

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

GROVE FRESH DISTRIBUTORS, INC.,)	
an Illinois corporation,)	
)	
Plaintiff,)	
)	No. 89 C 1113
vs.)	
)	
EVERFRESH JUICE CO.)	Judge Zagel
and HUGO POWELL,)	
)	
Defendants.)	

**GROVE FRESH'S BRIEF IN SUPPORT OF ITS
MOTION FOR AN EVIDENTIARY SANCTION REGARDING
EVERFRESH'S USE OF DIETHYL PYROCARBONATE**

In February 1989, John Labatt, Ltd. ("Labatt"), the parent of defendant Everfresh Juice Co. ("Everfresh") conducted an audit of the manufacturing practices at Everfresh. The audit was supervised by David Murray, Labatt's Technical Director. During this audit, Murray was given a handful of documents concerning Everfresh's dealings with Bio Trade, Ltd., a chemical maker domiciled in the Principality of Liechtenstein. These documents, which we will refer to hereafter as the "Bio Trade Documents," concerned the import and purchase of a liquid that was known at Everfresh as "Oleum 320/IDEA." This liquid was a preservative that was added to orange juice processed at Everfresh's Warren plant.

As we will show below, the liquid that Everfresh called Oleum 320/IDEA is actually diethyl pyrocarbonate ("DEPC"). DEPC was banned 19 years ago because it is a carcinogenic agent within the meaning of the Delaney Clause of the Food, Drug and Cosmetic Act, 21 U.S.C. Sec. 409(c)(3).

The information in the Bio Trade Documents, and the Documents themselves, were responsive to discovery requests that

Grove Fresh served on December 1, 1989. The failure to produce these documents for more than 15 months is part of a pattern of discovery abuse by the defense. An evidentiary sanction is now appropriate because if the relevant discovery requests had been answered honestly and completely, the facts which Grove Fresh now seeks to have established would have been admitted.

An evidentiary sanction alone is not enough, however. An evidentiary sanction merely gives Grove Fresh what it should have had in hand one year ago. A monetary sanction of \$25,000 should also be awarded as compensation for the fees and costs that Grove Fresh has incurred over the last six months in order to uncover the facts that the defense has deliberately concealed.

FACTS

The citations below are to "GF Statement," which refers to the 106 page Statement of Uncontested Facts That Should Be Deemed Admitted Pursuant To Rule 11 And Rule 37(a)(2)(A) that Grove Fresh has filed in support of its Motion For An Evidentiary Sanction Concerning Everfresh's Scapegoat Defense. The GF Statement contains extensive citations to transcripts, documents, affidavits and other supporting materials.

Chilled Orange Juice and DEPC

Like all foods, orange juice from concentrate is subject to spoilage from bacteria, yeast and mold. The juice processing industry has developed two basic methods for treating orange juice from concentrate so as to extend shelf life.¹ These two methods

1. "Shelf life" is a term in the food processing industry that refers to the period during which a food remains wholesome by preservation techniques which inhibit microbiological or biochemical changes and thus allow time for distribution and home storage. (GF Statement 125)

are commonly referred to as "hot pack" and "cold pack." Hot pack refers to hermevacuum-packing heat-processed juice that is packaged in sterile containers, such as sterilized glass bottles, to be stored at room temperature. Hot pack juice has a shelf life of about one year. (GF Statement 127-135)

Cold pack refers to juice that is flash pasteurized, then chilled, and then packed in polystyrene or fiberboard containers to be stored in refrigerated display cases. Under ideal conditions, cold pack juice has a shelf life of about 45 days. (GF Statement 127, 133)

DEPC is an anti-microbial agent that was discovered by scientists in Germany. DEPC is known as a cold-fill sterilizer. The action of DEPC is analogous to heat treatment, but without the destructive effect that heat has on the flavor and nutritional value of juices. Fruit juices treated with DEPC can have a superior flavor and are generally indistinguishable from the natural products. (GF Statement 136-142)

When DEPC is added to certain types of beverages, it breaks down chemically into its constituent compounds within 24 hours, and it is no longer detectable as DEPC. Originally, this quality was thought to be a positive one. During the 1960s, the FDA authorized the use of DEPC as a fermentation inhibitor in wine, malt beverages, soft drinks, and fruit-based beverages (but not pure juices). (GF Statement 137, 140)

By 1972, however, studies showed that DEPC was actually a serious health hazard in orange juice and other beverages. These studies showed that when DEPC breaks down into its constituent compounds, the compounds are capable of combining with other in-

redients in orange juice to form a by-product (urethan) that is a recognized carcinogen. (GF Statement 144) On the basis of these studies, the FDA in 1972 revoked the regulation authorizing the use of DEPC. 37 Fed.Reg. 3060, 15,426 (1972), codified at 21 C.F.R. Sec. 189.140 (1990). DEPC is one of only 13 substances that have been banned from use in human food because of a determination that they present a potential risk to the public health. See 21 C.F.R. Sec. 189.110-.191 (1990).

Fred Kohlbach

Fred Kohlbach is a German national. He has been in the orange juice business since 1955. In the late 1960s, Kohlbach and two American partners formed Home Juice International AG, a Swiss company domiciled in Chur, Switzerland. The business of Home Juice International was the marketing of fruit juices. This company wound up business in 1984. (GF Statement 161-166)

Kohlbach has also owned or controlled two companies named IDEA Inter Development and Engineering Limited ("IDEA"). The business of one of the IDEA companies includes the development, planning and building of juice manufacturing facilities and equipment. In January 1987, this company changed its name to Bio Trade Limited. (GF Statement 162-164, 167)

Kohlbach's Ties To The Home Juice Organization

When Kohlbach helped form Home Juice International, he acquired 47.5% of its stock. The rest of the stock was held by two Americans: Leonard Haddad (47.5%) and James Marshall (5%). At the time, Haddad and Marshall were both associated with an Illinois corporation called Home Juice Co. ("Home Juice/Illinois"). Haddad was the president and principal shareholder in Home

Juice/Illinois; Marshall was its vice-president in charge of research and development.² Home Juice/Illinois had numerous subsidiaries and affiliated companies throughout the United States. The ties between the Swiss company and Home Juice companies in the United States were emphasized on the Swiss company's letterhead,³ which stated in German: "This corporation is part of the HOME JUICE group of companies." (GF Statement 165)

Kohlbach is a good friend of Albert Allen, who was president of Home Juice/Illinois from about 1972 to about April 1978. During that period of time, Everfresh was a wholly-owned subsidiary of Home Juice/Illinois. In April 1978, Everfresh was spun off from Home Juice/Illinois as an independent corporation. Albert Allen became Everfresh's sole shareholder. He also became an officer and director of the new corporation. Albert Allen sold Everfresh to Labatt in December 1986. (GF Statement 18-21, 168)

Everfresh's Use of DEPC

When orange juice is processed without a preservative under the cold pack method, the maximum shelf life under the best of conditions is 45 days. Throughout the 1980s, Everfresh marketed cold pack orange juice with a shelf life of 90 days, but without

2. In the 1970s Marshall left Home Juice/Illinois and formed Flavor Fresh Foods Corp. That company was a defendant in the related case of Grove Fresh Distributors, Inc. v. Flavor Fresh Foods Corp., No. 89 C 1114 (N.D.Ill.) The Flavor Fresh case was settled in April 1990. On April 9, 1991, Grove Fresh filed a motion pursuant to Fed. R. Civ. P. 60(b)(3) to set aside that settlement, on the ground that the settlement was fraudulently obtained.

3. By the date of this letter (March 28, 1982) the Swiss company had changed its name to H.J. Foods International. The name change occurred in or around 1972. (GF Statement 164-165)

any mention on the label of an added preservative. (GF Statement 44-45, 159)

Everfresh's remarkable shelf life prompted a competitor to send a were sent anonymously between January 1983 and December 1984. The letters alleged that Everfresh was using DEPC in cold pack orange juice. One of the letters alleged that "[t]his product is being imported from overseas, and is brought into this country as a cleaning agent." The same letter alleged that "a doctor Fred Kohlbach is the supplier of the product."⁴ (GF Statement 170-172) [emphasis added]

The Bio Trade Documents produced this month show that in November 1987, Everfresh purchased 10 jerry cans⁵ of a product from Bio Trade. An invoice describes the product as "IDEA 300/50 CIP Cleansing and Aseptisizing Compound." The import records relating to this purchase describe it differently: they refer to the product as a "pesticide." An Everfresh inventory sheet from about the same time refers to the product by yet another name -- "Oleum 320 - IDEA."

An eye witness has confirmed in an affidavit that this Bio Trade product was added to Everfresh's cold pack orange juice. The eye witness, Duane Bosch, worked at Everfresh as a Laboratory Technician from July 3 to October 29, 1988. In early October 1988, Bosch saw one of his fellow workers pouring a liquid from a

4. In the copy of this letter produced by the FDA pursuant to the Freedom of Information Act, the name of the alleged supplier is blacked out. However, the copy of the related FORM FDA 2516 completed by an agent in connection with the complaint indicates that "doctor Fred Kohlbach" is the name that is blacked out in the letter. (GF Statement 170)

5. A jerry can is a five-gallon container.

five-gallon container into 32 ounce glass bottles, which were then stored in a refrigerator in the laboratory. This co-worker told Bosch that the name of the liquid was Oleum 320/IDEA, and that it was imported from Germany. Later, Bosch saw another employee take a 32 ounce bottle of Oleum 320/IDEA and add it to a batch of cold-pack orange juice. (GF Statement 174-177, 182-186)

Bosch started asking questions about Oleum 320/IDEA.⁶ He voiced to fellow workers the opinion that it was wrong to add Oleum 320/IDEA to orange juice. On October 29, 1988, he was fired for alleged insubordination. On about January 27, 1989, Bosch filed suit under the Michigan Whistleblower's Protection Act. Bosch's complaint alleged that Everfresh was adding unlawful ingredients to its orange juice, and that he had been fired for protesting the practice. Everfresh settled this suit in October 1989. (GF Statement 174) [Grove Fresh has obtained an affidavit from Bosch, a copy of which is attached hereto]

Murray's Audit

David Murray is Labatt's Technical Director. Within ten days of the filing of Bosch's complaint, Murray and his staff in-

6. "Oleum" is the commercial name for fuming sulfuric acid, which is a viscous liquid emitting choking fumes of sulfur trioxide. Fuming sulfuric acid is a concentrated form of sulfuric acid. Sulfuric acid is corrosive to all body tissues. Inhalation of concentrated vapor may cause serious lung damage. Skin contact may produce severe necrosis. Ingestion may cause severe injury and death. Sulfuric acid and fuming sulfuric acid are used in the manufacture of fertilizers, explosives, dyestuffs, other acids, parchment paper, glue, purification of petroleum, and pickling of metal. (GF Statement 178-180)

Oleum is a deleterious substance within the meaning of the Food and Drug Act. Adding oleum to orange juice would create an irrebuttable presumption that the juice is adulterated. 21 U.S.C. Sec. 402(a)(2)(A).

initiated an audit of the manufacturing practices at the Everfresh subsidiary. Murray himself audited the practices at Everfresh's plant in Warren, Michigan. One of the persons whom Murray interviewed was Glen Davis, the Quality Control Manager at Warren. Davis had been employed at Warren since the late 1970s. (GF Statement 191-193, 228-230, 237-240)

Davis told Murray that up until sometime in 1988, Everfresh had been using a preservative that came into the Warren plant under suspicious circumstances. Davis said that the preservative "did not always have the same name or labels." Davis asserted that he had had no role in ordering the preservative, and he claimed not to know the true name of the preservative. Davis's recollection was that the preservative had been purchased from a brokerage house. In fact, the Bio Trade Documents produced on April 5, 1991, include a purchase order and import record that refer to a broker/importer in Detroit doing business under the name V.G. Nahrgang Co. (GF Statement 191-193)

Davis also told Murray that there were at least three fictitious names for the preservative: Oleum, IDEA, and a third name that Murray has since forgotten. Murray checked the plant files for purchase records. Murray specifically testified that while many of the pertinent file folders were empty, he did find some purchase documents and a computer listing of raw ingredients that mentioned Oleum 320/IDEA. These are the documents that were belatedly produced to Grove Fresh on April 5, 1991.

When Murray was asked if he ever learned the true name of the preservative, he gave the following testimony:

QUESTION: Since then have you learned anything further about the preservative that Davis discussed with you that day?

ANSWER: If you are asking whether I know what the preservative is, I don't. But yes, I have learned more about the preservative and what it might be.

QUESTION: What have you learned?

ANSWER: It was reported in our Windsor meetings, the ones that Babinski [another Labatt auditor] had, and the follow up to those meetings with Walter Gazo [the Quality Control Manager at the Windsor plant]. When we suggested names to them -- okay, we used a series of names, one of those names was DEPC, whether he had ever heard the word before, and his response was, "Well, yes, I've heard someone called this once DEPC."

(Murray Dep. 97-98) [emphasis added]

Since DEPC is expressly prohibited as a food additive, the use of DEPC in food intended for human consumption creates an ir-rebuttable presumption that the food is adulterated. See 21 U.S.C. Sections 348(a)(2), 348(c)(3)(A), 342. The intentional adulteration is a felony violation, punishable by up to three years in prison, a fine of up to \$10,000, or both.

**Mitch Allen's Invocation
of the Fifth Amendment**

Mitch Allen first worked at Everfresh in 1956. He became president in about 1980. When Labatt acquired Everfresh in December 1986, Allen received a five-year employment contract from Everfresh as part of the consideration for the sale. Under the agreement, Allen receives \$300,000 a year, until January 31, 1992. Allen receives \$300,000 per year regardless of whether he actually renders any services. Allen resigned from active employment in September 1987. (GF Statement 254-255)

Allen was deposed on March 7, 1991. When asked whether he knew Fred Kohlbach and IDEA, Allen invoked the Fifth Amendment.

He also invoked the Fifth Amendment in response to the following questions:

Q. During the time that you were president of Everfresh Juice Company, IDEA was a supplier to Everfresh, was it not?

A. I respectfully decline to answer

Q. Now one of the products that IDEA either makes or distribute bonate; is that correct?

A. I respectfully decline to answer

Q. And during the time that you were president of Everfresh Juice Company Everfresh added diethyl pyrocarbonate to orange juice; isn't that so?

A. I respectfully decline to answer

Allen's invocation of the Fifth Amendment concerning matters that occurred during his employment as president supports the inference that the matters in the questions he has refused to answer, are true. Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).

**Procedural History of Grove Fresh's
Efforts to Discover the Ingredients
In Everfresh's Misbranded Juice**

On December 1, 1989, Grove Fresh served its first amended set of interrogatories and its first document request. Interrogatories 7 and 8 asked Everfresh to describe the ingredients in its formulas for adulterated orange juice, and to identify the vendors of each ingredient. Companion requests under Rule 34 sought the production of documents relating to ingredients and formulas. After much wrangling, Everfresh agreed to answer the interrogatories and to produce documents by April 9, 1990. This agreement was reduced to writing as part of a three-way agreement that effected a settlement in the related case of Grove Fresh

Distributors, Inc. v. Flavor Fresh Foods Corp., No. 89 C 1114

(N.D.Ill). However, Everfresh breached this agreement and failed to answer the interrogatories or produce any documents. (GF Statement 277-283, 288, 316)

On April 18, 1990, Grove Fresh filed a motion to compel answers to the interrogatories and to produce documents, in compliance with the settlement agreement. The motion was granted on April 20, 1990. On April 30, 1990, Everfresh served interrogatory answers. Everfresh responded to the interrogatory concerning ingredients by offering to produce accounts payable records pursuant to Rule 33(c). Everfresh also specifically named 26 different vendors. This response was incomplete in at least two respects. First, the documents that were ultimately produced did not include the Bio Trade Documents or any other documents that refer or relate to DEPC or Oleum 320/IDEA or any of its variants. Second, neither Bio Trade Ltd. nor Fred Kohlbach was among the 26 vendor names specifically listed in the narrative answer to the interrogatory.

ARGUMENT

A. The Information About DEPC And Oleum 320/IDEA Was Available To Everfresh's Current Management Long Before April 1990.

Whenever Grove Fresh has complained about the inadequacy of the defense's responses to discovery, the defendants use their scapegoat defense. They claim that they cannot give Grove Fresh the discovery it seeks because the only persons who have knowledge are Everfresh's former president and certain fired employees. This scapegoat defense was first trotted out on April

19, 1990, in response to Grove Fresh's very first discovery motion:

[T]he present motion actually results from the following problem: The former Everfresh employees who have the knowledge to possibly answer the detailed questions which plaintiff would now like to ask are simply not available to the defendants.

It was the former management of Everfresh, not the current management, that designed, implemented and knew about the activity at issue in this lawsuit. Everfresh's former president, chairman and chief executive officer, Daniel F. Kotwicki, left the company in 1988, and was replaced by Hugo Powell in January, 1989, before this lawsuit began. Plaintiff's motion reflects an unhappiness that Mr. Powell ... has only indirect knowledge of what occurred at Everfresh before he arrived at Everfresh. However, in responding to discovery requests, Everfresh and Mr. Powell do not have Mr. Kotwicki or his assistants available.

(Defendants' Preliminary Response To Plaintiff's Motion To Enforce Agreement Concerning Discovery, p.2) ["Preliminary Response"]

The scapegoat defense is false and misleading and is the subject of a separate motion for sanctions. With respect to DEPC and Oleum 320/IDEA, the scapegoat defense is false in at least three respects. First, the reference to Kotwicki and his assistants was a red herring insofar as the Warren plant is concerned. Kotwicki had nothing to do with Warren until December 1986, when Labatt bought Everfresh from Albert Allen. As we have shown above, Everfresh's dealings with Kohlbach dated back to at least 1982, if not earlier, long before Kotwicki was on the scene.

Second, as of April 1990, Everfresh's new management had already learned that the Warren plant had been buying a preservative from Bio Trade and Kohlbach. Murray had obtained that information 14 months earlier. Everfresh's failure to disclose the

information from the Murray audit can only be characterized as a deliberate attempt to conceal damaging information.

Third, if Murray's audit left any open questions about DEPC, Bio Trade or Fred Kohlbach, there were (and still are) at least four persons available to Everfresh's current management to answer such questions. Those four persons are Albert Allen, Mitch Allen, Michael Kanan, and Bruno Moser. Albert Allen was the former owner of Everfresh. When he sold his stock to Labatt, he executed an agreement that required him to respond to any subsequent inquiries about the operations at Warren. As of April 1990, his brother, Mitch, was collecting \$300,000 per year from Everfresh. Mitch, too, was under contract to answer any questions that Everfresh might have after he left active employment. (GF Statement 257-258)

As of April 1990, Michael Kanan was collecting \$60,000 per year from Everfresh. Kanan was employed at Everfresh from the mid-1960s until March 1989. He was chief financial officer when he left. He had knowledge about Bio Trade and Kohlbach, because he is the one who arranged to pay their invoices. He, too, was under contract to answer any questions that Everfresh might have after he left active employment. (GF Statement 256)

Finally, there is Bruno Moser. Moser has been employed at Everfresh since the early 1960s, and he is still employed there today. He has worked in quality control throughout his career at Everfresh. The nature of his work is such that he is familiar with Everfresh's formulas, and the ingredients in the formulas. Moreover, the Bio Trade Documents show that Moser was involved in the paperwork for the Bio Trade transactions. Thus, Moser had

knowledge relevant to Grove Fresh's interrogatories, and as a current employee he was certainly available to Everfresh and its counsel. (GF Statement 300)

B. The Court Has Authority To Impose The Sanctions Under Rules 37(b)(2)(A) and 11.

There are at least two Rules that give this court the authority to impose the sanctions sought by Grove Fresh: Rule 37 and Rule 11.

The order compelling discovery that was entered on April 20, 1990 constituted an order under Rule 37(a). The defendants disobeyed that order by deliberately withholding information and documents that were responsive to the discovery requests underlying the April 20th order. When a party disobeys an order issued under subdivision (a), one of the sanctions that can be imposed is "[a]n order that the matters regarding which the [initial] order was made or any other designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order." Fed. R. Civ. P. 37(b)(2)(A)

The court can also impose an evidentiary sanction for violations of the certification implied by Rule 11. The Preliminary Response filed on April 19, 1990, falsely stated that only "former ... employees ... have the knowledge to possibly answer the detailed questions which plaintiff would now like to ask." In fact, at least one current employee (Bruno Moser) had responsive information. It also stated falsely that all former employees who have knowledge "are simply not available to the defendants." As we have shown above, Albert Allen, Mitch Allen

and Michael Kanan are contractually obliged to give Everfresh the information sought by Grove Fresh's discovery requests.

Finally, for all of the reasons explained above, the supplemental answers to interrogatories served on April 30, 1990, also violated the Rule 11 certification.

C. A Monetary Sanction Is Appropriate Because Grove Fresh Has Expended Considerable Resources Proving Facts That Should Have Been Disclosed And Admitted One Year Ago.

An evidentiary sanction is warranted by the facts but, standing alone, an evidentiary sanction is not an adequate cure for the harm caused by the defense's deliberately deceitful conduct. The facts that the court is asked to deem as established were within the knowledge of witnesses employed by Everfresh or Labatt or otherwise subject to Everfresh's or Labatt's control. Those facts should have been provided in the answers to Grove Fresh's simple interrogatories, and in responses to its straightforward document requests, and in truthful answers to deposition questions.

If the defense had given honest and complete answers to the interrogatories on April 9, 1990, as they had promised to do, then Grove Fresh could well have completed discovery as to Everfresh's use of the Bio Trade preservative in short order, and without undue expense. But that did not happen, and as a result, Grove Fresh had to search for relevant information outside the discovery process. That search has been far costlier than ordinary discovery, both in terms of attorney time and out-of-pocket disbursements. For example, Grove Fresh engaged four different

European firms⁷ just to get basic information about Fred Kohlback and his companies.

CONCLUSION

For the reasons set forth above, the court should deem as established the facts respecting Everfresh's use of DEPC as set forth in the motion filed on April 16, 1991. In addition, the court should award Grove Fresh a monetary sanction of \$25,000 for the costs and fees incurred in its investigation of DEPC.

DATED: April 19, 1991

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7. The four firms retained by Grove Fresh are the London office of Sidley & Austin; Lynx Security Services, Ltd., also of London; Bar and Karrer, a law firm in Switzerland; and Nauta Dutilh, a law firm in Holland.