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

Case No. **CV 14-8390-DMG (PLAx)** Date April 11, 2018

Title ***Bahamas Surgery Center, LLC. v. Kimberly-Clark Corporation, et al.*** Page 1 of 38

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

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

Proceedings: IN CHAMBERS - AMENDED ORDER RE DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW; MOTION FOR A NEW TRIAL, REMITTITUR, OR AMENDMENT OF JUDGMENT; AND POST-TRIAL MOTION TO DECERTIFY THE CLASS [488, 489, 535, 536, 537]

On April 7, 2017, the jury in this case returned a verdict in favor of Plaintiff Bahamas Surgery Center, LLC and against Defendants Kimberly-Clark Corporation and Halyard Health, Inc. based on the sole claim of fraudulent concealment. The jury awarded Bahamas and the class $3,889,327 in compensatory damages, prejudgment interest, and $350 million in punitive damages against Kimberly-Clark. The jury also awarded Bahamas 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).

On May 26, 2017, Defendants moved for judgment as a matter of law ("JMOL") pursuant to Federal Rule of Civil Procedure 50(b) on Bahamas' sole claim of fraudulent concealment [Doc. # 535], and for a new trial, remittitur, or amendment of judgment under Rules 59(a) and (e) [Doc. # 536].[1] Defendants also moved to decertify the class [Doc. # 537]. Because the parties are intimately familiar with the facts of this case, the Court need not recite them here. The Court will incorporate its discussion of the evidence as it discusses the issues raised by the parties in the following sections.

The Court has duly considered the parties' written submissions. For the reasons set forth below, the Court **DENIES** Defendants' post-trial motions for JMOL, a new trial, and remittitur. The Court **GRANTS in part** Defendants' motion to amend the judgment to reduce the punitive damages award. The Court **DENIES** Defendants' post-trial motion to decertify the class.[2]

[1] Defendants moved for JMOL under Rule 50(a) on April 7, 2017 at the close of their case-in-chief. [Doc. ## 488, 489.] The Court reserved ruling on these motions. [Doc. # 490.]

[2] This Order amends and supersedes the Court's prior rulings on these motions. [Doc. # 573.]

I.
RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Legal Standard

Under Federal Rule of Civil Procedure 50, "[i]f a party has been fully heard on an issue during the jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," the court may grant a motion for judgment as a matter of law. Fed. R. Civ. P. 50(a). Such a motion may be renewed after trial if the court does not grant the motion as a matter of law after the close of the evidence and instead submits the issues to the jury. Fed. R. Civ. P. 50(b). "[A] challenge to the sufficiency of the evidence must be made in a Rule 50(a) motion for JMOL at the close of the evidence in order to be renewed in a Rule 50(b) motion for JMOL after trial." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1041 (9th Cir. 2003) (citing Fed. R. Civ. P. 50(b)).

In assessing a JMOL motion, a court "must view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (internal citation and quotation marks omitted). "In entertaining a motion for judgment as a matter of law, the court . . . may not make credibility determinations or weigh the evidence." *Id*. (internal citation, quotation marks, and brackets omitted); *see also Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001) (a district court "must accept the jury's credibility findings consistent with the verdict."). A court "must accept any reasonable interpretation of the jury's actions." *Zhang*, 339 F.3d at 1038.

"The test applied is whether the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Go Daddy*, 581 F.3d at 961. A court should deny a motion for JMOL where substantial evidence exists to support a jury verdict. *See Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007) ("A jury's verdict must be upheld if it is supported by substantial evidence.").

B. Analysis

A successful claim for fraudulent concealment requires a plaintiff to show: (1) defendant concealed a material fact, (2) defendant had a duty to disclose the fact, (3) defendant intentionally concealed the fact with the intent to defraud, (4) plaintiff was unaware of the concealed fact and would not have acted as he did if he possessed knowledge, and (5) as a result

of the concealment, plaintiff sustained damage. *Kaldenbach v.Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 850 (2009).

Here, Defendants make five arguments in support of their JMOL motion: (1) Defendants had no duty to disclose the negative information relating to the MICROCOOL* Breathable High Performance Surgical Gowns ("MicroCool Gowns"); (2) Bahamas failed to prove the element of reliance; (3) Bahamas failed to establish that Defendants had knowledge of the falsity or its materiality to end purchasers; (4) Bahamas failed to produce substantial evidence to support the jury's damages award; and (5) Bahamas lacks standing to prevail on its concealment claim. The Court addresses each of these arguments *seriatim*.

1. Duty to Disclose

In the absence of a fiduciary relationship between defendant and plaintiff, as here, there are three circumstances when an obligation to disclose may arise: (1) the defendant has exclusive knowledge of material facts not known to the plaintiff; (2) the defendant actively conceals a material fact from the plaintiff; and (3) the defendant makes partial representations but also suppresses some material facts. *See Asghari v. Volkswagen Group of America, Inc.*, 42 F. Supp. 3d 1306, 1328 (C.D. Cal. 2013); Class Cert. Order at 22 (citing cases) [Doc. # 270].

i. Materiality

"A misrepresentation is judged to be material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question," and, as such, "materiality is generally *a question of fact* unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009) (internal quotation marks and citation omitted) (emphasis added).

Here, Defendants argue that because Bahamas failed to establish "[c]lasswide proof of materiality" of the concealed information at issue (i.e., failure to meet the AAMI Level 4 standards), the jury unreasonably reached the implicit finding that Defendants had a duty to disclose that information to class members. *See* Mot. JMOL at 10 [Doc. # 535]. For instance, according to Defendants, "the evidence established that whether the undisclosed information would have been material varies among class members." *Id.* at 11. Indeed, Defense expert Dr. Hanssen testified that only 2.7% of survey respondents identified AAMI Level 4 as an important factor when considering gown purchases. *See* Trial Tr. (4/5/17) at 85–87 ("I conclude that [the AAMI level on a product] is important for some buyers, but the number for whom it is important

is very small") [Doc. # 535-6, Ex. E at 16].[3] Defendants also highlight evidence that the price and sales of MicroCool Gowns remained stable before and after knowledge of Bahamas' lawsuit became public, and the fact that Bahamas presented no survey evidence demonstrating the materiality of the ASTM 1671 testing failures. Mot. JMOL at 14 (citing Dr. Baker's testimony regarding price and sale stability that "strongly suggest[] that any undisclosed information was immaterial"); Trial Tr. (4/5/17) at 158 (Dr. Baker concluding "that there is no association between the use of the AAMI 4 label – or in that sense also alleged misuse of the AAMI 4 label – and the prices that class members would have been paying for these gowns") [Doc. # 536-6, Ex. E at 29].

While this evidence certainly cuts in Defendants' favor, substantial evidence presented at trial exists to support the jury's implicit finding of materiality—that reasonable end purchasers of surgical gowns would attach importance to whether the gowns met the AAMI Level 4 standard. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994) ("Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence."). For example, Bahamas presented evidence that Defendants' own employees believed that end purchasers would rely on the representation that the MicroCool Gowns satisfied the AAMI Level 4 standard. *See, e.g.*, Bernard Vezeau Testimony at 24 ("Q: In your experience in marketing and sales at Kimberly-Clark, did you have the understanding that when the company made a representation regarding the efficacy, safety of a product, meeting a certain standard, like AAMI Level 4, that purchasers and healthcare professionals would rely upon that standard when purchasing and using the product? . . . A: Absolutely. They would take us – I mean, we would provide them testing data. We would provide them sales brochures. But they relied upon us to present our product as being safe or being compliant with an AAMI 3 or an AAMI 4 standard.") [Doc. # 506, Ex. B at 71].

Bahamas also offered evidence that Defendants marketed the MicroCool Gowns as providing the highest level of barrier protection for liquid-intensive treatments, including the treatment of Ebola patients. *See, e.g.*, Trial. Tr. (3/30/17) at 62 ("Q: Okay. So did you market the MicroCool gowns to customers who were looking to purchase personal protection equipment as it related to Ebola, didn't you? A: [Kimberly-Clark's former Vice President of Sales and Marketing Christopher Lowery testifying] Yes. We referred – or translated the recommendations of the CDC [Center for Disease Control] through to our customers and point out that our AAMI 4 level gown was survivable.") [Doc. # 546-1 at 33]. This is circumstantial evidence that end purchasers considered barrier protection a significant consideration and that

[3] Page citations to the Trial Transcript and briefs are to the internal page numbers, whereas citations to the Docket Numbers ["Doc. #"] are to the pages assigned by the CM/ECF electronic pagination system.

Defendants responded in kind by acknowledging the importance of that factor in their advertising and marketing efforts. Put differently, Defendants would not have placed such emphasis in their marketing on the superior protection provided by their AAMI Level 4 gowns if it was so obviously unimportant to end purchasers.

Significantly, Bahamas offered the testimony of Christine Rashel Campos, a registered nurse who served as Bahamas' director of nursing during the class period. Trial Tr. (4/3/17) at 107–09 [Doc. # 546-1 at 78]. Her responsibilities included purchasing surgical gowns for the center. *Id.* She testified that the "AAMI rating [on surgical gowns] would give us the reassurance that we have that [highest level of] protection for our staff and surgeons." *Id.* at 115–16. She went on to testify that she understood the term "AAMI Level 4" to be a "high level of protection during a high-fluid case, that [the surgical gown] wouldn't leak, and it would protect you from any microorganisms[4] or fluid getting under the gown. . . . You don't see if it's [nonvisible microorganisms] there, so to protect yourself, you would – you would wear a gown that's AAMI 4." *Id.* Ultimately, she testified that had she "kn[own] that there was a problem or [the MicroCool Gowns] weren't passing the industry standards, I wouldn't have purchased them." *Id.* at 125; *see generally* Pl. Opp. Decert. at 10–11 (citing evidence from the record that goes to issue of materiality) [Doc. # 545].

Drawing all reasonable inferences in favor of Bahamas, the Court concludes that Bahamas presented substantial evidence at trial to show that reasonable end purchasers attached importance to whether the MicroCool Gowns satisfied the AAMI Level 4 standard. Moreover, Defendants' failure to disclose the gowns' inability to satisfy the AAMI Level 4 standard was material to reasonable end purchasers who were in the business of performing high-fluid medical procedures. That the jury apparently chose to believe Bahamas' percipient witnesses over Defendants' retained experts was a credibility determination well within the jury's province. *See Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001) ("[T]he court must accept the jury's credibility findings consistent with the verdict.") (internal quotation marks and citation omitted).

a. Whether Bahamas Must "Prove Again At Trial" the Elements of Class Certification

Defendants also argue that Plaintiff failed to prove that class members "uniformly expected to receive an AAMI Level 4 gown" and points to the Court's Class Certification Order

[4] Campos testified that "microorganisms" consist of "[b]acteria or organisms you can't see. We disinfect that [Operating Room] in-between cases, and we take a level of security to protect ourselves from transmitting any transmissible diseases." *Id.*

finding that Bahamas failed to meet its burden to show a uniform affirmative representation prior to or at the point of sale. Mot. JMOL at 12 (citing Class Cert. Order at 15–16); *see also* Mot. Decert. at 9 ("In order to prove that compliance with the AAMI Level 4 standard was material to every class member, Plaintiff needed to, but could not, prove that all class members were told the gown was AAMI Level 4.") [Doc. # 537]. But the Court already has explained that for a "fraudulent concealment claim such as this, involving the omission of uniform, material facts, a plaintiff need not show uniform reliance as it would in an affirmative misrepresentation claim." Class Cert. Order at 23 (citing cases). Having found that common issues predominate on the fraudulent concealment claim, the Court certified the class.

In essence, Defendants' position appears to be that Bahamas had a burden during trial to prove all the elements of class certification (e.g., common questions predominate as to materiality) before a jury. Decert. Reply at 3 (rejecting plaintiff's argument that it "was only required to prove elements of Bahamas Surgery Center's claim, which, in turn, applied to all class members" because it "ignores that class certification is an inherently tentative determination that a plaintiff will be able to prove the claims of the class at trial using common, classwide evidence—*i.e.*, that the same evidence will suffice for each member to make a prima facie showing, or that common issues are susceptible to generalized, class-wide proof") (internal quotation marks and citation omitted).

Indeed, Defendants argue that "[a]lthough the Court's class certification order stated that a presumption of reliance might apply . . . , Plaintiff still bore the burden of proving at trial facts supporting such a presumption, just as it bore the burden of proving all the disputed elements of its claims." Mot. JMOL at 10 n.4. To be clear, Bahamas had a burden at trial to prove materiality. *See* Jury Instruction No. 26 (Concealment) [Doc. # 493]. But to the extent Defendants argue that Bahamas must "prove again at trial" the facts supporting the presumption of materiality *as to the entire class* (separate and apart from the class representative), they are incorrect.[5]

[5] Defendants cite to *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6 (2011). The Supreme Court's *Dukes* footnote, however, was limited to a discussion about the "fraud on the market" presumption that securities-fraud class plaintiffs can invoke to avoid the problem of proving reliance. Under this fraud-on-the-market presumption, all individual investors who "purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements." *Id.* "To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, . . . an issue they will surely have to *prove again at trial* in order to make out their case on the merits." *Id.* (emphasis added). Defendants cite to no authority that this unique need to prove market efficiency at trial in securities fraud class actions extends to the need for class representatives to prove materiality as to all class members at trial in common law fraudulent concealment cases.

Defendants' logic would mean that the Court erred in instructing the jury that "[i]n a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. . . . *You may assume that the evidence at this trial applies to all class members.*" Jury Instruction. No. 3 (emphasis added) [Doc. # 493]; *see, e.g.*, *Cooper v. S. Co.*, 390 F.3d 695, 713 (11th Cir. 2004) (Rule 23 is "designed to ensure that 'the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives.'") (citation omitted), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). Significantly, Defendants could have objected to this language, but failed to do so. *See* Trial Tr. (4/6/17) at 153–54; Trial Tr. (4/7/17) at 6-8 (Defendants failed to object to this aspect of Jury Instruction No. 3's language after the Court asked the parties if they had any issues regarding the jury instructions) [Doc. # 561].

Because the Court certified the class, the jury was free to assume that the materiality evidence presented as to class representative Bahamas applied to all class members on the lone fraudulent omission claim. Of course, Defendants were entitled to introduce evidence aimed at undermining the elements that formed the basis of class certification—for example, though they chose to rely on retained experts, Defendants could have called certain class members as witnesses to attest that the AAMI Level 4 rating meant nothing to them. But Bahamas was not required during trial to prove materiality as to all class members by, for instance, bringing in testimony or evidence involving hundreds of other class members. *See* Newberg on Class Actions § 1:5 (5th ed.) (a "primary purpose of the class suit is to promote efficiency by enabling representatives to litigate for absent class members"). The Court therefore rejects any contention that Bahamas was required to "prove again at trial" facts supporting the presumption of reliance *as to all individual absent class members* on the fraudulent omission claim.[6]

ii. Unreasonable Safety Risk

Defendants argue that because Bahamas "failed to demonstrate an unreasonable safety risk of any kind" posed by the MicroCool Gowns, it failed to prove a duty to disclose. As a preliminary matter, the Court does not agree that evidence of an unreasonable safety risk is a prerequisite for establishing a duty to disclose in a fraudulent concealment claim not alleging a

[6] Even if such a requirement exists, the Court finds that Bahamas met that burden when the evidence is viewed in the light most favorable to Plaintiff. For example, Bahamas introduced evidence of Defendants' extensive advertising and promotional activities, which emphasized the superior performance of the MicroCool Gown in providing liquid barrier protection, in intensive high-fluid procedures and even in interactions with Ebola patients. This is circumstantial evidence of materiality that would support the presumption of reliance on the part of not only Bahamas, but also absent class members.

latent defect outside of warranty. Courts commonly recognize that a duty to disclose can exist even when the alleged omissions do not involve an unreasonable safety risk. *See, e.g.*, *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1268 (C.D. Cal. 2007) (plaintiff sufficiently alleged a duty to disclose as defendant, among other things, actively concealed the material fact from plaintiff "that a significant amount of toner remains in the toner cartridge when its color laser printers shut-down and indicate that the toner cartridge is 'empty,'" but did not allege existence of a design defect).

Defendants do cite to an order from this Court in *Avedisian v. Mercedes-Benz USA, LLC*, 43 F. Supp. 3d 1071, 1077 (C.D. Cal. 2014), where it stated that "[o]utside of representations made in the warranty, a defect is material only if it poses safety concerns." That case, however, involved the potential for physical injury from an alleged defect that was *de minimis*: "no reasonable factfinder could find that the injuries resulting from [peeling chrome trim on certain interior car components of a Mercedes-Benz] are severe enough to present an unreasonable safety hazard." *Id.* at 1079. More to the point, *this case* does not raise a latent defect claim outside of a warranty period—instead, Bahamas alleges that Defendants failed to disclose that its MicroCool surgical gowns did not meet the standards for an AAMI 4 rating. Although the words "defect" and "defective" have been used loosely in this case as a shorthand to describe the problems with the MicroCool gowns, evidence in the record strongly suggests that a problem during the manufacturing process (faulty bar sealers), not a design defect in the gown itself, played a role in causing leakage and tearing in the gown's seams. *See, e.g.*, Trial Tr. (3/30/17) at 151 (Christopher Lowery testifying about communications between two Kimberly-Clark employees who described technology used to seal MicroCool gown seams as "crap") [Doc. # 546-1, Ex. E].

Defendants do not cite any authority for the proposition that the "unreasonable safety hazard" materiality standard applies to cases that do not allege design defects. Indeed, they cannot, because the Ninth Circuit has indicated that this "safety risk" materiality standard is limited to latent design defect claims. *See, e.g.*, *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1143 (9th Cir. 2012) ("[A]s Plaintiffs allege that HP concealed the design defect in the Laptops, the District Court did not err in requiring Plaintiffs to allege the design defect caused an unreasonable safety hazard."). The partial refund remedy in this case recognizes that the MicroCool Gown was not defective for some purposes (e.g., in non-high-fluid intensive surgical procedures), but did not deserve to be sold with the AAMI Level 4 rating under which it was marketed.

Even if the "unreasonable safety risk" materiality standard can be engrafted onto a fraudulent concealment claim that does not allege a design defect, when the evidence is viewed

in the light most favorable to Bahamas, it satisfied its burden. Although the Court agrees with Defendants that Bahamas did not present any evidence that anyone suffered physical harm while wearing a MicroCool Gown, Bahamas presented substantial evidence of unreasonable safety risks arising from a surgical gown that is not truly impermeable. For example, the class representative witness, Rashel Campos, testified that she sought to purchase an AAMI Level 4 gown in order to provide a measure of reassurance to Bahamas' staff and surgeons that they would receive the highest level of protection while engaged in high-fluid procedures. Trial Tr. (4/3/17) at 115-16. Implicit in that testimony is the existence of a concern among healthcare professionals that operating with a permeable surgical gown in high-fluid procedures poses a safety risk from microorganisms, even if it is not explicitly quantified. It was reasonable for the jury to infer that addressing this safety concern was the basis for a class member's selection of an "AAMI Level 4" rated gown to purchase in the first place. Bahamas' expert Jeffrey Stull testified that the MicroCool Gowns, which did not meet the AAMI Level 4 standard, posed a safety risk to healthcare workers and patients. *See, e.g.*, Trial Tr. (4/3/17) at 194–97. Defendants attack Stull's testimony, stating that he "did not attempt to quantify the risk" or point to scientific literature. Mot. JMOL at 5. Such concerns, however, involve credibility determinations and issues of weight. The jury was well within its province to credit Stull's testimony over Defendants' experts, especially since Stull was involved in the "development and implementation of [the ASTM 1671] test" at issue. Trial Tr. (4/3/17) at 177–78.

iii. Sufficient Transaction Relationship

Defendants contend that "a defendant has no duty to disclose where 'there was no transactional relationship'—no 'direct dealings'—'between the plaintiff and defendant." Def. Mot. JMOL at 5 (emphasis in original) (citing *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 311–12 (2017), *review denied* (Mar. 29, 2017)). Bahamas asserts that Defendants waived this argument by not raising it in their Rule 50(a) motion. *See Go Daddy*, 581 F.3d at 961 ("Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion."). "Allowing trial courts to set aside jury verdicts on grounds not presented in pre-verdict motions has been held to constitute an impermissible re-examination of jury verdicts in violation of the Seventh Amendment." *Pet Food Exp. Ltd. v. Royal Canin USA, Inc.*, 2011 WL 6140874, at *2 (N.D. Cal. Dec. 8, 2011) (citation omitted) . Defendants' failure to raise this issue sooner—either in their Rule 50(a) motion or earlier during discussions over the language of the jury instructions—has effected a waiver of their argument that the existence of a direct transactional relationship between Plaintiff and Defendant is a necessary condition to establishing a duty to disclose in fraudulent concealment actions.

Nonetheless, even if Defendants did not waive this direct-dealings argument, the Court finds that the lack of a direct transactional relationship between Defendants and Bahamas is not fatal to Bahamas' concealment claim. The medical malpractice case Defendants cite is distinguishable: it involved an injured plaintiff's claim against the manufacturer of a medical device and the doctor (as well as his medical group) who *rented out* that device to plaintiff. *Bigler-Engler*, 7 Cal. App. 5th at 314. In that case, the evidence did not show that the defendant manufacturer "derived any monetary benefit from [plaintiff's] individual rental of the Polar Care device. Indeed, [defendant medical group] appears to have obtained the Polar Care device [plaintiff] used from [defendant manufacturer] several years before [plaintiff's] surgery and maintained the device itself for rental to its patients. Under these circumstances, there was no relationship between [defendant manufacturer] and [plaintiff] (or her parents) sufficient to give rise to a duty to disclose." *Id.* In contrast, here, Bahamas actually *purchased* the MicroCool Gowns, albeit through a third-party intermediary (i.e., CPT manufacturer), and substantial evidence at trial showed that Defendants profited from such sales.[7]

In short, the Court **DENIES** Defendants' motion for JMOL as to this issue because Defendants waived the argument or, alternatively, because Bahamas and class members purchased the MicroCool Gowns largely through authorized third-party intermediaries, which resulted in a direct financial benefit to Defendants.

iv. FDCA Preemption

Defendants argue that "[t]o the extent Plaintiff purports to rely on the alleged disclosure of data related to the safety or efficacy of the gowns, its claim fails as a matter of law because Plaintiff failed to produce evidence showing that Defendants fell short of any duty to disclose such information under the Food, Drug, and Cosmetics Act ('FDCA')." Mot. JMOL at 8.

The FDCA preempts claims arising out of state laws that "establish or continue in effect with respect to a device intended for human use any requirement: (1) which is different from, or in addition to, any requirement applicable . . . to the device, and (2) which relates to the safety or effectiveness of the device or to any matter included in a requirement applicable to the device

[7] Defendants' citation to *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1059 n.3 (9th Cir. 2008), is also unavailing. *Platt*'s statement that the fraudulent concealment claim could not be premised on a duty to disclose because plaintiff failed to allege there was a transactional relationship between the parties is *dicta*. *Id.* (citing *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 337 (1997)). The district court dismissed plaintiff's fraudulent concealment claim because it was barred by the statute of limitations and the Ninth Circuit affirmed on that ground. *Id.* at 1059–60 ("Platt's fraudulent concealment claim . . . was therefore barred by the three-year statute of limitations.").

under this chapter." 21 U.S.C. § 360k(a). Here, Defendants argue that Bahamas' concealment claim would impose a duty to disclose that "would effectively amount to requiring Defendants to undertake a corrective field action of the sort that is exclusively governed by federal law and regulations" under the FDCA. JMOL Reply at 9 [Doc. # 549].

As Bahamas points out, however, it does not seek relief that would require Defendants to take a "corrective field action" or its functional equivalent. *See generally* Amended Final Pretrial Conference Order [Doc. # 450]. Bahamas' damages are economic in nature.[8] Defendants have not identified any cases where the court deemed a medical device fraudulent concealment damages claim preempted because it is tantamount to a field action (i.e., subjecting the device to a recall). In the absence of such authority, the Court declines to deem Bahamas' fraudulent concealment claim preempted.

2. Reliance and Whether Class Would Have Been Aware of Any Disclosure of the Concealed Information

Defendants argue that Bahamas "failed to prove that the undisclosed information was material to every member of the class, and so there is no ground on which a reasonable jury could find a duty to disclose or *presumption of reliance* on a classwide basis." Mot. JMOL at 14 (emphasis added); *see also* JMOL Reply at 13 ("Because Plaintiff failed to prove materiality classwide—and thus the duty-to-disclose and reliance elements of its claims— . . . . Judgment as a matter of law should be granted."). The Court disagrees with Defendants' position on the materiality issue for the reasons already discussed. *See supra*, section I.B.1.i. Defendants mount a second argument on the issue of reliance: that Bahamas neither presented evidence demonstrating how any plausible disclosures by Defendants would have reached all class members nor did it "prove that *each* class member would have actually seen the disclosures." Mot. JMOL at 17.

As an initial matter, Defendants did not propose a jury instruction requiring these additional elements—i.e., that Plaintiff must (1) prove a "uniform mechanism of disclosure" of the concealed information and that (2) class members would have been *actually exposed* to any disclosure—to prove reliance. *See* Mot. JMOL at 17–18. Defendants' proposed instruction as to the concealment claim includes only the following requirement for reliance: "That had the omitted information been disclosed, Plaintiff reasonably would have behaved differently." *See* Def. Proposed Jury Instruction No. 2 (citing Judicial Council of California Civil Jury Instructions 1901) [Doc. # 325]. Defendants' post hoc argument that Plaintiff failed to satisfy the above

[8] Plaintiff's requests for additional injunctive relief (i.e., notice from Defendant's CEO concerning trial outcome) were denied. [Doc. # 529.]

newly raised elements has therefore been waived, and the Court's final pretrial conference order controls. *See* Amended FPTC Order at 15 ("That had the omitted information been disclosed, a reasonable consumer would have attached importance to the concealed or non-disclosed information's existence or nonexistence in determining his or her choice of action.") [Doc. # 450]; *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 950 (9th Cir. 1993) ("A pretrial order generally supersedes the pleadings, and the parties are bound by its contents."); *S. California Retail Clerks Union & Food Employers Joint Pension Tr. Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984) ("We have consistently held that issues not preserved in the pretrial order have been eliminated from the action."). [9]

To be sure, the Ninth Circuit may review a challenged jury instruction for plain error whenever a civil trial litigant fails to object to a jury instruction. *Chess v. Dovey*, 790 F.3d 961, 970 (9th Cir. 2015). Defendants argue that under Ninth Circuit law, Plaintiff as a matter of law *must* "establish a plausible method of disclosure [of the concealed information] and . . . that [it] would have been aware of information disclosed using that method" in order to prevail on a claim for fraudulent concealment. *See* Mot. JMOL at 15 (quoting *Daniel v. Ford Motor Company*, 806 F.3d 1217, 1227 (9th Cir. 2015)). Although *Daniel* did analyze whether a group of plaintiff car buyers would have been aware of a disclosure by defendant Ford regarding certain vehicle defects, the rule it applied was that "[a] plaintiff *may* [prove actual reliance in a fraudulent omission claim] by simply proving 'that, had the omitted information been disclosed, one would have been aware of it and behaved differently.'" *Id.* at 1225 (emphasis added) (quoting *Mirkin v. Wasserman*, 5 Cal.4th 1082 (1993)). *Mirkin*, the case upon which *Daniel* relied, however, does not require a plaintiff to establish the actual method or mechanism by which a defendant could have disclosed the information.

As already discussed in prior orders, for cases of fraudulent concealment, reliance is presumed if the omitted information is material. *See* Class Cert. Order at 23 (citing cases) [Doc. # 270]; *In re Tobacco II Cases*, 46 Cal. 4th at 327. *Daniel* does not alter this rule. *See supra*, section I.B.1.i. (discussing materiality). Here, class representative witness Campos' testimony provides a legally sufficient basis for a materiality finding: she testified that had she known about the problems with the MicroCool Gown and its failure to satisfy industry standards for AAMI Level 4, Bahamas would not have purchased the gowns. *See* Trial Tr. (4/3/17) at 125.

[9] Defendants argue there was no waiver because the Court's final pretrial conference order incorporated the reliance elements from the Defendants' memorandum of contentions of fact and law. *See* JMOL Reply at 13 n.12 (citing Doc. # 299 at 2). The portion of the Defendants' memorandum of contentions of fact and law that Defendants cite in their Reply, however, does not allude to any requirements that Plaintiff must establish both a plausible mechanism of disclosure and actual exposure to such a disclosure to prove fraudulent omission.

In any event, *Daniel* reversed a district court's summary judgment in favor of Ford on the awareness-of-defect and method-of-disclosure issues because the consumer plaintiffs created a genuine issue of material fact when it "presented evidence that they interacted with and received information from sales representatives at authorized Ford dealerships prior to purchasing their [defective vehicles]." *Daniel*, 806 F.3d at 1226. *Daniel* concluded "this [was] sufficient to sustain a factual finding that Plaintiffs would have been aware of the disclosure if it had been made through Ford's authorized dealerships." *Id.*

Here, Bahamas' class representative witness Campos testified that she interacted with and received information about the surgical gowns from third party intermediaries (i.e., CPT distributor) prior to purchasing them. *See, e.g.*, Trial Tr. (4/3/17) at 118–20; 147–48. She also saw the AAMI Level 4 label on the package. *Id.* at 119-20. Because in a class action trial, Plaintiff need only prove its claims through the class representative (and need not prove what every individual class member would have done), Campos' testimony serves as a legally sufficient evidentiary basis for a jury's finding that there was a plausible mechanism of disclosure and that class members would have been aware of any disclosure through the third party intermediaries and through the labeling or packaging of the gowns themselves. *See* Judicial Council of California Civil Jury Instructions 115 ("You may assume that the evidence at . . . trial applies to all class members"); *see also* Newberg on Class Actions § 1:5 (5th ed.) (a "primary purpose of the class suit is to promote efficiency by *enabling representatives to litigate*") (emphasis added); *Cooper*, 390 F.3d at 713 ("fortunes of the class members . . . rise or fall with the fortunes of the class representatives") (internal quotation marks and citation omitted).

3. Scienter

In further support of their JMOL motion, Defendants posit that Plaintiff's failure to prove that Defendants acted with the requisite scienter is fatal. Specifically, Defendants claim that they did not know about the omitted information at issue (i.e., MicroCool Gowns failed industry standard tests relating to liquid barrier protection) or that such information was material to Bahamas. Mot. JMOL at 18. Defendants point to evidence supporting their "good-faith belief that the MicroCool gowns complied at all times with the applicable AAMI Level 4 standard," and promptly addressed quality control issues when they arose. *Id.* at 19; *see, e.g.*, Trial Tr. (4/4/17) at 162 (defense expert Philip Phillips testifying that "changes in a recognized standard do not retroactively affect their product's [FDA] clearance for approval status"); Trial Tr. (4/5/17) at 132 (defense expert Duane Steffey testifying that certain test results "indicate that more likely than not, the MicroCool gowns were in compliance with the applicable 2003 [AAMI level 4] standard during the class period"); Trial Tr. (4/4/17) at 243 (Defendants convened a

Quality Review Board (QRB) and commissioned its own testing in response to the Cardinal Health results). According to Defendants, Bahamas "points to vague and generalized testimony from former employees that, at most, allude to an unquantified risk that never materialized." *Id.* at 18–19 n.9 (citing to portions of video deposition transcripts of witnesses Keith Edgett and Bernard Vezeau).

Bahamas responds by pointing to myriad evidence from the trial that, viewed in the light most favorable to Bahamas, serves as substantial evidence to support the jury's implicit finding of scienter as to not only the testing failures but also the recurrent manufacturing problems that most likely contributed to the failures. *See* Opp. Decert. at 16–19 [Doc. # 545 at 25-28]. The Court agrees that the evidence in the record is quite substantial and more than adequate to support a finding of scienter.

As this Court already explained in its Findings of Fact and Conclusions of Law, "[t]he jury obviously credited Bahamas' percipient witnesses and expert witnesses over Defendants' expert witnesses." FFCL at 3–4 [Doc #529] (citing e.g., Bernard Vezeau Testimony at 8 ("[T]here was no priority to fix [the MicroCool Gowns' compliance issues] whatsoever, because making improvements to the [MicroCool Gown] product was in direct conflict with improving the margins on the product. . . . And the clear direction from Kimberly-Clark headquarters out of Dallas was we needed to make the business more profitable.") [Doc. # 506, Ex. B]; Joanne Bauer Testimony at 10 (testifying she does not dispute making statement that she was "sick and tired of the noncompliance problems" that had plagued various products for *close to a decade*) [Doc. # 506, Ex. D]).

4. Proof Supporting Damages

Defendants argue that Bahamas failed to establish damages because it presented no evidence from which a reasonable jury could conclude that Plaintiff suffered economic harm. In particular, Defendants argue Bahamas did not demonstrate overpayment because it failed to "prove that every class member was exposed to a representation that the MicroCool gowns met the AAMI Level 4 standard." Mot. JMOL at 24–25 ("Plaintiff therefore cannot rely on a damages model that presumes that all class members' expectations regarding the gowns were based on Defendants' alleged misrepresentations."). A fraudulent concealment claim, however, does not require exposure to a material misrepresentation, but rather concealment of a material fact. *See* Class Cert. Order at 14 (elements for fraudulent misrepresentation), 21–22 (elements for fraudulent concealment); *see also, supra*, section I.B.1.

Alternatively, Defendants argue Bahamas' inappropriate use of the KC100 gown as a comparator gown invalidates the partial-refund damages model. Defendants assert the KC100 is not a valid comparator—Defendants believe there "were far better comparators"—and attack the testimony of Plaintiff's damages expert Michael Williams. For instance, they contend that "Dr. Williams' willingness to parrot the assumptions of counsel—without any effort to investigate the gown he used as a benchmark . . . dooms his analysis under *Daubert* and Rule 702." *See* Mot. JMOL at 28–29. As an initial matter, the Court notes that it denied Defendants' motion *in limine* to exclude Williams' testimony. *See* Doc. # 403. In the final analysis, however, the jury's implicit decision to place weight on Williams' decision to use the KC100 gown as a comparator over others is supported by substantial evidence from the record. *See, e.g.*, Trial Tr. (4/4/17) at 108-110 (explaining reasons for using comparator gown and denying he used the KC100 because counsel "told [him] to use it").

Accordingly, the Court **DENIES** Defendants' request that judgment be entered in its favor because Bahamas failed to prove damages.

5. Punitive Damages

According to Defendants, both California and federal law bar the imposition of punitive damages in this case. They contend that Bahamas failed to demonstrate by clear and convincing evidence that Defendants acted with malice, oppression, or fraud under California law. Moreover, Defendants assert that the punitive damages award violates the Due Process Clause of the Fourteenth Amendment.

In California, a plaintiff must show, by clear and convincing evidence, that the defendant acted with oppression, malice, *or fraud* in order to obtain punitive damages. *Hill v. Superior Court*, 244 Cal. App. 4th 1281, 1287 (2016); Cal. Civ. Code § 3294(a) ("[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover [punitive] damages"). Civil Code section 3294 defines fraud as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code § 3294(c)(3). "Clear and convincing evidence" is evidence "sufficient to support a finding of high probability." *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

Here, the issue is "whether there was substantial evidence supporting the jury's conclusion that there was clear and convincing evidence supporting an award of punitive

damages." *Flores v. CNG Fin. Corp.*, 45 F. App'x 771, 773 (9th Cir. 2002). Viewing the evidence in the light most favorable to Bahamas, the Court finds that the jury was entitled to impose punitive damages against Defendants. Bahamas produced substantial evidence, which the jury obviously believed, that Defendants engaged in fraud when they concealed material information from Bahamas concerning the MicroCool gowns' AAMI Level 4 rating. *See supra*, section I.B.3.

Among other clear and convincing evidence, Bahamas presented the testimony of fact witnesses Keith Edgett and Bernard Vezeau, both of whom worked for Kimberly-Clark. These witnesses described how, even though Defendants knew the MicroCool Gowns did not comply with the applicable standards that determine a certain level of liquid barrier protection, they chose to not disclose that information to its consumers and persisted in marketing their product with an AAMI level 4 rating. *See, e.g.*, Bernard Vezeau Testimony at 24–25 ("[The purchasers] relied upon us to present our product as being safe or being compliant with an AAMI 3 or an AAMI 4 standard. . . . [Those representations] were false.") [Doc. # 506, Ex. B]; Keith Edgett Testimony at 8 ("Q. So when you talk about openly communicated, you're talking about the fact that within the organization it was widely known that the products were noncompliant and creating safety risks, but a completely different story was being told to purchasers and healthcare professionals outside the organization; is that right? THE WITNESS: Correct. That's correct.") [Doc. # 506, Ex. A].

In response, Defendants argue that Bahamas "failed to offer clear and convincing proof that Defendants engaged in intentionally fraudulent conduct within the meaning of the punitive damages statute," and, for instance, point to testimony concerning the MicroCool Gowns' compliance with the 2003 AAMI Level 4 standard as evidence of Defendants' good faith. *See, e.g.*, Trial Tr. (4/5/17) at 144 (Defense expert testifying that "if I look at the test results from 2010 through 2014, the testing sponsored by Kimberly-Clark, and if those results were judged in accordance with the applicable 2003 standard, that more likely than not during the class period, the MicroCool gowns were in compliance with that standard"). In the face of these competing narratives, however, the jury chose to credit Bahamas' fact witnesses over Defendants' expert testimony. The jury was entitled to do this, and the Court may not make credibility determinations or otherwise weigh the evidence. *See Winarto*, 274 F.3d at 1283; *Go Daddy*, 581 F.3d at 961.

In short, there is substantial evidence in the record to support the jury's finding that Bahamas satisfied the clear and convincing standard in demonstrating Defendants' liability for punitive damages.[10]

6. Standing

Defendants argue that Bahamas lacks standing because it presented "no evidence that the MicroCool gowns it purchased failed to perform as they were represented to" and it "received the full benefit of its bargain." Mot. JMOL at 36. This is not the first time Defendants have made this standing argument. *See, e.g.*, MSJ at 11 (arguing Bahamas has not suffered an injury-in-fact because no evidence exists that '***a single MICROCOOL* gown that Bahamas purchased*** experienced a failure of any kind or performed in any way other than how it was expected to perform") (emphasis in original). The Court previously rejected this line of argument on multiple occasions and will not address it anew. *See* Summary Judgment Order at 5–6 [Doc. # 271]; Motion to Dismiss Order at 5–7 [Doc. # 40].

Separately, Defendants argue that Bahamas lacks standing to pursue claims against Halyard because it is undisputed that Bahamas never purchased MicroCool Gowns manufactured or sold by Halyard. The Court rejects this argument and incorporates the reasons it articulated from the bench on April 6, 2017 in denying Defendants' motion for judgment as a matter of law. *See* Trial Tr. (4/6/17) at 141–44. To summarize, the Court rejected Defendants' late-blooming contention, after two weeks of trial, that Bahamas lacked standing to sue Halyard, in part because they were aware of the operative facts and yet failed to raise that argument prior to trial, thereby prejudicing Bahamas' ability to name another class representative. *See, e.g.*, *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590, 604 (C.D. Cal. 2012); *Valazquez v. GMAC Corp.*, 2009 U.S. Dist. LEXIS 88574, *9-10 (C.D. Cal. Sept. 10, 2009) ("It is true that Courts regularly allow replacement of the named plaintiff after class certification. . . . [T]he reason substitution is appropriate after class certification is that 'once certified, a class acquires a legal status separate from that of the named plaintiffs,' such that the named plaintiff's loss of standing does 'not necessarily call for the simultaneous dismissal of the class action, if members of that class might still have live claims.'"). After class certification, the Court has an obligation to consider the interests of unnamed and absent class members. *See Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002) ("once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs. The certification of a class changes the standing aspects of a

[10] Defendants contend that any punitive damages award violates the Due Process Clause because they lacked fair notice that their conduct could subject them to punitive damages. The Court rejects this argument in part as will be discussed in greater detail below. *See infra*, section II.B.

suit, because '[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff.'"). Indeed, Halyard did not argue that all unnamed class members lacked standing, nor could they.

More importantly, as the Court stated in its oral ruling during the trial, Bahamas has standing to pursue its claims against Halyard under the juridical link doctrine. The Ninth Circuit has stated that this doctrine may apply to establish standing for a class representative like Bahamas (1) where the named plaintiff's harms "are the result of a conspiracy or concerted schemes between the defendants," *or* (2) where it would be "expeditious" to combine the defendants into one action because they are "juridically related." *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 465–66 (9th Cir. 1973).

Here, Bahamas presented evidence of a concerted scheme between Kimberly-Clark and Halyard to defraud purchasers of the MicroCool Gowns.[11] For instance, the evidence it introduced revealed that the MicroCool Gown product remained the same across both companies as did the alleged practice of ongoing concealment of material facts. It also demonstrated that the same individuals relevant to the lawsuit, who were previously employed by Kimberly-Clark, became employees of Halyard and assumed the same positions. *See, e.g.*, Avenatti Decl, Ex. H at 230 (research and development team member from Kimberly-Clark became part of Halyard). The corporate representative for Halyard testified at trial as the spokesperson setting forth all of the relevant timelines and corporate records from the perspective of the defense for the entire class period, including that period of time during which Kimberly-Clark was the sole manufacturer of the surgical gowns. The existence of a contractual obligation between Defendants further bolsters the application of the juridical link doctrine. *See* Newberg on Class Actions § 2:5 (the "doctrine is used mostly when there was either a contractual obligation among all defendants or a state or local statute requiring common action by the defendants") (internal quotation marks omitted). The contract between Halyard and Kimberly-Clark explicitly states Halyard shall be liable for Kimberly-Clark's conduct prior to October 2014 in connection with the MicroCool Gowns. *See, e.g.*, Distribution Agreement § 2.4 ("Assumption of Liabilities") [Doc. # 477-1].

Finally, the expeditiousness factor under *La Mar* also demanded the application of the juridical link doctrine. This case had been in litigation since October 2014 and had undergone a two-week trial by the time Defendants challenged Bahamas' standing to sue Halyard. It would have been a complete waste of judicial resources, as well as the parties' resources and the jury's time, to start all over with new litigation against Halyard to address solely those class claims

[11] Halyard "spun off" from Kimberly-Clark two days after this lawsuit was filed on October 29, 2014. *See* October 31, 2014 Distribution Agreement Between Kimberly-Clark and Halyard [Doc. # 477-1].

pertaining to post-October 2014 purchases, when Halyard took over the business of selling the same surgical gowns.

Accordingly, the Court finds that Bahamas had standing to pursue claims against Halyard under the juridical link doctrine and because certain absent class members unquestionably had standing to pursue the fraudulent concealment claim against Halyard.

C. Conclusion

In light of the foregoing, the Court **DENIES** Defendants' JMOL motion, in its entirety.

II.
MOTION FOR NEW TRIAL, REMITTITUR, OR AMENDMENT OF THE JUDGMENT

A. Legal Standard

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); *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1372 (9th Cir. 1987) (judge should not grant a new trial unless "left with the definite and firm conviction that mistake has been committed."). "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).

A court may alter or amend a final judgment pursuant to Federal Rule of Civil Procedure 59(e). District courts have "considerable discretion" when addressing motions to amend a judgment under Rule 59(e). *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (internal citations omitted). A "Rule 59(e) motion is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Wood v. Ryan*, 759 F.3d 1117, 1121 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 21 (2014) (internal citation and quotation marks omitted).

Generally, "[a] district court may grant a Rule 59(e) motion if it is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id.* (emphasis in original) (internal citations and quotation marks omitted). "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

B. Analysis

1. Constitutionality of Punitive Damages Award

Defendants argue that the punitive damages awards in this case—$350 million against Kimberly-Clark and $100 million against Halyard—exceed constitutional limits.

Punitive damages are "aimed at deterrence and retribution." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The Supreme Court has "instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418. A trial court's application of these guideposts to the jury award is subject to de novo review. *Id.*

i. Reprehensibility

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). In determining reprehensibility, a court must consider whether: the defendant's conduct caused physical harm; the target of the conduct was financially vulnerable; the conduct was isolated or repeated; the conduct evinced a reckless disregard for the health or

safety of others; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. *State Farm*, 538 U.S. at 419. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419.

Here, the sheer size of the jury's punitive damages award speaks loudly and clearly that the jury found Defendants' conduct in this case to be exceedingly reprehensible. Defendants have not convinced the Court that it should disturb the jury's implicit finding of reprehensibility. Three of the five reprehensibility factors appear to be at issue: reckless disregard, deceitfulness, and repeated conduct.

First, Defendants' conduct evinced both a reckless disregard for the health and safety of others, as well as deceitfulness. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) ("Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it."); *supra*, section I.B.5 (clear and convincing evidence of fraud for purposes of assessing punitive damages). For instance, fact witnesses like Keith Edgett testified that Defendants continued to sell the MicroCool Gowns even though the product had a known "compliance problem" and "did not on a continuous basis provide the levels of performance that were being claimed on the products," performance related to the liquid barrier protection of healthcare providers. *See* Keith Edgett Testimony at 33–34 [Doc. # 506, Ex. A]; *see also, e.g.*, Bernard Vezeau Testimony at 7–8 ("making improvements to the [MicroCool Gowns] was in direct conflict with improving the margins on the product. To make a product compliant or safe, you have to invest money in it. And the clear direction from Kimberly-Clark headquarters out of Dallas was we needed to make the business more profitable. And there are documents that I have that clearly stated that potential compliance efforts will come at the expense of profits or general margin.") [Doc. # 506, Ex. B].

Bahamas presented ample evidence that supports the jury's implicit finding that Defendants knew about the compliance issues and the safety risks that could result from less-protective gowns. *See, e.g.*, Trial Tr. (3/30/17) at 151 (Christopher Lowery testifying about communications between two Kimberly-Clark employees who described technology used to seal MicroCool gown seams as "crap") [Doc. # 546-1, Ex. E]; Bernard Vezeau Testimony at 8 ("the concern is that a defective product can lead to a surgeon becoming infected or the patient becoming infected") [Doc. # 506, Ex. B]; Trial Tr. (3/31/17) at 33-34, 43-44 (Rolando Ferrera, Project Manager at Kimberly-Clark's Honduras plant, described his repeated efforts to make

Kimberly-Clark aware of the problems with the manufacturing process for the gowns) [Doc. # 556]; Lon Taylor Testimony at 10 ("strikethrough can lead to exposure and infection for both the patient and healthcare worker") [Doc. # 506, Ex. C]. Yet, Defendants marketed the MicroCool Gowns as having the highest level of barrier protection and appropriate for use by healthcare providers when treating patients with communicable diseases as deadly as Ebola. *See* Trial Tr. (3/30/17) at 62 (Lowery testifying MicroCool Gowns were marketed to customers looking to purchase personal protection equipment as it related to the Ebola virus).

Second, there was also evidence that Defendants' deceitful conduct was not isolated, but repeated throughout the class period: Defendants sold three million MicroCool Gowns to class members during the class period. *See* Trial Tr. (4/5/17) at 49 (J.D. Hurdle testimony) [Doc. # 546-1, Ex. I]. Given the existence of substantial evidence that the gown's compliance problems were a known and ongoing concern during the class period, the Court rejects Defendants' contention that there is "no evidence that Defendants have repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." Def. Mot. New Trial at 10.

Defendants argue that they presented evidence of good faith sales of the MicroCool Gowns. For instance, according to Defendants, their expert witness Philip Phillips established that once the FDA gave Defendants 510(k) clearance to market the gowns as AAMI Level 4 based on an earlier 2003 AAMI PB70 standard, "it was entirely appropriate for Defendants to continue to market the MicroCool gown as 'AAMI 4' compliant without satisfying the yet-to-be-adopted 2012 standard." Mot. New Trial at 10 (citing Trial Tr. (4/4/17) at 167–69 [Doc. # 558]).[12]

Yet, Bahamas presented countervailing evidence at trial that disputed Defendants' assertion that the MicroCool Gowns satisfied the 2003 standard during the 510(k) clearance process to begin with. *See, e.g.*, Keith Edgett Testimony at 31–32 (testifying that he believed Defendants' statements in its 510(k) submission and data submitted to the FDA were "false" in part because the product used for validation was tested "under ideal conditions" and that he shared this belief with the company that the 510(k) submission contained false and misleading statements), 41–42 ("So my point was that when these validations were run, they weren't run under normal representative manufacturing conditions. It was ideal state, which is not the case."); Trial Tr. (4/3/17) at 189–90, 194 (Plaintiff's expert Jeffrey Stull testifying that the MicroCool Gowns did not satisfy AAMI Level 4 and that "in terms of testing, there is no difference" between the 2003 and 2012 editions of the AAMI standard for classifying surgical

[12] Phillips testified that even if certain tests in 2012 and 2013 showed that the MicroCool gowns did not meet the "revised proposed 2012 AAMI 4 standard," Defendants could still "legally market [the gowns as AAMI 4] in accordance with the 2003 version of the AAMI PB70 standard." Trial Tr. (4/4/17) at 166–67.

gown performance). Bahamas also offered evidence that Defendants knew the gowns did not comply with the 2003 standard. *See, e.g.*, Keith Edgett Testimony at 4 (testifying that in a "late 2012, early 2013" company meeting, the president of Kimberly-Clark's healthcare division Joanne Bauer said "she was sick and tired of all the noncompliance issues that . . . she had experienced *for more than a decade* and she wanted [Edgett] to fix it") (emphasis added) [Doc. # 506, Ex. A]; Trial Ex. 93 (Intertek testing report from Cardinal Health of the MicroCool Gowns) [Doc. # 535-11]; Keith Edgett Testimony at 57 ("[Cardinal Health] tested our products and they showed us proof that our products were not compliant") [Doc. # 506, Ex. A].

Defendants point to evidence that they were never able to replicate the Cardinal Health failing test results. *See, e.g.*, Trial Tr. (4/4/17) at 243 (Defense expert J.D. Hurdle testifying "we were never able to replicate those results, not even close"). According to Defendants, "the results from a single test, conducted by an adversary in litigation and inconsistent with all previous testing of the MicroCool Gowns, is hardly enough to establish that Defendants knew the gowns did not comply with the 2003 Level 4 standards." Mot. JMOL at 20.

Given the conflicting witness testimony and the absence of objective evidence that definitively impeached any one witness' credibility, the Court cannot conclude that the jury's implicit finding on the issue of reprehensibility was contrary to the clear weight of the evidence. *See Carrethers v. Bart Area Rapid Transit*, 2012 U.S. Dist. LEXIS 41009, at *14 (N.D. Cal. Mar. 26, 2012) ("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.") (discussing *Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987)). Bahamas satisfied this guidepost.[13]

ii. Ratio of Punitive Damages to Compensatory Damages

With regard to the second guidepost, the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424-25. In practice, however, "few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* In *State Farm*, the Supreme Court overturned a

[13] Defendants do focus on the lack of evidence of physical harm. *See, e.g.*, New Trial Reply at 5–8. Although Defendants are correct that all evidence of harm presented at trial was economic, the physical-harm factor is only one of the five reprehensibility factors. That no physical harm manifested itself does not negate evidence of Defendants' indifference to or reckless disregard for the safety of others. On balance, the three factors discussed above weigh in favor of the imposition of a punitive damages award.

$145 million punitive damages award, representing a 145:1 ratio, as unconstitutionally excessive. *Id.* at 429.

Here, the ratios for both Kimberly-Clark and Halyard far exceed the single-digit ratio. The punitive damages award against Kimberly-Clark represents a ratio of 90 to 1 while the award against Halyard represents a ratio of 382 to 1. Similar to *State Farm*, the injuries in this case are also purely economic. The jury awarded full compensatory damages as requested by Bahamas, and based on the damages model presented by Plaintiff. Plaintiff's award for the economic harm it suffered was not insubstantial. As it stands, the punitive damages awards against Defendants are constitutionally excessive. *See id.* at 424 ("courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered").

The analysis, however, does not end there. The Supreme Court has declined to impose a "a bright-line ratio which a punitive damages award cannot exceed." *Id.* Indeed, it has held that "even though a punitive damages award of more than 4 times the amount of compensatory damages might be close to the line, it did not cross the line into the area of constitutional impropriety." *Gore*, 517 U.S. at 581; *State Farm*, 538 U.S. at 424. The Ninth Circuit has also stated that "[i]n cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality." *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005) (finding reprehensible conduct where anti-abortion activists "made no bones about its intent to intimidate those in the reproductive health services community by true threats of serious injury or death" and concluding "[o]ur constitutional sensibilities are not offended by a 9 to 1 ratio"); *cf. Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1043-44 (9th Cir. 2003) (post-*State Farm* case upholding 7 to 1 ratio where the wrongful conduct involved significant racial discrimination).

Having carefully reviewed the evidence and the jury's verdict, the Court concludes that a sizeable reduction in the punitive damages award is required under governing case law. Defendants' conduct was egregious—but that assessment must be tempered by a consideration of the fact that this case presented evidence of only economic harm and not emotional or physical harm. In light of the reprehensibility analysis in the previous section, and, in particular, the evidence presented of a long period of deceit and reckless disregard for potential harm to front-line healthcare providers, the Court finds that Defendants' conduct is sufficiently egregious to justify a ratio of 5 to 1, which comports with the requirements of due process.

iii. Differences Between Punitive Damages and Civil Penalties

The third guidepost is the disparity between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 428. The parties disagree over the proper reference point. Defendants argue that the Food, Drug, and Cosmetic Act provides the appropriate analogous statutory penalty because the statute includes "fraud on the FDA." This is an improper comparator. In support of this assertion, Defendants cite *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 (2001), where the Supreme Court acknowledged that "the FDA may respond to fraud by seeking injunctive relief . . . and civil penalties." *Buckman*'s reference to the FDA's statutory enforcement powers, however, was made in the context of discussing an alleged wrongdoer's fraudulent misrepresentations to the FDA to attain market clearance; in other words, "false statements made during this and related approval processes." *Id.* In contrast, Bahamas' claim involves fraudulent concealment whereby material information is concealed from private consumers to induce them to purchase a product. Its claim does not involve a "state-law fraud-on-the-FDA claim," which in any event would be preempted. *Id.* at 350–52. Bahamas' proposed reference point is the UCL. The Court also rejects this comparator. As Defendants note, Bahamas fails to cite any case where a court turned to the UCL for a comparable civil penalty when analyzing a punitive damages award's constitutionality.

Because the Court is unaware of any "statutory penalty for misconduct that is comparable in a meaningful way to the misconduct at issue here, . . . [t]he third guidepost therefore plays no significant role in [its] analysis." *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 555, 570 (2011) (internal citations omitted) (did not use UCL as comparable civil penalty in case involving a claim for "intentionally conceal[ing] facts"); *see Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1183–84 (2005) ("The third guidepost is less useful in a case like this one, where plaintiff prevailed only on a cause of action involving common law tort duties that do not lend themselves to a comparison with statutory penalties, than in a case where the tort duty closely parallels a statutory duty for breach of which a penalty is provided.") (internal quotation marks and citations omitted).

In summary, the Court's application of the *State Farm* guideposts to the facts of this case leads it to the conclusion that (1) Defendants' misconduct was sufficiently reprehensible to warrant an award of punitive damages; (2) the ratio of punitive to compensatory awards is unconstitutionally large; and (3) the third guidepost plays no role in the analysis. Under *State Farm*, the jury's award of $350 million as punitive damages against Kimberly-Clark upon a compensatory damage award of $3,889,327 is neither reasonable nor proportionate to the wrong committed. The same analysis applies to the jury's award of $100 million in punitive damages

against Halyard upon a compensatory damage award of $261,445. Instead, the Court concludes that a ratio of 5:1—i.e., $19,446,635 in punitive damages against Kimberly-Clark and $1,307,225 against Halyard—would comport with the requirements of due process.

Accordingly, the Court **DENIES** Defendants' motion for a new trial based on excessive punitive damages. The Court **GRANTS in part** Defendants' motion to amend the judgment to reduce the punitive damages award as stated above, and **DENIES** Defendants' motion for remittitur. *See Leatherman Tool Grp., Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002) (a new trial is not necessary in every case in which a court finds that a punitive damages award is constitutionally excessive).[14]

2. Jury Verdict

Defendants seek a new trial because they believe the record was "replete with improper, incendiary, and irrelevant statements by Plaintiffs' counsel designed to inflame the jury against defendants" as well as "the improper admission of excluded evidence," via Plaintiff's counsel, all of which deprived them of a fair trial. Mot. New Trial at 18–19.

Where a party makes claims of attorney misconduct, "a new trial should only be granted where the flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Settlegood v. Portland Public Schools*, 371 F.3d 503, 516–17 (9th Cir. 2004) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984) (internal quotation marks omitted)). "There is an even 'high[er] threshold' for granting a new trial where . . . Defendants failed to object to the alleged misconduct during trial." *Settlegood*, 371 F.3d at 517 (quoting *Kaiser Steel Corp. v. Frank Coluccio Contr. Co.*, 785 F.2d 656, 658 (9th Cir. 1986)). Moreover, "where 'offending remarks occurred principally during opening statement and closing argument, rather than throughout the course of the trial,' we are less inclined to find the statements pervaded the trial and thus prejudiced the jury." *Settlegood*, 371 F.3d at 518 (quoting *Kehr*, 736 F.2d at 1286). "[T]he trial court is in a superior position to gauge the prejudicial impact of counsel's conduct during the trial." *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 346 (9th Cir. 1995). Here, Defendants argue Plaintiff's counsel committed misconduct in nine different ways.

[14] Under certain circumstances, a court may need to make further factual findings before it may reduce a punitive damages award. *See Leatherman*, 285 F.3d at 1151. Nonetheless, Plaintiff concedes that no such circumstances exist here. *See* Pl.'s Resp. to Order at 6 ("[A] retrial on punitive damages would ultimately be a wasteful exercise for all involved.") [Doc. # 575]; *accord* Defs' Stmt Concerning Pl.'s Resp. [Doc. # 576].

The first alleged misconduct is that Plaintiff's counsel "evaded" the Court's decision to exclude an August 2012 FDA warning letter sent to Kimberly-Clark—it did not relate to the MicroCool Gowns—by playing a portion of a videotaped deposition testimony of Joanne Bauer in which she recalled "being aware of the warning letter" and "t[aking] action to reply." Mot. New Trial at 20. At trial, during Bauer's testimony, the Court sought clarification that both the letter as well as "the lines that have been in the deposition transcript" that refer to the letter have been excluded. Trial Tr. (3/29/17) at 100 [Doc. # 546-1]. Plaintiff's counsel replied, "Your Honor, we already cut them all out." *Id.* This apparently was not the case. *See* Doc. # 506-1 at 38 (references to letter appearing in "Video Deposition Transcript Clips as Played at Trial"). The Court concludes that this portion of the testimony was improperly included. Nevertheless, in a trial that lasted nine days and involved multiple witnesses and hundreds of exhibits, the Court does not find this single instance of testimony briefly referring to this letter to be prejudicial or evidence of attorney misconduct warranting a new trial.[15] *See Settlegood*, 371 F.3d at 516–17 (misconduct must *sufficiently permeate an entire proceeding* to provide conviction that the jury was influenced by passion and prejudice); *cf. Trovan, Ltd. v. Pfizer, Inc.*, 2000 WL 709149, at *23 (C.D. Cal. May 24, 2000) ("When evidence is charged to have been improperly admitted, any error is more likely to be found harmful, and thus reversible, if the evidence is substantively important, inflammatory, repeated, emphasized, or unfairly self-serving." (quoting *Doty v. Sewal*, 908 F.2d 1053, (1st Cir. 1990)).

The second alleged misconduct involves Plaintiff's counsel's presentation of the videotaped deposition testimony of Bernard Vezeau, which contained statements concerning

[15] The entire exchange is as follows:

A. Exhibit 70 is a letter from the Department of Health and Human Services to Tom Falk, titled a warning letter.
Q. And it is from the FDA Division of Health and Human Services, correct?
A. That is correct.
Q. And you have a recollection of receiving this letter?
A. I don't recall it, but I see it.
Q. Do you have a recollection of being aware of this warning letter or the events leading up to the warning letter?
A. I have a recollection of being aware of a warning letter.
Q. What do you recall about the warning letter?
A. What is stated in here, that we got the warning letter and we took action to reply that were deemed adequate by the FDA.
Q. Well, this letter specifically requested a response on page two, right?
A. On page two it says, "Your firm's responses to this observation appear to be adequate."

Joanne Bauer Testimony at 23 [Doc. # 506-1 at 38].

surgical masks that the Court ruled should have been excluded. Mot. New Trial at 20–21. Vezeau testified regarding compliance and "quality control issues" with "Fluidshield masks," a non-gown product. Plaintiff admits that the relevant pages were "inadvertently and mistakenly not removed from the testimony that was to be played for the jury." Opp. Mot. New Trial at 30. In any case, the Court does not find these limited references to a non-MicroCool Gown product to have been prejudicial or sufficiently pervasive to warrant a new trial.[16]

The third alleged misconduct is that Plaintiff's counsel improperly referenced throughout trial and during closing argument an alleged statement by Bauer concerning a decade of noncompliance problems with company products. Defendants argue that Bauer had no recollection of making this statement, and, that to the extent she did, it did not relate to the MicroCool Gown product. *See* Mot. New Trial at 21. Defendants were free to argue this point to the jury. But Plaintiff's counsel did not commit misconduct by arguing that the alleged Bauer statement, which came out as *admissible evidence* through Keith Edgett's testimony, did happen and related to the MicroCool Gowns. *See Settlegood*, 371 F.3d at 518 (court less inclined to find the alleged offending remarks prejudiced jury when they occurred principally during closing argument).

The fourth alleged misconduct involves Plaintiff's damages expert, who testified that Defendants could withstand a punitive damages award of $170 million each. According to Defendants, the damages expert estimated this figure "without proper foundation" and based it partly on inadmissible evidence (e.g., the market value of stock). *See* Mot. New Trial at 23 ("Dr. Williams admitted that this number was based on, *among other things*, the 'market value of stock[].'") (emphasis added). Yet, as Defendants concede, the Court struck from the record the damages expert's reference to Kimberly-Clark's market value.[17] *Id.* Notwithstanding Defendants' criticisms of the $170 million estimate (e.g., "irrelevant and misleading information," *id.*), that figure was admissible evidence that Plaintiff counsel was entitled to rely upon in arguing his case.

[16] Defendants also point to a portion of Keith Edgett's testimony, where he states, "Whether it was – I don't mean to just pontificate, but whether it's gowns or masks, or whatever, it was a constant underlying foundation of concern all the time." *See* Mot. New Trial at 21 (citing Dec. # 506, Ex. A at 36). The inclusion of this passing non-specific reference to masks was also not prejudicial. *See* MIL Order at 12 –13 ("As a practical matter, the Court is not inclined to require redaction of references to non-MicroCool-Gown products during the presentation of evidence involving MicroCool Gowns at trial.") [Doc. # 403].

[17] Defendants also point to the damages expert's reference to $49 billion as Kimberly-Clark's market value. Mot. New Trial at 23. They concede that Plaintiff's counsel "did not expressly recite the $49 billion figure" again and acknowledge that "the Court struck it from the record." *Id.* The Court therefore finds no prejudice with respect to this figure.

The fifth alleged misconduct is that Plaintiff's counsel "repeatedly invoked . . . irrelevant and misleading evidence" related to Defendants' SEC filings, and "invited the jury to consider, over Defendants' objections, Defendants' SEC filings to *draw their own conclusions* about Defendants' financial condition." Mot. New Trial at 24 (emphasis in original). As stated above, however, the Court struck from the record evidence relating to Defendants' market value. As for certain information from the SEC filings, the Court admitted these documents (with certain redactions) into evidence—Plaintiff's counsel committed no misconduct in calling for the jury to make inferences from these publicly available documents. Courts generally permit parties to introduce evidence of publicly available financial documents filed with the SEC in evaluating a defendant's financial condition for the purposes of assessing punitive damages. *See Bankhead v. ArvinMeritor, Inc.*, 205 Cal. App. 4th 68, 74 (2012) ("publicly available documents filed with the Securities and Exchange Commission, including [the defendant's] . . . annual 10-K reports . . . and 2010 proxy statement" are "generally accepted financial documents used and relied upon by economists or experts in finance to evaluate a company").

The sixth alleged misconduct is that Plaintiff's counsel exhorted the jury to "send a message" and expressed to them, among other things, that "a parking ticket isn't going to do it." Mot. New Trial at 24. The Court finds no misconduct in this regard. *See Settlegood*, 371 F.3d at 519 n.13 (reversing trial court's disapproval of counsel's closing argument urging the jury to "send a message" because "[r]eminding the jury that they have the capacity to deter defendants and others similarly situated is certainly legitimate where punitive damages are at stake.").

The seventh alleged misconduct is that Plaintiff's counsel "tried to shoehorn into its case irrelevant, unsubstantiated, and prejudicial speculation from Keith Edgett that Kimberly-Clark submitted 'inaccurate' data to the FDA in its 510(k) submission seeking AAMI Level 4 clearance for the MicroCool gowns." Mot. New Trial at 25. These are evidentiary arguments that do not serve as a proper basis for allegations of attorney misconduct—the Court allowed this evidence in as it was relevant to counter Defendants' assertion that the MicroCool Gowns satisfied the FDA's 2003 version of the AAMI PB70 standard. To the extent Defendants argue that Plaintiff's counsel improperly asserted "the test results that Mr. Edgett testified were basically falsified for the FDA," the Court rejects this as a basis for a new trial. *Settlegoode*, 371 F.3d at 520 ("That [plaintiff's counsel] had no direct evidence supporting these arguments is of little consequence; circumstantial evidence and inference are sufficient to support a legitimate argument."). Moreover, Plaintiff's counsel made this assertion during closing argument, and Defense counsel failed to object. *See* Trial Tr. (4/7/17) at 66; *Settlegoode*, 371 F.3d at 517 (higher threshold for granting a new trial where defendants failed to object to the alleged misconduct during trial).

The eighth alleged misconduct is that Plaintiff's counsel "falsely and prejudicially suggested to the jury that Defendants or their council had engaged in witness tampering, subornation of perjury, and other criminal conduct." Mot. New Trial at 26–27; *see, e.g.*, Trial Tr. (4/7/17) at 43 ("[T]hey bought themselves a defense. Instead of bringing the people, the real people, like yourselves, to tell you what really happened, they went out and they spent 380 to $440,000 on experts."), 64 ("You don't have to be prepped for 15 hours to tell the truth."). In response to concerns raised by Defendants, however, the Court issued a curative instruction following the opening portion of Plaintiff's counsel's closing argument. It instructed the jury to "disregard statements that may be disparaging of opposing counsel. There is nothing improper about counsel preparing witnesses for trial. The credibility of witnesses, whether they have -- have been prepared for their sworn testimony or not, is a matter that is entirely for you to decide." Trial Tr. (4/7/17) at 84. This was sufficient to cure any prejudice that may have occurred. *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1270 (9th Cir. 2000) ("There is a strong presumption that the curative instructions given by the district court were followed by the jury and therefore we so presume."). Although Plaintiff's counsel was not permitted to disparage Defense counsel or impugn their integrity, "[a]s an advocate in a civil lawsuit, he was perfectly entitled to argue that the jury should disbelieve the opposing party's witnesses for any number of reasons, including that they may have been *guided by advice of their lawyers*." *Settlegoode*, 371 F.3d at 520 (emphasis added).

Finally, the ninth alleged misconduct is that Plaintiff's counsel accused Defendants of "hiding witnesses from the jury because Defendants did not call an additional 27 employees to testify." Mot. New Trial at 29. To be sure, Plaintiff's counsel used provocative language. *See* Trial Tr. (4/7/17) at 43 (arguing Defendants did not bring witnesses because "they were going to be forced to admit the truth. And that's why they hid them from you."). Such language and comments regarding Defendants' failure to call certain witnesses, however, do not warrant a new trial and are within the boundaries of vigorous, fair advocacy. *See Auto Owners Ins. Co. v. Bass*, 684 F.2d 764, 769 (11th Cir. 1982) ("Generally, counsel in a civil trial may comment on the failure of a party to call an available witness whose testimony the party would naturally be expected to produce if favorable to him.").

In sum, the Court finds that Defendants' misconduct allegations against Plaintiff's counsel do not provide a sufficient basis for a new trial.

3. Classwide Liability Finding

Defendants hone in on Jury Instruction No. 26 (Concealment), which sets forth three alternative theories as to whether Defendants had a duty to disclose information to Plaintiff. *See*

Jury Instructions at 30 [Doc. # 493]. According to Defendants, the first of these theories—that "Defendants disclosed some facts to Plaintiff but intentionally failed to disclose other facts, making the disclosure deceptive," Doc. # 493 at 30—cannot serve as the basis for classwide liability "because the duty to disclose under that theory turns on the specific affirmative representations made to each member of the class." Mot. New Trial at 32. But because the jury rendered only a general verdict—the Court cannot discern precisely which of the three theories the jury relied upon in finding a duty to disclose—Defendants argue the jury may have relied on this allegedly improper theory. Defendants contend this possibility warrants vacating the judgment or a new trial. Mot. New Trial at 31, 33.

"As a general rule, a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (internal quotation marks omitted). A court may, however, exercise its discretion to "construe a general verdict as attributable to one of several theories if it was supported by substantial evidence and was submitted to the jury free from error." *Id.* (citing *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir.1980)); *see also Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1439 (9th Cir. 1996) ("Our review of the district court's decision to apply the exception in *Traver* is limited to whether the court abused its discretion."). In deciding whether to exercise this discretion, the court must analyze the following:

> (1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories.

Kern, 899 F.2d at 777.

Here, the Court exercises its discretion to uphold the jury's verdict based on the two other duty-to-disclose theories, which are supported by substantial evidence:

> [2] That Defendants intentionally failed to disclose certain facts that were known only to them and Defendants knew that Plaintiff did not know or could not have reasonably discovered those facts;
> or
> [3] That Defendants actively concealed important facts from Plaintiff or prevented Plaintiff from discovering those facts

Jury Instructions at 30. Bahamas' action focused on Defendants' *concealment* of material facts related to the MicroCool Gowns, facts of which Bahamas was not aware. *See, e.g.*, *generally* Trial Tr. (4/7/17) (Plaintiff's closing argument repeating the word "concealment" throughout). The evidence presented at trial on the concealment issue supports the conclusion that the jury was unlikely to be confused whether this was an affirmative misrepresentation or concealment action. Moreover, Defendants' defenses—e.g., MicroCool Gowns provided the level of barrier protection represented, Bahamas did not suffer damages, Defendants made sales in good faith—applied equally to all three duty-to-disclose theories. The jury could not have found in favor of Plaintiff under any of these theories without rejecting Defendants' defenses. The Court also already analyzed the strength of the evidence supporting Plaintiff's duty-to-disclose theory based on concealment, which was substantial, and need not repeat its analysis again. *See supra*, section I.B.1. Finally, the same disputed issues of fact (e.g., whether MicroCool Gowns satisfied the AAMI Level 4 standard) applied to all three duty-to-disclose theories.

Accordingly, having weighed each of the *Traver* considerations, the Court exercises its discretion to apply the *Traver* exception to the duty-to-disclose finding and upholds the general verdict. Defendants' motion to vacate the judgment or have a new trial is **DENIED**.[18]

C. Conclusion

In light of the foregoing, Defendants' motion for new trial, remittitur, or amendment of the judgment is **DENIED**, except to the extent that the Court **GRANTS in part** Defendants' request to amend the judgment to reduce the punitive damages award.

III.
MOTION TO DECERTIFY THE CLASS

Defendants move to decertify the class. According to Defendants, Bahamas failed to offer classwide proof as to both liability and damages. Mot. Decert. at 1 [Doc. # 537].

A. Legal Standard

Rule 23 provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). "A district court retains the flexibility to address problems with a certified class as they arise, including the ability to decertify." *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indust. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010). "The party

[18] The Court assumes, only for the sake of argument, Defendants' position that Plaintiff could not have succeeded on establishing a duty to disclose based on the first theory involving the "disclos[ure] of some facts."

seeking decertification has the burden of establishing that the requirements of FRCP 23 have not been met." *Edwards v. First Am. Corp.*, 289 F.R.D. 296, 299 (C.D. Cal. 2012) (citing *Gonzales v. Arrow Fin. Servs. LLC*, 489 F. Supp. 2d 1140, 1153 (S.D. Cal. 2007); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 651 (C.D. Cal. 2000)). "This burden is substantial, as 'doubts regarding the propriety of class certification should be resolved in favor of certification.'" *Edwards*, 289 F.R.D. at 299–300 (quoting *Gonzales*, 489 F.Supp.2d at 1154).

B. Analysis

1. Duty to Disclose or Reliance

Defendants argue that Bahamas failed to present classwide evidence proving the duty to disclose and reliance elements of the class members' claims. First, they argue Bahamas presented no evidence that Defendants had the "necessary direct transactional relationship"—which Defendants believe is a prerequisite to proving duty to disclose—with Bahamas and each of the class members. As explained above, however, the Court rejects Defendants' direct dealings argument. *See supra*, section I.B.1.iii. In any event, the primary authority on which they rely is distinguishable. *See id.* (discussing *Bigler-Engler*, 7 Cal. App. 5th at 314).

Second, Defendants contend Bahamas failed to prove materiality classwide. Mot. Decert. at 7. The Court rejects this line of argument for reasons already discussed. *See supra*, section I.B.1.i ("Defendants argue that because Bahamas failed to establish '[c]lasswide proof of materiality" of the concealed information at issue (i.e., failure to meet the AAMI Level 4 standards), the jury unreasonably reached the implicit finding that Defendants had a duty to disclose that information to class members.").

Third, Defendants argue decertification is necessary because Bahamas "did not prove a uniform mechanism of disclosure to which all class members could have been made aware of any concealed information at or before the point of sale." Mot. Decert. at 12. The Court rejects Defendants' contention for reasons already discussed. *See supra*, section I.B.2.

In sum, Defendants have not met their heavy burden to show decertification is necessary.

2. Rules Enabling Act and Due Process

Defendants assert the class should be decertified because the Court "deprived Defendants of their due process rights to rebut any such presumption" of reliance. Mot. Decert. at 12. Defendants focus on the Court's ruling on Plaintiffs Motion *in Limine* No. 4 ("MIL No. 4"),

where it held Defendants could not present evidence at trial relating to former putative class representatives. [Doc. # 403 at 4–5]. Defendant raise three issues with respect to this due process rights claim.

First, Defendants argue they could have presented evidence that two former putative class representatives continued purchasing MicroCool Gowns even after the allegations in the lawsuit were disclosed, which "would have rebutted any presumption of reliance because a person who purchases a product even after learning concealed information about it cannot prove reliance on an omission." Mot. Decert. at 13. Second, they argue the Court incorrectly precluded them from offering evidence that some former putative class representatives purchased MicroCool Gowns *unknowingly*. Third, Defendants contend the Court precluded them from introducing evidence of some former putative class representatives who began purchasing the gowns before they were marketed as AAMI Level 4, and continued to purchase them at the same price after they received the AAMI Level 4 rating. According to Defendants, all of this evidence concerning former putative class representatives could have negated any inferences of materiality or rebutted any presumption of reliance.

The Court rejects Defendants' argument that the ruling on MIL No. 4 violated their due process rights or the Rules Enabling Act.[19] There are six former plaintiffs at issue here. Three of them—non-California plaintiffs (Knapp Medical Center, LLC; Prime Healthcare Services – Harlingen; and Prime Healthcare Services – Landmark, LLC)—had claims that were dismissed, at Defendants' request, because the court lacked personal jurisdiction. *See* Doc. # 161. Two of the other California plaintiffs—Garden Grove, LLC and Prime Healthcare Centinela, LLC—were essentially flukes in the sense that their one-time purchases of the MicroCool Gowns were "accidental." *See* Hand Decl. ¶¶ 19–20 [Doc. # 190-6]; Def. Opp. MIL No. 4 at 3–4 (describing purchase by former plaintiffs as "accidental") [Doc. # 362]. Indeed, it is not surprising that Prime Healthcare Centinela and Garden Grove moved to voluntarily dismiss their claims, which the Court did so *with prejudice*. [Doc. # 177]. As for the sixth plaintiff, Dr. Harayr Shahinian, the record shows he never made any purchases of the MicroCool Gowns. *See* Hand Decl. ¶ 18 [Doc. # 229-5].

To recap, the Court did not preclude Defendants from introducing evidence that would rebut Plaintiffs' evidence of reliance or materiality. Based on considerations of potential for

[19] Defendants raised these same issues in their opposition to Plaintiff's MIL No. 4. *See* Doc. # 362. Plaintiff asserts that Defendants' arguments, although couched in a motion to decertify, amount to an improper motion for reconsideration. Opp. Decert. at 13; L.R. 7-18 ("No motion for reconsideration shall in any manner repeat any oral or written argument in support of or in opposition to the original motion."). Although Plaintiff raises a valid point, the Court will address Defendants' issues.

confusion, misleading the jury, and undue delay under Fed. R. Evid. 403, it simply made no sense to introduce evidence of these six former plaintiffs and non-class members as the Court previously explained. *See* Doc. # 403 at 4–5 (rejecting proposition that experiences of former plaintiffs were "typical" because they were dismissed prior to the order granting class certification, never approved as class representatives, or never even received gowns labeled AAMI Level 4). If they wished, Defendants could have presented any of numerous *actual* class members to take the stand and testify that they did not rely on the AAMI Level 4 rating. Defendants did not do that—they must now live with their decision.

3. Scienter

Defendants also argue that Bahamas failed to prove scienter across the entire class period, which ran from February 12, 2012 to January 11, 2015. They use the same arguments they advanced in their JMOL motion. Mot. Decert. at 16–17 ("As explained in Defendants' JMOL motion, Plaintiff failed to satisfy this requirement with respect to the *entire* class period.") (citing JMOL Mot. at 18-23). The Court rejects Bahamas' scienter arguments for reasons already explained. *See supra*, section I.B.3.

In the alternative, Defendants contend the Court should narrow the class period to cover only January 18, 2013 to September 9, 2013 because Bahamas "failed to present any evidence that Defendants knew there was a potentially material issue with MicroCool gowns before January 18, 2013 (when Kimberly-Clark first received the Cardinal Health test results) or after September 9, 2013 (when the MicroCool gowns satisfied the revised AAMI Level 4 standard just adopted by the FDA)." Mot. Decert. at 17. To the contrary, Bahamas presented sufficient evidence that could have led a reasonable jury to believe that Defendants had knowledge that the MicroCool Gowns failed to comply with the AAMI Level 4 standard outside of this proposed narrowed period. *See, e.g.*, Trial Exs. 134, 257–60; Jerald Jascomb Depo. at 197:21–223:6 (testifying regarding a written exchange Jascomb had with Rolando Ferrera in March 2012 regarding a failed test result involving the MicroCool Gowns) Ex. G [Doc. # 506-1 at 95–102].

Accordingly, the Court **DENIES** Defendants' request to narrow the class period.

4. Classwide Proof of Damages

Finally, according to Defendants, the trial demonstrated that compensatory and punitive damages cannot be adjudicated with classwide proof.

i. Compensatory Damages

Defendants argue that Bahamas' damages model fails "because Plaintiff presented no evidence that the gown was represented to all class members as satisfying the AAMI Level 4 standard, that representation cannot be a component of Plaintiff's damages model as to the class" and the class should be decertified based on the failure to satisfy the *Comcast* standard. Mot. Decert. at 20.

Under *Comcast v. Behrend*, 13 S. Ct. 1426, 1433 (2013), Bahamas was required to present a damages model capable of measuring class-wide damages attributable to its theory of liability. *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability"); *see also Chavez v. Blue Sky Natural Bev. Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010). Without adequately tethering damages to a defendant's allegedly wrongful acts, "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1435. As long as a feasible and efficient mechanism exists to calculate damages on a classwide basis, the presence of potential individualized damages will not negate predominance.

Here, like in its JMOL motion, Defendants point to Plaintiff's alleged failure to show that every class member was exposed to a representation that the gowns satisfied the AAMI Level 4 standard. *Compare* Def. Mot. JMOL at 24–25 *with* Mot. Decert. at 20. Once again, the Court rejects this argument because a fraudulent concealment claim does not require exposure to a material misrepresentation, but rather concealment of a material fact. Defendants also repeat their argument regarding the alleged use of an "inappropriate comparator gown as the basis for the value of what class members actually received." *Compare* Mot. Decert. at 20 *with* Def. Mot. JMOL at 28–29.

The Court **DENIES** Defendants' request to decertify the class on the basis of this alleged invalid comparator—the jury chose to credit Plaintiff's expert's decision to use the KC100 gown as the comparator over defense testimony criticizing that decision. *See supra*, section I.B.4. Defendants have not satisfied their heavy burden to show why the Court should take the drastic step of decertification based on the evidence presented at trial.

ii. Punitive Damages

Defendants argue that because recovery of punitive damages requires individualized proof of inquiry as to each class member regarding their varying degrees of alleged harm and

compensatory damages, such inquiries predominate and the class should be decertified. Mot. Decert. at 22.

The Ninth Circuit, however, has long held "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514; *see also Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015) ("damage calculations alone cannot defeat certification" (quoting *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)). This naturally applies to motions for decertification under Rule 23 (i.e., individualized damages cannot, by itself, warrant decertification). *See Edwards*, 289 F.R.D. at 299 ("The party seeking decertification has the burden of establishing that the requirements of FRCP 23 have not been met."). Instead, Bahamas needed to only demonstrate that Plaintiffs' damages stemmed from Defendants' actions that created the legal liability. *See Pulaski*, 802 F.3d at 987. Here, a jury, based on substantial evidence, implicitly found that harm to Plaintiff stemmed from Defendants' failure to disclose material information regarding the MicroCool Gowns' ability to satisfy the AAMI Level 4 standard, which gave rise to liability for fraudulent concealment. Punitive damages were assessed, however, not only to punish Defendants for past conduct that harmed Plaintiff and the class, but also to discourage Defendants from similar misconduct in the future. Thus, even if class members suffered varying amounts of economic damages, the deterrence factor, focusing on Defendants' conduct, was susceptible of common proof.

Given the above, and because individualized damages calculations alone cannot defeat certification, the Court **DENIES** Defendants' motion to decertify the class because of issues that arise out of the punitive damages award. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

IV.
CONCLUSION

In light of the foregoing, the Court **DENIES** Defendants' motions for judgment as a matter of law [Doc. ## 488, 489, 535]. Defendants' motion for new trial, remittitur, or amendment of the judgment is also **DENIED**, except to the extent that the Court **GRANTS in part** Defendants' motion to amend the judgment to reduce the punitive damages award [Doc. # 536]. Concurrent with the filing of this Amended Order, the Court shall amend the judgment such that the punitive damages award as to Defendant Kimberly-Clark shall be reduced from $350 million to $19,446,635 and, as to Defendant Halyard Health, it shall be reduced from $100

million to $1,307,225. Finally, the Court **DENIES** Defendants' motion to decertify the class [Doc. # 537].

IT IS SO ORDERED.