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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Maricopa County, et al.,

10 Plaintiff,

11 v.

12 Office Depot Incorporated,

13 Defendant.
14

No. CV-14-01372-PHX-DWL

ORDER

15 On October 9, 2019, the Court issued a lengthy order in which it ruled upon seven
16 motions in limine, two motions to exclude expert opinions, and Maricopa County's request
17 for a jury trial. (Doc. 203.) Now pending before the Court are a pair of motions for
18 reconsideration, filed by Maricopa County, that challenge certain aspects of that order.
19 (Docs. 206, 207.) For the following reasons, the Court will require further briefing on the
20 first motion and deny the second motion.

21 I. Motion to Reconsider—Krivoshia

22 In the first motion for reconsideration (Doc. 206), Maricopa County challenges the
23 portion of the October 9, 2019 order that denied Maricopa County's motion to exclude
24 some of the opinions of Office Depot's expert, Patrick Krivoshia.

25 As background, Maricopa County had argued, in its original motion to exclude, that
26 Krivoshia's decision to apply an across-the-board discount of 20% to all purchases before
27 February 3, 2007 and a 5% across-the-board discount to all subsequent purchases had "no
28 basis in reality" and thus violated Rule 702(b)'s requirement that an expert's opinion be

1 based upon “sufficient facts or data.” (Doc. 171 at 6-8.) In response, Office Depot argued
2 that a particular set of pricing data, known as the MC-OD0000009 data set, supplied the
3 foundation for Krivoshia’s application of these discounts. (Doc. 176 at 3-4, 9, 14.) And
4 during oral argument, in response to questioning by the Court about why neither party
5 actually provided the MC-OD0000009 data set as an attachment to its brief, Office Depot’s
6 counsel stated: “[W]hile we’re happy to provide it to you, the reason that we didn’t attach
7 it to our brief is that it is literally thousands and thousands of lines of structured data. And
8 given that there was no challenge to the substance of it, as we understood Maricopa’s
9 challenge, we didn’t think it was relevant.” (Rough Transcript at 89.)

10 Based in part on this explanation, the Court denied Maricopa County’s motion to
11 exclude. (Doc. 203 at 31-35.) Specifically, the Court began by noting that Krivoshia’s
12 expert report contained an assertion that “the MC-OD0000009 data set provided factual
13 support for his decision to apply a 20% discount to purchases before February 13, 2007
14 and a 5% discount to purchases after that date” and stated that the presence of this assertion
15 “suggest[ed] Krivoshia wasn’t simply making up the 5% and 20% figures, which is what
16 [*Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997)] prohibits, and instead was grounding his
17 opinions in historical pricing data.” (*Id.* at 33.) Next, the Court noted that it was “odd that
18 Office Depot failed to submit the actual MC-OD0000009 data set in support of its response
19 brief” but further noted that “Maricopa County also declined to submit the MCOD0000009
20 data set.” (*Id.* at 33-34.) The Court ultimately concluded that, because Krivoshia claimed
21 he was relying on historical pricing data and the parties hadn’t submitted any evidence to
22 prove or disprove this assertion, Office Depot had done just enough to satisfy Rule 702.
23 (*Id.* at 34.)

24 As an attachment to the motion for reconsideration, Maricopa County supplies a
25 copy of what it claims is the actual MC-OD0000009 data set. (Doc. 206 at 8.) It is a one-
26 page document that contains only a few lines of text. (*Id.*) Maricopa County argues this
27 document cannot possibly provide a valid foundation for Krivoshia’s opinions under Rule
28 702 because, *inter alia*, “[t]here is no testimony of record in this case that sets the

1 foundation for, authenticates or explains the cryptic content of MC-OD000009—the only
2 explanation of its meaning that has been provided in this case is the description by counsel
3 during the October 4, 2019 argument.” (*Id.* at 3.) Maricopa County thus contends that
4 reconsideration is warranted because “Office Depot’s counsel for the first time introduced
5 issues at oral argument which plaintiff believes misled the Court into an erroneous ruling.”
6 (*Id.* at 1.)

7 Soon after Maricopa County filed its motion, Office Depot filed a “Notice of
8 Errata.” (Doc. 210.) In this document, Office Depot acknowledges that the statements
9 made by its counsel during the hearing about the size of the MC-OD0000009 data set were
10 inaccurate, provides an explanation for why counsel, in good faith, believed the statements
11 were accurate at the time they were made, and concludes by stating that “[i]t does not
12 appear from the Court’s decision that counsel’s inadvertent error had any bearing on the
13 Court’s determination of the motion, but if the Court requests a substantive response to
14 Maricopa’s reconsideration motion pursuant to Local Civil Rule 7.2(g)(2), Office Depot
15 will provide one.” (*Id.* at 2.)

16 The Court fully accepts Office Depot’s explanation that the misstatements during
17 the hearing were made in good faith. Mistakes happen. Nevertheless, the Court would like
18 to receive further briefing on the issues raised by Maricopa County. Accordingly, Office
19 Depot is ordered to file a response (not to exceed 11 pages) by November 4, 2019, and
20 Maricopa County may file a reply (not to exceed seven pages) by November 12, 2019.
21 Although Office Depot is free to invoke the high standard for reversal that applies to
22 motions for reconsideration (see Part II *infra*), it should also attempt to explain, on the
23 merits, why the MC-OD0000009 data set provides an adequate foundation for Krivoshia’s
24 opinions under Rule 702(b) and *Joiner*.

25 II. Motion to Reconsider—CCSF Audit

26 In the second motion for reconsideration (Doc. 207), Maricopa County challenges
27 the portion of the October 9, 2019 order that granted Office Depot’s motion in limine to
28 exclude evidence of an audit that had been conducted by CCSF.

1 As background, the contract between CCSF and Office Depot was in effect from
2 January 2005 to November 2009. After learning that other entities had conducted audits
3 of their contracts with Office Depot, which subsequently resulted in settlements, CCSF
4 conducted its own audit and found millions of dollars in overcharges. In its motion in
5 limine, Office Depot moved to exclude evidence concerning the CCSF audit on three
6 grounds: (1) Rule 408 (settlement evidence); (2) hearsay; and (3) Rule 403 (unfair
7 prejudice and jury confusion). (Doc. 158.)¹

8 In the October 9, 2019 order, the Court agreed with Office Depot in part and thus
9 granted its motion in part. (Doc. 203 at 17-23.) Specifically, although the Court clarified
10 that Rule 408 did not bar the admission of the CCSF audit (*id.* at 19-20), the Court
11 concluded the audit didn't fall within Rule 803(8)'s hearsay exception for public records
12 because it was prepared in anticipation of litigation (and without a hearing) and thus wasn't
13 trustworthy. (*Id.* at 20-21). The Court also held that the audit wasn't admissible under
14 Rule 703 because Maricopa County's expert stated during his deposition that he didn't rely
15 on the audit when formulating his opinions. (*Id.* at 22.) Given these determinations, the
16 Court concluded under Rule 403 that Maricopa County could merely refer to the fact that
17 CCSF *conducted* an audit but could not introduce the audit *contents*. (*Id.* at 22-23.)

18 In its motion for reconsideration, Maricopa County takes issue with the Court's
19 trustworthiness analysis. (Doc. 207.) Specifically, Maricopa County argues that the key
20 consideration in this context is the reliability of the methodology underlying the audit, that
21 the audit here employed an "exemplary" methodology (it was conducted in compliance
22 with government auditing standards by a team led by a highly experienced auditor), and
23 that the audit was initiated well before litigation was anticipated. (*Id.* at 2-3.) Thus,
24 although Maricopa County acknowledges that the CCSF City Attorney became involved
25 in the audit process before the audit was finalized, and further acknowledges that no
26 hearing was ever held, it argues these factors don't render the audit untrustworthy for

27 ¹ The motion in limine also sought to exclude evidence of an audit conducted by
28 Maricopa County and of the settlement between CCSF and Office Depot, but Maricopa
County's motion for reconsideration only challenges the Court's decision to grant the
exclusion request pertaining to the CCSF audit.

1 purposes of Rule 803(8). (*Id.* at 3-5.) Finally, Maricopa County also argues it couldn't
2 have raised all of these points and arguments in its response to Office Depot's motion in
3 limine due to the Court's page limitations. (*Id.* at 1.)

4 Motions for reconsideration should be granted only in rare circumstances.
5 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Such motions
6 should not be used for the purpose of asking a court "to rethink what the court had already
7 thought through – rightly or wrongly." *Id.* (citation omitted). Indeed, reconsideration is
8 an "extraordinary remedy" that is available only in "highly unusual circumstances." *Kona*
9 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted). The
10 Local Rules further state that a motion for reconsideration should be denied "absent a
11 showing of manifest error or a showing of new facts or legal authority that could not have
12 been brought to [the Court's] attention earlier with reasonable diligence" and that "[n]o
13 motion for reconsideration of an Order may repeat any oral or written argument made by
14 the movant in support of or in opposition to the motion that resulted in the Order." LRCiv.
15 7.2(g).

16 These standards are not satisfied here. Maricopa County has merely offered a more
17 refined version of the argument it already offered in its written response to the motion in
18 limine and again during the hearing. Moreover, even if the CCSF audit were somehow
19 deemed trustworthy for purposes of Rule 803(8), its introduction would still trigger Rule
20 403 concerns. As noted, Maricopa County's expert didn't rely on the CCSF audit when
21 formulating his opinions. A significant risk of confusion would arise if Maricopa County
22 were allowed to introduce opinion testimony from its expert concerning the pricing that he
23 believes should have been available to CCSF under its contract with Office Depot, then
24 were also allowed to dump into evidence the CCSF audit documents, which reflect
25 different calculations and opinions on this topic. That is why the Court concluded, in the
26 portion of the October 9, 2019 order addressing Office Depot's Rule 403 challenge to the
27 audit/settlement evidence, that Maricopa County will only be allowed to refer to the
28 existence of the CCSF audit, not its contents. (Doc. 203 at 22-23.) Maricopa County's

1 motion for reconsideration doesn't address, much less demonstrate the manifest error
2 pervading, this portion of the Court's analysis.

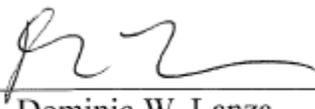
3 Accordingly, **IT IS ORDERED** that:

4 (1) Maricopa County's motion for reconsideration re: CCSF audit (Doc. 207) is
5 **denied**; and

6 (2) With respect to Maricopa County's motion for reconsideration re: Krivoshia
7 (Doc. 206), Office Depot is ordered to file a response (not to exceed 11 pages) by
8 November 4, 2019, and Maricopa County may file a reply (not to exceed seven pages) by
9 November 12, 2019.

10 Dated this 25th day of October, 2019.

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Dominic W. Lanza
United States District Judge