

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)	MDL No. 2:14-mn-02502-RMG
PRACTICES AND PRODUCTS)	
LIABILITY LITIGATION)	CASE MANAGEMENT ORDER NO. 78
)	
)	This Order relates to cases:
)	
)	2:15-cv-04038 2:15-cv-04771
)	2:15-cv-04058 2:15-cv-05101
)	2:15-cv-04375 2:15-cv-05102
)	2:15-cv-04433
)	2:15-cv-04547
)	2:15-cv-04752

Defendant’s Motion to Dismiss (Dkt. No. 1463)

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. 1463). 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 & 6.¹

After Pfizer filed the motion to dismiss, four Plaintiffs submitted PFSs, and Pfizer has withdrawn the motion as to these four Plaintiffs. (Dkt. Nos. 1502, 1516). One Plaintiff has not responded to Pfizer’s motion at all. The four remaining Plaintiffs have provided materially deficient PFSs. The Court addresses each group of Plaintiffs separately.

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.

¹ The Peters Plaintiffs claim they submitted a timely PFS. (Dkt. No. 1495). These claims are addressed below.

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. Plaintiff Brenda Russell

Plaintiff Brenda Russell has failed to provide any response to Defendant's motion and has failed to serve a PFS on Defendant. Therefore, the Court finds dismissal with prejudice appropriate. By Court order, Ms. Russell's completed PFS was due 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

² Plaintiffs agreed and consented to this Order.

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 Ms. Russell, and she bears responsibility for her failure to adequately supply such information. She has failed to provide such information despite multiple warnings from the Court and follow-up by Pfizer, and *she has provided no reason whatsoever for her 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. Plaintiffs Arnott, Moore, and Potts

The Court has repeatedly warned Plaintiffs that it will dismiss cases with prejudice where they do not provide adequate PFSs and accompanying authorizations. (*E.g.*, CMO 64, Dkt. No. 1345, at 5; CMO 35, Dkt. No. 916, at 5). Here, while Plaintiffs Arnott, Moore, and Potts provided some information, they have failed to provide medical authorizations specifically required by the Court’s orders, after multiple warnings and extensions. Therefore, the Court

dismisses these cases without prejudice and with the conditions stated below. They may rejoin the MDL once they have complied with the Court's orders.

D. Peters Plaintiffs

Plaintiffs Cheryl Sephus, Steven Sephus, Stanley Sephus, and Lashawn Peters (hereinafter "Peters Plaintiffs") have brought suit on behalf of their deceased mother Phillipa Peters. (*See* Case No. 2:15-cv-04752). The Peters Plaintiffs state that they served a PFS on December 23, 2015. Pfizer states that it did not receive this PFS. Regardless, the PFS is missing material information. The sections regarding Ms. Peters' residences, employment history, family medical history, alleged injuries and damages, the health and medical history of Plaintiff, statin prescriptions, disability history, medical conditions, healthcare providers, alcohol and tobacco use, exercise and physical activity, diet and nutrition, and communications with Pfizer are all left entirely blank. (Dkt. No. 1495-2).

On February 26, 2016, Pfizer sent a letter to Plaintiffs' counsel via email stating that it had not received a PFS from the Peters Plaintiffs. (Dkt. No. 1463-5). Plaintiffs' counsel did not receive this letter. (Dkt. No. 1495 at 2). Pfizer filed the instant motion on March 25, 2016, after not receiving a response to its deficiency letter. (Dkt. No. 1463).

Peters Plaintiffs state that the first time they were aware of any deficiency was when Pfizer filed its motion on March 25, 2016. (*See* Dkt. No. 1495). Thereafter, Plaintiffs provided an updated PFS. Pfizer provided this PFS as an exhibit for the Court's review in camera. (*See* Dkt. No. 1503). This updated PFS included some additional information but still did not provide Ms. Peters' employment history, health and medical history, disability history, medical conditions, family medical history, or details regarding her health care providers. Plaintiffs also did not provide information regarding their alleged injuries and damages. Thus, this updated

PFS is still materially deficient. In a reply on April 21, 2016, Pfizer asks the Court to dismiss this case with prejudice if Plaintiffs did not cure the deficiencies within 14 days (by May 5, 2016).

It is clear from the updated PFS that the Peters Plaintiffs are attempting to attain the necessary information but have to seek it from various sources as Ms. Peters is deceased. In addition, the Peters Plaintiffs did not receive Pfizer's deficiency letter and were unaware that Pfizer intended to file a motion to dismiss until it did so. Under these circumstances, the Court finds dismissal too harsh a sanction at this time, and Pfizer's motion is denied without prejudice. The Peters Plaintiffs must provide a material complete PFS within 45 days of the date of this Order. If they do not do so, Pfizer may renew its motion. Plaintiffs are advised that if they fail to do so, their case may be dismissed.

E. Conclusion

Pfizer has withdrawn its motion with regard to Plaintiffs Joyce & Jacob Bryant, Case No. 2:15-cv-04038; Roberta Holt, Case No. 2:15-cv-04433; Grace Sheffey, Case No. 2:15-cv-05102; and Elizabeth Smith, Case No. 2:15-cv-04547. (Dkt. Nos. 1502, 1516).

For the reasons stated above, Pfizer's Motion to Dismiss (Dkt. No. 1463) with regard to the remaining Plaintiffs is **GRANTED IN PART AND DENIED IN PART**.

The claims of Brenda Russell, Case No. 2:15-cv-04375, are **DISMISSED WITH PREJUDICE**.

The claims of the following Plaintiffs

Plaintiff	Case No.
Moore, Alice & Donald	2:15-cv-04058
Arnott, Cytnia & Robert	2:15-cv-04771
Potts, Sheila & Gary	2:15-cv-05101

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.

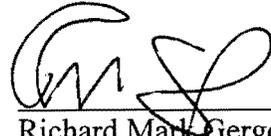
Plaintiffs are advised that if they attempt to refile their suits without complying with the above conditions, the Court may dismiss their second suit with prejudice.

With regard to the Peters Plaintiffs, Case No. 2:15-cv-04752, Pfizer’s motion is **DENIED WITHOUT PREJUDICE**. The Peters Plaintiffs must provide a materially complete PFS within 45 days of the date of this Order. If they do not do so, Pfizer may renew its motion. Plaintiffs are advised that if they fail to provide a materially complete PFS within 45 days of the date of this Order, their case may be dismissed.

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AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'RMG', written over a horizontal line.

Richard Mark Gergel
United States District Court Judge

May 12, 2016
Charleston, South Carolina