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

IN RE: ABILIFY (ARIPIPRAZOLE) PRODUCTS LIABILITY LITIGATION This document relates to all cases.	Case No. 3:16-md-2734 Chief Judge M. Casey Rodgers Magistrate Judge Gary Jones

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST TO CONSOLIDATE CASES FOR TRIAL

Defendants respectfully request that the Court deny Plaintiffs' request to consolidate individual cases for trials.

In the joint agenda letter for the December 14, 2017 case management conference, Plaintiffs requested for the first time that the Court conduct a "multi-plaintiff trial from a subset of the trial pool." ECF No. 624, at 4. At the CMC, the Court declined to revisit its procedure for the current pool of four cases, which will proceed with individual and sequential trials beginning in June 2018. The Court, however, directed the parties to confer about Plaintiffs' request to consolidate future trial pool cases, and to submit simultaneous briefs if the parties could not agree. The parties conferred and reached impasse on the issue.

1. **Consolidating bellwether cases for trial is generally disfavored and would defeat the purpose of the bellwether process in this litigation.**

At the outset of this litigation, the Court explained that it would follow a bellwether process involving trials of a "representative sample of cases" that the parties could use to evaluate broad segments of the litigation. *See* CMC No. 1 Tr. at 36:2-5, ECF No. 123 ("So in my view, the key to useful bellwether trials is to have a true representative sample of cases . . . ."); CMO No. 1, at 3, ECF No. 67 ("The key to a useful bellwether process is to have a truly representative sample of cases for discovery."). The Court decided to use that bellwether process for "the future of the litigation, with the understanding that more individual cases will be filed." ECF No. 67, at 3.

Defendants believe the Court should continue to identify additional bellwether cases.[1] Consolidating future pool cases for trial, however, would

[1] Defendants believe that cases for a second pool of cases should be selected randomly. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 ("To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly . . . ."); Barbara J. Rothstein & Catherine R. Borden, MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES 46 (Fed. Judicial Ctr. 2011) (unless the attorneys can agree on the cases to be included, trial pool cases should be selected randomly). Other methods of selecting trial pool cases would allow the parties to "skew the information that is produced." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315; *see also In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1021 (5th Cir. 1997) ("trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation" "is not a bellwether trial").

eliminate the benefit of the bellwether process. Conducting a trial that involves several Plaintiffs' unique medical and behavioral histories, risk factors, and claimed injuries would make it impossible to extrapolate a verdict to any particular segment of the pool.[2] And consolidating the cases will allow Plaintiffs to bury their weakest cases, and improperly ratchet up the perceived strength of the litigation as a whole.

"[E]mpirical research shows clearly that consolidation can alter the patterns of verdicts and awards handed down by jurors."[3] Indeed, researchers have concluded that, when cases are tried together, plaintiffs with lesser damages are able to ride the coattails of their more severely damaged co-plaintiffs to higher verdicts.[4] One study found that consolidation of two to five plaintiffs' claims into a single trial "gives plaintiffs an important advantage in litigation" by increasing

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[2] Any attempt to consolidate Plaintiffs by group (*e.g.*, home state, time period/duration of usage, risk factors, claimed injuries) would also leave many other groups untested, and thus undermine the goal of the bellwether process to learn about the entire litigation.

[3] K. Bordens & I. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & PSYCH. REV. 43, 66 (1998).

[4] *Id.* at 61; *see also, e.g.*, Peggy L. Abraham *et al.*, *The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency*, 14 MEALEY'S ASBESTOS BANKRUPTCY REP., #9, at 5 (2015) ("[T]he strength of any one of the consolidated cases can improve the value of the other cases by the process of grouping the allegations together.").

their probability of winning by a statistically significant percentage.[5] In other words, a jury verdict in a consolidated trial will provide limited information about the claims and defenses in any individual case, while giving the parties skewed information about the inventory as a whole.

For these reasons, in an MDL, "[t]he judge should view any proposal for consolidated bellwether trials with skepticism. At the bellwether stage, the goal should be to achieve valid tests (not strive to achieve verdicts as to large inventories of claims) and consolidation can tilt the playing field, undermining the goal of producing representative verdicts." Duke Law Center for Judicial Studies, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS TORT MDLS 29 (2014). Consolidation can defeat the purpose of the bellwether process: to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis' and what range of values the cases may have if resolution is attempted on a group basis." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315.

The parties' experience with the first trial pool of cases underscores these concerns. When faced with the prospect of individual trials based on the Court's

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[5] Michelle J. White, *Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials* 18 (Nat'l Bureau of Econ. Research Working Paper No. 9362, 2002), http://www.nber.org/papers/w9362.pdf.

selection of the seven trial pool cases filed in this District, Plaintiffs dropped three cases before a single Plaintiff was deposed. Rather than have any of those individual Plaintiffs appear alone in the spotlight before the jury, the cases were dismissed with prejudice. That is useful information about the litigation. It tells us that, absent consolidation, at least some (if not many) of the Plaintiffs' cases are too weak to make it to a jury. That process of requiring individual cases to stand or fall on their own merit should continue.

The situation with the remaining Plaintiffs in the trial pool is equally illuminating. Fact-specific issues as to each Plaintiff overwhelm every aspect of this litigation, from causation and the learned intermediary doctrine to the applicable state law and statute of limitations. For instance, Plaintiffs took Abilify for a wide range of psychiatric conditions. Many of those conditions are associated with a several-fold increased risk of compulsive gambling or other compulsive behaviors. Plaintiffs also took different doses of Abilify across varying time periods while different warnings were in effect, often with significant gaps or in combination with a variety of different other drugs. Some Plaintiffs engaged in gambling and other compulsive behaviors long before starting Abilify. Other Plaintiffs did so long after stopping Abilify. Some Plaintiffs used alcohol and illicit substances that are known to cause compulsivity. So far, each trial pool Plaintiff has presented a different combination of these crucial issues.

Significantly, as this Court will recall from the *Daubert* hearing, Plaintiffs have a unique causal theory in which "iatrogenic" (Abilify-induced) compulsive behaviors are distinguished from "idiopathic" compulsive behaviors based on whether the individual engaged in compulsive behaviors before or after taking the drug (challenge/dechallenge) and whether alternative causes for the compulsive behaviors were controlled for and ruled out. Thus, to prove causation in their cases, Plaintiffs will need to show that *each* compulsive behavior alleged by *each* Plaintiff (i) was not present before Abilify use started, (ii) actually started during Abilify use, and (iii) did not continue after Abilify use stopped. And for *each* Plaintiff, Plaintiffs' specific causation experts will need to rule out various alternative causes, including many of the mental health disorders Abilify is approved to treat.

On this fundamental issue, the differences in the remaining four trial pool Plaintiffs' cases are striking. For example:

- Plaintiff Lilly [redacted]
- Plaintiff Marshall [redacted]

[redacted]

- Plaintiff Viechec [redacted]
- Plaintiff Lyons [redacted]

Consolidated trials would allow Plaintiffs to obscure these differences and weaknesses, which are central to the parties' claims and defenses.

This is not to say that trial consolidation is never appropriate in mass tort litigation. Consolidation for trial might be appropriate in "mature" mass torts, in which "little or no new evidence is likely, appellate review of novel legal issues has been completed, and a full cycle of trial strategies has been explored." *Id.* § 22.314.

Such were the circumstances in *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1313 (11th Cir. 2017), which Plaintiffs have cited to the Court. There, the Southern District of West Virginia consolidated four cases in the pelvic mesh MDLs, and transferred them to the Southern District of Florida for trial. At that point, pelvic mesh had been the subject of product liability litigation for over a

[redacted]

decade, and there were over 50,000 cases pending in federal MDLs. Several cases had been tried to verdict and over 20,000 cases had been settled. Given the scope and nature of that litigation, in its order consolidating the four cases for trial, the MDL judge explained that "the bellwether process is not viable in this MDL." Pretrial Order # 91, at 4, ECF No. 10, *Eghnayem v. Boston Sci. Corp.*, No. 2:13-cv-07965 (S.D. W. Va. Apr. 11, 2014).

Here, by contrast, the bellwether process remains viable. This litigation is barely two years old and no cases have been tried or settled. The parties can obtain the most reliable information about the litigation as a whole by continuing with a bellwether process that will generate representative verdicts in individual cases.

2. **Consolidating cases for trial would prejudice Defendants.**

Although Rule 42 allows consolidation if the jury will decide a "common question of law or fact," it is not permitted if it would prejudice a party. *See, e.g.*, *Eghnayem*, 873 at 1313 (district court must consider whether "specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues"); 28 U.S.C. § 2072 (federal rules "shall not abridge, enlarge or modify any substantive right"). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re*

Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d. Cir. 1993) (*quoting In re: Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)).

Here, consolidation would prejudice Defendants by requiring them to defend against multiple unique claims at once. As the Manual for Complex Litigation cautions, "differences in facts relevant to exposure, causation, and damages, as well as in the applicable law, often make consolidation for trial purposes . . . unfair." *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.32.

As discussed above, any single Plaintiff may have limited (if any) success proving that Abilify—and not his or her underlying condition or some other factor—caused the alleged compulsive behavior. Any single plaintiff may have difficulty showing that his or her facts meet the standard for "iatrogenic" Abilify-induced gambling that Plaintiffs have advanced. But aggregating the claims of multiple Plaintiffs who all allege that their compulsive behaviors were caused by Abilify would have an improper bolstering effect: by the sheer number of cases under considerations, jurors might more easily believe that Abilify caused harm. Consolidation would also allow Plaintiffs to support each other's claims.

For these reasons, where disputed issues of specific causation and individual medical histories are central to the plaintiff's claims, numerous courts have declined to consolidate pharmaceutical and other products liability cases. *See, e.g.*, *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (reversing

consolidation where injuries encompass "a number of different ailments for each of which there are numerous possible causes other than the tortious conduct of one of the defendants); *Guenther v. Novartis Pharm. Corp.*, No. 6:08-CV-456-ORL-31, 2012 WL 5398219, at *2 (M.D. Fla. Oct. 12, 2012) ("[T]hese cases turn on case-specific witnesses."), *R. & R. adopted*, 2012 WL 5305995 (M.D. Fla. Oct. 29, 2012); *Michael v. Wyeth, LLC*, No. CIV.A. 2:04-0435, 2011 WL 1527581, at *2 (S.D. W. Va. Apr. 20, 2011) (refusing to consolidate three hormone replacement therapy (HRT) cases because "each plaintiff has a unique medical and family history," was prescribed HRT drugs "in varying doses . . . by different doctors, at different times, . . . took the HRT drugs for different lengths of times," developed "different forms of breast cancer," and "had different pre-existing risk factors for breast cancer").[6]

The circumstances warranting consolidation in *Eghnayem* were different. There:

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[6] *See also, e.g.*, *Graziose v. Am. Home Prods. Corp.*, 202 F.R.D. 638, 641 (D. Nev. 2001) ("[The concern] that the individual plaintiff's and defendant's causes and rights are not lost in the 'shadow of a towering mass litigation' . . . is heightened in an area of scientific inquiry such as medicine, where the science is a developing one and scientific and legal controversies are impacted by many individualized circumstances and conditions." (quoting *In re Repetitive Stress Injury Litig.*, 11 F.3d at 373)); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 447 (D.N.J. 1998) ("A consolidated trial of these fourteen cases would compress critical evidence of specific causation and marketing to a level which would deprive [defendant] of a fair opportunity to defend itself.").

> most of the evidence went toward the common claims among the plaintiffs: (1) whether the Pinnacle was a defective medical device and (2) whether the Pinnacle's warnings were sufficient. The only evidence that went to the individual claims came from the more-easily-distinguishable doctors who did each plaintiff's implantation, and concerned comparatively straightforward questions: (1) did the Pinnacle's design cause *that* plaintiff's injuries, and (2) did the lack of sufficient warnings influence *that* doctor's decision to implant the Pinnacle.

Eghnayem, 873 F.3d at 1314. In other words, as is often the case in medical device mass tort litigation, specific causation was not complicated. *See, e.g.*, Pretrial Order # 91, at 4, ECF No. 10, *Eghnayem v. Boston Sci. Corp.*, No. 2:13-cv-07965 ("While there will be separate evidence relating to failure to warn and individual damages, the similarities in these cases, particularly as to the claim of design defect, far outweigh any differences."). Likewise, in *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985), the district court consolidated four asbestos cases involving plaintiffs who "were similarly situated in terms of the manner in which they had been exposed to asbestos and the extent of their disease."

This litigation does not involve asbestos or similar "product-based mass torts in which the evidence of exposure and general causation is clear" to justify aggregation. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.311 & n.1065. As discussed above, Plaintiffs' alleged injuries encompass "a number of different

ailments for each of which there are numerous possible causes other than the tortious conduct of one of the defendants." *In re Repetitive Stress Injury Litig.*, 11 F.3d at 373. Plaintiffs should not be permitted to blur these differences by requiring Defendants to defend against multiple unique claims at once.

3. Consolidating cases for trial would be inefficient.

Consolidation also would create inefficiencies. *See Eghnayem*, 873 at 1313 (district court must consider "the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives"). By requiring proof on multiple individuals' medical histories, usage of Abilify, alleged damages, and exposure to marketing (among others), consolidated trials would be significantly more complicated. They would require testimony from multiple treating physicians, specific-causation experts, and Plaintiffs themselves, each of whom would present different facts.[7] The jury would have to expend time and effort trying to keep track of which witness's testimony applies to which Plaintiff, and which defense evidence applies to which Plaintiff. By necessarily involving

[7] As noted above, because each Plaintiff's medical history and history of the alleged compulsive behaviors before, during, and after Abilify is relevant to causation, these cases will require more medical evidence than a typical pharmaceutical or medical device case.

additional witnesses and exhibits, moreover, consolidated trials would be longer, imposing greater hardship on the jurors.

4. Plaintiffs' request to consolidate is premature in any event.

Even if the Court believes consolidation *might* be appropriate, it should not rule in a vacuum. The parties first should have an opportunity to fully develop the legal and factual basis for their claims and defenses in future trial pool cases, so that the Court has enough information to assess the relevant factors. *See, e.g., In re Levaquin Prods. Liab. Litig.*, No. MDL 08-1943(JRT), 2009 WL 5030772, at *4 (D. Minn. Dec. 14, 2009) ("[T]he parties should conclude case-specific discovery in the bellwether cases and should fully develop the legal and factual bases for their claims and defenses before the Court ultimately rules on plaintiffs' motion to consolidate.").

CONCLUSION

For the foregoing reasons, Plaintiffs have not carried their "burden of showing that the balance weighs in favor of consolidation." *Northstar Marine, Inc. v. Huffman*, No. CIV.A. 13-0037-WS-C, 2014 WL 4167019, at *2 (S.D. Ala. Aug. 21, 2014). Defendants respectfully ask that the Court decline Plaintiffs' request to consolidate future trial pool cases for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)

Pursuant to Local Rule 7.1(B), counsel for Defendants certify that they contacted counsel for Plaintiffs regarding the relief requested in the foregoing motion. Plaintiffs do not consent to this motion.

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 3,148 words, excluding the parts exempted by that Rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 5th day of January, 2018, 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 e-mail notification to all registered counsel of record.

s/ Larry Hill
Larry Hill