

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**IN RE: PROTON-PUMP INHIBITOR
PRODUCTS LIABILITY LITIGATION**

**2:17-MD-2789 (CCC)(MF)
(MDL 2789)
and all member and related cases**

This Document Relates to: ALL ACTIONS

Judge Claire C. Cecchi

CASE MANAGEMENT ORDER NO. 39

CASE MANAGEMENT ORDER NO. 39
(Modifies CMO No. 9 to Address “No PFS Cases”)

The Court hereby issues the following Case Management Order to govern the procedure and schedule for cases in which a Plaintiff fails to serve a Plaintiff Fact Sheet in response to Defendants’ Notice of Non-Compliance in accordance with the timeline set forth by Case Management Orders No. 9 and 27 (“CMO No. 9” and “CMO No. 27” or together “CMOs Nos. 9 and 27”).¹

I. Scope of Order

This Order applies to all cases pending in, filed in, or transferred to MDL 2789. This CMO is entered on consent based on the fact that this MDL was formed more than two and a half years ago, in August 2017. The obligation for a Plaintiff to prepare and serve a Plaintiff Fact Sheet (“PFS”) in MDL 2789 was originally set forth in CMO No. 9, which was entered in February 2018, and the initial deadline for serving PFSs under CMO No. 9 was set 120 days thereafter. At this time, there remain a significant number of cases in which all of the deadlines for serving PFSs under CMO No. 9 have passed but PFSs have not been served. Based on these considerations, this CMO

¹ Presently pending before this Court are several motions to dismiss that were filed against tolling plaintiffs who failed to serve a PFS. (See, e.g., Doc. 336, Doc. 386, Doc. 429, and Doc. 430). This Case Management Order shall not affect those pending motions to dismiss.

provides a mechanism to address cases where the Plaintiff has not served a PFS without burdening the litigation, the parties, and the Court with multiple motions to compel and/or dismiss. This Order applies only to those cases in which, in each case, the Plaintiff has failed to serve a PFS as required by CMO No. 9 or in response to a notice of non-compliance served on the Plaintiff and the time period for doing so has elapsed pursuant to CMO No. 9 Section II.E.1 through II. E. 3. The purpose of this CMO is to encourage service of a PFS and to provide those Plaintiffs with a final opportunity to serve their PFS or have their cases dismissed.

This Order supersedes only the motion to compel procedure set forth in CMO No. 9, Section II.E.4 (Phase III: Motion to Compel) and only inasmuch as all underlying notices and meet-and-confer obligations of CMO No. 9 have been met by Defendants. It does not apply to cases where a PFS has been served but has been designated as “not substantially complete” by the Defendant(s) and does not supersede or otherwise affect any other portions of CMOs Nos. 9 and 27.

II. Definition/Categorization of Cases as No PFS

If a Plaintiff has failed to produce a PFS in response to Defendants’ Notice of Non-Compliance in accordance with the timeline set forth by CMO No. 9 or CMO No. 27, the case is deemed a “No PFS Case” under this Order.

III. Procedure for No PFS Cases

A. Production Requirements

For all No PFS Cases, including those in which a motion to compel production of a PFS is already pending, as set forth in Section III.B below, Defendants shall periodically prepare a list of such cases in the template format attached to this Order as Exhibit A (the “No PFS List”).² A

² Defendants shall serve the No PFS List on the individual attorney representing the Plaintiff included on the No PFS List. In addition, a courtesy copy of the No PFS List shall be provided to the MDL Co-Lead Counsel so that the

Plaintiff may be included on the No PFS List only if the relevant Defendant(s) has or have first complied with the Failure to Serve a PFS procedures set forth in CMO No. 9 Section II.E, as follows:

1. grant a 30 day extension to serve the PFS, if timely requested by the Plaintiff under CMO No. 9, Section II.E.1; and
2. send a notice of non-compliance to counsel for the individual Plaintiff as required by CMO No. 9, Section II.E.1, giving the Plaintiff 21 days to cure by serving his or her PFS.

In addition to the requirements above, to the extent the parties have agreed, as set forth in CMO No. 9 Section II.E.3, to meet and confer following expiration of the 21-day cure period, the 14-day meet and confer period must have expired. By placing a case on the No PFS List, Defendants are representing to the Court that they have complied with all steps required by CMO No. 9 Section II.E.1, 2 and 3.

Any Plaintiff who fails either to challenge inclusion on the No PFS List by identifying the PFS previously produced to Defendants or to produce a signed and dated PFS in compliance with Section II of CMO No. 9 by the applicable deadlines set forth in this Order will have his or her case dismissed as set forth in Section III.C below.

B. Mandatory Deadlines

1. In all cases in which a PFS has not been produced and the meet and confer deadline to respond to Defendants' Notice of Non-Compliance under CMO No. 9 expired on or before March 31, 2020, no sooner than 30 days after the entry of this Order, Defendants shall

Plaintiffs' Steering Committee is aware of the number of cases on each list; however, the obligation to comply with the requirements and deadlines set forth in this CMO shall rest solely with the individual attorney representing the Plaintiffs included on the No PFS List. The PSC and its individual members shall have no obligation to take any action with regard to any individual Plaintiff's case other than those cases in which the Plaintiff has retained that PSC member lawyer/law firm to represent them.

provide, via email, to the individual Plaintiff's counsel, a No PFS List identifying the relevant cases by Plaintiff name. For each such case, within 60 days of Defendants' sending the above-referenced email(s) per this subsection, each Plaintiff on the No PFS List must either (a) challenge inclusion on the applicable No PFS List by identifying the PFS previously produced to Defendant(s) or (b) produce a signed and dated PFS as required by CMO No. 9.

2. In all cases in which a PFS has not been produced and the meet and confer deadline to respond to Defendants' Notice of Non-Compliance under CMO No. 9 expired on or after April 1, 2020, no sooner than 60 days after the entry of this Order, Defendants may periodically provide, via email to the individual Plaintiff's counsel, a No PFS List identifying the relevant cases by Plaintiff name. For each such case, within 90 days of Defendants' sending the above-referenced email(s) per this subsection, each Plaintiff on this No PFS List must (a) either challenge inclusion on the applicable No PFS List by identifying the PFS previously produced to Defendant(s) or (b) produce a signed and dated PFS as required by CMO No. 9.

3. If a Plaintiff produces a PFS in response to his or her inclusion on a No PFS List, the operation of this Order no longer applies to that Plaintiff. If a Plaintiff produces a PFS in response to his or her inclusion on a No PFS List under this Order and there is a dispute as to its sufficiency, Section II.D (Fact Sheet Deficiency Dispute Resolution) of CMO No. 9, which governs Deficiency Letters, shall apply. However, a Plaintiff may not serve an unsigned,³ blank, or "shell" (*i.e.*, "placeholder") PFS to avoid dismissal under Section III.C of this Order.

³ The signature of the Plaintiff is required, including an original signed signature page, an e-signature (whether done through DocuSign, Adobe-Sign, or other electronic signature program), a scanned image of the signed signature page of the PFS, or a photograph of the signed signature page of the PFS. A signature by an attorney "on behalf of" the Plaintiff shall not be considered the signature of the Plaintiff.

C. Dismissal for Failure to Comply

1. Failure to comply with this Order will result in automatic dismissal of the entire complaint without prejudice. “Automatic” means that the Court shall enter the order of dismissal without prejudice as set forth in Section III.C.3 below.

2. Upon the expiration of the applicable deadlines set forth in Section III.B above, with respect to Plaintiffs remaining on the No PFS List who either (a) failed to challenge inclusion on the No PFS List or (b) failed to produce a signed PFS as required by Section III.A above, Defendants will submit, via email, to the relevant individual Plaintiff’s counsel, with a courtesy copy to the PSC, a proposed Omnibus Order of Dismissal (“Dismissal Order”) separately identifying the cases for dismissal without prejudice.

3. Thereafter, Defendants will submit, by email to the Court with a copy to the relevant individual Plaintiff’s counsel and the PSC, the proposed Dismissal Order for the Court’s entry in each of the individual dockets. Within 21 days of Defendants’ submission of the Dismissal Order to the Court, any individual Plaintiff’s counsel who believes a case is identified in error in the submission to the Court shall notify the Court in writing with copies to Defendants and the PSC of the claimed error, with any evidence that the case should not be included.⁴ If no such notices and corresponding evidence are received within the 21 days, the Court shall cause dismissals in each of the individual dockets to be entered promptly thereafter. If a Plaintiff provides such notice and evidence within the 21-day time period, his or her case shall be removed from the Omnibus Order of Dismissal, after which the Court shall cause dismissals in

⁴ The PSC is not responsible for responding to appearance on a No-PFS List or a Dismissal Order List on behalf of any individual plaintiff, which is the sole responsibility of the attorney retained by each individual plaintiff. Nevertheless, the PSC and counsel for Defendants shall meet and confer about the No-PFS and/or Dismissal Order process and report to the Court as necessary as a result of Plaintiffs, if any, erroneously appearing on either list.

each of the remaining individual dockets to be entered promptly. This 21-day period is not intended to be an extension of the deadlines set forth in Section III.B above.

4. Dismissal of the cases of Plaintiffs removed from the Dismissal Order upon notice to the Court shall be held over by the Court until the next scheduled Case Management Conference, and the dismissal of these Plaintiffs' cases shall be placed on the Case Management Conference agenda. Counsel for any such Plaintiff shall appear at the Case Management Conference in person to address the filed notice, and counsel for the Defendant(s) in that Plaintiff's case may present arguments to the court in support of dismissal of the Plaintiff's case. Should the Court find that any such case should be dismissed for failure to serve a PFS, after hearing argument of counsel, if any, the Court shall cause dismissals in each of the individual dockets to be entered.

SO ORDERED.

DATE: May 20, 2020



Claire C. Cecchi, U.S.D.J.

Exhibit A

