

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: ORDER GRANTING CAP EXPORT'S MOTION TO SET ASIDE
JUDGMENT PURSUANT TO FRCP 60(b)(3) [249]

I. Introduction

On Sept. 29, 2019, Plaintiff Cap Export, LLC ("Cap Export") filed this motion to set aside the judgment issued by this Court in favor of Defendant Zinus, Inc. ("Zinus") on May 30, 2019. Dkt. 244; Dkt. 249. Following several hearings and two court-ordered depositions, the Court took the motion under submission on Dec. 2, 2019. For the reasons articulated below, the Court GRANTS Cap Export's motion.

II. Factual and Procedural Background

a. *This Court's prior proceedings.*

Zinus is the owner of U.S. Design Patent No. 8,931,123 ("the '123 patent"). Dkt. 1 ¶ 8. On December 18, 2015, counsel for Zinus contacted Cap Export, informing Cap Export that Zinus was the owner of the '123 patent and alleging that Cap Export was advertising, distributing, and selling products that fell within the scope of the '123 patent and thus was infringing the '123 patent. *Id.* ¶ 10. Cap Export responded by filing a lawsuit seeking declaratory judgments regarding patent invalidity and non-infringement. *Id.* ¶¶ 14-22. In turn, Zinus filed counterclaims against Cap Export and third-party claims against Abraham Amouyal ("Amouyal") and 4Moda Corp. ("4Moda") for infringement of the '123 patent and unfair business practices pursuant to California Business and Professions Code § 17200

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

et seq. See Dkt. 11.

On November 29, 2016, this Court issued an order granting summary judgment of invalidity on the ground that Claims 1 and 3 of the '123 patent were obvious under 35 U.S.C. § 103. Dkt. 70. Judgment was entered in favor of Cap Export. Dkt. 74. On appeal, the Federal Circuit vacated the Court's order. Dkt. 90.

On remand, the Court granted Zinus' motion for partial summary judgment as to the validity of its patent, and with regard to direct infringement under 35 U.S.C. § 271(a), but denied Zinus' motion for partial summary judgment as to induced infringement under 35 U.S.C. § 271(b). Dkt. 154. In its Order, the Court considered Cap Export's arguments regarding subject matter, definiteness, anticipation, and obviousness, in the context of Zinus' motion for partial summary judgment. *Id.* at 7-14. In particular, the Court analyzed relevant evidence of "prior art" references identified by the parties and established that the '123 patent was valid as a matter of law on that basis, because none of the "prior art" references considered by the Court either anticipated or made obvious the patent claims embodied in the '123 patent. *Id.* at 8-12. Following this Court's Order granting partial summary judgment to Zinus, the parties stipulated to the entry of a final judgment and permanent injunction. Dkt. 242. Court entered the judgment and permanent injunction on May 30, 2019. Dkt. 243. The stipulated judgment required Cap Export and Amouyal to make payments totaling \$1,100,000, declared the '123 patent and each of its 3 claims enforceable and not invalid, and entered judgment for patent infringement against Cap Export. *Id.*

Cap Export then filed a Motion to Set Aside the Judgment on Sept. 29, 2019. This Court held a hearing on the motion on Oct. 28, 2019. Dkt. 268. After ordering the parties to depose percipient witnesses, the Court held a further hearing on Nov. 18, 2019. Dkt. 281. The Court then ordered supplementary briefing on the motion from both parties. Dkt. 286; Dkt. 287.

b. *The '123 Patent Claims*

Claims 1 and 3 of the '123 patent were discussed in detail in this Court's November 29, 2016 order. Dkt. 70. As to Claim 1, it is sufficient at this point to restate the Court's summary of that claim: "In essence, this claim describes a bed frame that can be taken apart. The longitudinal bar can be removed from the headboard and footboard, and then the longitudinal bar and footboard can fit inside

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

the compartment in the headboard in their compact state.” *Id.* at 6. Claim 2 is similar to Claim 1 except that it distinguishes between footboard legs and headboard legs, and provides that footboard legs “are attached to a bottom side of the footboard” (which itself “fit[s] inside the compartment of the headboard”) and headboard legs “are not attached to the headboard in a compact state,” but rather “are contained inside” the headboard compartment in the compact state. Dkt. 128-1 at 8. Claim 3, as summarized in this Court’s prior order, “adds the new element that the headboard compartment is closed with a zipper.” Dkt. 70 at 8.

The ’123 patent can thus be summarized as being “directed to a bed whose components fit compactly inside a ‘compartment’ in the headboard that can be closed with a zipper.” Dkt. 128-1 at 5. In the bed’s compact state, the headboard contains all of the other bed components, including the footboard, four legs, and a central longitudinal bar. *Id.* at 5-6.

c. *The Rule 60 motion and Cap Export’s supporting evidence.*

Cap Export’s motion seeks relief from the stipulated judgment under Fed. R. Civ. P. 60(b). Dkt. 249. Cap Export argues that relief would be appropriate under Rule 60(b)(2) for newly discovered evidence, Rule 60(b)(3) for fraud, misrepresentation, or misconduct by an opposing party, and the Rule 60(b)(6) catch-all allowing relief for “any other reasons that justify relief.” *Id.*

Cap Export’s motion is based on evidence it presents to the Court indicating that Zinus’ then-president, Colin Lawrie (“Lawrie”) purchased either identical, or substantially similar “bed-in-a-box” products from a third-party manufacturer, Woody Furniture, for several years prior to the ’123 patent application’s filing date of September 25, 2013. Dkt. 249 at 1; Dkt. 1-1, Ex. A (the ’123 Patent). Cap Export submits a variety of evidence in support of its motion. *See* Dkt. 249-1; Dkt. 249-2. Because the Court ultimately concludes that this motion is best analyzed under Rule 60(b)(3), the Court will summarize relevant evidence for context prior to its analysis of the motion under Rule 60(b)(3).

i. *The Classic Brands Lawsuit*¹

¹ The Court notes as threshold issue that it can only take judicial notice of *undisputed* matters of public record, not *disputed* facts stated in public records. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-690 (9th Cir. 2001). Its recounting of the

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

Cap Export first submits documents from a lawsuit filed by Zinus against Classic Brands, LLC (“Classic Brands”) on June 22, 2019 in the Central District of California, alleging infringement of patents owned by Zinus, including the ‘123 patent (the “Classic Brands Lawsuit”). Dkt. 249-1, Ex. 5. Cap Export then submits a declaration filed in that lawsuit by Noel M. Cook, which includes as an exhibit a letter from counsel for Classic Brands stating that Classic Brands believes that “as early as 2010, a company called Xiamen XinShunYang Industry and Trade Company (“XXITC”), located in Xiamen, China was manufacturing, promoting and selling a bed-in-a-box frame that includes all of the disclosed elements taught by the ‘123 and ‘382 Patents.” Dkt. 249-1, Ex. 6 at 12.² The letter from Classic Brands also included an allegedly translated declaration from Xie Yuxian, who stated that he worked for XXITC from 2010 to 2015, which manufactured and sold “a bed where all of the components of the bed (except the headboard) were packed inside of a zippered compartment in the headboard.” The letter also includes a variety of photo exhibits showing the various components of the beds manufactured by XXITC, and purchase invoices between XXITC and Woody Furniture in Malaysia. See Dkt. 249-1, Ex. 6 at 21-73.

Zinus moved for partial summary judgment in the Classic Brands Lawsuit on Aug. 20, 2019. *Zinus Inc. v. Classic Brands, LLC*, 2:19-cv-05455-PSG-E (Aug. 20, 2019). Zinus did not seek summary judgment on its cause of action for infringement of the ‘123 patent. *Id.* The court in the Classic Brands Lawsuit ultimately granted Classic Brands’ motion to transfer the case to the District of Maryland. *Zinus Inc. v. Classic Brands, LLC*, 2:19-cv-05455-PSG-E (Oct. 3, 2019).

ii. *The Declaration of Agnes Tan*

documents and declarations submitted by Cap Export and taken from the Classic Brands Lawsuit is solely to provide context for the sequence of events leading to this motion. Disputed facts contained within these documents filed solely with another court were not considered in conjunction with the Rule 60(b)(3) analysis below, although some documents from the Classic Brands Lawsuit have been included in the record of this case.

² Citations to this document are complicated by the fact the letter in question was submitted as an attachment to a declaration in the Classic Brands lawsuit, which has resulted in three separate “Exhibit” lettering/numbering formats. The Court’s citations are to the exhibits marked by Cap Export’s counsel at the appropriate docket locations and reference the page numbers on each exhibit in blue at the top of each document in this exhibit.

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

Cap Export also submitted the declaration of Agnes Tan (“Tan”), who declared that she is the marketing director for Woody Furniture in Malaysia, and that she can speak and read English. Dkt. 249-6. She attaches as an exhibit a copy of Proforma Invoice No. WM 11190 dated Feb. 9, 2012, which was sent to and signed by Colin Lawrie. *Id.*, Ex. A. She declares that the invoice is for “a bed **with all components fitting in the headboard**, including footboard and the longitudinal bar, for shipping.” *Id.* at 1 (emphasis added). She also states that Colin Lawrie signed the attached invoice. *Id.* at 1. The attached invoice indicates that it was sent to Jusama Group Consulting Inc. (“Jusama”) in Toronto, Canada. *Id.*, Ex. A. The invoice indicates that it was for purchase of a total of 405 “Mersin” beds, with an item number of “PC001C.” *Id.* Colin Lawrie and Peng DeFranco (an employee of Jusama in Canada) are listed in the “Attn:” line on the invoice. *Id.* The Declaration also includes a Bill of Lading for the WMI 11190 invoice, on behalf of Woody Furniture and shipped from Xiamen, China to Toronto. Dkt. 249-6, Ex. B.

iii. *Emails between Jusama and Woody*

Cap Export also submits printouts of emails between Lawrie, Tan, and Peng DeFranco regarding the beds purchased by Jusama. *See* Dkt. 272, Ex. 505; Dkt. 249-2, Ex. 10. These emails discuss shipment dates for the different bed purchases, and problems with missing parts within shipments sent to Jusama. In particular, DeFranco states in a Sept. 10, 2011 email that due to issues with missing parts for the bed frames, Jusama “opened up a new box to get the instruction today,” and that customers had reporting that “2 of the 4 side panels” used in assembling were missing. Dkt. 249-2, Ex. 10. DeFranco also writes that “[w]e had to open up new beds to retrieve the missing parts.” *Id.*

iv. *Lawrie’s Deposition*

While president of Zinus, Lawrie was deposed in this lawsuit on Oct. 11, 2016. Dkt. 249-2, Ex. 13. During his deposition, Lawrie stated that he had been president of Zinus since January 2014, and that he was previously vice president of sales and marketing for Zinus. *Id.* at 10. Prior to assuming that role in January 2012, he was a sales representative and independent contractor. *Id.* at 11. While Lawrie was a sales representative for Zinus, he stated that he operated on Zinus’ behalf through his own business in Canada, and that this business was called “HQV.” *Id.* at 21-22. The deposition transcript then indicates that immediately following this answer, counsel for Cap Export cautioned Lawrie against exchanging

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zimus, Inc. et al</i>		

notes with his attorney. *Id.* at 22.

The deposition then covered Lawrie's knowledge of bed frames that have been shipped disassembled, as relevant to the claims of the '123 patent. Counsel for Cap Export begins by asking Lawrie:

Q. Had you ever seen a bed frame that had been shipped disassembled prior to September of 2013?

A. I had seen beds that were shipped in component parts, you know, most beds were, five or six boxes.

Q. Okay, or three or --

A. Or three or four boxes.

Q. What do you think the novelty or the invention is of the 123 Patent?

A. The ability to package an unassembled bed into a headboard **and have it ship in one box.**

Id. at 30 (emphasis added). After several pages of definitional follow-up, Counsel for Cap Export again asks Lawrie another direct question on the topic:

Q. Prior to September 2013 had you ever seen a bed that was shipped disassembled in one box?

A. No.

Q. Not even -- **I'm not talking about everything stored in the headboard, I'm just saying one box.**

A. **No, I don't think I have.**

Id. at 35 (emphasis added). Later, Cap Export's counsel asked Lawrie about disassembled furniture more generally:

Q. Do you know of any other pieces of furniture prior to September of 2013 that shipped disassembled in one box and the components were actually shipped inside one of the other components of the piece of furniture?

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

A. I can't think of one that I've had personal knowledge of off the top of my head. That are disassembled components inside the box itself – inside another component of it?

Q. Yes.

A. I guess the only thing I can think of off the top of my head would be shelves inside a cabinet.

Id. at 41-42 (emphasis added). On several other occasions throughout the deposition, Lawrie is asked similar questions:

Q. So prior to 2013, September of 2013, **the only piece of furniture that you can think of that shipped in one box, disassembled, and the components were contained in another component**, was just a cabinet with shelves; is that accurate?

A. I'm trying to think of upholstery or bedroom furniture.

Q. Desks, anything like that.

A. Again, desks -- in my experience, desks have always come flat pack, you know, they're not inside the table top or anything like that.

Q. That would be then no, just the cabinet essentially?

A. That I'm aware of.

...

Q. Had you ever seen prior to September 2013 **a piece of furniture that the disassembled component parts were shipped in another component** -- you said just the cabinet, right?

A. That's the only one I can recall off the top of my head.

Id. at 42-43, 63 (emphasis added).

v. The Declaration of Peng Defranco

In its Opposition to Cap Export's motion to set aside the judgment, Zinus submitted a declaration by Peng Defranco ("Defranco"). Dkt. 255-3. Defranco states that she has reviewed the invoice submitted by Tan showing purchase and shipment of beds described in Invoice No. WM 11190, sent to Jusama by Woody Furniture in Malaysia. *Id.* at 1. She states that she was the contact person for Woody on behalf of

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

Jusama in Canada. She declares that “I do not recall ordering or receiving any beds prior to the end of 2013 in which all of the bed components fit inside a compartment in the headboard.” *Id.* at 2. She then asserts that she saw pictures of beds in a sales catalogue from Woody Furniture prior to 2013, which had a “single-piece central wooden plank that could not have fit inside a headboard.” *Id.* Defranco never definitively states in her declaration that the beds actually purchased by Jusama had all components shipped in the headboard, only that (1) she did not recall doing so, and (2) she received a catalogue from Woody advertising a bed that could not have had all pieces fit in the headboard, because of single-piece side panels used in the bed frame.

vi. *The Declaration of Colin Lawrie*

Lawrie did not initially submit a declaration in response to Cap Export’s initial motion. Lawrie did later file a declaration in this case following the Court’s initial hearing on the motion to set aside judgment. Dkt. 266-1. In this declaration, Lawrie states that he testified as an expert witness on bed frames for Zinus at the Oct. 11, 2016 deposition, he has no recollection of notes being passed to him during his deposition by lawyers for Zinus, and he was a part-owner of Jusama from 2005 “until a few years ago,” and that Jusama was also part-owned by HQV Inc. (“HQV”), which itself “was wholly owned by its president, Ely Benzaquen.” *Id.* at 2-4. He also asserts that he has no independent recollection of the purchase invoice submitted by Agnes Tan, but that it does appear to be his signature. *Id.* at 7. He states that he does not know whether all of the bed frames referred to on the invoice “had all of the non-headboard pieces contained in a compartment in the headboard.” *Id.* at 9. He, like Peng Defranco, speculates that some beds had a central wooden beam that was too long to fit in the headboard. *Id.* He also states that “[i]t is also possible that I never knew whether the beds that were being ordered from Woody were beds whose non-headboard components all fit in a headboard compartment, or not.” *Id.* at 10.

With respect to his answer of “No” to the question “[p]rior to September 2013 had you ever seen a bed that was shipped disassembled in one box?” during his Oct. 11, 2016 deposition in this matter, Lawrie states that “I now believe my answer was literally incorrect, but I am absolutely certain that at no time did I ever intend to answer falsely during that deposition.” *Id.* at 11. He declares that he thought the question was meant to ask whether he had ever seen a bed shipped disassembled in one box “with all of the components in the headboard,” and states that he assumed that any reference to “one box” also

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

assumed that each box had all components within the headboard (as the '123 patent calls for). *Id.*

vii. *Court-Ordered Depositions of Tan, Lawrie, and DeFranco*

Following the initial hearing on this motion, the Court ordered video depositions to be conducted of Agnes Tan, Peng Defranco, and Lawrie. Dkt. 268. Peng Defranco declined to have her deposition taken, unless compelled by a subpoena. Dkt. 266-3. She stated in a follow-up declaration that English was her fourth language and she did not want to be misinterpreted, that she had a prior negative experience in litigation, and that she had never seen an actual platform headboard bed with a headboard compartment for storing the other components of the bed. *Id.* at 2. She also declared that she did not work for Jusama in the warehouse, and that she did not know whether an invoice would show whether the components actually fit in a headboard or were just packed in a single box. *Id.* at 2-3.

1. *Tan*

Agnes Tan's deposition was taken in Singapore on Nov. 14, 2019. Dkt. 271. Her deposition was conducted entirely in English, in which she is fluent. *Id.* She testified that she has worked for Woody Furniture since 1997, that she is currently a director at Woody, and that in 2011 Colin Lawrie was a customer of Woody Furniture, affiliated with Jusama. *Id.* at 4-5. She identified a copy of Proforma Invoice No. WM 11190 dated Feb. 9, 2012, and testified that the item number "PC001C" product was a "bed in a box," which meant "that all the parts, we put into the headboard at the back, and then we zip it up and, you know, become one piece packed in a box. One piece per part carton." *Id.* at 6. She then identified the Bill of Lading, and testified that it represented a shipment of 405 cartons of "bed in a box" beds from Woody Furniture to Jusama Group, each of which she again testified contained all of the other parts within the bed frame headboard. *Id.* at 7. She also testified that they made two other shipments from Woody Furniture, one in January 2011, and another in February 2013. *Id.* at 9-10. These exhibits were also lodged with the Court by Cap Export. *See* Dkt. 272, Ex. 500, Ex. 502, Ex. 503.

Agnes Tan also testified that she communicated extensively via email with both Lawrie and Peng Defranco. *Id.* at 11. She then identified a printout copy of an email regarding the "bed in a box" purchases made by Jusama from Woody Furniture. *See* Dkt. 272, Ex. 505. The email exhibit shows an email address for "Colin zinusmail Lawrie," copied in the "CC" line, with an email address of

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

colin@zinusinc.com. *Id.*

2. Lawrie

Colin Lawrie’s follow-up deposition was taken in Toronto on Nov. 15, 2019. Dkt. 274. Lawrie testified that he did not have any documents, emails, or laptops from the time of the alleged transactions between Woody Furniture and Jusama. *Id.* at 18-19. When asked whether he contacted anyone at Jusama, he said “nobody could track down anything.” *Id.* at 19. He stated that he was not aware that he had ever used a Zinus email to communicate about Woody beds. *Id.* at 20. He stated that he had no memory of the invoice, or any purchase of the Woody beds. *Id.* at 38-39.

With regard to the Jusama/HQV business connection, he testified that from 2010 to 2013, Zinus paid “Colin Lawrie Marketing” (wholly owned by Lawrie) as an independent contractor, and that he considered “Colin Lawrie Marketing” and Jusama “one and the same.” *Id.* at 51-52. As in his declaration, he indicated that HQV was entirely owned by another shareholder in Jusama, Ely Benzaquen. *Id.* at 53. He also testified that he did not remember being paid by HQV, and that Peng Defranco was employed by Jusama, and to his knowledge she was never paid by HQV either. *Id.* at 53-54. When asked why he did not disclose his relationship with Jusama in his declaration or previous deposition testimony, he testified that “I don’t think I was asked about it.” *Id.* at 218.

With regard to the Woody beds purchased by Jusama, he testified that he had “no definite memory,” but thought that those beds did not come with all other component parts in the headboard, as the ‘123 patent required. *Id.* at 55-56. He also stated that he didn’t remember ever seeing a bed with everything in the headboard. *Id.* at 59. He testified that he “doesn’t remember anything coming in one box,” which he also acknowledged was an important benefit regardless of whether all the pieces of the bed frame fit in the headboard. *Id.* at 73 (“it was good to have one box, no matter how big the box was”). When asked what he did to refresh his recollection regarding what type of beds Jusama ordered from Woody, he testified that he “looked back and didn’t find anything,” and again asserted that he had no recollection of seeing everything stored in the headboard. *Id.* at 85-86.

Lawrie again acknowledged that his answer of “No” to the question of whether he had ever seen a bed prior to September 2013 that was shipped disassembled in one box was “literally incorrect,” but

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zimus, Inc. et al</i>		

that he did not intend to answer falsely at the deposition. *Id.* at 108. Lawrie was then shown pictures of an exhibit showing pictures of Woody beds purchased in 2010, which were filed in the Classic Brands Lawsuit. *See* Dkt. 273, Ex. 558. Lawrie acknowledged that they appeared to show beds with all the components placed inside a headboard. Dkt. 274 at 165-66. He then testified that he had no independent recollection of the Woody beds ordered by Jusama, and whether those beds had all component parts stored in the headboard. *Id.* at 167.

III. Legal Standard

Rule 60(b)(3) provides for relief from judgment for fraud, misrepresentation, or misconduct by an opposing party. To prevail, the movant must prove by clear and convincing evidence that (1) the prevailing litigants obtained the verdict through fraud, misrepresentation, or other misconduct, and (2) the conduct complained of prevented the losing party from fully and fairly presenting the defense. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004). Rule 60(b)(3) also "require[s] that fraud ... not be discoverable by due diligence before or during the proceedings." *Ibid.* The merits of a case are not before the court on a Rule 60(b) motion. *Id.* at 1261. Rule 60(b)(3) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987).

A motion pursuant to Rule 60(b) in a patent case is generally treated as a procedural motion that does not directly implicate substantive patent law. *See Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1381 (Fed. Cir. 2002) ("Because rulings under Rule 60(b) commonly involve procedural matters unrelated to patent law issues as such, we often defer to the law of the regional circuit in reviewing such rulings."). However, "when a district court's ruling under Rule 60(b) turns on substantive issues unique to patent law," Federal Circuit precedent on the topic control. *See Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc.*, 714 F.3d 1289, 1293 (Fed. Cir. 2013). Because the Rule 60(b)(c) analysis below does not turn on substantive issues unique to patent law, the Court applies Ninth Circuit precedent in analyzing Cap Export's Rule 60 motion.

IV. Analysis

a. Fraud, Misrepresentation, or Misconduct by an Opposing Party

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

The Court concludes that Lawrie's deposition testimony on Oct. 11, 2016 misrepresented his prior experience with and knowledge of bed frames that were shipped disassembled in a single box, as well as his business relationship with Jusama. Lawrie as president of Zinus can properly be considered an "adverse party" for the purposes of Rule 60(b)(3). See *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1102 (9th Cir. 2006).

i. Lawrie's deposition testimony misrepresented his knowledge of disassembled bed frames.

Lawrie asserted in his recent deposition and submitted declaration that while his answer at the prior deposition regarding his knowledge of beds shipped disassembled in one box was only "literally incorrect," it was not intended to mislead Cap Export. In particular, he asserts that because many of the questions in his deposition specifically addressed his knowledge of bed frames both (1) shipped disassembled in one box and (2) with all component parts stored in the headboard, that his answer of "No" assumed that counsel for Cap Export was asking about his knowledge of beds both shipped disassembled in a single box *and* with all components stored in the headboard. Dkt. 266-1 at 11.

But the questions asked by Cap Export's counsel specifically distinguished between those two concepts:

Q. Prior to September 2013 had you ever seen a bed that was shipped disassembled in one box?

A. No.

Q. Not even -- **I'm not talking about everything stored in the headboard, I'm just saying one box.**

A. **No, I don't think I have.**

Id. at 35 (emphasis added). Lawrie's explanation that he incorrectly understood the question to assume that every non-headboard component was also stored in the headboard is wholly implausible given how counsel for Cap Export specifically distinguishes between those two concepts. The Court concludes that his repeated answer of "No" constituted an affirmative misrepresentation, in light of the substantial

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

evidence that he had otherwise made multiple purchases of beds that were shipped disassembled in one box, and his acknowledgment that his deposition testimony was “literally incorrect.”

Lawrie was also separately asked three times whether he had ever seen or had knowledge of a bed, or other piece of furniture, that was both shipped disassembled in one box, and had its components stored inside another component for shipment. *See* Dkt. 249-2 at 41-43, 63. In his declaration and at his deposition, he repeatedly speculated that beds he purchased for Jusama from Woody Furniture may have been shipped disassembled in one box but did not necessarily contain all their component parts within a headboard. Dkt. 266-1 at 10; Dkt. 274 at 55-56 (“I don’t remember ever seeing a Woody bed that came in one headboard”). However, he also repeatedly stated at his recent deposition that he lacked an independent recollection of the invoices and purchases he made for Jusama from Woody Furniture, and that he was only “assuming” Woody’s bed did not have all the components in the headboard. *Id.* at 85-86; 108-109. Lawrie also acknowledged, when presented with pictures of the Woody beds taken in 2010, that those pictures showed bed frames where all the component pieces fit into the headboard. *Id.* at 165-166; Dkt. 273, Ex. 558 (exhibit shown to Lawrie).

Similarly, both of the declarations submitted by Peng Defranco do not specifically state that the beds purchased by Zinus from Woody Furniture did not have all the components stored within the headboard and shipped in a single box. *See* Dkt. 255-3; Dkt. 266-3. Defranco’s initial declaration very specifically addresses only the bed frame in a catalogue she received from the sales team at Woody, which she declares had “single-piece side panels that could not have fit inside any compartment in the headboard.” Dkt. 255-3 at 1. But Defranco then states only that “I do not recall ordering or receiving any beds prior to the end of 2013 in which all of the bed components fit inside a compartment in the headboard.” *Id.* at 2. Similarly, her follow-up declaration states only that “I had never seen an actual platform headboard bed with a headboard compartment, where all the non-headboard components were packed into the compartment.” Dkt. 266-3. She then states that she did not work in the warehouse at Jusama, and that she does not have first-hand knowledge of whether the components of the bed frames purchased by Jusama were both packed into the headboard and shipped in a single box. *Id.* at 3. Defranco’s declarations, like Lawrie’s testimony, asserts only that the beds purchased by Jusama from Woody *might* not have contained all component pieces within the headboard and shipped disassembled within a single box.

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

In contrast, both the declaration and deposition testimony under oath by Agnes Tan straightforwardly assert that the beds purchased by Jusama from Woody between 2011 and 2013 were both shipped disassembled in one box and had all component parts stored within the headboard. *See* Dkt. 249-6 at 2; Dkt. 270 at 6. In addition, Tan specifically testified that the “PC001” bed frames listed in the invoice to Jusama had their central beam cut in half “so that you can pack everything into the headboard at the back.” *Id.* at 11. Tan’s testimony is also reinforced by the exhibits showing Woody beds with all the pieces packed into the headboard, and the emails between Jusama and Woody in which Peng Defranco distinguishes between opening shipment “boxes” to access additional instruction manuals (which presumably would never be packed inside a headboard, and be shipped loose in the box) and opening up the “beds” to retrieve missing parts. *See* Dkt. 249, Ex. 10. This terminology is consistent with packaging of all components in the headboard, which would require opening the “bed” itself to access additional bed frame pieces.

The Court also finds the overall timeline of events highly relevant to its analysis. Lawrie’s purchases on behalf of Jusama occurred between 2011 and 2013, and Zinus filed its application for the ‘123 patent in September 2013. Lawrie declares that he was not substantively involved in the application for the ‘123 patent and that until the ‘123 patent was issued to Zinus, that he was not aware Zinus had applied for a patent related to a patent based on all bed frame components being stored in the headboard. Dkt. 266-1 at 6-7. The Court finds it highly improbable that Lawrie was completely unaware of Zinus’ patent activities given his role as president, or that at the time of his 2016 deposition he had completely forgotten about the three separate purchases made by Jusama from Woody several years beforehand.

The Court concludes based on Agnes Tan’s testimony and other supporting evidence that the “PC001” beds shipped to Jusama on three separate occasions were both shipped disassembled in one box *and* had all component parts stored in the headboard. The Court finds Lawrie’s testimony, which seeks to assert both that he has no independent recollection of the beds and that they were constructed in a manner that would render the majority of his statements technically correct, to be implausible and self-serving in the context of this motion. Peng Defranco’s declarations only definitively state that a specific bed in a catalog provided by Woody’s sales team did not have all the component parts contained in the headboard, scrupulously declining to state that the beds actually purchased by Jusama were the beds she saw in the catalog. Her additional declaration then expressly disclaims any personal knowledge on that issue. Therefore, Lawrie’s additional, repeated denials that he had knowledge of or experience with beds

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

or other furniture *shipped with components stored within another component* constitute affirmative misrepresentations of his knowledge based on the repeated purchases of such beds by Jusama from Woody prior to the filing of the '123 patent in September 2013.

ii. *Lawrie's deposition testimony misrepresented his business relationship with Jusama in Canada.*

At Lawrie's deposition, he testified that the business he ran while working with Zinus as a sales representative was named "HQV" and counsel for Cap Export immediately cautioned Lawrie and his attorney against passing notes during the deposition. *See* Dkt. 249-2, Ex. 13 at 21-22. In his follow-up declaration, Lawrie stated that he was a part owner of Jusama, and that HQV was also a part owner of Jusama, and "was wholly owned by its president, Ely Benzaquen." Dkt. 266-1 at 4. Lawrie then stated that Jusama and HQV acted as sales representatives for Zinus, and that "sometimes Jusama did business under the name of HQV." *Id.* But the declaration also indicates that Jusama and HQV acted as sales representatives from 2005 to 2010, dates prior to the relevant sales of Woody beds to Jusama. *Id.* The rest of Lawrie's declaration indicates only that from 2010 until 2014 Lawrie was an independent contractor for Zinus California (the relevant party in this action). *Id.* He also stated that he has no recollection of notes being passed at that point in the deposition. *Id.* at 2-3.

In Lawrie's 2019 deposition, he testified in greater detail that when working for Zinus as an independent contractor from 2010 to 2013 (roughly the period during which Jusama purchased the beds from Woody), he was paid through a separate entity, "Colin Lawrie Marketing." Dkt. 274 at 51-52. He then testified that Colin Lawrie Marketing owned half of Jusama, and that HQV owned the other half of Jusama. *Id.* at 52-53. He stated that Peng Defranco was an employee of Jusama, and an employee of HQV, "through the ownership of Jusama." *Id.* at 53. He stated that he was never paid from HQV personally (to his recollection) and that he was unsure if Defranco had been. *Id.* at 53-54. He also stated that he did not disclose his relationship with Jusama because he did not believe he was asked about it, and that no notes were passed during the deposition. *Id.* at 218.

The Court finds that by testifying that the business he operated in Canada through which Zinus employed him as an independent contractor was "HQV," Lawrie also made an affirmative misrepresentation. Lawrie was a part owner of Jusama, and HQV was also a part owner of Jusama, but

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

HQV itself was *wholly owned* by Ely Benzaquen. Lawrie was not paid by HQV, Lawrie had no ownership interest in HQV, and HQV did not have any employees. Lawrie’s decision to testify that his business was called “HQV” and omit any reference to Jusama, viewed in light of (1) the purchases made from Woody by Jusama, (2) the references to note-passing directly following his statement at the deposition, and (3) his later testimony regarding the structure of his business strongly suggests that his responses were intended to evade any reference to Jusama in this litigation.

b. Materiality

Cap Export must also establish that affirmative misrepresentation in question was “material,” that it “prevented the losing party from fully and fairly presenting [its] defense.” *Casey*, 362 F.3d 1254, 1260 (9th Cir. 2004). If Lawrie had fully disclosed his prior experience and knowledge of the Woody beds, the evidence Cap Export presents now regarding purchases made in advance of the filing of the ‘123 patent would have been available for the Court to consider during its prior analysis on obviousness and anticipation, which led to partial summary judgment for Zinus with regard to the ‘123 patent’s validity.

Rule 60(b)(2)’s “newly discovered evidence” materiality requirement requires the moving party to establish that the outcome of the case would have been different. *See Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (“To merit relief under Rule 60(b)(2), “[t]he newly discovered evidence must be of such magnitude that production of it earlier would have been likely to change the disposition of the case.”) (quoting *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 211 (9th Cir. 1987)). The materiality requirement under Rule 60(b)(3) is substantially lower, and “when the case involves the withholding of information called for by discovery, the party need not establish that the result in the case would be altered.” *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990). While the parties dispute whether the evidence presented here is sufficient on its own to render the ‘123 patent invalid, Zinus does not dispute that the evidence concealed by Lawrie’s misrepresentations is material to the question of the ‘123 patent’s validity.

Accordingly, the Court concludes that evidence of three separate purchases of beds functionally identical in design to the claims in the ‘123 patent would have been material to Cap Export’s arguments against the ‘123 patent’s validity, and therefore Lawrie’s misrepresentations regarding his knowledge of

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

those beds “prevented [Cap Export] from fully and fairly presenting [its] defense.” *Casey*, 362 F.3d at 1260 (9th Cir. 2004).

c. Due Diligence

The Ninth Circuit reads a due diligence requirement into Rule 60(b)(3), similar to the express due diligence requirement embodied in Rule 60(b)(2). *See Casey*, 362 F.3d at 1260 “Federal Rule of Civil Procedure 60(b)(3) require[s] that fraud ... not be discoverable by due diligence before or during the proceedings.” *Id.* (quoting *Pac. & Arctic Ry. and Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991)); *Jones*, 921 F.2d at 878. Ninth Circuit district courts applying Rule 60(b)(3) have construed the due diligence requirement under Rule 60(b)(3) to focus on whether the prejudiced party had prior knowledge of the alleged misrepresentation at issue in the motion, or sufficient notice to choose to pursue it at that time. *See Acacia Research Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 2009 WL 10671395, at *5 (C.D. Cal. June 12, 2009) (moving party declined to bring a motion to compel or otherwise pursue discovery issue where opposing party lodged objection); *United States for Use & Benefit of Nasatka Barrier, Inc. v. Int’l Fid. Ins. Co.*, 2019 WL 6971381, at *2 (C.D. Cal. Apr. 2, 2019) (plaintiffs were aware of alleged misrepresentations involving adequacy of discovery responses during the trial and expressly declined to bring them to the Court’s attention); *Sathianathan v. Smith Barney, Inc.*, 2009 WL 537158, at *5 (N.D. Cal. Mar. 3, 2009) (alleged fraudulent statements were contained in opposing party’s motion and reply brief, and moving party failed to act on it at that time); *see also Berry v. Dillon*, 291 F. App’x 792, 795 (9th Cir. 2008) (evidence of alleged misrepresentation in possession of moving party before trial, making 60(b)(3) relief inappropriate).

Zinus disputes Cap Export’s general due diligence in this litigation, in both its Opposition and supplemental briefs. *See* Dkt. 255; Dkt. 286. Zinus asserts that Cap Export was not diligent in its discovery efforts, and argues that Cap Export failed to seek discovery with regard to Cap Export’s knowledge of prior art, to depose Lawrie in more detail on his knowledge of prior art, and to depose certain non-parties discussed in the Court’s analysis above, including Woody, XXITC, Agnes Tan, and Suk Kan Oh, the inventor listed on the ‘123 patent. Dkt. 286 at 3-8. In response, Cap Export argues that it engaged three separate prior art search companies to uncover prior art, served interrogatories and requests for production on both Lawrie and Zinus, and actually deposed Lawrie on this topic. Dkt. 286 at 11-12; Dkt. 249 at 24.

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

The Court begins its due diligence analysis by noting that Cap Export did depose Lawrie. Zinus' suggestion that Lawrie would have been more forthcoming if Cap Export had specifically designated the topic of "prior art" for deposition is wholly implausible given the evidence in the record regarding Lawrie's misrepresentations on this topic. *See* Dkt. 286 at 4. Cap Export asked him, repeatedly, about his knowledge of disassembled beds shipped in a single box with all components stored in the headboard. And as the Court has previously concluded, Lawrie then repeatedly misrepresented his knowledge of such bed designs, in light of the multiple purchases by Jusama of bed frames matching the claims in the '123 patent, all purchased prior to the filing of the patent. Cap Export also hired three separate prior art search firms during the course of litigation. Dkt. 287 at 11. Zinus asserts that those firms conducted "very inexpensive, incompetent and shoddy on-line patentability searches" rendering them "worthless" for purposes of patent litigation. Dkt. 286 at 3. Zinus has presented no evidence in support of that conjecture, and as discussed below the unique nature of the prior art relevant here (physical products sold prior to the patent's filing date) pushes against any finding that Cap Export's efforts to discover prior art were not reasonably diligent.

Cap Export's interrogatories demanded that Zinus "State all facts in support of YOUR contention that the '123 Patent is not obvious to a person of ordinary skill in the art" and "State all facts in support of YOUR contention that the '123 Patent is valid." Dkt. 249-2, Ex. 18. As phrased, these interrogatories could be interpreted to require Zinus only to disclose facts *in support* of the Patent's validity, which would not necessarily extend to prior art in Zinus' possession. *Id.* But Zinus' response to these interrogatories effectively declined to disclose any information to Cap Export whatsoever on those topics. *Id.* The Court finds it unlikely that more effectively drafted interrogatories would have resulted in greater disclosure of information by Zinus. Moreover, Lawrie's deposition testimony establishes that although he was Zinus' president at the time of his deposition in October 2016, the purchases from Woody between 2011 to 2013 were made through Jusama and shipped to Canada. There is no evidence that Zinus (a California corporation operating separately from Jusama) actually had any prior art or knowledge of the Woody purchases. The sole exception is the president, Lawrie, who the Court concludes would have been exceedingly unlikely to disclose that information in response to a discovery request made to Zinus, given the affirmative misrepresentations he made when deposed in this lawsuit, and his efforts to conceal Jusama's involvement.

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

The Court also notes that Zinus' arguments regarding the third-parties that Cap Export *could have* pursued discovery from ignores the fact that none of those individuals or corporations were parties to this lawsuit. Cap Export would have necessarily required a reason to pursue such discovery, and as discussed above, the deposition of Lawrie where he failed to disclose (1) his prior purchases of beds matching the exact description of the '123 patent and (2) the existence of Jusama, denied Cap Export that opportunity to exercise reasonable due diligence in unearthing this evidence as a result of Lawrie's misrepresentations.

Cap Export has offered no clear explanation for why it failed to depose the alleged inventor of the '123 patent, Suk Kan Oh ("Oh"), during the course of the prior litigation. Cap Export submits a declaration by Oh, in which he states that after inventing the bed in June 2013, "Zinus-China" (the Xiamen-based Chinese company, not the California-based "Zinus" that is a party to this lawsuit and where Lawrie served as president) entered into a Cooperation Agreement³ with Woody in August 2013 to manufacture a "bed in a box" consistent with the '123 patent, through production at the XXITC facilities in Xiamen, China. Dkt. 269-1 at 3. Oh's declaration carefully states that "[t]o my knowledge, I have not personally inspected any platform bed made by XXITC in which all of the component parts fit inside a compartment in the headboard of the bed. I do not believe that I have ever seen any pictures of any bed produced by XXITC." This assertion regarding Oh's personal knowledge does not contradict this Court's prior conclusion that Woody Furniture previously manufactured and sold to Jusama bed frames that embody the claims of the '123 patent, because it only addresses Oh's personal knowledge, and does not dispute whether Woody actually produced beds mirroring the claims of the '123 patent.⁴ See *supra* Part IV.a.i.

Zinus argues that *if* Oh had been deposed, he would have mentioned this agreement with Woody in the course of his deposition, and that *if* Cap Export had been more diligent, they could have sought

³ The Cooperation Agreement is attached to the Oh Declaration. Dkt. 269-1, Ex. B. However, it is entirely in a non-English language, with the exception of two separate references to "Woody Woodworking." *Id.* The Court cannot take notice of the contents of the alleged Cooperation Agreement without a translation pursuant to Rule 604 of the Federal Rules of Evidence.

⁴ The Court acknowledges that the precise relationship between the different Zinus entities and Woody Furniture is somewhat unclear on this record. However, much of this lack of clarity can be traced to Lawrie's misrepresentations regarding his prior "bed in a box" purchases from Woody, and his concealment of Jusama more generally during his deposition.

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-00371-SVW-MRW	Date	5/11/2020
Title	<i>Cap Export, LLC v. Zinus, Inc. et al</i>		

discovery from Woody and separately uncovered Lawrie’s purchases on behalf of Jusama. Dkt. 286 at 4. But given this Court’s conclusion based on the testimony of Agnes Tan that Woody was *already* manufacturing beds embodying the elements of the ‘123 patent’s claims, the Court finds it highly unlikely that a deposition of Oh would have revealed information to Cap Export that would have led to evidence that the patent was potentially invalid. Cap Export’s failure to depose Oh does not create a “safe harbor” for misrepresentations by Lawrie at his deposition. The Court will not conclude that the mere possibility that a deposition of Oh would have led Cap Export to investigate Woody Furniture, and then independently uncover purchases made by Lawrie through a separate corporate entity in Canada, supports the conclusion that relief under 60(b)(3) should not be foreclosed by a lack of due diligence in these circumstances.

The material evidence concealed by Lawrie’s misrepresentation was not widely available, a matter of public record, or information already in Cap Export’s possession. *Cf. In re M/V Peacock on Complaint of Edwards*, 809 F.2d 1403, 1405 (9th Cir. 1987) (insufficient due diligence under 60(b)(2) when relevant records were not in exclusive control of opposing party, and could have been uncovered by investing the matter with the Coast Guard); *Daghlian v. DeVry University, Inc.*, 582 F. Supp. 2d 1231, 1253 (C.D. Cal. 2007) (plaintiff failed to show due diligence under 60(b)(2) when relevant evidence was publicly available on website); *Sathianathan v. Smith Barney, Inc.*, 2009 WL 537158, at *9 (N.D. Cal. Mar. 3, 2009) (information already disclosed to plaintiff years before the alleged misrepresentation and included in motion briefs by defendant not sufficient to support a 60(b)(3) motion); *United States v. Tanoue*, 165 F.R.D. 96, 97–98 (D. Haw. 1995) (unsworn statements of plaintiff could self-evidently have been obtained by due diligence at a prior point in the litigation). Zinus’ argument regarding due diligence would effectively excuse misrepresentations by an opposing party in all circumstances where an alternate course of discovery would have uncovered the fraud. The Court declines to interpret Rule 60(b)(3) in such a restrictive manner.

The relatively unique nature of the relevant evidence here also influences the Court’s analysis. “Prior art” as defined in the patent law embodies a wide universe of potential types of publicly available evidence. *See* N.D. Cal. Model Patent Jury Instructions at 22 (Oct. 2019) (https://www.cand.uscourts.gov/wp/content/uploads/2019/12/NDCAL_Model_Pat_Jury_Inst_8-2017_updated_10-2019.pdf). But most prior art searches are document-focused, making the existence of physical products embodying the three claims of the ‘123 patent an especially challenging type of

Initials of Preparer

PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 5/11/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

potential prior art to unearth during discovery. *See* 1 Pat. L. Fundamentals § 1:29 (2d ed.) § 1:29. Overview of the Patenting Process (“A comprehensive prior art search requires both searching full text data bases such as those available on the Internet and searching the U.S. Patent Classification system.”). Here, the third-party evidence concealed by Lawrie’s misrepresentations was not documents discoverable in a standard prior art search, but concealed purchases from a Malaysian furniture company.

Finally, the Court also notes that in the context of affirmative misrepresentations by an opposing party’s agents, Ninth Circuit precedent suggests that due diligence requirements of Rule 60 should be construed more leniently.⁵ *See In re M/V Peacock*, 809 F.2d at 1403 (“we think a different case would be presented if the Shipowners’ misrepresentations had been made with the intent to deceive Craig or her counsel.”)

V. Conclusion

The Court concludes that Cap Export has met its burden of establishing by clear and convincing evidence that it is entitled to relief under Rule 60(b)(3). Cap Export’s motion to set aside this Court’s judgment of May 30, 2019 is GRANTED. Dkt. 243. The Court VACATES the Stipulated Final Judgment and Permanent Injunction in favor of Zinus. The Court orders the parties to conduct any additional discovery or settlement negotiations necessary to bring this case to a conclusion, and sets a deadline to file any renewed summary judgment motions by September 7, 2020. Following hearing on a motion or cross-motions, the Court will set a trial date if necessary.

⁵ The Court notes that the Ninth Circuit in *M/V Peacock* analyzed Rule 60(b)(3) without expressly discussing the implied due diligence component. 809 F.2d at 1404-05. But that analysis focused on the plaintiff’s prior knowledge of the crucial nature of the allegedly misrepresented information and failure to verify it with a third-party (the Coast Guard), analysis implicitly grounded in due diligence. *Id.* at 1405. The Court’s suggestion that “a different case would be presented” if the defendant had made affirmative misrepresentations strongly implies a different due diligence inquiry in the context of an affirmative misrepresentation, like the one before this Court.

Initials of Preparer

PMC