Federal Court Cour fédérale

Date: 20150626

Docket: T-259-14

Citation: 2015 FC 798

Ottawa, Ontario, June 26, 2015

PRESENT: CASE MANAGEMENT JUDGE MIREILLE TABIB

BETWEEN:

SHIRE CANADA INC.

Applicant

and

PHARMASCIENCE INC. AND THE MINISTER OF HEALTH

Respondents

and

SHIRE LLC

Respondent Patentee

ORDER AND REASONS

[1] Pharmascience Inc., with the consent of the other parties to this application under the *Patented Medicines (Notice of Compliance) Regulations* SOR/93-133, makes this motion for an

order allowing it to file under confidential seal sales data which it purchased from IMS Health Incorporated for the specific and declared purpose of use in this application.

[2] The evidence before me shows that IMS makes it its business to gather, compile and sell pharmaceutical and healthcare information as to pharmaceutical sales data, prescription data, medical claims data and other related data. It sells reports and analysis as to the pharmaceutical markets in, inter alia, Canada and the US. Its customers and subscribers include pharmaceutical companies, both brand and generics. Customers use IMS's services and products for business planning purposes, but also for litigation purposes. In addition to regular subscription reports, IMS can and does accept commissions to compile and analyse data as to specific market segments in specific time frames.

[3] In the present case, IMS entered into a contract with Pharmascience to compile and sell to it information specifically and exclusively for use in this litigation. The contract between IMS and Pharmascience provides that Pharmascience may only use the information in the application if it "request the court to permit presentation of such material" in a manner "appropriate to maintain the confidentiality of the Data". It appears that Pharmascience has already included the data it has obtained from IMS in an affidavit it has served on its opponent pursuant to Rule 307 of the *Federal Courts Rules*. Pursuant to the Rules, Pharmascience is now obliged to file this affidavit into court. Pharmascience has designated the IMS data as confidential pursuant to a Protective Order issued by the Court, but that Protective Order only governs the manner in which parties deal with information they exchange between themselves. It does not allow them to file materials under seal without first applying for and obtaining a specific confidentiality order

pursuant to Rule 151 of the Rules. Having deliberately sought out and purchased information and bound itself to keeping it confidential without first ensuring that it would be permitted to file it confidentially, Pharmascience now comes to the court and argues that preserving its ability to respect a freely given undertaking of confidentiality is an important interest that outweighs the fundamental principle of open and accessible court proceedings, and preserving IMS's ability to rely on such undertakings in order to be able to offer a for profit service also represents an important interest that should outweigh the principles of open and accessible court proceedings. Pharmascience's motion is ill-founded in fact and in law, and is dismissed.

[4] The criteria for granting a confidentiality order pursuant to Rule 151 were set out by the Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41.

[5] The first requirement, of course, is that the information be, in fact, "of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed"" (*Sierra Club,* above, at para.60. See also, *Takeda Canada Inc et al. v Minister of Health and Mylan Pharmaceutical ULC* 2014 FC 1076 at para. 15.).

[6] I am not satisfied that Pharmascience has established this basic requirement. As stated in *Sierra Club,* "One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution". Both IMS and Pharmascience should know that, and should know that confidentiality orders are discretionary and not issued merely for the asking. The confidentiality agreement entered into

between IMS and Pharmascience does not prohibit Pharmascience from filing the information in court without a confidentiality order. All it does is require Pharmascience to "request the court to permit presentation of such material [in such a manner as to maintain the confidentiality of the data]". The contract does not require Pharmascience to forego filing the material in open court if its request is dismissed by the Court. Given that Pharmascience's obligations under the contract appear to be satisfied merely by seeking permission, with no guarantee that it will be granted, I am not persuaded that IMS and Pharmascience, who are sophisticated corporations entering into a contract for the provision of information for the specific purpose of being used in litigation, can have had a reasonable expectation that the information would remain confidential. On that basis alone, Pharmascience's motion must fail.

[7] The test in *Sierra Club* also requires the moving party to establish that there is a serious risk of harm to an important interest, and that the risk in question must be real and substantial, well grounded in the evidence (*Sierra Club*, above, at para. 54). The evidence before me does not establish the IMS or Pharmascience would risk serious harm if the data were disclosed.

[8] According to Pharmascience's written representations, the harm that would be suffered if the data were made public would be to IMS itself, and resides in the fact that the data would become available to other clients and competitors of IMS without compensation. On the evidence before me, IMS charged Pharmascience $6,900.00 for the provision of the data. There is no indication whatsoever that IMS would not have been willing to sell the very same information for the very same fee to any person willing to pay that fee. Because the data was tailored to a specific request, there is no evidence of how many customers would have been

willing to pay for that information, but on the face of it, any sales lost to IMS from the disclosure of this set of data cannot be considered serious by any stretch of the imagination.

[9] Even if I were to consider the loss of confidentiality of this limited set of data as erosive of IMS's general ability to rely on the confidentiality of other commissioned reports, the evidence before me would still not support a finding that this constitutes an important interest, as defined in Sierra Club, at para.55:

> In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests.

[10] There is no evidence that IMS would have refused to sell the information to Pharmascience without the confidentiality undertaking. Nor is there any evidence that Pharmascience could not have obtained the information from another source without giving a confidentiality undertaking. No evidence been led as to any harm that might be caused to IMS if, by reason of the court's refusal to issue a confidentiality order in this matter, IMS were to refrain in future from selling information for use in litigation or, more broadly, what important interest would be harmed if IMS or its competitors decided that they could not profitably sell data for use in litigation without guarantees of confidentiality.

[11] Pharmascience has alluded to the preservation of its contractual obligation of confidentiality as an interest that may be harmed if a confidentiality order is not issued. As

mentioned above, Pharmascience is not at risk of breaching a confidentiality agreement. It has already complied with such obligations as it had by making the motion.

[12] Even if Pharmascience's use of the data without a confidentiality order was in breach of the agreement, I would not have considered Pharmascience's ability to uphold the agreement an interest worthy of protection in the particular circumstances of this case. The Supreme Court in *Sierra Club* did recognize a breach of a confidentiality agreement as harm to a commercial interest that "can be characterized more broadly as the general commercial interest of preserving confidential information". However, the confidentiality agreement in that case pre-existed the litigation. Here, IMS chose to sell "confidential" information for use in a public forum and Pharmascience chose to bind itself to a confidentiality agreement with full knowledge that their agreement runs contrary to the very intent and purpose for which information is sought and provided. As mentioned above, although Pharmascience baldly asserts that it was "required" to agree to the confidentiality provision, there is no evidence to support that assertion. The Court sees no wider public interest in protecting Pharmascience's ability to uphold an agreement of confidentiality it has not shown was necessary and into which it entered in defiance of the principles of open and accessible court proceedings.

[13] Similarly, IMS asserts that there is a wider public interest in preserving the confidentiality of the data, because disclosure would harm its competitive position against other purveyors of market data. The Court sees no wider public interest in preserving a competitive position in a business model that relies on selling information to be used as evidence in open court, where the value of the service is premised on the seller's ability to erect a confidential

barrier around what should be public. If IMS or its competitors do not wish the information they sell to be used for litigation in a public court of law, they can simply choose not to sell it for that purpose. If pharmaceutical corporations wish to use data they purchase for use in court, they should seek it from sellers who will not require them to keep it confidential.

[14] Finally, Pharmascience has cited one unpublished consent order to show that this Court once granted a confidentiality order in respect of IMS data. An endorsed order that contains no discussion or analysis of the evidence put before the Court and does not purport to determine any issue of law is neither binding nor persuasive authority.

[15] In conclusion, Pharmascience has failed to meet its burden to show that either it or IMS had a reasonable expectation that the information would be kept confidential, to show that any commercial interest that might be harmed by the disclosure is one that can be expressed in terms of a public interest in maintaining confidentiality and further, that the risk of any harm to that commercial interest is real or substantial.

ORDER

THIS COURT ORDERS that:

1. Pharmascience's motion is dismissed.

"Mireille Tabib"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-259-14
STYLE OF CAUSE:	SHIRE CANADA INC. v PHARMASCIENCE INC. AND THE MINISTER OF HEALTH AND SHIRE LLC
ORDER AND REASONS:	TABIB P.
DATED:	JUNE 26, 2015

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

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