

FILED

MAY 18 , 2021

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

IN RE: ZOSTAVAX LITIGATION

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY**

MCL NO. 629
Docket No. L-4999-18

CASE MANAGEMENT ORDER:

**AMENDED BELLWETHER SELECTION
AND SCHEDULING**

THIS MATTER having come before the Court with the Consent of all Counsel, and for good cause having been shown, the Court hereby enters the following order:

IT IS on this 18th day of May 2021, hereby

ORDERED as follows:

In furtherance of the effective and efficient case management of complex litigation, this Order will govern the guidelines and procedures for selecting bellwether cases (“Bellwether Discovery Cases”) as part of *In re: Zostavax Litigation* (“MCL No. 629”). This Order will further govern the guidelines and procedures for case-specific discovery to be conducted in the Bellwether Discovery Cases, some of which will be proposed and designated for further discovery (“Bellwether Trial Pool Cases) and trial (“Bellwether Trial Cases”). The guidelines and procedures set forth herein will apply to all actions that are a part of MCL No. 629.

I. BELLWETHER SELECTION CRITERIA

Only cases meeting the following criteria will be eligible for selection as Bellwether Discovery Cases:

- A Plaintiff Fact Sheet (“PFS) was due or served pursuant to the Plaintiff Fact Sheet Order on or before the date of this Order *or* plaintiff-specific fact discovery occurred prior to the date this MCL was created (August 15, 2018).

- Plaintiff/plaintiff-decedent received the Zostavax vaccine and alleges that he or she subsequently developed herpes zoster (“shingles”).¹

II. BELLWETHER DISCOVERY CASES

A. Selection of Bellwether Discovery Cases

On February 24, 2020, Plaintiffs’ Liaison Counsel provided Defendants’ Liaison Counsel with their selections of thirty (30) Bellwether Discovery Cases. On April 13, 2020, Defendants’ Liaison Counsel provided Plaintiffs’ Liaison Counsel with their selections of thirty (30) Bellwether Discovery Cases. Plaintiffs’ Liaison Counsel and Defendants’ Liaison Counsel have jointly notified the Court of the sixty (60) cases selected as Bellwether Discovery Cases. The parties will select cases that they have a good-faith belief are representative of cases in MCL No. 629 and should be robustly discovered and then taken to trial.

B. Plaintiffs’ Obligation to Provide Signed Authorizations

On or before April 27, 2020, and consistent with N.J. Ct. R. 4:17-4, each plaintiff in the sixty (60) Bellwether Discovery Cases shall produce signed authorizations for the release to Merck’s counsel, Venable LLP, and/or Merck’s medical records collection vendor, Litigation Management, Inc. (“LMI”), of medical, insurance, employment, and Medicare/Medicaid records from any healthcare provider, hospital, clinic, outpatient treatment center, and/or any other entity, institution, agency or other custodian of records identified in the PFS, except that a plaintiff does not need to produce an authorization for employment records if the plaintiff is not making a claim for lost wages or lost earning capacity. The authorizations shall be served electronically on Defendants’ Liaison Counsel at the following email address: [ZostavaxMCL_PFS @venable.com](mailto:ZostavaxMCL_PFS@venable.com).

¹ Plaintiff/plaintiff-decedents who received the Zostavax vaccine and allege that they subsequently developed a condition other than shingles, or a condition in addition to shingles (other than any sequelae that may flow directly from shingles, such as postherpetic neuralgia (“PHN”) and allodynia), are excluded from the bellwether process at this time.

Nothing in this order prevents Defendants from seeking additional authorizations for the release of records, including authorizations for the release of Social Security records, as part of later discovery in these cases.

Plaintiffs are required to (1) determine which health care providers identified in their PFS require proprietary authorizations; (2) obtain those proprietary authorizations; and (3) serve those proprietary authorizations. If plaintiffs fail to provide proprietary authorizations required by health care providers identified in their PFS, they must do so within fourteen (14) days of being notified by Merck's counsel that such an authorization is necessary. If plaintiff does not provide the proprietary authorization within fourteen (14) days, Merck may then submit to the Court a motion to compel.

For healthcare providers identified in the PFS who do not require proprietary authorizations, plaintiff shall produce a single general authorization, in which the authorization is dated and signed by plaintiff, but the provider field is left blank. Plaintiff's provision of such an authorization shall constitute permission for Merck to use it for any healthcare provider identified in Section II of the PFS.²

If Merck wishes to obtain records from a source not identified in the PFS, Merck shall provide plaintiff's counsel for that particular case with notice of its request for an authorization. If Merck is seeking permission to add a provider name to the general authorization, plaintiff shall respond within seven (7) days either granting permission or objecting. If plaintiff's counsel objects to Merck's request, plaintiff's counsel and Merck's counsel shall meet and confer within five (5) business days

² Contemporaneous with the service of a PFS, a plaintiff may object to the use the general authorization for the collection records from specific healthcare providers identified in Section III of the PFS. If no such contemporaneous objection is made, Merck may pursue records from healthcare providers identified in Section III of the PFS using the general authorization.

of the date of the objection in an attempt to resolve the objection. If plaintiff does not respond to Merck's request within seven (7) days, Merck may add the requested provider to the general authorization. If Merck is seeking permission to collect records from a provider who requires a proprietary authorization, Merck shall attach the authorization required by that provider or facility to its request. Within fourteen (14) days of receiving that notice, plaintiff's counsel shall either object to Merck's request or provide an executed authorization. If plaintiff's counsel objects to Merck's request, plaintiff's counsel and Merck's counsel shall meet and confer within five (5) business days of the date of the objection in an attempt to resolve the objection. If plaintiff's counsel fails to object to the request or provide the requested authorization within fourteen (14) days, or if counsel are unable to resolve the objection after a meet-and-confer has been had over an objection, Merck may file a motion to compel.

C. Core Fact Discovery

On or before November 12, 2020, Defendants' Liaison Counsel and Plaintiffs' Liaison Counsel shall exchange selections of fifteen (15) cases for Core Fact Discovery (for a total of thirty (30) cases. These selections shall be made from the sixty (60) Bellwether Discovery Cases. If necessary, and before November 19, 2020, the parties will meet and confer in good faith to avoid any duplication in their respective selections of Bellwether Discovery Cases for Core Fact Discovery. On November 19, 2020, the parties shall jointly notify the Court of the list of thirty (30) Bellwether Discovery Cases that will proceed to Core Fact Discovery.

Core Fact Discovery will consist of up to four (4) depositions of plaintiff-specific fact witnesses. Core Fact discovery will be limited to depositions of: the plaintiff; the health care provider who administered Zostavax to plaintiff; the health care provider who prescribed Zostavax to plaintiff; and the health care provider(s) who treated plaintiff for the conditions he or she alleges

were caused by Zostavax. Upon agreement of the parties or for good cause shown, additional depositions of health care providers may be taken.

Core Fact Discovery shall commence on November 19, 2020 and close June 3, 2021.

D. Merck's Obligation to Provide a Defendant Fact Sheet

On February 18, 2021, or 90 days after receiving a materially complete PFS, whichever is later, Merck will complete and execute a Defendant Fact Sheet ("DFS") for each of the thirty (30) cases selected for Core Fact Discovery and produce to plaintiffs all records required under the DFS. Concurrent with service on the individual plaintiff, Merck shall serve the completed and executed DFS and responsive documents upon the Plaintiffs' Liaison Counsel by sending an email to zostavax-nj@bernlip.com. The Plaintiffs' Executive Committee as well as any duly authorized agents or designees of the Plaintiffs' Executive Committee shall be permitted to review any and all DFSs and accompanying relevant records.

III. BELLWETHER TRIAL POOL CASES

A. Selection of Cases for Bellwether Trial Pool and Additional Fact Discovery

On or before June 18, 2021, Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel will each identify three (3) cases for Additional Fact Discovery and Bellwether Trial consideration. These six (6) cases will be referred to as Bellwether Trial Pool Cases. Additional Fact Discovery will consist of up to four (4) depositions of plaintiff-specific fact witnesses. In addition, the parties may serve interrogatories and requests for production related to case-specific facts in the six (6) Bellwether Trial Pool Cases.

As part of Additional Fact Discovery, each party in a Bellwether Trial Pool Case may only notice two (2) additional case-specific fact depositions of current or former Merck employees, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. If the non-noticing party disputes that the designated

deponent has information that is case-specific to the particular Bellwether Discovery Case, the non-noticing party may challenge the notice within five (5) business days by moving for a protective order. The parties must meet-and-confer in good faith prior to the filing of the motion.

Additional Fact Discovery for the Bellwether Trial Pool Cases will commence June 18, 2021 and will close September 20, 2021.

B. Bellwether Trial Pool Expert Discovery and Dispositive Motion Practice

On or before November 5, 2021, Plaintiffs' Liaison Counsel will serve expert reports in the six (6) Bellwether Trial Pool Cases. On or before December 10, 2021, Defendants will serve expert reports in the Bellwether Trial Pool Cases. No party will serve rebuttal expert reports. Expert depositions for the Bellwether Trial Pool Cases will conclude no later than March 10, 2022. Any motions challenging the admissibility of expert witness testimony will be served on or before April 6, 2022; opposition briefs will be served on or before May 6, 2022; and reply briefs will be served on or before May 27, 2022.

Any dispositive motions in the Bellwether Trial Pool will be served on or before April 6 2022; opposition briefs will be served on or before May 6, 2022; and reply briefs will be served on or before May 27, 2022.

IV. BELLWETHER TRIAL CASE SELECTION AND SCHEDULING

After all dispositive motions and motions challenging the admissibility of expert witness testimony are fully briefed by the parties, the Court shall schedule a status conference to determine the schedule and logistics for selecting Bellwether Trial Cases. Prior to this status conference, the parties shall meet and confer and jointly submit a status report.

V. EFFECT OF DISMISSALS OF BELLWETHER DISCOVERY CASES

If, prior to September 20, 2021, any Bellwether Discovery Case is voluntarily dismissed by plaintiff(s), other than because of settlement, Defendants' Liaison Counsel may select a

replacement case for inclusion in the Bellwether Discovery Cases. If, prior to September 20, 2021, any Bellwether Discovery Case is settled by Defendants, Plaintiffs' Liaison Counsel may select a replacement case for inclusion in the Bellwether Discovery Cases. If, prior to September 20, 2021, any Bellwether Discovery Case is dismissed after motion practice initiated by Defendants, the party that selected the dismissed case may select a replacement case for inclusion in the Bellwether Discovery Cases.

In addition, in the event that cases selected as Bellwether Trial Pool Cases are dismissed after September 20, 2021, the Court may modify the deadlines herein depending upon the circumstances of the dismissal or otherwise adjust the balance of selections or the terms of this Case Management Order to ensure the integrity of the bellwether process.

This Order may be modified or amended for good cause shown, after appropriate notice and opportunity to be heard is provided to the affected parties, when the Court believes the interest of justice requires modification.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated: May 18, 2021

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**PLAINTIFFS' LIAISON
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Respectfully submitted,

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**DEFENDANTS' LIAISON
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APPROVED AND SO ORDERED THIS 18TH DAY OF MAY 2021

/s/ Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.