UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	09-CV-1739
	)	
JOHN P. MESSINA, d/b/a	)	Judge Gettleman
The Law Office of John P. Messina,	)	
Debtor.	)	
----------	)	

DEBTOR-APPELLANT'S REPLY
TO LABATT JUDGMENT CREDITORS
[Corrected]

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INTRODUCTION

The events that led to debtor's bankruptcy were set in motion on July 14, 1993. That is when the Labatt Judgment Creditors, seeking to make the 90c5009 seal permanent, told the Seventh Circuit that "many of the allegations in the [90c5009] complaint were false;" that the false allegations had been made "to extract a large settlement;" and that debtor "sought to misuse the District Court's files to harm Everfresh." (A.3-4, ¶¶3, 5.)

These are serious charges, but no court has ever adjudicated them. This court can and should do so. The record will show that the charges were false, and that the lawyers who made the charges knew that they were false.

I. The Labatt Judgment Creditors' Admissions Require A Finding That The $149,554 Judgment Is Dischargeable.

Debtor's Opening Brief describes the Labatt Judgment Creditors' illegal manufacturing practices and their lack of candor with the Food and Drug Administration ("FDA"), the Department of Justice, and Grove Fresh. The evidence includes admissions by James Marshall, one of the co-conspirators named in the 90c5009 complaint and a former client of Steven Kowal and McDermott Will & Emery.

In December 1992 Marshall met with prosecutors for more than 15 hours and told them all that he knew about the manufacturing practices at the orange juice processors targeted by the 90c5009 complaint:: American Citrus and its predecessor, Home Juice Co.; Everfresh; Holiday Juice; and Flavor Fresh. Marshall's proffer led to a guilty plea in a related criminal case in the Western District of Michigan and to his being sentenced to 37 months in prison and fined $125,000. *United States v. Kohlbach*, 38 F.3d 832 (6th Cir. 1994).

Confronted with their former client's admissions, Kowal and McDermott Will & Emery no longer claim that the 90c5009 complaint falsely accused their current clients. In fact, they do not challenge even a single sentence in debtor's description of the Labatt Judgment Creditors' history of criminal and civil deceits. Under the rules of appellate procedure and the evidentiary maxim *qui tacet consentire videtur*—"silence gives consent"—their failure to dispute any of this evidence is an admission that debtor's statement of that history is true. (§A, below.)

Since that undisputed history corroborates the truth of the allegations in the 90c5009 complaint (§B, below), Kowal and McDermott Will & Emery violated Rule 11 every time

they argued otherwise (§C, below). In particular, they violated Rule 11 in July 1993, when they told the Seventh Circuit that the author of the 90c5009 complaint had falsely accused the Labatt Judgment Creditors in order to "extract" money from them.

Debtor had just cause to defend himself against that false and defamatory claim. His attempt to defeat it by asking for a hearing did not cause the Labatt Judgment Creditors any legally cognizable harm, much less did it cause them a willful or malicious injury. Accordingly, the $149,544 judgment he was assessed for making that attempt is dischargeable, and the summary judgment in 99-A-1573 should be reversed. (§D, below.)

A. The Labatt Judgment Creditors Have Admitted to 30 Years of Criminal And Civil Deceits.

Debtor's Opening Brief includes a 37-page "statement of the facts relevant to the issues presented for review, with appropriate references to the record," as required by B.R. 8010(a)(1)(D). Debtor's statement included charges of criminal and civil deceit that the Labatt Judgment Creditors would have protested if the statements were untrue. (§1, below.) They have not protested, however. Their silence is an admission that those statements, which are summarized below in §§2-8, are, in fact, true.

1. When innocent parties are falsely charged, they protest.

The maxim *qui tacet consentire videtur*—"silence gives consent"—is an ancient principle of the common law. WIGMORE ON EVIDENCE, §1071. In its modern form, the maxim holds that when a statement is made in the presence of a person, and "probable human behavior" would be to protest the statement if it were untrue, then the person's silence is an admission that the statement is, in fact, true. Fed. R. Evid. (2)(B), Advisory Committee's Notes (1975); FEDERAL RULES OF EVIDENCE MANUAL §801.02[6][d] (9th ed. 2009).

Qui tacet consentire videtur has particular force where, as here, a statement asserts criminal conduct and the circumstances permit a prompt denial, but the person offers no protest. *United States v. Hoosier*, 542 F.2d 687 (6th Cir. 1976).

Here, the Labatt Judgment Creditors sought and received an extension of time to respond to debtor's Opening Brief, so they had 60 days in which to check and double-check debtor's statements. If they found that debtor had "not…fairly presented" the facts, or that he had "omitted or stated them incorrectly," they had the burden of specifying the flaws, with appropriate citations to the record. *See* B.R. 8010(a)(2); PRACTITIONER'S HANDBOOK

FOR APPEALS TO THE UNITED STATES COURT OF APPEALS TO THE SEVENTH CIRCUIT 73 (2003).

The Labatt Judgment Creditors have submitted a statement of facts, but their statements do not dispute any of the statements by debtor summarized in §§2-8, below. Their silence, and the silence of their lawyers regarding the statements charging them with wrongful conduct, is an admission that those statements are true and correct and relevant to this appeal.

2. By their silence, the Labatt Judgment Creditors admit that they and their co-conspirators practiced economic adulteration from 1962 to 1991.

The Labatt Judgment Creditors have not protested the following statements, which describe felony crimes under §303(a)(2) of the Food, Drug and Cosmetic Act ("Act"), 21 U.S.C. §333(a)(2):

- Starting in 1962 and continuing through 1988 or 1989, Home Juice, Everfresh, Holiday Juice, and American Citrus (Home Juice's successor), using a common formula created by James Marshall, deceived consumers by making and selling adulterated orange juice falsely labeled as 100% pure. (Opening Brief 8-9, 16-17)
- Starting in 1979 and continuing through 1991, Flavor Fresh and Peninsular Products, using Marshall's formula, deceived consumers by making and selling adulterated orange juice falsely labeled as 100% pure. (Opening Brief 9-10, 16-17)

These crimes are punishable by up to three years in prison and a fine up to $10,000 for each offense.

3. By their silence, the Labatt Judgment Creditors admit that they and their co-conspirators practiced hygienic adulteration from 1979 to 1991.

The Labatt Judgment Creditors have not protested the following statements describing violations of §409(a) of the Act, 21 U.S.C. §348(a), which prohibits unsafe additives from foods:

- Starting in 1979 and continuing through 1988 or 1989, Home Juice, Everfresh, Holiday Juice, and American Citrus jeopardized public health by using Oleum 320/IDEA, an unsafe additive imported from Germany under false pretenses. (Opening Brief 9, 17, 19)
- Starting in the early 1980s and continuing through 1991 Flavor Fresh and Peninsular Products jeopardized public health by using Oleum 320/IDEA. (Opening Brief 9, 17)

The intentional use of an unsafe additive is a felony crime under §303(a)(2) of the Act, 21 U.S.C. §333(a)(2).

4. By their silence, the Labatt Judgment Creditors admit that Labatt had incriminating knowledge of economic adulteration at Everfresh.

The Labatt Judgment Creditors have not protested the following statements regarding Labatt's incriminating knowledge of economic adulteration at Everfresh:

- During the negotiations to acquire Everfresh, the sellers disclosed a pending lawsuit alleging that Everfresh made and sold adulterated orange juice; Labatt bought the firm anyway, in December 1986. Over the next seven months Everfresh made more than one million gallons of adulterated orange juice products. (Opening Brief 18-19.)
- The lawsuit alleging adulteration settled in August 1987. Over the next five months, Everfresh continued its illegal practices, making more than two million gallons of adulterated orange juice products. (Opening Brief 19.)

Under §303(a)(1) of the Act, 21 U.S.C. §333(a)(1) and *United States v. Dotterweich*, 320 U.S. 277 (1943), Labatt officials who knew about Everfresh's economic adulteration practices and were in a position to remedy the violations but failed to do so, were subject to strict criminal liability.

5. By their silence, the Labatt Judgment Creditors admit that a key Everfresh employee deceived the Department of Justice regarding the date when Everfresh stopped using the unsafe additive.

The Labatt Judgment Creditors have not protested the following statements:

- Bruno Moser was the Everfresh employee who supervised Everfresh's use of the unsafe additive. In October 1993, Moser deceived the Department of Justice by making a false statement under oath regarding the date that Everfresh ceased using Oleum 320/IDEA. (Opening Brief 34)
- That same month, the Department of Justice filed Moser's affidavit in sentencing proceedings in the Western District of Michigan. (*Id.*)

The actions described in these statements violated 18 U.S.C. §1621, which prohibits perjury.

6. By its silence, McDermott Will & Emery admits that its lawyers violated the False Statements Act.

McDermott Will & Emery has not protested the following statements, which describe a violation of 18 U.S.C. §1001(a):[1]

- In 1989, McDermott Will & Emery aided Labatt in deceiving the FDA into granting Labatt and its orange juice subsidiaries an amnesty from criminal charges. The deceptions included (a) false statements about Labatt's knowledge of Everfresh's and Holiday Juice's illegal practices and (b) the omission to disclose the subsidiaries' use of Oleum 320/IDEA. (Opening Brief 18-20)

The omission and the false statements violated §1001(a) because they were made to a government agency for the purpose of influencing action on a matter within the agency's jurisdiction.

7. By its silence, McDermott Will & Emery admits that its lawyers violated R.P.C. 3.3(13).

McDermott Will & Emery has not protested the following statement:

- McDermott Will & Emery deceived Grove Fresh in 89c1113 by suppressing evidence regarding (a) Everfresh's use of Oleum 320/IDEA, and (b) Labatt's knowledge of Everfresh's illegal practices. (Opening Brief 22-23)

The actions described in this statement violated R.P.C. 3.3(13), which provides that "a lawyer shall not…suppress any evidence that the lawyer or client has a legal obligation to reveal or produce."

8. By their silence, McDermott Will & Emery and Mr. Kowal admit that they violated R.P.C. 5.6(b).

McDermott Will & Emery and Mr. Kowal have not protested the following statement:

- As a condition of settlement, the defense lawyers demanded and extracted an unethical restriction on debtor's right to practice law. (Opening Brief, pp. 30, 31-32)

The actions described in this statement violated R.P.C. 5.6(b), which provides that "[a] lawyer shall not participate in offering or making…an agreement in which a restriction

[1] Section 1001(a) provides: "[W]hoever, in any matter within the jurisdiction of the executive…branch of the Government of the United States, knowingly and willfully— (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years…."

on the lawyer's right to practice is part of the settlement of a controversy between private parties."

B. The Labatt Judgment Creditors' admissions corroborate the allegations in the 90c5009 complaint.

The admissions described above in §A corroborate the truth and accuracy of the allegations Grove Fresh made 19 years ago, when it filed the 90c5009 complaint. (A copy of the complaint, without exhibits, may be found at Rule 11 App. 28-81.)

That 54-page complaint, supported by 86 exhibits, was the product of a year-long investigation in which debtor and his co-counsel (Rivkin Radler & Kremer) had invested more than 1,000 hours of attorney time,[2] more than 500 hours of paralegal time, and relied on the services two experts costing approximately $40,000.[3] (Rule 11 App. 87-93.)

The complaint named ten defendants (¶¶21-30) and three non-party co-conspirators (¶¶31-40). It described the process for manufacturing orange juice concentrate (¶¶41-50), the organization of the orange juice industry (¶¶51-61), and industry standards of identity (¶¶62-64). It explained the economic incentives for making and selling adulterated juice (¶¶65-67) and identified the most common forms of adulteration (¶68).

Relying on records that the defendants, their agents, and their predecessors had filed with government agencies in numerous jurisdictions from the 1950s through 1990, the complaint traced the history of what it referred to as the Home Juice Organization—that is, Home Juice Co. and its 20 subsidiaries, affiliates, and franchises in the United States, Canada, and Europe. (¶¶72-91).

The key allegations were in ¶¶94-96, which alleged that after years of extensive research and development, the Home Juice Organization

> developed a formula for producing a beverage that had the look and taste of 100% pure orange juice from concentrate, and which was labeled and described to the

[2] Debtor's efforts included his interviewing: (a) scientists at the Florida Department of Citrus "FDOC"); (b) economists at the University of Florida-Gainesville and the University of Illinois; (c) Grove Fresh employees; and (d) Kristen Chadwell, FDOC's general counsel, who had supervised a 1982-85 investigation of Midwest juice processors, including Everfresh, Holiday Juice, and American Citrus. He also reviewed thousands of records from the FDOC, the FDA, and ten other state, federal and Canadian government agencies. (Rule 11 App.88-92.)

[3] The experts were: Dr. Alan Brause, a nationally recognized analytic chemist who tested samples of the defendants misbranded products; and Coopers & Lybrand, where a team of experts analyzed industry data and Grove Fresh's historical costs and revenues and calculated that between 1980 and 1990, Grove Fresh had lost profits in excess of $2,000,000 due to unfair competition. (A revised estimate, issued in September 1991, was $2.9 million.) The fee for Cooper & Lybrand's services was in excess of $37,000. (Rule 11 App.88.)

> consuming public as 100% pure orange juice from concentrate, but which, in fact, consisted of significant amounts of sugar, chemicals, flavorings and preservatives, mixed in a solution of water and only a minimal amount of orange juice concentrate.

(¶95.) The complaint alleged that the defendants used this formula to form "a scheme for making unlawful profits from adulterated orange juice and other fruit juices." (¶94.) Citing a computer printout of a formula for "Everfresh OJ" dated May 1975, which listed numerous illegal ingredients in a product that would be sold as 100% pure,[4] the complaint alleged that the scheme began no later than May 1975. (¶96.)

The allegations in ¶¶94-96 were corroborated by the admissions described above in §A-2.

The complaint made two sets of allegations specific to Labatt. First, the complaint alleged that Labatt had joined the conspiracy no later than December 1986, when it acquired Everfresh and allowed Everfresh to continue making adulterated orange juice falsely labeled as 100% pure. (¶¶9-13.) This allegation was corroborated by the admissions described above in §A-4.

Second, it alleged that Labatt had made false statements to the FDA in May 1989 when, in order to obtain amnesty for itself and its orange juice subsidiaries, it concealed the date on which it first learned about Everfresh's illegal practices. (¶¶14-15.) This allegation was corroborated by the admissions described above in §A-6.

C. The defense lawyers violated Rule 11 every time they claimed that the 90c5009 complaint falsely accused their clients.

From the outset of the Grove Fresh litigation (February 1989) through the date of settlement (April 1993), Kowal's clients included James Marshall and Flavor Fresh. (Rule 11 App.3, ¶¶15-16.) From March 1989 through April 1990, Kowal shared that representation with McDermott Will & Emery. (Rule 11 App.2, ¶13.)

In preparing to defend against allegations that Flavor Fresh and Marshall were making and selling adulterated orange juice, Kowal and McDermott Will & Emery had a Rule 11 duty find out all that Marshall knew on that subject. A minimally competent interrogation of Marshall would have elicited the inculpatory evidence that Marshall later disclosed to the Department of Justice. As §B, above, demonstrated, that evidence corroborated the 90c5009 allegations.

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[4] Debtor obtained the "Everfresh OJ" formula from investigators at the Florida Department of Citrus.

Since the defense lawyers knew or should have known from the outset that the 90c5009 allegations were true, they violated Rule 11 every time they argued that the 90c5009 complaint falsely accused the Labatt Judgment Creditors.

D. The $149,554 judgment is dischargeable.

The events that led to the $149,554 judgment against debtor were set in motion on July 14, 1993. That is when the Labatt Judgment Creditors, seeking to make the 90c5009 seal permanent, told the Seventh Circuit that "many of the allegations in the [90c5009] complaint were false;" that the false allegations had been made "to extract a large settlement;" and that debtor "sought to misuse the District Court's files to harm Everfresh." (A.3-4, ¶¶3, 5.)

As §C just showed, the defense lawyers knew these arguments were false and defamatory, but they rejected debtor's demand that they retract them. Only then did debtor file a motion asking the Seventh Circuit for a hearing. The undisputed facts show that this request triggered the contempt proceedings that led to the $149,554 fee award to the Labatt Judgment Creditors. (A.8, ¶24.) As a matter of law, these facts cannot sustain a claim that the conduct underlying the fee award was "malicious," meaning that it was "in conscious disregard of [debtor's] duties or without just cause or excuse…." (R.28, p. 14.)

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Here, the Labatt Judgment Creditors were asking the government for relief that, if granted, would label debtor as an unethical lawyer who used false pleadings to extort a big-money settlement. Because their request could not be granted without defaming debtor, he had just cause to ask for a hearing. The bankruptcy court erred in finding otherwise.

II. The Contempt Order Enforced An Illicit Arrangement Whereby the Labatt Judgment Creditors, With Judge Zagel's Aid and Support, But In Violation Of Seventh Circuit Principles, "Bought" the Right To Remove The 90c5009 Records From The Courthouse.

The Grove Fresh settlement included an illicit arrangement whereby the Labatt Judgment Creditors "bought" the right to remove most of the 90c5009 records from the courthouse. The purpose of this "purchase" was to: (a) undermine the Journalists' appeal, (b) bar potential plaintiffs from gaining access to Grove Fresh's papers, and (c) suppress evidence that would expose the fraud that induced the FDA to grant amnesty to the Labatt Judgment Creditors and its orange juice subsidiaries.

Debtor never consented to the arrangement, since it was premised on the false and defamatory claim that the author of the 90c5009 complaint had falsely accused the Labatt Judgment Creditors in order to "extract" an unjust settlement. (Debtor's Rule 11 Response 8.) Debtor's efforts to defend against that claim led to the Contempt Order and a five-year prior restraint secured by a $50,000 cash bond that would be forfeited if he spoke without Judge Zagel's permission.

The arrangement whereby the Labatt Judgment Creditors "bought" the 90c5009 records goes unmentioned by them, but understanding that arrangement's parameters is essential to understanding why the Contempt Order included a five-year prior restraint—and why Judge Zagel continued to bar debtor's speech even after debtor had shown that his proposed speech was based entirely on public information. By failing to honor the terms of his own order, Judge Zagel effectively enforced this illicit arrangement without ever referring to it.

A. The arrangement violated the principle that judicial records are not "a bargaining chip in the process of settlement."

In the Seventh Circuit's eyes, judicial records are "created at cost to the public and other litigants, [and should not] be a bargaining chip in the process of settlement." *Matter of Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299, 1302 (1988). *Memorial Hospital of Iowa County* barred settlements conditioned on the vacatur of unfavorable district court decisions. Such settlements had become a staple of corporate litigation after 1979, when the Supreme Court approved the use of offensive collateral estoppel. Under that doctrine, a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" to prevent a defendant from relitigating issues resolved in the earlier proceeding. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Judge Zagel apparently believed that *Memorial Hospital of Iowa County* did not apply to 90c5009 because he had suppressed the docket for three years: Since none of his rulings had been docketed, the bargain struck by the Labatt Judgment Creditors did not require the vacatur of any orders. Judge Zagel took this logic to an extreme conclusion: Since none of his rulings had become "official," *Smith v. U.S. District Court*, 956 F. 2d 647, 650 (7th Cir. 1992) likewise did not apply to the pleading, motions, and briefs underlying those rulings. *Smith* holds that the federal common law right of access to judicial records includes "materials on which a court relies in determining the litigants' substantive rights."

The suppression of the docket was itself unlawful (*see* III-B-1, below), however, so these premises hardly justified the arrangement whereby the Labatt Judgment Creditors, in Judge Zagel's words, "bought the [90c5009] case from the plaintiff" and could, therefore, remove virtually all of the 90c5009 records from the courthouse. Debtor's Rule 11 Response, p. 6.

B. The records that the Labatt Judgment Creditors "bought" refuted their claims for why 90c5009 should remain sealed.

The records that the Labatt Judgment Creditors "bought" included the three sets of papers Grove Fresh had filed regarding the Journalists' access claims. Those papers refuted the Labatt Judgment Creditors' claims that the author of the 90c5009 complaint had falsely accused the Labatt Judgment Creditors and disclosed confidential information in order to "extract" an unjust settlement. (Debtor's Rule 11 Response 4-7; Rule 11 App. 6-7, ¶34; 10-11, ¶49; 11, ¶52.)

The "bought" records also included two sets of briefs and rulings that likewise refuted the Labatt Judgment Creditors' false and defamatory claims: (1) A March 1991 finding that the 90c5009 complaint was based entirely on information in the public domain, and (2) a July 1992 ruling authorizing a 17-year discovery period, back to 1974, after Grove Fresh made a *prima facie* showing of a continuous course of wrongful conduct beginning no later than May 1975.

1. The March 1991 finding that the 90c5009 complaint was based on information "obtained from public agencies without help from the defendants or a court order."

The Labatt Judgment Creditors moved to dismiss the 90c5009 complaint on the same ground as Everfresh had alleged in its emergency motion for a seal—that it was an unauthorized amendment to Grove Fresh's February 1989 complaints that was intended to evade and disregard earlier rulings by the court on procedural issues and the discovery schedule. *See* 888 F. Supp. at 1431. In support, they made the following three-step argument:

- The 90c5009 complaint was nothing more than an amendment to the February 1989 complaints "disguised by a different caption and docket number."
- The only new information in the 90c5009 complaint "was drawn from public sources of information [and] were obtained voluntarily and not through service of process."
- Too much time had lapsed to permit Grove Fresh to use this public information to amend its 1989 complaints.

(A.284.)

In March 1991, Judge Zagel denied the motions to dismiss, and thereby ruled against the Labatt Judgment Creditors on the only ground they had articulated for the seal. Nevertheless, Judge Zagel kept the seal in place.

More importantly, his ruling included a finding that "*the information used to [draft the 90c5009 complaint] was obtained from public agencies without help from the defendants or a court order.*" (R.24, Ex. 21, p.8; emphasis added.) This finding supported the Journalists' claim for access, since trial courts cannot restrict litigants from disseminating information obtained without the court's help. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 37 (1984). But, since Judge Zagel had suppressed the docket, the Journalists did not even know that Judge Zagel had denied the motions to dismiss, much less that he had made a finding that supported their claims for access.

2. The July 1992 ruling authorizing 17 years of discovery, back to 1974.

While the Journalists' motion was pending, Grove Fresh and the Labatt Judgment Creditors litigated a dispute over the time period for discovery. Grove Fresh sought discovery from 1974 forward. American Citrus objected to any discovery prior to 1988; Everfresh objected to any discovery prior to 1983.

Grove Fresh moved to overrule these objections, arguing that the complaint alleged a continuous course of wrongful conduct beginning no later than May 1975, and that discovery from January 1974 forward was reasonable. In support, Grove Fresh filed a 23-page brief that outlined the evidence it had gathered to support the complaint's allegations. The brief included a 15-page statement of facts supported by 75 specific citations to deposition transcripts and documents. (A.78-114.) Grove Fresh's reply brief included nine pages of additional facts (A.116-25) supported by 25 specific citations to deposition transcripts and documents.

In July 1992 Judge Zagel overruled the Labatt Judgment Creditors' objections and granted Grove Fresh the right to "conduct discovery regarding formulas, ingredient lists and [the unsafe additive] from January 1, 1974, as to all defendants." (R.8, Ex. 9.) Grove Fresh's *prima facie* showing of a continuous course of wrongful conduct dating to at least May 1975 refuted the Labatt Judgment Creditors' claim that the 90c5009 complaint falsely accused them.

C. The records that the Labatt Judgment Creditors "bought" created a roadmap for consumers to hold the Labatt Judgment Creditors jointly and severally liable for $45 million in damages caused by their co-conspirators in the related criminal case.

The sentencing proceedings in the related criminal case included a finding that Marshall and Flavor Fresh were members of a conspiracy that defrauded consumers in 26 states of $45 million. (A.261.) The 90c5009 complaint linked the Labatt Judgment Creditors to a conspiracy with Marshall and Flavor Fresh. (Rule 11 App.38, ¶¶36-38.) In denying motions to dismiss the 90c5009 complaint, the March 1991 ruling sustained Grove Fresh's contention that the Labatt Judgment Creditors were jointly and severally liable for damages caused by Marshall and Flavor Fresh. The briefs underlying the July 1992 ruling on the scope of discovery created a roadmap for proving a *prima facie* conspiracy case against the Labatt Judgment Creditors and Flavor Fresh and Marshall. (A.78-129.) Marshall's proffer in the related criminal case outlined further evidence of the conspiracy and for extending the claims back to 1962. (A.178-95.)

Thus, when the Labatt Judgment Creditors "bought" the 90c5009 records, they "bought" the right to suppress evidence that supported a claim for holding them jointly and severally liable for the $45 million in damages caused by Flavor Fresh.

D. The records that the Labatt Judgment Creditors "bought" exposed the fraud that induced the FDA to grant amnesty to Labatt and its orange juice subsidiaries.

In May-June 1989, McDermott Will & Emery obtained amnesty for Labatt and its orange juice subsidiaries by omitting to disclose Everfresh's and Holiday Juice's ten-year history of using the unsafe additive. *See* §I-A-6, above. If McDermott Will & Emery had disclosed that information, the FDA could have shut down the fraudulent scheme for importing the unsafe additive from Europe.

As of the date that McDermott Will & Emery met with the FDA and omitted to disclose the unsafe additive, the firm was also representing Marshall and Flavor Fresh. (Rule 11 App.2, ¶13.) By omitting to disclose the information about the unsafe additive, McDermott Will & Emery facilitated Marshall's and Flavor Fresh's use of the unsafe additive for two more years.

During the investigation and prosecution of Marshall and Flavor Fresh for using the unsafe additive, Everfresh falsely represented to the Justice Department that it had stopped using the unsafe additive in 1986, when Labatt bought the firm. *See* §1-A-5, above. Evidence

in the 90c5009 files showed that Everfresh continued to use the unsafe additive for two more years. (A.65, ¶23; Rule 11 App.136-42.)

Thus, when the Labatt Judgment Creditors "bought" the 90c5009 records, they "bought" the right to suppress evidence that would expose the fraudulent basis for the amnesty granted to Labatt and its subsidiaries.

E. The administration of the prior restraint tacitly enforced the illicit arrangement whereby the Labatt Judgment Creditors "bought" the 90c5009 records.

Between 1996 and 1998, Judge Zagel issued a series of orders that barred debtor from speaking about the facts underlying claims against the Labatt Judgment Creditors even after debtor had complied with the terms of the prior restraint—that is, he had demonstrated that his proposed speech did not reveal information deemed confidential. *See* Opening Brief 39-41.

As a result, the Labatt Judgment Creditors settled the consumer class actions without having to defend against the adverse evidence in the 90c5009 records that they had "bought." Among other things, they escaped joint and several liability for the $45 million in damages caused by co-conspirators Marshall and Flavor Fresh. (*See* A.267-72 for detailed account of the consumer class action litigation.)

III. Collateral Estoppel Does Not Bar Debtor From Litigating Whether He Had Just Cause To Seek A Hearing On October 22, 1993.

The Labatt Judgment Creditors argue that the Contempt Order collaterally estops debtor from litigating whether his October 1993 motion in the Seventh Circuit caused them a willful and malicious injury. (Labatt Judgment Creditors Brief 27-29.) For the reasons stated below, collateral estoppel does not apply.

A. The collateral estoppel argument violates Rule 11 because it implicitly renews the meritless July 1993 arguments that triggered the contempt proceedings that resulted in the Contempt Order .

Debtor filed his October 1993 motion for one reason only: to defend against the July 1993 claim that the 90c5009 complaint falsely accused the Labatt Judgment Creditors. When Kowal and McDermott Will & Emery made that argument, they knew from their prior representation of James Marshall that the allegations in the 90c5009 complaint were, in fact, true. Nevertheless, they persisted in those arguments, in violation of Rule 11. *See* §I-C, above. They compounded the Rule 11 violation by petitioning for a contempt citation when debtor attempted to defend himself.

Their attempt to enforce the Contempt Order as collateral estoppel implicitly renews the meritless arguments that led to its entry. The implicit renewal of those arguments in this appeal likewise violates Rule 11.

B. Collateral estoppel does not apply because there is reason to doubt the quality and fairness of the proceedings that led to the Contempt Order.

Collateral estoppel does not apply "if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana v. United States*, 440 U.S. 147, 164n.11 (1979). *See also* RESTATEMENT (SECOND) OF JUDGMENTS §28(3).

Here, there are six reasons for doubting "the quality, extensiveness, [and] fairness of procedures followed in" the proceedings leading up to the publication of the Contempt Order and its affirmance in an unpublished order. Reasons 1 through 5 are described below. Reason No. 6—that the Contempt Order is an unreliable account of the Grove Fresh litigation—is discussed below in §IV.

1. Judge Zagel undermined due process by suppressing the 90c5009 docket for four years and nine months.

Without explanation, Judge Zagel suppressed the 90c5009 docket for four years and nine months. (A.238 ¶¶3.b, 3.c.) The suppression was arbitrary—no party moved for it. It was also unlawful—no statute authorized it.[5] As a result, none of his orders could be appealed during that four-year-and-nine-month period. *See* Fed. R. App. P. 4(a)(2) (notice of appeal filed before an order has been entered on the docket is ineffective until the date the order is actually entered); *Stelpflug v. Federal Land Bank of St. Paul*, 790 F.2d 47, 49 (7th Cir. 1986) (same).

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[5] As of August 1990, there were only three statutes that authorized (a) the filing of a civil case under seal along with (b) a temporary suppression of a public docket. None of these statutes applied to 90c5009, since the 90c5009 complaint did not purport to state a claim under any of them.

Under the False Claims Act, a complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2).

Under Section 34 of the Lanham Act, which authorizes *ex parte* applications for a writ of seizure of trademark-infringing goods, any order granting such an application "together with the supporting documents, shall be sealed until the person against whom the order is directed has an opportunity to contest such order, except that any person against whom such an order is directed shall have access to such order and supporting documents after the seizure has been carried out." 15 U.S.C. §1116(d)(8).

The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510 et seq., requires that applications made under that Act, and orders authorizing or approving the interception of a wire, oral, or electronic communication, "shall be sealed by the judge." 18 U.S.C. §2518(8)(b).

During that four-year-and-nine-month period, to the extent that Judge Zagel issued oral orders, those could not be enforced or appealed, either. *Bates v. Johnson*, 901 F.2d 1424 (7th Cir. 1990) (oral injunctions are not enforceable or appealable.)

2. Judge Zagel undermined due process by exercising undue control over the 90c5009 papers.

For seven years, Judge Zagel exercised undue control over the papers in the 90c5009 file. The 90c5009 defendants filed all of their papers in chambers, never with the clerk on the 20th floor, but Judge Zagel never forwarded the papers to the clerk, in violation of FRCP 5(e).[6] (A.239 ¶5.c) Grove Fresh filed its papers on the 20th floor, but all of its papers were rerouted, undocketed, to chambers, where they remained throughout the litigation. (A.240 ¶5.d.)

Judge Zagel abused his control over the file when, on May 15, 1995, he finally allowed the clerk to create a docket, but withheld 132 of the 380 records in the 90c5009 file; all or most of those 132 records were kept in a closet in his chambers. (A.300 ¶19.) Because those records were not docketed, they were not part of the official record and could not be considered by a court of appeals.

Judge Zagel finally released those 132 records in 1997, but only after debtor had incurred $40,000 in fees for compelling their release and entry on the docket. (A.297-301; A.252-53 ¶¶55-57.)

3. The order for which debtor was sanctioned in 1995 was not a gag order, nor was it enforceable or appealable until May 1997.

The Contempt Order treats the order sealing 90c5009 as a gag on debtor's speech, but the emergency motion for a seal didn't ask for a gag, and the seal order itself did not include a gag or any of the detailed findings for a gag required by *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970).[7] Rather, the sealing order was a simple minute order consisting of three sentences:

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[6] As a convenience to parties faced with emergencies, FRCP 5(e) allows papers to be filed initially in a judge's chambers, but "in [that] event the judge *shall* note thereon the filing date *and forthwith transmit them to the office of the clerk*." (emphasis added). Rule 5(e) does not give a trial judge any discretion to withhold from the clerk papers that were filed initially in chambers; if the papers were timely filed, they *must* be forwarded to the clerk. *International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 46 (2d Cir. 1975).

[7] *Chase* holds that "before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the

> Plaintiff's motion to file case under seal is granted. The complaint and all subsequent pleadings shall be filed under seal until further order of court. (A.390.)

Moreover, the seal order, though issued in August 1990, was not entered on the docket until May 1997. (A.238 ¶3.a.) Since trial court orders are not enforceable or appealable until they are docketed (*see* §B-1, above), debtor was sanctioned in 1995 for speaking in violation of an order that was not a gag order and which, in any event, was not enforceable or appealable until May 1997.

If the reasons stated in the 1995 Contempt Order were the true reasons for the seal, they should have been disclosed in August 1990, when Judge Zagel denied Grove Fresh's motion to vacate the stipulated seal (see (Opening Brief 25-27for procedural history of the stipulated seal), or in November 1992, when he denied the Journalists' access claims, so that debtor could have a timely opportunity to appeal. Omitting to disclose this reason in 1990 or 1992 was unprincipled.

4. According to the Contempt Order's time-line, the seal order punished Grove Fresh for attempting to petition the FDA.

In the Contempt Order, Judge Zagel justified his broad construction of the three-sentence sealing order with sweeping comments about debtor's character and fitness to practice law. He declared that debtor had a "tragic 'flaw'" in his personality because he is an attorney "who could not keep a confidence," and that debtor attempted "to beat the defendants into submission by generat[ing] unfavorable publicity for them." 888 F. Supp. 1438.

Judge Zagel cites but a single event to explain how he formed this belief before he sealed 90c5009. This single event is referred to in footnote 2 (888 F. Supp. at 1431n.2) as the "Minute Order of 7/18/90 Granting Motion to Enforce Protective Order in 89c1113."[8]

The "Minute Order of 7/18/90…" concerned Grove Fresh's intent, disclosed to the defense and Judge Zagel, to petition the FDA to investigate Everfresh—not, as Judge Zagel implies, an attempt to leak information to the press. Grove Fresh had a First Amendment right to make such a petition. *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*,

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trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.'" 435 F.2d at 1061. (citation omitted).

[8] Footnote 2 cites one other event to support the statement that debtor made "repeated attempts to beat the defendants into submission by disclosing materials previously designated as confidential to generate unfavorable publicity for them," but that event occurred in October, two months after the seal was imposed. The facts underlying that event, which are set forth at A.215¶45(a) did not justify the seal even if they had occurred prior to the date the seal was imposed..

365 U.S. 127, 138-39 (1961) (corporation has First Amendment right to petition government agency to bring about an advantage to it and a disadvantage to its competitors).

In support of that petition, Grove Fresh wanted to submit business records produced by Everfresh showing that in 1987, Everfresh had made and sold 3.2 million gallons of adulterated orange juice. Everfresh had designated those records as confidential under an order of confidentiality, so Grove Fresh could not give those records to the FDA unless it overcame Everfresh's claim of confidentiality. Grove Fresh challenged that claim in accordance with the procedures established by the confidentiality order. Judge Zagel rejected the challenge; Grove Fresh (and debtor) complied with his ruling. (Further details of this event are set out at A.211-14 ¶¶30-36, 42-44; A.230-32 ¶¶12-18.)

Nothing in the events underlying the "Minute Order of 7/18/90…" justified the 90c5009 sealing order or the finding that debtor was an attorney "who could not keep a confidence."

Judge Zagel first disclosed debtor's attempt to petition the FDA as the reason for the seal order in the Contempt Order itself—five years later. If he had disclosed this reason on August 30, 1990, when he denied Grove Fresh's motion to vacate the stipulated seal order, Grove Fresh could have appealed the ruling as an especially perverse retaliation for attempting to exercise a First Amendment right to petition the government.

5. The opportunistically conflicting claims regarding debtor's status as a Grove Fresh attorney.

Debtor's status as a Grove Fresh attorney after January 21, 1993—the date he was "relieved of all responsibility" for the Grove Fresh litigation[9]—was the subject of opportunistically conflicting claims throughout the post-settlement proceedings. Between August 21, 1993, and April 20, 1995, the Labatt Judgment Creditors made an issue of that status eight different times. Three times they affirmatively alleged that debtor continued as a Grove Fresh attorney after January 21, 1993; five times they affirmatively alleged he had been discharged on that date. (A.245-47, ¶¶23-29.)

There was a consistency to their inconsistency: Judge Zagel had no post-settlement jurisdiction over debtor unless he continued as a Grove Fresh attorney post-January 21,

[9] See Opening Brief 30.

1993.[10] So, whenever Judge Zagel's jurisdiction over debtor was an issue, the Labatt Judgment Creditors alleged that debtor had continued as a Grove Fresh attorney post-January 21, 1993.

On the other hand, acknowledging that debtor was a Grove Fresh attorney post-January 21, 1993, would give him unequivocal standing to be heard in the Seventh Circuit. To block debtor from being heard there, the Labatt Judgment Creditors alleged that debtor had been discharged on January 21, 1993. (A.245¶26(b); A.246¶28(d).)

Judge Zagel adjudicated this issue twice. The first time, in December 1994, he ruled that debtor had continued as a Grove Fresh attorney post-January 21, 1993, and that his communications with Grove Fresh and co-counsel were protected by the attorney-client privilege. (A.246, ¶¶26(e), 27.)

The second ruling came in the Contempt Order, when he sanctioned debtor for referring to himself as a Grove Fresh attorney in the papers debtor filed in the Seventh Circuit on October 22, 1993, when he asked to be heard on the charge that the 90c5009 complaint had falsely accused the Labatt Judgment Creditors. 888 F. Supp. at 1449.

A principled adjudicator is "consistent within and across cases" and "acknowledge[es] the true ground of decision." R. Posner, THE FEDERAL COURTS: CHALLENGE AND REFORM 312 (1995). Judge Zagel's contradictory adjudications of debtor's status as a Grove Fresh lawyer was unprincipled.

C. The unpublished affirmance of the Contempt Order should not operate as collateral estoppel.

Jenner & Block had a conflict of interest that precluded the firm from presenting any arguments of judicial misconduct. Even without such arguments, the firm made a compelling case for reversing the Contempt Order. Fourteen of the 23 pages of argument in its opening brief were devoted to First Amendment and due process arguments backed by

[10] Federal courts do not have inherent jurisdiction over disputes arising out of the settlement of federal civil suits. Such disputes involve contract claims governed by state law unless some independent ground for federal jurisdiction exists. *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1186-88 (7th Cir. 1985).

The Labatt Judgment Creditors sought to state an independent ground for federal jurisdiction by invoking FRCP 60(b) and alleging that Grove Fresh and debtor had fraudulently induced the April 1993 settlement. However, since FRCP 60(b) provides jurisdiction only for alleged fraud by a party, and since the alleged fraud was based on alleged conduct by debtor after January 21, 1993, they could not state a FRCP 60(b) claim unless they alleged that debtor was a Grove Fresh attorney at the time of the April 1993 settlement.

controlling precedents. (A copy of Jenner & Block's brief is Attachment in the Appendix to Debtor's Reply Brief.)

The panel hearing the appeal included Judge William Bauer, Judge Zagel's partner for the last 32 years as co-author of a leading law school text book, HADDAD, MARSH, ZAGEL, MEYER, STARKMAN AND BAUER'S CASES AND COMMENTS ON CRIMINAL PROCEDURE (Foundation Press).

The panel dispensed with oral argument and affirmed the Contempt Order in an unpublished opinion written by Judge Bauer. His four-page opinion fails Judge Posner's litmus test for distinguishing a principled opinion from a result-oriented one. The principled opinion, according to Posner, addresses the facts and issues in a case that are adverse to the opinion's ultimate conclusion; the result-oriented opinion, on the other hand, ignores those difficult facts and issues. THE FEDERAL COURTS: CHALLENGE AND REFORM 351-52 (1995)

Judge Bauer's opinion ignored completely all of the facts and issues that were adverse to his decision to affirm the Contempt Order. His opinion did not even acknowledge the First Amendment or due process arguments supporting reversal, much less rule on them. The opinion also skimped on its discussion of the applicable law; it cited a total of four cases, without discussing any of them; only two of the four were among the 52 cases Jenner & Block had cited.

Because Judge Bauer omitted to adjudicate those issues, debtor is not precluded from litigating them here. *See Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38, 45 (2d Cir. 1986) *Gelb* stands for the proposition that collateral estoppel requires *effective* appellate review. If an issue has been presented in a prior appeal, but is not adjudicated by that prior appeal, that issue can be relitigated in a subsequent proceeding.

D. The Seventh Circuit's 2002 ruling sanctioned debtor for an argument he didn't make.

In 2002 the Seventh Circuit sanctioned debtor for arguing that "there were irregularities in the assembly of the record for his direct appeal" from the June 1995 Contempt Order. *Grove Fresh v. John Labatt Ltd.*, 299 F.3d 635, 641 (2002). Respectfully, debtor did not make that argument; his argument concerned his efforts to perfect an interlocutory appeal in March 1995, three months before the Contempt Order issued. Debtor explained the mistake at pp.7-9, 11-12 of *John P. Messina's Petition for Rehearing With*

Suggestion For Rehearing En Banc ("*Petition*"), but the court denied relief. (A copy of the *Petition* is Attachment 4 in the Appendix to Debtor's Reply Brief.)

Debtor may have presented his arguments inartfully, but, respectfully, his 2002 appeal was not a "repackage" of the prior appeal by Jenner & Block. *See Petition*, pp. 10-11, which identifies three arguments presented in the 2002 appeal that Jenner & Block had not presented in the prior appeal, and which the 2002 panel had not adjudicated. Since the issues were never adjudicated, debtor shouldn't be collaterally estopped from raising them. *See Gelb, supra.*

IV. The Contempt Order's Narrative Fails Judge Posner's Measure Of A Fair And Candid Litigation Narrative.

The narrative in the Labatt Judgment Creditors' brief rehashes the litigation narrative in the Contempt Order. The credibility of the Labatt Judgment Creditors' narrative rests on the credibility of the narrative in the Contempt Order.

Judge Richard Posner has identified criteria for measuring whether a journalist's litigation narrative is fair or fraudulent. "In the Fraud Archives," *New Republic* 29 (April 19, 1999)[11] (§A) [A copy of "In the Fraud Archives" is Attachment 2 in the Appendix to Debtor's Reply Brief.] If Judge Posner were to apply to the litigation narrative in the Contempt Order the same rigorous standards of candor and completeness that he applied to a journalist's litigation narrative, he would conclude that the Contempt Order's narrative is fraudulent. (§§B-C.)

A. The measure of a fair and candid litigation narrative.

In THE CRIME OF SHEILA MCGOUGH (Alfred A. Knopf 1999), Janet Malcolm examined the relationship between objective truth and narratives created in courtrooms. Malcolm examined that relationship by reconstructing an obscure criminal case in which a criminal defense lawyer (McGough) was tried and convicted on charges of fraud, perjury, witness intimidation and related crimes. Malcolm concluded that McGough was innocent, but Malcolm did not believe that the judges and prosecutors had "framed" McGough, in the sense of deliberately fabricating a case against a person whom they believed to be innocent. Rather, Malcolm concluded, McGough was convicted because she told the truth, but

[11] Believing that this essay was important "to the understanding and improvement of law," he included a slightly revised version of it as Chapter 10, *Testimony*, in FRONTIERS OF LEGAL THEORY 2, 319-35 (HARVARD UNIV. PRESS 2001) ["*Testimony,*" a copy of which is Attachment 3 in the Appendix to Debtor's Reply Brief.].

couldn't mold the truth into a good story. On the way to this conclusion Malcolm concluded that courtroom narratives are unreliable:

> Law stories are empty stories. They take the reader to a world entirely constructed of tendentious argument, and utterly devoid of the truth of the real world, where things are allowed to fall as they may.

THE CRIME OF SHEILA MCGOUGH 78-79.

Malcolm's book irritated Posner because it argued not only that the legal system failed McGough, but also that the system is rotten to the core—"it cannot do justice in any case, owing to its epistemological and ethical inadequacies." *(New Republic* 29, A. 449.) He prepared his critique by doing what only a federal judge could do—he arranged to have the official record of McGough's case delivered to his chambers. After scouring through it he concluded that McGough was indeed guilty and that Malcolm's narrative was a "fraud." (*Id.*) His analysis rested on four points:

- The record of an ordinary federal case is public in a technical sense, in that it is available for public inspection in a government archive, but "it is not published, and *it is not readily available to people outside the federal judiciary." (New Republic* 29, A. 449; emphasis added.)
- Malcolm had easy access to the McGough records because McGough made them available to her. Her readers did not have equivalent access, so they had no independent means for evaluating Malcolm's claims about McGough's innocence.
- This asymmetrical access to the relevant case records imposed a duty on Malcolm to give a fair and candid account of the facts bearing on McGough's guilt or innocence.
- Malcolm breached that duty by giving a false and misleading account of the trial proceedings.

Posner identified six different ways in which Malcolm tried to make her reader doubt McGough's guilt. Her "ethically most dubious, but rhetorically most effective means" of persuasion was that she "ignore[d] much of the damaging evidence presented at McGough's trial." *Testimony* 330 (A.466; emphasis added). Posner argued that Malcolm ignored this evidence "because it would spoil the story she [was] determined to tell." *New Republic* at 32 (A.452.)

Posner's critique of THE CRIME OF SHEILA MCGOUGH suggests this paradigm for evaluating whether the narrative in a published judicial opinion, such as the narrative presented by the Contempt Order, is fair or not:

- The record of an ordinary federal case is public in a technical sense, in that it is available for public inspection in a government archive, but "it is not published, and it is not readily available to people outside the federal judiciary" other than the parties and their lawyers.
- The audience for a published opinion includes members of the bar and the academy who are not parties to the case. Members of this audience do not have ready access to the record underlying a published opinion, so they have no independent means for evaluating whether the opinion's narrative is fair or not.
- This asymmetrical access to the relevant case record imposes a duty on the judge to give a fair and candid account of the facts underlying the controversies described in the opinion.
- A judge breaches this duty if he omits facts material to a fair understanding of the underlying controversies.

This paradigm is comparable to Judge Posner's definition of a principled judicial opinion as one that addresses *all* of the facts and issues in the underlying case that are *adverse* to the opinion's ultimate conclusion. THE FEDERAL COURTS: CHALLENGE AND REFORM 351-52 (Harvard Univ. Press

B. Judge Zagel and the Labatt Judgment Creditors omit to disclose facts that preclude the five-year prior restraint imposed by the Contempt Order.

The dispute between debtor and the Labatt Judgment Creditors was a dispute over commercial speech—the truth or falsity of the 90c5009 complaint's allegations about their manufacturing practices. If the allegations were false or misleading, the First Amendment would permit the prior restraint imposed by the Contempt Order. *E.g.*, *Central Hudson v. Public Serv. Comm'n*, 447 U.S. 557 (1980). On the other hand, if the allegations were true and accurate, the First Amendment barred the prior restraint. *E.g.*, *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

Clearly, the Labatt Judgment Creditors' 30-year history of criminal and civil deceits was relevant to a fair and just resolution of their request for a prior restraint. Disclosing that history would make plain that they had no right to such relief.

Judge Zagel was familiar with that history. He knew, for example, that Marshall and other witnesses in the related criminal case had corroborated the allegations of the 90c5009 complaint. That information was set out at pp. 6-8 of debtor's letter to John Elson, the attorney for the Journalists, which Elson attached as Ex. A to the Journalists' *Memorandum In Support Of Intervenor's Motion For Public Access To All Documents That Are, And Ever Were, In The*

90c5009 Court File. (A copy of this Memorandum is Attachment 6 in the Appendix to Debtor's Reply Memorandum.)

Nevertheless, Judge Zagel omitted this information from the Contempt Order. Moreover, the letter to Elson—a letter that outlined the evidence corroborating the truth of the allegations in the 90c5009 complaint, and thus demonstrated that a prior restraint was not justified—was one of the acts of speech for which Judge Zagel cited debtor for contempt. 888 F. Supp. at 1446.

One can conclude, as Judge Posner concluded about Janet Malcolm, that Judge Zagel omitted the information about the truthfulness of the 90c5009 complaint because disclosing that information would spoil the story he wanted to tell—a story that would justify a five-year prior restraint on debtor's speech.

To prevent the press from questioning the truth of his narrative or the fairness of the five-year prior restraint, Judge Zagel denied the Journalists' claim for access to the sealed pleadings, motions and briefs that described that history. Thus, when a *Chicago Tribune* reporter prepared a story on the Contempt Order, the seal on the relevant litigation records prevented him from learning about the Labatt Judgment Creditors' crimes and deceits. When the reporter called debtor for a comment on the upcoming story, the gag on debtor's speech prevented him from telling the reporter that the prior restraint was protecting a criminal enterprise. (R.99, Ex. 1, p2, ¶11; A. 395 ¶11.) All that was left for the reporter's story were the scathing criticisms of debtor that Judge Zagel had published to justify the prior restraint of (truthful) speech imposed by the Contempt Order. (A. 395 ¶12)

Today, when lawyers and judges read the Contempt Order in the Federal Supplement, all that they can know are those scathing criticisms of debtor. They have no way of knowing that the prior restraint barred truthful speech about 30 years' of crimes and deceits.

C. The Contempt Order omits to disclose information material to a fair understanding of debtor's status as a Grove Fresh attorney and his alleged litigation tactics.

The Contempt Order omits to disclose information material to a fair understanding of debtor's status as a Grove Fresh attorney and his alleged litigation tactics. Most glaring of all is the omission to disclose the FRCP 60(b) proceedings. For two years Judge Zagel exercised FRCP 60(b) jurisdiction over debtor on the premise that he was a Grove Fresh attorney as of the date of settlement (April 1993). *See* §III-B-5. Disclosing the exercise of

that jurisdiction would undercut his finding that debtor had been discharged on January 21, 1993. So, those proceedings go unmentioned.

The Contempt Order omits to describe the context in which debtor disclosed the information Judge Zagel found to be protected by confidentiality orders—the amount of the settlement ($2,000,000) and the fact that witnesses invoked the fifth amendment. Debtor disclosed this information to rebut the Labatt Judgment Creditors' charge that he had falsely accused them. The amount of the settlement was relevant rebuttal because businesses don't ordinarily pay $2,000,000 to settle false claims. And, in civil cases, the fact that a witness invoked the fifth amendment is admissible evidence and supports an inference of wrongdoing.

The Contempt Order gives materially incomplete accounts of many episodes in the underlying proceedings; the incomplete accounts create unfair innuendoes too numerous to rebut in the space of this reply brief. A full and fair account of the proceedings underlying the Contempt Order may be found in debtor's submissions to the Illinois Attorney Registration and Disciplinary Commission (A.226-332; Rule 11 App. 82-104) and in an affidavit filed in 90c5009 dated October 1, 1996 (A.203-17.)

CONCLUSION

For the reasons stated above this court should: (a) reverse summary judgment for the Labatt Judgment Creditors in 99-A-1573 and enter summary judgment on the complaint for debtor; (b) remand 99-A-1573 for an adjudication of debtor's counterclaim; (c) vacate the fee awards to the trustees; and (d) remand the bankruptcy case for a hearing on the merits of debtor's objections to the fee awards to the trustees' attorneys.

Dated: December 15, 2009 /s/ John P. Messina

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