

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

RECEIVED

APR 16 1991

H. STUART CUNNINGHAM  
UNITED STATES DISTRICT COURT

No. 89 C 1119

GROVE FRESH DISTRIBUTORS, INC., )  
an Illinois corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
EVERFRESH JUICE COMPANY, )  
et al., )  
 )  
Defendants. )

Judge Zagel

GROVE FRESH'S MOTION  
FOR AN EVIDENTIARY SANCTION CONCERNING  
EVERFRESH'S SCAPEGOAT DEFENSE

Plaintiff Grove Fresh Distributors, Inc. ("Grove Fresh"), by its attorneys, moves the court for an order pursuant to subparagraphs (A) and (B) of Rule 37(b)(2) of the Federal Rules of Civil Procedure as follows: (1) precluding defendants Everfresh Juice Co. ("Everfresh") and Hugo Powell ("Powell") from offering evidence at trial in support of the "scapegoat" theory of defense, and (2) deeming as established for purposes of plaintiff's case-in-chief at trial certain designated facts. The facts that Grove Fresh seeks to have deemed established will be set forth in a separate filing. Grove Fresh will also submit a memorandum in support of this motion. By way of introduction Grove Fresh states as follows:

1. Everfresh and Powell have asserted a scapegoat defense. They allege that the misbranded juice that prompted Grove Fresh's suit was the work of a single executive (Daniel Kotwicki) and three technical employees who have since resigned or been fired.

2. Defendants also allege that Kotwicki fabricated a completely false set of books and records to conceal the adultera-

tion from John Labatt, Ltd. ("Labatt"), Everfresh's parent corporation. Because of Kotwicki's fabrications, they argue, Labatt did not and could not discover the unlawful manufacturing practices until January 1989. They also claim that Kotwicki's alleged deceptions have prevented the defense from providing much of the information that Grove Fresh has sought in discovery.

3. The scapegoat defense does not fit the facts. The defense has admitted that the Everfresh plant in Warren made misbranded orange juice in the years 1983 through 1988. Yet Kotwicki was neither an officer nor a director nor a shareholder nor an agent of Warren during the years 1983, 1984, 1985 or 1986. Clearly, Kotwicki is not responsible for the unlawful acts that occurred at Warren in those years.

The identity of the responsible persons, and the facts which demonstrate their responsibility, will be set forth in the papers that will be submitted in further support of this motion.

WHEREFORE, Grove Fresh prays for an order as set out above.

GROVE FRESH DISTRIBUTORS, INC.

BY:   
One of its attorneys

John P. Messina, Esq.  
135 South LaSalle Street  
Suite 1960  
Chicago, Illinois 60603-4303  
(312) 630-1105

Warren S. Radler, Esq.  
Dale R. Crider, Esq.  
Dorothy B. Zimbrakos, Esq.  
RIVKIN, RADLER, BAYH,  
HART & KREMER  
30 North LaSalle Street  
Suite 4300  
Chicago, Illinois 60602  
(312) 782-5680