

Federal Court



Cour fédérale

Date: 20200120

Docket: T-1645-19

Citation: 2020 FC 81

Ottawa, Ontario, January 20, 2019

PRESENT: Mr. Justice McHaffie

BETWEEN:

FLUID ENERGY GROUP LTD.

Plaintiff

and

**EXALTEXX INC., NOVAMEN INC. AND
GLOBALQUIMICA PARTNERS LLC**

Defendants

ORDER AND REASONS

I. Overview

[1] Cease and desist letters are a common part of pre-litigation proceedings in Canada, including in patent infringement cases. Although not required by law, such demand letters can serve laudable purposes of providing notice of a legal claim and a potential lawsuit, allowing the recipient to assess the claim and their conduct, and initiating discussions leading to resolution of the dispute before litigation is commenced.

[2] At the same time, cease and desist letters that threaten litigation, and all of its associated risks and costs, can be used tactically in a way that avoids a determination of the true merits of a claim. Sending infringement allegations and threats of expensive patent litigation to customers or suppliers of an alleged infringer can result in the defendant being significantly harmed in the marketplace, and even forced from it entirely, long before a determination of infringement is made. Where such letters are untrue, in that the patent is not valid or not infringed, they may themselves be actionable. Where the requirements for an injunction are met, they may be enjoined.

[3] In this patent infringement action, Fluid Energy Group Ltd asserts that products of its competitor, Exaltexx Inc, infringe its patents. After starting the action, Fluid sent three cease and desist letters, including to a company that supplies a chemical to Exaltexx, and a small trucking company that hauls product from Exaltexx to one of its customers. These letters made broad-ranging assertions of infringement covering Exaltexx products and threatened patent litigation against the companies if they refused to comply with the demand to immediately cease and desist. The trucking company in particular felt it had no choice but to comply with the demand and cease handling Exaltexx products.

[4] Exaltexx seeks an interlocutory injunction preventing Fluid from sending further cease and desist letters to third parties alleging that they or Exaltexx infringe Fluid's patents, or demanding that they stop dealing with Exaltexx's products. Exaltexx states that the letters go beyond acceptable pre-litigation correspondence, and are causing irreparable harm to its business.

[5] In the present case, I am satisfied that Exaltexx has raised a serious question to be tried that Fluid's allegations that its suppliers of products and services are infringing Fluid's patents are actionable under subsection 7(a) of the *Trademarks Act*, RSC 1985, c T-13. I am also satisfied on the evidence that in the context of this industry, permitting Fluid to continue to write such letters to Exaltexx's suppliers would cause irreparable harm to Exaltexx, given the small number of chemical suppliers and transporters available, the impact Fluid's letters have had to date, and the impact Fluid clearly intends them to have. In the absence of any evidence filed by Fluid as to any harm the requested injunction would cause to their business interests, I find that the balance of convenience favours granting an injunction.

[6] However, Exaltexx has not filed adequate evidence to raise a serious question regarding the infringement allegations made about Exaltexx's products themselves. This is not because there is evidence that Exaltexx infringes, but because there is no proper evidence one way or another and Exaltexx bears the onus on its motion. Absent such evidence, I am not satisfied that it has established a serious question that Fluid's infringement allegations about the products themselves are false and thus actionable under subsection 7(a).

[7] An injunction is therefore issued on the terms set out below, enjoining Fluid from communicating with Exaltexx's suppliers (a) alleging that they are infringing Fluid's patents by dealing with Exaltexx's products, (b) demanding that they cease dealing with Exaltexx's products, and/or (c) threatening legal proceedings for infringement. However, the injunction will not at this time extend to enjoin Fluid from alleging that Exaltexx's products infringe Fluid's patents, or from communicating with customers or potential customers of Exaltexx.

II. The Litigation Background

[8] Fluid and Exaltexx are competitors in the sale of chemicals to the oil and gas industry. Each sells chemical products described as “safe acids”: strong acids that have been modified by blending them with additives to be more environmentally and dermatologically safe. These products are sold to customers who inject them downhole to stimulate oil production from a formation.

[9] In November 2017, Fluid sued Exaltexx in the Alberta Court of Queen’s Bench, alleging that Exaltexx breached a confidentiality agreement signed when the parties were discussing a potential business relationship. A second action in that Court was brought in November 2019, naming both Exaltexx and two of its officers. Those cases are ongoing.

[10] In this Court, Fluid alleges that Exaltexx products infringe patents held by Fluid. Fluid holds nine Canadian patents that pertain to acid compositions, issued between 2016 and 2019. By way of overview:

- six of these patents claim synthetic acid compositions for use in oil industry activities or, in the starred patent, “downhole oil industry activities”, and uses thereof (CA 2,892,876*; CA 2,961,777; CA 2,961,787; CA 2,961,792; CA 2,961,794; and CA 2,961,783);
- one claims synthetic acid compositions for use in industrial activities that do not include any downhole activities, and uses thereof (CA 2,892,875);
- one claims uses of a modified acid composition in various industries including the oil industry (CA 3,006,476); and

- the last claims aqueous synthetic acid compositions, uses thereof, and methods that comprise use of the compositions (CA 2,974,757).

These descriptions are provided for context and without making any findings regarding the scope or construction of the patents. As necessary below, I will refer to each patent by the final three numbers of the patent (*e.g.*, the '876 Patent).

[11] Fluid has also named as defendants two of Exaltexx's chemical suppliers, GlobalQuimica Partners LLC and Novamen Inc. Fluid alleges that GlobalQuimica and Novamen have also infringed Fluid's patents, and that they induced Exaltexx to infringe by supplying some or all of the components of the products alleged to infringe; induced other competitors, customers, suppliers and distributors to infringe; and conspired with Exaltexx to infringe. Counsel for GlobalQuimica and Novamen was present at the hearing of this motion, but those parties took no position on and no part in the motion. At the hearing, the Court was advised that a settlement had been reached between Fluid and Novamen that was expected to lead to the discontinuance of the action against Novamen.

[12] Fluid put GlobalQuimica and Exaltexx on notice of its infringement allegations through a cease and desist letter dated February 26, 2019. That letter identified an acid additive product manufactured by GlobalQuimica and marketed as GQ-300, which is relabeled by Exaltexx and resold in Canada as ACA (Acid Controlling Additive), which Fluid alleged infringed the '876 Patent, the '777 Patent and the '787 Patent. The letter attached a copy of Fluid's Statement of Claim against Exaltexx in the Alberta Court of Queen's Bench.

[13] The Federal Court action was filed on October 9, 2019. In late October, Exaltexx's counsel wrote to Fluid's, alleging deficiencies in Fluid's Statement of Claim, including a failure to adequately particularize the claims of infringement and inducing infringement. Exaltexx requested amendments to the Statement of Claim. After a brief exchange, on November 1, Fluid's counsel indicated that it would consider the issue and respond, agreeing to extend the deadline for a defence in the interim. A follow up from Exaltexx on December 11 resulted in Fluid responding that it was considering the matter and would respond soon.

III. The Impugned Cease and Desist Letters

[14] While the pleadings issue was outstanding, Exaltexx discovered that Fluid's counsel had written to Panther Industries Inc, one of Exaltexx's raw chemical suppliers, and to Dwayne Hommy Trucking Ltd, the preferred transporter of one of Exaltexx's clients. The two letters, dated December 9, 2019, are effectively identical, and are effectively identical to a third letter of the same date sent to Nitmoi Labs Inc.

[15] Because the content of the letters is material, I reproduce the text of the letter below, using the letter to Panther as an example. I have added paragraph numbers for ease of reference.

1. We are legal counsel for Fluid Energy Group Ltd. (**Fluid**). The purpose of this letter is to put you on notice of a potential legal claim and Court action by Fluid against Panther Industries Inc. (**Panther**) for patent infringement and/or inducing or procuring patent infringement.

2. It has come to Fluid's attention that Panther has been storing for sale, transporting, importing, shipping, distributing, supplying, selling and/or using modified and synthetic acid products and systems that are marketed and sold by Exaltexx Inc. (**Exaltexx**) or their distributors that may be known only to you in Canada, including but not limited to products known and sold as Stimtexx SPA HCl, GQ-300 Acid Additive, Acid Controlling

Additive, ACA Concentrate, and Ener-Ox HC Acid Replacement (collectively, the **Infringing Products**), for various uses in the oil and gas industry in Canada.

3. Fluid believes that the composition and use of the Infringing Products, either as sold, or when mixed as intended with other additives, fall within the scope of the claims of Fluid's Canadian Patents No. 2,892,875, 2,892,876, 2,961,777, 2,961,787, 2,961,792, 2,961,794, 2,961,783, 2,974,757 and 3,006,476 (the **Fluid Patents**), which grant Fluid the exclusive right to manufacturer, sell, and license the use of the protected compositions for the life of the patents.

4. Fluid has commenced a legal action for patent infringement in the Federal Court of Canada against Exaltexx, and other manufacturers and distributors of the Infringing Products. A copy of the Statement of Claim is enclosed.

5. Please take note that by storing for sale, transporting, importing, shipping, distributing, supplying, selling and/or using the Infringing Products in Canada, Panther has infringed, is continuing to infringe, and/or has induced and procured others to infringe, the Fluid Patents. Fluid hereby demands that Panther immediately cease and desist from storing, transporting, importing, shipping, distributing, supplying, selling and/or using the Infringing Products, or any similar infringing products, in Canada, and confirm in writing to the undersigned that it has done so and will continue to do so, by no later than Friday, December 20, 2019.

6. **If Panther refuses to comply with this demand, Fluid will take legal action to protect its intellectual property and patent rights without further notice**, including an action for injunctive relief and to recover damages, including loss of profits and reputational damage, and/or an accounting and delivery up of profits received by Panther as a result of its unlawful acts, together with punitive damages and legal costs.

7. Fluid further demands that Panther take immediate steps to retain and preserve all potentially relevant records, both in paper and electronic format (the Records), including but not limited to: active data and records (such as all material, safety and product data sheets, and all shipping, delivery, inventory, customs, waybill and sales records related to the Infringing Products); archived and back-up data, including any data at risk of timed or routine deletion; data on stand-alone computers, cell phones, tablets, and other electronic devices, including metadata from all such devices;

and text messages, voicemails, or any other recorded interactions. As a potential party to impending legal action, Panther is obligated to assist in the retention and preservation of the Records. We ask that you consult with forensic and information technology consultants, as needed, to ensure the proper preservation of electronic Records. Panther must not destroy, delete, or alter the Records in its possession or control in any manner.

8. We await your timely response.

[Bold in original.]

[16] Other than forwarding the letter to Exaltexx, there is no information on the record regarding Panther's response or reaction to the letter. Hommy Trucking, however, retained counsel, who wrote to Fluid's counsel indicating that Hommy Trucking was a small trucking company and asking Fluid to rescind its letter. When Fluid refused to do so, Hommy Trucking's counsel wrote to Exaltexx's counsel, saying they had no choice but to advise their client to agree to cease handling Exaltexx products.

IV. Exaltexx's Motion

[17] This motion was brought on December 18, 2019, requesting a hearing by December 20. The motion sought both an order pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106, striking the Statement of Claim without leave to amend, and an injunction enjoining Fluid from

disseminating any further statements, including the provision of copies of the Statement of Claim of the within action, to any supplier, distributor, customer or other party associated or involved with Exaltexx' safe acids business which allege breach or infringement of the Asserted Patents and/or which threaten legal proceedings for infringement or breach of the Asserted Patents[.]

Exaltexx's motion also sought disclosure of parties to whom Fluid had sent statements alleging breach or infringement and/or which threaten legal proceedings.

[18] Exaltexx's motion is supported by an affidavit from Katherine Ayotte, Chief Financial Officer of Exaltexx, and a law clerk's affidavit attaching various correspondence.

[19] The day following service of Exaltexx's motion, Fluid served an Amended Statement of Claim. Exaltexx asserts that the amendments do not satisfy its concerns about the Statement of Claim and the particularization of the allegations of infringement and inducing infringement. Exaltexx maintains its motion to strike the Statement of Claim, which remains outstanding.

[20] After discussions between Exaltexx and Fluid, the parties reached an agreement that allowed for the orderly conduct of the injunction aspect of the motion. That agreement included a requirement that Fluid provide a list of parties that had been contacted alleging that Exaltexx is infringing Fluid's patents or demanding that the recipient cease and desist from selling Exaltexx products, and providing non-privileged communications. It also included a temporary agreement by Fluid not to send further correspondence, on terms that Exaltexx now submits should be continued by the Court, namely that:

- 1) Fluid not communicate with any new parties alleging that (i) Exaltexx is infringing its patents or (ii) demanding that they cease and desist from selling, distributing, etc. Exaltexx's products on that basis.
- 2) Fluid not initiate further contact with the parties it has already contacted alleging that (i) Exaltexx is infringing its patents or (ii) demanding that they cease and desist from selling, distributing, etc. Exaltexx's products on that basis.

[21] No prohibition was agreed to, or is sought by Exaltexx, restricting Fluid from commencing any patent infringement actions, either by way of new action or adding parties to this action, or from discussing settlement with any of the defendants.

[22] The interim agreement pending the injunction hearing was expressly without prejudice to the parties' positions and arguments on the motion.

[23] Subsequent to the agreement, Fluid advised Exaltexx that the only parties that Fluid had communicated with were Panther, Hommy Trucking, Nitmoi Labs, and Brenntag Canada Inc. Ms. Ayotte's evidence is that Brenntag is a chemical supplier Exaltexx had been dealing with since 2015, but that in early November 2019, Brenntag advised that it was rescinding a quote on acid supply and blending services and would no longer be able to provide custom acid blending to Exaltexx. Fluid did not provide a copy of written correspondence with Brenntag, so it can be inferred that communications with Brenntag were either oral or are subject to a claim of privilege.

[24] Fluid briefly cross-examined Ms. Ayotte on her affidavit, but chose not to file any evidence itself in response to Exaltexx's injunction motion.

V. Preliminary Issues

[25] Fluid raises two preliminary issues regarding the prerequisites for bringing a motion for injunctive relief. While each raises an important issue, I find that each is answered by undertakings given by counsel at the hearing of the motion.

A. *Motion Prior to Proceedings*

[26] Rule 372 provides that motions may only be brought before “the commencement of proceedings” in situations of urgency and only if an undertaking to commence proceedings is given:

Motion before proceeding commenced

372 (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

[Emphasis added.]

Requête antérieure à l’instance

372 (1) Une requête ne peut être présentée en vertu de la présente partie avant l’introduction de l’instance, sauf en cas d’urgence.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s’engage à introduire l’instance dans le délai fixé par la Cour.

[Je souligne.]

[27] Fluid notes that Exaltexx has not commenced a claim or counterclaim against Fluid, and that its motion materials gave no undertaking to do so. Exaltexx responds that an action has already been commenced by Fluid, such that the Rule does not apply. In the alternative, counsel for Exaltexx indicated that the matter was brought on an urgent basis, and confirmed that he had instructions to undertake to commence a counterclaim as required by the Court. Exaltexx submitted that it would be appropriate to await the outcome of the outstanding pleadings motion, and to commence the counterclaim in due course in response to the claim if and as it stood after that motion. At the same time, counsel asked that any requirement to file a counterclaim before

the pleadings motion be expressly without prejudice to the outstanding pleadings motion, a proviso that Fluid did not object to.

[28] I agree with Fluid that a counterclaim must be considered a separate proceeding for purposes of Rule 372. The *Federal Courts Rules* generally recognize counterclaims as separate actions from the main claim, although they are asserted within the same court file. Thus counterclaims must themselves be “commenced;” may proceed independently from the main action; may be brought against parties not party to the main action; and are described as “proceedings” in a number of places: *Federal Courts Rules*, Rules 62(2), 63(1)(b), 105, 171(b), 182, 189-192, 419, Form 171E.

[29] Further, the principle behind Rule 372 is that the motions described in Part 8, including injunction motions, are for the preservation of rights in a proceeding, *i.e.*, they address matters on an interlocutory basis pending a full determination of rights. The nature of the pending claim, and the relief sought, are to be described and defined in pleadings. This is as true for motions brought by a defendant to preserve rights pending determination of a counterclaim as it is for motions brought by a plaintiff to preserve rights pending determination of the main action: *AMTIM Capital Inc v Appliance Recycling Centers of America*, 2018 CarswellOnt 8793 at para 19.

[30] I therefore agree that this motion was brought before commencement of proceedings for purposes of Rule 372, so the urgency and undertaking requirements must be met. As to the former, I am satisfied that Exaltexx’s motion was brought in a situation of urgency. The motion

was originally brought on short notice within a week of Exaltexx becoming aware of the letters sent to Panther and Hommy Trucking. In the circumstances, and particularly in light of the outstanding concerns raised regarding the Statement of Claim, I accept that it was reasonable to bring the motion before commencing a counterclaim.

[31] As to the latter, the undertaking required by Rule 372(2) was not given by Exaltexx in its motion materials. However, counsel at the hearing indicated that he was instructed to provide the undertaking and did so. In particular, counsel indicated Exaltexx's intention and undertaking to counterclaim against Fluid when required to plead in response to "a proper pleading," including a counterclaim for damages and an injunction under subsection 7(a) of the *Trademarks Act* arising from the cease and desist letters sent by Fluid. Counsel for Fluid accepted that an undertaking from counsel was satisfactory for this purpose.

[32] With reference to *AMTIM Capital*, Fluid suggests that a draft counterclaim ought to have been filed by Exaltexx pending the pleadings motion. However, as Exaltexx points out, the situation in *AMTIM Capital* was rather different, as the main action in that case had been commenced in 2011 (although a motion to amend the claim was pending), and it was "not exactly clear what the basis for the injunction request will be": *AMTIM Capital* at para 16. In any case, I do not take *AMTIM Capital* as standing for the proposition that a draft pleading must always be provided where an injunction is sought prior to proceedings.

[33] I agree with Exaltexx that there is little to be gained in requiring Exaltexx to serve a Statement of Defence and Counterclaim in response to the Amended Statement of Claim before

the determination of the outstanding pleadings motion, which may result in striking or further amendment of the Amended Statement of Claim. Exaltexx will therefore be required to serve a counterclaim together with any Statement of Defence in accordance with any order made disposing of the motion to strike the Statement of Claim. In the event that that motion results in the striking of the Statement of Claim, Exaltexx's claim shall be filed as an independent action, subject to further order of the Court in disposing of the pleadings motion. If the parties reach a settlement, either of the counterclaim or the entire action, Exaltexx will be relieved of its undertaking.

[34] For clarity, I make no comment on the situation of a respondent to an application invoking the powers of the Court pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, nor on the powers of the Court under section 44 of that Act in situations where the final disposition is left to another body, as discussed in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626.

B. *Undertaking as to Damages*

[35] Rule 373(2) requires a party seeking an interlocutory injunction to undertake to abide by any order concerning damages caused by the granting of the injunction, absent contrary order:

**Interim and Interlocutory
Injunctions**

Availability

373 (1) On motion, a judge may grant an interlocutory injunction.

**Injonctions interlocutoires
et provisoires**

Injonction interlocutoire

373 (1) Un juge peut accorder une injonction interlocutoire sur requête.

Undertaking to abide by order

(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.

[Emphasis added.]

Engagement

(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

[Je souligne.]

Again, Exaltexx did not provide this undertaking in its motion materials, as is common practice. Fluid submits that this is fatal to Exaltexx's motion.

[36] An undertaking as to damages is an important and necessary precondition to the granting of an injunction. As extraordinary interlocutory relief, an injunction grants the moving party significant advantages in advance of a full determination on its merits. As a risk-balancing mechanism, those advantages are coupled with the requirement to pay any damages arising if it is ultimately determined that the injunction should not have been granted: see, e.g., *Ordina Shipmanagement Ltd v Unispeed Group Inc*, 1998 CanLII 8785 (FC) at para 12, quoting Robert J Sharpe, *Injunctions and Specific Performance*, 2nd ed. (Toronto: Thomson Reuters, looseleaf) at p 2-28. The risk-balancing nature of the undertaking is such that it is also relevant to the balance of convenience: *Commodore v Canada (Attorney General)*, 2001 FCA 387 at para 13; *Lac La Biche (Town) v Alberta*, 1993 ABCA 104 at para 26.

[37] Exaltexx argues that it should not be required in the circumstances to give an undertaking as to damages since (1) it is not seeking to enjoin Fluid from engaging in a revenue-producing activity by competing or selling product, and (2) the only possible damages arising from the injunction would be due to sales by Exaltexx and thus be duplicative of the main claim for infringement. In the alternative, counsel again advised at the hearing that he had received instructions to give the requisite undertaking as to damages.

[38] An undertaking as to damages is required here. While the injunction sought does not prevent Fluid from competing, it seeks to stop Fluid from engaging in activity relating to its commercial operations that could have an impact on its business. In any case, it is not only injunctions that relate to revenue-producing activity that require an undertaking as to damages—Rule 373(2) is not so limited. The potential damages to Fluid are also not necessarily co-extensive with the claim for infringement, as the trial judge might, for example, dismiss both Fluid's infringement claim and Exaltexx's counterclaim under subsection 7(a) of the *Trademarks Act* and determine that the injunction should not have been granted.

[39] Exaltexx's argument that Fluid has not filed evidence that they would suffer harm must similarly be rejected. The obligation is on Exaltexx to meet the conditions for the relief it seeks on the motion, including through giving the requisite undertaking, and not on Fluid to prove that an undertaking is necessary. While it will be for Fluid to establish damages arising from the issuance of the injunction at the appropriate stage, they are theoretically possible and Exaltexx must give an undertaking to pay them.

[40] At the same time, the absence of evidence from Fluid does undermine its argument regarding the need to be able to examine on the undertaking. Since Exaltexx did not give its undertaking in its motion materials, Fluid argues that it was unable to test or examine on the strength and enforceability of the undertaking. While this may be a more significant factor in other cases, I do not find it affects the validity of the undertaking in this case. The injunction Exaltexx seeks does not inherently suggest that it could cause significant financial harm. Contrary to Fluid's submissions, Exaltexx does not seek to prevent Fluid from enforcing its patent rights, nor from promoting its products and competing in the marketplace. In the absence of evidence of a significant financial impact on Fluid from being unable to continue to write letters accusing Exaltexx and its suppliers of infringement, I am satisfied with the undertaking as to damages given by Exaltexx.

VI. Exaltexx Has Met the Requirements for an Injunction

[41] To obtain an interlocutory injunction, Exaltexx must show that: (A) it has raised a serious question to be tried in respect of its claim against Fluid; (B) it will suffer irreparable harm if the injunction is not granted; and (C) the balance of convenience favours the granting of the injunction: *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 334.

[42] The elements of the *RJR-MacDonald* test are conjunctive, in that the moving party must satisfy all three to obtain relief. However, they are not independent silos, and a stronger finding on one or more of the elements may lower the threshold for the other elements: *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432 at para 56; *Boehringer Ingelheim (Canada) Ltd v Pharmacia Canada Inc*, [2001] OJ No 1911 (QL) at paras 35-37. The Supreme Court of Canada has recently

confirmed that the “fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case”: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 1, 25.

[43] For the reasons below, I am satisfied that Exaltexx has met its onus to establish each of the three parts of the *RJR-MacDonald* test with respect to Fluid’s allegations that Exaltexx’s suppliers (using that term in reference to suppliers of both products and services such as transport services) infringe Fluid’s patents.

A. *Exaltexx has Raised a Serious Question to be Tried*

[44] Exaltexx grounds its serious question (or serious issue) to be tried in subsection 7(a) of the *Trademarks Act*. Exaltexx has also raised section 52 of the *Competition Act*, RSC 1985, c C-34, which similarly addresses false and misleading statements, but places its reliance on the *Trademarks Act* for the purpose of this motion. The Court therefore does not need to address whether injunctive relief may be had pursuant to sections 36 and 52 of the *Competition Act*: see *Energizer Brands, LLC v The Gillette Company*, 2018 FC 1003 at paras 86-91.

[45] The “serious question to be tried” threshold is a low one and requires only that the applicant’s case be “neither frivolous nor vexatious”: *RJR-MacDonald* at pp 335, 337; *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12. Nonetheless, it requires the Court to make a “preliminary assessment of the merits of the case”: *RJR-MacDonald* at p 337. This assessment is to be made on the evidence filed on the motion. As the Federal Court of Appeal stated in its pre-*RJR-MacDonald* decision in *Turbo Resources*, “the party seeking the injunction must satisfy

the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried” [Emphasis added]: *Turbo Resources Ltd v Petro Canada Inc*, [1989] 2 FC 451 (CA) at paras 19, 21; see also *Unilin Beheer BV v Triforest Inc*, 2017 FC 76 at para 112.

[46] To raise a serious question for the purposes of this motion, Exaltexx must establish on the evidence that there is a serious question to be tried regarding its proposed claim against Fluid under subsection 7(a) of the *Trademarks Act* arising from the statements it seeks to enjoin. To assess this, I will first review the requirements of subsection 7(a) of the *Trademarks Act* and cases that have applied it in the context of cease and desist letters. I will then review the letters and the evidence filed to assess whether a serious question has been raised with respect to each of the required elements of subsection 7(a).

(1) General principles regarding subsection 7(a) of the *Trademarks Act*

[47] Subsection 7(a) of the *Trademarks Act* contains the following prohibition:

Prohibitions

7 No person shall

(a) make a false or misleading statement tending to discredit the business, goods or services of a competitor;

Interdictions

7 Nul ne peut :

a) faire une déclaration fausse ou trompeuse tendant à discréditer l’entreprise, les produits ou les services d’un concurrent;

[48] Section 7 of the *Trademarks Act* is “nourished for federal legislative purposes in so far as it may be said to round out regulatory schemes prescribed by Parliament in the exercise of its

legislative power in relation to patents, copyrights, trade marks and trade names”: *MacDonald v Vapor Canada Ltd*, [1977] 2 SCR 134, 1976 CanLII 181 (SCC) at p 172. Thus for subsection 7(a) to be valid, it must be read to pertain to false and misleading statements made about a trademark or other intellectual property: *Riello Canada Inc v Lambert* (1986), 9 CPR (3d) 324 at para 35; *Canadian Copyright Licensing Agency v Business Depot Ltd*, 2008 FC 737 at para 27.

[49] It has long been recognized that a false allegation that a competitor infringes a patent may fall within subsection 7(a): *S&S Industries Inc v Rowell*, [1966] SCR 419 at pp 422, 424-425, 429-432. This is so even if the falsity of the allegation may not be established until later, such as after a finding that the patent is invalid: *S&S Industries* at p 425. The essential elements of such an action are (a) a false or misleading statement; (b) tending to discredit the business, wares or services of a competitor; and (c) resulting damage: *S&S Industries* at p 424.

[50] Justice Manson of this Court recently applied *S&S Industries* and subsection 7(a) in *Excalibre Oil Tools Ltd v Advantage Products Inc*, 2016 FC 1279, aff’d 2019 FCA 121. After concluding that none of the relevant patents was infringed, Justice Manson addressed the claim that Advantage’s statements to customers that Excalibre’s product infringed were false or misleading. Since no version of Excalibre’s product infringed any of Advantage’s patents, Justice Manson concluded that it was clear that the letters alleging infringement contained false and misleading statements: *Excalibre* at paras 29, 52, 280.

[51] As to whether the letters tended to discredit Excalibre's business or wares, Justice Manson distinguished at paragraphs 281-283 between cease and desist letters that are "informative" and those that are "threatening", referencing the decision of Justice Hughes in *E Mishan & Sons, Inc v Supertek Canada Inc*, 2016 FC 986:

Patentees are entitled to assert that they have rights flowing from a valid patent. Therefore, not every assertion of a patent or other intellectual property, which may subsequently be held to be invalid, will be held to constitute a false and misleading statement per section 7(a) ([Supertek] at para 11).

It is important to distinguish between cease and desist letters that are informative and letters that are threatening. In *Supertek*, above, Mr. Justice Roger Hughes contrasted the situation in *S&S*, where the false and misleading statements consisted of a cease and desist letter threatening litigation that never came to pass, with the situation in *M&I Door Systems Ltd v [Indoco] Industrial Door Co Ltd* (1989), 25 CPR (3d) 477 (FCTD), where the cease and desist letter was more informative than threatening. Informative letters set out a patentee's rights and provide information that will enable the recipient to understand what may constitute infringement. Threatening letters contain explicit or veiled threats that the recipient will be sued if they do not change a particular course of conduct.

Statements made in a threatening cease and desist letter will tend to discredit the goods or services of the patentee's competitor. ...

[Emphasis added; some citations omitted]

[52] Justice Manson found the letters at issue in that case to be threatening, and to discredit Excalibre's product. He therefore found the subsection 7(a) claim to be made out, with the quantum of damages to be determined on reference: *Excalibre* at paras 284-289.

[53] Fluid notes that *Excalibre* was a finding after trial rather than on an injunction motion, and points to this Court's decision in *Mr. Safety Check Systems Inc v Brake Safe Inc* (1997), 76 CPR (3d) 136 (FCTD). There, Mr. Safety Check had sent letters to Brake Safe's customers

advising that anyone infringing their patent would be liable to pay damages, and also distributed copies of advertisements comparing Brake Safe's product with "Cheap Lookalikes" (although not specifically naming Brake Safe's product as a cheap lookalike). In declining to grant an injunction restraining Mr. Safety Check's conduct, Justice Cullen made the following observations at paragraphs 17-20:

As I found in the previous motion I heard in this case, an extremely limited review of the case on the merits leads me to conclude that there are several real issues that need determination on the basis of findings of fact and credibility. As well, there are several complex legal issues that need resolution regarding ownership/co-ownership, inventorship, and infringement, to name a few. Credibility and issues going to the very heart of infringement cannot be determined in this motion. It appears that there may even be two different products at issue here. Such issues require a full-blown trial.

I believe that there may be a serious issue as to whether the activities of the respondents could be in breach of subsection 7(a) of the Canadian Trade-marks Act. I agree with counsel to the applicants that this Court has jurisdiction to make determinations on this provision, and on all of the documents at issue in this motion. Although, at times the present issues may seem like a breach of contract situation, the issues are, nevertheless, clearly all tied to the patent dispute before this Court. However, because of the complexity of the case, the trade-marks question is better answered after a full exposition of the facts at issue, such as that which would occur in a trial, and not as a preliminary matter as it has been presented here.

The question of whether the respondent's statements are false and misleading is inextricably tied to the issues that must be resolved at trial. There is no way to divorce the applicant's allegations from the resolution of the main action. There is no way to pronounce on these allegations without the resolution of the main action.

For the above reasons, I am not convinced that there is a serious issue that must, or even could, be resolved in a preliminary way. Nevertheless, because I do not believe that the applicants' case is frivolous or vexatious, it is now prudent to consider the second and third prongs of the interlocutory injunction test.

[Emphasis added.]

[54] While Justice Cullen concluded, on the facts before him, that there was no serious issue appropriate for injunctive relief, I do not take *Mr. Safety Check* as standing for a general proposition that a subsection 7(a) claim can never be the subject of an injunction. Although, as Fluid points out, the truth or falsity of the allegations of infringement may only be ultimately determined after trial, the same is true of any claim raised as the basis for an injunction. The standard on a motion for an injunction is only whether, on a preliminary assessment of the merits, there is a serious issue to be tried: *RJR-MacDonald* at p 334. There is no basis to treat a claim under subsection 7(a) as being subject to a different test. I note that Justice Cullen does appear to have recognized that despite his misgivings, he ought to consider the remaining parts of the *RJR-MacDonald* test, since the applicant's case was not frivolous or vexatious: *Mr. Safety Check* at paras 20-26.

[55] I note too that in the "previous motion" between the same parties referred to at the outset of the passage above, Justice Cullen also dismissed Mr. Safety Check's request for an injunction to restrain the alleged patent infringement by Brake Safe, raising similar concerns regarding the need for a final determination at trial, but still proceeding to consider the other branches of the test since the case was not frivolous or vexatious: *Mr. Safety Check Systems Inc v Brake Safe Inc* (1997), 77 CPR (3d) 1 (FCTD) at paras 19, 25-28. Despite the potential difficulties of determining infringement issues at an early stage identified by Justice Cullen, a serious issue regarding patent infringement can clearly be established in the appropriate case: see, e.g., *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 at paras 54-57, aff'd 2005 FCA 390.

[56] This Court granted an injunction to restrain cease and desist letters based on subsection 7(a) in *Rolls-Royce plc v Fitzwilliam* (2000), 10 CPR (4th) 1 (FCTD). Justice Blanchard concluded that Mr. Fitzwilliam's letters, which asserted rights in the Rolls-Royce name trademarks and threatened legal proceedings, raised a serious issue under subsection 7(a), on the basis of the facts before him and an analysis of the record: *Rolls-Royce* at paras 5, 7-8, 15. Fluid distinguishes *Rolls-Royce* on grounds that Rolls-Royce had a strong ownership claim to the trademarks at issue and that Mr. Fitzwilliam had had a previous injunction awarded against him on a similar issue. However, while these points may go to the overall appropriateness of the injunction in that case, they do not limit the granting of an injunction to such cases, and not preclude an injunction in cases where the intellectual property issues are less clear. Indeed, Justice Blanchard confirmed that the threshold to establish if there is a serious issue "is a rather low one": *Rolls-Royce* at para 15.

[57] Based on the principles from these cases, it is clear that cease and desist letters that assert patent infringement may form the basis for an action under subsection 7(a), and that an injunction may issue in the appropriate case to enjoin the issuance of such letters, where a serious issue is raised regarding the elements of subsection 7(a) and the remaining elements of the *RJR-MacDonald* test are met.

(2) Serious question regarding false or misleading statements by Fluid

[58] Exaltexx alleges that it has established a serious issue that statements by Fluid are false and misleading both as to infringement by Exaltexx, and as to infringement by suppliers, *i.e.*, Panther and/or Hommy Trucking. Fluid argues that its statements cannot form the basis of a

subsection 7(a) claim given the context of the litigation and the privilege that applies, and that, in any event, Exaltexx has not established that the allegations are false or misleading. I will first address Fluid's arguments regarding the statements in the letter and whether they are covered by privilege, and then turn to whether there is a serious question raised regarding the falsity of the statements.

(a) *Fluid has made non-privileged allegations of infringement*

[59] As an initial matter, I am satisfied that there is a serious issue that Fluid's letters make allegations both that Exaltexx's products infringe Fluid's patents and that Panther and Hommy Trucking are infringing those patents by their involvement with Exaltexx's products.

[60] Fluid notes that paragraph 3 of each letter (reproduced above at paragraph [15]) merely states that Fluid "believes" that Exaltexx's products fall within the scope of its patents, which it asserts is not false. Leaving aside whether inclusion of the word "believes" is sufficient to avoid a finding under subsection 7(a) in this context, paragraph 2 of the letter defines Exaltexx's products as "Infringing Products", paragraph 4 attaches the Statement of Claim in which infringement allegations are made, and paragraph 5 asserts that the recipient has actually infringed by dealing with the Exaltexx products (which in this context could only be true if Exaltexx's products infringe), to the extent that they will face legal action if they do not cease doing so (paragraph 6). Without pre-determining an issue that will need to be decided at trial, there is a serious issue that in context, the letter alleges that Exaltexx's products and Exaltexx's suppliers infringe Fluid's patents.

[61] Fluid also contends that the reference to the Statement of Claim cannot form the basis of a claim under subsection 7(a) as the pleading is subject to privilege, citing *Nintendo of America Inc v Battery Technologies Inc*, 2001 FCT 596 at para 35 and *Chase Manhattan Corp v 3133559 Canada Inc*, [1999] FCJ No 1044 (FCTD) at paras 2-3. Each of those cases involved a counterclaim alleging that statements made in the statement of claim breached subsection 7(a). Statements in a pleading are themselves subject to an absolute privilege: see, e.g., *Big Pond Communications 2000 Inc v Kennedy* (2004), 70 OR (3d) 115 (SC) at paras 7-15. The counterclaims in *Nintendo* and *Chase Manhattan* were thus unsustainable. However, this does not mean that statements that are contained in a pleading can be repeated out of court with impunity.

[62] In *Hill v Scientology*, the Supreme Court of Canada recognized that a qualified privilege applies to cover fair and accurate reports, made without malice, of documents relating to judicial proceedings: *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 150-153. This privilege may be defeated where out of court statements exceed the legitimate purposes of the occasion and go beyond a permissible scope, even if it does not amount to actual malice: *Hill v Scientology* at paras 155-156. However, even this qualified privilege is limited to reporting on the judicial proceedings; it does not extend to assertions independent of those proceedings. In other words, the fact that an allegation may be made in a pleading does not mean that the same allegation, made in other contexts, is cloaked with privilege.

[63] In the present case, Fluid's reference to its action against Exaltexx in paragraph 4 of its letter, taken alone, might arguably be subject to qualified privilege. However, the Court does not

need to assess whether the contents and circumstances of the letter might take it outside the scope of the privilege, as the other allegations of infringement in the letter go beyond a mere report on the pleadings and are not privileged. In this regard, I disagree with Fluid's characterization that Exaltexx is trying to "prevent the public from learning that Fluid has sued Exaltexx for patent infringement." Rather, Exaltexx's motion seeks to prevent Fluid from alleging that Exaltexx and its suppliers are infringing Fluid's patents and threatening its suppliers with litigation.

[64] Fluid also asserts that in the context of subsection 7(a), the protection given to pleadings is extended to "statements made after litigation has commenced," relying on paragraphs 32-33 of

Business Depot:

The line of patent abuse cases, commencing with the decision of the Supreme Court in *S&S Industries*, has clearly limited the validity of a section 7(a) claim to the improper assertion of patent rights without the commencement of an infringement action, and is an extension of the common law in the 19th century. But this line of cases has never been applied to copyright claims or to statements made after litigation has been commenced.

... Section 7(a) of the *Trade-marks Act* deals essentially with trade liability, and relates to unfair competition. While it has been expended [*sic*] to cover false misleading statements related to patents, it has never been used in the context of copyright, especially when a statement has been made after an action has been launched.

[Emphasis added; citations omitted]

[65] Read in context, I do not agree that *Business Depot* intended to extend the privilege over pleadings, or immunity from subsection 7(a), to *any* statement made after litigation has commenced. In *Business Depot*, the Canadian Copyright Licensing Agency ("Access Copyright") sued Business Depot for copyright infringement related to its photocopying services.

Having filed its claim, Access Copyright issued a press release regarding the action that made statements about Business Depot, including that it had profited from copyright infringement. Business Depot brought a counterclaim alleging breach of subsection 7(a).

[66] Prothonotary Aalto struck Business Depot's subsection 7(a) counterclaim on the basis that (i) Access Copyright and Business Depot were not "competitors" as required by subsection 7(a); and (ii) subsection 7(a) requires that the statements pertain to intellectual property of the claimant (the party affected by the statements) rather than the defendant (who made the statements): *Business Depot* at paras 1, 5-6, 9-10. On appeal, Justice de Montigny, then of this Court, upheld the decision. While the fact that Access Copyright and Business Depot were not competitors was sufficient to dismiss the appeal, Justice de Montigny also commented on Prothonotary Aalto's second basis for striking the claim.

[67] Justice de Montigny recognized that *S&S Industries* and *Riello* each allowed claims under subsection 7(a) based on statements regarding the defendant's intellectual property rather than the plaintiff's. He thus apparently recognized that at least some statements about the defendant's intellectual property may ground a subsection 7(a) claim: *Business Depot* at para 31. However, Justice de Montigny distinguished those cases on the basis that they related to an "improper assertion of patent rights without the commencement of an infringement action," noting that the principle had not been extended to copyright claims or statements made after litigation was commenced: *Business Depot* at paras 32-33.

[68] In support of this statement, Justice de Montigny cited *Levi Strauss & Co v Timberland Co* (1997), 74 CPR (3d) 49. There, Prothonotary Morneau concluded that subsection 7(a) did not incorporate a tort of abuse of process and could not ground a claim based on the commencement of numerous proceedings, based on the privilege that applies to pleadings: *Levi Strauss* at paras 11-16. Given this reference, and in the context of the statements at issue in *Business Depot*, which primarily described the allegations made in the statement of claim, it appears that Justice de Montigny was simply recognizing that subsection 7(a) could not be based on privileged statements, including a report on the commencement of an action, *i.e.*, a statement made after an action has been launched. There certainly does not appear to be any policy basis to allow a plaintiff a wholesale freedom to make false statements outside the scope and requirements of litigation, immune from a claim under subsection 7(a), simply because an action has been commenced.

[69] I make three further observations with respect to *Business Depot*. First, to the extent it purports to limit claims under subsection 7(a) to the improper assertion of patent rights without the commencement of an infringement action, *Excalibre* stands as a more recent example of a subsection 7(a) claim being successful even where an infringement action was brought by the patentee.

[70] Second, the distinction between statements made regarding the intellectual property rights of the claimant rather than the defendant seems difficult to maintain based on either the language of subsection 7(a) or the constitutional limitations discussed in *MacDonald v Vapor Canada* and more recently in *Kirkbi AG v Ritvik Holdings*, 2005 SCC 65 at paragraphs 19-36.

Certainly, as Justice de Montigny recognized, claims have been allowed based on assertions about the intellectual property rights of the party making the statement: *S&S Industries*; *Riello*; *Excalibre*; see also *JAG Flocomponents NA v Archmetal Industries Corporation*, 2010 FC 627 at para 117, where Justice Phelan noted that “it is not necessary to own a mark to have the right to claim s. 7 relief. The question is whether the offending party is using alleged intellectual property rights subject to federal jurisdiction to harm a competitor.”

[71] Third, while not at issue in this case, there does not appear at first blush to be any constitutional or interpretive reasons to limit subsection 7(a) to patent cases (as in *S&S Industries* and *Excalibre*) and trademark cases (as in *Rolls-Royce*) but not copyright cases, particularly as patents and copyright both appear expressly in section 91 of the *Constitution Act, 1867*.

[72] For the purposes of the present case, I need simply conclude that there is a serious issue that subsection 7(a) can cover statements made (i) by a patentee (ii) after commencement of proceedings (iii) with respect to their own patent rights and the infringement of those rights by others. For the reasons above, I so conclude. I also conclude that there are non-privileged allegations of infringement by Exaltexx in the letters sent by Fluid. The next question is whether Exaltexx has raised a serious issue that those statements are false.

(b) *There is a serious question that some of the infringement allegations are false or misleading*

[73] As noted, Exaltexx asserts a serious question to be tried with respect to both the assertions that its products infringe Fluid’s patents, and the assertions that those involved with Exaltexx, notably Panther and Hommy Trucking, have infringed Fluid’s patents. I will deal with

the latter first, as I conclude that Exaltexx has raised a serious question that these assertions are false or misleading.

[74] Ms. Ayotte's affidavit establishes that Panther is "one of Exaltexx' raw chemical suppliers" and "has only supplied Exaltexx with hydrochloric acid." She was not cross-examined on those statements. None of the Fluid patents claim hydrochloric acid or use of hydrochloric acid by itself. Regardless of whether Exaltexx may use this acid in producing a composition that infringes one or more of the Fluid patents, merely supplying a component is neither infringement nor inducing infringement. This is so even if the component is intended to be incorporated into a patented combination or cannot be used for any other purpose: *MacLennan v Produits Gilbert Inc*, 2008 FCA 35 at paras 33-38. Indeed, counsel for Fluid conceded that if all that Panther is doing is supplying hydrochloric acid—which is the only evidence before the Court—they would not have breached the patents.

[75] I am satisfied that on the evidence before the Court, there is a serious issue to be tried that Fluid's statements in paragraph 5 of its letter that "Panther has infringed, is continuing to infringe, and/or has induced and procured others to infringe, the Fluid Patents" are false or misleading.

[76] Ms. Ayotte's affidavit also establishes that Hommy Trucking is a "preferred shipping agent, or transporter" of one of Exaltexx's clients, and that when that client purchases product, it is delivered to Hommy Trucking for shipment. To Ms. Ayotte's knowledge, Hommy Trucking does not buy or sell the product, but simply stores or ships it to the client. Again, Ms. Ayotte was

not cross-examined on this statement. As Exaltexx notes, storing or shipping are not expressly identified as infringing conduct within the meaning of section 42 of the *Patent Act*, RSC 1985, c P-4, which refers to the grant of an exclusive right of “making, constructing and using the invention and selling it to others to be used.”

[77] Fluid argues that the concept of “use” in the *Patent Act* is broad, and that the Supreme Court of Canada in *Monsanto* held that possession raised a rebuttable presumption of use: *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34 at para 58(6). *Monsanto* does not provide great assistance to Fluid, both given the factual context of that case and the discussion of the concept of use at paragraphs 45-57 of the case. Indeed, *Monsanto* itself notes that a defendant may rebut the presumption of use based on possession through evidence that “the invention was neither used, nor intended to be used, even by exploiting its stand-by utility”: *Monsanto* at para 56. On the evidence, there is no indication that Hommy Trucking, as a shipping agent, used, intended to use, or even could use the invention. Fluid could point to no case in which merely trucking a product was found to constitute infringing use. Nonetheless, Fluid argues that transport may be determined to constitute use at trial, while recognizing that their success at trial on this issue was an “open question.” This alone confirms that there is a serious issue that the allegations that Hommy Trucking “has infringed, is continuing to infringe, and/or has induced and procured others to infringe, the Fluid Patents” are false or misleading.

[78] Little reliance was placed by Exaltexx on the letter sent to Nitmoi Labs, and the Court has no evidence of its role in Exaltexx’s business. I therefore make no findings with respect to Nitmoi Labs.

[79] With respect to Brenntag, Fluid advised Exaltexx as part of the parties' agreement that it had communicated with Brenntag. However, no letter was produced by Fluid, and no evidence was filed by Fluid as to the nature or timing of those communications. We are therefore left with Ms. Ayotte's evidence that Brenntag is a chemical supplier and blender that Exaltexx had been dealing with since 2015, but that in early November 2019, Brenntag rescinded a quote on acid supply and blending services and said it would no longer be able to provide custom acid blending to Exaltexx.

[80] On cross-examination, Ms. Ayotte indicated that Brenntag's supplier, Chemtrade, had refused to sell acid to Brenntag to resell to Exaltexx for their product. Contrary to Fluid's submissions, this evidence does not simply indicate that Brenntag "terminated its relationship with Exaltexx due to issues with a supplier." The evidence that Chemtrade refused to supply to Brenntag for resale to Exaltexx in particular, in the context of the fact that Fluid communicated with Brenntag regarding its claims of infringement, suggests that the rescission of the quote may have related to the infringement allegations.

[81] There is thus positive evidence that Fluid communicated with Brenntag regarding the issue, and positive evidence of the letters Fluid wrote to others trading with Exaltexx. In the absence of any responding evidence from Fluid regarding the nature and content of its communications with Brenntag, I am prepared to make an inference that Fluid's communications, like those with Panther and Hommy Trucking, included allegations of infringement regarding Brenntag that may be false or misleading.

[82] Having addressed the allegations that Exaltexx's suppliers have infringed, I turn to the allegations that Exaltexx's products themselves infringe. I find that on the evidence filed, Exaltexx has not established a serious issue with respect to these allegations.

[83] As noted above, while the serious question threshold is low, it must be established on the evidence filed with the Court: *Turbo Resources* at paras 19, 21. Exaltexx relies on three aspects of the record to demonstrate a serious issue that the infringement allegations are false: (i) the deficiencies in Fluid's Statement of Claim, including the Amended Statement of Claim; (ii) the statements in correspondence from GlobalQuimica's counsel as to why its GQ-300 product does not infringe Fluid's patents; and (iii) the request in Fluid's first cease and desist letter to Exaltexx and GlobalQuimica requesting a sample for testing. I find that none of these are adequate to satisfy the low serious question threshold, considered either separately or together.

[84] With respect to the pleadings, Exaltexx alleges that the Statement of Claim that was attached to the letters, and the Amended Statement of Claim that has since been served, are so devoid of material facts, frivolous and without merit, that there is nothing to suggest from reading them that the allegations are "anything but false." I disagree. Regardless of any deficiencies in the pleading, even serious or fatal ones, that may be found to exist on the hearing of the motion to strike, I do not agree that the contents of the Statement of Claim, either in its original form or as amended, can be relied on to establish a serious issue as to the falsity of the infringement allegations made either in the claim or in the letters sent by Fluid.

[85] Similarly, the fact that Fluid requested samples of some of Exaltexx's products for testing is not evidence of the falsity of the allegations of infringement. If Fluid in fact had no knowledge of the contents of Exaltexx's products, this may show that Fluid's allegations were speculative, and even reckless, but it does not speak to whether they are true or false, or to whether there is a serious question as to their falsity.

[86] More substantively, Exaltexx points to two letters sent by US and Canadian counsel to GlobalQuimica, respectively, in response to Fluid's first cease and desist letter. While the first contains a plain denial of infringement, the latter is more specific in stating why GlobalQuimica's GQ-300 product (which is the ACA product of Exaltexx) does not infringe the patents, notably that it does not contain urea (an element of the '876, '875, '777, '787, '792, '794 and '783 Patents), lysine (an element of the '757 Patent), or a mineral acid and an alkanolamine (an element of the '476 Patent).

[87] While this information, properly presented, would raise a serious question as to whether the infringement allegations in Fluid's letters are false or misleading, I agree with Fluid that attaching a letter from counsel for a co-defendant to an affidavit with nothing further to explain is not sufficient evidence to raise a serious issue to be tried.

[88] Evidence filed on a motion can include hearsay information from third parties. As an exception to the general rule that affidavits are to be confined to facts within the deponent's knowledge, Rule 81(1) provides that an affidavit filed on a motion may include statements as to the deponent's belief, with the grounds for it. In the present case, Ms. Ayotte attached the

GlobalQuimica letters, but did not say either that she believes their contents or her grounds for doing so. Rather, she simply describes the letter as “detailing why in GQ’s view the GQ-300 product does not infringe any of the subject patents of the Federal Action,” and on cross-examination, she stated that she was not involved in drafting the letter and had no information about it beyond what was written in it.

[89] Nor does Ms. Ayotte indicate why no direct evidence regarding the issues addressed in the GlobalQuimica letter could be filed, either from herself (although she stated on cross-examination that she did not have any involvement with GlobalQuimica in terms of the makeup of the products) or someone else at Exaltexx. It may be that, as counsel for Exaltexx suggested, it purchases the product from GlobalQuimica and therefore has no knowledge of its contents. This does seem somewhat counterintuitive given that Exaltexx’s technical people make recommendations to customers regarding safe acid treatments. More to the point, though, there is no evidence on the record to support counsel’s statement that Exaltexx does not know the content of its own product and that this explains the lack of direct evidence from Exaltexx on the issue. Nor is there evidence to explain why, if this is so, evidence could not be obtained from GlobalQuimica. Contrary to Exaltexx’s submission, it is not incumbent on Fluid to elicit evidence on cross-examination as to why more direct evidence was not available.

[90] I am also not satisfied that the fact that Fluid did not respond to the GlobalQuimica letter amounts to evidence of the truth of its contents sufficient to establish a serious question to be tried. There is no indication that Fluid accepted or agreed with the contents of the letter either

expressly or by its lack of response, and nothing can be inferred from the absence of a response in correspondence in this context.

[91] There are no doubt reasons why each party chose not to file any direct evidence pertaining to the issue of whether Exaltexx's product infringes Fluid's patents. However, Exaltexx has the burden to establish a serious question to be tried on the evidence. In my view, even in the context of an urgent motion, it cannot put that evidence forward by relying on the contents of a letter from counsel for another party attached as an exhibit, thereby shielding that evidence from cross-examination, without adequate explanation or a justified assertion of belief in its contents: see, *e.g.*, *ME2 Productions Inc v Doe*, 2019 FC 214 at paras 97, 120-123.

[92] In the absence of any statement that Ms. Ayotte believes the information in the GlobalQuimica letter and giving the grounds for that belief, or explaining why no direct evidence going to the question of whether Exaltexx's product infringes, I am not prepared to accept the attachment of the GlobalQuimica letter as being adequate evidence to raise a serious issue as to the falsity of the infringement allegations.

[93] That said, there is no need to make the adverse inference suggested by Fluid to the effect that the lack of direct evidence regarding composition indicates that Exaltexx is seeking to hide information and that its product does in fact infringe. In the absence of any positive evidence of infringement by Fluid, I decline to make such an inference.

[94] I stress that in making the foregoing determination, I am not making any conclusions regarding the contents of the Exaltexx products, whether they fall within the scope of any one of the Fluid patents, or whether Exaltexx would be able on proper evidence to demonstrate non-infringement either on the serious question standard or, at trial, a balance of probabilities. My conclusion is solely based on the evidence that was before the Court on this motion.

[95] I therefore conclude that Exaltexx has established a serious question to be tried in respect of the falsity of Fluid's allegations that Exaltexx's suppliers and shippers are infringing Fluid's patents, but not with respect to the falsity of Fluid's allegations that Exaltexx itself is infringing.

(3) Serious question regarding statements tending to discredit a competitor

[96] I also conclude that there is a serious issue to be tried that the statements made by Fluid regarding infringement by Hommy Trucking and Panther tend to discredit a competitor. Fluid did not argue to the contrary, focusing its submissions on whether the statements were false or misleading. There is no question that Fluid and Exaltexx are competitors.

[97] In *Riello*, the defendant had sent letters to the plaintiff's customers that they would infringe the defendant's patent and have to pay royalties for selling the plaintiff's product. Justice Strayer did not have any difficulty finding that these statements would tend to discredit the plaintiff, as they indicated not only that the plaintiff's product was wrongly produced, but also that anyone dealing with those products would be subject to demands for payment of royalties: *Riello* at para 31.

[98] As noted above, Justice Manson in *Excalibre* similarly noted the significance of litigation threats, distinguishing between “informative” and “threatening” cease and desist letters.

Justice Manson concluded that “statements made in a threatening cease and desist letter will tend to discredit the goods or services of the patentee’s competitor”: *Excalibre* at para 283.

[99] The letters sent by Fluid are clearly “threatening” cease and desist letters, as they directly allege infringement, demand that the recipient cease their conduct (paragraph 5), and threaten serious legal action if they do not do so (paragraph 6). Absent any evidence from Fluid regarding the Brenntag communication, and given Exaltexx’s evidence regarding Brenntag’s rescission of its quote, I am prepared to infer that the communication to that company was of a similar nature.

[100] The threatening nature of the Fluid letters is amplified by the inclusion of the demand for document preservation in paragraph 7, which suggests a potentially expensive process involving extensive records and “forensic and information technology consultants,” and which may well overstate the recipient’s obligations.

[101] While not determinative, I note that unlike the initial letter sent to Exaltexx, the letters sent to Panther and Hommy Trucking do not invite any discussion or explanation as to why the recipient might not be infringing. Rather, they simply assert infringement based on a wide variety of alleged conduct (much of which the recipients do not undertake) relating to a wide variety of products, and state that Fluid will take legal action if the recipient does not comply with the demand to immediately cease and desist. The seriousness of this threat of legal action

was underscored by providing a copy of Fluid's claim against Exaltexx and GlobalQuimica, which claims \$100,000,000 in damages.

[102] I am therefore satisfied that in the context of these letters, there is a serious question to be tried that Fluid's allegations regarding infringement by Exaltexx's suppliers tend to discredit Exaltexx. If I had found that there was a serious question with respect to Fluid's allegations that Exaltexx's products infringe the Fluid patents, I would have similarly found that those statements tend to discredit Exaltexx.

(4) Serious question regarding resulting damage

[103] Justice Hughes in *Supertek* recognized with reference to *S&S Industries* that resulting damage is an essential element of a subsection 7(a) claim: *Supertek* at para 7; *Excalibre* at para 285. In *Riello*, however, Justice Strayer concluded that it was not necessary to prove loss to obtain an injunction under section 53 of the *Trademarks Act* based on a subsection 7(a) claim: *Riello* at para 34. I need not resolve this question, as I conclude that there is a serious question to be tried that the statements made in the Fluid letters have caused resulting damage to Exaltexx.

[104] In this regard, I consider that the damage ought to be considered in the context of the "letter writing campaign" as a whole, rather than having to establish damage flowing from each individual letter. This is in part owing to the nature of this motion, which seeks to enjoin further letters, some of which might directly cause damage, and some of which might not. Ultimately, Exaltexx will have to prove the particular damage it has suffered, and how it was caused by

Fluid's statements. At this juncture, I consider that Exaltexx must simply demonstrate a serious issue that it has suffered damage from Fluid's conduct in making the statements in the letters.

[105] In the present case, the evidence is clear that Hommy Trucking, at least, has ceased to do business with Exaltexx as a result of Fluid's letter. Fluid argues that Exaltexx has not given evidence of the actual harm that this has caused. I disagree. While there is no evidence of the specific monetary value of this impact—a matter addressed below in assessing irreparable harm—Ms. Ayotte's evidence is clear that Hommy Trucking is a preferred shipping agent of one of their clients. I have no difficulty in concluding that a preferred shipping agent of a customer ceasing to do business raises a serious issue of both direct financial harm associated with re-routing shipments (assuming another shipper satisfactory to the customer can be found and orders placed despite the shipping disruption) and reputational harm with both the shipper and the customer.

[106] Fluid also argued that Hommy Trucking's decision reflects the advice of counsel, which would include an assessment of the merits of the allegation. However, this submission conflicts directly with the initial response actually sent by Hommy Trucking's lawyer, which was that "My client has no knowledge or insight as to whether your clients [*sic*] threatened action is valid or frivolous. All they know for sure is that your request affects their bottom line." This is the very concern raised by threatening letters of this nature, namely that the potential for expensive litigation will result in compliance regardless of the merits of a particular infringement allegation.

[107] With respect to Brenntag, as noted above, the evidence of Ms. Ayotte in her affidavit and on cross-examination raises at least a serious issue that it ceased to supply Exaltexx for reasons associated with the infringement allegations. Given that Brenntag was a supplier making competitive quotes on the supply of products and services, in a market with a small number of suppliers, I again have no hesitation in concluding that there is a serious issue as to whether Exaltexx has suffered damage as a result.

[108] Fluid argues that there is no evidence with respect to Panther's reaction to the cease and desist letter. This is ultimately immaterial in light of the other damages suffered by Exaltexx. However, it is clear that Fluid's desire and intent from the Panther letter was that Panther stop supplying Exaltexx. It hardly lies in the mouth of Fluid to argue that it should be allowed to continue sending such letters on the basis that one supplier may have decided not to comply.

[109] In this regard, the situation is different from the *Boehringer* case relied on by Fluid. That case involved statements by pharmaceutical companies regarding the nature and mechanisms of action of competing drug products. Justice Nordheimer found that there was insufficient evidence that *Boehringer* would suffer economic loss as a result of the statements: *Boehringer* at para 67. Unlike in *Boehringer*, the statements in this case were accompanied by direct demands to stop doing business with a competitor, and there is evidence that at least some recipients have complied with that demand. It is thus not the case that Exaltexx's fears "emanate entirely from within itself, with no independent evidence that such fears are being, or are likely to be, borne out by actual events" as was the case in *Boehringer*.

[110] As there is evidence sufficient to raise a serious issue with respect to each of the elements of a claim under subsection 7(a) of the *Trademarks Act*, I turn to the question of irreparable harm.

B. *Exaltexx Has Established Irreparable Harm*

[111] Unlike the “serious question” threshold, the threshold for establishing irreparable harm is a high one: *Laboratoires Servier v Apotex Inc*, 2006 FC 1443 at paras 22-23. In *Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at paragraphs 89-90, Justice Manson recently summarized the irreparable harm requirement as follows:

“Irreparable” refers to the nature of the harm suffered rather than its magnitude; it is harm that either cannot be quantified in monetary terms or cannot be cured. The Applicant must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for interlocutory relief is denied. It is not sufficient to demonstrate that irreparable harm is likely to be suffered, nor should the alleged harm be based on mere assertions.

However, Canadian appellate courts have also held that “clear proof of irreparable harm is not required” and have cautioned against requiring claimants to prove to a high degree of certainty that irreparable harm will conclusively result...

[Emphasis added; citations omitted.]

[112] As set out above, the irreparable harm requirement is not an independent silo, such that a stronger substantive case may lower the threshold on irreparable harm: *GoldTV.Biz* at para 56; *Boehringer* at para 35. In the present case, I take into account the fact that on the evidence before me, there is a fairly strong case that Exaltexx will be able to establish at trial that Fluid’s allegations that Hommy Trucking and Panther are infringing its patents are false or misleading, regardless of the outcome of the infringement claim against Exaltexx. At the same time, this does

not relieve Exaltexx of the requirement to demonstrate irreparable harm if the requested injunction is not granted.

[113] Exaltexx asserts the following types of irreparable harm will result if the requested injunction is not granted:

- irrevocable damage to its business reputation and loss of control over its image in the oil and gas industry;
- loss of actual and potential customers, in a market with a small number of such customers;
- harm to its relationships with suppliers, as evidenced by the decisions of Hommy Trucking and Brenntag, in a market where the number of suppliers and transporters is small and limited by the nature of the hazardous chemicals;
- unquantifiable damages as Exaltexx cannot know how many of its suppliers have been contacted.

[114] Ms. Ayotte's evidence, while in some places not as precise as it could be, is clear to the effect that:

- Exaltexx is a comparatively small company, with six employees and \$2,000,000 in annual revenues;
- Exaltexx relies on its relationships with chemical suppliers, distributors and transporters to operate its business;
- as the safe acid business involves the provision of hazardous chemicals, it takes time to develop client relationships as the client must have confidence that the supplier can

provide the product in a safe and reliable way, and must approve products for use, such that the loss of a customer for any reason can be permanent;

- there is a small field of chemical suppliers, and the loss of even a single supplier can be detrimental to Exaltexx's business, by affecting the supply of raw materials and thus its ability to meet orders, attract new business, and provide competitive pricing;
- the number of companies that are willing to deal with the hazardous materials sold by Exaltexx is very limited, and there is both a small client base and small field of providers willing to ship and store chemicals of this nature;
- Exaltexx's safe acids business is at risk, as is the entire business of Exaltexx given the small community of clients and chemical providers and the impact of a negative reputation.

[115] Fluid did not cross-examine on this evidence, and filed no evidence in response.

[116] Given the particular nature of the business in which Exaltexx works, I find that the evidence of damage to Exaltexx's business reputation; harm to relationships with suppliers, to the extent of actual loss and/or potential loss of those suppliers; the potential impact on Exaltexx's business as a whole given the size of the industry and the size of Exaltexx; and the difficulties associated with quantifying the nature of that harm amounts to clear and non-speculative evidence of irreparable harm if the injunction is not granted.

[117] In considering the damage to Exaltexx's business reputation and the harm to its business relationships, I consider in part the nature of the letters that have been sent by Fluid. On the scale

from “informative” to “threatening” described by Justice Manson in *Excalibre*, Fluid’s letters fall at the “very threatening” end. The fact that such threatening letters are recognized as “tending to discredit” the business, goods or services of a competitor shows the inherently detrimental reputational impact of them: *Excalibre* at para 283. Reputational damage may be the subject of inference from the evidence: *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paras 28-30.

[118] I do not accept Fluid’s contention that Exaltexx has failed to show irreparable harm because only Hommy Trucking has expressly decided not to do business with Exaltexx on the basis of the letters, there is no evidence that they cannot be replaced, and that Exaltexx has not established a “wholesale refusal” to do business with Exaltexx: *Boehringer* at para 73. To date, Fluid states that it has sent three cease and desist letters and communicated with a fourth party. The stated goal on the face of the letters is to have companies dealing with Exaltexx’s products—including those whose only role is unlikely to be considered infringing—cease doing so. One of the letter recipients has expressly complied (Hommy Trucking), and there is evidence suggesting that the party receiving a verbal or privileged communication (Brenntag) has too.

[119] By resisting this motion, Fluid is seeking to be able to send equivalent letters to each and every supplier dealing with Exaltexx’s products, including any who might replace suppliers like Hommy Trucking, demanding that they cease doing so. It is a strained argument for Fluid to suggest that they ought to be permitted to do so because their initial letters were not fully effective in achieving their stated goal. This is particularly so since there is a small number of potential suppliers (both chemical suppliers and transporters) available. As Fluid conceded, the

assessment of whether harm is irreparable is necessarily context specific. The reference in *Boehringer* to a “wholesale refusal” was to the lack of evidence of a wholesale refusal by physicians to prescribe the plaintiff’s drug. This does not create a new “wholesale refusal” standard that must be met in different contexts relating to different statements made in different markets with different effects.

[120] I similarly reject Fluid’s argument, again relying on *Boehringer*, that there is no evidence that the harm to Exaltexx’s reputation is “irrevocable” since Exaltexx could counteract that harm through its own communications: *Boehringer* at para 74. *Boehringer* was not dealing with a situation of direct demands to cease doing business, nor with threats of patent litigation, but with concerns about misinformation being disseminated about a drug product. Again, it is a strained argument that Fluid should be permitted to continue to send potentially false allegations of infringement, demands to cease dealing with Exaltexx’s products, and threats of litigation, all without notice to Exaltexx, on the basis that Exaltexx could or should counter those threats through its own statements or an indemnity.

[121] I do accept Fluid’s argument that Exaltexx’s initial lack of knowledge regarding who Fluid communicated with does not itself make commercial damages unquantifiable, since this information would be discoverable in the litigation process. However, even with this information, identifying which suppliers refused to bid or supply as a result, which customers decided they could not rely on Exaltexx because of its difficulties obtaining supply or transport, and the resulting broader impact in the marketplace arising from further letters being sent would be impossible to quantify, even if Exaltexx’s safe acid business survived such a campaign.

C. *The Balance of Convenience Favours an Injunction*

[122] Assessing the balance of convenience involves determining which party would suffer greater harm from the granting or refusal of the injunction: *Boehringer* at para 76. Fluid has filed no evidence of any harm it would suffer if prevented from writing further cease and desist letters, in order to counterbalance the evidence of harm to Exaltexx.

[123] Rather, Fluid argues that the balance of convenience favours not granting the injunction based on a number of unsustainable assertions regarding the impact of the injunction, including that it would:

- “restrict the holder of a valid patent from advising others in their shared commercial space of its efforts to protect its intellectual property”;
- “see Fluid prohibited from defending its patent rights...by advising third-parties about this lawsuit”, while Exaltexx “would be permitted to market a potentially infringing product without competition”;
- “seriously curtail Fluid’s ability to promote its products, while allowing a competitor to promote, unchecked, potentially infringing products”;
- prohibit Fluid from “initiat[ing] a discussion with companies that it believes are infringing its patent” so that where “the entity shows no infringement, then no litigation needs to be undertaken”;
- force Fluid to “commence litigation against any entity it believed was infringing”; and
- “severely restrict Fluid’s ability [to] enforce the patent rights it holds.”

[124] There is nothing in the injunction requested by Exaltexx that would in any way curtail Fluid's ability to promote its products. Nor would it prevent Fluid from appropriately enforcing its patent rights, either through litigation or through *bona fide* pre-litigation communications. Fluid has provided no evidence that either its business or its patent rights would be in any way harmed if it is prevented from making allegations of patent infringement by Exaltexx's suppliers, and threatening litigation if they continue to deal with Exaltexx's products.

[125] As noted at the outset, cease and desist letters form a common part of litigation in Canada and can be a valuable part of enforcement of rights including intellectual property rights. In the present case, however, by sending highly threatening letters to companies against whom it has suspect infringement claims, Fluid has gone beyond the appropriate and valuable use of cease and desist letters. If the result is that they become less able to use them as a tool in enforcing their patent rights until the determination of those rights, it is a result of their own actions to date and the resulting impact on Exaltexx.

[126] In the absence of any evidence at all from Fluid and in light of the undertaking as to damages given by Exaltexx, I am satisfied that the balance of convenience favours the issuance of the injunction.

D. *The Fundamental Question: Is granting an injunction just and equitable in all of the circumstances of the case?*

[127] As the Supreme Court of Canada stated in *Google v Equustek*, the ultimate or fundamental question is whether granting an injunction is just and equitable in the circumstances: *Google v Equustek* at paras 1, 25. While the three-part test from *RJR-MacDonald*

is designed to address this question, I consider it appropriate to briefly address the fundamental question separately.

[128] In this action, Fluid alleges that a competitor's product infringes its patents. That claim is clearly contested, and the determination of that claim will be made on its merits in this Court at the appropriate time. In the interim, Fluid has engaged in a letter writing campaign raising serious and aggressive threats of litigation, including against parties—such as Hommy Trucking and Panther—for whom a claim of patent infringement appears, on the evidence before the Court at this time, tenuous at best. To the extent that Fluid did not know that these parties' only involvement with Exaltexx was as suppliers, I cannot find that this excuses writing letters of such a broad and threatening nature. If anything, this lack of knowledge would simply make the letter writing reckless. The letters were far from being "very carefully worded and circumspect," to use the language of Justice Cullen in *M&I Door Systems Ltd v Indoco Industrial Door Co Ltd* (1989), 25 CPR (3d) 477 (FCTD) at paragraph 101. To the contrary, they appear on their face to be designed for maximum threatening effect, with the goal of having suppliers cease doing business with Exaltexx regardless of the merits of a claim against those suppliers and well before determination of their claim against Exaltexx.

[129] I reiterate the important and typically constructive role of cease and desist letters, and the importance of allowing intellectual property rights holders the ability to enforce those rights in practical and effective ways, including outside or before the litigation process. Even keeping these principles in mind, I have no difficulty concluding that in this case it is just and equitable to enjoin Fluid from continuing its threatening communications with Exaltexx's suppliers.

VII. Remedy: Scope of the Injunction

[130] Exaltexx has established a serious issue that Fluid's statements, that suppliers of products (such as chemicals) and services (such as transport) infringe Fluid's patents, are actionable under subsection 7(a) of the *Trademarks Act*. They have not, on this motion, done the same with respect to Fluid's statements that Exaltexx's products are themselves infringing. As the other elements of the *RJR-MacDonald* test have also been met, an injunction will issue restraining Fluid from making further allegations of infringement by, or threats of litigation to, Exaltexx's suppliers. While Fluid may have better infringement claims against some suppliers than others, such as those who engage in the blending of chemicals into the final formulation alleged to be infringing, Fluid's conduct in sending letters indiscriminately and the need to avoid a case-by-case oversight by the Court is such that Fluid will be enjoined from such communications with any of Exaltexx's suppliers.

[131] Exaltexx has also referred to the harm that may come from similar letters being sent to customers, and it also seeks to enjoin Fluid from making infringement allegations against customers. However, there is to date no evidence that Fluid has sent or intends to send such letters to customers. This may be because those customers are also customers of Fluid, or it may be for other reasons. Nonetheless, despite the concerns raised by Ms. Ayotte regarding the actions of certain customers, the list of entities contacted provided by Fluid's counsel pursuant to the parties' agreement did not identify those or any customers. Although there is no evidence directly from Fluid on the issue, I am not prepared in the circumstances to infer from the lack of sworn evidence that counsel's statement is inaccurate.

[132] In addition, the nature of these patents is such that if Exaltexx's products infringe Fluid's patents, customers using those products may similarly infringe. Given the absence of evidence establishing a serious question with respect to Exaltexx's products, there is similarly an absence of evidence to establish that a statement alleging that a customer is infringing would be actionable under subsection 7(a), if such a statement were made. The injunction issued at this time will therefore not cover customers or potential customers of Exaltexx.

[133] An injunction will therefore issue in the form of the order set out below.

[134] I conclude by reaffirming the statement of Justice Hughes to the effect that not every assertion of intellectual property that may subsequently be proven incorrect will constitute a false and misleading statement that tends to discredit a competitor resulting in a subsection 7(a) claim: *Supertek* at paras 10-11. Still less will every such assertion or threat of litigation be appropriately the subject of an injunction, as there will be many cases in which either the requirements of subsection 7(a) or the other aspects of the *RJR-MacDonald* test are not met. However, where allegations of infringement and threats of litigation are directed to third parties in an effort to effectively obtain in the marketplace what could not be obtained with an injunction, a reasonable basis for a subsection 7(a) claim may be made out. If a claimant suffers irreparable harm as a result and the remainder of the *RJR-MacDonald* test is satisfied, an injunction preventing such communication may appropriately issue.

VIII. Costs

[135] In accordance with the request of the parties at the conclusion of the hearing, if they are unable to agree on costs, they may make submissions on the following basis:

- Exaltexx shall file written submissions on costs, in letter format, not to exceed three pages single-spaced, by January 28, 2020. Exaltexx may attach a bill of costs as an appendix.
- Fluid shall file written submissions on costs, in letter format, not to exceed three pages single-spaced, by February 5, 2020. Fluid may attach as an appendix a bill of costs and/or a submission, not to exceed one page, addressing specific line items in the Exaltexx's bill of costs (if filed).
- Exaltexx may file reply submissions, in letter format, not to exceed one page single-spaced, by February 11, 2020. Exaltexx may attach as an appendix a submission, not to exceed one page, addressing specific line items in the Fluid's bill of costs (if filed).
- If the foregoing dates are unworkable for the parties, they may consent to extend them, provided all materials are filed by February 21, 2020, or they may address the Court further.

ORDER IN T-1645-19

THIS COURT ORDERS that

1. Fluid Energy Group Ltd, including through its lawyers, employees, representatives, agents, or any entity or person under their authority or control, shall not communicate with any supplier associated or involved with Exaltexx Inc's safe acids business, whether or not they have been contacted by Fluid Energy Group Ltd to date, so as to:
 - a. make statements alleging that those suppliers are breaching or infringing one or more of Canadian Patents CA 2,892,876; CA 2,961,777; CA 2,961,787; CA 2,961,792; CA 2,961,794; CA 2,961,783; CA 2,892,875; CA 3,006,476; and CA 2,974,757 by virtue of supplying goods or services to Exaltexx Inc or otherwise dealing with Exaltexx Inc or its products;
 - b. demand that those suppliers cease supplying goods or services to Exaltexx Inc or otherwise deal with Exaltexx Inc or its products; and/or
 - c. threaten legal proceedings for infringement or breach of said patents by virtue of supplying goods or services to Exaltexx Inc or otherwise dealing with Exaltexx Inc or its products.
2. This order does not restrict or prevent Fluid Energy Group Ltd from:
 - a. engaging in any discussions with the defendants in this action; and/or
 - b. commencing any action against any such parties, either by new claim or by seeking to add parties to this action.
3. Exaltexx Inc shall file within seven days of the date of this order an undertaking to abide by any order concerning damages caused by the granting of the foregoing

injunction, confirming the undertaking given by counsel for Exaltexx Inc at the hearing of this matter.

4. Exaltexx Inc is required to serve a counterclaim together with any Statement of Defence in accordance with any order made disposing of the motion to strike the Statement of Claim. In the event that the Statement of Claim is struck, Exaltexx Inc's claim against Fluid Energy Group Ltd pursuant to subsection 7(a) of the *Trademarks Act* shall be filed as an independent action, subject to further order of the Court in disposing of the motion to strike the Statement of Claim.
5. The motion of Exaltexx Inc, as it relates to the request for an interlocutory injunction in paragraph 3 of its notice of motion, is otherwise dismissed.
6. Costs may be spoken to in accordance with the reasons given.

“Nicholas McHaffie”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1645-19

STYLE OF CAUSE: FLUID ENERGY GROUP LTD v EXALTEXX INC ET AL

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 9, 2020

JUDGMENT AND REASONS: MCHAFFIE J.

DATED: JANUARY 20, 2020

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