

**FILED**

**JULY 23 , 2021**

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

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IN RE ZOSTAVAX LITIGATION

*Sherri Sebring 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-005334-20

**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 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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

**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:

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.<sup>3</sup> 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.

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<sup>3</sup> 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 July 2, 2021 and thus this Motion should be granted, and Plaintiff’s case reinstated. In opposition, Defendant argues that Plaintiff’s purported POU is an uncorroborated, and lacking sufficient detail to constitute adequate POU. In reply, Plaintiff asserts that the POU contained in her medical records, serve to supplement her affidavit affirming that she received Zostavax at Phoenix, Arizona Walgreens, and that the documents were “destroyed, purged, deleted or otherwise removed.” See Def. Ex. E. Having reviewed the motion, opposition, and reply, along with all exhibits, the Court will be denying this motion.

The Court notes that Exhibit D to Defendant’s opposition are medical records dated July 2016, which make a single reference to a shingles vaccine. Specifically, under “Immunizations,” the records state “shingles vaccine: once after age 60. Done.” As an initial matter, the Court takes no issue with the fact that the immunization does not mention Zostavax by name. As the Court has found in several recent decisions, Zostavax would have been the only shingles vaccine on the market in 2016 when Plaintiff purportedly received same. However, the Court finds these records insufficient under the controlling POU Orders, as there is no way for the Court to identify the source of this statement, and there is certainly no corroboration of same by way of specifics (e.g., a specific vaccination date, vaccination location, dosage, etc.). Therefore, the Court has no choice but to deny this motion.

**D) Conclusion**

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