

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC.,
an Illinois corporation,

Plaintiff,

v.

JOHN LABATT LIMITED, a Canadian
corporation;
JOHN LABATT, INC., a California
corporation;
LABATT FOOD COMPANY, a division
of John Labatt Limited;
EVERFRESH, a division of Labatt
Food Company;
EVERFRESH INC., a Michigan
corporation, and
EVERFRESH INC., a Canadian
corporation, jointly doing
business as EVERFRESH JUICE
COMPANY;
AMERICAN CITRUS PRODUCTS
CORPORATION, an Illinois
corporation doing business as
HOME JUICE CO.;
DANIEL KOTWICKI;
ALBERT "ACE" ALLEN;
MICHAEL ALLEN; and
CHARLES JAMAIL,

Defendants.

EMERGENCY MOTION:

EVERFRESH INC.'S MOTION TO REQUIRE
GROVE FRESH TO FILE ITS MOTION AND REPLY UNDER SEAL

Defendant Everfresh Inc. ("Everfresh") by its attorneys, moves this Court for an order requiring Grove Fresh to file its threatened motion to compel and its reply brief concerning its earlier motion to compel, which is due October 5, 1990, under seal and in chambers. In support, Everfresh states the following:

1. On October 1, 1990, counsel for Everfresh received a letter via messenger from plaintiff's attorney, John

No. 90 C 5009

JUDGE ZAGEL

JUDGE WILLIAMS
SITTING IN HIS STEAD

PURSUANT TO COURT ORDER,
FILED UNDER SEAL IN
CHAMBERS

P. Messina. The letter threatens to file a motion to compel and to include spurious and scandalous accusations in Grove Fresh's reply brief to the earlier motion to compel.

2. On February 10, 1989, Grove Fresh filed a complaint against Everfresh, as well as complaints against four other juice companies. On November 27, 1989, Judge Zagel dismissed Count II of Grove Fresh's complaint and limited Counts I and III. In addition, the November 27, 1989 order gave Grove Fresh 28 days, until December 26, 1989, to replead its complaint. Grove Fresh did not file an amended complaint within that time period.

3. On December 29, 1989, Grove Fresh filed a motion to extend the time for filing an amended complaint to January 26, 1990. The defendants did not object to such an extension. Grove Fresh, however, decided not to file an amended complaint, and none has ever been filed.

4. On August 23, 1990, counsel for Everfresh received a letter, via telecopier, from plaintiff's attorney, John P. Messina, threatening to file a completely new lawsuit. Defendants went in on an emergency motion before Judge Zagel to require plaintiff to file its new complaint under seal with Judge Zagel. When the parties appeared on the motion, Mr. Messina agreed to filing the complaint under seal. Since the filing of the new complaint, plaintiff has filed an amended version of the new complaint.

5. The new complaint contains many scandalous statements that plaintiff knows or should know to be untrue. Judge Zagel has refused to lift the seal in the new case, and the parties are in the midst of a briefing schedule before Judge Zagel on Everfresh's motion to dismiss. Apparently, Grove Fresh is unhappy with Judge Zagel's unwillingness to lift the seal, and further desires to make its scandalous statements public. Mr. Messina has in the past included documents that were designated as confidential, pursuant to a protective order entered by Judge Zagel, as attachments to pleadings in the public record, which have subsequently been forwarded to the press.

6. The October 1, 1990 letter, which realleges and outlines many of the scandalous statements contained in the new complaint, is another obvious attempt of Mr. Messina to avoid the rulings of Judge Zagel and put these allegations into the public record. Everfresh has no doubt that Mr. Messina intends to include a copy of his October 1, 1990 letter as an attachment to his motion to compel, which he threatens to file in that letter. Further, Mr. Messina threatens to reallege the allegations in its reply brief that is due on October 5, 1990. As such, the reply brief and the motion should be filed under seal, otherwise, the ruling of Judge Zagel requiring the allegations of the new complaint to be filed under seal and the subsequent briefings on that complaint be filed under seal will be avoided.

WHEREFORE, Everfresh requests that this Court order Mr. Messina to comply with Judge Zagel's ruling, not publish his October 1, 1990 letter to the public, and file his threatened motion under seal with the Court, as well as his reply brief, which is due October 5, 1990.

Respectfully submitted,

EVERFRESH INC.

By Lazar P. Raynal
One of its attorneys

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October 1, 1990

BY MESSENGER

Bruce H. Weitzman, Esq.
David J. Stetler, Esq.
Lazar P. Raynal, Esq.
McDERMOTT, WILL & EMERY
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Re: The Grove Fresh Litigation

Gentlemen:

You have served a notice to take the depositions of Purity Products, Inc. and Jeffrey C. Hines, Esq., in Baltimore, Maryland, during the week of October 8, 1990. So far as we can discern, your only purpose in taking these depositions is to attempt to establish a link between Grove Fresh and Purity Products that would enable you to argue that Grove Fresh is somehow bound by the settlement agreement Purity Products executed in August 1988.

There is no basis for any reasonable person to believe that Grove Fresh has had any contacts or connection with Purity Products other than the brief and quite limited telephone conversations that Mr. Troy described at his deposition. Nevertheless, despite the expense and inconvenience of traveling to Baltimore, we will not stand in the way of these depositions. In fact, we welcome them, so that Grove Fresh's independence from Purity Products can be established beyond question, once and for all.

We welcome your notice of these depositions for another reason as well. The deposition of a non-party is a two-way street. Your decision to depose Purity Products and Hines entitles us to cross-examine them on matters relevant to this lawsuit. Thus, your notice brings to a head three important controversies that the defense has created over the last five months:

(1) your contention that, during the time period for which you are willing to provide discovery, i.e., February 1986 to the present, there were only two claims of adulteration asserted against Everfresh: a 1988 lawsuit filed by Purity Products, and Grove Fresh's 1989 complaint;

Bruce H. Weitzman, Esq., et al.

October 1, 1990

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(2) your contention that R. Bruce Fraser and Dave Murray, who are officers of John Labatt, Ltd., had no knowledge of adulteration at the Everfresh subsidiary prior to the audit of manufacturing practices that Murray conducted during the first quarter of 1989; and

(3) your contention that Grove Fresh's attorneys have violated Rule 11, because they allegedly failed to conduct an adequate investigation of the allegations made against Fraser and Murray in the complaint in case no. 90 C 5009.

Items (1) and (2) are false. During the time period that you have defined as relevant, there was a third lawsuit alleging orange juice adulteration. This third lawsuit was filed in March 1986 by Purity Products. This lawsuit was disclosed to Fraser and Murray in or about November 1986, before Labatt ever acquired the Warren, Michigan plant. This third lawsuit was settled in August 1987, with the knowledge and approval of Fraser.

Item (3) is groundless. If Grove Fresh's investigation was incomplete it was not for lack of effort but solely because the defendants and their lawyers have concealed material information, and have refused to produce relevant documents.

Our view of your Rule 11 charges is not news to you. You first made these charges in a letter dated August 30, 1990. The allegations appeared to be mere posturing, but we responded nevertheless, in a letter September 5, 1990. We thought the matter would end there, but your motion of September 21, 1990, demonstrates that you intend to pursue your Rule 11 claims to the end. In order to put your baseless accusations to rest once and for all, we must take the steps outlined at the conclusion of this letter.

We make our demands and assertions in the context of the facts set out below. In summary, these facts establish four conclusions: First, that defendant Hugo Powell made false statements to a government agency in May 1989, with the specific intent of concealing his ultimate employer's culpability for the manufacture of adulterated orange juice.

Second, that Powell made false statements in, and omitted material facts from, his affidavit of April 10, 1990.

Third, that defense counsel, in violation of Fed. R. Civ. P. 11 and 26(g), has provided false and misleading answers to discovery requests, and that these false and misleading answers were provided for the purpose of concealing the culpability of Everfresh's parent corporation.

Fourth, that McDermott Will & Emery holds actual or potential conflicts of interest that preclude it from acting as trial counsel in this case.

I. FACTS

General Background

In 1970, Everfresh Juice Co. of Warren, Michigan ("Everfresh/Warren") registered the "Everfresh" tradename for use on fruit juice products in the United States. At the time of registration, Everfresh/Warren was owned or controlled by Albert Allen and Michael Allen. Also at the time, Daniel Kotwicki was chief financial officer.

In May 1977, Kotwicki became president of Holiday Juice Ltd. in Windsor, Canada ("Holiday Juice"). At the time, Albert Allen was a part-owner of Holiday Juice. In July 1977, Kotwicki caused Holiday Juice to register the "Everfresh" trademark for use on fruit juice products in Canada. Since then, Holiday Juice's "Everfresh" orange juice has become the largest-selling brand of single-strength orange juice in Canada.

Allen relinquished this ownership interest in Holiday Juice in 1978, while retaining his interest in Everfresh/Warren.

John Labatt Ltd. ("Labatt") acquired Holiday Juice in 1983. The acquisition was engineered by R. Bruce Fraser, Labatt's vice president of corporate development. At the date of acquisition, Kotwicki was still Holiday Juice's president. From the date of acquisition until his resignation in December 1988, Kotwicki reported to Fraser. (Powell Dep. 104-05)

In 1983 or 1984, after Labatt had acquired Holiday Juice, Labatt entered into negotiations to acquire Everfresh/Warren from the Allens. The purpose of the negotiations was to unite the rights to the "Everfresh" tradename in Labatt, thereby giving it the exclusive right to the tradename in North America. Negotiations progressed to a substantial point, but at the last minute the Allens decided not to sell.

In March 1986, Purity Products, Inc. ("Purity") filed a complaint against Everfresh/Warren. Purity Products, Inc. v. Everfresh Juice Co., JFM 86-963 (D. Md.) The complaint alleged that Everfresh/Warren was manufacturing and selling adulterated orange juice.

Later in 1986, while the Purity suit was pending, Labatt, through Fraser, revived discussions with the Allens about acquiring Everfresh/Warren. On November 3, 1986, Labatt formed JLI Juice Co. as a holding company for the purpose of making the acquisition. Five of the six officers at JLI Juice Co. were also officers of Labatt: W.J. Emmerton, James A. Meer, Dean C. Kitts, and Ilay C. Ferrier. (The sixth officer was Patrick Daly, of Holiday Juice.) Fraser was the president of JLI Juice Co.

Similarly, three of the four directors were also Labatt officers.: Fraser, Emmerton, and Kitts. (The fourth director was Kotwicki.)

**Fraser's Knowledge of Adulteration
At Everfresh/Warren**

On or about December 1, 1986, JLI Juice Co. acquired all of the stock of Everfresh/Warren, which thereupon became a wholly-owned subsidiary of JLI Juice Co. The Purity case was still pending on the date of acquisition. The existence of this litigation was disclosed to Messrs. Fraser, Emmerton, Meer, Ferrier and Kitts in their capacities as officers and directors of the buyer. (See Boden Dep. 27, 67-68) The Purity case was settled in late August 1987, nearly nine months after Labatt acquired Everfresh/Warren from the Allens.

From the date of acquisition through the end of 1987, Everfresh/Warren manufactured and distributed at least 3,200,000 gallons of adulterated orange juice. Of this total, about 1,800,000 gallons were manufactured while the Purity case was still pending; about 1,400,000 gallons were manufactured after the Purity case was settled. (See Everfresh documents, control nos. 10006383 through 10006984.)

From the date of acquisition through the date of the Purity settlement, and for several months thereafter, the day-to-day operations at Everfresh/Warren were under the direction and control of its president, Michael Allen, one of the former principals of Everfresh/Warren. Allen resigned in about October or November 1987. Throughout his tenure, Allen reported directly to Fraser. Allen did not get along with Kotwicki, and he would not follow any instructions from Kotwicki. (Boden Dep. 71)

The defendants in this case have not produced any evidence that Fraser or any other officer of Labatt or JLI Juice Co. took any steps to terminate the adulteration practices at Everfresh/Warren.

**Fraser's Knowledge Of
Adulteration At Holiday Juice**

Fraser learned about allegations of adulteration at Holiday Juice in July 1987 at the latest, when Purity sent a letter to Kotwicki alleging that Holiday Juice was selling adulterated orange juice in the Baltimore area. This letter was sent while Purity's suit against Everfresh/Warren was still pending. Kotwicki sent a copy of this letter to Fraser and discussed it with him. In January 1988, Purity brought suit on its allegations against Holiday Juice. Kotwicki notified Fraser of the suit and kept him apprised of all developments. (See Memorandum from Kotwicki to Fraser dated February 22, 1988, control no. 10007164.)

Kotwicki resigned in December 1988. He resigned in a dispute with Fraser and Labatt over his authority in the areas of personnel and administration. Defendant Hugo Powell succeeded Kotwicki in mid-January 1989. Powell took the job on the condition that he would report directly to George Taylor, and not to Bruce Fraser. (Powell Dep. 105)

**Powell's Investigation Of The
Adulteration Practices At Everfresh**

(By the time that Powell succeeded Kotwicki, Labatt had acquired a total of four juice plants. The three plants in the United States were combined into a Michigan corporation named Everfresh, Inc. The fourth plant, in Windsor, Ontario, changed its name from Holiday Juice to Everfresh, Inc., a federal Canadian corporation. Hereafter, these four plants are referred to collectively as "Everfresh;" we will continue to refer to the plant in Warren as "Everfresh/Warren.")

Powell alleges that he first learned about the adulteration practices at Everfresh through interviews with Michael Kanan and Michael Petric. At the time, Kanan was Everfresh's chief financial officer, and Petric was director of technical services for the entire Everfresh Division. Powell claims that he immediately flew to Toronto and personally reported his findings to George Taylor, the president of Labatt Food Co. and Powell's immediate supervisor. Powell claims that Taylor was "shocked" to hear the news. Powell claims that Taylor had no prior knowledge of the adulteration at Everfresh. (Powell Dep. 68-82.)

Powell alleges that after Petric's disclosures about adulteration, he was in contact with Dave Murray, Labatt's director of technical services. Powell has given the following account of this contact:

I defined for [Murray] what I had been told [by Petric and Kanan] and asked him to quickly think through a plan which would enable him to audit the Everfresh, Inc. operation as it pertained to quality adherence to government standards and the related procedures for producing products, to embark on the audit and to report back to me.

(Powell Dep. 85) Murray's audit took about two months and was completed by April 1989.

In February 1989, while Murray's audit was under way, Grove Fresh brought this suit against Everfresh and Powell. At this point Powell brought McDermott, Will & Emery into the investigation he was conducting into Everfresh's adulteration practices. (Powell Dep. 86)

In April 1989, Murray reported the results of his audit to Powell. The defense has refused to produce any documents that refer or relate to this audit.

As a result of the findings in Murray's audit, Powell fired Petric. He also fired Walter Gazo and Glenn Davis, directors of quality control at the Windsor plant and the Warren plant, respectively.

In May 1989, defendant Powell and a group of Labatt executives and attorneys met with officials of the U.S. Food and Drug Administration in Washington, D.C. The Labatt contingent included attorneys from the Chicago and Washington offices of McDermott, Will & Emery. The substance of this meeting has been summarized in an interrogatory answer dated June 1, 1990, and signed by Mr. Weitzman:

Mr. Appler¹ ... described what apparently occurred under Everfresh's previous president in making orange juice and how Labatt's own technical audits led to the ending of those practices, despite Everfresh's previous president's efforts to prevent Labatt from learning about those practices; ...

II. DEFENSE MISCONDUCT

The False And Misleading Presentation To The FDA

If the interrogatory describing the May 1989 meeting between the FDA and Everfresh is accurate, then Everfresh's presentation to the FDA was false and misleading. According to the interrogatory answer, Labatt told the FDA that it first learned about adulteration at its Everfresh subsidiary during the first quarter of 1989, after Murray conducted the audit requested by Powell. That representation was false, and the Labatt officers attending the meeting knew it to be false. As discussed above at page 4, Labatt learned about adulteration at Everfresh/Warren no later than December 1986, when Fraser, Dean Kitts, and the other officers and directors of JLI Juice Co. were given notice of the Purity suit.

Labatt also learned about adulteration at its Windsor, Ontario plant no later than July 1987, when Fraser was given a copy of Purity's demand letter to Kotwicki.

1. The reference is to William Appler, a partner in McDermott, Will, & Emery's Washington, D.C. office.

**The False And Misleading
Discovery Responses**

In December 1989, Grove Fresh served a set of interrogatories on Everfresh. Interrogatory no. 6 asked Everfresh to "identify every past or present officer, director, and employee of Everfresh who has any knowledge of [orange juice] adulteration." In response, Everfresh identified Kotwicki, Petric, Davis and Powell.

This interrogatory answer was false. During the period of time for which the defense has agreed to provide discovery, Everfresh's officers and directors included Fraser, Kitts, Emmer-ton, Ferrier, Meer, Michael Allen and Albert Allen. All of these individuals had knowledge of adulteration as a result of the disclosures made when Labatt acquired Everfresh/Warren.

Interrogatory no. 10 asked the following:

State whether you have received any complaints about the presence of sugar, or any other adulterant, in orange juice from concentrate you have manufactured. If your answer is "yes," identify the source, date and nature of each complaint, in complete detail.

In response, Everfresh stated that "as far as can be determined," the only complaints were the lawsuit that Purity Products filed against Holiday Juice in 1988, and the suit filed by Grove Fresh in 1989. Similarly, Hugo Powell, in paragraph 8 of the affidavit dated April 10, 1990, asserted that the 1988 Purity suit and the 1989 Grove Fresh suit were the only claims of adulteration of which he was aware. Neither the interrogatory answer nor the Powell affidavit made any mention of the adulteration suit that Purity had filed against Everfresh in March 1986.

For reasons that by now need not be repeated, the answer to interrogatory no. 10 and the Powell affidavit were both false.

The Powell affidavit is false and misleading in another respect. In paragraph 2 of the affidavit Powell states in pertinent part:

[U]nder Daniel F. Kotwicki's control, [Everfresh] had prepared amounts of orange juice from concentrate in a manner contrary to the manner I believe should have been used.

The affidavit goes on to describe in general terms the ingredients in the adulterated orange juice manufactured by Everfresh. The import of the affidavit is that Kotwicki was the only officer at the operations level who ordered and supervised the adulteration of orange juice. This import is false.

In 1987, Michael Allen, in his capacity as president of Everfresh/Warren, ordered and supervised the manufacture of at least 3,200,000 gallons of adulterated orange juice. Allen took his instructions from Fraser, not from Kotwicki. Allen's activities regarding orange juice adulteration are material facts. The omission of these material facts from Powell's affidavit renders the affidavit false and misleading.

III. McDERMOTT, WILL & EMERY'S CONFLICTS

McDermott, Will & Emery ("MW&E") did not come to this case with a tabula rasa. MW&E was actively involved in the administration of Leonard Haddad's estate. In particular, MW&E was involved in the sale of Haddad's interest in Holiday Juice to Kotwicki. MW&E was also involved in the sale of Home Juice to Henry Lang.

MW&E was also involved in Labatt's acquisition of Boden Products, Inc. Because of the defense's refusal to produce any documents relating to the acquisitions of Everfresh/Warren and Wagner Juice Co., we cannot say for certain that MW&E was involved in those transactions, but we believe that it was.

In the light of the allegations in case no. 90 C 5009, MW&E's involvement in the Haddad estate and the Labatt acquisitions create a host of potential conflicts of interest, the discussion of which is best left for another day.

The point here is that by May 1989 MW&E, by virtue of the facts available to it from its involvement in the Haddad estate, the Labatt acquisitions and the Powell investigation, was in a unique position to assess the true scope of Labatt's knowledge of adulteration as of the day that the Labatt officials met with the FDA.

Lead counsel of record in this case attended the May 1989 meeting with the FDA. He and his partner from the MW&E Washington office are witnesses to the statements made to the FDA by the Labatt officials. Because these MW&E partners are material witnesses, MW&E may be disqualified from acting as trial counsel in this case or case no. 90 C 5009.

IV. CONCLUSION

On the basis of the facts outlined above, Grove Fresh hereby makes the following demands:

(1) that the defendants withdraw the Rule 11 motion dated August 30, 1990;

(2) that the defendants withdraw that portion of the motion to strike under rule 12(f) and 11 which seeks to strike paragraphs 9, 10, 12-15 of the original complaint in case no. 90 C 5009;

(3) that Everfresh withdraw its general objection to the production of documents that refer or relate to Labatt affiliates and third parties, at least insofar as the objections stand as a bar to discovery relating to the various Purity lawsuits;

(4) that Everfresh produce all documents that refer or relate to Purity Products' lawsuits against Everfresh and Holiday Juice Ltd., including, but not limited to the following: Purity Products, Inc. v. Everfresh Juice Co., No. Y 82-3253 (D. Md.); Purity Products, Inc. v. Everfresh Juice Co., No. JFM 86-963 (D. Md.); Purity Products, Inc. v. Holiday Juice Ltd., No. 88-41 (D. Md.);

(5) that Everfresh amend and supplement interrogatory no. 6 of the December 1989 set, regarding officers and employees who have knowledge of adulteration; in particular, that Everfresh indicate the knowledge of the officers and directors of JLI Juice Co., the parent of Everfresh/Warren; and

(6) that Everfresh produce all documents that refer or relate to Jeffrey C. Hines.

As to items (1), (2) and (3), we demand that you file appropriate papers with the court by 4 p.m. on Wednesday, October 3, 1990. We demand that you provide the discovery described in items (4), (5) and (6) by close of business on Friday, October 5, 1990.

If the defense has not resolved items (1), (2) and (3) by Wednesday, October 3, 1990, you will leave Grove Fresh with no choice but to present the allegations herein to the court. The allegations will be presented in a motion to compel the production of all documents that refer or relate to the 1986 Purity lawsuit, including the documents relating to Labatt's acquisition of Everfresh/Warren. The allegations will also be presented in the reply brief due on Friday, October 5th, regarding Grove Fresh's motion to compel the production of third party documents.

Very truly yours,



John P. Messina

/jm

cc: Mr. Cecil Troy
Dorothy B. Zimbrakos, Esq.
Michael J. Weber, Esq.