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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHEL HENDRIX,

Plaintiff(s),

vs.

NOVARTIS PHARMACEUTICAL
CORPORATION,

Defendant(s).

Case No.: CV-13-2402-MWF (PLAx)

ORDER GRANTING DEFENDANT
NOVARTIS PHARMACEUTICALS
CORPORATION’S MOTION FOR
SUMMARY JUDGMENT [106]

This matter is before the Court on Defendant Novartis Pharmaceuticals Corporation’s (“NPC”) Motion for Summary Judgment (the “Motion”). (Docket No. 106). This case was assigned to this Court on March 19, 2013.

I. BACKGROUND

A. Undisputed Facts

Plaintiff Michel Hendrix was diagnosed with multiple myeloma in September 1999 by his oncologist, Dr. Berenson. (Plaintiff’s Counter-Statement of Uncontroverted Facts (“PCUF”) ¶ 1). As part of his treatment for bone-related

1 symptoms of his cancer, Dr. Berenson placed Plaintiff in a clinic trial in September
2 1999, in which Plaintiff received 4mg infusions of the bisphosphonate drug
3 Zometa every three to four weeks. (Defendant’s Statement of Uncontroverted
4 Facts (“SUF”) ¶ 33; PCUF ¶ 3). His Zometa treatment followed this regimen until
5 it was discontinued in October 2003. (SUF ¶ 72). Zometa was approved by the
6 FDA in February 2002. (SUF ¶ 3).

7 In September 2002, Plaintiff’s dentist, Dr. Powell, noticed exposed bone in
8 his lower right jaw. (PCUF ¶ 5; SUF ¶ 49). Dr. Powell referred him to an oral
9 surgeon, Dr. Salaita, who recommended and performed a sequestrectomy to
10 remove Plaintiff’s exposed dead bone on October 4, 2002. (PCUF ¶¶ 6, 8; SUF
11 ¶ 50). Plaintiff continued to have exposed bone in his lower right jaw, and he
12 consulted an endodontist who performed a root canal on tooth number 31 on
13 November 5, 2002. (PCUF ¶ 9-10; SUF ¶ 51). This procedure was unsuccessful,
14 and Dr. Salaita performed a series of procedures over the next three months
15 designed to relieve Plaintiff’s pain and resolve the exposed bone issue, including
16 another sequestrectomy, an incision and drain of an infected area, and extractions
17 of teeth 30 and 31. (PCUF ¶¶ 11-13). During the next seven months, Plaintiff
18 underwent further treatments on his lower right jaw, including an extraction of
19 tooth 32 and another sequestrectomy, but he continued to suffer from exposed
20 necrotic bone. (PCUF ¶¶ 14-16; SUF ¶¶ 53-54). Dr. Salaita’s notes dated April 2,
21 2003, state that Plaintiff’s jaw issue was “probably secondary to monthly
22 Prednisone and Zometa (bisphosphonate).” (SUF ¶ 57). He later referred to his
23 reference to Zometa in that note as “something of a guess.” (Salaita Dep. at 42).

24 Dr. Salaita referred Plaintiff to Dr. Felsenfeld, an oral and maxillofacial
25 surgeon, in or around September 2003. (PCUF ¶ 16). Dr. Felsenfeld met with
26 Plaintiff on September 18, 2003, and the doctor noted his impression that Plaintiff
27 had “bisphosphonate osteonecrosis” (osteonecrosis of the jaw, or “ONJ”). (SUF
28 ¶ 59; PCUF ¶ 17). Plaintiff testified that at his first meeting with Dr. Felsenfeld,

1 he informed the doctor that he believed his jaw problems resulted from Zometa,
2 although he could not remember the date of that meeting. (SUF ¶ 61; Plaintiff’s
3 Responses to Defendant’s Statement of Uncontroverted Facts (“PRSUF”) ¶ 61).

4 On October 14, 2003, Plaintiff saw Dr. Barstis, an oncologist who had been
5 treating him since 1999, to discuss discontinuing Zometa treatment. (PCUF ¶ 4;
6 SUF ¶ 69). At that meeting, Plaintiff and Dr. Barstis decided to stop the Zometa
7 treatment. (SUF ¶ 72). Dr. Barstis had spoken to Dr. Felsenfeld regarding Dr.
8 Felsenfeld’s clinical impressions regarding the connection between Zometa and
9 ONJ. (SUF ¶ 69). Around the same time, Dr. Barstis also discussed the
10 connection with Dr. Berenson. (SUF ¶ 70; PRSUF ¶ 70; Barstis Dep. at 56). On
11 November 4, 2003, Plaintiff saw an orthopedic doctor, Dr. Bloze, who noted that
12 “it is believed” that Plaintiff’s Zometa treatments were discontinued because it
13 caused his ONJ. (SUF ¶¶ 74-75).

14 In January 2007, Plaintiff resumed Zometa treatments once per year. (SUF
15 ¶ 80). He and Dr. Barstis chose to resume the treatment on a much less frequent
16 basis than he had taken it from 1999 to 2003 because Dr. Barstis believed that once
17 per year treatments were “extremely unlikely” to cause ONJ. (PCUF ¶¶ 41-42, 45;
18 Barstis Dep. at 68). His yearly Zometa regimen continues today. (SUF ¶ 81).

19 **B. Procedural History**

20 Plaintiff filed his Complaint against NPC in the Eastern District of New
21 York on January 13, 2006. (Docket No. 1). The case was consolidated in 2007
22 into multidistrict litigation (“MDL”) in the Middle District of Tennessee, along
23 with over a dozen other cases alleging harms suffered from treatment with
24 bisphosphonate drugs Aredia and Zometa. That multidistrict litigation was styled
25 *In re Aredia & Zometa Products Liability Litigation*, No. 3:06-md-1760 (M.D.
26 Tenn.) (“MDL 1760”). NPC filed its first iteration of the present Motion in the
27 MDL on May 17, 2011 (*Hendrix v. Novartis Pharm. Corp.*, No. 3:06-cv-374 (M.D.
28 Tenn.) (“Case 06-374”), Docket No. 28), but before it could be heard the cases of

1 the MDL were remanded to their respective districts. (Case 06-374, Docket No.
2 53). The parties then moved to transfer the instant action from the Eastern District
3 of New York to this Court. (Docket No. 56).

4 On April 22, 2013, this Court held a preliminary Status Conference to
5 determine the best course to proceed with litigation. (Docket No. 75). Pursuant to
6 the Court's order, the parties filed a Joint Status Report ("JSR") on May 6, 2013
7 (Docket No. 83), in which NPC requested leave to supplement the Motion for
8 Summary Judgment it had filed in the MDL with additional briefing to address
9 governing Ninth Circuit law and any factual and legal developments that may have
10 arisen in the two years since the original motion was filed. (JSR at 7). The Court
11 issued a Scheduling Order allowing this supplemental briefing (Docket No. 84),
12 and NPC filed the present Motion on August 16, 2013. (Docket Nos. 106-09).
13 The present Motion includes an argument that Plaintiff's action is barred by the
14 applicable statute of limitations, an argument that was omitted from NPC's original
15 Motion for Summary Judgment. Plaintiff filed an Ex Parte Application to Strike
16 the Motion, arguing, *inter alia*, that the statute of limitations argument was non-
17 supplemental, and thus the Motion fell beyond the scope of the Court's Scheduling
18 Order. (Docket Nos. 117-18). The Court denied Plaintiff's application. (Docket
19 No. 124).

21 **II. DISCUSSION**

22 **A. Legal Standard**

23 Under the Federal Rules of Civil Procedure, a movant is entitled to summary
24 judgment if it can demonstrate that there is no genuine dispute as to any material
25 fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P.
26 56(a). In deciding a motion for summary judgment under Rule 56, the Court
27 applies *Anderson, Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty*
28 *Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex*

1 *Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).
2 Where, as here, “the non-moving party bears the burden of proof at trial, the
3 moving party need only prove that there is an absence of evidence to support the
4 non-moving party’s case.” *In re Oracle Corp. Securities Litig.*, 627 F.3d 376, 387
5 (9th Cir. 2010). The burden then shifts to the non-moving party, which may not
6 simply rely on allegations in its pleadings but must identify specific facts raising a
7 genuine dispute that will be material at trial. Fed. R. Civ. P. 56(c).

8 NPC advances two bases for summary judgment that it claims dispose of
9 Plaintiff’s action in full. First, the action is barred by the statute of limitations, and
10 second, Plaintiff cannot show that any alleged wrongdoing by NPC proximately
11 caused his injuries. (Mot. at 11-16). Additionally, NPC argues that Plaintiff’s first
12 claim for relief fails as a matter of law because California does not recognize
13 claims of defective design of prescriptions drugs. (Mot. at 17). Finally, NPC
14 argues that the fourth and fifth claims for relief for breaches of express and implied
15 warranties are not cognizable in personal injury actions under California law
16 because such theories of recovery have been subsumed into the theory of strict
17 products liability, and because Plaintiff has failed to allege the exact terms of any
18 express warranty made to him by NPC. (Mot. at 17-18).

19 Because this Court determines that there is no genuine issue of material fact
20 as to whether this action was brought within the period prescribed by the
21 applicable statute of limitations, and NPC is entitled to judgment as a matter of law
22 on that basis alone, it does not reach NPC’s remaining three arguments.

23 **B. Statute of Limitations**

24 A federal court sitting in diversity jurisdiction must generally apply the law
25 of the forum state regarding whether an action is barred by the statute of
26 limitations. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10, 65 S. Ct. 1464, 89
27 L. Ed. 2079 (1945). Under California law, personal injury actions are subject to a
28 two year limitation. Cal. Code Civ. Proc. § 335.1. Generally, a cause of action

1 accrues and the limitations clock “begins to run upon the occurrence of the last
2 element essential to the cause of action.” *Neel v. Magana, Olney, Levy, Cathcart*
3 *& Gelfand*, 6 Cal.3d 176, 187, 98 Cal. Rptr. 837 (1971).

4 The discovery rule, however, is an exception to this general rule whereby a
5 cause of action does not accrue until the plaintiff discovers, or has reason to
6 discover, that he has been wrongfully injured. *See, e.g., Jolly v. Eli Lilly & Co*, 44
7 Cal.3d 1103, 1110-11, 245 Cal. Rptr. 658 (1988). Plaintiff filed this lawsuit on
8 January 17, 2006. The parties agree that the alleged injury occurred no later than
9 2002; thus, his action is barred by the statute of limitations unless he carries his
10 burden of showing that he had no actual or inquiry notice of the nature of his cause
11 of action prior to January 17, 2004.

12 **1. The Statute of Limitations Defense Was Not Waived**

13 As a preliminary matter, Plaintiff argues that NPC waived its statute of
14 limitations defense by failing to raise the defense in its original motion for
15 summary judgment. The Court disagrees.

16 Under the Federal Rules of Civil Procedure, an affirmative defense properly
17 pleaded in the answer is not waived despite the defendant’s failure to raise the
18 defense in a later motion. *See Alcantar v. Hobart Serv.*, No. EDCV-11-1600-PSG
19 (SPx), 2013 WL 228501, at *5 (C.D. Cal. Jan. 22, 2013) (holding that a defendant
20 who had properly pleaded an exhaustion of remedies defense did not waive the
21 defense by waiting until the Final Pretrial Conference Order to litigate it); *see also*
22 *Greenberg v. U.S. Dep’t of Treasury*, 10 F. Supp. 2d 3, 23 (D.D.C. 1998) (“The
23 Court is aware of no authority which requires a party to raise an affirmative
24 defense pled in its answer in its first motion for summary judgment in order to
25 avoid waiving that defense.”).

26 Plaintiff cites *Shewbridge v. El Dorado Irrigation District*, No. CIV-S-05-
27 0740-FCD-EFB, 2007 WL 1294392 (E.D. Cal. Apr. 30, 2007), in support of his
28 argument that statute of limitation defense has been waived. The *Shewbridge* court

1 denied the defendants' motion to modify the pretrial scheduling order to permit the
2 filing of a dispositive motion on an affirmative defense that the defendants had
3 asserted in their answer but raised for the first time in the joint pretrial conference
4 statement. The posture of that decision was critically different from the present
5 motion. The *Shewbridge* defendant had missed a deadline for filing dispositive
6 motions set forth in the pretrial scheduling order; as such, Rule 16(b) required the
7 defendant to show "good cause" to modify the order. *Id.* at *2. That rule is not
8 applicable here.

9 Nevertheless, the *Shewbridge* court did suggest that a district court may
10 deem an affirmative defense waived when a defendant unduly delays in litigating
11 the defense in a way that unfairly prejudices the plaintiff. *Id.* at *3 (citing *North*
12 *Pacifica, LLC v. City of Pacifica*, 366 F. Supp. 2d 927, 930 (N.D. Cal. 2005)
13 (holding that a defendant that had asserted an unclear and "conclusory" preclusion
14 defense in its answer had waived the defense by waiting until the end of the
15 liability phase of the trial to raise the issue); *Kern Oil & Refining Co. v. Tennoco*
16 *Oil Co.*, 840 F.2d 730, 740-41 (9th Cir. 1988) (holding that a defendant who had
17 failed to raise a res judicata defense in its answer had waived it under Rule 8, and
18 could not amend its answer to include the defense after the end of the trial). The
19 Court is aware of no authority, however, suggesting that it has the power to deem a
20 properly pleaded defense waived *before trial*, and indeed even before a Rule 16
21 pretrial conference.

22 Even if such a power exists, the Court determines that NPC did not unduly
23 delay in raising this defense, and Plaintiff has suffered no unfair prejudice.
24 Plaintiff had notice that NPC intended to raise a statute of limitations defense.
25 Plaintiff argues that the specific arguments raised in this Motion caught him by
26 surprise, and he would have liked to conduct further discovery to refute them, but
27 throughout the discovery period in this case NPC has made no attempt to hide that
28 it wanted to determine whether the action was barred. NPC has asked questions in

1 several depositions directly related to the precise time at which Plaintiff suspected
2 or should have suspected a causal relationship between Zometa and ONJ. Plaintiff
3 now claims he was unable to conduct fact discovery on that same issue, but this
4 claim is baseless. He was on notice of the statute of limitations defense since NPC
5 filed its answer, and has been reminded during the discovery process. While it is
6 curious that NPC chose not to address the statute of limitations in its original
7 Motion for Summary Judgment, Plaintiff cannot show that any delay was
8 unreasonable or prejudicial.

9 The Court thus rules that NPC did not waive its statute of limitations
10 defense.

11 2. If Tolling Is Unavailable, Then Plaintiff's Suit Is Untimely

12 NPC argues that Plaintiff's suit is barred by the statute of limitations because
13 prior to January 17, 2004, Plaintiff knew, or a reasonable investigation would have
14 uncovered, a factual basis for his claim that he was inadequately warned about the
15 dangers of Zometa. Under California's discovery rule, a cause of action does not
16 accrue, for purposes of the statute of limitations, until the plaintiff discovers, or has
17 reason to discover, that he has been wrongfully injured. *See Jolly*, 44 Cal.3d at
18 1110-11. "[T]he plaintiff discovers the cause of action when he at least suspects a
19 factual basis, as opposed to a legal theory, for its elements, even if he lacks
20 knowledge thereof—when, simply put, he at least 'suspects . . . that someone has
21 done something wrong' to him, 'wrong' being used, not in any technical sense, but
22 rather in accordance with its 'lay understanding.'" *Norgart v. Upjohn Co.*, 21
23 Cal.4th 383, 397-98, 87 Cal. Rptr. 2d 453 (1999) (citations omitted) (quoting *Jolly*,
24 44 Cal.3d at 1110 & n.7). He has reason to discover the injury when he has
25 "notice or information of circumstances to put a reasonable person on *inquiry*."
26 *Jolly*, 44 Cal.3d at 1110-11 (quoting *Gutierrez v. Mofid*, 39 Cal.3d 892, 896-97,
27 218 Cal. Rptr. 313 (1985)). In order for the discovery rule to delay the accrual of a
28 cause of action, the plaintiff bears the burden of showing that he "conduct[ed] a

1 reasonable investigation of all potential causes of [his] injury,” and failed to
2 discover that the injury was wrongfully caused “despite reasonable diligence.”
3 *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 808, 27 Cal. Rptr. 3d 661
4 (2005) (quoting *McKelvey v. Boeing N. American, Inc.*, 74 Cal. App. 4th 151, 160,
5 86 Cal. Rptr. 2d 645 (1999)) (internal quotation marks omitted).

6 The discovery rule does not trigger accrual of a cause of action unless the
7 plaintiff has some reason to suspect *wrongdoing*; that is, when a plaintiff, through
8 reasonably diligent investigation, discovers only that he has been injured but not
9 that the injury may have a wrongful cause, then the clock has not yet begun to run.
10 *See Nev. Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307 (9th Cir. 1992)
11 (holding that the facts supported a reasonable inference that the plaintiff could
12 have believed it was injured as a result of “innocent mistakes” rather than fraud,
13 and this inference rendered summary judgment inappropriate).

14 Here, the gravamen of Plaintiff’s complaint is that NPC wrongfully failed to
15 warn him of a possible connection between Zometa and ONJ. Under the discovery
16 rule, therefore, the statute of limitations clock began to run as soon as Plaintiff had
17 good cause to suspect that Zometa may have caused his ONJ.

18 Under California law, a plaintiff seeking the benefit of the discovery rule
19 “must specifically plead facts to show (1) the time and manner of discovery and (2)
20 the inability to have made earlier discovery despite reasonable diligence. The
21 burden is on the plaintiff to show diligence” *McKelvey*, 74 Cal. App. 4th at
22 160. There is no plausible interpretation of the undisputed facts that allows
23 Plaintiff to meet his burden. The Opposition argues only that NPC incorrectly
24 pegs the date of discovery at September 18, 2003 (Opp. at 12) but does not marshal
25 evidence in favor of an alternative date. Ultimately, the Court determines that the
26 evidence presented requires the conclusion that Plaintiff had reason to suspect by
27 the end of 2003 that he had suffered an adverse reaction from taking Zometa, and a
28 reasonable investigation, including ordinary conversations with his physicians,

1 would have revealed a factual basis for his present claims. For this reason, NPC is
2 entitled to summary judgment on all claims.

3 NPC advances two specific facts supporting its claim that Plaintiff had
4 actual knowledge by Fall 2003 that he had suffered an adverse reaction to Zometa.
5 *First*, Plaintiff stated in his deposition that he had told Dr. Felsenfeld about his
6 broken jawbone, and that he believed the cause was Zometa. (SUF ¶ 61; Hendrix
7 Dep. 1/12/2011 at 233, 235). *Second*, Plaintiff and Dr. Felsenfeld did in fact
8 discuss Plaintiff's ONJ, and Dr. Felsenfeld said that he also suspected that Zometa
9 caused ONJ, and that the doctor had seen two or three other bisphosphonate
10 patients with the same condition. (SUF ¶ 62; Hendrix Dep. at 233). Plaintiff
11 stated that he cannot remember the date that he had this conversation with Dr.
12 Felsenfeld, but Dr. Felsenfeld's notes indicate that this meeting happened on
13 September 18, 2003. (SUF ¶ 59; Berger Dec. Ex. 61).

14 Plaintiff contends he only remembered an approximate date that he saw a
15 television commercial describing a possible link between Zometa and ONJ, and a
16 genuine issue of fact remains as to the date when he developed his suspicion.
17 (Opp. at 10; PRSUF ¶ 61). Indeed, the facts surrounding this advertisement are
18 somewhat vague; NPC claims in its Reply that it has never advertised Zometa on
19 television. (Reply at 3). But even if the exact date Plaintiff learned of (or at least
20 began to suspect) a causal connection between ONJ and Zometa is unclear,
21 Plaintiff has not provided a sufficient basis to dispute that he and Dr. Felsenfeld
22 discussed their mutual suspicion on September 18, 2003. Any reasonable jury
23 would inevitably conclude that Plaintiff must have discovered his injury by
24 September 18, 2003, which triggered the statute of limitations.

25 Additionally, NPC argues that Plaintiff had sufficient information to be put
26 on inquiry notice of his injury as early as April 2, 2003 (Mot. at 13 (citing SUF ¶
27 57)). In addition to Dr. Felsenfeld, four more of Plaintiff's treating physicians
28

1 indicated in Plaintiff's health records, with varying degrees of certainty, that the
2 ONJ was linked to Zometa.

3 Dr. Salaita, making, in his words, "something of a guess," opined in April
4 2003 that Plaintiff's jaw problem was "probably secondary to prednisone and
5 monthly Zometa bisphosphonates." (PCUF ¶ 22; Salaita Dep. at 40-41). Although
6 he "was looking more at the prednisone," he thought that "as a chemotherapeutic
7 agent [Zometa] may have been inhibiting healing of the soft tissue." (Salaita Dep.
8 at 41-42).

9 Drs. Barstis and Berenson discussed the connection between Zometa and
10 ONJ with Dr. Felsenfeld in or around October 2003. (SUF ¶ 70; Barstis Dep. at
11 54-56). Plaintiff disputes the timing of these conversations, and to what extent
12 Drs. Barstis and Berenson made independent diagnoses, but Dr. Barstis's
13 undisputed testimony described a period in October 2003 in which Drs. Felsenfeld,
14 Barstis, and Berenson, discussed whether the benefits of Zometa outweighed "the
15 possible damage." (Barstis Dep. at 56 ("A: And Dr. Felsenfeld told me that in his
16 opinion if the Zometa was helping the patient, that he thought it might outweigh
17 the—the possible damage and that he thought that one should consider continuing
18 with the Zometa and I believed—I didn't think I should. And I think Dr. Berenson
19 didn't either, but I don't—I just don't remember that discussion. But I did talk to
20 him.")). Neither Dr. Barstis nor Dr. Berenson diagnosed Plaintiff with ONJ, as
21 Plaintiff points out (Opp. at 20-21; PCUF ¶ 20-21), but both considered the
22 possibility that Plaintiff was experiencing jaw problems as a side effect of Zometa.

23 Finally, Dr. Bloze wrote in her November 4, 2003 office notes that Plaintiff
24 "was treated for osteoporosis with Zomata [sic], which was recently discontinued.
25 Apparently, it is believed that this has caused osteonecrosis of his right jaw."
26 (SUF ¶ 75; Berger Dec. Ex. 69).

27 Plaintiff insists that these doctors merely suspected that Zometa caused ONJ.
28 (Opp. at 19-20). Dr. Salaita only guessed that Zometa may have played a role in

1 Plaintiff's ONJ. Drs. Berenson and Barstis testified to ignorance as to the
2 connection between Zometa and ONJ. (Opp. at 20-23). Plaintiff does not address
3 Dr. Bloze's records, but she appeared to rely on other doctors' diagnoses. (SUF ¶
4 75). And Dr. Felsenfeld made only a "working diagnosis." (Opp. at 23-24).

5 Plaintiff is undoubtedly correct that none of his treating physicians had, in
6 2003, conclusively determined that Plaintiff's ONJ was caused by Zometa.
7 Caution and prudence are marks of a good doctor. But the lack of certainty is
8 irrelevant. California law does not require a plaintiff to be certain of the cause of
9 his injury before his cause of action accrues; it merely requires facts sufficient to
10 put a reasonable plaintiff in suspicion that he has been wronged. *See Fox*, 35
11 Cal.4th at 807; *Norgart*, 21 Cal.4th at 398. It requires the plaintiff, once put in
12 suspicion, to conduct a reasonable investigation, *see Fox*, 35 Cal.4th at 808, which
13 surely includes ordinary discussions with one's treating physicians as to possible
14 causes of one's injuries.

15 Even if Plaintiff is correct in asserting that those of his doctors who were
16 uncertain as to the link between Zometa and ONJ would have scrupulously
17 maintained that they did not know what caused Plaintiff's injuries (*see Opp.* at 23),
18 notwithstanding the suspicions they noted in his health records, the "working
19 diagnosis" that Dr. Felsenfeld shared with Plaintiff, coupled with Plaintiff's jaw
20 injury and his own suspicions, sufficed to put Plaintiff on notice of his claim and
21 trigger the statute of limitations. Even one "probable" diagnosis has been held to
22 put a plaintiff on inquiry notice of his claim. *See Gray v. Reeves*, 76 Cal. App. 3d
23 567, 577, 142 Cal. Rptr. 716 (1978) (holding that a diagnosis that plaintiff's injury
24 was "probably caused" by a drug was "enough to put [him] on notice"); *Holmes v.*
25 *Hospira, Inc.*, No. EDCV-12-01708 VAP (DTBx), 2013 WL 1516952, at *5 (C.D.
26 Cal. Apr. 11, 2013) (holding that the "possible diagnosis" of a single doctor linking
27 plaintiff's injuries to an adverse drug reaction, among several doctors providing
28 various other possibilities, sufficed to trigger the statute of limitations).

1 Plaintiff's other arguments to the contrary are unavailing. Plaintiff asserts
2 that a reasonable investigation could not have uncovered a causal connection
3 between Zometa and ONJ in 2003 because at that time, NPC denied such a
4 connection (Opp. at 13-14; PCUF ¶ 29); because its expert witness has denied and
5 continues to deny such a connection (Opp. at 16; PCUF ¶ 33-34); and even its
6 updated Zometa package insert, released to doctors and consumers in or around
7 December 2003, remained equivocal as to the possibility that Zometa causes ONJ
8 (Opp. at 15; PCUF ¶¶ 31-32). But the discovery rule does not delay the accrual of
9 a cause of action until the defendant admits to the alleged wrongdoing. It may be
10 true that if Plaintiff had confined his investigation to asking NPC and its agents
11 whether Zometa had caused his injury, NPC would not have told him that Zometa
12 causes ONJ. California law, however, requires more: plaintiffs must conduct a
13 reasonable investigation. By the end of 2003, Plaintiff had developed a jaw injury
14 that he and his treating physicians believed may be causally linked to Zometa. A
15 reasonable investigation would have revealed his doctors' suspicions and the
16 factual basis of Plaintiff's failure to warn and related claims.

17 Accordingly, this action is untimely unless the statute of limitations was
18 tolled pursuant to some doctrine recognized under California law. The Court now
19 turns to that crucial issue.

20 **3. The Statute of Limitations Was Not Tolled by *Becker v.***
21 ***Novartis Pharmaceutical Corp.***

22 On September 15, 2005, Susan Becker filed a complaint against NPC in the
23 Middle District of Tennessee, alleging personal injuries resulting from Zometa use
24 on behalf of herself and a class of persons that included Plaintiff. *Becker v.*
25 *Novartis Pharm. Corp.*, No. 3:05-cv-0719 (M.D. Tenn. Sept. 15, 2005) (the
26 "Tennessee Class Action"). *Becker* was consolidated into the MDL-1760 on April
27 19, 2006.

1 Plaintiff claims that the rule of *American Pipe & Construction Co. v. Utah*,
2 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), should apply to toll the
3 statute of limitations on his claim during the pendency of a class action suit in
4 which he was a member of the putative class. Alternatively, Plaintiff claims that
5 even if the *American Pipe* rule does not directly apply, his lawsuit is nonetheless
6 timely under California’s equitable tolling doctrine, because Plaintiff is a resident
7 of California who acted in good faith and NPC is not prejudiced by having to
8 defend against this separate action. *See Hatfield v. Halifax PLC*, 564 F.3d 1177,
9 1188 (9th Cir. 2009) (citing *Becker v. McMillin Constr. Co.*, 226 Cal. App. 3d, 277
10 Cal. Rptr. 491 (1991)). The September date is critical, because much of the
11 evidence proffered by NPC in support of its Motion suggests that Plaintiff and his
12 treating physicians may have begun to suspect that the Zometa treatments were
13 linked to his ONJ around September of 2003.

14 Although the interplay between *American Pipe* tolling and equitable tolling
15 remains the subject of some confusion, as discussed below, this Court holds that
16 neither *American Pipe* tolling nor equitable tolling benefit Plaintiff.

17 **a. *American Pipe* Tolling**

18 The Supreme Court ruled in *American Pipe* that under the Federal Rules of
19 Civil Procedure, the “commencement of a class action suspends the applicable
20 statute of limitations as to all asserted members of the class who would have been
21 parties had the suit been permitted to continue as a class action,” even when class
22 certification is ultimately denied. 414 U.S. at 544. As a federal court sitting in
23 diversity jurisdiction, however, this Court is bound by state law with respect to the
24 tolling of statutes of limitations and the treatment of class action lawsuits. *York*,
25 326 U.S. at 110 (holding that when state law would bar recovery under its statute
26 of limitations, it “bears on a State-created right vitally,” and thus a federal court
27 must follow state law). The parties agree that California law governs this dispute.
28

1 The California Supreme Court first ruled on the applicability of the
2 *American Pipe* tolling rule under California law in *Jolly*, 44 Cal.3d at 1118-26. In
3 *Jolly*, the plaintiff sued a drug manufacturer, claiming that she had been injured *in*
4 *utero* by her mother's use of the allegedly defective drug diethylstilbestrol (DES).
5 *Id.* at 1107. She claimed that, although her action was brought outside the time
6 required under the applicable statute of limitations, the rule of *American Pipe*
7 tolled the statute of limitations during the pendency of a class action in which she
8 was a member of the putative class. *Id.* at 1117.

9 The *Jolly* court weighed the policy considerations underlying the tolling
10 rule, namely protecting of the efficiency and economy of class action litigation (by
11 eliminating the incentive for class members to file individual actions to preserve
12 their claims) while ensuring that defendants are protected from unfairly delayed
13 claims. *Id.* at 1121. In *American Pipe*, the court reasoned, the defendants had
14 been fairly put on notice of the general nature of the claims within the putative
15 class by the filing of the class action. The class action suit at issue in *Jolly*, by
16 contrast, had not put defendants on notice of the scope of the claims within the
17 class, because the suit had only sought damages on behalf of the representative and
18 not the class as a whole, and because personal injury claims tend to vary widely in
19 the underlying facts related to major elements of each claimant's claim. *Id.* at
20 1123-24. Furthermore, denying the tolling was not unfair to class members, who
21 would not reasonably be expected to delay filing individual claims during the
22 pendency of a class action that sought no damages on their behalf.

23 The California Supreme Court ultimately declined to apply the *American*
24 *Pipe* rule to a personal-injury mass-tort class action case arising from alleged
25 product defects and negligence relating to a prescription drug. In so doing, it
26 declined to address "the broader question whether in *any* personal injury mass-tort
27 case the filing of a class action complaint can serve to toll the statute of limitations
28 for putative class members when the class ultimately is denied certification for lack

1 of commonality.” *Id.* at 1125 (emphasis added). It did, however, reason that the
2 lack of commonality that typifies personal-injury mass-tort class action cases
3 *presumptively* precludes application of the *American Pipe* tolling rule because the
4 class action suit rarely will serve to sufficiently notify the defendants of each class
5 member’s claim. *Id.*

6 In *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008),
7 a California plaintiff sought the benefit of *American Pipe* tolling to preserve his
8 claim during the pendency of a class action lawsuit filed in Illinois in which the
9 plaintiff was a member of the putative class. The Ninth Circuit noted that
10 California, like most states, had not adopted “cross-jurisdictional” tolling. *Id.* It
11 concluded that in the absence of California authority permitting cross-jurisdictional
12 tolling, it would refrain from “importing” the doctrine into California law. *Id.* The
13 Ninth Circuit cited to *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287-88 (4th Cir.
14 1999), in which the Fourth Circuit declined to import cross-jurisdictional tolling
15 into Virginia law in part because of the “unwieldy prospect of tying Virginia’s
16 statute of limitations to the resolution of claims in other jurisdictions.” 534 F.3d at
17 1025.

18 Plaintiff here seeks to toll the statute of limitations based on the Tennessee
19 Class Action. Therefore, the Ninth Circuit’s interpretation of California law on
20 cross-jurisdictional tolling applies, and *Clemens* bars the application of *American*
21 *Pipe* tolling in this case. Any tolling of the statute of limitations must fall within
22 California’s doctrine of equitable tolling.

23 **b. Equitable Tolling**

24 The applicability of equitable tolling remains somewhat ill-defined in cases
25 in which a plaintiff seeks to toll an individual action during the pendency of a class
26 action in which he or she was merely a member of the putative class. Prior to
27 *Clemens*, California courts deciding such cases appeared to apply solely the test
28 laid out in *Jolly*, without reference to California’s equitable tolling doctrine. The

1 courts simply scrutinized the complaint in the prior class action to determine
2 whether it was of a type that would reasonably put the defendant on notice of the
3 individual claims of the putative class members. *See, e.g., S.F. Unified Sch. Dist.*
4 *v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 44 Cal. Rptr. 2d 305 (1995) (granting
5 tolling under *Jolly*, then rejecting defendant’s arguments that principles of equity
6 should defeat tolling); *Becker*, 226 Cal. App. 3d 1493 (applying *Jolly* without
7 reference to equitable tolling, and determining that a geographically limited,
8 property-based class action suit properly put defendants on notice of individual
9 plaintiffs’ claims).

10 One year after *Clemens*, the Ninth Circuit decided *Hatfield v. Halifax PLC*,
11 564 F.3d 1177 (9th Cir. 2009). It maintained that “the California Supreme Court
12 has indicated a general agreement with tolling in the class action context.” *Id.* at
13 1187-88 (citing *Jolly*, 44 Cal.3d at 1120-21). At issue was the alleged wrongful
14 withholding from investors of the proceeds from the sale of a building society.
15 Judith Hatfield, the plaintiff in *Halifax*, filed a class action suit in a New Jersey
16 trial court, and following dismissal of the suit she filed a substantively identical
17 class action suit in federal court in California. *Id.* at 1179-80. The district court
18 granted a motion to dismiss on the ground that the suit was barred by the statute of
19 limitations.

20 In considering whether Hatfield’s own individual claim was tolled by the
21 New Jersey class action, the Ninth Circuit applied the black-letter three-factor test
22 for equitable tolling under California law: “(1) timely notice to the defendant in the
23 filing of the first claim; (2) lack of prejudice to the defendant in gathering evidence
24 to defend against the second claim; and (3) good faith and reasonable conduct by
25 the plaintiff in filing the second claim.” *Halifax*, 564 F.3d at 1185 (citing *Collier*
26 *v. City of Pasadena*, 142 Cal. App. 3d 917, 191 Cal. Rptr. 681 (1983)). The Ninth
27 Circuit held that the traditional equitable tolling doctrine applied because the
28 defendants had been given timely notice, no prejudice had been shown because the

1 two claims were substantially similar, and the second action was filed on the same
2 day the New Jersey Appellate Division upheld dismissal of the first action. *Id.*

3 Considering whether the claims of putative class members were tolled, the
4 Ninth Circuit drew a distinction between California resident class members, whose
5 claims California had an interest in protecting, and non-resident class members.
6 As to residents, the Ninth Circuit reasoned, California's doctrine of equitable
7 tolling applies *alongside* the rule of *American Pipe* as interpreted by the California
8 Supreme Court in *Jolly*. Consequently, although *Clemens* would have barred
9 application of *American Pipe* to the class members because the first suit was filed
10 in a different jurisdiction, equitable tolling potentially rescued their claims.

11 The Ninth Circuit cited *Becker* in support of this conclusion, although the
12 *Becker* court relied exclusively on *Jolly* and *American Pipe* and did not purport to
13 apply equitable tolling as a doctrine distinct from *American Pipe* tolling. (The
14 *Halifax* court noted that some California cases treat the doctrines as
15 interchangeable. 564 F.3d at 1188.) In *Becker*, the plaintiffs in a class action suit
16 alleging improper construction of houses in a subdivision lost their motion for
17 class certification on the basis that the claims lacked commonality. *Id.* at 493. The
18 *Becker* court noted *Jolly*'s admonition that class action suits that lack the
19 commonality required for class certification rarely suffice to put the defendants on
20 notice of each class member's individual claims, and thus tolling will generally be
21 unavailable. *Id.* at 495 (citing *Jolly*, 44 Cal.3d at 1125). Nevertheless, the court
22 distinguished *Jolly* because the claims at issue in *Becker* had substantial
23 similarities. Each claim was based on alleged negligent construction of similar
24 houses in a geographically confined area. The defendant was put on notice of the
25 possibility that each homeowner in the subdivision—and no other plaintiffs—may
26 have claims against it. This limited scope contrasted starkly with the nebulous,
27 nationwide class in *Jolly*. *Id.* at 497.

28

1 The *Halifax* court concluded that “*Jolly* and *Becker* would clearly permit
2 equitable tolling at least as to any class members who individually subsequently
3 filed a similar claim. . . . Thus, every indication is that California would at least
4 apply equitable tolling to claims made by its own residents.” *Halifax*, 564 F.3d at
5 1189. This conclusion seems difficult to square with *Clemens*, which, also relying
6 on *Jolly*, concluded that tolling could *not* apply under California law if the prior
7 class action was filed in a different jurisdiction. The *Halifax* court distinguished
8 *Clemens* by noting that equitable tolling extends beyond *American Pipe* tolling.
9 *See id.* at 1188 (“Although the two types of tolling—equitable and *American*
10 *Pipe*—overlap to some extent, *see Becker*, 277 Cal. Rptr. at 496, and even though
11 California courts have treated them at times as interchangeable, they are not
12 congruent.”).

13 Several cases involving class action tolling under California law have
14 interpreted *Halifax* to require applying both the *Jolly* test (as an application of
15 *American Pipe*) and then the traditional, three-part equitable tolling test. *See*
16 *Delagarza v. Tesoro Refining and Mktg. Co.*, No. C-09-5803 EMC, 2011 WL
17 4017967 (N.D. Cal. Sept. 8, 2011) (holding that tolling was unavailable under
18 *American Pipe* because the latter suit simply attempted to relitigate denial of class
19 certification, but tolling was allowable under *Halifax* because “Defendant makes
20 only a cursory claim of prejudice,” *id.* at *5); *Centaur Classic Convertible*
21 *Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009 (C.D. Cal.
22 2011) (applying *Clemens* bar on cross-jurisdictional application of *American Pipe*,
23 and then holding that equitable tolling was unavailable because plaintiff’s two
24 actions were filed subsequently in the same court); *see also Vincent v. Money*
25 *Store*, 915 F. Supp. 2d 553 (S.D.N.Y. 2013) (applying California law); *Gardner v.*
26 *Shell Oil Co.*, No. 09-05876-CW, 2010 WL 1576457 (N.D. Cal. Apr. 19, 2010);
27 *Moore v. Wachovia Securities*, No. CV-09-9071-AHM (VBKx), 2010 WL
28 1437923 (C.D. Cal. Mar. 15, 2010); *Love v. First Mortg. Corp.*, No. G044630,

1 2012 WL 314875 (Cal. Ct. App. 2012) (unpublished opinion, may not be cited in
2 California courts). On the other hand, one district court described *Halifax* as
3 “embrac[ing] th[e] rule” of *American Pipe*; that court did not apply the three-part
4 equitable tolling test. *Baker v. Aegis Wholesale Corp.*, No. C 09-5280-PJH, 2010
5 WL 2853915 (N.D. Cal. 2010).

6 This Court will presume that it must apply the three-part equitable tolling
7 test and that *Halifax* allows Plaintiff to argue that equitable tolling should occur
8 despite *Clemens* and *Jolly*. Although theoretically equitable tolling is available,
9 this Court cannot conclude that the California Supreme Court would apply the
10 doctrine to these facts. This conclusion, on which the grant of summary judgment
11 turns, is based on two reasons:

12 **First**, the facts of this case are simply too close to the facts of *Jolly* and too
13 different from the facts of *Becker*. The California courts do not view *American*
14 *Pipe* and equitable tolling as being vastly disparate doctrines. Yes, *Halifax* shows
15 that a case can exist in which one doctrine applies and the other does not.
16 However, the facts in *Halifax* were quite different from *Jolly*. If California
17 recognized cross-jurisdictional tolling, then under *Jolly* the California Supreme
18 Court would have applied *American Pipe* to the facts in *Halifax*. Likewise, *Halifax*
19 relied on the reference to “equities” by the Court of Appeal in *Becker*.

20 Given the similarity between the two doctrines, the Court does not believe
21 that the California Supreme Court would view Plaintiff—indistinguishable as he is
22 from the plaintiff in *Jolly*—as deserving equitable tolling. Under *Jolly*, the filing
23 of a class action suit may toll the individual claims of putative class members so
24 long as the defendant received fair notice of the claims of individual class members
25 by the filing of the initial class action, which protects the defendant from unfair
26 and duplicative claims. *Jolly*, 44 Cal.3d at 1122-23. “[B]ecause personal-injury
27 mass-tort class-action claims can rarely meet the community of interest
28 requirement in that each member’s right to recover depends on facts peculiar to

1 each particular case, such claims may be presumptively incapable of apprising
2 defendants of ‘the substantive claims being brought against them’” *Id.* at
3 1125 (quoting *Am. Pipe*, 414 U.S. at 555).

4 *Jolly*’s rationale in denying tolling because of possible prejudice to
5 defendants is fully applicable here. The present case, like *Jolly*, involves a plaintiff
6 seeking the benefit of tolling of his own cause of action based on a mass-tort
7 personal-injury class action suit alleging injuries caused by a prescription drug.
8 This fact easily distinguishes the present case from *Halifax*, which involved a suit
9 based on property damage. Such suits tend to have narrower factual bases, and
10 equitable tolling is more likely to apply. *See Halifax*, 564 F.3d at 1180 (damages
11 sought by investors for withholding of sale proceeds); *Becker*, 226 Cal. App. 3d at
12 1496 (damages sought for defective and negligently constructed real property).
13 The Tennessee Class Action alleged that Zometa caused osteonecrosis of the jaw
14 among some minority of those individuals who had taken the drug. The possible
15 claimants, therefore, could have been any individual who had taken Zometa at any
16 time. Each had taken different dosages, worked with different prescribing
17 physicians, and had a unique medical history. The Tennessee Class Action could
18 not have alerted NPC to the possibility of any individual class member’s claims.

19 Putting the cross-jurisdictional issue aside, only in an extremely rare case
20 will *American Pipe* tolling be unavailable but the three-part-test equitable tolling
21 be available. This action is not that extremely rare case. The analysis in *Jolly* is
22 important in regard to equitable tolling as well as *American Pipe* tolling.

23 **Second**, application of the three-part test to the individual claims of Plaintiff
24 Michel Hendrix does not result in tolling. The *Halifax* panel did not itself apply
25 the three-part equitable tolling test to the claims of class members, but only to the
26 individual claims of Judith Hatfield, the named plaintiff in both the earlier New
27 Jersey case and the later California case. According to a long line of California
28 precedents, including those cited in *Halifax*, a plaintiff who wishes to benefit from

1 equitable tolling must have actually relied on the use of some other legal
2 mechanism to vindicate his rights. *See Addison v. State*, 21 Cal.3d 313, 317, 146
3 Cal. Rptr. 224, 578 P.2d 941 (1978) (“[C]ourts have adhered to a general policy
4 which favors relieving plaintiff[s] from the bar of a limitations statute when,
5 *possessing several legal remedies*[,] *he . . . pursues one* designed to lessen the
6 extent of his injuries or damage.” (citing California Supreme Court cases)
7 (emphasis added)); *see also McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45
8 Cal.4th 88, 100, 84 Cal. Rptr. 3d 734 (2008) (“[California’s equitable tolling] may
9 apply where one action stands to lessen the harm that is the subject of a potential
10 second action; where administrative remedies must be exhausted before a second
11 action can proceed; or where a first action, embarked upon in good faith, is found
12 to be defective for some reason.”), *cited in Halifax*, 564 F.3d at 1188.

13 Plaintiff did not delay filing this action *because of* the pendency of the
14 Tennessee Class Action. Indeed, he filed his suit a mere four months after the
15 Tennessee Class Action was filed, and the two suits proceeded concurrently for
16 several years. Given this history, it is not plausible that Plaintiff relied on an out-
17 of-state class action suit as part of the diligent pursuit of his rights, and thus
18 equitable tolling does not apply.

19 Lurking in the above analysis is the issue whether the availability of
20 equitable tolling is an issue for the district court or for the jury. That issue need
21 not be resolved here because there simply are no disputed facts in regard to the
22 equities for a jury to resolve.

23 Accordingly, the Court **GRANTS** Defendant’s Motion for Summary
24 Judgment as to all counts. Because the Court holds that Plaintiff’s suit is time
25 barred, it declines to reach NPC’s remaining arguments.

1 This Order shall constitute notice of entry of judgment pursuant to Federal
2 Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court ORDERS the
3 Clerk to treat this Order, and its entry on the docket, as an entry of judgment.

4 IT IS SO ORDERED.

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7 Dated: October 2, 2013

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MICHAEL W. FITZGERALD
9 United States District Judge
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