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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BAHAMAS SURGERY CENTER, LLC,
Plaintiff,
v.
KIMBERLY-CLARK CORPORATION,
et. al.,
Defendants.

Case No.: CV 14-8390-DMG (PLAx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The legal claims in this case came before a jury during a nine-day trial that began on March 28, 2017 and concluded on April 7, 2017. The jury returned a verdict in favor of Plaintiff Bahamas Surgery Center, LLC and against Defendants Kimberly-Clark Corporation and Halyard Health, Inc. based on the claim of concealment. The jury awarded Plaintiff and the class \$3,889,327 in compensatory damages, prejudgment interest, and \$350 million in punitive damages against Kimberly-Clark. The jury also awarded Plaintiff and the class \$261,445 in compensatory damages, prejudgment interest, and \$100 million in punitive damages against Halyard Health. *See* Doc. ## 501, 503 (verdict forms).

1 In addition to this legal claim, Bahamas brought an equitable claim against
2 Defendants under California’s Unfair Competition Law (“UCL”). As to this remaining
3 equitable claim, the Court makes the following findings of fact and conclusions of law
4 pursuant to Rule 52 of the Federal Rules of Civil Procedure.

5 **I.**
6 **FINDINGS OF FACT¹**

7 This is a class action consisting of the following class members: All entities and
8 natural persons in California who purchased MICROCOOL* Breathable High
9 Performance Surgical Gowns (“MicroCool Gowns”) as end-purchasers from February 12,
10 2012 and January 11, 2015. *See* Class Cert. Order at 34 [Doc. # 270]; Amended Final
11 Pretrial Conference Order at 2 [Doc. # 450]. This excludes (a) governmental entities; (b)
12 any person or entity in which any judge, justice, or judicial officer presiding over this
13 matter and members of their immediate families and judicial staff, have any controlling
14 interest; and (c) any partner or employee of Class Counsel. Class Cert. Order at 34 n.15.

15 Bahamas bases its equitable class claim under the UCL on the same underlying
16 facts as the concealment claim that it presented to the jury, i.e., that Defendants concealed
17 material information from Plaintiff and the class relating to a defect in the MicroCool
18 Gowns and that, as a result, Plaintiff and the class overpaid for the gowns. Given that the
19 verdict forms did not require the jury to make any express findings as to why it found for
20 Bahamas on the sole legal claim, the Court looks to the jury instructions and the jury’s
21 verdict to discern the jury’s implicit determinations.

22 The Court instructed the jury that for Bahamas to prevail on the concealment
23 claim, it must prove the following:
24
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27 ¹ To the extent any of the Court’s findings of fact may be considered conclusions of law or vice
28 versa, they are so deemed.

1 1. That Defendants disclosed some facts to Plaintiff but
2 intentionally failed to disclose other facts, making the disclosure
3 deceptive;

4 or

5 That Defendants intentionally failed to disclose certain facts
6 that were known only to them and Defendants knew that Plaintiff did
7 not know or could not have reasonably discovered those facts;

8 or

9 That Defendants actively concealed important facts from
10 Plaintiff or prevented Plaintiff from discovering those facts;

11 2. That Plaintiff did not know of the concealed facts;

12 3. That Defendants intended to deceive Plaintiff by concealing the
13 facts;

14 4. That the concealed or non-disclosed facts were material;

15 5. That Plaintiff was harmed; and

16 6. That Defendants' concealment was a substantial factor in
17 causing Plaintiff's harm.

18 Jury Instructions No. 26. [Doc. # 493.]

19 Having found for Plaintiff, the jury must have implicitly found that Bahamas
20 proved by a preponderance of the evidence that Defendants intentionally failed to
21 disclose material facts to Bahamas and/or actively concealed material facts from
22 Bahamas relating to the MicroCool Gowns of which Bahamas was unaware, and which
23 led Bahamas to suffer harm.

24 The Court adopts, as it must, the jury's implicit factual determinations as embodied
25 in its verdict, including its conclusion that Bahamas satisfied its burden at trial by proving
26 by a preponderance of the evidence that Defendants intentionally concealed material
27 information about the MicroCool Gowns from Bahamas and the class.

28 Given the sheer size of the jury's verdict and the evidence presented at trial, one of
the implicit findings of the jury also includes, at the very least, a determination that
Defendants concealed information regarding a defect in the MicroCool Gown, and that
the defect was material to whether the MicroCool Gown deserved the AAMI Level 4
rating which Defendants used to market the gown. The specific defect on which the
evidence focused at trial was the vulnerability of the MicroCool Gowns' sleeve seams to

1 tearing and/or permitting access to fluids. *See, e.g.*, Keith Edgett Testimony at 17 (“I
2 would see the complaints [relating to the MicroCool Gowns] . . . in lists that would be
3 circulated specific to strike-through or gross failure, meaning liquid penetration. I recall
4 seeing complaints of sleeves falling off the gowns.”) [Doc. # 506, Ex. A].

5 The jury obviously credited Bahamas’ percipient witnesses and expert witnesses
6 over Defendants’ expert witnesses. *See, e.g., id.* at 8, 30 (“There was general awareness
7 that the [MicroCool Gown] product[] w[as] not compliant, and there was a general
8 concern with respect to what risks that presented to healthcare workers, patients, and the
9 community. . . . Yet that was not communicated to the customer base.”); Bernard Vezeau
10 Testimony at 8 (“[T]here was no priority to fix [the MicroCool Gowns’ compliance
11 issues] whatsoever, because making improvements to the [MicroCool Gown] product
12 was in direct conflict with improving the margins on the product. . . . And the clear
13 direction from Kimberly-Clark headquarters out of Dallas was we needed to make the
14 business more profitable.”) [Doc. # 506, Ex. B]; Joanne Bauer Testimony at 10
15 (testifying she does not dispute making statement that she was “sick and tired of the
16 noncompliance problems” that had plagued various products for close to a decade) [Doc.
17 # 506, Ex. D]; *see also, e.g.*, Rolando Ferrera Testimony, 3/31/17 Transcript at 77
18 (discussing sleeve seam manufacturing problems with MicroCool Gown production at
19 Honduras plant and that Defendants had to have known about strikethrough and
20 channeling issues).

21 Additionally, the evidence presented at trial demonstrated that Bahamas and class
22 members incurred economic damages as a result of Defendants’ concealment and were
23 entitled to a partial refund of the amounts they overpaid to Defendants, as calculated by
24 Bahamas’ damages expert, Michael Williams.

25 In light of the evidence presented by the parties at trial and the jury’s implicit
26 findings, the Court finds that Bahamas proved by a preponderance of the evidence that
27 Defendants’ failure to disclose material information to, or active concealment of such
28 information from, Bahamas relating to the MicroCool Gown’s defective sleeve seam and

1 non-compliance with the AAMI Level 4 standard (under either the 2003 or 2012
2 iterations of the standard) constitutes a fraudulent business practice that is likely to
3 deceive the reasonable consumer.

4 II.

5 CONCLUSIONS OF LAW

6 A. Unfair Competition Law

7 The UCL prohibits “unfair competition,” which is defined as any “unlawful, unfair
8 or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. A business
9 practice under the UCL is “fraudulent” if “members of the public are likely to be
10 deceived.” *Comm. on Children’s Television v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211
11 (1983).

12 In particular, to establish a UCL violation based on concealment and/or non-
13 disclosure of material facts, a plaintiff must generally prove the following: (1)
14 Defendants engaged in “unfair competition” by engaging in a “fraudulent business act or
15 practice”; (2) plaintiff “has suffered injury in fact and has lost money or property as a
16 result of the unfair competition,” Cal. Bus. & Prof. Code § 17204; (3) the information
17 Defendants concealed or failed to disclose was material, *see, e.g., In re Tobacco II Cases*,
18 46 Cal. 4th 298, 326-27 (2009); and (4) Defendants had a duty to disclose the material
19 information omitted, *see, e.g., Falk v. GMC*, 496 F. Supp. 2d 1088, 1098 (N.D. Cal.
20 2007) (“If [Defendant] had this duty [to disclose], yet failed to follow through with it,
21 members of the public would very likely be deceived.”). The Court did not include
22 actual reliance as an element of the claim, because “[a]ctual reliance is presumed (or at
23 least inferred) when the omission is material.” *Ehrlich v. BMW of N. Am., LLC*, 801 F.
24 Supp. 2d 908, 919 (C.D. Cal. 2010) (citing *Tobacco II*, 46 Cal. 4th at 327).

25 B. Jury’s Implicit Determinations

26 “[W]here legal claims tried by the jury and equitable claims tried by the court are
27 ‘based on the same set of facts, the Seventh Amendment requires the trial judge to follow
28 the jury’s implicit or explicit factual determinations.’” *Sanders v. City of Newport*, 657

1 F.3d 772, 783 (9th Cir. 2011), quoting *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507
2 (9th Cir. 1989) (“the district court in deciding the [equitable] claim will be bound by all
3 factual determinations made by the jury in deciding the [legal] claims”); *Los Angeles*
4 *Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (reversing district
5 court’s denial of equitable relief because it “engag[ed] in factfinding contrary to the
6 implicit findings of the jury verdict”).

7 Because the verdict form does not contain express factual findings, the Court must
8 look to the jury instructions to determine whether findings can be inferred from the jury’s
9 verdict. *Los Angeles Police Protective League*, 995 F.2d at 1473.

10 Since Bahamas’ UCL claim is based on the same underlying facts as the legal
11 claim decided by the jury, it follows from the jury’s implicit determinations on the legal
12 claim that Bahamas satisfied its burden of establishing by a preponderance of the
13 evidence that Defendants engaged in a fraudulent business practice (i.e., concealment of
14 material information pertaining to the MicroCool Gown) likely to deceive the public and
15 reasonable consumers. *See, e.g., Tu Thien The, Inc. v. Tu Thien Telecom, Inc.*, No. CV
16 11-09899-MWF (JEMx), 2014 U.S. Dist. LEXIS 111200, at *4 (C.D. Cal. Aug. 11,
17 2014) (adopting jury’s findings in ruling on equitable claims because they are based on
18 the same underlying facts as the legal claims).

19 Accordingly, Bahamas prevails on its UCL claim.²

20 **C. Appropriate Equitable Relief**

21 _____
22 ² The Court rejects Defendants’ argument that Bahamas lacks standing to bring its UCL claims
23 against Halyard on behalf of the class. *See* Def. Resp. at 4 n.1 [Doc. # 521.] As the Court stated on the
24 record, the juridical link doctrine permits Bahamas to pursue claims against Halyard. *See* 4/6/17
25 Transcript; *see also La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 465–66 (9th Cir. 1973)
26 (juridical link doctrine may apply (1) where the named plaintiff’s harms “are the
27 result of a conspiracy or concerted schemes between the defendants,” or (2) where it would be
28 “expeditious” to combine the defendants into one action because they are “juridically related.”). As the
Court pointed out in its April 6, 2017 oral ruling on the issue of standing, Halyard Health spun off from
Kimberly-Clark on October 31, 2014 and assumed all liabilities in connection with the MicroCool
Gowns through Defendants’ Distribution Agreement. *See* Amended Final Pretrial Conference Order at
2–3 (admitted facts) [Doc. ## 450, 477-1].

1 Bahamas seeks restitution in the same amount as the compensatory damages
2 awarded by the jury. The Court denies Bahamas' request, because the jury's
3 compensatory damages award is an adequate remedy at law. *See, e.g., Greene v. Bowen,*
4 *639 F. Supp. 554, 563 (E.D. Cal. 1986)* (“[A]s a general matter . . . a person suffering
5 monetary injury has an adequate remedy at law and accordingly equitable relief should be
6 denied.”).

7 In addition to restitution, Bahamas seeks injunctive relief in the form of a notice
8 from each Defendant's Chief Executive Officer (“CEO”) concerning the trial's outcome.
9 A plaintiff seeking a permanent injunction must demonstrate:

10 (1) that it has suffered an irreparable injury; (2) that remedies available at
11 law, such as monetary damages, are inadequate to compensate for that
12 injury; (3) that, considering the balance of hardships between the plaintiff
13 and defendant, a remedy in equity is warranted; and (4) that the public
14 interest would not be disserved by a permanent injunction.

15 *eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).*

16 Here, Bahamas contends that monetary damages do not adequately notify class
17 members regarding the material information that Defendants concealed. Assuming that is
18 true, Bahamas has not satisfied its burden to show that class members will likely suffer
19 irreparable harm in the absence of a letter from Defendants' CEOs concerning the
20 outcome of the trial. It is reasonable to infer that some of the millions of MicroCool
21 Gowns sold during the class period may still be sitting on shelves waiting to be used by
22 class members. Trial Ex. 203; Declaration of Michael Avenatti (“Avenatti Decl.”) ¶ 4,
23 Ex. 3 (evidence that MicroCool Gowns have a shelf life of five years). Nonetheless,
24 because there was no evidence that anyone had suffered physical harm while wearing a
25 MicroCool Gown as a result of a strikethrough or a torn sleeve, the Court cannot presume
26 without competent evidence that class members likely will suffer such harm due to future
27 MicroCool Gown use. Furthermore, there is nothing to prevent Class Counsel from
28 notifying class members of the outcome of the trial in any manner he chooses.

1 Finally, Plaintiff requests that Defendants be enjoined from issuing statements
2 seeking to “contradict, undercut, or otherwise minimize the findings of the Court or the
3 injunctive relief awarded.” See Pl. Post-Trial Brief at 22. Such relief is not necessary to
4 address Plaintiff’s and the class members’ harm, which is economic in nature. The Court
5 therefore rejects Plaintiff’s request.


6 In short, while Bahamas satisfies the elements for a UCL claim based on
7 fraudulent concealment, because it has not shown that it lacks an adequate remedy at law
8 that addresses the harm it suffered, its request for restitution and injunctive relief is
9 **DENIED.**³

10 **III.**
11 **CONCLUSION**

12 In light of the foregoing, the Court finds in favor of Plaintiff and against
13 Defendants on Plaintiff’s UCL claim. Nevertheless, because Plaintiff fails to meet the
14 standard for equitable relief, the Court **DENIES** Plaintiff’s request for restitution and
15 injunctive relief.

16 The Court will enter Judgment accordingly.

17
18 DATED: May 15, 2017

19 
20 _____
21 DOLLY M. GEE
22 UNITED STATES DISTRICT JUDGE
23
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27 _____
28 ³ In light of the Court’s ruling, it need not address Defendants’ arguments that the primary jurisdiction and abstention doctrines bar Bahamas from receiving any relief under the UCL.