



1 Complaint alleging copyright infringement against Defendant AIF.<sup>1</sup> On October 30,  
2 2013, the jury returned a special verdict in favor of Plaintiff and against Defendant  
3 AIF. (Dkt. No. 386.) Specifically, the jury found that AIF infringed upon valid  
4 copyrights owned by Brighton. (Id.) Out of 51 of AIF's designs, the jury found  
5 infringement for 39 of the designs encompassing 11 copyrights. (Id.) The jury also  
6 found that AIF did not engage in copyright infringement willfully or innocently. (Id.)  
7 For damages, the jury awarded Plaintiff \$1,000,000 in lost profits and \$1,050,000 in  
8 statutory damages. (Id.)

9 Plaintiff filed a copyright, trademark, and trade dress infringement complaint on  
10 February 24, 2010. (Dkt. No. 1.) AIF was later added to the case, in February 2011,  
11 on Brighton's First Amended Complaint solely on copyright infringement. (Dkt. No.  
12 51.)

13 The issue raised in this motion concerns the lost profit damages assessed against  
14 AIF. Therefore, some background as to the discovery of AIF's sales invoices is  
15 relevant. Fact discovery in this case closed on March 9, 2012. AIF produced some  
16 invoices during discovery and continued to produce sales records after discovery had  
17 closed. AIF submitted supplemental invoices to Brighton on June 1, 2012, July 6,  
18 2012, July 10, 2012; July 23, 2012, July 25, 2012, and June 10, 2013.

19 At first, AIF had difficulty producing invoices because Brighton had not  
20 disclosed any SKU numbers that were alleged to have infringed its designs. This was  
21 accomplished on December 20, 2011. In addition, AIF had challenges producing  
22 invoices because the invoices were all in paper form until AIF adopted Quick Books  
23 in 2010. The final production of invoices occurred on September 23, 2013, one month  
24 before trial, which amounted to 32,000 AIF invoices with dates ranging from 2005 to  
25 2009 which were admitted at trial as Exhibits JO, JP, JQ, JR, JS, JT and OP. On  
26 October 8, and again on October 21, 2013, AIF's damages expert David Drews

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28 <sup>1</sup>While numerous defendants were named in the complaint, all settled prior to and at the start  
of trial.

1 submitted a supplemental expert report that took into account the additional invoices  
2 produced after the close of discovery. According to Drews' calculations, AIF's gross  
3 revenues from its sale of the accused products were \$24,692.46 and its net profits were  
4 \$3,640.76. (Dkt. No. 409-4, Walker Decl., Ex. E.)

5 Over AIF's relevance objection, the Court allowed Plaintiff to admit AIF's total  
6 gross revenues of all products from 2004-2010 which totaled \$55,823,870. This was  
7 the only calculation provided by Plaintiff to the jury. As a result, during rebuttal  
8 closing argument, Plaintiff's counsel stated, "[t]he fact is we don't know what they  
9 have sold of these designs in issue. We don't know if they were \$25,000 or a million  
10 dollars, or \$5 million." (Dkt. No. 393-4 at 3.)

11 AIF moves pursuant to Federal Rule of Procedure ("Rule") 50(b), or  
12 alternatively, it also moves for a new trial pursuant to Rule 59(a) based on the jury's  
13 special verdict of lost profit damages of \$1,000,000 as speculative, excessive and not  
14 supported by substantial evidence.

15 AIF also argues that the jury's statutory damages of \$1,050,000 was calculated  
16 improperly. It contends that since the jury found only 11 infringing works at issue, and  
17 no willful infringement, the statutory award could not be more than \$330,000 as  
18 provided in 17 U.S.C. § 504(c). Plaintiff does not dispute this and agrees with AIF.  
19 However, Plaintiff argues it will be selecting "lost profits" as its damages of choice as  
20 long as the Court does not grant AIF's motion.

## 21 DISCUSSION

### 22 I. Judgment as a Matter of Law

#### 23 A. Legal Standard

24 As a threshold matter, the Court must determine whether AIF waived its right to  
25 move for judgment as a matter of law by failing to move for judgment as a matter of  
26 law at the close of the evidence. Under Rule 50(a)(1):

27 If a party has been fully heard on an issue during a jury trial and the court  
28 finds that a reasonable jury would not have a legally sufficient evidentiary  
basis to find for the party on that issue, the court may . . . resolve the issue  
against the party; and . . . grant a motion for judgment as a matter of law

1           against the party on a claim or defense that, under the controlling law, can  
2           be maintained or defeated only with a favorable finding on that issue.  
3           Fed. R. Civ. P. 50(a)(1). “A motion for judgment as a matter of law may be made at  
4           any time before the case is submitted to the jury. The motion must specify the  
5           judgment sought and the law and facts that entitle the movant to the judgment.” Fed.  
6           R. Civ. P. 50(a)(2). “If the court does not grant a motion for judgment as a matter of  
7           law made under Rule 50(a), the court is considered to have submitted the action to the  
8           jury subject to the court’s later deciding the legal questions raised by the motion.” Fed.  
9           R. Civ. P. 50(b).

9           No later than 28 days after the entry of judgment . . . the movant may file  
10          a renewed motion for judgment as a matter of law and may include an  
11          alternative or joint request for a new trial under Rule 59. In ruling on the  
12          renewed motion, the court may ... (1) allow judgment on the verdict, if the  
13          jury returned a verdict; . . . (2) order a new trial; or . . . (3) direct the entry  
14          of judgment as a matter of law.

12          Id.

13          The Ninth Circuit “strictly adhere[s] to the requirements of Rule 50(b), which  
14          prohibit a party from moving for judgment as a matter of law after the jury’s verdict  
15          unless that motion was first presented at the close of evidence.” Image Technical  
16          Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1997). If a party fails  
17          to make a motion for judgment as a matter of law under Rule 50(a) before the case is  
18          submitted to the jury, “a party cannot question the sufficiency of the evidence either  
19          before the district court . . . or on appeal.” Cabrales v. County of Los Angeles, 864  
20          F.2d 1454, 1459 (9th Cir. 1988) (emphasis omitted), vacated on other grounds by 490  
21          U.S. 1087 (1989).

22          However, “[w]hen a special verdict does not support a judgment a reviewing  
23          court may make an exception to the Rule 50(b) requirement of a motion for directed  
24          verdict as a prerequisite to a motion for JNOV.”<sup>2</sup> Pierce v. S. Pacific Transp. Co., 823  
25          F.2d 1366, 1369 (9th Cir. 1987). “Similarly, when a jury’s answers are irreconcilably  
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27                   <sup>2</sup>In 1991, motion for directed direct, under Rule 50(a) and a motion for judgment  
28                   notwithstanding the verdict (“JNOV”) under Rule 50(b) were amended to be called motions for  
                  judgment as a matter of law. Fernandez v. City of San Francisco, No. C-93-2597, 1996 WL 162993,  
                  at \*2 n. 1 (N.D. Cal. 1996).

1 inconsistent, a reviewing court may review whether the answers support the judgment  
2 even in the absence of either a motion for directed verdict or a motion for JNOV.” Id.  
3 A motion for JNOV is not required to be made for a motion for JNOV “when the  
4 challenge is to the consistency of the answers under a Rule 49(a) special verdict, and  
5 not to the sufficiency of evidence supporting a general verdict.” Id.; see also Ferarolis  
6 v. Int’l Recovery Sys., Inc., 2006 WL 1371187, at 4 (E.D. Pa. May 18, 2006) (Rule 50  
7 motion not appropriate to challenge legal errors made by the court) (citing Greenleaf  
8 v. Garlock, Inc., 174 F.3d 352, (3d Cir. 1999)). In the absence of a rule 50(a) motion,  
9 a party is precluded from later challenging the sufficiency of the evidence either before  
10 the district court through a renewed motion for judgment as a matter of law or on  
11 appeal. Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1347  
12 (9th Cir. 1986).

13 Here, Plaintiff did not move for judgment as a matter of law under Rule 50(a)  
14 prior to the case being submitted to the jury. Plaintiff argues that its case falls under  
15 the exception because the jury’s award was inconsistent with the special verdict. The  
16 Court disagrees. AIF challenges the special verdict damages award based on the  
17 underlying evidentiary ruling by the Court which allowed Plaintiff, through its  
18 damages expert, to present Defendant’s total gross revenues generated during the  
19 infringement period. Contrary to AIF’s argument, the special verdict answers are not  
20 irreconcilably inconsistent, and AIF seeks to challenge the sufficiency of the evidence  
21 which requires that AIF first move under Rule 50(a).

22 However, AIF may move for a motion for new trial under Rule 59(a) and  
23 challenge a court’s evidentiary ruling. Klein v. Hollings, 992 F.2d 1285, 1289-90 (3d  
24 Cir. 1993). “Unlike a motion for judgment as a matter of law, a motion for a new trial  
25 does not have to be preceded by a Rule 50(a) motion prior to submission of the case  
26 to the jury.” Freund v. Nycomed Amersham, 347 F.3d 752, 765 (9th Cir. 2003). In  
27 deciding a Rule 59(a) motion, “[t]he judge can weigh the evidence and assess the  
28 credibility of witnesses, and need not view the evidence from the perspective most

1 favorable to the prevailing party.” Landes Const. Co., Inc. v. Royal Bank of Canada,  
2 833 F.2d 1365, 1371 (1973). However, a stringent standard applies when the motion  
3 is based on insufficiency of the evidence. Venegas v. Wagner, 831 F.2d 1514, 1519  
4 (9th Cir. 1987). On this basis, a motion will be granted only if the verdict “is against  
5 the great weight of the evidence, or it is quite clear that the jury has reached a seriously  
6 erroneous result.” E.E.O.C. v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997)  
7 (internal quotations omitted). “The district court cannot substitute its evaluations for  
8 those of the jurors.” Tortu v. Las Vegas Metro. Police Dept., 556 F.3d 1075, 1084 (9th  
9 Cir. 2009). The court “may not grant or deny a new trial merely because it would have  
10 arrived at a different verdict.” United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139  
11 (9th Cir. 1999). The Ninth Circuit provides the following guidance on this somewhat  
12 imprecise standard:

13         On the one hand, the trial judge does not sit to approve miscarriages of  
14         justice. His power to set aside the verdict is supported by clear  
15         precedent at common law and, far from being a denigration or a  
16         usurpation of jury trial, has long been regarded as an integral part of  
17         trial by jury as we know it. On the other hand, a decent respect for the  
18         collective wisdom of the jury, and for the function entrusted to it in our  
19         system, certainly suggests that in most cases the judge should accept  
20         the findings of the jury, regardless of his own doubts in the matter.  
21         Probably all that the judge can do is to balance these conflicting  
22         principles in the light of the facts of the particular case. If, having  
23         given full respect to the jury's findings the judge on the entire evidence  
24         is left with the definite and firm conviction that a mistake has been  
25         committed, it is to be expected that he will grant a new trial.

20 Landes Const. Co., Inc., 833 F.2d at 1371–72 (footnotes omitted). The district court  
21 has discretion in ruling on a motion for a new trial. SEC v. Todd, 642 F.3d 1207, 1225  
22 (9th Cir. 2011).

### 23 **B. Lost Profit Damages**

24         The copyright owner is entitled to either actual damages and any additional  
25         profits of the infringer or statutory damages. 17 U.S.C. § 504(a). The copyright owner  
26         may elect to pick either at any time before final judgment. 17 U.S.C. § 504(c)(1).  
27         Plaintiff asserts that it seeks to recover the lost profits award of damages as long as the  
28         Court does not grant Defendant’s motion.

1 As to actual damages and profits,

2 The copyright owner is entitled to recover the actual damages suffered  
3 by him or her as a result of the infringement, and *any profits of the*  
4 *infringer that are attributable to the infringement* and are not taken  
5 into account in computing the actual damages. In establishing the  
6 infringer's profits, the copyright owner is required to present proof  
7 only of the infringer's gross revenue, and the infringer is required to  
8 prove his or her deductible expenses and the elements of profit  
9 attributable to factors other than the copyrighted work.

10 17 U.S.C. § 504(b)(emphasis added). Lost profits can be direct or indirect and is the  
11 wrongfully obtained profits resulting from the infringement. Polar Bear Prods., Inc.  
12 v. Timex Corp., 384 F.3d 700, 710 (9th Cir. 2004).

13 The burden is on the copyright owner to present proof “only of the infringer’s  
14 gross revenue” and then the burden shifts to the infringer to demonstrate its “deductible  
15 expenses and the elements of profits attributable to factors other than the copyrighted  
16 work.” Polar Bear, 384 F.3d at 711 (citing 17 U.S.C. § 504(b)).

17 It is “implicit that the profits sought are those that arise from the infringement”  
18 and a copyright owner must present a gross revenue number that bears a “legally  
19 significant relationship” to the infringement. Id. at 711. Therefore, Plaintiff must  
20 demonstrate a causal link between the infringement and the profits sought. Id. at 712.  
21 Damages must be sufficiently supported by the evidence and non-speculative. Id. at  
22 708. “When an infringer’s profits are only remotely and speculatively attributable to  
23 infringement, courts will deny recovery to the copyright owner.” Frank Music Corp.  
24 v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 517 (9th Cir. 1985).

25 With these requirements in mind, the Court addresses AIF’s challenge to the \$1  
26 million profit award. At trial, Brighton did not give an estimate for AIF’s profits  
27 allegedly gained from its unauthorized use of Brighton’s copyrighted material. Instead,  
28 Brighton provided an estimate of the total gross sales of all AIF profits. The evidence  
admitted showed that AIF sold hundreds of watches and the jury found that AIF  
violated 39 copyright designs. (Dkt. No. 386.)

AIF contends that Plaintiff’s introduction of and the court’s erroneous

1 evidentiary ruling admitting, over the relevance objection of defense counsel,  
2 Defendant's total gross revenues of \$55,823,870, Exhibit No. 568, generated during  
3 the period of infringement from 2004-2010 was prejudicial because it was not  
4 attributable to the gross revenues of infringing products. As such, the jury's award  
5 based on Defendant's lost profits is speculative and excessive as a matter of law and  
6 not supported by the evidence at trial. In fact, according to Defendant, the evidence at  
7 trial revealed that there was about \$25,000 in gross revenues based on sales of the  
8 infringing products and about \$3,600 in net profits during the period of infringement.  
9 Therefore, the jury verdict award of \$1,000,000 contrasts grossly with the \$25,000 in  
10 gross revenues of invoices presented at trial. AIF asserts that since Plaintiff failed to  
11 meet its burden of proving gross revenues generated by the infringing sales,  
12 Defendant's profits should be limited to the evidence of sales adduced at trial by the  
13 Defendant.

14 Plaintiff opposes arguing that the jury's award was well within the permissible  
15 range based on the evidence. The jury's award of \$1,000,000 is less than 1.8 percent  
16 of AIF's total sales of \$55,823,870. Plaintiff asserts that the jury could not reasonably  
17 estimate profits when there were no sales records for over half of the AIF styles at  
18 issue; there were no pre-2005 sales records for any of the AIF styles at issue; AIF could  
19 not fill in the gaps through testimony; and AIF's testimony that it produced all of its  
20 records was not credible. Plaintiff contends that the jury considered the incomplete  
21 sales invoices produced by AIF; the 2004 AIF catalog indicating the quantity of  
22 infringing AIF product compared to non-infringing AIF product; AIF's total sales  
23 during the majority of the period of infringement; AIF's testimony; and testimony from  
24 the parties' respective expert economists. Based on what was available and presented,  
25 the jury's award of \$1million should not be disturbed.

26 When a defendant, "who has control of the evidence of sales, fails and refuses  
27 to produce evidence of sales or absence of sales, plaintiffs may be allowed to use  
28 "indirect and less definite and certain methods of proof." Deering Milliken & Co. v.



1 Gilbert, 269 F.2d 191, 193 (2d Cir 1959) (holding that where defendant produces no  
2 evidence of sales, defendant bears risk of uncertainty in damages determination relying  
3 on circumstantial evidence). In Gilbert, the defendant was patently evasive; denying  
4 any palming off and cloaked his answers by a short memory. Id. Plaintiff need only  
5 establish “a basis for a reasoned conclusion as to the extent of injury caused by the  
6 deliberate and wrongful infringement.” Id. If there is incomplete evidence of sales of  
7 infringing goods, the Court “may justifiably rely on circumstantial evidence involving  
8 the extent of an infringer’s wrongdoing.” N.Y. Racing Ass’n, Inc. v. Storup News  
9 Agency Corp., 920 F. Supp. 295, 301 (N.D.N.Y. 1996) (trademark infringement case).

10 In a case where damage calculations are not exact, and while damages may not  
11 be based on mere speculation or guess, “it will be enough if the evidence show the  
12 extent of the damages as a matter of just and reasonable inference, although the result  
13 be only approximate.” Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S.  
14 555, 563 (1931). A wrongdoer cannot complain that the damages cannot be measured  
15 with exactness and precision. Id. “The risk of uncertainty should be thrown upon the  
16 wrongdoer instead of upon the injured party.” Id.

17 In Cosmos, the district court assessed the amount of damages in the form of  
18 defendant’s profits to be \$2,341,526.52. Cosmos Jewelry Ltd. v. Po Sun Hon Co., 470  
19 F. Supp. 2d 1072, 1087 (C.D. Cal. 2006), aff’d, Cosmos Jewelry, Ltd. v Po Sun Hon  
20 Co., 2009 WL 766517 (9th Cir. 2009). The plaintiff alleged copyright infringement  
21 of its plumeria-themed jewelry. Id. at 1081. The amount of damages awarded  
22 consisted of gross sales from selling infringing plumeria jewelry, including non-  
23 infringing jewelry. Id. at 1081. In reviewing the defendant Hon’s invoices, plaintiff  
24 was unable to distinguish between plumeria and nonplumeria jewelry in the invoices  
25 because of the poor quality of the invoices. Id. The district court found that a large  
26 portion of the defendant’s total profits was attributable to the sale of plumeria-themed  
27 jewelry. Id. The Ninth Circuit affirmed and expressed concern that the amount of  
28 damages included some jewelry sales that did not infringe; however, because Hon’s

1 testimony was unreliable and the records he produced were “limited, illegible, and of  
2 course subject to a credibility determination themselves”, reversal was not warranted.  
3 Id. at \*2. The Ninth Circuit noted that since both Plaintiff and the district court could  
4 not reasonably account for Hon’s profits or sales from infringing jewelry less non-  
5 infringing jewelry, then Plaintiff was entitled to the award of the total amount of profits  
6 from the infringing period. Id.

7 In this case, while a similar factual situation as in Cosmos exists due a lack of  
8 complete sales invoices to determine gross profits attributable to the infringing  
9 products, and credibility issues as to the defendant’s corporate representative, the jury  
10 did not award the total gross sales of \$55,823,870, but based on the evidence provided,  
11 came to a determination of \$1,000,000, less than 1.8% of the total gross sales.

12 The sales invoices produced by Defendant were both untimely and incomplete  
13 which deprived Plaintiff from making a diligent review of the records to establish a  
14 causal connection between the infringement and the gross revenue reasonably  
15 associated with the infringement.

16 While the Court acknowledges that AIF had difficulty providing its sales  
17 invoices concerning the accused watches because all records prior to 2010 were all in  
18 paper form, the timing of supplemental disclosures of sales invoices raises questions  
19 as to Defendant’s attempt to “hide the ball” until the eve of trial. AIF provided  
20 supplemental disclosures of invoices on June 1, 2012, July 6, 2012, July 10, 2012; July  
21 23, 2012; and July 25, 2012 which consisted of about 241 pages (AIF 545-786). Then,  
22 on June 10, 2013, AIF provided additional sales invoices, (AIF 787-795), which  
23 consisted of nine pages. Then, on September 23, 2013, one month before trial, AIF  
24 produced ten additional boxes of invoices amounting to 32,000 invoices dating from  
25 2005 to 2009 (AIF 796-33484).

26 It is curious that one month before trial, Defendant presents the bulk of its  
27 invoices to Plaintiff. There is no explanation why the bulk of the invoices were not  
28 disclosed earlier. Not only is the late disclosure questionable, courts have recognized

1 late submission of documents or expert reports prejudices the opposing party. See  
2 Staley v. U.S. Bank Nat. Ass'n, 10cv591-BLW, 2013 WL 331271, at \*5 (D. Idaho Jan.  
3 29, 2013) (citing Fair Housing of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002));  
4 GenSci OrthoBiologics v. Osteotech, Inc., 2001 WL 36239743, at 18 (C.D. Cal. Oct.  
5 18, 2001) (excluding relevant supplemental expert reports because they were not  
6 provided until the eve of trial and would greatly prejudice defendant who had no time  
7 to prepare a response to these supplements). Here, the late disclosure of sales invoices  
8 prevented Plaintiff and its expert from thoroughly reviewing the records, from  
9 conducting discovery or depositions, and from allowing Brighton's damages expert to  
10 file a response to Defendant's final supplemental expert report which was not  
11 completed until October 21, 2013, two days before trial. Clearly, there was insufficient  
12 time for Brighton to respond to Drews' analysis and conclusion. The Court also notes  
13 that Plaintiff filed a motion in limine to exclude these invoices due to their late  
14 submission. (Dkt. Nos. 302, 352.) The Court intended to exclude the invoices in its  
15 tentative ruling until Plaintiff informed the Court that it reached an agreement and  
16 withdrew that motion. (Dkt. No. 414 at 10.)

17 Despite the late submission, in looking closely at Drews' supplemental expert  
18 report, the Court notes that the report raises questions as to the completeness of the  
19 records he reviewed and the validity of his calculations. In his report, Drews states that  
20 as to the numerous terms of "Western", "wstl" and "wstm" in the invoices, it was  
21 "impossible to ascertain whether they were related to an accused product or not. I have  
22 therefore not included any of these sales in my results, unless they also met one of the  
23 product number criteria." (Dkt. No. 409-4, Drews' Suppl. Expert Report at 6.) Thus,  
24 a large number of product items were not accounted for in Drews' calculations of gross  
25 sales of infringing products.

26 Moreover, a careful look at the invoices with infringing products reviewed by  
27 Drews demonstrates that he may not have reviewed a complete set of invoices. (Id. at  
28 11-17.) First, Helby Import Co. was a big customer of AIF from 2006 to 2009.

1 However, there is an absence of any sales by Helby from July 25, 2007 to January 2,  
2 2008 and then no invoices after September 19, 2009. In addition, Brightlings appears  
3 to be another major customer of AIF. However, no sales to Brightlings is noted after  
4 July 2009 and none between April 2007-January 2008 and again from December 2008  
5 to July 2009, and after one sale on July 2, 2009, no additional sales after July 2009.  
6 The lack of invoices for certain time period could demonstrate that there are many  
7 missing invoices not accounted for in Drews' calculations. Furthermore, the fact that  
8 AIF did not have any invoices with purchases from RK Texas Leather Mfg., Inc. who  
9 purchased infringing watches from AIF, is telling as to the completeness of the  
10 invoices.<sup>3</sup>

11 These examples raise grave doubts about the completeness of the invoices  
12 disclosed. Not only did it appear that Plaintiff did not have a complete set of invoices  
13 from January 2005 through December 2011, the period that Drews reviewed, but no  
14 invoices were produced for 2004 which accounted for half of the infringing products.  
15 (Dkt. No. 406-1, Wesley Decl., Ex. D, 10/28/13 Trial Tr. at 70:11-21 (Issa testified that  
16 no records were produced or admitted prior to 2005).) Plaintiff obtained a copy of the  
17 2004 AIF catalog, not produced by AIF, which showed 27 new product numbers of  
18 infringing products. Lastly, the invoices only accounted for 23 products out of the 51  
19 products at issue so 28 product invoices were not produced. (Dkt. No. 406-1, Wesley  
20 Decl., Ex. D, 10/28/13 Trial Tr. at 163:24-165:6.)

21 Lastly, there were serious questions regarding the credibility of AIF's corporate  
22 representative, Imran Issa. At his deposition, he answered most questions with "I don't  
23 know," or "I don't remember" even the questions one would think he would know the  
24 answer. His answers appeared evasive and cryptic. As the person most  
25 knowledgeable, he failed to provide any useful information to Plaintiff in order to  
26 calculate lost profits. The jury most likely questioned the credibility of Issa's testimony

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28 <sup>3</sup>Issa testified that he did not find sales records that were produced by Texas  
Leather in its own files.

1 on damages.

2 Although Plaintiff did not provide Dr Drews' gross revenue calculations  
3 attributed to the infringement to the jury, AIF did. AIF presented evidence of the total  
4 amount of gross revenues from the infringing products and the net profit through its  
5 expert, David Drews, and from the testimony of Imran Issa, AIF's Vice President.  
6 (Dkt. No. 393-3, Walker Decl., Ex. A, Tr. Trans. 10/28/13 at 39:10-16; Tr. Trans.  
7 10/28/13 at 148:3-22.) Defendant also raised these amounts in closing stating that the  
8 infringement consisted of less than \$25,000 worth of revenue and less than \$5,000  
9 worth of profits. (Dkt. No. 391, Tr. Trans. 10/29/13 at 58:16-19; 86:10-11.) Based on  
10 the competing evidence and competing credibility of experts and witnesses, the jury  
11 assessed an award of \$1,000,000 in lost profits. The Court should not disturb a jury's  
12 determination absent evidence to the contrary. Polar Bear, 384 F.3d at 713 ("In the  
13 absence to the contrary, we presume that the jury fulfilled its duty to apportion  
14 profits."); Summit P'ship v. Turner Broad Sys., Inc., 235 F.3d 1184, 1192 (9th Cir.  
15 2000) ("weighing the credibility of conflicting expert witness testimony is the province  
16 of the jury"); Long v. Johnson, 736 F.3d 891, 896 (9th Cir. 2013) (courts must "respect  
17 the exclusive province of the jury to determine the credibility of witnesses, resolve  
18 evidentiary conflicts, and draw reasonable inferences from proven facts.")

19 Due to the lack of complete invoices of sales of the infringing products, Brighton  
20 sought to provide the jury with a range it could consider. The Court does not find that  
21 AIF was prejudiced by the Court's admission of Exhibit 568 concerning AIF's total  
22 gross sales on all products from 2004-2010, the relevant infringing time period. The  
23 jury awarded \$1,000,000, less than 1.8% of the gross revenues of total products.<sup>4</sup>  
24 Based on what was presented to the jury, the Court does not find that the verdict of

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26 <sup>4</sup>In its reply, for the first time, AIF argues that any sales prior to 2008 is  
27 irrelevant anyway because of the three year statute of limitations. Courts generally  
28 decline to consider new facts or different legal arguments raised for the first time in the  
reply brief. Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007). Since AIF raises  
this issue for the first time in its reply, which prevents Plaintiff from providing a  
response, the Court declines to consider it.

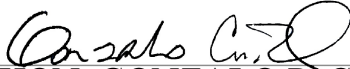
1 \$1,000,000 is against the “great weight of the evidence” or that the jury reached a  
2 “seriously erroneous result.” See Pape Lift, Inc., 115 F.3d at 680. Thus, the Court  
3 DENIES AIF’s motion for a new trial.

4 **Conclusion**

5 Based on the above, the Court DENIES Defendant AIF’s motion for judgment  
6 as a matter of law pursuant to Rule 50(b); and alternatively, DENIES AIF’s motion for  
7 a new trial under Rule 59(a).

8 IT IS SO ORDERED.

9  
10 DATED: May 27, 2014

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12 HON. GONZALO P. CURIEL  
13 United States District Judge  
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