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

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I. INTRODUCTION

Defendants Cadbury plc, Cadbury Holdings Ltd. and Cadbury Adams Canada Inc. (collectively, the "Cadbury Defendants") submit this Reply Memorandum in Further Support of their Motion to Dismiss the Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("Direct Purchaser Class Compl."), the Indirect End Users' Consolidated Complaint ("Indirect Purchaser End User Compl."), the Indirect Purchasers for Resale's Consolidated Complaint ("Indirect Purchaser Resale Compl.") and the Individual Plaintiffs' Amended Consolidated Complaint ("Individual Plaintiffs' Compl."). The Cadbury Defendants have signed on to and respectfully refer the Court to all of the arguments made in Defendants' Reply Briefs in Support of the Motion to Dismiss, dated December 4, 2008 (collectively, the "Joint Reply Briefs").[1]

Plaintiffs seek to embroil three separate and distinct foreign Cadbury entities, which Plaintiffs concede did not sell any "chocolate candy products" (as defined in the consolidated complaints) in the United States, in this price-fixing litigation. But, even a cursory review of Plaintiffs' allegations as to each of these

[1] The Cadbury Defendants signed on to Defendants' Briefs in Support of the Motion to Dismiss, dated September 29, 2008. Consequently, contrary to Plaintiffs' assertions in their briefs, the Cadbury Defendants have not "waived" any arguments in support of their motions to dismiss the various consolidated complaints.

three entities reveals that those allegations are woefully insufficient to survive a motion to dismiss.

Plaintiffs' brief in opposition to the Cadbury Defendants' motion papers reinforces this conclusion. In a forty-nine page brief, Plaintiffs spend nearly thirty-five of those pages trying to bolster their vain effort to assert personal jurisdiction over Cadbury plc and Cadbury Holdings Ltd.[2] One has to reach page 35 of Plaintiffs' brief before first encountering Plaintiffs' argument on the supposed merits of the "claims" they think they have set out against the Cadbury Defendants. And that argument is nothing short of frivolous. For if Plaintiffs have stated a claim here against the Cadbury Defendants then, as will be shown below, similar "price-fixing" charges can be leveled against any company that exits a market by licensing a competitor. Not surprisingly, that is not the law and not even Plaintiffs' opposition brief can muster the courage to state otherwise.

We begin with the completely uncontradicted fact that Plaintiffs have been unable to plead even a single, solitary meeting or communication between any Cadbury Defendant and any other manufacturer of chocolate products at which the pricing of chocolate products (Cadbury-branded or otherwise) in the United States was discussed. We then turn to the second uncontested fact present here: that the

[2] Cadbury Holdings Ltd. and Cadbury plc are submitting a separate reply brief in further support of the motion to dismiss for lack of personal jurisdiction that addresses in detail Plaintiffs' opposition to that motion.

Cadbury Defendants did not make or sell chocolate products in the United States during the alleged conspiracy period. Plaintiffs' inability to allege that any of the Cadbury Defendants were competitors in the relevant market or that they otherwise participated in the alleged conspiracy fatally undermines Plaintiffs' claims against Cadbury.

Plaintiffs, recognizing these defects, turn to a license agreement with the Hershey Chocolate Company ("Hershey") that has been publicly available for twenty years.[3] They then recite its terms to this Court (one could even say they go so far as to distort those terms) and conclude that they have thus made out a sufficient complaint against the Cadbury Defendants for conspiring to fix prices in a market in which they have not participated for twenty years.

What is most remarkable about Plaintiffs' opposition to the Cadbury Defendants' motion is that Plaintiffs are reduced to arguing, in effect, that the license agreement with Hershey, now a public fact for twenty years after thorough review by the United States Department of Justice, itself supports an inference of a violation of United States antitrust laws. Plaintiffs maintain, without any evidence, that in meetings between Hershey and Cadbury representatives, the participants must have discussed prices and thus have violated the antitrust laws. It is hardly

[3] Plaintiffs do not and cannot allege that Cadbury Adams Canada Inc. is a party to this license agreement.

surprising that they cite no support for this proposition because there simply is none.

So radical is Plaintiffs' response to the Cadbury Defendants' motion to dismiss, that the following consequences would flow from Plaintiffs' "theory":

- Any company that exits a market by licensing a competitor would, in Plaintiffs' view of the world, immediately be potentially liable for participation in a price-fixing conspiracy;

- Non-sellers of products of many different stripes – patent holders, trademark owners and the like – could be accused of fixing prices with grantees receiving intellectual property rights as long as the grantor and grantee have met to discuss the sale of the affected products;

- Any principal-agent relationship in the sale of a product could give rise to the creation of a "price-fixing conspiracy" along the lines of the one alleged in this instance; and

- The mere existence of an antitrust investigation outside the United States would warrant continuation of a private antitrust case in the United States against a non-U.S. company that even Plaintiffs admit did not sell the subject product in the United States.

Plaintiffs' allegations against the Cadbury Defendants are insufficient to meet the pleading standards set out by *Twombly* and its progeny. Indeed, Plaintiffs would set the *Twombly* bar so low as to make it virtually non-existent. An examination of Plaintiffs' allegations regarding the various Cadbury Defendants highlights these deficiencies.

As to Cadbury Adams Canada Inc., Plaintiffs:

Do Allege	**Do Not Allege**
An investigation by the Canadian Competition Bureau of the activities of Canadian chocolate manufacturers in Canada.	No allegation of any sales of chocolate products in the United States.
	No allegation of participation in any discussions or meetings pertaining to the sale or pricing of chocolate products in the United States.
	No allegation of any licensing relationship with any U.S. manufacturer or seller of chocolate products.

As to Cadbury plc and Cadbury Holdings Ltd., Plaintiffs:

Do Allege	**Do Not Allege**
A twenty-year-old, publicly available, exclusive license arrangement between Cadbury and Hershey that was reviewed by the Department of Justice at the time of Cadbury's sale of its U.S. chocolate business to Hershey.	No allegation of any sales of chocolate products by either Cadbury plc or Cadbury Holdings Ltd. in the United States during the alleged conspiracy period.
That the license agreement authorized regular meetings between Hershey and Cadbury executives to discuss the manufacture and marketing by Hershey of Cadbury-branded chocolate products in the United States.	No allegation that the meetings authorized by the license agreements actually took place.
	No allegation that any of the meetings authorized by the license agreements involved the discussion of any chocolate products other than the Cadbury-branded chocolate products that are the subject of the license.

	No allegation that any of the meetings authorized by the license agreements involved the discussion of the price of any chocolate products (including the price of the licensed products) sold in the United States.
	No allegation of participation by either Cadbury plc or Cadbury Holdings Ltd. in any discussions or meetings with Mars or Nestle pertaining to the sale or pricing of chocolate products in the United States.
	No allegation of participation by either Cadbury plc or Cadbury Holdings Ltd. in any discussions or meetings with Hershey, outside of those authorized by the license agreements, pertaining to the sale or pricing of any chocolate products in the United States.
	No allegation of any investigation by the Canadian Competition Bureau or anyone else of the activities of either Cadbury plc or Cadbury Holdings Ltd.

What is plain here is that no Cadbury entity has any role in any litigation about fixing prices of chocolate products in the United States. Indeed, even the very license provisions relied upon by Plaintiffs make clear that any discussions between Hershey and Cadbury were limited to the manufacture and marketing of Cadbury-branded products by Hershey and did not include non-Cadbury-branded products. Accordingly, the alleged discussions between Cadbury as licensor and Hershey as licensee about the Cadbury-licensed products cannot give rise to a price-fixing claim. Moreover, under the terms of the license agreements,

Hershey's pricing of Cadbury-branded chocolate was not a subject of discussion specified by the license agreements. Thus, Plaintiffs' allegations regarding these meetings between Cadbury and Hershey cannot lead to an inference of illicit collusion. On these undisputed facts – no meetings, no sales, no discussions with Hershey concerning pricing – Plaintiffs' efforts to concoct an offense by the Cadbury Defendants come to rest once and for all. The license provisions relied upon by Plaintiffs did not create an antitrust issue twenty years ago when they were presented to the Department of Justice and they present no such issue here. The motion of the Cadbury Defendants to dismiss the baseless claims against them should be granted.

II. ARGUMENT

A. The Consolidated Complaints Fail To Allege That The Cadbury Defendants Participated In Any Discussion Or Agreement To Fix The Price of Chocolate Products in the United States

The consolidated complaints fail to allege that any Cadbury Defendant sold any chocolate products in the United States during the purported conspiracy period. This is not surprising, as it is public knowledge that Cadbury exited the U.S. chocolate business in 1988. *See* Declaration of John Mills in Support of the Motion by Defendants Cadbury Holdings Ltd. and Cadbury plc to Dismiss for Lack of Personal Jurisdiction, dated September 26, 2008 ("Cadbury Jurisdictional Decl."), ¶¶ 27-29 ("Cadbury sold its United States chocolate business to the

Hershey Foods Company ("Hershey").") and Ex. 1 (Hershey Foods Corporation Form 8-K, dated August 25, 1988; *see also* Time, September 8, 2008, *Is Parting Sweet for Cadbury?* ("Cadbury does not control its own chocolate brand in the U.S., having sold those rights to Hershey in 1988 under a 25-year agreement that only Hershey can terminate."). Indeed, Plaintiffs concede that Cadbury sold its U.S. chocolate business to Hershey back in 1988 and that none of the Cadbury Defendants sold chocolate products in the United States at any time relevant to this action. *See* Plaintiffs' Memorandum In Opposition to the Cadbury Defendants' Motion to Dismiss ("Plaintiffs' Opp."), at 38 ("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.") (emphasis added).

A licensor and licensee are, of course, not horizontal competitors, *see Freer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153 (3d. Cir. 1981), and cannot conspire for purposes of the Sherman Act. *Levi Case Co. v. ATS Prods. Inc.*, 788 F. Supp. 428, 432 (N.D. Cal. 1992) (licensor and exclusive licensee cannot conspire for purposes of the Sherman Act). Accordingly, the Cadbury Defendants did not compete with Mars, Hershey or Nestle for the sale of chocolate products in the United States during the alleged conspiracy period. *See Texaco Inc. v. Dagher*, 126 S.Ct. 1276, 1278 (2006) ("Texaco and Shell Oil formed a joint venture . . .

thereby ending competition between the two companies in the domestic refining and marketing of gasoline"). Thus, the Cadbury Defendants were incapable of conspiring in violation of the Sherman Act to fix the price of chocolate products in the United States. *See Evans v. S. S. Kresge Co.*, 394 F. Supp. 817, 847 (W.D. Pa. 1975) (concluding that alleged price-fixing agreement did not violate Sherman Act because it was not made between competitors and stating, "before we may say that such agreements . . . are inherently unlawful, we must find that the agreements were made between competitors, actual or potential, dealing in competing products in a relevant market."); *Mastandrea v. Gurrentz Int'l Corp.*, 65 F.R.D. 52, 56 (W.D. Pa. 1974) ("in order for a conspiracy to exist within the meaning of the antitrust laws, it must be alleged that there was a conspiracy *between competitors*") (emphasis added).

Also absent from both Plaintiffs' allegations in the consolidated complaints and the elaborations in Plaintiffs' briefs is a single allegation that any of the Cadbury Defendants participated in an illegal discussion or agreement to fix the price of chocolate products in the United States. Although Plaintiffs inappropriately try to lump all of the Cadbury Defendants together, each of the Cadbury Defendants is a separate and distinct corporate entity and each has moved to dismiss the complaints. Accordingly, the sufficiency of Plaintiffs' allegations must be determined with regard to each of the Cadbury Defendants.

1. Cadbury Adams Canada Inc.

Parsing out the details of Plaintiffs' consolidated complaints, as to defendant Cadbury Adams Canada Inc., Plaintiffs' sole allegation is that the company is under investigation by the Canadian Competition Bureau ("CCB") for allegedly agreeing to fix the price of chocolate products in Canada. Plaintiffs readily concede in their briefs that the CCB's jurisdiction and interest is confined to Canada and does not include investigation of anti-competitive activities in or directed at the United States. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss (1) Direct Purchaser Plaintiffs' Consolidated Class Action Complaint and (2) Individual Plaintiffs' Amended Consolidated Complaint at 3. Moreover, neither the consolidated complaints nor the pronouncements from the CBC cited by Plaintiffs indicate or refer to a single meeting, contact or communication by Cadbury Adams Canada Inc. or any other Cadbury entity relating to the pricing of chocolate products in the United States. Thus, the consolidated complaints' quotations from excerpts of the CBC's November 28, 2007 Information pertaining to events, conduct and effects in Canada do not allege a violation of United States antitrust laws.

None of Plaintiffs' other allegations serve to remedy this pleading deficiency. Notably, there is not a single well-founded allegation in any of the consolidated complaints that Cadbury Adams Canada Inc. sold any chocolate

products in the United States during the conspiracy period. Nor do Plaintiffs allege anywhere that Cadbury Adams Canada Inc. licensed the manufacture or sale of any chocolate products in the United States during the relevant time period. Finally, there is no allegation that anyone from Cadbury Adams Canada Inc. ever participated in, authorized, or even had knowledge of any meetings to discuss chocolate prices in the United States. Thus, the various consolidated complaints fail to state a claim against Cadbury Adams Canada Inc.[4]

2. Cadbury plc and Cadbury Holdings Ltd.

In regard to defendants Cadbury plc and Cadbury Holdings Ltd., the consolidated complaints do not allege that the conduct of these U.K.-based entities

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[4] Plaintiffs' briefs in opposition to Defendants' motions to dismiss contain many allegations not found in Plaintiffs' complaints. It is black-letter law that a plaintiff is not entitled to amend its complaint through statements made in motion papers. *See, e.g.*, *Melrose, Inc. v. City of Pittsburgh*, No. 02 Civ. 1161 (JFC), 2008 WL 4449687, at *13 (W.D. Pa. Sept. 30, 2008) ("It is well established that a plaintiff may not attempt to amend a complaint through a brief in opposition to a motion for summary judgment."). Moreover, supplemental allegations in motion papers that are not found in the complaints should not be considered on a motion to dismiss. *See*, *e.g.*, *Berkoski v. Ashland Reg'l Med. Ctr.*, 951 F. Supp. 544, 546 (M.D. Pa. 1997) (converting motion to dismiss to motion for summary judgment in view of fact that motion to dismiss was supported by several documents outside pleadings citing supplemental memorandum of defendant, and fact that plaintiff also included documents in opposition papers citing its opposing brief and statement of facts.); *cf. Berry v. Klem*, 283 Fed. Appx. 1, 3 (3d Cir. 2008) ("To decide a motion to dismiss, a court generally should consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.") (internal citation and quotations omitted). But, even if the Court were to consider the factual material presented for the first time in Plaintiffs' motion papers, those briefs do not contain a single supplemental fact as to Cadbury Adams Canada Inc. on any of these issues.

is being investigated by the CCB (or by anyone else for that matter). Moreover, the consolidated complaints also are devoid of any well-founded factual allegations that either of these two entities sold any chocolate products in the United States during the alleged conspiracy period. Indeed, as set forth above, Plaintiffs concede that Cadbury sold its chocolate business in the United States to Hershey back in 1988 and that neither of these Cadbury entities sold chocolate products in the United States at any time relevant to this action. *See* Plaintiffs' Opp. at 38.

The consolidated complaints also lack a single allegation that either Cadbury Holdings Ltd. or Cadbury plc participated in a meeting with any competitor to actually discuss or set the price of chocolate products in the United States. Indeed, no specific meetings or communications of any kind are alleged between Cadbury Holdings Ltd. or Cadbury plc on the one hand and anyone from Mars or Nestle on the other hand. Similarly, there are no allegations that anyone – including Hershey – acted as Cadbury's agent in any meetings with either Mars or Nestle.

As amplified at length in Plaintiffs' briefs, the allegations against the two U.K.-based Cadbury Defendants boil down to unsupported speculation that, in the context of the license agreements between Hershey and Cadbury, the Cadbury Defendants somehow must have discussed and reached agreement on the price of chocolate products in the United States. *See* Plaintiffs' Opp. at 42 ("*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*.") (emphasis added); *see also id.* at 41 ("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.") (emphasis added).

As a preliminary matter, Plaintiffs do not allege that the meetings provided for in the license agreements actually occurred, only that the license agreements called for such meetings. But, assuming that Plaintiffs are entitled to an inference that these meetings did occur as contemplated by the license agreements, Plaintiffs are not entitled to any inference that those meetings involved any discussions other than those authorized by the license agreements. Plaintiffs, of course, cite no case law for their proposition that the mere occurrence of legitimate meetings between a licensor and licensee, without more, supports an inference of collusion. The supposed "inconceivability" that meetings between Hershey and Cadbury could not have been conducted without engaging in illegal conspiratorial behavior is hardly a sufficient basis for a claim of price-fixing.

Similarly, the allegation that meetings between Hershey and Cadbury called for by the license agreements "support an inference" that Cadbury had "motive and

opportunity" to fix the price of chocolate products in the United States does not amount to an allegation that Cadbury actually participated in any agreement to do so. Moreover, plainly evident from the license agreements is that Cadbury's incentive was to receive a higher royalty payment. That royalty payment was based on the net revenue generated by the sale of Cadbury-branded products. An increase of net revenue can of course be realized by either increased pricing of Cadbury-branded products (assuming there is not a corresponding loss of volume) or lower pricing that presumably leads to increased market share. Given that the royalty formula is based entirely on the top-line revenue figure and is unaffected by the cost to Hershey of the goods sold, Cadbury was only concerned with higher revenues, regardless of whether those revenues were achieved through higher or lower pricing. Accordingly, on the facts alleged here, Plaintiffs are not entitled to an inference that Cadbury was motivated to fix prices for chocolate products above competitive levels.

Plaintiffs' speculation is particularly specious where, as here, the meetings authorized by the license agreements and relied on by Plaintiffs are equally consistent with legitimate business behavior. *See Matsushita Elect. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). As pointed out in the Cadbury Defendants' opening brief, that there were meetings between Hershey and Cadbury representatives has hardly been a secret. The license agreements – including the

provision requiring periodic meetings between Hershey and Cadbury representatives to discuss marketing and sales – were part of a public filing in connection with Hershey's purchase of Cadbury's U.S. chocolate business back in 1988. Not only were the terms of those agreements open to public scrutiny at that time, they were also reviewed by the Department of Justice as part of the Hart-Scott-Rodino ("HSR") review process. The Department of Justice declined to take any action whatsoever to change them. For over *twenty years* now – long before the start of Plaintiffs' alleged conspiracy period – the license agreements have been in effect without any objection having been raised by state or federal regulators or any private party. Accordingly, allegations that these meetings – and the discussions specified in and contemplated by the license agreements – occurred are plainly insufficient to raise any inference of improper collusion.

B. Plaintiffs Do Not Allege Any Facts To Support Their Contention That The Cadbury Defendants Had Access To Pricing Information Regarding Chocolate Products In The United States

Plaintiffs' briefs engage in pure speculation that Cadbury must have had knowledge of the pricing by Hershey of both Hershey- and Cadbury-branded chocolate products in the United States. But that very speculation highlights the fact that Plaintiffs' boilerplate allegations of such knowledge lack any factual foundation. Indeed, as Plaintiffs' briefs implicitly concede, the terms of the license agreements between Hershey and Cadbury demonstrate that Plaintiffs' proposed

inferences are totally unfounded. The simple truth is that Plaintiffs have not alleged – and cannot allege – any facts in support of the inferences they wish to draw.

As discussed above, the mere fact that Hershey and Cadbury may have had legitimate meetings at regular intervals – pursuant to the terms of a publicly disclosed, twenty-year-old license agreement that was reviewed and not challenged by the Department of Justice – does not, without more, lead to an inference of illicit behavior. Indeed, the terms of the license agreement are standard and unexceptional, and Plaintiffs have not alleged otherwise.

Plaintiffs' attempts to insinuate something illicit into these standard license agreements are fatally undermined by the statements in their own briefs. For example, Plaintiffs concede that Cadbury and Hershey met to discuss the "marketing and sales of Cadbury-branded products in the U.S." Plaintiffs' Opp. at 38 (emphasis added). There is, however, no allegation in the consolidated complaints or in Plaintiffs' briefs that these regular meetings involved the discussion of any Hershey-branded or other non-licensed chocolate products. And indeed, the license agreements that form the sole basis for Plaintiffs' allegations about these meetings specifically provide for only a discussion and exchange of certain limited information pertaining to the licensed (*i.e.*, Cadbury-branded) products. There is, of course, nothing improper or illicit about a licensor

discussing the sales and marketing of the *licensed* products with its licensee, *see Levi Case*, 788 F. Supp. at 432, and Plaintiffs have proffered no authority to the contrary.

Indeed, as pointed out in the Cadbury Defendants' opening brief, the license agreements were part of the sale of Cadbury's U.S. chocolate business to Hershey and were thus reviewed by the United States Department of Justice pursuant to a Hart-Scott-Rodino filing. *See* Asset Purchase Agreement § 9.4 (setting forth the need to obtain HSR approval of the entire transaction). The Cadbury Defendants certainly do not, as Plaintiffs suggest, contend that such clearance by the Department of Justice "implies that Hershey and Cadbury could not have violated the antitrust laws since then." *See* Plaintiffs' Opp. at 46, n.37. But, the HSR approval does indicate that activity in compliance with the terms of the license agreements does not violate the antitrust laws. Plaintiffs have not alleged any facts that would support an inference that any of the Cadbury Defendants or Hershey did something other than what was permitted by the terms of the license agreements.

And even with respect to Cadbury-branded products, Plaintiffs ultimately concede that what Cadbury and Hershey actually discussed was not the pricing, but only the net sales, of Cadbury-branded products. Plaintiffs' Opp. at 39.[5] This is in

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[5] Of course, even if it had occurred, a discussion between licensor Cadbury and its sole U.S. licensee Hershey about the U.S. price of Cadbury-branded chocolate products would not be illegal. *See*, *e.g.*, *Levi Case*, 788 F. Supp. at 432.

accord with the terms of the license agreements, which clearly delineate that the information Hershey provides to Cadbury is the net sales, and not the pricing of the Cadbury-branded products sold by Hershey. Plaintiffs also agree that "Net Sales" is defined in the various license agreements as "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 under the Trademarks in the Territory **during each Annual Period**, [less certain allowances]." Trademark License Agreement § 1.1(f); PPY Agreement § 1.1(e) (emphasis added); *see also* Plaintiffs' Opp. at 39. "Licensed Products" is defined as "**all food and food related products** and services and non-food promotional products and services." *Id.* at §§ 1.1(c) and (d), respectively (emphasis added). Thus Plaintiffs concede (as they must), that in accordance with the terms of the license agreements, Hershey and Cadbury discussed the net sales and not the pricing of Cadbury-branded products.

To circumvent this crucial concession, Plaintiffs conflate the terms "price" and "net sales," even though they are two very different concepts. Net sales are of course not equivalent to price. Thus, providing a net sales figure to someone does not, without more, disclose anything about prices being charged. Plaintiffs similarly fail to address the schedules to the license agreements – pointed out in the Cadbury Defendants' opening brief – that delineate the calculation methodology for net sales. Those schedules make clear that "net sales" consist of *one* number

based on the aggregate gross sales of *all* licensed products, minus certain allowances. *See* Trademark License Agreement Schedule B; PPY Agreement Schedule A. It is, of course, elementary that providing a gross or even net revenue figure does not disclose anything about the prices being charged, particularly where, as here, the revenue figure is an aggregate number for several different product lines and numerous differentiated products. Otherwise, every annual report showing a company's net revenues would, under Plaintiffs' rationale, disclose pricing information to its competitors in violation of the antitrust laws.

Accordingly, there is no factual basis for any allegation by Plaintiffs that any of the Cadbury Defendants were given information about any chocolate product pricing in the United States. Once the boilerplate allegations of the consolidated complaints are stripped bare and examined under the light of Plaintiffs' explanations in their own briefs, it is clear that the allegations regarding the meetings between Cadbury and Hershey do not support an antitrust claim.

C. The License Agreements Gave Hershey Complete Control Over The Pricing Of The Licensed Products; Thus, Plaintiffs Cannot Allege That The Cadbury Defendants Had Input On Or Control Over The Pricing of Chocolate Products in the United States

While Plaintiffs flatly assert that Cadbury maintained control over the pricing by Hershey of Cadbury-branded products in the United States, Plaintiffs fail to allege a single fact in support of that erroneous contention. *See* Plaintiffs' Opp. at 39-40. As a preliminary matter, Plaintiffs have not and cannot allege that

Cadbury Adams Canada Inc. was a party to any license agreement pertaining to the sale of chocolate products in the United States. Accordingly, none of the license-centric arguments advanced by Plaintiffs support the assertion of a claim against Cadbury Adams Canada Inc.

As for the Cadbury U.K. Defendants, the terms of the very license agreements between Hershey and Cadbury that Plaintiffs purport to rely upon for their contention completely contradict Plaintiffs' fanciful allegations. Consequently, Plaintiffs' allegations in this regard (as in many others) are not well-founded and should not be accepted by the Court as true. *See Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) ("[A] court need not credit either bald assertions or legal conclusions in a complaint when deciding a motion to dismiss.") (internal citation and quotations omitted).

As discussed above, nowhere in the license agreements is Hershey obligated to provide any Cadbury entity with information about the price Hershey charges in the United States for any Cadbury-branded product. All Hershey is obligated to do is provide an aggregate net sales figure that is used to calculate the royalty due under the license agreement. *See supra* at 17-18. Moreover, while the license agreements provide certain rights regarding quality control (Article 4), royalty payments (Article 5), and marketing of the product and use of the trademarks (Article 6), there is not a single provision in any license agreement that provides

any Cadbury Defendant with any input, influence or control over the pricing by Hershey of Cadbury-branded products. If the parties had contemplated that any Cadbury entity would exert any influence or control over the pricing of Cadbury-branded chocolate products in the United States, surely the license agreements would have specifically delineated the terms of such pricing authority and put some teeth in the ability to exercise that control.

Plaintiffs have not alleged that Cadbury Adams Canada Inc. was ever a party to or had any rights under the license agreements. Plaintiffs also have not alleged, and indeed cannot offer, any basis for an allegation that the Cadbury U.K. Defendants discussed anything more with Hershey than what was contemplated by and permitted under the license agreements. Accordingly, there is no factual basis for an allegation that any Cadbury Defendant had any information regarding, much less influence or control over, the pricing of chocolate products in the United States.

The Cadbury Defendants' lack of direct chocolate product sales, coupled with the absence of any information, input, influence or control over Hershey's pricing of Cadbury-branded products in the United States during the purported conspiracy period makes the inclusion of any Cadbury entity in the alleged U.S.

conspiracy more than implausible.[6] Adding unnecessary participants to a conspiracy that is necessarily dependant upon secrecy is not only irrational, but makes no sense from the view of the alleged co-conspirators. *Cf. Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) (conspiracy cannot be inferred where plaintiff's conspiracy theory is implausible or makes no economic sense); *Rosefielde v. Falcon Jet Corp.*, 701 F. Supp. 1053, 1061-62 (D.N.J. 1988) (same). It particularly makes no sense to include a party that does not even sell the product in question.

To include the Cadbury U.K. Defendants in this alleged price-fixing conspiracy would open up any licensor to claims that it engaged in a price-fixing conspiracy where, as here, the licensor and licensee were once competitors. That simply is not the law, and Plaintiffs raise nothing to suggest otherwise. Any claim against Cadbury Adams Canada Inc. is, of course, even more attenuated, as that entity is not even alleged to have been a party to the license agreements.

Plaintiffs have opposed the Cadbury Defendants' motion by reflexively turning to the license agreements that they have had access to for twenty years. In so doing, Plaintiffs have not thought through their "position" based on those

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[6] Plaintiffs' reliance on *Babyage.com* and *Howard Hess* is unavailing. Both involved vertical re-sale price maintenance arrangements. Plaintiffs have not interposed any resale price maintenance claims here, nor could they. Nor have they advanced any well-founded allegation that Cadbury had any input, much less control, over the pricing by Hershey of Cadbury-branded chocolate products.

agreements and the meetings that they have imaginatively created from them. On such creative writing, complaints for alleged price-fixing are not sustained. To do otherwise would set the *Twombly* bar for pleading an antitrust conspiracy so low as to be virtually non-existent. Accordingly, the consolidated complaints should be dismissed as against all of the Cadbury Defendants.

III. CONCLUSION

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

Respectfully submitted,

Dated: December 4, 2008

By: s/ Bridget E. Montgomery

Bridget E. Montgomery (PA 56105)
Jennifer L. Eul (PA 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.