

09-17533

United States Court of Appeals for the Ninth Circuit



SHELDON G. ADELSON,
Plaintiff-Appellant,

v.

MOSHE HANANEL,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Appellant Sheldon G. Adelson is a natural person. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Nevada had jurisdiction over this action because it is between a citizen of a State and a citizen of a foreign state and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332.

The District Court issued a judgment “in favor of defendant and against plaintiff.” A-49. This Court has appellate jurisdiction to review the judgment under 28 U.S.C. § 1291.

The judgment of the District Court is dated October 13, 2009. Appellant Sheldon G. Adelson filed a notice of appeal on November 10, 2009. Because the notice of appeal was filed within 30 days of the judgment, it was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether, in an action for defamation in which the defendant disputes having made the defamatory statement to a newspaper reporter, the trial court errs by excluding evidence that other reporters attributed the identical statement to the defendant and that the defendant had engaged in a concerted effort to influence the media.

2. Whether, when counsel for one party flouts a trial court's rulings by repeatedly offering improper, prejudicial, arguments and questions before the jury, the court errs by prohibiting opposing counsel from responding and by refusing to give a curative instruction.

PRELIMINARY STATEMENT

In this defamation case, the central issue was whether the defendant had even made the statement at issue. The plaintiff, Sheldon Adelson, had available powerful evidence on this point: documentary proof that the defendant, Moshe Hananel, had made the same statement on other occasions. The trial court erroneously excluded that important evidence on the grounds that the other statements were not alleged as independent torts in this lawsuit. That mistake had a demonstrable and prejudicial impact on the case: the verdict form shows that the jury ruled in the defendant's favor because it was not persuaded that he had made the statement. The evidence of other, identical statements should have been admitted under any standard of relevance, because it corroborated the attribution of the statement by the reporter who wrote the article at issue and thereby made the defendant's denial much less plausible. The trial court's ruling on that issue was reversible error.

The trial was also tainted by defense counsel's persistent violation of the trial court's ruling precluding either side from discussing separate, pending litigation between the two parties. Defense counsel's flouting of that ruling extended beyond a mere accident or occasional slip-up; it was egregious and continuous. The trial court, however, not only refused to permit plaintiff's counsel to respond

to the one-sided story that had been told, but also to give any curative instruction. That error was prejudicial and merits a new trial as well.

STATEMENT OF THE CASE

Adelson filed a complaint for defamation in the District of Nevada on December 11, 2006. A-234 (Docket #1). Hananel filed five motions to dismiss, some of which resulted in discovery. A-236, 240, 245 (Docket #20, 59, 61, 63, 107); *see also* A-238 (Docket #39, 42) (ordering discovery). He also filed several motions to extend time or to stay. A-235, 237, 246 (Docket #6, 14, 35, 109). Substantive discovery began in March of 2008. Docket #127. A jury trial was held from October 6 through October 9, 2009. The jury returned a verdict in Hananel's favor, and the District Court entered judgment on October 13, 2009. A-49. Adelson filed a timely notice of appeal on November 10, 2009. A-47.

STATEMENT OF THE FACTS

Moshe Hananel is a former employee of Interface Partners International Ltd. (IPI), a company owned by Sheldon Adelson to make and manage investments in Israel. Hananel's employment ended in 2000. Hananel claims that an alleged oral contract with Adelson entitles him to a huge finder's fee for what he describes as his role in the establishment of a multi-billion-dollar casino and hotel development

made by Las Vegas Sands, Inc. in Macau, China.¹ In 2009, shortly before trial began in this case, a federal court in Massachusetts ruled, after a bench trial, that there was never any such agreement. Litigation brought by Hananel in Israel addressing essentially the same claim is still pending.

The Defamatory Statement

When Hananel filed his lawsuit in Israel in January 2004, he issued a press release titled, “Lawsuit Filed against Sheldon Adelson and Others Re 12% Stock Options in Macau Casino.” A-152 - 54.² The press release trumpeted Hananel’s demand for 12% of the Macau development and provided his version of the contract and an alleged cover-up by Adelson. Interestingly, it was written not in Hebrew, the official language of Israel and its courts, but in English. The release ended with contact information for Hananel’s publicist, Orly Katav, including her email address and office telephone, mobile, and fax numbers—all including Israel’s +972 country code, indicating that she expected to be called from overseas.

Id.

¹ Hananel’s claim essentially was that he “discovered” Macau—Asia’s largest gambling center since at least the 1960’s—and that a hastily-prepared proposal for a residential development in the Zhuhai region of southern China somehow led to the massive Macau development. *E.g.*, A-209 ¶ 5.

² The date on the press release, “4/1/04,” reflects the Israeli date-month-year format. A-13-14.

Following the adjournment of a hearing in the Israeli litigation in February of 2004, Hananel made the defamatory statement that is at issue in this case: “Regarding opportunism, the only opportunist here is Mr. Adelson, who uses the fact that I’m blind now to expel me from my rights.” A-151. That statement, which was published in the *Las Vegas Sun* on February 18, 2004, was false: Adelson’s defense of Hananel’s billion-dollar option claim had nothing to do with Hananel’s supposed visual impairment (which itself was heavily disputed). Moreover, Mr. Adelson was not an “opportunist” but instead was (as the Massachusetts court found) asserting valid defenses against Hananel’s massive and unfounded claim to the Macau investment. The statement was published on the *Sun*’s website (see <http://www.lasvegassun.com/news/2004/feb/18/hearing-delayed-in-suit-over-macau-development/>), where it remains easily available to the public around the world. As Adelson testified, the permanence of the web publication makes the defamatory statement particularly threatening to his reputation. See 10/6/09 Tr. at 130.

At trial, Hananel admitted speaking to the *Sun* reporter (A-102, A-230 ¶ 34). As to the statement in the *Sun*, however—the one statement that happened to be the basis of the defamation claim—he insisted that he was misquoted (although he testified that he took no steps to correct the supposed misquote). A-104; 10/7/09

Tr. at 309-10. Nonetheless, he also asserted at length that every word of that quotation was true. A-111-15, 115-16; *see also* A-230 ¶ 32.

Adelson sought to depose the *Sun* reporter, Richard Velotta, in order to establish his journalistic integrity and his practices and those of the *Sun* on quoting sources. Magistrate Judge Leen granted the reporter's motion to quash the subpoena, however, on the ground that that information was privileged under Nevada's news shield statute. *See* Docket #196.

Though Adelson was barred from obtaining evidence that Velotta was a reliable reporter, the accuracy of his quotation was bolstered by the undisputed fact that the same statement published in the *Sun* was published verbatim in at least two other newspapers as well—the *Hoje Macau* (A-155) and the *Ponto Final* (A-158), both in Macau—and was described as a direct quote from Hananel in both cases. Contrary to Hananel's assertions that he merely responded to reporters who contacted him (A-120), the *Ponto Final*, in another article, reported that that the “press release [was] sent to our editorial office.” A-171 (also referring to “the press release sent by the complainant businessman”). In a third article, the *Ponto Final* reported that “[t]o prove [his allegations], he [Hananel] sent *Ponto Final* a copy of a letter addressed to him by Interface International Partners [*sic*].” A-176.

Other newspapers in Nevada and around the world also published interviews in which Hananel took credit for the Macau development and asserted claims

against Adelson. The *Las Vegas Business Press* reported that Hananel said, among other things, that “the basic vision of the [Macau] opportunity and what would be there, I must admit humbly, is mine. The first time I talked to Sheldon Adelson about Macau, I showed him where it was located and how to reach Macau. I presented to Sheldon Adelson the existence of Macau . . . and I had to explain to him where it is.” A-161 (ellipsis in original). In addition to the *Sun*, the *South China Morning Post* (A-164), the *Ponto Final* (A-171) (in multiple articles), and another article in the *Las Vegas Business Press* (A-182) also reported speaking to Hananel or Orly Katav. Hananel never disputed making any of those statements. Nonetheless, as explained below, all of that evidence was excluded at trial.

Hananel’s publicity campaign was not haphazard—he directed his media efforts at specific pressure points in Israel, Las Vegas, and Macau. As the *Las Vegas Business Press* reported:

The [Israeli] case has attracted attention in the Macau and Hong Kong media. Although Adelson, Wynn and Ho had won the three initial concessions, the Macau government had also picked three runners-up, who would take the concession if one of its holders could not fulfill their obligations or had run afoul of the parameters.

A-182. According to that account, widespread publicity itself could impair the Macau development, independent of any legal merit of Hananel’s claims. Similarly, in another exhibit barred from the trial, Hananel wrote to Goldman Sachs’s lawyers in Israel, raising the specter that Goldman had committed

securities fraud by failing to mention Hananel's claims in the prospectus for the initial public offering of Las Vegas Sands Corp. stock. A-185.

Further, the bare assertion of a legal claim against Adelson could jeopardize his livelihood and charitable activities, not only because the business community in which Adelson operates regards reputation as a vital commodity (A-148-149), but because his businesses depend critically on the ability to retain an unrestricted Nevada gaming license. A-146-147. State gaming authorities require licensees to maintain a "squeaky clean" public appearance, which Hananel's statements to the Nevada press were designed to tarnish. *Id.* Such reputational damage, once suffered, could well be irreversible. *Id.* Similarly, charitable organizations regularly reject contributions from individuals and organizations upon even the perception of moral deficiency. A-150. Thus, apart from the personal insult that Adelson suffered (*id.*), any damage to his reputation puts him in peril of serious financial loss, a consequence of which Hananel was surely aware.

The Proceedings Below

Adelson first filed a claim for defamation as part of his lawsuit in the District of Massachusetts. Docket #1 in 04-cv-10357 (D. Mass.) ¶¶ 43-47. While the Massachusetts court found specific personal jurisdiction over Adelson's other claims, the defamation claim, because it centered around a statement to a Las Vegas reporter, was determined to center around Nevada and was dismissed.

Docket #78 at 24, 04-cv-10357 (D. Mass.). Adelson subsequently refiled that claim in this action in the District of Nevada. The parties are also involved in two lawsuits brought by Hananel in Israel, one addressing Hananel's claim to the Macau development and one involving issues of Israeli labor law, including alleged accruals of unused vacation time. A-210 ¶ 18.

Evidence of Other Statements

Throughout the pre-trial proceedings, the Magistrate Judge took the position that this was a "simple and straightforward case." *E.g.*, A-7; A-226 ("it's going to be a surgical case, not a wide open one"). Accordingly, she excluded evidence of the many other statements by Hananel to the press, including the two verbatim republications of the statement at issue in this case. A-13-31.

At the pre-trial hearing, Adelson argued that the press release and Hananel's hiring of a publicist were relevant to show his state of mind in making the statement to the *Sun*. A-16. The Magistrate Judge ruled those facts inadmissible, further constraining the scope of the case:

What I believe is admissible in this case and what the jury should know is that Adelson and Hananel have been involved in protracted and contentious litigation in Israel and federal court, and the District of Massachusetts and here, disputing whether Hananel is entitled to options as a result of the casino venture in which Adelson invested and developed in Macau, and that the litigation has been ongoing between the parties since 2002. That gives the jury enough in which to understand the statement that is alleged to be defamatory and the conduct which precedes, or the statements that were made by the parties in connection with the prior lawsuits is not otherwise admissible.

A-16-17. In other words, the only fact, other than the statement itself, that the Magistrate Judge believed was relevant was the existence of prior litigation. Following that explanation, the Magistrate Judge, without comment, excluded each of the other newspaper articles described above. A-22-31.

The District Court excluded Hananel’s press release and the Macau articles for a different reason. It noted that Adelson had based the defamation claim on only the one statement in the *Las Vegas Sun*—that is, Adelson was not claiming damages for statements made in other countries to other newspapers. A-43. The District Court seized upon that fact to exclude *any* use of the other publications, even as evidence that Hananel had made the statement to the *Sun* or to show his state of mind. A-4-5.

When Hananel moved under Rule 50(a) to strike the punitive damages claim because of a lack of evidence of malice, the court relied on Hananel’s testimony “that the reporter called him and not that he called the reporter or reached out to the reporter.” A-128. During Hananel’s cross-examination, he stated that the initial contact was made by the *Sun* reporter, who called Hananel. A-119. However, when Adelson sought to impeach Hananel’s testimony with the press release that Hananel’s publicist had, in fact, distributed around the world, the court refused to admit it, reasoning that “[t]he press release is irrelevant to this case.” A-121.

The Massachusetts Case

Before trial, Hananel filed a motion *in limine* to exclude reference to the ruling in Adelson's favor in the Massachusetts case. He argued that

A jury left to consider a favorable judgment for Adelson, albeit in an unrelated action, may improperly conclude that Adelson's defamation claim is meritorious or give unearned credibility to Adelson and his representations in this case. On the other hand, precluding any reference to Judge Saris' written order and judgment in no way handicaps or prejudices Adelson since ***the two actions are factually unrelated and have no bearing on one another.***

A-196 (emphasis added). The District Judge granted that motion. A-9; *see also* A-32 (M.J. Leen: "Obviously I have -- have severely restricted the exhibits that either side may offer in this case in my preliminary rulings concerning prior litigation among the parties.").

At trial, in what is hard to see as anything other than a deliberate plan to flout the ruling that he himself had invited, Hananel's counsel brought up the Massachusetts proceedings again and again in an effort to insinuate that this case was merely an attempt to harass Hananel. Although the trial court sustained objections every time, the jury nonetheless heard considerable argument suggesting that the Massachusetts lawsuits—filed February 22, 2004 and September of 2006, both ***after*** the statement at issue here—were harassing. As a result, the jury heard Hananel's allegations that Hananel tried to settle the Israeli case, while Adelson wanted to litigate; that Adelson engaged in a litigation

“counteroffensive”; that IPI had withdrawn one lawsuit in Israel and refiled it in Massachusetts; and that Hananel had suffered personally and financially as a result.

That misconduct began in opening argument:

[MR GREEN:] Mr. Hananel, through his attorneys in Israel, approached Mr. Adelson and his counsel, they sought to work things out. They didn’t want to litigate something. They tried to settle something --

MR. KENT: Your Honor, this is irrelevant and improper.

THE COURT: It is irrelevant. . . . *The objection’s sustained.*

MR. GREEN: Going to get right into what happens next because it was directly relevant to this case and why this case was brought.

Mr. Hananel proceeds to file an action in Israel to enforce his rights. Again, he doesn’t even know about Macau then.

THE COURT: *The objection’s sustained. The objection’s sustained.* That’s not proper. That’s not relevant here. Please wrap up that part. Get to this case here.

MR. GREEN: Getting to this case, Your Honor.

THE COURT: It’s not this case, I’ve made that ruling.

* * *

[MR. GREEN:] Mr. Adelson then goes on the counteroffensive and files one case after another and these cases are important, lady and gentlemen of the jury, because it relates to the truth of the statement.

THE COURT: *The objection’s sustained.*

All right. Stop.

The objection’s sustained. That’s not proper argument here. . . .

Please proceed with the Court's direction.

MR. GREEN: . . . Mr. Adelson proceeded over the next number of years to file litigations that were vexatious, oppressive and harassing against Mr. Hananel.

MR. KENT: Sorry, Your Honor. Objection.

MR. GREEN: The first one he does is in 2002 --

THE COURT: *Objection sustained.* . . .

MR. GREEN: . . . Mr. Adelson, over the course of the next number of years, files paper after paper in case after case. He starts an Israeli case which he files in late 2002 blaming Mr. Hananel for embezzlement when there was nothing to it.

THE COURT: *The objection is sustained.* This is not relevant to this case. . . .

Please proceed according to the Court's direction.

MR. GREEN: That case was ultimately withdrawn only after paper after paper to be refiled in Massachusetts with paper after paper only to be dismissed there.

THE COURT: *The objection's sustained.*

A-138-42 (emphasis added).

The misconduct continued during direct examination of Hananel:

Q. And what happened at the end of four years [of litigation in Israel], sir?

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

BY MR. GREEN:

Q. Was that case refiled in Massachusetts by Mr. Adelson?

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

BY MR. GREEN:

Q. How many appeals did Mr. Adelson file, sir, in the United States?

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

BY MR. GREEN:

Q. Now, Mr. Adelson gave testimony on the first day of this trial in which he acknowledged a quotation at his deposition about having you run out of money. What is -- what has all of this meant to you financially, sir, in terms of all of this litigation?

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

BY MR. GREEN:

Q. What have been the consequences to you personally, sir, as a result of all the litigation filed by Mr. Adelson?

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

Irrelevant.

BY MR. GREEN:

Q. Are you familiar with the fact, sir, that when this Nevada suit was first filed, Mr. Adelson sued you for civil harassment?

A. Yes, sir.

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

BY MR. GREEN:

Q. Is that claim still with us today, sir?

MR. KENT: Objection. Irrelevant.

THE COURT: *Sustained.*

Irrelevant.

A-116-118 (emphasis added). Following direct examination of Hananel, Adelson sought permission to introduce his side of the Massachusetts proceedings. A-124. The court denied that request. *Id.*

The court also denied Adelson's request for a curative jury instruction. A-125. Counsel pointed out that "[i]n his direct examination, Mr. Hananel testified about how the -- the Israeli proceedings are still ongoing, nine years of litigation that the Macau issue is up for decision in that case." A-125-126. The court denied that request, finding that the issue was "irrelevant." A-126.

Hananel's counsel continued to flout the court's order in his closing statement:

[MR. GREEN:] As of January 2004 Mr. Hananel was asserting rights in the Israeli litigation. He was asserting rights to the fact that he did not get sufficient notice from Mr. Adelson, that he was entitled to certain benefits, that he was entitled to certain options and the case had been amended as of 2003, this was in effect as of 2004, the cases had been consolidated, to add his option rights for Macau. That was one of his rights.

And as of January 2004 --

THE COURT: Now *that's as far as you should go* on the rights. I think I've given you a fair chance.

* * *

MR. GREEN: . . . The basis for his statement on that is that Mr. Adelson had, on November 17 -- on November 17 of 2002, more than two and a half years after Mr. Hananel had been terminated back in April and May of 2000, filed for the first time this complaint alleging what he alleged there in terms of embezzlement from the company. Now, that complaint will be with you in the jury room. You will see the \$9.90 charge that he's been sued for there.³ You will see Mr. Hananel being sued for return of salary saying he shouldn't have been working --

THE COURT: Just a minute.

MR. KENT: It's irrelevant.

THE COURT: *Objection is sustained.*

MR. GREEN: . . . One other point you should keep in mind here, how is it that they wait two and a half years to bring an action against Mr. Hananel for so-called embezzlement? You'd think -- did it take them that long to find that \$9.90 charge?

THE COURT: Just a minute.

MR. KENT: It's irrelevant.

THE COURT: *Objection is sustained.* That's irrelevant. Do not proceed further with that argument, please.

A-80-82 (emphasis added).

Of course, Hananel's tale of harassment would have been much less effective in front of a jury that knew that Adelson had *won* the finder's-fee case and that the court had found Hananel's supposed "rights" to be imaginary. Therefore, after Hananel's argument, Adelson's counsel "renew[ed] our request that we be able to

³ Among the claims brought by IPI against Hananel in Massachusetts was a claim for misuse of corporate funds. The total damages alleged were over \$600,000 but included one line item for \$9.90. *See* Docket #1, 06-cv-11708 (D. Mass.) at 3.

tell the jury about the Judge Saris decision.” A-90. As counsel explained, “I appreciate the fact that the Court has sustained a series of objections, but the problem that we see is it’s been hit upon time and time again.” A-90 - 91. The court observed that “I think the argument has been improper” but denied that request. Finally, after all closing argument, Adelson’s counsel supplemented the record and repeated the request, which was denied again. A-92 - 93.

The Verdict

The jury returned a verdict in Hananel’s favor. Responding to a special verdict form, it answered “No” to the first question: “Did you find that defendant made the allegedly defamatory statement at issue in this case?” A-94 - 95. The jury did not reach the remaining questions on the form. *Id.*

SUMMARY OF THE ARGUMENT

The court below was faced with the concededly difficult task of narrowing the scope of the case, which is but one of several lawsuits between the two parties. The court’s efforts were entirely one-sided, however. The court prevented Adelson from introducing plainly relevant and highly persuasive evidence that Hananel had made the defamatory statement, and it applied its ruling concerning the Massachusetts litigation only against Adelson. A new trial is warranted to correct those errors.

First, the trial court excluded evidence that not only had Hananel reached out to news outlets around the world to disparage Adelson but that exactly the same defamatory statement that was published in the *Las Vegas Sun* was also published in two other newspapers. Had the jury known that, it could reasonably have doubted Hananel's protest that he had never made the statement that the *Sun* reporter attributed to him. The likelihood that all three reporters—one in Las Vegas and two in Macau—independently fabricated the same quotation is slim indeed. Given that we know from the verdict form that the jury found in Hananel's favor not because the statement was true but because it believed that he had never said it, the exclusion plainly was prejudicial.

Second, after an even-handed decision that neither side could make use of the Massachusetts lawsuit, the trial court tolerated an extraordinary campaign by Hananel's counsel to flout that ruling. Hananel had free rein to repeatedly introduce his irrelevant and highly prejudicial theory that Adelson is a serial litigant intent on draining Hananel's financial resources while withholding compensation to which Hananel is entitled. Yet Adelson was hamstrung from responding. His counsel, unlike Hananel's, understood orders *in limine* to be binding and sought permission to modify them. As a result, the jurors heard a skewed version of the facts—most importantly, they did not know that Hananel's claim concerning Macau was resoundingly rejected in court, nor was Adelson

allowed to remind them that the first two lawsuits were initiated by Hananel. Hananel's assertions were obviously prejudicial, as demonstrated by his own eagerness to introduce them in the face of unrelenting objections.

ARGUMENT

Standard of Review

Decisions concerning the admissibility of evidence generally are reviewed for abuse of discretion, but related questions of law are reviewed *de novo*. See *United States v. Keiser*, 57 F.3d 847, 852 n.6 (9th Cir. 1995). The District Court's response to misconduct of counsel is reviewed for clear error. See *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192 (9th Cir. 2002).

I. The District Court Erred by Precluding Testimony That Hananel Made The Defamatory Statement On Other Occasions.

The critical issue in this case—as proven by the verdict form—was whether Hananel had actually made the defamatory statement to the *Sun* reporter. Consistent with its “surgical” approach to the case, the District Court ruled that the only statement by Hananel that would be admitted was the defamatory statement to the *Sun*. The court excluded statements by Hananel to newspapers, as well as the press release that Hananel issued through his publicist. It did so even though two of the excluded articles contained the exact same quote that was published in the *Sun*, and both of those articles attributed the statement as a direct quote from Hananel. The error from excluding that evidence was compounded by the court's

prior refusal to allow Adelson to obtain any testimony at all from the *Sun* reporter—even as to his general qualifications and practices. Therefore, Adelson was prohibited from presenting any evidence at all to corroborate the quotation in the *Sun* article.

The Magistrate Judge excluded the two articles that contained the same defamatory statement and the press release because, as Hananel’s counsel put it, they “contain[] a number of statements that are not at issue in this case.” A-15. The trial court affirmed that decision on the same basis, that only the *Sun* article was the “subject matter of the plaintiff’s defamation claim.” A-3-5. Whether the other statements were “*at issue*”—in the sense of being a basis for liability—is irrelevant. The uncontradicted documentary evidence that other reporters had attributed the identical statement to Hananel was plainly *relevant* to prove that Hananel made the statement that was the basis for liability. Because that evidence went to the heart of the factual dispute that the jury resolved against Adelson, its exclusion easily satisfies the standard for prejudice and warrants a new trial.

The Federal Rules of Evidence provide that “[a]ll relevant evidence is admissible” (F.R.E. 402) and that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” F.R.E. 401. *See, e.g., Boyd v. City & County of San Francisco*, 576 F.3d 938, 943-

44 (9th Cir. 2009). Thus, evidence that is “a step on one evidentiary route to the ultimate fact” is relevant (*Old Chief v. United States*, 519 U.S. 172, 178-79 (1997)); *see also United States v. Russell*, 971 F.2d 1098, 1105 (4th Cir. 1992) (“‘relevant evidence’ is defined broadly”).

Hananel’s defense essentially was that the *Las Vegas Sun* reporter somehow misunderstood Hananel or else fabricated the statement. Evidence that at least two other reporters attributed the identical quote to Hananel belies that explanation. Addressing similar evidence in a defamation case, the Nevada Supreme Court wrote that:

Regarding Smiley’s and Hamilton’s testimony concerning other disparaging or defamatory remarks Bongiovi allegedly made about other doctors, Sullivan correctly argues that the statements were introduced to show Bongiovi’s mental state, such as motive or intent. Smiley’s and Hamilton’s testimony demonstrated that Bongiovi intentionally made the defamatory remark to Jones. Thus, the testimony was proper under NRS 48.045(2). Also, although not argued by the parties, Smiley’s and Hamilton’s testimony demonstrated that the defamatory remark about Sullivan was not a mistake or an accident, again making the testimony proper under NRS 48.045(2).

Bongiovi v. Sullivan, 138 P.3d 433, 447 (Nev. 2006) (footnote omitted). If evidence of alleged defamatory statements about *other people* is relevant to prove defamation of the plaintiff as in *Bongiovi*, then surely evidence of the very same statement at issue must be relevant as well. Thus, at the very least, the *Ponto Final* and *Hoje Macau* articles should have been admitted.

The other articles that did not contain the same statement, as well as Hananel's press release, should have been admitted as well. Contrary to Hananel's story that he passively waited to respond to press inquiries, that evidence would have shown that he engaged in an active, worldwide media campaign to press his claim for options in the Macau project and to attack Adelson where he was most vulnerable—in Macau and Las Vegas, where Adelson depended on gambling licenses, and in the financial markets, where Las Vegas Sands, Inc. had issued stock. That evidence, too, would have “made the existence of” the fact that Hananel made the defamatory statement “more probable,” and it was also relevant to prove Hananel's malice. F.R.E. 401.

In *Fiber Systems International, Inc. v. Roehrs*, the Fifth Circuit rejected “the unsupported proposition that nondefamatory statements cannot be probative of actual malice in a defamation per se case” and affirmed the admission of other statements that, “while perhaps not defamatory on their face, were relevant to the question of whether FSI defamed the defendants.” 470 F.3d 1150, 1170 (5th Cir. 2006) (“Although not admitted as substantive evidence of defamation, the documents illustrated the circumstances in which the defamatory statements were made and the state of mind of the FSI employees who made them, and were thus relevant evidence from which actual malice could be inferred.”) (quoting district

court).⁴ That “unsupported proposition” was precisely the argument that Hananel made for excluding these exhibits. Likewise, in *Workman v. Serrano*, the court held that evidence of “other articles, editorials and publications” was relevant, not “to directly establish the elements of defamation,” but to prove knowledge of falsity and malice. No. A05-834, 2006 WL 771580, at *10 (Minn. Ct. App. Mar. 28, 2006). As in *Fiber Systems*, the court erroneously rejected the argument that the plaintiff should be “preclude[d] from relying on anything but the editorial to prove his defamation case.” *Id.*

At the very least, the other articles should have been admitted as relevant background to Hananel’s interview with the *Sun*. Such evidence is admissible even when it is prejudicial. *See Plascencia v. Alameida*, 467 F.3d 1190, 1203 (9th Cir. 2006) (evidence of murder victim’s family relationships offered by the prosecution is proper “background and foundation evidence”); *United States v. Hollis*, 490 F.3d 1149, 1153 (9th Cir. 2007) (prosecution evidence found relevant to “provid[e] the jury with the necessary background to put the charged transactions . . . into context”). *Cf. Flores v. State*, 5 P.3d 1066, 1068 (Nev. 2000)

⁴ *See also Guccione v. Hustler Magazine, Inc.*, No. 80AP-375, 1981 WL 3516, at *7 (Ohio Ct. App. Oct. 8, 1981) (“Past libels by defendants of plaintiff Guccione may be admissible as having a bearing upon the issue of actual or express malice.”); *Baer v. Rosenblatt*, 203 A.2d 773, 779 (N.H. 1964) (“Any or all of the statements in these articles could be considered by the jury in their determination of whether the defendant was actuated by malice in publishing the article of January 29, 1960.”), rev’d on other grounds, 383 U.S. 75 (1966).

(“Evidence of other bad acts may be admissible to provide necessary context under the complete story doctrine.”).

Nor could the exclusion of the other statements be justified based on countervailing prejudice to Hananel. *See Marzani v. United States*, 168 F.2d 133, 137 (D.C. Cir. 1948) (“And we do not see that evidence that he had made the same statements [previously] was prejudicial to him upon a trial as to the truth of the [later] statements; in fact, it would appear to have been beneficial, in that it showed that he had consistently from a time close to the event maintained the same position.”). The statements in the other articles are simply repetitions of Hananel’s position with respect to Adelson and Macau, and the press release is Hananel’s own attempt to influence the media. The only conceivable reason for Hananel to object to that evidence is precisely because it is powerfully relevant to the plausibility of his denial that he made the defamatory statement to the *Sun*.

II. The District Court Improperly Permitted Hananel’s Counsel To Flout Its Ruling Concerning Reference To The Massachusetts Action.

A new trial should be granted for the further reason that the trial court failed to correct the prejudice from deliberate and repeated efforts by Hananel’s counsel to inform the jury about the Massachusetts lawsuit. Hananel evidently believed that he could use the fact of that litigation to turn the jury against Adelson by impugning Adelson’s motives for filing this lawsuit, and suggesting that Hananel is a helpless victim of Adelson’s litigation strategy. That gambit depended

critically on Hananel’s ability to control the flow of information to the jury. If the jury knew that it was *Hananel*, not Adelson, who “fired the first shot” (actually, the first two) in Israel, and that the only court yet to have ruled on the merits sided with Adelson, then Hananel’s pleas would ring hollow. Unfortunately, the trial court allowed Hananel to get away with that effort.

As shown above, counsel’s statements went far beyond any good faith misunderstanding of the court’s ruling *in limine* concerning the other litigation—a ruling that Hananel himself elicited—and likely constituted a deliberate (and successful) attempt to evade it. Adelson was prejudiced because his counsel abided by those rulings. When he asked for permission to provide counterbalancing facts and for a curative instruction, the court refused any relief.

A. Hananel’s Counsel Repeatedly and Flagrantly Violated the Court’s Rulings in Limine.

Hananel’s position throughout the pre-trial proceedings was that other lawsuits between the parties were irrelevant to the defamation alleged in this case. Thus, he successfully moved *in limine* to exclude reference to the Massachusetts court’s rejection of his claim for options in the Macau development. A-193; *see also* A-192 (“Whether Hananel has a right to an option in the Macau casino project is wholly irrelevant to the single defamatory statement at issue here.”). He also objected to the admission of an Adelson affidavit filed in an Israeli case relating to Hananel’s employment, on the ground that “Hananel’s employment and the terms

of same is irrelevant to the defamation claim at issue and Adelson should not be permitted to expand the scope of this case by introducing and relying on evidence of Hananel's employment, a topic that has been litigated in a number of other fora." A-188. Hananel further objected to proposed exhibits (later withdrawn), arguing that "Adelson seeks to blur the narrow and, to use Judge Leen's word, 'surgical' nature of this case to include Hananel's employment with Adelson which is not an issue in the instant case." *Id.* at A-198-91.

As outlined in the Statement of Facts, despite the court's clear pre-trial ruling that the Massachusetts and Israeli lawsuits were not relevant to this case and that all reference to them was prohibited, Hananel's lawyer was able to claim before the jury:

- that Hananel wanted to settle the Israeli case, while Adelson wanted to litigate;
- that following Hananel's suit, "Mr. Adelson then goes on the counteroffensive and files one case after another" in an improper effort to harass Hananel;
- that Adelson withdrew one lawsuit in Israel and refiled it in Massachusetts and that Adelson pursued appeals; and
- that the litigation had negative personal and financial consequences for Hananel.

In one extraordinary sequence during opening statement, the trial court was forced to sustain four consecutive objections to almost identical remarks concerning the litigation history. After counsel described Adelson’s Massachusetts suit as a “counteroffensive,” the court twice said “The objection’s sustained,” then “All right. Stop.” A-140. Without missing a beat, counsel continued with the improper argument, asserting that Adelson “file[d] litigations that were vexatious, oppressive and harassing against Mr. Hananel.” A-141. After another objection was sustained, Hananel’s counsel continued, claiming that Adelson “file[d] paper after paper in case after case.” A-142. Entirely undeterred, Hananel’s counsel completed his narrative, stating that “[t]hat case was ultimately withdrawn only after paper after paper to be refiled in Massachusetts with paper after paper only to be dismissed there.” *Id.* Finally, after the trial court granted a fourth objection, and after Hananel’s counsel had apparently completed his argument, the improper references ended. *Id.*

During the direct examination of Hananel, the trial court sustained *seven* consecutive objections, permitting Hananel’s counsel to elaborate on his theory of the litigation history through leading questions. A-116-118. Finally, during closing argument, the court first reminded Hananel’s counsel that reference to the prior litigation was barred, then sustained two more objections when counsel ignored that warning. A-80-82.

B. The Trial Court’s Refusal to Grant Any Relief to Adelson Was Prejudicial.

The persistence of Hananel’s counsel in the face of clear and repeated rulings by the court permitted him to inject his entire side of the litigation history into the case. Knowing that Adelson would be barred from responding, Hananel presented a one-sided and highly misleading account of those proceedings. For example, he implied that one suit by an Adelson-related company, Interface Partners International, Limited, sought damages of only \$9.90, an allegation that was demonstrably false but that Adelson’s counsel was not permitted to deny. A-58. He also repeatedly suggested that Hananel’s own litigation was intended to “enforce his rights” in the Macau development, rights that, unbeknownst to the jury, the Massachusetts court had decided were a figment of Hananel’s imagination. He also argued that “there was nothing to” claims brought by *IPI* (A-142)—a charge that had nothing to do with the defamation claim and that IPI had no opportunity to rebut. Finally, Hananel suggested that it was Adelson who dragged out the other proceedings, filing “paper after paper” (A-142) when a fair review of those cases would show that it was Hananel’s repeated motions to dismiss, reargue, and stay that ate up much of the docket.

The trial court’s failure to address such remarks constitutes reversible error: “Reversible error is committed when counsel’s closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the

verdict.” *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir. 1977) (internal citations omitted) (referencing similar authority in the Sixth Circuit). Similarly, “improper questioning by counsel generally entitles the aggrieved party to a new trial if it conveys improper information to the jury and prejudices the opposing litigant.” *Silbergleit v. First Interstate Bank of Fargo, N.A.*, 37 F.3d 394, 398 (8th Cir. 1994). That is particularly so where the “incident was neither isolated nor accidental, but counsel repeatedly attempted to use irrelevant and prejudicial evidence.” *Id.*

Here, there can be no doubt that Hananel’s counsel introduced “extraneous matter” into the case. As he himself framed the issue, “the two actions are factually unrelated and have no bearing on one another.” A-196. Nor can there be any doubt that the improper argument and questioning could have influenced the verdict. The plaintiff’s reputation and character are a central issue in any defamation case, and Hananel’s counsel was able to portray Adelson as a serial litigant who files repetitive and baseless lawsuits. And Hananel’s lawyer would not have made this line of attack the centerpiece of his opening and closing statements had he not determined that there was a reasonable probability that the jury would consider the present lawsuit to be merely another aspect of Adelson’s “counteroffensive.”

The trial court, however, refused to permit Adelson to balance out Hananel’s assertions or even to grant a curative instruction. A-125. Thus, although the court had determined that *any* reference to the prior litigation was irrelevant, what the jury heard was worse—*one side* of that history, unbalanced by the other. The notion of balance is entrenched in the rules of evidence, for example in the so-called Principle of Completeness in Federal Rule of Evidence 106: “when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988). The “opened door” doctrine reflects the same idea. *See, e.g., People of Territory of Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993) (“by introducing the evidence, Muna’s attorney opened the door to its exploration by both sides”); *United States v. Vaandering*, 50 F.3d 696, 704 (9th Cir. 1995).⁵

Where one side repeatedly introduces inadmissible evidence, and the other side has no opportunity to rebut, a new trial is often the only cure for the ensuing

⁵ Where evidence is received improperly, even otherwise inadmissible evidence may be offered to rebut. *See CCMS Pub. Co. v. Dooley-Maloof, Inc.*, 645 F.2d 33, 37 (10th Cir. 1981) (“Defendants’ disregard of court orders justified” admission of evidence that violated F.R.E. 408); *St. Clair County v. Bukacek*, 131 So. 2d 683, 690 (Ala. 1961) (“rule is that irrelevant, incompetent or illegal evidence may be admitted to rebut evidence of like character”); *Bremhorst v. Phillips Coal Co.*, 211 N.W. 898, 904 (Iowa 1927) (“It was the duty of the court to give both parties the benefit of the same rules of evidence.”).

prejudice. Thus, for example, in *Lasar v. Ford Motor Co.*, this Court held that a mistrial was proper for “deliberate bad faith violation” of a ruling *in limine* during opening argument. 399 F.3d 1101, 1115 (9th Cir. 2005). Similarly, in *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, this Court affirmed the grant of a new trial where counsel’s violations of rulings *in limine* “left the jury with [an] unrebutted impression that Anheuser” had engaged in prior misconduct unrelated to the claims in the case. 69 F.3d 337, 347 (9th Cir. 1995). “Because [evidence on that topic was] excluded by the court’s ruling, Anheuser did not present evidence to rebut the inference Beardslee had created. Anheuser was thus in the untenable situation that the district court had sought to avoid in its *in limine* ruling.” *Id.*

At a minimum, the trial court should have granted Adelson’s request for a curative instruction. There was no reasonable basis for refusing to provide such an instruction. *See United States v. Melendez-Rivas*, 566 F.3d 41, 51 (1st Cir. 2009) (ordering new trial where wrongful admission of evidence was compounded by failure to grant curative instruction); *Virgin Islands v. Mujahid*, 990 F.2d 111, 117 (3d Cir. 1993) (prejudice “compounded by the lack of a curative instruction”). But even that likely would not have cured the harm from “repeated exposure of a jury to prejudicial information.” *O’Rear v. Fuehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977) (noting that, in a similar situation, “disparity in treatment of counsel unfairly hamstrung” plaintiff’s counsel). In those rare cases, as here, a new trial is

the only appropriate remedy. *Id.* (“as the trial judge himself observed during the trial, ‘you can throw a skunk in to the jury box and instruct the jurors not to smell it, but it doesn’t do any good.’”); *see also Straub v. Reading Co.*, 220 F.2d 177, 182 (3d Cir. 1955) (“Where, as here, there has been calculated sustained improper conduct producing biased issues as they went to the jury we cannot decline to act.”).

The jury should not have been given only half of a heavily disputed story. Allowing the verdict to stand would punish Adelson for abiding by the trial court’s rulings and reward Hananel for ignoring them.

CONCLUSION

For all of the foregoing reasons, plaintiff-appellant Sheldon G. Adelson respectfully requests that this Court vacate the judgment below and remand for a new trial.

Dated: New York, New York
March 4, 2010

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 7,275 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on March 4, 2010.

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