

Federal Court



Cour fédérale

Date: 20220606

Docket: T-1194-20

Toronto, Ontario, June 6, 2022

**PRESENT:** Case Management Judge Trent Horne

**BETWEEN:**

**DERMASPARK PRODUCTS INC.**

**Plaintiff /  
Defendant by Counterclaim**

**and**

**PRESTIGE MD CLINIC, SHEKARSARAEI SINA,  
SALEHI MOHAMMAD REZA,  
NEMATPOOR ZAHRA AND  
SAFARIAMIN ATEFEH**

**Defendants /  
Plaintiffs by Counterclaim**

**ORDER**

I. Overview

[1] Two motions in writing are before the Court. The plaintiff moves to further amend the statement of claim to add a further plaintiff that was earlier removed; the defendants move to strike the statement of claim, or in the alternative for particulars. I will deal with both motions together.

[2] This should be a relatively straightforward proceeding for infringement of copyright and trademark rights. The statement of claim, however, has been a moving target. The original statement of claim was issued in October 2020. It was amended the following month to, among other things, remove one of the plaintiffs. A draft amended amended statement of claim to return the same party back to the style of cause was sent to defendants' counsel by email in January 2022. The plaintiff then brought a motion to amend the statement of claim, but the notice of motion did not attach a draft amended pleading. A further proposed amended statement of claim was included in the plaintiff's reply argument on the defendants' motion to strike. As a result, some 18 months after the proceedings were initiated, the parties remain at the pleadings stage.

[3] Some allegations in the statement of claim will be struck without leave to amend, but it will not be struck in its entirety. Given the numerous amendments to date, the practical solution is to go back to the beginning, and permit the plaintiff to serve and file a fresh as amended statement of claim that includes the proper parties, and identifies and particularizes proper causes of action.

[4] Most of the matters in dispute were entirely avoidable. Costs will therefore be awarded against the plaintiff.

## II. Background

[5] The statement of claim issued on October 7, 2020 named two plaintiffs: Pollogen Ltd ("Pollogen") and Dermaspark Products Inc ("Dermaspark"). In general, the proceeding involves

intellectual property rights associated with skin treatment machines and products. The machines that perform the treatments are branded as OXYGENEO. It is asserted that the OXYGENEO machines are Class III medical devices, and subject to regulation by Health Canada. The branding associated with cosmetic creams includes trademarks such as NEOBRIGHT. The plaintiffs also assert ownership of copyrighted works.

[6] Dermaspark is a Canadian corporation. In the initial statement of claim, it alleged that Dermaspark is Pollogen's exclusive authorized distributor in Canada, and that Pollogen is a fully-owned subsidiary of Lumensis Ltd ("Lumensis"). Pollogen states that it has had a distribution agreement with Lumensis, who manufactures the product, since 2012.

[7] The statement of claim asserts that the defendant Prestige MD Clinic is a general partnership in Ontario, which carries on two salon businesses in Ontario. The four individual defendants are alleged to be the partners of Prestige MD Clinic, and the directing minds of the business.

[8] It is alleged that the defendants acquired a counterfeit OXYGENEO machine and products, and performed skin treatments using this machine and products, all the while presenting them as original.

[9] The prayer for relief seeks a range of declarations and injunctive relief for infringement of intellectual property rights, as well as various forms of compensatory and punitive damages.

[10] A defence and counterclaim was filed on November 10, 2020. In brief, the defendants acknowledged awareness of the OXYGENEO machine, and assert that they bought one on Amazon for a lower price than what was offered from the plaintiffs. The defendants further assert that, after the machine arrived, it was discovered that it did not meet their needs, and that it was returned. The defendants state that they never used the product in association with their services or otherwise. The counterclaim seeks a declaration that the defendants did not infringe the plaintiffs' rights, and that the claim is an abuse of process.

[11] An amended statement of claim was filed on November 20, 2020. It removed Pollogen as a party, and also added new material facts. The defendants responded with an amended statement of defence and counterclaim, also filed on November 20, 2020.

[12] Affidavits of documents and schedule 1 productions were exchanged in October 2021.

[13] In late December 2021, counsel for the defendants advised of their intention to proceed with a motion to strike. The plaintiff responded the next day, indicating an intention to further amend the statement of claim by re-adding Pollogen as a party. A draft further amended statement of claim was sent to counsel for the defendants on January 21, 2022. The proposed amendments only added Pollogen as a party in the style of cause; to the extent other amendments were made, they were not identified with underlining or otherwise.

[14] By notice of motion dated March 16, 2022, the plaintiff moved for an order directing that Pollogen be re-added as a party as a co-plaintiff. The notice of motion did not attach a draft amended pleading.

[15] The evidence on the plaintiff's motion includes an affidavit of Moshe Ben Shlomo, the director of Dermaspark. His affidavit states that he directed counsel to remove Pollogen from the statement of claim due to his sincere intention not to involve Pollogen in the action, and states that he innocently believed that it was not necessary to involve Pollogen in the action since Dermaspark is the exclusive Canadian distributor of certain products, and has the exclusive right to use certain intellectual property as described in the pleadings.

[16] In its reply materials on the motion to strike, the plaintiff included yet another proposed amended pleading, a second amended statement of claim, which shows significant amendments to the previous version.

[17] In this order, I will refer to the statement of claim as the "Original Claim", and the amended statement of claim that was filed on November 20, 2020 as the "Amended Claim".

[18] It is inappropriate for the plaintiff to include a proposed amended pleading in its reply submissions on a separate motion. The proposed amendments, the very purpose of the plaintiff's motion, should have been included in the first instance. The plaintiff has split its case, and frustrated the defendants' ability to fully respond to the motion to amend. In the interest of getting this action out of the pleadings stage, I will consider the plaintiff's motion to amend

based on the draft second amended statement of claim included in the plaintiff's responding materials, which I will refer to as the "Proposed Claim". This will be a factor in the assessment of costs.

[19] For the remainder of this order, I will consistently refer to the plaintiffs in the plural, even though there was only one plaintiff in the Amended Claim.

### III. Law on Motions to Strike

[20] The legal principles applying to motions to strike are well known. To strike a pleading, it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. It needs to be plain and obvious that the action is certain to fail because it contains a radical defect (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 17).

[21] To disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action which is to be founded on those facts; and (c) indicate the relief sought, which must be of a type that the action could produce and the Court has jurisdiction to grant (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5).

[22] On a motion to strike, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19).

IV. Law on Motions to Amend

[23] Rule 75 of the *Federal Courts Rules*, SOR/98-106 (“Rules”) provides that the Court, on a motion, may, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

[24] Amendments to pleadings are permitted at any stage of a proceeding (i) unless they would result in injustice that cannot be compensated with costs, and (ii) provided they serve the interests of justice (Rule 75; *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 9; *Canderel Ltd v R*, [1994] 1 FC 3 (Fed CA) at para 10; *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at paras 20-22, leave to appeal ref’d SCC Case No. 39600).

[25] The controlling principle for allowing an amendment at any stage of an action is whether the amendment assists in determining the real questions in controversy between the parties, provided it would not result in an injustice not compensable in costs and that it would serve the interests of justice (*Canada v Pomeroy Acquireco Ltd*, 2021 FCA 187 at para 4).

V. Law on Particulars

[26] When considering the defendants’ alternative request for particulars, I begin with the observations of Justice Hughes in *Trudeau Corporation 1889 Inc v Product Specialties Inc*, 2009 FC 148 at para 4: motions for particulars, without a strong evidentiary basis to persuade the Court that the defendant cannot plead over, are to be discouraged.

[27] Particulars: a. inform the party opposite of the case it has to meet; b. prevent surprise at trial; c. enable the party opposite to know what evidence it will have to gather and present at trial; d. focus the allegations and limit the generality of the pleadings; e. limit the issues for trial and discovery; and f. tie the party pleading to the allegations made in the pleading, thus ensuring that nothing new will be raised at discovery or trial without leave. Each case will be considered on its own facts (*Throttle Control Tech Inc v Precision Drilling Corporation*, 2010 FC 1085 at para 11).

[28] The purpose of particulars is not the same as examination for discovery. A party is entitled to enough information to understand the other party's position and prepare a responsive answer, not every fact on which the action is based (*Océan Navigation Inc v Abitibi Consolidated Inc*, 2007 FC 413 at para 6).

[29] To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action. The plaintiff needs to explain the “who, when, where, how and what” giving rise to the defendant’s liability (*Al Omani v Canada*, 2017 FC 786 at para 14 (“*Al Omani*”)).

## VI. The Copyright Claims

[30] The allegations of copyright infringement in each of the Original Claim, Amended Claim, and Proposed Claim are fundamentally flawed.

[31] Copyright is a statutory scheme; copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute. The legislation speaks for itself and the actions of a party must be measured according to the terms of the statute (*Compo Co Ltd v Blue Crest Music et al*, [1980] 1 SCR 357 at 372-373). The *Copyright Act*, RSC 1985, c C-42 sets out the conditions for the existence, ownership and enforceability of copyright.

[32] Much of the recent procedural conflict has arisen from Pollogen exiting, then attempting to re-enter the proceedings. Notwithstanding Mr. Shlomo's sincere beliefs described above, the requirements for the presence of copyright owners in litigation is squarely addressed in the *Copyright Act*.

[33] Subsection 34(1) of the *Copyright Act* provides that, where copyright is infringed, the owner of copyright is entitled to remedies conferred by law.

[34] Subsections 41.23(1) and (2) of the *Copyright Act* provide:

Protection of separate rights

(1) Subject to this section, the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner, may individually for himself or herself, as a party to the proceedings in his or her own name, protect and enforce any right that he or she holds, and, to the extent of

Protection des droits distincts

(1) Sous réserve des autres dispositions du présent article, le titulaire d'un droit d'auteur ou quiconque possède un droit, un titre ou un intérêt acquis par cession ou concession consentie par écrit par le titulaire peut, individuellement pour son propre compte, en son propre nom comme partie à une procédure, soutenir et faire

that right, title and interest, is entitled to the remedies provided by this Act.	valoir les droits qu'il détient, et il peut exercer les recours prévus par la présente loi dans toute l'étendue de son droit, de son titre et de son intérêt.
Copyright owner to be made party	Partie à la procédure
(2) If proceedings under subsection (1) are taken by a person other than the copyright owner, the copyright owner shall be made a party to those proceedings, except	(2) Lorsqu'une procédure est engagée au titre du paragraphe (1) par une personne autre que le titulaire du droit d'auteur, ce dernier doit être constitué partie à cette procédure sauf :
(a) in the case of proceedings taken under section 44.12, 44.2 or 44.4;	a) dans le cas d'une procédure engagée en vertu des articles 44.12, 44.2 ou 44.4;
(b) in the case of interlocutory proceedings, unless the court is of the opinion that the interests of justice require the copyright owner to be a party; and	b) dans le cas d'une procédure interlocutoire, à moins que le tribunal estime qu'il est dans l'intérêt de la justice de constituer le titulaire du droit d'auteur partie à la procédure;
(c) in any other case in which the court is of the opinion that the interests of justice do not require the copyright owner to be a party.	c) dans tous les autres cas où le tribunal estime que l'intérêt de la justice ne l'exige pas.

[35] Pursuant to section 41.23, a person deriving an interest by grant in writing (e.g. a license) may bring a proceeding for infringement of copyright, however the default position is that the copyright owner shall also be made a party to the proceedings. While the Court has the ability to

order that the copyright owner not be a party to the proceedings, Dermaspark has not moved for such relief.

[36] It was appropriate to include Pollogen as a plaintiff in the Original Claim, and improper to remove it in the Amended Claim. This should have been known to the plaintiffs from the outset.

[37] Turning to the substance of the proposed amendments, paragraph 1(a)(i) of the Proposed Claim seeks a declaration that the defendants have infringed Pollogen's copyright, but does not identify what specific works are in issue.

[38] The Proposed Claim identifies and describes the works in issue as follows:

21) Defendants have repeatedly advertised, offered and sold their services of a counterfeit Pollogen Product, as well as reproduced and published copyrighted material developed by Plaintiffs for marketing purposes (hereinafter referred to as the "Copyrighted Works").

22) Said Copyrighted Works are comprised of original works of authorship available and published on Pollogen's website (<https://pollogen.com>), for which the exclusive right to reproduce, perform, publish or translate, in Canada, had been granted to Dermaspark, including, the original literary work describing the Geneo+/OxyGeneo Products available at <https://pollogen.com/products/geneo/>.

23) All such Copyrighted Works are owned by the plaintiff Pollogen.

24) Plaintiff Pollogen's own employees, created the Copyrighted Works and assigned the same to Plaintiffs.

[39] These allegations are new; until the delivery of the Proposed Claim, the works alleged to have been infringed were not identified or particularized at all.

[40] Pointing to a website, without more, is inadequate. A website can be dynamic, with the content changing from time to time. Websites can also include a wide array of literary and artistic works. The defendants should not be required to guess what literary or artistic works on the Pollogen website are alleged to have been reproduced by the defendants without authorization, and which ones are not. A blanket statement that the works were created by Pollogen employees and assigned to Pollogen, without more, is insufficient. In these circumstances, particularly where a limited number of works appear to be in issue, the defendants are entitled to know, before filing a defence, at least: the specific works that are in issue; the identity of the authors of each work; whether Pollogen's claimed ownership in the works arises by operation of law or assignment (or both); whether any of the works are licensed to Dermaspark; and how or where the copyrighted works are alleged to have been misused. Anything less would impair the defendants' ability to prepare an informed defence, and would not adequately frame the issues for documentary and oral discovery.

[41] Given the absence of adequate and complete information in the Proposed Claim as to the copyrighted works in issue, the copyright claims must be struck.

[42] Striking a pleading without leave to amend is a power that must be exercised with caution. If a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani* at paras 32-35).

[43] The plaintiffs have had no fewer than five opportunities to properly particularize their copyright claims: in the Original Claim; the Amended Claim; the version of the statement of claim sent to opposing counsel on January 21, 2022; their own motion to amend; and in response to the defendants' motion to strike. Yet all the defendants have now is a general reference to a Pollogen website.

[44] While I am not inclined to give the plaintiffs a sixth bite at the apple, there is at least a scintilla of a cause of action in copyright. The plaintiffs will therefore be granted leave to amend the copyright claims, which includes the addition of all copyright owners as plaintiffs. Any such amended pleading must identify: (a) the specific works that are in issue; (b) the authors of each work; (c) whether Pollogen's claimed ownership in the works arises by operation of law or assignment (or both); (d) whether any of the works are licensed to Dermaspark; (e) whether any grant of interest is written or oral; and (f) how or where the copyrighted works are alleged to have been reproduced, in whole or in substantial part, by the defendants.

## VII. The Trademark Claims

[45] If Dermaspark is a licensee of the trademarks in issue, and Pollogen is the trademark owner, section 50(3) of the *Trademarks Act*, RSC, 1985 c T-13 ("TMA") applies:

Owner may be required to take proceedings	Action par le propriétaire
(3) Subject to any agreement subsisting between an owner of a trademark and a licensee of the trademark, the licensee may call on the owner to take proceedings for infringement	(3) Sous réserve de tout accord encore valide entre lui et le propriétaire d'une marque de commerce, le licencié peut requérir le propriétaire d'intenter des

thereof, and, if the owner refuses or neglects to do so within two months after being so called on, the licensee may institute proceedings for infringement in the licensee's own name as if the licensee were the owner, making the owner a defendant.

procédures pour usurpation de la marque et, si celui-ci refuse ou néglige de le faire dans les deux mois suivant cette réquisition, il peut intenter ces procédures en son propre nom comme s'il était propriétaire, faisant du propriétaire un défendeur.

[46] At paragraph 11 of the Proposed Claim, Pollogen claims to be the owner of certain registered trademarks. It should have been apparent, before the Original Claim was served and filed, that Pollogen was required to be a party to these proceedings.

[47] In the versions of the statement of claim that preceded the Proposed Claim, a consistent issue was that infringement of unregistered trademarks was alleged, but the plaintiffs failed to identify what those unregistered trademarks were.

[48] This is now addressed, again for the first time, in the Proposed Claim at paragraph 26:

26) Said common law trademarks include, Pollogen, Geneo, Geneo+, OxyGeneo, NeoRevive, NeoBright, Super Facial, 3-in-1 super facial, Tripollar RF, among others (hereinafter the "Common Law Trademarks").

[49] Two issues are immediately apparent. First, the use of "include" and "among others" inadequately defines the unregistered marks in issue. The defendants should have a closed list of what unregistered rights are claimed by the plaintiffs. Second, there is duplication in the definitions for Pollogen Trademarks and Common Law Trademarks, specifically that GENE0+, OXYGENEO, NEOREVIVE, NEOBRIGHT, and 3-IN-1 SUPER FACIAL are claimed to be

both registered marks and unregistered marks. To the extent the plaintiffs are claiming two kinds of rights in the same trademark, this must be explained.

[50] More confusing is paragraph 27 of the Proposed Claim (*sic* throughout):

27) Through the continuous use and promotion of [...] the Pollogen Trademarks, Common Law Trademarks and its Copyrighted Works since March 2012, the Plaintiffs' businesses have come to enjoy a valuable reputation and goodwill in Canada, in association with skin care services [...].

[51] Returning to first principles, trademarks indicate the source of a particular product, process or service in a distinctive manner, so that, ideally, consumers know what they are buying and from whom. The foundation of a trademark is distinctiveness because only a distinctive mark will allow the consumer to identify the source of the goods (*Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 39). In other words, a trademark must be distinctive of a single source (*Yiwu Thousand Shores E-Commerce Co Ltd v Lin*, 2021 FC 1040 at para 32).

[52] Dermaspark and Pollogen cannot simultaneously have goodwill in the same trademarks. If Pollogen is the alleged owner, and Dermaspark a controlled licensee, that must be clearly stated. It is not.

[53] There is also an issue with paragraphs 28 and 61 of the Proposed Claim, directed to depreciation of goodwill. The allegations of depreciation of goodwill include what is defined as the Common Law Trademarks, but section 22 of the TMA is limited to registered trademarks. There is no cause of action for depreciation of goodwill in an unregistered trademark.

[54] The plaintiffs rely on section 7(a) of the TMA, however the Proposed Claim only includes reference to the section in the prayer for relief, and recites the language of the section in paragraph 37. This allegation must be particularized if it is to be advanced.

[55] The allegations of trademark infringement will therefore be struck. Since there is a scintilla of a cause of action for trademark infringement, leave to amend these allegations will be granted. Any such amended pleading must identify: (a) the owner of the trademarks in issue; (b) whether any of the trademarks are licensed to Dermaspark; (c) whether any license is written or oral; (d) identification of registered trademarks in issue, including registration numbers; (e) identification of the unregistered trademarks in issue; and (f) material facts supporting each cause of action under the TMA. The Proposed Claim relies on sections 7(a), 7(b), 7(c), 7(d), 19, 20, and 22. The defendants are entitled to particulars of infringement for each of these sections, including the plaintiffs' trademarks that are claimed to apply to each section, and what the defendants are alleged to have done to breach each of these sections.

#### VIII. Punitive Damages

[56] Punitive damages are reserved for exceptional cases in which “malicious, oppressive and high-handed” misconduct represents a “marked departure from ordinary standards of decent behaviour” and offends the court’s sense of decency (*Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 36 and 94 (“*Whiten*”)).

[57] There is jurisprudence in both the Federal Court and Federal Court of Appeal that infringement of intellectual property rights (even if that infringement is intentional), without

more, does not give rise to a claim for punitive damages (e.g. *Dimplex North America Ltd v CFM Corporation*, 2006 FC 586, aff'd 2007 FCA 278 (*Dimplex*); *Bauer Hockey Corp v Sport Maska Inc (Reebok-CCM Hockey)*, 2014 FCA 158 (*Bauer*); and *Ark Innovation Technology Inc v Matidor Technologies Inc.*, 2021 FC 1336 at para 152).

[58] That is not to say that punitive damages are unavailable in intellectual property cases. In *Bell Helicopter Textron Canada Limitée v Eurocopter, société par actions simplifiée*, 2013 FCA 219 at paras 185-193, the Court of Appeal upheld a punitive damages award in a patent case where the defendant knew the patent was valid, appropriated the invention as its own, and marketed it as its own, knowing this to be untrue.

[59] In *Bauer*, the material facts supporting a claim for punitive damages included an assertion that Reebok-CCM had previously acknowledged that Bauer's predecessor-in-title had certain exclusive rights (para 33), and, after receiving a demand letter, Reebok-CCM not only failed to cease its infringing activities, but rather adopted the impugned design on an entire line of hockey skates (para 34). In light of these additional elements, the Court of Appeal could not conclude that Bauer's claim of punitive damages had no reasonable prospect of success (para 35).

[60] In *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at para 78, Justice Pentney allowed a claim for punitive damages on a default judgment motion in a copyright proceeding. The award was based on the defendants' failure to delete the infringing programs despite their promise to do so, as well as their failure to pay the fees quoted even after they completed and returned a settlement agreement. The latter point was particularly relevant

because it demonstrated that the defendants were aware of what was required to lawfully use the software, but they both refused to pay and continued to use the plaintiffs' software. The Court also noted the defendants' decision not to participate in the proceeding.

[61] To summarize the above, a claim for punitive damages, based on intentional infringement alone, cannot be sustained. There has to be something more. What constitutes "something more" is not a closed list.

[62] In this matter, the allegations related to punitive damages are almost entirely directed to deliberate and knowing infringement. There is, however, an allegation in paragraph 64 of the Proposed Claim that performing medical treatments using counterfeit machines and products that are not licensed by Health Canada posed a significant risk of bodily harm to patients, and put their health and safety at risk. It is alleged that the defendants intentionally deceived their trainees and the public to gain financial profit.

[63] Presuming this allegation to be true for the purposes of this motion, such conduct could amount to "something more" than intentional infringement alone. The claim for punitive damages will not be struck without leave to amend.

#### IX. Personal Liability

[64] In order to find an officer or director personally liable, the officer or director must have engaged in the willful and knowing pursuit of a scheme that constituted infringement and that

reflected an indifference to the risk of it (*Mentmore Manufacturing Co, Ltd v National Merchandise Manufacturing Co.* (1978), 40 CPR (2d) 164 at 174 (“*Mentmore*”).

[65] It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself 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 directing minds (*Tommy Hilfiger Licensing Inc v Produits de Qualité IMD Inc*, 2005 FC 10 at paras 140-142).

[66] The mere fact that individual defendants may be sole shareholders and directors of a company is not, by itself, enough to support an inference that the company was their agent or instrument in the commission of acts of infringement, or that they authorized such acts, so as to make themselves personally liable (*Mentmore* at para 24; *Petrillo v Allmax Nutrition Inc*, 2006 FC 1199 at para 32).

[67] Personal liability of directors is exceptional, even if it appears to a plaintiff that an individual’s conduct is deliberate and uncooperative (*Monsanto Canada Inc. v Schmeiser*, (2001) 12 CPR (4th) 204 at para 114; *aff’d* 2002 FCA 309 and 2004 SCC 34).

[68] While the Proposed Claim makes a number of allegations against the personal defendants, the pleaded misconduct is in relation to the operation of the business. The Proposed Claim does not contain sufficient material facts to establish that the actions of the individual

defendants were independently tortious, that the corporation was used as a shield to protect them from liability, or that the corporate veil should be pierced. Their inclusion as parties gives the impression of an aggressive litigation tactic. Given the number of opportunities the plaintiffs have had to particularize these allegations and have not done so, I am not persuaded that there is even a scintilla of a cause of action against the individual defendants. These allegations will be struck without leave to amend.

[69] I note that, in the Amended Claim, one of the defendants is identified as “Nematpoor Zahra”. In the documents filed by the defendants, this defendant is identified as “Nematpoor Zajra”. No order has been made to amend the style of cause. I will therefore use the spelling in the originating document. In any event, the claim as against this person is struck without leave to amend.

X. Costs

[70] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[71] On one hand, the defendants could have avoided much of the procedural wrangling that has occurred over the last 18 months by bringing their motion to strike/particulars when the Original Claim was served. But pleadings motions are discouraged, and there is something to be said for a party just getting on with it, even though that may add time and expense to the discoveries.

[72] The real obstacle to this matter not moving forward is the continuously evolving statement of claim.

[73] The plaintiffs should have known from the outset that Pollogen was a necessary party to the proceedings, and that it was necessary to clearly identify the copyright and trademark rights that are alleged to have been infringed. The shifting sands of the plaintiffs' allegations, which still do not meet the basic requirements of pleading, have needlessly added delay and expense.

[74] I take particular issue with the plaintiffs' late presentation of the Proposed Claim in their reply materials on the motion to strike.

[75] The defendants were substantially successful on the motion, and will be prejudiced by the delays associated with the further amendments to the statement of claim. Such prejudice can be addressed in costs. I award costs of both motions to the defendants, fixed at \$5,000.00, payable forthwith. Costs will be payable by Dermaspark, the only plaintiff at the time the motions were brought.

**THIS COURT ORDERS that:**

1. The amended statement of claim is hereby struck.
2. The plaintiff's claim as against Shekarsaraei Sina, Salehi Mohammad Reza, Nematpoor Zahra and Safariamin Atefeh is struck without leave to amend.

3. The plaintiff is granted leave to serve and file a fresh as amended statement of claim against Prestige MD Clinic that includes claims for trademark and copyright infringement, as well as punitive damages, as set out in this order.
4. Any fresh as amended statement of claim shall be served and filed within 30 days of the date of this order.
5. Dermaspark Products Inc. shall pay the defendants' costs of these motions, fixed at \$5,000.00, payable forthwith.

"Trent Horne"  
\_\_\_\_\_  
Case Management Judge