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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)

DEFENDANTS' OPPOSITION TO ORACLE'S MOTIONS FOR LEAVE TO FILE MOTIONS FOR RECONSIDERATION REGARDING (1) SAVED DEVELOPMENT COSTS AND (2) UP-SELL AND CROSS-SELL PROJECTIONS

Date: N/A
Time: N/A
Place: 3rd Floor, Courtroom 3
Judge: Hon. Phyllis J. Hamilton

I. INTRODUCTION

This Opposition responds to Oracle's two motions for leave to file motions for reconsideration. Oracle's motions disregard this Court's orders and this District's rules. Although the Court expressly ordered that the new trial is limited to determining lost and infringer's profits only, Oracle seeks to revive evidence that relates solely to the legally precluded hypothetical license claim—*i.e.*, evidence of saved development costs and cross-sell/up-sell projections designed to inflate that license claim. The Court need not revisit its rulings relating to this now-irrelevant evidence and should deny Oracle's motions as moot. Moreover, the motions wholly fail to comply with the Local Rules. Contrary to Oracle's assertion, the Court did not fail, manifestly or otherwise, to consider dispositive legal arguments. There are few, if any, issues in this case more litigated than saved development costs and cross-sell/up-sell evidence both independently and as they relate to the license theory. The Court has spent significant judicial resources carefully analyzing and thoughtfully considering the parties' extensive arguments on these topics. Indeed, Oracle's papers eventually concede that the Court considered Oracle's arguments, but simply disagreed with them. That is no basis for reconsideration. Oracle's insistence on offering repeated substantive argument in violation of the Local Rules' express prohibition is yet another reason to deny Oracle's motions, and impose sanctions.

II. THE COURT'S PREVIOUS RULINGS

On numerous occasions, the Court has made clear that Oracle may not seek damages based on saved development costs or cross-sell/up-sell opportunities—whether as standalone claims or in support of Oracle's now-precluded hypothetical license claim. These orders lay the groundwork for the evidentiary rulings to which Oracle now belatedly objects.

A. Saved Development Costs.

On August 17, 2010, the Court granted summary judgment that Oracle may not seek copyright damages "based on 'saved development costs.'" ECF No. 762 (8/17/10 Order) at 22. At the September 30, 2010 pretrial conference the Court affirmed its holding, stating "[T]here will be no testimony from an expert on saved acquisition costs. That's out of the case." Declaration of Tharan Gregory Lanier ("Lanier Decl.") ¶ 1, Ex. 1 (9/30/10 Hrg. Tr.) at 121:15-

122:10); *see also* ECF No. 914 (9/30/10 Order) at 3 (ruling that "no witness may testify regarding saved acquisition costs").

B. Cross-Sell/Up-Sell Projections.

On September 17, 2009, Magistrate Judge Laporte ordered discovery sanctions against Oracle, precluding Oracle from presenting at trial evidence of alleged lost profits relating to: (1) Oracle customers that did not become TomorrowNow customers; (2) licensing revenue, as opposed to support revenue; and (3) products not supported by TomorrowNow. ECF No. 482 (9/17/09 Order) ("Sanctions Order"). These precluded sales included so-called "cross-sell" and "up-sell" opportunities. *Id.* This Court fully adopted the Sanctions Order on November 2, 2009, overruling Oracle's objections and holding that "the precluded evidence will NOT be admitted through the back door." ECF No. 532 (11/2/09 Order) at 1 (emphasis in original).

On September 30, 2010, having considered the parties' written and oral arguments, the Court affirmed the Sanctions Order and granted Defendants' Motion in *Limine* No. 2 "to exclude evidence of lost profits (as part of or as support for [Oracle's] fair market value license claim)." ECF No. 914 (9/30/10 Order) at 2. The Court held: "Oracle made no adequate disclosure and SAP had no opportunity to take discovery[] regarding lost profits in the form of lost software license sales (lost 'cross-sell' and 'up-sell' opportunities) or lost license revenues." *Id.*

At trial, the Court again affirmed the Sanctions Order and further defined its scope. After detailed briefing and lengthy oral argument, the Court confirmed on November 8, 2010 that the Sanctions Order precluded not only evidence of cross-sell/up-sell opportunities offered in support of Oracle's lost profits claim, but also evidence of cross-sell/up-sell projections offered to bolster Oracle's hypothetical license claim. Lanier Decl. ¶ 2, Ex. 2 (11/8/10 Trial Tr.) at 826:14-21.

III. ARGUMENT

A. The Court Should Deny Both Motions as Moot.

This Court has stated unequivocally that Oracle may not pursue hypothetical license damages in this case as a matter of law and that the new trial is limited to determining "lost profits/infringer's profits only." ECF No. 1081 (9/1/11 Order) at 20; *see also* ECF No. 1088 (9/16/11 Order) at 2; ECF No. 1103 (1/6/12 Order) at 4 (referring to "new trial on lost

profits/infringer's profits"); *cf.* Defs.' Opp. to Mot. for Clarification (filed concurrently). Yet, through its motions, Oracle seeks to revive precluded evidence of saved development costs and cross-sell/up-sell projections that it would offer to support a hypothetical license claim. *See, e.g.*, ECF No. 1122 at 1, 4 (arguing that evidence of saved costs "is relevant and admissible for the limited purposes of providing the jury with a reasonableness check on Meyer's measure of the hypothetical license valuation"); ECF No. 1124 (Pls.' Mot.) at 1 (claiming that evidence of cross-sell/up-sell projections is "relevant to show the amount of the royalty that Oracle would have demanded from SAP in hypothetical negotiations for a license to use that software"), 6 (stating that evidence of cross-sell/up-sell projections "would not be used to show lost profits and rather supports Oracle's hypothetical license theory").

This previously excluded evidence is irrelevant to the new trial and inadmissible on that basis alone. Fed. R. Evid. 402. Thus, Oracle's motions should be denied as moot. *See, e.g.*, *Pickard v. DOJ*, No. C 10-05253 LB, 2011 U.S. Dist. LEXIS 74127, at *2 (N.D. Cal. July 8, 2011) (denying motion for certification of interlocutory appeal as moot in light of court's grant of transfer motion whose previous denial party sought to appeal).

B. Oracle's Motions Fail to Comply with Local Rule 7-9 and Should Be Denied.

Despite parroting the Local Rules' requirements, Oracle fails to comply with them. The sole justification that Oracle offers to support its motions is that the Court "manifestly failed" to consider dispositive legal arguments that would have supported admitting evidence of saved development costs and cross-sell/up-sell projections. But Oracle's own papers show that Oracle's real objection is not that the Court overlooked these arguments, but that the Court was not convinced by them. Oracle's mere disagreement with the Court's rulings does not support reconsideration; nor do Oracle's improperly repeated arguments.

1. Legal Standards.

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 that the party seeks to revisit was issued. 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." Civ. L.R. 7-9(c). "Any party who violates this restriction shall be subject to appropriate sanctions." *Id.* Courts may "summarily deny motions that are not filed in compliance with the 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).

2. Oracle's Motion Regarding Saved Development Costs Evidence Fails to Comply with Local Rule 7-9.

As basis for its motion for leave regarding saved development costs, Oracle argues only that the Court "manifestly failed to consider a material fact before the Court prior to its ruling." ECF No. 1122 at 4. But to support this position, Oracle offers nothing more than a rehash of the arguments it presented on summary judgment and in connection with its *Daubert* briefing. *See id.* at 4-5. Oracle's recycled arguments, which the Court considered and rejected, are improper and cannot justify reconsideration.

Contrary to Oracle's claim, the Court did not "manifestly fail" to consider argument as to the admissibility of saved development costs evidence. The parties offered express argument on these issues in connection with Defendants' *Daubert* motion to exclude testimony from Oracle "expert" Paul K. Pinto, which the Court considered before ruling to exclude evidence of saved development costs. There, as here, Oracle argued that despite the Court's summary judgment order excluding copyright damages "based on 'saved development costs,'" ECF No. 762 (8/17/10

Order) at 22, Pinto's opinions on saved costs were "still relevant considerations in determining the fair market value of the hypothetical license" because they bear on "what it would have cost SAP for research and development," rather than "the amounts that Oracle allegedly spent to develop and/or acquire the intellectual property at issue."[1] *Compare* ECF No. 843 (Pls.' Opp. to Defs.' Mot. to Exclude Pinto) at 9 *to* ECF No. 1122 at 4-5 (describing testimony about "SAP's saved development costs as objective evidence relevant to the hypothetical license remedy"). To support this position, Oracle misconstrued the summary judgment order as having excluded only evidence of Oracle's saved costs, rather than SAP's saved costs. *See* ECF No. 843 (Pls.' Opp. to Defs.' Mot. to Exclude Pinto) at 9. Oracle repeats that mischaracterization, arguing that the Court's exclusion of expert testimony regarding "saved acquisition costs" was based on the Court's "fail[ure] to consider" that Oracle experts would offer evidence of allegedly non-precluded SAP saved costs.[2] ECF No. 1122 at 4. But the Court considered all of the arguments and ultimately ruled that all testimony on purported saved costs should be excluded as irrelevant. ECF No. 876 (Defs.' Reply iso Mot. to Exclude Pinto); Lanier Decl. ¶ 1, Ex. 1 (9/30/10 Hrg. Tr.) at 121:10-122:10 ("And I totally agree . . . there will be no testimony from an expert on saved acquisition costs. That's out of the case.").

Oracle offers no basis for its claim that the Court overlooked these arguments, which Oracle now improperly re-advances. Civ. L.R. 7-9(c); *Runge v. Ippollito*, No. C 06-5218 PJH (PR), 2009 U.S. Dist. LEXIS 27125, at *3 (N.D. Cal. Mar. 23, 2009) (Hamilton, J.) (denying motion for leave where party failed to make required showing under Civil Local Rule 7-9 and instead "attempt[ed] to reargue" previous positions). Thus, the Court should deny Oracle's motion for leave as groundless. *See Elder-Evins*, 2011 U.S. Dist. LEXIS 103080, at *5-6;

[1] Oracle also advanced these arguments on summary judgment—arguments that the Court unequivocally rejected. *See, e.g.*, ECF No. 677 (Pls.' Opp. to Defs.' Mot. for Partial Summary Judgment) at 17-20 (arguing that "[t]he costs SAP saved by using Oracle's software and support materials are directly relevant to the FMV of Oracle's hypothetical license damages" and citing same authority offered in ECF No. 1122 at 5); ECF No. 762 (8/17/10 Order) at 22.

[2] Oracle offered an identical argument, objecting to the Court's ruling excluding expert testimony regarding saved costs, in its Conditional Motion for New Trial, which the Court denied. *Compare* ECF No. 1122 at 5 (arguing relevance of expert testimony on SAP's alleged saved costs as "reasonableness check" and claiming prejudice resulting from exclusion) *to* ECF No. 1046 at 10-11 (same); ECF No. 1066 (Pls.' Reply iso Cond. Mot. for New Trial) at 9-10 (same); ECF No. 1081 (9/1/11 Order) at 20 (denying conditional new trial motion).

Salinas, 2011 U.S. Dist. LEXIS 94354, at *9; *Rearden LLC v. Rearden Commerce, Inc.*, No. C 06-07367 MHP, 2009 U.S. Dist. LEXIS 15590, at *6 (N.D. Cal. Feb. 26, 2009) (denying motion for leave where party "failed to show a manifest failure that would entitle them to leave to file a motion for reconsideration").

3. Oracle's Motion Regarding Cross-Sell/Up-Sell Projections Evidence Fails to Comply with Local Rule 7-9.

As with its motion regarding saved development costs evidence, Oracle does not assert that reconsideration of the Court's November 8, 2010 ruling excluding evidence of cross-sell and up-sell projections is justified on the basis of newly discovered facts or a material change in law. Instead, Oracle again contends that the Court should revisit its ruling because the Court "fail[ed] to consider" arguments that Oracle advanced in favor of admitting such evidence. Oracle's claim is belied by its own papers, which confirm that the Court did not overlook these arguments—it simply disagreed with them. Oracle's reassertion of the very positions the Court thoughtfully considered and ultimately rejected in deciding to exclude cross-sell/up-sell projections cannot support reconsideration and blatantly disregards the provisions of the Local Rules.

The Court has considered the scope of Magistrate Judge Laporte's Sanctions Order on no fewer than three occasions, each time with the benefit of complete briefing and, in two cases, accompanied by extensive oral argument. Yet, according to Oracle, the Court should review its November 8, 2010 ruling construing the Sanctions Order to preclude evidence of cross-sell/up-sell projections because the Court allegedly failed to consider three of Oracle's arguments: (1) the Sanctions Order precluded only evidence of lost cross-sell/up-sell opportunities offered to support Oracle's lost profits claim, not evidence of Oracle's cross-sell/up-sell projections, which Oracle would have offered to support its license claim; (2) Defendants should not have been permitted to argue that the Sanctions Order applied to cross-sell/up-sell projections evidence; and (3) it would violate due process to "extend" the Sanctions Order to preclude cross-sell/up-sell projections evidence. ECF No. 1124 at 14-20. Given the considerable resources that the parties and the Court have devoted to these issues in the litigation, however, there is no merit to Oracle's claim that the Court "manifestly failed" to consider any of these arguments. *See, e.g., Salinas*, 2011

U.S. Dist. LEXIS 94354, at *9 (denying motion for leave, finding that "[t]here is no indication the court 'manifestly' failed to consider anything that could prove dispositive").

For example, before the Court's November 8, 2010 ruling, Oracle argued multiple times that the Sanctions Order precluded only evidence of lost cross-sell/up-sell opportunities used to support lost profits, not of cross-sell/up-sell projections used to support a hypothetical license.[3] ECF No. 499 (Pls.' Objs. to Sanctions Order) at 1 n.1; ECF No. 790 (Pls.' Opp. to Defs.' Mots. *in Limine*) at 1-2, 4 ("Judge Laporte did not exclude . . . evidence of the parties' expectations in January 2005 about future up-sales, cross-sales or any other value they would have attributed to a hypothetical license."), 10; ECF No. 977 (Pls.' Opp. to Defs.' Mot. to Enforce) at 4, 6 (same); Lanier Decl. ¶¶ 1-2, Ex. 1 (9/30/10 Hrg. Tr.) at 55:4-12, 56:5-6, 57:24-58:6; Ex. 2 (11/8/10 Trial Tr.) at 811:14-16, 813:17-22. Oracle cannot in good faith contend that the Court failed to consider these arguments when Oracle simultaneously complains that the Court understood—but rejected—them. *See, e.g.*, ECF No. 1124 at 6, 8-10 ("But having established that the sanction did not cover this evidence, the Court was persuaded otherwise at the last minute . . . ."); ECF No. 1046 (Pls.' Cond. Mot. for New Trial) at 5 ("The distinction between forward-looking projections and backward-looking results, which the Court expressly and properly recognized, should have ended this dispute."); ECF No. 1066 (Pls.' Reply iso Cond. Mot. for New Trial) at 3-4 ("The distinction between forward-looking projections and backward-looking results, which the Court recognized, ends the debate."); Lanier Decl. ¶ 2, Ex. 2 (11/8/10 Trial Tr.) at 816:25-818:16 ("Judge Laporte's order doesn't address it. No order I've issued addresses this. As far as I'm concerned, this is [an] entirely new issue."), 823:22-824:1, 825:2-4, 826:14-21 ("Well, I think you've both made good arguments. It clearly wasn't contemplated by the Court at the time of the pretrial ruling. But I'm persuaded by the defense position.").

Similarly, Oracle has argued numerous times that the Sanctions Order should not preclude cross-sell/up-sell evidence offered in support of its hypothetical license claim because Defendants

[3] Oracle also offered these arguments in support of its Conditional Motion for New Trial. *See, e.g.*, ECF No. 1046 (Pls.' Cond. Mot. for New Trial) at 3-5; ECF No. 1066 (Pls.' Reply iso Cond. Mot. for New Trial) at 2-4; ECF No. 1081 (9/1/11 Order) at 20.

allegedly limited their sanctions motion to evidence offered in connection with lost profits.[4] ECF No. 790 (Pls.' Opps. to Defs.' Mots. *in Limine*) at 2 (arguing that "Defendants expressly limited their Rule 37 motion to lost profits"), 4, 10; ECF No. 977 (Pls.' Opp. to Defs.' Mot. to Enforce) at 4-5 (arguing that "Defendants expressly disclaimed that the sanctions order would in any way limit Oracle's ability to present evidence" of cross-sell/up-sell projections); Lanier Decl. ¶ 1, Ex. 1 (9/30/10 Hrg. Tr.) at 55:4-12, 57:3-7. Although Oracle never expressly argued, as it does now, that Defendants are judicially estopped from arguing that the Sanctions Order excludes cross-sell/up-sell evidence offered to support Oracle's hypothetical license claim, this untimely-raised argument cannot justify reconsideration and has been waived. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (holding that reconsideration motion "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation"); *Napa Cmty. Redevelopment Agency v. Cont'l Ins. Co.*, No. C-94-3284 DLJ, 1995 U.S. Dist. LEXIS 22542, at *6 (N.D. Cal. Nov. 17, 1995) ("If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived."); *Runge*, 2009 U.S. Dist. LEXIS 27125, at *3 (denying motion where party failed to comply with Civil Local Rule 7-9 and instead "attempt[ed] to reargue" previous positions and "present[] new arguments that could have been, but were not, presented at the time of the ruling").[5]

Finally, there is no reason to believe that the Court failed to consider Oracle's assertion that "extending" the Sanctions Order to preclude evidence of cross-sell/up-sell projections would violate due process, where Oracle expressly raised this issue before the Court's ruling.[6] ECF No.

[4] Oracle also argued as much in its Conditional Motion for New Trial. *See, e.g.*, ECF No. 1046 (Pls.' Cond. Mot. for New Trial) at 3, 7; ECF No. 1066 (Pls.' Reply iso Cond. Mot. for New Trial) at 2-3.

[5] Oracle's estoppel argument also fails on the merits. Oracle acknowledges that judicial estoppel prohibits a party from asserting a position only where the party's position is "clearly inconsistent" with an earlier position. ECF No. 1124 at 16 (quoting *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008)). As Defendants previously explained, however, Defendants' position that the Sanctions Order applies with equal force to cross-sell/up-sell projections offered to support Oracle's hypothetical license claim is not "clearly inconsistent" with positions they took in moving for sanctions or in their subsequent efforts to uphold the Sanctions Order. ECF No. 1055 (Defs.' Opp. to Pls.' Cond. Mot. for New Trial) at 8.

[6] Oracle reasserted this argument in its Conditional Motion for New Trial. *See, e.g.*, ECF No. 1046 (Pls.' Mot. for Cond. New Trial) at 6-7; ECF No. 1066 (Pls.' Reply iso Cond. Mot. for New Trial) at 6.

977 (Pls.' Opp. to Defs.' Mot. to Enforce) at 1-2 ("Barring such evidence at this stage would be highly prejudicial to Oracle and would violate due process."), 7-8 (arguing same); *Salinas*, 2011 U.S. Dist. LEXIS 94354, at *9; *Elder-Evins*, 2011 U.S. Dist. LEXIS 103080, at *5-6; *Rearden*, 2009 U.S. Dist. LEXIS 15590, at *6.

Ultimately, Oracle's own papers make clear that its real complaint is not that the Court overlooked key arguments that Oracle offered to support admitting cross-sell/up-sell projections, but that the Court was not persuaded by them. Oracle's desire to re-litigate these issues in the hopes of a better result provides no basis for reconsideration, and Oracle's reassertion of the very positions that the Court considered (and rejected) in finding that the Sanctions Order precludes evidence of cross-sell/up-sell projections is improper. *Napa Cmty.*, 1995 U.S. Dist. LEXIS 22542, at *15 (denying reconsideration motion where party "simply disagree[d] with this Court's finding based on the same facts now presented for reconsideration"); *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) (stating that "[d]isagreement with a decision or the recapitulation of rejected arguments are not adequate bases for reconsideration") (citation omitted); Civ. L.R. 7-9(c).

4. Sanctions Are Appropriate.

Oracle's conspicuously-timed motions (all three of them) fail so utterly to comply with Civil Local Rule 7-9's requirements that sanctions and appropriate. Civil Local Rule 7-9(c) provides that "[n]o motion for leave to file a motion for reconsideration may repeat any oral or written argument" previously asserted in connection with challenged ruling and that "[a]ny party who violates this restriction shall be subject to appropriate sanctions"). Civ. L.R. 7-9(c); *see also* Fed. R. Civ. P. 11 (providing that papers presented to court must not be filed "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"); *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (holding pleading subject to Rule 11 sanctions if (1) legally or factually baseless from objective perspective, and (2) attorney has not conducted reasonable, competent inquiry before filing); *Sconiers v. Fresno Cnty. Superior Court*, No. 1:11-cv-00113-LJO-SMS, 2011 U.S. Dist. LEXIS 122195, at *2-2 (E.D. Cal. Oct. 21, 2011) (holding that motion to reconsider orders "has no apparent purpose other than to challenge the

authority of the Court" and that "[t]his warning will serve as a predicate for sanctions"), *sanctions imposed* at 2011 U.S. Dist. LEXIS 152225, at *1-2 (E.D. Cal. Dec. 13, 2011). Oracle's persistent disagreement is not a proper basis to seek reconsideration. Its three motions needlessly burden the Court and prejudice Defendants' trial preparation. Sanctions are appropriate.

IV. CONCLUSION

The new trial will be limited to determining lost profits and infringer's profits—the issues that could and should have been tried in November 2010, but for Oracle's overreaching. Because the motions are irrelevant in light of the limited scope of the new trial and entirely fail to comply with the requirements of Civil Local Rule 7-9, both should be denied.

Dated: May 1, 2012

JONES DAY

By: /s/ Tharan Gregory Lanier
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