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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JERRY J. HAWKINS,
12 Plaintiff,
13 v.
14 SIMPLEXGRINNEL, L.P.; and TYCO
15 INTERNATIONAL, INC.,
16 Defendants.

Case No.: 12cv1406-MMA (BGS)

**ORDER GRANTING DEFENDANTS'
MOTION TO PRECLUDE RE-
LITIGATION OF PLAINTIFF'S
CLAIM FOR PUNITIVE DAMAGES
AND ANY EVIDENCE IN SUPPORT
THEREOF**

[Doc. No. 126]

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19 Before the Court is Defendants' motion to preclude re-litigation of Plaintiff's claim
20 for punitive damages and any evidence in support thereof based on the law of the case
21 doctrine. Doc. No. 126 ("Mtn"). Plaintiff opposes the motion [Doc. No. 127 ("Oppo.")]
22 and Defendants reply [Doc. No. 128 ("Reply")]. The Court, in its discretion, decides the
23 matter on the papers submitted and without oral argument, pursuant to Civil Local Rule
24 7.1.d.1. Accordingly, the motion hearing date currently set for **December 18, 2017** is
25 hereby **VACATED**. For the reasons discussed herein, the Court **GRANTS** Defendants'
26 motion.

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1 **RELEVANT BACKGROUND**

2 On March 14, 2017, a three day jury trial commenced in this action. The trial was
3 bifurcated into a liability phase and a punitive damages phase. On March 16, 2017,
4 Plaintiff rested his case-in-chief. Doc. No. 118 at 60. Defendants then moved for
5 judgment as a matter of law on Plaintiff’s claims for age discrimination and wrongful
6 termination in violation of public policy, or in the alternative, for punitive damages. *Id.*
7 at 61. The Court denied judgment as a matter of law with respect to Plaintiff’s claims for
8 age discrimination and wrongful termination in violation of public policy. *Id.* at 61-62.

9 However, the Court granted judgment as a matter of law with respect to Plaintiff’s
10 punitive damages, stating “I don’t think any reasonable jury could make the requisite
11 predicate findings of malice, oppression, or fraud based upon the evidence presented
12 here.” *Id.* at 62. The Court further stated that “[i]t just doesn’t seem to me based on this
13 record – you know what’s required; clear and convincing evidence. It’s some pretty
14 heavy, bad stuff, and I just don’t see it.” *Id.* at 67. The Court disagreed with Plaintiff’s
15 argument that Mr. Ciereck had discretion as a managing agent for the corporation to
16 make corporate policy and used that discretion inappropriately and with discriminatory
17 intent, or malice, to discriminate against Plaintiff. *Id.* at 67-68. Accordingly, the Court
18 granted Defendants’ motion for judgment as a matter of law with respect to Plaintiff’s
19 punitive damages claim. *Id.* at 70.

20 Following the Court’s ruling, Defendants elected not to put on additional evidence
21 and rested. *Id.* at 77. The jury was unable to reach a unanimous decision regarding
22 Plaintiff’s age discrimination claim and the Court declared a mistrial. *Id.* at 122. The
23 case is currently set for re-trial on January 23, 2018. Doc. No. 125. The parties now
24 dispute whether the Court should permit Plaintiff to seek punitive damages in the new
25 trial. *See* Doc. Nos. 126, 127.

26 **DISCUSSION**

27 Defendants argue that the law of the case doctrine bars Plaintiff from re-litigating
28 punitive damages. Mtn at 4. Plaintiff contends that the Court may revise an interlocutory

1 order, such as the Court’s judgment as a matter of law finding, at any time and that the
2 law of the case doctrine is inapplicable. *Oppo*. at 2-3.

3 Prior to 2001, several Ninth Circuit cases applied the law of the case doctrine to
4 district court decisions. In *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d
5 703 (9th Cir. 1990), a district court granted summary judgment and awarded attorneys’
6 fees in defendant’s favor. *Id.* at 706. Potentially implicit in the order granting summary
7 judgment and award of attorneys’ fees was a determination that the underlying contract
8 mandated an award of attorneys’ fees for the prevailing party. *See id.* The Ninth Circuit
9 reversed and remanded for trial. *Id.* After a bench trial before a new district judge, the
10 district court found for plaintiff, but denied a motion for attorneys’ fees. *Id.* The Ninth
11 Circuit in *Milgard* asked whether the law of the case doctrine prevented the second
12 district judge from revisiting the issue of contract interpretation. *Id.* at 715. The Ninth
13 Circuit noted that a court’s reconsideration of an issue previously decided should be
14 reviewed for abuse of discretion and concluded that the law of the case doctrine applied.
15 *Id.* However, the Ninth Circuit found that the first court’s interpretation was dicta, which
16 was not entitled to preclusive effect. *Id.* at 716.

17 In *United States v. Alexander*, 106 F.3d 874 (9th Cir. 1997), a case Defendants rely
18 heavily upon, the judge granted a motion to suppress a confession prior to a criminal trial.
19 *Id.* at 875. The government did not perfect an appeal of the decision and the case was
20 transferred to a different judge for trial. *Id.* The government then filed a motion to
21 reconsider the suppression ruling, which the trial judge denied based on the law of the
22 case doctrine. *Id.* at 875-76. At trial, testimony called into question the veracity of
23 certain declarations submitted in support of the motion to suppress. *Id.* at 876. The
24 government filed yet another motion to reconsider and the trial judge again denied the
25 motion, finding that the inconsistencies were not sufficiently significant to warrant
26 reconsideration. *Id.* The jury was ultimately unable to reach a verdict on any count and
27 the court declared a mistrial. *Id.* The trial judge then held an evidentiary hearing
28 regarding suppression and ultimately reconsidered the first judge’s order and allowed

1 admission of the confessions at a subsequent trial. *Id.* The Ninth Circuit reversed,
2 holding that the mistrial did not constitute a changed circumstances triggering an
3 exception to the law of the case doctrine. *Id.* at 876-77. The Ninth Circuit also found
4 that the order did not constitute “clear error” causing “manifest injustice.” *Id.* at 877-78.

5 In *Lower Elwha Band of S’Klallams v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir.
6 2000), the Ninth Circuit reviewed a multi-decade case regarding fishing rights that had
7 been transferred between many district judges. *Id.* at 445-48. Many issues were litigated
8 in “subproceedings” or mini-trials. *Id.* at 446. Some of the mini-trials were conducted by
9 a visiting judge who granted summary judgment in one mini-trial in 1990. *Id.* at 446.
10 Even though “no apparent issues remained pending, a final judgment was not entered.”
11 *Id.* at 446-47. Eight years later, a different judge handling the case, determined she did
12 not have the authority to disturb the visiting judge’s decisions. *Id.* at 447. The Ninth
13 Circuit concluded the judge properly determined she was bound by the law of the case
14 and could not disturb the visiting judge’s prior orders. *Id.* at 452-53.

15 In 2001, the Ninth Circuit decided *City of Los Angeles, Harbor Division v. Santa*
16 *Monica BayKeeper*, 254 F.3d 882 (9th Cir. 2001), a case relied heavily upon by Plaintiff,
17 which held that “the law of the case doctrine is wholly inapposite [to district court
18 decisions]. The doctrine simply does not impinge upon a district court’s power to
19 reconsider its own interlocutory order provided that the district court has not been
20 divested of jurisdiction over the order.” *Id.* at 888. The Ninth Circuit panel concluded
21 that “as long as a district court has jurisdiction over the case, then it possesses the
22 inherent procedural power to reconsider, rescind, or modify an interlocutory order for
23 cause seen by it to be sufficient.” *Id.* at 889 (quoting *Melancon v. Texaco, Inc.*, 659 F.2d
24 551, 553 (5th Cir. 1981); Fed. R. Civ. P. 54(b) (“[A]ny order or other form of decision,
25 however designated, which adjudicates fewer than all the claims or the rights and
26 liabilities of fewer than all the parties . . . is subject to revision at any time before the
27 entry of judgment adjudicating all the claims and the rights and liabilities of all the
28 parties.”)).

1 In 2004, the Ninth Circuit reached the same conclusion in *United States v. Smith*,
2 389 F.3d 944 (9th Cir. 2004). There, the district court granted a motion to suppress
3 evidence obtained during a search of a defendant’s car. *Id.* at 947. The government
4 moved for reconsideration, contending that no party had briefed whether a search
5 incident to arrest could constitutionally precede the arrest. *Id.* The district court granted
6 the government’s motion. *Id.* The Ninth Circuit concluded that the law of the case
7 doctrine did not restrict a district court’s power to reconsider its own order so long as it
8 has not been divested of jurisdiction over that order. *Id.* at 949. The Ninth Circuit
9 distinguished from *Alexander*, explaining that in *Alexander* the district court granted
10 reconsideration only after the jury was unable to reach a verdict. *Id.* at 950 (citing
11 *Alexander*, 106 F.3d at 875).

12 As it currently stands, Ninth Circuit “case law leaves some doubt concerning
13 whether the law of the case doctrine constrains a district court’s discretion to reconsider
14 its own rulings prior to final judgment.” *Mark H. v. Lemahieu*, 513 F.3d 922, 932 n.8
15 (9th Cir. 2008). However, district courts in the Ninth Circuit have liberally applied *Santa*
16 *Monica Baykeeper* and *Smith* in holding that a district court has authority to review any
17 order prior to final judgment or appeal of the issue to be reviewed. *See e.g., USACM*
18 *Liquidating Trust v. Monaco*, No. 2:09-cv-01947-RCJ-PAL, 2010 WL 1849291, at *4 (D.
19 Nev. May 6, 2010) (“[A] district court has inherent power to reconsider its interlocutory
20 orders if it finds just cause to do so, so long as it retains jurisdiction in the matter.”); *J2*
21 *Global Communications, Inc. v. Protus IP Solutions*, No. CV 06-00566 DDP (AJWx),
22 2010 WL 1609965, at *3 (C.D. Cal. Apr. 20, 2010) (“The Court may reconsider, sua
23 sponte, its own order denying Protus’ motion for partial summary judgment and
24 concludes that it may be appropriate to do so here.”); *Ventures Edge Legal PLLC v.*
25 *GoDaddy.com LLC*, No. CV-15-02291-PHX-GMS, 2017 WL 1075059, at *3 (D. Ariz.
26 Mar. 22, 2017) (“A district court is not bound by law of the case doctrine with respect to
27 an interlocutory order”); *In re Sony Grand WEGA KDF-E A10/A20 Series Rear*
28 *Projection HDTV TV Litig.*, 758 F. Supp. 2d 1077, 1098 (S.D. Cal. 2010) (“the law of the

1 case doctrine is discretionary, and ‘is in no way a limit on a court’s power to revisit,
2 revise, or rescind an interlocutory order prior to entry of final judgment in the case.’”)
3 (citation omitted). Thus, the Court has the discretion to permit Plaintiff to seek punitive
4 damages at the new trial despite its prior judgment as a matter of law ruling.

5 Even so, public policy dictates that the efficient operation of the judicial system
6 requires the avoidance of re-arguing questions that have already been decided. *See*
7 *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989).
8 Here, Plaintiff has not convinced the Court that he should be permitted to seek punitive
9 damages in the upcoming trial after the Court found as a matter of law that there was
10 insufficient evidence of punitive damages. Plaintiff urges the Court to not assume “that
11 the evidence will be identical,” and claims that “[i]t is actually possible that the guilty
12 conscience of one of the defendants’ former employees’ will prevail, and the truth will
13 come out. It is possible that Plaintiff’s counsel will be able to marshal better evidence
14 and/or be more effective at drawing out the truth from the same witnesses.” *Oppo*. at 2.
15 Thus, Plaintiff appears to argue that the same witnesses will testify differently to the
16 extent that there will be sufficient evidence in the new trial supporting the assertion that
17 Mr. Ciereck is a managing agent who acted with malice, oppression, or fraud in making
18 any decision with respect to Plaintiff. However, this is not new or additional evidence
19 that was not previously available. *See Pyramid Lake Paiute Tribe of Indians*, 882 F.2d at
20 369 n.5 (stating that a court can reconsider an interlocutory ruling where there is
21 additional evidence that was not previously available); *Oppo*. at 2 (“[i]t is *possible* that
22 Plaintiff’s counsel will be able to marshal better evidence and/or be more effective at
23 drawing out the truth from the *same* witnesses”) (emphasis added). The Court
24 understands that testimony elicited from the same witnesses as the first trial will not be
25 identical in the second trial. However, Plaintiff offers only the possibility and
26 speculation that a witness’ guilty conscience or Plaintiff’s counsel’s “marshal[ing]” will
27 provide the new or different evidence required to let the issue of punitive damages reach
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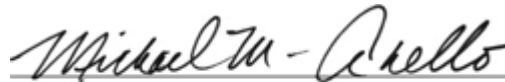
1 the jury. The Court is not persuaded that the testimony will be substantially different,
2 such that punitive damages would be permitted to go to the jury.

3 **CONCLUSION**

4 Based on the foregoing, the Court finds Plaintiff's argument insufficient, and
5 **GRANTS** Defendants' motion to preclude re-litigation of Plaintiff's claim for punitive
6 damages. *S.M. v. J.K.*, 262 F.3d 914, at 917 (9th Cir. 2001) (indicating that the district
7 court denied the plaintiff's motion for reconsideration and upheld its judgment as a
8 matter of law ruling with respect to punitive damages and did not permit Plaintiff to seek
9 punitive damages in a subsequent trial). Plaintiff expresses concern that Defendants'
10 motion also seeks preclusion of any evidence supporting punitive damages, even if that
11 evidence supports Plaintiff's underlying claim. The Court's ruling is not so broad. The
12 Court only finds that Plaintiff cannot seek punitive damages. The Court does not
13 preclude evidence relevant to Plaintiff's underlying claim.

14 **IT IS SO ORDERED.**

15 Dated: December 12, 2017

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17 Hon. Michael M. Anello
18 United States District Judge
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