

JUDGE BARBARA JACOBS ROTHSTEIN



01-MD-01407-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

**ORDER GRANTING DEFENDANT
WYETH'S MOTION TO DISMISS
WITH PREJUDICE ON BEHALF OF
ALL DEFENDANTS PURSUANT TO
CMOs 15 AND 15A**

This document relates to Exhibits A & B

BEFORE this Court is Wyeth's motion, on behalf of all defendants, for an order dismissing the actions of Plaintiffs failing to file individual complaints (listed on Exhibit A) and the original multi-plaintiff complaints (listed on Exhibit B) pursuant to Case Management Orders 15 and 15A.

INTRODUCTION

On May 29, 2003, this Court entered CMO 15, Severance of Multiple Plaintiff Cases, and ruled that these multiple plaintiff cases did not meet the threshold standard for permissive joinder under Fed. R. Civ. P. 20(a). Plaintiffs in any multiple-plaintiff case pending in MDL 1407 as of May 29, 2003, excluding those cases alleging loss of consortium on behalf of a spouse, were therefore directed to file and serve new individual (severed) complaints within 30 days of entry of the order. CMO 15, at ¶ 2.

On August 26, 2003, this Court entered CMO 15A, which provides that "the original multiple plaintiff Complaints . . . shall be dismissed with prejudice as of the

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1 effective date of this Order, which includes any plaintiffs for whom a timely individual
2 severed complaint was not filed." CMO 15A, at ¶ 3. In relevant part, CMO 15A states as
3 follows:

4 If any multiple plaintiff Complaints are docketed in MDL 1407 after the
5 entry of this Order, plaintiffs must sever the claims of the plaintiffs in
6 accordance with CMO 15. After all applicable deadlines set forth in CMO
7 15 have elapsed, defendant may move for the dismissal of the original
8 multiple plaintiff complaint in accordance with the provisions of this CMO.

9 *Id.*

10 This Court issued a minute entry on October 30, 2003, and directed that defendants
11 file within seven (7) days of the entry of the October 30, 2003 minute entry a single
12 proposed order of dismissal listing all cases in which plaintiffs filed untimely new
13 individual complaints in violation of CMOs 15 and 15A for cases docketed on or before
14 May 29, 2003. As a result, on November 7, 2003, defendants supplied the Court with such
15 lists only for cases that were docketed in MDL 1407 as of May 29, 2003. On December 8,
16 2003, defendants filed a second such proposed order of dismissal listing plaintiffs whose
17 cases were docketed after May 29, 2003 who failed to comply with this Court's orders. On
18 May 7, 2004, after considering both of defendants' proposed orders of dismissal, this Court
19 issued a final order of dismissal for plaintiffs filing untimely new individual complaints in
20 violation of CMOs 15 and 15A. Thereafter, on June 4, 2004, defendants submitted another
21 motion for dismissal pursuant to CMOs 15 and 15A including additional cases in which
22 plaintiffs filed untimely or no individual complaints. This Court issued an Order granting
23 defendants' motion on August 23, 2004.

24 This Order pertains to additional plaintiffs who failed to comply with CMO 15 and
25 multi-plaintiff complaints that can now be properly dismissed pursuant to CMO 15A.
26 Exhibit A to this motion lists the plaintiffs who failed to file individual complaints as
27 required by CMO 15. Exhibit B lists the original multiple plaintiff cases to be dismissed
28 with prejudice pursuant to CMO 15A.

1 **DISCUSSION**

2 **I. DISMISSAL OF PLAINTIFFS' CLAIMS WITH PREJUDICE IS**
3 **WARRANTED PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE**
4 **41(b) AND 37.**

5 The failure of Plaintiffs listed on Exhibit A to file severed complaints as mandated
6 by CMOs 15 and 15A warrants dismissal of Plaintiffs' actions with prejudice. Federal Rule
7 of Civil Procedure 41(b) permits dismissal of an action for a plaintiff's failure to comply
8 with any order of court. Fed. R. Civ. P. 41(b). Except under certain circumstances,
9 which are not relevant here, dismissal under Rule 41 "operates as an adjudication upon the
10 merits." *Id.* Further, according to Federal Rule of Civil Procedure 37, if a party "fails to
11 obey an order to provide or permit discovery . . . the court . . . may make such orders in
12 regard to the failure as are just," including "an order . . . dismissing the action or
13 proceeding." Fed. R. Civ. P. 37(b)(2)(C). In the Ninth Circuit, the standards governing
14 dismissal for failure to follow a court order are "basically the same" under both Rule 41
15 and Rule 37. *Malone v. United States Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987).

16 Before dismissing a case for noncompliance with court-ordered discovery, a court
17 must weigh five factors: "(1) the public's interest in expeditious resolution of litigation; (2)
18 the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the
19 public policy favoring disposition of cases on their merits; and (5) the availability of less
20 drastic sanctions." *Id.* at 130 (quoting *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th
21 Cir. 1986)). Under Rule 37, in addition to consideration of these five factors, a dismissal
22 sanction for failure to comply with a discovery order also requires willfulness, bad faith, or
23 fault of the party. *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983);
24 *American Telesis Inc. v. Star Telecom*, No. C 99-2687 VRW, 2001 U.S. Dist. LEXIS
25 16583, at *5 (N.D. Cal. Oct. 11, 2001).

26 All five factors weigh heavily against Plaintiffs in these cases, and dismissal with
prejudice is warranted. See May 5, 2004 Order of Dismissal with Prejudice for Failure to

1 Comply with CMO Nos. 15 and 15A. Plaintiffs' willful and intentional disregard of this
2 Court's orders has interfered with the prompt resolution of this litigation and the Court's
3 need to manage a large multi-district litigation. Moreover, Defendants have been
4 prejudiced because without the information contained in the CMO 15 severed complaints,
5 their ability to defend these cases is seriously compromised. Plaintiffs' unreasonable delays
6 in filing individual complaints promote the loss of evidence, whether through faded memory
7 or lost documents. Although there is a preference that cases be disposed of on their merits,
8 Plaintiffs' failure to comply with CMO 15 makes it impossible to dispose of these cases on
9 this basis. Finally, dismissal is warranted because, absent a convincing reason for
10 noncompliance with CMO 15, Plaintiffs' failure to file severed complaints is not excusable.
11 Therefore, given the overwhelming weight of factors favoring dismissal and the strong
12 evidence of Plaintiffs' willful disregard of CMO 15, Plaintiffs' failure to file individual
13 complaints supports dismissal of these cases with prejudice.

14 **II. DISMISSAL OF THE MULTI-PLAINTIFF CASES LISTED ON EXHIBIT B**
15 **IS APPROPRIATE AS ALL APPLICABLE DEADLINES HAVE PASSED**

16 CMO 15A provides that "[a]fter all applicable deadlines set forth in CMO 15 have
17 elapsed, defendant may move for the dismissal of the original multiple plaintiff complaint in
18 accordance with the provision of this CMO." CMO 15A, at ¶ 3. As this Court has
19 previously stated, "dismissal of the original multi-plaintiff cases is not a sanction, *per se*,"
20 but instead "is simply an administrative procedure the court has implemented to eliminate
21 non-viable complaints from its docket." Order Granting Defendants June 4, 2004 Motion
22 to Dismiss with Prejudice for Failure to Comply with CMOs 15 and 15A, at p. 3.

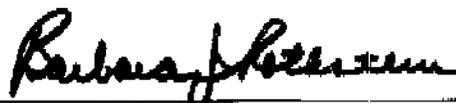
23 The original multi-plaintiff cases listed on Exhibit B were docketed in MDL 1407 on
24 or before September 7, 2004. Under CMO 15, individual complaints were to be filed, at
25 the latest, thirty days from docketing. Therefore, all applicable deadlines set forth in CMO
26 15 have elapsed in the cases listed on Exhibit B, and these original multi-plaintiff
complaints can be properly dismissed pursuant to CMO 15A.

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1 CONCLUSION

2 For the foregoing reasons, defendants' motion to dismiss the cases listed on Exhibits
3 A and B is granted, and these cases are dismissed with prejudice in their entirety.

4 DATED this 18th day of February, 2005.

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Hon. Barbara J. Rothstein
7 United States District Judge

Exhibit A: Plaintiffs Represented by Counsel Failing to File a CMO 15 Complaint

	Plaintiff Name	Case Name	State	MDL Case No.	Disfiter Date
1	Lang- Daniel	<i>Daniel Lang, et al. v. Wyeth, et al.</i>	MS	C04-1847	9/7/04
2	Gillespie- Vernon	<i>Ainsworth, James, et al. v. Wyeth, et al.</i>	MS	C04-1846	9/7/04

Exhibit B: List of Original Multi-Plaintiff Cases Ripe for Dismissal Pursuant to CMO 15/15A

	Case Name	State	MDJ Case No.	Date Docketed
1	Aidt, Jeffrey, et al. v. Bayer Corp., et al.	MS	C04-0721	4/14/04
2	Ainsworth, James, et al. v. Wyeth, et al.	MS	C04-1846	9/7/04
3	Allford, Keva, et al. v. Bayer Corp., et al.	MS	C04-0399	3/9/04
4	Davis, Vanessa, et al. v. Wyeth, et al.	MS	C04-0713	5/3/04
5	Dunlap, Verna, et al. v. Bayer Corp., et al.	MS	C04-0014	1/22/04
6	Lacy, Deedward, et al. v. Wyeth, et al.	MS	C04-0021	2/2/04
7	Lamar, Vivian, et al. v. Bayer Corp., et al.	AL	C03-2463	8/22/03
8	Lang, Daniel, et al. v. Wyeth, et al.	MS	C04-1847	9/7/04
9	Tucker, Leatha, et al. v. Wyeth, et al.	MS	C03-3126	11/10/03
10	Townsend, Nathan, et al. v. Wyeth, et al.	MS	C04-0015	2/3/04
11	Wade, Dennis, et al. v. Bayer Corp., et al.	MS	C04-0716	5/11/04