UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION	:	**MDL DOCKET NO. 1935**
	:	**(Civil Action No. 1:08-MDL-1935)**
	:	**(Judge Conner)**
THIS DOCUMENT RELATES TO: ALL DIRECT PURCHASER AND INDIVIDUAL PLAINTIFF CLAIMS	:	*FILED ELECTRONICALLY*

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

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Direct Purchaser Plaintiffs and Individual Plaintiffs (together "Plaintiffs") respectfully submit this memorandum in opposition to the Motion to Dismiss filed on September 29, 2008 by Defendants The Hershey Company and Hershey Canada, Inc. (together "Hershey"); Mars Inc., Mars Snackfood US LLC, and Mars Canada, Inc. (together "Mars"); Nestlé U.S.A., Inc., Nestlé S.A. and Nestlé Canada, Inc. (together "Nestlé"); and Cadbury Holdings Ltd., Cadbury plc and Cadbury Adams Canada, Inc. (together "Cadbury") (Docket No. 476). For the reasons set forth below, Defendants' motion should be denied.

PRELIMINARY STATEMENT

The Complaints filed in this case allege that, at the beginning of the Class Period, facing waning demand and the prospect of stagnating revenue, Defendants engaged in collusion to increase their prices, revenues and profits. Beginning in late 2002, Defendants implemented a series of coordinated price increases of their Chocolate Candy products in the United States pursuant to an unlawful agreement to fix those prices. Plaintiffs are purchasers of Chocolate Candy products directly from Defendants who paid inflated prices and seek to recover the damages caused by this unlawful price-fixing conspiracy.

Defendants' Motion To Dismiss Plaintiffs' Complaints is based on the erroneous proposition that "none of Plaintiffs' factual allegations [bear] any

connection to the U.S. market." Def. Br. at 4.[1] Defendants have no choice but to make this argument – however implausible – because the Canadian Competition Bureau has found ***direct evidence*** of Defendants' price fixing conspiracy in Canada. In fact, however, Plaintiffs have set forth numerous allegations concerning Defendants' price-fixing in the U.S. market, including linkage to Defendants' Canadian price-fixing conspiracy:

- A U.S. market structure that is susceptible to price-fixing (Dir. Compl. ¶¶ 47, 52, 55, 56-58; Indiv. Compl. ¶¶ 60-66, 101);

- Numerous meetings and discussions among the Defendants that provided ample opportunity to discuss pricing in the U.S. (Dir. Compl. ¶¶ 89-97, 103; Indiv. Compl. ¶¶ 102, 106);

- Parallel price increases in the U.S. by each Defendant that cannot be explained by cost or demand increases (Dir. Compl. ¶¶ 59-71, 75-80; Indiv. Compl. ¶¶ 79, 94);

- Intertwined Canadian and U.S. markets for Chocolate Candy, including substantial imports of Canadian manufactured Chocolate Candy sold directly to U.S. customers in the U.S. (Dir. Compl. ¶¶ 50, 51, 53; Indiv. Compl. ¶ 107(f)-(h));

- Integrated corporate structures for the Defendants' U.S. and Canadian operations (Dir. Compl. ¶¶ 82-88, 105; Indiv. Compl. ¶¶ 30, 41, 46, 52, 107(b));

[1] References are made to the Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def. Br.") (Docket No. 477). References are also made to the Direct Purchaser Plaintiffs' Consolidated Class Action Complaint, filed Aug. 13, 2008 ("Dir. Compl.") (Docket No. 418) and the Individual Plaintiffs' [Corrected] Amended Consolidated Complaint, filed Aug. 13, 2008, as corrected Sept. 12, 2008 ("Indiv. Compl.") (Docket No. 448).

- Direct evidence of a conspiracy to fix the price of Chocolate Candy manufactured in Canada by the Defendants' Canadian affiliates (Dir. Compl. ¶¶ 98-105; Indiv. Compl. ¶¶ 119-34); and

- Direct evidence implicating at least one senior U.S. employee of the Defendant with the largest U.S. market share in the conspiracy to fix the price of Chocolate Candy in Canada, as well as of the involvement of a senior Canadian employee who previously had had pricing authority in the U.S. during the Class Period (Dir. Compl. ¶¶ 103-04; Indiv. Compl. ¶¶ 132-34).

Defendants appear to concede that Plaintiffs have sufficiently alleged the existence of a conspiracy to fix prices in Canada, but take the position that such allegations are irrelevant. This is incorrect under the circumstances pled in the Complaints. The fact that the Canadian Competition Bureau's investigative authority stops at the Canadian border does not mean that Defendants' price-fixing activities were similarly limited. Given the integrated nature of Defendants' North American operations and the intertwined Canadian and U.S. markets, and when viewed in light of all the allegations, it is *highly* plausible that Defendants conspired to fix the price of Chocolate Candy not only in Canada, but also in the United States.

Those allegations set Plaintiffs' Complaints apart from the complaint that was dismissed in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In *Twombly*, the complaint included no specific allegations of an actual agreement and "proceed[ed] ***exclusively*** via allegations of parallel conduct." *Id.* at 1971 n.11 (emphasis added); *see also id.* at 1970 ("the complaint leaves no doubt that

plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs"). Plaintiffs herein have alleged far more than parallel action to support the conclusion that a specific agreement to fix the price of Chocolate Candy existed in the U.S.

Perhaps recognizing as much, Defendants suggest that in the wake of *Twombly* each of Plaintiffs' specific allegations, when viewed in isolation, must independently suggest the existence of a conspiracy. Yet the law is clear – both before and after *Twombly* – that Plaintiffs' allegations must be viewed as a whole.[2]

Defendants' effort to disaggregate Plaintiffs' Complaints into isolated facts to which they can respond with piecemeal, *post-hoc* justifications is one of three improper strategies Defendants employ in their Motion to Dismiss. Another is to mischaracterize Plaintiffs' Complaints, asserting without any basis, for example, that the allegations are purely conclusory and wholly unrelated to the U.S. market. To the contrary, Plaintiffs set forth specific facts, including concerning market

[2] *See, e.g., Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007) (noting that an antitrust conspiracy must be "viewed as a whole"); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) ("Nothing in *Twombly* . . . contemplates this 'dismemberment' approach to assessing the sufficiency of a complaint. Rather, a district court must consider a complaint in its entirety without isolating each allegation for individualized review."); *In re Southeastern Milk Antitrust Litig.*, MDL No. 1899, 2008 WL 2117159, at *7 (E.D. Tenn. May 20, 2008) (rejecting defendants' "attempt to parse and dismember the complaints").

structure, costs and demand, relationships between U.S. and Canadian Defendants and markets, opportunity to conspire, and the conspiracy in Canada. A third improper strategy is Defendants' introduction of extraneous, misleading "facts."

When viewing Plaintiffs' Complaints in their entirety and taking the allegations contained therein as true – as this Court must, *see Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) ("on a Rule 12(b)(6) motion, the facts alleged must be taken as true")[3] – it is respectfully submitted that Plaintiffs have alleged facts that plausibly suggest a price-fixing conspiracy. Accordingly, Defendants' Motion to Dismiss should be denied.

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[3] In *Phillips*, the Third Circuit recently explained:

> The Supreme Court reaffirmed [in *Twombly*] that Fed. R. Civ. P. 8 "requires only a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the...claim is and the grounds upon which it rests" and that this standard does not require "detailed factual allegations." The Supreme Court also reaffirmed that, on a Rule 12(b)(6) motion, the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. The Supreme Court did not address the point about drawing reasonable inferences in favor of the plaintiff, but we do not read its decision to undermine that principle.

515 F.3d at 231 (quoting *Twombly*, 127 S. Ct. at 1964-65). *See also* 515 F.3d at 228: "The District Court, in deciding a motion under Fed. R. Civ. P. 12(b)(6), was required to accept as true all factual allegations of the complaint and draw all inferences from the facts alleged in the light most favorable to [plaintiff]." *See also Sessions v. Owens-Illinois, Inc.*, No. 1:07-cv-1669, 2008 U.S. Dist. LEXIS 89148, *12-*13 (M.D. Pa. Nov. 4, 2008); *Galvani v. Pennsylvania*, No. 1:08-cv-0393, 2008 U.S. Dist. LEXIS 89150, at *8-*10 (M.D. Pa. Nov. 4, 2008).

STATEMENT OF FACTS

Direct Purchaser Plaintiffs bring this antitrust class action on behalf of themselves and a proposed nationwide class of all persons and entities (the "Class") who purchased Chocolate Candy in the U.S. directly from Defendants from December 9, 2002 until at least December 20, 2007 (the "Class Period"). Individual Purchaser Plaintiffs are companies that purchased Chocolate Candy in the U.S. directly from Defendants during the Class Period and have chosen to pursue independent actions. All Plaintiffs seek treble damages arising from Defendants' agreement to fix the prices of Chocolate Candy sold in the U.S. during the Class Period.

The Complaints allege, among other things, the following facts in detail to support their claims that Defendants engaged in unlawful concerted conduct under Section 1 of the Sherman Act:

A. The Chocolate Candy Market

Chocolate Candy is a distinct, multi-billion dollar product market that includes candy bars, bagged chocolate products and seasonal novelty chocolates. Dir. Compl. ¶ 47-48; Indiv. Compl. ¶ 59. Each of the Defendants markets similar Chocolate Candy products that are composed of substantially the same ingredients, packaged in standardized sizes, and sold through the same channels to the same

customers. Dir. Compl. ¶ 47; Indiv. Compl. ¶ 105. The Defendants' Chocolate Candy offerings are thus fungible, commodity-like products. *Id.*

The U.S. Chocolate Candy market is dominated by Defendants, whose combined market share is approximately 77%. Dir. Compl. ¶ 52; Indiv. Compl. ¶ 101. Defendants' controlling market share, combined with the high barriers to entry for would-be competitors, enables Defendants to exercise significant market power, including the power to raise prices. Dir. Compl. ¶¶ 56-58; Indiv. Compl. ¶¶ 62-65. Purchasers of Chocolate Candy, on the other hand, are a diffuse and varied group that cannot influence prices in any meaningful way. Dir. Compl. ¶ 55; Indiv. Compl.¶¶ 65, 104. All of these factors – Defendants' concentrated market share; the commodity-like nature of Chocolate Candy; purchasers' lack of buyer power; high barriers to entry – make the Chocolate Candy market susceptible to a price-fixing conspiracy.

B. Parallel Price Increases and Pretextual Explanations

On December 9, 2002, Mars instituted a price increase of 10.7% for regular sized chocolate bars, as well as increases for some multi-pack chocolate bars. Dir. Compl. ¶ 60; Indiv. Compl. ¶ 79. Days later, Hershey followed suit, announcing a 10.7% increase for regular sized bars and price increases for multi-pack products similar to those announced by Mars. Dir. Compl. ¶ 61; Indiv. Compl. ¶ 80. Only days after that, Nestlé announced price increases tracking those of Mars and

Hershey. Dir. Compl. ¶ 62; Indiv. Compl. ¶ 81. Thus, in less than a week, Defendants announced nearly identical price increases. The symmetry of the price increases is particularly noteworthy given historical industry practice: in the ***seven years*** prior to the flurry of price increases in December 2002, Defendants' prices had been stable. Dir. Compl. ¶¶ 59, 64; Indiv. Compl. ¶ 95.

Two years later the pattern repeated itself. Between late November and late December 2004, Defendants again in concert announced price increases of similar magnitude for similar products. Dir. Compl. ¶¶ 65-67; Indiv. Compl. ¶¶ 82-85.

Then, in the space of three weeks from late March through early April 2007, Defendants announced a third round of coordinated price increases. Dir. Compl. ¶¶ 69-71; Indiv. Compl. ¶¶ 87-89. Again, the price increases were of similar magnitude for similar products. *Id.*

The price increases implemented by Defendants – which represent a stark break with historical pricing practices in the Chocolate Candy industry – cannot be explained by cost or demand increases. Dir. Compl. ¶¶ 75-79; Indiv. Compl. ¶¶ 90-96. In fact, costs remained stagnant or decreased for much of the Class Period. Dir. Compl. ¶¶ 75-81; Indiv. Compl. ¶¶ 90-94. The primary ingredients of Chocolate Candy are cocoa, sugar and milk. The price of cocoa – the most significant raw material input for Chocolate Candy – was lower throughout the vast majority of the Class Period as compared with the first month of the

conspiracy. Dir. Compl. ¶ 77; Indiv. Compl. ¶ 91. Similarly, sugar and milk costs were largely stable or lower throughout the bulk of the Class Period. Dir. Compl. ¶ 78; Indiv. Compl. ¶¶ 92-93. Moreover, Defendants used futures contracts and forward purchasing agreements to insulate themselves from price fluctuations. Dir. Compl. ¶ 79; Indiv. Compl. ¶ 91. Finally, demand for Chocolate Candy was stable or declining through most of the Class Period as Americans turned to healthier and premium snacks. Dir. Compl. ¶ 75; Indiv. Compl. ¶ 96.

To be sure, Defendants disagree with these allegations, citing some cherry-picked "facts". Notably, however, Defendants' own statements are in conflict. Dir. Compl. ¶ 80; Indiv. Compl. ¶ 90. Compare, for example, Defendants' assertion that the costs of "transportation, labor, cocoa and milk . . . rose substantially during the relevant time period," Def. Br. at 21-22, to a statement, still available on Hershey's website, that the company made in a press release dated July 17, 2003, in the wake of the first round of price increases:

> Hershey's second quarter sales increased 3.1 percent, reflecting sales of new products and limited edition items, as well as the impact of the price increase announced in December 2002 . . . . ***Gross margin expanded as a result of pricing, lower raw ingredient and packaging costs, and supply chain savings.*** Selling, marketing, and administrative costs were essentially flat as a percentage of sales.

(available at http://www.thehersheycompany.com/news/release.asp?releaseID=432294) (emphasis added). At the time, however, Defendants explained

the price increase as driven by "the rising cost of raw materials, labor and transportation." Dir. Compl. ¶¶ 60-62; Indiv. Compl. ¶¶ 79-81.

That Defendants offered misleading and pretextual explanations for their price increases is even more suspicious when one considers that the price indices in the United States were closely correlated with similar indices in Canada. Dir. Compl. ¶ 74. As discussed below, there is direct evidence that price increases in Canada were the result of illegal price-fixing.

Even if Defendants are right that certain costs increased during the Class Period (and note that Defendants say nothing about their own ***actual*** costs, as opposed to general cost indices), that "fact" would not suffice to immunize them from these antitrust claims, which are based on far more than just pretextual explanations for price increases. Moreover, now is not the time for the Court to choose one side's statistics over the other's. The question of costs is one that will be disputed as this case proceeds, through fact and expert discovery, and there will be more appropriate times for the Court and jury to address costs with the benefit of a developed record. This motion, where the Court assesses the sufficiency of the allegations, is not the time to weigh the evidence.[4]

[4] Ignoring their own *actual* costs, including the price protection they obtained from futures contracts and forward purchasing agreements (Dir. Compl. ¶78; Indiv. Compl. ¶ 91), Defendants cite generalized cost "data" which have little relevance here. *See* Def. Br. at 22-23, Defs.' Exhibits C-F. Plaintiffs believe their "costs"

(Footnote continued)

allegations in relation to Defendants' pricing are supportive of collusive pricing. For example:

- Cocoa: Defendants attribute their price hikes to cocoa cost increases, but the argument is belied by the facts: Defendants twice increased Chocolate Candy prices in the 52 months following December 2002, despite the fact that cocoa prices were lower in 50 of those 52 months than they had been in December 2002. *See* Def. Br., Ex. E.

- Fuel: The U.S. Census Bureau's Survey of Manufacturers reveals that Defendants' fuel cost argument is a pretense: fuel accounts for only a miniscule percentage of manufacturers' costs (0.5%), which is not enough to play a role in Chocolate Candy price increases. *See* factfinder.census.gov.

- Wages: Defendants' 56.3% labor cost figure – which reflects the average wage increase for all U.S. jobs between 1995-2006 – is also misleading. Bureau of Labor Statistics data show that labor costs for Sugar and Confectionary Product Manufacturing increased only 2% between 2002 and 2006, and that labor costs in 2004 and 2005 were lower than in 2002. *See* www.bls.gov/data. Hence, Defendants' arguments about the effects of "general inflation" are likewise unfounded.

- Milk: Fluid milk manufacturing cost data from the Bureau of Labor Statistics show that national milk prices were essentially flat in the four years preceding Defendants' first price increase in December 2002, and that milk prices were steadily declining during the year that led to Defendants' first price increase. Milk prices also were declining during the six months prior to Defendants' second price increase at the end of 2004. *See* Bureau of Labor Statistics data for fluid milk manufacturing (available at data.bls.gov/ppi).

- Sugar: Defendants do not mention the price of sugar, a key Chocolate Candy ingredient. Sugar prices were stable or declining during most of the period during which Defendants implemented their price increases. *See* data.bls.gov/ppi (cane sugar refining data).

C. The Canadian Investigation

On November 28, 2007, the Associated Press reported that Canadian authorities had launched an investigation in July 2007 into an alleged price-fixing scheme among Hershey Canada, Nestlé Canada, Mars Canada and Cadbury Canada. Dir. Compl. ¶ 98; Indiv. Compl. ¶ 108. Based on its investigation, which includes the assistance of a cooperating company involved in the conspiracy (presumably Cadbury), the Canadian Competition Bureau submitted two sworn affidavits in support of its request for search warrants. *Id.*

The affidavits recount secret meetings – at coffee shops, restaurants and trade conventions – between executives at Hershey, Mars, Nestlé and the "Cooperating Company". Dir. Compl. ¶¶ 99, 101-102, 104; Indiv. Compl. ¶¶ 119-121, 123-124. The affidavits also cite and quote numerous communications via telephone, fax and email between the employees of Defendants, all aimed at fixing the price of Chocolate Candy. Dir. Compl. ¶¶ 99, 101-104; Indiv. Compl. ¶¶ 120-34. The affidavits identify no fewer than 30 employees of Defendants who sent or received communications relating to the conspiracy. Indiv. Compl. ¶ 107(c). The meetings and communications occurred between top executives, and explicitly included discussions of price. Dir. Compl. ¶¶ 100-104; Indiv. Compl. ¶¶ 121-25.

Defendants insist that Plaintiffs' "allegations of direct communications relate solely to the Canadian Defendants and the Canadian market[.]" Def. Br. at

7. Defendants are wrong. First, the Canadian allegations comprise only a small percentage of the Plaintiffs' allegations relating to conspiracy. Those allegations succinctly show that what Defendants are doing illegally next door is consistent with their behavior in the U.S. and that there are enough facts that make it plausible that the parallel pricing in the U.S. was the result of the same type of conduct that resulted in parallel price increases in neighboring Canada. Thus, the allegations concerning Canada add to the plausibility of a conspiracy in the U.S. Plaintiffs further carefully allege – and Defendants do not dispute – that Defendants have structured their companies such that Canadian and U.S. operations exist within the same division. Plaintiffs specifically allege – again, without dispute from Defendants – that Defendants' cooperation and coordination with each other pursuant to licensing agreements transcends the U.S./Canadian border. Plaintiffs allege – and Defendants do not dispute – that price indices in the U.S. and Canada were closely correlated. Plaintiffs allege – and Defendants do not dispute – the massive cross-border Chocolate Candy trade between the U.S. and Canada. That trade is so pervasive that it is reasonable, at this stage, to infer that if Defendants fixed prices in Canada, they were also doing it in the U.S.[5]

[5] In fact, the economic features of the Chocolate Candy market are such that price-fixing in the Canadian market – price fixing that Defendants appear to concede occurred – would not have been effective unless Defendants also fixed prices in the much larger U.S. market because arbitrage would have undermined any "Canada-only" conspiracy. Indiv. Compl. ¶ 107(f).

Finally, Defendants seek to minimize the significance of, and to request inferences in their favor, as to one communication discovered by the Canadian Competition Bureau that belies all of Defendants' protestations that the price fixing in Canada was unrelated to the U.S. In late 2006 (*i.e.*, almost four years into the alleged conspiracy), Eric Lent, a high-level employee at Hershey with pricing authority in the U.S., assumed a new position with Hershey Canada. Dir. Compl. ¶ 103; Indiv. Compl. ¶ 132. Shortly thereafter, Lent was introduced via email to a competitor. *Id.* The author of this January 3, 2007 email introduction was Humberto Alfonso, a senior executive at Hershey in the U.S. (formerly Executive Vice President Finance, Chief Financial Officer of Cadbury Schweppes). *Id.* In that e-mail – for which Defendants request that this Court grant them the "inference" that it was merely a "social contact" – U.S. Hershey executive Alfonso urged Lent and the competitor to "keep close" to one another. *Id.*[6] Aside from the

[6] This instruction ("keep close to your competitor, I am including contact info below in an effort to introduce you both" – Dir. Compl. ¶ 103) is similar to language used by a defendant in *In re High Fructose Corn Syrup Antitrust Litigation* ("*HFCS*"), 295 F.3d 651, 662 (7th Cir. 2002), and which was relied upon in part by the Seventh Circuit in reversing summary judgment in favor of defendants. In *HFCS*, the initial statement by a defendant's president was: "[O]ur competitors are our friends. Our customers are the enemy." 295 F.3d at 662. An important lesson from that case is that discovery disclosed other statements from defendants consistent with the "friends/enemies" statement by the first defendant. Here, the statement by Hershey's U.S. executive, particularly when viewed in light of all the allegations in the Complaints, is much more plausible and consistent with the existence of a conspiracy than with independent action.

fact that it is Plaintiffs who are entitled to the benefit of reasonable inferences on this motion to dismiss, not Defendants, the record is clear that Lent and his "competitor" arranged to speak the very next day. Dir. Compl. ¶ 103; Indiv. Compl. ¶ 133. Further, the Canadian Competition Bureau affidavit makes clear that Eric Lent was directly involved in pricing discussions with competitors. Dir. Compl. ¶ 104; Indiv. Compl. ¶ 134. Within months, Defendants simultaneously implemented another round of price hikes ***in the U.S.*** Dir. Compl. ¶¶ 69-71; Indiv. Compl. ¶¶ 87-89.

D. Close Ties Between the U.S. and Canada

Defendants ask the Court to believe that the Canadian and U.S. Chocolate Candy markets, as well as Defendants' Canadian and U.S. Chocolate Candy operations, are wholly unrelated. They rely heavily on *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007), where the court found the plaintiffs alleged no "linkage" between conduct in the European market and the U.S. market for elevators and their maintenance. This is at direct odds not only with the facts alleged by Plaintiffs, but with government market statistics, trade patterns, and Defendants' established operating practices.

During the Class Period, the U.S. imported approximately $3.6 billion worth of Chocolate Candy from Canada. *See* U.S. International Trade Commission, North American Industry Classification System (data available at

http://dataweb.usitc.gov). In fact, according to the Canadian government, nearly all Canadian Chocolate Candy exports – approximately 98% during the Class Period – go to the U.S. Canadian Bureau of Industry (data available at http://www.ic.gc.ca). Moreover, Canada not only exports Chocolate Candy to the U.S., but the majority of its Chocolate Candy imports – more than a billion dollars during the Class Period – come from the U.S. *Id.* In other words, the Canadian and U.S. markets have a substantial and bi-directional trade relationship. This is not surprising as the same companies – Defendants Hershey, Mars, Nestlé and Cadbury – dominate both markets. Defendants have market shares of approximately 77% in the U.S. and 64% in Canada. Dir. Compl. ¶ 52; Indiv. Compl. ¶¶ 101, 107(a). Because of the import-export realities between Canada and the U.S., the prices charged in each market are likely to affect the revenues and profitability of the related U.S. and Canadian companies of each defendant group. *See, e.g.*, Dir. Compl. ¶ 73; Indiv. Compl. ¶107(i).

Given the symbiotic relationship between the U.S. and Canadian Chocolate Candy markets, both of which are highly concentrated, Defendants have structured their operations so that their U.S. and Canadian business segments are tightly interwoven. All Defendants have placed their U.S. and Canadian business units within the same operational division. Dir. Compl. ¶ 82; Indiv. Compl. ¶ 107(b). Hershey and Mars employ "North American" divisions or groups to oversee U.S.

and Canadian operations. Dir. Compl. ¶¶ 82-83, 85; Indiv. Compl. ¶¶ 30, 41. Nestlé and Cadbury organize their Canadian and U.S. operations under their "Zone Americas" and "Americas Region," respectively. Dir. Compl. ¶¶ 86-87; Indiv. Compl. ¶¶ 46, 52. The executives responsible for managing these divisions of Hershey, Mars and Cadbury are based in the United States. Dir. Compl. ¶¶ 83, 85, 87.

The integration of Canadian and U.S. operations undoubtedly facilitated Defendants' considerable cross-border activity within and among themselves. For example, Mars manufactured candy in Canada, shipped it to the U.S., and sold it directly to U.S. customers. *Id.* ¶ 53. Hershey has manufactured a wide variety of Chocolate Candy in Canada – including Mr. Goodbar, York Peppermint Patties, Hershey's Kisses and Krackel – for import and sale in the U.S. *Id.* ¶ 50. Defendants also engaged in cross-border licensing arrangements. *Id.* ¶¶ 89-91; Indiv. Compl. ¶¶ 31, 48, 51, 55, 107(g). For example, Hershey and Nestlé have entered into agreements under which Hershey manufactures O-Henry bars (a Nestlé product) in Canada, while Nestlé did so in the United States. Dir. Compl. ¶ 90; Indiv. Compl. ¶ 107(g). Under licensing agreement, Hershey also manufactured the York, Almond Joy and Mounds brands (Cadbury products), as well as the Kit Kat and Rolo brands (Nestlé products), in the United States. Dir. Compl. ¶¶ 89-90; Indiv. Compl. ¶¶ 31, 48, 51, 107(g). Indeed, the

Hershey/Cadbury licensing agreement required meetings on at least a quarterly basis between competing Defendants concerning the marketing, promotion and sale of Chocolate Candy in the U.S. Dir. Compl. ¶ 91; Indiv. Compl. ¶ 55. Thus, in addition to Defendants' internal integration of Canadian and U.S. operations, Defendants maintain close cross-border operational relationships ***with their competitors***.

STATEMENT OF QUESTION INVOLVED

Whether the Direct Purchaser Plaintiffs' and Individual Plaintiffs' factual allegations present a plausible inference of conspiracy where they have alleged, *inter alia*, a market structure that is susceptible to price fixing, parallel price increases for Chocolate Candy in the United States by Defendants that cannot be explained by increased costs or demand, intertwined U.S. and Canadian markets for Chocolate Candy, Defendants' interwoven corporate structures with respect to their U.S. and Canadian operations, direct evidence of Defendants' participation in a conspiracy to fix the price of Chocolate Candy in Canada, and direct evidence implicating a senior U.S.-based employee of the Defendant with the largest share of the U.S. market in the conspiracy to fix the price of Chocolate Candy in Canada.

Suggested Answer: **Yes.**

LEGAL STANDARD ON A MOTION TO DISMISS

A complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations[.]" *Twombly*, 127 S. Ct. at 1964; *Phillips*, 515 F.3d at 231. Rule 8(a)(2) requires only a short, plain statement of a claim for relief: "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests'." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). The complaint should not be dismissed if the facts "state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974.

On a motion to dismiss, the Court assumes that Plaintiffs can prove the facts alleged in the complaint. *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). The Court construes all factual allegations in the light most favorable to Plaintiffs, drawing all reasonable inferences in their favor. *Phillips*, 515 F.3d at 231; *Gomery v. Versatile Mobile Sys. Inc.*, No. 1:07-CV-2292, 2008 WL 2357693, at *1 (M.D. Pa. June 4, 2008). And the Court "should be extremely liberal in construing antitrust complaints." *Knuth v. Erie-Crawford Dairy Coop.*, 395 F.2d 420, 423 (3d Cir. 1968); *see also In re Hypodermic Products Antitrust Litig.*, No. 05-CV-1602 (JLL/CCC), 2007 WL 1959225, at *6 (D.N.J. June 29, 2007).

The Court considers the totality of facts in the complaint ***as they have been alleged***; Defendants may not recast or attempt to isolate allegations. *Indianapolis Life Ins. Co. v. Hentz*, No. 1:06-CV-2152, 2008 WL 4453223, at *5 (M.D. Pa. Sept. 30, 2008).

ARGUMENT

Contrary to the legal standard mandated by the Supreme Court in *Twombly*, Defendants ask this Court to isolate and separate each fact from the totality of facts alleged in the Complaints, to resolve factual inferences in Defendants' favor, and even to accept Defendants' allegations of fact as true. None of these things are appropriate at the motion to dismiss stage.

As detailed above, Plaintiffs allege a factual context that shows that Defendants' parallel pricing structure resulted from an agreement to fix prices, and not from natural market forces. Many courts post-*Twombly* have denied motions to dismiss based on allegations of parallel conduct and price fixing similar to Plaintiffs' allegations in this case. If Defendants' interpretation of the law were correct, the pleading hurdle in price fixing cases would be so high that it would be impossible for plaintiffs to survive a motion to dismiss except in cases in which plaintiffs actually took part in or directly observed meetings of the conspirators, or where there is a government pleading, based on prior grand jury or Civil

Investigative Demand investigation.[7] That is not the law.

I. THE COMPLAINTS STATE A CLAIM UNDER SECTION ONE

Defendants claim that the price-fixing conduct Plaintiffs allege is consistent with innocent behavior. Def. Br. at 12. Not so. Plaintiffs allege that a combination of parallel conduct, a concentrated market structure with high barriers to entry, stable or decreasing costs, and declining product demand made Defendants' simultaneous price increases economically irrational in the absence of collective decision making; that Defendants had easy opportunities to reach agreements on price during their frequent meetings at trade association events, industry dinners, and licensing dealings; and that, according to the sworn affidavit of an official of the Canadian Competition Bureau, specific high-level employees of Defendants in Canada colluded on pricing at specific times and places (including at trade association meetings[8]), and that these communications were

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[7] There are many instances where conspiracies have been proven without prior government indictments or complaints. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 2006 U.S. Dist. LEXIS 82167 (S.D.N.Y. Nov. 8, 2006) (preliminarily approving a $336 million settlement) (final approval pending); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (in reversing the district court's grant of summary judgment in favor of defendants, rejected defendants' argument that the lack of a Department of Justice investigation proved that no price fixing conspiracy existed, and noted that the Department of Justice has "limited resources" and "may also have felt that the antitrust class action bar had both the desire and the resources to prosecute such a suit vigorously").

[8] Dir. Comp. ¶¶ 101, 104.

facilitated in at least one instance by a high-level, U.S.-based employee of the Defendant with the largest U.S. market share.

A. The Complaints Satisfy the Legal Standard Set Forth in *Twombly*

1. Plaintiffs Need Only Plead Minimal Facts to Survive a Motion to Dismiss

Purporting to rely on *Twombly*, Defendants criticize the Complaints for failing to allege the dates, times, and terms of their agreements on price.[9] *See* Def. Br. at 10 ("Plaintiffs do not identify a single meeting or phone call or document where such an alleged agreement was hatched."). *Twombly* did not change the long-standing rule that a conspiracy can be alleged through circumstantial evidence from which it might plausibly be inferred. *Twombly* does not require that "to survive a motion to dismiss, plaintiffs must plead specific back-room meetings between specific actors at which specific decisions were made." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007). The Supreme Court has long recognized that, "in complex antitrust litigation,"

[9] In *Twombly*, two local subscribers of telephone and high speed internet services sued the nation's major incumbent local exchange carriers ("ILECs"), alleging an antitrust conspiracy in which the defendants supposedly had agreed not to compete outside of their respective "legacy" service areas, and had engaged in parallel business conduct designed to prevent competitive local exchange carriers ("CLECs") from entering those areas. The Court granted *certiorari* "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Id.* at 1963. The Court defined the issue as whether a complaint may survive a motion to dismiss if it alleges "certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical independent action." *Id.* at 1961.

"motive and intent play leading roles" and "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976). An antitrust conspiracy "is generally covert and must be gleaned from records, conduct, and business relationships." *Callahan v. A.E.V., Inc.*, 947 F. Supp. 175, 179 (W.D. Pa. 1996). "The 'liberal' approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings." *Knuth*, 395 F.2d at 423.

In fact, the Supreme Court in *Twombly* held that the law does not impose a heightened pleading standard, nor does it impose

> a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Behrend v. Comcast Corp., 532 F. Supp. 2d 735, 738 (E.D. Pa. 2007) (quoting *Twombly*, 127 S. Ct. at 1965) (internal quotations omitted); *see also Phillips*, 515 F.3d at 231. For an antitrust complaint to survive a motion to dismiss, its allegations of parallel conduct need only be accompanied by sufficient factual context to "nudg[e] th[e] claims across the line from conceivable to plausible."

Twombly, 127 S. Ct. at 1974. It is respectfully submitted that Plaintiffs' detailed Complaints clearly satisfy this test. *See*, *supra* at 6-18.

Unlike Plaintiffs' Complaints, the complaint in *Twombly* contained only an "allegation of parallel conduct and a bare assertion of conspiracy[.]" *Twombly*, 127 S. Ct. at 1966. The *Twombly* plaintiffs' conspiracy claim "proceed[ed] *exclusively* via allegations of parallel conduct." *Id.* at 1971 n.11 (emphasis added). Significantly, the parallel business conduct attacked in *Twombly* – geographic division of the intricate telecommunications markets – previously had been authorized by federal law; and size, fear of retaliation, and simple inertia likely accounted for the defendants' decisions not to encroach on each other's regions. *Id.* at 1971-72.

Although the complaint in *Twombly* was defective in many respects, the Supreme Court stated that even its bare-bone allegations of parallel conduct alone came close to satisfying the notice pleading requirements of Rule 8. "An allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility[.]" *Id.* at 1966. Because the *Twombly* complaint failed to "set forth a single fact in a context that suggest[ed] an agreement," the Court held the complaint inadequate. *Id.* at 1968-69. The plaintiffs had not "nudged their claims across the line from conceivable to plausible." *Id.* at 1974.

Here, Plaintiffs allege three separate instances of conspicuous and historically anomalous parallel price increases – allegations that are considerably stronger than those in *Twombly*, which the Supreme Court acknowledged as "close" to sufficient. In addition, Plaintiffs allege numerous facts all pointing toward the existence of Defendants' conspiracy. *See*, *supra* at 6-18.

2. Plaintiffs Are Not Required to Allege the Dates, Times or Terms of Defendants' Illicit Agreements

Many defendants have argued – unsuccessfully – as Defendants do here, that *Twombly* requires plaintiffs in antitrust conspiracy cases to plead the dates, time, and terms of the agreement, as well as the substance of secret illicit conversations. "As long as the complaint alleges that the alleged co-conspirators had a plausible reason to participate in the conspiracy, the complaint is sufficient." *Trans World Techs., Inc. v. Raytheon Co.*, No. 06-5012 (RMB), 2007 WL 3243941, at *4 (D.N.J. Nov. 1, 2007). *Twombly* bars only the claims of "plaintiffs who alleged 'parallel conduct' or 'conspiracy' and little more." *UltiMed, Inc. v. Becton, Dickinson & Co.*, No. 06-2266 (DSD/JJG), 2007 WL 2914462, at *1 (D. Minn. Oct. 3, 2007); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 408 n.2 (D. Del. 2007) (denying motion to dismiss antitrust claims under *Twombly*'s "flexible plausibility standard").

3. Post-*Twombly* Case Law Confirms that Plaintiffs Have Alleged a Plausible Conspiracy by Defendants to Fix the Price of Chocolate Candy

Over the last 18 months, multiple District Courts, including this Court, have applied *Twombly* and rejected motions to dismiss antitrust complaints under circumstances that support sustaining the Complaints in this case:

1. *Univac Dental Co. v. Dentsply Int'l, Inc.*, No. 1:07-cv-0493, 2008 WL 719227, at *1 (M.D. Pa. March 14, 2008) (denying motion to dismiss an antitrust complaint that alleged a monopolization scheme and discussed various coercive elements of the scheme).

2. *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *3 (E.D. Pa. Aug. 3, 2007) (denying motion to dismiss horizontal price-fixing complaint and finding allegations of parallel business conduct – combined with allegations of market concentration, inter-competitor communications, and the use of a trade publication to signal anticompetitive practices – sufficient to "situate [the] allegations of parallel conduct in a context that suggests preceding agreement").

3. *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008) (denying motion to dismiss a horizontal price-fixing complaint and finding that allegations of parallel price increases, a market structure conducive to collusion, meetings between defendants at trade conferences, and pricing behavior that broke from historical practice "plausibly suggest" an illegal agreement).

4. *In Re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M:07-1819 CW, 2008 WL 426522 (N.D. Cal. Feb. 14, 2008) (denying motion to dismiss a horizontal price-fixing complaint that alleged parallel price increases, a market structure conducive to collusion, exchanges of information between competitors, and trade association meetings that provided opportunities to conspire).

5. *Babyage.com, Inc. v. Toys "R" Us Inc.*, 558 F. Supp. 2d 575, 583 (E.D. Pa. 2008) (denying a motion to dismiss complaints alleging a conspiracy between manufacturers and a major retailer to establish minimum retail

prices where plaintiffs alleged "facts tending to negate the potential of unilateral conduct").

Defendants' failure to mention the *Labelstock*, *OSB* and *Babyage* decisions – or any post-*Twombly* Section One decision from this District, or even this Circuit – underscores the weakness of their arguments. Instead, Defendants rely on cases from outside this jurisdiction, none of which is analogous to this case.

For example, Defendants' heavy reliance on *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007), is misplaced. The *Elevator* complaint alleged solely parallel conduct, conclusory averments of a conspiracy, and a European enforcement action with no connection to the United States. *Id.* at 49-52. The complaint in *Elevator* alleged "basically every type of conspiratorial activity that one could imagine," but failed to provide any details about the actual conspiracy. *Id.* at 50.

Plaintiffs' Complaints here, in contrast, contain much more than a "list of theoretical possibilities." *Id.* These Complaints specifically describe Defendants' in-unison price increases in the face of declining demand, U.S. price indices that closely correlated with price indices in Canada and occurred contemporaneously with a series of secret meetings among Canadian affiliates of the U.S. Defendants to fix the prices for Chocolate Candy in Canada; direct evidence implicating a high-level Hershey employee of engaging in improper pricing discussions with competitors shortly after his transfer to Canada from the U.S., after an introduction

was made to a competitor by a senior, U.S.-based Hershey executive; the tightly interwoven nature of Defendants' operations in Canada and the United States; and the opportunities for collusion that existed through licensing relationships among Defendants and trade association memberships.

Moreover, in *Elevator*, the European and American elevator markets had insufficient "linkage" to support an actionable claim in U.S. court based on alleged wrongdoing in Europe. *Elevator*, 502 F.3d at 52.[10] Here, in contrast, such linkage is plentiful, as discussed in the Complaints – the manufacturers of Chocolate Candy organized their American and Canadian operations under the same corporate and operational umbrella, shipped fungible candy bars from Canada to the United States, and communicated internally across the border.

The other post-*Twombly* cases cited by Defendants are also inapposite. In *In re Late Fee and Over-Limit Fee Litigation*, 528 F. Supp. 2d 953, 957-58 (N.D. Cal. 2007), a case in which the "principal claim" dealt with punitive damages, the plaintiffs' alternate price-fixing claim was pleaded in a conclusory manner, providing "*no details* as to when, where, or by whom th[e] alleged agreement was reached." *Id.* at 962 (emphasis added). The "heart of the plaintiffs' antitrust allegations" was nothing more than a chart demonstrating that the defendants'

[10] The *Elevator* complaint included only a single paragraph regarding the connections between the European and alleged U.S. conspiracy, and even that paragraph lacked specific details. *See* Def. Br., Ex. B ¶ 70.

behavior was "not even roughly in parallel." *Id.* Indeed, the limits of *Late Fee* have already been recognized by this court; Judge Vanaskie characterized this decision as, "[l]ike *Twombly*, . . . rest[ing] solely on allegations of parallel conduct." *In re Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 373.

Similarly, Defendants invoke the complaint in *In re Parcel Tanker Shipping Services Antitrust Litig.*, 541 F. Supp. 2d 487, 491 (D. Conn. 2008), which alleged a price-fixing conspiracy but "never allege[d] specific facts tending to support the alleged theories of conspiracy."[11] In this case, by contrast, Plaintiffs' Complaints are filled with specific facts as summarized *supra* at 6-18.[12]

Post-*Twombly* case law makes clear that *Twombly* does not require Plaintiffs to do the impossible: plead the complaint as if they were actual observers of the

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[11] In *In re Parcel Tanker*, 541 F. Supp. 2d at 491-92, the plaintiff was a competing shipping company alleging that, not only had defendant shipping companies conspired to increase shipping rates (a charge to which they had pled guilty), they had also conspired to decrease shipping rates to hinder plaintiff's shipping business. Leaving aside whether a conspiracy to reduce prices, even for predatory purposes, can ever be plausible, *cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), plaintiff shipping company was not able to point with specificity to any meetings among competitors at which the subject matter of reducing prices was discussed.

[12] As for *GPU I*, 527 F. Supp. 2d 1011, Defendants ignore the court's subsequent ruling in *GPU II* that an amended complaint alleging parallel practices and a departure from historical pricing practices satisfied *Twombly*. *In Re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007). Plaintiffs allege far more than that Defendants "blindly" followed a price increase of an industry leader, as in *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117, 132 (3d Cir. 1999) (affirming grant of summary judgment, not motion to dismiss).

conspiracy, or were present in every room in which Defendants met to fix prices. *See, e.g.*, *GPU I*, 527 F. Supp. 2d at 1028. Plaintiffs need allege only parallel conduct plus some small measure of additional fact to rise "above the speculative level." *Twombly*, 127 S. Ct. at 1965. *Accord Sessions*, 2008 U.S. Dist. LEXIS 89148, at *13; *Galvani*, 2008 U.S. Dist. LEXIS 89150, at *9. That is enough to satisfy Rule 8 and to put Defendants on notice of the claims against them. Plaintiffs meet this standard.

B. The Complaints Allege Many Facts that Suggest Plausible Agreement

1. Market Conditions

Unlike the conspiracy in *Twombly*, the conspiracy to fix the prices of Chocolate Candy in a consolidated market at supracompetitive levels is precisely the type of conspiracy that courts find economically "plausible." In such cases, the trial court reviews a plaintiff's factual allegations and evidence less rigorously than when the alleged conspiratorial conduct is economically implausible. *See, e.g., In re Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 375 (denying motion to dismiss where, in addition to parallel conduct, plaintiffs pleaded "behavior and market conditions that suggest [defendant]'s conduct was something other than a natural, unilateral reaction to market forces").

In a footnote that Defendants ignore, the *Twombly* majority unequivocally stated that "complex and historically unprecedented changes in pricing structure

made at the very same time by multiple competitors, and made for no other discernible reason" would be actionable. *Twombly*, 127 S. Ct. at 1966 n.4. Indeed, "any interference with the elements of price is regarded as illegal *per se* under the Sherman Act." *Catalano v. Target Sales*, 446 U.S. 643, 649 (1980). And, as the Third Circuit has held, "an agreement among oligopolists to fix prices at a supra-competitive level – makes perfect economic sense." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 358 (3d Cir. 2004).[13]

The Complaints in this case describe precisely this scenario. Plaintiffs allege that Defendants implemented unprecedented, parallel, nearly identical, industry-wide price increases in December 2002 as a result of their conspiracy. After years of price stability, the price of Chocolate Candy suddenly increased by ten percent across the market in the United States within a period of less than one week. Dir. Compl. ¶¶ 59-64; Indiv. Compl. ¶¶ 76-77, 79-81. This substantial and coordinated shift is in itself ***highly suspicious***.

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[13] Defendants' argument that the parallel price increases here were simply the result of an oligopoly at work (Def. Br. at 16-17) is belied by the existence of the Canadian conspiracy. The existence of the Canadian conspiracy provides evidence that Defendants' parallel pricing behavior in the United States is not simply the result of an oligopoly. In Canada, four manufacturers control 64% of the chocolate market. Indiv. Compl. ¶ 107(a). If a 64% share was not enough to be able to achieve parallel price increases without expressly agreeing to fix prices, it is reasonable to conclude that an agreement also was necessary to achieve such increases in the United States.

Added to that is the fact that there are two additional follow-on price increases that were closely correlated in both timing and amount. This renders the conspiracy even more plausible: "the fact that multiple instances of parallel conduct are alleged makes it far less likely that a business justification exists for all of the acts taken in total." *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 944 (E.D. Tenn. 2008).

Basic principles of economics dictate that the price increases alleged in the Complaints did not result from independent action. The fact that the price of Chocolate Candy went up while demand was falling raises a red flag. "Normally, reduced demand and excess supply are economic conditions that favor price cuts, rather than price increases." *In re Flat Glass Antitrust Litig.*, 385 F.3d at 361 (citing Richard A. Posner, ANTITRUST LAW 69-79 (2d ed. 2001)).

Thus, the allegations of Defendants' pricing practices raise more than enough facts to state an antitrust cause of action. *See Twombly*, 127 S. Ct. at 1966 n.4 (noting that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2008 WL 3916309, at *3 (N.D. Cal. Aug. 25, 2008) (recognizing that allegations of pricing practices that

"cannot be explained by the forces of supply and demand" satisfy *Twombly*).[14]

2. Direct Evidence from a Cooperating Witness

Not only were Defendants' price increases economically irrational absent coordinated action, but the Complaints include direct evidence – set forth in affidavits executed by a representative of the Canadian Competition Bureau – of Defendants' efforts to fix the price of Chocolate Candy. *See, e.g.,* Dir. Compl. ¶¶ 103-04 (detailing the introduction of Eric Lent (a former U.S. Hershey executive transferred to Hershey Canada) to a competitor by Humberto Alfonso, a senior executive at Hershey in the U.S., and quoting Lent as acknowledging that he talked about pricing with his competitor "all the time").

The meetings and statements of Defendants' Canadian employees cannot be discounted as Canada-specific, given the interconnected markets, Defendants' interconnected Canadian and U.S. operations, and the unusual, industry-wide price increases that happened both in the United States and Canada. The conclusion that

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[14] Defendants contend that market characteristics should have put Plaintiffs "on notice of the alleged conspiracy" and that the lack of such notice demonstrates that market characteristics are insufficient to "support a 'plausible' inference of conspiracy *on their own*." Def. Br. at 24 (emphasis supplied). Defendants' argument is yet another example of their improper attempt to parse Plaintiffs' allegations in isolation. As explained above, evidence of a market with characteristics that make it susceptible to price-fixing is just one element of Plaintiffs' interconnected allegations.

Defendants' price-fixing conspiracy stopped at the Canadian border is unrealistic in light of the totality of allegations in Plaintiffs' Complaints.[15]

Those allegations include Defendants exporting substantial amounts of Chocolate Candy products from Canada to the United States, Defendants operating their American and Canadian operations on an integrated basis, and direct evidence showing that high-level employees of Defendants in Canada communicated in furtherance of the price-fixing conspiracy. Not coincidentally, the price indices of Chocolate Candy in Canada closely tracked the price indices for Chocolate Candy sold in the U.S. during the Class Period.

While Defendants point out differences in labeling regulations in the United States and Canada, such differences do not prevent extensive Chocolate Candy commerce between the two countries. Defendants manufacture substantial amounts of Chocolate Candy in Canada for sale in the U.S., and pursuant to licensing agreements (which call for specific meetings between Defendants to discuss U.S. marketing and sales) share responsibilities amongst each other for the manufacture of certain brands of Chocolate Candy in Canada and the U.S. In other words, there are extensive cross-border dealings among Defendants involving the

[15] *See United States v. Andreas*, No. 96 CR 762, 1999 WL 299314, at *1 (N.D. Ill. May 5, 1999) (finding foreign prices "highly relevant" in criminal antitrust proceeding involving the alleged price-fixing of "a fungible product which is amenable to being shipped internationally"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (U.S. antitrust jurisdiction exists if activity outside the U.S. has an anticompetitive effect inside the U.S.).

manufacturing, marketing and sale of Chocolate Candy in the U.S. *See, e.g.,* Dir. Compl. ¶¶ 89-91; Indiv. Compl. ¶¶ 51-52, 55, 107(g).

In deciding this motion, the Court must draw all competing inferences in Plaintiffs' favor. *See, e.g., Phillips*, 515 F.3d at 228, 231; *In re Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 370.[16] The direct evidence of Defendants' price-fixing activities in Canada – which are spelled out in detail in the Complaints, and which implicate at least one present and one former high-level U.S. executive – are consistent with the conspiracy alleged in the U.S. and support the plausibility of those allegations.

3. Motive and Opportunity

The Complaints contain a plethora of additional, detailed allegations that support Plaintiffs' contention that Defendants unlawfully agreed to fix the prices of Chocolate Candy. First, Defendants comprise a highly concentrated industry with high barriers to entry. Numerous courts have observed that a price-fixing

[16] In denying a post-*Twombly* motion for judgment on the pleadings, the court in *Flying J Inc. v. TA Operating Corp.*, No. 1:06CV00030 TC, 2007 WL 3254765, at *1 (D. Utah Nov. 2, 2007), rejected the argument that, where two interpretations of evidence are possible – one favoring collusion, the other favoring competition – *Twombly* requires resolution of the dispute in favor of the defendants. Likewise, the court in *SRAM* confronted evidence that the defendants claimed was susceptible to an innocent interpretation, but the court refused to accept that interpretation, concluding that under Rule 8 all competing inferences must be drawn in the plaintiffs' favor. *SRAM*, 2008 WL 426522, at *4; *see also Phillips*, 515 F.3d at 231.

conspiracy is particularly likely to occur when these market conditions are present; executives have a motive to conspire when coordinated action, albeit anticompetitive, bears little risk and will ensure the profits of the handful of individual corporations that hold market power.[17]

Second, Defendants had frequent opportunities to conspire at trade association meetings and while monitoring their licensing arrangements. According to Professor Areeda's authoritative treatise, "simultaneous action in circumstances suggesting communication supports an inference of conspiracy." 6 Areeda & Hovenkamp ¶ 1425, at 182; *see also In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 492 (E.D. Pa. 2005) ("Evidence of communication and cooperation among defendants through the aegis of a trade association may also be relevant to establish the existence of a conspiracy or combination, which is

[17] *See In re Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 371 (price-fixing conspiracy made "perfect economic sense" where market conditions raised "inference that collusive conduct was both plausible and in [defendants'] economic interests"); *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 172 (E.D. Pa. 2007) ("high barriers to entry . . . allow a conspiracy such as the one alleged here to continue indefinitely with limited risk that a new competitor would enter the market and undercut the agreed-upon prices"; industry therefore deemed "susceptible to a price-fixing conspiracy"); *In re OSB*, 2007 WL 2253419, at *3 (denying motion to dismiss where "market is highly concentrated, facilitating collusion"); *In re Flat Glass*, 385 F.3d at 358 ("an agreement among oligopolists to fix prices at a supra-competitive level – makes perfect economic sense.").

a required element of a Section 1 Sherman Act claim.").[18]

Furthermore, Plaintiffs allege that the multiple licensing agreements between Defendants, which provided for regular meetings, gave Defendants additional opportunities to communicate unlawfully regarding the price of Chocolate Candy. As noted by Judge Posner, collusive pricing is more likely where "firms are each other's customers or suppliers as well as competitors" and where "the executives of the competing firms get to know and maybe trust each other and have opportunities to discuss pricing without arousing suspicions." Richard A. Posner, ANTITRUST LAW (2d ed. 2001) at 78. Indeed, that very type of conversation occurred at a trade association meeting in Canada. *See* Dir. Compl. ¶¶ 101, 104.

Defendants had multiple opportunities to conspire, and notably, those opportunities were followed by historically unusual price increases that contradicted natural market behavior. This behavior is indicative of conspiracy.

C. Defendants' Attacks on the Plausibility of the Conspiracy Alleged in the Complaints Are Unavailing

Defendants insist that Plaintiffs have neglected to allege an agreement. Def. Br. at 10-11. Defendants are wrong. Plaintiffs explicitly refer to Defendants'

[18] *See also In re OSB*, 2007 WL 2253419, at *4 (denying motion to dismiss where defendants allegedly "confirmed their agreements during meetings at industry trade shows and events"); *SRAM*, 2008 WL 426522 at *6 ("participation [in trade meetings] demonstrates how and when Defendants had opportunities to exchange information or make agreements.").

"discussions and *agreement* about increasing prices of Chocolate Candy." Dir. Compl. ¶ 112 (emphasis added). The Complaints allege an "*agreement*, understanding, or concerted action between and among defendants and their co-conspirators in furtherance of which defendants raised, fixed, stabilized and maintained prices for Chocolate Candy." Dir. Compl. ¶ 121 (emphasis added). "Defendants' unlawful conduct was through mutual understanding or *agreement* between or among defendants and their co-conspirators." Dir. Compl. ¶ 122 (emphasis added) *see also* Indiv. Compl. ¶¶ 77, 90. Defendants pluck these allegations from the Complaints and label them "conclusory," but when considered in context, together with the other facts alleged, they cannot be deemed implausible or conclusory. *See City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 7 (D.D.C. 2008) ("Because the complaint alleged some circumstantial facts that support an inference of an agreement, the plaintiffs' claim is plausible.").[19]

[19] *See also In re Flat Glass*, 385 F.3d at 369 (recognizing that in evaluating allegations of conspiracy, a court "must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence"); *In re Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 373 (rejecting defendants' argument that *Twombly* "instructs district courts to assess each allegation separately and, if the allegation is consistent with competitive behavior, it must be disregarded when determining whether plaintiff has pleaded a § 1 claim"); *In re Southeastern Milk*, 555 F. Supp. 2d at 943 (denying motion to dismiss price-fixing complaint, criticizing defendants' "attempt to parse and dismember the complaints"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2008 WL 3916309, at *4 (denying motion to dismiss in light of "all of plaintiffs' allegations together").

1. Plaintiffs' Cost Allegations Are Plausible

Defendants' attacks on Plaintiffs' allegations that Chocolate Candy manufacturing costs were steady or decreasing highlight Defendants' misguided efforts to dismember the Complaints and replace them with competing "facts" of their choice. Plaintiffs allege that Defendants' "raw material component costs . . . did not justify the level of increased prices for Chocolate Candy, a conclusion that is supported by third-party economic analysis." Dir. Compl. ¶ 112; *see also* Indiv. Compl. ¶¶ 90-94. As a preliminary matter, Defendants ignore the basic tenet that "on a Rule 12(b)(6) motion, the facts alleged must be taken as true[.]" *In re Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 370 (citation and internal quotation marks omitted). But even disregarding these procedurally inappropriate attacks – Defendants' arguments are grossly misleading.

The data Defendants offer as purporting to represent Defendants' costs do no such thing. Defendants say nothing about their actual costs, but instead try to rebut Plaintiffs' allegations with generalized, aggregated market data that bear little if any relation to Defendants' real costs. Def. Br. at 21-23. *See supra* n. 4.

Even were the Court ultimately to conclude on a fully developed record that some of Defendants' costs did in fact increase at one time or another during the Class Period, such a "fact" cannot immunize them from liability. That Defendants offered pretextual explanations for price increases is but one of Plaintiffs' many

allegations, all of which, taken together (as they must be), plausibly suggest the existence of a conspiracy to fix the price of Chocolate Candy.

On Defendants' Motion To Dismiss, the Court need only recognize that Plaintiffs have alleged yet another fact – Defendants' costs do not justify or explain their price increases – that, when considered with the other allegations in the Complaints, plausibly supports Plaintiffs' claim that Defendants conspired to fix the price of Chocolate Candy.

2. Defendants' Market Share and Advertising Spending Are Irrelevant

Defendants grasp at straws when they argue that Defendants' decisions to advertise their products during the Class Period somehow proves that they did not fix prices. Def. Br. at 17-18. A price-fixing conspiracy does not necessarily extinguish all competition, nor does it imply that the individual corporations with market power no longer have an interest in maintaining or expanding their respective market shares. Advertising, brand name recognition, and the quality of goods or services being sold, in addition to price, generally dictate market share.[20] Even with a firm price-fixing agreement in place, if one or more Defendants had ceased advertising, those Defendants might have lost market share to the other Defendants, and sales across the entire Chocolate Candy industry might have

[20] All of these elements exist in Canada, where there is direct evidence of price fixing.

suffered, to the detriment of all Defendants. Moreover, such a drastic departure from historical marketing practices might alert regulatory authorities that something was amiss. Therefore, while Defendants' coordinated departure from their historic *pricing* practices raises an inference of collusion, this inference is neither supported nor undermined by Defendants' continued marketing of their products.

Defendants also suggest that their allegedly "shifting market shares . . . are an affirmative sign of a lack of collusion." Def. Br. at 18-19. Beyond constituting an inappropriate request for an inference to be drawn in their favor, this statement is highly misleading. First, nothing in the Sherman Act or the case law supports the notion that competitors' agreement on price is acceptable so long as they continue to compete for market share. Indeed, it is entirely plausible that Defendants agreed to fix the price of Chocolate Candy at a certain level, and compete for business on bases other than price, *e.g.*, through product innovation and advertising. Second, as even Defendants acknowledge, Plaintiffs have alleged that market shares remained stable throughout the Class Period. Def. Br. at 18. The Court must accept this allegation as true.

Defendants, nonetheless, argue that market shares did shift. Notably, in doing so, Defendants explicitly disown the "accuracy of the specific figures" upon which they rely. *Id.* Thus, even Defendants do not claim that their market shares

changed significantly during the Class Period. In this argument, then, Defendants invite the Court both to (1) rely on figures that Defendants themselves do not believe, and (2) draw inferences in Defendants' favor from those figures. The Court should not accept either invitation. Taken in the context of the Complaints as a whole, the market share allegations plausibly support the existence of a conspiracy by Defendants to fix the price of Chocolate Candy.

In sum, Plaintiffs have alleged numerous facts, which, taken as true and viewed as a whole, plausibly suggest the existence of a conspiracy by Defendants to fix the price of Chocolate Candy in the U.S.[21]

II. DEFENDANTS FAIL TO SHOW FUTILITY OF AMENDMENT

Should the Complaints be found insufficient in any way, Plaintiffs respectfully request leave to amend. It is well settled that leave to amend under Federal Rule of Civil Procedure 15(a) should be "liberally granted." *Long v.*

[21] Although not briefed, Defendants also move to dismiss the claim of Individual Plaintiff Giant Eagle, Inc. ("Giant Eagle") under the Ohio Valentine Act, Ohio Rev. Code Ann. §§ 1331.01 to 1331.14 (Defs.' Mot. to Dismiss (Docket No. 476) at 2). The Ohio Valentine Act was patterned after and is to be interpreted in accordance with the Sherman Act. *See, e.g., C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp.*, 407 N.E.2d 507, 509 (Ohio 1980) ("the Valentine Act ...[was] patterned after the Sherman Antitrust Act, and as a consequence this court has interpreted the statutory language in light of federal judicial construction of the Sherman Act.") Accordingly, for the same reasons that Defendants' Motion to Dismiss Plaintiffs' claims for relief under Section 1 of the Sherman Act should be denied, so too should Defendants' Motion to Dismiss Giant Eagle's Ohio Valentine Act claim be denied.

Wilson, 393 F.3d 390, 400 (3d Cir. 2004).[22] *See also Phillips*, 515 F.3d at 228 ("[I]n the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint.") and *id.* at 245-246.

III. THE FTAIA DOES NOT BAR PLAINTIFFS' CLAIMS

Seeking to persuade this Court to ignore the evidence regarding the Canadian conspiracy, Defendants claim that the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") places beyond reach any "allegations involving the Canadian market." *See* Def. Br. at 28. Defendants' argument is a red herring. The FTAIA is simply inapplicable to a situation such as the one here – where the Complaints cite facts relating to conduct that occurred outside the U.S. – so long as the conspiracy alleged had domestic anticompetitive effect. *See F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162-163 (2004). Plaintiffs' allegations regarding Canada merely demonstrate that Defendants' price-fixing activities in Canada are consistent with their behavior in the U.S. and support the plausibility of a conspiracy in U.S., and that there are enough facts to make it plausible that the parallel pricing in the U.S. was the result of the same

[22] *See id.* ("absent undue or substantial prejudice, an amendment should be allowed under Rule 15(a) unless denial [can] be grounded in bad faith or dilatory motive, truly undue or unexplained delay, repeated failure to cure deficiency by amendments previously allowed or futility of amendment.") (citation and internal quotation marks omitted). *See also Foman v. Davis*, 371 U.S. 178, 182 (1962).

type of conduct that resulted in parallel price increases in neighboring Canada, not to seek redress for harms the conspiracy caused outside of the United States.

A. The FTAIA Does Not Bar Plaintiffs' Sherman Act Claims

Congress enacted the FTAIA to clarify that the Sherman Act does not apply to wholly-foreign conduct unless that conduct has the requisite domestic effect. *See Empagran*, 542 U.S. at 162-163. The FTAIA therefore protects against "the opening of American courthouses to numerous antitrust suits at the behest of foreign interests in cases having only minimal consequences for American economic interests." IB Herbert Hovenkamp, ANTITRUST LAW ¶ 272i(1) at 287 (3d ed. 2006). The Act reflects "the concern of the antitrust laws in protection of *American* consumers and *American* exporters, not foreign consumers or producers[.]" *Id.* (emphasis in original).

This case was brought by *American* purchasers who paid higher prices to purchase Chocolate Candy products in the United States because of a conspiracy between Chocolate Candy manufacturers to fix the prices of those products. Where – as here – the claims seek redress for restrained U.S. commerce, the FTAIA simply does not apply.

The cases cited by Defendants are inapposite. In *Empagran*, for example, the Court was not asked to apply the FTAIA to claims of domestic plaintiffs for domestic injuries. At issue was whether a foreign purchaser could "bring a

Sherman Act claim based on foreign harm." 542 U.S. at 159.[23] In examining that issue, however, the Court expressly recognized that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury." *Id.*

Recognizing these FTAIA limits, defendants, like those in *Empagran*, usually direct FTAIA motions only at the claims of foreign plaintiffs seeking redress for having paid higher foreign prices. *See id.* at 237 (noting that while the plaintiffs included both "foreign and domestic purchasers of vitamins," defendants moved to dismiss only the "wholly foreign" transactions – those made by foreign purchasers for foreign delivery).

In sum, the FTAIA does not preclude Sherman Act claims – like those here – that are based on "injury suffered domestically by purchasing [the targeted product] in the domestic market at inflated prices." *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 781 (N.D. Cal. 2007) (defendants challenged only "Plaintiffs' claims of injury resulting from purchases in foreign markets").

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[23] The other cases cited by Defendants are similarly distinguishable. *See Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 302 (3d Cir. 2002) (examining whether conduct "directed at reducing the competitiveness of a foreign market" will support a Sherman Act claim by foreign plaintiffs); *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 559 (D. Del. 2006) (dismissal of Sherman Act claims "that are based on lost sales of [plaintiff's] German-made microprocessors to foreign customers").

B. The Canadian Conspiracy Is One Piece of Circumstantial Evidence of the U.S. Conspiracy, and the FTAIA Is Not an Evidentiary Rule

The FTAIA does not prohibit parties from relying upon evidence of activities that took place outside of the United States. What is important under the FTAIA is not where meetings or other collusive activities took place, but rather where the economic consequences of the conspiracy are felt. *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 305 (3d Cir. 2002) ("it is the situs of the effects, as opposed to the conduct, that determines whether United States antitrust law applies") (internal quotations omitted). When foreign conduct is "meant to produce and did in fact produce some substantial effect in the United States," it is "well established" that the Sherman Act applies. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *id.* at 796 n. 23 (finding that such conduct "plainly meets [the FTAIA's] requirements").

Defendants' suggestion that this evidence should be disregarded because Plaintiffs have not linked the Canadian conspiracy and the U.S. market completely ignores the allegations in the Complaints. As the Complaints explain, the Canadian conspiracy is relevant, persuasive evidence that "establish[es] and

confirm[s] that Defendants also fixed prices in the United States."[24] Indiv. Compl. ¶ 107.

C. Individual Plaintiffs Have Alleged, In the Alternative, A North American Market, Pursuant to Which U.S. Prices Would Have Been Directly Affected by the Canadian Conspiracy

The same economic features that make the Chocolate Candy industry vulnerable to arbitrage also support the Individual Plaintiffs' allegation that the relevant geographic market may be defined as including the U.S. and Canada – a relevant market that Individual Plaintiffs plead in the alternative. Indiv. Compl. ¶ 107(i). If a U.S.-Canadian market is the proper geographic market, even the Defendants have not disputed that when they colluded to fix the prices of Chocolate Candy products in Canada, their actions directly affected the price of such products sold to Plaintiffs in the United States.

Defendants' argument that the Individual Plaintiffs provide no factual support for this geographic market definition is devoid of merit. Def. Br. at 30. That factual support is laid out in detail in the Individual Plaintiffs' Complaints. *See* Indiv. Compl. ¶ 107(f)-(i) (providing over three pages of detailed allegations).

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[24] *See In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 U.S. Dist. LEXIS 29160, at *12 (E.D. Pa. Oct. 29, 2004) ("Evidence of cooperation between Defendants in foreign price-fixing, through a trade association or otherwise, would certainly be relevant to establish the existence of an illegal combination or conspiracy in restraint of trade..."; "Evidence of foreign price-fixing among Defendants would also be material to prove that they had the opportunity and ability to engage in domestic price-fixing for automotive refinishing paint.") (citations omitted).

Those allegations include not only the relevant economic features of the Chocolate Candy product market that serve to define that market, but also evidence that Defendants actually exported and imported significant quantities of product between the U.S. and Canada. *Id.* These allegations amply satisfy the relevant pleading requirements.

Whether the appropriate market definition will be the U.S.-Canadian market or only the U.S. market is a fact-intensive issue that will be the subject of discovery and expert testimony. There is certainly no legal barrier to the existence of such a market, nor is there anything novel or economically irrational about alleging such a market.[25] As such, there is no basis to dismiss this allegation.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety.

[25] *See, e.g., SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1278 (8th Cir. 1981) (relevant market is North America); *U.S. v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001) (same); *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1398 (D. Colo. 1995) (denying motion to dismiss under FTAIA where the alleged geographic market was North America).

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