

Competition Tribunal



Tribunal de la concurrence

Citation: *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 3

File No.: CT-2024-006

Registry Document No.: 25

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 103.1 granting leave to make an application under section 79 of the *Competition Act*.

BETWEEN:

JAMP Pharma Corporation
(applicant)

and

Janssen Inc
(respondent)



Decided on the basis of the written record.

Before: Mr. Justice Andrew D. Little (Chairperson)

Date of order: August 13, 2024

CONFIDENTIALITY ORDER

FURTHER TO an application for leave filed by JAMP Pharma Corporation on July 26, 2024, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34, to commence an application under section 79 against Janssen Inc;

AND FURTHER TO an informal motion made by letter from JAMP Pharma Corporation counsel dated August 8, 2024;

AND CONSIDERING the affidavit of Sukhad Juneja sworn on August 7, 2024;

AND CONSIDERING that the application for leave under section 103.1 will be determined based on affidavit evidence and submissions from the parties, without documentary or oral discoveries and a hearing under the *Competition Tribunal Rules*;

AND CONSIDERING the draft confidentiality order provided by the Parties, which was also provided for comment to the Commissioner of Competition, and the consent of Janssen Inc to the issuance of the proposed confidentiality order;

AND UPON DETERMINING that a confidentiality order should be issued, in substantially the form proposed by the Parties;

THE TRIBUNAL ORDERS THAT:

[1] For the purpose of this Order:

- (a) “**Act**” means the *Competition Act*, RSC 1985, c C-34, as amended;
- (b) “**Affiliate**” has the same meaning as in subsection 2(2) of the Act;
- (c) “**Applicant**” means JAMP Pharma Corporation, its Affiliates; its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (d) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (e) “**Designated Representatives**” means up to three in-house counsel and up to one additional individual designated by each of the Parties who will be permitted access to Records designated as Level B Protected in accordance with the terms of this Order. No Party may designate any individual as a Designated Representative unless an individual has previously reviewed and executed the Confidentiality Undertaking in the form attached as Schedule A hereto. Any designation shall be made by written notice to the Tribunal with a copy sent concomitantly to the other Party. Any Party may make a motion to the Tribunal objecting to such designations.

The Parties may, on mutual consent and after advising the Tribunal in writing, increase the number of Designated Representatives;

- (f) “**Independent Expert**” means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of that Party; (ii) has not been an employee of that Party within two years prior to the date of this Order, (iii) is not a current employee of a competitor of that Party; (iv) has not been an employee of a competitor of that Party within two years prior to the date of this Order; and (v) has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;
- (g) “**Parties**” means the Applicant and the Respondent collectively, and “**Party**” means either one of them;
- (h) “**Person**” means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (i) “**Proceeding**” means the application for leave filed by the Applicant pursuant to section 103.1 of the Act on July 26, 2024;
- (j) “**Protected Record**” means any Record (including the information such Record contains) that is produced in the Proceeding, including affidavits, Records listed in affidavits, and submissions that:
 - i. the Party producing the Record claims is confidential by designation under to Section [2] of this Order; or
 - ii. the Tribunal has determined is confidential;
- (k) “**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;
- (l) “**Respondent**” means Janssen Inc, its Affiliates; its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (m) “**Third Party**” means any Person other than the Applicant, the Respondent and the Commissioner; and
- (n) “**Tribunal**” means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended.

[2] Disclosure of Records containing any of the following types of information could cause specific and direct harm, to the extent they, or information in them, are not already publicly available or otherwise available to the recipient, and such Records may be designated as Protected Records:

- (a) personal health information of an individual;
- (b) information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), product planning or development, clinical trials and their results, capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives produced by a Party or a Third Party;
- (c) names or lists of existing, prospective, and former customers and/or suppliers;
- (d) confidential contractual arrangements between the Parties and their customers, agents, and/or suppliers or between Third Parties and their customers, agents, and/or suppliers;
- (e) financial data or reports, or financial information relating to a Party or their customers, suppliers or a Third Party;
- (f) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information of a Party or a Third Party;
- (g) internal market studies and analyses of a Party or a Third Party;
- (h) communications between a Party and health care professionals and a Party and patients relating to ustekinumab; and
- (i) other Records containing competitively sensitive and/or proprietary information of a Party or a Third Party.

[3] Without prejudice to any position or argument a Party may take or make in (a) the Proceeding and in any related appeals, including (without limiting the generality of the foregoing) with respect to any claim of confidentiality or privilege by a Party, or (b) any application for an order under section 107.2 of the Act by the Applicant, the Respondent, or a Third Party, a Party may designate as Level A Protected (as defined below), any information that could identify a Third Party who is reasonably concerned about the public disclosure of its identity.

[4] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree in writing that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[5] Protected Records will be identified in the following manner for the purpose of the Proceeding:

- (a) a Party claiming that a Record is a Protected Record shall, at the time of production of a Protected Record, mark it with the name of the Party producing the Record and with “Confidential – Level A” or “Confidential – Level B” on the face of each Record and/or on each page that is claimed as confidential;
- (b) subject to Section [4] of this Order, all Records designated as Protected Records shall be treated as a Protected Record, save for determination otherwise by the Tribunal or re-designation pursuant to Section [9] below;
- (c) the inadvertent failure to designate a Record or portion thereof as a Protected Record at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made;
- (d) if a Record originates with or from more than one Party and is designated by at least one Party as a Protected Record, the highest level of confidentiality shall universally attach to that Record, subject to the resolution of any challenge to that claim of confidentiality;

[6] At any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts to agree as to whether the Records (or portions thereof) are to be treated as Protected Records. If an agreement cannot be reached, a Party may apply to the Tribunal to determine whether the Record or a portion thereof is a Protected Record or what level of confidentiality should apply to a Protected Record

[7] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level A” (“**Level A Protected**”) may be disclosed only to:

- (a) outside counsel to the Parties and outside counsel’s staff who are directly involved in the Proceeding;
- (b) any personnel of the Tribunal and of the presiding judicial member’s chambers as may be necessary for the conduct of the Proceeding; and
- (c) Independent Experts and their staff who are directly involved in the Proceeding; and
- (d) the Commissioner, including the Commissioner’s counsel and staff.

[8] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level B” (“**Level B Protected**”) may be disclosed only to:

- (a) the individuals described in Section [7] above; and

(b) Designated Representatives of the Parties.

[9] A Party may at any time and with prior reasonable notice to the other Party re-designate as Level A Protected, Level B Protected or public Records any of its own Records designated as Level A Protected, Level B Protected or public Records. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Records re-designated as public shall cease to be Protected Records unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Record to Level A Protected or Level B Protected, a prior disclosure of it in accordance with its prior designation shall not constitute a breach of this Order.

[10] If a Party or the Commissioner is required by law to disclose a Protected Record, or if a Party or the Commissioner receives written notice from a Person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Record, that Party or the Commissioner shall give prompt written notice to the Party that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[11] Outside counsel to the Parties and their staff, Independent Experts and their staff, and the Commissioner and his staff, may make copies of any Protected Record as they require in connection with the Proceeding.

[12] Nothing in this Order prevents a Party from having full access to, using or disclosing Protected Records that originated from that Party.

[13] If either Party requests, and the Tribunal permits, that a hearing be held with respect to the Proceeding:

- (a) Protected Records tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with Paragraph [5](a), above;
- (b) Protected Records presented at the hearing shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record; and
- (c) Nothing in this Order shall abrogate or derogate any legal onus, burden or requirement applicable to a sealing order or abrogate or derogate in any way from the rights of the Parties to assert confidentiality claims during the course of the hearing.

[14] The Parties shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are filed with the Tribunal, which redacted versions shall be marked "Public" on the face of the Record and shall form part of the public record in the Proceeding. Each Protected Record shall identify the portions of the Record which have been redacted from the "Public" version, by highlighting such portions in the Protected Record.

[15] Nothing in this Order shall preclude or impede outside counsel to the Parties' ability to communicate with or advise their client of general or high-level conclusions based on their review and evaluation of Level A Protected and/or Level B Protected Records produced by any Party,

provided that such communications or advice shall not disclose or reveal the specific contents of any Level A Protected and/or Level B Protected Record in violation of this Order.

[16] The termination of the Proceeding shall not relieve any Person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any Confidentiality Undertaking, subject to any further order of the Tribunal.

[17] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Records and any copies of Protected Records (except Protected Records in the possession of the Tribunal) shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Parties may keep copies of Protected Records in their files and that any copies of Protected Records as may exist in the Parties' automatic electronic backup and archival systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[18] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[19] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Records or information produced by another Party.

[20] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 13th day of August 2024.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

SCHEDULE A

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records, I _____, of the City of _____, in the Province/State of _____, hereby undertake and agree to maintain the confidentiality of any Protected Records that I obtain and, in particular, that:

1. I will not copy, disseminate, transfer or otherwise share or disclose any Protected Record to any other person, except, as applicable, Persons permitted by order of the Competition Tribunal.
2. I will not use any Protected Record for any purpose other than in connection with the Proceeding and any related appeals.
3. Upon completion of the Proceeding and any related appeals, I agree that all Protected Records, and any copies of same, in my possession shall be dealt with in accordance with instructions from counsel for the Party I am employed or retained by or as prescribed by the order of the Tribunal.
4. I have read the Confidentiality Order granted by the Tribunal on _____, a copy of which is attached to this Undertaking, and agree to be bound by it. I acknowledge that capitalized terms in this Undertaking have the same meaning as defined in the Confidentiality Order. I further acknowledge that any breach of this Undertaking by me will be considered to be a breach of the Confidentiality Order.
5. I acknowledge and agree that the completion of the Proceeding and any related appeals shall not relieve me of the obligation to maintain the confidentiality of Protected Records in accordance with the provisions of this Undertaking. I further acknowledge and agree that either Party shall be entitled to injunctive relief to prevent or enjoin breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.
6. In the event that I am required by law to disclose any Protected Record, I will provide counsel for the Parties to the Proceeding with prompt written notice so that the Party that claimed confidentiality over the Protected Record may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Records that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to it.
7. I will promptly, upon the request of the Party who provided Protected Records to me, advise where they are kept. At the conclusion of my involvement in the Proceeding and any related appeals, I will, upon the request and direction of the Party who provided Protected Records to me, destroy, return or otherwise dispose of all Protected Records received or made by me having been duly authorized and directed to do so.

8. I hereby attorn to the jurisdiction of the Tribunal to resolve any disputes arising under this Undertaking.

DATED this ____ day of _____, 2024.

SIGNED, SEALED & DELIVERED in the presence of:

Name of witness

Name of signatory

COUNSEL OF RECORD:

For the applicant:

JAMP Pharma Corporation

Andrew Brodtkin

David Rosner

Jordan Scopa

Jonathan Wall

Arash Rouhi

For the respondent:

Janssen Inc

Robert Kwinter

Nicole Henderson

Cathy Beagan Flood

Jonathan Bitran

Brian Facey