

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

IN RE:)
AREDIA and ZOMETA PRODUCTS)
LIABILITY LITIGATION) NO. 3:06-MD-1760
) JUDGE CAMPBELL
This Document Relates To Case Numbers:)
3:07-0037 (Osterwald-Kalkofen))
3:07-0530 (Petevi))
3:07-0531 (Ballingall))
3:07-0532 (Shostak))
3:07-0533 (Hussey))

MEMORANDUM

Pending before the Court are Defendant's Motions for Summary Judgment or, in the Alternative, To Dismiss on Grounds of *Forum Non Conveniens*, in each of the above-captioned cases (Docket Nos. 1663, 1665, 1667, 1669 and 1672) and Plaintiffs' Cross Motion for Discovery Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure (Docket No. 1738).

For the reasons stated herein, Defendant's Motions for Summary Judgment are GRANTED, and the claims of the above-captioned Plaintiffs are DISMISSED. Plaintiffs' Cross Motion for Discovery (Docket No. 1738) is DENIED.

FACTS

Plaintiffs in the above-captioned cases do not dispute that they are citizens and residents of Germany (Osterwald-Kalkofen), Cyprus (Petevi), New Zealand (Ballingall), and Canada (Hussey and Shostak) and that they received their treatments of Aredia and/or Zometa and their alleged injuries in their respective countries, not in the United States.

Defendant has presented evidence that it does not sell, manufacture, market, distribute or advertise Aredia or Zometa in Germany, Cyprus, New Zealand or Canada. Declaration of Rebecca J.M. Jolley (Docket No. 1682). Plaintiffs have filed nothing to rebut Defendant's evidence but, rather, ask for additional discovery in order to more fully respond to Defendant's Motion.

DISCUSSION

A fundamental principle of traditional product liability law is that the plaintiff must prove that the defendant supplied the product which caused the injury. Travelers Indemnity Co. v. Industrial Paper & Packaging Corp., 2006 WL 2050686 at * 10 (E.D. Tenn. July 19, 2006) (citing Rodrigues v. General Electric Corp., 204 F.Supp.2d 975,976 (E.D. Tex. 2001)). Defendant contends that these Plaintiffs cannot establish this essential element of their claims because Defendant does not sell, manufacture, market, distribute or advertise Aredia or Zometa in Germany, Cyprus, New Zealand or Canada.

In response to Defendant's Motion, these Plaintiffs argue that, pursuant to Fed. R. Civ. P. 56(f), they are entitled to additional discovery in order to counter Defendant's allegations. That Rule provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

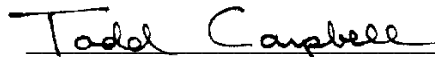
The burden of establishing the need for further discovery rests upon the party advancing the request. Jocham v. Tuscola County, 239 F.Supp.2d 714, 735 (E.D. Mich. 2003). Rule 56(f) may be invoked only when the plaintiff has been unable to acquire needed discovery through due

diligence, not to permit further discovery when the plaintiff has failed to thoroughly examine her opportunities in the time available to her. *Id.* at 734.

In this case, the issue about which Plaintiffs seek additional discovery is a fundamental element of each of their claims: whether Defendant, in fact, supplied the product which caused their alleged injuries. Plaintiffs bear the burden of establishing the product identification information necessary to sue the correct Defendant. Plaintiffs did not need formal discovery in order to investigate whether Defendant in fact manufactured, sold or distributed the Aredia and/or Zometa which they received and should have made that determination prior to filing suit or certainly by this point in the litigation.

For these reasons, Plaintiff's request for additional discovery pursuant to Fed. R. Civ. P. 56(f) is DENIED, and Defendant's Motions for Summary Judgment are GRANTED.

IT IS SO ORDERED.



TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE