

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

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IN RE: LIPITOR (ATORVASTATIN)	
CALCIUM) MARKETING, SALES)	MDL No. 2:14-mn-02502-RMG
PRACTICES AND PRODUCTS)	
LIABILITY LITIGATION	)	CASE MANAGEMENT ORDER NO. 64
)	
	)	This Order relates to cases:
	)	2:15-cv-1427
	)	2:15-cv-2204
	)	2:15-cv-2504
	)	2:15-cv-2733
	)	2:15-cv-2953
	)	2:15-cv-2954
	)	2:15-cv-2916
	)	2:15-cv-3008
	)	2:15-cv-3009
	)	2:15-cv-3010
	)	2:15-cv-3014
	)	2:15-cv-3015
	)	2:15-cv-3022

Defendant's Motion to Dismiss (Dkt. No. 1176)

A. Background

Pfizer moved to dismiss the claims of twenty-six (26) Plaintiffs with prejudice because they had not complied with their discovery obligations and this Court's Orders. (Dkt. No. 1176). At the time that Pfizer filed its motion, none of these Plaintiffs had served a Plaintiff Fact Sheet (PFS) or any accompanying disclosures in accordance with Case Management Order Nos. 5 & 6, despite follow-up requests from Pfizer.

Since the filing of the motion, fourteen (14) Plaintiffs have stipulated to the dismissal of their claims. (Dkt. No. 1184). Pfizer has withdrawn its motion without prejudice as to four (4) other Plaintiffs. (Dkt. No. 1234 at 2-3). Thus, the motion is now moot in Case Nos. 2:15-cv-

2204, 2:15-cv-2504, 2:15-cv-2733, 2:15-cv-2953, and 2:15-cv-2954. The Court address the remaining eight (8) Plaintiffs below.

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*, 573 F. App’x 268, 269 (4th Cir. 2014); *see also Coles v. Northcutt*, 574 F. App’x 268 (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. Non-Responsive Plaintiffs

Plaintiff Catherine Owens (Case No. 2:15-cv-2916) has not provided a PFS and has not responded Pfizer’s motion. Counsel for Plaintiff Monica Maye (Case No. 2:15-cv-1427) filed a response stating that Plaintiff Maye had not provided any of the required discovery and was completely unresponsive to counsel. (Dkt. No. 1233). 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).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.*).

¹ Plaintiffs agreed and consented to this Order.

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 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. Sanders Firm Plaintiffs

Under CMO 5, the PFSs and medical authorizations for the six Sanders Firm Plaintiffs were due by August 31, 2015. Pfizer sent Plaintiffs a letter on September 18, 2015, again asking for PFSs and medical authorizations. Plaintiffs did not provide them, and Pfizer filed the instant motion on October 13, 2015. On October 21, 2015, Plaintiffs filed documents titled “Notice of Compliance” that stated the Plaintiffs had “complied with the defendant’s discovery requests as of 10/19/15.” (Dkt. Nos. 1185-1190). However, one of these Plaintiffs had not actually provided Pfizer with a PFS or any of the required discovery. (Dkt. No. 1234 at 4). Three other Plaintiffs provided materially deficient PFSs and no signed medical authorizations, which were clearly required by the Court’s orders. (Dkt. No. 1234-1). Plaintiff Ayala provided materially deficient PFSs and unusable authorizations (improperly filled out). (*Id.*). Plaintiff Cook medical authorizations, but her PFS was missing material information. (*Id.*). None of these Plaintiffs have asked for leave to file a sur-reply to address these deficiencies in their discovery productions.

Under the circumstances here, the Court finds dismissal appropriate. The Court has repeatedly warned Plaintiffs that it will dismiss cases with prejudice where deficiencies are not promptly cured. (*E.g.*, CMO 35, Dkt. No. 916, at 5). With regard to the Plaintiffs who have not provided signed any medical authorizations, despite repeated requests, orders of this Court and a motion to dismiss, the Court dismisses these claims with prejudice. These Plaintiffs have not made a serious, good faith effort to comply with the Court’s orders. With regard to Plaintiffs Cook and Ayala, the Court dismisses their claims but finds dismissal with prejudice too harsh a

sanction. While these Plaintiffs have not complied with their discovery obligations, they made more than a cursory attempt to do so. Therefore, the Court dismisses their claims without prejudice and with the conditions stated below.

E. Conclusion

Pfizer's Motion to Dismiss (Dkt. No. 1176) is **GRANTED IN PART**. The claims of the following Plaintiffs are **DISMISSED WITH PREJUDICE**:

Plaintiff	Case No.
Monica Maye	2:15-cv-1427
Catherine Owens	2:15-cv-2916
Miriam Anukem	2:15-cv-3008
Althea Clark	2:15-cv-3009
Maria Del Toro	2:15-cv-3015
Darlene Dozier	2:15-cv-3022

The claims of the following Plaintiffs

Plaintiff	Case No.
Ramonita Ayala	2:15-cv-3010
Beverly Cook	2:15-cv-3014

are **DISMISSED WITHOUT PREJUDICE** but with the following conditions:

If Plaintiff seeks to refile her action against Pfizer,

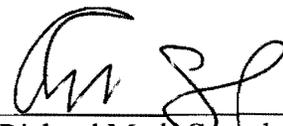
- (1) She must do so in the United States District Court for the District of South Carolina or other federal district court;
- (2) She must file a "Single-Plaintiff Complaint." A "Single-Plaintiff Complaint" is a complaint filed: (1) by an individual plaintiff; (2) by a plaintiff and family member plaintiffs; 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.

Plaintiffs are advised that if they attempt to refile their suits without complying with the above conditions, the Court may dismiss their second suit with prejudice.

The motion is **DENIED AS MOOT** as to the Plaintiffs in Case Nos. 2:15-cv-2204, 2:15-cv-2504, 2:15-cv-2733, 2:15-cv-2953, and 2:15-cv-2954.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

January 22, 2016
Charleston, South Carolina