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

GROVE FRESH DISTRIBUTORS, INC., Plaintiff,	)	
v.	)	NO. 90 C 5009
JOHN LABATT LIMITED, et al., Defendants.	)	HONORABLE JAMES B. ZAGEL

MEMORANDUM OPINION AND ORDER

Several defendants move to dismiss this complaint in three separate motions before the Court. This opinion will address the motions of Everfresh, Inc. (Everfresh); John Labatt Limited, John Labatt, Inc., and Everfresh/Canada (Labatt); and American Citrus Products Corp. and Henry Lang (American Citrus).

Background

The parties to this suit have an extensive and rocky litigation history, covering three lawsuits and more than a few contentious court appearances. The cases involving these parties have been consolidated in this Court for pretrial purposes. In a previous ruling affecting cases 89 C 1113, Grove Fresh Distributors, Inc. v. Everfresh Inc. and Hugo Powell, and 89 C 1117, Grove Fresh Distributors, Inc. v. American Citrus Products Corp. d/b/a Ho[illegible] Juice Co. and Henry Lang, this Court dismissed the counts alleging RICO violations. The Lanham Act claims and

the pendent state law claims for unfair competition survived. See Order, Nov. 27, 1989. This suit, 90 C 5009, realleges Lanham Act and unfair competition claims against Everfresh (but not Hugo Powell) and American Citrus, and resurrects the RICO claims against them. In addition, it joins new defendants including the Labatt defendants and new claims including a conspiracy claim against all the defendants.

I.

Each of the motions to dismiss includes an argument that the Lanham Act claims should fail based on the Court's prior ruling in the related cases. In November of 1989, this Court held that a private cause of action under the Lanham Act cannot be based on a violation of the Federal Food, Drug and Cosmetic Act. See Order, Nov. 27, 1989. To proceed on its claim, the plaintiff would have to prove the existence of an industry definition of "orange juice from concentrate", apart from the official FDCA regulations. The plaintiff could not rely on the FDCA definition to establish the standard against which the defendants would be judged in a civil action. In addition, the industry definition, assuming one existed, must be consistent with the FDCA definition in order to avoid preemption problems. The Court, however, allowed the previous Lanham Act claims to survive motions to dismiss because the task of finding an industry definition of "orange juice from concentrate," independent from but not

inconsistent with the FDCA regulations, was possible, if not promising.

Once again, the Lanham Act claims survive, as they pertain to orange juice.[1] Even striking all reference to the FDA regulations, the plaintiff asserts enough to state a claim. In reviewing a 12(b)(6) motion, we "assume the truth of all well-pled allegations and . . . [dismiss] only if [the plaintiff] failed to allege any set of facts upon which relief could be granted." Gold v. Wolpert, 876 F.2d 1327, 1329 (7th Cir. 1989). The plaintiff alleges a detailed industry standard on which to base its claim. Striking all references to its adoption by the FDA leaves intact an allegation of an industry standard. Therefore, the plaintiff may proceed to the next stage of proving its claim under the Lanham Act.

II.

Labatt argues that this Court lacks personal jurisdiction over John Labatt Ltd. and JLI in its motion to dismiss. John Labatt Ltd. is a Canadian corporation with its principal place of business in Ontario. John Labatt, Inc. (JLI) is a California corporation with its principal place of business in

---

[1] Claims based on adulteration of other juices, such as grapefruit juice and apple juice, are dismissed. The Court is allowing the plaintiff great latitude in this litigation, but will not permit the inclusion of products for which a standard has not been articulated. Hugo Powell's alleged statements do not cure this defect. The plaintiff fails to state a Lanham Act claim based on juices other than orange juice.

New Jersey. This Court has jurisdiction over foreign corporations doing business in Illinois or falling under any provisions of the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, sec. 2-209 (1987). The plaintiff argues that Labatt conducted business in Illinois through the actions of its wholly-owned subsidiaries, Everfresh/Canada and Everfresh, Inc.. In addition, Grovefresh alleges that Labatt ignored the separate corporate existence of the subsidiaries, treating them as "a department of Labatt." Therefore, the plaintiff argues that the separate corporate entities should be disregarded in determining jurisdiction.

Separate existence of corporate entities will be disregarded and the corporate veil restricting liability will be pierced if the unity of interest, ownership, and control effectively makes one the mere instrumentatilty of the other, and if adherence to the fiction of separate existence would sanction a fraud or promote injustice. Van Dorn Co. v. Future Chemical and Oil Corp., 753 F.2d 565, 569-70 (7th Cir. 1985); Parr v. Penril, 1989 WL 44607, 2 (N.D. Ill. 1989). Factors contributing to corporate separateness include maintaining separate books, separate assets, separate day-to-day control, and adequate capitalization of each corporation. Id. Unless the subsidiary's separate corporate status is disregarded as a fiction by the Court, "a foreign parent company is not subject to jurisdiction merely because its subsidiary is doing business in the state." National Presto

Industries v. Glen Dimplex Ltd., et al., 1989 WL 51449, 3 (N.D. Ill. 1989).

The parties are hereby ordered to submit to the Court briefs, affidavits and any other relevant materials concerning the Court's jurisdiction over Labatt. This issue will be resolved before trial based on the evidence presented by the parties. Labatt's motion to dismiss will be continued until the resolution of the jurisdiction issue.

III.

Everfresh and American Citrus challenge the adequacy of the RICO counts against them.[2] Rule 9(b), which applies to RICO claims, requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The plaintiff must specify the time, place and contents of any false representations, identify the party making it, and describe how the misrepresentations were communicated. In situations involving multiple defendants, the role of each defendant must be specific enough to enable each to prepare an answer and a defense. Morgan v. Kobrin Securities, Inc., 649 F. Supp. 1023, 1028-29 (N.D. Ill. 1986).

---

[2] Labatt's challenge to RICO claims against it will be deferred until after the resolution of the jurisdictional issues.

The RICO claims are pleaded with sufficient particularity. The plaintiff has specified which subsections of section 1962 it is invoking to show RICO violations. The charts the plaintiff includes in its amended complaint, viewed in conjunction with its allegations, adequately specify the dates, contents, locations, and parties involved in the alleged false representations. These facts form the requisite allegations of predicate acts. The defendants have enough information to prepare answers and defenses.

The plaintiff alleges a separate enterprise made up in part by the defendants in Counts VII and X.[3] A proper enterprise allegation includes "an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consensual decision-making." Jennings v. Emry, 910 F.2d 1434, 1440 (7th Cir. 1990). The plaintiff has alleged an organization formed by the defendants and others over a number of years and joined in the purpose of adulterating orange juice in a way which lowers costs and evades detection. Viewing all facts and inferences favorably to the plaintiff, as we must for the purposes of a motion to dismiss, the plaintiff has properly alleged an enterprise in each RICO count.

The plaintiff adequately alleges an injury to its business. Defendants argue analogies to taxpayers (Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985)) and shareholders (Rylewicz v. Beaton

---

[3] The Labatt 1962(a) allegation will not be decided at this time. It is continued, along with the other substantive LaBatt issues.

Services, Inc., 888 F.2d 1[illegible] (7th Cir. 1989)); neither category of plaintiff resembles the direct injury allegedly suffered by the business competitor plaintiff in this case. In addition, the allegations of agreement and concerted action survive the low standard for dismissal, a prima facie claim for which relief can be granted with all facts and inferences viewed in favor of the plaintiff.

IV.

The Court declines to dismiss the amended complaint as duplicative litigation or as an unauthorized amendment to the original 89 C 1113 and 89 C 1117 complaints. The conspiracy allegation ties the defendants to each other in the alleged adulteration scheme. Although conspiracy is not a separate cause of action in Illinois,[4] it certainly adds to a complaint of tortious acts and statutory violations, and can change the entire structure and breadth of the claims.

The Court does not regard the 90 C 5009 case as an escape route from its earlier rulings. The plaintiff chose not to amend its previous complaints; by now, the time to do so is long gone. The previous rulings concerning those cases remain valid and no

---

[4]Plaintiff requests no relief in Count VI, the conspiracy count. The conspiracy allegations could have been incorporated into the unfair competition counts, but there is no harm at this point in leaving them separate.

further amendments to those cases[5] will be permitted. The question of whether the earlier cases will be consolidated for trial with each other or the instant case has not yet been finally resolved. The plaintiff's RICO claims survived these motions to dismiss, unlike the earlier RICO claims in the 1989 cases which failed for insufficient particularity. The allegations in the 5009 case satisfy the requirements for RICO claims, as discussed above. Defendants cannot win dismissal of substantially similar claims in a different lawsuit based on previous defects which have since been cured. However, given the defendants' arguments and the plaintiff's agreement that the information used to cure the RICO claims was obtained from public agencies without help from the defendants or a court order and therefore was available at the time the original complaints were filed, the defendants may have a Rule 11 remedy for the original "severely flawed" RICO claims.

V.

The Everfresh motion to dismiss is denied. The American Citrus motion to dismiss is denied. The Labatt motion to dismiss is continued, pending resolution of the personal jurisdiction issues which will be briefed without delay. Consequently, all

---

[5] No further amendment to the 90 C 5009 case will be permitted after the addition of JLI to RICO counts VII and VIII. The plaintiff has had more than adequate opportunities to state its claims.

counts of the complaint[6] survive, but discovery as to John Labatt Limited and John Labatt, Inc. (JLI) will be limited to jurisdictional matters until the issue is resolved.

Enter:

James B. Zagel
United States District Judge

Date: 20 Mar 91

[6] Counts I and IV are limited to orange juice, as previously noted.