

FILED

July 13, 2023

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

**IN RE: ZOSTAVAX LITIGATION**

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

MCL NO. 629

**CASE MANAGEMENT ORDER:**

**FIRST AMENDED BELLWETHER  
SELECTION AND SCHEDULING: GROUP B**

**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 13th day of July, 2023,

**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 Group B bellwether cases (defined below) (“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”).

**I. BELLWETHER SELECTION CRITERIA**

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

- Plaintiff/plaintiff-decedent received the Zostavax vaccine and alleges that he or she subsequently developed a condition other than herpes zoster (“shingles”) and have served a certified and responsive Plaintiff Fact Sheet by May 1, 2023.<sup>1</sup>

Those cases currently active in MCL No. 629 meeting these criteria are identified in Exhibit A to this Order (the “Group B Cases”).

## **II. BELLWETHER DISCOVERY CASES**

### **A. Preselection Assessment**

#### **i. Assessing Merits of the Group B Cases**

All individual plaintiffs’ counsel shall review their Group B Cases to assess their merit. For any Group B Case that, after such review, individual counsel no longer believes, in good faith, to be meritorious, individual counsel will use best efforts to obtain permission from the plaintiff to voluntarily dismiss their case with prejudice. For those cases in which permission is granted, the parties shall file a stipulation of dismissal with prejudice and without fees or costs pursuant to New Jersey Rule 4:37-1(a). The process described in this section, including the filing of stipulations of dismissal, shall be completed by July 31, 2023. Any Group B Cases not voluntarily dismissed by July 31, 2023, or otherwise dismissed by motion, will be eligible for selection as a Bellwether Discovery Case.

#### **ii. Amended Plaintiff Fact Sheets**

As part of their assessment of the merits of their Group B Cases, individual plaintiffs’ counsel shall review with their respective plaintiffs the operative Plaintiff Fact Sheets (PFS) served in their respective Group B Cases and confirm that they still intend to seek recovery for each of the injuries they attributed to Zostavax in Section C of the PFS. If plaintiffs are no

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<sup>1</sup> Plaintiff/plaintiff-decedents who received the Zostavax vaccine and allege that they subsequently developed shingles are excluded from the bellwether process at this time.

longer seeking to recover for certain injuries identified therein, an amended PFS eliminating the claim for those injury/injuries shall be served by July 31, 2023. Transmission of the amended PFS shall be accompanied by a letter or email identifying the injury/injuries for which the plaintiff is no longer making a claim.

**B. Selection of Bellwether Discovery Cases**

On August 14, 2023, Plaintiffs' Liaison Counsel and Defendant's Liaison Counsel will exchange selections of fifteen (15) Bellwether Discovery Cases for a total of thirty (30) cases. Each party shall make a good-faith attempt to ensure that its bellwether selections are representative of the Group B Cases as a whole. If either party believes that the other party has failed to comply with this provision, they may raise an objection with the Court after making a good-faith effort to resolve the dispute without Court intervention.

**C. Plaintiffs' Signed Authorizations**

On or before September 5, 2023 and consistent with N.J. Ct. R. 4:17-4, each plaintiff in the thirty (30) 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.<sup>2</sup> The authorizations shall be served electronically on

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<sup>2</sup> In recognition of the parties' need to quickly and efficiently collect and review relevant medical records, it is expected that plaintiffs' counsel will use the time allotted to case assessment in Section II.A. to begin the process of obtaining the necessary authorizations. Once authorizations are obtained in any of the Bellwether Discovery Cases, counsel shall not delay in producing those authorizations in accordance with this section.

Defendants' Liaison Counsel at the following email address: [ZostavaxMCL\\_PFS @venable.com](mailto:ZostavaxMCL_PFS@venable.com).

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.<sup>3</sup>

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

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<sup>3</sup> Contemporaneous with the service of a PFS, a plaintiff may object to the use of the general authorization for the collection of 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.

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 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.

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 ten (10) 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.

**D. Defense Fact Sheets**

Provided that the form and substance of a Defense Fact Sheet (DFS) is agreed-upon by the parties and entered by the Court by no later than June 8, 2023, Defendants shall serve a DFS in all Bellwether Discovery Cases by September 5, 2023.

**E. Core Fact Discovery**

On January 16, 2024, Defendants' Liaison Counsel and Plaintiffs' Liaison Counsel shall exchange selections of ten (10) cases for Core Fact Discovery (for a total of twenty (20) cases). These selections shall be made from the thirty (30) Bellwether Discovery Cases. Each party shall make a good-faith attempt to ensure that its selections are representative of the Group B cases as a whole. If either party believes that the other party has failed to comply with this provision, they

may raise an objection with the Court after making a good-faith effort to resolve the dispute without Court intervention.

If necessary, and before January 22, 2024, 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 January 29, 2024, the parties shall jointly notify the Court of the list of 20 Bellwether Discovery Cases that will proceed to Core Fact Discovery.

Core Fact Discovery will consist of up to four (4) depositions of case-specific fact depositions per case unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. Core Fact Discovery shall commence on January 22, 2024, and close on July 1, 2024. Any case-specific written discovery shall be served on the opposing party no later than April 30, 2024.

### **III. BELLWETHER TRIAL POOL CASES**

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

On or before July 15, 2024, Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel will each identify four (4) cases for Bellwether Trial consideration. These eight (8) cases will be referred to as Bellwether Trial Pool Cases.

#### **B. Bellwether Trial Pool Expert Discovery and Dispositive Motion Practice**

On or before August 15, 2024, Plaintiffs' Liaison Counsel will serve expert reports in the eight (8) Bellwether Trial Pool Cases. On or before September 16, 2024, Defendants' Liaison Counsel will serve expert reports in the Bellwether Trial Pool Cases. Within 14 days of receipt of the opposing party's expert report Counsel may seek permission from the Court to file rebuttal expert reports, which shall be permitted solely to refute unforeseen theories or address evidence

obtained or scientific publications published after plaintiff's expert reports were served. Expert depositions for the Bellwether Trial Pool Cases will conclude no later than April 30, 2024.

At the conclusion of expert discovery, the parties and the Court shall confer regarding a briefing schedule for Kemp and dispositive motions in the eight (8) Bellwether Trial Pool Cases.

#### **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 July 1, 2024, any Bellwether Discovery Case is voluntarily dismissed by plaintiff(s), other than because of settlement or procedural dismissal due to circumstances unforeseen at the time the case was selected for the Bellwether Discovery Pool, Defendants' Liaison Counsel may select a replacement case for inclusion in the Bellwether Discovery Cases. If, prior to July 1, 2024, 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 July 1, 2024, 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 the event that cases selected as Bellwether Trial Pool Cases are dismissed after July 15, 2024, 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.

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

Service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. If applicable, 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 entry of the Order.

Uploaded pursuant to the June 28, 2023 Case Management Conference.

Please see the attached Exhibit A.



**Exhibit A to CMO: Bellwether Selection and Scheduling: Group B**

<b>Plaintiff Name</b>	<b>Docket No.</b>	<b>Firm</b>
Alderman, Drema	MID-L-003166-19	Marc J. Bern & Partners LLP
Anderson, Lannie G.	MID-L-008593-20	Sadaka Associates, LLC
Aumick, Deborah	MID-L-002591-21	Sadaka Associates, LLC
Baker, Cheryl	MID-L-001561-21	Marc J. Bern & Partners LLP
Baker, Darrell	MID-L-003368-18	Marc J. Bern & Partners LLP
Barrios, Nohra	MID-L-000824-20	Morgan & Morgan / Sadaka Associates, LLC
Berkowitz, Avrum David	MID-L-006673-19	Douglas & London, P.C.
Best, Judith Monahan, Laura Gugliucci (admin)	MID-L-002272-20	Morgan & Morgan / Sadaka Associates, LLC
Bilinski, Vickie	MID-L-007925-20	Sadaka Associates, LLC
Bland, Hank	MID-L-000141-19	Morgan & Morgan / Sadaka Associates, LLC
Braley, Stephen	MID-L-001915-19	Sadaka Associates, LLC
Brockman, Joan	MID-L-007239-18	Marc J. Bern & Partners LLP
Campbell, Marie	MID-L-004767-21	Marc J. Bern & Partners LLP
Cardaciotto, Paul	MID-L-007142-19	Douglas & London, P.C.
Carder, Nora	MID-L-004820-21	Marc J. Bern & Partners LLP
Chambers, Brenda	MID-L-006890-19	Sadaka Associates, LLC
Chand, Naresh	MID-L-003810-20	Sadaka Associates, LLC
Conte, Joseph	MID-L-006530-18	Marc J. Bern & Partners LLP
Cook, Dolores	MID-L-001354-19	Marc J. Bern & Partners LLP
Cozzarelli, Raymond	MID-L-007664-19	Sadaka Associates, LLC
Davis, Danny	MID-L-000936-21	Sadaka Associates, LLC
Depaul, Linda	MID-L-006723-17	Sadaka Associates, LLC
Doles, Mary	MID-L-008481-20	Sadaka Associates, LLC
Dougherty, Sharon C.	MID-L-002066-19	Marc J. Bern & Partners LLP
Dougherty, Terri	MID-L-001968-21	Sadaka Associates, LLC
Edmunds, David	MID-L-003498-20	Douglas & London, P.C.
Elliott, Diane	MID-L-002875-21	Sadaka Associates, LLC
English, Edward	MID-L-003579-22	Sadaka Associates, LLC
Fay, Roland	MID-L-006886-19	Morgan & Morgan / Sadaka Associates, LLC
Ferris, Harold Ferris, David (admin)	MID-L-000157-21	Sadaka Associates, LLC
Fiermonte, Cecilia	MID-L-001420-21	Sadaka Associates, LLC
Foley, Jennie	MID-L-006947-20	Douglas & London, P.C.
Foren, Gary	MID-L-001897-19	Sadaka Associates, LLC

<b>Plaintiff Name</b>	<b>Docket No.</b>	<b>Firm</b>
Frede, Kathryn	MID-L-001924-19	Sadaka Associates, LLC
Garrison, Janet	MID-L-000783-21	Sadaka Associates, LLC
Geller, Allan	MID-L-003515-20	Douglas & London, P.C.
Grabbs, Dyan	MID-L-003288-21	Sadaka Associates, LLC
Grieco, Phyllis	MID-L-000784-21	Sadaka Associates, LLC
Haines, Ruth	MID-L-002807-21	Sadaka Associates, LLC
Hall, Brenda	MID-L-001437-19	Sadaka Associates, LLC
Harries, Mark	MID-L-005635-19	Sadaka Associates, LLC
Hefty, Jeanne Marie	MID-L-003936-21	Marc J. Bern & Partners LLP
Hermanson, Lynne	MID-L-003912-21	Marc J. Bern & Partners LLP
Hires, Diane	MID-L-008261-18	Marc J. Bern & Partners LLP
Hopkins, Ann Marie	MID-L-008594-20	Sadaka Associates, LLC
Huryan, Elsie	MID-L-000833-20	Morgan & Morgan / Sadaka Associates, LLC
Irving, Ellen	MID-L-001421-21	Sadaka Associates, LLC
Jackson, Shirley	MID-L-003355-21	Sadaka Associates, LLC
Jenson, John	MID-L-004891-19	Marc J. Bern & Partners LLP
Kalman, Debra Kalman, Neil (admin)	MID-L-001965-20	Douglas & London, P.C.
Kaplan, Scott	MID-L-006734-18	Marc J. Bern & Partners LLP
Kelley, Suzanne	MID-L-002388-21	Sadaka Associates, LLC
Kirkland, Mona	MID-L-008343-19	Morgan & Morgan / Sadaka Associates, LLC
Lafont, John	MID-L-008653-19	Sadaka Associates, LLC
Larsen, Maureen E.	MID-L-004216-20	Morgan & Morgan / Sadaka Associates, LLC
Lawson, Karen	MID-L-000077-21	Sadaka Associates, LLC
Lawson, Kimberly	MID-L-000078-21	Sadaka Associates, LLC
Lewis, Dollie	MID-L-002195-19	Sadaka Associates, LLC
Lien, Elizabeth	MID-L-000609-19	Marc J. Bern & Partners LLP
Liftig, Robert	MID-L-003477-19	Sadaka Associates, LLC
Lightfoot, Kathleen	MID-L-002147-20	Morgan & Morgan / Sadaka Associates, LLC
Little, Michael	MID-L-001925-19	Sadaka Associates, LLC
Lobel, Arthur	MID-L-001544-20	Morgan & Morgan / Sadaka Associates, LLC
Lobel, Elizabeth	MID-L-001545-20	Morgan & Morgan / Sadaka Associates, LLC
Lombardo, Elissa	MID-L-008622-18	Marc J. Bern & Partners LLP
Majors, Gloria	MID-L-004715-21	Sadaka Associates, LLC
Marko, Robin	MID-L-003365-18	Marc J. Bern & Partners LLP

<b>Plaintiff Name</b>	<b>Docket No.</b>	<b>Firm</b>
McClain, Susan	MID-L-004752-21	Marc J. Bern & Partners LLP
McClure Christie, Rhonda	MID-L-000134-19	Sadaka Associates, LLC
McGee, Frazier	MID-L-008558-19	Morgan & Morgan / Sadaka Associates, LLC
Merker, Michael	MID-L-003509-20	Douglas & London, P.C.
Miley, Suzanne	MID-L-000042-21	Sadaka Associates, LLC
Molina, Laura	MID-L-002654-20	Marc J. Bern & Partners LLP
Moore, Janet	MID-L-007178-18	Marc J. Bern & Partners LLP
Mosley, Margaret	MID-L-003354-21	Sadaka Associates, LLC
Mulligan, William	MID-L-001969-21	Sadaka Associates, LLC
Nelson, Peggy	MID-L-005749-17	Sadaka Associates, LLC
Norman, Silestine	MID-L-000785-21	Sadaka Associates, LLC
Parish, Cassandra	MID-L-008084-18	Sadaka Associates, LLC
Parker, Deborah	MID-L-000447-18	Sadaka Associates, LLC
Paynter, Debra	MID-L-000043-21	Sadaka Associates, LLC
Perez, Lynne	MID-L-002198-20	Morgan & Morgan / Sadaka Associates, LLC
Peterson, Spencer	MID-L-002322-21	Sadaka Associates, LLC
Pierce, Cynthia Ferguson, Catherine Holly Brightwell (admin)	MID-L-002628-19	Marc J. Bern & Partners LLP
Pineiro, Ada	MID-L-005054-17	Sadaka Associates, LLC
Plummer, Donna	MID-L-001527-22	Marc J. Bern & Partners LLP
Pope, Bonnetta	MID-L-004993-19	Marc J. Bern & Partners LLP
Printz, Rochelle	MID-L-004691-21	Douglas & London, P.C.
Pujat, Geraldine	MID-L-008235-18	Morgan & Morgan / Sadaka Associates, LLC
Raymos, Crystal	MID-L-000080-19	Marc J. Bern & Partners LLP
Reese, Allen	MID-L-003501-20	Douglas & London, P.C.
Rivkind, Maxene	MID-L-001181-19	Marc J. Bern & Partners LLP
Rodgers, David H.	MID-L-001835-21	Sadaka Associates, LLC
Salvador, Christine	MID-L-002537-21	Sadaka Associates, LLC
Sands, Diane	MID-L-002098-19	Marc J. Bern & Partners LLP
Scarlett, Sherrie	MID-L-000080-21	Sadaka Associates, LLC
Schott, Theodore L.	MID-L-008634-18	Marc J. Bern & Partners LLP
Seaton, Michael	MID-L-003484-19	Sadaka Associates, LLC
Siebken, Lois	MID-L-008578-18	Marc J. Bern & Partners LLP
Smith, Bruce	MID-L-001967-21	Sadaka Associates, LLC
Sneed, Charles	MID-L-000942-19	Sadaka Associates, LLC
Snowberger, Duane	MID-L-004545-21	Sadaka Associates, LLC

<b>Plaintiff Name</b>	<b>Docket No.</b>	<b>Firm</b>
Sonenberg, Beverly	MID-L-003270-20	Marc J. Bern & Partners LLP
Souto, Pamela	MID-L-000809-20	Morgan & Morgan / Sadaka Associates, LLC
Statts, Mary J.	MID-L-000934-19	Morgan & Morgan / Sadaka Associates, LLC
Stepneski, Melody	MID-L-000831-20	Morgan & Morgan / Sadaka Associates, LLC
Stice, Evelyn	MID-L-007941-20	Sadaka Associates, LLC
Still, Charles B.	MID-L-002952-20	Sadaka Associates, LLC
Sukkar, Norman	MID-L-005192-17	Morgan & Morgan / Sadaka Associates, LLC
Trabucco, Rosanne	MID-L-004408-21	Marc J. Bern & Partners LLP
Valone, Joseph	MID-L-003876-21	Sadaka Associates, LLC
Verastegui, Gerri	MID-L-001954-20	Douglas & London, P.C.
Walker, Marc L.	MID-L-002319-20	Morgan & Morgan / Sadaka Associates, LLC
Wantland, Reta	MID-L-003082-20	Sadaka Associates, LLC
Waterfield, Laura	MID-L-003578-22	Sadaka Associates, LLC
Watson, Sherry	MID-L-002043-21	Sadaka Associates, LLC
Watts, Evelyn	MID-L-001267-21	Sadaka Associates, LLC
Whyte, Michael	MID-L-000835-20	Morgan & Morgan / Sadaka Associates, LLC
Williams, Eunice	MID-L-006232-19	Morgan & Morgan / Sadaka Associates, LLC
Winn, Frankie	MID-L-000888-21	Marc J. Bern & Partners LLP
Woerndell, Robert	MID-L-006301-20	Marc J. Bern & Partners LLP