

**PREPARED BY THE COURT**

In Re: Singulair® Litigation

SUPERIOR COURT OF NEW  
JERSEY LAW DIVISION:  
ATLANTIC COUNTY

DOCKET NO.: ATL-L-481-22

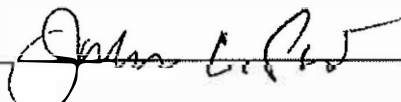
**ORDER: DISMISSAL WITH  
PREJUDICE**

**THIS MATTER** having been brought before the court by Eileen Oakes Muskett, Esq., attorney for Defendants' Merck & Co., Inc. and Merck Sharp & Dohme Corp., and the Court having considered the moving papers, and any opposition thereto and for good cause being shown as stated in the Memorandum of Decision;

**IT IS** on this 20<sup>th</sup> day of December 2024, upon consideration of Defendants' Motion to Dismiss Plaintiffs' cases with prejudice, it is hereby **ORDERED** that the Defendant's Motion is **GRANTED** and the Plaintiffs' claims, as identified in Exhibit A attached to the Defendants' motion are dismissed with prejudice with the exception of Plaintiff Tajionna Rogers.

**IT IS FURTHER 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  
 Opposed


  
 HON. JOHN C. PORTO, P.J.Cv.



**NOT FOR PUBLICATION WITHOUT THE APPROVAL  
OF THE COMMITTEE ON OPINIONS**

JOHN C. PORTO, P.J.Cv.

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

**TO:** Lynne Kizis, Esq.  
Wilentz, Goldman & Spitzer, P.A.  
*Attorneys for Plaintiffs*

*All other counsel of record on  
eCourts.*

Eileen Oakes Muskett, Esq.  
Fox Rothschild, LLP  
*Attorney for Defendants, Merck &  
Co., Inc. and Merck Sharp & Dohme  
Corp.*

**RE:** In Re Singulair® Litigation

**DOCKET NO.** ATL-L-481-22

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**NATURE OF MOTION: Defendants' Motion to Dismiss Plaintiff's Complaint With Prejudice for Failure to provide Plaintiff Fact Sheets**

**HAVING CAREFULLY REVIEWED THE MOVING PAPERS, I HAVE RULED ON THE ABOVE CAPTIONED MOTION AS FOLLOWS:**

**NATURE OF MOTION AND PROCEDURAL HISTORY**

This is a products liability/Multi-County Litigation ("MCL") matter. All Plaintiffs allege various injuries as a result of ingesting Defendants' prescription pharmaceutical product, Singulair. On January 1, 2022, Plaintiffs filed their Complaint.

On September 4, 2024, the Court entered an order compelling Plaintiff to provide materially complete Plaintiff Fact Sheets ("PFS's"). On September 27, 2024, this Court entered an Order granting Defendant's motion to dismiss without prejudice for failure to make discovery. On December 3, 2024, Defendant filed this unopposed motion to dismiss Plaintiff's complaints with prejudice for failure to

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produce and exchange discovery/PFS' identified in Exhibit A<sup>1</sup> attached to Defendants' motion.

## PARTIES' CONTENTIONS

### **DEFENDANTS**

Defendant's counsel certified on September 4, 2024, this Court entered an Order<sup>2</sup> compelling 21<sup>3</sup> Plaintiffs to produce "materially complete [PFS'] or Dismissals With Prejudice" by September 6, 2024. On September 27, 2024, this Court entered an Order granting Defendant's motion to dismiss without prejudice for failing to produce the required materially complete PFS's.

To date, counsel certified Plaintiffs did not provide the sought after PFS's and more than 60 days passed since the case was dismissed without prejudice. Plaintiffs did not move for reinstatement of the claims. Therefore, counsel requested this Court enter an order dismissing Plaintiffs' Complaints with prejudice.

### **PLAINTIFFS**

Plaintiff's counsel argued Defendants' motion to dismiss the claims of Joseph McCartney and Tajionna Rogers with prejudice should be denied.

Specifically, counsel stated "dismissal with prejudice is an extreme remedy that is inappropriate where, as here, Plaintiffs are diligently working to provide Defendants with the information they seek, and Defendants will suffer no prejudice from allowing Plaintiff's additional time to comply with Defendants' demands." Counsel argued that both Joseph McCartney and Tajionna Rogers have, or are actively working to, provide Defendants with sufficient PFS's. However, counsel asserted with respect to Plaintiff Tajionna Rogers, "[a]lthough still not conceding that her Amended [PFS] was deficient and, despite being only three years old when

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<sup>1</sup> The Plaintiff's names and associated docket numbers are included in the Exhibit.

<sup>2</sup> See this Court's September 4, 2024 Order (LCV20242153693).

<sup>3</sup> Said Plaintiffs were identified in Exhibit A of the Defendant's motion.

she first started taking Singulair, Plaintiff worked with counsel and her mother to collect the additional information and submitted a Second Amended [PFS] Sheet today, on December 12, 2024.” So, counsel argued “a dismissal with prejudice is not justified here.”

Further, counsel argued Defendants will not suffer prejudice by the allowance of additional time for Plaintiff’s to substitute their PFS’s. Counsel argued discovery is still ongoing, and “Defendants continue to collect records from numerous Plaintiffs and have focused their efforts on obtaining deposition testimony in the bellwether cases.” Since these are not bellwether cases, counsel argued dismissal with prejudice is not appropriate to Joseph McCartney and Tajionna Rogers and should be denied.

Additionally, counsel requested an extension of time of thirty days for Joseph McCartney and Tajionna Rogers to cure the alleged deficiencies in their PFS’s.

#### **DEFENDANT REPLY BRIEF**

Defendant’s counsel initially noted their motion identified three Plaintiffs and Plaintiff’s counsel did not oppose dismissal as to the remaining one Plaintiff, specifically, Geneva Bradleyward, listed on the omnibus motion. Therefore, said claims should be dismissed with prejudice.

However, in light of Plaintiff’s counsel’s opposition to Joseph McCartney and Tajionna Rogers dismissal with prejudice, Defense counsel argued their dismissal is still warranted. Counsel stated, “it has been over eighteen months since this Court entered Case Management Order #6 regarding the production of [PFS] and at least nine months since [PFS] for all Plaintiff’s in this MCL were due.” In addition, counsel argued Plaintiffs have already been granted several discovery extensions to comply with these obligations and have yet to do so.

Counsel further argued with respect to Joseph McCartney, Plaintiff’s opposition failed to note “that the last attempt by plaintiff McCartney to comply with

his discovery obligations was before this Court's Order on September 27th dismissing his claims. In fact, plaintiff McCartney uploaded a materially deficient [PFS] on September 24, 2024 – months after it was initially due and weeks after the deadline imposed by Case Management Order #13.” As such, counsel argued McCartney's deficiencies include “failure to sign the [PFS]; failure to provide proof of use of Singulair; failure to include certain details regarding his mental health history; and failure to identify all of plaintiff's treating providers.” In addition, counsel asserted Plaintiffs failed to provide any explanation as to why McCartney should be afforded any further extension of discovery when he has yet to provide any information or documentation in the months that have passed since the case was dismissed without prejudice.

By correspondence dated December 16, 2024, Defendants' counsel informed this Court Tajionna Rogers “uploaded a materially complete PFS. Plaintiff was apprised of the reasons for the PFS deficiency months prior.” For that reason, Defendants requested an adjournment of that motion “pending [the] filing of the motion to reinstate.”

Nevertheless, McCartney never filed any motion seeking reinstatement of the claims since the September 27, 2024 Order granting dismissal without prejudice and never “demonstrated ‘exceptional circumstances’ as to why [defendants'] motion should not be granted.”

Accordingly, counsel requested this Court grant the motion to dismiss with prejudice to all three Plaintiff's listed in Exhibit A.

### **DISCUSSION**

Defendants seek a dismissal of the Plaintiff's Complaints based on Rules 4:23-2(b)(3) and 4:23-5(a)(2) for failure to provide the PFS.

The rules of discovery are to “be construed liberally in favor of broad pretrial discovery.” Payton v. New Jersey Turnpike, 148 N.J. 524, 535 (1997). This policy is based upon the principle that “[o]ur court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts.” Jenkins v. Rainer, 69 N.J. 50, 56-57 (1976).

Rule 4:10-2(a) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

Rule 4:23-5(a)(2), states, in pertinent part:

If an order of dismissal or suppression 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 of an order of dismissal or suppression with prejudice. [...] If the delinquent party is appearing pro se, the moving party shall attach to the motion a similar affidavit of service of the order and notices or, in lieu thereof, a certification as to why service was not made. Appearance on the return date of the motion shall be mandatory for the...delinquent pro se party. [...]

The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.

Rule 4:23-2(b)(3) states

If a party... fails to obey an order to provide or permit discovery,... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;

Here, the Court finds the Plaintiffs failed to comply with Defendant's discovery requests, as well as complying with the September 4, 2024 Order. Additionally, the order of dismissal without prejudice was not vacated on behalf of Joseph McCartney or the remaining Plaintiff listed by the Defendants. The record reflects eighteen months elapsed since this Court entered Case Management Order #6 regarding the production of PFS and at least nine months since PFS for all plaintiffs in this MCL were due. Defendants' counsel noted Plaintiffs were already afforded several extensions to comply with their discovery obligations. This Court further finds Defendants waited the requisite 60 days before filing this motion and the requested discovery remains outstanding. Plaintiff McCartney attempted to, but did not submit a sufficient/compliant PFS and the latest attempt contained "explicit deficiencies".

The Court also finds Defendants are not in default of any discovery obligations and made good faith effort to resolve the issues prior to filing the motion. Moreover, McCartney never filed any motion seeking reinstatement of the claims since the September 27, 2024 Order granting dismissal without prejudice and never “demonstrated ‘exceptional circumstances’ as to why [defendants’] motion should not be granted.”

This Court is cognizant of the logistical issues confronted by Plaintiff’s counsel and that a dismissal with prejudice is an extreme sanction; however, the Defendants are entitled to all appropriate discovery within the timelines established by the Court. The Plaintiffs are likewise obligated to abide by the requisite timelines to provide discovery and are further obligated to file appropriate motions. Since the PFS were not provided and no motions to vacate the existing dismissal was never filed, the Court is constrained to grant the Defendants’ motion in accord with Rule 4:23-2(b)(3).

Accordingly, with the exception of Plaintiff Tajionna Rogers, the Court **GRANTS** Defendant’s motion to dismiss the two identified Plaintiffs’ Complaint with prejudice for failure to provide discovery.

An appropriate Order is entered on eCourts. Conformed copies accompany this Memorandum of Decision.

  
JOHN C. PORTO, P.J.Cv.

Date: December 20, 2024



**EXHIBIT A**

<b>Plaintiff Name</b>	<b>Case No.</b>
Bradleyward, Geneva	ATL-L-000587-22
McCartney, Joseph	ATL-L-000639-22
Rogers, Tajionna	ATL-L-000662-22