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Orange Juice Companies Seek to Punish Lawyer Who Uncovered Consumer Fraud

Hearing Scheduled for Federal Court on January 31

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Chicago, Illinois— Next Tuesday a federal court will conduct a hearing on charges that John Messina, a Chicago sole practitioner, is in contempt of a court order sealing a lawsuit that Mr. Messina filed in 1990. The sealed suit alleged that several juice companies, including three Chicago area companies -- Home Juice Co., Everfresh Juice Co., and Flavor Fresh Foods Corp. -- had conspired to manufacture adulterated orange juice from at least 1975 through 1989. The complaint also alleged that in May 1989, John Labatt, Ltd., Everfresh's parent corporation, made false statements to the Food and Drug Administration in order to ward off a criminal proceeding against its subsidiary.

Mr. Messina filed the suit on behalf of Grove Fresh Distributors, Inc., a local competitor of the defendants. Grove Fresh alleged that the defendants' illegal practices had caused it to suffer substantial losses because its pure but higher-priced orange juice was overwhelmed in the market by the defendants' lower-priced, adulterated product, which was misrepresented to consumers to be pure orange juice. Home Juice, Everfresh and Labatt settled Grove Fresh's claims in April 1993, for a total of $2,000,000.

Mr. Messina contends that the contempt charges are legally groundless, and that the charges were filed in retaliation for his having repudiated a so-called consulting agreement that was designed by the defendants to preclude him from representing consumers in class action suits against the defendants. Mr. Messina was forced to sign such an agreement in April 1993 as a condition to the defendants' settling with Mr. Messina's client, who at the time was 78 years old and in failing health. (The client died eleven months later.) Mr. Messina alleges that the defendants' lawyers initiated the contempt charges as part of a strategy for precluding Mr. Messina from providing consumers with evidence that is relevant to three class action suits that are now pending against Everfresh, Labatt and Home Juice in the Circuit Court of Cook County.

In a related proceeding the defendants have moved to set aside the $2,000,000 settlement with Grove Fresh. They claim that they never would have settled with Grove Fresh if they had known that Mr. Messina would repudiate the agreement that would otherwise bar him

from representing or advising consumers in the pending class action suits. On January 24, 1995, Mr. Messina moved to intervene in this proceeding and to challenge the defendants' right to undo the settlement. He contends that the purpose of the disputed agreement violated a rule of professional conduct that prohibits lawyers from requiring "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." This rule, he argues, reflects Illinois' public policy favoring the public's unfettered right of access to counsel. Because the disputed agreement violates this public policy, he contends, the court should not award the defendants any relief for Mr. Messina's repudiation of the agreement.

The Rationale for the Seal

The seal order was imposed in response to a motion that the defendants brought four days *before* Grove Fresh even filed its lawsuit. The seal order was entered without explanation by Judge James B. Zagel.

In November 1992 Judge Zagel, in denying a motion by journalists to remove the seal, declared that the seal was necessary because the allegations of Grove Fresh's complaint, if untrue, would damage the defendants' reputations. He implied that the case should remain sealed until Grove Fresh came forward with evidence to support its allegations. As of November 1992, however, Grove Fresh *had* come forward with such evidence. Among other things three of the individual defendants and five other defense witnesses had invoked the Fifth Amendment privilege during the discovery phase of the case. These eight witnesses refused to answer any deposition questions about the defendants' manufacturing practices on the ground that their answers would be incriminating. Under the civil rules of evidence, these Fifth Amendment claims would be inadmissible at trial that the allegations of the complaint were true. *RAD Services, Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271, 275 (3d Cir. 1986). This and other evidence was called to Judge Zagel's attention, but he did not address any of it when he ruled on the journalists' motion.

Judge Zagel's rationale for sealing Grove Fresh's case would apply to any civil suit that charges a defendant with intentional misconduct. If this rationale were applied across the board, every civil suit alleging intentional misconduct would have to be filed under seal until the plaintiff proved its claims. Since more than 90 % of all federal civil suits are settled before trial, Judge Zagel's rationale would deny the public access to a substantial percentage of the business conducted by the federal courts.

The Contempt Charges

The contempt charges against Mr. Messina stem from his response to a brief the defendants filed in the Seventh Circuit Court of Appeals seeking to make the seal on the Grove Fresh case permanent. The defendants' brief was filed in July 1993, three months after Home Juice, Everfresh and Labatt had paid Grove Fresh $2,000,000 to settle the sealed suit. As part of the settlement Mr. Messina was required to sign an agreement that required him never to speak about the facts of the case, and never to represent anyone else who had claims against Home Juice, Everfresh or Labatt.

In their Seventh Circuit brief the defendants argued that Grove Fresh's case should remain sealed because the complaint, which Mr. Messina had drafted, falsely accused Home

Juice, Everfresh and Labatt in order to "extract" money from them. After the defendants refused to retract these libelous charges, Mr. Messina sought to clear his name by filing papers with the Seventh Circuit that summarized the evidence supporting Grove Fresh's complaint. Shortly afterwards, Home Juice, Everfresh and Labatt filed their contempt petitions in the district court. They argued that Mr. Messina breached the seal when he disclosed to the Seventh Circuit the evidence that supported Grove Fresh's complaint. These are the charges that are set for trial next Tuesday.

Home Juice, Everfresh and Labatt also filed a motion to require Grove Fresh to pay back the $2,000,000.00 settlement payment. These motions argued that secrecy was an important element of the settlement, and that Mr. Messina breached that secrecy when he responded to the defendants' charges by disclosing evidence to the Seventh Circuit.

The remand from the Seventh Circuit

In May 1994 the Seventh Circuit held that the trial court had acted improperly when it sealed the case without holding a hearing or making any findings of fact. The appeals court remanded the case to the district court with instructions that the seal be removed unless the defendants could prove some legitimate reason for keeping the case sealed.

On remand the district court gave the defendants to August 1, 1994, to substantiate their claim that Mr. Messina had falsely accused them. The defendants did not come forward with any proof. Instead, they abandoned that claim. Nevertheless, the entire case, including the contempt petitions, is still under seal.

James Marshall, a key co-conspirator, confessed to Grove Fresh's charges

The sealed complaint identified James Marshall as an orange juice expert who created a formula for manufacturing adulterated orange juice that could fool government regulators. The complaint alleged that Marshall invented this formula in the early 1970s, when he worked at Home Juice Co., and that Home Juice Co. shared the formula with its various affiliates, including Everfresh Juice Co.

Documents filed by the Justice Department in a related criminal case *United States v. Peninsular Products Co., et al.*, no. 93 CR-21 (W.D. Mich.), confirm the basic allegations of Grove Fresh's sealed complaint. The indictment in the *Peninsular Products* case charged Marshall, Flavor Fresh, and eight other defendants with a conspiracy to manufacture adulterated orange juice. The conspiracy described by the indictment was between 1979 and 1991. During that time consumers paid $1,100,000,000 to purchase the defendants' adulterated orange juice. At a sentencing hearing for one of Marshall's co-defendants the government presented evidence regarding the amount of fraud on consumers. According to the government's experts, consumers purchased the defendants' products in reliance on the defendants' misrepresentations that their products were pure orange juice. According to the government's expert economist, consumers who relied on such misrepresentations were defrauded by an amount in excess of $40,000,000.

Because of a jurisdictional dispute with the United States Attorney in Illinois, the United States Attorney in Michigan was not allowed to bring charges against Home Juice Co.

(headquarters in Melrose Park. Illinois) or Everfresh Juice Co. (headquarters in Franklin. Park. Illinois). However. before pleading guilty to charges that led to a three-year prison sentence and a fine of $125,000.00, Marshall met with the Michigan prosecutors and gave them a detailed account of his illegal activities dating back to the early 1970s. when he worked at Home Juice Co. Marshall's account was summarized in a memorandum prepared by prosecutors in December 1992. The prosecutors filed this memorandum in October 1993 in sentencing proceedings in the *Peninsular Products* case. According to this memorandum Marshall told the government that he

> "developed the formula for adulteration at Home Juice and he also bought the ingredients. The formula would have been orange juice concentrate. 25% sugar (granulated sucrose at the time), as much citric acid as was needed. (probably) Beta carotene, benzoate as a preservative. and minerals (potassium citrate and potassium phosphate)."

Marshall also told the government that he gave the adulteration formula to executives at corporations that were then affiliated with Home Juice. One of the companies that got and used Marshall's formula was Everfresh Juice Co. (Labatt acquired Everfresh in December 1986.)

The Jurisdictional Dispute Over Prosecuting Everfresh and Home Juice for Using IDEA, an Illegal Preservative

In August 1989 Anton Valukas, then the United States Attorney for Northern Illinois. began a grand jury investigation into the manufacturing practices of several companies. including Everfresh. The investigation began with a grand jury subpoena requiring Grove Fresh to give the government evidence in its possession regarding Everfresh's illegal practices. Grove Fresh promptly provided the subpoenaed evidence. The investigation appeared to come to a halt in early 1990, when Mr. Valukas returned to private practice.

In the spring of 1991 Grove Fresh obtained evidence that Everfresh and Peninsular Products Co. (an orange juice processor based in Lansing, Michigan) had been using IDEA. an illegal preservative that was imported under the false pretense that it was a cleaning agent. By the summer of 1992, Grove Fresh had evidence that Everfresh used IDEA from about August 1979 to at least October 1988. In discovery. Everfresh specifically admitted that between March 1987 and July 1988, its total purchases of IDEA were in excess of $250,000.

IDEA was marketed by Friedrich Kohlbach, a German national who, during the 1970s and early 1980s, owned a 47% interest in Home Juice International, a European affiliate of Home Juice Co. Although Grove Fresh did not know so at the time, other customers who purchased IDEA from Kohlbach included Home Juice and Flavor Fresh.

Grove Fresh gave its evidence about IDEA to the Food and Drug Administration. In a September 1991 telephone conversation an FDA lawyer told Mr. Messina that at FDA's request, the United States Attorney's office in Michigan was investigating Peninsular Products' illegal practices. He also told Mr. Messina that the Michigan U. S. Attorney wanted to expand the scope of its investigation to include illegal practices at Everfresh and

Home Juice. However, he told Mr. Messina, the United States Attorney in Illinois was not willing to cede jurisdiction over any investigation of Everfresh or Home Juice. The gist of this conversation was later confirmed in a letter from Margaret Porter, general counsel to FDA's parent agency.

The February 1993 indictment in the *Peninsular Products* case included charges against Kohlbach. The government arrested Kohlbach in April 1993, as he was entering the United States. Kohlbach was placed under house arrest. He eventually pleaded guilty to some of the charges in the indictment. At his sentencing the government submitted an affidavit from James Marshall which included information about Kohlbach's sales of IDEA to Everfresh and Home Juice. Marshall testified that

> "I also knew through my business and personal relationships with individuals at Home Juice in Melrose Park and Everfresh in Michigan, large juice manufacturers and distributors, that Kohlbach's preservative was illegally used in their 100% orange juice. I know that Home Juice had a machine that was capable of spraying Kohlbach's preservative into the juice while the juice was being packaged.

However, Everfresh and Home Juice were never indicted for their use of IDEA.

False Testimony About the Date that Everfresh stopped using IDEA

The sealed civil case includes evidence that Bruno Moser was the Everfresh employee in charge of purchasing IDEA and supervising its addition to Everfresh's products. Documentary evidence showed that between March 1987 and July 1988, Everfresh purchases of IDEA exceeded $250,000. Other evidence established that Everfresh was still adding IDEA to its orange juice as late as October 1988. Thus, when the Peninsular Products indictment was issued in February 1993, the five-year statute of limitations on criminal charges for Everfresh's illegal use of IDEA had not yet expired.

In October 1993 Bruno Moser gave the government an affidavit in connection with the sentencing proceedings against Kohlbach. Moser admitted that Everfresh started using Kohlbach's preservative "[s]ometime in the late 1970s or very early 1980's." He swore that "Everfresh used Kohlbach's product from approximately 1980 through approximately 1986 when Labatt purchased Everfresh and we were directed to discontinue its use." If, in fact, Everfresh had stopped using IDEA in 1986, the criminal statute of limitations for that use would have expired in 1991, two years before the *Peninsular Products* indictment. However, evidence in the sealed case established that Everfresh continued to use IDEA through 1988. Thus, the statute of limitations on such charges had not yet expired when the *Purity Products* indictment was issued.

Labatt's Economic Motive for Avoiding Criminal Charges Against its Everfresh Subsidiary

The *Labatt* civil case included evidence that from at least 1974 to 1989, Everfresh had conspired with several other companies to manufacture adulterated orange juice. During those years Everfresh and its co-conspirators sold more than $200,000,000 of adulterated orange juice. If Everfresh and its co-conspirators were indicted and convicted on criminal

adulteration charges, the federal sentencing guidelines would have required the government to establish the amount of consumer losses caused by the defendants' illegal conduct. If such consumer losses were calculated by the same method used to calculate consumer losses in the *Peninsular Products* case (see July 9, 1993 Tr. of Proceedings, pp. 189-95), the amount would be $53,000,000 or more.

If a court made a finding on the amount of consumer losses in a criminal proceeding against Everfresh and its co-conspirators, that finding would operate as collateral estoppel in any consumer class action litigation against them. Under civil law each conspirator is responsible not only for the consequences of its own fraud, but also for that of its co-conspirators. Thus, if the total amount of consumer losses caused by the co-conspirators was $53,000,000, Everfresh would be jointly and severally liable for that full amount.

Consumers have a claim against Labatt for the full amount of the fraud damages. Labatt's liability arises out of evidence that Labatt knew about and gave its implicit approval to Everfresh's illegal practices. Labatt acquired Everfresh in December 1986. As of December 1986 Everfresh, for the third time in ten years, was a defendant in a civil suit alleging that it manufactured and sold adulterated orange juice. Everfresh's sole shareholder disclosed this lawsuit to Labatt before he sold his shares to Labatt. He also told Labatt that the allegations of the suit were true. After the closing Labatt had the right to demand that its new subsidiary change its illegal formulas, but it did not. As a result Everfresh continued to make adulterated orange juice after Labatt acquired it. In calendar year 1987, Everfresh made at least 3,200,000 gallons of adulterated orange juice. More than a million of those gallons were manufactured between January and August 1987, while the lawsuit alleging adulteration was still pending. That suit was settled in August 1987 for $70,000. Everfresh continued to make adulterated orange juice after the suit was settled.

Under civil law, Labatt's ratification of Everfresh's illegal practices renders it ultimately liable for any damages that might be assessed against Everfresh.

The Coercive Tactics for Obtaining Mr. Messina's Signature on the so-called Consulting Agreement

The parties began settlement talks in late September 1992. Labatt's lawyers told Mr. Warren Radler, Mr. Messina's co-counsel, that Labatt and Everfresh were "concern[ed] that Mr. Messina immediately would turn around and sue them again" once the Grove Fresh case was concluded. They told Mr. Radler that Grove Fresh had to find a way to resolve the defendants' concern or else there would be no settlement. In effect, the defendants invited Mr. Radler to violate 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."

After learning about the defendants' demand Mr. Messina reviewed various treatises on professional conduct and responsibility. He concluded that the only possible way for the

defendants to circumvent Rule 5.6(b) would be an agreement whereby they retained him as a legal consultant on orange juice litigation. He also concluded, however, that the rules on conflicts of interest barred him from negotiating over the terms of any such consulting agreement until after Grove Fresh's claims were settled. He reported his conclusions to Mr. Radler. He asked Mr. Radler to notify the defendants that he, Mr. Messina, would not make any proposals that would restrict his practice, and that he would not consider any proposals by the defendants for a consulting agreement until after Grove Fresh's claims were settled.

Mr. Radler refused to notify the defendants that Mr. Messina would not consider a consulting agreement until after Grove Fresh's claims were settled. Moreover, as lead counsel in the negotiations he also prohibited Mr. Messina from having any contact with defense counsel on the subject of settlement.

After Mr. Radler refused to tell the defendants about Mr. Messina's position, Mr. Messina notified Mr. Radler that the latter had "[no] authority to speak for me on any proposal that would directly or indirectly restrict my right to practice law." After receiving this notice Mr. Radler arranged for settlement conferences with the court. One week prior to the first such conference he issued an ultimatum to Mr. Cecil Troy, Grove Fresh's principal. Mr. Radler told Mr. Troy that Rivkin Radler & Kremer would terminate its representation of Grove Fresh unless Mr. Messina was relieved of all responsibility for the litigation.

At the time of Mr. Radler's ultimatum Mr. Troy was 78 years old and in failing health (he died in March 1994). Mr. Messina was a sole practitioner who could not match Rivkin Radler & Kremer's resources for bringing Grove Fresh's claims to trial. He told Mr. Troy if Rivkin Radler & Kremer withdrew, Grove Fresh's ability either to settle the case or to bring it to trial would be compromised. With Mr. Messina's support, Mr. Troy capitulated to Mr. Radler's ultimatum.

Judge Zagel then held settlement conferences on January 28 and February 19, 1993. At Mr. Radler's insistence, Mr. Messina was excluded from these conferences. At these conferences Mr. Radler told the defendants that their concern over Mr. Messina's representation of other claimants could be mooted if they would retain Mr. Messina as a legal consultant. He falsely represented to the defendants that "Mr. Messina had determined that such an agreement was not violative of any ethical rules." Then, in disregard of the November 1992 notice that he had no authority to speak for Mr. Messina, Mr. Radler negotiated with the defendants over the amount of the consulting fee that would be paid to Mr. Messina, as well as the length of the consulting agreement.

By the conclusion of the second conference on February 19, Mr. Radler had negotiated a settlement package totaling $2,200,000. The package provided for a $2,000,000 payment to Grove Fresh and a $200,000 payment to Mr. Messina in consideration for his not representing other claimants. As negotiated by Mr. Radler, Mr. Messina's part of the package was to be confirmed in the form of a legal representation and consulting agreement.

Mr. Radler reported these terms to Mr. Messina the next day. Mr. Troy was also present. Mr. Troy pleaded with Mr. Messina to accept the terms that Mr. Radler had negotiated so that he, Mr. Troy, could enjoy the rewards of the litigation while he was still alive. Mr. Messina bowed to Mr. Troy's plea. He accepted the terms that Mr Radler had negotiated, subject to a satisfactory writing.

In the negotiations that followed, the defendants demanded that Mr Messina make a written representation that in his opinion, the proposed consulting agreement did not violate the Rules of Professional Conduct. They also demanded a representation that his decision to execute the agreement was not influenced by anything that the defendants or Grove Fresh had said or done. Mr. Messina refused to make these representations because they were not true.

The defendants refused to go forward with the settlement unless Mr Messina capitulated to their demands for representations regarding the ethical propriety of the consulting agreement. On March 21, 1993, Mr. Messina notified the defendants that if they continued to insist on these representations, he would not execute a consulting agreement. The defendants insisted on the representations. A stalemate ensued.

On March 24, 1993, Mr. Radler and defense counsel reported the stalemate to Judge Zagel. The court ordered Mr. Messina to appear in chambers the following morning, which he did. Prior to any meeting between Mr. Messina and Judge Zagel, the defendants, according to one of their lawyers, "presented .... the actual consulting agreement ... to the District Court Judge for his approval. Judge Zagel approved." They also told Judge Zagel that there could be no settlement unless Mr. Messina agreed to make the disputed representations about the ethical propriety of the consulting agreement. Finally, they informed the court that they had just been served with state court complaints seeking damages for nationwide classes of orange juice consumers. They told the court that they suspected that Mr. Messina was involved in this litigation, and that if he were, the settlement with Grove Fresh was off.

Judge Zagel then met privately with Mr. Messina and informed him that he would be subject to a $2,000,000 malpractice claim if Grove Fresh lost the settlement because of his refusal to capitulate to the defendants' terms.

After the session in chambers was concluded Mr. Troy again asked Mr. Messina to execute the consulting agreement. Then, Mr. Radler proposed a strategy for defeating the defendants' threat to pull out of the settlement because of the class action suits that had recently been filed. His strategy required Mr. Messina to sign the consulting agreement in precisely the form that it was first tendered by the defendants earlier in the month

Mr. Messina expressed concern about the absolute confidentiality clause in a section of the defendants' draft. He anticipated that the defendants, in order to defeat the intervenor's challenge to the seal in the Seventh Circuit, would mount personal attacks on him. The absolute confidentiality clause, he told Mr. Radler, would complicate his ability to defend against any such personal attacks. Mr. Radler told Mr. Messina to "cross that bridge when

you come to it." He also assured Mr. Messina that if he signed the consulting agreement as requested, Rivkin Radler & Kremer would provide free legal assistance to help resolve any problems that might arise in the future. Based in part on these assurances, Mr. Messina signed the consulting agreement.

In April 1993, the defendants tendered the first $50,00 installment due to Mr. Messina under the consulting agreement. Mr. Messina instructed his attorney to deposit this fee into an interest-bearing trust account.

On July 14, 1993, the defendants filed a brief in the Seventh Circuit which alleged that Mr. Messina had drafted a false complaint in order to "extract" money from the defendants. On August 5, 1993. Mr. Messina notified the defendants that he was repudiating the consulting agreement. He tendered back the full amount of the $50,000 fee, plus accrued interest.

The defendants' initial rule 60(b) motion was presented on August 24, 1993, three weeks after Mr. Messina repudiated the consulting agreement. As of that date the defendants had not asked Mr. Messina to render any services, nor had they disclosed any confidences to him.

Rivkin Radler & Kremer has not provided Mr. Messina with any legal assistance concerning any of the disputes that have arisen since April 1993.