B12 Consulting, LLC v. UST Global, Inc.
8:20-cv-01773-JVS-JDE

TENTATIVE Order Regarding Motion for Judgement as a Matter of Law and In the Alternative a New Trial [93] [94]

Defendant UST Global, Inc. ("UST") moves for renewed judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). (RJMOL Mtn., Dkt. Nos. 93, 94.) Plaintiff B12 Consulting, LLC ("B12") opposed the motion (RJMOL Opp'n, Dkt. No. 97) and UST replied (RJMOL Reply, Dkt. No. 98). UST seeks in the alterative a new trial, pursuant to Rule 59(a). (New Trial Mtn., Dkt. No. 94). B12 opposed the motion (New Trial Opp'n., Dkt. No. 96) and UST replied (New Trial Reply, Dkt. No. 99.)

For the following reasons, the Court **DENIES** UST's motions.

I. BACKGROUND

The background of this case is known to the Court and the parties. The parties do not dispute the following facts. B12 is a Texas limited liability company that provides Information Technology ("IT") staffing and related services to clients. UST is a Delaware corporation with its principal place of business in Aliso Viejo, California. UST is a technology company that at times engages subcontractors to provide staffing support for projects. B12 and UST entered into a Master Service Agreement on October 20, 2014 ("2014 MSA"). Per the MSA, B12, as a subcontractor agreed to provide IT support services to UST as a client. (2014 MSA § 1.) Per the MSA, B12 was at all times solely responsible for its independent contractors. (Id.)

The 2014 MSA lays out certain components each Statement of Work must contain, including the UST client name, project ID, start and end date for the services, and the type of services the subcontractor is to perform. (Id.) The 2014 MSA does not itself contain Statements of Work, but once a conforming Statement of Work was executed, it became part of the 2014 MSA. (Id. § 17.) Further, the 2014 MSA states that UST is obligated to pay for the performance of services detailed in a fully executed Statement of Work. (Id. § 4.A; Trial Tr. 8/24/22 at 182:7-10.) The "Fee Schedule" section of the Statement of Work establishes the

fee to be paid for the work specified in that particular Statement of Work. (Trial Tr. 8/24/22 at 192:16-193:1.) Finally, a Statement of Work must be signed by an authorized representative of UST and B12. (Id. 181:6-14.)

This case went to trial on August 23, 2022. At trial, B12 sought payment for two sets of invoices: the "Spain" invoices and the "Global Media" invoices. The sole witness for B12 was Shouvik Bhattacharyya, B12's founder, corporate representative, and managing consultant. UST called no witnesses. At the close of B12's case, UST properly moved for judgment as a matter of law pursuant to Rule 50(a) on the ground that B12 failed to present legally sufficient evidence of four elements: (1) that the 2014 MSA applies to and governs the invoices for which B12 sought payment, (2) that B12 did all, or substantially all, of the significant things that the 2014 MSA required it to do, (3) that UST failed to do something that the 2014 MSA required it to do, and (4) that B12 was harmed and UST's breach of the 2014 MSA was a substantial factor in causing B12's harm. (Dkt. No. 80 at 1.) The Court denied the motion (Dkt. No. 90) and the jury returned a verdict in favor of B12 on August 25, 2022, awarding B12 its requested $1,541,142.51 in damages. (Dkt. No. 89.)

UST now renews its motion for judgment as a matter of law pursuant to Rule 50(b) and moves in the alternative for a new trial.

II. LEGAL STANDARD

A. Renewed Motion for Judgment as a Matter of Law: Rule 50(b)

Pursuant to Fed. R. Civ. P. 50(a), a motion for judgment as a matter of law must be made before the case is submitted to the jury and must specify the judgment sought and the law and facts that entitle the movant to the judgment. Fed. R. Civ. P. 50(a). If the Court does not grant the motion, then "the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." EEOC v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009). A party may move to renew its motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) within twenty-eight days after the entry of judgment, or if the motion addresses a jury issue not decided by a verdict, no later than twenty-eight days after the jury was discharged. Fed. R. Civ. P. 50(b). It may also move in the alternative a request for a new trial under Fed.

R. Civ. P. 59. Id.

In ruling on a motion for judgment as a matter of law, the court may: "(a) allow the judgment to stand, (b) order a new trial, or (c) direct entry of judgment as a matter of law." White v. Ford Motor Co., 312 F.3d 998, 1010 (9th Cir. 2002). A moving party is entitled to judgment as a matter of law if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion that is contrary to the jury's verdict. E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d at 961. A jury's verdict "must be upheld" if it is supported by substantial evidence, even where it "is possible to draw a contrary conclusions." Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002). Judgment is appropriate "if there is no legally sufficient basis for a reasonable jury to find for that party on that issue." Costa v. Desert Palace, Inc., 299 F.3d 838, 859 (9th Cir. 2002). Additionally, when making its determination, the Court cannot "make credibility determinations" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." Tan Lam v. City of Los Banos, 976 F.3d 986, 995 (9th Cir. 2020) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 159-51 (2000).

B. Motion for New Trial: *Rule 59(a)*

Pursuant to Fed. R. Civ. P. 59(a), in an action in which there has been a jury trial, a new trial may be granted "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Courts may grant new trials, "even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999) (internal quotations omitted). When considering a motion for a new trial based on sufficiency of the evidence, the trial court must weigh the evidence and assess the credibility of the witnesses. Landes Const. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987.) Authority to grant a new trial "is confided almost entirely to the exercise of discretion on the part of the trial court." Allied Chem. Corp. v. Daiflon, 449 U.S. 33, 36 (1980) (per curiam).

III. DISCUSSION

A. Arguments Not Raised in 50(a) Motion

As a threshold matter, the Court will address B12's arguments regarding grounds UST raises in its 50(b) motion that it did not raise in its 50(a) motion. A renewed motion for judgment as a matter of law under Rule 50(b) "is not a freestanding motion" and is "limited to the grounds asserted in the pre-deliberation Rule 50(a) motion." Go Daddy Software, Inc., 581 F.3d at 961. UST argues in its 50(b) motion that B12's testimony that some Statements of Work and invoices contained errors or "type-os" is precluded because B12 did not plead a defense of mistake or sought reformation on the basis of mistake. (RJMOL Mtn. 6-7.) UST additionally argues that portions of Bhattacharyya's testimony were "inadmissible parol evidence." (Id. 6, 9.)

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." OTR Wheel Eng'g, Inc. v. W. Worldwide Serv., Inc., 897 F.3d 1008, 1016 (9th Cir. 2018). This requirement is "strictly construed," and forecloses both 50(b) motions brought where no 50(a) motion was raised, as well as grounds or arguments not raised in the party's pre-verdict motion. Id.; Tortu v. Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1082 (9th Cir. 2009). UST did not argue in its 50(a) motion that some of Bhattacharyya's testimony constituted inadmissible parol evidence, nor that B12 is precluded from referring to mistakes or error in the Statements of Work. Therefore, UST cannot now raise these arguments as grounds for judgment as a matter of law now in its post-verdict motion.

Separately, the Court acknowledges that B12's evidence regarding mistakes in invoices and Statements of Work did not attempt to prove an issue not raised in the pleadings. B12 did not seek rescission of the contract, which is the purpose of a mistake defense, as UST contends. (RJMOL Mtn. 6-7.) Rather, Bhattacharyya's testimony regarding clerical errors was relevant to show why certain Statements of Work referenced MSAs other than the 2014 MSA. (Id. 8-9.) Additionally, UST objected to B12's purported use of parol evidence on this issue at trial and the Court considered and overruled those objections. (Trial Tr. 8/24/22 at 95:15-17; 112:10-11.)

Accordingly, UST cannot rely on arguments regarding Bhattacharyya's

personal knowledge of the invoicing process or his testimony as to mistakes or errors in the Statements of Work.

B. The Jury Had a Legally Sufficient Basis to Find for B12

The Special Verdict Form posed six questions to the jury. (Dkt. No. 89.) Although UST's motion does not parallel the verdict form, the Court will address each of its arguments as they pertain to the questions put to the jury.

1. Special Verdict Question 1

The jury's answer to Special Verdict Question 1, asking the jury to decide whether B12 and UST entered into a contract, is not contested. The parties do not dispute at this time the jury's finding that the 2014 MSA is a valid contract between B12 and UST. (Id., Question 1.)

2. Special Verdict Question 2

The second question posed to the jury was "whether an invoice submitted for payment must be supported by a Statement of Work which covers the time frame specified in the invoice." (Id., Question 2.) The jury answered that "[s]o long as the Statement of Work covers the work described in the invoice, it is not necessary that the work be performed within the time frame specified in the Statement of Work." (Id.) UST now proffers three arguments that the evidence B12 presented at trial was insufficient to support this conclusion. (RJMOL Mtn. 18.) First, that the 2014 MSA's terms only require UST to pay for Statements of Work that conform to each of its technical requirements, and any error, clerical or otherwise, releases UST from its obligation to pay. Second, B12's interpretation of the 2014 MSA to permit invoices outside of the Statement of Work's stated time period is contrary to the unambiguous terms. And third, B12's evidence of "course of performance" is irrelevant.

Ultimately, all of these arguments boil down to a fundamental disagreement with the jury's verdict: that procedural and technical deficiencies, including that invoices submitted outside the time frame specified in the Statement of Work, is contrary to the plain text of the MSA and UST therefore does not have to pay. While this is one reasonable interpretation the jury could have come to, the Court

finds that there was sufficient evidence to support the opposite conclusion. See Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1287 (9th Cir. 2001) ("When two sets of inferences find support in the record, the inferences that support the jury's verdict of course win the day.")

B12 presented evidence that UST had previously paid invoices for dates that were outside the date ranges in the Statements of Work for various contractors, indicating that the time period was not a necessary prerequisite to payments. (Trial Tr. 8/24/22 at 103:7-104:16; 8/25/22, 29:13-16.) Bhattacharrya additionally testified that, prior to this litigation, UST had "never" objected to tendering payment for services rendered outside the time period listed on a Statement of Work, and that UST had paid B12 invoices even when the dates did not match. (Id. 8/24/22 at 76:18-20, 84:22-25, 87:14-88:9, 101:7-106:12, 105:19-106:12.) Battacharrya explained that this occurred due to the urgency with which contractors were provided to UST. (Id. 73:23-75:11 ("all that UST wanted was for the candidate to start working on the project," and "other things like Statements of Work could have been worked out").)

UST argues that evidence of invoices paid that pre-dated their corresponding Statements of Work is irrelevant for purposes of showing that B12 should have expected payment for invoices that post-dated their Statements of Work, as the invoices at issue here were. (RJMOL Mtn. 19.) However, this was not the question posed to the jury. The jury was asked generally whether an invoice submitted for payment outside the time frame specified in the corresponding Statement of Work precluded B12 from obtaining payment. (Dkt. No. 89, Question 3.) Accordingly, the jury was entitled to infer that UST's previously paying invoices submitted outside of the time frame specified in their corresponding Statements of Work meant UST was obligated to pay for services provided in the invoices at issue in this case.

UST additionally argues that B12 did not present enough evidence to show UST's previous payments of invoices dated outside their Statements of Work's time frames obligated it to pay for other incorrectly-dated invoices. (Id. 19.) In support of this argument, UST relies on Simi Management Corporation v. Bank of America in which the court held that 44 instances out of 36,000 was not conclusive evidence to prove course of performance at the summary judgment stage. 930 F. Supp. 2d 1082, 1098 (N.D. Cal. 2013). However, this case is

inapposite. The court did not find that a small number of transactions could not, as a matter of law, be evidence of course of performance. Rather, the court's reasoning was based on the standard of proof required to win at summary judgment – that 44 out of 36,000 transactions did not "conclusively" show a course of performance, and there therefore remained a triable issue of fact for the jury. Id. Here, the jury resolved a similar factual dispute in favor of B12. Inferring that UST did not place great weight on the exact dates of Statements of Work based on UST's previous approval of out-of-date invoices is undoubtedly reasonable. See S. Cal. Edison v. Sup. Ct., 37 Cal. App. 4th 839, 851 (1995) ("the acts and conduct of the parties . . . before any controversy has arisen" is admissible evidence "on the issue of the parties' intent"). Indeed, UST has not presented any authority to show that making such an inference is inherently improper or unreasonable.

Finally, UST contends that Bhattacharrya's testimony that there was "no rhyme or reason" as to what invoices were paid indicates that his testimony only went to inconsistency, not course of performance. (RJMOL Mtn. 20.) Again, while this is one inference a jury could make, it is not the only inference. B12 asserts that UST's conduct in paying certain invoices outside of the time frame specified in the Statement of Work while denying others demonstrated that UST "did not interpret the 2014 MSA to require a[Statement of Work] covering every time period." (RJMOL Opp'n. 7.) This is, indeed, a reasonable inference to make. UST's pattern of approving some invoices and rejecting others indicates that UST did not view the time frame requirement as a particularly important or necessary one. As Battacharrya testified,"all that UST wanted was for the candidate to start working on the project," and "other things like Statements of Work could have been worked out." (Trial Tr. 8/24/22 at 73:23-75:11.) The jury was entitled to believe him and make such an inference.

Because the jury's finding on Special Verdict Question 2 was reasonable and based on substantial evidence, the Court does not find cause to grant judgment to UST on these grounds.

3. Special Verdict Question 3

Special Verdict Question 3 asked the jury whether B12 did "all, or substantially all, of the significant things that the contract required it to do." (Dkt.

No. 89, Question 3.) As an initial matter, the Court addresses the parties' arguments about what constituted the contract's purpose such that it was substantially performed. "California law does not require strict compliance with the terms of a contract [for services] but rather follows the 'substantial performance' doctrine." Kennedy Miller Films PTY Ltd. v. Warner Bros., a Div. of Time Warner Entm't LP, 199 F.3d 1332, at *1 (9th Cir. 1999) (quoting Pacific Allied v. Century Steel Prods., Inc., 162 Cal. App. 2d 70, 76 (1958). "[T]he question of what constitutes substantial performance is to be determined in each case with reference to the particular facts and circumstances, together with the intention of the parties and the purpose of the contract." Id.

B12 presented evidence at trial that the purpose of the contract was to provide IT services to UST, not to perfectly fill out Statements of Work or invoices. (2014 MSA § 1.) Indeed, to the extent properly prepared Statements of Work constituted a "significant thing" the contract required B12 to do, the jury heard evidence that the burden to prepare SOWs does not lie solely with B12. (Dkt. No. 89, Question 3.) The text of the MSA does not specify which party is responsible for preparing Statements of Work, but rather that Statements of Work shall "be prepared." (2014 MSA § 1.) Additionally, Bhattacharyya testified at trial that UST prepared the majority of the SOWs at issue in this case. (Trial Tr. 8/24/22 at 73:23-74:9.) Furthermore, the undisputed testimony was that UST "never complained" about "the quality of services that B12 or its contractors provided." (Id. 63:5-10, 79:19-80:5; 8/25/22 at 56:12-57:3.) Because it was reasonable for the jury to believe that the contract's purpose was to perform IT services, and B12 presented substantial evidence that it performed those services without complaint from UST, the Court holds that the jury's findings were based on specific and substantial evidence.

Notwithstanding the above, UST argues that certain deficiencies in the invoices at issue and their corresponding Statements of Work precluded any finding that it must pay those invoices. Specifically, UST challenges the jury's finding in favor of B12 on Question 3 on three grounds: (1) there was no evidence that the timesheets were submitted to or approved by the appropriate entities required by the 2014 MSA, (2) B12 did not invoice the correct entity, and (3) the invoices at issue in this case were not governed by the 2014 MSA. (RJMOL Mtn. 5-10.) The Court will address each in turn.

a. Timesheets

UST argues that B12's failure to present any timesheets for the Spain invoices at trial conclusively proved that B12 did not submit timesheets, and UST is therefore not liable for those invoices. (Id. 10.) B12 admitted it did not have timesheets, but asserts it submitted other evidence tending to show that it substantially complied with its obligations under the 2014 MSA. (RJMOL Opp'n. 15-16.) For example, Bhattacharyya testified that the time sheets were submitted by email and that he assumed they were approved because the invoices were approved.[1] (Trial Tr. 8/24/22 at 219:23-220:4.) UST asserts that this is an extrapolation that cannot serve as the basis of the jury's findings. (RJMOL Mtn. 11.) However, the Court finds that this assumption was reasonable and based on sufficient circumstantial evidence. Bhattacharyya explained at trial that for each contractor, B12 submitted timesheets containing a UST-generated project ID number. (Trial Tr. 8/24/22 at 76:21-79:3, 80:9-83:7.) Only after the timesheets had been approved by a UST-authorized person could B12 create an invoice. (Id. 82:20-83:7.) From this, the jury inferred that an invoice's existence is evidence that the timesheet was submitted and approved.

UST also argues that there was no evidence that the individuals approving the Spain invoices were authorized representatives of the appropriate UST entity because there is no record of the timesheets. (RJMOL Mtn. 11.) However, as previously discussed, the jury was entitled to infer based on Bhattacharyya's testimony that the timesheets were approved by the appropriate personnel because such approval was a prerequisite to creating invoices. (Trial Tr. 8/24/22 at 219:23-220:4.) Additionally, UST asserts that even if the timesheets were submitted, the evidence shows that the individuals approving the Spain invoices were, in fact, UST Global Espana employees, not UST Global, Inc. employees as required by the 2014 MSA. (RJMOL Mtn. 11.) UST points to evidence that the emails approving the Spain invoices were sent by UST employees with "UST, ESP" in their email domain names. Accordingly, a jury could conclude that these

---

[1] UST asserts that Bhattacharrya's testimony on the invoicing process is impermissible due to a lack of personal knowledge. (RJMOL Mtn. 12-14.) Not only is this argument improper because it was not raised in its 50(a) motion, but the Court previously addressed this issue in its order regarding motions for summary judgment (Dkt. No. 33). UST presents no authority that casts doubt on the Court's previous ruling or why it should change at the trial stage versus the summary judgment stage.

individuals were not employees of UST Global, Inc., and therefore were not authorized individuals under the meaning of the 2014 MSA.

However, this is only one possible conclusion, and it is not the one that the jury reached. The jury saw that the UST employees approving the Spain invoices had email addresses with the domain name "@ust-global.com," which could lead to an inference that they were authorized UST Global employees. (Trial Ex. 18.) B12 also presented evidence that UST continuously approved the invoices it submitted, never rejected them based on issues with Statements of Work, or told B12 that some other UST entity was responsible for payment. (Trial Tr. 8/24/22 63:19-64:1.) Furthermore, Bhattacharyya testified that UST requested B12 email the Spain invoices directly to "specific persons who were authorized by UST to get the approval email" because there was no electronic system for the IT services work B12 did in Latin America and Mexico. (Id. 132:14-133:6.) Finally, B12 presented testimony that Jordi Falguera, Pilar Cabrera, and Rajeskhar Kamath, all of whom approved invoices on behalf of UST, worked for UST Global. (Id. 134:8-135:6; Trial Tr. 8/25/22 at 50:24-52:25.) Based on this evidence, the jury could reasonably infer that employees of UST Global were authorized to approve UST invoices submitted to them.

UST's arguments as to the Media Services timesheets fail for similar reasons. UST again argues that there are no timesheets or timesheet approvals in the record. (RJMOL Mtn. 14.) UST further argues that there is no "competent" evidence that uploading a timesheet to UST's online system necessarily submitted the timesheet to UST Global Inc., as opposed to UST Global Media Services. (Id.) Again, while it is undisputed that there are no timesheets in evidence, the jury could have made the same inferences regarding the Media Services invoices as the Spain invoices. Additionally, B12 presented evidence that both entities (UST Global, Inc. and UST Global Media Services) had the same employer ID. (Trial Tr. 8/25/22 at 61:7-63:20.) Further, B12 formatted the invoices according to UST's instruction and UST approved them, despite having 30 days to reject them. (Id. 83:19-22, 87:23-88:8, 102:24-103:2; Trial Tr. 8/24/22 at 115:2-24, 183:4-23.) Accordingly, the jury had substantial evidence upon which to base its verdict.

b. Entities Invoiced

UST next contends that there is no competent evidence that B12 submitted

the Spain invoices to the correct entity – UST Global Inc. (RJMOL Mtn. 12.) The Spain invoices listed UST Global Espana as the "billed to" entity, containing UST Global Espana's address at the top. (Trial Tr. 8/24/22 at 214:5-15.) UST asserts that this evidence necessitates a conclusion that the Spain invoices were sent to an entity other than UST Global Inc., rendering them invalid. (RJMOL Mtn. 12.) While that is certainly a reasonable inference to draw, as with other issues in this case, there were other conclusions based on substantial evidence to which the jury could have, and did, come. Bhattacharyya testified that UST Espana was merely UST Global's office in Spain and that B12 followed UST's instructions regarding where to send invoices for services done in Latin America and Mexico.[2] (Trial Tr. 8/24/22 at 214:5-15 ("That's [UST's] office address in Spain. Somebody must have given us the address.").) A jury could infer based on this testimony that UST assented to B12's submitting invoices to UST Espana for work done in Latin America and Mexico, and UST is therefore obligated to pay those invoices.

UST similarly argues B12 failed to present evidence that it submitted the Global Media invoices to the correct entity. (RJMOL Mtn. 14.) The Global Media invoices listed "UST Global Media Services, Inc." as the entity to be invoiced. Therefore, according to UST, the only reasonable conclusion is that B12 failed to prove it submitted the Media Services Invoices to UST Global, Inc. (Id. 15.) This argument fails for the same reasons as UST's arguments regarding the Spain invoices, because B12 presented substantial evidence that could lead to a different conclusion. Bhattacharyya testified that the Global Media invoices were billed to UST at its corporate address, despite their references to "UST Global Media Services," and that it was B12's practice to format invoices according to UST's instructions." (Trial Tr. 8/25/22 at 98:7-99, 102:11-103:2.) Additionally, UST approved these invoices, and B12 was never told that the invoices did not match the Statements of Work or that B12 should seek payment from another entity. (Id. 63:13-64:8, 83:19-22, 100:6-9.) Accordingly, the jury was entitled to

[2] UST also argues that consideration of evidence regarding an instruction to submit invoices to an entity other than UST Global, Inc. constitutes a modification of the MSA, the terms of which must be in writing and signed by both parties. (RJMOL Mtn. 12 (citing 2014 MSA § 17).) However, the Court is unconvinced that such an instruction constitutes a contract modification such that evidence of it is inadmissible, particularly in light of the fact that Section 5 of the MSA required B12 to use either the ITS program, the "then current invoice management process or system used by UST Global in the applicable country or region," or some "other pre-approved UST Global invoice management process or system." (Id. § 5.B.)

infer from B12's evidence that B12 performed substantially all of the significant things the 2014 MSA required, obligating UST to pay B12 for those invoices.

c. 2014 MSA

Finally, UST argues that, because the Statements of Work and corresponding invoices at issue in this case did not contain one or more required pieces of information, they did not conform to the 2014 MSA and no reasonable jury could find that UST liable. Specifically, UST asserts that the there is insufficient evidence for a reasonable jury to conclude that the Spain Statements of Work are (1) governed by the 2014 MSA, and (2) signed by an authorized representative of UST. (Id. 5.) UST also contends B12 failed to present competent evidence that the Media Services Statements of Work were governed by the 2014 MSA. (Id. 7.) The court will address each set of Statements of Work in turn.

i. Spain Statements of Work

UST contends that B12 failed to present evidence that the Spain Statements of Work are governed by the 2014 MSA because they do not mention the 2014 MSA or UST Global Inc. (RJMOL Mtn. 5.) Rather, the Spain Statements of Work state on their face that they are governed by a January 22, 2015 agreement with UST Global Espana, S.A. (Trial Exs. 3, 6-10.) Moreover, the Fee Schedule section of the Spain Statements of Work do not explicitly incorporate the payment and invoicing terms of the 2014 MSA, instead referencing the 2015 agreement with UST Global Espana, S.A. (Id.) Finally, UST relies on an unsigned MSA dated January 15, 2016, between B12 and UST Servicios, S.A. de C.V., arguing that must have been the agreement the Spain invoices fell under and that Bhattacharyya testified as much. (RJMOL Mtn. 7.)

While this evidence on its own may imply that the only reasonable conclusion is that the Spain Statements of Work do not fall under the 2014 MSA, B12 presented significant evidence explaining these discrepancies on which the jury was entitled to rely. First, B12 presented significant evidence that references to contracts other than the 2014 MSA were errors. Bhattacharyya testified that the contract referenced in the Spain Statements of Work did not actually exist, and therefore a reference to it was an "error." (Trial Tr. 8/24/22 at 111:12-16; 8/25/22

at 65:12-16.) Similarly, Bhattacharyya testified that references to a purported contract with UST Spain was in error and that a "clerical person got the information wrong." (Trial Tr. 8/24/22 at 111:17-12:5.) B12 also presented evidence that B12 had not done any work for UST in Spain, leading to an inference that the reference to UST Spain was incorrect. (Id. 111:17-12:5.) Second, Bhattacharyya testified that the term "UST Global" appearing in the Spain statements of Work meant UST Global Inc., consistent with the 2014 MSA. (Id. 112:17-113:20.) Finally, Bhattacharyya testified that the unsigned agreement dated January 15, 2016 was not operative and did not control the Spain invoices. (Id. 111:17-112:5.)

UST's attempts to undercut this evidence by challenging its validity and questioning the weight the jury should have given it. (RJMOL Mtn. 6-7.) However, it is not for UST, nor this Court, to second-guess the jury's weighing of the evidence or the witness's credibility on a 50(b) motion. See Tan Lam, 976 F.3d at 995 (the Court cannot "make credibility determinations" on a 50(b) motion). The jury's choice to find that the omission of "Inc." on the Statements of Work B12 prepared was immaterial to a determination that B12 substantially performed under the 2014 MSA was reasonable and supported by substantial evidence. Similarly, the jury was entitled to infer based on Bhattacharrya's testimony that the Spain invoices fell under the 2014 MSA, and not an unsigned MSA or a nonexistent MSA.

UST also specifically challenges the evidence B12 put forth regarding two subcontractors: Bermudez and Bonalde. UST argues that these contractors' Statements of Work reference an agreement between UST Global Spain and B12, and they also contain incorrect Project IDs, something that Battacharyya admitted was "critical from an invoicing standpoint." (Trial Exs. 35N-35O; Trial Tr. 8/24/22 at 194:9-12, 135:10-25.) As with UST's other arguments, had this been the only evidence presented at trial, UST would have a very strong case. However, B12 put on testimony that these Statements of Work erroneously contained references to a non-existent agreement with UST Global Spain, but UST subsequently corrected them to reflect the 2014 MSA. (Trial Tr. 8/24/22 at 124:15-126:4.) Furthermore, Bhattacharyya testified that the project IDs were also changed for similar reasons. (Id. 215:6-216:3.) Based on this evidence, the jury could reasonably come to the conclusion that the Statements of Work for Bermudez and Bonalde were governed by the 2014 MSA.

Finally, UST argues that B12 failed to establish that the Spain Statements of Work were executed by an authorized representative of UST Global Inc. (RJMOL Mtn. 7.) Bhattacharyya testified that he did not know who the signatory on the Spain Statements of Work was, leading to the only reasonable conclusion that these Statements of Work were not signed by an authorized representative of UST Global Inc. (Id.) However, this argument fails for several reasons. First, Bhattacharyya testified at trial that he did not know who the signatory was because he could not read the handwriting, not because they were an unknown, unauthorized UST employee. (Trial Tr. 8/24/22 at 213:1-2.) Second, UST did not proffer evidence that the signatory was not, in fact, an authorized UST employee. Third, B12 presented evidence that the invoices associated with the Spain Statements of work were approved. (Id. 134:11-136:18.) Finally, B12 proffered evidence that the people who approved the Spain invoices were authorized to do so. (Id. 134:8-135:6; Trial Tr. 8/25/22 at 50:24-52:55.) Taken together, a jury could conclude that, notwithstanding Bhattacharyya's inability to read who the signatory was, that the person who approved the invoices was an authorized representative of UST Global Inc.

Viewing the above in the light most favorable to B12, the Court finds that there was substantial evidence upon which the jury could rely in concluding that the Spain Statements of Work were governed by the 2014 MSA.

ii. Media Services Statements of Work

UST's arguments regarding the Media Services Statements of Work follow the same form as its contentions as to the Spain Statements of Work. UST asserts that the Media Services Statements of Work state that they are governed by an agreement dated January 7, 2013, do not mention the 2014 MSA, fail to incorporate the payment and invoicing terms of the 2014 MSA, and therefore no reasonable jury could conclude that these Statements of Work are governed by the 2014 MSA. (RJMOL Mtn. 8-9.) However, as with the Spain Statements of Work, B12 put forth significant evidence that could lead a jury to conclude otherwise. First, Bhattacharyya testified that B12 did not execute a 2013 MSA, so a reference to such an agreement was a mistake made by UST – the party that prepared these Statements of Work. (Trial Tr. 8/24/22 at 95:17-96:4; Trial Tr. 8/25/22 at 55:13-24.) Second, the Statements of Work contained UST Global's logo. (Trial Tr. 8/24/22 at 96:2-6.) Therefore, there was substantial evidence upon which the jury

could have based its conclusion that the Media Services Statements of Work were intended to be governed by the 2014 MSA, and any errors in them were at least not entirely B12's responsibility. Taken together in the light most favorable to B12, the Court finds that there was substantial evidence for the jury to conclude that the Media Services Statements of Work were governed by the 2014 MSA.

Even assuming *arguendo* that B12's evidence rebutting UST's arguments above was not enough, the jury was entitled to find for B12 based on an inference that the "significant" things B12 had to do did not include submitting perfect Statements of Work or invoices completely free from technical defects. (RJMOL Mtn. 10.) As analyzed above, B12 presented evidence that UST had previously approved and paid invoices with similar technical deficiencies, and UST did not reject invoices for any such failing prior to the filing of this lawsuit. (Trial Tr. 8/24/22 at 63:19-22, 64:9-11, 145:8-12.) Furthermore, B12 proffered an email correspondence between Bhattacharyya, Kiran Kumar, Rajeskhar Kamath (who works in finance at UST Global at UST Global, Inc's address in California) and Tijay Padmanabhan (head of finance for UST Global, Inc.). (Trial Ex. 20, Trial Tr. 8/25/22 at 44:19-45:16.) The purpose of the email was to obtain payment for invoices that had been generated pursuant to the 2014 MSA. (Id. 46:4-47:3.) In these emails, Kamath stated that UST had "reconciled the files [B12] sent to [UST]" with their records and confirmed that UST owed B12 $1,021,171.00. (Trial Ex. 20.) At trial, Bhattacharyya testified that this email showed that UST Global owed B12 for unpaid invoices at issue in this case, UST knew this, and did not tell B12 to collect this sum from a different entity. (Trial Tr. 8/24/22 at 139:9-143:11.) This is plenty of evidence for a jury to conclude that UST not only submitted the invoices at issue to the correct entity, but also that UST understood B12 to have done so, informing B12 that UST owed B12 for the services they provided.

4. Special Verdict Questions 4, 5, and 6

Special Verdict Question 4 asked the jury to decide whether UST Global failed to do something that the contract required of it. (Dkt. No. 89, Question 4.) Special Verdict Question 5 asked the jury whether B12 was harmed by UST's breach, and Question 6 asked what B12's damages were, if any. (Id., Questions 5, 6.) UST bases its challenge to the jury's findings on these questions on its arguments that neither the Spain nor the Media Services Statements of Work fell

under the 2014 MSA, so there can be no breach and, accordingly, no harm or damages. (RJMOL Mtn. 15-21.) Because the Court found that B12 presented substantial evidence to the contrary above, the Court will not second-guess the jury's conclusion as to Special Verdict Questions 4 and 5. Similarly, because the jury awarded B12 damages in the amount of the invoices for services B12 rendered under the Spain and Media Services Statements of Work, the Court also finds no reason to revisit the jury's conclusion on Question 6.

C. Motion for a New Trial

Turning now to UST's motion for a new trial, UST raises two arguments: sufficiency of the evidence and improper testimony at trial. The Court will address each in turn.

As to the sufficiency of the evidence, UST makes substantially the same evidentiary arguments it relied on in its renewed motion for judgment as a matter of law. Although in a motion for a new trial, the court must make its own credibility determinations of the witnesses and weigh the evidence, the Court does not reach a different conclusion than the jury. See Landes Const. Co., Inc., 833 F.2d at 1371. The clear weight of the evidence supports a finding that, notwithstanding errors and mistakes in the Spain and Media Services Statements of Work, B12 performed substantially all of the significant things the 2014 MSA required it to do, UST admitted as much by approving all the invoices at issue in this case, and by confirming in email that it owed B12 payment for the services it rendered. Accordingly, the Court **DENIES** UST's motion for a new trial on the grounds of insufficiency of the evidence.

UST also alleges that counsel for B12 improperly testified to the jury about an exhibit about which B12 did not elicit testimony. (New Trial Mtn. 25.) During rebuttal argument in closing, B12's counsel pointed the jury specifically to Exhibit 29 which was pre-admitted before trial, although B12 did not ask Bhattacharyya, the sole witness in this case, any questions about it. (Id. 26.) Exhibit 29 was an agreement between UST Global Inc. and Mythri Consulting, LLC in which UST agreed to pay Mythri for two subcontractors' services because B12 had not done so. (Id.) In pointing the jury to this exhibit, counsel for B12 made the following statement:

> What you end up doing after the echo of these words fade is you start looking through those binders for evidence. You're not going to find any. You're not going to find any contracts that they want to insinuate [sic] exist. Here's what you will find, and it's something that we actually haven't shown you before, but it is in evidence. Just when you thought there could be no more documents in this case, there's an exhibit that is in your binder. It is trial Exhibit 29. . . . The exhibit in question is a contract between UST Global, Inc., and the subcontractor that provided services, Ramya and Vamshi, two resources on the Media Services piece. You'll see it just as the words on the page. In that agreement that UST Global, Inc. signed, UST Global, Inc. agreed with that subcontractor that B12 had invoiced UST Global, Inc., for those services—the words on the page. They just spent three days telling you that B12 invoiced UST Global Media Services for the work done on the Media Services project, but there's a different contract that they signed where they said something different. Consider that when you evaluate whether or not the position they're taking—and position, I mean the words coming out of counsel's mouth, are something you should rely on when reaching your verdict. You need to look at the evidence, not what people say. And the evidence here is undisputed.

(Trial Tr. 8/25/22 at 180:5-181:16.)

UST argues that, while merely referencing to this pre-admitted exhibit is not prejudicial, making arguments about the exhibit was improper and prejudicial. (New Trial Reply 14-15.) Specifically, UST contends that was no evidence that the two invoices were among the invoices at trial, and therefore the only evidence linking Exhibit 29 to B12's claim was B12's counsel's argument during closing. (New Trial Mtn. 26-27.)

In support of this assertion, UST relies on Hern v. Intermedics, Inc., in which the court reversed the denial of a motion for a new trial based on prejudicial misconduct of counsel at closing argument. 2000 WL 127123 (9th Cir. 2000). There, counsel for plaintiff suggested in her rebuttal closing argument that there was evidence not presented to the jury which would have demonstrated that defendant's pacemaker caused others to suffer serious injury or death. Id. at *4.

Although this statement was made at the end of trial, decreasing the longevity of its prejudicial impact, plaintiff's counsel made it immediately prior to the jury's deliberations without providing defense counsel an opportunity to refute it. Id. Accordingly, plaintiff's counsel's reference to evidence outside the record violated "well-settled rule that it is improper in closing argument to make reference, over objection, to matters not in evidence" and constituted prejudicial misconduct. Id. (quoting Janich Bros., Inc. v. Am. Distilling Co., 570 F.2d 848, 860 (9th Cir. 1978)).

Although there are many parallels between Hern and the case now before the Court, the thrust of Hern is that attorneys may not refer to or argue about evidence not in the record. Here, B12's counsel pointed the jury's attention to an exhibit that was jointly pre-admitted and therefore in the record. Indeed, UST objected to B12's counsel's reference to Exhibit 29, but the Court overruled its objection. (Trial Tr. 8/25/22 at 180:22.) Nor did counsel for B12 suggest that "serious information had been kept from [the jury] at trial," as counsel in Hern did. (New Trial Mtn. 27-28.) Rather, B12's reference to an exhibit already in the record cast doubts on UST's theory of the case.

The statement at issue occurred in B12' rebuttal argument, following UST's argument that the unpaid invoices at issue had been executed under a "completely different business arrangement" than the 2014 MSA. (Trial Tr. 8/25/22 at 161:16-18; 169:10-11.) B12 was entitled to refer to an exhibit in evidence to undercut UST's theory that other valid agreements existed and controlled the unpaid invoices. This is not, as UST argues, a circumstance where B12 referenced "matters not in evidence in closing argument." (New Trial Reply 15 (quoting Hern, 2000 WL 127123, at *3).) UST offers no authority to support its position that an exhibit jointly admitted prior to trial is not "in evidence" simply because neither party elicited testimony from the witness about it. Although, as in Hern, UST did not have an opportunity to address B12's reference to Exhibit 29, other than contemporaneously objecting to it, the Court finds that directing the jury's attention to an exhibit jointly admitted was not improper, and therefore not prejudicial. The Court therefore **DENIES** UST's motion for a new trial on improper argument grounds.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** UST's motion for renewed judgment as a matter of law and motion for a new trial.

IT IS SO ORDERED.