

**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. 44**
)
) **This Order relates to cases:**
)
) **2:14-cv-03995**
)
)
)

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

A. Background

The multi-plaintiff case *Garabedian, et. al, v. Pfizer*, Case No. 2:14-cv-03995, was transferred to this MDL on October 9, 2014. (Dkt. No. 562). Under CMO 5, Plaintiff Facts Sheets and accompanying disclosures were due from these Plaintiffs on November 10, 2015. (See CMO 5, Dkt. No. 110). Fifty of the Plaintiffs in the *Garabedian* case failed to provide a Plaintiff Fact Sheet or the accompanying disclosures. On February 18, 2015, Pfizer sent deficiency letters to each of the three law firms that were Plaintiffs' counsel of record in accordance with CMO 6. (Dkt. No. 934-2). After receiving no response, Pfizer filed the instant motion to dismiss on July 6, 2015.¹ (Dkt. No. 934).

Pfizer's deficiency letter, which was sent by e-mail, was filtered into the "junk" e-mail folder of one of Plaintiffs' three law firms, and the second of Plaintiffs' law firms was in the midst of a dissolution at the time the deficiency letter was sent. (See Dkt. No. 1056 at 1-2). Due to these particular circumstances, the parties stipulated to, and the Court entered an order

¹ Pfizer's July 6, 2015 Motion to Dismiss included other Plaintiffs as well. (See Dkt. No. 934). In CMO 39, the Court addressed the motion as to all Plaintiffs but the *Garabedian* Plaintiffs. (See CMO 39, Dkt. No. 989).

granting, an additional extension to provide Plaintiff Fact Sheets to August 24, 2015. (*See* CMO 37, Dkt. No. 949).

Under CMO 37, if Plaintiffs provided a Plaintiff Fact Sheet and other mandatory disclosures by August, 24, 2015, Pfizer would withdraw its motion to dismiss, without prejudice to its ability to renew the motion should it discover material deficiencies in the provided Plaintiff Fact Sheets. (*See id.*). CMO 37 provided that “[w]ith respect to the *Garabedian* Plaintiffs who fail to provide their PFSs and other mandatory disclosures by August 24, 2015, and who do not voluntarily dismiss their actions . . . by August 24, 2015, Pfizer’s Motion to Dismiss will proceed as to those plaintiffs as of August 25, 2015.” (CMO 37, DKt. No. 949 at 2).

On August 24, 2015, thirty of the fifty *Garabedian* Plaintiffs at issue provided Plaintiff Fact Sheets and accompanying disclosures, and Pfizer withdraws its motion as to these thirty Plaintiffs. (Dkt. No. 1056 at 2; Dkt. No. 1084 at 3; Dkt. No. 1084-2). None of the Plaintiffs sought to voluntarily dismiss their claims by August 24, 2015. Plaintiffs’ counsel was unable to make contact with the twenty Plaintiffs who failed to provide Plaintiff Fact Sheets despite contacting them at the addresses, phone numbers, and e-mail addresses that Plaintiffs provided to their counsel, searching for updated contact information via LexisNexis, social media websites, and other methods, and attempting to contact family members. (Dkt. No. 1056 at 3). Plaintiffs’ counsel request that the claims of these Plaintiffs be dismissed without prejudice, and Pfizer requests that they be dismissed with prejudice. (Dkt. Nos. 1056, 1084).

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. Discussion

These twenty Plaintiffs have not provided any information required by this Court’s orders, despite the fact that this information was due ten (10) months ago. 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). Furthermore, the parties here agreed, and the Court ordered, that to the extent Plaintiffs sought to dismiss their claims without prejudice, they would do so by August 24, 2015. (*See* CMO 37, Dkt. No. 949).

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 for their failure to comply with this Court’s orders. As the Court has done with previous Plaintiffs who have failed to respond to their counsel, (*see* CMO 39), the Court finds this behavior is “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).

D. Conclusion

Pfizer’s Motion to Dismiss (Dkt. No. 934) is **GRANTED IN PART**.²

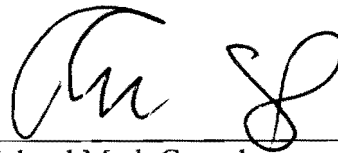
The claims of the following Plaintiffs in *Garabedian, et. al. v. Pfizer*, Case No. 2:14-cv-03995, are **DISMISSED WITH PREJUDICE**:

Plaintiff
LaVonne Adams
Emma Andrews
Carol Barnesel
Varie Booker
Barbara Coffey

² The motion was otherwise resolved by CMO 39.

Barbara Covington
Kimberly Davis
Madylin Deszell
Betty Faucette
Alice Fisher
Marilyn Green
Michelle Grimes
Janet Henderson
Anita Huff
Rose Lawson
Florastine Longs
Koren Martin
Linda Metcalf
Debra Patterson
Cynthia Turk

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

September 4, 2015
Charleston, South Carolina