

Federal Court



Cour fédérale

Date: 20120316

Docket: T-644-09

Citation: 2012 FC 318

Docket: T-644-09

BETWEEN:

APOTEX INC.

Plaintiff

and

SANOFI-AVENTIS

Defendant

Docket: T-933-09

BETWEEN:

**SANOFI-AVENTIS AND
BRISTOL-MYERS SQUIBB SANOFI
PHARMACEUTICALS HOLDINGS
PARTNERSHIP**

Plaintiffs

and

**APOTEX INC.
APOTEX PHARMACHEM INC.
AND SIGNA SA de CV**

Defendants

PUBLIC REASONS FOR JUDGMENT ON COSTS

BOIVIN J.

[1] These Reasons for Judgment on Costs pertain to the issue of costs following the Judgment and Reasons for Judgment in *Apotex Inc. v Sanofi-Aventis*, 2011 FC 1486, [2011] FCJ No 1813, dated December 6, 2011. The case concerned the drug clopidogrel bisulfate, sold in Canada under the brand name Plavix in accordance with Canadian Patent No. 1,336,777 (the ‘777 Patent), issued to Sanofi-Aventis (Sanofi) on August 22, 1995. Apotex Inc. (Apotex) instituted an impeachment action of the ‘777 Patent (T-644-09) on April 22, 2009, and Sanofi responded by filing an infringement action (T-933-09) on June 8, 2009, and sought damages in the order of several hundred million dollars. As set forth in its Judgment and Reasons for Judgment of December 6, 2011, the Court found that Apotex had infringed the ‘777 Patent but that the claims of the ‘777 Patent were invalid for lack of utility – the patent did not disclose the requirements for sound prediction – and for obviousness. Consequently, Apotex’ impeachment action was allowed and Sanofi’s infringement action was dismissed.

[2] As the parties were unable to agree on costs, they filed written submissions detailing their respective positions in January of 2012. The Court has reviewed both their initial submissions and reply submissions carefully and these Reasons now address the principal heads of costs highlighted by the parties.

[3] In accordance with Rule 400 (1) of the *Federal Courts Rules*, SOR/98-106 (the Rules), the Court has “full discretionary power over the amount and allocation of costs ...”. In so doing, Rule 400 (3) provides certain factors that may be taken into consideration:

PART II

COSTS

AWARDING OF COSTS BETWEEN
PARTIES

Factors in awarding costs

400. (3) In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (j) the failure by a party to admit anything that should have been

PARTIE II

DÉPENS

ADJUDICATION DES DÉPENS ENTRE
PARTIES

Facteurs à prendre en compte

400. (3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

- a) le résultat de l'instance;
- b) les sommes réclamées et les sommes recouvrées;
- c) l'importance et la complexité des questions en litige;
- d) le partage de la responsabilité;
- e) toute offre écrite de règlement;
- f) toute offre de contribution faite en vertu de la règle 421;
- g) la charge de travail;
- h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
- i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;
- j) le défaut de la part d'une partie de signifier une demande visée à la

admitted or to serve a request to admit;

(k) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or

règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou

technical nature of the issues in dispute, or
(iii) the amount in dispute in the proceeding; and

la nature technique des questions en litige,
(iii) la somme en litige;

(o) any other matter that it considers relevant.

o) toute autre question qu'elle juge pertinente.

[4] In assessing costs, the Court bears in mind the principle reiterated by Justice Layden-Stevenson in *Johnson & Johnson Inc. v Boston Scientific Ltd.*, 2008 FC 817 at para 3, [2008] FCJ No 1022 [*Johnson & Johnson*], that “[c]osts should be neither punitive nor extravagant. It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party ...”.

I. The Scale of Costs

[5] Generally speaking, a successful party – in this case Apotex – is entitled to its costs. According to Rule 407 of the Rules, these costs are typically assessed at the mid-point of Column III of Tariff B, along with certain additional fees and disbursements. However, numerous judgments stemming from pharmaceutical patent cases have determined that costs are to be assessed at the upper end of Column IV of Tariff B, given the complexity of the issues raised by such cases (see for example, *Sanofi-Aventis Canada Inc. v Apotex Inc.*, 2009 FC 1138 at para 14, [2009] FCJ No 1626 and *Sanofi-Aventis Canada Inc. v Novopharm Limited*, 2009 FC 1139 at para 13, [together referred to as the *Ramipril Infringement Proceedings*]; *Johnson & Johnson* at para 15; *Adir v Apotex Inc.*, 2008 FC 1070 at paras 9-11, [2008] FCJ No 1343, [*Adir*]; *Kirkbi AG v Ritvik Holdings Inc.*, 2002 FCT 1109 at para 10, [2002] FCJ No 1474, [*Kirkbi AG*]).

[6] In the present case, Apotex maintains that Sanofi lost a high stakes trial and that in accordance with established case law, its costs should also be assessed at the upper end of Column IV of Tariff B in light of the amounts claimed and the amounts recovered (Rule 400 (3)(b)), and the importance and complexity of the issues at stake (Rule 400 (3)(c)).

[7] In response, Sanofi contends that Apotex' costs should be assessed according to Column III of Tariff B. As well, Sanofi argues that only nine (9) days of the trial should be taxed. Sanofi further submits that no complex issues were at stake (Rule 400 (3)(c)), that the matter was brought to trial expeditiously, and that the proceedings did not require extensive work (Rule 400 (3)(g)).

[8] The Court observes that the trial in the proceedings lasted a total of twenty-six (26) days in Toronto and Ottawa, in both English and French. In addition, discoveries took place over twenty-three (23) days. At trial, the parties produced over one thousand (1000) documents, twenty-three (23) experts and fact witnesses testified and a total of two hundred and eleven (211) documents were marked as exhibits (Costs Submissions of Apotex Inc. and Apotex Pharmachem Inc. at para 12). In these circumstances, and considering as well the amounts at issue and the nature of the issues raised by this case, the Court is of the opinion that the complexity of this action warrants a costs award assessed at the upper end of Column IV of Tariff B in keeping with the aforementioned jurisprudence.

II. The Result of the Action

[9] Apotex maintains that it is entitled to one hundred percent (100%) of its costs on the basis that it was ultimately the successful party in this case (Rule 400 (3)(a)). Notwithstanding the fact

that it did not succeed on every issue, Apotex submits that it succeeded in the three primary issues concerning the validity of the '777 Patent: construction, sound prediction and obviousness.

Moreover, Apotex argues that a successful plaintiff should only be penalized where abuse of process is found, which is not the case in the present circumstances. Furthermore, Apotex asserts that this was not a case where merely discrete issues were won by a party as advanced by Sanofi.

[10] For its part, Sanofi contends that Apotex' costs award must be reduced in light of its lack of success on several issues, namely on a number of its patent validity attacks and on the issue of infringement. As well, Sanofi submits that it was successful on almost every issue and question of fact before the Court. Sanofi is accordingly of the view that Apotex should only be entitled to fifty percent (50%) of its costs.

[11] As noted earlier, a successful party is usually entitled to its costs. Nevertheless, where the success of an action is divided or limited to certain issues, this Court can order a reduction in the total costs award (see *Johnson & Johnson; Adir; the Ramipril Infringement Proceedings*, above).

[12] In the present case, the Court notes that Apotex' arguments failed to persuade the Court with regard to the issues of standing, claims construction, and certain portions of its validity arguments: overbreadth, sufficiency, anticipation, and double patenting. But more importantly, the Court also determined that Apotex had infringed the '777 Patent, though this point became moot subsequent to the Court's finding on the Patent's invalidity. Consequently, and in light of the above, the Court is of the view that Apotex' costs award should be reduced by twenty percent (20%).

III. Conduct of the Parties

[13] It is Sanofi's position that Apotex' costs award should also be reduced in light of its conduct during the proceedings and the factors outlined in 400 (3)(i) and 400 (3)(j) of the Rules. Sanofi asserts that Apotex' conduct and strategy in this case unnecessarily lengthened the trial, increased costs and complicated the entire proceedings. Specifically, Sanofi highlights the fact that Apotex refused to admit certain facts that were ultimately proven and that Apotex failed to withdraw several arguments that were found to be unconvincing by the Court. Sanofi accordingly maintains that it should not be penalized for Apotex' conduct.

[14] As for Apotex, it submits that there were no findings of abuse by the Court and therefore a reduction of their costs award is not warranted. Apotex also takes issue with Sanofi's conduct during the proceedings and affirms that many of Sanofi's requests to admit were improper in their form and that furthermore, Apotex did admit many facts. As well, Apotex argues that it did not unduly lengthen the proceedings, particularly as its discovery permitted it to prepare reports that proved helpful to the Court. Additionally, Apotex states that Sanofi has not quantified the amount of time and resources that it claims Apotex wasted.

[15] After considering the arguments advanced by the parties, the Court finds that it cannot penalize either party for its conduct during the proceedings which was emblematic of a typical hard-fought and complex patent litigation. There were trying times indeed, but nothing tantamount to abuse. In the absence of any abuse of process, the Court finds no reason to reduce Apotex' costs

award further on this basis (see *Monsanto Canada Inc. v Schmeiser*, 2002 FCT 439 at para 20, [2002] FCJ No 566, [*Monsanto*]).

IV. Counsel Fees and Disbursements

[16] With respect to counsel fees and disbursements, Apotex seeks an award for two (2) first counsel and one (1) second counsel for preparation and attendance at trial, as well as fees and reasonable disbursements for one (1) first counsel and one (1) second counsel for all pre-trial procedures. Apotex maintains that the disbursements should include travel, accommodation and related expenses.

[17] Sanofi is of the view that Apotex should not be permitted to recover for any amendments to its pleadings as many were rejected by the Court. In addition, Sanofi submits that Apotex should not be able to recover for the preparation of motion materials beyond what was ordered by the Court in this regard. Moreover, Sanofi maintains that Apotex' costs for documentary and oral discovery should be discounted because it was too extensive and at times wasteful.

[18] However trite, the Court observes that the volume of work pertaining to pharmaceutical patent cases can be significant. The Court recalls that, in the present case, the action was brought to trial within two (2) years of being instituted. Aside from the pace and volume of work, the Court also notes that all parties were represented by numerous attorneys throughout the course of the action. In the circumstances, given the amount of work (Rule 400 (3)(g)), the Court is prepared to allow Apotex to recover its costs for two (2) first counsel and one (1) second counsel for preparation and attendance at trial and for preparation, filing of and attendance for written argument during the course of trial (Items 13 to 15 of Tariff B).

[19] Regarding the pre-trial matters, Apotex is allowed to recover fees and reasonable disbursements (including travel, accommodation and related expenses) for one (1) first counsel and one (1) second counsel in all pre-trial procedures (Items 1 to 12, 16 to 22 and 24 of Tariff B), in respect of:

- preparation of pleadings;
- preparation of motion materials and attendance at motion hearings (other than those where costs were specifically directed or awarded to Sanofi);
- documentary and oral discovery (including reasonable time spent traveling to attend discovery out of the normal place of residence of those attending);
- preparation of expert affidavits for those experts who appeared at trial;
- preparation of witnesses who appeared at trial; and
- preparation and attendance at pre-trial conferences.

V. Expert Fees

[20] On the issue of expert fees, Apotex seeks fees and disbursements for its experts who appeared and testified at trial as well as those who assisted counsel in reviewing and understanding other experts reports, in preparing for the cross-examination of opposing experts, and in preparation for discoveries. Further, Apotex specifies that it is entitled to fees and disbursements for experts who attended trial for purposes of hearing the testimony of an opposing party's expert regarding issues considered in his or her own expert report.

[21] Conversely, Sanofi submits that Apotex should only be allowed to recover the necessary and reasonable expenses for expert witnesses who testified at trial pursuant to Rule 400 (3)(n.1). In this

regard, Sanofi expresses concern over the disbursements claimed by Apotex and, essentially, argues that Apotex seeks to recover costs associated with experts that were disqualified by the Reasons for Order and Order dated December 14, 2010 rendered by the undersigned.

[22] Pursuant to the established case law regarding expert fees, the Court concludes that Apotex is entitled to recover the fees and disbursements only for experts that appeared and testified at trial. Accordingly, no award will be provided for the experts who did not appear at trial. But, Apotex may also recover the fees and disbursements associated with the experts who testified at trial and who assisted counsel in reviewing and understanding other experts' reports, preparing for cross-examination of opposing experts and for assistance in preparing for discoveries.

VI. Offer to Settle

[23] In its submissions, Apotex has pointed to a written offer to settle that was put to Sanofi on April 1, 2011 – seventeen (17) days before the commencement of the trial – and which was not accepted by Sanofi. According to Apotex, the terms of the offer to settle allow for the doubling of its costs pursuant to Rule 420 and Rule 400 (3)(e).

[24] Rule 420 of the *Federal Courts Rules* outlines the following:

OFFER TO SETTLE	OFFRES DE RÈGLEMENT
Consequences of failure to accept plaintiff's offer	Conséquences de la non-acceptation de l'offre du demandeur
420. (1) Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to	420. (1) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le demandeur fait au défendeur une

settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.

Consequences of failure to accept defendant's offer

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,

(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or

(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.

Conditions

(3) Subsections (1) and (2) do

offre écrite de règlement, et que le jugement qu'il obtient est aussi avantageux ou plus avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens mais non au double des débours.

Conséquences de la non-acceptation de l'offre du défendeur

(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante :

a) si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours;

b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

Conditions

(3) Les paragraphes (1) et (2) ne

not apply unless the offer to settle	s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes :
(a) is made at least 14 days before the commencement of the hearing or trial; and	a) elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction;
(b) is not withdrawn and does not expire before the commencement of the hearing or trial.	b) elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction.

[25] For its part, Sanofi contends that the offer to settle put forward by Apotex was not a true offer to settle, essentially because it did not contain the element of compromise, or an incentive to accept. In particular, Sanofi emphasizes that the incentive to accept the offer to settle at issue depended exclusively on the date at which the judgment would be rendered rather than on the actual disposition of the merits. As such, Sanofi contends that such a speculative offer to settle cannot be said to be clear and unequivocal or to constitute a compromise or incentive to accept.

[26] Moreover, Sanofi argues that the requirements of Rule 420 are not met in the case at hand as the final Judgment rendered on December 6, 2011 is less favourable to Apotex than the offer to settle. According to Sanofi, under the offer to settle, it would have lost its right to enforce the '777 Patent against Apotex as of September 1, 2011 and would have lost its market exclusivity as of January 1, 2012. Instead, in the present case, Sanofi lost its right to enforce the '777 Patent on December 6, 2011. Sanofi also points to the fact that, as of January 12, 2012, no generic products have been placed on the formulary. Sanofi accordingly maintains that, in the circumstances, Apotex should not be entitled to a doubling of its costs.

[27] More particularly, Apotex' offer to settle provides for (i) an acknowledgement of the infringement of the '777 Patent by Apotex; (ii) an injunction from further infringement of the '777 Patent until and including December 31, 2011; (iii) a dismissal of the other claims by the parties; (iv) a non-exclusive licence granted by Sanofi to Apotex to manufacture, use, import (and to have manufactured, used and imported) clopidogrel-containing products, commencing September 1, 2011 and to sell such clopidogrel-containing products on or after January 1, 2012; and (v) a consent by Sanofi to the issuance of Apotex' Notice of Compliance effective September 1, 2011 for purposes of submission to provincial formularies, to be effective no earlier than January 1, 2012.

[28] As a preliminary matter, before considering the applicability of Rule 420, the Court is required to consider whether Apotex' offer qualifies as an offer to settle.

[29] In the *Ramipril Infringement Proceedings*, above, Justice Snider observed that Rule 420 triggers serious cost consequences in cases where a written offer to settle is made and judgment is rendered in favour of the party who put forward the offer to settle. Unsurprisingly, relevant case law suggests that a doubling of costs will only be granted in cases where the offer to settle satisfies certain requirements. Such requirements were outlined in a comprehensive manner in the case of *M.K. Plastics Corp. v Plasticair Inc.*, 2007 FC 1029 at para 39, [2007] FCJ No 1348, by Justice Tremblay-Lamer, as follows:

[39] In order to trigger the double costs rule, an offer must be clear and unequivocal in that the opposite party need only decide whether to accept or reject the offer (*Apotex Inc. v Syntex Pharmaceuticals*, [2001] FCA 137, [2001] F.C.J. No. 727 (QL), at para. 10). The offer must also contain an element of compromise (or incentive to accept) (*Canadian Olympic Assn. v. Olymel, Société en commandite*, [2000] F.C.J. No. 1725 (QL), at

para. 10). The offer must also be presented in a timely fashion such that the benefit would still be derived from the opposite party if accepted (*Sammammas Compania Maritima S.A. v. Netuno (the) Action in rem against the Ship "Netuno"*, [1995] F.C.J. No. 1442 (QL), at paras. 30 and 31). Finally, if accepted, the offer must bring the dispute between the parties to an end (*TRW, supra*, at p. 456).

[30] The burden of proving that a judgment is as favourable or more favourable, as the terms of an offer to settle, falls on the party who requests the application of Rule 420 – in this case Apotex.

[31] At first blush, the offer to settle made by Apotex does appear to be clear and unequivocal. Furthermore, it was presented in a timely fashion, and if it had been accepted it would have brought the dispute between the parties to an end. Likewise, Apotex' offer to settle slightly exceeded the result of the proceedings (December 6, 2011 as opposed to January 1, 2012).

[32] However, a closer analysis of the terms of the offer to settle reveals that Sanofi was not provided with any incentive to accept this offer to settle. More particularly, while Apotex' offer to settle acknowledges infringement of the '777 Patent, it does not offer any compromise in return; the benefits of the offer to settle were all one-sided; all advantages were conferred to Apotex and Sanofi would have received nothing (or very little) in return in accepting this offer to settle (*Baker Petrolite Corp. v Canwell Enviro-Industries Ltd.*, 2002 FCA 482 at para 4 (b), [2002] FCJ No 1710, [*Baker Petrolite*]; *ITV Technologies, Inc. v WIC Television Ltd.*, 2005 FC 744 at paras 7-11, [2005] FCJ No 934, [*ITV Technologies*]). In order to be acceptable, Apotex' offer to settle should have combined more than the mere acknowledgement of infringement. Significantly, the offer to settle did not contain any element of compensation or even any reference to the prejudice caused by the infringement such as to incite Sanofi to cross the settlement bridge and settle the dispute.

[33] This lack of an element of “compromise” is an element that cannot be overlooked. In the trademark case of *Canadian Olympic Assn. v Olymel, Société en commandite*, [2000] FCJ No 1725 at paras 10-13, 195 FTR 216, Justice Lemieux made the following observations that are particularly apposite:

[10] At least for the purposes of the cost award before me which does not arise in an action but in the context of an appeal from the Registrar of Trade-marks awarding Olymel two trade-mark registrations, I am of the view that the ingredient of compromise (or incentive to accept) is an essential element of an offer to settle. Other considerations may apply when considering an offer to settle liquidated or unliquidated damages in an action.

[11] The purpose of the offer to settle rule, as pointed out by Morden A.C.J.O. in Data General, supra, is to encourage the termination of litigation by agreement of the parties -- more speedily and less expensively than by judgment of the Court at the end of a trial. He added the impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early and careful consideration to the merits of the case.

[12] As argued by counsel for COA, Olymel's offer contained no element of compromise although it was made after Olymel had filed its respondent's memorandum of fact and law which, in my view, was not so persuasive and convincing as to render COA's continuation of the appeal without merit. In the circumstances, it was a request that COA capitulate an arguable appeal. Olymel's offer did not, in my view, advance the purposes of the offer to settle provision of the Rules.

[13] Without an element of compromise in analogous situations, an offer to settle could simply become a very easy mechanism for a respondent to obtain double costs and clearly, such a device is not within the intent of the Rules.

[Emphasis added.]

[34] In addition to the above, the Court observes that Rule 420 must be carefully weighed in light of the particular characteristics of each case. More particularly, while the Court notes that Rule 420

may encourage the termination of litigation by agreement of the parties, which may then save the parties and the Court precious time and resources, it cannot be applied mechanically as there is a real danger of prejudicing a party that has not been given genuine incentive to settle. As such, every offer to settle must be considered on a case-by-case basis in order to avoid abuses in this regard. In the present case, the Court is of the view that Apotex' offer to settle lacks the relevant factor of an element of compromise or incentive to accept. For these reasons, Rule 420 is not triggered and is thus inapplicable in the circumstances.

VII. Summary

[35] As per the Court's discretion in the matter of costs and upon consideration of all the relevant factors, Apotex shall have their costs according to the following terms:

- The costs award shall be assessed at the upper end of Column IV of Tariff B;
- Apotex can recover fees for one (1) first counsel and one (1) second counsel for all pre-trial procedures, including reasonable disbursements for travel, accommodation and related expenses as outlined in paragraph 19 of these Reasons;
- Apotex can recover fees for two (2) first counsel and one (1) second counsel for preparation and attendance at trial;
- Apotex can recover fees and disbursements for experts that appeared and testified at trial;
- Apotex can recover fees and disbursements associated with the experts who testified at trial and who assisted counsel in reviewing and understanding other experts' reports, preparing for cross-examination of opposing experts and for assistance in preparing for discoveries.

[36] In addition to the above, the Court concludes that Apotex' costs award will be decreased by twenty percent (20%). Apotex is accordingly entitled to an award at eighty percent (80%) of its

costs which will be assessed by the assessment officer in accordance with these Reasons. Finally, Sanofi's costs awards in pre-trial orders are to be set-off.

POSTSCRIPT

[1] These Reasons for Judgment on Costs are un-redacted from the Confidential Reasons for Judgment on Costs which were issued on March 16, 2012, pursuant to the Court's Direction dated March 16, 2012.

“Richard Boivin”

Judge

Ottawa, Ontario
March 16, 2012

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-644-09

STYLE OF CAUSE: Apotex Inc. v. Sanofi-Aventis

DOCKET: T-933-09

STYLE OF CAUSE: Sanofi-Aventis and Bristol-Myers Squibb Sanofi
Pharmaceuticals Holdings Partnership
v. Apotex Inc., Apotex Pharmachem Inc.
and Signa Sa de CV

SUBMISSIONS IN WRITING (COSTS)

**PUBLIC REASONS
FOR JUDGMENT ON COSTS:** BOIVIN J.

DATED: March 16, 2012

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