

Nestle Ducks Baby Formula Antitrust Suit, But Not Gerber

By Hailey Konnath

Law360 (February 6, 2024, 10:18 PM EST) -- A New York federal judge on Tuesday cut Switzerland-based Nestle loose from a baby formula packager's antitrust suit alleging Gerber breached a contract and cut an anti-competitive agreement with Perrigo to stave off competition in major retail stores, but ruled that Perrigo and Gerber will have to continue fighting the claims.

U.S. District Judge Nina Gershon agreed with Nestle SA that the court lacks personal jurisdiction over the company, noting that Westbury, New York-based P&L Development LLC hasn't argued that Nestle "resides, is found or transacts business in the Eastern District of New York." Rather, P&L has argued that Nestle waived any challenge to personal jurisdiction because it doesn't also challenge venue, according to the decision.

"This argument fails," Judge Gershon said.

Improper venue and lack of personal jurisdiction are "two independent grounds for dismissal" under the law, even though one depends on the other, she said. Choosing not to challenge the venue here doesn't waive the personal jurisdiction challenge, the judge added.

And although Gerber Products Co. is a subsidiary of multiple Nestle subsidiaries, Nestle didn't control the contracting or negotiation activities at the heart of the dispute, the judge stated.

"Having reviewed the parties' submissions, [P&L] fails to make a prima facie showing that Nestle SA — the ultimate parent of hundreds of separate corporate entities within the Nestlé group — participated in the alleged conspiracy," Judge Gershon found.

Notably, P&L hasn't offered up any "concrete facts linking Nestle SA to the negotiation, signing, performance or alleged repudiation" of the agreement with Perrigo Co. PLC, according to the decision. P&L's allegation that Nestle was indeed dictating Gerber's actions during the negotiation is "merely conclusory" and not enough to establish jurisdiction, Judge Gershon added.

At the same time, she denied Gerber and Perrigo's motions to dismiss, finding that P&L has indeed adequately alleged a potential scheme, at least at this stage in the litigation.

"Plaintiff raises a plausible inference that defendants had a 'conscious commitment' to such an agreement," the judge said.

And P&L has also alleged a "plausible reason" why Perrigo and Gerber would enter such an agreement, she stated.

"[P&L] sufficiently alleges that, in light of the high barriers to becoming an infant formula manufacturer, the Perrigo defendants' and Gerber's challenged agreement imposed significantly heightened barriers to enter the market for the sale of store-brand infant formula to U.S. retailers," Judge Gershon said. "The anticompetitive agreement prevented distributors, like [P&L], from obtaining any supply of store-brand infant formula and competing with the Perrigo defendants for sales to U.S. retailers."

According to the 2021 complaint, Gerber broke its contract with the family-owned P&L in order to honor its existing, allegedly anti-competitive contract with Perrigo. That was despite an agreement that would have benefited consumers and netted Gerber millions, P&L says.

"Faced with either ending Perrigo's monopoly or keeping PLD out of the market, Gerber has chosen, at Nestlé's direction, to go along with the unlawful anticompetitive agreement with Perrigo by repudiating the contract with PLD in furtherance of the defendants' conspiracy, thereby ensuring that Perrigo continues to earn monopoly profits," P&L contends.

In Tuesday's order, the judge rejected Gerber's argument that P&L's market definition isn't adequate because "no party disputes that branded and store-brand infant formula compete at the retail level," meaning branded and store-brand formula must belong in the same product market.

"Plaintiff does not allege that the relevant product market is the sale of store-brand infant formula at retail locations to end-user consumers, but sales of store brand infant formula to the retailers themselves, such as Walmart, Sam's Club, Target, Kroger and CVS," Judge Gershon said. "A product market can be limited to a particular category of buyers."

And with the market limited in this manner, P&L has alleged a plausible reason why retailers wouldn't switch to branded infant formula in response to a slight price increase for store-brand formula, the judge said.

As for the geographic market, Judge Gershon said that Perrigo selling infant formula in Canada doesn't render the alleged market implausible.

"Plaintiff plausibly alleges that U.S. retailers could not turn to manufacturers outside of the United States for store-brand infant formula," she said.

The judge also shot down P&L's request for jurisdictional discovery of Nestle. Because P&L has offered "mere conjecture and conclusory non-fact-specific allegations," that request is "more akin to a fishing expedition," the judge said.

P&L initially sued Gerber Products Co., Nestle SA, Grand Rapids, Michigan-based Perrigo and its subsidiaries L. Perrigo Co. and PBM Nutritionals LLC in September 2021. The suit was filed under seal, but a magistrate judge ordered the complaint to be partially unsealed. P&L then filed a new, mostly unredacted complaint in early 2022.

According to P&L, it entered a seven-year deal with Gerber to repackage its baby formula to sell it as store-brand formula to retailers like Walmart Inc., The Kroger Co., CVS Health Corp., Target Corp., Meijer, Rite Aid Corp. and Walgreens.

According to the complaint, P&L repackages products, so big-box retailers can sell them under their store brands, and those products typically cost roughly 30% less than brand-name goods.

But unbeknownst to P&L, Nestle allegedly already had an agreement with Perrigo under which Gerber was required to give Perrigo a "first right" to Gerber's excess baby formula. Gerber never disclosed its agreement with Perrigo until P&L was beginning to meet with retailers in May, and Gerber told P&L it needed to put its deal with P&L "on hold," according to the complaint.

P&L says that by September 2021, Gerber denied it had ever entered into a contract with P&L, and Gerber's general counsel informed the company that it would not be able to fulfill its obligations under their contract due to Nestle's agreement with a third party. That third party is Perrigo, P&L claims.

Gerber and Nestle are helping protect Perrigo's alleged monopoly profits "to the detriment of the retailers and, ultimately, consumers nationwide who buy infant formula," P&L claims.

Jonathan L. Lewis, counsel for P&L, told Law360 on Tuesday, "We are very pleased with Judge Gershon's thoughtful ruling greenlighting the case to move forward against Gerber and Perrigo, and we are looking forward to beginning the discovery process soon."

"We are confident that the discovery process will further validate the complaint's allegations, which Judge Gershon determined were more than sufficient to defeat Gerber's and Perrigo's motions to dismiss," he added.

Nestle, Gerber and Perrigo didn't immediately respond to requests for comment late Tuesday.

P&L is represented by Jennifer Fiorica Delgado, Jonathan L. Lewis and Zarema A. Jaramillo of Lowenstein Sandler LLP.

Perrigo is represented by J. Clayton Everett Jr., William S.D. Cravens and Vincent C. Papa of Morgan Lewis & Bockius LLP.

Nestle is represented by Carmine Zarlenga of Mayer Brown LLP.

Gerber is represented by Geoffrey W. Castello and Whitney M. Smith of Kelley Drye & Warren LLP.

The case is P & L Development LLC v. Gerber Products Co. et al., case number 1:21-cv-05382, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Dorothy Atkins. Editing by Kristen Becker.