

FILED

MAY 21, 2021

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

IN RE: ZOSTAVAX® LITIGATION

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX COUNTY

CASE NO. 629

Docket No.: MID-L-004999-18

**CASE MANAGEMENT ORDER #16**  
**May 4, 2021**  
**CASE MANAGEMENT CONFERENCE**

**THIS MATTER**, having come before the Court at a case management conference on May 4, 2021 and counsel for Plaintiffs and counsel for Defendants having been present, and for good cause having been shown;

**IT IS** on this 21st day of May 2021, hereby **ORDERED** as follows:

**1. MOTIONS TO VACATE: PLAINTIFF FACT SHEETS**

Plaintiffs whose claims were dismissed with prejudice on February 13, 2020 may not file motions to vacate those dismissals with prejudice if they were not identified by plaintiff's counsel as being compliant with their discovery obligations by March 29, 2021 as required by Case Management Order #14.

**2. ACCURATE DOCKET NUMBERS**

Plaintiffs formerly part of a consolidated docket number were assigned individual docket numbers after bifurcation. Motions must be filed under the individual docket numbers. Any pleading filed under an inaccurate docket number will not be accepted and the filing will be rejected.

**3. OUTSTANDING PROOF OF USE**

When Plaintiff submits medical records as evidence of proof of use, Plaintiff shall identify the specific page/line of the medical record that he/she claims constitutes this

proof of use. This requirement also applies to Plaintiffs' court submissions regarding proof of use.

Should a Defendant believe that any Plaintiff has not produced sufficient evidence of product use in accordance with the Product Usage Order dated August 23, 2019, the following procedure shall apply:

a. Defendant shall (i) communicate to Plaintiff's counsel in writing and copy Plaintiff liaison counsel and counsel for all other Defendants named and served, advising why Defendant believes Plaintiff has failed to comply with the Product Usage Order and (ii) offer a time to meet and confer within seven (7) days of the communication (the "Meet and Confer Request").

b. Should the parties not resolve the issue during the Meet and Confer Request process, lasting at least thirty (30) days, or if Plaintiff fails to respond to the Meet and Confer Request after thirty (30) days, or if the parties declare impasse before thirty (30) days elapses, Defendant may file and serve a Motion seeking an Order to Show Cause why Plaintiff's case should not be dismissed, in whole or in part, for failure to comply with the Product Usage Order (the "MOTSC").

c. Plaintiff shall file and serve any opposition to the MOTSC within fourteen (14) days of the date the MOTSC is filed and served.

d. The MOTSC shall be returnable at the next Case Management Conference that is at least thirty (30) days from the date the MOTSC is filed.

#### **4. WITHDRAWAL OF CERTAIN MOTIONS TO REINSTATE**

Plaintiffs shall withdraw the motions to reinstate in the following cases: 1) Brenton, Clark (MID-L-002076-19); 2) David G. Holley (MID-L-005205-19); 3) Judith Roy (MID-L-004952-20); 4) Janice Stearns (MID-L-002038-19); 5) Deborah Tignor (MID-L-000019-19); and 6) Mary Williams (MID-L-004957-20). As for Stewart Libes (MID-L-004986-

19), Plaintiff shall submit an updated motion to reinstate by June 3, 2021. Defendants may submit an opposition 7 days thereafter.

**5. PLAINTIFFS TO CORRECT ISSUES RAISED BY MCKESSON RELATED TO 270 CASES IN WHICH MCKESSON CANNOT ANSWER**

McKesson has provided Plaintiffs with three lists totaling 270 cases that have issues related to loss of consortium caption issues; estate issues or dismissed plaintiffs, which are preventing McKesson from answering. Plaintiffs shall serve McKesson with corrected amended complaints related to the 270 cases that McKesson has identified and/or Orders reinstating the dismissed plaintiffs by June 3, 2021. Counsel shall meet and confer to agree upon a schedule for McKesson to file their Answers to these complaints.

**6. BELLWETHER ORDER**

Plaintiffs and Defendants consent to an extension of the deadlines set forth in the August 27, 2020 Amended Bellwether Selection and Scheduling Order and shall provide a revised Order to the Court by May 14, 2021.

**7. VOLUNTARY DISMISSALS**

The Court agrees that Voluntary Dismissals may be filed in e-courts with electronic signatures. The Court also confirmed that Voluntary Dismissals filed under NJ Rule 4:37-1(b) require an Order while Stipulations to Dismiss under NJ Rule 4:37-1(a) do not require an Order .

**8. NEXT CASE MANAGEMENT CONFERENCE**

The next Case Management Conference is scheduled for June 2, 2021 at 10:00 AM, either telephonically or via a video link, which shall be circulated by liaison counsel or the Court at a later date.

*/s/ Bruce J. Kaplan*

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HONORABLE BRUCE J. KAPLAN, J.S.C.

### Statement of Reasons

The Court is in receipt of Plaintiffs' Liaison counsel's objections raised via email on May 12, 2021, to proposed Case Management Order ("CMO") 16, and has considered same.

As to CMO 16, ¶ 1, the Court having reviewed CMO 14, ¶ 10, confirms it was and remains this Court's intent in setting the March 29th, 2021 date to set a cut-off for the filing of motions to vacate dismissals with prejudice. Specifically, in using that date, the Court permitted Plaintiffs' counsel to file motions to vacate the dismissals of certain cases which were dismissed with prejudice more than a year ago on February 13, 2020. As is very clear from the transcript of that proceeding, such motions were conditioned upon full compliance with past Court Orders. CMO 14, ¶ 10 required Plaintiffs' counsel to "identify the list of the cases previously dismissed, subject to dismissal, or subject to a motion to compel in which they now believe they have satisfied their discovery obligations." Those cases which had been dismissed with prejudice in February 2020 that remained non-compliant as of March 29, 2021 would remain dismissed with prejudice.<sup>1</sup>

The record will reflect that the March 29, 2021 date came about for purposes of case management coupled with the Court's consideration of fairness to the Defendants.<sup>2</sup> In doing so the Court notes that the Multi-County Litigation Resource Book gives the Court significant discretion in prescribing procedures for motion practice in case management orders. The Court also considered whether and when it was reasonable to permit Plaintiffs who had been dismissed for over a year due to egregious delinquencies in threshold discovery obligations to have their final judgment of a dismissal with prejudice vacated after continued non-compliance with numerous Court-ordered deadlines and extensions in their favor. Furthermore, the record will also reflect that the Court extended the original date of March 9, 2021, included in the proposed CMO 14 submitted with consent of counsel, to March 29, thus giving Plaintiffs the benefit of an additional twenty (20) days to identify Plaintiffs for whom motions to vacate would be filed.

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<sup>1</sup> The Court acknowledges and apologizes for any confusion caused at the April 8, 2021 Case Management Conference when it said "I'm going to allow for it all," in response to Defense counsel's question regarding same. See April 8, 2021 CMC Tr. at 37:21-38:3. However, as stated above, that would be contrary to CMO 14 and for the reasons stated was never the Court's intent.

<sup>2</sup> When this Court was appointed to preside over the MCL docket, it was faced with over 950 pending motions, many of which were motions to vacate dismissals with prejudice. In order to appropriately manage this MCL and ensure its efficient progress, the Court had no choice but to set a cut-off for identifying long-dismissed Plaintiffs for whom counsel could move to vacate.

Furthermore, the March 29, 2021 deadline set by CMO 14 would be rendered meaningless if this Court were to allow the continued filing of motions to vacate for Plaintiffs not identified by that date. In coming to this determination, the Court specifically notes that R. 4:50-2 requires motions to vacate filed under R. 4:50-1(e) and/or (f) to be filed within a reasonable time.<sup>3</sup> Given that Plaintiffs have had the benefit of over one year to come into compliance with threshold discovery obligations, the Court finds the March 29, 2021 date to be more than reasonable in establishing a cut-off for said motions.

As to CMO 16, ¶ 3, the Court finds that, in the interest of judicial efficiency, as well as in the interest of fairness to the defense, Plaintiffs shall specifically identify the proof of use contained within medical and other records provided. This requirement is supported by Brugaletta v. Garcia, in which our Supreme Court held that “New Jersey trial courts have the authority under Rule 4:17-4(d) to compel a party producing documentary records to provide, with the records, a narrative that specifies where responsive information may be found.” 234 N.J. 225, 256 (2018). Thus, New Jersey case law, taken in conjunction with R. 4:18-1, specifically comment 2.2, makes clear that New Jersey law aims to prevent the practice of providing opposing counsel with an unreasonable volume of documents, placing the burden of identifying the relevant information on the demanding party. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2 on R. 4:18-1 (2021) (explaining that the purpose of requiring documents to be labeled to correspond with a production request is to “remedy the practice...of providing documents in helter-skelter fashion, placing upon the demander of documents, the onus, with its attendant expense and delay, of sorting through the material produced, much of which is often irrelevant to the demand”). This is especially true in this Multi-County Litigation (“MCL”), where the burden is on Plaintiffs to establish proof of use at the very inception of their case.

CMO 16, ¶ 3, as written, may also eliminate or reduce unnecessary motion practice. Without this requirement, which is hardly burdensome for Plaintiffs, oppositions may be filed simply because defense counsel in their review missed what Plaintiff relied on as proof of use, thereby also necessitating a reply brief. CMO 16 ¶ 3, as written, will also ensure that only those motions where proof of use as clearly identified is in dispute will be opposed. This will serve to benefit both the Plaintiffs and the Defendants in this litigation.

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<sup>3</sup> These are the sections of R. 4:50-1 on which Plaintiffs rely in most, if not all, of their motions to vacate.