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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PATRIOT RAIL CORP.,  
Plaintiff,  
v.  
SIERRA RAILROAD COMPANY,  
Defendants.

No. 2:09-cv-00009-MCE-EFB  
MEMORANDUM AND ORDER

\_\_\_\_\_  
And Related Counterclaim.

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Defendant Sierra Railroad Company ("Sierra") has filed a Request for Review by the District Court of the Magistrate Judge's Ruling (ECF No. 157) granting Plaintiff Patriot Rail Corp.'s ("Patriot's") Motion for a Protective Order (ECF No. 146). The protective order prevents further efforts by Sierra to enforce an order and subpoena seeking financial records from a third party, UBS Investment Bank ("UBS").

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1 Sierra requests review on grounds that the Magistrate Judge's  
2 order was "clearly erroneous or is contrary to law" pursuant to  
3 Federal Rule of Civil Procedure 72(a).<sup>1</sup> Alternatively, Sierra  
4 joints with its Request a Motion for Relief pursuant to  
5 Rule 60(b) or a modification of the Pretrial Scheduling Order  
6 ("PTSO") pursuant to Rule 16(b)(4). (Def.'s Req. for Review, 1:5-  
7 9, May 19, 2011, ECF No. 159).

8 For the reasons set forth below, Sierra's Request is denied.  
9

### 10 **BACKGROUND**

11  
12 This case stems from unsuccessful negotiations between the  
13 parties for Patriot's acquisition of Sierra. Patriot seeks  
14 monetary damages for breach of contract, breach of implied  
15 covenant of good faith and fair dealing, fraud, and unfair  
16 competition. Sierra, in turn, is countersuing for damages under  
17 the same theories, as well as intentional and negligent  
18 interference with prospective economic advantage,  
19 misappropriation of trade secrets, and coercion. (Joint Status  
20 Report, 2-3, Mar. 6, 2009, ECF No. 15).

21 The current Request (ECF No. 159) relates to a subpoena  
22 originally issued by Sierra to UBS on June 8, 2010, 10 days prior  
23 to the June 18, 2010 non-expert discovery cutoff. The cutoff,  
24 which had already been extended twice, was extended again to  
25 June 25, 2010, then once more to what the Magistrate Judge and  
26 Patriot presumed was a new cut-off date of September 10, 2010.

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28 <sup>1</sup> All further references to "Rule" or "Rules" are to the Federal  
Rules of Civil Procedure unless otherwise noted.

1 (See Orders Amending Pretrial Scheduling Order, ECF Nos. 100 &  
2 104). Sierra, however, contends that the plain language of the  
3 second order indicates that September 10 was only the “[1]last day  
4 for third parties to respond” to requests, not the deadline for  
5 them to enforce discovery requests. (Def.’s Req. 1:16-19, ECF  
6 No. 159).

7 On March 17, 2011, Sierra filed a Motion to Compel against  
8 UBS in the Southern District of New York (where UBS is  
9 headquartered). The motion was withdrawn when an agreement was  
10 apparently reached with UBS to produce the documents. (Id. at 6).  
11 On May 5, 2011, the Magistrate Judge granted Patriot’s Motion for  
12 a Protective Order preventing further efforts by Sierra to obtain  
13 the documents from UBS on grounds that those efforts were  
14 untimely. Sierra’s current Request asks this Court to reverse the  
15 Magistrate Judge’s order pursuant to Rule 72(a) or alternatively  
16 to modify the PTSO pursuant to Rules 60(b) or 16(b)(4).

## 18 ANALYSIS

### 19 A. Rule 72(a) Review

20  
21 In reviewing a magistrate judge’s determination, the  
22 assigned judge shall apply the “clearly erroneous or contrary to  
23 law” standard of review set forth in Local Rule 72-303(f), as  
24 specifically authorized by Rule 72(a) and 28 U.S.C.  
25 § 636(b)(1)(A). Under this standard, the Court must accept a  
26 magistrate judge’s decision unless it has a “definite and firm  
27 conviction that a mistake has been committed.”

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1 Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers  
2 Pension Trust for So. Cal., 508 U.S. 602, 622 (1993). If the  
3 Court believes the conclusions reached by the magistrate judge  
4 were at least plausible, after considering the record in its  
5 entirety, the Court will not reverse even if convinced that it  
6 would have weighed the evidence differently. Phoenix Eng. &  
7 Supply Inc. v. Universal Elec. Co., Inc., 104 F.3d 1137, 1141  
8 (9th Cir. 1997). After reviewing the evidence, this Court cannot  
9 say that the Magistrate Judge's order was "clearly erroneous or  
10 contrary to law" as the standard has been defined. While the  
11 language of the order extending the deadline to September 10,  
12 2010 was arguably vague, the Magistrate Judge indicated that he  
13 based his holding both on the fact that applicable local rules do  
14 not allow indefinite extensions of time and a lack of due  
15 diligence exercised by Sierra. (Tr. Of Proceedings, 10-11, May 2,  
16 2011, ECF No. 160).

17 Local Rule 144 states that "[n]o open extensions of time by  
18 stipulation of the parties will be recognized." L.R. 144(a).  
19 Consequently, the interpretation of September 10, 2010 as the  
20 non-expert discovery cut-off appears to be the most reasonable  
21 interpretation. Sierra contends otherwise, claiming that  
22 interpreting it as such would have given them no time to enforce  
23 the subpoena following UBS's failure to produce by the deadline.  
24 (Def.'s Req. 9:26-28, ECF No. 159).

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1           However, even if this Court were to adopt Sierra's  
2 interpretation of the September 10 date, the Magistrate Judge was  
3 well within the law in declaring that the six months it took  
4 Sierra to file a Motion to Compel - from September 10, 2010 to  
5 March 17, 2011 - demonstrated a lack of due diligence and thus  
6 made it untimely. Gault v. Nabisco Biscuit Co., 184 F.R.D. 620,  
7 622 (D. Nev. 1999) ("If the moving party has unduly delayed, the  
8 court may conclude that the motion [to compel] is untimely");  
9 Bredemus v. Int'l Paper Co., 252 F.R.D. 529, 534 (D. Minn. 2008)  
10 (the trial court generally has considerable discretion in  
11 granting or denying discovery requests and it is not an abuse of  
12 discretion to deny a discovery request that is untimely); In re  
13 Health Mgmt., Inc., 1999 WL 33594132, at \*5-6 (E.D.N.Y.  
14 Sept. 25, 1999) (finding no error in denial of motion to  
15 compel as untimely based on undue delay); see also  
16 Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86 (1st Cir.  
17 1996) (finding no abuse of discretion by the district court in  
18 denying appellant's motion to compel where appellant waited more  
19 than one month after the second extended discovery deadline).

20           Sierra's explanation for the delay is that Patriot's Summary  
21 Judgment Motion, filed on August 26, 2010, was not denied until  
22 February 1, 2011. Sierra claims that "moving to enforce the  
23 subpoena at this time...would have squandered judicial  
24 resources," because the documents would have become irrelevant if  
25 the motion was granted. (Def.'s Req. 6:3-8, ECF No. 159).

26           This explanation, however, does not address the six-week gap  
27 between the February 1, 2011 ruling and Sierra's March 17, 2011  
28 Motion to Compel.

1 If Sierra was under the assumption that September 10, 2010 was  
2 only the deadline for UBS to respond, it was still under a duty  
3 to begin enforcement as soon as feasible. Even accepting  
4 Sierra's argument that pursuing enforcement of the subpoena while  
5 the summary judgment was pending was a waste of resources, to  
6 demonstrate due diligence Sierra should have filed its motion  
7 shortly after the decision was rendered. Sierra offers no  
8 explanation for why it waited 44 more days to file the motion,  
9 despite the fact that all other significant discovery deadlines,  
10 as well as the last day to file dispositive motions had long  
11 expired. (Stipulation and Order, 3, July 27, 2010, ECF No. 104).

12 For the reasons detailed above, this court has no "definite  
13 and firm conviction" that the Magistrate Judge's order was  
14 "clearly erroneous or contrary to law." Therefore, relief from  
15 the order is not justified under Rule 72(a).

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17 **B. Review under Rules 60(b) and 16(b)(4)**

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19 Sierra also seeks alternative relief under Rule 60(b) or a  
20 modification of the PTSO under this Court's discretion pursuant  
21 to Rule 16(b)(4).

22 Rule 60(b) enumerates the grounds upon which a motion for  
23 relief from an order or judgment may be made. It specifies that:

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1 On motion and upon such terms as are just, the court  
2 may relieve a party or a party's legal representative  
3 from a final judgment, order, or proceeding for the  
4 following reasons: (1) mistake, inadvertence, surprise  
5 or excusable neglect; (2) newly discovered evidence  
6 which by due diligence could not have been discovered  
7 before the court's decision; (3) fraud by the adverse  
8 party; (4) the judgment is void; (5) the judgment has  
9 been satisfied; or (6) any other reason justifying  
10 relief. Fed. R. Civ. P. 60(b).

11 Mere dissatisfaction with the court's order or belief that the  
12 court is wrong in its decision are not adequate grounds for  
13 relief. Richardson v. Ayers, 2009 WL 1528183, \*1 (N.D. Cal.  
14 May 29, 2009). Relief under Rule 60(b)(6) is available only under  
15 extraordinary circumstances. Twentieth Century-Fox Film Corp. v.  
16 Dunnahoo, 637 F.2d 1338, 1341 (9th Cir. 1981).

17 To justify relief under Rule 60(b), Sierra urges an analysis  
18 of factors applied by the Ninth Circuit in Pincay v. Andrews,  
19 389 F.3d 853 (9th Cir. 2004). In Pincay, the Ninth Circuit,  
20 sitting *en banc*, affirmed the district court's excusal of a  
21 calendaring mistake that caused an attorney to miss the thirty-  
22 day deadline for filing an appeal. Id. at 856. After looking at  
23 issues including both the lack of any prejudice and the absence  
24 of any bad faith in the calendaring error at issue, the Pincay  
25 court determined that the district court did not abuse its  
26 discretion in allowing the attorney to file for an extension.

27 Id.

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1 Applying the Pincay factors to the present case, however, is  
2 unnecessary. As explained above, even accepting Sierra's  
3 interpretation of September 10, 2010 as only the deadline for UBS  
4 to respond, Sierra was still required to use due diligence in  
5 pursuing enforcement and has provided no explanation for the 44-  
6 day gap between the summary judgment ruling and its Motion to  
7 Compel. This Court bases its decision to deny Sierra's Request  
8 not solely on the reasonable interpretation of September 10, 2010  
9 as the non-expert discovery cutoff, but also on its assessment  
10 that Sierra did not exercise due diligence in pursuing  
11 enforcement. Therefore, excusing the mistaken interpretation of  
12 the September 10 deadline under Rule 60(b) would not excuse  
13 Sierra's untimely motion and, thus, does not justify the  
14 requested relief.

15 Similar reasoning applies to Sierra's request to modify the  
16 PTSO. The scheduling order "may be modified only for good cause  
17 and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The  
18 Rule's "good cause" standard primarily considers the diligence of  
19 the party seeking the amendment. Johnson v. Mammoth Recreations,  
20 975 F.2d 604, 609 (9th Cir. 1992). The district court may modify  
21 the pretrial schedule "if it cannot reasonably be met despite the  
22 diligence of the party seeking the extension." Fed. R. Civ. P.  
23 16 advisory committee's notes (1983 amendment). Because Sierra  
24 has not demonstrated such diligence, this Court also declines to  
25 modify the PTSO at this time.

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1 **CONCLUSION**

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3 For the foregoing reasons, Sierra's Request for Review and  
4 Motion for Relief (ECF No. 159) is DENIED.

5 IT IS SO ORDERED.

6 Dated: August 1, 2011

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MORRISON C. ENGLAND, JR.  
10 UNITED STATES DISTRICT JUDGE  
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