

Nestle, Hershey, Mars Melt Chocolate Antitrust Claims

By **Melissa Lipman**

Law360, New York (February 26, 2014, 8:47 PM ET) -- A Pennsylvania federal judge on Wednesday axed a class action accusing Nestle USA Inc., The Hershey Co. and Mars Inc. of conspiring to raise the price of chocolate, ruling that the chocolate buyers didn't have adequate evidence to back up their claims.

U.S. District Judge Christopher C. Conner granted the chocolate makers summary judgment, dropping the claims of both a slew of retailers bringing individual claims and a class of other direct purchasers.

The judge reasoned that though the plaintiffs' original claims were "quite plausible" given a similar conspiracy in Canada, the result of years of litigation and merits discovery showed that there was no proof to support those allegations.

"Despite diligent efforts on the part of plaintiffs' counsel and nearly unfettered access to defendants' records, plaintiffs are before the court with nothing more than speculation as to the who, what, when, where and how of the communications that allegedly facilitated the parallel price increases," Judge Conner wrote. "Nothing scandalous or improper has been discovered within our borders, and no evidence permits a reasonable inference of a price-fixing agreement."

Even though the three companies couldn't deny that their prices had increased in a "synchronized and parallel" fashion during the time of the alleged price-fixing plot, the plaintiffs still had to show that the behavior was the result of something more than the heavily concentrated nature of the chocolate market, the judge found.

As a result, the only conclusion the court could reach was that the plaintiffs had failed to find enough evidence that would exclude the possibility that the defendants had raised prices independently of one another, according to the opinion. But the plaintiffs' economics experts failed to persuade the judge that the companies were not simply raising their prices in response to an expected increase in the cost of their raw materials.

"In the end, despite exhaustive and comprehensive discovery, hundreds of depositions, the production of thousands of documents, and the tireless efforts of all counsel, the record sub judice is devoid of evidence — direct or circumstantial, individually or in toto — that shows the 'reciprocal exchange of information by any executive of the defendants with price-fixing authority,'" Judge Conner wrote.

The long-running MDL now includes a total of 91 cases, with claims brought by major retailers including CVS Pharmacy Inc., Walgreen Co. and others in the wake of German and Canadian investigations into

the chocolate industry.

Both the retailers and the class claim that Nestle, Hershey and Mars knew about each other's planned price hikes in advance of the formal announcements. The plaintiffs likewise claimed that the companies were driven by the success their Canadian affiliates had had pursuing a lockstep increase in list prices, according to the opinion.

The case originally also targeted Cadbury but the company paid \$2 million in 2011 to settle the case.

Attorneys for the defendants declined to comment on the ruling. An attorney for the plaintiffs was not immediately available for comment Wednesday.

The lead counsel for the direct purchaser plaintiffs are Berger & Montague PC and Hausfeld LLP.

Mars is represented by McDermott Will & Emery LLP and Butler Pappas Weihmuller Katz Craig LLP. Nestle is represented by Cadwalader Wickersham & Taft LLP, Mayer Brown LLP and Saul Ewing LLP. Hershey is represented by Patterson Belknap Webb & Tyler LLP, Kirkland & Ellis LLP and McNeese Wallace & Nurick LLC.

The case is In re: Chocolate Confectionary Antitrust Litigation, case number 1:08-md-01935, in the U.S. District Court for the Middle District of Pennsylvania.

--Editing by Katherine Rautenberg.