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March 16, 2018

VIA ECF

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:

As required by CMO 12 (Dkt. No. 749), the parties met and conferred regarding a protocol for selecting cases for the second discovery pool and bellwether trial pool. The Court has already ruled that the cases will be selected randomly but asked the parties to confer about whether there are broad categories that should be covered by the random selection. Defendants have previously advised the Court that if the cases were selected randomly they would waive *Lexecon*.

The parties were unable to reach agreement. Defendants sent their proposal to Plaintiffs on Tuesday afternoon. On Thursday, Plaintiffs' counsel requested an additional day to meet and confer. As of this moment, Plaintiffs have not provided us with any proposal or any response to Defendants' proposal. Defendants have no idea what kind of proposal Plaintiffs are going to submit.

Defendants respectfully submit that the most appropriate way to select the next discovery pool is to randomly select 25 Plaintiffs from the pool in the MDL

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without ensuring that the cases reflect any broad categories. Such a process would be fairest to both sides and give the parties information about the pool as a whole.

Defendants considered whether certain "demographic" factors could be built into the random selection process. But unfortunately, there are currently no reliable metrics to inform what cases are more or less representative of the Plaintiff pool as a whole. One of the key issues in this litigation is the Plaintiff's gambling history, including whether he or she engaged in gambling or compulsive behaviors before and after Abilify use and how quickly he or she began doing so after starting Abilify. But discovery of the first trial pool Plaintiffs has made clear that the complaints, profile forms, and fact sheets are not reliable on this issue. Depositions and medical records have repeatedly demonstrated that Plaintiffs' initial reports are wrong, sometimes wildly so. Even the underlying mental health conditions which led Plaintiffs to take Abilify are often far more complicated than what was originally claimed in profile forms.

A truly random selection of the second trial pool will allow the parties to reliably ascertain the strengths and weakness in the Plaintiffs' caseload as a whole. The drop-out rate for the first set of trial pool cases has been telling. When faced with the prospect of individual trials based on the Court's selection of the seven trial pool cases filed in this District, Plaintiffs voluntarily dismissed three cases before a single Plaintiff had been deposed, and Plaintiffs' counsel withdrew from a fourth case. The experience in New Jersey has been similar. Of the five cases recently selected for trial there, Plaintiffs reported to Judge DeLuca yesterday that they will dismiss one case and take another out of the pool (given bankruptcy proceedings). If this trend continues with a random selection of cases in a second trial pool, it will further confirm this important information about the Plaintiff pool as a whole.

Numerous authorities have recognized that random selection of cases can generate the best information about the plaintiff population as a whole. *See, e.g.*, 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*

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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").

In discussing these issues, Plaintiffs routinely cite Judge Fallon's CMO No. 4 in the *Xarelto* litigation, which set forth criteria and a process for selecting 40 discovery pool plaintiffs. This litigation and *Xarelto* have fundamental differences that may make Judge Fallon's approach a poor fit here. *Xarelto* relied on "complete and accurate" plaintiff fact sheets to select the cases for the trial pool, whereas on the key issues here the plaintiff profile forms and fact sheets have proven to be unreliable. In *Xarelto*, the nature of the underlying conditions and injuries described in the fact sheets were susceptible to objective validation in ways not available here. Judge Fallon also allowed for "party picks," which in this litigation would not be fair to Defendants in light of the great imbalance of information in Plaintiffs' favor at this stage.

This Court's ruling on the order in which the first trial pool cases are to be tried acknowledged that "a true *bellwether* sample" can be achieved based on a random selection. The Court also set forth a logistical mechanism to achieve a random selection. Dkt. 786, at 2 n.2. Defendants respectfully request that the Court apply that same mechanism to identify the 25 cases for the second trial pool.

* * *

Defendants look forward to discussing these matters with the Court.

Respectfully Submitted,

/s/ Anand Agneshwar
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