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FILED

December 1, 2023

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

IN RE ZOSTAVAX LITIGATION

APPLICABLE TO ALL CASES  
ON THE ATTACHED CASE LIST

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-004999-18

**ORDER:     DISMISSAL     WITHOUT  
PREJUDICE**

**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 authorizations in accordance with CMO #36 by November 10, 2023 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 1st day of December, 2023;

**ORDERED** that Defendants', Merck & Co., Inc., and Merck Sharp & Dohme Corp.'s, Motion to Dismiss without prejudice as to the Plaintiffs listed in Exhibit A attached **is hereby GRANTED**; and it is further

**ORDERED** that should Plaintiffs in Exhibit A fail to provide authorizations in accordance with CMO #36 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.

/s/ 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 Omnibus Order to dismiss Plaintiff's complaint without prejudice pursuant to R. 4:23-5(a)(1), for failure to provide authorizations in accordance with CMO #36 by November 10, 2023. The Court notes that it has considered the moving papers and Plaintiff's opposition to Naresh Chand (3810-20), Roland Fay (6886-19), Gary Foren (1897-19), Mona Kirkland (8343-19), Margaret Mosley (3354-21), David Rodgers (1835-21), Charles Sneed (942-19).

There was no opposition filed as to Crystal Ramos (80-19) and Cynthia Pierce (deceased) Catherine Holly Brightwell Ferguson (admin) (2628-19). Therefore, the requested relief of dismissal without prejudice will be entered as to these Plaintiffs without further discussion.

By way of background, the Court entered the June 5, 2023, Group B Bellwether CMO, which outlined a requirement of having all Group B cases "review with their respective plaintiffs the operative Plaintiff Fact Sheets" to ensure they intended to continue seeking recovery in this case. Any case not dismissed prior to the July 31, 2023, deadline was eligible to become a Group B Bellwether plaintiff. Despite this initial review, plaintiffs continued to voluntarily dismiss or fail to comply with discovery obligations once selected as a Group B Bellwether Plaintiff. For this reason, the Court entered the CMO #36 on October 16, 2023, requiring all Group B cases not already selected as a Bellwether case to produce fully executed authorizations by November 10, 2023. See CMO #36, entered October 16, 2023.

The reason for this was outlined in the November 1, 2023, case management conference stating: One [purpose] was, in the event that somebody drops out or there's a concern as to . . . one of [the] plaintiffs' current ability to proceed, we will have already [] had authorizations for replacement plaintiffs so we could continue

on our tight timeframe. Just as importantly, however, .... when someone then goes from being asked whether they want to proceed to being ordered that they have to complete certain documents and participate and communicate in order to proceed, sometimes there's a difference. And the intent of the Court's order was to ensure that the plaintiffs that are now being represented that they want to proceed actually do want to proceed, and that it's not just words, but it's by action by signing a release, authorizations.

[See 11/1/23 CMC Tr.]

Further, at the case management conference it was emphasized that authorizations provided years ago did not satisfy the requirements of CMO #366 because the purpose was to ensure current willingness to participate in this litigation, not willingness to participate years ago.

In support of Defendant's motion, Defense counsel argues that Plaintiffs have not complied with this Court's CMO #36, has failed to provide authorizations, and Plaintiffs' failure forecloses any opportunity for Merck to assess the willingness or ability for that Plaintiffs to litigate their respective case. Accordingly, Merck asks this Court to dismiss these Plaintiffs' cases without prejudice.

In opposition, Plaintiffs' counsel represents that their office notified the undersigned Plaintiffs of their discovery obligations under CMO #36. Specifically, they notified, Naresh Chand (3810-20), Roland Fay (6886-19), Gary Foren (1897-19), Mona Kirkland (8343-19), Margaret Mosley (3354-21), David Rodgers (1835-21), Charles Sneed (942-19) by way of calling and mailing them on multiple occasions about the need to respond to discovery and warning them that if they did not respond that their cases would be dismissed. Additionally, Plaintiffs' counsel employed a third-party investigator to locate Plaintiffs and to produce additional means of contacting them, 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, the outstanding Plaintiffs have not provided authorizations within the time allotted by CMO #36 and have failed to respond to their attorney's repeated attempts to contact them. In light of the fact that Plaintiffs continue 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 Plaintiffs on notice that their cases are 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 authorizations 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) as to all of the Plaintiffs in the attached Exhibit A schedule.

**EXHIBIT A**

**Schedule of Plaintiffs to be Dismissed Without Prejudice**

Raymos, Crystal	MID-L-000080-19
Sneed, Charles	MID-L-000942-19
Foren, Gary	MID-L-001897-19
Pierce, Cynthia (deceased) Ferguson, Catherine Holly Brightwell (admin)	MID-L-002628-19
Fay, Roland	MID-L-006886-19
Kirkland, Mona	MID-L-008343-19
Chand, Naresh	MID-L-003810-20
Rodgers, David H.	MID-L-001835-21
Mosley, Margaret	MID-L-003354-21