

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
PRACTICES AND PRODUCTS
LIABILITY LITIGATION

MDL No. 2:14-mn-02502-RMG
CASE MANAGEMENT ORDER NO. 39

This Order relates to cases:

- 2:15-cv-00354 2:15-cv-00855
- 2:15-cv-00414 2:15-cv-00873
- 2:15-cv-00417 2:15-cv-00874
- 2:15-cv-00419 2:15-cv-00875
- 2:15-cv-00420 2:15-cv-00876
- 2:15-cv-00426 2:15-cv-00877
- 2:15-cv-00575 2:15-cv-00895
- 2:15-cv-00576 2:15-cv-00896
- 2:15-cv-00577 2:15-cv-00898
- 2:15-cv-00578 2:15-cv-00899
- 2:15-cv-00605 2:15-cv-00900
- 2:15-cv-00739 2:15-cv-00901
- 2:15-cv-00740 2:15-cv-00902
- 2:15-cv-00741 2:15-cv-00903
- 2:15-cv-00742 2:15-cv-00904
- 2:15-cv-00744 2:15-cv-00905
- 2:15-cv-00745 2:15-cv-00906
- 2:15-cv-00746 2:15-cv-00907
- 2:15-cv-00747 2:15-cv-00920
- 2:15-cv-00748 2:15-cv-00921
- 2:15-cv-00752 2:15-cv-00923
- 2:15-cv-00754 2:15-cv-00924
- 2:15-cv-00762 2:15-cv-00925
- 2:15-cv-00791 2:15-cv-00926
- 2:15-cv-00792 2:15-cv-00927
- 2:15-cv-00793 2:15-cv-00928
- 2:15-cv-00808 2:15-cv-00929
- 2:15-cv-00809 2:15-cv-00930
- 2:15-cv-00810 2:15-cv-00934
- 2:15-cv-00850 2:15-cv-00937
- 2:15-cv-00851 2:15-cv-00943
- 2:15-cv-00852 2:15-cv-00953
- 2:15-cv-00853 2:15-cv-00982
- 2:15-cv-00854 2:15-cv-00983

2:15-cv-00984	2:15-cv-00997
2:15-cv-00985	2:15-cv-00998
2:15-cv-00986	2:15-cv-00999
2:15-cv-00987	2:15-cv-01006
2:15-cv-00988	2:15-cv-01007
2:15-cv-00989	2:15-cv-01015
2:15-cv-00990	2:15-cv-01016
2:15-cv-00991	2:15-cv-01017
2:15-cv-00992	2:15-cv-01018
2:15-cv-00993	2:15-cv-01088
2:15-cv-00994	2:15-cv-01089
2:15-cv-00995	2:15-cv-01180
2:15-cv-00996	2:15-cv-01183

Defendant's Motion to Dismiss (Dkt. No. 934)

A. Background

Pfizer moves to dismiss the claims of ninety-four (94) Plaintiffs with prejudice because Plaintiffs have not complied with their discovery obligations and this Court's Orders.¹ 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, despite repeated requests from Pfizer. Some, but not all, of these Plaintiffs have provided varying degrees of information in response to Pfizer's motion to dismiss. The Court addresses the various degrees of responses separately.

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

¹ Pfizer initially moved to dismiss the claims of 145 Plaintiffs. (Dkt. No. 934). However, Pfizer has withdrawn its motion as to Doris Rowland, Case No. 2:14-03995, and has stipulated to an extension of time with regard to fifty (50) other Plaintiffs in the case *Garabedian, et. al. v. Pfizer*, 2:14-cv-03995. (Dkt. No. 949). This Order does not address these Plaintiffs.

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. Plaintiffs that Have Not Responded

Four Plaintiffs (Freda Draper, Case No. 2:15-cv-00937; Betty Shoe, Case No. 2:15-cv-00943; Ruby Dumas, Case No. 2:15-cv-01183; and Rosa Washington, Case No. 2:15-cv-01180)

have not responded to Pfizer's motion to dismiss and have not provided the required PFS. 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 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

² Plaintiffs agreed and consented to this Order.

consider the danger of prejudice substantial.”). Plaintiffs’ delay also impacts the other thousands of 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 Unresponsive to Counsel

Eight Plaintiffs (Lois Chilcoate, Case No. 2:15-cv-00752; Judy Eady, Case No. 2:15-cv-00754; Jacqueline Lattery, Case No. 2:15-cv-00994; LoriAnn Little, Case No. 2:15-cv-00904; Diane Rauch, Case No. 2:15-cv-00895; Rosa Marie Rice, Case No. 2:15-cv-00853; Kathy Sandifer, Case No. 2:15-cv-00877; and Joyce White, Case No. 2:15-cv-1088) have not provided any information required by this Court’s orders. Their counsel filed a response to Pfizer’s motion stating that the firm was unable to “obtain any responses from its clients.” (Dkt. No. 953). This Court previously warned that “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," and warned Plaintiffs that it was "prepared to dismiss such cases with prejudice." (Dkt. No. 916 at 5 n.3, 5).

Plaintiffs set their own deadline by filing a complaint in this MDL. 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 orders. 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; *In re Guidant Corp.*, 496 F.3d at 867-68).

E. Juanita Church

In the rush to the courthouse, one Plaintiff (Juanita Church, Case No. 2:15-cv-00762) has apparently filed the same claim in both this MDL and in state court in Missouri. (*See* Dkt. No. 963). Her Missouri case has now been removed to the District Court for the Eastern District of Missouri. *See Scotino, et. al. v. Pfizer*, Case No. 4:15-00540 (E.D. Mo. Mar. 27, 2015). The Court dismisses the action currently pending in the MDL without prejudice, so that she may pursue her claims in the Missouri action. If her Missouri action is transferred to this MDL, Plaintiff should be prepared to meet this Court's deadlines.

F. Johnson Becker Plaintiffs

Sixty-eight (68) Plaintiffs provided Plaintiff Facts Sheets on July 20, 2015, after Pfizer filed its motion to dismiss. Most of these Plaintiffs have now either completely or substantially complied with their discovery obligations. However, nineteen (19) of these Plaintiffs still have

material deficiencies in the Plaintiff Fact Sheets provided. (*See* Dkt. No. 984-3). For example, these Plaintiffs have not provided the dates that they used Lipitor, have not provided the medical conditions or injuries that they allege they experienced while on Lipitor, or have not provided the date they were diagnosed with diabetes. (*Id.*).

Because these 19 Plaintiffs have now made some attempt, albeit late, to comply with their discovery obligations, the Court finds dismissal *with* prejudice to be too drastic of a remedy. However, months after the deadline in this Court's orders, these Plaintiffs have still failed to substantially comply with their discovery obligations. It is a waste of Pfizer's time to continue to ask these Plaintiffs come into compliance with the Court's orders, and it is a waste of the Court's time to continue to field motions spurred by Plaintiff's failure to comply with its orders. These Plaintiffs may rejoin the MDL once they have met their obligations. Therefore, the Court dismisses the claims of these 19 Plaintiffs without prejudice and with the conditions contained in CMO 12.

As for the 49 Plaintiffs now in substantial compliance, the Court denies Pfizer's motion to dismiss. These Plaintiffs have provided no reason for their five to seven month delay in complying with the orders of this Court. However, they have now complied, and 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 Plaintiffs.³

³ Pfizer notes that while some Plaintiffs have substantially complied with their obligations, the Plaintiff Fact Sheets still contain deficiencies that prevent a complete evaluation by Pfizer. (Dkt. No. 984 at 5 n.3). If such non-material deficiencies are not cured upon written request by Pfizer, Pfizer may move to compel production.

G. Curtis Law Group Plaintiffs

These twelve (12) Plaintiffs provided some information after Pfizer filed its motion to dismiss. However, seven (7) of them have failed to provide signed medical authorizations as required by this Court's orders, and all twelve have substantial material deficiencies. (Dkt. No. 950 at 2, 3; Dkt. No. 982-1). For example, Plaintiffs have not provided the dates that they used Lipitor, have not provided the medical conditions or injuries that they allege they experienced while on Lipitor, or have not provided the date that they were diagnosed with diabetes. (Dkt. No. 982-1). The Court has reviewed these Plaintiff Facts Sheets in camera. While the Court finds them materially deficient, eleven of these Plaintiffs have now made some attempt, albeit late, to comply with their discovery obligations, and the Court finds dismissal with prejudice to be too drastic of a remedy. However, as with the 19 Johnson Becker Plaintiffs above, the Court will not waste any more time waiting for these Plaintiffs to come into compliance with its Orders. They may rejoin the MDL once they have met their obligations. Therefore, the Court dismisses these cases without prejudice and with the conditions of CMO 12.

With regard to Plaintiff Cara Owens, however, the Court finds that Plaintiff has failed to make any attempt to comply with her discovery obligations. The PFS that she provided states only her name, social security number, date of birth, and address. It provides *none* of the other information required by the PFS. (Def. Ex. P, submitted in camera). It is page after page of blanks and contains no signature. The Court finds this the equivalent of submitting no PFS at all, and therefore, for the reasons stated above, dismisses this case with prejudice.

H. Conclusion

Pfizer's Motion to Dismiss (Dkt. No. 934) is **GRANTED IN PART AND DENIED IN PART**.

The claims of the following Plaintiffs are **DISMISSED WITH PREJUDICE**:

Plaintiff	Case No.
Lois Chilcoate	2:15-cv-00752
Judy Eady	2:15-cv-00754
Rosa Marie Rice	2:15-cv-00853
Kathy Sandifer	2:15-cv-00877
Diane Rauch	2:15-cv-00895
LoriAnn Little	2:15-cv-00904
Cara Owens	2:15-cv-00930
Freda Draper	2:15-cv-00937
Betty Shoe	2:15-cv-00943
Jacqueline Lattery	2:15-cv-00994
Joyce White	2:15-cv-01088
Ruby Dumas	2:15-cv-01183
Rosa Washington	2:15-cv-01180

The claims of Juanita Church, Case No. 2:15-cv-00762 are **DISMISSED WITHOUT PREJUDICE**.

The claims of the following Plaintiffs are **DISMISSED WITHOUT PREJUDICE BUT WITH THE FOLLOWING CONDITIONS**:

If Plaintiffs seek to refile their action against Pfizer,

- (1) They must do so in the United States District Court for the District of South Carolina or other federal district court;
- (2) They 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) They must not oppose transfer to this MDL proceeding;
- (4) They must not name a defendant that defeats federal diversity jurisdiction; and

- (5) They must serve completed Plaintiff Fact Sheets and accompanying disclosures on Pfizer in accordance with CMO 5 and Amended CMO 6 *before* filing suit and attach a certificate of service reflecting that they have done so to their complaint.

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

Plaintiff	Case No.
Catherine Stanford	2:15-cv-00745
Virginia Shatsar	2:15-cv-00808
Cindy Lindamood	2:15-cv-00850
Stella Phillips	2:15-cv-00852
Laura Tellez	2:15-cv-00854
Gloria Woodward	2:15-cv-00875
Perlie Pulliam	2:15-cv-00876
Janice Forrest	2:15-cv-00901
Nellie De Los Santos	2:15-cv-00907
Donna Darkenwald	2:15-cv-00920
Ora Davis	2:15-cv-00921
Kathie Grauer	2:15-cv-00923
Carolyn Holmes	2:15-cv-00924
Euline Mason	2:15-cv-00925
Flora McCregg	2:15-cv-00926
Nilima Mehra	2:15-cv-00927
Lucille Moore	2:15-cv-00928
Kate Mosley	2:15-cv-00929
Deborah Rogovin	2:15-cv-00934
Truvillina Threadgill	2:15-cv-00953
Antonia Harrison	2:15-cv-00982
Dorothy McLin	2:15-cv-00983
Annie Middleton	2:15-cv-00984
May Lewis	2:15-cv-00985
Elaine Osborne	2:15-cv-00990
Jennie Osborne	2:15-cv-00995
Dorothy Bell	2:15-cv-00996
Linda Moore	2:15-cv-01006
Wilma Salmons	2:15-cv-01017
Lori McIver	2:15-cv-01018

Pfizer's motion is otherwise **DENIED**.⁴ Plaintiff Church's motion for dismissal under Rule 41(a) (Dkt. No. 963) is **DENIED AS MOOT**.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

August 4, 2015
Charleston, South Carolina

⁴ This Order does not apply to Plaintiffs in the case *Garabedian, et. al. v. Pfizer*, 2:14-cv-03995. (See Dkt. No. 949).