

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

IN RE: ABILIFY (ARIPIPRAZOLE)
PRODUCTS LIABILITY LITIGATION,

Case No. 3:16-md-2734

Chief Judge M. Casey Rodgers
Magistrate Judge Gary Jones

This Document Relates to the Trial
Pool Cases

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ORDER

Pending before the Court is Defendants' Motion to Compel the Production of Plaintiffs' Online Gambling Records and for Inspection. ECF No. 602. Plaintiffs have filed a response in opposition. ECF No. 611. The Court conducted a telephonic hearing to address the motion on December 6, 2017. The motion, therefore, is otherwise ripe for review.

For the reasons discussed on the record at the hearing, and as summarized below, the motion to compel is due to be granted to the extent that Defendants request the production of Plaintiffs' online gambling records. Plaintiffs Lilly and Marshall are required to produce their relevant electronic devices for examination jointly by the parties' respective experts under the protocol outlined in this order. To the extent that Defendants request the Court to order a unilateral examination of Plaintiffs' electronic

devices by Defendant's expert the request is due to be denied.

Introduction

This motion was prompted when Defendants learned that Plaintiffs Lilly, Perez and Marshall engaged in significant gambling at online casinos, many of which are offshore. Defendants represent that Plaintiffs' gambling may have occurred after the Plaintiffs stopped using Abilify®. Defendants say this information is important because patients suffering from the mental health condition for which Abilify is indicated already have a significantly higher risk of pathological gambling and other compulsive behaviors.

Defendants represent that Lilly and Perez¹ did not disclose any online gambling in their original Fact Sheets and answers to interrogatories. According to Defendants, Lilly disclosed online gambling in a bankruptcy petition filed shortly after she began taking Abilify®. While Lilly's Fact Sheet and response to interrogatory No. 6, were silent on online gambling Plaintiff says she attached 145 pages of bank statements to her Fact Sheet, which discloses online gambling. As Defendants point out it is difficult to identify gambling transactions solely through financial records

¹ While Perez is one of the three Plaintiffs that is the focus of this motion, the Court will not resolve any issues relating to Perez because Plaintiffs represent that Perez's case is in the process of being dismissed. ECF No. 611, p. 12 n. 21.

because offshore online casinos and their payment processors frequently mask the identify of a financial transaction by changing the description text to something that is not recognizable as a gambling site.

As to Marshall, Defendants say, that although Marshall disclosed he engaged in online gambling Marshall's recently obtained financial records suggest that he gambled at more gambling websites, including gambling on websites years after he stopped taking Abilify®.

There is no serious dispute that Plaintiffs' gambling records are relevant to the issues in this case and are important sources of information for Defendants' defenses to each of Plaintiffs' claims. Defendants assert that because of the critical nature of these records the Court should order Lilly and Marshall to produce all records of online gambling or to permit Defendants access to any online gambling accounts Plaintiffs used.

But Defendants ask for more. Pointing to what Defendants characterize as incomplete discovery responses, Defendants contend that there is a real question as to whether all Plaintiffs have conducted a reasonable and diligent search of their computers and other electronic devices to identify their online gambling records. Because of the importance of the issue Defendants request that the Court order a

unilateral forensic examination by Defendants' expert of Lilly and Marshall's electronic devices on which they gambled.

Plaintiffs oppose Defendants' request arguing that wholesale, unfettered access to all data on all of Plaintiffs' electronic devices is unnecessary and would invade Plaintiffs' privacy. Plaintiffs say that Defendants Forensic Preservation and Inspection Protocol² would allow Defendants to have unfettered access to all of the data on Plaintiffs' electronic devices (whether relevant or not) and that such forensic examination is overly burdensome, not proportional to the needs of the case, and overly intrusive.

DISCUSSION

As a starting point the Court has no difficulty in concluding that Plaintiffs' gambling history—before, during and after Abilify® use—bear directly on specific causation and damages claims. As to specific causation gambling records are relevant to identifying two of the DSM-V criteria for pathological gambling.³ These types of records therefore are directly

² ECF No. 611, Ex. 1.

³ Two of the criteria are: 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).

relevant to the issue of whether Abilify® caused the gambling.

The records are also highly relevant to damages. In this case Lilly claims gambling losses in excess of \$150,000 due to Abilify.® Marshall claims gambling debts of more than \$300,000. These records will assist Defendants in confirming whether these claims are supportable.

Lilly and Marshall's instances of online gambling are not insignificant. Defendants say they have identified approximately 53 potential gambling related financial transactions from Marshall at 19 different gambling sites. With regard to Lilly Defendants represent that they have identified approximately 185 gambling transactions at 36 gambling sites.

As Defendants point out, there have been problems in obtaining records from the offshore casinos. Defendants have attempted to contact the casinos through their document retention vendors and through subpoenas but to no avail. Because of the difficulties in obtaining these records, Defendants contend they should be permitted to obtain records directly from Plaintiffs electronic devices. Among other records on their electronic devices, Plaintiffs normally would have emails relating to the establishment of the online accounts, account statements, browser histories and cookies showing the websites accessed, as well as

information concerning the amounts of money spent or won. In addition to records on their electronic devices this type of data may very well be stored on the “cloud” so even if Plaintiffs do not have the actual electronic device used to engage in online gambling the records may be available on the “cloud.” The only practical and efficient method of obtaining records from the “cloud” is through the cooperation of Plaintiffs.

All of this leads to the question of whether Defendants’ need for this information, coupled with Plaintiffs’ oversight, failure or inability to produce this information justifies the Court ordering a unilateral forensic examination by Defendants’ expert. The Court concludes that it does not, at least to the extent proposed in Defendants’ Forensic Preservation and Inspection Protocol.

The Federal Rules of Civil Procedure provides some guidance on the issue. Rule 34(a)(2) of the Federal Rules of Civil Procedure generally permits testing or sampling of the property or object of another. Yet, the Advisory Committee Notes to Rule 34 caution that inspection or testing of ESI “may raise issues of confidentiality or privacy.” The Notes further suggest that the Rule is “not meant to create a routine right of direct access to a party’s electronic information system, although such access

might be justified in some circumstances.” The Advisory Committee also notes that a court should “guard against undue intrusiveness” resulting from inspection of electronic devices, such as computer systems.

That is not to say that courts should not order forensic examinations of electronic devices in certain situations. Generally, there are two circumstances that may trigger the forensic examination of electronic devices. The first type of case is where the use of the computer or computer files is the focus of the claims in the case.⁴ Examples of these types of cases include the use of a computer to misappropriate trade secrets or copyrighted information or other types of infringement. That is not the circumstance in this case.

The second circumstance that may give rise to a forensic examination of a computer is where the party’s discovery responses

⁴ See, e.g. *Genworth Fin. Wealth Mgmt., Inc. v. McMullan*, 227 F.R.D. 443, 447-48 (D. Conn. 2010)(sufficient nexus between claims and need for computer imaging where plaintiff alleged that defendant used the computers to disseminate plaintiff’s confidential information); *Ameriwood Indus., Inc. v. Liberman*, 2006 WL 3825291, *5 (E.D. Mo. 2006)(permitting imaging where plaintiff alleged defendants used computers and confidential information to sabotage and divert plaintiff’s business); *Balboa Threadworks, Inc. v. Stucky*, 2006 WL 763668, *4 (D. Kan. 2006)(imaging permitted where alleged infringement “occurred through the use of computers to download copyrighted material).

contain “discrepancies or inconsistencies.”⁵ In this case, while there are some inconsistencies in Plaintiffs’ discovery responses, the real problem is that Lilly and Marshall were not given “any coaching or instructions on searching their electronic devices for evidence of internet gambling.” ECF No. 611, p. 10. This causes the Court concern for several reasons. First, as the Court expressed at the hearing, self collection by a layperson of information on an electronic device is highly problematic and raises a real risk that data could be destroyed or corrupted. Second, the Court assumed that the when Plaintiffs had produced responsive documents to Defendants’ request for production that an appropriate collection and review had been conducted of all sources of ESI. Admittedly, this did not happen.

In determining whether forensic imaging is necessary, the Court should take into account the potential intrusiveness of ordering forensic imaging and must weigh the inherent privacy concerns against its utility.⁶

While unilateral and unfettered forensic examination of Lilly and Marshall’s

⁵ *Ameriwood Indus., Inc. v. Liberman; simon Prop Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000)(allowing plaintiff t mirror image defendant’s computers where there were “troubling discrepancies with respect to defendant’s document production).

⁶ *John B. v. Goetz*, 531 F. 3d 448, 460 (6th Cir. 2008).

electronic devices raise privacy concerns, the Court concludes that those privacy concerns can be ameliorated by prohibiting Defendants' expert from disclosing to Defendants (or others) information obtained during the computer examination and requiring Defendants' expert to destroy any data at the conclusion of the case.

Plaintiffs argue that the only examination that the Court should order is a an ESI search of Lilly and Marshall's devices assisted by Plaintiffs' expert and not a "forensic examination" of their devices. The ESI search suggested by Plaintiffs should have been conducted previously, particularly in view of the fact that Lilly's deposition is scheduled to take place next week. A more thorough ESI examination needs to take place because the records that may be relevant to Defendants' requests could be located on the "cloud" in view of Plaintiffs' representation that some of the devices were lost, destroyed or no longer exist. Additionally, with regard to accessing online gambling accounts the experts may need to recreate passwords and other access protocols that may have been lost or forgotten. Lastly, a forensic search of browser histories may be necessary to identify possible online gambling sites that Plaintiffs did not recall and which may not be immediately identifiable based upon their URL name.

And while an argument can be made that Plaintiffs' expert is capable of accomplishing this type of examination, the assistance of Defendants' expert may add an additional level of expertise and, at a minimum, will provide some measure of assurance that a thorough and appropriate examination of Plaintiffs' electronic devices has been accomplished.

Consequently, the Court concludes that in order to identify and produce relevant ESI from Lilly and Marshall's electronic devices as efficiently and expeditiously as possible, Lilly and Marshall will be required to provide their relevant electronic devices jointly to Plaintiffs' ESI expert, Jonathan K. Jaffee and to a representative of I-Discovery Solutions, Defendants' ESI expert for an examination and search of the devices for relevant ESI relating to Lilly and Marshall's online gambling and any other gambling activities in which they engaged.

Lilly and Marshall must provide their electronic devices (cell phones, computers, tablets and any other electronic devices that were used to engage in online gambling) to the respective ESI experts no later than December 12, 2017. Lilly must provide her electronic devices to the respective experts on a mutually convenient date and time at the offices of Aylstock Witkin Kreis & Overholtz, PLLC in Pensacola, Florida. Marshall

must provide his electronic devices for inspection to the respective experts at a mutually agreeable date, time and location in Gainesville, Florida. In the event the parties require a mutually agreeable location the parties may use conference facilities at the United States Courthouse in Gainesville, Florida by making arrangements with my courtroom deputy Adelita Tinaya-Miller.

The respective experts shall be entitled to make mirror images from the electronic devices to be used for the examination and search for relevant ESI. Lilly and Marshall shall also provide other relevant information the respective experts may require in order to conduct their forensic examination such as usernames and passwords. Counsel for the parties may be present if they wish for the inspection.

Although the Court is ordering the forensic examination of Lilly and Marshall's electronic devices by the respective experts, in order to protect the privacy interests of Plaintiffs, Defendants' expert is prohibited from providing any confidential information to Defendants or its counsel that was obtained through the forensic examination. Further, Defendants' expert must destroy any ESI or other data obtained through the forensic examination at the conclusion of the case and provide certification to

Plaintiffs' counsel of the destruction of the data. Plaintiffs' expert, however, must maintain the data until further order of the Court in the event further examination must be conducted of the mirror images.

After the forensic examination and extraction of the data from the electronic devices has been completed, the respective experts must provide the data to Plaintiff's counsel for review, including any review for privilege and then Plaintiffs must produce the responsive information to Defendants' counsel. Counsel are encouraged to complete the review and production of responsive documents as expeditiously as possible.

In the event there are any unresolved disputes concerning this process the parties should present the issue to Court as promptly as possible for resolution.⁷

DONE AND ORDERED this 7th day of December, 2017.

s/ Gary R. Jones

GARY R. JONES
United States Magistrate Judge

⁷ The protocol in this order for a joint forensic examination of Plaintiffs' electronic devices only applies to Plaintiffs Lilly and Marshal of the trial pool cases because Plaintiffs represent that Lilly and Marshall are the only Plaintiffs in the trial pool cases who engaged in online gambling. However, as the Court stressed at the hearing the duty to conduct a reasonable inspection of the electronic devices belonging to any Plaintiff is required because the Federal Rules of Civil Procedure require a party to conduct a reasonable search for ESI by searching relevant electronic devices, including cell phones, computers and tablets.