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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 JEHAN ZEB MIR, M.D.,

12 Plaintiff,

13 v.

14 KIMBERLY KIRCHMEYER, et al.,

15
16 Defendants.

Civil No. 12cv2340-GPC (DHB)

**ORDER REGARDING JOINT
MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE
REGARDING DEPOSITION OF
LINDA WHITNEY**

[ECF No. 197]

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20 On September 16, 2016, the parties filed a Joint Motion for Determination of
21 Discovery Dispute regarding the deposition of Linda Whitney. (ECF No. 197.) For the
22 reasons set forth below, Plaintiff's motion to compel a further deposition of Ms. Whitney
23 is **DENIED**.

24 **I. BACKGROUND**

25 Plaintiff initiated this action on September 25, 2012, alleging Defendants wrongfully
26 took disciplinary action against Plaintiff's physician's and surgeon's certificate. (ECF No.
27 1.) On July 18, 2016, Plaintiff deposed Linda Whitney, who served as the Executive
28 Director for the California Medical Board from 2010 until her retirement in 2013. (ECF

1 No. 197-3 at 4-6.) Ms. Whitney is not a defendant in this case.

2 Towards the end of the deposition, Plaintiff asked Ms. Whitney to review over 700
3 pages of hearing transcripts from the underlying state administrative disciplinary action
4 that took place between October 2004 and May 2005. (ECF No. 197-3 at 14.) He then
5 asked Ms. Whitney to search through the documents and identify where in the transcripts
6 Plaintiff made the statement “the proctor would not allow him to do a femoral popliteal
7 bypass procedure on June 10, 2000.” (*Id.*) Plaintiff indicated that if Ms. Whitney needed
8 more time to answer, she should take the transcripts home with her and “go through them
9 tooth and nail” after the deposition. (*Id.* at 16.) However, he acknowledged that the
10 statement did not appear in the transcripts. (*Id.* (“I can tell you it’s not there, there is
11 nowhere you can find it.”).) Ms. Whitney’s counsel objected to the question and instructed
12 her not to respond. (*Id.* at 16-17.)

13 Plaintiff now requests the Court compel Ms. Whitney to attend a further deposition
14 to answer his question relating to the transcripts. Defendants argue it would be unduly
15 burdensome, annoying, and harassing to require Ms. Whitney to search for a certain
16 statement in the transcripts that does not exist, just to elicit a response that the statement is
17 absent from the document.

18 **II. ANALYSIS**

19 Federal Rule of Civil Procedure 30(d)(3) permits a deponent or party to move to
20 terminate or limit a deposition at any time during a deposition on the ground that it is being
21 conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses
22 the deponent or party. Fed. R. Civ. P. 30(d)(3)(A). The Court may order the deposition be
23 terminated or limited in scope and manner as provided in Rule 26(c). Fed. R. Civ. P.
24 30(d)(3)(B). Rule 26(c) provides that the Court may limit discovery to protect a party or
25 person from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R.
26 Civ. P. 26(c)(1).

27 During a deposition, a witness may be asked to consult records for the purpose of
28 refreshing the witness’s recollection. However, it is improper to require a witness to

1 examine records he is not familiar with in order to obtain information upon which he could
2 then answer. *Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co.*, 25 F.R.D. 81
3 (S.D.N.Y. 1959). The Court in *Deep South Oil Co. of Texas* explained:

4 As a general rule, the taking of an oral deposition pursuant to F.R.C.P. Rule
5 26, should not be converted in effect into an interrogatory procedure (Rule 33)
6 or an inspection procedure (Rule 34) by the device of asking a witness a series
7 of questions the answers to which he does not know and then directing him to
8 prepare or formulate answers by examining books or records, which answers
would then simply amount to a verbalization of what the witness found in the
examined books or records.

9 *Deep South Oil Co. of Texas*, 25 F.R.D. at 82. See also *In re Folding Carton Antitrust*
10 *Litigation*, 83 F.R.D. 132 (N.D. Ill. 1979) (holding deponents were not competent to testify
11 about documents they had never seen before, and questions requiring the deponents to
12 study the unfamiliar documents were improper).

13 Here, Plaintiff did not establish during the deposition that Ms. Whitney had ever
14 seen, had personal knowledge of, or was familiar with the transcripts. (ECF No. 197-3 at
15 23-24.) Therefore, the Court finds it would be improper to require Ms. Whitney to scour
16 the voluminous transcripts in order to formulate a response to Plaintiff's question. Further,
17 Plaintiff has conceded that the exercise would be futile because the statement he asked Ms.
18 Whitney to locate is not contained within the transcripts. Thus, the Court finds it would be
19 unduly burdensome, annoying, and harassing to require Ms. Whitney to respond to the
20 question. Moreover, Plaintiff has equal access to the information he seeks from Ms.
21 Whitney. Plaintiff has possession of the transcripts, and the documents speak for
22 themselves. Plaintiff does not need to elicit a response from Ms. Whitney to establish the
23 statement is absent from the transcripts.

24 Accordingly, the Court sustains Defendants' objections to the question posed to Ms.
25 Whitney regarding the transcripts. The Court finds the deposition of Ms. Whitney has been
26 concluded, and declines to order Ms. Whitney to appear for a further deposition, or to
27 further review the transcripts and respond to Plaintiff's question.

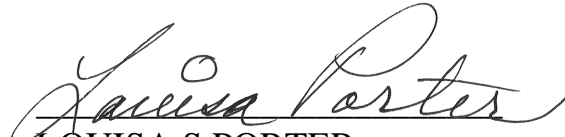
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1 **III. CONCLUSION**

2 For the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiff's motion to
3 compel a further deposition of Ms. Whitney is **DENIED**.

4 **IT IS SO ORDERED.**

5 Dated: October 19, 2016



6 LOUISA S PORTER

7 United States Magistrate Judge

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