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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**IN RE JUUL LABS, INC., MARKETING,  
SALES PRACTICES, AND PRODUCTS  
LIABILITY LITIGATION**

**Case No. 3:19-md-02913-WHO**

**Honorable William H. Orrick**

**This Document Relates to:**  
*Lucas Lawless*

**PLAINTIFF LUCAS LAWLESS’  
RESPONSE IN OPPOSITION TO  
DEFENDANT JLI’S MOTION TO  
DISMISS WITHOUT PREJUDICE FOR  
FAILURE TO SUBMIT DISCOVERY  
REQUIRED BY CASE MANAGEMENT  
ORDER NO. 8**

Plaintiff Lucas Lawless, by and through undersigned counsel, states as follows in response and opposition to Defendant JUUL Labs, Inc.’s (“JLI”) Motion to Dismiss Without Prejudice for Failure to Submit Discovery Required by Case Management Order No. 8.

**I. BACKGROUND**

Plaintiff Lucas Lawless is an 18-year-old living in Whitewater, Montana. He started using JUUL in 2019 at just 17 years old. As a result of Defendants’ conduct, he suffers nicotine addiction, mental health and behavioral issues, anxiety, and shortness of breath. These conditions started when he was a minor and continue into adulthood. Mr. Lawless’ Short-Form Complaint and Demand for

1 docket on April 13, 2020. Pursuant to Case Management Order (“CMO”) No. 8, his Plaintiff Fact  
2 Sheet (“PFS”) was due 60 days after his case was docketed, on June 12, 2020. On July 13, 2020,  
3 Defendant JLI served Plaintiff with a Notice of Overdue Discovery and subsequently filed its  
4 motion to dismiss on August 13, 2020. From April 16, 2020 to the present, Plaintiff Counsel has  
5 diligently but unsuccessfully attempted to communicate with Mr. Lawless to facilitate completion  
6 of a PFS for his case. For the reasons set forth below, Plaintiff requests that the Court deny  
7 Defendant JLI’s motion to dismiss and grant Plaintiff additional time to complete and serve a PFS.  
8

## 9 **II. ARGUMENT**

10 Dismissal is a harsh penalty that should be imposed only in extreme circumstances, which  
11 are not present in this case. As set forth below, each factor that the Court must weigh to determine if  
12 dismissal is appropriate weighs in favor of denying Defendant JLI’s Motion to Dismiss and granting  
13 Plaintiff more time to comply with CMO 8. There is no indication or assertion that Plaintiff or  
14 Plaintiff’s counsel has acted in bad faith or that Defendant JLI has been prejudiced by Plaintiff’s  
15 delay in submitting a PFS. Rather, Lucas Lawless – like hundreds of other plaintiffs in this litigation  
16 – acquired a severe addiction to nicotine at a very young age through use of JUUL e-cigarette  
17 products. As a direct result of Defendants’ tortious conduct, Plaintiff has suffered mental and  
18 physical changes to his brain that impact how he thinks, acts, and functions. Now, in seeking justice  
19 for his injuries, he has been asked to provide intimate details through a PFS about matters teenagers  
20 generally prefer to keep private. For a normal teenager, this would be challenging; for a teenager  
21 whose brain is ravaged with addiction, this is a monumental task. Furthermore, all of this is taking  
22 place during an unprecedented global pandemic. Plaintiff’s counsel understands that completion of  
23 a PFS is a necessary and important part of maintaining a claim in any MDL litigation. However, the  
24 unique circumstances present justify allowing Plaintiff additional time to comply with CMO 8, so  
25 his case can be decided on the merits rather than on procedural grounds. Defendants would not be  
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1           **A. The factors governing whether dismissal is appropriate weigh in favor of**  
2           **denying Defendants Motion to Dismiss and granting additional time to**  
3           **comply with CMO 8.**

4           When deciding whether to dismiss a case for failure to comply with a court order, courts  
5           must weigh the following factors: “(1) the public's interest in expeditious resolution of litigation; (2)  
6           the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public  
7           policy favoring disposition of cases on their merits; and (5) the availability of less drastic  
8           sanctions.” *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir.  
9           2006) (internal quotation marks omitted) (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130  
10          (9th Cir.1987)). “Dismissal is a harsh penalty and is to be imposed only in extreme circumstances.”  
11          *Id.* Courts are “guided by the same dismissal factors in complex as well as ordinary cases.” *Id.* at  
12          1229.

13           Under the second factor, the court’s need to manage its docket, a delay in proceedings is  
14          only “so egregious as to favor dismissal” where it “bring[s] cases to a complete halt or allow[s]  
15          plaintiffs to control the pace of the docket rather than the court.” *Al Bahr Shriners v. United States*  
16          *Bureau of Land Mgmt.*, 2016 WL 11265905, at \*1–4 (S.D. Cal. Dec. 15, 2016) (citing *Yourish v.*  
17          *California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). For the third factor, a defendant only  
18          suffers prejudice “if the plaintiff’s actions impair the defendant’s ability to go to trial or threaten to  
19          interfere with the rightful decision of the case. . . . Delay alone has been held to be insufficient  
20          prejudice.” *Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). The fourth factor,  
21          “the public policy favoring disposition of cases on their merits[,] strongly counsels against  
22          dismissal.” *Id.* Furthermore, “The district court abuses its discretion if it imposes a sanction of  
23          dismissal without first considering the impact of the sanction and the adequacy of less drastic  
24          sanctions.” *Id.* Also, “for the prior implementation of a lesser sanction to be a persuasive factor, it  
25          must have occurred after the plaintiff’s violation of a court order.” *Id.* Finally, “Dismissal is ... the  
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1 'callous disregard' for the Court's authority, and, therefore, the Court must determine if dismissal is  
2 warranted.” *Green v. Rubenstien*, 2009 U.S. Dist. LEXIS 74036, \*4 (S.D. W. Va. Aug. 19, 2009)  
3 (citing *Stevens v. Federated Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 51001, 2006 WL 2079503  
4 (N.D.W.Va. July 25, 2006) (internal citations omitted)).

5  
6 Motions to dismiss based on a plaintiff’s failure to serve a PFS or similar document in the  
7 context of an MDL are routinely rejected by courts in favor of a less drastic sanction, such as  
8 granting the plaintiff an extension under threat of dismissal upon the new deadline. *E.g.*, *In re Am.*  
9 *Med. Sys., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 2018 WL 2985999, at \*1–3 (S.D.W. Va. June  
10 13, 2018); *Al Bahr Shriners*, 2016 WL 11265905, at \*1–4; *In re Gen. Motors LLC Ignition Switch*  
11 *Litig.*, 2019 WL 3302606, at \*2–4 (S.D.N.Y. July 23, 2019) (denying defendant’s motion to dismiss  
12 for failure to serve a substantially completed PFS before the deadline and imposing as a sanction  
13 “one final opportunity” to serve the PFS within three weeks); *In re Ethicon, Inc., Pelvic Repair Sys.*  
14 *Prod. Liab. Litig.*, 2016 WL 1316637, at \*2–3 (S.D.W. Va. Apr. 4, 2016).

15  
16 In MDL No. 2325, a product liability MDL with over 500 filed cases that involved  
17 transvaginal surgical mesh, motions to dismiss based on failure to serve a PFS were routinely  
18 denied in favor of an extension. Using nearly identical opinions, the United States District Court for  
19 the Southern District of West Virginia, Charleston Division, gave approximately 250<sup>1</sup> plaintiffs an  
20 extension on the deadline to serve a PFS as the appropriate sanction under the principles discussed  
21 above. *See e.g.*, *In re Am. Med. Sys., Inc.*, 2018 WL 2985999, at \*1–3; *In re Am. Med. Sys., Inc.,*  
22 *Pelvic Repair Sys. Prod. Liab. Litig.*, 2018 WL 2981103, at \*3 (S.D.W. Va. June 13, 2018); *In re C.*  
23 *R. Bard, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 2017 WL 3188449, at \*1 (S.D.W. Va. July 26,  
24 2017). Generally, the extension was for 30 days from the date of the opinion, but many plaintiffs’  
25 PFS were already 90 days or more overdue. *See e.g.*, *In re Am. Med. Sys., Inc.*, No. 2018 WL  
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1 2985999, at \*1. In these 250 mirroring opinions, the court reasoned that (despite finding bad faith,  
2 the risk of prejudice, and a potential adverse effect on the management of the MDL weighing in  
3 favor of dismissal), “application of the fourth factor—the effectiveness of less drastic sanctions—  
4 counsel[ed] against [dismissal.] Rather than imposing harsh sanctions at this time, the court opts for  
5 a lesser sanction and allows the plaintiff one more chance to comply, subject to dismissal, upon  
6 motion by the defendant, if [plaintiff] fails to do so.” *Id.* The court added, that even “considering the  
7 administrative and economic realities of multidistrict litigation . . . affording the plaintiff a final  
8 chance to comply with discovery, [subject to dismissal] if she fails to do so, is a ‘just order’ under  
9 Rule 37 and in line with the Federal Rules of Civil Procedure as a whole.” *Id.* (citing Fed. R. Civ. P.  
10 1.).  
11

12 In *Al Bahr Shriners*, the District Court for the Southern District of California denied a  
13 defendant’s motion to dismiss for failure to serve a PFS and granted the plaintiff an extension as the  
14 appropriate sanction for delay, even when the PFS was over six months late. 2016 WL 11265905, at  
15 \*1–4. The District Court’s reasoning is instructive. The court observed that dismissal is not  
16 appropriate unless “at least four factors support dismissal or where at least three factors ‘strongly’  
17 support dismissal.” *Id.* Under the first factor, the court found that the public’s interest in expeditious  
18 resolution weighed in favor of dismissal given the six months’ delay. *Id.* Under the second factor,  
19 the court stated “the Court does not believe that a six month delay in providing five fact sheets is the  
20 type of excessive delay that warrants dismissal especially when there are over 100 Plaintiffs at  
21 issue.” *Id.* (emphasis added). Under the third factor, the court found that, after sixth months, “loss of  
22 evidence and loss of memory by a witness” was a “real concern” and this risk of prejudice weighed  
23 in favor of dismissal. *Id.* Under the fourth factor, the public policy favoring disposition of cases on  
24 their merits, the court explained that although it is the “responsibility of a moving party to move his  
25 or her case toward disposition on the merits, the Court does not find the Plaintiffs’ actions to have so  
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