

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

OMAR GOMEZ,
Plaintiff,

v.

JORDAN FACHKO and CITY OF SANTA
CLARA,
Defendants.

Case No. 19-CV-05266-LHK

**AMENDED ORDER DENYING
PLAINTIFF’S MOTION FOR
RECONSIDERATION**

Re: Dkt. No. 115

On November 8, 2021, in the Court’s order ruling on the parties’ motions in limine, the Court excluded the opinion of Alexander Jason, Defendants’ crime scene analyst expert, that the wheels of Plaintiff’s car were turned to the left at the time of the shooting incident. ECF No. 99 at 5. The Court explained that this opinion, which is “based on Mr. Jason’s review of a witness’s deposition testimony and of a video of the incident,” is not admissible because it is not based on “specialized knowledge.” *Id.* at 6. Specifically, the Court explained that specialized knowledge is not “‘required to view . . . videos and interpret what they do or do not show.’” *Id.* (citing *Nunez v. City of San Jose*, Case No. 17-CV-03860-LHK, ECF No. 112 at 9–10 (N.D. Cal. June 13, 2019); *see also, e.g., Zeen v. Cty. of Sonoma*, No. 17-CV-02056-LB, 2018 WL 3769867, at *2 (N.D. Cal. Aug. 9, 2018) (holding that an expert witness could not testify “about what he believes the video

footage shows, much less what he believes actually occurred during the incident”); *Lam v. City of San Jose*, No. 14-cv-00877-PSG, 2015 WL 6954967, at *2 (N.D. Cal. Nov. 10, 2015) (holding that an audio forensics expert “may not testify as to what he believes [defendant] said [on the recording]”). Similarly, specialized knowledge is not required to interpret deposition testimony. ECF No. 99 at 6. Thus, the Court ruled that Mr. Jason may not provide an opinion about the positioning of the wheels of Plaintiff’s vehicle during the incident. *Id.*

In the same November 8, 2021 order, the Court also excluded an animation created by Jason Fries, Plaintiff’s forensic animation expert. ECF No. 99 at 7–9. The Court explained that, although an expert witness may not testify about his interpretation of videos or images, an expert witness may enhance videos or images and testify about the enhancement process. *Id.* at 8; *see, e.g., Zeen*, 2018 WL 3769867, at *2 (holding that an expert witness “may testify about how he enhanced the video footage”); *Lam*, 2015 WL 6954967, at *2 (holding that an expert witness “may explain how he enhanced the audio and play the enhanced audio to the jury”). However, where a party submits enhanced images as expert evidence, that evidence is reliable only if the expert used a reliable method to enhance the images.

The Court’s order explained that several factors cast serious doubt on the reliability of Mr. Fries’s animation. First, the Court explained that Mr. Fries had made inconsistent statements about the method he used to prepare the animation. ECF No. 99 at 7. Specifically, although Mr. Fries previously stated that he prepared the animation using software called “3D Studio Max 2018,” Mr. Fries testified during his deposition that he used software called “Blender.” *Id.* Second, the Court explained that Mr. Fries had failed to provide Defendants with the animation file despite Defendants’ repeated requests for the file. *Id.* at 8. The Court noted that it had previously excluded Mr. Fries’s expert testimony in another 42 U.S.C. § 1983 case for the same reason. *See id.*; *Nunez v. City of San Jose*, Case No. 17-CV-03860-LHK, ECF No. 112 at 9 (N.D. Cal. June 13, 2019) (“Because Mr. Fries failed to produce enhanced video stills that formed the basis of his opinion . . . he will not be permitted to testify as to this opinion.”).

Without the animation, Mr. Fries’s expert testimony relies entirely on his review of the

1 video and the photographs of the incident. As the Court explained in the context of its order
2 excluding Mr. Jason’s opinion, specialized knowledge is not ““required to view . . . videos and
3 interpret what they do or do not show.”” ECF No. 99 at 6 (quoting *Nunez v. City of San Jose*, Case
4 No. 17-CV-03860-LHK, ECF No. 112 at 9–10 (N.D. Cal. June 13, 2019)). Thus, the Court ruled
5 that, because “the animation is the only aspect of Mr. Fries’s proposed testimony that relies on
6 specialized knowledge,” Mr. Fries may not provide any expert testimony. *Id.* at 8.

7 On November 22, 2021, Plaintiff filed a request for clarification asking whether Mr. Fries
8 will be allowed to present an opinion from his expert rebuttal report. ECF No. 115 at 2.
9 Specifically, Plaintiff asked whether Mr. Fries will be allowed to present his opinion that “the
10 Honda would not have been able to get past the police vehicle that was positioned in front of the
11 Honda at the time of the shooting.” *Id.*

12 On November 23, 2021, the parties represented to the Court that they would meet and
13 confer to explore a stipulation about which portions of Mr. Fries’s expert rebuttal report, if any,
14 would be admissible. However, on the Friday after Thanksgiving, November 26, 2021, the parties
15 informed the Court that they had failed to reach a stipulation.

16 On the morning of Monday, November 29, 2021, the Court ordered Plaintiff to file a
17 supplemental brief explaining which of Mr. Fries’s opinions do not rely on the excluded
18 animation. On the evening of November 29, 2021, Plaintiff filed a supplemental brief identifying
19 eight opinions that purportedly do not rely on the excluded animation. *See* ECF No. 131. On the
20 morning of November 30, 2021, Defendants filed an opposition arguing that “most of the opinions
21 sought to be introduced by Plaintiff through Mr. Fries rely on his animation as a foundational
22 element” and that the remaining opinions rebut opinions of Alexander Jason, Defendants’ crime
23 scene analyst expert, that the Court has excluded. ECF No. 136 at 2.

24 The Court construes Plaintiff’s request for clarification and supplemental brief as a motion
25 for reconsideration under Civil Local Rule 7-9. Under Local Rule 7-9, leave of the Court is
26 required before a party may file a motion for reconsideration of an interlocutory order. Plaintiff
27 did not seek leave to file a motion for reconsideration in accordance with Local Rule 7-9.

1 Regardless, the Court considers Plaintiff's arguments and, for the reasons below, concludes that
2 reconsideration is not warranted.

3 Local Rule 7-9(b) allows for reconsideration only if the moving party can show:

4 (1) That at the time of the motion for leave, a material difference in fact or law exists from
5 that which was presented to the Court before entry of the interlocutory order for which
6 reconsideration is sought. The party also must show that in the exercise of reasonable
7 diligence the party applying for reconsideration did not know such fact or law at the time
8 of the interlocutory order; or

9 (2) The emergence of new material facts or a change of law occurring after the time of
10 such order; or

11 (3) A manifest failure by the Court to consider material facts or dispositive legal arguments
12 which were presented to the Court before such interlocutory order.

13 Civil L.R. 7-9(b). According to Plaintiff, the Court failed to consider that Mr. Fries reached his
14 opinions "by reviewing the video and the photographs" of the incident and "by conducting his
15 own test by driving a Honda Civic." ECF No. 131 at 7. Thus, although Plaintiff does not specify
16 which provision of Local Rule 7-9 justifies reconsideration, the Court construes Plaintiff's
17 argument to be that there was a "manifest failure by the Court to consider material facts or
18 dispositive legal arguments." Civ. L.R. 7-9(b)(3).

19 As an initial matter, Mr. Fries's opinions rely primarily on his analysis of the excluded
20 animation, not on his review of the video and the photographs of the incident or on his own test
21 drive of a Honda Civic. Each of the opinions that Plaintiff seeks to introduce either refers to the
22 excluded animation or depends on data produced by the excluded animation. Indeed, Mr. Fries's
23 expert rebuttal report states that "[o]nly by tracking the video in 3D . . . can you perform any
24 meaningful analysis." ECF No. 135-2 at 1. Thus, the fact that Mr. Fries also reviewed the video
25 and the photographs of the incident and test drove a Honda Civic would not have been material to
26 the Court's analysis.

27 Regardless, even assuming that Mr. Fries primarily formed his opinions by reviewing the
28 video and the photographs of the incident, that fact does not change the Court's conclusion that
"the animation is the only aspect of Mr. Fries's proposed testimony that relies on specialized
knowledge." ECF No. 99 at 8. The Court previously has explained that specialized knowledge is

not “required to view . . . videos and interpret what they do or do not show.” *See Nunez v. City of San Jose*, Case No. 17-CV-03860- LHK, ECF No. 112 at 9–10 (N.D. Cal. June 13, 2019); *see also, e.g., Zeen v. Cty. of Sonoma*, No. 17-CV-02056-LB, 2018 WL 3769867, at *2 (N.D. Cal. Aug. 9, 2018) (holding that an expert witness could not testify “about what he believes the video footage shows, much less what he believes actually occurred during the incident”). Thus, Mr. Fries’s review of the video and the photographs of the incident may not form the basis for his expert testimony.

For similar reasons, Mr. Fries’s test drive of a Honda Civic may not form the basis for his expert testimony. Most importantly, Plaintiff has failed to explain why Mr. Fries’s test drive of the Honda Civic required specialized knowledge. Specifically, Mr. Fries’s expert rebuttal report states that his test drive consisted of the following steps: (1) shifting the vehicle from reverse into first gear; (2) placing his foot on the gas pedal; and (3) stopping the vehicle. *See* ECF No. 135-2 at 7–8. These actions could be performed by lay people and do not require any “scientific, technical, or other specialized knowledge.” Fed. R. Evid. 702(a). Moreover, even assuming that these actions required scientific, technical, or other specialized knowledge, Mr. Fries does not possess such knowledge. As noted, Mr. Fries is Plaintiff’s forensic animation expert and his expertise is “in the field[s] of forensic animation, 3D laser scanning, audio/video analysis, line of sight, laser-based photogrammetry, scientific method, and trajectory analysis.” ECF No. 135-1 at 1. Expertise in these fields does not qualify Mr. Fries to provide specialized knowledge about test driving an automobile.

Thus, as the Court previously explained, “the animation is the only aspect of Mr. Fries’s proposed testimony that relies on specialized knowledge.” *Id.* at 8. Because that animation has been excluded, Mr. Fries, who is a forensic animation expert, has no remaining expertise that would be helpful to the jury.

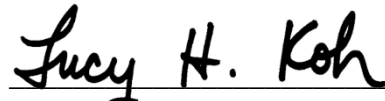
Moreover, two of the opinions of Mr. Fries that Plaintiff seeks to introduce rebut an opinion that the Court has excluded. Specifically, Mr. Fries’s opinions identified by Plaintiff as “Rebuttal Opinion 1” and “Rebuttal Opinion 5” rebut Mr. Jason’s excluded opinion that the

wheels of Plaintiff's car were turned to the left at the time of the incident. *See* ECF No. 99 at 6–7; ECF No. 131 at 4, 6. Defendants recognize that they are precluded from questioning Mr. Jason about his excluded opinion or about any opinions that depend on the excluded opinion. ECF No. 136 at 3, 5. Thus, Mr. Fries's Rebuttal Opinion 1 and Rebuttal Opinion 5 are irrelevant.

Thus, the Court DENIES Plaintiff's motion for reconsideration.¹ Mr. Fries will not be allowed to present any expert testimony in this case.

IT IS SO ORDERED.

Dated: December 1, 2021



LUCY H. KOH
United States District Judge

¹ This order supersedes ECF No. 141, which is hereby vacated.