

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

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

MDL No. 2848

**TRANSFER ORDER**

**Before the Panel:**\* Defendants Merck & Co., Inc., and Merck Sharpe & Dohme Corp. (together, Merck) move under 28 U.S.C. § 1407 to centralize this litigation in the Eastern District of Pennsylvania or, alternatively, the Middle District of Florida or the Eastern District of New York. McKesson Corporation, a co-defendant in 30 actions, supports the motion. This litigation currently consists of 57 actions pending in nine districts, as listed on Schedule A. Since the filing of the motion, the Panel has been notified of 41 related federal actions.<sup>1</sup>

Plaintiffs in 15 actions on the motion and two potential tag-along actions, represented by three firms, support centralization, but disagree on the appropriate transferee district, variously proposing the Eastern District of Pennsylvania, the Middle District of Florida, the District of New Jersey, the Eastern District of Wisconsin, and the District of New Mexico, as their preferred or alternative choice. Plaintiffs in 30 actions on the motion and nine potential tag-along actions represented by a fourth firm oppose centralization and, alternatively, request the Middle District of Florida or, alternatively, the Eastern District of Wisconsin.

On the basis of the papers filed and the hearing session held, we find that these actions involve common questions of fact, and that centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. All actions involve common factual questions arising out of allegations that Zostavax, a live vaccine for the prevention of shingles, caused plaintiffs to develop shingles or other injuries triggered by exposure to the live, attenuated varicella zoster virus contained in the vaccine,<sup>2</sup> and that defendants did not provide sufficient warning of the risks to healthcare providers or consumers. Issues concerning the design, testing, manufacture, regulatory approval, labeling, and marketing of Zostavax are common to all actions. Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings on

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\* Judge Lewis A. Kaplan took no part in the decision of this matter.

<sup>1</sup> These and any other related actions are potential tag-along actions. *See* Panel Rules 1.1(h), 7.1 and 7.2.

<sup>2</sup> The alleged injuries include herpes encephalitis, optical nerve damage, kidney and liver damage, Bell's palsy, Guillain Barre Syndrome, and other viral related illnesses and injuries.

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*Daubert* issues and other pretrial matters; and conserve the resources of the parties, their counsel and the judiciary.

The plaintiffs opposing centralization principally argue that (1) common factual issues do not predominate, emphasizing differences in the alleged injuries and plaintiffs' medical histories; (2) voluntary coordination is preferable to centralization; and (3) procedural disparities among the actions should preclude centralization. These arguments are unconvincing. First, differences in the plaintiffs' individual injuries and medical histories are not an obstacle to centralization when, as here, the actions share a common factual core. *See, e.g., In re: Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig.*, 53 F. Supp. 3d 1379, 1381 (J.P.M.L. 2014) ("The Panel has rejected the argument that products liability actions must allege identical injuries to warrant centralization."). In this litigation, all plaintiffs allege they were injured by the same product in the same manner – exposure to the live attenuated virus in Zostavax – indicating common factual issues will arise concerning the potential risks associated with the use of the live virus in the vaccine.<sup>3</sup>

We find that voluntary coordination is not a practicable alternative to centralization given the number of actions, districts, and plaintiffs' and defense counsel. There are presently a total of 98 actions pending in nine districts, and there have been widely varying discovery deadlines and duplicative motions to dismiss. Five distinct slates of plaintiffs' counsel represent plaintiffs. Moreover, the parties unanimously agree that there is a strong likelihood of additional federal actions and report a large number of state court actions.<sup>4</sup> We find that, on this record, informal coordination is not an efficient alternative to centralization.

Additionally, the actions are in a procedural posture that will enable them to realize significant benefits from centralized pretrial proceedings, even though there are some differences among them in the progress of discovery and pretrial motions. Fact discovery remains open in all actions, and expert discovery has not commenced in any action. No party disputes Merck's representation that no depositions of its employees have taken place in any of these actions. While motions to dismiss have been decided in about eight actions, substantial pretrial proceedings remain. In these circumstances, centralization likely will produce considerable discovery efficiencies and prevent inconsistent rulings.

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<sup>3</sup> The opposing plaintiffs also argue that plaintiff-specific causation issues are central to each action and best managed outside of an MDL. As we previously have held, "[a]lmost all personal injury litigation involves questions of causation that are plaintiff-specific. Those differences are not an impediment to centralization when common questions of fact are multiple and complex." *See, e.g., In re: Fluoroquinolone Prods. Liab. Litig.*, 122 F. Supp. 3d 1378, 1379 (J.P.M.L. 2015).

<sup>4</sup> The record indicates that there are at least 12 Zostavax actions involving over 300 plaintiffs in California state court, and 50 Zostavax actions involving over 800 plaintiffs in New Jersey state court. The California state court actions have been consolidated for pretrial proceedings, and two petitions for coordination of the New Jersey state court actions are pending.

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The opposing plaintiffs further argue that an MDL will delay resolution of their actions and thus cause prejudice to plaintiffs, most of whom are elderly. We are sympathetic to their concerns about the potential for delay. But centralization is appropriate if it furthers the expeditious resolution of the litigation taken as a whole, even if some parties might experience inconvenience or delay. *See, e.g., In re: Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2012). We also observe that their concerns are speculative. Other responding plaintiffs, as well as defendants, represent that centralization will ensure that the actions move forward efficiently and quickly.<sup>5</sup>

We conclude that the Eastern District of Pennsylvania is an appropriate transferee district for this litigation. Seven actions are pending in this district, and they are the earliest filed and most advanced actions in this litigation. The record indicates that the Merck facilities involved in the development, manufacturing, labeling, and marketing of Zostavax are located in Pennsylvania and nearby at its New Jersey headquarters. Thus, many of the common documents and witnesses likely will be located in this area. Common defendants Merck and McKesson request this district, as do plaintiffs in over a dozen actions. Judge Harvey Bartle III presides over all related actions in this district, and is familiar with the claims and issues. He is an experienced transferee judge with the willingness and ability to manage this litigation. We are confident he will steer this litigation on a prudent course.

IT IS THEREFORE ORDERED that the actions listed on Schedule A and pending outside the Eastern District of Pennsylvania are transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Harvey Bartle III for coordinated or consolidated pretrial proceedings.

## PANEL ON MULTIDISTRICT LITIGATION



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Sarah S. Vance  
Chair

Marjorie O. Rendell  
Ellen Segal Huvelle  
Catherine D. Perry

Charles A. Breyer  
R. David Proctor

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<sup>5</sup> *See, e.g.,* Pls.' Response, Doc. No. 34, at 7 (J.P.M.L. May 14, 2018).

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

MDL No. 2848

**SCHEDULE A**

Middle District of Florida

BELL v. MERCK & CO., INC., ET AL., C.A. No. 3:17-01320  
MCRAE v. MERCK & CO., INC., C.A. No. 3:18-00483  
ERICKSON v. MERCK & CO., INC., ET AL., C.A. No. 5:17-0562  
PILLITTERI v. MERCK & CO., INC., ET AL., C.A. No. 5:18-0037  
BLANCHARD v. MERCK & CO., INC., ET AL., C.A. No. 5:18-00038  
JONES, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 5:18-00144  
ERICKSON, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 6:17-01672  
SMITH v. MERCK & CO., INC., ET AL., C.A. No. 6:18-00043  
PATTERSON v. MERCK & CO., INC., ET AL., C.A. No. 6:18-00092  
ALFORD v. MERCK & CO., INC., ET AL., C.A. No. 6:18-00093  
GRENIER v. MERCK & CO., INC., ET AL., C.A. No. 6:18-00407  
MELENDEZ v. MERCK & CO., INC., ET AL., C.A. No. 6:18-00408  
KELLY v. MERCK & CO., INC., ET AL., C.A. No. 6:18-00604  
MALBERG v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00034  
BENCIVENGA v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00156  
BOWMAN, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00434  
STEPHENS v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00512  
DEKER v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00650  
DOLAN v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00651  
MELUCCI v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00695  
BOCKUS v. MERCK & CO., INC., ET AL., C.A. No. 8:18-00715

Northern District of Florida

HIRAM v. MERCK & CO., INC., ET AL., C.A. No. 1:18-00051  
ADAMS v. MERCK & CO., INC., ET AL., C.A. No. 4:18-00155  
SHEPPARD, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 4:18-00200  
GREEN v. MERCK & CO., INC., ET AL., C.A. No. 5:18-00007

Southern District of Florida

ENDRESEN-WORTHY v. MERCK & CO., INC., ET AL., C.A. No. 2:18-14095  
SOROKO v. MERCK & CO., INC., ET AL., C.A. No. 9:18-80021

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District of Massachusetts

VERGE v. MERCK & CO., INC., ET AL., C.A. No. 3:18-30036

District of New Jersey

GASPI v. MERCK & CO., INC., ET AL., C.A. No. 2:17-12849  
SMART, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:17-12853  
KIRK v. MERCK & CO., INC., ET AL., C.A. No. 2:17-13689  
GRACE, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:18-01844  
WARD, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:18-03811  
GASPARD v. MERCK & CO., INC., ET AL., C.A. No. 3:17-11483  
SYKES, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 3:17-11657  
SEIGMAN v. MERCK & CO., INC., ET AL., C.A. No. 3:17-12210  
PINKSTAFF, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 3:17-12212  
FARRINGTON v. MERCK & CO., INC., ET AL., C.A. No. 3:17-13496  
TEMPLET, ET AL. v. MERCK & CO, INC., ET AL., C.A. No. 3:18-00457  
WAGGONER, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 3:18-00987  
BROWN, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 3:18-02460  
CASSIDY, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 3:18-02527  
GEISHEKER v. MERCK & CO., INC., ET AL., C.A. No. 3:18-02544

Eastern District of New York

BRAVO, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 1:18-00687  
BRUMFIELD, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:17-06526  
ZACCANELLI, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:17-07106  
ALBISANO, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:18-00365  
CLARK, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:18-01592

Eastern District of Pennsylvania

DOTTER, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:16-04686  
ESTATE OF CARMEN RODRIGUEZ v. MERCK & CO., INC., ET AL.,  
C.A. No. 2:17-00485  
BILLECI, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:17-00486  
BENTLEY v. MERCK & CO., INC., ET AL., C.A. No. 2:17-01122  
DOHERTY, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:17-01415  
MOLOUKI v. MERCK & CO., INC., ET AL., C.A. No. 2:17-01983  
ELMEGREEN v. MERCK & CO., INC., ET AL., C.A. No. 2:17-02044

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Western District of Pennsylvania

LEE v. MERCK & CO., INC., ET AL., C.A. No. 2:18-00419

Eastern District of Wisconsin

EVERTS, ET AL. v. MERCK & CO., INC., ET AL., C.A. No. 2:18-00020