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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL WASHINGTON; ROBERT
GARBER; STEPHEN SULLIVAN;
DEBBIE BARRETT; DARLENE
MCAFEE; ROBERT JENKS; TYLER
CLARK,

Plaintiffs-Appellants,

v.

CVS PHARMACY, INC.,

Defendant-Appellee.

No. 21-16162

D.C. No. 4:15-cv-03504-YGR

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted November 15, 2022
San Francisco, California

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

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,**
District Judge.

Appellants filed a putative class action against CVS Pharmacy, Inc. (CVS), alleging violations of several state consumer protection statutes prohibiting deceptive trade practices. A jury returned a verdict in favor of CVS. Appellants argue that the district court committed instructional error and erroneously excluded evidence.

We review a district court's formulation of jury instructions for an abuse of discretion, but we review *de novo* whether an instruction states the law correctly. *See Murray v. Mayo Clinic*, 934 F.3d 1101, 1103 (9th Cir. 2019). In evaluating whether a particular jury instruction was erroneous, we consider the jury instructions as a whole, and whether the instructions fairly and adequately covered the issues presented. *See Dang v. Cross*, 422 F.3d 800, 804–05 (9th Cir. 2005).

We review a district court's evidentiary rulings for an abuse of discretion. *See Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, Nos. 18-56253, 18-56548, ___ F.4th ___, 2022 WL 16845116, at *5 (9th Cir. Nov. 10, 2022). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we **AFFIRM**.

** The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

1. Appellants assert that the district court erred by instructing the jury that CVS had no duty to disclose how copayments on generic prescriptions were calculated and by failing to give an instruction that CVS's omission of information to its customers about how the copayment was calculated could give rise to liability under the relevant state statutes. We disagree. A party is entitled to a jury instruction on a particular theory if the trial evidence provides a sufficient factual basis for invoking that theory. *See Dang*, 422 F.3d at 811. But if, as Appellants contended, CVS violated the state statutes by providing incorrect information to pharmacy benefit managers that led to incorrect copayments, it would have been liable wholly apart from any omissions at the point of sale or from any duty to disclose. The district court committed no instructional error. *See id.*

2. Appellants also challenge the third-party beneficiary instruction given by the district court. However, a prior panel of this court determined that Appellants' status as third-party beneficiaries presented a material issue of fact to be decided by the jury. Thus, the district court did not abuse its discretion in instructing the jury to consider, as a factor, Appellants' status as third-party beneficiaries of the contracts between CVS and the various pharmacy benefit managers. *See Murray*, 934 F.3d at 1103.

3. Finally, Appellants challenge the district court’s exclusion of evidence of other litigation challenging CVS’s failure to report discount program prices as usual and customary pricing. The district court reasoned that the other litigation was highly prejudicial, and that the case before the court needed “to be decided on its own merits.” The district court’s ruling was not “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.”¹

Unicolors, 2022 WL 16845116 at *5.

AFFIRMED.

¹ Because we conclude that the district court did not abuse its discretion when instructing the jury or when ruling on evidentiary matters, we do not address the alternate bases for affirmance proffered by CVS.