IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FERRING PHARMACEUTICALS, INC., et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 17-435-RGA
TEVA PHARMACEUTICALS USA, INC.,	:	
Defendant.	:	

ORDER

I **GRANT** the motion for reconsideration. (D.I. 33).

The underlying issue concerns whether Plaintiffs' "Vice President, Global Head of Intellectual Property," Pierre-Jérôme Blain, should have access to Defendant's ANDA and ANDA-related materials.

In ruling on this dispute, I take guidance from the leading case, *In re Deutsche Bank Trust Co.*, 605 F.3d 1373 (Fed. Cir. 2010). I have a declaration from Mr. Blain. (D.I. 49-2). I have agreements that he accepts and understands both a "competitive decision-making" bar and a "patent prosecution" bar. (*Id.*, ¶¶ 12-13).

I accept what Mr. Blain states in his Declaration, with one exception. He says he is "not involved in competitive-decision making" and then gives some examples of activities in which he is not involved. The quoted portion is more of a legal conclusion than a factual statement. I do not accord the legal conclusion any weight. I do, however, accept the specific examples given. I also accept that he has "supervisory responsibility for intellectual property matters, including both litigation and prosecution [but is] not involved in day-to-day prosecution

activities." (*Id.*, ¶ 5).

Deutsch Bank arose in the context of outside counsel. The Court noted that "competitive decisionmaking" was "shorthand" for "counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions . . . made in light of similar or corresponding information about a competitor." 605 F.3d at 1378. The Court noted that the extent of counsel's involvement may vary, suggesting that some counsel could be too low-level and others could be too high-level. In my opinion, Mr. Blain's "supervisory responsibility" for patent prosecution activities cannot reasonably be considered not to be "competitive decision-making." He is not analogous to *Deutsche Bank*'s rainmaking partners ("senior level supervisors [who] primarily serve as liaisons between prosecuting attorneys and clients"). In the absence of an explicit statement to the contrary, I interpret "supervisory responsibility" to include approval authority. Thus, I find that Mr. Blain is a competitive decision-maker.

That is not the end of the matter, however. I still have to balance the risk of Mr. Blain's inadvertent disclosure of knowledge he might gain from access to the ANDA and the ANDA-related materials against Plaintiffs' need for him to have access. In my opinion, this is a close question, but I believe the two-year post-litigation bar from relevant prosecution activities (including supervisory responsibility for those activities) make the risk of inadvertent disclosure acceptably low, while at the same time allowing him to do his job of "overseeing and managing this litigation." The technical details of Defendant's ANDA product would not seem to present much potential for mischief other than Plaintiffs trying to obtain more patents to assert against the ANDA product. The patent prosecution bar, in my opinion, adequately addresses that concern. On the other hand, Plaintiffs may suffer a harm if supervision of outside counsel is

divorced from access to the documents that are usually the entire infringement case.

Thus, I will sign the protective order that Plaintiffs have submitted.

IT IS SO ORDERED this 11 day of December 2017.

Richard G. Andrews
United States District Judge