UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNIE DE SOUZA,	:	
	:	
Plaintiff,	:	NO. 3:03CV2247 (MRK)
	:	
v.	:	
	:	
TAP PHARMACEUTICALS, INC.	:	
	:	
Defendant.	:	

ORDER

Before the Court is Defendant's Motion for Reconsideration [doc. #65], in which Defendant argues that the Court erred in denying its motion for summary judgment, *see* Order [doc. #61]. A motion to reconsider "'generally will be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" *Lopez v. Smiley*, 375 F. Supp. 2d 19, 21 (D. Conn. 2005) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995)). Defendant's motion is based on the following arguments: (1) that the Court may disregard the expert report of Dr. Suzanne Parisian if not sufficiently probative or well supported; and (2) that Plaintiff has produced no evidence that Defendant had any knowledge that its product carried the risk of permanent eye injury that might give rise to a duty to warn.

First, the Court notes that its prior ruling did not assert that evidence lacking in factual foundation or probative value must nevertheless be credited at the summary judgment stage. Instead, the Court was responding to Defendant's unsupported contention – repeated at the oral argument hearing and again in Defendant's motion for reconsideration – that the Court could not consider Dr. Parisian's report because it was "hearsay and inadmissible." Tap Pharmaceuticals, Inc.'s Reply

Memorandum in Support of Its Motion for Summary Judgment [doc. #49] at 7 n.2; *see* Memorandum in Support of Defendant's Motion for Reconsideration [doc. #65] at 6. Once again, the Court rejects Defendant's proposition that Dr. Parisian's sworn statements must be ignored because she does not attach the studies on which she bases her opinions. *See* 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6274, at 329 ("[T]he courts have admitted opinion testimony based solely on . . . facts or data that have not been admitted."); *id.* § 6273, at 311 ("[C]ourts have held that Rule 703 permits experts to base opinion testimony on evidence that is inadmissible under the hearsay, authentication and best evidence rules." (footnotes omitted)).

Defendant would do well to recall that at the time it moved for summary judgment, Defendant also submitted a motion in limine seeking to preclude the admission of Dr. Parisian's opinions on the ground that they were speculative and unfounded, and that they did not satisfy the standards of Rule 702 of the *Federal Rules of Evidence* and the line of cases emanating from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The parties explicitly requested that the Court first address the motion for summary judgment and then – after ruling on summary judgment – take up the *Daubert* motion, if necessary. As a consequence of Defendant's own choice, therefore, at the time the Court considered the summary judgment motion, the Court had not yet ruled on whether Dr. Parisian's opinions and report were admissible under Rule 702 and *Daubert.*

In fact, the Court still has not yet ruled on that issue, and it may well be that the Court will ultimately decide to bar the admission of Dr. Parisian's testimony following the upcoming and currently scheduled *Daubert* hearing. For now, however, the Court necessarily has to assume that

Dr. Parisian's opinions and report would satisfy *Daubert* and has to rule on Defendant's motion after considering the substance of Dr. Parisian's report and affidavit. Therefore, Defendant's citation in its motion for reconsideration to summary judgment decisions in which a court has stricken an expert's report under *Daubert*, *see, e.g.*, Mem. in Support of Def.'s Mot. for Reconsideration [doc. #65] at 4 (citing *Raskin v. Wyatt Co.*, 125 F.3d 55, 66-68 (2d Cir. 1997)), are irrelevant to the procedural context of this case. To the extent that Defendant argues that even though Dr. Parisian's opinions and report may be admissible under *Daubert* for present purposes, they nonetheless lack relevance or probative value, suffice it to say that – without in any way suggesting how it will ultimately rule on the *Daubert* motion – the Court cannot say as a matter of law at this stage that Dr. Parisian's opinions are so utterly lacking in probative value that the Court must ignore them for purposes of Defendant's summary judgment motion.

Second, contrary to the claims of Defendant in its Motion for Reconsideration, there is indeed evidence to support Plaintiff's claim that Defendant was aware of the risk of the adverse reactions that Plaintiff claims to have suffered. Dr. Parisian directly concludes that severe reactions, including "permanent loss of eyesight," were known to be possible side effects of Lupron. *See* Local Rule 56(A)(2) Statement [doc. #46] Ex. K at 7. Defendant strenuously argues that Dr. Parisian's report relies on inapplicable studies or adverse event reports – but that argument is based only on Defendant's own assertions. For instance, Defendant dismisses a study on which Dr. Parisian relies because the two sentences she quotes in her report "fail to provide any indication whatsoever that the identification of a 'risk of permanent loss of eyesight' was based upon scientifically reliable studies." Mem. in Support of Def.'s Mot. for Reconsideration [doc. #65] at 9. Defendant had an opportunity to depose Dr. Parisian about the bases for her conclusions and to present its own

evidence that those conclusions were unfounded. Yet, Defendant has failed to do so, and the Court is not persuaded by Defendant's bald claims that Dr. Parisian's report lacks sufficient "indicia of reliability," *see Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002), especially at the summary judgment stage.

Finally, Defendant also suggests that as a matter of law Plaintiff was obligated to "present . . . evidence that the FDA would have allowed TAP to include" a package-insert warning indicating permanent blindness. Mem. in Support of Def.'s Mot. for Reconsideration [doc. #65] at 6; *see also id.* at 8 (arguing that Plaintiff must show that the FDA concluded that a warning of permanent eye injury should be included in the Lupron package insert). However, Defendant does not cite a single legal authority for this proposition, and more importantly, Defendant offers no evidence to suggest that the FDA would not have accepted such a package-insert warning had Defendant sought it.

In sum, the Court finds that Defendant has not presented any controlling authority or overlooked data demonstrating that the Court's earlier ruling was incorrect. Accordingly, Defendant's Motion for Reconsideration [doc. #65] is DENIED.

IT IS SO ORDERED,

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: February 17, 2006.