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

IN RE: ABILIFY (ARIPIPRAZOLE) PRODUCTS LIABILITY LITIGATION	CASE NO. 16-MD-2734
This document relates to all cases	Chief Judge M. Casey Rodgers

PLAINTIFFS' MOTION FOR CONSOLIDATED TRIALS

Pursuant to the Court's instructions at the case management conference held December 14, 2017, plaintiffs submit this motion to join individual cases for adjudication in consolidated bellwether trials. This motion is supported by the accompanying Memorandum of Law.

Respectfully submitted this 5th day of January, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 5th day of January, 2018, a true and correct copy of the foregoing was electronically filed and served electronically via the Court's CM/ECF system, which will automatically serve notice to all registered counsel of record.

/s/ Bryan F. Aylstock
Bryan F. Aylstock

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CONSOLIDATED TRIALS

Plaintiffs move to join individual cases for adjudication in consolidated bellwether trials. Common issues of law and fact favor consolidation, and group trials will promote efficient resolution of this litigation.

The consolidation of cases for trial and the timing of any consolidation are decisions within the district court's broad discretion.[1] Federal Rule of Civil Procedure 42(a) provides:

> If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.[2]

In exercising its discretion to consolidate actions for trial, the trial court must consider:

[1] *Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304, 1313 (11th Cir. 2017); Manual for Complex Litigation § 22.313 (4th Ed.) ("Judges have broad discretion as to the timing of aggregation decisions.")
[2] Fed. R. Civ. P. 42(a).

> Whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time to conclude multiple lawsuits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.[3]

In considering any risk of prejudice and confusion, the district court must assess whether those risks may be reduced by the use of careful trial management, cautionary instructions to the jury, and verdict sheets outlining the claims of each plaintiff.[4]

Common Questions of Law and Fact

MDLs are formed when the Judicial Panel for Multi-District Litigation determines that multiple individual cases involve common questions of law and fact, and that centralization for *pretrial* proceedings would promote the efficient conduct of the litigation.[5] Thus, it is indisputable that the cases in the Abilify MDL share common questions of law and fact. The issue, here, is whether the common issues of law and fact warrant consolidation of groups of cases for trial, as well as for pretrial proceedings.[6] "[L]itigation involving large numbers of cases claiming similar injuries from the same product is particularly well-suited for Rule 42

[3] *Eghnayem*, 873 F.3d at 1313 (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985).
[4] *Eghnayem*, 873 F.3d at 1313-1314; *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2nd Cir. 1990).
[5] *In re Mentor Corp. ObTape Transobtrator Sling Prods. Liab. Litig.*, 2010 WL 797273, *3 (M.D. Ga. Mar. 3, 2010).
[6] See Manual for Complex Litigation, §22.311.

consolidation."[7] Courts have noted that the judicial discretion to consolidate trials, afforded trial judges by Rule 42, is especially appropriate for an MDL judge.[8]

Factually, the cases in this MDL are substantially similar. Each case involves a single product, aripiprazole (Abilify), which was developed, tested, and manufactured by the defendants to this action, taken under similar circumstances by each of the plaintiffs, and is alleged to have produced similar injuries (i.e., compulsive behaviors such as gambling). Abilify has been approved by the FDA for the treatment of schizophrenia and bipolar disorder, and for some symptoms of autism, and as an adjunct therapy for depression. Thus, each plaintiff was prescribed Abilify for the treatment of symptoms associated with one or more of these psychiatric conditions. As a psychotropic medication prescribed to treat chronic psychiatric conditions, Abilify is generally taken daily over long periods of time. Plaintiffs took Abilify (or aripiprazole once generic versions of the drug came on the market) continuously for months or years. Thus, the circumstances of Plaintiffs' exposure to Abilify are similar. Each of the MDL plaintiffs alleges that Abilify use caused (or significantly exacerbated) compulsive gambling behavior, causing financial and other injuries, by its action on neurotransmitters (especially dopamine). Labelling and marketing materials for Abilify in the United States did

[7] *Consorti v. Armstrong World Indus. Inc.*, 72 F.3d 1003, 1007-08 (2nd Cir. 1995).
[8] See *In re Mentor Corp.*, 2010 WL 797273, *3 (consolidation should be seriously considered in multidistrict litigation); *In re Welding Fume Prods. Liab. Litig.*, 2006 WL 2869548 at *2 (N.D. Ohio, Oct. 5, 2006); *In re Stand N' Seal Prods. Liab. Litig.*, 2009 WL 2224185, at *2 (N.D. Ga. July 21, 2009).

not include a warning about the association between Abilify and compulsive gambling until 2016, although the defendants warned much earlier in Europe.

Legally, the plaintiffs assert substantially the same claims. Plaintiffs have filed suit against defendants in separate actions, but with reference to a long-form master complaint which asserts common legal claims. The master complaint filed in this MDL alleges strict liability (defective design and failure to warn), breach of express warranty, breach of implied warranty, negligence, negligent misrepresentation, violation of consumer protection laws, and fraudulent concealment.

Conducting consolidated trials will save time, effort, and expense, and will avoid the risk of inconsistent judgments.

The Manual for Complex Litigation advises that "[a]ggregation of claims can maximize fair and efficient case management, minimize duplication, reduce cost and delay, enhance the prospect of settlement, promote consistent outcomes, and increase procedural fairness."[9] Consolidated trials will serve an important judicial interest—efficiency—because "there is clearly substantial overlap in the issues, facts, evidence, and witnesses" which will be presented at every plaintiff's trial.[10] The expert witnesses and evidence that will be presented at trial to establish whether Abilify may cause compulsive behaviors such as gambling (general

[9] Manual for Complex Litigation, § 22.312.
[10] *Eghnayem,* 873 F.3d at 1314.

causation), when defendants should have been or became aware of an association between Abilify and compulsive behaviors, how Abilify was labelled and marketed, and other essential elements of these cases, will likely be nearly identical for all cases. Although some case-specific evidence will also be introduced in litigating each plaintiffs' claims, a large amount of nearly identical evidence is likely to be introduced across cases.

The Manual for Complex Litigation also notes that "[c]ases having substantially similar evidence from the same expert or percipient witnesses sometimes benefit from some form of aggregation."[11] Plaintiffs expect to rely upon the same general causation experts across plaintiffs' cases. Similarly, Defendants are expected to rely on a group of experts in defending all claims. In addition, the parties are expected to use the same BMS and Otsuka witnesses and corporate documents to prove defendants' liability, or establish defenses to liability, across cases. This commonality of evidence and witnesses weighs in favor of consolidation. It would be extremely burdensome to the witnesses to be asked to travel to Florida and appear in multiple individual trials, rather than a few consolidated bellwether trials. Repeating such general causation and general liability evidence in sequential individual trials is both inefficient and enormously expensive.

[11] Manual for Complex Litigation, § 22.316.

Fairness considerations also weigh in favor of consolidation. Consolidation is uniquely appropriate in this case because some plaintiffs have suffered relatively minor economic losses from their compulsive behavior, and in such cases, the cost of an individual trial would be disproportionate to the amount of damages sought. In addition, consolidation will reduce the risk of inconsistent judgments.

Consolidation Will Facilitate Settlements

Additionally, plaintiffs believe that consolidating small groups of cases for trial will facilitate resolution of their claims. If each bellwether trial includes the claims of multiple plaintiffs, it will give the parties an opportunity to obtain verdicts for multiple claims without burdening the court or the parties with the substantial time commitment and cost of multiple separate trials.

In the Pelvic Repair System Litigation, Pretrial Order 78, Judge Goodwin first ordered the consolidation of eleven cases for trial on all issues. In his reasoning, he quoted *In re Mentor Corp.*:

> Since a court has limited time and resources to try large numbers of bellwether trials, it would appear that consolidation of multiple cases for trial in the MDL setting would provide parties with an opportunity to obtain results for multiple claims without burdening the court or parties with the substantial cost of multiple separate trials.[12]

[12] *In Re*: Boston Scientific Corporation Pelvic Repair System Products Liability Litigation, S.D.W.V. 12-md-2326, Doc. No. 701 at 5.

Additionally, Judge Goodwin wrote "if eleven of these Obtryx cases are disposed of in one trial, the disposition of these cases may facilitate settlement amongst the parties.[13]

Similarly, in Pretrial Order 91, Judge Goodwin ordered the consolidation of five additional cases for trial, stating that:

> the more cases that are tried together in this MDL. . . the sooner the parties will come to understand the true nature of these cases, their values, the weaknesses and strengths in their cases, and the cost of trying them. . . . [T]he burden on the parties may ultimately be less if a consolidated trial leads the parties to resolution more quickly than individual trials.[14]

Ultimately, a small number of group trials did lead to the settlement of the majority of the claims in the Pelvic Repair System MDL.

Similarly, consolidating a small group of claims for joint trial in the Abilify MDL will provide the parties with substantial information about the viability and value of various claims after one or two trials, rather than after many single-plaintiff trials. Thus, consolidation of small groups of cases for bellwether trials is likely to advance efforts to settle the remaining claims more efficiently than individual trials would.

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[13] *Id.*

[14] *In Re*: Boston Scientific Corporation Pelvic Repair System Products Liability Litigation, S.D.W.V. 12-md-2326, Doc. No. 757 at 4-5.

Minimal Risk of Prejudice or Confusion

In deciding whether to exercise its discretion to consolidate cases for trial, the district court must weigh the benefits of consolidating groups of similar cases for trial against the risk of prejudice or confusion.

To minimize the risk of jury confusion, cases can be grouped and tried by plaintiffs' state of residence so that a single set of jury instructions will apply to each plaintiff in the consolidated grouping. Groupings may also be guided by other factors, such as efficiency. For example, if cases in which the same specific causation experts will be called are consolidated for trial, costs will be minimized and efficiency will be increased.

Consolidating claims in this litigation will not give rise to any inherent conflicts between parties which would not have existed in the absence of consolidation; plaintiffs' claims against defendants are consistent, not competing.

Regarding the risk of prejudice from the simultaneous presentation of multiple plaintiffs' claims, it is important to note that, even in a single-plaintiff trial, the jury may hear evidence that others have been similarly injured by the product at issue.[15] Thus, consolidating cases for trial will not unduly prejudice defendants.

[15] *Eghnayem*, 873 F.3d at 1315; see also, *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (Eleventh Cir. 2000).

Finally, although case-specific causation evidence must also be presented at a consolidated trial, and this could, theoretically, cause confusion for the jury, any potential for confusion can be minimized by adept trial management, the organized presentation of evidence, implementation of procedures such as allowing jury note taking, and careful jury instructions. The Eleventh Circuit has found that consolidating asbestos cases for trial was appropriate, although the cases required the presentation of complex and individualized evidence regarding specific causation, such as evidence of exposure, a plaintiff's other risk factors, and medical histories.[16]

Plaintiffs are confident that any confusion or prejudice to defendants that could arise from consolidation of multiple cases in a single trial may be mitigated by creating small groups of plaintiffs, ensuring that the consolidated groups are created such that the law of a single state or a few applies, giving careful instructions to the jury to consider causation and damages in each case separately, and using separate verdict forms, with special interrogatories, for each plaintiff.[17]

[16] *Hendrix,* 776 F.2d at 1496.
[17] See, e.g., *Eghnayem,* 873 F.3d at 1313-1314.

Conclusion

Because plaintiffs believe that the factors which must be weighed in deciding whether cases should be consolidated for trial favor consolidation, they respectful request that the Motion for Consolidation be granted.

Respectfully submitted this 5th day of January, 2018.

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L.R. 5.1(C) and 7.1 (F) TYPE-SIZE AND WORD COUNT COMPLIANCE CERTIFICATE

I, Bryan F. Aylstock, hereby certify that, pursuant to N.D. Fla. L.R. 7.1(F), the attached brief was prepared using Microsoft® Office Word Version 2010, and that its text, exclusive of the case style, signature text, and Certificate of Service, contains 1,992 words according to the Microsoft® Word automatic word count function, which has been specifically applied to include all text, including headings, footnotes and quotations. I further certify that the attached brief has a typeface of 14 points in Times New Roman and complies with N.D. Fla. L.R. 5.1(C).

/s/ Bryan F. Aylstock
Bryan F. Aylstock

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