



Anand Agneshwar
+1 212.836.8011 Direct
Anand.Agneshwar@arnoldporter.com

September 6, 2018

VIA ECF

The Honorable M. Casey Rodgers
United States District Court for the
Northern District of Florida
Arrow Federal Building
100 North Palafox Street
Pensacola, Florida 35202

Re: *In re Abilify (Aripiprazole) Products Liability Litigation*,
MDL No. 2734

Dear Judge Rodgers:

In advance of the September 13, 2018 case management conference, Plaintiffs and Defendants Bristol-Myers Squibb Company (“BMS”), Otsuka America Pharmaceutical, Inc. (“OAPI”), and Otsuka Pharmaceutical Co., Ltd. (“OPC”) (collectively, “Defendants”) jointly submit the following proposed agenda.

I. Second Discovery Pool

As required by the Court’s Order regarding the Selection of the Second Group of Potential Trial Cases, on August 24, 2018, the parties submitted a joint list of the 10 cases—5 per side—stricken from the second discovery pool of 40 cases. *See* ECF No. 978. Three of the remaining 30 Plaintiffs have not waived venue, but pursuant to the Court’s Order of September 5, 2018, will proceed with the next step in the discovery process. *See* ECF No. 987.



The Honorable M. Casey Rodgers
September 6, 2018
Page 2

For each of the remaining 30 cases, Plaintiffs must provide by October 12, 2018, a completed Plaintiff Fact Sheet, medical, financial or gambling records authorizations for each of the sources identified in the Plaintiff Fact Sheet, and copies of relevant medical, financial, and gambling records in Plaintiffs' or Plaintiffs' counsel's possession. *See* ECF No. 953, ¶ 4.

The parties will be prepared to discuss the following issues regarding the second discovery pool at the CMC.

A. Collection of Plaintiffs' Third-Party Medical, Financial, and Gambling Records

As directed by the Court, the parties have met and conferred regarding an order to expedite the production of third-party records but have reached an impasse.

Defendants' Position: Defendants believe that this Court's Order of September 8, 2017, ECF No. 531, sets forth reasonable compliance deadlines for third parties, and that shortening those deadlines likely would not improve collection times. However, Defendants remain concerned that some third parties do not seem to understand the need to comply with the Court's order at all. Defendants also believe the process can proceed faster if Plaintiffs promptly provide signed authorizations for the physicians already identified by the 30 discovery pool Plaintiffs in their Profile Forms.

To address these issues, Defendants proposed an agreement under which (1) the Discovery Committee would draft stronger language for the cover letters sent by RecordTrak (the third-party document collection vendor) to help ensure the third parties understand the Order; and (2) by September 14, 2018, the 30 discovery pool Plaintiffs would produce to Defendants: (A) copies of all medical, financial gambling, and employment records in the possession, custody, or control of Plaintiffs or their counsel; and (B) signed medical, financial, gambling and employment records authorizations—with the name and address of the provider, institution, or



The Honorable M. Casey Rodgers
September 6, 2018
Page 3

establishment left blank—along with a list of all currently known Health Care Providers (including those that prescribed Abilify to Plaintiffs) and sources of financial, gambling and employment records that are currently known to Plaintiffs or their counsel. (The parties would reserve all rights to request or produce authorizations from additional medical, financial and gambling providers or establishments.) Production of these records and authorizations presents little burden to Plaintiffs because Defendants are seeking only those records that have already been collected by Plaintiffs or their counsel and authorizations for records sources currently known to Plaintiffs. Plaintiffs’ counsel typically gather these materials in performing their initial case evaluation. There is no reason why those documents cannot be produced immediately.

Plaintiffs’ claim that it is too burdensome to produce authorizations and documents within their possession defies our experience in these cases. Signing authorization forms takes a matter of minutes. Likewise, the records Defendants seek are ones that Plaintiffs’ counsel already have collected and reviewed, and there is no legitimate reason for Plaintiffs to redact them.

Similarly, Plaintiffs’ request for a blanket extension to March 2019 of the Court’s deadline for Supplemental Plaintiff Profile Forms (“SPPFs”) is excessive and will unreasonably delay this phase of the litigation. There is no justification for any extension for Plaintiffs who are not in the second trial pool. The SPPFs are necessary to evaluate the case inventory as a whole and will help identify unsupported cases.

Finally, Plaintiffs’ request that Defendants produce documents from their sales representatives ignores the parties’ bargained-for selection process, is inconsistent with the Court’s Order for the second discovery pool, and is overly burdensome.

Defendants agreed to make the first round of strikes without the benefit of medical records in exchange for the agreement that Defendants’



The Honorable M. Casey Rodgers
September 6, 2018
Page 4

Fact Sheets would be provided for the 20 trial pool Plaintiffs remaining after the second round of strikes.

Consistent with this agreement, the Court ordered:

By December 21, 2018, each side will strike an additional five (5) cases, taking the total second discovery pool down to 20 cases. The Parties will meet and confer on the reasonable scope of fact discovery for the 20 cases, including the number and sequence of depositions, the timing and production of Defendant Fact Sheets, and the timing of production, if any, of additional documents from both sides.

ECF No. 906, ¶ 5.

Instead, Plaintiffs would impose on Defendants the unnecessary costs of producing documents that are relevant only to the 10 Plaintiffs who will get struck from the pool before discovery begins in earnest. This is not an insignificant expense. Based upon Defendants' experience with the first round of plaintiff discovery, there are on average 3 sales representatives per prescriber *for each of BMS and OAPI*, and usually at least 2 prescribers per Plaintiff (and sometimes more). Plaintiffs' request also is not proportionate to Plaintiffs' need (if any) for such information for all 30 Plaintiffs, which would be approximately 360 custodians. Rather, as the Court's Order mandates, Defendants will produce this information and the Defendants' Fact Sheets for the 20 trial pool Plaintiffs. Again, Defendants remain willing to discuss expediting their production of sales representative production for the 20 Plaintiffs, but that process cannot begin until the parties have exercised their 5 additional strikes on December 14.

Plaintiffs' Position: Under this Court's Order Establishing Second Group of Potential Discovery & Trial Pool Cases (Doc No. 953), Plaintiffs are required to complete a Plaintiff Fact Sheet and provide authorizations and relevant medical and financial records to Defendants by October 12, 2018. Defendants' proposal, however, essentially requires that counsel for

Arnold & Porter

The Honorable M. Casey Rodgers
September 6, 2018
Page 5

the 30 trial pool Plaintiffs review—and make redactions where necessary—all medical records and financial documents in counsels’ possession in the next 9 days. As Defendants are certainly aware, the records in these cases often exceed thousands of pages and require significant time to review prior to production. The proposal also requires that counsel send to and receive back from their clients signed authorizations, the timing of which counsel cannot accurately predict nor control. This issue is compounded by the fact that all Plaintiffs are now required to complete the Supplemental PPF and provide supporting documentation to Brown Greer by October 31, 2018 pursuant to the Court’s Order dated August 31, 2018 (Doc No. 986).

Plaintiffs, however, are sympathetic to the plight of Defendants in their efforts to collect medical and financial records from third parties. As such, Plaintiffs request the Court extend the deadline for all Plaintiffs to complete Supplemental PPFs and provide records to Brown Green by 120 days. This would allow Plaintiffs to focus on the second trial pool cases and to provide records and authorizations to Defendants on a rolling basis with completion by the Court ordered October 12, 2018 deadline. In exchange, Plaintiffs requested that Defendants begin producing sales rep discovery for each of the second trial pool cases to Plaintiffs on a rolling basis. Defendants have flatly rejected this proposal as it would require them to produce documents earlier than required under the Court’s current schedule.

B. Inclusion of Plaintiff Justin Friedman in the Discovery Pool

Defendants wish to bring to the Court’s attention that the discovery pool includes a Plaintiff (Justin Friedman) in the *Rollo* case, 3:18-cv-1443, which was originally filed in California state court and removed to federal court. The case is subject to a motion to remand (described below).

II. Recent Filings in Other Jurisdictions

Defendants’ Position: Between August 6 and August 17, 2018, Plaintiffs’ counsel filed 24 complaints—comprising 1,154 plaintiffs—in state courts in California, Alabama, Illinois, Pennsylvania, and Nevada and

Arnold & Porter

The Honorable M. Casey Rodgers

September 6, 2018

Page 6

in federal court in Delaware.¹ Defendants are concerned that the overwhelming majority of these cases were filed by counsel with leadership positions in this MDL, and wish to discuss the significance of that issue with the Court at the CMC.

A. California

Plaintiffs' counsel filed 13 complaints, comprising 651 plaintiffs, in the Superior Court of California in and for San Francisco County:

- Kirtland & Packard, PLLC filed the first complaint, *Crisp*, on behalf of 47 California plaintiffs and 17 non-California plaintiffs on August 6, 2018; between August 13 and August 17, 2018, Kirtland & Packard, PLLC filed 7 additional complaints—*Mack*, *Marabuto*, *Abraham*, *Corralejo*, *Novick*, *Booth*, and *Stone*—on behalf of 409 California plaintiffs and 112 non-resident plaintiffs.
- Aylstock, Witkin, Kreis & Overholtz, PLLC filed one complaint, *Ortega*, on behalf of 44 California plaintiffs on August 10, 2018; Aylstock, Witkin, Kreis & Overholtz, PLLC filed an additional complaint, *Williams*, on behalf of 4 California plaintiffs on August 15, 2018.

¹ In addition, on August 22, 2018, an Oklahoma law firm filed a complaint in Oklahoma state court on behalf of a single Oklahoma plaintiff. *Martinez v. Bristol-Myers Squibb Co.*, CJ-18-4555 (Okla. Cty. Dist. Ct., Aug. 22, 2018). Defendants intend to remove the *Martinez* case to federal court on the basis of diversity of citizenship and notify the JPML that the case is a potential tag-along action.

Arnold & Porter

The Honorable M. Casey Rodgers

September 6, 2018

Page 7

- Napoli Shkolnik, PLLC filed three complaints—*Alford*, *Adams*, and *Earp*—on behalf of 145 California plaintiffs on August 13 and August 14, 2018.²

These new California state court complaints are in addition to the 8 complaints—comprising 239 plaintiffs—that were filed in California state court between April 25 and May 2, 2018, all of which were removed to federal court and transferred to this MDL, where they remain pending.³ This Court will, therefore, soon have jurisdiction over a total of 21 complaints, comprising 890 plaintiffs, that were originally filed in California state court.

The complaints in all of these are essentially identical to the Master Complaint in this MDL, except that Plaintiffs added one non-diverse defendant—a California pharmaceutical distributor named McKesson Corporation.⁴ Defendants removed these cases to federal court on the basis that Plaintiffs improperly joined McKesson to defeat diversity jurisdiction, which Plaintiffs dispute.

² Based on Defendants' review of the Complaints, 80 of these 145 plaintiffs (22 in *Adams* and 58 in *Alford*) were previously named as Plaintiffs in *Adeniran*, 3:18-cv-01406, which remains pending in the MDL.

³ Those cases are *Breeze*, 3:18-cv-01327, *Adeniran*, 3:18-cv-01406 *Rollo*, 3:18-cv-01443, *Behrman*, 3:18-cv-01465, *Davis*, 3:18-cv-01493, *Green*, 3:18-cv-01494, and *Evans*, 3:18-cv-01495. The eighth case, *Wyle*, 3:18-cv-01438, was filed by Milstein Jackson Fairchild and Wade LLP, which represents plaintiffs in at least 20 cases in the MDL.

⁴ The *Behrman* Complaint, filed by Napoli Shkolnik, PLLC on behalf of a single California plaintiff, also names as defendants Dr. Mark Frye, WPP Montagu Square LLC, Ogilvy Healthworld LLC, Compelle! Communications, and Nellie O'Brien.

Arnold & Porter

The Honorable M. Casey Rodgers

September 6, 2018

Page 8

B. Alabama, Illinois, Pennsylvania

Aylstock, Witkin, Kreis & Overholtz, PLLC filed three state court cases that are essentially identical to the Master Complaint in this MDL and allege that each plaintiff is a resident of the forum state and suffered losses in excess of \$75,000:

- *Rhodes*, on behalf of 18 Alabama plaintiffs in the Circuit Court of Mobile County, Alabama, filed on August 16, 2018;
- *Walker*, on behalf of 23 Illinois plaintiffs in the Circuit Court of Cook County, Illinois, filed on August 17, 2018; and
- *Tucci*, on behalf of 18 Pennsylvania plaintiffs in the Court of Common Pleas of Philadelphia County, Pennsylvania, filed on August 15, 2018.

Defendants removed these cases to federal court on the basis of diversity of citizenship, and all three cases are pending transfer to the MDL.

C. Nevada

Morris Anderson PLLC (also known as Bighorn Law, LLC) filed a complaint, *Brooks*, on behalf of 6 Nevada plaintiffs in Nevada state court on August 16, 2018. The complaint names as non-diverse defendants two resident sales representatives. The day after filing *Brooks*, the same law firm filed 3 cases in the MDL on behalf of Nevada plaintiffs that did not name Nevada sales representatives: *McCahera*, 3:18-cv-01943, *Wright*, 3:18-cv-01971, and *Bosarge*, 3:18-cv-01976. Defendants intend to remove the *Brooks* case to federal court on the basis of fraudulent joinder and notify the JPML that the case is a potential tag-along action.

Morris Anderson PLLC previously filed a complaint, *Johnson*, on behalf of 5 Nevada plaintiffs in Nevada state court on March 6, 2018. That

Arnold & Porter

The Honorable M. Casey Rodgers
September 6, 2018
Page 9

complaint named as non-diverse defendants the same two sales representatives. Overruling the *Johnson* plaintiffs' objections, the JPML transferred the case to the MDL on August 1, 2018, where it remains pending.

D. Delaware

Napoli Shkolnik, PLLC filed six complaints—*Arbuckle*, *Kinkle*, *Adams*, *Alexander*, *Meyer*, and *Covas*—in the United States District Court for the District of Delaware on behalf of 438 plaintiffs, none of whom are Delaware residents.⁵ Defendants notified the JPML of these potential tag-along actions, and all of them have since been transferred to the MDL.

Plaintiffs' Position: Plaintiffs are unaware of the source of Defendants' apparent concern regarding the state court cases. Parallel state court actions are common in pharmaceutical proceedings and often allow parties to obtain results from diverse venues in an effort to provide both sides with additional meaningful information about the value of the cases. These state court actions compliment but do not compete with the MDL proceedings, which are far more advanced than these newly filed cases.

III. **Proposed Consolidated Briefing on Remand and Personal Jurisdiction Issues in California Cases**

Pursuant to the parties' agreement, all of the California state court cases have been removed and are in the process of being transferred to the MDL. Pursuant to the parties' request, the Court deferred ruling on remand motions in the California state court cases that were filed in April and May.

⁵ Napoli Shkolnik, PLLC also filed one complaint on behalf of a single Delaware resident in Delaware state court. Although the case is not removable because of the Delaware citizenship of BMS and OAPI, counsel for the parties are discussing whether that case can be dismissed and refiled in New Jersey, so that it may be part of the coordinated multicounty litigation.

Arnold & Porter

The Honorable M. Casey Rodgers
September 6, 2018
Page 10

See CMO-14, at 3, ECF No. 901. The parties now request that the Court allow the parties to submit consolidated (superseding) briefing across all California cases in which the remand issues arise. The parties propose that Plaintiffs file their omnibus motion to remand on September 17, 2018, Defendants file their opposition on October 1, 2018, and Plaintiffs file a reply by October 8, 2018.

Defendants have also notified Plaintiffs that, under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), Defendants object to personal jurisdiction with respect to the claims of those Plaintiffs who are not residents of California or were otherwise not prescribed or allegedly injured by Abilify in California. The parties are continuing to confer about this issue.

IV. Punitive Damages Discovery

Plaintiffs' Position: This Court's April 2, 2018 Order (Doc No. 831) underscored Plaintiffs' need for punitive damages discovery. The Order states

[t]he Court encouraged the parties to continue to work towards a stipulation on net worth. In the event, however, that the parties are unable to stipulate to net worth, the Court advised the parties that appropriate arrangements will have to be made so that plaintiffs in fairness will be able to obtain (through discovery or otherwise) necessary financial information from which to calculate net worth.

Though no stipulation was ever reached by the parties, the issue was put on hold following the resolution of the first trial pool cases. At this time, however, a second trial pool has been selected and discovery on those cases is currently underway. To that end, Magistrate Jones' Omnibus Discovery Order (Doc No. 549) confirmed that "Plaintiffs will have the right to request additional discovery related to additional Plaintiffs after the [first] trial pool cases have been tried." As such, Plaintiffs are requesting the opportunity to



The Honorable M. Casey Rodgers
September 6, 2018
Page 11

pursue this line of discovery as it now pertains and is necessary to each of the second trial pool cases.

As this Court is aware, during the general cause and liability phase of this case the parties were operating under a compressed schedule and discovery was often abbreviated accordingly. Moreover, Defendants often cited Plaintiffs alleged delay in requesting discovery as a basis for refusing to produce same under the compressed schedule. Accordingly, Plaintiffs are requesting to undertake this discovery proactively.

It should be noted, again, that Plaintiffs are currently required to complete a Plaintiff Fact Sheet and provide authorizations and relevant medical and financial records to Defendants by October 12, 2018 for the second trial pool cases and are required to complete the Supplemental PPF and provide supporting documentation to Brown Greer by October 31, 2018 for all cases. Conversely, Defendants are not obligated by any discovery deadlines. In fact, Defendants have altogether refused to produce sales representative discovery for the second trial pool cases on a rolling basis prior to the December 14, 2018 strike deadline even though it is highly likely they have already begun the process of collecting it. Thus, Plaintiffs can see no reason why discovery as to punitive damages should not commence now and under these circumstances.

Defendants' Position: As the Court may recall, Plaintiffs raised the issue of Defendants' net worth for the first time after the close of fact discovery in the first trial pool. In his Order of April 2, 2018, Judge Jones "encouraged the parties to continue to work towards a stipulation on net worth." But before the parties could complete that meet-and-confer process, they reached a settlement of the remaining first trial pool cases, and the Court stayed the litigation pending global settlement discussions. Now that the stay has been lifted, Defendants propose that the parties be directed to confer on a net worth stipulation and report back to the Court by October 12, 2018. Moreover, Plaintiffs agreed not to seek additional discovery if the parties reached a stipulation as to net worth.



The Honorable M. Casey Rodgers
September 6, 2018
Page 12

V. Pending Motions Ripe for Determination

Pending before the Court are Plaintiffs' Brief in Support of Limited Rexulti Discovery (Doc No. 864), Spoliation and Rule 37 Motion for Sanctions against Defendant Otsuka America Pharmaceutical, Inc. (Doc No. 719), Plaintiffs' Disclosure Motion Regarding Two Documents Bristol-Myers Squibb Company Claims are Privileged and Inadvertently Disclosed (Doc No. 737) and Otsuka Pharmaceutical Co., LTD.'s Renewed Motion to Dismiss for Lack of Personal Jurisdiction (Doc No. 827).

Plaintiffs' Position: Following the resolution of the first trial pool cases, this Court entered its Global Settlement Order No. 1 (Doc No. 881) and a 120 day reprieve was afforded the parties to devise a global settlement framework. That period expired on September 1, 2018. A second set of trial pool cases has been selected and discovery on those cases has already commenced. As such, Plaintiffs request the Court rule on the outstanding discovery motions referenced above. Plaintiffs believe that such rulings will help guide the parties on further liability / punitive damages discovery and have the likely effect of influencing the parties future settlement negotiations, if any.

Defendants' Position: Defendants agree that these motions have been fully briefed and are ripe for decision. In the event the Court would like oral argument on any of these motions, Defendants respectively propose that the Court schedule a hearing at the Court's earliest convenience and notify the parties of the same.

VI. Status of the New Jersey Litigation

As they did with this Court, Defendants advised Judge Johnson and Judge Porto, by letter dated August 23, 2018, that the parties were unable to reach a global resolution, and asked the New Jersey MCL court to schedule an in-person case management conference at the court's earliest convenience.



The Honorable M. Casey Rodgers
September 6, 2018
Page 13

* * *

The parties look forward to discussing these issues with Your Honor
at the September 13 CMC.

Respectfully Submitted,

/s/ Anand Agneshwar
Anand Agneshwar