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19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DEFENDANTS' OPPOSITION TO
 ORACLE'S MOTION FOR
 CLARIFICATION**

Date: N/A

Time: N/A

Courtroom: 3, 3rd Floor

Judge: Hon. Phyllis J. Hamilton

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The Court’s September 1, 2011 Order granting judgment as a matter of law (“JMOL”) and
3 a new trial requires no clarification—the Court ruled that Oracle is not entitled to actual damages
4 for copyright infringement in the form of “hypothetical” license fees as a matter of law and
5 ordered that any new trial be limited to “the amount of actual damages in the form of lost
6 profits/infringer’s profits” only. ECF No. 1081 (9/1/11 Order) at 19; *see also* ECF No. 1088
7 (9/16/11 Order) at 2 (confirming grant of JMOL on hypothetical license theory). The Court
8 neither “reaffirmed that hypothetical license damages are available as a matter of law,” nor
9 “appeared to invite the introduction of hypothetical license damages evidence in the new trial,” as
10 Oracle claims. ECF No. 1120 at 1, 5. The unquestionable clarity of the Court’s orders shows that
11 Oracle seeks not clarification, but rather reconsideration of the Court’s ruling excluding Oracle’s
12 hypothetical license theory from the case. But Oracle’s failure to comply with the Local Rules’
13 requirements for such requests alone justifies denial. The Court should deny Oracle’s Motion for
14 Clarification and guide the parties to focus their remaining weeks of trial preparation on the only
15 issues remaining—lost and infringer’s profits.¹

16 **II. ARGUMENT**

17 **A. The Court’s Order Is Clear: Oracle May Not Seek License Damages as a**
18 **Matter of Law, and the New Trial Is Limited to Lost and Infringer’s Profits.**

19 Oracle asks the Court to “clarify” “that, at the second trial, it may submit evidence of
20 hypothetical license damages.” ECF No. 1120 at 1, 5-6. But “where an order or direction of the
21 court is clear, it follows that clarification is unnecessary.” *Mohammed v. City of Morgan Hill*, No.
22 5:10-cv-05630 EJD, 2011 WL 5085497, at *1 (N.D. Cal. Oct. 25, 2011) (denying clarification
23 motion where “nothing in the . . . order requires clarification”). No “clarification” is needed here,
24 as the Court’s post-trial orders plainly state that Oracle may not seek hypothetical license damages
25 as a matter of law and that the new trial is limited to lost and infringer’s profits only.

26 On September 1, 2011, this Court granted JMOL vacating the hypothetical license

27 _____
28 ¹ Such a ruling would render moot Oracle’s separately-filed motions for leave. *See* Defs.’
Opp. to Oracle’s Mots. for Leave (filed concurrently).

1 damages award and conditionally ordering a new trial. ECF No. 1081 (9/1/11 Order) at 10-15
2 (directing that “judgment shall be entered in SAP’s favor on this issue, pursuant to Rule 50”), 17-
3 19. The order left no room for doubt that Oracle may not pursue hypothetical license damages in
4 this case. The Court’s JMOL ruling rested on two independent grounds. *First*, Oracle failed to
5 prove that it lost any licensing opportunities; in fact, the undisputed evidence proved that Oracle
6 did not lose, and never would have lost, any license fees. *Id.* at 10-11, 14 (finding Oracle failed to
7 offer any “evidence of the type on which plaintiffs ordinarily rely to prove that they would have
8 entered into such a license” and that evidence confirmed Oracle “would not ever license to
9 anyone”). *Second*, even if “hypothetical” license fees were recoverable absent proof of lost
10 licensing opportunities, Oracle failed to offer any objective (let alone sufficient) evidence to
11 calculate a non-speculative license price. *Id.* at 10-15 (holding that “evidence Oracle presented
12 was insufficient to establish an objective non-speculative license price” and that Oracle offered
13 only subjective evidence in the form of “what Oracle would have demanded” for a license).

14 The Court also granted Defendants’ new trial motion because the verdict was against the
15 weight of the evidence. *Id.* at 17. Having determined that as a matter of law Oracle is not entitled
16 to copyright damages in the form of hypothetical license fees, the Court awarded a new trial
17 allowing Oracle to prove “actual damages in the form of lost profits/infringer’s profits.” *Id.* at
18 17-18. The Court offered Oracle a remittitur to \$272 million in lost profits and infringer’s profits
19 and stated that should Oracle reject the remittitur, “the court will order a new trial as to the amount
20 of actual damages in the form of lost profits/infringer’s profits.” *Id.* at 19; *see also id.* at 20
21 (limiting evidence at new trial if Oracle rejects remittitur). The Court concluded by holding:

22 In accordance with the foregoing, the court GRANTS judgment as a matter of law
23 as to the award of hypothetical license damages. The court finds further that the
24 award of hypothetical license damages totaling \$1.3 billion was contrary to the
25 weight of the evidence, and was grossly excessive. Given SAP’s concession of
26 liability, and request for a remittitur, the court GRANTS the motion for a new
27 trial as to actual damages, conditioned on Oracle’s rejection of a remittitur to
28 \$272 million. Should Oracle reject the remittitur, the court will order a new trial
as to actual damages *in the form of lost profits/infringer’s profits only.* *Id.* at 20.

After the September 1 ruling, the Court repeatedly confirmed that the hypothetical license theory was excluded as a matter of law and that the new trial is limited to lost and infringer’s

1 profits. On September 16, 2011, the Court reaffirmed that it “grant[ed] judgment as a matter of
2 law” on the hypothetical license theory. ECF No. 1088 (9/16/11 Order) at 2. It also corrected
3 Oracle’s misunderstanding of the JMOL order, as expressed in Oracle’s Motion for 1292(b)
4 Certification for Interlocutory Review (ECF No. 1085). Referring to the *second* basis for the
5 JMOL ruling (*i.e.*, the type of evidence sufficient to price a hypothetical license, assuming the
6 threshold requirement of establishing lost licensing opportunities is met), the Court explained that
7 its September 1 Order did not require that a copyright owner point to “actual” or “benchmark”
8 licenses to prove the value of a lost license, but rather held that Oracle was required to offer
9 evidence to “establish an objective, non-speculative license price” and failed to do so. ECF No.
10 1088 (9/16/10 Order) at 2 (noting Oracle “failed to provide objective evidence of what a willing
11 buyer would have paid” and “failed to provide evidence sufficient to allow the jury to assess fair
12 market value without undue speculation”). This clarification did not, however, alter the Court’s
13 finding that Oracle failed to establish that it lost licensing opportunities—the first, threshold basis
14 for the Court’s JMOL ruling. Far from “invit[ing] the introduction of hypothetical license
15 damages evidence in the new trial,” as Oracle argues (ECF No. 1120 at 5), the Court’s September
16 Order simply confirmed the ruling’s second, independent basis: As a matter of law, Oracle
17 failed to present sufficient evidence of an objective, non-speculative license price. ECF No. 1081
18 (9/1/11 Order) at 11 (“[T]he evidence Oracle presented was insufficient to establish an objective
19 non-speculative license price.”); ECF No. 1088 (9/16/11 Order) at 2 (explaining Oracle failed “to
20 establish an objective, non-speculative license price”).

21 In January, when this Court denied Oracle’s motion for certification for interlocutory
22 appeal, the Court again confirmed that the “new trial” will be limited to “lost profits/infringer’s
23 profits.” ECF No. 1103 (1/6/12 Order) at 4. Specifically, in rejecting Oracle’s argument that
24 certification for interlocutory would obviate the need for a “third trial,” the Court held:

25 Should Oracle opt to reject the remittitur and to proceed with a new trial on lost
26 profits/infringer’s profits, any subsequent appeal will present the Ninth Circuit
27 with *two verdicts to consider*—one on hypothetical damages, and *one on lost*
28 *profits/infringer’s profits*. At that point, Oracle will be free to make any argument
that it cares to make regarding the sufficiency of the evidence, whereupon the
Ninth Circuit can issue a ruling. *Id.* (emphasis added).

1 As these orders make clear, contrary to Oracle’s contention, the Court never has
2 “appeared to invite the introduction of hypothetical license damages evidence in the new trial.”
3 ECF No. 1120 at 5. Since the Court ““directly address[ed]”” this issue multiple times, there is
4 simply no room for Oracle to argue that there is ““confusion as to the actual claims”” that remain
5 in the case. *Id.* (quoting *California v. Infineon Techs. AG*, No. C 06-4333 PJH, 2007 WL
6 3034372, at *1-2 (N.D. Cal. Oct. 16, 2007)). Indeed, Oracle has conceded that, absent an appeal,
7 the new trial will not encompass its hypothetical license claim and will be limited to lost and
8 infringer’s profits. ECF No. 1089 (Oracle’s Mot. for 1292(b) Certification) at 3 (“If the JMOL is
9 error but the grant of new trial is affirmed, there will be no apparent basis for limiting the new
10 trial to lost profits and infringer’s profits.”); *id.* at 19 (“Absent certification, any appeal must wait
11 until after the new trial is held and a new judgment is entered. Only on that post-second-trial
12 appeal would the Ninth Circuit finally be able to review the sufficiency of Oracle’s hypothetical-
13 license evidence admitted in the first trial”); *id.* (“the second verdict will be erroneously
14 limited to lost/infringer’s profits”). Although Oracle may disagree with the Court’s many rulings
15 on this issue, mere disagreement is no basis on which to seek clarification.

16 **B. Oracle Cannot Satisfy This Court’s Strict Standards for Granting Leave to**
17 **File a Motion for Reconsideration.**

18 Faced with the clarity of the post-trial orders, Oracle effectively admits—in a footnote to
19 its Motion for Clarification—that the Court’s rulings were clear and that its real goal is to seek
20 reconsideration. ECF No. 1120 at 2 n.1. But the Local rules set strict standards for obtaining
21 leave to file a motion for reconsideration, and Oracle cannot avoid these standards by disguising
22 its motion as one for “clarification.” Civ. L.R. 7-9(b).

23 **1. Oracle Failed to Move for Leave.**

24 Where a court’s ruling has not resulted in a final judgment or order, a party may seek
25 reconsideration of the ruling under Civil Local Rule 7-9, but must first obtain leave of the court to
26 do so. Civ. L.R. 7-9(a)-(b). Oracle’s informal request for reconsideration does not even comply
27 with this threshold requirement and can be denied on that basis alone. *Id.*; *see also, e.g., United*
28 *States v. Beardslee*, No. CR-94-0186-DLJ, 2008 U.S. Dist. LEXIS 105667, at *3 (N.D. Cal. Dec.

1 22, 2008) (holding that “failure alone” to move for leave sufficed to deny reconsideration).

2 **2. This Court Did Not Manifestly Fail to Consider Material Facts or**
3 **Dispositive Legal Arguments.**

4 Even had Oracle properly moved for leave to file a motion for reconsideration, Oracle’s
5 request does not comply with Civil Local Rule 7-9 because Oracle fails to “specifically show”
6 that one of three permissible bases for reconsideration applies. Civ. L.R. 7-9(b). The Rule allows
7 reconsideration only if the moving party “specifically show[s]” (1) “a material difference in fact
8 or law” of which it was unaware “in the exercise of reasonable diligence”; (2) “[t]he emergence
9 of new material facts or a change of law occurring after the time of such order;” or (3) “[a]
10 manifest failure by the Court to consider material facts or dispositive legal arguments” presented
11 to the court before the order that the party seeks to revisit was issued. *Id.* In requesting leave, a
12 party may not “repeat any oral or written argument” that it made “in support of or in opposition to
13 the interlocutory order which the party now seeks to have reconsidered.” Civ. L.R. 7-9(c). “Any
14 party who violates this restriction shall be subject to appropriate sanctions.” *Id.* Courts may
15 summarily deny motions that are not filed in compliance with the Local Rules. *Grove v. Wells*
16 *Fargo Fin. Cal., Inc.*, 606 F.3d 577, 582 (9th Cir. 2010) (upholding district court’s denial of
17 motion to tax costs that was not in compliance with court’s local rules); *Elder-Evins v. Casey*, No.
18 C 09-05775 SBA, 2011 U.S. Dist. LEXIS 103080, at *5-6 (N.D. Cal. Sept. 13, 2011) (denying
19 motion for leave to file motion for reconsideration for failing to show any of three conditions
20 required for reconsideration under Civil Local Rule 7-9).

21 The sole basis for Oracle’s request is that this Court’s September 1, 2011 Order amounted
22 to “[a] manifest failure by the Court to consider material facts or dispositive legal arguments
23 which were presented to the Court before such interlocutory order.” Civ. L.R. 7-9(b)(3). This is
24 the key to Oracle’s entire motion, yet Oracle addresses this point in a scant footnote with little
25 explanation. This too is a reason that leave should be denied. Civ. L.R. 7-9(b) (requiring movant
26 to “specifically show” basis for allowing reconsideration).

27 Oracle’s one-sentence justification for granting leave is that “[t]he facts and arguments
28 before the Court on the post-trial motions showed that Oracle’s trial evidence met the standard for

1 sufficiency that had been established before and at trial, and Oracle’s evidence cannot be
2 precluded on retrial for failing to meet a different standard that had not yet been stated.” ECF No.
3 1120 at 2 n.1. But Oracle’s reliance on “[t]he facts and arguments before the Court on the post-
4 trial motions” does not support reconsideration, as this “repeat[s] . . . written argument” offered to
5 oppose the JMOL ruling. Civ. L.R. 7-9(c). Oracle points to no fact or argument that the Court
6 “manifest[ly] fail[ed] . . . to consider,” and its reassertion of previous arguments is prohibited and
7 sanctionable. Civil L.R. 7-9(b)(3)-(c); *see also, e.g., Salinas v. City of San Jose*, No. 5:09-cv-
8 04410 EJD, 2011 U.S. Dist. LEXIS 94354, at *9 (N.D. Cal. Aug. 23, 2011) (denying motion for
9 leave where “[t]here [was] no indication the court ‘manifestly’ failed to consider anything that
10 could prove dispositive”); *Jackson v. Walker*, No. CIV S-06-2023 WBS GGH P, 2010 U.S. Dist.
11 LEXIS 45974, at *10 (E.D. Cal. May 11, 2010) (“Disagreement with a decision or the
12 recapitulation of rejected arguments are not adequate bases for reconsideration”); *Sconiers v.*
13 *Fresno Cnty. Superior Court*, No. 1:11-cv-00113-LJO-SMS, 2011 U.S. Dist. LEXIS 122195, at
14 *2-3 (E.D. Cal. Oct. 21, 2011) (holding motion to reconsider “has no apparent purpose other than
15 to challenge the authority of the Court” and “warning will serve as a predicate for sanctions”),
16 *sanctions imposed* at 2011 U.S. Dist. LEXIS 152225, at *1-2 (E.D. Cal. Dec. 13, 2011).

17 More importantly, the premise of this argument—that the JMOL order articulated “a
18 different standard that had not yet been stated,” ECF No. 1120 at 2 n.1—is plainly refuted by this
19 Court’s prior orders. The September 1 Order denying Defendants’ summary judgment motion
20 “was not intended as a definitive ruling as to what Oracle was or was not required to show.” ECF
21 No. 1081 (9/1/11 Order) at 13. Rather, “the most salient guidance provided by” the Court’s order
22 “was the instruction that Oracle could claim lost license fees only if it ‘present[ed] evidence
23 sufficient to allow the jury to assess fair market value without ‘undue speculation.’” *Id.* After
24 having had “the benefit of [hearing] all the evidence,” the Court granted JMOL because “Oracle
25 failed to present such objective, non-speculative evidence”—both for proving lost licensing
26 opportunities as well as for proving a hypothetical license value. *Id.* at 14; *see also* ECF No.
27 1088 (9/16/11 Order) at 2 (explaining that Oracle failed to “establish an objective, non-
28 speculative license price”); ECF No. 1103 (1/6/12 Order) at 3 (“[T]he court clearly indicated in

1 the order granting judgment as a matter of law that Oracle had not presented sufficient objective
2 evidence . . . for a reasonable jury to find that Oracle was entitled to a hypothetical license.”).
3 Contrary to Oracle’s arguments, this “objective and non-speculative” requirement is not a new or
4 “different standard.” ECF No. 1120 at 2 n.1, 5-6 (arguing that the September 16 order “clarif[ied]
5 that hypothetical license damages are available if sufficient objective evidence supports them”).
6 As this Court observed, “Oracle put on the evidence it chose to present,” and it cannot blame this
7 Court for its own failure to present objective, non-speculative evidence to support its hypothetical
8 license theory. ECF No. 1081 (9/1/11 Order) at 14; *see also* ECF No. 1103 (1/6/12 Order) at 4.

9 **3. No New Facts Warrant Reconsideration.**

10 Although Oracle does not seek leave to file a motion for reconsideration based on “a
11 material difference in fact,” or “emergence of new material facts,” it devotes eight pages to
12 discussing additional evidence that it would offer in a second hypothetical-license trial. Civ. L.R.
13 7-9(b)(1)-(2). None of the evidence qualifies as a “material difference in fact” that Oracle “did
14 not know” at the time of this Court’s orders, nor is it “new” evidence that became available only
15 “after the time of [this Court’s] order.” Civ. L.R. 7-9(b)(1)-(2).

16 Oracle cites this evidence in an apparent attempt to convince the Court that the result
17 would be different in a second trial with more evidence. But this evidence would not lead to a
18 different outcome. Again, this Court’s JMOL ruling was based on two separate grounds. Even if
19 Oracle could present additional evidence regarding the value of the hypothetical license (*see* ECF
20 No. 1120 at 7-14), it could not overcome the first basis for the Court’s JMOL ruling—Oracle’s
21 failure to prove lost licensing opportunities. No additional evidence could remedy Oracle’s
22 fundamental failure at the first trial to show—or even argue—that it actually lost any licensing
23 opportunities. ECF No. 1081 (9/1/11 Order) at 10. This is because the evidence Oracle did offer
24 actually proves that it did not lose any licensing opportunities to Defendants or any third parties.
25 As this Court recognized, Oracle “admitted that it had never given any entity a license” for the
26 particular use at issue. *Id.* And Oracle voluntarily elicited testimony that affirmatively “showed
27 that Oracle had not only not licensed to anyone . . . in the past, but would not ever license to
28 anyone. . . .” *Id.* at 14. Without evidence of lost licensing opportunities, Oracle is prohibited, as

1 a matter of law, from recovering actual damages for copyright infringement in the form of
2 “hypothetical” lost license fees. Additional speculation about a license price would make no
3 difference in the outcome of a second hypothetical-license trial where, as here, the only evidence
4 is that there never was or would be a license to price.

5 **4. Oracle’s Reliance on “Fairness” Is Misplaced.**

6 In the end, Oracle relies only on its notion of “fairness” to justify grant of its Motion.
7 ECF No. 1120 at 6, 10. But under this Court’s rules, leave to file a motion for reconsideration
8 requires a more specific showing. Civ. L.R. 7-9(b). In any event, denying Oracle’s motion is
9 exceedingly “fair” and consistent with Civil Local Rule 1’s policy of “just, efficient, speedy and
10 economical determination of” litigation. Civ. L.R. 1-2(b); *see also* Fed. R. Civ. P. 1. The Court
11 gave Oracle a full and fair opportunity to present its best case for a hypothetical license, and
12 “after the benefit of having heard all the evidence,” ECF No. 1081 (9/1/11 Order) at 14, the
13 Court excluded the hypothetical license as a matter of law and granted a new trial to offer Oracle
14 a chance to prove lost and infringer’s profits. *Id.* at 20. Oracle sought no “clarification” at that
15 time. Instead, it elected a new trial with full knowledge that “[i]f Oracle rejects the remittitur
16 and opts for a new trial, the parties will be limited to putting on evidence regarding lost profits.”
17 *Id.* Now, less than two months before trial, Oracle asks this Court to resurrect Oracle’s plainly-
18 excluded hypothetical license claim in the second trial.

19 Lacking legal justification, the only plausible explanation for Oracle’s eleventh-hour
20 motion is that it is attempting to distract Defendants from trial preparation or to delay the trial.
21 Oracle even admits that its pretrial submissions include exhibits and witnesses relevant only to
22 the license theory. Defendants are compelled to deal with that in their trial preparation, even
23 though these claims do not belong in the case. Oracle’s attempts at distraction and delay already
24 have caused prejudice to Defendants, who should be focusing on the second trial rather than
25 opposing motions to “clarify” and reconsider past rulings, and needless burden on the Court.
26 *Cf. Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) (“Disruption to the
27 schedule of the court and other parties . . . is not harmless.”).

1 **III. CONCLUSION**

2 This Court's September 1, 2011 Order clearly excluded the hypothetical license remedy
3 from this case as a matter of law and limited the second trial to lost and infringer's profits. No
4 clarification is necessary and the Court should deny Oracle's Motion for Clarification.
5 Furthermore, the Court should deny Oracle's alternative, informal request for leave to file a
6 motion for reconsideration because Oracle has failed to specifically show that leave is proper
7 under Civil Local Rule 7-9(b). And, to permit the parties to focus their trial preparation and
8 reduce the prejudice to Defendants caused by Oracle's unnecessary motions, the Court should
9 direct Oracle to immediately submit narrowed exhibit and witness lists and deposition and
10 discovery designations that omit evidence or materials relating specifically to the excluded
11 hypothetical license theory and other irrelevant matters addressed in Oracle's moot motions for
12 leave to file motions for reconsideration.

13 Dated: May 1, 2012

JONES DAY

14 By: /s/ Tharan Gregory Lanier
15 Tharan Gregory Lanier

16 Counsel for Defendants
17 SAP AG, SAP AMERICA, INC., and
18 TOMORROWNOW, INC.