

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**IN RE: SEROQUEL PRODUCTS
LIABILITY LITIGATION**

**MDL Docket No.:
6:06-md-1769-Orl-22DAB**

THIS RELATES TO:

**ALL CASES POTENTIALLY
SUBJECT TO DISMISSAL WITH
PREJUDICE UNDER CASE
MANAGEMENT ORDER NO. 2**

**PLAINTIFFS' RESPONSE IN OPPOSITION TO ASTRAZENECA'S MOTION
REQUESTING CONVERSION TO DISMISSAL WITH PREJUDICE
FOR FAILURE TO SERVE PLAINTIFF FACT SHEET**

Plaintiffs in the above-styled and numbered cases (“Plaintiffs”) file this Response in Opposition to the Motion Requesting Conversion to Dismissal with Prejudice for Failure to Serve Plaintiff Fact Sheet filed by the AstraZeneca Defendants (“Defendants”), and would respectfully show the Court as follows:

I. SUMMARY OF RESPONSE

1. Defendants request that the Court dismiss Plaintiffs’ cases *with* prejudice—where such cases have already been dismissed *without* prejudice—pursuant to Defendants’ understanding of Case Management Order No. 2 (“CMO 2”) (Doc. 129). In doing so, Defendants run afoul of unequivocal Eleventh Circuit¹ precedent that cautions against imposition of “death penalty” sanctions under these circumstances. Because the requested

¹ The United States Court of Appeals for the Eleventh Circuit is referred to herein as the “Eleventh Circuit.”

action is not warranted and because the Eleventh Circuit instructs that *dismissal without prejudice is an available, lesser sanction*, the Court should maintain the status quo with respect to these cases and deny Defendants' Motion.

2. This Response, and the issues it addresses, affects approximately 1064 Plaintiffs whose cases have already been dismissed by the Court without prejudice, or who are currently subject to the 80-day waiting period prior to dismissal with prejudice pursuant to the Court's amendment to CMO 2. (Doc. 285.)

II. BACKGROUND

3. At the time that Defendants first moved to dismiss certain Plaintiffs' cases without prejudice, Plaintiffs certified that Fact Sheets for such Plaintiffs had been obtained and served. (*See, e.g.*, Plaintiffs' Certification of Service of Plaintiff Fact Sheets and Response to Defendants' Motion Requesting Dismissals Without Prejudice For Failure to Verify Plaintiff Fact Sheets, a true and correct copy of which is attached hereto as Exhibit A and incorporated herein for all purposes.) Pursuant to the language of CMO 2 (stating that "if a plaintiff files such notice [that his/her Fact Sheet has been served], the plaintiff's claims shall not be dismissed), Plaintiffs argued that they had complied with CMO 2 by serving such Fact Sheets and, therefore, those Plaintiffs' cases should not be dismissed. (Ex. A ¶1.) Nevertheless, the Court dismissed those cases without prejudice. For the reasons set forth in Plaintiffs' prior briefing on this issue, such as in the Ginter Certification and Response, as well as the arguments contained in this Response, Plaintiffs contend and hereby reassert that they have complied with CMO 2 in submitting Plaintiffs' Fact Sheets, and object to the dismissal of any Plaintiffs' cases—with or without prejudice—for failure to serve a Fact

Sheet verification. As shown below, such sanctions are inappropriate, especially as to a dismissal with prejudice, under Eleventh Circuit jurisprudence.

4. Contrary to Defendants' suggestion that Plaintiffs have failed to submit Fact Sheets at all, the submitted Fact Sheets only lack the final step of formal verification. Plaintiffs have disputed (and continue to dispute) whether the absence of a verification at this early stage of discovery renders a Fact Sheet "incomplete" for purposes of CMO 2. The express language of CMO 2 does not specifically order that the Fact Sheets be verified.

5. Moreover, the dismissal procedure contained in CMO 2 was the result of protracted, laborious negotiations between Plaintiffs' and Defendants' counsel over the information to be requested in the Fact Sheets, and whether the Fact Sheets required verification at all. Plaintiffs consented to Defendants' demand for verified Fact Sheets only upon the representation by defense counsel that the failure to serve a verified Fact Sheet would not constitute grounds for a motion to dismiss,² and upon the parties' agreement that Fact Sheet discovery would proceed at a more manageable pace, which—among other benefits—would permit Plaintiffs' counsel to evaluate individual cases and voluntarily dismiss those Plaintiffs' cases who—through intentional and affirmative action—refused to cooperate with the Court's rules and procedures. The more manageable pace of discovery proposed by the parties was not adopted by the Court.

² Defense counsel made this representation provided that it did not appear that Plaintiffs were taking advantage of the situation. Since certain Plaintiffs filed their Response to Defendants' Motion Requesting Dismissals Without Prejudice on or about June 14, 2007, approximately 490 additional defects with respect to verifications have been cured. (*See* Affidavit of Laurence Tien, a true and correct copy of which is attached hereto as Exhibit B and incorporated herein for all purposes.) It can hardly be said that Plaintiffs are taking advantage of the situation because a steady stream of verifications continue to be submitted.

6. Nevertheless, in the spirit of cooperation and in a good faith effort to move the parties' past such discovery disputes, Plaintiffs' attorneys have earnestly and conscientiously worked to obtain any missing Fact Sheet verifications and serve them upon Defendants, and have made remarkable strides in a very short period of time. (*See* Ex. B.) Meanwhile, Defendants have not been prejudiced by the lack of verifications because Defendants have had sufficient information regarding these Plaintiffs from which to conduct further discovery, including but not limited to access to Plaintiffs' medical records, as well as the factual information contained on the unverified Fact Sheets. In fact, nothing has prevented Defendants from obtaining medical records in many cases and using those records to confirm (or call into question) certain Fact Sheet information for themselves. Moreover, case specific discovery under the Court's schedule has yet to begin with regard to the Plaintiffs currently subject to dismissal with prejudice. Nor will such case specific discovery commence at any time because the cases have already been dismissed. Any of the possible justifications for Defendants' need of Plaintiffs' verifications, including any perceived improved ability to rely on the information contained in the Fact Sheets for purposes of impeachment, expert opinion thereon, etc. are not implicated where there is no opportunity for additional discovery to take place because the cases are no longer on file.

III. ARGUMENT & AUTHORITIES

7. Eleventh Circuit standards for imposing the "Draconian remedy of dismissal" instruct that Plaintiffs' cases should not be dismissed with prejudice. *E.E.O.C. v. Troy State Univ.*, 693 F.2d 1353, 1357 (11th Cir. 1982) (quoting *Marshall v. Segona*, 621 F.2d 763, 767 (5th Cir. 1980)) (internal quotation marks omitted). "[A] dismissal *with prejudice*, whether

on motion or *sua sponte*, is an extreme sanction that may be properly imposed *only* when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice.” *Betty K Agencies Ltd. v. M/V Monada*, 432 F.3d 1333, 1337-38 (11th Cir. 2005) (italicized emphasis in original); *see also World Thrust Films, Inc. v. Int’l Family Entm’t, Inc.*, 41 F.3d 1454, 1456 (11th Cir. 1995) (same); *Kilgo v. Ricks*, 983 F.2d 189, 192 (11th Cir. 1993) (same); *McKelvey v. AT&T Techs., Inc.*, 789 F.2d 1518, 1520 (11th Cir. 1986) (same). “Findings satisfying both prongs of our standard are *essential* before dismissal with prejudice is appropriate.” *Betty K Agencies Ltd.*, 432 F.3d at 1339. “[S]uch dismissal is a sanction of last resort, applicable only in extreme circumstances, and generally proper only where less drastic sanctions *are unavailable*.” *McKelvey*, 789 F.2d at 1520 (emphasis added). “Mere delay will not suffice; [a] finding of such extreme circumstances necessary to support the sanction of dismissal must, at a minimum, be based on evidence of willful delay; simple negligence does not warrant dismissal.” *Kilgo*, 983 F.2d at 192-93 (quoting *McKelvey*, 789 F.2d at 1520).

8. In numerous cases, therefore, the Eleventh Circuit has excused parties’ delays and ignorance of court orders because they did not rise beyond mere negligence to the level of “willful misconduct” or “contumacious conduct.” *See, e.g., McKelvey*, 789 F.2d at 1520 (holding that plaintiff’s failure to respond to show cause order requiring that plaintiff demonstrate why his case should not be dismissed for want of prosecution more than a year after the case had been filed was excusable, “simple negligence” because the record demonstrated that plaintiff’s counsel *never received the show cause order from the court*);

see also Beckwith v. Bellsouth Telecomm. Inc., 146 Fed.Appx. 368, 370-71, 372-73 (11th Cir. 2005) (holding that district court abused its discretion by dismissing a *pro se* plaintiff's case with prejudice for failure to comply with court orders where, over the course of more than two years, plaintiff had been unable file a complaint that complied with the Federal Rules of Civil Procedure, despite numerous court orders to do so; "[w]e cannot say that Beckwith's failure to comply with the orders of the district court was a result of bad faith or willfulness"); *Mingo v. Sugar Cane Growers Co-op.*, 864 F.2d 101, 103 (11th Cir. 1989) (declaring an abuse of discretion the district court's finding that "it would be unfair to defendant to allow this unhappy litigation to drag on longer than it already has [and] the circumstances of this case cry out for such a just, speedy, and inexpensive determination," where such language did not establish that "the trial court reflected upon the wide range of sanctions at its disposal and concluded that none save dismissal would spur this litigation to its just completion.").

9. Here, there is no showing that Plaintiffs have acted in bad faith or willfully disregarded the Courts orders. ***At most, Plaintiffs' silence in response to Plaintiffs' counsel's repeated requests for verifications (see Ex. B) amounts to negligent disregard of the Court's orders. Such negligence is not a basis for dismissal with prejudice in this circuit. No willful misconduct can be inferred from such silence.***

10. Moreover, a finding of no willful misconduct is especially appropriate here, where Defendants merely seek to verify the Fact Sheets, a technical defect that is automatically cured when the verifications are supplied. *See Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 366 (5th Cir. 1962) ("Defective verifications may certainly

be cured.”); *Martinez v. Neiman Marcus Group, Inc.*, No. 3:05-CV-0422-P, 2005 WL 2179137, at *5 (N.D. Tex. Sept. 7, 2005) (refusing to sanction plaintiff for delay in supplying verification to interrogatories, where such delay amounted to only a “technical violation of Fed. R. Civ. P. 33,” and the “technical omission” had since been cured); *Doeble v. Sprint Corp.*, No. 00-2053-KHV, 2001 WL 1718259, at *9 (D. Kan. June 5, 2001) (finding that there was “no evidence that [p]laintiff was prejudiced by the delay in receiving [d]efendants’ verification page and there [was] no precedent for finding of waiver in these circumstances”); *cf. Bank of Edgefield v. Farmers’ Co-Operative Mfg. Co.*, 52 F. 98, 101 (5th Cir. 1892) (upholding plea requiring verification where plea was sworn to at trial in open court).

11. That death penalty sanctions should not be imposed here is especially underscored by the fact that missing verifications continue to be submitted and served upon Defendants, thus curing any procedural defects, *including* verifications from those Plaintiffs whose deadlines have expired under CMO 2 and who are now subject to dismissal with prejudice. (See Ex. B.) In view of the above-cited case law, and the fact that previously delayed verifications continue to flow to Defendants as Plaintiffs’ counsel receives them, Plaintiffs should not be subjected to the extreme sanction of dismissal with prejudice.

12. Furthermore, the Eleventh Circuit imposes an additional test that must be satisfied before the sanction of dismissal with prejudice is ordered—i.e., an effective, lesser sanction must be unavailable. See *McKelvey*, 789 F.2d at 1520 (requiring that, to impose sanction of dismissal with prejudice, “less drastic sanctions [must be] *unavailable*”) (emphasis added); see also *Betty K Agencies Ltd.*, 432 F.3d at 1337-38 (holding that district court must specifically find that lesser sanctions “*will not suffice*”) (emphasis added).

13. Here, a lesser, available sanction has already been imposed by the Court because Plaintiffs' cases have already been dismissed without prejudice. The Court is no longer burdened with shepherding and adjudicating such cases, and Defendants cannot show (and have not shown) any prejudice by the Court's simply maintaining the status quo with respect to those cases. *From Defendants' perspective, the cases are already terminated.* Indeed, only the Plaintiffs themselves would be harmed, and their due process rights thwarted, by converting such dismissals to dismissals with prejudice because they have failed to respond to requests for their verifications. Such failure to respond may be attributable to the fact that some Plaintiffs have moved since the commencement of the litigation, are not receiving their mail, have had their telephones disconnected, are experiencing medical issues, or some other unforeseen reason.³ In fact, as set forth in Exhibit B, with respect to hundreds of Plaintiffs, counsel has received confirmation from the postal service that such Plaintiffs are no longer receiving mail at their record addresses, and such mail has been returned to counsel. Therefore, with respect to this subset of Plaintiffs, counsel can confirm that they have no knowledge that their cases are pending dismissal with prejudice, or that any problem exists with their case at all.

14. Notwithstanding their silence, which does not equal willful misconduct, Plaintiffs deserve their day in court, particularly when it is apparent that hundreds of Plaintiffs are not receiving communications from their attorneys. *See Betty K Agencies*, 432 F.3d at 1339 (“We rigidly require the district courts to make these findings precisely because

³ Seroquel, an “anti-psychotic” drug, is indicated for individuals suffering from serious mental illnesses. The fact that Seroquel users are having difficulty complying with Court procedures should also be taken into account when weighing whether Plaintiffs' cases should be dismissed with prejudice, denying them any chance for a true adjudication on the merits.

the sanction of dismissal with prejudice is so unsparing, and we strive to afford a litigant his or her day in court, if possible.”) (citation and internal quotation marks omitted); *compare Glades Pharms., LLC v. Murphy*, 227 Fed.Appx. 779, 780 (11th Cir. 2007) (refusing to hold that district court abused its discretion by dismissing case *without prejudice* for failure to comply with discovery orders); *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2005 WL 5417814, at *1 (N.D. Ohio Oct. 18, 2005) (dismissing plaintiffs cases *without prejudice* for failure to submit fact sheets); *In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d 563, 579 (acknowledging parties’ agreement whereby plaintiffs who failed to specifically identify a particular defendants’ product on a fact sheet or product identification chart would dismiss that defendant without prejudice, subject to the parties entering a tolling agreement).

15. Alternatively, if necessary, Plaintiffs’ counsel may sign the missing verifications or otherwise stipulate to the information contained within the Fact Sheets such that Defendants would be able to proceed with this more reliable information. This Court permits parties’ attorneys to sign verifications in other circumstances. *See* L.R. 7.01(e) (allowing attorneys to sign verifications for interrogatories in admiralty and maritime cases); *see also Greene v. United States*, 447 F.Supp. 885, 891 (D.C. Ill. 1978) (recognizing that “if the attorney does answer the interrogatories in his own name, the answers would bind the party on the same principle by which a party is bound by admissions or stipulations entered into by his attorney,” citing 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2172 n.29 (1970)). If allowed in this instance, this procedure would immediately cure the defect with respect to the missing verifications, and permit the parties to continue to move forward with discovery.

CONCLUSION

Ultimately, in light of the stringent mandate imposed by the Eleventh Circuit regarding dismissals with prejudice, coupled with Defendants' inability to articulate any prejudice by maintaining the current status of Plaintiffs' cases as dismissed without prejudice, the Court should not convert Plaintiffs' cases to "dismissed with prejudice." At a bare minimum, the current status protects Plaintiffs' due process rights in the event that certain Plaintiffs do later resurface and desire to refile their case. *See Zocaras v. Castro*, 465 F.3d 479, 485 (11th Cir. 2006) ("[T]he sanction imposed should fit the interests jeopardized and the harm caused by the violation."). The Court should deny Defendants' Motion, and grant Plaintiffs such other and further relief to which they may be justly entitled, including but not limited to amending CMO 2 to provide that any of Plaintiffs' cases that may be subject to dismissal under the procedures stated therein shall only be dismissed without prejudice, or alternatively, to allow Plaintiffs' counsel to verify the Facts Sheets or otherwise stipulate to the information contained therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August, 2007, I electronically filed the foregoing: PLAINTIFFS' RESPONSE IN OPPOSITION TO ASTRAZENECA'S MOTION REQUESTING CONVERSION TO DISMISSAL WITH PREJUDICE FOR FAILURE TO SERVE PLAINTIFF FACT SHEET with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to the counsel listed on the attached Service List.. I further certify that I mailed the foregoing document and the Notice of Electronic Filing by First-Class U. S. Mail delivery to the non-CM/ECF Participants listed on the attached Service List.

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