

**UNITED STATES DISTRICT COURT
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

**PLAINTIFFS' PROPOSAL FOR CHOOSING SECOND GROUP OF
POTENTIAL TRIAL CASES**

Pursuant to the Court's instruction, Plaintiffs met and conferred with Defendants on the issue of choosing the second group of potential trial cases. Unfortunately, the parties could not come to an agreement. Accordingly, Plaintiffs hereby submit their proposed methodology for the Court to employ in determining the second group of potential trial cases.

Plaintiffs' proposed approach is simple and is premised upon the goal of achieving representative results in the most efficient manner possible so as to facilitate an accurate and expedient resolution of the litigation.

Bellwether cases should 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, and what range of values the cases may have if resolution is attempted on a group basis. **The more representative the test cases, the more reliable the information about similar cases will be.** (emphasis added).

Manual For Complex Litigation (Fourth) § 22.315 (2004).

In 2008, three senior United States District Court Judges (Hon. Eldon E. Fallon, Hon. Jeremy T. Grabill and Hon. Robert Pitard Wynne) wrote: “**A bellwether trial is most effective when it can accurately inform future trends and effectuate an actual culmination to the litigation.**” *Bellwether Trials in Multidistrict Litigation*; Tulane Law Rev. Vol. 82:2323 at 2344 (attached hereto as Ex. A) (emphasis added). In other words, one of “the principal goals of the bellwether process” is to select a plaintiff or plaintiffs “who can truly be representative of the whole mass of plaintiffs in the MDL.” *In Re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. 09-2967, 2009 WL 3418128, at *3 (E.D. La. Oct. 14, 2009), *aff’d sub nom. In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 628 F.3d 157 (5th Cir. 2010). The Manual for Complex Litigation (Fourth) § 22.315 (Fed. Judicial Ctr. 2004) is explicit, “[if] bellwether trials or test cases are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases”. MCL 4th § 22.315; *See also, Rothstein, et al.*, *Managing Multidistrict Litigation in Products Liability Cases: a Pocket Guide for Transferee Judges* 44 (Fed. Judicial Ctr. 2011) (“If bellwether trials are to produce reliable information about the other cases in the MDL, the specific plaintiffs and their claims should be representative of the range of cases.”). After all, “[a] ‘bellwether case’ is a test case. . . . ‘Bellwether’

trials should produce representative verdicts and settlements.” *In re Tylenol (Acetaminophen) Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 12–7263, MDL No. 2436, 2015 WL 2417411, at *1 & n. 3 (E.D. Pa. May 20, 2015).

Bearing this in mind, Plaintiffs consulted Jake Woody of MDL Centrality and obtained updated data on the demographics of the cases. In reviewing the demographics of the existing cases, Plaintiffs recommend the following:

- **States:** Plaintiffs noted that California is the state in which the most plaintiffs (88 to date) reside. There is a significant drop-off after California, as indicated on the attached chart. Because Defendants indicated a potential unwillingness to waive *Lexicon*, Plaintiffs propose that all potential Bellwether picks for the second round should come from California and Florida.¹ Plaintiffs propose confining the Bellwether pool to two states for multiple reasons. First, to the extent counsel for either party is unable to obtain a *Lexicon* waiver, the Court will only need to travel to two jurisdictions (or one if Florida is one of the states selected). Second, to the extent a multi-plaintiff trial may occur, it will be necessary for plaintiffs to

¹ Multiple plaintiffs from the same states will allow for common legal issues to be briefed across a smaller subset of cases should the Court adopt Plaintiffs’ suggestion for a consolidated trial as previously briefed. *See* ECF No. 648. Further, Plaintiffs recognize that at this moment, there are not enough cases in Florida to meet the pool suggestions. However, Plaintiffs can make a good faith representation that multiple firms with cases already filed have additional Florida cases that should be filed in the upcoming months.

be from the same state. Third, any briefing that takes place can be confined to the laws of the two states at issue.

- **Indications:** In looking at the available data provided by Mr. Woody, the two most common indications for taking Abilify were major depressive disorder or depression (64.8%) and bipolar disorder (47.89%).² Because there are notable scientific differences for each indication, Plaintiffs further propose that the group of plaintiffs from one state should have all taken Abilify for major depressive disorder or depression and the group from the other should have all taken Abilify for bipolar disorder.
- **Injuries:** The vast majority of plaintiffs (approximately 98%) in the MDL claim gambling as their primary injury. Plaintiffs therefore propose that the pool be composed of plaintiffs claiming gambling as their primary injury.
- **Populating the Pool of Bellwether Cases:**
 - Step 1: While the parties tentatively discussed choosing 25 cases, Plaintiffs suggest choosing 76 to be safe, half from California and half from Florida, totaling 38 per state. The parties have already seen that obtaining records for these cases can be quite difficult, as many financial institutions refuse to produce financial records until a case is filed. Thus, the potential for cases to be dismissed once records are

²To the extent the Court wanted to select other indications, the next two most popular indications were anxiety (41.4%) and PTSD (16%).

obtained looms larger in this litigation than in others where only medical records are required. Once chosen, each of these 76 plaintiffs will then be required to complete a plaintiff fact sheet, records authorizations and to the extent possible, to produce all relevant medical and financial records.

- Step 2: After a period of time sufficient for the parties to review the fact sheets and the records (to be determined by the Court), each party will be permitted to strike 5 cases in each state, taking the total pool down to 28 cases per state.³
- Step 3: Once the pool is narrowed to 28 cases per state (or 56 cases total), each party will be permitted to nominate 6 cases from each of the two states (e.g., Plaintiffs nominate 6 California and 6 Florida cases, and Defendants also nominate 6 California and 6 Florida cases).
- Step 4: The Court will then select 6 cases from each state to be tried in multi-plaintiff trials.⁴
- Step 5: Plaintiffs will select the first group to be tried first.

³ If the Court decides that a smaller pool is appropriate from the outset (i.e., 50 cases), Plaintiffs propose that the number of strikes on each side be reduced accordingly so as to keep a larger pool at this stage.

⁴ To the extent there is any attrition in the Bellwether pools once the cases are in the advanced stages of discovery, a six-plaintiff trial should be sufficient to ensure that there are enough plaintiffs for a multi-plaintiff trial to take place.

Plaintiffs believe that the proposal outlines above will facilitate a just and expedient resolution of these cases and respectfully request that the Court adopt it. Should the Court have questions or concerns, Plaintiffs will be prepared to address them at the upcoming Case Management Conference.

Respectfully submitted this the 16th day of March, 2018.

On behalf of Plaintiffs

*s/Kristian Rasmussen*_____

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I HEREBY CERTIFY that this response and memorandum comply with the word limit of Local Rule 7.1(F) and the memorandum contains 1350 words, excluding the parts exempted by that Rule.

Respectfully Submitted,

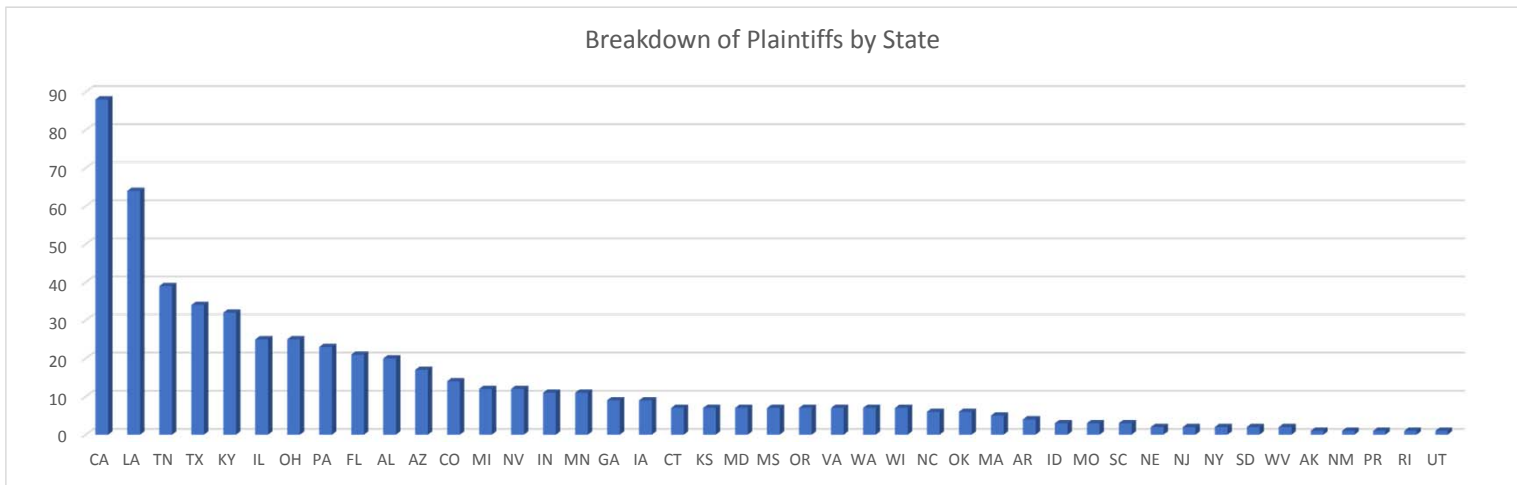
s/ Kristian Rasmussen
Kristian Rasmussen

CERTIFICATE OF SERVICE

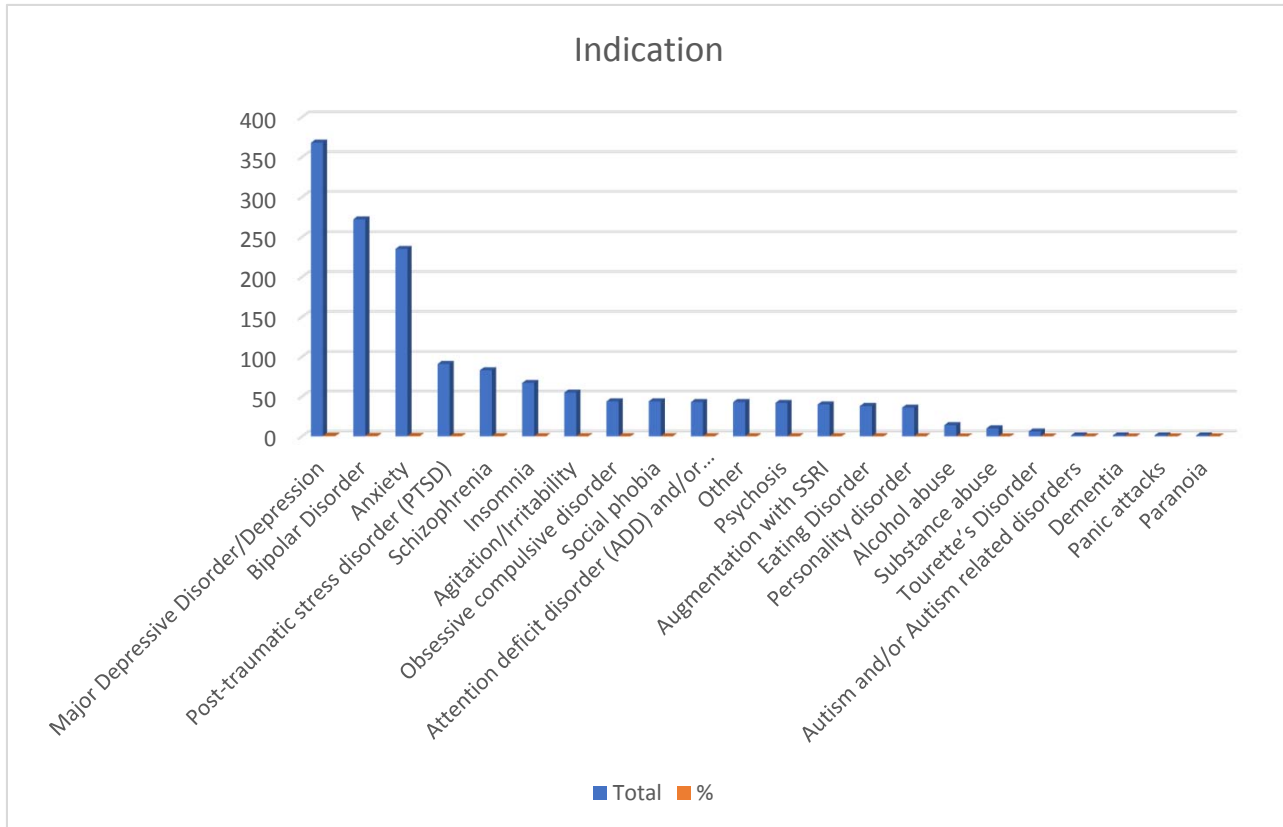
I HEREBY CERTIFY this 16th day of March, 2018, a true and correct copy of the foregoing was electronically filed and served electronically via the Court's CM/ECF system, which will automatically serve notice to all registered counsel of record.

s/Kristian Rasmussen
Kristian Rasmussen

State	Total
CA	88
LA	64
TN	39
TX	34
KY	32
IL	25
OH	25
PA	23
FL	21
AL	20
AZ	17
CO	14
MI	12
NV	12
IN	11
MN	11
GA	9
IA	9
CT	7
KS	7
MD	7
MS	7
OR	7
VA	7
WA	7
WI	7
NC	6
OK	6
MA	5
AR	4
ID	3
MO	3
SC	3
NE	2
NJ	2
NY	2
SD	2
WV	2
AK	1
NM	1
PR	1
RI	1
UT	1
Grand Total	567



Diagnosis Leading to Abilify Prescription		
Diagnosis	Total	%
Major Depressive Disorder/Depression	368	64.79%
Bipolar Disorder	272	47.89%
Anxiety	235	41.37%
Post-traumatic stress disorder (PTSD)	91	16.02%
Schizophrenia	83	14.61%
Insomnia	67	11.80%
Agitation/Irritability	55	9.68%
Obsessive compulsive disorder	44	7.75%
Social phobia	44	7.75%
Attention deficit disorder (ADD) and/or attention deficit hyperactivity disorder (ADHD)	43	7.57%
Other	43	7.57%
Psychosis	42	7.39%
Augmentation with SSRI	40	7.04%
Eating Disorder	38	6.69%
Personality disorder	36	6.34%
Alcohol abuse	14	2.46%
Substance abuse	10	1.76%
Tourette's Disorder	6	1.06%
Autism and/or Autism related disorders	1	0.18%
Dementia	1	0.18%
Panic attacks	1	0.18%
Paranoia	1	0.18%



Injury	#	\$
Gambling & other	421	74.25%
Gambling only	133	23.46%
No Gambling	13	2.29%

