

multiple reminders and follow-ups over a six-month period with no response, Pfizer requests that the claims of these two Plaintiffs be dismissed as well. (Dkt. No. 905 at 3).

B. Legal Standard

A defendant may move to dismiss any claim against it if the plaintiff fails to prosecute, 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*, --- Fed. App’x ---, 2014 WL 2211470 at *1 (4th Cir. 2014); *see also Coles v. Northcutt*, --- Fed. App’x ---, 2014 WL 2464392 at *1 (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. Eight Plaintiffs that Have Not Responded

The Court finds that dismissal with prejudice is warranted under the circumstances here. By Court order, completed Plaintiff Fact Sheets were due in these cases months ago. (*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).²

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.*)

These Plaintiff Fact Sheets are basic facts needed for Pfizer to assess the quality of these 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

² Plaintiffs agreed and consented to this Order.

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 5,000 plaintiffs in this litigation "by unfairly diverting the time and attention of the court away from their timely claims to that of [these plaintiffs]." *In re Guidant Corp.*, 496 F.3d at 867.

The information requested should be readily available to Plaintiffs, and Plaintiffs bear responsibility for their failure to adequately supply such information. Plaintiffs have failed to provide such information despite multiple warnings from the Court and follow-up by Pfizer, and *Plaintiffs 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).

D. Plaintiffs Himelfarb and Lung

These two Plaintiffs were required to serve their Plaintiff Facts Sheets and accompanying disclosures in November of 2014, and they have provided no reason for their seven-month delay in complying with the Orders of this Court. However, Pfizer does not dispute that these two Plaintiffs have now complied with their obligations, Pfizer's only prejudice was the time and effort spent on sending follow-up correspondence and preparing this motion. Under the circumstances, the Court finds dismissal to be too drastic a remedy. Therefore, the Court denies the motion to dismiss as to these two plaintiffs.

However, the Court agrees that Pfizer need not spend six months attempting to track down Plaintiff Fact Sheets from Plaintiffs who refuse to timely comply with this Court's Orders.³ Therefore, this Court endorses Pfizer's plan to file a motion to dismiss in accordance with Amended CMO 6 if Plaintiffs have not cured deficiencies within fourteen (14) days of Pfizer's initial deficiency letter. (Dkt. No. 905 at 4). **The Court puts Plaintiffs on notice that it is prepared to dismiss such cases with prejudice.**

E. Conclusion

Pfizer's Motion to Dismiss (Dkt. No. 880) is **GRANTED IN PART AND DENIED IN PART**. The claims of the following Plaintiffs are **DISMISSED WITH PREJUDICE**:

Plaintiff	Case No.
Kathy Dunn	2:14-3287
Sybal Tate	2:14-3293
Rachel Brent	2:14-3896
Chong Lee	2:14-3960
Esther Thomas	2:14-4056
Susan Robbins	2:14-4058
Ruth Ann Gray	2:14-4302
Joyce Witaker	2:15-0174

³ Plaintiffs should not file complaints in this MDL if they are not prepared to comply with this Court's Orders regarding Plaintiff Fact Sheets and accompanying disclosures.

The motion to dismiss is DENIED as to Plaintiffs Himelfarb and Lung.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

June 19, 2015
Charleston, South Carolina