

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

IN RE: ABILIFY (ARIPIPRAZOLE)
PRODUCTS LIABILITY
LITIGATION

Case No. 3:16-md-2734

Chief Judge M. Casey Rodgers
Magistrate Judge Gary Jones

This Document Relates to All Cases

CASE MANAGEMENT ORDER NO. 11

The Court held the Eleventh Case Management Conference in this matter on January 18, 2018. This Order serves as a non-exhaustive recitation of the key points of discussion between the Court and counsel at the conference.

I. Plaintiff *Viechec*

Defense counsel notified the Court that the Veterans Affairs (“VA”) hospital is resisting depositions of its healthcare professionals who have prescribed or treated Plaintiff *David Viechec*, Case No. 3:16-cv-291. In the event Defense counsel is unable to schedule these depositions, counsel should issue subpoenas to the witnesses and file a Motion to Compel in the event the witnesses fail to appear.¹ Also, Plaintiff’s counsel claimed that Defendants have yet to produce any call notes or custodial files for sales representatives who were in contact with Mr. Viechec’s prescribers and, thus, Plaintiffs have been unable to schedule depositions.

¹ See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

Defendants suggested that the documents Mr. Viechec seeks may relate to a time period in which he was prescribed the generic version of Abilify and not Abilify itself. The Court directed Plaintiffs to file a Motion to Compel in the event this issue has not been resolved by entry of this Order, given the pressing fact discovery deadline.

II. Document Production

Plaintiffs' submitted a declaration from their document vendor, Catalyst Repository Systems, Inc. ("Catalyst"), which outlined the dates of production for Dr. Carlson, one of BMS's custodians. According to Plaintiffs, a substantial portion of these documents were uploaded late and this delay disadvantaged them in preparing for Dr. Carlson's deposition on January 12, 2018. The Court advised Plaintiffs that if they wish to re-depose Dr. Carlson on this basis, they should brief the issue. Subsequently, during a discovery conference call held on January 24, 2018 before Judge Gary Jones, it became apparent that Catalyst's declaration was invalid and he ordered Plaintiffs to provide "BMS a supplemental declaration from its vendor explaining the misunderstanding by Plaintiff's vendor of the production by BMS as it relates to the de-duplication of the ESI." *See* ECF No. 680.

In addition, at the Case Management Conference, Plaintiffs notified the Court of Dr. Carlson's testimony during her deposition that she had maintained a handwritten notebook containing notes regarding her meetings with publication companies, which were not produced in response to Plaintiffs' document requests.

BMS asserted that the notebook was not responsive to the document requests because Dr. Carlson was a publication planner from 2003 and 2004 and Plaintiffs' document requests covered the period spanning 2009 through 2012. The Court ordered BMS to produce the notebook for the periods spanning 2003 through 2004 and 2009 through 2012, subject to privilege review, because the original discovery covered electronic data, not handwritten notebooks. In addition, Defendants were directed to communicate with its other witness-custodians to determine whether they have any similar responsive handwritten documents. Any such documents must be produced in advance of that witness's deposition and to the extent Defendants have a legal basis for withholding any responsive documents, they should promptly file a Motion for Protective Order.

Counsel for BMS also represented that documents for custodian Estelle Vester-Blokland were produced on January 12th and documents for custodians Susan Behling and Mary Kujawa would be produced by January 22, 2018.

III. Depositions

Plaintiffs were directed to depose BMS witness, Mark Pavao, on February 23, 2018, the date offered by Defendants. The Court also ordered that prior to any depositions taken by the parties, the party offering the witness must file a certification with the Court that the witness's complete custodial file has been produced, subject to any qualifications on privilege. The Court now directs that the certification be made 10 days in advance of the witness's deposition. In addition,

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Defendants were directed to file its Motion for Protective Order as to Plaintiffs' Rule 30(b)(6) deposition notices by January 25, 2018, which they have done.²

IV. OAPI's Motion for Protective Order

On January 5, 2018, OAPI filed a Motion for Protective Order regarding Plaintiffs' document request as to Launchpad Healthcare Solutions, LLC ("Launchpad"), Ogilvy Healthworld, LLC ("Ogilvy"), Sentrix Health Communications ("Sentrix"), and Rocky Mountain Poison and Drug Center ("Rocky Mountain"). With respect to OAPI's Motion for Protective Order as to Launchpad and Sentrix, Counsel for OAPI withdrew its protective order subject to a 7-day privilege review, which the Plaintiffs consented to and was also granted by the Court. With respect to Ogilvy, OAPI withdrew its Motion for Protective Order in its entirety subject to confirmation that Ogilvy was not its agent during the time frame covering Plaintiffs' document request. Finally, with respect to Rocky Mountain, the parties agreed to meet and confer with counsel for Rocky Mountain to potentially reach an agreement as to its production and will update the Court as to their progress. In the event Rocky Mountain resists production of Plaintiffs' document requests, it must file a Motion to Quash by February 5, 2018.

² The parties were directed to address their positions on the issue of foundation of corporate documents in their briefs on Rule 30(b)(6) depositions. However, Defendants' notified the Court in its Motion for Protective Order that Plaintiffs have withdrawn their request for a Rule 30(b)(6) deposition for foundation purposes. This issue is moot.

V. Second Discovery Pool

The Court intends to select 25 cases at random for a new discovery pool. The parties are directed to meet and confer to determine which variables the Court should consider in categorizing the cases prior to selection. Suggested variables include age, dosage, duration of dosage, the condition for which Abilify was prescribed, comorbidities, the type and duration of injury, pre-existing injury, and the place of filing for each case. After the 25 cases for the discovery pool are selected, the Parties will have a period of time in which they may object to any particular case selected. From these 25 cases, Plaintiffs and Defendants will each select 5 cases for trial, subject to objections by the opposing party.³ Although the Court will not issue a ruling on consolidation for trial at this time, it is considering consolidating 5 cases for trial and trying the remaining 5 cases individually, for a total of 6 trials.

DONE and **ORDERED** on this 31st day of January, 2018.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

³ Defense Counsel stated that, subject to Client review, they would be willing to waive *Lexecon* under such an approach.