

Federal Court



Cour fédérale

Date: 20180830

Docket: T-1107-17

Citation: 2018 FC 876

Vancouver, British Columbia, August 30, 2018

PRESENT: Madam Prothonotary Kathleen M. Ring

BETWEEN:

LIVING SKY WATER SOLUTIONS CORP.

Plaintiff

and

**ICF PTY LTD.,
SONEERA WATER, LLC,
SONEERA WATER CANADA LTD.,
AND DARRELL BEHAN**

Defendants

ORDER AND REASONS

I. Overview

[1] The Plaintiff, Living Sky Water Solutions Corp., is in the business of providing wastewater treatment systems. It provides the “Living Sky System” to its customers, including the Town of Kerrobert, Saskatchewan. The Defendants, Soneera Water, LLC and Soneera Water Canada Ltd. (collectively “Soneera”) are in the business of manufacturing and supplying water

treatment systems. The Defendant, Darrell Behan, is the Chief Executive Officer of Soneera. Soneera is the exclusive licensee in North America of Canada patent No. 2,834,902 [the “902 Patent”] which relates to a continuous flow electro flocculation water treatment system. Patent 902 is owned by the Defendant, ICF Pty Ltd.

[2] In the underlying action, the Plaintiff seeks a declaration that the Living Sky System does not infringe any claim of the 902 Patent. It also seeks a declaration that Soneera and Behan made false and misleading statements tending to discredit the business, goods and services offered by the Plaintiff and knowingly or recklessly made false or misleading representations to the public, contrary to sections 7(a) and 7(d) of the *Trade-marks Act* and section 52 of the *Competition Act*.

[3] The Defendants brought the present motion for an order pursuant to Rule 221(1)(a) and (c) of the *Federal Courts Rules* dismissing all the personal claims against Behan in his personal capacity, all claims under section 7(d) of the *Trade-marks Act* against all the Defendants, and all claims against the Defendants under section 52 of the *Competition Act*. They also seek an order striking portions of paragraphs 21, 24, 25, 26 and 27 of the Statement of Claim, and portions of the Plaintiff’s response dated October 4, 2017 to the Defendants’ demand for particulars. Alternatively, the Defendants seek an Order for further and better particulars as set out in Questions 1 to 20 in the Demand for Particulars dated September 19, 2017. They also seek an order pursuant to Rule 206 of the *Federal Courts Rules* that the Plaintiff serve a copy of the contract between the Plaintiff and the Town of Kerrobert described in paragraph 23 of the Statement of Claim [the Claim].

[4] The issues to be decided are as follows:

- (a) Has the Plaintiff pled sufficient material facts to disclose a reasonable cause of action under subsections 7(a) or (d) of the *Trade-marks Act*, or sections 36 and 52 of the *Competition Act*?
- (b) Has the Plaintiff pled sufficient material facts to disclose a reasonable cause of action against Behan in his personal capacity?
- (c) If any of the pleadings are struck, should the Plaintiff be granted leave to amend?
- (d) If the pleadings are not struck, do the Defendants require one or more of the particulars requested in order to plead in response to the Claim?
- (e) Are the Defendants entitled to production of the contract between the Plaintiff and the Town of Kerrobert pursuant to Rule 206 of the *Federal Courts Rules*?

[5] Having reviewed the motion records filed on behalf of the parties, and considered the oral submissions of counsel for the parties, and for the reasons that follow, I conclude that the Plaintiff's claims under section 7(d) of the *Trade-marks Act* and section 52 of the *Competition Act*, as alleged in paragraph 1(b) of the Claim, must be struck out as failing to disclose a reasonable cause of action, without leave to amend. All references to the term "representations" in the Claim must also be struck out, without leave to amend. The Defendants' motion for particulars is granted, in part, and the Plaintiff must provide particulars of the open-ended allegations identified in paragraphs 21 and 24 of the Claim. The Plaintiff must also serve a copy of the contract between the Plaintiff and the Town of Kerrobert described in paragraph 23 of the Statement of Claim within fourteen (14) days of the date of this Order.

II. Principles Applicable on a Motion to Strike

[6] The Court may strike a claim under Rule 221(1)(a) of the *Federal Courts Rules* [Rules] if it discloses no reasonable cause of action. The stringent test for striking out a claim on that basis is whether, assuming that the facts pleaded can be proved, it is “plain and obvious” that the claim discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success: *Hunt v Carey Inc* [1990] 2 SCR 959 at para 36; *Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [2011] 3 SCR 45.

[7] On a motion to strike a pleading on the grounds that it does not disclose a reasonable cause of action, those allegations that are capable of being proved must be taken as true: *Hunt v Carey Canada Inc* [1990] 2 SCR 959. This rule does not apply, however, to allegations based on assumptions and speculation: *Operation Dismantle Inc v The Queen* (1985), 18 DLR (4th) 481 (SCC) at 486-487 and 490-491.

[8] A statement of claim may be struck out as disclosing no reasonable cause of action where bare conclusions are set out without a supporting factual basis. No cause of action can exist where the plaintiff has not pled the requisite material facts which are capable of giving rise to a cause of action: *Amos v Canada*, 2017 FCA 213 at para 36; *Keremelevski v Ukrainian Orthodox Church of St Mary*, 2018 FC 406 at para 61.

[9] Moreover, a statement of claim may be struck out under Rule 221(1)(c) on the ground that it is fundamentally vexatious when it does not sufficiently reveal the facts on which a plaintiff bases his cause of action to make it possible for the defendant to answer it or for the

Court to regulate the proceeding: *Murray v Canada*, [1978] FCJ No 406 at para 10; *Kisikawpimootewin v Canada*, 2004 FC 1426 at paras 8-9; *Ceminchuk* at para 10.

[10] Rule 221(2) of the *Rules* provides that no evidence shall be heard on a motion to strike a pleading on the basis that it discloses no reasonable cause of action. Instead, the Court is required to limit its examination to the matters set out in the pleadings. In that regard, the Court may generally consider not only the formal pleadings (e.g. the Statement of Claim), but also the particulars provided by a party in response to a demand for particulars, since particulars furnished in an action form part of the pleadings: *Bosum v Canada*, 2004 FC 842 at para 7. However, if the particulars clearly include evidence by which allegations of fact are to be proved, Rule 221(2) prohibits the Court from considering such evidence.

[11] Accordingly, in considering the Defendants' motion under Rule 221(1)(a), I have disregarded the letter dated June 26, 2017 which forms part of the Plaintiff's Response to the Defendants' Demand for Particulars and is appended as Exhibit "B" to the Affidavit of Nelly Lee filed by the Defendants in support of their motion.

III. Claim under Section 7(a) of the Trade-marks Act

[12] On this motion, the Defendants do not seek an order striking out the Plaintiff's section 7(a) claim as a whole as disclosing no reasonable cause of action. Importantly, they do not seek to strike out paragraph 21(a) of the Claim (alleging that the Defendants made statements that the design of the Living Sky System has breached the 902 Patent), paragraph 22 (alleging that the statements are false and misleading and made to discredit the business, goods and

services offered by the Plaintiff), or paragraph 23 (alleging that Kerrobert refused to make a payment to the Plaintiff as a result of receiving the statements).

[13] Instead, the Defendants say that specific factual allegations in the Claim (i.e. portions of paragraph 21, paragraphs 24, 25, 26 and 27, and portions of the Plaintiff's response to the Defendants' demand for particulars) should be struck out because they do not support a reasonable claim under section 7(a) of the *Trade-marks Act*, or they are open-ended and vague, and they do not plead sufficient material facts for the Defendants to know the who, when, where, how and what gave rise to its liability.

[14] The Plaintiff argues that the factual allegations in subparagraphs 21(b) to (i) of the Claim are not limited to the section 7(a) claim, and therefore, to strike them from the Claim, the Court must conclude that they are immaterial to all of the pleaded causes of action. The Plaintiff says that the factual allegations in these subparagraphs, and in paragraph 22, are relevant to the section 7(a) claim. Even if the allegations are surplus, the Plaintiff contends that they should not be struck out as the Defendants have not shown that they are prejudicial.

[15] The requirements for the statutory cause of action created under sections 7(a) of the *Trade-marks Act* are: (a) a false and misleading statement; (b) tending to discredit the business, wares and services of a competitor; and (c) resulting damage: *S & S Industries Inc v Rowell*, [1966] SCR 419 at para 10, *Canadian Copyright Licensing Agency v Business Depot Ltd*, 2008 FC 737 at para 27.

[16] The Defendants advanced no arguments to establish why paragraphs 25, 26 and 27 of the Claim should be struck out, and I am not persuaded by the Defendants' arguments that the

impugned portions of paragraph 21 or paragraph 24 should be struck out. Subparagraphs 21(b) to (i) of the Claim, read in conjunction with paragraph 22, contain factual allegations that would arguably support the first two elements of a section 7(a) claim. They describe various statements allegedly made by the Defendants to the Town of Kerrobert, which the Plaintiff alleges are false and misleading, and tended to discredit the Plaintiff's business, goods or services. Likewise, paragraph 24 contains factual allegations that would arguably be relevant in establishing at least the first element of a section 7(a) claim, as it describes statements allegedly made by the Defendants to the Town of Unity which the Plaintiff asserts to be false and misleading.

[17] While the Defendants dispute that various statements described in these paragraphs were made for the purpose of discrediting the Plaintiff's business, goods or services, and they say that the alleged statements do not otherwise satisfy the requisite elements of a section 7(a) claim, the Court is required on a motion to strike based on Rule 221(1)(a) to accept, as true, the factual allegations that are capable of being proved. It will be for the trial judge to determine the merits of the Claim, including whether the impugned statements were made in a threatening manner that would tend to discredit the Plaintiff's business, goods or services: *Excalibre Oil Tools Ltd v Advantage Products Inc*, 2016 FC 1279 at para 282.

[18] In any event, even if any of the impugned paragraphs contain allegations that are surplus to the Claim, the Court will generally refuse to strike out surplus statements where they are not prejudicial: *Apotex Inc v Glaxo Group Ltd*, 2001 FCT 1351 at para 6. The Defendants have not established that any prejudice flows from the impugned paragraphs.

[19] Likewise, I decline to strike out specific words used in the introductory portion of paragraph 21 of the Claim which the Defendants say are open-ended or vague. This is not a case where the existence of the cause of action can be said to be dependent on facts which may turn up at discovery. The Claim discloses a cause of action under section 7(a) of the *Trade-marks Act* with or without the open-ended pleadings: *Reliance Comfort Limited Partnership v Commissioner of Competition*, 2013 FCA 12 at para 7. That said, I am of the view that the Plaintiff should provide particulars of the open-ended statements used in paragraphs 21 and 24 of the Claim, as discussed later in these Reasons.

[20] Accordingly, I dismiss the Defendants' motion to strike out subparagraphs 21(b) to (i), paragraphs 24, 25, 26 and 27, and portions of the Plaintiff's response to the Defendants' demand for particulars.

IV. Claim under Section 7(d) of the Trade-marks Act

[21] The Defendants seek an order striking out all claims under section 7(d) of the *Trade-marks Act* against all the Defendants on the basis that they disclose no reasonable cause of action. They argue that section 7(d) focuses on how a person makes use of a trademark, and that the Plaintiff has failed to plead specific facts to identify what trade-mark is at issue or any of the other requisite elements of a section 7(d) claim. The Defendants also argue that the Plaintiff has not pled an involvement with intellectual property as required by *MacDonald et al v Vapor Canada Ltd*, [1977] 2 SCR 134 at para 64 [*Vapor*].

[22] With respect to federal jurisdiction, I agree with the Plaintiff that it has pled the requisite intellectual property connection. The alleged false statements made by Soneera and Behan are

related to the patent rights of the parties and the goodwill associated with the parties' trade names or both.

[23] Regarding the elements of a statutory cause of action under section 7(d) of the *Trade-marks Act*, the Plaintiff contends that the term "use" applies to the use of a "description", and that section 7(d) is not limited in its application to the use of a trade-mark. The Plaintiff appears to argue that the alleged false statements made by the Defendants constitute the material facts necessary to establish the Defendants' use of a "description" under section 7(d) of the *Trade-marks Act*.

[24] Neither party cited any jurisprudence where the Court has squarely addressed whether section 7(d) is limited in its application to the use of a trade-mark. In *College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia v Council of Natural Medicine College of Canada*, 2009 FC 1110, which is the only decision referred to by the Defendants in making this argument, no issue arose regarding the scope of section 7(d) as the claim involved alleged use of trade-marks.

[25] Section 7(d) does not explicitly say that it is limited to use of a trade-mark. The Defendants argue that section 7(d), when read in conjunction with the definition of "use" in section 2 of the *Trade-marks Act*, as well as section 4, establish that use of a trade-mark is a necessary ingredient of a section 7(d) claim. While the Defendants invite the Court to engage in a statutory interpretation exercise on this motion to strike, this determination should be left to the trial judge based on a proper evidentiary record. Accordingly, despite my view that the Plaintiff may be stretching section 7(d) beyond its intended scope, at this stage it is not plain and obvious

that the allegations relating to section 7(d) must be struck out for failing to plead facts relating to use of a trade-mark.

[26] However, I agree with the Defendants that the Plaintiff has failed to plead sufficient facts to establish all of the remaining elements of a cause of action under section 7(d) of the *Trade-marks Act*. The Supreme Court construed section 7(d) in *Vapor* as follows:

[22] Section 7(d) appears to be directed to the protection of a purchaser or a consumer of wares or services, in contrast with s. 7(a) which involves slander of title or injurious falsehood *qua* a competitor in business. It involves what I would term deceit in offering goods or services to the public, deceit in the sense of material false representations likely to mislead in respect of the character, quality, quantity or composition of goods or services, or in respect of their geographic origin or in respect of their mode of manufacture, production or performance.

[27] *Vapor* indicates that section 7(d) is intended to prohibit the misuse of a description by a person in association with offering *his or her* goods or services to the public. In the present case, even assuming, without deciding, that the term “description” in section 7(d) could be construed as broadly as the Plaintiff suggests to include the alleged false statements made by Soneera and Behan, the Plaintiff has not pled material facts demonstrating that the Defendants made use of a false description relating to the attributes of the Defendants’ water treatment system which was likely to mislead the public. A review of the Claim, and particularly paragraph 21 which the Plaintiff relies on to support its section 7(d) claim, indicates that the alleged false statements made by the Defendants relate to the Plaintiff’s water treatment system (i.e. the Living Sky System), not to attributes relating to the Defendants’ water treatment system.

[28] Accordingly, I find that the Plaintiff has failed to plead sufficient facts to establish a claim under section 7(d) of the *Trade-marks Act*, and therefore the section 7(d) claim asserted in paragraph 1(b) of the Claim must be struck out as failing to disclose a reasonable cause of action. However, the factual allegations in the Claim that are relied on by the Plaintiff in support of the section 7(d) claim are not struck out since they are also relevant to the Plaintiff's claim under section 7(a) of the *Trade-marks Act*, which survives the motion to strike.

V. Claims under section 52 of the Competition Act

[29] The Defendants argue that the Plaintiff's claim with respect to an alleged breach of section 52 of the *Competition Act* should be struck out because the Plaintiff has not pled facts to establish that it acted in detrimental reliance on the Defendants' alleged misrepresentations. Accordingly, the Plaintiff has not pled the requisite causal connection between the alleged breach of section 52 of the *Competition Act* [Act] and the damages claimed under section 36 of that Act. The Defendants also say that the Plaintiff failed to plead an intellectual property aspect in relation to the section 52 claim, and therefore the Court lacks jurisdiction over it.

[30] The Plaintiff submits that it has pled sufficient material facts to enable a finding of causation. With respect to federal jurisdiction, the Plaintiff contends that it is not required to plead an intellectual property aspect in respect of its section 52 claim because subsection 36(3) of the *Competition Act* confers jurisdiction on the Federal Court over compensatory civil remedies under the *Competition Act*.

[31] I agree with the Plaintiff that this Court has jurisdiction over the claim under section 52 of the *Competition Act*. Section 36 of the Act operates to create a civil right of action for

damages resulting from an alleged breach of section 52 of the *Act*. Section 36(3) of the *Competition Act* provides that the Federal Court is a court of competent jurisdiction for the purposes of any action under section 36(1) of the *Act*.

[32] With respect to the sufficiency of the Plaintiff's claim under sections 36 and 52 of the *Competition Act*, the Defendants rely on the Ontario Superior Court of Justice's decision in *Singer v Schering-Plough Canada Inc*, 2010 ONSC 42 [*Singer*], for the proposition that a plaintiff claiming damages under section 36(1) of the *Competition Act* must establish that the person against whom the claim is made engaged in conduct that breached section 52(1) of the *Act*, that the plaintiff suffered loss or damage, and a causal connection between the breach and the damages (i.e. that the plaintiff relied on the alleged false representations to his detriment).

[33] Although not cited by either party, this Court in *Murphy v Compagnie Amway Canada*, 2015 FC 958 at paragraph 82 referred to *Singer* with approval and emphasized that reliance by the plaintiff on the alleged false representation to his detriment is a necessary ingredient of an action under section 36 of the *Competition Act*.

[34] In this case, the Plaintiff failed to plead material facts to establish that it relied upon the alleged false representations to its detriment. It is not sufficient for the Plaintiff to merely assert that the alleged false and misleading statements and representations caused damages to the Plaintiff, or that the Town of Kerrobert's refusal to pay, or lost sales to the Town of Unity were a result of these statements or representations. None of these factual allegations establish reliance *by the Plaintiff* on the alleged false representation to *its* detriment.

[35] For these reasons, the Plaintiff's claim pursuant to section 52 of the *Competition Act* asserted in paragraph 1(b) of the Claim must be struck out as failing to disclose a reasonable cause of action. All references to the term "representations" in the Claim are also struck out because the Plaintiff stated that it was specifically pled in support of the section 52 claim. The remaining allegations of fact relied on by the Plaintiff in support of the section 52 claim are not struck out since they are also relevant to the Plaintiff's claim under section 7(a) of the *Trade-marks Act*, which survives the motion to strike.

VI. Personal Claim Against Behan

[36] The Defendants seek an order pursuant to Rule 221(1)(a) and (c) dismissing all the personal claims against Behan in his personal capacity. They say that the Plaintiff failed to plead any material facts to demonstrate that Behan acted outside his role and duty as a corporate officer and beyond the scope of the corporate and normal business activities of Soneera when making the alleged false and misleading statements.

[37] In response, the Plaintiff asserts that the Defendants have misconstrued its argument, and that the allegation against Behan is that he personally committed the torts described in the Statement of Claim. It argues that individuals are responsible for their own tortious conduct, irrespective of whether they were acting on behalf of a corporation or within the scope of the authority, and that the Plaintiff has pled sufficient material facts to sustain a cause of action against Behan personally.

[38] The Federal Court of Appeal ruled in *Mentmore Manufacturing Co Ltd v National Merchandise Manufacturing Co Inc* (1978), 89 DLR (3d) 195, 22 NR 161, at para 24 that the

mere fact that an individual defendant may be the sole shareholder and director of a company is not, by itself, enough to support an inference that the company was the individual's agent or instrument in the commission of acts of infringement, or that the individual authorized such acts, so as to make the individual personally liable. The Court observed that the kind of participation in the acts of the company that give rise to personal liability is an elusive question, to be decided on the circumstances of each case, but that "[i]t would appear to be that degree and kind of personal involvement by which the director or officer makes the tortious act his own" (para 25). To attract personal liability on the part of a corporate director or officer, the Court held that:

[28]...[T]here must be circumstances from which it is reasonable to conclude that the purpose of the director or officer 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.

[39] Personal liability will only attach when the actions of the director or officer are such that the director's own behavior is tortious or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the individual: *Petrillo v Allmax Nutrition Inc*, 2006 FC 1199 at para 29; *Zero Spill Systems (Int'l) Inc v 614248 Alberta Ltd*, 2009 FC 70 at para 19.

[40] For example, in *Krav Maga Enterprises, LLC v Edge Combat Fitness Inc*, 2006 FC 112, the Court upheld an order adding an individual defendant on the basis that the plaintiff had pled sufficient facts alleging that the individual was acting in his personal capacity in engaging in the alleged infringing activities. The Court observed that the individual defendant personally carried out the alleged acts of infringement (distribution of email flyers signed by him), and likened the

facts to those in *Fibremann Inc v Rocky Mountain Spring (Icewater 02) Inc*, 2005 FC 977. In *Fibremann*, the Court rejected the individual defendant's argument that he had a *prima facie* defence that all activity complained of was carried out by him in his capacity as a director of the corporation, and therefore he should not be held personally liable. The Court concluded that the facts before it in *Fibremann* were not the same as in *Mentmore*:

[32] ... In this case, Mr. Kwok's actions went far beyond imparting direction to employees. He wrote the letters that induced third parties to deal with Rocky Mountain and that advised customers that Rocky Mountain was merely a "name change". Other allegations in the statement of claim describe similar events that were carried out directly by Mr. Kwok. In each case, it was Mr. Kwok who carried out the activities which led to the alleged infringement of the trade-mark.

[Emphasis added]

[41] Likewise, in *West Coast Engineering Ltd v JA Industries (Canada) Ltd*, (1997) 75 CPR (3d) 337 (FC), the Court dismissed a motion to strike a claim against the individual defendants under section 7(a) of the *Trade-marks Act* concluding that "[t]he fact that they may have been acting for the corporate defendant does not relieve them from the consequences of their personal actions if those actions are tortious. The Statement of Claim alleges particular activities by each of them which, if proved, could meet the test for personal liability ...".

[42] Considering the jurisprudence that holds corporate directors liable where their own behavior is tortious, I am satisfied that the facts alleged in the Claim regarding Behan's personal involvement in the impugned activities alleged to breach section 7(a) of the *Trade-marks Act* could, if proven, form a sufficient basis upon which it could be reasonably argued that Behan made the tortious acts his own and that his personal liability is engaged. The Plaintiff alleges at paragraph 9 of the Claim that Soneera and Behan sent letters to the Plaintiff and the Town of

Kerrobert threatening to bring patent infringement actions alleging infringement of the 902 Patent by the Living Sky System. Paragraphs 21 to 23 allege that Soneera and Behan made various representations and statements to the Town of Kerrobert regarding the Living Sky System as described in paragraph 21, that the statements were false and misleading, and that they were made by Soneera and Behan to discredit the business, goods and services provided by the Plaintiff. Paragraph 24 alleges that Soneera and Behan made false and misleading statements and representations, as described in that paragraph, regarding the Living Sky System to the Town of Unity.

[43] At this stage of the proceedings, it is not plain and obvious to me that the pleadings disclose no reasonable cause of action under section 7(a) of the *Trade-marks Act* against Behan in his personal capacity. The Claim alleges activities carried out directly by Behan which, if proved, could meet the test for personal liability in *Mentmore*. Accordingly, I would dismiss the Defendants' motion to strike the personal claims against Behan.

VII. Should the Plaintiff be Granted Leave to Amend its Pleadings?

[44] After determining that a pleading will be struck, Rule 221 of the *Federal Courts Rules* requires consideration of whether a pleading is struck with or without leave to amend. For a statement of claim to be struck without leave to amend, any defect in the statement must be one that is not curable by amendment: *Simon v Canada*, 2011 FCA 6 at paras 8 and 14.

[45] The Plaintiff submits that it should be granted leave to amend its pleadings, if the Court finds that insufficient facts have been pled, on the basis that the claim might possibly succeed if pleadings were amended. However, the Plaintiff did propose any amendments that could cure the

defects in the pleadings outlined above, despite extensive argument by the parties regarding the requisite elements of a cause of action under section 7(d) of the *Trade-marks Act* and section 52 of the *Competition Act*. In the circumstances, I conclude that the above-described portions of paragraphs 1(b) and 21 of the Statement of Claim should be struck out, without leave to amend: *Sivak v Canada*, 2012 FC 272 at para 94; *Gagne v Canada*, 2013 FC 331 at para 22.

VIII. Motion for Particulars

[46] In the alternative, the Defendants seek further and better particulars as set out in Questions 1 to 20 in the Defendants' Demand for Particulars dated September 19, 2017. They specifically object to the open-ended nature of some of the allegations in the Claim.

[47] The onus on a motion for particulars is on the moving party to establish that the particulars sought are necessary to enable it to plead in response to the impugned pleading, not just to prepare for trial, and that they are not within the party's knowledge. It is not appropriate for a party to request particulars merely in order to conduct a fishing expedition or to determine if there is a factual basis for a potential defence: *Stryker Corporation v Umamo Medical Inc*, 2016 FC 378 at para 25.

[48] The Defendants argue that the allegations in the introductory portion of paragraph 21 of the Statement of Claim that "Soneera and Behan have made or have had others make on their behalf, representations and statements asserting or implying, among other things that ..." (underlining added by Defendants) are open-ended and vague statements. They also contend that paragraph 24 contains vague and undefined terms, presumably referring to the Plaintiff's allegation that "Soneera and Behan have also made false and misleading statements and

representations regarding the Living Sky System to the Town of Unity (“Unity”) and others. Soneera and Behan have made false and misleading statements and representations that assert or imply, among other things, that ...” (underlining added).

[49] At the hearing, counsel for the Plaintiff indicated that the Plaintiff was willing to provide particulars of the “others” alleged in paragraph 21 to have made representations or statements on behalf of Soneera and Behan, as well as the other towns to whom the Plaintiff alleges the Defendants made false and misleading statements in paragraph 24 of the Claim.

[50] In my view, the Plaintiff must provide particulars of all of the open-ended allegations identified in the above-noted underlined portions of paragraphs 21 and 24 of the Claim, not just the term “others” in paragraphs 21 and 24. The open-ended allegations leave room for one to believe that there may be facts relating to other impugned representations or statements, or other entities that made them, that the Plaintiff intends to rely upon in support of its claim. The Defendants are entitled to this information, if it exists, to enable them plead in response, and to inform them of the case they have to meet.

[51] Apart from the open-ended pleadings described above, the balance of the Defendants’ motion for particulars is dismissed as the Defendants have failed to establish why the particulars as set out in Questions 1 to 20 in the Defendants’ Demand for Particulars dated September 19, 2017 are necessary to reply intelligently to the Statement of Claim. The Defendants’ evidence on this motion consisted of an affidavit of a legal assistant attaching, as exhibits, the Defendants’ request for particulars and the Plaintiff’s response. This affidavit does not detail the limitations of the Defendants’ knowledge in respect of the particulars sought, nor does it contain specific factual explanations to show a genuine need on the part of the

Defendants, as opposed to its solicitors, for particulars in order to be able to reply intelligently to the Plaintiff's Statement of Claim.

IX. Disclosure of Contract - Rule 206

[52] The Defendants also seek an order pursuant to Rule 206 of the *Federal Courts Rules* that the Plaintiff serve a copy of the contract between the Plaintiff and the Town of Kerrobert described in paragraph 23 of the Statement of Claim. The Plaintiff argued in its written submissions that the Court should exercise its discretion to relieve the Plaintiff from its obligation to disclose the contract pursuant to Rule 206 on the basis that the specific terms of the contract are not relevant. At the hearing, counsel for the Plaintiff stated that the underlying concern is maintaining confidentiality of the dollar amounts set out in the contract.

[53] I decline to exercise my discretion under Rule 206 to relieve the Plaintiff from serving the contract on the Defendants. Based on my review of the Statement of Claim, I find that the terms of the contract are relevant to issues raised in the pleadings. The Plaintiff relies on its allegation in paragraph 23 that "Kerrobert has refused to make a payment that is due under its contract with Living Sky as a direct result of receiving the statements" as a material fact to support its claim that it suffered loss or damage as a result of alleged false or misleading statements by the Defendants. The Plaintiff did not make any persuasive arguments to the contrary. Moreover, it did not seek to file an unexpurgated copy of the contract under seal to enable the Court to examine the terms of the contract to assess relevance.

[54] If the Plaintiff's underlying concern is ensuring that the information contained in the contract is treated as confidential, counsel should have taken steps to limit disclosure of any

sensitive information through an agreement between counsel, or failing that, by motion to the Court for an appropriate order.

[55] In the circumstances, I conclude that the Plaintiff must serve a copy of the contract between the Plaintiff and the Town of Kerrobert described in paragraph 23 of the Statement of Claim within fourteen (14) days of the date of this Order.

[56] Unless otherwise ordered or directed by the Court, the Defendants shall serve and file a statement of defence within twenty (20) days of compliance by the Plaintiff with the terms of this Order.

[57] As success is divided, I find it appropriate that each party should bear their own costs of the motion.

ORDER IN T-1107-17

THIS COURT ORDERS that:

1. The allegations of a breach of section 7(d) of the *Trade-marks Act* and section 52 of the *Competition Act* in paragraph 1(b) of the Statement of Claim are struck out, without leave to amend. All references to the term “representations” in the Claim are also struck out, without leave to amend. The balance of the Defendants’ motion to strike is dismissed.
2. Within fourteen (14) days of the date of this Order, the Plaintiff shall provide particulars of the following underlined allegations in the Statement of Claim:
 - (a) Paragraph 21: “Soneera and Behan have made or have had others make on their behalf, representations and statements asserting or implying, among other things that ...”; and
 - (b) Paragraph 24: “Soneera and Behan have also made false and misleading statements and representations regarding the Living Sky System to the Town of Unity (“Unity”) and others. Soneera and Behan have made false and misleading statements and representations that assert or imply, among other things, that ...”.
3. The balance of the motion for particulars is dismissed.
4. Within fourteen (14) days of the date of this Order, the Plaintiff shall serve a copy of the contract between the Plaintiff and the Town of Kerrobert described in paragraph 23 of the Statement of Claim.

5. Unless otherwise ordered or directed by the Court, the Defendants shall serve and file a statement of defence within twenty (20) days of compliance by the Plaintiff with the terms of this Order.

6. There shall be no order as to costs.

“Kathleen M. Ring”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1107-17

STYLE OF CAUSE: LIVING SKY WATER SOLUTIONS CORP. v. ICF PTY LTD., SONEERA WATER, LLC, SONEERA WATER CANADA LTD., AND DARRELL BEHAN

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: FEBRUARY 13, 2018

ORDER AND REASONS: MADAM PROTHONOTARY KATHLEEN M. RING

DATED: AUGUST 30, 2018

APPEARANCES:

William Regan FOR THE PLAINTIFF

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