

Court order. Fed. R. Civ. P. 41(b). The Court may also dismiss an action for failure to obey a discovery order under Fed. R. Civ. P. 37(b)(2). In determining whether dismissal is appropriate, the Court should consider “(i) the degree of personal responsibility of the plaintiff; (ii) the amount of prejudice caused the defendant; (iii) the existence of a history of deliberately proceeding in a dilatory fashion, and (iv) the existence of a sanction less drastic than dismissal.” *Ballard v. Carlson*, 882 F.2d 93, 95 (4th Cir. 1989). However, these four factors “are not a rigid four-prong test,” and “the propriety of a dismissal . . . depends on the particular circumstances of the case.” *Ballard*, 882 F.2d at 95.

Furthermore, “[r]igid application of these factors is unnecessary if the district court provided an ‘explicit and clear’ warning that the failure to comply with the order would result in dismissal of the case.” *Bailey v. Edwards*, 573 Fed. App’x 268, 269 (4th Cir. 2014); *see also Coles v. Northcutt*, 574 Fed. App’x 268, 269 (4th Cir. 2014) (“[G]enerally, a district court does not abuse its discretion in dismissing an action when a party fails to comply with a reasonable court order after being warned of the consequences of neglecting the court’s direction.”).

Courts are given broad discretion in managing an MDL docket with thousands of cases. *See, e.g., In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007). Because MDLs were created by Congress to encourage efficiency, “MDL courts must be able to establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial.” *Id.* (internal quotations omitted). Thus, MDL courts have “greater discretion to organize, coordinate and adjudicate its proceedings, including the dismissal of cases for failure to comply with its orders.” *Id.*

C. Discussion

1. Norma Schmid v. Pfizer, Case No. 2:14-cv-1525

The Court finds that dismissal with prejudice is warranted under the circumstances here.

By Court order, a completed Plaintiff Fact Sheet was due in this case on June 2, 2014. (*See* CMO 5, Dkt. No. 110). In CMO 6, the Court explicitly stated that

Any Plaintiff who fails to comply with any discovery obligations imposed by CMO 5 or by this Order within the time periods set forth herein — including provision of a PFS or required authorizations and other Mandatory Disclosures — may be subject to having her claims, as well as any derivative claim(s), dismissed if good cause is shown. Good cause shall exist where there is a material deficiency in responding to the required discovery, i.e., one that prejudices Pfizer through a failure to provide necessary information, thereby impeding Pfizer’s access to material and relevant evidence.

(Dkt. No. 148 at 6).¹

The Order goes on to state that when a Plaintiff fails to materially comply with her obligations under CMO 5, Pfizer’s counsel must send a notice of the material deficiency to Plaintiff’s counsel and allow Plaintiff fourteen days to cure the alleged material deficiency. (*Id.*) If the deficiency is not cured within that time or within an agreed extension, Pfizer may move for dismissal with prejudice, as it has done here. (*Id.*).

At the June 13, 2014 MDL Status Conference, the Court gave Plaintiffs a “drop dead date” of June 18, 2014, to comply with CMO 5. (Dkt. No. 237 at 10). The Court warned that if this deadline was not met, it would consider sanctions, including dismissal. (*Id.* at 12, 16). Four months later, Plaintiff Schmid has failed to cure material deficiencies of which she has been repeatedly notified. Specifically, she has failed to provide information regarding whether she experienced elevated glucose levels prior to Lipitor/statin usage and what, if any, alleged injuries were experienced while on Lipitor. (Dkt. No. 471-1).

¹ Plaintiffs agreed and consented to this Order.

In response to Pfizer's motion, Plaintiff Schmid did not provide any objection or any explanation for not providing the information requested in discovery. (*See* Dkt. No. 535). Instead, she filed a separate motion for voluntary dismissal without prejudice. (Dkt. No. 537). In this motion, she failed to acknowledge that Pfizer's motion to dismiss was pending or address any of the deficiencies in her discovery responses. (*See id.*).

The basic facts that Plaintiff Schmid has failed to provide to Pfizer are needed for Pfizer to assess the quality of her case, and failure to provide such information prejudices Pfizer in this litigation. *See In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1234 (9th Cir. 2009) (“[T]he purpose of the Plaintiff's Fact Sheet was to give each defendant the specific information necessary to defend the case against it, and that without this device, a defendant was unable to mount its defense because it had no information about the plaintiff or the plaintiff's injuries outside the allegations of the complaint.”); *In re Guidant Corp.*, 496 F.3d at 867 (“Given the time pressure on a defendant that must investigate the claims of nearly 1,400 plaintiffs, we consider the danger of prejudice substantial.”). Plaintiff's delay also impacts the other approximately 4,000 plaintiffs in this litigation “by unfairly diverting the time and attention of the court away from their timely claims to that of [this plaintiff].” *In re Guidant Corp.*, 496 F.3d at 867.

The information requested should be readily available to Plaintiff, and she has not provided any indication that it is not. Plaintiff bears responsibility for her failure to adequately supply such information. Plaintiff has failed to provide such information despite multiple warnings from the Court and follow-up by Pfizer, and *she has provided no reason whatsoever for her failure to comply with this Court's order*. This behavior is at least “a blatant disregard for the deadlines and procedure imposed by the court.” *In re Guidant Corp.*, 496 F.3d at 867.

Therefore, the Court finds that dismissal with prejudice is appropriate. *See In re Phenylpropanolamine*, 460 F.3d at 1233-34 (affirming district court's dismissal of actions with prejudice for failure to cure deficiencies in Plaintiff Fact Sheets by the deadlines in the Court's case management order); *In re Guidant Corp.*, 496 F.3d at 867-68 (affirming district court's refusal to set aside dismissal with prejudice for failure to serve Plaintiff Fact Sheets as required by court order). Pfizer's motion is granted as to Plaintiff Schmid, and Plaintiff's motion to dismiss without prejudice is denied.

2. *Celesten Clark v. Pfizer*, Case No. 2:14-cv-1429

Pfizer claims that Plaintiff's Fact Sheet is materially deficient because it cannot determine whether Plaintiff used Lipitor. (Dkt. No. 471-1). Plaintiff has submitted an affidavit that she was prescribed and ingested Lipitor sometime prior to 2005 and that she was diagnosed with diabetes in 2007. (Dkt. No. 535-1 at 5). Her Plaintiff Fact Sheet states that she used the drug "prior to 2004 . . . to the present." (Dkt. No. 564 at 4). Plaintiff's counsel represents that Plaintiff has requested "all of the medical and pharmacy records she believes exist in order to provide the use of Lipitor" but apparently no records confirm Plaintiff's claim that she used Lipitor. (Dkt. No. 535 at 8).

Pfizer complains that no medical records, including pharmacy records, submitted by Plaintiff demonstrate any use of Lipitor. (Dkt. No. 564 at 4-5). Pfizer states that the vague timeframe provided combined with pharmacy records that contradict Plaintiff's statement "provides insufficient information for Pfizer to assess and defend against this case." (*Id.*). However, Pfizer's argument is better suited for a motion for summary judgment under Rule 56 than a motion for dismissal for failure to comply with discovery obligations. It appears Plaintiff has taken all reasonable steps to provide the discovery requested by Pfizer, and supporting

medical records simply do not exist. To the extent Pfizer seeks further documentation, Plaintiff is only required to produce documents within her “possession, custody or control.” *See* Fed. R. Civ. P. 34. The Court will not sanction her for failing to produce documents that apparently do not exist. Plaintiff’s inability to produce any supporting documentation may well prove fatal to her claim, but it is not a willful disregard of this Court’s orders or her discovery obligations. Therefore, Pfizer’s motion is denied as to this Plaintiff.

3. *Wilma Horton v. Pfizer*, Case No. 2:14-cv-1471

Pfizer claims that Plaintiff’s Fact Sheet is materially deficient because it cannot determine whether Plaintiff used Lipitor or which medical conditions or alleged injuries were experienced while on Lipitor. (Dkt. No. 471-1). Plaintiff has submitted an affidavit that she was prescribed Lipitor and ingested the drug sometime before the year 2001 and that she was diagnosed with diabetes in 2001. Her Fact Sheet states that she was prescribed Lipitor in 2001 or before. (Dkt. No. 564 at 5). Plaintiff’s counsel requested records from the provider that Plaintiff claims prescribed Lipitor and diagnosed her with diabetes. (Dkt. No. 535 at 8). While some records were returned, the provider stated that all records prior to 2003 had been destroyed in accordance with the provider’s document retention policy. (*Id.*). Plaintiff has requested all medical and pharmacy records that she believes exist that might prove the use of Lipitor. (*Id.*).

Pfizer complains that Lipitor is not mentioned in the any medical records until 2012 and argues that the vague date range and unsubstantiated information does not provide Pfizer with sufficient information to assess and defend the merits of the case. (Dkt. No. 564 at 5). Again, Pfizer’s argument is better suited to a Rule 56 motion. While Plaintiff may have little evidence

to substantiate her claim, it appears Plaintiff has taken all reasonable steps to provide the discovery requested by Pfizer.² Therefore, Pfizer's motion is denied.

4. Martha Leon v. Pfizer, Case No. 2:14-cv-1520

Pfizer claims that Plaintiff's Fact Sheet is materially deficient because it cannot determine whether Plaintiff used Lipitor. (Dkt. No. 471-1). On her Fact Sheet, Plaintiff states that she does not recall the dates she used Lipitor, but that it was approximately 1996-2012.³ (Dkt. No. 564 at 5). Plaintiff's counsel has ordered pharmacy records from 1994 to 2014 and received partial records in return. These records indicate Lipitor prescriptions in 2007. (Dkt. No. 535 at 9). Medical records also apparently show that Plaintiff received Lipitor in 2007.⁴ (*Id.*). While Plaintiff ultimately may not be able to prove Lipitor usage prior to 2007, she has not willfully refused to obey the Court's orders. Because it appears Plaintiff and her counsel have made a reasonable inquiry as required by Rule 26(g) and provided all of the information in her knowledge and control, Pfizer's motion is denied.

5. Valerie Montez v. Pfizer, Case No. 2:14-cv-1507

Pfizer claims that Plaintiff's Fact Sheet is materially deficient because it cannot determine when Plaintiff was diagnosed with diabetes, when Plaintiff began taking Lipitor or whether Plaintiff experienced elevated glucose levels prior to taking Lipitor. (Dkt. No. 471-1 at 2). Plaintiff's Fact Sheet states that she took Lipitor from 2003-2010 and that she was diagnosed

² Pfizer has not suggested any further steps that Plaintiff could take to obtain the requested information.

³ Plaintiff initially stated her usage dates were approximately 2003-2012 but amended her Fact Sheet after she was informed that the FDA did not approve Lipitor for sale until December of 1996. (Dkt. No. 564 at 5-6).

⁴ It is not clear whether Plaintiff has requested earlier medical records. However, Pfizer has not complained that she has failed to request appropriate documents. To the extent that she has not requested earlier medical records, Plaintiff is under an obligation to do so in order to provide Pfizer with accurate information.

with diabetes in 2003; the month of diagnosis is not stated. (Dkt. No. 564 at 6). Available records do not show any Lipitor use prior to 2004. (*Id.*). Plaintiff's counsel requested medical records from two providers that Plaintiff indicated could have initially diagnosed her with diabetes but received certificates of no records for both. (Dkt. No. 535 at 9). Plaintiff has requested all medical and pharmacy records she believes exist to provide the information requested. (*Id.*). Because it appears Plaintiff and her counsel have made a reasonable inquiry as required by Rule 26(g) and provided all of the information in her knowledge and control, Pfizer's motion is denied.

6. *Nancy Olivas v. Pfizer*, Case No. 2:14-cv-1489

Pfizer claims that Plaintiff's Fact Sheet is materially deficient because it cannot determine when Plaintiff was diagnosed with diabetes, when Plaintiff began taking Lipitor or whether Plaintiff experienced elevated glucose levels prior to taking Lipitor. (Dkt. No. 471-1 at 2). Plaintiff states in her Fact Sheet that she was diagnosed with diabetes in 1997, that she believes she started Lipitor in 1997, and that she had elevated blood glucose in 1997. (Dkt. No. 564 at 6). Plaintiff has obtained medical record showing Lipitor use in 2001 and diabetes medications in 2003. (Dkt. No. 535 at 10). Plaintiff was initially diagnosed with diabetes by a provider who is no longer in practice, and Plaintiff cannot obtain medical records from the provider. (*Id.*). Plaintiff has requested all medical and pharmacy records she believes exist to provide the information requested. (*Id.*). Because it appears Plaintiff and her counsel have made a reasonable inquiry as required by Rule 26(g) and provided all of the information in her knowledge and control, Pfizer's motion is denied.

7. Deborah Packwood v. Pfizer, Case No. 2:14-cv-1497

Pfizer claims that Plaintiff's Fact Sheet is materially deficient because it cannot determine which medical conditions or alleged injuries were experienced while Plaintiff was on Lipitor. (Dkt. No. 471-1 at 2). Specifically, Pfizer complains that the Plaintiff Fact Sheet only provides approximate dates for Lipitor use and Diabetes diagnosis, making it difficult to determine which medical conditions occurred while she was taking Lipitor. (Dkt. No. 564 at 7). On her Fact Sheet, Plaintiff states that she took Lipitor from approximately 2002-2008 and that she was diagnosed with diabetes in approximately 2009. (*Id.*).

Plaintiff has obtained medical records showing Lipitor use in 2010 and "the first sign of elevated blood glucose levels in August of 2010." (Dkt. No. 535 at 10-11). However, Plaintiff has not provided an amended Fact Sheet to reflect the usage of Lipitor in 2010 or to revisit the date of her diabetes diagnosis. (Dkt. No. 564 at 7). Plaintiff has an ongoing duty to supplement discovery when she learns that a prior response is incomplete or incorrect in some material aspect. Fed. R. Civ. P. 26(e). Therefore, Plaintiff is ordered to provide an amended Plaintiff Fact Sheet to Pfizer within five (5) days of the date of this Order.

The Court has no information on how long Plaintiff has had these records, yet failed to amend her Fact Sheet. However, she has submitted amended Fact Sheets twice before based on follow-up conversations and assessments of medical records received. (Dkt. No. 535 at 6). The Court does not find dismissal an appropriate sanction at this time for Plaintiff's failure to supplement.⁵ Therefore, Pfizer's motion is denied.

⁵ It is not clear whether Plaintiff has attempted to obtain other medical records. The Court notes that Plaintiff has an obligation to attempt to obtain relevant medical and pharmaceutical records and supplement her Fact Sheet accordingly. A plaintiff's failure to even attempt to obtain relevant medical records that might indicate dates of Lipitor usage or the date of a diabetes diagnosis may warrant dismissal. When counsel meet and confer in cases of deficient Plaintiff

8. Coralynne Sebben v. Pfizer, Case No. 2:14-cv-1521

Pfizer claims that Plaintiff's Fact Sheet is materially deficient because it cannot determine when Plaintiff began using Lipitor. (Dkt. No. 471-1 at 2). Plaintiff's amended Fact Sheet indicates that she started using Lipitor in 1996 or 1997 and that she was diagnosed with diabetes in 1996 or 1997. (Dkt. No. 564 at 8). Plaintiff has obtained medical records "showing Lipitor usage *beginning* in 2007" and diabetes medications beginning that same year. (Dkt. No. 535 at 11 (emphasis added)). Again, Plaintiff did not amend her Fact Sheet to reflect the information learned from these records, specifically that Lipitor use began in 2007. Therefore, Plaintiff is ordered to provide an amended Plaintiff Fact Sheet within five (5) days of the date of this Order. At this time, the Court declines to dismiss Plaintiff's claims for failure to supplement.

9. Karen Jones v. Pfizer, Case No. 2:14-cv-1552

Plaintiff has failed to provide any executed medical authorizations as required by this Court's orders. (Dkt. No. 472 at 1; Dkt. No. 534 at 1). Plaintiff's counsel acknowledges that Plaintiff's claims should be dismissed because of this failure, but argues that dismissal without prejudice is appropriate. Pfizer notified Plaintiff's counsel of the deficiency in June of 2014. However, counsel did not attempt to contact Plaintiff about this deficiency until two months later in August of 2014. (Dkt. No. 534 at 3). Plaintiff's counsel sent two letters to Plaintiff in August and apparently made other attempts to contact Plaintiff since then but has been unable to reach her. (*Id.*). The Court declines to dismiss Plaintiff's claims with prejudice. Dismissal with prejudice is a particularly harsh sanction, and the Court has no information on why Plaintiff has

Fact Sheets, Plaintiff's counsel must disclose the steps Plaintiff has taken to obtain the requested information.

been unresponsive to her counsel. Therefore, the Court dismisses Plaintiff's claim without prejudice but with the conditions delineated in CMO 12.

Conclusion

For the reasons stated above, Pfizer's Motions to Dismiss (Dkt. Nos. 471, 472) are **GRANTED IN PART AND DENIED IN PART**.

The action *Schmid v. Pfizer*, Case No. 2:14-cv-1525 is **DISMISSED WITH PREJUDICE**.

The action *Karen Jones v. Pfizer*, Case No. 2:14-cv-1552 is **DISMISSED WITHOUT PREJUDICE** but with the following conditions:

If Plaintiff seeks to refile her action against Pfizer,

- (1) She must do so in the United States District Court for the District of South Carolina or other federal district court;
- (2) She must file a "Single-Plaintiff Complaint." A "Single-Plaintiff Complaint" is a complaint filed: (1) by an individual plaintiff; (2) by a plaintiff and family member plaintiffs; or (3) on behalf of the estate of a deceased individual, together with any family members and/or beneficiaries of such estate;
- (3) She must not oppose transfer to this MDL proceeding;
- (4) She must not name a defendant that defeats federal diversity jurisdiction; and
- (5) She must serve a completed Plaintiff Fact Sheet and accompanying disclosures and medical authorizations on Pfizer in accordance with CMO 5 and Amended CMO 6 *before* filing suit and attach a certificate of service reflecting that she has done so to her complaint.

Plaintiff Schmid is advised that if she attempts to refile her suit without complying with the above conditions, the Court may dismiss her second suit with prejudice.

Pfizer's motions are otherwise **DENIED**. Plaintiff's Motion to Dismiss in Case No. 2:14-cv-1525 (Dkt. No. 537) is **DENIED AS MOOT**.

Plaintiffs Deborah Packwood and Coralynee Sebben are **ORDERED** to serve amended Plaintiff Fact Sheets, as described above, within five (5) days of the date of this Order.

IT IS FURTHER ORDERED THAT when counsel meet and confer in cases of deficient Plaintiff Fact Sheets, Plaintiff's counsel must disclose to Pfizer the steps Plaintiff has taken to obtain the requested information.

AND IT IS SO ORDERED.


Richard Mark Gergel
United States District Court Judge

October 24, 2014
Charleston, South Carolina