

**IN RE: ZOSTAVAX LITIGATION**

**THIS ORDER APPLIES TO ALL  
CASES**

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

MCL NO. 629

~~PROPOSED~~ **CASE MANAGEMENT  
ORDER**

**DEPOSITION PROTOCOL**

**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 20th day of ~~December 2020~~,  
January 2021

**ORDERED** as follows:

This Order shall apply to depositions taken as part of Core Fact Discovery in any Bellwether Discovery Case and as part of Additional Fact Discovery in any Bellwether Trial Pool Case, as defined in Sections II and III of the August 27, 2020 Amended Bellwether Selection and Scheduling Order (“Bellwether Order”). This order sets forth the protocol for depositions taken by Plaintiffs or Defendants Merck & Co., Inc. and Merck Sharp & Dohme Corp. (collectively, “Merck”) and Defendant McKesson Corporation (collectively, “the Parties”). The Parties are adjusting to challenges posed by the COVID-19 pandemic and are exploring alternative methods of taking depositions and have determined that remote video depositions will be the method of conducting depositions unless otherwise agreed upon by the Parties. If a given deposition is taken with one or more Parties attending remotely, the Parties agree that the provisions in this stipulation will apply (“the Stipulation”):

**1. Compliance with New Jersey Rules of Civil Procedure and Court Orders.**

Remote depositions will be subject to the relevant New Jersey Rules, including but not limited to,

Rules 4:14 and 4:16, and all relevant orders of the Court, including but not limited to, the Bellwether Order.

- a. The deposition notice shall state that the deposition will be taken remotely. The notice shall also state, to the extent applicable, if the deposition is to be audiovisually-recorded.
- b. The fact that a deposition has been taken remotely will not impact the admissibility or use of deposition testimony at trial, or for any other purposes in this case.

2. **Remote Deposition Vendor.** Unless otherwise agreed in writing by all Parties, the Party noticing a deposition will select the remote deposition vendor.

3. **Confidentiality/Security.** Remote depositions will be conducted in a manner that complies with the Stipulated Protective Order entered in this case on June 12, 2019. If privileged or protected information is disclosed during the deposition due to a technical failure or disruption—including, but not limited to, any instances where the defending attorney is disconnected from the software or is unable to have an objection heard immediately—such disclosure shall not be deemed a waiver of privilege or protection.

4. **Technology and Connectivity.** Counsel defending the deposition if the witness is a Party to this litigation or a current or former Merck employee, or the Party noticing the deposition in the event the deponent is not a Party to this litigation, shall be responsible for ensuring that the deponent has access to the necessary equipment and software and a sufficient telephone and/or internet connection required for the deposition.

- a. If the deponent, taking attorney (or any second chair), or defending attorney (or any second chair) experiences connectivity issues during the deposition,

the deposition shall be stopped immediately to resolve the connectivity issues and shall be off the record at the time the deposition is stopped and until the connectivity issues are resolved. If the defending attorney, taking attorney, or deponent experiences connectivity issues, and connectivity is not restored within one (1) hour, the deposition shall be suspended and rescheduled unless the defending and taking attorneys agree to wait for an additional period. If there is only audio and no video connectivity, and video connectivity is not restored within one (1) hour, the deposition will be suspended and rescheduled unless the defending and taking attorneys agree to wait for an additional period or agree to otherwise proceed (*i.e.*, with only audio connectivity).

- b. With respect to any case-specific depositions of current or former Merck employees as permitted under Section III. A. of the Bellwether Order, if any participant other than the deponent, counsel for the taking Party or the deponent, the court reporter, or the videographer experience connectivity issues, they agree to continue to participate in the deposition by audio only. With respect to depositions of any Plaintiff, (i) if any participant (other than the deponent, counsel for the taking Party or the deponent, the court reporter, or the videographer) who does not intend to question the deponent experiences connectivity issues, they agree to continue to participate in the deposition by audio only, but (ii) if any participant who intends to question the deponent experiences connectivity issues, the deposition will be

suspended and rescheduled unless such participant, and the defending and taking attorneys, agree to wait for an additional period.

5. **Deposition Exhibits.** For depositions of Plaintiffs as permitted under Sections II. and III. A. of the Bellwether Order, or current or former Merck employees as permitted under Section III. A. of the Bellwether Order, all exhibits shall be sent to the deponent and counsel defending the deposition in time to be received the day before the deposition is to begin. Counsel taking the deposition will confirm the deponent and counsel's addresses prior to sending exhibits. An address provided pursuant to the Stipulation shall be regarded as highly confidential and may not be used by the taking Party for any purpose other than arranging for the delivery of potential exhibits. The exhibits will be in sealed envelopes marked with a number on the outside. Only when instructed to do so, the witness – and counsel for the witness – shall open the appropriate envelope on camera. Counsel taking the deposition will also upload the exhibits to the deposition vendor platform, during the deposition as the exhibit is introduced, so that all Parties are able to view the exhibits electronically. If the attorney or Party is unable to access the deposition vendor platform during the course of the deposition, the exhibits can be emailed to the attorney or Party during the deposition.

- a. If one or more potential exhibits are not marked at the deposition (“Unmarked Exhibits”), such sealed envelopes shall not be opened and shall be returned to the taking Party pursuant to Paragraph 5b. below.
- b. Following the completion of the deposition, the deponent and defending attorney shall, as soon as practicable but no later than 30 days after the deposition, return via overnight mail, all hard copies of the Unmarked

Exhibits. The taking Party shall provide a return label in the original shipment.

6. **Protections Against Discovery Abuse or Misconduct by Counsel.** During live testimony on the record, counsel shall not communicate, orally or in writing, with the deponent in any way other than through the videoconference or remote technology that may be heard by all participants to the deposition. This includes barring use of private messages of any kind, including text messages, emails, or instant messages. Such prohibition shall not affect the right of the deponent and her/his lawyer(s), including in-house counsel for Merck, to communicate in private off the record during a break in the deposition, subject to the relevant New Jersey Rules, including but not limited to, Rules 4:14-3(f) and 4:16, and all relevant orders of the Court, including but not limited to, the Bellwether Order. By way of example only, a deponent may consult privately with counsel during such times that a consultation would be permissible if the deposition were taken in person, including by asking for a break to seek advice on possible issues of privilege.

7. **Protections Against Discovery Abuse or Misconduct Regarding Deponent.** Defending counsel shall advise the deponent that:

- a. During the time the deponent is testifying, he or she shall not have anything (*e.g.* notes, documents, other electronic devices) within his or her view that may relate to the deposition unless provided to the taking Party before the deposition.
- b. The deponent shall not communicate, orally or in writing, with anyone other than counsel attending the deposition (remotely or in-person) regarding anything related to the substance of the deposition, except as set forth in

Section 6 above. This includes private messages of any kind, including text messages, emails, or instant messages.

- c. Except as permitted in Section 6 above, the deponent shall not use any electronic communication device to communicate with any individual regarding the deposition.
- d. Except for counsel for the Parties, videographers, and/or court-reporters, attending the deposition in person, the deponent shall be alone in a room in which the hardware equipment used for the deposition is located.

8. This Stipulation is not intended to compel any deponent or any counsel to appear in person during a deposition. If a deponent desires to be deposed remotely, he or she cannot be compelled to appear in person and the deponent's remote appearance shall not be used as a reason to cancel a deposition. Similarly, if a deponent and counsel for the deponent desire to appear in person, the fact that the taking Party will conduct the deposition remotely shall not be used as a reason to cancel a deposition.

9. The Stipulation is designed to address a novel deposition procedure and special circumstances posed by the COVID-19 pandemic, which are inherently subject to change; as such, the Stipulation will remain in effect for five months from the date entered into by the Parties, and be subject to reevaluation at that time. During that five-month period, to the extent that any provision of the Stipulation becomes burdensome or unworkable to a Party, the Parties agree to meet and confer on the issue. If, after the Parties meet and confer on this issue – that any provision of this Stipulation becomes burdensome or unworkable to a Party – and are unable to come to an agreement, each Party may file a motion for a protective order and seek to modify or terminate this Stipulation.

**IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

Respectfully submitted,

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**DEFENDANTS' LIAISON  
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**APPROVED AND SO ORDERED** this 20<sup>th</sup> day of January, ~~2020~~<sup>2021</sup>

/s/ James F. Hyland  
The Honorable James F. Hyland

**A COPY OF THIS ORDER SHALL BE POSTED ONLINE BY THE  
COURT.**