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

ASSOCIATED WHOLESALE GROCERS, INC., Plaintiff, v. CADBURY ADAMS CANADA, INC., CADBURY ADAMS USA, LLC, CADBURY HOLDINGS, LTD., CADBURY PLC, HERSHEY CANADA, INC., THE HERSHEY COMPANY, MARS, INC., MARS SNACKFOOD US, LLC, AND NESTLÉ U.S.A. INC., Defendants.	**Civil Action No. 1:12-cv-01604-CCC** **MDL DOCKET NO. 1935** **Honorable Christopher C. Conner** **FILED ELECTRONICALLY**

MEMORANDUM OF LAW IN SUPPORT OF THE CADBURY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Bridget E. Montgomery, Esquire (No. 56105)
Eckert Seamans Cherin & Mellott, LLC

Date: May 31, 2013

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Defendants Cadbury Adams Canada, Inc., Cadbury Adams USA, LLC, Cadbury Holdings, Ltd., and Cadbury plc (collectively, "Cadbury") submit this memorandum of law in support of their motion for summary judgment against Plaintiff Associated Wholesale Grocers, Inc. ("Plaintiff" or "AWG") pursuant to Rule 56 of the Federal Rules of Civil Procedure. The facts underlying this motion are fully set forth in Cadbury's Rule 56.1 Statement of Undisputed Material Facts ("56.1 Stmt.") and the Declaration of Dennis P. Orr ("Orr Decl.").

INTRODUCTION

AWG, the plaintiff in this tag-along action, contends that Cadbury participated in a conspiracy with a group of large American chocolate manufacturers to fix the price of chocolate candy in the United States from 2002 until at least 2008. AWG's claims against Cadbury cannot survive summary judgment, however, for a fundamental reason: AWG cannot offer any facts that explain how Cadbury participated in the antitrust conspiracy AWG seeks to prove.[1]

The history of this litigation began long before AWG filed its individual Complaint at the eleventh hour. The first complaints were consolidated as MDL

[1] Other defendants address in motions directed toward the Individual Plaintiffs in this action whether any issue of material fact exists as to whether such a conspiracy occurred among *any* of the defendants. Cadbury agrees that summary judgment is appropriate as to *all* defendants in this action, and herein adopts and incorporates the arguments asserted in Defendants' summary judgment motions, and maintains that their arguments apply with equal force to the claims of tag-along plaintiff AWG.

No. 1935 on April 7, 2008. (Transfer Order (ECF No. 1), attached as Ex. 63 to the Orr Decl.) Since then, the MDL Plaintiffs have had the benefit of lengthy and extensive discovery: the parties exchanged more than seven million pages of documents (*see* July 12, 2010 Status Report (ECF No. 829) at 1, attached as Ex. 64 to the Orr Decl.; July 16, 2010 Status Report (ECF No. 833) at 5-6, attached as Ex. 65 to the Orr Decl.), and took more than 140 depositions, with Cadbury alone producing more than 790,000 pages of documents (*see* Orr Decl., Ex. 65 at 5-6.), and providing eight key personnel for deposition. After this extensive discovery, the following key facts are not in dispute:

- No Cadbury employee has had a single meeting or discussion with a competitor concerning the price of chocolate candy sold in the United States.
- Cadbury and The Hershey Company are parties to licensing agreements that give The Hershey Company the exclusive right to market and sell Cadbury-branded chocolate candy products in the United States.
- All Cadbury-branded chocolate candy products sold in the United States, with *de minimis* exceptions, were marketed and sold by The Hershey Company.
- Cadbury possessed no authority to set the price of chocolate candy products sold in the United States.
- Cadbury possessed no non-public knowledge of the price of chocolate candy products sold in the United States.
- No plaintiff deposed in this action has purchased chocolate candy products from Cadbury; in fact, every plaintiff who testified on this point stated categorically that it had *not* done so.

Recognizing these facts and acknowledging the complete lack of evidence to controvert them, on April 28, 2011, all classes of plaintiffs in the MDL settled their

claims against Cadbury in exchange for a total of $2.5 million. (Orr Decl. Ex. 7 paras. 26-27; Ex. 8 para. 26; Ex. 9 para. 21; Ex. 10 para. 25.) As lead counsel for the Direct Purchaser Plaintiff Class, Laddie Montague, stated at the December 12, 2011 fairness hearing before this Court:

> I have to say that because of Cadbury's unique position we thought that the risk of summary judgment was something that we couldn't overlook. It was, there's just very little evidence with respect to them in the United States, and because they didn't have the parallel conduct that was the base of the allegations it would be very difficult.

(Orr Decl. Ex. 6 at 10:12-19).

This Court granted final approval of the settlements on December 12, 2011. (Final Judgment and Order of Dismissal of Indirect Purchaser for Resale Actions (ECF No. 1105), attached as Ex. 11 to the Orr Decl.; Final Judgment and Order of Dismissal of Direct Purchaser Actions (ECF No. 1106), attached as Ex. 69 to the Orr Decl.; Final Judgment and Order of Dismissal of Indirect End User Actions (ECF No. 1107), attached as Ex. 70 to the Orr Decl.) All individual claimants with pending complaints also settled their claims against Cadbury at that time. Although it opted out and filed the instant suit, AWG did not indicate in its pleading that the settling plaintiffs missed some crucial piece of evidence linking Cadbury to an agreement to fix the prices of chocolate candy in the United States, nor indeed, any evidence showing that Cadbury even participated meaningfully in the U.S. market for chocolate candy.

To survive summary judgment, AWG must point to facts from which a reasonable juror could conclude that Cadbury participated in the concerted action AWG alleges. If counsel for Class Plaintiffs in this action, after years of litigation and with the benefit of full discovery, could not identify sufficient factual support for Cadbury's participation in an alleged antitrust conspiracy, surely no reasonable juror could do so. As set forth below, the undisputed evidence makes clear that Cadbury did not engage in a single discussion about the pricing of U.S. chocolate products, much less enter into any agreement concerning those prices. Moreover, the relevant market AWG defines is not one in which Cadbury even meaningfully competes. Because no reasonable juror could find that Cadbury has committed an antitrust violation in the United States market for chocolate candy, Cadbury respectfully requests that the Court grant summary judgment in its favor.

STATEMENT OF QUESTION INVOLVED

Whether the Cadbury Defendants are entitled to summary judgment on the ground that there is no genuine issue as to any material fact because the record is devoid of evidence that the Cadbury Defendants (a) engaged in any form of concerted action with other defendants; and (b) participated in the relevant market, in which AWG alleges the anticompetitive activity occurred.

Suggested Answer: Yes.

STATEMENT OF UNDISPUTED FACTS

I. PROCEDURAL HISTORY & SETTLEMENT

On April 10, 2012, AWG revived this litigation against Cadbury after other plaintiffs, including all Individual Plaintiffs and the three plaintiff classes, settled their claims against Cadbury, entering into broad releases. (*See* Orr Decl. Exs. 7-10) (the "Settlement Agreements").[2] Plaintiffs in the consolidated actions were comprised of three plaintiff classes—the Direct Purchaser, Indirect Purchaser for Resale, and Indirect End User classes—as well as a group of Plaintiffs opting to pursue individual actions. In May 2011, all three Plaintiff classes filed motions for preliminary approval of their respective settlement agreements with the Cadbury Defendants. (Direct Purchaser Class' Motion for Preliminary Approval (ECF No. 983), attached as Ex. 66 to the Orr Decl.; Indirect End User Class' Motion for Preliminary Approval (ECF No. 989), attached as Ex. 67 to the Orr Decl.; Indirect Purchaser for Resale Class' Motion for Preliminary Approval (ECF No. 990), attached as Ex. 68 to the Orr Decl.)

This Court preliminarily approved the Settlement Agreements on August 12, 2011. (Orders for Preliminary Approval of Settlements (ECF Nos. 1023-1025), attached as Exs. 71-73 of the Orr Decl.) During the notice period, two plaintiffs—

[2] AWG was one of two direct purchaser plaintiffs to opt out of the Settlement Agreement.

including AWG—opted out of the settlements. (Oct. 19, 2011 Ltr. from Associated Wholesale Grocers (ECF 1050), attached as Ex.76 to the Orr Decl.) This Court held a fairness hearing to consider final approval of the settlements on December 12, 2011. (Orr Decl., Ex. 6 at 3:11-5:2.) Finding the settlements to be fair and reasonable, the Court granted final approval the same day. (Final Orders Approving the Settlements (ECF Nos. 1105-1107), attached as Exs. 11, 69-70 to the Orr Decl.) Thereafter, AWG brought its Complaint on April 10, 2012 in the District of Kansas. (Compl., attached as Ex. 1 to the Orr Decl.) The action was consolidated with MDL No. 1935 on August 3, 2012. (Transfer Order, attached as Ex. 62 to the Orr Decl.) Cadbury answered the AWG Complaint on August 23, 2012, and August 24, 2012. (Cadbury Defendants' Answers to Compl. (ECF Nos. 1187-1190), attached as Exs. 78-81 to the Orr Decl.)

II. PARTIES TO THE AWG ACTION

Plaintiff Associated Wholesale Grocers, Inc. is a Kansas corporation, with its principal place of business in Kansas City, Kansas. (Compl. para. 9, attached as Ex. 1 to the Orr Decl.) Associated Wholesale Grocers, Inc. provides more than 2,000 grocery stores and other retail outlets with various grocery and general merchandise items. (*Id.*)

Defendant Cadbury Holdings, Ltd. (formerly known as Cadbury Schweppes plc and Cadbury Schweppes Ltd.) was a private company organized under the laws

of the United Kingdom, with its principal place of business in Middlesex, England. (Decl. of John Mills in Supp. of the Mot. by Defs. Cadbury Holdings, Ltd. and Cadbury plc to Dismiss for Lack of Personal Jurisdiction, filed Sept. 29, 2008 (ECF No. 468) ("Mills Decl.") paras. 3-5, attached as Ex. 74 to the Orr Decl.) Cadbury Holdings, Ltd. is now a wholly-owned subsidiary of Mondelēz International, Inc. (formerly Kraft Foods Inc.), which announced a spinoff of its North American Grocery business, Kraft Foods Group, Inc., on October 1, 2012. (*See* Mondelēz International, Inc., Spin-Off Information, attached as Ex. 77 to the Orr Decl.)

Defendant Cadbury Adams Canada, Inc. was a private company organized under the laws of Canada, with its principal place of business in Toronto, Ontario, Canada. (Mills Decl. paras. 11-12.) Throughout the alleged conspiracy period, Cadbury Adams Canada, Inc. was a wholly-owned subsidiary of Cadbury Schweppes, which became Cadbury Holdings, Ltd. on May 7, 2008. (*Id.* para. 14.) On February 2, 2010, Kraft Foods Inc. acquired Cadbury plc, the parent company of Cadbury Holdings, Ltd. and Cadbury Adams Canada, Inc. (Kraft Foods Inc., Current Report (Form 8-K), Item 2.01 (Feb. 3, 2010), attached as Ex. 75 to the Orr Decl.) Cadbury Adams Canada, Inc. has since been absorbed by Kraft Foods Inc., which is now Mondelēz International, Inc. (*See* Mondelēz International, Inc., Spin-Off Information, attached as Ex. 77 to the Orr Decl.)

Defendant Cadbury Adams USA, LLC was a limited liability company organized under the laws of the state of Delaware, with its principal place of business in Parsippany, New Jersey. (Mills Decl. paras. 15-16.) Throughout the alleged conspiracy period, Cadbury Adams Canada, Inc. was a wholly-owned subsidiary of Cadbury Schweppes, which became Cadbury Holdings, Ltd. on May 7, 2008. (*Id.* para. 14.) On February 2, 2010, Kraft Foods Inc. acquired Cadbury plc, the parent company of Cadbury Holdings, Ltd. and Cadbury Adams USA, LLC. (Kraft Foods Inc., Current Report (Form 8-K), Item 2.01 (Feb. 3, 2010), attached as Ex. 75 to the Orr Decl.) Cadbury Adams USA, LLC has since been absorbed by Kraft Foods Inc., which is now Mondelēz International, Inc. (*See* Mondelēz International, Inc., Spin-Off Information, attached as Ex. 77 to the Orr Decl.)

Defendant Cadbury plc was a publicly-held company organized under the laws of the United Kingdom, with its principal place of business in Middlesex, England. (Mills Decl. paras. 8-9.) Cadbury plc was a holding company and did not manufacture or sell any products anywhere in the world. (*Id.* para. 10.) On February 2, 2010, Kraft Foods Inc. acquired Cadbury plc. (Kraft Foods Inc., Current Report (Form 8-K), Item 2.01 (Feb. 3, 2010), attached as Ex. 75 to the Orr Decl.) Kraft Foods Inc. became Mondelēz International, Inc. on October 1, 2012.

(*See* Mondelēz International, Inc., Spin-Off Information, attached as Ex. 77 to the Orr Decl.)

III. THE AWG COMPLAINT

AWG filed its Complaint on April 10, 2012 against Cadbury, Hershey Canada, Inc., The Hershey Company (together with Hershey Canada, Inc., "Hershey"), Mars, Inc., Mars Snackfood US, LLC (together with Mars, Inc., "Mars"), and Nestlé U.S.A., Inc. ("Nestlé") (collectively, the "Defendants") seeking damages and injunctive relief. (Compl. paras. 2-4, attached as Ex. 1 to the Orr Decl.) AWG asserts that the Defendants violated Section 1 of the Sherman Act, 15 U.S.C. §1; Section 4 of the Clayton Act, 15 U.S.C. §15(a); Section 16 of the Clayton Act, 15 U.S.C. § 26; and the Kansas Restraint of Trade Act, K.S.A. 50-101, *et seq*., by conspiring to "fix[], raise[], maintain[] or stabilize[] prices for chocolate candy products directly sold in Kansas and throughout the United States beginning by at least January 1, 2002 and continuing until at least 2008." (*Id.* paras. 2, 5.)

AWG's conspiracy and price-fixing allegations center on price increases on various categories of chocolate candy by Mars, Hershey, and Nestlé in (i) December of 2002, (ii) November and December of 2004, and (iii) March and April of 2007. (*Id.* paras. 49-63.) AWG does not allege that Cadbury implemented *any* price increase at all. (*See id.*) In fact, the Complaint makes clear

that Cadbury does not even take part in the alleged conspiracy's "Relevant Market," defined as "the United States market for chocolate candy products." (*Id.*para. 43.) While AWG asserts that the non-Cadbury Defendants hold specific shares of the Relevant Market (43.4% for Hershey; 24.3% for Mars; and 8.9% for Nestle), it does not contend that Cadbury holds *any* specific portion of the Relevant Market. Instead, AWG concludes that "[t]ogether with Cadbury's chocolate candy line licensed to Hershey, these four Defendants collectively control 76% of the Relevant Market." (*Id.* para. 74.)

Nonetheless, AWG asserts that all Defendants "engaged in a series of coordinated price increases on their chocolate candy products in the United States" (*id.* para. 51), and further conspired to "refrain[] from engaging in price competition, with the result that each of Defendants' respective market shares remained stable throughout the Relevant Period." (*Id.* para. 73.)[3]

IV. THE LICENSE AGREEMENTS

Nearly twenty-five years ago, on August 25, 1988, Cadbury sold its U.S. chocolate business to the Hershey Foods Company ("Hershey"). (*See* Hershey Foods Corp., Current Report (Form 8-K), Item 2(a) (Aug. 25, 1988) (excluding

[3] The AWG Complaint does not allege any facts suggesting that Cadbury engaged in any discussions with other defendants concerning the price of chocolate candy in the United States, obtained any non-public information concerning the price of chocolate candy in the United States, or had any authority to set the price of any U.S. chocolate candy product. (*See* Compl.)

exhibits), attached as Ex. 12 to the Orr Decl.; *see also* Orr Decl. Exs. 2-4.). As part of that sale, Cadbury Schweppes Inc. and Cadbury Limited entered into an Assets Purchase Agreement (the "Assets Purchase Agreement," attached as Ex. 2 to the Orr Decl.) as well as two license agreements—the Peter Paul/York Domestic Trademark and Technology License Agreement (the "PPY Agreement, " attached as Ex. 3 to the Orr Decl.) and the Cadbury Trademark and Technology License Agreement (the "Trademark License Agreement," attached as Ex. 4 to the Orr Decl.) (collectively, the "License Agreements"). Under the terms of the PPY Agreement and the Trademark License Agreement, Hershey was granted a twenty-five-year license, and assumed exclusive authority to produce, market, advertise, promote, sell, and distribute the licensed products in the United States. (*See* PPY Agreement, as amended Jan. 1, 1999 (the "Amended PPY Agreement," attached as Ex. 5 to the Orr Decl.) §§ 2.1, 7.1; Trademark License Agreement §§ 2.1, 7.1.)

Both the PPY Agreement and the Trademark License Agreement grant Cadbury a royalty based on a percentage of Net Sales. (Trademark License Agreement § 1.1(f); PPY Agreement § 1.1(e).) The License Agreements also provide schedules that set out the methodology of calculating Net Sales. (*See* Trademark License Agreement Schedule B; PPY Agreement Schedule A.) Both schedules demonstrate that, as the licensee, Cadbury is only entitled to annualized

numbers for gross sales, returns, off-invoice promotion allowances, liquidation allowances and "other" allowances to arrive at an annualized Net Sales figure. (*Id.*)

The Agreements entitle Cadbury to a quarterly summary and an annual audited report of the Net Sales and the calculation of royalties to which Cadbury would be entitled. (*Id*., § 5.4.) The License Agreement, PPY Agreement and Amended PPY Agreement each also provide that Hershey and Cadbury representatives shall meet once each quarter to review, "subject to compliance with applicable law," the marketing of the Licensed Products, the introduction of new Licensed Products, quality control, and certain advertising or packaging. (*Id*. § 6.1(a).)

The License Agreements do not grant Cadbury access or input to, let alone authority for, the pricing of the licensed chocolate products in the United States. (*See* License Agreements.) Hershey has sole and exclusive control over the pricing of any Licensed Products. (*See id.*) To the extent that Cadbury obtained information concerning the price at which the Licensed Products were sold in the United States, it was public information and typically from public sources, such as the Hershey website. (*See, e.g.*, Dec. 12, 2002 N. Harvey Email, attached as Ex. 13 to the Orr Decl.)

V. THE RECORD FOLLOWING DISCOVERY

All the evidence adduced during discovery confirms that the License Agreements strictly limited Cadbury's role in the United States market for chocolate candy conducting quality assurance audits of the Licensed Products being marketed and sold by Hershey (*see, e.g.*, Cadbury Quality Review Reports, attached as Exs. 14-16 to the Orr Decl.), participating in regular meetings and teleconferences to discuss marketing and quality (*see, e.g.*, Agenda, Minutes and Recaps of Hershey Meetings, attached as Exs. 20-24 to the Orr Decl.), and receiving quarterly and annual reports of royalties due pursuant to the agreements (s*ee, e.g.*, Royalty Reports, attached as Exs. 17-19 to the Orr Decl.).

At periodic meetings and on teleconferences, Cadbury and Hershey employees discussed topics strictly related to quality assurance issues, marketing plans and other topics delineated by the License Agreements. (S*ee, e.g.*, Agenda, Minutes and Recaps of Hershey Meetings, Exs. 20-24 to the Orr Decl.) Audits for quality control were conducted principally by technical staff focused on formula and technological issues and often consisted of testing samples of the Licensed Products and inspecting production techniques and facilities. (*See, e.g.*, Cadbury Quality Review Reports, attached as Exs. 14-16 to the Orr Decl.) At times, Cadbury and Hershey technical and marketing staff also met to discuss new product development, consistent with the terms of the License Agreement. (*See,*

e.g., Hershey Technical Review Visit Summary, attached as Ex. 25 to the Orr Decl.) None of the evidence concerning these interactions or communications, however, suggests that Cadbury and Hershey employees ever discussed the price at which the Licensed Products or other chocolate candy was sold in the United States. And pursuant to the License Agreements, the royalties Cadbury received from Hershey were calculated as a percentage of aggregated gross sales figures, not as a percentage of price or Hershey's margin on its sales. (*See, e.g.*, Royalty Reports, Exs. 17-19 of the Orr Decl.)

In addition, during depositions no witness testified that any employee of Cadbury *ever* discussed United States chocolate candy pricing with a competitor. *See* Orr Decl. Ex. 26 at 127:19-128:9; Ex. 27 at 139:15-140:8; Ex. 28 at 182:1-10, 183:4-10, 183:18-24, 184:7-10; Ex. 29 at 250:7-21; Ex. 30 at 133:21-134:10, Ex.31 at 98:13-99:4.) And Cadbury employees specifically testified that they never heard of any such conversations occurring. (*See* Orr Decl. Ex. 26 at 129:7-24; Ex. 27 at 140:9-141:3; Ex. 28 at 182:11-183:3, 183:11-17; 183:25-184:6; 184:11-17; Ex. 29 at 250:22-251:14; Ex. 30 at 134:11-135:3; Ex. 31 at 99:5-105:12.) There is simply no evidence—either direct or circumstantial—to the contrary.

Moreover, as Cadbury has maintained throughout this litigation, and as the record confirms, Cadbury had no meaningful sales of chocolate candy into the United States during the relevant time period. (*See* Orr Decl. Ex. 32; *see also* Orr

Decl. Ex. 33 at 1-2; Orr Decl. Ex. 34 at 1.)[4] None of Plaintiff's witnesses testified that they had purchased a single chocolate candy product from any Cadbury entity—and every witness who was asked about Cadbury products at deposition testified that he or she had never dealt with Cadbury with respect to chocolate products.[5]

LEGAL STANDARDS

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any

[4] During the relevant time period, Cadbury sold certain chocolate products to Cadbury's U.S. affiliates, international airlines and cruise lines with flights and cruises originating in the United States, and duty free stores. Such sales were *de minimis*. Annual sales totals range from approximately $734,000 to approximately $2.2 million. (*See* Orr Decl. Ex. 32.) Moreover, the chocolate products sold to Cadbury's U.S. affiliates were sold exclusively in Cadbury company stores, not to retail customers. Similarly, the chocolate products sold to airlines, cruise lines, and duty free stores were not sold at retail in the United States. Accordingly, such sales are not the subject of AWG's complaint as AWG defines "chocolate candy products," to mean "chocolate bars and other chocolate-based confectionary products, as well as boxed chocolates and seasonal novelty chocolates packaged *to be sold at retail*." (Compl. para. 40) (emphasis added).

[5] *See, e.g.* D. Orr Decl. Ex. 35 at 60:6-61:10; Ex. 36 at 37:24-38:9; Ex. 37 at 63:14-64:23; Ex. 38 at 13:22-14:21, 39:25-40:11; Ex. 39 at 82:16-23; Ex. 40 at 113:9-25; Ex. 41:8-10; Ex. 42 at 51:2-10; Ex. 43 at 66:2-13, 74:24-29; Ex. 44 at 49:16-50:1, 69:3-19, 375:22-376:7; Ex. 45 at 86:6-21; Ex. 46 at 37:14-25, 45:17-19; Ex. 47 at 28:25-30:12; Ex. 48 at 41:23-42:4; Ex. 49 at 46:19-47:6, 53:15-17; Ex. 50 at 22:6-17; Ex. 51 at 35:20-11; Ex. 52 at 25:18-22; Ex. 53 at 40:19-41:3, 52:2-4, 56:16-57:9; Ex. 54 at 32:9-15; Ex. 55 at 36:22-25, 48:6-8; Ex. 56 at 43:23-44:4, 207:10-13, 244:1-24; Ex. 57 at 33:1-21; Ex. 58 at 41:13-42:3; Ex. 59 at 29:7-17; Ex. 60 at 39:23-40:13.

material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also BMW, Inc. v. BMW of N. Am., Inc.*, 974 F2d 1358, 1363 (3d Cir. 1992). At summary judgment, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "However, a court need not 'turn a blind eye to the weight of the evidence.'" *Superior Offshore Int'l, Inc. v. Bristow Group*, No. 11-3010, 2012 U.S. App. LEXIS 15539 (3d Cir. July 27, 2012) (quoting *BMW*, 974 F.2d at 1363).

To demonstrate that a dispute is "genuine," the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts ..." but must instead "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (quotation marks omitted).

ARGUMENT

I. CADBURY DID NOT PARTICIPATE IN AN AGREEMENT TO FIX THE PRICE OF CHOCOLATE CANDY IN THE UNITED STATES.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15. U.S.C. § 1. Section 1 requires a plaintiff to prove two elements: (1) that defendants engaged in some form of "concerted action," and (2) that such action resulted in an "unreasonable restraint on trade." *In re Ins. Brokerage Antitrust Litig*, 618 F.3d 300, 315 (3d Cir. 2010). [6] The Third Circuit has held that the term "concerted action" means "`a unity of purpose or a common design and understanding or a meeting of the minds' or 'a conscious commitment to a common scheme.'" *Id.* at 314-315. Concerted action may be established in two ways: (1) direct evidence of concerted action, or (2) evidence that defendants engaged in parallel conduct and that "plus factors" exist that indicate this conduct violates the Sherman Act. *Id.* at 323.

[6] There is little authority interpreting what is required to establish a "trust" for the purpose of fixing prices under K.S.A. 50-101. Recognizing this "undeveloped area of state law," courts considering Kansas Restraint of Trade Act claims look to federal antitrust law. *Folkers v. Am. Massage Therapy Ass'n, Inc.*, No 03-2399, 2004 U.S. Dist. LEXIS 2156, at *24 (D. Kan. 2004); *see also Bergstom v. Noah*, 266 Kan. 829, 845 (1999) (noting that "cases [regarding federal law] may be persuasive authority for any state court interpreting its antitrust laws").

No reasonable juror could conclude that Cadbury shared in any common scheme relevant to AWG's claims: the record contains no evidence—either direct or circumstantial—that Cadbury engaged in concerted action to fix the price of chocolate candy in the United States.

A. The Record is Devoid of Evidence of an Agreement to Fix Prices.

In order to establish the existence of an agreement through direct evidence, AWG must show "evidence that is explicit and requires *no inferences* to establish the proposition or conclusion being asserted," *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (emphasis added), such as "a document or conversation explicitly manifesting the existence of the agreement in question." *In re Ins. Brokerage*, 618 F.3d at 324 n. 23; *see also InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 149 (3d Cir. 2003) (holding that "cases that require direct evidence of an illegal agreement [must] be established with much greater clarity" than the ambiguous statements plaintiffs offered to show an agreement).

Thus, establishing concerted action through direct evidence is a difficult task in the absence of testimony or documentary proof that embodies the agreement itself. In *Baby Food*, for instance, plaintiffs contended they had adduced direct evidence of a conspiracy when they identified statements from employees that the employees had exchanged pricing information with competitors, documentary evidence that defendants knew of competitors' impending price increases, and an

internal memorandum referring to a "truce" between the defendants. 166 F.3d at 120-21. The Third Circuit agreed that this record was insufficient as direct evidence because the facts provided by plaintiffs "evince[d] only an exchange of information among the defendants" rather than a conspiracy. *Id.* at 121. Plaintiffs, the court concluded, were "unable to present evidence of conspiracy to fix prices without drawing on inferences from all of the evidence they ha[d] introduced." *Id.*

Far from identifying the kind of informational exchanges among defendants that were at issue in *Baby Food*, AWG can point to nothing even *approaching* direct evidence of a conspiracy. There is absolutely no evidence that anyone at Cadbury discussed U.S. chocolate pricing with competitors. No Cadbury witness deposed in this litigation testified that he or she ever discussed United States chocolate pricing with a competitor *at all*, much less in the context of setting or fixing prices; no other defendant testified to such conversations with anyone at Cadbury. Nor is there any documentary evidence of such discussions; the employees responsible for the relationship between Hershey and Cadbury, for instance, did not discuss retail prices. In the rare instances when Cadbury employees were aware of retail pricing of the Licensed Products in the United States, they relied only on public information. (*See, e.g.*, Orr Decl., Ex. 13.) There is no evidence that Cadbury ever obtained a non-public price list for a competitor's chocolate products in the United States or had any other notice of impending price

increases. And, consistent with the terms of the License Agreements, there is no evidence that Cadbury had any input (let alone authority) on the price of even its own Licensed Products in the United States.

There can be no dispute that not even a scintilla of direct evidence appears in the enormous record of this litigation to suggest that the agreement AWG claims Cadbury and its competitors made ever existed. Without such evidence, AWG's claims can only survive summary judgment if a reasonable juror could find that circumstantial evidence shows that concerted action occurred. As discussed below, AWG falls far short of meeting that burden.

B. Cadbury Did Not—and Could Not—Engage in Parallel Conduct Concerning the Price of Chocolate Candy in the United States.

A plaintiff that cannot rely on direct evidence to establish concerted action under the Sherman Act must prove concerted action through evidence of parallel conduct (such as raising prices simultaneously) combined with certain other "plus factors" that render that conduct a violation of the Sherman Act. *In re Ins. Brokerage*, 618 F.3d at 323. If a plaintiff cannot point to evidence of concerted action either through direct or circumstantial evidence, summary judgment is warranted. *Superior Offshore Int'l, Inc. v. Bristow Group Inc.*, No. 1:09-CV-00438-LDD, 2011 U.S. Dist. LEXIS 66834 (D. Del. June 23, 2011) (granting defendant's summary judgment motion, in part because "Plaintiff has not come

forward with any facts that show Defendants acted in concert with a unity of purpose or reached a meeting of the minds in an unlawful arrangement."), *aff'd,* 2012 U.S. App. LEXIS 15539 (3d Cir. 2012).

AWG fares no better in identifying evidence that could satisfy this standard. AWG's theory is that the defendants engaged in parallel conduct by simultaneously increasing prices on several categories of chocolate candy in (i) December of 2002, (ii) November and December of 2004, and (iii) March and April of 2007. To succeed in asserting a Sherman Act claim based on conscious parallelism, "a plaintiff must show (1) that the defendant's behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process; and (3) certain 'plus' factors." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 n.11 (3d Cir. 2004). "Plus factors" are "circumstances under which . . . the inference of rational independent choice [is] less attractive than . . . concerted action." *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir. 2004). The Third Circuit has identified three potential "plus" factors: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *In re Ins. Brokerage*, 618 F.3d at 322 (quotation marks omitted).

AWG's theory fails at the first step: Cadbury never engaged in any of the parallel conduct plaintiffs contend occurred with respect to the United States market because Cadbury had no prices to raise on the dates of the alleged simultaneous price increases. Witnesses for Cadbury, other defendants, and plaintiffs alike testified that Cadbury had no meaningful chocolate candy business in the U.S., and not a single plaintiff in this action testified that he or she ever purchased chocolate candy from Cadbury. (*See, e.g.* Orr Decl., Ex. 26 at 130:18-131:7; Ex. 29 at 46:21-47:14, 230:14; Ex. 61 at 265:11-15.) Nothing produced in discovery contradicts those statements. As David Sculthorpe, former President of Cadbury Adams Canada, testified, "There was no chocolate in the U.S." (Orr Decl. Ex. 29 at 230:14.)

Nor are there facts to suggest Cadbury was in a position to set, or even to give input into, the prices of chocolate candy sold by competitors in the United States. Cadbury's royalties under the Licensing Agreements were calculated as a percentage of aggregate Net Sales. All information exchanged concerning Cadbury's royalties reflected only that information, and lacked any data about the pricing of the Licensed Products. (*See* Orr Decl. Exs. 17-19.) AWG can point to no evidence that anyone at Cadbury ever received non-public information about U.S. chocolate candy pricing—from Hershey or any other competitor.

There is no evidence that a Cadbury participated in the parallel conduct alleged, and summary judgment is warranted. The extensive record developed during discovery only confirms that Cadbury's role in the U.S. market was restricted by the Licensing Agreements. As Lead Counsel for Class Plaintiffs stated at last year's fairness hearing, the absence of parallel conduct was a driving force behind the settlement of Class claims—those Plaintiffs all but conceded they would not be able to point to sufficient evidence to survive summary judgment. (Ex. 6 at 10:17-19) ("There's just very little evidence with respect to [Cadbury] in the United States . . . .") Facing the same facts, AWG cannot establish a genuine issue of fact as to parallel conduct by Cadbury: none exists.

II. CADBURY DOES NOT COMPETE IN THE RELEVANT MARKET AND THUS CANNOT BE LIABLE UNDER SECTION 1.

The absence of evidence that Cadbury participated in the United States market for chocolate candy presents another fundamental problem for AWG's claims: AWG cannot define a market relevant to its claims in which Cadbury is a participant. *See United States v. Sargent Electric Co.*, 785 F.2d 1123, 1127 (3d Cir. Pa. 1986); *see also Spanish Broad. Sys. v. Clear Channel Communs., Inc.*, 242 F. Supp. 2d 1350, 1361 (S.D. Fla. 2003) ("A non-competitor in the relevant market normally cannot be liable for a Section One violation."). As the Third Circuit has held, "[a]n agreement among persons who are not actual or potential competitors in

a relevant market is for Sherman Act purposes *brutum fulmen*. An agreement 'to [engage in anticompetitive conduct] wherever and whenever possible' is meaningless for Sherman Act purposes unless there are in the real world of the marketplace some 'whens' and 'wheres.'" *U.S. v. Sargent Electric*, 785 F.2d at 1127.

AWG cannot describe any "whens" or "wheres" involving Cadbury. AWG's defines the relevant market as "The United States market for chocolate candy products." (Compl., para 43.) But Cadbury is not an actual competitor—or a potential competitor, due to the restrictions of Hershey's exclusive licenses—in the market AWG claims is relevant. *See U.S. v. Sargent Electric Co.*, 785 F.2d 1129 (granting summary judgment in bid-rigging action where undisputed facts showed defendants were not potential competitors at facilities in question); *Spanish Broad Sys.*, 242 F. Supp. 2d 1350 (dismissing Section 1 claim against English-language radio company, in part because English-language company did not compete in the Spanish-language radio market, in which anticompetitive activity was alleged to have taken place). Because it is not clear when, why, or how, Cadbury could participate in an agreement to fix U.S. chocolate candy prices when it did not sell chocolate candy in the United States, no reasonable jury could conclude that Cadbury was an actual or potential competitor in the relevant market.

CONCLUSION

The evidence in this case overwhelmingly confirms that Cadbury had no discussions or role in pricing chocolate candy in the United States during the relevant time periods, and does not participate meaningfully in the United States market for chocolate candy. Based on the complete absence of either direct or circumstantial evidence that anyone at Cadbury participated in discussions concerning the price of chocolate candy sold in the United States, and the lack of evidence that Cadbury competes in the relevant market, no reasonable juror could find that Cadbury engaged in concerted action to fix the price of chocolate candy sold in the United States market. For the reasons set forth above, Cadbury respectfully requests that the Court grant its motion for summary judgment and dismiss AWG's claims as a matter of law.

Respectfully submitted,

/s/Bridget E. Montgomery

Bridget E. Montgomery, Esquire (No. 56105)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101
Tel: (717) 237-6000
Fax: (717) 237-6019
bmontgomery@eckertseamans.com

/s/Dennis P. Orr

Dennis P. Orr, Esquire
Jessica L. Kaufman, Esquire
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0050
Tel.: (212) 468-8000
Fax: (212) 468-7900
dorr@mofo.com
jkaufman@mofo.com

Date: May 31, 2013

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

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2013, I caused to be served on all counsel of record, via the Court's ECF system, a true and correct copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF THE CADBURY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

/s/Bridget E. Montgomery
Bridget E. Montgomery, Esquire

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