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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

ORDER GRANTING DEFEN-
DANTS' MOTION TO DISMISS

9 This document relates to:
10 *DeLaughter v. Bayer Corp.*,
11 C03-3877

12
13 This matter comes before the court on a motion to dismiss
14 filed by Bayer Corporation on behalf of all defendants. Having
15 considered the pleadings filed in support of and opposition to
16 this motion, the court finds and rules as follows.

17 A. Deposition Scheduling

18 The fact discovery deadline in this case was April 22,
19 2005.¹ According to Bayer and the exhibits attached to its mo-
20 tion, defendants' counsel began trying to schedule depositions of
21 the three fact witnesses - plaintiff Bobby DeLaughter, his wife
22 (and plaintiff) Connie DeLaughter, and Gerald Renniger - at the
23 end of November, 2004. Bayer's counsel again attempted in January
24

25 ¹Defendant Bayer has also filed a motion to extend the
26 discovery deadline which, given the court's ruling herein, is
stricken as moot.

1 2005 to contact plaintiffs' Florida counsel, who responded that
2 he was unavailable through February. Counsel for Bayer sent an
3 additional five email requests for available dates to depose the
4 above witnesses, without receiving an adequate response from
5 plaintiffs' counsel. Eventually Bayer was able to depose Mr.
6 Delaughter; to date, plaintiffs' counsel has not agreed on an
7 available date for the depositions of either Mrs. Delaughter or
8 Mr. Renniger, failing to respond to defendants' email requests as
9 recently as March 20, 2005 and April 14, 2005.

10 In February 2005 Bayer also began attempts to schedule the
11 depositions of the nine health professionals - treating physi-
12 cians and an EMT - identified as relevant to this case. The time
13 lines of Bayer's attempts as to each witness are detailed in its
14 briefs in support of this motion. In short, Bayer has to date
15 been unable to complete all depositions, and each deposition that
16 did eventually go forward took several email requests and unre-
17 turned phone messages by Bayer to elicit a response by plain-
18 tiffs' counsel; several times plaintiffs' counsel canceled a day
19 or two before, or on the day of, the scheduled deposition.
20 Several cancellations resulted in physicians' cancellation fees
21 charged to Bayer's attorneys, and one witness, Dr. Fisk, has
22 refused to reschedule his twice-canceled deposition.

23 Plaintiffs' counsel offers no valid explanation for their
24 recalcitrance in scheduling depositions. The sum of their re-
25 sponse is that Bayer has made a habit of waiting until the last
26 minute, then rushing to schedule depositions before the discovery

1 deadline lapses. Plaintiffs' "evidence" of this behavior - a list
2 of cases in which both sides' attorneys also appear - proves
3 nothing. Moreover, while plaintiffs' counsel maintains that Bayer
4 waited "11 months" before attempting to schedule depositions,
5 see, e.g., Plaintiffs' Brief in Opposition at 2, Bayer's first
6 attempt came via email at the end of November, 2004 - some five
7 months before the deadline - and that late only at the request of
8 plaintiffs' Florida-based counsel for a reprieve in the wake of
9 Hurricane Ivan.²

10 This type of unresponsiveness in scheduling depositions -
11 particularly in the complicated business of scheduling physi-
12 cians' depositions - is unacceptable discovery practice. CMO 6
13 sets out specific procedures by which the parties are to cooper-
14 ate during discovery - procedures that, as outlined above,
15 plaintiffs' counsel have in this case clearly flouted. Plain-
16 tiffs' counsel's unrelenting failure to respond to defendants'
17 discovery requests is a flagrant violation of this court's
18 management order, costing enormous unnecessary energy and expense
19 to both parties, though especially to defendants, and to this
20 court.

21 B. Plaintiff's Fact Sheet Revisions and Deposition Errata Sheet

22 Plaintiffs' counsel's most egregious abuse of the discovery
23 _____

24 ²Because plaintiffs raise no issue of fact in their response
25 to defendants' motion, the court finds that oral argument is
26 unnecessary in this case. Plaintiffs' request that they be
allowed to depose defendants' counsel is also denied as
unnecessary and an obvious attempt to harass defendants' counsel.

1 process, however, is set forth in Bayer's "Supplement" to its
2 motion to dismiss. In that brief Bayer documents two instances of
3 attorney misconduct, if not outright ethical violation. The first
4 involves the Delaughters handing to defense counsel at a deposi-
5 tion their handwritten draft of the plaintiff's fact sheet
6 ("PFS"). The responses the Delaughters supplied on that version
7 of the PFS differ in marked, material ways from the final
8 attorney-produced version that counsel had submitted to defen-
9 dants, to which plaintiffs' counsel had attached the signature
10 page from the original handwritten version. For example, plain-
11 tiffs' counsel (1) changed information regarding several dates of
12 ingestion of certain medications (e.g. "May 5, 1997" for Alka-
13 Seltzer Plus Sinus Medicine to "On or about May 10, 1997"); (2)
14 altered whether plaintiffs were aware of expiration dates on the
15 medicine (from several dates certain to "Unknown" on the final
16 PFS); (3) and added an allegation - not present on the handwrit-
17 ten PFS - that plaintiff had ingested Robitussin. The final
18 version also *omitted* facts included in the original, including
19 the identities of several treating physicians, specifics regard-
20 ing plaintiff's stroke symptoms, and the occurrence of a second,
21 more serious stroke.

22 In the second instance, plaintiffs' counsel submitted thirty
23 pages of "errata" to Mr. Delaughter's deposition, supplying not
24 just typographical or minor corrections, but materially and in
25 some cases grossly different answers altogether. For example, in
26 response to inquiry regarding whether Mr. Delaughter knew how

1 Robitussin had been added to the final PFS, Mr. Delaughter
2 answered he did not. The errata sheet instead provides "I was on
3 one phone and my wife on the other phone but she done [sic] the
4 talking mostly. Connie thought she was supposed to fill out two
5 sets of papers one for the Alka-Seltzer products and one for the
6 Robutssin. When she talked to them in Florida thats [sic] when
7 the answers was [sic] corrected to be combined in one set of
8 papers. That was her mistake." In another example, Mr. Delaughter
9 was asked whether he remembered any other colors of the packaging
10 of the medication he took; he responded "No, sir; I don't remem-
11 ber." The errata sheet responds "Red, yellow, white and purple,
12 yellow, white, green, yellow and white." Several "no" responses
13 are changed to "yes;" "Well, I'm sure it did" to "No, it did
14 not."

15 Plaintiffs' counsel attempts to explain by submitting that
16 Mr. Delaughter suffers from "multiple severe medical conditions
17 that compromise his ability to perform well under the stressful
18 conditions of a deposition and necessitate multiple drafts of the
19 PFS" as a result of his stroke. Plaintiffs' Brief in Opposition
20 at 2. Yet plaintiffs submit no evidence in support of this
21 assertion, and assure the court that it should not have concerns
22 about Mr. Delaughter's competency. Plaintiffs also try to cast
23 the changes as mere clarifications. As the examples above illus-
24 trate, the variance from the initial version to the final PFS,
25 and from the testimony at deposition to the errata sheet, are far
26 more than mere clarifications; "yes" is not a clarification of

1 "no." Moreover, Mr. Delaughter testified at his deposition that
2 he did not at any time speak to his attorneys about the accuracy
3 of his handwritten responses after submitting them. Plaintiffs
4 offer no evidentiary support for their later explanation that the
5 final draft is the result of telephone conversations between Mr.
6 Delaughter and his attorneys.

7 Defendants do not ask for, and the court will therefore not
8 entertain, the imposition of sanctions for these ethical
9 breaches. Taken together, however, it is clear that at the very
10 least plaintiffs' alterations and omissions of multiple material
11 facts have worked serious prejudice on defendants' ability to
12 mount a defense, by knowingly requiring defendants to proceed
13 with false or incomplete information. Such harm cannot be undone
14 simply by extending the discovery deadline in this case.

15 C. Discussion

16 The applicable standard for dismissal for failure to comply
17 with a court order requires a court to evaluate five factors:
18 "(1) the public's interest in expeditious resolution of litiga-
19 tion; (2) the court's need to manage its docket; (3) the risk of
20 prejudice to the defendants; (4) the public policy favoring
21 disposition of cases on their merits; and (5) the availability of
22 less drastic sanctions." *Malone v. United States Postal Serv.*,
23 833 F.2d 128, 130 (9th Cir. 1987).

24 The court finds that these five factors weigh in favor of
25 dismissal. Plaintiffs' continuing delay impedes the resolution of
26 this dispute and the ability of the court to manage its docket,

1 problems compounded by the complex nature of the multi-district
2 litigation.

3 The court also finds that plaintiffs' delay is prejudicial
4 to defendants, impairing defendants' ability to discover evidence
5 before it is lost or forgotten, and in the case of Dr. Fisk,
6 possibly preventing defendants from obtaining any testimony at
7 all. Counsel for defendants have also spent an inordinate amount
8 of time and energy trying to schedule depositions - time and
9 energy that could have been spent on substantive litigation
10 matters. In addition, the misinformation supplied to defendants
11 jeopardizes the integrity of defendants' litigation strategy,
12 leading them to build a defense based on facts that have proven
13 untrue.

14 Less drastic measures, such as an extension of the discovery
15 deadline, are highly unlikely to have any salutary effect on
16 defendants' case, as there is no evidence that plaintiffs'
17 counsel will be any more cooperative going forward, depriving
18 defendants the fair opportunity to mount effective defense.

19 Finally, while public policy favors resolution of a case on
20 its merits, plaintiffs' counsel's failure to cooperate to allow
21 discovery to proceed does nothing to ensure such resolution; in
22 fact, quite the contrary. Plaintiffs' counsel's dilatory tactics
23 and deliberate supplying of misinformation obscure rather than
24 illuminate the facts that would have enabled resolution on the
25 merits.

26 For the foregoing reasons, the court GRANTS defendants'

1 motion to dismiss. The motion for an extension of the discovery
2 deadline is stricken as moot.

3 Dated at Seattle, Washington this 16th day of August, 2005.

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6 BARBARA JACOBS ROTHSTEIN

7 UNITED STATES DISTRICT JUDGE

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