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## Damages slashed in judgment notwithstanding

By Jonathan Lo

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San Diego Superior Court Judge Richard S. Whitney found that “the evidence of fraud was, in this court’s opinion, very thin and barely sufficient to support a verdict for fraud” and the jury’s finding of fraud “was not supported by substantial evidence of false promise or concealment.”

San Diego pharmaceutical company Impact Biomedicines achieved a major defense win in a rare judgment notwithstanding the verdict after trial, which reduced the plaintiff’s jury award to less than 1% of the \$75 million he claimed he was entitled to.

The plaintiff’s attorneys called it a judicial error and filed a notice of appeal.

Impact’s attorney Jake Ryan of Latham & Watkins LLP said in an interview Friday, “It was the prototypical Latham trial team effort. Everyone worked hard from the start of the case and kept fighting until the order was issued.” Colleen C. Smith and Andrew Gray of Latham also represented Impact.

Plaintiff Dr. James Brewer, chair of the neurology department at UC San Diego, sued Impact and its founder, Dr. John Hood, for quantum meruit, false promise and fraudulent concealment. He claimed that Impact

called on him to determine if some patients with the brain disorder Wernicke’s encephalopathy contracted that disease because of the blood cancer treatment that Impact was seeking to get free from a Food and Drug Administration clinical hold.

But, Brewer said, the company failed to notify him his diagnoses would be submitted to the agency. He also said Impact misrepresented to the FDA that he made conclusions on the drug based on materials he never received, potentially damaging his name and reputation. He also claimed that he was entitled to stock options worth 1% to 2% of Impact as part of his going rate for consulting work.

Ryan said Friday that Brewer admitted on the stand he knew his diagnosis was going to be sent to the FDA. *Brewer MD PHD vs Impact Biomedicines*, 37-2019-00067876, (Sup. Ct. S.D., filed Dec. 20, 2019).

Brewer’s attorneys are Christopher W. Arledge and Courtney L. Mitchell of Ellis George Cipollone O’Brien Annaguey LLP as well as Peter R. Afrasiabi of One LLP.

After a three-week trial in the San Diego County Superior Court, a 12-member jury awarded Brewer \$20,000 for his claim of unpaid consulting work as well as \$1 million in compensatory damages and \$4 million in punitive damages for his fraudulent concealment claims.

However, Superior Court Judge Richard S. Whitney partially granted Impact’s motion for judgment notwithstanding the verdict, finding that “the evidence of fraud was, in this court’s opinion, very thin and barely sufficient to support a verdict for fraud” and the jury’s finding of fraud “was not supported by substantial evidence of false promise or concealment.”

The judge ruled Brewer had not suffered harm, especially when the jury found that his false promise claims lacked merit, reducing the jury award to \$100,000 for compensatory damages and \$100,000 for punitive damages.

Arledge, for the plaintiff, said in an email Friday, “The trial court agreed that sufficient evidence supported the jury’s conclusions: Dr. John Hood and Impact defrauded Dr. Brewer and the FDA, that fraud caused harm, and lying to get an experimental drug approved was reprehensible and justified punitive damages. And while we disagree with the court’s decision to change the jury’s damages figures, that part of the order was legal error, and we are comfortable it will be reversed.”

Brewer and his counsel filed a notice of appeal in response to Whitney’s decision Wednesday.

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