

No. 18-A-_____

IN THE SUPREME COURT
OF THE UNITED STATES

ISAAC OWENS
Applicant

vs.

AUXILIUM PHARMACEUTICALS, LLC
Respondent

TO THE HONORABLE JUSTICE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE UNITED STATES
SUPREME COURT
AND
CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

**Isaac Owens' Application for an
Extension of Time to File a Petition for a
Writ of Certiorari**

Respectfully submitted by:

JAMES GRIFFIN O'BRIEN
Zoll & Kranz, LLC
6620 West Central Avenue
Toledo, Ohio 43617
Tel.: (419) 841-9623
Email: jim@toledolaw.com

Counsel for Applicant Isaac Owens

**To the Honorable Justice Elena Kagan, Associate Justice of the United States Supreme Court
and Circuit Justice for the Seventh Circuit:**

Applicant Isaac Owens respectfully requests an extension of sixty days—to and including December 16, 2018—in which to file his Petition for a Writ of Certiorari.

On July 19, 2018, the United States Court of Appeals for the Seventh Circuit entered final judgment affirming the judgment of the United States District Court for the Northern District of Illinois. The District Court Opinion (N.D. Ill, No. 14-cv-5180) is attached as **Exhibit A**; the Court of Appeals Opinion (7th Cir., No. 17-3416) is **Exhibit B**. Pursuant to Supreme Court Rule 13.1, Mr. Owens' petition for a writ of certiorari is due October 17, 2018. Mr. Owens makes this Application for an extension more than ten days prior to that deadline.

Mr. Owens brought his case against Auxilium Pharmaceuticals in 2014, alleging that his use of Auxilium's prescription testosterone replacement therapy, "Testim," caused him to suffer a deep vein thrombosis. Approximately 6,000 similar cases against Auxilium and four other pharmaceutical companies were consolidated by the Judicial Panel on Multidistrict Litigation before the Honorable Matthew F. Kennelly in the Northern District of Illinois. (*In re: Testosterone Replacement Therapy Products Liability Litigation*, MDL No. 2545.)

Mr. Owens' case was selected as one of two bellwether trial cases related to the use of Testim. However, prior to trial, the District Court granted summary judgment to Auxilium after excluding the testimony of Mr. Owens' causation expert. The Court found that the expert had assumed that Mr. Owens had taken a full dose daily, but that Mr. Owens' own testimony reflected he used less than a full dose daily. (Opinion, **Exhibit A** at 15-16.) The Court rendered no opinion on whether Testim caused Mr. Owens' DVT and no opinion as to what dose is sufficient to cause

a DVT; it only found that the expert's assumption of the background facts did not match the plaintiff's testimony. (*Id.*)

On appeal, Mr. Owens argued (1) that the evidence regarding how much medication he used daily was conflicting and not appropriate for summary judgment; and (2) that, regardless of how much gel he used every day, uncontested evidence showed he was receiving a "therapeutic dose" (that is, a medically sufficient dose), which is more germane than the exact quantity taken. Nonetheless, the Court of Appeals affirmed the District Court. (**Exhibit B.**)

But, while Mr. Owens' case was pending before the Court of Appeals, Auxilium entered a Master Settlement Agreement to resolve all known Testim cases. A reading of that Agreement indicates Mr. Owens' claim will be included in that resolution program, so long as the last of his appellate deadlines has not passed before the settlement program is effectuated.

Thus, good cause exists to grant an extension: it will allow Mr. Owens to enter the settlement program exactly as every other claimant in the litigation is able to do.¹ His claim will be evaluated by the Court-appointed Special Master and, assuming she deems it valid, paid within that program. Allowing that process to proceed will save the parties and the Court resources.

Auxilium will suffer no prejudice by this extension. In fact, the company will benefit because the amount the company will pay in the settlement program will not change whether Mr. Owens' case is included in that program or not. And, should Mr. Owens have to bring his Petition for a Writ on the merits, Auxilium may have to expend resources in responding to the Petition. Therefore, whether or not Auxilium supports the requested relief, it will not be prejudiced by it and may reap a benefit.

¹ Mr. Owens' case is the only Testim case in the entire MDL facing this predicament. No other case is in the appellate process. Moreover, Mr. Owens' case is meritorious; the District Court's dismissal addressed a perceived inconsistency in the expert's assumptions, not a lack of causation.

Therefore, Applicant Isaac Owens respectfully requests an extension of sixty days—to and including December 16, 2018—in which to file his Petition for a Writ of Certiorari.

October 5, 2018.

Respectfully Submitted,

/s/ James G. O'Brien
James G. O'Brien (Ohio 0088460, Cal. 308239)
ZOLL & KRANZ, LLC
6620 W. Central Ave., Suite 100
Toledo, OH 43617
Tel. (419) 841-9623
Fax (419) 841-9719
Email jim@toledolaw.com

Counsel for Applicant Isaac Owens