

Plusplus Lifesciences Llp & Anr. vs Dr. Shiwani Singh & Ors. on 30 November, 2022

Author: Navin Chawla

Bench: Navin Chawla

Neutral Citation Number: 2022/DHC/005217

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 11.11.2022

Date of decision: 30.11.2022

+ CS(COMM) 570/2022, I.A. 16445/2022

PLUSPLUS LIFESCIENCES LLP & ANR.Plaintiffs

Through: Ms. Rajeshwari H. and

Ms.Sugandh Shahi, Advs.

versus

DR. SHIWANI SINGH & ORS.

Through:

Mr.Satvik Verma,

with Mr.Rajneesh

Mr.Ehtesham

Mr.Akbar Siddique

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

I.A. 13093/2022 & I.A. 16291/2022

1. By the present judgment, I shall be disposing of the application being I.A. No.13093/2022, filed by the plaintiffs under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (in short, the 'CPC'), inter alia praying for an ad-interim order of injunction restraining the defendants from manufacturing, selling, offering for sale, advertising or in any manner dealing with the medicine bearing the mark 'NUTRIEPIC' or any medicine similar to the plaintiffs' medicine bearing the mark 'TRIMACARE'. The plaintiffs further pray for an ad-interim injunction restraining the defendants from manufacturing, selling, offering for sale, or in any manner dealing with medicine containing

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15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

'dienogest' under the mark 'UTTERCARE' or any mark deceptively similar to the mark of the plaintiffs- 'LAYERCARE'.

2. I shall also be disposing of the application, being I.A. No.16291/2022, filed by the defendants under Order XXXIX Rule 4 read with Section 151 of the CPC, praying for vacation of the ex-parte order of ad-interim injunction passed by this Court on 22.08.2022.

CASE OF THE PLAINTIFFS:

3. The plaintiffs have filed the above suit stating that the plaintiff no.1, a healthcare company, was founded in 2020 by Mr. Sameer Agarwal and Ms. Surbhi Gupta, who are currently the directors thereof; while the plaintiff no.2 was founded in October, 2018. The plaintiff no.2 is engaged in the marketing and distribution of various pharmaceutical and other goods manufactured or produced by the plaintiff no.1.

i) Trimacare v. Nutriepic:

4. It is further asserted by the plaintiffs that in and around the year 2019, Mr.Sameer Agarwal, the licensor of the plaintiffs, conducted a survey in the Indian market for multi-vitamin products containing micro nutrients that can cater to all the nutritional and other mineral needs of Indian women at once, that is, in a single pill. The survey was conducted cutting across different socio-economic strata of women who are currently pregnant, those who were pregnant three to five years ago, etc. cetera. Various doctors in rural and urban areas were also interviewed. The plaintiffs assert that as a result of the survey, it was found that there was no pre-natal supplement in India, especially one which is designed keeping in mind the different environmental, dietary, biological and

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Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

nutritional factors that affect pregnant Indian women. It was found that there was no single multi-micronutrient tablet that a pregnant Indian woman could consume during her pregnancy.

5. It is further alleged that in order to address the problems found in the survey, Mr.Sameer Agarwal and his team via extensive research, developed a range of medicinal goods, which are now marketed under the mark 'TRIMACARE', which is one of a kind multi-micronutrient, pre-natal/antenatal supplement developed purely based on the biological requirements of Indian pregnant women. A period of about two years were invested in the research and development of this range of products by the licensors of the plaintiffs, by expending a substantial amount of time and resources to research on the medicinal goods that would address the needs of Indian women.

6. It is alleged that the Food Safety and Standards Authority of (in short, 'FSSAI') licence for the medicine 'TRIMACARE' was received on 12.01.2021, after which the plaintiffs started marketing the same. Prior to its launch, the plaintiffs, through their in-house-team, undertook a complete survey of the market targeting their two types of customers, that is, gynaecology doctors, general practitioners, physicians, researchers; as also patients ranging from different socio-economic backgrounds, to test consumer acceptance and study the potential of the medicine. The survey was aimed at collecting data pertaining to the pricing of the medicinal goods, including focusing on various factors such as affordability and the preferred price acceptable to the customers.
7. Though the plaint contains averments with respect to the trade mark and copyright vested in the mark 'TRIMACARE', as would be

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NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

evident from the later part of this judgment, the same are irrelevant to the decision of the present application, inasmuch as, the claim of the plaintiffs, as far as the intellectual property rights in 'TRIMACARE' is concerned, is based on the misuse of the alleged confidential information by the defendants and not on the violation of any alleged rights of the plaintiffs in the trade mark and /or copyright in the packaging/label thereof.

8. The plaintiffs assert that its medicine 'TRIMACARE' is unique and one-of-its-kind in the market and no other company has been able to launch a competing pharmaceutical product. The said medicine, which was launched in January, 2021, has gained tremendous success.

9. It is further asserted that the plaintiffs, from time to time, train and educate the sales and marketing personnel about the said product, its efficacious advantages, uses, including the competitive edge over other products. Special training to the sales and marketing teams had to be imparted so that they could address and pre-empt all the queries raised by the doctors for which special scripts, learning manuals, and visual aids were created by Mr. Sameer Agarwal, which was licenced to the plaintiff no.1.

10. It is asserted that the medicine 'TRIMACARE' was developed by the plaintiffs in collaboration with Deccan Healthcare, with whom the plaintiffs have executed a Non-Disclosure Agreement. The sales and marketing and other teams of the plaintiffs do not interact with Deccan Healthcare and, thus, the process and the formula for the preparation of 'TRIMACARE' is kept confidential and maintained as such.

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NEGI

Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

11. The plaintiffs further assert that it has adopted the following practices to safeguard its proprietary and confidential information that may be generated within the company:

"28. The Plaintiffs have adopted the following practices to safeguard its proprietary and confidential information that may be generated within the company.

A. Execution of non-disclosure agreements at the time of joining the Company.

B. No person is allowed to carry any documents, physical or electronic, outside the organisation without express consent from Sameer Agarwal or Ms. Surbhi Gupta.

C. Specific training programmes conducted to sensitise employees and make them aware of their obligations of confidentiality.

D. All employees are provided with secure laptops and email ids which can function within the intranet of the organisation.

E. Only certain employees are permitted to carry the laptops home (on work-from-home basis, with the express consent and knowledge of the Founders Mr. Sameer Agarwal and Ms. Surbhi Agarwal).

F. Employees are required to provide regular updates of the work completed by them and research done to Mr. Sameer/Surbhi."

12. It is asserted that the medicine 'TRIMACARE' is unique in many ways as it comprises of a combination of several vitamins, minerals, fatty acids, et cetera, in a specific proportion. Such proportions were worked out and arrived at after much trial and error by the Research and Development Team (in short, 'R&D Team') at Deccan Healthcare in collaboration with pharmacologists, running continuous stability and synergy tests. Many of such ingredients are not compatible with other ingredients, for example, absorption of high-dose of iron with high-dose of

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NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

of calcium. It was through continuous experimentation that the plaintiff team was able to arrive at the manner in which they could be combined.

13. It is alleged that the technical know-how and the process for manufacturing the plaintiffs' medicine bearing 'TRIMACARE' is 'confidential information'. Such information was known only to Ms. Surbhi Gupta and Mr. Sameer Agarwal (the founders of the plaintiff no.1) and the R&D Team at Deccan Healthcare. No other person working with or for the plaintiffs was aware of the aforesaid intricacies. The sales and marketing personnel were extensively trained and educated about the advantages of the medicine bearing the mark 'TRIMACARE', however, the aforesaid proprietary and confidential information was not revealed to them. The plaintiffs have also filed a patent for the same on 25.01.2021.

14. The plaintiffs further assert that they also have confidential business information in the form of survey reports and sales models; packaging information; regarding best distributors and dealers; data with respect to special and specific requirements of customers; negotiable price structure; list of vendors of the plaintiffs; and the distribution of the plaintiffs.

15. The plaintiffs assert that vide Appointment Letter dated 01.07.2021, the defendant no. 1 was appointed by the plaintiffs as 'Project Manager'. Clause 1.5 of the Appointment Letter obliged the defendant no.1 to maintain confidentiality. Apart from the Appointment Letter, the defendant no.1 also executed a Confidentiality Agreement dated 01.07.2021, which imposed upon the defendant no.1 an obligation of confidentiality as well as non-solicitation of the plaintiffs' business.

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Neutral Citation Number: 2022/DHC/005217

and customers. The plaintiffs describe the role of the defendant no.1 as follows under:

"42. It is submitted that role of Defendant No. 1 in the company of Plaintiff No 1 and 2 was as follows under:

- A. Developing marketing strategy of all products;
- B. Scientific training of Representatives to give them a better understanding of the product developed by Plaintiff so as to better equip them to handle possible customer queries based on the knowledge and technical information provided to Defendant No. 1 by the Plaintiff as the same is not known to the public;
- C. Joint-working in the field to meet senior physicians;

- D. Addressing queries raised by medical professionals on product through scientific knowledge as acquired from the data provided by the Plaintiff.
- E. Preparing presentations for conferences and taking feedback of doctors."

16. The plaintiffs assert that by virtue of her position, the defendant no.1 had access to virtually all the confidential data pertaining to technical as well as business information, and over a period of time, the plaintiff no.1 herself was involved in several confidential matters. She was also the person in-charge for following up on the filing of the Provisional Patent Application for 'TRIMACARE' and corresponding with the Indian Patent Office for the filing of the complete specification for the same. In this manner, the defendant no.1 acquired some of the most confidential and sensitive technical information of the plaintiffs including formulae, recommendations by doctors, points of improvement

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Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

to be adopted in the product, and know-how to manufacture the product, despite her not being a part of the R&D Team at Deccan Healthcare.

17. It is further asserted that on the defendant no.1's recommendation the defendant no.2 was appointed as the 'Zonal Business Manager', (a designation which made him the Head of Sales for North India), on 04.08.2021. The defendant no.2 was also made in-charge of an entire sales team of medical representatives, area managers and regional managers.

18. On the same day, the defendant no.3 was appointed as the 'Regional Business Manager'. The defendant nos.2 and 3 also executed Confidentiality Agreements dated 04.08.2021, which contained the requisite covenants imposing an obligation of confidentiality as well as non-solicitation of the plaintiffs' business and customers upon the said defendants.

19. It is asserted that the defendant nos.2 and 3, by virtue of being part of the sales and marketing team, were in possession of extensive confidential information pertaining to the medicine bearing the mark 'TRIMACARE' and other data pertaining to sales, dealers, distributors, among others. The defendant nos. 2 and 3 also received specialised training regarding the subject medicine, in order for them to facilitate promotion and sales of the plaintiffs' medicinal goods in the market.

20. On 10.01.2022, the defendant no.1 served her Notice of Resignation, which was accepted by the plaintiffs. The defendant no.1 was eventually relieved from her services on 17.02.2022. The defendant

nos.2 and 3, along with various other key sales and marketing personnel also tendered their Notices of Resignation on 08.02.2022, immediately

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NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

after an extensive training workshop was conducted for the sales and marketing personnel for the launch of another product of the plaintiffs being 'LAYERCARE', which is also one of the subject matter of the present suit. Various other key sales and marketing personnel also served their Notice of Resignation in the evening of 08.02.2022, immediately on the conclusion of the training exercise. The defendant nos.2 and 3 were relieved from their employment at the plaintiffs on 08.02.2022.

21. The plaintiffs assert that it was later revealed that the defendant nos.1 to 3 had acquired shares in the defendant no.4-company and while the mothers of the defendant nos.2 and 3 had been directors of the defendant no.4-company since 09.09.2020, the mother of the defendant no.1 assumed the position of director in the said Company only on 05.01.2022. The plaintiffs assert that, therefore, the defendant nos.1 were already preparing for entering in competition with the plaintiffs, while being in the employment of the plaintiffs.

22. The plaintiffs assert that it was later learnt by the plaintiffs through the defendant no.4-company that the defendant nos.1 to 3 were about to launch a pre-natal supplement under the trade mark 'NUTRIEPIC', which the plaintiffs claim is based on and has the same ingredients as that of the plaintiffs' goods 'TRIMACARE'. The plaintiffs rely upon the following chart of ingredients of the two goods in support of this submission:

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

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Neutral Citation Number: 2022/DHC/005217

Ingredients	Range as claimed Trimacare-2 in Plaintiff's (Morning Tablet) Patent Application	
Vitamin B9 (L-methyl Folate)	0.2 to 10 mg	0.5 mg
Vitamin A	600-6000 mcg	1600 mcg

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Zinc	10-40 mg	12 mg	14
Vitamin E	7 to 400 mg	10 mg	10
Iodine	100-300 lmg	200 mcg	0.
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Vitamin C	30-200 mg	60 mg	80
Vitamin B1	0.2 to 100 mg	1.6 mg	2
Vitamin B2	0.2 to 100 mg	2 mg	2.
Vitamin B3	2 to 35 mg	18 mg	13
Vitamin B5	1-10 mg	5 mg	5
Vitamin B6	2-10 mg	3 mg	2.
Vitamin B7	10 mcg to 10 mg	30 mcg	40
Vitamin B12	0.2 to 1500	3.6 mcg	2.
Vitamin K2	25-90 mcg	55 mcg	-
Trace Minerals:	1-2 mg	1.7 mg	-
Copper			
Trace Minerals:	30-70 mcg	40 mcg	-
Selenium			
Trace Minerals:	2-6 mg	4 mg	-
Maganese			
Trace Minerals:	20-100 mcg	50 mcg	-
Chromium			
Trace Minerals:	45 mcg-2 mg	45 mcg	-
Molybdenum			
Trace Minerals:	100 mcg-10 mg	150 mcg	-
Boron			
Omega 3	50-2000 mg	200 mg	-
Iron	30-100 mg	60 mg	27
Choline	50-500 mg	-	50
Sodium	-	-	4.

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Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

Ingredients	Range as Trimacare- 2 claimed in (Evening Pill) Plaintiff's Patent application	Nutrieptic (Evening
Vitamin D2	200-4000 400 IU IU	15 mcg (600 IU)
Magnesium	200-400 206 mg mg,	120 mg
Calcium	300-800 mg 500 mg	260 mg

23. The plaintiffs assert that the medicine of the defendants has developed on the same lines as the plaintiffs' medicine and is intended directly compete with the plaintiffs' medicine. Its composition is within the range provided in the plaintiffs' patent claims. As the defendant nos.1 to 3 was aware and had access to the confidential experimental data regarding the patent, therefore, she also knew that certain elements of the composition such as the trace minerals could be eliminated without affecting the efficacy thereof and that the minor changes in the amount of ingredients of the composition would also not affect the efficacy thereof. The minor changes in the composition, therefore, were made by the defendants only because of the confidential information received by them in the course of their employment with the plaintiffs. It is asserted by the plaintiffs that but for the confidential information received by defendant nos.1 to 3, it would have been impossible for the defendants to have launched their medicine 'NUTRIEPIC' in such a short duration, as they could not have conducted the research, formulated the medicine, developed the brand name/artwork/packaging/trade dress, gotten it manufactured and be ready for launch by July, 2022. The plaintiffs assert that clearly, the defendant nos.1 to 3 were working for the development

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Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

and launch of their goods 'NUTRIEPIC' while being in employment of the plaintiffs.

24. It is further asserted that the defendant nos.2 and 3 also incorporated the defendant no.5-company on 24.11.2021, that is, while being in employment of the plaintiffs-company. The defendant nos.2 and 3 also became directors of the defendant no.5-company and applied for the device mark for 'NUTRIEPIC' and the other mark in dispute, that is, 'UTTERCARE', both on 17.12.2021; again, while being in employment of the plaintiffs. The defendant nos.1 to 3 also applied for and obtained drug license to market their products on or about January, 2022, that is, whilst being in employment of the plaintiffs. The plaintiffs assert that the above acts also prove mala fide of the defendants.

ii) Layercare v. Uttercare:

25. Coming to the other subject-matter of the dispute, it is asserted by the plaintiffs, that the plaintiffs have also launched a 'dienogest' medicine bearing the trade mark 'LAYERCARE' on 09.02.2022. 'LAYERCARE' is a combination of two words 'LAYER' and 'CARE'. The trade mark- 'LAYERCARE' was formed keeping in mind the

nature of the product and its utility; being one to have alleviated the problems of the endometriosis. Mr. Sameer Agarwal, the licensor of the plaintiff no.1, has also filed a Trade Mark Application bearing no.5158258 to protect the rights in the said mark. The application of the mark is still pending before the Trade Marks Registry. The said mark has been developed after extensive market research to create a mark that is distinct as compared to other 'dienogest' medicines in the market. It was

Signature Not Verified
Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

found that the names of other 'dienogest' medicines in the market include either 'dieno' or 'endo' as either a prefix or a suffix in their names. The plaintiffs adopted the mark, which is in complete deviation from this market practice.

26. The plaintiffs assert that the adoption of the mark 'UTTERCARE' by the defendants for its 'dienogest' medicine amounts to passing off, as the said mark is deceptively similar to the trade mark of the plaintiffs. The plaintiffs assert that it has a 'family of marks' with the word 'CARE', and, therefore, the use of a mark which includes the word 'CARE', by the defendants is likely to cause deception and confusion, especially keeping in mind their earlier association with the plaintiffs as their employees. It is asserted that the defendants are getting their product 'UTTERCARE' manufactured from the same manufacturer, who has been manufacturing the plaintiffs' medicine 'LAYERCARE', that is, Akums Lifesciences Ltd. The defendant nos.1 to 3, while being employed with the plaintiffs, used their resources to place an order with the said manufacturer to manufacture their product 'UTTERCARE' in January, 2022, and were able to launch the product in March, 2022, within days after their resignation.

27. Based on the above facts, the plaintiffs pray for an ad-interim injunction against the defendants restraining the defendants from manufacturing and/or marketing their pharmaceutical product 'NUTRIEPIC' and under the trade mark 'UTTERCARE'.

CASE OF THE DEFENDANTS:

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Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

28. On the other hand, the defendants assert that the plaintiffs are entitled to any relief inasmuch as they have concealed from this Court Examination/Hearing Notices dated 23.05.2022 and 29.08.2022 issued by the Indian Patent Office, raising an objection on the application of the plaintiffs seeking grant of a patent on the ground that the patent application is not novel. They submit that the medicine of the plaintiffs, that is, 'TRIMACARE' does not involve any novel process and is based on the already-available material in the market. The defendants have vast experience in the field of medicine and, therefore, were able to launch their medicine 'NUTRIEPIC' with the help of already-available non-proprietary information in the market.

29. The defendants assert that they have not used any confidential information obtained from the plaintiffs in the course of their employment, as no such confidential information was ever shared with them. The goods of the plaintiffs and the defendants are even otherwise different. The defendants have highlighted these differences by way of the following chart:

Signature Not Verified
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NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

30. On the use of the mark 'UTTERCARE', the defendants submit that the plaintiffs have again concealed from this Court that the Registrar of Trade Marks has raised objections under Section 11 of the Trade Marks Act, 1999 (in short, 'the Act') on the registration of the mark of

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Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

the plaintiffs, that is, 'LAYERCARE'. Even otherwise, the word 'CARE' is a generic and a common dictionary word used not only by the defendants but also by many other manufacturers.

31. The defendants assert that the packaging of the two medicines, that is, of the plaintiffs and the defendants, is also different and therefore there is absolutely no likelihood of any confusion being caused in the

mind of an unwary consumer.

SUBMISSIONS ON BEHALF OF THE LEARNED COUNSEL FOR THE
PLAINTIFFS

32. The learned counsel for the plaintiffs, while reiterating the stated hereinabove, submits that the plaintiffs, with extensive research had developed the medicine 'TRIMACARE'. The medicine comprises of combination of several vitamins, minerals, fatty acids, in a specific proportion, which was worked out and arrived at after much trial and error by the R&D Team at Deccan Healthcare. In such research, the compatibility of the ingredients and their proportions were to be worked out. It was further worked out as to which ingredient can be dispensed with without affecting the efficacy of the product. All of this information was confidential in nature and came in the hands of the defendant no.1 she was following up the patent application for the plaintiffs for the medicine. Similarly, such information also came in the hands of the defendant nos.2 and 3 as being key members of the sales and marketing team, who along with the team had to be trained to answer queries that may be raised by the doctors regarding the ingredients and efficacy of said medicine.

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

33. The learned counsel for the plaintiffs submits that but for the knowledge gained by the defendants in the course of their employment, the defendants would not have been able to launch their medicine 'NUTRIEPIC' immediately on leaving the employment of the plaintiffs. She submits that the defendants are, therefore, not only guilty of violating their terms of employment as contained in the Appointment Letter and the Confidentiality Agreement executed by them, but even otherwise have used the confidential information of the plaintiffs as a springboard to launch their product. Placing reliance on the judgment of the High Court of Justice-Chancery Division in Saltman Engineering Coy. Ltd., Ferotec Ltd. and Monarch Engineering Coy. (Mitcham) Ltd. v. Campbell Engineering Coy., Ltd. (1948) Vol. LXV RPC 203, she submits that the use of the confidential information, even for coming out with the so-called 'improved formulae' by the defendants amounts to a breach of confidence and the defendants are liable to be restrained.

34. Placing reliance on the judgment in Cranleigh Precision Engineering Ltd. v. Bryant, (1965) 1 W.L.R 1293, the learned counsel for the plaintiffs submits that the defendants having acquired confidential information are under a special disability in the field of competition in order to ensure that they do not get an unfair start. The plea of the defendants that the medicine 'TRIMACARE' is otherwise based on

generally available formulation, therefore, cannot assist the defendant their defence, inasmuch as, they were able to launch their medicinal goods immediately on leaving their employment with the plaintiffs only because they had received confidential information from the plaintiffs

Signature Not Verified
Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

the proportion of the ingredients, that would make the medicine efficacious.

35. The learned counsel for the plaintiffs further places reliance following judgments in support of her above submission:

- Terrapin Limited v. Builders' Supply Company (Hayes) Ltd. & Ors. (1967) 15 RPC 375;
- Fairfest Media Ltd. v. ITE Group PLC & Ors. 2015 SCC OnLine Cal 23; and
- Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh 2010 SCC OnLine Bom 1243

36. With respect to the mark 'LAYERCARE', the learned counsel for the plaintiffs submits that the plaintiffs are the only ones who use 'CARE' for their 'dienogest' product. The other manufacturers 'dienogest' in the market use the words 'dieno' or 'endo' as either a prefix or a suffix to name their medicine. The defendants have not given any reason for the adoption of a deceptively similar mark containing the word 'CARE'. She submits that this itself shows that the adoption of the mark 'UTTERCARE' by the defendants is tainted and dishonest.

37. She submits that the two marks: 'LAYERCARE' and 'UTTERCARE' are deceptively similar as they convey the same idea, fall in the same semantic field and convey the same or similar idea in mind of the person who is otherwise in know of the plaintiffs mark. She submits that use of such a deceptively similar mark is liable to be enjoined. In support, she places reliance on Make My Trip (India) Pvt. Ltd. v. Make My Travel (India) Pvt. Ltd., 2019 SCC OnLine Del 10638.

38. She further submits that as the defendants, being ex-employees of the plaintiffs, there is an even enhanced chance of deception due to the

Signature Not Verified
Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

adoption of a similar mark by the defendants. In fact, the obligation on the defendants to adopt a totally distinctive mark from the employer is even higher. In support, she places reliance on the following judgments

- Midas Hygiene Industries (P) Ltd. and Another v. Sudhir Bhatia and Others, (2004) 3 SCC 90;
- Charan Dass & Veer Industries (India) v. Bombay Crockery House, 1984 SCC OnLine Del 465;
- Cadila Healthcare Ltd. v. Uniza Healthcare LLP and Another. 2021 SCC OnLine Del 2330;
- The British India Corpn. Ltd. v. Kharaiti Ram & Others, 1999 SCC OnLine Del 1079;
- Shree Sainath Industries v. Sainath Auto Industries, 2004 SCC OnLine Guj 25; and
- Nutrica Pusti Healthcare Pvt. Ltd. and Others v. Morepen Laboratories Ltd., 2021 SCC OnLine Del 2631.

39. She submits that the plea of the defendants that the word 'CA' is common to trade, is liable to be rejected inasmuch as, the defendants have also filed an application seeking registration of the 'UTTERCARE' before the Trade Marks Registry and are therefore, estopped from contending that the word 'CARE' is generic. Further, the defendants have placed on record only the internet print-outs of the alleged other marks on record, without producing the actual products. She submits that mere printouts from the internet cannot be evidence of use of such marks by others. In support, she places reliance on the

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

judgment of this Court in Pankaj Goel v. Dabur India Ltd., 2008 SCC OnLine Del 1744.

40. She asserts that even otherwise, the marks cited by the defendants are not used for 'dienogest' but for other goods and, therefore, are not relevant to the facts of the present case. She submits that reliance of defendants on the availability of a 'dienogest' medicine by the mark 'DIENOCARE', is also liable to be rejected. She submits that not only was this mark not pleaded by the defendants in their application under Order XXXIX Rule 4 of the CPC, but also because to the best of the knowledge of the plaintiffs, no such product is available in the market.

41. She further submits that the plea of the defendants that the packaging of the products is different is also not relevant as the claim of the plaintiffs is based on the adoption of a deceptively similar trade mark by the defendants and no claim is made on the packaging of their products by the defendants.

42. She further submits that the plea of the defendants that the

defendant no.1 in her previous employment with Jagsonpal Pharmaceutical Ltd. had done extensive research which led the defendants to launch their medicine 'NUTRIEPIC', cannot be accepted as Jagsonpal Pharmaceutical Ltd. never launched a similar product. In any case, the documents filed by the defendants from Jagsonpal Pharmaceutical Ltd. itself shows that the defendant no.1 is in a habit of retaining confidential documents/information of her employer.

SUBMISSIONS ON BEHALF OF THE LEARNED SENIOR COUNSEL FOR THE DEFENDANTS

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15:55:47

Neutral Citation Number: 2022/DHC/005217

43. On the other hand, the learned senior counsel for the defendant while reiterating the above submissions of the defendants, further submitted that the pharmaceutical product of the plaintiffs under the trade mark 'TRIMACARE' is different from the defendants' product under the trade mark 'NUTRIEPIC'. While the plaintiffs' product is a nutraceutical, the defendants' product has an active FSSAI license for 'food for special dietary uses other than infants [multivitamin, multimineral with Choline Hydrogen Tartrate and Cranberry Extract Tablet and Food for Special Dietary Use other than Infants [Calcium, Magnesium and Vitamin D2 Tablet]'. Placing reliance on Section 22 of the Food Safety and Standards Act, 2006 read with the Food Safety And Standards (Health Supplements, Nutraceuticals, Food For Special Dietary Use, Food For Special Medical Purpose, Functional Food And Novel Food) Regulations, 2016, (in short, the 'Regulations'), he submits that the two products are separately dealt with even by the statutory authority, that is, the FSSAI, by issuing different licences.

44. He submits that even otherwise, the plaintiffs' good bearing tablet under the mark 'TRIMACARE' is a morning/evening pill and is different for different trimesters in the pregnancy, while the defendants' good bearing tablet under the mark 'NUTRIEPIC' is a single multi-vitamin dose which is not dependent on the pregnancy trimester.

45. Placing reliance on the comparative chart reproduced hereinabove, he submits that there are other differences between the components of the plaintiffs' and the defendants' medicine and therefore, it cannot be said

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Signing Date:01.12.2022CS(COMM) 570/2022

Pa

15:55:47

Neutral Citation Number: 2022/DHC/005217

that the defendants' product is in any manner based on the product of the plaintiffs.

46. The learned senior counsel for the defendants submits that, in no proprietary right can be claimed by the plaintiffs in the formulation of its medicine bearing the mark 'TRIMACARE', as the ingredients of such medicine are publici juris and, in fact, also published as the 'Summary of RDA for Indians-ICMR-NIN, 2020'.

47. He submits that even the Indian Patent Office has not accepted the plea of the plaintiffs of its medicine 'TRIMACARE' to be novel or to be entitled to a grant of patent. In this regard, he draws my reference to Examination Reports dated 23.05.2022 and 29.08.2022 issued by the Indian Patent Office. He submits that these have been intentionally concealed by the plaintiffs from this Court and this itself is a sufficient ground to reject the claim of the plaintiffs to the grant of discretionary relief under Order XXXIX Rule 1 & 2 of the CPC.

48. He submits that the defendant no.1, being a doctor herself, has vast work experience. She had done extensive research on the product while being in her employment with Jagsonpal Pharmaceutical Ltd. during the period of 2014 to 2018, and even otherwise. He submits that documents in this regard have been placed by the defendants along with their application, to which he has drawn my attention.

49. Drawing my reference to the contents of the plaint, he submits that it is the own case of the plaintiffs that the confidential information was vested only with Deccan Healthcare, their R&D team, Ms. Surbhi Gupta and Mr. Sameer Agarwal are the only ones who were aware of the intricacies involved in the manufacture of 'TRIMACARE'. He submits

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Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

that therefore, the plea of the plaintiffs that the defendant nos. 1 to 4 are also privy to any confidential information regarding 'TRIMACARE' is in contradiction to their own stand in the plaint.

50. He submits that the plea of the plaintiffs of any confidential information being shared by them with the defendants is even otherwise vague and unsubstantiated. He submits that it was obligatory on the part of the plaintiffs, in terms of Order VI Rule 4 of the CPC, to clearly place the confidential information which they claim to have been misused by the defendants. General assertions in this regard cannot suffice. In support, he places reliance on Satish Kumar v. Khushboo Singh & Ors. 2019 LAWPACK (Del) 76874; and Star India Private Ltd. v. Laxmiraj Seetharam Nayak, 2003 Lab IC 1618.

51. With respect to the use of the mark 'UTTERCARE' by the defendants, he submits that the word 'CARE' is generic and there are various other pharmaceutical products available in the market using the word 'CARE' as a part of their trade mark. He further submits that even the Registrar of Trade Marks has objected to the application of the plaintiffs seeking registration of its mark 'LAYERCARE', and this fact has been withheld by the plaintiffs in their plaint, again disentitling plaintiffs to any interim relief on account of concealment itself.

52. On the claim of the passing off made by the plaintiffs, the senior counsel for the defendants submits that the plaintiffs' medicine product was launched only one month prior to the launch of the medicine of the defendants. It has neither gained any goodwill nor reputation in the market; the packaging of the products of the plaintiffs' and the defendants' is completely different; in fact, even the manner of using

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NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

word 'CARE' by the plaintiffs and the defendants is totally distinct, and therefore, there is no chance of any consumer being deceived by the use of the mark 'UTTERCARE' by the defendants.

53. In this regard, he places reliance on the following judgments

- M/s Praba's v. Care Health Clinic Pvt. Ltd. v. M/s I-Care Aesthetic Clinic, 2021 SCC OnLine Mad 2695;
- Astrazeneca UK Ltd. v. Orchid Chemicals & Pharmaceuticals Ltd., 2007 SCC OnLine Del 237;
- Schering Corporation & Ors. v. Alkem Laboratories Ltd., 2009 SCC OnLine Del 3886;
- Intex Technologies (India) Ltd. & Anr. v. M/s AZ Tech (India) & Anr., 2017 SCC OnLine Del 7392; and
- Shreya Life Sciences Pvt. Ltd. v. Magna Biochem Pvt. Ltd., 2008 SCC OnLine Del 1668.

ANALYSIS AND FINDINGS

54. I have considered the submissions made by the learned counsel for the parties.

55. It is not disputed that the defendant nos.1 to 3 were in employment of the plaintiff no. 2 till 17.02.2022.

56. It is the case of the plaintiffs that in course of their employment the defendants acquired various confidential information of the plaintiffs especially with regard to its medicine 'TRIMACARE'. However, at the same time, the plaintiffs in the plaint have asserted that the sales and marketing and other teams of the plaintiffs did not interact with Decca Healthcare- with whom the plaintiffs had developed its pharmaceutical

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

product- 'TRIMACARE', and that the process and formula for preparation of 'TRIMACARE' was kept confidential and maintained as such. It is further asserted in the plaint that such information regarding the manufacture of the medicine 'TRIMACARE', including its advantages were known only to Ms.Surbhi Gupta, Mr.Sameer Agarwal and the R&D Team of Deccan Healthcare; no other person from the plaintiffs-companies were aware of the aforesaid intricacies. In this regard, paragraph nos. 27 and 32 of the plaint are important and reproduced hereinbelow:

"27. It is submitted that since the Plaintiff is an innovative company with innovative products, it has a separate R&D team to develop the products. In particular, the product 'TRIMACARE' was developed in collaboration with Deccan Healthcare. The Plaintiff has executed a Non-Disclosure Agreement with Deccan Healthcare, whereby Deccan Healthcare is not permitted to disclose any information regarding the formula or the process of manufacture of TRIMACARE or any other information associated therewith to any third party. The sales, marketing and operations teams of the Plaintiff do not interact with Deccan Healthcare. Thus, the process and the formula for preparation of TRIMACARE is kept confidential and maintained as such. It is further submitted that, since most of the products of the Plaintiff are backed by innovation and require extensive research, the R&D team is fully in charge of all innovations. The Plaintiff in accordance with industry best practices has an agreement with every scientist, so employed, obligating them not to disclose any confidential or proprietary information, including formula, plans, process, etc. to any person within the organisation or outside of the organisation without the consent of the Mr. Sameer Agarwal or Ms. Surbhi Gupta.

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NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Neutral Citation Number: 2022/DHC/005217

32. It is further submitted that all the af proprietary information regarding manufacture of the product TRIMACARE including the advantages thereof was known to Ms. Surbhi Gupta, Mr. Sameer Agarwal and R&D team. No other person from the Plaintiff aware of the aforesaid intricacies. The mar sales personnel were extensive trained and educated about the advantages of the product however, the aforesaid proprietary and confidential information was not revealed t them."

(Emphasis sup

57. The plaintiffs, despite the above categorical assertion, however further alleged that the defendant no.1, in her capacity as a Project Manager, acquired confidential information regarding the medicine 'TRIMACARE' as she was the person in-charge for following up on the filing of the Provisional Patent Application for the same. The plaintiff assert that working this closely for the filing of the Provisional Pate Application, the defendant no.1 acquired confidential technical know-how despite not being sanctioned to do so. However, I may note that the defendant no.1 joined services of the plaintiff no.2 only on 01.07.2021 that is, after the Provisional Patent Application seeking grant of the patent for 'TRIMACARE' had already been filed and the product also launched by the plaintiffs in January, 2021.

58. With regard to the patent claim for 'TRIMACARE', it is also important to note that the Indian Patent Office, by way of the Examination Report under Sections 12 and 13 of the Patents Act, 1970 dated 23.05.2022, has objected to the grant of patent inter alia stating the subject-matter of the claims made therein by the plaintiffs are obvious and lack inventive steps. It may be true that this is not the final opi

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NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

the Indian Patent Office, however, it was incumbent upon the plaintiffs have disclosed the same in the plaint, especially where they are seeking an ex-parte ad-interim order of injunction against the defendants, claiming that the process for the manufacture of 'TRIMACARE' was novel and available only to the plaintiffs. The plaintiffs, in the plaint disclosed the filing of the Provisional Patent Application, however, intentionally concealed from this Court the above Examination Report. This concealment itself is sufficient to deny an ad-interim relief to t

plaintiffs. [Ref S.K. Sachdeva & Anr. v. Shri Educare Limited and Another, 2016 SCC OnLine Del 6708; Mankind Pharma Ltd. v. Chandra Mani Tiwari & Anr., 2018 SCC OnLine Del 9678; Poly Medicure Limited v. Polybond India Pvt. Ltd., 2019 SCC OnLine Del 11967].

59. In fact, as pointed out by the learned senior counsel for the defendants, even the modified claim of the plaintiffs for the grant of patent has been objected to by the Indian Patent Office by way of the Examination Report dated 29.08.2022.

60. Apart from the above, it is the case of the defendants that the product of the plaintiffs and the defendants is entirely different as:

a) While the plaintiff's medicine is a morning/evening pill and is different for different trimesters of pregnancy; the defendant's single dose product prescribed for the entire period of pregnancy.

b) While the plaintiffs' medicine is a nutraceutical; the defendant's product is 'food for special dietary uses other than infants [multivitamin, multimineral with Choline Hydrogen Tartrate and Cranberry Extract Tablet and Food for Special

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

Dietary Use other than Infants [Calcium, Magnesium and Vitamin D2 Tablet], dealt with separately under the Regulations.

61. The defendants have also relied upon the 'Summary of RDA for Indians-ICMR-NIN, 2020', to show that even otherwise, the ingredients of such multi-nutrient produced by the plaintiffs are publici juris. The same is reproduced herein below:

62. A comparison of the defendants' medicine with the above summary issued by the ICMR, prima facie, appears to lend support to the submissions of the defendants that the medicine of the defendants is based on information that is publici juris. Even otherwise, the claim of the plaintiffs to the contrary, in my opinion, would require evidence to be led by the parties.

Signature Not Verified

Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

Pa

15:55:47

Neutral Citation Number: 2022/DHC/005217

63. The only assertion of the plaintiffs is that the fact the defendants were able to launch its medicine almost immediately on their leaving the employment of the plaintiffs shows that the defendants have used the knowledge gained by them in the course of their employment with the plaintiffs. Though at first blush, such a claim appears attractive, but deeper scrutiny, I do not find much merit in the same. The defendant nos. 1 to 3 has pleaded her vast experience in the field of medicine. As noted herein above, it is also the claim of the defendants that their product 'TRIMACARE' is based on information that is publici juris. The medicines of the parties also appear different. It is a separate thing that the defendants, by doing the ground work for launch of their medicine while being in employment of the plaintiffs, are in breach of employment contract, than to say that they have used some confidential/proprietary information of the plaintiff. For the breach of contract, the remedy of the plaintiffs would only be in a claim of damages against the defendant nos. 1 to 3 and not to an order of injunction as the defendant nos. 1 to 3 are no longer in employment of plaintiffs.

64. In Saltman Engineering (supra), the Court found that the defendants therein had made the second set of tools using confidential information contained in the original drawing. In the present case, however, prima facie, the plaintiffs have been unable to show such use.

65. In Cranleigh Precision Engineering Ltd. (supra), again it was found that the defendant was in possession of confidential information in his capacity as Managing Director of the plaintiff-company. The plaintiffs herein have not crossed this threshold.

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

66. In Terrapin Limited (supra), it was held that even if the confidential information is used as a starting point for a new design, same would amount to misuse of such confidential information. It was held that a person who has obtained information in confidence is not allowed to use it as a 'spring board' for activities detrimental to the person whose confidential communication is used. It was held that this prohibition shall also apply even when all the features have been published or can be ascertained at actual inspection by any member of the public. In the present case, however, the 'spring board' asserted appears to be in the defendant nos.1 and 3 doing the ground work for launch of their medicine- 'NUTRIEPIC' while being in employment of the plaintiffs, for which, if proved, the plaintiffs would be entitled to a

damages for breach of the contract of employment. As far as use of the confidential information is concerned, for the reasons stated herein above, in my prima facie opinion, the plaintiffs have failed to show any such 'spring board' advantage to the defendants.

67. In Fairfest Media Ltd. (supra), the Court again found the information supplied by the plaintiffs therein to the respondent no.1 therein to be confidential in nature, and the same to have been used by the respondent no.2 therein. Having found the same, on the facts therein equities were balanced by granting of an injunction for a limited period. In fact, applying the above yardstick, even if it is held that the defendants nos.1 to 3 had any 'spring board' advantage because of their employment with the plaintiffs, the balance of equity would demand that the defendants, already having suffered an ex-parte ad-interim injunction for a long period, should be freed from such shackles.

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NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

68. As far as the defendant nos.2 and 3 are concerned, the confidential information alleged to have been acquired by them is in relation to the sales and marketing plan and strategy developed by the plaintiffs, data pertaining to sales made /projections, data base of dealers, distributors among other sales tactics and information collected while conducting market surveys. It is however, not shown as to how this information is confidential in nature or is being misused by the defendants.

69. In Satish Kumar (supra), it was held that it is incumbent for plaintiff, in the plaint, to plead how the data in which confidentiality claimed is different from the data of any other entity engaged in such business and what is the secret about the same. Mere mention of the research process, financial/administrative and/or organizational matter transaction or affairs of the company or invention or discovery or patent protection does not satisfy the requirements of the pleadings. It was held as under:

"39. Confidentiality and secrecy is claimed in the same works in which copyright is claimed in the data, information and trade secrets residing in electronic devices without again specifying the particulars thereof or secrecy thereof. Mere mention of research process, financial/administrative and/or organizational matter transaction or affairs of the company or invention or discovery or patent protection does not satisfy the requirements of pleadings. The plaintiff as per its own admission is engaged in the business of providing logistics and forwarding services and is not engaged in any research work, it was incumbent for the plaintiff

to, in the plaint, plead how the data etc. confidentiality is claimed is different from any other entity engaged in such business and what is secret about the same and what step besides the clause aforesaid in the letters

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Digitally Signed By:RENUKA
NEGI
Signing Date:01.12.2022CS(COMM) 570/2022
15:55:47

Neutral Citation Number: 2022/DHC/005217

appointment of defendants no.1 to 8 have been taken by the plaintiff to secrecy/confidentiality thereof. The plaintiff's regard is vague and cannot be put to trial. The whole purpose of pleadings in a civil suit is to enable the opponent know the case to be met and which crystallizes ultimately in issues on which the parties go to trial. If such rules of pleading are not to be adhered to, it will result in a frivolous enquiry and enable a party to the suit to secure a victory by springing a surprise during the course of trial. Similarly, an injunction for confidentiality as sought, even if granted, is vague and unenforceable as aforesaid. This cannot pass such unenforceable order, the meaning whereof is not clear. It cannot be put to the Court nor to the defendant to show what the defendant is enjoined from doing.

70. In *Bombay Dyeing and Manufacturing Co. Ltd. (supra)*, the Court held that the information relating to strategic business plans, product mix, square footage of construction, capital expenditure or revenue budgets cannot be claimed to be matters of any confidential nature which no other competitor would know. It was held that contract rates and other ideas and condition could not be called trade secrets. In fact, an illustration was given of a salesman who left the company but could not be prevented from communicating with customers on the premise that he acquired the skill by experience from the employment.

71. The plaintiffs would, therefore, have to show that the information which is claimed to be confidential is of such nature that can be acquired by the defendants only because of their employment with the plaintiffs. Mere vague assertions of such information being related to sales and

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Neutral Citation Number: 2022/DHC/005217

marketing plan and strategy developed, in my prima facie opinion, cannot suffice.

72. In the present case, therefore, prima facie, the plaintiffs have been unable to show vesting of any confidential information regarding 'TRIMACARE' with the defendant nos.1 to 3 only because of their employment with the plaintiffs and/or use thereof, even as a 'spring board' by the defendants for launch of their product 'NUTRIEPIC'. The relief of temporary injunction in this regard, therefore, must fail.

73. As far as the claim based on the trade mark 'LAYERCARE' is concerned, while there is no doubt that the test to be adopted in a case where the defendant is an ex-employee or distributor or agent of the plaintiffs is less strict, at the same time, the plaintiffs have to show right over a particular mark.

74. In the present case, the claim made by the plaintiffs is only passing off. It is trite law that for testing a claim of passing off, what to be seen is the similarity between the competing marks, goodwill and reputation of the mark of the plaintiffs, and to determine whether there is a likelihood of deception or confusion being caused by the use of the complained mark.

75. In the present case, admittedly, the plaintiffs launched their product 'LAYERCARE' only in February, 2022. The defendants had left the employment of the plaintiffs on 17.02.2022. They had tendered their resignation prior to the launch of the medicine of the plaintiffs 'LAYERCARE'. Therefore, the special equities as are applicable in a case of an ex-employee or any ex-director or ex-distributor would not be available to the plaintiffs against the defendants.

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Neutral Citation Number: 2022/DHC/005217

76. On the general principles of passing off, it is to be seen that the word 'CARE' is a generic word over which the plaintiffs cannot claim exclusiveness. The marks 'LAYERCARE' and 'UTTERCARE' also cannot be held to be visually or phonetically similar. The packaging of the two products, that is, of 'LAYERCARE' and 'UTTERCARE' is also entirely different and in my prima facie opinion, is sufficient to rebut any claim of passing off. The same is reproduced hereinbelow:

77. From the above, it would be clear that the defendants' goods, fact, uses the alphabet 'C' in the word 'CARE' in a distinct form. There are also other distinctive features which would allay any claim of deceptive similarity between the two marks.

78. The claim of the plaintiffs of having a 'family of marks' with word 'CARE' also is ill-founded. This claim is based on only the two marks, that is, 'TRIMACARE' and 'LAYERCARE'. As noted, launch of both these medicines is recent and the plaintiff, at least prima-facie has been unable to show any goodwill and reputation in these marks so as to claim exclusivity over the work 'CARE'.

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Digitally Signed By:RENUKA

NEGI

Signing Date:01.12.2022CS(COMM) 570/2022

15:55:47

Pa

Neutral Citation Number: 2022/DHC/005217

RELIEF

79. In view of the above, ex-parte ad-interim order dated 22.08.2022 vacated. The defendants shall, however, on an affidavit, on a bi-annual basis, disclose the sales made by them for their medicinal product 'NUTRIEPIC'.

80. I.A. No.13093 of 2022 filed by the plaintiffs and I.A. No.1629/2022 filed by the defendants are disposed of with the above direction.

81. It is reiterated that the above observations are merely prima-facie in nature and shall not bind the Court while considering the merits of claim on the parties once they have led their respective evidence.

CS(COMM) 570/2022 and I.A. 16445/2022

82. List the suit and the pending application for completion of pleadings before the Learned Joint Registrar (Judicial) on 9th February 2023.

NAVIN CHAWLA

NOVEMBER 30, 2022/RN/AB/Ais