

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In Re: FEMA TRAILER
FORMALDEHYDE PRODUCTS
LIABILITY LITIGATION

MDL NO. 07-1873

SECTION "N" (5)

THIS DOCUMENT RELATES TO
Member Cases Referenced in Rec. Docs.
25130, 25131, 25132, 25135, 25141, 25144,
25146, 25154, 25174, 25232, 25233, 25234,
25235, 25236, 25237, 25238, 25239, 25240,
25241, 25243, 25244, 25245

ORDER AND REASONS

Before the Court are the following motions:

1) "Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets" (**Rec. Doc. 25130**), filed by defendant Gulf Stream Coach, Inc. ("Gulf Stream"), seeking to dismiss twelve plaintiffs from *Rhonda Brown, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-4716;

2) "Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets" (**Rec. Doc. 25131**), filed by defendant Gulf Stream, seeking to dismiss seven plaintiffs from *Constance Bullock, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-6949;

3) "Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88

Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25132**), filed by defendant Gulf Stream, seeking to dismiss eight plaintiffs from *LaSonia Davison, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7891;

4) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25135**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Stacy Allen, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7925;

5) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25141**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Thomas Beard, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-6945;

6) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25144**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Dawn Esposito, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-4718;

7) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25146**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Shera Borne, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 10-1280;

8) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25154**), filed by defendant Gulf Stream, seeking to dismiss three plaintiffs from *Lester Davis, et al v. Gulf Stream Coach, Inc., et al*, Civil Action

No. 09-4717;

9) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25174**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Casey Brown, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7075;

10) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25232**), filed by defendant Gulf Stream, seeking to dismiss twenty-five plaintiffs from *Wilma Necaize, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 10-2229;

11) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25233**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *George Burns, et al v. Gulf Stream Coach, Inc.*, Civil Action No. 10-2246;

12) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25234**), filed by defendant Gulf Stream, seeking to dismiss four plaintiffs from *Marvin Lott, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-6944;

13) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25235**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Timothy Lyons, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7079;

14) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88

Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25236**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Brandon McNair, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7078;

15) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25237**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Amanda Nieves, et al v. Gulf Stream Coach, Inc.*, Civil Action No. 10-2233;

16) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25238**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Kenneth Trent, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7895;

17) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25239**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Dawn Esposito, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-4718;

18) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25240**), filed by defendant Gulf Stream, seeking to dismiss four plaintiffs from *Jessica Jackson, et al v. Gulf Stream Coach, Inc.*, Civil Action No. 10-2231;

19) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25241**), filed by defendant Gulf Stream, seeking to dismiss three plaintiffs from *James Johnson, et al v. Gulf Stream Coach, Inc., et al*, Civil Action

No. 09-6951;

20) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25243**), filed by defendant Gulf Stream, seeking to dismiss four plaintiffs from *Angela Pittman, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 10-1282;

21) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25244**), filed by defendant Gulf Stream, seeking to dismiss three plaintiffs from *David Pujol, et al v. Gulf Stream Coach, Inc.*, Civil Action No. 10-2232; and

22) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25245**), filed by defendant Gulf Stream, seeking to dismiss two plaintiffs from *Kahla Roach, et al v. Gulf Stream Coach, Inc., et al*, Civil Action No. 09-7081.

In each of the above motions, Gulf Stream moves to dismiss the claims of the referenced plaintiffs with prejudice on grounds that they have failed to comply with this Court’s orders by failing to cure material deficiencies in their Plaintiff Fact Sheets. In response to each of the motions, the plaintiffs have filed a response memorandum. *See* Rec. Docs. 25515, 25516, 25517, 25518, 25519, 25520, 25521, 25522, 25523, 25524, 25525, 25526, 25527, 25528, 25529, 25532, 25533, 25534, 25535, 25536, 25537 and 25539.

A. BACKGROUND:

Shortly after the creation of this MDL, the Court issued Pre-Trial Order No. 2, which mandates that each plaintiff serve on the defendants a completed and verified Plaintiff Fact Sheet

(PFS) within thirty days after transfer (or direct filing) into the MDL. (Rec. Doc. 87, signed Jan. 30, 2008). This Order, which reflected an agreement among the parties regarding case management, also established a “Procedure for Dismissal of Claims for Failure to Comply with Discovery.” *See* Rec. Doc. 87 at pp. 8-9, § III(D). The Court reiterated this dismissal procedure in Pre-Trial Order No. 32 (Rec. Doc. 1180). According to the procedure, “[w]hen any plaintiff has failed to materially comply with his or her obligations under this Order to submit a completed PFS within the timelines established..., a counsel representing a Defendant shall send to Plaintiff’s Counsel for the plaintiffs in question...a letter confirming the failure to timely file and/or explaining the material deficiency in the PFS.” *See* Rec. Doc. 1180 at p.5. This deficiency letter must notify the plaintiff that he or she “will have thirty (30) days to cure the alleged material deficiencies, or any Defendant may thereafter move for dismissal, upon an appropriate showing that Plaintiff’s claims should be dismissed for failure to comply with the Court’s applicable Orders.” *Id.* More recently, in Pre-Trial Order No. 88, the Court (1) temporarily narrowed the PFS deficiency process to twenty-three “key” questions (except for cases where deficiency notices had been served and the time for curing such deficiencies already had expired) and (2) for deficiency notices served after March 24, 2011, extended the time for curing deficiencies to sixty (60) days. *See* Rec. Doc. 22124 (signed June 24, 2011), as corrected in Rec. Doc. 22153.

B. APPLICABLE LAW:

Federal Rule of Civil Procedure 41(b) authorizes the Court to dismiss an action or claim if a “plaintiff fails to prosecute or to comply with [the Federal Rules of Civil Procedure] or a court order.” Fed. R. Civ. P. 41(b). Because a dismissal with prejudice “is an extreme sanction

that deprives the litigant of the opportunity to pursue his claim,” a dismissal under Rule 41(b) should be granted “only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile.” *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (footnote omitted) (quoting *Callip v. Harris County Child Welfare Dep’t*, 757 F.2d 1513, 1519 (5th Cir. 1986)). Additionally, the Fifth Circuit looks for “at least one of three aggravating factors: ‘(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct.’” *Id.* (quoting *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986)).

Federal Rule of Civil Procedure 37(b)(2) “empowers a district court to impose ‘just’ sanctions on parties who disobey a discovery order.” *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994). However, “[b]ecause the law favors the resolution of legal claims on the merits, and because dismissal is a severe sanction that implicates due process,” the Fifth Circuit has articulated four factors “that must be present before a district court may dismiss a case as a sanction for violation of a discovery order”: (1) the violation must result “‘from willingness or bad faith and [be] accompanied by a clear record of delay or contumacious conduct;” (2) “the violation ... must be attributable to the client instead of the attorney;” (3) the violation “‘must substantially prejudice the opposing party;” and (4) there must be no “less drastic sanction [that] would substantially achieve the desired deterrent effect.” *Id.* at 1380-81 (citations omitted) (quoting *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990)).

C. ANALYSIS:

The Court finds that the stringent standards for dismissal under Rules 41(b) and 37(b)(2) have not been met.

First, Gulf Stream does not state in its motion papers when its counsel sent notice to plaintiffs' counsel specifying the PFS deficiencies. In the case of virtually every motion that this Court has granted pursuant to the deficiency dismissal procedure outlined in PTO Nos. 2 and 32, the defendant moving for dismissal has attached as exhibits all deficiency notices sent and all correspondence relating to the deficiency process for the plaintiffs at issue. This enables the Court to ensure that the plaintiffs have received adequate notice of the alleged deficiencies and have been afforded the appropriate sixty-day period for curing the alleged deficiencies. Because the instant motion papers do not contain this information, the Court is unable to make such a determination in this case. Based on this record, the Court is unable to find the requisite delay or contumacious conduct necessary for dismissal under Rule 41(b) or Rule 37(b)(2).

Second, and more importantly, the MDL phase of this litigation is near its end. No interest would be served at this late stage of the MDL by dismissing these plaintiffs' claims based on PFS deficiencies, even though certain of the deficiencies are listed among the "key" questions identified in Pre-Trial Order No. 88. The purpose of PTO 88 was to create a searchable database to be used toward global resolution. That effort has been completed, and most of the manufacturing defendants have agreed to a global settlement. Within the next two to three weeks, the Court will be filing a Notice of Suggestion of Remand with the Judicial Panel on Multidistrict Litigation ("MDL Panel") for all claims against those few remaining defendants, such as Gulf Stream, which have not reached a global resolution. *See* Pretrial Order No. 96, dated March 15, 2012 (Rec. Doc. 24856) ("With regard to all cases against manufacturing

defendants other than the Settling Defendants in which venue is proper in a district other than the Eastern District of Louisiana, this Court intends to file a Notice of Suggestion of Remand with the Judicial Panel on Multidistrict Litigation pursuant to Rule 10.1(b) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation.”). Thus, claims with proper venue elsewhere will be returned or transferred to the appropriate districts in the immediate future. For cases with proper venue in this District, the Court is in the process of setting such cases on the trial docket. These cases will be subject to full discovery and motion practice. *Id.* (“Member cases for which venue is proper in the Eastern District of Louisiana shall be promptly set for trial, except that trial shall not be set in any case against a Settling Defendant.”). Given this procedural posture and the additional circumstances set forth in the opposition memoranda, the Court finds that it would be inappropriate to dismiss these plaintiffs’ claims based on an MDL procedure that has largely served its purpose.

Accordingly,

IT IS ORDERED that the following motions are hereby **DENIED**:

- 1) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25130**), filed by defendant Gulf Stream;
- 2) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25131**), filed by defendant Gulf Stream;
- 3) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25132**), filed by defendant Gulf Stream;

4) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25135**), filed by defendant Gulf Stream;

5) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25141**), filed by defendant Gulf Stream;

6) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25144**), filed by defendant Gulf Stream;

7) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25146**), filed by defendant Gulf Stream;

8) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25154**), filed by defendant Gulf Stream;

9) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25174**), filed by defendant Gulf Stream;

10) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25232**), filed by defendant Gulf Stream;

11) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25233**), filed by defendant Gulf Stream;

12) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25234**), filed by defendant Gulf Stream;

13) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25235**), filed by defendant Gulf Stream;

14) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25236**), filed by defendant Gulf Stream;

15) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25237**), filed by defendant Gulf Stream;

16) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25238**), filed by defendant Gulf Stream;

17) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25239**), filed by defendant Gulf Stream;

18) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25240**), filed by defendant Gulf Stream;

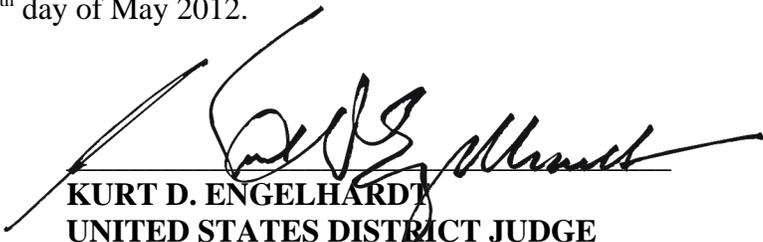
19) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25241**), filed by defendant Gulf Stream;

20) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25243**), filed by defendant Gulf Stream;

21) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25244**), filed by defendant Gulf Stream; and

22) “Motion to Dismiss for Failure to Comply with Pre-Trial Orders Nos. 2, 32, 86 & 88 Relating to Plaintiff Fact Sheets” (**Rec. Doc. 25245**), filed by defendant Gulf Stream.

New Orleans, Louisiana, this 11th day of May 2012.


KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE