

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CIVIL MINUTES

Date: January 22, 2019	Time: 61 minutes 9:05 a.m. to 10:06 a.m.	Judge: WILLIAM H. ORRICK
Case No.: 14-cv-04601-WHO	Case Name: Farar v. Bayer AG	

Attorneys for Plaintiff: Jeff Tillotson, Matthew J. Zevin, Jonathan Patton, and Jim Goff
Attorneys for Defendant: Sean Eskovitz, James M. Rosenthal, Kieran G. Gostin, and Alexandra M. Wash

Deputy Clerk: Jean Davis

Court Reporter: Debra Pas

PROCEEDINGS

Counsel appear for pretrial conference and motion hearing. The Court inquires about the impact of the parties' stipulation as to materiality on the pending motions. Counsel have different interpretations of the impact.

The Stipulation regarding materiality (Dkt. No. 267) is GRANTED.

The Stipulation regarding the motions in limine (Dkt. No. 258) is GRANTED.

The Court provides tentative rulings on the pending motions, hears argument, and rules as follows.

The **Motion to Strike** (Dkt. No. 250) is GRANTED in part. Mathiowetz and Martin were disclosed as "damages" experts in late 2018. Therefore, neither expert can testify in Phase I of the trial because their testimony as to materiality or reliance was not timely disclosed.

Accordingly, Mathiowetz is not able to testify as to her survey question regarding whether consumers would continue to purchase OAD after being informed that the product does not provide any benefits with respect to heart health, immunity, or energy for an otherwise healthy person who eats a balanced diet. That testimony is STRUCK and excluded.

Mathiowetz will be allowed to testify in Phase II as to her survey question showing that slightly less than one-third of consumers of such products take multivitamins at the recommendation of a health professional.

In Phase II, Martin may generally rebut plaintiffs' damages calculations. *See* Martin Report (Dkt. No. 244-4) Section X. However, Martin may not testify as to an "insurance benefit" providing "value" to consumers, unless a foundation is laid through a medical expert or otherwise admissible testimony showing that a specific percentage of the population is borderline with respect to nutrient deficiencies and could, therefore, benefit nutritionally from a multivitamin supplement as an "insurance policy." Martin's "market evidence" opinions based on sales data pre and post-use of the Challenged Statements and her statistical analyses are STRUCK because they go to materiality and were not timely disclosed. Martin may not testify as to her theory of "market value" for consumers who are not nutrient deficient. Therefore, Martin's testimony and opinions on those topics are STRUCK and excluded.

The **Motion to Decertify** (Dkt. No. 244) is DENIED. The motion relies exclusively on the materiality and reliance-related testimony of Mathiowetz and Martin that has been struck. That alone requires denial of the motion. In addition, the securities cases on which Bayer relied that discuss rebuttal of the fraud-on-the-market presumption are inapposite. The consumer protection cases cited by Bayer are also inapposite as they address situations where discovery demonstrated that defendant's representations were not uniform, that consumers saw different representations or significant numbers were not exposed to the representations at all, or where some consumers were shown to have known the truth about the alleged misrepresentations but purchased the product/service in any event. None of those issues are presented in this case.

Given the structure and requirements of the consumer protection claims at issue in this case, utilizing a presumption of reliance based on materiality and the need (for some of the claims only) to show reliance, there is no disconnect with the "full refund" damages model and no *Comcast* problem. There is a sufficient connection between the claims (the Challenged Statements were material, and for some, relied upon) and the plaintiffs' theory that the product was of no nutritional value to the vast majority of consumers to support the full-refund model.

Pre-trial Statement Disputed Legal Issue (Dkt. No. 250) as to punitive damages under Florida law. Plaintiffs may proceed with their punitive damages claim under Florida law only. Bayer had fair notice from the complaint that punitive damages were being sought. Plaintiffs' error in specifically identifying punitive damages under the wrong statute has not been shown to have prejudiced Bayer, nor has Bayer shown how plaintiffs' have failed to "litigate" the issue of punitive damages. Whether the evidence at trial supports an award of punitive damages under Florida law is another matter, which can be tested post-trial as necessary.

The **Motions in Limine** (Dkt. Nos. 256, 257) are decided as follows:

Plaintiffs' Motions in Limine

1. Motions in Limine Nos. 1 & 9. DENIED. Testimony regarding the named plaintiffs' relationships to class counsel is permitted for the limited purpose of showing bias and lack of individual reliance on the Challenged Statements. Bayer may not elicit testimony or make argument as to the named plaintiffs' financial motives given those relationships. A limiting instruction will be provided.

2. Motion in Limine No. 2. DENIED. Bayer does not intend to and should not characterize named plaintiffs' damages in any way, but Bayer can discuss circumstances surrounding named plaintiffs' purchase of OAD and any continued use of multivitamins after this suit was filed.
3. Motion in Limine No. 3. GRANTED. Bayer does not intend to present any evidence as to absent class member damages in Phase I.
4. Motion in Limine No. 4. GRANTED. The parties appear to agree on the distinction between what can be shown/argued in Phase I and Phase II. Plaintiffs must show in Phase II that products provide no nutritional benefit to majority of consumers.
5. Motion in Limine No. 5. GRANTED. If presumption of reliance based on materiality established in Phase I, in Phase II that presumption continues but Bayer may come forward with evidence of the nutritional value of OAD products to class members to prove the offset.
6. Motion in Limine No. 6. DENIED, in part. Consistent with rulings above, Martin or other experts may testify as to "insurance benefit" in Phase II only when there has been expert or otherwise admissible testimony quantifying the number or percentage of consumers who are borderline nutrient deficient and who could, therefore, receive nutritional benefits from taking OAD products.
7. Motion in Limine No. 7. DENIED, but Mathiowetz and Martin may testify in Phase II on topics identified above.
8. Motion in Limine No. 8. DENIED. Bayer may explore named plaintiffs' use of other multivitamins.
9. Motion in Limine No. 10. DENIED. Bayer may explore with named plaintiffs in Phase I their use of multivitamins for the purpose of challenging their reliance on the Challenged Statements.
10. Motion in Limine No. 11. GRANTED in part. Bayer agrees there is no need to discuss this in Phase I, but Bayer will generally be allowed to test the named plaintiffs' reliance on the Challenged Statements, and in Phase II will be allowed to introduce evidence of consumers using multivitamins on advice of health professionals.
11. Motion in Limine No. 12. DENIED. Bayer and plaintiffs can explore whether non-party witnesses take multivitamins.

Defendant's Motions in Limine

1. Motions in Limine Nos. 1-3. DENIED. Plaintiffs may introduce evidence of Bayer's advertising and marketing materials which, although now not relevant to stipulated-to materiality, are relevant to the actual or implied falsity of the Challenged Statements and Bayer's motivation and conduct.

2. Motion in Limine No. 4. DENIED. It is unclear what Bayer wants me to exclude or rule on.
3. Motion in Limine No. 5. DENIED. Plaintiffs may introduce evidence of harm from taking multivitamins.
4. Motion in Limine No. 6. DENIED. Plaintiffs may introduce evidence regarding lack of substantiation to support their actual or implied falsity claim, but I may give a limiting instruction as necessary to clarify that the burden to prove actual or implied falsity remains on plaintiffs.
5. Motion in Limine No. 7. DENIED. Admissibility of news articles will be addressed on a case-by-case basis but, if offered to show why Bayer took specific acts, articles may be admissible for non-hearsay basis.

Trial Matters

Jury selection is set for Friday, February 15, 2019 at 8:30 a.m., with opening arguments and presentation of evidence to begin Tuesday, February 19, 2019. In Phase I, each side will be limited to 12 hours, inclusive of opening and closing arguments. The process of time keeping and jury selection was reviewed.

A final jury instruction conference for Phase I will be held after the trial day on February 22, 2019, at a time to be set later.

The Court explained its intended revisions to the parties' proposed preliminary jury instructions, without objection. Counsel identified a dispute over one substantive final instruction, the resolution of which will help counsel prepare for opening and trial. The Court intends to issue a final set of Preliminary Instructions and a proposed instruction on the disputed substantive instruction identified prior to jury selection on February 15, 2019.

Counsel will meet and confer in an effort to achieve greater agreement on the proposed Verdict Form for Phase I and submit a revised agreed-to or disputed proposed verdict forms, and will lodge revised proposed final instructions in light of their stipulation on materiality.