

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOSTAVAX (ZOSTER VACCINE  
LIVE) PRODUCTS LIABILITY  
LITIGATION

MDL No. 2848  
Civil Action No. 2:18-md-02848-HB

THIS DOCUMENT RELATES TO:

*Loretta Abbo v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20200-HB

*Sylvia Anderson v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20184-HB

*John Andrea v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20185-HB

*Joseph Anemone v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20186-HB

*Linda Arch v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20126-HB

*Inez Archie v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20159-HB

*Deborah Augenti v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20160-HB

*Esther Bader v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20187-HB

THIS DOCUMENT RELATES TO:

*John Barrett v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20146-HB

*Jerome Berkowitz v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20188-HB

*Joseph Bernet v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20189-HB

*Irwin Binder v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20190-HB

*Diane Bonizzi v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20192-HB

*Sally Boon v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20137-HB

*Patricia Breault, Individually and as Executor of the Estate of Shirley Breault, v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20198-HB

*Teresa Brumbaugh v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20147-HB

*Cecil and Peggy Campbell v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20162-HB

*Rosemarie Case v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20191-HB

*Sylvane Chiarelli v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20245-HB

*Mary Jayne Clark v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20193-HB

*Monique Cochran v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20163-HB

*Robert J. Coffey v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20131-HB

*Eleanor Cohen v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20246-HB

*Alicia D. Colon v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20164-HB

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*Anthony Cretacci v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20302-HB

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*Patricia Damico v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20165-HB

*Annamarie Defrancis v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20296-HB

*Susan Detrie v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20148-HB

*Wayne and Carol Dickerson v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20294-HB

*Philip DiGregorio v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20166-HB

*Wilbert E. Dixon, Individually and as Proposed Administrator of the Estate of Gail Dixon, v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20149-HB

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*Joseph Engolia v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20167-HB*

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*Marleen and George Flanders v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20292-HB*

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*Patricia Frazier v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20210-HB*

*Donald Galloway and Conceita Pittman v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20258-HB*

*Sharon Godwin v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20151-HB*

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*Roland Halle v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20129-HB*

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*Helen Hoffman v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20180-HB*

*Janette Holmes v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:19-cv-20000-HB*

*Stephen Hopkins v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20264-HB*

*Beth Horowitz v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20207-HB*

*Maryann Intagliata v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20182-HB*

*Shirley Jackson v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20247-HB*

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*Mike Jones v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20269-HB

*Jerome Kaufman v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20221-HB

*William Kelshaw Jr. v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20178-HB

*Susan Kennedy v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20223-HB

*Barbara Kerrigan v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20225-HB

*Phyllis Kidney v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20227-HB

*Ernest Koch v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20130-HB

*Henry Kuhn v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20228-HB

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*Loretta Martinez-Favier v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20250-HB

*Robert Masucci v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:19-cv-20001-HB

*Sharon and James McBride v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20238-HB

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*Edna Middleton v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:19-cv-20007-HB

*Debra Moreno v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20212-HB

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*Judith K. Morris v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20275-HB

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*Linda Munger v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20282-HB

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*Leonard Reiss v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:19-cv-20010-HB*

*Sondra Reiss v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20293-HB*

*Angelina Riccio v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20208-HB*

*Florence Robinson v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20173-HB*

*Natalie Robinson v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:19-cv-20015-HB*

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*Garry Schuemann v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp., No. 2:18-cv-20201-HB*

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*Patricia Segnit v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20304-HB

*Karney and Patience Seymour v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20195-HB

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*Erica Sheid v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20277-HB

*Harold Showalter v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20205-HB

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*Carolyn Snell v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20132-HB

*Carol Snyder v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:19-cv-20012-HB

*Judith Snyder v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20273-HB

*Nicholas Speidel v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:19-cv-20016-HB

*Mary Speigle v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20158-HB

*August Speirs v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20270-HB

*Joyce Stedman v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:19-cv-20013-HB

*Ronald Stichter v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20142-HB

*Leo Summermatter v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20234-HB

*Daniel and Kathryn Szymusiak v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20231-HB

*Fatema Tahan v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20229-HB

*Donald Thering v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20226-HB

*Laurier Trahan v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20222-HB

*Palma Treschan v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20143-HB

*Carole Triplett v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20144-HB

*Charles and Dorothy Turnbull v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20203-HB

*Elsa Vega v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20220-HB

*Anthony Vespa v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20202-HB

*Catherine Wade v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20219-HB

*Evelyn Wagner v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20218-HB

*Betty Warner-Williams v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:19-cv-20017-HB

*Edward Waszak v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20265-HB

*Martha Watson v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20136-HB

*Janet Welty v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20262-HB

*Eron and Vernon West West v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20259-HB

*Beatrice Whitener v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20175-HB

*Jean Wright v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20181-HB

*Michael Yasso v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20253-HB

*Joseph Yopez v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20145-HB

*Matthew Zarosl, Individually and as Proposed Administrator of the Estate of Barbara Zarosl, v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20194-HB

*Felip Zielinski v. Merck & Co., Inc.; Merck Sharp & Dohme Corp.; and McKesson Corp.*, No. 2:18-cv-20177-HB



MEMORANDUM IN SUPPORT OF SEPARATE PRETRIAL ORDER NO. 172

Bartle, J.

May 2, 2019

Before the court is the omnibus motion of defendants Merck & Co. Inc. and Merck Sharp & Dohme Corp. ("Merck") to dismiss all claims for fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, and, where applicable, state consumer fraud violations alleged in the 173<sup>1</sup> above actions. While Merck has explicitly identified Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") allegations in its motion, some complaints instead assert violations of other state consumer fraud laws or simply "consumer fraud." See e.g. complaints in Saleme v. Merck & Co. Inc., et al., 2:18-cv-20297 and Yepez v. Merck & Co. Inc., et al., 2:18-cv-20145. These claims are typically described in count IX of the complaints. We are treating the motion as also moving to dismiss these claims because they contain language that is identical to the FDUTPA allegations Merck seeks to dismiss and are based on fraud.

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1. The omnibus motion was filed in 177 cases, but parties have since agreed to stipulations of dismissal in Gaines v. Merck & Co. Inc., et al., 2:18-cv-20169; Augustyniak v. Merck & Co. Inc., et al., 2:18-cv-20199; Stewart v. Merck & Co. Inc., et al., 2:18-cv-20236; and Sperling v. Merck & Co. Inc., et al., 2:18-cv-20237.

McKesson Corp. ("McKesson") has also filed motions to dismiss the entire complaint in each of these cases, including an omnibus motion that applies to 92 cases. In some of the above actions, one or both of the motions is unopposed.

We are granting the omnibus motion of Merck to dismiss with prejudice because plaintiffs have failed to plead the above described claims with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure as more fully explained in Bentley v. Merck & Co., 2017 WL 2349708 (E.D. Pa. May 30, 2017). See also Erickson v. Merck & Co., 2018 WL 2357273 (M.D. Fla. May 17, 2018); Erickson v. Merck & Co., 2018 WL 3626469 (M.D. Fla. Feb. 22, 2018); and Erickson v. Merck & Co., 2017 WL 9938491 (M.D. Fla. Dec. 8, 2017).<sup>2</sup> Any attempt to replead, in our view, would be futile.

Each of the 173 complaints is full of boilerplate language unrelated to the individual case and is the antitheses of how a proper federal complaint should be drafted. The one-size-fits-all approach of plaintiffs' counsel produced allegations that are absurd on their face as to every plaintiff. Notably, plaintiffs state that they were induced to obtain a Zostavax

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2. Although the decisions in this district lack consensus regarding whether Rule 9(b) applies to claims of negligent misrepresentation, we will follow Judge Stengel's decision in Hanover Ins. Co. v. Ryan, 619 F. Supp. 2d 127, 142 (E.D. Pa. 2007) and apply the heightened pleading standard.

vaccination by advertisements that began running years after plaintiffs were inoculated. Plaintiffs' counsel has habitually made such improper allegations, and the court has previously granted motions to dismiss nearly-identical claims with prejudice. See e.g. Everts, et al. v. Merck & Co. Inc., et al., 2:18-cv-20049 (Pretrial Order No. 87); In Re: Zostavax Products Liability Litigation, 2:18-md-2848 (Pretrial Orders Nos. 98-101). Despite the court's strong language chastising plaintiffs' counsel, counsel continues its vexatious behavior. When asked by defendants' counsel to dismiss voluntarily the hundreds of facially absurd claims in light of our repeated dismissals of identical claims, plaintiffs' counsel advised, "Absent a decision and order from the Court dismissing the fraud-based claims in each case, we will not voluntarily dismiss the fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, and consumer fraud claims." We reiterate that such behavior can only be designed to waste the time and resources of the court and opposing counsel.

Defendant McKesson, unlike Merck, has filed motions to dismiss the entire complaint in each of these actions. As we have done with respect to Merck's motion, we are granting McKesson's motions with prejudice as to the fraud and misrepresentation counts for the reason stated above. We are also dismissing the remaining counts without prejudice on the ground that plaintiffs have failed to satisfy the requirements of Rule 8(a) of the Federal Rules of

Civil Procedure. The complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The deficiencies of the complaints in this regard are manifest and need no further discussion beyond the well-reasoned analysis of Judge James Moody Jr. in Erickson v. Merck & Co., 2018 WL 2357273 (M.D. Fla. May 17, 2018) (dismissing a similar complaint). See also Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313 (11th Cir. 2015). We have repeatedly granted motions to dismiss such needlessly verbose complaints and continue to do so here.

While Merck has not filed motions to dismiss any count under Rule 8(a), we are dismissing each of the entire complaints as to it for the reasons asserted by McKesson. Otherwise, there would be one complaint as to McKesson and a different complaint as to Merck in each case. This would create unmitigated confusion. Accordingly, we are acting pursuant to Rule 1 of the Federal Rules of Civil Procedure which provides that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

We call ¶ 7 of this court's order to the special attention of plaintiffs' counsel and urge them not to repeat the

same behavior exhibited here with respect to any future filings in this Multi-District Litigation.