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

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	)	
Plaintiff,	)	No. 90 C 5009
vs.	)	Judge Zagel
JOHN LABATT, LIMITED, et al.,	)	Filed under seal pursuant to order dated August 28, 1990.
Defendants.	)	

AFFIDAVIT OF JOHN P. MESSINA

Pursuant to 18 U.S.C. §1746 John P. Messina declares as follows:

1. I am submitting this affidavit in response to charges of professional misconduct in a minute order dated August 27, 1996, wherein the court denied me leave to file a consumer class action complaint in state court. The minute order states in pertinent part as follows:

> But I am not satisfied, based on past experience, that Mr. Messina should serve as class counsel. *See, e.g., Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1447-48 (N.D. Ill. 1995) ("Mr. Messina's willingness to hurt his perceived enemies ... pales beside his willingness to run roughshod over the best interests of his client ... Had he been class counsel, I would have afforded him no fees, because he was seemingly incapable of placing his client's interests above his own.") Therefore, I deny Mr. Messina's motion for leave to file the complaint.

The client referred to in the quotation is Grove Fresh Distributors, Inc. ("Grove Fresh").

2. The statement that I am "incapable of placing [my] client's interest above [my] own" is tantamount to a charge that in the course of representing Grove Fresh, I violated R.P.C. 1.7(b), which provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests ..." A defense to this charge requires the disclosure of confidential communications with Mr. Cecil Troy, the late president and principal shareholder of Grove Fresh. Such disclosures are authorized by R.P.C. 1.6(c)(3), which provides that "[a] lawyer may use or reveal: ... confidences or secrets necessary to defend the lawyer against an accusation of wrongful conduct." The confidences disclosed in this affidavit are offered in defense of the charge of wrongful conduct. They are not intended as waivers of any privilege.

My introduction to the Grove Fresh litigation

3. In July 1989 I received a cold call from a person who identified himself as Jeffrey Hines. He told me the following: He was a member of the Maryland bar and an expert in litigation against companies that made or sold adulterated orange juice products.

He represented Grove Fresh, a Chicago distributor of orange juice. In February 1989 he filed five lawsuits for Grove Fresh in the Northern District of Illinois. The suits alleged that the defendants competed unfairly by selling adulterated and misbranded orange juice products in the same markets as Grove Fresh.

4. Mr. Hines also told me that he represented Grove Fresh for a contingent fee, and that he had previously hired local counsel on a contingent fee basis. However, local counsel had terminated the representation after receiving threatening letters from defense counsel. The letters asserted that Grove Fresh's claims were groundless and that the defendants would seek Rule 11 sanctions against Grove Fresh and its attorneys if Grove Fresh persisted with the litigation. I later learned that the letters that had caused Mr. Hines's local counsel to resign were sent on behalf of the defendants in case nos. 89 C 1113 and 89 C 1117. Everfresh Juice Co. ("Everfresh") and its president, Hugo Powell, were the defendants in no. 89 C 1113. American Citrus Products Corp., d/b/a Home Juice Co. ("Home Juice") and Henry Lang, its president and sole shareholder, were the defendants in no. 89 C 1117.

5. Mr. Hines asked me if I would appear as substitute local counsel in all five of Grove Fresh's cases on a contingent fee basis. Before deciding on this request I interviewed Cecil Troy, Grove Fresh's president and principal shareholder. At the time of the interview (July 1989) Mr. Troy was 74 years old but in good health. Mr. Troy told me that he and his late wife had started Grove Fresh in about 1962 with one truck and about $500 in capital, and that by 1979 they had built the business into a multi-million dollar operation with about fifteen jobbers. During the 1980s, he said, the business had declined dramatically. As of the date of the interview the number of Grove Fresh jobbers had dwindled to about four. Mr. Troy attributed Grove Fresh's problems to a series of freezes in Florida that had substantially increased the cost of orange juice concentrate. Mr. Troy believed that these conditions had increased the economic incentive for unscrupulous competitors to undercut legitimate operators like Grove Fresh by selling lower-priced, adulterated products.

6. I asked Mr. Troy why he had hired a Maryland attorney to pursue Grove Fresh's claims. He told me that Grove Fresh did not have the funds to hire a lawyer on an hourly-rate basis, and that he had been unable to find a Chicago lawyer who would handle Grove Fresh's claims for a contingent fee. He said that he had hired Mr. Hines in September 1988, after reading a story in a trade newspaper about unfair competition suits that Mr. Hines had filed in Maryland against two of Grove Fresh's more significant competitors, American Citrus Products Corp., d/b/a Home Juice Co. ("Home Juice"), and Everfresh Juice Co. ("Everfresh").

7. After interviewing Mr. Troy, after reviewing the pleadings in all five cases, and after interviewing two experts on the orange juice industry, I agreed to appear as local counsel in all five of Grove Fresh's cases. At the time of this decision I had been a solo practitioner for about two years. Except for *pro bono* matters, my practice was strictly limited to clients who paid hourly rates. I decided to take Grove Fresh's cases for a contingent fee because I believed that Grove Fresh's claims were strong, because my secondary role as local counsel would not require me to invest an undue amount of time

in the litigation, and because entering into a joint venture with an attorney experienced in food and drug litigation presented a valuable opportunity to learn a new area of the law.

Mr. Hines's conflict of interest

8. McDermott Will & Emery represented Everfresh and Powell in case no. 89 C 1113. They also represented Flavor Fresh Foods Corp. and James Benton, its president, in case no. 89 C 1114. In about October 1989 they contacted Mr. Hines to discuss settlement of both cases.

9. The discussions that followed were based on Grove Fresh's claims under Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a). Under Section 35(a) Grove Fresh could recover the profits that Flavor Fresh and Everfresh had gained from the sale of adulterated orange juice products. Under the defense's reading of the applicable statute of limitations, and assuming that Grove Fresh could establish Flavor Fresh's and Everfresh's liability, Grove Fresh could recover their illegal profits for the three-year period prior to the date of its complaints, *i.e.*, for the period from February 10, 1986 to February 10, 1989.

10. In November 1989 I learned that Flavor Fresh and Everfresh were refusing to negotiate with Mr. Hines over any claims Grove Fresh might have for the period from February 10, 1986 to August 10, 1988. The reason for this refusal, I eventually learned, was that in August 1988 -- about one month before Grove Fresh had retained Mr. Hines -- Mr. Hines had settled another case for another client by signing a covenant that barred Mr. Hines from suing Everfresh and John Labatt Limited ("Labatt"), Everfresh's parent, for any illegal acts that Everfresh and Labatt had committed prior to August 10, 1988. Although Flavor Fresh was not a beneficiary of this covenant, Mr. Hines had agreed to a demand by defense counsel that Grove Fresh's claims against Flavor Fresh be limited to the same time period as the claims against Everfresh.

11. The text of Mr. Hines's covenant with Everfresh was disclosed to Grove Fresh and me in a letter from defense counsel dated November 29, 1989. This letter also asserted that Mr. Hines had entered into a similar covenant with Home Juice and Henry Lang, Home Juice's president and sole shareholder. The effective date of the covenant protecting Home Juice and Lang was July 15, 1988. Grove Fresh and I later learned that this covenant was the basis on which Mr. Hines had stipulated in May 1989 that Grove Fresh's claims against Home Juice and Lang were limited to the period after July 15, 1988. Mr. Hines entered into that stipulation before he first contacted me, and without Grove Fresh's knowledge or consent.

12. Based on what defense counsel stated were the circumstances in which Mr. Hines had executed the covenants protecting Everfresh, Labatt, Home Juice, and Lang, those covenants violated Rule 5.6(b) of the Maryland (and the American Bar Association's Model) Rules of Professional Conduct. Rule 5.6(b) provides that "[a] lawyer shall not participate in offering or making ... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." Mr. Hines never told Grove Fresh or me about these covenants. Grove Fresh fired Mr. Hines on or about November 30, 1989.

13. Grove Fresh's discharge of Mr. Hines put me in a position that I would not have assumed voluntarily in July 1989, when I agreed to serve in the secondary role of local counsel. His discharge left me with sole responsibility for conducting discovery in, and then taking to trial, five complex cases that involved an area of the law in which I had no prior experience.

14. I was worried about the financial consequences to me and my family if I agreed to accept these new duties and responsibilities. If I accepted them, the financial structure of my practice would be materially transformed. Prior to November 30, 1989, my practice generated a steady cash flow because it was based almost exclusively on clients who regularly paid fees on an hourly-rate basis. Going forward with an expanded set of duties and responsibilities in Grove Fresh's five lawsuits would immediately change my practice into one where, for the foreseeable future, fifty percent or more of my professional time would be spent on matters for which my fees were contingent.

15. Because the circumstances that caused Grove Fresh to discharge Mr. Hines were not foreseeable in July 1989, when I agreed to the secondary role of local counsel, the expanded duties and responsibilities I faced after Mr. Hines was discharged constituted, in my opinion, a material change in the terms and conditions of my employment. For several days I considered whether this change was a sufficient ground for asking Grove Fresh and the courts for permission to withdraw from the litigation. I considered this option because I was worried that if I accepted the new duties and responsibilities, I would not be able to weather the changes in the financial structure of my practice.

16. I eventually concluded that I did not have the option of withdrawing from the litigation. I concluded that as the only remaining attorney of record, I bore the burden of repairing the injury created by my former co-counsel's undisclosed conflicts of interest. I concluded that I had a professional duty to ensure that Grove Fresh had access to timely, affordable counsel, and that this duty to my client superseded my concerns about my personal finances.

17. After I agreed to take over Mr. Hines's duties Mr. Troy offered to increase my contingent fee from 20% to 50%. I thought the offer was generous but excessive. I accepted an increase to 40%, which was equal to the total contingent fee that Grove Fresh had previously agreed to pay to Mr. Hines and me.

The conflict between my duties to Grove Fresh and my duties to another corporate client

18. Less than a month after Mr. Hines's discharge I was required to choose between my loyalty to Grove Fresh and my loyalty to another corporate client that was paying me at my regular hourly rates. The client (sometimes referred to hereafter as "the Real Estate Client") was engaged in the construction and management of commercial real estate. It owned or managed a dozen or more commercial properties in Chicago and the suburbs. This Real Estate Client had retained me in October 1989, on the recommendation of an acquaintance who regularly represented the Real Estate Client in lease transactions. The referring lawyer informed me that our mutual client, in addition to seeking a good outcome in the specific matter for which I was being retained, was also

seeking to develop a long-term relationship with a skilled litigator who would handle all future litigation for the Real Estate Client, and that I was being retained with this long-term prospect in mind.

19. During the first six weeks of the representation both the Real Estate Client and the referring lawyer expressed satisfaction with the advice and representation that I was providing. Then, in late December 1989, the Real Estate Client set a timetable for my completing a certain task. The timetable was not related to any court-imposed deadline. It also conflicted with demands on my time for resolving a series of crises in Grove Fresh's cases that had been triggered by the sudden discharge of Mr. Hines. I explained Grove Fresh's situation to the Real Estate Client and tried to persuade it to relax its timetable, but it was not willing to do so. The Real Estate Client required me to choose between its timetable and Grove Fresh's crises.

20. I concluded that my choice was governed by professional ethics. My Real Estate Client was wealthy and also an experienced consumer of legal services. It could easily replace me with an equally skilled lawyer, and it could do so without any harm to its interests in the pending litigation. Grove Fresh, on the other hand, had no funds for hiring a substitute attorney and no prospects for replacing me if I were to withdraw from the representation. With great reluctance, I withdrew from the representation of my Real Estate Client in early January 1990. Neither the Real Estate Client nor the referring lawyer has ever contacted me again.

The decision not to amend the RICO count in 89 C 1113.

21. The complaint that Mr. Hines filed against Everfresh in February 1989 included a count under Section 1962(a) of the RICO statute. On November 27, 1989, the district court dismissed this count because it was "severely flawed." One of the flaws cited by the court was the complaint's failure adequately to allege a RICO injury. In order to meet the requirements of Section 1962(a), the court held, Grove Fresh had to allege an injury by reason of the use or investment of the income derived from a pattern of racketeering. No such allegation was made in Mr. Hines's complaint. As I understood RICO case law at the time, alleging a Section 1962(a) injury in the case against Everfresh required alleging that Labatt, Everfresh's parent, had participated in Everfresh's RICO scheme.

22. The district court's ruling of November 27, 1989, characterized the flaws in Grove Fresh's RICO count as technical ones that could be cured, so it gave Grove Fresh leave to amend the RICO count. Two days later I received the letter that quoted the text of the covenant that restricted Mr. Hines's right to practice law. The letter included a warning that Everfresh would institute satellite litigation if Grove Fresh "attempt[ed] to disregard the time limitation" in Mr. Hines's restrictive covenant. I construed this warning as encompassing any attempt by Grove Fresh to cure the defects in its RICO count, since doing so would require alleging acts that occurred prior to August 10, 1988, as I explain in paragraph 23, below. This conflict between Grove Fresh's right to plead its legitimate claims and Mr. Hines's obligations to the defendants was one of the reasons why Mr. Hines was discharged the day after this letter was received.

23. After the district court's ruling of November 27, 1989, I reviewed with Mr. Troy the grounds on which Grove Fresh could amend the RICO count against Everfresh to include, on information and belief, allegations that Labatt was a participant in Everfresh's RICO scheme. Those grounds were as follows:

(a) The lawsuit that led to the covenant restricting Mr. Hines's practice had been filed in about January 1988, more than one year before the February 1989 complaint that Grove Fresh had filed against Everfresh. The prior lawsuit was against Holiday Juice Ltd., Everfresh's Canadian affiliate, which also distributed orange juice products in the United States, including Chicago.

(b) For at least some portion of the relevant period of time Daniel Kotwicki had been president of both Everfresh and Holiday Juice. Everfresh and Holiday Juice also had overlapping directors, including several high-ranking Labatt officials. The lawsuit against Holiday Juice was an event that Mr. Kotwicki was required to disclose to the directors. If Mr. Kotwicki had notified the directors about the lawsuit, then Labatt would have learned about Holiday Juice's alleged illegal practices through the Labatt officials who sat on Holiday Juice's board.

(c) Because the alleged illegal practices constituted felony violations of the food and drug laws, Labatt had a duty to conduct an immediate investigation into Holiday Juice's manufacturing practices, and to put an immediate halt to any illegal practices. Since Everfresh was operated by the same individual (Kotwicki) who operated Holiday Juice, a prudent investigation would have included Everfresh's practices as well.

(d) The adulterated orange juice products that precipitated Grove Fresh's February 1989 lawsuit had been manufactured in about the summer of 1988, long after Labatt should have learned about the January 1988 suit against Holiday Juice. This fact gave Grove Fresh a reasonable basis for alleging, on information and belief, that Labatt had known about and had approved of Everfresh's illegal practices.

24. I advised Mr. Troy that while Grove Fresh had legitimate grounds for suing Labatt, it was certainly not required to do so, and that a decision to forego RICO remedies against Labatt would not in any way impair Grove Fresh's claims against Everfresh under the Lanham Act or under the common law. I told him that in deciding whether to proceed with the RICO claim, he should consider that large corporations like Labatt often react aggressively to RICO claims. I warned him that naming Labatt as a RICO defendant might provoke Labatt into tactics that could complicate Grove Fresh's ability to bring its lawsuits to a successful conclusion at an early date.

25. Mr. Troy instructed me to proceed with a RICO claim against Labatt. He saw no point in pursuing any of the five lawsuits, he said, if he was going to abandon legitimate claims for fear of angering the businesses that, in his opinion, were responsible for Grove Fresh's near demise.

26. About one week after Mr. Troy authorized me to proceed with a RICO claim against Labatt, I met with defense counsel. The purpose of the meeting was to resume the settlement discussions that had been interrupted by the controversy leading to the discharge of Mr. Hines. In the course of the meeting I mentioned that Grove Fresh intended to amend its RICO claim against Everfresh to allege that Labatt had participated in the RICO scheme. Defense counsel stated that Grove Fresh did not have any basis for asserting any such claim against Labatt. They stated that they would not engage in any settlement discussions that included as a premise potential claims against Labatt. In support of the assertion that Grove Fresh had no claims against Labatt defense counsel told me that after Grove Fresh filed its complaint in February 1989 they had conducted an in-depth investigation and had learned the following:

(a) Hugo Powell, the only individual defendant in case no. 89 C 1113, became president of Everfresh in January 1989, just a few weeks before Mr. Hines filed Grove Fresh's complaint in that case. Mr. Powell had no responsibility for the illegal practices that occurred before he became president.

(b) Everfresh's illegal manufacturing practices were instituted by Daniel Kotwicki, Mr. Powell's predecessor. Mr. Kotwicki left the Labatt organization in about December 1988. During the time that he was Everfresh's president, he concealed Everfresh's illegal practices from Labatt.

(c) Labatt did not know about Everfresh's illegal manufacturing practices prior to January 1989. After reviewing the relevant facts Labatt fired the persons who had aided Mr. Kotwicki in carrying out the illegal practices. Moreover, Powell, Everfresh and Labatt had disclosed the prior, illegal practices to the United States Food and Drug Administration ("FDA"). Labatt, Everfresh and Powell were fully cooperating with the FDA's investigations of the orange juice industry.

27. I told defense counsel that if they would confirm in writing that Labatt did not know about Everfresh's illegal practices prior to January 1989, Grove Fresh would proceed with settlement negotiations on the premise that it had no claims against Labatt. Defense counsel rejected my suggestion. They stated that Grove Fresh should conduct its own investigation and should satisfy itself that it did not have any claims against Labatt.

28. After this meeting I reevaluated the wisdom of immediately amending the RICO claim to include allegations about Labatt. I recommended to Mr. Troy that Grove Fresh defer a final decision on joining Labatt as a RICO defendant until after we obtained further information about Labatt's knowledge of Everfresh's illegal practices. My recommendation was based on the following factors:

(a) I felt obliged to give some weight to defense counsel's assertions about Labatt's alleged innocence. Their assertions warranted consideration, I thought, because they were not just general denials of culpability, but, rather, specific statements of fact. Moreover, the statements were purportedly based on an in-depth investigation by attorneys experienced in corporate and criminal law. As attorneys they had a professional duty to speak truthfully to me, and to not knowingly make false statements of fact. At the time I had no basis for

questioning the credibility of any of the defense counsel who spoke at the meeting. I thought that their status as my adversaries was reason to be wary of their statements, but not grounds for rejecting their statements as inherently incredible.

(b) As of December 1989 a RICO claim against Labatt would be based on (i) the assumption that Mr. Kotwicki had disclosed the January 1988 lawsuit to Holiday Juice's board of directors, and (ii) a series of inferences that one could draw from that assumption. Prior to my meeting with defense counsel I thought that a reasonably prudent attorney could make such an assumption and draw such inferences. After defense counsel asserted that Mr. Kotwicki had concealed Everfresh's illegal practices from Labatt, I was no longer certain that under Rule 11, it would be reasonable for me to persist in the assumption that Mr. Kotwicki had disclosed the January 1988 lawsuit to Holiday Juice's directors. (I later learned, however, that Mr. Kotwicki did disclose the litigation to Labatt. He made the disclosure in a February 1988 memorandum to R. Bruce Fraser, Labatt's vice president for corporate development and also a Holiday Juice director.)

(c) In light of the aggressive Rule 11 letters that Everfresh's lawyers had sent to my predecessor as local counsel, Grove Fresh should assume that Labatt's counsel would be equally aggressive in reacting to a RICO claim against Labatt.

(d) In the final analysis, the issue was not whether Grove Fresh could successfully defend against a Rule 11 challenge to a RICO claim against Labatt. Rather, the issue was whether Grove Fresh could withstand the costs and delays inherent in even a successful defense of a Rule 11 challenge. I concluded that it could not, given Mr. Troy's age and Grove Fresh's precarious financial situation. I thought Grove Fresh would be better served by gathering more definite evidence regarding Labatt's knowledge of Everfresh's illegal practices and, if the evidence warranted, moving for leave to amend the complaint at a later date.

Mr. Troy accepted my advice. On January 26, 1990, I notified Everfresh's attorneys that Grove Fresh's "investigation of potential RICO claims is not yet completed. Therefore, we will stand on the Lanham Act and common law claims that were sustained by Judge Zagel, *at least for the time being*." (emphasis added)

Facts tending to rebut the claim that Labatt had no culpable knowledge prior to January 1989

29. In or before June 1990 I learned of facts that tended to rebut defense counsel's statements that Mr. Kotwicki was responsible for initiating Everfresh's illegal practices, and that Labatt did not know about Everfresh's illegal practices until January 1989. Those facts were as follows:

(a) Labatt acquired Everfresh in December 1986. Prior to that Everfresh had been sued at least twice for manufacturing adulterated orange juice. The first suit was filed in 1982 and settled in about 1983. The second suit was filed in March 1986 and was still pending in December 1986, when Labatt

acquired Everfresh. This second suit was disclosed to Labatt prior to the date that Labatt acquired Everfresh. This disclosure was significant because it established that Labatt had notice of Everfresh's illegal practices a full two years earlier than the January 1989 date alleged to me by defense counsel. The 1986 lawsuit was settled nine or ten months after the acquisition, *i.e.*, in about August or September 1987.

(b) In the eight years preceding its acquisition by Labatt, Everfresh was owned by Albert Allen and operated by his brother, Michael Allen. At no time during those eight years was Mr. Kotwicki an officer, director, or shareholder of Everfresh. In fact, throughout those eight years Mr. Kotwicki was an officer and director of Holiday Juice Ltd., which competed with Everfresh in many markets. If the allegations of the 1982 and 1986 lawsuits were true -- and Grove Fresh's subsequent discovery confirmed that they were -- then Everfresh's illegal practices were in place long before Labatt acquired Everfresh, and long before Mr. Kotwicki arrived on the scene.

(c) During the first seven months or so after Labatt acquired Everfresh, Michael Allen continued as Everfresh's president and chief operating officer. During this period of time he refused to submit to Mr. Kotwicki's authority or direction. And, as I explain below, during Mr. Allen's tenure under Labatt's ownership Everfresh manufactured more than 1,000,000 gallons of adulterated orange juice.

(d) Mr. Allen resigned from Everfresh in July 1987, whereupon Mr. Kotwicki was appointed as Everfresh's president and chief operating officer.

30. In late June 1990 Everfresh produced about 600 pages of business records (hereafter referred to as "batch sheets") which showed that between April and December 1987, the Everfresh plant in Warren, Michigan, manufactured more than 3.2 million gallons of adulterated orange juice. The batch sheets were initialed by the workers who processed the adulterated products described therein. The sheets also recorded the date and time that each batch was processed, and also the formula of ingredients used in each batch.

31. The batch sheets showed that in April, May and June 1987 -- that is, in the three months *before* Mr. Kotwicki was appointed president of Everfresh, and while Michael Allen was chief operating officer -- Everfresh manufactured more than 1,000,000 gallons of adulterated orange juice. When these batch sheets are read in conjunction with the facts described above in paragraph 29, they demonstrate that, contrary to what defense counsel told me in December 1989, Everfresh's illegal practices preceded Mr. Kotwicki's appointment as Everfresh's president.

32. The evidence that Grove Fresh obtained in or before June 1990 would support allegations that Labatt joined Everfresh's RICO scheme in December 1986, but the significance of the evidence went beyond the civil claims that Grove Fresh could allege. The representations that defense counsel made to me in December 1989 -- that Mr. Kotwicki had initiated Everfresh's illegal practices, and that Labatt did not learn about them until January 1989 -- had also been made to the FDA seven months earlier.

Alleging that Labatt joined Everfresh's RICO scheme in December 1986 would be tantamount to alleging that one or more persons associated with Labatt had made false statements to the government. By making false statements about the date that Labatt acquired culpable knowledge, Labatt obtained the benefit of the FDA's policy without making admissions of culpability that could be used against it by private civil litigants.

33. I discussed with Mr. Troy the possible consequences of Grove Fresh's alleging a RICO claim that explicitly or impliedly charged Labatt with lying to the federal government. I advised him that if Grove Fresh were to go forward with such a claim, the stakes for Labatt would go beyond the Grove Fresh litigation. Grove Fresh's evidence on liability could be used by other claimants, including consumers. Alleging that Labatt knew about and profited from Everfresh's illegal practices could make Labatt jointly and severally liable for the damages caused by Everfresh. It could also expose Labatt to large punitive damage claims. Whereas Grove Fresh might have joint and several claims against Labatt and Everfresh for several million dollars, the class of consumers who were fraudulently induced to purchase Everfresh's adulterated orange juice would have joint and several claims in the tens of millions of dollars. Because of these collateral consequences, I advised Mr. Troy, Labatt's budget and tactics for defending against any new claim by Grove Fresh would be in proportion to Labatt's potential exposure to all claimants, not just to Grove Fresh. I warned Mr. Troy that in light of the defense's conduct to date, and because of his age and Grove Fresh's precarious financial situation, Labatt would probably respond to any new claim by Grove Fresh with prolonged pretrial discovery proceedings, in the hope that Mr. Troy would die before the case was ready for trial.

34. Mr. Troy responded with a statement that he made several times during the course of the litigation, namely, that he wanted Grove Fresh to go wherever the evidence led. Since he intended to proceed, I told him, he should try to level the playing field by attempting to persuade the FDA to institute enforcement proceedings against Labatt and Everfresh. I explained the doctrine of collateral estoppel. I explained how, if the government were to obtain a judgment against Labatt and Everfresh in an enforcement proceeding, the doctrine would enable Grove Fresh to use that judgment as irrebutable proof of liability in a civil suit against Labatt and Everfresh.

35. In order to persuade the government to institute enforcement proceedings, however, Grove Fresh would first have to persuade the FDA that Labatt and Everfresh did not qualify for the "free pass" that the FDA usually gives to corporations that voluntarily and candidly report illegal practices. One way to do this, I advised Mr. Troy, would be to use the evidence described above in paragraphs 29-31, including the batch sheets, to demonstrate to the FDA that Labatt and Everfresh had made materially false statements to the government. Before Grove Fresh could send the batch sheets to the FDA, however, it would have to challenge Everfresh's claim that the batch sheets were entitled to be treated as confidential under a protective order that had been entered a few weeks earlier.

36. Mr. Troy agreed that we should take whatever steps were necessary to send the batch sheets to the FDA. He also expressed a reason of his own for challenging the confidentiality of the batch sheets. During the years that Everfresh sold misbranded

orange juice products, he said, Grove Fresh developed a reputation as a price gouger because of the higher prices it was required to charge for its authentic orange juice products. As a result of this unfair reputation Grove Fresh lost many customers. One way that Grove Fresh could restore its reputation and win back some of those customers, he said, was to present them with proof that Everfresh had misrepresented the authenticity of its orange juice products. Mr. Troy believed that disclosing the contents of the batch sheets to his orange juice customers would help him demonstrate that Everfresh had falsely advertised its orange juice products as being 100% pure.

37. In addition to the batch sheets Everfresh designated more than 18,000 other pages of documents as allegedly confidential. In my opinion the claims of confidentiality were unduly broad, in some cases absurdly so. I discussed with Mr. Troy the pros and cons of challenging these designations. I told him that the defense's lack of candor would be more difficult to overcome if the litigation went forward under blanket claims of confidentiality. I paraphrased Judge Cardozo's aphorism about sunshine being the best disinfectant and recommended that if the reliability of information gotten in discovery was a paramount concern, then Grove Fresh should make all reasonable objections to the defense's claims of confidentiality. On the other hand, if a settlement in the near term was more important, Grove Fresh should go along with all of the defense's designations of confidentiality under the protective order. Challenging even groundless claims of confidentiality, I advised, would only stoke the defendants' anxieties about potential liabilities to claimants other than Grove Fresh.

38. Mr. Troy opted to challenge the defense's claims of confidentiality.

39. My concerns about the honesty of the defendants' discovery responses were unfortunately confirmed by, among other things, their suppressing certain business records (the "Bio Trade Documents") regarding Everfresh's use of an illegal, and possibly health-endangering, preservative. The details of that misconduct, and the injury it caused Grove Fresh, are set forth in Grove Fresh's Memorandum in Support of its Motion to Compel Discovery Regarding Oleum 320/IDEA, filed in case no. 89 C 1113 on November 4, 1991. (Copies of the motion and memorandum are attached hereto as Exhibits A and B, respectively.) The court ordered the defense to provide Grove Fresh with an affidavit from an Everfresh officer or director that

> identifies every officer, director, employee and agent of Everfresh who had custody of the Bio Trade Documents, or who had copies thereof, between the date that David Murray [a Labatt quality control auditor] found the Bio Trade Documents in February 1989, and the date they were produced to Grove Fresh in April 1991.

40. On December 13, 1991, defense counsel sent me a letter in lieu of the court-ordered affidavit. Defense counsel explained that he was sending a letter rather than an affidavit because "no Everfresh officer or director has personal knowledge of facts concerning the chain of custody of the Bio-Trade documents referenced in Dave Murray's deposition." Rather, defense counsel stated, it was they and not their clients who had exclusive possession of the Bio Trade Documents from February 1989, when

Labatt first obtained them, to the date they were finally produced to Grove Fresh in April 1991. Defense counsel's only explanation for why they had failed to produce the Bio Trade Documents was that "we overlooked their presence in our files." A copy of this letter is attached hereto as Exhibit C.

41. I did not file any papers with the court memorializing defense counsel's admission of responsibility for suppressing the Bio Trade Documents. Instead, believing that Grove Fresh would be better served by getting its hands on admissible evidence than it would be by an award of sanctions against opposing counsel, I wrote defense counsel a letter offering to waive all claims for discovery misconduct in both case no. 89 C 1113 and 90 C 5009 if the defendants would answer certain discovery requests over which we had been wrangling for several months. My proposal led to months of fruitless negotiations. Grove Fresh settled its claims in April 1993, without any formal record being made of defense counsel's responsibility for the suppression of the Bio Trade Documents.

There was no personal agenda

42. In the Memorandum Opinion including Findings of Fact and Conclusions of Law issued on June 9, 1995 ("Contempt Opinion"), the court stated that I put my own interests ahead of Mr. Troy's and Grove Fresh's. According to the Contempt Opinion, the interest I allegedly elevated above theirs was my pursuit of a "personal agenda." 888 F. Supp. at 1430. I do not know for certain what is meant by the charge that I had a personal agenda. However, it appears from the Contempt Opinion that in the course of case no. 89 C 1113, the court concluded that I had a personal agenda "to hurt [the defendants] by disseminating information for purposes of damaging them outside the walls of the courtroom." *Id.* The Contempt Opinion states that the court's conclusion that I was pursuing such an agenda was the reason why the court entered the seal order on August 28, 1990.

43. The conclusion that I had a personal agenda appears to be based on Grove Fresh's July 1990 challenge to Everfresh's claim that the batch sheets should be treated as confidential under the protective order. The minute order denying that challenge is the only incident cited in the Contempt Opinion that preceded the entry of the seal order. 888 F. Supp. at 1431n.2. Prior to the July 13, 1990, hearing on the challenge to the batch sheets I had appeared before the court a total of six times in my capacity as lead counsel in case no. 89 C 1113. All six appearances occurred in 1990, on April 20, May 3 and 25, June 15 and 18, and July 2. To the best of my recollection at none of those prior appearances did the court make any statements about my having a personal agenda separate from Grove Fresh's.

44. At the July 13, 1990, hearing the court made the following comment before taking Grove Fresh's challenge to the batch sheets under advisement:

> I believe what's at stake here has very little to do with the interest of Mr. Messina's client. It may serve some other interest.

(7/13/90 Tr. of Proceedings, p. 12.) The court did not identify the personal interest it thought I was advancing. The court did not invite me to explain or defend my motive for challenging the alleged confidentiality of the batch sheets, and I did not believe that I needed to do so. Under the protective order the defense had the burden of proving the confidentiality of the batch sheets. My only motives for presenting Grove Fresh's challenge to the alleged confidentiality of the batch sheets are those described above in ¶¶34-37.

45. The Contempt Opinion cites the two motions listed below as instances of my alleged violations of the protective orders. 888 F. Supp. at 1438n.11. However, I did not have timely notice or opportunity to be heard on either of the motions:

(a) On October 3, 1990, Everfresh presented *ex parte* to Judge Williams its Emergency Motion to Require Grove Fresh to File Its Motion and Reply Under Seal. This motion was slid under my office door after 6:30 p.m. on October 2, 1990, after I had left for the evening. I did not learn about the motion until shortly before 10 o'clock the next morning. By the time I got to court, Judge Williams had already granted the motion.

This emergency motion concerned a letter I had sent to defense counsel on October 1, 1990, responding to their charge that the complaint I had recently filed in case no. 90 C 5009 violated Rule 11. The emergency motion alleged at page 3, without any supporting affidavit, that "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 [discovery], which he threatens to file." I never told anyone that I intended to publish to the press my October 1st letter responding to Everfresh's Rule 11 charges. I never told anyone that I intended to attach a copy of that letter to any motion in case no. 89 C 1113. In fact, I had no such intentions.

(b) On May 3, 1993, at a hearing at which several other motions were presented, Everfresh presented its Motion (A) to Enforce This Court's Previous Orders; (B) To Strike and Seal Grove Fresh's Latest Pleadings; and (c) For Sanctions. I was not served with a copy of this motion until May 6, 1990 -- three days after the court entered an order respecting the motion. This motion was served on me by first class mail, in an envelope postmarked May 3, 1991, the day the motion was actually presented.

46. At a hearing on May 3, 1991, I presented a series of motions for evidentiary sanctions in case no. 89 C 1113 and for related relief in case no. 89 C 1114. The court has stated that these motions evidenced "Mr. Messina's intention to beat one of the defendants in this case 'over the head in public with what [he] believe[d] to be wrongdoing.'" 888 F. Supp. at 1438. However, while the contents of these motions may have embarrassed Everfresh, they were not filed for that purpose. Rather, the motions were presented to remedy problems caused by the defense's lack of candor in discovery. These problems jeopardized Grove Fresh's ability to meet its burden at trial of going forward with evidence of Everfresh's liability. This is the context in which I brought these motions:

(a) Grove Fresh's claims in 89 C 1113 primarily concerned activities at juice processing plants in eastern Michigan and in Canada. In order to meet its burden of going forward with evidence of liability for the activities at those plants, Grove Fresh needed to call witnesses who resided beyond the trial subpoena power of the Northern District of Illinois. The only way that Grove Fresh could use these out-of-state witnesses at trial was to depose them prior to trial and then, at trial, to offer their deposition transcripts into evidence pursuant to Fed. R. Civ. P. 32(a)(3).

(b) Initially, Grove Fresh sought to prepare this aspect of its trial presentation through a discovery agreement in case no. 89 C 1113. The discovery agreement was executed in April 1990 as part of the consideration for Grove Fresh's agreement to settle related case no. 89 C 1114 on the defendants' financial terms. Pursuant to the discovery agreement Everfresh agreed to produce one or more witnesses who would testify in Chicago on an exhaustive list of topics relating to liability pursuant to Fed. R. Civ. P. 30(b)(6). If a knowledgeable witness had testified as agreed, Grove Fresh would have been able to meet its burden of going forward with evidence of liability without having to take any out-of-town depositions. However, the Rule 30(b)(6) witness produced by Everfresh lacked the requisite knowledge. His deposition transcript was not sufficient to satisfy Grove Fresh's burden of going forward on the issue of liability. As a result, Grove Fresh was required to take numerous out-of-town depositions. In order to pay for these depositions on liability, Grove Fresh had to use funds it had previously budgeted for its expert witness on damages.

(c) The important out-of-town witnesses on liability included Bruno Moser, a quality control manager who worked at Everfresh from about the late 1950s to about 1992. Mr. Moser eventually admitted to the government (Exhibit D hereto) that, from about 1980 to about 1986, he was the Everfresh employee primarily responsible for Everfresh's purchase and use of an illegal preservative. This illegal preservative was the subject of the suppressed Bio Trade Documents described above in paragraph 39. Through bank records Grove Fresh eventually learned that, contrary to what Mr. Moser told the federal government, he and Everfresh continued to purchase this illegal preservative after 1986. Bank records establish that Mr. Moser and Everfresh purchased the illegal preservative on at least six different occasions in 1987 and 1988, and that the total cost of these six purchases was in excess of $250,000. However, Grove Fresh did not have any of these documents on November 28, 1990, when it first deposed Mr. Moser. At that deposition Mr. Moser concealed his knowledge of the illegal preservative by giving the following false testimony:

Q. Prior to establishing a clean room [in 1988], did Everfresh use preservatives in its cold pack [orange juice]?

A. Not that I know.

. . . .

Q. And isn't it so that [Everfresh] had a product that had preservatives in it which you did not declare on the label?

A. This I don't know.

(Moser Dep. 88, 89, Exhibit E hereto.)

(d) A factor aggravating Mr. Moser's lack of candor was defense counsel's silence. The Everfresh attorney who appeared at Mr. Moser's deposition had received the suppressed Bio Trade Documents in about February 1989. These documents put him on notice that Everfresh had used an illegal preservative prior to 1988, and that Mr. Moser had knowledge of, and was actively involved in, Everfresh's purchase and use of that illegal preservative. Nevertheless, the attorney did not correct Mr. Moser's false denial of knowledge of Everfresh's use of a preservative.

47. The diversion of funds from the budget for the expert on damages to discovery on liability (*see* paragraph 46(b), above) required Grove Fresh to scale back the scope of the expert's work. The diversion also delayed completion of the expert's report by more than a year, to the fall of 1991. In 1991 Everfresh moved for summary judgment in case no. 89 C 1113 on the ground that the expert's report was inadequate. The court granted summary judgment on this ground in February 1992.

48. The motions I presented on May 3, 1991, were intended to remedy discovery problems that threatened Grove Fresh's ability to present its case-in-chief at trial. The motions were not presented in pursuit of a personal agenda.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated this 1st day of October, 1996.

Re-executed this 8th day of February, 2000

John P. Messina