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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BAUER BROS. LLC, a California limited liability company, <p style="text-align: right;">Plaintiff,</p> vs. NIKE, INC., an Oregon Corporation, <p style="text-align: right;">Defendant.</p> <hr/> NIKE, INC., an Oregon Corporation, <p style="text-align: right;">Counterclaimant,</p> vs. BAUER BROS. LLC, a California limited liability company, <p style="text-align: right;">Counterdefendant.</p>
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CASE NO. 09cv500-WQH-BGS
ORDER

HAYES, Judge:

The matter before the Court is the Motion for Reconsideration of the Magistrate Judge Discovery Ruling filed by Plaintiff Bauer Bros. LLC (“Bauer”). (ECF No. 166).

On February 29, 2012, the Magistrate Judge held a Discovery Hearing in this case regarding the request by Defendant Nike, Inc. (“Nike”) to exclude evidence of a silkscreen produced by Bauer in opposition to the Motion for Summary Judgment filed by Nike. (ECF No. 163). The Magistrate Judge ruled under Federal Rule of Civil Procedure 37 to exclude paragraphs 11 and 12 of the declaration of Luke Bauer regarding the silkscreen (See ECF No.

1 132 at 3) and Exhibit F attached to that declaration depicting the silkscreen. (See ECF No.
2 132-6). (ECF No. 163).

3 On March 14, 2012, Bauer filed a Motion for Reconsideration of the Magistrate Judge
4 Discovery Ruling. (ECF No. 166). Bauer contends that the ruling of the Magistrate Judge was
5 clearly erroneous and that Bauer was not required to produce evidence of the silkscreen during
6 discovery in this case. Bauer contends that the failure to produce evidence of the silkscreen
7 was substantially justified and harmless. On March 21, 2012, Nike filed an opposition
8 contending that the exclusion was proper under the Federal Rules. (ECF No. 170). On April
9 9, 2012, Bauer filed a reply. (ECF No. 173).

10 “Where a magistrate is designated to hear a discovery motion, ‘[a] judge of the court
11 may reconsider any pretrial matter ... where it has been shown that the magistrate’s order is
12 clearly erroneous or contrary to law.’” *Rockwell Int’l, Inc. v. Pos-A-Traction Indus., Inc.*, 712
13 F.2d 1324, 1325 (9th Cir. 1983) (quoting 28 U.S.C. § 636(b)(1)(A)); *see also* Fed. R. Civ. P.
14 72(a) (“[t]he district judge in the case must consider timely objections [to nondispositive
15 matters] and modify or set aside any part of the order that is clearly erroneous or is contrary
16 to law.”). “Matters concerning discovery generally are considered ‘nondispositive’ of the
17 litigation.” *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990).
18 “Review under the clearly erroneous standard is significantly deferential, requiring a definite
19 and firm conviction that a mistake has been committed.” *Concrete Pipe & Prod. v. Constr.*
20 *Laborers Pension Trust*, 508 U.S. 602, 623 (1993) (quotation omitted); *see also Hernandez*
21 *v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (same). “[T]he magistrate judge’s decision
22 ... is entitled to great deference by the district court.” *United States v. Abonce-Barrera*, 257
23 F.3d 959, 969 (9th Cir. 2001).

24 Federal Rule of Civil Procedure 26(a) provides that “a party must, without awaiting a
25 discovery request, provide to the other parties... a copy—or a description by category and
26 location—of all documents, electronically stored information, and tangible things that the
27 disclosing party has in its possession, custody, or control and may use to support its claims or
28 defenses....” Fed.R.Civ.Pro. 26(a)(1)(A)(ii). Federal Rule of Civil Procedure 37(c) provides


1 that “If a party fails to provide information... as required by Rule 26(a) or (e), the party is not
2 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at
3 a trial, unless the failure was substantially justified or is harmless.” Fed.R.Civ.Pro. 37(c).
4 Federal Rule of Civil Procedure 37(b) provides that “If a party... fails to obey an order to
5 provide or permit discovery... the court where the action is pending may issue further just
6 orders. They may include... (ii) prohibiting the disobedient party from supporting or opposing
7 designated claims or defenses, or from introducing designated matters in evidence....”
8 Fed.R.Civ.Pro. 37(b)(2)(A).

9 The Magistrate Judge found that production of the silkscreen evidence was required
10 under Rule 26(a) initial disclosures and should have been included in supplemental productions
11 by Bauer. (Discovery Hearing Transcript 10:23-24, 25:10-15; ECF No. 164 at 10, 25). The
12 record supports this finding. The Magistrate Judge found that Bauer’s failure to produce the
13 evidence was neither harmless nor substantially justified. (Transcript 17:13-15, 18:3-7, 25:10-
14 15, 26:21-25; ECF No. 164 at 17-18, 25-26). The record supports this finding. The Magistrate
15 Judge ruled that the silkscreen evidence, including Exhibit F and the related testimony of Luke
16 Bauer, shall be excluded. (Transcript 25:10-20, 26:21-25; ECF No. 164 at 25-26). Federal
17 Rule of Civil Procedure 37 authorizes this ruling.

18 The findings made by the Magistrate Judge were not clearly erroneous and the ruling
19 by the Magistrate Judge was not contrary to law. *See Rockwell*, 712 F.2d at 1325.

20 IT IS HEREBY ORDERED that the Motion for Reconsideration of the Magistrate
21 Judge Discovery Ruling (ECF No. 166) is DENIED.

22 DATED: May 3, 2012

23 
24 **WILLIAM Q. HAYES**
25 United States District Judge
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