No. 12-___

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner,

v.

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal law grants drug manufacturers exclusive rights to market prescription drugs in the United States if the manufacturers meet the detailed requirements imposed by the federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 355. Federal law further provides that the United States Food and Drug Administration ("FDA") has the exclusive authority to enforce or restrain any violations of the conditions for marketing approval. 21 U.S.C. § 337. The FDCA authorizes the FDA under defined conditions to withdraw a manufacturer's right to market a previously-approved prescription drug, but only after extending due process protections against deprivation of federally-bestowed rights, including prior notice and an opportunity for hearing. 21 U.S.C. § 355(e).

The questions presented are:

1. Whether the FDA's exclusive authority to punish violations of federal law governing the lawful marketing of prescription drugs preempts state tort law which allows the imposition of punitive damages to punish the same activity.

2. Whether a punitive damages award imposed in connection with the marketing of an FDA-approved drug impermissibly penalizes a drug manufacturer under state law for the exercise of its federal right to market the prescription drug.

3. Whether the Fourth Circuit below erred in basing its holding solely on *Wyeth v. Levine*, 555 U.S. 555 (2009), which does not address punitive damages.

PARTIES AND RULE 29.6 STATEMENT

Respondent, plaintiff below, is Herbert Fussman, individually and as Administrator of the Estate of Rita Fussman. The Petitioner is Novartis Pharmaceuticals Corporation ("NPC"). The following is a complete list of NPC's parent corporations and publicly held companies that own 10% or more of NPC's stock:

1. Parent Companies:

   (a) Novartis Finance Corporation, a New York corporation;

   (b) Novartis Corporation, a New York corporation;

   (c) Novartis Holding, AG, a Swiss company; and

   (d) Novartis AG, a Swiss company, whose American Depository Shares are publicly traded on the New York Stock Exchange.

2. Publicly held companies owning more than 10% of NPC stock:

   (a) Novartis AG indirectly owns a 100% interest in NPC.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Novartis Pharmaceuticals Corp. ("NPC"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reprinted in the Appendix ("App.") at 1a-19a. The district court's decision affirming punitive damages is reprinted at App. 20a-40a.

JURISDICTION

The Fourth Circuit rendered its decision on February 8, 2013. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the United States Constitution states in relevant part: "This Constitution, and the laws of the United States … shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art VI, clause 2.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the Appendix at App. 41a-43a.

STATEMENT

This petition presents two issues of exceptional importance under the Supremacy Clause of the United States Constitution: (1) whether a private plaintiff may use punitive damages to enforce legal standards of conduct in the marketing of federally-approved prescription drugs, notwithstanding the exclusive grant of enforcement authority to the FDA under federal law, and (2) whether a state may penalize a pharmaceutical manufacturer through the imposition of punitive damages for its exercise of a right granted under federal law to market a brand name prescription medication.

These issues were not resolved by this Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), which affirmed a state's right to provide its residents with legal remedies to compensate them for injuries allegedly caused by prescription drugs. State laws that permit imposition of punitive damages – which by definition aim not to compensate for injury but instead to penalize and deter conduct deemed repug-

nant to society – raise constitutionally distinct concerns.

The FDCA imposes detailed requirements for applicants seeking approval to lawfully market prescription drugs in the United States. *See* 21 U.S.C. § 355. Applicants that meet these requirements and demonstrate to the FDA's satisfaction that their drugs are safe for use under the conditions prescribed in the proposed labeling are granted the right to market their drugs throughout the United States, *see id.* § 355(c), and are guaranteed market exclusivity for a period of years, *see id.* § 355(j)(5)(F). This right may be withdrawn by the FDA only on grounds specified in the FDCA and after the FDA has provided the applicant with due process through notice and an opportunity for hearing. *See id.* § 355(e). The FDCA further provides that all proceedings "for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." *Id.* § 337.

The Court has held that the FDA's authority over the drug approval process precludes private litigation seeking to compel new warning labels on FDA-approved drugs or to punish a manufacturer for alleged failures to properly communicate with the FDA during the drug approval process. *See Heckler v. Chaney*, 470 U.S. 821 (1985); *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). In the case below, however – as in thousands of other prescription drug products liability cases pending before the country's courts – a common law jury was empowered to punish NPC through an award of punitive damages for alleged misconduct in the marketing and labeling of two FDA-approved prescription drugs: (1) Aredia, the generic form of which

is still on the market, and (2) Zometa®, which remain on the market as standard of care treatment for patients with breast cancer that metastasizes to bone, the same indication for which the drugs were prescribed to the Respondent.

The Fourth Circuit below held that the punitive damages award did not conflict with federal law, erroneously concluding that the Court had resolved the issue in *Wyeth v. Levine*, 555 U.S. 555 (2009). App. 18a-19a. But *Levine* involved only compensatory damages, which serve a "serve [a] different purpose[]" than punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). While compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages, "which have been described as 'quasi criminal,' operate as 'private fines' intended to punish the defendants and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (internal citation omitted). It is in this "different purpose" that the direct conflict between state and federal law in this case arises.

States may not, consistent with the Supremacy Clause and federal law, grant individuals the power to enforce federal drug marketing standards or to punish perceived violations of those standards. Even so, the legal system has become numb to the reality that the status quo grants thousands of prescription drug plaintiffs across the country exactly this authority through the "private fine" power of punitive damages. States also may not punish a drug company for its exercise of a right granted to it under federal law. But this is exactly what state tort law demands that juries do when presented with a

question whether to impose punitive damages on a drug manufacturer in connection with the lawful marketing of a prescription drug. The length of time this constitutionally-defective practice has been allowed to persist does nothing to validate it.

The writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Factual Background

1. FDA Regulatory and Enforcement Authority

Congress has explained that "under the Federal Food, Drug, and Cosmetic Act …, the Food and Drug Administration (FDA) has two important functions: (1) the review and approval of important new products that can improve the public health, such as lifesaving drugs, biological products, and medical devices; and (2) the prevention of harm to the public from marketed products that are unsafe or ineffective." Food and Drug Administration Modernization Act of 1997, S. Rep. 105-43, 1997 WL 394244, at *2. In its regulation of prescription drugs, the FDA is "guided by the principle that expeditious approval of useful and safe new products enhances the health of the American people [and that] [a]pproving such products can be as important as preventing the marketing of harmful or ineffective products." *Id*. at *8; *see also* Final Rule, New Drug and Antibiotic Regulations, 50 Fed. Reg. 7452-01, 7452 (Feb. 22, 1985) ("the final regulations [the NDA rewrite] enable FDA to act as both a *public health promoter*, by facilitating the approval of important new safe and effective therapies, and as a *public health protector*, by keeping off the market drugs not shown

to meet safety and efficacy standards") (emphasis added).

In keeping with these two federal objectives, a prescription drug may be lawfully marketed in this country only if the FDA concludes that the drug is both safe and effective. *See* 21 U.S.C. § 355. The Court has explained that "[t]he determination whether a drug is generally recognized as safe and effective . . . necessarily implicates complex chemical and pharmacological considerations . . . within the peculiar expertise" of the FDA. *Weinberger v. Bentex Pharms. Inc.*, 412 U.S. 645, 654 (1973). Thus, federal courts of appeals have repeatedly held that the determination whether a prescription drug may be lawfully marketed for sale in the United States is squarely within the primary scope of the FDA's regulatory authority.[1]

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[1] *See*, *e.g.*, *Zeneca, Inc. v. Shalala*, 213 F.3d 161, 170 (4th Cir. 2000) ("FDA's 'judgments as to what is required to ascertain the safety and efficacy of drugs fall squarely within the ambit of the FDA's expertise and merit deference from us.'") (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1490 (D.C. Cir. 1995) and *Schering Corp. v. FDA*, 51 F.3d 390, 399 (3d Cir. 1995)); *Henley v. FDA*, 77 F.3d 616, 621 (2d Cir. 1996) (same); *Rutherford v. United States*, 806 F.2d 1455, 1461 (10th Cir. 1986) ("[T]he intent behind the [FDCA] was to give the agency primary jurisdiction to determine evidentiary matters concerning drugs about which it has a special expertise."); *United States v. Undetermined Quantities of Various Articles of Drug Equidantin Nitrofurantion Suspension*, 675 F.2d 994, 1000 (8th Cir. 1982) ("A district court is not empowered to evaluate the actual safety and effectiveness of a drug product. That determination is committed to the FDA due to its superior access to technical expertise."); *Premo Pharm. Labs. Inc. v. United States,* 629 F.2d 795, 803 (2d Cir. 1980) (whether a drug is safe and effective "is to be determined by the FDA which, as distin-

Pursuant to its broad grant of regulatory authority, the FDA has enacted detailed requirements for New Drug Applications ("NDAs" or "Applications") addressing, *inter alia*, the format and organization of the Application, pharmacologic and toxicological studies, clinical investigation data, case reports, patent information, and marketing-exclusivity issues. *See* 21 C.F.R. § 314.50. Once a drug has received FDA approval, the FDA continues to subject drug manufacturers to extensive federal requirements mandating frequent submissions of adverse drug experience reports, *see* 21 C.F.R. § 314.80, and regular submissions of new studies and other information relevant to the continued approval of the drug, *see* 21 C.F.R. § 314.81. The FDA may also require post-marketing studies to gather additional information regarding the drug's safety, efficacy, or optimal use. *See* 21 U.S.C. § 356b. The FDA retains continuing regulatory control over the content and format of drug labels. *See* 21 C.F.R. § 201.57; *see generally* 21 C.F.R. Part 201.

The FDA also imposes strict requirements on drug manufacturers in their direct communications with physicians. *See* 21 C.F.R. § 200.5 ("mailing of important information about drugs"); § 201.57 and Part 201 (labeling); Part 202 ("Prescription Drug Advertising"); Part 203 ("Prescription Drug Marketing"). In seeking to market a drug to physicians, pharmaceutical companies also are required to "submit specimens of mailing pieces and any other labeling or advertising devised for promotion of the drug product at the time of initial dissemination of the labeling and at the time of initial publication of the advertisement for

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guished from a court, possesses superior expertise, usually of a complex scientific nature, for resolving the issue").

a prescription drug product." 21 C.F.R. § 314.81(b)(3). The FDA likewise comprehensively regulates the content and format of prescription drug advertising, including requiring that the advertisement "present a 'true statement' of information in brief summary relating to side effects, contraindications, and effectiveness," *id.* § 202.1(e)(5), and prohibiting advertisements that – as defined in detail in the regulations – are or may be "false, lacking in fair balance, or otherwise misleading," *id.* § 202.1(e)(6) & (7).

The FDA may withdraw approval of a prescription drug if scientific data show that the drug is unsafe or if clinical experience or testing not included in the Application or not available until after the Application was approved shows that the drug is not shown to be safe or effective. *See* 21 U.S.C. § 355(e). The FDA may also withdraw approval if it determines that the Application contained any untrue statement of material fact, *id.*, or if the applicant fails to comply with its post-marketing reporting requirements. *See* 21 C.F.R. § 314.80(j), 314.81(d). However, the FDA may not withdraw an applicant's right to market a previously-approved drug without first extending the applicant its due process rights to notice and opportunity for a hearing. *See* 21 U.S.C. § 355(e).

The FDCA grants the FDA exclusive authority to enforce and restrain violations of this detailed regulatory scheme, *see* 21 U.S.C. § 337, and amply empowers the FDA to punish drug company misconduct. The FDA is authorized to investigate alleged wrongdoing. *See id.* § 372. If it determines that a manufacturer has engaged in misconduct in connection with the marketing or labeling of a prescription drug, the FDA may seek civil penalties or pursue criminal prosecutions. *See id.* §§ 331,

333(a)(b). The FDA may also seek injunctive relief, *see id.* § 332, or seize prescription drugs it deems to be misbranded, *see id.* § 334.

Federal regulations empower citizens to report misconduct by prescription drug manufacturers by way of a citizen petition. *See* 21 C.F.R. § 10.30. Accordingly, patients who believe that they were injured by a prescription drug are provided a federal venue through which to seek punishment of a drug manufacturer for alleged improper conduct. As noted above, however, federal law places the power to determine whether such punishment is appropriate exclusively with the FDA. *See* 21 U.S.C. § 337.

2. Court Jurisprudence on FDA Authority

The Court has never addressed the issue of preemption of punitive damages in prescription drug products liability litigation. However, the Court's prior jurisprudence draws a clear line between the propriety of legal actions seeking to enforce manufacturer compliance or punish misconduct in connection with the marketing of prescription drugs and those seeking to compensate individuals for alleged injuries associated with the use of such products.

The Court consistently has rejected private party lawsuits aimed at enforcing conduct or punishing alleged misconduct in the marketing of prescription drugs. While these holdings have been variously premised on the legal doctrines of primary jurisdiction and preemption, each has turned on the fact that the FDCA bestows upon the FDA the exclusive authority to determine whether and under what conditions prescription drugs may be sold.

In *Weinberger*, 412 U.S. 645, the Court reversed a federal appellate opinion that would have allowed drug manufacturers to proceed with a declaratory judgment lawsuit seeking a judicial determination that their drugs were safe and effective. The Court held that the FDA had primary jurisdiction over whether a drug may be lawfully marketed in the United States and, accordingly, that this question was "appropriately routed to the agency, while the court stays its hand." *Id*. at 654.

In *Heckler*, 470 U.S. 821, the Court rejected a private action brought by prison inmates seeking to compel an FDA finding that drugs being used for human execution were misbranded and to require warning labels stating that the drugs were unapproved and unsafe for such use. The Court held that the issue was not a proper subject for judicial review because the FDCA's enforcement provisions "commit complete discretion to the Secretary to decide how and when they should be exercised." *Id.* at 835-38. Although not specific to prescription drugs, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), the Court likewise held that FDCA regulation of flour labeling (as incorporated into the Fair Packaging and Labeling Act) impliedly preempted a state labeling statute that would have required different product labels.[2]

And in *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Court rejected a private action alleging that a medical device manufacturer

[2] Likewise, lower courts have rejected plaintiffs' requests for injunctive relief based upon alleged inadequate prescription drug warnings in product liability litigation. *See Clarke v. Actavis Group HF*, 567 F. Supp. 711 (D.N.J. 2008); *Bernhardt v. Pfizer, Inc.*, Nos. 00 Civ. 4042 LLM, 00 Civ. 4379, 2000 WL 1738645 (D.N.J. Nov. 22, 2000).

had improperly secured FDA approval for orthopedic bone screws. The Court held that this claim was impliedly preempted because it conflicted with the FDA's plenary authority over medical device approval. *Id.* at 348. The Court explained that the FDCA includes "various provisions aimed at detecting, deterring, and punishing false statements made during [the FDA] approval process." *Id.* at 349. Plaintiffs could not use state tort law to detect, deter or punish this conduct because "[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with [the FDCA] provisions." *Id.* at 349 n.4.

In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court addressed the other side of the federal law/state law coin, holding that the FDA regulatory scheme did not preempt all private litigation seeking compensation under state tort law for personal injuries allegedly caused by prescription drugs. The Court's holding was guided by States' traditional role in protecting the health and welfare of their residents and the belief that Congress would not, without comment, deny compensation to consumers of brand name prescription drugs when they are injured by inadequate warnings. *See id.* at 574 (concluding that Congress determined that "state rights of action provided appropriate relief for injured consumers").

There was no award of punitive damages in *Levine* and, accordingly, no occasion for the Court to consider the separate preemption issue arising from such an award. In its holding, however, the Court noted that state tort law claims "serve a distinct compensatory function." *Id.* at 579. The Court also explained that in enacting the FDCA "Congress did

not provide a federal remedy for consumers harmed by unsafe or ineffective drugs." *Id.* at 574. By sharp contrast, the FDCA provides a wide variety of federal remedies by which the FDA may punish drug companies for alleged misconduct, and it provides a means for private individuals to raise such allegations through pubic citizen's petitions. *See* 21 U.S.C. §§ 331-334; 21 C.F.R. § 10.30.

3. Court Jurisprudence on Punitive Damages

The Court repeatedly has noted that compensatory damages and punitive damages "serve different purposes." *Campbell*, 538 U.S. at 416. While compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages, "which have been described as 'quasi criminal,' operate as 'private fines' intended to punish the defendants and to deter future wrongdoing." *Cooper Indus., Inc.*, 532 U.S. at 432 (internal citation omitted); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (punitive damages are imposed to further a State's interests "in punishing unlawful conduct and deterring its repetition").

The Court has found that punitive damages are more closely aligned with criminal penalties and government enforcement actions than they are with compensatory damages. The "purposes of punitive damages are the same as that of a fine imposed after a conviction of a crime." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 505 (2008) (quoting Restatement (Second) of Torts § 908 cmt a (1977), at 464) (internal quotations omitted). Moreover, "[p]unitive damages may often have a greater impact on the behavior [of a defendant] than the threat of an

injunction." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002). And punitive damages can encroach upon the federal government's authority to set disclosure requirements for the entire country, as in the FDCA. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 & n.15 (1996).

In *Gertz v. Welch*, 418 U.S. 323 (1974), the Court focused on the distinction between compensatory damages and punitive damages in addressing whether state law remedies in certain private libel actions impermissibly conflicted with federal rights under the First Amendment to the U.S. Constitution. The issue in *Welch* was whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court held that the plaintiff was entitled to seek compensatory damages for such falsehoods, recognizing "the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348. The Court held, however, that this "state interest extends no further than compensation for actual injury." *Id.* at 349.

The Court then barred any claim for punitive damages. The Court held that there was "no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state defined standards of liability for defamation." *Id.* at 350. The Court explained that "jury discretion to award punitive damages unnecessarily exacerbate the danger of media self-censorship" in violation of First Amendment rights. Moreover, the Court continued, "punitive damages are wholly irrelevant to

the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.*

4. FDA Regulation of Aredia and Zometa®

The FDA first approved Aredia as safe and effective for certain cancer-related treatments in 1991 and specifically approved Aredia for treating patients with bone metastases from breast cancer in 1996. App. 48a-49a. FDA approved Zometa® as safe and effective for the treatment of bone metastases from solid tumors (including breast cancer) and multiple myeloma in February 2002. App. 54a, 58a-59a. Both Aredia (in generic form) and Zometa® remain on the market as FDA-approved treatments, App. 67a, and even the plaintiff's own experts in the proceeding below agreed that these bisphosphonate drugs "have dramatically extended life, reduced skeletal complications, reduced pain and, thus, improved the quality of life for individuals with metastatic bone cancer." App. 53a, 55a. The FDA approved the Aredia and Zometa® labels at all times, App. 44a, 67a, and has never taken any enforcement action against NPC for mislabeling or misbranding Aredia or Zometa® with respect to any issue. App. 45a.

Eleven years after the FDA approved Aredia – on December 6, 2002 – NPC received its first adverse event report for a condition now called osteonecrosis of the jaw ("ONJ") in a bisphosphonates patient. App. 44a. NPC reported this adverse event report to the FDA on December 12, 2002, well within the FDA's applicable 15-day reporting period. 21 C.F.R. § 314.80. App. 44a. Over the following nine months,

NPC received additional reports of ONJ which likewise were timely reported to the FDA. App. 45a.

In September 2003, NPC proceeded by way of the FDA's "changes being effected" ("CBE") regulation, 21 C.F.R. § 314.70(c)(6)(iii)(A), to voluntarily add information regarding the reports of ONJ to the Adverse Reactions – Postmarketing Experience section of the Zometa label, stating in part that "Cases of osteonecrosis (primarily of the jaw) have been reported since market introduction." App. 44a-45a, 68a. As more data became available, NPC added information on ONJ to the label in March 2004 and September 2004, and sent letters to health care providers in September 2004 and May 2005. App. 49a. The March 2004 label change added that "[i]t is prudent to avoid dental surgery" in patients taking Zometa "as recovery may be prolonged." App. 49a. Each of these labeling changes and communications with physicians was approved by the FDA. App. 67a.

The scientific community continued to investigate whether there was a causal relationship between bisphosphonate drugs and ONJ. A 2007 report by a task force of the American Society for Bone and Mineral Research concluded that "bisphosphonates have not been proven to be causal." App. 56a-57a. The Task Force states that a differential diagnosis of bisphosphonates-associated ONJ would include, *inter alia*, periodontal disease, infectious osteomyelitis, osteoradionecrosis, bone tumors, or metastases, and that additional risk factors included anti-cancer therapy, glucocorticosteroids, and preexisting periodontal disease. App. 57a.

5. The Administration of Aredia and Zometa® to Respondent

After more than ten years in remission, Mrs. Fussman's breast cancer spread to her right chest wall in 1999 and metastasized to her bones by 2001, entering her lumbar spine. App. 70a. Mrs. Fussman's oncologist, Dr. Shaw, began treatment with monthly Aredia infusions to prevent pathological fractures and to decrease bone pain. App. 69a-70a. In November 2001, Dr. Shaw switched Mrs. Fussman to Zometa® because it required a shorter infusion time. App. 70a-71a. Mrs. Fussman's treatment with Aredia and Zometa® successfully protected her from bone complications, App. 46a-47a, 49a-50a, and, in her words, "probably made my bones feel better." App. 47a.

In December 2002 and February 2003, Mrs. Fussman had two teeth extracted. App. 73a-74a. By March 2003, Mrs. Fussman developed her alleged ONJ at the site of the extractions. Despite awareness of the reports of ONJ associated with Zometa®, Mrs. Fussman's oncologist continued the monthly Zometa® infusions through October 2004 and again from December 2004 through June 2005. App. 71a-72a. Less than a year after her last Zometa® infusion, Mrs. Fussman began experiencing severe bone pain in her spine. App. 50a-52a.

B. Proceedings Below

1. District Court Proceedings

Respondent filed this action on February 13, 2006, alleging that NPC had failed to adequately warn of a risk of ONJ associated with bisphosponate drugs and seeking compensatory and punitive damages. The

case was transferred for pretrial proceedings to the federal multidistrict litigation ("MDL") styled *In re Aredia and Zometa Litigation*, and then remanded for trial to the Middle District of North Carolina. At trial, NPC moved for judgment as a matter of law on preemption grounds on Respondent's demand for punitive damages, both at the close of Respodent's case at trial and at the close of all evidence. The district court denied NPC's motions. App. 75a-76a.

Respondent's punitive damages demand at trial rested heavily on the argument that NPC had violated various FDA regulations in its labeling and marketing of Aredia and Zometa®. Respondent presented as his opening expert witness a former FDA employee, Dr. Susan Parisian, who was allowed to testify as an expert "concerning the general FDA regulatory requirements, and the procedures and any compliance that would have been expected and required of the Defendant as to those regulatory requirments." App. 58a. This use of FDA regulatory experts has become commonplace in prescription drug litigation; Dr. Parisian, for example, has testified in court in such trials between 35 and 50 times. App. 67a-68a.

Dr. Parisian opined at length about NPC's alleged violations of FDA regulatory requirements, including:

- NPC's failure to provide the FDA with an animal study purportedly related to the risk of ONJ. App. 60a-61a;
- NPC's failure to provide the FDA with information about a different medical condition, osteopetrosis, related to the risk of ONJ. App. 61a;

- NPC's failure to properly design its clinical trials to look for adverse events in the jaw. App. 60a;
- NPC's failure to report to the FDA various claimed safety signals related to the risk of ONJ. App. 61a-63a;
- NPC's failure to inform the FDA after ONJ had been added to the drug label of certain comments provided to NPC by members of an outside advisory group regarding the risk of ONJ. App. 63a-64a.

Each of these alleged failures was specifically couched in terms of NPC's claimed requirements under the FDCA. Dr. Parisian also testified at length that the labels for Aredia and Zometa® during the relevant time period – despite having all been approved by the FDA – were not adequate based on the "rules and regulations of the FDA." App. 64a-67a.

In response to Dr. Parisian, NPC presented its own FDA regulatory expert, Dr. Janet Arrowsmith, who testified that NPC's conduct was fully compliant with FDA regulations and requirements. App. 44a-45a. The jury was thus squarely faced in its deliberations with the disputed question whether NPC had violated the FDCA in its labeling and marketing of Aredia and Zometa®.

On November 22, 2010, the jury returned a verdict for Respondent, awarding $287,000 for Mrs. Fussman's jaw injuries, $1.00 for Mr. Fussman's loss of consortium, and $12.6 million in punitive damages. App. 77a-80a. Under North Carolina law limiting punitive damages to three times the compensatory award, the district court entered judgment for

Respondent on November 29, 2010 for $1,258,083.19 (including pre-judgment interest). App. 81a-82a; N.C. Gen. Stat. § 1D-25. NPC filed a post-trial motion arguing that the punitive damages award was barred by federal preemption. The district court denied the motion, concluding that NPC's preemption argument was foreclosed by *Wyeth v. Levine*. App. 29a.

2. The Appeal to the Fourth Circuit Court of Appeals

NPC reasserted its preemption argument on appeal to the Fourth Circuit. NPC contended that the district court erred in summarily applying *Levine*'s compensatory damages preemption analysis to the issue of punitive damages. NPC explained that North Carolina allows punitive damages solely to punish intentional wrongdoing and deter others from similar behavior. Accordingly, the question here is not – as in *Levine* – whether federal law bars a state from providing compensation to individuals injured by prescription drugs. Rather, it is whether North Carolina may *punish* NPC for marketing Aredia and Zometa® pursuant to an FDA-approved label and *deter* other drug manufacturers from likewise acting in compliance with federal law.

Citing solely to *Levine*, the Fourth Circuit rejected NPC's preemption argument. App. 18a-19a. The court did not address the implied conflict preemption questions whether a state may enforce drug marketing standards notwithstanding the FDCA grant of enforcement authority to the FDA or whether NPC could be punished for exercising its federal right to market Aredia and Zometa® in compliance with the terms of the FDA approvals. Instead, the Fourth Circuit mistakenly viewed the

case through the prism of express preemption, reasoning that if Congress had intended to preempt punitive damages, it would have included an express preemption provision in the FDCA. App. 19a.

REASONS FOR GRANTING THE PETITION

A. The Punitive Damages Award Below Conflicts with the FDA's Plenary Enforcement Authority

The FDCA and the Court's precedent bestow upon the FDA the exclusive power to enforce the detailed federal regulatory scheme by which drug companies secure the right to market prescription drugs in the United States. *See* 21 U.S.C. § 337; *Buckman*, 531 U.S. at 349 & n.4; *Heckler*, 470 U.S. at 835-38; *Weinberger*, 412 U.S. at 654. Federal law provides that private individuals may participate in this enforcement function through the filing of a citizen's petition pursuant to 21 C.F.R. § 10.30. In all such cases, however, the FDA retains complete discretion to decide how and whether to proceed against a drug company for alleged misconduct. The FDA uses this discretion "to achieve a somewhat delicate balance of statutory objectives." *Buckman*, 531 U.S. at 348; *see also Hecker*, 470 U.S. at 831 (an FDA "decision not to enforce often involves a complicated balancing of a number of factors which are particularly within its expertise").

Punitive damages awards impermissibly conflict with this federal scheme by placing enforcement discretion in the hands of tort plaintiffs, who "act as a private attorney general" under state law. *In re Paris Crash*, 622 F.2d 1315, 1319 n.4 (9th Cir. 1980). As then-Judge Kennedy explained, in allowing state tort law demands for punitive damages, a "state …

authorizes private plaintiffs as deputies to bring suits expressing social condemnation and disapproval." *Id.* at 1322.

> [Punitive damages plaintiffs] act as private attorneys general to affect the deterrence and retribution functions [of punitive damages]. So far is this from being a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest.

Id. at 1319-20.[3]

Private plaintiffs empowered to seek state tort law punitive damages awards against prescription drug manufacturers can secure "private fines … to punish the defendant and deter future wrongdoing"[4] that greatly exceed the fines available to the FDA. While the FDA can pursue fines of up to $1,000 for a first violation or $10,000 for subsequent violations of federal standards governing the proper labeling of a prescription drug, 21 U.S.C. § 333, the "private attorney general" plaintiff below was able to pursue a punitive damages "fine" against NPC in the many millions of dollars based in part on his expert's testimony that NPC had violated various FDA

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[3] *See also In re School Asbestos Litig.*, 789 F.2d 996, 1003 (3rd Cir. 1986) (punitive damage "awards act as a form of criminal penalty administered by a civil court at the request of a plaintiff who serves somewhat as a private attorney general"); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) ("punitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account"); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 623 (7th Cir. 1981) (noting that the "'private attorney general' concept [is] inherent in the allowance of punitive damages in civil suits").

[4] *Cooper Indus., Inc.*, 532 U.S. at 432.

regulations with respect to the very same drug labeling. Punitive damages thus amply empower a plaintiff to do exactly what federal law states he cannot – privately enforce FDA labeling requirements for prescription drugs by subjecting "non-compliant" drug manufacturers to huge financial penalties.[5]

In *Buckman*, the Court explained that the FDA's exclusive enforcement authority under the FDCA creates a far clearer conflict with state law than existed in the only other case in which the Court has considered preemption of state tort law punitive damages awards. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court held that federal regulation of a nuclear facility did not preempt a punitive damages award arising from the plaintiff's alleged exposure to nuclear radiation at her residence. This decision, however, "turned on specific statutory evidence that Congress 'disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide

[5] It is no answer to state that tort plaintiffs are using punitive damages to enforce drug labeling standards defined by state rather than federal law. In the first place, the record below clearly demonstrates that the Respondent relied expressly on NPC's alleged violations of FDA regulations. Moreover, in the analogous context of false advertising under the Lanham Act, courts have held that Congress's decision to limit enforcement of the FDCA to the FDA precludes Lanham Act claims that would enforce standards not set by FDA. *See Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012) (rejecting Lanham Act challenge to labeling of juice beverage, noting: "If the FDA believes that more should be done to prevent deception, or that [defendant's] label misleads consumers, it can act. But … for a court to act when the FDA has not – despite regulating extensively in this area – would risk undercutting the FDA's expert judgments and authority").

adequate remedies for those who are injured by exposure to hazardous nuclear materials.'" *Buckman*, 531 U.S. at 352 (quoting *Silkwood*, 464 U.S. at 257). "In the present case, by contrast, we have clear evidence that Congress intended that the [FDCA] be enforced exclusively by the federal government." *Buckman*, 531 U.S. at 352.

The Court should grant certiorari because state law empowering products liability plaintiffs to enforce legal standards of conduct through punitive damages awards against prescription drug companies directly conflict with the federal law mandate that such enforcement authority rests solely with the FDA.

B. The Punitive Damages Award Below Impermissibly Penalized NPC under State Law for the Exercise of Its Federal Right to Market Aredia and Zometa®

As Congress has recognized, the FDA approval process is rigorous. New drug applications "typically run to hundreds of thousands of pages," and the process of securing NDA approval for a prescription drug "takes an average of 15 years and costs in the range of $500 million." Food and Drug Administration Modernization Act of 1997, S. Rep. 105-43, *available at* 1997 WL 394244, at *6. But a drug company that meets the FDA's approval requirements for new drugs secures the right under federal law to market its prescription drug throughout the United States, subject to FDA's conditions of approval. *See* 21 U.S.C. § 355.[6]

[6] To be sure, as Justice Thomas noted in *Levine*, FDA approval does not grant a drug company "the unfettered right, for all time, to market its drug with the specific label that was

FDA approval of a prescription drug also entitles the applicant drug company to various periods of market exclusivity. *See Activis Elizabeth LLC v. FDA*, 625 F.3d 760, 761-62 (D.C. Cir. 2010); 21 U.S.C. § 355(j)(5)(F). If the new drug contains an active ingredient that had not been previously approved by the FDA as part of another NDA, the drug manufacturer is granted 5 years of data exclusivity, during which time no other drug company can lawfully market a drug containing the same active ingredient. *Id.* § 355(j)(5)(F)(ii). If the new drug includes a previously approved active ingredient entity but a drug company submits "reports of new clinical investigations … essential to the approval" of an NDA for a new indication, the drug manufacturer is granted 3 years of market exclusivity with respect to that new indication. *Id.* § 355(j)(5)(F)(iii). Moreover, the applicant drug company's federal right to market its prescription drug may be revoked only by the FDA and only after the FDA has extended to the drug company its due process protections of notice and a hearing. *Id.* § 355(e).

State law punitive damages awards are preempted because they impermissibly penalize drugs companies for exercising their federal right to market FDA-approved drugs. It is hornbook law that "the Supremacy Clause directly forbids state action penalizing anyone for invoking a right or a procedure validly created by federal law." Laurence H. Tribe, *American Constitutional Law* § 6-29, 1182 n.11

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federally approved" in the initial NDA approval. *Levine*, 555 U.S. at 592. The key point here, however, is that the conditions of a drug company's right to market a prescription drug are defined by federal, not state, law and the right may be revoked only by the FDA.

(3d ed. 2000). "If state law purports to … penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Claus requires them to apply the federal rule." Caleb Nelson, *Preemption*, 80 Va. L. Rev. 225, 261 (March 2000); *see also Livadas v. Bradshaw*, 512 U.S. 107, 113-14 (1994) (state statute preempted because it "placed a penalty on the [plaintiff's] exercise of her statutory right [under the National Labor Relations Act] to bargain collectively with her employer"); *id.* at 117 n.11 (holding that state law penalty was preempted even though "the NLRA does not expressly recognize a right to be covered by a collective bargaining agreement, in that no duty is imposed on an employer to actually reach an agreement with represented employees").

This conflict is not ameliorated by the fact that it may be physically possible for a drug company to both market an FDA-approved drug and pay punitive damages for conduct taken in compliance with the FDA approval. As Justice Thomas explained, "if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both …" *Levine*, 555 U.S. at 590 (Thomas, J. concurring); *see also Chicago and North Western Transp. Co. v. Kalo Brick & Tire Co.*, 450 U.S. 311, 318 (1981) ("[i]t would be inconsistent with federal policy … if local authorities retained the power to decide whether the [railroad] carriers could do what the [Interstate Commerce] Act authorized them to do") (quoting *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 87 (1958)).

Moreover, unlike in the case of compensatory damages, a prescription drug product liability plaintiff cannot avoid preemption of punitive damages by arguing that state law complements FDA regulations. *Cf. Levine*, 555 U.S. at 579-79. To the contrary, the Court repeatedly has held that state law penalties are preempted even where the state law purports to have the same aim as federal law and adopts the same standards. *See Arizona v. United States*, 132 S.Ct. 2492, 2502-03 (2012) ("Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted."); *Buckman*, 531 U.S. at 347-48 (States may not impose their own punishment for fraud on the FDA); *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 288 (1986) (States may not impose their own punishment for repeat violations of the National Labor Relations Act); *see also National Meat Association v. Harris*, 132 S.Ct 965, 972-73 (2012) (savings clause allowing state regulation of the commercial sales activities of slaughterhouses does not save state ban on certain types of slaughterhouses from preemption because the ban "is something more than an 'incentive' or 'motivator'" and acts as a command that differs from federal regulation).

Prescription drug manufacturers are currently faced with a logical contradiction. They invest huge amounts of time and resources to comply with detailed requirements under federal law that, if met to FDA's satisfaction, grant the manufacturers the exclusive federal right to market their prescription drugs throughout the United States. However, under state tort law, private plaintiffs are authorized to use the punitive damages law of fifty different states to punish these manufacturers for their exercise of that very same federal right.

In such circumstances, the Supremacy Clause commands that state law must give way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 9, 2013

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1030

HERBERT FUSSMAN, individually and as Administrator of the Estate of Rita Fussman,
Plaintiff-Appellee,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.
James A. Beaty, Jr., Chief District Judge.
(1:06-cv-00149-JAB-PTS)

Argued: December 7, 2012

Decided: February 8, 2013

Before NIEMEYER, KING, and FLOYD, *Circuit Judges.*

Affirmed by unpublished per curiam opinion

ARGUED: Bruce Jeffrey Berger, HOLLINGSWORTH, LLP, Washington, D.C., for Appellant. John J. Vecchione, VALAD & VECCHIONE, PLLC, Fairfax, Virginia, for Appellee. ON BRIEF: Peter G. Pappas, NEXSEN PRUET, PLLC, Greensboro, North Carolina; Joe G. Hollingsworth, Katharine R. Latimer, Robert E. Johnston, HOLLINGSWORTH, LLP, Washington, D.C., for Appellant. Jodi D. Hildebran, ALLMAN SPRY LEGGETT & CRUMPLER, P.A., Winston-Salem, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In June 2001, upon learning that breast cancer had metastasized to her bones, Rita Fussman (Fussman) began receiving monthly infusions of Aredia, a pharmaceutical drug approved by the Food Drug Administration (FDA) and marketed by New Jersey-based Novartis Pharmaceuticals Corporation. Aredia is a bisphosphonate, a drug designed to prevent the loss of bone mass. Fussman began Aredia infusions at the behest of oncologist Dr. Heather Shaw and continued receiving the drug until November 2001 when Dr. Shaw changed her monthly regimen to infusions of Zometa, another Novartis-marketed, FDA-approved bisphosphonate. With the exception of a one month reprieve, Fussman remained on Zometa until June 2005. Fussman died in 2009.

This diversity action, which Fussman initiated in February 2006, involves a side effect of Aredia and Zometa known as "osteonecrosis of the jaw" (ONJ). ONJ occurs when the gums fail to cover part of the jaw bone and the bone starves and dies from lack of

blood. Fussman developed ONJ in March 2003, shortly after having two teeth extracted. Herbert Fussman, individually and as the administrator of the Estate of Rita Fussman, alleges that Aredia and Zometa caused Fussman's ONJ and that Novartis failed to warn adequately either Fussman or Dr. Shaw of the ONJ risk associated with the drugs.

After coordinated Multidistrict Litigation proceedings in the Middle District of Tennessee, the Judicial Panel on Multidistrict Litigation remanded this case to the Middle District of North Carolina for trial. Following a fifteen-day trial, a jury awarded $287,000 in compensatory damages and $12,600,000 in punitive damages to Herbert Fussman as administrator. Additionally, it awarded $1 for loss of consortium to Herbert Fussman individually. Per North Carolina General Statute § 1D-25, the district court reduced the punitive damages award to $861,000. *See* N.C. Gen. Stat. § 1D-25 ("Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater."). Thus, the total award, including prejudgment interest, was $1,258,083.19.

Novartis filed three post-judgment motions: a motion for a new trial, a motion for judgment as a matter of law on all claims, and a motion for judgment as a matter of law on punitive damages. The district court denied all three motions, and Novartis now appeals the denial of its motion for judgment as a matter of law on punitive damages and the denial of its motion for a new trial. It does not appeal the court's denial of its motion for judgment as a matter of law on all claims. For the reasons that follow, we affirm.

I.

We first address Novartis's contention that the district court erred in denying its motion for a new trial. We review a district court's denial of a motion for a new trial for abuse of discretion, *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003), recognizing that "[u]nder the applicable legal principles, a trial court 'should exercise its discretion to award a new trial sparingly,' and a jury verdict is not to be overturned except in the rare circumstance when the evidence 'weighs heavily' against it," *United States v. Smith*, 451 F.3d 209, 216-17 (4th Cir. 2006) (quoting *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003)).

A.

Novartis challenges four of the district court's evidentiary rulings, which we also review under the deferential abuse of discretion standard, *King v. McMillan*, 594 F.3d 301, 310 (4th Cir. 2010), and overturn only when "arbitrary and irrational," *United States v. Blake*, 571 F.3d 331, 346 (4th Cir. 2009), and violative of a "party's substantial rights," Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Thus, if we conclude that an alleged error would be harmless, we need not conduct additional analysis to determine whether the district court actually erred. *United States v. Banks*, 482 F.3d 733, 741 (4th Cir. 2007).

In this case, our review of the evidentiary rulings Novartis cites indicates that none of them, even if erroneous, affected Novartis's "substantial rights." Accordingly, we affirm the district court's denial of Novartis's motion for a new trial on that basis.

E-mails Between Novartis and
Drs. Schubert and Ruggiero

In 2004, Novartis published a "white paper" about ONJ. The paper indicated that although "[a] causal relationship between bisphosphonate therapy and osteonecrosis of the jaws ha[d] not been established," a panel of experts had convened "to discuss identification of risk factors" for ONJ, to "develop clinical guidelines for prevention, early diagnosis, management, and multidisciplinary treatment" of ONJ in cancer patients, and to "develop[] recommendations to reduce" ONJ in cancer patients receiving bisphosphonates.

At trial, the district court admitted e-mail conversations that occurred between Novartis and two experts—Dr. Mark Schubert and Dr. Salvatore Ruggiero—during the preparation and editing of the paper. In May 2004, during the final revisions of the paper, an e-mail exchange occurred between Dr. Schubert and Dr. Yong-jiang Hei, Global Medical Director of Novartis. Dr. Schubert had requested that the following language be included in the paper's "Potential Risk Factors" section:

> While osteonecrosis of the jaws following bisphosphonate therapy has been associated with infection and/or dental surgery, cases of spontaneous osteonecrosis lesions without other apparent risk factors have been observed. Some cases of osteonecrosis of the jaws have been observed after as few as [two] administrations of a bisphosphonate.

Via e-mail, Dr. Hei responded that this language was excluded from the final draft for several reasons, one of which being that the language "implie[d] a degree

of understanding of risk factors for osteonecrosis of the jaws that is not warranted in light of the general uncertainties regarding the causality of [the condition].” In a reply e-mail, Dr. Schubert commented at length regarding Novartis’s decision not to include his proposed language, and relevant to Fussman’s claims stated, “I encourage you to take a bold and honest approach to realistically warn people[,] an[d] this will, in the long run, be the best thing.” In a different May 2004 e-mail exchange with Novartis, Dr. Schubert commented on Novartis’s decision to include in the paper a long list of risk factors that were “possibly or possibly not related” to ONJ. Schubert stated, “The [inclusion of a] laundry list of factors leading to ‘exposed bone’ does have the appearance of ‘blowing smoke.’” Similarly, in August 2004, Dr. Ruggiero referenced the paper via e-mail, stating that it was misrepresenting the truth and that “bisphosphonates are the real culprits” behind ONJ.

Novartis contends that the district court erred in allowing Fussman to reference these e-mails because the statements therein were inadmissible hearsay. But we conclude that regardless of whether the district court erred in admitting the e-mails, such admission was harmless because the testimony included in the e-mails was also offered by Dr. Robert Marx, another member of the expert panel who testified at trial.

Dr. Marx testified that when he attended a meeting of the panel in 2004, he brought with him a “Notice of Importance” that he had developed and distributed to oral surgeons and oncologists regarding the relationship of ONJ to Aredia and Zometa. Dr. Marx also testified that his office faxed the Notice

to Dr. Peter Tarasoff, a Novartis medical affairs employee. In part, the Notice stated, "The exposed bone in the jaws (either the maxilla or mandible) is directly related to Aredia/Zometa, but may be further contributed to by the primary disease itself, other chemotherapy agents, and steroids such as [D]ecadron." Regarding the white paper, Dr. Marx explained his problems with the paper, stating,

> It was denying any cause-and-effect relationship. . . . [I]t was actually attributing so many things to exposed bone, none of which really did that, that many of us, not just me, objected to the written form several times that it was not addressing what we had inputted into the meeting.

He further testified that he communicated his objections to the paper to the Novartis employee who was managing the project: "My recollection is I told him the paper danced around the issue; and that things such as smoking, alcohol drinking, periodontal disease, and a whole host of other possibilities don't cause exposed bone; and to throw it into that framework was misleading to the readership."

In sum, to the extent that the jury concluded that Novartis knew of the ONJ risks associated with bisphosphonates and that it failed to warn of those risks or intentionally concealed those risks, the e-mails from Drs. Schubert and Ruggerio were not the sole cause. Dr. Marx's testimony supported such a conclusion as well. Accordingly, the district court did not err in denying Novartis a new trial based on its admission of the e-mails.

Dr. Lynne McGrath's Testimony

Since October 2005, Dr. Lynne McGrath has been the Vice President of Regulatory Affairs at Novartis. At trial, Novartis elicited testimony from Dr. McGrath regarding the regulatory history of Aredia and Zometa. The court ruled that Dr. McGrath could testify only to information about which she had personal knowledge, effectively limiting her testimony to post-October 2005 history. In contending that the district court erred in limiting Dr. McGrath's testimony, Novartis maintains that her position as Vice President "required her to have personal knowledge of the full regulatory history of the drug."

Novartis avers that the district court's ruling inhibited the jury from learning "information critical to [its] defense." Specifically, it notes that Dr. McGrath would have testified that (1) Novartis "worked closely with [the] FDA on all of the various label changes and that attention was paid to every word in the label," (2) Novartis "worked aggressively to obtain information from Dr. Marx and even hired a medical records company to assist in the process of collecting medical records," (3) Novartis's Emergency Management team "worked diligently to understand the new side effect, and, within a month of convening [in July 2003], decided to revise the label to reflect the cases of ONJ and began the process of revising the label," (4) "the risk factors listed in the September 2003 label were considered by [Novartis] to be well documented in the general medical literature for osteonecrosis generally, the only available literature at that time," (5) the "FDA simultaneously, looking at the same information, also recognized the propriety of listing the same risk factors," and (6) Novartis "considered label changes very serious matters and

worked hard to ensure that there was a strong basis for what it included in each label change." Additionally, Novartis contends that without the court-imposed limitation Dr. McGrath could have countered Fussman's presentation of the chronology of events, Fussman's implication that Novartis "simply 'chose' not to put necessary safety information into its label," and Fussman's disparagement of the Novartis Emergency Management team.

Once again, we need not determine whether the district court erred in limiting Dr. McGrath's testimony because any such error was harmless. Novartis's regulatory expert, Dr. Janet Arrowsmith, provided the testimony that Novartis maintains Dr. McGrath could have provided. Dr. Arrowsmith indicated that she reviewed "new drug applications for Aredia and Zometa," "notes of meetings between FDA and Novartis," and "notes of advisory boards [and] internal communications within Novartis." She testified, among other things, concerning the details of Novartis's interaction with the FDA; the timing and extent of Novartis's knowledge that bisphosphonates cause ONJ; whether Novartis would have modified the initial label on the drugs had potential cases of ONJ revealed during clinical trials been notated as such; the organization of the Novartis Emergency Management team; the team's decision to modify the drugs' labels in August 2003; and the actual modification of the labels in September 2003. Given the extent of Dr. Arrowsmith's testimony, we cannot conclude that the district court's limitation of Dr. McGrath's testimony harmed Novartis in a manner that affected its "substantial rights."

Dr. Ruggiero's Testimony

At trial, Fussman repeatedly referenced Dr. Salvatore Ruggiero's research regarding occurrences of ONJ in patients that receive bisphosphonates. It presented an e-mail showing that in April 2002, Dr. Ruggiero queried Dr. Tarrassoff about whether bisphosphonates cause osteonecrosis. It also presented an e-mail indicating that in May 2003, when Dr. Ruggiero attempted to publish a case series regarding ONJ in bisphosphonate patients, Novartis sought to prevent such publication. Using this evidence, Fussman averred that Novartis knew bisphosphonates present ONJ risks and chose not to act on what it knew.

To rebut the implications of Fussman's evidence, Novartis attempted to admit deposition testimony that Dr. Ruggiero had provided in another Aredia and Zometa case. Novartis represented to the district court that in the prior case Dr. Ruggiero had testified that (1) in April 2002, he did not report a case of ONJ to Novartis, and (2) he had "no knowledge of anyone trying to stop him from publishing" his case series. Ultimately, the district court denied the admission of the deposition, and Novartis now argues that such denial was prejudicial because the "excluded testimony tended to negate key allegations of wrongdoing that Fussman used to support liability and punitive damages." But such is not the case. The excluded deposition testimony would not have helped Novartis to any notable degree.

First, Novartis avows that Fussman repeatedly claimed that Dr. Ruggiero reported cases of ONJ to Novartis in April 2002. But our review of the record reveals that Fussman in fact did not make such a claim. Rather, Fussman merely repeated what the

evidence demonstrated—that in April 2002, Dr. Ruggiero asked Dr. Tarasoff if bisphosphonates cause osteoneocrosis. Fussman did not present evidence that Dr. Ruggierio reported specific ONJ cases. Thus, although Novartis contends that Dr. Ruggerio's testimony from the prior case would have undermined Fussman's claims, his deposition would have simply contradicted an argument that Fussman never pressed—namely, that Dr. Ruggiero reported cases of ONJ to Novartis in April 2002.

Similarly, Dr. Ruggiero's testimony—that he did not know Novartis attempted to prevent publication of his case series would have failed to contradict effectively Fussman's evidence that Novartis had indeed engaged in such conduct. Simply put, one would not expect that Novartis would notify Dr. Ruggiero of its own suppression attempts. It is unsurprising that Dr. Ruggerio was unaware of Novartis's actions, and evidence supporting this fact would not have advanced Novartis's defense. Hence, given the harmlessness of any district court error, we again affirm the district court's denial of Novartis's motion for a new trial.

Evidence of 2007 Zometa Label Revision

In pertinent part, Zometa's 2003 label included the following paragraph:

> Cases of osteonecrosis (primarily of the jaws) have been reported since market introduction. Osteonecrosis of the jaws has other well documented multiple risk factors. It is not possible to determine if these events are related to Zometa or other bisphosphonates, to concomitant drugs or other therapies . . . , to patient's underlying disease, or to other comorbid risk factors . . . .

In 2007, Novartis revised this portion of the label so that it stated the following:

> Cases of osteonecrosis (primarily involving the jaws) have been reported predominantly in cancer patients treated with intravenous bisphosphonates including Zometa. Many of these patients were also receiving chemotherapy and corticosteroids which may be a risk factor for ONJ. Data suggests a greater frequency of reports of ONJ in certain cancers, such as advanced breast cancer and multiple myeloma. The majority of the reported cases are in cancer patients following invasive dental procedures, such as tooth extraction. It is therefore prudent to avoid invasive dental procedures as recovery may be prolonged . . . .

Prior to trial, Novartis moved to exclude evidence of the 2007 revision, maintaining that the revision constituted a subsequent remedial measure. *See* Fed. R. Evid. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence[,] culpable conduct[,] a defect in a product or its design[,] or a need for a warning or instruction."). Although the district court granted Novartis's pre-trial motion, it reversed course at trial and allowed Fussman to cross-examine Dr. Arrowsmith regarding the label changes. Additionally, it allowed Fussman to reference the revision during closing argument.

To the extent that the district court erred in admitting evidence of the 2007 label revision, such error did not prejudice Novartis. Evidence of the revision was relevant to Novartis's awareness of the dangers of Zometa and to whether Zometa caused

Fussman's ONJ. Given that Fussman presented extensive evidence apart from the 2007 label change that supported both of these claims, we cannot conclude that admission of the label change "substantially swayed" the jury's verdict. Thus, once again, we conclude that the district court did not err in denying Novartis a new trial on such a basis.

B.

Novartis also contends that the district court's denial of two of its requested punitive damages jury instructions merited a new trial. We review jury instructions "holistically and through the prism of the abuse of discretion standard." *Noel v. Artson*, 641 F.3d 580, 586 (4th Cir. 2011). We must "simply determine 'whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.'" *Id.* (quoting *Bailey v. Cnty. of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996)). A party challenging a jury instruction "faces a heavy burden, for 'we accord the district court much discretion to fashion the charge.'" *Id.* (quoting *Teague v. Bakker*, 35 F.3d 978, 985 (4th Cir. 1994)). Indeed, we will reverse a district court for declining to give a requested instruction "only when the requested instruction '(1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired' that party's ability to make its case." *Id.* (quoting *United States v. Lighty*, 616 F.3d 321, 366 (4th Cir. 2010)).

Novartis challenges the district court's denial of Requested Jury Charge No. 37, which states:

> In making your determination of punitive damages in this case, you cannot consider any conduct occurring outside the state of North Carolina.
>
> In making your determinations of punitive damages, you may not consider any harm that may have been done to any other individual not in this case.
>
> Thus, in making your determinations of punitive damages in this case, you can only consider profits derived by [Novartis] from the state of North Carolina during the years of Mrs. Fussman's use.

It also challenges the denial of Requested Jury Charge No. 43, which states, "The law prohibits imposing punitive damages based on any corporate misconduct that did not specifically harm Mrs. Fussman."

Novartis avers that it requested these charges to guard against the risk that the jury would award damages to Fussman for harm that other individuals suffered. And Novartis maintains that such a risk was concrete because Fussman presented evidence that other individuals developed ONJ after they had been treated with Aredia and Zometa; questioned a Novartis expert about his diagnosis of a Tennessee woman who allegedly developed ONJ after using Aredia; and discussed total Zometa sales across the United States in 2005 and 2009. Citing *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), Novartis urges that the "Due Process Clause precludes a jury from punishing for 'the harm caused to others,'" and that therefore, "when asked, the district court is required to provide a jury instruction that protects against the

risk that punishment will be meted out for harm done to others." We conclude, however, that the district court did not abuse its discretion in declining to give the charges Novartis requested.

First, Requested Jury Charge No. 37 is incorrect. Although Novartis accurately states that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation," *id.* at 353, Novartis fails to recognize that due process does allow reference to and consideration of nonparty injuries as evidence of reprehensibility, *id.* at 355 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . ."). Thus, Requested Jury Charge No. 37's counsel not to consider any harm inflicted on any nonparty or any conduct that occurred outside of North Carolina is improper, and the district court appropriately declined to instruct the jury in this manner.

Second, Requested Jury Charge No. 43 was "substantially covered" by the district court's actual charge. Instead of the language that Novartis requested, the court gave the following punitive damages instruction:

> In making [a] determination [as to punitive damages], you may consider only that evidence which relates to the following: the reprehensibility of the Defendant's motive and conduct, if you have so found; the likelihood at the relevant time of serious harm to Ms. Fussman; the degree of the Defendant's awareness of the probable conse-

> quences of its conduct; the duration of the Defendant's conduct; the actual damages suffered by Ms. Fussman; any concealment by the Defendant of the facts or consequence[s] of its conduct; the existence and frequency of any similar past conduct by the Defendant, if you so find; whether the Defendant profited by the conduct.

We believe that when the court admonished the jury to "consider only" evidence connected to reprehensibility and evidence of "actual damages suffered by Ms. Fussman," it sufficiently dealt with the risk that Requested Jury Charge No. 43 presumably sought to guard against—namely, that the jury would award damages for harm suffered by "strangers to the litigation." *Id.* at 353. Thus, we also affirm the district court's decision not to give Novartis's Requested Jury Charge No. 43.

In sum, as to the evidentiary rulings Novartis contests, we hold that any errors by the district court were harmless. And as to Requested Jury Charges Nos. 37 and 43, we hold that the district court did not abuse its discretion in declining to give these charges. Accordingly, we affirm the district court's denial of Novartis's motion for a new trial.

II.

We next address the district court's denial of Novartis's post-trial motion for judgment as a matter of law on punitive damages. "We review de novo a district court's denial of a Rule 50 motion for judgment as a matter of law." *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001). "If, viewing the facts in the light most favorable to the non-moving party, there is sufficient evidence for a

reasonable jury to have found in [Fussman's] favor, we are constrained to affirm the jury verdict." *Id.*

A.

In its motion, Novartis argued (1) that the evidence of its misconduct suggests negligence, not willful or wanton conduct as required under North Carolina law to support a punitive damages award and (2) that evidence of its suppression of medical information regarding ONJ cannot support a punitive damages award because Fussman failed to demonstrate a causal nexus between Novartis's acts and her harm. We disagree.

First, Fussman presented evidence showing that Novartis's high-ranking officials knew about the drugs' side effects and subverted medical inquiries into such effects. This evidence provided a sufficient foundation for the jury to determine that Novartis's actions were willful, not simply negligent. And second, Fussman presented evidence sufficient to support a determination that Novartis's acts proximately caused her ONJ. Fussman's deposition testimony, taken before her death and presented at trial, indicated that she would not have taken Aredia and Zometa if she had known the drugs' risks. Indeed, evidence presented at trial indicated that Fussman stopped taking the drugs once she knew their hazards. Moreover, although Dr. Shaw testified that she would have continued Fussman's treatments even if she had known that ONJ was a possibility, the jury could have determined from other evidence that Dr. Shaw would have modified various aspects of Fussman's treatment had she been adequately warned of the drugs' perils.

We have simply sampled the record here. But the trial proceedings and the whole of the evidence that Fussman supplied to this Court bely a conclusion that insufficient evidence supported the jury's punitive damages award. Thus, we affirm the district court's denial of Novartis's motion for judgment as a matter of law on this basis.

B.

We also affirm the district court's denial of Novartis's motion for judgment as a matter of law on a preemption theory. Novartis contends that the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301-399, preempts the jury's award of punitive damages because the Aredia and Zometa labels complied with FDA regulations and the FDA has exclusive authority to enforce the labeling requirements of the FDCA. Once again, we disagree.

In no uncertain terms, the Supreme Court has dictated that the FDCA does not preempt state law claims against a drug company whose drug label complies with FDA regulations. *Wyeth v. Levine*, 555 U.S. 555, 581 (2009). In *Wyeth v. Levine*, the Court examined the history of the FDCA and Congress's intent in enacting the statute. The Court noted that in spite of Congress's "certain awareness of the prevalence of state tort litigation," it declined to expressly preempt state law failure-to-warn claims for prescription drugs. *Id.* at 575 ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.") (alteration in original) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67

(1989) (internal quotation marks omitted)). Congress's silence on the matter was notable, the Court reasoned, because in another context—*i.e.*, medical devices—it had amended the FDCA to include an express preemption provision. *See* Pub. L. No. 94-295, § 521, 90 Stat. 574 (1976) (codified at 21 U.S.C. § 360k); *Wyeth*, 555 U.S. at 567.

Here, Novartis seeks to carve out a niche in existing precedent by arguing that *Wyeth* is inapplicable because it does not expressly reference punitive damages. But Novartis fails to put forth any logical reason why the basis for the Court's decision in *Wyeth* should not equally apply to claims involving punitive damages. Novartis argues that the FDCA preempts the recovery of punitive damages because (1) the purpose of punitive damages is to punish and deter, something the FDA has "ample power" to accomplish through enforcement of labeling requirements and (2) allowing the punishment of FDA-approved conduct is improper. Neither of these arguments is efficacious. Had Congress intended to preempt punitive damages recovery, it could have clearly indicated as much—just as it did when it addressed medical devices. Thus, we affirm the district court's denial of Novartis's motion for judgment as a matter of law on this basis as well.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

1:06CV149

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN,
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

ORDER AND MEMORANDUM OPINION

This matter is before the Court on post-trial motions following a jury trial before this Court on claims by Plaintiff Herbert Fussman, individually and as the Administrator of the Estate of Rita Fussman, ("Plaintiff") against Novartis Pharmaceuticals Corporation ("Defendant" or "Novartis") alleging that Defendant's prescription medications Aredia and Zometa caused Mrs. Fussman to develop Osteonecrosis of the Jaw ("ONJ"), and that Defendant failed to adequately warn Mrs. Fussman and her medical providers, including her oncologist Dr. Heather Shaw, of the risk of ONJ associated with Aredia and Zometa. After a 15-day trial, the jury found in favor of Plaintiff, concluding that Novartis unreasonably failed to provide an adequate warning or instruction with respect to Aredia or Zometa, that the Aredia or Zometa medically caused Mrs. Fussman's jaw injuries, and that Novartis' failure to provide an

adequate warning was the proximate cause of Mrs. Fussman's jaw injuries. The jury also found that Novartis breached an implied warranty of merchantability made to Mrs. Fussman regarding Aredia or Zometa. After considering these claims, the jury considered the "learned intermediary" defense set out in North Carolina General Statute § 99B-5(c), which provides a defense to liability for prescription drug manufacturers for claims based on "failure to warn" if the manufacturer provided an adequate warning to the prescribing physician. However, after considering this defense, the jury found that Novartis did not provide an adequate warning or instruction for Aredia or Zometa to Mrs. Fussman's oncologist, Dr. Heather Shaw, who prescribed the drugs for Mrs. Fussman. The jury also found that the negligence of Novartis proximately caused Mr. Herbert Fussman to lose the consortium of his spouse. Finally, the jury found by clear and convincing evidence that Novartis was liable to the Plaintiff for punitive damages for willful or wanton conduct that Novartis' officers, directors or managers participated in or condoned.

Having reached these conclusions, the jury awarded Plaintiff Herbert Fussman, as the administrator of the Estate of Rita Fussman, $287,000.00 in compensatory damages and $12,600,000.00 in punitive damages on Plaintiff's claims of Negligent Failure to Warn and Breach of the Implied Warranty of Merchantability. However, North Carolina General Statute § 1D-25 provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater." Therefore, immediately following announcement of the verdict, the Court reduced the punitive damages award pursuant to North Carolina

General Statute § 1D-25 to three times the amount of compensatory damages, for a total of $861,000.00 in punitive damages. Based on the jury's verdict, the Court entered Judgment in favor of Plaintiff Herbert Fussman, as the administrator of the Estate of Rita Fussman, on Plaintiff's claims of Negligent Failure to Warn and Breach of the Implied Warranty of Merchantability, for $287,000.00 in compensatory damages and $861,000.00 in punitive damages, plus prejudgment interest of $110,082.19 on the compensatory damages award. The jury also awarded Plaintiff Herbert Fussman, individually, nominal damages in the amount of $1.00 on his claim for Loss of Consortium, and Judgment was therefore also entered in favor of Plaintiff Herbert Fussman, individually, for $1.00 in nominal damages on his claim of Loss of Consortium, for a total award of $1,258,083.19.

Following entry of the Judgment, Defendant Novartis filed three post-judgment motions that are presently before the Court for review: (1) a Motion for Judgment as a Matter of Law on All Claims [Doc. #539], (2) a Motion for Judgment as a Matter of Law on Punitive Damages [Doc. #535], and (3) a Motion for New Trial [Doc. #537]. For the reasons set forth below, all of these Motions will be denied.[1]

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[1] The Court notes that many of the issues raised by Defendant in these Motions were previously raised by Defendant in its Motions for Summary Judgment and Motions in Limine, and the Court finds no basis to reconsider or revisit those prior determinations. The Court will nevertheless address herein the particular contentions raised by Defendant in the present Motions, although the Court will not attempt to repeat here the Court's reasoning to the extent that it has been previously set out in this case.

I. Motion for Judgment as a Matter of Law as to All Claims [Doc. #539]

Under Federal Rule of Civil Procedure 50, "[j]udgment as a matter of law is appropriate when there is no legally sufficient evidentiary basis to support the jury's verdict." *Private Mortg. Inv. Services, Inc. v. Hotel and Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002). A motion for judgment as a matter of law should be granted if the jury's findings are not supported by substantial evidence, viewing all the evidence in the light most favorable to the prevailing party and drawing all reasonable inferences in favor of the prevailing party. *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (noting that in considering a motion under Rule 50, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence"); *Price v. City of Charlotte, North Carolina*, 93 F.3d 1241, 1249 (4th Cir. 1996) ("Because federal courts do not directly review jury verdicts, constrained, as we are, by the Seventh Amendment, the [Defendant] bears a hefty burden in establishing that the evidence is not sufficient to support the awards . . . [and because] we may not substitute our judgment for that of the jury or make credibility determinations, . . . if there is evidence on which a reasonable jury may return verdicts in favor of Appellees, we must affirm." (internal quotations omitted)).

In the present case, Defendant contends that it is entitled to Judgment as a Matter of Law because Plaintiff failed to present fact and expert testimony to support the failure to warn claims based on either

negligence or breach of an implied warranty.[2] Specifically, Defendant contends first that Plaintiff failed to present fact and expert testimony to prove that Novartis was required to give certain warnings, that the warnings if given would have resulted in different medical treatment, and that the different medical treatment would have avoided or mitigated Mrs. Fussman's ONJ. Second, Defendant contends that inconsistencies in the specific causation testimony of Plaintiff's expert, Dr. Najjar, required the jury to speculate as to the cause of Mrs. Fussman's ONJ, and that Dr. Najjar's theory of accelerated bone resorption contradicted Plaintiff's other experts' general causation theory that bisphosphonates such as Aredia and Zometa impede bone resorption. The Court will consider each of these contentions in turn.

With respect first to whether sufficient evidence was presented to support Plaintiff's failure to warn claims, the Court has considered Defendant's contentions and concludes that substantial evidence was presented from which a reasonable jury could have found either for or against Plaintiff on these claims, and the Court will not substitute its view for that of the jury in this case. In that regard, it is clear that the jury found that Novartis unreasonably failed to provide an adequate warning, and substantial

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[2] In footnotes in its briefing, Defendant contends that Plaintiff did not prove that Novartis manufactured the Aredia or Zometa received by Mrs. Fussman, and that Plaintiff did not prove when it was sold. However, in Response, Plaintiff notes that there has never been any dispute or question that Novartis was the exclusive manufacturer of Aredia and Zometa, and Plaintiff's medical records support the conclusion that she received Aredia and Zometa, which are manufactured only by Novartis. Therefore, the Court rejects Defendant's contentions as to the implied warranty claim.

evidence was presented to support this conclusion, including expert testimony from both Dr. Marx and Dr. Parisian as to what Novartis knew or should have known regarding the risks of ONJ and the corresponding failure of Novartis to provide an adequate warning of those risks.

There was also sufficient evidence to support the jury's conclusion that the failure to provide an adequate warning was the proximate cause of Mrs. Fussman's injuries. In this regard, Mrs. Fussman's deposition testimony, which was taken before her death in 2009 and which was presented at trial, included her statement that she would not have taken Aredia and Zometa if she knew then what she knows now. In addition, evidence was presented that Mrs. Fussman stopped taking the drug once she was warned of the risks. Moreover, Mrs. Fussman's treating dentists and oral surgeons all testified to various ways they would have changed their treatment of her had an adequate warning been provided. Finally, the Court notes that although Mrs. Fussman's treating oncologist, Dr. Shaw, testified that she would have recommended that Mrs. Fussman continue on Aredia or Zometa even if there were a risk of ONJ, there was also testimony from which a reasonable jury could have concluded that Dr. Shaw would have changed her treatment of Mrs. Fussman in other ways had she been adequately warned of the risks. In addition, there was testimony from which a reasonable jury could have concluded that at the time of Dr. Shaw's deposition, which was presented at trial, Dr. Shaw still was not fully informed or aware of the risks of ONJ, and on that basis the jury could have chosen to discount Dr. Shaw's statement that she would still have recommended that Mrs. Fussman continue taking Aredia or Zometa. Based on

the evidence presented, and viewing it in the light most favorable to Plaintiff, the Court concludes that there was sufficient evidence to support the conclusion that a sufficient warning would have resulted in different medical or dental treatment, and that those differences in treatment would have avoided or mitigated her jaw condition.[3]

With respect to Defendant's contentions regarding Dr. Najjar, the Court finds that there was sufficient testimony presented by Dr. Najjar to support his conclusion, and the jury's finding, that Mrs. Fussman suffered from bisphosphonate-induced ONJ, and that Dr. Najjar had ruled out other conditions, including osteomyelitis, to a reasonable degree of medical certainty. Although there were some potential inconsistencies between Dr. Najjar's testimony and Dr. Marx's underlying causation theory, those inconsistencies were for the jury to consider in according the testimony the weight they believed it deserved. Dr. Marx presented testimony as to general causation, that is, that bisphosphonates such as Aredia and

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[3] The Court notes that the jury was specifically instructed that in considering whether the alleged failure to provide an adequate warning or instruction with respect to Aredia or Zometa was a proximate cause of Mrs. Fussman's injuries, the jury was required to consider what warning reasonably should have been provided based on what Novartis knew or reasonably should have known at a given time while Mrs. Fussman was taking the drugs, and whether such a warning at that time would have changed the result for Mrs. Fussman. The jury was further instructed that if the jury found that Plaintiff had proved that Novartis should have given a different warning at a particular time, the jury was required to consider whether Plaintiff also proved that the different warning at that time would have resulted in different medical or dental treatment for Mrs. Fussman and that the different treatment would have avoided or mitigated Mrs. Fussman's jaw condition.

Zometa cause ONJ. Dr. Najjar was not presented to establish general causation, but instead testified as to specific causation based on his differential diagnosis of Mrs. Fussman.[4] In this regard, Dr. Najjar reviewed Mrs. Fussman's medical records, examined her, ruled out other potential causes of her condition, and concluded to a reasonable degree of medical certainty that Mrs. Fussman's ONJ was "because of" bisphosphonates, that is, Aredia and Zometa. Dr. Najjar testified that he specifically considered osteomyelitis but ruled it out because debridement, removal of necrotic bone, and antibiotics would have cured osteomyelitis but did not help Mrs. Fussman. In these circumstances, any inconsistencies or misstatements by Dr. Najjar regarding the underlying mechanism by which bisphosphonates cause ONJ were not critical to the differential diagnosis he provided. In addition, Mrs. Fussman's treating dentists and oral surgeons provided additional testimony supporting the conclusion that Mrs. Fussman suffered from bisphosphonate-induced ONJ, not osteomyelitis. Therefore, taking all of the evidence as a whole and taking all reasonable inferences in favor of Plaintiff, the Court concludes that sufficient evidence was

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[4] A differential diagnosis "is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. A reliable differential diagnosis typically, though not invariably, is performed after physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests, and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (internal quotation marks and citations omitted).

presented to support the jury's proximate cause determination in favor of Plaintiff.

Thus, having considered all of the contentions raised by Defendant in its Motion for Judgment as a Matter of Law, the Court concludes that although reasonable minds could differ as to the conclusions to be drawn from the evidence presented, there was sufficient evidence presented to support the jury's verdict in this case. Because the jury's verdict is supported by substantial evidence, the Motion for Judgment as a Matter of Law will be denied.[5]

II. Motion for Judgment as a Matter of Law as to Punitive Damages [Doc. #535]

Defendant has also filed a Motion for Judgment as a Matter of Law as to Damages asking the Court to strike the jury's punitive damage award in this case. In support of this Motion, Novartis contends first that the claim for punitive damages is preempted by the Supremacy Clause of the Constitution because the decision whether to punish Novartis for the labeling and marketing of Aredia and Zometa rests solely with the Food and Drug Administration; and second, that Plaintiff failed to present clear and con-

[5] The Court notes that Defendant alternatively asserts Rule 59(e) as a basis for its Motion, asking the Court to amend the Judgment in this case and enter Judgment in favor of Defendant. However, Defendant has not stated the basis for asserting a motion under Rule 59(e), nor has Defendant shown any intervening change in controlling law, any new evidence not available at trial, or any clear error of law or manifest injustice. *See Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir. 2006) (discussing Rule 59(e) standard). Therefore, to the extent that Defendant has alternatively brought its Motion pursuant to Rule 59(e), that motion would also be denied.

vincing evidence to support the conclusion that Novartis acted with fraud, malice or willful or wanton conduct that was ratified by Novartis' officers, managers or directors.

With respect to Defendant's contention that Plaintiff's claims are preempted by federal law, the Court notes that Defendant presented these same contentions in Defendant's Motion for Summary Judgment as to Punitive Damages. The Court considered those contentions and concluded that Plaintiff's claims were not preempted in light of the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1203-04, 173 L. Ed. 2d 51 (2009). The Supreme Court recently reaffirmed its decision in *Wyeth* as to name-brand, non-generic drugs, noting again that under the applicable federal laws and regulations, a brand-name drug manufacturer is free to strengthen its label in compliance with its state tort duty. *See Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). This Court therefore finds no basis to revisit its prior determination in this case with respect to Defendant's preemption contentions. Therefore, Defendant's Motion for Judgment as a Matter of Law on the basis of federal preemption will be denied.[6]

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[6] To the extent that Defendant contends that a claim for punitive damages based on "fraud on the FDA" would be preempted, the Court notes that the claim presented in the present case was not based on alleged fraud on the FDA or alleged violation of any federal laws or regulations. Instead, Plaintiff's claim for punitive damages was based on allegations of willful and wanton conduct under state law. As such, the jury was specifically instructed that "this is not a case about FDA enforcement proceedings," it "has not been brought by the FDA for any alleged violation of any FDA regulations," and "it is up to you [the jury] to determine whether Plaintiff has established a claim against the Defendant under state law." Thus, while it

To the extent that Novartis seeks judgment as a matter of law based on an alleged failure by Plaintiff to present sufficient evidence to support an award of punitive damages in this case, the Court notes that Defendant raised these contentions as part of its Motion for Summary Judgment on Punitive Damages, which the Court denied. Defendant has essentially renewed its contentions as part of its present Motion for Judgment as a Matter of Law. With respect to a claim for punitive damages under North Carolina law, the claimant bears the burden of showing by clear and convincing evidence that the defendant is liable for compensatory damages, and that "one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a) (2009). Additionally, when the claimant seeks punitive damages against a corporation, the claimant must show that "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damage." N.C. Gen. Stat. § 1D-15(c). In this case, Plaintiff asserted that Defendant, through its officers, directors, or managers, engaged in willful or wanton conduct, which is "the conscious and intentional disregard of and indifference to the rights and safety of others, which the

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is undisputed that "fraud on the FDA" claims are preempted by federal law, the present case does not involve "fraud on the FDA" claims. Instead, the willful and wanton conduct alleged in this case involved intentional deception and suppression of medical evidence by Novartis employees in investigating side effects and communicating with medical professionals, without relying on violation of any FDA rules or regulations. As such, Defendant's "fraud on the FDA" contentions are misplaced.

defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5 (2009). Thus, on Defendant's Motion under Rule 50(b), the Court must consider whether the evidence presented at trial would support a reasonable jury finding by clear and convincing evidence that Plaintiff demonstrated willful or wanton conduct by Novartis' officers, director or managers related to Mrs. Fussman's jaw injuries.

In its Motion for Judgment as a Matter of Law as to Punitive Damages, Defendant contends that Plaintiff failed to present sufficient evidence to support an award of punitive damages because Novartis "did nothing wrong." Defendant further contends that the evidence presented would not support a finding that Novartis intentionally concealed a risk that it should have known was likely to cause harm, and Defendant also contends that there is no evidence that any alleged "willful and wanton" conduct was related to Mrs. Fussman's jaw injuries. However, based on the evidence presented, the Court concludes that sufficient evidence was presented to support a finding by the jury, by clear and convincing evidence, that Novartis managers intentionally concealed the risk of ONJ and attempted to subvert the medical inquiry regarding the risks of ONJ, all with the knowledge and approval of high-ranking officials within the company. In addition, the evidence would support the conclusion that Novartis managers took this course of action for purely financial reasons, in order to protect its marketing of bisphosphonate drugs. Indeed, the evidence presented at trial against Novartis on this issue was of such sufficient strength that during closing arguments, counsel for Novartis felt compelled to concede that there was "bad news" for

Novartis because documents admitted during trial showed that Novartis managers had, in the words of defense counsel, engaged in "improper" thinking, were "less than perfect," and had raised ideas of doing things that "probably should not have been thought about" to prevent publication of or obscure medical evidence regarding risks of ONJ with Aredia and Zometa. In addition, there was sufficient evidence presented to support the jury's conclusion that this intentional deception and suppression of medical evidence by Novartis was related to Mrs. Fussman's jaw injuries, because the evidence was sufficient to support the finding that the actions by Novartis were undertaken as part of an effort to keep doctors and other medical professionals from learning of the ONJ risks, and it was this lack of adequate warning and information that the jury had already determined was the proximate cause of Mrs. Fussman's injuries.[7]

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[7] In its brief, Defendant contends that Novartis' conduct could not have been "willful or wanton" unless Novartis intentionally concealed a risk that it should have known was likely to cause harm. From this principle, Defendant apparently takes the position that Novartis cannot be liable even for intentional deception or suppression of the ONJ risks, because the odds of a bisphosphonate user developing ONJ were so small that the deception could not have been "likely" to cause harm. However, the "likelihood" at issue here is not the likelihood of a bisphosphonate user developing ONJ; to adopt Defendant's position on this point would require a plaintiff to establish that the un-warned side effect would appear in over 50% of individuals who used the drug in order to establish that the intentional failure to disclose it was "willful or wanton." Instead, in the present context, the "likelihood" of harm at issue is the likelihood that intentional deception or concealment of medical evidence regarding a potential side effect prevented medical professionals from being adequately warned of the potential side effect, which was then related to the ultimate injury sustained

The Court also notes that Defendant contends that because Mrs. Fussman began to suffer jaw injuries in March 2003, only evidence prior to March 2003 should be considered in making this punitive damages determination. However, the Court at trial rejected this contention and allowed Plaintiff to present evidence of Defendant's continuing conduct during the time period while Mrs. Fussman continued to receive the Aredia and Zometa and her jaw injuries continued. The Court will not reconsider that determination at this time. Therefore, in considering whether sufficient evidence was presented to support the punitive damages award in this case, the Court has considered the evidence presented at trial with regard to Novartis' conduct during the time period while Mrs. Fussman continued to receive Aredia and Zometa. Having considered this evidence, and for the reasons noted above, the Court concludes that the jury's award of punitive damages is supported by substantial evidence and the Motion for Judgment as a Matter of Law will be denied.[8]

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by the Plaintiff. *Cf. Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995) (upholding punitive damage award for intentional suppression of or deception regarding potential side effects, without requiring that the side effects be "likely" to occur in a majority or certain percentage of individuals using the drug); *Everhart v. O'Charley's, Inc.*, 200 N.C. App. 142, 683 S.E.2d 728 (2009) (concluding that under North Carolina law, punitive damages were available if a plaintiff demonstrated "a connection" between the aggravating conduct and the plaintiff's alleged harm).

[8] The Court notes that Defendant alternatively asserts Rule 59(e) as a basis for its Motion, asking the Court to amend the Judgment in this case and remove the punitive damages award. However, Defendant has not stated the basis for asserting a motion under Rule 59(e), nor has Defendant shown any intervening change in controlling law, any new evidence not

III. Motion for a New Trial [Doc. #537]

In its Motion for a New Trial [Doc. #537], Defendant contends that it is entitled to a new trial under Federal Rule of Civil Procedure 59(a). In considering a motion for a new trial, the Court may weigh the evidence presented during the trial and may consider the credibility of the witnesses in order to determine if the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice. *See* Fed. R. Civ. P. 59(a)(1); *Chesapeake Paper Prods. Co. v. Stone & Webster Engineering Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995); *Poynter v. Ratcliff*, 874 F.2d 219, 222-223 (4th Cir. 1989). In addition, a motion for a new trial may "raise questions of law arising out of alleged substantial errors in admission or rejection of evidence." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940). However, Federal Rule of Civil Procedure 61 provides that "[u]nless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial . . . . At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

As the basis for the Motion for a New Trial, Defendant contends that (1) Plaintiff failed to present evidence to sufficiently establish that Mrs. Fussman's injury was proximately caused by a lack of warnings;

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available at trial, or any clear error of law or manifest injustice. *See Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir. 2006) (discussing Rule 59(e) standard). Therefore, to the extent that Defendant has alternatively brought its Motion pursuant to Rule 59(e), that motion would also be denied.

(2) the Court erred in admitting or excluding certain evidence; and (3) the Court erred in instructing the jury with respect to punitive damages and the learned intermediary doctrine. The Court will consider each of these contentions in turn.

1. Motion for New Trial based on Proximate Causation

With respect to Defendant's first contention that there was a lack of evidence of proximate causation, this Court and the Multi-District Court repeatedly rejected this contention prior to trial. In addition, the Court has addressed this issue at length above with respect to Defendant's Motion for Judgment as a Matter of Law, and concluded that sufficient evidence was presented to support the jury's conclusion that the failure to provide an adequate warning was the proximate cause of Mrs. Fussman's injuries. In considering Defendant's present Motion for a New Trial, the Court has considered and weighed the evidence presented at trial and concludes that the jury's proximate cause determination was not against the clear weight of the evidence, was not based on false evidence, and did not result in a miscarriage of justice.

2. Motion for New Trial based on Evidentiary Rulings

With respect to the evidentiary rulings, the Court notes first that most of Defendant's contentions ask this Court to reconsider its prior evidentiary rulings in this case, which the Court is not inclined or persuaded to do here. For example, Novartis contends first that, although the Court initially excluded evidence regarding subsequent changes to the label

in 2007, the Court erred by ultimately allowing some evidence of the 2007 label to be admitted at trial. However, in considering this contention, the Court notes that after the Court agreed to exclude the 2007 label, Defense counsel nevertheless made ongoing references to Novartis' present labels and present FDA approval before the jury. Moreover, Novartis' expert witness, Dr. Arrowsmith, further opened the door to testimony regarding the 2007 label by volunteering information that was then subject to impeachment. Therefore, the Court will not reconsider its determination as to this evidence.

As an additional evidentiary objection, Novartis next argues that the Court improperly excluded the testimony of Dr. McGrath as a "corporate" witness for Novartis. However, the Court repeatedly allowed Defendant the opportunity to present Dr. McGrath's testimony to the extent Defense counsel could provide a sufficient foundation for Dr. McGrath's testimony based on her personal knowledge and not based upon summaries she may have had from other Novartis employees. Defense counsel did not provide this basic level of foundation, even after repeated opportunities and direction from the Court. Defense counsel also declined to call as a witness any other corporate representative with direct knowledge of actions taken by Novartis prior to Dr. McGrath joining Novartis. Thus, the fact that evidence was not presented on this issue is a result of Defense counsel's failure to lay a proper foundation or to present a witness with personal knowledge. Novartis also contends that the Court improperly admitted hearsay in e-mails to Novartis employees from members of Novartis' Advisory Board. However, the statements were not hearsay because they were statements by Novartis or its agents, made on the subject of their work on the

Novartis Advisory Board. Moreover, the statements were introduced to establish what information Novartis employees had received from Novartis' consultants, and the actions Novartis officials took in response, rather than for the truth of the matter asserted. Therefore, the Court will not reconsider its evidentiary determinations on this issue.

Novartis also contends that the Court improperly excluded Dr. Ruggiero's video deposition. However, Novartis did not notice Dr. Ruggiero's deposition for the present case, and was attempting to use a video deposition taken in a separate case, contrary to the rules set out for the Multi-District Litigation. Moreover, the Court during trial noted that Defendant could choose to present Dr. Ruggiero as a live witness. The Court also noted that if portions of the video deposition were presented, Plaintiff would at least be entitled to present the remainder of the video deposition, to which Defendant objected on the basis that the video deposition involved a separate plaintiff's medical information and involved Dr. Ruggiero's expert testimony in that case. The Court finds no basis to reconsider its determination as to Dr. Ruggiero's video deposition.

Novartis also objects to the introduction of evidence showing their national sales figures, which were allowed as part of the punitive damages consideration. However, the Court addressed this issue in rulings prior to and during trial, and the Court finds no basis to reconsider those rulings now. In addition, the jury was instructed that in considering punitive damages, the Plaintiff was required to prove by clear and convincing evidence that any wilful or wanton conduct of Defendant was related to the injury to Mrs. Fussman for which they had already awarded

relief, and further that any amount awarded as punitive damages was required to bear a rational relationship to the sum reasonably needed to punish the Defendant for egregiously wrongful acts committed against Mrs. Fussman. The national sales figure related only to Defendant's ability to pay punitive damages, not to any attempt to impose punitive damages based on potential harm to other individuals.

In sum, as to all of these evidentiary contentions, the Court notes that prior to and during trial in this case, the Court made many evidentiary rulings that were further set out in open court and in the Court's rulings on the parties' Motions in Limine, and Novartis has not presented any basis for reconsideration of those prior decisions. Moreover, even if there were a basis to reconsider those decisions, Novartis has not established that these evidentiary determinations caused substantial harm or would otherwise entitle Novartis to a new trial on the claims.

3. Motion for New Trial based on Jury Instructions

Finally, Novartis contends that the Court erred in failing to give additional jury instructions regarding punitive damages and erred in failing to instruct the jury that Novartis' duty to warn was limited to prescribing physicians. However, the Court gave the jury the North Carolina Pattern instructions for punitive damages and for negligence claims based on a duty to warn. To the extent that Defendant continues to contend that the duty to warn extends, as an initial matter, only to the prescribing physician, the Court considered and rejected that contention in ruling on Defendant's Motion for Summary Judgment prior to trial, and the Court finds no basis to change that

determination now.[9] As set out in greater detail in the Court's

Summary Judgment determination, North Carolina General Statute § 99B-5 provides an affirmative defense in a product liability action – whether based in tort law or contract law – where a prescription drug manufacturer provides an adequate warning to the prescribing physician.[10] This defense was presented to the jury in this case using the language set out in the North Carolina Pattern Jury Instructions, and the jury rejected the defense, concluding in any event that Novartis had failed to provide an

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[9] Indeed, Defendant's own expert witness, Dr. Arrowsmith, emphasized that warnings regarding Aredia and Zometa in the form of "Dear Health Care Provider" letters were provided not just to prescribing physicians, or even just to doctors, but instead were directed to other health care providers including nurses, dentists, and dental hygienists.

[10] Under the statute, "no manufacturer or seller of a prescription drug shall be liable in a products liability action for failing to provide a warning or instruction directly to a consumer if an adequate warning or instruction has been provided to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the claimant unless the United States Food and Drug Administration requires such direct consumer warning or instruction to accompany the product." N.C. Gen. Stat. § 99B-5(c). Thus, even if a plaintiff otherwise establishes a negligent failure to warn claim, the defendant nevertheless enjoys a "safe harbor" if the defendant can prove that it provided an adequate warning to the prescribing physician. This defense was presented to the jury in this case, and the jury concluded that this defense would not apply because Novartis had not provided an adequate warning to Dr. Shaw as the prescribing physician. This Court finds no basis to provide Defendant with greater protection than that set out in the language of the statute, or to interpret the statute in a way that is contrary to the case law and the North Carolina Pattern Instructions.

adequate warning to Dr. Shaw as Mrs. Fussman's prescribing physician. As such, the Court concludes that there is no basis for Defendant's request for a new trial on this issue.

Thus, having considered all of the contentions raised in the Motion for a New Trial, the Court finally concludes that the jury's verdict was not against the clear weight of the evidence, was not based on false evidence, and will not result in a miscarriage of justice. *See* Fed. R. Civ. P. 59(a)(1); *Chesapeake Paper Prods.*, 51 F.3d at 1237. The Motion for a New Trial [Doc. #537] will therefore be denied.

IV. CONCLUSION

For the reasons set out above, IT IS ORDERED that Defendant's Motion for Judgment as a Matter of Law on All Claims [Doc. #539], Motion for Judgment as a Matter of Law on Punitive Damages [Doc. #535], and Motion for New Trial [Doc. #537] are DENIED.

This, the 21st day of November, 2011.

/s/ James A. Beaty
United States District Judge

APPENDIX C

RELEVANT EXCERPTS OF PERTINENT STATUTORY AND REGULATORY PROVISIONS

21 U.S.C. § 337(a)

Except as provided in subsection (b) of this section, all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States. . . .

* * * *

21 U.S.C. § 355(a)

(a) Necessity of effective approval of application

No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) of this section is effective with respect to such drug.

* * * *

21 U.S.C. § 355(e)

(e) Withdrawal of approval; grounds; immediate suspension upon finding imminent hazard to public health

The Secretary shall, after due notice and opportunity for hearing to the applicant, withdraw approval of an application with respect to any drug under this section if the Secretary finds . . .

* * * *

21 U.S.C. § 355(j)(5)(F)(ii)

If an application submitted under subsection (b) of this section for a drug, no active ingredient (including

any ester or salt of the active ingredient) of which has been approved in any other application under subsection (b) of this section, is approved after September 24, 1984, no application may be submitted under this subsection which refers to the drug for which the subsection (b) application was submitted before the expiration of five years from the date of the approval of the application under subsection (b) of this section . . . .

* * * *

21 U.S.C. § 355(j)(5)(F)(iii)

If an application submitted under subsection (b) of this section for a drug, which includes an active ingredient (including any ester or salt of the active ingredient) that has been approved in another application approved under subsection (b) of this section, is approved after September 24, 1984, and if such application contains reports of new clinical investigations (other than bioavailability studies) essential to the approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application submitted under this subsection for the conditions of approval of such drug in the subsection (b) application effective before the expiration of three years from the date of the approval of the application under subsection (b) of this section for such drug.

* * * *

21 C.F.R. § 10.30 Citizen Petition

(a) This section applies to any petition submitted by a person (including a person who is not a citizen of the United States) except to the extent that other

sections of this chapter apply different requirements to a particular matter.

. . .

Citizen Petition

The undersigned submits this petition under ___ (relevant statutory sections, if known) of the ___ (Federal Food, Drug, and Cosmetic Act or the Public Health Service Act or any other statutory provision for which authority has been delegated to the Commissioner of Food and Drugs under 21 CFR 5.10) to request the Commissioner of Food and Drugs to ___ (issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 9 – NOVEMBER 12, 2010
[WITNESS – DEFENSE EXPERT
DR. JANET ARROWSMITH]

* * * *

[47] Q Just to be clear, Dr. Arrowsmith, from the time that Novartis received the first report of ONJ in patients on bisphosphonates, December 6, 2002, it had 15 days to report that; is that right?

A Yes, that's correct.

Q And they reported it in six days?

A Yes.

* * * *

[61] Q Let's back up a second, Dr. Arrowsmith, to the time in September of 2003 that Novartis effected the label change that you presented in front of the jury.

What procedural mechanism did Novartis use in order to change the label the same month that Dr. Marx published his letter to the editor?

A They used what's called a CBE-0, or changes being effected zero, which means that it is a labeling change that doesn't require prior approval from FDA before you start printing the label. …

* * * *

[64-65] Q Now, has FDA ever told Novartis that its labeling for Aredia or Zometa was inadequate?

A No.

Q Has FDA ever taken any enforcement action against Novartis for mislabeling or misbranding Aredia or Zometa with respect to any issue?

A No.

Q Based on your ten years of experience at FDA and your understanding of the regulations, your review of the documents, did Novartis in its handling of the ONJ issue do anything that you believe violated any FDA rule, regulation, or standard?

A No.

* * * *

Q Did Novartis ever fail to comply with any regulatory duty concerning following up on adverse event information?

A No.

Q Did Novartis ever fail in its duties to report adverse events to the FDA as required by the regulations?

A No, they reported them well within the time frame, certainly, with ONJ, well within the time frames that were required.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 1 & 2 – NOVEMBER 1-2, 2010
[WITNESS – PLAINTIFF RITA FUSSMAN]
[VIDEOTAPED DEPOSITION DATED
JANUARY 17, 2008]

* * * *

[Video Deposition Page 131]

Q. Have you had any skeletal fractures relating to your—related to your cancer?

A. Not that I know of.

Q. Have you experienced any skeletal compression from your cancer?

A. By compression, what are you referring to?

Q. Compression—basically, the spine constricts—

A. Pain?

Q. and makes people shorter. Generally.

A. I don't know if I'm shorter or not.

Q. No doctors ever told you that your skeletal—your skeleton had compressed?

A. No.

Q. Specifically your spine. No doctor ever told that to you?

A. No.

* * * *

[Video Deposition Page 169-170]

Q. And in the sixth line through the eighth line, there's a sentence that says, She states that her body tells her when it is time for Zometa because she perceives the sensation of stiffening in her back. Do you see that?

A. Yes.

Q. Can—can you explain to me what—

A. What that means?

Q.—what that means? First of all, do you—do you recall having that conversation with the doctor?

A. I think so. It probably made my bones feel better, and—and it was time to have it again.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 11 – NOVEMBER 16, 2010
[WITNESS – DEFENSE EXPERT
DR. ALLEN LIPTON]

* * * *

[32] Q. And based on your involvement in—in that clinical trial, do you know why Novartis continued to test Aredia after it was approved by the FDA to treat hypercalcemia of malignancy?

A. Yes.

Q. Could you tell us?

A. Well, the approval for hypercalcemia was in 1991, but there were earlier studies with Aredia and the older bisphosphonate clodronate from Europe that suggested that these drugs could prevent or delay skeletal-related events. So Novartis set up studies actually before and after 1991 to look at skeletal-related events as an end point because the label in 1991 was for only treating hypercalcemia. Novartis

thought they had a drug that would be beneficial for skeletal-related events, and that led to the labels in '95 and '96 for skeletal events in multiple myeloma and in breast cancer. So it was to expand the usage of the drug.

Q. What was the basis of the FDA's approval of Aredia for the treatment of breast cancer in 1996?

A. The basis of the 1996 approval of Aredia for breast cancer was two randomized placebo, double-blinded clinical trials in patients with metastatic breast cancer.

* * * *

[56-57] Q. After the first label change in 2003, did Novartis again change the Zometa labels to include additional data and suggestions regarding osteonecrosis of the jaw?

A. Yes. The second label change took place in March of 2004 and the things that were different in the March 2004 label from the September 2003 label were in the two boxes here. So the sentence was added: "The majority of reported cases are in cancer patients attended to a dental procedure. Although causality cannot be determined, it is prudent to avoid dental surgery as recovery may be prolonged."

* * * *

[58-59] Q. Now, Doctor, because of Mrs. Fussman's bone metastases, is it your opinion, to a reasonable degree of medical certainty, that she was at risk of having skeletal-related events?

A. Everybody who is diagnosed with bone metastasis is at risk of developing skeletal events.

Q. And did Mrs. Fussman suffer any skeletal complications while she was on Aredia or Zometa?

A. She received Aredia or Zometa from June of 2001 through June of 2005 and suffered no skeletal-related events during that period.

Q. There's been testimony in the case relating to Mrs. Fussman's radiation to the spine that she received in May 2006 after she stopped taking Zometa. Did she have any other skeletal complications after May of 2006?

A. Yes. After—well, after she stopped the—before that—after she stopped the Zometa, her pain the next couple of months, by November 2005, worsened. She required radiation therapy in 2006; and then just prior to her demise she developed hypercalcemia, which was treated with Aredia.

Q. And what was the result of her preventative treatment?

A. I'm sorry?

Q. What was the result of the Aredia treatment you just alluded to?

A. At the terminal phase with her hypercalcemia?

Q. Yes.

A. It controlled her hypercalcemia within a few days.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 9 – NOVEMBER 12, 2010
[WITNESS – DEFENSE EXPERT
DR. KENNETH MANNING]

* * * *

[36-37] Q Did the records reflect whether or not Mrs. Fussman suffered any skeletal-related complications during this time period?

A Yes, they do.

Q And what do they indicate?

A In May of 2006, Mrs. Fussman's back pain escalated to the point that she did receive a course of radiation therapy to her lower back for pain control; and in the studies, that was defined as a severe skeletal-related event.

Q And how long had Mrs. Fussman been off of the Zometa when she suffered the SRE that you've just described requiring radiation to the spine?

A That was approximately 11 months after her last dose of Zometa.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 4 – NOVEMBER 4, 2010
[WITNESS – PLAINTIFF EXPERT
DR. ROBERT MARX]

* * * *

[66-67] Q. Dr. Marx, among other things in your article, you wrote that "Such is the clinical value of these bisphosphonates, which have dramatically extended life, reduced skeletal complications, reduced pain, and thus improved the quality of life for individuals with metastatic bone cancer." Is that right?

A. That's correct.

Q. And you stated as well that "the benefits of IV," intravenous, "bisphosphonate therapy far outweighed the risk of developing bisphosphonate-induced exposed bone"; isn't that correct?

A. That's correct.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 11 – NOVEMBER 16, 2010
[WITNESS – DEFENDANT EMPLOYEE
DR. LYNNE MCGRATH]

* * * *

[16] Q. Dr. McGrath, did FDA approve Aredia as safe and effective for hypercalcemia of malignancy?

A. Yes, they did.

Q. And did FDA approve Aredia safe and effective for bone metastases relating to breast cancer?

A. Yes, they did.

Q. And did FDA approve Zometa safe and effective for hypercalcemia of malignancy?

A. Yes, they did.

Q. Finally, did FDA approve Zometa as safe and effective for bone metastases from breast cancer and from other solid tumors?

A. Yes, they did.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 6 – NOVEMBER 8, 2010
[WITNESS – PLAINTIFF EXPERT
TALIB NAJJAR, D.M.D.]
[VIDEOTAPED DEPOSITION
DATED OCTOBER 20, 2010]

* * * *

[Video Deposition Pages 76-77]

Q. Isn't it true, Dr. Najjar, that the clinical value of those bisphosphonates is that they have dramatically extended life, reduced skeletal complications, reduced pain and, thus, improved the quality of life for individuals with metastatic bone cancer?

MR. VECCHIONE: Objection; beyond the scope.

A. Based on the literatures, this is true, yes.

* * * *

[Video Deposition Pages 88-89]

Q. And are you familiar with the task force report that's published in the Journal of Bone and Mineral

Research headed—it's called "The Report of the Task Force of the American Society of Bone and Mineral Research."

Are you familiar with that?

A. I have seen it. I remember seeing—reading the article, yes.

MR. BERGER: All right. Let me mark as DX 7002 a copy of that editorial.

(Whereupon, exhibit is received and marked Defendant's Exhibit 7002.)

BY MR. BERGER:

Q. And if you would look, please, at the second page under "expert committee," you'll see that two of the organizations to which you belong, the American Academy of Oral Medicine and the American Association of Oral and Maxillofacial—

A. Pathology.

Q. —Surgeons, and the American Academy of Oral and Maxillofacial Pathology have participated in this task force. Right?

A. Right.

Q. Now, would you look, please, at page 1481, and under Section 2, on the left, the second quote is "bisphosphonates have not been proven to be causal."

Do you see that?

A. Yes, I do.

Q. And have you ever filed an objection with the AAOMS or any of your other organizations to their participation in this joint task force or their participation in this report?

A. No, I did not.

* * * *

[Video Deposition Pages 94-95]

Q. Then, if you look a little further down on page 1483 of the task force report, it mentions Table 6 and it says: "Table 6 summarizes risk factors currently felt to predispose to bisphosphonate-associated ONJ."

Do you see that?

A. Yes, I do.

Q. And the risk factors that are mentioned in this article on ONJ in patients taking bisphosphonates include cancer. Correct?

A. Right.

Q. Anticancer therapy. Correct?

A. Right.

Q. Malignancy. Correct?

A. Right.

Q. That's another way to say cancer.

Right?

A. Right.

Q. And then preexisting dental or periodontal disease.

Do you see that?

A. Yes, sir.

Q. And you agree with all those as being risk factors. Correct?

A. Yes, I do.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 3 – NOVEMBER 3, 2010
[WITNESS – PLAINTIFF EXPERT
DR. SUZANNE PARISIAN]

* * * *

[18-19] MR. GERMANY: Your Honor, at this time we would tender Dr. Parisian as an expert in the field of FDA regulatory affairs.

* * * *

MR. BERGER: We'll reserve our objections.

THE COURT: The Court will allow the witness to testify as an expert concerning the general FDA regulatory requirements, and the procedures and any compliance that would have been expected and required of the Defendant as to those regulatory requirements.

* * * *

[25] Q. All right. Now, we just looked at Exhibit 21, which was what you described as being the

launch label for Zometa from August of 2001. Do you remember that?

A. Yes, sir.

Q. And this particular label is dated February 2002?

A. Correct.

Q. Can you explain to the jury why there was a different label between—from—from August 2001 and February 2002?

A. The—the first launch approval by the FDA was for hypercalcemia of malignancy. That was the 2001 launch approval. And there was a new indication approved by the FDA for the second label, which was for solid tumors. So that was what the second label was for, a new indication.

[46] Q. Dr. Parisian, the literature that's attached to that particular e-mail on the issue of osteopetrosis, is, again, that the type of literature that in your experience would have been submitted to the FDA as a part of the approval process?

A. Yes. And discussed with the FDA because it's actually a genetic condition very similar to what the proposed mechanism is going to be for Zometa. So they're relevant in terms of when you inhibit osteoclasts what types of conditions do you produce or potential risks. And so this is a genetic condition where the osteoclasts are inhibited and so they're very relevant in terms of if you're making a drug that's going to be very potent at inhibiting osteoclasts.

* * * *

[55-57] Q. Now, given—based on your review of the Gotcher and Jee rat article and the osteopetrosis e-mail and article cited by Dr. Goessl, are these the types of problems that Novartis should have been looking for in the clinical trials?

MR. BERGER: Objection, Your Honor. Rule 702.

THE COURT: Overruled.

A. Yes. Because the osteopetrosis literature is about the jaw and patients with the inhibited osteoclasts have problems with their jaw and the rat-associated bisphosphonate, not Zometa but a bisphosphonate with denuded jawbone, because of the rapid turnover of the jawbone. So that would be an area you would expect or potentially could have expected if you're designing a clinical trial that you're going to see adverse events. So you would include that in your protocol to look for that type of change as just a safety issue.

THE COURT: Is it something that the FDA, as a part of its regulatory requirements, would have required a pharmaceutical company to do?

THE WITNESS: If they had been aware of it. In terms of the discussions that I saw, it was never brought up to the FDA; but in terms of design of a protocol for safety information that was foreseeable and relevant to human population, yes, sir.

Q. Dr. Parisian, based upon your review of the materials Novartis submitted to the FDA, did you find any evidence that the Jee and Gotcher rat article that Dr. Green testified he had in his files in 1986 was ever submitted to the FDA?

A. I did not ever find it submitted and I did not ever find a discussion by any of the medical officers that they were aware of the issue.

Q. And then as far as the issue of osteopetrosis as laid out in Dr. Goessl's e-mail, did you ever find any evidence that that information was ever submitted to the FDA prior to July of 2005?

A. No, sir. And, again, the medical officer has to be aware of it, so I saw no discussion where a medical officer was aware of that information.

Q. In your opinion, should that information, both the Gotcher and Jee article and the osteopetrosis articles, have been submitted to the FDA?

MR. BERGER: Objection, Your Honor. He asked that already.

THE COURT: Overruled.

A. Yes, sir, particularly in terms of the potency of Zometa.

* * * *

[66-67] Q. Explain to us what—well, first of all, does that have some meaning in terms of FDA?

A. Yes. All manufacturers of FDA-regulated products, drugs, devices have a requirement to look for safety signals in terms of their premarketing issues, things to be concerned about; and then once a product is marketed, there is a group of people in the manufacturer called the pharmacovigilance people that are looking for safety signals; that there may be something they need to look at to see if there is a safety issue with their product to follow up for. So it's—part of monitoring drugs is that all manufacturers is supposed—is required to be monitoring for safety signals

that they need to address to make sure that their product stays safe and effective and that no one is hurt.

Q. Can you give us an example of a safety signal?

A. A safety signal would be if you took a drug and all of a sudden a horn grew out of your head. That could be a safety signal. This is not what is intended for that drug, and so that would be a signal that that drug manufacturer would have to address to make sure that either you were warned that a horn was going to grow out of your head or that's something they need to look and find out why horns grow out of people's heads.

Q. Now, in April of 2002, was there any information in either the Aredia label or the Zometa label about osteonecrosis?

A. No. Or any kind of an issue with the jaw, no.

Q. In your opinion, based upon your experience at the FDA and your understanding of the regulations, if Novartis received an inquiry to the effect "Do bisphosphonates cause osteonecrosis?" would that have constituted a safety signal?

A. It would constitute a potential complaint that could be representing a safety signal; and so by the regulations under 314.80 if you receive a potential complaint or some negative effect, you have a duty as a manufacturer to follow up. And there are groups of people at the company that that's their job is to follow up that type of information and find out is this indeed a safety signal and, if it is, what do we need to do about it.

Q. Did you find any evidence that Novartis followed up on the April 2002 inquiry "Do bisphosphonates cause osteonecrosis?"

A. No.

* * * *

[71] Q. Now, again going back to safety signals, in your opinion, based upon your work at the FDA and your familiarity with the regulations, does this report to Novartis constitute a safety signal?

A. Yes. And that's also what is on the e-mail is that—when it talks about a spontaneous adverse event, the person who's giving it to Novartis is saying, Is this something that needs to be reported to the FDA as a spontaneous adverse event? So this is -- in terms of smoke and house fires, this is a lot of smoke.

* * * *

[77-78] THE COURT: Well, unless it's something that is the type of thing that should have been presented to the FDA as a matter of compliance, then I will sustain the objection.

MR. GERMANY: Yes, sir.

THE COURT: She can't just read it without some connection of what should have been presented to the FDA.

MR. GERMANY: Yes, sir.

(Conclusion of the bench conference.)

Q. (By Mr. Germany) Dr. Parisian, looking at the fourth bullet point of the document, it's written: "All advisors acknowledge that there is not clarity around the contribution of the many potential causes, but

all strongly believe there is a role of the bisphosphonates."

First of all, is that the kind of information that, based upon your experience of the regulations, Novartis should have provided to the FDA?

A. Yes, sir, particularly at this period of time to physicians and to dentists.

Q. And based upon your review of the evidence -- I'm sorry. Based upon your review of the Novartis documents, did you find any evidence that that information was provided to the FDA?

A. Not saying that the ONJ was associated with the bisphosphonates. There was a focus on all the other potential causes which they say they can't decide, but they do all say the bisphosphonate is the one cause that's associated with the reports.

Q. When you say that, you're speaking of the advisors?

A. The advisors.

* * * *

[94 Q. In your opinion, again, based upon your experience as an FDA officer and your familiarity with the FDA rules and regulations, should there have been something in the 2001 and 2002 Zometa label about osteonecrosis or jaw problems?

MR. BERGER: Same objection, Your Honor.

A. Jaw problems—

THE COURT: Excuse me, ma'am. Wait until I rule on the objection.

THE WITNESS: Yes, sir.

THE COURT: Overruled.

A. Yes, yes. There was information in the medical literature. There had been information in the clinical trials from Aredia. So the potential for an issue with jaws should have been in the label as a risk that a physician would need to consider.

[95] Q. Now, let's turn to the March 2003 Zometa label. I believe you told us there was no information about osteonecrosis of the jaw or jaw problems at all in that label?

A. Correct.

Q. Again, based on your experience as an FDA officer and your familiarity with the rules and regulations, do you have an opinion as to whether there should have been information in that label about osteonecrosis or jaw problems?

MR. BERGER: Same objection, Your Honor.

THE COURT: Overruled.

A. Yes, for the same reasons for the 2001 and 2002, 2003. There should be information about risks to potential jaw.

[96] Q. Now I want to turn, if we can, to the September 2003 label. Now, that label does for the first time have some information?

A. Correct.

Q. Where was that information located?

A. In the "Adverse Reactions," "Post-Marketing Experiences."

Q. Now, based upon your experience as an FDA officer and your familiarity with the FDA rules and regulations, do you have an opinion as to whether or

not the information contained in the "Post-Marketing Experiences" was adequate?

MR. BERGER: Objection. Rule 702, Your Honor.

THE COURT: Overruled.

A. Yes, I do have an opinion.

Q. What is that opinion?

A. That it wasn't adequate because it implies it's not related to the drug, which there's evidence to support the one common factor for all these reports has been taking bisphosphonate. This—

* * * *

[100-101] Q. Dr. Parisian, based upon your experience as an FDA officer and your familiarity and use of the rules and regulations, do you have an opinion as to whether or not the language contained in the "Precautions" section of the label for August 2004, November 2004, and April 2005 is adequate?

MR. BERGER: Same objections under Rule 702, Your Honor.

THE COURT: Overruled.

A. Yes, sir, I do.

Q. What's that opinion, please?

A. Again, it's still inadequate because it's implying that it's related to the cancer therapy and it's only seen in cancer patients. By the time this change was made, there had been reports of ONJ in patients who were not cancer patients; and that's not conveyed there so—which makes it stronger that it's associated with a bisphosphonate. So, again, the same issue. It appears it's only cancer patients and it

may be related to their chemotherapy drugs or corticosteroids.

* * * *

[111-112] Q. As we sit here today, Dr. Parisian, you know that Aredia is still considered to be safe and effective by FDA, correct?

A. It is still an approved drug, yes, sir.

Q. As we sit here today, you know that Zometa is still considered to be safe and effective by FDA?

A. It's still an FDA-approved drug, yes, sir.

Q. You know that millions of patients have benefited and continue to benefit from Aredia and Zometa, correct?

A. I'm not sure of the number of patients, but patients have benefited from both drugs.

Q. You're not here to suggest that these drugs should not be on the market, are you?

A. No, sir.

Q. Now, you had a lot of discussion about the labels. You know that FDA has approved the contents of the Aredia label at all times, correct?

A. The label is approved.

Q. You know that FDA has approved the contents of the Zometa label at all times, correct?

A. It is an approved label, yes, sir.

* * * *

[113] A. Those are the cases that I've chosen. They're not all totally plaintiffs, but those are the majority of cases I have.

Q. And the majority of those are pharmacological cases, correct?

A. No. There would be a mix of pharmaceutical and medical device cases.

Q. As of last year, Dr. Parisian, you had testified in court well over 50 times; isn't that right?

A. I'm not sure. It's 35 to 50. I'm not sure how many times.

* * * *

[133-35] Q. Okay. This is one of the labels that you criticized in your direct testimony, correct?

A. Yes, sir. Well, which year is this one? I mean, this is one that's criticized. I just want to know what label we're looking at.

* * * *

THE COURT: Go to the last page. I think the date may be on there.

Q. September 2003.

A. Yes, sir.

* * * *

Q. Now, the first sentence here: "Cases of osteonecrosis (primarily of the jaws) have been reported since market introduction." That was true, was it not?

A. Yes, sir.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 6 – NOVEMBER 8, 2010
[WITNESS – TREATING ONCOLOGIST
DR. HEATHER SHAW]

* * * *

[25-27] "Q. Let's talk about breast cancer and, you know, the possible benefits these drugs have for breast cancer treatment—I mean breast cancer patients and, you know, perhaps Mrs. Fussman too.

"A. Okay. So initially the indications would be for prevention of fracture due to bony metastases and decrease in pain. So improvement in quality of life with use of these agents.

"Q. When you say, 'decrease in pain,' you're talking about bone pain?

"A. Exactly. Decrease in bone pain, due to bony metastases.

"Q. Can you explain to me again, generally, in layman's terms, when a cancer—like breast cancer metastasizes to bone, as in Rita Fussman. Pathologically

speaking, what is occurring in the bone that causes problems and pain?

"A. Generally the tumor cells go to the bone, and they can either cause scarring there or sort of eat out a hole in the bone. And either one of those can irritate the nerves and basically cause the bone pain.

"Q. And why is it that you prescribe bisphosphonate—intravenous bisphosphonate drugs to treat that condition?

"A. Bisphosphonates rebuild the bone essentially. So that, again, prevents the fracture risk and, again, decreases the pain."

"Q. My recollection is that Mrs. Fussman's cancer first manifested in approximately '86. She was not treated by you at that time; correct?

"A. Correct.

"Q. All right. Her cancer recurred to her chest wall, not in the metastatic form, in 1999; is that correct?

"A. Yes. It was a chest wall recurrence."

"Q. And then she was, I guess, somehow referred to you or to Duke in, you know, the earlier portion of 2001; correct?

"A. Yes, I believe that was in May of 2001—

"Q. Okay.

"A.—when I first saw her."

* * * *

[32] "Q. And can you just tell me why you decided to switch her to Zometa?

"A. Again, I don't recall the specifics for this, but, in general, at the time we were trying to switch everyone from pamidronate to Zometa, because of the decreased length of the infusion time.

* * * *

[40] "Q. And do you recall discussing the issue with Mrs. Fussman and agreeing that she would continue to go ahead and receive the Zometa?"

"A. Again, I don't recall specifics, but my usual practice would have been to discuss my findings with the patient, discuss any—any potential medical decision making that would need to be made, and then come to a shared decision with the patient based on whatever new information had been found.

"Q. Do you have any reason to believe you would have not complied with your normal practice with Mrs. Fussman on that date?

"A. No.

"Q. So in all likelihood, you and she talked about it, and you agreed to go forward with her bisphosphonate treatment; correct?"

"A. Again, that would be consistent with my usual practice.

* * * *

[55] "Q. —'currently has no evidence for progressive'—'progressive osteonecrosis; therefore, we will restart her Zometa for her known bony disease. We plan on having her get her Zometa today and return in four weeks for Zometa.' Did I read that correctly?

"A. Yes.

"Q. and you've stated already, I believe, that you don't have any specific or general recollection of that discussion with Mrs. Fussman; correct?

"A. That's correct.

"Q. But it would have been your general practice, as you've testified, to have discussed it and made the decision to restart Zometa jointly?

[56-57] "A. Yes."

"Q. All right. Now, let me just call your attention, I guess, to 7/12/05. There comes a period of time where I think you finally take Mrs. Fussman off Zometa.

"And as we've gone through this is it your recollection that Mrs. Fussman's jaw problems would start and stop; is that fair?

"A. Yes.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 5 – NOVEMBER 5, 2010
[WITNESS – TREATING DENTIST
DR. JOEL WAGONER]

* * * *

[33-34] Q. And the date of those extractions was what?

A. December 16th, 2002.

Q. And those were teeth numbers 4, 5, 12, and 13?

A. Yes.

Q. Okay. Now, you then removed on—in January?

A. December 10th.

Q. December.

A. I'm sorry. February 10th, 2003.

Q. February. That's right.

A. Excuse me.

Q. The other five remaining teeth in the front?

A. That's correct.

Q. Okay. Let's go ahead and mark those.

A. Okay.

(The witness complied with the request.)

Q. All right. So 6 and 7 were removed February 10th, 2003, and 9 through 11—9, 10, and 11 were also removed on February 10th, 2003, correct?

A. Yes.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 9 – NOVEMBER 12, 2010
[RULE 50 HEARING AT CLOSE OF PLAINTIFF'S CASE]

* * * *

[50] THE COURT: Counsel, as you may be aware, the Court has released the jury until 2:00. They have been in the jury room since we started this morning and, of course, we have other matters that the Court might take up.

With respect to the motions made by the defendant under Rule 50 at the close of the plaintiff's evidence, the Court will deny those motions both as to the underlying case and as to punitive damages.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No.: 1:06CV00149-JAB-PTS

HERBERT FUSSMAN, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

TRANSCRIPT OF JURY TRIAL
DAY 13 – NOVEMBER 18, 2010
[RENEWED RULE 50 HEARING
AT CLOSE OF TRIAL]

* * * *

[25-26] MR. BERGER: And, Your Honor, we have the renewed motion under rule—for the punitive damages, just so the record is complete.

THE COURT: Yes. As well the Court will deny your motion with respect to Rule 50(a) as to excluding the issue of punitive damages.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[Filed Nov 22, 2010]

1:06CV149

HERBERT FUSSMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN,
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

VERDICT FORM

Plaintiff's Negligence Claim

1. Did Novartis Pharmaceuticals Corporation unreasonably fail to provide an adequate warning or instruction with respect to Aredia or Zometa?

   ✓ Yes ___ No

   If you answered "Yes" to this Question 1, proceed to Question 2.

   If you answered "No" to this Question 1, proceed to the end of the Verdict Form and fill in the signature and date.

2. Did Aredia or Zometa medically cause Mrs. Rita Fussman's jaw injuries?

   ✓ Yes ___ No

If you answered "Yes" to this Question 2, proceed to Question 3.

If you answered "No" to this Question 2, proceed to the end of the Verdict Form and fill in the signature and date.

3. Was the failure to provide an adequate warning the proximate cause of Mrs. Fussman's jaw injuries?

✓ Yes ___ No

If you answered "Yes" to this Question 3, proceed to Question 4.

If you answered "No" to this Question 3, proceed to the end of the Verdict Form and fill in the signature and date.

Plaintiff's Implied Warranty Claim

4. Did Novartis Pharmaceuticals Corporation breach an implied warranty of merchantability made to Mrs. Rita Fussman regarding Aredia or Zometa?

✓ Yes ___ No

After answering either "Yes" or "No" to this Question 4, proceed to Question 5.

Statutory Defense

5. Did Novartis Pharmaceuticals Corporation provide an adequate warning or instruction for Aredia and Zometa to Dr. Heather Shaw who prescribed them for Mrs. Rita Fussman?

___ Yes ✓ No

If you answered "Yes" to this Question 5, proceed to the end of the Verdict Form and fill in the signature and date.

If you answered "No" to this Question 5, proceed to Question 6.

Compensatory Damages

6. What amount of compensatory damages is the Plaintiff entitled to recover for Mrs. Rita Fussman's jaw injuries?

   $ 287,000.00 two hundred eighty seven thousand

   After answering this Question 6, proceed to Question 7.

Loss of Consortium Claim

7. Did the negligence of Novartis Pharmaceuticals Corporation proximately cause Mr. Herbert Fussman to lose the consortium of his spouse?

   ✓ Yes ___ No

   If you answered "Yes" to this Question 7, proceed to Question 8. If you answered "No" to this Question 7, proceed to Question 9.

8. What amount is Mr. Herbert Fussman entitled to recover for loss of consortium?

   $ 1.00 One dollar & no/100

   After answering this Question 8, proceed to Question 9.

Punitive Damages Claim

9. Is Novartis Pharmaceuticals Corporation liable to the Plaintiff for punitive damages?

   ✓ Yes ___ No

   If you answered "Yes" to this Question 9, proceed to Question 10.

   If you answered "No" to this Question 9, proceed to the end of the Verdict Form and fill in the signature and date.

10. What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff?

    $ 12.6 million twelve million 6 hundred thousand

    After answering this Question 10, proceed to the end of the Verdict Form and fill in the signature and date.

This, the 22 day of November, 2010

[Illegible]
Jury Foreperson

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:06CV149

HERBERT FUSSMAN, individually and as ADMINISTRATOR OF THE ESTATE OF RITA FUSSMAN,
Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

JUDGMENT

Pursuant to the verdict of the jury returned on November 22, 2010, and the Order of the Court entered contemporaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of Plaintiff Herbert Fussman, as the administrator of the Estate of Rita Fussman, on Plaintiff's claims of Negligent Failure to Warn and Breach of the Implied Warranty of Merchantability, for $287,000.00 in compensatory damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the jury's award of punitive damages in the amount of $12,600,000.00 is REDUCED pursuant to North Carolina General Statute § 1D-25 to three times the amount of compensatory damages. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of Plaintiff Herbert Fussman, as the administrator of

the Estate of Rita Fussman, for $861,000.00 in punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Plaintiff Herbert Fussman individually on his claim of Loss of Consortium, for $1.00 in nominal damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiff Herbert Fussman, as the administrator of the Estate of Rita Fussman, for prejudgment interest on the $287,000.00 compensatory damage award, at the legal rate of 8% per annum under North Carolina General Statute § 24-5(b) and § 24-1 from February 13, 2006 when this action was commenced, for total prejudgment interest of $110,082.19.

As a result of these determinations, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover of Defendant Novartis Pharmaceuticals Corporation the total sum of $1,258,083.19.

This, the 29th day of November, 2010.

/s/ James A. Beaty
United States District Judge