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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 LINDA MESSICK,

No. CV 12-00693 SI

9 Plaintiff,

10 v.

**ORDER GRANTING DEFENDANT'S  
DAUBERT MOTION TO EXCLUDE  
CAUSATION TESTIMONY AND  
MOTION FOR SUMMARY JUDGMENT**

11 NOVARTIS PHARMACEUTICALS CORP.,

12 Defendant.  
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15 In June 2011, while this action was pending in the Middle District of Tennessee for pretrial  
16 proceedings as part of MDL No. 1760 (*In re Aredia and Zometa Products Liability Litigation*),  
17 defendant Novartis Pharmaceuticals Corp. filed a *Daubert* motion to exclude specific causation  
18 testimony of plaintiff Linda Messick's retained expert, Dr. Richard Jackson, and plaintiff's non-retained  
19 experts, Drs. Gary Cecchi, Herbert Fawcett, Pritchard Lam, Matthew Liautaud, Nasser Said-Al-Naief,  
20 and Sol Silverman; and also a motion for summary judgment. Those motions were briefed but not  
21 decided in the MDL proceeding. Rather, in October 2011 this action was remanded to the Eastern  
22 District of North Carolina, where it had originally been filed. Thereafter, on plaintiff's unopposed  
23 motion to transfer, the action was transferred from the Eastern District of North Carolina to this District  
24 in February, 2012.

25 On November 8, 2012, this Court heard argument on defendant's motions. Having considered  
26 the parties' arguments, the Court hereby GRANTS defendant's *Daubert* motion as to Drs. Lam,  
27 Silverman, and Jackson. It also GRANTS defendant's motion for summary judgment, for the reasons  
28 set forth below.

**BACKGROUND**

1  
2 Plaintiff Linda Messick was diagnosed with breast cancer in August 2000. Pl.’s Response to  
3 Def.’s Statement of Undisputed Facts in Supp. of Summ. J. (“Pl.’s Resp. to Def.’s SUF”) ¶ 11. She  
4 received radiation therapy and several medications, and in April 2002, she was diagnosed with  
5 osteoporosis. *Id.* ¶ 16. From May 7, 2002 to November 14, 2002, Ms. Messick was treated with Zometa  
6 therapy, and from December 12, 2002 to June 10, 2004, she was treated with Aredia therapy; both  
7 therapies were prescribed by Dr. Cecchi, her oncologist. *Id.* ¶ 17-19.

8 During and after her Zometa and Aredia treatments, Ms. Messick visited the dentist for a variety  
9 of conditions. She had dental caries; restorative dental work requiring fillings, root canals, crowns,  
10 extractions and bridge adjustments; mobility in her lower right teeth; and moderate bone loss on tooth  
11 #28. Def.’s Statement of Undisputed Facts (“Def.’s SUF”) ¶¶ 27, 28. Dr. Lam extracted tooth # 29 in  
12 2002, tooth #20 in 2003, and tooth #28 in 2004. *Id.* Ex. 59 (“Lam Dep. II”) 49:1-16, 56:1-12; Vecchione  
13 Decl., Ex. 6 (“Lam Dep. III”) 51:17-22. Additionally, Ms. Messick suffered a hydrochloric acid  
14 accident which occurred during a root canal procedure. Lam Dep. III 55:1-3. In August 2002 and  
15 November 2003, Ms. Messick was diagnosed with periodontal disease. Def.’s SUF ¶¶ 23-27.

16 On July 17, 2004, Dr. Cecchi recorded that Ms. Messick’s “results improved” and discontinued  
17 her Aredia treatment, although the parties dispute whether the “results” referred to Ms. Messick’s bone  
18 density. *Id.* ¶ 20. The parties dispute whether the Aredia and Zometa therapy was used to treat Ms.  
19 Messick’s osteoporosis, which is an off-label use. *Id.* ¶ 17-18. In October 2005, Ms. Messick  
20 developed exposed bone in her mouth, which healed completely by October 2008, *id.* ¶ 33; plaintiff  
21 characterizes this as osteonecrosis of the jaw (“ONJ”).

22 Novartis is a pharmaceutical company engaging in marketing, distributing, promoting, testing,  
23 labeling, and selling the drugs Aredia and Zometa. Second Amended Complaint (“SAC”) ¶ 5. Aredia  
24 and Zometa are bisphosphonates prescribed for the management of metastatic disease to the bone and  
25 other bone diseases and conditions. *Id.* ¶ 7. On October 31, 1991, the FDA approved Aredia for the  
26 treatment of hypercalcemia of malignancy and approved the labeling. Pl.’s Resp. to Def.’s SUF ¶ 1.  
27 In September 1995, the FDA approved Aredia for other indications, including osteolytic bone metastases  
28 related to breast cancer. *Id.* ¶ 2. On August 20, 2001, the FDA approved Zometa for hypercalcemia of

1 malignancy and approved the labeling. *Id.* ¶ 3. In February 2002, the FDA approved Zometa for  
2 multiple myeloma and bone metastases from solid tumors. *Id.* ¶ 4.

3 On September 26, 2003, Novartis notified the FDA by letter that it was voluntarily revising the  
4 Adverse Reactions section of the Aredia and Zometa labeling to reflect information from recent reports  
5 of osteonecrosis of the jaw associated with the use of intravenous bisphosphonates. *Id.* ¶ 43. The same  
6 month Dr. Marx published an article discussing the prevalence of ONJ in patients being treated with  
7 Aredia and Zometa. *Id.* ¶ 43. The parties dispute when the public at large learned of the labeling  
8 change. *Id.*

9 On March 4, 2008, plaintiff filed a Second Amended Complaint alleging that Aredia and Zometa  
10 caused her ONJ, and that Novartis knew or should have known that bisphosphonates cause changes to  
11 patients' upper and lower jaws that can progress to jaw necrosis and osteomyelitis. SAC ¶ 12. Plaintiff  
12 alleges that in 2002, following physicians' reports that patients taking Aredia or Zometa reported severe  
13 complications and sometimes losses of their jaws, Novartis failed to implement studies regarding the  
14 risk of ONJ relative to Zometa and Aredia; and that Novartis did not notify physicians of the risk of ONJ  
15 until September 2004 and dental professionals until May 2005. *Id.* ¶ 14-15.

## 17 LEGAL STANDARD

### 18 I. Motion to Exclude Plaintiff's Expert Witnesses

19 Federal Rule of Evidence 702 provides that expert testimony based upon knowledge, skill,  
20 experience, training, or education is admissible if "(a) scientific, technical, or other specialized  
21 knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; (b) the  
22 testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and  
23 methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."  
24 Fed. R. Evid. 702.

25 The district court is charged with making the gateway determinations of whether the expert  
26 testimony is reliable and relevant. *See Barabin v. AstenJohnson, Inc.*, 10-36142, 2012 WL 5669685,  
27 at \*4 (9th Cir. Nov. 16, 2012) (reversing a district court for not making reliability or relevance findings,  
28 and admitting the testimony "[i]n the interest of allowing each party to try its case to the jury"). As a

1 guide for assessing the scientific validity of expert testimony under the reliability prong of Rule 702,  
2 the Supreme Court provided a nonexhaustive list of factors that courts may consider: (1) whether the  
3 theory or technique is generally accepted within a relevant scientific community, (2) whether the theory  
4 or technique has been subjected to peer review and publication, (3) the known or potential rate of error,  
5 and (4) whether the theory or technique can be tested. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S.  
6 579, 593-94 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Ninth Circuit  
7 also has indicated that independent research, rather than research conducted for the purposes of  
8 litigation, carries with it the indicia of reliability. *See Daubert v. Merrell Dow Pharms., Inc. (Daubert*  
9 *II)*, 43 F.3d 1311, 1317 (9th Cir. 1995).

10 If the testimony is not based on “pre-litigation” research or if the expert’s research has not been  
11 subjected to peer review, then the expert must explain precisely how he went about reaching his  
12 conclusions and point to some objective source – a learned treatise, the policy statement of a  
13 professional association, a published article in a reputable scientific journal or the like – to show that  
14 he has followed the scientific method, as it is practiced by (at least) a recognized minority of scientists  
15 in his field. *Id.* at 1318-19 (*citing United States v. Rincon*, 28 F.3d 921, 924 (9th Cir. 1994)); *see also*  
16 *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996). The proponent of the evidence  
17 must prove its admissibility by a preponderance of proof. *See Daubert*, 509 U.S. at 592 n.10.

## 19 **II. Motion for Summary Judgment**

20 Summary adjudication is proper when “the pleadings, depositions, answers to interrogatories,  
21 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any  
22 material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.  
23 56(c).

24 In a motion for summary judgment, “[if] the moving party for summary judgment meets its  
25 initial burden of identifying for the court those portions of the materials on file that it believes  
26 demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so  
27 that “the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, ‘specific  
28 facts showing that there is a genuine issue for trial.’” *See T.W. Elec. Service, Inc. v. Pacific Elec.*

1 *Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317  
2 (1986)).

3 In judging evidence at the summary judgment stage, the Court does not make credibility  
4 determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the  
5 nonmoving party. See *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v.*  
6 *Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).  
7 The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory,  
8 speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and  
9 defeat summary judgment. See *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49 (2d  
10 Cir. 1985); *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

## 11 12 **DISCUSSION**

### 13 **I. Motion to Exclude Plaintiff's Expert Witnesses**

14 In support of her suit, plaintiff Messick proffers her treating physicians and retained expert Dr.  
15 Jackson as witnesses who will testify that Aredia and Zometa caused her ONJ. Defendant moves to  
16 exclude the specific causation testimony of these expert witnesses. Because plaintiff conceded that Drs.  
17 Cecchi, Fawcett, Liautaud, and Said-Al-Naief do not offer specific causation testimony, Pl.'s Opp. at  
18 9, 10, 13, their testimony does not fall within the scope of this *Daubert* motion. Therefore, the Court  
19 only considers whether the specific causation testimony of Drs. Jackson, Lam, and Silverman should  
20 be excluded.

#### 21 22 **A. Dr. Jackson**

23 Dr. Jackson completed his oral and maxillofacial surgery residency in 1982 and became Board  
24 Certified in oral maxillofacial surgery in 1984. Mem. in Supp. of Def.'s Mot. to Exclude Causation  
25 Testimony of Pl.'s Experts, Ex. 2 ("Independent Medical Examination of Linda Messick" or "IME").  
26 Dr. Jackson has not been involved in any lectures on ONJ, has not conducted research on  
27 bisphosphonates or ONJ, and has not been part of any clinical studies in the past seven years. Mem. in  
28 Supp. of Mot. to Exclude Causation Testimony of Pl.'s Experts, Ex. 3 ("Jackson Dep. I") 20:14-19,

1 21:2-14. However, he has had “extensive experience” with ONJ in the past and present, and is the  
2 primary oral and maxillofacial surgeon managing ONJ in the Sacramento area. IME. Starting in 2003,  
3 he “began to see many more cases of osteonecrosis” in patients who had not received radiation therapy  
4 to the jaw. *Id.* After consulting six medical articles published in *Annals of Internal Medicine*; *Journal*  
5 *of Oral Maxillofacial Surgery*; *Oral Surgery*, *Oral Medicine*, *Oral Pathology*, *Oral Radiology and*  
6 *Endodontology*; and by the American Association of Oral Maxillofacial Surgeons (“AAOMS”), Dr.  
7 Jackson opined that the bisphosphonates in intravenous and oral form were the etiologic factor of ONJ,  
8 and not radiation: “it is my opinion that bisphosphonates have in the past and present always shown a  
9 propensity to cause jaw necrosis in patients.” *Id.*

10 Dr. Jackson examined Ms. Messick on February 4, 2011, several years after her ONJ resolved.  
11 IME. Relying on that physical examination, his review of her medical records, and the statements of  
12 her treating physicians, he wrote an expert report setting forth his diagnosis of Ms. Messick’s exposed  
13 bone. Jackson Dep. I. 102:1-6. In addition, Dr. Jackson obtained a piece of bone that had been  
14 extracted from Ms. Messick’s mouth in November 2008, which he sent to Dr. Said-Al-Naief for a  
15 pathology analysis. *Id.* 26:20-36:14. However, the bone had been stored in a plastic container and had  
16 not been preserved, and Dr. Jackson agreed with Dr. Said-Al-Naief’s statement that it is not  
17 scientifically reliable to do a pathology analysis three years after a sample is obtained, when the sample  
18 had not been preserved in any way. Mem. in Supp. of Mot. to Exclude Causation Testimony of Pl.’s  
19 Experts, Ex. 4 (“Said Dep.”) 60:9-12; Mem. in Supp. of Mot. to Exclude Causation Testimony of Pl.’s  
20 Experts, Ex. 5 (“Jackson Dep. II”) 221:11-18. In his report, Dr. Jackson listed as risk factors for Ms.  
21 Messick’s ONJ: use of intravenous Aredia and Zometa, tooth extractions, advanced age (73 years old),  
22 Caucasian race, osteopenia, and cortical steroid therapy. IME. He performed a differential diagnosis  
23 and found that Ms. Messick met the three criteria defined by the AAOMS for a diagnosis of  
24 bisphosphonate-related ONJ (“BRONJ”): (1) she had a past history of Aredia and Zometa use, (2) she  
25 had exposed necrotic bone that persisted for more than eight weeks, and (3) she had no history of  
26 radiation therapy to the jaws. *Id.* He ruled out alternative diagnoses of radiation-induced osteonecrosis  
27 of the jaw because she did not have radiation in her jaw, and non-suppurative osteomyelitis because she  
28 did not have any symptoms of infection. *Id.*

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(1) Reliability

As an initial matter, a court must determine if a witness has the required expertise under Rule 702(a), whether it be “knowledge, skill, experience, training, or education.” Based on Dr. Jackson’s medical education, board certification, and his clinical experience as an oral and maxillofacial surgeon treating ONJ, the Court finds that he is qualified under Rule 702(a). However, for other reasons the Court finds that Dr. Jackson’s testimony is insufficient to meet the *Daubert* threshold reliability test.

Under the reliability prong of Rule 702, the testimony must reflect scientific knowledge derived from the scientific method. *Daubert II*, 43 F.3d at 1316. In determining whether experts have derived their findings through the scientific method, the Court examines the expert’s independent research and reliance on objective sources, such as treatises or published articles in reputable journals. *Id.* at 1318-19. Dr. Jackson’s testimony depends both on his clinical experience, and six recent medical publications. These sources, however, these are only reliable for an assertion of general causation, not specific causation in Ms. Messick’s case.

As to specific causation, Dr. Jackson tried to rely on a pathology analysis to show that Ms. Messick’s ONJ was caused by Aredia and Zometa, but he admitted this was scientifically unreliable, owing to the lack of preservation of the three year-old bone sample. Dr. Jackson performed a differential diagnosis of Ms. Messick’s condition, ruling out osteomyelitis, osteoradionecrosis, and osteonecrosis in general, to diagnose her with BRONJ. However, Dr. Jackson identified five other risk factors that contributed to Ms. Messick’s BRONJ besides the Aredia and Zometa. Although he asserted that “it just doesn’t happen” that a patient with all of Ms. Messick’s risk factors but without exposure to bisphosphonates would have developed ONJ, he never explained the scientific basis for this conclusion. Jackson Dep. I 124:20-125:12. Indeed, when asked if there is “any scientifically reliable way for [him] to determine in a patient who has multiple risk factors at one time which of those particular risk factors is causing the underlying necrotic bone in the jaw,” he answered “no.” Mem. in Supp. of Mot. to Exclude Causation Testimony of Pl.’s Experts, Ex. 6 (“Jackson Dep. III”) 116:21-117:1.

The Court finds that Dr. Jackson’s opinion that Ms. Messick’s ONJ was caused by her

1 bisphosphonate use, instead of her other risk factors, is not based on reliable scientific methodology.  
2 *See also Luttrell v. Novartis Pharms. Corp.*, No. 07-CV-3015 TR, 2012 WL 4513109, at \*11 (E.D.  
3 Wash. Oct. 1, 2012) (excluding Dr. Jackson’s causation testimony in part because he offered no  
4 explanation why he ruled out alternative hypotheses of causation beyond “bald assertions” that BRONJ  
5 is unique compared to other causes of ONJ).

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7 **(2) Relevance**

8 The Court also finds that Dr. Jackson’s causation testimony does not meet the relevance  
9 requirement of Rule 702. Relevance for purposes of Rule 702 is assessed by looking to the governing  
10 substantive standard for causation. *Daubert II*, 43 F.3d at 1320. In this case the governing substantive  
11 standard, supplied by California tort law, requires plaintiff to show both general causation (i.e. that the  
12 drugs have the capacity to cause the condition at issue) and specific causation (i.e. that the drugs caused  
13 the plaintiff’s condition): “plaintiffs [] [must] show not merely that [the medication] increased the  
14 likelihood of injury, but that it more likely than not caused *their* injuries.” *In re Silicon Gel Breast*  
15 *Implants Products Liability Litigation*, 318 F. Supp. 2d 879, 890 (C.D. Cal. 2004) (emphasis in  
16 original); *see also Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681, 683 (9th Cir. 2008);  
17 *Daubert II*, 43 F.3d at 1320.

18 Here, Novartis argues that Dr. Jackson’s testimony is not relevant to show that Aredia and  
19 Zometa specifically caused Ms. Messick’s ONJ. Dr. Jackson’s differential diagnosis only determines  
20 that Ms. Messick’s ONJ is *related* to her bisphosphonate use, and he admits that a diagnosis of BRONJ  
21 does not mean that bisphosphonates *caused* her ONJ. *See* Jackson Dep. I 154:11-20 (“Well, the key is  
22 not the cause, the key is the support. Bisphosphonates support osteonecrosis, just like oxygen supports  
23 fire. So fire is not caused from oxygen, but it certainly is a necessary ingredient.”). Although he  
24 asserted in a hypothetical that a patient *like* Ms. Messick would not contract ONJ without exposure to  
25 bisphosphonates, he never opined that Aredia and Zometa actually caused Ms. Messick’s ONJ, and  
26 indeed, he stated that there was no scientifically reliable way for him to do so. Thus, Dr. Jackson’s  
27 testimony is not relevant to determine the specific causation of Ms. Messick’s ONJ.

28 Therefore, because the Court finds that Dr. Jackson’s testimony is neither reliable nor relevant

1 under Rule 702, it GRANTS defendant’s motion to exclude Dr. Jackson’s testimony.  
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3 **B. Drs. Lam and Silverman**

4 Dr. Silverman is an oral medicine specialist. Mot. at 9. He saw Ms. Messick from October 5,  
5 2004 to March 31, 2009. Mem. in Supp. of Mot. to Exclude, Ex. 15 (“Silverman Dep.”) 18:19-19:2.  
6 Dr. Silverman “assumed” Ms. Messick’s exposed bone was caused by the history of intravenous  
7 bisphosphonate use and Ms. Messick’s medical history, *id.* 62:12-15, stating “[t]here was a possibility  
8 of an association.” *Id.* 95:25-96:6. He did not complete a differential diagnosis to reach that conclusion,  
9 nor did he conduct a comprehensive literature search or conduct research relating to ONJ, BRONJ,  
10 Aredia, or Zometa, or publish articles relating to BRONJ and ONJ. *Id.* 12:18-25, 52:4-6, 109:3-7.

11 Dr. Lam is an oral surgeon who treated Ms. Messick from January 17, 1995 to November 20,  
12 2008. Mem. in Supp. of Mot. to Exclude, Ex. 11 (“Lam Dep. I”) 18:20-25. Dr. Lam did not make a  
13 definitive diagnosis for Ms. Messick’s condition, but had a “working diagnosis” or “impression” that  
14 Ms. Messick’s ONJ was related to her bisphosphonate therapy. *Id.* 92:16-25. In such instances where  
15 Dr. Lam does not have his own definitive diagnosis, it has been his habit and custom to refer patients  
16 to Dr. Silverman for diagnosis and to defer to him in those circumstances. *Id.* 75:8-15. Dr. Lam looked  
17 to Dr. Silverman to provide a more definitive diagnosis for Ms. Messick’s condition; Dr. Silverman  
18 concurred with Dr. Lam’s working diagnosis of osteonecrosis. *Id.* 93:1-11.

19 The Court finds that because Dr. Silverman merely assumed Ms. Messick’s ONJ was  
20 bisphosphonate-related and did not rely on scientific methods to determine the cause of Ms. Messick’s  
21 ONJ, his causation testimony must be excluded. Likewise, because Dr. Lam merely formed an  
22 impression and deferred to Dr. Silverman for a definite diagnosis, his causation testimony must be  
23 excluded as well. Dr. Silverman’s “assumption” and Dr. Lam’s “impression” are simply inadequate to  
24 satisfy the Ninth Circuit’s requirement under Rule 702, that where evidence of pre-litigation research  
25 or research subject to peer review is unavailable, the expert must point to an objective source, such as  
26 a treatise, policy statement of a professional association, or a published article in a reputable scientific  
27 journal. *Daubert II*, 43 F.3d at 1318-19 (testimony inadmissible where expert offered no tests and no  
28 testable theory as to causation, only drawing unsupported conclusions and relying on animal studies and

1 chemical structure analyses). Drs. Lam and Silverman offered only assumptions and impressions.  
2 Moreover, neither has shown that Aredia and Zometa more likely than not caused Ms. Messick’s  
3 injuries, as required under California tort law under the relevance prong of Rule 702. *Id.* at 1320.

4 The Court finds that neither Dr. Lam nor Dr. Silverman used reliable methods to determine the  
5 cause of Ms. Messick’s ONJ as required by Rule 702. Therefore, the Court GRANTS defendant’s  
6 motion to exclude their testimony.

7  
8 **II. Motion for Summary Judgment**

9 Plaintiff alleged six causes of action against Novartis based on her allegation that Aredia and  
10 Zometa caused her osteonecrosis of the jaw: (1) strict liability for defective design, manufacture and  
11 warning, (2) negligent manufacture, (3) negligent failure to warn, (4) breach of express warranty, (5)  
12 breach of implied warranty, and (6) loss of consortium. Certain of the manufacturing and consortium  
13 causes of action have been waived. For the remaining causes of action, Novartis argues that summary  
14 judgment in its favor is proper for numerous reasons.<sup>1</sup> This Court finds that plaintiff has submitted  
15 insufficient evidence to establish causation, and that this failure is dispositive of all her claims.

16 In a pharmaceutical personal injury action, causation must be proven within a reasonable medical  
17 probability, based upon competent expert testimony, and “[m]ere possibility alone is insufficient to  
18 establish a prima facie case.” *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 402 (1985). “A  
19 possible cause only becomes ‘probable’ when, in the absence of other reasonable causal explanations,  
20 it becomes more likely than not that the injury was a result of its action.” *Id.* at 403. A plaintiff must  
21 prove both general causation (here, that Aredia and Zometa have the capacity to cause ONJ) and specific  
22 causation (here, that Ms. Messick’s ONJ was caused by Aredia or Zometa). *See In re Silicone Gel*  
23 *Breast Implants Products Liab. Litig.*, 318 F. Supp. 2d at 922. Because Ms. Messick bears the ultimate  
24 burden of proof on causation, Novartis has only to point to the absence of a genuine issue of material

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26 \_\_\_\_\_  
27 <sup>1</sup> Novartis contends that there is insufficient evidence establishing causation; that there is no  
28 legal or factual showing that Novartis had a duty to warn Ms. Messick; that its warning was adequate;  
that any warnings would not have been heeded; that strict liability is barred by California law; that there  
was no express warranty; and that there was no privity of contract. Because this Court finds the  
causation question dispositive, it expresses no view on the other contentions.

