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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 IN RE: PHENYLPROPANOLAMINE
7 (PPA) PRODUCTS LIABILITY
8 LITIGATION,

MDL NO. 1407

9 ORDER GRANTING
10 DEFENDANTS' MOTION TO
11 DISMISS

12
13 This document relates to:

14 See Exhibit A

15 This matter comes before the court on a motion to dismiss by
16 Wyeth, GlaxoSmithKline Consumer Healthcare, L.P. and Block Drug
17 Company, Inc. to dismiss plaintiffs' claims for failure to serve
18 individual complaints. Having considered the briefs in favor of
19 and in opposition to this motion, the court finds and rules as
20 follows:

21 The cases listed on Exhibit A were originally filed as part
22 of multi-plaintiff complaints. Under Case Management Order
23 ("CMO") 15, plaintiffs who were party to such complaints are
24 required to file severed individual complaints within 30 days of
25 docketing in this multi-district litigation. After plaintiffs in
26 the instant motion failed to do so, defendants filed a motion to
dismiss for failure to comply with CMO 15. On November 18, 2004
the court denied that motion, finding that plaintiffs' counsel's

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1 neglect was excusable. The court ordered plaintiffs to file the
2 required complaints, giving a deadline of December 3, 2004.

3 Plaintiffs subsequently filed individual complaints with the
4 court. In their motion defendants now claim, however, that
5 plaintiffs have failed to serve hard copies of those complaints
6 as required by CMO 15 and the January 21, 2004 Supplemental
7 Order, and have not to date done so, except on defendant Bayer.
8 The instant motion seeks dismissal for failure to comply with CMO
9 15 and the court's November 18, 2004 order.

10 Plaintiffs do not dispute that they were under an obligation
11 to serve on defendants hard copies of the individual complaints.
12 Instead, they claim that they did, in fact, mail hard copies of
13 the complaints to defendants in a timely fashion. They submit
14 with their response an affidavit of paralegal Samantha Munoz, who
15 testifies that:

16 On November 22, 2004, I was request by attorney Timothy
17 O'Brien to send individual complaints by email to the
18 clerk of the U.S. District Court Western District of
19 Washington to be e-filed and e-served according to
20 Judge Rothstein's order of November 18, 2004. On Novem-
21 ber 22, 2004, I prepared a letter to all counsel en-
22 closing copies of the individual complaints
23 [A]ll were sent by placing these items in an envelope
24 with proper first class postage addressed to: C. Joyce
25 Hall, Watkins & Eager, Post Office Box 650, Jackson, MS
26 39205, cc: Donna Brown Jacobs, Eugene Naylor, Alexander
Alston, Richard Burson, Raymond Brown, Drew Malone,
Patrick Buchanan and William Dalehite. This was then
deposited in the Downtown Pensacola Post Office's blue
drop box located at our office building.

24 Affidavit of Samantha Munoz at 1-2.

25 The court first finds that plaintiffs did not timely serve
26 defendants with hard copies of the individual complaints. Even

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1 taking Munoz's affidavit as true, the testimony does not estab-
2 lish that plaintiffs mailed hard copies of the complaints to all
3 defendants, only that the complaints were sent to Joyce Hall,
4 counsel for Bayer. The court finds no inequity in so ruling, as
5 it is plaintiffs' responsibility to produce a certificate of
6 service in situations exactly like the one before the court. This
7 they have failed to do.

8 Having found that plaintiffs have failed to comply with CMO
9 15, the court must now determine whether dismissal is the proper
10 sanction therefor.

11 The applicable standard for dismissal for failure to comply
12 with a court order requires a court to evaluate five factors:
13 "(1) the public's interest in expeditious resolution of litiga-
14 tion; (2) the court's need to manage its docket; (3) the risk of
15 prejudice to the defendants; (4) the public policy favoring
16 disposition of cases on their merits; and (5) the availability of
17 less drastic sanctions." *Malone v. United States Postal Serv.*,
18 833 F.2d 128, 130 (9th Cir. 1987).

19 In the cases to which this motion pertains, defendants argue
20 that these five factors weigh in favor of dismissal. They assert
21 that plaintiffs' delay impedes the resolution of these disputes
22 and the ability of the court to manage its docket, problems
23 compounded by the complex nature of the multi-district litiga-
24 tion. Defendants also argue that plaintiffs' delay is prejudi-
25 cial, impairing defendants' ability both to discover evidence
26 before it is lost, and to accurately gauge their potential

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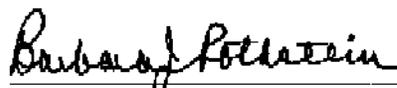
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1 liability. Plaintiffs claim that defendants were on notice of
2 the nature of plaintiffs' claims, as plaintiffs served plaintiff
3 fact sheets and electronic versions of the individual complaints.
4 Defendants respond that commencing discovery would have the
5 potential of waiving defendants' right to demand proper service.
6 Defendants also emphasize that this is not plaintiffs' first
7 failure to comply with CMO 15, and that defendants have been
8 forced to file motions and to send plaintiffs' counsel reminders
9 in attempts to cure plaintiffs' dilatory behavior in the past.

10 The court finds that dismissal under these circumstances is
11 proper. Given the complex nature of the MDL, enforcement of court
12 deadlines is of paramount importance. More than nine months have
13 passed since the docketing of the original multi-plaintiff
14 complaints in these cases, and plaintiffs' noncompliance has
15 effectively prevented defendants from going forward with discov-
16 ery. Finally, while public policy favors resolution of a case on
17 its merits, plaintiffs' failure to allow discovery to proceed
18 does nothing to ensure such resolution; in fact, quite the
19 contrary.

20 For the foregoing reasons the court hereby GRANTS defen-
21 dants' motion to dismiss.

22 DATED at Seattle, Washington this 6th day of April, 2005.

23 

24 BARBARA JACOBS ROTHSTEIN
25 UNITED STATES DISTRICT JUDGE
26

Exhibit A: CMO 15 Complaint Filed, But Defendants Not Served

Plaintiff	MDL #	Original Multi-Plaintiff Case	Booked in MDL	CMO 15 complaint filed
Buse, Phillip	04-2391	Phillip Buse, et al. v. Bayer Corp., et al. (MDL # 04-1360)	6/21/2004	11/22/2004
Wright, Richard	04-2398	Phillip Buse, et al. v. Bayer Corp., et al. (MDL # 04-1360)	6/21/2004	11/22/2004
Deere, Richard	04-2393	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2004
Jones, Thelma M. on behalf of the Estate of Mary J. McGee, deceased	04-2401	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2003
Kelly, Sigrett	04-2398	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/23/2004
King, Billy and Vickie	04-2397	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2004
Longine, Eula	04-2399	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/23/2004
Mosby-Jones, Theresa, on behalf of the Estate of Claudia Mac Mosby, deceased	04-2400	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2004
Rivers, John H. and Katherine	04-2396	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2004
Robb, Virginia and Matthew J.	04-2395	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2004
Rominger, Barbara and Kenneth	04-2394	Richard Deere, et al. v. Bayer Corp., et al. (MDL # 04-1363)	6/21/2004	11/22/2004