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Aspartame Class Action Dismissal Affirmed on Statute of Limitations Grounds

On January 28, 2011, the Third Circuit Court of Appeals in an unpublished opinion affirmed the 2008 decision of the District Court for the Eastern District of Pennsylvania to toss the Aspartame class action on statute of limitations grounds. The court of appeals agreed that the plaintiffs could not invoke the equitable doctrine of fraudulent concealment to toll the four-year statute of limitations for antitrust claims. *In re Aspartame Antitrust Litig.*, Case No. 09-1487. Doc # 003110422286, filed 1/28/2011 (hereafter "Op.").

The class plaintiffs asserted claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that the defendants had conspired to fix the prices of and allocate the market for Aspartame, an artificial sweetener, since at least January 1, 1993. Op. at 2; *see also In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 WL 4724094, at *1 (E.D. Pa. Aug. 11, 2008). The underlying class action was commenced in April, 2006, making the applicable statute of limitations, April 2002.

Neither of the two named plaintiffs – Nog, Inc. or Sorbee International, Ltd. – purchased any Aspartame product after 2001, with Nog's last purchase occurring in 1995 and Sorbee's in 2001. The district court initially had denied a motion to dismiss on statute of limitations grounds, finding that, although plaintiffs' factual allegations relating to fraudulent concealment were "not robust," the issue should be decided "on a developed factual record" and allowed the case to proceed to discovery. Op. at 2 (internal quotation marks omitted).

Discovery revealed, however, that neither plaintiff took any steps to investigate its claims. Nog's president and Rule 30(b)(6) designee testified that Nog purchased roughly $454 worth of Aspartame from Defendant NutraSweet in 1994 and 1995. He further testified that, while Nog believed that "the price [of Aspartame] was out of sight" when it began purchasing the product, no one at Nog complained to NutraSweet, attempted to negotiate a price reduction, or investigated the existence of other suppliers because Nog believed that NutraSweet was the only Aspartame supplier. Op. at 3; *see also Aspartame Antitrust Litig.*, 2008 WL 4724094, at *5 (Nog's designee testified to belief that NutraSweet "was the only game in town").

Sorbee's vice president and Rule 30(b)(6) designee testified that the company purchased roughly $47,500 worth of Aspartame between 1997 and 2001 and similarly denied having undertaken any investigation of the Aspartame market. He disclaimed any knowledge as to whether the company had negotiated the price of the Aspartame it purchased or attempted to obtain Aspartame at a lower price from any other supplier. He was also unable to answer "the most basic questions concerning the Aspartame market; he admitted that he had no understanding of the balance of supply and demand, the fluctuation in the price of raw materials, or the prevailing price tendered by other direct purchasers." Op. at 3-4; *see also Aspartame Antitrust Litig.*, 2008 WL 4724094, at *5 (noting Sorbee's designee had "no recollection about the 'negotiation, price paid, bidding, or process of purchasing Aspartame'").

Under these facts – and given that the named plaintiffs' purchases were all outside the limitations period – the district court granted the defendants' later summary judgment motion, finding that the "complete lack of any diligence by the Plaintiffs precludes them from invoking the equitable doctrine of fraudulent concealment." *Aspartame Antitrust Litig.*, 2008 WL 4724094, at *6. The district court pointed to "storm warnings" that as a whole put the plaintiffs on inquiry notice and triggered a duty to investigate. *Id.* at *6. These warnings included

(1) plaintiffs' belief that the price of Aspartame was "out of sight" and that NutraSweet was the sole supplier in the market, (2) the filing of several anti-competition suits in other jurisdictions naming some of the defendants, and (3) a 1993 Harvard study about the conditions of the Aspartame market, all of which "collectively revealed significant barriers to entry and lack of competition in the Aspartame market." *Aspartame Antitrust Litig.*, 2008 WL 4724094, at *6; Op. at 6-7.

The court of appeals affirmed, holding that, under the foregoing facts, "[e]ven if we assume that defendants fraudulently concealed their anticompetitive conduct, there is simply no evidence to show that plaintiffs exercised the level of due care necessary to toll the limitations period." *Id.* at 6. The court also rejected plaintiffs' argument that "their complete inactivity [was] justified by the sophistication of defendants' concealment" and that "until there is some outward indication of a price-fixing conspiracy, plaintiffs cannot be expected to do anything at all." *Id.* Pointing to the "storm warnings" noted by the district court, the court of appeals found this argument unpersuasive and held, "Although these warnings were not particularly ominous, they certainly required plaintiffs to do *something*. . . . Instead, both parties sat on their hands. Equity will not excuse such unjustified inactivity." *Id.* at 7 (emphasis in original; internal citations omitted)

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