

*Case Name:*

**Mealla v. Salba Corp. N.A.**

**RE: Alfredo Javier Mealla and Adolfo Manuel Mealla,  
(Applicants), and  
Salba Corp. N.A., Thelma Brown and Lawrence Brown,  
(Respondents)**

[2009] O.J. No. 4057

65 B.L.R. (4th) 132

2009 CarswellOnt 5846

Court File No. CV-09-8360-00CL

Ontario Superior Court of Justice

**P.A. Cumming J.**

Heard: September 23, 25 and 30, 2009.

Judgment: October 1, 2009.

(50 paras.)

*Civil litigation -- Civil procedure -- Injunctions -- Circumstances when granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Serious issue to be tried or strong prima facie case -- Motion by seed producers for interim injunctive relief to maintain status quo until oppression application determined allowed -- Plaintiffs raised serious issue for trial that defendants were bare trustees in respect of ownership of shares in corporation -- If requested relief was not granted, plaintiffs would suffer irreparable harm as actions of defendants jeopardized value of company's trademark and brand -- Balance of convenience lay with plaintiffs who had given an undertaking as to damages and posted security.*

Motion by seed producers for interim injunctive relief to maintain the status quo until their oppression application was determined. The applicants were farmers who produced a variety of crops including chia seeds. They owned Salba Corporation S.A. which was the exclusive grower and supplier of the Salba chia seed. They claimed that they were the beneficial owners of the shares

in Salba Corp., N.A., of which the applicants were the registered shareholders. The corporation was the registered owner of valuable trademarks associated with the Salba chia seed. The applicants met the respondent LB in 2002 and shortly thereafter LB introduced them to a professor who conducted nutritional research. A research and development company was incorporated and as a Canadian director was required, LB was recruited as a figurehead. He administered the affairs of the corporation and held the position of president. A nutritional study was conducted on the Salba chia seed, after which the product began to attract interest and the research and development company registered trademarks which it then assigned to another company. Salba N.A. was then incorporated and all of the trademarks were assigned to it. All of the instructions regarding the trademarks and all of the reporting letters and invoices had been sent to the respondents who, to the lawyer's knowledge, had been the legal and acting principals of Salba Corp. N.A. However, the applicants indirectly paid for the legal and accounting services to the company. Another corporation, Sahis Holding Corporation ("Sahis") was created with the intent that it would enter into partnerships with third parties for the manufacture of food products that incorporated the Salba chia seed. The shares in Sahis were to be held unequally by LB, the professor and the plaintiffs and Sahis was to hold 100 per cent of the shares in Salba N.A., but the share structure was never implemented. After the plaintiffs attempted to register a new trademark, they were advised that they could not do so as the trademark was held by Salba N.A. and that the defendants were the principals of the corporation. The company website was then changed without the plaintiffs' knowledge to remove all references to several of the plaintiffs' corporations. Subsequently, one of the corporations with which Salba S.A. dealt terminated its relationship with Salba S.A. on the basis that it was in breach of its warranty that it held the trademarks and then entered into a distribution partnership arrangement with Salba N.A. LB then wrote to a number of realtors of Salba Smart products advising them Salba N.A. had not authorized the use of the trademark Salba and to cease and desist using it. The plaintiffs were concerned that Salba N.A., which did not have access to the Salba chia seed, was attempting to use the Salba brand to market ordinary chia seeds

HELD: Motion allowed. The plaintiffs raised a serious issue for trial that the defendants were bare trustees in respect of the ownership of the shares in Salba N.A. The record established a strong prima facie case that the defendants were placed in nominal control of Salba N.A. to act only at the direction of the plaintiffs and on the basis that the defendants were bare trustees, that the ultimate share structure was to give ownership of a majority of shares to the plaintiffs, that Salba N.A. was to be merely a holding company for the trademarks and possible oppression by the defendants of the plaintiffs. If the requested relief was not granted, the plaintiffs would suffer irreparable harm as the actions of the defendants jeopardized the value of the Salba trademark and brand. The balance of convenience lay with the plaintiffs who had given an undertaking as to damages and posted security.

**Statutes, Regulations and Rules Cited:**

Canadian Business Corporations Act, s. 2, s. 238, s. 241(1), s. 241(2), s. 241(3)

**Counsel:**

*Ted Charney* and *Julian Roy*, for the Applicants.

*Geoff R. Hall* and *Brendan Brammall*, for the Respondents.

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**ENDORSEMENT**

P.A. CUMMING J.:--

**The Motion**

**1** The Applicants bring an application under s. 241(1) of the *Canada Business Corporations Act* ("*CBCA*") claiming that they are the beneficial owners of the shares in Salba Corp., N.A. ("Salba N.A."). The Respondent Lawrence Brown is a director of Salba N.A. and the Respondent, Thelma ("Trudy") Brown, the sister of her co-Respondent, is a director and nominally the registered owner of the 100 common shares that have been issued.

**2** Salba N.A. is the registered owner of valuable trademarks associated with a particular chia seed grain known as "Salba", used as an ingredient in certain health food products and recognized as a food supplement with claimed unique nutritional and medical benefits.

**3** The Applicants move for an interim order in the nature of interim injunctive relief under s. 241(3) of the *CBCA* seeking to maintain the *status quo* until their oppression application is dealt with on its merits in respect of who rightfully should have title to the shares of Salba N.A.

**The Evidence**

**4** The Applicants, residents of Buenos Aires, Argentina, are in the business of farming, cultivating and being major producers of many crops, including jojoba, grapes, olives and chia seeds.

**5** They claim they chose the name "Salba" to identify two new varieties (known as Sahis 911 and Sahis 912) of *salvia hispanica* or chia seed which they had cultivated in Peru over some 20 years. The cultivated varieties of developed white chia seeds reportedly have more consistent nutritional properties than common, predominantly black, chia seeds.

**6** The Applicants own Salba Corporation S.A. ("Salba S.A."), incorporated in 2004 in Uruguay, which is the exclusive grower and supplier of this cultivated seed. The new varieties have been registered with the departments of Agriculture in Peru (2008) and Argentina (2002).

**7** The Applicant Alfredo Mealla states that he met the Respondent Larry Brown in 2002 in Toronto. The record establishes that Mr. Brown has had a longtime interest in nutritional foods and common chia seeds. Alfredo Mealla was introduced by Mr. Brown to Professor Vladimir Vuksan, a professor of endocrinology at the University of Toronto, who was researching the potential health benefits of common chia seeds. Mr. Alfredo Mealla suggested that Prof. Vuksan use the Applicants' new varieties of cultivated white chia seeds in his research. Preliminary analysis suggested some promise.

**8** A corporation, ChiaNova Research Inc. ("Chia") was incorporated under the *CBCA* March 20, 2001 by the Applicants, with the Respondent Lawrence Brown as the director and President. The affiant, Professor Vuksan, states in his affidavit that he had referred the Applicants to his lawyer, John Capo, and attended at the meeting at Mr. Capo's offices with the Applicants.

**9** An extensive clinical study research agreement was entered into between Chia, Prof. Vuksan and St. Michael's Hospital July 8, 2001 funded by the Applicants at a cost of some \$175,000. The results of the four year study were published in *Diabetes Care* (2007 Nov; 30(11); 2804-10) after the study was completed in 2007 with the conclusion that long-term supplementation with "Salba" (as the "novel whole grain" that was supplied by the Applicants for the study was referred to in the published report)

"attenuated a major cardiovascular risk factor(SBP) and emerging factors (hs-CRP and vWF) safely beyond conventional therapy, while maintaining good glycemic and liquid control in people with well-controlled type 2 diabetes."

**10** The name of Chia was changed to "Salba Research and Development Inc." ("Salba R&D") October 18, 2002.

**11** Mr. Capo states in a reporting letter dated October 11, 2002 to the Applicants, Mr. Brown and Salba R&D, that the sole director, Mr. Brown, qualifies to be a director under Canadian law and that Salba R & D would issue 38 common shares to each of the Applicants, 16 shares to the Respondent Lawrence Brown and 8 shares as directed by those three shareholders. Alfredo Mealla states that in doing the incorporation of Chia he had been advised by Mr. Capo that a requirement was that there be a Canadian resident as a director of Chia (which later became Salba R & D). Prof. Vuksan confirms that this advice was given. Alfredo Mealla states he asked the Respondent Lawrence Brown to be a director as he resided in Toronto and was then otherwise unemployed. Prof. Vuksan states that it was clearly understood by Mr. Brown that he was recruited solely as a figurehead and that "the Mealla's were the real owners."

**12** The Applicant Alfredo Mealla states that while in Toronto he requested Mr. David Rogers who specializes in trademark registrations to apply for a trademark in respect of "Salba."

**13** Mr. Brown administered the affairs of Salba R&D as its President. The record indicates that some nine Canadian and United States' trademarks associated with the brand "Salba" were

registered in the name of Salba R & D by attorney Rogers.

**14** The Applicant Alfredo Mealla states that as the "Salba" product began to attract interest and the Applicants were in the process of entering into contracts with potential distributors he was concerned that many of the Salba trademarks were being used by different companies which might make Salba a generic name. He says he decided that the Salba trademarks should be protected from any potential operating debts by holding them in a separate corporation which had no commercial business. Salba R & D had assigned five trademarks to Salba National Solutions Inc. ("Salba Solutions") effective February 24, 2006, the date of the incorporation of Salba Solutions. A memo dated May 29, 2006 of Frank DiMarco, accountant, addressed to lawyer Capo, refers to Salba Solutions as being intended "to carry on a seed distribution business on a small scale." The Respondent Lawrence Brown is named as the first director and the Respondent Thelma Brown as having subscribed for 1200 common shares in trust. Salba Solutions was itself also the owner of record of at least one trademark.

**15** Salba N.A. was incorporated by Mr. Capo to hold all the trademarks April 12, 2006. All of the trademarks were assigned by Salba Solutions to Salba N.A. June 12, 2006.

**16** Mr. Rogers provided a brief affidavit dated September 24, 2009 stating that almost all of his instructions and reporting letters and invoices relating to protecting the trademarks of Salba N.A. have been sent to the Respondents and to the best of his knowledge the Browns "have always been the legal and acting principals of Salba Corp. N.A."

**17** It is noted the Applicants also dealt with the Reilly Intellectual Property Law Firm, P.C. in Denver, Colorado as an advisor on intellectual property matters involving "Salba". Ms. Reilly in an email to Alfredo Mealla dated July 6, 2009 refers to some \$80,541.19 in charges for intellectual property work in connection with "Salba" and states that she has spoken with Mr. Rogers about the charges and would like to discuss them with Mr. Mealla.

**18** The record suggests that the Applicants indirectly paid for Mr. Capo's and for Mr. Rogers' services and for the extensive trademark registrations, and for the services of the accountant, Frank DiMarco, who did the accounting and tax planning for Salba N.A. and the Salba group of companies. The Applicants, directly or indirectly, provided the funds to Salba N.A. to pay for these professional services. Mr. Brown claims that the Applicants owed monies to Salba N.A. and that all funds paid by the Applicants were for debts of the Applicants owed to Salba N.A. There is nothing in the written evidentiary record to support this contention of Mr. Brown. It is noted that Salba N.A. was non-operational without revenues and was simply the holding entity in respect of the Salba trademarks.

**19** Mr. Frank DiMarco has been the accountant for Salba N.A. since its inception. His memo of May 29, 2006 to Messrs. Brown, Alfredo Mealla and Prof. Vuksan refers to Salba R&D being incorporated to hold the trademarks and that it would be necessary to have the trademarks assigned from Salba R&D. (This was accomplished as of June 12, 2006, via the assignment from Salba

Solutions, Mr. DiMarco perhaps not realizing the trademarks had been assigned by Salba R&D to Salba Solutions February 24, 2006.) Mr. DiMarco refers to a new Canadian holding company, Sahis Holding Corporation ("Sahis") which would enter into partnerships with third parties for the manufacture of food products that incorporate the Salba seed. The partnerships would be carried on through corporations that would be owned 50% by the Salba group through Sahis and 50% by the respective third parties. Mr. Dimarco refers to the ownership of Sahis as being 84% non-resident (73.8.% being held by the Applicants), Prof. Vuksan having 10.5% and Mr. Brown 5.5%. Mr. DiMarco's proposed alternative corporate structures attached to his memo place Sahis as owning 100% of the shares of Salba N.A (and 100% of the shares of Salba Solutions).

**20** Mr. DiMarco points out in a brief affidavit of September 24, 2009 that the May 29, 2006 "memorandum accurately sets out what was discussed during a meeting on May 26, 2006 between Larry Brown, Vladimir Vuksan, Alfredo Mealla, John Capo and me" but "neither of the structures was ever implemented" and he is not aware of any transaction that made Salba N.A. a subsidiary of Sahis.

**21** An email from Thelma Brown to the Capo law firm (with copies to the Meallas and to Mr. Brown) dated June 16, 2006 states that Alfredo Mealla had requested Mr. Capo to prepare the documentation to reflect that the shareholdings of Sahis are such that the Meallas have 73.2% and Mr. Brown has 5.5%, with other shareholders holding the balance, and that Sahis is the holding corporation for Salba N.A. and Salba Solutions. There is nothing in the evidentiary record to suggest that Mr. Brown disagreed with these instructions. The overall evidence suggests the contrary, that is, that he was in agreement with this intended share structure.

**22** In an email dated August 4, 2006 Thelma Brown passed on to the Capo law firm (with a copy to Mr. DiMarco) Alfredo Mealla's instructions that the intended percentages in Sahis had changed such that the Meallas were to own 72.8% of the shares of Sahis, with Mr. Brown owning 5.5% and some six other individuals owning the balance.

**23** In an email of October 10, 2006 to the Capo law firm, Mr. Dimarco says that Salba N.A. "was established to hold the trademarks that were formerly in Salba R & D ... . Sahis is the holding company. Originally, I thought we were going with Sahis being owned by Larry, Vuksan Holdings and a new company for the foreign shareholders. Somewhere along the line it got changed and now Sahis is owned directly by everyone. Is my understanding correct?" After some further emails, the Respondent Thelma Brown responds by email to Mr. DiMarco (with a copy to the Capo law firm, Alfredo Mealla and Mr. Brown) that "Alfredo decided not to go ahead with the 4th company at this time and re-visit it at a later date."

**24** Moreover, a series of emails (from Mr. Capo's file) between Alfredo Mealla, Mr. Brown, Mr. Capo and Mr. DiMarco between March 20, 2008 and July 4, 2008 indicate that Mr. DiMarco was meeting with Alfredo Mealla and Mr. Brown and was seeking instructions from Alfredo Mealla as to the completion of the structure involving Sahis.

**25** In his testimony, Mr. Brown emphasized that in fact Salba N.A. was never formally made a subsidiary of Sahis. However, the evidentiary record establishes that it was the intent and plan of the Applicants and Respondents to have Salba N.A. made a subsidiary of Sahis. The history indicates Salba N.A. was regarded by the Respondents as being controlled by the Meallas at all times and subject to their direction as to how Salba N.A. would be placed within the overall corporate structure of the Salba group of companies.

**26** As stated above (paragraph 11), the intended shareholdings of Salba R & D in 2002 put control of the trademarks with the Applicants through Salba R&D at the inception of the dealings between the Meallas and the Browns and it was contemplated in May, 2006 (paragraph 19 above) that the Meallas would maintain such control through the planning in respect of Sahis with Mr. DiMarco, which would place the new repository of the trademarks, Salba N.A., under the control of Sahis, which in turn was to be controlled by the Meallas.

**27** The Applicant Alfredo Mealla states that he left everything up to the Respondent Lawrence Brown in respect of Salba N.A. which was not operational and formed simply to hold the trademarks. He says that Mr. Brown took directions from him. In an email from the Respondent Thelma Brown, Mr. Brown's sister, dated November 12, 2006, in response to a query from Alfredo Mealla about some company documents requiring signatures, Ms. Brown advised him as to who were the officers of Salba N. A.

**28** As known to the Respondents, the Applicants established four distributorships for Salba product in North America between 2006 and 2008. These distributorships in each instance were on a 50-50 basis with another arms length party through incorporated entities, being Salba Smart Natural Products LLC ("Salba Smart"), Source Salba Inc. ("Source Salba"), Salba Ole Limited ("Salba Ole") and Core Naturals LLC. ("Core Naturals"). Salba S.A. entered into exclusive supply agreements with all four.

**29** On April 24, 2006 the Capo law firm queried by email an indication of March 30, 2006 from Mr. Brown that Thelma Brown is the shareholder of the newly formed Salba N.A, incorporated April 12, 2006. Thelma Brown was expressly asked by the Capo law firm if the shares were being held in trust. Mr. Brown responded by email that day, April 24, 2006, saying that the shares were being held "in trust for me and Adolfo and Alfredo Mealla."

**30** Mr. Brown testified in response to the release of the file of the Capo law firm as part of the evidentiary record. He says that he was merely "considering" a trust involving the Meallas as beneficial owners of shares in Salba N.A. and emphasized that the trust was never formalized. The evidentiary record contradicts Mr. Brown. He offers no rational explanation for the contradiction of his position by the evidentiary record which indicates that he was merely to have an indirect minority interest in Salba N.A. (through a 5.5% shareholding in Sahis which would own 100% of Salba N.A.).

**31** Salba Ole attempted in March 2009 to register the trademark "Salba Ole Full Of Life". The

Respondents were later instructed on May 22, 2009 by the Applicant Alfredo Mealla to sign a forwarded "consent" on behalf of Salba N.A., with the stipulation this was required by May 26, 2009. An email exchange ensued with Thelma Brown saying she had forwarded the consent to Mr. Rogers for his review. When Mr. Alfredo Mealla responded that there was no issue and Salba Ole had been using the trademark for a year, Thelma Brown responded that " ... it would seem to make sense to wait a few days for David Rogers' advice. In the past we have always obtained his advice before doing anything that might permanently damage the SALBA trademark." Mr. Alfredo Mealla states this was the first time that his direction to Mr. Brown and Thelma Brown in respect of Salba N.A. was not followed.

**32** Salba S.A. received by registered mail dated June 4, 2009 a letter asserting that Salba N.A. was the owner of the trademark Salba, advising that Lawrence Brown and Thelma Brown are the principals of Salba Corp. N.A., that Salba N.A. has not licensed use of the Salba trademarks to Salba S.A. and that any such use by Salba S.A. was unauthorized and Salba N.A. would "take all actions necessary to protect our legal rights."

**33** In June, 2009 the *www.salba.info* website was changed, without the Applicants' knowledge, to remove reference to several of their family corporations, including AgriSalba S.A., Salba S.A. and Salba Nutritional as divisions in the Salba Group of companies.

**34** The Applicant Adolfo Mealla flew to Toronto about June 23, 2009 to confront Mr. Brown but states that Mr. Brown refused to meet with him.

**35** On June 25, 2009 the Applicants received a letter from Mr. Mitch Propster on behalf of Core Naturals LLC purporting to terminate its supply agreement with Salba S.A. on the basis that Salba S.A. was in breach of its warranty that it owned the Salba trademarks. Another letter purported to rescind the distributorship agreement.

**36** On September 10, 2009 a press release announced that Salba N.A. had appointed Core Naturals the "Exclusive Distributor for Salba in the U.S." Mr. Brown caused Salba N.A. to enter into this new distributorship arrangement with Core Naturals.

**37** Mr. Brown has recently written to Nexcel, a web-based retailer of Salba Smart products, claiming that Salba N.A. has not licensed the trademark Salba to Smart Salba. Mr. Brown also wrote to another retailer, Nature's Best and to United Natural Foods Inc, the largest distributor of Smart Salba products in the United States, to the same effect in respect of Smart Salba products. Mr. Brown advised GenpakLP, the company that manufactures packaging for Salba Smart, to cease and desist in doing so, with the result that Genpak has declined to print any further packaging for Salba Smart. Mr. Brown delivered a letter to Italpasta, a Canadian company that distributes Salba Ole pasta products, claiming that Salba N.A. has not authorized the use of the Salba trademark. Mr. Brown wrote to New Hope Natural Media, a major publisher in the natural foods industry, August 7, 2009 advising that it must cease and desist with respect to allowing advertising or marketing of any products of Salba Smart using any of the Salba trademarks.

**38** The record contradicts Mr. Brown's claimed lack of knowledge as to the use of the trademark Salba by Salba Smart. A dispute had arisen in 2007 involving a business of Great Western Tortilla and the use of the Salba trademark. In an email to Mr. Brown dated December 17, 2009 Mr. Rogers refers to a discussion he has had with the Trade-marks office and states that he should obtain Alfredo Mealla's confirmation "that he has in fact signed the agreement on behalf of Salba Corp N. A." On December 22, 2007 Mr. Rogers wrote a 10 page opinion letter to Mr. Brown at Salba N.A. referring to, *inter alia*, a sub-licence to Salba Smart to use the Salba trademark. The record establishes that an Assignment, to be effective as of January 26, 2007, provided that The Great Western Tortilla Company, William A. Ralston and Richard L. Ralston, had assigned their interest in certain Salba trademarks to Salba N.A. with Alfredo Mealla signing as President of Salba N.A. The Ralstons became partners with Salba S.A. in Salba Smart.

**39** The Applicants are concerned as the new letterhead of Salba N.A. now contains the phrase "Brand Salvia hispanica" (the name for generic chia seeds) directly under the Salba trademark and logo and fear that because Mr. Brown does not have access to the Applicants' varietal of seeds that Mr. Brown is trying to use the Salba brand to market ordinary chia seeds.

### **The Law**

**40** A "complainant" can bring an oppression application under s. 241(1), (2) of the *CBCA* to establish that

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer ... .

**41** Section 238 of the *CBCA* defines "complainant" *inter alia* to include a "beneficial owner" of a security of a corporation or any of its affiliates. Section 2 defines "beneficial ownership" to include "ownership through any trustee, legal representative, agent or other intermediary."

**42** The Applicants assert that they are beneficial owners of the shares of Salba N.A. or, at the least, of most of those shares. A broad and liberal interpretation is to be given to the meaning of "beneficial ownership" under the oppression remedy, consistent with the remedial nature of the statutory provision. A beneficial owner is someone who is the real owner of the shares even though the shares are in someone else's name as nominal owner. *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.).

**43** The Applicants' raise a serious issue for trial that the Respondents, in particular Thelma Brown, are "bare trustees" in respect of the ownership of the shares of Salba N.A. Where a trustee is not exercising independent discretion based upon a trust agreement or ownership rights but rather is carrying out the mandate of the beneficiaries, he or she is simply a "bare trustee." In such an instance the agency relationship predominates over the trust. The responsibility of the bare trustee is to carry out the instructions of his/her principals, the beneficiaries. *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (C.A.).

**44** Section 241(3) gives the Court the power to make any interim order it thinks fit. The onus is upon the Applicants to establish that they are properly entitled to an interim injunction. The three-part test seen in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.) is to be addressed in respect of this request.

**45** First, the Applicants must establish that there is a serious issue or question to be tried. In my view, the objective, evidentiary record establishes a strong *prima facie* case that the Respondents have been placed in nominal control of Salba N.A. to act only at the direction of the Applicants and on the basis that the Respondents are bare trustees in respect of the intended beneficial owners of the shares of Salba N.A. The record establishes a *prima facie* case that the intent of all parties as to the ultimate share structure was to give the Applicants direct or indirect (through Sahis) ownership of some 73 % of the shares of Salba N.A. and the Respondent Lawrence Brown direct or indirect (through Sahis) ownership of only some 5.5%. The record establishes a strong *prima facie* case that at all times it was understood by all parties that Salba N.A. was to be merely the holding corporation for the Salba trademarks and that decisions in respect thereof were to be made by the Applicants through their direct or indirect (through Sahis) control of Salba N.A. The record establishes a strong *prima facie* issue for trial as to possible oppression by the Respondents of the Applicants.

**46** Second, the Applicants must establish that they will suffer irreparable harm if the injunctive relief is not provided. In my view, the evidentiary record establishes there will be irreparable harm which cannot be compensated for by way of any ultimate award of damages if the requested interim injunctive relief is not given. The business enterprise of the Applicants is dependent upon maintaining the strength and credibility of the "Salba" brand through the protection of the trademarks owned by Salba N.A. The evidentiary record establishes that the actions of the Respondents are very seriously jeopardizing the value of the Salba trademarks and brand. The Respondents have threatened and interfered with the "Salba" distribution network and chain established by the Applicants. This is being done notwithstanding that the record establishes that the Respondent Lawrence Brown has known about and participated in the setting up of this distribution network by the Applicants in the first instance. The actions of the Respondents are also causing confusion in the consumer market. There is a real danger that the credibility of the Salba brand will be compromised irreparably if the Respondents allow sales of common chia seed to be sold under the Salba brand name rather than only the specially cultivated seeds in Peru supplied and sold by Salba S.A. to the Applicants' well-established Salba distribution network. A refusal to grant

injunctive relief could very adversely affect the Applicants' interests such that the resulting harm could not be remedied if the Applicants are ultimately successful at trial.

**47** Third, the Applicants must establish that on a "balance of convenience" interim injunctive relief is properly to be given. That is, a determination must be made as to which of the contending parties will suffer the greater harm from the granting or refusal of an interim injunction. In the instant situation the evidentiary record establishes that, in the absence of injunctive relief, the Respondents' assertion of ownership of Salba NA and control of its trademarks means that the Applicants' business enterprise is put to serious jeopardy and risk with the probability of significant irreparable loss and damages to the Applicants. In contrast, the Respondents have only since June embarked upon a purported operational business using the Salba trademarks and brand. The record establishes that until June, 2009, the Respondents have not caused Salba N.A. to enter into any licensing agreements except as instructed to do so by the Applicants. The Respondents have now entered into a single distribution contract, in June, 2009, with Core Naturals, and that party was, of course, aware of the existing Salba distribution network of the Applicants as Core Naturals was part of that network until it purportedly rescinded its contractual commitments as part of that distribution network created by the Applicants.

**48** The Applicants have given the requisite undertaking as to damages and have agreed, being non-residents, to put up \$50,000 as security for their undertaking..

### **Disposition**

**49** For the reasons give, the requested interim injunctive relief is granted to the Applicants. The appropriate Order will issue.

**50** I may be spoken to as to costs.

P.A. CUMMING J.

cp/e/qllxr/qlmxb/qlaxw/qlhcs