

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ENNS PONTIAC, BUICK, & GMC
TRUCK, et al.,

CASE NO. 1:07-cv-01043-LJO-BAM

Plaintiffs,
vs.

**ORDER ON RECONSIDERATION OF
MOTION TO COMPEL (Doc. 386)**

ORELIA FLORES, et al.,
Defendants.

_____ /

I. INTRODUCTION

Plaintiffs¹ seek reconsideration of Magistrate Judge McAuliffe’s January 27, 2012, order denying their motion to compel Defendant John Pearce to produce various documents. Plaintiffs also request the imposition of sanctions. For the reasons discussed below, this Court DENIES Plaintiffs’ motion for reconsideration and request for sanctions.

II. BACKGROUND

A. Background Facts

On July 19, 2007, Plaintiffs filed this environmental contamination action due to the alleged contamination of their property located at 1319 G Street in Reedley, California. The operative complaint

_____ ¹ Plaintiffs are: Enns Pontiac, Buick, & GMC Truck; Earl L. Enns & Esther Enns as Trustees of the 2004 Enns’ Family Trust; and Harold J. Enns & Patricia L. Enns as Trustees for the Family Trust.

1 involves claims related to the source, nature, and extent of alleged contamination underlying and/or
2 surrounding Plaintiffs' property and the properties located at 1307 and 1340 G Street. Plaintiffs allege
3 that the properties currently or previously owned by Defendants caused the environmental
4 contamination. Prior businesses at 1319 and 1340 G Street include dry cleaning establishments, which
5 are under the jurisdiction of the California Regional Water Quality Control Board ("RWQCB").
6 Defendant Pearce previously operated a dry cleaning business at 1340 G Street.

7 **B. Discovery Dispute**

8 On April 15, 2011, Plaintiffs served Defendant Pearce with a Second Set of Requests for
9 Production of Documents ("RFPs") which included the following requests for production:

10 **REQUEST FOR PRODUCTION No. 5:** ANY and ALL DOCUMENTS
11 relating to the preparation of the February 25, 2010 "Site Assessment Report
12 Former Dry Cleaners 1340 G Street Reedley, California" prepared by
13 Kleinfelder including but not limited to correspondence between PEARCE and
14 KLEINFELDER and/or notes, drafts of the report.

15 **REQUEST FOR PRODUCTION No. 6:** ANY and ALL DOCUMENTS not
16 previously produced relating to PEARCE's communications with ANY and
17 ALL governmental agencies included but not limited to the California Regional
18 Water Quality Control Board regarding the 1340 G STREET property.

19 **REQUEST FOR PRODUCTION No. 7:** ANY and ALL pictures related to
20 PEARCE's ownership and operation of the former dry cleaners at 1340 G Street
21 Reedley, CA.

22 **REQUEST FOR PRODUCTION No. 8:** ANY and ALL DOCUMENTS
23 relating to Salem Engineering Group, Inc's March 28, 2011 Review of
24 Groundwater Elevation and Flow Direction Data for 1340 G STREET
25 submitted to the California Regional Water Quality Control Board, including
26 but not limited to, communications between Kathleen Clack and Bruce Meyers
27 and/or notes, drafts of the report.

28 Defendant Pearce failed to respond to the requests in a timely manner. Defendant Pearce's response was
due on May 18, 2011. Plaintiffs received Pearce's response on June 2, 2011, with objections to RFP
Nos. 5-8. Accordingly, Plaintiff filed a motion to compel responses to RFP Nos. 5-8 on the ground that
Defendant Pearce's untimely response waived all objections to the RFPs.

1. Order No. 1: Doc. 245

On July 13, 2011, Magistrate Judge Beck ruled on Plaintiffs' motion to compel. Judge Beck
found that Defendant Pearce's untimely disclosure of documents "waived any objections to his RFP

1 responses or to the production of documents.” (Doc. 245, p. 5). The Court also determined however,
2 that the waiver was “not a broad-based subject matter waiver and [did] not extend to documents . . .
3 subject to the attorney-client privilege.” (Doc. 245, p. 5).

4 **2. Order No. 2: Doc. 246**

5 Also on July 13, 2011, Magistrate Judge Beck ruled on: (1) Plaintiffs’ motion to compel
6 deposition testimony and documents from Kleinfelder West, Inc., (“Kleinfelder”) a prior environmental
7 consultant for Defendant Pearce and (2) Defendant Pearce’s motion for protective order regarding the
8 deposition testimony and requests for documents from Kleinfelder. (Doc. 246). According to Plaintiffs,
9 Defendant Pearce asserted a blanket privilege over the entire Kleinfelder file, including documents
10 already disclosed to the RWQCB, and refused to allow Kleinfelder to answer questions regarding the
11 February 25, 2010, Site Assessment Report. (Doc. 246, p. 4). In Plaintiffs’ motion to compel, they
12 argued that because the February 25, 2010, Site Assessment Report was prepared for a governmental
13 agency Defendant Pearce waived the entire subject matter related to the report. (Doc. 246, p. 4-5).
14 Judge Beck rejected Plaintiffs’ argument and held that “the Court does not find a broad waiver of work
15 product protection based on disclosure of the final Site Assessment Report dated February 25, 2010.
16 To the extent not already completed, Kleinfelder must produce the underlying data on which the
17 assessment report was based, but need not produce drafts or notes regarding the report.” (Doc. 246, p.
18 5). The Court reiterated this determination when ruling on Defendant Pearce’s motion for protective
19 order, *i.e.*, that the deposition questioning of Kleinfelder and any associated document production be
20 limited to the data underlying the report. (Doc. 246, p. 10).

21 **3. Order No. 3 (Doc. 247)**

22 Following the filing of these orders, counsel for Defendant Pearce requested clarification
23 regarding, “whether Defendant Pearce must produce written communications between his attorney (Ms.
24 Clack) and his non-testifying expert, Kleinfelder West, Inc.” (Doc. 372-3). In the request for
25 clarification, counsel pointed out that the order at Doc. 246 limited Kleinfelder’s production of
26 documents to the data underlying the assessment report. (Doc. 246, p. 10). Counsel also pointed out
27 that the Court’s order at Doc. 245 was broader and provided that Pearce’s untimely disclosure waived
28 any objections to his RFP responses or to the production of documents. (Doc. 245, p. 5).

1 On August 9, 2011, Magistrate Judge Beck filed an order clarifying the two July 13, 2011 orders.
2 (Doc. 247). The order states in relevant part:

3 Defendant Pearce has waived all objections and any claimed work-product
4 protection in responding to Plaintiffs' Second Set of Requests for Production
5 of Documents. Defendant Pearce is therefore ordered to respond and to produce
responsive documents within seven (7) days of the date of this Order.

6 The Court's finding of waiver does not extend to documents that are subject to
7 the attorney-client privilege. If Defendant Pearce intends to withhold any
8 documents from this production on the basis of attorney-client privilege, then
he is ordered to produce a privilege log to Plaintiffs within seven (7) days of the
date of this Order.

9 (Doc. 247, p. 2). Absent from the order is any mention of the Court's previous ruling that the waiver
10 was not a broad-based subject matter waiver. (Doc. 245, p. 5). Also, absent from the order is any
11 mention of the protective orders related to the documents in the possession of Pearce's environmental
12 consultants which the Court granted. (Doc. 246, p. 10).

13 **4. Motion to Compel**

14 On December 16, 2011, Plaintiffs filed a motion to compel Defendant Pearce's compliance with
15 the Court's July 12, 2011 (Doc. 245) and August 9, 2011 (Doc. 247), discovery orders. (Doc. 362).
16 Plaintiff acknowledged that on August 4, 2011, Pearce produced a limited set of documents but
17 continued to refuse to produce a complete set of documents for RFP Nos. 5, 6, and 8 and continued to
18 refuse to produce a privilege log. On January 20, 2012, the parties submitted a joint statement regarding
19 Plaintiffs' motion to compel. (Doc. 375). In the joint statement, Defendant Pearce explained that he
20 already complied with RFP Nos. 5, 6, and 8. (Doc. 375, p. 29).

21 On January 27, 2012, a hearing was held before Magistrate Judge McAuliffe. (Doc. 385). At
22 the beginning of the hearing, Plaintiff acknowledged that RFP No. 7 was no longer at issue.² After
23 hearing argument from both parties, the Court issued a ruling from the bench. (Doc. 385, p. 16). The
24 Court stressed the need to read all of Judge Beck's orders together, and that they should not be read in
25 isolation. (Doc. 385, p. 16-17). The Court then went through each RFP and made a ruling. (Doc. 385,

26
27 ² RFP No. 7 requests pictures related to Defendant Pearce's ownership and operation of the former dry cleaners at
28 1340 G. Street in Reedley, California which Pearce operated from 1961 to 1987. No responsive documents to the request
exist, so Judge McAuliffe denied the motion to compel RFP No. 7 as moot. (Doc. 382).

1 p. 17). With regard to RFP No. 5, the Court denied the motion to compel. (Doc. 385, p. 16). The Court
2 first found that Pearce did not have control over the Kleinfelder documents not actually sent to Pearce.
3 (Doc. 385, p. 17). Thus, the Court reasoned, Pearce could not be “compelled to produce documents for
4 which [he did] not have possession, custody, and control.” (Doc. 385, p. 17). The Court further
5 explained that:

6
7 It would be completely inconsistent to read Judge Beck’s orders that the
8 Kleinfelder drafts are not to be produced, but . . . permit back door discovery
by saying those same drafts can be produced by [Pearce] . . . Enns may not use
the work of the consultant against [Pearce], and Judge Beck so held.

9 (Doc. 385, p. 18). The Court also denied the motion to compel RFP No. 6, because the documents
10 which complied with the request were already produced. (Doc. 385, p. 18). Finally, with regard to RFP
11 No. 8, the Court denied the motion to compel because Judge Beck previously denied Plaintiffs’ motion
12 to compel the same documents from Salem Engineering Group, Inc. (Doc. 385, p. 19). Thus, the Court
13 reasoned, Plaintiff could not “back door it” by asking for the same documents from Pearce. (Doc. 385,
14 p. 19).

15 III. LEGAL STANDARD

16 “A party seeking reconsideration of [a] Magistrate Judge’s ruling shall file a request for
17 reconsideration,” pursuant to Local Rule 303(c). The party seeking reconsideration must set forth facts
18 or law of a strongly convincing nature to induce the court to reverse the prior decision. *See, e.g.,*
19 *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D. Cal. 1986), *aff’d in part and*
20 *rev’d in part on other grounds*, 828 F.2d 514 (9th Cir. 1987).

21 This Court reviews a motion to reconsider a Magistrate Judge’s ruling under the “clearly
22 erroneous or contrary to law” standard set forth in 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). As
23 such, the Court may only set aside those portions of a Magistrate Judge’s order that are either clearly
24 erroneous or contrary to law. Fed. R. Civ. P. 72(a); *see also Grimes v. City and County of San*
25 *Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). “[R]eview under the clearly erroneous standard is
26 significantly deferential, requiring a definite and firm conviction that a mistake has been committed.”
27 *Security Farms v. International Broth. of Teamsters*, 124 F.3d 999, 1014 (9th Cir. 1997) (internal
28 quotation marks omitted); *Green v. Baca*, 219 F.R.D. 485, 489 (C.D. Cal. 2003). “In contrast, the

1 contrary to law standard . . . permits independent review of purely legal determinations by the magistrate
2 judge.” *Green*, 219 F.R.D. at 489 (internal quotation marks omitted). Thus, a District Court may
3 overturn a Magistrate Judge’s “conclusions of law which contradict or ignore applicable precepts of law,
4 as found in the Constitution, statutes or case precedent.” *Adolph Coors Co. v. Wallace*, 570 F.Supp. 202,
5 205 (N.D. Cal. 1983).

6 With these standards in mind, this Court turns to Plaintiffs’ criticisms of Magistrate Judge
7 McAuliffe’s January 27, 2012, ruling.

8 IV. DISCUSSION

9 A. Reconsideration of Motion to Compel

10 Plaintiffs contend that Magistrate Judge McAuliffe’s January 27, 2012, ruling was clearly
11 erroneous because it disregarded the specific and most recent order issued by Judge Beck which required
12 production of the requested documents and relied on a prior order, which was superseded by the more
13 recent order, in support of its decision.

14 Judge McAuliffe’s January 27, 2012, order was not clearly erroneous because the record shows
15 that the Court did not disregard any of Judge Beck’s prior orders but considered them together. At the
16 January 27, 2012 hearing, the Court explicitly stated that it disagreed with Plaintiffs’ position that the
17 Judge Beck orders should be read in isolation. (Doc. 385, p. 16). The Court stated, “I disagree with the
18 Plaintiff’s position. I think we need to read all of Judge Beck’s orders together, and they should not be
19 read in isolation.” (Doc. 385, p. 16-17). Moreover, the Court did not commit clear error by reading
20 Judge Beck’s prior orders together because there appears to be an omission in Judge Beck’s August 9,
21 2011 clarification order, which is the order Plaintiff argues supersedes the prior orders.

22 Judge Beck issued three discovery orders relevant to the instant dispute. The orders are at Docs.
23 245, 246, and 247. In Doc. 245, which was filed on July 13, 2011, Judge Beck granted Plaintiffs’ motion
24 to compel the production of documents listed in RFP Nos. 5-8. (Doc. 245, p. 5). Judge Beck granted
25 the motion based on its determination that Pearce’s untimely response to the RFPs “waived any
26 objections to his RFP responses or to the production of documents.” (Doc. 245, p. 5). Judge Beck
27 qualified the waiver however, by holding that “the waiver is not a broad-based subject matter waiver and
28 it does not extend to documents that are subject to the attorney-client privilege.” (Doc. 245, p. 5). Judge

1 Beck also acknowledged that, “Pearce made a good faith effort to pursue protective orders related to
2 documents in the possession of his environmental consultants.” (Doc. 245, p. 5).

3 That same day, Judge Beck ruled on Plaintiffs’ motion to compel deposition testimony and
4 documents from the person most qualified at Kleinfelder, Pearce’s former environmental consultant, and
5 Pearce’s motion for a protective order regarding the same deposition testimony and request for
6 documents. This is the order at Doc. 246. With regard to the request for documents, Plaintiffs argued
7 that because the February 25, 2010, Site Assessment Report was prepared for a governmental agency
8 there had been a waiver as to the entire subject matter related to the report. (Doc. 246, p. 4-5).
9 Production of a final report generally does not effect a broad waiver as to the entire subject matter of the
10 disclosed material. *See, e.g., S.E.C. v. Schroeder*, 2009 WL 1125579, *7 (N.D. Cal. Apr. 27, 2009)
11 (rejecting argument that production of final interview memoranda effected a broad waiver as to the entire
12 subject matter of the disclosed material , including underlying attorney notes and drafts). Accordingly,
13 Judge Beck rejected Plaintiffs’ argument and held that any waiver was limited to the production of the
14 underlying data referenced or contained in the report and ordered Kleinfelder to produce the underlying
15 data on which the assessment report was based but explicitly stated that Kleinfelder need not produce
16 drafts or notes regarding the report. (Doc. 246, p. 5).

17 Shortly thereafter, on August 8, 2011, counsel for Defendant Pearce sent a letter to Judge Beck
18 requesting clarification regarding the orders at Docs. 245 and 246. (Doc. 372-3). Pearce requested
19 clarification regarding “whether Defendant Pearce must produce written communications between his
20 attorney (Ms. Clack) and his non-testifying expert, Kleinfelder West, Inc.” (Doc. 372-3). Pearce
21 requested clarification in light of the fact that Doc. 246 limited Kleinfelder’s production of documents
22 to the data underlying the report while Doc. 245 was written more broadly. (Doc. 372-3). In response
23 to the letter, Judge Beck issued the order at Doc. 247. The order at Doc. 247 begins by briefly
24 summarizing the holding in the order at Doc. 245, *i.e.*, that Pearce’s untimely disclosure “waived any
25 objections to his RFP responses or to the production of documents.” (Doc. 247, p. 1). The summary
26 further acknowledged that the waiver did not extend to documents subject to the attorney-client
27 privilege. (Doc. 247, p. 1). Absent from the summary however, is Judge Beck’s previous holding that
28 the waiver was “not a broad-based subject matter waiver.” (Doc. 245, p. 5). In addition, the order fails

1 to mention the protective order related to the documents in the possession of Pearce’s environmental
2 consultant. (Doc. 246, p. 10). Judge Beck then clarified the prior orders as follows:

3
4 Defendant Pearce has waived all objections and any claimed work-product
5 protection in responding to Plaintiffs’ Second Set of Requests for Production
of Documents. Defendant Pearce is therefore ordered to respond and to produce
responsive documents . . .

6 The Court’s finding of waiver does not extend to documents that are subject to
7 the attorney-client privilege. If Defendant Pearce intends to withhold any
8 documents from this production on the basis of attorney-client privilege, then
he is ordered to produce a privilege log to Plaintiffs.

9 (Doc. 247, p. 2).

10 Plaintiff now argues that Doc. 247 supersedes all prior orders issued by Judge Beck. Thus,
11 according to Plaintiffs, Defendant Pearce waived all objections and work-product protections related to
12 RFP Nos. 5, 6, and 8. Given that the clarification order (Doc. 247) completely omits the limitation on
13 the waiver, *i.e.*, that the waiver was not a broad-based subject matter waiver, without any analysis or
14 discussion. Coupled with the fact that Judge Beck previously rejected Plaintiffs’ request for a broad-
15 based subject matter waiver in both Docs. 245 and 246, it appears that the failure to include the subject
16 matter limitation on the waiver in the clarification order was a mere oversight. Therefore, Judge
17 McAuliffe did not clearly err by reading the orders together when deciding Plaintiffs’ motion to compel.
18 Moreover, as pointed out by Judge McAuliffe, if the orders were read in isolation the clarification order
19 would be inconsistent with the orders at Docs. 245 and 246 and allow back door discovery. Judge Beck
20 was very clear in Doc. 246 that Kleinfelder “must produce the underlying data on which the assessment
21 report was based, but need not produce drafts or notes regarding the report.” (Doc. 246, p. 5). Thus, it
22 would be inconsistent and allow backdoor discovery to read the clarification order at Doc. 247 as
23 allowing Pearce to produce the same drafts or notes that Judge Beck previously ruled as protected as
24 produced by Kleinfelder. Accordingly, the record shows that Magistrate Judge McAuliffe considered
25 all of Judge Beck’s prior orders when ruling on Plaintiffs’ motion to compel and did not clearly err by
26 reading the orders together.

27 Moreover, based on the parties’ joint statement regarding Plaintiffs’ motion to compel,
28 Defendant Pearce has complied with RFP Nos. 5, 6 and 8. With regard to RFP No. 5, all that was

1 required to be produced was data underlying the February 25, 2010, Site Assessment Report. (Doc. 246,
2 p. 5). However, Pearce and Kleinfelder produced much more. In-house counsel for Kleinfelder
3 produced all of the working files kept by Kleinfelder related to the report which totaled approximately
4 400 pages. (Doc. 375, p. 36). Kleinfelder also produced emails with attachments relating to the
5 preparation of the report. (Doc. 375, p. 36). With regard to RFP No. 6, Pearce has already produced all
6 documents related to his communications with any governmental agencies. (Doc. 375, p. 41). Finally,
7 with regard to RFP No. 8, Pearce produced all documents related to Salem Engineering Group, Inc's
8 ("Salem") March 28, 2011, review of groundwater elevation and flow direction data. (Doc. 375, p. 39).
9 In addition, Plaintiffs have the data underlying the report because the March 28, 2011, Salem report
10 relies on the data generated by Plaintiffs' experts. Accordingly, this Court DENIES Plaintiffs' motion
11 for reconsideration.

12 **B. Request for Sanctions**

13 Plaintiffs request that this Court impose sanctions as it deems appropriate and order the payment
14 of reasonable expenses, including attorney's fees, as a result of Defendant Pearce's alleged failure to
15 comply with Judge Beck's discovery orders. If a party fails to obey an order to provide or permit
16 discovery the Court may impose sanctions and/or reasonable expenses. Fed. R. Civ. P. 37(b)(2).
17 Because Defendant Pearce complied with Judge Beck's discovery orders, this Court DENIES Plaintiffs'
18 request for sanctions.

19 **V. CONCLUSION AND ORDER**

20 For the reasons discussed above, this Court DENIES Plaintiffs' motion for reconsideration and
21 request for sanctions and reasonable expenses.

22

23 IT IS SO ORDERED.

24 **Dated:** February 27, 2012

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

25

26

27

28