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

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, Plaintiff,	)	No. 90 C 5009
vs.	)	Judge Zagel
JOHN LABATT LIMITED, a Canadian corporation, et al., Defendants.	)	FILED UNDER SEAL

GROVE FRESH'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO OVERRULE OBJECTIONS TO TIME PERIOD

Grove Fresh submits this reply memorandum in response to the briefs filed on February 21, 1992, and March 2, 1992, by the Everfresh defendants and by American Citrus Products Corp., d/b/a Home Juice Co. ("Home Juice"), respectively.

A. There Is Circumstantial Evidence Of A Formal Agreement To Make Adulterated Orange Juice.

Grove Fresh and the defendants agree that the gist of a conspiracy is an agreement to engage in an unlawful course of conduct. Home Juice contends that there is no evidence that the defendants ever entered into such an agreement. (Home Juice Brief, p. 18) This contention, however, ignores the relevant circumstantial evidence.

The conspiracy among the defendants involves a scheme for making unlawful profits from adulterated orange juice. Paragraph 100 of the amended complaint alleges that in furtherance of this scheme the defendants

> developed a formula for producing a beverage that had the look and taste of 100% pure orange juice from concentrate, and which was labeled and described to the consuming public as 100% pure orange juice from concentrate, but which, in fact, consisted of significant amounts of sugar, chemicals, flavorings and preserva-

tives, mixed in a solution of water and only a minimal amount of orange juice concentrate. (This formula is hereafter referred to as "the Home Juice Formula").

Grove Fresh alleges that Exhibit 6 to the amended complaint is a version of the Home Juice Formula that was in use at Everfresh Michigan as of May 1975, when Everfresh Michigan was a wholly-owned subsidiary of Home Juice. Parent and subsidiary corporations can be co-conspirators. International United Auto Workers v. Cardwell Manufacturing Co., 416 F. Supp. 1267, 1284, 1290 (D. Kan. 1976). Thus, evidence that Home Juice and Everfresh Michigan agreed to make "orange juice" pursuant to the formula in Exhibit 6 would constitute proof of a conspiratorial agreement.

Grove Fresh is not required to produce direct evidence of the defendants' unlawful agreement. A conspiracy by its nature tends to be secret. Thus, the law of evidence allows the existence of a conspiracy to be proved by circumstantial evidence. United States v. Conway, 632 F.2d 641, 643 (5th Cir. 1988). Here, Grove Fresh must rely on circumstantial evidence because all of the witnesses with knowledge of the conspiracy have invoked the Fifth Amendment.

The following circumstantial evidence establishes the existence of an agreement between and among Home Juice, Everfresh Michigan, and Everfresh Canada to make unlawful profits from the manufacture and sale of adulterated orange juice:

(1) The face of Exhibit 6 states that it is for "Everfresh OJ." It is reasonable to infer that "Everfresh OJ" refers to a product sold to the public as Everfresh-brand orange juice.

(2) The face of Exhibit 6 indicates that the formula originated at Home Juice, in that use of the formula required the approval of Jeff Jackson. As of the date on Exhibit 6, Jackson was an employee of Home Juice, not of Everfresh Michigan.

(3) The computer costing system that generated Exhibit 6 was designed by Dan Kotwicki in about 1975, after he was promoted from the subsidiary (Everfresh Michigan) to the parent (Home Juice) as chief financial officer. (See 1992 Wilder Dep. 18-20; Wolberg Dep. 52)[1]

(4) Kotwicki's costing system was designed to "compute the cost of each ingredient used in a particular batch of product." The costing system was tied to Home Juice's formulas, which were stored on its main-frame computer. This costing system was used to prepare financial statements for both Home Juice and Everfresh Michigan because "the formulas were roughly the same." (Wolberg Dep. 52-53)

(5) Everfresh Michigan did not have a main-frame computer, so its financial statements were actually prepared by Home Juice's computer in Chicago. Everfresh Michigan was

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1. At page 7 of Grove Fresh's opening brief, it was stated that Home Juice has been computerized since 1969. This statement was based on a 1990 deposition of a Home Juice employee.

Two days after Grove Fresh filed its opening brief, another Home Juice employee testified that while Home Juice may have had some data processing capacity in the early 1970s, it did not truly become "computerized" until about 1975, when Kotwicki became Home Juice's chief financial officer. (1992 Wilder Dep. 18-20)

equipped with a remote terminal that transmitted data to Home Juice's computer via a dedicated telephone line. (Wolberg Dep. 53; AC-00385; AC-00722-33)

(6) Everfresh Canada (originally known as Jay Zee Products, then as Holiday Juice) became an affiliate of Home Juice in May 1977, when Haddad, Home Juice's controlling shareholder, acquired a controlling interest in the corporation. Also in May 1977, Kotwicki was appointed chief executive officer of Everfresh Canada. (Amended Complaint par. 81-88)

(7) After Everfresh Canada became affiliated with Home Juice, its financial statements were prepared by the Home Juice computer. Everfresh Canada was connected to the Home Juice computer via a dedicated telephone line to the remote terminal at Everfresh Michigan. (AC-00682; AC-00722-33; LSNB-114102-03)

(8) Everfresh Michigan was spun off as an independent entity in April 1978. Nevertheless, Everfresh Michigan continued to have its financial statements prepared by Home Juice's computer until about September 1979. Even then, Everfresh Michigan continued, for some unknown period of time, to have access to Home Juice's computer for "formula usage." (AC-00646; AC-00381-85)

(9) Everfresh Canada became an independent entity in June 1979. Nevertheless, Everfresh Canada continued to have its financial statements prepared by Home Juice's computer until about October 1979. (AC-00594-99; AC-00638-44; LSNB-114102-03)

These facts establish that formulas were stored on Home Juice's main-frame computer, and that Home Juice, Everfresh Michigan and Everfresh Canada all had unrestricted access to those formulas. When the inferences most favorable to Grove Fresh are drawn, the record establishes that the defendants agreed among themselves to make adulterated orange juice according to formulas such as the one in Exhibit 6.

Once the existence of a conspiracy has been established, it is presumed to continue until the contrary is shown. United States v. Stromberg, 268 F.2d 256, 263 (2d Cir. 1959). A co-conspirator's liability does not end until he or she withdraws from the agreement. To accomplish effective withdrawal the defendant must show that he or she acted affirmatively to defeat or disavow the purpose of the conspiracy. United States v. James, 609 F.2d 36,41 (2d Cir. 1979).

Here, the earliest date that any defendant came forward to defeat or disavow the purpose of the conspiracy was in May 1989, when Everfresh had a meeting with the Food and Drug Administration.[2] Thus, the record supports a claim that the defendants engaged in a continuous course of tortious conduct from some date prior to May 1975 through at least May 1989.

B. Grove Fresh's Statement Of Facts Is Accurate.

Grove Fresh's summary of the circumstantial evidence encompasses 41 paragraphs. The summary is supported by 75 specific citations to deposition transcripts and documents. The defen-

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2. Grove Fresh alleges that Everfresh was untruthful in its presentation to the Food and Drug Administration. Thus, there will be an issue at trial as to whether the May 1989 meeting was an effective withdrawal from the conspiracy.

dants challenge only two of the 75 citations, and then make the grandiose contention that these two challenges destroy the credibility of Grove Fresh's entire summary of facts.

The general attack on Grove Fresh's credibility must be rejected because neither of the two specific challenges has any merit.

Wolberg identified Exhibit 6 as a Home Juice formula: Grove Fresh's opening brief identified Wolberg as the source for the contention that Exhibit 6 to the amended complaint is a Home Juice formula:

> Wolberg gave Eldred several documents that he represented were Home Juice formulas. One of the documents he gave to Eldred is the formula sheet that is Exhibit 6 [to the amended complaint]. (Eldred Dep. 31-34; Wolberg Dep. 67-70)

(Grove Fresh Opening Brief, p. 9)

Home Juice challenges Grove Fresh's summary of Wolberg's testimony. Home Juice argues that "[c]ontrary to the position taken by Grove Fresh, Mr. Wolberg stated explicitly that he did not know whether these formulas were ever used by any company." (Home Juice Brief, p. 15) However, Home Juice does not quote this alleged testimony, nor does it give a cite to the specific page and line numbers where it can be found. The reason for this omission is simple: Home Juice's contention is not true.

Exhibit 6 to the amended complaint was first shown to Wolberg at page 52 of the deposition transcript. This is what Wolberg said:

Q. Do you recognize this particular formula?

A. Yes, I think so.

Q. And what is it?

A. I believe its a formula used by [Home Juice] Chicago because it's on their issues [sic]. I remember it's on their computer. They had a costing system that spit out formulas like this.

Wolberg reaffirmed this testimony later in the deposition, at page 68, which is within the pages cited in Grove Fresh's Opening Brief:

Q. Did you provide any documents to Mr. Eldred that you recall?

A. I believe I did.

Q. Do you recall what those documents were?

A. They were examples of formulas.

Q. Formulas for products that was labeled as orange juice from concentrate?

A. Well, I don't know what the formulas were but they were formulas.

Q. Were they formulas of the Everfresh Company?

A. They were formulas from the Chicago company.

Q. Of Home Juice [in] Chicago?

A. Yes.

Although Wolberg claimed in this passage that he "didn't know what the formulas were," he had a fresher recollection eight years earlier, when he was interviewed by attorney Eldred. In a letter that Eldred wrote to the Florida Department of Citrus on January 7, 1983, a few days after he had interviewed Wolberg, Eldred summarized the interview as follows:

Wolberg has no direct evidence of current orange juice adulteration, but says that it is a long-time practice within the industry. <u>When he worked for Everfresh he knew that Home Juice Company was adulterating its product</u>. He suspected that the Everfresh product was also adulterated since Everfresh was using concentrate supplied by Home Juice. <u>He provided us with the enclosed computer formula for adulterated orange juice and represented to us that it was a Home Juice formula in use in the mid-1970s</u>. (emphasis added)

This letter was authenticated at a deposition of John Eldred in July 1991. (Eldred Dep. 26, 31, 33)

Eldred testified that he actually received several formulas from Wolberg. He received one formula during the face-to-face interview of January 3, 1983; he received the others under cover of a letter from Wolberg a few days later. Exhibit 6 to the amended complaint is from the group of formulas that Wolberg mailed to Eldred.

Grove Fresh has fairly characterized Wolberg's testimony.

Everfresh has badly twisted Eldred's testimony: Everfresh argues that "[n]obody has testified in any deposition ... that these alleged formulas were used at Everfresh or Home Juice for making anything, much less orange juice." (Everfresh Brief, p. 8) Everfresh supports this contention by quoting two sentences from the deposition of John Eldred:

> Eldred testified that he did not "have any idea what these two pages (alleged formulas) relate to. . .I don't know if they relate to adulteration." (Eldred Dep. pp. 31-34)

Everfresh's use of the quoted material is grossly misleading.

The first sentence quoted by Everfresh (that Eldred did not "have any idea what those two pages (alleged formulas) relate to") appears in the transcript at page 31, lines 16-17. This quote is taken out of context. When the preceding 12 lines of testimony are considered, it becomes evident that the quote selected by Everfresh is being used to knock down a straw man: no one except Everfresh has ever characterized the two pages in question as "alleged formulas."

The "two pages" mentioned in the quote are from Deposition Exhibit No. 5, which consists of five pages, not two. Deposition Exhibit No. 5 consists of materials that Wolberg gave to Eldred at the face-to-face interview of January 3, 1983. The relevant testimony is as follows:

> THE WITNESS: I have just been handed what has been marked as Deposition Exhibit 5 which consists of five pages. The first three pages of this constitute the formula documents provided to me by Mr. Wolberg and referred to as an enclosure in my letter of January 7th, 1983. The remaining two pages of Deposition Exhibit 5 were also enclosures to Ms. Mander [the Department of Citrus's General Counsel] and were also documents, to the best of my recollection, provided to me by Mr. Wolberg, although they do not appear to be formulas for orange juice products.
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> Q. Do you have any idea what those two pages relate to?
>
> A. I do not.

(Eldred Dep. p. 31, lines 4-17) [emphasis added] In this exchange, the witness clearly identifies three of the five pages as formulas; his letter of January 7, 1983, further describes the formulas as Home Juice formulas. His testimony about the remaining two pages is irrelevant to any issue raised by Grove Fresh.

The second sentence quoted by Everfresh appears in the transcript three pages later, at p. 34, lines 6-7. Here, Eldred is not discussing the formulas that Wolberg delivered at the face-to-face interview, as he was at page 31 of the transcript. Rather, Eldred is referring to the formulas that Wolberg sent by mail after the interview, under cover of a letter dated January 5, 1983. The questions and answers from which Everfresh lifts this second quote are as follows:

Q. During the course of your investigation did Mr. Wolberg send you other formulas than we have identified here this morning?

A. There appear to be in the file two or three other formulas in addition to those previously identified that accompanied his letter to me dated January 5, 1983.

Q. Do those formulas all relate to orange juice adulteration to your knowledge?

A. I don't know if they relate to adulteration. I know they relate to orange juice. From a review of my file, the formulas that arrived with Mr. Wolberg's letter were Home Juice formulas.

(Eldred Dep. p. 33, line 19 through 34, line 9) [emphasis added] In this passage Eldred states unequivocally that the formulas he received from Wolberg "relate to orange juice." Being a careful lawyer, he shied away from asserting the legal conclusion that these formulas relate to "adulteration." But the conclusion that the formulas relate to adulteration is obvious from an examination of all the non-orange ingredients listed in the formulas.

Marshall's testimony is not credible: Home Juice cites deposition testimony from James Marshall for the proposition that Exhibit 6 "was actually a formula for a drink." (Home Juice Brief, p. 17) Home Juice criticizes Grove Fresh for ignoring this allegedly relevant testimony.

Home Juice's criticism is misplaced. This is not a motion for summary judgment. Grove Fresh is not required to demonstrate that all of the facts underlying its contentions are undisputed. At best, Marshall's testimony goes to the weight of the evidence as to whether Exhibit 6 is a formula for orange juice, or a formula for some drink product.

Having said that, it must also be said that Marshall's testimony about Exhibit 6 is not very credible. Marshall characterized Exhibit 6 "as [not] a complete formula," and that "other things were added to the product to make a drink." (1990 Marshall Dep. 127) But the formula in Exhibit 6 is designed to yield a batch of 1028 gallons, of which 867 gallons are water. This high proportion of water (about 84% of the total batch) suggests that the formula is for a finished product, and not for an intermediate product to which other ingredients would later be added.

Also, the quality specifications in Exhibit 6 call for brix of 11.8 and an acid level of 6.0. These are the standards for single-strength orange juice from concentrate. Marshall's claim that Exhibit 6 is a drink formula is undercut by his inability to identify any orange drink product in the market that has the same levels of brix and acid as orange juice. (1990 Marshall Dep. 128-29)

C. If The Record Currently Lacks A Direct Link Between Home Juice And DEPC, It Is Due Only To Home Juice's Time-Period Objection.

Home Juice argues that Grove Fresh's brief "does not contain any information that would link the alleged use of DEPC with [Home Juice]." (Home Juice Brief, p. 17) If the record lacks such a link, it is only because Home Juice's time-period objection has gutted Grove Fresh's ability to get discovery from Home Juice.

While Home Juice has produced documents concerning general business matters dating to 1974, it has steadfastly refused to provide any information about formulas or ingredients for the

period prior to July 15, 1988. Indeed, at a deposition in August 1991, Home Juice's counsel instructed defendant Henry Lang not to answer any questions about formulas for the period prior to July 15, 1988. This instruction sealed off much relevant information because Lang has been employed at Home Juice since about 1972, and he has been Home Juice's president since 1979.

Counsel has given similar instructions to other Home Juice witnesses. The issue of whether Home Juice used DEPC cannot be resolved until Grove Fresh has an unfettered right to cross-examine witnesses and examine formulas for the period prior to July 15, 1988.

D. Because The Complaint Alleges A Conspiracy As Of May 1975, The Scope Of Discovery Necessarily Includes Facts Prior To May 1975.

The defendants have avoided any discussion of Fed. R. Civ. P. 26(b)(1), which defines the scope of discovery. That Rule authorizes discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The subject matter of this case is a conspiracy that began on some date prior to May 1975. The court has already ruled that the complaint states several causes of action. Therefore, a straightforward application of Rule 26(b)(1) requires that Grove Fresh be permitted to discover relevant matters beginning at some reasonable date prior to May 1975.

If the court sustains the time period objections, it will gut Grove Fresh's ability to prove claims for tortious acts by Home Juice prior to July 15, 1988, and for tortious acts by Everfresh prior to January 1983. The practical effect of such rulings would be the same as if the court granted partial summary

judgment for those periods of time. None of the "facts" recited in the Everfresh's brief warrants such a drastic result at this stage of the litigation.

Everfresh cites the fact that in February 1990, Grove Fresh disposed of certain documents. (Everfresh Brief, pp. 2, 8) However, the disposition was done innocently. Moreover, Everfresh has greatly exaggerated the scope of the documents that were discarded. Grove Fresh did not discard, and has provided to Everfresh, financial statements and income tax returns dating to 1975; cash disbursement journals to 1979; and accounts receivable journals to 1980.

Everfresh falsely implies that Grove Fresh has destroyed documents relating to "ingredients of its orange juice." (Everfresh Brief, p. 2) Grove Fresh never had such documents; it is a distributor, not a manufacturer. Records about the ingredients in Grove Fresh's orange juice are readily available from Grove Fresh's packers. Indeed, the defendants have already obtained extensive discovery from Eau Claire Packing Co., Grove Fresh's principal packer.

Finally, the balance which this court struck regarding the scope of discovery in 89 C 1113 should not control the outcome here. The motion to overrule the time-period objection in 89 C 1113 was filed on May 1, 1990; the last brief on the motion was filed on July 16, 1990.[3] The complaint in this case was filed on

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3. Grove Fresh sought to file a further brief on July 27, 1990, but the court denied Grove Fresh's request.

August 28, 1990. Obviously, in arguing the time-period motion in 89 C 1113, Grove Fresh was not in a position to argue factors relating to a complaint that had not yet been filed.

E. The Unauthorized Admission in 89 C 1117 Should Not Limit Grove Fresh's Discovery In This Case.

At pages 3-14 of its brief, Home Juice rehashes the merits of motions that have already been briefed and are still pending in 89 C 1117. Grove Fresh will limit its reply to new matters.

First, Home Juice has failed to cite any cases that would empower the court to ignore the express language of Fed.R.Civ.P. 36(b), which states that "[a]ny admission made by a party under this rule is for the purpose of the pending action only and ... may [not] be used against the party in any other proceeding." In each of the three cases cited at page 13 of Home Juice's brief, the admissions sought to be withdrawn had been made in the same proceeding. Thus, these cases are inapposite.

Second, Grove Fresh is not responsible for the delay in the resolution of the controversy concerning the unauthorized admission in 89 C 1117. Grove Fresh's current lead counsel filed his appearance in that case on September 6, 1989. The motion to vacate the unauthorized admission was filed on April 16, 1990. In between those two dates discovery was stayed, initially pursuant to an informal agreement between the parties and then pursuant to court order. The motion to vacate was filed as promptly as the circumstances required. While a delay in a ruling on this motion is regrettable, it is not due to inaction by Grove Fresh.

Third, Home Juice gives an incomplete account of the circumstances under which Grove Fresh asserted the attorney-client privilege as it applies to communications with Jeffrey Hines, Grove Fresh's former attorney. Home Juice sought to conduct an ex parte interview of Hines. Grove Fresh did not object, but because it would not be be present to invoke the privilege where appropriate, Grove Fresh sent Hines a written reminder that it was not making a wholesale waiver of its attorney-client privilege. Hines then declined Home Juice's request for an ex parte interview. Grove Fresh suggested that the best way to proceed would be a deposition, where the privilege could be asserted on a question-by-question basis. Inexplicably, Home Juice has refused to follow this procedure.

Finally, Home Juice complains that it has made decisions about discovery in this case that were premised on its prevailing on the pending motions in 89 C 1117. But Home Juice had no right to assume that it would win. If its assumption has now put it in a bad position, that is not Grove Fresh's fault.

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Respectfully submitted,

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