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August 8, 2024

Via Email
PUBLIC

The Honourable Andrew D. Little
Chair, Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Dear Justice Little:

Re: Informal Motion re Confidentiality Order in *JAMP Pharma Corporation v Janssen Inc.* – CT-2024-006 (the “Proceeding”)

We are counsel to the applicant, JAMP Pharma Corporation (“**JAMP**”), in this Proceeding.¹ We respectfully request that this letter be brought to the attention of Justice Little.

Pursuant to the Direction of this Tribunal, dated July 22, 2024, JAMP has communicated promptly with counsel to the respondent, Janssen Inc. (“**J&J**”), concerning the terms of a Confidentiality Order to be issued by the Tribunal. A draft Confidentiality Order is attached as Appendix “A”. All of the comments of counsel to J&J, Blake, Cassels & Graydon LLP, have been incorporated into the preparation of this draft Confidentiality Order, and J&J consents to the issuance of the draft Confidentiality Order. This letter is a motion under Rule 81 and Rule 66 of the *Competition Tribunal Rules* for the issuance of a single confidentiality order to cover all documents in this Proceeding, in the terms provided for in the draft Confidentiality Order. In support of this motion, please see (i) the grounds for the motion set out in Section I below and (ii) paragraphs 3 to 5 of the Second Juneja Affidavit.

Also pursuant to the Direction of this Tribunal, dated July 22, 2024, JAMP hereby submits evidence supporting the confidentiality claims in its application materials filed on July 26, 2024, all of which is consistent and in conformity with the draft Confidentiality Order. Please see Sections II and III below and paragraphs 6 to 49 of the Second Juneja Affidavit.

I. Grounds for the Motion for a Single Confidentiality Order

¹ All capitalized terms not defined have the same meaning as set out in the Affidavit of Sukhad Juneja in support of a confidentiality order, sworn on August 7, 2024 [“**The Second Juneja Affidavit**”].

a. Law and Practice

Rule 66(1)(b) of the *CT Rules* provides that the Tribunal may order a document or information in a document be treated as confidential upon a motion of a party who has filed or will file the document.² Rule 66(2) provides that the Tribunal may issue a single confidentiality order to cover multiple documents. The required contents of a motion under Rule 66(1)(b) are set out in Rule 67. In addition, Rule 81 provides that a motion for confidentiality may be brought through an informal request by sending a letter to the registry and serving same on the other parties.

The Supreme Court of Canada set out the legal test for a confidentiality order in *Sierra Club of Canada v. Canada*.³ This test was later affirmed in *Sherman Estate v. Donovan*.⁴ What has since become known colloquially as the *Sierra Club Test* was adapted by the Tribunal in *P&H* – albeit with a modification to incorporate the *CT Rules*.⁵ As formulated, the Tribunal’s test reflects the necessity and proportionality branches of the *Sierra Club Test*, while replacing the notion of serious risk to an important commercial interest by the notion of specific and direct harm, which is found in the *CT Rules*.⁶ Accordingly, a confidentiality order should be granted if the Tribunal is satisfied that:

1. the order is necessary to prevent, in the context of proceedings before the Tribunal, a specific and direct harm that would allegedly result from disclosing the identity of the witness or revealing the information in question in a proceeding open to the public;
2. there are no reasonable alternative measures to prevent the harm; and
3. the salutary effects of the order, including the effects on the right of the parties to a fair hearing, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible proceedings before the Tribunal.

The Tribunal has recognized the importance of a confidentiality order in a number of contexts. For example, the Tribunal has issued a single confidentiality order in many recent proceedings before it.⁷ By further example, the Tribunal has issued two Practice Directions concerning the practice

² *Competition Tribunal Rules*, SOR/2008-141, [“*CT Rules*”], r. 66(1)(b).

³ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [“*Sierra Club*”].

⁴ *Sherman Estate v. Donovan*, 2021 SCC 25.

⁵ *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2021 Comp. Trib. 2 [“*P&H*”].

⁶ *P&H*, 2021 Comp. Trib. 2 at para 79 and following.

⁷ See, for example, *Canada (Commissioner of Competition) v. Cineplex*, 2023 Comp Trib 6 (a proceeding under section 74 of the *Competition Act*) and *Canada (Commissioner of Competition) v. Rogers Communications Inc. et al*, 2022 Comp Trib 5 (a proceeding under section 92 of the *Competition Act*).

for the filing of confidential documents, one of which contains an example of the draft confidentiality order.⁸

b. The Draft Confidentiality Order

The draft Confidentiality Order is substantially the same as confidentiality orders in recent proceedings before the Tribunal. Nevertheless, the Tribunal may wish to note the following features of the draft Confidentiality Order:

1. Consistent with the 2008 Practice Direction, the draft Confidentiality Order has been adapted to the particular facts of the Proceeding, which in this case is under section 103.1 of the *Competition Act*. Accordingly, terms in confidentiality orders in recent proceedings that are not relevant to a section 103.1 proceeding – such as references to affidavits of documents – have been deleted. In addition, although the Commissioner of Competition (the “**Commissioner**”) is not a party to this Proceeding, he is to be provided with certain documents under section 103.1. In this case, the Commissioner was served with the “Level A” version of the application materials, on the basis of an undertaking to keep those documents confidential until the issuance of a Confidentiality Order. Thus, the draft Confidentiality Order applies to the Commissioner. We have consulted with counsel to the Commissioner regarding the draft Confidentiality Order, who have confirmed they have no comment on the draft Confidentiality Order. Counsel to the Commissioner is copied on this letter.
2. Paragraph 2 of the draft Confidentiality Order lists certain types of information, the disclosure of which could cause specific and direct harm. The list is similar to the list in the draft confidentiality order in the 2008 Practice Direction and the lists in confidentiality orders issued by the Tribunal in recent proceedings. However, the list has been adapted to reflect the circumstances of the pharmaceutical industry, in which both JAMP and J&J compete. Paragraph 2 of the draft Confidentiality Order is described in paragraphs 4 and 5 of the Second Juneja Affidavit.

c. Specific and Direct Harm, and the Public Interest

In assessing the first step of the test, the Tribunal must be convinced that the alleged harm rises up to a public interest dimension. There are two overriding public interest dimensions that are at stake before the Tribunal – the protection of competition and the protection of sensitive private information of third parties. The specific and direct harm from the disclosure of each of these types of information, with a view to their public interest dimension, is discussed below.

⁸ See Competition Tribunal Practice Direction Regarding the Filing of Confidential Documents, August 2008 [“**2008 Practice Direction**”] and Competition Tribunal Practice Direction Regarding the Filing of Confidential and Public Documents with the Tribunal, March 2018 [“**2018 Practice Direction**”].

i. Protection of Competition

Subparagraphs 2(b) to 2(i) list different types of information that are competitively sensitive or proprietary.

There is a public interest dimension to protecting competition. Parliament has passed the *Competition Act*, the purpose of which “is to maintain and encourage competition in Canada in order to,” among other things, “ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”⁹

The Federal Court has previously accepted that private parties’ interest in competitively sensitive and proprietary information has a public interest related to competition, including the competitive process to retain or acquire customers.¹⁰ The Federal Court found that it was necessary to issue a confidentiality order where, without one, a competitor would be able to acquire confidential business information of a party in a market with limited participants, endorsing the conclusion that such disclosure would “surely have an effect on competition.”¹¹

Similarly, the Tribunal has previously accepted that there is a public interest related to competition for information that is similar to the types listed in subparagraphs 2(b) to 2(i) when it issued confidentiality orders in recent proceedings that protected similar types of information.¹²

ii. Protection of Sensitive Private Information

Subparagraph 2(a) identifies information relating to personal health of an individual.

There is a public interest dimension to protecting the confidentiality of personal health information. Such information is precisely the kind of information the Supreme Court has recognized as part of the “biographical core” of an individual, in the sense that the information “reveals something intimate and personal.”¹³ Protecting “individuals from the threat to their dignity that arises when information revealing core aspects of their private lives” is disseminated from open court proceedings “is an important public interest....”¹⁴ The public interest aspect of

⁹ *Competition Act*, section 1.1.

¹⁰ *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2024 FC 239 at paras 48 and 50-51.

¹¹ *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2024 FC 239 at paras 50-51; citing: *Dow Chemical Canada ULC v. Nova Chemicals Corporation*, 2015 ABQB 81 which relied on the Competition Tribunal’s decisions in *Commissioner v. Superior Propane Inc.* and *Petro-Canada, The Chancellor Holdings Corporation and ICG Propane Inc.*

¹² See footnote 7, above.

¹³ *Sherman Estate v. Donovan*, 2021 SCC 25 at paras 35 and 77; *Khan v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 848 at para 10-11.

¹⁴ *Sherman Estate v. Donovan*, 2021 SCC 25 at para 71 and 73.

maintaining the confidentiality of Personal Health Information is further highlighted by the various pieces of legislation enacted for its protection.¹⁵

d. No Reasonable Alternatives

In assessing the second step of the test, the Tribunal must be convinced that there are no reasonable alternatives to the draft Confidentiality Order that JAMP seeks to prevent the harm identified in the first step.

There is no alternative form of order or proposal before the Tribunal. Absent the type of single Confidentiality Order requested by JAMP, JAMP and J&J would likely have to make individual motions to the Tribunal for most (if not all) documents filed with the Tribunal in this Proceeding. This would result in an inefficient use of both the Tribunal's and the parties' resources, and create challenges for a proceeding under section 103.1 to be dealt with expeditiously.¹⁶ As noted above, a single order of this type is expressly contemplated by Rule 66(2), and the Tribunal has made use of such orders in recent cases.¹⁷

The draft Confidentiality Order is flexible and not final. Among other things, subparagraphs 5(e) and (f) permit JAMP or J&J to challenge a claim of confidentiality or the level of confidentiality applied by the other party, and for the Tribunal to determine the validity of any claim of confidentiality. In addition, paragraph 8 permits JAMP or J&J to change the confidentiality designation that applies to a document filed in the Proceeding.

e. Balancing Salutary and Deleterious Effects

In assessing the third step of the test, the Tribunal must balance the salutary effects of the order, including the effects on the right of the parties to a fair hearing, against the deleterious effects of the order, including the effects on the right to free expression, which includes the public interest in open and accessible proceedings before the Tribunal.

As set out above, the salutary effects of granting the draft Confidentiality Order include protecting competition in the Canadian pharmaceutical industry and protecting sensitive personal information from public disclosure that risks the loss of dignity for those individuals whose information might be disseminated.

These salutary effects must be weighed against the negative effect of a confidentiality order on the open court principle. The Supreme Court has stated that the deleterious effects of a confidentiality

¹⁵ The Second Juneja Affidavit at para 20.

¹⁶ *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339, para. 19.

¹⁷ See footnote 7, above.

order should be assessed based on a specific emphasis on seeking the truth and the common good; and ensuring that participation in the political process is open to all persons.¹⁸

The Supreme Court has also recognized that the search for truth may actually be promoted by a confidentiality order.¹⁹ In this case, without the expectation of a confidentiality order, JAMP would not have brought this application before the Tribunal.²⁰ For example, the information JAMP seeks to maintain as confidential in its application (which is discussed in Section II below) is critical to showing how JAMP has been directly and substantially affected in its business by J&J's conduct. Confidentiality is clearly required to advance seeking the truth about whether the test in section 103.1(7) has been satisfied.

Moreover, as the nature of this Proceeding has a limited nexus with public institutions or the political process, the goal of fostering participation in the political process to all persons is not so highly engaged as to require disclosure of the types of information listed in paragraph 2 of the draft Confidentiality Order based on this core principle alone.²¹

Accordingly, the deleterious effects of the draft Confidentiality Order in the present case are circumscribed by the benefits the order will have on the search for the truth and public good, the limited engagement of the political process in the Proceeding, and by the nature of the confidentiality order sought which by design has a narrow scope that encompasses limited types of information (i.e., the types listed in paragraph 2 of the draft Confidentiality Order).²² JAMP respectfully submits that, given the narrow scope of protection sought, the ability of the public to engage with this proceeding before the Tribunal and to understand any decisions of the Tribunal flowing from this proceeding will not be meaningfully impacted in any way. Accordingly, the core purpose and values associated with the "open court principle" will not be offended.

In light of all of the foregoing, JAMP respectfully submits that the balance of the evidence favours the granting of a confidentiality order in the form attached in Appendix "A" to these submissions.

II. Evidence for the Confidentiality Claims in JAMP's Application Materials

The Second Juneja Affidavit identifies six (6) categories of highly sensitive information that JAMP maintains on a confidential basis, which have been redacted in the application materials: Personal Health Information, Commercial Data, Marketing Materials, HR Information, Market Participant Communications; and Contractual Confidentiality.²³ Each of these categories fits within the types

¹⁸ *Sierra Club* at para 74 and 75.

¹⁹ *Sierra Club* at para 75.

²⁰ The Second Juneja Affidavit at para. 17.

²¹ *Sierra Club* at para 83.

²² *Sierra Club* at paras 86-87.

²³ The Second Juneja Affidavit at para 7 and Schedule A thereto.

of information listed in paragraph 2 of the draft Confidentiality Order and is described below in terms of its specific and direct harm with a view to the public interest.²⁴

Pursuant to the draft Confidentiality Order, and consistent with the 2018 Practice Direction, JAMP marked the information in the application materials as either Level A or Level B.

a. Personal Health Information²⁵

A failure to treat the Personal Health Information in the application materials as confidential will have a specific and direct harm on JAMP, prescribers, and patients. To operate effectively, like other pharmaceutical companies, JAMP's business relies on the review and retention of Personal Health Information. In the pharmaceutical industry, such information is held in strict confidence due to, among other reasons, the various pieces of legislation that protect Personal Health Information and longstanding industry practice, which engenders the trust necessary for companies like JAMP to provide its services to prescribers and patients effectively.

Public disclosure of Personal Health Information risks placing JAMP in contravention of privacy legislation and is sure to erode the trust between patients, prescribers and JAMP. Either of these consequences will have a substantial and negative impact on JAMP's reputation and ability to effectively operate and compete in various product markets. More importantly, a broader disclosure of Personal Health Information would mean third parties, such as patients and prescribers, would have their sensitive medical information made public without their consent.

b. Commercial Data and Marketing Materials

The public disclosure of the Commercial Data and Marketing Materials that are included in the application materials would result in specific and direct harm for JAMP and competition itself. The Commercial Data includes highly sensitive commercial forecasts and results, including anticipated prices, sales volumes, and financial information.²⁶ The proprietary Marketing Materials form an important part of JAMP's efforts to attract and retain customers.²⁷ If disseminated, such information could help JAMP's competitors (including J&J) to target JAMP in new and different ways, all of which would harm JAMP's ability to compete successfully and result in less vigorous competition.

c. HR Information

To a significant degree, JAMP's competitive success is dependant on its highly knowledgeable and experienced personnel. Although the names of BioJAMP's employees may be publicly

²⁴ The Second Juneja Affidavit at para. 12.

²⁵ The Second Juneja Affidavit at para. 18 – 22.

²⁶ The Second Juneja Affidavit at para 23 – 26.

²⁷ The Second Juneja Affidavit at para 27 – 31.

available, other information such as the lines of reporting and the number of sales staff JAMP has for its product lines are maintained in strict confidence.²⁸ Such information is contained in the application materials. If this information were disseminated, JAMP's competitors would be better able to target JAMP's human capital, which would harm JAMP's ability to compete successfully. JAMP would suffer specific and direct harm.

d. Market Participant Communications

The Market Participant Communications in the application materials reveal the identifies of the prescribers and patients (that is, the customers) that communicate and cooperate with JAMP, including through the disclosure of information about J&J to JAMP.²⁹ Communicating in a confidential manner with customers, including collecting information about competitors' business practices, is integral to JAMP's business. JAMP's customers expect that their communications are held in confidence. Disclosure of the Market Participant Communications would result in customers ceasing to communicate with JAMP. It would also permit JAMP's competitors to better target these customers. Accordingly, dissemination of the Market Participant Communications will lead to a specific and direct harm to JAMP and these market participants.

e. Contractual Confidentiality

The application materials contain a small volume of confidential contractual information, disclosure of which might place JAMP in breach of the underlying contracts in question and subject it to legal risks.³⁰ Dissemination of the Contractual Confidentiality information would also impact the relationships JAMP has developed between itself and other persons which are parties to those agreements. Those effects would result in specific and direct harm to JAMP and its commercial relationships.

III. Other Matters – Evidence for the Confidentiality Claims in the Second Juneja Affidavit

The Second Juneja Affidavit contains a small amount of information that has been designated as Level B. Specifically, paragraph 49 contains some of the same Contractual Confidentiality information that was redacted from the application materials. In addition, Schedule A to the Second Juneja Affidavit contains the same information that was redacted from the application materials.

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²⁸ The Second Juneja Affidavit at para 32 – 36.

²⁹ The Second Juneja Affidavit at para. 37 – 44.

³⁰ The Second Juneja Affidavit at para. 45 – 49.

We are available to address any questions you may have about the foregoing, including through attendance at a Case Management Conference.

Yours truly,

Goodmans LLP

David Rosner

David Rosner

cc: Andrew Brodtkin, Jordan Scopa, Jon Wall and Arash Rouhi – *Goodmans LLP*
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