

Federal Court



Cour fédérale

**Date: 20220120**

**Docket: T-549-20**

**Ottawa, Ontario, January 20, 2022**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**JANSSEN INC. AND  
ACTELION PHAMACEUTICALS LTD**

**Plaintiffs**

**and**

**SANDOZ CANADA INC.**

**Defendant**

**ORDER**

**UPON** the defendant's (Sandoz) motion for an order that the second expert witness to be called by the plaintiffs (collectively, Janssen) to testify at the trial of this action be excluded from the testimony and evidence of Janssen's first expert witness called to testify;

**AND UPON** reading the parties' motion materials and hearing the oral submissions of counsel;

**AND UPON** considering that the parties agree to an order excluding all fact witnesses who may testify in this action from the courtroom, including any video conference of the proceedings, until they have completed their testimony;

**AND UPON** considering:

- i. Sandoz' arguments that (i) expert witnesses may be subject to exclusion orders; (ii) the rationale for an exclusion order applies in the circumstances of this case, where the expert witness provides the technical or scientific factual matrix for construing patent claims and/or determining issues such as obviousness; (iii) permitting Janssen's second expert witness to attend or be privy to the testimony of Janssen's first expert witness, including Sandoz' cross-examination, raises concerns regarding credibility, justice and fairness that would cause prejudice and unfairness to Sandoz and confer a tactical advantage on Janssen in light of the expert witnesses' identical mandates and the similarities between their expert reports; (iv) the terms of the exclusion order sought in respect of Janssen's second expert witness are narrow, and would only exclude such witness from a part of the proceeding; and (v) the order sought would not cause prejudice or unfairness to Janssen or impede Janssen's ability to lead evidence at trial;
- ii. Janssen's arguments that (i) Sandoz seeks unprecedented restrictions—expert witnesses are ordinarily exempt from exclusion orders; (ii) the risks that Sandoz complains of are not present in this case—Sandoz assumes that Janssen's expert witnesses will not abide by their obligations to provide objective and impartial evidence and attempts to cast doubt on their credibility before they have testified or been cross-examined; (iii)

the relief requested would prejudice Janssen, and prohibit Janssen from exercising its procedural right to effectively prepare its second expert witness for trial; and (iv) the relief sought could create far-reaching mischief in future cases and encourage parties to seek such orders as a tactical maneuver, leading to scheduling issues, inefficiency and delay;

**AND UPON** being satisfied that an exclusion order that affects an expert witness may be made, and that the specific terms for partial exclusion as proposed by Sandoz are warranted in the circumstances of this case;

**AND UPON** determining that Janssen's arguments in response to Sandoz' motion are not persuasive in the circumstances of this case, and in view of the specific terms for partial exclusion as proposed by Sandoz;

**THIS COURT ORDERS** that:

1. All fact witnesses who may testify in this action shall be excluded from the courtroom, including any video conference of the proceedings, until they have completed their testimony.
2. Janssen's second expert witness shall be excluded from the evidence of Janssen's first expert witness, including that:
  - i. Janssen's second expert witness may not attend during the testimony of Janssen's first expert witness or observe any portion thereof;

- ii. Janssen's second expert witness may not review any recordings, transcripts or exhibits of the first expert witness' evidence until after the second expert witness' testimony has concluded;
  - iii. no person (including any of the plaintiffs, plaintiffs' counsel, or the first expert witness) may communicate with the second expert witness regarding the first expert witness' evidence (including any questions posed by counsel for Sandoz and any recordings, transcripts or exhibits relating to the first expert witness' evidence) until after the conclusion of the second expert witness' testimony.
3. Costs of the motion are awarded to Sandoz.

"Christine M. Pallotta"

---

Judge