IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RONALD BARRANCO, Plaintiff, vs. 3D SYSTEMS CORPORATION, a Delaware corporation, 3D SYSTEMS, INC., a California corporation, ABRAHAM REICHENTAL, DAMON GREGOIRE, Defendants.	)	CIVIL NO. 13-00412 LEK-RLP

ORDER DENYING PLAINTIFF'S COMBINED RULE 50(B) MOTION FOR JMOL AS TO COUNTERCLAIM 2, AND RULE 59(A) MOTION FOR A NEW TRIAL

Before the Court is Plaintiff/Counterclaim Defendant Ronald Barranco's ("Plaintiff" or "Barranco") Combined Rule 50(b) Motion for JMOL as to Counterclaim 2, and Rule 59(a) Motion for a New Trial, filed April 30, 2018 ("Motion"). [Dkt. no. 406.] On May 14, 2018, Defendants/Counterclaimants 3D Systems Corporation and 3D Systems, Inc. ("Defendants" or "3D Systems") filed their memorandum in opposition, and Plaintiff filed his reply on May 29, 2018. [Dkt. nos. 410, 415.] The Court has considered the Motion as a non-hearing matter pursuant to Rule LR7.2(e) of the Local Rules of Practice of the United States District Court for the District of Hawai`i ("Local Rules"). Plaintiff's Motion is hereby denied for the reasons set forth below.

BACKGROUND

The background of this matter is well known to the parties, and the Court will only discuss the background relevant to the Motion. On January 30, 2015, this Court issued its Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment on All Claims Against Them ("1/30/15 Order"). [Dkt. no. 140.[1]] In the 1/30/15 Order, this Court ruled, *inter alia*, that the promise at issue was whether Defendants had promised Plaintiff they would invest in the primary domains, not whether Defendants guaranteed Plaintiff a $5,000,000 buyout payment. 2015 WL 419687, at *8. On April 19, 2016, Defendants filed a motion in limine seeking to excluding references to the alleged $5,000,000 buyout promise ("Defendants' MIL #4"). [Dkt. no. 189.] Also on April 19, 2016, Plaintiff filed motions in limine seeking to exclude testimony of Paul Saltzman ("Plaintiff's MIL #1") and seeking to introduce evidence regarding an arbitration award between the parties ("Plaintiff's MIL #2" and all collectively "motions in limine"). [Dkt. nos. 179, 180.] On May 13, 2016 this Court granted in part and denied in part Plaintiff's MIL #1 and denied Plaintiff's MIL #2. [Minutes, dkt. no. 244.] Also on May 13, 2016, this Court orally granted Defendant's MIL #4. [Minutes, dkt. no. 245.]

[1] The 1/30/15 Order is also available at 2015 WL 419687.

The jury trial began on May 17, 2016. [Minutes, dkt. no. 251.] On May 18, 2016, outside the presence of the jury, this Court again stated testimony regarding a $5,000,000 buyout payment was not admissible. [Trial – Day 1 Trans. ("Day 1 Trans."), filed 10/13/17 (dkt. no. 336), at 70-71.]

On May 27, 2016, the jury returned a verdict in favor of Defendants on all of Plaintiff's claims and in favor of Defendants on their counterclaim for breach of the Non-Compete Provision contained within the parties' Purchase and Sale Agreement ("PSA" and "Non-Compete Counterclaim"). [Special Verdict Form, dkt. no. 282.] In finding for Defendants on the Non-Compete Counterclaim, the jury answered "YES" to the question: "Did Barranco breach his promise not to engage in competition with 3D Systems for five years after signing the PSA?" [Id. at 4.] On May 9, 2017, in its Order Denying Plaintiff's Oral Motion for Judgment as a Matter of Law ("5/9/17 Order"), this Court concluded, in light of the jury's verdict, that Defendants were entitled to an equitable accounting. [Dkt. no. 300.[2]] On November 20, 2017, this Court conducted a one-day bench trial to perform the equitable accounting. [Minutes, dkt. no. 382.] On March 30, 2018, this Court issued its Findings of Fact and Conclusions of Law and Order ("FOF/COL"). [Dkt. no.

[2] The 5/9/17 Order is also available at 2017 WL 1900970.

391.[3]] The Court found Barranco breached the Non-Compete Provision of the PSA in four ways: 1) by using private email; 2) by providing $5,200 to assist Christopher Breault with his Pro SLA website; 3) by working with David Pham and R.J. Barranco, at least from February 19 to 21, 2012, to develop or design instant online quoting; and 4) by working to develop or design a new quoting engine during at least the period from March 19 to September 25, 2013. 307 F. Supp. 3d at 1089-91.

On August 13, 2018, this Court issued its Order Granting in Part and Denying in Part Plaintiff's Rule 52(b)/59(e) Motion to Amend Bench Findings and Judgment ("8/13/18 Order"). [Dkt. no. 435.[4]] In the instant Motion, Plaintiff renews his motion for judgment as a matter of law on the Non-Compete Counterclaim pursuant to Fed. R. Civ. P. 50(b) and seeks a new trial pursuant to Fed. R. Civ. P. 59(a). For the reasons set forth below, the Motion is denied.

STANDARD

This Court has stated:

> Federal Rule of Civil Procedure 50(b) allows a party to file a renewed motion for judgment as a matter of law after entry of judgment on a jury verdict. To file a renewed motion under Rule 50(b), a party generally must first file a motion for judgment as a matter of law under Rule 50(a) before the case is submitted to the

[3] The FOF/COL is also available at 307 F. Supp. 3d 1075.

[4] The 8/13/18 Order is also available at 2018 WL 3833499.

jury. E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009). If the court denies or defers ruling on the Rule 50(a) motion and the jury returns a verdict against the moving party, the party may then renew the motion under Rule 50(b). Id. Because it is a "renewed" motion, a party cannot "raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion." Id. (quoting Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003)).

The rule that a party must move for judgment as a matter of law before the case is submitted to a jury does not apply if the motion alleges inconsistencies in the answers given to a special verdict. Pierce v. Souther[n] Pacific Transp. Co., 823 F.2d 1366, 1369 (9th Cir. 1987) ("When a special verdict does not support a judgment a reviewing court may make an exception to the Rule 50(b) requirement of a motion for directed verdict as a prerequisite to a motion [judgment notwithstanding the verdict]."); Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1033 (9th Cir. 2003).

In ruling on a 50(b) motion, the Court may allow judgment on the verdict, order a new trial, or reverse the jury and direct the entry of judgment as a matter of law. Fed. R. Civ. P. 50(b). The court will direct judgment as a matter of law if "the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." Go Daddy Software, Inc., 581 F.3d at 961 (quoting Josephs v. Pac. Bell, 443 F.3d 1050, 1062 (9th Cir. 2006)). When considering the motion, the court "may not make credibility determinations or weigh the evidence." Id. (quoting Reeves v. Sanderson Plumb[]ing Prods., Inc., 530 U.S. 133, 150 (2000)). Instead, the court reviews the evidence "in the light most favorable to the nonmoving party" and draws "all reasonable inferences in that party's favor." Id. (quoting Josephs, 443 F.3d at 1062)). "While the district court may not resolve conflicts in the testimony or weigh the evidence, it may evaluate evidence at least to the

> extent of determining whether there is substantial evidence to support the verdict. '[A] mere scintilla of evidence will not suffice.'" Von Zuckerstein v. Argonne Nat'l Laboratory, 984 F.2d 1467, 1471 (7th Cir. 1993) (citing La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984)).
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> The Ninth Circuit has defined substantial evidence as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." Maynard v. City of San Jose, 37 F.3d 1396, 1404 (9th Cir. 1994) (citing George v. City of Long Beach, 973 F.2d 706, 709 (9th Cir. 1992)).

Du Preez v. Banis, CIVIL 14-00171 LEK-RLP, 2017 WL 3222536, at *1-2 (D. Hawai`i July 27, 2017) (alterations in Du Preez) (some citations omitted). This Court also noted:

> Federal Rule of Civil Procedure 50(b) allows a party filing a renewed motion for judgment as a matter of law to include an alternative request for a new trial under Rule 59. Rule 59 allows the court to grant a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Although Rule 59 does not specify the grounds on which a court may order a new trial, historically recognized grounds include: "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007) (quoting Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 n.5 (9th Cir. 2000)).
>
> "When a motion for a new trial is based on insufficiency of the evidence, a 'stringent standard applies' and a new trial may be granted 'only if the verdict is against the great weight of the evidence or it is quite clear that the jury has reached a seriously erroneous result.'" MLM Property, LLC v. Country Cas. Ins. Co., 2010 WL

1948609, at *2 (D. Or. 2010) (quoting Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1347 (9th Cir. 1984)).

Id. at *2.

DISCUSSION

I. Availability of an Adequate Remedy at Law

Plaintiff argues he is entitled to judgment as a matter of law on the Non-Compete Counterclaim because Defendants lack "the right to maintain a suit for an equitable accounting, like all other equitable remedies, . . . [in] the absence of an adequate remedy at law." See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962). The 8/13/18 Order, *inter alia*, declined to reconsider the FOF/COL's conclusions of law, and amend the judgment pursuant to Fed. R. Civ. P. 59(e) to impose $0 in liability based on Plaintiff's argument that, under Dairy Queen, this Court lacks authority to grant Defendants equitable relief. 2018 WL 3833499 at *3-4. The 8/13/18 Order noted: "Plaintiff has repeatedly presented to the Court his argument that, under Dairy Queen . . . and its progeny, this Court, sitting in equity, lacks jurisdiction to provide Defendants a remedy for Plaintiff's breach of the Non-Compete Agreement." Id. at *3 (citations omitted). Further, "[t]his Court has long acknowledged, and disagreed with, Plaintiff's position" regarding the Court's authority, under Dairy Queen, to grant Defendants equitable relief. Id. (citation omitted).

Plaintiff's argument based on Dairy Queen does not ask the Court to "determin[e] whether there is substantial evidence to support the verdict" regarding the Non-Compete Counterclaim. See Du Preez, 2017 WL 3222536, at *2 (citations and quotation marks omitted). The jury was not required to make a finding that Defendants lacked an adequate remedy at law. Instead, Plaintiff is asking the Court to revisit its prior rulings, which constitute the law of the case. The Ninth Circuit has stated:

> Under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." Thomas v. Bible, 983 F.2d 152, 154 (9th Cir.) (*cert. denied* 508 U.S. 951, 113 S. Ct. 2443, 124 L. Ed.2d 661 (1993). The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983). A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. Thomas v. Bible, 983 F.2d at 155.

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

For the reasons stated in the 8/13/18 Order, notwithstanding Plaintiff's contention that Defendants possessed an adequate remedy at law for Plaintiff's breaches of the Non-Compete Provision, Defendants were entitled to maintain the

Non-Compete Counterclaim. See 2018 WL 3833499, at *3-4. Plaintiff indicates his continued disagreement with the Court's ruling on this matter, but fails to show the Court's prior rulings were clearly erroneous, or any other circumstance warranting revisiting the law of the case. See Alexander, 106 F.3d at 876. Plaintiff is not entitled to judgment as a matter of law, under Rule 50(b), based on the argument that Defendants possessed an adequate remedy at law and therefore cannot assert the Non-Compete Counterclaim.

II. Complexity of the Parties' Accounts

Plaintiff argues he is entitled to judgment as a matter of law on the Non-Compete Counterclaim because Defendants failed "to show that the accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them." See Dairy Queen, 369 U.S. at 478 (internal quotation marks omitted). Plaintiff's argument is unrelated to whether substantial evidence supported the jury's finding that Plaintiff is liable for the Non-Compete Counterclaim. Instead, Plaintiff appears to be arguing that, his liability on the Non-Compete Counterclaim notwithstanding, this Court lacks authority to grant Defendants the remedy of an equitable accounting.

Plaintiff again seeks to revisit the law of the case. In the 5/9/17 Order, "this Court f[ound] that the issues related

to Counterclaim Count II[, *i.e.* the Non-Compete Counterclaim,] are complex enough to merit an equitable accounting." 2017 WL 1900970, at *5. In the 8/13/18 Order, this Court ruled it properly awarded Defendants equitable remedies on the Non-Compete Counterclaim:

> Under Hawai`i law, disgorgement is available for breach of contract. [FOF/COL, 307 F. Supp. 3d] at 1094 (citing Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1088 (9th Cir. 2003). This Court properly exercised its discretion to award "'equitable relief in the form of disgorgement.'" See id. at 1098 (quoting Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 130 Hawai`i 36, 49, 305 P.3d 452, 465 (2013)). Moreover, the FOF[/]COL vindicated one of the purposes of ordering disgorgement under Hawai`i law, which "'is to deter wrongdoers.'" See id. at 1100 (quoting Exec. Risk Indem., Inc. v. Pac. Educ. Servs., Inc., 451 F. Supp. 2d 1147, 1156 (D. Hawai`i 2006)).

2018 WL 3833499, at *4. Plaintiff argues this Court applied the wrong legal standard because the availability of equitable remedies, under Dairy Queen, depends "not [on] whether the 'issues' in a case are complicated, but whether the 'accounts between the parties' are complicated." [Mem. in Supp. of Motion at 11 (quoting 369 U.S. at 478).] Plaintiff cites no authority supporting his construction of Dairy Queen. Moreover, Plaintiff fails to address the Ninth Circuit's approval, in Eckard, of awarding equitable remedies in a breach of contract claim under Hawai`i law. See 338 F.3d at 1088. Plaintiff fails to show this Court's prior ruling was "clearly erroneous," or any other

circumstance warranting revisiting the law of the case. See Alexander, 106 F.3d at 876. Plaintiff is not entitled to judgment as a matter of law, under Rule 50(b), based on his contention that the accounts between the parties were not sufficiently complex to merit an equitable accounting.

III. Materiality of Plaintiff's Breaches

Plaintiff argues he is entitled to judgment as a matter of law because no evidence shows that his breaches of the Non-Compete Provision of the PSA were material. Plaintiff contends the 5/9/17 Order correctly looked to the indicia of materiality discussed Aickin v. Ocean View Investments Co., 84 Hawai`i 447, 460, 935 P.2d 992, 1005 (1997), and argues he is entitled to judgment as a matter of law because, apart from speculation that the breaching activity caused 3D Systems to lose Barranco's focus, "[t]here is no evidence that the alleged breaches impacted 3D Systems in any way." [Mem. in Supp. of Motion at 6.]

As a preliminary matter, this Court must address Defendants' contention that Plaintiff failed to preserve his materiality argument. See Fed. R. Civ. P. 50 advisory committee's note to 2006 amendment ("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."). In his oral preverdict motion, Plaintiff argued, *inter alia*, "Hawaii law requires a breach of contract to be a material breach."

[Trial - Day 4 Trans., filed 10/13/17 (dkt. no. 339), at 143.] In his written preverdict motion, Plaintiff argued Defendants failed to present sufficient evidence to the jury that they suffered injury, or that Barranco received any earnings, profits, or other benefits, arising from his violation of the Non-Compete Provision. [Pltf.'s Suppl. Brief in Supp. of His Motion for Judgment as a Matter of Law, RE: "Accounting," filed 5/24/16 (dkt. no. 267), at 2.] In the 5/9/17 Order, this Court considered and rejected Plaintiff's contentions that, *inter alia*: "(1) any breach of the non-compete agreement was not a material breach; [and] (2) there is no evidence of damages." 2017 WL 1900970, at *2. Plaintiff preserved the materiality argument in his preverdict motion. The Court now turns to its merits.

> The Hawai`i Supreme Court has stated:
>
> > In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
> >
> > > (a) **the extent to which the injured party will be deprived of the benefit which he reasonably expected**;
> > >
> > > (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> > >
> > > (c) **the extent to which the party failing to perform or to offer to perform will suffer forfeiture**;
> > >
> > > (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the

> circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Aickin, 84 Hawai`i at 460 n.27, 935 P.2d at 1005 n.27 (emphases in Aickin) (quoting Restatement (Second) of Contracts § 241 (1979)).

The law of the case doctrine also applies to Plaintiff's argument that he is entitled to judgment as a matter of law because none of his breaches was material. See United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000) (the law of the case doctrine applies where the issue has "been decided explicitly or by necessary implication in the previous disposition" (citation, internal quotation marks, and brackets omitted)). In the 5/9/17 Order, this Court rejected the contention that Plaintiff's breaching activities caused only insubstantial or speculative harms and stated: "It is clear . . . that designing a separate and new system and website amounts to more than losing focus." 2017 WL 1900970, at *4. By necessary implication, the jury could reasonably have found that Barranco's breaches of the Non-Compete Provision were material because they "deprived [3D Systems] of the benefit which [it] reasonably expected." See Aickin, 84 Hawai`i at 460 n.27, 935 P.2d at 1005 n.27.

Plaintiff argues the 5/9/17 Order made a mistake of law by analyzing whether Non-Compete Provision was material to the PSA rather than whether Plaintiff's breach was material. [Mem. in Supp. of Motion at 8-9.] Plaintiff ignores the FOF/COL's findings that the PSA incorporated Barranco's employment agreement; that Barranco's salary was consideration for both his employment agreement and the Non-Compete Provision; and that Barranco's breaching conduct was grounds for termination with cause. See 307 F. Supp. 3d at 1092. Plaintiff also ignores the findings that the Non-Compete Provision "protects 3D Systems against risks that arise from the difficulty of detecting and proving violations and of detecting and proving the earnings that arise from such violations," and that without the Non-Compete Provision, "Barranco would have received a lesser consideration in exchange from 3D Systems." See id. at 1092-93. Plaintiff fails to address these other ways that the non-breaching party was "deprived of the benefit which [it] reasonably expected." See Aickin, 84 Hawai`i at 460 n.27, 935 P.2d at 1005 n.27. Plaintiff fails to show any of the Court's prior rulings were clearly erroneous or any other reason warranting revisiting the law of the case.

To the extent Plaintiff is arguing Defendants were required, as a matter of law, to show evidence of damages at law, the Court has already considered and rejected this argument. In

the FOF/COL, this Court "predict[ed] the Hawai`i Supreme Court would . . . conclude that a defendant is entitled to claim the return of the consideration as an alternative form of contractual relief if the jury concludes that plaintiff breached the terms of the noncompetition agreement." 307 F. Supp. 3d at 1101 (citation and internal quotation marks omitted). Plaintiff fails to show this prior ruling was clearly erroneous or any other reason justifying revisiting the law of the case. Plaintiff is not entitled to judgment as a matter of law based on his contention that none of his breaches was material.

IV. Evidentiary Rulings

Plaintiff argues he is entitled to "a new trial based on three mistaken evidentiary rulings that more likely than not prejudiced the jury's verdict." [Mem. in Supp. of Motion at 12.] Specifically, Plaintiff challenges this Court's rulings on Defendants' MIL #4 and on Plaintiff's MIL #1 and Plaintiff's MIL #2. The law of the case doctrine applies to evidentiary rulings. Ritchie v. Hawai`i, Dep't of Pub. Safety, CIVIL 14-00046 LEK-KJM, 2017 WL 3205475, at *6-7 (D. Hawai`i July 27, 2017). Defendants argue Plaintiff's Rule 59(a) motion should be denied, under the law of the case doctrine, because "Barranco raises the same arguments considered and rejected by this Court in its motions *in limine*." [Mem. in Opp. at 16 (citing Ritchie, 2017 WL 3205475, at *7).] Defendants support

this contention with extensive citations to Plaintiff's prior filings. [Id. at 16-27.] Plaintiff apparently concedes the point and states:

> As 3D Systems belabors in its opposition brief, the Court already ruled on the evidentiary issues upon which Mr. Barranco seeks a new trial. Mr. Barranco continues to respectfully contend that those rulings were erroneous and prejudicial, but he believes that he grounds therefore are adequately set forth in his opening brief.

[Reply at 6.] Plaintiff makes no attempt to argue any exception to the law of the case doctrine applies.

Plaintiff fails to establish that the Court's prior rulings were clearly erroneous, or any other circumstance justifying departing from the law of the case. While Plaintiff disagrees with the Court's prior rulings, such continued disagreement does not warrant departing from the law of the case. See Alexander, 106 F.3d at 876. Absent such circumstances, this Court "would . . . abuse[] its discretion if it . . . refused to abide by its previous ruling[s]." See United States v. Phillips, 367 F.3d 846, 856 (9th Cir. 2004). The Motion is denied as to Plaintiff's request for a new trial pursuant to Rule 59(a).

CONCLUSION

On the basis of the foregoing, Plaintiff Ronald Barranco's Combined Rule 50(b) Motion for JMOL as to Counterclaim 2, and Rule 59(a) Motion for a New Trial, filed April 30, 2018, is HEREBY DENIED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII,

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

RONALD BARRANCO VS. 3D SYSTEMS CORPORATION, ET AL.; CV 13-00412 LEK-RLP; ORDER DENYING PLAINTIFF'S COMBINED RULE 50(B) MOTION FOR JMOL AS TO COUNTERCLAIM 2, AND RULE 59(A) MOTION FOR A NEW TRIAL