

CITATION: Tewari v. Hantover Canada Inc., 2024 ONSC 5453
NEWMARKET COURT FILE NO.: CV-22-3653-00
DATE: 20241002

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
GUARAV TEWARI)
)
Plaintiff/Responding Party)
) Guarav Tewari, Self-Represented
- and -) Plaintiff/Responding Party
)
HANTOVER CANADA INC.)
)
Defendant) Kevin Graham and Eric Turner, for the
) Defendant/Moving Party
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) **HEARD:** August 2, 2024

2024 ONSC 5453 (CanLII)

REASONS FOR DECISION

HEALEY, J.:

Nature of the Motion

- [1] This is a motion by the Defendant, Hantover Canada Inc. (“Hantover”) for a permanent or temporary stay of proceedings or, in the alternative, an order striking the Amended Statement of Claim without leave to amend. In the further alternative, Hantover asks that this action be consolidated with another action commenced by the Plaintiff, Gaurav Tewari, and that an order be made requiring the Plaintiff to provide further particulars. In submissions, counsel for Hantover, Mr. Graham, withdrew the request to consolidate because the parties in the other action had not been served with this motion.
- [2] The present action (the “Hantover Action”) was originally commenced on November 14, 2022, against Hantover Trading Inc., which is a distinct legal entity from Hantover. After nine months of urging the Plaintiff to amend his Statement of Claim to name the correct legal entity if his intention was to sue Hantover, Mr. Graham was finally served with the amended pleading on November 30, 2023. The Claim had been amended by the court three

months earlier, on September 1, 2023. Hantover is the only defendant in the Hantover Action.

- [3] The primary arguments advanced by Hantover are that this action is an abuse of process and a duplicate pleading because the factual allegations and claims against it are a replication of the other action commenced against it and other defendants on December 22, 2023, being *Tewari v. Desiccare, Inc. et al.*, bearing court file number CV-22-4105 (the “Desiccare Action”).
- [4] Hantover submits that the discretion of the court to stay the Hantover Action should be invoked pursuant to rule 21.01(3)(c) and (d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and/or s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”). Alternatively, the Claim should be struck pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure* as disclosing no reasonable cause of action, or under rule 25.11 because it is frivolous, vexatious and/or an abuse of process.
- [5] The Plaintiff’s primary defence to the motion is that the actions do not deal with the same subject matter. He contends that the Desiccare Action is focused on a manufacturing agreement license and infringement of the Plaintiff’s IP/Patent and Trademark and is unrelated to the Hantover Action, which focuses on confidentiality agreements made between Desiccare and the Plaintiff.

Issues

- [6] There were preliminary issues that this court had to dispense with before Hantover’s motion could be heard.
- [7] Mr. Tewari uploaded a cross-motion in the Hantover Action to Case Center, by which he seeks an interlocutory injunction against Hantover, requesting that the defendants – although Hantover is the sole defendant – be temporarily prohibited from carrying on any business in Canada until final disposition. He also referred to his cross-motion in his responding material to Hantover’s motion before the court.
- [8] Mr. Tewari’s motion was not properly before the court. By Order dated February 2, 2024, R.S.J. Edwards directed that Hantover’s motion to strike “will be heard first as already ordered”. This Order was reviewed by Charney J., the case management judge, on or about February 26, 2024, who directed that “The Plaintiff’s ‘cross-motion’ for an interlocutory injunction will not be scheduled or heard until the Court releases its decision on the Defendant’s motion to strike.” That direction from Justice Charney being unambiguous, this court declined to consider Mr. Tewari’s motion.
- [9] A secondary issue is that Mr. Tewari’s factum referenced material that is not contained in the record filed for this motion, such as an affidavit of Robert Serapiglia. He also uploaded material to Case Center that was not part of the record. Direction was given to the Plaintiff that this court is unable to consider anything from him other than the contents of a motion record that complied with r. 37.10(3) of the *Rules of Civil Procedure*, and those parts of his factum that referenced only the evidence properly before the court.

[10] The issues to be decided by this court are:

1. Whether the Hantover Claim should be stayed because it is a duplicate of an ongoing action, and is frivolous, vexatious and/or an abuse of process;
2. In the alternative, whether the Hantover Claim should be struck in its entirety because it is plain and obvious that there are no reasonable causes of action and/or the pleading is frivolous, vexatious or an abuse of process; and
3. If the Claim is struck, whether leave to amend should be granted and, if so, if such amendment should be conditional on the Plaintiff paying all costs orders owed to Hantover.

The Law – Stay of Proceedings

[11] In this case, Hantover seeks a permanent stay. A permanent stay of proceedings may be granted pursuant to r. 21.01(3) or s. 106 of the *CJA*.

[12] Rule 21.01(3) permits a defendant to move before a judge to have an action stayed or dismissed on the ground that:

....

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

[13] Section 106 of the *CJA* provides:

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[14] These legislative provisions both invoke the doctrine of abuse of process. The doctrine of abuse of process has been recently reviewed by the Court of Appeal in *Cashin Mortgages Inc. (Verico Cashin Mortgages) v. 2511311 Ontario Ltd. (Mortgages Alliance – Main Street Mortgages)*, 2024 ONCA 103, at para. 17:

Both r. 21.01(3)(c) and (d) invoke the doctrine of abuse of process. The doctrine of abuse of process has been applied to prevent a multiplicity of proceedings or the re-litigation of an issue, such as in the commencement of another proceeding that replicates the same

or similar issues and is against some or all the same parties. Various policy grounds are cited in the application of the doctrine of abuse of process: to ensure that no one should be “twice vexed by the same cause”, to “uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice”: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 38 citing Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham: Butterworths, 2000). It is a flexible doctrine that “evokes the ‘public interest in a fair and just trial process and the proper administration of justice’”, and, as a result, “engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute”: *Behn Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 39 and 40, citing *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, per McLachlin J. (dissenting) and *Canam Enterprises Inc. v. Coles*, (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A. (dissenting).

- [15] In *Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181, the Court of Appeal explained that “the doctrine of abuse of process is broader than *res judicata* and issue estoppel and applies to bar litigation that, if it proceeded, would ‘violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice’”: at para. 7, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37.
- [16] It is well-established that a stay may only be granted in the clearest of cases: *Farris v. Staubach Ontario Inc.*, 2004 CarswellOnt 1160 (S.C.), at para. 15. The test for a stay was articulated by Lederman J. to be that the moving party must clearly demonstrate two requirements: (1) that continuing the action would cause substantial prejudice or injustice to the moving party (not merely inconvenience and expense); and (2) the stay would not cause an injustice to the responding party: *Farris*, at para. 15, citing *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221 (Gen. Div.); *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2000] O.J. No. 4582 (S.C.), and *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34 (F.C.T.D) at p. 36.
- [17] The principles applicable to a stay of proceedings under s. 21.01(3)(c) were summarized in *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at paras. 15-16, as follows:

The determination of whether a stay of proceedings should be granted because another proceeding is pending between the same parties involves an exercise of discretion, taking into consideration the circumstances of the particular case. The moving party must demonstrate that the continuation of the action would cause it substantial prejudice or injustice (beyond inconvenience and

expense) because it would be oppressive or vexatious or would otherwise be an abuse of the process of the court, and that the stay would not cause an injustice to the responding party: *Farris v. Staubach Ontario Inc.* (2004), 32 C.C.E.L. (3d) 265 (Ont. S.C.J.), at para. 15. Factors relevant to prejudice include: the likelihood and effect of the two matters proceeding in tandem, the possibility and effect of different results, the potential for double recovery, and the effect of possible delay: *Farris*, at para. 16.

The fact that another proceeding is pending between the same parties in respect of the same subject matter does not automatically lead to an order dismissing or staying the claim. Rather, the order is discretionary and the judge hearing the motion must be satisfied that the stay or dismissal is warranted in the particular circumstances of the case. While a multiplicity of proceedings may constitute an abuse of process which warrants an order staying or dismissing a proceeding (see e.g., *Maynes v. Allen-Vanguard Technologies Inc.*, 2011 ONCA 125, 274 O.A.C. 229, at paras. 36, 46), that is not necessarily always the case. All of the circumstances must be considered to determine whether, in the interests of justice, a stay or dismissal should be granted.

- [18] The same considerations discussed in *Birdseye* apply to the analysis under s. 106 of the *CJA* – whether continuance of the action would work an injustice because it would be oppressive or vexatious or an abuse of the process of the court, and whether the stay would cause injustice to the plaintiff: *Peerenboom v. Peerenboom*, 2020 ONCA 240, 446 D.L.R. (4th) 418, at para. 34; *Yaiguaje et al. v. Chevron Corporation et al.*, 2013 ONCA 758, 118 O.R. (3d) 1, at para. 54, aff'd 2015 SCC 42, [2015] 3 S.C.R. 69, citing *Gruner v. McCormack*, [2000] O.J. No. 789, at para. 30; *Moneris Solutions Corp. v. Groupe Germain Inc.*, 2014 ONSC 6102, at para. 35.
- [19] In the same way, a court acting under the power conferred by s. 106 of the *CJA* must take into account the risk of multiplicity of proceedings, the avoidance of cost and inconvenience and the risk of inconsistent results: *Bruinsma v. Cresswell*, 2013 ONCA 111, 114 O.R. (3d) 452, at para. 76, citing *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*, 2008 ONCA 768, 76 C.L.R. (3d) 1, at para. 4.
- [20] While there is a lack of clarity as to whether there is a different test for a temporary or permanent stay, the cases dealing with a request for a stay tend to consider all of the circumstances, including whether the plaintiff will suffer injustice or other significant prejudice if a stay is granted, whether there is substantial overlap of issues in the two proceedings, whether the two proceedings share the same factual background, and whether unnecessary and costly duplication of judicial and legal resources will be prevented by a stay: *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2010 ONSC 2911, at para. 14, leave to appeal refused 2010 ONSC 4366; *Areva NP GmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 861 (S.C.), at paras. 18-19; *Kaye et al. v. Fogler*

Rubinoff LLP et al., 2019 ONSC 1289, at para. 26; and *Hester v. Canada*, 2008 CarswellOnt 807 (Ont. Div. Ct.), at para. 15.

- [21] Finally, s. 138 of the *CJA* provides that as far as possible, multiplicity of legal proceedings should be avoided.

Relevant Evidence

- [22] Mr. Tewari has advanced multiple actions in the Superior Court and undertaken appeals relating to various matters. Some of these were referenced in *Tewari v. Sekhorn*, 2024 ONCA 123. At paragraph 10 of *Sekhorn*, the Court noted that his statement of claim in that action and his submissions in response to the r. 2.1 notice bear many of the hallmarks of vexatious litigation.
- [23] While the issues in *Sekhorn* were different from those that are before this court, it is worthwhile noting that both the Hantover and the Desiccare Claims contain several of the indicators of vexatious litigation listed in *Sekhorn*, at paragraph 19, as does Mr. Tewari's responding motion record and factum. Particularly, there is "persistent reiteration and amplification", the "written submissions contain much that is not legally relevant to the dispute", there are multiple appendices and supporting documents, including flow charts, graphs and faulty syntax, emphatic tone reinforced by capitalized and bold fonts and the arguments are often difficult to follow.
- [24] There is emphasis, particularly in the factum, on perceived unfairness or ill-treatment. Under the heading "Part II Continued Bad Faith Malicious Acts of Defendants Abusing Court Proceedings and Taking Unnecessary Advantage of Self-Represented Plaintiff", several pages are devoted to reviewing procedural issues that the Plaintiff has interpreted as demonstrating this alleged injustice. The evidence filed by Hantover explaining the procedural history of this case does not support such an interpretation.
- [25] A cost order made in favour of Hantover in this action by Justice Sutherland in the amount of \$5,989 has not been paid. In addition, the affidavit of Kim Poulin lists other cost orders made in courts at this level or by the Court of Appeal against the Plaintiff in other cases, totalling \$325,125.56.
- [26] In his responding memorandum to Hantover's request to have this motion added to the Running Civil Motions List, delivered on January 3, 2024, the Plaintiff stated that he is impecunious and "does not [have] time or resources to be played with the delay tactics of big downtown firm representing defendant, who continue[s] to make millions of dollars at the behest of the Plaintiff's intellectual property and signed agreements with the defendant and opposes such delay-tactics."
- [27] Mr. Graham advised the court, by way of fairness to the Plaintiff as a self-represented litigant, that counsel in the Desiccare Action plan to bring a motion to challenge the jurisdiction of that proceeding.

The Hantover Action

- [28] In his Amended Statement of Claim in the Hantover Action, the Plaintiff alleges that he is a food process chemical engineer whose key career accomplishment is his invention of the “Zero-OxTech” processing system, designed to extend the shelf life of meat products. He further alleges that he entered into confidentiality and manufacturing agreements with Desiccare Inc. (“Desiccare”) to manufacture a component of the Zero-OxTech technology, referred to as an “oxygen scavenger”.
- [29] In the Hantover Action the Plaintiff seeks a declaration at paragraph 1(a) of the Amended Claim that his Zero-OxTech process and Zero-OxTech oxygen scavengers have been sold by Hantover illegally in Canada and globally without entering into a commercial agreement with the Plaintiff, and that Hantover has illegally exploited the Plaintiff’s intellectual property including trade secrets for unjust business enrichment.
- [30] The Plaintiff seeks a total of \$8.5M for the following: breach of contract, trade-secret violation, fraudulent inducement, fraud, breach of fiduciary duty and “anti-trust/anti-competition”, as well as punitive damages in an unspecified amount and a permanent injunction to restrain Hantover from selling and marketing oxygen scavengers in case-ready meat operations similar to his Zero-OxTech process.
- [31] The Plaintiff alleges in the Hantover Claim that two non-compete/non-disclosure agreements and a manufacturing agreement were entered into after he approached Desiccare to manufacture the Zero-OxTech scavenger (the “Desiccare Agreements”). He disclosed the specifications of the oxygen scavenger to Desiccare, and they began to manufacture the oxygen scavengers in 2003. In the ensuing years, he learned that Desiccare was manufacturing an oxygen scavenger for the Plaintiff’s competitors, without using the Plaintiff’s logo and without his permission.
- [32] Contrary to the Plaintiff’s contention that the Desiccare Action distinguishes itself from the Hantover Action by its focus on the infringement of the Plaintiff’s intellectual property, patents and trademarks, the Hantover Claim contains the heading “Trade Secret Violation” and the following, at paragraphs 22 to 26:

22. The Plaintiff adopts and incorporates paragraphs 5 through 19. By making the Agreement with the Plaintiff, the Defendant, HANTOVER CANADA INC., agreed that the Confidential and Proprietary Information the Plaintiff provided to the Defendant were trade secrets. The Confidential and Proprietary Information disclosed pursuant to the Agreement were also trade secrets. Those trade secrets consisted of formulas, patterns, oxygen absorption rates, initial oxygen concentration, mother-bag concepts, self-activated oxygen scavengers, vendor information, or compilations of information as described in this Complaint, used in one’s business that gives it an opportunity to obtain an advantage over competitors who do not know or use it.

23. The trade secrets and Confidential and Proprietary Information disclosed to the Defendant, HANTOVER was secret, not generally known or readily available by independent investigation. The trade secrets and Confidential and Proprietary Information disclosed to the Defendant, HANTOVER CANADA INC., gave them a competitive advantage they would not otherwise have.

24. The Plaintiff took reasonable measures to guard the secrecy of the information including requiring the defendant, HANTOVER CANADA INC., distributor of Desiccare to be bound by the Agreement being supplier of Desiccare products, prior to providing trade secrets and Confidential and Proprietary Information and in other material respects.

25. The Defendant, HANTOVER CANADA INC., acquired the Plaintiff's trade secrets by an improper means. The Defendant, HANTOVER CANADA INC., also began illegally using the trade secrets some time after 2004 and illegally used them continuously in commerce since then to seek a profit in their USA and CANADA operations.

26. As a result of Defendant [HANTOVER CANADA INC.]'s conduct, the Plaintiff seeks the full range of damages permitted in trade secret cases in order to compensate the Plaintiff for the Defendant [HANTOVER CANADA INC.]'s illegal acquisition and use of the Plaintiff's trade secrets, in the fullest and most flexible manner permitted by law, including the following: the Plaintiff's lost profits, the Defendant's disgorgement of profits, benefits or advantages received from their use of the Plaintiff's trade-secrets, all amounts by which the Defendant has unjustly enriched themselves, a reasonable royalty or licensing fee, the cost of developing the Plaintiff's trade-secrets and Confidential and Proprietary Information and exemplary damages because the Defendant's conduct is fraudulent, malicious and grossly negligent. The Plaintiff seeks \$1,000,000.00 from the defendant for the trade secret violation.

[33] Throughout the Amended Claim, the Plaintiff makes reference to the "defendant" (although sometimes refers to "defendants") having used and benefitted from the Plaintiff's trade secrets and confidential and proprietary information. For example, at paragraph 15 of the Amended Claim, the Plaintiff pleads that Hantover "is using the Plaintiff's Confidential and Proprietary Information", "which is the Intellectual Property of the Plaintiff."

[34] Each of the causes of action are premised on Hantover's misappropriation and/or use and/or disclosure of confidential and proprietary information. At paragraph 36, the Plaintiff pleads

that the injunction is sought, in part, due to Hantover's "continued misuse and misappropriation of trade secrets and Confidential and Proprietary Information".

Desiccare Action

- [35] The Desiccare Action involves eleven defendants, of which Hantover is one. Hantover is listed among the subset of defendants that the Plaintiff has grouped together and identified as "Defendants-1" (sometimes referred to as "Defendant-1") in the Statement of Claim.
- [36] As against Defendants-1, the Plaintiff seeks an order for a "permanent injunction for infringing the Plaintiff's proprietary intellectual property".
- [37] In the Desiccare Action, the Plaintiff asserts all of the same causes of action against Defendants-1 as he does in the Hantover Action except for breach of fiduciary duty and trade secret violation. In the Desiccare Action he seeks a total of \$37M in damages. He also seeks an unspecified amount in punitive damages.
- [38] In the Desiccare Action, after outlining his educational background and work history just as he does in the Hantover Action, the Plaintiff similarly references and explains at length how he developed the Zero-OxTech processing system and its various components and advantages. Multiple pages of diagrams and charts are included in both Claims to explain the process. The diagrams and charts are identical in each Claim.
- [39] The Plaintiff explains, in much the same wording as he did in the Hantover Action, how he became involved with Desiccare, and Desiccare's relationship to Hantover. He further alleges, just as in the Hantover action, that the Desiccare Agreements were signed. Just as he did in the Claim in the Hantover Action, portions of the agreements are excerpted in the Claim in the Desiccare Action.
- [40] In both Claims, the Plaintiff references the "disclosure" made at a cross-examination in another action in June 2022, where he learned that Hantover is a supplier of Desiccare products in Ontario, similar to the Plaintiff's Zero-OxTech oxygen scavengers (Hantover Action, paragraph 4; Desiccare Action, paragraph 26). The date of this discovery is important, as there are no other facts pled that indicate, in either claim, that the Plaintiff was aware of Hantover prior to that date.
- [41] Contrary to the Plaintiff's assertion that the Desiccare Action focuses on his intellectual property claims, rather than the breach of the Desiccare Agreements, the following paragraphs of the two Claims show a marked repetition between the contract claims in each action.
- [42] The following is found in the Hantover Claim:
20. Breach of Contract: Plaintiff adopts and incorporates paragraphs 4 through 19. The Defendant, HANTOVER CANADA INC., breached the Agreement by misappropriating, using and continue [continuing] to use Confidential and Proprietary

Information without entering into an agreement with the Plaintiff. The Defendant, HANTOVER CANADA INC., breached the Agreement by disclosing Confidential and Proprietary Information to third parties, who did not sign the Agreement or otherwise consent to its terms. The Defendant, HANTOVER CANADA INC., failed to take reasonable and appropriate steps to safeguard Confidential and Proprietary Information from theft, loss, or disclosure to others. The Defendant, HANTOVER CANADA INC., further breached the Agreement by failing to notify the Plaintiff of the loss or unauthorized use or disclosure of Confidential and Proprietary Information.

21. As a result of the Defendant [HANTOVER CANADA INC.]' breaches, the Plaintiff have [has] suffered actual damages in excess of this court's jurisdictional minimum and seeks the recovery of its actual damages in the form of out-of-pocket expenses, lost profits, loss in value of the business, lost business opportunities, and other damages permitted by law. The Plaintiff seeks \$1,000,000.00 from the defendants for the Breach of Contract.

[43] The following is found in the Desiccate Claim:

30. Breach of MANUFACTURING LICENSING Contract: Plaintiff adopts and incorporates paragraphs 14 through 29. The Defendant-1 (names omitted), breached the Manufacturing/licensing Agreement by misappropriating, using and continue [continuing] to BREACH Plaintiff's confidential manufacturing information without entering into an agreement with the Plaintiff for their unjust business enrichment.

31. As a result of the Defendant-1 breaches, the Plaintiff have [has] suffered actual damages in excess of this court's jurisdictional minimum and seeks the recovery of its actual damages in the form of out-of-pocket expenses, lost profits, loss in value of the business, lost business opportunities, and other damages permitted by law. The Plaintiff seeks \$15,000,000.00 from the defendants for the Breach of MANUFACTURING Contract.

[44] Having reviewed both the Hantover and the Desiccate Claims in detail, I agree with the summary of the two actions found at paragraph 44 of Hantover's factum, as it concisely distills the subject matter of both actions:

The Duplicated Actions are based on the exact same factual matrix, namely that the Plaintiff developed the Zero-OxTech Technology, the Plaintiff approached Desiccate to manufacture the Zero-OxTech oxygen scavenger and agreements were entered into

between the Plaintiff and/or Tewari De-Ox Systems Inc. and Desiccare, the Plaintiff disclosed certain information relating to the Zero-OxTech Technology to Desiccare who began manufacturing Zero-OxTech oxygen scavengers, Desiccare began manufacturing No-Ox oxygen scavengers that are substantially similar to Zero-OxTech oxygen scavengers and conspiring with competitors of the Plaintiff, and that Hantover is a distributor of Desiccare's No-Ox oxygen scavengers.

Analysis of the Stay Request

- [45] I am satisfied that there is no appreciable difference between the claims or allegations made against Hantover in the Hantover Action as compared to the Desiccare Action. The factual background is identical to each Claim, and the issues are duplicated.
- [46] The Parties will have to produce the same documents in discovery in the Hantover and Desiccare Actions, and the examinations for discovery will necessarily have to cover the same ground. At trial, the parties to each action will have to present largely the same factual evidence. This is unnecessarily costly and highly prejudicial to Hantover, who unlike the Plaintiff, has retained counsel in both actions.
- [47] As discussed earlier while comparing the Actions, the Plaintiff pleads almost identical causes of action —claiming breach of contract, fraudulent inducement, fraud, and anti-trust/anti-competitive conduct in both proceedings. Although the Plaintiff pleads a “trade secret violation” and “breach of fiduciary duty” in the Hantover Action, the claims in each proceeding arise out of the same set of facts.
- [48] A court deciding either matter will be forced to decide the same questions of fact and law, including but not limited to: (i) whether any of the Desiccare Agreements relied on by the Plaintiff are authentic; (ii) what, if any, information was disclosed to Desiccare, by whom and under what circumstances; (iii) what, if any, information has been misused by Desiccare and in what circumstances; (iv) what, if any, proprietary rights the Plaintiff has in the Zero-OxTech process and oxygen scavengers; (v) whether the Plaintiff has any patents pending in the United States or Canada (vi) whether any of the Desiccare Agreements referenced by the Plaintiff in the claims are binding on Hantover and, if so, whether any of those Agreements have been breached by Hantover; and (vii) if the Plaintiff makes out a cause of action, the measure of his general and punitive damages, and whether he is entitled to an injunction. Requiring two judges to hear and decide these cases is a waste of limited judicial resources and compromises the administration of justice.
- [49] The duplicate claims also present a risk of inconsistent findings. The Plaintiff has demonstrated an impulse to appeal whenever possible. The goal of finality, one of the underlying principles of the abuse of process doctrine, is further compromised where decisions will emanate from two separate actions.

- [50] The Plaintiff has presented no viable explanation for why he would commence the Desiccare Action in the year after he had amended his Claim in the Hantover Action. His explanation that the claims deal with different subject matter, being his primary defence to the motion, does not hold up under scrutiny. The basis for the claims against Hantover in each action is the same.
- [51] Staying this proceeding will therefore not cause any prejudice to the Plaintiff, who can presently carry on his claims against Hantover in the Desiccare Action. He may also seek leave to amend his pleading in the Desiccare Action to plead breach of fiduciary duty and trade secret violation if he chooses to do so.
- [52] The Hantover Action is an abuse of process and should be stayed. It is manifestly unfair to Hantover to have to answer to repetitious claims, and violates the integrity of the legal system.
- [53] I have considered, however, the spectre of a motion to dismiss the Desiccare Action for want of jurisdiction. If the Hantover Action is permanently stayed, and the Desiccare Action subsequently dismissed or stayed, the Plaintiff's ability to litigate these claims against Hantover will be at an end. I have considered whether, because of these circumstances, it would be in the interests of justice to grant only a temporary stay. I have concluded that it would not be. This is because the Hantover Claim should also be struck pursuant to r. 21.01(1)(b) and r. 25.11, as it is plain and obvious that it contains no reasonable causes of action and is frivolous, vexatious and an abuse of process.

The Law – Striking the Claim

- [54] Pursuant to r. 21.01(1)(b), a judge may strike out a pleading on the ground that it discloses no reasonable cause of action. No evidence is admissible on the motion, but the court may consider documents relied on and referred to in a pleading: *McDowell and Aversa v. Fortress Real Capital Inc.*, 2017 ONSC 4791, at paras. 46-47, rev'd on other grounds 2019 ONCA 71.
- [55] The test remains as articulated by the Supreme Court of Canada in the leading case of *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. A motion to strike ought to be granted where it is "plain and obvious" that the pleading discloses no reasonable cause of action. The claim must be certain to fail; if there is a chance that the plaintiff can succeed, the case should be permitted to go ahead. Further, neither the length nor complexity of the issues nor the novelty of the cause of action are alone reasons to strike a claim: *Hunt*, at p. 980.
- [56] In *Hunter v. Bravener*, 2003 CanLII 28855 (Ont. C.A.), the Court of Appeal provided guidance on the circumstances in which the "plain and obvious" test will be met: 1) where the plaintiff pleads allegations that do not give rise to a recognized cause of action; 2) where the plaintiff fails to plead a necessary element of a recognized cause of action; or 3) the allegations in the pleading are simply conjecture, assumptions or speculation unsupported by material facts: at paras. 3-5.

- [57] The court may also strike a pleading on the ground that it is frivolous, vexatious, or is an abuse of process under r. 25.11. The same “plain and obvious” test that is used for striking a pleading for the failure to show a reasonable cause of action is used to determine whether a pleading is frivolous or an abuse of process of the court: *Del Giudice v. Thompson*, 2021 ONSC 5379, at para. 56. A claim may be found to be frivolous, vexatious or an abuse of process when it asserts untenable pleas or contains insufficient material facts to support the allegations made: *Del Giudice*, at para. 57.

Analysis of the Causes of Action

- [58] In the Amended Claim, it is unclear whether the Plaintiff is focusing on all of the Desiccare Agreements, as he does refer to all of the agreements in paragraph 4. However, he has attached two such alleged documents, titled “Confidentiality and Nondisclosure Agreement” and the other titled “Agreement”, as Exhibit 2 to his Amended Claim.
- [59] For clarity, the following analysis refers to these two documents, but is equally applicable to the collective Desiccare Agreements. For consistency, I will continue to refer to them as the Desiccare Agreements.

Breach of Contract

- [60] Reading the Amended Claim in the Hantover Action in the broadest, least-critical manner, the basis for the claim appears to be that the Plaintiff alleges that Hantover is bound by the non-disclosure, non-competition and manufacturing agreements made between the Plaintiff and Desiccare, on the basis that Hantover is a distributor of products manufactured by Desiccare, and/or is an “associate” of Desiccare.
- [61] There is no allegation in the pleading that there was ever an agreement signed between Hantover and the Plaintiff, and several paragraphs of the Claim specifically note that no agreement was entered into between the Plaintiff and Hantover. Yet, the Plaintiff asserts that Hantover has breached the Desiccare Agreements because the terms of the contracts extend to and bind Hantover to its terms.
- [62] A similar argument had already been tested by the Plaintiff in the case of *Tewari v. Hillyer*, 2022 ONSC 6274 and soundly rejected by Verner J. In *Hillyer*, the Plaintiff attempted to sue another supplier, James Dawson Enterprises, who was alleged to be a supplier for Desiccare in Canada. The Claim alleged that a non-compete agreement that was signed between Desiccare and the Plaintiff had been infringed by James Dawson Enterprises through its supply of the products, and that James Dawson Enterprises benefitted financially from doing so. At paragraph 41, Verner J. concluded that that defendant could not have breached any contract, as there was no suggestion that Desiccare had the authority to bind that defendant when it made the contract. Verner J. also granted leave to the Plaintiff to amend his pleading to claim unjust enrichment, a cause of action that could be claimed against that defendant.
- [63] *Hillyer* was released on November 4, 2022. Despite that ruling, the Plaintiff commenced this claim against Hantover ten days later.

- [64] With some exceptions, privity of contract acts to limit contractual liability strictly to the parties to the contract: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 21. While *Fraser River* outlines those exceptions, none apply to the Plaintiff's case.
- [65] The Plaintiff has not pled any relationship between Hantover and Desiccare that would permit one of the principled exceptions to exist, nor has the Plaintiff pled any facts upon which to find that Desiccare had the authority to bind Hantover. Hantover is simply not bound by the Desiccare Agreements.
- [66] As a non-party to the Desiccare Agreements, it is plain and obvious that their terms do not bind Hantover, and that an action for breach of contract cannot succeed.

Trade Secret Violation

- [67] The Plaintiff's action for trade secret violation is premised on his belief that Hantover is bound by the Desiccare Agreements. At paragraph 22 of the Amended Claim, he alleges that "by making the Agreement with the Plaintiff, the Defendant, HANTOVER CANADA INC., agreed that the Confidential and Proprietary Information the Plaintiff provided to the Defendant were trade secrets. The Confidential and Proprietary Information disclosed pursuant to the Agreement were also trade secrets."
- [68] As previously noted, it is faulty to argue that: (1) Hantover and the Plaintiff made an agreement, or (2) that Hantover is bound by the terms of the Desiccare Agreements.
- [69] Throughout the Amended Claim, it is obvious that the Plaintiff conflates Desiccare with Hantover, something that was also noted by Verner J. to have occurred in the claim that she examined, which was admitted by the Plaintiff during argument before her: *Hillyer*, at para. 39.
- [70] There are no material facts pled in the Amended Claim upon which this court can conclude that any confidential information was conveyed by the Plaintiff to Hantover or that any such information was communicated in confidence to Hantover by Desiccare or anyone else. While the Claim makes bald allegations at paragraphs 22 to 26 that trade secrets and confidential and proprietary information was disclosed to Hantover, it does not say by whom, when, or under what circumstances. The allegations are unsupported by material facts.
- [71] Most significantly, there are no facts pled from which the court can infer that the Plaintiff and Hantover have had any interaction prior to this litigation through which confidential information could have been communicated, and the Plaintiff did not even know that Hantover was a distributor until June 2022. The Amended Claim alleges that Hantover's relationship to Desiccare is distributor only.
- [72] The Plaintiff is again attempting to extend the reach of the Desiccare Agreements to Hantover to support this cause of action yet does not even plead that Hantover received the Desiccare Agreements or was aware of their existence.

- [73] Trade secrets are enforced through the breach of confidence cause of action. Breach of confidence consists of three elements: (i) that the information conveyed was confidential, (ii) that it was communicated in confidence, and (iii) that it was misused by the party to whom it was communicated: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 635.
- [74] Reading the entire Amended Claim as broadly and generously as possible, it is plain and obvious that this cause of action cannot succeed, as the Plaintiff has no facts upon which a Court could conclude that confidential information was conveyed to Hantover.

Fraudulent Inducement

- [75] While “fraudulent inducement” is not a recognized cause of action, the Plaintiff seems to be referring to fraudulent misrepresentation. The basis for this cause of action is explained primarily in paragraph 27 of the Claim. The Plaintiff pleads that Hantover owed the Plaintiff an independent legal duty not to procure the agreement by fraud. He goes on to state that Hantover “entered into the Agreement” without any intent to comply with its terms.
- [76] Reading the entire Amended Claim as broadly and generously as possible, it is plain and obvious that this cause of action cannot succeed. There are no material facts to support a finding that Hantover procured or entered into any agreements with the Plaintiff.

Fraud

- [77] The tort of civil fraud has the following four elements: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant; (3) the false representation caused the plaintiff to act; and (4) the plaintiff’s actions resulted in a loss: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 87. The Plaintiff does not plead these constituent elements.
- [78] A pleading that alleges fraud or misrepresentation must contain full particulars: r. 25.01. In addition to being deficient in this respect, the pleading again makes bald and conclusory statements without pleading the four necessary elements to establish fraud.
- [79] The Plaintiff outlines the basis of the fraud claim at paragraph 29 of his Amended Claim. He alleges that Hantover made false representations that it intended to enter into a separate commercial agreement with the Plaintiff, with no particulars. Pleading again that Hantover is bound by the Desiccate Agreements, it is alleged that Hantover failed to disclose to the Plaintiff that it intended to use the Plaintiff’s confidential and proprietary information for commercial purposes, which was Hantover’s prime motive. Further, it is alleged that Hantover had a duty to disclose this intent. These “various misrepresentations and failures to disclose” are said to constitute fraud.
- [80] Again, there are no material facts pleaded upon which it can be determined that Hantover and the Plaintiff have had any conversations or interactions that would make it plausible

for the Plaintiff to succeed to establish that misrepresentations were made to him by Hantover, or that Hantover concealed information from him.

- [81] Reading the entire Amended Claim as broadly and generously as possible, it is plain and obvious that the constituent elements of fraud cannot be established, and so this cause of action cannot succeed.

Breach of Fiduciary Duty

- [82] The allegations relating to this claim are found specifically at paragraph 31 of the Claim. The bare allegations, once again, are that Hantover is bound by the Desiccare Agreements as Desiccare's "distributor/supplier/associate" and that Hantover entered into a confidential and fiduciary relationship of trust and confidence with the Plaintiff when Desiccare signed the Desiccare Agreements. It is alleged that the fiduciary duty was breached when Hantover misused and disclosed the confidential and proprietary information that the Plaintiff disclosed under the protections of those Agreements.
- [83] The cause of action as pled is once again premised on the Desiccare Agreements, to which Hantover is not a party and by which it is therefore not bound.
- [84] The three elements by which a fiduciary relationship may be established outside of the recognized categories were identified in dissenting reasons by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 136, adopted in *Lac Minerals v. International Corona Resources*, [1989] 2 S.C.R. 574 and confirmed in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 30-34. These three elements are:
- (i) the alleged fiduciary must give an undertaking of responsibility to act in the best interests of a beneficiary;
 - (ii) a defined person or class of persons who are vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them; and
 - (iii) the alleged fiduciary's power over the claimant must affect the legal or substantial practical interests of the beneficiary.
- [85] There are no facts pleaded that demonstrate that Hantover gave an undertaking to the Plaintiff, the first step in establishing a fiduciary relationship. Relying on the Desiccare Agreements to establish a fiduciary relationship, when Hantover is not a party to those Agreements, is doomed to fail.
- [86] Reading the entire Amended Claim as broadly and generously as possible, it is plain and obvious that the constituent elements of fraud cannot be established, and so this cause of action cannot succeed.

Anti-Trust/Anti-Competitiveness

[87] The allegations relating to this cause of action as framed are found at paragraph 33 of the Claim. While there is no recognized tort of anti-trust/anti-competitiveness, on an expansive reading of the Amended Claim, the Plaintiff seems to be advancing the tort of unlawful conduct conspiracy. He pleads that Hantover:

...did not leave any stone unturned to prevent the Plaintiff from entering the market by conspiring with the Plaintiff's direct competition, PACTIV, and Plaintiff's potential clients. The Defendant...used their market and financial influence to prevent the Plaintiff from entering the market and used/using the Plaintiff's Zero-OxTech oxygen scavenger's specifications to manufacture the similar oxygen scavengers for the Plaintiff's potential clients and its associates and created a monopoly for themselves. Thus, the Defendant made it prohibited for the Plaintiff to penetrate the market in USA and as well as in CANADA and globally and created monopoly for themselves.

[88] At paragraph 34, he characterizes these as Hantover's anti-trust and anti-competitive activities.

[89] The tort of unlawful conduct conspiracy has five essential elements, as explained in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 26:

- i) The alleged conspirators must act in combination, that is, in concert, by agreement or with a common design;
- ii) their conduct is unlawful;
- iii) their conduct is directed towards the plaintiff;
- iv) the alleged conspirators should know that, in the circumstances, injury to the plaintiff is likely to result; and
- v) their conduct causes injury to the plaintiff.

[90] In *Agribrands*, the court outlined the requirements for unlawful conduct for the purpose of the tort. At paragraph 28, it noted that it must be unlawful conduct by each conspirator, and that there is "no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful or, alternatively, if he or she is the only one of those acting in concert to act unlawfully."

[91] Further, to constitute "unlawful conduct" for the purpose of this tort, the conduct must be wrong in law, thus actionable: at para. 33.

- [92] While the plaintiff has alleged the first element, he has not sued PACTIV as an alleged co-conspirator (and has only vaguely referred to the Plaintiff's potential clients as alleged co-conspirators), and he has not pled any material facts that could establish that Hantover's conduct was unlawful. Further, the Plaintiff has certainly not pled any facts from which a court could conclude that PACTIV engaged in unlawful conduct in conspiracy with Hantover.
- [93] If Hantover "used their market and financial influence to prevent the Plaintiff from entering the market", this is not sufficient to establish an actionable wrong. Bald assertions that Hantover conspired with PACTIV or others to do certain things intended to injure the Plaintiff do not meet the required standard for a plea of unlawful conduct conspiracy, or conspiracy. Nor is there a contractual relationship upon which the impugned conduct could be based.
- [94] Again, the Plaintiff conflates Desiccare and Hantover by alleging, in paragraph 33, that Hantover was or is manufacturing the oxygen scavengers similar to the Plaintiff's Zero-OxTech oxygen scavenger's specifications in which to create this monopoly and cause economic injury to the Plaintiff. This is the only place in the pleading in which Hantover is alleged to be a manufacturer, conflicting with the balance of the Amended Claim in which Hantover is alleged to be a distributor or supplier. There is no basis set out in the Claim to attribute an actionable wrong to Hantover for its distribution activities.

Leave to Amend

- [95] The plaintiff has referenced leave to amend his Claim under Part VI of his factum but has not specified how he would propose to amend.
- [96] While granting leave to amend a pleading is a discretionary remedy, it is recognized that leave is usually denied only in the clearest cases, when it is plain and obvious that no tenable cause of action is possible on the facts as alleged: *RH20 North America Inc. v. Bergmann*, 2024 ONCA 445, at para. 25; *Mitchell v. Lewis*, 2016 ONCA 903, 134 O.R. (3d) 524, at para. 21.
- [97] However, where a plaintiff seeks leave to amend its claim to make new allegations, but it is clear that he does not have knowledge of the material facts to support such allegations, leave to amend may be refused: *Miguna v. Ontario (Attorney General)* (2005), 262 D.L.R. (4th) 222 (Ont. C.A.), at paras. 18, 22, cited in *RWDI Air Inc. v. N-SCI Technologies Inc.*, 2015 ONCA 817, at para. 14; see also *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 75.
- [98] The Plaintiff has attempted in this Amended Claim to plead six distinct causes of action against Hantover, none of which is tenable on the facts as alleged. In asserting each of them, the Plaintiff attempts to ground them in the Desiccare Agreements. However, it is plain and obvious that there is no relationship between the Plaintiff and Hantover that could ever make Hantover liable for the claims asserted. Giving the Plaintiff an opportunity to

amend the Claim again will not, I easily conclude, ever get it to the point where a viable claim against Hantover will exist.

- [99] Also, the Plaintiff has already amended the Claim once. Even when given the “prompt” by Justice Verner that unjust enrichment might be a cause of action open to him against a distributor, but no others, he chose to commence the Hantover Action seeking damages for everything but unjust enrichment. He seeks only a declaration that the Defendant has illegally exploited the Plaintiff’s intellectual property and its trade secrets for “unjust business enrichment”. Where the Plaintiff references unjust enrichment in the Claim, such references are intertwined with the other causes of action that are not viable, for the reasons previously explained. The only conclusion that may be drawn is that he does not have knowledge of the material facts that could support an unjust enrichment claim. It strikes me as being singularly unfair to Hantover to permit an amendment to permit an entirely new cause of action when the Plaintiff has had since November 2022 to properly plead unjust enrichment.
- [100] Further, having known since June 2022 that Hantover is a distributor, an unjust enrichment claim would now likely be statute-barred. Leave to amend is to be refused if the proposed amendment raises statute-barred causes of action: *Taylor v. Tamboril Cigar Co.*, [2005] O.J. No. 4182 (C.A.), at para. 2.

Order

- [101] This court orders that the Claim shall be permanently stayed.

Costs

- [102] Costs submissions may be made in writing, limited to no more than five double-spaced pages, not including a Bill of Costs. All authorities relied on are to be hyperlinked in the document or uploaded to Case Center with a tabbed (i.e., hyperlinked) index.
- [103] The Defendant’s submissions are due by October 14, 2024, and the Plaintiff’s by October 22, 2024. Any reply, if necessary, by October 25, 2024.
- [104] The submissions are to be filed with the court, with a copy emailed to my judicial assistant at BarrieSCJJudAssistants@ontario.ca, in addition to being uploaded to Case Center.

Madam Justice S.E. Healey

Released: October 2, 2024