

Date: 20090415

**Dockets: T-2191-07
T-724-08**

Citation: 2009 FC 375

Toronto, Ontario, April 15, 2009

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

**MULTI FORMULATIONS LTD., CELL FORMULATIONS LTD., NEW CELL
FORMULATIONS LTD., PUMP FORMULATIONS LTD., SIX STAR
FORMULATIONS LTD., MTOR FORMULATIONS LTD., MASS FORMULATIONS
LTD., IML FORMULATIONS LTD., HALO FORMULATIONS LTD., HHC
FORMULATIONS LTD., LEUKIC FORMULATIONS LTD. and CANADIAN
SUPPLEMENT TRADEMARK LTD.**

Plaintiffs

and

**ALLMAX NUTRITION INC., HEALTHY BODY SERVICES INC.,
RON TORCH and MICHAEL KICHUK**

Defendants

AND BETWEEN:

ALLMAX NUTRITION INC. and HEALTHY BODY SERVICES INC.

Plaintiffs by Counterclaim

and

**MULTIFORMULATIONS LTD., CELL FORMULATIONS LTD., NEW CELL
FORMULATIONS LTD., PUMP FORMULATIONS LTD., SIX STAR FORMULATIONS
LTD., MTOR FORMULATIONS LTD., MASS FORMULATIONS LTD., IML
FORMULATIONS LTD., HALO FORMULATIONS LTD., HHC FORMULATIONS LTD.,
LEUKIC FORMULATIONS LTD., CANADIAN SUPPLEMENT TRADEMARK LTD.,
IOVATE HEALTH SCIENCES INTERNATIONAL INC., IOVATE HEALTH SCIENCES
INC., TERRY BEGLEY and PAUL TIMOTHY GARDINER**

Defendants by Counterclaim

REASONS FOR ORDER AND ORDER

[1] The parties sell nutritional supplementary products and compete within the same markets. The Plaintiffs, a group of associated companies (collectively “Iovate” or the “Iovate Group”), have brought these two actions which allege, *inter alia*, infringement of Canadian Patents 2,194,218, 2,208,047 and 2,028,581. The first two patents are in issue in action T-2191-07 and the third patent is in issue in T-724-08. The Defendants are a group of associated companies (collectively “Allmax”) who are alleged to be infringing the patents in issue. The Iovate Group’s interest in these patents was assigned to it by third parties. Apparently, members of the Iovate Group have commenced litigation against Allmax in the United States. The subject matter of the litigation in the United States overlaps to some extent these actions and involves some of the same products.

[2] In their Statement of Defence and Counterclaim (the “Pleading”), Allmax adds a number of parties including two individuals, Terry Begley (“Begley”) and Paul Timothy Gardiner (“Gardiner”). These individuals are principals of various companies within the Iovate Group or so it is alleged. The primary focus of the Pleading is with respect to anti-competitive activity and other causes of action that flow from the provisions of the *Competition Act*, R.S.C. 1985, c. C. 34. There are also claims relating to a conspiracy to restrict advertising in publications of Allmax products, interference with economic relations, discriminatory pricing, misleading advertising and inducing breach of contract. All of these causes of action, it is alleged, flow from Iovate’s conduct and that of its principals who, it is also alleged, conspired together to lessen competition and drive Allmax

out of the market. Iovate seeks to strike from the Pleading many of these various causes of action and particularly those relating to the *Competition Act*.

[3] Prior to bringing this motion, Iovate's counsel sent a Demand for Particulars to counsel for Allmax. In responding to the Demand for Particulars, counsel for Allmax noted that most of the particulars requested were in the nature of evidence and early discovery as opposed to proper particulars. Notwithstanding this position, counsel for Allmax provided particulars in response to many of the items in the Demand for Particulars. Iovate then brought this motion to strike.

[4] The issues on the motion are whether these claims should be struck out and dismissed without leave to amend against Iovate and, in particular, the individual Defendants, Begley and Gardiner; second, if the claims are not struck out whether Allmax should provide the requested particulars; and third, should Iovate be granted an extension of time to serve and file its responding pleading.

[5] During the course of argument, counsel for Allmax conceded that claims relating to section 61(6) of the *Competition Act* were withdrawn and therefore they will be struck from paragraphs 85, 93 and 95 of the fresh as Amended Statement of Defence and Counterclaim. As well, counsel for the Iovate Group conceded that, having now read the Written Representations of Allmax, had paragraphs 91 and 92 been pleaded in the form of the Written Representations that they would survive a motion to strike. Thus, Iovate's counsel argued that if these paragraphs were struck with leave to amend and they were amended essentially in the form of paragraph 33 of the Written

Representations of Allmax, they would meet the minimum standards of pleading. So that there is no issue or misunderstanding regarding the meaning of these paragraphs of the Pleading, they will be struck with leave to amend in essentially the same form as paragraph 33 of the Written Representations of Allmax.

[6] The tests for striking out a pleading or parts of a pleading are well known. The jurisdiction to do so is found in Rule 21(1) of the *Federal Courts Rules*. The most frequently cited test is that found in *Hunt v. Carey Canada Inc.*, [1992] SCR 959 at page 980. The test is whether, assuming all of the allegations in the Pleading to be true, it is plain and obvious that the claim cannot succeed. The onus is on Iovate to establish that there are appropriate grounds to strike the Pleading. Justice Blanchard in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* [2005] F.C.J. No. 1600 at par. 31, aff'd at [2006] 47 C.P.R. (4th) 328, summarized the test in this fashion:

The onus of proof on the party moving to strike a pleading is a heavy one. The discretion to strike out pleadings should only be exercised in plain and obvious cases where the Court is satisfied beyond doubt that the allegation cannot be supported and is certain to fail at trial because it contains a radical defect.

[7] The impugned portions of the Pleading focus mainly on the causes of action alleged in respect of various sections of the *Competition Act*: in particular, the conspiracy section - section 45; and, the discriminatory pricing section – section 50(1)(a). The allegations of conspiracy and discriminatory pricing are founded in section 36 which provides that any person who has suffered a loss or damage as a result of conduct that is contrary to any provision of Part VI of the *Competition Act* may sue and recover from the person(s) who engaged in the conduct.

[8] Allmax has pleaded that Iovate engages in anti-competitive activity contrary to section 45 and making false and misleading representations under section 52(1). These two sections fall within Part VI of the *Competition Act*. The onus is on Iovate to demonstrate that the allegations in the Pleading are not sustainable and are bereft of any chance of success if they are to be struck.

Section 45 Cause of Action

[9] Section 45 addresses anti-competitive conspiracies. In order for a claim to succeed a Plaintiff must demonstrate a number of elements. They include:

- the identification of the alleged conspirators
- an agreement, combination or arrangement to conspire;
- an improper purpose being the undue prevention or lessening of competition in a particular geographic and product market flowing from the implementation of the agreement, combination or arrangement
- an intention by the conspirators to enter into the conspiracy
- an intention to unduly lessen competition, and,
- that damage has resulted from the conspiracy.

[10] These principles are summarized in cases such as *Apotex Inc. v. Laboratoire Fournier S.A.*

[2006] O.J. No. 4555, a decision of the Ontario Superior Court of Justice, in which Mr. Justice Belobaba observed:

Both parties agree that in pleading conspiracy Apotex must identify the alleged conspirators, the agreement to conspire the improper purpose the actions taken and the damage that resulted: *Normart Management Limited v. Westhill Redevelopment Co.* (1998), 37 O.R. 3rd (C.A.) at 104.

[11] As is often the case in alleging a conspiracy, the particulars of a conspiracy are not broadcast widely and Plaintiffs at the outset of proceedings frequently do not possess the precise details of the alleged conspiracy. As noted by Justice Cumming of the Ontario Superior Court of Justice in *North York Branson Hospital v. Praxair Canada Inc.* (1998), 84 C.P.R. (3d) 12, at par. 22 (Div. Ct.):

In truth, the very nature of a claim of conspiracy is that the tort resists detailed particularization at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of conspiracy is its secrecy and the withholding of information from alleged victims. The existence of an underlined agreement bringing the conspiracy together, proof of which is a requirement born by a Plaintiff often must be proven by an indirect or circumstantial evidence. A conspiracy is more likely to be proven by evidence of overt acts and statements by the conspirators from which the prior agreement can be logically inferred. Such details were not usually being available to a Plaintiff until discoveries. These considerations and the general theme of hunt, instructing Courts not to shy away from difficult litigation, also militate against holding pleadings in a civil conspiracy cases to an extraordinary standard.

[12] It is through the prism of these principles that this Pleading must be considered.

[13] The impugned portions of the conspiracy Pleading in issue allege three types of conduct of the alleged conspirators which are breach of the *Competition Act*: the assignment of patents as the result of settlement of litigation; interference with customer and supplier litigation; and, interference with business relationships.

[14] Allmax pleads that the Iovate Group have acquired patents and commenced litigation against their competitors. Indeed, the litigation has been particularized in a schedule to the Pleading. Allmax alleges that the litigation is in furtherance of acquiring patents with the purpose of asserting those patents against other competitors such as Allmax. This conduct, it is alleged constitutes a breach of section 45. As support for this proposition, Allmax cites the Federal Court of Appeal in *Eli Lilly v. Apotex Inc. et al. v. Eli Lilly et al.* 2005 FCA 361, wherein Justice Evans observed:

[25]. To subject the right to assign patents to section 45 in the circumstances under consideration in this case is also consistent with the scheme of the *Competition Act*.

[26]. For example, subsections 45(3), (7) and (7.1) provide specific exceptions and defences to the offences created by subsection 45(1). None deals with intellectual property rights. Moreover, it is clear that Parliament considered the interface of the *Competition Act* and intellectual property rights. For example, while subsection 79(1) prohibits the abuse of market dominance, subsection 79(5) provides that, for the purpose of section 79, "an act engaged in pursuant only to the exercise of any right ... derived under the ... *Patent Act* ... is not an anti-competitive act." Section 45 contains no analogous exemption for the exercise of rights under the *Patent Act*, including assignments pursuant to section 50.

[27]. In light of the above, the presumption of statutory interpretation, *expressio unius est exclusio alterius*, supports an interpretation of section 45 that does not impliedly exclude an assignment of patents which lessens competition by increasing the market power of the assignee beyond that inherent in the rights assigned.

[28] Further, section 32 provides that the Federal Court may make certain orders where use is made of the exclusive rights conferred by a patent so as to unduly restrain trade or lessen competition in an article. It is clear from this that Parliament did not intend to exclude the exercise of patent rights from the reach of the *Competition Act* altogether. In order to achieve consistency with

section 32, section 45 should be interpreted as applicable to an assignment of a patent which unduly lessens competition.

[15] Based on this jurisprudence, the allegations relating to the assignment of the patents are sufficiently pleaded to survive this attack.

[16] Another portion of the Pleading under attack is that relating to an alleged unlawful agreement to restrict advertising and publication of Allmax and Health Body Services Inc. (“HBS”) products thereby restraining and injuring competition. The Pleading alleges that members of the Iovate Group and each of Wieder Publications (“Wieder”) and MuscleMag entered into an agreement whereby Wieder and MuscleMag would not accept advertising or advertorials from Allmax. As part of its response to the Demand for Particulars, Allmax advised that a product called LEUTOR had been advertised in MuscleMag but that MuscleMag now refuses to accept such advertising.

[17] These portions of the Pleading sufficiently plead a cause of action which, based on the principles noted above, are not bereft of any chance of success. The Pleading alleges the names of the conspirators, the agreement to conspire, the improper purpose, the action taken and the damage which has resulted. Iovate has sufficient information to be able to plead to these allegations. This includes those paragraphs of the Pleading which deal with the business relationship between Allmax and HBS and GNC, the latter being a retail chain of stores which carried Allmax and HBS products but which, it is now alleged, refuses to carry their products in the U.S.

Affiliate and Section 45(8)

[18] A key argument of the Iovate Group is that the conspiracy allegations are made against a group of affiliated companies. The Pleading describes Gardner as the sole director of many of the companies comprising the Iovate Group. Similarly, Begley is described as the chief executive officer of one or more of the companies comprising the Iovate Group. Section 45(8) of the *Competition Act* provides that a conspiracy claim does not apply in respect of a conspiracy, combination, agreement or arrangement that is only entered into by affiliated companies. As conspiracy claims cannot be made against “affiliates” the conspiracy claims, so it is argued, are bound to fail.

[19] The *Competition Act* in section 2(2) defines corporations as affiliated if, *inter alia*, one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled by the same person. Section 45(8) provides an exception to conspiracy claims for corporation “only by companies each of which is, in respect of every one of the others an affiliate”. It is to be noted that section 45(8) does not apply to individuals. As pleaded, the Iovate Group companies are alleged to be owned or in the control of either or both Gardiner and Begley. This may ultimately be a defence to the conspiracy claim. Here, although there is pleaded a connection between the Iovate Group of companies, it is not plain and obvious that, at this stage of the proceedings the group of defendants as a whole fit within the definition of affiliates. Further, there is no “affiliation” pleaded with respect to the Iovate Group and Wieder and MuscleMag and at this stage no conclusion can be reached whether there is any affiliate status between them. This section

of the Pleading is therefore allowed to remain. No particulars are required as the claim is sufficiently particularized for Iovate to plead.

Personal Claims

[20] With respect to Begley and Gardiner individually, Iovate argues that as there is no independent cause of action alleged in tort the claims are doomed to failure and should be struck. It is argued that there are no specific allegations as against either of them that amount to an individual or separate claim in tort as required by the case law and that as the directing minds of the Iovate Group of companies, Gardiner and Begley cannot, by directing the corporations to act in a certain manner, make an agreement and conspire with the corporations. Iovate relies on *Normart Management Limited v. West Hill Redevelopment Company Ltd. et al.* 37 O.R. (3d) 97 (C.A.) in which Justice Finlayson observed at p. 103 as follows:

... limiting the acts under review to the directing minds, *per se*, a directing mind of a corporation cannot, by causing the corporation to act in a certain way, be said to have made an agreement with that corporation. The directing mind could make an agreement with another corporation by making an agreement with the directing mind of that other corporation, but if both directing minds are acting on behalf of their respective corporations, the agreement is between the two corporations. To conclude otherwise would be to challenge the recognized separate legal identity afforded to corporations under our law and to conclude that every corporate action which may give rise to a breach, by virtue of the decision-making authority of the corporate management, is an action of the directing minds personally.

[21] The Iovate Group also relies on the recent decision of Madam Justice Kiteley in *Goodman v. Earl Rumm et al.* 2007 CanLii 38119 (Ont. S.C.). That case involved a motion strike allegations of

conspiracy in a pleading against corporate directors on the ground that no separate tortious conduct of the individuals apart from the corporations was pleaded. Justice Kiteley, in striking the pleading, observed as follows:

[20]. The plaintiff has been greatly injured in his character and reputation in the community. His character and reputation have been injured in the eyes of his family, colleagues, business associates and clients. The plaintiff is entitled to general and aggravated damages for this loss.

[21]. The abuse of process and the conspiracy constitutes a wanton and outrageous disregard of the plaintiff's rights. The defendants have maliciously persisted in repeating the false claims asserted in the Action without any regard to the reputation of the plaintiff. The plaintiff is entitled to an award of punitive and exemplary damages.

[22]. The plaintiff proposes that this claim be tried together with the Action.

[22] However, factually this case is different from this case as there is sufficient facts pleaded to give rise to a separate claim against the individuals. There is also authority for the proposition that directors, officers and employees of corporations can be held liable for torts they commit personally even if they are acting in the course of their duties or in the best interests of the corporation [see, for example *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 (C.A.) at par. 11 and the cases cited therein; and, *ScotiaMacleod Inc. v. People Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.)]. As well, Justice Mactavish in *Petrillo v. Allmax Nutrition Inc.* (2006), 54 C.P.R. (4th) 319 observed at par. 72, based on an analysis of the Federal Court of Appeal's decision in *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co.* (1978) 40 C.P.R. (2d) 164, as follows:

Indeed, in order to attract personal liability on the part of a corporate director or officer, there must be circumstances from which it is reasonable to conclude that the purpose of the individual was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it, but the deliberate, willful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it: *Mentmore*, at ¶ 28.

[23] It is to be noted that both Begley and Gardiner are alleged co-conspirators together with the Iovate Group companies named in the Pleading. Gardiner is alleged to be the sole directing mind and/or the sole director of the Iovate Group of companies while Begley is described as an executive officer of one or more of the companies in the Iovate Group. The Pleading makes it clear that the Iovate Group is engaged “in a campaign of anti-competitive behaviour”. At this stage, the Pleading sufficiently details that Gardiner and Begley, through the auspices of the Iovate Group are alleged to have conspired, combined, agreed and arranged to unduly prevent or lessen competition in nutritional supplements. The Pleading contains the known details of the conduct which is to prevent the placing of advertising Wieder and MuscleMag and cause GNC not to carry Allmax products. If these facts are established at trial this is conduct that would be found to be outside the realm of ordinary business activity. As such, the requirement of separate tortious conduct of Gardiner and Begley for purposes of the Pleading has been satisfied.

[24] The Iovate Group also argue that the claim against Gardiner and Begley is bereft of any chance of success because a claim may only proceed against directors and officers of corporations if the exception in *Said v. Butt* [1920] 3 K.B. 497 does not apply. To quote the written representations of the Plaintiff: “To the extent that the claims against Gardiner and Begley relate to inducing breach

of contract, they are protected by the *Said v. Butt* **defence**” (emphasis added). Whether or not Gardiner and Begley are protected by the *Said v. Butt* defence is not an issue for a motion to strike pleadings. To determine if either or both of Gardiner or Begley are entitled to rely on *Said v. Butt* requires that evidence be lead regarding their conduct. This is not permissible on a motion to strike pleadings. Thus, this argument does not lead to striking the Pleading as against Gardiner and Begley.

[25] Claims against corporate officers and directors should not become a disguised attempt at a fishing expedition to try and elicit information to support a cause of action that is bereft of success.

As noted by Justice Mactavish in *Petrillo, supra*:

[36]. Finally, it is not enough for a Plaintiff to assert personal liability on the part of an officer or director of a company in a statement of claim, in the hope that evidence to support the allegation will be uncovered during the discovery process. A lawsuit is not a fishing expedition, and to do so is an abuse of the court’s process: see *Painblanc v. Kastner*, [1994] F.C.J. No. 1671, 58 C.P.R. (3d) 502.

[26] Here, the agreement to conspire is sufficiently pleaded and comprises of three elements. There are the patent assignments which give rise to the litigation; there are agreements or arrangements between the Begley, Gardiner and the Iovate Group, the particulars of which are not in the possession of Allmax; and, finally the agreements with Wieder, MuscleMag and GNC which are specifically pleaded in the Pleading.

[27] Thus, because of the involvement of Begley and Gardner with MuscleMag, Wieder and GNC, they are proper parties to this counterclaim. Here, sufficient particulars of a separate cause of

action against Gardiner and Begley have been pleaded and it cannot be said that the allegations are doomed to fail.

Section 50 – Discriminatory Pricing

[28] Iovate raises a significant argument in respect of Section 50(1) of the *Competition Act*. This section deals with discriminatory pricing. The section reads as follows:

50(1) Every one engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or

(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[29] In paragraphs 93 through 95 of the Pleading, Allmax alleges the conduct of Iovate as constituting an illegal trade practice, inducing breach of contract and tortious interference with economic interests all in contravention of the *Competition Act* and more particularly sections 45 (discussed above) and 50(1)(a). The particulars of the conduct include the fact that Wieder and MuscleMag refuse to carry advertising from Allmax; and, that GNC refuses to carry Allmax products, including those products which are the subject of this action and GNC has cancelled purchase orders already placed with Allmax. The issue is whether this part of the Pleading sufficiently sets out a cause of action under section 50(1)(a).

[30] As counsel noted, section 50(1)(a) of the *Competition Act* is a very convoluted and difficult section to understand, interpret and apply. Iovate argues that it is a section relating to the conduct of a seller and not a purchaser; it is focused on real and personal property; and, deals with the sale of like quality and quantity goods. Thus, Iovate argues that the Pleading does not raise a cause of action coming within section 50(1)(a) and must be struck because the Pleading does not deal with goods of like quantity and quality; it deals with the purchase of ad space or shelf space not real or personal property; and, is not focused one competitor versus another.

[31] In support of their position, Iovate relies upon the *Skybridge Investments Ltd. v. Metro Motors Ltd.* [2006] B.C.J. No. 2892, a decision of the British Columbia Court of Appeal wherein the Court cited with approval the motions judge who stated:

Two of the essential elements to be proved in a prosecution under this section are “a sale to a purchaser” and a “sale to a competitor of the purchaser”. The plaintiff’s complaint is not that they are being discriminated against in the matter of discounts, rebates, allowances,

price concessions or other advantages, in the sale of Ford motor vehicles; their complaint is that Ford will not sell Ford motor vehicles to them for resale or export. The plea is bound to fail.

[32] Iovate argues that there is nothing in the Pleading relating to like quality and quantity of goods and there is no “sale to a purchaser” and no “sale to a competitor of the purchaser”.

[33] There is little case law that interprets section 50(1)(a). Notable in the submissions of Iovate is that one of the few documents that assist in understanding section 50(1)(a) is the Price Discrimination Enforcement Guidelines issued by the Competition Bureau Canada dated March 12, 2008. In those guidelines the elements of the offence are described as follows:

The statute sets out a number of factors which must be satisfied for an offence to have been committed. There must be a “sale” of “articles” by a “person engaged in a business”. The sale must involve a “discount, rebate, allowance, price concession or other advantage” being “granted” to one “purchaser” which is “over and above” that which is “available” to the purchasers “competitors” in respect of “articles of like quality and quantity.” The comparison must relate to the prices “available” to the competitors “at the time the articles are sold to the purchaser.” The sale may discriminate “directly or indirectly.” The seller must have “knowledge” that the sale is discriminatory. Finally, the sale must be “part of a practice of discriminating.”

[34] Iovate argues that none of these elements are present in the Pleading, and, as in *Skybridge*, any references to Section 50(1)(a) should be struck as the plea is bound to fail.

[35] Notwithstanding the ingenious approach of counsel for Allmax in providing the Court with a colour-coded parsing of section 50(1)(a) in an effort to demonstrate that the Pleading raises a cause of action, I am not persuaded that it does so. Counsel for Allmax emphasized that given the

dearth of authority dealing with the application of section 50(1)(a) that an interpretation of section 50(1)(a) can be made to fit this case.

[36] Allmax argues that Iovate and Allmax are competitors of articles of like quality and quantity and thus the claim and the counterclaim clearly falls within this section. Allmax is unable to put their advertising in various magazines because of the conspiratorial actions and intentional actions of Iovate, Begley and Gardner.

[37] Counsel for Allmax emphasized that given the dearth of authority dealing with the application of section 50(1)(a) that an interpretation of section 50(1)(a) can be made to fit this case. The preamble to section 50 reads “everyone engaged in the business” which Allmax argues is Iovate. The section goes on to read ...“therefore that Iovate is a party or privy and assists in any sale that discriminates directly or indirectly against a competitor of a purchaser or articles from him”. This Allmax argues is a very wide provision which encompasses Allmax. Further, the section speaks to “other advantage” also a very wide phrase which is not limited in any way and finally that it must be “in respect of a sale of articles of like quality and quantity”. Allmax argues that Iovate and Allmax are competitors of articles of like quality and quantity and thus the Pleading clearly falls within this section.

[38] However, it seems to me that as complicated as section 50(1)(a) is, it relates to a scenario whereby Iovate is selling goods to at least two parties and discriminating in the price it offers its goods to one party over Allmax. That is not the case here. While it is a novel argument that the sale

of advertising space in the magazines prevents Allmax from advertising its wares, it is not a scenario which deals with the same quality and quantity of articles as contemplated by section 50(1)(a).

[39] Counsel for Allmax acknowledged that the interpretation put forward may be seen as novel but that it was not plain and obvious that it would not succeed. As support for this approach, counsel for Allmax pointed to a section of the Guidelines, *supra*, in which the then Director of Investigation and Research, commented that the Guidelines were published “with respect to section 50(1)(a) to ensure that the business community better understands the circumstances which may lead to an investigation under the *Act*. At the same time, the business community should be aware that a different interpretation of the provision could be advanced by parties seeking to recover damages privately under section 36 of the *Act*.”

[40] The interpretation urged by counsel for Allmax twists the section beyond its plain and ordinary meaning. The alleged wrongful acts as described in the Pleading are not those of a sale to a competitor of the purchaser. The alleged wrongful acts are the interference of the Iovate Group and two of its officers with right of Allmax and HBS to place advertising for their products in various magazines and in a retail chain of stores selling their products.

[41] All novel interpretations may be arguable but that does not make them legally tenable. In my view, this part of the Pleading does not fall within section 50(1)(a) and is bound to fail and references to section 50(1)(a) and section 50 must be struck.

Location of the Alleged Illegal Conduct

[42] One further argument advanced by Iovate in support of the proposition that the claims based on the *Competition Act* are without any chance of success, is that the claims are focused on activity that occurred primarily in the United States. Therefore, the conduct is outside the purview of the *Competition Act*.

[43] In the Pleading, Allmax refers to conduct that is North American in scope (Wieder is a publisher of magazines that are distributed throughout North America) and points specifically to the litigation in Canada that is alleged to be part of the campaign by the Iovate Group to unduly lessen competition. Allmax relied on the trial decision in *R. v. Stucky* [2006] O.J. No. 4933, in support of the proposition that the phrase “to the public” in section 52(1) of the *Competition Act* is not restricted to the Canadian public. On the appeal from the trial decision, the Court of Appeal for Ontario [*R. v. Stucky*, 2009 ONCA 151] recently expounded on the meaning of the phrase “to the public” as found in section 52(1). The Court confirmed the proposition that the phrase “to the public” is not restricted to the Canadian public. The Court held that the purpose of the *Competition Act* supports and interpretation of “to the public” which includes persons outside of Canada.

Justices Weiler and Gillese made the following observation:

[49]. In choosing to give effect to what he perceived to be the original intent of the legislation, the trial judge ignored the evolution in competition law thinking which has led to an increased concern with international business practices. This concern is reflected not only in the enactment of further sections of the Act to deal with practices such as telemarketing and the Internet, but also cross-border agreements between Canada and the United States. Our understanding of legislation should take into account current

circumstances. As Sullivan writes at p. 145 of the fifth edition of her text, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008):

As a rule, the public Acts of a legislature are not meant to operate as historical documents. They are written with an eye to the indefinite future, on the assumption that they will be applied not only to the facts in existence at the time they come into force but also to conditions and circumstances as they evolve from time to time. This assumption is codified in s. 10 of the federal *Interpretation Act* [R.S.C.1985, c. I-21]:

The law shall be considered as always speaking, and where a matter of thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

[56]. ... while the overall objective of the Act, in general, may be to promote vigorous and fair competition, the objective of the provision in issue here is significantly narrower. That objective is two-fold: to protect consumers from the effects of false or misleading statements; and, to prevent those making such statements from reaping the benefits stemming from these statements. In interpreting the phrase “to the public”, the trial judge did not consider this second objective.

[57]. Our analysis of the words “to the public” would not limit “the public” exclusively to persons within Canada. We, therefore, reject the trial judge’s interpretation of the phrase “to the public” in s.52(1), and hold, instead, that it should be interpreted as meaning “a group of persons” with whom the accused has a real and substantial link or connection.

[44] In my view, even though the phrase “to the public” was considered in *Stucky* in the criminal context and focused on section 52, it is an interpretation that equally applies to the *Competition Act* as a whole and to civil proceedings. The Court of Appeal for Ontario considered at some length the evolution of competition law and the international aspects which it entails. There is no reason not to apply a similar approach here. In the result, Iovate’s argument to strike on this ground fails.

Particulars

[45] Iovate seeks particulars of various miscellaneous paragraphs of the Pleading. For example, in paragraphs 46, 47 and 59 of the Pleading there are references to “nutritional supplements”, “health product and supplement business”, “Canada and elsewhere”, “being wielded” and “usurping market share”. The Iovate Group allege these phrases are too general and overly broad and that they require particulars. However, it is to be noted that Iovate in its statement of claim uses phrases such as “supplement” and “nutritional supplements”. If Iovate is using some of them why is it that they now need particulars of what these terms mean? In my view, particulars are not required in order for Iovate to reply to the Pleading.

[46] Paragraph 90 of the Pleading refers specifically to the assignments of the patents. Iovate seeks particulars of the parties to the assignments. There is no necessity to name the assignors as parties to the litigation. For that proposition, Allmax relies upon a decision of Justice Strayer of this Court in *Procter & Gamble Co. v. Kimberley-Clarke of Canada Ltd.*, (1986), 12 C.P.R. (3d) 430 (F.C.T.D.). While I do not see that case as supporting the proposition I am not persuaded in any event that the assignors need be named as parties to the litigation. They are not alleged to be co-conspirators.

[47] Finally, Allmax argues that particulars are not needed by Iovate in order to properly respond to the Pleading. There is no evidence filed by Iovate that they do not have sufficient facts to plead in response.

[48] In my view the Pleading is sufficiently particularized, especially since some particulars have been provided, to afford the Iovate group to be able to plead. As such, having reviewed and considered all of the parts of the Pleading for which particulars are requested, that relief is denied.

Competition Act Amendments

[49] Subsequent to the hearing of this motion, the *Competition Act* was amended. As leave is being granted to amend the Pleading arising from these Reasons, Allmax is also granted leave to plead such of the amendments to the *Competition Act* as may be required as a result.

Federal Court Jurisdiction

[50] The final point made by Iovate is that a contract between Iovate and magazine companies is not the subject matter of a claim that flows from the patents that belongs in this Court. They argue on the basis of the *Innotech Pty. Ltd. v. Phoenix Rotary Spike Harrow Ltd. et al.* (1997), 215 N.R. 397 (F.C.A.) that such a claim, if it is to be advanced, must be advanced in the Provincial Courts. In that decision, Justice Strayer observed at p. 398:

The counterclaim, when viewed by itself, would stand alone as an action for breach of contract and as such is not within the jurisdiction of this Court. Using the language of *Kellogg v. Kellogg*¹ the main action is primarily for the enforcement of a patent. That claim can be decided on the basis of the statement of claim and the statement of defence, and incidental to that determination the license, its existence, terms, and validity may well have to be considered. But the counterclaim which must be viewed as a distinct action primarily involves a claim for an alleged breach of contract.

It may well be, as counsel for the respondent ably demonstrated, that this result will lead to inconvenience. But that is not, of itself, a basis for this Court assuming jurisdiction.

[51] In that case, the counterclaim appears to have been a stand alone cause of action. Here, the counterclaim in the Pleading is an incidental tort or contract claim flowing from the enforcement of the patents. As has been noted by Justice Harrington of this Court in *Areva NP GmbH v. Atomic Energy of Canada Ltd.* [2006] F.C.J. No. 1208:

Atomic Energy does not take the position that this Court does not have jurisdiction insofar as the action is one for patent infringement. The tripartite jurisdictional test established by the Supreme Court in such cases as *Canadian Pacific Ltd. v. Quebec North Shore Paper Co.*, [1977] 2 S.C.R. 1054 and *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 that the matter must fall within a class of subject over which Parliament has legislative authority, that there must be an existing body of federal law essential to the disposition of the case, and that the administration of that law has been confided to this Court, has been easily met.

[17]. Section 91(22) of the *Constitution Act* gives Parliament legislative authority over “patents of invention and discovery”, Parliament has enacted the *Patent Act*, which specifically deals with infringement, and it confided jurisdiction upon the Federal Court pursuant to Section 20 of the *Federal Courts Act*.

[18]. Atomic Energy’s point is that the original Statement of Claim combined two causes of action: patent infringement, over which the Court has jurisdiction, and breach of contract, over which it has not. By the time its Motion to Strike was heard, we were faced with quite a different Statement of Claim. The conclusions with respect to breach of contract were dropped, but the contractual allegations remained to support new conclusions with respect to punitive and exemplary damages. Atomic Energy still asserts that the long recital of the contractual history between the parties should be struck, not only on the grounds of immateriality on which more will be said under that heading, but also because were the Court to award exemplary and punitive damages, it would have

to conclude that it was in breach of contract, a contract over which this Court has no jurisdiction.

[19]. In my view, the paragraphs in question should not be struck on jurisdictional grounds for two reasons. The first is that it is not “plain and obvious” that the contracts in question are beyond the jurisdiction of the Court. The second is that even if they are, it is open for Areva to submit Atomic Energy’s behaviour in relation thereto may justify punitive or exemplary damages, should it be found the patent has been infringed.

[52] In my view, this observation is apposite. I am not prepared at this juncture to hold that this Court does not have jurisdiction over the claims alleged in the Pleading as the manner in which they are pleaded flows from the allegations of infringement. If further support for this conclusion is needed, the explanation of Associate Chief Justice Jerome, as he then was, in *Titan Linkabit Corp v. S.E.E. See Electronic Engineering Inc.*, [1992] F.C.J. No. 807 amply supports it. In that case A.C.J. Jerome noted at p. 3:

Intellectual property disputes which include contractual disagreements are not unusual. It will not preclude the Court’s jurisdiction, provided the subject matter of the action primarily concerns a patent, trade mark or copyright.

[53] In this case the primary claim relates to infringement of patents. The defences and causes of action raised in the Pleading all flow from the enforcement of patent rights. Thus, at this juncture, these claims are allowed to stand.

Conclusion

[54] Allmax is allowed to amend the Pleading in accordance with these reasons although for greater clarity, with respect to the references to section 50 of the *Competition Act* they are struck without leave to amend. Iovate is granted an extension of time of 30 days following receipt of the amended Pleading to file its responding pleading. I am grateful to counsel for their very helpful and thorough written and oral submissions.

[55] As success has been divided, there will be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. References to sections 61(6) and section 50 of the Competition Act in the Fresh as Amended Statement of Defence and Counterclaim are hereby struck out without leave to amend.
2. The Defendants/Plaintiffs by Counterclaim are granted leave to amend the Fresh as Amended Statement of Defence and Counterclaim in accordance with these reasons for decision.
3. The Plaintiffs/Defendants by Counterclaim shall serve and file their Reply and Defence to Counterclaim within 30 days of being served with the Statement of Defence and Counterclaim as amended in accordance with these reasons for decision.
4. The parties may arrange a case conference to deal with any issues arising from these reasons for decision.
5. There shall be no order as to costs.

“Kevin R. Aalto”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-2191-07
T-724-08

STYLE OF CAUSE: MULTI FORMULATIONS LTD., CELL
FORMULATIONS LTD., NEW CELL
FORMULATIONS LTD., PUMP FORMULATIONS LTD.,
SIX STAR FORMULATIONS LTD., MTOR
FORMULATIONS LTD., MASS FORMULATIONS LTD.,
IML FORMULATIONS LTD., HALO FORMULATIONS
LTD., HHC FORMULATIONS LTD., LEUKIC
FORMULATIONS LTD. and CANADIAN SUPPLEMENT
TRADEMARK LTD.
v.
ALLMAX NUTRITION INC., HEALTHY BODY
SERVICES INC., RON TORCH and MICHAEL KICHUK

AND BETWEEN:

ALLMAX NUTRITION INC. and HEALTHY BODY
SERVICES INC.
v.
MULTIFORMULATIONS LTD., CELL
FORMULATIONS LTD., NEW CELL FORMULATIONS
LTD., PUMP FORMULATIONS LTD., SIX STAR
FORMULATIONS LTD., MTOR FORMULATIONS LTD.,
MASS FORMULATIONS LTD., IML FORMULATIONS
LTD., HALO FORMULATIONS LTD., HHC
FORMULATIONS LTD., LEUKIC FORMULATIONS
LTD., CANADIAN SUPPLEMENT TRADEMARK LTD.,
IOVATE HEALTH SCIENCES INTERNATIONAL INC.,
IOVATE HEALTH SCIENCES INC., TERRY BEGLEY
and PAUL TIMOTHY GARDINER

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 18, 2008

REASONS FOR ORDER: AALTO P.

DATED: April 15, 2009

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