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VIA E-MAIL

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
RECEIVED / REÇU Date: December 2, 2024 CT- 2024-006	
Badih Abboud for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 75

Competition Tribunal

Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Dear Registrar:

RE: JAMP Pharma Corporation v. Janssen Inc. – File No. CT-2024-006 – Submission on Costs

A. Introduction

Pursuant to the Tribunal's direction at paragraph 181 of its Order and Reasons dated November 20, 2024, these are Janssen's submissions regarding the costs of the above-captioned application. We ask that these submissions be put before Justice Little.

Janssen seeks a cost award of \$131,031.18, which it submits is fair and reasonable in all the circumstances of this case, including Janssen's complete success on the merits of the application, the complexity of the factual and legal issues raised, and the importance of the issues. This amount represents 30% of Janssen's actual legal fees incurred in responding to the application.

B. General Principles

The principles applicable to the assessment of costs are set out by the Tribunal in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*,¹ and confirmed in *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*² The Tribunal has full discretionary power over the amount and allocation of costs. In the circumstances of this case, Janssen submits that a costs award calculated using the *Federal Courts Rules* Tariff would be entirely inadequate, and therefore seeks recovery of a proportion of its actual legal spend. This is consistent with the objectives of costs awards before this Tribunal, which "include having the unsuccessful party make a 'reasonable contribution' to the successful party's costs of litigation".³

The Federal Court of Appeal has held that in "complex litigation conducted by sophisticated parties", lump sum awards calculated as a percentage of legal fees actually incurred by the successful party are

¹ 2022 Comp Trib 18 at paras 768-776 ("**P&H**").

² 2023 Comp Trib 03 at para 20 ("**Rogers/Shaw**").

³ *P&H* at para 771.

fair and reasonable.⁴ The Tribunal applied that approach in *P&H*, analogizing to the intellectual property litigation context, including: the greater than average complexity of such cases, the sophistication of the parties, legal bills far in excess of what is contemplated by the Tariff, and “giving parties an incentive to litigate efficiently”.⁵ The Tribunal went on to note that lump sum cost awards tend to range between 25% and 50% of actual fees incurred, and that the mid-point of the range is an appropriate starting point.⁶ Janssen’s request of 30% of legal fees incurred is at the lower end of this range.

The most important consideration in arriving at a cost award is which party succeeded. The Federal Court has made clear, and the Tribunal accepted that, “it should not be for the losing party to ‘tell the winning party how they could have succeeded by doing or spending less’”.⁷ The Tribunal will also have regard for other relevant factors including the importance and complexity of the issues, any public interest in bringing the case, and behavior that increased the duration and expense of litigation or was otherwise unreasonable or vexatious.⁸

C. Janssen prevailed on the only issue before the Tribunal

Janssen succeeded on all issues on JAMP’s leave application—the Tribunal concluded that JAMP had not led sufficient and cogent evidence to give rise to a *bona fide* belief that any of Janssen’s alleged conduct could be the subject of an order under s. 79 of the *Competition Act* or that JAMP’s business was directly and substantially affected by any of the alleged conduct. JAMP did not achieve any partial success, and the application was dismissed in its entirety. This militates toward a higher cost award in favour of Janssen.⁹

D. There Was No Public Interest Involved

Unlike some litigation brought before the Tribunal by the Commissioner, there was no public interest in this proceeding. JAMP’s litigation was essentially private commercial litigation, driven by its own private economic interests.

E. The Proceedings Involved Important and Complex Issues of Law and Fact

This was the first application decided on its merits for leave to bring a private abuse of dominance application following the 2022 amendments to the *Competition Act* introducing such a right. The proceeding raised complex issues of law regarding the application of s. 103.1 to s. 79, which was further complicated by the pending amendments to s. 103.1, as highlighted by the Commissioner’s submissions.

⁴ *P&H*, at para 13, citing *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 (“**Seedlings**”), and *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at para 50.

⁵ *P&H*, para 15, citing *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at paras 26-27 (“**Allergan**”).

⁶ *Ibid.*

⁷ *P&H*, at para 7, citing *Seedlings* at para 15.

⁸ *Rogers/Shaw* at para 24; *P&H* at para 768.

⁹ *Rogers/Shaw* at para 24, see also *Allergan* at paras 31, 43.

The Tribunal has previously recognized that issues of first impression with respect to the interpretation of the *Competition Act* are complex, and support awards of increased costs.¹⁰

Further, the application required Janssen to respond to a complex and voluminous factual record filed by JAMP, comprising four affidavits, 91 exhibits, and approximately 3,500 pages. Janssen first had to bring a motion seeking leave to adduce responding evidence to rebut JAMP's allegations, which was granted despite JAMP's opposition. Then, Janssen had to prepare its own detailed evidentiary record, which comprised 62 exhibits and 707 pages, all on an expedited timeline.¹¹

F. The Nature of JAMP's Allegations Militate in Favour of a Generous Award of Costs

Aside from the legal and factual complexity of the proceeding, the issues raised were of great importance to Janssen. In its application, JAMP sought prohibition orders and an administrative monetary penalty of more than a billion dollars that would have had a significant economic impact on Janssen. But moreover, JAMP made spurious allegations that struck directly at the heart of Janssen's reputation as a reputable medical innovation company. In its materials, JAMP baldly accused Janssen of deceiving patients, physicians, and public and private insurers, abusing the courts' processes, and placing economic profits above patient welfare. JAMP cannot possibly be surprised that Janssen would mount a vigorous and thorough defence to such allegations, incurring substantial legal fees in doing so.

G. Conclusion

Considering the foregoing, Janssen respectfully requests a cost award of \$131,031.18, equal to 30% of its actual legal fees incurred on this application (being \$436,770.60). Should you have any questions or require further information regarding the above submissions, we would be pleased to address them.

Yours respectfully,



Nicole Henderson

c: Andrew Brodtkin, Jordan Scopa, David Rosner, Jon Wall, Arash Rouhi, *Goodmans LLP*
Donald Houston, Kevin Hong, Kendra Wilson, *Competition Bureau*
Robert E. Kwinter, Cathy Beagan Flood, Jonathan Bitran, Joe McGrade, Brian A. Facey, *Blake Cassels & Graydon LLP*

¹⁰ See *B-Filer Inc. et al. v the Bank of Nova Scotia*, 2007 Comp Trib 26 at para 18.

¹¹ 2024 Comp Trib 4.