

Ontario Supreme Court
CPC International Inc. v. Seaforth Creamery Inc.
Date: 1996-06-04

CPC International Inc. et al.

and

Seaforth Creamery Inc. et al.

Court File No. 95-CU-89450 CM

Ontario Court (General Division), Cumming J. June 4, 1996.

John M. Roland, Q.C., and Deborah Glendinning, for the plaintiffs.

Robert C. Taylor, for defendant, Seaforth Creamery Inc.

Tracy Warne, Q.C., for defendant, Joseph Cianciaruso.

CUMMING J.:—

Introduction

[1] The plaintiff CPC International Inc. (“CPC”) is a corporation with its head office in New Jersey. It carries on business in the United States as a producer and distributor of food products, including Hellmann’s Mayonnaise. The plaintiff Best Foods Canada Inc. (“Best”) is a wholly owned subsidiary of CPC, with its office in Montreal, Quebec. Best produces and distributes food products throughout North America, including Hellmann’s Mayonnaise, under the trade-marks “Hellmann’s” and “Best Foods”.

[2] The defendant Seaforth Creamery Inc. (“Seaforth”) has its head office in Oakville, Ontario. It too produces food products, including mayonnaise, under the name “Village” in competition with Best. As well, Seaforth produces mayonnaise sold under private labels. These include “President’s Choice” and “Our Compliments”, marketed by the food store chains of Loblaws and IGA respectively, in competition with Best.

[3] The individual defendant, Joseph Cianciaruso, was employed by Best for some 17 years. When he resigned June 4, 1993, he was a Senior Product Development Technician whose duties included quality control, testing, research and development functions with respect to the production of Hellmann’s Mayonnaise. Mr. Cianciaruso was hired by Seaforth as Manager of Technical Services in December 1993.

[4] The plaintiffs allege in their Amended Statement of Claim that they have “trade secrets and confidential and proprietary information” (hereafter referred to collectively as “trade secrets”) relating to Hellmann’s Mayonnaise.

[5] There are three categories of “information” that will be under consideration in the case at hand: first, trade secrets; second, non-trade secrets but information which constitutes confidential information; and third, information that is neither, and hence, is in the public domain. However, even if certain information is in the public domain, the specific fact that a party utilizes that information in its food processing may not be in the public domain. Accordingly, the information that a party is utilizing public domain information in its operations can conceivably be confidential information.

[6] “Trade secrets” and “confidential information” are not easily definable with exhaustive precision, but once ascertained constitute proprietary rights. Any misappropriation by a former employee and new employer of that employee can give rise to liability in damages and to injunctive relief: *Ansell Rubber Co. Pty. Ltd. v. Allied Rubber Industries Ltd.*, [1967] V.R. 37 (Aust. S.C.) at 49, 51; *Seager v. Copydex Ltd.*, [1967] 2 All E.R. 415 (C.A.) at 417 per Lord Denning; *Thomas Marshall (Exports) Ltd. v. Guinle*, [1978] 3 All E.R. 193 (Ch. D.) at 209; *R.L. Grain Ltd. v. Ashton*, [1949] O.R. 303 at 307, 9 C.P.R. 143 (Ont. S.C.).

[7] The plaintiffs allege that Mr. Cianciaruso, while an employee of Best, acquired information relating to the trade secrets with respect to the formulation and processing of Hellmann’s Mayonnaise. They say he was in a position to know all the aspects of Best’s formulation and processing with respect to Hellmann’s Mayonnaise. They allege that he owed a fiduciary duty and a duty of confidence to Best. The plaintiffs’ alleged causes of action include inducing breach of contract, duty of confidence and fiduciary duty, intentional interference with economic interests and conspiracy. The plaintiffs allege also that Mr. Cianciaruso signed an Employee Agreement to the effect that he would not disclose such trade secrets. If such allegations are proven then the plaintiffs say they have a good cause of action: see, for example, *R.L. Cram Ltd. v. Ashton, Co.*, [1950] O.R. 62 at 68, 69, 11 C.P.R. 53 (Ont. C.A.).

[8] The plaintiffs allege that in order to formulate and produce “President’s Choice” and “Our Compliments”, Seaforth made changes to its then existing mayonnaise formulation and production processes through misappropriating and utilizing the plaintiffs’ trade secrets disclosed to Seaforth by Mr. Cianciaruso. Both defendants admit that some changes were

made to Seaforth's formulation of mayonnaise after Mr. Cianciaruso was employed by Seaforth.

[9] The plaintiffs seek ultimately an injunction and damages.

[10] The defendants deny all the allegations. As well, Seaforth counterclaims for an injunction and damages, alleging, *inter alia*, that CPC and Best are unlawfully using trade secrets and confidential and proprietary information of Seaforth relating to its production of pourable salad dressings. Best and CPC deny these allegations.

[11] When Best first learned in December 1993 of Mr. Cianciaruso's employment with Seaforth, the plaintiffs' concerns were made known by their counsel to the defendants. Not satisfied with the response, Best commenced an action on December 24, 1993, against the defendants. Best discontinued this action in August 1994 for the reason (it says in the present statement of claim issued in August 1995) that it was fearful of the risk that it might be prejudiced by unwanted disclosure through the court action of trade secrets even under the protection of a Confidentiality Order. Best says that, in discontinuing that previous action, it gave notice to Seaforth that it would monitor Seaforth's product lines and would re-institute proceedings if, in its view, its trade secrets were improperly used. About April 1995 reformulated "President's Choice" and "Our Compliments" mayonnaise products were brought into production by Seaforth.

[12] The onus is upon the plaintiffs at trial to prove their trade secrets: *Keybrand Foods Inc v. Guinchard* (1990), 33 C.P.R. (3d) 381 (Ont. Ct. (Gen. Div.)); *Molnar Lithographic Supplies Ltd. v. Sikatory* (1974), 14 C.P.R. (2d) 197 (Ont. C.A.) per Schroeder J.A. at p. 200. The plaintiffs at trial must establish that any of the information of the plaintiffs that is also information used by Seaforth was disclosed by Mr. Cianciaruso and that such information constitutes trade secrets or confidential information in respect of which the plaintiffs have rights protected by law.

Issues

[13] I have been appointed a case management judge to deal with the matters before trial: *Toronto Civil Case Management Rules*, O. Reg. 703/91, amended O. Regs. 210/93; 765/93, rule 3.01(1).

[14] The defendants brought motions under rule 25.10 of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 as amended, for an order that the plaintiffs comply with the defendants' demands for particulars. Those motions were heard on October 24, 1995, and were dismissed with oral reasons given on that date [summarized 59 A.C.W.S. (3d) 31]. The remaining pleadings were then filed and pleadings closed December 12, 1995.

[15] Various motions and cross-motions ensued and were heard January 4, 5, 15, and February 9, 1996, with written reasons for decision delivered April 4, 1996 [now summarized 62 A.C.W.S. (3d) 990]. At that time I dismissed the plaintiffs' motion for a Confidentiality Order for the reason that an evidentiary basis was not offered in support. I dismissed the motion without prejudice to the plaintiffs to bring a new motion with supporting evidence.

[16] The plaintiffs have now brought a new motion dated May 8, 1996, for a Confidentiality Order. In doing so they also sought leave to hear *viva voce* evidence at the hearing of this new motion.

[17] The defendants submitted that the plaintiffs' new motion should be adjourned or stayed pending the determination of their appeals in respect of my decision of April 4, 1996, which had dismissed certain motions brought by the defendants, at the same time as dismissing the plaintiffs' motion. I dismissed the defendants' motion for an adjournment or stay in respect of the plaintiffs' new motion by oral reasons given May 13, 1996.

The Issue of Viva Voce Evidence at the Hearing of the Plaintiffs' New Motion for a Confidentiality Order

[18] An affidavit, which may contain statements based on information and belief, is the usual form of putting forward evidence relating to the material facts alleged in a claim. An affidavit sworn by Roch Boucher, Plant Manager of Best Foods, was made in support of the plaintiffs' new motion for a Confidentiality Order.

[19] The defendants may seek to cross-examine upon any affidavit evidence, as provided by rule 39.02.

[20] The plaintiffs produced Mr. Boucher as a witness at the return of their motion, essentially for the purpose of cross-examination by the defendants in respect of his affidavit. Thus, the only exceptional aspect to the giving of evidence in respect of the motion at hand

was that the plaintiffs requested the deponent be cross-examined upon his affidavit in open court rather than simply before a court examiner as in the usual case.

[21] In my view, this was the correct approach in the case at hand and I agreed to it proceeding on this basis. The Court has the discretion to allow a witness to testify orally on a motion: rule 39.03(4). The Court has the inherent power to control its own proceedings by limiting cross-examination, or even preventing it, where it is in the interests of justice to do so: *Re Ferguson and Imax Systems Corp.* (1984), 47 O.R. (2d) 225, 44 C.P.C. 17 (Ont. Div. Ct.). It is my view that throughout the proceedings to date the defendants have suggested procedural approaches which might result in the information which the plaintiffs regard as their trade secrets and confidential information being disseminated or known outside the context of the proposed Confidentiality Order.

[22] As well, it is apparent that this litigation is extremely fractious which requires close supervision by the Court and a continuum of rulings as to procedural disputes. It was apparent that questions would likely arise on the cross-examination of Mr. Boucher that would relate to the plaintiffs' trade secrets and confidential information and the hearing of *viva voce* evidence would allow for an immediate determination as to whether questions were proper. As well, it was apparent that an appeal might ensue from the disposition of the new motion for a Confidentiality Order. As the defendants' appeal in respect of the dismissal of another motion is to be heard shortly, it was thought best by all parties to deal with all appeals in respect of motions to date at the same time.

[23] All in all, it is my view that the only way in which this motion could advance with fairness to both parties, and in a timely manner, was for the cross-examination of the deponents of affidavit evidence to take place in open court. Accordingly, this was done in respect of Mr. Boucher and also in respect of Mark Barr, the deponent of an affidavit by the responding defendants.

[24] In taking this approach, the Court allowed both deponents to be cross-examined on all matters relevant to the *motion*; however, objections to questions were sustained when the deponent was asked to answer questions that were not relevant to the motion but only relevant to the broader issues of the action: *Toronto Board of Education Staff Credit Union Ltd. v. Skinner*; *Toronto Board of Education v. Lake Rousseau Village Inn Ltd.* (1984), 46 C.P.C. 292 (Ont. H.C.J.).

The Plaintiffs' New Motion for a Confidentiality Order

[25] The plaintiffs have brought a new motion to establish a mechanism (by way of a so-called "Confidentiality Order") to identify, on a confidential basis, the changes allegedly made by Seaforth to the formulation and processing of its mayonnaise in order to produce the products sold under the "President's Choice" and "Our Compliments" labels. The plaintiffs would then, by their proposal, produce the relevant trade secrets they employ to enable the Court at a trial to make a determination as to the validity of their allegations by comparing the disclosed trade secrets of the plaintiffs with the changes made by Seaforth.

[26] The plaintiffs emphasize that they have some trade secrets, not necessarily relevant to the issues in this action, which they do not want to divulge. As well, they say that there may be some trade secrets which the individual defendant did not ever know or which he may have forgotten. The plaintiffs say they know generally what trade secrets Mr. Cianciaruso was exposed to in his former employment with Best. However, they cannot say with any precision what he now knows. Therefore, the plaintiffs say that the starting point for disclosure should be the *changes* made by Seaforth in respect of its production of mayonnaise after Mr. Cianciaruso took up employment with them.

[27] The objective for the Court's consideration is to achieve a fair adjudication of the issues raised in the pleadings in the interests of justice yet minimize the disclosure by both the plaintiffs and Seaforth to the maximum extent possible in achieving that end. What is necessary is a regime for limited disclosure. This would prima facie seem feasible, at least in the first instance, by isolating the *changes* made to the process of Seaforth after Mr. Cianciaruso's employment by Seaforth and comparing those changes to the plaintiffs' own process just prior to Mr. Cianciaruso's termination of his employment with Best.

[28] The plaintiffs propose that the confidentiality mechanism embrace production and discovery, including an inspection. It is the particular terms of the Confidentiality Order that are in dispute. The defendants are fearful that if Seaforth goes first in making disclosure to the plaintiffs and their experts of what it is that Seaforth does, the plaintiffs then would claim that such information is part of the plaintiffs' own trade secrets. Seaforth also says there is an inherent risk and lack of fairness to it in a process whereby Seaforth discloses first.

[29] Both defendants take the position in their pleadings that there are not any trade secrets relating to the preparation of mayonnaise. However, they do not want to divulge information to the plaintiffs that is not known to the plaintiffs and which might be used to the advantage of the plaintiffs as a competitor. As well, Seaforth says that the plaintiffs should not gain knowledge of their mayonnaise formulations prior to Mr. Cianciaruso becoming employed by Seaforth because this knowledge is not relevant to the issues.

[30] The legal foundation of the claims made by the plaintiffs and the counterclaim made by Seaforth is the existence and identity of trade secrets. The issue between the plaintiffs and Seaforth in the main action is whether Seaforth has used any trade secrets of the plaintiffs. The only way the plaintiffs can prove their case is by discovery of the *changes* made by Seaforth after Mr. Cianciaruso became Seaforth's employee.

[31] With respect to the counterclaim, the plaintiffs argue that the situation differs. Best says Seaforth was a producer at Seaforth's plant, under contract, of pourable salad dressings for Best from about September 1990 to 1993 under a secrecy agreement. Best admits in its defence to Seaforth's counterclaim to using the same in-house process which was used at Seaforth (but which Best claims it, in fact, developed for Seaforth's use). Hence, the plaintiffs say there is no need for disclosure or inspection of Best's production process in respect of pourable salad dressings as Seaforth already has all the relevant knowledge. That is, the plaintiffs say that both parties know and use the same formulation and production process. The sole issue in respect of the counterclaim would seem to be who has the proprietary rights in respect of any trade secrets relating to the pourables.

[32] To the extent disclosure may be necessary in respect of the counterclaim, the same Confidentiality Order that is made applicable to the main action, can be used in respect of the counterclaim relating to the salad dressings pourables, making the necessary changes. Seaforth has not brought any motion to date seeking a Confidentiality Order in respect of its counterclaim.

[33] *Warner-Lambert Co. v. Glaxo Laboratories Ltd.*, [1975] R.P.C. 354 (C.A.) involved an infringement of a patent action. A Confidentiality Order was made by the Court. In doing so, the Court discussed the considerations in making such an order. The governing principle is for the Court to resolve the conflict of interests of the parties by ordering a controlled measure of discovery to selected individuals upon terms that ensure there should neither be use, nor

further disclosure, of the disclosed trade secrets to the prejudice of the party disclosing same, yet ensure that the party claiming infringement gains such disclosure as is necessary and consistent with adequate protection of any trade secrets the disclosing party has. Trade secrets only have value if they are not generally known. An efficacious Confidentiality Order is essential. Thus, disclosure should not be required that is broader (in terms of both the content of the disclosure and the number of recipients of the disclosed information) than necessary to adjudicate the issues.

[34] The Court has the inherent discretion to grant a protective Confidentiality Order: see *Automated Tabulation Inc. v. Canadian Market Images Ltd.* (1995), 24 O.R. (3d) 292 (Ont. Ct. (Gen. Div.)) where disclosure was denied to an opposing party but allowed to that party's solicitors and experts; *Proctor & Gamble Co. v. Kimberley-Clark of Canada Ltd.* (1989), 25 C.P.R. (3d) 12 (F.C.A.); *Harnischfeger Corp. of Canada v. Kranco Inc.* (1991), 39 C.P.R. (3d) 81 (B.C.S.C.).

[35] The balancing of interests required to formulate the specific terms of the Confidentiality Order also requires the exercise of discretion. Such discretion should be exercised against disclosure of trade secrets where the probative value of such disclosure is clearly outweighed by the adverse effect to which disclosure could have: *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1992), 70 B.C.L.R. (2d) 180 at 184, 185, 43 C.P.R. (3d) 392 *sub nom.* *G.W.L. Properties Ltd. v. Industries Cafco Ltée* (B.C.S.C.).

[36] At various points, the defendants, through their counsel, appeared to argue that there should not be any Confidentiality Order; at other times they expressly stated that it was only the scope and sequence of discovery under a Confidentiality Order that was in issue.

[37] Mr. Boucher testified that Mr. Cianciaruso had access to the information relating to the trade secrets and confidential information of the plaintiffs pertaining to the formulation and processing of their mayonnaise. It is apparent from Mr. Boucher's testimony that the plaintiffs have extensive documentation relating to the formulation and processing of their product and that they are zealous in protecting the confidentiality thereof.

[38] Mr. Cianciaruso, as with other key employees, signed a "Confidentiality Agreement" during his employment with Best Foods.

[39] Mr. Boucher's affidavit states that Best Foods discontinued its original action against the defendants in August 1994 only because they felt that such approach was preferred at the time to divulging their trade secrets in the course of conducting the court action. The plaintiffs told the defendants that they would monitor the situation and would re-institute proceedings should it appear to the plaintiffs that the defendants were making use of any of their trade secrets.

[40] The plaintiffs became aware about April 1995 that Seaforth was then producing reformulated private label products for sale under the trade-marks "President's Choice" and "Our Compliments". Mr. Boucher and the plaintiffs detected a significant shift in the quality of these products of Seaforth such that the products were becoming similar in taste, profile, texture and flavour to the product produced by the plaintiffs.

[41] In April 1995 an advertisement for the "NEW President's Choice Mayonnaise" stated that acknowledgement was made "that Hellmann's Mayonnaise is an outstanding product" but "it could be hard to choose between NEW President's Choice Mayonnaise and Hellmann's" except for the lower price for the Seaforth-produced product.

[42] Mark Barr, the President of Seaforth, provided a responding affidavit. Seaforth has been owned by his family since about 1981. Mr. Barr joined Seaforth in 1990. His affidavit related only to the terms of a Confidentiality Order; his affidavit did not challenge the evidentiary basis of Mr. Boucher in his affidavit in support of the motion.

[43] In his cross-examination, Mr. Barr said that Mr. Cianciaruso is no longer Manager of Technical Services with Seaforth but now holds another position. Mr. Barr allowed that Mr. Cianciaruso has been intimately involved in the formulation and processing of Seaforth's mayonnaise products. The written description of Mr. Cianciaruso's initial employment position with Seaforth, a quality and technical services manager, also makes this clear. Under cross-examination Mr. Barr admitted that Seaforth has been requested to produce a mayonnaise for the private label market that is comparable to Hellmann's mayonnaise product.

[44] Having considered all the evidence in respect of the plaintiffs' new motion, I allow the motion. I make a Confidentiality Order in the terms set forth in Schedule "A" to these reasons for decision.

[45] I had circulated a draft Confidentiality Order with my reasons for decision of April 4, 1996, so that, if it developed that there was a new motion for a Confidentiality Order by the plaintiffs, all parties would be able to focus upon the possible terms and language thereof, in the event that an Order was granted. Both the plaintiffs and the defendants have made suggestions and submissions as to amendments to be incorporated into my draft Confidentiality Order. I have taken those submissions into consideration in formulating the terms of the Confidentiality Order. I have emphasized to the parties that it must be seen as being in the nature of an organic rather than mechanistic document, which will undoubtedly be changed (after submissions) from time to time as experience dictates and the process relating to the action unfolds.

[46] One term of the Confidentiality Order is that the party designates for Seaforth and Mr. Cianciaruso will not be permitted to attend on any inspection of the plaintiffs' plants. At first impression, this term may seem incongruous and unfair. However, I accept the plaintiffs' submission that it will be very difficult if not impossible to segregate on an inspection those aspects of the processing which the plaintiffs' claim have been used by the defendants from the process in its entirety. The plaintiffs have a legitimate concern in an inadvertent disclosure of a broader range of information than is necessary.

[47] The consistent position of the plaintiffs is that they have trade secrets in respect of the formulation and processing of mayonnaise. Conversely, the position of the defendants is that there are no trade secrets, with the possible exception of some spices, relating to mayonnaise.

[48] Seaforth has not put forth any evidence that it has the same concerns as the plaintiffs in respect of the disclosure to the opposing side of confidential information through an inspection. The only relevant purpose in an inspection of the plaintiffs' plant is the limited one of verifying whether or not the plaintiffs in fact do what they say they do in respect of the formulation and processing of their mayonnaise as it relates to the "changes" in the formulation and processing made by Seaforth since Mr. Cianciaruso's employment with Seaforth. This verification by inspection can be done by the defendant Cianciaruso, the defendants' designated expert and the defendants' counsel. Counsel for Seaforth had indicated, until the point of Mr. Barr's affidavit being introduced as evidence, that Seaforth did not wish its employees to attend any plant inspection of the plaintiffs.

[49] The plaintiffs also submitted that Mr. Cianciaruso should also not be permitted to attend upon the inspection of the plaintiffs' plant. They fear it will refresh his memory, or enlarge his knowledge, as to the full range of their trade secrets. However, given that Mr. Cianciaruso is the defendant who has worked for both Best and for Seaforth, and given that he is the one who is alleged to have disclosed the plaintiffs' trade secrets to Seaforth, who allegedly then used the said trade secrets, in my view it is appropriate he be allowed to attend upon the inspection.

Conclusion

[50] For the reasons given, the plaintiffs' motion for a Confidentiality Order is allowed. I order that the proceedings in this action be governed by the Confidentiality Order which is Schedule "A" to these reasons for decision. I may be spoken to with respect to costs.

Application granted.

SCHEDULE "A"

CONFIDENTIALITY ORDER

1.00 Confidentiality and Non-disclosure

1.01 The entire court file relating to this action will be sealed.

1.02 The hearing relating to any matter shall take place *in camera* unless and to the extent the court may otherwise direct.

2.00 Designated Information

2.01 CPC/Best and Seaforth may designate any information relating to the formulation, manufacture, and production process relating to their products ("designated information") as subject to the confidentiality provisions of this Order.

3.00 Confidentiality Undertakings

3.01 Designated information may be revealed only to "designated persons".

3.02 Designated persons referred to in paragraph 4.01 (f) to (j) are to sign and file with the Court a confidentiality undertaking before disclosure of designated information whereby they agree not to reveal any designated information to anyone other than other designated persons and not to use any designated information for any purpose other than assisting in this court proceeding.

4.00 Designated Persons

4.01 Designated persons shall include:

- (a) Mr. Justice Cumming as Case Management Judge and the Trial Judge;
- (b) counsel for the plaintiffs (J.M. Roland, D. Glendinning, T. Goldberg, E. Barlas);
- (c) counsel for the defendants (R.C. Taylor, D.C. Poynton, R.A. Maxwell, T.C. Warne);
- (d) associates or students-at-law, one per party at any given time, with leave of the court;
- (e) court reporter(s) at discovery or at hearing of motions or at trial;
- (f) the designated expert for the plaintiffs and the designated expert for the defendants;
- (g) party designates (two for the plaintiffs; two for Seaforth);
- (h) Mr. Cianciaruso;
 - (i) any expert(s) appointed by the Court; and
 - (j) such other persons as the Court may name from time to time.

5.00 Designated Experts

5.01 One expert for the plaintiffs and one expert for both defendants (“designated experts”) may be retained to assist in advising on matters relating to the designated information of the opposite corporate party. In the absence of consent by counsel, any additional designated experts must first be approved by the Court. Counsel shall be given an opportunity to make submissions in respect of any such application for approval. Designated information shall not be provided to any experts other than designated experts.

6.00 Designated Documents

6.01 Affidavits of documents of the corporate parties may contain a section entitled “Designated Documents”, containing documents relating to designated information.

6.02 For greater certainty, “designated documents” constitute “designated information”. The information contained in designated documents is not to be revealed to anyone other than designated persons at any time or to be used for any purpose other than

assisting in this court proceeding. The portions of the affidavits relating to designated documents and all designated documents filed with the Court are to be sealed.

6.03 Designated documents are to be viewed only by designated persons. Viewing shall take place only at the offices of counsel for the producing party. No copies shall be made. Any notes made relating to designated documents are to be kept in a secure place by the note taker, are subject to the confidentiality undertaking signed by the designated person making such notes, and all such notes are to be surrendered to the Court to form part of the sealed court file upon the conclusion of the trial.

7.00 Examinations for Discovery

7.01 Attendance at examinations for discovery is limited to the witness and the following designated persons: counsel, court reporter, designated experts, party designates and Mr. Cianciaruso.

7.02 There shall not be any discussion of any evidence taken at discovery with non-designated persons until counsel for each of CPC/Best, Seaforth and Cianciaruso have reviewed and marked the transcript. For greater certainty, there will be no discussion at any time with non-designated persons relating to designated information.

7.03 Counsel (designated persons) for CPC/Best, Seaforth and Cianciaruso will have a reasonable time period to mark any portion of a transcript of an examination for discovery that contains information relating to the formulation, manufacture or processing of mayonnaise as “designated information” and communicate such designation to the other counsel. Thereupon, other portions of the transcript that relate to non-designated information may be copied and discussed with non-designated persons for the purpose of assisting in this court proceeding. Evidence in those portions of the transcript which have been marked as containing designated information may not be revealed to anyone other than designated persons or used for any purpose other than assisting in this court action. The portions of the transcript relating to designated information are to be sealed. No copies of portions of the transcripts containing designated information may be made. Any notes made by designated persons which relate to such portions of the transcript containing designated information, together with the portions of the original transcripts containing designated information, shall be

surrendered to the court to form part of the sealed court file upon the conclusion of the trial.

8.00 Inspections

8.01 Only designated persons may attend upon any inspections of the plants of CPC/Best and Seaforth; provided however, the party designates of Seaforth shall not attend upon any inspection of a plant of CPC/Best. No videotaping will be allowed in the absence of a court order permitting same. Any notes made which relate to such inspections shall be surrendered to the court to form part of the sealed court file upon the conclusion of the trial. There shall not be any communication by designated persons to non-designated persons as to observations made or information learned during the inspections. Information learned from such inspections shall not be used for any purpose other than assisting in the court action. The procedures to be followed on plant inspections are to be agreed upon by counsel or be as directed by the Court.

9.00 Sequence for Disclosure

Step #1

9.01 CPC/Best is to disclose to the Court all information they claim is confidential and/or a trade secret relating to the formulation, manufacture and processing of Hellmann's Mayonnaise as done June 4, 1993. This information may be in coded form but must be in a manner that such parts of it as are necessary for Step #3 can be identified as information in existence June 4, 1994. All such information is "designated information" and is to be sealed as part of the court file, and will be subject to the confidentiality provisions of this Order.

Step #2

9.02 Seaforth is to disclose all information relating to its formulation, manufacture and processing of mayonnaise sold under the private labels "President's Choice" and "Our Compliments" as done prior to December 1, 1993. Seaforth is also to disclose such information that relates to *changes* since December 1, 1993, made in the formulation, manufacture and processing of mayonnaise by Seaforth sold under the private labels "President's Choice" and "Our Compliments". This disclosure is to be made through the production of documents, examinations for discovery, and by permitting an inspection of its manufacturing facility to view its formulation, manufacture and processing. So as to

facilitate production, discovery and inspection, prior thereto Seaforth shall make disclosure in writing setting forth a description of all the above-mentioned information. All such information disclosed by Seaforth will constitute “designated information” and be subject to the confidentiality provisions of this Order.

Step #3

9.03 CPC/Best is to disclose such parts of the designated information as has been disclosed by them pursuant to Step # 1, that CPC/Best claims is the basis for any of the aspects of Seaforth’s formulation, manufacture and processing disclosed by Seaforth pursuant to Step #2 above and which information CPC/Best alleges Cianciaruso disclosed to Seaforth and has been or is being used by Seaforth. This disclosure by CPC/Best is to be made through the production of documents, examinations for discovery and by permitting an inspection of its manufacturing facility to view its formulation, manufacture and processing. So as to facilitate production, discovery and inspection, prior thereto Seaforth shall make disclosure in writing setting forth a description of all the above-mentioned information. All such information disclosed by CPC/Best will continue to constitute “designated information” and be subject to the confidentiality provisions of this Order.

10.00 Motions

10.01 During the hearing of motions, only designated persons may be present when designated information is under discussion. Evidence relating to designated information is not to be revealed to non-designated persons and is to be used only for the purposes of the court action. No discussion of designated information is to take place while non-designated persons, including witnesses, are in the courtroom. Portions of any transcripts taken at these times that relate to designated information are to be sealed as part of the court file.

11.00 Final Disposition of Court Proceedings

11.01 Upon the final disposition of all court proceedings all designated information will be destroyed.

12.00 Modification or Amendments

12.01 A party may make an application from time to time to the Case Management Judge or the Trial Judge upon the commencement of the trial to modify any aspect of this Order and the Court may make such order as it sees fit.

12.02 The Court may on its own initiative, after giving notice and hearing any submissions counsel may wish to make, modify or amend this Order as it sees fit.

13.00 Schedule

13.01 The schedule for the proceedings will be:

- (1) CPC/Best to comply with Step #1;
- (2) production of non-designated documents by all parties and production of designated documents by the defendants;
- (3) inspection of Seaforth plant;
- (4) completion of examinations for discoveries of Seaforth/Cianciaruso; (the order of (3) and (4) may be reversed at the option of the plaintiffs)
- (5) production of designated documents by the plaintiffs;
- (6) inspection of CPC/Best plant;
- (7) completion of examinations for discovery of CPC/Best; (the order of (6) and (7) may be reversed at the option of the defendants)
- (8) filing expert reports and pre-trial memos;
- (9) pre-trial;
- (10) trial.

June 4, 1996

APPENDIX "A"

CONFIDENTIALITY ORDER

as amended June 14, 1996

1.00 Confidentiality and Non-disclosure

1.01 The entire court file relating to this action will be sealed.

1.02 The hearing relating to any matter shall take place *in camera* unless and to the extent the court may otherwise direct.

2.00 Designated Information

2.01 CPC/Best and Seaforth may designate any information relating to the formulation, manufacture, and production process relating to their products (“designated information”) as subject to the confidentiality provisions of this Order.

3.00 Confidentiality Undertakings

3.01 Designated information may be revealed only to “designated persons”.

3.02 Designated persons referred to in paragraph 4.01 (f) to (j) are to sign and file with the Court a confidentiality undertaking before disclosure of designated information whereby they agree not to reveal any designated information to anyone other than other designated persons and not to use any designated information for any purpose other than assisting in this court proceeding.

4.00 Designated Persons

4.01 Designated persons shall include:

- (a) Mr. Justice Cumming as Case Management Judge and the Trial Judge;
- (b) counsel for the plaintiffs (J.M. Roland, D. Glendinning, T. Goldberg, E. Barlas);
- (c) counsel for the defendants (R.C. Taylor, D.C. Poynton, R.A. Maxwell, T.C. Warne);
- (d) associates or students-at-law, one per party at any given time, with leave of the court;
- (e) court reporter(s) at discovery or at hearing of motions or at trial;
- (f) the designated expert for the plaintiffs and the designated expert for the defendants;
- (g) party designates (two for the plaintiffs; two for Seaforth);
- (h) Mr. Cianciaruso;
- (i) any expert(s) appointed by the Court; and
- (j) such other persons as the Court may name from time to time.

5.00 Designated Experts

5.01 One expert for the plaintiffs and one expert for both defendants (“designated experts”) may be retained to assist in advising on matters relating to the designated information of the opposite corporate party. In the absence of consent by counsel, any additional designated experts must first be approved by the Court. Counsel shall be given an opportunity to make submissions in respect of any such application for approval. Designated information shall not be provided to any experts other than designated experts.

6.00 Designated Documents

6.01 Affidavits of documents of the corporate parties may contain a section entitled “Designated Documents”, containing documents relating to designated information.

6.02 For greater certainty, “designated documents” constitute “designated information”. The information contained in designated documents is not to be revealed to anyone other than designated persons at any time or to be used for any purpose other than assisting in this court proceeding. The portions of the affidavits relating to designated documents and all designated documents filed with the Court are to be sealed.

6.03 Designated documents are to be viewed only by designated persons. Viewing shall take place only at the offices of counsel for the producing party. No copies shall be made. Any notes made relating to designated documents are to be kept in a secure place by the note taker, are subject to the confidentiality undertaking signed by the designated person making such notes, and all such notes are to be surrendered to the Court to form part of the sealed court file upon the conclusion of the trial.

7.00 Examinations for Discovery

7.01 Attendance at examinations for discovery is limited to the witness and the following designated persons: counsel, court reporter, designated experts, party designates and Mr. Cianciaruso.

7.02 There shall not be any discussion of any evidence taken at discovery with non-designated persons until counsel for each of CPC/Best, Seaforth and Cianciaruso have reviewed and marked the transcript. For greater certainty, there will be no discussion at any time with non-designated persons relating to designated information.

7.03 Counsel (designated persons) for CPC/Best, Seaforth and Cianciaruso will have a reasonable time period to mark any portion of a transcript of an examination for

discovery that contains information relating to the formulation, manufacture or processing of mayonnaise as “designated information” and communicate such designation to the other counsel. Thereupon, other portions of the transcript that relate to non-designated information may be copied and discussed with non-designated persons for the purpose of assisting in this court proceeding. Evidence in those portions of the transcript which have been marked as containing designated information may not be revealed to anyone other than designated persons or used for any purpose other than assisting in this court action. The portions of the transcript relating to designated information are to be sealed. No copies of portions of the transcripts containing designated information may be made. Any notes made by designated persons which relate to such portions of the transcript containing designated information, together with the portions of the original transcripts containing designated information, shall be surrendered to the court to form part of the sealed court file upon the conclusion of the trial.

8.00 Inspections

8.01 Only designated persons may attend upon any inspections of the plants of CPC/Best and Seaforth; provided however, the party designates of Seaforth shall not attend upon any inspection of a plant of CPC/Best. No videotaping will be allowed in the absence of a court order permitting same. Any notes made which relate to such inspections shall be surrendered to the court to form part of the sealed court file upon the conclusion of the trial. There shall not be any communication by designated persons to non-designated persons as to observations made or information learned during the inspections. Information learned from such inspections shall not be used for any purpose other than assisting in the court action. The procedures to be followed on plant inspections are to be agreed upon by counsel or be as directed by the Court.

9.00 Sequence for Disclosure

Step #1

9.01 CPC/Best is to disclose to the Court all information they claim is confidential and/or a trade secret relating to the formulation, manufacture and processing of Hellmann’s Mayonnaise as done June 4, 1993. This information may be in coded form but must be in a manner that such parts of it as are necessary for Step #3 can be identified *by the*

Court as information in existence June 4, 1994. All such information is “designated information” and is to be sealed as part of the court file, and will be subject to the confidentiality provisions of this Order.

Step #2

9.02 Seaforth is to disclose all information relating to its formulation, manufacture and processing of mayonnaise sold under the private labels “President’s Choice” and “Our Compliments” as done prior to December 1, 1993. Seaforth is also to disclose such information that relates to *changes* since December 1, 1993, made in the formulation, manufacture and processing of mayonnaise by Seaforth sold under the private labels “President’s Choice” and “Our Compliments”. This disclosure is to be made through the production of documents, examinations for discovery, and by permitting an inspection of its manufacturing facility to view its formulation, manufacture and processing. So as to facilitate production, discovery and inspection, prior thereto Seaforth shall make disclosure in writing setting forth a description of all the above-mentioned information. All such information disclosed by Seaforth will constitute “designated information” and be subject to the confidentiality provisions of this Order.

Step #3

9.03 CPC/Best is to disclose such parts of the designated information as has been disclosed by them pursuant to Step #1, that CPC/Best claims is the basis for any of the aspects of Seaforth’s formulation, manufacture and processing disclosed by Seaforth pursuant to Step #2 above and which information CPC/Best alleges Cianciaruso disclosed to Seaforth and has been or is being used by Seaforth. This disclosure by CPC/Best is to be made through the production of documents, examinations for discovery and by permitting an inspection of its manufacturing facility to view its formulation, manufacture and processing. So as to facilitate production, discovery and inspection, prior thereto *CPC/Best* shall make disclosure in writing setting forth a description of all the above-mentioned information. All such information disclosed by CPC/Best will continue to constitute “designated information” and be subject to the confidentiality provisions of this Order.

10.0 Motions

10.01 During the hearing of motions, only designated persons may be present when designated information is under discussion. Evidence relating to designated information is not to be revealed to non-designated persons and is to be used only for the purposes of the court action. No discussion of designated information is to take place while non-designated persons, including witnesses, are in the courtroom. Portions of any transcripts taken at these times that relate to designated information are to be sealed as part of the court file.

11.00 Final Disposition of Court Proceedings

11.01 Upon the final disposition of all court proceedings all designated information will be destroyed.

12.00 Modification or Amendments

12.01 A party may make an application from time to time to the Case Management Judge or the Trial Judge upon the commencement of the trial to modify any aspect of this Order and the Court may make such order as it sees fit.

12.02 The Court may on its own initiative, after giving notice and hearing any submissions counsel may wish to make, modify or amend this Order as it sees fit.

13.00 Schedule

13.01 The schedule for the proceedings will be:

- (1) CPC/Best to comply with Step #1;
- (2) production of non-designated documents by all parties and production of designated documents by the defendants;
- (3) inspection of Seaforth plant;
- (4) completion of examinations for discoveries of Seaforth/Cianciaruso; (the order of (3) and (4) may be reversed at the option of the plaintiffs)
- (5) production of designated documents by the plaintiffs;
- (6) inspection of CPC/Best plant;
- (7) completion of examinations for discovery of CPC/Best; (the order of (6) and (7) may be reversed at the option of the defendants)
- (8) filing expert reports and pre-trial memos;

- (9) pre-trial;
- (10) trial.

June 14, 1996

APPENDIX "A"
CONFIDENTIALITY ORDER

as amended July 9, 1996

1.00 Confidentiality and Non-disclosure

1.01 The entire court file relating to this action will be sealed.

1.02 The hearing relating to any matter shall take place *in camera* unless and to the extent the court may otherwise direct.

2.00 Designated Information

2.01 CPC/Best and Seaforth may designate any information relating to the formulation, manufacture, and production process relating to their products ("designated information") as subject to the confidentiality provisions of this Order.

3.00 Confidentiality Undertakings

3.01 Designated information may be revealed only to "designated persons".

3.02 Designated persons referred to in paragraph 4.01 (f) to (j) are to sign and file with the Court a confidentiality undertaking before disclosure of designated information whereby they agree not to reveal any designated information to anyone other than other designated persons and not to use any designated information for any purpose other than assisting in this court proceeding.

4.00 Designated Persons

4.01 Designated persons shall include:

- (a) Mr. Justice Gunning as Case Management Judge and the Trial Judge;
- (b) counsel for the plaintiffs (J.M. Roland, D. Glendinning, T. Goldberg, E. Barlas);
- (c) counsel for the defendants (R.C. Taylor, D.C. Poynton, R.A. Maxwell, T.C. Warne);

- (d) associates or students-at-law, one per party at any given time, with leave of the court;
- (e) court reporter(s) at discovery or at hearing of motions or at trial;
- (f) the designated expert for the plaintiffs and the designated expert for the defendants;
- (g) party designates (two for the plaintiffs; two for Seaforth);
- (h) Mr. Cianciaruso;
- (i) any expert(s) appointed by the Court; and
- (j) such other persons as the Court may name from time to time.

5.00 Designated Experts

5.01 One expert for the plaintiffs and one expert for both defendants (“designated experts”) may be retained to assist in advising on matters relating to the designated information of the opposite corporate party. In the absence of consent by counsel, any additional designated experts must first be approved by the Court. Counsel shall be given an opportunity to make submissions in respect of any such application for approval. Designated information shall not be provided to any experts other than designated experts.

6.00 Designated Documents

6.01 Affidavits of documents of the corporate parties may contain a section entitled “Designated Documents”, containing documents relating to designated information.

6.02 For greater certainty, “designated documents” constitute “designated information”. The information contained in designated documents is not to be revealed to anyone other than designated persons at any time or to be used for any purpose other than assisting in this court proceeding. The portions of the affidavits relating to designated documents and all designated documents filed with the Court are to be sealed.

6.03 Designated documents are to be viewed only by designated persons. Viewing shall take place only at the offices of counsel for the producing party. No copies shall be made. Any notes made relating to designated documents are to be kept in a secure place by the note taker, are subject to the confidentiality undertaking signed by the

designated person making such notes, and all such notes are to be surrendered to the Court to form part of the sealed court file upon the conclusion of the trial.

7.00 Examinations for Discovery

7.01 Attendance at examinations for discovery is limited to the witness and the following designated persons: counsel, court reporter, designated experts, party designates and Mr. Cianciaruso.

7.02 There shall not be any discussion of any evidence taken at discovery with non-designated persons until counsel for each of CPC/Best, Seaforth and Cianciaruso have reviewed and marked the transcript. For greater certainty, there will be no discussion at any time with non-designated persons relating to designated information.

7.03 Counsel (designated persons) for CPC/Best, Seaforth and Cianciaruso will have a reasonable time period to mark any portion of a transcript of an examination for discovery that contains information relating to the formulation, manufacture or processing of mayonnaise as “designated information” and communicate such designation to the other counsel. Thereupon, other portions of the transcript that relate to non-designated information may be copied and discussed with non-designated persons for the purpose of assisting in this court proceeding. Evidence in those portions of the transcript which have been marked as containing designated information may not be revealed to anyone other than designated persons or used for any purpose other than assisting in this court action. The portions of the transcript relating to designated information are to be sealed. No copies of portions of the transcripts containing designated information may be made. Any notes made by designated persons which relate to such portions of the transcript containing designated information, together with the portions of the original transcripts containing designated information, shall be surrendered to the court to form part of the sealed court file upon the conclusion of the trial.

8.00 Inspections

8.01 Only designated persons may attend upon any inspections of the plants of CPC/Best and Seaforth; provided however, the party designates of Seaforth shall not attend upon any inspection of a plant of CPC/Best. No videotaping will be allowed in the absence of a court order permitting same. Any notes made which relate to such

inspections shall be surrendered to the court to form part of the sealed court file upon the conclusion of the trial. There shall not be any communication by designated persons to non-designated persons as to observations made or information learned during the inspections. Information learned from such inspections shall not be used for any purpose other than assisting in the court action. The procedures to be followed on plant inspections are to be agreed upon by counsel or be as directed by the Court.

9.00 Sequence for Disclosure

Step #1

9.01 CPC/Best is to disclose to the Court all information they claim is confidential and/or a trade secret relating to the formulation, manufacture and processing of Hellmann's Mayonnaise as done June 4, 1993. This information may be in coded form but must be in a manner that such parts of it as are necessary for Step #3 can be identified *by the Court* as information in existence June 4, 1994. All such information is "designated information" and is to be sealed as part of the court file, and will be subject to the confidentiality provisions of this Order.

Step #2

9.02 Seaforth is to disclose all information relating to its formulation, manufacture and processing of mayonnaise sold under the private labels "President's Choice" and "Our Compliments" as done prior to December 1, 1993. Seaforth is also to disclose such information that relates to *changes* since December 1, 1993, made in the formulation, manufacture and processing of mayonnaise by Seaforth sold under the private labels "President's Choice" and "Our Compliments". This disclosure is to be made through the production of documents, examinations for discovery, and by permitting an inspection of its manufacturing facility to view its formulation, manufacture and processing. So as to facilitate production, discovery and inspection, prior thereto Seaforth shall make disclosure in writing setting forth a description of all the above-mentioned information. All such information disclosed by Seaforth will constitute "designated information" and be subject to the confidentiality provisions of this Order.

Step #3

9.03 CPC/Best is to disclose such parts of the designated information as has been disclosed by them pursuant to Step #1, that CPC/Best claims is the basis for any of the

aspects of Seaforth's formulation, manufacture and processing disclosed by Seaforth pursuant to Step #2 above and which information CPC/Best alleges Cianciaruso disclosed to Seaforth and has been or is being used by Seaforth. This disclosure by CPC/Best is to be made through the production of documents, examinations for discovery and by permitting an inspection of its manufacturing facility to view its formulation, manufacture and processing. So as to facilitate production, discovery and inspection, prior thereto *CPC/Best* shall make disclosure in writing setting forth a description of all the above-mentioned information. All such information disclosed by CPC/Best will continue to constitute "designated information" and be subject to the confidentiality provisions of this Order.

10.0 Motions

10.01 During the hearing of motions, only designated persons may be present when designated information is under discussion. Evidence relating to designated information is not to be revealed to non-designated persons and is to be used only for the purposes of the court action. No discussion of designated information is to take place while non-designated persons, including witnesses, are in the courtroom. Portions of any transcripts taken at these times that relate to designated information are to be sealed as part of the court file.

11.00 Final Disposition of Court Proceedings

11.01 Upon the final disposition of all court proceedings all designated information will be destroyed.

12.00 Modification or Amendments

12.01 A party may make an application from time to time to the Case Management Judge or the Trial Judge upon the commencement of the trial to modify any aspect of this Order and the Court may make such order as it sees fit.

12.02 The Court may on its own initiative, after giving notice and hearing any submissions counsel may wish to make, modify or amend this Order as it sees fit.

13.00 Schedule

13.01 The schedule for the proceedings will be:

- (1) CPC/Best to comply with Step #1 as set forth in s. 9.01, by July 24, 1996;

- (2) production of non-designated documents by all parties, production of designated documents by the defendants, and Seaforth to make its required disclosure in writing so as to comply with Step #2 as set forth in s. 9.02, by August 12, 1996;
- (3) inspection of Seaforth plant by September 30, 1996;
- (4) completion of examinations for discoveries of Seaforth/Cianciaruso by September 30, 1996; (the order of (3) and (4) may be reversed at the option of the plaintiffs)
- (5) production of designated documents by the plaintiffs and the plaintiffs to make their required disclosure in writing so as to comply with Step #3 as set forth in s. 9.03, by October 15, 1996;
- (6) inspection of CPC/Best plant by November 15, 1996;
- (7) completion of examinations for discovery of CPC/Best by November 15, 1996; (the order of (6) and (7) may be reversed at the option of the defendants)
- (8) filing expert reports and pre-trial memos by December 31, 1996;
- (9) pre-trial to be scheduled in February 1997;
- (10) trial.

July 9, 1996