

BEFORE THE UNITED STATES JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION

IN RE: ABILIFY COMPULSIVE BEHAVIOR PRODUCTS LIABILITY LITIGATION	MDL No. _____  <b>MEMORANDUM IN SUPPORT OF JOINT MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407</b>  ORAL ARGUMENT REQUESTED
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INTRODUCTION

Plaintiffs Denise Miley and Brad Miley, with the consent of other plaintiffs, and Defendants Bristol-Myers Squibb Company, Otsuka Pharmaceutical Co., Ltd.<sup>1</sup> and Otsuka America Pharmaceutical, Inc. (collectively, "Parties") move, pursuant to 28 U.S.C. § 1407, to transfer all Abilify® compulsive behavior cases pending in the federal courts to the Northern District of Florida for coordinated and consolidated pretrial proceedings before the Honorable M. Casey Rodgers, before whom two Abilify compulsive behavior cases are pending.

Abilify is a prescription medication used to treat patients with serious and debilitating mental health conditions. Abilify has received approval from the U.S. Food and Drug Administration ("FDA") for its indicated uses, and doctors widely prescribe it

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<sup>1</sup> Defendant Otsuka Pharmaceutical Co., Ltd. contests personal jurisdiction in the United States Federal Courts, and it has filed motions to dismiss on this basis. Otsuka Pharmaceutical Co., Ltd. supports creation of an MDL, but reserves all rights regarding its objection to personal jurisdiction. No waiver of any challenge to personal jurisdiction is created or implied by supporting this motion.

to treat patients with schizophrenia, bipolar I disorder, and major depressive disorder. Abilify is manufactured as tablets, oral solution, and injection. Since its U.S. launch over 13 years ago, an estimated 24 million patients have used Abilify.

On May 3, 2016, the FDA, in an “FDA Safety Communication,” announced that warnings regarding “compulsive or uncontrollable urges to gamble, binge eat, shop, and have sex” would be added to the Abilify label.<sup>2</sup>

Movant Denise Miley and her husband Brad Miley filed the first Abilify compulsive behavior case on January 12, 2016, in the District of Minnesota.<sup>3</sup> Currently, a total of 26 Abilify compulsive behavior cases filed by four different law firms are pending in 12 different federal district courts before 14 different federal district judges.<sup>4</sup> Many more federal cases are expected. In addition, 13 Abilify compulsive behavior lawsuits pending in New Jersey state court have been consolidated in one proceeding for pretrial coordination.<sup>5</sup> In total, Plaintiffs’ counsel anticipate that hundreds of additional Abilify compulsive behavior cases will be filed. All of the lawsuits arise out of the plaintiffs’ use of Abilify and each plaintiff alleges that Abilify caused compulsive gambling. Consolidation of these cases is critical to avoid

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<sup>2</sup> *FDA Drug Safety Communication: FDA Warns About New Impulse-Control Problems Associated With Mental Health Drug Aripiprazole (Abilify, Abilify Maintena, Aristada)*, FDA, May 3, 2016, <http://www.fda.gov/Drugs/DrugSafety/ucm498662.htm>.

<sup>3</sup> See Complaint, *Miley v. Bristol-Myers Squibb Co.*, No. 0:16-cv-67 (D. Minn. Jan. 12, 2016), ECF No. 1.

<sup>4</sup> A Schedule of Actions listing all Abilify compulsive behavior cases currently pending in federal court is filed herewith.

<sup>5</sup> See Civil Action Order, *Yun v. Bristol-Myers Squibb Co.*, No. BER-L-337-16 (N.J. Super. Ct. Law. Div. Mar. 18, 2016) (attached as Exhibit A).

duplication of efforts by numerous federal courts and the prejudice that could result from inconsistent rulings on key issues.

## ARGUMENT

### A. Standard for Transfer and Consolidation

Title 28, United States Code, section 1407 directs the Judicial Panel on Multidistrict Litigation to transfer federal civil actions for pretrial coordination or consolidation when: (1) the cases involve “common questions of fact”; (2) the transfer is convenient for the parties and witnesses; and (3) the transfer “promote[s] the just and efficient conduct” of the cases. 28 U.S.C. § 1407(a). The general purpose of § 1407 is to “eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation costs, and save the time and effort of the parties, the attorneys, the witnesses, and the courts.” *Manual for Complex Litigation* § 20.131 (4th ed. Westlaw 2016); see also *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-92 (J.P.M.L. 1968) (Section 1407 is aimed at eliminating “delay, confusion, conflict, inordinate expense and inefficiency” during the pretrial period). Upon a motion for transfer, the Panel considers factors including “the progress of discovery, docket conditions, familiarity of the transferee judge with the relevant issues, and size of the litigation.” *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006).

Also, when there is a significant state court docket regarding similar facts and theories of liability as the Federal cases that are proposed to be consolidated, this factor weighs in favor of consolidation as “[c]reation of an MDL likely will make it

easier to coordinate, as needed, pretrial proceedings in both the state and federal cases, because there will now be just one judge handling the latter.” *In re: Lipitor (Atorvastatin Calcium) Mktg., Salespractices and Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d 1354, 1356 (J.P.M.L. 2014) (citing *In re: Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 923 F. Supp. 2d 1376, 1378-79 (J.P.M.L. 2013)).

Consent and cooperation of counsel should factor into the Panel’s selection of the appropriate transferee court. “As a general rule, the Panel likes to accommodate the parties in selecting an appropriate transferee district. Consequently, if the parties or a group of them can make a joint recommendation, the Panel may be favorably impressed.” Judge John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 *Tulane L. Rev.* 2225, 2241 (2008); *see, e.g., In re Am. Honda Motor Co., Oil Filter Prods. Liab. Litig.*, 416 F. Supp. 2d 1368, 1369 (J.P.M.L. 2006) (“We are persuaded that the Central District of California is an appropriate transferee forum for this docket, in accordance with the unanimous support of the parties.”). Plaintiffs’ and Defendants’ counsel agree that consolidating all 26 currently pending federal cases in this litigation, and any subsequent “tag along” cases involving similar claims, is necessary to promote the just and efficient adjudication of these actions. Likewise, there is consensus that Chief Judge Rodgers’s court in the Northern District of Florida, where two of the Abilify compulsive behavior cases are pending,<sup>6</sup> is the most logical and convenient venue for these proceedings.

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<sup>6</sup> *Perez v. Bristol-Myers Squibb Co.*, No. 3:16-cv-251 (N.D. Fla.); *Viechec v. Bristol-Myers Squibb Co.*, No. 3:16-cv-291 (N.D. Fla.).

**B. Transfer and Consolidation Are Appropriate in This Matter****1. The Abilify compulsive behavior cases raise common questions of fact and involve common questions of law.**

One factor to consider for transfer and consolidation pursuant to 28 U.S.C. § 1407 is whether the cases involve “common questions of fact” subject to discovery. *In re: Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 493 F. Supp. 2d 1371, 1372-73 (J.P.M.L. 2007). The Panel recognizes that pharmaceutical product liability cases are often particularly well suited for consolidation, because they involve common questions of fact concerning the “development, testing, manufacturing and marketing” of the products. *In re Accutane Prods. Liab. Litig.*, 343 F. Supp. 2d 1382, 1383 (J.P.M.L. 2004); *see also In re Traysol Prods. Liab. Litig.*, 545 F. Supp. 2d 1357, 1358 (J.P.M.L. 2008) (common questions regarding the safety profile of a drug and the manufacturer’s warning); *In re Vytorin/Zetia Mktg., Sales Practices & Prods. Liab. Litig.*, 543 F. Supp. 2d 1378, 1380 (J.P.M.L. 2008) (common questions regarding the use and/or marketing of two pharmaceutical drugs).

These cases are all closely related.<sup>7</sup> The cases involve the same defendants, the same basic theories of liability, and the same general factual allegations. All of the

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<sup>7</sup> Defendants agree with Plaintiffs that the Abilify compulsive behavior cases should be coordinated and consolidated for pretrial proceedings in the interest of judicial efficiency and to avoid inconsistent rulings. Defendants also recognize that there will be common witnesses and experts as to liability and general causation issues. Defendants do not wish their joinder in this submission, however, to suggest any agreement as to which issues will be dispositive in individual cases. Each plaintiff will have to prove his or her individual case and Defendants believe that specific causation issues will be critically important, and likely more important, than the general issues. However one views the cases at this stage, however, coordinated and uniform case

cases will involve the same core of lay and expert witness testimony and document discovery. These cases also share overlapping issues based on the complaints' allegations, including:

- (1) Whether and to what extent Abilify is a substantial factor in causing the alleged compulsive behavior;
- (2) When Defendants learned of any such connection between Abilify and the alleged compulsive behavior;
- (3) Whether, and for how long, Defendants concealed any such knowledge from prescribing physicians;
- (4) Whether Defendants failed to provide adequate and timely warnings and instruction concerning the alleged relationship between Abilify and compulsive behavior;
- (5) Whether Defendants engaged in fraudulent and illegal marketing practices including, but not limited to, making unsubstantiated claims regarding the effectiveness and superiority of Abilify; and
- (6) Whether Defendant Otsuka Pharmaceutical Co, Ltd. is subject to personal jurisdiction in the United States courts.

Separate, unconsolidated pretrial proceedings in the federal cases that have been and will be filed would greatly increase the costs of this litigation for all parties, waste judicial resources, and create a significant risk of inconsistent rulings.

**2. Pretrial centralization of the Abilify compulsive behavior cases will enhance the convenience of the litigation as a whole.**

Transfer and consolidation is also appropriate when it enhances the convenience of the litigation as a whole. *In re: Library Editions of Children's Books*, 297

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management by an experienced judge like Chief Judge Rodgers will be beneficial for all parties.

F. Supp. 385, 386 (J.P.M.L. 1968). Defendants and Plaintiffs agree that they will both benefit from pretrial centralization.

Pretrial centralization would reduce discovery requests and costs significantly for Defendants. Defendants would be able to work with one consolidated set of federal court discovery requests and filings from Plaintiffs' counsel in these 26 federal cases, rather than negotiating with various counsel and courts across the country. Without pretrial centralization, discovery would proceed in a piecemeal and burdensome fashion: defense documents and witnesses would have to be produced numerous times, and the scope of discovery would have to be addressed and litigated in more than a dozen courts and in front of different federal judges.

Pretrial centralization also permits Plaintiffs' counsel to coordinate their efforts and share the pretrial workload, which reduces each individual counsel's costs. The 26 Abilify compulsive behavior cases currently pending in federal court were filed by four different law firms. Any variance between the manner in which those firms choose to proceed in the litigation can be reconciled by an MDL court.

Pretrial centralization will also allow Plaintiffs and Defendants to concentrate their attention and energy on a single federal forum, allowing Plaintiffs and Defendants to respond more quickly and effectively to opposing counsel and the transferee court, and enhancing the overall efficiency of the litigation. *See In re: Baldwin-United Corp. Litigation*, 581 F. Supp. 739, 741 (J.P.M.L. 1984). Centralization will conserve financial resources of the courts as one federal judge, rather than many

federal judges (currently there are 14 different federal district judges), and will resolve issues related to discovery, expert witnesses, and other common issues in the cases. Finally, centralization of the federal cases will make it easier for the New Jersey state court judge (and potential future state court judges) to coordinate with one federal judge, as opposed to attempting to coordinate with multiple federal judges across the country.

Because no case has progressed to the point of trial, and discovery has just begun, the goals of efficiency and coordination can be met by transferring all 26 pending cases to the MDL judge who may be assigned to this case. Failing to transfer would force all the parties to take repetitive and/or redundant depositions and other pretrial discovery, as well as leading to inconsistent and conflicting rulings.

**3. Pretrial centralization of the Abilify cases will promote the just and efficient conduct of these cases.**

Centralization of the Abilify compulsive behavior cases will also promote the just and efficient conduct of this litigation. In evaluating whether proposed pretrial transfers serve this goal, the Panel often asks whether centralization will prevent inconsistent or repetitive pretrial rulings. *See, e.g., In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001) (centralization would promote justice and efficiency because it would “eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary”). For litigation of this magnitude and scope, centralization before a single court eliminates the possibility of inconsistent rulings



among the Abilify compulsive behavior cases, and therefore, prevents different treatment of plaintiffs under similar legal theories. Here, for example, Defendant Otsuka Pharmaceutical Co., Ltd. has filed motions to dismiss for lack of personal jurisdiction in every case. Federal Judges presiding over these cases, including the Honorable Ellen L. Hollander in the District of Maryland and the Honorable M. Douglas Harpool in the Western District of Missouri, have expressed concern over the possibility of conflicting rulings on these motions.

As another example, in two of the cases courts have entered vastly different scheduling orders: one requires a very short discovery schedule and sets trial for February 2017,<sup>8</sup> while the other sets a discovery schedule to prepare for a trial in June 2018.<sup>9</sup> These inconsistent approaches preclude the cases proceeding on parallel tracks and render informal coordination of discovery impossible.

While the JPML has sometimes indicated that inconsistent rulings may be unavoidable, centralization will assist the Parties and the judiciary to keep the number of such potential conflicts to a bare minimum.

**C. The Northern District of Florida is the best transferee forum to efficiently oversee the federal Abilify compulsive behavior cases**

The Parties agree and respectfully urge the Panel to transfer the Abilify compulsive behavior cases to the Northern District of Florida for coordinated and consolidated pretrial proceedings before the Honorable M. Casey Rodgers, the

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<sup>8</sup> See Civil Minutes - General, *Thomas v. Bristol-Myers Squibb Co.*, No. 2:16-cv-326 (C.D. Cal. May 10, 2016), ECF No. 52 (attached as Exhibit B).

<sup>9</sup> See Case Management Order, *Meyer v. Bristol Myers-Squibb Co.*, No. 1:16-cv-191 (S.D. Ind. June 1, 2016), ECF No. 71 (attached as Exhibit C).

Chief Judge of that District, and before whom two Abilify compulsive behavior cases are pending, where they can be efficiently and justly managed by a court with capacity to handle these cases. The Panel balances a number of factors in determining the transferee forum, including: the experience, skill and caseloads of the available judges; the number of cases pending in the jurisdiction; the convenience of the parties; the location of the witnesses and evidence; and the minimization of cost and inconvenience to the parties. *See In re: Lipitor (No. II)*, 997 F. Supp. 2d at 1357; *In re: Preferential Drugs Prods. Pricing Antitrust Litig.*, 429 F. Supp. 1027, 1029 (J.P.M.L. 1977); *In re: Tri-State Crematory Litig.*, 206 F. Supp. 1376, 1378 (J.P.M.L. 2002). These factors weigh in favor of the Northern District of Florida and the Honorable M. Casey Rodgers.

In selecting the appropriate forum, the Panel considers whether a district already has numerous pending MDLs and will be overtaxed by the addition of a new litigation. *See In re Gator Corp. Software Trademark & Copyright Litig.*, 259 F. Supp. 2d 1378 (J.P.M.L. 2003). The Northern District of Florida currently has no pending MDLs. The Panel has stated that if a particular court has no MDLs, that is a clear factor weighing in favor of transfer to that under-utilized district. *E.g.*, *In re Pilgrim's Pride Fair Labor Standards Litig.*, 489 F. Supp. 2d 1381, 1381 (J.P.M.L. 2007); *In re Teflon Prods Liab. Litig.*, 416 F. Supp. 2d 1364, 1365 (J.P.M.L. 2006); *In re FedEx Ground Package System, Inc., Emp. Practices Litig. (No. II)*, 381 F. Supp. 2d 1380, 1382 (J.P.M.L. 2005); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 293 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 290 F. Supp. 2d 1374, 1376 (J.P.M.L. 2003).

The Northern District of Florida is efficient. According to the most recent Federal Court Management Statistics, the Northern District of Florida ranks 24th among districts in the entire country in median time from filing to disposition in civil cases (8.0 months compared to a nationwide median of 8.6 months).<sup>10</sup> Another “especially useful basis for comparing the various court dockets” is the percentage of cases over three years old. D. Herr, *Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation* § 6:17, at 210-11 (2009). The Northern District of Florida again performs well against this measure, with only 3.2% of its civil cases pending for three years or more (compared to a nationwide average of 12.2%).<sup>11</sup> The Northern District of Florida is also a convenient forum. An appropriate transferee court should be convenient for parties and witnesses. The Pensacola International Airport is served by five major airlines with flights and connections throughout the United States.<sup>12</sup>

The potential scope of this litigation is large. Abilify is widely prescribed. The recent increase in the number of filed cases and the number of firms filing those cases reflects the wide reach of this litigation. The Panel should take advantage of the Northern District of Florida’s skill and efficiency and consolidate all of the Abilify compulsive behavior cases in the Northern District of Florida.

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<sup>10</sup> Federal Court Management Statistics for Northern District of Florida, <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/12/31-2>; United States District Courts—National Judicial Caseload Profile, <http://www.uscourts.gov/file/19995/download>.

<sup>11</sup>Federal Court Management Statistics for Northern District of Florida, <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/12/31-2>; United States District Courts—National Judicial Caseload Profile, <http://www.uscourts.gov/file/19995/download>.

<sup>12</sup> See Bookings, Pensacola Int’l Airport, <http://flypensacola.com/page/Bookings>.

The Parties respectfully request that the litigation in the Northern District of Florida be assigned to the Honorable M. Casey Rodgers. Judge Rodgers, who, as noted above, is currently the Chief Judge of the District, has over 13 years of experience as a federal judge. She has served as a District Court Judge since 2003, following her term as a United States Magistrate Judge. She is currently assigned the two Abilify compulsive behavior cases pending in the Northern District of Florida. During her tenure, she has presided over multiple cases remanded from multidistrict litigations involving complex product liability actions, *see, e.g., Krause v. Novartis Pharms. Corp.*, No. 1:06-cv-12 (N.D. Fla.); *Leroy v. Medtronic, Inc.*, No. 3:14-cv-284 (N.D. Fla.), as well as numerous class actions, *see, e.g., Hall v. AETNA Life Insur. Co.*, No. 3:09-cv-222 (N.D. Fla.), *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Servs.*, No. 3:07-cv-62 (N.D. Fla.); *All-South Subcontractors, Inc. v. Amerigas Propane, Inc.*, No. 3:15-cv-9 (N.D. Fla.).

Accordingly, Plaintiffs and Defendants respectfully request that the Panel transfer the Abilify compulsive behavior cases to the Northern District of Florida for coordinated and consolidated pretrial proceedings before the Honorable M. Casey Rodgers.

#### **D. Expedited Hearing**

The Parties respectfully request that the Panel hear oral argument on this motion at the hearing scheduled for July 28, 2016, in Seattle, Washington. Because Plaintiffs and Defendants in all 26 Abilify compulsive behavior cases pending in the federal courts join in this motion, no further papers (such as an opposition or reply) will be filed. Since briefing is completed with today's filing, the motion is ripe to be disposed

of at the July 28 hearing. Expedited hearing would permit the Panel to rule before any of the cases progress to a point at which coordination and consolidation might present some difficulty. The inconsistent treatment of the cases by the federal judges before whom they are currently pending, as exemplified by the vastly different scheduling orders discussed above, render expedited consideration of this motion in the interest of judicial efficiency.<sup>13</sup>

### CONCLUSION

For the aforementioned reasons, the Parties respectfully request that the Panel order coordinated and consolidated pretrial proceedings for the Abilify compulsive behavior litigation, and respectfully request that the Panel transfer these cases to the Northern District of Florida.

Dated: June 24, 2016

Respectfully submitted,

By: /s/ Gary L. Wilson

Gary L. Wilson  
Munir R. Meghjee  
Megan J. McKenzie

ROBINS KAPLAN LLP  
800 LaSalle Avenue, Suite 2800  
Minneapolis, MN 55402-2015  
Telephone: (612) 349-8500  
Fax: (612) 339-4181  
GWilson@RobinsKaplan.com  
MMeghjee@RobinsKaplan.com  
MMcKenzie@RobinsKaplan.com

*Attorneys for Plaintiffs/Movants Denise Miley and  
Brad Miley*

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<sup>13</sup> The Parties will concurrently file a joint motion for expedited hearing pursuant to Panel Rule 6.3.

Dated: June 24, 2016

By: /s/ Kristian Rasmussen  
Kristian Rasmussen  
CORY WATSON, P.C.  
2131 Magnolia Avenue, Suite 200  
Birmingham, AL 35205  
Telephone: (205) 328-2200  
Fax: (205) 324-7896  
krasmussen@corywatson.com

*Attorneys for Plaintiffs*

Dated: June 24, 2016

By: /s/ J. Gordon Rudd Jr.  
J. Gordon Rudd Jr.  
ZIMMERMAN REED  
80 South Eighth Street, Suite 100  
Minneapolis, MN 55402  
Telephone: (612) 341-0400  
Fax: (612) 341-0844  
gordon.rudd@zimmreed.com

*Attorneys for Plaintiffs*

Dated: June 24, 2016

By: /s/ George T. Williamson  
George T. Williamson  
FARR, FARR, EMERICH, HACKETT, CARR  
& HOLMES, P.A.  
99 Nesbit Street  
Punta Gorda, FL 33950  
Telephone: (941) 639-1158  
Fax: (941) 639-0028  
gwilliamson@farr.com

*Attorneys for Plaintiffs*

Dated: June 24, 2016

By: /s/ Anand Agneshwar

Anand Agneshwar  
ARNOLD & PORTER LLP  
399 Park Avenue  
New York, NY 10022-4690  
Telephone: (212) 715-1107  
Fax: (212) 715-1399  
anand.agneshwar@aporter.com

Matthew Eisenstein  
ARNOLD & PORTER LLP  
601 Massachusetts Avenue, NW  
Washington, DC 20001  
Telephone: (202) 942-6606  
Fax: (202) 282-5100  
matthew.eisenstein@aporter.com

Barry J. Thompson  
HOGAN LOVELLS US LLP  
1999 Avenue of the Stars, Suite 1400  
Los Angeles, CA 90067  
Telephone: (310) 785-4600  
Fax: (310) 785-4601  
barry.thompson@hoganlovells.com

Lauren S. Colton  
HOGAN LOVELLS US LLP  
100 International Drive, Suite 200  
Baltimore, MD 21202  
Telephone: (410) 659-2700  
Fax: (410) 659-2701  
lauren.colton@hoganlovells.com

*Attorneys for Defendant Bristol-Myers Squibb  
Company*

Dated: June 24, 2016

By: /s/Matthew A. Campell

Matthew A. Campbell  
WINSTON & STRAWN LLP  
1700 K Street, NW  
Washington, DC 20006  
Telephone: (202) 282-5848  
Fax: (202) 282-5100  
macampbe@winston.com

Luke A. Connelly  
WINSTON & STRAWN LLP  
200 Park Avenue  
New York, NY 10166  
Phone: (212) 294-6882  
Fax: (212) 294-4700  
lconnell@winston.com

*Attorneys for Defendants Otsuka Pharmaceutical Co.,  
Ltd. and Otsuka America Pharmaceutical, Inc.*