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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 John King, as personal representative
10 of the estate of Patricia King,

11 Plaintiff,

12 v.

13 Novartis Pharmaceuticals Corporation,

14 Defendant.

No. CV-07-00018-PHX-DGC

ORDER

15
16 Plaintiff John King, the personal representative of the estate of Patricia King, has
17 filed a motion to transfer this case to the Central District of California pursuant to
18 28 U.S.C. § 1404(a). Doc. 31. The motion is fully briefed and no party has requested
19 oral argument. For the reasons that follow, the Court will grant the motion.

20 **I. Background.**

21 This case was filed in January 2007 and arose out of Defendant's manufacture of
22 two drugs, Aredia and Zometa, which are classified as bisphosphonates. Doc. 31 at 1.
23 These drugs can cause a condition known as "Bisphosphonate Related/Induced
24 Osteonecrosis of the Jaws" ("BRONJ"). *Id.* Plaintiff alleges that injections of "Aredia
25 and/ or Zometa" caused his wife to develop BRONJ. *Id.* at 3-5. This case was
26 transferred to the Middle District of Tennessee as part of a multidistrict litigation in
27 March 2007. Doc. 9. The case was returned to this Court in January 2014. Doc. 10.
28 Plaintiff now seeks to transfer the case to the Central District of California.

1 **II. Legal Standard.**

2 “For the convenience of the parties and witnesses, in the interest of justice, a
3 district court may transfer any civil action to any other district or division where it might
4 have been brought.” 28 U.S.C. § 1404(a). The district court may consider several
5 factors, including the plaintiff’s choice of forum, the extent of the parties’ contacts with
6 the forum, the contacts in the forum relating to the plaintiff’s cause of action, the
7 availability of non-party witnesses, and the accessibility of evidence. *See Jones v. GNC*
8 *Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). Courts may also consider the
9 parties’ contacts with the two forums, the contacts relating to Plaintiff’s claims in the
10 chosen forum, the location where relevant agreements were negotiated and signed, the
11 availability of compulsory process to compel non-party witness attendance, the effect of
12 transfer on the availability of witnesses and their live testimony at trial, the ease of access
13 to sources of proof, the state that is most familiar with the governing law, and the
14 differences in the costs of litigation in the two forums. *Id.* at 498-99.

15 **III. Analysis.**

16 **A. Initial Considerations.**

17 Defendant argues that Plaintiff must show a change in circumstances in order to
18 transfer the case away from the original forum. Doc. 32 at 3. Defendant cites no binding
19 authority for this proposition and instead presents a handful of unpublished district court
20 cases, only one of which is from within the Ninth Circuit. The Court need not decide
21 whether to apply this law, however, because a number of circumstances have changed
22 since this action was filed. Most importantly, the original Plaintiff has passed away and a
23 new Plaintiff has entered the case. In addition, seven years have elapsed, during which
24 the case was transferred to the Middle District of Tennessee and substantial pretrial
25 litigation has been completed. Circumstances in the case are clearly different than they
26 were when the original plaintiff chose this forum.

27 The Court must also determine whether this action “might have been brought” in
28 the Central District of California. 28 U.S.C. § 1404(a). Venue is proper in “a judicial

1 district in which a substantial part of the events or omissions giving rise to the claim
2 occurred[.]” 28 U.S.C. § 1391(b). Plaintiff argues that Mrs. King received some 42
3 injections of Zometa between 2002 and 2005 from Dr. William Lawler in Fullerton,
4 California. Doc. 31 at 3. Defendant does not dispute these facts. This is sufficient for
5 the Court to conclude that venue would have been proper in California as required for a
6 transfer under section 1404(a).

7 **B. Convenience of the Parties and Witnesses.**

8 Plaintiff argues that although he still lives in Arizona, he is “ready, willing, and
9 able to conduct this trial in California[.]” Doc. 31 at 9. Defendant does not contend that
10 litigating this case in California would be less convenient than Arizona.

11 Plaintiff further argues the majority of the witnesses that are relevant to this case
12 live in California. *Id.* at 4. Plaintiff identifies eight doctors and dentists who treated Mrs.
13 King, both before and after she began taking Zometa, and asserts that all but one, Dr.
14 Wasserman, live and work in California. *Id.* Defendant argues that Dr. Wasserman, who
15 allegedly continued administering injections of Zometa to Mrs. King after she moved to
16 Arizona, is a key witness and notes that it would be unable to compel Dr. Wasserman’s
17 testimony if the case were transferred. Doc. 32 at 6-7. Although Defendant is correct,
18 the opposite problem would exist with respect to seven doctors if the case remained here,
19 and Plaintiff notes that Dr. Wasserman has been deposed in this action. Doc. 34 at 2.

20 Defendant argues that Plaintiff and Mrs. King’s son are both potential witnesses
21 who reside in Arizona. Doc. 32 at 7. Plaintiff has stated his willingness to litigate this
22 case in California and has indicated that Mrs. King’s son will be made available for a
23 deposition. Doc. 34 at 2.

24 On balance, the Court concludes that California would likely be a more convenient
25 forum for medical witnesses and treatment records. The Court also concludes that
26 California would not impose any additional inconvenience on Defendant.¹

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28 ¹ Defendant argues that “a party filing a venue transfer motion is required to
demonstrate, ‘through affidavits or declarations containing admissible evidence, who the
key witnesses will be and what their testimony will generally include.’” Doc. 32 at 5

1 **C. Interests of Justice.**

2 Neither party contends that litigating this case would be any more or any less
3 expensive in California.

4 Although the parties appear to disagree on what law would apply, neither cites any
5 authority for their assertions that either Arizona or California law would apply. This
6 factor appears neutral.

7 The parties disagree on whether Arizona or California has a stronger interest in
8 this lawsuit. Plaintiff does not dispute that Arizona has a strong interest in providing
9 redress for its residents, *see Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir.
10 1984), but argues that California also has a significant interest because nearly all of Mrs.
11 King’s Zometa injections occurred there, as did most of her dental work to remedy the
12 effects of BRONJ. Defendant does not dispute these facts. Doc. 31 at 14. This factor
13 slightly favors Arizona.

14 Defendant argues that Plaintiff is engaging in forum shopping and cites *D’Agnese*
15 *v. Novartis Pharmaceuticals Corporation*, 952 F. Supp. 2d. 880 (D. Ariz. 2013), which
16 granted summary judgment for Defendant, as a result Plaintiff is trying to avoid. Doc. 32
17 at 2. But the *D’Agnese* case is not binding on this Court. True, it may be persuasive, but
18 it also may be persuasive for a federal judge in California. Plaintiff will not avoid the
19 potentially persuasive result in *D’Agnese* by transferring the case.

20 The Court is mindful of concerns that motions to transfer by plaintiffs should be
21 rarely granted in order to prevent forum shopping. But this case is not one where a
22 plaintiff has become dissatisfied with his choice of forum and seeks a more favorable
23 setting in which to assert his claims. Plaintiff did not file this case in Arizona, his late
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25 (citing *Koval v. United States*, No. 13-CV-1630-HRH, 2013 WL 6385595, at *2 n.16 (D.
26 Ariz. Dec. 6, 2013). As support for this conclusion, *Koval* cites *Adoma v. University of*
27 *Phoenix*, 711 F. Supp. 2d 1142, 1151 (E.D. Cal. 2010), which in turn cites *E & J Gallo*
28 *Winery v. F. & P. S.p.A.*, 899 F. Supp. 465 (E.D. Cal. 1994). *See Koval*, 2013 WL
6385595, at *2 n.16. The *E & J Gallo* case cites a California practice guide and a
Seventh Circuit case as support. 899 F. Supp. at 466-67. The Court is not persuaded that
it should deny Plaintiff’s motions for want of an affidavit when the key facts are not in
dispute.

1 wife did. What is more, the vast majority of the Zometa injections occurred in
2 California; a majority of the witnesses and evidence are located there; Plaintiff and Mrs.
3 King were residents of California for many years; Defendant is subject to personal
4 jurisdiction in California; it would be no more inconvenient for Defendant to defend this
5 litigation in California than in Arizona; and there are no indications that California would
6 be less favorable to Defendant. Although Arizona may have been a convenient forum in
7 2007 when Mrs. King was in ill health and resided here, seven years have passed, Mrs.
8 King has unfortunately passed away, and Plaintiff is now responsible for directing this
9 case. The Court concludes that the Central District of California is an appropriate forum
10 and will grant the motion to transfer.

11 **IT IS ORDERED:**

- 12 1. Plaintiff's motion to transfer (Doc. 31) is **granted**.
- 13 2. Defendant's motion to strike (Doc. 35) is **denied as moot**.²
- 14 2. The Clerk shall **transfer** this case to the Central District of California.

15 Dated this 16th day of June, 2014.

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David G. Campbell
United States District Judge

² Defendant also filed a motion to strike a declaration of Plaintiff's counsel attached to Plaintiff's reply. Doc. 35. The declaration contained no relevant information and was not considered by the Court in reaching its decision.