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UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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CRYSTAL LAKES,

No. 2:16-cv-02989 MCE AC

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Plaintiff,

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v.

ORDER

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BATH & BODY WORKS, LLC,

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Defendant.

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This case is before the court on plaintiff's motion for an order to show cause re contempt and for sanctions. ECF No. 163. Defendant has filed an opposition. ECF No. 165. This discovery-related matter was referred to the undersigned pursuant to E.D. Cal. R. 302(c)(1) and by the District Judge at ECF No. 173. The motion was taken under submission without oral argument, pursuant to Local Rule 230(g). ECF No. 164. Upon review of the record and the parties' briefs, the motion will be DENIED, for the following reasons.

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I. Relevant Background

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In this removed product liability action, plaintiff sues defendant Bath & Body Works, LLC ("BBW") for damages arising from an incident in which a candle sold by defendant "exploded" when she attempted to put it out, splashing and burning her with melted wax, inflicting what she characterizes as significant injuries and permanent scarring. ECF No. 2 at 9. Plaintiff asserts claims of general negligence and products liability and seeks recovery of general

1 and exemplary damages. Id. at 9-13. The specific product at issue is described as “a three-wick
2 Bath & Body Works Aromatherapy – Eucalyptus Spearmint scented candle purchased through
3 Amazon.com.” Id. at 18. This case has been before the undersigned previously for discovery
4 disputes, and some of the background that follows is reprised from the court’s previous order at
5 ECF No. 147, for the convenience of the parties.

6 In ruling on a motion to compel brought by plaintiff, the undersigned ordered on January
7 23, 2018 that, within 30 days: “Defendant shall produce additional documents in response to
8 Requests for Production numbered 6, 8, 12, 13, 14, 15, 16, 18, 20 as to all three-wick candles
9 marketed by Defendant, and whose manufacture occurred in 2005 or later.” ECF No. 40 at 6. As
10 relevant to the instant matter, Request for Production (“RFP”) No. 8 requested all documents
11 “evidencing any failure analysis undertaken regarding” BBW candles; RFP No. 12 requested all
12 documents evidencing “any sudden, unexpected flaring” of BBW candles; and RFP No. 13
13 requested all documents evidencing “the cause of any sudden, unexpected flaring” of BBW
14 candles. ECF No. 131-1 (Ex. 1) at 7-8.

15 On February 23, 2018, BBW produced what it characterizes as “nearly 100,000 pages of
16 documents, including the history of claims, claims files, and design documents including a
17 complete spreadsheet of consumer complaints relating to three-wick candles.” ECF No. 144 at 4.
18 On June 12 and July 9, 2018, plaintiff’s counsel deposed two BBW engineers who testified that in
19 pre-production development testing in the previous 6-9 months, one three-wick “Leaves” scented
20 candle with a new fragrance flashed over. Due to this flashover, engineers at BBW started a “root
21 cause analysis” which was still ongoing, and BBW did not launch, commercialize, mass produce,
22 or sell any Leaves candles with that fragrance. ECF Nos. 131-2 at 10-11; 131-3 at 6-7, 9, 12.
23 Plaintiff then issued an additional set of production requests, seeking in RFP No. 66 documents
24 related to the “root cause” investigation the engineers had described. ECF No. 131-5 (Ex. 5) at 6-
25 7. On July 18, 2018, defendant responded, objecting to RFP No. 66, in part because the “‘root
26 cause analysis’ . . . is ongoing and there are no written findings or analyses yet. Further, the
27 candle involved in the root cause analysis is a separate, unrelated product to the candle at issue in
28 this lawsuit.” Id. On July 27, 2018, plaintiff submitted an initial motion for adverse inference

1 (ECF No. 95), and between July 27-29, 2018, BBW supplemented its response to RFP No. 66 by
2 producing 83 pages of documents related to the root cause investigation (ECF No. 131-6 (Ex. 6)).
3 ECF No. 144-2. Non-expert discovery closed on July 30, 2018. ECF No. 72.

4 On June 12, 2018, plaintiff's counsel also deposed a BBW quality engineer, who testified
5 that BBW was aware of flashovers involving a three-layer, three-wick "Pina Colada" scented
6 candle; that there was some internal discussion, possibly in 2016, about performing a chemical
7 analysis on that candle; and, although he was not completely certain, he believed a chemical
8 analysis was ultimately performed. ECF No. 131-7 (Ex. 7) 8-9, 13-15. Plaintiff contended this
9 was the first time she learned of any investigation into flashovers by the Pina Colada candle.
10 ECF No. 131 at 6. Plaintiff confronted BBW about this testimony, and in October 2018 (two
11 months after the close of discovery), BBW produced 180 pages of documents relating to the Pina
12 Colada candle, which plaintiff alleges did not include any emails, discussion, or final report with
13 conclusions. ECF Nos. 131 at 7; 144 at 7. BBW stated that it produced these documents in good
14 faith, despite believing them to be unrelated to any of plaintiff's prior requests. ECF No. 144 at
15 7. An affidavit by Stephen Smith, the Vice President for Technical Services of BBW's parent
16 company, stated that "BBW, through counsel, has produced all responsive, non-privileged
17 documents relating to a root cause analysis of flashovers, candle fires or high flames, including
18 for the 'Pina Colada' candle. There are no additional documents." ECF No. 144-4 at 3.

19 In September 2018, plaintiff's counsel deposed a former BBW sales associate who
20 worked part-time in a BBW retail store in Pocatello, Idaho. The associate testified that in late
21 2015 or early 2016, her store manager advised her not to buy any candles from the multi-layer,
22 three-wick line because they were exploding on people; some amount of time later, the store
23 manager told her they had been instructed to remove one fragrance of three-wick candle—a
24 yellow, coconut scented candle—because they were having issues with them catching fire or
25 exploding. ECF No. 131-9 at 4-6. Plaintiff's counsel then followed up with BBW's counsel to
26 request records related to the "recall" of this candle, which she believes to be the Pina Colada
27 candle. ECF No. 131-10 (Ex. 10) at 4. Plaintiff never served a formal discovery demand for
28 these records, and BBW has not provided them to date. ECF Nos. 131 at 8, 144 at 7. The Smith

1 Affidavit referenced above states that “BBW does not have any documents relating to Plaintiff’s
2 contention of a ‘silent recall’ of any three-wick candles.” ECF No. 144-4 at 3.

3 Earlier in the litigation, plaintiff moved for sanctions based on defendant’s resistance to
4 providing data regarding all of its candles. Ultimately, a nearly 600-page spreadsheet of 1,280
5 candle flashover incidents was given to plaintiff’s counsel. ECF No. 85 at 12. Still, on July 11,
6 2018, the court granted in part the motion for sanctions because defendant’s positions in the
7 discovery dispute were not “substantially justified.” ECF Nos. 85, 111.

8 On February 27, 2019, plaintiff moved for evidentiary sanctions in the form of an adverse
9 inference jury instruction, pursuant to Rule 37(b)(2)(A). ECF No. 131. Plaintiff argued that
10 BBW had violated an earlier order, in part, by failing to produce all documents related to a Pina
11 Colada candle root cause investigation, which likewise constituted a “failure analysis,” and by
12 failing to produce documents related to the 2015 or 2016 “silent recall” of the Pina Colada three-
13 wick candle, which would have contained materials evidencing “sudden, unexpected flaring.” Id.
14 In relevant part, defendant argued that the motion amounted to an untimely raised discovery
15 dispute, and that BBW produced all non-privileged, responsive documents that it possesses
16 concerning the categories at issue. ECF No. 144. The motion was denied on May 15, 2019. ECF
17 No. 147.

18 **II. The Present Motion**

19 Plaintiff now moves the court to issue an order to show cause to BBW as to why it should
20 not be held in contempt for making repeated misrepresentations to the court. ECF No. 163 at 2.
21 Plaintiff “believes” that recent deposition testimony by the manager of the Pocatello, Idaho store
22 (referenced above), which was taken in another case, will show that BBW sent an e-mail directive
23 to its store managers throughout the country to remove the Pina Colada candle from the shelves,
24 effecting a “silent recall.” ECF No. 163 at 4-5. Plaintiff requested a copy of the manager’s
25 deposition testimony, and BBW has refused to provide it. Id. at 5. Plaintiff seeks an order from
26 this court requiring BBW to produce the manager’s deposition transcript immediately. Id.
27 Plaintiff “believes” that the transcript will show that defendant falsely represented in this case that
28 no such “silent recall” emails exist. Id.

III. Applicable Legal Standards

Where contempt is sought to compensate an aggrieved party for failure of an adverse party to comply with court orders, the asserted contempt is civil in nature. United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980). Civil contempt sanctions are intended to coerce compliance. Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827 (1994). To find civil contempt: "... the court need only (1) have entered a clear and unambiguous order, (2) find it established by clear and convincing evidence that the order was not complied with, and (3) find that the alleged contemnor has not clearly established his inability to comply with the terms of the order." Huber v. Marine Midland Bank, 51 F.3d 5, 10 (2d Cir. 1995). There need not be a willful violation of the order in order for the court to find civil contempt. See United States v. Laurins, 857 F.2d 529, 534 (9th Cir. 1988). Violation of an order to provide or permit discovery may be treated as contempt of court. Rule 37(b)(2)(A)(vii), Fed. R. Civ. Proc.

Magistrate judges must refer contempt proceedings to district judges. See 28 U.S.C. § 636(e); Bingman v. Ward, 100 F.3d 653, 656-57 (9th Cir. 1996). A magistrate judge may investigate whether further contempt proceedings are warranted and certify such facts to a district judge. 28 U.S.C. § 636(e); see also Alcalde v. NAC Real Estate Invs. & Assignments, Inc., 580 F. Supp. 2d 969, 971 (C.D. Cal. Aug. 4, 2008). A magistrate judge may not, however, conduct a contempt hearing in a civil case absent consent jurisdiction.

The Federal Magistrates Act establishes a certification procedure whereby, upon commission of an act constituting a civil contempt:

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(B)(iii); see also Bowens v. Atl. Maint. Corp., 546 F. Supp. 2d 55, 71-72 (E.D. N.Y. 2008).

1 Under this process, the magistrate judge functions to certify the facts and not to issue an
2 order of contempt. Bingman, 100 F.3d at 656-57. By certifying facts under Section 636(e), the
3 magistrate judge is simply attesting that further contempt proceedings are warranted. See 28
4 U.S.C. § 636(e). The magistrate judge's role is to determine whether the moving party can
5 adduce sufficient evidence to establish a prima facie case of contempt. Church v. Steller, 35 F.
6 Supp. 2d 215 (N.D. N.Y. 1999). Certification of facts is typically included in an order to show
7 cause why a contempt citation should not issue. 28 U.S.C. § 636(e); Alcalde, 580 F. Supp. 2d at
8 971 (citing Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial at ¶ 11:2316).

9 Upon certification of the facts supporting a finding of contempt, the district judge must
10 conduct a de novo hearing at which any disputed issues of fact are resolved and credibility
11 determinations are made. See Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 907-08 (3d
12 Cir. 1992). The party alleging civil contempt must demonstrate that the alleged contemnor
13 violated the court's order by "clear and convincing evidence," not merely a preponderance of the
14 evidence. In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir.
15 1993).

16 IV. Discussion

17 This court previously refused to order sanctions with respect to the non-production of
18 documents related to the alleged "silent recall," because plaintiff had failed to establish that any
19 such documents, or any such recall, existed. The deposition testimony of a part-time salesclerk in
20 Idaho, who remembered her manager telling her that she had been told to remove from the store a
21 particular fragrance of three-wick candle, was found to be insufficient. Following the close of
22 discovery, plaintiff has learned that there may after all exist evidence of such a silent recall. With
23 the tools of discovery no longer available to her, plaintiff seeks this evidence in the context of a
24 motion for an Order to Show Cause re Contempt.

25 The undersigned understands plaintiff's concern, and does not suggest that her suspicions
26 are unreasonable. However, an Order to Show Cause re Contempt does not issue on the basis of
27 reasonable suspicion. To obtain a certification of facts regarding contempt, plaintiff must present
28 evidence establishing a prima facie case of contempt. See Church, 35 F. Supp. 2d 215; see also

1 Proctor v. State Gov't of North Carolina, 830 F.2d 514, 521 (4th Cir. 1987) (certificate of facts
2 submitted by magistrate judge considered the statement of a prima facie case of contempt). She
3 has not done so.

4 The undersigned has not hesitated to certify facts regarding contempt where disobedience
5 of court orders has been plain: failure to appear, failure to provide compelled discovery, failure to
6 perform remediation pursuant to an order granting injunctive relief, attorney abandonment of a
7 client. Here, however, plaintiff has not presented a prima facie case of contempt. The fact that an
8 individual has been deposed in another case who may have relevant information, coupled with
9 plaintiff's suspicions that this information will confirm her position and demonstrate defendant's
10 duplicity, falls far short of a prima facie case of misrepresentation.

11 The motion at bar presents no new information regarding the alleged "silent recall," and
12 no actual evidence with any probative value regarding the existence of such a recall. Instead, the
13 motion *seeks* the information that plaintiff hopes will reveal the existence of a prima facie case.
14 Plaintiff provides no authority for the proposition that a motion to initiate contempt proceedings
15 may be used to obtain the evidence necessary to demonstrate contempt. The court is aware of no
16 such authority. The Ninth Circuit has rejected claims of a right to discovery even in the context
17 of an evidentiary hearing before the district judge regarding contempt. See Ahearn ex rel.
18 N.L.R.B. v. Int'l Longshore & Warehouse Union, Locals 21 & 4, 721 F.3d 1122, 1130 (9th Cir.
19 2013).¹ If discovery need not be provided when a full-blown contempt hearing is held, it cannot
20 be required at the OSC stage.

21 In any event, the record before the court simply does not support a certification of facts
22 regarding contempt. Plaintiff has made a record of her disbelief of defendant's representations,
23 but she has not presented any evidence or information that affirmatively indicates
24 misrepresentation. There are, quite simply, no facts to certify that would establish contempt and

25 ¹ Ahearn and FTC v. Kuykendall, 371 F.3d 745 (10th Cir. 2004), on which it relied, rejected
26 complaints by defendant contemnors that they had been denied discovery in relation to the
27 findings that they were in contempt. Alleged contemnors, who face sanctions, have due process
28 rights that may under some circumstances support discovery at the hearing stage. See
Kuykendall, 371 F.3d at 754. Plaintiffs seeking an OSC re contempt are not in an analogous
position.

1 thus support issuance of an OSC. Because plaintiff has not met her burden of presenting a prima
2 facie case of contempt, the motion must be denied.

3 **V. Conclusion**

4 For the foregoing reasons, the court hereby ORDERS that plaintiff's motion for an order
5 to show cause (ECF No. 163) is DENIED.

6 IT IS SO ORDERED.

7 DATED: July 28, 2020

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9 ALLISON CLAIRE
10 UNITED STATES MAGISTRATE JUDGE

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