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

FORTE CAPITAL PARTNERS,
LLC,

Plaintiffs,

v.

HARRIS CRAMER, LLP, *et al.*,

Defendants.

No. C 07-1237 SBA

ORDER

[Docket No. 112]

_____ /

This matter comes before the Court on Plaintiff’s “Objections to Magistrate’s Order on Plaintiff’s Motion to Compel Defendant Alan Frank to Appear for Completion of Deposition,” (Objection), [Docket No. 112] and Defendants’ Response [Docket No. 114]. Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. For the reasons that follow, the Court hereby DENIES the Objection. [Docket No. 112].

Background

This motion involves a discovery dispute between the Plaintiff, Forte Partners, LLC, and Defendants Alan Frank and his law firms, “Frank, Rosen, Snyder & Moss, LLP,” and the “Law Offices of Alan L. Frank & Associates.”¹ The discovery dispute came on for hearing on October 10, 2008 and the magistrate’s denial of plaintiff’s “Motion to Compel Defendant Alan Frank to Appear for Completion of Deposition” (Motion to Compel) is the subject of this Rule 72(a) objection.

The dispute over Alan Frank’s deposition arose in the following manner. The parties could not agree to how many days of deposition would be permitted for each party. In the Joint Case Management Conference, they stipulated to the following: “[t]he parties do agree to allowing two days for party depositions only.” [Objection, p. 3]. Plaintiff noticed the F.R.Civ.P. 30(b)(6)

¹ Defendants Harris Cramer, L.L.P.; Michael D. Harris; and Marc H. Snyder are also parties to this suit, but are not involved in this motion.

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For the Northern District of California

1 depositions of the two law firm defendants for August 27, 2008. Defendant Alan Frank's personal
2 deposition was set for August 29, 2008.

3 On August 27, 2008, Alan Frank appeared as his law firms' designee for the Rule 30(b)(6)
4 deposition. He testified for seven hours on August 27 and seven hours on August 28. On August
5 28, the following exchange occurred:

6 BY MR. SPANNER:

7 Q: The question to you, Mr. Frank, is: Whether you are the person most
8 knowledgeable as to each of the categories of this 30(b)(6) Deposition Notice?

9 A: Good morning, Mr. Spanner. The answer is yes.

10 [Docket No. 85, Ex. 6, Depo. of Alan Frank at 4:8-12].

11 Q: Do you recall seeing this document before?

12 A: Just one moment, please.

13 * * *

14 BY THE WITNESS:

15 A: I did not see this. Mr. Spanner, I have a little confusion, because a moment
16 ago you asked me if I was a 30(b)(6) designee deposition and I said yes. So the
17 answer I just gave you is based on my personal knowledge, is that what you were
18 asking me or were you asking me to respond on behalf of one or more of the
19 companies for which I am serving today as a designee?

20 BY MR. SPANNER:

21 Q: *Well, I'm having trouble with that question because I don't know how your*
22 *knowledge would be any different, in a sense that you know what you know.*

23 [*Id.* at 7:13-8:10 (emphasis added)].

24 At the end of the deposition on August 28, defense counsel objected, on the record, to
25 producing Mr. Frank for more than the two seven-hour days of depositions. *Id.* Nevertheless, Alan
26 Frank returned for his personal deposition the next day, but left after two hours of testimony. The
27 following reasons were given: 1) Mr. Frank had been deposed enough; and 2) Defendants' counsel
28 had a plane to catch. [Objection, p. 3].

1 On September 11, 2008, plaintiff filed the Motion to Compel. [Docket No. 68]. In its
2 Motion to Compel, plaintiff argued that:

3 Mr. Frank should be compelled to complete his deposition on the grounds that
4 Defendants' counsel refuses to produce Mr. Frank for the remainder of his deposition,
5 even though there is a stipulation between counsel in this case that parties can be
6 deposed for two days, and even though Mr. Frank has only been deposed in his
7 individual capacity for less than three hours.

8 The sole reason stated for continuing the deposition was to ask Mr. Frank about a November
9 18, 2007 letter. [*Id.*, pp. 6-14].

10 The November 18, 2007 letter was the subject of vigorous dispute during the 30(b)(6)
11 deposition. Prior to the October 10, 2008 hearing, Magistrate Judge Laporte determined that the
12 November 18, 2007 letter was a privileged document.

13 There are no written findings in the magistrate's order denying the plaintiff's Motion to
14 Compel, however, the Court has reviewed an audio recording of the proceedings.

15 The magistrate informed the parties that she would not compel Mr. Frank's deposition for
16 the sole purpose of asking about the November 18, 2007 letter because of her previous ruling that it
17 is privileged. Plaintiff stated there were additional issues about which they wished to question Mr.
18 Frank. The additional issues were not in the moving papers. Plaintiff's second reason for
19 completing the deposition was that the parties had stipulated to "two days per party" and plaintiff
20 was entitled to more time with Mr. Frank, the individual, versus the 30(b)(6) deponent. Defendant
21 objected on the basis that during Mr. Frank's deposition it was made clear that there was no
22 difference between Frank's personal answers and his answers as a 30(b)(6) witness. In fact, the law
23 firms no longer exist and Mr. Frank is the only person available to answer questions.

24 After hearing argument from both sides, the magistrate determined that the stipulation
25 regarding the number of days per deposition was ambiguous. The magistrate denied the Motion to
26 Compel without prejudice and ordered the parties to meet and confer to determine whether there was
27 a legitimate basis for taking additional time to depose Mr. Frank. [*See* Minute Entry, Docket No.
28 107, 10/10/2008].

1 The October 16, 2008 order (Order) states: “[t]he parties are hereby ordered to meet-and-
2 confer to determine whether Mr. Frank may be deposed further. Said meet-and-confer shall be
3 concluded within ten days after entry of this Order.” [Docket No. 111].

4 Plaintiff filed the pending Objection on October 17, 2008. Plaintiff made no reference to
5 whether the parties had complied with the meet and confer requirement. The Defendants’ response,
6 filed twelve days after plaintiff’s objection, states that “[t]he parties are currently meeting and
7 conferring regarding the further deposition of Mr. Frank.” [Docket No. 114, p. 2]. The date by
8 which the parties were to have met and conferred was October 26, 2008.

9 Plaintiff opposes Judge Laporte’s Order, on the basis that the Order is clearly erroneous and
10 contrary to law pursuant to F.R.Civ.P. 72(a). Finally, the Court notes that while plaintiff’s Objection
11 was pending, plaintiff filed another motion to compel. [Docket No. 116].

12 Legal Standard

13 A. F.R.Civ.P. 72(a) Provides:

14 When a pretrial matter not dispositive of a party's claim or defense is referred to a
15 magistrate judge to hear and decide, the magistrate judge must promptly conduct the
16 required proceedings and, when appropriate, issue a written order stating the decision
17 The district judge in the case must . . . modify or set aside any part of the order
18 that is “clearly erroneous or contrary to law.

19 B. F.R.Civ.P. 30(b)(6) States:

20 In its notice or subpoena, a party may name as the deponent a public or private
21 corporation, a partnership, an association, a governmental agency, or other entity and
22 must describe with reasonable particularity the matters for examination. The named
23 organization must then designate one or more officers . . . or designate other persons
24 who consent to testify on its behalf; and it may set out the matters on which each
25 person designated will testify. A subpoena must advise a nonparty organization of its
26 duty to make this designation. The persons designated must testify about information
27 known or reasonably available to the organization. This paragraph (6) does not
28 preclude a deposition by any other procedure allowed by these rules.

1 **II. Contrary to Law**

2 “The ‘contrary to law’ standard allows independent, plenary review of purely legal
3 determinations by the Magistrate Judge.” *Jadwin v. County of Kern*, 2008 WL 4217742 (E.D.
4 Cal.). In order to find the magistrate’s Order ‘contrary to law,’ the court must find that she
5 misapplied either contract law or Federal Rule of Civil Procedure 30(b)(6).

6 **A. The Joint Case Management Statement is Governed by Contract Law**

7 The Joint Case Management Statement provides for “two days for party depositions.”
8 [Docket No. 35]. A stipulation [here, the Joint Case Management Statement] is a contract and is
9 governed by the principles of contract law. *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989).

10 Under California law, the determination of whether a written contract is ambiguous is
11 a question of law that must be decided by the court. Even if the written agreement is
12 clear and unambiguous on its face, the trial judge must receive relevant extrinsic
13 evidence that can prove a meaning to which the language of the contract is
14 “reasonably susceptible.”

15 *City of Santa Clara v. Watkins*, 984 F.2d 1008, 1012 (9th Cir. 1993); see also *In re Crow Winthrop*
16 *Operating P’ship*, 241 F.3d 1121, 1124 (9th Cir. 2001).

17 Plaintiff argues that the stipulation is unambiguous and the magistrate erred in considering
18 the defendant’s interpretation of it, which was offered by the defendant in its Opposition to the
19 Motion to Compel:

20 It was defense counsel’s intent in entering this agreement that parties such as Mr.
21 Frank would only be subject to a maximum of two seven hour days no matter how the
22 depositions were noticed. . . . At no time did counsel for the Frank Rosen Defendants
23 anticipate that the stipulation would allow counsel for plaintiff to depose Mr. Frank
24 for two days as an individual defendant and for an additional two days as the
25 representative for Frank, Rosen, Snyder, & Moss, LLP. The stipulation was that Mr.
26 Frank would be deposed for two total days as a party in either his capacity as an
27 individual or as the FRCP 30(b)(6) representative for Frank, Rosen, Snyder & Moss,
28 LLP.

1 [Opposition to Motion to Compel, p. 3].

2 At the hearing on the motion to compel, Magistrate Laporte stated that the stipulation was
3 ambiguous. So the plaintiff argues that if the judge considered the defendant's point of view, she
4 misapplied contract law, and if she did not consider the defendant's point of view, then "there is no
5 basis for her ruling." [Objection, p. 4]. Either way, reasons the plaintiff, the magistrate erred in not
6 ruling in its favor. The plaintiff is wrong because "[u]nder California law, the determination of
7 whether a written contract is ambiguous is a question of law that must be decided by the court."
8 *City of Santa Clara* at 1012. If the stipulation is reasonably susceptible to two meanings, as the
9 magistrate found it to be, then it is not improper to consider extrinsic evidence. Yet this Court finds
10 no evidence that the magistrate found the stipulation ambiguous *because* she relied on defendants'
11 unexpressed subjective intent. However, this is really an academic point because, in effect, the
12 plaintiff succeeded in persuading the defendant to produce the deponent for a third day of testimony
13 and so its dispute is not with the interpretation of the contract so much as the amount of time he was
14 entitled to have under the contract.

15 As for Mr. Frank's status as a F.R.Civ.P. 30(b)(6) witness, plaintiff argues that it is entitled
16 to complete an additional deposition of Mr. Frank because he had only been deposed as a corporate
17 representative and an individual deposition must be completed as well.

18 There is nothing in the Federal Rules of Civil Procedure or caselaw that legitimates taking
19 the full seven hours to depose a person when there is no purpose for it. In *Miller v. Waseca Medical*
20 *Center*, defendants sought an extension of time to depose the plaintiffs and to compel production.
21 The Court held that "the Court is called upon in each case to make a fact intensive inquiry as to
22 whether a particular witness should or should not be required to submit to questioning which
23 exceeds seven hours in length."² 205 F.R.D. 537, 540. Each case presents a unique set of
24 circumstances. *Id.*

25 Plaintiff stated in the Motion to Compel that it wanted to ask about a privileged document,
26 which had been excluded by the magistrate. That was the only reason the plaintiff gave in its
27

28 ² Two days as stipulated to here.

1 moving papers, yet the magistrate permitted plaintiff additional time to meet and confer with the
2 defendant to discuss permissible lines of inquiry to justify compelling the deposition.

3 The court conducted a fact-intensive inquiry into whether Mr. Frank should be compelled
4 to submit to additional questioning. This is not contrary to law and thus is no basis to overrule the
5 order denying the Motion to Compel.

6 **Conclusion**

7 For the reasons set forth above, IT IS HEREBY ORDERED THAT Plaintiff's Objections to
8 Magistrate's Order on Plaintiff's Motion to Compel Defendant Alan Frank to Appear for
9 Completion of Deposition [Docket No. 112] is DENIED.

10 IT IS SO ORDERED.

11
12
13 Dated: 11/14/08


SAUNDRA BROWN ARMSTRONG
United States District Judge