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# [***In re Namenda Direct Purchaser Antitrust Litig.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P2G-KM11-F04F-01CN-00000-00&context=)

United States District Court for the Southern District of New York

July 20, 2017, Filed

15 Civ. 7488 (CM) (JCF)

**Reporter**

2017 U.S. Dist. LEXIS 113356 \*; 2017 WL 3085342

IN RE NAMENDA DIRECT PURCHASER ***ANTITRUST*** LITIGATION

**Subsequent History:** Adopted by, in part, Rejected by, in part, Motion granted by, Motion denied by [*In re Namenda Direct Purchaser* ***Antitrust*** *Litig., 2017 U.S. Dist. LEXIS 134047 (S.D.N.Y., Aug. 21, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P9G-TRJ1-F04F-0151-00000-00&context=)

**Prior History:** [*Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, 2016 U.S. Dist. LEXIS 128349 (S.D.N.Y., Sept. 13, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KRW-4Y01-F04F-00FJ-00000-00&context=)

**Core Terms**

confidential information, confidentiality, disqualified, generic, disqualification motion, patent, confidential relationship, consultant, disclosure, Advisory, disqualification, Plaintiffs', parties, Reply, Purchaser, Declaration, Memantine, recommend, cases, PLC, proposed expert, Pharmaceuticals, confidence, documents

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**Judges:** JAMES C. FRANCIS IV, UNITED STATES MAGISTRATE JUDGE. HONORABLE COLLEEN McMAHON, Chief Judge.

**Opinion by:** JAMES C. FRANCIS IV

**Opinion**

REPORT AND RECOMMENDATION

TO THE HONORABLE COLLEEN McMAHON, Chief Judge:

This is a putative class action asserting violations of ***antitrust*** law by defendants Forest Laboratories, LLC, Forest Laboratories, Inc., and Forest Laboratories Holdings**[\*3]** Ltd. (together, "Forest") and Actavis plc (now known as Allergan plc) in connection with the patented Alzheimer's drugs Namenda IR and Namenda XR (brand names for memantine hydrochloride). Before me are two motions arguing that two of the Direct Purchaser Plaintiffs' experts labor under conflicts of interest and must therefore be disqualified. Forest seeks to disqualify Dr. Lon Schneider, a physician who assertedly advised Forest on its development of Alzheimer's drugs. Teva Pharmaceuticals USA, Inc. ("Teva"), which is not a party to this litigation but is a defendant in related litigation regarding the same Alzheimer's drugs at issue here,[[1]](#footnote-0)1 seeks to disqualify Deborah Jaskot, a former Teva employee whom the plaintiffs have retained as an expert on ***regulatory*** issues in the pharmaceutical industry. I recommend denying both the defendants' motion and Teva's motion.[[2]](#footnote-1)2

Background

The plaintiffs in this action and the related litigation allege that Forest and several generic drug companies, including Teva, entered into collusive settlements of patent litigation**[\*4]** involving Namenda in order to restrict access to the drug. As noted in an earlier opinion, in 2007 a number of generic manufacturers filed Abbreviated New Drug Applications ("ANDAs") with the FDA for generic versions of Namenda IR in which they contended, among other things, that the Namenda patent was invalid. [*In re Namenda Direct Purchaser* ***Antitrust*** *Litigation, No. 15 Civ. 7488, 2017 U.S. Dist. LEXIS 76675, 2017 WL 2226591, at \*2 (S.D.N.Y. May 19, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NK8-D6M1-F04F-01WV-00000-00&context=). Forest later filed infringement suits against these generic manufacturers, who again argued patent invalidity. Id. Forest settled these cases, paying the generic manufacturers a cash payment and entering license agreements that allowed generic versions of Namenda IR to enter the market on a date before Namenda IR's patent expired, but "well after" the generic version of the drug could have been sold "if Forest's patent was found to be invalid." Id. (quoting [*Sergeants Benevolent Association v. Actavis, Nos. 15 Civ. 6549, 15 Civ. 7488, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*5 (S.D.N.Y. Sept. 13, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KRW-4Y01-F04F-00FJ-00000-00&context=)). The Supreme Court has held that settlements like this can be anticompetitive where a so-called "reverse payment" is "large and unjustified," [*FTC v. Actavis, Inc.,     U.S.    ,    , 133 S. Ct. 2223, 2237, 186 L. Ed. 2d 343 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=), such as when the patent holder had a strong defense against claims of invalidity, see, e.g., [*In re Namenda, 2017 U.S. Dist. LEXIS 76675, 2017 WL 2226591, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NK8-D6M1-F04F-01WV-00000-00&context=).

In a related stratagem, Forest allegedly violated the Sherman Act by "attempt[ing] to force patients and physicians to**[\*5]** switch from Namenda IR . . . to Namenda XR . . . 'by effectively removing Namenda IR from the market before its patent exclusivity period expired and a generic substitute to the Namenda drugs became available.'" [*In re Namenda Direct Purchaser* ***Antitrust*** *Litigation, No. 15 Civ. 7488, 2017 U.S. Dist. LEXIS 95796, 2017 WL 2693713, at \*1 (S.D.N.Y. June 21, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NV8-M9K1-F04F-0477-00000-00&context=) (quoting [*Sergeants Benevolent Association, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*1)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KRW-4Y01-F04F-00FJ-00000-00&context=); see generally [*New York v. Activis, PLC, No. 14 Civ. 7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198 (S.D.N.Y. Dec. 11, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DV9-K971-F04F-04HS-00000-00&context=). They accomplished this "hard switch" by introducing and promoting Namenda XR and announcing that Namenda IR would not be available after fall 2014. [*In re Namenda, 2017 U.S. Dist. LEXIS 95796, 2017 WL 2693713, at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NV8-M9K1-F04F-0477-00000-00&context=).

Here, Forest argues that Dr. Schneider must be disqualified because he received confidential information from the company when he "consulted for Forest in various capacities since at least 2003 on a variety of issues directly related to Forest's research, development, and approval of Namenda and Alzheimer's treatments." (Memorandum in Support of Defendants' Motion to Disqualify Dr. Lon Schneider ("Def. Memo.") at 2). Teva argues that Ms. Jaskot must be disqualified because she was privy to Teva's confidential information as a result of her twenty-three year tenure at that company, which included eight years as Vice President of U.S. Generic ***Regulatory*** Affairs. (Memorandum of Law in Support of Non-Party Teva USA's Motion to Disqualify Direct Purchaser Plaintiffs' Proposed Expert Deborah Jaskot ("Teva**[\*6]** Memo.") at 6).

Analysis

A. Legal Standard

A federal court's power to disqualify an expert witness derives from its "duty to protect the integrity of the legal process." [*Grioli v. Delta International Machinery Corp., 395 F. Supp. 2d 11, 13 (E.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HFS-51R0-TVW3-P22K-00000-00&context=) (quoting [*In re Ambassador Group, Inc., Litigation, 879 F. Supp. 237, 241 (E.D.N.Y. 1994))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-6BG0-003B-V1FC-00000-00&context=). However, a court should balance "the public interest in preserving judicial integrity and fairness . . . [against] the parties' right to the assistance of experts 'who possess specialized knowledge' and the right of such experts to 'pursue their professional calling.'" [*Hinterberger v. Catholic Health System, Inc., No. 08-CV-380, 2013 U.S. Dist. LEXIS 73143, 2013 WL 2250591, at \*6 (W.D.N.Y. May 21, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58GB-XVH1-F04F-00BP-00000-00&context=) (quoting [*Mays v. Reassure America Life Insurance Co., 293 F. Supp. 2d 954, 957 (E.D. Ark. 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BMY-VG80-0038-Y3BC-00000-00&context=).

The party seeking disqualification must make two showings. First, it must establish that it is objectively reasonable to believe that a confidential relationship existed. [*Gordon v. Kaleida Health, No. 08-CV-378, 2013 U.S. Dist. LEXIS 73334, 2013 WL 2250506, at \*5 (W.D.N.Y. May 21, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58GB-XVH1-F04F-00BJ-00000-00&context=). "The emphasis . . . is not on whether the expert was retained per se but whether there was a relationship that would permit the litigant reasonably to expect that any communications would be maintained in confidence." [*Hewlett-Packard Co. v. EMC Corp., 330 F. Supp. 2d 1087, 1093 (N.D. Cal. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=) (citing [*In re Ambassador Group, 879 F. Supp. at 243*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-6BG0-003B-V1FC-00000-00&context=)). Second, the moving party must demonstrate that its "confidential information was 'actually disclosed' to the expert or consultant." [*Gordon, 2013 U.S. Dist. LEXIS 73334, 2013 WL 2250506, at \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58GB-XVH1-F04F-00BJ-00000-00&context=) (quoting [*The Topps Co. v. Productos Stani Sociedad Anomina Industrial y Commercial, No. 99 Civ. 9437, 2001 U.S. Dist. LEXIS 5037, 2001 WL 406193, at \*1 (S.D.N.Y. April 20, 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42XC-PMJ0-0038-Y4FB-00000-00&context=). "Unlike attorney-client communications, discussions between parties or counsel and experts do not carry the presumption that confidential information was exchanged." [*Hewlett-Packard, 330 F. Supp. 2d at 1094*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=) (quoting [*Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=). Rather, the moving**[\*7]** party "should point to specific and unambiguous disclosures that if revealed would prejudice the party." Id.

Thus, "the instances of expert disqualification are rare," and generally "should not occur where a confidential relationship existed but no privileged information was communicated, or, alternatively, where no confidential relationship existed but privileged information was nonetheless disclosed." [*Grioli, 395 F. Supp. 2d at 13-14*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HFS-51R0-TVW3-P22K-00000-00&context=) (quoting [*In re Orthopedic Bone Screw Products Liability Litigation, No. MDL 1014, 1995 U.S. Dist. LEXIS 21526, 1995 WL 925673, \*3 (E.D. Pa. May 5, 1995))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RSN-C4J0-001T-5056-00000-00&context=); see also [*Ziptronix, Inc. v. Omnivision Technologies, Inc., No. C-10-5525, 2013 U.S. Dist. LEXIS 5422, 2013 WL 146413, at \*1 (N.D. Cal. Jan. 14, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57H5-BHR1-F04C-T16R-00000-00&context=)).

B. Dr. Schneider

Forest bases its disqualification motion on the following documents and other evidence demonstrating the contacts between the company and Dr. Schneider: Exh. K to Declaration of Heather K. McDevitt dated June 26, 2017 ("Second McDevitt Decl."); Alzheimer's Disease Executive Advisory Board Meeting dated Jan. 23, 2003, attached as Exh. L to Second McDevitt Decl.; Memorandum of Jeff Lawrence dated Aug. 20, 2003, attached as Exh. M to Second McDevitt Decl.; MEM-22 3rd Working Group Meeting Minutes dated May 10, 2004, attached as Exh. N to Second McDevitt Decl.; MEM-MD-22 Nursing Home Study Authors' Meeting, attached as Exh. P to Second McDevitt Decl.).

(1) A Consulting Agreement between**[\*8]** Dr. Schneider and Forest executed May 2, 2003, engaging Dr. Schneider to perform "[c]onsulting services for Memantine NDA" for a term of one year, with confidentiality obligations to last for an additional seven years. (Consulting Agreement dated May 2, 2003 ("May 2003 Consulting Agreement"), attached as Exh. A to Declaration of Heather K. McDevitt dated June 15, 2017 ("First McDevitt Decl.")).

(2) A PowerPoint presentation by Dr. Schneider entitled "Memantine Efficacy in Moderate to Severe AD," dated September 2003, which was given at an FDA advisory meeting. (Memantine Efficacy in Moderate to Severe AD dated Sept. 2003, attached as Exh. B to First McDevitt Decl.).

(3) A Consulting Agreement between Dr. Schneider and Forest executed December 4, 2003, engaging Dr. Schneider to perform consulting services on at least one study of the efficacy of memantine for a term of one year, with confidentiality obligations to last for an additional seven years. (Consulting Agreement dated December 4, 2003 ("December 2003 Consulting Agreement"), attached as Exh. C to First McDevitt Decl.; Study No. MEM-MD-12 dated June 28, 2004, attached as Exh. D to First McDevitt Decl.; First McDevitt Decl., 1 8).

(4) Notes**[\*9]** from a September 23, 2004 advisory conference call among two Forest employees, Dr. Schneider, and three other advisors regarding the "executive advisors['] [] feedback and impressions of Pfizer claims." (Thought Leader Outreach Notes from Advisory Conference Call 9/23, 10 am, attached as part of Exh. E to First McDevitt Decl.; First McDevitt Decl., ¶¶ 11-12).

(5) An unexecuted letter dated June 2, 2008, from Forest to Dr. Schneider stating that Forest had agreed to retain Dr. Schneider as a consultant in connection with two Namenda IR patent litigations, which includes a confidentiality provision. (Letter of Charles S. Ryan, Esq., Ph.D., and Patrick Jochum dated June 2, 2008 ("June 2008 Letter"), attached as part of Exh. F to First McDevitt Decl.; First McDevitt Decl., ¶¶ 14-16).

(6) Excerpts from Namenda business plans for fiscal years 2009 and 2010 listing Dr. Schneider as an Executive Advisor. (FY09 Business Plan, attached as Exh. G to First McDevitt Decl.; FY10 Business Plan, attached as Exh. H to First McDevitt Decl.; First McDevittDecl., ¶¶ 18-19).

(7) An unexecuted Advisory Board Approval Form and Needs Assessment dated November 4, 2009, listing Dr. Schneider as a board member,**[\*10]** moderator, and/or speaker. (Advisory Board Approval Form and Needs Assessment dated Nov. 4, 2009, attached as Exh. I to First McDevitt Decl.).

(8) A representation that Dr. Schneider was approached by an attorney for certain physicians specializing in the care of patients with Alzheimer's Disease who were to file an amicus curiae brief in the appeal of the decision preliminarily enjoining Forest from discontinuing sales of Namenda IR. Dr. Schneider ultimately did not sign on to the brief. (First McDevitt Decl., ¶¶ 24-25); Brief of Physician Amici Curiae in Support of Defendants-Appellants, New York ex rel. Schneiderman v. Actavis PLC, No. 14-4624 (2d Cir. Jan. 22, 2015), ECF No. 208.

Along with its reply brief, Forest submitted additional evidence, including documents indicating that Dr. Schneider (1) attended Forest's Alzheimer's Disease Executive Advisory Board meeting in January 2003; (2) presented at Forest's "mock FDA advisory committee hearing" in August 2003; (3) attended a Memantine Working Group meeting in May 2004; (4) participated in the MEM-MD-22 Nursing Home Study Authors' Meeting in October 2006.[[3]](#footnote-2)3 (Alzheimer's Disease Executive Advisory Board Executive Summary, attached**[\*11]** as

Forest admits that, because of the passage of time and the turnover of personnel, it cannot make "a detailed showing [] through declarations and exhibits[] evidencing the entanglement between the proposed expert, the confidential information received, and the litigation at hand." (Def. Memo. at 7). I appreciate its candor. Nevertheless, that does not relieve it of its burden to establish, with evidence rather than speculation, that Dr. Schneider should be disqualified. It has not made that showing here.

1. Confidential Relationship

Forest rests its argument that there was a confidential relationship between Dr. Schneider and Forest on the May 2003 Consulting Agreement, the December 2003 Consulting Agreement, and the June 2008 Letter. Pursuant to the two Consulting Agreements, Forest engaged Dr. Schneider to advise the company regarding memantine for two overlapping periods: May 2, 2003, to May 2, 2004, and December 1, 2003, to December 1, 2004. (May 2003 Consulting Agreement, ¶¶ 1, 4; December 2003 Consulting Agreement, ¶¶ 1, 4). Each of these agreements had a confidentiality clause requiring him to "hold in confidence" any non-public "technical and commercial information"**[\*12]** he received from Forest for the term of the agreement and an additional seven years. (May 2003 Consulting Agreement, ¶ 6; December 2003 Consulting Agreement, ¶ 6).

As noted, a confidential relationship exists where the entity potentially providing the confidential information "reasonably [] expect[ed] that any communications would be maintained in confidence." [*Hewlett-Packard, 330 F. Supp. 2d at 1093*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=). That standard can be met by documents that "evince an intent by the signatories to keep certain types of information confidential." [*AstraZeneca Pharmeceuticals, LP v. Teva Pharmaceuticals USA, Inc., No. Civ. A. 05-5333, 2007 U.S. Dist. LEXIS 88996, 2007 WL 4292384, at \*2 (D.N.J. Dec. 4, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R8X-6NC0-TXFR-F2XH-00000-00&context=). The confidentiality provisions included in the Consulting Agreements certainly "evince [such] an intent." Id. However, they also establish that any expectation of confidentiality evaporated in December 2011, when those provisions expired. Forest is clearly a sophisticated party and, indeed, appears to understand how to draft a confidentiality provision that does not include a time limitation. (June 2008 Letter at 2). So, although it was objectively reasonable for Forest to believe that it had a confidential relationship with Dr. Schneider until December 1, 2011, it is unreasonable to expect that any confidential information gleaned as a result of that relationship**[\*13]** "would be maintained in confidence" after that date. [*Hewlett-Packard, 330 F. Supp. 2d at 1093*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=); see, e.g., [*Return Mail, Inc. v. United States, 107 Fed. Cl. 459, 464 n.6 (Fed. Cl. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:573B-F5T1-F04B-X2F2-00000-00&context=) (recognizing that protection for confidential material may be "removed or waived").

Forest fares no better with the June 2008 Letter. As noted, the letter states that Forest "agreed to retain [Dr. Schneider] as a consultant" in connection with two Namenda patent litigations; if executed, that letter would bind Dr. Schneider to "maintain in strict confidence" any "materials, documents, and information of any kind" that he acquired or prepared in connection with the retainer. (June 2008 Letter at 1-2). However, Dr. Schneider did not execute the proposed agreement. (June 2008 Letter at 3).

Nevertheless, Forest argues that "a non-executed retainer can evidence a reasonable expectation of confidentiality." (Def. Memo. at 8 (citing [*Stencel, 174 F. Supp. 2d at 1084*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=))). In Stencel, counsel for the plaintiff contacted an attorney to serve as an expert. [*174 F. Supp. 2d at 1081*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=). "The parties were identified and the claims were explained in sufficient detail to allow [the proposed expert] to conduct a conflicts check." [*Id. at 1081-82*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=). The inquiry did not disclose a conflict, and the attorney agreed to serve as a consultant and potentially an expert. [*Id. at 1082*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=). Thereafter, the consultant attorney sent a retainer**[\*14]** agreement to the plaintiff, who "signed but did not return" it. Id. Later the consultant discovered a conflict and declined further consultation. Id. The court found that "the exchange of the Retainer Agreement, though not finalized, is persuasive evidence that [the plaintiff] could reasonably rely on [the consultant] to preserve the confidentiality of any statements made, since the Agreement itself indicates that understanding between the parties." [*Id. at 1084*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=).

The situation here is significantly different. According to Dr. Schneider, the June 2008 Letter Litvin dated June 22, 2017 ("Litvin Decl."), 911 8-9). That is, Dr. Schneider did not agree to serve as a consultant and later renege, and he did not provide to Forest a retainer agreement indicating that he agreed to a confidentiality provision. In this case, far from "indicat[ing] [an] understanding between the parties" [*Stencel, 174 F. Supp. 2d at 1084*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BK-50P0-0038-Y2X3-00000-00&context=), the June 2008 Letter actually signals that there was no such understanding. Any belief that the unexecuted agreement bound Dr. Schneider to keep information confidential would not be reasonable.

was sent to me by email on or about June 2, 2008 by Forest's counsel. I did not respond to that email. I received no subsequent communication**[\*15]** about this matter from Forest or its counsel until March 2009, when an attorney requested that I sign the agreement. I did not comply with this request.

[] In fact, I was not retained as a consulting expert for Forest in either of the District of Delaware cases mentioned in the [June 2008 Letter]. I did not bill Forest for a single hour of work pursuant to the [June 2008 Letter].

(Declaration of Lon S. Schneider, M.D., M.S., dated June 21, 2017 ("Schneider Decl."), attached as Exh. 8 to Declaration of Dan

Therefore, even if "[t]he 'objectively reasonable belief' standard is not a high hurdle," [*AstraZeneca, 2007 U.S. Dist. LEXIS 88996, 2007 WL 4292384, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R8X-6NC0-TXFR-F2XH-00000-00&context=), Forest has not cleared it.

2. Disclosure of Confidential Information

Forest's failure to establish a confidential relationship, on its own, dooms its motion. See [*Grioli, 395 F. Supp. 2d at 14*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HFS-51R0-TVW3-P22K-00000-00&context=). The company is no more successful in demonstrating that confidential information was, in fact, disclosed to Dr. Schneider. Forest relies on supposition and circumstance, a far cry from the identification of "specific and unambiguous disclosures that if revealed would prejudice [it]." [*Hewlett-Packard, 330 F. Supp. 2d at 1094*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=). Forest argues that Dr. Schneider's work in connection with the 2003 Consulting Agreements, his consultation on Namenda IR studies and presentations, and his**[\*16]** role on Forest's Namenda Advisory Committee "[s]trongly [s]uggest" that he received confidential information, noting repeatedly that he "must have learned" relevant technical details or that he "very likely" did so. (Def. Memo. at 9; Defendants' Reply Memorandum in Support of Motion to Disqualify Dr. Lon Schneider ("Reply") at 3). However, Dr. Schneider affirms that he did not receive information that is confidential in any of his interactions with Forest.[[4]](#footnote-3)4 (Schneider Decl., ¶¶ 6-7, 10, 14, 16).

Again, the cases Forest cites are distinguishable. Relying on [*Auto-Kaps, LLC v. Clorox Co., No. 15 Civ. 1737, 2016 U.S. Dist. LEXIS 37097, 2016 WL 1122037, at \*4 (E.D.N.Y. March 22, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JC2-SRY1-F04F-03G3-00000-00&context=), the company suggests that the Court "infer" that Dr. Schneider was given confidential information. (Def. Memo. at 10). In that case, all parties agreed that there was a confidential relationship between the plaintiff's expert and the defendant and that confidential information had been disclosed about the design of the product at issue. [*Auto-Kaps, 2016 U.S. Dist. LEXIS 37097, 2016 WL 1122037, at \*3-4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JC2-SRY1-F04F-03G3-00000-00&context=). Indeed, documents confirmed that. [*2016 U.S. Dist. LEXIS 37097, [WL] at \*4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JC2-SRY1-F04F-03G3-00000-00&context=). In light of those facts, the court further "infer[red] that [the expert] was [also] given or exposed to confidential information relating to [the defendant's] strategy regarding its intellectual property." Id. Here, on the other hand, Forest points to no evidence establishing the disclosure**[\*17]** of confidential information, while the plaintiff has provided a declaration from Dr. Schneider denying it.

Still, Forest insists that the Court should not take Dr. Schneider's word for it, because he is not an attorney and likely has a "layman comprehension of 'confidential' as a legal term." (Def. Memo. at 10-11 (quoting [*AstraZeneca, 2007 U.S. Dist. LEXIS 88996, 2007 WL 4292384, at \*4))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R8X-6NC0-TXFR-F2XH-00000-00&context=). In AstraZeneca, however, it was "evident from the record and in camera materials," that the expert "was exposed to highly sensitive marketing, business, and clinical information that clearly was not intended for publication, nor was ever subsequently published." [*2007 U.S. Dist. LEXIS 88996, 2007 WL 4292384, at \*4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R8X-6NC0-TXFR-F2XH-00000-00&context=). That is, the record affirmatively showed that the expert's "layman comprehension" was incorrect, and the expert was therefore disqualified. Id. On the other hand, the court found that the plaintiff's vague generalities about disclosures to a different expert did not "show[] conclusively that any confidential information was actually disclosed," and it therefore declined to disqualify. [*2007 U.S. Dist. LEXIS 88996, [WL] at \*3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R8X-6NC0-TXFR-F2XH-00000-00&context=). So it is here.[[5]](#footnote-4)5 See, e.g., [*Return Mail, 107 Fed. Cl. at 467-68*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:573B-F5T1-F04B-X2F2-00000-00&context=) (denying disqualification where movant failed to identify specific confidential information disclosed and expert denied he received confidential information); [*Eastman Kodak Co. v. Kyocera Corp., No. 10-CV-6334, 2012 U.S. Dist. LEXIS 132436, 2012 WL 4103811, at \*10 (W.D.N.Y. Sept. 17, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56KS-SCT1-F04F-01S7-00000-00&context=) ("In sum, Kodak has failed to point**[\*18]** to 'specific and unambiguous disclosures . . . that if revealed would prejudice' Kodak . . Accordingly, I deny Kodak's motion to disqualify Wallace as an expert witness for Kyocera in this litigation." (quoting [*Hewlett-Packard, 330 F. Supp. 2d at 1094*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=))).

For these reasons, I recommend denying Forest's motion to disqualify Dr. Schneider.[[6]](#footnote-5)6

C. Ms. Jaskot

I also recommend denying Teva's motion to disqualify Ms. Jaskot, although for different reasons. Teva has not established a risk that its confidential information will be used against it if Ms. Jaskot serves as an expert for the plaintiffs.

As noted, Ms. Jaskot was an employee of Teva for over two decades. (Teva Memo. at 6). She began in 1989 as an associate in ***Regulatory*** Affairs, and by 2004 she had been named Vice President of U.S. Generic ***Regulatory*** Affairs. (Teva Memo. at 6). She left Teva in November 2012. (Curriculum Vitae, attached as Exh. H to Declaration of Sarah K. Frederick dated June 29, 2017 ("Frederick Decl."), at 1). The plaintiffs do not dispute that Ms. Jaskot had a confidential relationship with Teva. (Direct Purchaser Plaintiffs' Memorandum in Opposition to Non-Party Teva USA's Notice of Motion to Disqualify Direct Purchaser Plaintiffs' Proposed Expert Deborah Jaskot ("Pl. Teva Memo.") at 2-3; Reply in Support of Non-Party Teva USA's Motion**[\*19]** to Disqualify Direct Purchaser Plaintiffs' Proposed Expert Deborah Jaskot ("Teva Reply") at 2). Rather, they argue that any confidential information she received is not relevant to the issues in this case and that Teva will not be prejudiced by Ms. Jaskot's participation here. (Pl. Teva Memo. at 4-10).

The plaintiffs first contend that Ms. Jaskot could not have received relevant confidential information from Teva because her employment ended in November 2012, "before Forest began its illegal hard switch on February 14, 2014," and "before Forest obtained pediatric exclusivity for Namenda IR in June 2013." (Pl. Teva Memo. at 3). However, as Teva points out, among the plaintiffs' allegations in this action is the existence of a conspiracy among certain generic drug-makers, including Teva, to enter into anticompetitive settlements in 2009 by which the generic companies agreed not to enter the market even after the FDA approved generic Namenda in 2010 and 2011. (Teva Reply at 2-3); see [*Sergeants Benevolent Association, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KRW-4Y01-F04F-00FJ-00000-00&context=) (noting that settlements occurred between July 2009 and July 2010). The plaintiffs' argument based on timing, then, is not convincing.

However, the plaintiffs' argument that there is little risk to Teva because**[\*20]** it is not a party to this litigation stands on firmer ground. As illustrated by most of the decisions Teva cites as support for its argument that Ms. Jaskot must be disqualified (Pl. Teva Memo. at 6), "[d]isqualification of a party's expert is `designed to protect the integrity of the judicial process by ensuring that experts do not use, even unwittingly, confidential information that they learned from a party in the course of an earlier engagement against that party in a later lawsuit.'" [*Gordon, 2013 U.S. Dist. LEXIS 73334, 2013 WL 2250506, at \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58GB-XVH1-F04F-00BJ-00000-00&context=) (emphasis added) (quoting [*Eastman Kodak, 2012 U.S. Dist. LEXIS 132436, 2012 WL 4103811, at \*8)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56KS-SCT1-F04F-01S7-00000-00&context=). That is, disqualification of an expert is not required to prevent the disclosure of trade secrets or other privileged information where it will not be used against the originator of that information: it is too blunt an instrument, especially as there are other, more targeted weapons available under the Federal Rules of Civil Procedure. See, e.g., [*Hewlett-Packard, 330 F. Supp. 2d at 1092*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D4B-5YN0-0038-Y4JC-00000-00&context=) ("[D]isqualification is a drastic measure that courts should impose only hesitantly, reluctantly, and rarely.").

To be sure, the operative complaint in this action includes some allegations against Teva, but that does not change the fact that Teva is not a defendant here and is in no legal jeopardy in this action. It is also true that this case has been accepted**[\*21]** as related to Sergeants Benevolent Association, a case with different plaintiffs but similar claims in which Teva is a defendant. (Docket Entry dated Oct. 6, 2015). But that designation is used merely to further goals of judicial efficiency and has no independent legal effect that would result in prejudice to Teva. S.D.N.Y. R. for the Division of Business Among District Judges 13, committee note.

Teva worries that its confidential information will be revealed in a deposition or upon cross-examination at trial. (Teva Memo. at 16-17; Teva Reply at 6). Again, this misunderstands the purpose of disqualifying an expert for a conflict of interest, which is to protect the former employer from use of its confidential information against itself and not as a general purpose procedural device to prevent the disclosure of privileged or confidential material. To the extent that "any public testimony by Ms. Jaskot given in [this] action would be available to the plaintiffs in [Sergeants Benevolent Association]" (Teva Memo. at 18), Teva will have the opportunity to challenge the use of any such information by, for example, filing a motion in limine in that action.[[7]](#footnote-6)7

**[\*22]**[*Merck Sharp & Dohme Corp. v. Teva Pharmaceuticals USA, Inc., Nos. Civ. 14-874, 15-250, 2015 U.S. Dist. LEXIS 117422, 2015 WL 5163035 (D. Del. Sept. 3, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV6-0441-F04D-0001-00000-00&context=), does not compel a different result. In that case, Apotex, Inc. ("Apotex") had hired an expert for an action filed against it in 2009 by Merck Sharp & Dohme Corp. ("Merck") regarding a particular patent. [*2015 U.S. Dist. LEXIS 117422, [WL] at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV6-0441-F04D-0001-00000-00&context=). After that case concluded (in Apotex's favor), Merck filed three new cases in 2014 and 2015 regarding the same patent: one against Teva and one against Amneal Pharmaceuticals LLC -- both in the District of Delaware -- and one against Apotex in the District of New Jersey. Id. In connection with the Delaware cases, Merck hired the same expert who had testified on Apotex's behalf in the 2009 litigation. Id. Apotex intervened in order to file a motion to disqualify the expert. Id. Although recognizing that Apotex was not a party to the Delaware litigations, the court nevertheless disqualified the expert, finding that Apotex previously had a confidential relationship with him during which it disclosed confidential information. [*2015 U.S. Dist. LEXIS 117422, [WL] at \*2-3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV6-0441-F04D-0001-00000-00&context=). The court further found that "Apotex's confidential information is at a substantial risk of disclosure and/or adverse use, by virtue of the fact that Merck has chosen to pursue simultaneous cases against all three general manufacturers" regarding**[\*23]** the patent. [*2015 U.S. Dist. LEXIS 117422, [WL] at \*3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV6-0441-F04D-0001-00000-00&context=). That is, the court took special notice of the fact that the same entity that was litigating against Apotex (albeit in a different action) had hired an expert whom Apotex had previously retained. That is not the case here. The plaintiffs in this action are not involved in Sergeants Benevolent Association. That fact ameliorates the "risk of . . . adverse use."[[8]](#footnote-7)8 Id.

Conclusion

For the foregoing reasons, I recommend denying both Forest's motion to disqualify Dr. Schneider (Docket no. 269) and Teva's motion to disqualify Ms. Jaskot (Docket no. 308). Pursuant to *28 U.S.C. § 636(b)(1)* and [*Rules 72*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-25Y1-FG36-104X-00000-00&context=), [*6(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8K0V-7CS2-8T6X-7257-00000-00&context=), and [*6(d) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8K0V-7CS2-8T6X-7257-00000-00&context=), the parties shall have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of Court, with extra copies delivered to the Chambers of the Honorable Colleen McMahon, Room 2550, and to the Chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

/s/ James C. Francis IV

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York

July 20, 2017

**End of Document**

1. 1This related action was brought on behalf of indirect purchasers of Namenda and is captioned Sergeants Benevolent Association Health & Welfare Fund v. Actavis, PLC, No. 15 Civ. 6549. (Order dated Jan. 26, 2016 ("1/26/16 Order"); Sergeants Benevolent Association Health & Welfare Fund v. Actavis, PLC, No. 15 Civ. 6549 (S.D.N.Y. Dec. 9, 2015). [↑](#footnote-ref-0)
2. 2The Honorable Colleen McMahon, Chief Judge, has requested that I address these motions in a Report and Recommendation. [↑](#footnote-ref-1)
3. 3Generally, courts will refuse to consider new evidence or arguments introduced on reply. See, e.g., [*Lewis v. New York City Transity Authority, 12 F. Supp. 3d 418, 445 n.13 (E.D.N.Y. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BWV-PPJ1-F04F-00W5-00000-00&context=); [*MPD Accessories B.V. v. Urban Outfitters, No. 12 Civ. 6501, 2013 U.S. Dist. LEXIS 185351, 2013 WL 7211833, at \*2 n.4 (S.D.N.Y. Dec. 17, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BK0-PKD1-F04F-03C7-00000-00&context=). Here, however, I permitted the plaintiffs to address this evidence in a sur-reply and, in any case, Forest's new evidence did not alter my analysis. [↑](#footnote-ref-2)
4. 4As discussed above, in connection with the 2003 Consulting Agreements, even if Dr. Schneider had received confidential information, the agreements themselves make clear that such information is no longer confidential. (May 2003 Consulting Agreement, ¶ 6; December 2003 Consulting Agreement, ¶ 6). [↑](#footnote-ref-3)
5. 5In its opening brief, Forest suggests that the "appearance of impropriety" is a sufficient reason to disqualify an expert. (Def. Memo. at 1). That is incorrect. Even in the case of attorney conflicts, "[o]nly in rare cases is disqualification for the mere appearance of impropriety desirable." [*Ghee v. Artuz, 285 F. Supp. 2d 328, 329 (E.D.N.Y. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49R1-MDV0-0038-Y2JH-00000-00&context=) (quoting [*Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc., 53 F. Supp. 2d 338, 346 (E.D.N.Y. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WTG-F6S0-0038-Y24C-00000-00&context=). And the standard for disqualification of experts is significantly less stringent than that for attorneys. See [*Grioli, 395 F. Supp. 2d at 13*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HFS-51R0-TVW3-P22K-00000-00&context=).

   To the extent that Forest intends to argue that the public interest favors disqualification, I disagree. Forest has failed to make the requisite showing on either prong of the test for disqualification. Moreover, insofar as my finding that there is no confidential relationship between Forest and Dr. Schneider is based on the 2003 Consulting Agreements and the June 2008 Letter, the public interest and judicial integrity both militate in favor of giving Forest and Dr. Schneider the benefit of their bargains (or, in the case of the June 2008 Letter, the absence of a bargain). [↑](#footnote-ref-4)
6. 6The parties' accusations of gamesmanship (Plaintiffs' Memorandum in Opposition to Defendants' Motion to Disqualify Dr. Lon Schneider at 1-2; Reply at 1-2) are unhelpful. They did, however, result in submission of an interesting email in which Forest offered to withdraw its disqualification motion if the plaintiffs agreed not to refer to Dr. Schneider's prior work for Forest in the future or to the filing of the disqualification motion in any subsequent discovery disputes (Email of Heather McDevitt dated June 23, 2017, attached as part of Exh. Q to Second McDevitt Decl.), a position that appears to be in tension with the company's claims that Dr. Schneider's alleged conflict of interest will cause them harm. [↑](#footnote-ref-5)
7. 7Moreover, there is a protective order in place in this action, which can be used to protect against disclosure of confidential information. [↑](#footnote-ref-6)
8. 8The court also noted that the Delaware defendants would likely "use the discovery process . . . to impeach [the expert] with his past work for Apotex." Id. As should be clear, I disagree that disqualification is the appropriate remedy for that hazard and note that the Merck court did not appear to consider any less severe relief. I therefore would decline to follow this (non-binding) precedent. [↑](#footnote-ref-7)