

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BAHAMAS SURGERY CENTER, LLC,
DBA Bahamas Surgery Center, a
California limited liability company, on
behalf of itself and all others similarly
situated,

Plaintiff-Appellee,

v.

KIMBERLY-CLARK CORPORATION, a
Delaware Corporation,

Defendant-Appellant,

and

HALYARD HEALTH, INC., a Delaware
Corporation,

Defendant.

No. 18-55478

D.C. No.
2:14-cv-08390-DMG-PLA

MEMORANDUM*

BAHAMAS SURGERY CENTER, LLC,
DBA Bahamas Surgery Center, a
California limited liability company, on
behalf of itself and all others similarly
situated,

No. 18-55483

D.C. No.
2:14-cv-08390-DMG-PLA

*This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Plaintiff-Appellee,

v.

HALYARD HEALTH, INC., a Delaware
Corporation,

Defendant-Appellant,

and

KIMBERLY-CLARK CORPORATION, a
Delaware Corporation,

Defendant.

BAHAMAS SURGERY CENTER, LLC,
DBA Bahamas Surgery Center, a
California limited liability company, on
behalf of itself and all others similarly
situated,

Plaintiff-Appellant,

v.

KIMBERLY-CLARK CORPORATION, a
Delaware Corporation; HALYARD
HEALTH, INC., a Delaware Corporation,

Defendants-Appellees.

No. 18-55558

D.C. No.

2:14-cv-08390-DMG-PLA

Appeal from the United States District Court

for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted July 14, 2020
Pasadena, California

Before: THOMAS, Chief Judge, and FERNANDEZ and W. FLETCHER, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge W. FLETCHER

In No. 18-55478, Defendant Kimberly-Clark Corporation (KC) appeals the district court's judgment, following a jury trial, in a class action brought against it by class representative Bahamas Surgery Center, LLC (Bahamas) regarding surgical gowns manufactured and sold by KC, which were labeled as compliant with the AAMI¹ Liquid Barrier Level 4 standard (the Gowns). In No. 18-55483, Defendant Halyard Health, Inc. (Halyard)² appeals the district court's judgment against it in the same action. In No. 18-55558, Bahamas appeals the district court's reduction of the jury's punitive damages awards, and conditionally appeals the district court's rejection of one of its damages models. We vacate the judgment.

(1) Halyard asserts that the district court erred when it determined that Bahamas had standing to sue it. We agree.

¹Association for the Advancement of Medical Instrumentation.

²On June 30, 2018, Halyard changed its name to Avanos Medical, Inc.

To establish constitutional standing, a named plaintiff in a class action “must ‘allege a distinct and palpable injury to himself’” arising from the defendant’s actions. *Easter v. Am. W. Fin.*, 381 F.3d 948, 961 (9th Cir. 2004); *see also Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S. Ct. 2777, 2783, 73 L. Ed. 2d 534 (1982).³

Bahamas has no claim against Halyard because it purchased no gowns from it, and any injuries it has are not traceable to Halyard’s conduct. *See Easter*, 381 F.3d at 961–62. Without a claim of its own, Bahamas cannot “‘seek relief on behalf of [itself] or any other member of the class.’” *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003). Even if other class members have valid claims against Halyard, that cannot retroactively cure the district court’s improper certification of a class wherein the named plaintiff (Bahamas) lacked standing to pursue those claims. *See Blum*, 457 U.S. at 1001 & n.13, 102 S. Ct. at 2784 & n.13; *NEI Contracting & Eng’g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 533 (9th Cir. 2019).⁴ Because Bahamas never had standing to sue

³Standing can be raised at any time and cannot be waived. *United States v. Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 2435, 132 L. Ed. 2d 635 (1995); *see also Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 576, 124 S. Ct. 1920, 1927, 158 L. Ed. 2d 866 (2004).

⁴The juridical link doctrine is irrelevant to Bahamas’ standing here. *See La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 464–66 (9th Cir. 1973) (standing assumed); *cf. Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998).

Halyard, we set aside the judgment against Halyard and remand with instructions to dismiss the claims against it.

(2) KC argues that the district court abused its discretion by refusing to decertify⁵ the fraudulent concealment class because individual issues predominated⁶ in the class with regard to the materiality⁷ of the purported omissions. We agree.

Under California law, a fact is “‘material’ if ‘a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.’” *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 919 (Cal. 1997); *see Jorgensen v. Beach ‘N’ Bay Realty, Inc.*, 177 Cal. Rptr. 882, 885–86 (Ct. App. 1981). The district court abused its discretion in failing to decertify the class because the evidence that it relied upon to demonstrate the materiality of the testing failures to the entire class applied only to the subset of

⁵See *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1033 (9th Cir. 2020); *see also United States v. Hinkson*, 585 F.3d 1247, 1261–63 (9th Cir. 2009) (en banc).

⁶See Fed. R. Civ. P. 23(b)(3); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 623, 117 S. Ct. 2231, 2246, 2249, 138 L. Ed. 2d 689 (1997); *see also Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016).

⁷See *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 100 Cal. Rptr. 3d 637, 652 (Ct. App. 2009); *see also Hoffman v. 162 N. Wolfe LLC*, 175 Cal. Rptr. 3d 820, 826–27 (Ct. App. 2014); *Tucker v. Pac. Bell Mobile Servs.*, 145 Cal. Rptr. 3d 340, 357 (Ct. App. 2012).

transactions in which class purchasers had seen representations about the Gowns' AAMI rating. Moreover, there is no evidence that a reasonable person would attach importance to AAMI test failures in a transaction for purchase of a package of surgical goods where the Gowns' AAMI rating was not noted on the package. *See Engalla*, 938 P.2d at 919; *Jorgensen*, 177 Cal. Rptr. at 885–86; *cf. In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 98–99 (Ct. App. 2009). Those transactions comprised the majority of class purchases.

Because the record does not support the conclusion that common questions regarding the materiality of the omissions predominated in the defined class, the district court abused its discretion in failing to decertify the class.⁸ We therefore vacate the judgment as to KC and remand for further proceedings.

(3) In light of our conclusions in (1) and (2) above, we need not and do not reach the other assignments of error raised by the parties.

VACATED and REMANDED with instructions to dismiss in No. 18-55843. **VACATED and REMANDED** for further proceedings consistent with this disposition in No. 18-55478. **DISMISSED** as moot in No. 18-55558. Bahamas shall bear costs on appeal.

⁸The heterogeneity in the fraudulent concealment class also fatally undermines the Unfair Competition Law class. *See* Cal. Bus. & Prof. Code § 17200; *Tucker*, 145 Cal. Rptr. 3d at 362.

FILED*Bahamas Surgery Center, LLC v. Kimberly-Clark Corp.*, Nos. 18-55478+

JUL 23 2020

W. FLETCHER, J., concurring in part and dissenting in part:

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I respectfully dissent from the disposition insofar as it holds that the district court abused its discretion by refusing to decertify the fraudulent concealment class because individual issues predominated. As I read California law, a plaintiff need not show that individual class members were exposed to specific affirmative misrepresentations to succeed on a claim of fraudulent concealment. *See In re Tobacco II Cases*, 207 P.3d 20, 40 (Cal. 2009). The trial record contains ample evidence from which a reasonable juror could have found, as the jury found here, that a reasonable purchaser of the surgical gowns in question would have considered it important that the gowns had failed industry-standard strike-through tests.

I would affirm the judgment against Kimberly-Clark Corporation.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

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