



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MEDOLAC LABORATORIES,)
) C.A. No: N18C-01
)
) Plaintiff,)
)
) COMPLEX COMMERCIAL
v.) LITIGATION DIVISION
)
)
) TRIAL BY JURY OF
PROLACTA BIOSCIENCE INC.) TWELVE DEMANDED
)
)
) Defendant.)

COMPLAINT

COMES NOW, Plaintiff Medolac Laboratories (“Medolac”), a Delaware corporation, by and through counsel, Cooch and Taylor P.A. of Wilmington, Delaware, for its Complaint against Defendant Prolacta Bioscience, Inc. (“Prolacta” or “Defendant”), states as follows:

INTRODUCTION

1. This case concerns the market for commercially-available human breast milk. When a mother’s own milk is unavailable, donor milk is the traditional alternative. But donor milk through traditional channels can be expensive and, relative to the needs of the many thousands of babies born prematurely, scarce.

2. There is tremendous demand for commercially-available human breast milk. In 2016, the Human Milk Banking Association of North America distributed **4.4 million ounces** of breast milk to hospitals in 2016 alone. *See PBS, Inside the growing business of mothers’ milk* (Apr. 26, 2017), available at

<https://www.pbs.org/newshour/health/inside-growing-business-mothers-milk> (last visited Jan. 5, 2018).

3. Recent studies suggest that as much as 11% of all babies born in the United States require specialized treatment in neonatal intensive care units (NICUs). These NICUs depend on donor breast milk because it contains high levels of nutrients that these at-risk infants need.

4. The emerging need for human breast milk has led to the development of what Business Insider has described as “a surprisingly cutthroat industry.” Associated Press, *Human breast milk is emerging as a surprisingly cutthroat industry*, (Jul, 7, 2015), available at <http://www.businessinsider.com/human-breast-milk-is-emerging-as-a-surprisingly-cutthroat-industry-2015-7> last visited (Jan. 5, 2018).

5. Two of the biggest players in the commercial breast milk industry are Medolac Laboratories and Prolacta Bioscience. Elena Taggart Medo has been a pioneer in the industry since its inception—she founded Prolacta and was its first CEO, then left to found Medolac in 2009.

6. Prolacta operates a large plant in Southern California that produces its own concentrated human milk fortifier that it sells to hospitalized newborns at a cost of \$135 per infant, per day. Wired Magazine, *Liquid Gold: The Booming Market*

for Human Breast Milk (May 5, 2011), available at https://www.wired.com/2011/05/ff_milk/ (last visited Jan. 5, 2018).

7. Medolac develops solutions for large-scale supply of human breast milk that is both priced at a more accessible level and available to the hospitals and clinics in the quantities that they need to treat sick infants. Medolac developed and released Co-Op Donor Milk in 2014, which is the first commercially sterile human breast milk that can be stored unopened at room temperature for up to three years. Medolac works with a cooperative donor network that is owned by the donors themselves.

8. In January 2015, when Medolac was poised to begin expansion of its Mothers Milk Cooperative Program and was seeking funding for the commercialization of a full suite of human milk based neonatal nutrition products, Medolac's Founder, Chairman and CEO Elena Taggart Medo was ambushed with a lawsuit by Prolacta in California state court.¹

9. That lawsuit, commenced despite the fact that Ms. Medo and Prolacta exchanged complete releases when she left the company, caused substantial harm to Medolac's business at a critical time in its development. Specifically, the public nature of these disparaging statements about Ms. Medo's character and alleged

¹ *Prolacta Bioscience, Inc. v. Elena Taggart Medo et al.*, Case No. 30-2015-00767116-CU-NP-CJC (Orange Cnty. Sup. Ct.).

professional misconduct caused Medolac to lose, *inter alia*, a deal with a large national hospital operator, a deal that would have been worth millions of dollars in revenue to Medolac.

10. Prolacta's lawsuit also caused Medolac's funding partners to either pull their support or offer less favorable financing terms with explicit reference to the litigation. This strangled Medolac's ability to purchase equipment and material at a critical time in the company's lifecycle.

11. The timing of Prolacta's January 2015 lawsuit was no accident: Prolacta knew from having participated in trade shows with Medolac that Medolac was preparing to bring a new suite of commercially sterile high-protein concentrate products to market. These high-protein concentrates would have been competitive with Prolacta's human milk fortifier product, and Medolac spent millions of dollars investing in the science behind developing these products.

12. Prolacta's lawsuit was commenced with the explicit goal of harming Medolac's business, and former employees of Prolacta will testify that they heard Prolacta's senior executives confirm the same.

13. In addition to filing a lawsuit against Ms. Medo accusing her of professional misconduct, on information and belief, Prolacta also contacted Medolac's existing and prospective customers in an effort to discredit Medolac.

Prolacta did this by making false attacks on the science behind Medolac’s product, and by spreading the news of its malicious lawsuit.

14. All of these malicious actions caused Medolac to lose a series of ongoing business opportunities. The harm therefrom was compounded by the fact that Prolacta’s attack took place at the precise time that Medolac was planning to bring a new suite of high-protein concentrate products (which would have competed directly with Prolacta) to market.

15. That harm was both expected and quantifiable.

PARTIES

16. Plaintiff Medolac is a Delaware public benefit corporation with its principal place of business in Lake Oswego, Oregon. Medolac is a human milk nutritionals startup that introduced the first commercially sterile human donor milk, which is currently being used by hospitals across the United States.

17. Defendant Prolacta is a Delaware corporation amenable to service via its registered agent, Corporation Service Company, 251 Little Falls Drive, Wilmington, DE 19808. Prolacta is a for-profit life sciences company that creates “specialty formulations made from human milk for the nutritional needs of premature infants in neonatal intensive care units (NICUs).”

JURISDICTION AND VENUE

18. This is an action arising under Delaware common law.

19. During the relevant time period, Prolacta was (and on information and belief, remains) a Delaware corporation.

20. Medolac is a registered Delaware public benefit corporation.

21. Venue is proper in this Court based upon Prolacta's domicile. Assignment to the Complex Commercial Litigation Division is appropriate because the amount in controversy exceeds \$1,000,000.

BACKGROUND

The Development of the Commercial Breast Milk Industry

22. Now, and more than ever before, scientists are able to understand and study the health benefits of human breast milk for infants. These benefits are even greater for prematurely-born infants, many of whom weigh less than 2.75 pounds at birth. The New York Times, *Breast Milk Becomes A Commodity, With Mothers Caught Up in Debate* (Mar. 20, 2015), available at <https://nyti.ms/2lMR0Dw> (last visited Jan. 5, 2018).

23. Private companies like Medolac can process and distribute more milk than their non-profit counterparts, while innovating to make their product last longer without the expense and requirement of cold storage. All 18 non-profit milk banks distributed 3.1 million ounces in 2013, and as of April 2017 Medolac distributed 1.5 million ounces, or nearly half of all nonprofit milk distribution in 2013.

24. Medolac's goal is to continue building its distribution network so that its milk, which is both commercially sterile and can be safely stored for up to 3 years at room temperature, can reach both homes and hospitals caring for infants in need.

Elena Medo Founds Prolacta

25. Elena Medo, Founder of Medolac, founded Prolacta in 1999 and was its first CEO.

26. As CEO of Prolacta, Ms. Medo successfully raised \$23 million in venture capital funding for the company before her departure in early 2009.

27. Prolacta charges a substantial premium for its product. A 4-ounce bottle of donor milk costs \$56, whereas a comparable bottle of Prolacta's fortifier costs between \$125 and \$312. The cost of Prolacta's product during a single premature baby's hospital stay is between \$5,600 and \$10,000. L.A. Times, *Prolacta develops nice delivering breast milk to hospitals* (Oct. 25, 2013), available at <http://www.latimes.com/business/la-fi-breast-milk-processing-20131025-story.html> (last visited Jan. 6, 2018).

Elena Medo's Departure from Prolacta

28. After founding the company and serving as its first CEO, Elena Medo left Prolacta in 2009. Her termination and release agreement ("the agreement" or "the Severance Agreement"), dated February 26, 2009 and attached as **Exhibit A** hereto, contains two important provisions: a full and complete release by Prolacta

of any claims against Ms. Medo (¶ I(b)), and a mutual non-disparagement provision (¶II(b)).

29. The agreement also provides for recovery of attorneys' fees by the prevailing party in any action to enforce its terms. (¶ 3(d)).

Elena Medo Founds Medolac

30. In 2010, Elena Medo founded Medolac, a public benefit corporation. Medolac is dedicated to innovating the access to, and use of, breast milk in clinical settings in a way that is affordable to the hospitals and clinics that need it.

31. Since its founding, Medolac has developed the first commercially sterile donor breast milk, distributed more than 3,465 gallons of milk, and earned more than \$2.4 million in revenue.

32. Historically, Medolac and Prolacta have focused their business on different segments of the same industry. Medolac focused on innovation relating to its sterilization procedure that both kills potential contaminants and allows the milk to be stored at room temperature. Prolacta focused on manufacturing human milk fortifiers that are intended to boost the products' nutritional value for premature babies.

33. Ms. Medo's experience and reputation in the industry has been an integral part of Medolac's success. She is both the company's chief innovator and the public face of the company. As Medolac's founder, chairman, and CEO she is

primarily involved in both the product and fundraising aspects of Medolac's business.

34. In 2015, Medolac planned to bring a high-protein concentrate version of its product to market, which would directly compete with Prolacta's primary product. Medolac's product would incorporate its sterilization technology, and due to the decreased costs associated with its production and distribution (*e.g.* the absence of a need for cold-chain storage and transport), would be less expensive than Prolacta's product.

35. Medolac is Prolacta's primary competitor in the commercial breast milk industry.

Prolacta Files Its Lawsuit in Violation of the Severance Agreement

36. Despite the existence of the aforementioned release and non-disparagement agreement, on January 20, 2015 Prolacta filed a lawsuit against Ms. Medo in Orange County Superior Court.

37. That complaint, attached as **Exhibit B** hereto, accuses Ms. Medo of, *inter alia*, stealing Prolacta's confidential proprietary information (§ 14), and having "absconded with [Prolacta's] personal property" (§ 13).

38. Prolacta's complaint alleges that Prolacta "was made aware" of this theft in December 2014 (§ 16) but provides absolutely no basis for that statement.

39. Indeed, Prolacta's 9-page complaint is filled with unsupported disparaging accusations that paint Ms. Medo as a thief and a dishonest businessperson.

40. Prolacta's complaint violates the non-disparagement provision of the Severance Agreement.

41. Further, Prolacta's complaint violates the general release contained in the Severance Agreement, which specifically releases any claims Prolacta may have against Ms. Medo.

42. Prolacta's claims have been repeatedly dismissed, and Prolacta has *amended its complaint four times*.

Medolac's Business Suffers As A Result

43. In an industry with only two primary competitors, here Medolac and Prolacta, Prolacta's lawsuit was especially harmful to Medolac's business. Prolacta's claims about Ms. Medo's integrity harmed Medolac's standing in the industry, and strangled Medolac's ability to engage with new business partners and to distribute and develop its products.

44. Specifically, a large group purchasing organization pulled out of talks to enter into a nationwide agreement with Medolac, citing the Prolacta litigation as the reason for its desire not to move forward. That contract was worth millions of dollars in revenue to Medolac, and would have been substantially more valuable

with the introduction of Medolac's high protein concentrate product. That organization cited "legal risk" as the reason for its desire not to move forward with the transaction.

45. Another large national hospital network with over 100 hospitals with neonatal units unexpectedly pulled out of talks for a national contract with Medolac after Prolacta filed its lawsuit.

46. In addition to these large national organizations, other individual hospitals refused to do business with Medolac between 2015 and the present, citing the "legal trouble" as the reason for their reluctance.

47. Medolac's financing partners were also aware of Prolacta's lawsuit, which negatively impacted their valuation of Medolac for purposes of that financing.

48. Indeed, and after industry publications picked up on the lawsuit between the industry's top two participants, Medolac was forced to issue its own press release condemning Prolacta's conduct.

49. In addition to the loss of specific business opportunities, Prolacta's conduct restricted Medolac's access to financing and therefore Medolac's ability to purchase equipment and material necessary to bring its new line of high-protein concentrate products to market. Medolac was hamstrung at a critical point by Prolacta's unfounded lawsuit after spending millions of dollars on the science behind

the development of these products, including advertising their development at a trade show that Prolacta attended.

50. Prolacta's use of the court system as a sharp-elbowed business tactic has caused Medolac to suffer millions of dollars in lost business income. Additionally, and by the parties' agreement, Medolac is entitled to recover damages and attorneys' fees stemming from Prolacta's breach of the Severance Agreement.

COUNT I

(Breach of Contract)

51. Plaintiff incorporates each of the preceding paragraphs by reference herein as if set forth in full herein.

52. The elements for a breach of contract claim under Delaware law are: “(1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) resulting damage to the plaintiff[.]” *Greenstar, LLC v. Heller*, 814 F. Supp. 2d 444,450 (D. Del. 2011). In order for there to be a contractual obligation, there must first be a valid contract. The required elements to prove a valid contract are: (1) the intent of the parties to be bound; (2) sufficiently definite terms; and (3) consideration. *Otto v. Gore*, 45 A.3d 120, 138 (Del. 2012).²

² The requirements for a valid contract under California law, which governs the Severance Agreement, are substantially similar. *See Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 250 P.3d 1115, 1121 (2011).

53. The Severance Agreement signed by Prolacta and Ms. Medo upon her departure from Prolacta is a valid and enforceable contract.

54. In that contract Prolacta covenanted, *inter alia*, to release Ms. Medo from “from any and all, and hereby waives any and all, claims, demands, liabilities, damages, costs, expenses, responsibilities, and causes or rights of action of any kind, type or nature, past and present, including unknown claims that might presently exist, accrued or yet to accrue, which the Company Representatives may possess, acquire, or otherwise have or obtain against Medo. . . .” **Exh. A** at ¶ I(b).

55. Additionally, Prolacta agreed not to disparage Ms. Medo. *Id.* at ¶II(b).

56. Despite the foregoing, Prolacta filed a complaint against Ms. Medo alleging six separate causes of action. In that complaint Prolacta calls Ms. Medo a thief at multiple points, and baselessly accuses her of various acts of professional misconduct. In the years since Prolacta filed its complaint it has been unable to survive a challenge to the pleadings, and is currently litigating its Fourth Amended Complaint.

57. Ms. Medo is Medolac’s founder and chief executive. She is the face of the company from a business development perspective as well as an integral part of its product development.

58. Prolacta's violation of the terms of the Severance Agreement caused Medolac to suffer damages as described herein and in an amount to be proven at trial.

59. Additionally, and by the express terms of ¶ III(D) of the Severance Agreement, Medolac is entitled to recover its attorneys' fees incurred in bringing this Complaint.

COUNT II

(Tortious Interference with Contractual and Prospective Business Relationships)

60. Plaintiff incorporates each of the preceding paragraphs by reference herein as if set forth in full herein.

61. To prevail on a claim for tortious interference with prospective business relationships under Delaware law, a plaintiff must prove (1) the existence of valid business relationship or expectancy; (2) knowledge of relationship or expectancy on the part of interferer; (3) intentional interference which induces or causes breach or termination of relationship or expectancy; and (4) resulting damages to party whose relationship or expectancy has been disrupted. *Enzo Life Scis., Inc. v. Digene Corp.*, 295 F. Supp. 2d 424, 429 (D. Del. 2003).

62. Medolac had dozens of valid business relationships, and expectancies thereof, with individual hospitals and hospital group owner/operators at the time of Prolacta's misconduct.

63. These include ongoing relationships with, *inter alia*, a large group purchasing organization, a large national hospital operator, and other individual hospitals around the country.

64. Prolacta knew this, by virtue of the fact that it was competing in the same concentrated industry for the same pool of customers.

65. Prolacta intentionally interfered with Medolac's relationships with those customers by making false claims about the efficacy of Medolac's products, by filing its malicious lawsuit, and by discussing that lawsuit with Medolac's customers.

66. Prolacta knowingly and intentionally executed a comprehensive strategy of business interference, at a time that it knew would do the most harm to Medolac's business.

67. Delaware courts have previously recognized that filing a lawsuit with no belief in the merit of the suit, or having some belief in the merit of the suit while intending only to harass the defendant constitutes tortious interference with prospective business relationships. *See Soterion Corp. v. Soteria Mezzanine Corp.*, C.A. No. 6158-VCN (Del. Ch. Oct. 31, 2012) (citing Restatement (Second) of Torts § 767 cmt. c (1979)).

68. That is exactly what Prolacta has done here.

69. Prolacta's senior executives openly acknowledged that the lawsuit had no merit (an admittedly obvious conclusion given the clarity of the release in the Severance Agreement) and was designed only to foist litigation costs upon Medolac and otherwise damage its business.

70. Medolac suffered millions of dollars of harm as a result, in an amount to be proven at trial.

COUNT III

(Defamation)

71. Plaintiff incorporates each of the preceding paragraphs by reference herein as if set forth in full herein.

72. Prolacta made false and defamatory statements of fact in both its lawsuit and its direct communications with Medolac's existing or potential clients.

73. Prolacta intentionally, or at least recklessly, maligned Medolac in its trade or profession.

74. The economic damage done to Medolac by Prolacta's false and defamatory statements of fact will never be fully known.

75. As a result of Prolacta's wrongful conduct, Medolac has suffered pecuniary losses in an amount to be determined at trial.

76. Prolacta's conduct was at least reckless, willful, and wanton, warranting an award of punitive damages.

JURY DEMAND

Plaintiffs hereby demand trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Medolac respectfully seeks judgment in its favor against Prolacta as follows:

- A. Awarding Medolac all recoverable damages, including punitive damages;
- B. Awarding Medolac pre-judgment and post-judgment interest;
- C. Awarding Medolac its attorneys' fees and costs incurred; and
- D. Awarding such other and further relief as the Court may deem just, equitable, or proper.

Dated: January 18, 2018

Respectfully submitted,

COOCH AND TAYLOR, P.A.

/s/ Blake A. Bennett _____

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