UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 12-1150-DMG (MANx)** Date July 7, 2017

Title ***Kim Allen, et al. v. Hyland's Inc., et al.*** Page 1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS - ORDER RE: PLAINTIFFS' MOTION FOR NEW TRIAL [476]

Plaintiffs Kim Allen, Melissa Nigh, Nancy Rodriguez, Diana Sisti, Sherrell Smith, Daniele Xenos, and Yuanke Xu move for a new trial on their breach of express warranty, Magnuson-Moss Warranty Act ("MMWA"), and California Consumer Legal Remedies Act ("CLRA") claims against Defendants Hylands, Inc. and Standard Homeopathic Company. Plaintiffs contend that the Court issued misleading jury instructions that did not accurately reflect the law and prejudiced Plaintiffs. They also argue that the jury verdict in favor of Defendants was against the clear weight of the evidence at least as to the cough and cold products and teeth tablets.

For the reasons discussed below, the Court **DENIES** Plaintiffs' motion for a new trial.

I. ANALYSIS

A. Jury Instructions

The Court "has substantial latitude in tailoring jury instructions." *Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000). "Jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002).

Here, Plaintiffs contend that the Court erroneously instructed the jury as to the warranty and CLRA claims when it required the jury to consider whether Plaintiffs met their burden of proof to show that Defendants' "representations were false because the products at issue cannot relieve symptoms as represented." *See* Jury Instruction No. 26 (as to CLRA claim) [Doc. # 425.]; Jury Instruction No. 30 (as to warranty claim, "Defendants' homeopathic products did not perform as promised because they cannot perform as promised"). First, according to Plaintiffs,

such instructions created a "heightened burden of proof" by requiring them to prove that Defendants' products "cannot" relieve certain symptoms, instead of requiring only that they prove the products "do not" provide relief. Second, Plaintiffs argue that the Court wrongly omitted an instruction that directed the jury to not consider any placebo effect in determining whether Defendants' products provided relief.

1. "Cannot" versus "Do Not"

Plaintiffs contend the "heightened burden" discussed above requiring Plaintiffs to prove that Defendants' products cannot resolve symptoms as advertised is not supported by the law and "materially affected [their] ability to prove the asserted causes of action and resulted in prejudicial error." *See* Mot. at 1 [Doc. # 476-1.] The Court disagrees.

As a preliminary matter, there is no trial-imposed "heightened burden." This same "burden" has existed since the Court certified the class based on Plaintiffs' own theory that "Defendants made material misrepresentations about products which do not work and *cannot possibly work* as a matter of scientific principle, given the level of dilution of their active ingredients." Class Cert. Order at 20 (emphasis added) [Doc. # 291]; *see also* Third Amended Complaint ¶ 53 ("Defendants know that there are, at best, traceable amounts of active ingredients present in Calms Forte and therefore must be aware that Calms Forte *cannot relieve any symptoms* for which Defendants advertise the Product.") (emphasis added) [Doc. # 203].

Even Plaintiffs' subsequent trial brief continued to assert that the Defendants' products "cannot relieve symptoms as represented." *See* Doc. # 383 at 6 ("Defendant made representations that were actually false or provided information in a manner that it was likely to mislead or deceive the consumer because the products *cannot relieve symptoms as represented*") (emphasis added), 7 ("Defendants' advertising statements were untrue or misleading such that those statements were likely to deceive the reasonable consumer because the products *cannot relieve symptoms as represented*") (emphasis added). There, Plaintiffs explicitly represented that their own homeopathy expert, Dr. Noel Rose, would "testify that the underlying principles of homeopathy are biologically implausible and accordingly the products *cannot be effective treatments for their advertised symptoms*, other than to provide an undisclosed placebo effect." *Id.* at 8 (emphasis added).

Ultimately, based on and adopting Plaintiffs' *own* cannot-relieve-symptoms theory, the Court at class certification rejected Defendants' arguments that individualized issues predominate or negate Plaintiffs' ability to satisfy the Rule 23(a) elements. *See* Class Cert. Order at 22 ("To the extent that the named plaintiffs differ from the absent class members in the

ways identified, such differences do not affect their ability to prove that Defendants' products cannot possibly work because the active ingredients are so diluted as to be useless."), 32 ("Plaintiffs contend that all of Defendants' representations on the product packaging were deceptive because the products are so diluted that they cannot possibly perform as advertised.") (citing Plaintiffs' class certification motion). The Court also relied upon own Plaintiffs' theory of the case to frame the issues in the Final Pretrial Conference Order. *See* Doc. # 382 at 4–5 (applying the phrase "cannot relieve symptoms as represented" to elements of each of Plaintiffs' claims). Plaintiffs raised no objections to the Court's Class Certification Order on the use of the word "cannot"—nor could they, as it was Plaintiffs' own theory of the case that enabled it to prevail on class certification.

Inquiring whether a product does or does not work as advertised would have invited the parties to present evidence as to whether various consumers found the particular product effective. As the Court explained previously at trial, "if we were here to decide whether [Defendants' products] work[] for some people [and not] for other people, then we would have individualized issues," which would make a class action improper. Sept. 15, 2015 Transcript at 157. [Doc. # 463.] Focusing the issue on whether the products cannot work as represented ensured that individualized issues did not predominate. Instead, the trial centered around expert testimony as to the science behind homeopathy and whether, as Plaintiffs originally posited, the active ingredients in the products are so diluted that they "cannot possibly perform as advertised."

Additionally, the Court does not find that its jury instructions led to prejudicial error. "In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered." *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001). Plaintiffs cite to no authority to support their position that the Court's warranty and CLRA jury instructions failed to fairly and correctly cover the elements of their legal claims—they did. *Compare* Jury Instructions No. 26 and 30 *with* Cal. Civ. Code § 1770(a) and California Civil Jury Instruction No. 1230, respectively. The Court also rejects Plaintiffs' contention that the warranty and CLRA jury instructions requiring Plaintiffs to prove that "[t]he representations were false because the products at issue cannot relieve symptoms as represented" is "inherently ambiguous because it is unclear whether it is intended to express possibility or ability." Mot. at 15. The instructions are clear: if the products cannot relieve the symptoms as advertised, the representations are false.

Finally, Plaintiffs argue that the jury instructions caused actual harm because "[i]n polling after the verdict, the jury stated it felt Plaintiffs proved the Products did not work, but that they were blocked due to the 'cannot' standard." Reply at 9 [Doc. # 480]. The Court will

disregard Plaintiffs' conclusory assertion about what "the jury" stated after rendering the verdict as it is inadmissible. *See* Fed. R. Civ. P. 606(b)(1).

2. Placebo Effect Instruction

Next, Plaintiffs contend that the Court erred by failing to instruct the jury not to consider any placebo effects in evaluating Plaintiffs' legal claims. Specifically, Plaintiffs requested that the Court issue the following instruction: "In determining whether Plaintiffs met their burden in establishing their claims you may not take into consideration the placebo effect in determining whether Defendants' products provided relief." *See* Proposed Jury Instructions [Doc. # 408.] The Court agrees with Plaintiffs that Defendants should not receive credit for conferring a benefit upon consumers that resulted only from a placebo effect. *See* Class Cert. Order at 40 n.26.

But Plaintiffs fail to demonstrate why this proposed placebo-effect instruction's omission resulted in prejudicial error or misled the jury. Plaintiffs received ample opportunity to discuss and argue the placebo effect at trial, for instance, through their expert witnesses and during closing argument. *See, e.g.*, Sept. 17, 2015 Transcript at 85 (Plaintiffs' attorney arguing in closing that "[h]omeopathy did not for the last 235 years, does not today, and will not in the future actually provide physiological, medical relief of any symptom other than a placebo effect, and that means they cannot. 'Do not' equals 'cannot.'") [Doc. # 466]; *see* Dixon Decl., Ex. 12 at 62 (Dr. James Taylor Video Deposition) (Q: "And so with respect to all four primary outcomes that you set out to measure, Cold 'n' Cough for Kids did not show any effect that was any different from placebo, correct? A: That's correct.")[1] [Doc. # 476-4]; *see also infra* section I.B (quoting testimony of Dr. Noel Rose regarding placebo effect). Plaintiffs cite no authority for the proposition that the Court's omission constitutes prejudicial error. They do cite to *FTC v. Pantron I Corp.* 33 F.3d 1088, 1100 (9th Cir. 1994), where the Ninth Circuit held that where "a product's effectiveness arises solely as a result of the placebo effect, a representation that the product is effective constitutes a 'false advertisement' [under the Federal Trade Commission Act] even though some consumers may experience positive results."

The *FTC* case, however, is distinguishable. Aside from involving an entirely different statute, the Federal Trade Commission Act, *FTC* involved the Ninth Circuit's review of a bench trial, not a jury trial. The Ninth Circuit reversed a district court's ruling in favor of Defendants in part because "[*a*]*ll* of the evidence of effectiveness adduced by Defendants can be explained by the placebo effect" and Defendants failed to present evidence that rebutted the medical

[1] Plaintiffs presented the video deposition of Dr. Taylor at trial. Dixon Decl., Ex. 12 at 61.

consensus that the products-at-issue are "inherently ineffective." *Id.* at 1097–98 (emphasis in original).

In contrast, Defendants in this case presented expert testimony that there is not yet medical consensus regarding the effectiveness of homeopathic remedies or that extreme dilution of an active ingredient necessarily causes it to be ineffective as a scientific principle. *See, e.g.*, Sept. 14, 2015 Transcript [Doc. # 462] at 18–19, 26 (Dr. Peter A.G. Fisher testified that he finds homeopathy effective in treating patients and has conducted placebo-controlled trials of homeopathic medicines); Sept. 11, 2015 Transcript [Doc. # 461] at 105 (Dr. Bernardo Merizalde testified that "homeopathic medicine can be helpful in the majority of conditions"); Sept. 15, 2015 Transcript [Doc. # 463] at 120-121, 146-148, 149 (Dr. Edward Calabrese discussed the concept of hormesis, the biphasic dose response phenomenon wherein a low dose is stimulatory whereas a high dose can be inhibitory or toxic, and proposed a scientific framework for testing). As the Court stated in its Findings of Fact and Conclusions of Law, the "evidence presented at trial demonstrated that the issue which the Court certified for class treatment continues to be the subject of scientific debate and Plaintiffs failed to present evidence of definitive scientific research to meet their burden of proof as to the products at issue." *See* Doc. # 471 at 3.

Still, Plaintiffs maintain that the placebo-effect instruction "would have removed any confusion arising from the faulty 'cannot' standard imposed on the jury." Reply at 9. As the Court explained earlier, the warranty and CLRA jury instructions are unambiguous and Plaintiffs fail to explain how they would have created confusion.

In short, for the reasons identified above, the Court **DENIES** Plaintiffs' motion for a new trial to the extent it is based on the warranty and CLRA jury instructions, or the Court's decision to omit the proposed placebo-effect instruction.

B. Jury's Determination

Under Rule 59(a), a court may grant a new trial after a jury trial on some or all issues, and to any party, "for any reason for which a new trial has heretofore been granted in an action at law or in federal court." Fed. R. Civ. P. 59(a). As the Ninth Circuit has noted, the rule itself "does not specify the grounds on which a motion for new trial may be granted." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). "Rather, the court is bound by those grounds that have been historically recognized" which "include, but are not limited to, claims that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the moving party." *Id*. (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

The Ninth Circuit has held that "the trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Id.* (internal citation, brackets, and quotation marks omitted). "The district court's denial of the motion for a new trial is reversible only if the record contains no evidence in support of the verdict" or where the district court has "made a mistake of law." *Id*. (internal citation and quotation marks omitted). In deciding whether to hold a new trial, "the trial court may weigh the evidence and credibility of the witnesses, [but it] is not justified in granting a new trial merely because it might have come to a different result from that reached by the jury." *Roy v. Volkswagen of Am., Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990) (internal quotation marks omitted).

Here, Plaintiffs argue that the jury's verdict was "contrary to the clear weight of the evidence directly relating to the Defendant's Cough & Cold Products and Teething Tablets Products, which unequivocally was clinically proven to not be as effective as advertised and did not alleviate the symptoms as Defendant's [sic] claimed." Mot. at 18. Plaintiffs point to testimony from the trial, including, among others, the testimony of Dr. John Borneman, Dr. James Taylor, and Dr. Rose. Mot. at 18–19. According to Plaintiffs, these witnesses testified that placebos performed better than or no different from the Teething Tablets and Cold & Cough products, in part citing Dr. Taylor's study of Hyland's Cold 'n Cough 4 Kids (the "Taylor Study") and Hyland's Teething Tablet Study, which purportedly demonstrate the products' ineffectiveness. Declaration of Deborah Dixon ("Dixon Decl."), Exs. 9–12 [Doc. # 476]. Plaintiffs specifically point to Dr. Rose's testimony that "with respect to the products that are under consideration . . . it is my opinion that there is no sound scientific or medical evidence that they provide any benefit to patients with medical conditions such as those described and indicated on the labels, beyond the placebo effect." *See* Dixon Decl., Ex. 16 (transcript of Rose testimony).

In their opposition, Defendants cite to evidence that conflicts with Plaintiffs' witnesses' assertions. For example, Defendants highlight Dr. Borneman's testimony wherein he stated that the Teething Tablet Study had a flawed design. *See* Sept. 2, 2015 Transcript at 114–18 ("In this trial the placebo group showed more activity than the active group did, which is not only sort of against what you would think, but it meant that there was a methodology problem somewhere.") [Doc. # 455]. Similarly, Defendants direct the Court's attention to other experts who testified that the Taylor Study had design flaws. Drs. Robbert van Haselen, for instance, testified that both the Taylor Study and the Teething Tablet Study upon which Plaintiffs relied were "inconclusive" on the issue of the products' effectiveness. September 4, 2015 Transcript at 33–34, 79–88 [Doc. # 461].

Plaintiff's own expert, Dr. Rose, admitted that the Taylor Study had methodological problems, including that it did not have enough statistical power to detect a difference between the treatment and the placebo. Sept. 4, 2015 Transcript at 99 [Doc. # 446]. Consequently, Dr. Rose conceded on cross-examination that the Taylor Study proves neither the Cough n' Cold product's effectiveness nor its ineffectiveness. *Id.* at 99–100. Defendants' experts also disputed Dr. Rose's assertion that homeopathic products definitively cannot provide relief beyond the placebo effect. *See supra* section I.A (citing as examples the testimony of Dr. Fisher and Dr. Merizalde). In their Reply, Plaintiffs attack the credibility of Defendants' expert witnesses.

Yet, in the absence of a definitive scientific study performed with proper methodology, it is precisely this type of conflicting evidence and testimony that counsels against granting a new trial. *See Union Oil Co. of California v. Terrible Herbst, Inc.*, 331 F.3d 735, 743 (9th Cir. 2003) (reversing district court decision to grant new trial where "substantial evidence [] goes both ways on all of the[] points"). While the Court may weigh the evidence in evaluating Plaintiffs' motion, "[i]t is not the courts' place to substitute our evaluations for those of the jurors." *Id.*; *see also Roy*, 896 F.2d at 1177–79 (finding that the defense's evidence did not so preponderate that it fell within the discretion of the trial judge to rule that the jury's [plaintiffs'] verdict was against the great weight of the evidence"). Any attempt by this Court to do so would merely substitute this Court's personal opinion for that of the jury's verdict.

Put differently, "the district court's discretion is more limited in cases where, as here, there is conflicting evidence on each side and the case turns on credibility issues." *Carrethers v. Bart Area Rapid Transit*, , 2012 U.S. Dist. LEXIS 41009, at *14 (N.D. Cal. Mar. 26, 2012) (discussing *Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987)); *see also Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.").

To summarize, because of the conflicting expert witness testimony and the absence of a definitive scientific study which would have effectively impeached one side or the other, the Court cannot conclude that the jury's verdict was contrary to the clear weight of the evidence—Plaintiffs simply did not carry their burden of proof by a preponderance of the evidence.
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II.
CONCLUSION

In light of the foregoing, the Court **DENIES** Plaintiffs' motion for a new trial.

IT IS SO ORDERED.