

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

IN RE: LIPITOR (ATORVASTATIN
CALCIUM) MARKETING, SALES
PRACTICES AND PRODUCTS
LIABILITY LITIGATION

MDL No. 2:14-mn-02502-RMG
CASE MANAGEMENT ORDER NO. 70

This Order relates to cases:

- 2:15-cv-03050 2:15-cv-03388
- 2:15-cv-03058 2:15-cv-03390
- 2:15-cv-03101 2:15-cv-03416
- 2:15-cv-03121 2:15-cv-03417
- 2:15-cv-03122 2:15-cv-03433
- 2:15-cv-03155 2:15-cv-03504
- 2:15-cv-03227 2:15-cv-03540
- 2:15-cv-03229 2:15-cv-03543
- 2:15-cv-03231 2:15-cv-03568
- 2:15-cv-03280 2:15-cv-03572
- 2:15-cv-03295 2:15-cv-03586
- 2:15-cv-03298 2:15-cv-03587
- 2:15-cv-03300 2:15-cv-03588
- 2:15-cv-03313 2:15-cv-03593
- 2:15-cv-03339 2:15-cv-03595
- 2:15-cv-03340 2:15-cv-03597
- 2:15-cv-03343 2:15-cv-03617
- 2:15-cv-03362

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Defendant's Motion to Dismiss (Dkt. No. 1297)

A. Background

Pfizer moved to dismiss the claims 35 Plaintiffs with prejudice for failure to comply with their discovery obligations and this Court's Orders. (Dkt. No. 1297). At the time that Pfizer filed its motion, none of these Plaintiffs had complied their obligations to serve a Plaintiff Fact Sheet (PFS) and provide accompanying disclosures in accordance with Case Management Order Nos. 5 & 6. Responses to Pfizer's motion to dismiss were due January 7, 2016. (See Dkt. No. 1297).

After Pfizer filed its motion and before January 7, 2016, ten of the thirty-five Plaintiffs served PFSs. Pfizer withdrew its motion as to nine of these Plaintiffs, and the claims of the tenth Plaintiff were dismissed by stipulation. (Dkt. Nos. 1306, 1358). On January 11, 2016, Pfizer filed a reply as to the remaining twenty-five Plaintiffs. (Dkt. No. 1322). These Plaintiffs did not file any response to Pfizer's motion, and Pfizer informed the Court that it had not received any PFSs from these Plaintiffs. (*Id.*).

After Pfizer filed its reply, another six Plaintiffs stipulated to the dismissal of their claims, leaving nineteen Plaintiffs at issue in Pfizer's motion. (Dkt. No. 1415). After Pfizer filed its reply and the deadline for responding to the motion had passed, certain Plaintiffs filed documents titled "Notice of Compliance."¹ (*See, e.g.*, Dkt. Nos. 1327, 1328). To date, ten of the remaining nineteen Plaintiffs have filed such notices. These notices consist of a single sentence that states, "[t]he Plaintiff, [Plaintiff's name], in the above-captioned matter gives notice that she complied with the defendant's discovery requests as of [date]." (*See, e.g.*, Dkt. No. 1328). These notices provide no other information. Pfizer has moved to strike these filings as untimely. (Dkt. No. 1338). Plaintiffs have filed no response to Pfizer's motion to strike.

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

¹ Two of these "Notices" were filed in the MDL docket and spread to the appropriate member case as required by CMO 13. However, a number of the notices were filed in the member case only, such that the Court was unaware of the Notices until Pfizer's letter asking guidance from the Court on whether it should respond to such notices. (*See* Dkt. No. 1391).

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

With regard to the nine Plaintiffs that have still provided no response whatsoever, the Court finds dismissal with prejudice appropriate. These Plaintiffs have failed to make any attempt to comply with the Court’s orders. 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 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

² Plaintiffs agreed and consented to this Order.

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. Other Plaintiffs

With regard to the ten Plaintiffs that filed one-sentence “Notice of Compliance” documents after the deadline for responses had passed, the Court dismisses the claims of these Plaintiffs without prejudice and with the conditions stated below. It is undisputed that these Plaintiffs failed to comply with the deadlines set forth in the Court’s Orders and failed to provide any response to Pfizer’s motion to dismiss. These late-filed, one-sentence “notices” do not provide the Court with the information necessary for the Court to determine whether these Plaintiffs have come into compliance with the Court’s orders or not. Given that Plaintiffs appeared to have made some effort to comply, however belatedly, the Court finds dismissal with

prejudice too harsh a sanction. However, Plaintiffs have shown a blatant disregard for the Court's deadlines in this case, and have wasted both the parties' time and the Court's time with their delays. Furthermore, because these "notices" were filed weeks after the deadline for a response, Pfizer has not had an opportunity raise material deficiencies in the Plaintiffs' PFSs with the Court in furtherance of their motion. Under the circumstances, the Court finds dismissal without prejudice and with the conditions below appropriate. Once Plaintiffs come into compliance with the Court's orders, they may refile their claims.

E. Conclusion

Pfizer's Motion to Dismiss (Dkt. No. 1297) is **GRANTED IN PART**. The claims of the following Plaintiffs are **DISMISSED WITH PREJUDICE**:

Plaintiff	Case No.
Alexander, Victoria	2:15-cv-03121
Nieves, Migdalia	2:15-cv-03155
Cobb, Lucille	2:15-cv-03298
De Leon, Dayleen	2:15-cv-03300
Hudspeth, Mildred	2:15-cv-03343
Latiolais, Annora	2:15-cv-03417
Spivey, Cheryl	2:15-cv-03504
Robinson, Noemia	2:15-cv-03540
Yeck, Debra	2:15-cv-03593

The claims of the following Plaintiffs

Plaintiff	Case No.
Grimes, Brenda	2:15-cv-03050
Gagliardi, Dolores	2:15-cv-03122
Figueroa, Rosa	2:15-cv-03231
Phlegar, Sharon	2:15-cv-03280
Bautista, Teresita	2:15-cv-03295
Gurrola, Maria	2:15-cv-03339
Lucas, Kay	2:15-cv-03416
Santos Benitez, Eileen	2:15-cv-03568
Strickland, Sylvia	2:15-cv-03586
Singleton, Evelyn	2:15-cv-03617

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, (Dkt. No. 1297), is otherwise **DENIED AS MOOT**. Pfizer's motion to strike (Dkt. No. 1338) is also **DENIED AS MOOT**.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

Agued
March 1, 2016
Charleston, South Carolina