

Federal Court



Cour fédérale

Date: 20241126

Docket: T-449-17

Citation: 2024 FC 1887

Ottawa, Ontario, November 26, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

AGI SURETRACK, LLC

Plaintiff / Defendant by Counterclaim

and

FARMERS EDGE INC.

Defendant / Plaintiff by Counterclaim

ORDER AND REASONS

I. Overview

[1] Farmers Edge Inc seeks its costs of this action, in which it successfully defended patent infringement allegations brought by AGI Suretrack, LLC (formerly Farmobile, LLC) and obtained a declaration that Canadian Patent No 2,888,742 [the '742 Patent] is invalid: *AGI Suretrack, LLC v Farmers Edge Inc*, 2024 FC 934 [Trial Judgment]. Farmers Edge asks the Court to award a total (revised) amount of \$5,689,225, which it calculates based on 50% of its

total recoverable fees, doubled after the date of a written offer to settle, plus recoverable disbursements, less the net result of interlocutory costs awards.

[2] AGI accepts that Farmers Edge should receive costs, but contends they should be awarded based on the high end of Column V of Tariff B of the *Federal Courts Rules*, SOR/98-106, with reduced disbursements, for a total of \$1,474,892. Alternatively, AGI argues that if a lump sum is to be awarded, 25% of a lower base fees amount would be reasonable and fair, yielding a total recoverable amount of \$2,182,615.

[3] For the reasons below, I will award Farmers Edge a lump sum amount of \$2,500,000 on account of fees, calculated as 33% of its adjusted recoverable fees to April 12, 2021, and 66% thereafter pursuant to Rule 420, together with disbursements in the amount of \$1,777,435, for a total of \$4,277,435 as costs of the action. Outstanding interlocutory costs orders will be offset against this amount, and amounts standing as security for costs will be released in partial payment. Post-judgment interest will run on the balance at a rate of 4.25% from the date of judgment, but with a grace period of 30 days for payment.

II. Fees

A. *The Court will award a lump sum for fees*

[4] Rule 400(1) of the *Federal Courts Rules* grants the Court “full discretionary power” over the amount, allocation, and payor of costs. Costs awards have a number of purposes, including providing indemnification to the successful party for their costs, encouraging settlement,

discouraging frivolous litigation and unnecessary steps, and facilitating access to justice: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras 22–27; *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 19.

[5] Rule 400(3) sets out a non-exhaustive list of factors the Court may consider in exercising its discretion. Rule 400(4) provides that the Court may fix all or part of any costs by reference to Tariff B, and may award a lump sum in lieu of, or in addition to, any assessed costs: *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at paras 10–11. Lump sum awards have found increasing favour in the Federal Courts, both in relatively simple matters and in complex matters where precise calculations can become complicated and burdensome: *Nova Chemicals* at para 12. Lump sum awards in excess of Tariff B may be awarded in appropriate cases, as even the high end of Column V may not meet the objective of making a reasonable contribution to the costs of litigation. However, an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts: *Nova Chemicals* at para 13; *Apotex Inc v Shire LLC*, 2021 FCA 54 [*Shire (FCA)*] at para 18.

[6] Recent costs decisions in patent cases show that this Court continues to exercise its discretion to award lump sum costs awards in excess of Tariff B in complex intellectual property matters: see, e.g., *Teva Canada Limited v Janssen Inc*, 2018 FC 1175 at paras 4–6; *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at paras 10–14; *Allergan* at paras 22–28; *NCS Multistage Inc v Kobold Corporation*, 2023 FC 1486 at paras 1662–1667; *Valley Blades Ltd v Usinage Pro-24 Inc (Nordik Blades)*, 2024 FC 1657 at paras 3, 14–18, 21.

[7] Farmers Edge contends that an elevated lump sum award is appropriate in this case. It notes that its true costs of this hard-fought, long, and complex litigation were an order of magnitude greater than would be assessable even at the top end of Tariff B. It submits that the parties are both sophisticated companies, represented by experienced teams of patent litigation counsel, that the amounts at stake were significant, and that AGI's conduct in the litigation speaks in favour of a lump sum award.

[8] AGI responds that Farmers Edge's own conduct resulted in significant costs thrown away during the course of the action. It therefore argues that Tariff B is therefore appropriate to ensure a proportionate recovery of Farmers Edge's legal fees.

[9] I will address the parties' respective arguments about the Rule 400(3) factors, including the conduct of the other party, in further detail below. These factors are relevant to both the granting of lump sum costs and the quantum of those costs. Having considered these factors, I conclude that the complexity of the matter, the significant inadequacy of the Tariff in providing any reasonable degree of indemnification, the amounts at stake, the sophistication and resources of the parties to the litigation, and the relative simplicity of a lump sum award all speak in favour of a lump sum costs award. Consideration of the parties' conduct and any costs thrown away can be taken into account in considering the quantum of the lump sum award.

[10] In the exercise of my discretion under Rules 400(1) and (4), I conclude it is appropriate to grant a lump sum award rather than costs based on Tariff B in this case.

B. *Calculation of the lump sum award*

[11] In determining an appropriate lump sum costs award, the Court is not limited to a particular calculation methodology, but it is common for the Court to base such an award on a percentage of reasonably incurred and recoverable fees. Neither party proposes any other basis for determining a lump sum award. Noting the importance of simplicity, I agree that a percentage calculation of fees is an appropriate basis on which to assess costs in this case.

[12] The relevant questions then become “What percentage?” and “What fees?”

(1) What percentage?

(a) *Adoption of a “starting point”*

[13] The Court is not restricted to any particular percentage or range of percentages for a lump sum costs calculation. Indeed, to conclude otherwise may constitute a fettering of the Court’s discretion: *Canada v Bowker*, 2023 FCA 133 at para 25. At the same time, the Court’s approach must be principled and guided by precedent: *Shire (FCA)* at para 24. In recent intellectual property cases, this Court has considered a range between 25% and 50% of actual fees as the basis for a lump sum party-and-party costs award, recognizing there may be cases where a higher or lower percentage is warranted: *Nova Chemicals* at para 17; *Shire (FCA)* at para 22; *Teva* at para 6; *Bauer* at paras 12–14; *Allergan* at para 27; *NCS Multistage* at para 1667. Neither party argues that a percentage outside this range should be used as a base rate for the calculation in this case: AGI proposes 25%, while Famers Edge proposes 50%, subject to the impact of Rule 420,

discussed below. I agree that the circumstances of this case do not warrant applying a percentage outside the range discussed and applied in the jurisprudence, before consideration of Rule 420.

[14] Within this 25–50% range, some cases have proposed setting a “starting point” at the bottom of the range, then assessing whether the circumstances warrant a higher or lower number: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at paras 22–24; *Bauer* at para 14. Others have set the starting point at the middle of the range (37.5%), based on the Chief Justice’s approach in *Allergan: Allergan* at paras 32–35; *NCS Multistage* at para 1667; *Takeda Canada Inc v Apotex Inc*, 2024 FC 106 at para 290. Still others have not used a starting point at all, simply assessing the appropriate percentage within the range: *Valley Blades* at paras 18–19, 22–28.

[15] I believe Farmers Edge overstates the case when it submits that *Seedlings* and *Bauer* have been “superseded” by *Allergan* and *NCS Multistage*. While a number of this Court’s recent cases have adopted the 37.5% starting point approach described in *Allergan*, I note that the Federal Court of Appeal in *Shire (FCA)*, a case decided shortly after *Allergan*, held that “awards between one-quarter and one-third of fees are the norm” and that “[w]hile some cases have allowed more, they are exceptional”: *Shire (FCA)* at para 22. These comments were made in the context of a pharmaceutical patent case of average complexity, involving sophisticated parties: *Shire (FCA)* at paras 19–20. In my view, there is some anomaly in using a starting point of 37.5% when the Court of Appeal has described that as being outside the “norm” and in the category of the “exceptional.”

[16] That said, the Chief Justice’s observations regarding the importance of incentives for conducting efficient litigation, the amounts at stake, the sophistication of commercial litigants, and the value of consistency on this issue are well taken: *Allergan* at paras 32–35. Balancing these observations and those of the Court of Appeal, it strikes me that a starting point of one-third (rounded down to 33%) is appropriate. This was the rate adopted in *Shire (FCA)* as the “usual partial indemnity rate” after positive and negative factors balanced out, and affirmed by the Court of Appeal as being the norm: *Shire (FCA)* at paras 9, 16, 22, aff’g *Apotex Inc v Shire LLC*, 2018 FC 1106 [*Shire (FC)*] at para 30. I will therefore use 33% as a starting point, while recognizing that this already reflects a costs award well higher than would be recoverable under Tariff B.

[17] Regardless of the starting point, or whether one is used at all, the objective of the exercise is ultimately to determine a reasonable basis for a calculation of lump sum costs within the range described in the jurisprudence, based on the relevant factors in the case, recognizing that (i) the determination of a lump sum is not an exact science, and (ii) a balance must be struck between compensating the successful party and not unduly burdening the unsuccessful party: *Nova Chemicals* at para 21; *Energizer Brands, LLC v Gillette Company*, 2024 FC 717 at para 9, citing *Janssen Inc v Teva Canada Ltd*, 2022 FC 269 at para 8 and *Federal Courts Rules*, Rule 3. This requires consideration of the relevant factors in the circumstances of the particular case, to which I now turn.

(b) *Success: Rule 400(3)(a)*

[18] Farmers Edge was successful on both infringement and validity. As a result, I did not need to address other issues such as extraterritoriality or remedies: Trial Judgment at para 25.

[19] Farmers Edge abandoned certain issues raised in the pleadings shortly before trial, including its allegations regarding ownership and inventorship, and therefore did not obtain the declarations on these issues it sought in its counterclaim: Trial Judgment at paras 20, 23, 534. AGI does not argue this amounts to “divided success” that should disentitle Farmers Edge to a costs award. However, it contends that its costs associated with the abandoned issues are “costs thrown away,” which should be considered in assessing the costs awarded to Farmers Edge. I will address this argument separately below under that heading.

(c) *Amounts claimed and recovered, importance and complexity of the issues, and amount of work: Rule 400(3)(b), (c), and (g)*

[20] The amounts at stake in the litigation were substantial. AGI sought in excess of \$65 million in damages to December 31, 2021, plus further damages thereafter, punitive damages, and injunctive relief. None of the amounts claimed were recovered.

[21] Farmers Edge claims the litigation was particularly important to it, as it would have been effectively put out of business if AGI had obtained the remedies it sought. AGI contests this, noting that Farmers Edge’s damages expert, Dr. Meyer, opined that only three of 19 components of FarmCommand were alleged to infringe the patent. In my view, Farmers Edge’s position on

damages should not be conflated with the overall importance of the issues in light of the amounts claimed by AGI. While AGI now relies on Dr. Meyer's evidence, it criticized that evidence at trial, contending that Dr. Meyer had inappropriately minimized the reasonable royalty and undervalued damages. Having been privy to confidential information regarding Farmers Edge's revenues, net income, and business, I accept that an award of damages of the nature sought by AGI would have had, at the least, a significant impact on Farmers Edge and may well have affected its ongoing viability.

[22] I also agree that this action was of above-average complexity, even for patent litigation. While it did not involve complex scientific issues and only one patent was at issue, the complexity was increased by the number of interrelated construction issues in play, the different claims asserted against different versions and different aspects of Farmers Edge's products over time, the resulting volume of expert reports, and the significant number of other liability and remedies issues raised by the parties in argument and expert evidence.

[23] These issues necessarily translated into an enormous amount of work for counsel, as seen in the invoices and fee details issued by McCarthy Tétrault LLP, Farmers Edge's counsel since November 2019 (Farmers Edge does not claim costs incurred prior to this date, when it was represented by another firm).

[24] These factors tend to point to a higher recovery. At the same time, the complexity of the litigation has already been factored into adopting a lump sum approach to costs and taking 33% of fees as a starting point. The particular complexity of this matter merits consideration, but such

consideration must not ignore the extent to which complexity has already been taken into account. The amounts at stake and the importance and complexity of the issues are also reflected in the higher resulting fees, which increase the total amount of a costs award even at the same percentage multiplier. Caution must therefore be exercised to avoid disproportionate compensation: *Seedlings* at para 23; *Bauer* at para 28.

[25] As a result, while I find that these issues, particularly the importance and complexity, have some upward influence on the appropriate percentage of recoverable fees, that influence must be tempered by the fact that both the costs approach and the resulting calculation already reflect these factors. Conversely, the fact that Farmers Edge is not claiming any fees at all in respect of the first two and a half years of the action means that the amount of work is not fully reflected in its claimed fees, so the resulting multiplication will be, if anything, on the conservative side.

(d) *Failure to admit anything that should have been admitted: Rule 400(3)(j)*

[26] Each side accuses the other of failing to admit things it should have admitted and asks that this be reflected in the Court's approach to costs. For the following reasons, I do not consider this a material factor in either direction.

[27] Farmers Edge alleges that AGI unnecessarily refused to admit the availability of certain prior art, requiring it to (i) get affidavits from John Deere and the Internet Archive that were ultimately admitted at trial without cross-examination (Trial Judgment at para 22); and

(ii) subpoena Google to give evidence regarding the dates of publication of YouTube videos, evidence that ultimately did not have to be called when AGI conceded the point mid-trial.

[28] I agree that AGI ought to have admitted these matters before Farmers Edge was put to the task of obtaining evidence to prove them. AGI's response that it was simply putting Farmers Edge to its burden of demonstrating the dates of availability of prior art misses the point. Evidently, each party has the burden to establish the facts they rely on to make their case. However, Rule 400(3)(j) recognizes that some facts can and should be established through admission, rather than requiring an opposing party to call evidence to prove them at trial. In my view, issues like the published dates of YouTube videos or information from the Internet Archive fall into this category, particularly if there is no reason to doubt the accuracy of the dates as they appear on their face. While a party may insist on the opposing party obtaining evidence from a website or a manufacturer to meet their burden, they must be prepared for that insistence to be reflected in the Court's assessment of costs.

[29] That said, the actual burden imposed on Farmers Edge with respect to these aspects of the evidence appears modest in the context of the action as a whole. Farmers Edge had a sizeable and sophisticated legal team representing it during years of litigation. Making arrangements to obtain a subpoena and two brief affidavits, one in a standard form, no doubt involved some time and cost. However, given the total recoverable costs put forward by Farmers Edge, any material adjustment to the percentage multiplier would result in disproportionate recovery for these issues.

[30] For its part, AGI notes that Farmers Edge refused to admit the authenticity of 86 documents from Crop Ventures, on grounds that confirming the authenticity of 700 pages of documents was “onerous and unreasonable.” It is difficult to fully assess this allegation on the information before the Court, but I see merit in AGI’s assertion. In the context of this action, reviewing and assessing the authenticity of 700 pages of documents does not appear on its face to be unduly onerous, particularly when the alternative may be that the authenticity of the documents must be proved at trial. Again, however, the impact of Farmers Edge’s refusal appears limited. The documents were not ultimately introduced at trial as the issues they spoke to were abandoned by Farmers Edge. The refusal to admit their authenticity therefore did not lengthen the trial in any way, and there is no evidence of any pre-trial cost incurred by AGI due to the refusal.

[31] Overall, while each party could have taken a more reasonable approach to admissions, I do not see the issues they have raised as having a material impact on the percentage multiplier to be used in determining a lump sum award of costs.

(e) *Allegations of impropriety: Rule 400(3)(o)*

[32] Each side also accuses the other of making unfounded allegations of impropriety, and asks that this be reflected in the costs award. There is no question that unfounded allegations of improper conduct, particularly those seriously prejudicial to the character or reputation of a party, are relevant in assessing costs, and may even merit solicitor-and-client costs: *H-D USA, LLC v Berrada*, 2015 FC 189 [*Berrada*] at para 21; *Air Canada v Toronto Port Authority*, 2010 FC 1335 at para 17(5); *Re Biszyk (No 2)*, 1980 CanLII 1843 (ONSC) at pp 9–10 (PDF).

[33] However, heightened costs are not automatically awarded any time an allegation may be described as one going to “impropriety.” In my view, the list of factors that has been adopted in Alberta to guide this assessment is helpful and relevant: *Abt Estate v Ryan*, 2020 ABCA 133 at para 61, citing *College of Physicians and Surgeons of the Province of Alberta v JH*, 2009 ABQB 48 at paras 25–27, in turn citing *Davis v 850015 Alberta Ltd*, 2003 ABPC 68 at para 35. This non-exhaustive list of factors is the following:

1. the nature of the allegation made, and whether the particular circumstances of the party against whom the allegation was made were such as to make the implication of the allegation more serious;
2. what, if any, information supportive of the allegation was known to the party making the allegation;
3. the strength and reliability of that information as it was known, or should have been known, by the party making the allegation;
4. the steps taken by the party making the allegation to verify the information upon which the allegation was based;
5. when the information was made known to the party making the allegation, whether additional information subsequently became known and whether the allegation was modified, or withdrawn to reflect the new information;
6. the timeliness of any such modification or withdrawal; and
7. whether the party making the allegation knew, or should have reasonably known, the allegation’s implications for the party against whom it was made.

[34] Considering these factors and the nature of the allegations raised by each party, I conclude that neither party’s arguments have a material effect on the overall award of costs.

[35] Farmers Edge contends that AGI's request for punitive damages at trial was based on seven allegations of impropriety, all of which were unfounded. They focus on two: AGI's allegation that Farmers Edge and Mr. Ault took contradictory positions in the Nebraska Litigation and in this Court, and its allegation that Farmers Edge maintained co-ownership and co-inventorship pleas in Canada after they had been rejected in Nebraska. While it was unnecessary to address punitive damages in light of the Court's other conclusions, I am not persuaded that Farmers Edge's request for such damages, or the allegations it put forward in support of that request, merit an increase in recoverable costs for Farmers Edge.

[36] Conversely, AGI argues that Farmers Edge's allegations of conspiracy and breach of fiduciary duty against the inventors of the '742 Patent, brought after the issues had been determined against Farmers Edge, similarly amount to allegations of improper conduct which ought to attract adverse cost consequences. These allegations were added to the pleadings in March and June 2020, and were withdrawn in December 2020, although formal amendments to the pleadings were made a few months later. Considering the factors above, and having reviewed the nature of these claims, the determinations in the Nebraska Courts, and the parties' arguments, I am again not persuaded that either the introduction of these claims, or the timing of their introduction and withdrawal, justifies a decrease in recoverable costs for Farmers Edge.

(f) *Costs thrown away on abandoned defences: Rule 400(o)*

[37] As noted above, Farmers Edge abandoned certain defences shortly before trial, notably those relating to (i) ownership and inventorship; (ii) the shop-right doctrine; (iii) anticipation and obviousness based on Crop Ventures' systems; and (iv) the *Gillette* defence. Farmers Edge does

not claim its costs in respect of these arguments, and has calculated its claimed or recoverable fees through a method designed to exclude fees related to these arguments.

[38] AGI nonetheless seeks a reduction in the lump sum award to reflect its own expert and fact witness fees associated with these issues, which it describes as “costs thrown away.” As AGI notes, costs thrown away are costs that are effectively wasted owing to another party’s actions, such as costs dedicated to an issue that has been withdrawn, abandoned, or rendered moot, or costs associated with trial preparation that must be re-done as a result of an adjournment:

Milliken & Company v Interface Flooring Systems (Canada) Inc, 1998 CanLII 7706 (FC) at para 7; *Teva Canada Limited v Pfizer Canada Inc*, 2017 FC 610 at para 3, citing *Caldwell v Caldwell*, 2015 ONSC 7715 at para 8.

[39] Farmers Edge contends that even if it had taken the abandoned arguments to trial and lost, this would likely not have affected its entitlement to costs: *Allergan* at paras 30–32, citing *Raydan Manufacturing v Emmanuel Simard & Fils*, 2006 FCA 293 at paras 2–5, and *Illinois Tool Works Inc v Cobra Anchors Co*, 2003 FCA 358 at paras 10–11, among others. It therefore argues there should be no reduction in fees based on the withdrawal of the issues.

[40] *Raydan* and *Illinois Tool Works* confirm that a defendant to patent litigation who succeeds on either infringement or validity remains the successful party rather than achieving “mixed results” or “divided success,” and will therefore generally be entitled to their costs: *Raydan* at para 5; *Illinois Tool Works* at para 11; Rule 400(3)(a). However, I do not read either case as precluding any consideration, under Rules 400(3)(o) or Rule 400(6), of costs thrown

away or of issues that a successful party lost or withdrew in fixing the level of a lump sum award. To the contrary, the Court of Appeal in *Shire* upheld a costs award in which the Court considered the dismissal of the defendant's counterclaim and the abandonment of claims as factors: *Shire (FCA)* at para 8, aff'g *Shire (FC)* at para 29.

[41] This is not to say that the Court can or should get into an issue-by-issue dissection of winning and losing arguments, which could rapidly negate the benefit of a lump-sum award and lead the Court to "engage in an autopsy of the trial and criticize retrospectively the parties' tactical decisions": *Bauer* at para 32; *Allergan* at para 30. There is a balance to be achieved. Parties should not be discouraged from withdrawing issues at or before trial to focus on the most important arguments and issues, which could occur if they faced adverse costs consequences for withdrawing those arguments instead of pursuing them. Conversely, parties should not be encouraged to advance every argument under the sun throughout an action on a theory that they can abandon them on the eve of trial without costs consequences as long as they are successful on any determinative issue.

[42] With this in mind, I consider the withdrawn arguments based on the Crop Ventures systems and the *Gillette* defence arguments to be simply sub-arguments on validity/infringement that fall well within the rule in *Raydan* and *Illinois Tool Works*. The withdrawal of these arguments has no impact on costs, particularly as Farmers Edge does not seek its costs of the *Gillette* defence.

[43] The shop-right defence and the ownership and inventorship allegations were separate issues, distinct from Farmers Edge's allegations that the '742 Patent was not valid or infringed, that necessitated expert evidence from each party. I find that Farmers Edge advancing and then withdrawing these issues did cause AGI to incur some witness costs thrown away, which should be reflected in a small reduction of the percentage applied. This reduction is significantly mitigated, but not eliminated, by the fact that Farmers Edge has already removed its own fees in respect of the issues from its claim (and does not seek its expert fees on the issues), and by the fact that the abandonment of the ownership and inventorship allegations was triggered by the withdrawal of a witness who Farmers Edge did not control.

(g) *Adjournment of the trial: Rule 400(o)*

[44] On April 12, 2021, a week before the trial in this matter was then scheduled to begin, Farmers Edge announced it had updated its software to implement what its expert, Mr. Ault, had described as a non-infringing alternative. In light of the update, the parties agreed the trial had to be adjourned, and Justice McVeigh, then assigned as trial judge, granted the adjournment: Trial Judgment at paras 221–223; *Farmobile, LLC v Farmers Edge Inc*, 2022 FC 22 at paras 9–13.

[45] AGI contends that Farmers Edge's last-minute disclosure of its software update, which had been in the works for months, resulted in a last-minute adjournment of the trial, and thus in considerable waste of counsel and witness time in preparing for the trial. While AGI does not seek compensation for its own wasted legal fees, it argues the percentage rate applied should be reduced to reflect the wasted expert fees of its experts, Dr. Edwards, Mr. Vanacht, Dr. Hollis, and Mr. Hamilton, associated with trial preparation in March and April 2021. It also contends

that Farmers Edge’s legal and expert fees in this period should be excluded from its recoverable fees and disbursements, issues I address further below.

[46] AGI notes that at the trial management conference at which the Court confirmed the initial adjournment, Justice McVeigh noted the last-minute nature of the adjournment, and stated “costs will incur and will be awarded in my discretion.” Although she could not exercise that discretion until trial, she specifically invited costs submissions at trial related to the adjournment.

[47] Farmers Edge responds that there should be no reduction in costs for the adjournment, since the reason for the adjournment—or at least the lengthy adjournment—was “AGI’s pursuit of ongoing infringement.” It says that it offered to proceed quickly to adjudication of whether its pre-April 2021 system infringed, with a later trial to be conducted on the post-April 2021 system if necessary, an offer AGI refused. It also claims that after the trial was set down to begin in October 2021, AGI pursued needless motions, resulting in further adjournment.

[48] The last of these points is easily dealt with. The trial was rescheduled for August 2022 by order of the Chief Justice dated July 9, 2021. Most, if not all, of the motions Farmers Edge refers to were brought after this date and had no effect on the ultimate trial date, which was already fixed.

[49] More significantly, I consider Farmers Edge’s argument that the adjournment was caused by AGI continuing to pursue its infringement allegations to be untenable. Although it was unsuccessful, AGI was entitled to pursue its allegations of infringement. Farmers Edge was equally entitled to modify its software in an effort to avoid any infringement that might have

occurred. The issue is the timing and context in which it occurred. Mr. Ault presented his opinion on proposed non-infringing modifications to the FarmCommand/CanPlug architecture in a report dated September 2, 2020. Mr. Ault opined that the option that was ultimately implemented would only take about a month to design, code, develop, and deploy. Indeed, Farmers Edge relied on the ease of this update in its arguments on damages. Yet it presented no evidence, either at trial or in support of its costs submissions, to explain why the update was not implemented or disclosed until April 12, 2021, seven months after Mr. Ault's report and a week before the scheduled trial date.

[50] Having been advised of this material update to the software at the heart of the litigation, AGI clearly needed to review and assess that software to determine its position. As Farmers Edge notes, proceeding to an effectively bifurcated trial on only the pre-April 2021 software version was one procedural possibility. However, I cannot accept its argument that the adjournment and the wasted trial preparation costs lay at AGI's feet because it preferred a trial on all issues.

[51] I therefore accept AGI's position that the lump sum awarded should reflect a small deduction to reflect costs thrown away on expert fees incurred in preparation for the adjourned trial date in April 2021. At the same time, I would not expect that all of the experts fees incurred in this time period in preparation for trial were entirely wasted. There was no doubt some substantial duplication of effort when the parties and experts again prepared for trial in the summer of 2022. However, the work undertaken in the spring of April 2021 would have obviated at least some aspects of the later preparation and/or rendered it more efficient.

(h) *Written offers to settle: Rules 400(3)(e), (k)(i), (o), and 420*

(i) Preliminary issue: without prejudice communications

[52] In its evidence supporting its costs submissions, Farmers Edge included copies of (i) an offer made on April 12, 2021, said to be a Rule 420 offer; (ii) other written settlement offers made by Farmers Edge between January 2020 and October 2022 that it asks the Court to consider under Rule 400(3)(e); and (iii) two offers made by AGI that it describes as “extortionary” and asks the Court to consider under Rule 400(3)(k)(i) and (o).

[53] AGI argues it was improper for Farmers Edge to disclose the contents of without prejudice settlement communications and they should be struck from the record “to promote the public policy favouring settlement discussions.” It claims Farmers Edge was entitled to put the fact of its offers and their non-acceptance before the Court, but not to disclose details of AGI’s own settlement communications without AGI’s consent.

[54] I note that while AGI’s arguments appear to be directed primarily at settlement communications from AGI or its counsel, they would theoretically apply to any without prejudice communications, since the without prejudice communication privilege is a jointly held privilege that cannot be unilaterally waived: *Meridian Manufacturing Inc v Concept Industries Ltd*, 2024 FC 604 at para 18, citing *Flock Estate v Flock*, 2019 ABCA 194 at para 34 and *Berkeley Square Holdings Ltd & Ors v Lancer Property Asset Management Ltd & Ors*, [2021] EWCA Civ 551 at paras 38, 40, 58.

[55] In any case, AGI's arguments on this point are without merit.

[56] The privilege over without prejudice settlement communications is an important one, as it promotes the settlement of disputes and improves access to justice: *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paras 1–2, 11–13; *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35 at paras 1, 31–33. There are, however, limits on and exceptions to the privilege: *Sable Offshore* at paras 12, 19; *Union Carbide* at paras 2–3, 34–35. One of these relates to the use of settlement offers in the assessment of costs.

[57] Farmers Edge contends that settlement privilege is presumed to expire once the merits of the dispute have been decided, citing the Alberta Court of Appeal's decision in *Mahe v Boulianne*, 2010 ABCA 74 at para 9. Stated so broadly, this proposition may conflict with *Sable Offshore*, which the Supreme Court issued three years after *Mahe*. In *Sable Offshore*, the Supreme Court held that the privilege protects settlement negotiations whether or not a settlement is reached, and even continues to cover successful settlement negotiations after the parties have settled litigation: *Sable Offshore* at paras 15–18; *Flock Estate* at para 34. It may therefore be too broad to assert that settlement privilege simply expires entirely after a decision on the merits.

[58] Nevertheless, it is clear that there is an established exception or limitation to the privilege, which allows parties to refer to settlement offers after the determination of the merits of an action where they are relevant to the issue of costs: *Mahe* at para 9. This exception is expressly recognized in Rule 422, which provides that “[n]o communication respecting an offer

to settle or offer to contribute shall be made to the Court [...] until all questions of liability and the relief to be granted, other than costs, have been determined” [emphasis added]. I agree with Farmers Edge that the interlocutory cases AGI cites in support of its arguments in fact confirm the scope of Rule 422: *Thibodeau v Halifax International Airport Authority*, 2018 FC 223 at para 24; see also *Maharaj v Rosetown (Town)*, 2022 SKQB 169 at para 26, applying *Thibodeau* in the context of the equivalent Saskatchewan rule.

[59] Here, all questions of liability and the relief to be granted, other than costs, have been determined. Rule 422 therefore recognizes that the parties can communicate offers to settle to the Court. Rules 400(3)(e) and 420 also recognize that offers to settle are relevant to costs. Indeed, it is difficult to understand how the Court could take into account “any written offer to settle” under Rule 400(3)(e), or determine whether a judgment is as favourable, more favourable, or less favourable than an offer under Rule 420, if a party were not allowed to file the offers with the Court. As Farmers Edge notes, AGI itself appears to have understood this, as its settlement offers are expressly marked “WITHOUT PREJUDICE SAVE AS TO COSTS.” This marking clearly indicates AGI’s intention to refer the Court to the offer in addressing costs. For AGI to suggest that it is nonetheless improper for Farmers Edge to do so is untenable.

[60] As the Supreme Court found in *Union Carbide*, the exception to settlement privilege that allows a party to disclose negotiations to prove the existence or scope of a settlement furthers the policy of promoting settlement rather than undermining it: *Union Carbide* at para 35. The same is true of the exception permitting disclosure of offers in the context of costs. The potential costs consequences of unaccepted offers, and the potential that either good faith offers or improper

settlement conduct might influence costs, encourage settlements and the “honest and frank discussions between the parties” that lead to settlements, rather than discouraging them: *Union Carbide* at para 31.

[61] AGI’s arguments that its settlement communications should be struck from the record are accordingly rejected.

(ii) Written offers to settle by Farmers Edge

[62] In addition to the Rule 420 offer discussed below, Farmers Edge made four written settlement offers between January 2020 and July 2022, shortly before trial commenced in August 2022 (one of these, from September 2020, is not found in Farmers Edge’s materials, although its submissions refer to it and AGI does not dispute it was made). Farmers Edge made a further settlement offer in October 2022, after closing submissions in September, while the Court had its decision under reserve.

[63] These offers were open for acceptance for a short duration, between less than a day and five days. Each offered to settle either this action or both this action and associated litigation in the United States, on terms that included a payment to AGI. The largest of these, sent in February 2021, offered to settle this action on terms that included a significant payment to AGI and a mutual covenant not to sue. None of the offers was accepted.

[64] As short term offers, none of these offers meets the requirements of Rule 420. However, offers that do not meet the requirements of Rule 420 may still be relevant to the assessment of

costs under Rule 400(3)(e): *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 20, aff'd 2012 FCA 265; *Allergan* at para 58. I am satisfied these settlement offers show that Farmers Edge was engaged in efforts to resolve the proceeding, on terms that would have been more advantageous to AGI than they were ultimately able to achieve at trial. They merit some recognition in the costs award, but a modest one given the nature of the offers and the impact of the Rule 420 offer discussed below.

(iii) Written offers to settle by AGI

[65] Farmers Edge refers to a settlement offer that AGI served on September 14, 2020, and another served on January 20, 2021. The second of these offers proposed more onerous settlement terms on Farmers Edge, in terms of payment and ongoing royalty rates, than the first. In making the second, AGI referred to the upcoming trial (then scheduled to begin in April 2021), to the potential business disruption and negative press that an injunction would cause, and to its claim for punitive damages. It also referred to recent news reports that Farmers Edge was preparing for an initial public offering, noting the value to Farmers Edge of not having to disclose the ongoing litigation in its IPO prospectus.

[66] Farmers Edge describes this as AGI attempting to leverage the IPO into an inflated settlement, and as extortionary and unacceptable behaviour amounting to “classic patent holdup,” meriting heightened costs. I am unable to agree.

[67] AGI and Farmers Edge were sophisticated parties engaged in high stakes litigation. In attempting to settle that litigation to their respective advantage, each was entitled to consider

their own and their adversary's interests in resolving the matter, including legal positions, trial risks, and broader business interests. Identifying those interests for consideration in a settlement offer is not inherently extortionary. As the Alberta Court of Appeal has phrased it: "Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty": *Amoco Canada Petroleum Co Ltd v Propak Systems Ltd*, 2001 ABCA 110 at para 25.

[68] Even before AGI's letter, Farmers Edge would no doubt have been considering the advantages or disadvantages of resolving the litigation—litigation it describes as potentially jeopardizing the company—in the context of its IPO. It would also have known of the prospectus disclosure obligations that AGI referred to. Farmers Edge may well have had an interest in resolving the matter before its IPO; indeed, it responded with its own highest offer just 10 days after AGI's offer. Whether or not it did, I cannot view AGI's reference to the IPO in its settlement offer in an effort to obtain an advantageous settlement to be "extortionary" or to justify a heightened costs award. I add that Farmers Edge's submission that the short-term nature of the January 2021 offer demonstrates AGI's "hardball tactics" is unpersuasive, particularly since all of Farmers Edge's own offers except its Rule 420 offer were similarly short-term in nature.

[69] There is no question that a party's inappropriate use of undue leverage, taking advantage of the opposing party's personal or economic vulnerability, may amount to bad faith or otherwise warrant increased costs or even punitive damages: see, e.g., *Fernandes v Penncorp Life*

Insurance Company, 2014 ONCA 615 at paras 70, 83–84. However, it strikes me that it will be a rare case in which sophisticated commercial parties referring to their respective business interests in an effort to persuade the other to accept a settlement offer will constitute improper negotiation tactics justifying increased costs.

[70] Similarly, I cannot accept Farmers Edge’s allegation that AGI engaged in improper “patent holdup,” through its refusal to settle and its continued pursuit of infringement allegations, including arguments regarding essential elements, despite its expert’s inconsistent positions on claims construction issues. While AGI’s arguments were unsuccessful, I am not prepared to conclude that they were advanced solely as a tactical position to unjustifiably maintain the litigation and preserve the threat of an injunction. AGI continued to pursue its claim for significant damages and injunctive relief through trial, which exposed it to costs, including doubled costs as discussed below, but this alone does not warrant increasing the rate at which those costs are awarded.

(iv) Rule 420 offer

[71] Rule 420 provides for particular cost consequences associated with a party’s failure to accept a written offer to settle on terms more favourable than they obtain at trial. To trigger the rule, the offer to settle must be made at least 14 days before the commencement of trial, and must not be withdrawn or expire before the commencement of trial: *Federal Courts Rules*, Rule 420(3). Where a defendant makes such an offer, and the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the offer, and to costs calculated at

double that rate, but not double disbursements, from that date to the date of judgment, unless the Court orders otherwise: *Federal Courts Rules*, Rule 420(2)(b).

[72] On April 12, 2021—the day it advised AGI of its implementation of the April 2021 software update—Farmers Edge made a written offer to settle this action on terms including a payment to AGI. The offer states that it remains open until one minute after the commencement of the hearing of the trial of the action. Farmers Edge contends that this offer is a qualifying offer under Rule 420, that AGI did not obtain judgment, and that it should be entitled to double its party-and-party costs from the date of the offer, pursuant to Rule 420(2)(b). Since it is asking that its party-and-party costs be awarded at 50% of its recoverable fees, it asks for 100% of its recoverable fees for the period after April 12, 2021, effectively full recovery of these fees.

[73] When this offer was made, the trial of this action was scheduled to commence a week later, on April 19, 2021. As noted, that trial date was adjourned in light of the software update, which the parties agreed required a postponement.

[74] AGI argues that because of this timing, Farmers Edge’s April 12, 2021, offer to settle does not meet the requirements of Rule 420. It contends that since the offer was made only a week before the trial date that was in effect at the time, it does not meet the condition of being “made at least 14 days before the commencement of the hearing or trial” in Rule 420(3)(a). I disagree. If the trial had gone ahead on April 19, 2021, then Farmers Edge’s offer would not have met the requirements of Rule 420(3)(a). However, the rule requires an offer to be made at least 14 days before the commencement of trial, not 14 days before the date when trial is

scheduled to commence. Trial did not in fact commence until 16 months later, in August 2022. In my view, the offer was plainly made at least 14 days before the commencement of the trial, and the requirements of Rule 420(3)(a) are met.

[75] AGI's argument that the offer was "invalid when made" misunderstands the nature of Rule 420. The Rule does not purport to validate or invalidate offers. It simply sets out costs consequences of failing to accept them, and conditions for the imposition of those consequences. There is nothing in Rule 420 that requires an offer to be served at least 14 days before the trial date in place at the date of the offer. Nor does the Rule state that an offer served less than 14 days before the scheduled trial date is invalid, cannot be accepted before the trial date, or cannot be accepted if the trial is adjourned. On its face, Farmers Edge's offer expired one minute after the commencement of the hearing of the trial of the action. There can be no suggestion that the trial commenced, or that the offer expired, on the original scheduled trial date.

[76] I note that if Farmers Edge had re-served exactly the same offer, say, ten days later (after the adjournment), it would clearly qualify as an offer made at least 14 days before the commencement of the trial. I see no reason why a litigant should be required to re-serve an offer that remains open for acceptance on its face in order to trigger the operation of Rule 420, simply because there has been an adjournment. AGI's complaint that Farmers Edge did not serve a new Rule 420 offer after the adjournment is therefore misplaced. Farmers Edge was not obliged to serve a "new" Rule 420 offer when its existing offer remained outstanding.

[77] The purpose of the 14-day requirement in Rule 420(3)(a) is primarily to allow the receiving party adequate time to review and consider the offer: *Scotia Capital Inc v Aphria Inc*, 2021 ONSC 2302 at para 16. It also allows the receiving party the opportunity to do so before incurring the costs of trial and at least some of the costs of pre-trial preparation. Here, while AGI would not have had the mandated time to review the offer before trial if it had proceeded on April 19, 2021, it had more than adequate time to review and consider the offer and assess its position before trial commenced in August 2022.

[78] AGI also argues that the April 12, 2021, offer was rendered invalid by the next offer Farmers Edge served, on July 22, 2022, about two weeks before the trial did begin. The July 2022 offer, which was open for acceptance for five days, included a larger settlement payment to AGI than the April 2021 offer. Although the July 2022 offer did not expressly state that the earlier offer remained outstanding, I see no basis to conclude that the July 2022 offer invalidated or otherwise cancelled the April 2021 offer.

[79] AGI relies on the Ontario Court of Appeal's decision in *Diefenbacher*, addressing Rule 49 of the *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, which is similar but not identical to Rule 420: *Diefenbacher v Young*, 1995 CanLII 2481 (ON CA). The Ontario Court of Appeal found that, while the "answer is elusive," the service of a second Rule 49 offer, without reference to the first Rule 49 offer, implicitly withdrew the first offer, whether or not the later offer was higher or lower. It therefore found that the cost consequences of Rule 49 only applied from the date of the second offer: *Diefenbacher* at pp 10–11 (PDF).

[80] I note that there appears to be some uncertainty about the continued applicability of *Diefenbacher* in Ontario, given a divide in the appellate case law on the issue: *Watt v TD Insurance*, 2020 ONSC 953 at paras 13–19; *Ramcharran v State Farm Mutual Automobile Insurance Co*, 2023 ONSC 3698 at paras 36–40; *Gorman v Powell*, 2006 CanLII 42801 at para 6. In any event, the Ontario Courts have confirmed that the principle in *Diefenbacher* is limited to subsequent Rule 49 offers, and does not apply to subsequent offers not made under Rule 49: *Watt* at para 19, citing *Sandhu v Sikh Lehar International Organization*, 2017 ONSC 7165 (at paras 19–20).

[81] In the present case, there was no Rule 420 offer subsequent to the April 2021 offer. In particular, the July 22, 2022 offer was not a Rule 420 offer. The principle in *Diefenbacher* can therefore have no application.

[82] In any event, I entirely agree with the observation of Justice LeMay in *Watt* that “it would be a strange result if a party seeking to compromise increased its offer to settle and thereby lost some of the benefits (cost consequences to the other side) of its willingness to compromise further”: *Watt* at para 20. If a party lost the costs benefits of an earlier Rule 420 offer by presenting a later offer that was more favourable to the other side, this would discourage parties from making subsequent offers that show a greater willingness to compromise. This is contrary to the very principles underlying Rule 420. I would therefore not be inclined to apply *Diefenbacher* in this Court even in the case of a subsequent Rule 420 offer. In this regard, I respectfully disagree with the contrary view expressed by the Assessment Officer in *Caricline Ventures Ltd v ZZTY Holdings Ltd*, 2002 FCT 1134 at paras 29–31, a case that was decided

primarily on the factual elements of the second offer that indicated that it effectively revoked the initial offer. In the present case, I see nothing in the July 2022 offer that either expressly or implicitly withdraws the April 2021 offer. I note that in *Teva*, Justice Locke accepted that a Rule 420 offer was not withdrawn by a subsequent more advantageous offer: *Teva* at paras 16–17.

[83] I therefore conclude that Farmers Edge’s offer of April 12, 2021, was not subsequently revoked or withdrawn, either through service of the July 2022 offer or otherwise.

[84] As for the other requirements of Rule 420, AGI does not dispute that Farmers Edge’s offer was clear and unequivocal, contained an element of compromise, and would have brought the litigation to an end: *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at para 87. As Justice Grammond noted, the fact that a defendant’s offer is for a small fraction of the claimed amount is not, in itself, grounds for finding that it does not contain an element of compromise: *Bauer* at para 42. Nor does AGI dispute that it failed to obtain judgment. I therefore conclude that Rule 420(2)(b) applies to presumptively entitle Farmers Edge to its party-and-party costs to the date of service of the offer, and to double that rate from the date of judgment.

(i) *Conclusions on the appropriate percentage*

[85] In consideration of the factors set out above, before considering the impact of Rule 420, I conclude it is appropriate to award party-and-party costs to Farmers Edge in a lump sum calculated based on 33% of its recoverable fees. I reach this conclusion based on a balance between the factors tending to increase the percentage (amounts claimed and recovered, the

resulting importance of the issues in the litigation, the above-average complexity of the issues, and the non-Rule 420 offers to settle) and those tending to decrease (costs thrown away related to the abandoned issues and the adjournment), which I conclude have approximately equal effect. Considering the matter more broadly, it also seems to me to be a just and appropriate basis for calculation in the context of the litigation as a whole in and in consideration of the range of lump sum awards from 25-50% found in the case law. In this regard, I consider the 25% proposed by AGI inadequate and inappropriate in the circumstances and the 50% proposed by Farmers Edge unduly high.

[86] As noted, Farmers Edge's Rule 420 offer presumptively has the effect of doubling this amount after April 12, 2021. The Court maintains a discretion under Rule 420 not to award double party-and-party costs, whether calculated pursuant to the Tariff or as a lump sum, depending on the circumstances of the case, including the impact of the doubling. However, that discretion should be exercised with caution, given the risk that the laudable goals that underlie Rule 420 would be undermined by dispensing too readily with the consequence of failing to accept an offer: *Michaels v Unitop Spolka Z Organiczona Odpowiedzialnoscia*, 2020 FC 1031 at para 5; *Bauer* at para 36.

[87] AGI submits that a lump sum recovery rate greater than 50% requires "exceptional circumstances," and is a "departure from the usual partial indemnity rate," used mainly in situations where the Court "wishes to express its displeasure with the conduct of the losing party": *Shire (FC)* at para 30; *Berrada* at para 27; *Teva* at para 35. It argues that these sentiments apply even to the application of Rule 420.

[88] However, the passages cited above pertain to lump sum awards generally on a party-and-party scale, and not to the effect of doubling because of a Rule 420 offer. In *Berrada*, Justice St-Louis' comments regarding a 50% rate were clearly made prior to consideration of Rule 420. She concluded that a 33% rate should apply, and then expressly considered whether to double that rate by operation of Rule 420. Although she ultimately found that no Rule 420 offer was made, this does not indicate that she was not prepared to double the 33% rate if an offer had been made: *Berrada* at paras 26–38. Similarly, there was no settlement offer at issue in *Shire*. Justice Fothergill's comment that 50% represents a “departure from the usual partial indemnity rate” cannot affect the application of Rule 420, which expressly contemplates doubling the “party-and-party” (*i.e.*, partial indemnity) rate: *Shire (FC)* at para 30.

[89] Nor does the fact that this Court has in some cases doubled a 25% base rate to 50% as a result of Rule 420 mean that the Court is unwilling to exceed 50% upon applying Rule 420 as a general matter: *Bauer* at paras 2–4, 43; *Iamgold Corporation v Hapag-Lloyd AG*, 2020 FC 610 at paras 7, 36–37; *Teva* at paras 35–36, 39.

[90] I am satisfied that in the present circumstances, Farmers Edge should benefit from, and AGI should not be relieved from, the costs doubling effect of Rule 420. I note that this will effectively multiply the reduction in the rate that I have included to reflect costs thrown away. However, it also has the same effect on the increases to the rate associated with the other elevating factors. I am satisfied on balance that the effect of the doubling is reasonable as an overall matter given the circumstances and the factors described above.

[91] I will therefore calculate a lump sum award of costs based on 33% of Farmers Edge's recoverable fees to April 12, 2021, and 66% thereafter.

(2) What fees?

[92] In its initial submissions, Farmers Edge itemized its claimed or recoverable fees as totalling \$1,439,268 before April 12, 2021, and \$3,335,240 thereafter, for a total of \$4,774,508.21. To reach these figures, Farmers Edge reviewed its dockets to remove unrecoverable fees, *i.e.*, fees incurred in respect of matters such as motions for which costs had already been awarded, the withdrawn defences, and unrelated work. In response, AGI identified errors in Farmers Edge's review, including what it considered to be incomplete deductions for unrecoverable time and incorrect weighting of recoverable and unrecoverable work. AGI also submitted that Farmers Edge's fees for trial preparation between February 22 and April 15, 2021, totalling \$448,264, should be unrecoverable, as those fees were ultimately wasted.

[93] In its reply submissions, Farmers Edge accepted all of AGI's identified errors, revising its recoverable fees figure to \$4,644,131. While there remain some minor differences in the parties' resulting calculations, they are trivial and ultimately in AGI's favour. However, Farmers Edge did not accept AGI's argument that trial preparation fees incurred between February 22 and April 15, 2021, should be considered unrecoverable. It attributed the costs of the adjournment to AGI, for the reasons set out above.

[94] I agree that in addition to taking into account the adjournment in the determination of the percentage, some adjustment to Farmers Edge's recoverable fees should be made to reflect trial preparation costs in the spring of 2021. Again, though, I would not expect that the pre-trial work done in the spring of 2021 was entirely wasted. The work done to prepare for the first scheduled

trial would have included some work that remained relevant and valuable in the summer of 2022. While it is impossible to calculate this precisely, in the exercise of the Court's best judgment, I will accept 60% of AGI's proposed reductions in the period from February 22 and April 15, 2021. This has the effect of reducing the recoverable fees prior to April 12, 2021, by about \$230,400, and those after that date by about \$38,400.

[95] Based on the foregoing, and using the spreadsheets helpfully provided by the parties with their costs submissions, I will award Farmers Edge the lump sum of \$2.5 million in fees, rounding from the following calculation:

	<u>Recoverable Fees</u>	<u>Lump sum percentage</u>	<u>Total</u>
To April 12, 2021	\$1,183,026	33%	\$390,399
After April 12, 2021	\$3,192,146	66%	<u>\$2,106,817</u>
			\$2,497,216

III. Disbursements

[96] Farmers Edge claims its disbursements in the revised total amount of \$1,877,808. These relate primarily to expert witness fees (\$1,496,361), with the remainder attributable to (i) fees for Ms. Robidoux, Farmers Edge's former CFO who prepared and gave evidence on contractual, financial, and accounting issues relevant to damages; (ii) electronic document hosting; (iii) the Internet Archive affidavit; and (iv) miscellaneous other disbursements including travel and transcripts.

[97] AGI argues that Farmers Edge's disbursements should be limited to \$934,750, raising four main arguments.

[98] First, AGI asserts that expert fees incurred in preparation for trial in March and April 2021 (totalling \$201,002) should be entirely deducted as wasted fees. For the reasons above, I consider this argument partially valid. Having reviewed the experts' invoices in this time period, I note that some of the fees incurred pertain to matters other than trial preparation. In addition, for the reasons above, I conclude some of the trial preparation in this time period would not have been wasted. I accept that \$100,000 in expert fees for this time period amounts to wasted expense occasioned by the adjournment that Farmers Edge should not recover.

[99] Second, AGI asserts that Dr. Meyer's fees were excessive. Farmers Edge claims \$907,214 for Dr. Meyer's fees, which represents a slight reduction in her actual fees based on an hourly rate cap to match the hourly rate of Farmers Edge's senior litigation counsel. AGI suggests that only \$279,773 of these fees should be recoverable, capping Dr. Meyer's fees at the same amount as Farmers Edge's next highest expert, Mr. Ault.

[100] I see no principled basis for this proposed reduction. There is no reason Dr. Meyer's fees should or must be the same as those of Mr. Ault. Dr. Meyer is an experienced economist who prepared lengthy, detailed, and complex reports on important damages issues with support from a team of consultants, economic analysts, and economic research staff with lower hourly rates. The Court must of course be attuned to concerns about "mounting and often extravagant expert fees": *Betsler-Zilevitch v Petrochina Canada Ltd*, 2021 FC 151 at para 21. However, in the absence of complete information about the fees of AGI's contrary experts, the Court is unable to undertake the comparison that led Justice Manson to impose a reduction on expert fees in *Betsler-*

Zilevitch. While Dr. Meyer's fees were certainly considerable, I conclude on the information before me that they were reasonable in the context of this action and the evidence she gave.

[101] Third, AGI argues that Farmers Edge should only recover \$35,218 of the \$101,296 it claims in respect of Ms. Robidoux's evidence, on grounds that all but two of her invoices did not include detailed narratives to support them. As a preliminary point, I note that the recovery of fees for factual witnesses is unusual, but permissible where they are justified and reasonably incurred: *Shire (FCA)* at para 26; *Mediatube Corp v Bell Canada*, 2017 FC 495 at para 40. AGI contests the amount of Ms. Robidoux's fees, but does not contest the recoverability of some of the fees paid to her for her time assisting in the litigation after her departure from the company. I agree that given Ms. Robidoux's role as CFO during material times, and the nature of the evidence she was able to prepare and bring to the Court, it is appropriate that the fees Farmers Edge paid for that assistance be recoverable as disbursements.

[102] As for AGI's argument for reducing those fees, I agree that the reasonableness of fees can be more readily assessed when detailed narratives are provided. Ms. Robidoux apparently did not provide Farmers Edge with detailed narratives for her invoices in the periods from March to June 2021 and January to July 2022. However, I nonetheless accept that her invoices are reasonable in the circumstances, given that in these periods she was examined for discovery, assisted in providing answers to undertakings, and did the work described in her affidavit filed at trial, which was a detailed affidavit with extensive exhibits. Much of Ms. Robidoux's work is reflected or corroborated in her trial affidavit and in the detailed ledgers of Farmers Edge's counsel. I therefore do not consider that a deduction is warranted, with one exception. That

exception pertains to \$355 in fees (plus GST), charged in respect of an unrelated matter in Ms. Robidoux's April 16, 2022 invoice, which AGI correctly points out was included in Farmers Edge's disbursement claim, presumably by oversight.

[103] Fourth, AGI asserts that Farmers Edge should not recover its disbursements for electronic document hosting fees in its Relativity database. It claims that Farmers Edge refused to produce documents from its Relativity database. It argues this was a litigation tactic designed to drive up AGI's costs and that Farmers Edge should therefore not be entitled to recover these costs. In support of this argument, it refers to a single email exchange, in which AGI's counsel requested load files for some documents in Farmers Edge's fifth affidavit of documents, and Farmers Edge's counsel refused because providing load files for documents it had already produced would involve unnecessary, time consuming, and expensive efforts. Farmers Edge responds that the majority of electronically hosted documents were in fact produced in e-discovery format, via productions in the Nebraska litigation, which the parties agreed would form part of the productions in this action. Having reviewed the parties' arguments and the limited evidence and argument put forward by AGI on this point, I see no reason to disallow the claim for electronic document hosting fees, which seem a reasonable disbursement in the circumstances of this case.

[104] I will therefore allow Farmers Edge's disbursements in the total amount of \$1,777,435.

[105] Combined with fees, this brings the total award of costs to \$4,277,435.

IV. Other adjustments and terms

A. *Interlocutory awards*

[106] The parties agree that interlocutory costs awards should be offset against the foregoing amounts. They also agree on the impact of four prior costs orders (dated April 14, 2022; June 15, 2020; September 3, 2020; and January 25, 2022), which combined yield a net payment to AGI of \$6,000. However, they disagree on the impact of my order of January 10, 2022.

[107] That order stated that costs of the three motions “are to [AGI] at the upper end of Column V, with the appearance fee on the motions doubled to account for second counsel”: *Farmobile, LLC v Farmers Edge Inc*, 2022 FC 22 at para 142 at Order (para 7). AGI’s submissions include a bill of costs in the amount of \$22,320 plus GST, for a total of \$23,486, and it claims this amount in setoff against the trial costs award.

[108] Farmers Edge contends that since the January 10, 2022, order states that costs “are to [AGI],” they are only payable to AGI in the cause and not in any event of the cause. It relies on *Orkin on the Law of Costs*, which states that “[c]osts to one party, for example ‘costs to defendant’, has been construed to mean ‘costs to defendant in the cause’ ”: MM Orkin and RG Schipper, *Orkin on the Law of Costs*, 2nd Edition (Toronto: Thomson Reuters Canada, 1987) at §1:9-11. For this proposition, *Orkin* cites a decision of the Supreme Court of British Columbia, *Digiandomenico v Ramos*, 1994 CanLII 2967 (BC SC).

[109] The Court in *Digiandomenico* was necessarily applying the practice and applicable rules in British Columbia. In that jurisdiction, it appears that interlocutory orders that are silent as to costs mean “costs to the successful party in the cause,” and those that simply state “costs to X” mean “costs to X in the cause”: *Digiandomenico* at paras 3–4.

[110] In this Court, the *Federal Courts Rules* yield a different result. The Court’s jurisdiction in respect of interlocutory costs is exercised independently from the result of the judgment, except where expressly provided by language such as “costs in the cause”: *Milliken & Co v Interface Flooring Systems (Canada) Inc*, 2003 FC 1258 [*Milliken (2003)*] at para 17; *Aird v Country Park Village Properties (Mainland) Ltd*, 2005 FC 1170 at para 10; *Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 848 at paras 7–11; *Federal Courts Rules*, Rules 400(1), 401(1). As a result, interlocutory orders that do not provide for costs at all are considered to be without costs, while those that award costs to a party are not costs “in the cause” but, effectively, costs “in any event of the cause”: *Milliken (2003)* at para 17; *Sandpiper Distributing Inc v Ringas*, 2020 FC 366 at para 47. The fact that the pleas arising from the motion at issue were ultimately abandoned does not affect AGI’s entitlement to the costs award as it was made at the time.

[111] AGI is therefore entitled to set off the amount of \$22,320 for costs of the January 10, 2022, order against the current costs award, but not the \$1,166 claimed for GST, for the same reasons that AGI argued against Farmers Edge’s claim for GST, leading Farmers Edge to abandon that claim. The total net from interlocutory orders therefore reduces the costs award by \$28,320.

B. *Security for costs*

[112] Each party posted security for costs. They agree that the amounts posted by Farmers Edge (\$72,300) and the amounts posted by AGI (\$120,000), plus any accrued interest, should be paid out to Farmers Edge, with the amounts posted by AGI being used in partial payment of the foregoing award of costs.

C. *Post-judgment interest*

[113] The parties agree that post-judgment interest is reasonably awarded at the rate set out in subsection 84(1) of *The Court of King's Bench Act*, CCSM c C280, since both parties are headquartered in Winnipeg: *Federal Courts Act*, RSC 1985, c F-7, s 37(2); *Bristol-Myers Squibb v Pharmascience*, 2023 FC 1153 at para 12. I agree with AGI that the Court's Trial Judgment of June 18, 2024, did not order costs but only invited submissions on costs. Post-judgment interest will therefore be payable at the applicable rate published under *The Court of King's Bench Act*, which is currently 4.25%. As reasonably requested by AGI, post-judgment interest will not run on the amounts that will be offset by the payment out of security for costs.

[114] AGI requests a grace period of 30 days in which to pay costs without attracting interest, citing *Astrazeneca Canada Inc v Apotex Inc*, 2011 FC 663 at para 5; see also *Mediatube* at para 99 and Order (para 3). Farmers Edge does not oppose the request. I will order that no interest will accrue if costs are paid in full within this period, but that thereafter, costs on any unpaid amounts will be payable, calculated from the date of this order.

V. Conclusion

[115] For the foregoing reasons, AGI shall pay to Farmers Edge the net amount of \$4,249,115, representing a lump sum award of costs of this action and counterclaim in the amount of \$4,277,435, inclusive of fees and disbursements, less the net amount of interlocutory costs orders of \$28,320. The sum of \$120,000, plus any accrued interest, posted by AGI as security for costs shall be paid out to Farmers Edge and deducted from the foregoing amounts in partial payment of the costs award. Interest shall run on the remaining balance on the terms set out above.

ORDER IN T-449-17

THIS COURT ORDERS that

1. The plaintiff/defendant by counterclaim, AGI Suretrack, LLC, shall pay to the defendant/plaintiff by counterclaim, Farmers Edge Inc, costs of this action in the net and inclusive amount of \$4,249,115.
2. The security for costs posted by AGI Suretrack, LLC in the amount of \$120,000 plus any accrued interest shall be paid to Farmers Edge Inc forthwith in partial payment of the foregoing amounts.
3. The security for costs posted by Farmers Edge Inc in the amount of \$72,300 plus any accrued interest shall be paid to Farmers Edge Inc forthwith.
4. Interest at a rate of 4.25% shall run from the date of this order on the difference between the amounts in paragraph 1 and those in paragraph 2, but no interest shall be payable on any amounts paid within 30 days of the date of this order.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-449-17

STYLE OF CAUSE: AGI SURETRACK, LLC v FARMERS EDGE INC.

PLACE OF HEARING: HEARD IN WRITING

ORDER AND REASONS: MCHAFFIE J.

DATED: NOVEMBER 26, 2024

APPEARANCES:

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Kevin Bushell
Charles AJ Macaulay

FOR THE PLAINTIFF/DEFENDANT BY
COUNTERCLAIM

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