UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KARLEEN HOGAN, surviving spouse and executor of the Estate of Timothy Hogan, deceased,

Plaintiff,

-against-

NOVARTIS PHARMACEUTICALS CORPORATION,

Defendant.

MEMORANDUM DECISION AND ORDER

06 Civ. 0260 (BMC) (RER)

COGAN, District Judge.

Before me is plaintiff's motion for a pre-motion conference to add another expert witness to the Joint Pre-Trial Order. Because the issue and the facts are fully pressed by plaintiff's submission, further briefing is unnecessary; her letter is deemed to constitute her motion and is denied for the reasons provided below.

Familiarity with this trial-ready case is presumed. After the action was remanded from the MDL Court, Judge Trager held a conference and ordered plaintiff to submit to defendant the expert reports of the witnesses she intended to call at trial. Plaintiff provided the reports of four experts: Dr. Suzanne Parisian, Dr. Robert Marx, Dr. James Vogel, and Prof. Wayne Ray. The case was then reassigned to this Court, and I gave leave to defendant to file its motion to exclude the testimony of all four witnesses pursuant to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). In her opposition, plaintiff withdrew Dr. Vogel's testimony.

The present motion seeks to re-designate Dr. Vogel as an expert so that he can offer the opinion that "the warnings on the Zometa label were inadequate and that [defendant] knew or

should have known that they were inadequate." Plaintiff argues that this Court's previous Order, which excluded in its entirety the testimony of Dr. Parisian, left an unexpected gap that would be filled by Dr. Vogel, and that defendant would suffer no prejudice as a result. I disagree. Plaintiff's failure to identify this witness was not "substantially justified" or harmless. Fed. R. Civ. P. 37(c)(1).

By way of brief background, I allowed limited testimony from two of plaintiff's experts but observed that the Court will not tolerate "superlawyers" on the stand – experts presenting arguments that properly belong in summation. Nor will these witnesses, I explained, be permitted to read emails and other documents that the jury can interpret itself; evidence that did not form the basis of reliable expert opinion will not form the basis of expert testimony in Court.

I precluded Dr. Parisian's testimony in its entirety on different grounds. Plaintiff offered Dr. Parisian as a "regulatory expert . . . to testify on [regulatory and labeling] issues under federal law." At the Final Pretrial Conference, the parties agreed that federal law is irrelevant to this action; plaintiff was pursuing a common law duty to warn and a breach of implied warranty without supplying any federal regulations that could inform the inquiry. Not all of Dr. Parisian's report was irrelevant. I examined whether she was qualified to opine on unspecified industry standards to explain to the jury how pharmaceutical companies gather data. Like Judge Spatt in Deutsch v. Novartis Pharms. Corp., No. 09-CV-4677, 2011 U.S. Dist. LEXIS 22755, at *138 (E.D.N.Y. Mar. 8, 2011), I concluded that she was not.

Without an expert to argue defendant's knowledge of ONJ – a strategy that plaintiff appears to have difficulty jettisoning – plaintiff's eleventh hour designation of Dr. Vogel is not entirely unexpected. What is surprising, however, is that plaintiff is using the preclusion of Dr. Parisian as the purported reason to restore Dr. Vogel to plaintiff's witness list. Dr. Vogel is a

practicing oncologist and hematologist whom the MDL Court deemed qualified to opine on the medical and scientific accuracy of defendant's warnings as well as on the general causation connection between defendant's drug, Zometa, and osteonecrosis of the jaw (ONJ). The Court did not address the rest of his report opining on defendant's corporate conduct, pretreatment dental screening, and whether defendant's delay in transmitting information impacted a lot of patients.

Plaintiff's justification for re-offering Dr. Vogel a little more than a week removed from jury selection seems suspicious, to say the least. Much of his testimony overlaps with that of Dr. Marx – plaintiff's causation and treatment expert – and does not touch on the regulatory expertise that Dr. Parisian sought to bring to the action. Dr. Parisian would have testified that Zometa's label did not comply with the FDA regulations; Dr. Vogel would instead testify whether the labels were inadequate from the perspective of an oncologist. Moreover, Dr. Vogel's report also reveals the type of advocacy and narration that this Court has precluded other experts from offering. For instance, relying in part on defendant's internal communication, Dr. Vogel opines on "whether there was information known to [defendant] about [the ONJ] risk that the company did not reveal."

Even if plaintiff's excuse for the late designation is not disingenuous, it is certainly unjustified. To the extent that there is any overlap between Dr. Parisian's testimony and Dr. Vogel's, I find it difficult to credit counsel's surprise at the preclusion of that testimony. Dr. Parisian was easily the most controversial expert of the four; her testimony has been limited and – albeit not in a case dealing with bisphosphonate drug – excluded in its entirety by other Courts. See In re Trasylol Products Liability Litigation, 709 F. Supp. 2d 1323 (S.D. Fla. 2010); see also Deutsch v. Novartis Pharms. Corp., 2011 U.S. Dist. LEXIS 22755, at *125 ("Dr. Parisian is

seasoned-veteran of product liability litigation and both parties have cited a litany of cases where her testimony has been accepted, excluded, or limited . . . ."). Thus, I dismiss the notion that plaintiff could not have reasonably anticipated this Court's preclusion of her testimony.

I also dismiss the contention that defendant has suffered no prejudice. True, given plaintiff's earlier representation that Dr. Vogel would be called to testify, defendant has briefed the admissibility of his testimony. And defendant has already deposed Dr. Vogel. Nevertheless, the absence of time for adequate trial preparation is an important factor. Indeed, if I were to permit this last minute designation, given the additional briefing and subsequent ruling that this would entail, it is quite possible that it could delay the trial or that the parties would not learn of the scope of Dr. Vogel's testimony until, literally, the eve of trial.

Accordingly, plaintiff's Motion for a Pre-motion Conference [410] is deemed to constitute her motion to amend the Joint Pre-trial Order, defendant's response [411] is deemed to be the opposition, and the Motion [410] is denied.

SO ORDERED.

/s/(BMC)

U.S.D.J.

Dated: Brooklyn, New York
April 29, 2011