

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

PHIGENIX, INC.  
Petitioner

v.

IMMUNOGEN, INC.  
Patent Owner

---

Case IPR2014-00676  
Patent 8,337,856 B2

---

**IMMUNOGEN, INC.'S MOTION TO EXPUNGE**

***Mail Stop "PATENT BOARD"***  
Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

## **I. Introduction**

Pursuant to 37 C.F.R. § 42.56, Patent Owner ImmunoGen respectfully submits this Motion to Expunge exhibits 2347 and 2348 from the record. These exhibits relate to marketing and sales-related proprietary information that the Board did not rely on in its Final Written Decision dated October 27, 2015. (Paper 39.) ImmunoGen certifies that the parties have conferred in good faith regarding this motion. Petitioner Phigenix's counsel confirmed that Phigenix will not oppose this motion.

## **II. Authorization for the Motion**

The Board authorized this motion in an email dated February 17, 2017. The email stated that "[t]he parties are authorized to file a motion to expunge the confidential information from the record prior to the information becoming public."

## **III. Procedural Background**

On June 18, 2015, ImmunoGen filed an unopposed Motion to Seal exhibits 2347 and 2348. (Paper 31.) On October 27, 2015, the Board granted the motion, concomitant with its issuing the Final Written Decision. (Paper 39.) The Board found that good cause existed to seal exhibits 2347 and 2348 because the exhibits contained "confidential information regarding Patent Owner's non-public marketing and sales-related proprietary information." (*Id.* at 29.) The Board also found that "Exhibits 2240-44, 2256, 2319, and 2320, which are unsealed, will

fulfill adequately the needs of the public to maintain a complete and understandable record in this case." (*Id.* at 29-30.)

In a December 3, 2015 email, ImmunoGen asked the Board for procedural guidance regarding preserving the record pending appeal of the Board's Final Written Decision to the United States Court of Appeals for the Federal Circuit (CAFC). In a December 4, 2015 email, the Board authorized ImmunoGen to file a motion to preserve the record pending appeal, which ImmunoGen filed on December 11, 2015. (Paper 40.)

On December 22, 2015, Phigenix filed a Notice of Appeal. (Paper 43.) On January 9, 2017, the CAFC issued a Notice of Entry of Judgment Accompanied by Opinion dismissing Phigenix's appeal. (Paper 44.) And on February 15, 2017, the CAFC issued a formal mandate. (Paper 45.)

#### **IV. Argument**

37 C.F.R. § 42.56 provides: "[a]fter denial of a petition to institute a trial or after final judgment in a trial, a party may file a motion to expunge confidential information from the record." The Board has previously explained that a party moving to expunge has to show that i) "any information sought to be expunged constitutes confidential information" and ii) the movant's interest in expunging the information "outweighs the public's interest in maintaining a complete and understandable file history." (*RPX Corp. v. Virnetx Inc.*, IPR 2014-00171, Paper 62 at 3 (P.T.A.B. Sept. 9, 2014).) The rules identify confidential information as "a

trade secret or other confidential research, development, or commercial information." 37 C.F.R. § 42.54(a)(7). And the Board must strike "a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information." 37 C.F.R. § 42.54(a); 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012).

In this case, ImmunoGen has already demonstrated, and the Board already agreed, that exhibits 2347 and 2348 sought to be expunged contain sensitive and confidential information. (Paper 39 at 29-30.) Indeed, the Board found that exhibits 2347 and 2348 "contain confidential information regarding Patent Owner's non-public marketing and sales-related proprietary information." (*Id.* at 29.) And there has been no change in sensitivity or confidentiality of the information contained in exhibits 2347 and 2348. Thus, ImmunoGen has met its burden in showing that "any information sought to be expunged constitutes confidential information." (*RPX Corp. v. Virnetx Inc.*, IPR 2014-00171, Paper 62 at 3 (P.T.A.B. Sept. 9, 2014).)

In addition, ImmunoGen's interest in expunging exhibits 2347 and 2348 "outweighs the public's interest in maintaining a complete and understandable file history." (*Id.*) In the Final Written Decision, the Board stated: "[w]e do not rely on Exhibits 2347 and 2348 in making our decision." (Paper 39 at 29.) Moreover, the Board noted that exhibits 2240-44, 2256, 2319, and 2320, which will remain in the record, "fulfill adequately the needs of the public to maintain a complete and

understandable record in this case." (*Id.* at 30.) Accordingly, because the Final Written Decision did not rely on any information in exhibits 2347 and 2348, and because public access to exhibits 2240-44, 2256, 2319, and 2320 fulfills the public's interest in maintaining a complete and understandable record, the expungement of exhibits 2347 and 2348 from the record will not diminish the public's understanding of the Final Written Decision.

## V. Conclusion

For the reasons stated above, ImmunoGen respectfully requests that exhibits 2347 and 2348 be expunged from the record.

Respectfully submitted,  
STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.

Date: March 2, 2017  
1100 New York Avenue, N.W.  
Washington, D.C. 20005-3934  
(202) 371-2600

/Eldora L. Ellison/  
Eldora L. Ellison  
Lead Counsel for  
Patent Owner ImmunoGen, Inc.  
Registration No. 39,967

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.