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**FILED**

**SEPTEMBER 24 , 2021**

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

JULIE SCHMIDT and JOHN SCHMIDT,

Plaintiffs,

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  
Case No. 629 Zostavax

DOCKET NO.: MID-L-004206-19

**ORDER**

**WHEREAS**, Defendants, Merck & Co., Inc., and Merck Sharp & Dohme, Corp., by and through its counsel, Fox Rothschild, LLP, with Plaintiffs' Complaint having been dismissed without prejudice on June 24, 2021, now moves the Court for an Order dismissing Plaintiffs' case with prejudice pursuant to R. 4:23-2, and the Court having considered the moving papers, for the reasons in the statement of reasons, and for good cause having been shown,

**IT IS ON** this 24th day September 2021, hereby;

**ORDERED** that Defendants' Motion is **GRANTED**; and it is further

**ORDERED** that Plaintiffs' case be and is hereby **DISMISSED with prejudice**; and it is further

**ORDERED** that this Order shall be deemed served upon its filing to eCourts. 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).

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

**OPPOSED**

**SEE STATEMENT OF REASONS ATTACHED**

## STATEMENT OF REASONS

This matter comes before the Court by way of Merck & Co., Inc., and Merck Sharp & Dohme, Corp Motion to Dismiss Plaintiffs' Complaint with prejudice in accordance with R. 4:23-5(a)(2). By way of background, on June 24, 2021, this Court entered an order dismissing this Plaintiffs' complaint without prejudice for failure to provide a materially complete Plaintiff Fact Sheet ("PFS"). The instant motion represents that the PFS is still outstanding. This Court notes that it has considered the moving papers, papers in opposition and reply.

In opposition, it is not disputed that despite Plaintiffs' counsel best efforts, the PFS has not been provided by the Plaintiffs. Specifically, despite the Plaintiffs being advised of their discovery obligation under PFS CMO dated June 12, 2019, and despite counsel calling the Plaintiffs twenty-two (22) times and mailing thirteen (13) notices, warning that failure to respond could result in a dismissal of their case with prejudice, the Plaintiffs have been unresponsive. Counsel in this case, then took the additional step of hiring a third-party investigator to locate the Plaintiffs to no avail. The Court also notes that the opposition also represents that the Plaintiffs have been noticed of the dismissal and mailed her via certified and regular mail on June 29, 2021, a copy of the dismissal along with a notice pursuant to R. 4:23-5(a)(1), which advised them of the dismissal and the steps necessary to rectify this matter. Counsel also advised them of this pending motion to dismiss with prejudice and mailed them via certified and regular mail on August 27, 2021, a copy of this motion along with a notice to client pursuant to R. 4:23-5(a)(2), which advised them of the filing of the motion, that their case could be dismissed with prejudice and what that would mean for their claim.

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 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. 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, PFS is threshold discovery that goes to the very foundation of this MCL. Moreover, the unfortunate reality is, at this juncture, given the length of time of non-compliance, there is no “lesser sanction” that can suffice to remedy the violations of this Court’s order. Per the PFS CMO, Plaintiffs’ PFS was due on December 1, 2019. According to Defendants, Plaintiffs have received roughly eight (8) 30-day extensions and one (1) 60-day extension to provide a materially complete PFS. This Court finds that the Plaintiffs have had more than enough time to comply with this Court’s orders and to communicate and cooperate with their attorney and have failed to do so.

In light of the foregoing, Plaintiffs’ cases are hereby **DISMISSED WITH PREJUDICE**.