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Makers of Equal, Splenda Settle

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It was high drama Friday afternoon in the court battle between the makers of Equal and Splenda when the jury asked to see the expert reports on damages.

Lawyers on both sides knew that probably meant the jury had decided in Equal's favor on liability — with a verdict that would say Splenda is misleading consumers with its slogan "made from sugar so it tastes like sugar" — and was now struggling only with how much money to award.

The stakes were high because Merisant, the maker of Equal, was asking that Splenda's maker, McNeil Nutritionals, be ordered to pay more than \$200 million in damages.

And then the jury asked for a dry erase board — an almost sure sign that they were busy calculating.

So the lawyers huddled. And they talked. And they struck a settlement.

And then the jury announced that it had a verdict.

But that verdict was never read in open court because the lawyers asked U.S. District Judge Gene E.K. Pratter for some time to finalize their deal.

When the deal was done, Pratter called the jury in and explained that their verdict was no longer necessary — but that it was far from pointless.

Pratter assured the nine-member panel that the settlement "would have been absolutely impossible without the work that you did."

In the hallway after court recessed, juror Barbara Helms said the jury had decided the case in Merisant's favor, but declined to disclose the amount the jury was poised to award.

"It was a substantial figure," she said, "but it wasn't as much as they were asking for."

Lawyers on both sides said that Merisant and McNeil would be issuing a joint public statement about the settlement, but that the financial aspects of the settlement would remain confidential.

In the suit, Chicago-based Merisant Co., which makes Equal and NutraSweet, accused McNeil of confusing consumers into thinking that Splenda, whose chemical name is sucralose, is healthier and more natural than other artificial sweeteners such as aspartame, which Equal is based on, or saccharine.

McNeil countered that it simply has a better product backed by superior advertising.

The monthlong trial was a mix of chemistry, advertising and consumer research.

Merisant's lead lawyer, Gregg F. LoCascio of Kirkland & Ellis in Washington, D.C., told the jury that McNeil has known all along that consumers are getting the wrong idea from its slogan. The research, he said, including McNeil's own internal research, showed that consumers mistakenly believe that the product "contains sugar" — which it does not — and that it is "more natural" than other sweeteners.

But instead of correcting that confusion, LoCascio said, McNeil set out to maximize its profit from the confusion. A television ad that included the tagline "but it's not



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sugar" was changed to delete that line, he noted.

McNeil's lawyer, Steven A. Zalesin of Patterson Belknap Webb & Tyler, argued that Equal was suing only because it had lost the battle in the marketplace. He also insisted that Splenda's slogan is literally true because the manufacture of sucralose begins with a sugar molecule.

Stand outside a Splenda plant, he said, and you'd see truckloads of sugar arriving every day.

But LoCascio said the slogan is still false because the chemical process used to turn ordinary sugar, or sucrose, into sucralose can be done just as easily with several other related molecules, including glucose and raffinose, a substance that is not even sweet.

As a result, LoCascio said, the word "so" in the middle of Splenda's slogan is untrue because the fact that Splenda is made from sugar has nothing to do with its sweetness.

The chemical process replaces three of the hydroxy groups on the sucrose molecule with atoms of chlorine, creating a substance that is 600 times sweeter than sugar.

The settlement came just one day after Merisant scored another court victory in a similar lawsuit in France.

Just hours before the closing arguments began in Philadelphia, the Commercial Court of Paris issued a nonjury verdict declaring that the French version of Splenda's slogan — which translates as "because it comes from sugar, sucralose tastes like sugar" — violates French consumer protection laws.

The French court awarded Merisant France 40,000 Euros (about \$54,000) in damages and ordered McNeil to remove the claim from all its ads and packaging. •