APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRENDSETTAH USA, INC.; TRENDSETTAH, INC., *Plaintiffs-Appellants*, v. SWISHER INTERNATIONAL, INC., *Defendant-Appellee*.	No. 20-56016 D.C. No. 8:14-cv-01664-JVS-DFM OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued And Submitted January 14, 2022
Pasadena, California

Filed April 15, 2022

Before: Johnnie B. Rawlinson and Paul J. Watford, Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Rawlinson

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY**

Relief from Judgment

The panel affirmed in part and reversed in part the district court's grant of relief from a judgment entered in favor of the plaintiff after a jury trial in an antitrust action.

The jury returned a verdict against Swisher International, Inc., on Sherman Act and breach of contract claims brought by Trendsettah USA, Inc. After trial, the district court granted partial summary judgment in favor of Swisher on the antitrust claims. This court reversed and remanded with instructions for the district court to reinstate the jury's verdict. Following the remand, the district court granted Swisher's motion for relief from judgment on the grounds that Trendsettah's failure to disclose that its chief executive officer Akrum Alrahib engaged in a scheme to fraudulently avoid payment of federal excise taxes constituted fraud on the court under Fed. R. Civ. P. 60(d), and newly discovered evidence and fraud warranting a new trial pursuant to Rule 60(b)(2) and (b)(3). The district court denied Trendsettah's motions for reconsideration and for Rule 60(b) relief from the order granting Rule 60 relief. The district court then granted Trendsettah's motion to voluntarily dismiss its claims with prejudice in order to take an immediate appeal.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that Trendsettah's voluntary dismissal of its claims with prejudice did not deprive this court of jurisdiction. The panel followed *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952 (9th Cir. 2018), which distinguished *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), and held that a voluntary dismissal of remaining claims can render an earlier interlocutory order appealable, so long as the discretionary regime of Rule 23(f), governing review of class action orders, is not undermined. The panel distinguished *Langere v. Verizon Wireless Servs., LLC*¸ 983 F.3d 1115 (9th Cir. 2020), which implicated a statutory jurisdictional restriction imposed by the Federal Arbitration Act.

Reversing in part, the panel held that the district court abused its discretion in granting Swisher's Rule 60(d) motion based on fraud on the court. The panel held that fraud on the court must be established by clear and convincing evidence, and the relevant inquiry is whether the fraudulent conduct harmed the integrity of the judicial process, rather than whether it prejudiced the opposing party. A party must show willful deception, and mere nondisclosure of evidence is typically not enough to constitute fraud on the court. The panel concluded that Swisher presented no clear and convincing evidence that either Trendsettah or its attorneys was responsible for an intentional, material misrepresentation directly aimed at the district court. Accordingly, the district court erred in granting relief under Rule 60(d). The panel reversed the district court's dismissal of Trendsettah's breach of contract claims and remanded with instructions to reinstate the jury's verdict on those claims.

Affirming in part, the panel held that the district court did not abuse its discretion in granting

Swisher's motion for relief from judgment premised on newly discovered evidence and fraud under Rule 60(b)(2) and (b)(3), with respect to Trendsettah's antitrust claims. Agreeing with other circuits, the panel held that the Rule 60(b) motion was timely under Rule 60(c)(1)'s one-year limitation period, which restarted because the prior appellate decision substantially altered the district court's judgment. The panel concluded that Swisher met the standard for relief from judgment because Trendsettah's tax evasion was relevant to antitrust liability and damages, and Swisher exercised reasonable diligence in discovering the fraud.

COUNSEL

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OPINION

RAWLINSON, Circuit Judge:

Trendsettah USA, Inc. (Trendsettah) appeals the district court's order granting relief from judgment pursuant to Federal Rule of Civil Procedure 60 (Rule 60) in favor of Swisher International, Inc. (Swisher). After a jury trial, Trendsettah was awarded $14,815,494 on its Sherman Act claim, and $9,062,679 on its breach of contract claim. The district court entered judgment in favor of Trendsettah, trebling the antitrust damages to $44,446,482.00 and reducing the contract damages to zero by stipulation. After trial, the district court reconsidered Swisher's motion for summary judgment and granted partial summary judgment in favor of Swisher on the antitrust claims. We reversed the district court's grant of summary judgment, and instructed the district court to reinstate the jury's verdict. *See Trendsettah USA, Inc. v. Swisher Int'l, Inc*., 761 F. App'x 714, 718 (9th Cir. 2019).

Following the remand, Swisher filed a Rule 60 motion for relief from judgment based on its discovery that Akrum Alrahib (Alrahib), Trendsettah's chief executive officer, engaged in a scheme to fraudulently avoid payment of federal excise taxes. The district court granted Swisher's motion after concluding that Trendsettah's failure to disclose Alrahib's tax fraud constituted fraud on the court under Rule 60(d), and newly discovered evidence and fraud warranting a new trial pursuant to Rule 60(b)(2) and (b)(3).

Trendsettah contends that the district court abused its discretion in granting Swisher's Rule 60 motion because: (1) the district court failed to apply the correct standards to determine that there was

fraud on the court, (2) Swisher's Rule 60(b) motion was untimely, (3) Swisher failed to exercise reasonable diligence in discovering Alrahib's fraud; and (4) any fraud committed by Alrahib did not impact the ultimate damages calculation presented by Trendsettah's expert.

We have jurisdiction under 28 U.S.C. § 1291, and we hold that the district court abused its discretion in granting Swisher's Rule 60(d) motion based on fraud on the court. However, the district court did not abuse its discretion in granting Swisher's motion for relief from judgment premised on newly discovered evidence and fraud under Rule 60(b)(2) and (b)(3), with respect to Trendsettah's antitrust claims. Accordingly, we reverse the district court's dismissal of Trendsettah's breach of contract claims and remand with instructions to reinstate the jury's verdict on those claims. We affirm the district court's grant of Rule 60(b) relief as to Trendsettah's antitrust claims.

I. BACKGROUND

In this protracted litigation, Trendsettah alleged that Swisher "maintain[ed] its monopoly of the market for the small cigars known as cigarillos, through taking anti-competitive actions targeting [Trendsettah,] a competitor in the cigarillo market." According to Trendsettah, it "entered the cigarillo market by contracting with Swisher to have Swisher exclusively manufacture [Trendsettah's] cigarillos, which [Trendsettah] marketed and sold under the brand name Splitarillo." Trendsettah alleged that "Swisher decided that rather than compete in the open market with the Splitarillo brand, it could best protect its monopoly by restricting the supply of Splitarillos," and that "Swisher began refusing to fulfill the orders for Splitarillos that [Trendsettah]

placed, or sabotaged such orders, in violation of the contract that it had agreed to, which contained no limit as to the number of cigarillos Swisher would manufacture." Trendsettah alleged various antitrust and contract claims against Swisher.

A jury found in favor of Trendsettah, awarding $14,815,494 on its antitrust claim and $9,062,679 on its contract claim. The district court entered judgment in favor of Trendsettah, trebling the antitrust damages to $44,446,482.00 and reducing the contract damages to zero by stipulation. Following the verdict, the district court granted summary judgment in favor of Swisher on the antitrust claims, and entered judgment in favor of Trendsettah on the contract claims.

On appeal, we affirmed in part and reversed in part the district court's judgment. *See Trendsettah*, 761 F. App'x at 718. We held that, although the district court properly reconsidered its prior summary judgment ruling, reversal was warranted because the district court "failed to draw all reasonable inferences in favor of" Trendsettah, and "cited evidence that Swisher had introduced at trial [that] the jury clearly had rejected." *Id.* at 717 (citation omitted). We "directed [the district court] to reinstate the jury's verdict in its entirety." *Id.* at 718.

On remand, Swisher filed a motion for relief from judgment pursuant to Rule 60 on the basis that Alrahib "conspired with [Trendsettah's] importer [Havana 59] to evade millions of dollars in federal excise taxes due on [Trendsettah's] cigarillos. The criminal tax evasion scheme entailed creating fake invoices and using [Trendsettah's] bank accounts to covertly transfer funds to [Trendsettah's] Dominican Republic manufacturer so that the Customs and

Border Protection . . . could not detect the actual first sales price of [Trendsettah's] cigarillos and collect the full amount of taxes due on them."[1]

Swisher maintained that it "learned of [Trendsettah's] tax avoidance and illegal kickbacks when a grand jury indictment in Mr. Alrahib's criminal case became publicly available." Swisher also asserted that during the discovery phase of the case between Swisher and Trendsettah, Trendsettah "refused to produce its federal excise tax filings, claiming irrelevance and undue burden," and "falsely represented" that federal excise tax information was reflected "in [Trendsettah's] sales records." Swisher maintained that it was "now apparent that the financial records [Trendsettah] passed off as accurate did not account for its illegal tax avoidance."

Swisher contended that it was entitled to relief from judgment because Trendsettah's conduct constituted fraud on the court. Swisher also asserted that relief from judgment was warranted under Rule 60(b) due to newly discovered evidence and fraud.

In support of its motion, Swisher submitted the declaration of Dr. Alan Cox, who provided expert testimony on behalf of Swisher during the trial. Dr. Cox observed that Alrahib's fraud scheme "overlapped

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[1] As discussed more extensively later in the opinion, Trendsettah's fraudulent avoidance of federal excise taxes thwarted Swisher's ability to sufficiently defend against Trendsettah's antitrust claim premised on its inability to compete in the face of Swisher's purported anticompetitive conduct. According to Swisher, this deception "left [Trendsettah] free to present to the jury and the [district court] a falsely inflated picture of the profitability of its cigarillo sales out of which its expert constructed a largely, if not entirely, sham claim for lost profits."

with most of the current injury and damages period claimed by [Trendsettah]" at trial. The fraud scheme affected the damages presentation by artificially inflating profits through fraudulent evasion of excise taxes. Dr. Cox opined that "[i]f one account[ed] for the excise taxes [Trendsettah] should have paid, [the damages] model—which the jury accepted in rendering its award—would have estimated no damages." "In addition, [Trendsettah's] tax evasion allowed [Trendsettah] to sell product at a price that was artificially low." Dr. Cox concluded that "had [Trendsettah] paid its excise taxes, it would have gone out of business by early 2014. Selling for three years at a loss was possible because [Trendsettah] had, in effect, taken an unlawful and unsanctioned subsidy from the government through its excise tax fraud scheme." "Absent such fraud, [Trendsettah] would have had to increase prices (and sell fewer products) or shut down. Its demonstrated inability to compete effectively in the relevant markets also indicate[d] that Swisher's alleged actions could not have harmed competition as [Trendsettah] alleged."

The district court granted Swisher's motion for relief from judgment under Rule 60. The district court reasoned that, prior to trial, Swisher sought discovery of Trendsettah's payment of federal excise taxes, but Trendsettah objected to the requested discovery on the grounds of undue burden and irrelevance. Trendsettah also informed Swisher that the information was available in Trendsettah's "financial records, sales orders, and invoices." Trendsettah's "general counsel subsequently testified that [Trendsettah] . . . produced all documents responsive to Swisher's discovery requests."

The district court noted that, of course, Trendsettah never disclosed Alrahib's involvement in the scheme to evade federal excise taxes. The district court emphasized that Trendsettah did not "disclose documents which demonstrated what Alrahib admits were falsified invoices." The district court determined that "the documents produced did not reflect the true cost of manufacturing and importing [Trendsettah's] cigarillos, even though they were presented to Swisher as an accurate reflection of [Trendsettah's] costs and profits."

The district court determined the "misleading financial records" were used by Trendsettah's damages expert, Dr. Deforest McDuff. The damages calculations were predicated on the 2013–14 profit margins that "were artificially inflated by the underpayment of federal excise taxes, infecting Dr. McDuff's entire analysis."

The district court concluded that Trendsettah "presented to the jury and to the Court a theory of lost profits premised on inaccurate data which was a product of a fraudulent tax evasion scheme," and that Trendsettah's "conduct tainted the integrity of the trial and interfered with the judicial process."

The district court was unpersuaded by Trendsettah's contention that Swisher failed to exercise reasonable diligence in discovering the fraud. The district court recalled that Trendsettah "successfully moved *in limine* to exclude any evidence or argument regarding Alrahib's past tax-related enforcement actions, in part based on the argument that Alrahib's tax evasion was merely past conduct that had no relevance to this trial."

The district court concluded that Swisher exercised reasonable diligence under Rule 60(d)(3) because Swisher "was entitled to accept [Trendsettah's] answers to its discovery requests as accurate and not to seek additional discovery relating to the issue." The district court concluded that Trendsettah "cannot blame Swisher for the success of its obstructionist conduct."

The district court ultimately held that Swisher demonstrated "by clear and convincing evidence that [Trendsettah] engaged in misconduct that undermined the judicial process," resulting in fraud on the court.

The district court also granted relief from the judgment under Rules 60(b)(2) and (b)(3) due to newly discovered evidence and fraud. The district court determined that Swisher's motion was timely because "the evidence demonstrating fraud—Alrahib's May 2017 interview which was revealed to the public in April 2019—was not available" when Swisher was able to move for a new trial. Additionally, the district court reasoned that "the Ninth Circuit's [remand] decision substantially altered the judgment," and the time for filing a motion for relief from judgment was "restart[ed]."

After the district court denied Trendsettah's motion for reconsideration, Trendsettah filed a Rule 60(b) motion for relief from the district court's order granting Swisher's Rule 60 motion, which the district court also denied.

Trendsettah subsequently filed a motion for certification of the district court's November 12, 2019 order to allow an interlocutory appeal, which the

district court denied. Trendsettah also filed a petition for mandamus with this court, which was denied.

Finally, Trendsettah filed a motion to voluntarily dismiss its claims with prejudice to take an immediate appeal of the district court's orders. The district court granted Trendsettah's motion to dismiss with prejudice, and Trendsettah filed a timely notice of appeal.

II. STANDARDS OF REVIEW

"We review questions of our own jurisdiction *de novo*." *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 17 F.4th 930, 934 (9th Cir. 2021) (citation omitted).

We review the district court's rulings on Swisher's Rule 60 motion for an abuse of discretion. *See Irvine Unified Sch. Dist. v. K.G.*, 853 F.3d 1087, 1090 (9th Cir. 2017).

III. DISCUSSION

A. Jurisdiction

Relying on *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), Swisher contends that we lack jurisdiction over Trendsettah's appeal because there is no final judgment. But Swisher's jurisdictional challenge is unavailing. In *Microsoft*, the Supreme Court considered whether jurisdiction exists under 28 U.S.C. § 1291 and Article III of the United States Constitution over "an order denying class certification . . . after the named plaintiffs have voluntarily dismissed their claims with prejudice." 137 S. Ct. at 1712. The Supreme Court held that, in the class action context, plaintiffs may not "transform a tentative interlocutory order [denying class certification] into a final judgment" by simply dismissing those claims with prejudice while

maintaining "the right to revive those claims if the denial of class certification is reversed on appeal." *Id.* at 1715 (citations and internal quotation marks omitted).

Over twenty years ago, we held in a case not involving a class action that a plaintiff may voluntarily dismiss claims with prejudice "to secure[ ] review of an order that would not ordinarily be reviewable until after a trial on the merits." *Concha v. London*, 62 F.3d 1493, 1508–09 (9th Cir. 1995). We emphasized that unlike the situation in *Microsoft*, the dismissal of his action with prejudice in this non-class action context "runs a serious risk of losing [the] claim entirely." *Id.* at 1508. If the plaintiff loses on appeal, "the dismissal with prejudice stands" and any future action for that claim is forever forfeited. *Id.* We concluded in the non-class action context, that permitting appeal following an unqualified dismissal with prejudice "is not likely to undermine our normal appellate practice." *Id.*

We have since clarified that the rule articulated in *Concha* was not impacted by *Microsoft*, which "involved an attempt to use the voluntary dismissal mechanism to obtain an appeal as of right in order to review an earlier denial of class certification." *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 955 (9th Cir. 2018). In *Rodriguez*, we meticulously explained that the plaintiffs in *Microsoft* attempted to thwart the "careful[ly] calibra[ted]" class certification provisions of Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 955. Specifically, in *Microsoft*, the Supreme Court "held the denial of class certification was not reviewable because plaintiffs had already been denied a discretionary appeal pursuant to [Federal Rule of Civil Procedure] 23(f)." *Id.* (citing

Microsoft, 137 S. Ct. at 1714–15). We noted that *Rodriguez* did not "involve an attempt to obtain review of a class certification issue." *Id.* Rather, *Rodriguez* involved "review of a partial summary judgment order." *Id.*

In *Rodriguez*, *see id.*, we cited with approval our post-*Microsoft* decision in *Brown v. Cinemark USA, Inc.*, 876 F.3d 1199 (9th Cir. 2017) that distinguished *Microsoft* on the same basis—that allowing interlocutory appeal of the denial of class certification would "subvert the balanced solution Rule 23(f) put in place for immediate review of class action orders." *Brown*, 876 F.3d at 1201.

In *Rodriguez*, we distilled our holding in *Brown* to this: "a voluntary dismissal of remaining claims can render the earlier interlocutory order appealable, so long as the discretionary regime of Rule 23(f) is not undermined." *Rodriguez*, 896 F.3d at 955 (citation omitted). We ultimately concluded that our pre-*Microsoft* precedent (*Concha*) and post-*Microsoft* precedent (*Brown*) controlled, rendering the voluntary dismissal with prejudice in *Rodriguez* "a valid final judgment for purposes of 28 U.S.C. § 1291." *Id.* at 956.

We are not persuaded that *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115 (9th Cir. 2020) compels a contrary conclusion. In that case, we held that voluntary dismissal of claims with prejudice did not provide appellate jurisdiction because the Federal Arbitration Act [FAA] "endeavors to promote appeals from orders barring arbitration and limit[s] appeals from orders directing arbitration." *Id.* at 1118 (citation omitted). We recognized that the FAA accomplishes this goal "by explicitly prohibiting the appeal of orders compelling arbitration." *Id.* (citation omitted); *see also Sperring v. LLR, Inc.*, 995 F.3d 680,

682 (9th Cir. 2021) (dismissing an appeal because "Appellants, like Langere, voluntarily dismissed their action with prejudice in an attempt to obtain an appealable final judgment *following an order compelling arbitration*") (emphasis added). Trendsettah's appeal does not implicate any similar statutory restrictions that would be adversely affected by permitting voluntary dismissal of claims with prejudice.[2]

The district court considered and acknowledged that Trendsettah sought to dismiss its claims with prejudice in order to appeal the court's rulings on Swisher's Rule 60 motion. But unlike the plaintiffs in *Microsoft* and *Langere*, Trendsettah is not attempting to take an appeal midstream, such that success on appeal would allow it to continue litigating its claims in a preferred posture or forum. Trendsettah's claims have already been litigated and a final decision on those claims has been reached. Thus, however we decide this appeal, the case will be over—either the jury's prior verdict will be reinstated or the district court's dismissal of Trendsettah's claims with prejudice will stand. Moreover, "[a] district court's involvement in the voluntary dismissal of a plaintiff's claims carries substantial weight in determining whether appellate jurisdiction is proper. . . ." *Galaza v. Wolf*, 954 F.3d 1267, 1272 (9th Cir. 2020). In sum, under applicable precedent, Trendsettah's voluntary dismissal of its claims with prejudice did not deprive

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[2] Swisher's reliance on *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125 (9th Cir. 2022) is misplaced. In *ICTSI Oregon, Inc.*, we addressed certification requirements for an interlocutory appeal under 28 U.S.C. § 1292(b), and did not consider the voluntary dismissal of claims with prejudice. *See id.* at 1129.

this court of jurisdiction. *See Concha*, 62 F.3d at 1507–08; *see also Brown*, 876 F.3d at 1201.

B. The District Court's Grant of Swisher's Rule 60 Motion Based On Fraud On The Court

Trendsettah contends that the district court failed to properly apply the requisite factors in determining whether Trendsettah engaged in fraud on the court.

Initially, it bears emphasizing that a party seeking to establish fraud on the court must meet a high standard. *See Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1104 (9th Cir. 2006). "We exercise the power to vacate judgments for fraud on the court with restraint and discretion, and only when the fraud is established by clear and convincing evidence." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011) (citations and internal quotation marks omitted).

Our precedent "emphasize[s] that not all fraud is fraud on the court." *United States v. Sierra Pacific Indus., Inc.*, 862 F.3d 1157, 1167 (9th Cir. 2017) (citation and internal quotation marks omitted). "In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct prejudiced the opposing party, but whether it harmed the integrity of the judicial process." *Id.* at 1167–68 (citations and internal quotation marks omitted); *see also Levander v. Prober* (*In re Levander*), 180 F.3d 1114, 1119 (9th Cir. 1999), *as amended* (explaining that "[f]raud upon the court should . . . embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its

impartial task of adjudging cases that are presented for adjudication.") (citation and internal quotation marks omitted).

Additionally, "mere nondisclosure of evidence is typically not enough to constitute fraud on the court, and perjury by a party or witness, by itself, is not normally fraud on the court." *Sierra Pacific Indus., Inc.*, 862 F.3d at 1168 (citation, alteration, and internal quotation marks omitted). "However, perjury may constitute fraud on the court if it involves, or is suborned by, an officer of the court. . . ." *Id.* (citations and internal quotation marks omitted). "Under the high standard for a Rule 60(d)(3) motion, a mere discovery violation or non-disclosure does not rise to the level of fraud on the court. . . ." *Id.* at 1171 (citation omitted). "[O]ur case law requires that a party show willful deception rather than simply reckless disregard for the truth . . ." *Id.* at 1172 (citation omitted).

Despite the exacting standard applicable to the determination of fraud on the court, the district court did not extensively address whether the purported fraud on the court involved an "*intentional*, material misrepresentation" in support of "an unconscionable plan or scheme which [was] designed to improperly influence the court in its decision." *Id.* at 1168 (citations omitted) (emphasis added). The district court briefly mentioned the requirement for an intentional misrepresentation, but characterized the trial testimony and evidence as "false" and "misleading," rather than an intentional misrepresentation. However, "mere nondisclosure of evidence is typically not enough to constitute fraud on the court, and perjury by a party or witness, by itself, is not normally fraud on the court." *Id.* at 1168

(citation, alteration, and internal quotation marks omitted). Notably, neither the district court nor Swisher identified any specific statements or testimony during the trial that amounted to perjury.

Moreover, "[a] fraud connected with the presentation of a case to a court is not necessarily a fraud on the court." *Estate of Stonehill*, 660 F.3d at 444 (citation and internal quotation marks omitted). Instead, we have recognized that "[m]ost fraud on the court cases involve a scheme by one party to hide a key fact from the court and the opposing party." *Id.* Such a scheme was found in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1130 (9th Cir. 1995), a wrongful death case resulting from a gun being dropped and misfiring while the safety was on. During trial, the defendant introduced a video demonstrating that "the safeties performed as designed, and the gun never fired." *Id.* at 1130. However, discovery in a different lawsuit revealed the existence of an earlier video, prepared at the same time as the trial video, "showing that the [gun] fired when dropped during testing." *Id.* This earlier video was never provided to Pumphrey. *See id.*

We concluded that introduction of the video depicting the safeties performing as designed constituted fraud on the court because the video shown at trial was made when "the original video did not turn out as planned." *Id.* at 1131. We reasoned that defendant Thompson Tools, through in-house counsel "undermined the judicial process" through failure to disclose the earlier video, affirmatively mischaracterizing the test results, and letting stand uncorrected "the false impression created by" the witness who performed the tests. *Id.* at 1133. Importantly, the defendant previously "answered a

request for production by stating that defendant [was] not presently aware of any records relating to the testing of the . . . handguns," and "[i]f records [were] later discovered, they [would] be made available pursuant to this request." *Id.* at 1131. But the earlier video was "never disclosed." *Id.*

Similarly, *In re Levander* involved fraud on the court because the bankruptcy court granted attorneys' fees against a corporation without "know[ing] of the existence of" a partnership to which the corporation had transferred its assets. 180 F.3d at 1117. "The reason the court so believed was that when one of the Corporation's officers was asked during a . . . deposition whether the Corporation's assets had been sold, he answered: No. The assets haven't been sold." *Id.* (internal quotation marks omitted). However, it was later revealed that "a former employee of the Corporation . . . owned what had been the Corporation's assets in the bank." *Id.* The bill of sale revealed that the Partnership had transferred ownership of all corporate assets "for one dollar." *Id.* We determined that fraud on the court occurred because "*the court relied on* the Corporation's depositions to impose attorneys' fees on the Corporation, rather than on the party with the assets—the Partnership." *Id.* at 1120 (citations omitted) (emphasis added).

In contrast to the facts in *Pumphrey* and *Levander*, no clear and convincing evidence was presented that either Trendsettah or its attorneys was responsible for "an intentional, material misrepresentation directly aimed at the court." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1097 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114

(2009) (citation and internal quotation marks omitted). Although the district court observed that Trendsettah's attorneys objected to Swisher's discovery requests for federal excise taxes as "burdensome" and "irrelevant," there was not clear and convincing evidence that Trendsettah's counsel had knowledge of or intended to conceal Alrahib's fraudulent tax evasion.[3] While the district court concluded that Trendsettah's financial records were "misleading" because they did not reveal Alrahib's conduct, it is not clearly evident that Trendsettah's discovery responses were "directly aimed at the court." *In re Napster*, 479 F.3d at 1097 (citation and internal quotation marks omitted). As the Tenth Circuit illuminated,

> Fraud on the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. . . .
>
> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly

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[3] Although a party may commit fraud on the court, *see In re Levander*, 180 F.3d at 1120, our cases often involve misconduct by an attorney. *See, e.g., Pumphrey*, 62 F.3d at 1133. In this case, the district court determined that "counsel acted in good faith and was not a party to the other activities of the Trendsettah principal."

> pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002) (citations and alterations omitted).

Our review of relevant case authority persuades us that the district court erred in granting relief from judgment under Rule 60(d) based on fraud on the court. *See Sierra Pacific Indus., Inc.*, 862 F.3d at 1171–72.

C. The District Court's Grant of Swisher's Motion for Relief from Judgment Due To Newly Discovered Evidence and Fraud

Trendsettah asserts that the district court abused its discretion in granting Swisher's motion for relief from judgment as to Trendsettah's antitrust claims pursuant to Rules 60(b)(2) and (b)(3) based on fraud and newly discovered evidence. Trendsettah posits that Swisher's motion was untimely under the one-year limitation period imposed by Rule 60(c)(1), and that no equitable exceptions applied to toll the limitations period.

In *Nevitt v. United States*, 886 F.2d 1187 (9th Cir. 1989), a case relied on by Trendsettah, we explained that "[a] motion for relief from judgment based on a mistake (Rule 60(b)(1)), newly discovered evidence (Rule 60(b)(2)), or fraud (Rule 60(b)(3)) shall be made not more than one year after the judgment, order, or proceeding was entered or taken." *Id.* at 1188 (citation and internal quotation marks omitted). The "one-year limitation period is not tolled during an appeal." *Id.* (citation omitted).

The present appeal is distinguishable from *Nevitt* because Swisher did not seek to toll the time limitations imposed by Rule 60(c)(1) while its appeal was pending. Rather, the district court determined that Swisher's motion was timely because "the Ninth Circuit's decision substantially altered the judgment, and the time for bringing a Rule 60(b) motion restart[ed]."

Although we have not extensively addressed this issue, other courts have concluded that the limitations period imposed by Rule 60(c)(1) may be restarted subsequent to an appeal. For example, in *Jones v. Swanson*, 512 F.3d 1045, 1048 (8th Cir. 2008), the Eighth Circuit explained that courts "have recognized that a new, one-year period under Rule 60(b) might be triggered if a subsequent appellate ruling substantially alters the district court's judgment in a manner that disturbs or revises the previous, plainly settled legal rights and obligations of the parties." (citations and alteration omitted); *see also Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 466 F.3d 97, 100–01 (2d Cir. 2006), *as amended* (concluding that the one-year limitations period for a Rule 60(b) motion was not restarted because its prior "ruling made no substantive change in [the] legal position from that established by the judgment of the district court") (citation omitted); *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1089 (10th Cir. 2005) (acknowledging that a new "one-year period under Rule 60(b) might be triggered if the subsequent appellate ruling substantially alters the district court's judgment") (citations omitted).

The reasoning of these cases informs our agreement with the district court that Swisher's

motion under Rule 60(b)(2) and (b)(3) was timely because our remand decision "substantially alter[ed] the district court's judgment in a manner that disturb[ed] or revise[d] the previous, plainly settled legal rights and obligations of the parties." *Jones*, 512 F.3d at 1048 (citations omitted). The jury rendered a verdict in favor of Trendsettah on its antitrust and breach of contract claims. On Swisher's motion for judgment as a matter of law, the district court entered judgment in favor of Trendsettah on the breach of contract claims, but entered judgment "in favor of [Swisher] and against [Trendsettah] on all of [Trendsettah's] other claims, including [Trendsettah's] claims for violation of Section 2 of the Sherman Act." On appeal, we ruled that in pertinent part:

> The district court's grant of summary judgment to Swisher as to its antitrust claims is REVERSED. The district court's grant of a new trial to Swisher as to the attempted monopolization claim is REVERSED. The district court's grant of [judgment as a matter of law] to Swisher as to the monopolization claim is REVERSED. . . . On remand, the district court is directed to reinstate the jury's verdict in its entirety. . . .

Trendsettah USA, Inc., 761 F. App'x at 718. Our remand decision "substantially alter[ed]" the district court's judgment in favor of Swisher regarding the antitrust claims, rendering Swisher's Rule 60 motions timely as to those claims. *Jones*, 512 F.3d at 1048 (citations omitted).

Contrary to Trendsettah's assertions, construing Swisher's motion as timely does not contravene Rule 60(c)(1) or Rule 6(b)(2) of the Federal Rules of Civil

Procedure. Rule 60(c)(1) provides that "[a] motion under Rule 60(b) must be made within a reasonable time—and for [Rule 60(b)] (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). The rule that we apply in conformity with our sister circuits is consistent with Rule 60(c)(1) because it is tethered to the judgment itself, and substantial alterations in the judgment from an appellate ruling. This rule is also consistent with Rule 6 of the Federal Rules of Civil Procedure, which prohibits a court from "extend[ing] the time to act under" Rule 60(b). Fed. R. Civ. P. 6(b)(2). We are not extending the time for filing a Rule 60(b) motion, but recognizing the beginning of a new limitations period as a result of an appellate decision that has "substantially alter[ed] the district court's judgment in a manner that disturbs or revises the previous, plainly settled legal rights and obligations of the parties." *Jones*, 512 F.3d at 1048.

Addressing the merits of Swisher's motion, Trendsettah contends that the district court erred in granting Swisher's Rule 60(b) motion because issues relating to federal excise taxes were irrelevant at trial, and Swisher did not exercise reasonable diligence in discovering Alrahib's fraud. We disagree.

"Rule 60(b) allows for relief from a final judgment, order, or proceeding for any of six reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason that justifies relief." *Hanson*

v. Shubert, 968 F.3d 1014, 1017 n.1 (9th Cir. 2020) (citation and internal quotation marks omitted).

"Relief from judgment on the basis of newly discovered evidence is warranted if (1) the moving party can show the evidence relied on in fact constitutes newly discovered evidence within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the newly discovered evidence must be of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (citation and internal quotation marks omitted).

"Rule 60(b)(3) permits a losing party to move for relief from judgment on the basis of fraud, misrepresentation, or other misconduct of an adverse party." *De Saracho v. Custom Food Mach., Inc*., 206 F.3d 874, 880 (9th Cir. 2000) (citation, alteration, and internal quotation marks omitted). "To prevail, the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *Id.* (citations omitted). "Rule 60(b)(3) is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. . . ." *Id.* (citation and internal quotation marks omitted).

Trendsettah contends that Swisher failed to meet the standard for relief from judgment premised on fraud and newly discovered evidence due to "the facial irrelevance of excise taxes" to the damages calculations performed by Trendsettah's expert. As previously noted, however, Trendsettah's tax evasion allowed it to set artificially low prices and continue to

compete effectively in the relevant markets, thereby incurring its asserted damages.

Moreover, Alrahib stated in his interview with an internal revenue agent that he was aware of the tax evasion and "that's how we could compete in the marketplace." Alrahib explained that "there's no way [they] could compete" without the benefits bestowed by the fraudulent evasion of federal excise taxes. Trendsettah does not dispute that, in support of Trendsettah's antitrust claim, Alrahib testified about the impact of Swisher's purported anticompetitive behavior on Trendsettah's business. Alrahib's concealment of his excise tax fraud scheme and its impact on Trendsettah's competitive viability precluded Swisher's defense to the antitrust claims "from being fully and fairly presented." *Wharf v. Burlington N. R.R. Co.*, 60 F.3d 631, 638 (9th Cir. 1995). Tellingly, Trendsettah does not advance any contention that the jury would have reached the same verdict for antitrust liability and damages if it were fully apprised of Alrahib's fraudulent evasion of federal excise taxes.

We are also unpersuaded by Trendsettah's contentions that Swisher did not exercise reasonable diligence in discovering the fraud. First, Trendsettah maintains that Swisher belatedly realized the import of federal excise taxes relative to the damages calculation for the antitrust claims. However, Trendsettah's reliance on this hypertechnical aspect of damages calculations, which it describes as "a methodological criticism that was available all along," misses the point. Trendsettah's fraud implicated more than "a methodological criticism." Instead, it undermined Trendsettah's allegations that its business was constrained by Swisher's

anticompetitive acts. Dr. Cox explained that "[a]bsent such fraud, [Trendsettah] would have had to increase prices (and sell fewer products) or shut down. Its demonstrated inability to compete effectively in the relevant markets [absent the tax fraud] also indicates that Swisher's alleged actions could not have harmed competition as [Trendsettah] alleged."

Second, Trendsettah maintains that Swisher had in its possession invoices "showing that [Trendsettah] paid Havana 59 nearly $40,000 per container in excise tax," "hundreds of copies of the tax filings themselves," "along with the details of the calculations and the canceled checks showing those payments." According to Trendsettah, Swisher was compelled to wade through these documents and piece together the fraudulent tax evasion scheme concealed by Alrahib. But Swisher was not required to engage in a fishing expedition to establish reasonable diligence. Indeed, it bears noting that Trendsettah's own expert did not detect the fraud that Trendsettah posits was hidden in plain sight.

Finally, Trendsettah asserts that the district court "adopted Swisher's factual premise that any line of questioning about excise-tax evasion would likely have led to the disclosure of the fraudulent scheme." Trendsettah apparently maintains that the district court made a factual finding that Swisher could have discovered Alrahib's tax fraud scheme if only it had asked questions about excise taxes at trial. But this notion is *not* supported by the district court's order. The district court explained that:

> based on [Trendsettah's] inaccurate arguments that Alrahib's federal excise tax violations were merely past wrongs, Swisher was foreclosed from asking Alrahib about

> excise tax evasion, a line of questioning that, absent perjury, would likely have led to the disclosure of the fraudulent scheme he later disclosed to federal agents.

In context, the district court's observation was related to Alrahib's deposition testimony and Trendsettah's motion *in limine*. In his deposition, Alrahib acknowledged that he failed to pay state excise taxes for a business in Arizona. However, Swisher was unable to pursue this issue at trial because the district court granted Trendsettah's motion *in limine* "to exclude evidence that Trendsettah's principal Akrum Alrahib . . . failed to pay excise taxes on tobacco products purchased through an Arizona company and later resold in California." Far from making a factual determination that "any line of questioning about excise-tax evasion" would have revealed Alrahib's fraud, the district court concluded that Swisher's failure to further question Alrahib concerning tax fraud was due to the grant of Trendsettah's motion *in limine* rather than a lack of diligence by Swisher. As a result, the district court correctly concluded that "the evidence demonstrating fraud—Alrahib's May 2017 interview which was revealed to the public in April 2019—was not available" when Swisher could have filed a motion for new trial.

We conclude that Swisher timely filed its Rule 60(b) motion and exercised reasonable diligence in discovering Alrahib's fraudulent evasion of federal excise taxes. If Swisher had been able to present evidence of Alrahib's fraud to the jury, it "would have . . . likely . . . change[d] the disposition of the case," *Feature Realty, Inc.*, 331 F.3d at 1093 (citation omitted), and enabled Swisher to "fully and fairly present[ ]" its defense to the antitrust claims, *Wharf*,

60 F.3d at 638. The district court, therefore, properly vacated the judgment in accordance with Rules 60(b)(2) and (b)(3).[4]

IV. CONCLUSION

Swisher was unable to meet the high threshold to establish fraud on the court under Rule 60(d). *See Sierra Pacific Indus., Inc.*, 862 F.3d at 1168. However, relief from judgment on Trendsettah's antitrust claims is warranted under Rule 60(b)(2) and (b)(3) based on newly discovered evidence and fraud.

Swisher's motion brought pursuant to Rule 60(b)(2) and (b)(3) based on newly discovered evidence and fraud was timely, and Swisher acted with reasonable diligence in discovering Alrahib's tax fraud scheme, which, if disclosed, would have likely altered the jury's verdict.

AFFIRMED in part and REVERSED in part. Each party shall bear its costs on appeal.

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[4] Because we affirm the district court's order granting Swisher's motion for relief from judgment under Rule 60(b), we decline to grant Trendsettah's request that this case be reassigned to a different district court judge.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No.	SACV 14-1664 JVS (DFMx)	Date	August 19, 2019
Title	Trendsettah USA, Inc. et al. v. Swisher International Inc.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Regarding Motion for Relief from Judgment or for Expedited Discovery, Motion to Stay, and Motion for Summary Adjudication**

The Court, having been informed by the parties in this action that they submit on the Court's tentative ruling previously issued, hereby rules in accordance with the tentative ruling as follows:

Defendant Swisher International, Inc. ("Swisher") filed a motion for relief from judgment pursuant to Federal Rules of Civil Procedure 60(b)(2), 60(b)(3), and 60(d), or in the alternative, for an order accelerating discovery into Plaintiffs' Trendsettah USA, Inc. and Trend Settah International, Inc. (collectively, "TSI") alleged misconduct. Mot., Docket No. 377. TSI filed an opposition. Opp'n, Docket No. 397. Swisher replied. Reply, Docket No. 414. With leave of the Court, TSI filed a sur-reply. Sur-Reply, Docket No. 421-1.

Swisher also moved to stay execution of any judgment against it in this case and related discovery under Federal Rule of Civil Procedure 62 until five business days after the filing of an order resolving the above motion for relief from judgment or, if later, five business days after notice of entry of any judgment entailed by such resolution. Docket No. 380. TSI opposed. Docket No. 404. Swisher replied. Docket No. 418.

Lastly, TSI moved for summary adjudication as to Swisher's supersedeas bond. Docket No. 364. Swisher opposed. Docket No. 372. Swisher replied. Docket No. 386.

For the following reasons, the Court **grants** the motion for relief from judgment. Therefore, the motions to stay and for summary adjudication are **denied as moot**.

I. BACKGROUND

The background of this case is familiar to the parties and detailed in the Court's prior orders. Docket Nos. 262, 274, 340; see also Docket No. 349. The Court recites only those facts necessary to this order.

A. Procedural History

The parties are manufacturers of cigars and other related products who entered into multiple supply agreements between 2011 and 2014. See Docket No. 262 at 1–2. In 2014, TSI filed this action against Swisher, initially alleging nine causes of action: (1) monopolization and attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2; (2) monopolization and attempted monopolization in violation of Florida Antitrust Law, Fl. Stat. § 542.19; (3) breach of contract; (4) breach of the implied covenant of faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7) intentional interference with prospective business relationships; (8) negligent interference with prospective business relationships; and (9) unfair competition in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Docket No. 1.

In May 2015, the Court dismissed the state law claims for negligent interference and unfair competition for failure to state a claim. Docket No. 40. In January 2016, the Court dismissed the state law claims for trade libel, tortious interference with contract, and intentional interference with prospective business relationships on summary judgment. Docket No. 99. The Court then scheduled trial on the remaining antitrust and contract claims for March 2016.

On August 17, 2016, following a jury verdict for TSI on its antitrust and breach of contract claims, the Court granted Swisher's motion for a new trial as to TSI's antitrust claims, but not its contract claims. Docket No. 262. The Court also granted Swisher judgment as a matter of law as to TSI's monopolization claim, but not as to its attempted monopolization claim. Id. Following the Ninth Circuit's decision in Aerotec Int'l Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016), the Court reconsidered its earlier decision denying Swisher summary judgment on TSI's antitrust claims, and granted Swisher summary judgment as to those claims. Docket No. 274.

Subsequently, the Ninth Circuit reversed the Court's grant of summary judgment to Swisher as to its antitrust claims, its grant of a new trial to Swisher as to the attempted monopolization claim, and its grant of judgment as a matter of law to Swisher as to the monopolization claim. Docket No. 349.

On July 8, 2019, TSI filed motions for attorneys' fees, expenses, and post- judgment interest, and for summary judgment as to Swisher's supersedeas bond. Docket Nos. 363, 364. On July 22, 2019, Swisher filed motions for relief from judgment or for expedited discovery, and to stay the proceedings. Docket Nos. 377, 380. The Court now turns to these motions.

B. Relevant Factual Background

On April 12, 2019, the Southern District of California unsealed the criminal indictment of Akrum Alrahib ("Alrahib") in connection with his arrest. See Declaration of Minae Yu, Docket No. 379, Ex. A. Alrahib is the founder, chief executive officer of TSI, and one of its principals/shareholders. Docket No. 162

at 3. He also oversees the day-to-day operations of TSI. Id.

The federal excise tax on imported cigarillos during the relevant time period was 52.75%. See Docket No. 377 at 4 n.3. According to the indictment, TSI fraudulently avoided paying federal excise taxes on cigarillos it imported from the Dominican Republic through its importer, Havana 59, for a period between 2013 and 2015. Yu Decl., Ex. A; see also Declaration of Ryan Roman, Docket No. 378, Ex. K at Response No. 22. The indictment lists a number of allegedly falsified invoices which marked down the price TSI was actually paying for cigars to avoid federal excise taxes. Yu Decl., Ex. A. The indictment further alleges that, in reality, TSI did not purchase cigarillos from Havana 59; instead, it purchased them from Productos del Tobacco ("Productos") at prices approximately 3 to 4 times the sales price reported to the government by wiring money from TSI's bank account in California to Productos' bank account. Id.; see also Yu Decl., Ex. G at Attachment C-6. The government also alleges that TSI received over $700,000 from Havana 59 as kickbacks in the form of payroll checks for TSI's employees and free cigar manufacturing equipment that TSI sent to Products. See id., Ex. A at 7, Ex. B at 7. The government is seeking a forfeiture judgment of $9,914,921 against property in which Alrahib has an interest allegedly traceable to these violations. Id., Ex. A at 14.

In a voluntary video-recorded interview conducted by Internal Revenue Service ("IRS") and Alcohol and Tobacco Tax and Trade Bureau ("ATTAB") agents on May 11, 2017, Alrahib made a number of admissions regarding his and Bryant's participation in a tax

evasion scheme. Relevant portions of the interview are reproduced below:

> ALRAHIB: Okay. That's the time that Tony Bryant approached me and says, look, I could import it for you, and I could save you money, and then I'll kick you back the money on the side. Okay.
>
> . . . .
>
> AGENT 2: On him giving you kickbacks on the 2 to 3 million dollars—
>
> ALRAHIB: Yes.
>
> AGENT 2: **Just to be clear, the kickbacks were from federal excise taxes evaded.**
>
> ALRAHIB: **That he evaded, yes. Yes.**
>
> . . . .
>
> ALRAHIB: Well, he was the importer. But was I aware that he was evading federal excise tax? Yes, if that's what you want me to say.
>
> AGENT 1: Yeah.
>
> ALRAHIB: I mean, that's what it was. Everybody knew that.
>
> . . . .
>
> AGENT 1: . . . [W]hat was your part in that?
>
> ALRAHIB: My part in what? In—
>
> AGENT 1: With the activity related to Tony [Bryant]'s importation.
>
> ALRAHIB: My part is, as the cheaper you could get it for me, Tony, and the more I could save on the back end, thank you very much.

. . . .

AGENT 1: What was it that you and Tony were doing, specifically, that allowed the product to, you know, be available cheaper? What was it that you were doing specifically to reduce your burden, your financial burden?

ALRAHIB: I wasn't doing anything. I wouldn't know how Tony was breaking up the importation tax. **He would just send me an email of how his BS breakdown was and then give us the invoice.** That was it. And then from that invoice of the total amount, I was supposed to take back 40, 50 percent, ...

AGENT 1: Okay. And then, so he would then have money to send back to you, to kick back to you, correct?

ALRAHIB: Yes.

AGENT 2: All right. So Tony invoices [ALRAHIB's company]. And you send him 36 grand. Of that 36 grand, your understanding was, you're getting half of it back?

ALRAHIB: I'm supposed to get 30 to 40 percent of that, of that money.

AGENT 2: And it's supposed to come back to you?

ALRAHIB: Yes. And however you break it down, however you do it, good luck to you. That's great. Give me my rebate.

AGENT 2**: No, I got—let me figure—but the rebate, though, is based on him evading federal excise tax.**

ALRAHIB: **Yes.**

AGENT 2: Okay.

AGENT 1: Thank you.

ALRAHIB: Yes, it is. Of course it is. I don't know what else to say, but I know I'm screwing—I mean, it is. I mean, yes. We all know that.

. . . .

AGENT 2: So Tony's scheme, there's—putting someone in between, but Tony—The scheme you worked with Tony, he took the extra step of instead of just putting someone in between—

ALRAHIB: I didn't work the scheme with Tony. I rode Tony's train because his scheme was already moving. And then Tony said, you want to come and save money riding my train? **Then I realized it's a scheme. Then when I saw his scheme, I said, wait a minute, I need to benefit from your scheme.**

. . . .

ALRAHIB: . . . let's say, for example, [the manufacturer] was charging me at the time 6 or 7 cents a stick, but Tony [Bryant] was claiming 2 cents a stick, so he never had extra money. He never had extra money because he never put the actual dollar amount that [the manufacturer] was charging us.

. . . .

AGENT 2: Tony [Bryant] never charged Trendsettah, being you, enough money to cover the actual cost of the product?

> ALRAHIB: **No. Of course not. It was all a game.**
>
> AGENT 2: No.
>
> ALRAHIB: This water costs a dollar, right. But when Tony [Bryant]—he's the importer, right?
>
> AGENT 1: Yeah.
>
> ALRAHIB: He's showing that this water is 30 cents. And then from the 30 cents, he's supposed to give me 10 cents.

Yu Decl., Ex. B at 3–5, 10–11 (quoting interview transcript) (emphasis in prosecutors' reproduction). Bryant pled guilty to related fraud and tax-evasion charges in 2016, and was sentenced to seven years in prison. See Yu Decl., Exs. D–F. Alrahib's criminal trial is scheduled to commence on December 16, 2019. Id., Ex. C.

C. Evidentiary Objections and Requests for Judicial Notice

On Rule 60 motions, "[t]he proffered evidence must be admissible." Winding v. Wells Fargo Bank, 2012 WL 603217, at *9 (E.D. Cal. Feb. 23, 2012), aff'd 706 F. App'x 918 (9th Cir. 2017); Norris v. F.B.I., 1990 WL 134276, at *2 (9th Cir. Sept. 18, 1990) (same). Furthermore, "[w]hen alleging a claim of fraud on the court, the plaintiff must show by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment." Weese v. Schukman, 98 F.3d 542, 552 (10th Cir. 1996) (emphasis added).

TSI objects to the Court's consideration of either the indictment or the government's brief appealing the magistrate's grant of bail to Alrahib, which

contains passages from Alrahib's interview transcript with IRS and ATTAB agents. Docket No. 403; see also Yu Decl., Exs. A, B.

TSI objects to the indictment on the ground that it is well-established that an indictment is not evidence. See United States v. Ramirez, 710 F.2d 535, 545 (9th Cir. 1983) ("[An] indictment is not evidence against the accused and affords no inference of guilt or innocence."). The Court agrees. Therefore, the Court will not consider the facts contained in the indictment for their truth. However, the Court takes judicial notice of the existence of the indictment and its contents as a public record, the accuracy of which cannot reasonably be questioned.

TSI objects to the government's brief appealing the magistrate's grant of bail to Alrahib, arguing (1) that statements in a brief are not evidence, and (2) that the evidence is inadmissible hearsay. Docket No. 403 at 2. However, admissions of a party opponent are not hearsay and are admissible. Fed. R. Evid. 801(d)(2). Moreover, the record of the interrogations is also admissible as a public record, resolving concerns about a potential second layer of hearsay as to the government's filing itself. Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 412 (6th Cir. 2006) (affirming admission of interrogation transcripts as public records and statements against declarant's interests). Therefore, TSI's objection to the Court's consideration of Alrahib's admissions in his interview with government agents is overruled because Alrahib's conduct is imputable to TSI, and thus his confession contained in the brief is admissible as an admission of a party opponent. Fed. R. Evid. 801(d)(2); see also Fed. R. Evid. 803(5), 803(8), and 804(b)(3).

TSI also objects to Exhibit A to the Supplemental Declaration of Minae Yu, Docket Nos. 415, 415-1. The document is a transcript of an April 30, 2019 hearing in the matter of USA v. Akrum Alrahib. TSI argues that the document, which contains statements of government employees characterizing what Alrahib supposedly told other government employees, constitutes double hearsay. Docket No. 419 at 1. The Court agrees. This evidence is distinct from direct statements from Alrahib quoted from an interview transcript. Therefore, the objection is sustained.

Swisher also filed evidentiary objections. Docket No. 416. Because there are 39 separate objections, the Court declines to address each one-by-one. To the extent the Order cites evidence to which Swisher objects, the objection is impliedly overruled. To the extent the Court does not rely on the evidence submitted, the Court declines to rule on the objections.

Finally, TSI filed a request that the Court take judicial notice of (1) The Order Denying Government's Motion for Pretrial Detention, filed in United States v. Alrahib, in the United States District Court for the Southern District of Florida, No. 1:19-cr-20165-RS, on May 1, 2019, as Docket Entry 17; (2) Swisher's Motion to Stay the Mandate, filed with the Ninth Circuit in the matter of Trendsettah USA, Inc., et al. v. Swisher International Inc., No. 1656823, on April 23, 2019, as Docket Entry 87; and (3) Swisher's Opposition to Lift Stay of the Mandate, filed with the Ninth Circuit in the matter of Trendsettah USA, Inc., et al. v. Swisher International Inc., No. 16-56823, on May 9, 2019, as Docket Entry 90. RJN, Docket No. 402, Exs. A–C. The Court may take judicial notice of matters of public record, Lee v. City of Los Angeles, 250 F.3d 668, 689

(9th Cir. 2001), including related filings from another case. Headwaters Inc. v. U.S. Forest Service, 399 F.3d 1047, 1051 n.3 (9th Cir. 2005). Therefore, TSI's request for judicial notice is granted.

II. LEGAL STANDARDS

A. Federal Rules of Civil Procedure 60(b)(2) and (b)(3)

"[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding [based on] . . . newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). To prevail, "the movant must show the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990).

The court may also grant relief from judgment based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To prevail under this subsection, the movant "must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." De Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 880 (9th Cir. 2000). In addition, this subsection "require[s] that [the alleged] fraud . . . not be discoverable by due diligence before or during the proceedings." Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004).

Under either subsection (b)(2) or (b)(3), the motion "must be made . . . no more than a year after the judgment or order." Fed. R. Civ. P. 60(c)(1).

B. Federal Rule of Civil Procedure 60(d)

The court may also "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). Relief under this subsection is not subsection is not subject to the one-year time limit. United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1167 (9th Cir. 2017) (citation omitted), cert. denied, 138 S. Ct. 2675 (2018).

"A court's power to grant relief from judgment for fraud on the court stems from 'a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.'" Id. (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S.238, 244 (1944)). "[R]elief from judgment for fraud on the court is 'available only to prevent a grave miscarriage of justice.'" Id. (quoting United States v. Beggerly, 524 U.S. 38, 47 (1998)). Thus, "not all fraud is fraud on the court." Id. (citation omitted).

"In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct prejudiced the opposing party, but whether it harmed the integrity of the judicial process." United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011) (internal quotation marks and citation omitted). Therefore, fraud on the court must be an "intentional, material misrepresentation," In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007),[1] and

[1] Abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

"involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (citation omitted).

The relevant misrepresentations must also go "to the central issue in the case," Estate of Stonehill, 660 F.3d at 452, and must "affect the outcome of the case," id. at 448. In other words, the newly discovered misrepresentations must "significantly change the picture already drawn by previously available evidence." Id. at 435. Thus, "[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party or witness, by itself, is not normally fraud on the court' " unless it is "so fundamental that it undermined the workings of the adversary process itself." Id. at 444–45 (quoting In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999)). However, "perjury may constitute fraud on the court if it involves, or is suborned by, an officer of the court." Sierra, 862 F.3d at 1168 (internal quotation marks and citation omitted).

Lastly, the fraud must have been unknown at the time of settlement or entry of judgment because "issues that are before the court or could potentially be brought before the court during the original proceedings 'could and should' be exposed at trial.'" Id. (quoting In re Levander, 180 F.3d at 1120). However, relief is available for fraud discovered after entry of judgment, or "after-discovered fraud," Hazel-Atlas, 322 U.S. at 244, particularly if the opposing party attempted to uncover the fraud before trial, but was "thwarted by a witness who blatantly lied about the relevant issue." Sierra, 862 F.3d at 1168–69. Accordingly, relief is supported if "key information" is

revealed only after entry of judgment. Sierra, 862 F.3d at 1169.

III. DISCUSSION

A. Rule 60(d)

As noted, to grant Swisher relief for fraud on the court, it must prove that (1) TSI engaged in misconduct that undermined the judicial process and (2) the misconduct went to the central issues in the case. See Estate of Stonehill, 660 F.3d at 445, 452.

Swisher sought information relevant to TSI's payment of federal excise taxes during discovery. Swisher served on TSI requests for production seeking federal excise tax filings made by or on behalf of TSI, its costs and profits, and the sources of funds for its machinery. See Roman Decl., Ex. A, RFP Nos. 26–29, 32–34; Ex. B, Interrogatory No. 17; Ex. L, RFP Nos. 21–24, 26, 57. In response to the requests for production seeking the federal excise tax filings made by or on behalf of TSI, TSI objected on the grounds that the production of the actual filings was burdensome and that the documents were irrelevant. Id., Ex. C, Resp. Nos. 26–28. Swisher responded that "FET payments are an essential component to calculating profits and profitability, which, of course, is the baseline for the lost profits analysis TSI's allegations require." Id. ¶ 3, Ex. E. However, TSI would later argue that "[t]he information Swisher seeks will already be found in TSI's financial records, sales orders, and invoices, which it has agreed to produce," id. ¶ 4, Ex. F, and that "[g]iven that the tax rates are publicly available, and given that the same information you seek will be available in TSI's sales records (and it's fair to say that TSI has no incentive to overestimate its tobacco sales to the government),

we do not think the probative value of these filings outweighs the burden of collecting them." Id. ¶ 7, Ex. I. TSI also sought to remove search terms relating to federal excise taxes in connection with electronically-stored information ("ESI") production. Id. ¶¶ 5–6, Exs. G–I. Swisher then agreed to remove these search terms. Id. ¶ 8. TSI's general counsel subsequently testified that TSI had produced all documents responsive to Swisher's discovery requests. See Yu Decl., Ex. R at 164:24–165:22.

Of course, TSI never disclosed the information Alrahib later admitted in his interview with federal agents, i.e., the scheme through which Bryant evaded federal excise taxes on TSI's cigarillos and passed along a portion of the profits from this evasion to Alrahib in the form of kickbacks. Nor did TSI disclose documents which demonstrated what Alrahib admits were falsified invoices prepared by Bryant which perpetrated the scheme. Therefore, the documents produced did not reflect the true cost of manufacturing and importing TSI's cigarillos, even though they were presented to Swisher as an accurate reflection of TSI's costs and profits. See, e.g., Yu Decl., Exs. J–L; Romand Decl., Ex. K at Resp. No. 17, Ex. P at Resp. No. 17, Ex. S at 88:5–95:2, 100:22–105:25, 113:1–7.

These misleading financial records were in turn relied on by TSI's economic expert, Dr. Deforest McDuff ("Dr. McDuff"), who used them as the basis of his damages analysis. See, e.g., Yu Decl., Ex. G at 42–48, Attachments C-1, C-6, C-7, D-13, D-14, E-12. Dr. McDuff also worked with Alrahib and Bryant, who submitted to his interviews. See, e.g., id. at 2–3, 23–25, 33–36. Dr. McDuff's damages calculations relied on TSI's profit margins during 2013 and 2014 which,

based on Alrahib's admissions, were artificially inflated by the underpayment of federal excise taxes, infecting Dr. McDuff's entire analysis. See id. at 47–48, Attachments C-6, C-7. Swisher also presents the declaration of its own expert, Dr. Alan Cox ("Dr. Cox") concluding that TSI's avoidance of federal excise taxes would allow it to lower costs and charge "artificially low prices . . . to sell more cigarillos than they would have in the absence of fraud." Declaration of Alan Cox ("Cox Decl."), Docket No. 377-2 ¶ 20. Dr. Cox also opines that, because of TSI's low gross profit margins, when corrected for the correct federal excise tax, TSI would have operated on a negative margin on sales of imported cigarillos from 2013–15. Id. ¶¶ 30–31.

At trial, TSI moved to exclude "any evidence or argument regarding any tax or regulatory enforcement actions Mr. Alrahib faced in the years prior to TSI's manufacturing relationship with Swisher." Docket No. 112 at 1. Prior to founding TSI, Alrahib faced a civil forfeiture action for failing to pay excise taxes on tobacco products distributed through one of his prior businesses. Yu Decl., Ex. M at 48:11–51:12. In support of its motion, TSI argue that Alrahib's failure to pay excise taxes more than a decade prior had nothing to do with the two central issues in this case, and that the admission of such past crimes, wrongs, or tax issues would lead to unfair prejudice. Docket No. 112 at 1. The Court ruled in TSI's favor on the basis of these representations, reasoning that "[s]tripped of a proper link, the evidence is merely improper character evidence." Docket No. 163 at 4. Of course, had TSI disclosed Alrahib and Bryant's scheme, that "proper link" would have been clear. But based on TSI's inaccurate arguments that Alrahib's federal excise tax violations were merely past wrongs, Swisher was foreclosed

from asking Alrahib about excise tax evasion, a line of questioning that, absent perjury, would likely have led to the disclosure of the fraudulent scheme he later disclosed to federal IRS and ATTAB agents.

Alrahib's credibility was central to the trial. He was TSI's first witness, and offered testimony regarding nearly element of TSI's claims. See Yu Decl., Ex. U at 28–102. In addition, other TSI witnesses presented a materially false portrayal of TSI's financial records, costs, profitability, injury, and damages. For instance, TSI's CFO Salah Kureh testified that every item of revenue or expense was properly recorded in TSI's financial records and that all this information was provided to TSI's expert. Id., Ex. V at 9–13. He also testified that TSI had higher profits on Productos-manufactured products compared to Swisher-manufactured products because Products' costs were lower, without disclosing the tax evasion scheme which reduced these costs. Id. at 20. Dr. McDuff further testified about TSI's profit margins, projected sales, lost profits, and the fact and extent of TSI's damages. Id. at 175–82, 187–88, 190, 193–98. TSI also offered, and the Court admitted into evidence, Trial Exhibits 135 and 136, which set forth artificially inflated profit margins for TSI. Id. at 193–95; id., Exs. X–Z. Based on these inaccurate profit margins, Dr. McDuff opined that TSI suffered $9,062,679 in lost profits between 2012 and 2015, and $5,752,815 in future sales, totaling $14,815,494 in damages. Id., Ex. V at 193–97, Exs. X–Y, Ex. A at 35, 53. After trial, the jury awarded the exact amounts Dr. McDuff computed based on TSI's false financial records. Id., Ex. Z at 35

Based on the foregoing, TSI presented to the jury and the Court a theory of "lost profits" premised on

inaccurate data which was a product of a fraudulent tax evasion scheme. Therefore, TSI's conduct tainted the integrity of the trial and interfered with the judicial process, and the judgment must be set aside. Fed. R. Civ. P. 60(d).

TSI's opposition does not present any argument which persuades the Court to alter this conclusion. TSI argues that, even if it falsely represented that further responsive information did not exist, it is not "fraud on the court" because the representation was made to Swisher, not the Court. Opp'n, Docket No. 410 at 21–22. However, this "trail of fraud continued without break" into proceedings before the Court and infected key evidence presented to the jury. Hazel-Atlas, 322 U.S. at 250.

TSI further argues that no misrepresentations were made to the jury because, regardless of Alrahib's participation in a "private conspiracy," the cost basis that formed the basis of Dr. McDuff's damages calculations "would have been the same anyway." Opp'n, Docket No. 410 at 18. However, as demonstrated above, this statement is untrue based on Alrahib's own admissions. His tax evasion was not a "private conspiracy" because it was engineered to avoid taxes on TSI's products, artificially boosting TSI's profits. TSI contends that no false evidence was presented because "Swisher does not allege that Trendsettah actually had higher costs than were reported to the jury, or that it actually had a lower profit margin . . . only that Trendsettah should have had higher costs and/or lower profit margins" from 2013–15. Docket No. 410 at 12. This argument is unavailing. TSI had no rights to the "profits" that were, by Alrahib's admission, stolen from the government. See AlphaMed Pharms. Corp. v. Arriva

Pharms., Inc., 432 F. Supp. 2d 1319, 1348 (S.D. Fla. 2006) ("It is beyond dispute that [a plaintiff] cannot recover lost profits that are predicated on the completion of illegal activity."); Carruthers v. Flaum, 365 F. Supp. 2d 448, 470 (S.D.N.Y. 2005) (dismissing claims with prejudice because plaintiff's claims for damages "are predicated on the completion of illegal activity . . . and are not recoverable for that reason alone").

TSI also argues that relief is not justified based on Swisher's counsels' lack of diligence, i.e., failure to uncover the fraud sooner. Opp'n, Docket No. 410 at 22. For instance, TSI argues that Swisher failed to pursue documentation regarding TSI's obligation to pay federal excise taxes, and failed to ask "a single witness a single question about" the subject. Id. at 6. However, as noted, Swisher served discovery calling for the production of the information which would have revealed the fraud, including "all documents showing or reflective of federal excise tax paid with respect to Splitarillos, whether paid by TSI or on TSI's behalf." Roman Decl., Ex. A, RFP Nos. 26, 27 (emphasis added). TSI resisted this discovery by objecting to its production on grounds of irrelevance and undue burden. Id., Ex. C, Resp Nos. 26, 27. Moreover, TSI's witnesses testified that all relevant documents were collected and produced. See Yu Decl., Ex. R at 164–65.

TSI also successfully moved in limine to exclude any evidence or argument regarding Alrahib's past tax-related enforcement actions, in part based on the argument that Alrahib's tax evasion was merely past conduct that had no relevance to this trial. Docket Nos. 112 at 1, 148-1 at 2. The Court found that there was no "proper link" between such evidence and this

case. Docket No. 163 at 4. TSI also claimed that Swisher would be able to determine the amount of federal excise taxes paid on its products using other documents to be produced and the publicly available tax rate; however, this misrepresentation did not account for TSI's failure to comply with the law by paying that rate. Roman Decl.¶¶ 4, 7, Exs. F, I. Alrahib also testified in a deposition that he had learned from his past tax-related mistakes, giving Swisher even less of a basis on which to pursue a theory of ongoing tax fraud. Yu Decl., Ex. M at 48:11–49:1, 50:3–7, 541:7–12. Furthermore, TSI submits invoices with its opposition that it argues show that TSI did not fail to pay excise taxes, but those are the very types of documents that TSI's CEO has admitted are fraudulent. Docket No. 379-2 at 3–5, 10–11; Docket No. 410-2 at 3–4, 10–11. Therefore, TSI's claim that excise taxes were of "no interest" to Swisher in discovery or trial, and that the "criticality" of the issue was not asserted until over three years after the verdict was returned, is incorrect.

Based on the foregoing, Swisher's discovery efforts constituted "due diligence" for purposes of Rule 60(d)(3). Swisher was "entitled to accept [TSI's] answers to [its] discovery requests as accurate and not to seek additional discovery relating to the issue." Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 305 F. Supp. 2d 939, 961 (E.D. Wis. 2004), reversed on other grounds, 402 F.3d 1198 (Fed. Cir. 2005). TSI cannot blame Swisher for the success of its obstructionist conduct. Id.; see also Wyle v. R. J. Reynolds Industries, Inc., 709 F.2d 858, 591 (9th Cir. 1983) (holding that it would be improper to allow a party to "profit from its own failure to provide discovery"); Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1537 (8th Cir. 1996) (holding that plaintiff's failure to

timely produce relevant documents requested by the defendant should not be viewed as lack of due diligence on the part of the defendant); Hazel-Atlas, 322 U.S. at 246 (stating "[w]e cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud" where plaintiff interfered with defendant's attempts to uncover the fraud); Pumphrey, 62 F.3d at 1133 (where defendant prevented disclosure of critical evidence during trial through the use of misleading, inaccurate, and incomplete responses to discovery requests and presentation of fraudulent evidence and testimony during trial, defendant "is in no position to dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict").

Moreover, where, as here, the Court itself was a victim of the fraud, "even if [the moving party] did not exercise the highest degree of diligence [the] fraud cannot be condoned for that reason alone." Hazel-Atlas, 322 U.S. at 246. As the Supreme Court explained, "[t]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Id. Thus, "it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigations." Id.

In sum, Swisher has shown by clear and convincing evidence that TSI engaged in misconduct that undermined the judicial process which went to the central issues in the case. See Estate of Stonehill,

660 F.3d at 445, 452; Fed. R. Civ. P. 60(d)(3). Accordingly, the motion for relief from judgment under Federal Rule 60(d)(3) is granted.

B. Rules 60(b)(2) and (b)(3)

TSI argues that relief under subsections (b)(2) and (b)(3) is time-barred by their one-year statute of limitations. Opp'n, Docket No. 410 at 13–15. TSI argues that Swisher is not entitled to relief under Rule 60(b)(2) because Swisher discovered TSI's fraud before the Court entered a new operative judgment in this case. However, Rule 60(b)(2) states that new evidence is that which "could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Here, the evidence demonstrating fraud—Alrahib's May 2017 interview which was revealed to the public in April 2019—was not available during that time frame.

TSI also points to Ninth Circuit precedent holding that this "one-year limitation period is not tolled during an appeal." Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989). However, "if the appeal results in a substantive change, then the time would run from the substantially modified order entered on mandate of the appellate court." Transit Casualty Co. v. Security Trust Co., 441 F.2d 788, 791 (5th Cir. 1971). Here, the Ninth Circuit's decision substantially altered the judgment, and the time for bringing a Rule 60(b) motion restarts. Therefore, this case is distinguishable from Nevitt, in which the court affirmed the district court's initial judgment. Nevitt, 886 F.2d at 1187. TSI argues that "the clock is restarted only if the resulting 'change' to the prior judgment was such as to present a new basis for the moving party's challenge, which had not existed under the prior judgment," citing to Jones v. Swanson, 512

F.3d 1045, 1049 (8th Cir. 2008). Opp'n, Docket No. 410 at 15. However, Jones states that the relevant inquiry is whether the "legal rights and obligations of the parties" have changed as a result of the appellate court's decision. Jones, 512 F.3d at 1049. Distinguishing between liability and damages, the Eight Circuit in Jones found that the appellate court's decision did not result in substantial changes because it only modified the amount of damages, not the liability determination, while the defendant's Rule 60 motion challenged only the liability ruling. Id. Here, as noted, the Ninth Circuit's decision substantially altered both Swisher's liability and damages, and its motion challenges both. Therefore, the motion is timely.[2]

Moreover, based on the same reasoning applied above to Swisher's motion for relief from judgment under Rule 60(d), the requirements of Rule 60(b)(2) and 60(b)(3) are satisfied. To prevail under subsection (b)(2), the movant must show that (1) the evidence constitutes "newly discovered evidence" within the meaning of Rule 60(b), (2) the movant exercised due diligence to discover this evidence, and (3) the newly discovered evidence would have likely changed the disposition of the case. Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003). Subsection (b)(3) requires that the movant show (1) fraud, misrepresentation, or misconduct by an opposing party which (2) prevented it from fully and

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[2] The Ninth Circuit's ruling did not alter anything with respect to the breach of contract claims. Therefore, they are time barred from relief under Rules 60(b)(2) and (b)(3). However, it is immaterial for purposes of this ruling because the judgment in favor of TSI on its breach of contract claims is vacated under Rule 60(d)(3).

fairly presenting its case or defense. Jones, 921 F.2d at 879. As demonstrated above, Swisher exercised the requisite diligence, newly discovered evidence of fraud was uncovered in 2019, and the evidence fraud would have likely changed the disposition of the case. Furthermore, the absence of this evidence of fraud from the record substantially interfered with Swisher's defense.

In sum, because Swisher has shown that relief is appropriate under Rule 60(b)(2) and Rule 60(b)(3) by clear and convincing evidence, its motion is granted under these subsections as well.

C. Mandate Rule

TSI also argues that the Ninth Circuit's mandate deprives the Court of authority to grant Swisher's Rule 60 motion. Opp'n, Docket No. 410 at 22–25. The Court disagrees. "Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to 'file additional pleadings, vary or expand the issues.'" Nguyen v. United States, 792 F.3d 1500, 1502 (9th Cir. 1986) (quoting Rogers v. Hill, 289 U.S. 582, 587–88 (1933)). The Supreme Court and several Courts of Appeals have held that district courts have the authority to rule on Rule 60 motions after the issuance of an appellate mandate. Standard Oil Co. of California v. United States, 429 U.S. 17, 18 (1976); Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 775 (9th Cir. 1986); Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 818 F.3d 1320, 1329 (Fed. Cir. 2016). Therefore, the Ninth Circuit's mandate does not preclude the Court's consideration of Swisher's Rule 60 motion.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** the motion for relief from judgment. Therefore, the motions to stay and for summary adjudication are **denied as moot.**

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No.	SACV 14-1664 JVS (DFMx)	Date	January 21, 2020
Title	**Trendsettah USA, Inc. et al. v. Swisher International Inc.**		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl/ Rolls Royce Paschal	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion for Reconsideration and to Amend the Final Pretrial Conference Order**

Before the Court are two motions.

First, Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (together "Trendsettah") moved pursuant to Local Rule 7-18, for reconsideration of the Court's August 19, 2019 Order or, in the alternative, for relief from that order under Rule 60(b)(1), (2), and/or (3). Mot., Dkt. No. 454. Defendant Swisher International, Inc. ("Swisher") opposed. Opp'n, Dkt. No. 466.[1] Trendsettah replied. Reply, Dkt. No. 470.[2] After the December 16, 2019 hearing, the Court asked the parties to submit supplemental briefs. Supp. Brs., Dkt. Nos. 481, 482.

Second, Swisher moved for an order modifying the final pretrial conference order entered on February 24, 2016, (Dkt. 162) to add two additional affirmative defenses. Mot., Dkt. No. 463. Trendsettah opposed. Opp'n, Dkt. No. 468. Swisher replied. Reply, Dkt. No. 471.

For the following reasons, the Court **DENIES** the motion for reconsideration and **GRANTS** the motion to amend the pretrial conference order.

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[1] Swisher also submitted Evidentiary Objections to the declarations submitted in support of Trendsettah's motion. Dkt. No. 467. To the extent the Order cites evidence to which Swisher objects, the objection is impliedly overruled. To the extent the Court does not rely on the evidence submitted, the Court declines to rule on the objections.

[2] Trendsettah has been reinstated by the California Franchise Tax Board, as of November 26, 2019. Dkt. No. 469.

I. BACKGROUND

The Court detailed the procedural and factual background of this case in its August 19, 2019 Order granting Swisher relief from judgment under Federal Rules of Civil Procedure 60(b)(2), 60(b)(3), and 60(d)(3). See generally Order, Dkt. No. 426 ("the Order").

In the Order, the Court noted that Swisher "sought information relevant to TSI's payment of federal excise taxes during discovery," and "served on TSI requests for production seeking federal excise tax filings made by or on behalf of TSI, its costs and profits, and the sources of funds for its machinery." Id at 11. "In response to the requests for production seeking the federal excise tax filings made by or on behalf of TSI, TSI objected on the grounds that the production of the actual filings was burdensome and that the documents were irrelevant." Id. The Court reasoned that production of documents "showing or reflective of federal excise tax paid with respect to Splitarillos, whether paid by TSI or on TSI's behalf," "would have revealed the fraud." Id. at 15. The Court found that Swisher's discovery efforts constituted due diligence for purposes of Rule 60(d)(3) and that Trendsettah had engaged in "obstructionist conduct" during the discovery process that successfully prevented Swisher from receiving these documents. Id. at 16.

The Court subsequently ordered a new trial in the case. Dkt. No. 427.

On November 12, 2019, the Court denied Trendsettah's motion to certify the Order for interlocutory appeal and to stay the case. Dkt. No. 458.

II. LEGAL STANDARD

A. Motion for Reconsideration

The grounds for reconsideration are set forth in Local Rule 7-18, which provides:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

L.R. 7-18.[3] The Court has discretion in determining whether to grant a motion for reconsideration. See Navajo Nation v. Confederated Tribes & Bands of the Yakima Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003). "Under L.R. 7-18, a motion for reconsideration may not be made on the grounds that a party disagrees with the Court's application of legal precedent." Pegasus Satellite Television, Inc. v.

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[3] See also School Dist. No. 1J, Multnomah Cnty. V. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (reconsideration appropriate if the movant demonstrates clear error, manifest injustice, newly discovered evidence, or an intervening change in controlling law).

DirecTV, Inc., 318 F. Supp. 2d 968, 981 (C.D. Cal. 2004).

B. Relief from Order under Rule 60

"[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding [based on] . . . mistake, inadvertence, surprise, or excusable neglect," "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," or "fraud . . . misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(1) (2)(3). To prevail, "the movant must show the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990).

III. Discussion

A. Motion for Reconsideration

Trendsettah argues that the Court should reconsider its Order granting Swisher relief from judgment because Swisher had in its possession, since December 30, 2015, documents from Havana 59 showing the excise tax calculations associated with the importation of Splitarillos. Mot. at 1. Trendsettah contends that Swisher's possession of these documents constitutes, under Local Rule 7-18, (a) "a material difference in fact or law from that presented to the Court before such decision," and (b) "the emergence of new material facts . . . occurring after the time of such decision," that warrant reconsideration of the Order. Swisher's possession of these documents, according to Trendsettah,

demonstrates that it was not diligent in pursuing its Rule 60 motion. And Trendsettah only learned that Swisher had these documents on October 23, 2019, from Swisher's trial counsel. Id. at 1; see also Declaration of Mark Poe ("Poe Decl."), Dkt. No. 454-38, Ex. 29. The Havana 59 documents[4] consist of filing and invoice packages, with calculations of first sale prices, the excise tax rate, the excise tax amount due, and copies of checks paying that amount. See, e.g., Poe Decl., Dkt. No. 454-9, Ex. 1, at 4.

If Swisher had scrutinized these documents, Trendsettah argues, it "would have criticized Dr. McDuff for failing to include the 1.3¢ excise tax payments that are reported hundreds of times on the face of the Havana 59 documents," in his expert report. Mot. at 2. Alternatively, according to Trendsettah, "Swisher's trial counsel would have at least asked one witness or another why Dr. McDuff hadn't included the excise taxes paid by Havana 59, or why his calculated price differed so dramatically from the price reported on the face of the Havana 59 documents." Id. at 3.

In its Rule 60 motion, Swisher asserted that it had "propounded all appropriate discovery prior to trial," and that "Swisher *had no basis to contest* TSI's representations during the discovery period until it learned of Mr. Alrahib's criminal indictment." Dkt. No. 377 at 20-21 (emphasis added). It also asserted that "information concerning TSI's tax avoidance, if it had been timely provided, likely would have changed the disposition of the case." Id. at 21. The Court agreed, reasoning that the newly discovered evidence

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[4] These documents were filed on October 29, 2019. See Dkt. Nos. 448-3 through 448-6.

of fraud "was uncovered in 2019," and that this evidence "would have likely changed the disposition of the case." Order at 18. But Trendsettah contends that because "Swisher was in possession of all of the excise tax documents all along, there was nothing to stop it from pursuing the theory that Trendsettah's cost-per-stick calculations *should* include excise tax payments." Id. (emphasis in original).

Trendsettah points to language in United States v. Sierra Pacific Industries, 862 F.3d 1157, 1169 (9th Cir. 2017) ("Sierra Pacific"), explaining that "a finding of fraud on the court [under Rule 60(d)(3)] is reserved for *material, intentional misrepresentations* that *could not have been discovered earlier*, even through due diligence." (Emphasis added). In analyzing how Swisher characterized the alleged tax avoidance scheme during the Rule 60 Motion briefing (see Dkt. No. 377 at 4), Trendsettah argues that Swisher would have been able to determine the scheme's mechanics had it "take[n] the time to compare the Havana 59 invoice/filing packages with Dr. McDuff's reported cost-per- stick calculations and their basis." Mot. at 12. Reasonably diligent attorneys, Trendsettah argues, would have used information in the Havana 59 documents (disparities between the first sale price Havana 59 reported to CBP and the first sale price calculated by Dr. McDuff) to explore how this scheme operated. Id. at 13-14; see Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir. 1987) ("[e]vidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence."). Swisher also was not diligent, Trendsettah contends, because the Havana 59 documents would have provided the former with a basis to pursue the theory that excise

taxes should be included in the cost-per stick calculations that Dr. McDuff presented to the jury; the documents show that Havana 59 was paying the excise taxes, not Productos. Mot. at 17-19.

Trendsettah further criticizes the Court's reliance on Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944) in its Order,[5] arguing that the Court did not have analogous grounds to excuse any lack of diligence on Swisher's part. Mot. at 15; see Order at 11, 14, 16. Trendsettah argues because no Trendsettah witness was asked about the excise tax issues, no witness "blatantly lied." Further, Trendsettah contends that Hazel-Atlas is distinguishable because Mr. Alrahib and Mr. Bryant did not similarly plan and execute a scheme to defraud the Court. See Hazel-Atlas, 322 U.S. at 244-45.

Swisher notes that fact discovery closed on November 16, 2015 and the depositions of Trendsettah's fact witnesses were completed on December 4, 2015. Dkt. No. 42. Trendsettah served Dr. McDuff's expert report on December 4, 2015 and Swisher took his deposition on December 17, 2015. Opp'n at 5-6. But Havana 59 did not produce documents until January 22, 2016. Declaration of Naim Surgeon ("Surgeon Decl."), Dkt. No. 466-8 ¶ 6.

Swisher argues that "[b]ecause these documents were produced well after the close of fact and expert discovery, Swisher did not have the opportunity to question any fact witness or TSI's expert about

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[5] The Court reasoned that "where, as here, the Court itself was a victim of the fraud, 'even if [the moving party] did not exercise the highest degree of diligence [the] fraud cannot be condoned for that reason alone.'" Order at 16 (citing Hazel-Atlas, 322 U.S. at 246).

Havana 59's documents." Opp'n at 7. Swisher contends that the documents "do not reveal that they were fabricated by Mr. Alrahib and Mr. Bryant to deceive the CBP or that the underlying transactions never occurred." Id. at 7-8.

Further, Swisher argues that Trendsettah improperly uses this motion "to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." Opp'n at 10; see Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003). Under Local Rule 7-18, "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion," and a party may not "merely urge the court to reconsider past arguments or present new arguments it failed to make prior to the issue of an order." Scottsdale Ins. Co. v. Dickstein Shapiro LLP, 389 F. Supp. 3d 794, 835-36 (C.D. Cal. 2019) (internal citations and quotation marks omitted).

The Court does not believe that Trendsettah's motion improperly parrots arguments it made in opposition to Swisher's Rule 60 motion. Although Trendsettah emphasized in its briefing on the earlier motion that Swisher served a subpoena on Havana 59, it did not make an argument regarding the information the documents contained and/or specifically how Swisher should have used the information. See Dkt. No. 397 at 1, 8.

However, the Court agrees with Swisher that its possession of the Havana 59 documents does not qualify, under Local Rule 7-18, as either "a material difference in fact or law from that presented to the Court before such decision," and/or a "new material fact[ ] . . . occurring after the time of such decision,"

that warrant reconsideration of the Order. Mr. Alrahib's conspiracy with Havana 59 was not revealed until April 2019. See Declaration of Minae Yu, Docket No. 379, Ex. A. Swisher's receipt of documents, after fact discovery had closed—that hypothetically could have revealed the alleged fraud and conspiracy—does not indicate a lack of diligence on its part.

Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128 (9th Cir. 1995), provides helpful guidance on this point. In that case, the defendant failed to disclose the existence of relevant evidence during discovery and provided "misleading, inaccurate, and incomplete responses to discovery requests." Id. at 1132. The defendant attempted to argue that the plaintiff's "failure to uncover the alleged fraud, after receiving . . . interrogatories answers," indicating the existence of the previously concealed evidence should bar the action, but the court reasoned that the defendant's "conduct during discovery assured that [plaintiff] would have no reason to pursue discovery," regarding the evidence. Id. at 1333. Accordingly, the plaintiff's "failure to uncover the fraud," did not bar the action. Id.

Here, as the Order explained, Swisher served discovery calling for the production of the information which would have revealed the fraud, including "all documents showing or reflective of federal excise tax paid with respect to Splitarillos, whether paid by TSI or on TSI's behalf," but Trendsettah objected to producing this discovery on grounds of irrelevance and undue burden. See Order at 15. Trendsettah's representations regarding Swisher's ability to determine the amount of excise taxes paid using other documents and the publicly available tax rate, "did not account for TSI's failure to comply with the law by

paying that rate." Id. Accordingly, Trendsettah's "conduct during discovery assured" Swisher that it "would have no reason to pursue discovery," regarding the excise taxes, and Swisher's "failure to uncover the fraud," after fact discovery had closed, does not entitle Swisher to reconsideration of the Court's Rule 60 Order. See Pumprey, 62 F.3d at 1132-33.

As mentioned above, Trendsettah relies on Sierra Pacific, 862 F.3d at 1169, which explained that a finding of fraud on the court under Rule 60(d)(3) "is reserved for material, *intentional* misrepresentations that could not have been discovered earlier, even through due diligence." (Emphasis added). But in that case, the court did not reach the issue of whether "the district court erred by requiring that [Defendants] act with diligence in attempting to discover the alleged fraud before trial," "[b]ecause none of the alleged instances of fraud rise to the level of fraud on the court regardless of the Defendants' diligence . . ." Id. at 1170 n.10. Trendsettah notes that Sierra Pacific mentioned Appling v. State Farm Mutual Automobile Insurance Company, 340 F.3d 769, 780 (9th Cir. 2003),[6] where the court reasoned that fraud on the court could not be found because the moving party "through due diligence could have discovered the non-disclosure." Opp'n at 11-12. But as explained above, Trendsettah's conduct during discovery contributed to the excise tax issues going undetected; therefore, unlike in Appling, Trendsettah's actions were not "aimed only at [Swisher]" and "disrupt[ed] the judicial process." Id.

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[6] Trendsettah cites this case in its Reply, not its Motion. Swisher does not address it in the Opposition.

At the December 16, 2019 hearing, the Court asked the parties to submit supplemental briefing on whether a material omission is sufficient to show fraud on the Court under Rule 60(d)(3) and Sierra Pacific. Trendsettah argues that an omission, like the failure to disclose the excise tax issue, cannot constitute fraud on the Court. See generally Supp. Br., Dkt. No. 482. Trendsettah contends that there is no evidence that Mr. Alrahib "understood the particular workings of Dr. McDuff's calculations," and therefore did not commit fraud on the Court by remaining silent. Id. at 3.

In Sierra Pacific, the Ninth Circuit reasoned that "[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party or witness, by itself, is not normally fraud on the court'" *unless* it is *"so fundamental that it undermined the workings of the adversary process itself*." 862 F.3d at 1168 (quoting United States v. Estate of Stonehill, 660 F.3d 415, 444-45 (9th Cir. 2011)) (emphasis added).

Both Sierra Pacific and Stonehill relied on In re Levander, 180 F.3d 1114 (9th Cir. 1999), which provides helpful guidance. In that case, a corporation filed a claim against a bankruptcy estate (the "Levanders"). Id. at 1116. An officer of the corporation provided deposition testimony that the corporation was an active business and still had assets. Id. at 1117. But the corporation had set up a partnership and transferred its assets to the partnership, unbeknownst to the Levanders and the bankruptcy court. Id. The corporation continued litigating the claim, but the partnership was the real party-in-interest and controlled the lawsuit and its assets. Id. at 1118, 1123. The Levanders won and sought fees,

but the corporation did not disclose the partnership's existence at the fee hearing. Id. at 1117, 1120. As a result, the court awarded fees only against the corporation. Id. at 1117.

The Ninth Circuit reasoned that:

> the perjury and *non-disclosure* in the instant case (that the Corporation had transferred its assets to shell entities months before the Corporation testified in depositions that the Corporation's 'assets haven't been sold') *was not—and could not have been—an issue* at the attorneys' fees hearing, as neither the court nor the Levanders knew that the Partnership existed. Therefore, *neither the Levanders nor the court had any reason to question the veracity of the Corporation* with respect to whether the Corporation still possessed its assets. Further, not only did the Corporation and the Partnership deceive the Levanders, but they also *deceived the court*, because the court relied on the Corporation's depositions to impose attorneys' fees on the Corporation, rather than on the party with the assets—the Partnership.

Id. at 1120 (emphasis added).[7]

The Court finds that Trendsettah's non-disclosure of material facts, misrepresentations during

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[7] Sierra Pacific did not overturn In re Levander. Instead, it held that no fraud had occurred based on the immateriality of the undisclosed information. 862 F.3d at 1173 ("The three instances of alleged fraud that came to light after settlement, viewed together, do not 'significantly change the picture already drawn by previously available evidence.'") (quoting Stonehill, 660 F.3d at 435).

discovery, and presentation of false financial information to the Court and the jury meets the standard articulated in In re Levander, Stonehill, and Sierra Pacific.

Mr. Alrahib himself acknowledged the materiality of the excise tax issue when he said that Trendsettah could not have imported and sold its cigarillos in the U.S. "if everything was crystal clear, and all the taxes were paid, all the federal taxes were paid properly to come into the U.S." Declaration of Minae Yu, Ex. C, Dkt. No. 473-4 at 3; see also Declaration of Minae Yu, Ex. B, Dkt. No. 379-2 at 3-5, 10-11 (confessing that he engaged in an tax fraud "scheme" to save Trendsettah money). Mr. Alrahib did not have to know exactly what Dr. McDuff would do with the company's lost profits calculations in his expert report for this information to taint the integrity of the trial.[8]

As this Court previously reasoned, the "underpayment of excise taxes would plainly effect profitability." Dkt. No. 163 at 4. Because Mr. Alrahib's criminal conduct distorted Trendsettah's costs, prices, demand and profitability, there is no competent, non-speculative evidence to show that there was any injury or the extent of damages caused by Swisher's conduct. Cox Decl. ¶¶ 46-47. Swisher noted in its Rule 60 motion that one way to calculate the impact of the fraud is to look at Trendsettah's cost of purchasing Splitarillos from Swisher—includes federal excise taxes and prices negotiated at arm's length—to provide a measure of TSI's costs in a

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[8] Indeed, Mr. Alrahib testified in his deposition that he had learned from his past failure to pay state excise taxes and expressed remorse for his past mistake, as if it had not continued. Yu Decl. Ex. M [Alrahib Dep.] at 47:7-51:12, 48:11-51:12, 290:4-294:25.

normal environment. Dkt. No. 377 at 9; Declaration of Alan Cox ¶¶ 27-28. When TSI's profits from 2012 to 2015 are computed using this data, they turn into losses of more than $5.5 million. Id. ¶ 43. Future profits turn into losses of more than $13 million. Id. ¶ 44. This adjustment demonstrates how the errors in Dr. McDuff's analysis led to Trendsettah asserting injury and damages where none may have existed.[9]

The Court would regard fraud amounting to that many millions of dollars as intolerable and undermining the workings of the judicial system. Accordingly, the Court denies the motion for reconsideration.

B. Relief from Order under Rule 60

In the alternative, Trendsettah first contends that Swisher failed to disclose its possession of the Havana 59 documents, and that counts as "mistake" or "inadvertence," entitling it to relief from the Court's Order. Fed. R. Civ. P. 60(b)(1). Second, Trendsettah argues that Swisher's possession of the Havana 59 documents is "newly discovered evidence," that the latter was not diligent, which falls within the meaning of Rule 60(b)(2). Id. Third, Swisher's failure to disclose the documents, Trendsettah argues, is a form of "fraud," "misrepresentation," or "misconduct by an opposing party." Id. at 21; Fed. R. Civ. P. 60(b)(3).

Swisher argues that relief under Rule 60 is inappropriate because the Court's Order was

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[9] At the trial, Dr. McDuff opined that Trendsettah suffered damages of $9,062,679 in the form of lost profits between 2012 and 2015 and $5,752,815 in the form of lost future sales, totaling $14,815,494 in total damages. Dkt. No. 377 at 12. The jury awarded Trendsettah $9,062,679 as contract damages and $14,815,494 as antitrust damages.

interlocutory, Opp'n at 19-20, citing, among other cases, United States v. Martin, 226 F.3d 1042, 1048 n.8 (9th Cir. 2000) ("Rule 60(b) . . . applies only to motions attacking final, appealable orders") and McKinsty v. Swift Transportation Company, of Arizona, LLC, 2017 WL 8943524, at *2 (C.D. Cal. Sept. 18, 2017) ("[a] motion for reconsideration of an interlocutory order is governed by Local Rule 7–18.").

Trendsettah points out that district courts "possess[ ] the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." City of L.A., Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 889 (9th Cir. 2001). This is correct, but the Court still denies relief under Rule 60(b) for the same reasons it denies Trendsettah's motion for reconsideration.

C. Swisher's Motion to Amend the Final Pretrial Conference Order

Under Federal Rule of Civil Procedure 16(e), "[t]he court may modify the order issued after a final pretrial conference only to prevent manifest injustice."

In evaluating whether to modify a pretrial order, courts consider the following factors: (1) the degree of prejudice to the party seeking modification resulting from failure to modify; (2) the degree of prejudice to the opposing party from the modification; (3) the impact of modification at the stage of the litigation on the orderly and efficient conduct of the case and (4) the degree of willfulness, bad faith or inexcusable neglect on the part of the party seeking modification. See U.S. v. First Nat. Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981). Where "the court determines that

refusal to allow a modification might result in injustice while allowance would cause no substantial injury to the opponent and no more than slight inconvenience to the court, a modification should ordinarily be allowed." Id.

Swisher requests that the Court modify the final pretrial conference order entered on February 24, 2016 (Dkt. No. 162) to allow it to advance two additional affirmative defenses of Illegality and Fraudulent Inducement. Mot., Dkt. No. 463 at 1. Swisher contends that these defenses "are based on new information concerning TSI's fraudulent tax evasion scheme that came to light after the Court entered the PTC Order," and "each provide an independent basis on which Swisher can defend against [Trendsettah's] remaining contract and implied covenant claims." Id. at 2. On this basis, Swisher argues that denying its request would result in injustice. And Swisher notes that the "Court has not yet entered a new scheduling order, discovery for a retrial has not yet begun and the date for the retrial has not yet been set." Mot. at 6.

Trendsettah's response to the motion largely reiterates arguments it made in its motion for reconsideration. See Dkt. No. 468. Otherwise, Trendsettah argues that Swisher's proposed additional defenses are "futile," and that Swisher should have filed a motion to amend its Answer instead. Id. at 2. Trendsettah does not respond to Swisher's analysis of the four factors courts generally consider in evaluating this type of motion.

Swisher notes that the final pretrial order "supersede[s] all prior pleadings" and "control[s] the subsequent course of the action." Reply, Dkt. No. 471 at 1; Rockwell International Corp. v. United States,

549 U.S. 457, 474 (2007). Because the final Pretrial Conference Order contained the most recent list of Swisher's affirmative defenses, Swisher contends that it is "the most logical document to amend." Id.

The Court finds that Swisher would be prejudiced if it was barred from being able to assert these defenses and that Trendsettah would not be prejudiced from allowing amendment. Further, modification would not have a great impact on the proceedings and Swisher's conduct in seeking modification does not evince bad faith or inexcusable neglect. Accordingly, the Court grants the motion.

IV. CONCLUSION

For the following reasons, the Court **DENIES** the motion for reconsideration and **GRANTS** the motion to amend the pretrial conference order.

Upon further reflection, the Court believes that its August 19, 2019 Order should be certified for interlocutory appeal under 28 U.S.C. § 1292(b), as it presents a controlling question of law, as to which there are substantial grounds for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982). In particular, the weight of omission in establishing a claim for fraud on the Court and whether this amounts to an undermining of the workings of the judicial process is a matter for debate.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

TRENDSETTAH USA, INC. and TREND SETTAH, INC. Plaintiffs, v. SWISHER INTERNATIONAL, INC. Defendant.	Case No. 8:14-CV-01664-JVS (DFMx) **ORDER GRANTING TRENDSETTAH'S *EX PARTE* MOTION FOR CLARIFICATION OF JANUARY 21 ORDER RE: § 1292(b) CERTIFICATION** Jan. 31, 2020

On January 24, 2020, Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. ("Trendsettah") filed an *ex parte* application seeking clarification of the 28 U.S.C. § 1292(b) certification set forth in the Court's January 22, 2020 order denying Trendsettah's motion for reconsideration of the Court's August 19, 2019 order granting Defendant Swisher International's Rule 60 motion.

Having reviewed the papers filed by the parties and all arguments in support of and against the *ex parte* application, Plaintiffs' *ex parte* application is hereby GRANTED. The Court is of the opinion that its August 19 Order, as further construed in its January 22 Order, should be certified for interlocutory appeal under 28 U.S.C. § 1292(b), as it presents a controlling question of law, as to which there are substantial grounds for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

IT IS SO ORDERED.

Dated: January 31, 2020

/s/ James V. Selna
Hon. James V. Selna
United States District
Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRENDSETTAH USA, INC.; TRENDSETTAH, INC., Plaintiffs-Petitioners, v. SWISHER INTERNATIONAL, INC., Defendant-Respondent.	No. 20-80024 D.C. No. 8:14-cv-01664-JVS-DFM Central District of California, Santa Ana ORDER Apr. 23, 2020

Before: OWENS and BENNETT, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: TRENDSETTAH USA, INC.; TRENDSETTAH, INC.	
TRENDSETTAH USA, INC.; TRENDSETTAH, INC., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA, Respondent, SWISHER INTERNATIONAL, INC., Real Party in Interest.	No. 20-71247 D.C. No. 8:14-cv-01664-JVS-DFM Central District of California, Santa Ana ORDER July 21, 2020

Before: THOMAS, Chief Judge, SCHROEDER and CALLAHAN, Circuit Judges.

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

All pending motions are denied as moot.

No further filings will be entertained in this closed case.

DENIED.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No.	SACV 14-1664 JVS (DFMx)	Date	9/16/20
Title	**Trendsettah USA, Inc. et al. v. Swisher International Inc.**		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS]**
Minute Order re Motion to Dismiss

Plaintiffs Trendsettah USA, Inc. *et al.* (collectively "Trendsettah") move to dismiss the case with prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. (Docket No. 565.) Swisher International, Inc. ("Swisher") filed an opposition (Docket No. 574-1; under seal), and Trendsettah replied (Docket No. 579). The Court invited Swisher to file a surreply (Docket No. 581), and Swisher responded (Docket No. 585). In addition, the Court invited Swisher to clarify the relief it sought in terms of conditions of dismissal (Docket No. 577), and Swisher responded (Docket No. 586). Trendsettah filed a further response. (Docket No. 587.)

Trendsettah seeks to end the trial phase of this protracted litigation in order to allow the Ninth Circuit to review this Court's rulings, including the grant of a new trial. (Motion, p. 2.) Swisher does not oppose the Motion, but urges the Court to impose certain conditions on any dismissal. (Opposition, p 1.)

The Court now grants the Motion with certain conditions.

I. Legal Standard.

Rule 41 of the Federal Rules of Civil Procedure provides in part:

> Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.

(Fed. R. Civ. P. 41(a)(1)(2); emphasis supplied.) A motion for voluntary dismissal should be granted unless the defendant shows it will suffer some plain legal prejudice as a result. Westlands Water Dist. v. United States, 100 F.3d 94, 96 (9th Cir. 1996). In general, plain legal prejudice is shown when actual

legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. United States v. Berg, 190 F.R.D. 539, 543 (E.D. Cal. 1999). Legal prejudice is prejudice to some legal interest, claim, or argument. Westland Water Dist., 100 F.3d at 96. In the present context where a plaintiff moves for dismissal, the Court may adopt conditions of dismissal to prevent prejudice to the defendant. (Fed. R. Civ. P. 41(a)(1)(2).)

Prejudice to the recovery of attorneys' fees is a cognizable prejudice under Rule 41. Munchkin, Inc. v. Luv N' Care , Ltd., 2018 WL 7507424 at *1 (C.D. Cal. May 2, 2018); Pechke Map Technologies LLC v. Miromar Development Corp., 2016 WL 1546465 at *2 (M.D. Fla. Apr. 15, 2016). Prejudice to discovery rights is also a cognizable prejudice in some circumstances. Hyde & Drath v. Baker, 24 F.3d 1162, 1069 (9th Cir. 1994).

II. Discussion.

Swisher urges the imposition of conditions to avoid prejudice to the following rights:

- Its right to claim attorneys' fees and costs as the prevailing party.
- Its right to claim attorneys' fees and costs under two Private Label Agreements ("PLA") with Trendsettah.
- Its right to claim attorneys' fees and costs under 28 U.S.C. § 1927, Rule 37 of the Federal Rules of Civil Procedure, and the Court's inherent powers.
- Its right to certain discovery under Magistrate Judge McCormick's outstanding order to compel (Docket No. 560).

- Its right to conduct the previously-noticed depositions of Trendsettah and its officers.

(Opposition, pp. 1-2, 23-24.)

A. Potential Fee Motions.

With respect to the first three items, Swisher has clarified its position upon invitation of the Court. Swisher does not seek to litigate prior to judgment the amount any award or indeed whether it is entitled to relief any under any of these theories, with two exceptions. (Docket No. 586, pp. 1-2.) Swisher also urges the Court to retain jurisdiction to consider such relief. That the Court will do.

In its Supplemental Brief, Trendsettah concedes that "there is no dispute that Swisher will have the right to claim fees and costs as (1) the prevailing party, and (2) under the PLAs." (Docket No. 587, p. 1; internal quotation marks deleted; id. at 5 ('the fees would remain pending for independent adjudication"; emphasis in original; internal quotation marks deleted.) These statements are unequivocal, and the Court relies upon them.[1]

Swisher urges two findings. First, Swisher invites the Court to find that the fact of Trendsettah's

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[1] "Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." Whaley v. Belleque, 520 F.3d 997, 1002 (9th Cir. 2008) (quoting Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996)). "Judicial estoppel is an equitable doctrine that is intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts." Whaley, 520 F.3d at 1002 (quoting Wagner v. Prof'l Eng'rs in Cal. Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004)).

voluntary dismissal may not be asserted as a bar to the possible fee motions, all other grounds being preserved to Trendsettah. (Opposition, pp. 1-2.) The Court finds that this condition appropriate and necessary to eliminate prejudice to Swisher. Second, Swisher invites the Court to enter a finding that it has not been judicially determined that Swisher is in default of it obligations under the PLAs. (Id., p. 2.) The Court finds that this condition is appropriate. If the Ninth Circuit affirms, Trendsettah will not be allowed to relitigate an issue which on a record of dismissal has been decided against it. Of course, if the Ninth Circuit reverses in some fashion, say by reinstatement of the original verdict, there would be no predicate for Swisher to seek relief under the PLAs.

B. Discovery.

The cases which Swisher cites for the proposition that it is entitled to discovery now seem to deal with situations where there is ongoing collateral litigation between the parties or related third-party litigation where the discovery would be relevant and somewhat time critical. See Hyde & Drath, 24 F.3d at 1165; In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996). That is not the present situation. The Court declines to condition dismissal on any further discovery. In that regard, the Court vacates without prejudice Swisher's Motion for Contempt. (See Docket No. 572.) The Court also stays without prejudice the pending depositions.

Depending on the Ninth Circuit's disposition, the discovery now sought may well be relevant. The Court finds that much of the discovery which Swisher now seeks would be relevant to post-trial motions for sanctions of various types. Any motion pursuant to 28 U.S.C. § 1927, and perhaps others, would be informed

by probing in greater detail conduct amounting to fraud on Court. Should the Ninth Circuit affirm, the Court is likely to entertain post-judgment discovery in support of the various motions that might be brought. Should the Ninth Circuit remand for a new trial, Swisher would have an opportunity renew its discovery requests. Of course, if the Ninth Circuit reinstated the original verdict, the issue would be moot. In no event, however, is further discovery warranted now.

III. Conclusion.

The Court grants the Motion to Dismiss with prejudice and includes the findings noted above. As the prevailing party, Swisher is directed to submit a proposed form of judgment within seven days. If the judgment is endorsed by Trendsettah as to form, the Court will enter the judgment promptly. Otherwise, the Court will wait seven days for objections. Swisher is cautioned to hew to the meets and bounds of this Order.[2]

IT IS SO ORDERED.

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[2] In response to the "tentative," Swisher pointed to several typographical errors and transpositions of the parties. (Docket No. 590.) This final order reflects those suggestions.

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRENDSETTAH USA, INC.; TRENDSETTAH, INC., Plaintiffs-Appellants, v. SWISHER INTERNATIONAL, INC., Defendant-Appellee.	No. 20-56016 D.C. No. 8:14-cv-01664-JVS-DFM Central District of California, Santa Ana ORDER May 25, 2022

Before: RAWLINSON and WATFORD, Circuit Judges, and RAKOFF,* District Judge.

The panel voted to deny the Petitions for Panel Rehearing.

Judges Rawlinson and Watford voted to deny, and Judge Rakoff recommended denying, the Petitions for Rehearing En Banc.

The full court has been advised of the Petitions for Rehearing En Banc, and no judge of the court has requested a vote.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Appellant Trendsettah's Petition for Panel Rehearing or Rehearing En Banc, filed April 29, 2022, and Appellee Swisher International, Inc.'s Petition for Rehearing or Rehearing En Banc, filed April 29, 2022, are DENIED.

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2, cl. 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such

order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section

798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be

further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

TRENDSETTAH USA, INC. and TREND SETTAH, INC. Plaintiffs, v. SWISHER INTERNATIONAL, INC. Defendant.	Case No. 8:14-CV-01664-JVS (DFMx) **TRENDSETTAH'S MOTION FOR DISMISSAL OF ITS CLAIMS WITH PREJUDICE** Judge: Hon. James V. Selna Courtroom: Courtroom 10C Date: Sept. 14, 2020 Time: 1:30 p.m.

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Attorneys for Plaintiffs Trendsettah USA, Inc. and
Trend Settah, Inc.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 14, 2020 at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable James V. Selna, United States District Court for the Central District of California, located in Court room 10C, 411 West Fourth Street, Santa Ana, California, plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (together, "Trendsettah") will, and hereby do, move for dismissal of its claims with prejudice pursuant to Rule 41(a)(2).

As Trendsettah has previewed in prior filings, it is unable to afford the litigation expenses of a second trial to replicate the verdict it previously obtained. Accordingly, Trendsettah seeks to voluntarily dismiss its claims with prejudice, and chooses to instead take an immediate appeal of the Court's August 19, 2019 Order vacating the verdict, as well as the Court's orders of January 21, 2020 and July 31, 2020 confirming that outcome.

This motion is based on this Notice and the accompanying Memorandum of Points and Authorities, the concurrently filed Declaration of Ramzy Rahib, any argument to be received from counsel at a hearing on this matter, and all papers and records in this matter.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on August 7, 2020.

Dated:
August 17, 2020

GOLDSTEIN & RUSSELL, P.C.

By: /s/ *Thomas C. Goldstein*
Thomas C. Goldstein
Attorneys for Trendsettah

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Because Trendsettah cannot afford to repeat the nearly $650,000 that it took to prevail at trial the first time, it now moves to dismiss its claims against Swisher with prejudice, so that it can directly appeal the Court's Rule 60 orders vacating the jury's verdict and ordering a new trial. This motion will constitute the end of the case. On appeal, either the Ninth Circuit will again order reinstatement of the verdict, or it will affirm the Court's Rule 60-related orders. The dispute will be over either way.

PROCEDURAL BACKGROUND

Trendsettah won the jury's verdict on March 30, 2016. ECF No. 206. On August 17, 2016, the Court granted Swisher's Rule 50(b) motion to vacate the antitrust portion of the verdict based on Swisher's new counsel's arguments related to the jury instructions on the "refusal to deal doctrine," and ordered a new trial. ECF No. 262. Then on November 9, 2016, the Court granted Swisher's motion for reconsideration of the summary judgment motion Swisher had filed a year prior, and entered judgment against Trendsettah's antitrust claims, on the ground that Swisher had proffered evidence of its purported "legitimate business reasons" for its conduct. ECF No. 274.

On appeal, the Ninth Circuit reversed, holding that despite Swisher's proffered evidence of its "legitimate business reasons," "the jury clearly rejected this evidence." ECF No. 349 at 3. It further held that the jury had been properly instructed, and that the Court had erred in granting JMOL against

Trendsettah's monopolization claim, because the jury was free to draw its own conclusions about the relevant market and the proper scope of damages, from the evidence that was before it. *Id.* at 5. The Ninth Circuit then remanded with instructions to "reinstate the jury's verdict in its entirety." *Id.* at 7.

The Court did not reinstate the jury's verdict upon remand, but instead granted *another* motion by Swisher to vacate the verdict, this time based on Swisher's Rule 60 arguments associated with the March 2019 indictment of Mr. Alrahib. ECF No. 426. The Court thereafter denied Trendsettah's motions related to (1) Swisher's belated revelation that it had in fact received through discovery of all of the excise tax filings related to Trendsettah's imported cigars that had been filed by Havana 59 (ECF No. 483), and (2) Swisher's belated revelation that it had been in possession of all of the excise tax invoices that Havana 59 had sent to Trendsettah, showing the excise tax amount that Trendsettah had paid to Havana 59, and that Swisher had noticed a Rule 30(b)(6) deposition topic on that issue, but never pursued any aspect of excise taxes at all. ECF No. 561. That order did not address Trendsettah's point that Swisher had never criticized Dr. McDuff's per-stick cost or profit calculations by contending that excise taxes should be included in *any* amount in those calculations. ECF No. 561.

On July 31—the same day that the Court denied Trendsettah's Rule 60 motion—Trendsettah informed Swisher of its intention to dismiss its claims to pursue a direct appeal of the Rule 60 orders. Decl. of Mark Poe ¶ 3; Ex. A.

ARGUMENT

Where a defendant has filed its answer to a plaintiff's claims, a plaintiff can dismiss the action only by stipulation or by court order. Fed. R. Civ. P. Rule 41(a)(1)(A)(ii), (a)(2). Swisher has declined to stipulate to dismissal, thereby necessitating this motion to obtain the requisite court order.

As Trendsettah has previewed in prior filings, it cannot afford the cost of a second trial to again prove its claims to a jury, which last time cost it **$649,538**. *See* Decl. of Ramzy Rahib ¶¶ 2-5. Accordingly, to gain restoration of the existing verdict, Trendsettah has no viable alternative other than to dismiss its claims with prejudice, and challenge the correctness of the Court's Rule 60-related orders.

Although courts may deny or impose conditions upon motions to dismiss where the plaintiff seeks to do so *without* prejudice to later renewing those claims, our research reveals no means by which a court can decline to grant dismissal where the plaintiff accedes to dismissal *with prejudice*. As the Sixth Circuit has explained:

> We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he . . . for any reason wishes to dismiss his action with prejudice, the client being agreeable. A plaintiff should have the same right to refuse to offer evidence in support of his claim that a defendant has.

Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964).

In other words, in the absence of prejudice to third parties, and where there are no counterclaims at issue, there does not appear to be any recognized ground for denying a plaintiff's request to dismiss

with prejudice. *See, e.g.*, *Schwarz v. Folloder*, 767 F.2d 125, 129 (5th Cir. 1985) ("no matter when a dismissal with prejudice is granted, it does not harm the defendant"); *California Sportfishing Prot. All. v. Matheson Tri Gas, Inc.*, 2013 WL 687041, at *2 (E.D. Cal. Feb. 25, 2013) ("'no case has been cited to us, nor have we found any, where a plaintiff, upon his own motion, was denied the right to dismiss his case with prejudice'") (quoting *Smoot*, 340 F.3d at 302-03); *Columbia Cas. Co. v. Gordon Trucking, Inc.*, 2010 WL 4591977, at *3 (N.D. Cal. Nov.4, 2010) ("Several courts have held that a court is without discretion to deny a motion under Rule 41(a)(2) where the plaintiff seeks dismissal with prejudice.") (collecting authority). Accordingly, this motion should be summarily granted.

CONCLUSION

For the foregoing reasons, Trendsettah asks the Court to dismiss its claims with prejudice and enter a final judgment, so that Trendsettah can proceed to a merits appeal of the Court's Rule 60 orders. Any treatment of prevailing party costs and attorneys' fees can be resolved in the ordinary course.

Dated:
August 17, 2020

GOLDSTEIN & RUSSELL, P.C.

By: /s/ *Thomas C. Goldstein*
Thomas C. Goldstein
Attorneys for Trendsettah

APPENDIX K

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

TRENDSETTAH USA, INC. and TREND SETTAH, INC. Plaintiffs, v. SWISHER INTERNATIONAL, INC. Defendant.	Case No. 8:14-CV-01664-JVS (DFMx) **PLAINTIFFS' NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment in this action entered on September 28, 2020, and from any and all other judgments, orders, opinions, decisions, rulings, and findings subsidiary thereto, subsumed therein, or subsequent thereto, including, without limitation the District Court's August 19, 2019 Order Regarding Motion for Relief from Judgment or for Expedited Discovery, Motion to Stay, and Motion for Summary Adjudication (ECF No. 426), January 21, 2020 Order Regarding Motion for Reconsideration and to Amend the Final Pretrial Conference Order (ECF No. 483), July 31, 2020 Order Regarding Motion for Relief Under Rule 60(b), or in the Alternative, for Reconsideration (ECF No. 561), September 16, 2020 Minute Order re Motion to Dismiss (ECF No. 591), and from any and all other judgments, orders, opinions, decisions, rulings, and findings of the District Court entered prior or subsequent to the entry of the final judgment.

This case was first filed in the District Court on October 14, 2014. A prior appeal in this case was docketed and heard as 16-56823.

Dated: September 28, 2020

GOLDSTEIN & RUSSELL, P.C.

By: /s/ *Thomas C. Goldstein*
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