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FILED

AUGUST 19, 2021

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

IN RE ZOSTAVAX LITIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX COUNTY

MCL NO.: 629

MASTER DOCKET NO.: 4999-18

**AMENDED
ORDER**

THIS MATTER having come before the Court upon Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp.'s, "10 Day Order" submissions, pursuant to Case Management Order 17, ¶ 2 ("CMO 17"), seeking to convert cases dismissed without prejudice by this Court on May 5, 2021, to dismissals with prejudice, and the Court having considered the moving papers, Plaintiffs' oppositions, for the reasons stated in the attached Statement of Reasons, and for good cause having been shown,

IT IS on this 9th day of August 2021, hereby;

ORDERED that the cases in the attached Exhibit A be and are hereby **DISMISSED WITH PREJUDICE** in accordance with R. 4:23-5(a)(2), for failure to comply with Court Orders requiring production of Plaintiff Fact Sheets, and it is further

ORDERED that that the cases in the attached Exhibit B be and are hereby **DISMISSED WITH PREJUDICE** in accordance with R. 4:23-5(a)(2), for failure to comply with Court Orders requiring production of Proof of Product Usage; and it is further

ORDERED that the cases in the attached Exhibit C be and are hereby **DISMISSED WITH PREJUDICE** in accordance with R. 4:23-5(a)(2), for failure to comply with Court Orders requiring **both** Proof of Product Usage and Plaintiff Fact Sheets; and it is further

ORDERED that this Order shall be deemed served upon its filing in the Master Docket (MID-L-4999-18). Movant shall serve all parties not electronically served within seven (7) days of the date of this Order in accordance with R. 1:5-1(a); and it is further

ORDERED that Plaintiffs' counsel shall serve Plaintiffs with a copy of this Order by ordinary mail, and certified mail, return receipt requested, within seven (10) days of the date of this Order.

/s/ Bruce J. Kaplan

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

OPPOSED

SEE ATTACHED STATEMENT OF REASONS

STATEMENT OF REASONS

Defendants, Merck & Co., Inc., and Merck Sharp & Dome, Corp., (hereinafter referenced as “Defendant”) move this Court by way of 10-Day Order filed on July 9, 2021, to convert Plaintiffs’ cases currently dismissed without prejudice to dismissals with prejudice, in accordance with R. 4:23-5(a)(2).¹ On July 19, 2021, Plaintiffs filed a general “omnibus” opposition, indicating that certain Plaintiffs in Defendants’ Exhibits were either voluntarily dismissed or are now compliant with their discovery obligations.² Plaintiffs’ counsel argues that the remaining Plaintiffs should not be dismissed with prejudice given that dismissal with prejudice is the ultimate sanction, that cases should be won or lost on their merits, and that Defendant is not prejudiced by Plaintiffs’ inability to produce threshold discovery. The Court notes that it has read the moving papers, and the papers in opposition; briefing is complete, and this matter is ripe for decision. For the reasons stated herein, the Plaintiffs’ cases attached in the Exhibits below are **DISMISSED WITH PREJUDICE**.

The circumstances surrounding this matter are largely undisputed. The Plaintiffs subject to this Order had their cases dismissed without prejudice on May 5, 2021 after failing to provide Defendant with either Proof of Use and/or Plaintiff Fact Sheets (“PFS”). It is undisputed that, prior to this Court entering the two May 5, 2021 Orders dismissing these cases without prejudice, Plaintiffs sought and received numerous extensions from this Court to provide Defendant with sufficient Plaintiff Fact Sheets and/or Proof of Use.

Specifically, following an April 26, 2021 Liaison Counsel Meeting and a May 4, 2021 Case Management Conference, on May 5, 2021, this Court entered Orders dismissing Plaintiffs without prejudice for “failure to provide proof of product usage pursuant to the Court’s August 23, 2019 Product Usage Order, paragraph 4 of Case Management Order No. 7, the Court’s instruction at the December 17, 2019 Case Management Conference and the Court’s April 15, 2021 Order,” and for “failure to timely provide a Plaintiff Fact Sheet pursuant to the Court’s instruction at the 2/4/2020

¹ Pursuant to Case Management Order No. 17, ¶ 2, (“CMO 17”), this Court permitted Defendant to file its request to convert dismissals without prejudice into dismissals with prejudice under the “10 Day Rule,” giving Plaintiff’s 10 days to object to Defendant’s form of Order or the substance therein. Plaintiffs’ objection was received on July 19, 2021.

² These Plaintiffs have been crossed off the attached exhibits, with those Plaintiffs who have agreed to voluntarily dismiss their cases being included on a separate Order, with language reflecting same. The Plaintiffs who counsel has indicated are now compliant were reinstated via Order dated August 6, 2021.

CMC and Case Management Order No. 8.” See Orders dated 5/5/2021. Those Orders further provided that Plaintiffs had sixty (60) days to come into compliance with their outstanding discovery obligations and move to reinstate, or Defendants could move to dismiss their Complaints with prejudice. Ibid.

This brings the Court to the instant 10-Day Orders. It has now been more than sixty (60) days since Plaintiffs’ Complaints were dismissed without prejudice for failure to provide a either a materially complete, verified PFS, and/or sufficient Proof of Use. To date, for the attached Plaintiffs, same has *still* not been provided. This is despite several initial extensions to provide same, dismissals without prejudice, two (2) decisions regarding what constitutes sufficient Proof of Use, and initial Orders entered two (2) years ago requiring this threshold discovery. For Plaintiffs to submit an opposition arguing that these cases “should [not] be subject to the ultimate sanction of dismissal with prejudice,” simply because their non-compliance is “not purposeful,” is without merit to warrant a discussion at this point in time. See Plt.’s Opp., pg. 1.³ This is especially true since Plaintiffs do not explain to the Court what steps have been taken, or are being taken, to obtain sufficient Proof of Use for the affected Plaintiffs, nor why they are unable to provide a materially complete, verified PFS.

While Plaintiffs’ positions remain unchanged since the May 5, 2021 Orders dismissing their cases without prejudice, the Court’s position certainly has changed. As noted above, this Court entered the May 5 Orders giving Plaintiffs sixty (60) additional days to satisfy their long-outstanding discovery obligations, thereby placing them on notice that failure to accomplish same may result in dismissal with prejudice. Now, more than two (2) months later, the Court finds itself dealing with Plaintiffs who are in the exact same position as they were when they were dismissed without prejudice. At this time, it is illogical to conclude that dismissals with prejudice are unwarranted under the circumstances.

Pursuant to R. 4:23-5(a)(2), if “an order of dismissal ... 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 for an order of dismissal with prejudice.” It is well-settled that “dismissal with prejudice is the ultimate

³ Plaintiffs’ argument that Defendant has suffered little prejudice as a result of their inability to provide sufficient Proof of Use and/or a materially complete, verified PFS is meritless. Defendant certainly has the right to defend itself against the claims asserted against it in this MCL, and without being able to link Plaintiffs’ claims to their inoculation of Zostavax, Defendant cannot adequately defend its interests.

sanction, [and that] it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party,” Zaccardi v. Becker, 88 N.J. 245, 253 (1982) (internal citations omitted), “or when the litigant rather than the attorney was at fault.” Ibid. (citing Schlosser v. Kragen, 111 N.J. Super. 111 N.J. 337, 341 (1970)). Our Supreme Court has also held that, “[t]he dismissal of a party’s cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases where the order for discovery goes to the very foundation of the cause of action ... or where refusal to comply is deliberate and contumacious.” Schlosser, 111 N.J. at 341 (citing Tsibikas v. Morrof, 5 N.J. Super. 306 (App. Div. 1949)).

As demonstrated by the Court’s foregoing discussion, PFSs and Product Usage are threshold discovery that goes to the very foundation of this MCL, linking Plaintiffs’ claims to their alleged inoculation of Zostavax, which Plaintiffs should be in possession of prior to filing their case. Moreover, at this juncture, there is no “lesser sanction” that can suffice to remedy the violations of this Court’s multiple Orders, and there has certainly been no showing made as to why sufficient Proof of Use and/or a materially complete, verified PFS has not been obtained and provided either in the extensive length of time prior to entry of the May 5, 2021 dismissal orders, nor in the two (2) months since these Plaintiffs’ cases have been dismissed without prejudice.

The unfortunate reality is that despite the length of time of the deficiencies and the number of extensions, Plaintiffs have failed to produce sufficient POU and/or a materially complete, verified PFS. Counsel’s request that this Order be denied is based on the need for more time, but counsel’s opposition is void of any indication that more time would be helpful. Accordingly, as this Court has every reason to believe that counsel has pursued all avenues to obtain POU and/or a PFS on behalf of Plaintiffs, and as there is nothing before this Court as to why more time is necessary at this point in the litigation (other than to further review the matter), this Court has no choice but to grant the requested relief concluding that the attached Plaintiffs have failed to comply with this Court’s Orders and is unsure if and when they ever can.

Accordingly, the Plaintiffs’ listed in the attached Exhibits are hereby **DISMISSED WITH PREJUDICE.**

SEE ATTACHED EXHIBITS

EXHIBIT A

Plaintiff	Docket No.
Allen, Mary	MID-L-000671-19
Blodgett, Rosemary	MID-L-000689-19
Brown, Deborah	MID-L-000468-19
Brown, Marcia	MID-L-000696-19
Butler, William	MID-L-000698-19
Crawley, Patricia	MID-L-000945-19
Fulton, Sheila	MID-L-000556-19
George, Gale	MID-L-008291-18
Hall, Judy	MID-L-000478-19
Hall, Wayne M.	MID-L-000913-19
Hardesty, Barbara	MID-L-000483-19
Henderson, Laverna	MID-L-008625-18
Horton, Leman	MID-L-000488-19
Johnson, Arlene	MID-L-000206-19
Larocca, Margaret	MID-L-008272-18
Lopas, Robert	MID-L-008262-18
Maggart, Sylvia	MID-L-000651-19
Makowski, Dennis	MID-L-008705-18
McKinney, Debra	MID-L-000675-19
Oehmke, Linda	MID-L-000049-19
Parr, Bonnie	MID-L-008248-18
Riani, Rocco A.	MID-L-000518-19
Sanchez, Enrique	MID-L-007944-18
Schadow-Heffron, E. Jeannie	MID-L-000535-19
Sewell, George	MID-L-000898-19
Stahl, Mary (deceased) Gallamore, Barbara (proposed admin)	MID-L-007914-18
Stark, Margaret	MID-L-008306-18
Wampole, Mary (deceased) David, Erica (proposed admin)	MID-L-000547-19
Wisely, Lana	MID-L-000334-19
Zaniewski, Patricia	MID-L-000512-19

EXHIBIT B

Plaintiff	Docket No.	Previous Docket No.
Backlund, Maureen	MID-L-003718-20	MID-L-007635-17
Bonner, James	MID-L-004980-20	MID-L-002500-18
Bostick, Coza Nix (deceased) Johnson, Vickie Lee (admin) Ash, Denise (admin)	MID-L-005568-20	MID-L-003827-18
Bouie, Michael	MID-L-007469-18	
Carrico, Marilyn	MID-L-000161-19	
Cobb, Lois	MID-L-005884-20	MID-L-004023-18
Davidson, Betty Gale	MID-L-000178-19	
Dodson, Nancy	MID-L-004182-20	MID-L-001886-18
Eubanks, James, Jr.	MID-L-004874-20	MID-L-003014-18
Farber, Harold	MID-L-005551-20	MID-L-003027-18
Fleming, Marilyn	MID-L-005884-20	MID-L-004023-18
Foreman, Agnes	MID-L-004245-20	MID-L-001886-18
Gassman, Catherine	MID-L-005883-20	MID-L-004023-18
Gowanlock, Polly	MID-L-003810-19	
Griffith, Virginia	MID-L-000330-18	
Haugh, Gloria	MID-L-000233-18	
Howard, Shirley	MID-L-006564-18	
Husak, Stephen	MID-L-000021-18	
Ioven, Maria	MID-L-005358-20	MID-L-003595-18
Johnston, Ronald	MID-L-007211-18	
Jones, Charles W.	MID-L-005060-20	MID-L-002500-18
Jones, Joan	MID-L-004105-20	MID-L-000048-18
Kinsley, Mary Carol	MID-L-007037-20	MID-L-001886-18
Koloski, Richard	MID-L-000445-18	
Ladner, Mitzi	MID-L-004893-20	MID-L-003014-18
Lambert, Pat	MID-L-005669-20	MID-L-004575-18
Landeros, Miguel	MID-L-004037-20	MID-L-003014-18
Lemerise, Joseph	MID-L-005679-20	MID-L-004023-18
MacElrath, Bruce	MID-L-008309-18	
McClellan, James	MID-L-004910-20	MID-L-003014-18
Oliver, Jane	MID-L-005340-20	MID-L-003827-18
Owens, Patricia	MID-L-004348-20	MID-L-001319-18
Page, Virgie	MID-L-004964-19	
Palmer, Charlene	MID-L-005401-20	MID-L-003827-18
Patterson, Carylin	MID-L-004937-20	MID-L-003014-18
Payne, Robert	MID-L-004210-20	MID-L-000728-18
Pearson, Mary Frances	MID-L-000451-19	
Peck, Linda	MID-L-005357-20	MID-L-003595-18

Plaintiff	Docket No.	Previous Docket No.
Petersen, Florence	MID-L-005490-20	MID-L-003827-18
Peterson, Frances	MID-L-004941-20	MID-L-003014-18
Poepelmeier, Phyllis	MID-L-004148-20	MID-L-001918-18
Pope, Albert	MID-L-003500-20	MID-L-007028-17
Reed, Stephanie	MID-L-004861-20	MID-L-003015-18
Rich, Anne Marie	MID-L-004901-20	MID-L-001999-18
Riley, Frank	MID-L-003929-20	MID-L-004979-18
Rodgers, Noel	MID-L-003535-20	MID-L-006620-17
Rodriguez, Lynette	MID-L-005644-20	MID-L-004023-18
Sack, Julian	MID-L-004760-20	MID-L-003015-18
Santa-Maria, Charles	MID-L-008693-18	
Schiller, Hazel	MID-L-004759-20	MID-L-003015-18
Schott, Diane	MID-L-004754-20	MID-L-003015-18
Seagle, Carolyn	MID-L-003994-20	MID-L-004497-17
Seaton, Janet	MID-L-004583-19	
Shipman, Edna	MID-L-004998-20	MID-L-003014-18
Smith, Cecil W.	MID-L-002052-19	
Struckman, Bonnie M.	MID-L-000900-19	
Sutton, Frank	MID-L-003502-20	MID-L-006620-17
Swennes, Jan W.	MID-L-004914-20	MID-L-001919-18
Taylor, Grace	MID-L-001806-19	
Thompson-Richards, Linda	MID-L-007189-18	
Velasquez, Mary	MID-L-004713-20	MID-L-003015-18
Vereski, Ronald	MID-L-004315-20	MID-L-001599-18
Vohan, Nancy	MID-L-005038-20	MID-L-002500-18
Volpe, Angelo	MID-L-004947-20	MID-L-003374-18
Webster, Edith	MID-L-004979-19	
Whitehead, Kathy J.	MID-L-005624-20	MID-L-004023-18
Williams, Carol	MID-L-006628-18	
Winfield, Betty	MID-L-004968-20	MID-L-003014-18
Wolf, Joseph	MID-L-004994-20	MID-L-003974-18
Yows, Michael A.	MID-L-000963-19	

**Vereski, Ronald

EXHIBIT C

Plaintiff	Docket No.
Brown, Sharon	MID-L-008686-18
Jeness, Judith	MID-L-008706-18
Tudor, Viola	MID-L-000973-19
Voyles, Emma J.	MID-L-007942-18