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FILED

November 22, 2023

HON. BRUCE J. KAPLAN, J.S.C.

And

DUGHI, HEWIT & DOMALEWSKI, P.C.

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Attorneys for Defendants Genentech, Inc., Hoffmann-La Roche Inc., GlaxoSmithKline LLC, and Roche Laboratories, Inc.

IN THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MIDDLESEX COUNTY

DOROTHY L. MASON,	SUPERIOR COURT OF NEW JERSEY
	LAW DIVISION, MIDDLESEX
Plaintiff,	COUNTY
	Docket No. MID-L-9710-14
VS.	
	FOSAMAX LITIGATION
MERCK SHARP & DOHME CORP.,	
GLAXOSMITHKLINE LLC., HOFFMAN-LA	ORDER DISMISSING
ROCHE, INC., GENENTECH, INC., and	DEFENDANTS ROCHE
ROCHE LABORATORIES, INC.,	LABORATORIES INC.,
	HOFFMANN-LA ROCHE INC.,
Defendants.	GLAXOSMITHKLINE LLC, and
	GENENTECH, INC. WITH
	PREJUDICE FOR FAILURE TO
	PROVIDE PROOF OF USE

THIS MATTER having been opened to the Court by Bowman and Brooke LLP, attorneys

for Defendants Roche Laboratories Inc. and Hoffmann-La Roche Inc., for an Order, pursuant to

the Court's July 7, 2023, Order and Rule 4:23-2(b), dismissing Plaintiff's Complaint with prejudice for failure to provide proof of use, and upon notice to all interested parties, and the Court having reviewed the submissions, and for good cause shown;

IT is on this 22nd day of November, 2023, ORDERED as follows:

1. Defendants Roche Laboratories Inc. and Hoffmann-La Roche Inc.'s Motion to

Dismiss be and **hereby is GRANTED**; and

2. Plaintiff's Complaint be and hereby is **dismissed with prejudice** as to Defendants Roche Laboratories Inc., Hoffmann-La Roche Inc., GlaxoSmithKline LLC, and Genentech, Inc., for failure to provide proof of use.

ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to R. 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

UNOPPOSED

ISI Bruce J. Kaplan HONORABLE BRUCE J. KAPLAN, J.S.C.

Statement of Reasons

This matter having been brought before the Court upon motion by Blank Rome LLP, attorneys for Defendants Roche Laboratories Inc., Hoffmann-La Roche Inc., GlaxoSmithKline LLC, and Genentech, Inc., ("Roche"), for an Plaintiff's complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide adequate POU. The Court has read and reviewed the papers submitted and notes that Plaintiff has not filed an opposition.

By way of relevant procedural history, On July 7, 2023, this Court entered an Order dismissing Plaintiffs' Complaint without prejudice and permitting Defendants Roche Laboratories Inc. and Hoffman-La Roche Inc. to file a motion to dismiss Plaintiffs' Complaint with prejudice if Plaintiffs failed to provide proof of use within sixty (60) days of the Court's Order. Proof of notice was provided to the Court showing notice was provided to Plaintiff's counsel.

In light of Plaintiff's failure to comply with this Court's Orders and in light of the additional time provided previously, this Court will be entering an Order dismissing this case with prejudice. The Court finds that despite notice and opportunity, Plaintiff has not provided the outstanding discovery, has not reinstated the complaint, or filed opposition.

In so doing, the Court notes pursuant to R. 4:23-5(a)(2), if "an order of dismissal ... without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 60 days from the date of the order, move on notice for an order of dismissal with prejudice." It is well-settled that "dismissal with prejudice is the ultimate sanction, [and that] it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party," <u>Zaccardi v. Becker</u>, 88 N.J. 245, 253 (1982) (internal citations omitted), "or when the litigant rather than the attorney was at fault." Ibid. (citing <u>Schlosser v. Kragen</u>, 111 N.J. Super. 337, 341 (1970)).

Our Supreme Court has also held that, "[t]he dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases where the order for discovery goes to the very foundation of the cause of action ... or where refusal to comply is deliberate and contumacious." <u>Schlosser</u>, 111 N.J. Super. at 341 (citing <u>Tsibikas v. Morrof</u>, 5 N.J. Super. 306 (App. Div. 1949)).

The unfortunate reality is given the length of time of non-compliance, and the lack of any opposition, the Court finds there is no "lesser sanction" that can suffice to remedy the violations of this Court's order.

More than sixty (60) days have passed since Plaintiff's Complaint was dismissed without prejudice and Plaintiff has failed to provide proof of use, has failed to file a Motion to Reinstate the case, and Plaintiff has failed to object to the requested relief. As a result, Defendant Roche's motion to dismiss with prejudice is granted.