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SUPERIOR COURT OF NEW JERSEY

COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, P.J.Cv.

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AMENDED MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE:	**In re Accutane Litigation**
DOCKET #:	**Case No. 271**
DATE:	**February 20, 2013**
MOTION:	**Recusal under R. 1:12-1, et. seq.**
ATTORNEYS:	**Michael Griffinger, Esq. – Defendant** **Christopher Seeger, Esq. - Plaintiff**

Defendant Hoffman-La Roche has filed this motion and asked this Court to recuse itself based on allegations of real or perceived bias against the defendant. Having considered the briefs and arguments of the parties as well as the applicable law, the Court denies the motion.

By Order of the Supreme Court of New Jersey dated May 2, 2005 all Accutane cases, except for a few specific cases, were assigned to this Court. This included pending cases and all cases to be filed by plaintiffs alleging injury as a result of the ingestion of Accutane, which is sold by the defendant.

Background on the Management of Accutane

The Court has managed the Accutane litigation using the same general management techniques employed for all mass torts assigned to it over the years. The Court maintains close supervision over the litigations. The management techniques include in-person management conferences every one to two months. Decisions made at these sessions result in orders binding on all cases in some instances, and in a specific group of pending cases or even a single case in other instances.

These management conferences are designed to make the management of hundreds or even thousands of cases feasible. These management conferences last for hours. Most are for at least four hours. Many last all day. Agenda items are submitted by the parties in advance so that all issues can be placed on the table at each conference. In addition, the parties are encouraged to request short telephone management conferences on any specific limited dispute that arises between the parties between management conferences. The parties are discouraged from filing motions on discovery issues, summary judgment issues, and similar topics until the issues have been raised and discussed at conferences. Motions are routinely filed each month on *pro hac vice* admissions and out-of-state commissions, etc. and they are handled outside of the conferences.

This level of management means counsel and the Court interact regularly in informal settings as these conferences are usually held in a meeting room rather than a courtroom. These

conferences are generally recorded from beginning to end. There have been discussions held off the record, both in the meeting room and in chambers, but these are exceptions to the Court's rule of recording even all day management conferences. Occasionally counsel from both sides have requested to speak with the Court *ex parte* and such discussions have been held with the permission of counsel from the other side. These usually relate to personal issues such as illness, family, etc., but over the years have involved some more general litigation issues, but are conducted only after the adversary consents.

Accutane probably has in excess of twenty-five thousand pages of transcripts out of which the parties have cited to a few in this application. In addition, at oral argument the parties acknowledged that this Court has made literally over a thousand rulings on contested issues. The Court tends to speak to counsel bluntly, honestly and at times forcefully when needed. The Court understands and respects the difficult job the lawyers for both plaintiffs and defendants have in representing their respective clients and the resulting enormous pressures on all counsel.

Legal Standards

Disqualification is governed by Rule 1:12-1 which addresses bias as a reason for recusal and includes in part (g) "when there is any reason which might preclude a fair and unbiased hearing and judgment or which might reasonably lead counsel or the parties to believe so." See Ferren v. City of Sea Isle, 243 N.J. Super. 522, 526 (App. Div. 1990). Rule 1:12-2 specifically allows any party on motion to seek disqualification of a Judge, but such motion should be filed "before trial or argument." Obviously, this is to prevent a party from waiting to obtain a ruling or a verdict in a trial, and only then move for recusal of a Judge if a decision is unfavorable. The motion must be made to the trial Judge being sought to be disqualified. See State v. McCabe, 201 N.J. 34, 35 (2010); Bennett v. Stewart, 155 N.J. Super. 326 (App. Div.), certif. denied, 77

N.J. 468 (1978). "It is not only unnecessary for a judge to withdraw from a case upon a mere suggestion that he is disqualified; it is improper for him to do so unless the alleged cause of recusal is known by him to exist or is shown to be true in fact." Hundred E. Credit Corp. v. Eric Schuster Corp., 212 N.J Super. 350, 358 (App. Div.), certif. denied,107 N.J. 60 (1986) (citing Clawans v. Schakat, 49 N.J. Super. 415, 420-21 (App. Div. 1958), certif. denied, 27 N.J. 156 (1958). However, a party seeking recusal need not "prove actual prejudice on the part of the court to establish an appearance of impropriety; an objective reasonable belief that the proceedings were unfair is sufficient." DeNike v. Cupo, 196 N.J. 502, 517 (2008).

Appearance at DRI Conference

The Court is frequently asked to participate in educational conferences on mass tort litigation and the Court lectures at one or two such conferences annually. Attorneys who attend can receive CLE credits. The Court has declined many such requests to lecture for various reasons. To avoid any appearance of bias, the Court asks if, and insists that, the program be open to members of both the plaintiff and the defense bars. If lawyers participate in a presentation, a plaintiff's attorney and a defense attorney must be on the panel. For most presentations, Judges from other jurisdictions have also participated.

DRI is an association of defense lawyers that calls itself "the Voice of the Defense Bar." The conference the Court appeared at in May 2012 was organized by the Drug & Medical Device Committee of the DRI. The panel, which was selected by the organizers, included Judge Moss from Philadelphia and a defense lawyer and a plaintiff's lawyer. The plaintiff's lawyer, David Buchanan, is well known in pharmaceutical litigation and has appeared before this Court; as has defense counsel who has also participated in conferences at which this Court has appeared. The mass tort bar is a relatively small and specialized group of attorneys. Many of the

attorneys across the country know each other and appear in litigation together as co-counsel or adversaries in several venues where mass tort litigation is ongoing.

In addition to Judge Moss, Judge Fallon, a well-respected Federal Judge with whom this Court worked in VIOXX® litigation with and who manages some of the most difficult MDL cases, appeared at the conference. A plaintiff's attorney involved in litigation before him, and who served on a plaintiffs' steering committee, appeared with Judge Fallon on the panel. This is common and, to this Court's knowledge, has never been questioned until this motion was filed. This Court's planned attendance was well known to all counsel. As was customary, a list of dates the courtroom will be "dark" was provided to the attorneys for the parties. This is a list of whole or half days when either the Court, or at times counsel, is not available for trial. Generally, in a six week trial there are several dates where the trial is not in session. Counsel can be guided accordingly in scheduling witnesses and preparation days.

When preparing for a seminar, this Court usually confers with other panelists only once before the conference to generally discuss the format, the time each member of the panel will speak, the order of presentation, whether there will be a question and answer portion, whether any of the panel members will use power point, etc. The details of each of our individual presentations are almost never discussed. Rather, there is ordinarily a general discussion of the division of topics to assure there is no overlap. Other than such general discussions, there would be no discussion of what Mr. Buchanan or any other panelist would speak about. As such, any suggestion that Mr. Buchanan and this Court engaged in improper *ex parte* communications is without merit. This Court is well aware that "a judge should not confer or meet with one party or attorney to the exclusion of the adversary unless there is express consent, or unless necessary on an aspect or matter having nothing to do with the merits or ultimate disposition of any issue."

Zuckerman by Zuckmerman v. Piper Pools, Inc., 232 N.J. Super. 74, 80 (App. Div. 1989). The conversation with Mr. Buchanan, preparatory for the conference, did not pertain in any way to the Accutane trial. In fact, no general legal issues were discussed.

Defense counsel never gave any indication they had even the slightest concern about the Court's appearance with plaintiff's counsel at this conference. It was expected that some defense attorneys from the Accutane litigation would attend, and they did. The same plaintiff's attorney is also counsel in Fosamax® litigation and some defense attorneys from that litigation were present and thanked the Court for attending. Consequently, no one could reasonably conclude that this Court's participation in the conference demonstrated bias towards one side or the other.

As to this Court's actual lecture, defense counsel suggests the Court discussed the Accutane litigation. This Court is almost always asked to advise the audience about what cases are pending before it and the status of the litigation. This Court does not have notes from the conference. The Court requested a transcript of the conference, but there was no recording made. The Court believes it listed all the litigations that were aggregated before the Court at the time of the conference. This Court believes it gave the same type of introductory remarks it gives on most occasions. The Court listed each type of litigation with some brief information such as:

1) Fosamax – This Court has X number of cases. It has had one bellwether trial in New Jersey with a verdict for the defense. There have been X number of federal trials with X verdicts for plaintiff and defendant. The amount of the verdict was X. The Court anticipates a future bellwether trial on femur fractures since all prior trials have involved jaw problems.

2) Accutane – There are X cases filed. There have been X bellwether trials. The verdicts have been as follows: XXX. The defendants are not engaged in settlement negotiations and have indicated they want to have additional trials. We are trying to schedule them as soon as possible and the next one is on X date.

3) Levaquin – There are X cases pending before this Court. There has been one bellwether trial with a defense verdict. There has been one federal trial with a defense verdict.

4) Pelvic Mesh – There are X cases pending before this Court involving both Gynecare and Bard cases. Counsel is currently preparing bellwether pool of cases so this Court can try its first case in the near future.

5) Bristol-Myers Squibb – This is an environmental litigation. There are X cases before this Court. The Court is currently managing this litigation and hope to schedule the first trial in the near future.

6) Stryker Trident - There are X number of cases pending before the Court.

7) Reglan – There are X number of cases etc.

This Court proceeds through all the cases that have been given multi-county litigation status before it. Defense counsel claims the Court's statement that they are not settling these cases demonstrates bias. However, defendants usually tout the fact that they are not settling cases as a way to discourage new cases from being filed. Defense counsel in this case or in any other case has never suggested to the Court they wanted to keep secret that they were not paying to settle cases. The opposite has occurred. Nothing was said about Accutane that was not public record and/or well known. Legal rulings or legal issues relating specifically to Accutane were never discussed.

There were two topics the Court did talk about in order to provide lawyers, of whom the majority were defense lawyers, some general guidance that it thought would be of benefit to them. Attorneys attend these conferences to learn something that can help them in their practice and if the Court gives them no advice, it is wasting their time and money.

This Court discussed two topics that were especially pertinent to the mass tort bar: Kemp motions and Lone Pine Orders. First, Kemp motions. Kemp v. State, 174 N.J. 412 (2002) is the seminal case in New Jersey on the admissibility of scientific opinions by an expert. The purpose of Kemp/Daubert/Frye motions is to prevent expert witnesses from giving an opinion to a jury that has no scientific basis. It is designed to avoid "junk science" from becoming evidence in a

case. The Court's comments neither addressed Accutane or any other specific litigation nor defended any rulings it has made. This Court simply pointed out that parties, both plaintiffs and defendants in pharmaceutical litigation, frequently file Kemp motions to bar every expert and every opinion of their adversary's experts. This Court made three points as it recalls. First, it is more difficult to prevail on these motions where the expert being proffered is a leading scientist in a field from a respected national center, such as the Cleveland Clinic or Mayo Clinic, who has published hundreds of peer review articles and textbook chapters in their field. These motions can be granted, but there should be some careful analysis as to their merit before filing them, because the standard for review is whether the expert employed scientific methodology. Second, the Court told the audience, many of whom were in-house counsel who pay the legal fees for these motions, that it is an uphill battle and frequently a waste of the client's money to attack every expert on every opinion with a Kemp motion. Third, this Court suggested parties would have a greater chance of success if they focused on a specific expert and/or a specific opinion of an expert, instead of wholesale attempts to exclude every expert and all opinions. The Court recommended that a focused attack on an expert opinion would have more credibility and have a better chance of success in any litigation, rather than a shotgun approach. This had no applicability to the Accutane litigation at all, because plaintiffs have used the same two experts in every trial. The Appellate Division already determined that plaintiffs' expert used a proper scientific methodology. The Kemp motion on this expert has been ruled on, appealed and then affirmed three times, and has been ruled on again before every trial. The comments made in the Court's lecture in no way reflected on the specific issues in any particular litigation.

Second, in the case of "lone pine" rulings, these are also applications frequently made to multi-county litigation judges. The purpose of such a motion is to weed out cases with no merit.

The problem is that the words "lone pine" are the subject of controversy in legal literature. The words create a strong reaction from the plaintiff's bar who almost always fight aggressively to avoid entry of "lone pine" orders.

This Court made a few points about "lone pine" motions. First, the term comes from an unpublished New Jersey Law Division case Lore v. Lone Pine Corporation, L-33606-85, 1986 N.J. Super. Unpub. Lexis 1626 (App. Div. Nov. 18,1986), which has no precedential value on its own even in New Jersey. The case involves a toxic tort action against a landfill and hundreds of defendants who allegedly dumped products at the landfill. The judge first stayed all discovery, then ordered plaintiffs to produce expert reports on each damage claim being asserted by each plaintiff, including causation reports, before allowing any discovery from the defendants. The "lone pine order" gave plaintiffs six months to produce these reports. Plaintiff did not comply. The plaintiff's lawyer claimed he had been distracted by family obligations that arose from the illness and then death of his father. The judge gave plaintiffs two more months, and then found the very limited single expert report plaintiff submitted was inadequate. The judge dismissed plaintiffs' complaints with prejudice for failure to state a claim. Clearly, the judge thought the plaintiffs did not have and would have never had the proof needed to succeed in their case. In the decision he accused plaintiffs of filing a suit just to force defendants to come up with settlement money. Despite its lack of precedential value, the case has been cited in many decisions in mass tort cases where judges have ordered plaintiffs to produce reports or evidence to substantiate their claims. In most of these decisions, the facts, the timing, and the actual orders are far from what was ordered in the actual Lone Pine case.

At the conference, this Court described the facts above and advised that when defendants file a motion and request a "lone pine order" by that name or cite that case, it creates an almost

reflex reaction from plaintiffs' counsel causing more fireworks in a case as well as the loss of many trees.

The point made by the Court to the attorneys was that, although most courts would probably not order expert reports from plaintiff before any other discovery was completed, the concept of weeding out cases without merit was very important to judges. The Court then said there were certainly motions that would be helpful to weed out meritless cases. It suggested that motions to compel prescription records to prove that plaintiff used a product and/or medical records documenting the claimed injuries could be used to weed out meritless claims early in litigation. The Court encouraged defense counsel to file these motions, but not cite "Lone Pine" as the authority. It stated they might be more successful in getting plaintiffs' counsel to agree to their request and/or getting a judge to grant the relief requested if the motion was not called a "lone pine" motion. The Court encouraged plaintiffs' counsel to assist in the effort to separate the wheat from the chaff. Nothing the Court said at this conference could create even a perception of bias against the defendant Hoffmann-La Roche or defendants in general.

Claims of Bias based on Judge's Comments and Role in Discovery Proceedings

The defendant raises the question about the Court's role in managing discovery, pretrial issues, and some critical comments made to defense counsel by the Court. In our adversary system, trial lawyers from both sides tend to be very suspicious of each other, with each side accusing the other of not disclosing information or trying to get an unfair advantage. All trial judges deal with these types of complaints almost every day. Judges struggle to maintain civility in litigation. This Court tries to prevent bickering, suspicion and even paranoia at times among the lawyers before it. The Court discourages accusations being made against each side by the other, but it also must stay alert to and acknowledge that one side or the other may be hiding

information, taking unfair advantages and/or playing games with the system. This Court is responsible for maintaining a fair playing field under the rules of law. At times, this means finding fault, taking action to get to the truth and at all times being in control of the proceedings.

Unfortunately, there have been several events over the years that have raised serious concerns about representations made by counsel to the Court. Plaintiffs' counsel frequently raises concerns that defense counsel is delaying the case and providing incomplete discovery. [1] In order to avoid further delays when there are discovery disputes and accusations between the parties, the Court attempts to avoid long hearings to determine which party may be at fault. Rather, the Court's goal has been to ensure both sides have what is needed to proceed in the litigation. Two examples of these efforts are set forth below.

Very early in the litigation, the plaintiffs complained to the Court that their expert witness had mistakenly called Ice Miller (a Chicago based law firm representing the defendant) and that although Ice Miller knew they should not talk to plaintiffs' expert (who thought he was talking to plaintiffs' counsel), the expert engaged in a discussion with Ice Miller. Ice Miller's counsel represented to the Court that there was no actual discussion and as soon as the expert identified himself, Ice Miller cut off the conversation. They acknowledged this was what should have been done. Plaintiffs, based on their conversations with their expert, questioned this representation and asked that any notes or memos of the conversation be turned over. This Court ordered that any notes and memos be produced, and it turned out that there had, in fact, been a discussion with the expert and a memorandum documenting the conversation was created at the time and then distributed to some other attorneys in the firm. The actual information obtained was not

[1] Similar issues arose before Judge McCoun in the federal Multi-District Litigation on Accutane. The MDL Court found Michael Griffinger had misrepresented to the court the availability of discovery materials in response to Plaintiff's document requests. As a result, Mr. Griffinger's *pro hac* vice admission was rescinded. Upon petition by Mr. Griffinger, the Order rescinding his appearance was vacated and he was permitted to voluntarily withdraw his admission.

significant, but defense counsel's failure to be candid with the Court about what had occurred resulted in this Court revoking the *pro hac vice* admissions of the attorneys from Ice Miller. No appeal was filed.

At a later point in the litigation, allegations were brought before the Court that the individual plaintiffs were being harassed and embarrassed during their depositions by several different attorneys representing the defendant. The pattern of questioning suggested there was an intentional plan to intimidate and harass plaintiffs. The defendant adamantly denied these allegations. The deposition questions shown to the Court included questions about anal sex and religion. The questions went far beyond anything that was appropriate, including follow-up questions such as asking why a Catholic plaintiff did not attend mass regularly. There was no medical expert who related anal sex to the disease process. This Court made it clear that the questions were outrageous and different defense counsel asking the same questions in depositions scattered across the country was disturbing. This occurred at a management conference. At a break, in chambers, a defense attorney asked to speak *ex parte* with the permission of plaintiffs' counsel. She came into chambers, she said she was having difficulty not crying, and proceeded to explain that she had been given a "script" of the questions to ask. She stated she was sorry and would not engage in such behavior again. She was concerned about repercussions. In the end, the Court did not sanction any counsel or the defendant, but ordered such deposition questioning to stop. This Court has always understood the pressure attorneys for plaintiffs and defendants are under in litigation. The Court's role is to control the way the litigation is conducted so both sides have a fair playing field. It did that in this case. This Court counseled the individual defense lawyer about personal integrity and took no further action.

These are just two of several incidents that have created difficulty for the Court to appear even-handed in the face of contradictory representations made by defense counsel during the course of the litigation. The conflicting representations give the appearance of defense counsel initially being less than candid with the Court and only being forthright after the Court took action.

The fact is that the Court has applied the same approach to both defense and plaintiffs' counsel. Generally, the Court accepts representations from either side and questions representations only when there is reason to question them on both plaintiff's side and the defendant's side. However, defendant's counsel have been less respectful to the Court, less candid in their representations to the Court, and much more difficult to deal with than plaintiffs' counsel when it comes to any type of compromises to move the litigation forward. This Court is not addressing decisions regarding settlement, which have never been a factor in any of the Court's rulings.

When defendant accused plaintiffs' expert on causation of deleting part of an e-mail chain, the Court took steps to make sure the defendant got the deleted information. The deletion created a situation where information was improperly withheld from defendant and the Court addressed the situation at the time. Whether the Court's subsequent evidential rulings were correct is not a proper argument to be raised in this motion.

This Court will not defend its decision not to allow the Racine study to be used by the defense at the last trial. This trial resulted in two defense verdicts and two plaintiffs verdicts. This case will be appealed by one side or the other or both, and the Court's decision will be properly reviewed at that time. There is no question, however, that the same defense attorney who the Court had the prior discussion with about the harassment of plaintiffs in depositions,

improperly redacted portions of the e-mail chain between a defense expert and others without noting it in a privilege log. The Court did call another defense attorney from another firm back into chambers with other attorneys from both sides to discuss another part of the same issue. The Court did question her actions as an officer of the court. When the attorney stated she wanted the conversation on the record, the Court replied "that's too bad." The Court then explained to counsel that it wanted to discuss the matter off the record because the Court was considering withdrawing her *pro hac vice* admission. The Court did not want to create a record that could be used against the attorney if she applied for admission to another court and this Court decided not to take such action. Because defense counsel requested the discussion be on the record, the Court then went out on the record. Defense counsel then asked the Court to seal the record so that the transcript could not be used against her in another court. The Court agreed to this request. To use any of this to suggest the Court has a bias against the defense, as opposed to acknowledging the Court's actual attempts to fairly handle a difficult situation with concern for the attorneys' and the parties' welfare, is not justified.

In Litehy v. U.S., the Supreme Court stated:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J. P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. *It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.*

[510 U.S. 540, 550-51 (1994) (emphasis added)].

In the case of Horn v. Village Supermarkets Inc., the court held "a trial judge has the ultimate responsibility to control the trial in the courtroom and is given wide discretion to do so." 260 N.J. Super. 165, 175 (App. Div. 1992). In the unpublished decision of Lennox v. Grossman, the Appellate Division stated that if the litigant's "subjective point of view were enough to trigger a disqualification, forum shopping could run amok." A-0271-08T1, 2009 N.J. Super. Unpub. Lexis 2576, *15 (App. Div. Oct. 15, 2009). In the case of Ex parte American Steel Barrel Co., the Supreme Court stated "the recusal statute 'was never intended to enable a discontended litigant to oust a judge because of adverse rulings made." 230 U.S. 35, 44 (1913).

None of the Court's comments to counsel or questions about the credibility of counsel at different times could reasonably be perceived as being based on a bias against the defendant or counsel. None of the Court's comments referred to by the defendant at argument have been abusive, and none have been in front of any jury. In the over 1,000 decisions made by this Court in this litigation, the Court has always been completely even-handed and fair. Rulings on very significant issues have been made in favor of both sides. This does not mean every decision will be affirmed. The defendant at oral argument suggested the Court had become biased because the Court is "frustrated" by the rulings of the higher court in this litigation. There is no merit to this argument. Complex pharmaceutical litigation involves teams of highly skilled lawyers from numerous law firms representing both plaintiffs and defendant. This type of litigation involves a constant flurry of difficult and often cutting edge legal issues. When this Court started to handle pharmaceutical litigation, two of this Court's earliest decisions were appealed. In one case, the Appellate Division affirmed this Court's decision.[2] The Supreme Court then reversed and

[2] See International Union of Operating Engineers Local # 68 Welfare Fund v. Merck & Co., Inc., 384 N.J. Super. 275 (App.Div. 2006).

remanded.[3] In the second case, the Appellate Division reversed and remanded this Court's decision,[4] but the Supreme Court reversed the Appellate Division and the matter was remanded to this Court to reinstate the judgment dismissing plaintiff's complaint.[5] From that early point in the Court's assignment to multi-county litigation, it became apparent that this Court was not in Kansas anymore, and every ruling would be scrutinized and some reversed. This does not frustrate the Court. It makes the job challenging and interesting.

The Court is also not frustrated that the litigation has not settled. When there had been two verdicts in favor of the plaintiffs and there were only a few hundred cases filed, the Court encouraged the defendant and plaintiffs to settle the cases. For whatever reasons, the opportunity got away and now there are thousands of cases. This is likely much more frustrating to the parties than to the Court. The Court continued to encourage settlement negotiations between the parties with an outside mediator until they ended over a year ago. The lack of candor by defense counsel who claimed in his certification with this motion that he has been handling settlement negotiations implied there are still ongoing negotiations. This is disturbing. At oral argument, counsel acknowledged that at least for a year and maybe closer to two years, there have been no settlement discussions. This lack of candor is another example of the Court being placed in the position of having to ask counsel to clarify what appears to be a contradictory statement about the litigation.

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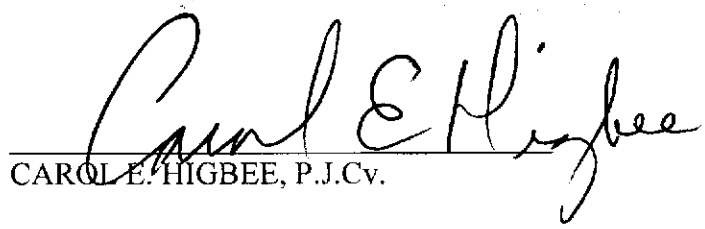
[3] See International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372 (N.J. 2007).
[4] See Sinclair v. Merck & Co., Inc., 389 N.J. Super. 493 (App.Div. 2007).
[5] See Sinclair v. Merck & Co., Inc., 195 N.J. 51 (2008).

Conclusion

Accordingly, for all of the reasons set forth above, the Court denies the motion.



CAROL E. HIGBEE, P.J.Cv.

XXXX Order is attached.