

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WISK AERO LLC,
Plaintiff,
v.
ARCHER AVIATION INC.,
Defendant.

Case No. [3:21-cv-02450-WHO](#)

**ORDER ON OBJECTIONS TO
MAGISTRATE JUDGE'S
NONDISPOSITIVE PRETRIAL ORDER**

Re: Dkt. No. 320

Plaintiff Wisk Aero LLC (“Wisk”) objects to a nondispositive pretrial order entered by Magistrate Judge Donna Ryu. *See* Motion for Relief (“Obj.”) [Dkt. No. 320]; *see also* Order Granting in Part and Denying in Part Motion to Modify Protective Order (“MJ Order”) [Dkt. No. 316]. For the reasons that follow, Wisk’s objections are **OVERRULED** and its motion for relief is **DENIED**. This Order assumes familiarity with the dispute.

Under 28 U.S.C. § 636, “a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court,” except for certain matters not relevant here. 28 U.S.C. § 636(b)(1)(A). When reviewing objections to a magistrate judge’s determination under this provision, “[a] judge of the court may reconsider any pretrial matter . . . where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” *Id.*

Wisk has not shown that Judge Ryu’s order was contrary to law. Wisk’s contrary-to-law argument relies almost entirely on the Ninth Circuit’s decision in *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992).¹ Far from contradicting *Brown Bag*, Judge Ryu’s

¹ Wisk’s other cited cases do not advance its argument. *Acer America Corp. v. Technology Properties*, 2009 WL 1363551 (N.D. Cal. May 14, 2009), differs because there were no allegations that the employees reviewing the trade secrets previously knew the information in the documents. And Wisk says *Medina v. Microsoft Corp.*, 2014 WL 3884506 (N.D. Cal. Aug. 7,

1 order faithfully applies it. In *Brown Bag*, the issue was whether newly retained in-house counsel
2 was subject to an existing protective order restricting documents outlining trade secrets to
3 “attorneys’ eyes only,” which had been previously implemented when the plaintiff was
4 represented by outside counsel. *Id.* at 1469. Unlike Archer’s request, there the *plaintiff* sought
5 access to the *defendant’s* trade secrets, and there were no allegations that the plaintiff’s reviewing
6 employees already knew the information. *Id.* at 1469-70. The Ninth Circuit reasoned that courts
7 must balance the broad entitlements of Federal Rule of Civil Procedure 26(b)(1), which permits
8 discovery of nonprivileged information relevant to any party’s claim or defense, with the
9 protections of Rule 26(c), which prohibits imposing undue burdens in the discovery process
10 through publication of trade secrets. *See id.* at 1470; *see also* Fed. R. Civ. P. 26(b)(1), (c). The
11 magistrate judge here was required to “inquire[] into the specific factual circumstances of [the
12 parties’] conflicting interests” and issue a protective order that “strikes a reasonable balance
13 between those interests.” *Id.* at 1471. The magistrate judge was not, as Wisk asserts, required to
14 apply a blanket rule precluding review of adversaries’ trade secrets merely because Archer had
15 access to independent experts who could review the information. *See* Obj. at 3.

16 Judge Ryu applied the *Brown Bag* balancing test. First, she acknowledged the parties’
17 competing interests. *See* MJ Order at 4-6. Though Wisk asserted that permitting Archer’s
18 employees to review the documents would unfairly refresh their memories, Judge Ryu concluded
19 that these concerns were outweighed by Archer’s need to develop arguments based on information
20 known only to those employees, including arguments related to specific trade secrets. *See id.*
21 Second, Judge Ryu modified the protective order only “narrowly.” *Id.* at 7. The modification
22 ensures Archer’s employees are given access only to information that Wisk alleges each person
23 already has, and only for a brief time period, to balance Wisk’s “valid concern” about refreshing
24 their memories. *Id.* at 7-8.

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26 2014), prohibits a plaintiff from reviewing a defendant’s trade secrets even if the plaintiff cannot
27 find an attorney or afford an expert. But that case is distinguishable from this one both because
28 the *plaintiff* sought to access the *defendant’s* trade secrets and because the court found the
plaintiff’s two convictions for felony bank fraud were relevant to his attempts to view Microsoft’s
trade secrets. *See id.* at 2. At any rate, that court also undertook the proper balancing test. *See id.*
at 3.

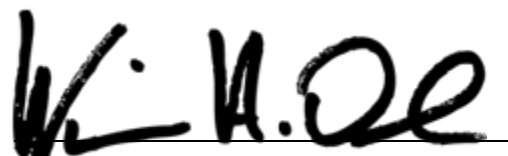
1 Additionally, Wisk has not shown that Judge Ryu clearly erred by applying the balancing
2 test in this way. Judge Ryu recognized the legitimate interests on both sides of the scale and
3 sought to conscientiously balance them. *See* MJ Order 4–8. She acknowledged Archer’s
4 arguments that producing an effective defense requires asking its employees to advise on the
5 *specific* facts alleged by Wisk, including whether they developed or used the protected
6 information, whether it was treated as secret at Wisk, and whether it originated from Wisk or
7 elsewhere. *See id.* at 4. It was not clear error to reject Wisk’s musings about the information its
8 adversary does or does not need to defend itself in this suit. *See* Obj. at 1-2. Additionally, the
9 amended protective order carefully balances Wisk’s valid concerns about refreshing its
10 competitors’ memories by implementing several safeguards, such as limiting the time for review,
11 mandating the presence of counsel during review, barring taking notes, and requiring Archer to
12 provide declarations about the reviews. *See id.* at 8; *see also Brown Bag*, 960 F.2d at 1470
13 (requiring the court to undertake “a factual inquiry” and “examine . . . all the risks and safeguards”
14 before issuing a protective order).

15 Accordingly, the objections to Judge Ryu’s order are OVERRULED and Wisk’s motion
16 for relief from it is DENIED.

17 **IT IS SO ORDERED.**

18 Dated: September 16, 2022

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William H. Orrick
United States District Judge