

February 15, 2018

FEB 21 2018

SENT VIA CERTIFIED AND REGULAR MAIL

RECEIVED

Ms. Taironda E. Phoenix
Chief, Civil Court Programs
Administrative Office of the Courts
Hughes Justice Complex
P.O. Box 981
Trenton, NJ 08625-0981
P: (609) 815-2900 x54900

RE: Application for the designation of multicounty litigation concerning Merck's Zostavax vaccine

Dear Ms. Phoenix:

I submit this letter on behalf of the over 285 individual Plaintiffs¹ whose cases are currently pending in New Jersey's State Courts alleging injuries caused by a single product, Merck and Co., Inc.'s Zostavax Vaccine. Several of these cases are currently pending before 10 different Judges with no coordination of discovery or centralized management. These cases involve serious injuries and the number of Plaintiffs will only grow as more people realize that they have been injured by Merck's Zostavax vaccine. As such, I am writing to respectfully request that the Supreme Court establish a multicounty litigation designation in accordance with Rule 4:38A and Directive # 08-12 "Promulgation of Revised Multicounty Litigation Guidelines."

MERCK'S ZOSTAVAX VACCINE

Merck sells its Zostavax vaccine to individuals over the age of 50, claiming that it can prevent shingles from occurring. The vaccine is practically ubiquitous and can be administered at pharmacies all across the United States. But the vaccine is less than 60% effective in preventing shingles and it can actually cause severe injuries, including brain damage and death.

This is largely due to the fact that the vaccine contains a live virus that, once injected, can cause inflammatory reactions damaging nerves throughout the body. Indeed, facial paralysis, encephalitis, meningitis, loss of dexterity, and other injuries are known side effects of Zostavax, but many clinicians are unable to link those injuries to the vaccine because it can take several months before symptoms appear.

CURRENT STATUS OF THE LITIGATION

The fact that many of the Plaintiffs in this litigation are elderly is the primary reason for my making

¹ Including those with consortium claims.

this request for a multicounty designation. Since this litigation started my office already lost 5 claimants due to a number of factors, including age. Last month, in an effort to move these cases forward, 23 Requests for Production were served on the Merck Defendants. My office has worked up and resolved 1 Zostavax case in the recent past in the Union Vicinage² during summary judgment and is currently preparing for trial in six cases pending in the Eastern District of Pennsylvania, with at least 12 additional cases currently pending in other federal courts. I have been actively involved in these cases since 2011 and understand the issues. If a multicounty designation is granted, I would commit to move forward with discovery very quickly, with the goal of having our first trial in New Jersey this year.

MULTICOUNTY DESIGNATION IS APPROPRIATE

Multicounty designation for mass tort cases is warranted at this time because a large number of parties have presented themselves with claims that have common, recurring issues of law and fact, stemming from Merck's Zostavax vaccine. Additionally, there is geographical disbursement of parties, a high degree of commonality of the injuries, and a likely interdependence among different claims. At least 23 cases have already been filed in New Jersey encompassing over 285 individual Plaintiffs, and all involve the recurrent legal issues of design defect, negligence, failure to warn, and breaches of warranty. As a result of the high degree of commonality of injuries and damages exhibited by the Plaintiffs, coordinated discovery would be advantageous and would promote convenience and fairness to all parties to these cases. In addition, all parties would benefit from a dedicated multicounty judge and staff familiar with the issues presented by the Zostavax vaccine, which would necessarily lessen the risk of inconsistent rulings. All of these considerations support a multicounty designation to ensure that these cases are managed in a coordinated fashion.

In light of all of these factors, I respectfully request that the New Jersey Supreme Court designate the Merck Zostavax litigation for MCL Management in the Middlesex County Superior Court. At a minimum, hundreds of Plaintiffs are waiting for justice and need to have an orderly progression to trial in the coming months – judicial economy mandates that a single judge oversee all pre-trial aspects of these cases.

Sincerely,



Mark T. Sadaka, Esq., MSPH
Managing Attorney

cc: Eileen O. Muskett, Esq. (via regular mail)

Enclosure

² Checceca, et al. v. Merck & Co., Inc., et al. Docket No.: UNN-L-2723-12



**MARC J. BERN
& PARTNERS LLP**
ATTORNEYS AT LAW

March 6, 2018

Hon. Glenn A. Grant, J.A.D.
Administrative Office of the Courts
of the State of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625

Civil Practice Division

MAR 08 2018

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RE: Request for Multicounty Litigation Designation of Zostavax Litigation

Dear Judge Grant:

Marc J. Bern & Partners LLP represents over 500 plaintiffs in actions filed against Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp. for injuries suffered from the Zostavax® vaccine in two counties in the State of New Jersey (“Zostavax Litigation”).¹ On behalf of over 500 plaintiffs presently in suit in New Jersey Superior Court in the Union and Middlesex Counties, and in anticipation of filing future Zostavax Litigation cases in New Jersey Superior Court(s), we respectfully request Multicounty Litigation (“MCL”) designation of these cases before Judge James Hyland in Middlesex County pursuant to Rule 4:38A.

BACKGROUND

Our firm currently represents 569 Plaintiffs in the 24 Zostavax Litigation cases pending in the New Jersey Superior Court. *See Exhibit A.* MCL designation is appropriate for the Zostavax Litigation to avoid inevitable duplicative discovery; avoid an increasing number of inconsistent rulings on the same issues of law and fact in the pending Zostavax Litigation cases, as well as future Zostavax Litigation cases; and ultimately in the interest of conserving judicial resources. The Zostavax Litigation cases pending in New Jersey have not yet been consolidated for discovery purposes or otherwise.

ARGUMENT

The Zostavax Litigation cases meet all criteria pursuant to Rule 4:38A and the MCL Guidelines, Directive #08-12 (the “Directive”) regarding MCL designation. The Zostavax Litigation is the very type of litigation that the Directive was adopted to address. Therefore, the Zostavax Litigation should be designated as an MCL in the Middlesex County Superior Court before Judge James Hyland.

¹ A list of the current Zostavax Litigation Cases filed by Marc J. Bern & Partners LLP in New Jersey Superior Court is attached hereto as **Exhibit A.**



**MARC J. BERN
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**I. THE ZOSTAVAX LITIGATION SATISFIES THE CRITERIA FOR
CENTRALIZED CASE MANAGEMENT.**

A. The Zostavax Litigation Involves a Large Number of Parties

Our firm filed the first Zostavax Litigation case in the New Jersey Superior Court on June 30, 2017. Since that date, our Zostavax Litigation filings in the New Jersey Superior Court have increased in both frequency and volume, and we currently represent 569 Plaintiffs in 24 Zostavax Litigation cases pending in the New Jersey Superior Court. *See Exhibit A.* We anticipate filing significant additional Zostavax Litigation cases in the Superior Court of New Jersey. We believe that the current volume of cases in the Zostavax Litigation and the anticipated increased volume of Zostavax Litigation cases will quickly become a burden on judicial resources.

Based on the number of cases filed by the undersigned counsel totaling over 500 Plaintiffs thus far, and with anticipation of future Zostavax Litigation filings in New Jersey Superior Court and consideration of similarly situated cases filed by other counsel, the Zostavax Litigation meets the numerosity criteria pursuant to the Directive.

**B. The Zostavax Litigation Involves Claims with Common, Recurrent Issues of
Law and Facts Associated with the Zostavax® Vaccine**

All pending Zostavax Litigation cases involve hundreds of claims with common, recurrent issues of law and fact that are associated with a single product: the Zostavax® vaccine. The Zostavax® vaccine is designed, researched, developed, manufactured, tested, labeled, advertised, promoted, marketed, and sold, supplied, and/or distributed by Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and/or McKesson Corp. Each of the 569 Plaintiffs was administered the Zostavax® vaccine in largely the same manner between the dates of 2007 and 2017.

Each Plaintiff was informed that the Zostavax® vaccine was safe and effective for the intended use of long-term prevention of shingles. Each Plaintiff was exposed to largely the same labeling and warnings or lack thereof, which Plaintiffs allege to be grossly inadequate. Each Plaintiff relied upon representations and/or warranties made by the named Defendants regarding the safety and efficacy of the Zostavax® vaccine. Each Plaintiff relied on this information and was thus inoculated with the Zostavax® vaccine, which caused a host of severe medical complications ranging from herpes zoster (shingles), post-herpetic neuralgia, retinol necrosis, keratitis, and acute myelitis, encephalitis, meningitis, eye disorders leading to blindness, and other zoster-related injuries and sequelae.

Our Plaintiffs allege that the manufacturers, marketers, distributors, and sellers of the Zostavax® vaccine had knowledge of the dangerous propensity of the live-attenuated Zostavax® vaccine and misrepresented and omitted material information about the safety, risks, and efficacy of the Zostavax® vaccine in the interest of promoting vaccine sales. Our Plaintiffs in each of the 24 cases pending before the New Jersey Superior Court have brought claims of negligence, strict



**MARC J. BERN
& PARTNERS LLP**
ATTORNEYS AT LAW

liability, breach of warranty, fraudulent and negligent misrepresentation, fraudulent concealment, and unjust enrichment for the harms they have suffered as a result of their inoculation with the Zostavax® vaccine. As such, there are recurrent issues of law and fact regarding the named Defendants' liability that meet the commonality criteria, pursuant to the Directive.

C. Geographical Disbursement of All Parties Exist

Defendants Merck & Co., Inc. and Merck Sharp & Dohme Corp. ("Merck") are incorporated in New Jersey and maintain their corporate office(s) in New Jersey, with their principal place(s) of business located at 2000 Galloping Hill Road in Kenilworth, New Jersey. Upon information and belief, Merck maintains at least 7 known offices and operating facilities throughout New Jersey, with numerous additional locations throughout the United States. Merck's corporate structure with employees nationwide will require testimony from corporate witnesses from locations throughout the state of New Jersey and other locations throughout the United States.

McKesson Corp. ("McKesson") has been named as a defendant by our Plaintiffs in the Zostavax Litigation for its alleged role – independently, and vicariously through Merck – in the design, research, development, manufacture, testing, labeling, advertisement, promotion, marketing, sale, supply, and/or distribution of the Zostavax® vaccine to Plaintiffs. McKesson is a California-based company incorporated in Delaware, and upon information and belief has major operating facilities in New Jersey and various locations throughout the United States.

Most of the Plaintiffs in the pending Zostavax Litigation cases reside outside of the State of New Jersey. Fact witnesses for these Plaintiffs and each named Defendant are similarly located throughout the United States. Plaintiffs' counsel, who presents this application, is a New York-based law firm with offices in San Francisco, Chicago, and Philadelphia. Each named defendant in our Zostavax Litigation cases is represented by counsel located outside of New Jersey. Merck's lead counsel is, upon information and belief, Venable LLP, which is a law firm founded in Baltimore, Maryland, and has offices in New York, DC, and California. Upon information and belief, Merck is also represented by local counsel, Fox Rothschild LLP, in the Zostavax Litigation cases pending in the New Jersey Superior Court. Fox Rothschild LLP is a law firm founded in Philadelphia, Pennsylvania, and has offices in New York, Pennsylvania, New Jersey, California, and several other states. McKesson is represented by Clark Hill PLC, which is a law firm that operates primarily out of its Philadelphia office.

The location and/or residence of each Plaintiff, each Defendant, witnesses for each party, and counsel for each party is geographically disbursed nationwide, and thus the Zostavax Litigation has the requisite geographical diversity necessary to centralize the judicial management of the cases pending state-wide pursuant to the Directive.



D. All Plaintiffs Have a High Degree of Commonality of Injury and Damages

Plaintiffs' damages and physical injuries in the Zostavax Litigation are all alleged to be related to the zoster virus. These injuries include herpes zoster (shingles), post-herpetic neuralgia, retinol necrosis, keratitis, and acute myelitis, encephalitis, meningitis, eye disorders leading to blindness, and other complications. Plaintiffs allege that the Zostavax® vaccine caused or failed to effectively prevent the injuries. While Plaintiffs have physical injuries that are specific to only each Plaintiff, all Plaintiffs allege the same causes of action (negligence, product liability, breach of warranty, misrepresentation, strict liability and unjust enrichment) for the injuries that they suffered from their use of the Zostavax® vaccine. Thus, a high degree of commonality of injury and damages alleged by our plaintiffs exists, thus meeting the commonality of damages criteria pursuant to the Directive.

E. Centralization will Be Fair and Convenient

MCL designation of the Zostavax Litigation is an appropriate solution to efficiently manage these substantially similar cases with a significant number of parties involving hundreds of filings and hearings.

Our Zostavax Litigation cases are presently, upon information and belief, pending before twelve New Jersey Judges: Robert J. Mega; Michael V. Cresitello, Jr.; Lisa M. Vignuolo; James F. Hyland; Vincent LeBlon; Melvin L. Gelade; Phillip Lewis Paley; Andrea G. Carter; Thomas D. McCloskey; Sheree V. Pitchford; Patrick Bradshaw; and J. Randall Corman. The twelve Judges presently presiding over the Zostavax Litigation Cases have heard and ruled on almost one hundred nearly identical pre-answer motions, and have heard arguments by largely the same counsel for Plaintiffs and Defendants on issues of a common nucleus of both fact and law. The Court has had to entertain oral arguments simultaneously before two or more Judges in two separate counties on more than one occasion.

Despite the nearly identical issues of fact and law presented before the Court, not all rulings and decisions on the nearly-identical motions in the Zostavax Litigation cases pending in New Jersey Superior Court have been consistent. We anticipate and presume that inconsistent rulings on substantively identical issues of law and/or fact will continue to occur in the future. Thus, MCL designation will be beneficial to preserve consistency throughout these similar cases, and will be fair and convenient for all parties and the Court.

II. MIDDLESEX COUNTY IS THE BEST VENUE FOR MCL DESIGNATION

Plaintiffs submit that Middlesex County is the appropriate and most efficient and fair forum for the MCL designation of the Zostavax Litigation. Merck's counsel has also submitted an



**MARC J. BERN
& PARTNERS LLP**
ATTORNEYS AT LAW

informal application (attached as **Exhibit B**) for “special management” of these cases on September 26, 2017, in Middlesex County.

Bergen and Atlantic Counties have an abundance of MCLs currently before them (eight and five, respectively). Of the seven MCLs currently designated in Middlesex County, two – Levaquin and Reglan – are, upon information and belief, on the verge of closing. Thus, based on a review of the current MCL caseload presently available on the Court webpage and dockets, Middlesex County is the proper venue for the MCL designation of this litigation given its mass tort and complex litigation division.

Moreover, the overwhelming majority of the Zostavax Litigation cases are pending in Middlesex County (*see Exhibit A*), and this fact alone more than militates against an assignment to a location other than Middlesex County.

CONCLUSION

For the foregoing reasons, the Zostavax Litigation satisfies the requisite criteria for MCL designation. We submit that it is in the best interests of justice, efficiency, and conservation of judicial resources to designate it as such, and that Middlesex County is the best venue for this MCL designation. Thank you for your time and consideration.

Respectfully submitted,

THOMAS J. JOYCE, III

Enclosures

cc: Eileen Oakes Muskett, Esquire
Lisa Carney Eldridge, Esquire
Jonathan D. Klein, Esquire

Exhibit A

Venue	Docket Number	Case Caption	Case Initiation Date	Judge
MIDDLESEX	L-004075-17	OWENS, JANE VS MERCK & CO., INC.	6/30/2017	James F. Hyland
MIDDLESEX	L-004177-17	ANDERSON, TAMMY VS MERCK & CO., INC.	7/11/2017	James F. Hyland
MIDDLESEX	L-004353-17	SENF, CARMEN VS MERCK & CO., INC.	7/20/2017	J.Randall Corman
MIDDLESEX	L-004457-17	GUNDERSON, MARVIN VS MERCK & CO., INC.	7/26/2017	Michael V. Cresitello Jr
MIDDLESEX	L-004508-17	MILDENBERG, CHRISTINA VS MERCK & CO., INC.	7/28/2017	Lisa Vignuolo
MIDDLESEX	L-004659-17	ENGLAND, DESSIE VS MERCK & CO., INC.	8/4/2017	Michael V. Cresitello Jr
MIDDLESEX	L-004929-17	YORCK, ANNAMARIE VS MERCK & CO., INC.	8/17/2017	Patrick Bradshaw
UNION	L-002257-17	JACKSON, EVELYN VS MERCK & CO., INC.	8/18/2017	Robert J. Mega
MIDDLESEX	L-005705-17	HUFF, MAXINE VS MERCK & CO., INC.	9/27/2017	Lisa Vignuolo
MIDDLESEX	L-005792-17	BROWN, PATRICIA VS MERCK & CO., INC.	9/29/2017	Thomas D. McCloskey
MIDDLESEX	L-006039-17	CATTANI, VALDEMAR VS MERCK & CO., INC.	10/11/2017	Thomas J. Buck
MIDDLESEX	L-006162-17	SASSER, ELSIE VS MERCK & CO., INC.	10/17/2017	Michael V. Cresitello Jr
MIDDLESEX	L-006270-17	ENGLER, ADOLPHE VS MERCK & CO., INC.	10/23/2017	James F. Hyland
MIDDLESEX	L-006620-17	STARK, HELEN VS MERCK & CO., INC.	11/7/2017	Gary K. Wolinetz
MIDDLESEX	L-007028-17	JOHANNEMANN, CAROLE VS MERCK & CO., INC.	11/28/2017	Patrick Bradshaw
MIDDLESEX	L-007182-17	WEBER, BETTY VS MERCK & CO., INC.	12/5/2017	Vincent Le Blon
MIDDLESEX	L-007301-17	HESS, DAVID VS MERCK & CO., INC.	12/11/2017	Sheree V. Pitchford
MIDDLESEX	L-007525-17	SISNETSKY, EUGENE VS MERCK & CO., INC.	12/22/2017	Patrick Bradshaw
MIDDLESEX	L-007635-17	MOOSE, MARY VS MERCK & CO., INC.	12/29/2017	Thomas J. Buck
MIDDLESEX	L-000321-18	MOODY, CHEROYL VS MERCK & CO., INC.	1/17/2018	Gary K. Wolinetz
MIDDLESEX	L-000728-18	GOLLOTTO, ROSEMARY VS MERCK & CO., INC.	2/1/2018	Patrick Bradshaw
MIDDLESEX	L-000848-18	HYATT, DARLA VS MERCK & CO., INC.	2/8/2018	Andrea Carter
MIDDLESEX	L-001318-18	BRATTIN, SHIRLEY VS MERCK & CO., INC.	3/1/2018	Gary K. Wolinetz
MIDDLESEX	L-001319-18	EDWARDS, JAMES VS MERCK & CO., INC.	3/1/2018	Gary K. Wolinetz

EXHIBIT B



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September 26, 2017

VIA FEDERAL EXPRESS

The Honorable Jamie D. Happas, P.J.Cv.
Middlesex County Superior Court
56 Paterson Street, Room 406
New Brunswick, New Jersey 08903

Re: Special Management Request

Dear Judge Happas:

Please be advised I am counsel for Merck Sharp & Dohme Corp. and Merck & Co, Inc. ("Merck") with respect to several lawsuits filed in Middlesex County alleging personal injuries purportedly caused by Merck's shingles vaccine, Zostavax. Many of these lawsuits have been filed on behalf of multiple individuals under a single caption. While Merck believes such claims are improperly joined under R. 4:30, Merck does not intend to file a motion to sever until the cases are trial-ready. Instead, Merck leaves to the Court's discretion whether separation of the matters into individual cases is appropriate at this time.

In light of the number of individual plaintiffs who have brought claims in Middlesex County against Merck alleging injuries related to the administration of Zostavax (145 as of the date of this letter), Merck respectfully requests assignment of these matters to a single judge for special management, particularly for coordination of discovery efforts. Merck is not requesting creation of a Multi-County Litigation at this time. Nevertheless, given his status as the mass tort judge for Middlesex County and his familiarity with the company, Merck believes that the cases should be assigned to Judge James Hyland.

A list of Zostavax product liability cases currently pending in Middlesex County is attached to this letter as Exhibit A. Hearings on Merck's motions to dismiss in two of the cases, Anderson and Owens, are currently scheduled for this Friday, September 29. Thank you for your consideration.

A Pennsylvania Limited Liability Partnership

California Connecticut Delaware District of Columbia Florida Nevada New Jersey New York Pennsylvania

Middlesex County Superior Court
September 26, 2017
Page 2

Very truly yours,



Eileen Oakes Muskett

cc: Debra J. Humphrey, Esquire (Marc J. Partners LLP)
Alexandra Colella, Esquire (Marc J. Partners LLP)
Andrew Knox, Esquire (Lopez McHugh)
Michael Katz, Esquire (Lopez McHugh)
Mark Sadaka, Esquire (Sadaka Associates)

Case Name	Date Filed	Docket No.	Pretrial Judge
Anderson, et al	7/11/17	4177-17	Arthur Bergman
Armendariz	7/31/17	4519-17	Lisa Vignuolo
England, et al	8/4/17	4659-17	Phillip L. Paley
Gunderson, et al	7/26/17	4457-17	Phillip L. Paley
Johns	8/10/17	4778-17	Arthur Bergman
Kendrick	8/14/17	4816-17	Lisa Vignuolo
Mildenberg, et al	7/28/17	4508-17	Melvin Gelade
Moore	8/10/17	4777-17	Arthur Bergman
Owens, et al	6/30/17	4075-17	Phillip L. Paley
Pineiro	8/23/17	5054-17	Phillip L. Paley
Senf, et al	7/20/17	4353-17	Phillip L. Paley
Shivener	7/24/17	4392-17	James F. Hyland
Sukkar	8/31/17	5192-17	James F. Hyland
Tincher	9/25/17	5640-17	Arthur Bergman
Yorck, et al	8/17/17	4929-17	Vincent LeBlon

EXHIBIT A