

1 Nanometrics raised the former issue at the Final Pretrial Conference held on October 20, 2023,
2 and, pursuant to the Court’s request, submitted citations to the record pertaining to its assertion
3 that the Court’s prior orders in this action conflicted with the theory of excuse purportedly raised
4 by Optical. *See* ECF No. 189.

5 **I. LEGAL STANDARD**

6 A motion for leave to file a motion for reconsideration may be filed prior to the entry of a
7 final judgment in the case. Civ. L.R. 7-9(a). “The moving party must specifically show
8 reasonable diligence in bringing the motion” and one of the following circumstances:

- 9 (1) That at the time of the motion for leave, a material difference in
10 fact or law exists from that which was presented to the Court before
11 entry of the interlocutory order for which reconsideration is sought.
12 The party also must show that in the exercise of reasonable diligence
13 the party applying for reconsideration did not know such fact or law
14 at the time of the interlocutory order; or
- 15 (2) The emergence of new material facts or a change of law occurring
16 after the time of such order; or
- 17 (3) A manifest failure by the Court to consider material facts or
18 dispositive legal arguments which were presented to the Court before
19 such interlocutory order.

20 Civ. L.R. 7-9(b). Whether to grant leave to file under Rule 7-9 is committed to the Court's sound
21 discretion. *See United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000). Nanometrics brings
22 the Motion under Local Rule 7-9(b)(3). *See* Mot. 1–2.

23 **II. DISCUSSION**

24 The Court has carefully reviewed Nanometrics’s Motion, the helpfully provided record
25 citations, and the parties’ briefings on Nanometrics’s Motion for Summary Judgment (the “MSJ”).
26 Broadly, the Court finds that the arguments raised by Nanometrics go to factual disputes to be
27 decided by a jury.

28 With respect to Nanometrics’s argument that the Court found a dispute of fact based on a
new argument of excuse put forth by Optical, the Court advises that it did not and does not read
Optical’s brief in opposition to the MSJ to assert a new theory of excuse from performance. *See*
MSJ Opp’n, ECF No. 141. Accordingly, the Court’s MSJ Order does not adopt any such theory.
Rather, the portions of the MSJ Order challenged by Nanometrics hold that there exist genuine

1 issues of fact regarding Optical’s performance because there are issues of fact on what full
2 performance entailed, not that there exist disputes of fact as to whether Optical’s performance was
3 excused.¹ See Mot. 6–8; MSJ Order 7 (Parts III(A)(2)(b)–(c)). The Court additionally notes that
4 its discussion of Nanometrics’s purported failure to provide commercial specifications to Optical,
5 see *id.* (Part III(A)(2)(c)), does not concern excuse, but instead picks up on a theme raised by
6 Nanometrics in its moving papers: that “the parties never reached agreement on commercial terms
7 . . . for the 25 micron production lenses, or any other lens.” See Mot. Summ. J. 20, ECF No. 139;
8 MSJ Order 7 (citing Mot. Summ. J. 20); see also *Unruh v. Smith*, 123 Cal. App. 2d 431, 437
9 (1954) (describing promisee’s prevention of performance not as excuse for nonperformance, but
10 as “equivalent to performance by the promisor”). The Court will therefore deny the Motion with
11 respect to the excuse issue of the breach of contract claim.

12 With respect to Optical’s promissory estoppel claim, Nanometrics argues that the MSJ
13 Order should have found that Optical’s assertion in its opposition to the MSJ that “there was never
14 a fixed and final design specification for the 25 micron lens project” precluded a conclusion that
15 the promise at issue was clear and unambiguous. See Mot. 8 (citing MSJ Opp’n 17). Optical
16 made this statement in connection with its arguments opposing Nanometrics’s motion for
17 summary judgment on the breach of contract claim. See MSJ Opp’n 17. Nanometrics then filed a
18 reply in support of its summary judgment motion in which the Court can find no mention of its
19 present promissory estoppel argument based on Optical’s statements in the opposition brief. See
20 MSJ Reply 12–14, ECF No. 143. Accordingly, Nanometrics has not provided a proper basis for a
21 motion for reconsideration on this ground, *i.e.*, a material difference in fact or law, the emergence
22 of material facts or a change of law, or a manifest failure by the Court to consider material facts or
23 dispositive legal arguments which were presented to the Court prior to the issuance of the MSJ
24 Order. See Civ. L.R. 7-9(b). Further, to the extent this argument is in any way based on the same
25 issue of excuse discussed above, given the reference in the MSJ Order’s discussion of promissory
26

27 ¹ To the extent the section heading of “Performance or Excuse for Nonperformance” caused
28 confusion, the Court clarifies that the heading refers to the general statement of the element of a
breach of contract claim as it was previously described in the MSJ Order. See MSJ Order 5, 6.

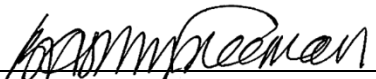
1 estoppel to the Court’s reasoning on performance, *see* MSJ Order 9 (“However, for the reasons
2 described above, [Optical] has provided sufficient evidence to create a genuine dispute of fact as
3 to whether it in fact met the condition for the promise”), the Court will deny the Motion for
4 the same reasons.

5 **III. ORDER**

6 For the foregoing reasons, the Court hereby DENIES Nanometrics’s Motion for Leave to
7 File a Motion for Partial Reconsideration of the Court’s Order Denying Summary Judgment. The
8 action will go forward according to the current trial schedule.

9
10 **IT IS SO ORDERED.**

11 Dated: October 31, 2023

12
13 
14 _____
15 Beth Labson Freeman
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28