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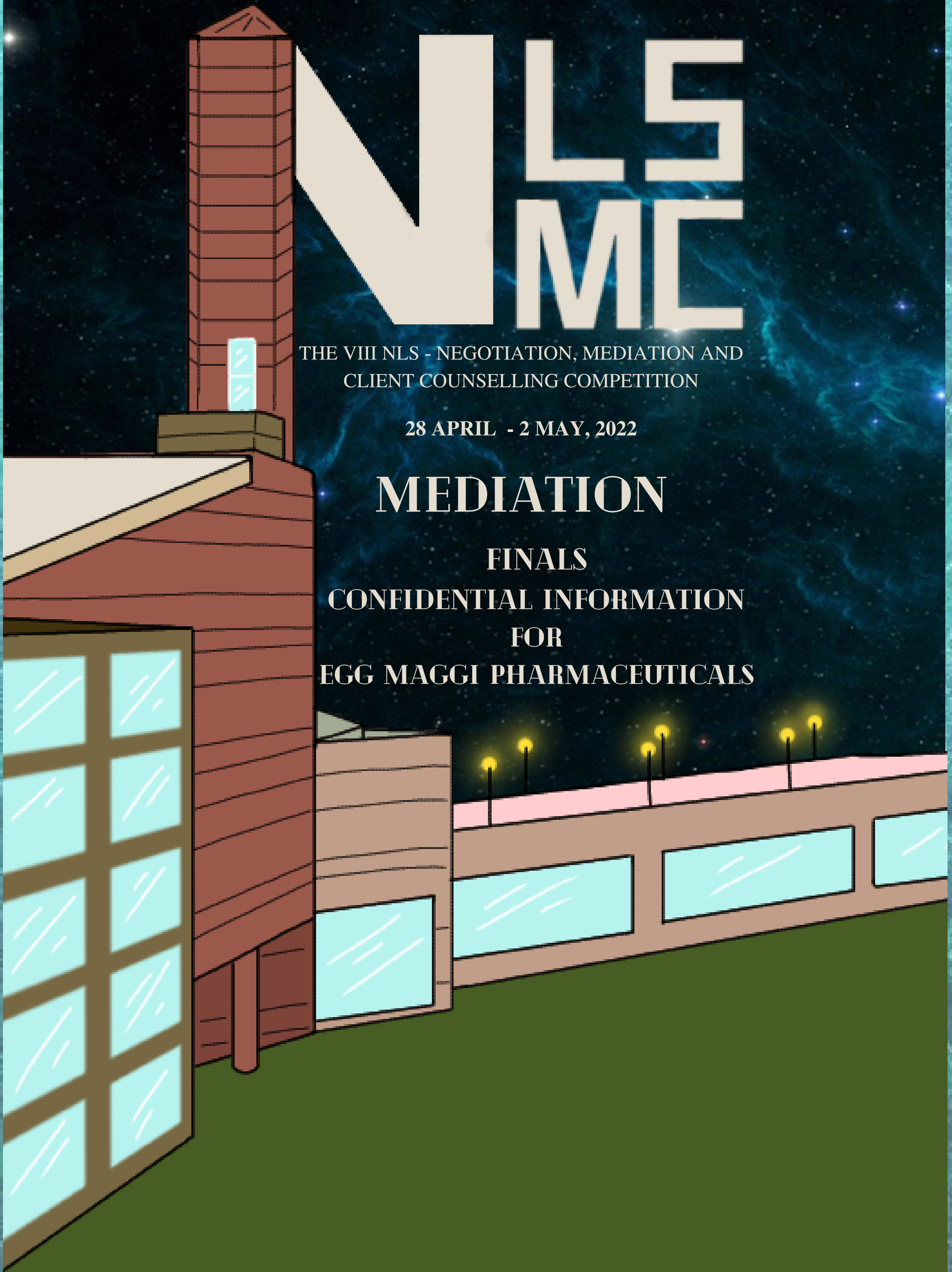
THE VIII NLS - NEGOTIATION, MEDIATION AND
CLIENT COUNSELLING COMPETITION

28 APRIL - 2 MAY, 2022

MEDIATION

FINALS

CONFIDENTIAL INFORMATION
FOR
EGG MAGGI PHARMACEUTICALS



MEDIATION FINALS

**IN THE MATTER OF AN ARBITRATION UNDER
THE LCIA RULES (2014)
BETWEEN**

Egg Maggi Pharmaceuticals LLC

Claimant

- AND -

The Republic of Silverstone

Respondent

ARB Case No. ACT/03/2022

MEDIATION SESSION

**CONFIDENTIAL INFORMATION FOR EGG MAGGI PHARMACEUTICALS
(CLAIMANT)**

You are Mx. Jodie Wilson, the CEO of Egg Maggi Pharmaceuticals (EMP or Claimant), accompanied by the General Counsel of EMP. You have been the CEO for the last 10 years and are completely privy to the details of the investment and subsequent shutdown of the plants in Silverstone. EMP has had a successful run under your leadership, but your businesses globally have met with criticism for your steep pricing of drugs, which make them unaffordable to large sections of the population and have given your company a bad reputation. You are concerned that the incident in Silverstone will prompt similar action in other countries and you are determined to resolve this today. You have full authority to settle on behalf of the Claimant on any or all issues today.

A. Issue of Standing in Investment Arbitration Proceedings

The original investment in Silverstone was made by your wholly owned subsidiary, Chilli Maggi Pharmaceuticals. Although CMP was the original investor, you have obtained all their rights, obligations and liabilities at the time you bought all its assets. This means that any claims they had against Silverstone for violating the 2007 Bilateral Investment Treaty stand transferred to you. However, one of the factors that Investment Arbitration Tribunals consider in their assessment of such issues is the time of such assignment or restructuring. It might be argued that since the alleged breach of the BIT took place before the purchase of the business, the right to sue under the BIT lay exclusively with the company owning the investment at the time of breach – CMP. This means that there is a reasonable chance that your claim would be outright rejected if this case went to arbitration. This should make you more amenable to settle this matter at the Mediation session itself, subject to the business considerations outlined below.

B. Indirect Expropriation and Compensation

The relevant clause of the BIT, dealing with expropriation is as follows:

'Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation.'

The 2007 BIT is broad enough to allow indirect expropriation of property through regulatory measures, such as the issuance of a compulsory license. However, if the host state carries out this expropriation for a public purpose, and in fulfilment of the conditions in the clause, then such action would amount to lawful expropriation which does not breach the BIT.

In the instant case, the compulsory licence was issued for a public purpose – the health emergency – and was in compliance with domestic patent law. However, you were the only

pharmaceutical company manufacturing a medicine for the eye infection against whom a compulsory license was issued. No such license was issued against domestic companies that manufactured substitute drugs. However, you must note that these substitute drugs were cheaper for sale and less efficacious against the infection, according to several credible studies. The extent to which these facts will impact a finding a non-discrimination will depend solely on the Tribunal's ruling in the case. Furthermore, you want to challenge that the royalties were not adequate compensation for the indirect expropriation, but the same seems unlikely since global guidelines indicate standard royalties payments to be along the lines of 6% of the price of goods. Alternatively, the Silverstone Government will resort to the public health exception in the BIT to absolve itself of all liabilities. You want to use this discussion to know how the Silverstonian government views its alleged action, in case this case does proceed to arbitration.

Your primary motivation behind filing this claim under the BIT was to revoke the compulsory license issued against EyeDropit and to claim compensation for the losses suffered. Your legal team has informed you that even if you do prove that the alleged action resulted in indirect expropriation, you will be entitled to compensation only and the Tribunal may not ask for the revocation of the compulsory license. Thus, you should use this mediation session to convince the Silverstone government to revoke the compulsory license to prevent the domestic manufacturers from producing the drug, as this is of utmost priority. Although you have presently shut down your business in Silverstone, you are looking to restart the same (See point D below) and would like to manufacture EyeDropit yourself. You are cognizant of the fact that the primary reason for issuing a compulsory license against your drug was due to its steep price, so you are willing to give an undertaking that the price of EyeDropit in the Silverstonian markets will be capped at \$70 dollars, subject to increase in cost of production, if compulsory license is revoked. You also want to third parties to stop producing the drug or you are willing to aggressively pursue protection of your patents in domestic courts.

With respect to compensation for the alleged government action, your legal assessment divides your losses into two categories –

1. The issuance of compulsory licence during the health emergency; and
2. The continuation of the compulsory licence after the health emergency had ended.

For the first category, your losses were estimated at \$70 million, after having offset the royalties received from the domestic manufacturers. For the second category, your estimated losses amount to another \$90 million. However, even if the compulsory licence was valid during the emergency, it was not so after the emergency ended and you want atleast another \$20 million for infringement of your patent rights. Unless you receive atleast \$180 million from Silverstone, you will not drop your claims before the arbitral tribunal.

C. Counterclaim

You were aware of the environmental investigations against CMP, but you were under the impression that the fine had been paid. Given that investigations were concluded over 2 years

ago and no fine was imposed then, you could argue that the authorities did not mean to impose a fine. That being said, you don't want this matter to be publicly litigated because of the bad repute it might bring to EMP. Thus, you are willing to pay somewhere between \$75-90 million if all investigations against CMP are closed and you can have a fresh start.

D. Resuming Business in Silverstone

Prior to the issuance of compulsory licence, your business in Silverstone was highly lucrative, owing to the market and the support from the government for your R&D requirements. However, You sense some hostility towards foreign investment in Silverstone, in light of the events that have transpired. Further, given the losses you have suffered, you don't want to risk investing too much money into Silverstone. In light of these considerations, you are open to the idea of a Joint Venture with a Silverstonian investor.

However, you want control over the Joint Venture (with equity somewhere between 50% to 75%, depending on market conditions), especially the power to set prices as you please. This is a reasonable amount, considering the know-how and technical capacity you bring to the table. This joint venture shall start operating the R&D unit and existing manufacturing plants, with a plan to expand R&D in the first five years of its operations. In order to assuage the government's concerns upon pricing, you are willing to accept their recommendations on prices, but you will have the final authority to decide prices – which you plan to use judiciously to ensure that your company has a good reputation in Silverstone. In return, you want an undertaking from the government that they will not issue a compulsory license against any of your drugs without giving you an opportunity to address their concerns.

You are ideally looking to start operations for this Joint Venture by the end of 2022 and would want the Silverstonian Government's assistance in meeting this timeline.

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