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

UNITED STATES OF AMERICA,

Plaintiff,

No. CIV S-09-2445 KJM-EFB

vs.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants.

ORDER

AND RELATED CROSS-ACTIONS.

This matter comes before the court upon defendant Sierra Pacific Industries' ("SPI") request for reconsideration. (ECF 142.) In reaching the decision set forth below, the court has carefully reviewed the parties' briefing and supporting exhibits, and the record related to the discovery motion heard by the magistrate judge on January 21, 2011 and resolved by an order issued on January 25, 2011. Because the court has determined oral argument is not necessary for the fair resolution of the request for reconsideration, SPI's request for oral argument is denied. (ECF 160.)

I. PROCEDURAL HISTORY

On November 24, 2010, the magistrate judge issued an order granting in part SPI's motion to compel filed October 27, 2010 (ECF 86). (ECF 101.) On December 20, 2010,

1 SPI filed a motion to compel compliance with the court’s November order. (ECF 119.) The
2 magistrate judge held a hearing on this motion on January 21, 2011 (ECF 136) and thereafter
3 issued an order denying the motion on January 25, 2011. (ECF 138.)

4 SPI filed the present request for reconsideration on February 8, 2011. (ECF 142.)
5 SPI specifically asks the court to issue an order: “(1) requiring the United States to produce by a
6 date certain all documents responsive to Requests for Production Nos. 9, 36-67, and 70-84,
7 regardless of any claim of privilege or protection; (2) allowing Sierra Pacific to conduct a
8 forensic examination of any computers used by [United States Forest Service (“USFS”)]
9 employees who likely have documents responsive to these critical discovery requests”
10 (SPI’s Mot. at 4, 17.) On February 28, 2011, the government plaintiff filed its opposition and
11 notice of the lodging of the transcript of the hearing held on January 21, 2011. (ECF 152, 156,
12 158.)

13 II. ANALYSIS

14 A. Standard

15 Federal Rule of Civil Procedure 72(a) directs district judges to consider timely
16 objections to nondispositive pretrial orders issued by magistrate judges and to “modify or set
17 aside any part of the order that is clearly erroneous or is contrary to law.” *See also* Local Rule
18 303(f) & 28 U.S.C. § 636(b)(1)(A). “‘A finding is ‘clearly erroneous’ when although there is
19 evidence to support it, the reviewing [body] on the entire evidence is left with the definite and
20 firm conviction that a mistake has been committed.’” *Concrete Pipe and Prods. v. Constr.*
21 *Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (quoting *United States v. United States*
22 *Gypsum Co.*, 333 U.S. 364, 395 (1948)). “[R]eview under the ‘clearly erroneous’ standard is
23 significantly deferential” *Id.* at 623. “To succeed [on a motion for reconsideration], a party
24 must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior
25 decision.” *Enriquez v. City of Fresno*, 2011 U.S. Dist. LEXIS 29998, at *3 (E.D. Cal. Mar. 23,
26 2011). Furthermore, when filing a motion for reconsideration, a party must show “what new or

1 different facts or circumstances are claimed to exist which did not exist or were not shown upon
2 such prior motion, or what other grounds exist for the motion.” E.D. Cal. Local Rule 230(j)(3).
3 However, “[a] motion for reconsideration ‘may not be used to raise arguments or present
4 evidence for the first time when they could reasonably have been raised earlier in the litigation.’”
5 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)
6 (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

7 B. Application

8 i. Magistrate Judge’s Order

9 In its December 20 motion to compel, SPI moved the court for an order
10 compelling the government to comply with the court’s November 24, 2010 order to produce
11 allegedly withheld personnel records. Specifically, SPI sought a finding that the government had
12 waived attorney-client privilege and work product doctrine or that these privileges do not apply
13 to the documents in question or, if they do apply, that the crime-fraud exception is applicable;
14 SPI also sought an order that the government produce documents responsive to SPI’s requests
15 for production. (SPI’s Mot. to Compel at 2-3, ECF 119.) SPI further sought a court order
16 “allow[ing SPI] to conduct a forensic examination of the laptops and desktops and other
17 computer systems belonging to the individuals that engaged in [concealing facts].” (Jan. 21,
18 2011 Hearing Transcript at 6:18-25, ECF 152.) The magistrate judge denied the motion to
19 compel personnel records as moot, while finding that the government had properly preserved its
20 privilege objections with respect to those records; the judge also found that the government had
21 “conducted a reasonable search and made diligent inquiries to locate and produce responsive
22 documents,” and that SPI had not established the necessary elements of the crime-fraud
23 exception. (Order, Jan. 24, 2011, ECF 138.)

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1 ii. Request for Reconsideration

2 In accordance with Local Rule 303, SPI indicates the following as the specific
3 part of the magistrate judge’s ruling to which it objects:

4 The United States represents that it has conducted a reasonable
5 search and made diligent inquiries to locate and produce
6 responsive documents. [] That representation is properly verified in
7 the Taylor declaration which describes in detail the search that was
8 conducted. The court finds those efforts to be diligent and in
9 compliance with the plaintiff’s discovery obligations. Accordingly,
10 the motion to compel must be denied as to these documents as
11 well.

12 SPI requests that the court order the United States not to withhold
13 any responsive documents that may be located in the future on the
14 basis of privilege because . . . the crime-fraud exception applies.
15 The court finds that . . . SPI has not established the necessary two
16 elements to invoke the crime-fraud exception: 1) that the United
17 States Forest Service was engaged in or planning a criminal or
18 fraudulent scheme when it sought the advice of the United States
19 Attorney to further the scheme and 2) that the documents sought
20 are sufficiently related to and were made in furtherance of the
21 intended, or present, continuing illegality.

22 (SPI’s Mot. at 11 (quoting ECF 138).)

23 The government argues that SPI does not explain how the magistrate judge’s
24 order is clearly erroneous or contrary to law. (Pl.’s Opp’n at 7.) It also maintains that the
25 request for reconsideration improperly relies on material not previously presented to the
26 magistrate judge, including events that did not occur until after the January 21, 2011 hearing.

(*Id.* at 8.) The government characterizes SPI’s crime-fraud argument as “frivolous.” (*Id.*)

 Fundamentally, SPI’s request is based on a belief that the government is
concealing information in some sort of cover up scheme, but the only evidence it offers in
support is the timing of disclosures made by the government, in conjunction with an analysis of
the contents of produced documents compared to earlier responses to interrogatories and requests
for admission. For example, SPI is concerned that “[o]ne day after the Court issued [the January
2011 order], the USFS produced more Red Rock documents even though everything had
supposedly been produced. Today, on the date of this filing, the USFS produced yet another

1 round of responsive documents.” (SPI’s Mot. at 3.) Yet the record before the court
2 demonstrates that the productions of which SPI complains are but a few productions in the
3 context of at least ten serial, supplemental productions. (*See, e.g.*, Warne Decl. at ¶¶ 4-7, 9, 12,
4 16-17, 22-24, 29-31, ECF 133.) The record is not inconsistent with the magistrate judge’s
5 conclusion, that based on the productions to date, “the rolling production that both parties have
6 been using to conduct discovery in this case [is] a very reasonable and efficient approach to use.”
7 (ECF 152 at 14:6-10.)

8 Regarding SPI’s arguments that documents produced by the government more
9 recently expose contradictions when compared with prior responses to interrogatories and
10 requests for production (*see, e.g.*, ECF 152 at 21:22 - 22:17) , these asserted contradictions are
11 based on the production of responsive documents, albeit on a “rolling basis,” and so do not
12 support a conclusion that the magistrate judge’s denial of a motion to compel production of
13 documents is clearly erroneous. While the contradictions may well provide grist for the mill at
14 trial, they also are not sufficient to meet SPI’s burden of establishing that the crime-fraud
15 exception should apply in this case. To invoke the crime-fraud exception, “the party who seeks
16 to invade the privilege ‘must first make a prima facie showing of a violation sufficiently serious
17 to defeat the privilege, and second, establish some relationship between the communication at
18 issue and the prima facie violation.’” *In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377,
19 380 n.4 (9th Cir. 1996) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)). SPI has
20 failed to make such a showing.

21 Finally, regarding SPI’s challenge to the magistrate judge’s conclusion that the
22 government’s document search was “diligent and in compliance with the plaintiff’s discovery
23 obligations,” the record reflects government counsel’s detailed written and oral descriptions of
24 the searches conducted in response to discovery responses; the searches are represented to
25 include searches of electronic material that would be responsive. (*See, e.g.*, ECF 125 at 13-22;

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1 ECF 152 at 18:10-19:19.) Here too, the magistrate judge's order was not contrary to law or
2 clearly erroneous.

3 III. CONCLUSION

4 For the foregoing reasons, SPI's requests for reconsideration and for oral
5 argument are hereby DENIED.

6 IT IS SO ORDERED.

7 DATED: May 19, 2011.

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10 UNITED STATES DISTRICT JUDGE
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