

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TPOV ENTERPRISES 16, LLC,

Plaintiff(s),

v.

PARIS LAS VEGAS OPERATING
COMPANY, LLC,

Defendant(s).

Case No. 2:17-CV-346 JCM (VCF)

ORDER

Presently before the court is Magistrate Judge Ferenbach's order (ECF No. 125) denying counter-defendants Rowen Siebel, TPOV Enterprises 16, LLC, and TPOV Enterprises, LLC's (collectively "TPOV") motion for protective order (ECF No. 99) and granting counter-claimant Paris Las Vegas Operating Company, LLC's ("Paris") countermotion to compel and for sanctions (ECF No. 119). TPOV objected and moved for reconsideration (ECF No. 135), and Paris filed a response (ECF No. 137).

Also before the court is TPOV's motion for leave to file a reply (ECF No. 139), which Paris moves to strike (ECF No. 142). TPOV responded to Paris's motion to strike. (ECF No. 148).

I. Background

The instant action arises from a contractual dispute between TPOV and Paris regarding the Gordon Ramsay Steak Restaurant. The parties are aware of the facts of this dispute, so the court need not reiterate them at length. As relevant to the instant dispute, the parties have had ongoing problems conducting discovery. (See generally ECF Nos. 99; 106; 110; 114; 115; 119; 135; 137; 139; 142; 148).

1 In particular, the instant motion for protective order and countermotion to compel and for
2 sanctions arise from TPOV cancelling the deposition of its Rule 30(b)(6) witness, Craig Green.
3 (ECF Nos. 99; 110).

4 Judge Ferenbach held a telephonic hearing regarding TPOV's motion for protective order
5 (ECF No. 100) and ordered a hearing on both motions (ECF No. 104), which he held on May 13,
6 2019, (ECF No. 116). Judge Ferenbach conducted a second hearing on the motions on June 13,
7 2019, (ECF No. 124), and issued his order the following day (ECF No. 125).

8 **II. Legal Standard**

9 A district judge may affirm, reverse, or modify, in whole or in part, a magistrate judge's
10 order, as well as remand with instructions. LR IB 3-1(b).

11 Magistrate judges are authorized to resolve pretrial matters subject to the district judge's
12 review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); see also
13 Fed. R. Civ. P. 72(a); LR IB 3-1(a) ("A district judge may reconsider any pretrial matter referred
14 to a magistrate judge in a civil or criminal case under LR IB 1-3, when it has been shown the
15 magistrate judge's order is clearly erroneous or contrary to law."). The "clearly erroneous"
16 standard applies to a magistrate judge's factual findings, whereas the "contrary to law" standard
17 applies to a magistrate judge's legal conclusions. See, e.g., *Grimes v. Cty. of San Francisco*, 951
18 F.2d 236, 240 (9th Cir. 1991).

19 A magistrate judge's finding is "clearly erroneous" if the district judge has a "definite and
20 firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S.
21 364, 395 (1948). "[R]eview under the 'clearly erroneous' standard is significantly deferential."
22 *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602,
23 623 (1993).

24 "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law,
25 or rules of procedure." *United States v. Desage*, 2017 WL 77415, at *3, --- F. Supp. 3d ----, ----
26 (D. Nev. Jan. 9, 2017) (quotation omitted); see also *Grimes*, 951 F.2d at 241 (finding that under
27 the contrary to law standard, the district judge reviews the magistrate judge's legal conclusions de
28 novo).

1 **III. Discussion**

2 As an initial matter, the court grants TPOV’s motion for leave to file a reply (ECF No. 139)
3 and denies Paris’s countermotion to strike (ECF No. 142). In its reply, TPOV urges the court to
4 consider the objection to Judge Ferenbach’s R&R as to both TPOV Enterprises LLC and TPOV
5 Enterprises 16 LLC. Id. at 2–3. The court will consider the instant appeal as to both TPOV entities.

6 TPOV advances two argument in favor of reconsidering Judge Ferenbach’s order. (See
7 generally ECF No. 135). First, TPOV believes that Judge Ferenbach’s order is not based on the
8 facts of the case. Id. at 8–17. Next, TPOV argues that the sanction is not clearly related to any
9 deficiency in discovery. Id. at 17–19.

10 Although TPOV urges that court to review Judge Ferenbach’s order de novo (ECF No. 139
11 at 3), TPOV’s objections are factual (see generally ECF No. 135). Despite the fact that TPOV
12 suggests that Judge Ferenbach’s order is “contrary to law,” TPOV concedes that Fed. R. Civ. P.
13 37 is the rule governing the underlying motion for sanctions. (ECF No. 135 at 7–8) and
14 acknowledges that Judge Ferenbach “f[ound] that the [instant] sanctions are appropriate under
15 Federal Rule of Civil Procedure 37(d)(1)(A)(i).” Id. at 7. Consequently, Judge Ferenbach applied
16 the correct standard; TPOV simply disagrees with the outcome. The court will not substitute its
17 judgment for Judge Ferenbach’s factual determinations simply because TPOV summarily argued
18 that the order was both “contrary to law” and “clearly erroneous.” See generally id.

19 Accordingly, the court reviews Judge Ferenbach’s determination under a clearly erroneous
20 standard. Under this deferential standard, a decision is clearly erroneous only if it “strike[s] [the
21 court] as wrong with the force of a five-week old, unrefrigerated dead fish.” *Ocean Garden, Inc.*
22 *v. Marktrade Co.*, 953 F.2d 500, 502 (9th Cir. 1991) (quoting *Parts and Elec. Motors, Inc. v.*
23 *Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

24 At the May 13, 2019, hearing motion, Judge Ferenbach indicated that there had been “a lot
25 of problems with [TPOV]” in discovery and that TPOV “ha[s] not been forthcoming in this
26 jurisdiction, in this case.” (ECF No. 126 at 27, 36). At the June 13, 2019, hearing, Judge Ferenbach
27 noted that Paris had been “very accommodating” and had reset depositions several times. (ECF
28 No. 134 at 9). Then, as Paris argued at the hearing, TPOV “showed a complete disregard for

1 properly noticed depositions. Their regard was so small that they wouldn't even provide a reason
2 why their witness couldn't show up until the morning before the deposition was set to proceed."
3 Id.

4 Judge Ferenbach said that "there was no justification for the 30(b)(6) witness to, you know,
5 fail to attend on this record" and found that sanctions were appropriate. Id. at 15. He expressly
6 noted that "a good case has been made here for certain facts to be deemed established because,
7 you know, the defendant has tried and tried to get these things taken care of. I think it's just
8 appropriate given the conduct of the plaintiffs in this case, the two entities." Id. at 17.

9 As confirmed in his written order after the hearing, Judge Ferenbach found that the
10 following sanctions are appropriate for TPOV's unjustifiably rescheduling Craig Green's
11 deposition:

12 1. The depositions of TPOV's FRCP 30(b)(6) witnesses and the
13 personal deposition of Craig Green must take place in Las Vegas.

14 2. The following facts are deemed as established in this case:

15 a. Neither Seibel nor the TPOV Parties informed Paris of Seibel's
16 criminal activities after entering into the TPOV Agreement.

17 b. TPOV had an obligation in accordance with Section 10.2 of the
18 TPOV Development Agreement to disclose activities related to
19 Seibel's guilty pleas.

20 c. Seibel did not update his disclosures as required under Section
21 10.2 of the TPOV Development Agreement.

22 (ECF No. 125 at 2).
23

24 At the June 13 hearing, Judge Ferenbach heard and considered TPOV's arguments in
25 opposition to these sanctions. For instance, Judge Ferenbach considered—and rejected—TPOV's
26 contention that monetary sanctions were more appropriate. (ECF No. 134 at 19–22). Judge
27

28

1 Ferenbach further heard—and rejected—arguments that the facts to be deemed as established were
2 unrelated to Mr. Green’s deposition. Id. at 20–24.

3 TPOV’s motion merely reiterates the arguments it already presented to Judge Ferenbach at
4 the hearing. Judge Ferenbach has managed the highly contested discovery proceedings in this
5 matter, held hearings on the underlying motions, and made his factual determinations. The court
6 does not find that Judge Ferenbach’s determinations are clearly erroneous. Therefore, TPOV’s
7 motion is denied.

8 **IV. Conclusion**


9 Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that TPOV’s objection and
11 motion for reconsideration (ECF No. 135) be, and the same hereby is, DENIED.

12 IT IS FURTHER ORDERED that TPOV’s motion for leave to file a reply (ECF No. 139)
13 be, and the same hereby is, GRANTED.

14 IT IS FURTHER ORDERED that Paris’s motion to strike (ECF No. 148) be, and the same
15 hereby is, DENIED.

16 DATED March 23, 2020.

17 
18 _____
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26
27
28