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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AVAGO TECHNOLOGIES FIBER IP
(SINGAPORE) PTE. LTD., et al.,

Plaintiffs,

v.

IPTRONICS INC., et al.,

Defendants.

Case No. [5:10-cv-02863-EJD](#)

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL RELIEF
FROM NON-DISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE**

Re: Dkt. No. 621

I. INTRODUCTION

After discovering that an expert witness retained by Plaintiff Avago¹ may have prosecuted patents in violation of the protective order entered in this case, Defendant IPtronics filed a motion under Federal Rule of Civil Procedure 37(b) to enforce the prosecution bar and remedy the protective order violation. See Docket Item No. 546. Avago opposed the motion. See Docket Item No. 555.

The matter was referred to Magistrate Judge Paul S. Grewal, who held a hearing on May 12, 2015. See Docket Item No. 573. In a written ruling filed on June 11, 2015, Judge Grewal granted IPtronics' motion, finding that Avago's expert, Dr. Dennis Deppe, had violated the protective order. See Docket Item No. 609. As a remedy, Judge Grewal excluded Deppe from providing evidence in this action.

Avago now moves this court for partial relief from Judge Grewal's order, specifically the

¹ In this order, "Avago" refers to all of the plaintiffs: Avago Technologies U.S. Inc., Avago Technologies General IP (Singapore) Pte. Ltd., Avago Technologies Trading, Ltd., and Avago Technologies International Sales Pte., Ltd. "IPtronics" refers to the two named defendants: IPtronics, Inc. and Mellanox Technologies Denmark Aps.

1 portion banning Deppe from acting as an expert witness. See Docket Item No. 621. Its arguments
2 are without merit. Accordingly, the invitation to second-guess Judge Grewal will be denied.

3 **II. LEGAL STANDARD**

4 Subject to limitations not relevant here, any non-dispositive pretrial matter before the
5 district court may be referred to a magistrate judge for determination. 28 U.S.C. § 636(b)(1)(A).
6 Once rendered, the decision of the magistrate judge may only be reconsidered by the district court
7 where the order is “clearly erroneous” or “contrary to law.” Id.; Fed. R. Civ. P. 72(a). This
8 standard is not easily met because it affords the magistrate judge significant deference. United
9 States v. Abonce-Barrera, 257 F.3d 959, 969 (9th Cir. 2001) (“[T]he text of the Magistrates Act
10 suggests that the magistrate judge's decision in such nondispositive matters is entitled to great
11 deference by the district court.”).

12 “A finding is ‘clearly erroneous’ when although there is evidence to support it, the
13 reviewing court, after reviewing the entire evidence, is left with the definite and firm conviction
14 that a mistake has been committed.” United States v. U.S. Gypsum Co., 333 U.S. 364, 395
15 (1948). “An order is contrary to law when it fails to apply or misapplies relevant statutes, case law
16 or rules of procedure.” Tompkins v. R.J. Reynolds Tobacco Co., 92 F. Supp. 2d 70, 74 (N.D.N.Y.
17 2000).

18 **III. DISCUSSION**

19 As an initial matter, it is important to frame the issue before the court. Avago does not
20 contest that finding that Deppe prosecuted patents which, as Judge Grewal found, “plainly relate to
21 optical communication on systems using VCSELs, parallel optical interconnects and laser drivers”
22 - the same technology embodied in the patents-in-suit. Instead, Avago seeks review and
23 modification of the remedy Judge Grewal imposed. To that end, Avago argues that Judge Grewal
24 could only have ordered sanctions pursuant to the court’s inherent authority and, in doing so,
25 basically failed to observe the limits of such authority when he precluded Deppe from further
26 participation in this case.

1 Avago’s argument is unpersuasive for two principal reasons. First, it was not raised before
2 Judge Grewal. Not once did Avago claim that Rule 37(b) sanctions cannot be imposed on a
3 retained expert witness because such a witness is not “a party or a party’s officer, director, or
4 managing agent or a witness designated under Rule 30(b)(6) or 31(a)(4).” That failure alone is
5 fatal to this motion. Much like a court of appeals, a reviewing district court does not consider
6 arguments that could have made to the magistrate judge but were not. See Favoured Devs. Ltd. v.
7 Lomas, No. C06-02752 MJJ, 2007 U.S. Dist. LEXIS 78599, at *5-6, 2007 WL 3105107 (N.D.
8 Cal. Oct. 23, 2007). Avago provides no compelling reason to take up the argument now. The
9 court therefore concludes that Avago has waived it.

10 Second, and in any event, this court would reject Avago’s reasoning even if the argument
11 was raised. Aside from the prosecution bar, the protective order provides in explicit terms the type
12 of punishment that may befall those who sign-on and then violate its provisions. It states: “I
13 understand and acknowledge that failure to so comply could expose me to sanctions and
14 punishment in the nature of contempt.” Avago did not dispute that Deppe became subject to this
15 provision of the protective order in exchange for his receipt of IPtronics’ confidential information.
16 Deppe, therefore, consented to the court’s supervision of his activities in relation to this action
17 and, in turn, consented to the imposition of punishment for non-compliance. Thus, whether under
18 Rule 37(b) or pursuant to inherent powers, it is unquestionable that the court had authority to
19 impose a sanction on Deppe for his violation of a valid court order. A finding of bad faith was not
20 a necessary precursor even assuming, as Avago does, that only inherent powers can support a
21 sanction under these circumstances. See Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015,
22 1035 (9th Cir. 2012) (“[A] district court has the inherent power to sanction for: (1) willful
23 violation of a court order; or (2) bad faith. A determination that a party was willfully disobedient
24 is different from a finding that a party acted in bad faith. Either supports the imposition of
25 sanctions.”).

26 Furthermore, the remedy fashioned by Judge Grewal was not clearly erroneous or contrary
27

1 to law. It is obvious that Judge Grewal thoughtfully considered alternatives to the outright
2 exclusion of Deppe, but observed “the difficulty in separating out confidential information in
3 testimony, and the unreasonable lack of trust such a [protective order]violation fosters.” In the
4 end, Judge Grewal determined that the gravity of Deppe’s violation - which was by no means
5 inconsequential - and the unsettling conditions it created could only be alleviated by an order
6 precluding Deppe from providing evidence in this action. Given the discretionary review to which
7 sanctions decisions are subjected, Judge Grewal’s finding is entitled to significant deference. See
8 Grimes v. City & Cnty. of S.F., 951 F.2d 236, 241 (9th Cir. 1991) (holding that pretrial orders of a
9 magistrate judge are not subject to de novo review and, as such, “the reviewing court may not
10 simply substitute its judgment for that of the deciding court.”). Although it may have preferred a
11 different order, Avago simply has not provided a viable reason to undermine or modify the one
12 that issued.

13 **IV. ORDER**

14 Based on the foregoing, the court finds that Judge Grewal’s exclusion of Deppe as an
15 expert witness is neither clearly erroneous nor contrary to law. Avago’s motion for relief from
16 that order is DENIED.

17
18 **IT IS SO ORDERED.**

19 Dated: October 27, 2015

20 
21 EDWARD J. DAVILA
22 United States District Judge