

# Ocean Spray Sued By Longtime Associates

*Lawsuit alleges special deals for Costco, H.E. Butt at the expense of Sam's Club, B.J.'s, and others.*

BY BILL MARTIN

**Those who attended the retirement dinner Ocean Spray Cranberries Inc. held for James Nolan on Nov. 26, 2001, at the Dan'l Webster Inn on Cape Cod, as this writer did after being assigned to cover the event for one of the fresh fruit and vegetable trade publications, may be astonished a few years later to find that Nolan and the co-op have become foes in what has turned out to be one of the most fascinating stories ever to unfold in the produce industry.**

Turning up at various places in this story, which almost plays out like a drama one might watch on television or at the movies, are some of the biggest names in the industry, including Ocean Spray of Lakeville/Middleboro, MA (along with its largest fresh cranberry grower in Massachusetts); David Oppenheimer & Associates Partnership, Vancouver, B.C.; DNE World Fruit Sales, Fort Pierce, FL; Costco Wholesale, Issaquah, WA; C&S Wholesale Grocers Inc., Hatfield, MA; BJ's Wholesale Club, Natick, MA; Sam's Club, Bentonville, AR; H.E. Butt Grocery Co., San Antonio, TX; Wegmans Food Markets, Rochester, NY; Shaw's Supermarkets Inc, East Bridgewater, MA; Publix Super Markets, Inc., Lakeland, FL; and SuperValu Inc., Eden Prairie, MN.

In short, it's about two people who say they tried in good faith to follow a company's board-endorsed, written policy on antitrust compliance that its employees and sales agents are compelled to sign and agree to abide by under penalty of termination, imprisonment and fines for failure to do so.

Despite fresh cranberries estimated being only around a

\$25 million-a-year business for a company that posted fiscal year 2005 gross sales of about \$1.4 billion, the co-op refers to fresh cranberries as its "signature product" and "the essence of Ocean Spray's business."

This matter most likely wouldn't have evolved into a story which now has captured the industry's attention if it weren't for the treatment the Nolan claim to have received from Ocean Spray after repeatedly pointing out to its management, and later the board of directors, that their organization may not be practicing what it preaches.

A civil suit by the Nolans was filed in December 2003 in the Massachusetts Superior Court System. It has survived a motion to dismiss. Nine counts survived a motion for a summary judgment. The trial is scheduled for June 11 in Plymouth, MA.

## PAST FILLED WITH LAUGHTER

Nolan's retirement dinner helps to illustrate that no matter how strong the credibility a person seems to have with an organization after having worked for it a long time and receiving the widespread praise he did, this may not prove to be much of an asset when questioning a company's actions where legal matters are concerned. On this night, the 25-year veteran with the giant cranberry co-op was honored as he stepped down from being its domestic and international fresh fruit sales manager. At Ocean Spray's request, Nolan immediately was joining The Nolan Network (TNN), the successful produce sales and merchandising firm headed up by his wife of 31 years, Theresa, to continue doing essentially the same job for the co-op he had carried out as an Ocean Spray employee.

Pat McCarthy, Ocean Spray's former group vice president of sales and marketing, who Nolan once reported directly to for several years, told the audience, "Jim never had a boss that was as smart as he was, including me." While McCarthy, a living legend in the grocery industry after spending nearly three decades helping to build Ocean Spray into the powerhouse food and beverage company it's



become today, retired a few years ahead of Nolan, his former underling apparently continued to do a topnotch job for the co-op right up until the end since Nolan's final performance review as an Ocean Spray employee received an overall score which was among the highest in the company.

Another topic brought up that evening were Nolan's humorous presentations about the current state of Ocean Spray's fresh fruit business at its mostly otherwise buttoned-up, annual national sales meetings primarily focusing on the co-op's processed products. These talks, delivered by a former newspaper man from the Midwest with a master's degree in journalism, garnered much laughter and sometimes standing ovations from the co-op's executives in sales, marketing and senior management.

Nolan's highly acclaimed sense of humor was even the subject of a 1993 front-page story in an Ocean Spray corporate publication, a good indication his popularity inside the co-op was similar to what



**James Nolan, during happier times.**

ing of fresh cranberries for North America and, two years later, also Europe. Theresa Nolan, with three college degrees in French, Spanish and an M.B.A., founded TNN 20 years ago after spending the prior six years as the California Strawberry Advisory Board's first full-time merchandiser.

Her stellar reputation in the industry and strong contacts with major retailers and wholesalers from having represented various commodity groups and shippers caught the attention of Ocean Spray's vice president of sales. The co-op came to rely

on Nolan not only for her sales and merchandising skills, but also sought her input in putting together fresh cranberry marketing plans.

## THE DEAL WITH COSTCO

As the new fresh cranberry season was starting in September 2000, Nolan sent out a price announcement under his name to Ocean Spray's club store accounts that was approved by the co-op. The season-long price for both domestic and Canada was \$25 f.o.b. for cases of 12 two-pound bags.

However, only 10 days after Nolan's price announcement, September 25, 2000, Ocean Spray offered Costco, without Nolan's knowledge, a price of \$18 delivered on the club store pack for the months of September and October, and a delivered price of \$23 for November.

An exhibit in the Nolan complaint is a voice mail to Ocean Spray's account manager for Costco, Jay Salamon. The voice mail was from the Costco fresh cranberry buyer and was forwarded to James and others at Ocean Spray. In it, the buyer states, "...we talked about how to avoid the Robinson-Patman Act."

Nolan protested to Ocean Spray's management the lower pricing should not be given to Costco unless the same price was offered to competitors of Costco, including BJ's and Sam's Club. Nolan also protested about Ocean Spray funding in-store demonstrations for only Costco.

"Ocean Spray then initiated an elaborate cover-up which continues to this day," alleges the Nolan complaint. "Ocean Spray tried to justify the lower price given to Costco by claiming to be meeting the price offered to Costco by Northland Cranberries Inc. on its fresh cranberries club store pack. Northland did not then, and still does not have, a fresh cranberries club store pack."

## ON THE WAY OUT

On Dec. 8, 2000, Nolan unexpectedly was handed a "separation agreement" from Ocean Spray to sign, which would terminate his employment at the end of the month. In his deposition, Nolan said he suspects this was due to his opposition to the alleged special pricing given to Costco that same season in which he said he "appeared to be a minority of one."

This action was contrary to the promise Ocean Spray made Nolan the prior summer that he would retire at age 55, the earliest an employee can take early retirement, and manage the fresh cranberry business outside the co-op through TNN.

Despite Richard O'Brien's, both James Nolan and TNN's immediate superior at Ocean Spray, threat that refusal to sign would result in TNN not getting a contract to sell and merchandise Ocean Spray's fresh cranberries, Nolan refused to sign the separation agreement, and two subsequent ones, because they would have imposed restrictions upon him which Nolan considered unaccept-

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he enjoyed with the larger produce industry throughout his career.

Though none of the co-op's cranberry growers were present at this event, perhaps they more than anyone would have appreciated hearing what was said about Nolan by Grant J. Hunt, president of the Grant J. Hunt Co., Oakland, CA, and Ocean Spray's produce broker for Northern California. Hunt, a former chairman of the board for the Produce Marketing Association, the industry's largest trade group, and someone who worked closely with Nolan during most of his career at Ocean Spray, sent an e-mail for this occasion reading in part:

"He always maintained the highest levels of personal integrity. The fresh cranberry industry has weathered more than its share of storms of controversy, but throughout all the battles, one truism remained. The industry always kept its respect for Jim Nolan and the principles for which he stood. He was loyal to Ocean Spray to a fault and made every effort to protect the brand with retailers, even when he had to personally suffer the slings and arrows of the attacks on the company from the trade. Jim always put the success of the growers ahead of personal success with his career. Jim Nolan knows more about the fresh cranberry marketing business than any other individual alive today."

Cut to the present where Nolan and his wife will soon face off against Ocean Spray in a civil court trial, which looks to have all the makings of a classic David vs. Goliath battle.

His wife's participation in the lawsuit stems from Ocean Spray's senior management, without any involvement on the part of her husband, hiring her firm in 1999 to handle its sales and merchandis-

# Antitrust Guidelines

**O**cean Spray's Antitrust Policy Compliance Guide requires employees to comply with federal anti-trust laws, including the Robinson-Patman Act. Regarding this particular statute, the guidelines read in part:

"...prohibits sellers from charging different prices for the same product to customers who are in competition with each other, where the effect may lessen or restrain competition or create a monopoly."

In a March 14, 2000 letter to employees, Robert Hawthorne, president and CEO of Ocean Spray, wrote in part: "Apart from the risk of violation of these laws (which may result in imprisonment, fines and treble damage awards), compliance is good business because the antitrust laws are intended to protect our economic freedom and strengthen our system of private enterprise by promoting competition."

Furthermore, the Ocean Spray antitrust guide states, "Corporations violating the federal antitrust laws are subject to fines of up to \$10 million... Individuals are subject to jail sentences of up to three years and fines of up to \$350,000." **pb**

able. Finally it was agreed Nolan would take early retirement the following fall and then continue to handle Ocean Spray's fresh cranberry business through TNN.

## THE FALL OUT

As the 2001 fresh cranberry shipping season was about to get under way, a domino effect of events, which started with the Costco special pricing the previous season, began to unfold. On September 7, 2001, Robert Hawthorne, president and CEO of Ocean Spray, received an e-mail from Ken Ryan, procurement manager for C&S, who supplies BJ's, which currently has over 160 club stores in the Eastern United States, according to its website.

In part, Ryan wrote: "In reviewing last year's sales data, which includes competitors' retails, we have concluded not all club stores received the same price from Ocean Spray on 12/2lb cases. Based on our \$25 f.o.b. price, plus .50 cents freight, we had a \$2.125 unit cost price. This is before any warehouse costs and costs to transport them to our BJ's club stores. These costs average .75 per case, which brought our delivered cost to the stores to \$2.19 per unit."

Ryan further stated this "forces" the company to have a \$2.99 retail price to make a profit. At the same time, C&S store checks of Costco revealed Costco selling the same pack for \$2.29 during the season, which is only .10 cents above C&S's total cost.

"Stores do not survive on that type of gross profit margin. This difference in retail has hurt our stores' price image and increased our shrink due to lower sales," Ryan's e-mail said.

Ryan proceeded to request a meeting with Ocean Spray "to correct this problem."

According to the Nolan complaint, Graham West, managing director of ingredients technology group, O'Brien's boss, as well as Neil Bryson, Ocean Spray's in-house attorney, and O'Brien went to C&S headquarters.

The complaint states, "Although C&S requested Theresa, TNN's president, also attend the meeting, West did not allow her to attend... West refused to allow Theresa to attend the meeting because he knew Theresa was aware of the special pricing given Costco in 2000; had opposed it from the beginning; and had already stated she would not lie to C&S's management about it."

At the meeting Ryan demanded that Ocean Spray reimburse C&S for the price difference it paid versus Costco, plus damages.

"The Ocean Spray representatives told C&S to claim some cran-

berries it would receive from Ocean Spray were of poor quality and to take a discount from an Ocean Spray invoice," the Nolan complaint reads.

## SAM'S CLUB, BJ'S AWARDS

A January 15, 2002 report from the Nolans to Ocean Spray says, "We still believe the cooperative needs to tell Sam's Club what took place on fresh cranberries club store pricing during season 2000. It should offer to remit them the difference between the considerably higher price that they paid Ocean Spray for the 1/2lb. club pack versus what Costco was charged.

"In addition, there should be reparations for any other damages that Sam's Club may feel they suffered from being out of line on price with their main competitor all season. Over four months now have passed from the time when C&S Wholesale Grocers e-mailed Rob Hawthorne confronting him about this identical situation in connection with the fruit that they supply BJ's."

Continuing, the report says, "Since C&S quickly reached a settlement with Ocean Spray, we're surprised that something hasn't been done to also compensate Sam's Club. It's almost ironic that the cooperative was a recipient of Sam's Club prestigious 'Vendor of the Year' award for the same year when this unfortunate incident occurred.

"Legal considerations aside, the fact remains that the special pricing Ocean Spray gave to Costco in 2000, which we advised against from the start, was highly unethical in the least. It enabled them to enjoy a significant competitive advantage over the other club stores as well as those conventional supermarket chains, such as Safeway, that have come to view Costco as a rival."

Ironically, according to the *Scoop Online*, an internal Ocean Spray publication dated May 2, 2001, the co-op also was presented with BJ's Partnership Award. As was the case with the Sam's Club Vendor of the Year award, this award came after the co-op allegedly gave special pricing to BJ's and Sam's Club's main club store competitor, Costco, in the fall of 2000.

## NON-RETAILER PROMOTION

In September 2002, with a new fresh cranberry season getting underway, Ocean Spray's James Lesser, group product manager for food, produce and value-added ingredients, announces what the Nolan complaint describes as "an unprecedented, last-minute addition" to the co-op's trade program, a \$2 per case "non-retailer promotion."

While this promotion was offered to all domestic produce wholesalers, it "was created to appease C&S which, still upset over the Costco incident, had stopped supplying both Pathmark and BJ's with Ocean Spray fresh cranberries in 2001."

## CONFUSING PRICE ANNOUNCEMENT

On September 5, 2002, Lesser issued a price announcement through Thanksgiving of \$18 f.o.b. domestic orders requested for arrival by October 26. The price increased to \$19 f.o.b. on orders requested for arrival between October 27 and November 30.

On November 26, 2002, Ocean Spray's Lesser issued what some consider a confusing price announcement for December. In part, the announcement reads: "The December price for Ocean Spray 24/12 ounce and 20-pound bulk fresh cranberries for the United States is U.S. \$24 f.o.b. all shipping points for orders placed after Nov. 25, 2002."

The complaint states, "Many people had difficulty understanding this announcement. Some customers interpreted the price announcement to mean orders for December shipments [that] were placed before the price announcement came out would be invoiced at \$19 f.o.b.," which was the November price.

The complaint notes that when questioned, Lesser insisted the \$19 f.o.b. applied only to November shipments, regardless of when December orders had been placed. TNN's "persistent requests" for a new price announcement to clarify was rejected by Lesser and O'Brien. Instead, TNN was instructed to tell customers and brokers the December price was \$24 f.o.b. for all customers.

## THE DEAL WITH H.E. BUTT

Although The Nolan Network was contracted to handle sales and merchandising for Ocean Spray, the co-op decided to use Jacksonville, FL-based broker, Acosta Sales Inc., to make sales calls on H.E. Butt, the large San Antonio-based grocery chain.

Only a week after Lesser's September 5th price announcement, Acosta, without the Nolan's knowledge, provided H.E.B. with a price of \$19 f.o.b. for cases of 24/12-ounce packages and 20-pound bulk fresh cranberries for the whole season. The deal also contained a \$3 off-invoice allowance on purchased fruit "without ever advertising Ocean Spray branded fresh cranberries during that season," the complaint reads. Other retailers were required in writing to advertise to get the promotional allowance.

Additionally the Nolans claim O'Brien approved H.E.B. receiving truckload rates at \$1.53 per case even though "H.E.B. did not take delivery of Ocean Spray cranberries in full truckloads at any time during the 2002 season. This resulted in H.E.B. sometimes paying as little as half of what the freight rate for the size of its order should have been."

Soon the Nolans learned of special pricing Ocean Spray allegedly provided H.E.B. through Acosta. The complaint alleges Ocean Spray use Acosta as a broker, so Acosta offered H.E.B. price concessions to get its business. Ocean Spray has done little cranberry business with H.E.B. since Northland left the co-op in the early 1990s, and Northland has been supplying HEB with most of its cranberries.

## RETAILERS ASKED TO PAY UP

According to the complaint, "Several of Ocean Spray's customers took deductions from [December] invoices... believing they should have been charged only \$19. Even though H.E.B. was charged \$8 less than the \$24 f.o.b. per case, Lesser wrote to several customers requesting payment of the full invoiced price of \$24... in his letter to these customers, Lesser refers to and quotes from a revised December price announcement which he claims was also published on November 26th, 2002."

Among the customers Ocean Spray sought more money from was: Shaw's Supermarkets, Publix, Supervalu and C&S.

After receiving Lesser's February 21, 2003 letter, Ken Ryan of C&S called Theresa Nolan asking for a fax verification that the revised price announcement had actually been sent to C&S on Nov. 26, 2002.

The Nolan's complaint notes she knew nothing of the Lesser letters to those accounts until she received the phone call from Ryan, despite Nolan being responsible for selling fruit to those accounts. Nolan immediately asked Lesser for the fax verification for C&S.

On March 11, 2003, Lesser, who on February 28 had told Nolan the second notice was distributed to the produce trade on Nov 26, now advises her he wrote the revised price announcement, but it was never sent out.

## CRISIS MANAGEMENT

The story takes another strange twist when the Nolans claim Lesser, who denied this in his deposition, never wrote the February 21 letter to C&S, nor the other collection letters regarding unauthorized deductions from December 2002 fresh cranberry invoices, nor any of the 2002 price announcements.

According to the Nolans' complaint, "Ocean Spray used the [Little Falls, NJ-based] Marcus Group to ghost write Lesser's fresh cranberries price announcements during 2002 to conceal the favorable pricing which Ocean Spray extended to H.E.B. on this item that same year. This attempt to conceal the truth was the reason for the ambiguous wording of Ocean Spray's fresh cranberries price announcement for December 2002 shipments and why Lesser refused to respond to TNN's urging Ocean Spray send out another, more lucid notice immediately in the wake of the original one."

According to the Marcus Group website, the company "offers a wide-range of advertising, public relations and crisis communications services," the complaint states. The information in the complaint referring to the Marcus Group was learned by looking at the properties of Lesser's e-mails.

On January 15, 2003, James Nolan e-mailed TNN's final fresh cranberry report to Ocean Spray management for the 2002 season. In the report, Nolan again complained to Ocean Spray about the discriminatory pricing provided Costco in 2000 and H.E. Butt in 2002.

"We'd like to remind everyone of how giving preferential treatment to selected accounts on an item like fresh cranberries, aside from the legal issues, can ultimately cost the cooperative far more money than just that of the actual concession made to the recipient as well as create serious customer relations problems," Nolan's report reads.

The report pointed out the price Ocean Spray charged H.E. Butt on fresh cranberries in December was "astonishing considering all the trouble the cooperative got into with C&S over what it did for Costco. Not only was H.E. Butt's f.o.b. price 21% less than what all other customers in the U.S. and Canada had, the retailer also saved on average around another dollar per case in transportation costs the entire season by receiving a substantially reduced freight rate," Nolan's report reads.

Nolan further noted as far as can be determined, besides H.E. Butt being the only customer in North American still paying \$19 f.o.b. per case for the co-op's fresh cranberries in December, "H.E. Butt was the sole account that intentionally wasn't invoiced the correct amount according to the cooperative's published 2002 freight rate sheet."

Furthermore, as pointed out in Nolan's e-mail report, unlike the situation with Costco, where the "biggest risk Ocean Spray incurred by giving just that customer a steep discount from the published price for the 2 lb. bag in 2000 is to its credibility with the other club stores (Sam's Club apparently is still unaware of what happened regarding Costco in 2000 despite TNN's longstanding, strong recommendation to Ocean Spray that it come clean with them about this), the deal H. E. Butt enjoyed has the potential to jeopardize the cooperative's relationships and reputation with everyone it sells fresh cranberries to in the produce industry."

On the next day Ocean Spray vice president – cranberry, Stewart Gallagher, forwarded TNN's December report to Randy Papadellis, who had succeeded Hawthorne as president and CEO of Ocean Spray. Gallagher was responsible for the co-op's beverages, foods and ingredients business. Instead of expressing any concern Ocean Spray's Antitrust Policy Compliance Guide and/or federal antitrust laws may have been violated, Gallagher wrote, "FYI. I refuse to have my people go through another season with this guy representing us. Do I have your approval to hire a produce expert to manage this business next season so we can completely cut Nolan out of our lives? We are paying him a fortune as a consultant. We'll save a lot of money and improve a lot of people's blood pressure if we never have to read reports like this again."

Less than two hours later, Graham West, who reported to Gallagher, forwarded prior e-mails to Lesser and O'Brien, both of whom

reported to West, stating, "Rich & Jim, I discussed this with Stu this morning... getting a fresh produce manager (cranberry & grapefruit) isn't the entire answer but I'll take it and make it work if we can get rid of this guy."

Thirty-three minutes later, O'Brien forwarded prior e-mails to Graham West and Lesser with copies to Gallagher and Neil Bryson

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stating, "I believe we have Neil's support in going with a new hire."

### MORSE AIRS PRICING CONCERNS

On April 1, 2003, Mike Dubuc, vice president of finance for North Easton, MA-based Morse Brothers Inc., the largest supplier of fresh cranberries from Massachusetts to Ocean Spray, wrote Ocean Spray chairman Bob Rosbe. In part, the correspondence reads, "I have reason to believe Ocean Spray has enormous exposure stemming from fresh fruit in what is referred to as the Costco cover-up from two years ago. Further there is a storm brewing with C&S Wholesale regarding this past season where H.E. Butts (sic) was given far more favorable case pricing than the rest of the trade."

Dubuc also addressed his concern that "the trade will discover

our past questionable practices, in particular the Costco scandal where Sam's Club was a victim, and that our single largest customer, Wal-Mart at 11 percent plus of our sales, will stop buying Ocean Spray."

Dubuc also asked an investigation of this issue be "fast tracked" before the trade learned of Lesser's appointment as head of both marketing and sales for fresh fruit, due to Lesser's "unethical behavior in the past."

### NOLAN REPORT FOR THE BOARD

Dubuc later asked James Nolan to prepare a report for the Ocean Spray Board of Directors and arranged a meeting between the Nolans and board member Richard Poznysz, head of the board's audit committee. During a two-hour meeting at the Nolans' home, 10 days after Dubuc e-mailed Rosbe, James Nolan provided Poznysz with the requested report detailing, among other things, Ocean Spray's practices with Costco and H.E.B.

On May 6, 2003 at the request of Chip Morse III, president of Morse Brothers, Theresa Nolan arranged a meeting for Morse and Poznysz at C&S headquarters with top produce management.

### MEETING AT C&S OFFICES

According to the Nolan complaint, "At this meeting (at C&S headquarters) and despite his knowledge to the contrary, Poznysz asked the C&S executives whether they thought TNN was responsible for C&S paying a higher price for the club store pack in 2000 than Ocean Spray charged Costco.

C&S confronted Poznysz with Lesser's Feb. 21, 2003 letter, which they then knew falsely stated a revised price announcement and, using this false information as its basis, asking for payment at the \$24 f.o.b. case price for their December fresh cranberries.

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"Poznysz, fully aware of the special deal H.E.B. had received from Ocean Spray in 2002, did not mention this special deal during his meeting with C&S," the complaint alleges.

"Instead, Poznysz, who also was informed by C&S of the questionable way Ocean Spray wanted to reimburse it over the Costco incident, told C&S if it were him, he would ignore the letter and pay only \$19 f.o.b., which C&S believed was the correct price based on when its December order had been placed."

At the meeting, Poznysz indicated he would report to C&S the outcome of the investigation relating to Costco and the November 26, 2002 price announcement. The results of the investigation were never reported to C&S, the complaint states.

According to the Nolan complaint, "During May and June of 2003, Ocean Spray did conduct an internal investigation of its pricing practices, which included interviewing Ocean Spray employees; examining the contents of computers used by employees; removing hard drives from computers; and reviewing and removing Ocean Spray records."

Instead of Nolan's report being used to investigate Ocean Spray management, in an ironic twist, the Nolans began to suspect the Ocean Spray board was using the requested report against the whistle blowers themselves.

In early June 2003, the Nolans were also told by another large unnamed Ocean Spray grower that there was an investigation into Ocean Spray's pricing practices. However, "the grower told the couple they were now a target of this probe." At this time, the Nolans decide to retain an attorney.

On July 14, 2003 TNN, through its attorney, reiterated its concerns about the damage to its and the Nolans' reputations, requested the results of the Ocean Spray investigation and asked what corrective steps would be taken.

Ocean Spray refused to divulge the outcome of the investigation.

## **OPPENHEIMER REPLACES TNN**

On Aug 7, 2003, Ocean Spray issued a press release naming Vancouver, BC, Canada-based The Oppenheimer Group to manage the sales and marketing of fresh cranberries for the 2003 season.

In the press release, Lesser stated in part: "As a grower-owned cooperative, we're obligated to take the steps necessary to sell more fruit more profitably."

However, in an e-mail Lesser sent to the Nolans on September 4, 2002, regarding Ocean Spray's pricing through Thanksgiving, he states, "I'm aware that you think we are leaving money on the table with the \$19 November price...."

TNN's legal documents state, "In 2002, Ocean Spray's fresh cranberry case sales rose 13 percent over the prior year. Revenues also increased in 2002 and would have been even stronger had Ocean Spray followed the Nolan's recommendation to sell its fresh cranberries at a higher price than it actually did in November 2002."

Furthermore, court documents contend that the financial arrangement TNN had with Ocean Spray, "was less lucrative than the contract Ocean Spray awarded to Oppenheimer in 2003 to perform fewer services than TNN did."

Continuing, the complaint states, "the decision to replace TNN and the Nolans came as a result of the Nolans' complaints about Ocean Spray's pricing practices which violated the antitrust compliance guide."

Oppenheimer was a year-round client of Theresa Nolan's for 17 years on apples, pears and kiwifruit. When she learned of Oppenheimer getting the Ocean Spray account, Nolan urged Oppenheimer to "check with Ocean Spray to find out what unresolved ethical issues TNN had with the cooperative."

Upon doing this, the complaint claims Theresa Nolan was

informed by Oppenheimer it was told nothing by Ocean Spray "that would keep it from wanting to have the fresh cranberries account."

## **TNN LOSES OPPENHEIMER ACCOUNT**

On November 24, 2003, Oppenheimer informed Theresa Nolan in person, with a letter dated November 18, 2003. The letter was from Chairman, President and CEO, John Anderson, informing her that Oppenheimer will not be renewing her contract for 2004.

During this November 24 meeting, Jim Hohman, sales manager of Oppenheimer's Newark, DE, office and Nolan's immediate superior, stated her performance was not the issue and gave several examples of exceptional work she had done for Oppenheimer, as well as praised her strong relationship with the trade.

According to the complaint, "A conflict of interest between Ocean Spray and Theresa was cited by Oppenheimer as the reason for the decision to end its business association with her. Cal Tribiano, an Oppenheimer salesman who also was present at the meeting, told Theresa it would be difficult to recuse herself from a call with a customer when fresh cranberries were being discussed."

Later that day Anderson published a company-wide e-mail announcing her departure. In part it reads, "Theresa has spent more than two decades with Oppenheimer successfully marketing New Zealand kiwifruit, pip fruit and later the entire Oppenheimer basket. During the years Theresa has been with Oppenheimer she has achieved excellent results through her unique blend of innovation and market savvy combined with her skill at meshing retailer needs with grower offerings."

Following her termination, Steve Woodyear-Smith, Oppenheimer group category director, kiwifruit, wrote in a letter to her, "your professionalism and expertise have been second to none."

Theresa Nolan also received a letter from David Nelley, category director, pipfruit, of the Oppenheimer group. Nelley praised her for a "signature blend of wisdom and creativity," and being "an invaluable asset to our program... Indeed, what is now the Braeburn 'heartland' of the North East is largely due to your efforts... Theresa, we count you among the industry's finest."

## **TNN LOSES DNE ACCOUNT**

In 2004, Ft. Pierce, FL-based DNE World Fruit Sales, the largest independently owned citrus marketer in the world, declined to renew its contract with TNN, which had served the past eight years as its merchandising agency for the United States.

Since 1997 DNE had a licensing agreement with Ocean Spray to ship fresh citrus under the Ocean Spray label. TNN's immediate supervisor at the time DNE severed their ties with TNN was Mark Hanks, then an Ocean Spray employee, working out of DNE's Fort Pierce office and reporting to both Greg Nelson at DNE and Jim Lesser at Ocean Spray.

## **THE L&S FACTOR**

In an effort to save the remnants of their business, and hopefully start rebuilding it, TNN entered into an arrangement with L&S Cranberry to market the company's fresh cranberries to supermarkets and produce wholesalers, starting with the 2005 season. L&S is owned in part by the same principals as Morse Brothers Inc.

L&S's cranberry bogs are in Quebec, Canada. L&S also had once been a member of the Ocean Spray cooperative and has been unsuccessfully seeking readmission for several years.

Was L&S using the Nolans to get back in the co-op?

In a letter dated October 27, 2005, Morse Brothers advised Robert Beams, Ocean Spray's director of agricultural supply, since "Ocean Spray has explicitly indicated that it will not be seeking any additional acreage at this time and for the foreseeable future," it was

## Decas, Northland And Ocean Spray In Earlier Lawsuits

The TNN complaint is not the first involving antitrust issues against Ocean Spray. In what is now Decas Cranberry Sales of Wareham, MA, the company brought antitrust litigation against Ocean Spray in the late 1980s.

According to *JS Online*, published by the *Milwaukee Journal Sentinel*, Nov. 29, 2002, Decas president John C. Decas said, "They [Ocean Spray] set the price on each and every cranberry item that is sold. When they make a bad decision, like they are this year with fresh fruit, we suffer because of it."

On November 13, 2002, *NutraUSA Ingredients.com* published a story regarding a multi-count federal antitrust lawsuit against Ocean Spray filed in 2002 by Northland Cranberries and Clermont, a cranberry processor.

John Swendrowski, Northland's chairman and CEO, issued a statement appearing in the article: "Ocean Spray's stranglehold over the production and sale of cranberries and cranberry concentrate in North America has enabled it to stifle Northland and other competitors' efforts," he said. "We are unwilling to sit back and watch Ocean Spray carry out its plan to cripple competition in cranberry products through unfair methods."

Continuing, Swendrowski stated, "Virtually everyone in the cranberry business has been negatively affected by Ocean Spray's market manipulation. The victims range from customers and consumers of cranberry products to the growers that have no alternative but to participate in the Ocean Spray cartel or face elimination."

Northland dropped its lawsuit in September 2004 after agreeing to sell its cranberry processing operations to Ocean Spray. That was also the last year Northland shipped consumers fresh cranberries.

The Decas lawsuit against Ocean Spray was settled out-of-court. **pb**

Morse Brothers' intention to have L&S enter the private label fresh cranberry market.

L&S also informed Ocean Spray, "As part of our efforts, we have contracted The Nolan Network to represent us in the marketplace and fully expect to construct a packing facility on site in the not so distant future."

To sell the fruit, Theresa Nolan convinced a large fresh cranberry customer of Ocean Spray, Ahold USA Inc., Braintree, MA, and its four operating divisions to buy fresh cranberries from L&S packed under each supermarket chain's respective individual store brand. Those divisions are: Stop & Shop, Tops Markets, Giant Food Stores and Giant Food Inc.

TNN also signed up D'Arrigo Brothers of Mass, a Boston wholesaler, to purchase fresh cranberries under the L&S label.

"Despite the packinghouse's repeated failure to both pack the variety of berries L&S promised to deliver to Ahold and to size the fruit properly, TNN managed to sell all of the fresh cranberries L&S made available to it at a price which was acceptable to L&S," the complaint reads.

Continuing, the complaint reads, "L&S agreed that the plaintiffs would also market all of L&S's fresh cranberries in the 2006 fresh cranberry season. L&S's fresh cranberry crop was projected to be large enough to pack at least 100,000 cases in 2006 and much greater amounts in subsequent years."

In preparation for the 2006 season, TNN had a booth dedicated and paid for by L&S at the 2005 Produce Marketing Association Convention and Exposition in Atlanta in early November.

Theresa Nolan and TNN contractor, Rick Stepp, spent three days

telling retailers, wholesalers and others who stopped by the booth that TNN had been hired to be L&S's sales and merchandising agent.

The TNN staff also told the trade of L&S's plans to build a new packinghouse in time for the 2006 season and to offer retailers their own private label, or the L&S house brand fresh cranberries, in a choice of clamshells or poly bags.

On display in the L&S booth were individual private label clamshells for all of Ahold USA's supermarket chains, along with containers under the L&S house brand, which D'Arrigo was selling to some of its accounts.

After the PMA convention TNN contacted 58 major retailers and wholesalers in the U.S. and one Canadian supermarket chain. All but five of the companies surveyed expressed interest in doing business with L&S on fresh cranberries.

The day after Thanksgiving in November 2005, Wegmans contacted TNN to begin laying the groundwork to buy private label fresh cranberries for the 2006 season.

In January 2006, L&S told TNN it had deferred plans to build their own packing facility, but instructed TNN to continue working with Wegmans on the private labeling program while a packinghouse in the United States was found. TNN assisted L&S in this search for a packing facility.

"Despite its repeated refusals over several years to allow L&S back into the cooperative, in March 2006, while L&S was in the process of negotiating packing arrangements with potential co-packers for the 2006 season, Ocean Spray reversed its course and approached L&S with an invitation to rejoin the cooperative," the court documents state.

Because Wegmans demanded to know why L&S would not be supplying them with fresh cranberries, L&S advised the Nolans in an April 26, 2006 e-mail that L&S had called Julie Salone, product development coordinator for the company Wegmans uses for sales and marketing of their private label products.

L&S told Salone that Ocean Spray was re-admitting L&S into the co-op "since it is our intention to go private label and due to the success of our 2005 season, Ocean Spray recognized the threat and TNN's ability to shift the market and the Ocean Spray board made a very unprecedented move to take in outside acreage immediately. L&S advised the plaintiffs that L&S...emphasized [to Salone] that it was the strength of TNN that spooked Ocean Spray into offering us [L&S] this opportunity."

In court documents, the Nolans contend L&S was admitted into the cooperative to further increase Ocean Spray's "monopoly power in the fresh cranberry market, which already is estimated to be around 80 percent."

Not only have the retailers and wholesalers been deprived of an alternative source of fresh cranberries, but the Nolans were forced out of the market by "Ocean Spray's deliberate, ongoing and unrelenting actions," the complaint concludes.

### THE DEAFENING SILENCE

The allegations in the Nolan versus Ocean Spray lawsuit have so many twists and turns, it could be a movie. The now defunct *Cranberry Stressline*, a news and opinion internet website about the cranberry industry, posted the entire lawsuit, including many exhibits. It went so far as to not only urge its audience to read the Nolan complaint, but explained the antitrust implications of the Robinson-Patman Act.

PRODUCE BUSINESS has tried to reach numerous individuals connected to Ocean Spray, including management, board members, grower-stockholders and the defendant's law firm. However, each party either declined to return phone calls, or refused to comment. **pb**