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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| AMY R. GURVEY, |) | Case No.: 3:09-cv-00942 AJB (BGS) |
| |) | |
| Plaintiff, |) | Order Denying Plaintiff’s Ex Parte |
| v. |) | Application for Reconsideration |
| |) | |
| LEGEND FILMS, INC. <i>formerly known as</i> |) | [Doc. No. 139] |
| LEGEND FILMS, LLC, JEFFREY B. YAPP, |) | |
| BARRY B. SANDREW, LEGEND3D, INC., |) | |
| and LEGEND FILMS, LLC, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

The Plaintiff, Amy Guvey, an attorney representing herself in the instant action, filed an ex parte declaration and motion, [Doc. No. 139], to vacate Magistrate Judge Skomal’s October 3, 2011 Order, [Doc. No. 120] denying reconsideration of disqualification and discovery. The Defendants subsequently filed an opposition to the Plaintiff’s motion. [Doc. No. 142.] The Court has reviewed the Plaintiff’s motion and finds that is in fact an objection to Judge Skomal’s Order under Rule 72(a) of the Federal Rules of Civil Procedure. Based upon the record, the parties’ moving papers and for the reasons set forth below, the Plaintiff’s objection is OVERRULED.

Relevant Background

On July 11, 2011,¹ the Plaintiff filed an ex parte application, [Doc. No. 103], seeking: (1) to extend discovery, (2) mandate production of documents from Defendants; (3) an order granting Plaintiff

¹ The ex parte request was filed nunc pro tunc to June 29, 2011.

1 the right to appear telephonically; and (4) an order granting Plaintiff expedited electronic filing
2 privileges for this lawsuit. The Plaintiff also opposed Defendants' request to extend the deadline for
3 expert designations. On July 8, 2011, Defendants filed an opposition to Plaintiff's ex parte motion.
4 [Doc. No. 101.]

5 On July 13, 2011,² the Plaintiff filed a motion, [Doc. No. 107], to disqualify Magistrate Judge
6 Skomal for his failure to properly notify her of the cancellation of the Mandatory Settlement Conference
7 ("MSC") that was set for July 7, 2011, which caused her to unnecessarily travel from New Jersey to San
8 Diego. The MSC was vacated on June 27, 2011, [Doc. No. 97], in response to a declaration from the
9 Plaintiff on June 23, 2011, [Doc. No. 96], requesting that the Court extend discovery, compel production
10 of certain documents by Defendants and allow Plaintiff to appear telephonically for all future
11 appearances.³ On July 15, 2011, Magistrate Judge Skomal issued an Order, [Doc. No. 109], denying
12 Plaintiff's Ex Parte Motion, [Doc. No. 107], for Expedited Hearing and to Disqualify Magistrate Judge.

13 On July 19, 2011,⁴ Plaintiff filed another ex parte motion to extend discovery deadlines to
14 September 1, 2011, opposing Defendants' ex parte motion to extend expert deadlines, and requesting
15 expedited rehearing on discovery during the week of July 11. [Doc. No. 112.] The Defendants filed a
16 response in opposition to Plaintiff's second ex parte motion on July 19, 2011. [Doc. No. 113.] On July
17 29, 2011, Magistrate Judge Skomal issued an Order: (1) granting Defendants' Ex Parte Motion to Extend
18 Expert Designation, [Doc. No. 99]; (2) granting-in-part and denying-in-part Plaintiff's Ex Parte Motion
19 to Extend Discovery, [Doc. No. 103]; and (3) denying as moot Plaintiff's Ex Parte Motion to Extend
20 Discovery Deadlines, [Doc. No. 112], and extending the discovery deadline to September 1, 2011. [Doc.
21 No. 114.]

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24 ² Plaintiff's ex parte application was filed nunc pro tunc to July 7, 2011.

25 ³ The Court notes that Plaintiff brought the instant action in the United States District Court for
26 the Southern District of New York on October 29, 2008. On December 8, 2008, Defendants moved to
27 dismiss the complaint for lack of personal jurisdiction or, in the alternative, to transfer the case. Before
28 the New York court could rule on the motion, however, the parties stipulated to the transfer of the action
to the United States District Court for the Southern District of California. The case was transferred to
this Court on May 1, 2009. [Doc. No. 1].

⁴ Plaintiff's ex parte application was filed nunc pro tunc to July 13, 2011.

1 On September 8, 2011,⁵ the Plaintiff filed another ex parte application, [Doc. No. 116], in which
2 she requested: 1) the Court extend fact discovery until October 15, 2011; and 2) reconsideration of
3 Judge Skomal's decision not to recuse himself. In her moving papers, Plaintiff contends that she
4 informed the Court at the MSC that she could not complete fact discovery until October 2011. The
5 Court rejected the Plaintiff's contention and denied the Plaintiff's request for another extension of time
6 to complete discovery on October 3, 2011, Doc. No. 120, because the Plaintiff's prior requests only
7 sought an extension of fact discovery to August 31, 2011 and the Court granted Plaintiff until September
8 1, 2011. The Court also denied Plaintiff's request for reconsideration because the Plaintiff has not
9 presented the Court with newly discovery evidence, demonstrated how the Court committed clear error,
10 or presented the Court with an intervening change in controlling law. See Doc. No. 120, at 4.

11 On October 7, 2011, the Plaintiff filed a notice of appeal, Doc. No. 121, of Magistrate Judge
12 Skomal's Order of October 3, 2011, which was dismissed by the Ninth Circuit for lack of jurisdiction on
13 December 12, 2011, Doc. No. 145. On October 27, 2011,⁶ the Plaintiff also concurrently filed the
14 current objection, Doc. No. 139. Defendants filed an opposition to the objection, Doc. No. 142.

15 Discussion

16 Currently before the Court is the Plaintiff's objection to Magistrate Judge Skomal's October 3,
17 2011 Order, Doc. No. 120, denying Plaintiff's initial requests and subsequent ex parte requests for
18 reconsideration of discovery extensions and his disqualification. Under Rule 72(a) of the Federal Rules
19 of Civil Procedure, the district judge in the case must consider timely objections and modify or set aside
20 any part of the order that is clearly erroneous or is contrary to law. The Plaintiff argues that Magistrate
21 Judge Skomal's October 3, 2011 Order denying reconsideration/re-argument of the Plaintiff's motion to
22 disqualify Judge Skomal pursuant to 28 U.S.C. section 455 for ADA violations, bias and abuse, to
23 extend discovery and for an extension of time to retain new counsel should be vacated. The Plaintiff
24 argues the October 3, 2011 Order should be vacated because: (1) the June 13, 2011 MSC should have
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28 ⁵ Plaintiff's ex parte application was filed nunc pro tunc to September 1, 2011.

⁶ Plaintiff's ex parte application was filed nunc pro tunc to October 7, 2011.

1 been conducted on the record;⁷ and (2) Magistrate Judge Skomal should not have ruled on the motion
2 for disqualification under 28 U.S.C. § 455.

3 Plaintiff alleges that she informed Magistrate Judge Skomal at a MSC that she could not
4 complete discovery until October 2011. The Plaintiff argues that because the MSC was not held on the
5 record, the Court should reverse the October 3, 2011 Order and disqualify Magistrate Judge Skomal.
6 [Doc. No. 139, p. 10.] The Plaintiff's contention that the absence of a record or transcript for the MSC is
7 somehow sufficient to support her objection to Magistrate Judge Skomal's October 3, 2011 Order is
8 without merit. As the Defendants aptly point out in their opposition, the Court is not obligated to record
9 the proceedings of an MSC, especially when a settlement is not reached.⁸

10 The Plaintiff's argument with regard to her motion for disqualification under 28 U.S.C. § 455 is
11 equally unpersuasive as this section clearly requires a Magistrate Judge to rule on a motion seeking his
12 disqualification.⁹ Judge Skomal properly decided this motion because a motion for disqualification
13 under 28 U.S.C. §455 "is addressed to, and must be decided by, the very judge whose impartiality is
14 being questioned." *In re Bernard*, 31 F.3d 842, 843 (9th Cir.1994). Furthermore, in considering
15 disqualification motions, "judges are not to recuse themselves lightly[,] and should participate in cases
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18 ⁷ The Court notes Plaintiff's failure to appear in person for the MSC on June 13, 2011 and the
19 fact that the Court telephoned the Plaintiff with Defendants' counsel present to inquire as to her
20 whereabouts.

21 ⁸ *Lynch, Inc. v. Samatamason Inc.*, 279 F.3d 487, 491 (7th Cir. 2002); ("No one supposes that
22 there is any impropriety in a judge's conducting settlement discussions off the record."); *Woodson v.*
23 *Surgitek, Inc.*, 57 F.3d 1406, 1411, fn. 6 (5th Cir. 1995) ("The settlement negotiations...were conducted
24 off the record"); *see Monaghan v. SZS 33 Associates, L.P.*, 73 F.3d 1276, 1280 (2d Cir. 1996)
25 ("unrecorded settlement meeting before the court"); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d
26 1157, 1183 (5th Cir. 1978) (settlement discussions off the record); *see generally Dvorkin v. New York*
27 *Presbyterian-Hosp.*, 2011 WL 280801 at *1 (S.D.N.Y. January 19, 2011) (Court did not request court
28 reporter for MSC proceedings, in which plaintiff attended by telephone without authorization, until
settlement reached).

29 ⁹ "Section 455 imposes an affirmative duty upon judges to recuse themselves." *Yagman v.*
30 *Republic Ins.*, 987 F.2d 622, 626 (9th Cir.1983). It provides in relevant part:
31 (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any
32 proceeding in which his impartiality might reasonably be questioned.
33 (b) He shall also disqualify himself in the following circumstances:
34 (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge
35 of disputed evidentiary facts concerning the proceeding[.]
36 28 U.S.C. § 455(a) and (b).

1 assigned if there is no legitimate reason for disqualification.¹⁰ This Court's review of the record reveals
2 no evidence that would call into question Magistrate Judge's Skomal impartiality.¹¹

3 With regard to Plaintiff's September 1, 2011 request to again extend discovery, the Court notes:
4 (1) that none of the Plaintiff's written requests prior to September 1, 2011 sought an extension beyond
5 August 31, 2011, and (2) that the Court granted Plaintiff an extension until September 1, 2011. The
6 Court has inherent authority and discretion to manage its dockets. In the absence of evidence or efforts
7 on behalf of the Plaintiff to complete discovery or good cause for her failure to comply with the
8 September 1, 2011 deadline, the Court finds Magistrate Judge Skomal's denial of the Plaintiff's request
9 to again extend discovery, without any explanation or a showing of good cause by the Plaintiff, was not
10 clearly erroneous or contrary to law.

11 As for the Plaintiff's request for an extension of time to retain new counsel, the Court notes that:
12 (1) the Plaintiff is an experienced attorney; and (2) the Plaintiff has twice in the course of this case either
13 discharged or refused to communicate with prior counsel, thereby causing counsel to file motions to
14 withdraw, Doc. Nos. 43 and 82. In light of the Plaintiff's request to substitute herself as counsel in this
15 case in June of 2011, Doc. No. 93, and the Plaintiff's failure to demonstrate any efforts in the preceding
16 months to retain counsel, the Court finds Magistrate Judge Skomal's denial of the Plaintiff's request for
17 an extension of time to retain new counsel was within Judge Skomal's discretion and was not clearly
18 erroneous or contrary to law.

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27 ¹⁰ *United States v. Snyder*, 235 F.3d 42, 45 (1st Cir. 2000)); *Holland*, 519 F.3d at 912.


28 ¹¹ (*See* Docket No. 109, p. 5-6; *In Re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994); *United States v. Balistreri*, 779 F.2d 1191, 1202-03 (7th Cir. 1985).)

1 Conclusion

2 For the reasons set forth above, this Court finds that the Plaintiff has failed to demonstrate that
3 Magistrate Judge Skomal's October 3, 2011 Order was clearly erroneous or contrary to law, and as such,
4 the Plaintiff's objection, Doc. No. 139, is hereby OVERRULED.

5 IT IS SO ORDERED.

6 DATED: January 27, 2012

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9 Hon. Anthony J. Battaglia
10 U.S. District Judge
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