opportunity" to participate in a conspiracy, even if such existed here – which they do not – do not constitute "substantial acts" in furtherance of a conspiracy. *See Santana*, 14 F. Supp. 2d at 718. Given the total absence of allegations that the Cadbury Defendants discussed or agreed with their competitors upon the price of chocolate products in the United States during the relevant time period, Plaintiffs' co-conspirator contacts theory of jurisdiction cannot lie.

Furthermore, even if such acts had occurred in the United States—and they did not occur in the United States, or anywhere else for that matter—Plaintiffs have neither alleged nor argued that Cadbury Holdings Ltd. or Cadbury plc knew or should have known of their occurrence. *See Von Pein v. Ciccotelli*, Civ. A. No. 94-4860, 1995 WL 79527, at *2 (E.D. Pa. Feb. 17, 1995) (finding lack of personal jurisdiction under conspiracy theory where complaint failed to allege that out-of-state defendants were aware of the alleged co-conspirator's activities within the forum). Accordingly, personal jurisdiction cannot be established over Cadbury Holdings Ltd. and Cadbury plc on this basis.

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in their opening brief, Cadbury Holdings Ltd. and Cadbury plc respectfully request that the Court dismiss the complaints against them for lack of personal jurisdiction.

Dated: December 4, 2008

Respectfully submitted,

By: s/ Bridget E. Montgomery

Bridget E. Montgomery (No. 56105)
Jennifer L. Eul (No. 88443)
ECKERT SEAMANS CHERIN & MELLOTT LLC
213 Market Street
8th Floor
Harrisburg, PA 17101
Tel.: (717) 237-6000
Fax: (717) 237-6019

bmontgomery@eckertseamans.com
jeul@eckertseamans.com

By: s/ Thomas M. Mueller
Dennis P. Orr (NY 1014406)
Thomas M. Mueller (NY 2119600)
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104
Tel.: (212) 468-8161
Fax: (212) 468-7900
dorr@mofo.com
tmueller@mofo.com

Counsel for Cadbury plc, Cadbury Holdings Ltd. and Cadbury Adams Canada Inc.