



ATTORNEYS

August 24, 2017

VIA ECF AND E-MAIL

The Honorable M. Casey Rodgers
United States District Court for the
Northern District of Florida
Arnow Federal Building
100 North Palafox Street
Pensacola, Florida 35202

Re: *In re Abilify (Aripiprazole) Products Liability Litigation*, MDL No. 2734

Dear Judge Rodgers:

In advance of the August 31, 2017 case management conference, Plaintiffs submit the following proposed agenda. Unfortunately the parties were not able to submit a joint proposed agenda as the Defendants emailed a revised agenda at 12:57 am this morning and another version at 10:25 am today. Additionally, Defendants attached a partial email exchange with their proposed agenda. Therefore, for the sake of completeness and accuracy, Plaintiffs have attached the complete email exchange between the parties. See, Ex. A attached hereto and incorporated herein.

I. DEFENDANTS' PROPOSED SCHEDULE MODIFICATION (A.K.A. "CURRENT STATUS OF DISCOVERY")

As an initial matter, Plaintiffs recognize the practicalities of the situation. Plaintiffs have repeatedly advised the Defendants of this and expressed their desire and willingness to work with Defendants to adjust the pretrial deadlines.¹ However, Plaintiffs cannot operate in a vacuum and need information from Defendants in order to make informed decisions. Unfortunately, Defendants have not provided Plaintiffs with any meaningful information to make informed decisions to determine if reasonable adjustments to the pretrial schedule might be necessary.

On March 23, 2017, this Court entered the scheduling order jointly proposed and stipulated to by both parties. (ECF 273). The scheduling order outlines the various discovery deadlines applicable to both general liability and the trial pool cases. It is noteworthy, that the scheduling order adjusted the previous schedule and provided more time than requested by Defendants. In fact, during the CMC on March 1, 2017, the Court stated,

[T]he Joint Discovery Committee submitted a proposed schedule for the workup of [trial pool] cases, which I appreciated. And I looked

¹ Plaintiffs do not believe the trial date needs to be delayed or rescheduled at this time. This may change as the litigation progresses but, neither the parties nor the Court have adequate information to consider the matter presently.

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at that yesterday and was in agreement with it. I had some observations that I made this morning earlier and that kind of *led us into a discussion earlier in regards to the effort on the Defendants' part to produce records relevant to the liability case while they're also having to address the production of relevant documents to the issue of general causation*. And so what we discussed this morning is the Joint Discovery Committee getting back together and proposing another schedule ... that would move that period of discovery -- *it would push that back or off some to accommodate the Defendants*.... The proposed schedule from the Discovery Committee suggested a February trial date. And I'm going to ask the Discovery Committee to revisit this and to propose a schedule that would result in -- or end in trials starting in June of 2018. ... [T]hat would be six months from when I was originally looking at, which was December. So June is four months from what you were all proposing in February, but it would be six months from the Court's schedule.

Defendants' proposal would also defeat one of the goals of this Court and one of the primary purposes of MDL consolidation; that is, having trials to test Plaintiffs' theories of liability and establishing relative case values. Under Defendants' proposal, the first trials would occur in New Jersey. In fact, during the fifth CMC on May 25, 2017, the Court noted, "I do anticipate successive trials on those four cases. What I would like to do is have them completed by the time Judge DeLuca and the New Jersey litigation begins trials in October."

Plaintiffs are willing to work with Defendants to adjust some of the pretrial deadlines. However, Plaintiffs do not believe the current trial date needs to be pushed at this time. Although Plaintiffs have asked, to date, Defendants have refused to articulate the burden (i.e., the amount of time necessary to complete document production) forming the basis of their request to adjust the schedule. For example, during the initial meet and confer call, the Defendants advised Plaintiffs that they need approximately nine months to complete document production. However, the Defendants have not stated an basis for that estimate. Even today, during a meet and confer call, the Defendants would not take a position on any custodial file(s) and/or search term(s). The parties have another meet and confer conference scheduled on the morning of August 31, 2017. The parties will update the court regarding the progress made during the meet and confer sessions.

Plaintiffs understand the litigation of this size requires a lot work and cooperation between the parties. Throughout this litigation Plaintiffs have, and will continue, working cooperatively with the Defendants to ensure this litigation moves efficiently. Unfortunately, Plaintiffs cannot simply agree to Defendants' request in a vacuum. Until Defendants give Plaintiffs a reasonable and reliable idea of the burden involved both in terms of timing and volume of production, Plaintiffs cannot make an informed response and/or counter proposal. Moreover, Plaintiffs expect the Defendants will produce documents from various custodial files on a rolling basis. Just as this Court explained its expectation to the Plaintiffs, "[As for the Plaintiffs, as we discussed this

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morning, your experts need to be reviewing documents on a rolling basis” See, 4th CMC Hrng. Trans. pp. 11-12.

Regardless of the ultimate outcome and decision by the Court on scheduling, Plaintiffs believe it would be most helpful if the Court would reschedule recurring discovery conference calls and, initially, set strict deadlines for the parties to submit briefs in the event they cannot reach an agreement regarding certain matters including: general liability search terms, number of custodial files to be searched, and the number of witnesses each defendant must produce for deposition.

II. STATUS OF CASE SPECIFIC DISCOVERY

Both parties believe that the other side is deficient in various aspects of discovery regarding the cases included in the trial pool. The parties will update the Court on the status of discovery and articulate their respective positions regarding the issues raised.

III. MOTION TO COMPEL

Defendants’ Position: On July 14, 2017, Defendants filed a motion to compel employment authorizations from Plaintiff Fanny Lyons. That motion is now fully briefed, and Defendants request an opportunity to be heard at the August 31, 2017 case management conference. Defendants note that the cases upon which Plaintiff relies to argue that a heightened standard of relevance should apply to her employment records are cases in which non-party personnel files were at issue (*e.g.*, a non-party witness or a defendant’s non-party employees). *See* Pl. Opp’n at 2. Defendants request the opportunity to briefly address such issues with the Court.

Plaintiffs’ Position: Defendants argue that the heightened standard, routinely applied by Florida state and federal courts in connection with discovery seeking employment files, is limited to scenarios involving non-party witnesses. However, Defendant has yet to raise a single Florida case which has addressed the distinction or why it would even matter. As the Plaintiff noted in their response, Florida federal courts clearly established that there is a federal and state constitutional right to privacy inherent in employment files. Even if the heightened standard does not apply, which it does, Defendants have failed to demonstrate that their requests are relevant and that they are proportional to their stated needs. Finally, federal MDL courts have found that discovery directed at employment files, even when the mental health of the plaintiff is at issue, are non-discoverable. *See In re Zolofit (Sertraline Hydrochloride) Prod. Liab. Litig* 2013 WL 8596291 (E.D. Pa. Oct. 22, 2013); *In re Baycol Products Litigation*, MDL No. 1431 (MJD/JGL) (D. Minn. Jan. 14, 2003) (attached to Plaintiff’s response as Ex. 1). Plaintiff looks forward to discussing these, and any other issues Defendants may raise at the upcoming conference.

IV. Additional Agenda Items

- a. Errata Sheets from *Daubert* Hearing.

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- b. Defendants' Motion to Maintain Documents Under Seal.
c. Update Re: *Pro Se* Litigants.
d. Update Re: Cases Pending.

* * *

We look forward to discussing these issues with Your Honor on August 31, 2017.

Respectfully Submitted,

/s/
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Attorneys for Plaintiffs

Exhibit A

Plaintiffs' Proposed Agenda to CMC August 31, 2017

From: Connelly, Luke A. <Lconnell@winston.com>
Sent: Friday, August 18, 2017 5:13 PM
To: George Williamson; Campbell, Matt; Agneshwar, Anand;
lauren.colton@hoganlovells.com; Eisenstein, Matthew A.
Cc: Kristian Rasmussen; Marlene Goldenberg; Behram Parekh; Julie Reynolds; Jennifer Liakos; Lexi Hazam
Subject: RE: Abilify MDL: Liability Phase Discovery

And I should have noted that 8/25 at 3pm ET works for us.

Luke

Luke A. Connelly
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From: Connelly, Luke A.
Sent: Friday, August 18, 2017 6:04 PM
To: 'Williamson, George T.' <gwilliamson@farr.com>; Campbell, Matt <MACampbe@winston.com>; Agneshwar, Anand <Anand.Agneshwar@apks.com>; lauren.colton@hoganlovells.com; Eisenstein, Matthew A. <Matthew.Eisenstein@apks.com>
Cc: Kristian Rasmussen (KRasmussen@CoryWatson.com) <KRasmussen@CoryWatson.com>; Marlene Goldenberg (mjgoldenberg@goldenbergglaw.com) <mjgoldenberg@goldenbergglaw.com>; Behram V. Parekh <bvp@kirtlandpackard.com>; Julie Reynolds (JReynolds@RobinsKaplan.com) <JReynolds@RobinsKaplan.com>; Jennifer Liakos (JLiakos@Napolilaw.com) <JLiakos@Napolilaw.com>; Hazam, Lexi J. <lhazam@lchb.com>
Subject: RE: Abilify MDL: Liability Phase Discovery

George:

We are gathering information about the custodians you have identified and will provide an update in the call. We would also ask that you be prepared to tell us why you think the identified custodians have relevant discoverable information. Some of the proposed custodians do not appear to have worked for a pharmaceutical division of any defendant and it appears that others have never worked on Abilify. As such, it would be helpful to exchange information to enable us to move towards a more appropriate list of custodians.

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From: Williamson, George T. [<mailto:gwilliamson@farr.com>]
Sent: Friday, August 18, 2017 4:37 PM
To: Connelly, Luke A. <Lconnell@winston.com>; Campbell, Matt <MACampbe@winston.com>; Agneshwar, Anand <Anand.Agneshwar@apks.com>; lauren.colton@hoganlovells.com; Eisenstein, Matthew A. <Matthew.Eisenstein@apks.com>
Cc: Kristian Rasmussen (KRasmussen@CoryWatson.com) <KRasmussen@CoryWatson.com>; Marlene Goldenberg (mjgoldenberg@goldenbergglaw.com) <mjgoldenberg@goldenbergglaw.com>; Behram V. Parekh

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Subject: RE: Abilify MDL: Liability Phase Discovery

Luke, thank you for your email. As you know, Plaintiffs have proposed search terms and custodians, and have propounded requests for production on all Defendants. In the absence of a formal response to those requests or a meaningful meet and confer, we cannot properly evaluate, and certainly cannot agree to, discovery limitations nor to an extension of the existing discovery schedule.

To facilitate the discussion, we sent an e-mail on 8/16 asking for further information about our proposed custodians and requesting a call to discuss, but have received no response. We intend to be reasonable in our conduct of liability discovery, as we have been throughout the general causation discovery phase, but we cannot agree to discovery limitations in the abstract. As such, we propose to set a call on Friday 8/25/17 at 3pm EST to discuss search terms and custodians in detail. This will provide Defendants an additional week from our initial liability phase discovery call to review the proposed custodian list and production volume based on the requested search terms, and will facilitate a productive meet and confer prior to the upcoming discovery call with the court. In order to have a meaningful discussion, please provide the information regarding custodians requested in our 8/16 e-mail in advance of that call.



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From: Connelly, Luke A. [<mailto:Lconnell@winston.com>]

Sent: Wednesday, August 16, 2017 3:46 PM

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Cc: Campbell, Matt <MACampbe@winston.com>; lauren.colton@hoganlovells.com; Agneshwar, Anand <Anand.Agneshwar@apks.com>; Eisenstein, Matthew A. <Matthew.Eisenstein@apks.com>

Subject: Abilify MDL: Liability Phase Discovery

Counsel,

As we noted during our call today, Plaintiffs did not serve BMS with any liability-phase document requests until July 27th and did not serve the Otsuka defendants until August 8th. That is only about a month before the current September 8th deadline for substantial completion of Defendants' document production.

As you know, completing Defendants' production of general causation documents alone took 5 months. In the liability phase, Plaintiffs are now seeking substantially broader discovery. For example, you've propounded 5 times as many document requests and proposed 5 times as many custodians, in addition to suggesting 39 new, broad search terms. And unlike the general-causation phase, you now seek production of documents from at least 10 custodians whose native language is not English.

Given our experience in the general-causation phase and other cases, Defendants do not see how the parties can complete discovery of the scope Plaintiffs have proposed within the deadlines provided under the current schedule. We have only had your document requests and proposed custodian list and search terms for a short period. The parties are at this moment negotiating the scope of the requested discovery. But even assuming we

can reach agreement on a more limited scope of discovery, Defendants still estimate that it will take at least 7 to 9 months to complete our production. We also suspect that Plaintiffs will want another 1 to 2 months to review the documents and then another 2 to 3 months to complete fact depositions after that.

We'd appreciate your thoughts on what a reasonable amount of time is for each of these steps. We also ask that you answer the following questions so we can better understand what you believe the scope of discovery will be in the liability phase:

1. Do Plaintiffs intend to serve any more document requests on Defendants?
2. Do Plaintiffs currently intend to insist that Defendants produce documents from all 127 custodians they included on their recent list? How many additional custodians do Plaintiffs intend to seek? Are Plaintiffs willing to agree to reasonable limits on the number of custodians? If so, how many?
3. How many depositions of Defendants' current and former employees do Plaintiffs currently intend to request? Are Plaintiffs willing to agree to limits on the number of depositions of Defendants' current and former employees? If so, how many?
4. Once Defendants have substantially completed that production, how long do Plaintiffs believe they will need to review that production and complete depositions?

We would appreciate answers to these questions as soon as possible so we can better gauge what can and cannot reasonably be accomplished before the close of fact discovery currently slated for the end of November.

We hope that the parties can work together cooperatively to reach agreement on a realistic scope of liability-phase discovery and a timetable for its completion.

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