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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IGUAÇU, INC.,

No. C 09-0380 RS

Plaintiff,

v.

**ORDER OVERRULING OBJECTION  
TO DISCOVERY ORDER**

ANTONIO CABRERA MANO FILHO,

Defendant.

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In this breach of contract action, plaintiff Iguacu, Inc contends it is owed commissions under a written “Finder’s Agreement” whereby it allegedly was obligated to, and did, assist defendant Antonio Cabrera Mano Filho (“Cabrera”) in locating investors for certain ethanol production projects. One issue is whether there is a drafting error in certain portions of the written agreement. Specifically, Iguacu argues that the terms used to refer to the respective parties, “You” and “Buyer,” were inadvertently transposed in some provisions. Iguacu contends the error arose from the fact that the document was prepared from an earlier “boilerplate” agreement intended for use in differently-structured transactions, and that when that prior “buyer boilerplate” form was “flipped over” to a “seller boilerplate” form, the need to reverse those references was apparently overlooked.

1 Iguaçú claims that the parties had a mutual understanding of the meaning of the agreement  
2 as executed, notwithstanding the alleged drafting error. Nevertheless, Iguaçú previously sought and  
3 was granted leave to amend its complaint to include an alternative claim for reformation, should it  
4 prove necessary.

5 In light of this issue and Iguaçú’s assertion of the reformation claim, Cabrera sought  
6 document production and deposition testimony from the attorneys who represented Iguaçú in  
7 connection with the negotiations leading to the formation of the agreement. The magistrate judge to  
8 whom discovery disputes have been referred ruled that communications between Iguaçú and those  
9 attorneys have “not been placed in issue and that no waiver of attorney-client privilege or attorney  
10 work product has occurred.” The magistrate judge conditioned the denial of further discovery into  
11 the matter, however, on Iguaçú complying with its representation that “it will not ask the attorneys  
12 to testify at trial, will not seek to introduce any previously unproduced documents withheld as  
13 privileged (or attorney work product) and will not offer any testimony by Iguaçú witnesses referring  
14 to alleged drafting errors by the attorneys.” Cabrera now seeks review of this non-dispositive  
15 ruling.

16 A district court may modify a magistrate judge’s ruling on a non-dispositive matter only if  
17 the order is “clearly erroneous” or “contrary to law.” 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a);  
18 *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). Here, Cabrera contends the  
19 discovery it seeks is not protected by the work-product doctrine, that attorney-client privilege has  
20 been waived, and that the magistrate judge erred in concluding otherwise. The proper construction  
21 of the agreement, of course, does not turn on any undisclosed intent that may have been held by  
22 Iguaçú and known to its attorneys. Iguaçú’s argument that the terms “Seller” and “You” have been  
23 transposed flows from the face of the agreement itself and from non-attorney testimony as to the  
24 circumstances under which the document was prepared. The magistrate judge’s order effectively  
25 precludes Iguaçú from blaming its attorneys at trial or referring to any role they may have had in  
26 preparation of the document. Whether Iguaçú will be able to meet its burden to establish grounds  
27 for reformation absent evidence from its attorneys involved in the preparation of the document is a  
28 separate question. Under these circumstances, though, Iguaçú is not impermissibly using its claim

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of privilege both as a “sword” and a “shield.” As such, Cabrera has not shown the magistrate judge’s ruling to be clearly erroneous or contrary to law, and the objection is overruled.

IT IS SO ORDERED.

Dated: 12/10/12

  
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RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE