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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 BAUER BROS. LLC, a California
11 limited liability company,
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13 vs. Plaintiff,
14 NIKE, INC., an Oregon corporation,
15 Defendant.
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CASE NO. 09-CV-500 W(BGS)

ORDER DENYING MOTION TO
ENFORCE SETTLEMENT
(Doc. No. 22)

17 Pending before the Court is Defendant Nike, Inc.'s ("Nike") motion to enforce
18 settlement. The Court decides the matter on the papers submitted and without oral
19 argument. See S.D. Cal. Civ. R. 7.1(d.1) For the reasons stated below, the Court
20 **DENIES** Defendant's motion. (Doc. No. 22.)
21

22 **I. BACKGROUND**

23 Nike has sponsored the United States men's soccer team since 2005. (Doc. No.
24 22-1 at 4.) In an effort to bring awareness to the team, Nike adopted a promotional
25 campaign using the historic rallying cry, "DON'T TREAD ON ME," to spark national
26 pride. Id. Since 2005, the phrase has been used in soccer publications and on
27 promotional products and merchandise. (Id. at 5.)
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1 Plaintiff Bauer Brothers LLC (“Bauer Brothers”) creates and sells apparel. Its
2 product line includes clothing bearing the trademarked phrase “DON’T TREAD ON
3 ME.” (Doc. No. 1.) Bauer Brothers owns this trademark and, in March 2009, brought
4 suit against Nike for trademark infringement. Id.

5 On May 18, 2009, both parties met at an Early Neutral Evaluation (“ENE”)
6 Conference before Magistrate Judge Adler. (Doc. No. 13.) During that conference, the
7 parties were able to reach a settlement. The settlement included nine conditions, each
8 of which were placed on the record orally. (Doc. No. 22 at Exh A.)

9 The seventh condition, in its entirety, reads:

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11 Point number seven, is Nike will provide in two weeks the declaration
12 confirming that it has not made any profits on its “Don’t Tread On Me”
or “DTOM” products that it has sold.

13 (Doc. No. 22, Exh A at 2:14–18.) The settlement transcript does not include an
14 explanation of how the parties would define “profits.”

15 On June 11, 2009, Nike sent a declaration to Bauer Brothers to satisfy the “no
16 profit” condition. (See Doc. No. 27 - Filed under Seal) Bauer Brothers objected to
17 Nike’s “no profit” declaration and has refused to dismiss the lawsuit.

18 As a result, Nike has filed the instant motion to enforce the May 18th settlement.
19 (Doc. No. 22.) Since the date of that filing, the case was transferred to Magistrate Judge
20 Gallo (Doc. No. 30), and then to Magistrate Judge Skomal. (Doc. No. 31.) Magistrate
21 Judge Adler is no longer associated with this case.

22 23 II. LEGAL STANDARD

24 It is well settled that a district court has the equitable power to enforce a
25 settlement agreement for a case pending before it. Callie v. Near, 829 F.2d 888, 890 (9th
26 Cir. 1987); see Mid-South Towing Co. V. Har-Win, Inc., 733 F.2d 386, 389 (5th Cir.
27 1984); Aro Corp. V. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976); Autera v.
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1 Robinson, 419 F.2d 1197, 1200 (D.C. Cir. 1969). However, settlement agreements
2 should only be enforced if they are complete. Id. Summary enforcement of a settlement
3 agreement “is ill-suited to situations presenting complex factual issues related either to
4 the formation or the consummation of the [settlement] contract, which only testimonial
5 exploration in a more plenary proceeding is apt to satisfactorily resolve.” Russell v. Puget
6 Sound Tug & Barge Co., 737 F.2d 1510, 1511 (9th Cir. 1984); quoting Autera, 419 F.2d
7 1197 at 1200.

8 9 **III. DISCUSSION**

10 The “no profit” declaration that Nike provided to Bauer Brothers was submitted
11 to the Court under seal. (See Doc. No. 27.) Generally, it indicates a positive gross
12 margin on three “DTOM” products. However, the total gross margin is less than the
13 amount Nike spent on the advertising and promotional support of U.S. soccer. Because
14 Nike’s expenditures exceed the profits generated, Nike believes it has satisfied the “no
15 profit” condition of the May 18th settlement agreement.

16 Bauer Brothers has refused to dismiss this case because it believes that Nike’s “no
17 profit” declaration is either (a) a breach of the settlement terms (because it shows that
18 Nike did make a profit) or (b) that there never was an agreement based upon
19 misrepresentations by Nike. (Doc. No. 28 at 3.) The Court agrees with Bauer Brothers,
20 but only to the extent that the settlement can not currently be enforced.

21 The May 18th settlement agreement does not indicate how Nike’s lack of profits
22 would be calculated. Nike’s self-created method is simple, indicates a lack of profit, and
23 was provided under penalty of perjury. It is also vague and generously broad when
24 defining the advertising deductions. Thus, the Court can perceive why Nike believes
25 their declaration was sufficient, and why Bauer Brothers objects to it. But it remains
26 unclear as to why Bauer Brothers believes it is entitled to anything more given the terms
27 of the settlement. (See Doc. No. 22, Exh A at 2:14–18.)
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1 In support of their arguments regarding how they agreed to define profits, both
2 parties have cited comments that were made to Magistrate Judge Adler during the ENE.
3 This Court is not in a position to give credence to any of those comments. And neither
4 party has addressed whether the Nike declaration was timely. Indeed, it appears that
5 it was not timely, which seemingly frustrates the literal enforcement of condition seven
6 that Nike seeks.

7 Thus, as briefed, the Court concludes that the issue presented is ill-suited for
8 summary enforcement. See Russell, 737 F.2d at 1511. Nike's motion to enforce the
9 settlement is therefore **DENIED** without prejudice.

10 Despite this conclusion, the Court remains hopeful that the parties can resolve
11 the "lack of profits" determination and achieve a resolution out of the May 18th
12 settlement agreement.

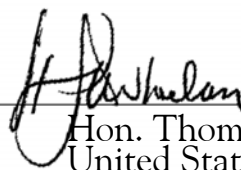
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14 **II. CONCLUSION**

15 For the reasons stated above, Nike's motion to enforce the settlement is **DENIED**
16 without prejudice. (Doc. No. 22.)

17 Additionally, the parties are hereby **ORDERED** to jointly call Magistrate Judge
18 Skomal's chambers within three court days of the date of this order to discuss the status
19 of this case and the scheduling of future dates.

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21 **IT IS SO ORDERED.**

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23 DATED: June 4, 2010

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25 
26 Hon. Thomas J. Whelan
27 United States District Judge
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