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

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IN RE ZOSTAVAX LITIGATION

Deborah Jones and Johnny Jones v. Merck & Co., Inc., Merck Sharp & Dohme Corp., and McKesson Corp

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX COUNTY

MCL NO.: 629

DOCKET NO.: MID-L-004139-20

ORDER

WHEREAS, Plaintiff, by and through their attorneys Marc J. Bern & Partners LLP, upon notice to all interested parties, have moved before this Court to Reinstate Plaintiff's Complaint, which is currently dismissed without prejudice for failure to provide proof of use, and the Court having read the moving papers, papers in opposition, reply and sur-reply, and for good cause having been shown,

IT IS on this 23rd day of July 2021, hereby:

ORDERED that the Motion to Reinstate is **DENIED**; 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
HON. BRUCE J. KAPLAN, J.S.C.

OPPOSED

SEE ATTACHED STATEMENT OF REASONS

Statement of Reasons

This matter comes before the Court upon Plaintiff's Motion to Reinstate her Complaint, which was dismissed without prejudice on February 13, 2020 pursuant to Rule 4:23-2 after failing to comply with the Court's Product Usage Order. The Court notes that it has considered the moving papers, papers in opposition, reply, and sur-reply, along with all supporting exhibits.

The crux of Defendant's argument in opposition is that Plaintiff's proffered Proof of Use is insufficient and does not comport to this Court's August 23, 2019, February 20, 2020, and April 15, 2021 Proof of Use Orders.

Accordingly, the issue before the Court is whether the documents Plaintiff produced are sufficient Proof of Use.

A) The Proof of Use Orders

a) August 23, 2019 Initial Proof of Use Order

On August 23, 2019, Judge Hyland entered the Initial "Proof of Use" Order in this MCL, requiring plaintiffs to provide "documentary evidence of proof of use of Zostavax … within 35 days of the date of th[e] Order." See Order dated 8/23/19. Subsequently, at a February 4, 2020 Case Management Conference ("CMC"), Judge Hyland became aware that the August 23, 2019 Order inadvertently did not apply to cases filed after the Order due to the specific language used.[1] To remedy what seemed like an oversight, defense counsel proposed that the next Case Management Order ("CMO") should address this issue and provide that cases filed after the August 23, 2019 Order should similarly provide Proof of Use. At that time, Plaintiffs' counsel had no objections and agreed to produce such documentary evidence of Proof of Use within thirty (30) days of the Court's next CMO.[2]

b) Case Management Order No. 8

Following the Court's February 4, 2020 CMC, Judge Hyland entered CMO 8, dated February 20, 2020. CMO 8, ¶ 4, provides the following language regarding Proof of Use:

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[1] The August 23, 2019 Order specifically stated, "*[t]he remaining Plaintiffs* … shall provide … counsel with documentary evidence of proof of use …." See Order dated 8/23/19.

[2] Although the parties agreed that some Proof of Use should be provided to defense counsel as well as to the Court, the parties requested clarification from the Court as to what actually constitutes "Proof of Use". Judge Hyland explained that he "wanted something definite" such as a "vaccination record" or an "indication in the medical records that the vaccine was given on [a] particular day." Plaintiffs did not object to this discussion. See 2/4/20 Tr. 32:3-11.

> Within 30 days of the date of this Order, Plaintiffs in all cases filed after August 23, 2019 shall provide liaison counsel for Plaintiffs … with documentary evidence of proof of use of Zostavax. Any cases filed after the date of this Order shall provide this same information within 30 days after the complaint is filed with the court. Plaintiffs' liaison counsel shall forward the documentary evidence of proof of use to defense liaison counsel within 35 days of the date of this Order and for cases filed after the date of this Order within 35 days of the date the complaint is filed. Proof of use is clarified to include definitive proof the plaintiff received the Zostavax vaccination, such as a medical record confirming the vaccination was provided on the date of that record or a vaccine administration record.

Thereafter, Plaintiffs filed a Motion for Reconsideration, arguing that many Plaintiffs subject to CMO 8 did not have specific vaccination records because Zostavax is widely distributed throughout pharmacies, without a prescription, and retention requirements for pharmacies are not uniform nationwide. Plaintiffs requested that the Court reconsider the definition set forth in CMO 8 to further include additional documentation which may be sufficient in establishing Proof of Use.

c) April 15, 2021 Proof of Use Opinion re: Reconsideration of CMO 8

On April 15, 2021 this Court rendered its "Proof of Use" Order/Opinion" ("hereinafter the "POU Order") denying reconsideration of CMO 8. Consistent with Judge Hyland's prior Orders, the Court's focus was on definitive proof of use that would help the Court objectively determine which Plaintiffs had credible claims; indeed, the Court noted that this is the very purpose of a Lone Pine Order.[3] The Court notified counsel that it would not accept a self-serving Affidavit or Certification from a Plaintiff certifying that they received the Zostavax vaccine, finding that same was not "something definite". In fact, the Court noted that the current definition, in place since CMO 8, requires "corroborative documentation". In re Zostavax, MCL 629, 4/15/21 Order. While the Court acknowledged certain types of sufficient Proof of Use in its POU Order, it reserved deciding disputes over whether other types of Proof of Use are sufficient to an appropriate time. Ibid.

B) Legal Standard: Reinstating Dismissal Without Prejudice

According to R. 4:23-5(a)(1), a "delinquent party may move on notice for vacation of the dismissal or suppression order [without prejudice] at any time before the entry of an order of

[3] Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Law Div. Nov. 18, 1986).

dismissal or suppression with prejudice." R. 4:23- 5(a)(1). The motion shall be supported by an affidavit that recites that the withheld discovery "has been fully and responsively provided." Ibid. If an order without prejudice is not vacated, the party entitled to discovery may move for an order dismissing the case with prejudice "after the expiration of 60 days from the date of the order." R. 4:23-5(a)(2).

C) Discussion Re: Plaintiff's Proof of Use

Plaintiff argues that Defendant has been served with adequate Proof of Use and thus this Motion should be granted, and Plaintiff's case reinstated. In opposition, Defendant argues that Plaintiff's Proof of Use is not definitive of proof that Plaintiff received the Zostavax vaccination and thus this Motion should be denied as Plaintiff's discovery has not "been fully and responsively provided" as required by R. 4:23-5(a)(1). In reply, Plaintiff argues that the records incorrectly list a different vaccine, and that Plaintiff actually received Zostavax. In sur-reply, Defendant essentially urges the Court to disregard Plaintiff's interpretation of what the records *meant* to say, and to interpret them as they are written.

This motion presents a unique situation to those recently before the Court. Namely, that the Court is being asked to find POU and reinstate Plaintiff's Complaint based on what Plaintiff contends is a "typo" in her medical records. Specifically, Plaintiff's medical records, submitted as Exhibit D to Defendant's opposition list "Varicella," (the chickenpox) along with a specific lot number, dated 2/26/2016. Plaintiff argues that this is a mistake, and that Plaintiff actually received Zostavax. In doing so, Plaintiff points to another page of her records which Zostavax is mentioned by name. However, that list indicates that Zostavax was "discussed." And while the Court notes that the list also provides a date for "Last Done," the fact that the date provided is 2/26/16, the same date as the records, and that it is included under a heading of health maintenance that were *reviewed* during that visit, the Court cannot find that this establishes receipt of Zostavax.

Turning to the purported mistake in recording varicella instead of Zostavax, the Court cannot find POU based on an unsupported claim that the records contained a "typo." The records contain a lot number, which Defendant represents is the specific Merck lot number for Varitrax, their varicella/chickenpox drug. The Court finds it unlikely that the medical facility would record the incorrect drug along with the lot number for that drug, and Plaintiff has not provided the Court with reason to believe otherwise. Furthermore, the records reflect a Vaccine Information Statement ("VIS") publication date of 1/10/07, which Defendants have provided evidence as belonging to

Varitrax, not Zostavax. See Def. Ex. F. As such, the Court cannot take what amounts to judicial notice of a typo. The Court can only resolve this motion based on what is in the records before it, and the records reflect that Plaintiff received Varitrax, not Zostavax.

Lastly, the Court notes that it is unpersuaded by Plaintiff's argument that because she had chickenpox as a child, she would not have been a candidate for Varitrax, and thus Varitrax could not have been what she actually received. The Court is not in a position to make the medical determination that Plaintiff would not have had reason to receive the varicella vaccine. As Defendant asserts in sur-reply, assuming *arguendo* that Plaintiff did in fact have chickenpox as a child, any number of medical reasons could have necessitated the need for the adulthood administration of same. Thus, the Court has no choice but to deny this motion.

D) Conclusion

Accordingly, in light of the foregoing, this motion is **DENIED.**