

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

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U.S. DISTRICT COURT CHARLESTON, SC

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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. 80</b>           |
|                              | ) |   |
|                              | ) | <b>This Order relates to cases:</b>           |
|                              | ) |   |
|                              | ) | <b>2:15-cv-03815            2:16-cv-00573</b> |
|                              | ) | <b>2:16-cv-00291            2:16-cv-00574</b> |
|                              | ) | <b>2:16-cv-00314            2:16-cv-00575</b> |
|                              | ) | <b>2:16-cv-00572            2:16-cv-00991</b> |
|                              | ) |   |
|                              | ) |   |

**Defendant’s Motion to Dismiss (Dkt. No. 1553)**

Pfizer moved to dismiss the claims of 9 Plaintiffs with prejudice because Plaintiffs have not complied with their discovery obligations and this Court’s Orders. (Dkt. No. 1553). 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.

After Pfizer filed the motion to dismiss, four Plaintiffs submitted PFSs, and Pfizer has withdrawn its motion without prejudice as to these four Plaintiffs. (Dkt. No. 1566; Dkt. No. 1574 at 3). Plaintiff Margaret Lee and Pfizer entered into a stipulation to allow Plaintiff additional time to become compliant, (Dkt. No. 1571), and this Order does not address the motion with regard to Plaintiff Lee. The remaining four Plaintiffs have not responded to Pfizer’s motion.

### A. 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.*

**B. Plaintiffs Sampsell, Smith, Teply, and West**

These Plaintiffs have failed to provide any response to Defendant’s motion and have failed to serve a PFS on Defendant. Therefore, the Court finds dismissal with prejudice appropriate. By Court order, these Plaintiffs’ completed PFSs were due months ago. (*See* CMO 5, Dkt. No. 110; DKt. No. 1553-1). 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.*) Pfizer has done so here. (*See* Dkt. Nos. 1553-4, 1553-5, and 1553-6). 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

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<sup>1</sup> 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."). Plaintiff's 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 they bear responsibility for her failure to adequately supply such information. They have failed to provide such information despite multiple warnings from the Court and follow-up by Pfizer, 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).

### C. Conclusion

Pfizer has withdrawn its motion with regard to Plaintiff Mildred Jordan, Case No. 2:16-cv-0573, Plaintiff Judith Martin, Case No. 2:16-cv-00574; Plaintiff Cathryn Vazquez, Case No. 2:16-cv-00575, and Cheryl Wenz, Case No. 2:16-cv-00572. (Dkt. No. 1574 at 3).

For the reasons stated above, Pfizer's Motion to Dismiss (Dkt. No. 1553) is **GRANTED** with regard to Plaintiffs Sampsell, Smith, West and Teply. Thus, the claims of these Plaintiffs are **DISMISSED WITH PREJUDICE:**

| <b>Plaintiff</b> | <b>Case No.</b> |
|------------------|-----------------|
| Carol Sampsell   | 2:15-cv-03815   |
| Nancy Teply      | 2:16-cv-00291   |
| Roberta Smith    | 2:16-cv-00991   |
| Elizabeth West   | 2:16-cv-00991   |

The Court reserves ruling on the motion with regard to Plaintiff Lee, Case No. 2:16-cv-00314, in accordance with the parties' stipulation. (*See* Dkt. No. 1571).

**AND IT IS SO ORDERED.**



Richard Mark Gergel  
United States District Court Judge

July 18, 2016  
Charleston, South Carolina