IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-4038

GROVE FRESH DISTRIBUTORS, INC., Plaintiff,	)	
v.	)	No. 89 C 1113
EVERFRESH JUICE COMPANY and HUGO POWELL, Defendants.	)	
GROVE FRESH DISTRIBUTORS, INC., Plaintiff,	)	
v.	)	No. 90 C 5009
JOHN LABATT LIMITED, a Canadian corporation, et al., Defendants,	)	James B. Zagel Judge Presiding
and	)	
THE AD HOC COALITION OF IN-DEPTH JOURNALISTS, Intervenor-Appellant.	)	

AFFIDAVIT OF JOHN P. MESSINA

John P. Messina, on oath deposes and states:

1. I am one of the attorneys of record for plaintiff, Grove Fresh Distributors, Inc. ("Grove Fresh"). Mr. Cecil Troy is Grove Fresh's president and principal shareholder. Mr. Troy is 78 years old.

2. In July 1989, Mr. Jeffrey Hines, a Maryland attorney, called me and described five cases he had filed for Grove Fresh in February 1989. I had never spoken to

EXHIBIT
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Mr. Hines before. He told me that he had gotten my name through the Chicago Bar Association.

3. Mr. Hines asked me if I would file an appearance in the five *Grove Fresh* cases as his local counsel. In August 1989, after reviewing the pleadings in the five cases, I agreed.

4. Mr. Hines was discharged by Mr. Troy on November 30, 1989. At Mr. Troy's request, I took over the *Grove Fresh* cases as lead counsel. Three days earlier, on November 27, 1989, the district court had dismissed RICO claims in three Grove Fresh cases: *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, No. 89 C 1113; *Grove Fresh Distributors, Inc. v. American Citrus Products Corp.*, No. 89 C 1117; and *Grove Fresh Distributors, Inc. v. Olympic Gold Juice Co.*, No. 89 C 1118. The district court gave Grove Fresh 28 days in which to amend the RICO claims.

5. I obtained a four-week extension of time for amending the claims. At the end of that period I believed that Grove Fresh had good RICO claims, but I also believed that I did not have enough documentary evidence in hand to satisfy the requirements of Rule 11. Therefore, on January 26, 1990, I notified the defendants in case nos. 89 C 1113, 1117 and 1118 that my investigation of potential RICO claims was not yet completed, and that I would stand on the existing complaints for the time being. (*Appendix I, Exhibit 4.*)

6. Between November 1989 and August 1990, I conducted an investigation of RICO claims against the defendants in case nos. 89 C 1113, 89 C 1117 and 89 C 1118. I also investigated RICO and common law claims against John Labatt, Ltd. ("Labatt"), the parent of the corporate defendant in 89 C 1113. In the course of my investigation I obtained information from the following governmental agencies, among others: the Food and Drug Administration; the United States Patent and Trademark Office; the Florida Department of Citrus; the secretaries of state in Illinois, Michigan, Wisconsin, California,

New Jersey, Massachusetts, Delaware, Florida, New York, among other jurisdictions; and the Bureau of Corporate and Consumer Affairs for the Province of Ontario, Canada.

7. On at least five occasions prior to August 1990, the Everfresh defendants asked me to make a settlement demand on behalf of Grove Fresh. I repeatedly declined to make such a demand until after I had completed my investigation of Grove Fresh's RICO claims against the existing defendants and also its potential claims against Labatt. That investigation was completed in August 1990. I concluded that Grove Fresh had claims against Labatt under RICO and under the common law of unfair competition.

8. On August 15, 1990, I sent Everfresh's counsel a demand letter. (*Appendix I, Exhibit 5.*) The letter sought payment of four categories of claims. The letter identified Labatt as one of the entities generally liable to Grove Fresh, but the letter did not particularize those claims. The defendants did not respond to, or even acknowledge receipt of, the August 15th letter.

9. In the week following August 15 I continued drafting a new complaint which included Grove Fresh's claims against Labatt. On August 23, 1990, as this new pleading was nearing completion, I sent a follow-up letter to defense counsel which particularized the claims against Labatt. (*Appendix I, Exhibit 6.*) The letter gave notice that if the defendants had changed their mind and were no longer interested in settlement negotiations, Grove Fresh would file a new suit which would include Labatt as a defendant.

10. Late in the morning of the following day, August 24, 1990, I received telephone notice that McDermott, Will & Emery had arranged to present an emergency motion to seal the new complaint described in my August 23rd letter. I received a copy of the motion about 45 minutes prior to the emergency hearing. (*Appendix II, Exhibit 20.*)

11. The Emergency Motion implicitly called upon the court to evaluate the contents of the new complaint. However, the new complaint was not yet in its final form,

so it was not possible for me to submit the complaint to the trial court at the August 24th hearing. I saw no reason to force a decision on the Emergency Motion in a vacuum, so, prior to the hearing I told Everfresh's lawyer, Mr. Lazar Raynal, that when the new complaint was ready for the trial court's inspection, I would file it under seal so long as there would be a prompt hearing to *unseal* the complaint. Mr. Raynal agreed to this procedure, and the agreement was reported to the trial court. As a result of this agreement, the hearing on the Emergency Motion took less than one minute, and it did not involve any argument whatsoever on the substance of the motion.

The February 1993 Settlement Offer

12. In February 1993, the defendants offered Mr. Troy a substantial sum of money in settlement. The amount of the proposed settlement ($2,000,000) was equal to about 70% of Grove Fresh's lost profits of $2,900,000 as calculated by Grove Fresh's experts on damages at Coopers & Lybrand.

13. There was a catch, however. The defendants would not settle with Mr. Troy unless he obtained my consent to a consulting agreement. The purpose of the consulting agreement was to create on paper an attorney-client relationship between the defendants and me, so that I would have a conflict of interest that would bar me from representing future plaintiffs against the defendants.

14. The proposal was made to my co-counsel, Mr. Warren Radler, on February 18, 1993. He reported the proposal to me the next day at a meeting with Mr. Troy. Mr. Radler told me that the amount of the consulting fee ($200,000) and the length of the agreement (two and one-half years) were not negotiable items. After Mr. Radler explained the defendants' proposal, Mr. Troy made an impassioned plea that I accept the agreement so that he could put this litigation behind him before he was "pushin' up daisies," as he put it.

15. I did not solicit the proposed agreement, and I did not think that the proposed agreement was in my best professional or economic interests. Nevertheless,

because of my respect and affection for my client, Mr. Troy, and my concern for his circumstances (he was 78 years old and complained of declining health), and because of the personal plea he had made, I agreed to the defendants' proposal, subject to the negotiation of a suitable writing.

16. The first draft of the Consulting Agreement was prepared by the defendants and delivered to me on March 9, 1993. On March 12, Mr. David Lee, whom I had retained to represent me in negotiations over the Consulting Agreement, sent defendants a marked up draft. There were two major changes in Mr. Lee's mark up.

The Confidentiality Clause

17. First, Paragraph 1 of the defendants' draft contained a confidentiality clause that was absolute and unconditional. Section 1 provided in pertinent part:

> Messina will not disclose to anyone any information or documents relating to the business and activities of the [defendants-appellees] and any of their present or affiliated companies, officers, employees, agents, successors and assigns.

Mr. Lee's marked-up draft modified the confidentiality clause with the phrase, "Except as may be required by law or a court of competent jurisdiction ..."

18. This proposed change to Section 1 grew out of my concern over two motions that had been set for an evidentiary hearing beginning September 30, 1992, but which had been continued and would never be resolved by the trial court because of the impending settlement. (Copies of these motions are in *Appendix I, Exhibits 17 and 18.*) In the opinion of Professor Daniel Coquillette, whom I have retained as an expert witness in this dispute,[1] these two motions involved attorney misconduct of the type that is required to be reported under *In re Himmel*, 125 Ill. 2d 531 (1988).

19. My understanding of Illinois law was that the filing of the motions with the district court probably did not satisfy my obligations under *Himmel*, and that a separate report to the Attorney Registration and Disciplinary Commission ("ARDC")

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[1] A copy of Professor Coquillette's resume is in *Appendix I, Exhibit 19.*

might be required. *See Himmel,* 125 Ill. 2d at 544 (noting that the Illinois Supreme Court, acting upon recommendations from the ARDC, "ultimately bears responsibility for deciding an appropriate sanction" for attorney misconduct.); *Schnack v. Crumley*, 103 Ill. App. 3d 1000, 431 N.E.2d 1364, 1369 (4th Dist. 1982) (holding that "sanctions based on alleged professional misconduct must be addressed to the [ARDC] which is vested with the authority to consider such matters, and which is the proper forum for such actions rather than this court."); *Reed Yates Farms, Inc. v. Yates*, 172 Ill. App. 3d 519, 530, 526 N.E.2d 1115, 1122 (4th Dist. 1988) (holding that ARDC proceedings are completely separate and apart from the judicial proceedings in which the attorney misconduct was alleged to have occurred); *People v. Camden*, 210 Ill. App. 3d 921, 926, 569 N.E.2d 312 (5th Dist. 1991) (vacating sanction ordered by trial judge on ground that it "was an impermissible infringement on the exclusive power of the [Illinois] Supreme Court, acting through the [ARDC], to adjudicate attorney disciplinary matters. Disciplinary proceedings and sanctions for unprofessional conduct are exclusively within the province of the Supreme Court.").

20. The purpose of the proposed modification to Section 1 was to enable me to make whatever reports were required by *In re Himmel.*

The Representations Regarding Compliance With the Rules of Professional Conduct

21. The second major change in Mr. Lee's marked-up draft related to Section 4 of the defendants' draft, which included the following representations:

> Messina and the Hiring Parties each warrant and represent that each has relied upon its own judgment and on the advice of its/his own attorney, and not on any advice, statement or representation of any other party or its counsel ... as to the propriety of and the basis for its/his decision to enter into this Agreement and for the language of this Agreement. Each party further agrees that no statements or representations made by any of the other parties, or any of their agents, employees or counsel, have influenced or induced it to execute this Agreement. In addition, Messina specifically acknowledges and represents that he has reviewed the applicable ethical rules and restrictions that apply to attorneys in the

State of Illinois, and that he has concluded that this consulting agreement is consistent with and is not in violation of any of those ethical rules or restrictions.

Section 4 was inaccurate. Contrary to the text of Section 4, I *was* influenced to execute the agreement by statements from the defendants. Had I not been told that the defendants would refuse to settle with Grove Fresh unless I executed the consulting agreement, I would not have even considered the consulting agreement. I had also reviewed the ethical rules that apply to attorneys in Illinois, and, contrary to the text of Section 4, I thought that the agreement might be a violation of Rule 5.6(b). Because I was not willing to make the representations embodied in Section 4, Mr. Lee's marked up draft deleted Section 4 in its entirety.

22. Mr. Lee transmitted the marked up draft with a letter which gave notice that if the defendants were not requiring the Consulting Agreement, I would forego the $200,000 consulting fee. (*Appendix I, Exhibit 8*) His letter stated:

> Mr. Messina understands that your clients required this [Consulting] Agreement as part of the Grove Fresh settlement. If that is not correct, please conclude the Grove Fresh settlement without this [Consulting] Agreement and the $200,000 that would be payable thereunder.

23. The defendants replied that the Consulting Agreement was required, so negotiations continued. The defendants also objected to the changes that Mr. Lee had made to Sections 1 and 4.

24. On March 21, 1993, I sent the defendants a second marked-up draft. This marked-up draft again included the "Except as required by law ..." modification to the Section 1 confidentiality clause, and it again deleted the proposed representations embodied in Section 4. The second marked-up draft was delivered with a cover letter which gave notice that if these changes were not acceptable to the defendants, I would not sign the consulting agreement, and the settlement with Grove Fresh would have to proceed without the Consulting Agreement:

> Please let me know by 4 p.m. on Tuesday, March 23, 1993, whether your clients require the terms from the Original Draft that have been deleted from the

> Revised Draft. *If they insist on having those terms, there can be no agreement.* I have advised Rivkin Radler & Kremer that if there is no agreement on the consulting arrangement by 4 p.m. on March 23, they are free to take all steps necessary to enforce Grove Fresh's rights to the $2,000,000 settlement with your clients. (emphasis added)

(*Appendix I, Exhibit 9.*)

25. The defendants again rejected the changes to Sections 1 and 4, and they reported the impasse to the trial court. I was required to appear in chambers on March 25, 1993. At the outset of the proceedings in chambers on March 25, defense counsel made a presentation to the court from which I was excluded. I was then brought in for a private meeting with the court, without a court reporter. The court expressed to me the opinion that the Consulting Agreement did not violate the Rules of Professional Conduct, but the court did not explain the basis for this opinion.[2]

26. The court then described what might happen if the settlement failed to close because of my objections to the Consulting Agreement, and the case went to trial. While the evidence on liability was strong, the court said, the evidence on causation and damages was less so. If the jury returned a verdict for less than the $2,000,000 now being offered by the defendants, or if the jury found that Grove Fresh had not proven damages, Grove Fresh would have a malpractice claim against me for the difference between $2,000,000 and the jury's verdict. If Grove Fresh sued and obtained a judgment against me, the judgment would be a personal liability that could be executed against my personal assets.

27. I did not reply to the court's statements about my exposure to a malpractice claim. Instead, I told the court that for the sake of settlement I had been willing to go along with the concept of a consulting agreement, but that the form of agreement tendered by the defendants contained several unpalatable provisions. I tendered to the court a simple, two-page contract that would establish the relationship of attorney-client between

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[2] It appears that the court's opinion was based on information imparted during the initial proceedings from which respondent was excluded.

the defendants and myself, and which I had already executed. (*Appendix I, Exhibit 10.*) I stated that if the defendants' only objective was to preclude me from representing other orange juice claimants, they could accomplish their objective by executing this two-page agreement and then immediately putting me to work (no matter how briefly) on an orange juice matter. I then would have a conflict of interest that would preclude me from representing other orange juice claimants against the defendants.

28. At this point I was sent from chambers while the court met with defense counsel and co-counsel for Grove Fresh. I was ordered back into chambers about ten or fifteen minutes later. By then defense counsel had received and reviewed my proposed, two-page form of agreement. Defense counsel stated that my proposed form of agreement was not acceptable to them. At the conclusion of the session, defense counsel told the court and Grove Fresh that their clients were reconsidering whether to settle with Grove Fresh at all.

29. Afterwards I met with Mr. Troy and co-counsel. We were all concerned and distressed by the defendants' statement that they were reconsidering whether to proceed with any settlement. Mr. Troy reiterated his request that I enter into the consulting agreement so that the case could be settled. I reported to my co-counsel the court's statements about my exposure to a malpractice claim of up to $2,000,000.

30. In response to defendants' statement that they were reconsidering settlement, Mr. Radler decided on the following strategy for forcing the defendants' hand. Invoking contract law principles of offer and acceptance, Grove Fresh and I should accept without change the most recent forms of agreements submitted by the defendants. In my case, this meant accepting the form of agreement submitted to me on March 9. Grove Fresh and I should execute those offers in exactly the form submitted by the defendants. If the defendants failed to honor these acceptances, Grove Fresh would file a motion for specific enforcement of the settlement offer it had accepted.

31. In order to induce me to execute the March 9th form of the Consulting Agreement, Mr. Radler told me that I owed a professional duty to Grove Fresh to take whatever steps were necessary to ensure the closing of the settlement. Mr. Radler did not make any statements on the subject of malpractice, but under the circumstances I inferred that he did not rule out the possibility of advising Grove Fresh to follow the opinion of the trial court and to sue me for malpractice if the settlement fell through.[3]

32. Throughout the negotiations over the Consulting Agreement I had in mind the following provision of the Preamble to the Illinois Rules of Professional Conduct:

> The policies which underlie various rules may, under certain circumstances, be in some tension with one another. Wherever feasible, the rules themselves seek to resolve such conflicts with clear statements of duty. In other cases, *lawyers must weigh conflicting values and make decisions, at the peril of violating one or more of the following rules.* Lawyers are trained to make just such decisions, however, and should not shrink from the task. (emphasis added)

On March 25, I was faced with a conflict between my client's desire to conclude the litigation, and my desire to avoid signing an agreement which included provisions that were personally objectionable to me and were also, in my opinion, contrary to public policy. I also had to deal with a trial court judge and a co-counsel who disagreed with me and forcefully told me that I had a duty to subordinate my personal and professional interests to those of the client. In short, the reality I faced was that if I followed my own judgment and resisted the consulting agreement, the settlement with Grove Fresh would not close, and I would be surrounded by a disappointed client, a hostile co-counsel, and a hostile trial court judge.

33. I decided that the only practical solution was to take the steps necessary to close the settlement, but to preserve my right to litigate the disputed issues at a later date in a declaratory judgment action. If the defendants prevailed in such an action, I would

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[3] I should emphasize that the defendants' tactics put Mr. Radler in a position that was almost as difficult and uncomfortable as the one in which they placed me. I believe that at all relevant times, Mr. Radler acted in good faith to find a fair and practical solution to the conflicts created by the defendants' demands.

abide by the decision, and the settlement they had demanded would be preserved. If the court found that the defendants had no right to require the consulting agreement as a condition of settlement, I would be freed from the contract while Mr. Troy would get to keep the settlement to which he was entitled. Accordingly, I signed the consulting agreement on March 25, 1993. The Grove Fresh settlement closed on April 16, 1993.

34. Consistent with my intention of testing the validity of the consulting agreement at an appropriate time, I have never used any portion of the consulting fees paid thereunder. When the first installment of the consulting fee ($50,000) was tendered in April 1993, I delivered the funds to my attorney, Mr. David Lee, and instructed him to place the funds in a custodial, interest-bearing account, which he did, and where the funds have remained ever since.

35. In the meanwhile, there was an appeal pending in the Seventh Circuit regarding the validity of the seal. The appeal was being prosecuted by a group of journalists who had intervened in the trial court to get access to the sealed files. Because of the history of the case, I anticipated that the defendants would defend the seal in the Seventh Circuit by alleging that I had engaged in professional misconduct, and that the seal was necessary to protect them from my alleged misconduct. Because such a defense would raise additional issues regarding the confidentiality provisions in the settlement documents, I decided to defer the filing of a declaratory judgment action until after the defendants filed their brief in the Seventh Circuit.

36. The defendants filed their brief on July 14, 1993. This brief attempts to justify the seal in terms which imply that I lack the character and fitness to practice law. The arguments in the defendants' brief are constructed out of false statements and out of omissions of material facts which create false innuendoes.

37. On August 5, 1993 I sent the defendants notice that I viewed the Consulting Agreement to be void on a number of grounds, and I tendered back the first installment of $50,000 with all accrued interest. I also gave notice of my intent to report

matters to the ARDC which, in my view, I am required to report under *In re Himmel,* 125 Ill. 2d 531, 533 N.E.2d 790 (1988). (*Appendix I, Exhibit 12.*)

38. On the same date I filed a complaint with the ARDC regarding the false statements in Appellees' Brief. (*Appendix I, Exhibit 13.*) On August 10, 1993, the defendants filed a motion in this Court to make two corrections to their brief. These corrections, however, did not alter their theory of the case on appeal. As corrected, the Appellees' Brief continues to assert that I drafted a false and scandalous complaint in case no. 90 C 5009 for the purposes of intimidating the defendants into paying an unjust settlement, and that the seal was necessary to protect them from this alleged misconduct.

39. On August 19, I notified the defendants that I intended to file a defense to their charges in the Seventh Circuit. (*Appendix I, Exhibit 14.*) The next day, before I could make any filing with this Court, the defendants filed a motion in *Grove Fresh Distributors, Inc. v. John Labatt, Ltd., et al.*, No. 90 C 5009 which seeks to enforce the confidentiality provisions in the Grove Fresh settlement and in the Consulting Agreement or in the alternative, to require Grove Fresh to refund the full amount of the settlement. (*Appendix II, Exhibit 22.*) This motion is still pending.

40. On September 8, 1993, defense counsel filed a formal response to my complaint to the ARDC. (*Appendix I, Exhibit 15.*) In this response counsel told the ARDC that "any determination about the contents of the [defendants-appellees'] brief should be made by the Seventh Circuit, which has the benefit of all the briefs, record and pleadings.

41. On October 1, 1993, I again asked for the defendants' consent to my filing papers in the Seventh Circuit that would respond to the statements about me in Appellees' Brief. The defendants refused.

Further affiant sayeth not.

John P. Messina

Subscribed and sworn to
before me this 20th day
of October, 1993.

Notary Public

" OFFICIAL SEAL "
LAURELLE A. DANCOX
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 5/15/95