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

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, Plaintiff, vs. EVERFRESH JUICE CO. and HUGO POWELL, Defendants.	No. 89 C 113 Judge Zagel

GROVE FRESH'S MEMORANDUM IN OPPOSITION TO EVERFRESH'S MOTION FOR RULE 11 SANCTIONS

Everfresh's Rule 11 motion attacks Grove Fresh based on a paper that was prepared and signed in February 1989 by Jeffrey Hines, Esq., Grove Fresh's original counsel. The motion does not seek Rule 11 sanctions against Hines, who was fired from this case in November 1989. The only question, then, is whether Grove Fresh should be punished for Hines's omissions. The answer is no, because the omissions that Everfresh complains about were the direct result of an explicit agreement between Hines and Everfresh that was bought and paid for by Everfresh and its parent, John Labatt, Ltd. ("Labatt").

I. SUMMARY OF ARGUMENT.

Over a 13-year period from 1976 to 1988, Hines sued Everfresh and its affiliates four different times for selling misbranded orange juice. Hines also sued American Citrus Products Corp., d/b/a Home Juice Co. All five cases were filed in Maryland federal court on behalf of a Baltimore competitor. All five cases were settled before the complaint in this case was filed. The illegal acts underlying those five suits eventually

became part of the RICO complaint that Grove Fresh filed in August 1990 in case no. 90 C 5009.

The complaint that Hines filed in this case did not mention Everfresh's 13-year history of illegal acts. Hines's complaint omitted this history because by the time Grove Fresh contacted him, he had already entered into a secret contract in which he promised not to disclose that history to any of his future clients. Hines made this promise when he settled a 1988 lawsuit against Labatt's Holiday Juice division, of which Everfresh was a unit. In the words of an Everfresh lawyer, Hines's silence was purchased by "the setting of a settlement amount larger than otherwise would have been the case."

Grove Fresh learned about Hines's secret contract in November 1989, after this Court had granted Grove Fresh leave to amend its RICO claim. The covenant came to light in a letter wherein Everfresh threatened to take "additional steps to enforce [Hines's covenant]" if he amended Grove Fresh's RICO claim to include any facts about the pre-August 1988 suits against Everfresh.

Grove Fresh fired Hines immediately after learning about his illegal contract with Everfresh. Having lost the services of the only plaintiff's lawyer who knew about Everfresh's 13-year history of misbranding orange juice, Grove Fresh was unable to amend its RICO claim within the time allowed by the Court.

Everfresh's Rule 11 motion lacks any logic or merit. If the complaint in this case omitted facts relevant to the RICO claim, it was not, as Everfresh alleges, because of an inadequate investigation by Grove Fresh's first lawyer. Rather, it was because

Everfresh, in violation of the Maryland Code of Professional Responsibility, had secretly paid that lawyer not to disclose the relevant facts to future clients such as Grove Fresh.

The facts relevant to Everfresh's motion are not in dispute. Therefore, the motion should be denied without a wasteful evidentiary hearing.

II. FACTS.

Hines is a member of the Maryland bar. One of his clients is Purity Products, Inc., which distributes juices and drinks in the Baltimore metropolitan area.

In April 1976, Hines filed a complaint for Purity Products against Everfresh in Maryland federal court. Purity Products, Inc. v. Ever Fresh Juice Co., No. H 76-620 (D. Md.) The complaint alleged that Everfresh made misbranded orange juice. At the time, Everfresh was a wholly-owned subsidiary of Home Juice Co. of Illinois. This suit was settled in December 1977.

In 1982, Hines filed a second suit alleging that Everfresh's orange juice was misbranded. Purity Products, Inc. v. Ever Fresh Juice Co., No. Y 82-3253 (D. Md.). As of 1982, Everfresh was an independent entity 100% owned by Albert Allen. Everfresh settled this suit in or about 1983.

In March 1986, Hines filed a third suit alleging that Everfresh made misbranded orange juice. Purity Products, Inc. v. Ever Fresh Juice Co., No. JFM 86-963 (D. Md.) At the time the complaint was filed, Everfresh was still owned by Albert Allen. In December 1986, while the suit was still pending, Allen sold his stock in Everfresh to Labatt. Everfresh became a unit in what was then known as Labatt's Holiday Juice division.

Everfresh and Labatt settled this suit in about August or September 1987 for $70,000.

In January 1988, Hines filed two more complaints alleging misbranding of orange juice. One of the complaints was against Labatt's Holiday Juice division, of which Everfresh was now an operating unit. Purity Products, Inc. v. Holiday Juice, Ltd., No. 88-41 (D. Md.). The other was against Home Juice, Everfresh's former parent. Purity Products, Inc. v. American Citrus Products Corp., d/b/a Home Juice Co., No. 88-40 (D. Md.) Both Holiday Juice and Home Juice hired the same defense counsel, the Chicago law firm of Burditt & Radzius.

At the time of these suits, the Everfresh unit at Holiday Juice was co-packing orange juice for Home Juice.

The complaint against Home Juice was settled on July 15, 1988 for $150,000. The complaint against Holiday Juice was settled on August 10, 1988, for $250,000. Both settlement agreements included covenants restricting Hines's right to practice law. The Holiday Juice covenant provided as follows:

> Jeffrey C. Hines, and all attorneys, paralegals and others who have worked on the case brought by Purity against Holiday Juice, or who have had access to the documents and information concerning that case, shall not in the future represent or provide any information or assistance to any party concerning or on account of acts statements or omissions alleged to have been committed by Holiday Juice, John Labatt, Limited, John Labatt, Inc., Everfresh, Inc., and/or JZ Juice Co. prior to [August 1988]. (emphasis added)

In September 1988, Grove Fresh contacted Hines after its principal, Cecil Troy, read about the 1988 Purity Products suits in a trade publication. Between October and December 1988, Hines assisted Grove Fresh in obtaining a series of chemical analyses

of the "orange juice" being sold by six of Grove Fresh's competitors. These analyses showed that five of the competitors, including Everfresh and Home Juice, were selling misbranded orange juice. In reliance on these chemical analyses, Hines filed suits against the five violators on February 10, 1989. None of the complaints specified the period of time for which Grove Fresh was seeking damages.

Everfresh and Home Juice filed motions to dismiss the complaints. In August 1989, several months after after these motions were fully briefed, John P. Messina was retained as local counsel for Hines.

On November 27, 1989, this Court issued an opinion granting Everfresh's and Home Juice's motions to dismiss the RICO claims that Hines had drafted. The Court held that the RICO claims were deficient because, among other things, they did not specify the time, place and contents of Everfresh's or Home Juice's false representations. (Mem. Op. at 7.) However, the Court also held that the faults with the complaints were "reparable if plaintiff is given an opportunity to replead. There is no reason to deny this opportunity." (Mem. Op. at 11.) The Court gave Grove Fresh 21 days (later extended to January 26, 1990) in which to replead the RICO counts.

Home Juice's Enforcement of the Covenant

Long before the Court granted Grove Fresh leave to amend the RICO claims, both Home Juice and Everfresh put Hines on notice that they would enforce the covenants restricting his right to practice law. Hines, in turn, promised those defendants that he would obey the covenants.

In March 1989, Home Juice's lawyer called Hines and

> reminded Mr. Hines that he had executed an agreement in previous litigation which prohibited him from asserting any claim for a period prior to the date of resolution of that case. [Home Juice's lawyer] told Mr. Hines that his agreement would have an effect on the case that [Hines] had filed on behalf of Grove Fresh...

(5/21/90 Affidavit of Steven M. Kowal, par. 2)[1] In a follow-up letter dated March 31, 1989,[2] Hines told Home Juice's lawyer that he had kept the pre-July 1988 facts from Grove Fresh:

> As to the matter of the Agreement [not to sue Home Juice for acts or omissions prior to July 15, 1988], I promised not to disclose any bad acts of [Home Juice] and I have not, thereby upholding my end of the Settlement Agreement.

Thereafter, Home Juice served Hines with a request to admit that Grove Fresh was not seeking to recover damages for the period prior to July 15, 1988. Hines admitted to this request without notifying Grove Fresh. This unauthorized admission is the subject of a pending motion in Grove Fresh Distributors, Inc. v. American Citrus Products Corp., No. 89 C 1117 (N.D. Ill.).

Everfresh's Enforcement of the Covenant

Everfresh enforced Hines's covenant through Bruce Weitzman, a partner at McDermott, Will & Emery. On October 16, 1989, Weitzman flew to Baltimore to meet with Hines. The purpose of the meeting was to discuss settlement of this case and the related case of Grove Fresh Distributors, Inc. v. Flavor Fresh Foods, Inc., No. 89 C 1114 (N.D. Ill.). During this meeting

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1. This affidavit is Exhibit A to the Memorandum of American Citrus Products Corporation In Support of its Motion to Strike the Assertion of the Attorney-Client Privilege, filed in Grove Fresh Distributors, Inc. v. American Citrus Products Corp., 89 C 1117 (N.D. Ill.) (filed June 1990).

2. Id., Exhibit B.

Hines assured Weitzman that Grove Fresh's complaints against Everfresh and Flavor Fresh were "drafted ... to seek damages post August of 1988." Hines stated that the time period of the complaints was limited because "he [had] agreed not to pursue any such claims prior to August of 1988."[3] Two weeks later, Weitzman made a written offer to settle both cases for the sum of $35,000. The offer specified that the settlement would be for the period from August 1988 to February 1989.

This offer was the subject of a meeting between Messina and Weitzman on November 21, 1989. Messina had not been present at the October 16th meeting between Weitzman and Hines, nor had he been privy to any other discussions about Hines's restrictive covenant. He first learned that Hines might be under a restriction during the November 21st meeting. In a follow-up letter the next day, Messina asked Weitzman to disclose the actual terms of Hines's restrictive covenant:

> Since neither I nor Mr. Troy has seen the [Purity Products] settlement agreements [restricting Hines's right to practice law], we are not in a position to comment on the substance of those agreements....
>
> If Everfresh and Flavor Fresh wish to proceed with settlement discussions on the premise that the damage period does not begin any earlier than August 1988, they should, within seven days, set forth their position in writing, completely and in detail, and with supporting authorities.

(A copy of this letter is attached hereto as Exhibit B.)

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3. These aspects of the meeting were confirmed five months later, in a court filing in the Flavor Fresh case, No. 89 C 1114. See page 2 of Defendants' Response in Opposition to Plaintiff's Motion to Strike the Defense that the Time Period Covered by the Complaint Is Post-August 10, 1988 (March 7, 1990). [A copy of this pleading is attached hereto as Exhibit A.]

In a reply dated November 29, 1989, Weitzman disclosed the covenant that is quoted above at p. 4 of this memorandum. He also reiterated his earlier contention that the period for damages was limited, and he threatened to go to court if Grove Fresh "expanded" its claims to include the period prior to August 10, 1988:

> It has been my understanding (and apparently the understanding of Mr. Hines as well) that the relevant time period covered by those two lawsuits begins after August 10, 1988. The reason for this is paragraph 7 of the settlement agreement that Mr. Hines and others executed on August 10, 1988, ...
>
> I understand that there was good reason to include this provision, and it was also reflected in the setting of a settlement amount larger than otherwise would have been the case.
>
> I have been assuming that Mr. Hines was complying with his agreement, and that there was no need for additional steps to enforce that agreement.... If the present litigation against my clients is not settled, and if you then attempt to disregard the time limitation referred to above, we will have an additional dispute for the court to resolve, ... (emphasis added)

(A copy of this letter is attached hereto as Exhibit C.) Weitzman's threat came just two days after this Court issued its opinion dismissing the RICO claims, but also granting Grove Fresh leave to amend.

Grove Fresh discharged Hines the day after receiving Weitzman's letter. From and after the date of discharge, neither Grove Fresh nor any of its attorneys has had any communications with Hines regarding the merits of the claims against Everfresh and Home Juice.

Hines formally withdrew his appearance on January 22, 1990, four days before the deadline for amending the RICO claims. On January 26, 1990, Grove Fresh's new lead counsel notified the

defendants that Grove Fresh was not in a position to amend the RICO claims:

> Our investigation of potential RICO claims is not yet completed. Therefore, we will stand on the Lanham Act and common law claims that were sustained by Judge Zagel, at least for the time being. (emphasis added)

(A copy of this letter is attached hereto as Exhibit D.) It then took Hines's successors seven months to investigate and analyze the potential RICO claims. These efforts included the time-consuming and expensive process of obtaining records from clerks of court and other public agencies. It is probable that most, if not all of these records were already in Hines's possession. But because Everfresh had paid Hines not to disclose such records to anyone, Hines's copies of these records were not available to Grove Fresh.

On August 28, 1990, Hines's successors filed a new lawsuit on Grove Fresh's behalf. Grove Fresh Distributors, Inc. v. John Labatt, Ltd., No. 90 C 5009 (N.D. Ill.). The new suit named nine corporate or individual defendants, including Everfresh, Labatt, and Home Juice. As later amended, the complaint included three RICO counts against Everfresh and Labatt. The complaint also included numerous references to four of the five suits that Hines had previously prosecuted against Everfresh and Home Juice, but which he had covenanted not to disclose to Grove Fresh.[4] (Amended Complaint, par. 110(h), 110(i), 110(j), 142, 143, 144. See also Appendix to the Complaint, Exhibits 16, 23, 24).

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4. Grove Fresh's complaint does not mention the 1976 suit against Home Juice, the very first of the suits filed by Hines. Grove Fresh did not learn about the 1976 suit until after the complaint in 90 C 5009 was filed.

III. ARGUMENT.

The real victim here is Grove Fresh, not Everfresh. Grove Fresh's only mistake was the unknowing one of hiring a plaintiff's lawyer who was already bound to a secret contract with two of the target defendants. Grove Fresh's innocent mistake is not the kind for which a plaintiff should be punished under Rule 11.

Indeed, the root of the Rule 11 claim lies not in Grove Fresh's conduct, but in the illegal and unethical contract between Everfresh and Hines. Maryland prohibits lawyers from "offering or making ... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." Maryland Code of Professional Conduct, Rule 5.6(b). Hines's restrictive covenant falls squarely within this prohibition.[5]

If Hines's right to practice law had not been restricted by this illegal contract, the complaint he filed in February 1989 could have included the pre-August 1988 facts that were later alleged by his successors in the complaint they filed in 90 C 5009. And if Everfresh had acknowledged in November 1989 that this il-

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5. Maryland law governs because the contract was executed in Maryland, the contract arose out of a Maryland lawsuit, and the lawyer who was subject to the restrictions is a member of the Maryland bar.

Illinois also prohibits such contracts. As of July-August 1988, Rule 2-108 of the Illinois Code of Professional Responsibility provided: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law." In 1990, Illinois adopted the version of this rule that appears in the Model Code of Professional Conduct. See Illinois Rules of Professional Conduct, Rule 5.6(b).

legal contract was unenforceable, instead of threatening "additional steps to enforce" it, Hines could have timely amended the RICO claim to meet the standards of pleading set by this Court's Memorandum Opinion of November 27, 1989.

Given these facts, Everfresh's decision to file this Rule 11 motion is incomprehensible.

CONCLUSION

For the reasons stated above, Everfresh's Rule 11 motion must be denied.

DATED: July 14, 1992

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