

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:)
AREDIA and ZOMETA PRODUCTS)
LIABILITY LITIGATION)
)
This Document Relates to:)
Case No. 3:06-0377 (Thomas))
Case No. 3:06-0381 (Hogan)) NO. 3:06-MD-1760
Case No. 3:06-0521 (Brodie)) JUDGE CAMPBELL
Case No. 3:06-0550 (White))
Case No. 3:06-0659 (Crews))
Case No. 3:08-0068 (Fussman))
Case No. 3:08-0069 (Forman))
Case No. 3:08-0071 (Deutsch))
Case No. 3:08-1157 (Anderson))
Case No. 3:08-1156 (Melau))

ORDER

Pending before the Court is Defendant's Motion to Exclude Litigation-Wide Testimony of Plaintiffs' Expert Dr. Robert Marx, D.D.S. (Docket No. 2379). Defendant's Motion is DENIED in part and MOOT in part as follows.

Dr. Marx is a board-certified oral and maxillofacial surgeon at the University of Miami School of Medicine. He is involved in ongoing research concerning bisphosphonates and osteonecrosis of the jaw ("ONJ"). He was one of the earliest physicians to allege a connection between bisphosphonates and ONJ. Dr. Marx was invited by Novartis in 2003 to participate in more than one advisory board meeting on ONJ.

The instant motion asks the Court to exclude Dr. Marx's litigation wide testimony,¹ which touches on five areas: (1) the causal connection between Aredia and Zometa and ONJ, (2) treatment

¹ Dr. Marx offers both litigation-wide and case-specific opinions in this litigation.

and preventative measures for ONJ, (3) alleged misconduct by Defendant which he considers to be taken in “bad faith,” (4) whether certain patients in the Aredia/Zometa clinical trials likely had bisphosphonate-induced ONJ, and (5) criticisms of certain aspects of the clinical trials.

EXPERT TESTIMONY UNDER RULE 702 AND *DAUBERT*

Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

A trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert*, 113 S.Ct. at 2795. This requirement entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied properly to the facts in issue. *Sigler v. American Honda Motor Co.*, 532 F.3d 469, 478 (6th Cir. 2008); *Bland v. Verizon Wireless, LLC*, 538 F.3d 893, 896 (8th Cir. 2008).

Under *Daubert*, the proponent of an expert witness must demonstrate that (1) the witness is qualified by knowledge, skill, experience, training or education, (2) the testimony of that expert witness is relevant, meaning that it will assist the trier of fact to understand the evidence or to

determine a fact in issue, and (3) the testimony of that expert witness is reliable. *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir. 2008).²

The Sixth Circuit Court of Appeals has stated that “*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading ‘junk science’ on the other.” *Best v. Lowe’s Home Centers, Inc.*, 563 F.3d 171, 176 (6th Cir. 2009). The Rule 702 inquiry is a flexible one, and the focus must be solely on principles and methodology, not on the conclusions they generate. *Id.* at 177. An expert who presents testimony must employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.*

The court must be sure not to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other. *In re Scrap Metal*, 527 F.3d at 529. The task for the Court in deciding whether an expert’s opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to unsupported speculation. *Id.* at 529-530. Rejection of expert testimony is the exception, rather than the rule. *Id.* at 530.

Here, Dr. Marx’s testimony is clearly more than unsupported speculation. Defendant’s arguments impugn the credibility and accuracy of Dr. Marx’s opinions, but the Court finds, for

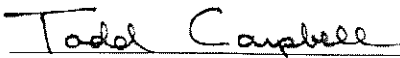
² The Court in *Daubert* identified several factors that may bear on the inquiry, but it took care to emphasize that the inquiry is a flexible one. *See Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001). The trial court must consider whether the factors are reasonable measures of reliability in a given case. *Id.* Those factors are (1) whether a theory or technique can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) whether a technique has a known or potential rate or error and the existence of standards controlling its operation; and (4) whether the theory or technique enjoys general acceptance in a relevant scientific community. *Id.* at 251, n. 5.

purposes of summary judgment, Plaintiffs have carried their burden of demonstrating that Dr. Marx's testimony is admissible under *Daubert*.

The Court has not considered, however, for purposes of summary judgment, Dr. Marx's opinions concerning the alleged "bad faith" misconduct of Novartis or his opinions concerning the clinical trials. It was unnecessary for the Court to reach these opinions in ruling on the pending dispositive motions, so Defendant's Motion with regard to those opinions is moot.

For these reasons, Defendant's Motion to Exclude Litigation-Wide Testimony of Plaintiffs' Expert Dr. Robert Marx, D.D.S. (Docket No. 2379) is DENIED in part and MOOT in part.

IT IS SO ORDERED.



TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE