

Are Any Lessons Learned From Ocean Spray Trial?

Although The Nolan Network's court victory doesn't resolve Robinson-Patman Anti-Trust issues, nor Jim Nolan's death, both loom large during the trial.

BY BILL MARTIN

It is a beautiful late Autumn afternoon in New England as Jim Nolan loads his custom-made set of golf clubs into the trunk of his car. He is excited about the prospect of getting in a round of golf before the sun sets. Nolan drives a few miles over to the Pine Hills Golf Club, during which time he remarks it may be his last time to play golf for a long time, considering his plans to sue Middleboro, MA-based Ocean Spray Cranberries Inc., his employer of 25 years. He is convinced the company violated the Robinson-Patman Act for allegedly providing favored pricing to one competitor over another after the huge cooperative publicly announced a price for the season for fresh fruit. Just as troubling to Nolan is what he perceives as moves by Ocean Spray management that are damaging the reputation of his wife, Theresa Nolan, and her sales and marketing company, The Nolan Network (TNN).

Nearly six years later — May 29th, 2009 — after the legal fight with the cooperative drags on after Nolan's death, Ocean Spray is found liable for unfair and deceptive business practices. Theresa Nolan has since been awarded over \$2.8 million in damages, legal fees and interest in the case. It took a minimum 11 of the 13 jurors to find Ocean Spray legally responsible for unfair and deceptive business practices.

In a prepared statement, John Isaf, Ocean Spray spokesperson, said, "We are happy the individuals [Richard O'Brien and James Lesser] in the claim were vindicated and the jury found they did nothing wrong. We are disappointed and perplexed on how the jury could still reach a verdict against Ocean Spray. We intend to appeal this decision. We are very confident we will prevail upon appeal."

Ocean Spray wastes little time in filing an appeal. Although O'Brien and Lesser are found not liable in the civil case, Theresa Nolan is appealing this verdict as well. The appeals process may take two years.

Jim Nolan and TNN reported to O'Brien, as well as Lesser, who eventually took over O'Brien's responsibilities relating to fresh fruit. Could O'Brien and Lesser be charged with Robinson-Patman Act anti-trust violations? In a recent phone conversation, a spokesperson at the U.S. Department of Justice said the alleged actions by Ocean Spray, Lesser and O'Brien are something in which the Federal Trade Commission will be "very interested." The FTC has not responded to inquiries by PRODUCE BUSINESS as of the publication's



Theresa and Jim Nolan

editorial deadline.

Although alleged anti-trust violations are never directly addressed in the case, the trial is showered with evidence contending Ocean Spray provided favorable pricing to Costco at the expense of Sam's Club, BJ's and others. It also alleges H.E. Butt (HEB) Grocery Co., of San Antonio, TX, received favorable pricing on fresh cranberries, as well as transportation costs, at the expense of competitors. [Editor's note: For more information about the anti-trust allegations and evidence presented at the trial, please see coverage in the May, 2007, issue of PRODUCE BUSINESS, as well as sister publication, JIM PREVOR'S PERISHABLE PUNDIT at www.perishablepundit.com/index.php?hot=oceanspray].

Looking back, this September afternoon in 2003 is in fact Nolan's last golf game, although he lives another four-and-a-half years. However, four-and-a-half years is not long enough for redemption in the civil case filed in December, 2003, and thus, consumes the rest of his life. Jim Nolan's ailing heart gives out on the evening of March 2, 2008.

Employed as Ocean's Spray's domestic and international fresh fruit sales manager, Nolan is widely praised for his effectiveness in representing Ocean Spray's interests and forthrightness in dealing

with the trade. On that golf outing Nolan is not really focusing on his game, as he has not seen this writer in a quite a while and there is a great deal to discuss. It is ironic Nolan even belongs to such an exclusive country club (thanks to the insistence of Theresa), because his frugality is legendary in the produce industry, such as his early days at the *The Packer* when he chose to take New York public buses and subways from Manhattan to the Hunts Point Terminal Market, where he was known as a pioneer in developing and writing profiles of the market, as well as other produce terminals.

Yet one of the most public displays of being penny-pinching occurs later that day where Jim and Theresa reside, Plymouth, MA. Jim Nolan is not waiting for this writer at the house. Instead, he is grocery shopping at the local Shaw's Supermarket Inc. Ready to reap the rewards of diligently clipping coupons from the Sunday paper for months, on this occasion the self-described perfectionist even outdoes himself.

When Nolan finishes his marathon shopping excursion, it is quite an amazing scene at the checkout counter. He pulls out of his pockets large stacks of coupons, handing them to the stunned cashier. As the enormity of Nolan's feat begins to sink in, and the cashier methodically deducts the coupons from the total tab, you can hear the whispers growing in volume from the other shoppers. When the grocery bill is totaled, and the value of the coupons is deducted from the cost of the groceries, Nolan owes the supermarket a dollar and some change!

Fast forwarding to the present, for people who know Jim Nolan's frugal reputation, spending a few hundred thousand dollars on a lawsuit to fight Ocean Spray might seem out of character. But there are things he cherishes more than money, and that is his character, the reputation of his wife of nearly 32 years and that of The Nolan Network.

Even though Theresa Nolan, her company and late husband ultimately prevail in the lawsuit, it comes at a high price. Grant J. Hunt Co. of Oakland, CA, had been Ocean Spray's broker representative in Northern California for many years. The company president and a past chairman of the Produce Marketing Association, Hunt observes, "I am so proud of the jury that delivered justice to the memory of Jim Nolan, because everything he did concerning this entire lawsuit was for the good of Ocean Spray's growers. It was never about himself. It was never about money. I loved that guy. He was a tower of integrity. He always spoke the truth to power. He stood up to them."

Attorney Christopher Murray represent-

ed the Nolans in the lawsuit. He acknowledges that Theresa feels strongly the whole litigation process basically killed her husband. Murray knows it is difficult. "I knew Jim, and from the meetings with him on numerous occasions, his physical and, to a certain extent, his mental health, had been deteriorating because of the wear and tear of the pending trial — and more importantly because of what had occurred," he remarks.

A majority of counts from the plaintiff's complaint were dismissed, but Murray says what they were left with is significant — to deal with the backbone of the case between The Nolan Network and Ocean Spray: the unfair and deceptive business practices.

TNN lost a majority of its business after filing the lawsuit, including accounts with some of the industry's leading firms.

DEFENSE CLOSING ARGUMENTS

The closing arguments of the trial are held on May 29th, a cloudy, chilly day with a drizzling rain that is a prelude of things to come for Ocean Spray, backed by the huge Boston, MA, law firm of Todd & Weld, pitted against The Nolan Network and its one-person law office attorney Christopher Murray, who has brought in one outside attorney, Joe Phelan, for assistance.

Theresa testified that a separation agreement was thrust upon her husband in December of 2000, after he had tried unsuccessfully earlier in the year to keep Ocean Spray from offering Costco a deal without extending it to Costco's competitors. The Nolans allege this special pricing is a viola-

tion of Ocean Spray's own anti-trust policy compliance guide, which Jim had been required to read, sign and abide by in both "the letter and spirit of the law." (Possible penalties for not following this are termination, fines and jail time.)

That separation agreement will effectively result in the firing of Jim, silencing him and keeping either him or his heirs from filing a lawsuit against Ocean Spray. Jim refuses to sign it after a long exile at home where he is told to "think about it." Ocean Spray finally allows him to come back to work until the fall of 2001, when he retires at age 55 and takes over the sales management of Ocean Spray's fresh cranberry business through TNN.

In his closing arguments, attorney Kevin Peters stands before the jury defending his clients — Ocean Spray, O'Brien and Lesser. He asks the jury how Ocean Spray can have a relationship with The Nolan Network when Jim and Theresa Nolan refuse to meet with the company. He maintains Jim Nolan was later offered a contract from O'Brien in 2002, but refused to sign it. Peters maintains O'Brien convinced the Ocean Spray legal department to agree to another one-year contract, as had been done in the past.

Theresa Nolan says prior to the Costco ordeal, the TNN contract is simply "a mere list of what we would do and how much we would charge." She continues, "After the 2000 season, Ocean Spray tried to get us to sign a new document — a broker agreement — that would have silenced us with a confidentiality clause. In addition, that contract would have a 30-day termination policy that



The courthouse in Plymouth, MA, where the trial was held.

would have made it legal for Ocean Spray to send us packing with only a month's notice."

Theresa maintains TNN refused to sign the more restrictive broker agreement in 2001, and again in 2002, because it would keep "us from being able to defend ourselves." She adds, "In January of 2003, after our written report included a complaint about what was done for HEB and a reminder of what the Costco incident had cost Ocean Spray, we were told that TNN had to sign that agreement or not be hired."

Theresa then refers to a "smoking gun" email spawned by a TNN December, 2002, report, which proves Ocean Spray had no intention of hiring TNN back anyway. Peters attempts to make the point in the trial that the defendants tried to re-sign TNN, but the Nolans would not agree to the contract being offered.

Peters maintains Ocean Spray wanted to continue the relationship with the Nolans in 2003, including a confidentiality agreement in the contract, which he says is a common practice. O'Brien wanted a contract, but instead he was slapped with a lawsuit, Peters says.

In courtroom testimony, Ken Ryan, procurement manager for C&S in 2000, when

the Costco incident occurred, indicates how even minor price differences can damage a company's low price image and states Costco, due to the special price they received, retailed the two-pound bags of fresh cranberries at \$2.29, (only ten cents higher than BJ's delivered cost) while BJ's was forced to sell their berries at \$2.99 a bag.

One has to ask what the produce industry can learn from this episode.

Although year after year the Nolans were critical of Ocean Spray tactics, Peters acknowledged they continued to be hired because they did their job so well. He maintains Ocean Spray finally had to plan for the upcoming season and hired Vancouver, BC-based David Oppenheimer & Associates to replace TNN.

Theresa Nolan says running parallel to

the contract issue was the investigation launched by an April 1, 2003, email from Mike Dubuc, vice president of finance for Morse Bros. Inc., to the chairman of Ocean Spray's Board of Directors, asking them to look into what occurred with Costco and then HEB.

"After preparing a report on the incident at the request of Bob Rosbe, Ocean Spray's chairman, we were told by Chip Morse, an Ocean Spray grower-owner and former board member, that Lesser and O'Brien would be 'fired with cause' because of their part in the incidents," says Theresa Nolan.

Both O'Brien and Lesser insisted the Nolans sign the restrictive broker agreement even though TNN was not a broker. "Because we had been told by a grower-owner at Ocean Spray that Lesser and O'Brien would be terminated, we also believed TNN would be negotiating with someone else and we wouldn't have to sign that document. What we didn't know at the time was that there was a plan not to hire us back, which was indicated by an email that went up the chain of command with a copy of our December, 2002, report attached," Theresa Nolan says. "In the email, Stu Gallagher, senior vice president of international business, Ocean Spray's

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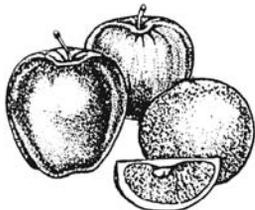
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legal counsel, Neil Bryson, O'Brien, Lesser and others discuss their intention to 'get rid of this guy,' referring to Nolan."

She further adds that during the trial, Peters maintains Ocean Spray was merely trying to standardize their contracts, and it had no malicious purpose in asking them to sign the restrictive broker agreement. Peters claims all food brokers doing business with Ocean Spray are required to sign the exact same document.

Theresa Nolan knows Grant Hunt had not been required to sign that contract. So to prove that all food brokers are not being asked to use the same document, her attorney, Christopher Murray, asks Lesser under oath if Grant Hunt had been required to sign the broker contract and Lesser says no. On redirect from Peters, Lesser says the reason Hunt had not been required to sign it is because he was a sub-contractor to TNN.

Nolan maintains that it is not true. Nolan states Grant Hunt had been a broker for Ocean Spray for many years, and while TNN often consulted with him, he was never a sub-contractor to TNN. Hunt contracted with Ocean Spray directly.

PLAINTIFF CLOSING ARGUMENTS

As in his opening arguments, Nolan's attorney Murray addresses the jury without notes and it certainly appears his words are coming from the heart. He tells the jury, "You don't get credibility somewhere; you get it by living. This case is largely about credibility and motivation."

Referring to Ocean Spray in general — and specifically O'Brien and Lesser — Murray says the motivation of the executives is anger, spite, fear, retaliation and revenge. Between 1999 and 2003, The Nolan Network made money for Ocean Spray and in one year alone the Nolans earned \$1.8 million. "Why would the Nolans want to upset the apple cart and jeopardize the business?" Murray asks. "They were reaching out desperately to try and fix problems. Instead, they were thwarted and blamed."

Using an Ocean Spray attorney's description from earlier in the trial, Murray says, "Jim and Theresa were the king and queen of the produce industry. They were respected in the business. Jim Nolan was so respected at Ocean Spray to avoid a conflict of interest, he is allowed to join The Nolan Network after retirement."

Murray points out over the years there were no strings attached to the TNN/Ocean Spray contract and certainly no confidentiality agreement. "Then, the Costco incident rears its ugly head." When it was revealed Costco got a better deal on fresh cranberries

OCEAN SPRAY IN LEGAL BATTLES WITH DECAS CRANBERRY AND POM WONDERFUL

Besides its legal wranglings with The Nolan Network, Ocean Spray Cranberries is involved in at least two other legal battles with companies in the produce industry, Decas Cranberry Sales Inc. of Carver, MA, plus a separate lawsuit with POM Wonderful LLC of Los Angeles, CA.

Ocean Spray filed a complaint in the U.S. District Court of Massachusetts against Decas in October, 2008, accusing Decas of violating the cooperative's patent for manufacturing sweetened dried cranberry products.

In a statement issued by Ocean Spray spokesperson, John Isaf, he maintains the cop has been issued a patent by the United States government. "We're obligated to protect and enforce... against those we believe may be violating the right, just as any other company with a patent routinely does." Decas repeatedly refuses to provide information or answer questions about its manufacturing process to allay suspicions of patent infringement, adds Isaf. "We will not be swayed from enforcing our patent rights and will vigorously defend these counter-claims."

Isaf's reference to a counter-claim makes reference to the one filed by Decas against Ocean Spray in June, 2009. In a press release dated June 24, by Decas Cranberry, the 75-year-old, family-owned company not only denies any infringement, but alleges Ocean Spray is using "unfair and deceptive business practices, improper interference in Decas'

business relationships, abuse of process and anticompetitive conduct in violation of the Sherman Act."

Continuing, the press release states Decas first began manufacturing its sweetened, dried cranberry product in 1999 and obtained a patent on it in 2002. Decas has had tremendous success with its product, which is marketed in direct competition with Ocean Spray's [own sweetened dried cranberries] product," the press release reads.

Jeff Carlson, Decas' CEO, claims "The time of Ocean Spray's patent infringement lawsuit is highly suspect, as it was made at a time when Decas was seeking outside investment to fuel future innovation and growth, and numerous cranberry growers were exploring the possibility of signing on with Decas."

In a lawsuit involving POM Wonderful versus Ocean Spray, POM accuses Ocean Spray of false and misleading advertising in marketing a juice product, claiming it has cranberry and pomegranate juice, when in fact it has apple and grape juice with little or no pomegranate juice. POM states apple and grape juice are not only less nutritious, but cheaper to produce than cranberry and pomegranate juice, resulting in Ocean Spray being able to sell its juice for less. The lawsuit is filed in U.S. District Court, Central District in California.

Ocean Spray has not responded to a request for comment on POM Wonderful's lawsuit at this issue's editorial deadline. **pb**

than BJ's, Nolan didn't make up things about anti-trust laws; the laws are in the Robinson-Patman Act, Murray says.

Concern over anti-trust is so important to Ocean Spray that its legal standards are "mirrored" in its own anti-trust guidelines. Murray says Ocean Spray tells its people that not only does the Act deal with fair pricing, but the company can be held liable for a lot of damages as well, plus individuals can face jail time if they break the law or Ocean Spray's policy.

Despite complaints by the Nolans to Ocean Spray about unfair pricing practices, O'Brien did nothing, Murray says. A couple of months later, Nolan was presented with a separation agreement stating he's going to be terminated and it has a confidentiality agreement. You are going to sign this document and shut up or you won't receive your

benefits, Murray argues.

O'Brien said earlier in the trial he did not know anything about a separation agreement and all he knows is Nolan stopped showing up for work. Nolan went home for a month refusing to sign the document. "Your boss sees you're not coming to work and he doesn't know what's going on?" Murray asks.

THE O'BRIEN, LESSER FACTOR

At the center of the allegations in TNN's original complaint are the business practices of O'Brien, in addition to Lesser. Lurking in the background throughout the trial and what plays heavily in the plaintiff's lawsuit are concerns Ocean Spray is in violation of anti-trust laws under the Robinson-Patman Act. In Murray's opening state-

ments at the trial on May 14th, he tells the jury they will see examples of violations of the Robinson-Patman Act, as well as Ocean Spray's violation of its own internal company policy regarding anti-trust, which reflects federal law.

Ken Ryan, in 2001, was procurement manager for C&S Wholesale Produce, of Hatfield, MA. He testifies at the trial that he was very upset with Ocean Spray when store checks revealed the co-op had given significant discounts to Costco, compared to the price on cranberries his customer, BJ's, received. After Ryan requested a meeting with Ocean Spray to correct the problem, Graham West, managing director of ingredients technology group — O'Brien's boss — and Neil Bryson, in-house attorney for Ocean Spray, were dispatched to C&S headquarters. At this time, Ryan was told to either kick over or reject cranberries received from Ocean Spray and take a discount from the invoice.

In a phone interview with this writer taken after the trial, Ryan — who now handles East Coast sales for Sun Pacific Marketing Cooperative Inc., headquartered in Los Angeles, CA, and is based in Hatfield, MA — said he did not think this was the right thing to do, because when there was a deduction

from a load of fruit, "It basically comes out of the grower pool. I know it's a co-op, and the growers all get paid based on what's being made, but to claim a quality issue did not set with me very well," he says.

Ryan adds he knows Ocean Spray is a grocery company for the most part and they are used to working on price lists. However, he emphasizes he is in the produce industry and if you want to quote one customer \$8 on peppers and quote \$9 to another customer, there is nothing wrong with that. Ryan says he has no problem with a published price list if you are paying the same price for the product as everyone else when the product arrives. You can put whatever retail price on it you want.

"But when it is a published price and you have the understanding that this price is what every customer is paying, then you proceed from there and decide how you want to market it. But when that is undermined, and you find out it is not the same price for everyone, it creates a credibility issue with Ocean Spray," Ryan continues. "We were upset about that. If it wasn't a published price list and Costco got a better price, then so be it, and maybe I didn't do my job in negotiating. However, when you have the understanding everyone's going to

pay that price, that's a problem."

Ryan is not sure what the trade can learn from this experience, but adds, "I've been in this business 30 years and I truly believe if you don't have your integrity, you're not going to last in this business." He points out produce is one of the few businesses left where millions of dollars a day are exchanged on a phone call or a handshake. "When you can't have that amount of trust with the person you're dealing with, it's hard to stay in the business."

TURNING POINT

Murray feels the turning point in the trial is the exceptional testimony of Theresa Nolan in explaining the produce industry and then describing all of the players so a jury of lay people could understand it. "Once she had done that and I saw the jury was playing pretty close attention, I thought we had a good chance of prevailing," he says. "There's testimony right off the bat that was really important and really well received."

In closing, Murray observes, "I'm ecstatic everything worked out for Theresa and I hope this gives her some type of closure and that she's able to get on with life, because I know this has been an incredible ordeal." **pb**

transportation to do list

- Figure out why my logistics program isn't working*
- Contemplate hiring transportation employees*
- Check web for truck companies*
- Check DOT to verify trucking companies*
- Hire administrative help to make the calls to DOT*
- Call insurance companies to verify it on every carrier hauling our freight*
- Hire more help to check the insurance verification*
- Check SaferSys for driver records*
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