

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAHNSEN, et al.,	.
	.
Plaintiffs,	.
	.
vs.	.
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	.
BOSTON SCIENTIFIC	.
NEUROMODULATION CORP., et	.
al.,	.
	.
	.
Defendants.	.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STEVEN C. MANNION
UNITED STATES MAGISTRATE JUDGE

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I N D E X

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1 (Commencement of proceedings at 3:20 P.M.)

2

3 THE COURT: All right. We're on the docket in the
4 matter of United States of America, et al., plaintiffs versus
5 Boston Scientific Neuromodulation Corp., et al., 11-cv-1210.
6 Appearances, beginning with relators plaintiffs.

7 MR. HARBIST: Your Honor, Nicholas C. Harbist will
8 argue the motion to disqualify.

9 MR. PICKARD: Your Honor, good morning, Adrien
10 Pickard with the law firm of Blank Rome representing the
11 plaintiffs relators.

12 MR. POULIN: Your Honor, Thomas Poulin, I'm with
13 Simmer Law Group formerly Blank Rome for plaintiff relators.

14 THE COURT: Okay.

15 MR. ROBINSON: Good afternoon, Your Honor, Rick
16 Robinson for defendant Boston Scientific Neuromodulation
17 Corp.

18 THE COURT: Welcome.

19 MS. REYNOLDS: Lesley Reynolds from Norton Rose
20 Fulbright, also for defendants Boston Scientific
21 Neuromodulation corporation.

22 THE COURT: Okay.

23 MS. GALANT: Felice Galant, Norton Rose Fulbright
24 for defendant Boston Scientific Neuromodulation.

25 THE COURT: Okay. Thank you.

1 All right. Counsel, before we begin, just to let
2 you know, I have reviewed your paperwork, fully familiar with
3 such disqualification motions and at least the issues. I
4 spent nine years on the New Jersey Advisory Committee of
5 Professional Ethics. Five years, I think, or about that
6 amount of time -- I don't want to make a misrepresentation --
7 as the chair. So I am fully familiar with these issues. I'm
8 happy to hear from you, anything you want to add to your
9 paperwork?

10 MALE SPEAKER: Your Honor, do you prefer us to talk
11 from the desk or from the lectern.

12 THE COURT: Wherever you are most comfortable.

13 MALE SPEAKER: I'll get up.

14 THE COURT: Just, if you want, just keep the
15 microphone close, if you're going to stay there.

16 MALE SPEAKER: No, I'll go here.

17 THE COURT: Okay, sure.

18 MALE SPEAKER: All right. So, Your Honor, since
19 you are familiar with the papers and the issues, I'm going to
20 just emphasize a few points which I think are really
21 dispositive on the motion to disqualify.

22 Blank Rome has come up with this theory that
23 because Ms. Hasan was a temporary lawyer or is equivalent to
24 a temporary lawyer, the only issue that the Court has to look
25 at is whether or not she had access to their client

1 confidential materials. There are three reasons why agreeing
2 with that would be wrong.

3 THE COURT: Okay.

4 MR. ROBINSON: The first is there is no way on
5 earth as a factual matter that she's a temporary lawyer. She
6 has been working for Blank Rome for 18 months. She just, in
7 spite of the representation that Blank Rome made to the Court
8 that she would not be renewed as a seconded attorney, we
9 found out during the deposition, that when her secondment
10 agreement expired, she was given an indefinite oral
11 extension.

12 Now, so she is not just -- she's now continuing
13 indefinitely in this position. So there is no way that is
14 like a temporary attorney.

15 Second, if you look at the D.C. ethics, the ABA
16 ethics opinion and the DCA -- D.C. ethics opinion that they
17 cite for this temporary attorney concept, both of them make
18 it absolutely clear that the temporary attorney analysis
19 doesn't apply if the attorneys present themselves to the
20 public as if they were in a law firm, as if they were
21 associated with a law firm. And that is undeniably what they
22 have done here with Ms. Hasan.

23 THE COURT: Cite and --

24 MR. ROBINSON: The website, the business cards,
25 every there's not one contemporaneous document that suggests

1 | that they viewed her as anything other than an associate
2 | until we raised the disqualification issue. And this has all
3 | been this elaborate post hac rationalization to try --
4 | basically to try to save their contingent fee in this case.
5 | And it -- there's just no support for it in the facts. They
6 | went out of their way to suggest to their internal --
7 | internally within the firm that she was an associate, to the
8 | state bar in California that she was an associate, to the
9 | national association for legal placement for the diversity
10 | reporting purposes that she was an associate. All -- every
11 | time they had a chance to describe her status within the
12 | firm, they held her out as an associate in the firm.

13 | So the whole construct of the D.C. ethics opinion
14 | and the ABA ethics doesn't apply.

15 | Third, if you look at the language -- the actual
16 | language of the ABA Opinion 88-356, they also warn that if
17 | that the attorney acquired relevant knowledge about the
18 | matter at issue at the first firm, then the second firm
19 | shouldn't hire her. That is right there in the opinion. So
20 | the opinion just simply doesn't apply to the situation where
21 | they've held her -- they've got an ongoing, indefinite
22 | arrangement, they've held her out to the public as an
23 | associate, and she had actual knowledge.

24 | Now, if you look at the case law, such as the
25 | Martin case that we cite in the brief and the Dewey case, I

1 think it is pretty clear that if you violate this rule,
2 disqualification is automatic. The courts talk about how
3 it's a drastic remedy, but if you look at the results in the
4 cases, disqualification is automatic.

5 And I think that the only reason that the Dewey
6 case didn't disqualify the law firm was because that case --
7 that motion was brought on the eve of trial.

8 We are not on the eve of trial. But interestingly,
9 Dewey didn't just excuse the violation and say it's too late;
10 they actually made the law firm forfeit their fees from that
11 point going forward. So they still put teeth into the
12 violation of the rule. They just felt that given how late it
13 was in the day, it would be too disruptive to the
14 administration of justice to disqualify the firm.

15 But we don't have that situation here. There's
16 going to be no prejudice to the relators in this case if they
17 have to retain new counsel. Blank Rome is actually the third
18 law firm they've had in this case. So finding counsel has
19 not been a problem for them at all.

20 Now, while it's not required, I think the facts of
21 this case show that there has been significant prejudice to
22 Boston Scientific. Ms. Hasan owes an undivided duty of
23 loyalty to her former client Boston Scientific. She should
24 be helping us with this case, not them.

25 Instead, she had aligned herself with her current

1 employer Blank Rome in helping them oppose this motion by
2 voluntarily submitting an affidavit support of their position
3 in the case. So not only does that show that we can't
4 possibly use her as a witness in the case, in spite of
5 firsthand knowledge relating to the claims of the relators,
6 it also shows that she violated the screen, because the
7 screen says she shall not participate in this case.

8 THE COURT: Okay. Are you suggesting that she
9 should not have submitted a certification in response to the
10 allegation that she's engaging in improper conduct?

11 MR. ROBINSON: She should -- yes, I am. She should
12 not --

13 THE COURT: She should have been silent.

14 MR. ROBINSON: She could have been deposed. She
15 could have insisted on being deposed and --

16 THE COURT: And how would that be different, her
17 volunteering to give a deposition to say I've given no
18 confidential information over to my new employer versus her
19 saying that in deposition or certification?

20 MR. ROBINSON: Because if she was un -- she would
21 have been subpoenaed to a deposition, and she would be
22 appearing pursuant to a court order.

23 THE COURT: Well, okay.

24 MR. ROBINSON: And so --

25 THE COURT: And so what's the confidential

1 information you believe she's given over?

2 MR. ROBINSON: I don't think -- I don't know if she
3 has given any confidential information over. I don't have to
4 prove it.

5 THE COURT: Okay.

6 MR. ROBINSON: And that's actually made very
7 clear --

8 THE COURT: And you don't have to prove prejudice,
9 but you decided just to start on that road just now.

10 MR. ROBINSON: Now --

11 THE COURT: And you told me that there was
12 prejudice, and I have yet to hear it.

13 MR. ROBINSON: Well, Your Honor, I cannot use her
14 as a witness. She's got compromised --

15 THE COURT: That's the prejudice. Okay.

16 MR. ROBINSON: Yeah, she's got compromised loyalty.
17 She should be helping us. She should be giving -- she has --
18 she had -- before she was hired by Blank Rome, there's no
19 question that she had an undivided duty of loyalty to Boston
20 Scientific.

21 THE COURT: Okay. I thought you had a better
22 argument until you started down the prejudice road.

23 MR. ROBINSON: Well, then I'll withdraw that
24 argument, Your Honor.

25 Okay. But let me make the point that in Dewey,

1 | there were no actual confidences given to the side-switching
2 | attorney. And the court said, though, we cannot conceive of
3 | a situation that would allow the new firm to proceed if the
4 | side-switching attorney actually had confidences about the
5 | case. That's the lead -- that's the controlling authority
6 | here, Your Honor.

7 | So rather than risk delving into areas where my
8 | argument is not as strong, I will turn this over to the other
9 | side or answer any questions that you might have for us about
10 | the position we've taken in the brief.

11 | THE COURT: I had a question, but I'm going to hold
12 | off on it for right now.

13 | MR. ROBINSON: Okay. Thank you.

14 | THE COURT: Okay. Thank you very much.

15 | For you, I have a question right out of the box.

16 | MR. HARBIST: I'll see if I can handle it, Judge.

17 | THE COURT: Ms. Hasan, yes or no, does she have a
18 | personal 1.9 conflict here?

19 | MR. HARBIST: It's unclear, based upon the record
20 | that is submitted. Obviously, we couldn't delve into that
21 | with her, and her affidavit that we submitted does not
22 | reflect that.

23 | The only evidence in the record is the Schubert
24 | declaration, which we believe is just conclusory, at best,
25 | Your Honor. And as we pointed out in our reply brief, the

1 | evidence of her so-called participation in this internal
2 | investigation, is, I believe, eight emails that they declared
3 | privilege on that she was either copied on -- and it's in our
4 | brief -- there were eight out of 156 emails during
5 | November 2009. Of those eight, four was -- she was cc'd on,
6 | and she authored two. Whether that she would be conflicted
7 | based upon that, I would just be speculating.

8 | And it's the -- it's the defendant's burden here,
9 | and a heavy burden, that's what the case law says, and they
10 | just haven't submitted sufficient information for the Court
11 | to make that determination. And they could have. They could
12 | have taken Ms. Hasan's deposition. They could have sought
13 | Ms. Hasan's certification. We are not violating her duty of
14 | loyalty by soliciting her certification here because first of
15 | all, number one, Your Honor, there's nothing in that
16 | certification that gets into the client confidences. Number
17 | two, all it does is delve into the relationship she has with
18 | Blank Rome, which is the heart of the matter, which Judge
19 | Arleo suggested that we get into. And in my reading of the
20 | conflict disqualification cases, you almost always have a
21 | certification of the allegedly conflicted attorney.

22 | THE COURT: Arleo.

23 | MR. HARBIST: Arleo.

24 | THE COURT: Yes.

25 | MR. HARBIST: So, Your Honor, in this second motion

1 to disqualify, which is filed on eve of their motion to
2 compel discovery, I'm going to submit to the Court that three
3 propositions really evolve from the case law. And Your Honor
4 knows all this, so I'm not going to go through all the case
5 law on disqualifications. One, the cases are decided on a
6 case-by-case basis in an intense, fact-specific inquiry.
7 It's the defendant's high burden and that motions to
8 disqualify are viewed with disfavor and are a drastic remedy
9 that the Court should hesitate to impose.

10 The defendant doesn't espouse this fact-specific
11 inquiry. They propose an acknowledgment and perception test
12 as dispositive. And what they're essentially arguing, Judge,
13 is that because Blank Rome labeled Ms. Hasan as an associate
14 and held her out as an associate, that she must be associated
15 with Blank Rome for purposes of Rule 1.10, even though she
16 does not hold any of the hallmarks of a traditional
17 associate.

18 And I'll submit to the Court that the ethics
19 opinions and the cases don't countenance that type of test,
20 but they mandate what they describe as a functional analysis.
21 And using the fact-specific functional analysis test, the
22 record shows that Ms. Hasan does not function like a
23 traditional associate. First, she worked for a staffing
24 agency for the client and was hired by Blank Rome as a client
25 accommodation, and immediately seconded back to the client.

1 She was only hired for the purposes of the secondment.

2 THE COURT: And is she still working under that
3 arrangement now?

4 MR. HARBIST: She is -- that arrangement has been
5 extended, as Mr. Robinson said, and she's still working on --
6 under the exact same arrangement.

7 THE COURT: Extended for how long, do you know?

8 MR. HARBIST: My understanding is it was extended
9 for another year, Your Honor. And a writing has been
10 prepared for that.

11 At Blank Rome, she doesn't function like a real
12 associate. And the Court has in the record all of the ways
13 she doesn't function as a -- as a real associate. That is,
14 she doesn't work at Blank Rome's offices. She doesn't work
15 on other client matters that have been assigned to blank --
16 by Blank Rome partners. She doesn't continue as a Blank Rome
17 employee after the secondment. She has no administrative
18 assistment. There's no physical office. She doesn't perform
19 any -- we don't perform any evaluation of her. There's no
20 compensation review. She's not trained like a traditional
21 associate. She doesn't bill time to clients --

22 THE COURT: And that's all also part of your *de*
23 *facto* screening process.

24 MR. HARBIST: There is a *de facto* screening
25 process, and I was going to get to that.

1 And because of *de facto* screening process, which is
2 implemented by virtue of the secondment, she has no access to
3 Blank Rome confidential information. Blank Rome has no
4 access to her client confidential information. Indeed, the
5 way the secondment is set up, it's designed to screen her
6 from access to Blank Rome client confidences and from Blank
7 Rome to access to her prior client confidences. She has no
8 computer and no computer access remotely or otherwise. She
9 only has an email account that she can access. And the
10 record shows she never did and never sent any emails.

11 So the hiring and secondment here is even unique.
12 It is because unlike the traditional secondment where we have
13 an associate, a client has a need, we send the associate
14 over, serve for some period of time.

15 THE COURT: She started there. Right.

16 MR. HARBIST: She wasn't with Blank Rome. She was
17 a staffing agency -- the client asked us to take her on and
18 send her back, and we did that.

19 Everything about her functional relationship shows
20 she's isolated at this client from Blank Rome, its employees,
21 its systems, along with the confidences that she held. Thus,
22 this is not a side-switching-attorney-type case.

23 THE COURT: Okay. I've got all.

24 Let me interrupt with a question on your -- your
25 prompt written notice to Boston Scientific. That's the other

1 area that I have issues with possibly.

2 MR. HARBIST: Well, we gave written notice to
3 Boston Scientific shortly after they raised the issue. I
4 believe they raised the issue on or about the 5th, 6th of
5 June of last year, shortly before -- I think we were -- that
6 was a Friday. We were scheduled to argue the motion to
7 compel discovery on the Monday. They raised it on a Friday.
8 We immediately implemented a temporary screen via email. And
9 then they raised the issue again before the Court at the
10 motion to compel. And then we provided written notice
11 shortly thereafter in June. And then I think, there's a
12 letter in the record to that effect, Your Honor.

13 THE COURT: Mr. Robinson, he's going to -- he's
14 wondering why and wants to argue, wasn't your notice to
15 Boston supposed to come before they found out? You're
16 supposed to tell them when you hired the person, or you then
17 have a case that you've got this issue, not, oh, it's been
18 discovered and now we're going to disclose it. You don't
19 disclose after discovery.

20 MR. HARBIST: And that's because -- first of all,
21 there's a case that allows that type of notice after the
22 fact, and that's cited in our brief, and I think that was a
23 District of New Jersey case, Your Honor.

24 THE COURT: Please refresh my recollection on that
25 one.

1 MR. HARBIST: Let me see if I can -- I have it here
2 somewhere in my notes. It's the Ellis case, Judge, at
3 page 34 in our brief. If I -- and if my recollection serves
4 me right, it's a District of New Jersey case from 2003.
5 So -- so that case suggests that notice after the fact is
6 appropriate.

7 In this case, it is clear that we did not pick up
8 this conflict because during the process of the bringing
9 aboard Ms. Hasan, the forms she filled out disclosed her
10 relationship with the client, she didn't specifically set
11 forth in the form -- although she did in a separate résumé
12 that we had, and our conflicts people according to the form,
13 they didn't search Boston Scientific. And so none of us who
14 are involved in this matter, understood that she was even
15 with the firm. And that is because while she was technically
16 an employee, she was a seconded employee and also with the
17 client, working for the client, doing the client work,
18 nothing at Blank Rome.

19 Let me get back to, Judge, in the ethics opinions
20 that Mr. Robinson cites, particularly the notion of this
21 temporary lawyers, the ethics opinion do talk about temporary
22 lawyers, but it's not limited to that phrase, temporary
23 lawyers.

24 Those ethics opinions, in my view, emphasize three
25 essential things when you look at the factors that they cite:

1 One, whether the attorney worked on the specific matter at
2 issue; where the work is done; and does -- did the firm have
3 accesses to that attorney's client confidences. And
4 similarly, the cases that we have cited and in particular,
5 the two cases that we picked up, the Menendez case, which was
6 Judge Thompson, who in this District was sitting by
7 designation in the Virgin Islands, looked at a conflicted
8 lawyer or allegedly conflicted lawyer situation and came to
9 the conclusion that there was no real association for
10 purposes of the imputation rule, 1.10, and because that
11 attorney worked remotely, that attorney worked on other
12 matters, and there was a constructive screen and there was --
13 the firm had no access to her -- that attorney's confidential
14 information. And similarly in the Matuma [phonetic] case,
15 the conflict- -- allegedly conflicted lawyer worked remotely
16 on other matters, not the, quote, disqualified matter. The
17 attorney had no conflict with the attorneys on that matter.
18 The attorney had no client contact or expectation of
19 advancement within the firm, although the attorney was called
20 as an associate and held out and paid as an associate, the
21 court found essentially that that was an outsourcing
22 relationship.

23 Similarly, Your Honor, that is essentially what we
24 have here. Ms. Hasan has only access to the client files to
25 whom she is seconded. She does only work for that client.

1 She has restricted access to Blank Rome client files. She
2 has very limited access to Blank Rome at all electronically
3 except an email account that she never used. She works
4 remotely at the client's facility, exclusively for the
5 client, at direction of the client. She has no expectation
6 of advancement and will be discharged after the secondment
7 relationship ended.

8 So I don't think the -- the temporary attorney
9 analogy is completely apt, although some of the factors that
10 the bar opinions cite are important and should be looked at.
11 In this case, like Matuma here and Menendez, the court
12 found -- those courts found the fact that the law firms
13 referred to the allegedly conflicted associate and paid the
14 conflicted associate and represented the conflicted associate
15 to be an associate, was not dispositive.

16 Here, the client wanted the associate, Ms. Hasan,
17 to be labeled as an associate; that's in the record at
18 Ms. Friend's deposition. Rules require that we be candid if
19 we are going to -- are going to list her as an associate,
20 which we did. The fact that she was invited to an
21 associate's retreat but never attended that retreat doesn't
22 establish that she functioned like a real associate.

23 The bottom line here is, as Your Honor knows,
24 associates are the horses [*sic*] of big law. They're the work
25 horses. In this case, Blank Rome called Ms. Hasan a horse,

1 | but she was really a zebra. She didn't function liked the
2 | traditional horse at all.

3 | And I submit to the Court that that's the test.
4 | The duty to supervise here exists under the RPCs. That fact
5 | was present in Matuma and Menendez and actually exercised in
6 | those cases because the work of that -- those associates were
7 | reviewed. Here, there was no need to exercise the joint
8 | supervision that's in the secondment agreement because the
9 | work she did was only for the client under the client's
10 | direction. There were no facts that arose in the
11 | relationship that required Blank Rome to exercise any of that
12 | joint supervision right.

13 | THE COURT: Anything else to add?

14 | MR. HARBIST: Judge, I could go through the other
15 | distinctions. And the only thing I'm going to suggest,
16 | Your Honor, is that the Dewey case that Mr. Robinson relies
17 | upon and much of the argument here, and even the test they
18 | propose, this acknowledgment and perception test really
19 | relies upon the proposition and assumes that Ms. Hasan will
20 | divulge any information that she has and breach her fiduciary
21 | responsibility. That really is a resurrection of the
22 | discarded appearance of impropriety standard that was the
23 | basis of the Dewey case and has since been rejected by the
24 | New Jersey Supreme Court in --

25 | THE COURT: You're now giving me nightmare

1 | flashbacks. Sorry.

2 | MR. HARBIST: I think I'm recollecting correctly.
3 | And even the Second Circuit said that in the imputation rule
4 | under Rule 1.10, it's not designed and always necessary to
5 | preserve the high stands of the profession.

6 | So -- so the fact that there was a -- some
7 | theoretical possibility that Ms. Hasan could disclose client
8 | confidences to Blank Rome because of her relationship, is not
9 | the test here that is espoused by the expert as well as the
10 | acknowledgment in perception test that the defendant now
11 | seeks to foist upon the Court.

12 | I have other issues to discuss if Your Honor wants
13 | to hear them.

14 | THE COURT: Don't think I need to hear them.

15 | MR. HARBIST: Or I can answer any other questions.

16 | THE COURT: No. I think you've answered questions.
17 | Thank you so much.

18 | Mr. Robinson, would you like to take up to 4
19 | minutes in reply?

20 | MR. ROBINSON: Yes. Under Rule 1.9, Ms. Hasan is
21 | clearly conflicted, and Ms. Schubert's declaration
22 | establishes that. If Your Honor wants any more information
23 | about the specifics of what she did, we'd provide that *in*
24 | *camera ex parte*.

25 | THE COURT: No, I think I'm good on the 1.9.

1 MR. ROBINSON: Okay. The problem here is that they
2 didn't do a conflict check. They knew that she worked in
3 Boston Scientific. They knew it enough to put it on their
4 website, that you should hire Ms. Hasan because she used to
5 work in compliance at Boston Scientific. That's what they
6 tell the world. If we were under an appearance of
7 impropriety test, you could bounce them just for that, you
8 know.

9 THE COURT: That's gone.

10 MR. ROBINSON: But that is gone, and we're not
11 arguing for an appearance of impropriety test. We just want
12 1.10 applied here. She is associated with their firm, any
13 way you look at it. You can either look at what they've told
14 the world and are still telling the world back then, or you
15 can -- or I guess, you could think what about they're saying
16 here, but I don't think what they're saying here has any
17 validity.

18 And they didn't comply with the rule. There's no
19 such thing as *de facto* screening. You have to have a written
20 screen. It has to be acknowledged. They didn't do that.

21 And on the issue of notice to Boston Scientific,
22 what the Endo case actually says is the reason endo was
23 allowed to give the late notice is because -- and this is
24 on -- I'm reading from page 7 of the Lexis case, I think it's
25 page 18 -- page 19 of the opinion: There was no occasion

1 | prior to this notification in July 2005 when the law firm
2 | could have reasonably been aware of the potential conflict.

3 | Well, in the case, not only did they know, did the
4 | firm know that she -- Ms. Hasan had worked for Boston
5 | Scientific, the person in charge of running conflicts knew
6 | she had worked for Boston Scientific. And that this whole
7 | thing could have been solved if she had simply run a conflict
8 | check, because they could have gone to their client and said,
9 | we're sorry, under the ethics rules, we have to tell Boston
10 | Scientific and get their consent before we hire this woman.
11 | That would have solved the whole thing. But instead, they
12 | forgot to run the conflict check. And that's why we're here.

13 | Thank you.

14 | THE COURT: Okay. I think I've heard enough. I'm
15 | going to take a 10-minute recess, go over my notes and come
16 | out with a decision. Feel free to use the facilities.

17 | MALE SPEAKER: Thank Your Honor.

18 | THE COURT: And we'll be back. So you take us off
19 | the record, Ms. Chen.

20 | (Recess: 305 P.M. to 4:04 P.M.)

21 | THE COURT: Okay. We're back on the record in
22 | United States of America *ex rel.*, et al., plaintiffs, versus
23 | Boston Scientific, et al., 14-CV-6102 [*sic*]. This matter
24 | comes before the Court by way of Boston Scientific
25 | Neuromodulation Corporation, hereafter "Boston Scientific's,"

1 motion to disqualify Blank Rome LLP purportedly because Blank
2 Rome has a conflict of interest under New Jersey Rules of
3 Professional Conduct 1.9(a) and 1.10(c); Docket Entry 160.
4 In addition, Boston Scientific requests that the Court award
5 Boston Scientific all of its costs, expenses and attorney's
6 fees that relate to the discovery of Blank Rome's conflict
7 and the preparation in filing of this motion.

8 Background procedure history. This case concerns a
9 *qui tam* action. Relator's plaintiffs, Wendy Bahnsen and
10 Carolina Fuentes, plaintiffs, allege that Boston Scientific
11 perpetrated a fraudulent billing scheme and defrauded various
12 health care programs from 2006 through the present.
13 Plaintiffs further allege that they were both unlawfully
14 terminated because they complained to Boston Scientific's
15 management about the billing activities discussed in their
16 complaint.

17 Ritu Hasan was employed as in-house corporate
18 counsel and compliance counsel for defendant Boston
19 Scientific from March 2009 through February 2011. While
20 employed with Boston Scientific, Ms. Hasan was engaged in
21 activities and internal investigations conducted by Boston
22 Scientific in direct response to many of the allegations made
23 by plaintiffs regarding billing improprieties and
24 retaliation, as well as Boston Scientific's findings and
25 strategies to respond to those allegations.

1 In early 2014, Boston Scientific's counsel
2 discovered that Ms. Hasan had been hired by Blank Rome as an
3 associate in its Los Angeles office.

4 Thereafter, Boston Scientific's counsel sent a
5 letter to Blank Rome notifying the firm of the conflict issue
6 and its request that Blank Rome withdraw from the case.

7 Blank Rome subsequently responded to that --
8 responded that it had performed an internal investigation
9 regarding the conflict and determined that it did not need to
10 withdraw from the case. According to Blank Rome, Ms. Hasan's
11 relationship with the firm is governed by a "secondment"
12 executed between the firm and one of its clients on
13 September 10, 2013. Ms. Hasan's understanding "was that she
14 would not be a regular associate of Blank Rome, she would not
15 be working for any client other than the client to whom she
16 was seconded, and would have no assignments from any Blank
17 Rome partner. Her main office would remain the office where
18 she had worked before the secondment in Calabasas." Docket
19 Entry 164-3, Hasan Declaration at paragraph 3.

20 Ms. Hasan already had a "working relationship with
21 that particular client independent of Blank Rome for
22 approximately two and a half years from April 2011 until
23 October 2013." Docket Entry 164-3 at paragraph 3.

24 Ms. Hasan further states that since starting the
25 secondment, her "job has not functionally changed." *Ibid.*

1 She further states that "since I was hired by Blank
2 Rome and immediately seconded to the client, I have disclosed
3 no information relating to my prior employment by Boston
4 Scientific Neuromodulation Corporation to Blank Rome."
5 Docket Entry 164-3 at Hasan Declaration, paragraph 12.

6 Pursuant to that agreement, Ms. Hasan "remains an
7 employee of Blank Rome" and works under the joint supervision
8 of the firm and the client. Docket Entry 128-B.

9 Ms. Hasan has not "performed any work on behalf of
10 Blank Rome" during the term of the agreement. *Ibid.*

11 Instead, although Blank Rome continues paying
12 Ms. Hasan's salary and providing her with insurance and other
13 benefits, the firm has sent Ms. Hasan on a "secondment to the
14 client as a courtesy to the client, provided the client works
15 in good faith to identify opportunities for the firm to
16 represent the client." Under the agreement, Ms. Hasan
17 performs services only for the client. The agreement
18 acknowledges that Ms. Hasan's work for the client could
19 potentially create conflict issues for the firm by requiring
20 her to "maintain a thorough record of the matters on which
21 she performed services so that either the firm or the client
22 may perform the appropriate conflict check."

23 Also, Ms. Hasan declared that "at no time since I
24 was hired by Blank Rome, have any Blank Rome lawyers had any
25 access to the client confidences that I obtained from my

1 | prior employment by Boston Scientific Neuromodulation
2 | Corporation." Docket Entry 164-3, Hasan Declaration at 13 --
3 | paragraph 13.

4 | At the Court's direction, the parties engaged in
5 | limited discovery related to the disqualification issue. And
6 | on January 15, 2015, the Court granted leave for defendant to
7 | file its motion to disqualify. See Docket Entry 156.

8 | Discussion. A magistrate judge may consider and
9 | decide nondispositive pretrial matters pursuant to 18 U.S.C.
10 | § 636. The conduct of attorneys admitted to practice before
11 | the United States District Court for the District of New
12 | Jersey is governed by the New Jersey Rules of Professional
13 | Conduct. See Local Civil Rule 103.1 subparagraph (a), as
14 | well as Beilowitz v. General Motors Corp., 226 F. Supp. 2d
15 | 565 at 568 (D.N.J. 2002) (applying New Jersey's 1.7 in a
16 | motion to disqualify). In construing the RPC, this Court
17 | must look to -- or may look to the decisions of the New
18 | Jersey Supreme Court and other relevant authority. See Essex
19 | Chemical Corp. V. Hartford Accident and Indemnity Company,
20 | 993 F. Supp. 241 at 246 (D.N.J. 1998). Thus, the RPCs and
21 | case law provide the standards of conduct and allow for the
22 | disqualification as it means to ensure compliance with the
23 | rules. See Oswell v. Morgan Stanley, Dean Witter & Company
24 | Inc., Civil Action No. 06-5814, 2007 WL 2446529 at *2 (D.N.J.
25 | 2007) (stating that "a court may disqualify an attorney where

1 | it is necessary to enforce the court's disciplinary rules.").

2 | When deciding a motion to disqualify, the movant
3 | bears the burden of proof that disqualification is
4 | appropriate. Maldonado v. New Jersey, ex rel., 225 F.R.D.
5 | 120 at 136-37 (D.N.J. 2004). There are two provisions that
6 | RPC's implicated in this motion: Rule 1.9 and Rule 1.10.

7 | Rule 1.9. New Jersey Rule of Professional
8 | Conduct 1.9, duties to former clients, provide that "a lawyer
9 | who has represented a client in another matter -- or in a
10 | matter shall not thereafter represent another client in the
11 | same or substantially related matter in which that client's
12 | interests are materially adverse to the interests of the
13 | former client unless the former client gives informed consent
14 | in writing." RPC 1.9 paragraph (a). Three requirements must
15 | be met to prove conflict of interests exists under 1.9(a):
16 | (1) a past attorney-client relationship existed; (2) the
17 | current representation involves the same or a matter
18 | substantially related to the prior matter; and (3) the
19 | interests of the attorney's current clients are materially
20 | adverse to the former clients interests. See Carreno v. City
21 | of Newark, 834 F. Supp. 2d 217 at 224-25 (D.N.J. 2011).

22 | While plaintiff -- plaintiffs do not appear to take
23 | a position in their opposition brief on whether Ms. Hasan is
24 | disqualified from the matter and counsel at oral argument
25 | stated that they as much took no position, the Court finds

1 that Ms. Hasan would be disqualified from this matter under
2 1.9. The Court finds that that the first element is met
3 because Ms. Hasan worked as an in-house counsel at Boston
4 Scientific from March 2009 to February 2011. Second element
5 of substantial relation is met because facts relevant to the
6 prior representation are both relevant and material to the
7 subsequent representation. See Carreno, 834 F. Supp. 2d at
8 227 [sic]. While at Boston Scientific, Ms. Hasan worked on
9 matters that involved similar allegations by relators
10 concerning billing improprieties and retaliations, and
11 therefore, the facts relevant to her representation are
12 relevant and material to the instant matter. According to
13 the Boston Scientific supervisor of Ms. Hasan from March 2009
14 and 2010, Ms. Hasan was "actively engaged in activities and
15 internal investigations conducted by Boston Scientific in
16 direct response" to many of these allegations. See
17 Declaration of Tracy Schubert, Docket Entry 159-6 at
18 paragraph 5. In fact, Ms. Hasan was involved with Boston
19 Scientific's internal investigation regarding many of the
20 same allegations as in this suit. Id. at paragraph 9.
21 Furthermore, her name appears on privilege logs reduced in
22 the instant case where she is listed as a participant in
23 privileged communications regarding relators and many of
24 their allegations. Finally, the third element is met because
25 the interests of the relators are materially adverse to the

1 | interests of Boston Scientific.

2 | Having determined that Ms. Hasan is disqualified
3 | from representing plaintiffs pursuant to 1.9, the next issue,
4 | the real question here is the propriety of imputing that
5 | conflict to Blank Rome. New Jersey RPC 1.10 imputation of
6 | conflict of interests provides as follows: When a lawyer
7 | becomes associated with a firm, no lawyer associated with the
8 | firm shall knowingly represent a person in a matter in which
9 | that lawyer is disqualified under RPC 1.9 unless (1) the
10 | matter does not involve a proceeding in which the personally
11 | disqualified lawyer had primary responsibility, (2) the
12 | personally disqualified lawyer is timely screened from any
13 | participation in the matter and is apportioned no part of the
14 | fee therefrom, and (3) written notice is promptly given to
15 | any affected former client to enable it to ascertain
16 | compliance with the provision of this rule.

17 | Defendant is correct, once a conflicted attorney is
18 | "associated with" a law firm, the law firm must meet all
19 | three prongs of the exceptions set forth in 1.10 in order to
20 | avoid imputation of the conflicted lawyer's conflict to the
21 | entire law firm. Blank Rome's lack of written notice to
22 | Boston Scientific prior to Boston Scientific's discovery is
23 | of concern. However, that issue is not dispositive of the
24 | overall motion. The primary issue is whether Ms. Hasan is
25 | "associated with" the firm.

1 New Jersey Superior Court Advisory Committee on
2 Professional Ethics, ACPE, Opinion Number 632 provides
3 guidance on how to determine whether a lawyer is associated
4 with a law firm. New Jersey ACPE is vested with specific
5 jurisdiction by the New Jersey Supreme Court under Court
6 Rule 1:19-2 over certain queries concerning the conduct of
7 attorneys. Appeals from ACPE decisions are taken directly to
8 the New Jersey Supreme Court.

9 The Opinion 632 follows ABA formal Opinion 88-356
10 and states "the question whether a temporary lawyer is
11 associated with a firm at any time must be determined by a
12 functional analysis of the facts and circumstances involved
13 in the relationship between the temporary lawyer and the firm
14 consistent with the purposes of the rule." 124 New Jersey
15 Law Journal 926. ACPE Opinion 632 concludes that "whether a
16 temporary lawyer is treated as being 'associated with a firm'
17 while working on a matter for the firm, depends on whether
18 the nature of the relationship is such that the temporary
19 lawyer has access to information of firm clients other than
20 the client on whose matter the lawyer is working and the
21 consequent risk of improper disclosure or misuse of
22 information relating to representation of other clients of
23 the firm."

24 In performing a functional analysis, this Court
25 concludes that Ms. Hasan is not associated with Blank Rome

1 | for purposes of 1.10 here. First, the Court finds that
2 | Ms. Hasan has not had access to information of the firm's
3 | clients. During the time that she has been employed by Blank
4 | Rome from April 2011 to October 2013 until present, she has
5 | never had electronic or other access to Blank Rome electronic
6 | documents or client documents. See Hasan Declaration at
7 | paragraph 10. Ms. Hasan does not work at Blank Rome offices
8 | but instead at offices of the Blank Rome client to whom she
9 | was seconded. Id. at paragraph 7. In fact, she was present
10 | at the Blank Rome office only in October 8 and 9, 2013, for
11 | orientation order to receive Outlook web access, training,
12 | and attend human resource administrative issues. Id. at
13 | paragraph 6. See also Friend Declaration at paragraph 13.
14 | According to the chief human resource officer for Blank Rome,
15 | Allison Friend, Ms. Hasan's email account inbox consists
16 | entirely of junk and group emails, and she has not checked or
17 | used her email account since her training on October 8, 2013.
18 | Declaration of Friend at paragraph 18. Ms. Hasan cannot view
19 | public folders available on Outlook web access. She cannot
20 | make files of folders available to others via Outlook web
21 | access, and she has no access to systems or folders of the
22 | firm, including i-manage, the firm's document management
23 | system. Id. at paragraph 16-17.

24 | The Court also concludes that there is no evidence
25 | of any risk of improper disclosure or misuse of information

1 relating to representation of other clients of the firm. The
2 secondment agreement specifically states under a section
3 entitled "conflicts of interest and confidentiality" that
4 "Hasan shall not continue to perform on behalf of the firm
5 during the term. Communication with colleagues at the firm
6 shall be similarly restricted." See September 10, 2013,
7 Agreement, Docket Entry 128-2. The agreement, which does not
8 allow Ms. Hasan to work for Blank Rome on other matters and
9 which restricts her communications with colleagues
10 accordingly, was entered into prior to the beginning of her
11 employment with Blank Rome. Blank Rome hired Ms. Hasan
12 because its client asked Blank Rome to hire Ms. Hasan and
13 then immediately seconded her back to the client. Ms. Hasan
14 had previously worked for the client until the client faced
15 budgetary constraints and could not continue to employ Ms.
16 Hasan. See Declaration Allison Friend at paragraphs 4
17 through 6.

18 Furthermore, because Ms. Hasan has no access to
19 information regarding Blank Rome's clients, the Court finds
20 that there is no risk of improper disclosure of information
21 relating to the firm's representation of other clients.

22 Because the Court concludes that Ms. Hasan was not
23 associated with Blank Rome for purposes of 1.10, it need not
24 determine whether any of the three exceptions to 1.10 would
25 apply.

1 Because Ms. Hasan is not associated with Blank
2 Rome, the Court does not require that the entire firm of
3 Blank Rome be disqualified from this matter. For the
4 foregoing reasons, good cause shown, defendant's motion to
5 disqualify is denied, and the Court will issue an appropriate
6 order.

7 Anything else on this side of the dais?

8 MR. POULIN: Your Honor, this isn't related to the
9 motion for disqualification, just one point of clarification
10 on discovery. And, Your Honor, Thomas Poulin from plaintiffs
11 relators.

12 Just one point of clarification, the defendants
13 submitted a letter to the Court, as the Court knows, stating
14 that our motion to compel is moot. Therefore, just to
15 clarify, if we could get on the record the defendant's
16 assertion that they are -- their discovery obligations then
17 are complete and that they've withdrawn their objections
18 going forward, because they've represented --

19 THE COURT: This is a motion on the
20 disqualification issue?

21 MR. POULIN: No, this is on the motion to compel,
22 Your Honor, where they have -- in the letter they sent you,
23 the letter said that our motion to compel is moot. And the
24 only way it can be moot is they've withdrawn their objections
25 and have completed discovery or are in the process of

1 completing discovery.

2 THE COURT: Okay. Hold that thought.

3 Anything else from defense on the motion to
4 disqualify?

5 MR. ROBINSON: Yes, I think it would be useful for
6 the record, in case of a subsequent appeal of Your Honor's
7 decision, if we could make it clear what your ruling is on
8 their motion to strike the Ambrosio [phonetic] declaration.

9 THE COURT: At this point -- thank you very much
10 for bringing that up. That motion is terminated as moot at
11 this point. It's terminated.

12 MR. ROBINSON: Okay.

13 Anything else?

14 Now, you want to go into other matters?

15 MR. POULIN: No, Your Honor. No, Your Honor,
16 again, Thomas Poulin for plaintiffs relators.

17 Just that one point of clarification so that we can
18 move on with discovery in this case, that they've withdrawn
19 their objections to --

20 THE COURT: Docket what?

21 MR. POULIN: Excuse me?

22 THE COURT: What's the docket entry you're
23 referring to, if anything?

24 MR. POULIN: It is recently submitted letter by
25 Norton Rose Fulbright where they state that our motion to

1 | compel is moot.

2 | THE COURT: Ah, the agenda letter they left on my
3 | desk.

4 | MR. POULIN: And the point --

5 | THE COURT: Is that the case?

6 | MS. REYNOLDS: Your Honor, the motion to compel in
7 | relevant to the discovery dealt in part with the patient
8 | sampling. Because we understood the discovery deadline to be
9 | March 20th, and we were moving to deal with that, and we had
10 | a breakdown in the meet-and-confer process, we produced the
11 | patient data without sampling. We are not withdrawing our
12 | objections to the overly broad requests. I think we would
13 | stand on the fact that we think the motion to compel is moot.
14 | And I don't think there needs to be further elaboration on
15 | this at this point. We've produced all of the patients in
16 | our possession at this point, but we don't withdraw our
17 | objections to the enormous -- the enormity of scope,
18 | relevance and all of the other objections we've made in our
19 | discovery requests.

20 | MR. POULIN: Your Honor, Thomas Poulin for
21 | plaintiffs relators.

22 | Your Honor, they have asserted they've produced all
23 | of the documents that are responsive. We don't know and just
24 | in this month, they have just recently --

25 | THE COURT: Have you met and conferred this month

1 on this issue?

2 MR. POULIN: Yes, Your Honor, in fact, we've met
3 and conferred a number of times.

4 THE COURT: This month?

5 MR. POULIN: This month, yes, Your Honor, and last
6 month, after your order, Your Honor.

7 THE COURT: And -- and part of the issue was that
8 discovery was ending this month. Correct?

9 MR. POULIN: That was part of the issue,
10 Your Honor.

11 THE COURT: So that issue -- that fact has changed
12 since you had your discussions. Correct?

13 MR. POULIN: That is correct, Your Honor.

14 THE COURT: Okay. So what you're going to do at
15 this point is you're going to have a meet-and-confer. You
16 can do that right here in the courtroom, and you can call and
17 if necessary, Ms. Chen will come out, and if necessary, I'll
18 come out.

19 MR. POULIN: All right.

20 THE COURT: Okay? Anything else for today?

21 MR. POULIN: Thank Your Honor.

22 THE COURT: Anything else for today, now that we
23 all know we're in a new ball game, at least until the end of
24 May.

25 UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

1 THE COURT: I thank you all very, very much. Safe
2 travels, but please stay, meet and confer, we love
3 meet-and-confer.

4 (Conclusion of proceedings at 4:25 P.M.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 39 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

19th of March, 2015

Signature of Approved Transcriber

Date

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