

1st Circ. Throws Out Nestle Ice Cream Antitrust Suit

By **Jonathan Randles**

Law360, Los Angeles (September 2, 2011) -- The First Circuit on Thursday affirmed a district court's dismissal of an antitrust suit against Nestle SA over a merger between one of its subsidiaries and an ice cream distributor in Puerto Rico, maintaining the plaintiff lacked standing to file suit.

Sterling Merchandising Inc. accused Nestle PR in 2006 of attempting to monopolize the Puerto Rican ice cream market when it merged with Payco Foods Corp. in June 2003 and acquired Dreyer's Grand Ice Cream Inc. the same year. The suit claimed Nestle and Payco subsequently used exclusionary contracts to suppress competition in the island's ice cream distribution market.

But the three-judge panel determined that Sterling — the second-largest ice cream distributor in Puerto Rico — hadn't established an antitrust injury for claims against Nestle arising under the Sherman Act and Clayton Act.

The First Circuit's ruling follows U.S. District Judge Salvador E. Casellas' decision to toss the lawsuit in 2010 because, among other problems, Sterling had not established a plausible damages theory.

Following its merger with Payco, Nestle controlled 85 percent of Puerto Rico's ice cream distribution market, the appeals court said. But following the merger, Sterling's sales actually increased by an average of 11 percent each year from 2003 to 2008, according to the ruling.

By 2007, Nestle's share of the market dropped to about 70 percent, and during that time, the company also lost several of its exclusive distribution arrangements with Puerto Rican retail companies to Sterling, the opinion said.

Sterling couldn't substantiate claims that the market had suffered a reduction in output or an increase in consumer prices as a result of Nestle's business decisions, Circuit Judge Sandra Lynch said in the ruling.

Further, while Nestle still controlled a majority of Puerto Rico's ice cream market even after Sterling's lawsuit was filed, it had no apparent effect on the overall competitiveness of the market, the opinion said.

“Even had Sterling made an adequate showing of harms to competition through increased consumer prices or reduced output, Sterling would have to show those market impairments were the result of antitrust violations in order to demonstrate antitrust injury,” Judge Lynch said. “But Sterling has failed to show that any of Nestle PR's conduct violates antitrust provisions.”

Carmine Zarlenga of Mayer Brown LLP, who represents Nestle, said Friday that the First Circuit's ruling showed market structure wasn't enough to demonstrate antitrust claims following an acquisition.

“[Sterling's] good performance during the very period that was being attacked and complained about ended up being adverse to the plaintiff,” Zarlenga said. “Their own performance was inconsistent with their claims.”

Attorneys for Sterling did not immediately respond to requests for comment.

Nestle is represented by Carmine R. Zarlenga of Mayer Brown LLP , Luis A. Oliver-Fraticelli and Roberto A. Camara-Fuertes of Fiddler Gonzalez & Rodriguez PSC, and Jose L. Ramirez-Coll of Adsuar Muniz Goyco Seda & Perez-Ochoa PSC.

Sterling is represented by David C. Indiano-Vicic and Jeffrey M. Williams-English of Indiano & Williams PSC and David J. Gilles, Kevin J. O'Connor, Jennifer Cotner and Josh Johanningmeier of Godfrey & Kahn SC.

The case is Sterling Merchandising Inc. v. Nestle SA et al., case number 10-1925, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Christopher Norton. Editing by Elizabeth Bowen.

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