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.	)	
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DEBTOR'S RESPONSE TO AMERICAN CITRUS'S RULE 11 MOTION

Debtor, John P. Messina, d/b/a The Law Office of John P. Messina ("debtor"), hereby responds to the Motion of American Citrus Product Corporation ["American Citrus"] for Sanctions and for an Order to Prevent Future Misconduct ("Rule 11 Motion").

In support of this response debtor submits, in a separate appendix ("Rule 11 App.__"), his affidavit and supporting exhibits.

Introduction

The narrative in the Rule 11 Motion is derived from the narrative in *Grove Fresh Distributors, Inc. v. John Labatt, Ltd., 888 F.* Supp. 1427 (N.D. Ill. 1995) ["Contempt Order"]. As debtor's Reply Brief will show, that narrative omitted relevant and material facts that required a different result than the one reached by Judge Zagel.

Before responding to the numbered paragraphs in the Rule 11 Motion, debtor presents the facts that American Citrus has omitted from its presentation to this court.

I. Statement of Additional Facts.

A. The suppression of the 90c5009 docket.

Judge Zagel not only sealed 90c5009, he suppressed the docket for four years and nine months and gave no explanation for either of these extraordinary acts. (A.238 ¶¶3.b, 3.c.) 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).

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.)

B. The false and defamatory arguments accusing Grove Fresh and its attorneys of criminal and unethical conduct.

In September 1991, the Ad Hoc Coalition for In Depth Journalism ("Journalists") intervened in 90c5009 to challenge the seal and the suppression of the docket. They also intervened in 89c1113 to challenge the administration of the protective order in that case. Mincing no words, the Journalists argued that the court's failure to explain its reasons for sealing 90c5009 was "unprincipled and unprecedented" and invited the following questions:

> Does [the court] have a financial interest in the outcome of the case? Does it have personal ties with anyone linked with the parties or their attorneys? Does it have a publicly unpopular or unacceptable ideological agenda? [citations omitted]

(Rule 11 App.5 ¶28.) The litigation over the Journalists' claims generated 12 filings—a motion and three briefs by the Journalists; three briefs by Everfresh; two by American Citrus; and two briefs and a motion to strike by Grove Fresh. (Rule 11 App.5-11, ¶¶28-53.)

The Labatt Judgment Creditors opposed the Journalists by accusing Grove Fresh and its lawyers of criminal and unethical conduct. Everfresh made the outrageous claim that debtor had drafted the 90c5009 allegations "for the purpose of damaging or smearing the reputation and image of defendants" (Rule 11 App.8, ¶40) and then gave this false account of the emergency motion for a seal:

> The seal was originally ordered in the [90c5009] case at Everfresh's request because plaintiff had threatened to file the action in the public record, if Everfresh did not pay a multi-million dollar settlement, with unsubstantiated scandalous accusations that would damage the reputation of Everfresh and others.

(Rule 11 App.7-8 ¶¶38-40.) If these statements were true, which they weren't, Grove Fresh and its attorneys would have been guilty of the crime of intimidation, a class three felony under Illinois law. 70 ILCS 5/12-6 (1992). *See People v. Hubble*, 81. Ill App. 3d 560, 563,401 N.E.2d 1282, 1285 (2d Dist. 1980) (essence of crime of intimidation is "a threat made with intent to coerce another person.") The attorneys would also have been guilty of filing a groundless complaint in violation of Rule 11, and of having violated at least five Rules of Professional Conduct. [1]

[1] The five Rules of Professional Conduct implicated by Everfresh's arguments were: Rule 1.2(f)(l) (prohibiting action "when the lawyer knows or reasonably should know that such action would serve merely to harass or maliciously injure another;." Rule 3.1 (prohibiting a lawyer from "bring[ing] ... a proceeding ... unless there is a basis for doing so that is not frivolous ..."); Rule 3.3(a)(l) (prohibiting a lawyer from "mak[ing] a statement of material fact or law to a tribunal which the lawyer knows or reasonably should know is false"); Rule 4.4 (prohibiting a lawyer from "us[ing]

Everfresh offered no evidence to support its claims because none existed. American Citrus made arguments along the same line, also without evidentiary support, but its arguments were even more outlandish—so much so that it agreed to withdraw both of its briefs. (Rule 11 App.9-10, ¶¶42-47.)

Fourteen months later Judge Zagel denied the Journalists' access claims without adjudicating the defamatory claim that the 90c5009 complaint falsely accused the Labatt Judgment Creditors. If he had ruled on the Labatt Judgment Creditors' claim in accordance with the rules of evidence, he would have denied it for their failure to come forward with any evidence to support the charges of criminal and unethical conduct.

C. American Citrus has omitted to disclose Grove Fresh's reaffirmation of debtor's right to a contingent fee.

Paragraph 4 of the Rule 11 Motion alleges that debtor was "discharged by his client" in January 1993. The facts American Citrus has omitted to disclose, summarized below, show otherwise.

The event to which American Citrus refers occurred in the course of the Journalists' appeal from the order denying their access claims. They had filed a timely appeal in December 1992, but the appeal stalled when the Labatt Judgment Creditors moved to dismiss it as a premature interlocutory appeal. Grove Fresh, debtor, and co-counsel at Rivkin Radler & Kremer all agreed that Grove Fresh should support the interlocutory appeal. Debtor drafted a memorandum opposing the motion to dismiss; Rivkin Radler & Kremer reviewed and approved the draft; debtor signed it and filed it. (Rule 11 App.12-14, ¶¶58-69.)

Grove Fresh's support for the Journalists made the defendants unhappy, so much so that they threatened to terminate settlement negotiations unless Grove Fresh withdrew its memorandum. Debtor and co-counsel disagreed on how to proceed, whereupon Rivkin Radler & Kremer issued an ultimatum: they would withdraw from the litigation unless they were given complete control over it. (Rule 11 App.14, ¶70.)

Realistically, as a sole practitioner debtor could not take Grove Fresh's cases to trial without the resources of a firm such as Rivkin Radler & Kremer. Mr. Troy, who was 78 and in failing health—he would die 14 months later—recognized this as well. So, on January 21,

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means that have no substantial purpose other than to embarrass, delay, or burden a third person ..."); and Rule 8.4(a)(4) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation.")

1993, he yielded to the ultimatum and signed the following letter exactly as dictated by Warren Radler:

> This confirms our meeting today at Rivkin, Radler & Kremer. You are hereby relieved of all responsibility in the handling of this matter. Warren S. Radler and Dale R. Crider will act as our sole attorneys and trial lawyers.
>
> We very much appreciate all of your effort in getting this ready for trial and we are optimistic that the matter will be resolved favorably.
>
> *This will also advise you that you will continue to be entitled to receive 20% of any amount received by way of settlement or verdict.* [emphasis added.]

(Rule 11 App.14-15, ¶¶71-72.)

Illinois does not allow a discharged attorney to collect a contingent fees[2] so when Mr. Troy (and Radler) reaffirmed debtor's right to a contingent fee, he (and Radler) was reaffirming debtor's continuing status as a Grove Fresh lawyer, albeit as one with no further responsibilities in the litigation. Indeed, when the case settled three months later, debtor received his full contingent fee of $400,000.

In the Contempt Order, Judge Zagel quoted the second and third sentences of the letter to support his finding that Grove Fresh had discharged debtor on January 21, 1993. 888 F. Supp. at 1449. He omitted to quote the fourth and fifth sentences because the legal significance of those sentences conflicted with the finding he wanted to make. He also omitted to disclose his December 1994 ruling that debtor's post 1/21/93 communications with Grove Fresh and Rivkin Radler & Kremer were protected by the attorney-client privilege. *See* Opening Brief 35.

Following the example Judge Zagel set in the Contempt Order, American Citrus has omitted to disclose any of these facts in its Rule 11 Motion.

D. Judge Zagel's refusal to release the 90c5009 files for transmission to the court of appeals.

In the Journalists' appeal from the denial of relief in the 89c1113 case, the record was transmitted to the court of appeals without a hitch. Not so in the appeal from the order denying access to the 90c5009 files.

As of February 1, 1993, there were approximately 200 pleadings, motions, briefs, orders, and other papers in the 90c5009 case file, but none of those papers had been

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[2] *In re Estate of Callahan*, 144 Ill. 2d 32, 578 N.E.2d 985 (1991) (discharged attorney loses his right to a contingent fee)

transmitted to the Seventh Circuit. (Rule 11 App.15-16, ¶77.) On that date the Seventh Circuit issued an order implying that the 90c5009 case file couldn't be transmitted because it had disappeared:

> *Due to the unavailability of certain documents*, the clerk of the district court was unable to transmit a complete record on appeal for this court's review. Counsel shall tender copies of all previously "unavailable" documents to the clerk of the district court by no later than 3:00 pm on Thursday, February 4, 1993. These copies shall be accompanied by the stipulation of counsel as to the accuracy of the copies tendered.
>
> The clerk of the district court shall transmit these documents as a supplemental record by no later than February 5, 1993. (emphasis added)

(*Id.*)

After receiving this order the Journalists' lawyer (John Elson) submitted all of the Journalists' papers—their motion to intervene and their three briefs. (Rule 11 App.16, ¶79.) Everfresh submitted only one of its briefs in opposition to the Journalists' claims, and nothing else. (Rule 11 App.16, ¶¶80-81.) For the reasons stated in §E, below, Grove Fresh submitted no papers—not even the three sets of papers it had filed in the district court in support of the Journalists' access claims.

None of the other 200 or so records in the 90c5009 were tendered to the clerk for inclusion in the record on appeal.

Elson also investigated the reference to "the unavailability of certain documents." A deputy clerk in the district court told him that the 90c5009 file had been lost and couldn't be found. (Rule 11 App.16, ¶78.) Later, Elson learned from Judge Zagel's courtroom deputy that the 90c5009 files weren't lost—they were in Judge Zagel's chambers, but Judge Zagel had not authorized the deputy clerk to release the files to the court of appeals. (Rule 11 App.17, ¶¶88-89.)

Judge Zagel had no lawful authority to withhold the 90c5009 files from the court of appeals.

E. The incomplete record for the Journalists' appeal—only four of the approximately 200 records in the 90c5009 file.

A few days after debtor was "relieved of all responsibility" for the Grove Fresh litigation, Rivkin Radler & Kremer made the following agreements at a settlement conference with Judge Zagel:

- Grove Fresh would not participate any further in the Journalists' appeal.

- If the parties settled, Grove Fresh would not oppose a motion by the Labatt Judgment Creditors to withdraw from the courthouse all of the 90c5009 papers.

(Rule 11 App.16-17, ¶84; 18, ¶¶92-95.)

Thus, when the Seventh Circuit issued the February 1 order requiring the parties to submit "copies of all previously 'unavailable' documents to the clerk of the district court" for inclusion in the record on appeal, Rivkin Radler & Kremer did not submit copies of any of Grove Fresh's papers nor did it police the submissions by the Labatt Judgment Creditors. (Rule 11 App.16-17, ¶84.)

F. Judge Zagel 's view that the Labatt Judgment Creditors "bought" the right to remove from the courthouse the 90c5009 records that had not been docketed.

On May 5, Judge Zagel issued a two-page *Opinion Clarifying A Prior Order Of Court*. The *Opinion* explained the grounds on which he had allowed the Journalists' to intervene. The *Opinion* also disclosed that "the parties to this case have been given leave to withdraw from the file all papers other than the Amended Complaint, the Answer and the Judgment of Dismissal." (Rule 11 App.19, ¶101.)

The *Opinion Clarifying A Prior Order Of Court* was the Journalists' first notice that Judge Zagel would allow the defendants to remove the 90c5009 records from the courthouse. On May 11, the Journalists' moved in the district court for a stay of the removal of the records pending the outcome of its appeal. Judge Zagel denied the motion with the following explanation:

> THE COURT: There is as far as I am concerned no case. *The defendant bought the case from the plaintiff*. And absent some strong reason not to permit that, which nobody has brought to my attention, *there is no case*. And the only decision – in fact, technically it is not, I think, a decision. It simply confirmed what the parties have worked out. *And you are roughly in the same position as you were as if the case had never been filed in the first place*.

(5/11/93 Tr.6.)[emphasis added] (Rule 11 App.19-20, ¶102.)

On May 12, the Journalists' filed an emergency motion asking the Seventh Circuit to stay the removal of the records. The Seventh Circuit granted the stay and set a briefing schedule on the merits of the appeal. For reasons that have never been explained, however, the clerk of the district court did not create a docket when he transmitted the 90c5009 records to the Seventh Circuit. (Rule 11 App.20, ¶¶103-04.)

G. The threat to debtor.

The Labatt Judgment Creditors' only chance at defeating the Journalists' appeal was if they reiterated in the Seventh Circuit the arguments they had submitted to Judge Zagel—arguments that accused Grove Fresh and its lawyers with criminal and unethical conduct. *See* §B, above.

Grove Fresh had effectively rebutted the Labatt Judgment Creditors' charges in the three sets of papers it had filed in the district court during the briefing on the Journalists' claims. (Rule 11 App. 6-7, ¶34; 10-11, ¶49; 11, ¶52) Because there was no docket, however, those papers were not part of the record on appeal. Because Grove Fresh had made no submissions in response to the Seventh Circuit's February 1st order (§D, above), those papers were not part of the supplemental record created at that time.

As a result of the events described in §§D-F, above, debtor, as the lawyer who signed the 90c5009 complaint, would be defenseless in the Seventh Circuit if, as expected, the Labatt Judgment Creditors repeated there the charges they had made in the district court—that the 90c5009 complaint was filled with "unsubstantiated scandalous accusations" that were made "for the purpose of damaging or smearing the reputation and image of defendants" and to extract a "multi-million dollar settlement." (Rule 11 App. 7-8, ¶¶38-40.)

H. The Labatt Judgment Creditors' reiteration of charges of extortion and unethical conduct.

On July 14, 1993, the Labatt Judgment Creditors filed their brief opposing the Journalists' claims for access and made the following claims:

- On August 23, 1990, a Grove Fresh lawyer sent them a letter "threatening to file a…lawsuit…which would contain unsubstantiated and scandalous allegations." The purpose of the alleged threat was "to extract a large settlement." (A.3, ¶3.)
- When the Labatt Judgment Creditors, refused to pay, the Grove Fresh attorney filed the complaint. (*Id.*)
- "[M]any of the allegations in the [90c5009] complaint were false, contained information derived from confidential discovery material subject to [a] protective order, and were designed to embarrass, harass, and falsely accuse defendants." (*Id.*, ¶5.)
- Grove Fresh's attorney "sought to misuse the District Court's files to harm Everfresh." The trial court, "[k]nowing the full status and history of the case in controversy…ordered that the…complaint be filed under seal." (A.3-4, ¶5.)

After learning about these arguments debtor rescinded the Legal Services and Consulting Agreement ("Consulting Agreement") he had been required to execute as part of the settlement. He also tendered back the initial $50,000 installment and demanded a retraction. (A.71.) The Labatt Judgment Creditors rejected debtor's rescission of the Consulting Agreement and refused to retract. (*Id.*) They warned debtor not to respond to the charges they had made in the Seventh Circuit, claiming that debtor was barred from doing so by virtue of his duties under the Consulting Agreement. (*Id.*)

I. The FRCP 60(b) motion alleging debtor was a Grove Fresh attorney as of the date of the motion (August 1993).

After debtor rescinded, the Labatt Judgment Creditors filed a motion in the 90c5009 case seeking relief against debtor and Grove Fresh under FRCP 60(b). The motion sought either to enforce the Consulting Agreement or rescind the $2,000,000 settlement.

The motion alleged that as of August 1993, debtor was one of Grove Fresh's attorneys. (A.71.)

J. Procedural history of debtor's motion for a FRAP 46(c) hearing.

On October 22, 1993, debtor filed with the Seventh Circuit *Motion Of John P. Messina For A Hearing Regarding Allegations Of Misconduct In Appellees' Brief Of July 14, 1993, And For Other Relief.* (A.1-42.)

Debtor argued that his reputation would be damaged if the court accepted as true, and repeated in a published opinion, the Labatt Judgment Creditors' charges of unethical conduct by the lawyer who signed the 90c5009 complaint. Publishing such charges would be a form of attorney discipline, debtor argued, for which he had a right to a hearing before the discipline was imposed. (A.8.) Accordingly, debtor asked for a hearing pursuant to FRAP 46(c), which at the time provided as follows:

> A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar….

On the very first page debtor identified himself, not as a Grove Fresh attorney, but as a *pro se* petitioner seeking a hearing for himself only, pursuant to FRAP 46(c). On page 3, debtor referred to himself as "one of the attorneys of record for plaintiff Grove Fresh," but he made it clear that Grove Fresh was playing no part in his filing:

> Petitioner is one of the attorneys of record for plaintiff Grove Fresh Distributors, Inc. ("Grove Fresh"). On March 25, 1993, Grove Fresh executed an agreement to settle its claims against the defendants for the sum of $2,000,000. *Since the settlement, Grove Fresh has ceased to participate in this appeal.* (emphasis added)

(A.3.)

On October 25 and 27, the Labatt Judgment Creditors moved to strike debtor's papers, alleging that Grove Fresh had discharged him as its attorney on January 21, 1993, so he had no standing to be heard. This allegation contradicted their FRCP 60(b) motion then pending in the district court, which alleged that he was a Grove Fresh attorney as of August 5, 1993, the date he rescinded the Consulting Agreement. (Rule 11 App.21 ¶111-12.)

Debtor asked the Seventh Circuit for time to respond to the Labatt Judgment Creditors, but the Seventh Circuit denied that request on November 9, 1993. It also denied his FRAP 46(c) motion for a hearing and issued a rule to show cause why he should not be disciplined for filing allegedly frivolous motions. (Rule 11 App.22 ¶115.)

Debtor answered the rule to show cause on November 22, 1993. In June 1994, the Seventh Circuit referred the rule to show cause to the ARDC. In a letter dated July 5, 1994, the ARDC notified debtor that it had opened an inquiry into the Labatt Judgment Creditors' allegation that the 90c5009 complaint "contain[ed] false statements and information derived from confidential discovery material subject to a protective order and was filed to embarrass, harass and falsely accuse the defendants." (Rule 11 App.22 ¶¶118-20.)

The ARDC asked debtor to provide the Commission with "any and all information related to this matter including evidence upon which you based the allegations contained in the complaint you filed in the Grove Fresh litigation." Debtor responded on August 16, 1994. (Rule 11 App.82-104.) The ARDC was satisfied with his response and closed its inquiry in September 1994. (Rule 11 App.23 ¶¶122.)

On November 4, 1994, debtor moved to discharge the Rule to Show Cause that had issued on November 9, 1993. The Seventh Circuit granted that motion on November 17, 1994. (Rule 11 App.23 ¶¶123.)

II. Response to American Citrus's Rule 11 allegations.

For his response to the numbered paragraphs in American Citrus's Rule 11 Motion, debtor states as follows:

> 1. On June 9, 1995, Judge James B. Zagel issued findings of fact and conclusions of law holding Messina in contempt for willful and repeated violations

of confidentiality orders and a seal order. *Grove Fresh Distributors, Inc. v. John Labatt, Ltd., 888 F.* Supp. 1427 (N.D. Ill. 1995).

Answer to ¶1: Debtor admits that Judge Zagel issued an opinion on June 9, 1995 ("Contempt Order") that includes findings of fact and conclusions of law. Debtor states that the Contempt Order speaks for itself.

2. Prior to the contempt determination, Judge Zagel issued the seal order because Messina engaged in conduct that was "questionable if not reprehensible." Messina had attempted to disregard a confidentiality order to improperly disclose information. Id. at 1431. Thereafter, Messina was repeatedly admonished by the court because of his attempts to disregard the confidentiality and seal orders during the course of the litigation. Id. at 1431, n. 2; 1438, n. 11.

Answer to ¶2: Debtor denies that he engaged in any "questionable if not reprehensible" conduct prior to the date of the seal order. Debtor admits that Judge Zagel admonished him several times, but denies that he attempted to disregard any confidentiality orders or the seal order.

3. Even after the contempt proceedings were initiated, Messina disregarded the court's orders and ignored a procedure specifically established to avoid further disclosure problems. Instead, Messina disclosed confidential information to journalism students asserting that he had decided the propriety of his conduct for himself. Id. at 1446.

Answer to ¶3: Debtor admits that in September 1994, he sent a letter to John Elson, a professor at Northwestern Law School and the attorney of record for the Journalists who had intervened in 90c5009 to challenge the seal. Except as admitted, debtor denies the allegations of ¶3.

Further answering, debtor states that as of September 1994, there was no gag order in 90c5009, nor were there any other enforceable or appealable orders in 90c5009. *See* §A, above.

4. In the June 9, 1995 ruling, Judge Zagel also held that Messina had violated Rule 11 of the Fed. R. Civ. Proc. in three ways. Messina had filed a motion in the U.S. Court of Appeals for the Seventh Circuit seeking an original evidentiary hearing. The Court of Appeals had remanded the determination of the nature of the violation and the sanctions to the district court. Judge Zagel held that Messina had misrepresented to the appellate court that he was an attorney for a party when he had been discharged by his client approximately nine months earlier. Also, by signing the pleading, Messina certified that it was filed for a proper purpose when it was not. Also, Messina's motion was not warranted by existing law but instead was precluded by it. Id. at 1449-52.

Answer to ¶4: Debtor admits that ¶4 purports to recite certain findings from the Contempt Order and to describe certain proceedings in the Seventh Circuit. Further answering, debtor states that ¶4 and the Contempt Order omit relevant and material facts regarding the events they purport to describe. Those facts are summarized above in §§B, E-J.

> 5. Judge Zagel ordered Messina to pay $149,554.45 plus statutory interest to the contempt petitioners. Also, Messina was fined $1,000 for the Rule 11 violations and ordered to compensate the petitioners for the costs incurred.

Answer to ¶5: Debtor admits that ¶5 recites certain orders issued by Judge Zagel. Except as expressly admitted, debtor denies the allegations in paragraph 5.

> 6. Judge Zagel found that Messina's conduct and attitude evidenced a significant risk of repetition of the disregard of court orders. Messina was ordered to post a $50,000 bond "with the admonition that any future disclosures - made without first consulting me and proving an independent public source - will lead to forfeiture of this amount, if not further sanctions." The bond was to remain in effect for five years. Id. at 1452.

Answer to ¶6: Debtor admits that ¶6 purports to recite certain findings from the Contempt Order. Except as expressly admitted, debtor denies the allegations in paragraph 6.

Further answering, debtor states that the prior restraint was a disguise for specifically enforcing the unethical restriction on debtor's right to practice law that Judge Zagel had authorized the Labatt Judgment Creditors to include in the settlement of the Grove Fresh litigation.

> 7. Messina's 42-page motion and two-volume appendix seeking an evidentiary hearing before the appellate court was stricken as "frivolous." The Court of Appeals ordered Messina to show cause why he should not be disciplined for this filing. Eventually, the Court of Appeals referred this matter to the Illinois Attorney Registration and Disciplinary Commission.

Answer to ¶7: Debtor denies that ¶7 accurately describes the events it purports to describe. The relevant facts are summarized above in §J.

> 8. During the course of the contempt proceedings and while the petitions were being considered by the court, Messina filed a series of notices of appeal and jurisdictional statements. These pleadings again disclosed information that was protected from disclosure. These pleadings were stricken by the Court of Appeals, and the order stated Messina would be sanctioned if he continued to file frivolous papers. Judge Zagel described Messina's conduct as "a shamelessly willful subversion of this court's authority and business, performed with . . .reckless abandon . . . ." Id. at 1448.

Answer to ¶8: Debtor admits the allegations in the first sentence and denies the allegations in the second sentence. He admits that the third and fourth sentences purport to

recite the contents of a Seventh Circuit order and a finding by Judge Zagel. Except as expressly admitted, debtor denies the allegations of ¶8 and each of them.

Further answering, debtor states that the procedural history of the notices of appeal referred to in ¶8 is set forth at (Rule 11 App.24-27.)

> 9. Messina appealed the contempt decision. It was unanimously affirmed in an unpublished opinion. 134 F.3d 374 (7th Cir. 1998). The petition for writ of certiorari was denied. 525 U.S. 988 (1998).

Answer to ¶9: Debtor admits the allegations of ¶9, except that he denies that the appeal met the standards for an unpublished order as set forth in former Circuit Rule 10.

> 10. Messina did not pay the attorney's fees sanction imposed by Judge Zagel. Instead, he filed for protection in the bankruptcy court.

Answer to ¶10 : Admitted.

> 11. The judgment holders filed an adversary complaint in bankruptcy seeking a determination that the contempt judgment was not dischargeable pursuant to 11 U.S.C. §523(a)(6). Messina responded by attempting to contest the fairness of the contempt proceeding.

Answer to ¶11: Debtor admits the first sentence of ¶10 and admits that his answer to the adversary complaint alleged that his 1993 request for a hearing in the Seventh Circuit had not caused the Labatt Judgment Creditors any willful or malicious injury within the meaning of §523(a)(6).

> 12. United States Bankruptcy Judge John H. Squires held the contempt judgment was not dischargeable. In its memorandum opinion, the bankruptcy court rejected as irrelevant Messina's attempt to rehash the factual basis of the litigation before Judge Zagel. Also, the bankruptcy court approvingly quoted language from another case that Messina's attempt to reopen the district court's final judgment "made no sense." (Mem. Op. p. 12).

Answer to ¶12 : Debtor admits that Judge Squires believed he had no jurisdiction to consider the collateral attack on the fairness of the procedures underlying the Contempt Order because of the "[bankruptcy court's] position in the federal hierarchy, which is below that of the District Court." (3/27/00 Mem. Opinion 12.) Debtor neither admits nor denies the other allegations in ¶12 and states that Judge Squire's Memorandum Opinion speaks for itself.

> 13. During the course of the disposition of the adversary complaint in bankruptcy, Messina repeated some of the same misconduct that resulted in the initial contempt judgment. He filed pleadings that publicly disclosed information protected by the confidentiality and seal orders. Messina made no attempt to use the procedure required by Judge Zagel's contempt decision.

Answer to ¶13: Debtor admits that in the course of the adversary proceeding, he inadvertently disclosed that a witness invoked the fifth amendment. He denies that the disclosure caused any injury to the Labatt Judgment Creditors.

> 14. Messina's improper disclosure resulted in a second contempt petition before Judge Zagel. Messina was again found to have violated the district court's orders. Messina was ordered to pay the petitioner $7,500 for the attorney's fees incurred.

Answer to ¶14: Debtor admits that American Citrus filed a second petition to hold debtor in contempt and that Judge Zagel ruled in it's favor and ordered debtor to pay $7,5000 in attorney's fees. Except as admitted, debtor denies the allegation in ¶14.

> 15. Messina used the second contempt proceeding again to contest the fairness of the initial contempt judgment. Messina filed a motion seeking recusal of Judge Zagel, who he alleged exhibited an "unremitting bias." Messina supported this contention, in part, by insisting that Judge Zagel had issued findings about Messina's conduct leading to the imposition of the seal that were unwarranted. Messina also asserted that Judge Zagel issued inconsistent rulings related to Messina's status as an attorney for Grove Fresh.

Answer to ¶15 : Debtor admits that he contested the second contempt proceeding; that he moved for Judge Zagel's recusal on the ground that Judge Zagel did, in fact, have an unremitting bias against debtor; that the findings Judge Zagel made to justify the seal order were not supported by the record,; and that Judge Zagel did, in fact, issue inconsistent rulings regarding debtor's status as a Grove Fresh attorney.

Except as expressly admitted, debtor denies the allegations in ¶15.

> 16. Messina also sought to vacate the initial contempt judgment through a motion filed pursuant to Rule 60(b)(6) of the Fed. R. Civ. Proc. Among other reasons, Messina argued that he had been prejudiced because failure to maintain a proper record had deprived him of the ability to appeal. Also, he argued that he was not properly represented during his first appeal because his lawyers from Jenner & Block operated under an undisclosed conflict of interest.

Answer to ¶16: Debtor admits that he filed a FRCP 60(b)(6) motion challenging the Contempt Order; that he was, in fact, prejudiced by Judge Zagel's tampering with the reord, in that he prevented debtor from perfecting appeals in spring 1995, before the Contempt Order issued, as described at Rule 11 App.24-27; that Jenner & Block did, in fact, have an undisclosed conflict of interest; and that the firm's conflict is the reason why it did not present the record-tampering issue in its direct appeal from the Contempt Order.

Except as expressly admitted, debtor denies the allegations in ¶16.

17. Judge Zagel denied Messina's motions for recusal and to vacate the contempt judgment.

Answer to ¶17: Admitted.

18. Messina appealed the denial of his motions. Judge Zagel's decisions were unanimously affirmed by the U. S, Court of Appeals for the Seventh Circuit in a published opinion. Messina's petition for rehearing and suggestion for rehearing en banc were denied. 299 F.3d 635 (7th. Cir. 2002). Messina's petition for writ of certiorari to the United States Supreme Court was denied. 538 U.S. 907 (2003).

Answer to ¶18: Admitted.

19. The Court of Appeals did not merely reject Messina's contentions. The appellate court stated that Messina had failed to heed warnings against future abuse of the legal system. The court stated that Messina's appeal was an attempt to repackage prior appeals and pursue claims that "had been unsuccessfully litigated numerous times in both this Court and in the district court, ..." Accordingly, the appellate court found Messina's appeal to be "frivolous." He was sanctioned pursuant to Rule 38 of Fed. R. App. Proc., and ordered to pay $1,500 "for his abuse of the litigation process and the frivolous nature of this appeal." 299 F.3d at 642.

Answer to ¶19: Debtor admits the allegations in the fourth, fifth, and sixth sentences in ¶19, but denies that his appeal was frivolous. Debtor neither admits nor denies the allegations in sentences one through three and states that the Seventh Circuit's opinion speaks for itself.

20. Messina has attempted to contest the validity of Judge Zagel's contempt ruling in Illinois state court. In 1998, there was a hearing to confirm the settlement of a state class action. Messina pursued his argument through surrogates. The lead intervener contesting the settlement was Stuart Cohen, who at the time was an attorney representing Messina

Answer to ¶20: Debtor admits that Stuart Cohen is an attorney; that Mr. Cohen was a member of a class whose claims were being settled in a state court class action; and that Mr. Cohen challenged the fairness of the proposed settlement. Except as admitted, debtor denies the allegations of ¶20.

The relevant procedural history of the class action settlement is set forth at A.268-72.

21. The objections of the interveners were rejected by the Illinois appellate court for the First Judicial District. The court stated that it has " . . . no authority to rebuke, annul or modify an order or decree of a federal court . . . ."

Answer to ¶21: Debtor admits the first sentence of ¶21. Debtor neither admits nor denies the remaining allegations in ¶21 but states that the Appellate Court's opinion speaks for itself.

22. The Illinois appellate court noted that Messina could not have represented a party at the settlement fairness hearing because he "was suspended from the practice of law at the time of the hearing . . . ."

Answer to ¶22: Debtor neither admits nor denies the allegations in ¶22 but states that the Appellate Court's opinion speaks for itself. Further answering, debtor states that in or around March 1998, he received a stipulated 30-day suspension for a technical infraction of the rules governing client funds accounts, in a matter unconnected to the Grove Fresh litigation.

23. With this history of restraining orders, admonitions, warnings, findings, contempt rulings, penalties and disciplinary proceedings, Messina now comes before this Court ostensibly to appeal the non-dischargeability decision of the bankruptcy court. Messina's appeal, however, is focused on the conduct of the underlying Grove Fresh litigation and the initial contempt proceeding. He not only pursues arguments and contentions that have been appealed and unanimously rejected twice, he pursues arguments which the Court of Appeals has held to be "frivolous" and for which he has already been sanctioned.

Answer to ¶23: Denied.

24. It is clear beyond any shadow of a doubt that Messina simply will not obey court orders. He will not accept the rejection of his contentions. He will continue to abuse the litigation process and waste the time, money and resources of every conceivable court system, the parties and the lawyers for the parties.

Answer to ¶24: Denied.

25. To pursue his course of misconduct, Messina has largely ignored the financial penalties that have been imposed against him. Although some amounts have been paid, most have not. Moreover, the financial penalties that have been imposed represent only a fraction of the expenditures that have been required to address his misconduct. There was no order, for example, that required reimbursement for expenditures in the bankruptcy court, to respond to either of his two appeals to the U. S. Court of Appeals for the Seventh Circuit or to address the claims of the alleged interveners in the state court litigation.

Answer to ¶25: Denied.

26. Financial penalties based only on reimbursement for some of the expenditures caused by Messina simply have not been effective. Those reimbursement penalties have not deterred Messina to this point; reimbursement penalties cannot reasonably be expected to prevent future misconduct. Accordingly, the petitioner seeks severe sanctions against Messina to prevent future abuse.

Answer to ¶26: Denied.

27. The petitioner submits that Messina's appeal of the bankruptcy court decision violates Rule 11(b)(l) of the Fed. R. Civ. Proc. By reasserting arguments and contentions that already have been rejected by the Court of Appeals as frivolous,

Messina's appeal has not been brought for a proper purpose. Rather, the appeal was brought to harass the parties and increase the costs of litigation,

Answer to ¶27: Denied. No prior court has adjudicated either of the following issues: (a) whether the 90c5009 complaint falsely accused the Labatt Judgment Creditors; (b) whether debtor's 1993 request for a hearing on that issue caused the Labatt Judgment Creditors any cognizable injury.

28. Similarly, Messina's appeal violates Rule 11 (b)(2). His claims are not warranted by existing law. They already have been rejected as frivolous. There is no reasonable basis for him to believe this Court would or should ignore the controlling determinations of the Court of Appeals.

Answer to ¶28: Denied.

29. The petitioner submits that Messina also has violated 28 U.S.C. §1927. The assertion of arguments already rejected by the Court of Appeals as frivolous is unreasonable and vexatious and brought in bad faith.

Answer to ¶29: Denied.

30. Both Rule 11(c)(4) and §1927 authorize the Court to order Messina to reimburse the petitioner for attorney's fees and costs expended in connection with Messina's violations. Accordingly, the petitioner respectfully requests an order requiring Messina to pay the attorney's fees and costs incurred, in an amount to be determined.

Answer to ¶30: Denied.

31. Rule 1l(c)(4) authorizes this Court to impose a sanction that is sufficient to deter repetition of the conduct or comparable conduct. In making this determination, the Court is authorized to review whether the current misconduct is part of a pattern Vollmer v. Publishers Clearing House, 248 F.3d 698,710 (7th Cir. 2001); Grebiskes v. Universities Research Association, Inc., 417 F.3d 752,758 (7th Cir. 2005).

Answer to ¶31: Denied.

32. In Messina's case, there is overwhelming evidence of a protracted course of conduct to disregard court orders and harass the defendants from the Grove Fresh litigation. Judge Zagel noted that Messina pursued his own agenda, and that observation continues to remain accurate and relevant. The history of this litigation establishes conclusively that Messina will not hesitate to ignore any court order with which he disagrees. Monetary sanctions designed to reimburse respondents are ineffective and insufficient - either to deter Messina or fully compensate the respondents.

Answer to ¶32: Denied.

33. Accordingly, the petitioner requests that Messina be ordered to pay a multiple of the attorney's fees and costs expended by the respondent. The petitioner requests that Messina be ordered to pay three times the amount of the attorney's fees

and costs incurred. The petitioner submits this order is necessary to attempt to achieve deterrence from additional misconduct and secure compliance with court orders, directions and warnings.

Answer to ¶33: Denied.

34. In addition to the provisions of Rule 11, the petitioner submits that an order requiring of a multiple of the fees and costs incurred to secure deterrence is authorized by this Court's inherent authority to protect its jurisdiction and enforce its orders. Support System International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995); Grebiskes v. Universities Research Association, Inc., supra.

Answer to ¶34: Denied.

35. Messina has failed to pay a substantial portion of the monetary sanctions that already have been imposed against him. He has continued his pattern of disobedience while ignoring the sanctions imposed to confiont and deter that defiance. Accordingly, the petitioner respectfully requests that Messina be ordered to pay all of the sanctions, including applicable interest, that already have been imposed. At a minimum, Messina should be barred from any court filing unless and until all such sanctions have been paid. Support Systems International, Inc. v. Mack; supra.

Answer to ¶35: Denied.

36. Rule 1 l(c)(4) and this Court's inherent power authorize sanctions that include non-monetary directives. The petitioner submits that additional orders are justified and necessary to deter Messina from continued abuse of the litigation process.

Answer to ¶36: Denied.

37. Messina's brief in this Court indicates that he is contemplating additional litigation related to the underlying Grove Fresh litigation and the contempt proceedings, orders and sanctions related to that litigation. In describing the counterclaim he filed in the bankruptcy proceeding, Messina said his claim "sought damages for tortious interference with debtor's contractual relations with orange juice consumers." (Messina Brief at 41). Later, Messina contends that the bankruptcy trustee breached his fiduciary obligations by failing to take any action on that claim. (Messina Brief at 50). Thus, there is reason to conclude that Messina intends to pursue additional litigation alleging some sort of tortious interference.

Answer to ¶37: Debtor admits that if this appeal succeeds, he will pursue his counterclaims and challenge the fee awards to the trustees and their attorneys. Except as expressly admitted, debtor denies the allegations in ¶37.

38. The petitioner requests that this Court exercise its inherent authority to enter an order prohibiting Messina, or anyone on his behalf, from initiating or pursuing any legal proceedings whatsoever in any federal or state court that are related in any way to the Grove Fresh litigation or any of the subsequent proceedings. The petitioner also requests a warning that violation of the order will result in serious sanctions, including the possibility of criminal contempt. To this

point, the record is clear that civil contempt and monetary sanctions simply have not been effective in deterring Messina h m additional misconduct.

Answer to ¶38: Denied.

39. The Court's authority extends to prohibiting vexatious litigation. Such an order would not violate Messina's constitutional rights because it would not prevent his access to the courts for other matters, which presumably would be appropriate. See, e.g., In the matter of Lamar Chapman, 328 F.3d 903 (7th Cir. 2000); Dreis & Krump Manufacturing Company v. International Association of Machinists and Aerospace Workers, District No. 8, 802 F.2d 247 (7th Cir. 1986); Srivastava v. Marion County Election Board, 2005 WL 406387 (7th Cir. 2005).

Answer to ¶39: Denied.

40. The petitioner requests that this Court consider the brief it filed in response to Messina's appeal in further support of this motion.

Answer to ¶40: Debtor neither admits nor denies ¶40.

41. On August 13, 2009, American Citrus served this motion on Messina in conformance with Rule 11(c)(2) of the Fed. R. Civ. Proc. The motion was transmitted by both email and regular mail. The Notice of Service and Certificate of Service are attached.

Answer to ¶41: Admitted.

42. The motion served on Messina contained the introduction, paragraphs 1 through 40 and the prayer for relief

Answer to ¶42: Admitted.

43. Messina has not responded.

Answer to ¶43: Admitted.

44. Messina has indicated his intention to continue to pursue his frivolous appeal. He has requested that his reply in support of his appeal be filed with the Court on October 16, 2009. He has not stated nor has he given any indication that he will abandon his appeal and reimburse American Citrus for the expenditures that have been required.

Answer to ¶44: Debtor admits that he intends to pursue this appeal. Except as expressly admitted, debtor denies the allegations in ¶44.

45. Accordingly, American Citrus has no choice other than to proceed with this motion for relief

Answer to ¶45: Denied.

Dated: December 1, 2009 /s/ John P. Messina

John P. Messina, Debtor
541 N. Cuyler, Oak Park, IL 60302
(708) 228-4507
Attorney No. 1892622

Certificate of Service

I certify that on December 1, 2009, I provided service of this **DEBTOR'S RESPONSE TO AMERICAN CITRUS'S RULE 11 MOTION** via ECF electronic filing to: **David Leibowitz,** dleibowitz@lakelaw.com
J. Christian Nemeth, jnemeth@mwe.com
Steven Kowal, steven.kowal@klgates.com

Dated: December 1, 2009 /s/ John P. Messina

John P. Messina, Debtor
541 N. Cuyler, Oak Park, IL 60302
(708) 228-4507
Attorney No. 1892622