UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: INCRETIN-BASED THERAPIES PRODUCTS LIABILITY LITIGATION	Case No.: 13md2452 AJB (MDD) **ORDER GRANTING MOTIONS TO SEAL BRIEFING REGARDING NOVO'S CLAIM OF ABSOLUTE PROTECTION AND CLAWBACK** (Doc. Nos. 1317, 1348, 1376, 1386)

Presently before the Court are several motions to seal briefing related to a discovery dispute between the parties regarding clinical trial data and Defendant Novo Nordisk Inc.'s ("Novo") request for clawback and related documents. (Doc. Nos. 1317, 1348, 1376, 1386). For the reasons set forth below, each motion to seal is **GRANTED**.

I. BACKGROUND

On August 13, 2015, the parties filed a joint motion to expedite briefing and hearing regarding a discovery dispute between Plaintiffs and Novo. (Doc. No. 1309.) As part of the joint motion, the parties represented that a discovery dispute between the parties to this litigation required Court resolution, and that the same dispute was poised for resolution before the Judicial Council Coordinated Proceedings ("JCCP") in Los Angeles County Superior Court before Judge Highberger. The parties requested the Court adopt the abbreviated briefing schedule already in place in the JCCP. (*Id.* at 2.) The Court

granted the joint motion and arranged for joint argument regarding the discovery dispute with the court in the JCCP.

On August 17, 2015, Plaintiffs filed a memorandum of facts and contentions of law setting forth their position regarding the discovery dispute. (Doc. No. 1316.) The memorandum and supporting documents were lodged under seal, (Doc. No. 1318), and accompanied by a motion to seal (Doc. No. 1317). In their motion to seal, Plaintiffs state they do not oppose sealing the data at issue in the discovery dispute, and request leave to maintain certain documents under seal. (*Id.* at 2.) These documents include: (1) Plaintiffs' motion regarding the underlying discovery dispute; (2) the rebuttal report of Dr. David Madigan; (3) correspondence dated July 24, 2015 from Novo's counsel to Plaintiffs; and (4) excerpts from the deposition of Dr. John Buse. (*Id.*)

On August 24, 2015, Novo filed a motion requesting to seal Novo's opposition to the underlying discovery dispute, various declarations in support of Novo's opposition, Novo's motion to seal, and the documents cited by Plaintiffs in their motion to seal. (*See* Doc. No. 1348, p. 2-3.) Defendants Amylin Pharmaceuticals, LLC ("Amylin"), Eli Lilly and Company ("Lilly"), and Merck Sharp & Dohme Corp. ("Merck") also filed a motion to seal their opposition to Plaintiffs' motion regarding the underlying discovery dispute. (Doc. No. 1376.)

On August 31, 2015, Plaintiffs filed a motion to seal their reply brief regarding the discovery dispute. (Doc. No. 1386.) Citing to the Court's prior confidentiality rulings, Plaintiffs request leave to file the following documents under seal: (1) Plaintiffs' reply brief regarding the underlying discovery dispute; (2) excerpts from Dr. David Graham's August 26, 2015, presentation; (3) related exhibits; (4) excerpts from clinical trial protocol; (5) excerpts from expert report of Dr. Sarah Thayer; and (6) excerpts from the reliance lists of various expert reports of Defendants' experts Tony Reid, Sarah Thayer, Sheila Weiss, and Timothy Wang. (*See id.*)

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II. LEGAL STANDARD

Courts have historically recognized a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978). "Unless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point." *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). To overcome this strong presumption, a party seeking to seal a judicial record must articulate justifications for sealing that outweigh the public policies favoring disclosure. *See Kamakana*, 447 F.3d at 1178-79. However, the presumption in favor of public access does not apply with equal force in the context of non-dispositive motions. *Id.* at 1179. In such cases, a party must only demonstrate that good cause exists to justify sealing a document. *Foltz*, 331 F.3d at 1135. When moving to seal all of the information in a document, the parties must provide good cause to seal the document in its entirety. *See Kamakana*, 447 F.3d at 1183. Good cause may exist to seal records that are "privileged, contain trade secrets, contain confidential research, development or commercial information, or if disclosure of the information might harm a litigant's competitive standing." *Dugan v. Lloyds TSB Bank, PLC*, Case No.12cv0249, 2013 WL 1435223, at *2 (N.D. Cal. Apr. 9, 2013).

III. DISCUSSION

Although several motions to seal are currently before the Court, the arguments raised in support of sealing the briefing and related exhibits are largely the same. Novo argues that good cause exists to seal the data from the ongoing clinical trial and any reference to the data in the briefing and attached exhibits because disclosure could jeopardize the study, and severely prejudice Novo as well as those involved in the clinical trials. (Doc. No. 1349, p. 4-6.) Merck, Amylin, and Lilly argue their memorandum in opposition to the discovery dispute involves sensitive information and should be sealed. Finally, Plaintiffs note in both motions to seal that they do not oppose maintaining the

documents under seal, and acknowledge specifically that the data should remain sealed at this time. (Doc. Nos. 1317, p. 2; 1386, p. 2.)

As a non-dispositive motion, the underlying discovery dispute requires the proponent of a motion to seal demonstrate good cause to do so. Upon review of the motions to seal and consideration of the discovery dispute, the good cause standard is readily satisfied. Novo provides several declarations which detail why the information should be maintained under seal, which the Court finds persuasive. (*See, e.g.*, Doc. Nos. 1349-12; 1349-13.) The information relates to an ongoing clinical trial mandated by the Food and Drug Administration ("FDA") and will not result in published, publically available data for several months. The potential to compromise the trial itself, as well as the prejudice to Novo that may result from public disclosure of the information at this time warrants maintaining the data and any reference to that data under seal.

IV. CONCLUSION

As set forth above, the Court finds good cause to maintain the briefing regarding the discovery dispute between Plaintiffs and Novo and related exhibits under seal. The Court orders as follows:

(1) Plaintiffs' motion to seal the memorandum of facts and contentions of law and attached exhibits regarding the discovery dispute between Novo and Plaintiffs is **GRANTED**. (Doc. No. 1317.) The Clerk of Court is instructed to docket the sealed lodged proposed documents under seal. (Doc. No. 1318.)

(2) Novo's motion to seal its memorandum in opposition to Plaintiffs' memorandum of facts and contentions of law and attached exhibits as detailed in the motion to seal is **GRANTED**. (Doc. No. 1348.) The Clerk of Court is instructed to docket the sealed lodged proposed documents under seal. (Doc. No. 1349.)

(3) Merck, Amylin and Lilly's motion to seal its opposition to Plaintiffs' memorandum of facts and contentions of law is **GRANTED**. (Doc. No. 1376.) The Clerk of Court is instructed to docket the sealed lodged proposed

documents under seal. (Doc. No. 1377.)

(4) Plaintiffs' motion to file its reply brief and attached exhibits under seal is **GRANTED**. (Doc. No. 1386.) The Clerk of Court is instructed to docket the sealed lodged proposed documents under seal. (Doc. No. 1387.)

IT IS SO ORDERED.

Dated: September 9, 2015

Hon. Anthony J. Battaglia
United States District Judge