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December 7, 2017

**VIA ECF AND EMAIL**

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 December 14, 2017 case management conference, Plaintiffs and Defendants Bristol-Myers Squibb Co. (“BMS”), Otsuka America Pharmaceutical, Inc. (“OAPI”), and Otsuka Pharmaceutical Co., Ltd. (“OPC”) (collectively, “Defendants”) jointly submit the following proposed agenda.

**I. Status of Discovery in Four Trial Pool Cases**

**Plaintiffs’ Position**

Plaintiffs continue to diligently review documents and privilege logs produced by Defendants. Nevertheless, in spite of the Court’s admonition that dumping a large portion of documents at the end of discovery would be problematic, Defendants’ production is far from complete with only 11 days left to go until the production deadline.

Defendants continue to emphasize the fact that they have produced over 1 million pages of documents. This is a highly deceptive statistic, as one document could span hundreds of pages. In fact, Defendants have produced a total of 143,517 documents (77,329 from BMS, 66,188 from OAPI, and 0 from OPC). The most instructive figure here is that Defendants are only over halfway done with their overall production.

Defendants disclosed in the most recent update letter to the Court (sent via e-mail on December 4, 2017) that their production was only “approximately 60% complete.” Defendants received Plaintiffs’ discovery requests on August 8, 2017. Defendants have



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now had four months to review the documents which have been produced to date and are still on track to dump more than 40% of all liability documents on Plaintiffs with less than two months for Plaintiffs to both review all documents and complete every deposition for the general liability and specific causation phases of the case.

As a result of this delay, Plaintiffs are working as quickly as possible to identify who the most relevant deponents for this phase of the case and have periodically updated Defendants to this effect to allow them to obtain dates for deponents with as much notice as possible.

The parties are presently working to find a solution to the small timeframe that exists between the adjudication of privilege log issues (which will be fully briefed as of January 12, 2018) and the due date for Plaintiffs' expert reports (January 31, 2018). While Plaintiffs will try to take as many depositions as possible before privilege disputes are decided, they may have to leave those depositions open to account for new documents that may be disclosed as a result of that process.

#### Defendants' Position

Defendants would like to provide a substantive update to the Court regarding the four trial pool cases, based on discovery taken to this point. Defendants will confer with Plaintiffs about this issue in advance of the conference.

Defendants have been working diligently to gather records from Plaintiffs and third-party sources and to complete fact depositions of the Plaintiffs' witnesses by the February 16, 2018 close of fact discovery. Depositions of Plaintiffs and certain family members have been scheduled as follows: Jennifer Lilly (Dec. 12), Bryan Marshall (Dec. 19), David Viechec (Dec. 20), Fanny Lyons (Jan. 4), Darryl Lyons (Jan. 5), and Cassie Viechec (Jan. 12). Defendants expect to take additional fact witness depositions in each case, and interviews may be helpful depending on the information conveyed in Plaintiffs' depositions. Defendants also will work with Plaintiffs to schedule and complete the depositions of Plaintiffs' treating physicians by the deadline.

As to the discovery of Defendants, Defendants are continuing to produce documents on a rolling basis and are on track to meet the December 18, 2017 deadline to substantially complete document productions. Since the Court resolved the parties' disputes over the scope of the third round of discovery on September 26, Defendants have collectively produced about 150,000 documents totaling over a million pages of documents, and will be producing tomorrow (December 8) approximately 57,000



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documents comprising roughly a million more pages. This is a small fraction of the volume of documents Defendants have had to review over the last three months, including tens of thousands of documents written in Japanese. In addition, Defendants have produced two sets of privilege logs per Judge Jones's Omnibus Order and the parties' mutual agreement and will be producing another privilege log for the remaining documents withheld as privileged by the December 22 deadline.

Plaintiffs complain that Defendants are "on track to dump more than 40% of all liability documents on Plaintiffs with less than two months for Plaintiffs to both review all documents and complete every deposition for the general liability and specific causation phases of the case." But this ignores the fact that Defendants *already produced* over 14 million pages of documents in the first two rounds of discovery covering *all key* issues in this litigation, including pre-clinical and clinical data on Abilify, regulatory submissions for Abilify, relevant adverse event data, and marketing plans and promotional materials for Abilify. They also included custodial e-mails reflecting internal company discussions and analyses of the possible link between aripiprazole and pathological gambling, and communications with health authorities and the medical community about the link. In any event, Defendants have kept the Court and Plaintiffs apprised of the status of their review and production of documents throughout the process, and Plaintiffs' complaints about the sequencing and volume of the remaining document productions already have been aired and resolved. All of these issues were discussed at length with Judge Jones, prior to his entry of the operative scheduling order.

As to depositions of Defendants, Plaintiffs have identified 20 of Defendants' witnesses that they wish to depose (five priority custodians, 11 additional custodians and four OPC custodians). Plaintiffs indicated that they will be requesting deposition dates for sales representatives as well. Defendants have proposed dates for certain witnesses and also continue to discuss with Plaintiffs reasonable ways to streamline the depositions, to reduce needless duplication and expense. For example, Defendants do not understand why Plaintiffs would need to take depositions of multiple employees with similar responsibilities and knowledge of issues in this case. Defendants are also concerned about Plaintiffs' request to take depositions of senior executives at the companies who have limited unique knowledge of those issues.

In addition, during a meet and confer on December 4, Plaintiffs explained that they may seek to defer many of these depositions of Defendant witnesses until after January 19, so that outstanding privilege disputes can be resolved in advance of the depositions. As Defendants informed Plaintiffs, deferring the depositions in that way may present difficulties (particularly for senior executives and former employees). In



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any event, given Plaintiffs' knowledge of the schedule, Defendants do not agree that Plaintiffs should be allowed to re-depose any witness based on the resolution of disputes over privilege.

Defendants will be prepared to discuss these issues with the Court at the upcoming conference.

## **II. Next Wave of Trial Pool Cases**

### Plaintiffs' Position

Defendants claim that adding another case to the trial pool is impossible under the current schedule. However, Defendants have exaggerated the discovery necessary to bring an additional case to trial and have engaged in overbroad discovery that is not proportional to the needs of the case. For example, Defendants have ordered dental, podiatry, ophthalmology, vein clinic, OBGYN, chiropractic, and sleep center records for various trial pool plaintiffs. Defendants have also ordered medical bills from these and other non-mental health providers.

Plaintiffs assert that appropriately tailored discovery could be completed in advance of the trial dates scheduled in August and September 2017 and believe the first federally filed case should replace the dismissed *Perez* case in the trial pool. Plaintiffs are willing to waive any objection under *Lexecon v. Milberg Weiss*, 523 U.S. 26 (1998), to having this case tried in the MDL Court.

Plaintiffs believe conducting a multi-plaintiff trial from a subset of the trial pool would serve the interests of efficiency and judicial economy. It is within the Court's discretion to consolidate cases for trial under Fed. R. Civ. P. 42(a), and the Eleventh Circuit recently endorsed such an approach in *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304 (11th Cir. 2017).

With regard to the selection of a second pool of bellwether trial cases, the Plaintiffs seek the Court's guidance as to whether the Court has a preferred method for case selection. The Plaintiffs are amenable to meeting and conferring with Defendants in an effort to reach an agreement about a process and procedure for selecting the second trial pool, if that is the Court's preference. We ask the Court to set a date by which the parties should submit proposals to the Court for consideration, if the parties are unable to reach an agreement.



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Defendants' Position

The trial pool looks different than it did ten months ago, when the Court directed the parties to “fully work up the six cases originally filed in the Northern District of Florida prior to the entry of the Order allowing direct filing, ECF No. 106.” ECF No. 182, at 2. Only two of those original six cases remain. After some discovery, Plaintiffs voluntarily dismissed with prejudice three cases (*Eckert*, *Locklear*, and *Perez*). A fourth case (*Johnson*) was dismissed for lack of subject matter jurisdiction. Following the *Eckert* and *Locklear* dismissals, the Court added *Marshall* and *Lilly*, and there are now four cases in the current trial pool. ECF No. 348, at 3.

As Defendants explained during the November 21, 2017 discovery call, it would be extremely difficult to add a new trial pool case at this late stage. As Plaintiffs have acknowledged, third-party records — including gambling records, bank statements, and healthcare records showing Plaintiffs’ gambling history and medical condition — are critically important but also difficult and time-consuming to obtain. *See* ECF No. 189, at 2 and 4. To illustrate, the process of collecting documents from third-parties alone has taken six months, as Defendants began sending out authorizations to third parties in May 2017. The four remaining trial pool cases have required 543 records requests (an average of almost 136 requests per case).<sup>1</sup>

This process has been complicated by the fact that Plaintiffs failed to identify all of their health care providers and other sources of records in their initial or amended Fact Sheets. For example, just yesterday (December 6, 2017), Defendants received psychiatric records from a hospital that had treated a Plaintiff in 2003, the year that she first was prescribed Abilify. Even though her counsel apparently collected records from the hospital in July 2017, Plaintiff had not identified that psychiatric hospital in her initial or amended Plaintiff Fact Sheet.

Judge Jones’s recent Order requiring two of the trial pool Plaintiffs to produce their electronic devices for examination further underscores the difficulties Defendants have faced gathering the necessary records. ECF No. 623. Judge Jones expressed “concern” that those Plaintiffs were not given any “coaching or instructions on searching their electronic devices for evidence of internet gambling.” *Id.* at 8. According to the Order, Judge Jones assumed that “when Plaintiffs had produced responsive documents to Defendants’ request for production that an appropriate collection and review had been

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<sup>1</sup> The *Perez* case similarly had 138 records requests.



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conducted of all sources of ESI. Admittedly this was not done.” *Id.* Although Judge Jones “stressed at the hearing the duty to conduct a reasonable inspection of the electronic devices belonging to any Plaintiff” in future cases, *id.* at 12 n.7, it has taken Defendants many months to collect the existing records for the existing trial pool Plaintiffs. Plaintiffs’ efforts to brush aside this and other discovery as “overbroad” are wrong.

Defendants cannot be expected to start this process anew with an additional trial pool Plaintiff and complete third-party record collection — let alone take all fact depositions — by the February 16, 2018 fact discovery deadline.

Given these circumstances, Defendants believe the parties should meet and confer about a set of randomly-selected cases that could form a second “trial pool,” which the parties could work up. That will allow Defendants to start working with third parties and collecting the records for those Plaintiffs in the near-term, and the parties can prepare those cases for trials to commence at an appropriate interval following the resolution of the first four cases and the first pool of New Jersey cases.

As to Plaintiffs’ suggestion that it would be appropriate to conduct a “multi-plaintiff trial from a subset of the trial pool,” Defendants do not agree and believe that the Court has already established an appropriate and efficient process for trying the four remaining trial pool plaintiffs with individual and sequential trials. Plaintiffs have not suggested multi-plaintiff trials previously. If they are now asking the Court to revisit its process, it should be done with a motion and full briefing.

### **III. Priority and Sequence of Depositions of Plaintiffs’ Prescribing/Treating Physicians**

The parties continue to meet and confer regarding this issue, as the Court directed at the November 21, 2017 discovery conference.

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We look forward to discussing these issues with Your Honor on December 14.

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Respectfully Submitted,

*/s/ Bryan F. Aylstock*

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