IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE DEPAKOTE:	)	
	)	
RHEALYN ALEXANDER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 12-CV-52-NJR-SCW**
	)	
ABBOTT LABORATORIES, INC.,	)	**LEAD CONSOLIDATED CASE**
	)	
Defendant.	)	

ORDER

ROSENSTENGEL, District Judge:

On October 24, 2016, the Court issued an Order to Show Cause as to why certain cases should not be dismissed for failure to follow a Court Order.[1] (Doc. 639). This was the second Order to Show Cause concerning the failure by certain Plaintiffs to comply with the requirement to provide claim forms to Defendants. (*See* Doc. 639) (providing a full recitation of the procedural history of the claim forms issue). In the October 24 Order, the Court warned that failure to file a response by the deadline of November 8, 2016, would result in an immediate dismissal. A variety of responses were filed by some, but not all, of the delinquent Plaintiffs before the deadline passed.

From the outset, the Court is compelled to note that a small group of Plaintiffs continues to monopolize the Court's attention. Whether it is blatantly failing to plead diversity jurisdiction, accidently dismissing Plaintiffs through filing an incorrect

[1] The October 24 Order to Show Cause was subsequently clarified to expressly exclude all cases filed after the relevant December 2015 deadline. (Doc. 651).

Amended Complaint,[2] or failing to comply with Orders of the Court, these Plaintiffs are drawing upon a disproportionate and unreasonable amount of the Court's time and resources. (*See* Doc. 667) (concerning the failure to properly allege diversity jurisdiction); *see also* Case No. 12-cv-1091 (Doc. 59) (concerning the "inadvertent" dismissal of several Plaintiffs' claims).

Even without these errors, the unique nature of the Depakote mass action continues to challenge the Court's ability to manage the docket. For example, the current litigation is not appropriately consolidated under Rule 23 despite having many of the burdensome characteristics of a class action. Additionally, because the majority of cases were directly filed in the Southern District of Illinois, the mass action avoided the MDL process thereby eliminating the resources and tools usually available for taming complex litigation.[3] These challenges are exponentially compounded by repeated substantive mistakes and failures to comply with the Court's Orders.

The Court does not view Plaintiffs as one giant party to be held accountable for each other's actions. Indeed, the vast majority of litigants and counsel are doing exactly what is expected and required when proceeding in federal court. Nevertheless, all parties must be mindful that every minute the Court spends dealing with these completely avoidable issues is time taken from the resolution of the mass action. With that in mind, the Court will address each of the Plaintiffs in detail below.

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[2] The Court has no doubt that these first two errors were caused by a combination of the habitual "copy and paste" practice of litigation combined with a failure of attention to detail.

[3] Outside of the Depakote litigation, the Court maintains a full caseload of over 300 active civil cases in various stages of the judicial process, in addition to a full criminal docket. The Depakote litigation added an additional 134 cases to the Court's caseload. The Court gratefully notes that the Seventh Circuit recently provided temporary funding for an additional law clerk to assist with mass action. The added manpower has dramatically increased the Court's ability to manage the docket and advance the Depakote litigation and must be fully utilized before it ends.

Nonresponsive Plaintiffs

In their supplemental response to the original Order to Show Cause entered on May 16, 2016, Plaintiffs indicated that a number of Plaintiffs were "nonresponsive" to counsel. (Doc. 480). Those same individuals, listed below in Table 1, failed to provide any response to the second Order to Show Cause. It has almost been a year since the original deadline elapsed; these Plaintiffs have had ample time to comply with multiple Orders of the Court.

At the Status Conference, Lead Plaintiffs' Counsel requested an additional thirty days to allow counsel to try to get in touch with the clients in question. Each counsel was aware as of May 2016 that the listed Plaintiffs were nonresponsive and that every effort needed to be made to contact these Plaintiffs. Also, for any Plaintiff who could not be reached, counsel could have filed a motion for an extension of time to comply with the Court Order *before* the November 8 deadline instead of waiting until the November 17 Status Conference to make such a request. The Court has no confidence that an additional thirty, sixty, or even 365 day extension would make a difference, because the evidence before the Court strongly suggests that these Plaintiffs have abandoned their claims (in fact, almost thirty days have passed since the status conference, and still nothing has been filed). Therefore, the request for additional time is **DENIED**.

The Court is faced with a set of Plaintiffs who were aware of the requirements to provide the most basic of information to Defendants and failed to do so. *See* Exhibit 1 (a draft copy of the claim form Plaintiffs were to provide). Instead of complying with the Court's Order, they cut off all communication for almost a year and counting. The Court

warned that dismissal with prejudice was a possible outcome if the parties failed to respond to the second Order to Show Cause. (Doc. 639, at pp. 2-3). It is undisputed that dismissal of these actions for failure to follow a Court Order and failure to prosecute is warranted under the circumstances. Plaintiffs argue, however, that any dismissal should be without prejudice because there are minors involved. (Doc. 692, at p. 40) ("The only thing I would ask is, we're dealing with children, and I don't think that it's appropriate to dismiss their case with prejudice on account of their mother or father being a poor representative for their claim.")

Dismissal with prejudice is a harsh sanction that can be employed when Plaintiffs demonstrate a pattern of dilatory or contumacious behavior. *Patterson by Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston*, 852 F.2d 280, 285 (7th Cir. 1988). The Court is satisfied that such behavior has been demonstrated by the adult Plaintiffs listed in Table 1. By failing to comply with a Court Order and then engaging in "radio silence" for almost a year and counting, Plaintiffs have demonstrated a disregard for the judicial process. Accordingly, the individual claims of the adult representatives listed in Table 1 are **DISMISSED with prejudice**; this includes their ability to serve as the future representative of the associated minor child in any Depakote litigation.

As to the minor Plaintiffs listed in Table 1, the case of *Patterson by Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston* ("*Patterson*") is instructive as to how the Court should proceed. 852 F.2d 280 (7th Cir. 1988). In *Patterson*, the Seventh Circuit affirmed a dismissal with prejudice of a minor's claim for failing to cooperate in discovery and for repeated failures to comply with Court Orders. In doing so, the Court distinguished the

"long established" duty of the Court to safeguard a minor's interest by pointing out that all litigants are bound by the conduct of their attorney and by noting the repeated failures to comply with Court Orders. *Id.* at 284. While the Court finds the conduct in question sufficiently egregious to warrant severe sanctions, the fact that the minor Plaintiffs are the real parties in interest and the conduct in question appears to be attributable entirely to the actions of their representatives, dismissal with prejudice of their claims is not warranted. Accordingly, the individual claims of the minor Plaintiffs listed in Table 1 are **DISMISSED** without prejudice.[4]

The culpability for this circumstance does not rest exclusively with the individual Plaintiffs or even their representatives. When the Court set the December 31, 2015 deadline, it was the duty of each counsel to ensure compliance by Plaintiffs with the Court Order. The Court assumes that each counsel, as officers of the Court, executed this duty and knew, as of January 1, 2016, which Plaintiffs where not in compliance with the Court Order and why. Yet it was not until five months later (and only after the issuance of an Order to Show Cause), that the Court was alerted that these Plaintiffs were nonresponsive. The same absence of communication permeated the most recent Order to Show Cause responses. Instead of informing the Court as to the status of the parties in question, as some counsel correctly chose to do, for nearly twenty-three Plaintiffs, no response or indication was received. The Court can appreciate that Plaintiffs' primary focus may be on the large number of meritorious cases within the mass action, but the

[4] The counsel for Plaintiffs Janet Woolfolk, individually and as next friend of A.W., and Rhealyn Alexander, individually and next friend of E.I. filed a Motion to Withdraw as Counsel due to an inability to contact the Plaintiffs. Case No. 12-cv-57 (Doc. 103); Case No. 12-cv-52 (Doc. 675). As their claims have been dismissed, the associated Motions to Withdraw as Counsel are **DENIED** as moot.

Court is obligated to manage *every* active case on its docket, including those considered by some to be the low hanging fruit. (Doc. 692, at pp. 33; 32).

Finally, the Court notes that Plaintiffs' counsel indicated that they have been unable to contact "Olivia Wilson, mother of Plaintiff Jonathan Wilson." (Doc. 674 at pp. 2-3). The Court has received no indication that Jonathan Wilson is a minor or otherwise legally incompetent. While the Court understands that an adult child may reside at home where traditional parent/child social roles apply, the law recognizes Jonathan Wilson as a competent litigant until proven to the contrary. As he is not represented by a "next friend" representative, the failure to prosecute his claim and the repeated failure to comply with an Order of this Court fall squarely on his shoulders. Therefore, the individual claim of Jonathan Wilson is **DISMISSED** without prejudice to ripen into with prejudice thirty days after the date of this Order. To avoid the possibility of a communication error, Plaintiff Wilson may file an affidavit within the thirty day window explaining why he has failed to prosecute his case and follow Orders of this Court.

Table 1

Name of Representative	Child/Injured Party	Case Number
Alexander Rhealyn	E.I.	12-cv-52
Brandi Arrowood	J.A.	12-cv-824
Jacquelyn Askins-King	J.A.	14-cv-1248
Paula Cannon	J.C.	14-cv-1248
Caroline Davis	S.D.	14-cv-1248

Name of Representative	Child/Injured Party	Case Number
Erica Hart	A.H.	12-cv-824
Tina Haynes	J.H.	12-cv-824
Erin Jackson	R.M.	12-cv-824
LaSandra Palmer	J.P.	12-cv-824
Janet Woolfolk	A.W.	12-cv-57
N/A	Jonathan Wilson	12-cv-163
Loida Colon	L.C.	12-cv-57

Plaintiffs previously listed under the "Proof of Use" category

Plaintiffs' response to the May 15, 2016 Order to Show Cause indicated that several Plaintiffs did not provide a claim form because they were having difficulty locating evidence of their usage of Depakote. Thirteen of these individuals failed to provide any response. Like all of the other Plaintiffs, these thirteen individuals were warned that "failure to provide a timely response would result in immediate dismissal." Accordingly, the Plaintiffs listed in Table 2 are **DISMISSED without prejudice**.

Table 2

Name of Representative	Child/Injured Party	Case Number
Angela Fetter	G.I.	12-cv-824
Angela Fetter	J.I.	12-cv-824
Dana Littles	J.B.	14-cv-1248
Patricia McKinney-Cole	J.M.	12-cv-824

Name of Representative	Child/Injured Party	Case Number
Alicia Middleton	A.M.	12-cv-824
Tomeka Nealy	A.N.	12-cv-824
Debbie Oppermann	K.O.	12-cv-824
Elizabeth Scott	M.S.	14-cv-1248
Mandi Truman	L.T.	14-cv-1248
Adria Weaver	M.W.	12-cv-824
Kimberly Wright	Z.W.	14-cv-1248
N/A	Matthew LeMaster	15-cv-472
Danielle Yancer-Lindsey	J.A.	14-cv-1248

Claims Plaintiffs will be moving to dismiss

Plaintiffs indicated, prior to the November 8 deadline, that they would be moving to dismiss the claims of the individuals listed in Table 3. To date, Plaintiffs have dismissed the claims of Plaintiffs Misty Williams-Couch individually and as next friend of her minor child F.J. and Anthony Pate. If Plaintiffs still seek to dismiss the claims of Shamika Anderson, individually and as next friend of M.G. or Holly Lynn Russell individually as parent and next friend of D.M., they must file the appropriate dismissal paperwork on or before **December 20, 2016**.

Table 3

Name of Representative	Child/Injured Party	Case Number
Shamika Anderson	M.G.	14-cv-425

Name of Representative	Child/Injured Party	Case Number
N/A	Anthony Pate	12-cv-1091
Holly Lynn Russell	D.M.	12-cv-53
Mary Williams-Couch	F.J.	13-cv-1061

Plaintiffs who filed responses

The remaining Plaintiffs filed responses with the Court before the November 8, 2016 deadline. With one exception, their responses were completely unacceptable. In the face of a warning that the Court was contemplating dismissal with prejudice, the vast majority of replies provided were nonresponsive or paltry in detail. Take for example the responses for Courtney Peace and Patricia Garris-Howard. (Docs. 659; 662). First, these responses were not prepared by the individual Plaintiffs and instead were crafted by their attorney. Second, they do nothing to clarify why the Plaintiffs failed to comply with the December 2015 deadline or even whether a claim form was submitted back in May of 2016.[5] Given the repeated failures to comply with this Court's Orders, including the most recent deficient responses, the claims of Patricia Garris-Howard, individually and as next friend of T.G.H., and Courtney Peace, individually and as next friend of C.P. are **DISMISSED** without prejudice.

The remaining responses, with one exception, are completely inadequate and fail to satisfy the requirements set forth in the October 29 Order to Show Cause. The

[5] Indeed, the responses appear to imply that counsel failed to verify whether the Plaintiffs submitted the required forms until November 1, 2016, after the Court's second Order to Show Cause. Each individual counsel has a duty to ensure that their clients understand and comply with the Orders of the Court. This is especially true in the face of an Order to Show Cause. It is unacceptable if an attorney did not follow up to ascertain whether his or her client had complied with the Court's previous Order back in May.

responses fall into one of two patterns: either the document fails to present any relevant information related to the Order to Show Cause, or the document provides little more than a skeletal response.[6] The details provided do not allow the Court to make any meaningful assessment regarding their compliance with this Court's Order. Plaintiffs were instructed to explain "in detail" why their claims should not be dismissed, and instead of heading this instruction, they provided the Court with three or four sentences of vague explanation. *Compare* (Doc. 674-1, at p. 11) *with* (Doc. 674-1, at p. 6) (providing the minimum level of detail for the Court to assess the Plaintiffs failure to provide the required forms). Plaintiffs where warned that the Court was contemplating dismissal of their cases and yet the Plaintiffs submitted inadequate responses. Accordingly, the Plaintiffs' claims listed in Table 4 are **DISMISSED** without prejudice.

Table 4

Name of Representative	Child/Injured Party	Case Number
N/A	Victoria Cook	12-cv-163
Patricia Garris-Howard	T.G.H.	14-cv-1248
Tequila Harrell-Wright	C.H.	12-cv-694
N/A	Jessie Hobson	13-cv-134
N/A	Lindsey James	13-cv-134
Penny Elaine Jaquay	A.J.	13-cv-622
Karen Kelly	S.K.	12-cv-53

[6] The majority of the responses in the second category present four basic pieces of information: (1) Plaintiff took Depakote; (2) Plaintiff gave medical information to the lawyer; (3) the lawyer was not able to get the records; and (4) the records may not exist anymore. *See e.g.* (Doc. 674-1).

Name of Representative	Child/Injured Party	Case Number
Janet Mann	K.P.	13-cv-1312
N/A	Judy Mason	12-cv-163
N/A	Shana Mullenix	15-cv-472
Courtney Peace	C.P.	14-cv-1248
Pinnie Pounds	N.P.	12-cv-824
Thompsalina A. Reed	H.G.	12-cv-57
Susan Roles	J.M.	15-cv-472
James R. White	D.W.	12-cv-57
Melissa A. Wilkinson	J.W.	12-cv-53

Finally, the Court must note two items that do not fit into the above categories. First, the response by Penny Jaquay was not sworn as required by the Court and is therefore facially unacceptable. Second, as noted above, the Court received affidavits from the biological mothers of several adult Plaintiffs without receiving responses from the actual litigants themselves. All litigants must act on their own behalf unless the Court receives information that a litigant is a minor or is legally incompetent.[7]

IT IS SO ORDERED.

DATED: December 13, 2016

NANCY J. ROSENSTENGEL
United States District Judge

[7] The Court recognizes that some Plaintiffs have lifelong cognitive impairment. If Plaintiffs believe an adult requires a legal representative to conduct this litigation, then they must immediately bring such a request to the Court's attention. Responses by anyone other than the listed Plaintiff and his or her counsel will not be recognized by the Court.