

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

MERZ NORTH AMERICA, INC.,)	
)	
Plaintiff,)	
)	
v.)	NO.: 5:15-CV-262-H-KS
)	
CYTOPHIL, INC. d/b/a)	
REGENSCIENTIFIC,)	
)	
Defendant.)	
)	
)	
CYTOPHIL, INC)	
)	NO.: 5:16-CV-745-H-KS
Plaintiff,)	
)	
v.)	
)	
MERZ NORTH AMERICA, INC.,)	
)	
Defendant.)	

ORDER

This matter is before the court on Merz North America, Inc.'s motion to dismiss Cytophil, Inc. v. Merz North America, Inc., No. 5:16-CV-745-H-KS, pursuant to Rules 41(a)(1)(B) and 13(a) of the Federal Rules of Civil Procedure [DE #32]. Magistrate Judge Kimberly A. Swank filed a Memorandum and Recommendation ("M&R") on February 16, 2017, recommending that the motion be denied. Merz

filed objections to the M&R, and Cytophil responded to the objections. This matter is ripe for adjudication.

Under Rule 72(b) of the Federal Rules of Civil Procedure, a district judge "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3).

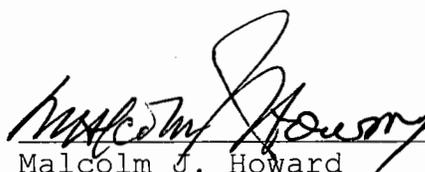
Cytophil first objects to the M&R's conclusion that in order for the two-dismissal rule to apply against a party, the party must have dismissed two previous actions. Having reviewed the M&R, Cytophil's objections, and Merz's response thereto, the court finds Cytophil's objection is without merit. Merz's objection fails to acknowledge or address the relevant case law.

Next, Cytophil objects to the M&R's conclusion that the two dismissal rule requires both of the prior actions to have been dismissed by notice. This objection is without merit because the M&R correctly concluded that two actions were not previously dismissed, and it is irrelevant whether the dismissals were by notice.

Finally, Cytophil objects, arguing that Rule 15 of the Federal Rules of Civil Procedure should be applied to this scenario. However, Rule 15 has no applicability here. The mere consolidation of two actions does not invoke Rule 15.

A full and careful review of the M&R and other documents of record convinces the court that the recommendation of the magistrate judge is, in all respects, in accordance with the law and should be approved. Accordingly, the court adopts the recommendation of the magistrate judge as its own. For the reasons stated therein, the motion to dismiss pursuant to Rules 41(a)(1)(B) and 13(a) [DE #32] is DENIED.

This 30th day of March 2017.



Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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