

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

IN RE: ABILIFY (ARIPIPRAZOLE)  
PRODUCTS LIABILITY LITIGATION

Case No. 3:16md2734

Chief Judge M. Casey Rodgers  
Magistrate Judge Gary Jones

This Document Relates to All Cases

---

**COMMON BENEFIT FUND ORDER NO. 5<sup>1</sup>**

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.

**I. PURPOSE FOR THE RECOMMENDATION**

This Order is intended to (1) avoid unnecessary conflicts and expense, conserve judicial resources, and expedite the disposition of all the cases; (2) provide for the fair and equitable sharing among claimants, and their counsel, of the burden of services performed and expenses incurred by counsel acting for the common benefit of all claimants in this complex litigation; and (3) enable claimants' counsel to obtain fair access to the common-benefit work product.

---

<sup>1</sup> This Order amends and replaces the Common Benefit Fund Order originally entered on April 11, 2018, so as to correct a scrivener's error in the title.

### **A. Governing Principles and the Common Benefit Doctrine**

The governing principles are derived from the United States Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litig.*, 660 F.Supp.522, 525-29 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all claimants, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion.

### **II. Application of the Order**

This Order applies to all claims now pending, as well as to any claim later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In re Abilify (Aripiprazole) Products Liability Litigation*, Case No. 3:16-md-2734 ("MDL"). This Order further applies to: (1) each counsel who represents a claimant with an Abilify case now pending in or later filed in, transferred to, or removed to this Court, regardless of whether or not the claimant's counsel

signs the “Participation Agreement” (attached hereto as Exhibit A), and regardless of whether or not the claimant’s counsel also has cases outside the MDL (filed or unfiled) (“the MDL Claimants’ Counsel”), to the extent that MDL work product is utilized in prosecuting such cases outside the MDL (filed or unfiled); and (2) counsel who represents only claimants with cases filed in state court who elects to sign the Participation Agreement (“the Participating Non-MDL Claimants’ Counsel”) together with the MDL Claimants’ Counsel (“Participating Counsel”).

**A. Participation Agreement (Exhibit A)**

Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement between: (1) the Plaintiffs’ Steering Committee (“PSC”) and other claimants’ counsel performing common benefit work in connection with the MDL and (2) claimants’ counsel with cases solely in state court who elect to sign the Participation Agreement. The Participation Agreement is a private and cooperative agreement between claimants’ counsel only, and not defendants or defendants’ counsel.

The Court has been advised that co-leads and all members of the PSC have or will sign the Participation Agreement, subjecting themselves and their cases, whether filed in this MDL proceeding, filed in another venue, unfiled, or tolled, to an assessment of the Gross Monetary Recovery, as defined below.

All claimants' counsel who currently have cases pending in any state court and who want to become a Participating Counsel shall, within 45 days of this Order, execute the Participation Agreement. Any claimants' counsel who does not yet have a case filed in any federal or state court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first case is filed in any state court, if that counsel intends to voluntarily become a Participating Counsel at the fee and expense percentages set forth herein. Failure to execute a Participation Agreement indicating that claimant's counsel will be a Participating Counsel within the time frame set forth in this paragraph may result in higher percentages for common benefit assessment as a result of such later participation.

Participating Counsel shall be entitled to receive all common benefit work product performed by the PSC. Counsel who choose not to execute the Participation Agreement are not entitled to receive common benefit work product and may be subject to an increased assessment on all Abilify cases in which they have a fee interest if they receive common benefit work product or otherwise benefit by the work performed by Participating Counsel.

The Court recognizes the jurisdictional rights and obligations of the state courts to conduct their state court litigation as they so determine and that the state court litigations may include counsel who are Participating Counsel. This Order and

the Participation Agreement are not intended to be cited by a Party to the Participation Agreement in any other court in support of a position that adversely impacts the jurisdictional rights and obligations of the state courts and state court Participating Counsel.

### **III. LITIGATION FEE AND EXPENSE FUNDS**

#### **A. Establishing the Fee and Expense Funds**

At an appropriate time, the Plaintiffs' Fees and Common Benefit Fund Committee ("PFFC") will be directed to establish two interest-bearing accounts to receive and disburse funds as provided in this Order (the "Funds"). The first fund shall be designated the "Abilify Fee Fund" and the second fund shall be designated the "Abilify Expense Fund." These funds will be held subject to the direction of this Court.

#### **B. Payments into the Fee and Expense Funds**

All claimants and their counsel who are subject to this Order and who agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to Abilify claims are subject to an assessment of the gross monetary recovery, as provided herein.

##### **1. Gross Monetary Recovery**

A “Gross Monetary Recovery” occurs when a claimant or his/her counsel either agrees or have agreed, for monetary consideration, to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages (hereinafter a “Settlement”), with respect to any Abilify claim.

## **2. Assessment Amount**

The assessment amount shall be nine (9) percent. The assessment represents a hold back. *See In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 266 (E.D.N.Y. 2006). The Leadership and the PFFC, after consulting and receiving approval of the special master, may request the allocation of the total assessment between fees and expenses at the time the application for disbursement is made, or for modifications of the assessment amount, for good cause shown. For any counsel failing to timely execute the Participation Agreement, such counsel may, at the Court’s discretion, be subject to an increased assessment. Under appropriate circumstances after consultation and with the approval of the special master, the PFFC may waive any late participation fee.

## **C. Reporting Obligations**

Plaintiffs’ Liaison Counsel (“PLC”) shall provide to Defendants’ Liaison Counsel the following two lists on a quarterly basis: (a) a list of all cases and counsel who have filed a case that is pending in the MDL (“the MDL Counsel List”) and (b)

a list of all cases and counsel who have executed the Participation Agreement who do not have a case pending in the MDL (“the Non-MDL Participating Counsel List”). These same lists shall be made available to all claimants’ counsel with cases in this MDL and upon request of any other claimants’ counsel who signs the Participation Agreement. In the event there is a dispute as to whether a case should be on the lists, Plaintiffs’ Co-Lead Counsel shall seek to resolve the matter with the particular claimant’s counsel informally, and if that is unsuccessful, upon motion to the Court.

Within 14 days of receipt of these two lists from PLC, Defendants’ Liaison Counsel shall provide PLC a list of all lawyers who appear as counsel of record on a complaint in any Abilify case in any court in the United States (state or federal) who do not appear on either the MDL Counsel List or the Non-MDL Participating Counsel List. The parties’ reporting obligations shall continue quarterly until the conclusion of this MDL.

**D. Defendant Obligations<sup>2</sup>**

Defendants and their counsel shall not distribute any settlement proceeds to any claimant or claimant’s counsel until after (1) defendant’s counsel notifies the PLC in writing of the existence of a settlement and the name of the claimant and

---

<sup>2</sup> Defendants were afforded an opportunity to object to the obligations imposed on them in this Order. *See* ECF No. 785. No objections were raised.

individual claimants' counsel; and (2) the PLC has advised defendants' counsel in writing whether or not the individual claimant's counsel's cases are subject to an assessment pursuant to this Order. The PLC shall be permitted to share this information with the PFFC and the Special Master, who shall otherwise keep this information confidential.

For cases subject to an assessment, defendants are directed to withhold an assessment from any and all amounts paid to claimants and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No orders of dismissal of any claim that is subject to this Order shall be entered unless accompanied by a certificate of claimant's and defendant's counsel that the assessment, where applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to the settling claimant or his/her counsel or designee. If for any reason the assessment is not or has not been so withheld, the claimant and his/her counsel are jointly responsible for paying the assessment into the Funds promptly.

Counsel for each defendant shall provide at least quarterly notice to the Court or its designee, Special Master Ellen Reisman, and served on the PFFC, the names and docket numbers of the cases for which it has paid an assessment into the Funds since the last such report. A report is not due if there are no payments made into the Funds by that Defendant during that quarter. Details of any individual settlement

agreement, individual settlement amount and individual amounts deposited into escrow shall be confidential and shall not be disclosed by the CPA to the PFFC, the Court, or the Court's designee, unless the Court requests that it receive that information. Monthly statements from the CPA, however, shall be provided to the PFFC and the Court showing only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

#### **IV. ASSESSMENT DISTRIBUTIONS**

##### **A. Common Benefit Expenses**

In order to be eligible for reimbursement of common benefit expenses, said expenses must meet the requirements and the limitations set forth in the Common Benefit Fund Orders entered by this Court.

##### **B. Procedures and Forms**

The PFFC proposes the establishment of forms and procedures to implement and carry out any time and expense submissions as required by the Court and for reimbursement from the Funds.

##### **C. Court Approval**

The amounts deposited in the Funds shall be available for distribution to Participating Counsel who have performed professional services or incurred expenses for the common benefit. No amounts will be disbursed without review and

approval by the Special Master or such other mechanism as the Court may order. Specifically, such sums shall be distributed only upon order of this Court. This Court retains jurisdiction over any common benefit award or distribution and, in furtherance of state-federal cooperation, may receive input from the state court judges.

**D. Application for Distribution**

Each Participating Counsel who does common benefit work has the right to present their claim(s) for compensation and/or reimbursement prior to any distribution approved by this Court. Any Counsel who does not sign the Participation Agreement shall not be eligible to receive common benefit payments for any work performed or expenses incurred. At the appropriate time, the Court may appoint a Common Benefit Fee Allocation Committee to make recommendations to the Court on common benefit fee allocations.

**DONE and ORDERED**, on this 11th day of April, 2018.

*M. Casey Rodgers*

---

**M. CASEY RODGERS**  
**CHIEF UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

IN RE: ABILIFY (ARIPRAZOLE) Case No. 3:16-md-2734  
PRODUCTS LIABILITY  
LITIGATION

Chief Judge M. Casey Rodgers  
Magistrate Judge Gary Jones

This Document Relates to All Cases

**EXHIBIT A:  
ATTORNEY PARTICIPATION AGREEMENT**

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, 201\_, by and between the Plaintiffs’ Co-Lead Counsel, Plaintiffs’ Liaison Counsel, Plaintiffs’ Executive Committee, and Plaintiffs’ Steering Committee (“Leadership”) appointed by the United States District Court for the Northern District of Florida in MDL No. 2734 and

---

[Name of the Lawyer/Law Firm Executing the Agreement] (“Participating Counsel”).

**WHEREAS**, the United States District Court for the Northern District of Florida appointed Leadership to facilitate the conduct of pretrial proceedings in the federal actions relating to the use, marketing, and sales of Abilify; and

**WHEREAS**, the Leadership in association with other attorneys

working for the common benefit of plaintiffs, have developed or are in the process of developing work product which will be valuable in all proceedings and benefit all plaintiffs alleging injury caused by use of the prescription medication Abilify (“Common Benefit Work Product”); and

**WHEREAS**, the Participating Counsel are desirous of acquiring the Common Benefit Work Product and establishing an amicable, working relationship with the Leadership for the mutual benefit of their clients;

**NOW THEREFORE**, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

**I. SCOPE OF AGREEMENT**

**A. Purpose**

This Participation Agreement is a private cooperative agreement between plaintiffs’ attorneys to share Common Benefit Work Product pursuant to the Common Benefit Fund Orders entered by the Court in MDL 2734 and this Participation Agreement. Any plaintiffs’ attorney who executes this Agreement (“Participating Counsel”) is entitled to receive the Common Benefit Work Product created by those attorneys who have also executed, or have been deemed to have executed, the Participation Agreement, regardless of the venue in which the attorney’s cases are pending.

Participating Counsel are also entitled to submit claims for reimbursement of common benefit costs and time submissions for approved common benefit work in accordance with the terms of the Common Benefit Fund Orders.

**B. Rights and Obligations of Participating Counsel**

Upon execution of this Participation Agreement, the Leadership will provide Participating Counsel access to the common benefit work product, including access to the document depository. Participating Counsel agree that all cases in which Participating Counsel has a fee interest, including filed, unfiled cases, tolled cases, and/or cases filed in state and/or federal court, are subject to the terms of this Participation Agreement. Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has a filed a civil action arising from the use, marketing, and sale of Abilify. Such list shall include the court and docket number of each such case. Participating Counsel shall also produce a list that contains the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has not yet filed a civil action arising from the use, marketing, and sale of Abilify. Participating Counsel shall provide the initial list to Plaintiffs' Liaison Counsel, Bryan Alystock, within 45 days of the signing of this

Agreement. Participating Counsel shall supplement the list every 90 days thereafter. The signed *Agreement* and list of claimants shall be emailed to [BWilliams@awkolaw.com](mailto:BWilliams@awkolaw.com) and the original copies mailed to:

Bryan Alystock, Esquire  
Aylstock, Witkin, Kreis & Overholtz  
17 E. Main Street, Suite 200  
Pensacola, Florida 32502

**II. AGREEMENT TO PAY ASSESSMENT ON GROSS RECOVERY**

Subject to the terms of this Agreement, the provisions set forth below, and the terms of Common Benefit Orders enter by the Court in MDL 2734, all claimants and their counsel who agree to settle, compromise, dismiss, or reduce the amount of a claim, or with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, for any Abilify claim(s) are subject to an assessment of the Gross Monetary Recovery, as provided herein.

**A. Assessment Amount**

Participating Counsel hereby acknowledges that the Common Benefit fee assessment amount shall be nine (9) percent of the Gross Monetary Recovery in each case and represents a holdback. *See In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 266 (2d. Cir. 2006).

However, to obtain the benefit of this assessment amount, all plaintiffs'

counsel with a case pending in this MDL or in any state court shall execute this Participation Agreement within 45 days of the entry of Common Benefit Order No. 4. Any plaintiffs' attorney who does not yet have an Abilify case filed in any state or federal court shall execute this Participation Agreement (a) within 45 days of the date their first case is filed in or otherwise docketed in this Court via transfer or removal, or (b) within 45 days of the date their first case is filed in any state court. Failure to execute the Participation Agreement within these time frames may result in an increased assessment as result of such later participation.

**B. Gross Monetary Recovery Defined**

Gross Monetary Recovery includes any and all amounts paid to claimants' counsel by Defendants through a settlement or pursuant to a judgment. In measuring the Gross Monetary Recovery, the parties are to (a) exclude court costs that are to be paid by Defendant; (b) include any payments to be made by Defendant on an intervention asserted by third-parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (*e.g.*, Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future.

**C. Covered Claims**

The assessment amount set forth above and in the related Order shall apply to all claims now pending, as well as to any claim later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In re Abilify (Aripiprazole) Products Liability Litigation*, Case No. 3:16-md-2734 (MDL 2734), regardless of whether the plaintiff's attorney is either Participating or Non-Participating Counsel. Counsel who sign this Participation Agreement further agree that the assessment shall apply to all unfiled cases, tolled cases, and/or cases filed in state court in which they have a fee interest, regardless of the size of that fee interest.

Counsel who do not sign the Participation Agreement are not entitled to receive Common Benefit Work Product, and may be subject to an increased assessment on all Abilify cases in which they have a fee interest if they receive any Common Benefit Work Product or otherwise benefit from the work product created by Leadership or other Participating Counsel working with the MDL. Non-Participating Counsel shall not be eligible to receive Common Benefit payments for any work performed or expenses incurred.

**D. Attorney Fee Lien**

With respect to each case resolved in which any Participating Counsel has a fee interest in connection with Abilify related claims that are filed or

pending in any court, are un-filed or are subject to a tolling agreement, each Participating Counsel shall agree to have Defendants deposit or cause to be deposited in the Abilify Fee and Expense Funds established by the District Court in the MDL a percentage of the gross amount recovered by each such client that is equal to the assessment amount. In the event Defendants do not deposit the assessed percentage into the Funds, Plaintiff and Plaintiff's Participating Counsel shall deposit or cause to be deposited in the Abilify Fee and Expense Funds established by the District Court in the MDL a percentage of the gross amount recovered by each such client that is equal to the assessment amount.

Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grants and conveys to the Leadership a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Abilify-induced injury and Abilify marketing and sales practices, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Participation Agreement. Participating Counsel will undertake all actions and execute all documents reasonably necessary to effectuate and/or perfect this lien and/or security interest.

**E. Attorney-Client Contracts**

The Leadership and Participating Counsel recognize the importance of

individual cases and the relationship between case-specific clients and their attorneys. Regardless of the type of settlement or conclusion eventually made in matters, the Leadership will recommend to this Court that appropriate consideration will be given to individual case contracts between attorneys and their clients.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Legibly Printed Attorney's Name

\_\_\_\_\_  
Legibly Printed Law Firm's Name

Dated: \_\_\_\_\_

\_\_\_\_\_  
Plaintiffs' Liaison Counsel  
on behalf of Leadership