

Federal Court



Cour fédérale

Date: 20160405

Docket: T-191-16

Citation: 2016 FC 378

Ottawa, Ontario, April 5, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

**STRYKER CORPORATION AND
STRYKER CANADA LP**

Plaintiffs

and

**UMANO MEDICAL INC. AND UMANO
MEDICAL WORLD INC.**

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion by the Defendants to strike portions of the Plaintiffs' Statement of Claim pursuant to Rule 221 of the *Federal Court Rules*, SOR/98-106 (the Rules). In the alternative, the Defendants move for further and better particulars under Rule 181. The motion also seeks an order enjoining the Plaintiffs to provide, as per Rule 206, a copy of

every document referred to in the Statement of Claim although counsel for Defendants did not address this request orally at the hearing but simply referred the Court to their written submissions.

II. Background

[2] The Plaintiffs, Stryker Corporation and Stryker Canada LP (collectively, the Plaintiffs) develop, manufacture and sell medical technologies including siderail support mechanisms. On April 16, 2013, the Canadian Patent No. 2,619,678 (the '678 Patent) was issued to Stryker Corporation for an invention entitled "Movable Siderail Apparatus For Use With a Patient Support Apparatus."

[3] The Plaintiffs allege that in 2012, they entered into manufacturing agreements with Umamo Medical Inc and Umamo Medical World Inc (collectively, the Defendants) while the Defendants were constituted under the names Groupe Bertec Inc and Gestion Bertec Inc. Under these agreements, the Defendants were required to manufacture certain hospital beds for the Plaintiffs, using the Plaintiffs' technology and specifications, while protecting Stryker Corporation's exclusive rights to its intellectual property. The Plaintiffs contend that despite these agreements, the Defendants began competing against the Plaintiffs by manufacturing, selling, marketing, distributing or otherwise transferring hospital bed products and beds, to the Plaintiffs' clients and others in at least as early as 2014. They further allege that Groupe Bertec Inc and Gestion Bertec Inc were established by three of their former employees and by an employee of Flextronics International Ltd. Flextronics International Ltd. is a corporation with which the Plaintiffs had entered into a

manufacturing relationship in which Flextronics would manufacture certain hospital bed products for Stryker Medical, a division of Stryker Corporation.

[4] On February 1, 2016, the Plaintiffs commenced an action for patent infringement against the Defendants. The Plaintiffs allege that the Defendants' Umano Snow Bed and Umano Cocoon Bed (collectively, the Umano Beds) infringe claim 10 of the '678 Patent and that the Umano Snow Bed infringes claim 19 of the '678 Patent.

[5] On March 1, 2016, the Defendants filed the present motion. The Plaintiffs vigorously oppose it and seek costs, irrespective of the outcome of the motion, on a solicitor-client basis in the amount of \$10,000 for having been irrevocably prejudiced by the Defendants revealing in their motion record the Plaintiffs' without prejudice settlement offer of particulars. The Plaintiffs claim that this breach of confidential communications undermines the position they have taken from the outset of this proceeding which is that no particulars are required beyond those provided in the original Statement of Claim.

[6] Finally, both parties are seeking that this proceeding be continued as a specially managed proceeding under rules 383 and 385 of the Rules.

III. Analysis and Decision

A. *Motion to Strike*

[7] The Defendants seek to have paragraphs 23-24, 29-30 and 33-34 of the Statement of Claim struck out. These paragraphs read as follows:

23. The Defendants' Umano Snow Bed and Umano Cocoon Bed each comprise a movable siderail apparatus for use with a patient support apparatus, comprising:

a) a siderail having two or more upper pivots in a longitudinally spaced apart relationship;

b) a cross-member having two or more lower pivots in a longitudinally spaced apart relationship, the cross-member being coupled to an intermediate frame or deck support of the patient support apparatus;

c) a guiding mechanism operatively connected to the cross-member and the two or more lower pivots; and

d) two or more support arms, a first end of each support arm pivotally connected to one of the two or more upper pivots of the siderail, a second end of each support arm pivotally connected to one of the two or more lower pivots;

e) wherein the siderail is movable between a deployed position and a stowed position through rotational movement in a plane substantially vertical and substantially parallel to the longitudinal length of the patient support apparatus and wherein the guiding mechanism provides a means for lateral movement of the siderail towards and away from the patient support apparatus during rotational movement of the siderail;

all as set out in claim 10 of the '678 Patent;

24. The Umano Snow Bed further comprises a moveable siderail apparatus for use with a patient support apparatus comprising the device in claim 10 and wherein:

a) each of the lower pivots includes a pivot shaft, the apparatus further comprising a damper mechanism, the

damper mechanism being coupled to the pivot shafts of the lower pivots,

all as set out in claim 19 of the '678 Patent.

[...]

29. Furthermore, the Defendants' activities pertaining to the Umano Beds include advertising, marketing, promoting, and providing instructions and other support related to the installation and use of such beds such that the Defendants are inducing and procuring, and will induce and procure, others to infringe claims 10 and 19 of the '678 Patent. These infringing activities of others would not have occurred and would not occur but for the Defendants' activities as described herein of manufacturing, using, selling, and offering for sale hospital beds, including Umano Beds, coupled with the Defendants' advertising, marketing, promoting, instructions and other support related to the installation and use of such beds; and, but for the Defendants exercising influence over such others to undertake these infringing activities in Canada.

30. Stryker is unaware of the full extent of the Defendants' activities. Full particulars of all of the Defendants' activities are within the knowledge of the Defendants are not within the knowledge of Stryker. However, Stryker claims in respect of all such activities.

[...]

33. Stryker also claims under section 55(2) of the *Patent Act* reasonable compensation for damage sustained by Stryker by reason of the Defendants' activities after the application for the '678 Patent became open to public inspection, and before the grant of the '678 Patent on April 16, 2013, that would have constituted an infringement of the '678 Patent had the '678 Patent been granted on February 22, 2007.

34. Stryker also claims aggravated, exemplary and punitive damages in view of the wilful and deliberate infringement of the '678 Patent and the high-handed conduct of the Defendants in obtaining know-how through a position of trust with Stryker and from at least one former Stryker employee, and then using that know-how to expedite production and sale of an infringing siderail apparatus and bed.

[8] 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 [*Apotex*]).

[9] It is well-established that the threshold for striking out a statement of claim is high (*Eli Lilly Canada Inc v Nu-Pharm Inc*, 2011 FC 255, at para 11, 385 FTR 208 [*Eli Lilly*]). The well-known test to strike out pleadings is whether it is “plain and obvious” that all or parts of the pleadings disclose no reasonable cause of action even if the facts pleaded are true (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 74 DLR (4th) 321 [*Hunt*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, at para 22, [2011] 3 SCR 45 [*Imperial Tobacco*]). As such, a motion to strike will not succeed “so long as a cause of action, however tenuous, can be gleaned from a perusal of the statement of claim” (*Pharmaceutical Partners of Canada Inc v Faulding (Canada) Inc* (2002), 117 ACWS (3d) 221, at para 13, 21 CPR (4th) 166 [*Pharmaceutical Partners of Canada*]). Stated differently, the moving party must demonstrate, beyond doubt, that the case cannot possibly succeed at trial (*Pharmaceutical Partners of Canada*, at para 13).

[10] The Defendants submit that since paragraphs 23 and 24 are mere recitations of claims 10 and 19 of the ‘678 Patent, they are insufficiently pleaded because they provide no factual basis for claiming infringement and therefore ought to be struck from the Statement of Claim.

[11] The Defendants rely on *Bertelsen Inc v Automated Tank Manufacturing Inc*, 2011 FC 1219 [*Bertelsen*] and *Heli Tech Services (Canada) Ltd v Weyerhaeuser Company Limited*, 2011 FCA 193 [*Heli Tech*] to argue that merely reciting a patent claim is improper and insufficient to properly plead the facts upon which a claim for infringement can be based (see *Bertelsen*, at paras 16-17; *Heli Tech*, at paras 29-30). Yet, the general principle that a party may not use the language of patent claims to describe the acts of the alleged infringer of a patent is not a hard and fast rule. Each case must be assessed on its facts, as must the evidence presented, and the exact wording of the patent and the statement of claim (*General Electric Co v Wind Power Inc*, 2003 FCT 537, at para 18, 122 ACWS (3d) 1014 [*General Electric*]). As indicated in *General Electric*, there may be circumstances where the wording of a claim is such that it can be used as a model to describe exactly what the defendant has done that constitutes an encroachment of the plaintiff's rights (at para 19).

[12] In my view, the cases relied on by the Defendants are distinguishable from the facts of this case since the Plaintiffs' claim of patent infringement is limited to the alleged copying of a physical apparatus, namely, the parts comprising a siderail. This is not a case where the patent infringement is related to a complicated process or method such as in *Bertelsen* or *Heli Tech*. It appears to me that the situation at issue is not overly complex and is similar to a decision rendered by Justice Snider, in *Tyhy v Schulte Industries Ltd*, 2004 FC 1421 [*Tyhy*], where this Court refused to strike a pleading on the basis that the allegations mirrored language in the claim:

[6] [...] The alleged infringement relates to a piece of equipment in respect of which the Plaintiffs hold the '162 patent. In paragraph 10 of the statement of claim, the Plaintiffs describe seven features of the Schulte Flex Arm Devices. These seven alleged attributes are descriptions of physical characteristics. It seems to me that the Defendant ought to be able to review this list and determine whether its Schulte Flex Arm Devices do or do not do the things that are described in that list. This is the essence of the claim. To my mind, it is irrelevant that the words used to describe the attributes of the device mirror those in the claim.

[13] Similarly, in the case before me, the Defendants are told which physical characteristics of the siderails of the Umano Beds infringe the Plaintiffs' '678 Patent. Given that the claim of infringement is related to the physical characteristics of precisely two claims in the '678 Patent, it seems quite obvious to me that the Defendants are in a position to review the Plaintiffs' claims and determine whether the siderails share the same physical characteristics as those in the Statement of Claim.

[14] Given the foregoing, I see no reason why these paragraphs should be struck, the pertinent facts having been sufficiently pleaded by the Plaintiffs in a manner which allows the Defendants to know the case that has to be met.

[15] As for paragraphs 29 and 30 of the Statement of Claim, I see no reason to find that the claim of inducement has no reasonable chances of success. A determination of inducement requires the application of a three-prong test: (1) the act of infringement must have been completed by the direct infringer; (2) the completion of the acts of infringement must be influenced by the acts of the alleged inducer to the point that, without the influence, direct infringement would not take place; and; (3) the influence must knowingly

be exercised by the inducer, that is, the inducer knows that this influence will result in the completion of the act of infringement (*Corlac Inc v Weatherford Canada Inc*, 2011 FCA 228, at para 162).

[16] The Plaintiffs allege that the Defendants manufacture and sell beds with the infringing siderail and that the Defendants are inducing others to infringe the '678 Patent by manufacturing, using, selling and offering beds for sale as well as advertising, marketing, promoting, and providing instruction or other support related to the installation of the infringing beds. In my opinion, the facts of this case are distinguishable from *Bayer Inc v Pharmaceutical Partners of Canada Inc*, 2015 FC 388 [*Bayer*], cited by the Defendants, where the allegation of inducement was struck pursuant to paragraph 6(5)(b) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the Regulations), for being based on mere speculation. Here, the Plaintiffs plead that the Defendants are in fact infringing claims 10 and 19 of the '678 by manufacturing beds with the infringing siderail. I see no need to answer the question of whether or not a motion made pursuant paragraph 6(5)(b) has any bearing in this proceeding since, in any event, I am of the opinion that the Plaintiffs sufficiently pleaded material facts to make out the three-prong test since this Court has found in the past that inducement may occur where a person actively promotes and sells a product, with no other significant commercial use, for an infringing use by another (*Abbvie Corporation v Janssen Inc*, 2014 FC 55, at para 106; *Astrazeneca Canada Inc v Apotex Inc*, 2015 FC 322, at para 391).

[17] The Defendants submit that paragraph 30 of the Statement of Claim ought to be struck because it is a bald allegation and is no answer to merely say that matters should be within the knowledge of the Defendants. I see no reason to strike paragraph 30 since the Statement of Claim, when read as a whole, sufficiently supports a claim for inducement. Moreover, it seems clear to me that the Defendants “manufacturing, using, selling and offering for sale hospital beds” activities and the Defendants’ “advertising, marketing, promoting, instructions and other support” are matters falling within the Defendants’ knowledge.

[18] The Defendants also submit that paragraph 33 of the Statement of Claim should be struck since it alleges compensation and damages for the Defendants’ activities since at least April 16, 2013. The Defendants submit that this allegation contradicts the Plaintiffs’ assertion at paragraph 21 of the Statement of Claim, which states that the Defendants began their infringing activities at least as early as sometime in 2014. They argue that the Plaintiffs simply have no evidence of infringing activities prior to 2014. The difficulty I have with the Defendants’ submissions on this point is that it is not the role of the Court to evaluate the sufficiency of evidence on a motion to strike but whether the claim has any reasonable prospect of success (*Imperial Tobacco*, at paras 23, 25). As explained by the Supreme Court in *Imperial Tobacco* above:

[22] [...] It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[19] I agree with the Plaintiffs that the claims related to the start date of the alleged infringing activities are not inconsistent since the wording at paragraphs 21 and 33 leave open the possibility that infringing activities began before 2014. It seems appropriate to me that the precise date the alleged infringements began, if at all, is a matter to be determined during the subsequent phases of this proceeding.

[20] Regarding the claim for aggravated, exemplary or punitive damages at paragraph 34 of the Statement of Claim, the Defendants contend that such claims should only be resorted to in exceptional cases and with restraint and should be supported by sufficient material facts. This is not the case here, the Plaintiffs having failed to identify specific facts regarding the alleged wilful infringing conduct (*Bauer Hockey Corp v Sport Maska Inc (Reebok-CCM Hockey)*, 2014 FCA 158, at para 26 [*Bauer*]).

[21] As is well-established, aggravated, exemplary or punitive damages should only be awarded where the evidence shows that there has been “high-handed, malicious, arbitrary or highly reprehensible conduct that departs to a marked degree from the ordinary standards of decent behaviour” (*Bauer*, above at para 26; *Bell Helicopter Textron Canada Limitée v Eurocopter, société par actions simplifiée*, 2013 FCA 219, at para 184). While I agree with

the Defendants that this Court has recognized that allegations of wilful and knowing infringement are alone insufficient to support a claim for punitive damages, I find that the facts of this case are analogous to those in *Bauer* where the Federal Court of Appeal found that a claim for punitive damages may be made where allegations of wilful and knowing infringement are sufficiently supported by material facts in the statement of claim (see *Bauer*, at paras 33-35). As stated by the Supreme Court in *Hunt*, above, “[i]t is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff’s chances of success.” Accordingly, the Defendants’ request to strike this portion of the Plaintiffs’ pleading is denied.

[22] Again, when read as a whole, the Statement of Claim provides sufficient material facts to support a claim for punitive damages, including the history and prior manufacturing relationship between the parties, the use of this relationship by the Defendants to copy the Plaintiffs’ patented designs, and the hiring of at least one former employee of the Plaintiffs and inventor of the ‘678 Patent, in order to assist with the manufacturing of the infringing products.

[23] Therefore, that part of the Defendants’ motion seeking to strike paragraphs 23-24, 29-30 and 33-34 of the Statement of Claim is denied.

B. Request for Particulars

[24] In the alternative, the Defendants seek further and better particulars with regard to paragraphs 23-26, 29-30 and 32-34 of the Statement of Claim alleging that they are unable to plead over the allegations made within these paragraphs as currently framed.

[25] Rule 181 requires a party to include particulars of allegations in its pleadings and permits the Court to order further and better particulars of allegations in a pleading. It is well-settled that where a party requests particulars it must establish that the particulars sought are necessary to enable it to plead in response to the impugned pleadings, not just to prepare for trial, and that they are not within the party's knowledge (*Throttle Control Tech Inc v Precision Drilling Corporation*, 2010 FC 1085, at para 7 [*Throttle Control*]; *Cooper Canada Ltd v Amer Sports International Inc*, (1996), 4 FTR 146, at para 7, 38 ACWS (2d) 4; *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA 100, at para 7 [*Imperial Manufacturing*]). Moreover, it is not appropriate for a party to request particulars merely in order to conduct a fishing expedition or to determine if there is a factual basis for a potential defence (*Imperial Manufacturing*, above at para 7; *Quality Goods IMD Inc v RSM International Active Wear Inc*, 101 FTR 318, at para 2, 58 ACWS (3d) 390).

[26] In examining the Defendants' requests for further and better particulars, I will not consider, as the Plaintiffs urge me to do, the particulars they provided to the Defendants in an effort to settle the matter of particulars as I am satisfied that these particulars were

provided without prejudice, that if not accepted, they would be retracted and that they are, as a result, settlement privileged.

[27] In general, to establish that the requested particulars are necessary for pleading and not within its knowledge, a party's affidavit in support of a motion for particulars shall contain details as to what information is needed for pleading and why the party, without such information, would be unable to instruct counsel for the purposes of replying to the Statement of Claim (*Abercrombie & Fitch Co v Giant Tiger Stores Limited*, 2009 FC 492, at para 11, [*Abercrombie*]; *38867227 Canada Inc v Eagle Pack Pet Foods Inc*, 2006 FC 1095, at para 7[*Eagle Pack Pet Foods*]).

[28] Here, the Defendants have filed the affidavit of Gabriel Mercier (the Mercier affidavit) in support of the request for particulars. Further to reading this affidavit, I am not convinced the Defendants have a genuine need for particulars since the Mercier affidavit does not contain any specific factual explanations as to why the information requested is necessary to respond to the impugned pleadings nor that the information requested is not within the Defendants' knowledge (*Throttle Control*, at paras 7-8; *Reliance Comfort Limited Partnership v Commissioner of Competition*, 2013 FCA 129, at para 9 [*Reliance Comfort Limited Partnership*]).

[29] The Defendants allege they require particulars regarding what structure of the bed which Stryker alleges is the guiding mechanism in order to plead over paragraph 23 of the Statement of Claim. The Defendants further allege that they need to know the features of

the Umano Beds that allegedly infringe claim 19 of the '678 Patent in order to plead over paragraph 24 of the Statement of Claim.

[30] The only explanation the Mercier affidavit provides for why the Defendants cannot plead over paragraphs 23 and 24 of the Statement of Claim without particulars is because the language of these paragraphs are mere recitations of parts of the Plaintiffs' patent specifications and provide no factual basis for claiming infringement. I simply cannot agree with the Defendants' submissions on this point. As indicated above, it was entirely open to the Plaintiffs' to use the language of the Patent claims at paragraphs 23 and 24 of the Statement of Claim. Moreover, if the Defendants truly copied the design and the inventor of the '678 Patent is now an employee of the Defendants, it seems plain and obvious to me that the particulars requested by the Defendants under these paragraphs fall squarely within their knowledge. The Defendants have not convinced me that they require particulars to plead over paragraphs 23 and 24 of the Statement of Claim.

[31] The Defendants also seek further particulars regarding paragraphs 25 and 34 of the Statement of Claim as they relate to the Plaintiffs' claim for punitive damages. Paragraph 25 reads as follows:

25. The Defendants intentionally copied Stryker's patented design. A prior manufacturing relationship between Stryker and both Flextronics and Bertec (now Umano), which spanned over four years, facilitated Umano's ability to copy Stryker's patented designs.

[32] With respect to paragraph 25, the Defendants argue that they cannot plead over this paragraph since the allegation is limited to wilful and knowing infringement and that they require, as result, the following particulars: (i) what are the details and the surrounding circumstances of the Umamo's alleged intentional copying of Stryker's patented design; and (ii) how did the prior manufacturing relationship facilitate Umamo's ability to allegedly copy Stryker's patented designs.

[33] Regarding paragraph 34, the Defendants allege that they require the following particulars in order to plead over the allegations stated at that paragraph: (i) precisely what is the wilful and deliberate nature of the alleged infringement; and (ii) what are the specific facts on the alleged high-handed conduct of the Defendants.

[34] Again, as explained above, I am satisfied that the Statement of Claim, when read as a whole, pleads sufficient material facts to support the Plaintiffs' request for punitive damages. In particular, I agree with the Plaintiffs that their pleading, as it relates to punitive damages, offers more particulars than the one in *Bauer*, above, which was allowed by the Federal Court of Appeal to proceed unamended.

[35] In the same vein, I am also satisfied that the material facts as pleaded by the Plaintiffs are sufficiently particularized to allow the Defendants to respond. This appears to me to be a case where the party moving for particulars is required to explain by affidavit how the information sought is not within their knowledge (*Throttle Control*, 2010 FC 1085, at para 8). Again, as the Mercier affidavit is silent as to what information sought is not

within the Defendants' knowledge, I can only assume that the information not contained in the Statement of Claim and needed for pleading is within the Defendants' knowledge (*Eagle Pack Pet Foods Inc*, at paras 14-15; see also *Throttle Control*, at para 7).

[36] The Defendants also request further particulars to plead over paragraph 26 of the Statement of Claim, which reads as follows:

26. Moreover, the Defendants exploited their prior relationships derived from Stryker, knowingly pursuing and hiring at least one former Stryker employee as well as the inventor of the '678 Patent, to assist with the manufacture of the Defendants' infringing Umano Beds.

[37] More specifically, they request particulars (i) as to the employee referred to; and (ii) as to the specific facts surrounding the prior relationships alleged and how hiring at least one former Stryker employee as well as the inventor of the '678 Patent assisted in the manufacturing of the Umano Beds. The Defendants also take issue with the Plaintiffs' use of the words "at least," alleging that "at least" cannot be used as it is indefinite and resorts to mere speculation and inferences.

[38] Regarding the Plaintiffs' use of the words "at least," this Court has taken the position that open-ended pleadings do not entitle a defendant to further and better particulars where the open-ended pleadings is a matter within the knowledge of the defendant (see *Reliance Comfort Limited Partnership*, 2013 FCA 129, at paras 8-9).

Again, the Mercier affidavit does not provide any explanation as to why these particulars are necessary to allow the Defendants to plead in response to the impugned pleadings. The Defendants are clearly in a better position to know which of their employees were formerly

employed by Stryker and how, if at all, these former employees or the inventor of the '678 Patent played a role in the manufacturing of the Umano Beds.

[39] The Mercier affidavit also states that the Defendants require the following particulars in order to plead over paragraph 29: (i) specific facts and events amounting to “advertising, marketing, promoting, and providing instructions and other support to the installation”; (ii) the specific facts and acts describing the influence asserted by the Defendants to third parties to allegedly induce to infringe; (iii) further specifics regarding the “manufacturing, using, selling and offering for sale” of other hospital beds; and, (iv) a list detailing the hospital beds aimed by this allegation, including, but not limited to model numbers or other information for the purpose of identifying the specific hospital beds raised by this allegation.

[40] I note that the Mercier affidavit does not explain why this information is necessary to plead over the allegations set out in paragraph 29 of the Statement of Claim. Moreover, the Mercier affidavit does not indicate that the information requested is not within the Defendants' knowledge. This is insufficient for granting particulars.

[41] Regarding paragraph 30 of the Statement of Claim, it is not clear what kind of particulars the Defendants are requesting. The Mercier affidavit merely states that “[t]he allegations regarding the alleged infringement of the '678 Patent are insufficient. Therefore, it is no answer to merely say that matters are within the knowledge of the Defendants.” Again, the Defendants do not make any pleadings to demonstrate that the

facts alleged in this paragraph are not within their knowledge and the Mercier affidavit is also silent on this point.

[42] The Mercier affidavit states that the Defendants require the Plaintiffs to particularize the phrase “other related benefits” found in paragraph 32 of the Statement of Claim. Paragraph 32 reads as follows:

32. Such profits have been and will be made and enjoyed by the Defendants with respect to the above-mentioned manufacture and sale of the Umano Beds, and with respect to other related benefits. Therefore, Stryker claims damages or an accounting of profits that Stryker may, after due inquiry, elect for infringement, and for inducing and procuring infringement, of the ‘678 Patent.

[43] Yet, the Mercier affidavit provides no explanation as to why the Defendants require further particulars on this point. Again, I am inclined to believe that this information falls within the Defendants’ knowledge.

[44] Lastly, regarding paragraph 33 of the Statement of Claim, I find that the Mercier affidavit does not explain why particulars are required or what kind of particulars are required for that matter. As indicated above, I find no inconsistencies in the Statement of Claim as to the precise date the alleged infringements began. This is a matter that should be left to be determined during the subsequent phases of this proceeding.

[45] Overall, it seems clear to me that the Defendants have enough information in their knowledge to know the case to be met and are now merely looking for particulars to bolster their defence. The Defendants’ request for particulars is inappropriate at this stage of the

proceeding since the purpose of requesting particulars is not meant to allow the infringing party to “go on a “fishing expedition” to discover grounds of defence unknown to them” (*Abercrombie*, above at para 12). Moreover, I agree with the Plaintiffs that the Defendants seem to have a discovery purpose in mind and have confused the purpose of particulars with discoveries. Before ordering a witness to answer a question on discovery, “the Court considers whether the information sought is relevant and material to the legal and factual issues in the proceeding” (*Imperial Manufacturing*, at para 33). This is not the case on a motion for particulars where the primordial concern is whether the particulars are necessary to allow a defendant to plead (*Imperial Manufacturing*, at para 32). Thus, the Defendants’ motion for particulars is denied in its entirety.

C. Request under Rule 206

[46] Rule 206 states that a copy of every document referred to in a pleading shall be served with the pleading. The Defendants are seeking the production of documents, which they claim, are referred to in paragraphs 3, 8 and 15 of the Plaintiffs’ Statement of Claim.

[47] Paragraphs 3, 8 and 15 of the Statement of Claim read as follows:

3. Stryker Corporation markets and sells its medical technologies, including hospital beds and siderail support mechanisms for use with patient support apparatuses (e.g., stretchers and hospital beds), in Canada through its exclusive Canadian distributor Stryker Corporation LP. Stryker Canada LP has its principal place of business at 45 Innovation Drive, Hamilton, Ontario, Canada L9H 7L8.

8. Bertec was formed to continue the manufacturing operations in Canada and to supply Stryker with certain hospital bed products.

15. Stryker Canada LP is licensed to sell, among other things, movable siderail apparatus for use with a patient support apparatus related to the '678 Patent. Stryker Canada LP is a person claiming under Stryker Corporation with respect to the '687 Patent, as set out in section 55 of the *Patent Act*, RCS 1985, c P-4, as amended (the "Patent Act").

[48] Specifically, the Defendants request that the Plaintiffs produce all agreements, licenses, and other document between Stryker Corporation and Stryker Canada LP as its exclusive distributor referred at paragraph 3. The Defendants also request that all supply agreements and other documents referred at paragraph 8 be produced. Lastly, the Defendants request that all licenses and other documents referred to at paragraph 15 be produced. As these paragraphs refer to documents, the Defendants argue that they should be produced (*John Labatt Ltd v Molson Breweries, A partnership* (2003) 69 FTR 235, at para 6, 44 ACWS (3d) 464 [*John Labatt*]).

[49] The Plaintiffs disagree with the Defendants' request arguing that the documents requested for production are not relevant to the principal question before the Court. The Plaintiffs also contend that paragraphs 3, 8 and 15 do not specifically refer to any documents.

[50] This Court has established that the purpose of Rule 206 is to force a party to serve a document referred to in its pleadings. Rule 206 is not meant to be used to get an advanced discovery (*John Labatt*, at para 19). Moreover, "the fact that there may be documents in existence which relate to the subject matter or the issues raised in the pleadings does not [...] transform these documents into documents referred to in a pleading" as provided in

Rule 206. Given the foregoing, I am of the view that paragraphs 3, 8 and 15 do not refer to any documents within the meaning of Rule 206. The Defendants will have the opportunity, on discovery, to question the Plaintiffs on - and seek copies of - any document that may be relevant to the facts alleged in these three paragraphs, including any licensing or supply agreements. Therefore, the Defendants' request for the production of documents pursuant to Rule 206 is denied.

D. Costs

[51] Rule 400 of the Rules provides the Court with "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." In other words, costs are at the complete discretion of the Court (*Balfour v Norway House Cree Nation*, 2006 FC 616, at para 19, 296 FTR 65 [*Balfour*]).

[52] Here, there is no doubt that being on the losing end of their motion, costs are to be awarded against the Defendants. The issue is whether costs should be awarded on a solicitor-client basis in an amount of \$10,000 as requested by the Plaintiffs.

[53] It has now been well-established that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct or as a matter of public interest (*Young v Young*, [1993] 4 SCR 3, at 134, 108 DLR (4th) 193; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, at 80, 48 FTR 160; *Mackin v New Brunswick (Minister of*

Finance); *Rice v New Brunswick*, 2002 SCC 13, at para 86, [2002] 1 SCR 405; *Balfour*, at para 18).

[54] The Plaintiffs claim that the Defendants, by revealing in their motion record the settlement privileged particulars offered by the Plaintiffs to buy peace, have committed an unauthorized breach of confidential information, which has undermined their position on this issue. The Plaintiffs contend that such disclosure was designed to improperly affect the course of justice.

[55] There is a breach of confidence when it is established that the information conveyed was confidential, communicated in confidence, and misused by the party to whom it was communicated (*International Corona Resources Ltd v LAC Minerals Ltd*, [1989] 2 SCR 574, at para 10). Here, the Defendants claim that they disclosed the settlement privileged particulars in order to show that they complied with the Court's practice that a motion for particulars be preceded by an informal request for particulars.

[56] However, I fail to see how such disclosure was necessary in order to let the Court know that this preliminary approach had been followed in this case. As a result, I find that by disclosing the settlement privileged particulars offered by the Plaintiffs, the Defendants committed a breach of confidence as this information was confidential, communicated in confidence, and misused by the Defendants.

[57] Does this breach justify an award of costs on a solicitor-client basis in the circumstances of this case? I do not think so. Although a breach of this nature is of the utmost serious nature, it did not, in the present case, undermine the Plaintiffs' position on the merits of the case, let alone the request for particulars, or undermine the integrity of the alternative dispute resolution process, as was the case in *Andersen Consulting v Canada*, [1999] ACF No 1455, 91 ACWS (3d) 895, quoted by the Plaintiffs. However, this sort of behaviour ought to be discouraged as it is in the nature of improperly affecting the course of justice. As a result, costs on the motion are to be payable forthwith by the Defendants and are to be calculated from the highest unit of Column IV of Tariff B.

E. Case Management

[58] In letters to the Judicial Administrator dated March 3, 2016, both parties requested that this proceeding be continued as a specially managed proceeding. The Defendants further ask that the bilingual nature of the present proceeding be taken into consideration in the designation of the case management judge.

[59] This request is granted.

[60] In the meantime, the Defendants are to file and serve their Statement of Defence within 20 days of the date of this Order.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed;
2. The Statement of Defence shall be filed and served within 20 days of the date of this Order;
3. Costs of this motion, which are to be calculated from the highest unit of Column IV of Tariff B, are awarded to the Plaintiffs and are payable forthwith; and
4. This proceeding is to be continued as a specially managed proceeding.

"René LeBlanc"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-191-16

STYLE OF CAUSE: STRYKER CORPORATION AND STRYKER CANADA
LP v UMANO MEDICAL INC. AND UMANO
MEDICAL WORLD INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 9, 2016

ORDER AND REASONS: LEBLANC J.

DATED: APRIL 5, 2016

APPEARANCES:

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William Boyer

FOR THE PLAINTIFFS

Kang Lee

FOR THE DEFENDANTS

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FOR THE DEFENDANTS