

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GENERAL ELECTRIC COMPANY,

Plaintiff,

v.

THOMAS WILKINS,

Defendant.

1:10-cv-00674-OWW-JLT

ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION
(Doc. 112)

I. INTRODUCTION.

Plaintiff General Electric Company ("Plaintiff") proceeds with an action against Defendant Thomas Wilkins ("Defendant") for damages and injunctive relief.

On October 18, 2010, during a hearing on Plaintiff's motion for preliminary injunction, the court orally ruled that Defendant was precluded from offering his own testimony in opposition to Plaintiff's motion due to Defendant's obstructive conduct at his court-ordered deposition. (Doc. 88 at 2).

On November 30, 2010, Defendant filed a document entitled "Reservation of Rights Brief as Requested by Court on October 18, 2010 and Request for Reconsideration" ("Defendant's November 30 Brief"), as well as a declaration signed by Defendant. (Doc.

1 112).¹ Defendant's November 30 Brief asks the court to reconsider
2 its decision to bar Defendant from offering testimony in opposition
3 to Plaintiff's motion for preliminary injunction.

4 Plaintiff filed opposition to Defendant's motion for
5 reconsideration on December 3, 2010. (Doc. 118). Defendant filed
6 a reply to Plaintiff's opposition on December 14, 2010. (Doc.
7 123).

8 **II. FACTUAL BACKGROUND.**

9 On October 5, 2010, the court ordered that certain witnesses
10 be deposed regarding the issues raised by Plaintiff's motion for
11 preliminary injunction. (Doc. 55). Defendant Thomas Alexander
12 Wilkins was one of the witnesses subject to the court's October 5
13 order. Due to the parties inability to agree on logistics, on
14 October 12, 2010, Defendant appeared at the United States District
15 Court in Fresno for his deposition, accompanied by his attorney.
16 Defendant identified himself as "Thomas Alexander Wilkins *on behalf*
17 *of Thomas Wilkins.*" (Doc. 99, Ex. B at 5) (emphasis added). When
18 the court reporter attempted to administer the standard witness'
19 oath² to Defendant, Defendant responded by asking the deposition
20 reporter and videographer to agree to "full commercial liability."
21 The following exchange took place:

22
23 ¹ Contrary to the title of Defendant's document, the court did not request
24 briefing on Defendant's "reservation of rights" theory. (Doc. 88 at 5).

25 ² The Ninth Circuit has described the term "oath" as a "solemn declaration,
26 accompanied by a swearing to God or a revered person or thing, that one's
27 statement is true," and the term "affirmation" as a "pledge equivalent to an oath
28 but without reference to a supreme being or to 'swearing;'" both are sufficient
to place a witness under penalty of perjury. *United States v. Bueno-Vargas*, 383
F.3d 1104, 1110 (9th Cir. 2004). Here, Defendant was technically asked to give
his affirmation. The term "oath" is employed throughout this opinion in order to
be consistent with the parties' briefs.

1 **Reporter:** Please raise your right hand. Do you solemnly
2 affirm to tell the truth, the whole truth, and nothing
but the truth?

3 **Defendant:** Without prejudice and a full reservation of
4 rights, I will hold all parties here, all agents and
5 groups of agents, in their full commercial liability,
including you. What is your name and who do you work
for? What is your name and who do you work for.

6 **Reporter:** I'm not here to answer questions. I'm just
7 swearing you in, doing my job.

8 **Defendant:** Okay. Are you the court reporter?
Reporter: Yes.

9 **Defendant:** Okay. Do you agree to do your job under full
10 commercial liability?

11 **Reporter:** Yes

12 **Defendant:** Thank you. Do you agree to do your job under
13 your full commercial liability? And please state your
name.

14 **Videographer:** I do. Dillon Wasserman.

15 **Defendant:** Thank you Dillon.

16 **Mr. Hanlon:** Mr. Wilkins, you're here to give a deposition
17 pursuant to court orders. I don't have to make any
agreements to you to proceed with that deposition, and I
decline to do so.

18 **Defendant:** Are you referring to me?

19 **Mr. Hanlon:** I am referring to you, sir. How would you
20 like me to refer to you?

21 **Defendant:** Thomas Alexander Wilkins.

22 **Mr. Hanlon:** Okay. Thomas Alexander Wilkins, I am here to
23 take your deposition pursuant to court order. I don't
have to make any agreements to proceed, and I decline to
do so.

24 **Defendant:** Your offer is accepted.

25 (Doc. 99, Ex. B at 5-7). The Reporter attempted to administer the
26 oath a second time:

27 **Reporter:** Would you please raise your right hand again.
28 Do you solemnly affirm to tell the truth, the whole

1 truth, and nothing but the truth?

2 **Defendant:** Without prejudice and a full reservation of
rights, I do.

3 **Mr. Hanlon:** Mr. Schulte, I'm not sure what Mr. Wilkins
4 means by "without prejudice." Either he's under oath or
he's not.

5 **Mr. Schulte:** I agree. He's either under oath or he's not.

6 **Mr. Hanlon:** Mr. Wilkins, do you understand that you're
7 under oath?

8 **Defendant:** Please define your term "understand."

9 **Mr. Hanlon:** Are you under oath to tell the truth, the
10 whole truth, and nothing but the truth in this
deposition?

11 **Defendant:** Okay. I am not Mr. Wilkins. I'm Thomas
12 Alexander Wilkins. Offer right back to you. As far as
13 truth, the whole truth, and nothing but the truth, I'm
stating, without prejudice and a full reservation of
rights, I do.

14 (Doc. 99, Ex. B at 7-8). The reporter attempted to administer the
15 oath a third time, and once again, Defendant responded by
16 qualifying his oath with the phrase "without prejudice and a full
17 reservation of rights." Neither Defendant nor his attorney
18 explained the meaning of this qualification and its intended effect
19 on Defendant's testimony to Plaintiff's counsel, despite repeated
20 requests. Plaintiff's counsel expressed a desire to involve a
21 magistrate judge, but Defendant's counsel refused:

22 **Mr. Hanlon:** All right. Let's go off the record. I'm
23 going to see if the magistrate is available.

24 **Mr. Schulte:** Actually, if you're going to stop the
25 deposition and the deposition is done, we did not come
26 here today to do anything other than participate in a
deposition. You have now informed us that unless Mr.
Wilkins-

27 **Mr. Hanlon:** We're still on the record, sir. Please put
28 your microphone back on.

1 **Mr. Schulte**:- answers the way you want him to answer that
2 you're not proceeding today. He didn't give you the
3 answer you wanted, so it appears that we're done. If you
4 want to proceed, lets proceed. If you don't, that's up
5 to you...

6 **Mr. Hanlon**: All I'm trying to do is have the witness be
7 sworn. Without the witness being sworn...this isn't a
8 deposition. It's just a conversation. I'm trying to
9 make sure we're here for a deposition...

10 **Mr. Schulte**: Mr. Wilkins has answered how he's
11 comfortable. I'm not going to sit here and change his
12 answers. I suggest you not do the same. Whether you
13 proceed today or not is up to you.

14 (Doc. 99, Ex. B at 9-11).

15 At the hearing on Plaintiff's motion for preliminary
16 injunction held on October 18, 2010, Plaintiff brought Defendant's
17 conduct at his deposition to the attention of the court. The court
18 stated that to the extent Plaintiff refused to be deposed, he would
19 not be permitted to offer testimony in opposition to the motion for
20 preliminary injunction:

21 There is no evidence from defendant before the Court that
22 would be provided by Mr. Wilkins. His refusal to be
23 deposed, the Court will treat as essentially disabling
24 him from presenting evidence himself.

25 (Doc. 88 at 2). The court noted that Defendant would not be
26 precluded from offering any evidence other than Defendant's
27 testimony. (Id.).

28 After reviewing the Defendant's deposition transcript in open
29 court and after allowing the parties to argue their respective
30 positions, the court concluded that Defendant's conduct was
31 tantamount to a refusal to be sworn. The court discussed the oath
32 requirement on the record and stated:

33 the law requires an unqualified acknowledgment to tell
34 the truth. And there may not be any magic about the words

1 that are used to do that, but reserving rights in the
2 Commercial Code and international treaties and declaring
3 that he's a free man upon the land and the rest of it,
I'm sure you know what I'm talking about, Mr. Schulte,
that's not acceptable.

4 (Doc. 88 at 5).³ Defendant's counsel expressed disagreement with
5 the court's assessment of the oath requirement, and the court gave
6 counsel the opportunity to provide legal authority in support of
7 his position. (Doc. 88 at 5). More than six weeks later,
8 Defendant filed a brief purporting to provide authority justifying
9 Defendant's conduct at his deposition.

10 **III. LEGAL STANDARD.**

11 A motion for reconsideration is appropriate where the district
12 court (1) is presented with newly discovered evidence, (2)
13 committed clear error or the initial decision was manifestly
14 unjust, or (3) if there was an intervening change in controlling
15 law. *See School Dist. No. 1J v. AC&S, Inc.*, 5 F.3d 1255, 1263 (9th
16 Cir. 1993); *Osband v. Woodford*, 290 F.3d 1036, 1038 (9th Cir. 1999)
17 (en banc). A reconsideration motion should not merely present
18 arguments previously raised, or which could have been raised in a
19 previous motion. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th
20 Cir. 1985).

21 **IV. DISCUSSION.**

22 Defendant contends that the court erred in finding that
23 Defendant refused to be deposed and asks the court to court to
24 rehear Plaintiff's motion for preliminary injunction, permit
25

26 ³ As discussed below, a witness' qualification of the oath does not violate
27 Federal Rule of Civil Procedure 30(b) provided the witness expresses that she is
28 impressed with the duty to tell the truth and understands that she can be
prosecuted for perjury for failure to do so. *See Gordon v. Idaho*, 778 F.2d
1397, 1400 (9th Cir. 1985).

1 Defendant to testify at the hearing, and reconsider its decision to
2 grant Plaintiff's motion.⁴ Defendant assails the court's statement
3 during the October 18 hearing that "the law requires an unqualified
4 acknowledgment to tell the truth." (Doc. 112 at 2). The crux of
5 Defendant's argument is that Plaintiff was within his rights to
6 offer his unique qualifications to the oath.

7 Defendant did not offer a written declaration or testimony in
8 opposition to Plaintiff's motion for preliminary injunction until
9 *after* the court ruled at the hearing that his conduct at the
10 deposition precluded the court from considering his testimony.
11 Pursuant to the court's October 1, 2010 minute order, Defendant's
12 opposition to Plaintiff's motion for preliminary injunction was due
13 on October 8, 2010. (Doc. 53). Defendant submitted a timely
14 opposition to Plaintiff's motion on October 8 but did not submit
15 his declaration until November 30, 2010, almost eight weeks after
16 his opposition was due and six weeks after the hearing on
17 Plaintiff's motion. Defendant offers no explanation for his
18 belated attempt to bolster his opposition with a post-hearing
19 declaration. Even assuming *arguendo* that there is a good faith
20 justification for Defendant's delay in submitting his sworn
21 declaration, Defendant's declaration is properly excluded pursuant
22 to the Federal Rules of Civil Procedure.

24
25 ⁴ Defendant also complains that the court erred in issuing a tentative
26 ruling "without consideration" of Defendant's testimony. This complaint is moot
27 in light of the written decision issued concurrently with this order. The court
28 notes that Defendant's argument regarding the court's tentative decision entails
an affirmative misrepresentation. As discussed above, at the time the court
issued its tentative decision on October 18, Defendant had not submitted a
declaration and had not attempted to offer testimony in opposition to the motion
for preliminary injunction.

1 **A. The Oath Requirement**

2 Rule 30(b)(5)(iv) requires deponents to give an oath or
3 affirmation at the beginning of all depositions. Fed. R. Civ. P.
4 (30)(b)(5)(iv). "Any statement indicating that the deponent is
5 impressed with the duty to tell the truth and understands that he
6 or she can be prosecuted for perjury for failure to do so satisfies
7 the requirement for an oath or affirmation under [Federal Rule of
8 Civil Procedure] 30(c)." *Gordon*, 778 F.2d at 1400; accord *United*
9 *States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004) ("true
10 test" for whether a declaration is made under oath or affirmation
11 "is whether the procedures followed were such that perjury could be
12 charged therein if any material allegation contained therein is
13 false.").⁵ Although no special verbal formula is required to
14 comply with Rule 30(c)'s oath requirement, *Gordon*, 778 F.2d at 1400
15 (citing Fed. R. Evid. 603), "[a] cleverly worded oath that creates
16 loopholes for falsehood or attempts to create a safe harbor for
17 perjury" is unacceptable, see *United States v. Ward*, 989 F.2d 1015,
18 1019 (9th Cir. 1992).⁶ Simply stated, "clever" qualifications and
19 game playing cannot be countenanced in times of crowded dockets and
20 court case overload.

21 ///

23 ⁵ Although *Bueno-Vargas* concerned the oath requirement applicable to
24 warrant applications under the Fourth Amendment, the Court relied in part on
25 cases interpreting Federal Rule of Evidence 603, including *United States v. Ward*,
discussed in footnote 2 below. 383 F.3d at 1111 n.9.

26 ⁶ *Ward*, a criminal case, concerned a defendant's desire to deviate from the
27 standard witness oath at trial. *Id.* at 1017. The *Ward* Court discussed *Gordon*
28 and Rule 603 and concluded that "[a]ll that the common law requires is a form or
statement which impresses upon the mind and conscience of a witness the necessity
for telling the truth." *Id.* (citing *United States v. Looper*, 419 F.2d 1405, 1407
(4th Cir. 1969)).

1 Defendant's statements and conduct in response to the
2 reporter's repeated good faith attempts to place him under oath
3 evidences that Defendant was not impressed with the unqualified
4 duty to tell the truth and did not reflect his understanding that
5 he could be prosecuted for perjury for failure to do so. To the
6 contrary, Defendant's conduct was evasive, evinced gamesmanship,
7 and created the appearance that Defendant was attempting to create
8 a potential safe harbor for perjury by implicitly threatening to
9 impose "liability" on the reporter who was performing a statutory
10 duty for which the reporter is licensed by the State.⁷ When the
11 reporter first attempted to administer the oath to Defendant,
12 Defendant sought to avoid giving an affirmative response by
13 threatening to impose commercial liability on the reporter and
14 asking for the reporter's name and employer, which is evidenced on
15 a business card and the deposition transcript itself. (Doc. 99,
16 Ex. B at 6). When Plaintiff's counsel expressed doubt to
17 Defendant's counsel as to whether Defendant had taken the oath,
18 Defendant's counsel stated: "your belief is irrelevant to me," a
19 statement that was vexatious and itself irrelevant.⁸ (Id. at 7).

20 In response to the reporter's second attempt to administer the
21 oath, Defendant replied: "without prejudice and a full reservation
22 of rights, I do." (Id. at 7-8). Plaintiff's counsel sought to
23 understand what these qualifications meant by asking for guidance
24 from Defendant's counsel reflecting what Defendant meant by the
25

26 ⁷ It is impossible to ascertain Defendant's intent as to his duty to
27 truthfully testify.

28 ⁸ In reported conduct, Defendant's counsel Mr. Schulte has repeatedly been
rude, uncooperative, and unprofessional in his dealings with Plaintiff's counsel.

1 phrase "without prejudice," noting that "either [Defendant is]
2 under oath or he's not." (Id. at 8). Defendant's counsel
3 responded: "I agree. He's either under oath or he's not." (Id.).⁹
4 Plaintiff's counsel then sought to ensure that Plaintiff understood
5 the solemnity and purpose of the oath:

6 **Mr. Hanlon:** Mr. Wilkins, do you understand that you're
7 under oath?

8 **Defendant:** Please define your term "understand."

9 **Mr. Hanlon:** Are you under oath to tell the truth, the
10 whole truth, and nothing but the truth in this
11 deposition?

12 **Defendant:** Okay. I am not Mr. Wilkins. I'm Thomas
13 Alexander Wilkins. Offer right back to you. As far as
14 truth, the whole truth, and nothing but the truth, I'm
15 stating, without prejudice and a full reservation of
16 rights, I do.

17 Plaintiff's counsel indicated he was not comfortable with
18 Defendant's ambiguous response and sought guidance from Defendant's
19 counsel as to the meaning of Defendant's statements. Defendant's
20 counsel then stated: "I'm not uncomfortable proceeding today.
21 Whether you proceed or not is up to you." (Doc. 99, Ex. B at 9).

22 Defendant now contends that his qualifications to the oath
23 were intended to "protect and preserve any rights he may have in
24 his intellectual property" and to prevent "misuse" of his

25 ⁹ Despite repeated discussions between Plaintiff's counsel and Defendant's
26 counsel about Defendant's responses to the oath, Defendant's counsel
27 conspicuously refused to state that he believed Defendant was under oath while
28 at the deposition. If, as urged at oral argument and in the November 30 brief,
Defendant's counsel truly believed that his client had been placed under oath at
the deposition, there is no good faith explanation for counsel's refusal to
express his belief to Plaintiff's counsel. Nor is there any good faith
explanation for counsel's refusal to involve a magistrate judge where his
client's statements raised the issue and while all parties were present in the
courthouse for Defendant's deposition.

1 testimony. (November 30 Brief at 3).¹⁰ Neither Defendant nor his
2 counsel offer any reason why this explanation was not given to
3 Plaintiff's counsel during the deposition. Further, competent
4 counsel acting in good faith had a duty to advise Defendant that
5 taking the standard witness' oath without his purported
6 qualification would not have jeopardized his intellectual property
7 rights or authorized any party to lawfully use his sworn testimony
8 for improper purposes.

9 The conduct of Defendant and his counsel expressly
10 communicated that neither was impressed with the solemnity and
11 importance of the oath. The uncertainty created by Defendant's
12 responses to the oath was exacerbated by Defendant's assertion of
13 a purported distinction between "Thomas Wilkins," "Mr. Wilkins,"
14 and "Thomas Alexander Wilkins." At the outset of the deposition,
15 Defendant introduced himself as "Thomas Alexander Wilkins *on behalf*
16 *of Thomas Wilkins.*" (Doc. 99, Ex. B at 5) (emphasis added). He
17 refused to be addressed as Mr. Wilkins. Later in the deposition,
18 Defendant feigned ignorance as to who Plaintiff's counsel was
19 addressing when counsel asked the question: "Mr. Wilkins, do you
20

21 ¹⁰ The record contains evidence of an alternative motive for the conduct
22 of Defendant and his counsel. Prior to appearing at the deposition on October
23 12, Defendant's counsel foreshadowed Defendant's refusal to be meaningfully
24 deposed. First, on October 6, 2010, Defendant's counsel stated in an email that
25 Defendant would not proceed with his deposition unless Plaintiff's counsel, Mr.
26 Hanlon, agreed to be deposed. (Doc. 100, Ex. I). On October 8, 2010,
27 Defendant's counsel sent an email which stated "In light of the Court's Decision
28 on the MTD, you have no complaint and a moot injunction. I cannot imagine one
single question which will be within the scope of a dismissed complaint. I
expect, if you proceed, that your deposition transcript will consist of two
attorneys arguing about scope, and nothing from Mr. Wilkins." (Doc. 100, Ex. T).
Later on October 8, Defendant's counsel sent another email stating "Mr. Wilkins
will be there on the 12th if you insist. If you can ask a question that is
within the scope of a dismissed complaint and a moot preliminary injunction, he
will answer...I do not believe a single question will get answered." (Doc. 100,
Ex. V).

1 understand that you're under oath?" (Id. at 7, 8). In light of
2 Defendant's refusal to take the oath as administered, refusal to
3 explain his qualifications to taking the oath, refusal to
4 participate in seeking the assistance of the magistrate judge, and
5 attempt to suggest that his identity was in question, Defendant's
6 conduct at the deposition was vexations, multiplied and delayed the
7 proceedings, and created sufficient doubt whether Defendant
8 intended to offer his testimony under penalty of perjury that it
9 was reasonable for Plaintiff's counsel to interpret the totality of
10 the conduct as a refusal to be sworn.¹¹

11 **B. Cases Provided by Defendant**

12 Defendant cites *Gordon*, 778 F.2d at 1400; *Looper*, 419 F.2d at
13 1407; *Girouard v. United States*, 328 U.S. 61 (1946); and *In re*
14 *Thiesen*, 141 Cal. App. 2d 274 (Cal. Ct. App. 1956) as support for
15 his contention that the court erred in construing his conduct as a
16 refusal to be sworn. *Gordon* provides the applicable standard for
17 oaths in the Ninth Circuit, and *Looper* was cited as authority for
18 the court's holding in *Gordon*. 778 F.2d at 1400. *Girouard* and
19 *Theisen* concern naturalization oaths and are not relevant here.¹²

20 In *Gordon*, a *pro se* plaintiff refused to raise his right hand

21
22 ¹¹ The court does not hold that a deponent may not qualify the oath with
23 phrases such as those used by Defendant, so long as it is clear-- either from all
the circumstances or from explanation offered by the deponent or counsel-- that
the deponent intends to offer testimony subject to penalty to perjury.

24 ¹² Defendant cites these cases for the following propositions,
25 respectively: (1) "courts have traditionally considered the intent of the person
26 changing the oath;" and (2) "Courts are not desirous of implying unstated
27 language into legislative language where rights are concerned." (November 30
28 Brief at 4). With respect to the first proposition, the record is insufficient
to ascertain Defendant's intent at the time of his deposition because of the
failure of Defendant and his counsel to explain the meaning of Defendant's
qualification. With respect to the second proposition, to the extent Defendant
advances *Thiesen* as support for the notion that it was necessary for Defendant
to qualify his oath as he did, the case is not helpful.

1 and either "swear" or "affirm" at his deposition because doing so
2 violated his sincerely-held religious beliefs. 778 F.2d at 1401.
3 The Ninth Circuit held that, because the First Amendment required
4 the district court to employ the least restrictive means to place
5 the plaintiff under oath, it was error for the district court to
6 impose the severe sanction of dismissing plaintiff's case due to
7 the plaintiff's refusal to use the specific words "swear" or
8 "affirm." *Id.*

9 In *Looper*, a criminal defendant raised religious objections to
10 the district court's insistence that he place his hand on the bible
11 and appeal to god. 419 F.2d at 1406. After the defendant refused
12 to comply with the district court's directive, the court precluded
13 the defendant from testifying. The Fourth Circuit Court of Appeal
14 granted the defendant a new trial, holding:

15 The common law, as made applicable by Rule 26, requires
16 neither an appeal to God nor the raising of a hand as a
17 prerequisite to a valid oath. All that the common law
18 requires is a form or statement which impresses upon the
19 mind and conscience of a witness the necessity for
20 telling the truth.

19 *Id.* at 1407 (citation omitted).

20 Defendant's refusal to take the oath as administered was not
21 based on the revered constitutional interests at issue in *Gordon*
22 and *Looper*. Rather, Defendant's qualifications to the oath and
23 threats of commercial liability against the reporter were
24 purportedly intended to "protect and preserve any rights he may
25 have in his intellectual property" and to prevent "misuse" of his
26 testimony. (November 30 Brief at 3). Critically, unlike the
27 witnesses in *Gordon* and *Looper*, Defendant and his counsel refused
28 to explain the purpose and meaning of Defendant's qualification to

1 the oath and whether Defendant intended to tell the truth as
2 required by law. Taken as a whole, Defendant's statements and
3 conduct at his deposition created such doubt as to whether
4 Defendant intended to offer testimony subject to penalty of perjury
5 that Defendant's oath was deficient. Defendant's declaration will
6 not be considered for purposes of resolving Plaintiff's motion for
7 preliminary injunction.¹³ Defendant's motion for reconsideration
8 is DENIED.

9 IT IS SO ORDERED.

10 **Dated:** January 20, 2011

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

¹³ Defendant's November 30 brief asks that Defendant be afforded an
27 opportunity to testify at trial. Provided Defendant is found to comply with the
28 Federal Rules of Civil Procedure's obligations, there has been no suggestion
Defendant will be precluded from testifying at trial. Plaintiff has referred to
the pejorative and unprofessional conduct of Defendant's counsel. Such matters
should be addressed by a noticed motion or addressed to the State Bar.