

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADOBE SYSTEMS INCORPORATED,

No. C 10-2769 CW

Plaintiff,

ORDER DENYING  
DEFENDANTS' MOTION  
FOR LEAVE TO FILE  
MOTION FOR  
RECONSIDERATION  
(Docket No. 133)

v.

HOOPS ENTERPRISE LLC; and ANTHONY  
KORN RUMPF,

Defendants.

\_\_\_\_\_  
AND ALL RELATED CLAIMS  
\_\_\_\_\_

Defendants and Counter-claimants Hoops Enterprise, LLC, and Anthony Kornrumpf move for leave to file a motion for reconsideration pursuant to Civil Local Rule 7-9(b)(3). Having considered the papers submitted by Defendants, the Court DENIES their motion.

BACKGROUND

On October 11, 2011, Defendants filed an administrative motion seeking an extension of the fact discovery deadline. In that motion, Defendants represented that they sought the extension to enforce the execution of subpoenas on certain third-party companies for copies of contracts relevant to their first sale doctrine affirmative defense and for depositions of individuals at some of these companies. Defendants also stated that they wanted to notice additional depositions of Adobe employees in relation to these contracts, which they were in the process of doing, and to

United States District Court  
For the Northern District of California

1 subpoena at least one additional non-party individual for  
2 deposition. After considering that motion and Adobe's opposition  
3 thereto, the Court issued an order extending the fact discovery  
4 deadline for the limited purpose of executing the third-party  
5 subpoenas already issued.

6 On November 7, 2011, Defendants Hoops Enterprise LLC and  
7 Anthony Kornrumpf filed a second administrative motion for an  
8 order extending the fact discovery deadline, again in order to  
9 notice and take depositions of Adobe employees. On December 1,  
10 2011, after considering the second administrative motion and  
11 Adobe's opposition, the Court denied the motion and re-iterated  
12 that the first order had extended the fact discovery deadline only  
13 for the execution of subpoenas already served.

14 On December 1, 2011, Defendants filed a motion seeking leave  
15 to file a motion for reconsideration of this Court's order,  
16 stating that there had been a manifest failure by the Court to  
17 consider facts that showed that Plaintiff had caused the delay,  
18 that Defendants had acted diligently at all times, and that the  
19 denial of an extension of fact discovery would prejudice  
20 Defendants by denying them a fair trial on the merits.

21 LEGAL STANDARD

22 A party may only file a motion for reconsideration of an  
23 interlocutory order after obtaining leave of the Court. Civil  
24 Local Rule 7-9(a). Civil Local Rule 7-9(b) sets forth several  
25 showings that a party may make to support a motion for leave to  
26 file a motion for reconsideration, including: "A manifest failure  
27 by the Court to consider material facts or dispositive legal  
28 arguments which were presented to the Court before such

1 interlocutory order." Civil Local Rule 7-9(b)(3). "No motion for  
2 leave to file a motion for reconsideration may repeat any oral or  
3 written argument made by the applying party in support of or in  
4 opposition to the interlocutory order which the party now seeks to  
5 have reconsidered." Civil Local Rule 7-9(c).

6 DISCUSSION

7 Defendants have only repeated the written arguments that they  
8 already made in support of their two administrative motions  
9 seeking an extension of the fact discovery deadline, which is  
10 impermissible under Civil Local Rule 7-9(c). This alone is  
11 sufficient for the denial of their motion.

12 Defendants have also not demonstrated that there has been a  
13 manifest failure of the Court to consider these arguments.  
14 Instead, the Court considered Defendants' arguments when they were  
15 originally offered and declined to order a broad extension of the  
16 fact discovery deadline at that time.

17 Defendants have not demonstrated that they acted diligently  
18 to comply with this Court's scheduling order. While Defendants  
19 are correct that some delay occurred while the magistrate judge  
20 considered Plaintiff's opposition to their third-party subpoenas  
21 for documents, Defendants have not proffered any explanation for  
22 their initial delay in serving these subpoenas.

23 Defendants also have not demonstrated that the denial of the  
24 ability to take depositions of Plaintiff's employees and agents  
25 would prejudice them. In the instant motion, Defendants state  
26 that the depositions are necessary to their preparation of their  
27 defense and counter-claim; however, in their administrative  
28 motions and supporting affidavits, they made clear that they

1 believe that the depositions are relevant to the preparation of  
2 their first sale defense. The first sale doctrine "allows the  
3 'owner of a particular copy' of a copyrighted work to sell or  
4 dispose of his copy without the copyright owner's authorization."  
5 Vernor v. Autodesk, Inc., 621 F.3d 1102, 1107 (9th Cir. 2010)  
6 (citing 17 U.S.C. § 109(a)). It "does not apply to a person who  
7 possesses a copy of the copyrighted work without owning it, such  
8 as a licensee." Id. (citing 17 U.S.C. § 109(d)). The Ninth  
9 Circuit has held that "a software user is a licensee rather than  
10 an owner of a copy where the copyright owner (1) specifies that  
11 the user is granted a license; (2) significantly restricts the  
12 user's ability to transfer the software; and (3) imposes notable  
13 use restrictions." Id. at 1111. Defendants have not demonstrated  
14 that the additional depositions are relevant to making this  
15 determination, which can be done by looking to the contracts  
16 themselves. This Court's prior order already extended the fact  
17 discovery deadline in order to allow Defendants to obtain these  
18 documents.

19 Accordingly, the Court DENIES Defendants' motion for leave to  
20 file a motion for reconsideration (Docket No. 133).

21 IT IS SO ORDERED.

22  
23 Dated: 12/14/2011

  
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CLAUDIA WILKEN

United States District Judge

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