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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Paul Schenk, et al.,

10 Plaintiffs,

11 v.

12 Novartis Pharmaceuticals Corporation,

13 Defendant.

No. CV-12-08223-PCT-NVW

ORDER

14 Before the Court is Defendant Novartis Pharmaceuticals' First Motion to Strike
15 Expert Report of Robert Marx, D.D.S. (Doc. 39), Plaintiffs' Response (Doc. 42), and
16 Defendant's Reply (Doc. 44). Novartis made an error in uploading the exhibits
17 supporting its First Motion to Strike (Doc. 39) and failed to include a copy of the report
18 challenged by its First Motion. When the Court requested a copy of the missing report,
19 Novartis instead chose to file a Second Motion to Strike Expert Report of Robert Marx,
20 D.D.S. (Doc. 75). The Second Motion (Doc. 75) is identical to the First Motion
21 (Doc. 39), except that the correct exhibits are attached.

22 Before the Court is also Novartis' Motion to Exclude Dr. Robert Marx's
23 Specific Causation Opinions (Doc. 60). This Motion (Doc. 60) is substantially similar
24 to the First Motion to Strike Expert Report of Robert Marx, D.D.S. (Doc. 39), as it also
25 challenges whether Dr. Marx has supplied an adequate basis for his expert causation
26 opinion. Although the Motion to Exclude Dr. Robert Marx's Specific Causation
27 Opinions (Doc. 60) is better reasoned than Novartis' First Motion to Strike Expert
28 Report (Doc. 39), the motions address the same core issue, and the Court would have

1 been better served if Novartis had taken the time to consolidate its arguments against
2 Dr. Marx's case-specific testimony into a single motion.

3 Despite the overlap, Novartis' First Motion to Strike Expert Report of Robert
4 Marx, D.D.S. (Doc. 39) and its Motion to Exclude Dr. Robert Marx's Specific Causation
5 Opinions (Doc. 60) will be granted. Novartis' Second Motion to Strike Expert Report of
6 Robert Marx, D.D.S (Doc. 75) will be denied as unnecessary and duplicative.

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8 **I. FACTS**

9 **a. Background**

10 This action is one of over eight hundred product liability suits currently pending
11 against Novartis Pharmaceuticals its products Aredia and Zometa. Aredia and Zometa
12 are bisphosphonate drugs primarily indicated for the prevention of bone fractures in
13 patients with hypercalcemia of malignancy in cancers that have metastasized to the bone.
14 All pending cases concern Novartis' alleged failure to warn of the risk of osteonecrosis of
15 the jaw associated with use of the two drugs. This action differs from the other cases
16 filed because Plaintiff Paul Schenk was not prescribed Aredia and Zometa for
17 metastasized cancer, but was instead prescribed the drugs off-label to prevent fractures
18 associated with a rare genetic disease: osteogenesis imperfecta. This action is brought
19 against Novartis by Paul Schenk and his wife.

20 **b. Dr. Marx's Expert Report**

21 The Schenks served disclosures for six non-retained experts, including Dr. Robert
22 Marx, on the final date for such disclosures, January 31, 2014. Some disclosures were
23 general, such as the statement that they planned to rely on expert reports submitted in the
24 multi-district litigation from which this case was remanded. *See In re: Aredia and*
25 *Zometa Prods. Liab. Litig.*, Dck. No. 3:06-MD-1760, pending in Middle District of
26 Tennessee. Two disclosures were specific to Dr. Marx. One was for a case-wide report
27 served in the class action stage of the multi-district litigation dated October 6, 2008.
28 Another was for a case-specific causation report which discussed Mr. Schenk's medical
records and his genetic condition. The case-specific report was dated January 29, 2014.

1 On February 4, Novartis informed the Plaintiffs that Dr. Marx's case-specific report was
2 inadequate and that Novartis would move to strike it. In response, the Plaintiffs
3 immediately submitted a second case-specific report from Dr. Marx, also dated January
4 29, 2014.

5 Novartis also objected to the second report and proceeded to file this First Motion
6 to Strike Expert Report of Robert Marx, D.D.S. (Doc. 39), alleging that neither Dr.
7 Marx's first case-specific report nor his second, revised report complies with the Federal
8 Rules of Civil Procedure. Novartis' First Motion to Strike (Doc. 39) seeks only to
9 exclude Dr. Marx's case-specific reports. It does not seek to exclude Dr. Marx's more
10 generalized, case-wide opinions in other reports.

11 Dr. Marx's First Report (Doc. 39, Exh. 2) is a half-page letter stating that he has
12 reviewed medical records and the deposition testimony listed the sheets attached to his
13 letter. The letter states that after careful review of the record, combined with his
14 knowledge of bisphosphonate bone toxicity, experience in over 350 cases, and his
15 consideration of other possible causes of Mr. Schenk's jaw problems, he has concluded
16 that Aredia and Zometa were the root cause of Mr. Schenk's osteonecrosis of the jaw,
17 and that the osteonecrosis was not the result of Mr. Schenk's genetic condition or any
18 other cause. No other details, such as what 350 cases were reviewed or what specific
19 facts or information led to his conclusion, are provided in the letter. The letter also states
20 that Dr. Marx has not yet had a chance to review copies of Mr. Schenk's "many sinus and
21 jaw CT scans that were accomplished as well as long bone films" and that he reserves the
22 right to amend the report after reviewing such films. (Doc. 39, Exh. 2).

23 Attached to the letter is a single page with listings which appear exactly as
24 follows:

25 Medical Records Reviewed

- 26 1. Medical records Craig Brady DO 8739-0177 to 8739-0188
27 2. Medical records Craig Brady DO 8739-0157 to 8739-0164
...
14. Shaw Low Medical Center 6360-0028 to 6360-0261

28 (Doc. 39, Exh. 2). The list contains twelve nearly identical listings for "Craig Brady DO"

1 and four listings for records from medical centers. It is not possible to infer the content
2 of the medical records reviewed from the information provided. The attachment also lists
3 the names of people whose depositions were reviewed by Dr. Marx but provides not
4 information concerning the subject matter or content of the depositions.

5 Dr. Marx's Second Report (Doc. 75, Exh. 3) was submitted to Novartis four days
6 past the disclosure deadline on February 4, 2014 but is dated the same date as his First
7 Report: January 29, 2014. It is nearly identical to the First Report, except with two
8 additions. The first is that Dr. Marx demonstrates his familiarity with Mr. Schenk's
9 genetic disease, osteogenesis imperfecta, by stating he has treated many cases of true
10 osteomyelitis of the jaws caused by the genetic disease and has published on the disease
11 in his textbook *Oral and Maxillofacial Pathology*. The second is that Dr. Marx states he
12 has reviewed Mr. Schenk's CT scans and has found they confirm that Mr. Schenk's
13 osteonecrosis is bisphosphonate induced and not a product of osteogenesis imperfecta or
14 osteomyelitis. The Second Report is followed by the same single page attachment as the
15 First Report. No additional support for his conclusions is provided.

16 Novartis seeks to strike both Dr. Marx's First and Second Report based on the
17 Reports' failure to comply with the Federal Rules of Civil Procedure. Novartis also seeks
18 to strike the Second Report because it was disclosed four days after the deadline for
19 expert disclosures. Novartis alleges that although the Second Report is dated the same
20 day as the First Report, it is unlikely the Second Report was prepared the same day
21 because if Dr. Marx had been able to review Mr. Schenk's CT Scans before the
22 disclosure deadlines, the Schenks would have disclosed that information in a timely
23 manner.

24 **II. APPLICABLE RULE**

25 In its Motion, Novartis alleges Dr. Marx's Reports fail to comply with Federal
26 Rule of Civil Procedure 26(a)(2)(C). The Schenks, however, disclosed Dr. Marx as a
27 witness under Federal Rule of Civil Procedure 26(a)(2)(B), not (C). (Doc. 39, Exh. 3).
28 This distinction is important because subsections (B) and (C) distinguish between a
"percipient witness who happens to be an expert and an expert who, without prior

1 knowledge of the facts giving rise to litigation, is recruited to provide expert opinion
2 testimony.” *Downey v. Bob’s Disc. Furniture Holdings*, 633 F.3d 1, 3 (1st Cir. 2011).
3 Experts under subsection (C) generally have actual involvement with the events giving
4 rise to the litigation, and the disclosure required under Rule 26(a)(2)(C) “is considerably
5 less extensive than the report required by Rule 26(a)(2)(B).” Fed. R. Civ. P. 26(a)(2)(C),
6 Advisory Committee’s note 2010.

7 It is unclear whether Novartis’ mistake resulted from a typographical error or a
8 genuine misunderstanding of the Rules of Civil Procedure. The Court only discovered
9 the issue after trying to make sense of Dr. Marx’s expert report, given that Novartis’
10 Motion (Doc. 39) classified him as a treating physician expert. The Court presumes
11 Novartis alleges Dr. Marx’s Reports fail to comply with Federal Rule of Civil Procedure
12 26(a)(2)(B).

13 **III. APPLICATION TO DR. MARX’S REPORT**

14 A party planning to present a witness retained specifically to present expert
15 testimony must provide a report prepared and signed by the witness along with the initial
16 expert witness disclosure. Fed. R. Civ. P. 26(a)(2). This report must contain:

- 17 (i) a complete statement of all opinions the witness will express and the
basis and reasons for them;
- 18 (ii) the facts or data considered by the witness in forming them;
- 19 (iii) any exhibits that will be used to summarize or support them;
- 20 (iv) the witness’s qualifications, including a list of all publications authored
in the previous 10 years;
- 21 (v) a list of all other cases in which, during the previous 4 years, the witness
testified as an expert at trial or by deposition; and
- 22 (vi) a statement of the compensation to be paid for the study and testimony
23 in the case.

24 Rule 26(a)(2)(B). If a report is not submitted in accordance with Rule 26(a), the court
25 has the discretion to exclude the evidence associated with the expert “on a motion, at a
26 hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R.
27 Civ. P. 37(c); *see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106
28 (9th Cir.2001) (noting that “[t]wo express exceptions ameliorate the harshness of Rule

1 37(c)(1): The information may be introduced if the parties' failure to disclose the required
2 information is substantially justified or harmless”).

3 It is undisputed that Plaintiffs did not include any of the information required by
4 subsections (iv) & (v) of Rule 26(a)(2)(B) in Dr. Marx's First or Second Report.
5 Plaintiffs argue submitting this information was unnecessary because Novartis already
6 had access to Dr. Marx's qualifications and publications though his participation in
7 related actions and the earlier, class-action stages of this case. While the error in failing
8 to submit this information is likely harmless, as Novartis has clear access to the
9 information required by subsections (iv) & (v), it must also be noted that the Schenks also
10 had the same, clear access to the necessary information. Plaintiffs could have easily
11 included the required information with the disclosure reports, thereby complying with the
12 Rule and saving both the parties and the court this runaround.

13 But it is not the omission of the information required by subsections (iv) and (v)
14 that provides the impetus for striking Dr. Marx's case-specific Reports. The Reports will
15 be stricken because they are conclusory and fail to provide any factual support for the
16 opinion they express. The entire text of Dr. Marx's Second Report is as follows:

17 As per your request, I have reviewed copies of medical records and
18 copies of deposition testimonies as indicated in the attached sheets.
19 I have also reviewed CT scans taken of Mr. Schenk at the Navopage
20 facility.

21 After careful review of these records combined with my knowledge
22 of bisphosphonate bone toxicity and my experience in over 350
23 cases as well as my experience and considering other possible causes
24 of Mr. Paul Stephen Schenk's jaw problems in differential diagnosis,
25 I came to the conclusion that he suffered from bisphosphonate
26 induced osteonecrosis of the jaws and not either his osteogenesis
27 imperfecta, osteomyelitis, a dental or sinus infection, or any other
28 diagnosis.

I am familiar with osteogenesis imperfecta [Mr. Schenk's genetic
disease] and published on this disease in my textbook Oral and
Maxillofacial Pathology. I have also treated numerous cases of true
osteomyelitis of the jaws. Mr. Schenk's clinical course and CT scan
images are consistent with bisphosphonate induced osteonecrosis,

1 not either osteogenesis imperfecta or otesomyelitis. Therefore,
2 Aredia and Zometa were the root cause of his osteonecrosis related
3 to a significant accumulation of these bisphosphonates in his jaws
4 from repeated doses.

5 (Doc. 75, Exh. 3). Dr. Marx's First Report (Doc. 39, Exh. 2) contains even less detail
6 than the Second Report above, and the contents of the First Report are entirely subsumed
7 into the Second.

8 Dr. Marx's Report fails because it does not include facts in support of his
9 conclusion that Schenk's jaw damage is the result bisphosphonate toxicity. Fed. R. Civ.
10 P. 26(a)(2)(B)(ii) (requiring expert reports to include "the facts or data considered by the
11 witness in forming them"). Dr. Marx states that he formed his opinion based on Schenk's
12 medical records but gives no indication of the content of the records reviewed. The
13 records identified in the attachment to the Report are labeled only "Medical Records" and
14 it is not possible to infer the type or quantity of medical records reviewed.

15 Dr. Marx's general assertion that he used a differential analysis is itself a bare
16 conclusion. His letter merely identifies possible causes of osteonecrosis of the jaw and
17 fails to show why each alternative diagnosis is unlikely. Dr. Marx provides no details
18 regarding Mr. Schenk's specific jaw condition and no explanation as to how he
19 determined Mr. Schenk suffers from osteonecrosis related to a significant accumulation
20 of bisphosphonates and not osteonecrosis caused by osteogenesis imperfecta. His reports
21 offer nothing more than unsupported conclusions.

22 Plaintiffs attempt to justify Dr. Marx's noncompliance with Rule 26 by suggesting
23 Novartis could gather the necessary supporting information from its depositions of Dr.
24 Marx. But the prior depositions of Dr. Marx dealt with Dr. Marx's case-wide opinions
25 and opinions as to other plaintiffs, none of whom had Mr. Schenk's genetic bone disease.
26 Those depositions do not provide foundation for Dr. Marx's specific causation opinion
27 outlined in his report about Mr. Schenk. Its noncompliance with Rule 26(a)(2)(B) is
28 neither harmless nor justifiable. Accordingly, both Dr. Marx's First (Doc. 39, Exh. 2)
and Second (Doc. 75, Exh. 3) Case-Specific Expert Reports will be stricken. It follows

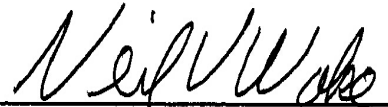
1 that Dr. Marx's specific causation opinions will be excluded from the remainder of this
2 action. *See* Fed. R. Civ. P. 37(c).

3 IT IS THEREFORE ORDERED that Novartis Pharmaceuticals Corporation's First
4 Motion to Strike Expert Report of Robert Marx, D.D.S. (Doc. 39) is granted.

5 IT IS FURTHER ORDERED that Novartis' Motion to Exclude Dr. Robert Marx's
6 Specific Causation Opinions (Doc. 60) is granted.

7 IT IS FURTHER ORDERED that Novartis Pharmaceuticals Corporation's Second
8 Motion to Strike Expert Report of Robert Marx, D.D.S (Doc. 75) is stricken.

9 Dated this 23rd day of July, 2014.

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13 Neil V. Wake
14 United States District Judge
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