IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

I-MAB BIOPHARMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 22-276-CJB
	)	
INHIBRX, INC. and BRENDAN ECKELMAN,	)	
	)	
	)	
Defendants.	)	

Rodger D. Smith II and Anthony D. Raucci, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, DE; Ching-Lee Fukuda, Tai-Heng Cheng and Timothy Q. Li, SIDLEY AUSTIN LLP, New York, NY; Erik B. Fountain, SIDLEY AUSTIN LLP, Dallas, TX, Attorneys for Plaintiff.

Philip A. Rovner and Jonathan A. Choa, POTTER ANDERSON & CORROON LLP, Wilmington, DE, Attorneys for Defendants.

MEMORANDUM OPINION

June 2, 2023
Wilmington, Delaware

Christopher J. Burke
BURKE, United States Magistrate Judge

In this case, Plaintiff I-Mab Biopharma ("I-Mab" or "Plaintiff") brings trade secret misappropriation claims against Defendants Inhibrx, Inc. ("Inhibrx") and Brendan Eckelman ("Dr. Eckelman" and collectively with Inhibrx, "Defendants"). Pending before the Court is the remaining pending portion of Defendants' motion to dismiss the operative First Amended Complaint ("FAC"), filed pursuant to the doctrine of *forum non conveniens* (the "Motion"). (D.I. 61) For the reasons set forth below, the Court DENIES this portion of the Motion.

I. BACKGROUND

A. Factual Background

The Court incorporates by reference its discussion of the factual background regarding this case, which was set out in its August 8, 2022 Memorandum Opinion (the "August 8 MO"). (D.I. 97 at 2-5) Below, it will include additional factual background that is particularly relevant to the Motion.

B. Procedural History

I-Mab filed this action on March 1, 2022. (D.I. 2) On May 12, 2022, I-Mab filed the operative FAC. (D.I. 49) The FAC contains two causes of action, both for trade secret misappropriation against both Defendants: Count I, which alleges a violation of the federal Defend Trade Secrets Act, and Count II, which alleges a violation of the Delaware Uniform Trade Secrets Act. (*Id.* at ¶¶ 175-201)

On May 25, 2022, Defendants filed the instant Motion, (D.I. 61), which was fully briefed as of June 15, 2022, (D.I. 76). Defendants' Motion presented three attacks with respect to I-Mab's claims: (1) I-Mab's claims must be brought in the Delaware Court of Chancery ("Court of Chancery") pursuant to the forum-selection clause of the Confidentiality Order that is at issue

here (i.e., the *forum non conveniens* portion of the Motion); (2) Dr. Eckelman is not subject to personal jurisdiction in this Court, pursuant to Federal Rule of Civil Procedure 12(b)(2); and (3) I-Mab failed to properly plead its claims, pursuant to Federal Rule of Civil Procedure 12(b)(6). In the August 8 MO, the Court[1] denied the Motion as to the second and third attacks. (D.I. 97 at 12-24) As for the *forum non conveniens* portion of the Motion, the Court determined that it could not decide the issue without first making a factual determination, following an evidentiary hearing, regarding whether Dr. Eckelman was an employee of an I-Mab competitor at the time he signed the Undertaking.[2] (*Id.* at 9-12) The Court thus held in abeyance the *forum non conveniens* portion of the Motion pending that evidentiary hearing. (*Id.* at 24)

Defendants subsequently filed a motion for reconsideration of the Court's conclusion regarding the *forum non conveniens* portion of the Motion. (D.I. 101) On October 25, 2022, the Court denied the motion for reconsideration (the "October 25 MO"). (D.I. 141)

On October 28, 2022, the parties filed pre-hearing briefs. (D.I. 142; D.I. 145) On November 8, 2022, the Court held an evidentiary hearing (the "November 8 hearing"). (D.I. 158 (hereinafter, "Tr.")) On November 29, 2022, the parties filed post-hearing briefs. (D.I. 155; D.I. 156)

II. DISCUSSION

The Court will first set out the legal framework that applies to the factual determination

[1] On July 7, 2022, the parties filed a joint notice of consent to the Court's jurisdiction to conduct all proceedings in this case, including trial, the entry of final judgment and all post-trial proceedings. (D.I. 89)

[2] The Undertaking is the document that Dr. Eckelman signed in which he agreed to be bound by the terms of the Confidentiality Order. (D.I. 97 at 4) The Confidentiality Order, in turn, is further discussed herein.

that it must make in order to finally resolve the *forum non conveniens* portion of the Motion. It will then turn to the merits of the issue.

A. Legal Framework

As the Court has previously noted, the Confidentiality Order at issue relates to underlying arbitration proceedings between I-Mab and Tracon Pharmaceuticals, Inc. ("Tracon"). The Confidentiality Order defines a "[c]ompetitor" as "a person or entity endeavoring to engage in the same or similar line of business, provide the same or similar services, sell the same or similar products, and/or operate in the same markets, as well as any person or entity who are actually engaged in any of these activities." (D.I. 62, ex. A at ¶ 8) The Confidentiality Order permits I-Mab and Tracon to supply confidential discovery material to experts in connection with the arbitration proceedings, provided that such an expert "is not currently an employee of . . . any competitor . . . of [I-Mab or Tracon], as far as the expert or consultant can reasonably determine." (*Id.*) And the Confidentiality Order further emphasizes that "[u]nder no circumstances shall an expert or consultant who is a competitor or an employee of a competitor of a Party . . . be provided access" to confidential discovery material. (*Id.*)

It is undisputed that Dr. Eckelman was employed by Inhibrx when he agreed to be an expert witness for Tracon and when he signed the Undertaking in November 2021. (D.I. 145 at 4; Tr. at 167-68)[3] Therefore, the issue at the heart of the parties' dispute is whether Inhibrx was then a "competitor" to I-Mab as that term is defined in the Confidentiality Order.[4] (D.I. 155 at 1,

[3] Dr. Eckelman founded Inhibrx in 2010, and currently serves as the company's Chief Scientific Officer. (Tr. at 166, 168; *see also* D.I. 143, ex. B at 9-10)

[4] Therefore, below the Court will at times simply discuss whether Inhibrx was a competitor of I-Mab's at the relevant time. Again, if I-Mab's reading of the Confidentiality Order's meaning is correct, then not only Inhibrx (as an "entity") but also Dr. Eckelman (as a "person" who works for that "entity") would have been I-Mab competitors as of November

5; D.I. 156 at 1; *see also* D.I. 141 at 4) If the answer to this key question is "no"—that is, if I-Mab and Inhibrx were not competitors as defined by the Confidentiality Order—then Dr. Eckelman is a party (or at least a third-party beneficiary) to the Confidentiality Order, and thus has standing to enforce its forum-selection clause. (D.I. 156 at 1) But if, on the other hand, the answer to this key question is "yes"—i.e., that I-Mab and Inhibrx *were* competitors as defined by the Confidentiality Order—then the Court would move on to address one additional question. In light of the Confidentiality Order's provision stating that confidential material can be provided to an expert if such expert "is not currently an employee of . . . any competitor . . . of [I-Mab or Tracon], *as far as the expert or consultant can reasonably determine*[,]" (D.I. 62, ex. A at ¶ 8 (emphasis added)), the Court would also then need to assess whether an expert in Dr. Eckelman's position would have been able to reasonably determine that he was an I-Mab competitor at the relevant time. And if the answer to that question was "yes" as well, then for reasons the Court has previously articulated, (D.I. 97 at 9-10), Dr. Eckelman could not be considered to be a party to the Confidentiality Order (nor a third-party beneficiary thereto); thus, he would have no standing to enforce the order's forum-selection clause, (D.I. 155 at 5, 20; Tr. at 266, 268-69, 291-92).[5]

How must these key "competitor"-related questions be evaluated? As an initial matter, it is undisputed that they must be assessed as of November 18, 2021, the date on which Dr.

2021. But for efficiency's sake, the Court will largely focus on Inhibrx's competitor status below, knowing that Dr. Eckelman's competitor status rises and falls with the decision as to Inhibrx.

[5] The forum-selection clause of the Confidentiality Order would otherwise require this action to be brought in the Court of Chancery. (D.I. 62, ex. A at ¶ 30; *see also* D.I. 97 at 6-7) There is no dispute that the forum-selection clause is valid and enforceable; rather, the crux of the dispute is whether Dr. Eckelman has standing to enforce that clause. (D.I. 97 at 7; D.I. 141 at 3-4; D.I. 142 at 3)

Eckelman signed the Undertaking. (Tr. at 41-42, 58, 269; *see also* D.I. 62, ex. B) Beyond that, as the Court explained in the October 25 MO, the Court must undertake an *objective* assessment of whether Inhibrx meets the "competitor" definition. (D.I. 141 at 6 n.3 (citing cases); *see also* D.I. 155 at 6); *Quantum Tech. Partners IV, L.P. v. Ploom, Inc.*, C.A. No. 9054-ML, 2014 WL 2156622, at *5 (Del. Ch. May 14, 2014) ("Delaware courts adhere to the objective theory of contract construction, *i.e.*, courts first will look to the terms of the agreement, ascribing to the words their common or ordinary meaning, and interpret[ing] them as would an objectively reasonable third-party observer.") (internal quotation marks and citations omitted). This objective inquiry also applies to the question of whether Dr. Eckelman was employed by an I-Mab competitor "as far as [he] can reasonably determine[.]" (D.I. 62, ex. A at ¶ 8) And because these inquiries are objective ones, then Dr. Eckelman's subjective belief on the issues does not control. *Cf. Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 104 (Del. 2013) (explaining that a contractual provision that required a "reasonabl[e]" belief would impose an objective standard, while a contractual provision looking to one's "belie[f]" would impose a subjective standard); *see also Crumplar v. Super. Ct. ex rel. New Castle Cty.*, 56 A.3d 1000, 1005-08 (Del. 2012) (explaining that language requiring an assessment of reasonableness imposes an objective, rather than a subjective, standard); *Braga Inv. & Advisory, LLC v. Yenni Income Opportunities Fund I, L.P.*, C.A. No. 2017-0393-AGB, 2020 WL 3042236, at *10 & n.126 (Del. Ch. June 8, 2020); *see also* (D.I. 155 at 7-8).[6]

[6] At least at one time, Defendants had suggested that the Court's inquiry turned on whether an expert who signed the Undertaking had subjectively, *in his or her own mind*, determined that he or she was not a competitor. (*See* D.I. 101 at 4-5; D.I. 141 at 5 n.3) However, by the November 8 hearing, Defendants appeared to acknowledge that the law requires that the Court must make an objective analysis regarding whether Inhibrx was a "competitor" of I-Mab's (and, if so, whether Dr. Eckelman could have reasonably determined that it was). (Tr. at 281-82, 291-92)

One of Defendants' arguments as to why the Court should find that Dr. Eckelman is a party to the Confidentiality Order is put to rest by application of this objective analysis. Thus, before diving into the merits of the "competitor" issues, the Court will first address that argument.

The Confidentiality Order does not include language requiring I-Mab's (or Tracon's) pre-approval or consent, prior to an expert signing an Undertaking. (*See* D.I. 62, ex. A at ¶ 8) Nor does the Confidentiality Order permit I-Mab or Tracon the opportunity to object to any potential expert before that expert signs the Undertaking.[7] (*Id.*) According to Defendants, this demonstrates that I-Mab intended for Tracon to have the unilateral right to invite an expert like Dr. Eckelman to join the Confidentiality Order—and for such an expert to be considered a party to that contract—without any further inquiry into the subject being permitted thereafter. (D.I. 142 at 9; D.I. 156 at 7-8) Defendants then note that Tracon's invitation to Dr. Eckelman to join as an expert demonstrates that Tracon intended for Dr. Eckelman to become a party to the Confidentiality Order. (D.I. 142 at 9-10; D.I. 156 at 9; Tr. at 279, 284) All of this, according to Defendants, means that Tracon's and Dr. Eckelman's determination that Dr. Eckelman was not a competitor indisputably makes Dr. Eckelman a party (or at least a third-party beneficiary) to the Confidentiality Order—i.e., someone who is entitled to enforce the forum-selection clause. (D.I. 142 at 8-10; D.I. 156 at 7-9)

But the intent of the contracting parties here (i.e., I-Mab's and Tracon's intent as to who would be a party or third-party beneficiary of the Confidentiality Order) is best assessed by

[7] This is in contrast to the Protective Order that governs this case. That Protective Order requires a party to first identify a potential expert witness, with the other party then permitted to lodge an objection prior to the identifying party sharing the objecting party's confidential information with the expert. (D.I. 93 at ¶ 7.4)

analyzing the *language that those parties agreed to in the Confidentiality Order itself*. Although the Confidentiality Order does not provide a party with the ability to object before the other party's expert signs the Undertaking, it *does* require that the expert must not work for a "competitor" of the opposing side. (Tr. at 273-74 (I-Mab's counsel suggesting that the inclusion of the competitor provisions in the Confidentiality Order was a way of manifesting I-Mab's intent as to who would become a party to that contract)) I-Mab and Tracon were emphatic about this, such as when they agreed in the Confidentiality Order that "*[u]nder no circumstances* shall an expert . . . who is a competitor or an employee of a competitor of a Party, or who is providing services to any of the foregoing, be provided access to Confidential Discovery Material or Highly Confidential Discovery Material absent further order of the Court or consent of the Producing Party." (D.I. 62, ex. A at ¶ 8 (emphasis added))

In light of this, one cannot credibly argue that I-Mab or Tracon crafted the Confidentiality Order in such a way to allow that *anyone* who one side permitted to sign the Undertaking would automatically become a party to that Order.[8] (D.I. 155 at 20 ("There would be no reason for the parties to adopt all the objective prohibitions against competitor experts in the Confidentiality Order if a third-party competitor could circumvent that prohibition at will.")) To the contrary, I-Mab's and Tracon's intention was clearly that its competitors' employees would not sign the Undertaking, nor would they become a party to the Confidentiality Order.

[8] All of this being said, had I-Mab and Tracon included language in the Confidentiality Order requiring disclosure of a potential expert witness, prior to the sharing of confidential material with such a witness, then this whole litigation might have been avoided. Indeed, at oral argument, I-Mab's current counsel (who were not involved in drafting the Confidentiality Order) seemed to acknowledge that inclusion of such a provision would have been preferable in this respect. (Tr. at 274) Yet despite this, the lack of any such language in the agreement does not impact the Court's objective assessment of whether Inhibrx and I-Mab were competitors.

And so, in order to give effect to that aspect of I-Mab's and Tracon's intent, the Court is required to make an *objective* determination about whether Dr. Eckelman was in fact employed by a competitor at the relevant time (and, relatedly, if he could have reasonably determined that this was so). Taking the contrary path suggested by Defendants would wrongly amount to simply crediting Tracon's and Dr. Eckelman's later, subjective views about whether Inhibrx met the "competitor" definition.[9]

With that out of the way, the Court now turns to the merits of the dispute.

B. Discussion

The Court must first objectively assess whether Inhibrx was a "competitor" to I-Mab as that term is defined in the Confidentiality Order, as of November 2021. If so, the Court must then examine whether an expert similarly situated to Dr. Eckelman could have reasonably determined that this was so at the time. The Court takes up these issues in turn.

1. Was Inhibrx a "Competitor" to I-Mab as Defined in the Confidentiality Order, as of November 2021?

I-Mab argues that it and Inhibrx were competitors as of November 2021 (and that they still are today). It asserts that this is so at least because both companies are endeavoring to engage in—and are actually engaged in—the same or similar lines of business: the development

[9] Moreover, the intent that has to matter here is the intent of the parties *who drafted and signed the Confidentiality Order*—I-Mab and Tracon—not the intent of someone who later signed a joinder to that agreement (like Dr. Eckelman). In other words, the relevant inquiry has to look at what *I-Mab and Tracon* intended as far as who could be a party or an intended third-party beneficiary to the Confidentiality Order. (*See* D.I. 141 at 5-6; D.I. 145 at 5); *see also Green v. Wisneski*, C.A. No. 11817-MM, 2021 WL 4999348, at *2 (Del. Ch. Oct. 15, 2021) (explaining that under Delaware law, a valid contract requires proof that the drafting parties mutually assented to all essential terms).

of particular antibodies[10] that are designed to target the same types of tumors in cancer patients. (D.I. 155 at 8; *see also* D.I. 145 at 7; Tr. at 272) Dr. Taylor Guo, I-Mab's former Chief Scientific Officer, testified that I-Mab was founded in 2016 to, *inter alia*, develop monoclonal and bispecific antibodies[11] for use in the immuno-oncology field[12] for the global market. (Tr. at 64, 83-84; *see also* D.I. 157, ex. 15 at IMAB-DE000345, -349, -352) I-Mab is headquartered in China, and it also has offices in Rockville, Maryland and San Diego, California. (Tr. at 84, 120-21; *see also* D.I. 146, ex. 1 at 90-92) I-Mab currently has around 300 employees, and it became a NASDAQ-listed company in 2020. (Tr. at 120, 123)

As for Inhibrx, Dr. Eckelman testified that the company has also developed bispecific and monoclonal antibodies for use in the immuno-oncology field. (*Id.* at 166-67, 176-78; D.I. 157, ex. 24 at 17-18; *see also* D.I. 157, ex. 22 at 31 (Inhibrx's CEO Mark Lappe agreeing that, as of October 2022, "Inhibrx is currently engaged in developing bi-specific antibodies for use in the field of immuno-oncology"))[13] Inhibrx is headquartered in La Jolla, California. (D.I. 146, ex. 10 at 1; *see also* Tr. at 123) In 2020, it became a publicly traded company. (Tr. at 168)

I-Mab asserts that it and Inhibrx are competitors with respect to at least two such antibodies, in that: (1) both I-Mab and Inhibrx are currently engaged in developing competing

[10] Antibodies are large molecules or proteins that are generally introduced to a patient's body through infusion. (Tr. at 17, 69)

[11] Monoclonal antibodies target one site on a cell, while bispecific antibodies can target two different sites at the same time. (Tr. at 18-19, 70-71, 177-78)

[12] The immuno-oncology field relates to the use of drugs to stimulate a cancer patient's weakened immune system in order to fight cancer cells. (Tr. at 67)

[13] Dr. Eckelman testified that presently, Inhibrx does not work in the field of monoclonal antibodies. (Tr. at 239-40, 258)

PD-L1x4-1BB bispecific antibodies; and (2) both companies have developed and licensed CD47 monoclonal antibodies. (D.I. 155 at 8-12; *see also* D.I. 145 at 7-10)[14] The Court's assessment of the competitor issue below will focus on the evidence with respect to I-Mab's and Inhibrx's PD-L1x4-1BB bispecific antibodies.[15]

I-Mab is currently developing a bispecific antibody known as TJ-L14B (also called "ABL503" and "L14B").[16] This antibody is designed to attack solid tumors in cancer patients[17] by targeting two molecular sites: (1) the PD-L1 (the "tumor engager"), which is a site found on cancer cells that weakens the immune system's ability to attack a tumor; and (2) the 4-1BB (the "immune cell activator"), which is a site found on T cells or immune cells that can be accelerated to attack a tumor. (Tr. at 18-20, 71-72, 126-29; D.I. 143, ex. B at 105, 123; D.I. 157, ex. 38) I-Mab's TJ-L14B antibody is currently being tested in United States Phase 1 clinical trials, which are expected to conclude in June 2023. (Tr. at 128; D.I. 157, ex. 16 at 3) I-Mab plans to launch TJ-L14B in the global market, including the United States. (Tr. at 65, 127)

Meanwhile, Inhibrx is also developing a bispecific antibody called INBRX-105. (D.I. 157, ex. 24 at 20, 23-24) It is undisputed that, like I-Mab's TJ-L14B bispecific antibody,

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[14] In addition to these antibodies, both I-Mab and Inhibrx are also currently developing other antibodies for use in the immuno-oncology field. (D.I. 157, ex. 15 at IMAB-DE0000346, -349, -350; *id.*, exs. 20, 21, 24 at 21-23)

[15] As the Court will explain, it agrees with I-Mab that Inhibrx was a "competitor" to I-Mab with respect to both companies' development of PD-L1x4-1BB bispecific antibodies (and that an expert similarly situated to Dr. Eckelman would have reasonably determined the same). In light of this conclusion, it is not necessary for the Court to also examine the evidence with respect to the parties' CD47 monoclonal antibodies.

[16] I-Mab works with a partner, ABL Bio, in the discovery and development of bispecific antibodies. ABL Bio's name for TJ-L14B is ABL503. (Tr. at 72, 77, 88)

[17] Examples of common solid cancers include lung cancer, liver cancer, stomach cancer, intestinal cancer and colon cancer. (Tr. at 72)

INBRX-105 is designed to attack solid tumors in cancer patients by also targeting the PD-L1 and 4-1BB sites. (Tr. at 127, 129, 176, 193, 204, 249-51; *see also* D.I. 143, ex. B at 123; D.I. 155 at 9) INBRX-105 is also currently in United States Phase 1 clinical trials, which are expected to conclude in December 2023. (Tr. at 128; D.I. 157, ex. 23 at 2) Inhibrx is developing INBRX-105 for the global market, including the United States. (Tr. at 127, 175-76, 227-29; D.I. 143, ex. B at 95-96)[18]

If there was no specific definition of "competitor" to help guide the inquiry, then the record evidence would suggest that objectively reasonable third-party observers might have come to different conclusions about whether Inhibrx and I-Mab were competitors in November 2021. That is because there is evidence of record supporting both points of view.

On the one hand, there is evidence that certain individuals at Inhibrx did not consider I-Mab to be a competitor at this time, based on whatever definition of "competitor" they were utilizing. For example, as will be discussed in more detail below, Dr. Eckelman repeatedly stated that he does not believe I-Mab and Inhibrx to have been competitors then (or to be competitors today). (*See, e.g.*, Tr. at 174, 187-88, 194) Moreover, there are no documents of record created by Inhibrx that identify I-Mab as a competitor. (D.I. 156 at 12; Tr. at 201) This is so even though the record contains two Inhibrx documents in which Inhibrx lists out its competitors. First, in the "Competition" section of Inhibrx's United States Securities and Exchange Commission's ("SEC") Form 10-K Annual Report for the fiscal year that ended on December 31, 2021 ("2021 Form 10-K"), Inhibrx references numerous "primary competitors"

[18] In addition to I-Mab's TJ-L14B and Inhibrx's INBRX-105, there are two other bispecific antibodies targeting the PD-L1 and 4-1BB sites currently in United States Phase 1 clinical trials: one from Genmab (called "GEN1046") and one from Merus (called "MCLA-145"). (D.I. 157, ex. 39 at IMAB-DE0006928; Tr. at 20)

that fall into four groups, including one group titled "[a]ntibody drug discovery companies that may compete with us in the search for novel therapeutic antibody targets[.]" (D.I. 144, ex. H at INBRX01053) This particular group includes reference to 10 competitors, but I-Mab is not listed (nor is I-Mab listed as a competitor elsewhere in this document). (*Id.*)[19] Dr. Eckelman was involved in drafting (or at least approving) this section of the 2021 Form 10-K. (Tr. at 245) Second, an October 2021 presentation for investors regarding Inhibrx's molecules includes a slide entitled "INBRX-105 is a best-in-class 4-1BB agonist[.]" (D.I. 144, ex. I at INBRX00976) This slide sets out two groupings of candidates, including a grouping of six candidates for "PD-L1 x 4-1BB Bispecifics" that includes INBRX-105 (as well Genmab's GEN1046 and Merus's MCLA-145). *See supra* n.18. But the slide does not include reference I-Mab's TJ-L14B. (D.I. 144, ex. I at INBRX00976)

Beyond these Inhibrx documents, two I-Mab-created documents similarly do not list Inhibrx as a competitor. The first of these is a "[c]ompe[]titive [i]ntelligence" planner for the November 2021 Society of Immunotherapy Conference ("SITC") annual meeting; the document was generated by I-Mab's alliance management and business intelligence team, and it was circulated in order to assist I-Mab employees who were preparing to attend the conference. (D.I. 143, ex. C at 43, 78; D.I. 144, ex. K at IMAB-DE0001053; Tr. at 99) A section of the planner relating to the 4-1BB target lists 12 companies and associated drugs, but this list does not include

[19] The competitors listed on this portion of the 2021 Form 10-K include Regeneron Pharmaceuticals, Inc., Adimab LLC, Genmab A/S, Macrogenics, Inc., Merus N.V., MorphoSys AG, Numab Therapeutics AG, Amgen, Inc., Xencor Inc., and Zymeworks Inc. (D.I. 144, ex. H at INBRX01053) The 2021 Form 10-K notes more generally that Inhibrx's "competitors also include large pharmaceutical and biotechnology companies who may be developing therapeutic candidates with mechanisms similar to or targeting the same indications as our therapeutic candidates." (*Id.*)

Inhibrx. (D.I. 144, ex. K at IMAB-DE0001062-63; Tr. at 100-01)[20] The second I-Mab document is a similar April 2022 "[c]ompe[]titive [i]ntelligence" planner for a 2022 American Association of Cancer Research ("AACR") meeting. (D.I. 144, ex. L at IMAB-DE0001125; Tr. at 102) The section relating to the 4-1BB target in this planner lists 20 companies and drugs, but not Inhibrx or INBRX-105. (D.I. 144, ex. L at IMAB-DE0001129-30; Tr. at 104)[21]

On the other hand, however, it is also clear that a number of individuals knowledgeable in the field (using whatever definition of "competitor" they thought appropriate) believed that I-Mab and Inhibrx were competitors in and around November 2021.

For example, notwithstanding the two I-Mab documents just discussed, there are plenty of I-Mab-related documents that suggest that I-Mab did think Inhibrx to be a top competitor. For example, a September 2019 I-Mab presentation entitled "TJ-L14B/ABL503 (PD-L1x4-1BB BsAb)" (the "September 2019 PD-L1x4-1BB BsAb presentation") reviews the "[c]ompetitive landscape" with respect to PD-L1x4-1BB bispecific antibodies—and it includes Inhibrx in a listing of eight companies with such molecules. (D.I. 157, ex. 36 at IMAB-DE0006829; Tr. at 77) The September 2019 PD-L1x4-1BB BsAb presentation also contains a slide providing a "[b]riefing" with respect to INBRX-105, as well as slides that specifically compare I-Mab's TJ-L14B, Inhibrx's INBRX-105 and Merus's MCLA-145. (D.I. 157, ex. 36 at IMAB-DE0006830, -

[20] Dr. Guo speculated that Inhibrx may not have been listed in this document because it did not have a poster or presentation at the meeting. (Tr. at 101-02) But Dr. Guo admitted that he did not know for sure whether this was the case. (*Id*.) And Dr. Eckelman testified that Inhibrx actually did present three posters at the November 2021 SITC meeting, including a poster regarding INBRX-105. (*Id.* at 199-200, 229)

[21] Dr. Guo again speculated that this may have been because Inhibrx did not have a poster or presentation listed for the AACR 2022 meeting. (Tr. at 104-05) Again, though, he admitted that he did not know for sure whether this was the case. (*Id*.)

831, -835; Tr. at 79-80) Additionally, a January 2021 I-Mab presentation lists the "[c]ompetitive [l]andscape" with respect to TJ-L14B, and it includes Inhibrx and INBRX-105 in a listing of six companies and their respective molecules. (D.I. 157, ex. 37 at IMAB-DE0007488) One slide in the presentation again compares TJ-L14B to INBRX-105 and MCLA-145, and it specifically refers to "*competitor* Inhibrx." (*Id.* at IMAB-DE0007489 (emphasis added))[22]

I-Mab also suggested that Inhibrx was a competitor in I-Mab's SEC filings. In I-Mab's Form 20-F for the fiscal year that ended December 31, 2020, it discussed its TJ-L14B antibody and noted that "several companies have been developing PD-L1 x 4-1BB bi-specific antibodies, and the most advanced are from Genmab, Inhibrx and Merus, all in Phase 1." (*Id.*, ex. 40 at IMAB-DE0006429) And in its Form 20-F for the fiscal year that ended December 31, 2021, I-Mab again stated that several companies were developing PD-L1x4-1BB bispecific antibodies, "with the most advanced being developed by Genmab and Inhibrx, which are both currently in Phase 2 trials." (*Id.*, ex. 41 at IMAB-DE0008051)[23]

In addition to this I-Mab-related evidence, the record shows that at least some third parties viewed I-Mab and Inhibrx as competitors in the relevant time frame. For instance, a

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[22] And there are more internal I-Mab-related documents like this in the record. For example, a June 2020 I-Mab presentation regarding "I-Mab Bi-specific Molecules for Immuno-Oncology" notes that TJ-L14B is a "potential best-in-class PD-L1x4-1BB" bispecific antibody with "[c]ompetition" from "[t]wo" bispecific antibodies from Inhibrx and Merus, which were both in Phase 1 clinical trials. (D.I. 157, ex. 38 at IMAB-DE0007413) Another undated ABL Bio presentation in the record compares I-Mab's TJ-L14B to INBRX-105 and MCLA-145, noting that I-Mab's antibody shows "[s]uperior [t]arget-specific [b]inding and [a]ctivity[,]" and summarizes the clinical trials of TJ-L14B, INBRX-105, MCLA-145 and GEN1046. (*Id.*, ex. 39 at IMAB-DE0006927-28)

[23] In addition to the above-referenced documentary evidence from I-Mab on this score, Dr. Guo and I-Mab's Chief Business Officer, Dr. Weimin Tang, also testified that they believed that I-Mab was an Inhibrx competitor—particularly by the point in which the two entities were working to develop PD-L1x4-1BB bi-specific antibodies at the same time. (Tr. at 74, 89, 125, 135-36)

September 2021 JMP Analysis Report on Inhibrx (the "JMP Report") explained that "[w]hile Inhibrx's platform technology generates a unique class of therapeutics, we believe there are several competitors working toward similar goals with different technologies or approaches." (D.I. 144, ex. J at INBRX03420)[24] It then identifies I-Mab as a "[m]ajor [c]ompetitor[]" of Inhibrx's INBRX-105, since I-Mab also has "a bispecific antibody targeting PD-L1 and 4-1BB[.]" (*Id.*)[25] The next page of the report includes a chart entitled "Competitor Analysis of Inhibrx Assets[,]" and for INBRX-105, it lists four competitors: Numab Therapeutics (which is listed as having a competing trispecific antibody), Genmab, Merus and I-Mab. (*Id.* at INBRX03421)[26] Upon receiving this report, Mr. Lappe forwarded it to Dr. Eckelman on September 21, 2021. (*Id.* at INBRX03372; Tr. at 211-13) Mr. Lappe also forwarded it to Inhibrx's general counsel and Chief Financial Officer, as well as to Inhibrx's remaining board members. (D.I. 146, ex. 4 at INBRX02993; D.I. 143, ex. D at 116; Tr. at 30, 213)

Furthermore, in July 2021, the journal *Vaccines* published a peer-reviewed paper entitled "Bispecific Antibodies: A Smart Arsenal for Cancer Immunotherapies"; in the article, the authors identified Inhibrx's INBRX-105 and I-Mab's TJ-L14B in a table among several "[i]mmune modulating bispecific antibody formats in clinical trials for cancer therapy." (D.I.

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[24] The JMP Report was prepared by Reni J. Benjamin, PhD, an analyst with JMP, which is a small investment bank. (D.I. 144, ex. J at INBRX03373; D.I. 157, ex. 22 at 107-08; Tr. at 211) Dr. Benjamin is one of six market analysts in the industry that focuses on Inhibrx, for the purpose of providing information to investors and potential investors. (D.I. 157, ex. 22 at 108-09)

[25] This identification was made on page 48 of the 60-page report. (D.I. 144, ex. J at INBRX03420)

[26] When asked about the JMP Report during a deposition, Mr. Lappe suggested that Dr. Benjamin must have been using an "incredibly broad[]" definition of "competitor." (D.I. 157, ex. 22 at 111-12)

157, ex. 43 at IMAB-DE0008619-20) The paper later notes that TJ-L14B is currently in Phase 1 clinical trials and is "anticipated to show strong antitumor efficacy with no liver toxicity due to the localized activation of 4-1BB in tumors." (*Id.* at IMAB-DE0008635)[27]

So if one were to pause here and to summarize the record evidence listed above, one might conclude that, as of November 2021: (1) there is some good evidence that Inhibrx did not consider I-Mab to be a competitor; (2) while not entirely one-sided, there is some good evidence that I-Mab did consider Inhibrx to be a competitor; and (3) there is evidence that a few knowledgeable third parties considered I-Mab and Inhibrx to be competitors. But again, each of those parties' views on this score would be dependent on whatever idiosyncratic definition of "competitor" that party happened to be using at the time.

In contrast, here the Court is not considering the "competitor" question in a vacuum. That is, the Court is not assessing the issue based on whatever definition of "competitor" Inhibrx or I-Mab or JMP or anyone else may have had in their head at the relevant time. Instead, the Court must utilize the particular definition of "competitor" set out in the Confidentiality Order. That is because for the unresolved standing issue in question, the Court is trying to determine whether the parties to the Confidentiality Order would have intended to enter into a contractual agreement with someone like Dr. Eckelman, or whether someone like Dr. Eckelman would have been an intended third-party beneficiary of that contract. (D.I. 97 at 9-10; D.I. 141 at 4-7 & nns. 2-3) And surely, in making that determination, the parties would have been guided by the

[27] With respect to INBRX-105, Mr. Lappe noted that the [redacted] (D.I. 157, ex. 22 at 203-05)

specific definition of "competitor" that they chose to include in the relevant Confidentiality Order. (D.I. 97 at 9-10; D.I. 141 at 4-7 & nns. 2-3)

So that brings us back to the Confidentiality Order's definition of the term:

> A "Competitor" is a person or entity endeavoring to engage in the same or similar lines of business, provide the same or similar services, sell the same or similar products, and/or operate in the same markets, as well as any person or entity who are actually engaged in any of these activities.

(D.I. 62, ex. A at ¶ 8) This is a very broad definition in a number of ways.

For one thing, the definition encompasses several different scenarios. In other words, pursuant to the definition, a person or entity is a competitor if he/she/it is: (1) endeavoring to engage in the same or similar lines of business; (2) actually engaged in the same or similar lines of business; (3) endeavoring to provide the same or similar services; (4) actually providing the same or similar services; (5) endeavoring to sell the same or similar products; (6) actually selling the same or similar products; (7) endeavoring to operate in the same market; *or* (8) actually operating in the same market.[28] (*See* D.I. 155 at 5-6; Tr. at 270-71)

[28] At the November 8 hearing, it became clear that Dr. Eckelman's view of what the "competitor" definition covers is different than how the Court has set it out above. Dr. Eckelman testified that he thought that because the definition uses the term "endeavoring to" in close proximity only to the act of "engage in the same or similar lines of business[,]" then the "endeavoring to" term only modified that act—and not the other three listed acts of "provide the same or similar services" or "sell the same or similar products" or "operate in the same markets[.]" (Tr. at 185, 221-23, 292-93; *see also* D.I. 62, ex. A at ¶ 8; D.I. 156 at 15) Dr. Eckelman's reading of the definition was not reasonable. That is because the contract unambiguously makes clear that the "endeavoring to" language modifies all four types of acts described therein. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."). Perhaps the easiest way to see this is to note that the definition of "competitor" ends with the phrase "as well as any person or entity who are actually engaged in any of these activities." (D.I. 62, ex. A at ¶ 8) This text demonstrates that both the "endeavoring to" and "actually engaged" language modifies all four of the acts described in the definition (i.e., "any of these [four] activities"). (Tr. at 221-22) Indeed, Dr. Eckelman's contrary interpretation would render the "as well as" language largely

For another, some of the wording used in the definition is quite open-ended. For example, the definition captures companies that are "endeavoring to" develop products—even if neither company has commercial products yet on the market. (Tr. at 271) Additionally, the definition does not require that two companies' lines of businesses, services or products must be identical—rather, they just need to be "similar." (D.I. 155 at 6) Moreover, the definition uses expansive terms such as "line[] of business"—a phrase that could be interpreted to mean that if two companies were simply endeavoring to engage in the "pharmaceutical business," then they are competitors.

In sum, I-Mab and Tracon could have negotiated a narrow definition of "competitor," but they chose not to. Instead, they defined the term in a wide-ranging manner.[29]

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superfluous, because as to each of the three listed acts other than "engage in the same or similar lines of business," Dr. Eckelman's reading would have the "competitor" definition twice noting that a person "actually engaged in any of these activities" is a competitor. That would be antithetical to a key tenant of contract interpretation, which disfavors the use of superfluous language. (D.I. 155 at 6 n.1 (citation omitted); Tr. at 294-95)

[29] I-Mab, both in its pre-hearing brief and at the outset of the November 8 hearing, contended that as part of the March 2021 drafting process for the Confidentiality Order, it intentionally expanded the definition of "competitor" from that in the Court of Chancery's sample order. I-Mab suggested that it had done so in order to further protect its confidential information by adding language that covered persons or entities "endeavoring to engage in the same or similar lines of business" and/or endeavoring to "operate in the same markets[.]" (D.I. 145 at 6-7 (citing D.I. 146, ex. 6 at 114; *id.*, ex. 7 at ¶ 7) (internal quotation marks omitted); *see also* Tr. at 23-24; Defendants' Evidentiary Hearing Exhibit 18) In support of this argument, I-Mab pointed to a sample Confidentiality Order that was available on the Court of Chancery's website, which defined "'[c]ompetitors'" simply as "persons or entities engaged in the same or similar lines of business as the Producing Party." (D.I. 146, ex. 7 at ¶ 7)

However, during the November 8 hearing, Defendants' counsel ably demonstrated that I-Mab's argument in this regard was incorrect. As it turns out, the sample Confidentiality Order that I-Mab had pointed to was adopted in August 2021. (*See* Tr. at 55-56) Back in March 2021, however, the sample Confidentiality Order available on the Court of Chancery's website included the "endeavoring to engage/operate in" language. (Defendants' Evidentiary Hearing Exhibit 14 at 1 & ¶ 8) Indeed, in reviewing the correspondence between I-Mab's counsel (who was different than its counsel in this case) and Tracon's counsel during the drafting of the

With this in mind, when applying the Confidentiality Order's broad definition of the term, it becomes clear that I-Mab and Inhibrx were in fact "competitors" in the relevant time frame. This is so, at a minimum, because the two entities were then endeavoring to engage in and were actually engaged in the same "line of business" as each other. Even assuming *arguendo* that being in the same "line of business" requires something more than the companies both working in the "pharmaceutical business," there can be no real question that I-Mab and Inhibrx fit this bill. With regard to I-Mab's work on TJ-L14B and Inhibrx's work on INBRX-105, the two companies are engaged in the development of important antibodies.[30] And it is the undisputed testimony (including the testimony of Dr. Guo and I-Mab's Chief Business Officer, Dr. Weimin Tang) that these antibodies are very similar, in that:

- both are bispecific antibodies;
- both relate to the immuno-oncology field;
- both target the same two molecular sites, PD-L1 and 4-1BB;
- both are intended to treat solid tumors in cancer patients;
- both are being developed for the global market; and
- both are currently being tested in Phase 1 clinical trials.

Confidentiality Order, it is clear that this "endeavoring to" language was already present in the Court of Chancery's then-form order. (Defendants' Evidentiary Hearing Exhibit 13 at IMAB-DE0009713, -9725) By the end of the November 8 hearing, I-Mab's counsel admitted that it had been mistaken and that it had wrongly assumed that I-Mab had expanded the definition of "competitor" in this way during the drafting process. (Tr. at 276-77; *see also* D.I. 155 at 19 n.2)

In their post-hearing brief, Defendants made much of this mess up, spending the first three pages of their Argument section recounting how "I-Mab [f]abricated the [d]rafting [h]istory of the Confidentiality Order[.]" (D.I. 156 at 4-7; *see also id.* at 1) And to be sure, this was an unfortunate moment for Plaintiff at the November 8 hearing. (Though to be clear, there is no evidence that I-Mab or its counsel "fabricated" anything intentionally. Instead, they appear simply to have made a mistake on this point.). But in any event, regardless of who crafted the definition of "competitor," it is nevertheless a very broad definition. And it is that broad definition that the Court must apply in determining whether Inhibrx was an I-Mab competitor as of November 2021.

[30] It is of course possible that the companies could be said to compete with one another with respect to other antibodies as well, (*see, e.g.*, D.I. 155 at 13; Tr. at 75-76), but the Court herein focuses on the evidence specific to TJ-L14B and INBRX-105.

(Tr. at 74-76, 117, 125-29; *see also* D.I. 155 at 9-10) While there may be some structural differences between TJ-L14B and INBRX-105, it cannot be that the presence of any such difference, no matter how small, renders the two development efforts non-competing. After all, as Dr. Guo aptly noted, the two drugs would necessarily have to have "slightly different structures" because otherwise, they would "be the same molecule" and thus could be "subject to . . . [allegations of] patent infringement[.]" (Tr. at 80)

Additionally, it is worth noting that at least one other independent third party has concluded that [redacted] I-Mab alerted the arbitration tribunal (the "Tribunal") to this issue in January 2022—about one month after I-Mab had received Dr. Eckelman's expert report. (D.I. 157, ex. 28; *id.*, ex. 29 at ¶ 6; *see also id.*, exs. 30, 31) The Tribunal ultimately concluded that [redacted]

[redacted] The Tribunal's conclusion is of course not binding on the Court. But it is certainly a notable data point that: [redacted]

The Court is not dissuaded from its conclusion by the fact that Inhibrx and its leadership team did not subjectively view these two development efforts as being in competition with each other. That is because Inhibrx's view of who is a "competitor" appears to clash with the definition in the Confidentiality Order. It also appears to be a volatile (and at times quixotic) interpretation.

Take the testimony of Mr. Lappe, for instance. In his October 2022 deposition, Mr. Lappe stated that he does not pay attention to who Inhibrx's competitors are and that, in his view, Inhibrx did not have *any* competitors. (D.I. 146, ex. 3 at 54-55) According to Mr. Lappe, "[n]o one" at Inhibrx "really" pays attention to who its competitors are. (*Id.* at 54) Mr. Lappe added that until Inhibrx has the "totality of clinical data" for INBRX-105 and other potentially competing drugs, it has "no idea" who it competes with. (*Id.* at 55) Yet when Inhibrx filed its 2021 Form 10-K (previously discussed above), it seems like Inhibrx did in fact have "an idea" about who its competitors were. In that filing, Inhibrx reported:

> The biotechnology industry is characterized by rapid evolution of technologies, *fierce competition* and strong defense of intellectual property. . . . [*W*]*e face competition* from major pharmaceutical and biotechnology companies, academic institutions, governmental

> agencies and public and private research institutions, among others.

(D.I. 144, ex. H at INBRX01053 (emphasis added)) Inhibrx then listed by name its 40 "primary competitors[.]" (*Id.*) So in contrast to Mr. Lappe's testimony in this case, Inhibrx's 2021 Form 10-K conveys to the public that Inhibrx does in fact (in Inhibrx's subjective view) have quite a lot of competitors. Indeed, it seems to pay close attention to those competitors.[31]

As for Dr. Eckelman, it is hard to pin down exactly when, in his view, the makers of two bispecific antibodies might actually compete with each other. But whatever that view is, it certainly does not align with the broad definition of "competitor" found in the Confidentiality Order. As a general matter, Dr. Eckelman testified that even if "two antibodies bind the same target or pair of targets," that does not mean that the antibodies compete, for true competition cannot be determined until there is a "very robust clinical dataset" regarding the respective antibodies that spans "across indications and patient populations[.]" (Tr. at 188-90; *see also id.* at 210-11 ("[W]e need to generate the totality of clinical data to figure [out] if and who [Inhibrx's] competitors may be."); *id*. at 216-17) According to Dr. Eckelman, one would need to know all about the "efficacy and tolerability" of the antibodies in the clinic before making a determination regarding competition. (*Id.* at 196) In Dr. Eckelman's view, even if two antibodies share the same target (or pair of targets) and are "very similar in terms of their overall design[,]" if they have different toxicity, potency, efficacy, tolerability or stability profiles (which in turn can have an impact on the patient population that receives the antibody), then they likely do not compete. (*Id.* at 188-91; *see also id.* at 198) In other words, a molecule "must have

[31] Similarly, while Mr. Lappe testified that Inhibrx does not compete with Genmab or Merus, (D.I. 143, ex. D at 61-62), Inhibrx's investor presentation appeared to identify, *inter alia*, Genmab's and Merus's PD-L1x4-1BB bispecific antibodies as competing candidates to Inhibrx's INBRX-105, (D.I. 144, ex. I at INBRX00976).

the same stability function safety profile [and] be able to exert the same clinical benefit . . . and be in the same line of therapy" in order to compete with INBRX-105. (*Id.* at 243) Dr. Eckelman also testified that if another company's drug was "inferior" to Inhibrx's drug, the two drugs would not compete with one another. (D.I. 143, ex. B at 101)

Yet Dr. Eckelman did not use this exceedingly narrow definition of competition when he helped Inhibrx prepare its 2021 Form 10-K. In that document, as noted above, Inhibrx listed tens of competitors and explained that it faced competition from entities in a broad and diverse array of sectors. (Tr. at 245-46; *see also* D.I. 144, ex. H at INBRX01053) When asked about this apparent contradiction during the November 8 hearing, Dr. Eckelman acknowledged that, for purposes of his company's SEC filing, he did not "need the entirety of the clinical data of molecules in order to determine whether Inhibrx and another company are competitors[.]" (Tr. at 246)[32] Dr. Eckelman stated that in the 2021 Form 10-K, the competitors listed were other companies that "have similar capability to build novel therapeutics or discover novel therapeutic types. . . . based on [Inhibrx's] knowledge of their capabilities as antibody engineers." (*Id.* at 245-46)[33] Dr. Eckelman then attempted to describe the companies listed in the 2021 Form 10-K as "potential[] competitors"—companies that "could eventually become competitors"—before

[32] While the 2021 Form 10-K lists Genmab as a primary competitor (and, as discussed above, Inhibrx's investor presentation also appears to identify Genmab's PD-L1x4-1BB bispecific antibody as a competing candidate to Inhibrx's INBRX-105), (D.I. 144, ex. H at INBRX01053; *id*., ex. I at INBRX00976), Dr. Eckelman would not admit that Genmab was a competitor during the November 8 hearing, (Tr. at 244).

[33] Dr. Eckelman did not list I-Mab as a competitor in the 2021 Form 10-K even though he was by then aware that the company had a bispecific antibody that targeted the same two molecular sites as did INBRX-105, and even though he was aware that I-Mab had been claiming it was a competitor of Inhibrx. (Tr. at 208-09) This was because he did not believe that the company "fall[s] into the category of antibody drug discovery companies working on novel therapeutic targets." (*Id*. at 209; *see also id.* at 252)

being forced to acknowledge that in the filing itself, Inhibrx described the entities as those that "are, in fact, competitors." (*Id.* at 247-48)[34]

Turning to his testimony specifically about competition with INBRX-105, here again, Dr. Eckelman's point of view seemed to waver. For example, in certain portions of his testimony, Dr. Eckelman testified that he *did not know yet* whether I-Mab's TJ-L14B will compete with INBRX-105. (*Id.* at 243, 248; D.I. 143, ex. B at 101) He testified that he would not consider I-Mab's TJ-L14B and Inhibrx's INBRX-105 to compete "until [Inhibrx] understand[s] the tolerability and activity profile of the molecules and what line of therapy they ultimately go in." (Tr. at 251; *see also id.* at 255, 260-61 (Dr. Eckelman explaining that he cannot determine whether TJ-L14B and INBRX-105 compete until "we have a much more robust set of clinical data as well as tolerability and . . . the specific patient population [the drugs will be targeted to]")) This is so even despite Dr. Eckelman's acknowledgment that TJ-L14B could capture some of the immuno-oncology market and that it was "possible" that the two drugs could compete in the future—because it is also possible that the two drugs may not end up doing so, and the answer will not be known until the "efficacy and tolerability profiles" of the drug candidates are made clear. (*Id.* at 253-55)

However, at other points in his testimony, Dr. Eckelman conveyed his belief that INBRX-105 and TJ-L14B *do not* compete, in light of the "molecular design" and the

[34] In the end, this portion of Dr. Eckelman's testimony made clear that it simply does not make much sense to say that Inhibrx needed to have seen the totality of the clinical data of another company's drug candidate in order to determine whether that other company was an Inhibrx competitor. (Tr. at 245-48) To the contrary, the record evidence suggests that reasonable people in the drug development business (including Inhibrx) make decisions all the time about whether the company they work for competes with another drug developer. And they do so without having at their disposal the full array of clinical data regarding those entities' two potentially competing drug candidates.

"engineering" of these two molecules. (*Id.* at 194) TJ-L14B is twice the molecular weight of INBRX-105, and according to Dr. Eckelman, the research demonstrates that smaller molecules "more easily penetrate[] into tumor tissue than larger molecules" and do so more efficiently. (*Id.* at 192-93, 204) Further, Dr. Eckelman notes that the binding domains on INBRX-105 are in close proximity to one another, while the binding domains on TJ-L14B are on opposite ends of the molecule, with the former design being "superior[.]" (*Id.* at 193-94; *see also id.* at 254 (Dr. Eckelman testifying that INBRX-105 is "superior" to TJ-L14B))

If you meld all of Dr. Eckelman's November 8 hearing testimony about competition together, it suggests that: (1) one needs all of the clinical data before one can begin to determine whether two drug candidates are competitors; (2) any possible difference, no matter how small, between drug candidates could mean that the parties are not competitors; and (3) if a company views its drug candidate as superior to other drug candidates, then it will not face any competition. The Court doubts that this extremely narrow, "eye-of-the-needle"-type of "competitor" definition aligns with how most objective observers in the relevant field would understand the term. But the bigger point here is that this definition surely does not gibe with the much broader definition of "competitor" found *in the Confidentiality Order*.[35] That definition does not say anything like "a '[c]ompetitor' is a person or entity developing a drug that, upon review of the totality of a robust clinical dataset, has the same efficacy, safety, and stability profile, exerts the same clinical benefit, has the same molecular profile, and is in the same line of therapy in the same patient population" as the drug made by the signatory's company. Nor does it say that "a '[c]ompetitor' is a person or entity developing a drug that is of equivalent or greater

[35] Indeed, Dr. Eckelman's definition of "competitor" sounds more like it refers to products that are *identical* or *near-identical*, as opposed to products that *compete* or *endeavor to compete* with each other.

quality." And in light of what the Confidentiality Order's controlling definition *does* say, I-Mab and Inhibrx are competitors because, at minimum, they were endeavoring to engage in or were actually engaged in the same line of business—the development of I-Mab's TJ-L14B and Inhibrx's INBRX-105 bispecific antibodies. It does not matter that these antibodies "have some differences on which each company rests its claims of superiority[,]" as "[t]hat is the nature of competition." (D.I. 155 at 10)

2. Could Dr. Eckelman Have Reasonably Determined that Inhibrx Was a Competitor In November 2021?

Having determined that I-Mab and Inhibrx were competitors at the relevant time pursuant to the definition of "competitor" in the Confidentiality Order, the next question the Court must answer is: Was this something that Dr. Eckelman could have reasonably determined in November 2021? (*See* Tr. at 267-69, 286-87) For a number of reasons, that answer is an easy "yes."[36]

When Dr. Eckelman signed the Undertaking in November 2021, he was very familiar with I-Mab. Between 2017 and 2019, I-Mab and Inhibrx discussed a collaboration in which I-Mab would license and develop INBRX-105 for the China market. (D.I. 143, ex. B at 109-10; D.I. 157, ex. 22 at 102, 134; Tr. at 82, 175-76, 178-79) Dr. Eckelman and Mr. Lappe were personally involved in these discussions. (D.I. 143, ex. B at 110; Tr. at 176, 183) Dr. Eckelman

[36] Defendants suggest that in order to figure out what an expert in Dr. Eckelman's shoes could have reasonably determined at the relevant time, the Court could consider extrinsic evidence about the parties' course of performance—specifically evidence about what I-Mab's experts in the arbitration did or did not do to determine whether they were competitors of Tracon. (D.I. 156 at 18-19 (citing cases)) They then argue that because I-Mab presented no evidence on that issue, this somehow makes Dr. Eckelman's own determination that Inhibrx was not a competitor a reasonable one. (*Id.*) This is not a persuasive counter-argument. The *lack of evidence* in the record about I-Mab's experts or what due diligence those people did regarding the competitor issue does not blunt the impact of the *substantial amount* of record evidence regarding Dr. Eckelman's due diligence (or lack thereof) at the relevant time.

noted that I-Mab "had built an impressive clinical development capability in China." (Tr. at 176) The discussions between I-Mab and Inhibrx were about the design and function of INBRX-105 and studies relating to the antibody (the parties also discussed collaborating with respect to another trispecific molecule). (D.I. 157, ex. 22 at 154; Tr. at 177)[37] During the discussions, I-Mab revealed to Inhibrx that I-Mab's pipeline included a PD-L1 monoclonal antibody. (D.I. 157, ex. 15 at IMAB-DE0000350; *id.*, ex. 44)

From these discussions, then, Dr. Eckelman at least knew that I-Mab was interested in working on a bispecific antibody targeting the PD-L1 and 4-1BB sites. And he could have easily learned from "publicly available and easily accessible" sources that, as of November 2021, I-Mab had subsequently begun to develop such an antibody. (D.I. 155 at 14-17)

For instance, Dr. Eckelman was present at the SITC meeting in November 2021, which took place only a few days before he signed the Undertaking. Both I-Mab and Inhibrx were presenting posters about their respective PD-L1x4-1BB bispecific antibodies at this very meeting. (Tr. at 229-30) In his November 8 hearing testimony, Dr. Eckelman stated that although he was at this conference, he did not actually see I-Mab's poster (instead, he only later became aware that I-Mab had presented a poster at the meeting). (*Id*.) But elsewhere in his testimony, Dr. Eckelman acknowledged that if a company presented a poster at this conference, that is something that would have been "potentially well known, if you're someone who cares about that." (*Id.* at 201)

[37] Inhibrx ultimately partnered with another company, Elpiscience, with respect to the development and licensing of INBRX-105 in China, Hong Kong, Macao and Taiwan. (Tr. at 227-28)

Alternatively, had Dr. Eckelman wished to confirm whether I-Mab was attempting to commercialize a 4-1BB-targeting bispecific antibody in November 2021, he could have simply taken a look at I-Mab's website. Had he done so, he likely would have seen a story published on I-Mab's home page reporting preclinical data for the antibody. (Tr. at 226; Plaintiff's Evidentiary Hearing Exhibit 47)[38] Or he could have just scanned the entirety of the JMP Report that he had received two months before being retained as an expert (instead of only reviewing the summary). In that document, I-Mab was identified as a "[m]ajor [c]ompetitor" of Inhibrx (due to the fact that both companies were developing bispecific antibodies targeting PD-L1x4-1BB). (Tr. at 214, 256-57; D.I. 144, ex. J at INBRX03420) Or Dr. Eckelman could have looked at I-Mab's public SEC Form 20-F filing from 2020, in which I-Mab conveyed that Inhibrx was a competitor that, like it, was developing a PD-L1x4-1BB bi-specific antibody. (D.I. 157, ex. 40 at IMAB-DE0006429) In short, it was easily publicly verifiable that as of November 2021, I-Mab had begun to develop its own bispecific antibody targeting the PD-L1 and 4-1BB sites.

But Dr. Eckelman did no such due diligence, which under the circumstances, is hard to understand. To recap, in November 2021, Dr. Eckelman was about to sign an Undertaking that he believed would bind him to the terms of the Confidentiality Order in the arbitration. As noted above, that Confidentiality Order emphasized how under no circumstances should a competitor receive a party's confidential material. So by signing that Undertaking, Dr. Eckelman was publicly communicating his assurance that he and Inhibrx were not then I-Mab competitors,

[38] I-Mab's homepage displayed a link to this story as of November 7, 2022. (Plaintiff's Evidentiary Hearing Exhibit 47) Similarly, as of September 2022, I-Mab's website featured a story entitled "Building Globally Competitive & Risk-Balanced Global & China Portfolios" that discussed, in connection with I-Mab's global portfolio, I-Mab's "[b]i-specific antibody panel" including TJ-L14B. (Plaintiff's Evidentiary Hearing Exhibit 41 at IMAB-DE0008266-69; Tr. at 232-33)

pursuant to the very expansive definition that the Confidentiality Order provided for that term. And yet before taking this step, Dr. Eckelman made *absolutely no effort* to check on the status of I-Mab's then-current activities. (Tr. at 225, 233-34)

So how did Dr. Eckelman determine in November 2021 that, in his view, I-Mab and Inhibrx were not competitors (such that he could sign on as an expert)?

Sometime around November 2021, Dr. Eckelman first reviewed the Confidentiality Order's definition of "competitor[.]" (*Id.* at 171-73, 220-21) He then concluded that Inhibrx was not an I-Mab competitor based solely on his understanding of I-Mab's business—an understanding he had gained from Inhibrx's licensing-related discussions with I-Mab back in 2017-19. (*Id.* at 178, 182, 224-26, 233-34) These discussions had led Dr. Eckelman to believe that I-Mab was interested in developing Inhibrx's molecule because I-Mab had not built one itself and did not have the capabilities to do so. (*Id.* at 180-81) Dr. Eckelman explained that based on this years-old information, he thought that I-Mab's line of business was in "licensing molecules for the China market[,]" while Inhibrx's line of business was "innovative drug development predominantly in the [United States]." (*Id.* at 179-80, 184, 186)[39] According to Dr. Eckelman, Inhibrx is not "endeavoring to be in [the China] market." (*Id.* at 184)[40] Thus Dr. Eckelman did not recognize that by November 2021, I-Mab was developing its own PD-L1x4-1BB antibody. And so based on this stale knowledge base, Dr. Eckelman concluded that Inhibrx

[39] As of November 2021, Dr. Eckelman had also seen a press release regarding I-Mab's collaboration with AbbVie relating to CD47; this press release also underscored to him that China was I-Mab's territory. (Tr. at 224-25) This collaboration was announced in September 2020. (D.I. 157, ex. 19)

[40] Despite this claim, Dr. Eckelman acknowledged that Inhibrx still has a say in the "clinical design" for INBRX-105 in China. (Tr. at 229; *see also* D.I. 155 at 17)

and I-Mab were in or were endeavoring to be in different lines of business, and that they operated in different geographic markets, such that the definition of "competitor" did not apply to Inhibrx. (*Id.* at 184-86)[41] These efforts to assess the competition issue were by no means reasonable.[42]

C. Conclusion

In sum, Dr. Eckelman is not a party to nor an intended third-party beneficiary of the Confidentiality Order, because: (1) Dr. Eckelman was employed by Inhibrx in November 2021; (2) Inhibrx was then (and is now) a competitor of I-Mab as that term is defined in the Confidentiality Order; and (3) Dr. Eckelman could have reasonably determined that fact at the relevant time. (*See* D.I. 97 at 9-10) Thus, Dr. Eckelman has no standing to enforce the forum-selection clause of the Confidentiality Order.

III. CONCLUSION

For the foregoing reasons, the Court DENIES the *forum non conveniens* portion of the Motion.

Because this Memorandum Opinion may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Opinion. Any such redacted version shall be submitted no later than **June 6, 2023** for review by the Court. It should be

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[41] Dr. Eckelman concluded that the "providing the same or similar services" language in the Confidentiality Order did not apply since Inhibrx "is not a service provider[,]" and that the "sell the same or similar products" language in the Order did not apply since Inhibrx does not have products. (Tr. at 185-86)

[42] Dr. Eckelman testified that prior to agreeing to serve as an expert, he spoke with Mr. Lappe and Inhibrx's general counsel, and that "no one objected[.]" (Tr. at 182) It is not clear whether Inhibrx's general counsel was provided with the Confidentiality Order's definition of "competitor" at this time.

accompanied by a motion for redaction that shows that the presumption of public access to judicial records has been rebutted with respect to the proposed redacted material, by including a factually-detailed explanation as to how that material is the "kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Opinion.