IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

HARBOUR ANTIBODIES BV, HARBOUR ANTIBODIES HCAB BV, ERASMUS UNIVERSITY MEDICAL CENTER ROTTERDAM, and DR. ROGER KINGDON CRAIG,	)	
Plaintiffs,	)	
v.	)	Civ. No. 21-1807 (MN)
TENEOBIO, INC.,	)	
Defendant.	)	

REPORT AND RECOMMENDATION OF SPECIAL MASTER

By order of the Court dated August 24, 2022, Judge Noreika referred to me, as a Special Master, the Motion to Disqualify DLA Piper LLP (US) and all of its affiliates ("DLA" or "DLA Piper (US)") from representing Harbour Antibodies BV, Harbour Antbodies HCAb BV, Erasmus University Medical Center Rotterdam, and Dr. Roger Kingdon Craig (collectively "Plaintiffs" or "Harbour") in this case, which motion was filed by defendant Teneobio, Inc. ("Teneobio"). ("the Motion"). (D.I. 40) For the reasons that follow, I recommend that the Motion to Disqualify DLA ("the Motion") be denied.

THE PARTIES

DLA is a global law firm that operates through separate and distinct legal entities, including DLA Piper LLP (US), DLA Piper UK LLP, DLA Piper France LLP, DLA Piper Australia, and DLA Piper Dinu SCA (in Romania). (D.I. 52, ¶ 3) Prior to October 19, 2021, Teneobio was a "privately held, clinical stage biotechnology company developing a new class of biologics called Human Heavy-Chain Antibodies." (D.I. 42, ex. A) On July 27, 2021, Amgen

Inc. ("Amgen") announced its intentions to acquire Teneobio, a transaction that was completed on October 19, 2021 (D.I. 42, exs. A, B), making Teneobio a wholly owned subsidiary of Amgen.

DLA'S RELATIONSHIP WITH AMGEN

DLA has performed legal work for Amgen over the course of years, as reflected in the multiple engagement letters made part of this record. For instance, in September 2008, a master engagement letter was executed between DLA Piper (US) and "Amgen Inc., including its subsidiaries and affiliates (hereinafter collectively, 'Amgen')," that would apply if DLA were to perform certain intellectual property work. (D.I. 42, ex. C) That engagement terminated no later than April 2020. (D.I. 52, ¶¶ 5-7) In February 2014, Amgen Romania and DLA Piper Dinu executed an engagement letter regarding advice on corporate and regulatory matters, which engagement is still ongoing on an amended basis. (D.I. 52, ¶¶ 14-15, exs. 1, 2) In December 2017, DLA agreed to represent the interests of "Amgen" in a review of its "Worldwide Compliance and Business Ethics Program." (D.I. 42*,* e., G) In December 2018, DLA Piper Australia and DLA Piper France executed essentially identical master engagement letters with "Amgen, Inc., including its subsidiaries and affiliates (hereinafter collectively, 'Amgen')," covering certain intellectual property work. (*Id.,* exs. D, E) These engagements terminated in February 2020 and January 2020, respectively. (D.I. 52, ¶¶ 10, 13) On December 14, 2021, "Amgen" executed an engagement letter with DLA Piper (US) regarding "Power Purchase Agreement Advice." (D,I, 42*,* ex. F)

During the same course of years, DLA has requested and received waivers and consents from "Amgen Inc." for potential conflicts of interest. (*Id.,* exs. H, I) However, "[t]o Amgen's knowledge, Amgen has never waived a conflict to allow DLA Piper to be adverse to Amgen or

its affiliates in litigation. And to Amgen's knowledge, DLA Piper has never asked for such a waiver." (*Id.,* ¶ 9)

DLA'S RELATIONSHIP WITH HARBOUR

In November 2020, DLA Piper (US) began working on a matter through DLA Piper UK for Harbour Biomed (Shanghai) Co., Ltd. ("Harbour Biomed"). (D.I. 51, ¶ 3) In January 2021, DLA Piper UK and Harbour Biomed entered a formal engagement letter that involved assisting Harbour Biomed "in preparing a patent filing strategy concerning an antibody discover[y] platform." (D.I. 52, ¶ 16, ex. 3) On August 6, 2021, DLA Piper (US) was asked to represent Harbour in a potential action against Teneobio, and began billing time to the matter on August 18, 2021. (D.I. 51, ¶¶ 4, 7) After completing "an extensive review and investigation of the underlying factual and legal issues presented by" Harbour's patents, DLA filed a complaint on behalf of Harbour against Teneobio on December 23, 2021. (*Id.,* ¶¶ 10, 11)

TENEOBIO'S RELATIONSIP WITH AMGEN

According to the papers filed by Teneobio, it is a "wholly owned subsidiary of Amgen, which Amgen acquired on October 19, 2021." (D.I. 42, ¶ 2) In this regard, Amgen "does not operate Teneobio as an independent business; all of Teneobio's employees are Amgen employees, and the Amgen employees who run the Teneobio business report up to Amgen management." (*Id.,* ¶ 3) Amgen "makes strategic decisions for Teneobio," including "all … legal decisions for this case," as Teneobio "does not have a separate legal department." (*Id.*) The 2020 10-K filed on behalf of Amgen included its subsidiaries. (D.I. 65, ex. A at 1) The 2021 10-K filed on behalf of Amgen identified its "[a]cquisition activities [as] complex," and went on to explain that "failures or difficulties in integrating or retaining new personnel or in integrating the operations of the businesses, products or assets we acquire (including related

technology, commercial operations, compliance programs, manufacturing, distribution and general business operations and procedures) may affect our ability to realize the benefits of the transaction. . . ." (*Id.* at 49) Teneobio has argued that the relief sought in this action "includes both an injunction against and damages from Amgen," thus constituting direct adversity. (Reply at 6)

PROCEDURAL BACKGROUND

As noted, on December 23, 2021, Harbour sued Teneobio for infringement of several patents which disclose a platform technology that utilizes transgenic rodents to generate functional heavy chain-only antibodies ("HCAbs") for therapeutic or research purposes. (D.I. 1) In the complaint, Harbour seeks both injunctive relief and damages.

Teneobio filed its answer on March 4, 2022 (D.I. 9), and a scheduling order was entered by the Court on April 29, 2022. (D.I. 21)[1] Discovery commenced, and Harbour served its first set of interrogatories and requests for production on Teneobio, both of which define Teneobio as "including without limitation subsidiaries, divisions, affiliates . . . and all other persons acting or purporting to act[ ] on behalf of Teneobio, Inc." (D.I. 43, exs. A, B) The Parties engaged in settlement efforts in May, through which process the in-house Amgen lawyer primarily responsible for this litigation became aware of a potential conflict between DLA and Teneobio's parent, Amgen. On June 7, 2022, Amgen's General Counsel informed DLA's General Counsel that "DLA's representation of the *Harbour* plaintiffs appeared to have given rise to a conflict" due to "the potential compliance engagement" memorialized in the December 14, 2021

[1] According to the Court-ordered schedule, fact discovery is to be completed by March 15, 2023, the *Markman* hearing is to be conducted on August 16, 2023, expert discovery is to be completed by February 2, 2024, and trial is to commence on August 26, 2024. (D.I. 21)

engagement letter regarding "Power Purchase Agreement Advice."[2] (D.I. 42, ¶ 7, exs. K, L) During their efforts to resolve the conflicts issue, Amgen requested that Harbour "give an enforceable commitment to Amgen Inc. ('Amgen') that in this action Harbour will not seek any form of injunctive relief against Amgen Inc. and/or any of its subsidiaries/affiliates other than Teneobio, Inc. ('Teneobio'), and further will not seek recovery of damages or other form of monetary remedies from Amgen Inc. and/or any of its subsidiaries/affiliates other than Teneobio." (D.I. 66, ex. B) Harbour responded that neither it nor DLA would agree to "Amgen's extraordinary and baseless demand." (*Id.,* ex. C) The Motion was filed on July 18, 2022.

LEGAL STANDARDS

There can be no dispute that a district court has the "inherent authority to supervise the professional conduct of attorneys appearing before it," including the power to disqualify an attorney from a representation. *United States v. Miller,* 624 F.2d 1198, 1201 (3d Cir. 1980) (citations omitted). "[W]hether disqualification is appropriate depends on the facts of the case and is never automatic." *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.,* 142 F. Supp. 2d 579, 583 (D. Del. 2001); *Boston Scientific Corp. v. Johnson & Johnson, Inc.,* 647 F. Supp. 2d 369, 374, n.7 (D. Del. 2009) (citations omitted). Indeed, because motions to disqualify are generally disfavored, the District Court in Delaware has held that the moving party has the burden to "clearly demonstrate that 'continued representation would be impermissible.'" *Talecris Biotherapeutics, Inc. v. Baxter Int'l, Inc.,* 491 F. Supp. 2d 510, 513 (D. Del. 2007). I believe it fair to say that the District Court in Delaware has approached motions to disqualify

[2] The "Power Purchase Agreement Advice" engagement letter is characterized by Amgen counsel as DLA's advising "Amgen and its affiliates regarding multiple aspects of their Environmental, Social, and Governance initiatives at locations around the world." (D.I. 42, ¶ 7, ex. F)

counsel "with 'cautious scrutiny,' mindful of a litigant's right to the counsel of its choice." *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.,.* 2011 WL 2692968, at *6 (D. Del. June 22, 2011). Even if a conflict is found, the Third Circuit "has noted that a district court has 'wide discretion in framing its sanctions to be just and fair to all parties involved.'" *United States v. Miller,* 624 F.2d at 1201..

The District of Delaware has adopted the ABA's Model Rules of Professional Conduct, of which "Rule 1.7: Conflict of Interest: Current Clients" is the most pertinent here. Rule 1.7(a) provides in relevant part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a) goes on to explain that a concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Although a lawyer "ordinarily must withdraw from the representation" if "a conflict arises after representation has been undertaken" (Rule 1.7, Comment [4]), the Comments to Rule 1.7 recognize the complexities of representing corporate clients. For instance, in Comment [34], the ABA explains that "[a] lawyer who represents a corporation … does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." Such a lawyer

> is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the

> organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

In Comment [5], the ABA also recognizes that "[u]nforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation." "Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict." *Id.*

"Thrust upon" conflicts as described in Comment [5] have been defined as "conflicts between two clients that (1) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where (2) the conflict was not reasonably foreseeable at the outset of the representation, (3) the conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived . . . but one of the clients will not consent to the dual representation." Formal Opinion 2005-05, New York City Bar (July 1, 2005), at 2-3. Factors that are considered in determining whether an actual conflict exists include "the relationship between the two corporate entities, and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member." *Id.* at 3. "[M]any courts have applied a flexible approach to 'thrust upon' situations that focuses on balancing the interests of all affected parties," rather than automatically preventing the lawyer from withdrawing from one client in order to continue representing the other. *Id.* at 8.

The question presented at bar is whether representation adverse to a client's corporate affiliate implicates the duty of loyalty owed to the client. Courts that have addressed the issue of "a corporate affiliate conflict" have examined "(i) the degree of operational commonality

between affiliated entities, and (ii) the extent to which one depends financially on the other." *GSI Commerce Solutions, Inc. v. BabyCenter, LLC,* 618 F.3d 204, 210 (2d Cir. 2010).

With respect to the former, courts have considered the extent to which entities rely on a common infrastructure, e.g., whether they share an integration of technology systems or rely on or otherwise share common personnel including management and legal services. "As to financial interdependence, several courts have considered the extent to which an adverse outcome in the matter at issue would result in substantial and measurable loss to the client or its affiliate." *Id.* at 211. The United States Court of Appeals for the Federal Circuit likewise has determined that, when applying Rule 1.7 (a), courts should look to "'the total context, and not whether a party is named in a lawuit,' to assess 'whether the adversity is sufficient to warrant disqualification.'" *Dr. Falk Pharma GmbH v. GeneriCo, LLC,* 916 F.3d 975, 982 (Fed. Cir. 2019). In sum, courts should consider whether "affiliates are so interrelated that representation of one constitutes representation of all." *Id* (citing *GSI Commerce,* 618 F.3d at 210-212).

DISCUSSION

DLA has challenged Teneobio's standing to bring the Motion in the first instance, as DLA claims that Teneobio is not a client. "[T]he essential purpose of [Rule 1.7] is to ensure a lawyer's duty of loyalty to the client." *Appeal of Infotechnology, Inc.,* 582 A.2d 215, 220 (Del. 1990). The Delaware Supreme Court has held that "a non-client litigant does not have standing to merely enforce a technical violation of the Rules." *Id.* at 221. Although it is doubtful that concurrent representation, as alleged here by Teneobio and Amgen, would be considered a "technical violation" of the Rules, even so the Delaware Supreme Court has determined that a non-client litigant may seek to enforce Rule 1.7 if "the conflict adversely affects his or her rights. We, therefore, place the burden on the non-client litigant to prove the existence of a conflict and

to show by clear and convincing evidence exactly how that conflict will affect the 'fair and efficient administration of justice.'" *Id.* Consequently, by all standards, it is Teneobio's burden to clearly demonstrate that: (1) DLA's representation of Harbour constitutes a concurrent conflict of interest; (2) the conflict was not "thrust upon" DLA; and (3) disqualification is the most appropriate remedy.

With respect to the first issue, the fact the DLA represents Amgen in unrelated matters does not mean that, 'by virtue of that representation, [DLA] necessarily represent[s]" Teneobio. Rule 1.7(a), Comment [34]. Consequently, I will examine the "total context" of the relationships as provided by the record. *Celgard, LLC v. LG Chem, Ltd.,* 594 Fed. Appx. 669, 672 (Fed. Cir. 2014).

The evidence submitted by the Parties in this regard does not paint that clear a picture. For instance, the various engagement letters submitted by the Parties do not consistently portray how Amgen, as a corporate entity, does business. In the 2018 engagement letters regarding IP legal services, Amgen specifically noted that the engagement included its subsidiaries and affiliates. (D.I. 42, exs. C, D, E) There are several letter of record indicating that the engagements were between a specific DLA affiliate and a specific Amgen affiliate. (D.I. 52, exs. 1-3) Finally, there are two letters of record whereby "Amgen" engaged DLA to represent "its" interests. (D.I. 42, exs. F, G) Teneobio argues that the December 7, 2017 engagement of DLA to review "Amgen's Worldwide Compliance and Business Ethics Program" is ongoing and DLA's advice in this regard "is directed not only to Amgen but all of its subsidiary companies, including Teneobio." (Opening at 12-13) In support of this proposition, Teneobio refers to language found in an attached schedule to the letter, where "Areas for Inclusion" are described "in the context of Amgen's Operating Model" and "coverage of key compliance risk areas"

include "emerging risk areas and newer business activities." (D.I. 42, ex, G, Sch. A at 1) There is no further explanation, however, and I am left with the impression that when Amgen wanted subsidiaries involved, it specified as such. Likewise, the 2021 10-K (but apparently not the 2020 10-K) alludes to the fact that Amgen attempts to integrate the operations of its acquired businesses, but the language refers to the "failures or difficulties" in accomplishing such.

With respect to the two primary factors reviewed by courts in determining whether corporate affiliates are so interrelated that they should be deemed one client, the evidence again is not robust. For instance, the degree of operational commonality between Amgen and Teneobio was described by Amgen's Associate General Counsel, Intellectual Property & Litigation, in a single paragraph of his declaration: (1) Amgen does not operate Teneobio as an independent business; (2) all of Teneobio's employees are Amgen employees; (3) the Amgen employees who run the Teneobio business report up to Amgen management; (4) Amgen makes strategic decisions for Teneobio, including what outside counsel Teneobio will retain; (5) Amgen makes all other legal decisions for this case, as Teneobio does not have a separate legal department. (D.I. 42, ¶ 3)[3] As to financial interdependence, the only reference to such is the argument made by Amgen's counsel that "[m]onetary and injunctive relief against Teneobio would harm Amgen."[4] (Opening at 6)

With this record in mind, I am not persuaded that there was a corporate affiliate conflict when DLA commenced its work on behalf of Harbour in August 2021, given the various ways Amgen presented itself in its past engagement letters and the fact that Teneobio was not formally

[3] The declaration fails to address some of the more practical aspects of operational commonality, such as whether the corporate entities share integrated technology systems or share corporate benefits.

[4] I note in this regard that, generally, a lawsuit against the affiliate of a corporate client is only indirectly adverse to the corporate client. ABA Formal Op. 95-390 (1995). There is case law, however, indicating that when injunctive relief is sought against an affiliate, it is considered more than merely "being adverse in an 'economic sense.'" *See Celgard,* 594 Fed. Appx. at 671.

acquired until October 2021. I also am not convinced by the evidence of record that there was a corporate affiliate conflict in December 2021, when DLA commenced this litigation on behalf of Harbour against Teneobio. In addition to the inconsistent ways Amgen has portrayed itself as a business entity, there is no way of knowing from the record the degree of corporate interrelatedness that existed between Teneobio and Amgen at that point in time. *See, e.g.,* D.I. 65, ex. A at 49.

Given the virtually unchallenged assertions of Amgen that Teneobio is at least an interrelated subsidiary now, DLA's representation of Amgen in its ongoing (albeit unrelated) engagements arguably constitutes representation of Teneobio as well, making DLA's representation of Harbour in this litigation a conflict of interest under Rule 1.7(a)(1).[5] Assuming, then, that there is a concurrent conflict, the next issue to be addressed is whether the conflict was "thrust upon" DLA, thus allowing for a more flexible approach to disqualification.. I have found that Teneobio has not carried its burden to prove that the conflict existed at the time DLA accepted representation of Harbour; therefore, the conflict "arose only during the ongoing representation of both clients." Formal Opinion 2005-05, New York City Bar, at 2. Teneobio argues, however, that the conflict was "reasonably foreseeable" by December 2021 and, therefore, arose through the fault of DLA.

I am not persuaded by Teneobio's argument. There is no evidence of record suggesting that DLA knew, or should have known, that Teneobio had lost its independent corporate identity within months of its acquisition by Amgen.[6] The averments by Amgen's counsel in this regard

[5] I decline to find a violation of Model Rule 1.7(a)(2), given the unrelated nature of the engagements and the lack of any factual or legal bases for such a conclusion. *See, e.g.,* D.I. 55 at 6.

[6] The facts at bar are distinguishable from those examined in *Truckstop.net, L.L.C. v. Sprint Communications Co., L.P.,* 2006 WL 8447685 (D. Idaho, Jan. 3, 2006), where the court focused on whether the law firm was involved "in the creation of the conflict of interest" by being engaged to assist in the merger. *Id.* at *4. Here, DLA was not involved in the acquisition and had no way of knowing its consequences.

are general and not supported by a timeline or other helpful documents. In contrast, Harbour has submitted multiple declarations indicating that: (1) DLA's advice in connection with the December 17, 2017 engagement was directed only to Amgen's compliance department or Amgen's in-house counsel (D.I. 53); (2) DLA's advice in connection with the December 14, 2021 engagement has been directed to Amgen's in-house counsel (D.I. 54); and (3) as of August 2021, DLA's counsel in this proceeding did not know what Teneobio's future corporate identity would be (D.I. 51). Weighing this evidence in light of the record, I conclude that the conflict as asserted by Teneobio was not reasonably foreseeable, nor was it created in the first instance through any fault of DLA.[7]

Which brings me to the last issue: assuming a concurrent conflict exists, has Teneobio met its burden to prove that disqualification is the most appropriate remedy under the circumstances of record. Courts, including the District of Delaware, have "often employed a balancing test in determining the appropriateness of the disqualification of an attorney," *TQ Delta,* 2016 WL 5402180 at *6, and "carefully examine the totality of the circumstances . . . including the impact, nature and degree of a conflict." *Wyeth v. Abbott Laboratories,* 692 F. Supp. 2d 453, 457 (D.N.J. 2010). Among the factors examined by courts are: (1) prejudice to the parties; (2) overlap in the substance of the engagements or the attorneys working on same; (3) access by the attorney from prior or current engagements to confidential information relevant to this litigation; (4) the complexity of the issues in the case and the expense and time it would take for new counsel to get up to speed; (5) any indicia of ulterior motives, either by the timing of the Motion or the concurrent engagements; and (6) the effectiveness of alternative remedies in

[7] As noted above, the complicating factor at bar is that the alleged client – Amgen – is a global corporation with an unknown number of corporate subsidiaries and affiliates and without discernable (at least from this record) rules to follow in determining which corporate entity should be considered the client.

protecting the integrity of the judicial process. *See, e.g., Wyeth,* 692 F. Supp. 2d. at 459; *TQ Delta,* 2016 WL 5402180 at *6; transcript at 58-59.

Prejudice. In weighing the first factor, Teneobio/Amgen will be deprived of the loyalty that DLA owes to its clients if disqualification is not granted, and will lose the peace of mind that is associated with loyalty. If disqualification is granted, Harbour will be deprived of experienced counsel who has already invested substantial time in this complex litigation. I note in this regard, however, that the litigation is in its early stages. I find this factor weighs in favor of disqualification.

Overlap. I can discern no overlap – substantively or by DLA lawyers - between this litigation and DLA's prior and current engagements with Amgen. This factor weighs against disqualification.

Confidential information. There is no indication of record that any of Amgen's confidential information that DLA may have accessed through other engagements has any relevance to the instant litigation. (D.I. 51, ¶20; D.I. 53, ¶ 6; D.I. 54, ¶ 5) This factor weighs against disqualification.

Complexity. Patent litigation is complex. Although there is not a scarcity of patent attorneys to pick up a case, the fact remains that conflicts are a hurdle[8] and much of the work done for a patentee in a case is done before the complaint is even filed. In other words, it would take time and money to replace DLA, even at this stage of the litigation. This factor weighs against disqualification.

Ulterior motives. I observe that both Harbour and Teneobio have ascribed ulterior motives to each other in the context of the Motion. Teneobio has suggested that Amgen is

[8] Especially if global corporations like Amgen insist that a conflict exists if an attorney has had an engagement with it or any of its subsidiaries or affiliates.

actually the target of the patent infringement suit (based on the timing of the litigation[9]), tending to prove the merits of Teneobio's corporate interrelatedness contention. Harbour has suggested that the Motion was filed months after litigation commenced and not until settlement negotiations had broken down, tending to prove either that Teneobio and Amgen are not really interrelated or that the Motion is nothing more than a disfavored litigation strategy. Other than timing, however, none of these accusations are bolstered by any proof and, therefore, carry no weight.

Integrity of the judicial process. Rule 1.7(a) was enacted "to prevent divided loyalties and to protect against the disclosure of client confidences." *End of Road Trust v. Terex Corp.,* 2002 WL 242464 (D. Del. Feb. 20, 2002), at *3 (citing *IBM v. Levin,* 579 F.2d 271, 280 (3d Cir. 1978)). As noted above, there is no indication of record that DLA's representation of Harbour will "materially interfere with [its] independent professional judgment" in representing Amgen in unrelated matters, or that any client confidences have been shared between the DLA attorneys representing Harbour and any other DLA Piper (US) attorneys. *Elonex,* 142 F. Supp. 2d at 583-84. Moreover, on June 6, 2021, Harbour put in place a precautionary screen between the DLA Piper (US) attorneys representing Harbour and all other DLA Piper (US) attorneys representing Amgen in active matters for Amgen. (D.I. 52, ¶ 17) Harbour has offered to retain conflict counsel. Consistent with Formal Opinion 2005-05 of the New York City Bar, DLA also has "the option to withdraw from one of the representations in order to avoid the conflict." *Id.* at 9. In sum, the integrity of the judicial process can be adequately protected by alternative remedies to disqualification.

[9] Harbour had reached out to Teneobio in 2017 about the latter's possible infringing activities, but did not actually prepare suit until after Amgen's acquisition of Teneobio.

CONCLUSION

There can be no doubt that DLA owes a duty of loyalty to Amgen with respect to DLA's current engagements with Amgen. The question of whether the duty of loyalty extends to Teneobio by virtue of its being a wholly integrated subsidiary of Amgen has been answered in the affirmative, based more on an assumption that such an integration has taken place than on the actual facts of record. Nevertheless, assuming a concurrent conflict of interest exists, I have concluded that such a conflict was thrust upon DLA, thus allowing for a more flexible approach to the issue of disqualification. I have further concluded that the factors often found relevant to the determination of whether disqualification is mandated weigh against disqualification here.

The District of Delaware has approached motions to disqualify with "cautious scrutiny," and does not hesitate to deny such motions in the absence of a robust record that "clearly demonstrate[s] that 'continued representation would be impermissible.'" *Talecris,* 491 F. Supp. 2d at 513. Indeed, many more motions to disqualify have been denied in this District than granted (*see, e.g.,* transcript at 52-53), and the circumstances supporting disqualification in the past are distinguishable from the circumstances at bar.[10]

Where, as here, both the client (Amgen) and the law firm (DLA) are global in scope with multiple affiliates, it is critical to the integrity of the judicial process that "the client" be clearly identified. That did not happen here, and an unforeseeable conflict arose, It was Teneobio/Amgen's burden to prove that disqualification is the most appropriate remedy under these circumstances. I have concluded that the burden of proof was not met and, therefore, I recommend that the Motion be denied.

[10] In both *Apeldyn Corp. v. Samsung Elecs. Co.,* 693 F. Supp. 2d 399, 404 (D. Del, 2010), and *Innovative Memory Sols., Inc. v. Micron Tech., Inc.,* 2015 WL 2345657 (D. Del. May 15, 2015), at *5, the court found that there was a "substantial relationship" between the subject matters of the engagements in dispute.

. Objections to this Report and Recommendation shall be made consistent with Paragraph 9 of the Court's August 24, 2022 Order.

Respectfully submitted,

Dated: October 3, 2022

/s/ Sue L. Robinson
Sue L. Robinson
Special Master