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Chocolate Makers Accused of Price Fixing
Lawyers Hope For A Chocolate Fix By Filing Class Actions

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SAN FRANCISCO - A box of Valentine's Day chocolates has become a bitter topic for those accusing the industry of gouging sweethearts on the price of candy.

Nestlé USA Inc., The Hershey Co., Cadbury Plc, and other big names in the confectionery business are accused of conspiring since 2002 to fix chocolate prices, according to government investigations and plaintiffs' attorneys who have brought dozens of lawsuits in U.S. federal court on behalf of stores that purchased the chocolate.



Now California chocolate consumers - essentially everyone in the state with a sweet tooth - are part of the litigation. Several California plaintiffs' firms filed three class action lawsuits recently in San Francisco Superior Court to seek damages for anyone who bought a piece of chocolate in the past eight years.

"Unless you hate chocolate, you are probably in our class," said Richard Saveri, of San Francisco's Saveri & Saveri, representing consumers in the lawsuit *Patricia McAllister v. Nestlé USA*, CGC-10-496030.

His clients accuse Nestlé USA, a unit of Switzerland-based Nestlé S.A., of conspiring with Hershey, Cadbury and Mars Inc. in both the U.S. and Canada through meetings, phone calls and other correspondence to fix prices in response to a decline in the demand for chocolate that the plaintiffs blame on "increasing health concerns and changing consumer preferences." "In the end, it's a conspiracy that put millions in the defendants' pockets," said Pasadena attorney Randall Renick, a partner at Hadsell Stormer Keeny Richardson & Renick who filed one of the lawsuits in San Francisco on Jan. 21. *Andrea Clark v. Nestlé USA*, CGC-10-496175.

Nestlé USA spokeswoman Edie Burge said by e-mail that the company is aware of the lawsuits and will continue to defend itself against the allegations. Attorneys from the Washington, D.C. office of Howrey, representing Nestlé USA and other chocolatiers, did not return calls seeking comment.

While chocolate is a particularly tasty topic, Saveri said price fixing in the food industry is a fairly common problem and various governments have had their suspicions about the candy companies for years.

Canada's Competition Bureau began investigating Mars, Nestlé USA, Nestlé Canada, Nestlé S.A., and other confectioners for alleged price fixing at the end of 2007. Several months later, the German Federal Cartel Office searched chocolate companies' offices for documents regarding similar allegations.

The U.S. Department of Justice is also investigating for evidence of price fixing in chocolate market, according to attorneys.

Because the company's offices are based in Glendale, Nestlé USA is the primary defendant named in the three state lawsuits. Plaintiffs would like to keep the California consumer litigation from being removed to federal court to join the dozens of pending cases based on similar claims centralized in U.S. District Court, Eastern District of Pennsylvania, Saveri said.

San Francisco attorney Michael J. Hassen, a partner at Jeffer Mangels Butler & Marmaro who publishes the "Class Action Defense Blog," said he was aware of more than 70 federal lawsuits in that court against the chocolatiers on behalf of commercial chocolate buyers.

Referring to the mass of lawsuits as "bandwagon litigation," he said the primary goal of filing these complaints appears to be attorneys' fees. If the U.S. and Canadian governments are already conducting investigations, their findings will punish any illegal behavior with stiff fines, Hassen said.

And the fact that anyone in California who has eaten a chocolate bar since 2002 - potentially millions of people - can seek damages in the suits raises questions regarding the actual benefits that could go to the plaintiffs.

"How much are people going to get and what are they going to get?" he said.

Saveri said the plan is to have people apply for cash settlements if the lawsuits go in the consumers' favor.

"The management of a settlement is pretty easily done in this type of situation," said David Levine, a professor at UC Hastings College of the Law who teaches civil procedure. "Typically there's a level of materiality where you trust people and they make a claim, 'I bought X number of chocolate.' Or you could prove greater damages if you really love your chocolate."

While "bandwagon," or what Levine calls "me too" lawsuits are always a concern, he said plaintiffs' attorneys can avoid such appearances by making clear how their lawsuits are different from the ones already filed.

The California class actions appear to differ from the ones in federal court because they focus only on consumers and are trying to protect them according to state laws, he added.

"California has strong consumer protection laws, stronger than in other places," Levine said.
"And California consumers deserve those protections."

The state lawsuits rely heavily on information taken from the Canadian investigation. They tell the story of an industry ripe for price fixing agreements, with Nestlé USA, Hershey and Mars controlling more than 75 percent of the multi-billion-dollar U.S. market for chocolate candy.

Licensing agreements between Hershey and Nestlé USA, and also Hershey and Cadbury - which is in the final stages of being taken over by Kraft Foods Inc. - allowed for the exchange of data between multiple competitors that created opportunities for collusion, according to a complaint filed Jan. 22. *John Rinaldi v. Nestlé USA*, CGC-10-496212.

Citing the rising cost of supplies - particularly cocoa - the companies raised their prices by about 10 percent in December 2002, then by about 5.5 percent around the same time a couple of years later, and another 5 percent or so in 2007.

"The price increases were instead the product of a conspiracy among the defendant and its co-conspirators, and cannot be explained solely by purported changes in the price of raw materials for these products," the complaint said.

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