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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

NORBERT TSCHAKERT,  
Plaintiff,  
v.  
HART ENERGY PUBLISHING, LLLP, *et al.*,  
Defendants.

Civil No. 10cv2598-L(WMC)  
**ORDER OVERRULING  
PLAINTIFF'S OBJECTION TO  
MAGISTRATE JUDGE'S JANUARY  
21, 2011 ORDER**

Plaintiff Norbert Tschakert filed an action against several defendants to set aside an alleged fraudulent transfer under California law. The Court sua sponte dismissed the action because plaintiff did not adequately allege subject matter jurisdiction. Plaintiff was given until January 21, 2011, in which to file an amended complaint that would provide the court with a basis for finding subject matter jurisdiction under 28 U.S.C. Section 1332(a)(1).

On January 18, 2011, plaintiff filed an ex parte motion for immediate discovery for determining subject matter jurisdiction. [doc. #4] Under the Civil Local Rules, the motion was directed to the assigned magistrate judge for consideration. On January 25, 2011, Magistrate Judge William McCurine, Jr. denied plaintiff's request finding that because the action had been dismissed, the Court lacked the authority to consider the discovery motion and accordingly, did not consider the ex parte motion on the merits.

Plaintiff has now filed an objection to the magistrate judge's Order contending that the ex

1 parte motion concerning discovery was a dispositive motion that should have been considered by  
2 the district court judge, and the language of the order of dismissal demonstrates that the district  
3 court intended to retain jurisdiction over the case.

4 When considering objections to a magistrate judge's non-dispositive discovery order  
5 under Federal Rule of Civil Procedure 72(a), the district judge must modify or set aside any part  
6 of the order "that is clearly erroneous or is contrary to law." The "clearly erroneous" standard  
7 applies to the magistrate judge's factual determinations and discretionary decision made in  
8 connection with non-dispositive pretrial discovery matters." *FDIC v. Fidelity & Deposit Co. of*  
9 *Md.*, 196 F.R.D. 375, 378 (S.D.Cal.2000). "Clearly erroneous" review is "significantly  
10 deferential, requiring 'a definite and firm conviction that a mistake has been committed.'" *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993). The  
11 "contrary to law" standard "permits independent review of purely legal determinations by the  
12 magistrate judge." *Fidelity*, 196 F.R.D. at 378.

13  
14 Because it is a discretionary decision regarding a non-dispositive pretrial matter, this  
15 Court reviews Magistrate Judge McCurine's Order under 28 U.S.C. § 636(b)(1)(A) using a  
16 "clearly erroneous" standard. *See also Hoar v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir.1990)  
17 ("Matters concerning discovery generally are considered 'non-dispositive' of the litigation.").  
18 Nevertheless, the Court also reviews the decision under the "contrary to law" standard.

### 19 Discussion

20 The linchpin of any discussion concerning this action is the Court's subject matter  
21 jurisdiction. As discussed in its Order dismissing the action, the federal court is one of limited  
22 jurisdiction. *See Gould v. Mutual Life Ins. Co. of N.Y.*, 790 F.2d 769, 774 (9th Cir. 1986). It  
23 possesses only that power authorized by the Constitution or a statute. *See Bender v.*  
24 *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). It is constitutionally required to raise  
25 issues related to federal subject matter jurisdiction and may do so *sua sponte*. *Steel Co. v.*  
26 *Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998); *see Indus. Tectonics, Inc. v. Aero Alloy*,  
27 912 F.2d 1090, 1092 (9th Cir. 1990). A federal court must satisfy itself of its jurisdiction over  
28 the subject matter before proceeding to the merits of the case. *Ruhrigas AG v. Marathon Oil Co.*,

1 526 U.S. 574, 577, 583 (1999).

2 The plaintiff bears the burden of demonstrating that jurisdiction is properly before the  
3 court. *See Thornhill Publ'g Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.  
4 1979). The complaint must affirmatively allege the state of citizenship of each party. *Bautista v.*  
5 *Pan Am. World Airlines, Inc.*, 828 F.2d 546, 551 (9th Cir. 1987); *see also Kanter v. Warner-*  
6 *Lambert, Co.*, 265 F.3d 853 (9th Cir. 2001).

7 The Court carefully reviewed plaintiff's complaint and found it did not allege the facts  
8 necessary to establish diversity as required by 28 U.S.C. Section 1332. The complaint was  
9 *dismissed* for lack of subject matter jurisdiction. Plaintiff was given leave to file an amended  
10 complaint in order to properly demonstrate the Court's subject matter jurisdiction. Plaintiff does  
11 not have a complaint pending before the Court.

12 As a matter of law, when a case has been dismissed because the Court lacks subject  
13 matter jurisdiction, there can be no discovery ordered by either the magistrate judge or the  
14 district court judge. Leave to amend the complaint does not and cannot establish the Court's  
15 continuing jurisdiction when subject matter jurisdiction was never established. Accordingly, the  
16 magistrate judge did not err in finding the court lacked the authority to consider the motion.

17 Further, pre-complaint discovery is not contemplated under the Federal Rules of Civil  
18 Procedure except under Rule 27. Rule 27 is intended to apply to situations in which testimony  
19 might be lost to a prospective litigant unless taken immediately, without having to wait for a  
20 lawsuit or other legal proceeding to commence. In other words, Rule 27 applies "only in that  
21 special category of cases where it is necessary to prevent testimony from being lost." *Ash v.*  
22 *Cort*, 512 F.2d 909, 911 (3d Cir.1975). Rule 27 does not permit inquiry as broad as the discovery  
23 provisions of Rule 26(b). *State of Nevada v. O'Leary*, 151 F.R.D. 655, 657 (D. Nevada 1993),  
24 affirmed, 63 F.3d 932 (9th Cir. 1995).

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1 **Conclusion**

2 Because the complaint was dismissed based on lack of subject matter jurisdiction, the  
3 Court did not and could not retain jurisdiction over the case. Plaintiff's request for pre-complaint  
4 discovery was a non-dispositive matter appropriately directed to the magistrate judge. For the  
5 reasons explained above, the order finding the Court lacked the authority to consider the motion  
6 because there was no complaint pending is not clearly erroneous. Further, the Court concludes  
7 that the magistrate judge's order is not contrary to law but is in fact required by law.

8 Accordingly, plaintiff's objections to the magistrate judge's January 21, 2011 Order are  
9 **OVERRULED**. The above-captioned case remains dismissed for lack of subject matter  
10 jurisdiction.

11 **IT IS SO ORDERED.**

12 DATED: January 31, 2011

13   
14 M. James Lorenz  
United States District Court Judge

15 COPY TO:

16 HON. WILLIAM McCURINE, Jr.  
17 UNITED STATES MAGISTRATE JUDGE

18 ALL PARTIES/COUNSEL  
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