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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD HAYES ALBEE,

NO. CIV. S-09-1145 LKK/EFB

Plaintiff,

v.

O R D E R

CONTINENTAL TIRE NORTH
AMERICA, INC., An Ohio
Corporation, and FORD
MOTOR COMPANY, INC., a
Delaware Corporation,

Defendants.

_____/

Plaintiff alleges that he was driving a 2002 Ford Explorer when the left rear tire catastrophically malfunctioned as a result of a tread and/or belt separation. The Explorer lost control and rolled over, resulting in severe injuries to Plaintiff. The vehicle was designed and manufactured by defendant Ford Motor Co., Inc., and the tire was designed manufactured by defendant Continental Tire North America, Inc. ("Ford" and "Continental," respectively). Plaintiff brings claims against both for strict liability and negligence in the design and manufacture of these

1 products.¹

2 The case is presently before the court on a motion for
3 reconsideration of a discovery order entered by the magistrate
4 judge assigned to this case. Continental seeks reconsideration of
5 the March 18, 2010 order (Dkt. No. 91) insofar as it granted in
6 part plaintiff's motions to compel (Dkt. Nos. 41, 63, 66, 67) and
7 concomitantly denied in part Continental's motion for a protective
8 order (Dkt. No. 69). The court heard argument on the matter on
9 April 26, 2010. For the reasons stated below, Continental's
10 request for reconsideration is denied.

11 I. Background

12 A. Factual Background

13 The complaint alleges that Ford designed and manufactured the
14 2002 Ford Explorer that plaintiff was operating at the time of the
15 accident and that Continental designed and manufactured the General
16 Ameritrac SUV 235/70R16 tire that suffered a tread and/or belt
17 separation that was a cause of the subject accident.

18 Plaintiff alleges that the tire suffered a number of specific
19 design and manufacturing defects which caused the accident. Compl.
20 ¶¶ 10-11. The design defects include "inadequately sized or
21 improperly engineered belt wedges," "the utilization of tread
22 compounds with a useful life greater than the ability of other tire
23 structures to adhere," "the failure to incorporate into the design
24 of the tire a nylon overbelt or cap or strip to inhibit belt/belt

25 ¹ Plaintiff has also sued Ford; they are not parties in the
26 instant dispute.

1 separations," and "the failure to use adequate amounts of anti-
2 ozonants and anti-oxidants in the belt skin compound." Compl. ¶
3 10.

4 Much of the present discovery dispute concerns the degree of
5 similarity between the tire used on plaintiff's vehicle and other
6 tires manufactured by Continental. One dimension of similarity or
7 difference is tire size. The tire used on plaintiff's vehicle was
8 a General Ameritrac SUV, sized P235/70R16 radial passenger tire.
9 According to Continental, "The 'P' stands for passenger; '235'
10 represents the width of the tire in millimeters; '70' is the ratio
11 of height to width; 'R' means radial; '16' is the nominal rim
12 diameter in inches." The sticker adhered to plaintiff's vehicle
13 apparently indicated that "Standard Load" tires of this size were
14 the only ones Ford approved for use on that vehicle model.
15 Continental states that Ford approved two other tire sizes for
16 other "trims" of 2002 Ford Explorers: sizes P245/70R16 and
17 P255/70R16. Plaintiff contends that certain other Ford Explorers
18 (apparently those produced in other model years) use tires with a
19 15" nominal rim diameter, as opposed to the 16" diameter used on
20 plaintiff's vehicle.

21 Unsurprisingly, tires vary in many ways other than size.
22 According to Continental, tires of a "common green" are those using
23 the same cured tire standard and plant build specification, sharing
24 the identical combination and placement of components and built in

25 ////

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1 the same way prior to being vulcanized in a press.² Continental
2 represents that it manufactured approximately 269,000 tires "from
3 the same specification" as the tire at issue here. Although
4 sharing a common green, these tires included ten different models,
5 bearing "a different name or design on the sidewall which occurs
6 during the curing process." More broadly, Continental represents
7 that it made tires P235/70R16 sized tires in "twenty-three separate
8 tire specifications," amounting to "several millions of tires," in
9 the last ten years. Joint Statement of March 3, 2010, at 2.

10 **B. The Disputed Discovery**

11 On August 24, 2009, the magistrate judge entered a protective
12 order governing discovery to be produced by Continental in this
13 case. (Dkt. No. 39). Under this order, when Continental labels
14 information as "confidential," then Plaintiff's counsel, experts,
15 and staff cannot use the information for any purpose except their
16 work on this case. "Confidential," as used by the order, is meant
17 to refer to "information that is, contains, or reveals a trade
18 secret or other designated confidential research, development, and
19 other commercial information of [Continental]." Id. at 2.

20 The disputed discovery includes both written discovery
21 (interrogatories and requests for production) and depositions under
22 Fed. R. Civ. P. 30(b)(6). The written discovery was allegedly
23 first served on August 11, 2009. Joint Statement at 2 (Dkt. No.

24
25 ² Even tires of a common green may not be identical, however,
26 as Continental states that "[r]evisions are made to the cured tire
standards and plant build specification over time which would apply
to the subject model tire as well as all of the common greens."

1 50). Continental responded by objecting to many of these requests.
2 After several meet and confer sessions, two joint statements, and
3 a prior hearing before the magistrate judge, the magistrate judge
4 heard the motions to compel and for a protective order regarding
5 the written discovery on March 18, 2010.

6 Continental objected to the written discovery primarily on two
7 grounds. More generally, Continental argued that plaintiff sought
8 information regarding other tire models without any showing that
9 this information was relevant. As to a subset of the requests,
10 Continental argued that they sought protected trade secrets without
11 showing that this information was necessary to plaintiff's case.
12 The magistrate judge's resolution of both objections is discussed
13 in greater detail below. In general, as to the relevance
14 objection, the magistrate judge held that plaintiff was entitled
15 to discovery relating to tires with 15" and 16" nominal diameters
16 and widths from 185 to 265 millimeters and manufactured from 2000
17 through 2009 (the "general scope" approved by the magistrate
18 judge). As to the trade secrets objection, the magistrate judge
19 limited the requests in a way that he held would not reveal trade
20 secrets.

21 Limited to the general scope of tire sizes provided above, the
22 magistrate judge ordered Continental to respond to interrogatories
23 3-5 and 8, and requests for production 18, 20, 21, 27-32, 34-41,
24 44-45, 54. Some of these requests concern the identification of
25 tires constructed from similar materials or designs, but the
26 majority concern identification of possible failures in other

- 1 tires. The court quotes these requests here:
- 2 **3:** Please identify the brand names of all tires produced by
3 CTNA which utilized the same skim stock as the subject
4 tire.
- 4 **4:** Please identify the brand names of all
5 [tires] which utilized the same wedge
6 (gumstrip) or belt edge material as the
7 subject tire.
- 6 **5:** Please identify the brand names of all
7 [tire] which utilized the same inner
8 liner material as the subject tire.
- 8 **8:** Please state whether CTNA, or any of its
9 affiliated, successor, and/or predecessor
10 corporations, have ever received a
11 complaint of injury or death that
12 allegedly occurred as a result of tread
13 separation involving a [tire]. If the
14 answer to the foregoing is "yes", as to
15 each such complaint, please state:
16 a. Name and address of attorney
17 representing such individuals;
18 b. Description of tire involved.
- 15 **18 & 20:** Any internal memos, meeting notes,
16 reports, or studies relating to blistered
17 liners, air pockets, or air bubbles in [tires]
18 produced by CTNA at the Mount Vernon, Illinois
19 plant [#18] [or] companywide [#20]
- 18 **21:** Any and all documents, including
19 electronic documents (e-mails), relating
20 to any actual or potential recall and/or
21 replacement program for any [tires]
- 20 **27:** Copies of adjustment records for all
21 [tires] with nylon overlays, cap plies,
22 or nylon belt edge strips
- 22 **28:** Copies of any and all adjustment records,
23 accumulation of adjustment data, or
24 analysis of adjustment data for tires
25 designated as CTNA General Ameritrac SUV
26 radial tires or any CTNA steel belted
27 radial passenger or light truck tire with
28 the same or similar skim stock

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- 29:** Copies of any and all adjustment records, accumulation of adjustment data, or analysis of adjustment records for steel belted radial passenger and light truck tires produced by CTNA from 1998 through the present.
- 30 & 31:** Any and all documents, including but not limited to, periodic reports, i.e., monthly, quarterly, semi-annual, etc., which reflect injuries, accidents, failures in service, malfunctions, or tread separations of [tires] produced by CTNA [#30] [or] produced by CTNA at its Mount Vernon, Illinois plant [#31].
- 32:** Any and all documents which reflect injuries, accidents, failures in service, or malfunctions of [tires] in which a tire suffered tread or tread belt separation and subsequent loss of control of the vehicle, including, but not limited to, complaints and accident reports.
- 33:** Adjustment records and adjustment records analysis for CTNA General Ameritrac SUV tires manufactured inside the United States.
- 35:** Provide any periodic reports, including but not limited to, monthly, quarterly, semi-annually, etc., of adjustment records or adjustment analysis provided to plant employees, plant chemists, management, or corporate headquarters from 1998 through the present.
- 36 & 37:** Copies of all incident reports, claims reports, and/or or product liability reports, by whatever name, reflecting complaints of tread belt separation for CTNA General Ameritrac SUV steel-belted radial tires [#36] [or] General Ameritrac SUV steel-belted radial tires with the same or similar skim stocks [#37]
- 38:** Copies of all incident reports, claims reports, and/or or product liability reports, by whatever name, for all tires produced by CTNA with nylon overlays, cap

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plies, or nylon belt edge strips

39: Any and all documents which reflect legal action brought against CTNA for alleged tread and/or belt separation failures of steel belted radial passenger or light truck tires from 1998 through the present. Please include the Complaint and all other documents reflecting the date the claim was made, the name of the plaintiffs or complaining party, the nature of the defect alleged, the place and date of manufacture of the tire, and, if a verdict or settlement was reached, the amount of the verdict or settlement.

40: Copies of any and all complaints brought against CTNA for alleged tread separation and/or belt separation of radial steel belted passenger or light truck tires which resulted in personal injury or property damages from 1998 through the present.

41: Copies of any and all complaints brought against CTNA for alleged tread separation and/or belt separation of passenger or light truck tires designated as CTNA General Ameritrac SUV radial tires or any CTNA steel belted radial passenger or light truck tire of similar "green tire" construction from 1998 through the present, which resulted in personal injury or property damages.

44: Copies of air permeability testing data, specifications and standards for CTNA General Ameritrac SUV and tires with the same inner liner, or of inner liners or inner liner material prior to the date of manufacture of the subject tire.

45: All video film and photographic depictions of vehicle stability testing performed on any light truck vehicle with CTNA General Ameritrac SUV tires and written documentation in reference thereto including, but not limited to, test protocols, test results and test evaluations.

1 **54:** The results of road test belt edge and/or
2 tread belt durability testing and analysis of
3 the CTNA General Ameritrac SUV or similar
4 tires.

5 In addition to these requests, the magistrate judge granted
6 several other requests, but with a narrower scope:³

7 **6:** This interrogatory requested "the brand names
8 of all tires produced by CTNA which utilized
9 the same antioxidant package as the subject
10 tire." The magistrate judge granted this
11 request, but further reduced the general
12 scope, directing Continental to identify only
13 16" nominal diameter tires (whereas the
14 general scope included both 15" and 16"
15 tires). Transcript at 50-59.

16 **12:** Interrogatory 12 asked "Was there any change
17 in the level of antioxidants in CTNA General
18 Ameritrac SUV tires produced in Mount Vernon,
19 Illinois plant from 1998 through the present.
20 And if so, explain all changes in detail."
21 The magistrate judge ordered Continental to
22 answer yes or no for all 16" tires otherwise
23 within the general scope. Rather than
24 explaining changes in detail, Continental was
25 permitted to provide a simple summary of the
26 reason for the change. Transcript at 59-62.

23: This document request asked, in essence,
 whether Continental used ground coal in tire
 manufacture. Plaintiff was directed to re-
 word and then re-serve this request.
 Transcript at 62-67.

47: "Copies of any and all depositions, including
 exhibits, of tire expert witnesses on behalf
 of CTNA from prior tread belt separation
 litigation involving the General Ameritrac SUV
 or similar tires since 2000." This request
 for production was also subject to the limited
 scope, including only 16" tires meeting the
 other general scope criteria.

25 ³ Above, the court merely quoted plaintiff's requests in full.
26 For the following, the court paraphrases, quoting language as
appropriate and where indicated.

1 Separate from the above written discovery, the motions to
2 compel and for a protective order concerned numerous proposed
3 depositions of corporate representatives under Fed. R. Civ. P.
4 30(b)(6). These depositions were noticed much later than the
5 written discovery, in January of 2010. See Joint Statements
6 Concerning Depositions (Dkt. Nos. 78, 81). The magistrate judge
7 ordered Continental to respond to the following items subject to
8 the Scope Limitations, but only after plaintiff had limited the
9 scope of the information sought in additional ways (besides the
10 Scope Limitations) specified by Continental: areas of inquiry
11 numbers 4-6 and 10, areas of testimony numbers 1, 9-10 and 14, and
12 request numbers 8-9 and 11. Transcript at 82-88, 92-93, 95,
13 105-106 and 108-110. He also ordered Continental to respond to
14 areas of testimony number 12, 21-26, and 29, subject to the general
15 or reduced scope limitations, but without prejudice to
16 Continental's ability to renew its request for a Protective Order
17 on privilege grounds, so long as Continental first supplied a
18 privilege log. Transcript at 93-94, 96-101, 122-124. These
19 requests were largely similar to the written discovery discussed
20 above, and as such need not be repeated in full here.

21 **II. Standard for Review of Magistrate Judge's Discovery Orders**

22 Federal Rule of Civil Procedure 72(a) provides that non-
23 dispositive pretrial matters may be decided by a magistrate judge,
24 subject to reconsideration by the district judge. See also Local
25 Rule 72-303(f). The district judge shall, upon reconsideration,
26 modify or set aside any part of the magistrate judge's order which

1 is "found to be clearly erroneous or contrary to law." Id.; see
2 also 28 USC § 636 (b) (1) (A).

3 Discovery motions are non-dispositive pretrial motions within
4 the scope of Rule 72(a) and 28 USC § 636(b) (1) (A), and thus subject
5 to the "clearly erroneous or contrary to law" standard of review.
6 Rockwell Intern., Inc. v. Pos-A-Traction Industries, Inc., 712 F.2d
7 1324, 1325 (9th Cir. 1983) (per curium). "A finding is 'clearly
8 erroneous' when although there is evidence to support it, the
9 reviewing court on the entire evidence is left with the definite
10 and firm conviction that a mistake has been committed." United
11 States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Anti-
12 Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316,
13 1318 (9th Cir. 1982).

14 **III. Analysis**

15 Continental raises three issues. First, Continental generally
16 argues that the ordered discovery exceeds the scope of Fed. R. Civ.
17 P. 26(b) by allowing discovery of products other than the tire
18 specifically at issue without a showing that those products are
19 substantially similar. Second, Continental argues that a subset
20 of the ordered discovery contains trade secrets, that such
21 discovery is only proper on plaintiff's showing that this
22 information is necessary, but that no such showing has been made.
23 Finally, Continental objects to the order to produce deposition
24 transcripts from other, separate cases, for a variety of reasons.

25 **A. Scope of Discovery**

26 Continental argues that information regarding tires other than

1 the model at issue is not discoverable until plaintiff demonstrates
2 that the other tires are "substantially similar."⁴

3 **1. "Substantial Similarity"**

4 This proceeding is governed by the federal rules of evidence
5 and civil procedure, notwithstanding the fact that plaintiff's
6 claims arise under California law. The only binding authority
7 identified by the parties concerning substantial similarity in
8 products liability actions concerns the *admissibility* of evidence.
9 The Ninth Circuit has repeatedly held that "[a] 'showing of
10 substantial similarity is required when a plaintiff attempts to
11 introduce evidence of other accidents as direct proof of
12 negligence, a design defect, or notice of the defect.' Minor or
13 immaterial dissimilarity does not prevent admissibility." White
14 v. Ford Motor Co., 312 F.3d 998, 1009 (9th Cir. 2002) (quoting
15 Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103, 1105 (9th
16 Cir. 1991) and citing Western Recreational Vehicles, Inc. v. Swift
17 Adhesives, Inc., 23 F.3d 1547, 1555 (9th Cir. 1994)).

18 In this case, the magistrate judge concluded that tire size
19 was not the sole determinant of similarity. Plaintiff alleges that
20 the tire's defects included:

21
22 ⁴ Plaintiff's opposition characterizes Continental as arguing
23 that discovery should be limited to 16" tires. Continental argues
24 for much more (or less) than this: it wants discovery limited to
25 the "common greens" for the tire used on plaintiff's car; failing
26 that, discovery limited to size of tire that would actually fit on
plaintiff's car, and failing that, discovery limited to tires that
fit 2002 explorers. Contrary to plaintiff's implication,
Continental has not conceded that discovery regarding all 16" tires
is proper.

1 nylon edge strips that weren't properly
2 fitted, insufficient adhesion between the
3 rubber skim interfaces of the steel belts,
4 issues about porosity, trapped air that's
5 present, whether or not there were impressions
6 on the belt skim wedge areas that indicate
7 aged components have been utilized, whether or
8 not open or cracked inner liner splices
9 allowed for oxygen to get in. [¶] [and] . . .
10 what antioxidants were used.

11 Transcript at 4. The magistrate judge held that at this stage,
12 plaintiff was entitled to investigate whether tires were similar
13 with respect to these traits despite being a different size than
14 the allegedly defective tire. Id. ("So saying that a tire is of
15 a particular size doesn't really speak to those, . . . given that
16 the issue here is whether the inner liner, the steel belt skim
17 stock, the wedges in these cap plies are somehow making a
18 difference in terms of the steel oxidizing, or rusting, and
19 ultimately the tire failing due to separat[ion] of the belts.").
20 If products share the specific design features alleged to be
21 defective, it may be that other differences between the products,
22 such as tire size, are "immaterial." White, 312 F.3d at 1009 .

23 This case differs from White, Cooper, and Western Recreational
24 Vehicles in at least two salient regards. One is that the Ninth
25 Circuit cases concerned evidence *defects* in other products, which
26 were held to be relevant only if the products were similar. Here,
27 plaintiff seeks in part to discover whether the products are
28 *dissimilar*, which may reveal that the other tires presented a
29 superior, safer design that should have been used for the subject
30 tire. Transcript at 7. The jury will need to determine whether

1 the disputed tire "is performing as good as other sets of tires,
2 or much worse than other sets of tires, or even better than other
3 sets of tires." Id. Of course, the safety of another tire will
4 be relevant only if the other tire is similar enough to the one at
5 issue that the two could have shared a common design. Nonetheless,
6 the alternative theory of relevance recognized by the magistrate
7 judge implicates a broader sense of similarity.

8 The second, and perhaps more important, distinction is that
9 the above cases concerned admissibility, whereas evidence need not
10 be admissible to be discoverable. Federal Rule of Civil Procedure
11 26(b)(1) provides in pertinent part that:

12 Parties may obtain discovery regarding any
13 nonprivileged matter that is relevant to any
14 party's claim or defense For good
15 cause, the court may order discovery of any
16 matter relevant to the subject matter involved
in the action. Relevant information need not
be admissible at the trial if the discovery
appears reasonably calculated to lead to the
discovery of admissible evidence.

17 A court may limit discovery if:

18 (i) the discovery sought is unreasonably
19 cumulative or duplicative, or is obtainable
20 from some other source that is more
convenient, less burdensome, or less
expensive;

21 (ii) the party seeking discovery has had ample
22 opportunity by discovery in the action to
obtain the information sought; or

23 (iii) the burden or expense of the proposed
24 discovery outweighs its likely benefit, taking
25 into account the needs of the case, the amount
in controversy, the parties' resources, the
importance of the issues at stake in the
litigation, and the importance of the proposed
26 discovery in resolving the issues.

1 Fed. R. Civ. P. 26(b)(2). Whether to limit discovery under these
2 provisions is a further exercise of the court's discretion.

3 The distinction between admissibility at trial and
4 discoverability is especially significant where, as here, a
5 threshold question is factually intensive. Information necessary
6 to determine whether products are similar will ordinarily be within
7 the control of the manufacturer and/or designer. The rules cannot
8 be read as imposing a "Catch-22" that would require proof of
9 similarity before a party may discover evidence of similarity.

10 **2. Other Cases Cited by Continental**

11 Notwithstanding the above, Continental cites several cases
12 that limited discovery on the ground that products were not
13 substantially similar, relying in particular on Hofer v. Mack
14 Trucks, Inc., 981 F.2d 377, 381 (8th Cir. 1992), Barcnas v. Ford
15 Motor Co., No. C 03-04644, 2004 WL 2827249, 2004 U.S. Dist. LEXIS
16 25279 (N.D. Cal. Dec. 9, 2004),⁵ and Piacenti v. General Motors
17 Corp., 173 F.R.D. 221, 225 (N.D. Ill. 1997). After reviewing these
18 three, the court concludes that the magistrate judge did not abuse
19 his discretion by declining to follow these cases on the facts
20 here.

21 Hofer concerned a rollover of a Mack truck. 981 F.3d at 380.
22 Plaintiff requested for discovery regarding prior truck designs,
23 which plaintiff contended were safer and that defendant had
24

25 ⁵ The court notes that Barcnas's author, magistrate judge
26 Edward A. Infante, explicitly designated his opinion in that case
as "not for publication."

1 wrongfully departed from. Id. Thus, the factors distinguishing
2 the instant case from White--discovery as opposed to admissibility
3 and pertinence of dissimilarity as well as similarity--do not
4 distinguish the instant case from Hofer. The district court denied
5 the Hofer plaintiff's motion to compel discovery. Id. The Eighth
6 Circuit noted that although there was "no black letter rule of
7 law," "discovery of similar, if not identical, models is generally
8 permitted." Id. at 380-81. After surveying various examples,
9 Hofer held that courts should "undertake[] a fact specific
10 determination of the extent of the similarities or dissimilarities,
11 and . . . inquire[] about the basis for the discovery request."
12 Id. at 381. Like White, Hofer recognized that the question was
13 whether the other models are similar in regards pertinent to the
14 issue or component being litigated. Id. In the case before it,
15 the court was "satisfied that the truck models F and W are
16 sufficiently dissimilar in design from the model MH that a
17 burdensome production of documents regarding the design minutiae
18 of those earlier models would not have yielded information which
19 would have supported Hofer's claim that the model MH truck cab was
20 defective." Id.

21 _____ Thus, in Hofer, an extensive factual record was available at
22 the time of the discover dispute. Hofer therefore was not
23 confronted with the "cath-22" identified above, because the
24 plaintiff was not asked to prove similarity before seeking the
25 evidence he would need to do so. As summarized by the Eighth
26 Circuit, the defendant in Hofer affirmatively demonstrated

1 dissimilarity, rather than merely seeking to rest on the allocation
2 of burdens. In this case, Continental has not shown dissimilarity,
3 nor has Continental shown that discovery had advanced to the point
4 at which plaintiff could be expected to make a showing of
5 similarity.

6 One possible solution to the problem of how to prove
7 similarity would have been to allow discovery to proceed in phases,
8 such that plaintiff could seek evidence to be used in making the
9 similarity showing before seeking other information. "Rule 26
10 vests the trial judge with broad discretion to tailor discovery
11 narrowly and to dictate the sequence of discovery." Charles Alan
12 Wright, Arthur R. Miller, Richard L. Marcus, 8 Fed. Prac. & Proc.
13 Civ. § 2008.1 (3d ed.) (quoting Crawford-El v. Britton, 523 U.S.
14 574, 598 (1998)). Of course, to recognize that the magistrate
15 judge could have adopted this approach is not to hold that the
16 approach was required. Moreover, while phased discovery has an
17 appeal in the abstract, it is not clear how it would be implemented
18 here. For example, plaintiff seeks information about tire
19 construction and also about tire failures. The former indicates
20 whether tires are similar in various regards. The latter, however,
21 may indicate which regards are actually pertinent, by identifying
22 those components that do and do not fail.

23 Accordingly, the magistrate judge did not abuse his discretion
24 by declining to follow Hofer on the facts of this case. Barcenas
25 and Piacenti involved facts similar to Hofer, and the court finds
26 them distinguishable for the same reasons. In each, discovery had

1 progressed to the point where the defendant made a showing of
2 dissimilarity, rather than merely arguing that the moving plaintiff
3 had failed to meet his burden. Barcenas, 2004 U.S. Dist. LEXIS
4 25279, *22; Piacenti, 173 F.R.D. at 225. In this case, facts
5 bearing on similarity have not yet been offered, and the
6 magistrate's determination that the requested discovery would
7 itself bear on similarity was not clearly erroneous or contrary to
8 law.

9 In summary, the magistrate judge did not abuse his discretion
10 by ordering discovery regarding tires other than the specific tire
11 at issue without a more extensive showing of substantial
12 similarity.

13 **B. Trade Secrets**

14 Continental separately argues that even if the ordered
15 discovery is within the scope of Rule 26(b)(1), some of the
16 discovery seeks trade secrets. Trade secrets are be protected from
17 discovery unless the party seeking disclosure establishes that "the
18 trade secret sought is relevant and necessary to the prosecution
19 or defense of the case." Hartley Pen Co. v. United States Dist.
20 Court, 287 F.2d 324, 331 (9th Cir. 1961).

21 In this case, the magistrate judge explicitly found that
22 plaintiff had not made a showing of necessity as to any of the
23 requested discovery. The magistrate judge held that plaintiff's
24 requests could be narrowed, however, so as to avoid implicating any
25 trade secrets. For example, the magistrate judge concluded that
26 the antioxidant formulas used by Continental were protected trade

1 secrets, but the dates of any changes in these formulas were not.
2 Transcript at 12-13.

3 On Continental's motion for reconsideration, Continental bears
4 the burden of establishing that the magistrate judge committed an
5 abuse of discretion. Continental has argued that it closely guards
6 its formulas, and cites numerous cases holding that formulas
7 themselves are trade secrets. Continental has not meaningfully
8 addressed, however, the magistrate judge's conclusion that the
9 limited information encompassed by the order to compel does not
10 rise to the level of a trade secret. Moreover, Continental bore
11 the burden of demonstrating that this information constituted a
12 trade secret before the magistrate judge. Accordingly,
13 Continental's request for reconsideration is denied in this regard.

14 **C. Prior Depositions**

15 The magistrate judge ordered Continental to produce
16 transcripts of all depositions since 2000 of experts hired by
17 Continental in any litigation concerning the belt tread separation
18 for tires within the limited scope, i.e., 16" tires with widths
19 from 185 to 265 millimeters. Transcript 67-76. Aside from
20 Continental's general relevance argument discussed above,
21 Continental argues that compulsion of these items was improper
22 because these transcripts will be inadmissible at trial.

23 **IV. Conclusion**


24 For the reasons stated above, Continental's request for
25 reconsideration (Dkt. No. 98) of the magistrate judge's order of
26 March 18, 2010 (Dkt. No. 91) is DENIED. Continental SHALL produce

1 the ordered discovery within twenty-one (21) days of the date of
2 this order. Plaintiff SHALL file a proposed modification of the
3 scheduling order within seven (7) days thereafter.

4 IT IS SO ORDERED.

5 DATED: April 27, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT