

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

<p>IN RE: ABILIFY (ARIPRAZOLE) PRODUCTS LIABILITY LITIGATION</p> <p>This Document Relates to the Following Case:</p> <p><i>Perez v. Bristol-Myers Squibb Company, et al.</i>, 3:16-cv-251</p> <p><i>Lilly v. Bristol-Myers Squibb Company, et al.</i>, 3:17-cv-186</p> <p><i>Marshall v. Bristol-Myers Squibb Company, et al.</i>, 3:17-cv-172</p> <p><i>Viechec v. Bristol-Myers Squibb Company, et al.</i>, 3:16-cv-00291</p> <p><i>Lyons v. Bristol-Myers Squibb Company, et al.</i>, 3:16-cv-00414</p>	<p>Case No. 3:16-md-2734</p> <p>Chief Judge M. Casey Rodgers Magistrate Judge Gary Jones</p>
--	--

**DEFENDANTS' MOTION TO COMPEL THE
PRODUCTION OF PLAINTIFFS' ONLINE
GAMBLING RECORDS AND FOR INSPECTION**

TABLE OF CONTENTS

	Page
INTRODUCTION	2
BACKGROUND	4
A. Lilly’s Online Gambling	5
B. Perez’s Online Gambling.....	6
C. Marshall’s Online Gambling.....	7
ARGUMENT	8
I. The Court Should Compel Plaintiffs Lilly, Marshall, And Perez To Produce Online Gambling Records Or To Give Defendants Access To Their Online Gambling Accounts.	8
A. The records are relevant and proportional to the needs of the case.	9
B. The records exist.	10
C. Defendants cannot obtain the offshore records unless Plaintiffs produce them or give Defendants access to Plaintiffs’ online gambling accounts.	12
II. The Court Should Require Forensic Examination and Production of the Plaintiffs Lilly, Perez, and Marshall’s Computers and Devices.....	13
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ameriwood Indus., Inc. v. Liberman</i> , 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006)	13, 15
<i>Ferron v. Search Cactus, L.L.C.</i> , 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008)	15
<i>Rosy Blue, NV v. Davis</i> , 2008 WL 11337622 (M.D. Fl. Feb. 11, 2008)	10, 11
<i>Searock v. Stripling</i> , 736 F.2d 650 (11th Cir. 1984)	10
<i>Viasat, Inc. v. Space Sys.</i> 2013 WL 12061801, at *6 (S.D. Cal. Jan. 14, 2013)	11
<i>Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.</i> , 280 F.R.D. 681 (S.D. Fla. 2012)	13, 14, 15, 16
<i>Yellow Pages Photos, Inc. v. Yellow Book USA, Inc.</i> , 2009 WL 10670333 (M.D. Fla. June 20, 2009)	13
Other Authorities	
Fed. R. Civ. P. 34	10
Fed. R. Civ. P. 34 and 26(b)	8, 13
Fed. R. Evid. 401	8

INTRODUCTION

Defendants recently discovered that Plaintiffs Lilly, Perez, and Marshall failed to disclose significant gambling at online casinos, many of which are offshore,¹ including gambling that may have occurred *well after* they stopped using Abilify®. Defendants sought discovery from these Plaintiffs on their gambling history in order to assess their claims that they started Abilify then “began compulsively gambling shortly thereafter, and stopped compulsively gambling soon after [they] had ceased taking Abilify.” Such information is critical because, as Defendants’ expert explained at the *Daubert* hearing, patients suffering from the mental health conditions for which Abilify is indicated already have a significantly higher risk of pathological gambling and other compulsive behaviors.

In their original Fact Sheets and answers to interrogatories, Lilly and Perez did not voluntarily disclose any online gambling. Yet, [REDACTED] repeatedly reference online gambling, and [REDACTED] [REDACTED] shortly after she began taking Abilify. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ “Online gambling” refers to any form of gambling online whether it is through offshore or domestic casinos.

[REDACTED]

[REDACTED]

Defendants have attempted to collect as many records as possible through authorizations and subpoenas, but have no reasonable way to compel production of records from offshore third parties, where much of the gambling appears to have occurred. Because of the critical importance of this information, Defendants respectfully request that this Court order Plaintiffs Lilly, Perez, and Marshall to produce all records of online gambling or to permit Defendants access to any online gambling accounts Plaintiffs used.

Moreover, given the incomplete discovery responses of more than half of the trial pool Plaintiffs, there is now reason to question whether all Plaintiffs have conducted a reasonable and diligent search of their computers and other electronic devices to identify all instances of prior online gambling. We are living in a digital age where Plaintiffs can gamble anywhere and at any time, without a traditional paper trail. Information about such activities, particularly when the online gambling is through off-shore casinos, can be obtained only through forensic inspections. Further complicating the picture is the fact that, according to Plaintiffs' own expert,

[REDACTED] Ex. 27,

[REDACTED] *id.*, [REDACTED] Thus, at this time,

Defendants also ask the Court to order Plaintiffs Viehec and Lyons to certify that

they did not use electronic devices to gamble at any time—either before, during, or after taking Abilify®. Further, because Defendants expect online gambling to be a recurrent issue, they request any applicable relief granted here be applied in future cases that are worked up in this litigation.

BACKGROUND

Defendants have served discovery requests specifically requesting information relating to online gambling. Section IV.K of the Plaintiff Fact Sheet, for example, asks [REDACTED]

[REDACTED] Ex. 1 at 3. Defendants’ Interrogatory No. 6 asks [REDACTED]

[REDACTED] Ex. 2 at 3-4; *see also* Interrog. Nos. 5 & 7 (seeking similar information for the period preceding and post-dating Plaintiffs’ Abilify use). Request for Production (“RFP”) No. 2 seeks [REDACTED]

[REDACTED]

Ex. 3 at 3.²

² RFP No. 3 requests [REDACTED]

[REDACTED] Ex. 3 at 3-4. RFP No. 5 requests [REDACTED]

[REDACTED] Ex. 3 at 4.

Despite these requests, Plaintiffs did not produce any online gambling records. Given the significance of this information, Defendants asked Plaintiffs to confirm that they had “performed a diligent search of [their] personal files, including e-mails, social media, and other electronic records, for documents responsive to our requests for production.” Ex. 4, 5, 6. Plaintiffs again did not produce any online gambling records.

Defendants—through their own investigation—have since discovered that Plaintiffs Lilly, Perez, and Marshall engaged in significant, previously undisclosed online gambling. Yet they have failed to produce the records.

A. Lilly’s Online Gambling

Lilly has not disclosed any online gambling activity to Defendants. In response to Interrogatory No. 6, [REDACTED]

[REDACTED]

[REDACTED] Ex. 7. But her Fact Sheet and her Profile Form are silent on online gambling.

Defendants then obtained Lilly’s 2005 bankruptcy petition. There, she disclosed [REDACTED]

[REDACTED]

[REDACTED] Ex. 8 at 4-6-7.

Lilly’s financial records also reveal more online gambling activity, [REDACTED]

[REDACTED]

[REDACTED] Ex. 9.³

B. Perez’s Online Gambling

Like Lilly, Perez did not initially disclose any online gambling to Defendants. Ex. 16 at 2. Once Defendants reviewed her medical records and identified references to “[REDACTED]

[REDACTED] Ex. 11. Upon receipt of this amended information, Defendants attempted to collect records from gocasino.com but were unable to obtain any records from what turned out to be only a site that refers visitors to other gambling sites. Ex. 12.

Defendants’ preliminary analysis of Perez’s financial records has revealed

[REDACTED]

[REDACTED] In fact, [REDACTED]

[REDACTED]

[REDACTED] Ex. 13 [REDACTED]

In 2012, [REDACTED]

³ Offshore online casinos and their payment processors frequently mask the identity of a financial transaction by changing the description text to something benign such as web-support24.com—which [REDACTED] Ex. 10 at 6, Ex. 20. This practice makes it difficult for Defendants to identify gambling transactions solely through the financial records and is another reason why Defendants need the actual gambling records.

[REDACTED]

[REDACTED] Ex. 14; *see also* Ex. 15 at 3 [REDACTED]

[REDACTED]; Ex. 15 at 2 [REDACTED] Ex. 15 at 1 ([REDACTED]

[REDACTED].

Perez concedes that [REDACTED]

[REDACTED] Ex. 16 at 2 (fact sheet [REDACTED]

[REDACTED]; *see also* Ex. 17 (casino records [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] In particular, in August 10, 2009, [REDACTED]

[REDACTED]

Ex. 18. That means she started gambling compulsively as early as 1999, before Abilify was even on the market and well before her earliest Abilify prescription in 2007. Given the persistency with which Perez gambled online during other periods, it is reasonable to believe she gambled online during the periods before she started and after she stopped Abilify.

C. Marshall's Online Gambling

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Ex. 19 [REDACTED]; *see also* Ex. 20

[REDACTED]

Marshall [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 22. Like Perez, Marshall also conceded that [REDACTED]

[REDACTED] x. 1 at 2.

ARGUMENT

I. The Court Should Compel Plaintiffs Lilly, Marshall, And Perez To Produce Online Gambling Records Or To Give Defendants Access To Their Online Gambling Accounts.

Under Federal Rule of Civil Procedure 26(b)(1), “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. The online gambling records at issue are indisputably relevant.

Defendants cannot obtain them other than through Plaintiffs, either from Plaintiffs' computers and other electronic devices or in the data "cloud."

A. The records are relevant and proportional to the needs of the case.

Plaintiffs' gambling history—before, during, and after Abilify use—is central to this litigation. In particular, Plaintiffs' online gambling records bear directly on specific causation and damages claims. For example, records that show gambling activity before a Plaintiff ever took Abilify, or after he or she stopped taking Abilify, disprove Plaintiff's theory that it was Abilify that caused the gambling.⁴ To illustrate, Marshall [REDACTED] Ex. 1 at 2. But his medical records [REDACTED] note [REDACTED] [REDACTED] Ex.21, 22. Records like these are highly relevant to whether Abilify caused the gambling.

These records are also relevant to Plaintiffs' damages claims. Lilly claims [REDACTED] Ex. 23 at 2. Marshall claims [REDACTED] Ex. 1 at 4. Perez claims [REDACTED]

⁴ Gambling records are also helpful in identifying two of the DSM-V criteria for pathological gambling: exhibiting the "need[] to gamble with increasing amounts of money in order to achieve desired excitement" and "after losing money gambling often returns another day to get even ('chasing' one's losses)." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 586 (5th ed. 2013).

[REDACTED] Ex. 16 at 4. The records at issue will help to confirm or undermine these claims.

In short, these records go to the heart of Plaintiffs’ claims. They are easily accessible to Plaintiffs, who have direct access to their accounts and electronic devices.

B. The records exist.

Plaintiffs cannot credibly claim that these records no longer exist, or that they have fully discharged their obligations to search for them under the Rules. At a minimum, Plaintiffs should have emails containing monthly account statements showing wins, losses, money transfers, and promotional communications. In Marshall’s case, his duty to preserve relevant information arose in December 2014

[REDACTED] Ex. 24. In January 2016, [REDACTED] and in May 2017 [REDACTED]

[REDACTED] Ex. 21, Ex. 25. Marshall should have records of those activities.

[REDACTED]

[REDACTED] This analysis is incomplete because Plaintiffs have failed to identify all of

their financial accounts. For instance, Defendants recently learned that both [REDACTED] Ex. 9 at 3, Ex. 26 at 2.

In addition to records of gambling activity physically available to Plaintiffs in their computers and phones, the data from these online gambling sites could also exist in the “data cloud.” Plaintiffs may have access—and “control” over this data—even if they no longer have the specific device that they used to gamble. *See* Fed. R. Civ. P. 34; *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (“[c]ontrol is defined not only as possession, but as the legal right to obtain the documents requested upon demand”); *see also* 8B Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 2210 (3d ed.) (“Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact it has no copy.”). *See also Rosy Blue, NV v. Davis*, 2008 WL 11337622, at *3 (M.D. Fl. Feb. 11, 2008) (granting a motion to compel a request for production stating “although the transactions at issue may have been carried out on the internet, documentation regarding the transactions should be within the control of the Defendant”)

C. Defendants cannot obtain the offshore records unless Plaintiffs produce them or give Defendants access to Plaintiffs’ online gambling accounts.

Defendants have sent authorizations to several offshore casinos, attempted contacting them (through Defendants’ document collection firm, RecordTrak), and, as a last resort, sent subpoenas—but the casinos have not responded. Defendants have exhausted all reasonable avenues of obtaining these records.

Because many of the online gambling records are held by offshore entities, Defendants would have to undertake lengthy and time-consuming measures, such as proceeding under the Hague Convention, in a further attempt to obtain them. But “before resorting to the Hague Convention procedures,” courts rightly “consider the availability of other methods of obtaining the information sought.” *Viasat, Inc. v. Space Sys./Loral, Inc.*, 2013 WL 12061801, at *6 (S.D. Cal. Jan. 14, 2013) (quoting *Calixto v. Watson Bowman Acme Corp.*, 2009 WL 3823390, at *1 (S.D. Fla. Nov. 16, 2009)). In fact, courts will refuse to issue letters rogatory from international non-parties when the request “seeks unnecessarily duplicative information which Plaintiffs can request from the United States-based” party. *Id.* at *7.

In addition to the records showing bets, wins/losses, money transfers, and promotional communications, the following information is easily available to Plaintiffs but not Defendants:

- Emails relating to setting up accounts, account statements, promotional items, deposits or withdrawals of monies or credits, emails about lost

password/username, and information showing when these sites were accessed or the amounts of money spent or won,

- Browser histories and cookies showing the websites accessed,
- User names and passwords for log ins,
- Saved files, applications (web based or otherwise), or other data that have account information for entities at which Plaintiff gambled,
- Data from mobile devices (including tablets) that can be extracted, archived, backed up, or exported showing when these sites were accessed or the amounts of money spent or won,
- Screenshots of pages and accounts relevant to computer and mobile gambling applications.

This information is well within the parameters of the discovery requests referenced above and is essential to Defendants' defense of this litigation. Plaintiffs Lilly, Perez, and Marshall should produce these materials or at a minimum give Defendants access to the online accounts.

II. The Court Should Require Forensic Examination and Production of the Plaintiffs Lilly, Perez, and Marshall's Computers and Devices.

Due to Plaintiffs' discovery failures and the critical nature of the information sought, Defendants also request that the Court order a forensic examination of Plaintiffs Lilly, Perez, and Marshall's electronic devices on which they gambled through a neutral third-party vendor. Each of these Plaintiffs represented that they conducted a diligent search for this information, but none produced online gambling records or even initially disclosed online gambling (or the extent it). In light of this,

Defendants request that the Court compel examination of their devices and accounts.

“A court may rely on its authority under Fed. R. Civ. P. 34 and 26(b) to order mirror-imaging of a party’s hard drive.” *Yellow Pages Photos, Inc. v. Yellow Book USA, Inc.*, 2009 WL 10670333, at *1 (M.D. Fla. June 20, 2009) (internal quotations omitted). “Before compelling such imaging the court must weigh inherent privacy concerns against its utility . . . consider[ing] whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests.” *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 687 (S.D. Fla. 2012) (internal quotations omitted).

“When a requesting party demonstrates . . . the responding party’s failure to produce requested information, the scales tip in favor of compelling forensic imaging.” *Wynmoor*, 280 F.R.D. at 687. “[D]iscrepancies or inconsistencies in the responding party’s discovery responses may justify a party’s request to allow an expert to create and examine a mirror image of a hard drive.” *Ameriwood Indus., Inc. v. Liberman*, 2006 WL 3825291, at *4 (E.D. Mo. Dec. 27, 2006). The court may also consider “the relationship between the plaintiff’s claims and the defendants’ computers.” *Yellow Pages Photos*, 2009 WL 10670333, at *1.

Here, Plaintiffs' discovery responses are inconsistent and insufficient. *See Wynmoor*, 280 F.R.D. at 685 (“[T]he producing party has an obligation to search available systems for the information demanded,” including “[d]eleted computer files, whether e-mails or otherwise.”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See supra* at Background. Plaintiffs should have produced this information in the first instance, instead of requiring Defendants to uncover the information from third-parties, under a tight discovery schedule.

In *Wynmoor*, the defendant moved for inspection because the plaintiff had failed “to produce a single piece of [] (ESI).” 280 F.R.D. at 683. Plaintiff argued that production and inspection were improper because “defendant offers no evidence that any discoverable ESI exists.” *Id.* Finding that the requested information was relevant to the claims, the court granted the motion to compel because “Plaintiffs are either unwilling or unable to conduct a search of their computer systems for documents responsive to Defendant’s discovery requests.” *Id.* at 687. The same has proven true here.

In addition, as in other cases in which the court required inspections, “the relationship between the plaintiff’s claims and the[ir] [] computers” is undeniable.

Ameriwood Indus., Inc. v. Liberman, 2006 WL 3825291, at *4 (E.D. Mo. Dec. 27, 2006). Plaintiffs used their computers to carry out the precise conduct that this case centers on—gambling.

In sum, because Defendants cannot obtain this information from another source, inspection of Plaintiffs' computers and other devices on which they gambled is necessary and appropriate. *See Ferron v. Search Cactus, L.L.C.*, 2008 WL 1902499, at *2 (S.D. Ohio Apr. 28, 2008) (“The fact that the Plaintiff’s computers contain the only available documentary evidence of his visits to the website in issue and such evidence has not otherwise been produced” weighed in the favor of inspection). Defendants thus ask the Court to require a collection and review process similar to the one ordered by the Southern District of Florida in *Wynmoor*, involving an independent computer expert who acts as an officer of the court to prevent privileged waiver issues, and who is subject to the Court’s Confidentiality Order. That would allow Defendants to obtain the relevant information while protecting Plaintiffs’ privacy and confidential information.⁵

⁵ In *Wynmoor*, the court ordered the expert to mirror image the computer, then run a set of search terms negotiated by the parties. 280 F.R.D. at 687-88. The expert then provided the search term results to the plaintiff, who searched for and produced responsive documents along with a privilege log. *Id.* The defendant paid the expert, but the court left open the possibility of cost-shifting in the event improper conduct was uncovered. *See id.* Here, in addition to their hard drives, any search should also include information stored in the online gambling accounts that Plaintiffs’ used, which is likely stored on cloud-based servers.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to compel the production of Plaintiffs Lilly, Perez, and Marshall's online gambling records and order forensic inspection of their computers and electronic devices. Additionally, the Defendants' request that the Court order Plaintiffs Lyons and Viechec to certify that they did not use electronic devices to gamble at any time—either before, during, or after taking Abilify®. Further, because Defendants expect online gambling to be a recurrent issue, they request any applicable relief granted here be applied in future cases that are worked up in this litigation.

Respectfully submitted,

s/ Larry Hill

Larry Hill (Florida Bar No. 173908)
Charles F. Beall, Jr. (Florida Bar No. 66494)
Kimberly S. Sullivan (Florida Bar No. 101408)
MOORE, HILL & WESTMORELAND, P.A.
350 West Cedar Street
Maritime Place, Suite 100
Pensacola, FL 32502
850-434-3541
lhill@mhw-law.com
ljohnson@mhw-law.com
cbeall@mhw-law.com
ksullivan@mhw-law.com

Anand Agneshwar (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
212-836-8000
anand.agneshwar@apks.com

Matthew A. Eisenstein (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
202-942-6606
matthew.eisenstein@apks.com

Barry J. Thompson (*pro hac vice*)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-785-4600
barry.thompson@hoganlovells.com

Lauren Colton (*pro hac vice*)
HOGAN LOVELLS US LLP
100 International Drive, Suite 200
Baltimore, Maryland 21202
410-659-2700
lauren.colton@hoganlovells.com

Attorneys for Defendant Bristol-Myers Squibb Company

Matthew A. Campbell (*pro hac vice*)
Eric M. Goldstein (*pro hac vice*)
Rand K. Brothers (*pro hac vice*)
WINSTON & STRAWN LLP
1700 K Street, NW
Washington, DC 20006
202-282-5848
macampbe@winston.com
egoldstein@winston.com
rbrothers@winston.com

Luke A. Connelly (*pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
212-294-6882
lconnell@winston.com

s/ Hal K. Litchford

Hal K. Litchford

Kelly Overstreet Johnson

Russell Bradbury Buchanan

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

101 N Monroe Street, Suite 925

Tallahassee, FL 32301

850-425-7500

kjohnson@bakerdonelson.com

rbuchanan@bakerdonelson.com

hlitchford@bakerdonelson.com

*Attorneys for Defendants Otsuka Pharmaceutical Co., Ltd. and Otsuka America
Pharmaceutical, Inc.*

CERTIFICATE UNDER LOC. R. 7.1(B)

Counsel for Defendants have attempted to resolve these disputes in writing with counsel for Plaintiffs.

s/ Hal K. Litchford

Hal K. Litchford

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I HEREBY CERTIFY that this motion and memorandum comply with the word limit of Local Rule 7.1(F) and the memorandum contains 3,500 words, excluding the parts exempted by that Rule.

s/ Hal K. Litchford

Hal K. Litchford

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 20th day of November, 2017, a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system, which will automatically serve notice of this filing via email notification to all registered counsel of record.

/s/ Hal K. Litchford _____

Hal K. Litchford