

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

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U.S. DISTRICT COURT CHARLESTON, SC  
2014 NOV 13 P 3:11

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IN RE: LIPITOR (ATORVASTATIN	)	
CALCIUM) MARKETING, SALES	)	<b>MDL No. 2:14-mn-02502-RMG</b>
PRACTICES AND PRODUCTS	)	
LIABILITY LITIGATION	)	<b>CASE MANAGEMENT ORDER NO. 24</b>
	)	
	)	<b>This Order relates to cases:</b>
	)	
	)	<b>2:14-cv-1951</b>
	)	<b>2:14-cv-2514</b>
	)	<b>2:14-cv-2985</b>
	)	

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**Pfizer’s Motions to Dismiss (Dkt. Nos. 571, 584, 598)**

**A. Background**

Pfizer moved to dismiss the claims of three Plaintiffs with prejudice because Plaintiffs have not complied with their discovery obligations and this Court’s Orders. (Dkt. Nos. 571, 584, 598). Two of these plaintiffs have not served a Plaintiff Fact Sheet or provided accompanying medical authorizations in accordance with this Court’s orders. (Dkt. Nos. 571, 598). They have also failed to file any response to Pfizer’s motions to dismiss. The third Plaintiff, Ida Bailey served an unsigned deficient Fact Sheet and failed to provide the accompanying medical authorizations in accordance with this Court’s orders. (Dkt. No. 584). Bailey’s counsel filed a response arguing that the Bailey has “disappeared” and cannot be located by counsel. (Dkt. No. 641). Counsel has asked for an additional 90 days to locate her.

**B. Legal Standard**

A defendant may move to dismiss any claim against it if the plaintiff fails to prosecute the claim, fails to comply with the Federal Rules of Civil Procedure, or fails to comply with a 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 F. 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. Terry Dunlap v. Pfizer, Inc., No. 2:14-cv-1951 & Janice Jenkins v. Pfizer, Inc., No. 2:14-cv-2985

The Court finds that dismissal with prejudice is warranted under the circumstances here. By Court order, Dunlap's completed Plaintiff Fact Sheet was due on June 14, 2014, and Jenkins' completed Fact Sheet was due on August 25, 2014. (*See* CMO 5 at ¶ 4, 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).<sup>1</sup>

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.*)

In both of these cases, Pfizer provided notice of Plaintiffs' failure to provide a Fact Sheet and allowed time for Plaintiffs to cure the deficiencies. (*See* Dkt. Nos. 571-1, 571-2, 598-1, 598-2). In both cases, Pfizer received no response. Pfizer then filed motions to dismiss these cases on October 15, 2014, and October 23, 2014, respectively. Plaintiffs have not responded to these motions.

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<sup>1</sup> Plaintiffs agreed and consented to this Order.

The basic facts that Plaintiffs have failed to provide to Pfizer are needed for Pfizer to assess the quality of their cases, 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.”). Plaintiffs’ 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 Plaintiffs, and they have not provided any indication that it is not. Plaintiffs bear responsibility for their failure to adequately supply such information, and they have provided no reason whatsoever for their 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 motions are granted as to Plaintiffs Dunlap and Jenkins.

2. Ida Bailey v. Pfizer, Inc., No. 2:14-cv-2514

Plaintiff has failed to provide any executed medical authorizations as required by this Court's orders, and the Fact Sheet that she has provided is deficient and unsigned. Plaintiff's counsel acknowledges that Plaintiff has failed to meet her discovery obligations but asserts that this failure is solely due to her "disappearance." (Dkt. No. 641). Counsel asks for an additional 90 days to locate Plaintiff. (*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 as to why Plaintiff left her former residence without providing counsel with a forwarding address or why she has been unresponsive to requests made through her family members. However, the Court also declines to allow cases to remain pending in this MDL where Plaintiff is unresponsive to counsel and has failed to meet her discovery obligations. 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. 571, 598) are **GRANTED**. The following actions are **DISMISSED WITH PREJUDICE**:

*Terry Dunlap v. Pfizer, Inc.*, No. 2:14-cv-1951

*Janice Jenkins v. Pfizer, Inc.*, No. 2:14-cv-2985

Pfizer's Motion to Dismiss (Dkt. No. 584) is **GRANTED IN PART AND DENIED IN PART**. The claims of Ida Bailey in *Berger, et. al., v. Pfizer, Inc.*, No. 2:14-cv-2514<sup>2</sup> are **DISMISSED WITHOUT PREJUDICE** but with the following conditions:

If Plaintiff seeks to refile her action against Pfizer,

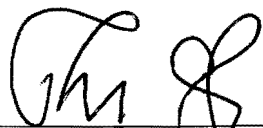
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<sup>2</sup> This action has multiple plaintiffs.

- (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 Bailey 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.

**AND IT IS SO ORDERED.**

  
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Richard Mark Gergel  
United States District Court Judge

November 13, 2014  
Charleston, South Carolina