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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SAN DIEGO COMIC CONVENTION, a  
12 California non-profit corporation,  
13 Plaintiff,

14 v.

15 DAN FARR PRODUCTIONS, a Utah  
16 limited liability company; DANIEL  
17 FARR, an individual; and BRYAN  
18 BRANDENBURG, an individual,  
19 Defendants.

Case No.: 14-cv-1865 AJB (JMA)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
EX PARTE APPLICATION FOR  
RECONSIDERATION OF THE  
COURT'S ORDER EXCLUDING  
THE TESTIMONY OF CLARKE  
NELSON**

(Doc. No. 277)

20 Presently before the Court is Defendants Dan Farr Productions, Daniel Farr, and  
21 Bryan Brandenburg's (collectively referred to as "Defendants") ex parte application for a  
22 motion for reconsideration of the Court's order excluding the testimony of Clarke Nelson.  
23 (Doc. No. 277.) Plaintiff San Diego Comic Convention ("Plaintiff") opposes the motion.  
24 (Doc. No. 293.) As explained more fully below, the Court **GRANTS IN PART AND**  
25 **DENIES IN PART** Defendants' ex parte motion.

26 **BACKGROUND**

27 On August 7, 2014, Plaintiff filed a complaint against Defendants asserting causes  
28 of action for (1) federal trademark infringement and (2) false designation of origin. (Doc.

1 No. 1.) The heart of the instant lawsuit revolves around Defendants’ production of Salt  
2 Lake Comic Con, which Plaintiff asserts infringes on their trademark “Comic-Con”  
3 registered with the United States Patent and Trademark Office (“USPTO”). (*Id.* ¶¶ 13, 17.)

4 On June 23, 2017, both parties filed various motions. Relevant to the purposes of the  
5 instant matter is Plaintiff’s motion to exclude Defendants’ expert Clarke B. Nelson. (Doc.  
6 No. 91.) On September 12, 2017, the Court granted Plaintiff’s motion to exclude. (Doc.  
7 No. 252.) On October 11, 2017, Defendants filed the present matter, their ex parte motion  
8 for reconsideration. (Doc. No. 277.) This Order follows.

### 9 **LEGAL STANDARD**

10 A motion to alter judgment is brought under Federal Rule of Civil Procedure 59(e).  
11 *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983). An amendment  
12 to a judgment is appropriate under Fed. R. Civ. P. 59(e) if: “(1) the district court is  
13 presented with newly discovered evidence, (2) the district court committed clear error or  
14 made an initial decision that was manifestly unjust, or (3) there is an intervening change in  
15 controlling law.” *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) (citing  
16 *School Dist. No. 1J, Multnomah Cty., v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).  
17 The Ninth Circuit has recognized that in the interests of finality and conservation of judicial  
18 resources, Rule 59(e) is an “extraordinary remedy to be used sparingly.” *Kona Enter., Inc.*  
19 *v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

### 20 **DISCUSSION**

#### 21 **A. Procedural Issues**

22 As a threshold matter, the Court first notes that Defendants failed to follow the local  
23 rules. Per the local rules, any application for reconsideration must be filed with a “certified  
24 statement of an attorney setting forth . . . (1) when and to what judge the application was  
25 made, (2) what ruling or decision or order was made thereon, and (3) what new or different  
26 facts and circumstances are claimed to exist which did not exist, or were not shown, upon  
27 such prior application.” CivLR 7.1.i.1.

28 Next, the Court highlights that the present motion represents Defendants’ second

1 attempt at filing their ex parte application. Defendants filed their initial ex parte motion on  
2 October 9, 2017, a day before the twenty-eight day deadline to file motions for  
3 reconsideration was to expire. (Doc. No. 270 (*See* Fed. R. Civ. P. 59(e)). However,  
4 Defendants’ failure to follow Judge Battaglia’s Civil Case Procedures resulted in this initial  
5 ex parte motion being struck from the docket. Defendants then filed their amended ex parte  
6 motion on October 11, 2017. (Doc. No. 277.) Thus, the present motion is untimely, as a  
7 result of Defendants’ own actions. However, the Court declines to deny the motion based  
8 on procedural grounds in light of the Court’s desire to decide matters on the merits.

9 B. Motion for Reconsideration

10 Defendants seek reconsideration of three categories of rebuttal opinions provided by  
11 their expert Mr. Nelson: (1) identification of costs and expenses incurred by Defendants to  
12 generate the \$22.8 million of gross revenue accused of infringement by Plaintiff’s financial  
13 expert, Dr. Patrick Kennedy, and deduction of the same; (2) a rebuttal to Plaintiff’s  
14 financial expert’s opinion of up to \$9.8 million in potential corrective advertising damages;  
15 and (3) various economic data points in rebuttal to Plaintiff’s financial expert’s failure to  
16 provide any meaningful analysis of the potential contribution of the asserted marks to  
17 Defendants’ profits. (Doc. No. 292 at 2–3.) Defendants make clear that they are not seeking  
18 reconsideration of the exclusion of Mr. Nelson’s 5-10% conclusion.<sup>1</sup> (*Id.* at 3.)

19 Plaintiff states in opposition that Defendants’ motion (1) fails to address the proper  
20 legal standard; (2) is attempting to reargue issues already briefed by the parties and ruled  
21 upon by the Court; (3) incorrectly argues that Plaintiff failed to address certain opinions in  
22 its motion to exclude Mr. Nelson; and (4) allowing Mr. Nelson to testify to Defendants’  
23 aforementioned topics would render the gatekeeping function of the Court meaningless.  
24 (*See generally* Doc. No. 293.)

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26 <sup>1</sup> After analyzing over fifteen various qualitative and quantitative considerations in his  
27 expert report, Mr. Nelson concluded that “it [was] his opinion that not more than 5% to  
28 10% of [Defendants’] operating profits could be attributed to the accused marks.” (Doc.  
No. 234-2 at 58.)

1 The Court will take each of Defendants’ reconsideration requests in turn.

2 **i. Identification of Costs and Expenses**

3 Under this first category, Defendants ask the Court to reconsider its order excluding  
4 Mr. Nelson’s cost opinions. (Doc. No. 292 at 4.) Specifically, Defendants seek to have Mr.  
5 Nelson opine as to his financial analysis of Defendants’ accounting records to determine  
6 which of Defendants’ costs should be applied to accused revenues to then calculate their  
7 total profits—as reflected in Schedule 3. (*Id.*) Plaintiff retorts that Mr. Nelson’s cost  
8 opinions fail to engage in any discussion or analysis of any methodology for calculating  
9 deductions from their expert’s \$22,099,489 revenue figure. (Doc. No. 293 at 7.)

10 The Court notes that it was not its intention to exclude the data represented in  
11 Schedule 3. The Court clarifies that it found Schedule 3 inextricably intertwined with the  
12 various considerations the Court finds unsupported and unreliable as discussed *infra* pp.  
13 6–7. However, having reviewed Schedule 3 on its own, the Court finds that the data fits  
14 within the definition of expenses under 17 U.S.C. § 504(b)—“Expenses are all operating  
15 costs] [overhead costs][and] production costs incurred in producing the defendant’s gross  
16 revenue. The defendant has the burden of proving the defendant’s expenses by a  
17 preponderance of evidence.” Accordingly, upon reconsideration, and if authenticated, the  
18 Court would allow a summary of the data from Defendants’ accounting records, (FRE  
19 1006) (presumably Schedule 3), to be offered. Thus, Defendants’ motion is **GRANTED** in  
20 part, and in this regard.

21 On a side note, the Court makes clear that the data within Schedule 3, if otherwise  
22 admissible as matters of fact, is simply monetary amounts associated with advertising,  
23 sales, and costs of goods, etc. (Doc. No. 234-2 at 75–78.) Thus, an expert is not required  
24 to testify to these data points. However, if Defendants wish to call upon Mr. Nelson to  
25 testify to the creation of Schedule 3, he is to only testify to the numbers presented in the  
26 schedule and their source. He is precluded from giving any opinions about or drawn from  
27 the data. Of course, any defense witness with personal knowledge could do the same. From  
28 the data itself, the jury, consistent with Ninth Circuit Model Jury Instruction 15.29, could

1 deduct relevant sums in considering profits.

2 One further note, the Court finds the litigation fees and costs associated with this  
3 data fall outside of “operating, overhead, and production costs incurred in producing the  
4 gross revenue,” (See Model Instruction 15.29), and would need to be redacted from the  
5 data presented.

6 **ii. Corrective Advertising Damages**

7 Next, Defendants ask the Court to reconsider exclusion of Mr. Nelson’s rebuttal  
8 corrective advertising opinions as they are vital to demonstrating how Plaintiff’s expert Dr.  
9 Kennedy’s corrective advertising claim is unsupported. (Doc. No. 292 at 6–7.) Plaintiff  
10 retorts that Mr. Nelson’s corrective advertising claim does nothing more than criticize the  
11 advertising methodology employed by Dr. Kennedy, which Plaintiff’s argue Mr. Nelson is  
12 not qualified to do. (Doc. No. 293 at 8.) Moreover, Plaintiff claims that Mr. Nelson failed  
13 to address Dr. Kennedy’s \$2,832,363 alternative damages figure. (*Id.*)

14 Defendants’ motion for reconsideration as to this factor does not meet any of the  
15 specified criteria for a motion for reconsideration. Rather, the motion addresses the  
16 contention that Mr. Nelson’s rebuttal opinions are “reliable and important considerations  
17 for the trier of fact to properly assess damages and evaluate deficiencies in Dr. Kennedy’s  
18 opinions.” (Doc. No. 292 at 6.) However, the Court disagrees. In contrast, the Court finds  
19 Mr. Nelson’s corrective advertising arguments unreliable and unsupported.

20 First, the Court notes that Mr. Nelson’s report is lacking in any substantive financial  
21 analysis as to how Dr. Kennedy’s corrective advertising figure is erroneous. Instead, Mr.  
22 Nelson states that Dr. Kennedy’s opinion is “speculative and unreliable” and that Dr.  
23 Kennedy’s estimate “appears to be nothing more than a loosely constructed memo  
24 proposing a ‘campaign’ having two key targets.” (Doc. No. 234-2 at 59–60.) Moreover,  
25 the various rebuttal opinions he makes against Dr. Kennedy are so heavily entrenched in  
26 unsupported arguments that the Court is concerned that these opinions would not be  
27 reasonably accurate so as to help the trier of fact make an appropriate determination  
28 regarding corrective advertising. *See In re Silicone Gel Breasts Implants Prods. Liab.*

1 *Litig.*, 318 F. Supp. 2d 879, 893–94 (C.D. Cal. 2004) (holding that a court under Rule 702  
2 must make an inquiry into whether an expert’s opinion would be useful or helpful to the  
3 trier of fact).

4         Second, the Court finds Mr. Nelson unqualified to provide an opinion on the various  
5 conclusions he made within this portion of his report. Mr. Nelson’s opinion jumps from  
6 public confusion, license agreements as related to corrective advertising, the value of the  
7 trademarks in question, to the survey commissioned by Plaintiff. (Doc. No. 234-2 at 60–  
8 62.) As Defendants repeatedly declare in their motion, Mr. Nelson is a certified public  
9 accountant, a member of the American Institute of Certified Public Accountants, is  
10 certified in Financial Forensics, and Accredited in Business Valuation. (Doc. No. 292 at  
11 4.) Taking a closer look at Mr. Nelson’s curriculum vitae reveals that he states that he has  
12 “experience” in intellectual property matters, has assisted intellectual property holders with  
13 “licensing negotiations,” and engaged in various trademark “business disputes.” (Doc. No.  
14 234-2 at 70.) However, the majority of his experience is centered on accounting and his  
15 publications mainly revolve around patent infringement. (*Id.* at 70, 72.) Consequently, the  
16 Court finds that Mr. Nelson goes beyond his expertise and formulates unreliable opinions  
17 regarding trademark law. *See* Fed. R. Civ. P. 702 (holding that a person is qualified to  
18 testify as an expert if he or she has the “knowledge, skill, experience, training, or  
19 education” sufficient to qualify them as an expert on the subject to which their testimony  
20 relates).<sup>2</sup> Thus, the Court **DENIES** Defendants’ motion in this aspect.

21         The Court clarifies that testimony as to the amount of money either party has spent  
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24 <sup>2</sup> Defendants broadly mischaracterize Mr. Nelson’s intellectual property experience.  
25 Defendants’ motion states that Mr. Nelson “is a highly experienced intellectual property  
26 damages expert . . . given his education, training, experience . . . [and] recognition.” (Doc.  
27 No. 292 at 9.) However, experience in intellectual property damages does not render Mr.  
28 Nelson an expert on trademark law in general. Moreover, Mr. Nelson’s education and  
training, as reflected in his resume, are centered in accounting, financial forensics, and  
business valuation. (Doc. No. 234-2 at 70.) Mr. Nelson does not hold a degree or  
certification in intellectual property, nor does he have any legal training in trademark law.

1 on advertising or corrective advertising are simply data points that can be testified to by a  
2 fact witness with appropriate personal knowledge. However, the various opinions detailed  
3 above are improper and are thus appropriately excluded.

4 **iii. Contribution Rates**

5 Under this final category, Defendants seek reconsideration of Mr. Nelson’s  
6 contribution opinions, “which represent the types of information considered and analyses  
7 commonly applied by other courts to assess the contribution of the asserted trademarks to  
8 Defendants’ profits.” (Doc. No. 292 at 9.) Specifically, Defendants point to various license  
9 and proposed license agreements for the asserted trademarks. (*Id.*) Plaintiff argues that  
10 reconsideration as to this factor is not warranted as these various considerations, detailed  
11 in around fifty-seven pages, are not tied to a particular methodology or reliable damages  
12 opinion. (Doc. No. 293 at 9.)

13 First, the Court disagrees with Defendants’ assertion that the Court offered no  
14 criticism of any of the specific economic data points discussed by Mr. Nelson—geographic  
15 characteristics of the parties’ customers, revenue by various geographies, the parties  
16 advertising and promotional expenditures, national attendance figures, and competition  
17 between the parties. (Doc. No. 292 at 10.) The Court’s previous order clearly stated that  
18 the various considerations presented by Mr. Nelson were produced for the Court without  
19 any background as to why “Mr. Nelson chose to focus on the considerations he did” nor  
20 “why the factors he chose were important.” (Doc. No. 263 at 15.)

21 Next, Defendants have not set forth any basis that warrants reconsideration. Rather,  
22 in their motion to reconsider, Defendants appear to be re-litigating issues the Court  
23 considered when ruling on Plaintiff’s motion to exclude. (*See generally* Doc. No. 263.)  
24 This is improper. *See, e.g., Costello v. U.S. Gov’t*, 765 F. Supp. 1003, 1009 (C.D. Cal.  
25 1991) (holding that in general, “courts avoid considering Rule 59(e) motions where the  
26 grounds for amendment are restricted to either repetitive contentions of matters which were  
27 before the court on its prior consideration or contentions which might have been raised  
28 prior to the challenged judgment.”); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*,

1 99 F.R.D. 99, 101 (E.D.Va. 1983) (holding that “Plaintiff improperly used the motion to  
2 reconsider to ask the Court to rethink what the Court had already thought through—rightly  
3 or wrongly.”).

4 The Court reiterates that it finds that Mr. Nelson’s various contribution opinions are  
5 essentially pure argument without any methodology to support his conclusions. *See Diviero*  
6 *v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) (holding that expert  
7 testimony is “unreliable and inadmissible” when an expert fails to “satisfactorily [] explain  
8 the reasoning behind his opinions,” rendering his opinions “unsubstantiated and  
9 subjective”). Moreover, the Court is puzzled as to how these considerations are relevant as  
10 they are directly connected to Mr. Nelson’s 5-10% conclusion. (*See* Doc. No. 234-2 at 58  
11 (“Based on the above qualitative and quantitative considerations . . . it is my opinion that  
12 not more than 5% to 10% of [Defendants’] operating profits could be attributed to the  
13 accused marks.”)). Defendants assert that the various contribution opinions will help the  
14 trier of fact assess the contribution of the trademarks to Defendants’ profits. (Doc. No. 292  
15 at 9.) In direct opposition, the Court finds that these various qualitative and quantitative  
16 considerations would be wholly unconstructive and impractical as the trier of fact would  
17 be left with a smattering of opinions without any direction as to how much each  
18 consideration weighed in its analysis or how to put these considerations together to come  
19 to a percentage.

20 Based on the foregoing, Defendants’ motion as to this factor is **DENIED**.

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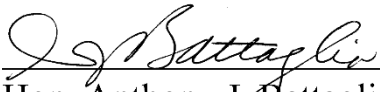


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2 **CONCLUSION**

3 As explained more thoroughly above, the Court **GRANTS IN PART AND**  
4 **DENIES IN PART** Defendants' ex parte motion for reconsideration. *See Navajo Nation*  
5 *v. Confederated Tribes and Bands of the Yakama Indian Nation*, 331 F.3d 1041, (9th Cir.  
6 2003) ("Whether or not to grant reconsideration is committed to the sound discretion of the  
7 court.").

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9 **IT IS SO ORDERED.**

10 Dated: October 27, 2017

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12 Hon. Anthony J. Battaglia  
13 United States District Judge  
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