UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In Re:	)	
	)	
AREDIA® AND ZOMETA® PRODUCTS LIABILITY LITIGATION	)	
	)	**No. 3:06-MD-1760**
(MDL No. 1760)	)	**Judge Campbell/Brown**
	)	
This Document Relates to:	)	
***Ramsey*, 3:06-CV-00864**	)	

To: The Honorable Todd J. Campbell, United States District Judge

REPORT AND RECOMMENDATION

For the reasons explained below, the Magistrate Judge recommends that plaintiff's motion to substitute (DE 6291; Related Case 17) be **DENIED**, that the motion to dismiss filed by the Novartis Pharmaceuticals Corporation (NPC) (DE 6293; Related Case 18) be **GRANTED**, that this case be **DISMISSED** with prejudice, and that any pending motions be **TERMINATED** as moot.

I. INTRODUCTION AND BACKGROUND

The original plaintiff in this action, Hilda Ramsey ("Ms. Ramsey") died on August 25, 2006. (DE 207) Beatie and Osborn Law LLC ("Beatie-Osborn") filed a suggestion of death on December 8, 2006 in which counsel represented that "Suzanne Ramsey, the personal representative of Hilda Ramsey's estate, will be substituted in this action. . . ."[1] (DE 207)

Nearly six (6) years later, on November 17, 2012, attorney Daniel Osborn,[2] filed a motion

[1] "Suzanne" actually was Sue Ann Ramsey ("Sue Ann"), one of Ms. Ramsey's two daughters, the other being Sally McConnell (Ms. McConnell). Counsel misspelled Sue Ann's name in the notice of death, and in subsequent documents. (DE 6676 Ex. 1, p. 23; Related Case 50)

[2] Attorneys Beatie and Osborn were partners in the law firm of Beatie and Osborn LLP at the time this action commenced. Beatie-Osborn dissolved in December 2008. (DE 2088; Related Case 9) Mr. Osborn moved to substitute himself as the attorney of record in the instant case on May 15, 2009. (DE 2202; Related Case 9) The motion was granted on May 19, 2009. (DE 2205; Related Case 12)

to substitute. (DE 6291; Related Case 17) The following day, December 18, 2012, NPC filed motion to dismiss and objecting to the motion to substitute. (DE 6293; Related Case 18) NPC filed a notice of supplemental authority January 4, 2013. (DE 6389; Related Case 21)

Plaintiff filed a response on January 18, 2013 in opposition to NPC's motion to dismiss and in support of plaintiff's motion to substitute (DE 6430; Related Case 26), following which NPC replied on February 1, 2013 (DE 6354; Related Case 28). Thereafter, on February 2, 14, and 19, 2013, NPC filed four more notices of supplemental authority. (DE 6361, 6383, 6390; Related Case 29, 30, 33)

This Report and Recommendation (R&R) addresses two matters pending before the court: plaintiff's motion to substitute, and NPC's related motion to dismiss. Both questions are properly before the court.[3]

II. ANALYSIS

The procedures to be followed in substituting a personal representative for a deceased plaintiff in this multi-district litigation (MDL) are governed by Rule 25(a), Fed. R. Civ. P and the Case Management Order (CMO). The relevant parts of Rule 25(a) in this matter are as follows:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.
>
> . . .
>
> A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 . . . . A statement noting death must be served in the same manner. . . .

[3] This R&R addresses both motions in an effort to resolve these matters more quickly than would be the case were the Magistrate Judge to rule on the motion to substitute first, then enter an R&R recommending dismissal after the appropriate time to respond to the order denying substitution had passed.

Rule 25(a)(1), (3), Fed. R. Civ. P. The court may enlarge the 90-day period under Rule 25(a) if a motion for an extension of time is filed within the initial 90-day time frame. Rule 6(b), Fed. R. Civ. P. (1963 amendment). Whether it does or not is left to the court's sound discretion. *Id*. The court also may grant a motion for an extension of time after the 90-day time frame has run, but only upon a showing of "excusable neglect." Rule 25 (1963 Amendment); *see also* Rule 6(b)(1)(B), Fed. R. Civ. P.

The relevant parts of the CMO at issue here are as follows:

> Within sixty (60) days of . . . the death of a plaintiff . . . plaintiff's counsel shall file a 'Suggestion of Death' that identifies the plaintiff and describes the time, date, and circumstances of the plaintiff's death.
>
> The ninety (90) day time period for filing a Motion for Substitution, as Required by Fed. R. Civ. P. 25(a), will commence upon the filing of a Suggestion of Death . . . .
>
> In the event that applicable state law requires the opening of an estate and the appointment of a personal representative to pursue the claims of a deceased plaintiff, plaintiff's counsel shall initiate or cause to be initiated proceedings to open and estate and/or obtain the appointment of a personal representative for plaintiff within thirty (30) days of the plaintiff's death . . . .

(DE 89, pp. 12-13; 103, p. 1)

A. Relevant Dates

The following dates in the record are relevant to the two questions before the court:

Aug. 25, 2006	Ms. Ramsey died. (DE 207)
	Sue Ann "notified Osborn in writing" "within a week" of her mother's death. (DE 6676, Ex. 1, Depo., p. 22; Related Case 50)
Dec. 8, 2006	A suggestion of death is filed, asserting that "Suzanne Ramsey, the personal representative of Hilda Ramsey's estate, will be substituted in this action . . . ." (DE 207)

Dec. 8, 2006	The following entries are made on docket changing the parties: "Hilda E. Ramsey, Deceased, TERMINATED: 12/08/2006" and "Suzanne Ramsey, substituted on behalf of Hilda Ramsey, deceased." (DE 207; Related Case 35) The TNMD docket reflects Mr. Osborn and Philip Miller, both of Beatie-Osborn, representing "Suzanne Ramsey."
Dec. 2006	Sue Ann testifies at her later deposition that Beatie-Osborn began representing her in this action during the month of December 2006. (DE 6676 Ex. 1, Depo. Trans., pp. 23-24; Related Case 50)
Jan. 7, 2007	Sue Ann updates the plaintiff's fact sheet (PFS), noting that she is representing her late mother and that Mr. Osborn is representing her on behalf of Beatie-Osborn. (DE 6354, Ex. 6; Related Case 28)
May 15, 2009	Mr. Osborn moves to substitute Osborn Law in the case of "Ramsey, Sueanne (06-cv-00864)" following the dissolution of Beatie-Osborn. (DE 2202, Ex. A; Related Case 9)
Jul. 25, 2011	Sue Ann and Ms. McConnell file an inventory of their late mother's estate listing "wrongful death and survival action against Novartis Pharmaceutical Corporation" as the only asset. (DE 6354, Ex. 3; Related Case 28)
July 25, 2011	Sue Ann and Ms. McConnell execute the oath and bond of representative. (DE 6354, Ex. 8-9; Related Case 28)
Aug. 9, 2011	Sue Ann files a petition for probate of her late mother's will and for letters testamentary. Letters testamentary issued to Sue Ann and Ms. McConnell as "independent co-executors" the same day. (DE 6354, Ex. 1; Related Case 28)
Dec. 17, 2012	Mr. Osborn files a motion to substitute Sue Ann and Ms. McConnell as independent co-executors of their late mother's estate. (DE 6291; Related Case 17)

B. Plaintiff's Arguments

Counsel advances the following arguments in support of the motion to substitute and in opposition to NPC's motion to dismiss: 1) the suggestion of death filed on December 8, 2006 was not served on "any potential successors and representatives, including Ms. Ramsey's two daughters

. . . ."; 2) the 90-day clock under Rule 25(a)(1) did not begin to run at the time the suggestion of death was filed because the suggestion of death was not served on "potential successors and representatives"; 3) Sue Ann "was (and is) a proper party for substitution . . . ."; 4) Sue Ann was not required to comply with the CMO in matters pertaining to her late mother's estate; and 5) the court has the discretion to extend the 90-day limit under Rule 25(a)(1).

1. The Question of Notice and the 90-day Clock under Rule 25(a)(1)

Under Rule 25(a)(3), notice of a suggestion of death is governed by Rule 5, Fed. R. Civ. P. as to parties in an action. Where a party is represented by counsel, service is made upon counsel unless the court orders otherwise. Rule 5(b)(1), Fed. R. Civ. P. On the other hand, notice of a suggestion of death under Rule 25(a)(3) is governed by Rule 4, Fed R. Civ. P. as to non-parties. The formality of notice under Rule 4 is required for the court to establish jurisdiction over a person who previously was not subject to the court's jurisdiction. *See Giles v. Campbell*, 698 F.3d 153, 159 (3rd Cir. 2012)(Rule 5 is "clerical and administrative in nature, whereas notice under Rule 4 is "Jurisdictionally Rooted")(citations omitted).

Mr. Osborn argues that the suggestion of death failed to provide notice to " any potential successors and representatives, including Ms. Ramsey's two daughters," Sue Ann and Ms. McConnell, in accordance with the Federal Rules of Civil Procedure; therefore, the 90-day period under Rule 25(a) did not begin to run at the time the suggestion of death was filed on December 8, 2006. (DE 6430, p. 4; Related Case 35) Mr. Osborn argues that notice actually was served on December 17, 2012 when the motion to substitute was filed. (DE 6430, pp, 5-6) Mr. Osborn's theory is that because notice was served the day the motion to substitute was filed, there is no violation of the 90-day requirement under Rule 25(a)(1).

Mr. Osborn refers only to Sue Ann and Ms. McConnell in the context of this argument; he

does not identify any other "potential successors and representatives" to whom this argument might pertain, nor are there any others apparent in the record. (CE 6430, pp. 4-5; Related Case 26) Consequently, this argument is deemed to pertain solely to Sue Ann and Ms. McConnell.

a. Notice – Sue Ann

Sue Ann testified at her February 12, 2013 deposition that she "notified Osborn in writing" "within a week" of her mother's death on August 25, 2006, and that "the Beatie Osborn firm" was her attorney – and Ms. McConnell's – in December 2006. (DE 6676, Ex. 1, Depo., pp. 2, 24; Related Case 50) Sue Ann's claim that Beatie-Osborn represented her in December 2006 is supported by the fact that Beatie-Osborn filed the suggestion of death on December 8, 2006 in which counsel represented that "Suzanne Ramsey, the personal representative of Hilda Ramsey's estate, will be substituted in this action. . . ." (DE 207) Finally, the docket in the instant case shows that the late Ms. Ramsey was "terminated" as the plaintiff in this action on December 8, 2006, that "Suzanne Ramsey" was substituted for her late mother, and that Mr. Osborn and Beatie-Osborn represented her.[4] If Sue Ann were represented by Beatie-Osborn on December 8, 2006 as she testified at her deposition, and as the foregoing strongly suggests, then Sue Ann was on notice of the suggestion of death the day it was filed, and that is the date that the 90-day clock under Rule 25(a)(1) would have begun to run.

Mr. Osborn concedes that Beatie and Osborn "began representing Sue Ann" "shortly after the filing of the Suggestion of Death." (DE 6668, ¶ 4, p. 2; Related Case 48) The inference from Mr. Osborn's statement is that Sue Ann was not Beatie-Osborn's client on December 8, 2006 when the notice of death was filed, but became their client "shortly [there]after."

[4] The docket entry dated December 8, 2006 reads: "(Court only) *** Party Suzanne Ramsey rep by Philip J. Miller, Russel H. Beatie, Daniel A. Osborn added. Party Hilda E. Ramsey terminated per filing of suggestion of death in lead case 3:06mdl1760. (Km,) (Entered:01/22/2007)"

Assuming for the sake of argument that no formal agreement of representation existed between Sue Ann and Beatie-Osborn at time the suggestion of death was filed, and that a formal agreement were required, the record shows that Sue Ann signed an updated PFS on January 7, 2007 in which it is written that Sue Ann is representing her deceased mother. (DE 121; Related Case 28, Ex. 6) The revised PFS also shows Mr. Osborn representing Sue Ann – at least as of on January 7, 2007 – on behalf of Beatie-Osborn. (DE 121; Related Case 28, Ex. 6, ¶ A.4, p. 2) The record shows further that Mr. Osborn served NPC with a copy of the updated PFS on January 8, 2007. (DE 6676 Ex. 2-3; Related Case 50) Based on the foregoing, it is clear that Sue Ann was represented by Beatie-Osborn not later than January 7, 2007.

When Sue Ann entered the representative relationship with Beatie-Osborn, she ceased being a non-party, and became a party to this action. When Sue Ann became a party, notice requirements under Rule 5 applied for purposes of Rule 25(a)(1), not those for non-parties under Rule 4. Under Rule 5, notice of the December 8, 2006 suggestion of death would have been imputed to Sue Ann on the date that the representative relationship began, *i.e.*, not later than January 7, 2007. Because Sue Ann was on notice of the December 8, 2006 suggestion of death on January 7, 2007, that is the latest date that the 90-day clock would have begun to run under Rule 25(a)(1), at least with respect to her.

For the reasons explained above, Mr. Osborn's argument regarding when Sue Ann was on notice for the purpose of Rule 25(a)(1) is without merit. Given the foregoing, it is apparent that the motion to substitute, at least with respect Sue Ann was filed more than five and one-half (5 ½) years after the 90-day clock under Rule 25(a)(1) had run.

b. Notice – Ms. McConnell

Mr. Osborn states in his declaration that "Osborn Law's representation of Mrs. McConnell

did not occur until late 2012 or early 2013 . . . ." (DE 6668, ¶ 5, p. 2; Related Case 48) Apart from Sue Ann's testimony to the contrary at her deposition, there is nothing in the record that contradicts Mr. Osborn's declaration that neither he nor anyone at Beatie-Osborn represented Ms. McConnell in December 2006.

Ms. McConnell does not appear in the record until December 17, 2012 when Mr. Osborn moved to substitute she and Sue Ann as "Independent Co-Executors" of their late mother's estate. (DE 6291; Related Case 17) Related documents filed show that Ms. McConnell and Sue Ann filed the inventory in their late mother's estate on July 25, 2011, and later that Sue Ann filed the petition for probate and letters testamentary on August 9, 2011 on behalf of both she and Ms. McConnell. (DE 6354 Ex. 1, 3; Related Case 28) A copy of an order admitting the late Ms. Ramsey's estate to probate dated August 9, 2011, and appointing both Sue Ann and Ms. McConnell as representatives of their late mother's estate, is attached to the motion to substitute. (DE 6291, Ex. A; Related Case 17) As a matter of note, the actions taken in 2011 by Sue Ann Ms. McConnell should have been completed under the CMO not later than 30 days after the suggestion of death was filed.

As it turns out, when Mr. Osborn commenced his representation of Ms. McConnell is not critical to the question of notice with respect to when the 90-day time frame under Rule 25(a)(1) began to run. Although Rule 25(a)(1) requires service, it does not specify which non parties to serve. Rule 25(a)(3), Fed. R. Civ. P.; *see Atkins v. City of Chicago, et al.*, 547 F.3d 869, 873 (7th Cir. 2008)(citations omitted). Under *Atkins*, cited with approval by Mr. Osborn, a suggestion of death filed by counsel for the party who has died – as is the case here – is required to service notice on "non-parties with a significant financial interest in the case, namely the decedent's successors (if his estate has been distributed) **or personal representative ([if] it has not been)** . . . ." *Id.* (emphasis added)(collecting cases).

As shown above, the late Ms. Ramsey's estate was not opened until August 9, 2011. Since the late Ms. Ramsey's estate was not opened in December 2006, much less distributed, notice to Sue Ann – identified in the suggestion of death as Ms. Ramsey's "personal representative" – was all that was required. In other words, under *Atkins*, serving Ms. McConnell with the suggestion of death was not required to start the 90-day clock ticking under Rule 25(a)(1). Mr. Osborn's argument with respect to notice as to McConnell is without merit.

c. The 90-day Time Frame Under Rule 25(a)(1)

For reasons previously explained, the 90-day clock under Rule 25(a)(1) began to run between sometime in December 2006 and January 7, 2007. Using January 7, 2007 as the starting point – the date most advantageous to plaintiff – the 90 days under Rule 25(a)(1) began to run on that date with the 90-days expiring on April 8, 2007. Using April 8, 2007 as the date the 90-day time frame expired under Rule 25(a)(1), the motion to substitute filed on December 17, 2012 was filed more than five and one-half (5 ½) years late.

As previously established, *supra* at p. 3, the court may expand the time-frame under Rule 25(a)(1) if a motion for an extension of time is filed within the original 90-day period. Beatie-Osborn did not file a motion for an extension of time within the original 90-day period under Rule 25(a)(1). Mr. Osborn correctly notes correctly that the court may expand the 90-day time-frame under Rule 25(a)(1) if a motion is filed beyond the original 90-day time frame upon a showing of "excusable neglect."

Apart from stating: "At best, the failure, if any, of plaintiff's counsel to file a motion to substitute was 'excusable neglect,'" Mr. Osborn offers nothing to support his position that the 5½ year delay was due to "excusable neglect." Delays due to counsel's unexplained oversight of more than 5½ years can never be excused due to "excusable neglect."

For the reasons explained above, the motion to substitute before the court was filed more than 5 ½ years later than it should have been, and Mr. Osborn has failed to establish that the delay was due to "excusable neglect." Consequently, the motion to substitute should be denied on those grounds.

2. Whether Sue Ann Is a Proper Party for Substitution and Whether it Was Necessary for Sue Ann to be Appointed Her Late Mother's Personal Representative

a. Whether Sue Ann Is a Proper Party for Substitution

Mr. Osborn argues next that Sue Ann "was (and is) a proper party for substitution . . . ." (DE 6430, ¶ II.B, pp. 6-7; Related Case 26) Mr. Osborn's Argument misses the point. The question is not whether Sue Ann is a proper party for substitution; the question is: "Was Sue Ann substituted in accordance with Rule 25(a)(1) and the CMO?" The answer is: "She was not." Mr. Osborn's argument that Sue Ann is a proper party for substitution is without merit.

b. Whether Sue Ann Was Required to Be Designated Her Late Mother's Personal Representative

Although not entirely clear, it appears that Mr. Osborn's argument here is that the CMO is inconsistent with both the spirit and intent of Rule 25. More particularly, Mr. Osborn appears to argue that the substitution provisions of the CMO are overly restrictive, unduly burdensome, and that he should not have to comply with them.

The CMO at issue has been in effect since July 28, 2006. (DE 89) Although the CMO has been amended over the course of the past nearly-eight (8) years for a variety of reasons, no objections were filed at the time the CMO was entered with respect to the provisions at issue here, or after, nor have any motions to discard the existing provisions ever been filed. Absent any

objection by counsel when the opportunity to object was ripe, the CMO has been the law of the case for nearly 8 years. *See e.g., Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1140 (10th Cir. 2009)(standing for the proposition that, when the district court enters a CMO, and no challenge to the CMO is raised, the CMO becomes the law of the case and is binding on the parties). As the law of the case, the CMO is binding on the parties to this MDL; compliance is not optional . . . it is mandatory. *Id.*

Compliance with the CMO is mandatory because administering cases in a multi-district litigation action is a far different breed of cat than administering cases on a normal docket. *See In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1231-32 (9th Cir. 2006). Contrary to Mr. Osborn's apparent view, parties to an MDL have an "unflagging duty" to comply with clearly communicated CMOs. *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998). Failure to comply "strictly" with a CMO may result in "severe sanctions," *see 2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d 1355, 1369 (Fed. Cir. 2006), and the district court possesses wide-ranging powers to sanction parties who repeatedly balk with a CMO, *see* Rule 16(f), Fed. R. Civ. P.; *see also Tower Ventures, Inc. v. City of Westfield*, 296 F.3d 43, 45-46 (1st Cir. 2002). Dismissal is a proper sanction where failure to comply with the CMO was not outside the party's control. *In re Phenylpropanolamine (PPA) Products Liability*, 460 F.3d at 1235-36.

For the reasons explained above, counsel representing parties to this MDL – including Mr. Osborn – are required to comply with the CMO. Where as here, a party fails to comply with the CMO, dismissal is an appropriate sanction.

3. Summary of the Foregoing Analysis

The motion to substitute filed on December 17, 2012 was filed more than 5½ years late. Mr. Osborn has failed to establish that this delay was due to "excusable neglect." Consequently, this

case is subject to dismissal for failure to comply with Rule 25(a)(1) and the CMO.

C. Dismissal on Procedural Grounds

Dismissal on procedural grounds is disfavored in the Sixth Circuit, subject to the sound discretion of the court. *See Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980). An abuse of discretion occurs when the district court's action leaves "[a] definite and firm conviction that the trial court committed a clear error of judgment." *Stough v. Mayville Cmty. Sch.*, 138 F.3d 612, 614 (6th Cir. 1998). Courts in the Sixth Circuit typically have considered the following four factors when considering whether dismissal is proper for failing to comply with procedural rules: 1) whether failure to comply was a result of willfulness, bad faith, or fault; 2) whether the adversary was prejudiced by the dismissed conduct; 3) whether the dismissed party was warned that failure to comply could lead to dismissal; and 4) whether less drastic sanctions were imposed or considered before dismissal was ordered. *See e.g., Schafer v. City of Defiance Police Dept., et al.*, 529 F.3d 731, 737 (6th Cir. 2008); *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999). Although none of the factors above is outcome dispositive, a case "is properly dismissed by the district court where there is a clear record of delay or contumacious conduct." *Knoll*, 176 F.3d at 363. These four factors are addressed below.

1. Willfulness, Bad Faith, or Fault

The issue of willfulness, bad faith, and/or fault turns on the answers to the following questions: 1) given that Mr. Osborn began his representation of Sue Ann not later than thirty (30) days after the suggestion of death was filed, and less than six (6) months after the CMO was entered, why did Mr. Osborn, a member of the Plaintiffs' Steering Committee (PSC) (DE 87), fail to ensure that Ms. Ramsey's estate was opened in accordance with the CMO, fail to ensure that Sue Ann was designated as the personal representative of her late mother's estate, and fail to file a motion to

substitute in 2007 the two months remaining of the original 90-day period; and 2) why did Mr. Osborn not realize in the intervening 5½ years that none the foregoing actions had been completed, and take action to remedy the defects?

One can only speculate regarding possible answers to the questions above. However, had Mr. Osborn, or anyone in his office, reviewed the file in this case at any time during the 5½ years Mr. Osborn was the attorney of record, it would have been apparent that none of the actions above had been completed, in particular the need to substitute a proper party for the late Ms. Ramsey. As a member of the PSC, Mr. Osborn was aware of the requirements of both Rule 25(a)(1) and the CMO, the intent/purpose of both, and his obligation to comply with both. Given Mr. Osborn's special knowledge of both Rule 25(a)(1) and the CMO, fault must fall to Mr. Osborn for his failure to comply with those requirements. The next question is whether Mr. Osborn's actions/inactions were willful.

Mr. Osborn's failure here stems from what can be best described as an emerging pattern of Mr. Osborn's willful neglect of his clients. More particularly, Mr. Osborn continues to run afoul of the procedures that pertain to substitution following the death of his clients, the requirement to open the deceased client's estate where required by state law, and the need to have a proper party appointed as the deceased's personal representative in matters pertaining to their estate. To the extent that failure to keep abreast of what is going on in his clients' constitutes Mr. Osborn's standard operating procedure (SOP), then that SOP is "knowing." To the extent that Mr. Osborn's failure to keep abreast of the proceedings in his clients' cases is "knowing," then his conduct is **willful**.

2. Prejudice

NPC has had to bear the costs of litigating this issue. To the extent that NPC has had to

commit resources to litigate an issue resulting from Mr. Osborn's failure to know what is going on in this case, NPC has been prejudiced.

This case also was among the first group of cases to be referred to fact discovery with March 15, 2013 the date that a suggestion of remand was to be entered. (DE 6156) The intended date to enter a suggestion of remand has long passed. To the extent that discovery in this case has been held in abeyance pending a resolution of this issue, remand will be delayed even longer. Moreover, if NPC's motion to dismiss is denied, NPC will have to complete discovery in this case at a time when NPC has begun to shift its resources to discovery in the second group of cases submitted to fact discovery thereby adversely affecting that effort. The delay in suggesting remand, and the potential requirement to address outstanding discovery requirements in this case while cases in the second group are in fact discovery, both constitute additional prejudice to NPC.

3. Prior Warning

Both Rule 25(a)(1) and the CMO provide clear warning that failure to substitute entitles the defendant to move for dismissal with prejudice. Mr. Osborn was aware of the possible consequences of his failure to comply with Rule 25(a)(1) and/or the CMO.

4. Whether Other less Drastic Sanctions Were Considered

The Magistrate Judge recognizes that dismissal with prejudice is the ultimate sanction for Mr. Osborn's failure to comply with the intent/purpose of Rule 25(a)(1) and the CMO. However, after considering other less drastic sanctions, the Magistrate Judge is of the view that dismissal with prejudice is the appropriate sanction. Mr. Osborn's failure in this case has burdened the court, strained scarce court resources, delayed disposition of this case, and prejudiced the defendant.

5. Summary of the Analysis

The four factors addressed above each favor NPC. Therefore, NPC's motion to dismiss on

procedural grounds should be granted for failure to comply with Rule 25(a) and the CMO.

III. RECOMMENDATIONS

For the reasons explained below, the Magistrate Judge recommends that plaintiff's motion to substitute (DE 6291; Related Case 17) be **DENIED**, that the motion to dismiss filed by the NPC (DE 6293; Related Case 18) be **GRANTED**, that this case be **DISMISSED** with prejudice, and that any pending motions be **TERMINATED** as moot.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has fourteen (14) days from service of this R&R within which to file with the District Court any written objections to the proposed findings and recommendations made herein. Any party opposing shall have fourteen (14) days from receipt of any objections filed regarding this R&R within which to file a response to said objections. Failure to file specific objections within fourteen (14) days of receipt of this R&R may constitute a waiver of further appeal of this R&R. *Thomas v. Arn*, 474 U.S. 140, *reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this the 24th day of June, 2013.

/s/Joe B. Brown
Joe B. Brown
United States Magistrate Judge