

Eileen Oakes Muskett, Esquire  
Attorney ID No. 020731994  
**FOXROTHSCHILD LLP**  
Midtown Building, Suite 400  
1301 Atlantic Avenue  
Atlantic City, NJ 08401  
Tel: (609) 348-4515  
Fax: (609) 348-6834  
[emuskett@foxrothschild.com](mailto:emuskett@foxrothschild.com)

FILED

October 20, 2023

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

*Attorneys for Defendants Merck & Co., Inc.  
and Merck Sharp & Dohme LLC.*

DEBORAH NUNEZ,  
Plaintiff,

v.

MERCK & CO., INC., MERCK SHARP &  
DOHME CORP., "JOHN DOE," "JANE  
DOE," AND "XYZ CORP" (FICTITIOUS  
NAMES),

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-001486-23

**DEFENDANTS' MOTION TO DISMISS  
THE CLAIMS OF PLAINTIFF WITHOUT  
PREJUDICE**

**ORDER**

**THIS MATTER** having been brought before the Court upon motion by Fox Rothschild LLP, attorneys for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to Dismiss Plaintiffs' Complaint, without prejudice, pursuant to R. 4:23-5(a)(1), for failure to provide a materially complete and certified Plaintiff Fact Sheet, and the Court having read and considered the papers submitted in this matter, opposition filed, and for good cause having been shown;

**IT IS** on this 20th day of October, 2023;

**ORDERED** that Defendants', Merck & Co., Inc., and Merck Sharp & Dohme Corp.'s, Motion to Dismiss without prejudice **is hereby GRANTED**; and it is further

**ORDERED** that should Plaintiff fail to produce a materially complete and certified Plaintiff Fact Sheet within sixty (60) days of this Order, then a motion to dismiss with prejudice may be filed; and it is further

**ORDERED** that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this order.

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

**OPPOSED**

### **Statement of Reasons**

This matter having been brought before the Court upon motion by Fox Rothschild LLP, attorney for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to dismiss Plaintiff's complaint without prejudice pursuant to R. 4:23-5(a)(1), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS"). The Court notes that it has considered the moving papers and Plaintiffs' opposition.

By way of background, Plaintiff's PFS was originally due on June 26, 2023, as set forth in the June 12, 2019, PFS Case Management Order and the September 8, 2021, Amended CMO: Plaintiff Fact Sheets (the "PFS CMOs"). On June 29, 2023, Merck's counsel contacted plaintiff's counsel regarding this case, as Merck had not yet received a PFS despite the deadline for service of the same having passed, however no response was received. On July 13, 2023, Merck's counsel again contacted plaintiff's counsel, asking if they would agree to include Plaintiff on a consent order. On August 24, 2023, Plaintiff's counsel responded stating he would "need additional time." During the August 29, 2023, Case Management Conference and pursuant to CMO #35, Plaintiff's counsel was to provide substantially complete and certified PFS by October 1, 2023 or counsel for Merck had permission to file a motion to dismiss without prejudice thereafter.

In support of Defendant's motion, Defense counsel argues that Plaintiff has not complied with this Court's PFS Orders, has failed to provide a PFS, and Plaintiff's failure forecloses any opportunity for Merck to assess the case. Accordingly, Merck asks this Court to dismiss Plaintiff's case without prejudice.

In opposition, Plaintiff's counsel represents that their office notified Plaintiff of their discovery obligations under the PFS CMO, by way of calling Plaintiff six (6) times and mailing her four (4) notices about the need to respond to discovery and warning her that if she did not respond that her case would be dismissed. Additionally, Plaintiff's counsel employed a third-party investigator to locate Plaintiff and to produce additional means of contacting her, to no avail. Plaintiff asks this Court for additional time, as the Court sees fit, to produce the outstanding discovery.

R. 4:23-5(a)(1) provides, in pertinent part, "[i]f a demand for discovery ... is not complied with ... the party entitled to the discovery may ... move, on notice, for an order dismissing or suppressing the pleading of the delinquent party.... Unless good cause or other relief is shown, the court shall enter an order of dismissal ... without prejudice."

Here, Plaintiff has not provided PFS within the original time frame and has failed to respond to her attorney's repeated attempts to contact her. In light of the fact that Plaintiff continues to be non-compliant with discovery, the Court believes that dismissal without prejudice is appropriate at this time pursuant to R. 4:23-5(a)(1). A dismissal without prejudice is an appropriate sanction that will suffice to put Plaintiff on notice that her case is in jeopardy of being dismissed, and Defendants will be within its right to file a motion to dismiss with prejudice should Plaintiffs fail to produce a materially complete and certified PFS within sixty (60) days of this Order.

Accordingly, the Court will be granting Defendants' motion to dismiss without prejudice pursuant to R. 4:23-5(a)(1).