UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF MASSACHUSETTS

CASE NO. 00-40137 NMG

RIVERDALE MILLS CORPORATION and JAMES M. KNOTT, SR., Plaintiffs	)
v.	)
UNITED STATES OF AMERICA, STEPHEN CREAVIN, JUSTIN PIMPARE, DANIEL GRANZ and THREE UNKNOWN NAMED AGENTS of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants	)

PLAINTIFFS' CLOSING ARGUMENT

There are four elements of the plaintiffs' claim for malicious prosecution against the United States. They are:

(1) An investigative or law enforcement officer of the United States initiated or continued criminal proceedings against the plaintiffs;

(2) The criminal proceedings terminated in favor of the plaintiffs;

(3) There was no probable cause to initiate or continue the criminal proceedings; and

(4) The United States (acting through its investigative or law enforcement officer) acted with malice.

The plaintiffs address each element in turn.

1. Stephen Creavin, an Investigative or Law Enforcement Officer of the United States, Acting Within the Scope of His Employment, Initiated and Continued the Criminal Proceedings.

It is undisputed that Stephen Creavin was a special agent of the Environmental Protection Agency ("EPA") with power to make arrests and to execute search warrants. As such he was, at all material times, an investigative or law enforcement officer of the United States as defined in 28 U.S.C. §2680(h). Stipulation of Undisputed Facts, ¶5.

On October 22, 1997, one day after the civil inspection conducted by EP A Agents Pimpare and Granz, Creavin initiated criminal proceedings against the plaintiffs by referring the matter to Assistant United States Attorney Kotlier with a request that the U.S. Department of Justice commence criminal proceedings against the plaintiffs, Riverdale Mills Corporation ("RMC") and James M. Knott, Sr. ("Knott"). (Creavin Testimony.)

The United States' position that criminal proceedings do not commence until a grand jury hands down an indictment is untenable. If accepted, U.S. C. §2860(h) would be meaningless. Under that interpretation there could never be a valid claim for malicious prosecution against the United

States because grand jury proceedings are conducted by United States Attorneys or their assistants who are not investigative or law enforcement officers of the United States.

2. The Criminal Proceedings Terminated in Favor of the Plaintiffs on May 6, 1999.

On April 22, 1999 the United States unilaterally moved to dismiss the entire two-count indictment against RMC and Knott for lack of sufficient evidence to prove the charges against them. (Stipulation of Undisputed Facts, ¶21.) On May 6, 1999 the Court allowed the government's motion (Stipulation of Undisputed Facts, ¶22), thereby terminating the criminal proceedings in favor of the plaintiffs in this case.

The United States' contention that the criminal proceedings were not terminated in favor of the plaintiffs because they were terminated only after this Court's ruling suppressing evidence of the surreptitious sampling results allegedly obtained on October 21, 1997 is unsupported by citation of any authority. Even after the suppression ruling, there remained evidence of alleged sampling at manhole no. 1 on November 7, 1997 that was allegedly below 5.0 s.u. and which formed the basis for Count 2 of the indictment. Nonetheless, the government elected to dismiss both counts of the indictment for the alleged felony violations that occurred on November 7, 1997 as well as on October 21, 1997.

3. Creavin Had No Probable Cause Either to Initiate or to Continue the Criminal Proceedings.

Probable cause to initiate or continue a criminal proceeding is a state of facts in the mind of the accuser "as would lead a man of ordinary caution and prudence to believe or entertain a strong suspicion that the plaintiff committed a crime." *Carroll v. Gillespie,* 14 Mass. App. Ct. 12, 19 (1982); *Conway v. Smerling,* 37 Mass. App. Ct. 1 (1994). That state of mind must be based on reasonable investigation and on reliable evidence. Lack of probable cause may be established by evidence that the investigation was so flawed or superficial that it provided no reasonable basis for thinking the accused could be found guilty beyond a reasonable doubt.

1. <u>When Creavin Initiated the Criminal Proceedings on October 22. 1997, Creavin Had No Probable Cause to Do So.</u>

Judged by the above-referenced standards, Creavin had absolutely no probable cause to initiate the criminal proceedings by referring the matter to AUSA Kotlier on October 22, 1997.

At that time Creavin had only an allegedly anonymous "TIPS" letter[1] and the oral report of Agent Pimpare that he had identified "routine high (12.5) and low (2) pH effluent discharges at manhole no. 1 and an inoperative waste treatment system." Pimpare told Creavin on October 22, 1997 that during the inspection of October 21, 1997, Knott claimed ownership of the roadway in front of the plant and of the 300 foot sewer pipe below it that served only RMC and no-one else.

[1] Creavin claims to have sent that letter in August 1997, although the envelope in which it was received by the EPA, was post marked September 29, 1997. The government has not explained this obvious anomaly.

Pimpare also informed Creavin that valves in the coating line discharge piping had been positioned to divert the high pH coating line rinsewater away from the basement collection tanks where it would ordinarily have mixed with and neutralized the low pH galvanizing line rinsewater that flowed by gravity to the basement tanks.

No statute or regulation required RMC to maintain a wastewater pretreatment system if no effluent with a pH less than 5.0 was discharged to a POTW. Expert testimony established that given the production conditions that prevailed on October 21, 1997, and again on November 7, 1997, it was chemically and physically impossible for RMC to discharge prohibited effluent even into manhole no. 1. Regardless of the position of the coating line discharge valves, the high pH coating line rinsewater combined and mixed with the low pH galvanizing line rinsewater in the depressed meter loop and in the 40 foot depressed basement discharge pipe. That mixing alone served to neutralize the effluent to a minimum of 6.0 s.u. if the coating line effluent were diverted from the basement collection tanks and to a minimum of9.0 s.u. when the coating line effluent was directed to the basement collection tanks without the addition of any caustic chemicals and without any mechanical mixing. (Testimony of Professor O'Shaughnessy and Dr. Roth.)

The inoperable features of the treatment system which Pimpare described to Creavin were no longer in use on October 21, 1997 or thereafter because technological innovations adopted by RMC in 1994 rendered those features unnecessary. There was no need for the filter press or for the settling tanks. The automatic infusion of caustic soda was not required while the galvanizing and coating processes were operating simultaneously as they were on October 21 and November 7, 1997. Creavin's blind acceptance of Pimpare's oral report was not supported by reliable evidence.

The Court expressed some confusion about how the two separate rinsewater streams could be neutralized if the coating line discharge were directed away from the basement. The neutralization occurs because regardless of the position of the coating line discharge line valves, all rinsewaters from both the galvanizing line process and the coating line process must pass through both the meter loop and the depressed basement pipe. It is important that even when the coating line discharge is diverted from the basement collection tanks, the galvanizing line rinsewater is collected there. When the final ejector tank pump is activated, its contents are pumped vertically to the ceiling above the manufacturing floor and then through the meter loop and the 40 foot depressed basement pipe up and out to manhole no. 1. As the galvanizing line fluid follows that course it joins and mixes with the diverted coating line fluid in the meter loop and the depressed basement pipe, thereby effecting neutralization prior to discharge to manhole no. 1.

Creavin did not ask to see the field log that Pimpare had prepared on October 21, 1997. He did not interview Granz who had participated in the October 21 inspection or ask to see Granz's log. He did not inquire or consider why RMC or Knott would intentionally have diverted the coating line rinsewater away from the basement tanks. He did not explore or consider the significance of Knott's claimed ownership of the sewer line and the logical conclusion there from that the POTW did not

begin until manhole no. 2. He did not inquire whether any sampling had been done at manhole no. 2.

Creavin acknowledged that an important part of a reasonable investigation would have entailed examination. of the source material, but he admitted that he never examined it prior to October 22, 1997. Instead, Creavin contacted AUSA Kotlier on October 22, 1997 and requested that Kotlier initiate criminal proceedings against both plaintiffs for knowingly discharging rinsewater with a pH below 5.0 s.u. into a POTW.

If Creavin had not acted so hastily but had instead examined the field logs of Granz and Pimpare, Creavin would have observed that Pimpare had recorded only very few pH readings in his log and that Granz's log contained the details of the alleged sampling. He would have observed that Granz had altered many significant pH readings in his log without crossing out the original entry, rewriting it and initialing and dating the alteration, despite the EPA's National Enforcement Investigation Center's published protocol requiring those procedures when "accountable documents" are altered. The observation of these alterations would have prompted a reasonably prudent investigator to look into the reasons for those changes and raised serious doubts about the validity of the records. These numerous alterations reasonably support the inference that the readings were falsified.

Creavin would also have observed that Granz and Pimpare had opened manhole no. 2 where Granz recorded three pH paper readings of 7: one at the influent from the Rockdale public sewer; one at the base of the manhole; and one at the influent from RMC. The pH of the RMC influent was altered from 7 to 4, Granz admits that he originally wrote a 7. And he does not recall ever having changed it. Granz admitted that pH paper readings were accurate only within a range of one unit[2] So even if the paper reading indicated 4, it could well have been within the legal limit of 5.0.

Testimony of the plaintiffs' experts, Professor O'Shaughnessy and Dr. Roth, established that it was physically impossible for RMC rinsewater influent at manhole no. 2 to have been 4 if the pH of the other two samples taken by Granz and Pimpare on October 21 at manhole no. 2 were 7. Rinsewater does not magically change from 4 to 7 by falling several feet through the air.

On October 22, 1997 Creavin had conducted no investigation sufficient to establish a state of facts in his mind that would lead a man of ordinary caution and prudence to believe or entertain a strong suspicion that either Knott or RMC had committed a criminal violation of the Clean Water Act. In short, Creavin had no probable cause to initiate criminal proceedings on October 22, 1997.

B. Creavin Had No Probable Cause to Continue the Criminal Proceedings After October 22, 1997.

[2] Dr. Roth testified that pH paper would produce only a “ball park” reading that could be off as much as 2 units. He would not rely on pH paper in analyzing flowing wastewater.

During the execution of the search warrant on November 7, 1997 EPA agents recorded information which eliminated any semblance of probable cause to continue the criminal proceedings.

Agents Hickey and Pimpare opened manhole no. 1 at about 9:45 A.M. and found the pH to be neutral. They immediately entered the basement collection area and found the rinsewater in the final ejector tank to be neutral. Agent Osbahr, stationed at manhole no. 2, recorded 7 individual pH readings at that location, all at 5.0 or above. The United States' attempt to diminish the significance of that data by suggesting that its own agent lacked the expertise to record those readings accurately is disingenuous at best. Creavin never interviewed Hickey and never saw her log until he copied it in May of 1998, without ever reading it. Creavin did copy Osbabr's log in May of 1998 and reviewed it with Osbahr at that time (Exs. 28 and 76) with Attorney Peter Kenyon attending the interview by conference telephone. At that interview Creavin learned of the 7 exculpatory pH readings at manhole no. 2. Creavin also interviewed Pimpare and reviewed his November 7 log with him on May D, 1998. Creavin's notes of that interview record that Pimpare advised Creavin on May 13, 1998 that on November 7, 1997 there were additional unrecorded pH meter readings at manhole no. 1 that Were above 5.0. (Ex. *77*.)[3]

If Creavin had conducted a reasonable investigation of the facts developed during the search of November 7,1997, he would have discovered all of the above-described exculpatory information. That information alone would have convinced a man of ordinary caution and prudence that there was no probable cause to continue the criminal proceedings because there was no reasonable basis for believing that RMC or Knott could be found guilty beyond a reasonable doubt. Instead, Creavin chose to conceal all of this exculpatory data from the United States Magistrate Judge to whom he applied for a second search warrant on July 17, 1998 after his interviews with Pimpare and Osbahr.

If Creavin had conducted a proper investigation he would also have discovered that there was no evidence of any harm caused by RMC to the POTW or to the environment which EPA guidelines require before initiating criminal proceedings. There was no motive for Knott or RMC to divert the coating line rinsewater from the basement collection tanks; and there was no credible evidence that any crime had been committed.

IV. The United States, Acting Through Its Agent, Stephen Creavin, Acted with Malice.

As the plaintiffs have emphasized in their Requests for Rulings of Law, malice may be inferred from the lack of probable cause. The plaintiffs have established that Creavin had no probable cause either to initiate or to continue criminal proceedings against either of the plaintiffs. On the contrary, his investigation was so cursory, superficial and flawed that it provided no

[3] Even after the indictments were dismissed on May 6, 1999, AUSA Kempthorne advised this court in writing that there were two additional pH recordings at manhole no. 2 that were above 5.0. (Ex. 51.)

reasonable basis on October 22, 1997 or thereafter for believing that either plaintiff was guilty beyond a reasonable doubt of violating the Clean Water Act.
Creavin was aware as early as October 22, 1997 that Knott claimed ownership of the 300' sewer line. Yet Creavin failed to arrange additional sampling at manhole no. 2, where the POTW commenced, even after discovering that all manhole no. 2 samples on November 7, 1997 were 5.0 or higher.

Not until mid-April 1999 did Creavin obtain expert opinion concerning the effect of sanitary waste and groundwater infiltration into the sewer pipe between manholes no. 1 and no. 2. Even that opinion was seriously flawed because it rested on false assumptions of flow rates of wastewater and sanitary waste. As demonstrated by Dr. Roth's rebuttal affidavit, even assuming discharges of 2.19 pH rinsewater into manhole no. 1 (the lowest pH meter reading ever recorded by the EPA agents) that rinsewater would reach manhole no. 2 with a pH of not less than 5.0 S.u.

The low pH readings allegedly recorded have been shown by expert testimony to have been impossible to obtain. Faulty methodology, failure to recalibrate pH meters, or just plain ineptitude or falsification could account for the scientifically impossible values. And it is entirely incredible that in all of the agents' records there is an almost total absence of any high pH readings-a phenomenon that is impossible to explain if one accepts the government's contention that RMC was periodically discharging both high and low pH wastewater. A reasonable investigation by Creavin would have required. serious exploration of this obvious discrepancy. Creavin never undertook such an exploration.

Other factors also indicate that Creavin proceeded with improper motive. Although Creavin learned of the mispositioned coating line valve as early as October 1997, he decided not to advise Knott to correct that minor problem, but elected instead to proceed headlong to a criminal referral. Creavin signed a Criminal Investigation Case Opening Checklist on October 24, 1997 (Ex. 128) in which he stated that the decision had been reviewed by Patricia Hickey, Peter Kenyon and Michael Hubbard. Ms. Hickey denied that she had made any such review; Mr. Kenyon had no recollection of having done so; and the government failed to call Special Agent in Charge of the Region I CID, Michael Hubbard, to testify about his role in the criminal proceedings. On that opening checklist Creavin circled categories of "Harm" numbered 1 and 3 indicating-as Creavin testified-that there was evidence of actual as well as potential harm. But Creavin conceded that he had no evidence of any harm on October 24, 1997 or at any time thereafter, despite EPA published policy that criminal enforcement is to be initiated only where there is evidence of significant environmental harm.

All of these factual misrepresentations by Creavin, coupled with his hasty referral to AUSA Kotlier on October 22, 1997 for criminal prosecution, create an undeniable inference that Creavin was excessively eager to advance his personal position at the EPA by initiating and relentlessly pursuing his first criminal proceeding without reasonable investigation of the facts and motivated by improper purposes.

V. Conclusion

The plaintiffs urge the Court to find that the United States is liable to both plaintiffs for malicious prosecution and to set a date for trial on the issue of damages.

Respectfully submitted,
By their attorneys,

/s/ Warren G. Miller

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CERTIFICATE OF SERVICE

I, Warren G. Miller, attorney for the plaintiffs in the above-captioned matter, hereby certify that I have this day served the foregoing Closing Argument by electronic mail on R. Joseph Sher, Senior Trial Counsel at the Department of Justice and Barbara Healy Smith, Assistant United States Attorney and by first-class mail on counsel of record in the captioned matter.

August 16, 2004

/s/ Warren G. Miller
Warren G. Miller