

1 October 8, 2019, stack, the parties participated in a second settlement conference, but it wasn't
2 fruitful.⁵

3 With trial four months away, Warren filed a motion seeking leave to file a first amended
4 complaint expanding his claims to include all publication contracts between him and Cardoza
5 and all editions that Cardoza purportedly published of his works.⁶ The looming trial date also
6 prompted Cardoza to file a motion to reconsider my nine-months old summary-judgment order.⁷
7 Because neither side has met its burden to obtain the relief it seeks, I deny both motions.

8
9 **Discussion**

10 **A. Warren hasn't shown that his untimely motion to amend is the product of
11 excusable neglect.**

12 When Warren moved for leave to file a first-amended complaint, the deadline to amend
13 pleadings was one year and eight months in the rearview mirror.⁸ The local rules of this district
14 provide that a request to extend any date set by the discovery plan that's "made after the
15 expiration of the subject deadline will not be granted unless the movant also demonstrates that
16 the failure to act was the result of excusable neglect."⁹ Warren hasn't made this required
17 showing. It is difficult to discern how Warren could meet this standard—or even the lesser
18 showing of good cause—because he acknowledges in his motion that he obtained the facts that
19 he now seeks to amend his complaint with "[t]hrough the course of discovery[,]” which closed a
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21 ⁵ ECF No. 119 (minutes of second settlement conference).

22 ⁶ ECF No. 115 (motion for leave to amend).

23 ⁷ ECF No. 118 (motion for reconsideration).

⁸ ECF No. 60 at 2 (discovery scheduling order).

⁹ LR 26-4.

1 year and five months ago.¹⁰ Because Warren hasn't demonstrated that his failure to timely move
2 for leave to amend is the product of excusable neglect, his motion for leave to amend is denied.

3 **B. Cardoza hasn't shown that my summary-judgment order was clearly erroneous.**

4 A district court "possesses the inherent procedural power to reconsider, rescind, or
5 modify an interlocutory order for cause seen by it to be sufficient[.]" so long as it has
6 jurisdiction.¹¹ A motion to reconsider must set forth "some valid reason why the court should
7 reconsider its prior decision" by presenting "facts or law of a strongly convincing nature."¹²
8 Reconsideration is appropriate if the court "(1) is presented with newly discovered evidence, (2)
9 committed clear error or the initial decision was manifestly unjust, or (3) if there is an
10 intervening change in controlling law."¹³ "A motion for reconsideration is not an avenue to re-
11 litigate the same issues and arguments upon which the court already has ruled."¹⁴

12 Previously, I determined that Warren was entitled to summary judgment on the liability
13 element of his claim that Cardoza violated his copyright by selling his works in eBook format.
14 Cardoza argues that this determination was clearly erroneous because Warren hadn't discharged
15 his burden to demonstrate the absence of triable issues about two key facts: (1) Cardoza wasn't
16 licensed to publish Warren's works in eBook format and (2) Cardoza published Warren's works
17 in eBook format. I begin with the second fact.

20 ¹⁰ ECF No. 60 at 2 (discovery closed on January 16, 2018).

21 ¹¹ *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir.
2001) (quotation and emphasis omitted); *see also Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950,
955 (9th Cir. 2013); LR 59-1.

22 ¹² *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003).

23 ¹³ *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

¹⁴ *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005).

1 Among his undisputed material facts, Warren stated that Cardoza caused his
2 “Copyrighted Works [to be] made and published into eBooks” without his consent.¹⁵ To
3 demonstrate that the fact of eBook publication cannot be genuinely disputed, Warren pointed to
4 Cardoza’s response to an interrogatory request and a paragraph from Avery’s affidavit that
5 defendants filed to support their dismissal motion.¹⁶ Warren’s interrogatory asked Cardoza to
6 “[i]dentify and describe in detail the titles under which all reprints, new editions, electronic
7 books, and translations [that Cardoza] published for any book authored by Warren.”¹⁷ Cardoza
8 responded that “[d]efendants have knowledge of the following titles[,]” and then listed titles for
9 six of Warren’s works.¹⁸ Cardoza argues that this response establishes nothing and I cannot infer
10 from it that Cardoza published any of Warren’s works in eBook format. But I don’t have to infer
11 to reach that conclusion because Cardoza didn’t object to the request as compound, nor did it
12 clarify in its response that it didn’t publish any of the titles that it listed in eBook format.

13 Warren also relied on Avery’s declaration that “[t]he only business Cardoza Publishing
14 does with Amazon is to offer digital files to Amazon. If an Amazon customer purchases an ‘e-
15 book’ from Amazon, Cardoza Publishing will be paid a percentage of the sales proceeds.”¹⁹
16 Avery offered this testimony to demonstrate why Warren’s allegation that Cardoza sells his
17 works to Amazon is “inaccurate.”²⁰ Cardoza argues that this evidence establishes nothing. But

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20 ¹⁵ ECF No. 70 at 7, ¶ 19 (citing ECF No. 25 at ¶ 19 and ECF No. 70-2 at 33, Interrogatory No. 2 and the Response).

21 ¹⁶ *Id.* (citing ECF No. 25 at ¶ 19 and ECF No. 70-2 at 33, Interrogatory No. 2 and the Response).

22 ¹⁷ ECF No. 70-2 at 33.

23 ¹⁸ *Id.*

¹⁹ ECF No. 25 at 4, ¶ 19.

²⁰ *Id.*

1 Avery's testimony, when read in conjunction with the allegations to which it pertains,²¹ is that
2 Warren is wrong to allege that Cardoza sells paperback or hardcover formats of his works via
3 Amazon; rather, according to Avery, Cardoza publishes only the eBook format of Warren's
4 works through Amazon's platform.

5 In responding to Warren's summary-judgment motion, Cardoza didn't argue that
6 Warren's proffered evidence failed to establish the absence of a genuine dispute about the fact
7 that it published his works in eBook format. Nor did Cardoza deny that it had published his
8 works in eBook format. Rather, Cardoza's opening salvo on the merits of this claim was to
9 argue that Warren "fails to disclose to the [c]ourt that he has been paid[] and received a royalty
10 for all books (including eBooks) that have been sold."²² Thus, Cardoza has failed to show that I
11 clearly erred when I determined that there wasn't a triable issue about the fact that Cardoza had
12 published Warren's works in eBook format.²³

13 Cardoza also argues that my summary-judgment determination was clearly erroneous
14 because I should have found the contracts to be ambiguous as to whether they included eBook
15 format and left their interpretation to the jury. This is a rehash of Cardoza's summary-judgment
16 response, in which it argued that Warren "knows full well that 'eBooks' are considered in the
17 industry and between the parties . . . as 'special editions'" and the parties' contracts require
18 Cardoza to pay Warren royalties "on sales of a special edition at a reduced price . . . or on sales
19 of the regular edition at reduced prices for special use."²⁴ But Cardoza didn't proffer any

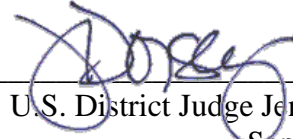
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21 ²¹ ECF No. 1 at ¶¶ 7, 26.

22 ECF No. 79 at 11.

23 ²³ Cardoza also argues that Warren's evidence didn't show actual sales figures or which of his
24 works Cardoza published in eBook format. These issues go more toward damages than liability,
25 so they are better left to the jury.

²⁴ ECF No. 79 at 11.

1 limine [ECF No. 131] at calendar call, which is scheduled for 1:30 p.m. on September 30, 2019,
2 or at its earliest opportunity thereafter.



U.S. District Judge Jennifer A. Dorsey
September 26, 2019

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