

Federal Court



Cour fédérale

Date: 20230213

Docket: T-484-21

Citation: 2023 FC 208

Ottawa, Ontario, February 13, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

THE NOCO COMPANY, INC.

**Plaintiff/
Defendant by Counterclaim**

and

**GUANGZHOU UNIQUE ELECTRONICS CO., LTD.,
SUI CHENG LIMITED,
SHENZHEN GOOLOO E-COMMERCE CO., LTD.,
AUKEY TECHNOLOGY CO. LTD.,**

**Defendants/
Plaintiffs by Counterclaim**

and

**SHENZHEN YIKE ELECTRONICAS CO., LTD.,
SHENZHEN DINGJIANG TECHNOLOGY CO. LTD.,
SHENZHEN LIANKE ELECTRON TECHNOLOGY CO., LTD.,
SHENZHEN TOPDON ELECTRONIC CO., LTD.,
HUNAN LIANKE ELECTRONIC COMMERCE CO., LTD.,
SUBSTANBO INNOVATIONS TECHNOLOGY LIMITED
LIABILITY COMPANY, AND SUBSTANBO INC.**

Defendants

PUBLIC ORDER AND REASONS

(Confidential Order and Reasons issued February 13, 2023)

I. **Overview**

[1] This is a motion for summary trial by Guangzhou Unique Electronics Co Ltd, Sui Cheng Limited, Shenzhen Gooloo E-Commerce Co Ltd, and Aukey Technology Co Ltd (Moving Defendants), arising from a patent action brought against them and other defendants. The other defendants have not participated in the motion.

[2] In the action, the plaintiff (NOCO) alleges that certain vehicle battery jump starters the defendants have offered for sale in Canada infringe claims 1-3, 9-15, 17, and 19 of Canadian Patent No 2,916,782 titled “Portable Vehicle Battery Jump Start Apparatus with Safety Protection” (782 Patent). The Moving Defendants defend these allegations on the basis that their jump starters do not infringe the asserted claims of the 782 Patent, and that all claims of the 782 Patent are invalid. Also, the Moving Defendants counterclaim for various relief, including a declaration that their newer jump starters, namely those equipped with a CC-209 printed circuit board (PCB) (CC-209 Products), do not infringe any claim of the 782 Patent.

[3] On this motion, the Moving Defendants seek judgment prior to trial on their counterclaim pursuant to Rule 216 of the *Federal Courts Rules*, SOR/98-106. Specifically, the Moving Defendants seek a declaration, pursuant to subsection 60(2) of the *Patent Act*, RSC 1985, c P-4, that their CC-209 Products do not infringe any claim of 782 Patent.

[4] The Moving Defendants allege that the requested declaration would cover some of the products identified as infringing products in NOCO's amended statement of claim, but would not be limited to those products. The declaration would apply to any of the Moving Defendants' products that are equipped with a CC-209 PCB.

[5] While a declaration of non-infringement for CC-209 Products would leave issues for trial, the Moving Defendants assert that a summary determination of the issues on this motion will streamline the action going forward, and possibly lead to a settlement of the action. In this regard, they ask the Court to direct that the claim construction findings made on this motion shall apply to the underlying action as a whole.

[6] For the reasons below, the motion for judgment is dismissed. The Moving Defendants have not met their burden to establish that summary trial under Rule 216 is appropriate. While NOCO asserts that the true nature of the motion is one for summary judgment under Rule 215, and that it should be dismissed because there is a genuine issue for trial, my decision does not turn on the nature of the motion. That said, the issues raised by the Moving Defendants are also unsuited to summary judgment under Rule 215.

[7] In addition to the Moving Defendants' motion for summary trial, these reasons address two evidence motions brought by NOCO: a motion to strike out parts of a reply affidavit from the Moving Defendants' expert witness, and a motion for leave to file a supplemental affidavit from NOCO's expert witness. The parties argued the evidence motions on the same day as the motion for judgment.

[8] NOCO's evidence motions are allowed. With the exception of one challenged paragraph, the challenged reply evidence from the Moving Defendants' expert's reply affidavit is struck out as improper. Leave to file NOCO's expert's supplemental affidavit is granted.

[9] I note that I would have dismissed the motion for judgment even if I had not allowed NOCO's evidence motions. In that sense, my decision does not depend on the outcomes of the evidence motions. However, the parties' arguments on the evidence motions were interconnected with their arguments on the main motion, and the points they raised are relevant to the question of whether summary trial is appropriate in this case. Furthermore, the evidence that was introduced through these motion records is relevant to a number of factors that I considered and weighed in reaching my decision on the motion for summary trial. The reasons on the evidence motions therefore form part of the overall reasons for dismissing the motion for summary trial.

[10] After setting out the background, I provide my reasons on the evidence motions, followed by my reasons on the main motion for summary trial.

II. **Background**

[11] NOCO commenced the underlying action in March 2021. Counsel for the Moving Defendants accepted service of NOCO's amended statement of claim in October 2021 and delivered a joint statement of defence and counterclaim in November 2021. In December 2021, the Moving Defendants amended their counterclaim to further specify the declaratory relief sought with respect to CC-209 Products. At the same time, they raised their intention to bring

this motion, and provided a draft notice of motion to NOCO. The Moving Defendants filed their notice of motion in January 2022.

[12] Prior to 2021, the Moving Defendants sold jump starter products in Canada through Amazon.ca. According to the Moving Defendants, NOCO persuaded Amazon.ca to de-list their jump starter products, resulting in a *de facto* injunction since they do not have an alternative retail channel in Canada. They ask for a declaration of non-infringement for CC-209 Products “with the goal of undoing NOCO’s commercial tactics”.

[13] The notice of motion is titled as a motion for “summary judgment / summary trial”. The reason for this, according to the Moving Defendants, is that they had not settled on which one of Rules 215 and 216 was the more appropriate summary disposition rule at the time they filed the notice of motion. The Moving Defendants subsequently elected to proceed under Rule 216. NOCO maintains that the election did not change the nature of the motion. NOCO asserts that the nature of this motion, which was argued in one day based on a paper record, is for summary judgment under Rule 215.

[14] The expert evidence on infringement relates to one product, Aukey Technology Co Ltd’s Tacklife T8 Pro jump starter (T8 Pro). The Moving Defendants allege the T8 Pro is: (i) equipped with a CC-209 PCB; and (ii) representative of all CC-209 Products for the purposes of determining non-infringement. To establish these allegations, the Moving Defendants rely on affidavits from two employees of Shenzhen Carku Technology Co Ltd (Carku). Carku

engineered the CC-209 PCB, and it manufactures CC-209 Products for the Moving Defendants. Carku is not a party to the action.

[15] The Carku employees are Mr. XingLiang (Leon) Lei, a sales manager who is responsible for managing sales of Carku's vehicle jump starter products, and Mr. Ming Cheng, a research and development manager who is responsible for various jump starter products engineered and manufactured at Carku, including the various PCBs that are installed and used in jump starter products. The employees attest that Carku has manufactured vehicle jump starters for the Moving Defendants, which were sold and delivered to the Moving Defendants in China as finished and packaged products ready for retail sale in Canada.

[16] Mr. Cheng attests that Carku engineered the CC-209 PCB in [REDACTED] and that Carku has installed the CC-209 PCB in vehicle jump starters manufactured after [REDACTED]. He further attests that all products equipped with a CC-209 PCB function in the same manner. His affidavit attaches six documents prepared and maintained by Carku, including technical specifications and source code, that are said to describe the functionality of "any product made by Carku that is equipped with this CC-209 PCB". English translations of the Carku documents were prepared by Morningside, a company that provides translation services for technical and legal documents.

[17] NOCO does not accept that the T8 Pro is representative of CC-209 Products, and submits there is insufficient evidence before the Court to make such a determination summarily.

[18] The parties rely on expert opinion evidence for the issues of claim construction and infringement. The Moving Defendants rely on the opinion of Dr. Martin Walker. Dr. Walker received a PhD in Electrical Engineering from Stanford University in 1979. NOCO relies on a responding opinion of Dr. Jonathan Wood. Dr. Wood received a PhD in Electrical Engineering from the Massachusetts Institute of Technology in 1973.

[19] In his affidavit, Dr. Walker discloses that he was retained in a proceeding before the United States International Trade Commission involving NOCO. In the US proceeding, he provided an opinion on behalf of one of the Moving Defendants (Shenzhen Gooloo E-Commerce Co Ltd) on whether jump starter products equipped with a CC-209 PCB infringed claim 1 of United States Patent No 9,007,015 (US Patent 015), which Dr. Walker states is identical to claim 1 of the 782 Patent. He states that in the US proceeding, the T8 Pro was the representative product for jump starters equipped with a CC-209 PCB, and the experts' infringement analyses involved the same Caraku documents that are appended to Mr. Cheng's affidavit.

[20] NOCO's expert Dr. Wood was also involved in the US proceeding. His affidavit for this motion includes results from tests he conducted on the T8 Pro for the US proceeding. Even though the Moving Defendants were not present for those tests, the parties agreed that the Moving Defendants would not object to the admissibility of Dr. Wood's evidence of his earlier tests, and NOCO would not object to the admissibility of reply evidence from Dr. Walker relating to the tests. NOCO's motion to strike out parts of Dr. Walker's reply affidavit, which I address in section III below, asserts that parts of the affidavit are outside the scope of the parties' agreement and constitute improper reply evidence.

[21] Dr. Wood is also an expert for NOCO in Federal Court File No T-343-20, *The NOCO Company, Inc v Canadian Tire Corporation, Limited*. In that action, NOCO alleges that the defendant (Canadian Tire) sells vehicle jump starters that infringe the 782 Patent. NOCO's motion to admit Dr. Wood's supplemental affidavit seeks to introduce evidence of his tests of Canadian Tire jump starters manufactured by Carku and equipped with a CC-209 PCB. NOCO asserts that Dr. Wood's tests revealed that the Canadian Tire CC-209 jump starters do not function in the same way as the T8 Pro tested in the US proceeding, suggesting that Carku uses different versions of the CC-209 PCB and/or different versions of the source code for the CC-209 PCB in the jump starters it manufactures. NOCO states this evidence is relevant to whether the T8 Pro is representative of the Moving Defendants' CC-209 Products, and consequently, whether a declaration of non-infringement should issue based on the experts' opinions on a single allegedly representative product, the T8 Pro.

[22] The Carku employees and the parties' expert witnesses were cross-examined out of court. The expert witnesses were cross-examined on all of their affidavits, including the parts of Dr. Walker's reply affidavit that are challenged in the motion to strike, and Dr. Wood's proposed supplemental affidavit. Transcripts of the cross-examinations and the exhibits marked on cross-examination are included in the motion records.

[23] I now turn to the two evidence motions brought by NOCO.

III. **NOCO's motion to strike parts of the Walker Reply**

[24] NOCO seeks an order striking paragraphs 5-37, 49-50, 51 (first sentence), and 52-60, as well as corresponding exhibits K-M and O-R, of Dr. Walker's Reply Affidavit sworn May 16, 2022 (Walker Reply). The Walker Reply was filed as part of the Moving Defendants' motion record for summary trial.

A. *The parties' submissions*

[25] As noted above, NOCO asserts that the challenged evidence is not proper reply evidence, and it falls outside the scope of the parties' agreement because it does not relate to Dr. Wood's US tests.

[26] NOCO submits the challenged paragraphs constitute improper case splitting, as they provide Dr. Walker's opinions on the construction of multiple terms in claim 1 of the 782 Patent that were or should have been part of his expert opinion in chief—including “microcontroller”, “internal power supply”, “vehicle battery isolation sensor” and “not turned on”. NOCO submits these constructions were not unexpected; in fact, they were integral to Dr. Walker's non-infringement opinion addressed in his first affidavit. Claims must be construed prior to an infringement analysis and Dr. Walker's opinions on the construction of claim terms should have been led in chief. Furthermore, Dr. Walker's position in his first affidavit was that some of these terms did not need to be construed, and he should not be permitted to resile from that position. In addition, NOCO submits much of the evidence constitutes mere rebuttal of Dr. Wood's evidence, or repeats evidence Dr. Walker gave in chief.

[27] The Moving Defendants note that paragraphs 34-37 and 52-60 of the Walker Reply are no longer necessary for the Court to decide the issues on this motion. However, they submit that Dr. Walker's evidence in the other challenged paragraphs is proper reply evidence, and even if it is not, the Court should exercise discretion to admit the other challenged paragraphs in the interests of justice.

[28] The Moving Defendants submit the challenged paragraphs should be admitted to allow Dr. Walker to respond to unforeseeable opinions from Dr. Wood. Dr. Wood and Dr. Walker both provided opinions for the US proceeding on whether products equipped with a CC-209 PCB infringed claim 1 of US Patent 015. The Moving Defendants allege that several of Dr. Wood's claim construction opinions on this motion were new and unexpected because they differed from Dr. Wood's previous opinions on the meaning of corresponding claim terms in US Patent 015, and they also differed from how the skilled person would define the terms. Dr. Walker states in the Walker Reply that he could not have anticipated the opinions of Dr. Wood with respect to several of the construed claim terms.

[29] The Moving Defendants state they have been disadvantaged by the order in which the evidence was presented on this motion. They provided their non-infringement position first, "in a reversal of the usual order". The Moving Defendants state they were "prepared to go first at least in part because NOCO's infringement position was believed to be known", alleging that NOCO and Dr. Wood changed several of their positions on material points when compared to the positions they took in the US proceeding.

B. *Analysis*

[30] On a motion for summary trial, a moving party is permitted to file evidence that would be admissible at trial as rebuttal evidence: *Federal Courts Rules*, Rule 216(2)(a).

[31] The core principles governing the admissibility of rebuttal or reply evidence at trial are set out in *Halford v Seed Hawk Inc*, 2003 FCT 141 at paragraphs 15-16 [*Halford*]:

1. Evidence which is simply confirmatory of evidence already before the Court is not to be allowed.
2. Evidence which is directed to a matter raised for the first time in cross-examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
4. Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of the Court's discretion.

[32] The principles in *Halford* apply to reply expert reports in patent cases: *Janssen Inc v Teva Canada Ltd*, 2019 FC 1309 at paras 16-17 [*Janssen v Teva*], citing *Dow Chemical Co v NOVA Chemicals Corp*, 2014 FC 844 at paras 5-8 of Schedule A; see also *T-Rex Property AB v Pattison Outdoor Advertising Limited Partnership*, 2022 FC 1008 at para 34.

[33] In exercising discretion to admit evidence that may not be the proper subject of reply, the Court may consider factors such as whether admitting the further evidence would serve the interests of justice, assist the Court in making a determination on the merits, or cause substantial prejudice to the other party: *Solvay Pharma Inc v Apotex Inc*, 2007 FC 913 at paras 9-12.

[34] Rules limiting the scope of reply evidence foster the goals of fairness and efficiency by ensuring that the responding party knows the case to meet, and by avoiding an endless alternation in adducing evidence: *Bauer Hockey Ltd v Sports Maska Inc dba CCM Hockey*, 2020 FC 212 at para 13, citing *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 12.

[35] Mere disagreement with statements made by another expert witness is not the proper subject of reply, and disagreements between experts can be addressed by cross-examination or highlighted in argument: *Janssen v Teva* at para 17; *Bauer Hockey Ltd v Sports Maska Inc dba CCM Hockey*, 2020 FC 212 at para 16.

[36] Dr. Walker's assertion that he could not have anticipated Dr. Wood's opinions is of marginal value. The Court must determine whether reply evidence could have been anticipated based on an objective analysis: *Merck-Frosst v Canada (Health)*, 2009 FC 914 at paras 17-18, citing *Astrazeneca Canada Inc et al v Novopharm Limited et al*, 2009 FC 902.

[37] Apart from paragraph 50, I agree with NOCO that the challenged paragraphs of the Walker Reply fall outside the scope of the parties' agreement, and they are not proper reply evidence. I am not persuaded that the Moving Defendants should be permitted to file the

challenged parts of the Walker Reply on the basis that they could not have anticipated Dr. Wood's constructions of claim terms in the 782 Patent, and I am not satisfied that the evidence should be admitted in the Court's discretion, in the interests of justice.

[38] I would note that, in their attempt to establish that Dr. Wood's opinions were unforeseeable, the evidence the Moving Defendants introduced in response to the motion to strike and the questions put to Dr. Wood on cross-examination have implications beyond the propriety of Dr. Walker's reply evidence. The Moving Defendants also seek to discredit Dr. Wood's claim construction opinions by raising an alleged inconsistency between his sworn opinions in the US and Canada, which NOCO vigorously disputes. This is an issue of credibility and as noted below, the need to decide serious issues of credibility is a consideration in deciding whether summary adjudication is appropriate, particularly based on a paper record.

[39] In any event, for the purpose of deciding whether the Walker Reply is admissible, I am not satisfied that the challenged paragraphs respond to evidence that could not have been reasonably anticipated. The Moving Defendants have not established that Dr. Wood's opinions were not reasonably foreseeable in light of the opinions he gave in the US, nor was it reasonable for them to assume that the construction of some claim terms would not be contentious in this action, based on Dr. Wood's US opinion.

[40] First, Dr. Wood's opinions in the US proceeding appear to reflect the assumptions that he was asked to make. The Moving Defendants cross-examined Dr. Wood on this point and they filed excerpts from his US report. This evidence indicates that Dr. Wood was not asked to

construe claim 1 of US Patent 015 for the US proceeding. He was instructed to provide an opinion on infringement based on claim constructions that were provided to him.

[41] Second, while there is no evidence before me on US law, it is apparent that the legal principles for claim construction in Canada and the US are not the same. In *Google LLC v Sonos, Inc*, 2021 FC 1462 [*Google*], this Court dismissed a motion for summary judgment where the moving defendant alleged that the parties to the Canadian proceeding had agreed, in a corresponding US proceeding involving identically-worded patent claims, that there was no infringement for the same products that were at issue in the Canadian proceeding. The Court found that even if it could conclude that the parties had reached an agreement on the construction of identically-worded US patent claims, construction of the Canadian patent claims could differ based on the different applicable principles under US and Canadian law: *Google* at para 53. Indeed, Dr. Walker states in his first affidavit that he was asked to follow the Canadian legal instructions, and not the legal instructions that were provided to him by the US lawyers.

[42] Also, I am not persuaded by the Moving Defendants' argument that they have been disadvantaged because the sequence of the evidence did not mirror the parties' respective burdens of proof on the issue of infringement. I fail to see how the Moving Defendants are disadvantaged by serving their evidence first when they are the moving parties on a motion for summary trial. The issues to be determined on a motion for summary judgment or summary trial are limited to the claims or defences from the underlying action that the moving party has raised: *Janssen Inc v Pharmascience Inc*, 2022 FC 62 at para 59 [*Janssen v PMS*]. The Moving Defendants' notice of motion does not set out the specific claim construction or infringement

issues to be determined on this motion, and NOCO would not have known the precise issues for summary adjudication until it received their evidence.

[43] Furthermore, I am not convinced that the burden lies with NOCO. The relief the Moving Defendants seek is judgment prior to trial on their counterclaim—specifically, a declaration pursuant to subsection 60(2) of the *Patent Act* that their products equipped with a CC-209 PCB do not infringe any claim of the 782 Patent. I disagree with the Moving Defendants that the motion for summary trial arises from the amended statement of claim and their counterclaim is merely a formality. In their notice of motion, the Moving Defendants state that they need a subsection 60(2) declaration of non-infringement so they will be able to list their “new” products on Amazon. The declaration the Moving Defendants seek would broadly cover all their jump starters that use the CC-209 PCB, independent of model name/number, and even future products. In my view, the Moving Defendants bear the burden on the issues they have raised on their motion, which is whether they are entitled to a declaration according to their counterclaim. In any event, much of the reply evidence in question relates to claim construction, which the Moving Defendants contend is a matter of law with no burden.

[44] Turning to the specific paragraphs of the Walker Reply that are at issue, (i) paragraphs 5-26, (ii) paragraphs 27-30, (iii) paragraphs 31-33, and (iv) paragraphs 49-50 and the first sentence of paragraph 51, respectively, respond to Dr. Wood’s construction of the claim terms (i) “microcontroller”, (ii) “internal power supply”, (iii) “vehicle battery isolation sensor”, and (iv) “not turned on”.

[45] The claim terms “microcontroller”, “vehicle battery isolation sensor” and “not turned on” are directly relevant to Dr. Walker’s non-infringement opinion. Dr. Walker provided an opinion on the construction of “vehicle battery isolation sensor” and “not turned on” in chief. He did not provide an opinion on the construction of “microcontroller”, even though the Moving Defendants argue that whether CC-209 Products have a “microcontroller” according to claim 1 of the 782 Patent is an important issue for summary determination. Dr. Walker discusses microcontrollers in various paragraphs of his in-chief affidavit and he stated on cross-examination that he had a construction in mind for his non-infringement opinion, and construed the term “microcontroller” in accordance with Canadian principles of claim construction. Dr. Walker stated that since “microcontroller” is a well-known term in the industry, he did not think there was any controversy on its meaning, and he did not feel it was necessary to explain what the term means.

[46] While Dr. Walker considers “internal power supply” to be an essential element of claim 1, the Moving Defendants admit that CC-209 Products have an internal power supply. Therefore, it is not necessary to construe this term in order to decide the issues raised for summary trial. The Moving Defendants’ position is that the Court could admit Dr. Walker’s reply on this point, if the Court chooses to construe additional claim terms to help focus the action.

[47] Of the challenged paragraphs and exhibits, in my view paragraph 50 of the Walker Reply falls within the scope of the parties’ agreement and is admissible. Paragraph 50 provides Dr. Walker’s response to Dr. Wood’s opinion on how the car battery detection circuit of the T8 Pro

functions, based on voltage measurements shown on an oscilloscope trace that was generated in the course of Dr. Wood's US tests. Dr. Walker's opinion on this point assists the Court to understand the tests.

[48] Paragraphs 5-26 (microcontroller), paragraphs 27-30 (internal power supply), paragraphs 31-33 (vehicle battery isolation sensor), and paragraphs 49 and 51 (first sentence) (not turned on), as well as corresponding exhibits K-M and O-Q, do not respond to an issue that could not have been reasonably anticipated. Rather, they address issues that could have been addressed in chief, or they are simply confirmatory of opinions that were provided in chief. In addition, paragraphs 27-30 are irrelevant. All of these paragraphs will be struck out, as they are not proper reply and I am not persuaded they should be admitted in the interests of justice.

[49] The Moving Defendants concede that paragraphs 34-37, 52-60, and Exhibit R of the Walker Reply, which relate to other claim terms, are no longer necessary for the Court to adjudicate infringement on the merits. These paragraphs are irrelevant and will also be struck out.

[50] In conclusion, paragraph 50 of the Walker Reply responds to Dr. Wood's US tests and falls within the scope of the parties' agreement. Paragraph 50 of the Walker Reply will not be struck out. All other challenged paragraphs and their corresponding exhibits are inadmissible, and struck from the record. Paragraphs 5-26, 27-30, 31-33, 49 and 51 (first sentence) and the corresponding exhibits do not meet the requirements for reply evidence and should not be

admitted in the Court's discretion. Paragraphs 34-37 and 52-60 and the corresponding exhibit are irrelevant as they are unnecessary to decide an issue on the motion for summary trial.

IV. **NOCO's motion to admit Dr. Wood's supplemental affidavit**

[51] NOCO seeks leave pursuant to Rule 216(2) of the *Federal Courts Rules* to admit a supplemental affidavit from Dr. Wood dated August 9, 2022. Dr. Wood was cross-examined on the supplemental affidavit, on August 29, 2022.

A. *The parties' submissions*

[52] NOCO submits that Dr. Wood's supplemental affidavit is directly relevant to the issues on the main motion, it assists the Court, and it was not available prior to cross-examinations. Admitting the supplemental affidavit would be in the interests of justice and would not prejudice the Moving Defendants.

[53] In his supplemental affidavit, Dr. Wood states that in July 2022 he conducted experimental testing on four Canadian Tire jump starter products at issue in Court File No T-343-20, namely, CC-201 PCB- and CC-209 PCB-versions of two jump starter models manufactured by Carku. The CC-209 PCB jump starters in that proceeding did not function in the same way as the T8 Pro, and as a result, Dr. Wood states he has reason to believe the assumption he relied on for his first affidavit in this proceeding was not correct. For his first affidavit, Dr. Wood was asked to assume the T8 Pro is representative of the allegedly infringing CC-209 Products in this proceeding. Dr. Wood now believes Carku must use different versions of the CC-209 PCB and/or different versions of source code in different devices, and possibly in

different manufacturing batches of the same devices, and he believes at least some CC-209 Products may behave differently than the T8 Pro.

[54] NOCO states it has never conceded that the T8 Pro is representative of CC-209 Products, and the supplemental affidavit of Dr. Wood confirms its concerns are legitimate. The Moving Defendants' evidence to establish that the T8 Pro is representative of CC-209 Products consists of Mr. Cheng's bare assertions that the products at issue in the summary trial motion are equipped with a CC-209 PCB and function in the same way. He asserts that the schematics, source code, flow charts and user manuals for the T8 Pro that are attached to his affidavit apply to each of the Moving Defendants' CC-209 Products, without corroborating documentary evidence. NOCO states it has not had a proper opportunity to test the accuracy of Mr. Cheng's assertions, since the Moving Defendants did not produce sample products and the parties have not exchanged production documents or conducted examinations for discovery.

[55] The Moving Defendants argue that Dr. Wood's supplemental affidavit is not relevant because the summary trial motion relates to products having a specific technical configuration. While the Canadian Tire jump starters use the same CC-209 PCB as the T8 Pro, they function differently because they use different source code in the microcontroller (CC-209LXL source code, not CC-209 source code). The Moving Defendants contend NOCO would have known about this distinction because it had access to significant documentary production in the US proceeding. In this regard, the Moving Defendants rely on an affidavit from a senior paralegal at the law firm that represented Carku and Shenzhen Gooloo E-Commerce Co Ltd in the US proceeding. They state the paralegal's affidavit confirms that NOCO was provided with PCB

schematics and source code for the products at issue in the US proceeding, and that NOCO was advised that Carku products do not all use the same PCB, and products using the same PCB may have different source code.

[56] The Moving Defendants submit that NOCO is attempting to create a discovery problem when obvious differences in source code explain the differences in functionality. When NOCO served its responding evidence for summary trial, it did not include any factual evidence to contest the suitability of the T8 Pro as a representative product. Further, the Moving Defendants say NOCO is attempting to use Dr. Wood's supplemental affidavit to contradict Mr. Cheng's evidence that was unchallenged on cross-examination, in violation of the rule in *Browne v Dunn*.

[57] The Moving Defendants argue that the functionality of Canadian Tire jump starters is irrelevant, as they are seeking a declaration that any of their products made according to the specific technical configuration set out in Mr. Cheng's affidavit—which encompasses both wiring and source code—do not infringe the 782 Patent. The Court's determination on the construction of claim 1 may or may not be applicable to Canadian Tire jump starters, depending on whether the non-infringement findings turn on the specifics of the source code. Regardless, the Moving Defendants contend the requested non-infringement declaration would not encompass Canadian Tire products because neither Canadian Tire nor the manufacturer, Carku, are parties to this action.

[58] NOCO counters that it could not have anticipated the issues with Mr. Cheng's evidence at the time of his cross-examination, and the rule in *Browne v Dunn* is inapplicable.

Furthermore, NOCO says it now knows, based on the paralegal's affidavit filed in response to the motion to admit, that Mr. Cheng spoke with an internal specialist at Carku on a break during his US examination, in order to confirm the accuracy of a table listing various Carku-manufactured jump starters and the PCBs used in each. NOCO submits this raises further concerns with Mr. Cheng's evidence, as it suggests he is not the person at Carku with the best information about the PCBs used in Carku jump starters, and his evidence is likely hearsay.

B. *Analysis*

[59] Since NOCO seeks to introduce the supplemental affidavit after cross-examinations, Rule 84(2) applies. The factors to consider include the relevance of the proposed affidavit and whether it will assist the Court, any prejudice to the opposing party, and the overall interests of justice, including whether the evidence was available or could have been anticipated earlier: *Havi Global Solutions LLC v IS Container Pte Ltd*, 2020 FC 803 at para 6 [*Havi*]; *Canmar Foods Ltd v TA Foods Ltd*, 2019 FC 1229 at paras 11-12. The factors are not a list of criteria to be met nor are they discrete, mandatory requirements of a conjunctive test; rather, they are factors to be considered and weighed in the Court's discretion: *Havi* at para 58; *Apotex Inc v Canada (Minister of Health)*, 2005 FC 1401 at paras 14, 36, aff'd 2005 FCA 397. The failure to establish any one factor is not necessarily fatal: *Havi* at para 58.

[60] I agree with NOCO that Dr. Wood's supplemental affidavit is relevant to whether there is sufficient evidence in respect of the declaration the Moving Defendants seek—that their products equipped with a CC-209 PCB do not infringe any claim of the 782 Patent. Dr. Wood's evidence assists the Court. His tests on Canadian Tire products were conducted in July 2022, and I am

satisfied that this evidence was not available prior to cross-examinations. Admitting the supplemental affidavit is in the interests of justice, and would not prejudice the Moving Defendants.

[61] I do not accept the Moving Defendants' argument that Dr. Wood's supplemental affidavit should not be admitted because there is a ready explanation for the difference in functionality, which shows that his evidence is not relevant to the products that are at issue in this proceeding. Dr. Wood's affidavit provides evidence that Carku manufactures jump starters that function differently despite having a CC-209 PCB. The Moving Defendants' explanation for the difference in functionality is the result of investigations by the Moving Defendants' counsel after NOCO served its motion to admit Dr. Wood's supplemental affidavit. Furthermore, the Moving Defendants introduce that explanation through an affidavit of a law clerk working with counsel for the Moving Defendants. The law clerk's affidavit attaches email correspondence from the Moving Defendants' counsel setting out the results of counsel's preliminary and further investigations, including discussions with Mr. Cheng who said that Canadian Tire products use a distinct source code identified as CC-209LXL and this is different from CC-209 source code.

[62] The fact that it was necessary for the Moving Defendants' counsel to conduct investigations after receiving Dr. Wood's supplemental affidavit is itself indicative of the relevance of the evidence.

[63] Furthermore, the fact that the Moving Defendants seek to rely on the information uncovered by counsel's investigation to support the relief sought on the motion for summary

trial, by way of counsel's hearsay evidence on a disputed point, highlights a deficiency in the evidence on the summary trial motion. Mr. Cheng's affidavit does not explain the source code Carku uses in association with its CC-209 PCB or how any differences in source code affect functionality, and the Moving Defendants have not filed a further affidavit from him. There is no direct evidence from Carku that explains the different versions of source code programmed on the third-party chips mounted on Carku CC-209 PCBs, and there is no evidence establishing that the difference in functionality that Dr. Wood observed is exclusively a function of CC-209LXL source code that is unique to Canadian Tire products.

[64] The paralegal's affidavit raises additional questions about whether the T8 Pro is representative of all the Moving Defendants' CC-209 Products. It also raises questions about whether the presence of a CC-209 PCB provides a reliable and unambiguous basis for defining what is alleged to be a class of non-infringing jump starter products, encompassing not only existing products but also future products. For example, the paralegal's affidavit indicates that source code on the CC-209 jump starters at issue in the US proceeding was updated around October 2021, and in that proceeding, the T8 Pro was the stipulated representative product for products equipped with a CC-209-V1.2 PCB, not simply a CC-209 PCB.

[65] I am not persuaded that NOCO or its Canadian counsel would have known all of this by reason of NOCO's access to documentary productions in the US proceeding. The paralegal's affidavit is marked as "solicitor's eyes only" confidential information and states that schematics and source code for the Carku products at issue in the US proceeding were provided to NOCO's US lawyers. NOCO asserts it was given limited information, which did not include Mr. Cheng's

deposition or evidence. Furthermore, I expect that Carku and certain Moving Defendants who were also parties to the US proceeding would have known more about the technical distinctions between Carku's products than NOCO, yet the Moving Defendants' Canadian counsel had to conduct an investigation after receiving Dr. Wood's supplemental affidavit, and it took almost two weeks to complete.

[66] For the foregoing reasons, I am satisfied that the *Havi* factors favour admitting Dr. Wood's supplemental affidavit, notwithstanding that it post-dates cross-examinations. NOCO is granted leave to file Dr. Wood's supplemental affidavit.

V. **The Moving Defendants' motion for summary trial**

A. *Overview of the parties' submissions*

[67] The Moving Defendants submit there has been a palpable culture shift to summary disposition, including in patent cases. In 2014, the Supreme Court of Canada issued its decision in *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], which states that rules of summary disposition should be "interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims": *Hryniak* at para 5.

[68] The Moving Defendants submit the issues on this motion are simple, straightforward and suitable for summary adjudication. The Court need only consider one representative product, three documents, and one patent claim. The experts disagree on infringement; however, their disagreement turns on the proper construction of claim 1, which is a question of law for the Court to decide. According to the Moving Defendants, once the Court construes claim 1, there is

no dispute on how that construction would be applied to the T8 Pro to determine whether it infringes the 782 Patent.

[69] The Moving Defendants argue that their motion follows the instruction at paragraph 29 of *Bauer Hockey Ltd v Sport Masko Inc (CCM Hockey)*, 2020 FC 624 [Bauer], where the Court encouraged summary trial following a patent trial that turned on claim construction:

[29] The trial lasted 21 days. Nevertheless, as these reasons will show, the case largely turns upon an issue of claims construction. Claims construction, we are often told, is a question of law, although some forms of evidence are admissible to assist in the process. Where more than 90% of the value of the claim depends on a question of law, the parties should contemplate bringing a motion for summary judgment or summary trial. Had the parties done so in this case, a considerable amount of judicial resources would have been saved, and each party's legal costs would have been substantially reduced...

[70] The Moving Defendants submit there is only one condition precedent for summary trial, sufficient evidence for adjudication, and it is easily satisfied in this case. Where there is sufficient evidence for adjudication, the Court may grant judgment regardless of the amounts involved, the complexities of the case, or the existence of conflicting evidence. The Moving Defendants state there is sufficient evidence for the Court to find that the T8 Pro is representative of their CC-209 Products. Mr. Cheng provided evidence that the Moving Defendants' products equipped with a CC-209 PCB are governed by the same technical architecture, and they all work the same way. As noted above, the Moving Defendants argue that NOCO cannot now challenge this evidence.

[71] According to the Moving Defendants, the power of the order they seek lies in the Court's reasons for non-infringement. NOCO has sued twelve companies in this and other actions, and on a proper construction of the claims, all of the products at issue in these actions would not infringe the 782 Patent. NOCO attempts to cast claim 1 as broadly as possible to capture products that are very different from what was taught in the 782 Patent. The Moving Defendants urge the Court to decide claim construction now, in order to give certainty to the public about the scope of the 782 Patent. They ask the Court to entrench certainty in the order by tying the declaration of non-infringement to the claim elements that the Court determines are not found in CC-209 Products. For example, the Moving Defendants submit that claim 1 requires a microcontroller that is configured to receive specified input signals and to provide specified output signals, and the Court could declare that CC-209 Products do not infringe the 782 Patent because the microcontroller of the CC-209 Products is not configured to receive one or more of the input signals or to provide one or more of the output signals.

[72] The Moving Defendants submit that a summary determination of non-infringement for CC-209 Products will avoid further delay of their ability to resume sales pending trial, by partially adjudicating the de-listing of products on their sole channel of commerce in Canada, Amazon.ca. A decision on this motion will therefore mitigate the ongoing prejudice due to NOCO's *de facto* injunction. Also, the Court's construction of claim 1 will narrow the issues for trial, as the construction will be applied to decide infringement for other allegedly infringing products and to decide the validity issues.

[73] NOCO submits it is not appropriate to decide the issues on this motion summarily. While the Moving Defendants elected to proceed under Rule 216, NOCO argues that the motion is effectively a request for summary judgment under Rule 215. NOCO points to *Gemak Trust v Jempak Corporation*, 2022 FCA 141 [*Gemak*], where the Federal Court of Appeal overturned the Federal Court's decision on a summary judgment motion that turned on only two claim construction issues. It states that many of the Federal Court of Appeal's cautionary comments are directly applicable to this motion.

[74] NOCO states that the claim construction and infringement issues raised on this motion turn on competing expert evidence, and both sides have raised serious credibility issues with the other side's expert that ought to be resolved at trial. NOCO argues the Moving Defendants are attempting to stretch summary judgment "to the extreme" by packing a multi-issue infringement trial into a one-day hearing based on an incomplete and unreliable paper record, without procedural protections such as affidavits of documents and discovery. According to NOCO, the patent cases where this Court has granted judgment summarily before trial and without *viva voce* evidence are clearly distinguishable from this case.

[75] In any event, NOCO states there is insufficient evidence before the Court to make a determination on infringement for CC-209 Products, and *viva voce* evidence would not have remedied the problems of deciding the issues on this motion in a summary way, for two reasons.

[76] First, there is insufficient factual evidence to summarily determine whether the T8 Pro is representative of CC-209 Products. NOCO says it has never accepted and does not concede that

the T8 Pro is representative of CC-209 Products. Since the Moving Defendants seek relief according to their counterclaim, NOCO argues that they bear the burden of proving they are entitled to the declaration they seek. NOCO submits it has not had the benefit of the discovery process to test the Moving Defendants' assertion that the T8 Pro is representative of CC-209 Products, and Dr. Wood's supplemental affidavit confirms that its concerns are legitimate. While the Moving Defendants argue that the Carku products manufactured for Canadian Tire are equipped with a CC-209 PCB programmed with different source code, the argument only serves to demonstrate that Mr. Cheng's evidence is wrong or misleading. Furthermore, the affidavit from the US paralegal suggests that Mr. Cheng's affidavit includes hearsay evidence, based on information he obtained from someone else at Carku.

[77] Second, NOCO contends the Moving Defendants refused to limit their motion to a manageable scope. The motion requires the Court to determine multiple issues of claim construction and infringement involving conflicting expert evidence. Instead of addressing what they believe to be the key issues, the Moving Defendants adopted a "scattershot approach" of putting forward every conceivable argument. They have advanced no fewer than eight issues of claim construction and non-infringement, and have even put in evidence and arguments on claim elements for which infringement is not in dispute. The result, according to NOCO, is that the Moving Defendants seek to have the Court determine the full scope of a non-infringement action by way of a one-day hearing based on conflicting evidence in a paper record.

[78] The Moving Defendants counter that the multiple issues raised on this motion reflect the weakness of NOCO's case, in that the T8 Pro lacks multiple essential elements of claim 1.

Nonetheless, they say a declaration of non-infringement should be granted as long as the Court can determine that the T8 Pro lacks even a single essential element of claim 1.

[79] Turning to any prejudice resulting from the delay to trial, NOCO submits the Moving Defendants have failed to adduce evidence from any one of them that attests to the urgency of the motion or the prejudice they would suffer if the issues on the motion are not determined summarily. The de-listing occurred a year before the notice of motion was served, the Moving Defendants' counterclaim already includes a claim against NOCO for damages, and the de-listing is not a *de facto* injunction because the Moving Defendants are not precluded from selling products in Canada through other channels of trade.

[80] On the other hand, NOCO argues it will be prejudiced if the issues on this motion are decided summarily based on this evidentiary record, without the procedural protections of oral and documentary discovery. NOCO states that the record on its motion to admit Dr. Wood's supplemental affidavit reveals weaknesses in the Moving Defendants' evidence that should be explored on discovery.

[81] Finally, NOCO states that summary trial is not an efficient use of judicial resources. Similar issues about whether products equipped with Carku's CC-209 PCB infringe the 782 Patent are set to be heard in Court File No T-343-20 by way of a full trial commencing February 20, 2023.

B. *Analysis*

[82] The first issue for consideration is whether the Court should summarily decide the issues raised in the Moving Defendants' motion—in other words, whether summary judgment or summary trial are “appropriate”: *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 12 [*Canmar*]; *Janssen v PMS* at para 35, citing *Teva Canada Limited v Wyeth and Pfizer Canada Inc*, 2011 FC 1169 at para 35, rev'd on other grounds, 2012 FCA 141. As the Federal Court of Appeal stated in *ViiV Healthcare Company v Gilead Sciences Canada Inc*, 2021 FCA 122 at para 42 [*ViiV*], the Court must be satisfied that the prerequisites for summary judgment or summary trial are met, and that the Court is able to grant judgment fairly and justly on the evidence adduced and the law.

[83] The Moving Defendants bear the burden of demonstrating that the Court should decide the issues summarily. I find they have not met their burden. The issues raised by the Moving Defendants are not suitable for summary trial, and I am not satisfied that summary disposition would assist with the efficient resolution of the action. There is insufficient evidence for adjudication of the issues raised on this motion and it would be unjust to decide the issues summarily. Therefore, the first issue is dispositive of this motion.

[84] In *ViiV*, the Federal Court of Appeal clarified the approach to summary judgment and summary trial:

[32] Rule 215 governs when the Court may grant summary judgment. It provides that if the Federal Court “is satisfied that there is no genuine issue for trial with respect to a claim or defence”, the Court shall grant summary judgment. There is “no genuine issue for trial” where the judge has “the evidence required

to fairly and justly adjudicate the dispute” on a summary basis, i.e., where “the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result”: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at paras 49 and 66; see also *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22 at para 25 and *Manitoba v Canada*, 2015 FCA 57, 470 NR 187 at para 11.

[33] Put another way, “a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial”: *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 24.

[34] Even if there is a “genuine issue of fact or law for trial with respect to a claim or defence”, the Court may “nevertheless determine that issue by way of summary trial”: Rule 215(3). In such cases, judges have greater powers to decide disputed questions of fact: *Manitoba* at para 16; *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para. 32.

[35] Rule 216 governs the Court’s discretion as to whether to hold a summary trial. The Court may decline to do so if “the issues raised are not suitable for summary trial” or “a summary trial would not assist in the efficient resolution of the action”: Rule 216(5). The Rule also provides that even if the amounts involved are high, the issues are complex or the evidence is conflicting, “the Court may grant judgment either generally or on an issue” unless “the Court is of the opinion that it would be unjust to decide the issues on the motion”: Rule 216(6).

[85] The words “issues...not suitable for a summary trial”, “assist in the efficient resolution of the action”, and “unjust” must be interpreted and applied broadly and in a manner that is consistent with the objectives of Rule 3, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: *ViiV* at paras 18, 36-37.

[86] The nature and sufficiency of the evidence is a key factor in determining if summary trial would provide an appropriate resolution of the issues before the Court: *Federal Courts Rules*,

Rule 216(6); *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 36 [*Milano Pizza*]; *Janssen Inc v Apotex Inc*, 2022 FC 107 at paras 44-45 [*Janssen v Apotex*].

[87] The Court has wide discretion to determine whether it would be unjust to grant judgment. The Court may consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, whether the litigation is extensive and the summary trial will take considerable time, whether credibility is a crucial factor and the deponents of conflicting affidavits have been cross-examined, whether proceeding by summary trial involves a substantial risk of wasting time and effort and producing unnecessary complexity, or results in litigating in slices, and any other matters which arise for consideration: *Wenzel Downhole Tools v National-Oilwell Canada Ltd*, 2010 FC 966, at paras 36-37 [*Wenzel*]; see also *ViiV* at para 38.

(1) The nature of the motion

[88] As noted above, NOCO argues that the Moving Defendants' motion is essentially a motion for summary judgment. NOCO states that in *Gemak*, the Federal Court of Appeal overturned a decision that granted summary judgment in a patent case involving fewer infringement issues than this motion, based on a paper record. Recognizing that summary judgment can have serious consequences for an unsuccessful party who will lose their "day in court", the Federal Court of Appeal stated that cases should go to trial where there are serious issues of witness credibility, and noted that the difficulty in assessing expert witness credibility on a paper record was a long-recognized shortcoming of cases decided under the *Patented*

Medicines (Notice of Compliance) Regulations, SOR/93-133 and one of the factors that led to changes in the regulations in 2017: *Gemak* at paras 68-73. The Court observed that while patent infringement issues are not excluded from the ambit of the summary judgment process, they tend to raise complex issues of fact and law that are usually better left for trial: *Gemak* at para 91.

[89] NOCO argues that the Moving Defendants' election to proceed by way of summary trial did not change the nature of their motion, which presents no principled distinction from the motion in *Gemak*. Therefore, the Federal Court of Appeal's cautionary comments apply equally, if not with greater force, based on the issues the Moving Defendants have raised. NOCO asserts that summary judgment should only be granted in the clearest of cases and the Moving Defendants have not met their burden of demonstrating there is no genuine issue for trial.

[90] The Moving Defendants maintain that they elected to proceed under Rule 216 and they are not required to meet the conditions of Rule 215. They urge caution in applying summary judgment case law, noting that the Federal Court of Appeal in *Gemak* made a clear distinction between summary judgment and summary trial. The Court stated that where there is a genuine issue of fact or law for trial, judges may conduct a summary trial in accordance with the provisions of Rule 216, and in such cases judges have greater power to decide disputed questions of fact: *Gemak* at para 65.

[91] I agree with the Moving Defendants that they brought a Rule 216 motion and it should not be dismissed for failing to meet the requirements of Rule 215. However, the factors the

Court will consider in deciding whether a matter is suitable for summary disposition under Rules 215 and 216 overlap. As the Federal Court of Appeal stated in *ViiV*:

[40] Some of the cases cited in *Milano Pizza* show that in some cases summary proceedings just add to the cost and duration of litigation. But other cases cited in *Milano Pizza* show that in some cases summary proceedings can improve access to speedy, cost-efficient justice.

[41] It is hard enough for parties to drive all the way to the final destination of trial and final determination of the merits of the litigation; to have their journey interrupted along the way and put through summary proceedings is harder still. But a summary procedure can sometimes provide the parties with an express route to their final destination. It all depends. The wise exercise of judicial discretion is called for: taking the words of the Rules, viewing them in light of the objectives of Rule 3 and examples in the case law, and applying them to the particular circumstances of the case.

[42] At the end of the day, the Court must be satisfied that the prerequisites in the Rules for summary judgment or summary trial, understood in light of Rule 3, are met and that it is able to grant summary judgment, fairly and justly, on the evidence adduced and the law.

[Emphasis added.]

[92] Also, I disagree that the test under Rule 215 is as strict as NOCO suggests. Summary judgment is not reserved for the clearest of cases, as NOCO asserts: *Gemak* at para 66, citing *Milano Pizza* at para 33. An apparent conflict in the evidence does not preclude summary judgment, and the pre-requisite of “no genuine issue for trial” can be satisfied where the motions judge has the evidence that is required to fairly and justly adjudicate the dispute: *Milano Pizza* at paras 29-31.

[93] Consequently, judges faced with a motion for summary disposition based on a paper record may be guided by similar factors to decide whether the matter is suitable for summary adjudication, regardless of whether the motion is made under Rule 215 or Rule 216.

[94] In appropriate cases, patent issues requiring expert evidence can be decided fairly and justly based on a paper record. Indeed, insisting that parties reserve multiple days for a summary trial in patent cases to allow the Court to hear *viva voce* evidence from experts can, in some cases, result in delay and expense that would not be in keeping with the objectives of Rule 3 and the principles of proportionality. Furthermore, regardless of whether a motion is made under Rule 215 or 216, a motions judge does have tools that can sometimes remedy any shortcomings of a paper record, if the judge is otherwise satisfied that summary adjudication is appropriate. Of course, parties still need to consider whether there is a need for *viva voce* evidence before conducting cross-examinations out of court, as the available tools are more limited and less useful after cross-examinations are complete.

[95] While many of my reasons for deciding that this matter is not suitable for summary trial would apply to a motion for summary judgment, my decision does not turn on the “true nature” of the motion. That is not to say that the Moving Defendants’ decision to proceed by way of a one-day hearing, based on a paper record, where both sides have raised serious issues of credibility, are not relevant factors in deciding whether summary trial is appropriate in the circumstances of this case. These points remain relevant factors, and I agree with NOCO that the cautionary comments in *Gemak* are applicable to this case. However, reserving multiple days for

the motion or having in-court cross-examinations would not have resolved my concerns with deciding the issues summarily.

[96] The Moving Defendants state that the only condition precedent for summary trial is whether there is sufficient evidence for adjudication, but this is not correct. Rule 216(5) provides that the Court shall dismiss a motion for summary trial if the issues are not suitable for summary trial or a summary trial would not assist in the efficient resolution of the action. Rule 216(6) provides that the Court may grant judgment, generally or on an issue, if the Court is satisfied that there is sufficient evidence for adjudication, unless the Court is of the opinion that it would be unjust to decide the issues on the motion. I address these points below.

- (2) The issues raised by the Moving Defendants are not suitable for summary adjudication

[97] In my view, the Moving Defendants have not presented a sufficiently narrow and well-defined non-infringement issue that is suitable for summary adjudication. The issues presented for determination are not narrow, and the Moving Defendants have not limited the motion to a manageable scope. I agree with NOCO that the contentious issues on the motion are too numerous, broad and complex to fairly and properly decide them summarily. Furthermore, the issues are not well-defined. The Moving Defendants present multiple, alternative arguments with respect to the bases for non-infringement and the scope of products covered by the requested declaration of non-infringement.

[98] As noted above, the requested relief is a declaration under section 60(2) of the *Patent Act* that the Moving Defendants' products equipped with a CC-209 PCB do not infringe any claim of

the 782 Patent. The Moving Defendants state the requested declaration would cover certain jump starters identified by model name/number in NOCO's amended statement of claim that are equipped with a CC-209 PCB, and it would more broadly cover all their jump starters that utilize this CC-209 PCB, independent of model name/number. The Moving Defendants led evidence that Carku is able to mark the packaging, in order to identify that a jump starter is equipped with a CC-209 PCB.

[99] The Moving Defendants' position is that the Court only needs to decide non-infringement for a single essential element of claim 1 of the 782 Patent; however, they have not limited their arguments to the claim terms that must be construed in order to make a finding of non-infringement based on a single essential element of claim 1. Instead, they have advanced what appear to be all possible non-infringement arguments for claim 1. They ask the Court to "entrench certainty" in the declaration of non-infringement by incorporating an explanation of the claim elements that the Court ultimately determines are not embodied in CC-209 Products.

[100] Furthermore, some of the essential elements alleged to be missing from CC-209 Products are outside the CC-209 PCB, or at least not confined to it—for example, "output port". The Moving Defendants state that the CC-209 PCB is "the circuitry that controls the functioning of the device", but they have not adequately explained how the presence of a CC-209 PCB provides a reliable and unambiguous basis for defining what they allege to be a class of non-infringing jump starter products.

[101] At the same time, the Moving Defendants urge the court to fully construe claim 1 on this motion, in order to give certainty to the public about the scope of the 782 Patent. To streamline the action going forward and narrow the issues for trial, they ask the Court to direct that the claim construction findings made on this motion shall apply to decide infringement for other allegedly infringing products and to decide validity issues. They assert that the issues raised on this motion are appropriate for summary trial because patent claim construction is a question of law for the Court to decide, and their approach was encouraged in *Bauer*.

[102] Patent claim construction is not, however, a “pure” question of law. Patents must be read through the eyes of a skilled person who approaches the patent with an appreciation of the common general knowledge in the art to which the patent relates, which introduces a factual aspect to the analysis: *Tearlab Corporation v I-MED Pharma Inc*, 2019 FCA 179 at paras 28-29.

[103] The level of factual complexity that is necessary to construe patent claims varies. At times claim construction requires heavier reliance on expert evidence to understand scientific or technical concepts that lie far outside of the Court’s experience or knowledge, and at times claim construction can be decided with less reliance on expert evidence, or even without it—for example, see *Canmar Foods Ltd v TA Foods Ltd*, 2019 FC 1233 at paragraph 81, affirmed in *Canmar*. During oral argument, the Moving Defendants acknowledged that there is an electrical engineering “barrier to entry” in this case, and some of the concepts necessary to decide the issues can be difficult for a lay person to follow. In short, claim construction issues do not automatically lend themselves to summary disposition by virtue of being questions of law.

[104] I disagree with the Moving Defendants that summary trial is appropriate as long as the Court is able to find that a single product, the T8 Pro, lacks a single essential element of claim 1 of 782 Patent. Even leaving aside issues with the adequacy or credibility of the technical evidence, the Moving Defendants have not provided any evidence to explain why the issue of whether the T8 Pro infringes the 782 Patent requires a separate determination before trial. If the T8 Pro is not found to be representative of a class of products, confining the inquiry to a single product of one of the Moving Defendants and a single essential element would not foster expediency, narrow the issues for trial and streamline the action, or assist with its efficient resolution. It amounts to litigating in slices, as discussed in the next subsection: *Wenzel* at paras 37-38.

[105] More importantly, this is not how the Moving Defendants framed their motion. The Moving Defendants presented multiple non-infringement arguments, and a range of possible non-infringement declarations that this Court could make, with the expectation that the Court could decide the motion on a narrower basis or re-define the relief. The issues raised and the expert and fact evidence that was adduced required NOCO to respond to a full-scope non-infringement action extending beyond the allegedly infringing products in NOCO's pleading, before any oral or documentary discovery had taken place. In my view, such an approach is inconsistent with the values underlying summary adjudication as a means for proportionate, cost-effective, and timely dispute resolution that fairly balances expediency with a just resolution of the issues in dispute: *Hryniak* at paras 1-2; *Canmar* at para 23.

[106] In this case, the motion raises multiple, complex issues of claim construction and infringement that have not been framed in a manner suitable for summary determination.

(3) Summary disposition would not assist with the efficient resolution of the action

[107] As noted above, the words “assist in the efficient resolution of the action” must be interpreted and applied in a manner that is consistent with the objectives of Rule 3 and the proportionality principle: *ViiV* at paras 18, 36-37. The Moving Defendants acknowledge that a declaration of non-infringement for CC-209 Products would leave infringement and validity issues for trial. Their argument about efficiencies is that if the Court decides the construction of claim 1 now, it will streamline the action going forward and possibly lead to a settlement of the action.

[108] I am not satisfied that a summary determination of the construction of claim 1 will assist with the efficient resolution of the action in this case.

[109] Motions for summary judgment or summary trial are time-intensive, and do not necessarily provide an “express route” to resolving a dispute: *ViiV* at para 41. Proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative: *Hryniak* at para 33.

[110] Procedural steps leading to trial, including documentary and oral discoveries, may also serve to streamline a case, narrow the issues for trial, and promote settlement. The evidence on this motion demonstrates that there are serious issues with respect to the underlying factual basis

for deciding infringement, including whether the T8 Pro is representative of CC-209 Products. In my view, allowing the discovery process to unfold is a more proportionate and efficient way to address these issues, particularly under case management.

[111] Restricting judgment to the T8 Pro alone, without deciding whether it is representative of other products, is not an efficient way to proceed and amounts to litigating in slices. This approach would not narrow the issues for discovery with respect to other products at issue, including the products of defendants who are not parties to this motion. Furthermore, deciding the issues the Moving Defendants have raised without understanding how the findings would affect other products at issue may result in repetition or even complicate the issues to be determined at trial on a more complete factual record.

[112] While the Moving Defendants point to the possibility of settlement, I note that the Federal Court of Appeal rejected a similar argument in *Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5 [*Realsearch*]. *Realsearch* involved a motion under Rule 107 for a separate determination on the construction two claim terms, before the action on infringement and validity would proceed—a process that, in some ways, is similar to a *Markman* hearing in US patent litigation: *Realsearch* at paras 4, 8. While it was not a motion for summary trial, the Federal Court of Appeal’s comments about deciding issues in advance to improve the likelihood of settlement are instructive. In this regard, the Court stated that the words “just, expeditious and least expensive determination” in Rule 3 relate to the Court’s ability to determine the issues, and not a means of assisting the parties to reach an out-of-court settlement of their dispute: *Realsearch* at para 16. The Court also noted the importance of giving sufficient attention to

whether an early determination on claim construction would secure a just determination of the proceeding on its merits: *Realsearch* at para 17.

[113] For the foregoing reasons, I am not satisfied that deciding the issues raised on this motion would assist to efficiently resolve the action due to a prospect of streamlining the proceeding or increasing the likelihood of settlement.

(4) There is insufficient evidence for adjudication

[114] Patent infringement trials and issues are inherently complex, and technical: *Wenzel* at para 38. However, Rule 216(6) provides that complexity is not a barrier to summary trial where there is sufficient evidence for adjudication and it would not be unjust to decide the issues on the motion.

[115] In my view, NOCO has “put its best foot forward” with evidence, as it was required to do: *Gemak* at para 67, citing *Milano Pizza* at para 34, among other decisions; see also *Janssen v Apotex* at para 52. NOCO has responded fully to the motion, and it has provided clear and supported reasons for believing there are serious issues with whether there is sufficient evidence for summary adjudication.

[116] I find there is insufficient evidence on this motion to fairly and justly adjudicate whether CC-209 Products infringe claim 1 of the 782 Patent. As I have already explained a number of issues with the sufficiency of the evidence elsewhere in these reasons, this subsection will briefly summarize some key points.

[117] In my view, there is insufficient evidence of how the CC-209 PCB component of the Moving Defendants' jump starters necessarily dictates relevant aspects of the technical architecture for the purpose of deciding infringement. The Court is not in a position to summarily determine that jump starters "equipped with a CC-209 PCB" would reliably and unambiguously define a class of products, including future products, for the purposes of a declaration of non-infringement.

[118] Similarly, there is insufficient evidence for the Court to determine that the T8 Pro is representative of CC-209 Products. The Moving Defendants' evidence is not sufficiently clear or complete in this regard, and NOCO has raised serious issues with the evidence. Dr. Wood's supplemental affidavit indicates that jump starters with a CC-209 PCB manufactured for two different Carlu customers did not function in the same way, and the Moving Defendants' argument that there is a ready explanation for the difference relies on counsel's hearsay evidence. There is insufficient evidence to establish that the difference Dr. Wood observed is exclusively a function of CC-209LXL source code that is unique to Canadian Tire products, and insufficient evidence of how differences in source code affect jump starter functionality.

[119] In addition, the parties have each raised issues with the credibility of the other side's witnesses. NOCO raises issues with Dr. Walker's credibility and the Moving Defendants allege that Dr. Wood has provided inconsistent opinions on issues of claim construction, and refused to answer questions on cross-examination. They say parts of his cross-examination exposed him as an advocate for NOCO's position.

[120] Judges have to take a “hard look” before deciding that there are issues of credibility that need to be resolved: *Milano Pizza* at para 39. Credibility is not necessarily a crucial issue; furthermore, the existence of conflicting affidavit evidence or disagreements between affiants do not necessarily establish that any affiant lacks credibility: *Collins v Canada*, 2015 FCA 281 at paras 78-80.

[121] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself; however, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination: *Hyrniak* at para 51.

[122] The Federal Court of Appeal recently reiterated that cases should go to trial where there are serious issues with respect to the credibility of witnesses: *Gemak* at para 71. The Court specifically noted the difficulty in assessing the neutrality and objectivity of expert witnesses, particularly in complex patent cases, based on a paper record: *Gemak* at paras 68-70, 88-89.

[123] The affiants on this motion were cross-examined out of court, and the motion for summary trial is based on a paper record. The Federal Court of Appeal has cautioned that it is difficult to infer a hostile attitude from a transcript (*Gemak* at paragraph 87) and difficult to decide, in the absence of *viva voce* evidence tendered in open court, whether a witness has crossed a line between being an objective, firm witness and an advocate (*Gemak* at paragraph 89). These cautions apply to the specific credibility concerns the Moving Defendants have raised in respect of Dr. Wood’s evidence.

[124] I have taken a hard look at the credibility issues raised. In my view, this is a case where it is not possible to make the necessary findings to reach a just and fair determination. The credibility issues affect multiple, important issues that this Court is being asked to decide summarily, and the credibility issues cannot be addressed justly and fairly by a summary proceeding.

[125] For these reasons, I find there is insufficient evidence to decide the issues raised on this motion summarily.

(5) It would be unjust to decide the issues summarily

[126] Lastly, having considered and weighed the factors summarized in *Wenzel*, I find it would be unjust to decide the issues raised on this motion summarily. Again, since a number of the points have been discussed elsewhere in these reasons, I will only briefly address some of the main points below. In my view, the *Wenzel* factors weigh against summary determination.

[127] ***Amounts involved compared to the cost of a conventional trial:*** There is no evidence of the monetary amounts at issue in the proceeding or the volume of the Moving Defendants' Canadian jump starter sales. Without some sense of these figures, it is not possible to conclude that the expense of trial would be disproportionate in relation to the amounts claimed, or that the Moving Defendants' businesses would be unduly prejudiced by the delay of a full trial.

[128] ***Complexity of the matter:*** Deciding the motion on the merits would involve making findings of fact about the products or class of products at issue, and would also require a decision

on multiple claim construction and infringement issues based on conflicting opinions from technical expert witnesses and a paper record. There are multiple points of disagreement on claim construction and the essential elements of claim 1 of the 782 Patent. In comparison to other summary judgment and summary trial decisions where this Court has found it appropriate to summarily adjudicate issues of patent infringement, this motion is more complex, including in terms of the products at issue and claim terms to be construed.

[129] *Urgency of the matter and any prejudice likely to arise by reason of delay:* The Moving Defendants argue that the Amazon.ca de-listing requires urgent resolution. The evidence on this point is from a Caraku employee, and some of it is hearsay. The employee states Caraku has not received any orders from the Moving Defendants for vehicle jump starters packaged for retail sale in Canada since late 2020, and the Moving Defendants have been unable to sell their jump starter products through Amazon.ca since NOCO submitted a complaint in early 2021. There is no evidence from any of the Moving Defendants about the value or volume of the loss of business, or the impact of de-listing on their businesses.

[130] *Whether credibility is a crucial factor:* There are serious issues of credibility that cannot be resolved based on the record on this motion, including credibility issues the Moving Defendants have raised.

[131] *The course of the proceedings, whether the litigation is extensive and the summary trial will take considerable time, and whether summary disposition involves a substantial risk of wasting time and effort, produces unnecessary complexity, or involves in litigating in slices:*

Determination of the issues on this motion would not be dispositive of the issues in the action, and summary adjudication of the construction of claim 1 is unlikely to assist with the efficient resolution of the action. Allowing the discovery process to unfold provides a more just and proportionate way to streamline the case and narrow the issues for trial. Summary disposition of the issues on this motion would not further the objective of securing a just, expeditious and less expensive determination of the issues before the Court on the action as a whole.

[132] *Any other matters which arise for consideration:* A full trial involving the 782 Patent is scheduled to commence on February 20, 2023, in the action against Canadian Tire. Summary adjudication of the claim construction issues on this motion may be duplicative, and run the risk of inconsistent findings or adding complexity to the issues for determination in that action.

VI. Conclusion

[133] With the exception of paragraph 50, NOCO's motion to strike out parts of the Walker Reply is granted. NOCO's motion to admit Dr. Wood's supplemental affidavit is also granted.

[134] The motion for summary trial is dismissed. The Moving Defendants have not met their burden to establish that the issues raised on the motion are suitable for summary adjudication.

[135] At the hearing, I directed the parties to discuss a possible agreement on costs, failing which the Court would provide an opportunity for written cost submissions. The parties were unable to agree on costs. Since NOCO will be involved in the trial commencing this month in Court File No T-343-20, the Court will hear from the parties before setting a schedule for written

cost submissions. Within one week of this decision, the parties shall file a joint letter or separate letters with a proposed schedule and page limit for written cost submissions. The parties shall provide reasons for proposing a page limit any higher than 10 pages, excluding bills of costs or lists of authorities.

ORDER in T-484-21

THIS COURT ORDERS that:

1. NOCO's motion to strike out parts of the Walker Reply is granted in part. Paragraphs 5-26, 27-30, 31-37, 49 and 51 (first sentence), 52-60 and the corresponding exhibits K-M and O-R of the Walker Reply are struck out.
2. NOCO's motion for leave to file Dr. Wood's supplemental affidavit is granted.
3. The Moving Defendants' motion for summary trial is dismissed.
4. Costs of the motions are reserved. The parties shall jointly or separately propose a schedule and page limit for written cost submissions within seven days of this decision, and the Court's direction on cost submissions will follow.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-484-21

STYLE OF CAUSE: THE NOCO COMPANY, INC. v GUANGZHOU
UNIQUE ELECTRONICS CO., LTD., SUI CHENG
LIMITED, SHENZHEN GOOLOO E-COMMERCE
CO., LTD., AUKEY TECHNOLOGY CO. LTD.,
and v SHENZHEN YIKE ELECTRONICAS CO., LTD.,
SHENZHEN DINGJIANG TECHNOLOGY CO. LTD.,
SHENZHEN LIANKE ELECTRON TECHNOLOGY
CO., LTD., SHENZHEN TOPDON ELECTRONIC CO.,
LTD., HUNAN LIANKE ELECTRONIC COMMERCE
CO., LTD., SUBSTANBO INNOVATIONS
TECHNOLOGY LIMITED LIABILITY COMPANY,
AND SUBSTANBO INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 8, 2022

**PUBLIC ORDER AND
REASONS:** PALLOTTA J.

DATED: FEBRUARY 13, 2023

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