UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: ABILIFY (ARIPIPRAZOLE) PRODUCTS LIABILITY LITIGATION

This Document Relates to All Cases
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Case No. 3:16md2734

Judge M. Casey Rodgers
Magistrate Judge Gary Jones

ORDER

Before the Court is Plaintiffs' request for limited discovery pertaining to the prescription drug Brexpiprazole, more commonly known as Rexulti. *See* Pl. Brief 1, ECF No. 864-29. For the following reasons, Plaintiffs' request is denied.

I. Background[1]

This multidistrict product liability action involves claims for injuries allegedly caused by the prescription drug Aripiprazole, more commonly known as Abilify. Extensive discovery has been completed on the complex general causation and liability issues at the heart of these claims. For more than a year, Plaintiffs have sought to expand the scope of discovery in this case to include information concerning another drug, Rexulti. Like Abilify, Rexulti is an atypical antipsychotic developed, manufactured, marketed, and sold by Defendant Otsuka Pharmaceutical

[1] The Court assumes the parties' familiarity with the facts, procedural history, and scientific terms used in this case, and thus summarizes only those facts relevant to Plaintiffs' request for Rexulti discovery.

Co., Ltd. ("OPC").[2] The parties agree that Rexulti is widely considered to be Abilify's successor. However, there is considerable disagreement regarding the extent of chemical similarity between the two drugs and whether either or both drugs can cause harmful impulsive behaviors in patients who take them. Plaintiffs believe that Abilify and Rexulti are chemically equivalent for purposes of the injuries alleged in this litigation, and that OPC knew about and failed to timely warn the medical community and/or the public of the impulsivity risks associated with Abilify to protect the market for greater Rexulti profits. Plaintiffs thus request discovery into Rexulti on grounds that it will yield "highly relevant" evidence bolstering their theory of causation and demonstrating OPC's motive and intent to conceal the need to warn patients about the risks of Abilify during the time period relevant to this case. *See id*. at 1.

II. Legal Standard

The Federal Rules of Civil Procedure adopt a liberal approach toward discovery, with the aim of ensuring that "civil trials in the federal courts [are] no longer . . . carried on in the dark." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). To this end, parties in federal litigation may obtain discovery regarding

[2] OPC developed, marketed, and sold Rexulti in the United States in collaboration with another international pharmaceutical company, H. Lundbeck A/S ("Lundbeck"). Lundbeck is not a party to this MDL. Defendant Bristol-Myers Squibb Co. ("BMS") was not involved in the development, marketing, or distribution of Rexulti.

> any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(2)(1). Although information need not be admissible at trial to be discoverable, *see id*., there are limits to what a party may discover. A court "must limit the frequency or extent" of proposed discovery that it finds to be, *inter alia*, outside the permissible scope of Rule 26(b)(1). *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).

III. Discussion

Plaintiffs argue that "targeted and limited discovery pertaining to Rexulti" is relevant to the issues of causation, motive and intent, and is proportional to the needs of this MDL. *See* Pl. Brief 1, ECF No. 864-29 at 1. The Court addresses these arguments in turn.

A. General Causation

Plaintiffs state that additional discovery will enable them to demonstrate that Rexulti and Abilify are mechanistically analogous drugs for purposes of general causation, such that evidence about the effects of Rexulti may be used to support their experts' opinions that Abilify produces comparable effects. In Plaintiffs' view, their request for Rexulti discovery on the issue of causation thus satisfies the

relevance and proportionality standard set forth in Rule 26(b)(2)(1). The Court disagrees.

In the Eleventh Circuit, an expert's general causation opinion that a drug causes certain effects may be supported, at least in part, by scientific evidence that similar drugs with similar chemical structures produce analogous effects. *See In re Abilify (Aripiprazole) Prod. Liab. Litig.*, 299 F. Supp. 3d 1291, 1311 (N.D. Fla. 2018) (citing *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1246 (11th Cir. 2005); *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1200-01 (11th Cir. 2002)). However, such extrapolations between drugs are only permissible where "other reliable scientific evidence establishes the validity of the analogy." *See id*.

In this case, the problem with Plaintiffs' position is that to establish the validity of their proposed chemical analogy, they must reliably establish the premise that the drug to which Abilify would be compared—here, Rexulti—does, in fact, cause harmful impulsive behaviors. *See In re Mirena IUS Levonorgestrel-Related Prod. Liab. Litig. (No. II)*, --- F. Supp. 3d ---, 2018 WL 5276431, at *29 (S.D.N.Y. Oct. 24, 2018) (excluding evidence regarding Bradford Hill factor of analogy where "a cause-and-effect relationship between [the comparator drug] and [the alleged effect] ha[d] never been substantiated" in the scientific literature). This they cannot

do. Plaintiffs have offered no *scientific* evidence that Rexulti causes impulsivity.[3] Importantly, potential "admissions" by OPC regarding the effects of Rexulti, as might be found in the company's internal documents, are no substitute for reliable scientific evidence of causation.

The Court recognizes that the Rule 26(b)(2)(B) discoverability standard generally is more expansive and inclusive than the admissibility standards set forth in the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Here, however, these standards are somewhat interrelated because evidence about Rexulti, a drug that is not the focus of this litigation, is only relevant (and thus, discoverable) as to general causation to the extent it can reliably support an expert opinion that Abilify causes impulsive behaviors. Given the current state of scientific knowledge about Rexulti—which Plaintiffs concede is limited because Rexulti has only been on the market for a short time, *see* CMC Transcript, ECF No. 994 at 19—evidence regarding that drug cannot reliably support an expert's general causation opinion in this case. Discovery into Rexulti thus would not help resolve the parties' dispute over liability; rather, it would inject "foundationally unsound"

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[3] The Fifth Circuit's observation about dopamine agonist Requip is equally applicable to Rexulti. *See Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 380 (5th Cir. 2010). That is,

> [p]erhaps [Rexulti] is a cause of problem gambling, but the scientific knowledge is not yet there. [Plaintiffs] urge the law to lead science—a sequence not countenanced by *Daubert*. And while the possibilities of their relationship properly spark concerns sufficient to warrant caution, the court must await its result."

See id.

ambiguity into an issue that is already fraught with complexity. *See Mirena*, 2018 WL 5276431, at *29. On balance, the Court finds that any marginal benefit to allowing Rexulti discovery simply does not justify the burden and expense of production. Accordingly, Plaintiffs' request for general causation discovery pertaining to Rexulti is denied.

B. Motive and Intent

Plaintiffs also argue that limited discovery pertaining to Rexulti "will likely provide substantial evidence" supporting the knowledge, intent, and/or motive elements of their failure to warn and punitive damages claims. *See* Pl. Brief 2, ECF No. 1014 at 4. Plaintiffs' theory in this regard is that OPC "deliberately chose not to change the Abilify label in the United States" and "refus[ed] to study the [drug's] association with pathological gambling" because the company was concerned that such actions would threaten FDA approval for Rexulti or "negatively impact future Rexulti sales." *See* Pl. Brief 1, ECF No. 864-29 at 6, 11-12. The Court finds no support for this theory in the evidentiary record.

To begin with, Plaintiffs have offered only speculation and conjecture as to a possible connection between the launch of Rexulti and OPC's labeling decisions for Abilify. During the general liability phase of discovery in this case, OPC produced "tens of thousands of documents" on its Abilify safety and labeling decisions. *See* Def. Response 2, ECF No. 1006-17 at 16. Plaintiffs have not identified a single

document from these materials suggesting that Rexulti had any bearing on those decisions.[4] At best, Plaintiffs proffered an admittedly compelling hypothetical explanation for the timing of OPC's Abilify safety and labeling decisions. But speculation alone, however intriguing, is not a permissible basis for additional discovery under Rule 26. *See Dellacasa, LLC v. Moriarty & Assocs. Of Fla., Inc.*, 2007 WL 4117261, at *2 (S.D. Fla. Nov. 16, 2007) (quoting *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004) ("While Rule 26(b)(1) still provides for broad discovery, courts should not grant discovery requests based on pure speculation that amounts to nothing more than a 'fishing expedition' into actions or past wrongdoing not related to the alleged claims or defenses."); *see also Steel Erectors, Inc. v. AIM Steel Int'l, Inc.*, 312 F.R.D. 673, 677 n.5 (S.D. Ga. Jan. 4, 2016) ("Speculation should never bait a relevancy hook, especially [ ] where potentially expensive international discovery would ensue."); *Boateng v. GEICO Gen. Ins. Co.*, 2010 WL 11552902, at *2 (S.D. Fla. June 10, 2010) ("The discovery rules are not a

[4] The Court's conclusion is not altered by the fact that OPC's document productions contain numerous redactions of references to (presumably) Rexulti. These redactions were permissible applications of the Court's two prior rulings that information pertaining to other dopamine agonists, such as Rexulti, was not discoverable in this litigation. *See* ECF Nos. 549 at 23-24, 610 at 7-9. References to Abilify were not redacted. *See, e.g.*, OPC and Lundbeck, Mechanism of Action Advisory Board Powerpoint, ECF No. 864-9 at 26; Dr. McQuade Email, ECF No. 864-17. Plaintiffs have never argued that documents pertaining to Abilify safety and labeling decisions contain improper redactions and the Court has seen no evidence suggesting that is the case.

ticket . . . to an unlimited never-ending exploration of every conceivable matter that captures an attorney's interest.") (internal marks omitted).

The Court agrees with OPC that the documentary evidence tells a different story than the one presented by Plaintiffs. More specifically, the record reflects that OPC was aware of the potential for a "significant" decline in revenue when the Abilify patents expired, *see* Otsuka Holdings Co., Ltd., *Annual Report 2014*, ECF No. 864-1 at 56, and, accordingly, employed a range of strategies to mitigate any long-term financial impact from these losses.[5] One key strategy involved the development and launch of Rexulti, which OPC considered the next-generation "successor" to Abilify. *See* Otsuka Holdings Co., Ltd., *Integrated Report 2017*, ECF No. 1014-2 at 22. OPC secured its earliest Rexulti-related patents in 2011, *see* U.S. Patent No. 7,888,362 B2 (Feb. 15, 2011), ECF No. 862-4, and submitted the Rexulti New Drug Application ("NDA") to the FDA in July 2014, *see* Rexulti NDA Approval Letter, ECF No. 862-6 at 5. Given the lengthy NDA review process, which appears to have necessitated more than 30 amended submissions by OPC, *see id*. at

[5] The Court notes that much of the Abilify patent cliff hysteria described by Plaintiffs appears to have been stoked in the publications of pharmaceutical industry media outlets rather than by OPC. *See, e.g*., Lucy Vann, *Newly Approved Rexulti Will Need to be Differentiated from Predecessor Abilify*, 358 CNS Drug News 1 (July 23, 2015), ECF No. 864-26; Lucy Vann, *Brexpiprazole Meets Primary/Secondary Endpoints in Phase III MDD Trial*, 326 CNS Drug News 1 (March 20, 2014), ECF No. 864-25; Ian Haydock, *Interview: Maverick Otsuka looks to challenge the norm*, Scrip Intelligence (May 28, 2013), ECF No. 864-3. While it is obvious that OPC stood to lose a sizeable revenue stream when the Abilify patents expired, this fact alone, or in combination with the evidence presented to date, cannot support Plaintiffs' quantum leap to the conclusion that the company therefore engaged in wrongdoing.

5, the company could not have known precisely when, or even if, Rexulti would be approved.

During that same period, published reports suggesting a possible link between Abilify and pathological gambling began appearing in the medical literature. On September 1, 2011, OPC, through BMS, its partner and intermediary, advised the FDA of seven "serious" reported cases of pathological gambling, as well as 16 pathological gambling cases found in a cumulative search of the companies' own adverse event reports databases for the period from July 17, 2002 to July 16, 2011. *See* BMS, Aripiprazole (All Formulations), *6-Month Periodic Safety Update Report for Jan. 17, 2011 to July 16, 2011* (Sept. 1, 2011), ECF No. 1006-3. In the months and years that followed, OPC kept the FDA apprised of all product safety actions taken with respect to Abilify around the world, including label changes required by regulatory authorities in the European Union and Canada.[6] These notifications were not buried within "a laundry list of" unrelated information the company was required to provide to the FDA, as Plaintiffs suggest. *See* Pl. Brief 2, ECF No. 1014 at 11.

[6] *See, e.g.*, BMS, Aripiprazole (All Formulations), *1-Year Periodic Benefit Risk Evaluation Report (PBRER) #3 for July 17, 2014 to July 16, 2015* (Aug. 24, 2015); BMS, Aripiprazole (All Formulations), *1-Year Periodic Benefit Risk Evaluation Report #1 for July 17, 2012 to July 16, 2013* (September 4, 2013), ECF No. 1006-11; OPC and BMS, Abilify (Orally Disintegrating Tablets), *Periodic Adverse Drug Experience Report for June 1, 2012 to May 31, 2013* (July 2, 2013), ECF No. 1006-9; OPC and BMS, Abilify (Oral Solution), *Periodic Adverse Drug Experience Report for Dec. 1, 2011 to Nov. 30, 2012* (Jan. 18, 2013), ECF No. 1006-4; OPC and BMS, Abilify (Injection), *Periodic Adverse Drug Experience Report for Sept. 1, 2011 to August 31, 2012* (September 28, 2012), ECF No. 1006-7.

Rather, the information was conspicuously and explicitly disclosed in product safety reports on post-market adverse events involving Abilify. *See supra* note 7. That the FDA did not meaningfully act on these disclosures until March 2016, *see* FDA Pharmacovigilance Review, ECF No. 428-11, provides no basis to infer wrongdoing by OPC. Stated differently, given the form and substance of OPC's regulatory submissions, the record falls far short of suggesting that the company "conceal[ed]" the impulsivity risks associated with Abilify until after Rexulti's launch in August 2015. *See* Pl. Brief 1, ECF No. 864-29 at 13. Without more, the notion of a link between Rexulti and OPC's product safety actions regarding Abilify in the United States is too speculative to warrant further discovery into Rexulti, even under the liberal relevancy standard of Rule 26(b).

In light of the Court's findings with respect to the relevance of Rexulti discovery, the Rule 26 proportionality factors weigh against Plaintiffs' request. This litigation involves important questions about a single drug, Abilify. Discovery on those issues has been extensive. Motion practice over discovery issues also has been extensive. The Court has presided over numerous case management conferences and issued multiple decisions regarding discovery. The cost of discovery has been substantial—for both sides. Nothing in the records produced by Defendants to date suggests that discovery into a separate drug, Rexulti, would help resolve questions about Abilify. Allowing further discovery based on Plaintiffs' hypothetical alone,

particularly in the face of extensive prior document productions revealing no evidence in support of Plaintiffs' position, would delay and needlessly increase the expense of this litigation and, moreover, subvert Rule 26(b)(1)'s goal of "guard[ing] against redundant or disproportionate discovery." *See* Fed. R. Civ. P. 26(b) advisory committee's note to 2015 amendment. The Court cannot countenance such a result. Accordingly, Plaintiffs' request for limited Rexulti discovery is **DENIED**.

SO ORDERED, on this 14th day of December, 2018.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE