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

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IN RE ZOSTAVAX LITIGATION

*Jean Liska 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-006541-18

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 and 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 May 5, 2021 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 and 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:

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.

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

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 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 was served with adequate Proof of Use on June 21, 2021 and thus this Motion should be granted, and Plaintiff’s case reinstated. In opposition, Defendant argues that Plaintiff is attempting to reinstate her case based on a call note from TriValley Primary Care that indicates she did not receive the vaccine at that location, and consequently, that Plaintiff has not produced any definite proof that she received Zostavax. In reply, Plaintiff maintains that while the foregoing records dated May 28, 2021, state that Plaintiff did not receive Zostavax at this facility, it was, however, “given elsewhere on 1/1/12.” See Def. Opp., p. 21 of 33 (see line 22-23 - bottom paragraph).

Having considered the arguments of counsel, and having reviewed the medical records supplied herewith, the Court will be denying this motion. The records purporting to provide POU, submitted as Exhibit D to Defendant’s opposition, do not approach the requisite level of “corroborative documentation” for POU to be sufficient. The records, as Defendant correctly points out, are merely call notes from a primary care facility, in which the author notes that Plaintiff self-reported having received Zostavax *at another facility*. The call notes—which are dated *well-after* the commencement of this litigation--further state, “I advised her that we have it listed as ‘pending’ and given elsewhere on 1/1/12.” See Def. Ex. D. While it is unknown to the Court precisely what is meant by “pending,” what the Court does know is that this does not rise to the level of corroborative documentation required by this Court’s POU rulings. Moreover, “given elsewhere on 1/1/12” is equally lacking in corroboration. Setting aside the curiousness of the purported New Years Day vaccination date, the call note is devoid of any other detail from which the Court could find corroboration of POU (e.g., vaccination location, lot number, dosage, etc.)

D) Conclusion

Accordingly, based on the foregoing, this motion is **DENIED**.