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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 2:09-CV-02445 JAM-EFB
)	
Plaintiff,)	
)	
v.)	<u>ORDER DENYING SIERRA PACIFIC</u>
)	<u>INDUSTRIES' MOTION FOR</u>
)	<u>RECONSIDERATION OF DISCOVERY</u>
)	<u>ORDER</u>
SIERRA PACIFIC INDUSTRIES, et)	
al.,)	
)	
Defendants.)	

This matter comes before the Court on Defendant Sierra Pacific Industries' ("SPI") Motion for Reconsideration of Discovery Order (Doc. #107). Plaintiff United States of America opposes the motion (Doc. #111).

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2010, the United States Forest Service invited the public to a series of seven tours of a Forest Service Project on the Plumas National Forest. Michael Schaps ("Schaps"), an associate attorney with Downey, Brand, counsel of record for SPI, attended the public tour, along with other

1 members of the public. During the tour, Schaps communicated
2 with a number of Forest Service employees. At no time did
3 Schaps inform those employees that he was an attorney with the
4 law firm representing SPI in this pending litigation.

5 Upon learning that Schaps attended the tour and asked
6 questions to Forest Service employees, the United States filed a
7 Motion for Protective Order to Bar Improper *Ex Parte* Contacts
8 and Produce Evidence of *Ex Parte* Contracts; And Prohibit Use of
9 Evidence Obtained From *Ex Parte* Contacts (Doc. #68) before the
10 Honorable Edmund F. Brennan, Magistrate Judge. After extensive
11 briefing and a hearing, Magistrate Judge Brennan granted the
12 United States' Motion for a Protective Order (Doc. #92). SPI
13 now asks this Court to reconsider and set aside Magistrate Judge
14 Brennan's Order.

15 II. OPINION

16 A. Legal Standard

17 28 U.S.C. § 636(b) and E.D. Cal. Local Rule 303 govern the
18 standard for a Motion for Reconsideration. The district court
19 "may reconsider any pretrial matter . . . where it has been
20 shown that the magistrate judge's order is clearly erroneous or
21 contrary to law." 28 U.S.C. § 363(b)(1)(A); E.D. Cal. Local
22 Rule 303(f). The standard of review under § 636(b)(1)(A) is
23 highly deferential; see United States v. Abonce-Barrera, 257
24 F.3d 959, 968-69 (9th Cir. 2001), and does not permit the
25 reviewing court to substitute its own judgment for that of the
26 magistrate judge's. Grimes v. City & County of San Francisco,
27 951 F.2d 236, 241 (9th Cir. 1991).

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1 B. Magistrate Judge's Opinion

2 Magistrate Judge Brennan held that Rule 2-100 of the Rules
3 of Professional Conduct of the State Bar of California
4 ("California Rules") was violated by SPI's counsel's
5 communication with Forest Service employees during the August
6 10, 2010 public tour.

7 1. Legal Standard

8 Rule 2-100 is a "no contact rule" which states that
9 "[w]hile representing a client, a member shall not communicate
10 directly or indirectly about the subject of the representation
11 with a party the member knows to be represented by another
12 lawyer in the matter, unless the member has the consent of the
13 other lawyer."

14 Rule 2-100 contains a "public body"/"public officer"
15 exception to the no contact rule. Subsection (C)(1) states that
16 "[t]his rule shall not prohibit communications with a public
17 officer, board, committee, or body." According to a proposed,
18 but not formally adopted, opinion by the California state bar,
19 the public officer exception allows for contact with a
20 represented party or employee if the communication is with:

21 a person to whom a communication would be
22 constitutionally protected by the First Amendment
23 right to petition the government. Such a person would
24 be one who, for example, has the authority to address,
25 clarify or alter governmental policy; to correct a
26 particular grievance; or to address or grant an
27 exemption from regulation.

28 Proposed Formal Opinion Interim No. 98-0002. Thus, the Proposed
Formal Opinion focuses primarily on the level of the public
official's authority to determine whether the public official

1 exception applies. The public officials at issue in the
2 unadopted opinion were line police officers, and they were
3 determined not to be of the requisite level of authority to be
4 covered by the public officer exception.

5 2. Magistrate Court's Analysis

6 Magistrate Judge Brennan found that the public officer
7 exception of subsection (C)(1) does not apply to the instant
8 case. "Schaps' actions were not an exercise of a First
9 Amendment right to seek redress of a particular grievance, but
10 were rather an attempt to obtain evidence from these employees."
11 Doc. #92 at 10. Schaps asked questions that went well beyond
12 attending a public information tour of a project site. "[T]he
13 facts show and the court finds that he was attempting to obtain
14 information for use in the litigation that should have been
15 pursued through counsel and through the Federal Rules of Civil
16 Procedure governing discovery." Id. Additionally, the court
17 found no evidence to support a conclusion that Schaps was
18 communicating with a policy-making official or persons with
19 authority to change a policy or grant some specific request for
20 redress that Schaps was presenting. Id. at 11.

21 Accordingly, the court found that the "public officer"
22 exception of Rule 2-100 (C)(1) has no application in this case
23 and granted the government's motion for a protective order and
24 discovery sanctions. The court ordered SPI to identify all
25 federal employees contacted without knowledge of counsel for the
26 United States in this matter to date, as well as the dates and
27 circumstances of each contact, and to produce originals and
28 copies of all recordings or documents relating to such

1 communications.

2 C. Analysis

3 Magistrate Judge Brennan's decision is not clearly erroneous
4 or contrary to law. Magistrate Judge Brennan found that the Forest
5 Service workers with whom SPI's counsel communicated, do not have
6 decision-making powers and have no authority to redress a
7 grievance. He also found that Schaps was not exercising his First
8 Amendment right to petition the government, but was instead engaged
9 in an attempt to discover and gather evidence and statements from
10 those employees for use in litigation. This Court finds that
11 Magistrate Judge Brennan's factual findings and application of the
12 law to be supported by the record and proper analysis. SPI argues
13 that Magistrate Judge Brennan failed to acknowledge and/or address
14 the actual text of Rule 2-100. In particular, SPI argues that the
15 Forest Service is a "public body" under 2-100(c)(1) and its
16 counsel's communications with any employee of the Forest Service is
17 permitted. This argument is without merit. Magistrate Judge
18 Brennan's Order is fully consistent with the plain meaning of the
19 terms "public officer" and "public body." These terms clearly
20 denote something more than any and all government employees.

21 This Court agrees with Magistrate Judge Brennan's conclusion
22 that SPI's interpretation of Rule 2-100 would carry the "public-
23 official" exception to Rule 2-100 too far. If the State Bar had
24 intended "public officer" or "public body" to mean all government
25 employees it would have said as much. The term "public body" does
26 not mean an individual and SPI's argument that the Forest Service
27 is a "public body" is irrelevant given the undisputed fact that all
28 of Schaps' communications were with individual employees of the

1 Forest Service. As the government argues, in common usage, "public
2 body" implies a multi-member group of individuals who derive
3 authority from their collective action, such as a city council or
4 Congress. It is impossible for this Court, as it was for
5 Magistrate Judge Brennan, to reconcile SPI's argument for
6 "unfettered access" to all government employees with the
7 unpublished state bar opinion. Holding otherwise would create the
8 unprecedented situation where attorneys for private litigants would
9 be permitted to speak to any government employee about any subject
10 for the purpose of obtaining information to be used against the
11 government in litigation.

12 Finally, this Court believes it is important to make clear
13 that it is troubled by SPI's counsel's behavior and decisions
14 with respect to this particular incident. Such conduct is out
15 of the ordinary and the Court takes SPI's counsel at its word
16 that it will not occur again. Local Rule 180 explicitly
17 prohibits "any conduct that degrades or impugns the integrity of
18 the Court or in any manner interferes with the administration of
19 justice." E.D. Cal. Local Rule 180(e). The ABA Model Rules
20 forbid all "conduct involving dishonesty, fraud, deceit, or
21 misrepresentation." Model Rule of Professional Conduct R.
22 8.4(c). These rules not only forbid affirmative false
23 statements of fact, but misleading omissions.
24 "Misrepresentations can also occur by partially true but
25 misleading statements or omissions that are the equivalent of
26 affirmative statements." Model Rule of Professional Conduct
27 4.1, Comment 1. Here, Schaps was instructed to "attempt to stay
28 confidential" (Schaps' Decl. (Doc. #107-1) ¶ 5). Such an

1 instruction is difficult to reconcile with SPI's position that
2 it had nothing to hide and did nothing wrong. Instead of
3 identifying himself as counsel for SPI, Schaps stated only his
4 full name and that he was a member of the public. Schaps' Decl.
5 ¶ 17. Even if Schaps did not make an affirmative false
6 statement, omitting that he represents SPI is an ethical lapse
7 because Schaps was not at the Forest Service tour simply as an
8 interested citizen, but as an attorney gathering evidence to be
9 used in litigation. While Schaps had an absolute right to
10 attend the tour, as a practicing attorney he is held to a higher
11 standard of ethical behavior than a general member of the
12 public, particularly when he is intimately involved in
13 litigation against the tour's sponsor. Such is clearly the
14 intent behind Local Rule 180(e) and Rule 2-100. Zealous
15 advocacy overcame professional responsibility in this particular
16 instance. It should not, and, the Court is certain, will not
17 happen again.

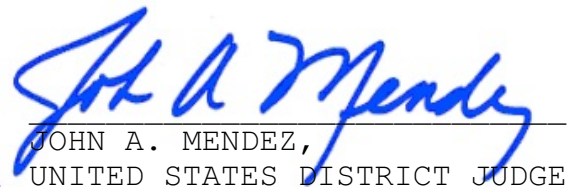
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19 III. ORDER

20 For the reasons set forth above,

21 SPI's Motion for Reconsideration is DENIED. SPI shall
22 comply with Magistrate Judge Brennan's Order (Doc. #92) within
23 seven (7) days from the date of this Order.

24 IT IS SO ORDERED.

25 Dated: January 10, 2011

26 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE