
No. 04-15531

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ET AL.,

Plaintiffs-Appellees,

v.

ORACLE CORPORATION,

Defendant-Appellee,

v.

FIDELITY EMPLOYER SERVICES COMPANY, LLC,

Third-Party Appellant.

RESPONSE OF THE UNITED STATES OF AMERICA
TO ORACLE'S MOTION TO DISMISS APPEAL AS MOOT

1. Throughout the proceedings in the district court, Oracle maintained that it was important to its defense that, in addition to outside counsel (Latham & Watkins), two in-house lawyers, Daley and Ross, have access to seven highly confidential documents of appellant, Fidelity Employer Services Company ("FESCO"). These claims, made over the objections of FESCO and the United

States, persuaded the district court on March 19, 2004, to rule that Daley and Ross may have access to the seven documents. FESCO appealed. By letter agreement dated May 4, 2004, Oracle agreed with FESCO to refrain from disclosing the seven documents to its in-house counsel for some period of time, apparently in return for further discovery from FESCO. *See FESCO Op., Attachment B.* Now, as the trial below concludes, Oracle has decided that it does not need to disclose the seven documents to Daley and Ross and has represented to this Court that it will not do so. Based on this representation, Oracle moves to dismiss the appeal as moot.

2. While the voluntary cessation of challenged activity generally does not, by itself, moot a case, no meaningful dispute remains for this Court to resolve. Rather, the only issue is whether Oracle is sufficiently bound (e.g. by contract or court order) to adhere to its agreement not to disclose the seven documents. The May 4, 2004, letter agreement between Oracle and FESCO, which, in its motion, Oracle represents is now “unconditional,” may well be sufficient. In any event, Oracle now says that it does not need to disclose the documents to Daley and Ross, so the factual predicate for the district court’s order in this regard has been eliminated. Accordingly, the United States will shortly move the district court to modify the protective order to prohibit Oracle from disclosing the seven documents to any of its in-house counsel. We do not expect Oracle to oppose that request. If

the court so modifies the protective order, FESCO will have all the protection that it ever sought in the district court, and this appeal should then be dismissed as moot. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001). We will notify this Court as soon as the district court acts.

3. Finally, there is no merit in FESCO's claim (FESCO Op. at 10-11, referring to pp. 26-32 of its opening brief) that, even if the issue of disclosure to Daley and Ross is moot, there is a live controversy over its challenge to the district court's order that the government disclose all of FESCO's documents to Oracle's outside counsel. FESCO waived this issue.

As we explained in our brief (at pp. 10-12, 14-15, 24-25), in the district court FESCO never challenged the disclosure of any of its documents to Oracle's outside counsel. Indeed, it fully acquiesced in that disclosure. See Appellant's Excerpts of Record at 133, 136, 210-12. FESCO, having waived the issue of disclosure to outside counsel, can not raise it for the first time in this appeal. *E.g.*, *United States v. Robertson*, 52 F.3d 789, 791-92 (9th Cir. 1994); *Long v. Director, OWCP*, 767 F.2d 1578, 1583 (9th Cir. 1985).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I do hereby certify that today, June 30, 2004, I served a true copy of the foregoing Response Of The United States Of America To Oracle's Motion To Dismiss As Moot, on all counsel of record as indicated below:

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