UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMGEN INC., Plaintiff, v. F. HOFFMANN-LA ROCHE LTD., a Swiss Company, ROCHE DIAGNOSTICS GmbH, a German Company and HOFFMANN LA ROCHE INC., a New Jersey Corporation, Defendants.	Civil Action No.: 05-12237 WGY

MEMORANDUM IN SUPPORT OF AMGEN'S EMERGENCY MOTION TO OVERRULE ROCHE'S OBJECTIONS TO AMGEN'S DESIGNATION OF ECONOMIC EXPERTS

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I. INTRODUCTION

This emergency motion is necessary because Amgen is being severely prejudiced by its inability to provide confidential information to its chosen economic experts due to Roche's baseless objections to their participation in the case. The parties have been unable to reach an acceptable resolution on the issue after numerous communications on the subject. Despite the fact that expert disqualification under any circumstances is disfavored, Roche takes the position in this litigation that Amgen should be precluded from retaining experts with whom Roche has never even communicated, and to whom Roche has never disclosed confidential or proprietary information.[1] Given the rapidly approaching close of fact discovery and the deadline for submission of expert reports, Roche's position is not only legally untenable but also highly prejudicial to Amgen.

On December 6, 2006, Amgen notified Roche that it intended to designate Drs. Eric Gaier and Christopher Stomberg, and Mr. Benjamin Scher, under the Protective Order in this case, and intended to share discovery materials with them.[2] Roche objected on the basis that all three gentlemen were "joint defense experts in various actions around the country relating to pharmaceutical pricing" and claimed that the "terms of their retention do not permit them to be adverse to … Hoffman LaRoche."[3] Roche also claimed that "certain issues in this action may be substantially related to issues in those cases."[4]

Amgen immediately investigated Roche's assertions and found them to be without merit. In particular, while Roche initially contemplated joining the group of companies that retained Dr. Gaier, Roche ultimately decided not to retain him and was explicitly removed from Dr. Gaier's

[1] Gaier Decl. ¶¶ 11-13.

[2] Brown Decl. Ex. A (hereinafter "12/6/06 letter from D. Fishman to T. Fleming").

[3] Brown Decl. Ex. B (hereinafter "12/11/06 letter from M. Mayell to D. Fishman").

retention letter.[5] Most importantly, Roche never shared any information – confidential or otherwise – with any of these three gentlemen. Indeed, no one from Roche has had any contact or communication with these three gentlemen at all.[6] In addition, the current litigation is not substantially related to the actions Roche professes to be concerned about.[7] Amgen promptly communicated this information to Roche, even transmitting the retainer agreements for these gentlemen that demonstrate Roche's withdrawal from the companies employing Dr. Gaier, and asked Roche to withdraw its objection to Amgen sharing confidential discovery materials with each of these gentlemen.[8] Roche refused.[9]

Roche's continued objection to these three economic experts is causing immediate and substantial prejudice to Amgen with each passing day. Fact discovery closes in this case on April 2, 2007. Initial expert reports are due April 6, with rebuttal expert reports due April 27. Amgen's economists are vital both to its request for injunctive relief and to meet and rebut Roche's antitrust counterclaims. The work that these economic experts will perform is particularly fact-intensive, detailed, and onerous. Merely by objecting on December 11, 2006 without a factual basis, Roche has already managed to deprive Amgen of approximately 30% of the time it had available to prepare expert reports. Each additional week of delay at this point steals away another 8% of Amgen's remaining time.

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[4] *Id.*

[5] Gaier Decl. ¶¶ 9-10. Dr. Stomberg and Mr. Scher have worked as consultants with Dr. Gaier on the matters referenced in Dr. Gaier's retention letter. *See* Stomberg Decl. ¶ 5; Scher Decl. ¶ 5.

[6] Gaier Decl. ¶ 12; Stomberg Decl. ¶ 7; Scher Decl. ¶ 7.

[7] Roche has to date refused to explain why it believes the two actions are related. *See* Brown Decl. Ex. D (hereinafter "12/15/06 letter from M. Mayell to D. Fishman"); Brown Decl. Ex. G (hereinafter "1/10/07 letter from M. Mayell to D. Fishman").

[8] Brown Decl. Ex. C (hereinafter "12/14/06 letter from D. Fishman to M. Mayell").

[9] 12/15/06 letter from M. Mayell to D. Fishman; 1/10/07 letter from M. Mayell to D. Fishman.

Despite these facts, Roche has continued to object to Amgen's designation of Drs. Gaier and Stomberg and Mr. Scher. Having failed to resolve the issue despite repeated communications,[10] Amgen hereby seeks relief from the Court to grant all three gentlemen access to Discovery Materials under the terms of the Protective Order.[11]

II. STATEMENT OF FACTS

Drs. Gaier and Stomberg and Mr. Scher are economists working at the consulting firm of Bates White LLC.[12] All three gentlemen have been retained by Amgen in this matter to provide expert consulting services in the current litigation before this Court.[13] Amgen anticipates that these gentlemen will provide consulting services on topics including the effect of a potential peg-EPO launch on Amgen and the public, the market(s) for erythropoiesis stimulating agents (ESAs), and whether certain alleged Amgen actions constitute "anticompetitive acts."

The matter(s) that Roche relies upon for its objection to all three gentlemen stems from a large group of pharmaceutical manufacturers defending multiple litigations regarding alleged fraudulent pricing practices associated with the Average Wholesale Price ("AWP") of certain pharmaceuticals. These AWP-related litigations have spawned both a federal action consolidated as an MDL in the District of Massachusetts, and multiple state actions around the country.[14] Roche appears to rely upon its status as a defendant in various different state actions

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[10] *See* 12/6/06 letter from D. Fishman to T. Fleming; 12/11/06 letter from M. Mayell to D. Fishman; 12/14/06 letter from D. Fishman to M. Mayell; 12/15/06 letter from M. Mayell to D. Fishman; Brown Decl. Ex. E (hereinafter "12/26/06 letter from M. Mayell to D. Fishman"); Brown Decl. Ex. F (hereinafter "1/8/07 letter from D. Fishman to M. Mayell"); 1/10/07 letter from M. Mayell to D. Fishman.

[11] All three gentlemen have already signed Attachment A indicating their agreement to be bound by the Protective Order. *See* Gaier Decl. ¶ 2 (Ex. B); Stomberg Decl. ¶ 2 (Ex. B); Scher Decl. ¶ 2 (Ex. B).

[12] Gaier Decl. ¶ 1; Stomberg Decl. ¶ 1; Scher Decl. ¶ 1.

[13] Gaier Decl. ¶ 2; Stomberg Decl. ¶ 2; Scher Decl. ¶ 2.

[14] Gaier Decl. ¶ 4.

in its effort to prevent each of these gentlemen from serving as Amgen's consultants in the current litigation.[15]

Dr. Gaier has served as a testifying expert in several AWP-related litigations.[16] Since February 2004, Dr. Gaier has offered six declarations (October 2004, January 2005, February 2005, March 2006, March 2006, and July 2006), two depositions (November 2004 and April 2006), and trial testimony (November 2006) in various AWP matters.[17] Dr. Stomberg and Mr. Scher have provided consulting expert support for these same litigations.[18]

On January 29, 2004, Dr. Gaier signed a retention agreement in connection with the following litigations: In re Pharm. Indus. AWP Lit., MDL No. 1456 (D. Mass); Swanston v. TAP Pharm. Prods. Inc., et al., CV 2002-004988 (Super. Ct. Ariz.); and State of Nevada v. Abbott Laboratories, Inc., et al., CV 02 00260 (2d Dist. Nev.).[19] Both Amgen and Hoffman-LaRoche, Inc. were listed as parties retaining Dr. Gaier.[20] Five months later on June 30, 2004, Dr. Gaier's retention letter in connection with the AWP litigations was revised to eliminate Hoffman-LaRoche, Inc. from the list of defendants retaining Dr. Gaier's services.[21] To the best of his knowledge, Dr. Gaier never signed any subsequent retention letter nor was he given any

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[15] 1/10/07 letter from M. Mayell to D. Fishman.

[16] Gaier Decl. ¶ 6.

[17] Gaier Decl. ¶ 6.

[18] Scher Decl. ¶ 5; Stomberg Decl. ¶ 5.

[19] Gaier Decl. ¶ 9 (Ex. C).

[20] Gaier Decl. ¶ 9 (Ex. C) ("This is to confirm our retention by the companies identified in Attachment A (the 'Companies')" and listing Amgen Inc. and Hoffman-LaRoche, Inc. on Attachment A.).

[21] Gaier Decl. ¶ 10 (Ex. D) (The revised letter explained that: "The above list supersedes the list appended to your original letter of retention as Attachment A. Accordingly, your services are being retained only by the group of defendants listed above [which does not include any Roche-related entities]. … We shall inform you in the event that there are any such changes to the above list.").

information that Hoffman-LaRoche, Inc. (or any of the defendants in this action) had been added back into the list of defendants in his retention letter.[22] Notably, Roche has not identified any additional or supplement agreements with any of these three gentlemen.[23]

During the brief interim period in 2004 when Hoffman-LaRoche was identified on Dr. Gaier's retention letter, no information from Roche – confidential or otherwise – was ever communicated to Drs. Gaier and Stomberg and Mr. Scher, or indeed, to the best of their knowledge, their firm, Bates White LLC.[24] In fact, during the entire period of time in which the AWP-related litigations have been pending, no one at Bates White LLC, including Drs. Gaier and Stomberg and Mr. Scher, has ever even communicated with anyone from Roche or anyone who claimed to represent Roche, let alone been given any confidential information by Roche.[25] Nor has Roche identified any Roche-related information – much less confidential information – that it claims has ever been communicated to any of these three gentlemen.[26]

Simply put, Roche has no basis for claiming that Drs. Gaier and Stomberg and Mr. Scher should be disqualified from serving as Amgen's experts in the current litigation, and likewise has no basis for denying any of these three gentlemen access to Discovery Materials under the Protective Order.

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[22] Gaier Decl. ¶ 10.

[23] Instead, Roche claims that Roche's "understanding" was that the terms of the January 29, 2004 letter from Bates White applied to "all manufacturers in the AWP joint defense group, be they federal defendants, State AG defendants or both." *See* 1/10/07 letter from M. Mayell to D. Fishman. Roche has not provided Amgen with any documentation to support this claim. Nor does Roche even acknowledge the existence of the June 30, 2004 revision to Dr. Gaier's retention in its 1/10/07 correspondence.

[24] Gaier Decl. ¶¶ 11-13; Scher Decl. ¶¶ 6-8; Stomberg Decl. ¶¶ 6-8.

[25] Gaier Decl. ¶ 12; Scher Decl. ¶ 7; Stomberg Decl. ¶ 7.

[26] *See* 1/10/07 letter from M. Mayell to D. Fishman (stating "[t]he issue is not whether Roche has as yet shared confidential information with these gentlemen" and failing to identify any confidential information communicated to Drs. Gaier and Stomberg and Mr. Scher).

III. ARGUMENT

Federal courts have the inherent power to disqualify experts,[27] typically citing concerns such as the need to protect the integrity of the adversary system and to promote public confidence in the fairness of the legal process.[28] However, courts are generally reluctant to disqualify expert witnesses.[29] Because experts in litigation serve as independent sources of information and not as advocates, the standards governing expert disqualification are distinguished from the standards for disqualification of attorneys.[30] Courts in Massachusetts do not apply the standards for attorney disqualification to experts.[31]

Amgen seeks the Court's intervention because it will suffer substantial prejudice if Roche is allowed to maintain its baseless objections. However, it is the party objecting to an expert that bears the burden of proving that a conflict of interest exists sufficient to warrant disqualification.[32] Thus the burden of proof remains on Roche, despite the fact that this matter is being brought to the Court's attention by Amgen.[33] In order to meet its burden, Roche must put

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[27] *English Feedlot, Inc. v. Norden Labs., Inc*., 833 F. Supp. 1498, 1501 (D. Colo. 1993) (citing *Great Lakes Dredge & Dock Co. v. Harnishchfeger Corp*., 734 F. Supp. 334, 336 (N.D. Ill. 1990).

[28] *Paul v. Rawlings Sporting Goods Co*., 123 F.R.D. 271, 278 (S.D. Ohio 1988).

[29] *Lacroix v. Bic Corp*., 339 F. Supp. 2d 196, 199 (D. Mass. 2004).

[30] *English Feedlot*, 833 F. Supp. at 1501; *In re Ambassador Group, Inc*., 879 F. Supp. 237, 241-43 (E.D.N.Y. 1994); *United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys*., 994 F. Supp. 244, 249 (D.N.J. 1997) (summarizing existing cases and holding that "[a]pplication of the same standard in both cases is not appropriate because experts and attorneys assume different rules in litigation); *but see Marvin Lumber & Cedar Co. v. Norton Co*., 113 F.R.D. 588, 591 (D. Minn. 1986).

[31] *See City of Springfield v. Rexnord Corp*., 111 F. Supp. 2d 71, 74 (D. Mass. 2000) ("Courts generally employ a different standard for disqualification of experts than for disqualification of attorneys."); *In re Malden Mills Indus., Inc*., 275 B.R. 670, 674 (Bankr. D. Mass. 2002) ("experts and attorneys play different roles in litigation and owe different levels of duty to a client.").

[32] *Rexnord*, 111 F. Supp. 2d at 73.

[33] *Id*.

forth specific facts and evidence, not merely conclusory assertions.[34]

Roche seeks to deprive Amgen – and ultimately this Court – from the benefits that a qualified expert may offer by making illusory references to a conflict of interest. Roche refuses to address the principle underlying expert disqualification, which focuses on whether a party will be prejudiced due to an expert's disclosure of previously obtained confidential information relevant to the instant cause of action.[35] Having never shared any confidential information with these three experts, Roche cannot demonstrate that it will be prejudiced in this manner.

Courts typically apply a two-part test in expert disqualification matters: First, was it objectively reasonable for the first party who claims to have retained the expert to believe that a confidential relationship existed? Second, did that party disclose any confidential information to the expert that is relevant to the current litigation?[36] Usually the answer to both prongs of this test must be affirmative before an expert can be disqualified.[37] For example, as one District of Massachusetts court has recently explained:

> [D]isqualification may not be warranted even if the expert witness signed a confidentiality agreement with the adversary. There may be situations where, despite the existence of a formal contractual relationship, so little

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[34] *See Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 312 (S.D.N.Y. 2003) (requiring the party to put forth evidence and stating that a conclusory assertion is insufficient); *Nikkal Indus., Ltd. v. Salton, Inc*., 689 F. Supp. 187, 191 (S.D.N.Y. 1988) (("[The] burden is not, of course, discharged by mere conclusory or ipse dixit assertions…").

[35] *Paul v. Rawlings Sporting Goods Co*., 123 F.R.D. 271, 280 (D. Ohio 1988) (Noting that the "total absence of demonstrable prejudice to [the party seeking an expert's disqualification] is a very important factor in determining that [the expert] ought not to be disqualified.").

[36] *Lacroix*, 339 F. Supp. 2d at 199-200; *Hewlett-Packard Co. v. EMC Corp*., 330 F. Supp. 2d 1087, 1093 (N.D. Cal. 2004)*; Ambassador*, 879 F. Supp. 237 (finding the existence of a prior confidential relationship, but finding that the "modus operandi" information at issue was not confidential, and furthermore that the work previously performed was not substantially related to the current "Ambassador" insolvency proceeding at issue).

[37] *Lacroix*, 339 F. Supp. 2d at 200; *but see City of Westminster v. MOA, Inc*., 867 P.2d 137, 140 (Colo. Ct. App. 1993) (finding disqualification might be required even if no disclosures took place).

> of substance occurs during the course of the relationship that neither the integrity of the trial process, nor the interests of the party who retained the expert, would be served by blanket disqualification.[38]

Here, Roche has failed to identify any facts that could provide a basis for either prong required in order to disqualify an expert.[39]

Some courts also consider additional factors relating to public policy, such as "the public interest in allowing or not allowing an expert to testify."[40] But as shown below, Roche cannot satisfy either the standard two-part test for expert disqualification, or any additional factors regarding public policy considerations.

A. Roche cannot reasonably believe a confidential relationship existed or exists.

First, Roche must prove that it was objectively reasonable for Roche to believe that a confidential relationship existed between it and Drs. Gaier and Stomberg and Mr. Scher. Courts do not have a bright-line standard that requires a formal retention agreement before a confidential relationship can be established, although the existence of such an agreement is one factor to be considered.[41] Other such factors include: the duration and degree of involvement between the expert and the client,[42] whether the expert was given any documents identified as

[38] *Lacroix*, 339 F. Supp. 2d at 200 (internal citations and quotations omitted).

[39] Cases involving issues of expert disqualification typically fall into two different factual scenarios: (1) where an expert communicates with one party to a litigation and then attempts to "switch sides" and consult for the opposing party regarding the same matter, *see Wang Labs. v. Toshiba Corp*., 762 F. Supp. 1246 (E.D. Va. 1991), or (2) where one party employs an expert who has previously been affiliated with the opposing side, *see Ambassador*, 879 F. Supp. 237. Similar legal standards apply in both situations. *See id*. (both *Wang Labs*. and *Ambassador* apply the standard two-part test).

[40] *Koch Refining Co. v. Jennifer Boudreaux MV*, 85 F.3d 1178, 1181 (5th Cir. 1996).

[41] *Paul*, 123 F.R.D. at 278; *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991); *Lacroix*, 339 F. Supp. 2d at 200.

[42] *Koch*, 85 F.3d at 1182; *Hewlett-Packard*, 330 F. Supp. 2d at 1093.

confidential attorney work product,[43] and whether a "substantial amount of trial strategy" was disclosed to the expert.[44] Assessing these factors, Roche could not have reasonably believed that it had a confidential relationship with Drs. Gaier and Stomberg and Mr. Scher, and thus the first prong of the test is not satisfied.

In the present case, there has been no direct involvement at all between Roche and Drs. Gaier and Stomberg and Mr. Scher – not even in the unrelated AWP litigation(s). Roche has never provided any of them with any documents at all, let alone any Roche "confidential" or "attorney work product" information.[45] Roche has never communicated with any of them – even in the context of the AWP litigation(s) – and thus cannot possibly have discussed anything about the current litigation with any of these three gentlemen.[46]

Roche claims that it has "retained" Drs. Gaier and Stomberg and Mr. Scher simply by being part of the AWP joint defense group.[47] But Roche has not identified to Amgen any retention letter or confidentiality agreement currently in effect involving any Roche entity and Drs. Gaier and Stomberg and Mr. Scher, or even their consulting firm of Bates White.[48] In fact, the agreement pertaining to the AWP matters of which Roche complains was explicitly amended

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[43] *Paul*, 123 F.R.D. at 279; *English Feedlot*, 833 F. Supp. at 1502-03.

[44] *Mayer*, 139 F.R.D. at 3.

[45] Gaier Decl. ¶¶ 11-13; Stomberg Decl. ¶¶ 6-8; Scher Decl. ¶¶ 6-8.

[46] Gaier Decl. ¶ 12; Stomberg Decl. ¶ 8; Scher Decl. ¶ 8.

[47] 1/10/07 letter from M. Mayell to D. Fishman (claiming that "the AWP joint defense group has retained Drs. Gaier and Stomberg, and Mr. Scher to consult on behalf of its members regarding each of the State AG suits, and this retention is pursuant under the terms of the January 29, 2004 retention letter." However, the letter does not provide any additional agreement or documentation supporting this claim.).

[48] *See* 12/14/06 letter from D. Fishman to M. Mayell (providing Roche with copies of Dr. Gaier's retention agreements); 1/8/07 letter from D. Fishman to M. Mayell (requesting any additional engagement letters); 1/10/07 letter from M. Mayell to D. Fishman.

to exclude Roche entities some two and a half years ago.[49] Furthermore, Dr. Gaier's retention agreement placed the burden of notifying him of a confidential relationship squarely on the party seeking representation (here, on Roche), explicitly stating that Dr. Gaier would be informed if any of the parties to his retention changed.[50] Having failed to ever notify Dr. Gaier that it desired a confidential relationship, it is fundamentally unfair for Roche to now attempt to make such a claim after failing to make its beliefs clear to the experts at issue.[51]

Roche also argues that Drs. Gaier and Stomberg and Mr. Scher should be prohibited from working for Amgen on this litigation because Roche claims to have contributed to an AWP defense expert fund related to some of the AWP litigation(s).[52] Roche has not explicitly identified what Roche amounts from this fund, if any, have actually been paid to Drs. Gaier and Stomberg and Mr. Scher.[53] But even assuming that Roche can bring forth some evidence proving that it has actually given some amount of money to Drs. Gaier and Stomberg and Mr. Scher, this fact alone does not create a "confidential relationship" with them.

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[49] Gaier Decl. Ex. C (January 29, 2004 letter); Gaier Decl. Ex. D (June 30, 2004 letter stating that "The above list supersedes the list appended to your original letter of retention as Attachment A. Accordingly, your services are being retained only by the group of defendants listed above [which does not include any Roche-related entities]. … We shall inform you in the event that there are any such changes to the above list.").

[50] Gaier Decl. Ex. D ("In the future, additional defendants may seek to becoming retaining defendants and fund expert contributions to gain access to expert testimony or advice. We shall inform you in the event that there are any such changes to the above list.").

[51] *See, e.g.*, *Paul*, 123 F.R.D. at 279 ("Consequently, I do not think it unfair to place the burden of making sure that the expert understands the type of relationship which exists, and the need to keep information disclosed during the course of that relationship confidential, on the attorney in the first instance."); *Wang Labs*, 762 F. Supp. at 1248 ("Lawyers bear a burden to make clear to consultants that retention and a confidential relationship are desired and intended.").

[52] *See* 12/15/06 letter from M. Mayell to D. Fishman; 1/10/07 letter from M. Mayell to D. Fishman (claiming that Roche has paid "at least $172,000" into an AWP defense expert fund, but not explicitly identifying the amount it claims has been paid to Drs. Gaier and Stomberg and Mr. Scher).

[53] *Id.*

While courts have treated the issue of payments to experts differently,[54] the cases in which payment has been considered a factor in establishing a confidential relationship are fundamentally different from the current situation. In each of those cases, direct payment was made to the expert and the expert had knowledge of who was paying for his services. By contrast, Drs. Gaier and Stomberg and Mr. Scher were paid through a joint defense fund and had no knowledge or information that any money that may have flowed through the fund to their firm Bates White LLC may have come from Roche.[55] To allow Roche to use such payments to establish that it reasonably believed it had a confidential relationship with these experts would be fundamentally unfair. Furthermore, it would also be contrary to public policy to find that a confidential relationship can be created between a party and an expert without the expert's knowledge.

In short, to accept Roche's assertion that it reasonably believed it had a confidential relationship with Drs. Gaier and Stomberg and Mr. Scher, one would have to accept that such a relationship could be established without the knowledge of one of the parties to the relationship, and with no communication between the parties. Such a leap is plainly unreasonable. Thus, Roche cannot satisfy the first prong of the test, and therefore cannot establish that these experts should be disqualified.

B. No Roche confidential information has been disclosed to these experts.

Moreover, Roche also cannot satisfy the second prong of the test – that it disclosed confidential information relevant to the current litigation to these experts. Roche cannot

[54] *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 413 (D. Utah 1999) ("[T]he mere payment for consulting time does not make an expert per se a 'retained expert.'"); *but see English Feedlot*, 833 F. Supp. at 1502 ("[S]ince SmithKline [the party seeking disqualification] paid Brown [the expert] to settle its consumer complaints, Brown was not an 'independent consultant.'").

[55] Gaier Decl. ¶ 14; Scher Decl. ¶ 9; Stomberg Decl. ¶ 9.

establish that any confidential Roche information has ever been disclosed to Drs. Gaier and Stomberg and Mr. Scher – let alone any confidential information relevant to the current litigation.[56] Confidential information may include discussions of litigation strategies, the kinds of experts a party expects to retain, the party's views of the strengths and weaknesses of each side, the role of a party's witnesses, and anticipated defenses.[57] Courts make a distinction between confidential business and financial records and confidential communications related to a particular litigation, with greater emphasis placed upon communications related to strategies about a particular litigation.[58] As noted previously, the confidential information disclosed must also be relevant to the litigation matter that is the subject of potential disqualification.[59]

Having never communicated with the experts at issue, it is not surprising that Roche has not disclosed any information to them – confidential or otherwise.[60] Roche appears to concede this fact, stating that "[t]he issue is not whether Roche has as yet shared confidential information with these gentlemen."[61] But of course, sharing confidential information with the expert at issue is a key factor in the expert disqualification analysis.[62]

In short, Roche cannot show that any relevant, confidential Roche information has been

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[56] "Because the burden is on the party seeking to disqualify the expert, that party should point to specific and unambiguous disclosures that if revealed would prejudice the party." *Hewlett-Packard*, 330 F. Supp. 2d at 1094.

[57] *Koch*, 85 F.3d at 1182; *see also Cherry Hill*, 994 F. Supp. at 250-51 (providing a list of examples of confidential information as that term is used in the context of expert disqualification, and specifically noting that the confidential information must be related to the specific litigation at issue).

[58] *Cherry Hill*, 994 F. Supp. at 251 (denying motion to disqualify despite expert's longstanding access to financial and business records).

[59] *Lacroix*, 339 F. Supp. 2d at 200; *Hewlett-Packard*, 330 F. Supp. 2d at 1093.

[60] Gaier Decl. ¶¶ 11-13; Scher Decl. ¶¶ 6-8; Stomberg Decl. ¶¶ 6-8.

[61] 1/10/07 letter from M. Mayell to D. Fishman.

[62] *Lacroix*, 339 F. Supp. 2d at 199-201.

communicated to Drs. Gaier and Stomberg and Mr. Scher, and that fact alone is sufficient to end the analysis.[63] Roche cannot satisfy the test for expert disqualification.

C. Roche cannot show that the AWP litigations are substantially related to this case.

In a minority of cases, courts have also considered whether there is a "substantial relationship" between the expert's prior association and the current proposed relationship.[64] While the principle case cited for this proposition, *Marvin Lumber*, has been repeatedly criticized as improperly applying a standard more appropriate to the disqualification of attorneys than experts, the substantial relationship test will be briefly addressed herein for completeness.[65]

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[63] In addition, as Roche has acknowledged, Amgen itself is also a defendant in the AWP litigations Roche is using as the basis for its attempt to disqualify these experts. *See* 12/11/06 letter from M. Mayell to D. Fishman. Any Roche information or litigation strategies disseminated among the "joint AWP defendants" has thus already been shared with Amgen, and it is nonsensical to claim that this information will somehow prejudice Roche in the current litigation.

[64] *See Ambassador*, 879 F. Supp. at 244-45 (noting that the party requesting disqualification had not detailed how knowledge of its methods and procedures gleaned in a prior matter bore a "substantial relationship" to the litigation at issue such that disqualification would be warranted); *Stanford v. Kuwait Airways Corp*., 1989 U.S. Dist. LEXIS 7633 at *3 (S.D.N.Y. 1989) (requiring a showing of a "substantial relationship between the prior association and the current proposed relationship" to justify disqualification); *Marvin Lumber*, 113 F.R.D. at 591-92 (applying a standard akin to attorney disqualification, and explaining that "[a] substantial relationship is present if the factual contexts of the two representations are similar or related.").

[65] *See Cherry Hill*, 994 F. Supp. at 250 ("Because the court declines to apply the attorney disqualification rules to experts, it finds the reasoning of Marvin Lumber unpersuasive."); *W. Va. ex rel. Billups v. Clawges*, 620 S.E.2d 162, 167 n.7 (W. Va. 2005) ("We have found two jurisdictions employing a minority rule which does not require an affirmative response to both questions. In these jurisdictions, the analysis used is similar to the standards governing conflict of interest involving attorneys, that is, once it is established that it was objectively reasonable to conclude a confidential relationship existed then there is a rebuttable presumption that confidential or privileged information was disclosed. *See Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 591 (D. Minn. 1986); *Conforti & Eisele, Inc. v. Division of Bldg. & Const*., 170 N.J. Super. 64, 405 A.2d 487, 490 (N.J. Super.L.Div. 1979). Thus, in those jurisdictions only the first part of the test requires an affirmative response and once that is obtained then the burden of proof shifts to the party opposing disqualification. The majority view, with which we agree, is that the distinctly different roles performed or purposes satisfied by experts and attorneys in litigation justify the different disqualification standards. *See e.g. English Feedlot, Inc. v. Norden*

Despite repeated requests from Amgen, Roche has refused to explain why it believes the AWP litigations are "substantially related" to the present action.[66] Because Roche cannot make such a showing, this is not surprising. The AWP matters concern alleged fraudulent pricing practices associated with the Average Wholesale Price for a variety of drugs.[67] The AWP litigation does not relate in any way to Roche's drug MIRCERA®, the drug at issue here. MIRCERA® could not possibly be at issue in any AWP litigation because it is not yet approved for sale, and thus does not have an AWP.[68]

Roche's own actions in discovery belie any claim that the AWP litigations have any relationship to the current litigation. Roche has served discovery requests upon Amgen asking for discovery relating to numerous current and former Amgen legal proceedings that it claims are relevant to the current matter.[69] Yet no discovery request from Roche has asked for any discovery relating to the AWP litigations to which Amgen is also a party.[70] Plainly, before its

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Laboratories, Inc., 833 F. Supp. 1498, 1501 (D. Colo. 1993); *Wang Laboratories, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1250 (E.D. Va. 1991); *Mitchell v. Wilmore*, 981 P.2d 172, 175 (Colo. 1999) (overruling adoption of minority view in *City of Westminster v. MOA, Inc.*, 867 P.2d 137 (Colo. App. 1993)).").

[66] *See* 12/11/06 letter from M. Mayell to D. Fishman (stating "we believe that certain issues in this action may be substantially related to issues in those cases."); 12/14/06 letter from D. Fishman to M. Mayell; 12/15/06 letter from M. Mayell to D. Fishman (declining to provide the basis for how this action may be related to the AWP litigations); 1/8/07 letter from D. Fishman to M. Mayell; 1/10/07 letter from M. Mayell to D. Fishman (failing to provide the basis for how this action may be related to the AWP litigations).

[67] Gaier Decl. ¶ 4.

[68] Amgen's EPOGEN® and Aranesp® drugs have been accused in certain AWP litigations. But this does not render the AWP litigations "substantially related" to the current matter which focuses on MIRCERA®. Furthermore, while information about these Amgen drugs may be considered confidential to Amgen, such information is most certainly not confidential to Roche.

[69] *See* 10/30/06 Defendants' First Set of Requests for Production and Things to Amgen Inc. (Nos. 1-123), Requests 38-44, Docket No. 177 Ex. 5.

[70] *See* 10/30/06 Defendants' First Set of Requests for Production and Things to Amgen Inc. (Nos. 1-123), Docket No. 177 Ex. 5; 1/08/07 Defendants' Second Set of Requests for Production and Things to Amgen Inc. (Nos. 124-315) (Brown Decl. Ex. H).

attempt to disqualify Amgen's experts, Roche did not believe the AWP actions were related to this litigation – and Roche should not be allowed to switch its story now.

D. Prejudice to Amgen and policy objectives weigh against disqualification in this case.

In deciding issues of expert disqualification, courts also consider fundamental fairness and policy concerns.[71] One important factor that weighs heavily in Amgen's favor is whether prejudice will result if an expert is disqualified.[72] Amgen will be severely prejudiced if it is denied the ability to use its economic experts at this stage of the litigation. As noted previously, fact discovery is rapidly closing and initial expert reports are currently due on April 6. Without the benefit of Drs. Gaier and Stomberg and Mr. Scher, Amgen has already been prejudiced in its ability to assess the documents produced by Roche to date and identify and prepare for the depositions of Roche's fact witnesses related to the issues for which these experts have been retained. More to the point, Amgen has been unable to adequately begin preparation of the necessary expert reports. Even if Amgen's motion was granted today, it would only have 85 remaining days until initial expert reports are due. Particularly in light of the complex and fact-intensive nature of the economic analysis these experts must complete, it would be highly prejudicial to Amgen to be forced to attempt to find other experts at this late date, provide them with the information required, and given them sufficient time to prepare their reports.

Courts have also noted the policy objective of preventing parties from "gaming" the retention of experts, thereby providing a motivation for a party to tie up experts it has no intention of using in order to prevent its adversary from gaining access to the expert of its

[71] *See Hewlett-Packard*, 330 F. Supp. 2d at 1094-95.

[72] *See Cherry Hill*, 994 F. Supp. at 251 (asking "whether another expert is available and whether the opposing party will be unduly burdened by having to retain a new expert.").

choice.[73] This is not a case where Roche ever even considered using the experts at issue for the current litigation or even attempted to retain them in this matter. Roche's objections to these experts accomplishes nothing other than to interfere with Amgen's access to the experts of its choice. Allowing Roche to disqualify experts with whom Roche has never even directly communicated would set a harmful precedent and would be highly prejudicial to Amgen.

IV. CONCLUSION

For all of the reasons given above, Amgen respectfully requests that the Court overrule Roche's objections to Drs. Gaier and Stomberg and Mr. Scher, and grant each of them immediate access to Discovery Materials pursuant to the Protective Order in this case.

Respectfully Submitted,

AMGEN INC.,
By its attorneys,

Of Counsel:

Stuart L. Watt
Wendy A. Whiteford
Monique L. Cordray
Darrell G. Dotson
Kimberlin L. Morley
AMGEN INC.
One Amgen Center Drive
Thousand Oaks, CA 91320-1789
(805) 447-5000

/s/ Michael R. Gottfried
D. Dennis Allegretti (BBO#545511)
Michael R. Gottfried (BBO# 542156)
Patricia R. Rich (BBO# 640578)
DUANE MORRIS LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210
Telephone: (617) 289-9200
Facsimile: (617) 289-9201

Lloyd R. Day, Jr.
DAY CASEBEER, MADRID & BATCHELDER LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
Telephone: (408) 873-0110
Facsimile: (408) 873-0220

William Gaede III
McDERMOTT WILL & EMERY

[73] *English Feedlot*, 833 F. Supp. at 1505.

3150 Porter Drive
Palo Alto, CA 94304
Telephone: (650) 813-5000
Facsimile: (650) 813-5100

Michael F. Borun
Kevin M. Flowers
MARSHALL, GERSTEIN & BORUN LLP
233 South Wacker Drive
6300 Sears Tower
Chicago, IL 60606
Telephone: (312) 474-6300
Facsimile: (312) 474-0448

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