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., Defendants.	)	Filed under seal pursuant to order dated August 28, 1990

NOTICE OF MOTION

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PLEASE TAKE NOTICE that on Tuesday, March 15, 1995, at 10:15 a.m., the undersigned shall appear before the Honorable James B. Zagel in the courtroom usually occupied by him at the U.S. District Court for the Northern District of Illinois, Eastern Division, and then and there present the attached Mr. Messina's Motion to Reconsider Redaction of References to Non-Party Co-Conspirators, a true and correct copy of which is attached hereto and served upon you herewith.

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Plaintiff,	)	
	)	No. 90 C 5009
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MR. MESSINA'S MOTION TO RECONSIDER REDACTION
OF REFERENCES TO NON-PARTY CO-CONSPIRATORS

John P. Messina, by his attorney, moves the Court to reconsider that portion of the order of November 21, 1994, whereby the Court granted a defense request that the names of eight non-party co-conspirators be redacted from the complaint before the complaint is made available to the public. In the alternative, Mr. Messina moves the Court to exclude from the scope of its order references to James Marshall, James Benton, and Gerald Wolberg.

Mr. Messina also requests clarification regarding filings that contain references to names or terms that are to be redacted before the filings themselves are unsealed. Four months ago, the Court ordered the defendants to prepare redacted copies of these items and to file them with the Clerk of the Court. Our understanding is that the defendants have failed to comply with the Court's order and have not provided those redacted copies. Mr. Messina requests clarification that the defendants' failure to prepare redacted copies of these filings does not bar Mr.

Messina from disclosing information in those portions of the filings that the Court has ordered to be unsealed.

This motion is prompted by requests that Mr. Messina's attorney has received from the Chicago Daily Law Bulletin for comments on the February, 1995 contempt hearing and the underlying controversy. Without the relief requested herein, Mr. Messina cannot present to the press his view of the contempt charges or the underlying controversy.

In support of this motion, Mr. Messina states as follows:

Mr. Messina has standing to challenge the redactions.

1. On February 3, 1995, Mr. Messina appeared and testified on a contempt petition alleging that he violated the seal order in this case. The alleged violation occurred in October, 1993, when Mr. Messina filed papers in the Seventh Circuit seeking to respond to a claim that the defendants had made for the purpose of keeping this case sealed. The defendants told the Seventh Circuit that the seal was necessary because the complaint in this case, which Mr. Messina had drafted, falsely accused them in order to "extract" money from them.

2. The defendants' claim was made in a brief not under seal. A reporter for The New York Times obtained a copy and asked Mr. Messina for a comment on the defendants' claim. In order to rebut defendants' claim, Mr. Messina discussed with the reporter some of the evidence that supports the allegations of the complaint.

3. The article that later appeared in The New York Times on October 31, 1993, did not repeat defendants' claim that Mr.

Messina filed a false complaint. Nor did the article discuss the particulars of the sealed complaint or any evidence covered by a protective order. Nevertheless, the defendants contend that Mr. Messina's conversation with The New York Times reporter violated the seal. In effect, the defendants have asserted a "heads we win, tails you lose" position. They contend that they are free to make public attacks on Mr. Messina's integrity and credibility, but that Mr. Messina is subject to a finding of contempt if he defends against such attacks.

4. The February, 1995 contempt hearing has presented Mr. Messina with the same dilemma. After the contempt hearing, a reporter who is preparing a story on the contempt hearing for the Chicago Daily Law Bulletin asked Mr. Messina's attorney to comment on the underlying controversy. Because of the threat that the defendants will file further contempt petitions, Mr. Messina's attorney declined to comment on either the contempt hearing itself or on the underlying controversy. (Declaration of Paul Strauss, Exh. A hereto.)

5. Before a newspaper story is written about Mr. Messina's conduct, Mr. Messina wants to be able to explain to the reporter the dispute from his perspective, including his views that (a) he did not draft a false complaint; (b) there was no basis for defendants' allegations against him in the Seventh Circuit; (c) the information in the sealed complaint came from the public record; and (d) he should not be held in contempt for revealing information in the public record, or for describing allegations in a complaint he drafted, based on information in the public record. Explaining these things and the circumstances of the

contempt proceedings requires some reference to the evidence regarding the activities of the non-party co-conspirators, especially those of Marshall, Benton and Wolberg. See discussion below at ¶¶8-15. The basic evidence regarding these illegal activities comes from the public domain and should not be subject to the seal or any protective orders. However, this Court's rulings and comments suggest that Mr. Messina may be subject to further contempt proceedings if he identifies Marshall, Benton or Wolberg as non-party co-conspirators named in the complaint. The Court has suggested that while the seal order does not prohibit Mr. Messina from disseminating publicly-obtained information, the order may bar him from describing the contents of a sealed pleading, even if he only identifies public information that is contained in the sealed pleading.

6. Mr. Messina has standing to challenge the order redacting the names of non-party co-conspirators if that order has caused him injury in fact, economic or otherwise, and if the interest he seeks to protect is arguably within the zone of interest regulated by the constitutional guarantee in question. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830 (1970). Mr. Messina meets this test. First, the Chicago Daily Law Bulletin is preparing a story about the contempt hearing. A discussion of the allegations about non-party co-conspirators is important to a presentation of Mr. Messina's point of view regarding the controversy underlying the contempt trial. Because the order redacting all references to non-party co-conspirators is enforceable by this Court's contempt powers, Mr. Messina and his

attorney cannot present their view of the underlying controversy to the Chicago Daily Law Bulletin. This chill on their speech is an ongoing injury in fact.

7. Second, Mr. Messina's interest in having the press include his point of view when it reports on the contempt trial is within the zone of interest regulated by the First Amendment. Gentile v. State Bar of Nevada, __ U.S. __, 111 S.Ct. 2720, 2745 (1991) (recognizing that attorneys have a First Amendment right to comment on the merits of claims or defenses in a pending proceeding). See also Pansy v. Borough of Stroudsberg, 23 F.3d 772 (3rd Cir. 1994) (holding that third parties have standing to challenge confidentiality orders even after the underlying litigation has terminated).

Background

8. August, 1990, Grove Fresh filed a lawsuit against 11 individual and corporate defendants. The complaint, as amended in September, 1990, alleges a conspiracy to manufacture adulterated orange juice from at least 1975 to 1989. The defendants included three juice manufacturers that were affiliated with one another during the 1970s: American Citrus Products Corp., d/b/a Home Juice Co.; Everfresh Juice Co. (now known as Everfresh Inc.); and Holiday Juice Ltd. (also known now as Everfresh Inc.). The amended complaint refers to these three defendants and to other presently or formerly related entities as the Home Juice Organization.

9. The amended complaint alleges that when Home Juice, Everfresh and Holiday Juice were affiliated with one another,

they used a common formula (referred to in the complaint as "the Home Juice Formula") for making adulterated orange juice. The amended complaint further alleges that Home Juice, Everfresh, and Holiday Juice continued to use the Home Juice Formula (or variations thereof) through 1989.

10. Exhibit 6 to the amended complaint is a copy of the Home Juice Formula. Paragraph 101 of the amended complaint alleges that Exhibit 6 is a version of the Home Juice Formula that was used by Everfresh in May, 1975, when it was still affiliated with Home Juice. Grove Fresh obtained Exhibit 6 from the Florida Department of Citrus pursuant to a public records request under Florida law.

11. Paragraphs 34-35 of the amended complaint identify Gerald Wolberg as a non-party co-conspirator. Wolberg was president of Everfresh from about 1972 to 1977. In particular, he was Everfresh's president as of May, 1975, the date of Exhibit 6. In 1983, Wolberg agreed to assist the Florida Department of Citrus in connection with the department's investigation of illegal manufacturing practices in the orange juice industry. In January of that year, Wolberg gave the department Exhibit 6. He told John Eldred, the attorney who was in charge of the department's investigation, that the formula in Exhibit 6 originated at Home Juice, and that the formula was used to manufacture adulterated orange juice. (See January 7, 1983 letter from John Eldred, p. 3, a copy of which is Exhibit 7 to the amended complaint.) Wolberg and Eldred confirmed these statements in the summer of 1991 at depositions in this case. (Wolberg dep., 67-70; Eldred dep., 31-34).

12. Paragraph 38 of the amended complaint identifies James Marshall as another non-party co-conspirator. Marshall was Home Juice's vice-president for research and development from 1962 to 1974. Paragraphs 100-102 of the amended complaint allege that Marshall played a key role in the development of the Home Juice Formula.

13. Paragraph 39 of the amended complaint identifies James Benton as a non-party co-conspirator. Benton worked in Home Juice's sales department until about 1976. In the late 1970s, Marshall and Benton formed the entity later known as Flavor Fresh Foods Corp. ("Flavor Fresh"). Paragraph 37 of the amended complaint identifies Flavor Fresh as a non-party co-conspirator. Flavor Fresh was in the business of, among other things, selling single-serve orange juice to consumers. Flavor Fresh's consumer products were manufactured for it by other companies, including Holiday Juice and Everfresh.

14. In February, 1993, Marshall, Benton, and Flavor Fresh were among seven persons and two corporations charged in a 33-count indictment with conspiring to violate the Food, Drug and Cosmetics Act by selling adulterated orange drinks as "orange juice from concentrate." United States v. Peninsular Products Co., et al., No. 93-CR-21 (W.D. Mich.). The indictment, a copy of which is attached as Exhibit B, covered acts from at least 1979 until February 1991. Marshall and Benton ultimately pleaded guilty to certain counts in the indictment. Marshall was sentenced to three years in prison. Benton was sentenced to two years in prison.

15. In the course of negotiating a plea agreement, Marshall gave the government a comprehensive statement of his history of illegal activities. (A summary of his statement is attached as Exhibit C.) In that statement, Marshall admitted that in 1974 or earlier, when he was Home Juice Co.'s vice president for research and development, he created a formula for making adulterated orange juice. He also stated that he gave this formula to both Everfresh and Holiday Juice (then known as JZ Juice). (Id., pp. 1-5.) Marshall's inculpatory statements[1] are admissible against his co-conspirators as an exception to the hearsay rule. Fed.R.Evid. 804(b)(3); Williamson v. United States, 114 S.Ct. 2431 (1994).

The order for redactions.

16. In May, 1994, the Seventh Circuit Court of Appeals directed this Court either to remove the seal or make specific

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[1] Marshall's confession has been corroborated in relevant part by Joseph Buechel, who worked as a quality control technician at Everfresh from 1973 through 1978. In a declaration under penalty of perjury that Buechel gave in connection with sentencing proceedings in the Peninsular Products case, Mr. Buechel gave the following testimony:

> Between 1973 and 1978, I worked as a Quality Control Technician for...EverFresh Juice Company. [Everfresh] had an affiliated company in Melrose Park, Illinois, which was known as Home Juice, Chicago [and is now known as American Citrus]. When I joined [Everfresh], James Marshall worked at the Chicago operation. During that time, [Everfresh] was adulterating its purportedly 100% pure orange juice from concentrate with sugar. Marshall had developed the formulas for adulterating orange juice for [Everfresh], and he provided ongoing technical advice on the adulteration process until he left the company around 1975.

(Id., pp. 1-2; emphasis added.)

findings as to why the seal was necessary. Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 898-99 (7th Cir. 1994). In the proceedings on remand, this Court has not required the defendants to justify the original seal order. Instead, the Court directed the defendants to identify those pleadings they desired to keep under seal and to state reasons why they should remain under seal.

17. On August 2, 1994, the American Citrus defendants filed their designation of documents and information that should remain under seal. At pp. 7-8, American Citrus argued that the names of non-party co-conspirators should be deleted from the complaint because they allegedly "did not have an opportunity to object to their inclusion in these allegations or to protect their interests." Citing two criminal cases which purportedly hold that "an indictment should not identify alleged but uncharged co-conspirators," American Citrus argued that Grove Fresh's civil complaint "should not have included references" to co-conspirators who were not joined as defendants. The Court accepted this argument. Even though American Citrus offered no evidence of any kind in support of any of its August 2 designations, this Court made a finding of fact that "the individuals in question...did not have full and adequate opportunity to object or take other steps to protect their interests." (Tr. of proceedings, 11/21/94, p. 5.) On the basis of this unsupported finding of fact, this Court ordered that the names of the non-party co-conspirators be redacted from the unsealed complaint.

American Citrus lacked standing
to assert the rights of non-parties.

18. American Citrus had no standing to assert the rights of non-party co-conspirators. "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties." Powers v. Ohio, 499 U.S. 400, 410, 111 S.Ct. 1364, 1370 (1991). In order to assert such rights, American Citrus had to meet three criteria:

> the litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute...; the litigant must have a close relation to the third party...; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Id. Because American Citrus has never offered any evidence on any of these three criteria, American Citrus could not seek relief on behalf of the non-party co-conspirators.

Marshall, Benton do not have
any cognizable privacy interests.

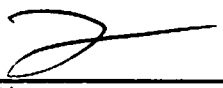
19. The premise of the redaction order is that the non-party co-conspirators are presumably innocent of the charges in the complaint. This presumption is not applicable to Marshall, Benton, and Wolberg. Each of them has made statements to government agencies admitting to their involvement in the illegal activities described in the complaint. Because they have made such admissions, they do not have a cognizable right to keep their illegal activities secret.

WHEREFORE, Mr. Messina prays for an order:

(a) vacating that part of the November 21, 1994 order that requires the redaction of the names of non-party co-conspirators; or

(b) in the alternative, excluding James Marshall, James Benton and Gerald Wolberg from the scope of the redaction order; and

(c) granting such other relief as is proper and just.



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DECLARATION OF PAUL STRAUSS

Paul Strauss, being duly sworn on oath, deposes and states as follows:

1. Since a hearing was held on motions to hold John Messina in contempt, I have been contacted several times by John Rooney, a reporter for the Chicago Daily Law Bulletin. Mr. Rooney has asked me to comment on the proceedings. To date, I have refused to do so because of uncertainty as to how the Court's orders, particularly its seal order, will be interpreted, and uncertainty as to whether any comments about the case or the contempt proceedings might be viewed by the Court as violating its seal order.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 13, 1995.

Paul Strauss

28 U.S.C. §1746

EXHIBIT
A