UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

v.

BANC DE BINARY LTD., et al.

Defendants.

Case No. 2:13-cv-00992-MMD-VCF

ORDER

(Defs.' Objections to Magistrate Judge's Jan. 15, 2015 Discovery Order – dkt. no. 102)

(Defs.' Objections to Magistrate Judge's Feb. 11, 2015 Discovery Order – dkt. no. 108)

(Defs.' Emergency Motion for a Hearing and Expedited Ruling – dkt. no. 115)

I. SUMMARY

Defendants Banc de Binary Ltd., et al., object to, and seek reconsideration of, two discovery orders (dkt. nos. 101, 103) issued by Magistrate Judge Cam Ferenbach. (Dkt. nos. 102, 108.) The Court has reviewed Plaintiff's opposition briefs (dkt. nos. 104, 109). Because the Court finds that the Magistrate Judge's decisions are not clearly erroneous or contrary to law, Defendants' objections are overruled, and their requests for reconsideration are denied. Furthermore, Defendants' Emergency Motion for a Hearing and Expedited Ruling (dkt. no. 115) is denied as moot.

II. BACKGROUND

The discovery disputes at issue arise from Plaintiff's civil enforcement action, which alleges that Defendants violated various provisions of the Commodity Exchange Act and its applicable regulations by trading certain financial instruments. (*See* dkt. no.

52 ¶¶ 1-10.) On January 15, 2015, the Magistrate Judge issued a discovery order ("January Order") denying Defendants' Motion for Partial Stay of Discovery pending the resolution of a dispositive motion. (Dkt. no. 101.) Defendants objected on February 2, 2015. (Dkt. no. 102.) Shortly thereafter, on February 11, 2015, the Magistrate Judge entered a second discovery order ("February Order") that denied Defendants' Motion for Protective Order and granted Plaintiff's Motion to Compel. (Dkt. no. 103.) Defendants filed their objections on March 2, 2015. (Dkt. no. 108.)

III. LEGAL STANDARD

Magistrate judges are authorized to resolve pretrial matters subject to district court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a); LR IB 3-1(a) ("A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3, where it has been shown that the magistrate judge's ruling is clearly erroneous or contrary to law."). A magistrate judge's "finding is clearly erroneous when although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (alteration, citation, and internal quotation marks omitted). Because a magistrate judge's pretrial order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to *de novo* review, "[t]he reviewing court may not simply substitute its judgment for that of the deciding court." *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

IV. JANUARY ORDER ON DEFENDANTS' MOTION TO STAY DISCOVERY

The January Order denied Defendants' Motion for Partial Stay of Discovery relating to Defendants' alleged contacts with United States-based customers before October 2012. (Dkt. no. 101 at 1-4; *see* dkt. no. 76.) Defendants sought the partial stay in light of their pending Motion for Partial Summary Judgment ("MPSJ"), which argues that Plaintiff lacked jurisdiction to regulate the financial instruments at issue in Plaintiff's

///

civil enforcement action before a change in the relevant law became effective in October 2012. (Dkt. no. 74 at 4.)

"Under the liberal discovery principles of the Federal Rules," a party seeking to limit discovery "carr[ies] a heavy burden of showing why discovery [should be] denied." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); *see also Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011). To determine whether Defendants met this burden, the Magistrate Judge applied the following two-part test, which several courts in this District have adopted: (1) "the pending motion must be potentially dispositive of the entire case or at least dispositive of the issue on which discovery is sought," and (2) "the court must determine whether the pending potentially dispositive motion can be decided without additional discovery." (Dkt. no. 101 at 2 (quoting *Tradebay*, 278 F.R.D. at 602) (internal quotation marks omitted).) The Magistrate Judge concluded that Defendants could not satisfy the second prong of this two-part test because the issue underlying the MPSJ — the scope of Plaintiff's jurisdiction — turns on open questions of fact, not law, and because Defendants failed to show that those questions of fact could be decided without further discovery. (Dkt. no. 101 at 2-4.)

Defendants assert that the Magistrate Judge's analysis was clearly erroneous and contrary to law because it relies on the Magistrate Judge's misreading of an earlier order that denied Defendants' Motion to Dismiss ("MTD Order"). (Dkt. no. 102 at 3-5.) Like the MPSJ, the Motion to Dismiss had raised arguments regarding the scope of Plaintiff's jurisdiction. (*See* dkt. no. 44.) As the Magistrate Judge noted, the MTD Order denied dismissal because of a factual dispute over whether Defendants' financial instruments could be classified as "options" as defined in the Commodity Exchange Act. (Dkt. no. 101 at 2-3.) The Court could not resolve such a factual dispute at the pleading stage without reaching beyond the Complaint. (*See* dkt. no. 44 at 6.) The Magistrate Judge reasoned that the same questions of fact that foreclosed dismissal would affect Defendants' MPSJ. (Dkt. no. 101 at 2-4.) In light of this open question of fact, and given the parties' dispute over the extent of discovery required to address the MPSJ, the

Magistrate Judge concluded that Defendants had failed to meet their burden of showing that discovery should be stayed. (*Id.* at 3-4.)

Defendants argue that the Magistrate Judge misread the MTD Order in stating that the Court "has already determined that discovery is required to adjudicate the issues underlying" the MPSJ. (Dkt. no. 102 at 3-4 (quoting dkt. no. 101 at 2) (internal quotation marks omitted).) The Court disagrees. Although Defendants are correct that the MTD Order did not address outstanding discovery needs in the MPSJ context, the Magistrate Judge referenced the MTD Order merely to illustrate that the dispute prompting Defendants' request to stay discovery involves an open question of fact, not of law. (*See* dkt. no. 101 at 2-3.) This reasoning is not clearly erroneous or contrary to law.

Defendants further contend that the Magistrate Judge acted contrary to law by failing to take a "preliminary peek" at the merits of the MPSJ before concluding that additional discovery is required to resolve it. (Dkt. no. 102 at 5-7.) This argument is also unavailing. The Magistrate Judge explained that the potentially dispositive issue in the MPSJ was the same issue addressed in the MTD Order — whether, before October 2012, the Commodity Exchange Act covered Defendants' trading of financial instruments. (Dkt. no. 101 at 3-4.) Because that issue involved an open question of fact, the Magistrate Judge concluded that staying discovery would be inappropriate. (*Id.*) Furthermore, the Magistrate Judge reasoned that even if this "preliminary peek" had convinced him that Defendants would prevail on their MPSJ, a stay of discovery would still prejudice Plaintiff by foreclosing Plaintiff's ability to oppose the motion. (*Id.* at 4.) The Court thus finds that the Magistrate Judge's decision was neither clearly erroneous nor contrary to law.

Accordingly, the Court will overrule Defendants' objections to the January Order and deny their request for reconsideration.

V. FEBRUARY ORDER

Defendants raise similar objections to the Magistrate Judge's February Order, which denied Defendants' Motion for Protective Order and granted Plaintiff's Motion to

Compel. (Dkt. no. 103.) The Court will address objections regarding each Motion in turn.

A. Motion for Protective Order

Defendants contend that the Magistrate Judge clearly erred in denying Defendants' Motion for Protective Order, which sought to quash the deposition of Yoram Menachem and to limit the scope of discovery in light of the pending MPSJ. (Dkt. no. 103 at 2-4; *see* dkt. no. 77.) With regard to the scope of discovery, Defendants argue that the Magistrate Judge misconstrued the basis for their request by reasoning that "[a] party cannot resist discovery by asserting that a claim will fail." (Dkt. no. 103 at 3; *see* dkt. no. 108 at 8-9.) Defendants argue that they requested to limit the scope of discovery in light of the MPSJ, a detail the Magistrate Judge allegedly ignored. (Dkt. no. 108 at 9.) The Court finds that the Magistrate Judge did not commit clear error or act contrary to law in refusing to limit the scope of discovery. First, the February Order did, in fact, reference the MPSJ. (*See* dkt. no. 103 at 2-3.) Moreover, as noted above, the Court disagrees with Defendants that the Magistrate Judge erred in refusing to stay discovery pending the resolution of their MPSJ. (*See supra* Part IV.)

Defendants further argue that the Magistrate Judge made two clear errors in refusing to quash the Menachem deposition. First, Defendants contend that the Magistrate Judge failed to consider supporting affidavits before concluding that Defendants had failed to show that the deposition would cause Menachem — the CEO of Defendant E.T. Binary Options Ltd. ("ETBO") — to experience "annoyance, embarrassment, oppression, or undue burden or expense." (Dkt. no. 103 at 4); *see* Fed. R. Civ. P. 26(c)(1). By ignoring those affidavits, Defendants argue, the Magistrate Judge failed to balance the deponent's needs with Plaintiff's interest in accessing information. (Dkt. no. 108 at 7 (citing *Serrano v. Cintas Corp.*, 699 F.3d 884, 902 (6th Cir. 2012)).) Second, Defendants contend that in reasoning that Menachem could produce discoverable information, the Magistrate Judge improperly relied on an out-of-context statement made during the deposition of Defendant Oren Laurent. (*Id.* at 7-8.) The Court

///

finds that neither of these alleged deficiencies demonstrates that the Magistrate Judge's decision was contrary to law or clearly erroneous.

A party seeking a protective order has the burden to "show good cause [for the order] by demonstrating harm or prejudice that will result from the discovery." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (internal quotation marks omitted). Here, Defendants are correct that in concluding that Defendants failed to meet this burden, the Magistrate Judge did not cite to two affidavits that Defendants offered in support of their Motion for Protective Order. (*See* dkt. no. 103 at 3-4.) This omission, however, does not render the Magistrate Judge's conclusion clearly erroneous or contrary to law. Menachem's own affidavit states that he "believe[s] that [Plaintiff] has noticed [his] deposition for the sole purpose of harassing and annoying [him]." (Dkt. no. 77-2 ¶ 2.) Menachem further writes that, "[t]o the best of [his] knowledge, [he has] no personal knowledge of the events giving rise to CFTC's action." (*Id.* ¶ 6.) Defendants' second affidavit — authored by Defendants' counsel — similarly asserts that Menachem cannot provide "unique, non-repetitive information." (Dkt. no. 77-3 ¶¶ 5, 7.) But the gist of the Magistrate Judge's reasoning is that Defendants failed to meet their burden because they relied too heavily on Menachem's status as ETBO's CEO in seeking to quash his deposition. (*See* dkt. no. 103 at 4.) These affidavits do not undermine that rationale. Except for these conclusory statements, the affidavits do not demonstrate that Menachem's deposition will cause him harm or prejudice. Thus, even though the February Order does not cite to these affidavits, the Court is not persuaded that the Magistrate Judge's decision was clearly erroneous or contrary to law.

Nor does the Court find that the Magistrate Judge erred in referring to Laurent's deposition. In a footnote, the Magistrate Judge explained that he found unavailing Defendants' argument that Menachem lacked discoverable information because he became CEO after Plaintiff had initiated this action. (Dkt. no. 103 at 4 n.3.) The Magistrate Judge referred to Laurent's deposition — which suggested that Menachem had knowledge of Defendants' day-to-day activities — as an example to bolster this

point. (*See id.*) Rather than deny Plaintiff the opportunity to depose Menachem, the Magistrate Judge reasoned that Menachem could explain, during his deposition, any lack of knowledge caused by his late start date. (*Id.*) This reasoning supports the Magistrate Judge's overall conclusion that Defendants failed to demonstrate any harm or prejudice that would result from Menachem's deposition. *See Rivera*, 364 F.3d at 1063. As noted above, the Court is not convinced that the Magistrate Judge clearly erred or acted contrary to law in concluding that Menachem's status as ETBO's CEO does not, without more, warrant the protective order. Accordingly, the Court overrules Defendants' objections and declines to reconsider the Magistrate Judge's denial of Defendants' Motion for Protective Order.

B. Motion to Compel

Defendants also object to the Magistrate Judge's decision to grant Plaintiff's Motion to Compel.[1] They argue that the decision was clearly erroneous and contrary to law because the Magistrate Judge improperly shifted the burden of persuasion to Defendants after determining that Plaintiff had failed to satisfy its threshold burden. (Dkt. no. 108 at 9-11.) Defendants also contend that the Magistrate Judge erred by allegedly creating Plaintiff's legal arguments for them. (*Id.* at 10-11.) The Court disagrees.

First, rather than concluding that the Motion to Compel entirely fails to identify relevant and discoverable information (as Defendants contend), the Magistrate Judge merely admonished Plaintiff for filing an unnecessarily lengthy and repetitive motion. (*See* dkt. no. 103 at 7.) The Magistrate Judge noted instances in the Motion to Compel that, alone, failed to indicate whether the information sought was relevant or discoverable. For instance, the Magistrate Judge was not persuaded by requests for information that would expand the scope of party-controlled discovery, including

[1]Plaintiff submitted an errata to its Motion to Compel, seeking to modify the relief requested in its Motion. (Dkt. no. 110.) The Court does not address whether Plaintiff's request is appropriately raised in an errata. Because Plaintiff's errata relates to the Magistrate Judge's February Order, Plaintiff's request should be raised with the Magistrate Judge.

discovery associated with a pending Order to Show Cause. (*Id.* at 7 & n.5.) Additionally, the Magistrate Judge rejected Plaintiff's attempt to rely on discovery orders issued in a parallel action that the Securities and Exchange Commission brought against Defendants. (*Id.* at 7 & n.6.) Notwithstanding these deficiencies, the Magistrate Judge concluded that the Motion to Compel seeks discoverable information that is relevant to Plaintiff's allegations that Defendants acted as a common enterprise in unlawfully soliciting customers in the United States. (*Id.* at 8-9.) In light of this threshold showing, the Magistrate Judge further reasoned that Defendants had failed to meet their burden in resisting discovery. (*Id.* at 7-8); *see Blankenship*, 519 F.2d at 429. These conclusions are not clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.")

Defendants' second objection — that the Magistrate Judge crafted Plaintiff's legal arguments for them — also falls short. (*See* dkt. no. 108 at 10-11.) Defendants place too much weight on language that the Magistrate Judge cited in reprimanding Plaintiff for filing an overly lengthy motion. (*See* dkt. no. 103 at 8.) The Magistrate Judge noted that he "reviewed each of [Plaintiff's] requests" before concluding that they warrant granting the Motion to Compel. (*Id.*) Indeed, despite the length of the Motion to Compel, the Magistrate Judge identified eight discrete types of information that Plaintiff seeks. (*Id.* at 9.) Nothing in the February Order suggests that the Magistrate Judge committed clear error or acted contrary to law in identifying what information Plaintiff seeks, and why. The Court therefore overrules Defendants' objections and declines to reconsider the Magistrate Judge's ruling on Plaintiff's Motion to Compel.

VI. EMERGENCY MOTION

Because the Court has resolved Defendants' objections to the January and February Orders, the Court denies Defendants' Emergency Motion for a Hearing and Expedited Ruling (dkt. no. 115) as moot.

///

Moreover, the Court notes that Defendants waited until the final deadline to file their objections to the January and February Orders. (*See* dkt. no. 101 (issued January 15, 2015); dkt. no. 102 (filed February 2, 2015); dkt. no. 103 (issued February 11, 2015); dkt. no. 108 (filed March 2, 2015).) Defendants sought review of their objections on an emergency basis more than two weeks after their objections were fully briefed. (*See* dkt. no. 115 (filed April 3, 2015); dkt. no. 109 (Plaintiff's response to Defendants' latest objections, filed March 19, 2015).) They waited nearly one month after they were required to file responses to document requests and interrogatories — one of the reasons for which Defendants requested expedited review — to seek emergency relief. (*See* dkt. no. 115 at 5; dkt. no. 116 at 2 (correcting the Emergency Motion to clarify that Defendants' responses were due by March 6, 2015, rather than by May 6, 2015).) Defendants thus appear to have created their own emergency through delay.[2]

VII. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Objections.

It is ordered that Defendants' Objections to the Magistrate Judge's Discovery Orders (dkt. nos. 102, 108) are overruled and denied.

It is further ordered that Defendants' Emergency Motion (dkt. no. 115) is denied as moot.

Dated this 22nd day of April 2015.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

[2]Although Defendants engaged in apparent delay, Defendants then expected an immediate response from the Court. This is evidenced by Defendants' letter to the Court inquiring about the status of their Emergency Motion shortly after it was filed. (Dkt. no. 120.)