

Federal Court



Cour fédérale

**Date: 20241122**

**Docket: T-2418-23**

**Citation: 2024 FC 1875**

**Ottawa, Ontario, November 22, 2024**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**EIS GMBH AND EIS INC.**

**Plaintiffs**

**and**

**TBMBM, INC.**

**Defendant**

**ORDER AND REASONS**

**UPON** motion by the Defendant, TBMBM, Inc. dated June 27, 2024, for an Order to strike portions of the Statement of Claim, for particulars, and other relief;

**AND UPON** reviewing and considering the motion record of the Defendant dated and filed June 27, 2024 and reply written representations dated and filed July 12, 2024;

**AND UPON** reviewing and considering the Plaintiffs' responding motion record dated and filed July 8, 2024;

**AND UPON** noting that the Plaintiffs have voluntarily agreed to amend certain portions of the Statement of Claim prior to this decision;

**AND UPON** hearing the submissions of counsel for the Plaintiffs and counsel for the Defendant on November 19, 2024, by teleconference;

**AND UPON** considering:

I. Procedural History

[1] The Plaintiffs, EIS GmbH and EIS Inc. (collectively “EIS”), initiated this action for patent infringement on November 10, 2023. The Plaintiffs claim that the Defendant, TBMBM, Inc., infringes on EIS’s patent rights in Canadian Patent No. 2,943,097 (the “097 Patent”). The 097 Patent is directed to a pressure massage device.

[2] The Statement of Claim alleges that the Defendant has manufactured and caused to be manufactured, marketed, imported, distributed, offered for sale, sold and induced sale and importation, within Canada, of compression wave massage devices that infringe the 097 Patent.

[3] On December 15, 2023, the Defendant made a motion for security for costs, and requested an additional 30 days following the order of security for costs to file pleadings in response. On April 12, 2024, after multiple extensions granted, the Plaintiffs filed a responding motion record.

[4] On May 23, 2024, Associate Judge Coughlan ordered that the Plaintiffs pay into the Court the sum of \$75,000 as security for the costs of the Defendant up to and including the completion of examinations for discovery, and that the Defendant shall serve and file its responding pleadings within 30 days of the payment into the Court.

[5] Five days later, the Plaintiff tendered the payment into the Court.

[6] On June 27, 2024, the Defendant brought this motion to strike portions of the Statement of Claim without leave to amend and motion for particulars, including the production of samples or photos or diagrams of each alleged infringing product. The Defendant asserts that the identified portions of the Plaintiffs' Statement of Claim should be struck as lacking sufficient particularization and material facts.

[7] The Plaintiffs provided a response, which included a proposed Amended Statement of Claim. The proposed Amended Statement of Claim deleted the claim for punitive damages and allegations of deliberate and willful infringement. While the Defendant accepted these amendments, they maintained the rest of their motion to strike and motion for particulars.

[8] The parties and this Court agreed to proceed with the Defendant's motion with respect to the proposed Amended Statement of Claim dated July 8, 2024.

[9] As a result, the parties and the Court discussed the remaining portions of the motion on November 19, 2024.

## II. Applicable Rules

[10] The Defendant has brought this motion to strike under Rules 221 (1)(a), (c) and (f) and motion for particulars under Rule 181(2) of the *Federal Courts Rules*, SOR/98-106. The relevant provisions are set out in Appendix A.

## III. Applicable Law

### A. *Motion to Strike*

[11] To justify striking a pleading pursuant to Rule 221(1) it must be “plain and obvious” or beyond reasonable doubt that the action cannot succeed. In order to be struck without leave to amend, any defect in the claim must be one that is not curable by amendment (*Simon v Canada*, 2011 FCA 6 at para 8).

[12] The purpose of pleadings is to ensure that the opposing party knows the case to be met (*Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FC 1310 at para 35). The pleading must tell the defendant who, when, where, how and what gave rise to its liability (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19).

[13] The judge charged with assessing the adequacy of pleadings must consider the pleadings as a whole and “ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings fair and manageable.” This calls on the Court to consider the whole of the circumstances, including the relative knowledge and means of knowledge of the

parties (*Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at paras 34-36).

[14] On a motion to strike pursuant to Rule 221(1)(a), the pleading should be read generously with allowance for inadequacies due to drafting deficiencies and the Court should exercise its discretion to strike only in the clearest of cases. A pleading will be struck for disclosing no reasonable cause of action only if the absence of a reasonable cause of action is plain and obvious, even assuming the facts alleged to be true, and the claim has no prospect of success (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17).

[15] A claim will be struck under Rule 221(1)(c) as scandalous, frivolous or vexatious, or as an abuse of process only when it is so clearly futile that it has not the slightest chance of success (*Canadian National Railway Company v BNSF Railway Company*, 2018 FC 614 at para 10). This may occur where the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings (*Kisikawpimootewin v Canada*, 2004 FC 1426 at paras 8-9).

[16] The Court of Appeal has held that an allegation made without any evidentiary foundation is an abuse of process, and ought to be struck out (*AstraZeneca Canada Inc v Novopharm Limited*, 2010 FCA 112 at para 5). It must be kept in mind that allegations in a pleading that are capable of being proved must be taken as true, unless the allegations are based on assumption and speculation (*Operation Dismantle Inc v The Queen* (1985), 1985 CanLII 74 (SCC) at para 27, 18 DLR (4th) 481).

[17] Accordingly, portions of the Plaintiffs' Statement of Claim that relate to "inducement and procuring infringement" and punitive damages, are struck as lacking sufficient material facts and particulars as pleaded. Allegations of future acts of infringement are improper as being in the realm of speculation and will be struck (*Pfizer Research And Development Co v Lilly Icos LLC*, 27 CPR (4th) 86, 2003 FCT 753 at para 21). Lastly, provisions covering "any" and "all" "compression wave massage device that would infringe" are also struck with leave to amend these provisions to the devices pleaded and particularized, namely the Pink Cherry Devices and Sona Devices. The provisions as written are overly broad and deficient in factual materials such that the Defendant cannot know how to answer.

[18] The Defendant also requested allegations of manufacturing to be struck for failing to provide sufficient factual foundation. Unlike the claims to inducement, the allegations of manufacturing are sufficiently particularized to allow the Defendant to respond, and are capable of being proven as true. Either party may bring a motion later in the proceeding for further amendments, if required.

#### B. *Motion for Particulars*

[19] A party requesting particulars that has yet to file a defence must establish that the particulars sought are necessary for it to plead its defence and that the requested particulars are not within its knowledge (*Decor Grates Incorporated v Imperial Manufacturing Group Inc*, 2015 FCA 100 at para 7).

[20] In general, to establish that the particulars are required, a party must provide an affidavit detailing what information is needed for the pleading and why without such information, it would be unable to instruct counsel for the purposes of replying to the statement of claim (*Stryker Corporation v Umano Medical Inc*, 2016 FC 378 at paras 27-28).

[21] Upon review of the Defendant's motion record and in consideration of my order on the motion to strike as set out above and my direction to counsel at the hearing regarding proposed amendments, I am not convinced the Defendant has a genuine need for the particulars requested. The Defendant has sufficient information to respond to the pleadings.

[22] For the reasons above, I do not find the Defendant's requests pursuant to Rules 206 and 249 of the *Federal Courts Rules* for documents referred to in the Statement of Claim and for production of samples are relevant to this proceeding at this stage.

### C. *Case Management*

[23] Due to the delay with which this proceeding has progressed, I am ordering that this proceeding continue as a specially managed proceeding pursuant to Rule 384 of the *Federal Courts Rules*.

**ORDER in T-2418-23**

**THIS COURT ORDERS that:**

1. The following portions of the Plaintiff's Statement of Claim are struck:
  - (a) Paragraph 1(a)(iii);
  - (b) Paragraph 1(b)(i) (the words "any compression wave massage device that would infringe any claim of the '097 Patent, including");
  - (c) Paragraph 1(b)(ii);
  - (d) Paragraph 1(b)(iii) (the words "all compression wave massage devices that infringe, or that when used infringe, any claim of the '097 Patent, including");
  - (e) Paragraph 1(b)(iv) (the words "and for inducing and procuring infringement,");
  - (f) Paragraph 1(b)(vi) (noted as voluntarily amended by the Plaintiffs);
  - (g) Paragraph 15 (the words "and induced sale and importation");
  - (h) Paragraph 17 (the words "and induce sale and importation");
  - (i) Paragraph 20 (the words "and induced sale and importation");



- (j) Paragraph 22 (the words “and induce sale and importation of”);
  - (k) Paragraph 26 (the words “and future”);
  - (l) Paragraph 27 (the first, third and fourth sentences) (noted as voluntarily amended by the Plaintiffs).
- 2. The Plaintiffs shall serve and file an Amended Statement of Claim no later than December 31, 2024, in accordance with this Order.
  - 3. The Defendant shall serve and file pleadings within 45 days of service and filing of the Statement of Claim.
  - 4. No costs are awarded for this motion.
  - 5. This proceeding shall continue as specially managed proceeding under Rule 384 of the *Federal Courts Rules*.

"Michael D. Manson"

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Judge

## Appendix A

Relevant Provisions of the *Federal Courts Rules*, SOR/98-106:

### **Motion for particulars**

**181 (1)** A pleading shall contain particulars of every allegation contained therein, including

(a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and

(b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.

### **Further and better particulars**

(2) On motion, the Court may order a party to serve and file further and better particulars of any allegation in its pleading

### **Motion to strike**

**221 (1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

### **Précisions**

**181 (1)** L'acte de procédure contient des précisions sur chaque allégation, notamment :

a) des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;

b) des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une intention malicieuse ou frauduleuse.

### **Précisions supplémentaires**

(2) La Cour peut, sur requête, ordonner à une partie de signifier et de déposer des précisions supplémentaires sur toute allégation figurant dans l'un de ses actes de procédure.

### **Requête en radiation**

**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

[...]

(c) is scandalous, frivolous or vexatious,

[...]

(f) is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.

**Order for special management**

**384** The Court may at any time order that a proceeding continue as a specially managed proceeding.

[...]

c) qu'il est scandaleux, frivole ou vexatoire;

[...]

f) qu'il constitue autrement un abus de procédure

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

**Ordonnance de poursuivre à titre d'instance à gestion spéciale**

**384** La Cour peut, à tout moment, ordonner que l'instance se poursuive à titre d'instance à gestion spéciale.

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

**DOCKET:** T-2418-23

**STYLE OF CAUSE:** EIS GMBH AND EIS INC. v TBMBM, INC.

**PLACE OF HEARING:** HELD BY TELECONFERENCE

**DATE OF HEARING:** NOVEMBER 19, 2024

**ORDER AND REASONS:** MANSON J.

**DATED:** NOVEMBER 22, 2024

**APPEARANCES:**

Jeffrey W. Robinson Laurel Q. Hogg	FOR THE PLAINTIFFS
Yuri Chumak	FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

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