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. 82** **This Order relates to all cases except those listed in footnote 1.**[1]

NOTICE: THIS ORDER CONTAINS AN IMPORTANT DEADLINE FOR ALL PLAINTIFFS.

Before the Court is Defendant's omnibus motion for summary judgment. (Dkt. No. 1564).[2] No Plaintiff has put forth any evidence of specific causation, which all parties agree is an essential element of Plaintiffs' claims. Plaintiffs, however, argue that non-bellwether Plaintiffs have not had an adequate opportunity to marshal such evidence. (Dkt. No. 1611). As more fully explained below, and in an abundance of caution, the Court provides Plaintiffs with a fourth opportunity to show cause why summary judgment should not be granted on this ground.

Plaintiffs in this MDL all allege that they have developed type 2 diabetes as a result of taking Defendant Pfizer's cholesterol-lowering drug Lipitor. (Dkt. No. 1 at 1; Dkt. No. 160). From the outset of this litigation, all parties have litigated this MDL as if they agreed that

[1] This Order does not apply to the two bellwether cases that have separate motions for summary judgment pending, *Daniels v. Pfizer*, Case No. 2:14-cv-01400 and *Hempstead v. Pfizer*, Case No. 2:14-cv-01879. (*See* Dkt. Nos. 1562, 1563). The Court has also stayed 128 cases pending its ruling on Plaintiffs' motions to remand. This Order does not apply to those cases.

[2] Unless otherwise stated as is the case here, the docket numbers in this Order refer to the MDL Docket, Case No. 2:14-cv-2502.

whether Lipitor can and did cause diabetes in a particular plaintiff, which all parties agree is a complicated, progressive and multi-factor disease, is a complicated medical issue requiring expert testimony. Thus, both parties retained multiple experts regarding both general and specific causation.[3] After extensive briefing and oral argument, the Court excluded the expert testimony of both specific causation experts identified by Plaintiffs in the bellwether cases.[4] (CMO 55; Dkt. No. 1283; CMO 76, Dkt. No. 1517).

However, Plaintiffs noted that in the SPARCL study, patients with certain characteristics taking 80 mg of Lipitor had a relative risk ratio of developing diabetes greater than 2. Thus, it was possible that Plaintiffs with such characteristics and taking 80 mg of Lipitor prior to diagnosis might be able to proffer a specific causation expert opinion that would survive *Daubert*, even if the Court's ruling in CMO 55 was correct. The Court had counsel identify any such cases in an attempt to identify a bellwether case that could survive summary judgment. (*See* CMO 61, Dkt. No. 1323). However, at a January 22, 2016 hearing on the matter, Plaintiffs' Lead Counsel stated that no Plaintiffs in the MDL met those criteria. (Dkt. No. 1347 at 5).

The Court then asked whether there were any cases in the MDL that could survive summary judgment, given the Court's *Daubert* rulings.

> THE COURT: Let's talk for just a minute about where that leaves us. . . . let me ask this first from the plaintiffs: Is there any reason to believe that if we picked a 20- or 40- milligram case to try as a bellwether that you would have any class of cases or factual presentation or new theory that might survive specific causation, assuming the correctness of the Murphy order? Mr. Hahn?

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[3] General causation is whether a substance is capable of causing a particular injury or condition; specific causation is whether the substance caused the injury of the particular plaintiff at issue. *E.g., Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005).

[4] The Court denied Plaintiffs' motion to reconsider its exclusion of Dr. Murphy's testimony in CMO 75, Dkt. No. 1514.

> MR. HAHN: The short answer is no, sir, Your Honor, we don't. Given the Murphy order and the Court's reading of the medicine, we are not going to be able to get a differential diagnosis that's going to survive.
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> THE COURT: Well, it's not a differential diagnosis, you've got to show specific causation more likely than not. And you have an opinion to that. . . .
>
> But if we assume for a minute that the critical question then is whether the Court is correct regarding the standard, if you are telling me, Mr. Hahn, that if I'm correct, then you're not going to have a case that survives summary judgment?
>
> MR. HAHN: Yes, Sir.

(Dkt. No. 1347 at 9-10). The Court went on to discuss with counsel options for proceeding within the MDL. Defendant's Lead Counsel suggested the Court issue an order to show cause to see if any Plaintiff could differentiate her case and then, if not, grant summary judgment in all cases, and Plaintiffs' Lead Counsel agreed:

> MR. CHEFFO: . . . So I think what is most efficient for this litigation . . . is to have that ultimately reviewed, right? And I think that what other courts in similar situations have done is they have basically said, just issue an order to show cause and said, look, you know, if anybody thinks that they are differently situated or has some kind of different argument or something else, they can come forward; if not, what we are going to do is we are going to grant judgment on that.
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> . . . . they would then . . . presumably get appealed to the Fourth Circuit and the Circuit Court would do what it's going to do. And I think that's the appropriate . . . remedy in an MDL.
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> . . . . the most efficient way is to expeditiously grant summary judgment for all the cases on that ground, and anything else, get to the Fourth Circuit and have the Court review it.
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> THE COURT: Mr. Hahn, what your thoughts?
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> MR. HAHN: Judge, I – I believe that Mark was cheating and reading off of my notepad. We basically agree. . . . .

(Dkt. No. 1347 at 11-13).

The Court took counsel's suggestion and issued CMO 65, which stated,

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> Lead Plaintiffs' counsel advised the Court in an on the record telephone conference of January 22, 2016, that, if the Court's ruling excluding the expert testimony of Dr. Elizabeth Murphy (CMO 55, Dkt. No. 1283) is correctly decided, then none of the cases now pending in the MDL will be able to survive summary judgment on the issue of specific causation. Notice is hereby given that any Plaintiff who disputes the position taken by Plaintiffs' Lead Counsel and asserts that her case can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is upheld on appeal, such Plaintiff shall provide notice to the Court within 15 days of this order and set forth with specificity how her case is distinguished from the Court's ruling in CMO 55. The Court will then promptly set a schedule in each such case for identifying expert witnesses, submitting expert reports, deposing identified experts, and briefing *Daubert* and dispositive motions.

(Dkt. No. 1352). CMO 65 did not require any Plaintiff to marshal any evidence with 15 days. The Order only required that Plaintiffs give notice within the 15-day period. The Court explicitly stated that if any Plaintiff came forward, it would then set a pre-trial schedule in those case(s), allowing Plaintiffs time to develop expert testimony. However, not a single Plaintiff came forward. Nor did a single Plaintiff ask for an extension of time to file a notice in response to CMO 65. This Order was issued on January 25, 2016, and now, seven months later, still not a single Plaintiff has come forward in response to this Order and asked to proceed with her case.

On June 9, 2016, the Court held a Status Conference to discuss proceeding with summary judgment. (Dkt. No. 1550). Plaintiffs, for the first time, had appellate counsel appear in front of the Court. (*Id.*). It was in this conference that Plaintiffs' counsel indicated, for the first time in this litigation, that some plaintiffs may possibly be able to survive summary judgment despite the Court's *Daubert* rulings:

> MR. HAHN: . . . And by taking up 10, 20, and 40, your general causation opinions, and then Murphy's specific causation opinion, I don't think we can have a summary judgment as to all the other plaintiffs in the litigation, because those

> other plaintiffs, in some states you don't have to have [an] expert—New Mexico is one—. . . . there may be other plaintiffs that have—haven't had the opportunity, and plan to put up a specific causation expert that's going to give an opinion that would get them to a jury.
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> THE COURT: No, no, I had—I entered an order, Mr. Hahn, in which I said if any of you don't agree with the lead counsel's position about specific causation, you need, by a designated date, to identify your case and provide me the names of your experts, so we can get on with discovery.
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> MR. HAHN: Yes, sir.
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> THE COURT: So I don't think we're out there with other potential cases. Now this issue of states that do not require expert testimony on causation, . . . I wasn't aware there were such states.

(Dkt. No. 1550 at 7). The Court went on to state: "let's assume there are. Then the brief in opposition could say all claims from the following—from the State of New Mexico, we oppose it, because there's not a[n expert] requirement. . . . the plaintiff would still have to make a showing of whatever is required under that law to establish causation, even if you don't need an expert. . ." (*Id.* at 9). Thus, Plaintiffs had an opportunity to come forward with evidence under this new theory in opposition to summary judgment.

However, when the deadline for opposition to summary judgment came a month-and-a-half later, not a single Plaintiff came forward with evidence that she claimed precluded the entry of summary judgment. Instead, Plaintiffs argued that it was theoretically possible that some unidentified Plaintiff(s) may possibly have some unidentified circumstantial, non-expert evidence of specific causation. (Dkt. No. 1586). In this opposition, Plaintiffs readily acknowledged that any Plaintiff "who believed she could adduce a differential diagnosis that could survive *Daubert* notwithstanding the exclusion of Dr. Murphy's expert testimony in *Hempstead*" should have come forward in response to CMO 65, (Dkt. No. 1586 at 13), but

argued that Plaintiffs should be allowed to present non-expert testimony to transferor courts after remand.

Given this speculative response, the Court gave Plaintiffs a third opportunity to come forward if any thought her case could survive summary judgment. The Court issued CMO 81, which stated in part:

> **NOTICE IS HEREBY GIVEN** that any Plaintiff who asserts that her case can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is upheld on appeal, must file a response to Defendant's motion for summary judgment (Dkt. No. 1564) within fifteen (15) days of the date of this Order. Any such response must specifically identify the particular Plaintiff opposing summary judgment, identify the substantive state law that she contends applies to her claims, and include all evidence that she asserts precludes the entry of summary judgment in her case.
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> If any Plaintiff contends that she needs additional case-specific discovery to provide such evidence, she must comply with the requirements of Fed. R. Civ. P. 56(d) and identify the specific facts that are yet to be discovered. Should the claims of any Plaintiff survive summary judgment based on Rule 56(d), the Court will then promptly enter a scheduling order in each such case allowing for appropriate discovery and the filing of dispositive motions after discovery.

(Dkt. No. 1599 at 3-4). Again, not a single Plaintiff came forward with evidence of specific causation. Nor did a single Plaintiff make an individualized Rule 56(d) request.

Instead, Plaintiffs filed an omnibus response arguing that, other than the two bellwether Plaintiffs, no Plaintiff has had an opportunity to develop the facts of her case. (Dkt. No. 1611). Inexplicably, Plaintiffs argued that none of the Plaintiffs (other than the two bellwether Plaintiffs) have had an opportunity to "hire experts" or "prepare expert reports," (Dkt. No. 1661 at 8), despite the fact that CMO 65 offered any Plaintiff the opportunity to do just that.

In the Rule 56(d) affidavit filed with Plaintiffs' response, Plaintiffs state that they need an opportunity to seek (1) "[e]vidence, testimony, and (if necessary) third-party discovery from their treating physicians," (2) "[e]xpert opinions regarding specific causation," and (3) "their

patient records." (Dkt. No. 1611-1). Plaintiffs have not stated any other information that they need to seek to defend against this motion for summary judgment.

As an initial matter, the time for a Plaintiff to come forward and argue that she could produce an expert opinion on specific causation that would survive *Daubert* has passed. The Court issued an order to show cause on this ***seven months ago***, and explicitly stated that it would allow any such plaintiff to proceed with discovery and pre-trial proceedings, and in the last seven months not a single Plaintiff has come forward. Plaintiffs' Lead Counsel testifies that he understood his admission at the January 22, 2016 status conference as a confirmation "on the ability of Plaintiffs to survive the evidentiary standards for specific-causation expert evidence set forth in CMO 55" and that he understood CMO 65 to "relate to whether individual Plaintiffs believe their case could survive the Rule 702 expert standards in CMO 55." (Dkt. No. 1611-1 at 6-7). Whatever the dispute about non-expert evidence, there can be no dispute, and according the Plaintiffs' Lead Counsel's affidavit, there is no dispute, that any Plaintiff who believed she could proffer expert evidence on specific causation that would survive Rule 702 and *Daubert* was required to come forward in response to CMO 65. (*See also* Dkt. No. 1611 at 17 ("CMO 65 directed any Plaintiff who thought they could survive summary judgment on specific causation in light of the Court's exclusion of Dr. Murphy in CMO 55 (Doc. 1283) to come forward with new or additional expert evidence."); Dkt. No. 1611 at 18 ("Plaintiffs continued to understand the Court's order to relate to whether individual Plaintiffs believed their case could survive the Rule 702 expert standards in CMO 55, not the separate legal issue of whether the law of their state requires expert evidence.")). No Plaintiff has done so. Therefore, Plaintiffs' argument that they have not had an opportunity to seek specific causation expert testimony is meritless. The

Court provided that opportunity in CMO 65, not a single Plaintiff came forward, and by not coming forward in response to CMO 65, Plaintiffs have waived that argument.

With regard to non-expert evidence, in an abundance of caution, the Court will provide Plaintiffs with a fourth and final opportunity to come forward. Plaintiffs have argued that 15 days is not sufficient time to marshal their evidence. Thus, the Court will afford them an additional 60 days. The Court notes that the only facts that Plaintiffs have stated they may need to discover (other than expert testimony) to defend against summary judgment is information from their own treating physicians and their own patient records. (Dkt. No. 1611-1 at 5). They have not requested any discovery from Defendants or other third-parties.

Given the nature of the evidence that Plaintiffs claim they need time to marshal, specifically their request to marshal their own medical records and information from their own treating physicians, the Court finds 60 days sufficient.[5]

NOTICE IS HEREBY GIVEN that any Plaintiff who asserts that her case can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is upheld on appeal, must file a response to Defendant's motion for summary judgment (Dkt. No. 1564) within sixty (60) days of the date of this Order. Any such response must (1) specifically identify the particular Plaintiff opposing summary judgment, (2) identify the substantive state law that she contends applies to her claims, and (3) include all evidence that she asserts precludes the entry of summary judgment in her case.[6]

[5] Plaintiffs have not stated how long they need to marshal this evidence or suggested any proposed timeline for obtaining it.

[6] Any such notice should be filed in the MDL management case, Case No. 2:14-mn-2502, and spread to the appropriate member case.

The arguments of Plaintiff's Lead Counsel and the PSC are before the Court, and the PSC need not and should not file an additional, repetitive omnibus opposition in response to this Order. This Order provides an opportunity for ***individual*** Plaintiffs to oppose summary judgment based on the specific circumstances of their cases.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

August 23, 2016
Charleston, South Carolina