

Federal Court



Cour fédérale

**Date: 20220110**

**Docket: T-449-17**

**Citation: 2022 FC 22**

**Ottawa, Ontario, January 10, 2022**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**FARMOBILE, LLC**

**Plaintiff/  
Defendant by Counterclaim**

**and**

**FARMERS EDGE INC.**

**Defendant/  
Plaintiff by Counterclaim**

**ORDER AND REASONS**

**I. Overview**

[1] These reasons address three interlocutory motions in this patent infringement action:

(i) Farmobile's motion to further amend its pleadings; (ii) Farmers Edge's motion to further amend its pleadings; and (iii) Farmers Edge's motion to bifurcate or, alternatively, adjourn the trial scheduled to commence on August 8, 2022. At a case management conference on November 4, 2021, it was recognized that the motions were related and I agreed to hear the three motions together.

[2] For the reasons below, each party's motion to further amend their pleadings is granted in part and dismissed in part, while Farmers Edge's motion to bifurcate or adjourn is dismissed, with costs of the three motions payable to Farmobile on the basis set out below.

[3] In summary, Farmobile's amendments alleging Farmers Edge continues to infringe its patent after recent software amendments are permitted, but its inadequately particularized allegation that Farmers Edge infringes because its current software and system is "functionally equivalent" to the prior software is not permitted.

[4] Farmers Edge's amendments that are truly responsive to Farmobile's allegations of infringement of device claims, including those Farmobile consents to, are permitted. However, despite Farmers Edge's protests, most of its proposed amendments are not responsive to either Farmobile's new claims or to new circumstances. Rather, they are attempts to raise new defences that could have been raised earlier and/or are based entirely on unsupported speculation. The proposed amendments will result in—and in at least some cases appear designed to result in—extensive further documentary and oral discovery and further expert reports that would jeopardize the current trial dates. Indeed, Farmers Edge's motion to bifurcate or adjourn the trial is premised largely on the need for such discovery and reports because of its proposed amendments. These amendments are not in the interests of justice and will not be permitted at this stage of the litigation. Nor will Farmers Edge's request to implement an unworkable and inefficient bifurcation or to again adjourn the trial of this matter be granted.

## II. Substantive and Procedural Background

### A. *General nature of the proceeding*

[5] This action revolves around Canadian Patent No 2,888,742 (the '742 Patent), entitled "Farming Data Collection and Exchange System," of which Farmobile is the registered owner. Farmobile claims Farmers Edge infringes the '742 Patent through its farming data exchange system marketed under the name "FarmCommand" and a related data collection device known as the "CanPlug." Farmers Edge denies Farmobile's allegations, asserting that it is the rightful owner of the '742 Patent, that in the alternative it does not infringe the asserted claims, and that in the further alternative the '742 Patent is invalid.

[6] The '742 Patent contains both "device claims" (claims 1–19) claiming a relay device with certain features, and "system claims" (claims 20–44) claiming a farming data exchange system or a server system with certain features. As explained further below, both the Farmobile system/Canplug device and the claims at issue have changed over time. This is a significant part of what drives the dispute between the parties about further amendments to the pleadings.

[7] By the time of the currently scheduled trial dates in August 2022, it will be over five years since the action was commenced. Trial of the matter has been scheduled and adjourned a number of times. For present purposes, it is necessary to recount only the more recent procedural history, beginning shortly before the trial was scheduled to commence in April 2021.

B. *The April 2021 software update and the adjournment of the trial in April 2021*

[8] On August 4, 2020, the action and counterclaim were set down for trial for 15 days beginning April 19, 2021. Heading into the April 2021 trial date, the primary operative pleadings were Farmobile's Amended Statement of Claim, filed on August 29, 2019; and Farmers Edge's Twice Further Amended Fresh as Amended Statement of Defence and Counterclaim, filed on February 17, 2021. The Amended Statement of Claim alleged the FarmCommand system infringed a number of the system claims of the '742 Patent. The allegation of infringement of the system claims replaced the original allegation that eight of the device claims were infringed. The device claims were withdrawn in August 2019 when the system claims were asserted.

[9] In preparation for trial, the parties had filed expert reports both on technical matters pertaining to the patents and on damages. In July 2020, Farmobile filed an expert report from its technical expert, George Edwards, which gave his opinion that the FarmCommand system infringed system claims of the '742 Patent. In September 2020, Farmers Edge served a report from its expert, Aaron Ault, which gave his opinion there was no infringement of the '742 Patent. In addition, Mr. Ault's report is said to have described non-infringing alternatives (NIAs) that Farmers Edge could have implemented even on Dr. Edwards' approach to construction and infringement of the patent. Dr. Edwards addressed these NIAs in a reply report.

[10] On April 12, 2021, a week prior to the scheduled trial date, Farmers Edge announced it had changed the software running on the CanPlug device to implement what it claimed to be a "non-infringing alternative endorsed by both Mr. Ault and Dr. Edwards." I will refer to these

software changes as the April 2021 Update. The following day, Farmers Edge delivered a further report from Mr. Ault, styled as an “Update” to his September 2020 non-infringement report. Mr. Ault’s Update report maintained his opinion of non-infringement and gave his view that Dr. Edwards’ allegations of infringement were no longer applicable to the April 2021 Update of the software system.

[11] After a trial management conference (TMC) with Justice McVeigh, then assigned as trial judge, the parties agreed the issues arising from the April 2021 Update required adjournment of the April 19 trial. On April 16, Justice McVeigh adjourned the trial on consent.

[12] Having reviewed the April 2021 Update, Farmobile raised the possibility of reasserting the device claims of the ’742 Patent. At a further TMC on April 27, Justice McVeigh required Farmobile to advise by May 14 whether it would be advancing the device claims. The trial was set down for October 4, 2021 with an apparent recognition that that date would not be achievable if the device claims were reasserted.

[13] Farmobile did reassert the device claims, claiming the CanPlug infringed certain of those claims. It put these allegations forward in a draft Further Amended Statement of Claim. Farmers Edge initially refused to consent to the amendments, although they later consented and the Further Amended Statement of Claim was filed in August 2021. In the meanwhile, at a TMC on June 25, Justice McVeigh concluded the matter would not be ready for trial on October 4 and again adjourned the trial. She also ordered that Dr. Edwards’ report responding to Mr. Ault’s

Update report be served by July 16 and Mr. Ault's reply be served by July 30. On July 9, the matter was set down for trial commencing August 8, 2022.

C. *The July 2021 software update*

[14] The parties served reports in accordance with the schedule set by Justice McVeigh.

Dr. Edwards' July 16 report gave his view that the CanPlug with the April 2021 Update software infringed the asserted device claims. Mr. Ault's July 30 reply report disagreed, but further gave his opinion that another software change would render the CanPlug non-infringing even on Dr. Edwards' approach. He stated that Farmers Edge had implemented that further software change on July 28 in what I will refer to as the July 2021 Update.

[15] In response to this information, Farmobile requested documents regarding the July 2021 Update. Disputes about those documents, including the scope of production and redactions, and disputes about amendments to the pleadings, have occupied the parties in the subsequent months.

[16] On the productions side, the dispute over the scope of Farmobile's request for documents related to the July 2021 Update was ultimately narrowed to its request for the FarmCommand "server-side software." Farmobile alleges that the FarmCommand system operates through interaction between the CanPlug device, which has software running on it, and a server-based system in the cloud. Farmers Edge had produced both the CanPlug software and the server-side software after the April 2021 Update. With respect to the July 2021 Update, Farmers Edge produced the CanPlug software but refused to produce the server-side software on grounds of relevance. On December 16, 2021, Case Management Judge (CMJ) Ring heard Farmobile's

motion seeking production of the server-side software related to the July 2021 Update. As of the hearing of the three motions before me on December 20, 2021, CMJ Ring’s decision on that motion was under reserve.

[17] On the pleadings side, Farmobile advised Farmers Edge in September it would be alleging infringement with respect to the July 2021 Update. In October and November, the parties exchanged draft amended pleadings and objections to the drafts. As set out below, some of the amendments were consented to, but significant aspects of each party’s proposed amendments remain in dispute.

### III. General Principles on Amendment of Pleadings

[18] As both parties’ motions to amend their pleadings rely on Rule 75(1) of the *Federal Courts Rules*, SOR/98-106, I set out the general principles relating to motions under that Rule before turning to each party’s motion. The Rule itself reads as follows:

#### **Amendments with leave**

**75 (1)** Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

#### **Modifications avec autorisation**

**75 (1)** Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

[19] The Federal Court of Appeal has confirmed that the general rule is that “an amendment should be allowed at any stage of an action for the purpose of determining the real questions in

controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice”: *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at para 19, quoting *Canderel Ltd v Canada*, [1994] 1 FC 3 (CA) at p 10; *McCain Foods Ltd v JR Simplot Company*, 2021 FCA 4 at para 20. That allowing the amendment “would not result in an injustice to the other party not capable of being compensated by an award of costs” and that it “serve the interests of justice” are independent criteria to be met: *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 9.

[20] In assessing whether an amendment would serve the interests of justice, the Court may consider factors such as (i) the timeliness of the motion to amend; (ii) whether the proposed amendments would delay trial; (iii) whether the amending party’s prior position has led another party to follow a course of action in the litigation that it would be difficult to alter; and (iv) whether the amendments will facilitate the Court’s consideration of the substance of the dispute on its merits: *Enercorp* at paras 20–21, quoting *Continental Bank Leasing Corp v R*, [1993] TCJ No 18; *Federal Courts Rules*, Rule 3. These factors are considered together without any single factor being determinative.

[21] An amendment must also yield a sustainable pleading. As a result, an amendment that does not disclose a reasonable cause of action or defence, and is thus liable to be struck out under Rule 221, should not be permitted: *Enercorp* at para 22; *McCain* at paras 20–22; *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 28–32. This includes amendments that are inadequately particularized to allow the opposing party to plead in response: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16–20. Similarly, amendments that



represent a radical departure from the party's prior positions are abusive and should not be permitted: *Hospira Healthcare Corporation v The Kenny Trust for Rheumatology Research*, 2020 FCA 191 at para 5; *Merck & Co, Inc v Apotex Inc*, 2003 FCA 488 at para 47.

[22] With these principles in mind, I turn to the parties' respective motions to amend their pleadings.

IV. Farmobile's Motion to Amend its Pleadings

A. *Nature of the proposed amendments*

[23] Farmobile seeks to amend the Further Amended Statement of Claim it filed in August 2021 after the April 2021 Update. The proposed amendments set out in its draft Twice Further Amended Statement of Claim fall into two main categories:

- (1) allegations that the CanPlug infringes certain device claims after the July 2021 Update (found in paragraphs 7, 9, and 12–16);
- (2) allegations that after the April 2021 Update and the July 2021 Update, the asserted system and device claims are infringed “because the hardware and software components operate in a manner that is functionally equivalent to the previous system” (new paragraphs 17 and 32).

[24] For the reasons that follow, I grant leave to make the former amendments and deny leave to make the latter amendments.

B. *The proposed amendments are allowed in part*

- (1) Allegations that the CanPlug infringes certain device claims after the July 2021 Update (paragraphs 7, 9, and 12–16)

[25] Farmobile’s proposed amendments to paragraphs 7 and 13–16 of the Further Amended Statement of Claim refer to the July 2021 Update to Farmers Edge’s “code / system” and asserts the CanPlug continues to infringe eight device claims of the ’742 Patent. The list of eight asserted claims is a subset of the ten claims asserted against the CanPlug after the April 2021 Update.

[26] The proposed amendments to these paragraphs may be summarized as follows:

- Paragraphs 7 and 16: The CanPlug is alleged to assert the eight asserted device claims after the July 2021 Update. In paragraph 16, the CanPlug is alleged to comprise “each and every element” listed in the asserted claims “for the foregoing reasons” (referring to prior paragraphs).
- Paragraph 9: The CanPlug is alleged to store certain identified descriptive information about a “farming operation land segment” after the July 2021 Update.
- Paragraph 12: The CanPlug is alleged to determine that the farming operation occurred on the farming operation land segment and to store certain identified descriptive information about a “farming operation land segment” after the July 2021 Update.

- Paragraphs 13, 14, and 15: Each paragraph states “[f]or the foregoing reasons, after the July 28, 2021 amendments to the code / system, the CanPlug continues to infringe” the claim or claims of the ’742 Patent referred to in the respective paragraph.

[27] I question whether these amendments are truly necessary. Even before the proposed amendments, the Further Amended Statement of Claim alleged the CanPlug infringed the asserted device claims of the ’742 Patent. This allegation did not change simply because Farmers Edge changed its software. Nevertheless, I believe the amendments serve the helpful purpose of confirming or clarifying that Farmobile continues to allege infringement even after the July 2021 Update, and to specify that two of the previously asserted claims are not asserted.

[28] Farmers Edge does not contend that Farmobile should not be permitted to amend its pleadings in response to the July 2021 Update. However, it opposes these proposed amendments on grounds that they are insufficiently particularized, asserting the amendments simply recite the patent claim elements without pleading sufficient material facts. It cites a number of decisions of this Court to the effect that a pleading cannot baldly allege infringement by reciting claims or claim elements and leave the defendant to guess how the claims are being construed or how the infringement is occurring: *Faulding (Canada) Inc v Pharmacia SpA*, 1998 CanLII 8165 (FC) at para 7, aff’d 1999 CanLII 8759 (FCA); *Mostar v Drill-Tek*, 2017 FC 575 at paras 21–22, 28; *Edwards Lifesciences v Livanova* (January 3, 2018, Court File No T-1831-16); *Poyntz v Elcargio Fabrication* (June 20, 2018, Court File No T-1338-17).

[29] While a pleading cannot baldly claim infringement without adequate material facts, analysing the sufficiency of the material facts pleaded is contextual and fact driven: *Mostar* at para 23. This is consistent with the observations of Justice Rennie for the Federal Court of Appeal at paragraphs 18 and 19 of *Mancuso*:

There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[Emphasis added.]

[30] In my view, read in the context of the pleadings as a whole, the amendments to paragraphs 7, 9, and 12–16 allow Farmers Edge to know the nature of the infringement allegations made in respect of the July 2021 Update sufficiently to plead intelligently and adequately in response. They define the issues with sufficient precision to make the pre-trial and trial proceedings manageable and fair. Importantly, the amendments appear in the context of the existing language of paragraphs 6 to 16 of the Further Amended Statement of Claim, which sets out the aspects of the FarmCommand system and CanPlug device said to infringe the asserted claims of the patent. Those allegations may or may not be proven at trial. But I am satisfied that they set out with adequate particularity the infringement allegations made in respect of the July 2021 Update.

[31] Farmers Edge complains that Farmobile simply recites elements of the patent claims. The amendments in paragraphs 9 and 12 certainly set out the descriptive information stored by the CanPlug in language that echoes the asserted claims. However, I agree with Farmobile that references to information such as a “latitude coordinate,” a “longitude coordinate,” or an “elevation above sea-level” are difficult to put in different terms, and need not be stated in terms other than those used in the claims for Farmers Edge to understand them. As Case Management Judge Aylen held, “there is no hard and fast rule against a plaintiff pleading the language of the claims of the patents at issue in the proceeding” to set out the facts alleged to infringe a patent: *Mostar* at para 29.

[32] As for the other *Enercorp/Continental Bank* factors, I consider the request to amend to have been timely in reaction to the further updates to the Farmers Edge software in July 2021, and see no reason that the proposed amendments should delay trial. As noted above, while the amendments may not be strictly necessary, they will facilitate the Court’s consideration of the substance of the dispute on its merits. They will also not cause an injustice to Farmers Edge, having been raised in response to changes to Farmers Edge’s software. While the parties anticipate filing further expert reports in connection with the July 2021 Update, these additional reports could be described as required by the software amendments, the pleadings amendments, or both. In any event, these additional costs can be compensated for through any costs award following trial.

[33] Leave is therefore granted to amend paragraphs 7, 9, and 12–16 in accordance with the proposed Twice Further Amended Statement of Claim.

- (2) Allegations that the system operates in a manner that is “functionally equivalent” to the previous system (new paragraphs 17 and 32)

[34] Farmobile seeks to add the following paragraph to its Amended Statement of Claim, as new paragraph 17:

Furthermore, and in the alternative, after the April 12, 2021 and July 28, 2021 amendments to the code / system, claims 1 3, 4, 9, 10, 11, 13, 17, 18, 19, 20, 26, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43 and 44 of the ‘742 Patent are infringed by Farmers Edge because the hardware and software components operate in a manner that is functionally equivalent to the previous system (i.e. before the code / system changes made on April 12, 2021). For example, the expert for the Defendant, Mr. Ault, opined in his April 13, 2021 and July 30, 2021 expert reports that after the April 12, 2021 and July 28, 2021 amendments to the code / system, Farmers Edge’s system and services have the same functionality and user experience. Accordingly, Farmers Edge’s code / system continues to deprive Farmobile of its exclusive right, privilege and liberty of making, constructing and using its invention, and selling it to others to be used, in claims 1 3, 4, 9, 10, 11, 13, 17, 18, 19, 20, 26, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43 and 44 of the ‘742 Patent.

[Emphasis added.]

[35] Farmobile also seeks to add a sentence to its former paragraph 31 (new paragraph 32) to similar effect, referring only to the system claims.

[36] I pause to observe that the parties’ apparent practice of adding new amending paragraphs in a manner that renumbers paragraphs in the prior pleading entails inconvenience and potential confusion. In my view, the practice that I understand to be more common, namely giving new amending paragraphs sub-numbers such as “16.1” or “16A” to avoid unnecessary renumbering of later paragraphs, is preferable.

[37] Farmers Edge objects to the amendments in new paragraphs 17 and 32 on grounds that a claim of infringement based on “functional equivalence” is not just a novel claim, but an untenable one that is contrary to established Canadian law. It cites *Free World Trust*, in which the Supreme Court of Canada rejected the “spirit of the invention” as a concept informing the infringement analysis, and *Eurocopter*, in which the Federal Court of Appeal considered a functional equivalence argument to be contrary to *Free World Trust*: *Free World Trust v Électro Santé Inc*, 2000 SCC 66 at paras 31(d), 34–40, 45–50; *Bell Helicopter Textron Canada Limitée v Eurocopter, société par actions simplifiée*, 2013 FCA 219 at paras 82–85, 95–98. Farmobile responds that regardless of terminology, its claim is consistent with the recognition in *Free World Trust* that “[i]t would be unfair to allow a patent monopoly to be breached with impunity by a copycat device that simply switched bells and whistles, to escape the literal claims of the patent”: *Free World Trust* at para 55, citing *Improver Corp v Remington Consumer Products Ltd*, [1990] FSR 181 at pp 182, 192.

[38] I agree with Farmers Edge that *Free World Trust* confirms that the Canadian approach to patent infringement is that if all essential elements of a claim are present, there is infringement; if an essential element is not present, there is no infringement: *Free World Trust* at paras 20, 31(f), 68, 75; *Western Oilfield Equipment Rentals Ltd v M-I LLC*, 2021 FCA 24 at paras 48–49. I also agree that infringement cannot viably be established simply on the basis that a product has the “same functionality and user experience” as a prior product, without reference to the essential elements of a patent claim.

[39] Farmobile confirmed during oral argument that it was not trying to introduce the American doctrine of equivalents into Canadian law, nor to advance a novel theory of infringement in which there might be infringement even though not all essential elements of a claim were present. Rather, it confirmed that its pleading was, in essence, a pleading that the only elements of the asserted claims that are not present in Farmers Edge's FarmCommand system and/or CanPlug device after the April 2021 Update are non-essential elements. It argues, with reference to the recent decision of the UK Supreme Court in *Actavis*, that its amendments are timely, since the essentiality analysis can only be reasonably undertaken once a variant is known, in order to assess whether the variant makes a difference to how the invention works: *Actavis UK Limited v Eli Lilly and Company*, [2017] UKSC 48 at paras 61–66; *Free World Trust* at para 31(e)(iii).

[40] It is difficult to glean from the text reproduced at paragraph [34] above that Farmobile's pleading is intended to be a pleading that the only elements of the asserted claims that are not present in the FarmCommand system and/or CanPlug device after the April 2021 Update are non-essential elements. Indeed, if this were the sole intent of the pleading, it could be considered redundant over the allegations of infringement in the earlier paragraphs, which I have allowed. However, even accepting this to be the intention of the pleading, the proposed allegation lacks adequate material particulars. Farmobile has not indicated in its draft pleading, or in particulars provided to Farmers Edge, which elements of the asserted claims it alleges to be non-essential. It is insufficient to broadly allege that a defendant's system has all essential elements of a claim. It is similarly insufficient to broadly allege that any claim elements the defendant's system does not have are non-essential without specifying which those non-essential elements are.



[41] Contrary to Farmobile's arguments, this lack of detail cannot be attributed to the outstanding dispute over disclosure of the July 2021 Update server-side software, as the allegation on its face pertains to the system after the April 2021 Update. Farmobile has had all relevant software and associated productions connected with the April 2021 Update for many months, yet has given no indication which elements of the claims it asserts are alleged to be non-essential. In any event, to the extent that Farmobile alleges that it needs the server-side software to conduct its essentiality analysis for purposes of alleging infringement after the July 2021 Update, the solution is not to plead blindly in advance of getting the necessary information and expect to fill in the blanks later.

[42] The proposed amendments at new paragraphs 17 and 32 are therefore not permitted.

[43] I note as a final point on this issue that it may not be necessary in every case to have a separate pleading regarding non-essential elements. An allegation of infringement is an allegation that all essential elements of a claim are present, regardless of the presence or absence of any non-essential elements. As Justice Binnie noted in *Free World Trust*, the identification of elements as essential or non-essential is made on the basis of the common knowledge of the worker skilled in the art to which the patent relates: *Free World Trust* at para 31(e)(i). It is therefore frequently the subject of expert evidence, designed to assist the Court in making the necessary and relevant determinations of essentiality. If a defendant's expert asserts that a product does not infringe because it does not have a certain claim element, and the plaintiff's expert asserts that the identified element is not an essential element, I question whether a pleadings amendment is needed in every case to identify non-essential elements to ensure the fairness of the trial process.

C. *Conclusion*

[44] Farmobile is therefore granted leave to amend its Further Amended Statement of Claim through the filing of a Twice Further Amended Statement of Claim containing the amendments proposed in paragraphs 7, 9, and 12–16, but not those proposed in new paragraphs 17 or 32.

[45] Consequential amendments to subsequent pleadings are addressed below.

V. Farmers Edge’s Motion to Amend its Pleadings

A. *Nature of the proposed amendments*

[46] Farmers Edge’s proposed Thrice Further Amended Fresh as Amended Statement of Defence and Counterclaim contains a number of different categories of proposed amendments. Four of them may be quickly disposed of:

- The proposed amendments in paragraphs 2, 13–15, and 18–19 are simply formal, updating paragraph numbers and asserted claims of the patent. Farmobile has consented to these amendments and leave is granted to make them.
- Proposed new paragraphs 33 and 35 assert a *res judicata* defence in response to Farmobile’s assertion of the device claims. Farmobile has consented to these amendments and leave is granted to make them.
- Proposed new paragraph 34 responds to Farmobile’s proposed “functionally equivalent” pleading (Farmobile’s proposed new paragraph 17, discussed above). Given my refusal to

permit this amendment, the responding paragraph is unnecessary. Leave is therefore denied to add this paragraph.

- Proposed new paragraph 38 sets out an alternative defence based on non-infringing alternatives. Farmobile is correct that this is somewhat duplicative of Farmers Edge's existing paragraph 16. However, the allegation in new paragraph 38 is directed at the CanPlug in particular and includes the allegation, not found in paragraph 16, that Farmers Edge has already implemented NIAs. Leave is granted to add this paragraph.

[47] This leaves the following contested categories of amendments:

- (1) allegations arising from the acquisition of Farmobile by Ag Growth International, Inc [AGI] (found in new paragraphs 25–27);
- (2) allegations that the asserted claims of the '742 Patent are invalid based on inutility and overbreadth (paragraphs 28–31);
- (3) an allegation that one of the inventors of the '742 Patent represented that the prior art relevant to the subject matter of the patent was very strong and that Farmobile concluded it would be futile to continue prosecution of the related United States Patent (new paragraph 32);
- (4) an allegation that Farmobile's profitability is relevant to Farmobile's claim for royalty damages (new paragraph 39); and
- (5) allegations that Farmobile is a non-practicing entity with no ability to service Farmers Edge's customer base (new paragraphs 31, 40–41).

[48] For the following reasons, I conclude that none of these proposed amendments are in the interests of justice and decline to grant leave.

B. *The contested amendments are not allowed*

(1) Allegations regarding AGI's acquisition of Farmobile (new paragraphs 25–27)

[49] In paragraph 25 of its proposed pleading, Farmers Edge alleges that on April 16, 2021, AGI “acquired the balance of the outstanding shares of Farmobile.” This allegation appears to stem from a press release announcing AGI's acquisition of all outstanding shares of “Farmobile, Inc.,” building on AGI's earlier minority equity investment. This allegation then leads to two further allegations.

(a) *Transfer of ownership, champerty and/or maintenance*

[50] First, in proposed paragraph 26, Farmers Edge seeks to allege that AGI entered into arrangements to acquire the legal and equitable title to the '742 Patent, such that Farmobile has no standing to bring this action or, alternatively, that AGI is improperly supporting the litigation and is controlling the litigation “in a relationship resembling champerty and/or maintenance.” Farmers Edge seeks to allege this disentitles Farmobile to equitable remedies, punitive damages, or increased costs, and entitles Farmers Edge to elevated costs.

[51] Leaving aside whether “a relationship *resembling* champerty and/or maintenance” is a sustainable legal concept, the primary difficulty with this proposed pleading is that Farmers Edge has no factual foundation for it whatsoever, as counsel conceded during oral argument. It is

simply an assertion being made by Farmers Edge with an apparent eye to conducting discovery on the AGI transaction to uncover facts that might show an improper relationship. It is, in other words, a classic fishing expedition. As Justice Stratas noted at paragraph 18 of *Lukács v Swoop Inc*, 2019 FCA 145:

[O]ne cannot plead allegations without having at least some evidence behind the allegations. Making bald, conclusory allegations in a pleading, such as a motion for leave to appeal, without any evidentiary foundation is an abuse of process [...]. A legal proceeding, such as a motion for leave to appeal “is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court’s process”: *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 [[1994] FCJ No 1671] at para. 4 (F.C.A.).

[Emphasis added; some citations omitted.]

[52] Farmers Edge contends that its allegation should be taken as true for purposes of assessing its pleadings amendment and that it is not required to plead evidence. It argues that the Supreme Court has recognized that a claimant may not be in a position to prove the facts pleaded at the time of a motion to strike pleadings and “may only hope to be able to prove them,” particularly where they are a stranger to a transaction: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22; *Enercorp* at para 37; *McCain* at para 39.

[53] While the approach taken on a motion to strike pleadings is relevant, it is not the only relevant principle on a motion to amend. The amendment must serve the interests of justice, a question assessed through a variety of factors including whether the proposed amendments would delay trial, and whether they will facilitate the Court’s consideration of the substance of the dispute on its merits: *Enercorp* at paras 20–21, citing *Continental Bank*. In my view, both of these *Enercorp/Continental Bank* factors speak strongly against allowing an amendment that

appears to be no more than speculation. Indeed, Farmers Edge relies on its own amendments as necessitating an adjournment or bifurcation, as discussed further below. I also cannot read *Imperial Tobacco*, *Enercorp*, or *McCain* as permitting or encouraging amendments in the nature of a fishing expedition simply because they might support a defence if the baldly asserted allegations of fact turn out to be true: *Lukács* at para 18; *Kastner v Painblanc*, [1994] FCJ No 1671 (CA) at para 4; *Tomchin v Canada*, 2015 FC 402 at paras 38–40, 47; *Astrazeneca Canada Inc v Novopharm Limited*, 2009 FC 1209 at para 17, aff'd 2010 FCA 112 at para 5. As Justice Hughes noted in *Astrazeneca*, pleadings that are based on “assumptions and speculation” cannot be taken as true for purposes of a motion to strike, even if “a competent solicitor can draft a [pleading] that has the appearance of setting out a cause of action”: *Astrazeneca* at paras 10, 13.

[54] This is particularly so when the pleaded allegation that AGI acquired the '742 Patent as an asset runs contrary to the available information that AGI's purchase was a share transaction and one, moreover, relating to the shares of Farmobile, Inc and not Farmobile, LLC, which is the plaintiff and registered owner of the '742 Patent.

[55] Proposed paragraph 26, alleging the transfer of the '742 Patent and a “relationship resembling champerty and/or maintenance,” is not permitted.

(b) *Due diligence allegations*

[56] Second, in proposed paragraph 27, Farmers Edge seeks to allege that in the context of the AGI transaction, the due diligence process included an evaluation of the litigation that revealed

that “Farmobile’s claim for damages is baseless and/or highly exaggerated.” Farmers Edge again seeks to allege that this disentitles Farmobile to equitable remedies, punitive damages, or increased costs, and entitles Farmers Edge to elevated costs.

[57] Again, however, this allegation is made without any factual foundation whatsoever, with respect to either the existence or content of the asserted due diligence evaluation, other than Farmobile’s contention that it is common in the context of an acquisition to conduct an audit on outstanding litigation. The apparent goal of the amendment is to seek discovery regarding the transaction including disclosure of due diligence materials, in hopes that such discovery will show as true what is currently only bald speculation. For the reasons discussed above, such a pleading is an improper fishing expedition: *Lukács* at para 18. It would also unnecessarily delay this matter and distract the parties from the material issues in dispute in pursuit of a tangential and questionably relevant side issue pertaining to alleged assessments of the litigation occurring in a due diligence context.

[58] Proposed paragraph 27, pertaining to the due diligence allegations, is not permitted. As paragraphs 26 and 27 are not permitted, paragraph 25 has no relevance and will also not be permitted.

(2) Invalidity allegations (new paragraphs 28–31)

[59] Farmers Edge has contested the validity of the ’742 Patent as an alternative pleading since the outset of this action. Its current Twice Further Amended Fresh as Amended Statement of Defence and Counterclaim alleges that all of the claims of the ’742 Patent are invalid on

grounds of anticipation and obviousness. It also alleges that the system claims asserted in the Amended Statement of Claim, namely claims 20, 26–39 and 41–44, are invalid for being broader than any invention disclosed in the '742 Patent.

[60] Farmers Edge now seeks to add two new invalidity allegations as they pertain to the device and system claims Farmobile now asserts. Farmers Edge seeks to allege the claims are invalid because their utility was neither demonstrated nor soundly predicted before the filing date and/or that any sound prediction was not disclosed in the patent. It also seeks to allege the claims are invalid because the claims are broader than any invention purportedly made by the inventors (as opposed to being broader than any invention disclosed in the patent, the current pleading). In each case, Farmers Edge's proposed allegation includes reference to Farmobile's device known as the "PUC." Farmers Edge seeks to allege the PUC was non-functional, that its code could not function according to the device claims, and that the server/system software intended to interface with the PUC could not function according to the system claims.

[61] In my view, it is not in the interests of justice to permit Farmers Edge to assert these new invalidity allegations at this stage for the following reasons.

[62] First, the request to add these invalidity allegations is not timely. The parties have served their technical expert reports in respect of Farmers Edge's allegations of invalidity.

Farmers Edge has conducted discoveries that included discovery on issues relevant to invalidity allegations. It has also amended its pleadings on a number of occasions, as is clear from the title of its current and proposed pleadings. Farmers Edge's pleadings amendments included



amendments to its invalidity allegations, and even included a draft allegation of inutility that was served in a draft amended pleading in November 2019 but not pursued.

[63] In this regard, Farmers Edge submits that its amendments are responsive to Farmobile's "reinterpretation" of the '742 Patent in the wake of the April 2021 Update and the July 2021 Update. It argues it could not have made these allegations any sooner and that if Farmobile is permitted to change its infringement allegations, Farmers Edge should be entitled to "respond to this shifting landscape." I cannot accept these arguments. Farmers Edge has not persuasively explained how the continued assertion of infringement after the April 2021 Update and/or the July 2021 Update affects the interpretation of the '742 Patent such that defences of inutility or overbreadth that were not previously asserted have now become available. This is particularly so when those defences are now being asserted with reference to the PUC device that has been marketed for years and with reference to relevant dates in respect of the patent that pre-date this litigation. Farmers Edge's submission that it is simply raising new invalidity allegations because Farmobile is now asserting a greater number of claims (*i.e.*, the device claims) is also belied by the fact that it has asserted the invalidity of all claims of the '742 Patent since the outset of the action.

[64] Second, the proposed amendments raise a serious risk of a further delay of the trial. It is clear the allegations of invalidity have been made in such a manner to implicate the design and development of the PUC device and its software, matters that do not appear to be raised elsewhere in the pleading, as well as the scope of the invention made by the inventors. Farmers Edge itself contends, in the context of its request for bifurcation or adjournment, that its new

defences will require technical analysis of Farmobile's PUC device and further expert reports, as well as further examinations of inventors who have already been examined in writing. This may even require letters rogatory to examine one of the inventors in the US who is no longer a Farmobile employee. During oral argument, Farmers Edge confirmed that such examinations were only necessary to address its new invalidity defences. Indeed, given the nature of the new utility defences, their being drafted in such a way that they directly raise the potential for new disclosure of Farmobile software and financial information and further examination of the inventors, and their being combined with a request to bifurcate or adjourn the trial, the Court is left to question whether the amendments were put forward with an eye on procedure, discovery, and delay, rather than on the merits of the '742 Patent's validity.

[65] Third, and as a related matter, it does not appear the amendments will facilitate the Court's consideration of the substance of the dispute on its merits. The validity of the '742 Patent is a further alternative allegation by Farmers Edge, made in the alternative to its claim that it is the rightful owner of the '742 Patent and its defence of non-infringement. Its primary invalidity allegations are those of anticipation, obviousness and claims broader than the disclosure. While a defendant can, as a general rule, raise any viable invalidity defences it chooses, I cannot accept that permitting two further invalidity defences in respect of a further alternative invalidity argument will facilitate consideration of the substance of the dispute, particularly where they are put forward at a late stage of the proceedings, put the trial date at risk, and would require diversion of already limited trial and trial preparation time away from the primary issues in dispute.

[66] The new invalidity allegations in paragraphs 28 to 31 will not be permitted. The allegations in the final two sentences of paragraph 31 regarding Farmobile being a non-practicing entity are addressed below.

(3) Allegation of representation by an inventor regarding prior art (new paragraph 32)

[67] Farmers Edge next wishes to amend its pleadings to allege that one of the named inventors of the '742 Patent made a representation to Farmers Edge:

The named inventor, Tatge, represented to Farmers Edge that the prior art relevant to the subject matter of the '742 Patent, including that of claims 1, 3, 4, 9, 10, 11, 13, 17, 18, and 19, is very strong. He also represented that, as a result, Farmobile concluded that it would be futile to continue prosecution of the related United States Patent, and ceased expending further efforts and expense related to its prosecution.

[68] While not specified in the paragraph, Farmers Edge says this allegation pertains to its defence against Farmobile's claims for monetary and equitable remedies claims and costs.

[69] In addition to being an inventor, Mr. Tatge was formerly the Chief Executive Officer of Farmobile. However, the pleading refers to Mr. Tatge in his role as an inventor. It appears this is done because Farmers Edge seeks to examine him for discovery in respect of the pleading in his capacity as an assignor/inventor pursuant to Rule 237(4) of the *Federal Courts Rules*.

Farmers Edge would not be entitled to examine Mr. Tatge simply as a corporate representative pursuant to Rule 237(1). However, although Farmers Edge refers to Mr. Tatge in his capacity as an inventor, they explained at the hearing that the argument is, at least in part, one of detrimental reliance, namely that Farmers Edge was induced by the representation to pursue a course of

conduct to its detriment, and that Farmobile as a company (not Mr. Tatge as an inventor) is therefore precluded from certain remedies.

[70] I agree with Farmobile that the allegation in this paragraph, even if accepted as true, is wholly irrelevant to the issues in the action and should not be permitted. To begin, it is clear that the statement pertained to Farmobile's decision to continue prosecution of a related United States patent. Whether or why Farmobile chose not to prosecute a patent in a foreign jurisdiction can have no bearing on the availability of equitable remedies or costs in a Canadian action on a Canadian patent. An inventor's opinion or statement on the strength of prior art is similarly irrelevant, all the more so as it relates to the pursuit of a foreign patent. If the prior art shows the patent to be invalid for anticipation or obviousness, there will be no issue of either monetary or equitable remedies. If the patent is valid, the opinion of one of the inventors regarding the strength of the prior art during prosecution of a foreign patent cannot possibly affect the available remedies in Canada, even if that opinion was conveyed to the defendant.

[71] The result is that allowing the amendment will lead to further discovery, with resulting potential disputes over the scope of that discovery—particularly given Mr. Tatge's different roles and the parties' litigation history—all in an effort to establish an irrelevant fact. This is not in the interests of justice.

[72] The other *Enercorp/Continental Bank* factors reinforce this conclusion. Again, the proposed amendment is not timely. As Farmobile sets out in its responding materials, Farmers Edge has been aware of Mr. Tatge's statement for years, to the extent of having

examined Mr. Tatge on it in the context of related litigation in Nebraska in May 2017. While Farmers Edge crafts its allegation as being responsive to the new assertion of the device claims, using the language “including that of claims 1, 3, 4, 9, 10, 11, 13, 17, 18, and 19,” Mr. Tatge’s statement as alleged was not limited to device claims, or to the Canadian patent at all, but to the “subject matter” of the patent in the context of prosecution of the US patent. Farmers Edge provided no adequate explanation for its request to put the allegation forward at this stage. Further still, while Farmers Edge referred in argument to a course of conduct it claims to have followed as a result of the representation, there is no allegation of this in the paragraph, and no explanation of what course of conduct was purportedly undertaken or how, why, or whether, it was induced by Mr. Tatge’s statement.

[73] The allegation of a representation by Mr. Tatge regarding the prior art as set out in proposed paragraph 32 will not be permitted.

- (4) Allegation of relevance of Farmobile’s profitability and licensing rates (new paragraph 39)

[74] As noted above, Farmers Edge’s new paragraph 38 refers to its allegation that it could have, would have, and has implemented NIAs. I have permitted this amendment. Farmers Edge then seeks to add the following as new paragraph 39:

As such, Farmobile’s own profitability and licensing/purchase rates for Farmobile’s own distributors and customers are relevant to Farmobile’s claim for royalty damages. While full particulars are known to Farmobile, Farmobile’s own distributors and customers include Record Harvest Enterprises Inc. (“**Record Harvest**”). Record Harvest has entered into a licence agreement with Farmobile related to the technology allegedly covered by the ‘742 Patent.

[75] Farmers Edge again claims this allegation is directly responsive to Farmobile's new allegation that the CanPlug infringes the device claims of the '742 Patent. At the same time, it argues that Farmobile's financials, including documents relating to the Record Harvest licence, are already relevant since the royalty rate Farmers Edge allegedly should have paid is already at issue in the action, such that the new paragraph 39 "will not change the scope of the action" and is a "mere particularization of an extant plea."

[76] It is difficult to see how these two assertions can co-exist. If the new paragraph is merely a particularization of an existing plea relating to the reasonable royalty payable for the '742 Patent, it is one that could have been pleaded long ago, regardless of the addition of the device claims. Notably, neither party has contended that the royalty rate to license the '742 Patent would depend on the number of claims of the patent asserted. To the contrary, Farmers Edge's expert, Dr. Meyer, concluded that a reasonable royalty rate would be determined by evaluating the bargaining range for each party in a hypothetical negotiation between the parties "to license the Patent-at-Issue from September 15, 2015 through patent expiry on September 22, 2034." While she calculates the royalty based on acreage, she does not calculate it based on the number of claims asserted or practiced.

[77] Further, as Farmobile points out, Dr. Meyer's report already calculates damages separately on the assumption that NIAs would have been available to Farmers Edge at the time of the hypothetical negotiation. She does not assert any concern about being unable to assess such damages without Farmobile's profitability or its licensing or sale rates. Given this evidence from its own expert, Farmers Edge's submission that its implementation of NIAs and

Farmobile's continued assertion of infringement now makes Farmobile's profitability relevant is inconsistent and unpersuasive. As for the specific reference to Record Harvest, there is no allegation that this licence agreement was a licence for or covering the '742 Patent. To the contrary, the allegation carefully specifies that it is a licence "related to the technology allegedly covered by the '742 Patent." Farmers Edge has not explained how this licence, apparently entered into after September 2015, could affect the determination of damages arising from infringement of the '742 Patent on its own damages theory and expert evidence.

[78] In any event, I consider the proposed pleading that particular information and documents are "relevant" to be improper. Information and documents are relevant to the matters pleaded in an action or they are not; they are not made so by a pleading that purports to define what is relevant. A pleading is to "contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved" [emphasis added]: *Federal Courts Rules*, Rule 174. As noted above, there is no "bright line" between pleading material facts and the prohibition on pleading evidence: *Mancuso* at para 18. However, Farmers Edge's proposed pleading of what information and documents it considers relevant to other aspects of the pleading plainly falls on the side of pleading evidence.

[79] The proposed amendment at paragraph 39 regarding the relevance of Farmobile's profitability and licensing/purchase rates will not be permitted.

(5) Allegation that Farmobile is a non-practicing entity (new paragraphs 31, 40–41)

[80] In its new paragraphs 40 and 41, Farmers Edge seeks to allege that Farmobile does not practice the '742 Patent, and has no ability to service Farmers Edge's broad customer base:

In the alternative, if the CanPlug infringes any claim of the '742 Patent, which is denied, an injunction should not issue. Farmobile is a non-practicing entity with no ability to service Farmers Edge's broad customer base. Farmobile has no or limited presence in Canada, Australia, Brazil, Ukraine, Russia, or the United States. Past and present Farmobile sales will reveal that Farmobile has no ability to service Farmers Edge's broad customer base.

Additionally, Farmobile's web-based hardware and software are inferior to, and an unsuitable replacement for, the allegedly infringing products. Farmobile has insufficient capacity to service Farmers Edge's broad customer base. In any event, damages are an adequate remedy for any ongoing acts of infringement, which are denied. As a result, Farmobile is not entitled to any equitable remedies, punitive damages, or increased costs.

[81] A similar allegation is raised in paragraph 31, alleging that to the extent Farmobile contends its PUC device is not covered by the '742 Patent, it is a non-practicing entity and is not entitled to equitable remedies, punitive damages, or increased costs.

[82] I conclude that it would not be in the interests of justice to allow these amendments, considering the *Enercorp/Continental Bank* factors. In particular, I consider the timeliness of the requested amendment, the further discovery the proposed pleadings would apparently entail, and the potential impact on the trial dates to be particularly important factors. I also consider the amendments will not facilitate the Court's consideration of the substance of the dispute.



[83] The core of these proposed allegations is the assertion that an injunction, equitable remedies, punitive damages, or increased costs should not be awarded on the basis that Farmobile is a non-practicing entity. As with other amendments discussed above, the language of paragraph 40 is crafted to appear responsive to Farmobile's new allegation that the CanPlug infringes the device claims of the '742 Patent ("if the CanPlug infringes any claim of the '742 Patent"). However, the CanPlug as part of the FarmCommand system has been part of the Statement of Claim since the outset of this proceeding, throughout the time when the device claims were originally pleaded and when the device claims were withdrawn in favour of the system claims. In any event, to the extent Farmobile's ability to service Farmers Edge's customers is alleged to be relevant to the availability of certain remedies for patent infringement, it has been relevant throughout and in respect of all patent claims. The reintroduction of the device claims as the result of Farmers Edge's code updates does not provide Farmers Edge with a blank cheque to introduce new allegations that could have been asserted long ago.

[84] Broad further discovery would be required as a result of the amendment. The pleading as drafted would justify discovery on Farmobile's operations in six different countries, including its past and present sales. It would also raise technical aspects of the PUC device in order to establish whether Farmobile is or is not a "non-practicing entity," leading to further technical expert reports. This broad further discovery, together with the concomitant motions the parties have shown themselves inclined to bring, would put the current trial dates in jeopardy. This extensive discovery and risk to the trial dates would be in service of an alternative argument regarding the availability of narrow aspects of the requested relief if it is determined that the '742 Patent is properly owned by Farmobile, is valid, and is infringed. The amendments would

not facilitate the Court's consideration of the central relevant issues of the dispute, but rather would again distract the parties from preparing for trial on those issues.

[85] This final factor is also influenced by the limited relevance to the issue of remedy of the assertion that Farmobile is a non-practicing entity. Farmers Edge alleges that that Farmobile's status as a non-practicing entity is relevant to its entitlement to an injunction, citing *Unilever PLC v Procter & Gamble Inc*, [1993] FCJ No 117 (TD) at para 185, aff'd [1995] FCJ No 1005 (CA). In that case, Justice Muldoon declined to grant an injunction despite his finding of infringement because the patent was going to expire in 19 months, the plaintiffs never practiced the invention in Canada, and an injunction would inflict hardship on both the defendants and, especially, "on their innocent employees in these hard economic times": *Unilever* at para 185.

[86] I cannot take Justice Muldoon's approach in the particular context of that case to stand for any general principle that not practicing a patent disentitles a patentee to an injunction. I agree with Justice Gauthier, then of this Court, when she observed that *Unilever* is "clearly distinguishable on its facts": *Valence Technology, Inc v Phostech Lithium Inc*, 2011 FC 174 at paras 239–240, aff'd 2011 FCA 237. The present case is very different from that in *Unilever*. The '742 Patent will not expire until 2034 and there is no allegation of hardship to Farmers Edge's employees. To the contrary, one of Farmers Edge's central arguments, as set out in its paragraph 16 and confirmed in its new paragraph 38, is that if found to infringe, it can and would simply implement a non-infringing alternative.

[87] Farmobile goes further to argue that Farmers Edge’s allegation that a non-practicing entity should not be entitled to an injunction or other remedies is bound to fail and does not disclose a reasonable defence. This Court has certainly held that an injunction is generally available as a remedy where necessary to prevent further infringement of a patent, including to patentees who do not practice their patents: *Valence* at paras 239–240; *Bombardier Recreational Products Inc v Arctic Cat, Inc*, 2020 FC 946 at paras 37–39; *Arysta Lifescience North America, LLC v Agracity Crop & Nutrition Ltd*, 2019 FC 530 at para 19; *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 113 at para 397, aff’d 2013 FCA 219. Injunctions are specifically contemplated in subsection 57(1) of the *Patent Act*, RSC 1985, c P-4. This Court has held that it should refuse to grant a permanent injunction where there is a finding of infringement “only in very rare circumstances” and that granting an injunction invokes “the public interest to ensure the enforceability of the Canadian patent system”: *Valence* at para 240; *Eurocopter (FC)* at para 397. This is consistent with the recognition that a patent grants a monopoly to the patentee in the form of the “exclusive rights” granted in section 42 of the *Patent Act*.

[88] Justice Locke for the Federal Court of Appeal has recently clarified that a patentee being a non-practicing entity does not disentitle the patentee from electing an accounting of profits: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2021 FCA 154 at paras 75–81. The same conclusion appears applicable to injunctive relief. At the same time, however, Justice Locke recognized that not practicing the patent may be a factor relevant to the decision whether to allow a patentee to elect an accounting of profits: *Seedlings* at para 81. To the extent that not practicing the patent may be a factor in whether to permit an election of an accounting, it can be argued to be a factor in deciding whether to grant an injunction in a particular case. Thus

while a defence that a patentee should not obtain an injunction in a particular case because it is not practicing the patent may be difficult to make out, I cannot conclude it is so difficult to make out that it is bound to fail.

[89] Nonetheless, in these circumstances, while Farmers Edge's non-practicing entity allegations may be sustainable in the sense applied on a motion to strike, it remains a matter of tangential relevance. Whether Farmobile is or is not practicing the '742 Patent does not in itself automatically disentitle it to injunctive relief, as discussed above. Nor is the alleged inferiority of Farmobile's product in any way relevant to its ability to exercise and enforce its patent rights, if they are found to be valid and validly owned. The proposed amendment is therefore unlikely to facilitate the Court's consideration of the substance of the dispute on its merits, but will more likely distract both the Court and the parties in side issues relating to Farmobile's use of the patent and its financial affairs. In the circumstances, the late addition of this pleading with its concomitant impacts on the conduct of the action, the timing of trial, and the ultimate conduct of the trial, is not in the interests of justice.

[90] The proposed amendments relating to Farmobile allegedly being a non-practicing entity, and its impact on the availability of injunctive or other relief, as set out in new paragraphs 31, 40, and 41, are not permitted.

[91] For clarity, nothing in the foregoing purports to pre-determine any issue regarding the availability of any remedies sought by Farmobile in the event that the Court finds there to be infringement. Those issues will be determined at trial.

(6) Conclusion

[92] I have considered each of the contested amendments proposed by Farmers Edge individually. However, it is worth noting that as a whole, the proposed amendments have a distinctive flavour of a party trying to introduce into an action a series of new allegations that would result in further documentary and oral discovery of the other party and inventors, including broad-ranging enquiries into financial information, ownership transactions, and technical information that were previously not part of the action. This discovery, as well as the necessary new expert reports, is likely to lead to further disputes, further motions, further expense, and further delay. Despite Farmers Edge's protests to the contrary, these allegations are not justified simply because Farmobile has responded to Farmers Edge's software amendments by asserting the device claims of the '742 Patent.

[93] Since I have concluded that the proposed amendments are not in the interests of justice or are otherwise not permissible, I need not separately address whether they would cause prejudice to Farmobile that cannot be compensated in costs, as these are independent criteria: *Janssen* at para 9. I nonetheless question whether a further lengthy adjournment or a proposed bifurcation that would put off important issues such as remedies and validity for a year or more, which Farmers Edge itself recognizes will be the results of its proposed amendments, are matters readily compensable in costs. In this regard, the discussion below regarding prejudice to Farmobile of a proposed bifurcation or adjournment is also relevant to the issue of amendments, as it is the amendments that would ultimately necessitate the bifurcation or adjournment.

C. *Consequential amendments*

[94] Each party on their motion to amend seeks to also amend their further responsive pleadings. Farmobile seeks to amend its Twice Further Amended Fresh as Amended Reply and Defence to Counterclaim. Farmers Edge seeks to amend its Second Amended Reply to Defence to Counterclaim. In each case, these subsequent pleadings depend in large part on whether the other party's amendments are granted.

[95] Based on my conclusions above, the parties' consequential amendments are permitted in part as follows.

- (1) Farmobile's proposed Thrice Further Amended Fresh as Amended Reply and Defence to Counterclaim

[96] Farmobile is granted leave to make the formal amendments in its proposed pleading regarding title and paragraph numbers (*e.g.*, in paragraphs 1, 3, and 4, among others), as modified to reflect the paragraphs permitted in Farmers Edge's Thrice Further Amended Fresh as Amended Statement of Defence and Counterclaim.

[97] In paragraph 5, the first amendment regarding material facts amounts to argument regarding Farmers Edge's amendment of its new paragraph 38. It is not permitted. The second amendment denying implementation of an NIA is permitted.

[98] New paragraph 6 is responsive to Farmers Edge's new paragraph 33 and is permitted.

[99] New paragraph 7 pertains to the “functionally equivalent” allegations, which have not been permitted. This paragraph is not permitted.

[100] New paragraphs 54 to 56, 67, 70, 74, and 78 to 80 respond to allegations in Farmers Edge’s Thrice Further Amended Fresh as Amended Statement of Defence and Counterclaim that have not been permitted. These paragraphs are unnecessary and not permitted.

(2) Farmers Edge’s proposed Thrice Amended Reply to Defence to Counterclaim

[101] Farmers Edge is granted leave to make the formal amendments in its proposed pleading regarding title and paragraph numbers (*e.g.*, in paragraphs 1 and 5, among others), as modified to reflect the paragraphs permitted in Farmobile’s Thrice Further Amended Fresh as Amended Reply and Defence to Counterclaim.

[102] The proposed amendment in paragraph 2 is responsive to Farmobile’s first proposed amendment to paragraph 5, which has not been permitted. It is unnecessary and not permitted.

[103] New paragraph 3, while difficult to understand, replies to Farmobile’s new paragraph 6 and is permitted.

[104] New paragraph 4 replies to Farmobile’s new paragraph 7 regarding the “functionally equivalent” allegation that has not been permitted. It is unnecessary and not permitted.

[105] New paragraphs 18 to 22 reply to pleadings that have not been permitted. They are unnecessary and not permitted.

VI. Farmers Edge's Motion to Bifurcate or Adjourn

A. *Nature of the motion*

[106] As set out above, in July 2021, this action was set down for trial commencing in August 2022. The current trial dates were set after trial dates in April 2021 and October 2021 were adjourned in the wake of the April 2021 Update to Farmers Edge's software. After expert reports were exchanged in July 2021, Farmers Edge implemented the July 2021 Update.

[107] Farmers Edge says there is now no time for it to fairly defend itself against Farmobile's new infringement claims in time for an August 2022 trial. It points in particular to Farmobile's proposed "functionally equivalent" pleading, but also to the allegations that the CanPlug infringes the device claims of the '742 Patent after the April 2021 Update and the July 2021 Update. Farmers Edge asks that the action be bifurcated so that issues that had "crystallized" prior to the April 2021 Update will proceed to trial in August 2022, with later issues to follow as required. In the alternative, it asks that the August 2022 trial dates be again adjourned.

[108] Farmers Edge clarified at the hearing of the motions that if Farmobile's amendments were not allowed, it did not think bifurcation or adjournment was necessary. It is also apparent that the asserted need for bifurcation and adjournment is based in significant part on the further discovery and expert reports arising from Farmers Edge's various proposed new defences. For the reasons I have set out above, I have not granted leave to Farmobile to add its "functionally equivalent" pleading, but I have granted leave to make the other amendments regarding the July 2021 Update. I have also granted leave to Farmers Edge to make some responding



amendments, but have not granted leave to make a number of the additional amendments it proposed. As I have explained, one of the reasons for refusing leave for some of Farmers Edge’s proposed amendments was the potential impact on the trial date that would be occasioned by the significant new discovery and reports arising from the amendments.

[109] Although a number of the amendments that appear to have driven Farmers Edge’s request for bifurcation or adjournment have not been permitted, I will nonetheless address the request on its merits, since it is not clear that Farmers Edge’s concession that bifurcation is unnecessary if Farmobile’s amendments were not granted pertained exclusively to the “functionally equivalent” allegation.

B. *The action should not be bifurcated*

(1) Principles on a motion to bifurcate

[110] The Court’s ability to bifurcate a proceeding is set out in Rule 107 of the *Federal Courts*

*Rules:*

**Separate determination of issues**

**107 (1)** The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

**Instruction distincte des questions en litige**

**107 (1)** La Cour peut, à tout moment, ordonner l’instruction d’une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.

**Court may stipulate procedure**

(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

**Ordonnance de la Cour**

(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

[111] There is no real dispute regarding the principles on a motion to bifurcate. The ultimate question is whether, in light of the evidence and all the circumstances of the case, bifurcation is more likely than not to result in the just, expeditious and least expensive determination of the proceeding on its merits: *Ilva Saronno SpA v Privilegiata Fabbrica Maraschino “Excelsior” Girolamo Luxardo SpA*, [1998] FCJ No 1500 at para 14; *Merck & Co Inc v Brantford Chemicals Inc*, 2004 FC 1400 at para 4; *Apotex Inc v Bristol-Myers Squibb Co*, 2003 FCA 263 at paras 3, 10; *Federal Courts Rules*, Rule 3. Relevant “practical and economic considerations” that inform this assessment include the complexity of the issues; whether the issues are clearly separate or are interwoven; whether there will be time and cost savings and efficiencies or, conversely, increased costs and delay; and whether the trial of the first portion will put an end to the action and/or facilitate settlement of remaining issues: *Merck v Brantford* at paras 5–7.

[112] A litigant has a “basic right” to have all issues in dispute resolved in one trial: *Apotex* at para 7. This right is qualified by Rule 3 and the recognition that the Court must control its process to promote timely and affordable access to the civil justice system: *Tracbeam, LLC v Bell Mobility Inc*, [2019] FCJ No 1615 at paras 16–18, citing *Hryniak v Mauldin*, 2014 SCC 7 at para 2. Nonetheless, as bifurcation represents a departure from the norm, the burden is on the

moving party to demonstrate that bifurcation is warranted in the circumstances: *Apotex* at paras 7, 10; *Merck v Brantford* at para 4.

(2) Farmers Edge's proposed bifurcation

[113] The most common form of bifurcation, particularly in proceedings under the *Patent Act*, is between liability and damages. Depending on the issues in the action, the liability phase typically involves an assessment of whether the patent is valid and infringed, and may include an assessment of the plaintiff's entitlement to injunctive and other relief. If the plaintiff is successful, the damages phase will address the quantum of damages and may address the plaintiff's ability to elect an accounting of profits, if not addressed in the liability phase, and the quantum of those profits.

[114] This is not, however, the only manner in which an action may be bifurcated. Rule 107 does not limit the Court to a particular approach to bifurcation, provided it will lead to the just, expeditious, and least expensive determination of the matter on its merits.

[115] The bifurcation that Farmers Edge proposes is considerably different. It proposes that the first phase of trial would assess (i) whether the FarmCommand system, as it existed prior to the April 2021 Update, infringed the asserted system claims; (ii) whether the '742 Patent is invalid based on the anticipation, obviousness, and overbreadth grounds previously asserted; and (iii) the inventorship, co-inventorship, and shop-rights issues asserted by Farmers Edge. The second phase would assess (i) whether the FarmCommand system and/or CanPlug device infringed the system claims or device claims of the '742 Patent after the April and July 2021 Updates;

(ii) damages and equitable remedies including injunctive relief; and (iii) “any other pleaded issues permitted by the Court” following the parties’ amendments motions. Farmers Edge confirmed that this third category would include the additional validity defences it sought to raise, including as they related to the system claims.

[116] I agree with Farmobile that Farmers Edge’s proposed bifurcation does not simply represent a proposal to proceed in August 2022 with the issues that had “crystallized” prior to the April 2021 Update. When the matter was scheduled to proceed to trial in April 2021, it was going to address all issues, including damages and other remedies. The parties had filed expert reports addressing damages for that purpose. Farmers Edge is now proposing that even these issues be put off to another trial that would not occur until at least well into 2023.

(3) Farmers Edge’s proposed bifurcation is not justified

[117] Farmers Edge raises three primary arguments to support its request for bifurcation. First, it says the August 2022 trial date cannot be maintained if it is to proceed on all issues. Second, it argues bifurcation will occasion no prejudice to Farmobile. Third, it argues a bifurcated proceeding will be more efficient and less expensive. For the reasons set out below, I do not accept these arguments.

(a) *The August 2022 trial date can be maintained*

[118] The parties have already exchanged expert reports with respect to the April 2021 Update. As noted above, there remains a dispute regarding the server-side software related to the

July 2021 Update that is currently under reserve by CMJ Ring. Given this dispute, the parties have yet to exchange expert reports with respect to the July 2021 Update, but I see no reason that these reports should delay trial. I note that while Farmobile advised the Court in an agenda for an October 21, 2021 case management conference that Dr. Edwards required both document production and oral discovery prior to finalizing his infringement report regarding the July 2021 Update, Farmobile was very clear in submissions to me that Dr. Edwards' report could be delivered prior to any oral discovery in respect of the July 2021 Update.

[119] Farmers Edge contends that the August 2022 trial date is unachievable in light of (i) its own request for documents responsive to its proposed pleading amendments; (ii) the need for documentary production and discovery in respect of the amendments; (iii) inventor examinations, including a likely motion for letters rogatory; (iv) discovery and further expert reports on Farmers Edge's CanPlug device and Farmobile's PUC device and financials; (v) an updated royalty and damages analysis; and (vi) the history in this proceeding of unnecessary motions, which it attributes to Farmobile's "refusal to cooperate at any stage."

[120] As has been explained above, many of these steps are not required in light of my conclusions on the parties' amendments motions. In particular, I have dismissed Farmers Edge's request to amend its pleadings to add a variety of defences that would have required the very extensive documentary and oral discovery requests that ground its argument that the August 2022 trial date is unachievable. On the amended pleadings as I have permitted them, the August 2022 trial date should be readily achievable, particularly with sophisticated parties represented by sophisticated and experienced counsel. While there certainly remains a concern

that the parties' conduct to date shows a proclivity for interlocutory motions, I am confident that with the continued skillful case management of CMJ Ring, combined with the parties' respective assertions that they are committed to having the matter proceed efficiently to trial, there is no reason that the matter should not proceed to trial in August 2022.

[121] It is worth highlighting at this point that the parties have known of the August 2022 trial date since July 2021. They have been involved in the action since 2017. Trial dates are generally set by this Court well in advance to allow parties to take the necessary steps to reasonably reach trial in an orderly fashion. When trial dates are set, those dates are unavailable to other litigants who also wish to have their matters heard. It is incumbent on parties to make every effort to be ready for trial on the scheduled date, including through the reasonable conduct of pre-trial steps.

[122] I note that both parties have raised the potential for Farmers Edge to implement a further NIA upon receipt of an expert report from Dr. Edwards that concludes that the FarmCommand system and/or CanPlug device continues to infringe the '742 Patent. Should there be such a further software update, it can be addressed at that time. As I have expressed in other contexts, changes to software do not necessarily need to result in a trial adjournment: see *Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 276 at paras 412–416. I am certainly sympathetic to Farmers Edge's assertion that it must be permitted to amend its software to avoid infringement. Indeed, it would seem odd for Farmobile to insist that Farmers Edge not change its software, thereby *continuing* to infringe (on Farmobile's allegation), so that Farmobile can obtain at trial an injunction requiring Farmers Edge *not* to infringe. I am also sympathetic to Farmobile's argument that at some point the issues for trial must be fixed so that the parties can

proceed to trial in an orderly fashion. These issues can only be addressed in context as and when they arise.

(b) *Prejudice to Farmobile*

[123] Farmers Edge argues Farmobile would not be prejudiced by a delay in obtaining an injunction because any such delay is compensable in damages, Farmobile has not sought an interlocutory injunction, and Farmobile cannot therefore argue it would suffer irreparable harm. In my view, these arguments are misplaced. Prejudice arising from further delay of a trial is a different matter than irreparable harm for purposes of an interlocutory injunction.

[124] I similarly cannot accept Farmers Edge's argument that Farmobile cannot complain of delay because it resisted Farmers Edge's summary judgment motion in mid-2020. A plaintiff taking the position that a matter is not suitable for summary judgment, or one who has not sought an interlocutory injunction, is still entitled to push for a prompt trial date.

[125] This matter was set down for trial in 2020, and again in 2021. Parties are generally entitled to expect their matters to proceed to trial in a reasonable time. I am satisfied that some prejudice would be occasioned simply by the inherent delay in further postponing Farmobile's remedial requests.

[126] In this regard, I am satisfied that the affidavit from Harley Janssen filed by Farmobile provides some further support of the existence of prejudice. Mr. Janssen is Vice President of Customer and Product at Farmobile. His affidavit notes the importance of growing seasons to

agriculture technology companies, which makes it difficult to convert a customer from one technology to another once they have committed to a technology for a growing season. While Mr. Janssen only joined Farmobile in September 2021, this aspect of his evidence was based on his extensive experience in agribusiness and was not shaken, or even materially addressed, in cross-examination.

[127] I therefore conclude that there would be some prejudice to Farmobile arising from the requested bifurcation. While the evidence is not extensive on this issue and the asserted prejudice not massive, it remains a factor against the proposed bifurcation.

[128] It is worth pausing at this point to address Mr. Janssen's affidavit and Farmers Edge's cross-examination on it. Farmers Edge argues Mr. Janssen's evidence should be disregarded given his lack of firsthand knowledge of a number of the issues he raises. These include the inconvenience to Farmobile's General Counsel, Dr. Archer, as a result of the April 2021 adjournment, and Farmobile's likely interest in settling the case if it is bifurcated. Farmers Edge also contends that its cross-examination of Mr. Janssen was frustrated by the refusal of improper questions and that Farmobile conducted an improper re-examination.

[129] Having reviewed Mr. Janssen's affidavit and the transcript of the cross-examination, I make the following observations. First, Mr. Janssen's evidence regarding the inconvenience to Dr. Archer and others as a result of the last-minute adjournment in April 2021 is largely irrelevant to the current request to bifurcate. There can be little question that the late adjournment of a trial is likely to cause inconvenience to those involved. This is a factor no doubt considered



by the parties when they consented to the adjournment. However, it has little if any bearing on the current request to bifurcate or adjourn.

[130] Second, while Farmers Edge was entitled to cross-examine Mr. Janssen on this irrelevant information since it was in his affidavit, the extensive questioning on the source of Mr. Janssen's knowledge and Dr. Archer's ability to swear her own affidavit on this irrelevant information was equally irrelevant and of no assistance to the Court. It is simply unclear to the Court why Farmers Edge considered it necessary to challenge evidence to the effect that a last-minute adjournment is inconvenient, or that in April 2021 in particular it resulted in additional inconvenience due to COVID-19 testing requirements.

[131] It is equally unclear why Farmers Edge considered it necessary or valuable to require Mr. Janssen to bring to the examination "invoices, tickets, travel itineraries, and other supporting documentation showing Dr. Archer travelled to Canada in advance of the trial in April 2021 and was delayed in returning to the US," as it did in its Direction to Attend, or to spend pages of the transcript asking why those documents were not searched for and produced. None of this suggests an efficient or focused approach to either this motion or to the litigation generally. It certainly does not support Farmers Edge's contention that delays in the process are solely attributable to Farmobile's refusal to cooperate. Nor does the cross-examination on this point or on issues of "settlement strategy" lead me to reject Mr. Janssen's evidence on the more relevant and substantive issue of the impact of delay on an agribusiness technology company.

(c) *Bifurcation is impracticable and inefficient*

[132] Farmers Edge argues that its proposed bifurcation would be more efficient and less expensive, saving the Court and parties significant costs. I cannot agree.

[133] As a preliminary note, Farmers Edge's suggestion that it be permitted to pursue some invalidity arguments at the first trial, holding back other invalidity arguments to be made if and when it is found to infringe some of the claims, appears entirely unworkable and unfair. In addition to having to recall expert witnesses to address related issues, it would put the Court in the position of attempting to determine infringement of claims whose validity had not ultimately been determined, while Farmobile would have to face a serial approach to invalidity arguments. However, given my refusal to permit the additional invalidity arguments, this is not now a determinative matter.

[134] As the pleadings will stand based on my determinations on the amendments motions, the issues that would be bifurcated to the second trial would be the infringement allegations related to the April 2021 and July 2021 Updates, and issues of remedies.

[135] With respect to the former, I can see no efficiencies in having experts and lay witnesses reattend at a second trial to address further infringement allegations regarding related, and in some cases overlapping, patent claims and software and hardware systems that will largely be the same. The issues are clearly interwoven. Dividing the infringement issues would mean that witnesses, experts, counsel, and the Court would all have to get back up to speed on the same

technologies and readdress some of the same issues, even assuming the same counsel and trial judge are involved at the second trial.

[136] With respect to the latter, as noted above, the parties have already filed damages reports. Even if further reports have to be filed, I see no material efficiency at this stage in postponing those issues to a second trial. Nor would it be efficient to postpone arguments about whether a permanent injunction should issue to some future date.

[137] It is certainly possible that one or more of the issues Farmers Edge proposes be decided at the first trial could obviate the need for a second trial entirely. If, for example, the Court concludes that Farmers Edge is the proper owner of the '742 Patent, or that the entirety of the patent is invalid on grounds of anticipation or obviousness, no second trial would be necessary. However, while this does not alone justify a serial approach in which various arguments are raised at different stages. The opposite possibility that Farmers Edge is not successful on these issues, and the efficiencies of having to conduct a second trial in such circumstances, must also be considered.

[138] In sum, I see little reason to bifurcate the proceeding, and considerable reasons to have all matters presented, argued, and decided at the trial scheduled for August 2022.

C. *The trial should not be adjourned*

[139] In the alternative to bifurcation, Farmers Edge asks that the August 2022 trial be adjourned. It contends that bifurcation and adjournment are “[t]he only realistic options” since it

is “now impossible for all issues to be ready for trial [in] August 2022.” For the reasons I have set out above, including my findings on the amendments motions and my conclusions regarding the ability to meet the August 2022 trial date, I disagree with this contention. The parties can and should be ready for trial in August 2022. There is no reason to adjourn the set trial dates.

## VII. Costs

[140] Each party sought their costs of each of the motions, although neither party filed a bill of costs or made submissions on costs at the conclusion of what was already a long hearing day.

[141] My assessment is that Farmobile had mixed success on its motion to amend.

Farmers Edge was largely unsuccessful on its motion to amend. Farmers Edge was also entirely unsuccessful on its bifurcation motion. For the reasons I have described above, I have material concerns regarding Farmers Edge’s approach of trying to raise numerous new issues late in the proceeding that would entail extensive further discovery and expert reports, and effectively seeking to bifurcate or adjourn the trial in consequence. As I have indicated, I do not accept Farmers Edge’s contention that its proposed amendments were simply seeking to respond to and defend against Farmobile’s amended claims. Farmobile’s amended claims were made to react to Farmers Edge’s software amendments which were, in turn, made in reaction to Farmobile’s assertions and expert evidence on infringement. None of this justifies the attempt to include wholly new invalidity arguments or new defences based on nothing but speculation or old and irrelevant statements about the prior art.

[142] On balance, in considering the Rule 400(3) factors, and in particular Rules 400(3)(a), (c), (g), (i), (k), I conclude that Farmers Edge should pay Farmobile the costs of the three motions at the upper end of Column V, with the appearance fee on the motions doubled to account for second counsel.

### VIII. Conclusion

[143] For the foregoing reasons, each party's motion to amend is granted in part and dismissed in part, while Farmers Edge's motion for bifurcation or adjournment is dismissed.

[144] As the parties have already prepared their proposed amendments and should be able to modify them in accordance with this decision in fairly short order, I will provide a tight schedule in which the amended pleadings are to be served so that no further delay is occasioned. Each amended pleading is to be served in order, to permit the opposing party to ensure necessary adjustments are made to matters such as paragraph numbering. The pleadings may thereafter all be filed concurrently. To again avoid any delay in the conduct of the matter, any further steps in the proceeding may proceed on the basis of the pleadings as they are to be amended in accordance with these reasons, even before the amendments have been served.

**ORDER IN T-449-17**

**THIS COURT ORDERS that**

1. Farmobile, LLC’s motion for leave to amend its Further Amended Statement of Claim and its Twice Further Amended Fresh as Amended Reply and Defence to Counterclaim is granted in part in accordance with the reasons given.
2. Farmers Edge Inc’s motion for leave to amend its Twice Further Amended Fresh as Amended Statement of Defence and Counterclaim and its Second Amended Reply to Defence to Counterclaim is granted in part in accordance with the reasons given.
3. Farmers Edge Inc’s motion to bifurcate the trial of this action or, in the alternative, to adjourn the trial currently scheduled for August 8, 2022, is dismissed.
4. The foregoing amended pleadings shall be served on the following schedule:

<b><u>Amended Pleading</u></b>	<b><u>On or before</u></b>
Farmobile’s Twice Further Amended Statement of Claim	January 13, 2022
Farmers Edge Inc’s Thrice Further Amended Fresh as Amended Statement of Defence and Counterclaim	January 18, 2022
Farmobile’s Thrice Further Amended Fresh as Amended Reply and Defence to Counterclaim	January 21, 2022
Farmers Edge Inc’s Thrice Amended Reply to Defence to Counterclaim	January 26, 2022

5. All of the foregoing amended pleadings are to be filed by January 28, 2022. The parties may consent to modifications to the foregoing schedule provided all amended pleadings are filed by February 1, 2022.

6. Any further steps in the proceeding may proceed on the basis that the foregoing amendments have been made, even prior to the date of service or filing.
7. Costs of the three motions are to Farmobile, LLC at the upper end of Column V, with the appearance fee on the motions doubled to account for second counsel.

“Nicholas McHaffie”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-449-17

**STYLE OF CAUSE:** FARMOBILE LLC v FARMERS EDGE INC

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** DECEMBER 20, 2021

**ORDER AND REASONS:** MCHAFFIE J.

**DATED:** JANUARY 10, 2022

**APPEARANCES:**

Scott Foster  
Mathew Brechtel  
Joan Archer  
R. Nelson Godfrey  
Nicholas James

FOR THE PLAINTIFF/DEFENDANT BY  
COUNTERCLAIM

Kendra Levasseur  
James S. S. Holton  
David Tait  
Jasmine Godfrey

FOR THE DEFENDANT/PLAINTIFF BY  
COUNTERCLAIM

**SOLICITORS OF RECORD:**

Seastone IP LLP  
Vancouver, British Columbia  
-and-  
Gowling WLG (Canada) LLP  
Vancouver, British Columbia

FOR THE PLAINTIFF/DEFENDANT BY  
COUNTERCLAIM

McCarthy Tétrault LLP  
Toronto, Ontario

FOR THE DEFENDANT/PLAINTIFF BY  
COUNTERCLAIM