UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	LA CV 16-0476 JCG	Date	July 12, 2017
Title	*A.C.T. Products, Inc. v. W.S. Industries, Inc., et al.*		

Present: The Honorable	**Jay C. Gandhi, United States Magistrate Judge**	
Kristee Hopkins	None Appearing	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
None Appearing	None Appearing	

Proceedings: **<u>TENTATIVE RULING</u>: ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL; MOTION TO AMEND THE JUDGMENT AND FOR RELIEF UNDER RULES 60(a) AND 60(b); AND REQUEST FOR A PERMANENT INJUNCTION TO PREVENT DEFENDANT FROM MAKING, USING, SELLING, OR OFFERING FOR SALE PRODUCTS USING PLAINTIFF'S TRADEMARK**

The Court is in receipt of: (1) Plaintiff's renewed motion for judgment as a matter of law or, alternatively, for a new trial ("Rule 50 and 59(a) Motion"), Defendant's opposition ("Opp. to Rule 50 and 59(a) Motion"), and Plaintiff's reply ("Reply Re Rule 50 and 59(a) Motion"), [*see* Dkt. Nos. 122, 126, 132]; (2) Plaintiff's motion to amend the judgment and for relief under Rules 60(a) and 60(b) ("Rule 59(e) and 60 Motion"), Defendant's opposition ("Opp. to Rule 59(e) and 60 Motion"), and Plaintiff's reply ("Reply Re 59(e) and 60 Motion"), [Dkt. Nos. 121, 127, 133]; and (3) Plaintiff's request for a permanent injunction to prevent Defendant from making, using, selling, or offering for sale products using Plaintiff's trademark ("Request"), Defendant's opposition ("Opp. to Request"), and Plaintiff's reply ("Reply Re Request"), [Dkt. Nos. 123, 128, 134].

For the reasons discussed below, Plaintiff's motions are **DENIED**.

I. <u>Background</u>

On March 11, 2016, Plaintiff sued Defendant for, *inter alia*, federal trademark infringement and counterfeiting, federal unfair competition, federal false advertising, California trademark infringement, California common law unfair competition, and California false advertising. [*See* Dkt. No. 1.] Defendant alleged, *inter alia*, statute of limitations as an affirmative defense. [*See* Dkt. No. 18 at 27.]

In April 2017, this Court presided over a jury trial in this matter in which Plaintiff argued each of its claims, and Defendant argued its affirmative defenses. [*See* Dkt. Nos. 95-97, 98.] On each claim or affirmative defense, Plaintiff or Defendant bore the burden of proof by a preponderance of the evidence.

Wong Kwai Sing v. Dulles, 265 F.2d 131, 133 n. 2 (9th Cir. 1959) (finding that the "ordinary civil" burden of proof is preponderance of the evidence).

After three days of evidence and argument, and several hours of deliberation, the jury found that Plaintiff had established its claims, but that Defendant had established the affirmative defense of statute of limitations. [Dkt. No. 105.] Judgment was entered thereafter. [Dkt. No. 114.]

Plaintiff argues that judgment as a matter of law, or in the alternative, a new trial, is warranted because: (1) Defendant did not present sufficient evidence to establish its statute of limitations affirmative defense; (2) the Court did not instruct the jury on equitable tolling, equitable estoppel, trademark infringement as a continuing wrong, and did not define "discovering" in the instructions; and (3) the verdict was irreconcilably inconsistent. (*See generally* Rule 50 and 59(a) Mot.; Reply Re Rule 50 and 59(a) Mot.) Plaintiff incorporates these arguments in its Motion to Amend the Judgment and for Relief Under Rules 60(a) and 60(b). (*See generally* Rule 59(e) and 60 Mot.; Reply Re Rule 59(e) and 60 Mot.) Plaintiff also requests permanent injunctive relief based upon the jury's finding of willful trademark infringement. (*See generally* Req.)

The Court addresses Plaintiff's contentions below and finds that each lacks merit.

II. Legal Standards

A. Judgment As a Matter of Law

A motion for judgment as a matter of law after the verdict renews the moving party's prior Rule 50(a) motion for judgment as a matter of law at the close of all the evidence. Fed. R. Civ. P. 50(b). Judgment as a matter of law after the verdict may be granted only when the "evidence and its inferences, construed as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion" as to the verdict. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 775 (9th Cir. 1990). Where there is sufficient conflicting evidence, or if "reasonable minds could differ over the verdict," judgment as a matter of law after the verdict is improper. *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 181 (9th Cir. 1989) (internal citation and quotation marks omitted).

Moreover, when the sufficiency of the evidence is questioned and is the basis of a Rule 50(b) motion, the inquiry is whether there was "substantial evidence" in favor of the jury's verdict. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002). Substantial evidence is "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion from the same evidence." *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001).

B. New Trial

Under Federal Rule of Civil Procedure 59(a), a federal court may grant a new jury trial for "grounds that have been historically recognized." *Zhang v. Am. Gem. Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). In other words, "[t]he 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." *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n. 15 (9th Cir. 2000). Notably, "a district court may not grant a new trial simply because it would have arrived at a different verdict." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

In deciding a motion for a new trial, "the district court may, in its discretion, grant the motion and order a new trial . . . or deny the motion and reinstate the judgment." *Milhouse v. Travelers Commercial Ins. Co.*, 982 F. Supp. 2d 1088, 1093 (C.D. Cal. 2013) (internal citation and quotation marks omitted), *aff'd*, 641 F. Appx. 714 (9th Cir. 2016).

C. Amending the Judgment Under 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). However, "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) (citing *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). "There are four grounds upon which a Rule 59(e) motion may be granted: 1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; 2) the moving party presents newly discovered or previously unavailable evidence; 3) the motion is necessary to prevent manifest injustice; or 4) there is an intervening change in controlling law." *Turner*, 338 F.3d at 1063 (internal citations and quotation marks omitted).

D. Federal Rule of Civil Procedure 60(a)

Under Rule 60(a), "[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Although the rule allows for correction of clerical errors and oversights, it does not permit correction of substantive mistakes. *Blanton v. Anzalone*, 813 F.2d 1574, 1577 n. 2 (9th Cir. 1987), states:

> The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

E. Federal Rule of Civil Procedure 60(b)

Under Rule 60(b), "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for" reasons including "(1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). Relief under 60(b) is to be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (internal citations omitted).

F. Equitable Permanent Injunctive Relief

The Seventh Amendment to the United States Constitution preserves the right to a jury trial for legal claims but not for equitable claims, such as a claim for injunctive relief. *See* U.S. Const. amend. VII; *see also Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 962 (9th Cir. 2001). "[W]here there are issues common to both the equitable and legal claims, 'the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims.'" *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 170 (9th Cir. 1989) (alteration in original) (citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)).

However, in resolving equitable issues after a jury trial, the court must consider the jury's factual findings. *See L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (the court must "follow the jury's implicit or explicit factual determinations" on the legal issues in ruling on the remaining equitable issues) (citing *Miller v. Fairchild Indus.*, 885 F.2d 498, 507 (9th Cir. 1989)) (internal quotation marks omitted).

In regard to equitable injunctive relief, "[a] plaintiff is not automatically entitled to an injunction simply because it proved its affirmative claims." *Westinghouse Elec. Corp. v. General Circuit Breaker & Electric Supply, Inc.*, 106 F.3d 894, 903 (9th Cir. 1997). A party seeking permanent injunctive relief in a trademark action must satisfy the following four-factor test set forth by the United States Supreme Court in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006):

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

A district court may not assume irreparable harm merely upon a showing of infringement. *See Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013), cert. denied, 135 S. Ct. 57 (2014). Rather, the party seeking an injunction must demonstrate actual irreparable injury. *Id.*; *see also Reno Air Racing Ass'n, Inc., v. McCord*, 452 F.3d 1126, 1137-38 (9th Cir. 2006). District

courts have broad discretion in determining whether to grant or deny permanent injunctive relief and should be guided by traditional principles of equity. *eBay, Inc.*, 547 U.S. at 391.

When considering permanent injunctive relief, the Court may also consider whether the defendant established any affirmative defenses. *In re Circuit Breaker Litigation*, 860 F. Supp. 1453, 1454-55 (C.D. Cal. 1994).

III. Discussion

A. Neither Judgment as a Matter of Law nor a New Trial is Warranted on the Grounds that Defendant Did Not Present Sufficient Evidence to Establish Its Statute of Limitations Affirmative Defense

Plaintiff claims that there was insufficient evidence for the jury to find the statute of limitations affirmative defense. (Rule 50 and 59(a) Mot. at 9-13.)

1. Plaintiff Has Not Preserved the Arguments It Raises Here

Defendant argues that Plaintiff is barred from bringing this renewed motion for judgment as a matter of law because, even though Plaintiff brought a motion for judgment as a matter of law during trial, it did not raise the arguments it now raises. (*See* Opp. to Rule 50 and 59(a) Mot. at 4-6.)

As a rule, "[a] party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion." *Informatica Corp. v. Business Objects Data Integration, Inc.*, 527 F. Supp. 2d 1076, 1081 (N.D. Cal. 2007) (citing *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (citing Advisory Comm. Notes to the 1991 amendments, Fed. R. Civ. P. 50 ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.")); *see also Seungtae Kim v. BMW Financial Services NA, LLC*, 142 F. Supp. 3d 935, 942 (N.D. Cal. 2015)).

Here, Plaintiff did not raise an argument regarding Defendant's statute of limitations defense. Instead, Plaintiff moved for a directed verdict on only its claims, arguing that "[t]he defense has not put forward any witnesses with personal knowledge of facts that would dispute the plaintiff's claims and has not put forward any documentary evidence that would dispute plaintiff's claims." (4/13/17 Tr., Vol. 2, 7:7-9:3.)

Accordingly, as a preliminary matter, Plaintiff's renewed motion for judgment as a matter of law is barred for this procedural reason.

2. There was Substantial Evidence for the Jury to Find the Statute of Limitations Affirmative Defense

In any event, Plaintiff's argument that there was insufficient evidence for the jury to find the statute of limitations affirmative defense is unavailing.

As a rule, the statute of limitations for federal and California trademark infringement is four years. *Miller v. Glenn Miller Productions*, 318 F. Supp. 2d 923, 942 n. 11 (C.D. Cal. 2004).

Here, Plaintiff sued Defendant on March 11, 2016. (Compl. at 23.) Plaintiff argues that it discovered infringement occurring in 2015, while it was litigating another trademark infringement case. (*See* Rule 50 and 59(a) Mot. at 14-15.) Plaintiff thus argues that the jury erred in finding for Defendant on the statute of limitations issue. (*See id*. at 15.)

However, there is substantial evidence that Defendant infringed Plaintiff's mark prior to March 11, 2012. Defendant conceded in the stipulated facts read to the jury that Defendant sold marks bearing Plaintiff's trademark in 2010 and 2011. [*See* Dkt. No. 100 at 14.] There is also substantial evidence that Plaintiff was aware of such infringement because it sent Defendant a cease-and-desist letter soon thereafter. [*See* Dkt. No. 100 at 15.]

Further, throughout trial Plaintiff argued that Defendant willfully infringed in 2010 by being willfully blind to the possibility that the trademark at issue was indeed trademarked. Plaintiff asked Defendant questions such as, "[s]o it is correct that you knew the 777 could be an intellectual property at that time in 2010 when you were purchasing the brushes in China?" (4/12/17 Tr., Vol. 2, 108:15-17). Moreover, during closing argument, Plaintiff argued,

> As you heard the testimony of Mr. Hung, he is the one who went to China. He is the one who knew. He said: When I saw this, I knew right away [pre-2011] it was not from the manufacturer. Nevertheless, because of the demand he wanted to fulfill and keep the customer happy. He didn't want to refer them to a competitor, to A.C.T. He says, well, that's okay. I will just sell them a knockoff.

(4/13/17 Tr., Vol. 2, 20:24-21:6.)

As for the alleged infringement from 2011 to 2015 that Plaintiff argues was a "continuing wrong" (*see* Rule 50 and 59(a) Mot. at 14), there was substantial evidence for the jury to find that Defendant ceased infringement after receiving the cease-and-desist letter in 2011. Henry Hung, Defendant's president, testified that Defendant did not ship any nail brushes bearing Plaintiff's mark after receiving the cease-and-desist letter. (4/12/17 Tr., Vol. 2, 99:5-8.) Further, Vinh Lam, an owner of Defendant, testified that after receiving the cease-and-desist letter, he instructed Defendant's buying agent to stop the printing of Plaintiff's mark. (4/13/17 Tr., Vol. 1, 56:7-12.)

As such, even if it is possible to disbelieve Defendant's claim that it stopped infringing prior to 2012, there is substantial evidence to support the jury's conclusion that Defendant's willful infringement was confined to that time, and that Plaintiff was aware of it then. *See Johnson v. Paradise Valley Unified Sch. Dist*., 251 F.3d 1222, 1227 (9th Cir. 2001) ("A jury's verdict must be upheld if it is supported by substantial evidence . . . even if it is also possible to draw a contrary conclusion from the same evidence.").

Accordingly, the jury's finding of the statute of limitations affirmative defense is supported by substantial evidence and not contrary to the clear weight of the evidence.

B. Neither Judgment as a Matter of Law nor a New Trial is Warranted on the Grounds that the Court Did Not Instruct the Jury on Equitable Tolling, Equitable Estoppel, and Trademark Infringement as a Continuing Wrong, and Did Not Define "Discovering" in the Jury Instructions

Plaintiff also argues that the Court erred by not instructing the jury on equitable tolling, equitable estoppel, and trademark infringement as a continuing wrong, and by not defining "discovering" in the instructions. (Rule 50 and 59(a) Mot. at 18.)

1. Plaintiff Did Not Preserve Its Objections to the Jury Instructions

As a rule, "Federal Rule of Civil Procedure 51(c)(1) provides that '[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.' Assignments of error are limited, under Rule 51(d)(1), to instructional errors properly objected to, and to failures to give instructions that were properly requested." *General Metals of Tacoma, Inc. v. Bean Environmental LLC*, 319 Fed. Appx. 462, 463 (9th Cir. 2008); *see also Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) (*en banc*) (noting that the Ninth Circuit "has enjoyed a reputation as the strictest enforcer of Rule 51").

Here, during the Rule 51(b) conference, Plaintiff did not request that the Court include instructions on equitable tolling, equitable estoppel, and trademark infringement as a continuing wrong, nor ask the Court to define "discovering" in the instructions. (*See* 4/13/17 Tr., Vol. 1, 64:9-73:20) In addition, Plaintiff did not submit proposed jury instructions on equitable tolling, equitable estoppel, and trademark violation as a continuing wrong. [*See* Dkt. Nos. 84, 92.] During the Rule 51(b) conference, Plaintiff raised issues only on statutory notice, abandonment of trademark, damages, and willful blindness. (4/13/17 Tr., Vol. 1, 67:10-14, 69:1-4; Vol. 2, 4:20-25; 9:4-9). Plaintiff took issue with the phrasing of the statute of limitation questions on the verdict form, but not in regard to the jury instructions. (4/13/17 Tr., Vol. 1, 77:17-82:2). It was only after the jury came back with questions that Plaintiff mentioned the equitable tolling issue. (4/14/17 Tr., 8:20-23.)

Accordingly, Plaintiff did not preserve its objections to the lack of jury instructions on equitable tolling, equitable estoppel, and trademark infringement as a continuing wrong, and to the lack of a definition of "discovering" in the instructions. Therefore, as a procedural matter, Plaintiff may not raise them at this juncture.

2. There was No Instructional Error

In any event, there was no error in the jury instructions, as they accurately stated the law regarding the statute of limitations.

As a rule, a party seeking a new trial based on the trial court's jury instructions must show *both* instructional error *and* that the error was prejudicial, or not harmless. *See Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009); *Tritchler v. Cty. Of Lake*, 358 F.3d 1150, 1154-55 (9th Cir. 2004). And, "[i]n reviewing jury instructions, the relevant inquiry is whether the instructions *as a whole* are misleading or inadequate to guide the jury's deliberation." *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000) (emphasis added).

The statute of limitations for federal and California trademark infringement is four years. *Miller*, 318 F. Supp. 2d at 942 n. 11 (C.D. Cal. 2004).

Here, the the jury instructions accurately stated the law regarding the statute of limitations. Jury Instruction Nos. 28-30 properly identified the relevant statutory timeframes. [*See* Dkt. No. 100 at 37-39.] Also, Jury Instruction No. 31 accurately stated California's discovery rule. [*See* Dkt. No. 100 at 40]; California Civil Jury Instruction No. 455 (on delayed discovery). Plaintiff's counsel also agreed that "on the statute of limitations there are clear instructions." (*See* 4/13/17 Tr., Vol. 2, 77:9-10.)

Notably, Plaintiff does not point to any errors in the instructions that the Court provided, but argues that the Court erred by not further instructing the jury or allowing argument after the jury returned with questions. (Rule 50 and 59(a) Mot. at 28.) However, it was well within the Court's discretion to tell the jury it had all the evidence, argument, and instructions it needed. [*See* Dkt. Nos. 103, 108]; *see Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003) (a trial judge has "wide discretion" in responding to questions from the jury). Even if a court's response is clearly not the only course available, the court acts "within its discretion by simply referring the jury to the instructions they had already been given." *Id*. at 995 (also citing *Davis v. Greer*, 675 F.2d 141, 145-46 (7th Cir. 1982)) (where the "entire jury charge clearly and correctly stated the controlling law," and the trial court responded to a jury question by saying only, "Consider all of the instructions carefully," the "trial court's response was sufficiently specific to clarify the jury's confusion.").

Accordingly, Plaintiff fails to show error in the jury instructions.

C. A New Trial is Not Warranted on the Grounds that the Verdict was Irreconcilably Inconsistent

Plaintiff argues that the jury's findings of willful infringement and false advertising, but also of the statute of limitations affirmative defense, are irreconcilably inconsistent. (Rule 50 and 59(a) Mot. at 33-35; Reply Re Rule 50 and 59(a) Mot. at 10-11.)

"[W]here inconsistent verdicts are alleged, the test is not whether there was substantial evidence for the jury's conclusion, but whether it is *possible to reconcile* the verdicts." *Vaughan v. Ricketts*, 950 F.2d 1464, 1471 (9th Cir. 1991) (emphasis in original). "In the case of a general verdict with interrogatories, the trial court has the discretion to enter judgment on the factual findings, even if they conflict with the jury's conclusion as to liability." *Zhang*, 339 F.3d at 1038. "[T]he determination of liability can simply be conformed to the factual findings." *Id*. at 1037-38.

Here, the jury found willful infringement and false advertising, but also that Plaintiff reasonably knew about the use and advertising of its mark earlier than the applicable timeframes, to reasonably suspect that it suffered harm. [Dkt. No. 105 at 2, 5.] The latter finding established Defendant's statute of limitations affirmative defense. *See Miller*, 318 F. Supp. 2d at 942 n. 11 (C.D. Cal. 2004). It is possible to reconcile the jury's conclusion as to liability with the factual finding establishing the affirmative defense because there was substantial evidence that willful infringement and advertising occurred only from 2010 to 2011. (*See* III.A.2, *supra*.) Once the jury additionally found that Plaintiff knew of these harms before their applicable timeframes, it was within the Court's discretion to conform the determination of liability to the factual finding. *Zhang*, 339 F.3d at 1037-38. Notably, Plaintiff's counsel understood this as well:

> The Court: These two questions [on the statute of limitations] take[] out every claim that would be covered. Do you understand that?
> ***
> I'm telling you in advance these two – I feel I always have to say this now – pardon the expression – will trump. Okay?
> Plaintiff's counsel: Fair enough.

(4/13/17 Tr., Vol. 1, 81:2-3, 24-25; 82:1.)

Accordingly, the verdict's findings of both liability and the statute of limitations affirmative defense are not irreconcilably inconsistent.

D. The Jury Instructions and Verdict Did Not Contain Errors Warranting Amendment of the Judgment

Plaintiff moves the Court to amend the judgment by way of striking the verdict's questions and answers on the statute of limitations issue. (Rule 59(e) and 60 Mot. at 25.)

As discussed in II.C, *supra*, a Rule 59(e) motion to amend the judgment may be granted to correct manifest errors of law or fact upon which the judgment is based. *Turner,* 338 F.3d at 1063.

Here, Plaintiff argues the Court provided erroneous jury instructions that produced an inconsistent verdict. (*See* Rule 59(e) and 60 Mot. at 8-9.) However, as the Court found in III.B.2, *supra*, the jury instructions contained no error. Further, the verdict was consistent in finding both willful infringement and the affirmative defense of statute of limitations. (*See* III.C, *supra*.)

Therefore, an amendment to the judgment is not warranted.

E. Relief Under Federal Rule of Civil Procedure 60(a) is Not Warranted

Plaintiff also moves pursuant to Federal Rule of Civil Procedure 60(a) to strike the statute of limitations findings on the verdict form. (Rule 59(e) and 60 Mot. at 26.)

As stated in II.D, *supra*, only "clerical mistakes" are correctable under Rule 60(a). *Dible v. City of Chandler,* 361 Fed. Appx. 790, 791 (9th Cir. 2010) (citing *Blanton*, 813 F.2d at1577 n. 2).

Here, Plaintiff moves to strike the statute of limitations questions on the verdict form. (Rule 59(e) and 60 Mot. at 26.) This change, however, is based on alleged substantive legal or factual mistakes on the form. (*See id*. at 26-27.) As such, the change falls beyond the scope of clerical mistakes and oversights permitted under Rule 60(a). *See Blanton,* 813 F.2d at 1577.

Therefore, a correction to the verdict form pursuant to Rule 60(a) is not warranted.

F. Relief Under Federal Rule of Civil Procedure 60(b) is Not Warranted

Plaintiff moves the Court for relief from the judgment, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, claiming that the agreed-upon jury instructions erroneously stated the law on the governing statute of limitations. (Rule 59(e) and 60 Mot. at 27-31.)

Here, relief from the judgment under Rule 60(b) is not proper because the parties already argued how the jury instructions should read. During the Rule 51(b) conference, Plaintiff raised issues only on statutory notice, abandonment of trademark, damages, and willful blindness, but did not raise the objections it brings here. (4/13/17 Tr., Vol. 1, 67:10-14, 69:1-4, Vol. 2, 4:20-25; 9:4-9). Moreover,

Plaintiff has not alleged extraordinary circumstances that prevented it from bringing the objections that it now makes. (*See* 4/13/17 Tr., Vol. 1, 64:9-73:20); *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008); *see also Tann v. Service Distributors*, 56 F.R.D. 593, 600 (E.D. Pa. 1972) (Rule 60 is not intended to allow reconsideration of questions already litigated and decided, but to provide correction of injustice in extraordinary circumstances), *aff'd*, 481 F.2d 1399 (3d Cir. 1973).

As discussed in III.B.1, *supra*, if a party moves to assign as error a failure to give an instruction, it must have properly requested the instruction during the Rule 51(b) conference. Fed. R. Civ. P. 51(d)(1)(B). Plaintiff did not do so. (*See* 4/13/17 Tr., Vol. 1, 64:9-73:20) Further, in the absence of an objection, an error in the jury instructions may nevertheless be reviewed if the instruction is plainly erroneous. Fed. R. Civ. P. 51(d)(2). As discussed in III.B.2.a, *supra*, the Court's instructions on the governing statute of limitations were not erroneous.

Therefore, relief from the judgment pursuant to Rule 60(b) is not warranted.

F. A Permanent Injunction is Not Warranted

Plaintiff moves for permanent injunctive relief based upon the jury's finding of willful trademark infringement. (*See generally* Req.)

1. Plaintiff Has Not Demonstrated Irreparable Injury

Plaintiff alleges irreparable injury on the grounds that Defendant's infringement has: (1) damaged Plaintiff's reputation and goodwill because Plaintiff's witness testified during trial that Plaintiff's customers called to complain about Defendant's inferior goods that they thought were manufactured by Plaintiff; and (2) caused the loss of business opportunities because Defendant is a competitor of Plaintiff. [Req. at 4-5.]

As a rule, to obtain a permanent injunction, Plaintiff must demonstrate irreparable injury. *See Herb Reed*, 736 F.3d at 1249; *Reno Air Racing*, 452 F.3d at 1137-38. Evidence of economic injury alone generally will not support a finding of irreparable harm, as such injuries may be remedied by an award of money damages. *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Evidence of intangible injury, such as a loss of customers or damage to a party's goodwill, can constitute irreparable harm. *Id.*; *see also Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001). Evidence of a loss of control over one's business reputation may also suffice. *See Herb Reed*, 736 F.3d at 1250.

Here, Plaintiff's statements concerning irreparable injury are insufficient. It asserts harm to its business, goodwill, and reputation (*see* Req. at 4-5). However, its allegations are in the past tense and Plaintiff has provided no evidence that Defendant continues to infringe its trademark. *See In re Circuit Breaker Litigation*, 860 F. Supp. at 1456 ("When a defendant has ceased its infringing conduct and

shows no inclination to repeat the offense, a court may not issue an injunction.") (citing *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 807 (D.C.Cir. 1987)); *Westinghouse*, 106 F.3d at 903 (9th Cir. 1997) ("The court's findings that the defendants were . . . not likely to harm the public in the future offer[s] additional justification for the denial [of permanent injunctive relief] . . . [and] no evidence suggests, that defendants' *current* practices . . . infringe [plaintiff's] trademarks"). Plaintiff also fails to provide evidence of continuing customer complaints. (*See* Req. at 4-5). Thus, any continuing reputational harm is speculative. *See Herb Reed*, 736 F.3d at 1250 (a finding of reputational harm may not be based on "pronouncements [that] are grounded in platitudes rather than evidence"); *Purdum v. Wolfe*, 2014 WL 171546, at *4 (N.D. Cal. Jan. 15, 2014) ("Plaintiffs have not presented any evidence of 'shoddy manufacturing' by [defendant], and thus Plaintiffs' theory of irreparable harm is purely speculative."). Lastly, the jury's finding of the affirmative defense of statute of limitations also militates against an injunction. *See In re Circuit Breaker Litigation*, 860 F. Supp. at 1455; *Westinghouse*, 106 F.3d at 903 (9th Cir. 1997).

Therefore, as Plaintiff has not made any showing of irreparable injury, a permanent injunction is not warranted. *See Herb Reed*, 736 F.3d at 1249.[1]

III. Order

Accordingly, Plaintiff's JMOL and New Trial Motion, Motion to Amend the Judgment and For Relief Under Rules 60(a) and 60(b), and Request for a Permanent Injunction, [Dkt. Nos. 121-123], are **DENIED**.

It is so ordered.

cc: Parties of Record

00 : 00

Initials of Clerk kh

[1] Because Plaintiff has not demonstrated irreparable harm, the Court need not examine the remaining factors. *See Pom Wonderful v. Pur Beverages LLC*, 2015 WL 10433693, at *18; *Purdum*, 2014 WL 171546, at *9.