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*Attorneys for Defendant
Novartis Pharmaceuticals Corporation*

BEVERLY MENG,

Plaintiff,

v.

NOVARTIS PHARMACEUTICALS
CORP.,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX COUNTY

Docket No.: MID-L-7670-07-MT

CASE NO. 278

CIVIL ACTION
In Re Aredia® and Zometa® Litigation

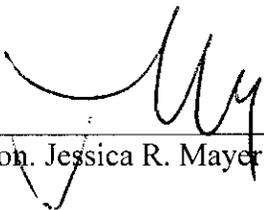
RE: APAL
**ORDER GRANTING DEFENDANT
NOVARTIS PHARMACEUTICALS
CORPORATION'S MOTION *IN LIMINE*
TO EXCLUDE NEW AND
INADMISSIBLE OPINIONS FROM
PLAINTIFF'S EXPERT,
DR. RICHARD KRAUT**

THIS MATTER having been opened to the Court by Sils Cummis & Gross P.C.,
attorneys for defendant Novartis Pharmaceuticals Corporation ("NPC"), seeking an order to
exclude new and inadmissible opinions from plaintiff's expert, Dr. Richard Kraut, and the Court
having reviewed the papers submitted and arguments of counsel, and for good cause shown;

IT IS on this 5th day of April 2013, ORDERED as follows:

1. NPC's motion is granted *in part*

2. Plaintiff is precluded from introducing any evidence or testimony concerning Dr. Kraut's opinion that Ms. Meng suffered a BRONJ-related event after her September 2012 extraction;
3. A copy of this Order is to be served ^{per the name of} upon all counsel of record within seven (7) days of the date hereof.



Hon. Jessica R. Mayer, J.S.C.

This motion was:

Opposed

Unopposed

* for the reasons set forth in the attached memorandum.

**Defendant's Motion in Limine to Exclude New and Inadmissible Opinions
from Plaintiff's Expert, Dr. Richard Kraut**

Defendant's motion is **GRANTED IN PART**. The New Jersey Court Rules require that an expert report "contain a complete statement of that person's opinions and the basis therefor" Rule 4:17-4(e). "The purpose of the report is to forewarn the propounding party of the expected contents of the expert's testimony in order to enable preparation to counter such opinions with other opinion material." Maurio v. Merck Constr. Co., 162 N.J. Super. 566, 569 (App. Div. 1978). This requirement governing expert reports ensures that neither a litigant nor the court is unfairly burdened by unforeseeable expert testimony. Indeed, a vague or overly broad designation of expert opinion testimony would burden this court with having to review material from other trials and other legal proceedings in order for the court to familiarize itself with the material so as to understand the basis for the expert's testimony in this case. See Ingram v. Novartis Pharms. Corp., 282 F.R.D. 563 (W.D. Okla., June 19, 2012).

"It is well settled that a trial judge has the discretion to preclude expert testimony on a subject not covered in the written reports furnished in discovery." Ratner v. General Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990); followed by Conrad v. Robbj, 341 N.J. Super. 424, 441 (App. Div. 2001), certif. denied 170 N.J. 210 (2001). In the interests of fairness to the court and to counsel, and as previously ordered in this matter,¹ all experts in this case shall be bound by the opinions set forth in their expert reports for the Bessemer matter, their expert reports and related deposition testimony for this matter, and testimony presented to the jury in the Bessemer trial. However, experts shall also be allowed to testify as to additional materials

¹ See Order regarding Defendant's Motion in limine #47 in Meng v. Novartis Pharmaceuticals Corp., MID-L-7670-07 (Aug. 8, 2012).

that may have been published subsequent to the issuance of their expert reports for the Bessemer and Meng cases and Bessemer trial testimony, provided the subsequently published material supports their previous opinions and does not alter their prior opinions.

The court's opinion regarding each of Defendant's arguments is set forth in greater detail, below.

Part I. Motion to Exclude Opinions Regarding the Symptoms Ms. Meng Experienced Prior to the Extraction in September 2012 of Tooth #30 (Lower Right Molar)

Dr. Kraut is not permitted to revise his opinion regarding the necessity of Ms. Meng's tooth extraction in September, nor state that Zometa® was the cause of her broken tooth and need for extraction.

Dr. Kraut is bound by his former opinion because defendant Novartis Pharmaceuticals Corporation ("Defendant" or "NPC") should have been able to question Dr. Kraut at his depositions as to his opinions. Since Defendant was not given this opportunity, Dr. Kraut cannot now revise his opinion without giving NPC a chance to depose him regarding these opinions. As this court ordered in motion in limine #47, "all experts in this case shall be bound by the opinions set forth in their expert reports for the Bessmer matter, their expert reports and related deposition testimony in this matter, and testimony presented to the jury at the Bessemer trial."

Plaintiff contends that Defendant will not be surprised by anything Dr. Kraut says, because defense counsel has deposed Dr. Kraut numerous times and is very familiar with his testimony. Plaintiff further argues that any potential revision to Dr. Kraut's testimony (regarding the necessity of the tooth extraction by Dr. Stewart, or that Ms. Meng's use of Zometa® was the cause for her broken tooth and need for extraction) is minor, and that there is no intent to mislead, no surprise, and no prejudice.

This court cannot allow Dr. Kraut to revise his previously disclosed opinions at trial, even if Defendant fully expects the revision, because Defendant was not given the opportunity to depose Dr. Kraut regarding potential revisions to his testimony. Plaintiff attempts to conflate the circumstances surrounding the extraction of tooth #31 with the circumstances surrounding the

extraction of tooth #30, but this court cannot do so without causing resulting prejudice to Defendant. Therefore, Part I of Defendant's motion is **GRANTED**.

Part II. Motion to Exclude Opinions Regarding the Degree to Which Ms. Meng's Mandible (Lower Jawbone) had Increased in Density due to Zometa® Since 2009

Dr. Kraut is permitted to offer additional support regarding Ms. Meng's increased bone density. Dr. Kraut was previously qualified as Plaintiff's specific causation expert in this matter. Order regarding Defendant's Motion to Exclude Testimony of Dr. Richard Kraut in Meng v. Novartis, Docket No. MID-L-7670-07 (June 29, 2012). This court has held that Dr. Kraut may use cone beam studies to determine bone density, and that the reliability of such a methodology can be explored on cross examination. Order regarding Defendant's Motion in limine #51 in Meng v. Novartis, MID-L-7670-MT (Aug. 8, 2012). Defendant is aware of the court's prior in limine ruling on this issue. Dr. Kraut is qualified to give his opinion regarding the density of Ms. Meng's mandible without the use of Hounsfield numbers (i.e., by visually comparing cone beam studies). To the extent that Dr. Kraut's qualification as an expert and reliability of his testimony relies on "Hounsfield numbers," such evidence would be excluded because it would be new evidence and Dr. Kraut was not prepared to give Hounsfield numbers during his deposition. Therefore, Part II of Defendant's motion is **GRANTED IN PART**.

Part III. Motion to Exclude Opinions Regarding the Density of Ms. Meng's Maxilla (Upper Jawbone) due to Her Zometa® Treatment

Dr. Kraut will not be allowed to testify as to the density of Ms. Meng's maxilla in 2012 since he did not examine her maxilla density in 2012. Therefore, Part III of Defendant's motion is **GRANTED**.

Part IV. Motion to Exclude Opinions on Whether Ms. Meng had Delayed Healing in the Area Where Tooth #15 (Upper Left Molar) had been Extracted in 2006

Since Dr. Kraut had not examined the radiographs of tooth #15 by the time of his deposition, he cannot opine regarding “delayed healing” of tooth #15 at trial. Delayed healing related to other teeth cannot be used to support an assertion that there was delayed healing at the site of the extraction of tooth #15. Therefore, Part IV of Defendant’s motion is **GRANTED**.

Part V. Defendant's Motion in Limine to Exclude Certain Opinions of Dr. Richard Kraut Because They are Inadmissible Under Kemp and N.J.R.E. 403 and 702

A. Dr. Kraut's Opinions as to Ms. Meng's Jawbone Densities

NPC argues that Dr. Kraut's opinion regarding the density of Ms. Meng's jaw is "his personal, speculative belief..." in "the guise of a scientific analysis of cone beam studies," and should be excluded for three reasons.

First, Defendant argues that Dr. Kraut has not compared Ms. Meng's jaw prior to her exposure to bisphosphonates, to her jaw subsequent to bisphosphonate exposure. Thus, Dr. Kraut cannot dismiss the possibility that Ms. Meng has always had a denser jawbone than an average patient. While this may be true, Dr. Kraut is still qualified as a causation expert and therefore may opine as to the density of Ms. Meng's jawbone. Dr. Kraut's methodology may be explored by NPC on cross-examination.²

Second, Defendant argues that Dr. Kraut has never compared Ms. Meng's cone beam studies side by side with those of patients who were not exposed to bisphosphonates, and only speculates that Ms. Meng's jawbone looks denser. Again, NPC may address this issue on cross-examination.

However, Dr. Kraut has never used Hounsfield units to compare Ms. Meng's bone density to that of other patients, and testified that he will not be prepared to do so until trial. Dr. Kraut is precluded from using the Hounsfield unit analysis at trial, as using this methodology would cause undue prejudice to Defendant who has not had an opportunity to explore this science prior to trial. Dr. Kraut cannot wait until trial to offer such analysis to support his opinion. Therefore, Part V-A of Defendant's motion is **GRANTED IN PART**.

² See also Order regarding Defendant's Motion in limine #51 in Meng v. Novartis, MID-L-7670-MT (Aug. 8, 2012).

B. Defendant's Motion to Preclude Dr. Kraut's Opinion that Ms. Meng's New Injury is BRONJ

NPC argues that Dr. Kraut cannot state that Ms. Meng had BRONJ because Ms. Meng's condition does not meet the criteria for BRONJ under the AAOMS guidelines, specifically, exposed bone for more than eight weeks. Plaintiff responds that Defendant's argument goes to the weight of the evidence, rather than admissibility. This court agrees.

Further, Defendant asserts that Dr. Kraut cannot rely on "Stage 0" BRONJ as a basis for his causation opinion, and that Dr. Kraut has no basis to assert that a patient can develop BRONJ more than six years after taking Zometa®. This court previously ruled that Dr. Kraut is qualified to opine on the specific causative factors underlying Ms. Meng's injury. To the extent that Defendant disagrees with Dr. Kraut's opinion, Defendant may cross-examine Dr. Kraut at trial. Therefore, Part V-B of Defendant's motion in limine is **DENIED**.