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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 **INTRODUCTION**

16 Pending before the Court is Maricopa County’s motion for reconsideration of an
17 earlier order denying its motion to preclude testimony from Office Depot’s expert. (Doc.
18 206.) For the following reasons, the motion for reconsideration will be denied.

19 **RELEVANT BACKGROUND**

20 On June 28, 2019, Maricopa County filed a motion to preclude Office Depot’s
21 expert, Patrick Krivoshia, from offering the opinion that, under the CCSF contract,
22 Maricopa County would have received an across-the-board discount of 20% on purchases
23 before February 13, 2007 and an across-the-board discount of 5% on purchases after that
24 date. (Doc. 171.) Specifically, Maricopa County argued that, because these 20% and 5%
25 figures had “no basis in reality,” Krivoshia’s opinions were not “based upon sufficient facts
26 or data” as required by Rule 702. (*Id.*)

27 On October 4, 2019, the Court heard oral argument on an array of pretrial motions,
28 including Maricopa County’s motion to preclude Krivoshia. (Doc. 205 [transcript].)

1 During that hearing, Office Depot’s counsel argued that Krivoshia had “specifically
2 identifie[d],” in his expert report, a particular set of pricing data (known as the “MC-OD9”
3 data set) that provided the foundation for his 5% and 20% figures. (*Id.* at 69. *See also id.*
4 at 78-79 [Office Depot’s confirmation that the MC-OD9 data set provides the factual
5 foundation for Krivoshia’s opinion].) In response, the Court asked both parties why they
6 hadn’t submitted that data set as an attachment to their respective briefs. Maricopa
7 County’s explanation was that “we didn’t include it because [we] think it has no bearing to
8 the issue that [Krivoshia] claimed his opinions were covering, the actual prices paid”
9 (*Id.* at 85.) Office Depot, meanwhile, stated that “while we’re happy to provide it to you,
10 the reason that we didn’t attach it to our brief is that it is literally thousands and thousands
11 of lines of structured data. And given that there was no challenge to the substance of it, as
12 we understood Maricopa’s challenge, we didn’t think it was relevant.” (*Id.* at 89.)

13 On October 9, 2019, the Court issued a 48-page order that resolved an array of
14 different motions in limine, expert preclusion motions, and other motions filed by the
15 parties. (Doc. 203.) As for Maricopa County’s motion concerning Krivoshia, the Court
16 concluded it should be denied because Krivoshia’s expert report stated that the MC-OD9
17 data set “provided factual support for his decision to apply” the challenged discounts and
18 “[t]hese references suggest Krivoshia wasn’t simply making up the 5% and 20% figures .
19 . . and instead was grounding his opinions in historical pricing data.” (*Id.* at 33.) The Court
20 did note it was “odd” that neither party had submitted the actual MC-OD9 data set as part
21 of the briefing process but concluded that, because “Krivoshia asserted in his report that a
22 particular data set provides the factual foundation for his opinions and Maricopa County
23 hasn’t shown this assertion is inaccurate,” the proper outcome was to allow Krivoshia to
24 testify and then allow Maricopa County to challenge his assumptions through cross-
25 examination. (*Id.* at 33-34.)

26 On October 23, 2019, Maricopa County filed a motion to reconsider the denial of
27 its motion to preclude Krivoshia’s opinions. (Doc. 206.) In support of the motion,
28 Maricopa County provided a copy of the actual MC-OD9 data set—which, contrary to the

1 representations made by Office Depot’s counsel during oral argument, is less than one page
2 long. (Doc. 206 at 8.)

3 On October 24, 2019, Office Depot filed a notice of errata acknowledging that
4 counsel’s statements during oral argument concerning the size of the MC-OD9 data set
5 were inaccurate. (Doc. 210.) This notice also explained why counsel had a good-faith
6 belief in the accuracy of the statements at the time they were made. (*Id.*)

7 On October 25, 2019, the Court issued an order that, *inter alia*, “fully accept[ed]
8 Office Depot’s explanation that the misstatements during the hearing were made in good
9 faith” but ordered Office Depot to file a substantive response to the reconsideration motion.
10 (Doc. 211 at 1-3.)

11 On November 4, 2019, Office Depot filed its response. (Doc. 212.)

12 On November 12, 2019, Maricopa County filed a reply. (Doc. 216.)

13 ANALYSIS

14 Maricopa County argues that reconsideration is warranted because (1) Office Depot
15 made new arguments during the October 4, 2019 oral argument that “misled the Court into
16 an erroneous ruling” and (2) the MC-OD9 data set “applied only to purchases of certain
17 non-stock items by two of the many CCSF departments,” and the prices for these items
18 were negotiated on an *ad hoc* basis, so the analytical gap between the MC-OD9 data set
19 and Krivoshia’s opinions is too significant to pass muster under Rule 702. (Doc. 206; Doc.
20 216.) In response, Office Depot argues that (1) a motion for reconsideration is an
21 inappropriate vehicle for advancing such arguments because Maricopa County was aware
22 of the MC-OD9 data set when it filed its original exclusion motion and (2) on the merits,
23 the MC-OD9 data set adequately supports Krivoshia’s opinions because his report
24 pertained to a hypothetical determination of what Maricopa County would have paid under
25 the CCSF contract, rather than what Office Depot actually charged CCSF. (Doc. 212.)

26 Motions for reconsideration should be granted only in rare circumstances.
27 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Such motions
28 should not be used for the purpose of asking a court ““to rethink what the court had already

1 thought through—rightly or wrongly.” *Id.* (citation omitted). Indeed, reconsideration is
2 an “extraordinary remedy” that is available only in “highly unusual circumstances.” *Kona*
3 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted). The
4 Local Rules further state that a motion for reconsideration should be denied “absent a
5 showing of manifest error or a showing of new facts or legal authority that could not have
6 been brought to [the Court’s] attention earlier with reasonable diligence” and that “[n]o
7 motion for reconsideration of an Order may repeat any oral or written argument made by
8 the movant in support of or in opposition to the motion that resulted in the Order.” LRCiv.
9 7.2(g).

10 Given these principles, the Court agrees with Office Depot that the arguments now
11 being raised by Maricopa County do not constitute a permissible basis for granting
12 reconsideration. Although Office Depot’s failure to attach the MC-OD9 data set to its
13 response to the exclusion motion was unfortunate, and although Office Depot’s counsel’s
14 inaccurate statements during oral argument didn’t help things, the bottom line is that
15 Krivoshia’s report clearly referenced the MC-OD9 data set. (Doc. 171-1 at 17 n.47.) Thus,
16 to the extent Maricopa County believed the data set failed to provide an adequate
17 foundation for Krivoshia’s opinions, it could and should have attempted to prove its point
18 by providing the data set during the earlier briefing process. Maricopa County’s
19 explanation during oral argument on October 4, 2019 for why it failed to do so—the
20 relevance of the data set wasn’t apparent to it at the time (Doc. 205 at 85)—means the
21 current motion must be denied. Reconsideration is an extraordinary remedy generally
22 reserved for the discovery of new and previously unavailable information or authority, not
23 the belated recognition of the relevance of existing information.

24 Finally, although the merits-based reasons for excluding Krivoshia’s opinions that
25 Maricopa County develops in its reconsideration motion present a close call, the Court is
26 not convinced they are so strong as to demonstrate that the October 9, 2019 order was
27 manifestly erroneous. An expert opinion must be “based on sufficient facts or data.” Fed.
28 R. Evid. 702(b). The Supreme Court has emphasized that “nothing in either *Daubert* or

1 the Federal Rules of Evidence requires a district court to admit opinion evidence that is
2 connected to existing data only by the *ipse dixit* of the expert. A court may conclude that
3 there is simply too great an analytical gap between the data and the opinion proffered.”
4 *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). See also *City of Pomona v. SQM N.*
5 *Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014) (“*Joiner* requires an expert to justify a
6 foundational assumption or refute contrary record evidence.”). However, “[s]haky but
7 admissible evidence is to be attacked by cross examination, contrary evidence, and
8 attention to the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th
9 Cir. 2010). “Basically, the judge is supposed to screen the jury from unreliable nonsense
10 opinions, but not exclude opinions merely because they are impeachable.” *Alaska Rent-A-*
11 *Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013).

12 Here, Krivoshia’s invocation of, and reliance upon, the MC-OD9 data set
13 adequately establishes that his opinion is not unreliable nonsense. His objective was to
14 “develop independent opinions related to the extent to which Maricopa County . . . may
15 have been overcharged for purchases of office products.” (Doc. 171-1 at 5.) His basic
16 methodology was to make “a comparison between Maricopa’s total spending (net of
17 rebates) under the L.A. County Contract and what those same items would have cost under
18 the CCSF Contract.” (*Id.* at 13.) In reaching his opinion about what Maricopa County
19 would have been charged under the CCSF contract, Krivoshia relied on MC-OD9, which
20 is Office Depot’s pricing structure under certain contracts for certain goods during the
21 relevant time. (*Id.* at 17 n.47.) This suggests Krivoshia’s opinion is not unreliable
22 nonsense, but rather an attempt with some foundation in fact at estimating Maricopa
23 County’s hypothetical outlays under the CCSF contract. (Doc. 212 at 10-12.) Maricopa
24 County’s main point—these were not the prices CCSF actually paid—is certainly a strong
25 basis for impeaching Krivoshia’s opinion, but it’s not a basis for excluding his opinion
26 altogether.

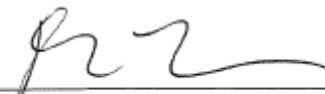
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Accordingly, **IT IS ORDERED** that Maricopa County's motion for reconsideration (Doc. 206) is **denied**.

Dated this 13th day of December, 2019.



Dominic W. Lanza
United States District Judge