Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
Elaine Wallace (SBN 197882)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
ramittelstaedt@jonesday.com
jmcdonell@jonesday.com
ewallace@jonesday.com

Tharan Gregory Lanier (SBN 138784)
Jane L. Froyd (SBN 220776)
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
tglanier@jonesday.com
jfroyd@jonesday.com

Scott W. Cowan (Admitted *Pro Hac Vice*)
Joshua L. Fuchs (Admitted *Pro Hac Vice*)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600
swcowan@jonesday.com
jlfuchs@jonesday.com

Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

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

[PROPOSED] ORDER DENYING ORACLE'S MOTION FOR CLARIFICATION

Having considered the papers filed by the parties in connection with Oracle's Motion for Clarification ("Motion"):

IT IS HEREBY ORDERED THAT: Oracle's Motion is DENIED.

Oracle moved for "clarification" that it may offer evidence to support a hypothetical license theory of copyright damages at the new trial in light of the Court's September 1, 2011 and September 16, 2010 Orders. Alternatively, Oracle requests, in a footnote, leave to file a motion for reconsideration of the Court's post-trial rulings. For the reasons discussed below, the Court denies both requests.

Request for Clarification. "[W]here an order or direction of the court is clear, it follows that clarification is unnecessary." *Mohammed v. City of Morgan Hill*, No. 5:10–cv–05630 EJD, 2011 WL 5085497, at *1 (N.D. Cal. Oct. 25, 2011) (denying clarification motion where "nothing in the . . . order requires clarification"). No "clarification" is needed here. The Court's September 1, 2011 Order vacating the hypothetical license award and conditionally awarding a new trial plainly stated that, as a matter of law, Oracle may not seek actual damages in the form of lost license fees and that the new trial would be limited to determining "actual damages in the form of lost profits/infringer's profits only." ECF No. 1081 (9/1/11 Order) at 20. The Court's grant of judgment as a matter of law ("JMOL") as to Oracle's hypothetical license claim rested on two bases: (1) Oracle failed to prove that it lost any licensing opportunities and, in fact, affirmatively offered evidence that it did not, and never would have, lost any license fees, and (2) even if "hypothetical" license fees were recoverable absent proof of lost licensing opportunities, Oracle failed to offer any objective (let alone sufficient) evidence upon which the jury could have relied to calculate a non-speculative license price. In light of these findings, the Court ruled that Oracle may not seek hypothetical license damages in this case and that, should Oracle reject the remittitur, "the court will order a new trial as to the amount of actual damages in the form of lost profits/infringer's profits." *Id.* at 19.

The Court subsequently confirmed that the hypothetical license theory was excluded as a matter of law and that the new trial would be limited to lost and infringer's profits. On September 16, 2011, the Court verified that it "grant[ed] judgment as a matter of law" on the hypothetical

license theory. ECF No. 1088 (9/16/11 Order) at 2. This September 16 Order also clarified that, as to the second basis for the JMOL ruling, the Court did not hold that a copyright owner is required to offer "actual" or "benchmark" licenses to prove the value of a lost license. This clarification did not alter the Court's finding that Oracle failed to establish that it lost licensing opportunities—the first, threshold basis for the JMOL ruling. The Court's January 6, 2012 Order denying Oracle's motion for 1292(b) certification for interlocutory appeal again stated that the "new trial" will be "on lost profits/infringer's profits." ECF No. 1103 (1/6/12 Order) at 4.

The Court's post-trial orders make clear that the new trial will address lost profits and infringer's profits only. The Court once again reaffirms that Oracle may not seek or present evidence relating to actual damages in the form of a hypothetical license.

Request for Reconsideration. Where a court's ruling has not resulted in a final judgment or order, a party may seek reconsideration of the ruling under Civil Local Rule 7-9, but must first obtain leave of the court. Civ. L.R. 7-9(a)-(b) (citing Fed. R. Civ. P. 54(b)). The Rule allows reconsideration under only three circumstances: (1) where, at the time of the motion, "a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought"; (2) the "emergence of new material facts or a change of law occurring after the time of such order"; or (3) "manifest failure by the Court to consider material facts or dispositive legal arguments" presented to the court before the order. Civ. L.R. 7-9(b). Civil Local Rule 7-9 also expressly prohibits the repetition of "any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered. Any party who violates this restriction shall be subject to appropriate sanctions." Civ. L.R. 7-9(c). Courts may "summarily deny motions that are not filed in compliance with the Court's Local Rules." *Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 582 (9th Cir. 2010) (upholding district court's denial of motion to tax costs that was not in compliance with court's local rules); *Elder-Evins v. Casey*, No. C 09-05775 SBA, 2011 U.S. Dist. LEXIS 103080, at *5-6 (N.D. Cal. Sept. 13, 2011) (denying motion for leave to file motion for reconsideration for failing to show any of three conditions required for reconsideration under Civil Local Rule 7-9).

Oracle's request for reconsideration, confined to a footnote in its Motion for Clarification, fails to comply with Civil Local Rule 7-9's threshold requirement that a party formally seek leave to move for reconsideration. This failure alone justifies denial of Oracle's request. Civ. L.R. 7-9(a); *United States v. Beardslee*, No. CR-94-0186-DLJ, 2008 U.S. Dist. LEXIS 105667, at *3 (N.D. Cal. Dec. 22, 2008) (holding that party's "failure alone" to move for leave was sufficient basis to deny reconsideration).

Even had Oracle filed a request for leave, such request would have lacked merit because Oracle makes no attempt to show that one of three permissible bases for reconsideration applies. Civ. L.R. 7-9(b). Here, the sole basis for Oracle's request for reconsideration is that the Court manifestly failed to consider material facts or dispositive legal arguments. But Oracle identifies no evidence or argument that the Court overlooked in issuing its September 1, 2011 Order. Oracle claims only that the facts and arguments before the Court on the post-trial motions showed that Oracle's trial evidence supported the jury's hypothetical license verdict.

Oracle's reliance on the facts and arguments the Court considered in precluding Oracle's hypothetical license remedy does not justify reconsideration—instead, it violates Civil Local Rule 7-9's prohibition on repeated argument. Civ. L.R. 7-9(c). Oracle's failure to identify any facts or arguments that that Court overlooked in issuing its September 1 Order justifies denying Oracle's request for reconsideration. Civil L.R. 7-9(b)(3)-(c); *see also, e.g.*, *Salinas v. City of San Jose*, No. 5:09-cv-04410 EJD, 2011 U.S. Dist. LEXIS 94354, at *9 (N.D. Cal. Aug. 23, 2011) (denying motion for leave where "[t]here [was] no indication the court 'manifestly' failed to consider anything that could prove dispositive"); *Jackson v. Walker*, No. CIV S-06-2023 WBS GGH P, 2010 U.S. Dist. LEXIS 45974, at *10 (E.D. Cal. May 11, 2010) ("Disagreement with a decision or the recapitulation of rejected arguments are not adequate bases for reconsideration.").

Finally, Oracle's informal request for reconsideration is not supported by its lengthy description of the "new" valuation evidence it would offer at a new trial to price a hypothetical license. Such evidence, to which Oracle had access prior to the first trial but did not present, does not qualify as a "material difference in fact" that Oracle "did not know" at the time of the Court's post-trial orders, nor does it constitute "new" evidence that became available only "after the time

of [this Court's] order[s]." Civ. L.R. 7-9(b)(1)-(2). Further, this proposed evidence regarding the alleged value of a hypothetical license does not affect the Court's ruling that, as a matter of law, Oracle is not entitled to recover lost license fees—whatever their value—because it failed to prove that it lost licensing opportunities. Thus, there is no reason to revisit the Court's ruling excluding the hypothetical license theory.

* * *

The Court's previous orders are clear that Oracle may not seek damages in the form of a hypothetical license and that the new trial is limited to lost and infringer's profits. To permit the parties to focus their trial preparation and reduce the prejudice to Defendants caused by Oracle's unnecessary motions, the Court ORDERS Oracle to immediately submit narrowed exhibit and witness lists and deposition and discovery designations that omit evidence or materials relating specifically to the excluded hypothetical license theory and other irrelevant matters referenced in Oracle's now moot motions for leave to file motions for reconsideration.

IT IS SO ORDERED.

DATED: _____ By: _____
Hon. Phyllis J. Hamilton