UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: Suboxone (Buprenorphine/ Naloxone) Film Products Liability Litigation This document relates to: All Actions	Case No. 1:24-md-03092-JPC MDL No. 3092 Hon. J. Philip Calabrese

DEFENDANTS' INDIVIOR INC., INDIVIOR SOLUTIONS INC. AND AQUESTIVE THERAPEUTICS, INC.'S RESPONSE TO PLAINTIFFS' BRIEF RE: TOLLING AGREEMENT[1]

Although Plaintiffs concede that the personal injury claims at issue in this MDL accrued no later than June 17, 2022—the date on which the labeling of Suboxone® Sublingual Film ("Suboxone film") was revised to reflect the alleged risk of dental injury—fifteen months elapsed before the first of those claims were filed. Shortly after the first cases were filed, Plaintiffs' Counsel (now the PLC) proposed a tolling agreement, which Plaintiffs claimed they needed because they expected to file "thousands" of cases; Defendants did not agree. The parties continued discussing Plaintiffs' request for a tolling agreement, including after the last CMC.[2] The parties remain at an impasse. In short, a tolling agreement is not in Defendants' interest, particularly on the terms suggested by Plaintiffs, under which Defendants would get

[1]Indivior PLC, Reckitt Benckiser LLC, and Reckitt Benckiser Healthcare (UK) Ltd. are challenging personal jurisdiction and are not properly before the Court, and, therefore, are not participating in this Response as it is premature at this juncture to start litigating their defenses, statute of limitation or otherwise.

[2] *See* Minutes and Order, ECF No. 62, ¶ 4, Page ID #: 663 (April 17, 2024).

no benefit other than purported proof of use of Suboxone film, untethered to causation and purported damages.

Plaintiffs acknowledge that "[s]tatutes of limitations can be tolled only by agreement,"[3] but refuse to accept that they have no such agreement here. Instead, Plaintiffs seek to coerce Defendants into accepting their tolling proposal by asking the Court to order Defendants to file an answer to each complaint unless they capitulate to the tolling request. The Court should deny Plaintiffs' request for at least four reasons. First, the absence of a tolling agreement will not waste significant judicial and defense resources, as Plaintiffs claim. Second, state court litigation is likely to proceed in tandem with this MDL regardless of whether the parties agree to toll the statute of limitations. Third, Plaintiffs had and have ample resources to conduct a reasonable pre-suit investigation without a tolling agreement, and any failure on Plaintiffs' part to do so cannot be attributed to Defendants. Finally, Plaintiffs' request is not made to "promote the just and efficient conduct" of this MDL, but rather to increase Defendants' burden and expense by demanding they file hundreds, if not thousands, of responsive pleadings that Plaintiffs previously agreed were unnecessary.

1. Plaintiffs overstate the "inefficiencies" that will result from "blind filing" meritless claims.

Plaintiffs' principal argument is that absent a tolling agreement, Plaintiffs' Counsel will be forced to "blind file" claims only to dismiss them once "a reasonable opportunity for further investigation" reveals them to be meritless. Pls' Brief on

[3] *See* Pls' Brief on Benefits of Tolling Agreement, ECF No. 75, at Page ID# 769.

Benefits of Tolling Agreement ("Pls.' Tolling Br."), ECF No. 75, at Page ID# 771-72. Plaintiffs claim this will result in all parties and the Court being forced to waste resources "pars[ing] through scores of claims to uncover which are viable and which are not." *Id.* at 772. Plaintiffs' argument is specious. Neither the Court nor the Defendants are needed to parse through any documents to uncover which claims Plaintiffs' Counsel believes they can pursue consistent with Rule 11. Plaintiffs appear to concede as much, as Plaintiffs—and only Plaintiffs—would be parsing through such documents before filing complaints if the statute of limitations is tolled. More importantly, however, the Federal Rules of Civil Procedure do not permit the sort of "blind filing" that Plaintiffs suggest they will undertake; to the contrary, the Rules require Plaintiffs' counsel to conduct an appropriate investigation into the facts that is reasonable under the circumstances.[4] Regardless, whatever resources would be "wasted" by the Court "opening cases that will soon leave its docket" are marginal, at best, especially in the age of electronic filing. At bottom, Plaintiffs complaint is that they will incur costs when they choose to file suit without first vetting claims that turn out to be meritless.

[4] While plaintiffs try to evade this requirement by relying on the language in Rule 11(b) that allows filings "upon information and belief," plaintiffs' concept of "blind filing" would gut this rule and permit lawsuit based on a *lack* of information or belief. Indeed, any ambiguity on this point was clarified:

> Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief ***does not relieve litigants from the obligation to conduct an appropriate investigation*** into the facts that is reasonable under the circumstances; ***it is not a license to join parties, make claims, or present defenses without any factual basis or justification***.

Id. Notes of Advisory Committee on Rules—1993 Amendment (Emphasis added).

2. Competing state-court litigation will ensue with or without a tolling agreement; indeed, it already has.

Plaintiffs claim the PLC "has thus far been able to head off … competing state court cases … pending negotiation of a tolling agreement [, b]ut absent such an agreement, the PLC will be unable to persuade lawyers with non-diverse clients from filing cases" in the state courts of Virginia, New Jersey, and Delaware where federal courts do not enjoy diversity jurisdiction. Pls.' Tolling Br. at Page ID# 772. Indeed, Plaintiffs forewarn that "one of these state-court fronts" will "certainly develop" in the absence of a tolling agreement. *Id*. at Page ID# 772-73. But contrary to Plaintiffs' assertions, the PLC has not been able to head off state-court litigation in this litigation; at least one such action already has been filed in New Jersey. Just as the PLC was incorrect in its ability to hold off state court litigation in New Jersey, there is no support for the PLC's claim that it could prevent additional cases from being filed in Virginia, New Jersey, or Delaware regardless of whether Defendants agree to extend Plaintiffs' time to file suit. State court actions are inevitable with or without a tolling agreement. That said, the potential inefficiencies that arise from parallel state proceedings are manageable and mitigable. With the assistance of the Court, Defendants, and the PLC through a designated liaison, will work to coordinate these proceedings with the MDL as much as possible which has successfully been done in many other MDLs such as *In Re Fosamax Products Liability Litigation* (MDL No. 1789), the New Jersey Multi-County Litigation (MCL), *In Re Incretin Mimetics Products Liability Litigation* (MDL No. 2452), and the California Judicial Council Coordination Proceedings (JCCP).

3. Defendants are not responsible for the PLC's claimed inability to reasonably investigate their cases.

Plaintiffs bemoan the alleged "chaos" they claim (but have failed to show) will ensue absent a tolling agreement and insist the "blame be laid entirely at Defendants' feet." Plaintiffs suggest that their alleged predicament was unforeseeable because Defendants did not communicate their unwillingness to enter a tolling agreement until May 8, 2024. Pls' Tolling Br. at Page ID# 776, 776. This is demonstrably false. The parties have discussed the concept of a tolling agreement since Fall of 2023 and Defendants have at every turn indicated that they do not agree.

As Plaintiffs acknowledge, the FDA mandated that the label for buprenorphine-containing medicines dissolved in the mouth be revised to reference reports of dental problems in patients using those drugs. Indivior Inc. carried out the FDA's mandate on June 17, 2022, by revising the label for Suboxone film. Defendants lack visibility at this time into when Plaintiffs' Counsel began advertising to solicit potential claimants, but the first action was not filed until late September 2023. The following month, Plaintiffs first requested Defendants' agreement to toll limitations, and Defendants declined. Defendants have never wavered from this position.

For example, in a February 20, 2024, draft of the Joint Memorandum the parties ultimately filed as ECF No. 32 on March 1, Defendants asserted as follows:

> The parties further discussed whether it would be beneficial to have a repository for medical records of individual plaintiffs early in this matter, but thus far Plaintiff has indicated that it would be interested in using such a repository online if Defendants agree to toll Plaintiffs' claims and further agree to share in the cost of such repository. **Defendants do not agree to toll Plaintiffs' claims**.

Plaintiffs subsequently removed this paragraph from the final Joint Memorandum (ECF No. 32).

Thereafter, Plaintiffs continued to seek, and Defendants continued to refuse to enter, a tolling agreement and the issue was included in the parties' Joint Status Report and Agenda of April 11, 2024, in which Defendants clearly stated:

> **Defendants do not agree to toll the statute of limitations on any claim**. Defendants are not required to waive substantive rights merely because the PLC is trying to file numerous claims and is unprepared to do so.

ECF No. 59, Page ID #515 (emphasis added). The parties addressed the issue with the Court at the CMC on April 16, 2024, following which, the Court encouraged the parties to confer further on the issue. *See* ECF No. 62, ¶ 4, Page ID #: 663. Defendants complied and attempted to negotiate an acceptable tolling agreement, but those efforts failed as stated in the May 8, 2024 communication referenced in Plaintiffs' brief. Plaintiffs' Counsel are responsible for limiting the representations they accept to a number they can manage. The upcoming expiration of the statute of limitations is not a surprise to Plaintiffs, and the twenty law firms in the Plaintiffs' Leadership Committee have ample resources to vet cases before filing.

4. Plaintiffs' request for an order requiring an answer for each complaint filed is designed to punish Defendants, and any argument to the contrary is disingenuous.

Given how clearly their point is stated, Plaintiffs likely do not deny that their request for an order requiring Defendants to file an answer to each complaint is solely intended to coerce Defendants into accepting the tolling proposal and to punish them if they do not. As stated in Plaintiffs' brief:

> **If Defendants insist that each plaintiff file a separate complaint per the civil rules, Defendants should answer each complaint per the civil rules.**
>
> **…**
>
> Considering the expected volume of this litigation, the task of appearing in, monitoring, and answering those complaints will be formidable. Given plaintiffs are forced by the absence of a tolling agreement to initiate new cases with full individual complaints, the PLC can, and should, fairly insist on full answers, particularly where Defendants refusal to agree tolling amounts to nothing more than a gamble that plaintiffs' counsel will have neither the time nor resources to file a separate complaint for each client.

Pls.' Tolling Br. at Page ID# 774.

Plaintiffs' frustration is clear as is their intent to escalate Defendants' litigation burden unless Defendants capitulate to Plaintiffs' tolling proposal. First, Plaintiffs effectively admit as much. *See id.* Second and contrary to Plaintiffs' contention, Defendants do not "insist" that each plaintiff file a "full individual complaint" and never have. To the contrary, as Defendants previously have advised, Defendants believe the PLC should file a Master Complaint and individual plaintiffs should file a Short-Form Complaint. And third, the PLC's present demand for an answer to each complaint constitutes a complete reversal of the PLC's position which they represented to the Court during the CMC on March 7, 2024:

> MS. SLETVOLD: Well, your Honor, we haven't fully as a leadership team formulated what our position is going to be in terms of a master complaint. So I think it is a little premature to set that up. **What I can say is that we certainly aren't going to insist the Defendants answer every single complaint separately, and we think there is reasonably some value to streamlining that a skotch [Sic] perhaps by selecting a specific complaint that they can answer** just so we can, you know, get an understanding of what their responses to various allegations are to help us target discovery.

Hearing Tr., ECF No. 46, at 60:15-61:1 (emphasis added). The PLC's position as stated at the March 7, 2024 CMC is logical given that the 486 complaints filed to date are, in large part, uniform. Indeed, other than to increase Defendants' litigation burden, there is no plausible reason for Plaintiffs to abandon this position and now demand an answer to each complaint.

In sum, requiring a separate answer for every filed complaint would be an unnecessarily expensive and time-consuming burden on Defendants. Indeed, while the complaints generally are uniform in substance, they each slightly differ in their paragraph numbering and other minor differences that would require hours of modifications to each answer. Defendants are prepared to file an answer in the selected exemplar case along with their Rule 12 motions as is required by the Court's Civil Standing Order. Since Plaintiffs' complaints are substantively similar, the answer will provide Plaintiffs with Defendants' positions on their allegations.

Conclusion

Defendants have an undeniable right to assert statutes of limitations defenses and seek the dismissal of any late-filed complaint. Their unwillingness to agree to Plaintiffs' tolling proposal is reasonable and will not inflict any considerable inefficiency on this MDL. In contrast, Plaintiffs' request for an order requiring Defendants to file an answer to each complaint is unreasonable and meant only to coerce Defendants into accepting Plaintiffs' tolling proposal and punish them if they do not. The Court should deny Plaintiffs' request.

Dated: May 13, 2024

Respectfully submitted,

BOWMAN AND BROOKE LLP

By: */s/ Randall L. Christian*
Randall L. Christian

2901 Via Fortuna Drive, Suite 500
Austin, Texas 78746
Tel: (512) 874-3811
Fax: (512) 874-3801
randall.christian@bowmandbrooke.com

SUTTER O'CONNELL

By: /s/ *Denise A. Dickerson*
Denise A. Dickerson

3600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114
Tel: (216) 928-2200
Fax: (216) 928-4400
ddickerson@sutter-law.com

Attorneys for Defendant Indivior Inc., Indivior Solutions Inc., and Aquestive Therapeutics, Inc.

CERTIFICATE OF SERVICE

Per Appendix B, ¶ 14 of the Northern District of Ohio's Electronic Filing Policies and Procedures Manual, I hereby certify that on May 13, 2024, the foregoing *INDIVIOR INC.'S RESPONSE TO PLAINTIFFS' BRIEF RE: TOLLING AGREEMENT* was electronically filed with the Clerk of Court using the CM/ECF system, and notice of this filing will be electronically transmitted to all counsel of record by operation of the Court's electronic filing system.

/s/ *Denise A. Dickerson*
Denise A. Dickerson