

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

FILED

GROVE FRESH DISTRIBUTORS, INC., )  
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 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 EVERFRESH INC., )  
 and HUGO POWELL, )  
 )  
 Defendants. )

JAMES D. ZAGEL, Judge  
U.S. DISTRICT COURT

No. 89 C 1113  
Judge Zagel

**DOCKETED**

JAN 23 1991

AFFIDAVIT OF WILLIAM D. APPLER

I, William D. Appler, without waiving any attorney-client or work-product privilege, state in camera to the Court as follows:

1. I am a partner in the Washington office of the law firm of McDermott, Will & Emery, where my practice is concentrated in matters involving the United States Food and Drug Administration (FDA). I have personally represented John Labatt, Ltd. on various FDA-related matters since 1985. I make this Affidavit on the basis of my personal knowledge, following a review of my time records and files concerning my representation of Labatt on an FDA-matter which began in February, 1989.

2. On February 7, 1989, McDermott, Will & Emery received a telephone conference call from John Labatt, Ltd.'s General Counsel, Dean Kitts and John Labatt, Inc.'s in-house

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counsel, Ken Rosenthal. These two attorneys spoke with my associate, Gaile L. McMann. Ms. McMann took extensive notes during that telephone conversation, which she then provided to, and discussed with, me that same day.

3. The substance of the call, and my discussion with Ms. McMann, was that the attorneys had gained information which suggested that a former CEO of Everfresh Inc. had added unlabeled ingredients to orange juice produced by the company. These allegations, if true, might constitute violations of the Food, Drug and Cosmetic Act. The in-house attorneys sought McDermott, Will & Emery's advice on how this matter should be handled, including what information should be conveyed to the FDA. They asked our firm to prepare a list of the information we would need to advise Labatt, Inc. and Labatt, Ltd. ("Labatt") on how best to handle the legal problems relating to this matter.

4. Ms. McMann and I had a second, similar telephone conversation with Mr. Kitts on February 8, 1989. During that telephone call, I agreed to prepare a letter to Mr. Kitts and Mr. Rosenthal. This letter would outline the facts and issues as we then understood them, and recommend a course of action.

5. With Ms. McMann's assistance, I prepared such a letter, and sent it by telefacsimile to Mr. Kitts and Mr. Rosenthal jointly on February 9, 1989. My recommendation was that there be a thorough investigation of the matter, which in

my opinion was required by relevant FDA regulations. I asked that a detailed report be prepared for my review, so that I could further advise Labatt. My letter suggested a further conference call among all counsel by held on February 13, 1989.

6. I participated in a telephone conference call involving Mr. Kitts, Mr. Rosenthal, David Murray of John Labatt, Ltd., Ms. McMann and myself, which was held on February 14, 1989. Ms. McMann took notes during that call. The point of the conference was to discuss the facts as we knew them, and the investigation I had recommended. We agreed that I would prepare a letter to Mr. Rosenthal, specifically requesting a thorough investigation for me of these allegations. There was no discussion of the Grove Fresh lawsuit, which we were not yet aware had been filed on February 10, 1989. On February 16, 1989, Mr. Rosenthal called Ms. McMann to inform her of this suit, and he asked that McDermott, Will & Emery defend it.


7. I drafted a letter to Mr. Rosenthal on February 17, 1989, and transmitted it to him by telefacsimile on February 21, 1989. This letter reflected the fact that he had sought our advice on February 7, 1989; that we needed detailed information on the facts of any misbranding of orange juice; that an investigation should be conducted confidentially for us; and that the report of the investigation should be provided to us, with no copies retained by Everfresh or Labatt.

8. The investigation was conducted immediately, and

a report dated February 21-22, 1989, was subsequently provided to me by Mr. Murray. I received the original of that report, which contains both Ms. McMann's and my marginal notes and underlinings. I confirmed with Mr. Murray at the time that there were no other copies of the report. So far as I am aware, there were and are no other copies, and the original report remains in McDermott, Will & Emery's files. This report was used by me to shape my subsequent presentation of information, both to the FDA and to the Canadian Health Protection Branch. It was also used as a basis for developing defense strategy in the Grove Fresh litigation.

9. The decision to conduct this investigation and prepare a report was made by me, with Ms. McMann's assistance, and accepted by in-house counsel for our clients. The purpose of this report was to assist our representation of Labatt before the FDA and in any litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 17<sup>th</sup>, 1991.

  
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William D. Appler