

**In the United States Court of Appeals
for the Third Circuit**

No. 23-1032

In re: ZOSTAVAX (Zoster Vaccine Live) Products Liability Litigation

MARIANA ABARTA and all other plaintiffs
listed in Exhibit A to notice of appeal,
Appellants.

On Appeal from the Order of the U.S. District Court for the Eastern
District of Pennsylvania, No. 2:18-md-02848-HB, Dismissing
Specified Group A Cases Pursuant to Fed. R. Civ. P. 41(b)
(Hon. Harvey Bartle III, U.S.D.J.)

BRIEF FOR APPELLANTS AND
VOLUME ONE OF THE JOINT APPENDIX
(Pages Appx1-Appx119)

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION	5
III. STATEMENT OF THE ISSUES ON APPEAL	6
IV. STATEMENT OF RELATED CASES AND PROCEEDINGS	7
V. STATEMENT OF THE CASE.....	7
A. Relevant Factual History	7
B. Relevant Procedural History.....	15
C. Rulings Presented For Review.....	20
VI. SUMMARY OF THE ARGUMENT	22
VII. ARGUMENT	26
A. The District Court’s Rule 41(b) Dismissal, Following Issuance Of A <i>Lone Pine</i> Order Requiring Production Of Non-Existent Specific Causation Evidence, Improperly Deprived Plaintiffs Of The Procedural Safeguards Under Fed. R. Civ. P. 56 To Establish By A Preponderance Of The Evidence That Merck’s Vaccine Caused Their Shingles Outbreaks	26
1. Standard of review	26

2. The district court’s <i>Lone Pine</i> order was improper because it concluded that the only way plaintiffs could establish specific causation was with 100 percent certainty and it required plaintiffs to produce non-existent evidence that never existed.....	27
B. The District Court Abused Its Discretion And Committed An Error Of Law In Dismissing Plaintiffs’ Suits Under Federal Rule Of Civil Procedure 41(b) Due To Their Inability To Supply Evidence That Does Not Exist And Never Had Existed.....	38
1. Standard of review	38
2. A Rule 41(b) dismissal was not intended to penalize a party for failing to produce evidence that does not exist and never existed.....	39
VIII. CONCLUSION.....	46

TABLE OF AUTHORITIES

	Page
Cases	
<i>Baptiste v. Sommers</i> , 768 F.3d 212 (2d Cir. 2014).....	41
<i>Cottle v. Superior Court</i> , 5 Cal. Rptr. 2d 882 (Cal. Ct. App. 1992)	29, 30
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	2, 12, 16, 31
<i>Gelboim v. Bank of Am. Corp.</i> , 574 U.S. 405 (2015).....	5, 12, 34
<i>Hamer v. LiveNova Deutschland GmbH</i> , 994 F.3d 173 (3d Cir. 2021).....	26, 27, 38
<i>In re Asbestos Prods. Liab. Litig. (No. VI)</i> , 718 F.3d 236 (3d Cir. 2013)	27, 42
<i>In re Digitek Prod. Liab. Litig.</i> , 264 F.R.D. 249 (S.D. W. Va. 2010)	28, 29
<i>In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.</i> , 852 F.3d 268 (3d Cir. 2017), <i>vacated and remanded</i> <i>on other grounds</i> , 139 S. Ct. 1668 (2019).....	27
<i>In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Pract. & Prods.</i> <i>Liab. Litig.</i> , 892 F.3d 624 (4th Cir. 2018).....	37
<i>In re Pansier</i> , 417 F. App'x 565 (7th Cir. 2011) (per curiam)	41
<i>In re Zantac (Ranitidine) Prods. Liab. Litig.</i> , No. 20-MD-2924, 2022 WL 17480906 (S.D. Fla. Dec. 6, 2022), <i>appeal pending</i> , Nos. 11047 & 11080 (11th Cir.)	37
<i>In re: Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.</i> , 858 F.3d 787 (3d Cir. 2017).....	36

<i>In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.,</i> 579 F. Supp. 3d 675 (E.D. Pa. 2021).....	12
<i>Koon v. United States</i> , 518 U.S. 81 (1996).....	26, 27, 39
<i>McManaway v. KBR, Inc.</i> , 265 F.R.D. 384 (S.D. Ind. 2009)	29
<i>Poullis v. State Farm Fire & Cas. Co.</i> , 747 F.2d 863 (3d Cir. 1984).....	21, 41, 42, 44
<i>Rodriguez v. Hirshberg Acceptance Corp.</i> , 62 F.4th 270 (6th Cir. 2023).....	40
<i>Simeone v. Girard City Bd. of Educ.</i> , 872 N.E.2d 344 (Ohio Ct. App. 2007)	29

Statutes

28 U.S.C. §1291.....	5
28 U.S.C. §1332.....	5

Court Rules

Fed. R. Civ. P. 41(b).....	3-6, 9, 11, 14, 18-23, 25, 26, 34-42, 44-46
Fed. R. Civ. P. 56.....	4, 6, 14, 23, 24, 26, 33, 36-38, 43, 44
Fed. R. Evid. 702.....	12

Other Authorities

Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*,
129 Yale L.J. Forum 64 (Nov. 4, 2019)30, 31

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I. INTRODUCTION

Lone Pine orders are a type of case management order sometimes used in multi-district litigation (MDL) proceedings that require plaintiffs to produce *prima facie* evidence, typically expert reports, in support of their claims. This Court's precedents recognize that *Lone Pine* orders can serve a proper purpose in the right MDL context, but also that, if improperly employed, they can unlawfully deprive plaintiffs of the individualized consideration their cases are entitled to receive before they are dismissed with prejudice for evidentiary insufficiency.

The district court's order in this MDL, dismissing nearly 1,200 individual cases due to those plaintiffs' inability to comply with a *Lone Pine* order that compelled them to produce a type of DNA evidence that simply does not exist and never existed, vividly demonstrates the improper use of the *Lone Pine* procedure that this Court has cautioned against because it has deprived plaintiffs of the procedural protections and individualized consideration their cases are entitled to receive under the Federal Rules of Civil Procedure.

In this MDL, plaintiffs allege that being inoculated with defendants' shingles vaccine, Zostavax, caused plaintiffs to contract shingles rather

than protecting them from shingles as marketed by defendants. There is no dispute among the parties that being inoculated with Zostavax can cause shingles (meaning that the parties agree evidence exists of general causation). Plaintiffs' claims have survived the motion to dismiss stage and are in the beginning stages of case-specific discovery. Until January 2022 and the subsequent entry of the district court's Lone Pine Order directing them to produce non-existent DNA evidence, discovery in plaintiffs' cases was essentially stayed pending discovery and motion practice in the five cases selected as bellwethers.

At the motion for summary judgment stage for the five bellwether cases, and after all case-specific discovery had been conducted in only those five cases, the district court ruled that those plaintiffs' specific causation expert witness failed to satisfy *Daubert* because his specific causation testimony was too conclusory. Appx743-766. In its opinion, the district court noted that none of the plaintiffs had undergone a specific type of DNA test called polymerase chain reaction (PCR) testing. Appx745.

Following the issuance of that decision, at Merck's request, and over plaintiffs objections, the district court in this MDL entered a *Lone Pine* order requiring plaintiffs-appellants to produce PCR testing results, even though

the district court had been advised that: (1) no such evidence existed because PCR testing on a shingles outbreak was never the standard of care for treating shingles, and it could not be performed today since the shingles rashes no longer existed; and (2) PCR testing cannot conclusively determine whether a shingles rash was caused by Zostavax as conceded by defendants' own experts in the bellwether trials. Appx879-886, 956-966. The *Lone Pine* order did not require plaintiffs to identify whatever evidence they possessed to prove specific causation, including expert opinion. Appx963-966.

After plaintiffs failed to produce that non-existent DNA evidence, Merck moved pursuant to Fed. R. Civ. P. 41(b) to dismiss all of plaintiffs-appellants' actions for failure to comply with the district court's *Lone Pine* order, and the district court granted that relief, dismissing these nearly 1,200 cases. Appx54, 967-1026. The district court's order constituted reversible error for numerous reasons.

The district court's order improperly assumes that the only way to conclusively (meaning with 100% assurance) determine whether the Zostavax vaccine caused a specific outbreak of shingles is to perform PCR testing on DNA obtained from an active shingles lesion. Not only is this

assumption inaccurate, as could have been explained by plaintiffs' experts had the district court given them the opportunity to do so, but for the plaintiffs to prevail, they do not have the burden to come forth with *conclusive* (100%) evidentiary support of specific causation; rather, the burden is preponderance of the evidence. Plaintiffs-appellants are familiar with no other case in which a *Lone Pine* order has been applied to dismiss on a wholesale basis nearly 1,200 cases for failure to produce *conclusive* evidentiary support of specific causation that doesn't exist, has never existed, and thus cannot be furnished.

Dismissal under Rule 41(b) is not proper where plaintiffs bear no blame or responsibility for their failure to comply with the court order in question, because it required the production of a type of evidence that simply doesn't exist and never existed. And the combined improper use of a *Lone Pine* order and a Rule 41(b) dismissal to dispose of nearly 1,200 cases for lack of sufficient proof of specific causation improperly deprived plaintiffs-appellants of the procedural protections they were entitled to receive under Fed. R. Civ. P. 56 to demonstrate in each individual case that sufficient evidence exists to establish specific causation by a preponderance of the evidence.

II. STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The Judicial Panel on Multidistrict Litigation centralized these cases for coordinated or consolidated pretrial proceedings in the U.S. District Court for the Eastern District of Pennsylvania. Appx134. The district court possessed diversity jurisdiction over these cases pursuant to 28 U.S.C. §1332 because the cases were between citizens of different states and the amount in controversy in each case exceeded \$75,000, exclusive of interest and costs.

This Court possesses appellate jurisdiction over this appeal pursuant to 28 U.S.C. §1291 because the district court's order dismissing these cases pursuant to Fed. R. Civ. P. 41(b) constituted a final order. *See Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 415 (2015). The district court entered its dismissal order on December 6, 2022. Appx54. Plaintiffs-appellants filed their timely notice of appeal from that order to this Court on January 5, 2023. Appx1.

III. STATEMENT OF THE ISSUES ON APPEAL

1. Whether the district court's Rule 41(b) dismissal, following its issuance of a *Lone Pine* order requiring the production of specific causation evidence that does not exist and has never existed, improperly deprived plaintiffs of the procedural safeguards available to them at the summary judgment stage under Federal Rule of Civil Procedure 56 to establish by a preponderance of the evidence, either collectively or on a case-by-case basis, that defendants' vaccine specifically caused their shingles outbreaks?

Where preserved: Plaintiffs-appellants preserved this argument in their responses in opposition to Merck's Motion for *Lone Pine* Order and Merck's Motion to Dismiss pursuant to Fed. R. Civ. P. 41(b). Appx892-894, 1252-1978, 1566, 1572, 3165.

2. Whether the district court abused its discretion or committed an error of law in dismissing plaintiffs' suits under Federal Rule of Civil Procedure 41(b) due to their inability to supply evidence that does not exist and never had existed?

Where preserved: Plaintiffs-appellants preserved this argument in their responses in opposition to Merck's Motion to Dismiss pursuant to Fed. R. Civ. P. 41(b). Appx1252-1978, 1571-1583.

IV. STATEMENT OF RELATED CASES AND PROCEEDINGS

As the district court's opinion in support of its order dismissing over 1,200 Group A cases explains:

The court with the agreement of the parties has divided the more than 2,000 cases in this MDL into Groups A, B, and C for management purposes. Group A cases are those in which plaintiffs allege that they have suffered shingles or shingles-related injuries. Group B consists of those cases where the plaintiffs allege various other injuries as a result of Zostavax. Group C cases involve alleged hearing loss injuries. The 1,189 actions which are the subject of defendants' pending motion are part of Group A.²

² Group A also includes some 500 cases in which plaintiffs allege they suffered from both shingles-related and non-shingles-related injuries. Those actions are not presently before the court.

Appx107.

V. STATEMENT OF THE CASE

A. Relevant Factual History

This MDL concerns Zostavax, a vaccine developed and manufactured by defendants Merck & Co., Inc. and Merck Sharp & Dohme Corp. to purportedly prevent the occurrence of shingles. Appx744. Zostavax was licensed by the Food & Drug Administration ("FDA") in 2006 and was

initially approved for use in adults 60 or older. *Id.* It was later approved by the FDA for use in adults 50-59. *Id.*

Plaintiffs claim in 1,189 separate actions now before this Court that Zostavax did not do what it was supposed to do (namely, prevent shingles) and instead actually caused them to suffer from shingles. Appx106. Merck now admits that Zostavax can cause Shingles. Appx270, 440-441. Merck discontinued the sale and use of Zostavax in the United States effective November 18, 2020.

Zostavax contains the live varicella-zoster virus (“VZV”). Appx109-110. It is well-known that VZV causes both chickenpox, which typically occurs in childhood, and shingles, that is, herpes zoster, which occurs later in adulthood after a person has experienced chickenpox. Appx109. VZV remains in the body for life. *Id.* When the body is exposed to the virus for the first time, it travels up nerve fibers from the skin and becomes dormant in nerve cells, called ganglia, near the spinal cord, where it remains dormant. *Id.* If the virus reactivates later in life, it travels down the nerve fibers and results in shingles. *Id.* Shingles manifests itself in a painful rash on various parts of the body. *Id.* One out of three adults will experience shingles during his or her lifetime. *Id.* (citing Rafael Harpaz, *et al.*,

Prevention of Herpes Zoster: Recommendations of the Advisory Committee on Immunization Practices (ACIP), 57 *Morbidity & Mortality Wkly. Rep.* 2, 9 (2008)). The CDC estimates that one million new cases of shingles occur each year in the United States. Appx109.

Virtually all persons over the age of 30 in the United States have had chickenpox and carry the so-called wild-type strain of VZV in their systems. *Id.* Zostavax is made up of a specific strain of VZV referred to as the “Oka” strain. *Id.* Merck used PCR Testing in its clinical studies to determine whether a shingles rash after vaccination contained wild-type VZV or Oka strain. Appx445. This PCR Testing was specific to Merck and was not the standard of care for healthcare providers. Merck’s testing revealed that some of its tested shingles rashes contained both wild-type VZV and Oka strain (“mixed-strain” rashes), but Merck reported to the FDA that these rashes were wild-type, meaning that they did not contain Oka. Appx445-446. Had plaintiffs’ claims not been improperly dismissed by the district court under Rule 41(b), plaintiffs intended to introduce expert evidence on the inadequacies of Merck’s PCR testing and how even test results showing wild-type only rashes could still have been caused by Zostavax.

Zostavax is not designed to produce immunity by causing a mild case of shingles but rather to prevent shingles by boosting immunity before an outbreak of shingles takes place. Appx110. From the beginning, Merck made it clear that Zostavax's effective rate was around 50% and waned over time. *Id.* The effectiveness also declined with the age of the patient. *Id.* While Merck concedes that an immunocompetent adult who receives Zostavax can develop shingles from the live-attenuated virus, Merck points to various studies that show that only one such case is known ever to have occurred. Appx270-271. Plaintiffs' counsel, on the contrary, have argued to the district court that, based on the opinions of plaintiffs' experts, approximately 15 percent of the shingles outbreaks experienced by Zostavax recipients after being vaccinated had the vaccine strain present in their shingles rashes and that because of the failures inherent to Merck's PCR the vaccine strain is likely present in many other rashes, perhaps all of them. Appx441, 731-732.

Because this appeal involves a dispute over plaintiffs' ability or inability to prove specific causation, a word about the differences between general causation and specific causation is in order. In any product liability case or contamination case, a plaintiff has the burden to prove both general and

specific causation. General causation refers to whether the product or contaminant is capable of inflicting the harm that the plaintiff claims to have sustained. Thus, for example, in a suit alleging that hormone replacement therapy medications caused the plaintiff's breast cancer, the plaintiff must present evidence sufficient to allow the finder of fact to conclude by a preponderance of the evidence that the medication is capable of causing breast cancer. Or, in the case of contamination, that the contaminant is capable of causing the plaintiff's illness or injury.

In this case, the parties agree that the Zostavax vaccine can trigger a shingles outbreak (general causation) – although the parties do disagree, as noted above, concerning how often that result occurs. Appx270, 440-441. The dispute that gives rise to this appeal concerns specific causation only, and whether it was procedurally proper for the Court to dismiss plaintiffs' cases using a *Lone Pine* order combined with a wholesale Fed. R. Civ. P. 41(b) dismissal when they had not been given a fair opportunity to conduct full merits discovery in their respective cases and present expert evidence of specific causation based upon the requirements of their respective states' laws.

The issue of specific causation in Group A cases first came before the district court in the context of five bellwether cases that the parties were preparing for trial. Merck filed a motion in each of the five Group A bellwether cases to exclude the testimony of plaintiffs' causation expert in those cases, Dr. Mark Poznansky, under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In the context of those five cases, the district court ruled that Dr. Poznansky's specific causation opinions failed to satisfy *Daubert* because they were overly conclusory. See *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, 579 F. Supp. 3d 675, 681 (E.D. Pa. 2021). Without the required specific causation expert testimony to support those plaintiffs' claims, the district court entered summary judgment in favor of Merck in each of the five cases on December 7, 2021. Appx108, 245-246. The five plaintiffs initially appealed from the district court's entry of summary judgment but thereafter voluntarily dismissed their appeals. Appx108-109.

Unlike in a case certified as a class action, where a district court's decision in the case can bind other members of the class, an MDL proceeding consists of cases that retain their separate and individual status. See *Gelboim*, 574 U.S. at 413. A ruling in one case that the plaintiff possessed

insufficient evidence does not dictate that same outcome in a second plaintiff's case unless, perhaps, that second plaintiff can only offer the same insufficient evidence that the first plaintiff put forth. But, at a minimum, that second plaintiff is given the opportunity to try to present sufficient evidence even if a different plaintiff had been unable to do so.

The lesson that the district court drew from its entry of summary judgment in the five bellwether cases was that only PCR testing could definitively determine (meaning with 100% accuracy) whether a given plaintiff's shingles had been caused by receiving the Zostavax vaccine (Appx110), even though that matter was never actually argued before the district court by Merck in the bellwether cases and is a "lesson" that plaintiffs disagree with (Appx879-886). Plaintiffs acknowledge that a PCR test can sometimes show whether Zostavax caused a shingles outbreak, with the important caveat that the failure to detect the Oka strain of the virus in a shingles lesion does not definitively disprove that the vaccine did not cause the shingles. Appx883-886. In the bellwether trials, Merck's own experts provided testimony that supports plaintiffs' position in this regard. Appx881-886, 1569-1571.

However, of much greater relevance, plaintiffs do not concede – and in fact affirmatively disagree – that the evidence of specific causation put forth in the five bellwether cases is the best that plaintiffs can offer to prove specific causation under their respective states’ laws, and the remaining Group A plaintiffs in this MDL proceeding are entitled to present the most robust version of specific causation evidence that they are capable of mustering under their respective states laws before the district court concludes whether that evidence is sufficient to allow a finder of fact to conclude that each plaintiff has established specific causation by a preponderance of the evidence. Appx1575-1576.

The procedures the district court employed in this case – issuing a *Lone Pine* order requiring the production of non-existent DNA evidence, followed by the Rule 41(b) dismissal of all of the remaining nearly 1,200 Group A cases due to the non-existence of any DNA evidence in any of those cases – pretermitted this inquiry without providing the plaintiffs the safeguards to which they were entitled under the summary judgment procedures set forth in Rule 56 for considering whether these plaintiffs’ actual evidence of specific causation, which these Group A plaintiffs have

never had an opportunity to put forth for consideration, is or is not legally sufficient.

B. Relevant Procedural History

This MDL proceeding was initiated in the U.S. District Court for the Eastern District of Pennsylvania on August 2, 2018. Appx134. As noted above, Group A cases remain in the beginning stages of discovery after having survived the motion to dismiss stage of this litigation.

A little over three years later, in September 2021, the parties were preparing to take five Group A bellwether cases to trial. The purpose of bellwether trials in an MDL proceeding is to provide both sides with guidance concerning common aspects of the other actions that remain pending in the MDL, even though the outcome of any single MDL case is not necessarily predictive of the outcome of any other MDL case.

Merck in September 2021 filed a motion in the five bellwether cases to exclude the expert testimony of plaintiffs' specific causation expert in those cases, Mark Poznansky, M.D. Appx263-264. On December 1, 2021, after the motion had been fully briefed and argued, the district court granted Merck's motion to exclude Dr. Poznansky's specific causation opinions

under *Daubert*, on the basis that they were too conclusory. Appx743-766. The district court ultimately entered summary judgment in favor of Merck in those five cases based on the respective state's laws of the individual plaintiffs, concluding that plaintiffs could not prove specific causation in the absence of Dr. Poznansky's excluded testimony. Appx108.

On January 27, 2022, Merck filed a motion asking the district court to issue a *Lone Pine* order in these Group A cases directing plaintiffs to produce PCR testing results demonstrating that the vaccine strain of the virus was present in plaintiffs' shingles lesions. Appx767-877. Plaintiffs opposed that request, explaining (among other things) that no such PCR testing evidence exists since it was not the standard of care to perform such testing when plaintiffs contracted shingles and that the testing can't be performed after the fact once such lesions have healed. Appx878-896. Plaintiffs also explained in their opposition that there was a wide gulf (approaching 50 percent) between the 100 percent certainty of specific causation that PCR testing might in certain instances provide and the more-likely-than-not standard of proof applicable to plaintiffs' specific causation evidence in this MDL. Appx880, 882, 887, 894.

On March 30, 2022, over the plaintiffs' objections, the district court issued pretrial order (PTO) 426, granting the *Lone Pine* order that Merck had requested. Appx963-966. The order directed plaintiffs in Group A to "serve laboratory reports or other records documenting that strain-identification testing detected vaccine-strain varicella zoster virus ('VZV') in a rash sample from the plaintiff." Appx963. Notably, the *Lone Pine* order did not direct plaintiffs who were unable to produce such PCR testing to instead identify whatever other evidence and expert support they could offer to establish that the Zostavax vaccine more likely than not was the cause of their shingles (meaning case-specific factual causation). Appx963-966.

In other words, the *Lone Pine* order did not require Group A plaintiffs to identify whatever evidence they possessed to prove specific causation, including expert opinion. Rather, the *Lone Pine* order merely directed plaintiffs to produce one specific type of genetic testing evidence that was known to all in advance not to exist.

As assuredly as night follows day, plaintiffs were unable to satisfy the district court's *Lone Pine* order, because none of the plaintiffs in Group A possessed PCR testing results of their shingles lesions, since such testing

was never the standard of care, and Merck had never instructed physicians treating vaccinated patients for shingles to perform such testing to rule-in or rule-out whether Zostavax had caused the outbreak. Appx1563. As a result, none of the Group A plaintiffs had anything to serve on Merck in response to the district court's *Lone Pine* order. Appx112.

Having received nothing from the Group A plaintiffs in response to the district court's *Lone Pine* order, because the identified evidence didn't exist and never existed, on August 24, 2022 Merck filed a motion to dismiss all Group A cases pursuant to Fed. R. Civ. P. 41(b) or, in the alternative, for summary judgment. Appx967-1246. Thereafter, on September 23, 2022, the district court issued PTO 452, which by agreement of the parties stayed Merck's motion to the extent it sought summary judgment in order to permit the parties and the district court to address defendants' motion to dismiss under Rule 41(b). Appx1249-1251.

Various groups of plaintiffs filed their own responses in opposition to Merck's motion to dismiss, but those responses all made the same major points. Appx1252-1978. First, plaintiffs emphasized and reemphasized that none of them intended to rely on precisely the same specific causation evidence that the district court had already found lacking at the summary

judgment stage of the five bellwether cases. Appx1575. Rather, plaintiffs intended to rely on different, and more robust, evidence of specific causation whose sufficiency the district court had not yet had the opportunity to consider, and which was not properly before the district court in the Rule 41(b) dismissal proceeding, since that proceeding focused solely on whether plaintiffs' non-production of non-existent PCR testing necessitated the dismissal of their actions for inability to prove specific causation. *Id.*

Second, plaintiffs argued that no *Lone Pine* order that they have been able to identify had ever required the plaintiffs to produce, on pain of dismissal, a form of non-existent evidence that was incapable of being created after-the-fact. Appx1562-1563, 1571, 1576-1578. And, third, plaintiffs argued that a Rule 41(b) dismissal is intended to dismiss a case where the plaintiff has refused to comply with a court order, but is not intended to dismiss a case where the plaintiff was unable to comply with the court order because the court order required the plaintiff to accomplish something that was simply impossible – to go back in time to create evidence that doesn't currently exist and never existed. Appx1572-1584.

C. Ruling Presented For Review

On December 6, 2022, after Merck's Rule 41(b) motion to dismiss had been fully briefed and orally argued, the district court issued the order that is the subject of this appeal dismissing plaintiffs' claims against Merck in 1,189 separate actions for failure to produce the PCR testing that the district court's *Lone Pine* order demanded. Appx54-105.

The district court's memorandum opinion issued in support of the dismissal order makes clear that the district court – despite having held no formal proceedings to determine the question – has concluded that “the record is undisputed that such [PCR] testing is the only way to prove whether Zostavax or the wild-type virus caused a person's shingles. Otherwise, causation in any case is mere speculation.” Appx113. The district court further criticized plaintiffs for insisting that they had evidence other than precisely what the district court had already rejected from Dr. Poznansky in the five bellwether cases that would suffice to prove specific causation by a preponderance of the evidence, even though no district court proceedings to date have been directed to that inquiry. Appx113-117. According to the district court, “If plaintiffs had prima facie proof of

specific causation, common sense dictates that it would have surfaced by now." Appx117.

The district court then turned to consider whether dismissal under Rule 41(b) was proper, applying the factors this Court set forth in *Poullis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984). Appx118-119. First, the district court recognized that "the plaintiffs here have not acted willfully or in bad faith insofar as they are unable to produce nonexistent PCR tests." Appx118. However, the district court suggested that plaintiffs were proceeding in bad faith by insisting that they could establish specific causation by a preponderance of the evidence even without PCR testing (*id.*), even though none of these plaintiffs had been given the opportunity (or been required, in a procedurally proper way) to come forward with precisely the evidence they rely on to establish specific causation in each of their cases.

The district court further explained that Group A cases had been at a standstill since the dismissal of the five bellwether cases on December 1, 2021 (Appx119), even though that is not true, given that Merck sought its *Lone Pine* order soon thereafter, and the parties have been litigating the continued survival of these cases ever since. The district court noted the

prejudice to Merck in keeping these cases alive and the administrative burden on the district court. *Id.* Finally, the district court wrote that “there is no effective sanction other than dismissal” for plaintiffs’ failure to produce the non-existent evidence that never existed which the *Lone Pine* order required plaintiffs to produce. *Id.*

VI. SUMMARY OF THE ARGUMENT

Plaintiffs herein agree that *Lone Pine* orders can serve a useful purpose in multi-district litigation, allowing a district court to cull unmeritorious cases, and plaintiffs herein further agree that if they are unable to come forward with sufficient evidence capable of proving specific causation under their respective states’ laws by a preponderance of the evidence at the summary judgment stage of this proceeding, the district court would have no alternative other than to enter summary judgment against them and in favor of Merck.

Those two points of agreement aside, the district court’s combined use of a *Lone Pine* order requiring plaintiffs to produce non-existent evidence that never existed on pain of dismissal under Rule 41(b) for disobeying a court order represented a travesty of justice in this case. The Federal Rules

of Civil Procedure offer an established procedure for disposing of cases in advance of trial where a party cannot satisfy its burden of proof as to one or more elements of the plaintiff's claim, and that procedure is known as summary judgment under Rule 56.

That well-established summary judgment procedure, and not some *ad hoc* supplementary procedure involving an unprecedented type of *Lone Pine* order followed by a clearly inappropriate Rule 41(b) dismissal for failing to obey an order calculated to be impossible to obey, is the way in which plaintiffs' ability or inability to prove specific causation by a preponderance of the evidence in these cases should be adjudicated.

There are any number of permissible *Lone Pine* orders that a district court can enter in an MDL involving a defective product or contaminant. Prove that you have been exposed to the product or contaminant; prove that you have been injured or harmed by the product or contaminant; prove that you have an expert who will opine by a reasonable degree of medical certainty that your exposure to the product or contaminant caused your injury or harm. These types of *Lone Pine* orders can serve an appropriate purpose and enable an MDL court to cull clearly unmeritorious cases from the rest at the appropriate time.

But never before, at least as far as plaintiffs are aware, has a district court entered a *Lone Pine* order requiring plaintiffs to produce evidence demonstrating a 100 percent certainty that the defendant's product or contaminant caused the plaintiff's injury, let alone a form of evidence that the district court knew (because it had been so advised) simply doesn't exist and thus cannot be produced because it never existed. The *Lone Pine* order entered in this case was a charade employed in a rush to judgment that deprived the plaintiffs-appellants in this case of their procedural rights under Rule 56 to have their actual specific causation evidence considered in the context of the applicable preponderance of the evidence standard of proof.

The district court concluded that because in five bellwether cases the plaintiffs could not prove specific causation under their respective state laws with greater than 50 percent certainty, and because in no cases could the plaintiffs prove specific causation with 100 percent certainty, then in none of the remaining nearly 1,200 cases could the plaintiffs prove specific causation under their respective state laws with greater than 50 percent certainty, even though in these nearly 1,200 other cases the plaintiffs' specific causation evidence would be different and more robust than what

the district court had rejected in the first five cases. The math behind the district court's precipitous rejection of plaintiffs' Group A claims simply does not add up.

For these reasons, this Court should reverse the district court's Rule 41(b) dismissal of these cases and remand these cases to the district court for further proceedings that will allow for appropriate case-specific discovery and proper motion practice as to each plaintiff's respective claims, and which will permit plaintiffs to place before the district court, and for the district court to evaluate individually or collectively as appropriate, plaintiffs' specific causation evidence at the summary judgment stage, applying the requisite preponderance of the evidence standard of proof.

VII. ARGUMENT

A. The District Court's Rule 41(b) Dismissal, Following Issuance Of A *Lone Pine* Order Requiring Production Of Non-Existent Specific Causation Evidence, Improperly Deprived Plaintiffs Of The Procedural Safeguards Under Fed. R. Civ. P. 56 To Establish By A Preponderance Of The Evidence That Merck's Vaccine Caused Their Shingles Outbreaks

1. Standard of review

This Court reviews involuntary dismissals under Fed. R. Civ. P. 41(b) for abuse of discretion. *See Hamer v. LiveNova Deutschland GmbH*, 994 F.3d 173, 177 (3d Cir. 2021). “Although we defer to the District Court’s discretion, dismissals with prejudice are drastic sanctions, only appropriate in limited circumstances, and doubts should be resolved in favor of reaching a decision on the merits.” *Id.* (internal quotations, footnotes, and brackets omitted).

As the U.S. Supreme Court explained in *Koon v. United States*, 518 U.S. 81, 100 (1996), “[a] district court by definition abuses its discretion when it makes an error of law.” As *Koon* recognized, “an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction.” *Id.* The U.S. Supreme Court summed up its analysis of the applicable standard of review by concluding that “[t]he abuse-of-discretion standard

includes review to determine that the discretion was not guided by erroneous legal conclusions.” *Id.*

2. The district court’s *Lone Pine* order was improper because it concluded that the only way plaintiffs could establish specific causation was with 100 percent certainty and it required plaintiffs to produce non-existent evidence that never existed

Lone Pine orders have proven controversial, and the district court’s decision in this case will only serve to stoke that controversy. Nevertheless, this Court has recognized that *Lone Pine* orders can serve a proper purpose “to streamline litigation in mass tort cases.” *Hamer*, 994 F.3d at 178. The *Hamer* case itself involved a routine type of *Lone Pine* order that “require[d] plaintiffs to produce threshold *prima facie* support for their claims, such as expert reports and medical records.” *Id.*

Nevertheless, in both *Hamer, id.*, and in *In re Asbestos Prods. Liab. Litig.* (No. VI), 718 F.3d 236 (3d Cir. 2013), which also involved a *Lone Pine* order, this Court remarked that “efficiency must not be achieved at the expense of preventing meritorious claims from going forward.” That, regrettably, is precisely what happened in this case. As this Court recognized in reversing an MDL court’s entry of summary judgment in *In re Fosamax (Alendronate*

Sodium) Prods. Liab. Litig., 852 F.3d 268, 302 (3d Cir. 2017), *vacated and remanded on other grounds*, 139 S. Ct. 1668 (2019), “the District Court’s understandable desire to streamline proceedings cannot override the Plaintiffs’ basic trial rights.”

In *In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249 (S.D. W. Va. 2010), the district court considered the source of a district court’s power and rationale for entering a *Lone Pine* order, explaining:

It is of some consequence that no federal rule or statute requires, or even explicitly authorizes, the entry of *Lone Pine* orders. Nevertheless, *Lone Pine* orders have proven useful at times in complex litigation, and the courts citing authority for this type of extraordinary procedure typically rely upon the broad permission bestowed by Federal Rule of Civil Procedure 16.

Id. at 256.

Ultimately, in *Digitek*, the district court declined to issue a *Lone Pine* order, reasoning:

Given a choice between a “*Lone Pine* order” created under the court’s inherent case management authority and available procedural devices such as summary judgment, motions to dismiss, motions for sanctions and similar rules, I believe it more prudent to yield to the consistency and safeguards of the mandated rules especially at this stage in this litigation. Claims of efficiency, elimination of frivolous claims and fairness are effectively being addressed using the existing and standard means. Resorting to crafting and applying a *Lone Pine* order

should only occur where existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of this litigation. We have not reached that point.

Id. at 259.

Similarly, in *McManaway v. KBR, Inc.*, 265 F.R.D. 384 (S.D. Ind. 2009), the district court recognized that “[a] significant criticism of the *Lone Pine* order is that ‘it gives courts the means to ignore existing procedural rules and safeguards.’” *Id.* at 386 (quoting *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 350 (Ohio Ct. App. 2007)).

Likewise, in *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882, 898 (Cal. Ct. App. 1992), Associate Justice Johnson would have rejected the propriety of the trial court’s use of a *Lone Pine* order in that case to dismiss the plaintiff’s case, explaining:

The Legislature has provided a pretrial procedure for terminating a cause of action because the plaintiff has insufficient evidence to warrant a jury trial of the claim. That procedure is summary judgment. Consequently, trial courts lack “inherent power” to do the same thing under another name, especially one which omits vital procedural protections the Legislature guaranteed in its summary judgment statute. This attempt to grant the functional equivalent of a summary judgment in the guise of a case management order impinges on a litigant’s constitutional right to have material issues of fact decided by a jury without affording the procedural protections

the Legislature deemed essential before this drastic step would be allowed.

An appellate court would reverse a summary judgment if the trial court considering the summary judgment motion failed to adhere to essential requirements of that statutory procedure. The result should be no different where the court omits those statutory steps entirely by calling an action effectively granting summary judgment a case management order or something else.

Id. at 898 (Johnson, J., dissenting).

Academics whose research focuses on mass torts and civil procedure have also voiced these same concerns. Law professor Nora Freeman Engstrom and Amos Espeland, in an essay titled *Lone Pine Orders: A Critical Examination and Empirical Analysis*, 168 U. Penn. L. Rev. Online 91 (2020), recognized:

[T]here is a deep and legitimate worry that *Lone Pine* orders are sometimes used as pseudo-summary judgment motions. As we explain in greater detail below, some *Lone Pine* orders function like summary judgment motions but simultaneously deprive plaintiffs of fundamental protections that Rule 56 generally affords.

Id. at 101 (footnotes omitted).

And law professor Elizabeth Chamblee Burch, in an essay titled *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 Yale L.J. Forum 64 (Nov. 4, 2019), observed that “As a judicial concoction, *Lone Pine*

orders are the pluots of mass torts, grafting together snippets of federal rules while ignoring their procedural protections.” *Id.* at 65 (footnote omitted).

The specific *Lone Pine* order that the district court entered in this case suffered from two significant flaws. First, the district court apparently concluded at some point, as the result of entering summary judgment against the five bellwether plaintiffs for failing to prove specific causation following the exclusion of Dr. Poznansky’s specific causation testimony under *Daubert* as excessively conclusory, that plaintiffs have no ability to prove specific causation other than through PCR testing. Appx110, 113. But plaintiffs don’t agree with that conclusion, and they have repeatedly informed the district court that they intend to prove specific causation in their individual cases using evidence that is stronger and more robust than the evidence that the district court ruled insufficient in the five bellwether cases. Appx1575-1576.

Plaintiffs profoundly disagree that PCR testing is conclusive of causation. Indeed, while a test result showing Oka strain supports causation, a result showing wild-type does not rule out causation. Appx879-882. Plaintiffs intend to produce evidence of why this is the case

through discovery. Yet, no proceedings have occurred or have been ordered to occur in this MDL to determine whether the vast majority of remaining Group A plaintiffs – who are now the nearly 1,200 appellants herein – can prove specific causation in their individual cases in the absence of PCR testing.

The district court's order requiring that PCR testing evidence be produced for plaintiffs to be able to continue to maintain their cases against Merck required a plaintiff to prove with 100 percent certainty that the vaccine contributed to causing the shingles outbreak. However, for plaintiffs to prevail on their personal injury claims against Merck, plaintiffs merely must establish by a preponderance of the evidence that Zostavax caused their shingles-related injuries. Thus, there is a wide disparity, approaching 50 percent, between the certainty of proof of specific causation that the district court required plaintiffs to provide and the certainty of proof that would suffice for plaintiffs to prevail on their claims.

To be sure, the district court had other ways that it could have chosen to proceed to resolve case specific causation. For example, the district court could have issued a *Lone Pine* order that contained reasonable deadlines and required all remaining Group A plaintiffs to furnish Merck with the

evidence they intended to rely on to prove specific causation in their individual cases, including expert reports opining that specific causation could be established within a reasonable degree of medical certainty. If plaintiffs failed to come forward with such evidence, then presumably their cases could be dismissed. While this type of a *Lone Pine* order still bears a troubling resemblance to a summary judgment proceeding without the procedural safeguards that Rule 56 affords, it would still impose a burden that plaintiffs with valid claims should be capable of satisfying.

This observation brings us to the other significant flaw in the *Lone Pine* order that the district court entered in this case. In no other case with which plaintiffs are familiar has a district court entered a *Lone Pine* order that the plaintiffs were categorically unable to satisfy because it required the production of evidence that does not exist and never existed.

This facet of the district court's *Lone Pine* order is why we have resorted to characterizing the procedure for dismissing these nearly 1,200 Group A cases as a charade. If the specific type of evidence necessary for plaintiffs to maintain a successful claim against Merck is conclusively known not to exist, as was the case here with regard to PCR testing of plaintiffs' shingles lesions, then the one and only appropriate way to dispose of plaintiffs'

claims is through the well-settled procedure of motions for summary judgment based upon the laws of the plaintiffs' respective states.

Here, however, Merck instead prevailed on the district court to transform what should have been a motion for summary judgment into a combination of a *Lone Pine* order requiring the production of the impossible and a Rule 41(b) dismissal order improperly penalizing plaintiffs for their inability to do the impossible. Adding insult to injury, the district court topped it off by criticizing plaintiffs for failing to come forward with their actual evidence to establish specific causation, notwithstanding that the district court's *Lone Pine* order did not require, nor did any other court order require, plaintiffs to produce that evidence. Appx113-117, 963-966. A summary judgment motion, by contrast, would have allowed the appropriate discovery to be conducted and would have required plaintiffs to come forward with their specific causation evidence. The district court, in essence, faulted plaintiffs for failing to respond to a summary judgment motion that was not the basis for the district court's dismissal order.

An MDL proceeding involves the coordination of what remain separate, individual cases. *See Gelboim*, 574 U.S. at 413. This MDL is not a class action. The five bellwether plaintiffs failed to prove specific causation in their

individual cases, but that failure does not bind the remaining nearly 1,200 Group A plaintiffs or doom these remaining cases to failure. Each plaintiff retains the ability to prove specific causation using the evidence available to him or her. And Merck, should it wish to do so, can test the ability of each plaintiff to do so via procedures expressly provided for in the Federal Rules of Civil Procedure, at which point the district court will properly have before it the precise specific causation evidence on which plaintiffs rely, instead of criticizing plaintiffs on a Rule 41(b) motion for not coming forward with evidence or liability theories that the *Lone Pine* order and Rule 41(b) dismissal procedure did not require plaintiffs to produce.

The district court has emphasized, and no doubt Merck will reemphasize in its appellate presentation, that the opposing parties agree that Zostavax infrequently causes shingles, although they disagree as to how often it occurs. But even if Zostavax was responsible for causing 50.1 percent of shingles outbreaks post-vaccination, or even 99.9 percent, that would not relieve the plaintiff in any given case from having to prove specific causation. Being able to prove specific causation (or not) is entirely a separate inquiry from how often a given product or contaminant causes injury. Unless that causation percentage equals zero or 100 percent, or the

injury is a signature injury (such as asbestosis can only result from asbestos exposure), specific causation is always an issue in every product liability or contamination case.

In other words, the concern that the district court confronted in this case – that it can be difficult for any given plaintiff to prove specific causation – is an issue that regularly confronts MDL judges in cases of this nature. Yet no other MDL judge, at least as far as plaintiffs are aware, has deigned to employ a *Lone Pine* order coupled with a Rule 41(b) dismissal to dismiss cases on a wholesale basis simply because specific causation can be difficult to prove in individual cases. The uniqueness of the *Lone Pine* order at issue here, and its extreme harshness (given that it sought the impossible), demonstrate its impropriety.

Lastly, it deserves to be emphasized that preventing a district court from improperly circumventing the Rule 56 summary judgment procedures by utilizing a *Lone Pine* order and Rule 41(b) dismissal, as occurred here, would not hamper a district court's ability to dispose of unmeritorious claims on a collective basis where appropriate. For example, in *In re: Zolofit (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787, 792 n.22, 800 (3d Cir. 2017), this Court affirmed the district court's entry of summary

judgment in all pending cases due to plaintiffs' inability to establish general causation. Similarly, in *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Pract. & Prods. Liab. Litig.*, 892 F.3d 624, 629 (4th Cir. 2018), the Fourth Circuit affirmed the entry of summary judgment against all plaintiffs in the MDL based on the district court's exclusion of expert testimony regarding general and specific causation where all the plaintiffs were relying on precisely the same expert testimony. And, in December 2022, a federal district judge entered summary judgment in favor of the defendants, and dismissed all MDL cases, on the issue of general causation in *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-MD-2924, 2022 WL 17480906 (S.D. Fla. Dec. 6, 2022), *appeal pending*, Nos. 11047 & 11080 (11th Cir.).

The choice this Court faces is not between allowing a district court to improperly apply a *Lone Pine* order and Rule 41(b) dismissal or allowing potentially unmeritorious claims to remain pending. Rather, the choice this Court faces is whether the district court's improper circumvention of Rule 56's summary judgment procedures in this case, resulting in the wholesale dismissal of nearly 1,200 separate cases without any evaluation of whether those plaintiffs can prove specific causation in their cases by a preponderance of the evidence, can be allowed to stand.

For the reasons set forth above, this Court should hold that the district court erred as a matter of law and abused its discretion in dismissing plaintiffs-appellants' Group A claims for lack of sufficient evidence of specific causation via a *Lone Pine* order and Rule 41(b) dismissal, instead of following the appropriate procedures, particularly Rule 56 summary judgment, intended to address whether a party can present sufficient evidence to support a necessary element of his or her claim.

B. The District Court Abused Its Discretion And Committed An Error Of Law In Dismissing Plaintiffs' Suits Under Federal Rule Of Civil Procedure 41(b) Due To Their Inability To Supply Evidence That Does Not Exist And Never Had Existed

1. Standard of review

This Court reviews involuntary dismissals under Fed. R. Civ. P. 41(b) for abuse of discretion. *See Hamer*, 994 F.3d at 177. "Although we defer to the District Court's discretion, dismissals with prejudice are drastic sanctions, only appropriate in limited circumstances, and doubts should be resolved in favor of reaching a decision on the merits." *Id.* (internal quotations, footnotes, and brackets omitted).

As the U.S. Supreme Court has explained, “[a] district court by definition abuses its discretion when it makes an error of law.” *Koon*, 518 U.S. at 100. As *Koon* recognized, “an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction.” *Id.* Rather, “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” *Id.*

2. A Rule 41(b) dismissal was not intended to penalize a party for failing to produce evidence that does not exist and never existed

Federal Rule of Civil Procedure 41(b), on which the district court relied in dismissing the nearly 1,200 Group A cases that are the subject of this appeal, provides:

INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Fed. R. Civ. P. 41(b).

When Rule 41(b) states that a case can be involuntarily dismissed due to a plaintiff’s “fail[ure] . . . to comply with . . . a court order,” *id.*, the rule

obviously contemplates that the failure is voluntary and intentional. Here, by contrast, no plaintiff was able to comply with the district court's *Lone Pine* order because no PCR testing was conducted of shingles lesions at the relevant time since PCR testing was not the standard of care for treating shingles, and Merck had not told physicians to perform such genetic testing when someone vaccinated with Zostavax developed shingles. Appx882, 1563.

Plaintiffs did not refuse to produce PCR testing of their shingles lesions, nor did plaintiffs fail due to inattention to produce such PCR testing. Rather, as this brief has already repeatedly explained, plaintiffs were unable to provide PCR testing of their shingles lesions because no such PCR testing had occurred during their shingles outbreaks, and PCR testing cannot be performed once shingles lesions have healed.

That a party must be at fault for having failed to comply with a court order before that compliance can justify dismissing a suit under Rule 41(b) is well-recognized. Indeed, the very first factor in the Sixth Circuit's four-part test for evaluating whether a Rule 41(b) dismissal was justified examines "whether the party's failure is due to willfulness, bad faith, or fault." See *Rodriguez v. Hirshberg Acceptance Corp.*, 62 F.4th 270, 277 (6th Cir.

2023). Likewise, the Second Circuit has explained that “even when a court issues a notice of a possible dismissal and a plaintiff fails to comply with the court’s directive, the court must still make a finding of willfulness, bad faith, or reasonably serious fault” *Baptiste v. Sommers*, 768 F.3d 212, 217 (2d Cir. 2014). And the Seventh Circuit recognized in *In re Pansier*, 417 F. App’x 565, 569 (7th Cir. 2011) (per curiam), that there is a “stricter standard for dismissal under Rule 41(b), which requires a pattern of contumacious conduct and a showing of prejudice to the opposing party in order to justify dismissal for failure to prosecute or for noncompliance with court orders.”

The district court in this case conceded that plaintiffs were not at fault for their inability to produce PCR testing of their shingles lesions in response to the district court’s *Lone Pine* order. Appx118. This alone suffices to necessitate reversal.

For nearly 40 years, this Court has evaluated the propriety of a Rule 41(b) dismissal for failure to comply with a court’s order under the six-factor balancing test announced in *Poullis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 867-68 (3d Cir. 1984). These factors consist of: (1) the extent of the party’s personal responsibility; (2) the prejudice to the adversary caused by

the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *See Poulis*, 747 F.2d at 868. This Court has ruled that the *Poulis* factors apply in evaluating a district court's dismissal under Rule 41(b) in the *Lone Pine* order context. *See In re Asbestos*, 718 F.3d at 246.

Evaluating the district court's Rule 41(b) dismissal of these nearly 1,200 Group A cases due to plaintiffs' inability to comply with the district court's *Lone Pine* order under the *Poulis* factors further confirms that the dismissal constituted an abuse of discretion and represented reversible error. Factors one and four – “the extent of the party's personal responsibility” and “whether the conduct of the party or the attorney was willful or in bad faith” – can be considered together, and both of those factors strongly counsel against dismissal and in favor of reversal. It is undisputed that no plaintiff had a PCR test to disclose for reasons having nothing to do with the merits of their claims – since PCR testing of shingles lesions was never the medical standard of care – so plaintiffs bore no personal responsibility

for their inability to produce such testing results, nor was their inability to produce such testing results willful or in bad faith.

The second factor — prejudice to the adversary — cannot be established here, because a well-established procedure exists for Merck to have the district court evaluate, on a proper record, whether Group A plaintiffs can present admissible evidence capable of proving specific causation by a preponderance of the evidence, and that procedure is summary judgment under Rule 56. To the extent the *Lone Pine* procedure prejudiced Merck, it was Merck's fault for prevailing on the district court to venture down that road over plaintiffs' opposition.

Plaintiffs have no history of dilatoriness. The district court relied on the fact that plaintiffs' cases were still pending to satisfy this prong, but that proves too much. Dilatoriness means failing to do things on time, and no evidence of plaintiffs' failures to meet deadlines that prejudiced defendants exists on any widespread basis in this case. Indeed, plaintiffs' cases were effectively stayed pending the bellwether trials until January 2022, and the *Lone Pine* order frolic-and-detour in which Merck decided to engage resulted in one-plus year of delay to this point that should have been avoided.

The fifth factor – “the effectiveness of sanctions other than dismissal” – isn’t truly implicated here, since plaintiffs shouldn’t face *any sanctions* as the result of their inability to comply with a *Lone Pine* order that required them to accomplish the impossible. But, as this brief has repeatedly explained, there exists alternate procedures that unquestionably will suffice to allow Merck to require plaintiffs to come forward at the appropriate time with sufficient admissible evidence to prove specific causation in order to enable their suits to proceed, and that procedure includes summary judgment under Rule 56. Plaintiffs should not be punished because Merck unilaterally opted to engage in the *Lone Pine* order charade, and was able to enlist the support of the district court over plaintiffs’ vociferous objections.

Lastly, factor six – whether a plaintiff’s claim is meritorious – focuses on whether plaintiffs have asserted claims that are capable of surviving a motion for judgment on the pleadings. *See Poulis*, 747 F.2d at 869-70. Here, plaintiffs’ claims satisfy that threshold.

Rule 41(b) itself, and the *Poulis* factors that this Court considers in deciding whether a district court’s Rule 41(b) dismissal is appropriate, both confirm that a party must be at fault before a Rule 41(b) dismissal for

disobeying a court order is proper. In this case, the district court itself freely conceded that plaintiffs bore no modicum of fault for being unable to produce PCR testing of their shingles lesions. Appx118. This alone suffices to compel the reversal of the district court's dismissal of these nearly 1,200 Group A cases under Rule 41(b).

* * * * *

Plaintiffs-appellants acknowledge that they bear the burden of proving the element of specific causation in order to prevail on their claims against Merck that Zostavax caused them to experience shingles and sustain the shingles-related injuries that resulted. Nevertheless, for the reasons explained above, the procedure that Merck devised and that the district court approved, involving the issuance of a *Lone Pine* order requiring plaintiffs to accomplish the impossible on pain of dismissal, represented reversible error.

This Court should therefore reverse the district court's improper Rule 41(b) dismissal of these Group A cases and remand them for further proceedings that will allow for appropriate case-specific discovery and proper motion practice as to each plaintiff's respective claims and which will allow the district court to adjudicate on a proper record the adequacy

of that specific causation evidence on an individual or collective basis, as appropriate.

VIII. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Rule 41(b) dismissal of these Group A cases and remand for appropriate further proceedings.

Respectfully submitted,

Dated: May 10, 2023

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME
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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,156 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: May 10, 2023

/s/ Howard J. Bashman

Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: May 10, 2023

/s/ Howard J. Bashman

Howard J. Bashman

**CERTIFICATION OF ELECTRONIC FILING
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Counsel hereby certifies that the electronic copy of this Brief for Appellants is identical to the paper copies filed with the Court.

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: May 10, 2023

/s/ Howard J. Bashman

Howard J. Bashman

**In the United States Court of Appeals
for the Third Circuit**

No. 23-1032

In re: ZOSTAVAX (Zoster Vaccine Live) Products Liability Litigation

MARIANA ABARTA and all other plaintiffs
listed in Exhibit A to notice of appeal,
Appellants.

On Appeal from the Order of the U.S. District Court for the Eastern
District of Pennsylvania, No. 2:18-md-02848-HB, Dismissing
Specified Group A Cases Pursuant to Fed. R. Civ. P. 41(b)
(Hon. Harvey Bartle III, U.S.D.J.)

JOINT APPENDIX
Volume One of Six
(Pages Appx1-Appx119)

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TABLE OF CONTENTS

Page

**Volume One of Six
(Pages Appx1-Appx119)**

Notice of appeal filed January 5, 2023Appx1

District court’s order granting Merck’s motion to
dismiss specified Group A cases filed
December 6, 2022Appx54

District court’s memorandum opinion filed
December 6, 2022Appx106

**Volume Two of Six
(Pages Appx120-Appx742)**

District court’s docket entries.....Appx120

Merck’s Motion to Exclude the Specific Causation
Opinions of Mark Poznansky, M.D. filed
September 28, 2021Appx263

Plaintiffs’ Memorandum in Opposition to Merck’s
Motion to Exclude the Specific Causation
Opinions of Mark Poznansky, M.D. filed
October 21, 2021Appx435

Merck’s Reply in Support of its Motion to Exclude
the Specific Causation Opinions of
Mark Poznansky, M.D. filed November 8, 2021Appx589

Transcript of November 17, 2021 oral argument on
Merck’s Motion to Exclude the Specific Causation
Opinions of Mark Poznansky, M.D.Appx678

**Volume Three of Six
(Pages Appx743-Appx1329)**

District court’s memorandum opinion in support of its
order granting Merck’s Motion to Exclude the
Specific Causation Opinion Testimony of
Mark Poznansky, M.D. in the Five Bellwether Cases
filed December 1, 2021Appx743

District court’s order granting Merck’s Motion to Exclude
the Specific Causation Opinion Testimony of
Mark Poznansky, M.D. in the Five Bellwether Cases
filed December 1, 2021Appx766

Merck’s Motion for Entry of a *Lone Pine* Case Management
Order filed January 27, 2022.....Appx767

Plaintiffs’ Opposition to Merck’s Motion for Entry of a
Lone Pine Case Management Order filed
March 4, 2022.....Appx878

Merck’s Reply in Support of its Motion for Entry of a *Lone Pine*
Case Management Order filed March 21, 2022Appx897

District court’s memorandum opinion in support of its order
granting Merck’s motion for entry of a *Lone Pine*
case management order filed March 30, 2022Appx956

District court’s *Lone Pine* case management order filed
March 30, 2022.....Appx963

Merck’s Motion to Dismiss Group A Cases or, in the
Alternative, for Summary Judgment filed
August 24, 2022Appx967

District court’s pretrial order 450 filed
September 1, 2022Appx1247

District court’s pretrial order 452 filed
September 23, 2022Appx1249

Plaintiffs’ Answers in Opposition to Merck’s
Motion to Dismiss Group A Cases filed
October 3, 2022Appx1252

**Volume Four of Six
(Pages Appx1330-Appx1952)**

Plaintiffs’ Answers in Opposition to Merck’s
Motion to Dismiss Group A Cases filed
October 3, 2022 (continued).....Appx1330

**Volume Five of Six
(Pages Appx1953-Appx2604)**

Answer in Opposition to Merck’s Motion to Dismiss
Group A Cases filed October 4, 2022Appx1953

Merck’s Replies in Support of its Motion to Dismiss
Group A Cases filed October 17, 2022Appx1979

**Volume Six of Six
(Pages Appx2605-Appx3177)**

Merck’s Replies in Support of its Motion to Dismiss
Group A Cases filed October 17, 2022 (continued)Appx2605

Merck’s Replies in Support of its Motion to Dismiss
Group A Cases filed October 24, 2022Appx2874

Letter from Merck’s counsel to district court judge
filed October 27, 2022Appx3110

Transcript of November 9, 2022 oral argument on
Merck’s Motion to Dismiss Group A Cases.....Appx3113

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

IN RE: ZOSTAVAX (ZOSTER VACCINE)
LIVE) PRODUCTS LIABILITY) MDL No. 2848
LITIGATION)
)
)

THIS DOCUMENT RELATES TO:) **PLAINTIFFS’ NOTICE OF APPEAL**
)
1188 Actions Listed in Appendix A to Notice)
of Appeal)
)

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs identified in Appendix A attached hereto hereby appeal to the United States Court of Appeals for the Third Circuit from Pretrial Order 458 with accompanying memorandum dated December 6, 2022, document numbers 1141 and 1142 herein, granting Defendants’ Motion to Dismiss.

Respectfully submitted,

/s/ Mark T. Sadaka
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Dated: January 5, 2023

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

IN RE: ZOSTAVAX (ZOSTER VACCINE : MDL NO. 2848
LIVE) PRODUCTS LIABILITY :
LITIGATION :
:

APPENDIX A

Mariana Abarta v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05095	Kathryn Kershner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00585
Loretta Abbo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20200	Phyllis Kidney v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20227
Tina Ackerly v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20031	Linda Kincaid v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02218
Gloria Adams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03869	Virginia Kinchen v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20082
Jo Ann Adams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04401	Anita King v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04049
Leslie Adams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06576	William King v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03811
Sandra Gayle Adkins v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00015	Nancy Kirkpatrick v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04418
Diane Aitken v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03932	Bertha Kirsch v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20283
Joan Akins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20254	Sharon Klutchko v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20304

Toni Albano v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20039	Jason Knierim, Individually and as the Personal Representative of the Estate of Patricia Knierim v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20301
Margaret Albisano v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20046	Keith Koestner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00220
Janice Alexander v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02990	Clara Kohlman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05686
Charles Allen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05986	Elizabeth Koski v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02626
Ruth Allen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01718	Sharon Kostenbader v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20116
Robert Allender v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04690	Matthew Kresge v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01559
Doretta Allison v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00002	John Kruczek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20157
Guadalupe Alvarez v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20055	Virginia Kruczek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05613
Beverly Alvey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02549	Coleen Kuehner v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05635
Patricia Ames v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00955	Tony Kupser v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20168
Dale Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20049	Geraldine Kyle v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05167
Ethelyn Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20171	

Knoble Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01519	Linda Lafave v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04503
Linda Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03535	Fabiola Lagrimas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03940
Linda Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03552	Sylvia Laguerra v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20003
John Andrea v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20185	Linda Lail v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06172
Nadine Andres v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20297	Dorothy Lain v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00691
Dana Andrews v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04859	Patricia Lakin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04853
Jacqueline Andrews v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05614	Donald Lambert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05860
Joseph Anemone v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20186	Gwynne Lambert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20243
Irene Anrode v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20115	Peggy Lambert v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00058
Judith Antanavica v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-01678	Cheryl Lamparella v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20230
Linda Arch v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20126	Delores Landers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05663
Delia Archuleta v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00611	Frances Lane v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20239

Doreen Arena v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04770	James Laprairie v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03288
Theresa Armstead v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20118	Judy Laratta v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20076
Selma Arnold v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03333	James Larkner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20054
Jimmy Arrington v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00259	Judy Larose v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04656
James Atherton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06555	Susan Larson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04601
Doris Atkins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03361	Helen Lauters v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20083
Lorna Atkinson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04276	Irene Lawrence v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01560
Deborah Augenti v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20160	Susan Layton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03673
Jo Autin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20019	Rosa Le Roy v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03428
Annette Avila v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01520	Roslynn League v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-5530
Ellen Ayers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04698	Colleen Leahy v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01561
Patricia Ayers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05627	Joann Leavitt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20285

Robert Bach v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04592	Dennis Lee v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04815
Glenda Edwards, as the Personal Representative and Executor of the Estate of Esther Bader v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20187	Etta Lee v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20048
David Bailey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01884	Melanie Lee v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00411
Joan Bailey v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04180	Paula Lee v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05826
Bilinda Ray Baker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02976	Paulette Lee v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05611
Lillie Baker v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20075	Reginald Lee v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20334
Nina Baker v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20124	Mary Lemarr v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00462
Nannette Bakko v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04762	Danny Lemoine v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20199
Stanley Baldwin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03384	Brenda Lemons v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06243
David Bales v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03330	Marjorie Lemster v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03704
Antoinette Bambas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04246	Frank Leshar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05697
	Ann Levinson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20249

Barbara Barber v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06089	Bernard Levitt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03565
Teresa Barber v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20276	Harold Lewis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20220
Jerrie Bardwell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20012	Robin Lewis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05610
Barbara Barker v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20194	Terrence Ley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04861
Carolyn Barnes v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20120	Coralee Linder v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01389
John Barrett v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20146	Mary Linn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20141
Delilah Basquez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04696	Jane Linsley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05163
Mitchel Bass v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20060	Deborah Lipscomb v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04145
Rod Batchelor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03316	Linda Little (formerly Linda Friguglietti) v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04677
Wilma Batten v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-20000	Michael Little v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01670
Robert Bauer, Individually and as Legal Representative of the Estate of Katherine Bauer v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-04544	Claire Livingston v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03346

Susan Beach v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03036	Cynthia Llinas v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20155
Rebecca Bean v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01779	Delilah Lloyd v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20233
Helen Beaty v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04038	Nina Locicero-Scala v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03941
Patsy Beaver v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20125	Scarlett Lockhart v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03629
Janet Bektashi v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20099	Nancy Lockwood v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02862
Vincent Belardo v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04390	Valeria Logan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03942
Mary Ann Bell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04331	Bernice Lommasson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02843
Vickie Bell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20081	Sharon Long v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05026
Jerry Bennett v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01960	Carmen Longoria v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03358
Stephen Bera v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01732	Pamela Looney v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00450
Nancy Berger v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06118	Josephine Loud v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20110
Jerome Berkowitz v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20188	William Loughery v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20294

Joseph Bernet v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20189	Elaine Luciano v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04600
Alfred Berry v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01529	Sally Lueck v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05166
Lacy Berry v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01043	Dewana Luengas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05753
Judy Bevilacqua v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04699	Paul Lupo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20112
Frederick Bickleman v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20092	Deborah Lusk v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20206
Sarah Bierbrodt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04340	Larry Luttrell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05646
Charles Bird v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02751	Susan Luxenburg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01731
Carolyn Birmantas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20050	Roger Lyddon v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20094
Robert Bishop v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02521	Joseph Lyons v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03945
Catherine Bitterman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01489	Ronald Lyons v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00005
Mary Black v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01731	Maryann Macaluso v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05301
Susan Black v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02520	Robert Mack v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03234

Earl Blackstock v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20056	Suzanne Mackler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02464
Dianne Blaine v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00206	Sylvia Madden v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03733
Kathy Blankenship v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20027	Jim Maddox v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01561
Wanda Blevins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04816	Moses Maestas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05621
James Blocher v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20057	Sherry Magee v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00670
Karen Bloodsworth v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00234	Stephen Maher v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00571
Randall Bloodworth v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02307	Antonino Maida v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06194
Ronald Bonini v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-05491	William Maine v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04680
Adrienne Booker v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20085	Pamela Malachin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02977
Roscoe Boose v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20103	Ernest Malizia v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20235
Janet Bothwell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01521	Edith Malloy v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03810
Jay Bowersox v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04784	Dale Malone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05147

Alvin Bowler v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03336	Terry Malovich v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20013
Eileen Bowman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20015	Linda Malzahn v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02989
Cindy Box v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20162	Loran Manes v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01192
Charles Boyer v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20163	Alberta Mann v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03958
Robert Bozzomo v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06578	Ramona Mansker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20014
Elaine Braginton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20053	Vickie Marcum v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04139
Edna Brasier v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20028	Steven Marks v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20113
Margaret Bratina v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20158	Ramonda Marling and Mischelle Williams, as Co-Executrixs for the Estate of John Marling (deceased) v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01483
David Bray v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04926	Ann Marmoraine v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03355
Jeanette Breland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20198	Tedi Charla Marsh v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01490
Kay Bridgham v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03783	Evelyn Marshall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03141
Deborah Brinkmann v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04927	

Desirea Brisbon v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00624	Richard James Marshall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03706
Duane Britton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04851	Thomas Martel v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00875
Linda Brodeske v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20045	Gerald Martin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02234
Michael Bronner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00603	Patrick Martin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03684
Paula Brooks v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20029	Reta Martin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03800
Ann Broughton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20020	Tony Martinez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00231
Robbie Broussard v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20277	Wanda Martinez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20156
Frances Brown v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05645	Vicky Mashburn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04596
Mark Brown v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04635	Margaret Mason v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02258
Nancy Brown v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20078	Joanne Masterson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02552
Peggy Brown v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20040	Robert Masucci v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20001
Paulette Browne v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00041	Joyce Mathis v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01094

Elfriede Bruce v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02271	Pamela Matthis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02248
Teresa Brumbaugh v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20147	Diane Maurer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03178
Georgiann Brumfield v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20044	Joyce Mayberry v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20232
Carolyn Bryant v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20078	Robert Mayberry v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02040
Pearl Bryant v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03948	Mylene Mayes v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03285
Vicki Bryant v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01688	William Mazzei v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05057
David Bryne v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03950	Cheryl McBroom v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03400
John Buist v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03775	Patricia McCargar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04406
Jolayne Burch v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20111	Johnny McClain v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00032
Karen Burke v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03872	Karla McClain v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05669
Cynthia Burks v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01663	James McClelland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20026
Katherine Burley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00644	Karen McCloskey v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20018

Edward Burnett v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00758	Betty McComic v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04575
Marquis Burnett v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20030	Patricia McConnell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01237
Kittie Burnworth v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02493	Pola McCorkle v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20093
Brenda Burton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20082	Louise McCowan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20021
Jerroldine Burton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02650	Peggy McCoy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05536
Nancy Burton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03264	Donald McCullough v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20145
Karn Busch v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05652	Ginger McDaniel v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01674
Andrew Bush v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03489	Gwendolyn McDaniel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20083
Jimmie Buster v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05205	Richard McDonald v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20240
Shirley Butler v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20131	William Battle McDonald, Sr. v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03028
Deborah Buys v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00915	Evelyn McFall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20330
Sherron Byars v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00760	

Ernest Byrd v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04224	Marjorie McGaha v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20089
Kelly Byrnes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20253	Cindy McGhehey v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-03916
Joyce Cager v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04603	Ulysses McGill v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03894
James Caggiano v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01825	Garry McGinnis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04841
Brenda Cagle v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20104	Roxanne McGowan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20084
Clarence Cain v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20060	Vicki McGowan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03344
Shirley Caldwell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20252	Kelly McGraw-Martino v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05651
Cynthia Calhoun v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01524	Cynthia McKenna v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03469
Gail Callahan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05040	Patricia McKown v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20271
Gayleen Callahan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02084	Catherine McLaughlin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05699
Barbara Callow v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03779	Debbera McLaughlin v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00172
James Michael Calt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20177	James McLaughlin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05547

Kathleen Calvert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20019	Carolyn McLendon v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04806
Venus Calvert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20245	Stephen W. McNair v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05982
Judy Cameruca v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00588	Rosemary McNally v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05513
Carolyn Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01475	Janet McNeil v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03370
Cecil Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20162	Marian McRae v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20001
Patti Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20069	Jacqueline McRight v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05426
Rosella Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03875	Michelle McRight v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20319
John Cannon v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01525	Donna McRobbie v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00022
Deborah Caracci v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05695	Darrell McSwain v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00218
Wynnette Card v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06093	Helaine Meadows v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05873
Joshua A. Carey, Individually and as Personal Representative for the Estate of Marietta Patricia Carey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01522	Pedro Rivera Melendez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20011
	Carolyn Mello v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20114

Patricia Carlson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20102	Robert Melton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02628
Joel Carpenter v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20167	Betty Melucci v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20019
Bobby Carr v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20221	Valerie Menzies v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04505
Reecie Carter v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20203	Susan Reed Merrill v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01187
Shirley Cartright v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20065	Robbie Merritt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04720
Baby Cartwright v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01528	Alice Michael v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05161
Dennis Carver v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00760	Yvonne Michelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05636
Rosemarie Case v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20191	Robert Mickells v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00047
Leslie Cash v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02811	Lindia Middleton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00319
Robyn Suhlman Individually and as Proposed Administrator for the Estate of Dorothy Cassidy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01521	Joyce Midkiff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00049
Larry Cassidy v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20041	Debra Mihalsky v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20099
	Bonnie Miller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05397

Juan Castro v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01516	James Miller v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00681
Brenda Cavanaugh v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20323	Janice Miller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20119
Edward Cederberg v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20073	Margaret Ann Miller v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04334
Debra Cellmer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01792	Marilyn Miller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20095
Brian Chambers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05679	Paul Miller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00596
Estella Chambers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20211	Rose Mills v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03349
Sherman Chambers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02155	Clara Mitchell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00040
Mark Charles v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03793	Laska Moak v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05651
Joyce Chicora v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20161	Grant Mobley v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20076
Christina Christopher v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05290	Suzanne Moderhak v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05621
Kathleen Cirillo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20061	Paulette Moe v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01614
Gary Clark v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05132	Rosalind Mohamed v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20116

Shirley Clark v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20047	Deborah Monnier v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03953
Patricia Cleveland v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04433	Barbara Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05555
Lawrence Cleveringa v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20156	Donna Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01231
Stanley Cline v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00265	Nancy Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02824
Willie Clinton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20044	Pamela Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03371
Larry Clonch v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02277	Wayne Moore v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20090
Carol Cocciolone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06052	Elina Morales v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20034
Laura Cochran v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20271	Rosaline Moran v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04041
Monique Cochran v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20163	Debra Moreno v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20212
Florence Cody v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01175	Kathleen Morgan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00284
Robert Coffey v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20131	Lorna Moro v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03900
Janice Cogar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01534	Diane Morris v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04692

Eleanor Cohen v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20246	John Morris v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20274
Patrice Colamesta v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20111	Judith Morris v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20275
Carolyn Cole v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20134	Nancy Morrow v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01562
Paul A. Cole Jr. v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04584	Jean Morse v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20130
Mary Coleman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06193	Ricky Moses v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20095
David Collier v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20086	Rhoda Moziy v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20278
Connie Collins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02071	Judith Mulhair v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20080
Wilma Collins v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20093	Fannie Mundy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20234
Jo Ann Colombe v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00333	Linda Munger v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20282
Kaye Colon v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01830	Bonnie Murray v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05625
Juan Colon-Valdez v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03211	James Myers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03020
Elaine A. Colvin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06054	Susan Mynatt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00698

Ellen Conner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03045	Jacquelyn Nash v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20288
Martha Conrad v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05201	Ernestine Natoli v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20040
Michael Contos v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04309	Rhoda Neft v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20320
Ann Conzelman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05274	Arlene Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05164
Carol Cook v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01535	Nora Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04419
Donna Cook v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00336	Phyllis Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20104
Elijah Cooper v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20306	Ulysses Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03034
Freda Cooper v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20072	Grace Nero v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01143
Patricia Cooper v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01536	Imogene Newbrey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20101
Andy Cooperman v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00759	Judy Newell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20175
Emily Cornelison v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03334	David Newton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05499
Robert Cornelius v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04583	Sharon Nicoll v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03791

Susan Cottrill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04506	Kathleen Niemic v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20191
Deborah Courtney v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05305	Kerstin Nierenz v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04206
Charles G. Covington v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03375	Bernice Niesporek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20128
Jerry Cowan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01379	Carl Ninaus v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20272
Steven Cox v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00437	Kathleen Noel v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04380
Carolyn Crawford v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04815	Jose Nunez v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00543
Leroy Crawley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00016	Helen Oatney v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03588
Tracy Cremer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01537	Linda Odess v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20211
Anthony Cretacci v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20302	Cindy Oetting v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06103
Gloria Crevier v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20248	Diane Ofner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20064
Scott Criddle v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01538	Peggy Oiler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01687
Judith Critz v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01546	Margaret Olson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02211

Salvatore Croce v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20252	David Oremus v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20021
Julie Cross v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04504	Nancy Orth v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20291
Minnie Cross v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20196	Richard Ortiz v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20008
Yvonne Cross v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03350	Lisa Osborn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04570
Wanda Crouse v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01539	Janet O'Shea v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20077
Teresa Cunnington v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05277	Sharon Ostrowski v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04639
Hiram Curtis v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20021	Cathy D. Ott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03817
Patricia Cutillo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20197	Mary Outlaw v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20172
Sandra Cutshaw v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05858	Bernard Packard v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01427
Katherine Daigle v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03351	Julian Padgette v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06101
Stephen Daigle v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02841	Rosa Pagan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20272
Patricia D'Amico v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01540	Patrick Papas v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20276

Eleanor Darney v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00473	Barbara Ann Parker v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01118
Sherry Darwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04854	Susan Parker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01941
Billie Davidson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20070	Sheila Parnther v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01491
Michael Davies v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03325	Shawn Parrish v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04578
Claudia Davis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06133	Jeanette B. Partain v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02831
Elnora David v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01644	Barbara Passarelli v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20094
Frances Davis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20222	Mavis Patterson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20284
Lee Davis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04638	Linda Patton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20288
Marcella Davis v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-01219	Wanda Pauling v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01482
Lawrence Dawes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04593	Claretha Paulk v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04579
Alberto De La Pena v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04266	Constance Payne v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04312
James R. Deam v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05612	Martha Peace v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20098

Elizabeth Deaton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01188	Shari Pearce v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00579
Diana Deats-O'Reilly v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05862	Marian Pechon v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20160
Irma DeClue v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20021	Lenda Pendleton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20070
Connie Delk v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20062	Deborah Perkins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00002
Margherita DeLustro v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20079	Ignace Perrin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20190
Esther Dengler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01098	Marvin Peterke v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20110
Rebecca Dennett v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04571	Judith Peters v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20284
James Dennis v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20106	Mertes Peterson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01164
Jean Detlaff v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04594	Claudia Petrello v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01876
Ronald Detonnancourt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04655	Janice Peyton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00944
Harriet Devan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20302	Ngocmy Pham v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01565
Victor Diaz v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03489	Mary Phipps v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00654

Sandra Dick v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20268	Patricia Pierce v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03284
Clarence Dicken v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20017	Kelly Pierga Individually and as Personal Representative of the Estate of Patricia Pierga v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20092
Wayne Dickerson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20294	Leslie A. Pingel v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03902
Anthony DiClemente v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05180	William Pinkstaff v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20036
Richard Dingleddy v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01676	Mary Pizzica v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02343
Peggy Diss v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20074	Andrea Plechavicius v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01190
Elaine Dittman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20312	Thomas Polidori v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03707
George Dodd v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06355	Maureen Pons v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20290
Donna Dodge v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20055	Earl Poplars v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20068
Melanie Dodge v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02060	Limon Poppell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20204
Michael Dolenic v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20092	Donna Porche v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00532
Thomas Dominski Sr. v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03947	

Mary Donaldson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03777	Jo Anna Porter v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05664
Patricia Donnelly v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20018	Lorraine Powell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03398
Kay S. Dorance v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00587	Sheila Powell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00593
Dennis Dorgan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05678	Julia Prahin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03850
Mary Douglas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20281	Lillie Pratt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20051
Valdemarest Drake-Taylor v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00590	Donna Preloger v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04615
Myron Dudenbostel v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20303	Carolyn E. Prentis v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20111
Sally Duff v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05637	Brenda Prichard v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20117
George Durbin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04586	Sheila Prigmore v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03380
Wynn Duvernay v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20036	Ann Proctor v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06100
Jesse Dyer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06478	Karen Prorok v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03353
Willard Dyess v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20238	Hassie Pryor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20100

Maudie Eads v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20079	Shelly Pryor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02132
Jane D. Earley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03352	Edward Quagliata v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20179
Peggy Easley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00605	Linda K. Quincy v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04339
Gloria Eaton v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20128	Helen Radel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01820
Margaret Edel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04310	Ralph Raiford v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20201
Shara Edwards v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20098	Dora Randall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03345
Diane Eisentrager v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00148	Roger Randall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00591
Gary Elder v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00148	Margaret Rankin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03387
Michael Ellis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02120	Sharon Rankins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03653
Janet Elton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00052	Steven Rapetti v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04856
Mary Louise Emery v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06106	Marsha Rapp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04381
Judith Endresen-Worthy v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20025	Kenneth Rasmussen v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20066

Joseph Engolia v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20167	Sharon Rasnake v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20031
Robert Enright v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05595	Marc Rawitt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20135
Hugo Enriquez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04678	Barbara Rawls v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04244
Rosemarie Ephlin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00150	James Redden v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20146
Nadine Erhart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04881	Adrian Reed v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03342
Sarah Erkins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20217	Clarice Reed v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02830
Cecilia Espinoza v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20287	Fransca Reesen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03035
Dorothy Esquilin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20063	Sandra Reeves v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04307
Kaye Estes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04416	Ronald Regan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03898
Shirley Eubanks v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04605	Philip Reina v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20048
Darlene Evans v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20113	Susan Reinhart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03530
Jennie Werner Evans v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01745	Leonard Reiss v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20010

Martha Everts v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20049	Sondra Reiss v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20293
Patricia H. Ezell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05630	Mark Rennix v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00007
Diane Fair v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04332	Darla Rhodes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05648
Bobbie Farley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03801	Mark Rhodes v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04824
James Farmer v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05616	Robert Richins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01086
Richard Farmiglietti v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03803	Suzan Riddell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03907
Larry Farrington v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20037	Christine Rider v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01174
Janet Feasel v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04042	Irene Rill v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01038
Lillian Feinberg v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02214	Carmen Rivera v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04576
Jackie Feist v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20018	Terry Robbins v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01568
John Fening v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04274	Charlotte Roberts v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03509
Debra Ferguson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06171	Diana Roberts v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20095

Lillie Ferguson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04572	Kenneth Gary Roberts v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02708
Marilyn Ferguson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20019	Laurann Robertson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03473
Thomas Ferrerio v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03394	Linda G. Robertson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04781
Norma Fields v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20200	Catherine Robinson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04864
Marilyn Fierro v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01673	Sandra Robinson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04313
Virginia Fifield v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01752	Ruth Ester Rocha v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04520
Adamilta Figueroa-Lerner v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20257	Victor Rodriguez v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01528
Gwyn Fish v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01544	Nancy Rogauskas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20025
Judy Fisher v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20168	Donna Rogers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05911
Terri Fithen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04048	Joyce Ronemous v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03033
Carol Fitzgerald v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02087	Dolores Rorech v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20295
Norma J. Fleming v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04809	Elizabeth Rork v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04061

Bonnie Florentine v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03532	Wanda Rosales v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20339
Susan Flynn v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20123	Jerry Neal Rose v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-05188
David Fontaine v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20216	Joan Ross v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03795
Susan Fontenot v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06549	Deborah Ross-Cole v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03360
Phyllis Ford v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20079	Janice Rounsville v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02914
Darleen Foreman v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20052	Marjorie Rowley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04880
Shirley Francis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04253	Ardene Royster v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03997
Linda Franklin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04517	Marilyn Rubin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05916
Carol Franson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20080	Clifton Rucker v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20321
Barbara Franzier v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04029	Juan Ruiz v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20060
Joyce Freeman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05452	Linda Russ v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20243
Patty Freeman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03510	Rachel Ryles v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20081

Catherine Friend v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20097	Cecilia Sackett v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01307
Nancy Fritts v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20099	Dorothy Safalow v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03157
Minerva Frye v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20026	Yvonne Saleme v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20297
Alma Fuller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02662	Linda Salisbury v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04701
Barbara Fuller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04182	Gale Saltzgiver v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01100
Sue Fuller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01545	Joy Sample v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04681
James Gallagher v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20228	Aida Samson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05787
Judith Gallagher v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00461	Lana Sandahl v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03402
Stephen Gallo v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03974	Amy Sandberg v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01236
Donald Galloway v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20258	Jacob Sande v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20068
Dianne Gamble v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01981	Carolyn Sanner v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20183
Consuelo Garcia v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05279	Gail Santoro v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20209

Lucinda Garcia v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03524	Gerald Sarnello v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00320
Jeane Garcia-Doreenne v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05628	Kathleen Sauer v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01616
Sheryl Gardner v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20210	Bruce Edward Schaefer v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05547
Joan Garrett v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20013	Carol Schasel v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20298
Barbara Garrison v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05116	Eleanor Schaul v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01571
Tim Gartland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20164	Carolyn Schickel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00511
Steven Garton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01166	Ruth Schmidli v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20169
Randy P. Gaspard as Executor of the Estate of Pierre L. Gaspard, deceased v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv- 20033	Paul Schmidt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06370
Raymond Gaud v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04125	Garry Schuemann v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20201
Janice Gautreaux v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05170	Joyce Schulte v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03472
Joanna Gee v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02187	Gloria Schultz v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20239
	Lorene Schumacher v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03335

Mark Geisheker v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20042	Frederick Schunck v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03369
Alice Generally v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20037	Elaine Schwartz v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20014
Shirley George v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00814	Adrian Scott v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04321
Jean Ann Gering v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01969	Hattie Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01092
Ingrid Gerlach v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20007	Lynne Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01641
Beverly Gers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03348	Susan Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03408
Myra Gibson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03554	William Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00607
Eileen Giddings v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01523	Sheri Scudder v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01572
Lawrence Giuliano v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01116	Robert Seabrooks v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20303
Judy Gladney v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01520	George Seale v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05689
Elizabeth Gladue v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04272	Inez Jean Seals v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01292
Howard Glassco v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20065	Mary Sebastiani v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00033

Thomas Gleason v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20139	Susan Sebilian v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02908
Robert Glover v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00761	Margaret Secor v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02129
Raymond Goad v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20189	Steven Seefeldt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02408
Jimmy Godwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04922	Helena Seigman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20035
Joann Martin Godwin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05169	Perry Sells v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20077
Nona Godwin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20264	Candace Sentell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01850
Deborah Gordon v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04671	Levina Serrano v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00575
Stephen Earl Gorman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02216	Emanuel Seyfert v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02284
Tammy Gose v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01205	Karney Seymour v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20195
Philip Grace v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20031	Diane Shapuras v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01574
Marion Graham v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20133	Sheila Shea v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20281
Sue Grams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00643	Erica Sheid v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20277

Ruth Granillo v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01547	Peggy Shell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20085
Tommy Grantham v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05551	Dolores Shemes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00753
Joyce Grasby v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20260	Lessie Shepard v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04581
Thomas Graybeal v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06425	Rachel Sheppo v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03913
Connie Grayson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03399	Char Sheridan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01575
Rosemarie Greb v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01688	Tony Shobert v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04780
Charles T. Green v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05652	Carol Short v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00003
Terrance Green v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04198	James Short v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04686
Jane Greenawalt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20054	Gloria Shy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20280
Harriet Greenburg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04814	Joyce Sievers v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00545
Janice Greene v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20071	Jack Signorelli v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01185
Mildred Greenwell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20057	Kathryn Sikkila v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00324

Ethel M. Greer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03039	Frank Simmons v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20112
Ouida Gregory v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20033	Theora Simmons v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04013
Judith Grenier v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20010	Peter Skumanich v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20286
Pamela Gresham v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05155	Paulann Slater v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01692
Linda Griffin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04187	Betina Sluss v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03363
Robert Griffin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20072	David Smiddy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03602
Debbie Griffith v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02494	Connie Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02126
Weldon Griffith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04031	Derek Smith v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20165
Burleigh Grimes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20091	Donevon Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01739
Beverly Grondin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01609	Jerry Smith v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20048
Elizabeth Guberud v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20041	Leroy Smith v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20116
Debbie Guerrero v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20261	

Leisa Guiliano v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04998	Peggy Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05574
Anita Guillotel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04819	Rhonda Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04519
Ronald Guse v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20096	Ronni Kessler Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04866
Georgia Gustafson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03388	Sheila Smith v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03809
Delsie Gutierrez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01486	Suzanne Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01333
Mary Lou Hagan as Executrix of the Estate of William Hagan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01549	Thomas Smithson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20059
Roxanne Haines v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03401	Janis Smoot, Individually and as the Personal Representative of the Estate of Ernest Smoot v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05856
Arlene L. Halfon v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20105	Judith Snyder v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20273
Deborah Hall v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04679	Malinda Snyder v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05027
Ellen Hall v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03253	William Spathelf v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20251
Patricia Hall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01550	Sandra Speer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04624

Regina Hall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04589	Janice Spillers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20204
Wenda L. Hall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04185	Estelle Spritzer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06062
Joann Hallahan. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02752	Christine Squires v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01500
Deborah Halle v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03282	Rick Stamps v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04826
Roland Halle v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20129	Carolyn Stanley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01578
Anna Hallmark v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20053	Ron Stansbarger v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04582
Wilma Joann Hamilton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05245	Cheryl Stark v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01146
Ruth Hammer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01656	Joyce Stedman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20013
Elton F. Hammond, III v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05875	Susan Steig v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03531
Audrey Hancock v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20205	Leah Steinberg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03785
Gary Hanna v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20174	Rhonda Steinlauf v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20327
Raymond Hannan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05160	Judith Stevenson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03149

Lora Hanson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01518	Barbara Stewart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04208
Sam M. Hanson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20042	Georgia Stewart v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20117
Lewis Harper v. Merck & Co., Inc., et al., Civil Action No 2:19-cv-20088	Rhonda Stigall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03548
Cindy Harris v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04813	James Stiles v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20059
Linda Watkins Harris v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05296	Karen Stiner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03403
Joyce Hart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01675	Susan Stockers v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01567
Rebecca Hart v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03386	Seth Stockholm v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20043
Shirley Hartert v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20073	Barbara Stone v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-04542
Caroline Hatfield v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02899	Darlene Stone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02333
Shirley Hatten v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01651	Jeff Stone v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00236
Karen Haugen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04544	Jessie Stone v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01087
Leon Hayes v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00595	Patrick Stone v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03893

Carole B. Hays v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03468	John Stopyra v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04034
Charlotte Hedlund v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01844	Carol Storey v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04814
Miles Heitzenrater v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02844	Joseph Strahan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20333
Joyce Helman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20263	Chrissy Street v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02665
Nancy Helmbrecht v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03283	Mary Strickland v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05535
Betty Helton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20292	Elizabeth Stripling v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-01223
Debi Henderson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05741	Sharon Strohecker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06511
Joseph Henderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04674	Nancy Strong v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00237
Rodger Henderson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20066	Robert Sullivan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20026
James F. Hendricks v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20185	Leo Summermatter v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20234
Robert Henneberry v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20208	Linda Sunderland v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01696
Paul Leon Henry v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02498	Amerigo Suriani v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00042

Robert R. Hergan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20109	Paul Suszko v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01446
Maria Hernandez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04580	Joanne Suzio v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00534
Brenda Herrin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03937	Mary Swalley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05860
Tony Herring v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03542	Joe Sykes v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20034
Stuart Hersh v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04199	Annette Talley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01615
Barbara Hession v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20219	Wilbert Talmadge v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00692
Gladys Heys v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04378	Donald Tangredi v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04147
Jonathan Lee Hickey v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03738	Anthony Tankxley v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20071
Edna Higgins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20335	Michele Tanner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03348
Howard R. Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20286	Dolores Taylor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20025
Marilyn Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04896	Myra Taylor v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02950
Patricia Hill v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05596	Linda Temple v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05531

Robert Hill v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01551	Ora Terrell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03377
Ronald Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04588	Jeanneen Terry v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20106
Wanda Sue Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03354	Kathleen Teti v. Merck & Co., Inc., et al., Civil Action No. 5:20-cv-03926
David Himmerich v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00701	Marilyn Tharp v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20115
Patricia Hinckley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04200	Shirley Tharp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04210
Dickey Hines v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04858	Bernie Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00297
Ann Hixson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20230	James E. Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00435
Juanita Hobbs v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00054	Marcia Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05539
Teresa Hobbs v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00582	Teola Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20066
Elsie Hodupp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03283	Gail Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01176
Nancy Hoenig v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02735	JoLynne Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05208
Nellie Hoff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06503	Linda Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20224

Helen Hoffman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20180	Mary Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03382
Sandra Hoffman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01881	Cynthia Tobias v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03383
Dolores Holland v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20123	Dale Todd v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06134
Joanne Holland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01527	Robert Tokar v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02478
Tracy Holloway v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06126	Thomas Tomlinson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01305
Herbert F. Holmes, Jr. v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02523	Beverly Hilt Tortora v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03385
Nathaniel Holmes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20197	Ella Townsell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20015
Madelyn Holt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05647	Laurier Trahan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20222
Stephen Hopkins v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20264	Sandra Trapnese v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20064
Robert Hopper v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20103	Palma Treschan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20143
Annette Horner v. Merck & Co., Inc., et al., Civil Action No. 5:21-cv-00473	Sarah Trevino v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20195
Gordon Horton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03328	Carole Triplett v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20144

Walter Houston v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20074	Nancy Trout v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02076
Brenda Howard v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20121	Kathleen Trudeau v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03349
Sherri Forrestall and Terri Blackman, as surviving children of Darlene Howard, deceased v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02902	Charles Turnbull v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20203
Juliette Howard v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05944	Lewis Turner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05470
Grace Howe v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04621	Ouida Turner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05536
Jacquelyn Huff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03797	Debra Vandiver v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02876
Sandra Hughes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03035	Patricia VanHoose v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20058
Mackie J. Humphries v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01631	Beulah Vanmeter v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20052
Mary A. Huneycutt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04818	Patricia Vasicek v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00466
Jessica J. Hurt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05158	Victoria Vaughn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00749
Howard Hutchison v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05168	Elsa Vega v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20220
	Betty Verhulst v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00581

Linda Huter v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20067	Joanne Vickers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20207
Glenda Inman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00747	Sylvia Videkovich v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01220
Maryann Intagliata v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20182	Barbara Viglienvone v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20225
Glenn Irwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04550	Thomas Vlcek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01426
John Irwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02229	Kristi Vollmer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00602
Nathan Ivory v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20033	Catherine Wade v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20219
Harvey Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05588	Joyce Wade v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05750
Janet Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20242	Evelyn Wagner v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20218
Nora Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03435	Linda S. Wagner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02058
Shirley Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20247	Stephen Scott Waite v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03732
Kenneth Jacobson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20258	Mary Waldroup v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20056
Linda Jacobson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05926	Candace Wallace v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04315

Judith James v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05687	Joe Wallace v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20058
Richard James v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04115	Michele Waller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03683
Sharon James v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00413	Dennis Walsh v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20097
Cynthia Jamison v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20027	Julius Waltzer v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20078
Joanne Januzzi v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02692	Marilyn Wanda v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00477
Benjamin Jarrard v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05643	Marjie Warner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04220
Linda Jefferson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20337	Arnette S. Washington v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20022
Gene Jeffery v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04587	Serena Washington v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03805
Betty Jenkins v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05383	Edward Waszak v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20265
Debra Jennings v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00592	Martha Watson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20136
Peggy Jensen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01181	Linda Weicht v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05690
Robert Jensen v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03381	Ann Weiler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02742

Damaris Jimenez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20268	Sandra Wein v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04270
Catherine Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20300	Nellie Wells v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00035
Joseph Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02937	Deborah Welton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00016
Sherry Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02220	Janet Welty v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20262
Tamera Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20282	Rosalie Wenckoski v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20096
Yolanda Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05696	Eron West v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20259
Bonnie Johnson-Fisk v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04569	Joyce White v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03393
Douglas Johnston v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20065	Steve White v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02949
Barbara Jones v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02784	Tavia Whitehead v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20096
Ed Jones v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04145	Dorothy Whitten v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20290
Ethel Jones v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03619	Jacqueline Wilkins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04825
Mike Jones v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20269	David Williams v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20084

Dona Jones-Lane v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20050	James I. Williams, Jr. v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20022
Janet Jordan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01711	Raymond Wilson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04828
Michael Jukofsky v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05293	Judy Wise v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01585
Margaret Kachinski v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01407	Linda L. Wolfstone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04271
Clarence Kaestner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01665	Charlotte Wood v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00796
Fred Kaiser v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20088	Hugh Wood v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00328
Nancy Kaiser v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00038	Gary Woodruff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01137
Theodore Kalata v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03251	Jean Wright v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20181
Barbara Kane v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-4916	Jonathan Wright v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05933
Fred Kaplan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02716	Marian Wright v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20119
Jeanette Karadimos v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20098	Olynda Wylie v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20138
Davida Karp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02124	Laura Yarnell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20110

Larry Kassen v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20214	Joseph Yopez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20145
Mary Kearney v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03516	Wanda Yoachim v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03162
Michael Keba v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01337	Judy D. Yorio v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06298
Theresa Keel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01633	Jeannette Young v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01202
Gerald Keesler v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03939	Victoria Young v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05846
Judy Kellar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02463	Kathleen Youngman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03372
Thomas Kellner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00011	Mary Zaccanelli v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20045
Dale Kellogg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00004	Ursula L. Zahnleiter v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03652
Joye Kelly v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20012	Mary Zeigenfuss v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05160
Jeanette Keltz v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04123	Josi Zendzian v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01515
Inez Kenison v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03404	Thomas Zentack v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20332
Thomas Kennedy v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01042	Patricia Zerfing v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01586

Koval Kenneth v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01195	Judi Ziebart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01201
Melissa Kent v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20011	Robert Ziebell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00598
Barbara Kerrigan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20225	Felip Zielinski v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20177
William Zurn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20181	Tim Zike v. Merck & Co., Inc., et al., Civil Action No. 2:21- cv-20091

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Notice of Appeal was filed with the Clerk of Court using the CM/ECF system this 5th day of January, 2023, thereby giving notice to all counsel of record.

Respectfully submitted,

/s/ Mark T. Sadaka
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOSTAVAX (ZOSTER VACCINE : MDL NO. 2848
LIVE) PRODUCTS LIABILITY :
LITIGATION :
_____ :
:

THIS DOCUMENT RELATES TO: :

1189 Actions Listed in :
Appendix A to Pretrial Order :
No. 458 :
:
:
:

PRETRIAL ORDER NO. 458

AND NOW, this 6th day of December, 2022, for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that the motion of defendants to dismiss the Group A cases (Doc. # 1082) identified in Appendix A to this Order is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III

J.

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

IN RE: ZOSTAVAX (ZOSTER VACCINE : MDL NO. 2848
LIVE) PRODUCTS LIABILITY :
LITIGATION :
:

APPENDIX A TO PRETRIAL ORDER NO. 458

Mariana Abarta v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05095	Kathryn Kershner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00585
Loretta Abbo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20200	Phyllis Kidney v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20227
Tina Ackerly v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20031	Linda Kincaid v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02218
Gloria Adams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03869	Virginia Kinchen v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20082
Jo Ann Adams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04401	Anita King v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04049
Leslie Adams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06576	William King v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03811
Sandra Gayle Adkins v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00015	Nancy Kirkpatrick v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04418
Diane Aitken v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03932	Bertha Kirsch v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20283
Joan Akins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20254	Sharon Klutchko v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20304

Toni Albano v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20039	Jason Knierim, Individually and as the Personal Representative of the Estate of Patricia Knierim v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20301
Margaret Albisano v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20046	Keith Koestner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00220
Janice Alexander v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02990	Clara Kohlman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05686
Charles Allen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05986	Elizabeth Koski v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02626
Ruth Allen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01718	Sharon Kostenbader v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20116
Robert Allender v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04690	Matthew Kresge v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01559
Doretta Allison v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00002	John Kruczek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20157
Guadalupe Alvarez v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20055	Virginia Kruczek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05613
Beverly Alvey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02549	Coleen Kuehner v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05635
Patricia Ames v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00955	Tony Kupser v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20168
Dale Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20049	Geraldine Kyle v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05167
Ethelyn Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20171	

Knoble Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01519	Linda Lafave v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04503
Linda Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03535	Fabiola Lagrimas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03940
Linda Anderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03552	Sylvia Laguerra v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20003
John Andrea v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20185	Linda Lail v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06172
Nadine Andres v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20297	Dorothy Lain v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00691
Dana Andrews v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04859	Patricia Lakin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04853
Jacqueline Andrews v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05614	Donald Lambert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05860
Joseph Anemone v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20186	Gwynne Lambert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20243
Irene Anrode v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20115	Peggy Lambert v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00058
Judith Antanavica v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-01678	Cheryl Lamparella v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20230
Linda Arch v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20126	Delores Landers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05663
Delia Archuleta v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00611	Frances Lane v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20239

Doreen Arena v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04770	James Laprairie v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03288
Theresa Armstead v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20118	Judy Laratta v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20076
Selma Arnold v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03333	James Larkner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20054
Jimmy Arrington v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00259	Judy Larose v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04656
James Atherton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06555	Susan Larson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04601
Doris Atkins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03361	Helen Lauters v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20083
Lorna Atkinson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04276	Irene Lawrence v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01560
Deborah Augenti v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20160	Susan Layton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03673
Jo Autin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20019	Rosa Le Roy v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03428
Annette Avila v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01520	Roslynn League v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-5530
Ellen Ayers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04698	Colleen Leahy v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01561
Patricia Ayers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05627	Joann Leavitt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20285

Robert Bach v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04592	Dennis Lee v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04815
Glenda Edwards, as the Personal Representative and Executor of the Estate of Esther Bader v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20187	Etta Lee v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20048
David Bailey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01884	Melanie Lee v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00411
Joan Bailey v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04180	Paula Lee v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05826
Bilinda Ray Baker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02976	Paulette Lee v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05611
Lillie Baker v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20075	Reginald Lee v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20334
Nina Baker v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20124	Mary Lemarr v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00462
Nannette Bakko v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04762	Danny Lemoine v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20199
Stanley Baldwin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03384	Brenda Lemons v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06243
David Bales v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03330	Marjorie Lemster v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03704
Antoinette Bambas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04246	Frank Leshar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05697
	Ann Levinson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20249

Barbara Barber v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06089	Bernard Levitt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03565
Teresa Barber v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20276	Harold Lewis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20220
Jerrie Bardwell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20012	Robin Lewis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05610
Barbara Barker v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20194	Terrence Ley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04861
Carolyn Barnes v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20120	Coralee Linder v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01389
John Barrett v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20146	Mary Linn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20141
Delilah Basquez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04696	Jane Linsley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05163
Mitchel Bass v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20060	Deborah Lipscomb v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04145
Rod Batchelor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03316	Linda Little (formerly Linda Friguglietti) v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04677
Wilma Batten v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-20000	Michael Little v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01670
Robert Bauer, Individually and as Legal Representative of the Estate of Katherine Bauer v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-04544	Claire Livingston v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03346

Susan Beach v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03036	Cynthia Llinas v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20155
Rebecca Bean v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01779	Delilah Lloyd v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20233
Helen Beaty v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04038	Nina Locicero-Scala v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03941
Patsy Beaver v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20125	Scarlett Lockhart v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03629
Janet Bektashi v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20099	Nancy Lockwood v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02862
Vincent Belardo v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04390	Valeria Logan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03942
Mary Ann Bell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04331	Bernice Lommasson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02843
Vickie Bell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20081	Sharon Long v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05026
Jerry Bennett v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01960	Carmen Longoria v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03358
Stephen Bera v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01732	Pamela Looney v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00450
Nancy Berger v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06118	Josephine Loud v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20110
Jerome Berkowitz v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20188	William Loughery v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20294

Joseph Bernet v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20189	Elaine Luciano v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04600
Alfred Berry v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01529	Sally Lueck v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05166
Lacy Berry v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01043	Dewana Luengas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05753
Judy Bevilacqua v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04699	Paul Lupo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20112
Frederick Bickleman v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20092	Deborah Lusk v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20206
Sarah Bierbrodt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04340	Larry Luttrell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05646
Charles Bird v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02751	Susan Luxenburg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01731
Carolyn Birmantas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20050	Roger Lyddon v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20094
Robert Bishop v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02521	Joseph Lyons v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03945
Catherine Bitterman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01489	Ronald Lyons v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00005
Mary Black v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01731	Maryann Macaluso v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05301
Susan Black v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02520	Robert Mack v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03234

Earl Blackstock v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20056	Suzanne Mackler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02464
Dianne Blaine v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00206	Sylvia Madden v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03733
Kathy Blankenship v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20027	Jim Maddox v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01561
Wanda Blevins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04816	Moses Maestas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05621
James Blocher v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20057	Sherry Magee v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00670
Karen Bloodsworth v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00234	Stephen Maher v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00571
Randall Bloodworth v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02307	Antonino Maida v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06194
Ronald Bonini v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-05491	William Maine v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04680
Adrienne Booker v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20085	Pamela Malachin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02977
Roscoe Boose v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20103	Ernest Malizia v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20235
Janet Bothwell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01521	Edith Malloy v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03810
Jay Bowersox v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04784	Dale Malone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05147

Alvin Bowler v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03336	Terry Malovich v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20013
Eileen Bowman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20015	Linda Malzahn v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02989
Cindy Box v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20162	Loran Manes v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01192
Charles Boyer v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20163	Alberta Mann v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03958
Robert Bozzomo v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06578	Ramona Mansker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20014
Elaine Braginton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20053	Vickie Marcum v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04139
Edna Brasier v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20028	Steven Marks v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20113
Margaret Bratina v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20158	Ramonda Marling and Mischelle Williams, as Co-Executrixs for the Estate of John Marling (deceased) v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01483
David Bray v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04926	Ann Marmoraine v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03355
Jeanette Breland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20198	Tedi Charla Marsh v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01490
Kay Bridgham v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03783	Evelyn Marshall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03141
Deborah Brinkmann v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04927	

Desirea Brisbon v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00624	Richard James Marshall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03706
Duane Britton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04851	Thomas Martel v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00875
Linda Brodeske v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20045	Gerald Martin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02234
Michael Bronner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00603	Patrick Martin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03684
Paula Brooks v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20029	Reta Martin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03800
Ann Broughton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20020	Tony Martinez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00231
Robbie Broussard v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20277	Wanda Martinez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20156
Frances Brown v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05645	Vicky Mashburn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04596
Mark Brown v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04635	Margaret Mason v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02258
Nancy Brown v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20078	Joanne Masterson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02552
Peggy Brown v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20040	Robert Masucci v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20001
Paulette Browne v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00041	Joyce Mathis v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01094

Elfriede Bruce v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02271	Pamela Matthis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02248
Teresa Brumbaugh v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20147	Diane Maurer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03178
Georgiann Brumfield v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20044	Joyce Mayberry v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20232
Carolyn Bryant v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20078	Robert Mayberry v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02040
Pearl Bryant v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03948	Mylene Mayes v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03285
Vicki Bryant v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01688	William Mazzei v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05057
David Bryne v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03950	Cheryl McBroom v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03400
John Buist v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03775	Patricia McCargar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04406
Jolayne Burch v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20111	Johnny McClain v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00032
Karen Burke v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03872	Karla McClain v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05669
Cynthia Burks v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01663	James McClelland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20026
Katherine Burley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00644	Karen McCloskey v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20018

Edward Burnett v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00758	Betty McComic v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04575
Marquis Burnett v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20030	Patricia McConnell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01237
Kittie Burnworth v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02493	Pola McCorkle v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20093
Brenda Burton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20082	Louise McCowan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20021
Jerroldine Burton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02650	Peggy McCoy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05536
Nancy Burton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03264	Donald McCullough v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20145
Karn Busch v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05652	Ginger McDaniel v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01674
Andrew Bush v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03489	Gwendolyn McDaniel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20083
Jimmie Buster v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05205	Richard McDonald v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20240
Shirley Butler v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20131	William Battle McDonald, Sr. v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03028
Deborah Buys v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00915	Evelyn McFall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20330
Sherron Byars v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00760	

Ernest Byrd v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04224	Marjorie McGaha v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20089
Kelly Byrnes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20253	Cindy McGhehey v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-03916
Joyce Cager v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04603	Ulysses McGill v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03894
James Caggiano v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01825	Garry McGinnis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04841
Brenda Cagle v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20104	Roxanne McGowan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20084
Clarence Cain v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20060	Vicki McGowan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03344
Shirley Caldwell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20252	Kelly McGraw-Martino v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05651
Cynthia Calhoun v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01524	Cynthia McKenna v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03469
Gail Callahan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05040	Patricia McKown v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20271
Gayleen Callahan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02084	Catherine McLaughlin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05699
Barbara Callow v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03779	Debbera McLaughlin v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00172
James Michael Calt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20177	James McLaughlin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05547

Kathleen Calvert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20019	Carolyn McLendon v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04806
Venus Calvert v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20245	Stephen W. McNair v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05982
Judy Cameruca v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00588	Rosemary McNally v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05513
Carolyn Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01475	Janet McNeil v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03370
Cecil Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20162	Marian McRae v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20001
Patti Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20069	Jacqueline McRight v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05426
Rosella Campbell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03875	Michelle McRight v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20319
John Cannon v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01525	Donna McRobbie v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00022
Deborah Caracci v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05695	Darrell McSwain v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00218
Wynnette Card v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06093	Helaine Meadows v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05873
Joshua A. Carey, Individually and as Personal Representative for the Estate of Marietta Patricia Carey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01522	Pedro Rivera Melendez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20011
	Carolyn Mello v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20114

Patricia Carlson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20102	Robert Melton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02628
Joel Carpenter v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20167	Betty Melucci v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20019
Bobby Carr v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20221	Valerie Menzies v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04505
Reecie Carter v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20203	Susan Reed Merrill v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01187
Shirley Cartright v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20065	Robbie Merritt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04720
Baby Cartwright v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01528	Alice Michael v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05161
Dennis Carver v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00760	Yvonne Michelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05636
Rosemarie Case v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20191	Robert Mickells v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00047
Leslie Cash v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02811	Lindia Middleton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00319
Robyn Suhlman Individually and as Proposed Administrator for the Estate of Dorothy Cassidy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01521	Joyce Midkiff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00049
Larry Cassidy v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20041	Debra Mihalsky v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20099
	Bonnie Miller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05397

Juan Castro v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01516	James Miller v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00681
Brenda Cavanaugh v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20323	Janice Miller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20119
Edward Cederberg v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20073	Margaret Ann Miller v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04334
Debra Cellmer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01792	Marilyn Miller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20095
Brian Chambers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05679	Paul Miller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00596
Estella Chambers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20211	Rose Mills v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03349
Sherman Chambers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02155	Clara Mitchell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00040
Mark Charles v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03793	Laska Moak v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05651
Joyce Chicora v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20161	Grant Mobley v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20076
Christina Christopher v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05290	Suzanne Moderhak v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05621
Kathleen Cirillo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20061	Paulette Moe v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01614
Gary Clark v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05132	Rosalind Mohamed v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20116

Shirley Clark v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20047	Deborah Monnier v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03953
Patricia Cleveland v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04433	Barbara Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05555
Lawrence Cleveringa v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20156	Donna Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01231
Stanley Cline v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00265	Nancy Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02824
Willie Clinton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20044	Pamela Moore v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03371
Larry Clonch v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02277	Wayne Moore v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20090
Carol Cocciolone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06052	Elina Morales v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20034
Laura Cochran v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20271	Rosaline Moran v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04041
Monique Cochran v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20163	Debra Moreno v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20212
Florence Cody v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01175	Kathleen Morgan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00284
Robert Coffey v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20131	Lorna Moro v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03900
Janice Cogar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01534	Diane Morris v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04692

Eleanor Cohen v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20246	John Morris v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20274
Patrice Colamesta v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20111	Judith Morris v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20275
Carolyn Cole v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20134	Nancy Morrow v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01562
Paul A. Cole Jr. v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04584	Jean Morse v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20130
Mary Coleman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06193	Ricky Moses v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20095
David Collier v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20086	Rhoda Moziy v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20278
Connie Collins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02071	Judith Mulhair v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20080
Wilma Collins v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20093	Fannie Mundy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20234
Jo Ann Colombe v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00333	Linda Munger v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20282
Kaye Colon v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01830	Bonnie Murray v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05625
Juan Colon-Valdez v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03211	James Myers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03020
Elaine A. Colvin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06054	Susan Mynatt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00698

Ellen Conner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03045	Jacquelyn Nash v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20288
Martha Conrad v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05201	Ernestine Natoli v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20040
Michael Contos v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04309	Rhoda Neft v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20320
Ann Conzelman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05274	Arlene Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05164
Carol Cook v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01535	Nora Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04419
Donna Cook v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00336	Phyllis Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20104
Elijah Cooper v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20306	Ulysses Nelson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03034
Freda Cooper v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20072	Grace Nero v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01143
Patricia Cooper v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01536	Imogene Newbrey v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20101
Andy Cooperman v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00759	Judy Newell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20175
Emily Cornelison v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03334	David Newton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05499
Robert Cornelius v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04583	Sharon Nicoll v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03791

Susan Cottrill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04506	Kathleen Niemic v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20191
Deborah Courtney v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05305	Kerstin Nierenz v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04206
Charles G. Covington v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03375	Bernice Niesporek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20128
Jerry Cowan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01379	Carl Ninaus v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20272
Steven Cox v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00437	Kathleen Noel v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04380
Carolyn Crawford v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04815	Jose Nunez v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00543
Leroy Crawley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00016	Helen Oatney v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03588
Tracy Cremer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01537	Linda Odess v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20211
Anthony Cretacci v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20302	Cindy Oetting v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06103
Gloria Crevier v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20248	Diane Ofner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20064
Scott Criddle v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01538	Peggy Oiler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01687
Judith Critz v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01546	Margaret Olson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02211

Salvatore Croce v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20252	David Oremus v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20021
Julie Cross v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04504	Nancy Orth v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20291
Minnie Cross v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20196	Richard Ortiz v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20008
Yvonne Cross v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03350	Lisa Osborn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04570
Wanda Crouse v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01539	Janet O'Shea v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20077
Teresa Cunningham v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05277	Sharon Ostrowski v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04639
Hiram Curtis v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20021	Cathy D. Ott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03817
Patricia Cutillo v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20197	Mary Outlaw v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20172
Sandra Cutshaw v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05858	Bernard Packard v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01427
Katherine Daigle v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03351	Julian Padgette v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06101
Stephen Daigle v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02841	Rosa Pagan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20272
Patricia D'Amico v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01540	Patrick Papas v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20276

Eleanor Darney v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00473	Barbara Ann Parker v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01118
Sherry Darwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04854	Susan Parker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01941
Billie Davidson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20070	Sheila Parnther v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01491
Michael Davies v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03325	Shawn Parrish v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04578
Claudia Davis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06133	Jeanette B. Partain v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02831
Elnora David v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01644	Barbara Passarelli v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20094
Frances Davis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20222	Mavis Patterson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20284
Lee Davis v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04638	Linda Patton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20288
Marcella Davis v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-01219	Wanda Pauling v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01482
Lawrence Dawes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04593	Claretha Paulk v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04579
Alberto De La Pena v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04266	Constance Payne v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04312
James R. Deam v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05612	Martha Peace v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20098

Elizabeth Deaton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01188	Shari Pearce v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00579
Diana Deats-O'Reilly v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05862	Marian Pechon v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20160
Irma DeClue v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20021	Lenda Pendleton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20070
Connie Delk v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20062	Deborah Perkins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00002
Margherita DeLustro v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20079	Ignace Perrin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20190
Esther Dengler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01098	Marvin Peterke v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20110
Rebecca Dennett v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04571	Judith Peters v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20284
James Dennis v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20106	Mertes Peterson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01164
Jean Detlaff v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04594	Claudia Petrello v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01876
Ronald Detonnancourt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04655	Janice Peyton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00944
Harriet Devan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20302	Ngocmy Pham v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01565
Victor Diaz v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03489	Mary Phipps v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00654

Sandra Dick v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20268	Patricia Pierce v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03284
Clarence Dicken v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20017	Kelly Pierga Individually and as Personal Representative of the Estate of Patricia Pierga v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20092
Wayne Dickerson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20294	Leslie A. Pingel v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03902
Anthony DiClemente v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05180	William Pinkstaff v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20036
Richard Dingleddy v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01676	Mary Pizzica v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02343
Peggy Diss v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20074	Andrea Plechavicius v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01190
Elaine Dittman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20312	Thomas Polidori v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03707
George Dodd v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06355	Maureen Pons v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20290
Donna Dodge v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20055	Earl Poplars v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20068
Melanie Dodge v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02060	Limon Poppell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20204
Michael Dolenic v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20092	Donna Porche v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00532
Thomas Dominski Sr. v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03947	

Mary Donaldson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03777	Jo Anna Porter v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05664
Patricia Donnelly v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20018	Lorraine Powell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03398
Kay S. Dorance v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00587	Sheila Powell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00593
Dennis Dorgan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05678	Julia Prahin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03850
Mary Douglas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20281	Lillie Pratt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20051
Valdemarest Drake-Taylor v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00590	Donna Preloger v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04615
Myron Dudenbostel v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20303	Carolyn E. Prentis v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20111
Sally Duff v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05637	Brenda Prichard v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20117
George Durbin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04586	Sheila Prigmore v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03380
Wynn Duvernay v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20036	Ann Proctor v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06100
Jesse Dyer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06478	Karen Prorok v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03353
Willard Dyess v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20238	Hassie Pryor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20100

Maudie Eads v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20079	Shelly Pryor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02132
Jane D. Earley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03352	Edward Quagliata v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20179
Peggy Easley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00605	Linda K. Quincy v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04339
Gloria Eaton v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20128	Helen Radel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01820
Margaret Edel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04310	Ralph Raiford v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20201
Shara Edwards v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20098	Dora Randall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03345
Diane Eisentrager v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00148	Roger Randall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00591
Gary Elder v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00148	Margaret Rankin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03387
Michael Ellis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02120	Sharon Rankins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03653
Janet Elton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00052	Steven Rapetti v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04856
Mary Louise Emery v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06106	Marsha Rapp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04381
Judith Endresen-Worthy v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20025	Kenneth Rasmussen v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20066

Joseph Engolia v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20167	Sharon Rasnake v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20031
Robert Enright v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05595	Marc Rawitt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20135
Hugo Enriquez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04678	Barbara Rawls v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04244
Rosemarie Ephlin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00150	James Redden v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20146
Nadine Erhart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04881	Adrian Reed v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03342
Sarah Erkins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20217	Clarice Reed v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02830
Cecilia Espinoza v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20287	Fransca Reesen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03035
Dorothy Esquilin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20063	Sandra Reeves v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04307
Kaye Estes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04416	Ronald Regan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03898
Shirley Eubanks v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04605	Philip Reina v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20048
Darlene Evans v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20113	Susan Reinhart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03530
Jennie Werner Evans v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01745	Leonard Reiss v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20010

Martha Everts v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20049	Sondra Reiss v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20293
Patricia H. Ezell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05630	Mark Rennix v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00007
Diane Fair v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04332	Darla Rhodes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05648
Bobbie Farley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03801	Mark Rhodes v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04824
James Farmer v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05616	Robert Richins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01086
Richard Farmiglietti v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03803	Suzan Riddell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03907
Larry Farrington v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20037	Christine Rider v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01174
Janet Feasel v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04042	Irene Rill v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01038
Lillian Feinberg v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02214	Carmen Rivera v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04576
Jackie Feist v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20018	Terry Robbins v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01568
John Fening v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04274	Charlotte Roberts v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03509
Debra Ferguson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06171	Diana Roberts v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20095

Lillie Ferguson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04572	Kenneth Gary Roberts v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02708
Marilyn Ferguson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20019	Laurann Robertson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03473
Thomas Ferrerio v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03394	Linda G. Robertson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04781
Norma Fields v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20200	Catherine Robinson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04864
Marilyn Fierro v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01673	Sandra Robinson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04313
Virginia Fifield v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01752	Ruth Ester Rocha v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04520
Adamilta Figueroa-Lerner v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20257	Victor Rodriguez v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01528
Gwyn Fish v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01544	Nancy Rogauskas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20025
Judy Fisher v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20168	Donna Rogers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05911
Terri Fithen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04048	Joyce Ronemous v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03033
Carol Fitzgerald v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02087	Dolores Rorech v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20295
Norma J. Fleming v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04809	Elizabeth Rork v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04061

Bonnie Florentine v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03532	Wanda Rosales v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20339
Susan Flynn v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20123	Jerry Neal Rose v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-05188
David Fontaine v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20216	Joan Ross v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03795
Susan Fontenot v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06549	Deborah Ross-Cole v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03360
Phyllis Ford v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20079	Janice Rounsville v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02914
Darleen Foreman v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20052	Marjorie Rowley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04880
Shirley Francis v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04253	Ardene Royster v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03997
Linda Franklin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04517	Marilyn Rubin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05916
Carol Franson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20080	Clifton Rucker v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20321
Barbara Franzier v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04029	Juan Ruiz v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20060
Joyce Freeman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05452	Linda Russ v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20243
Patty Freeman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03510	Rachel Ryles v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20081

Catherine Friend v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20097	Cecilia Sackett v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01307
Nancy Fritts v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20099	Dorothy Safalow v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03157
Minerva Frye v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20026	Yvonne Saleme v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20297
Alma Fuller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02662	Linda Salisbury v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04701
Barbara Fuller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04182	Gale Saltzgiver v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01100
Sue Fuller v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01545	Joy Sample v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04681
James Gallagher v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20228	Aida Samson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05787
Judith Gallagher v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00461	Lana Sandahl v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03402
Stephen Gallo v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03974	Amy Sandberg v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01236
Donald Galloway v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20258	Jacob Sande v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20068
Dianne Gamble v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01981	Carolyn Sanner v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20183
Consuelo Garcia v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05279	Gail Santoro v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20209

Lucinda Garcia v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03524	Gerald Sarnello v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00320
Jeane Garcia-Doreenne v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05628	Kathleen Sauer v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01616
Sheryl Gardner v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20210	Bruce Edward Schaefer v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05547
Joan Garrett v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20013	Carol Schasel v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20298
Barbara Garrison v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05116	Eleanor Schaul v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01571
Tim Gartland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20164	Carolyn Schnickel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00511
Steven Garton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01166	Ruth Schmidli v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20169
Randy P. Gaspard as Executor of the Estate of Pierre L. Gaspard, deceased v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv- 20033	Paul Schmidt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06370
Raymond Gaud v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04125	Garry Schuemann v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20201
Janice Gautreaux v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05170	Joyce Schulte v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03472
Joanna Gee v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02187	Gloria Schultz v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20239
	Lorene Schumacher v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03335

Mark Geisheker v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20042	Frederick Schunck v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03369
Alice Generally v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20037	Elaine Schwartz v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20014
Shirley George v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00814	Adrian Scott v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04321
Jean Ann Gering v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01969	Hattie Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01092
Ingrid Gerlach v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20007	Lynne Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01641
Beverly Gers v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03348	Susan Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03408
Myra Gibson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03554	William Scott v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00607
Eileen Giddings v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01523	Sheri Scudder v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01572
Lawrence Giuliano v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01116	Robert Seabrooks v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20303
Judy Gladney v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01520	George Seale v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05689
Elizabeth Gladue v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04272	Inez Jean Seals v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01292
Howard Glassco v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20065	Mary Sebastiani v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00033

Thomas Gleason v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20139	Susan Sebilian v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02908
Robert Glover v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00761	Margaret Secor v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02129
Raymond Goad v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20189	Steven Seefeldt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02408
Jimmy Godwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04922	Helena Seigman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20035
Joann Martin Godwin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05169	Perry Sells v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20077
Nona Godwin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20264	Candace Sentell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01850
Deborah Gordon v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04671	Levina Serrano v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00575
Stephen Earl Gorman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02216	Emanuel Seyfert v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02284
Tammy Gose v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01205	Karney Seymour v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20195
Philip Grace v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20031	Diane Shapuras v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01574
Marion Graham v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20133	Sheila Shea v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20281
Sue Grams v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00643	Erica Sheid v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20277

Ruth Granillo v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01547	Peggy Shell v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20085
Tommy Grantham v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05551	Dolores Shemes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00753
Joyce Grasby v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20260	Lessie Shepard v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04581
Thomas Graybeal v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06425	Rachel Sheppo v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03913
Connie Grayson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03399	Char Sheridan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01575
Rosemarie Greb v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01688	Tony Shobert v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04780
Charles T. Green v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05652	Carol Short v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00003
Terrance Green v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04198	James Short v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04686
Jane Greenawalt v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20054	Gloria Shy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20280
Harriet Greenburg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04814	Joyce Sievers v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00545
Janice Greene v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20071	Jack Signorelli v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01185
Mildred Greenwell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20057	Kathryn Sikkila v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00324

Ethel M. Greer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03039	Frank Simmons v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20112
Ouida Gregory v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20033	Theora Simmons v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04013
Judith Grenier v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20010	Peter Skumanich v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20286
Pamela Gresham v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05155	Paulann Slater v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01692
Linda Griffin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04187	Betina Sluss v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03363
Robert Griffin v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20072	David Smiddy v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03602
Debbie Griffith v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02494	Connie Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02126
Weldon Griffith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04031	Derek Smith v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20165
Burleigh Grimes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20091	Donevon Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01739
Beverly Grondin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01609	Jerry Smith v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20048
Elizabeth Guberud v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20041	Leroy Smith v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20116
Debbie Guerrero v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20261	Margaret Smith v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00872

Leisa Guiliano v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04998	Peggy Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05574
Anita Guillotel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04819	Rhonda Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04519
Ronald Guse v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20096	Ronni Kessler Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04866
Georgia Gustafson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03388	Sheila Smith v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03809
Delsie Gutierrez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01486	Suzanne Smith v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01333
Mary Lou Hagan as Executrix of the Estate of William Hagan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01549	Thomas Smithson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20059
Roxanne Haines v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03401	Janis Smoot, Individually and as the Personal Representative of the Estate of Ernest Smoot v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05856
Arlene L. Halfon v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20105	Judith Snyder v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20273
Deborah Hall v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04679	Malinda Snyder v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05027
Ellen Hall v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03253	William Spathelf v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20251
Patricia Hall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01550	Sandra Speer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04624

Regina Hall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04589	Janice Spillers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20204
Wenda L. Hall v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04185	Estelle Spritzer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06062
Joann Hallahan. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02752	Christine Squires v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01500
Deborah Halle v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03282	Rick Stamps v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04826
Roland Halle v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20129	Carolyn Stanley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01578
Anna Hallmark v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20053	Ron Stansbarger v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04582
Wilma Joann Hamilton v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05245	Cheryl Stark v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01146
Ruth Hammer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01656	Joyce Stedman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20013
Elton F. Hammond, III v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05875	Susan Steig v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03531
Audrey Hancock v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20205	Leah Steinberg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03785
Gary Hanna v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20174	Rhonda Steinlauf v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20327
Raymond Hannan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05160	Judith Stevenson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03149

Lora Hanson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01518	Barbara Stewart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04208
Sam M. Hanson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20042	Georgia Stewart v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20117
Lewis Harper v. Merck & Co., Inc., et al., Civil Action No 2:19-cv-20088	Rhonda Stigall v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03548
Cindy Harris v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04813	James Stiles v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20059
Linda Watkins Harris v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05296	Karen Stiner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03403
Joyce Hart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01675	Susan Stockers v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01567
Rebecca Hart v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03386	Seth Stockholm v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20043
Shirley Hartert v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20073	Barbara Stone v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-04542
Caroline Hatfield v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02899	Darlene Stone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02333
Shirley Hatten v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01651	Jeff Stone v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00236
Karen Haugen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04544	Jessie Stone v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01087
Leon Hayes v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00595	Patrick Stone v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03893

Carole B. Hays v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03468	John Stopyra v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04034
Charlotte Hedlund v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01844	Carol Storey v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04814
Miles Heitzenrater v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02844	Joseph Strahan v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20333
Joyce Helman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20263	Chrissy Street v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02665
Nancy Helmbrecht v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03283	Mary Strickland v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05535
Betty Helton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20292	Elizabeth Stripling v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-01223
Debi Henderson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05741	Sharon Strohecker v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06511
Joseph Henderson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04674	Nancy Strong v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-00237
Rodger Henderson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20066	Robert Sullivan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-20026
James F. Hendricks v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20185	Leo Summermatter v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20234
Robert Henneberry v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20208	Linda Sunderland v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01696
Paul Leon Henry v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02498	Amerigo Suriani v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00042

Robert R. Hergan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20109	Paul Suszko v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01446
Maria Hernandez v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04580	Joanne Suzio v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00534
Brenda Herrin v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03937	Mary Swalley v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05860
Tony Herring v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03542	Joe Sykes v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20034
Stuart Hersh v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04199	Annette Talley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01615
Barbara Hession v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20219	Wilbert Talmadge v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00692
Gladys Heys v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04378	Donald Tangredi v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04147
Jonathan Lee Hickey v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03738	Anthony Tankxley v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20071
Edna Higgins v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20335	Michele Tanner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03348
Howard R. Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20286	Dolores Taylor v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20025
Marilyn Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04896	Myra Taylor v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02950
Patricia Hill v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05596	Linda Temple v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05531

Robert Hill v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01551	Ora Terrell v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03377
Ronald Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04588	Jeanneen Terry v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20106
Wanda Sue Hill v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03354	Kathleen Teti v. Merck & Co., Inc., et al., Civil Action No. 5:20-cv-03926
David Himmerich v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00701	Marilyn Tharp v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20115
Patricia Hinckley v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04200	Shirley Tharp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04210
Dickey Hines v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04858	Bernie Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00297
Ann Hixson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20230	James E. Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00435
Juanita Hobbs v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00054	Marcia Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05539
Teresa Hobbs v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00582	Teola Thomas v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20066
Elsie Hodupp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03283	Gail Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01176
Nancy Hoenig v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02735	JoLynne Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05208
Nellie Hoff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06503	Linda Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20224

Helen Hoffman v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20180	Mary Thompson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03382
Sandra Hoffman v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01881	Cynthia Tobias v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03383
Dolores Holland v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20123	Dale Todd v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06134
Joanne Holland v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01527	Robert Tokar v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02478
Tracy Holloway v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-06126	Thomas Tomlinson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01305
Herbert F. Holmes, Jr. v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02523	Beverly Hilt Tortora v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03385
Nathaniel Holmes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20197	Ella Townsell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20015
Madelyn Holt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05647	Laurier Trahan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20222
Stephen Hopkins v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20264	Sandra Trapnese v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20064
Robert Hopper v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20103	Palma Treschan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20143
Annette Horner v. Merck & Co., Inc., et al., Civil Action No. 5:21-cv-00473	Sarah Trevino v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20195
Gordon Horton v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03328	Carole Triplett v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20144

Walter Houston v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20074	Nancy Trout v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02076
Brenda Howard v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20121	Kathleen Trudeau v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03349
Sherri Forrestall and Terri Blackman, as surviving children of Darlene Howard, deceased v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-02902	Charles Turnbull v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20203
Juliette Howard v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05944	Lewis Turner v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05470
Grace Howe v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04621	Ouida Turner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05536
Jacquelyn Huff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03797	Debra Vandiver v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02876
Sandra Hughes v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03035	Patricia VanHoose v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20058
Mackie J. Humphries v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01631	Beulah Vanmeter v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20052
Mary A. Huneycutt v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04818	Patricia Vasicek v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00466
Jessica J. Hurt v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05158	Victoria Vaughn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00749
Howard Hutchison v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05168	Elsa Vega v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20220
	Betty Verhulst v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00581

Linda Huter v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20067	Joanne Vickers v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20207
Glenda Inman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00747	Sylvia Videkovich v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01220
Maryann Intagliata v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20182	Barbara Viglienvone v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20225
Glenn Irwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04550	Thomas Vlcek v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01426
John Irwin v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02229	Kristi Vollmer v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00602
Nathan Ivory v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20033	Catherine Wade v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20219
Harvey Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-05588	Joyce Wade v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05750
Janet Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20242	Evelyn Wagner v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20218
Nora Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03435	Linda S. Wagner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02058
Shirley Jackson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20247	Stephen Scott Waite v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03732
Kenneth Jacobson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20258	Mary Waldroup v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20056
Linda Jacobson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05926	Candace Wallace v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04315

Judith James v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05687	Joe Wallace v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20058
Richard James v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04115	Michele Waller v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03683
Sharon James v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00413	Dennis Walsh v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20097
Cynthia Jamison v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20027	Julius Waltzer v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20078
Joanne Januzzi v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02692	Marilyn Wanda v. Merck & Co., Inc., et al., Civil Action No. 2:22-cv-00477
Benjamin Jarrard v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05643	Marjie Warner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04220
Linda Jefferson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20337	Arnette S. Washington v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20022
Gene Jeffery v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04587	Serena Washington v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03805
Betty Jenkins v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05383	Edward Waszak v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20265
Debra Jennings v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00592	Martha Watson v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20136
Peggy Jensen v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01181	Linda Weicht v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05690
Robert Jensen v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03381	Ann Weiler v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02742

Damaris Jimenez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20268	Sandra Wein v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04270
Catherine Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20300	Nellie Wells v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00035
Joseph Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-02937	Deborah Welton v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00016
Sherry Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02220	Janet Welty v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20262
Tamera Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20282	Rosalie Wenckoski v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20096
Yolanda Johnson v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05696	Eron West v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20259
Bonnie Johnson-Fisk v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04569	Joyce White v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03393
Douglas Johnston v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20065	Steve White v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02949
Barbara Jones v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02784	Tavia Whitehead v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20096
Ed Jones v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04145	Dorothy Whitten v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20290
Ethel Jones v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03619	Jacqueline Wilkins v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04825
Mike Jones v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20269	David Williams v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20084

Dona Jones-Lane v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20050	James I. Williams, Jr. v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20022
Janet Jordan v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01711	Raymond Wilson v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-04828
Michael Jukofsky v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-05293	Judy Wise v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01585
Margaret Kachinski v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01407	Linda L. Wolfstone v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-04271
Clarence Kaestner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01665	Charlotte Wood v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00796
Fred Kaiser v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20088	Hugh Wood v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00328
Nancy Kaiser v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00038	Gary Woodruff v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01137
Theodore Kalata v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03251	Jean Wright v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20181
Barbara Kane v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-4916	Jonathan Wright v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05933
Fred Kaplan v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02716	Marian Wright v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20119
Jeanette Karadimos v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20098	Olynda Wylie v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20138
Davida Karp v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02124	Laura Yarnell v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20110

Larry Kassen v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20214	Joseph Yopez v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20145
Mary Kearney v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03516	Wanda Yoachim v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03162
Michael Keba v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01337	Judy D. Yorio v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-06298
Theresa Keel v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01633	Jeannette Young v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01202
Gerald Keesler v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03939	Victoria Young v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05846
Judy Kellar v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-02463	Kathleen Youngman v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-03372
Thomas Kellner v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00011	Mary Zaccanelli v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20045
Dale Kellogg v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-00004	Ursula L. Zahnleiter v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-03652
Joye Kelly v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20012	Mary Zeigenfuss v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-05160
Jeanette Keltz v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-04123	Josi Zendzian v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-01515
Inez Kenison v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-03404	Thomas Zentack v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20332
Thomas Kennedy v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-01042	Patricia Zerfing v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01586

Koval Kenneth v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01195	Judi Ziebart v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-01201
Melissa Kent v. Merck & Co., Inc., et al., Civil Action No. 2:21-cv-20011	Robert Ziebell v. Merck & Co., Inc., et al., Civil Action No. 2:20-cv-00598
Barbara Kerrigan v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20225	Felip Zielinski v. Merck & Co., Inc., et al., Civil Action No. 2:18-cv-20177
William Zurn v. Merck & Co., Inc., et al., Civil Action No. 2:19-cv-20181	Tim Zike v. Merck & Co., Inc., et al., Civil Action No. 2:21- cv-20091

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

IN RE: ZOSTAVAX (ZOSTER VACCINE : MDL NO. 2848
LIVE) PRODUCTS LIABILITY :
LITIGATION :

THIS DOCUMENT RELATES TO: :
:
1189 Actions Listed in :
Appendix A to Pretrial Order :
No. 458 :

MEMORANDUM IN SUPPORT OF PRETRIAL ORDER NO. 458

Bartle, J.

December 6, 2022

This multidistrict litigation (“MDL”) concerns Zostavax, a vaccine developed and manufactured by defendants Merck & Co., Inc. and Merck Sharp & Dohme Corp. (“Merck”) to prevent the occurrence of shingles. Plaintiffs claim in 1,189 separate actions now before this court that Zostavax did not do what it was supposed to do and instead caused them to suffer from shingles or shingles-related injuries. Defendants now move to dismiss all these actions under Rule 41(b) of the Federal Rules of Civil Procedure for failure of plaintiffs to come forward with prima facie supporting evidence as called for by

Pretrial Order No. 426.¹ Fifteen plaintiffs' firms filed opposing briefs. Thirteen of these briefs were substantively identical. Each of the fifteen advanced generally the same arguments.

The court with the agreement of the parties has divided the more than 2,000 cases in this MDL into Groups A, B, and C for management purposes. Group A cases are those in which plaintiffs allege that they have suffered shingles or shingles-related injuries. Group B consists of those cases where the plaintiffs allege various other injuries as a result of Zostavax. Group C cases involve alleged hearing loss injuries. The 1,189 actions which are the subject of defendants' pending motion are part of Group A.²

This MDL is now over four years old. Extensive discovery has taken place. Merck has produced over 6,000,000 pages of documents related to Zostavax and made nearly

1. Rule 41(b) provides in relevant part: "If the plaintiff fails to prosecute or comply . . . with a court order, a defendant may move to dismiss the action or any claim against it."

In this motion, defendants also sought in the alternative summary judgment under Rule 56 of the Federal Rules of Civil Procedure. By agreement of the parties, the court stayed defendants' motion to the extent they moved for summary judgment in order to permit the court to address defendants' motion to dismiss under Rule 41(b). See Pretrial Order No. 452.

2. Group A also includes some 500 cases in which plaintiffs allege they suffered from both shingles-related and non-shingles-related injuries. Those actions are not presently before the court.

40 persons available for depositions. Specific fact discovery has been completed in the five Group A bellwether cases selected for trial. Numerous expert reports were exchanged and depositions of experts conducted.

After completion of this massive discovery, Merck filed a motion in each of the five Group A bellwether cases to exclude the testimony of plaintiffs' causation expert, Dr. Mark Poznansky, under Rule 702 of the Federal Rules of Civil Procedure and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The law requires a plaintiff's medical expert's opinion on causation to exclude any obvious alternative cause. Heller v. Shaw Indus., Inc., 167 F.3d 146, 156 (3d Cir. 1999). The court held that Dr. Poznansky had failed to make this differential diagnosis to exclude as a cause of plaintiffs' shingles a reactivated shingles (wild-type) virus already present in their bodies because of having contracted chickenpox earlier in their lives. In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig., 579 F. Supp. 3d 675, 681 (E.D. Pa. 2021). Without the required expert causation testimony to support plaintiffs' claims, the court entered summary judgment in favor of Merck in each of the five cases on December 1, 2021. Pretrial Orders Nos. 411, 413, 415, 417, 419. The plaintiffs appealed the decision in four of these cases but promptly

thought better of it and voluntarily dismissed those appeals on May 20, 2022.

It is well-known that the varicella-zoster virus ("VZV") causes both chickenpox, which typically occurs in childhood, and shingles, that is, herpes zoster, which occurs later in adulthood after a person has experienced chickenpox. The VZV remains in the body for life. It travels up nerve fibers from the skin and becomes dormant in nerve cells, called ganglia, near the spinal cord until it reactivates. When it reactivates, it travels down the nerve fibers and results in shingles. Virtually all persons over the age of 30 in the United States have had chickenpox and carry the so-called wild-type virus in their systems. Shingles manifests itself in a painful rash on various parts of the body. One out of three adults will experience shingles during his or her lifetime. Rafael Harpaz et al., Prevention of Herpes Zoster: Recommendations of the Advisory Committee on Immunization Practices (ACIP), 57 Morbidity & Mortality Wkly. Rep. 2, 9 (2008). The CDC estimates that one million new cases of shingles occur each year in the United States. Id.

Zostavax was developed to prevent shingles in adults 50 years and older and was licensed by the Food & Drug Administration in 2006. It consists of the Oka strain of the VZV, a live-attenuated virus that is a weakened form of the

natural or wild-type virus found in the body of someone who has had chickenpox. Zostavax is not designed to produce immunity by causing a mild case of shingles but rather to prevent shingles by effecting immunity before an outbreak of shingles takes place. From the beginning, Merck made it clear that Zostavax's effective rate was around 50% and waned over time. The effectiveness also declined with the age of the patient. While Merck concedes that an immunocompetent adult who receives Zostavax can develop shingles from the live-attenuated virus, Merck points to various studies that show that only one such case is known ever to have occurred. There is no evidence in the record of any other such case.

Plaintiffs, of course, have the burden of proof to establish that Zostavax caused their shingles in each individual case. In doing so, they must rule out the obvious alternative cause that the wild-type virus reactivated. On this issue Merck has presented the court with uncontradicted medical authority that a laboratory test of a person's shingles rash--specifically a polymerase chain reaction assay, otherwise known as a PCR test--is the only way to tell whether the shingles was caused by the virus strain contained in Zostavax or by the wild-virus strain from chickenpox closeted in a person's body. See, e.g., Harpaz et al., Prevention of Herpes Zoster, supra, at 1, 6. Plaintiffs concede that it cannot be determined which strain of

the virus causes shingles simply by how the rash appears.

November 17, 2021 Hr'g Tr., at 43:6-11 (Doc. # 992).

Significantly, Dr. Poznansky, plaintiffs' own causation expert, has recently testified "where we're looking at causation cases, to determine whether it was vOka or wild-type VZV, you would actually need to do definitively a PCR test to do it." Likewise the attorney for over 700 plaintiffs in this MDL and for plaintiffs in a similar California proceeding against Merck involving Zostavax has candidly written: "Shingles caused by the Oka/Merck strain VZV cannot be distinguished on clinical observations from shingles caused by wild-type VZV; a PCR assay test is needed to make this determination."

On March 30, 2022, several months after entering summary judgment in favor of Merck in the Group A bellwether cases, the court granted Merck's motion for a Lone Pine order, named for Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).³ In that order, Pretrial Order No. 426, the court required all plaintiffs in the Group A cases to "serve laboratory reports or other records documenting that strain-identification testing detected vaccine-strain varicella zoster virus ('VZV') in a rash

3. A Lone Pine order is a mechanism "by which trial courts require plaintiffs to produce threshold prima facie support for their claims, such as expert reports and medical records." Hamer v. LivaNova Deutschland GmbH, 994 F.3d 173, 178 (3d Cir. 2021).

sample from the plaintiff ('Laboratory Reports')." This could not come as a surprise. In this MDL, plaintiffs have been obligated to produce various medical documentation by pretrial order. See, e.g., Pretrial Order No. 46. The court concluded its Memorandum in support of Pretrial Order No. 426 with the following:

It is now time for plaintiffs to come forward with the Laboratory Reports or other documentation Merck requests to enable the court to weed out non-meritorious from meritorious claims and move along these . . . cases toward a final resolution. A Lone Pine management order is the only viable way that "will promote the just and efficient conduct of [these] actions. 28 U.S.C. § 1407(a)."

In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig., MDL No. 18-2848, 2022 WL 952179, at *3 (E.D. Pa. Mar. 30, 2022).

The plaintiffs were given 90 days to serve the laboratory reports or other relevant documentation.⁴ No extensions were requested, and this period has now expired.

It is undisputed that not one of the 1,189 Group A plaintiffs has provided the required laboratory report or laboratory equivalent documentation. In addition, plaintiffs, who always have the burden of proof, have produced no expert report and have produced no published literature that conclude that the strain of shingles caused by the vaccine can be

4. For any new Group A case, a plaintiff must comply with Pretrial Order No. 426 within 90 days after the action is filed.

diagnosed in absence of a laboratory PCR test. Indeed plaintiffs' expert, Dr. Poznansky, as noted above, did not provide a differential diagnosis in his expert reports in the five bellwether cases and has testified more recently that a PCR test is required to make the specific cause determination. In sum, the record is undisputed that such testing is the only way to prove whether Zostavax or the wild-type virus caused a person's shingles. Otherwise, causation in any case is mere speculation. Those PCR test reports can only be prepared from an examination of existing rashes. It is in the nature of shingles that the rashes manifesting shingles disappear after a time. Because the rashes of all the plaintiffs which were allegedly caused by Zostavax ceased to exist long ago, there is no chance of any laboratory reports of the causes of the rashes ever being generated, either now or at any point in the future. Without such reports, the cases of the Group A plaintiffs will fail for want of proof.

Faced with this obvious predicament, the Group A plaintiffs simply make numerous unsupported and irrelevant pronouncements concerning specific causation in their briefs in opposition to Merck's motion to dismiss. For example, in each opposing brief (E.g., Doc. # 1092), plaintiffs state in a footnote on page 1, "Plaintiffs have the right to and can prove specific causation in their individual cases without PCR

testing. To this end, Plaintiffs have addressed such in the Appendix that has been annexed hereto as Ex. 2.” Consequently, the court eagerly turned to the Appendix to see what plaintiffs’ previously undisclosed proof of specific causation might be. The Appendix, on which all plaintiffs rely, states on page 1 that “Plaintiffs address the merits of their respective cases here, and, particularly, how they generally intend to prove their claims at trial given that PCR testing is inherently unreliable in proving same.” Unfortunately the Appendix is not what it is billed to be. It baldly states on page 3 that “Plaintiffs argue, as supported by their experts, that, except in unique circumstances, every case of Shingles after vaccination is more likely than not caused by or contributed to by the Oka strain.” Yet plaintiffs never say who those experts are, never cite to any supporting expert report, and never attempt to explain away the contrary testimony of Dr. Poznansky.

The Appendix then references “the concept of immunosenescence, or the weakening of the immune system as we age” and the existence of COVID-19. It never goes on to tell the reader how these references are relevant to prove that Zostavax, rather than the wild-type virus, caused any specific plaintiff to contract shingles.

The Appendix on page 5 states that since the court dismissed the five Group A bellwether actions for failure of

Dr. Poznansky to opine on case specific causation, "additional support for causation from the CDC has been identified by Plaintiffs which they intend to introduce at the appropriate time." The reader is then directed to footnote 6 which states, "This additional support was submitted by the plaintiffs' experts in the New Jersey state court consolidated [Zostavax] litigation, and this matter is currently being briefed by Judge Kaplan." The court looked forward to plaintiffs' revealing what this additional support might be. Again, the plaintiffs never disclosed what was behind the curtain. In addition, plaintiffs ignore the contrary testimony of Dr. Poznansky which is also before the New Jersey court. It is puzzling that it is the "appropriate time" for plaintiffs to share their allegedly critical and supportive evidence with Judge Kaplan but not with this court, particularly if plaintiffs really think that this evidence might defeat Merck's pending motion to dismiss 1,189 cases in this MDL. The court can only conclude that there is no such evidence.

Plaintiffs then argue on page 6 of the Appendix that the court should "accept Plaintiffs' experts' opinions that every case of Shingles following vaccination was more likely than not caused by the vaccine In other words, Plaintiffs' experts opine that . . . [a] 65-year-old would have up to a 0% chance of naturally developing Shingles after

Zostavax." Again, plaintiffs never identify their experts or supply their opinions to support this hyperbole.

On page 8 of the Appendix plaintiffs state:

there is a 15% to 100% chance that the resulting Shingles rash contains both Oka and wild strains, which Plaintiffs experts will opine was caused by the vaccine strain, which is based on widely accepted principles of immunosenescence that the parties agree upon.

The 15% to 100% chance referenced above says nothing about the specific causation of shingles in any individual plaintiff. These cases will not be decided on general probabilities. The relevance of immunosenescence in establishing specific causation as opposed simply to general probabilities in an older population is not explained.

Plaintiffs spend significant time in their briefs expounding on the issue of general causation, that is, that Zostavax can cause shingles. This focus misses the mark. The issue here is not whether Zostavax can cause shingles as a matter of medical science. General causation by itself as noted above will never be enough for plaintiffs to prevail. Plaintiffs must go further. They must alternatively prove that Zostavax and not the wild-type virus caused each of them to contract shingles.

The court's Lone Pine order was designed merely to require each plaintiff to come forward with prima facie

evidence, either through laboratory reports or other records, that can support the claim that Zostavax caused his or her shingles rather than the wild-type virus. Despite unsupported assertions on the part of plaintiffs, they cannot debunk the premise of that order.

This court, as noted above, has now presided over the MDL for over four years. There has been extensive discovery and a more than sufficient opportunity for plaintiffs to produce any prima facie evidence of specific causation in the Group A cases. The plaintiffs failed with their expert Dr. Poznansky in the five Group A bellwether cases and have produced no relevant evidence even in the face of the subsequent Lone Pine order. If plaintiffs had prima facie proof of specific causation, common sense dictates that it would have surfaced by now.

Our Court of Appeals has emphasized that district courts presiding over an MDL must be "granted significant latitude to manage their dockets and to mitigate 'potential burdens on the defendants and court.'" Hamer v. LivaNova Deutschland GmbH, 994 F.3d 173, 178 (3d Cir. 2021) (citation omitted). The Court has explained that "management orders are essential tools in helping the court weed out non-meritorious . . . claims." Id. In In re Asbestos Prod. Liab. Litig. (No. VI), 718 F.3d 236, 248 (3d Cir. 2013), an MDL, the Court

affirmed dismissal of actions for failure to comply with a Lone Pine order which required production of medical evidence.

Finally, this court must consider relevant factors under Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863 (3d Cir. 1984), before any dismissal of these actions as Merck requests.⁵ As these actions are part of an MDL, the court considers Poulis in the context of Hamer and In re Asbestos. Not all factors in Poulis need be satisfied to sustain a dismissal. In re Asbestos, 718 F.3d at 246. The court agrees that the plaintiffs here have not acted willfully or in bad faith insofar as they are unable to produce nonexistent PCR tests. That, however, is not the full story. Plaintiffs still insist in opposition to defendants' motion to dismiss that they have expert evidence to support the required differential analysis that Zostavax and not the wild-type virus caused shingles in all the outstanding cases. Plaintiffs do so even though they have not divulged any of this evidence to the court and know that undisputed evidence exists to the contrary. This is not good faith.

5. The Poulis factors are "(1) the extent of the party's personal responsibility; (2) prejudice to the adversary; (3) a history of dilatoriness; (4) whether the conduct of the party was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of the claim or defense." In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 687 F. App'x 210, 213 (3d Cir. 2017) (citing Poulis, 747 F.2d at 868-70).

Furthermore, it cannot be denied that after more than four years there has been significant delay with the Group A cases. These cases have remained at a standstill since the dismissal of the five Group A bellwether cases on December 1, 2021. There is nothing before the court to indicate that the Group A plaintiffs can ever succeed on the merits. Continuing to carry these cases on the docket of MDL 2848 is severely prejudicial to Merck under the circumstances to say nothing of the added administrative burden to this court as it seeks to move this MDL forward. There is no effective sanction other than dismissal.

Accordingly, the court will grant the motion of Merck under Rule 41(b) to dismiss the 1,189 Group A cases identified in Appendix A in which plaintiffs claim that the Zostavax vaccine caused them to suffer from shingles.⁶

6. At oral argument on the pending motion to dismiss, plaintiffs for the first time argued that their cases should not be dismissed without an analysis of the applicable underlying substantive state law on causation for each case. This argument was not made in the briefing in opposition to Merck's motion for the Lone Pine order or in opposition to Merck's motion to dismiss. This argument is thus waived. E.g., N. Penn Towns, LP v. Concert Golf Partners, LLC, 554 F. Supp. 3d 665, 696 n.10 (E.D. Pa. 2021). Even if state law rather than federal evidence rules apply, plaintiffs have not shown that any state does not require proof of specific causation by a medical expert or that proof of specific causation through a medical expert in any state could be established here without a PCR test. In addition, plaintiffs' speculation about further advances in medicine in detecting causation so as to avoid dismissal is totally without merit.

CERTIFICATE OF SERVICE

I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this document is being served electronically on them by the Notice of Docket Activity:

Christopher J. Conoscenti
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Dated: May 10, 2023

/s/ Howard J. Bashman
Howard J. Bashman