EXHIBIT R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 13-cv-0876-WJM-NYW

XY, LLC,

Plaintiff / Counterclaim Defendant,

v.

TRANS OVA GENETICS, LC,

Defendant / Counterclaim Plaintiff.

ORDER ON POST-TRIAL MOTIONS

Plaintiff and Counterclaim Defendant XY, LLC ("XY") brought this case against Defendant and Counterclaim Plaintiff Trans Ova Genetics, LC ("Trans Ova") arising out of disputes over a License Agreement which had permitted Trans Ova to use XY's patented technology. (ECF No. 301.) The Court held a three-week jury trial commencing on January 25, 2016, and the jury rendered a verdict on February 12, 2016. (ECF Nos. 419, 461.)

The jury found that XY breached the License Agreement (the "Agreement") and the duty of good faith and fair dealing because it had not proven it had the right to terminate the Agreement in November 2007, and awarded Trans Ova $528,000 in damages for that breach. (ECF No. 461 at 1–2.) The jury also found that Trans Ova had committed a material, uncured breach of the Agreement prior to April 16, 2009, such that the Agreement terminated on that date, and awarded XY $1,481,000 in damages for that breach. (*Id.*) The jury found that Trans Ova had infringed all claims

of the ten patents in suit, that Trans Ova's infringement was willful, and that Trans Ova had not proven that any of the patent claims was invalid or unenforceable. (*Id.* at 3–9.) Consequently, the jury awarded XY $4,585,000 in patent infringement damages. (*Id.* at 9.) The jury also found that XY had unclean hands, barring claims for unjust enrichment and injunctive relief. (*Id.*) Finally, the jury rejected Trans Ova's recoupment claim under the antitrust laws, finding that Trans Ova had not proven that the semen sorting technology market was a relevant market or that XY had a specific intent to monopolize that market. (*Id.* at 10–12.) The Court has yet to enter Final Judgment.

Before the Court are eight post-trial motions:

(1) Trans Ova's Renewed Motion for Judgment as a Matter of Law Under Rule 50(b) or, in the Alternative, Motion for a New Trial Under Rule 59(a) or, in the Alternative, Motion to Alter or Amend a Judgment Under Rule 59(e) ("Breach Motion") (ECF No. 473);

(2) Trans Ova's Motion to Alter or Amend a Judgment Under Rule 59(e) ("Willful Infringement Motion") (ECF No. 477);

(3) Trans Ova's Motion for a New Trial Under Rule 59(a) ("Relevant Market Motion") (ECF No. 479);

(4) Trans Ova's Motion for a New Trial Under Rule 59(a) on the Issue of Invalidity ("Invalidity Motion") (ECF No. 480) (together with the Relevant Market Motion, "New Trial Motions");

(5) XY's Motion to Declare this Case Exceptional Pursuant to 35 U.S.C. § 285 and to Award Attorneys' Fees ("Fee Motion") (ECF No. 467);

(6) XY's Motion for Award of Enhanced Damages for Patent Infringement Under 35 U.S.C. § 284 ("Damages Motion") (ECF No. 468);

(7) XY's Motion to Set an Ongoing Royalty Rate ("Royalty Motion") (ECF No. 471); and (8) XY's Motion for Prejudgment Interest ("Interest Motion") (ECF No. 472).

For the reasons set forth below, the Willful Infringement Motion is granted, the Royalty Motion and the Interest Motion are granted in part, and the remaining motions are denied.

I. TRANS OVA'S BREACH MOTION

Trans Ova's Breach Motion seeks to reconcile the two breaches of contract found in the jury's Verdict with a ruling that XY's breach rendered Trans Ova's breach legally inoperative. (ECF No. 473.) Trans Ova seeks judgment as a matter of law under Federal Rule of Civil Procedure 50(b), or in the alternative, an amended judgment or new trial under Rule 59. (*Id.*)

A. Legal Standards

In evaluating a motion brought under Rule 50(b), the Court must examine all the evidence admitted at trial, construe that evidence and the inferences from it in the light most favorable to the non-moving party, and refrain from making credibility determinations and weighing the evidence. *See Tyler v. RE/MAX Mountain States*, 232 F.3d 808, 812 (10th Cir. 2000). Judgment as a matter of law is appropriate "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Finley v. United States*, 82 F.3d 966, 968 (10th Cir. 1996).

Alternatively, Defendant seeks a new trial under Rule 59(a)(1), which permits the Court to order a new trial "for any of the reasons for which a new trial has heretofore

been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1). Such a motion can be granted based on any error so long as "the district court concludes the 'claimed error substantially and adversely' affected the party's rights." *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1217 (10th Cir. 2008) (quoting *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1297 (10th Cir. 1998)).

Defendant's next alternative request to amend the judgment is brought under Rule 59(e). "Rule [59(e)] was adopted to make clear that the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 450 (1982) (internal quotation marks omitted). Accordingly, the Court may amend the judgment in its discretion where there has been an intervening change in the controlling law, new evidence that was previously unavailable has come to light, or the Court sees a need to correct clear error or prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

Where a jury's verdict appears internally inconsistent, "[t]rial courts have a duty to attempt to reconcile juries' answers to special verdict questions in order to avoid the need for retrials." *Palmer v. City of Monticello*, 31 F.3d 1499, 1505 (10th Cir. 1994) (citing *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963)). The obligation to harmonize the jury's findings if possible arises from the Seventh Amendment. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). "If there is any view of the case which makes the answers consistent, the case must be resolved in that way." *Palmer*, 31 F.3d at 1505. The Court may find fatal inconsistency

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