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

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

MR. MESSINA'S
MOTION FOR RECUSAL

John P. Messina, by his attorney, moves the Court to recuse itself pursuant to 28 U.S.C. §455 recusing itself from the post-judgment proceedings and in support thereof states as follows:

In the spring of 1993, Mr. Messina was required to sign a Legal Representation and Consulting Agreement ("consulting agreement"). Defense counsel has stated that the consulting agreement constituted a "representation" by Mr. Messina that "he would not represent plaintiffs in other cases against these defendants." (Exh. 1 hereto.) Defense counsel has also stated that "[w]ithout those representations, the Grove Fresh case would not have been settled...." (Id.) Defense counsel's statements suggest that the consulting agreement was an improper subterfuge for evading Rule 5.6(b) of the Rules of Professional Conduct, which prohibits lawyers from negotiating "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

These post-judgment proceedings were precipitated by a brief the defendants filed in the Seventh Circuit in July 1993, three months after Mr. Messina signed the consulting agreement. The brief accused Mr. Messina of drafting pleadings in violation of Rule 11. In order to defend himself, Mr. Messina repudiated the consulting agreement and tendered back the $50,000.00 he had received thereunder to that date.

Three weeks after this repudiation, the defendants initiated these post-judgment proceedings. Defendants alleged that they were fraudulently induced into settlement by representations concerning Mr. Messina's willingness to enter into the consulting agreement.

In April, 1994, while the defendants' Rule 60(b) motion was still pending, Mr. Messina wrote to the Illinois Attorney Registration and Disciplinary Commission regarding the consulting agreement. The complaint alleged that the consulting agreement was a violation of R.P.C. 5.6(b).

In a response dated October 18, 1994, McDermott, Will & Emery defended the propriety of the consulting agreement. They admitted that the consulting agreement had been proposed by Mr. Messina's co-counsel to address their "clients' concern that Mr. Messina immediately would turn around and sue them again" once the Grove Fresh case was concluded. They alleged, however, that this Court had authorized them to require the consulting agreement as a condition of settlement:

> Because no authority on point was found, in order to be certain that the consulting arrangement proposed by Mr.

> Messina[1] was ethical, enforceable and fully disclosed, the parties presented the concept of the consulting agreement -- and ultimately the actual consulting agreement itself -- to the District Court Judge for his approval. Judge Zagel approved. Indeed, the consulting agreement was fully discussed between Judge Zagel and Mr. Messina.

Shortly after receiving this response, the ARDC decided not to proceed any further with its inquiry.

On January 27, 1995, Mr. Messina filed a motion alleging that the defendants have conducted these post-judgment proceedings unreasonably and vexatiously, in violation of 28 U.S.C. §1927. He has also moved to intervene in the Rule 60(b) proceeding and for leave to file a motion for summary judgment therein. Both of these motions put in issue whether the consulting agreement was a subterfuge for restricting Mr. Messina's practice in violation of R.P.C. 5.6(b).

Thus, the proceedings now before the Court turn in large part on a determination of whether the consulting agreement was an illegal contract that violated the rules of ethics. The McDermott, Will & Emery lawyers have represented that the Court already expressed an opinion on that issue and approved of the consulting agreement, and that defendants relied on the Court's

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[1] Mr. Messina did not propose the consulting agreement. Mr. Messina was excluded from the settlement conferences with the Court as well as the prior negotiations between the lawyers. The consulting agreement was proposed by Warren Radler, Mr. Messina's former co-counsel. According to McDermott, Will & Emery, Mr. Radler represented to them that "Mr. Messina had come up with the idea of a consulting agreement and that Mr. Messina had determined that such an agreement was not violative of any ethical rules." If this is an accurate account of what Mr. Radler told defense counsel, Mr. Radler misrepresented Mr. Messina's position.

opinion and participation with respect to the consulting agreement.

Mr. Messina has no personal knowledge of what representations were made to the Court by either Mr. Radler or the defendants on the subject of the consulting agreement. Nor does Mr. Messina have any personal knowledge that the Court actually authorized the defendants to require the consulting agreement as a condition of settlement. Nevertheless, in light of the statements made by McDermott, Will & Emery to the ARDC, Mr. Messina respectfully submits that the Court should recuse itself under 28 U.S.C. §455(a), which provides as follows:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

WHEREFORE, Mr. Messina prays for an order recusing the Court from these proceedings.

Respectfully submitted,

Paul Strauss
One of the Attorneys for Mr. Messina

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January 12, 1994

Judson H. Miner
Davis, Miner, Barnhill & Galland
14 West Erie Street
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Re: Grove Fresh v. Labatts

Dear Mr. Miner:

I have received your letter of January 11, 1994.

We do not agree that Mr. Messina is permitted "to represent other orange juice claimants" as you relate in your letter. In order to secure the settlement of the Grove Fresh case, Mr. Messina stated that he would not represent plaintiffs in other cases against these defendants. That representation was made through the consulting agreement. It was also made in an affidavit filed with the court. Without those representations, the Grove Fresh case would not have been settled, and both Grove Fresh and Mr. Messina would not have received their respective shares of the settlement proceeds.

Any breach by Mr. Messina of those representations at this time will constitute further evidence that the settlement of the Grove Fresh case was procured through misrepresentations by Mr. Messina. It will also demonstrate that Mr. Messina has failed to comply with the agreements that were necessary to bring about that settlement. Thus, such action by Mr. Messina would violate his agreements and representations that were used to procure the settlement of the Grove Fresh case, and would also place him in a conflict of interest position with Grove Fresh, a client he contends he continues to represent.

In addition, I would like to correct your misstatement that the defendants are unwilling to pursue settlement discussions. As we stated to you on December 30, 1993, we are willing to listen to reasonable settlement proposals. The failure of your client to abide by the agreements that he has made in the past, however, creates a substantial impediment to

EXHIBIT

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accepting any promise that would result in a settlement of the current situation. There is simply no basis to believe that he would in fact fulfill any promise or representation that he makes.

Since you represent the party who chose to breach the agreements that were made in settlement of the underlying litigation, and who chose to publically disclose information he knew was to be kept confidential, we believe it is incumbent upon you to propose reasonable settlement options. A return to the status quo after the numerous and inexplicable actions of your client, however, is not only unacceptable but impossible.

Sincerely,

Steven M. Kowal

SMK/jg
cc: David J. Stetler
Dale R. Crider

Transmitted by fax
and regular mail

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CERTIFICATE OF SERVICE

Paul Strauss, an attorney, certifies that he caused a copy of the attached Notice and Motion to be served upon counsel to whom the foregoing Notice is directed, by messenger, this 27th day of January, 1995.

Paul Strauss