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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANGUAGE LINE SERVICES, INC., a Delaware corporation,

Plaintiff-Appellee,

v.

LANGUAGE SERVICES ASSOCIATES, INC., a Pennsylvania corporation,

Defendant-Appellant,

and

WILLIAM SCHWARTZ; PATRICK CURTIN, individuals,

Defendants,

v.

BRYAN LUCAS,

Third-party-defendant-Appellee.

No. 11-17757

D.C. No. 5:10-cv-02605-JW

MEMORANDUM*

Appeal from United States District Court
for the Northern District of California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

James Ware, District Judge, Presiding

Argued and Submitted August 10, 2012
San Francisco, California

Before: CALLAHAN and WATFORD, Circuit Judges, and SINGLETON,** Senior District Judge

This trade secrets litigation involves a dispute between two competitors, Language Services Associates ("LSA") and Language Line Services ("Language Line").[1] LSA appeals the district court's order overruling its objections to the Special Master's ("Master's") denial of LSA's motion to modify or vacate the preliminary injunction.[2] We affirm.

1. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." *See, e.g., Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005). We stated in *Grunwald*, however, that an order denying a motion to modify or dissolve an

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** The Honorable James K. Singleton, Jr., Senior United States District Judge for the District of Alaska, sitting by designation.

[1] The parties are familiar with the facts, and we repeat them here only as necessary to explain our decision.

[2] The notice of appeal states that LSA also appealed Discovery Order No. 7 (order finding LSA in contempt), but LSA's opening brief did not address the contempt finding. LSA therefore waived the contempt finding, and we do not address that issue. *Dream Games of Ariz. v. PC Onsite*, 561 F.3d 983, 994-95 (9th Cir. 2009).

injunction is appealable only if the motion is based on a claim of changed circumstances and raises new matter not considered at the time of the injunction. *Id*. Thus, we may review the denial of LSA's motion only if the motion, in substance, "is based on new circumstances that have arisen after the district court granted the injunction." *Id.*

LSA claims that the Evolver Report proves it never had the September 2009 Report (2009 Report), and that this change in circumstances allows us to review the denial of its motion to modify or vacate the injunction. Although LSA's interpretation of the Evolver Report is problematic, the report does provide forensic evidence of the extent of Language Line's confidential information on LSA's and its employees' computers. This new information, not known to the district court at the time it issued the preliminary injunction, satisfies the *Grunwald* test and allows us to review LSA's motion.

2. We review for abuse of discretion the "district court's decision denying the motion to modify or dissolve the preliminary injunction," *Grunwald*, 400 F.3d at 1126 n.7, "a district court's decision regarding a preliminary injunction," *Walczack v. EPL Prolong, Inc.*, 198 F.3d 724, 730 (9th Cir. 1999), and the "district court's determination as to the amount and appropriateness of the security required by Rule 65(c)." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). A

district court "abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* at 1078-79. We therefore review de novo "any underlying issues of law." *Grunwald*, 400 F.3d at 1126 n.7.

3. LSA argues that the Evolver Report proves it never had the 2009 Report, and that changed circumstances warrant at least modifying the injunction to cover only the information found on LSA's computers. "A district court has inherent authority to modify a preliminary injunction in consideration of new facts." *A&M Records, Inc. v. Napster*, 284 F.3d 1091, 1098 (9th Cir. 2002). However, the Evolver Report's ultimate conclusion was that LSA still had Language Line's intellectual property on its computers. LSA concedes that the forensic imaging of its computers found sublists containing information on 441 companies that matched the 2009 Report, and that the 2009 Report was found on a thumb drive associated with Schwartz's laptop. Accordingly, the Evolver Report does not support modifying or vacating the preliminary injunction.

4. LSA next argues that even if Curtin and Schwartz had access to the full 2009 Report, the Evolver Report proves LSA does not have it now, and therefore the injunction must be modified or vacated. Again, this is based on a questionable interpretation of the Evolver Report. Moreover, LSA has admitted that Schwartz and Curtin took and distributed Language Line's confidential information to LSA

employees who then used it to solicit Language Line's customers. The Master and the district court could have reasonably concluded that LSA's repeated violations of the injunction undercut LSA's claim that it could no longer use the 2009 Report to harm Language Line.

5. LSA next contends that the injunction should be modified to include only over-the-phone translation services ("OPI"). The Master noted and the district court agreed that this would effectively allow LSA to "have a foot in the door provided by those lists, the very conduct the Injunction seeks to prevent." LSA argues that the Master's conclusion "is only applicable if LSA were going to try and sell OPI services in violation of the injunction," but that "such sales would be very easy to detect and police and would not happen." Nonetheless, in light of LSA's multiple violations of the injunction, the district court did not abuse its discretion in refusing to modify the injunction to include only OPI services.

6. LSA next claims that the injunction should be modified to exclude customers involved in third-party Group Purchasing Organization ("GPO") agreements. According to LSA, under a GPO agreement, vendors get "the benefit of pre-negotiated pricing by a third-party," and when "those negotiations happen, vendors" such as LSA "have no idea who might ultimately sign up to take advantage of the pre-negotiated pricing and terms." Thus, LSA contends that

having Language Line's list of customers with pricing data "is irrelevant as there are not individual negotiations with members of a GPO."

Although LSA's assertions have some weight, the Master noted that LSA had not presented evidence as to why GPOs should be treated differently under the existing injunction, and that without specific evidence subject to cross-examination there was no reason to modify the injunction. On this record, we cannot find that the district court abused its discretion in not modifying the preliminary injunction to exclude GPOs. However, this matter may be ripe for reconsideration in further proceedings in the district court.

7. LSA next claims that even if at one time it had the 2009 Report, the information on the report is now stale. The Master found that LSA's argument is supported only by its Chief Operating Officer's declaration, and without discovery on the issue this argument does not support modification of the injunction. Given the deferential nature of our review, we find that the district court did not abuse its discretion in refusing to modify the injunction.

8. When the district court addressed the injunction originally, it considered only Language Line's likelihood of success on the merits and its risk of irreparable harm without the injunction, despite the Supreme Court's holding in *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008), which held that when a

district court considers granting an injunction, it must consider not only the likelihood of (1) success on the merits and (2) irreparable harm without an injunction, but also (3) the balance of equities and (4) the public interest. However, the district court's failure to discuss all four elements from *Winter* was harmless error. *See Johnson*, 572 F.3d at 1084-85 (noting that the district court failed to consider the element of irreparable harm, but affirming because the record supported a finding of likelihood of irreparable harm). Here, the record supports determinations that the balance of hardships tips in favor of Language Line, and that the injunction is in the public interest. LSA is not entitled to any relief based on the district court's failure to consider all four parts of the *Winter* test.

9. LSA incorrectly argues that Federal Rule of Civil Procedure 65(c) requires the posting of a bond. Despite the mandatory language of Rule 65(c), district courts retain "discretion as to the amount of security required, *if any*." *Id.* at 1086 (internal quotation marks and citation omitted). Here, LSA made three requests for a bond: (1) when the court issued the injunction; (2) in its motion for reconsideration; and (3) in the amount of $50,000,000 in its motion to modify or vacate the injunction. The Master rejected this evidence in support of a bond as "speculative [and] conclusory," and the district court rejected it "because the court ha[d] already denied the request on several occasions." Given the lack of objective

evidence of damages and the deferential nature of the abuse of discretion standard, we affirm the district court's decision to deny LSA's request for a $50,000,000 bond.

However, we note that the district court failed to articulate its reasons for denying LSA's request for a bond. We have held that despite the "seemingly mandatory language" of Rule 65(c), a district court has discretion as to the amount of security required. *Johnson*, 572 F.3d at 1086. "We review for abuse of discretion a district court's determination as to the amount and appropriateness of the security required by Rule 65(c)." *Id*. Absent a clear statement by the district court concerning its reasons for requiring or not requiring a bond, we may not be able to discern the district court's reasons for its action. In the future, the district court's orders granting injunctive relief should include explanations for its exercise of discretion under Rule 65(c).

Finally, we express concerns with two aspects of this case. First, the district court erroneously applied a clear error standard of review to the Master's findings of fact and conclusions of law instead of conducting de novo review. Fed. R. Civ. P. 53(f)(3), (4). Second, it has been almost a year since the district court denied LSA's motion to modify or vacate the preliminary injunction and more than two years since the issuance of the injunction. Preliminary injunctions are ambulatory

remedies, designed for "preserving the status quo and preventing the irreparable loss of rights before judgment." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*,739 F.2d 1415, 1422 (9th Cir. 1984). Preserving the status quo implicitly recognizes that the parties' rights may change over time, and it does not justify indefinitely extending a preliminary injunction. *See, e.g., Sprint Communications Co. L.P. v. CAT Communications Intern., Inc.*, 335 F.3d 235, 242 (3d Cir. 2003).

As noted, the information in the 2009 Report, which served as the basis for the preliminary injunction, is now over three years old. Judge Ware has retired, and counsel at oral argument indicated that the case is now without district or magistrate judge oversight, further complicating matters. Should LSA move for modification of the injunction, the district court must conduct de novo review of any findings of fact and conclusions of law made by the Master and should consider whether changed circumstances support modifications of the preliminary injunction, particularly on such issues as its application to GPOs.

The denial of LSA's motion to modify or vacate is **AFFIRMED.**

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
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Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

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Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk