

Federal Court



Cour fédérale

Date: 20160826

Docket: T-300-16

Citation: 2016 FC 975

Vancouver, British Columbia, August 26, 2016

PRESENT: Prothonotary Roger R. Lafrenière

BETWEEN:

**THE REGENTS OF
THE UNIVERSITY OF CALIFORNIA
AND TEARLAB CORPORATION**

Plaintiffs

and

I-MED PHARMA INC.

Defendant

ORDER AND REASONS

[1] On July 29, 2016, the Defendant, I-MED Pharma Inc. (I-MED), moved in writing pursuant to Rule 369 of the *Federal Courts Rules* for:

- (a) an order requiring the Plaintiff, TearLab Corporation Inc. (TearLab), to deposit into Court, by no later than ten (10) days following this order, the amount of \$141,101.00 as security for costs granted to I-MED by Justice Manson in a

Judgment dated June 22, 2016 for TearLab's unsuccessful motions for interim and interlocutory injunctions;

- (a) costs of \$2,000.00 for this motion, payable forthwith if this motion is opposed;
and
- (b) an order for such further or other relief as counsel may advise and as to this Honourable Court may seem just;

I. Background

[2] A brief review of the procedural background is required in order to place the present motion in proper context.

[3] I-MED brought an earlier motion on March 11, 2016 for an order requiring Tearlab to deposit into court the amount of \$100,000.00 as security for I-MED's costs leading up to and including the first round of oral examinations for discovery. I-MED also sought an additional amount of \$150,000.00 as security for I-MED's costs to defend against TearLab's interlocutory injunction motion. The motion was made returnable at the General Sittings in Montreal on March 22, 2016. Prothonotary Morneau directed that the motion be placed before me as case a management judge.

[4] During a case management conference with counsel for the parties on March 14, 2016, the parties were encouraged to attempt to resolve the issue. The parties ultimately agreed that TearLab would post \$50,000.00, without prejudice to either party's right to seek an increase or

decrease of security at a later time. At the joint request of the parties, I-MED's motion was adjourned to be heard, if necessary, at a special sitting before me on April 27, 2016.

[5] On March 24, 2016, Mr. Justice James Russell dismissed Tearlab's motion for an interim injunction. He directed that the parties could address the Court on the issue of costs of the motion after the interlocutory decision was made.

[6] During a case management conference on April 1, 2016, the parties requested that I-MED's motion for security for costs be heard at the same time as Tearlab's motion for an interlocutory injunction. By Order dated April 27, 2016, Tearlab's motion for an interlocutory injunction and I-MED's motion for security for costs were fixed to be heard together on May 17, 2016.

[7] On May 31, 2016, Mr. Justice Michael Manson issued an order dismissing Tearlab's motion for an interlocutory injunction. He also granted I-MED's motion for increased security, in part, based on the following reasons:

[95] The Defendant also sought \$150,000.00 in security to cover its likely costs of defending against the interlocutory injunction. I agree with TearLab that the request for this relief is not appropriate in the context of security for costs, as this motion was heard on the same day as the motion for interlocutory injunction, and the interim injunction has since passed.

[96] I find that though TearLab has provided some evidence it has assets in Canada, the financial and banking information from TearLab is weak and shows little asset value. I would increase security payable by TearLab into the Court to a total of \$100,000 at this stage of the proceeding.

[8] Justice Manson further ordered that costs of both motions be awarded to I-MED. The parties were directed to provide written submissions on costs, including the costs of the interim injunction motion, within 10 days.

[9] On June 22, 2016, Justice Manson fixed the costs of the interim and interlocutory injunction motions in the lump sum amount of \$141,101.00, to be paid by Tearlab following disposition or conclusion of the action. He also fixed the costs of the motion for security for costs in the amount of \$2,500.00 in favour of I-MED.

[10] Tearlab has appealed Justice Manson's Order dated May 31, 2016. In its notice of appeal filed on June 10, 2016, Tearlab seeks its costs of the appeal and the motions below.

[11] I-MED now moves for increased security in the equivalent amount of costs awarded by Justice Manson in dismissing Tearlab's motion for an interlocutory injunction.

II. Analysis

[12] I-MED submits that increased security is warranted in light of the substantial costs awarded in its favour by Justice Manson on June 22, 2016. Tearlab counters that the present motion is barred by the doctrine of *res judicata*. According to Tearlab, the issues in this motion are the same as the issues raised in I-MED's motion for security for costs dated March 10, 2016, that involve the same parties. I disagree that I-MED is precluded from seeking increased security.

[13] When dealing with I-MED's request for Tearlab to post an additional amount of \$150,000.00 as security to cover I-MED's likely costs in defending the interlocutory injunction, Justice Manson did not purport to finally adjudicate the issue of security. He simply decided that increased security in the amount of \$50,000.00 should be posted by Tearlab "at this stage of the proceeding". It was clearly contemplated that the parties would be providing submissions on the issue of costs of the motions when the Order dated May 31, 2016 was issued. Given the intervening (and substantial) cost award against Tearlab - the quantum of which had not been adjudicated at the time of the Order dated May 31, 2016 - I-MED is perfectly entitled to ask the Court to revisit the issue of security.

[14] On a motion to increase security for costs, the moving party has the onus of establishing that: (i) there is a significant gap between the security ordered and the actual expenses; (ii) the actual expenses were not reasonably foreseeable; and (iii) the original request for security was based on an assessment of the complexity of the case which in hindsight was not realistic: *Bruno Appliance and Furniture Inc v Cassels Brock & Blackwell LLP*, 2009 CanLII 72029 (ON SC).

[15] I-MED has established that there is now a significant gap between the security of \$100,000.00 posted and the actual costs awarded in its favour. This gap will no doubt increase since the parties have yet to embark on discovery.

[16] It is common ground that Tearlab is ordinarily resident outside of Canada, within the meaning of Rule 416(1)(a) of the *Federal Courts Rules*. Tearlab therefore had to demonstrate that it has sufficient Canadian assets to pay costs, and to establish why the Court should not exercise its discretion to grant the security sought by I-MED.

[17] On the basis of the material before me, I am not satisfied that Tearlab has any assets of value in Canada. Although the company may have bank accounts in Canada that receive revenue from its Canadian sales and have maintained positive balances, these are fleeting assets that are easily transferable. There is also no suggestion that Tearlab is impecunious or that an order for increased security for costs would create a financial burden rendering it impossible for the company to carry on the action.

[18] There is no magic formula in deciding how much security should be posted by a party. Taking into account the cost awards already made in favour and against each party to date and the steps that remain to be taken by the parties in order to complete examinations for discovery, I conclude that an additional amount of \$100,000.00 should be posted by Tearlab as security for I-MED's costs. The matter of security may be revisited in the event Tearlab is successful on its appeal or another significant gap develops between I-MED's actual costs and the security posted.

ORDER

THIS COURT ORDERS that:

1. The Plaintiff, Tearlab Corporation, shall deposit an additional amount of \$100,000.00 as security for the Defendant's costs within 14 days of the date of this Order.

2. Costs of this motion, hereby fixed in the amount of \$1,500.00, shall be paid by the Plaintiff, Tearlab Corporation, in the cause.

“Roger R. Lafrenière”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-300-16

STYLE OF CAUSE: THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA AND TEARLAB CORPORATION
v I-MED PHARMA INC.

**MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA
PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: LAFRENIÈRE P.

DATED: AUGUST 26, 2016

APPEARANCES:

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PATRICK S. SMITH

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TEARLAB CORPORATION

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