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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, BRYAN  
18 BRANDENBURG, an individual,

19 Defendants.

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

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR ATTORNEYS' FEES  
AND COSTS PURSUANT TO 15  
U.S.C. § 1117(a)**

(Doc. No. 425)

20 Pursuant to 15 U.S.C. § 1117(a), a court may in “exceptional cases” award  
21 reasonable attorneys’ fees and costs to the prevailing party in a trademark infringement  
22 lawsuit. Plaintiff San Diego Comic Convention (“SDCC”) moves this Court to find that  
23 the instant case is “exceptional.” (Doc. No. 425.) Defendants Dan Farr Productions, Daniel  
24 Farr, and Bryan Brandenburg (collectively referred to as “DFP”) oppose SDCC’s request.  
25 (Doc. No. 512.) On May 31, 2018, the Court held a hearing on the motion and then  
26 submitted the matter. (Doc. No. 504.) Finding that this case is in fact “exceptional,” the  
27 Court awards SDCC reasonable attorneys’ fees and costs subject to certain deductions.  
28

1 Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** SDCC’s motion.  
2 (Doc. No. 425.)

3 **BACKGROUND**

4 The Court is already well-versed as to the events leading up to the institution of this  
5 action. Thus, for the purposes of this Order, the Court will only provide a narrow review  
6 of this lawsuit’s factual and procedural background.

7 On August 7, 2014, SDCC filed a lawsuit against DFP alleging two causes of action:  
8 (1) Federal Trademark Infringement, 15 U.S.C. § 1114; and (2) False Designation of  
9 Origin, 15 U.S.C. § 1125(a). (*See generally* Doc. No. 1.) SDCC is a non-profit corporation,  
10 formed in 1975, that is dedicated to the awareness and appreciation of comics and related  
11 popular art forms. (Doc. No. 1 ¶ 10.) Every year since 1970, SDCC has produced and held  
12 its convention known as the “Comic-Con convention” in San Diego, California. (*Id.* ¶ 11;  
13 Doc. No. 97 at 9.)<sup>1</sup> The convention spans several days in length and showcases several  
14 hundred events, workshops, educational and academic programs, games, award shows,  
15 costume contests, as well as hosts panels of special guests that include science fiction and  
16 fantasy authors, film and television actors, directors, producers, and writers. (Doc. No. 1 ¶  
17 12; Doc. No. 97 at 9.) In 2016, attendance to San Diego Comic-Con exceeded over 135,000  
18 attendees. (Doc. No. 97 at 9.)

19 SDCC’s family of trademarks at issue in this case are:

- 20 1. Comic-Con;
  - 21 2. Comic Con International;
  - 22 3. Anaheim Comic-Con; and
- 23  
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27 <sup>1</sup> Page numbers refer to the CM/ECF number and not the number listed on the original  
28 document.



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4 4.

5 (Doc. No. 1 ¶ 13; Doc. No. 244 at 11.) Each of these registered trademarks is incontestable.  
6 (Doc. No. 381 at 25:15–25.) Additionally, SDCC states that it has used these marks  
7 extensively and continuously in interstate commerce and thus the marks have become  
8 valuable assets as well as symbols of its goodwill and positive industry reputation. (Doc.  
9 No. 1 ¶ 15.)

10 In early 2013, Defendant Dan Farr Productions, a limited liability company, began  
11 to advertise and promote its own popular arts convention named “Salt Lake Comic Con”  
12 (“SLCC”). (Doc. No. 234-2 at 7; Herrera Decl. Ex. 5 (“Farr Depo.” 11:4–9, Doc. No. 95-  
13 7).) Similar to SDCC’s convention, SLCC is a three-day fan event featuring the best in  
14 movies, television shows, gaming, sci-fi, fantasy, and comic books. (Doc. No. 244 at 12.)  
15 Since 2013, SLCC has been held every year and in the beginning of 2014, Dan Farr  
16 Productions created its Salt Lake Comic Con FanXperience event, which has also been  
17 held every year since its inception. (Farr Depo. at 11:10–15; Doc. No. 97 at 11.)

18 Thus, the marrow of this case is whether DFP’s comic arts and popular fiction  
19 event named “Salt Lake Comic Con” infringed on SDCC’s three incontestable trademarks.<sup>2</sup>  
20 On December 8, 2017, after an eight-day jury trial, the jury found that DFP had indeed  
21 infringed on SDCC’s family of trademarks. (Doc. No. 395 at 2–5.) As to unfair competition  
22 and false designation of origin however, the jury found in favor of DFP. (*Id.* at 6.) In total,  
23 the jury awarded corrective advertising damages to SDCC in the amount of \$20,000.00.  
24 (*Id.* at 8.)

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28 <sup>2</sup> The Court notes that after the trial, DFP changed the name of their event to “FanX Salt Lake Comic Convention.” (Doc. No. 513 at 7–8.)

1 Post-trial, SDCC filed three motions: (1) its motion for permanent injunction, (Doc.  
2 No. 419); (2) the instant motion, its motion for attorneys’ fees and costs, (Doc. No. 425);  
3 and (3) its motion for judgment as a matter of law or in the alternative motion for new trial,  
4 (Doc. No. 433). Thereafter, on August 8, 2018, the Court ordered SDCC to file a  
5 supplemental brief breaking down the total amount of fees it requested. (Doc. No. 523.)  
6 DFP then asked for the opportunity to respond to SDCC’s supplemental brief. (Doc. No.  
7 531.) The Court granted this request, and DFP’s response was filed on August 22, 2018.  
8 (*Id.*; Doc. No. 532.)

## 9 DISCUSSION

### 10 A. This Case is Exceptional Pursuant to 15 U.S.C. § 1117(a)

11 SDCC’s motion provides an exhaustive and detailed account of the actions it  
12 believes makes this case exceptional. (*See generally* Doc. No. 425-1.) In opposition, DFP  
13 asserts that SDCC’s motion is based on distortions, is unpersuasive, and relies on critiques  
14 that are hyperbolic and hypocritical. (*See generally* Doc. No. 512.)

15 The Lanham Act permits an award of reasonable attorneys’ fees to the prevailing  
16 party in “exceptional cases.” 15 U.S.C. § 1117(a). Originally, “[w]hile the term  
17 ‘exceptional’ [was] not defined in the statute, generally a trademark case [was] exceptional  
18 for purposes of an award of attorneys’ fees when the infringement [was] malicious,  
19 fraudulent, deliberate or willful.” *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400,  
20 1409 (9th Cir. 1993).

21 In 2016, the Ninth Circuit in *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.*, 839  
22 F.3d 1179 (9th Cir. 2016), relied on the Supreme Court’s decision in *Octane Fitness, LLC*  
23 *v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014), to abrogate *Lindy Pen Co.*  
24 and modify the standard definition of “exceptional” in attorney fee recovery Lanham Act  
25 cases. *SunEarth, Inc.*, 839 F.3d at 1180. Ultimately, the Ninth Circuit held that “district  
26 courts analyzing a request for fees under the Lanham Act should examine the ‘totality of  
27 the circumstances’ to determine if the case [is] exceptional, exercising equitable discretion  
28

1 in light of the nonexclusive factors identified in *Octane Fitness* and *Fogerty*, and using a  
2 preponderance of the evidence standard.” *Id.* at 1181 (internal citation omitted).

3 The Ninth Circuit also defined an exceptional case as one that simply “stands out  
4 from others with respect to the substantive strength of a party’s litigating position  
5 (considering both the governing law and the facts of the case) or the unreasonable manner  
6 in which the case was litigated.” *Id.* at 1180 (citation omitted). The nonexclusive factors in  
7 determining if a case is “exceptional” include: “frivolousness, motivation, objective  
8 unreasonableness (both in the factual and legal components of the case) and the need in  
9 particular circumstances to advance considerations of compensation and deterrence.” *Id.* at  
10 1181 (citation omitted).<sup>3</sup> Additionally, despite the Ninth Circuit’s decision to alter the  
11 definition of “exceptional,” the Federal Circuit held that *Octane Fitness* “gave no  
12 indication that [the Federal Circuit] should rethink [its] litigation misconduct line of § 285  
13 cases” and stated that “district courts can turn to [] pre-*Octane Fitness* case law for  
14 guidance” regarding such arguments. *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1349  
15 (Fed. Cir. 2015).

16 In sum, litigation brought in bad faith or with objectively baseless claims may be  
17 considered exceptional, as may litigation demonstrating inequitable conduct or willful  
18 infringement. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 525 n.12 (1994); *see also Octane*  
19 *Fitness*, 134 S. Ct. at 1757 (“[A] case presenting either subjective bad faith or exceptionally  
20 meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee  
21 award.”). Similarly, courts “have awarded attorneys’ fees . . . where a party advances  
22 arguments that are particularly weak and lack support in the record or seek only to re-  
23 litigate issues the court has already decided.” *Intex Recreation Corp. v. Team Worldwide*  
24 *Corp.*, 77 F. Supp. 3d 212, 217 (D.C. Cir. 2015). Thus, the determination of “exceptional”  
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27 <sup>3</sup> “*Octane Fitness* lowered the bar for an exceptional case finding[.]” *Veracode, Inc. v.*  
28 *Appthority, Inc.*, 137 F. Supp. 3d 17, 102 (D. Mass. 2015).

1 falls squarely within the discretion of the trial court. *Highmark Inc. v. Allcare Health Mgmt.*  
2 *Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014).

3 Here, the jury found that DFP infringed on all three of SDCC’s trademarks, yet also  
4 found that DFP did not willfully infringe the marks. (*See generally* Doc. No. 395.) Thus,  
5 under the original definition of “exceptional,” SDCC’s request for attorneys’ fees would  
6 have been difficult to advance successfully. *See Gracie v. Gracie*, 217 F.3d 1060, 1068  
7 (9th Cir. 2000) (“Here the jury explicitly found that [the defendant] engaged in ‘willful’  
8 infringement . . . The district court’s decision to make a fee award to [the plaintiff] thus  
9 flows quite naturally from the jury’s finding of willful infringement . . .”). However, after  
10 *SunEarth*, examining the totality of the circumstances, the Court finds that this case is not  
11 a dime a dozen. Instead, it is a trademark infringement lawsuit that stands out from others  
12 based on the unreasonable manner it was litigated and thus an award of attorneys’ fees and  
13 costs to SDCC is justified.

14 ***i. SDCC is the Prevailing Party***

15 As an initial matter, the Court addresses DFP’s assertion that the “split verdict” in  
16 this case illustrates that there is no clear winner. (Doc. No. 512 at 8–9.) Accordingly, as  
17 the Lanham Act only authorizes an award of fees “to the prevailing party,” DFP contends  
18 that SDCC’s motion is flawed. (*Id.*) DFP’s argument is both unpersuasive and legally  
19 unsound.

20 Had DFP researched this issue thoroughly, DFP would have discovered that the jury  
21 verdict in favor of SDCC for trademark infringement renders SDCC the prevailing party.  
22 *See Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992) (illustrating that a party prevails “when  
23 actual relief on the merits of [the plaintiff’s] claim materially alters the legal relationship  
24 between the parties by modifying the defendant’s behavior in a way that directly benefits  
25 the plaintiff.”); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding that a  
26 prevailing party is one that “succeed[s] on any significant issue in litigation which achieves  
27 some of the benefit the parties sought in bringing suit.”) (citation omitted); *Orantes-*  
28 *Hernandez v. Holder*, 713 F. Supp. 2d 929, 942 (C.D. Cal. 2010) (“A plaintiff is deemed

1 the ‘prevailing party’ if, as a result of a judgment or consent decree entered in the legal  
2 action he or she brought, there is a ‘material alteration of the legal relationship of the  
3 parties.’”) (citation omitted). Based on the foregoing, in the instant matter, SDCC is the  
4 prevailing party for § 1117(a) purposes.

5 Next, the Court identifies the various circumstances of this case that warrant an  
6 award of attorneys’ fees and costs under § 1117(a).

7 *ii. DFP’s Failure to Comply with Court Rules*

8 The Court highlights three incidents that occurred prior to trial. First, in  
9 contravention to this Court’s Local Rules, DFP filed two summary judgment motions that  
10 totaled over forty pages in length. (Doc. Nos. 216, 218, 244, 245.) The local rules clearly  
11 explicate that when filing a motion, all the arguments should be contained in one brief, not  
12 exceeding a total of twenty-five (25) pages. CivLR 7.1.h.

13 DFP advances two arguments to explain their actions, both of which are nonsensical  
14 and only further support this Order’s final conclusion. DFP asserts that they had leave to  
15 make their filings because the Clerk gave out a single hearing date for all dispositive  
16 motions and that SDCC also broke the rules as it filed both a motion for summary judgment  
17 and a motion to exclude on the same day, which totaled over forty-three pages. (Doc. No.  
18 512 at 20–21.) DFP’s reasoning is disconcerting. Logically, all arguments relating to a  
19 specific motion need to be contained in a single motion. Under DFP’s theory of motion  
20 practice, a party could file a separate brief for every cause of action it sought to dismiss  
21 under Federal Rule of Civil Procedure 12(b)(6), thereby violating the page limits set by  
22 this Court. This is erroneous. Thus, in contrast to DFP’s belief that SDCC broke the rules,  
23 it did not.

24 The Court also highlights that DFP did not file a timely Daubert challenge to  
25 SDCC’s expert Patrick Kennedy. The Court then denied DFP’s motion to file a late  
26 challenge, however despite this, DFP utilized a motion in limine to revisit the issue. (Doc.  
27 Nos. 321, 345, 340; Transcript of Motion in Limine Hearing at 169:14–16, November 14,  
28 2017.) In the same vein, after DFP lost a Daubert challenge to SDCC’s expert Mr. Ezell,

1 (Doc. No. 263 at 10), DFP attempted to re-introduce their argument that Mr. Ezell and his  
2 Teflon Survey were irrelevant both during motion in limine, (Doc. No. 314-1 at 7), and in  
3 their motion for judgment as a matter of law, (Doc. No. 429-1 at 14).

4 Finally, the most prominent example of DFP's disregard for this Court's rules and  
5 procedures occurred on June 23, 2017, when DFP filed a motion for leave to amend their  
6 pleading that expressly referenced testimony that had been designated "Confidential—  
7 Attorneys' Eyes Only" by SDCC and the Protective Order in this case. (Doc. No. 129-1 at  
8 3.) In spite of the highly confidential information contained in the document, Defendant  
9 Bryan Brandenburg also disseminated the information on the Internet through his social  
10 media accounts and SLCC's Twitter Page. (*Id.*)

11 In sum, DFP's indifference to this Court's rulings and the Local Rules are actions  
12 that should be deterred by compensation furnished to SDCC.

13 ***iii. DFP's Unreasonable Manner of Litigation***

14 **a. DFP's Persistent Desire to Re-Litigate Issues Already Decided**

15 At every opportunity, DFP has repeated, re-argued, and recycled arguments already  
16 briefed by both parties and analyzed and ruled on by the Court. This type of wasteful  
17 litigation tactic forced SDCC to expend extra, unnecessary legal fees and drove this Court  
18 to squander already limited judicial resources.

19 The Court first focuses on DFP's naked licensing defense. This defense was first  
20 produced at summary judgment. (Doc. No. 263-1 at 20–25.) However, finding insufficient  
21 evidence to support the theory, the Court denied DFP's motion on the matter. (Doc. No.  
22 263 at 26–29.) Thereafter, during the pre-trial conference, after the Court expressed its  
23 concern that there was not enough evidence to bring this defense to trial, DFP offered to  
24 prepare a formal proffer document on the issue and submit that in advance of the motion  
25 in limine hearing. (Doc. No. 265 at 9:11–11:19.)

26 DFP's formal proffer document provided the Court relatively the same evidence  
27 supplied at summary judgment. (Doc. Nos. 315, 344.) Accordingly, still finding the  
28 evidence inadequate, the Court denied the motion. (Doc. No. 340.) Post-trial, DFP's motion



1 for new trial inexplicably argues that they are “entitled to a proper adjudication of its naked  
2 licensing defense.” (Doc. No. 436-1 at 7.) Thus, in total, DFP has attempted to re-argue  
3 this defense three times, blatantly ignoring the record and this Court’s previous rulings.

4 DFP’s repetitive motion practice also manifested itself in their “generic ab initio”  
5 defense. Initially, when this theory was first presented to the Court during summary  
6 judgment, DFP argued that this case “is not a genericide case.” (Doc. No. 244 at 23.)  
7 Instead, DFP argued that “Comic-Con” was generic “before it was applied as a trademark  
8 to the products in question.” (*Id.* at 24 (citing *Horizon Mills Corp. v. QVC, Inc.*, 161 F.  
9 Supp. 2d 208, 220 n.16 (S.D.N.Y. 2001)).)

10 After carefully considering the evidence outlined by DFP, the Court denied DFP’s  
11 summary judgment motion arguing that SDCC’s trademarks are generic ab initio. (Doc. No.  
12 263 at 18.) Notwithstanding this fact, DFP brought a motion in limine “regarding  
13 genericness evidence.” (Doc. No. 314-1.) Finding the in limine motion improper, the Court  
14 stated during the hearing:

15 **The Court:** Well, it could be that I ruled out generic ab initio, already. And  
16 re-arguing it again is questionable to whether it’s in conformity to what  
17 motion in limine is about.

18 . . .

19 This is a motion in limine. We’re talking about a time line and you’ve tried to  
20 reargue the summary judgment.

21 (Doc. No. 425-7 at 4:21–10:12.) This motion was then denied. (Doc. No. 340.)

22 In spite of the summary judgment order and the in limine ruling, DFP’s motion for  
23 new trial devotes several pages to arguing that they should have been “allowed to show  
24 *Genericness Ab Initio.*” (Doc. No. 436-1 at 17–27.) DFP supported this argument with  
25 more or less the same evidence produced at summary judgment. Altogether, “Generic ab  
26 initio” has been discussed, analyzed, and denied by this Court three times.<sup>4</sup>

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27 <sup>4</sup> Generic ab initio was not only repeatedly discussed, but it is also a defense that DFP  
28 strategically used and then disposed of depending on the evidence they sought to exclude.

1           Though not referenced by SDCC, DFP’s use of the Oxford Dictionary definition of  
2 “Con” is another blatant example of DFP’s “head in the sand” litigation strategies that has  
3 resulted in this Court repeatedly re-analyzing the same arguments. At summary judgment,  
4 to support their “generic ab intio” theory of defense, DFP argued that one may look to the  
5 individual parts of a mark. (Doc. No. 244 at 16, 19.) DFP then referenced the Oxford  
6 Dictionary definition of “con.” (*Id.*) In its order denying DFP’s summary judgment motion  
7 on “generic ab intio,” the Court clearly explained that courts have not only held that  
8 dictionary definitions are weak evidence of genericness, but that courts have routinely  
9 rejected the breaking down of phrases into their individual and often generic parts. (Doc.  
10 No. 263 at 17.)

11           Astonishingly, ignoring the case law provided to them, DFP’s motion for new trial  
12 again points to the same Oxford dictionary definition. (Doc. No. 436-1 at 25.) As a result,  
13 this argument has been recycled by DFP twice in complete disregard of this Court’s  
14 previous rulings and Ninth Circuit precedent. *See Advertise.com, Inc. v. AOL Advertising,*  
15 *Inc.*, 616 F.3d 974, 978 (9th Cir. 2010) (concluding that in determining similarity of marks  
16 “we look to the mark as a whole and that the combination of generic terms may, in some  
17 instances, result in a distinctive mark.”).

18           DFP also repeatedly sought to compel this Court to revisit their fraud defense. First,  
19 DFP unsuccessfully requested leave to add fraud as an affirmative defense. (Doc. No. 202  
20 at 6–10.) Thereafter, at the pretrial conference, DFP again referenced this defense. (Doc.  
21 No. 265 at 12:8–20.) DFP then filed a motion in limine to be able to put forward evidence  
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24 The Court notes that at the outset DFP plainly asserted that this was not a genericide case.  
25 (Doc. No. 244 at 23.) DFP’s summary judgment motion then asserted that as SDCC’s  
26 trademarks were “generic ab initio,” SDCC’s Teflon survey was irrelevant. (*Id.* at 23–24.)  
27 In contrast to the above, DFP’s expert Jeffrey Kaplan stated in his report that he was hired  
28 to “offer linguistic evidence supporting [his] opinion that the expression ‘comic con’ was  
generic at the time the above-captioned law suit was filed, and is currently generic[.]” (Doc.  
No. 91-2 at 3 (emphasis added).) This discrepancy was noted by the Court in its summary  
judgment order. (Doc. No. 263 at 12.)

1 of SDCC’s alleged fraud on the USPTO to the jury. (Doc. No. 319.) The Court ultimately  
2 denied the motion after reminding DFP that it had already gotten rid of the fraud claim.  
3 (Transcript of Motion in Limine hearing at 141:20–22, November 14, 2017.) In sum, fraud  
4 was re-argued two times.

5 Ultimately, resembling a broken record, DFP has repetitively restated and rehashed  
6 several contentions that they were unable to advance successfully prior to trial. This type  
7 of cyclical motion practice is objectively unreasonable and has justified attorneys’ fees  
8 under the Lanham Act. *See Parks, LLC v. Tyson Foods, Inc.*, No. 5:15-cv-00946, 2017 WL  
9 3534993, at \*1 (E.D. Pa. Aug. 17, 2017) (holding that the hallmark of a case that has been  
10 litigated in an unreasonable manner is one that involves “wasteful procedural maneuvers  
11 or dilatory tactics”) (citation and internal quotation marks omitted); *see also Cognex Corp.*  
12 *v. Microscan Sys., Inc.*, No. 13- CV-2027 JSR, 2014 WL 2989975, at \*4 (S.D.N.Y. June  
13 30, 2014) (criticizing the plaintiff for post-trial motions that simply sought to relitigate  
14 issues decided during trial and awarding fees at least as to those motions); *Precision Links*  
15 *Inc. v. USA Prods. Grp., Inc.*, No. 3:08-cv-00576-MR, 2014 WL 2861759, at \*3 (W.D.N.C.  
16 June 24, 2014) (criticizing the plaintiff for seeking a preliminary injunction based in large  
17 part on a previously rejected theory of liability and for filing frivolous post dismissal  
18 motions).

#### 19 b. DFP’s Objectively Unreasonable Legal Arguments

20 DFP’s efforts to formulate legal arguments based on factually and legally irrelevant  
21 case law also help bolster this Court’s conclusion that the instant matter is not a middle-of  
22 the-road trademark case. The Court notes that at certain points, DFP’s zealous advocacy  
23 has turned into gamesmanship.

24 To begin with, the Court focuses on DFP’s motion to amend their pleading. DFP  
25 sought to amend so that they could allege that SDCC committed fraud on the USPTO. (*See*  
26 *generally* Doc. No. 204-1.) However, DFP’s motion failed to cite to the correct legal  
27 standard to support such a claim. Instead, DFP pointed the Court to a list of inapplicable  
28 patent cases. (*Id.* at 5.)

1 Further, DFP requested amendment so as to add a defense of inequitable conduct.  
2 (*Id.* at 16.) However, as the Court pointed out in its order, inequitable conduct is a defense  
3 raised in patent infringement cases. (Doc. No. 202 at 11 (*see Mag Instrument, Inc. v. JS*  
4 *Prods., Inc.*, 595 F. Supp. 2d 1102, 1109 (C.D. Cal. 2008) (holding that inequitable conduct  
5 consists of several elements including “the failure to disclose known material information  
6 during the prosecution of a patent, coupled with the intent to deceive the PTO.”).)

7 DFP’s motion in limine proffering evidence of a naked license is yet another  
8 example of DFP’s faulty, hodgepodge legal reasoning. (Doc. No. 344.) DFP states:

9 Second, “where circumstances or the previous course of dealing between the  
10 parties places the offeree under a duty to act or be bound, his silence or  
11 inactivity will constitute his assent”: SDCC’s silence, on the heels of its  
12 “threatened immediate or vigorous enforcement,” was “intentionally  
13 misleading”—and gave SDCC “a duty to speak,” especially when coupled  
14 with Reed’s communicated reliance on its remedial measures’ sufficiency and  
15 years of friendly intercourse. Third, “implied license may arise by ...  
16 acquiescence”; “permission or lack of objection is ... equivalent to ...  
17 license [REDACTED]”

18 (*Id.* at 6 (internal footnotes omitted).) The Court illustrates that in total, DFP selectively  
19 chose and blended together specific phrases from five different cases. Specifically, DFP  
20 quotes from: *Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal. App. 2d 650, 655 (1960);  
21 *Hottel Corp. v. Seaman Corp.*, 833 F.2d 1570, 1574 (Fed. Cir. 1987); *Scholle Corp. v.*  
22 *Blackhawk Molding Co.*, 133 F.3d 1469, 1472 (Fed. Cir. 1998); *I.A.E., Inc. v. Shaver*, 74  
23 F.3d 768, 775 (7th Cir. 1996); and *Winbond Elec. Corp. v. ITC*, 262 F.3d 1363, 1374 (Fed.  
24 Cir. 2001). (*Id.*) However, DFP’s reliance on the foregoing cases is misplaced—both *Hottel*  
25 *Corp.* and *Scholle Corp.*, analyze equitable estoppel defenses in the patent infringement  
26 context, 833 F.2d at 1574; 133 F.3d at 1472, *Shaver*, examined how a copyright owner  
27 could transfer to another person any exclusive rights an owner has in a copyright, 74 F.3d  
28 at 774–75, and *Winbond* examined an implied license/waiver in a patent infringement case,  
262 F.3d 1374.

1 A final example of DFP’s groundless legal reasoning comes from their opposition  
2 brief to SDCC’s instant motion. DFP’s brief cites to *Kellogg Co.*, to demonstrate that Mr.  
3 Brandenburg did not admit that Comic Con is a brand. (Doc. No. 512 at 10–11.) Instead,  
4 DFP claims that what Mr. Brandenburg meant when he said “brand” was the “goodwill”  
5 of SDCC’s events, not that he meant “brand” in a legal trademark sense. (*Id.* at 11.) The  
6 portion of *Kellogg* DFP employs is:

7 Kellogg Company is undoubtedly sharing in the goodwill of the article known  
8 as “Shredded Wheat”; and thus is sharing in a market which was created by  
9 the skill and judgment of plaintiff’s predecessor and has been widely extended  
10 by vast expenditures in advertising persistently made. But that is not unfair.  
11 Sharing in the goodwill of an article unprotected by patent or trade-mark is  
the exercise of a right possessed by all—and in the free exercise of which the  
consuming public is deeply interested.

12 *Id.* (citing *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 122 (1938)).

13 It is plainly clear to the Court and should be evidently unmistakable to DFP that  
14 *Kellogg* is factually immaterial. In *Kellogg*, the plaintiff did not have an exclusive right to  
15 the use of the term “Shredded Wheat” as a trade name as it was determined that the term  
16 was generic of the article it described. *Id.* at 116 (emphasis added). In fact, “Shredded  
17 Wheat” was never used as a trademark. *Id.* at 117. Additionally, the patent for the product  
18 and the process of making the item was “dedicated to the public” as the patent had expired  
19 on October 15, 1912. *Id.* The present matter involves three incontestable trademarks—  
20 trademarks DFP knew were registered with the USPTO—and there is no patent in play.<sup>5</sup>  
21 (Doc. No. 394 at 21.)

22 The above-mentioned examples are simply a small collection of DFP’s unreasonable  
23 manner of litigation and do not encompass every instance they misrepresented a case for  
24 their own benefit. This type of frivolous motion practice should be deterred. *See Monolithic*  
25

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26 <sup>5</sup> The Court notes that *Kellogg* is also a recycled argument, having already determined its  
27 inapplicability during motion in limine. (*See generally* Doc. No. 314; Transcript of Motion  
28 in Limine Hearing at 29:5–19, November 14, 2017.)

1 *Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 726 F.3d 1359, 1366 (Fed. Cir. 2013) (“[L]itigation  
2 misconduct and unprofessional behavior may suffice, by themselves, to make a case  
3 exceptional . . .”).

4 Beyond gamesmanship, there has been inappropriate citation to as well as  
5 incomplete or inaccurate references to purported case authority throughout this litigation  
6 by DFP. In each order on every post-trial matter, DFP has been called out in this regard.

7 c. DFP’s Objectively Unreasonable Responses to this Litigation

8 More convincing evidence of this case’s exceptional nature materializes itself in  
9 DFP’s unreasonable responses to this litigation. DFP admits to receiving SDCC’s cease  
10 and desist letter. (Doc. No. 383 at 92:9–20; Tr. Ex. 127.) However, instead of consulting  
11 an attorney or trying to reach out to SDCC’s legal team, DFP continued to use “Comic  
12 Con” in their event name. (*Id.* at 92:13–23.) Moreover, within a week of receiving the cease  
13 and desist letter and with full knowledge of SDCC’s trademark registrations, DFP sought  
14 and successfully registered their Salt Lake Comic Con mark with the USPTO. (Doc. No.  
15 304-1 at 2.) The Court finds DFP’s foregoing reactions to be both factually and legally  
16 unreasonable.

17 DFP asserts that since the jury sided with them on willfulness, the Court may not  
18 reach a different result by applying the same stipulated definition of willfulness to the same  
19 body of evidence and return a different result. (Doc. No. 512 at 13.) DFP then asserts that  
20 willfulness in the trademark infringement context is the same as “motivation” under §  
21 1117(a). (*Id.* at 12–13.) The Court disagrees.

22 First, DFP’s assertion that the definition of “willfulness” mirrors “motivation” is  
23 completely unsupported. This is simply a legal theory conjured up by DFP. Second, a  
24 finding of exceptionality pursuant to § 1117(a) includes examining the totality of the  
25 circumstances, which includes factors such as objective unreasonableness, frivolousness,  
26 compensation, deterrence, and motivation. *SunEarth, Inc.*, 839 F.3d at 1181. Thus, the  
27 Court is not altering the jury’s willfulness verdict as DFP suggests. Instead, the Court is  
28

1 reviewing the circumstances of this case under the lens of § 1117(a), a review process that  
2 is distinct from a willfulness analysis.

3 Accordingly, the Court finds DFP’s various reactions listed above objectively  
4 unreasonable pursuant to § 1117(a). *See Decus, Inc. v. Heenan*, No. 16-5849, 2018 WL  
5 1082842, at \*3 (E.D. Pa. Feb. 27, 2018) (“Cases finding exceptionality based on litigation  
6 in an ‘unreasonable manner’ include a defendant’s continued trademark infringement after  
7 it knew, through the [USPTO] and plaintiff’s cease and desist letters, its mark ‘was  
8 confusingly similar’ to plaintiff’s mark[.]”); *see also Mountz, Inc. v. Northeast Indus.*  
9 *Bolting and Torque, LLC*, No. 15-cv-04538-JD (MEJ), 2017 WL 780585, at \*2 (N.D. Cal.  
10 Jan. 27, 2017) (“Defendant’s response to the litigation, including the threats to Plaintiff’s  
11 business, the attempt to register the offending mark with the PTO, and the failure to respond  
12 to the Complaint, was objectively unreasonable.”).

13 d. Objectively Unreasonable Litigation Conduct

14 An additional component to the Court’s analysis is DFP’s misconduct during trial.  
15 SDCC places a great emphasis on this conduct, (Doc. No. 425-1 at 22–26), while DFP’s  
16 opposition brief focuses the Court’s attention on SDCC’s misconduct during trial, (Doc.  
17 No. 512 at 27–30). The Court finds SDCC’s assertions more persuasive.

18 At the outset, DFP’s opening statement included the following comment:

19 The fact is Comic Con is thriving. Okay. They made more money each year  
20 since Salt Lake Comic Con came on the scene. They haven’t lost a single  
21 customer to us . . . We’re small potatoes. They also have \$15 million in cash  
22 sitting in their bank. They own a downtown office building they paid \$5 million  
cash for. They’re not for-profit, but they’re the deep pocket.

23 . . .

24 So Defendants, if they have to pay even a fraction of what CCI asks would be  
25 put out of business and the people of Utah would be paying for it. But they’re  
also suing them individually. So they would be pushing them to bankruptcy.

26 (Doc. No. 381 at 52:12–53:24.) Referencing a party’s wealth to play off the bias of the jury  
27 is clear misconduct. *See Hoffman v. Brandt*, 65 Cal. 2d 549, 552–53 (1966) (“The argument  
28 was clearly error . . . a deliberate attempt by counsel to appeal to social or economic

1 prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where  
2 the asserted wealth or poverty is not relevant to the issues of the case.”); *see also Martinez*  
3 *v. Dep’t of Transp.*, 238 Cal. App. 4th 559, 566 (2015) (“The law, like boxing, prohibits  
4 hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion  
5 or sympathy of the jury. In more concrete terms, attorneys cannot make appeals based on  
6 irrelevant financial aspects of the case such as the hardship that would be visited on a  
7 defendant from a plaintiff’s verdict.”) (internal citation omitted).

8 During trial, DFP also introduced different concepts that played off of their “generic  
9 ab initio” theory of defense—a defense that this Order clearly delineates was excluded at  
10 summary judgment, the pre-trial conference, and motion in limine. For instance, DFP made  
11 references to a “generic brand.” (Doc. No. 381 at 35:19–20.) SDCC objected to such  
12 classification and the Court sustained the objection stating that it was a  
13 “mischaracterization” and asked the jury to disregard the comment. (*Id.* at 35:24–36:5.)

14 DFP however did not stop in their quest to put this legally flawed notion before the  
15 jury. After being admonished, DFP began referring to Comic-Con as a “national brand.”  
16 (*Id.* at 39:18.) For example, during Mr. Brandenburg’s testimony, the Court had to censure  
17 DFP.

18 Q. And when you said, but we are hijacking the brand, were you referring to  
19 San Diego’s brand?

20 A. No, I was not.

21 Q. Whose brand were you referring to?

22 A. As you can see in the next sentence, I clarify what I was referring to was  
23 the national Comic Con brand.

24 Ms. Bjurstrom: Objection, your honor.

25 The Court: Sustained. Jury will disregard the last comment.

26 Mr. Katz: I’m not sure why.

27 The Court: There is no evidence of a national comic brand, sir.

28 (Doc. No. 383 at 123:23–124:9.) Then during closing arguments, despite the Court’s  
previous rulings, DFP continued to use the phrases “Comic Con circuit” and “Comic Con  
Brand.” (Doc. No. 403 at 40:9–43:5.)



1 Further, DFP misstated the law. For instance, DFP argued a “substantial confusion”  
2 standard instead of the likelihood of confusion test utilized by the Ninth Circuit. (*Id.* at  
3 46:9–14.) Moreover, DFP constantly and repeatedly referred to SDCC’s trademark as  
4 “Comic dash Con.” (Doc. No. 381 at 37:2–4 (“And you saw on the screen that Plaintiff’s  
5 showed you, Comic-Dash-Con as she described each era of Comic Con.”); *Id.* at 39:11–16  
6 (“In fact, in 1998, there were 30 events that called themselves Comic Con, and that’s ten  
7 years before San Diego Comic Convention, or SDCC, ever applied for their mark in  
8 Comic-Dash-Con alone.”).)

9 The Ninth Circuit has repeatedly emphasized that similarity of two marks is first  
10 “considered in their entirety[.]” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206  
11 (9th Cir. 2000). Second, “similarity is adjudged in terms of appearance, sound, and  
12 meaning, and third, similarities are weighed more heavily than differences.” *Id.* (internal  
13 citations omitted). Under this standard, cases from this district as well as others have held  
14 that a dash or hyphen is inconsequential in determining the similarity of two marks. *See*  
15 *Maxim Integrated Prods., Inc. v. Quintana*, 654 F. Supp. 2d 1024, 1031–32 (N.D. Cal.  
16 2009) (placing little emphasis on the hyphen in the mark “My-iButton” when comparing  
17 its similarity to “i Button”); *see also Therma-Scan, Inc., v. Thermoscan, Inc.*, 295 F.3d 623,  
18 633–34 (6th Cir. 2002) (finding the dash insignificant in the mark Therma-Scan when  
19 comparing its similarity to the mark Thermoscan).

20 Despite the foregoing, at trial, DFP proceeded under the belief that the dash was  
21 significant in determining the similarity of their mark and SDCC’s “Comic-Con”  
22 trademark. For example, DFP stated:

23 Mr. Katz: It’s Comic-Dash-Con, and their position is it’s enforceable as  
24 Comic Con with nothing in between, a space, a dash. You know, they use the  
25 dash when they use it alone, and they use the space when they use it with  
something else.

26 . . .

27 Ms. Bjurstrom: We have Comic Con International without a dash, and we  
have San Diego Comic Con International without a dash.

28 . . .

1 The Court: But as to Comic Con with the dash, does the mark cover Comic  
2 Con without the dash in its plain and literal meaning?

3 Ms. Bjurstrom: Absolutely.

4 The Court: How?

5 Ms. Bjurstrom: It is. It's likely to be confusing. You don't say Comic-Hyphen-  
6 con.

7 Mr. Katz: That's what we're trying to establish, that it is not likely to be  
8 confusing.

9 Ms. Bjurstrom: It's the same mark.

10 The Court: So if - -

11 Ms. Bjurstrom: You look at how it looks, how it sounds, how it's perceived.  
12 You don't say Comic - -

13 Mr. Katz: We disagree.

14 Ms. Bjurstrom: Please. You don't say Comic-Hyphen-Con. You don't say  
15 Coca-Hyphen-Cola. You say Coca-Cola.

16 (Doc. No. 382 at 58:10–59:13.)

17 In light of the case law from this district, DFP's forceful attempts to draw the jury's  
18 attention to the dash in "Comic-Con" in analyzing the similarity of the two trademarks at  
19 issue is legally groundless. *See Super-Krete Int'l, Inc. v. Sadleir*, 712 F. Supp. 2d 1023,  
20 1032 (C.D. Cal. 2010) ("While Defendants argue that the hyphen is significant in  
21 modifying the term, this argument is contrary to the case law—and common sense.").

22 Finally, during closing argument, DFP doubled down and broke the "Golden Rule."  
23 DFP's counsel stated:

24 Even if you accept the dismissive "they're just infringers, we'll get to them."  
25 Okay. They've caused harm, too. What share of the harm did they cause to  
26 this brand erosion that we haven't seen any measure of? So we are just asking  
27 you to think critically about the evidence. Think about what it means. And  
28 what it would mean to you if you were personally involved in this.

**The Court:** Golden Rule. Jury is not--you are not to put the jury in the place  
of either party. The jury will disregard the last comment.

**Mr. Katz:** I apologize for that. I will state it differently.

(Doc. No. 403 at 71:2–13.) The "Golden Rule" argument, "asking the jury to put itself in  
the position of the party, is improper." *Reynolds v. Gerstel*, No. 1:09-cv-00680-SAB, 2013  
WL 4815788, at \*5 (E.D. Cal. Sept. 9, 2013); *see also Lovett v. Union Pac. R.R. Co.*, 201

1 F.3d 1074, 1083 (8th Cir. 2000) (explaining that the Golden Rule “argument is universally  
2 condemned because it encourages the jury to depart from neutrality and to decide the case  
3 on the basis of personal interest and bias rather than on the evidence.”) (citation omitted).

4 In sum, DFP’s trial misconduct further supports the Court’s conclusion that this case  
5 is “exceptional” pursuant to § 1117(a).

6 *iv. Remaining Issues*

7 One additional factor in determining the exceptionality of a case under the Lanham  
8 Act is the substantive strength of a party’s litigating position. *See Veracode*, 137 F. Supp.  
9 3d at 101. SDCC points to the following pieces of evidence to demonstrate the strength of  
10 its case: (1) the incontestable status of its trademarks; (2) its trademark survey that  
11 demonstrated that 83% of consumers recognize it as a brand; (3) Mr. Brandenburg’s  
12 admission that Comic-Con is a brand; and (4) the commercial strength of its marks. (Doc.  
13 No. 425-1 at 11–12.) In opposition, DFP argues that their case is equally strong. (Doc. No.  
14 512 at 9–10.)

15 The Court finds that this case is not so “deeply lopsided” in regards to strength to  
16 warrant finding it exceptional under this specific factor. *See Veracode, Inc.*, 137 F. Supp.  
17 3d at 101 (holding that a case must present the “indicia of a deeply lopsided case” for the  
18 moving party to satisfy this element). The Court explicates that though SDCC’s case is  
19 compelling and heavily supported by persuasive evidence, DFP’s case, including the  
20 evidence of over one hundred comic events using “comic con” in their event name, is not  
21 objectively frivolous.

22 Thus, this factor weighs neutrally. *See Gametek LLC v. Zynga, Inc.*, No. CV 13-2546  
23 RS, 2014 WL 4351414, at \*3 (N.D. Cal. Sept. 2, 2014) (explaining that although the  
24 opposing party’s briefing “consisted of granular parsing of the claimed steps rather than  
25 any substantive explanation of how this differed from the underlying abstract idea[,] [i]t  
26 did not . . . descend to the level of frivolous argument or objective unreasonableness.”).

27 Next, the Court turns to SDCC’s argument that DFP’s abuse of the media makes this  
28 case “exceptional.” (Doc. No. 425-1 at 7, 8, 14–15.) Specifically, SDCC takes issue with

1 the press releases and interviews DFP gave after they received SDCC’s cease and desist  
2 letter, their articles published through social media that attacked SDCC and its executives,  
3 and DFP’s alleged “public bullying strategy” that persisted over three years all aimed at  
4 denigrating SDCC before the public. (*Id.*) DFP asserts that they cannot be punished for  
5 exercising their First Amendment rights. (Doc. No. 512 at 15–16.)

6 The Court’s analysis under this factor is best explained by quoting to Defendant  
7 Brandenburg himself. In a news article, Mr. Brandenburg explained his reaction to  
8 receiving SDCC’s cease and desist letter:

9 “Our knee jerk reaction was that [SDCC was] trying to intimidate us” . . . “We  
10 were not going to cease and desist using the name. We decided to go public  
11 about it.” After consulting with their lawyers, the team behind the Salt Lake  
12 Comic Con knew they had strong legal ground to stand on, but they didn’t  
13 want to go to court, they wanted to win in the court of public opinion . . .  
14 “Everyone said that San Diego had no leg to stand on, but the only way to win  
15 this would be to outspend them on legal fees” . . . “Our strategy was, if we  
16 are going to spend legal fees vs. legal fees, we wanted to be creative. We put  
17 it out to the public, challenging the cease and desist letter publically.”

18 (Doc. No. 126-3 at 2–3.)

19 Refusing to cease and desist and turning to the media to litigate a trademark  
20 infringement case in the court of “public opinion” is objectively irrational. The Court  
21 clarifies that it is not maintaining that Mr. Brandenburg was not entitled to his First  
22 Amendment rights. Instead, looking to the standard proscribed by the Ninth Circuit,  
23 objectively, DFP’s reaction and actions in response to SDCC’s cease and desist letter force  
24 this case to stand out from others. Nevertheless, the Court notes that this argument is but  
25 one small factor in this Order’s analysis. In fact, even without this element, the  
26 circumstances discussed *supra* pp. 7–18 adequately and reasonably justify SDCC’s request  
27 for attorneys’ fees pursuant to § 1117(a).

28 Finally, DFP’s opposition brief is littered with statements such as: “The jury  
disagreed; but in finding no willfulness, the jury accepted DFP’s explanation that when the  
defendants used the term ‘brand,’ they were referring to *that* goodwill, the goodwill of the

1 events.” (Doc. No. 512 at 11.) These blatant, unsupported statements are plainly specious—  
2 DFP has no idea what the jury believed or how they understood the evidence. Thus, the  
3 Court ignored such statements in coming to its conclusion.

4 **v. Conclusion**

5 SDCC’s motion is bursting at the seams with incidents that it believes demonstrates  
6 the exceptional nature of this case. After careful consideration of the totality of the  
7 circumstances, the Court agrees with SDCC and finds that it has satisfied its burden.  
8 Accordingly, the Court **GRANTS** SDCC’s motion for attorneys’ fees and costs, subject to  
9 the deductions delineated below. *See Kilopass Tech. Inc. v. Sidense Corp.*, No. C 10-02066  
10 SI, 2014 WL 3956703, at \*10–14 (N.D. Cal. Aug. 12, 2014) (concluding that the case was  
11 exceptional based on the defendant’s “exceptionally meritless” claims, the unreasonable  
12 manner in which the case was litigated, the defendant’s shifting theories of infringement,  
13 and conduct that amounted to gamesmanship).

14 **B. SDCC’s Requested Fees are Subject to Deductions**

15 SDCC argues that its fees and the allocated time spent are reasonable. (Doc. No.  
16 425-1 at 27–29.) DFP’s opposition brief devotes the last two pages to arguing that  
17 bifurcation is proper in the instant matter as they could not “fully respond to both liability  
18 and the proper amount of any award” in their opposition brief. (Doc. No. 512 at 30.) DFP  
19 then requests that an additional proceeding be had on the amount. (*Id.*)

20 The Court declines DFP’s request for bifurcation and for a further proceeding. DFP  
21 was provided the opportunity to oppose SDCC’s motion. Their decision to forego the  
22 chance to rebut the rates of SDCC’s attorneys and the reasonableness of their time sheets,  
23 not only fails to satisfy their burden at this stage of the litigation, but also acts as a waiver  
24 to any arguments not presented in their opposition brief. *See Stichting Pensioenfonds ABP*  
25 *v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (“In most  
26 circumstances, failure to respond in an opposition brief to an argument put forward in an  
27 opening brief constitutes waiver or abandonment in regard to the uncontested issue.”)  
28 (citation omitted).

1           Moreover, as DFP has failed to challenge or dispute SDCC’s hourly rate or provide  
2 substantial assertions opposing SDCC’s hours logged, the Court’s inquiry ends after it  
3 determines whether the fee request is reasonable. *See United States v. \$28,000.00 in U.S.*  
4 *Currency*, 802 F.3d 1100, 1105 (9th Cir. 2015) (“When ... a fee target has failed to offer  
5 either countervailing evidence or persuasive argumentation in support of its position, we  
6 do not think it is the court’s job either to do the target’s homework or to take heroic  
7 measures aimed at salvaging the target from the predictable consequences of self-indulgent  
8 lassitude.”) (citation omitted).

9           The Court now turns to an evaluation of the reasonableness of SDCC’s fees. Courts  
10 typically determine reasonableness by conducting a lodestar analysis of the hours expended  
11 and the hourly rate charged. *See McGrath v. Cty. of Nevada*, 67 F.3d 248, 252 (9th Cir.  
12 1995); *see also Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008)  
13 (explaining that in the Ninth Circuit, courts calculate an award of attorneys’ fees using the  
14 lodestar method, multiplying “the number of hours the prevailing party reasonably  
15 expended on the litigation by a reasonable hourly rate.”) (citation omitted). The burden is  
16 on the fee applicant to demonstrate that the number of hours spent were “reasonably  
17 expended” and that counsel made a “good faith effort to exclude from [the] fee request  
18 hours that are excessive, redundant, or otherwise unnecessary[.]” *Hensley*, 461 U.S. at 434.  
19 The district court has broad discretion in determining the reasonableness of attorney’s fees.  
20 *See Gates v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992).

21           Additionally, “[a]lthough in most cases, the lodestar figure is presumptively a  
22 reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar  
23 to account for other factors which are not subsumed within it.” *Ferland v. Conrad Credit*  
24 *Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001). The factors are:

- 25           (1) the time and labor required, (2) the novelty and difficulty of the questions  
26 involved, (3) the skill requisite to perform the legal service properly, (4) the  
27 preclusion of other employment by the attorney due to acceptance of the case,  
28 (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time  
limitations imposed by the client or the circumstances, (8) the amount

1 involved and the results obtained, (9) the experience, reputation, and ability  
2 of the attorneys, (10) the “undesirability” of the case, (11) the nature and  
3 length of the professional relationship with the client, and (12) awards in  
4 similar cases.

5 *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006) (citation omitted).

6 In total, SDCC requests \$4,994,245.20 in attorneys’ fees and costs incurred by it  
7 from the inception of this case through August 10, 2018. (Doc. No. 527 ¶ 5.) In addition,  
8 SDCC also requests certain non-taxable costs, including \$243,833.06 that SDCC paid to  
9 its two expert witnesses: Matthew G. Ezell and Patrick Kennedy, along with their  
10 assistants. (Doc. No. 425-3 ¶ 24.)

11 ***i. Reasonable Hourly Rate***

12 The determination of reasonable hourly rates is made by examining the prevailing  
13 market rates in the relevant community charged for similar services by “lawyers of  
14 reasonably comparable skill, experience, and reputation.” *Davis v. City and Cty. of San*  
15 *Francisco*, 976 F.2d 1536, 1546 (9th Cir. 1992) (citation omitted), *opinion vacated on*  
16 *other grounds by* 984 F.2d 345 (9th Cir. 1993). The “relevant community” for these  
17 purposes is the district in which the lawsuit proceeds. *Barjon v. Dalton*, 132 F.3d 496, 500  
18 (9th Cir. 1997).

19 The moving party has the burden to produce “satisfactory evidence, in addition to  
20 the affidavits of its counsel, that the requested rates are in line with those prevailing in the  
21 community for similar services of lawyers of reasonably comparable skill and reputation.”  
22 *Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1263 (9th Cir. 1987). Once the fee applicant  
23 has met its burden, the opposing party “has a burden of rebuttal that requires submission  
24 of evidence to the district court challenging the accuracy and reasonableness of the hours  
25 charged or the facts asserted by the prevailing party in its submitted affidavits.” *Gates*, 987  
26 F.2d at 1397–98.

27 SDCC cites to several Southern District of California cases as well as employs the  
28 declarations of Callie A. Bjurstrom and Peter K. Hahn to illustrate that its attorney rates

1 are reasonable. The following are the rates for the SDCC attorneys, paralegals, and  
2 litigation support team members who worked on the present matter.

- 3 1. Callie A. Bjurstrom, lead trial attorney with over twenty-nine years of experience—  
4 \$675.00 to \$760.00 an hour.
- 5 2. Peter K. Hahn, a partner and member of Pillsbury’s Intellectual Property (“IP”)  
6 Section with over twenty-eight years of experience—\$675.00 to \$760.00 an hour.
- 7 3. Michelle A. Herrera, an attorney with over sixteen years of litigation experience—  
8 \$525.00 to \$585.00 an hour.
- 9 4. Conor Civins, a partner with over fourteen years of experience—\$550.00 to \$685.00  
10 an hour.
- 11 5. Kirsten Gallacher, an associate in Pillsbury’s IP section—\$385.00 to \$545.00 an  
12 hour.
- 13 6. Nathaniel Smith, a University of San Diego School of Law 2007 graduate—\$550.00  
14 to \$730.00 an hour.
- 15 7. Matthew Stephens, an associate in Pillsbury’s IP Section—\$545.00 an hour.
- 16 8. Tim Rawson, a 2014 Pepperdine University School of Law graduate—\$545.00 an  
17 hour.
- 18 9. Lauren Wardle, an associate in Pillsbury’s IP Section—\$560.00 an hour.
- 19 10. David Stanton, a partner and member of Pillsbury’s Litigation section—\$765.00 an  
20 hour.
- 21 11. Andrew Chevalier, William Collier, Carl DiCarlo, Benton McDonough, Wilton  
22 McNair, Allison Porter, Candes Prewitt, Jennifer Romeo, Kelly Sims, Jenny  
23 Villalobos, Eboni Wooden, and Calumn Yeaman, contract attorneys who work out  
24 of Pillsbury’s office in Nashville, Tennessee who assisted with eDiscovery,  
25 document review, and legal research—\$110.00 an hour.
- 26 12. Sandra Edge, a senior legal analyst in Pillsbury’s IP Section with over thirty years  
27 of experience—\$285.00 to \$315.00.
- 28 13. Cody Gartman, a trial paralegal with over seven years of experience—\$245.00 an



1 hour.

2 14. Louie Perez, a senior legal analyst in Pillsbury’s IP section with over five years of  
3 experience—\$295.00.

4 15. Colin Drake, a Litigation Support Project Management Coordinator with over ten  
5 years of experience—\$275.00 to \$305.00 an hour.

6 16. Val Trinidad, a Senior Litigation Support Analyst with over nine years of  
7 experience—\$295.00 to \$305.00 an hour.

8 17. John Monarrez, a Research Specialist—\$150.00 an hour.

9 18. Stacey Barnes, a paralegal in Pillsbury’s IP section—335.00 an hour.

10 19. Martin Bridges, a consulting manager in Pillsbury’s Corporate Securities Group  
11 whose testimony was read into the record at trial—\$425.00 an hour.

12 20. Thomas Brooks, the Discovery Project Manager—\$305.00 an hour.

13 21. Stacey Campbell, a paralegal in Pillsbury’s IP section who provided trial  
14 preparation support—\$285.00 an hour.

15 22. John Farahjood, a Litigation Support Specialist who assisted with review of  
16 electronically stored information—\$305.00 an hour.

17 23. Gordon Moffat, Director of Litigation Support Services—\$390.00 an hour.

18 24. Patrick Ng, a Litigation Support Project Manager—\$305.00 an hour.

19 25. Anthony Vugrinecz, a Senior Litigation Support Analyst—\$299.42 an hour.

20 (Doc. No. 425-3 ¶¶ 2–16; Doc. Nos. 527-2, 530.)

21 Ultimately, the Court finds that SDCC has satisfied its initial burden and guided the  
22 Court as to the reasonable hourly rate prevailing in the community for similar work  
23 performed by attorneys of comparable skill and reputation. *See Chalmers v. City of Los*  
24 *Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). First, as to the two cases provided by SDCC,  
25 the hourly rates determined to be reasonable were \$607.50 for Ms. Bjurstrom, \$472.50 for  
26 Ms. Herrera, (Doc. No. 425-4 at 17), and \$630 an hour for a partner and \$495 an hour for  
27 an associate, (*Id.* at 24). The remainder of the cases cited to by SDCC demonstrate that  
28 rates for attorneys in the intellectual property division have earned upwards of \$800.00 an

1 hour. *See Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, No. 10-CV-0541-GPC  
2 (WVG), 2014 WL 6851612, at \*5–6 (S.D. Cal. Dec. 3, 2014) (finding rates reasonable  
3 where plaintiffs sought “an hourly rate of between \$170 per hour and \$895 per hour  
4 depending on the particular attorney or paralegal” for work by a “multi-state/national law  
5 firm”). Thus, based off the cases delineated above, the Court finds SDCC’s unopposed  
6 attorneys’ rates listed *supra* pp. 23–24 reasonable.

7 The Court notes that DFP’s response to SDCC’s supplemental fee brief argues that  
8 SDCC has not justified its lawyers’ hefty year-over-year rate increases. (Doc. No. 532 at  
9 6.) DFP then requests that the Court should substantially lower rates in calculating the  
10 lodestar. (*Id.* at 7.) This argument is nonsensical. DFP produces no rational justification for  
11 why SDCC’s lawyers should not receive raises each year they progress within their firm.  
12 Moreover, DFP’s conclusory arguments, unsupported by evidence or case law, do not  
13 satisfy their burden of rebuttal.

14 Next as to the paralegal rates, SDCC fails to provide any case law to support the  
15 rates of its paralegals and litigation support team members.<sup>6</sup> *See Blum v. Stenson*, 465 U.S.  
16 886, 895 n.11 (1984) (“To inform and assist the court in the exercise of its discretion, the  
17 burden is on the fee applicant to produce satisfactory evidence—in addition to the  
18 attorney’s own affidavits—that the requested rates are in line with those prevailing in the  
19 community for similar services . . . .”). Nevertheless, the Court may consider SDCC’s  
20 declaration in addition to similar cases and its own knowledge and familiarity with the  
21 Southern District of California legal market in setting a reasonable hourly rate. *See Ingram*  
22 *v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011).

23 Reasonable rates for paralegals in this district have ranged from \$125 to \$225. *See*  
24 *In re Maxwell Techs., Inc., Derivative Litig.*, No. 13CV966 BEN (RBB), 2015 WL  
25 12791166, at \*5 (S.D. Cal. July 13, 2015) (awarding \$225 paralegal rate to paralegals with  
26

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27 <sup>6</sup> For purposes of this Order, the Court will group SDCC’s paralegals, legal analysts,  
28 litigation support team members, and research specialists into one group.

1 “significant experience”); *see also Flowrider Surf, Ltd. v. Pac Surf Designs, Inc.*, No.  
2 15cv1879-BEN (BLM), 2017 WL 2212029, at \*2–3 (S.D. Cal. May 18, 2017) (awarding  
3 paralegal fees of \$150 per hour in a patent infringement case); *LG Corp. v. Huang Xiaowen*,  
4 No. 16-CV-1162-JLS (NLS), 2017 WL 3877741, at \*3 (S.D. Cal. Sept. 5, 2017) (finding  
5 reasonable a rate of \$225 per hour for a paralegal with over twenty years of experience).  
6 At its highest, this district has approved a paralegal rate of \$290.00. *See In re Maxwell*  
7 *Techs., Inc.*, 2015 WL 12791166, at \*5.

8 Pillsbury is an American Lawyer Top 100 law firm with its IP litigation practice  
9 named in the Best Lawyers in America for 2017. (Doc. No. 425-3 ¶ 17.) Thus, the Court  
10 does not dispute the quality of the work Pillsbury’s paralegals provided. However, SDCC  
11 has failed to produce evidence to demonstrate that its paralegal rates of over \$300.00 an  
12 hour are reasonable. Accordingly, taking into consideration Pillsbury’s national and global  
13 presence, the Court will cap SDCC’s paralegal, legal analysts, and litigation support team  
14 members’ hourly rates at \$290.00—the high end of paralegal rates provided by this district.  
15 *See Carr v. Tadin, Inc.*, 51 F. Supp. 3d 970, 981 (S.D. Cal. 2014) (listing paralegal rates  
16 that ranged from \$110.00 to \$295.00, but concluding that as rates of \$125–\$150  
17 predominated, a \$150.00 per hour rate for paralegals was reasonable). The final award will  
18 be adjusted in light of the above mentioned modification.

19 In sum, the Court finds SDCC’s attorneys’ rates in this case reasonable—these rates  
20 were largely unopposed by DFP. The paralegals and litigation support team members with  
21 rates over \$290.00 an hour will be capped at \$290.00. The remainder of the paralegal rates  
22 that do not exceed \$290.00 are considered reasonable.

### 23 ***ii. Hours Reasonably Spent***

24 “The moving party bears the burden of documenting the appropriate hours spent in  
25 the litigation and submitting evidence in support of the hours worked.” *Zest IP Holdings*,  
26 2014 WL 6851612, at \*6. After the moving party provides evidence of the hours billed, the  
27 opposing party has the burden of submitting evidence “challenging the accuracy and  
28 reasonableness of the hours charged or the facts asserted by the prevailing party in its

1 submitted affidavits.” *Gates*, 987 F.2d at 1398. “Even if the opposing party has not objected  
2 to the time billed, the district court ‘may not uncritically accept a fee request,’ but is  
3 obligated to review the time billed and assess whether it is reasonable in light of the work  
4 performed and the context of the case.” *Rodriguez v. Barrita, Inc.*, 53 F. Supp. 3d 1268,  
5 1280 (N.D. Cal. 2014).

6 District courts have discretion to reduce the number of hours that were not  
7 reasonably expended. *Hensley*, 461 U.S. at 434. When determining whether the number of  
8 hours expended is reasonable, the following criterion may be taken into account, but each  
9 factor cannot be an independent basis to reduce hours: “(1) the novelty and complexity of  
10 the issues, (2) the special skill and experience of counsel, (3) the quality of representation,  
11 and (4) the results obtained.” *Cabrales v. Cty. of Los Angeles*, 864 F.2d 1454, 1464 (9th  
12 Cir. 1988) (citation omitted), *judgment vacated on other grounds by* 490 U.S. 1087 (1989).

13 SDCC requests all hours billed from the inception of this case to August 10, 2018.  
14 (Doc. No. 527 ¶¶ 3, 4.) In analyzing reasonableness, the Court first notes that DFP requests  
15 a deduction for quarter-hour billing. (Doc. No. 512 at 30.) Courts have recognized that  
16 billing by the quarter-hour, not by the tenth is a “deficient” practice “because it does not  
17 reasonably reflect the number of hours actually worked.” *See Zucker v. Occidental*  
18 *Petroleum Corp.*, 968 F. Supp. 1396, 1403 n.11 (C.D. Cal. 1997) (demonstrating that an  
19 attorney with a \$300 hourly rate who works six minutes on a matter would charge \$30 if  
20 he bills by the tenth of an hour and \$75 if he bills by the quarter hour). Due to this, courts  
21 have reduced the fee award by a percentage to account for the unearned increment based  
22 on quarter-hour billing. *See Preseault v. United States*, 52 Fed. Cl. 667, 680–81 (Fed. Cl.  
23 2002). In the present case, the Court in its discretion reduces SDCC’s attorneys’ fee award  
24 by twenty percent to account for the practice of billing by the quarter-hour. *See Zest IP*  
25 *Holdings*, 2014 WL 6851612, at \*10 n.2 (taking a 20% overall reduction in fees based on  
26 quarter-hour billing).

27 DFP also briefly asserts that a reduction is appropriate as SDCC failed to delegate  
28 tasks to staff or colleagues with lower billing rates. (Doc. No. 512 at 30–31.) The Court

1 disagrees. As SDCC's time sheet demonstrates, the senior attorneys such as Ms. Herrera,  
2 Ms. Bjurstrom, and Mr. Hahn were mainly in charge of researching and drafting the  
3 dispositive motions in this case as well as settlement and discovery matters. (Doc. No. 507  
4 at 23, 29.) It is only logical to have the more senior attorneys personally involved in these  
5 major parts of the litigation process. Moreover, the timesheet demonstrates that SDCC did  
6 in fact delegate other more basic legal tasks to associate attorneys with lower billing rates  
7 such as Lauren Wardle and Tim Rawson. (Doc. No. 507 at 102, 103, 105, 159, 163.)

8         The Court notes however that it finds that some tasks were not properly delegated  
9 amongst SDCC's paralegal and litigation support team members. For example, on June 7,  
10 2017, John Farahjood was given the task of printing redacted PDF files. Printing files is  
11 not a reasonable use of a litigation support specialist who has a rate of \$305.00 an hour.  
12 (Doc. No. 507 at 122 (*see Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 970 (N.D. Cal.  
13 Dec. 12, 2014).) Thus, a reduction in the final lodestar amount is warranted.

14         Finally, DFP spends a sentence broadly concluding that SDCC's task descriptions  
15 are highly general and frequently redacted and therefore warrant closer scrutiny. (Doc. No.  
16 512 at 30.) First, as to the redactions, "[a] party seeking fees may redact certain portions of  
17 the relevant time entries when doing so is necessary to protect the attorney client privilege,  
18 so long as the unredacted portions still afford[] the Court sufficient detail to determine the  
19 reasonableness of the hours requested." *Shame on You Productions, Inc. v. Banks*, CV 14-  
20 03512-MMM (JCx), 2016 WL 5929245, at \*16 (C.D. Cal. Aug. 15, 2016) (citation and  
21 internal quotation marks omitted).

22         The Court notes that there are certain time entries that have been so heavily redacted  
23 that the Court cannot assess the reasonableness of the time expended. For example on  
24 August 6, 2017, Michelle Herrera stated "Research regarding [REDACTED]." (Doc. No.  
25 507 at 150.) This type of redaction has resulted in courts declining to award fees as to those  
26 heavily redacted billing entries. *See Shame on You Productions*, 2016 WL 5929245, at \*16.  
27 However, in the instant matter, SDCC redacted time entries, but also made the entries  
28 available to the Court for in-camera review. (Doc. No. 425-3 ¶ 23.) Thus, DFP's attack on

1 SDCC’s redacted time entries fails. *See Vogel v. Tulaphorn*, CV 13-464 PSG (PLAx), 2014  
2 WL 12629679, at \*10 (C.D. Cal. Jan. 30, 2014) (refusing to reject the defendant’s request  
3 for fees as it willingly stated that it could provide the redacted entries for in-camera  
4 review); *see also R.M. v. Encinitas Union Sch. Dist.*, No. 08cv412-L (JMA), 2013 WL  
5 3873069, at \*3 (S.D. Cal. July 25, 2013) (conducting an in-camera review of the  
6 defendant’s invoice to determine reasonableness).

7 Next, as to DFP’s assertion that the time entries are too general, the Court agrees in  
8 part. Though, SDCC’s counsel “is not required to record in great detail how each minute  
9 of his [or her] time was expended,” *Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004), a  
10 certain amount of specificity is required. Presently, some entries are incredibly vague. For  
11 instance, there are several entries that simply state in some form: “Assist with review  
12 project.” (Doc. No. 507 at 121, 122, 124, 136.) Additionally, on October 28, 2016, the time  
13 entry states: “Call with S. Edge regarding additional documents for review and review  
14 plan,” (*Id.* at 61), and on November 29, 2016, the narrative described states: “Document  
15 review,” (*Id.* at 67). This is a billing deficiency that justifies a reduction.

16 In that same vein the Court also reduces the amount of hours SDCC requests for  
17 duplicative attorney effort. Although it has been recognized that “the participation of more  
18 than one attorney does not necessarily constitute an unnecessary duplication of effort[,] *see*  
19 *McGrath*, 67 F.3d at 255, the Court believes that certain hours were not reasonably  
20 expended. For example in July of 2017, Mr. Hahn, Ms. Herrera, and Mr. Smith all took  
21 turns revising a sanctions motion. (Doc. No. 507 at 136.) Similarly, in that same month,  
22 Mr. Hahn, Mr. Smith, Mr. Stephens, Ms. Bjurstrom, and Ms. Herrera all billed for  
23 reviewing the opposition brief to DFP’s motion for leave to amend the pleading. (*Id.* at  
24 140.) Thus, another reduction in the lodestar figure is appropriate. *See Mogck v. Unum Life*  
25 *Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1195 (S.D. Cal. 2003) (finding a reduction of fees  
26 reasonable as both attorneys billed for reviewing the defendant’s objection and two  
27 attorneys billed for reviewing the Ninth Circuit opinion in the case); *see also Hensley*, 461  
28 U.S. at 432–34 (holding that counsel submitting fee applications must exclude hours that

1 are “excessive, redundant, or otherwise unnecessary[.]”); *AT&T Mobility LLC v. Yeager*,  
 2 No. 2:13-cv-00007 KJM DB, 2018 WL 1567819, at \*2 (E.D. Cal. Mar. 30, 2018)  
 3 (highlighting that the court has broad discretion to adjust the lodestar fee downward if it  
 4 concludes the attorneys performed work that was excessive or duplicative).

5 Finally, the Court addresses the arguments present in DFP’s response to SDCC’s  
 6 supplemental brief. (Doc. No. 532.) Finding that most of DFP’s qualms have already been  
 7 addressed above, the Court focuses solely on the assertion that a reduction is justified based  
 8 on overstaffing. (*Id.* at 4.) Here, the Court agrees with DFP that SDCC’s decision to send  
 9 three lawyers to the post-trial motion hearing is an unreasonable use of time. As Mr. Hahn  
 10 did not actively participate at the hearing, the Court will not award Mr. Hahn’s fees totaling  
 11 \$3,532.50 in relation to this matter. (Doc. No. 527-1 at 15.)

12 In sum, the Court reduces SDCC’s fee request by 20% for quarter-hour billing.  
 13 Additionally, based on the other billing deficiencies delineated above, an additional 5%  
 14 reduction is warranted as well as a reduction of \$3,532.50 for overstaffing. As to the  
 15 remainder of the hours, after an in-camera review, the Court finds the billed hours are well  
 16 within the bounds of reason and include sufficient descriptions reflecting the date, amount,  
 17 and nature of the work SDCC’s attorney’s performed. *See LG Corp.*, 2017 WL 3877741,  
 18 at \*4. Thus, the Court finds no further deduction necessary based on the nature and context  
 19 of the case, quality of the representation, and result obtained.

20 *iii. Lodestar Calculation*

21 **Table 1: Hourly**  
 22 **Rates**  
 23 **2014**

24 Timekeeper	Hourly Rate Billed	Hourly Rate Awarded	Time Billed
25 Bjurstrom, Callie A.	\$675.00	\$675.00	24.05 hours
26 Hahn, Peter K.	\$675.00	\$675.00	89 hours
27 Herrera, Michelle A.	\$525.00	\$525.00	41.20 hours

28

Drake, Colin B.	\$275.00	\$275.00	0.50 hours
Edge, Sandra V.	\$285.00	\$285.00	19.25 hours

<b>Table 2: Hourly Rates 2015</b>			
<b>Timekeeper</b>	<b>Hourly Rate Billed</b>	<b>Hourly Rate Awarded</b>	<b>Time Billed</b>
Bjurstrom, Callie A.	\$705.00	\$705.00	24 hours
Gallacher, Kirsten F.	\$385.00	\$385.00	10.25 hours
Hahn, Peter K.	\$705.00	\$705.00	174 hours
Herrera, Michelle A.	\$550.00	\$550.00	72 hours
Drake, Colin B.	\$290.00	\$290.00	5.25 hours
Edge, Sandra V.	\$295.00	\$290.00	21.50 hours

<b>Table 3- Hourly Rates 2016</b>			
<b>Timekeeper</b>	<b>Hourly Rate Billed</b>	<b>Hourly Rate Awarded</b>	<b>Time Billed</b>
Bjurstrom, Callie A.	\$735.00	\$735.00	93.25 hours
Gallacher, Kirsten F.	\$480.00	\$480.00	98.75 hours
Hahn, Peter K.	\$735.00	\$735.00	480.75 hours
Herrera, Michelle A.	\$565.00	\$565.00	229.50 hours
Stanton, David	\$765.00	\$765.00	0.25 hours
Drake, Colin B.	\$295.00	\$290.00	16.50 hours
Edge, Sandra V.	\$305.00	\$290.00	172.50 hours
Trinidad, Val	\$295.00	\$290.00	6.25 hours



<b>Table 4-Hourly Rates 2017</b>			
<b>Timekeeper</b>	<b>Hourly Rate Billed</b>	<b>Hourly Rate Awarded</b>	<b>Time Billed</b>
Bjurstrom, Callie A.	\$760.00	\$760.00	1085 hours
Chevalier, Andrew	\$110.00	\$110.00	85.25
Civins, Conor M.	\$608.16	\$608.16	283.75 hours
Collier, William E.	\$110.00	\$110.0	167.50 hours
DiCarlo, Carl	\$110.00	\$110.00	205.50 hours
Gallacher, Kirsten F.	\$545.00	\$545.00	119 hours
Hahn, Peter K.	\$760.00	\$760.00	1422.75 hours
Herrera, Michelle A.	\$585.00	\$585.00	967.55 hours
McDonough, Benton	\$110.00	\$110.00	88.25 hours
McNair, Wilton A.	\$110.00	\$110.00	85.75 hours
Porter, Allison	\$110.00	\$110.00	69 hours
Prewitt, Candes V.	\$110.00	\$110.00	81.75 hours
Rawson, P.E., Tim	\$485.35	\$485.35	50.25 hours
Romeo, Jennifer R.	\$110.00	\$110.00	123.25 hours
Sims, Kelly J.	\$110.00	\$110.00	184.75 hours
Smith, Nathaniel R.	\$578.42	\$578.42	45.00 hours
Stanton, David	\$790.00	\$790.00	12.75 hours
Stephens, Matthew R.	\$545.00	\$545.00	200.75 hours
Villalobos, Jenny R.	\$110.00	\$110.00	167.25 hours
Wardle, Lauren E.	\$560.00	\$560.00	145.45 hours

1	Wooden, Eboni T.	\$110.00	\$110.00	141.75 hours
2	Yeaman, Calumn J.	\$110.00	\$110.00	98.75 hours
3	Barnes, Stacey	\$335.00	\$290.00	5 hours
4	Bridges, Martin	\$425.00	\$290.00	1 hour
5	Brooks, Thomas	\$305.00	\$290.00	1 hour
6	Campbell, Stacey	\$285.00	\$285.00	7.25 hours
7	Drake, Colin B.	\$305.00	\$290.00	89 hours
8	Edge, Sandra V.	\$315.00	\$290.00	1,195.75 hours
9	Farahjood, John	\$305.00	\$290.00	17 hours
10	Gartman, Cody A.	\$245.00	\$245.00	224.80 hours
11	Moffat, Gordon	\$390.00	\$290.00	15.75 hours
12	Monarrez, John D.	\$150.00	\$150.00	12.75 hours
13	Ng, Patrick	\$305.00	\$290.00	0.50 hours
14	Perez, Louie	\$295.00	\$290.00	120.25 hours
15	Trinidad, Val	\$300.63	\$290.00	151 hours
16	Vugrinecz, J.	\$299.42	\$290.00	18.75 hours
17	Anthony			

19	<b>Table 5-Hourly Rates 2018</b>			
20				
21	<b>Timekeeper</b>	<b>Hourly Rate Billed</b>	<b>Hourly Rate Awarded</b>	<b>Time Billed</b>
22				
23	Bjurstrom, Callie A.	\$795.00	\$795.00	221.70 hours
24	Civins, Conor M.	\$675.00	\$675.00	14.25 hours
25	Hahn, Peter K.	\$785.00	\$785.00	221 hours
26	Herrera, Michelle A.	\$605.00	\$605.00	330.30 hours
27	Wardle, Lauren E.	\$615.00	\$615.00	120.75 hours
28				

1	Edge, Sandra V.	\$325.00	\$290.00	143.95 hours
2	Monarrez, John D.	\$300.00	\$290.00	0.25 hours

3  
4 SDCC requests **\$4,994,245.20** in attorneys’ fees and costs. (Doc. No. 527 ¶ 5.) The  
5 Court notes however, that the lodestar number based off of the declarations provided by  
6 SDCC is **\$5,278,438.88**. This discrepancy is due to the fact that the lodestar number does  
7 not include courtesy discounts that occurred in March 2017 (\$11,000), April 2017  
8 (\$30,000), May 2017 (\$30,000), June 2017 (\$50,000), July 2017 (\$20,000), August 2017  
9 (\$25,000), September 2017 (\$25,000), October 2017 (\$30,000), November 2017  
10 (\$55,000), December 2017 (\$20,000), January 2018 (\$10,000), and February 2018  
11 (\$10,000). In total, SDCC provided **\$316,000** in courtesy discounts. Subtracting the  
12 courtesy discounts, the new lodestar number is **4,962,438.88**. After the 20% reduction for  
13 quarter-hour billing, the 5% reduction for other billing deficiencies, and the **\$3,532.50** for  
14 overstaffing, the final lodestar number is **\$3,767,921.06**.

15 *iv. Expert Costs*

16 The Lanham Act provides that “[w]hen a violation of any right of the registrant of a  
17 mark registered in the Patent and Trademark Office . . . have been established in any civil  
18 action . . . the plaintiff shall be entitled to . . . (3) the costs of the action.” 15 U.S.C. §  
19 1117(a). Under Federal Rule of Civil Procedure 54, costs other than attorney’s fees may  
20 be allowed to the prevailing party unless a federal statute or a court order provides  
21 otherwise. Fed. R. Civ. P. 54(d)(1).

22 SDCC seeks to recover certain non-taxable costs. Specifically, SDCC requests  
23 **\$243,833.06** that SDCC paid to its two experts: Matthew G. Ezell and Patrick Kennedy,  
24 along with their assistants. (Doc. No. 425-3 ¶ 24.) DFP does not oppose this request. (*See*  
25 *generally* Doc. No. 512.)

26 Ms. Bjurstrom’s declaration delineates the various benefits and advantages provided  
27 by both experts. For instance, Mr. Ezell conducted the Teflon Survey that addressed the  
28 primary significance of “Comic-Con” to the public. (Doc. No. 425-3 ¶ 25.) Additionally,

1 Mr. Ezell performed substantive research and helped analyze and develop a response to the  
2 report prepared by DFP’s expert Jeffrey Kaplan. (*Id.*) As to Mr. Kennedy, he was hired to  
3 assess SDCC’s damage remedies and also prepared and submitted a detailed expert report  
4 and supplemental report. (*Id.* ¶ 26.) Both experts’ invoices were provided to the Court.  
5 (Doc. No. 425-6.)

6 It is clear from the record that Mr. Ezell’s work was critical to SDCC’s ultimate  
7 success in the action—specifically to its trademark infringement claim. Thus, given the  
8 reliance on Mr. Ezell and his survey, his fee of **\$92,323.56** for his work in connection with  
9 this matter was reasonably necessary for the prosecution of SDCC’s case. *See SAS v.*  
10 *Sawabeh Info. Servs. Co.*, No. CV 11-04147 MMM (MANx), 2015 WL 12763541, at \*35  
11 (C.D. Cal. June 22, 2015.) The Court will thus award **\$92,323.56** in costs.

12 In comparison, Mr. Kennedy’s necessity is less clear. Though he testified to various  
13 important financial matters, his corrective advertising report stating that a brand repair  
14 program would cost \$9.62 million was not well-received by the jury as evidenced by the  
15 jury award of only \$20,000. (Doc. No. 234-1 at 22; Doc. No. 395 at 8.) Based on the  
16 foregoing, the Court in its discretion, advances only **\$120,000.00** instead of \$151,509.50  
17 as costs to cover Mr. Kennedy’s expenses. (Doc. No. 423-3 ¶ 26 (*see Brighton Collectibles,*  
18 *LLC v. Believe Production, Inc.*, No. 2:15-cv-00579-CAS (ASx), 2018 WL 1381894, at \*5  
19 (C.D. Cal. Mar. 15, 2018)).)

20 Accordingly, the Court awards SDCC **\$212,323.56** to cover the costs of its two  
21 experts. *See Lanyard Toys Ltd. v. Novelty, Inc.*, No. CV 05-8406-GW (JWJx), 2008 WL  
22 11333941, at \*21 (C.D. Cal. Mar. 18, 2008) (explaining that the district courts “may award  
23 otherwise non-taxable costs . . .”) (citation omitted).

### 24 **CONCLUSION**


25 The Court has exhaustively and carefully considered the totality of the  
26 circumstances in this case. Having done so, the Court finds that this case stands out when  
27 compared to run of the mill trademark infringement cases. Accordingly, in its discretion,  
28

1 finding this case “exceptional” pursuant to 15 U.S.C. § 1117(a), SDCC as the prevailing  
2 party is awarded attorneys’ fees and costs subject to the deductions listed above.

3 It is accordingly **ORDERED** that SDCC is awarded attorneys’ fees and costs  
4 totaling \$3,962,486.84.<sup>7</sup> This award includes \$3,767,921.06 in attorneys’ fees and  
5 \$212,323.56 in expert costs. The Clerk of Court must enter judgment for SDCC and against  
6 DFP, and each of them, in this amount, as well as the \$20,000 awarded by the jury, in this  
7 case. The Clerk of Court is also directed to issue the permanent injunction. As no issues  
8 remain, the Clerk is instructed to **CLOSE** the docket of this case. Accordingly, SDCC’s  
9 motion for attorneys’ fees and costs is **GRANTED IN PART AND DENIED IN PART**.

10  
11 **IT IS SO ORDERED.**

12  
13 Dated: August 23, 2018

14   
15 Hon. Anthony J. Battaglia  
16 United States District Judge  
17  
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25  
26 <sup>7</sup> The Court notes that the final award was adjusted by deducting \$17,757.78 in attorneys’  
27 fees that were awarded to SDCC and paid by DFP in relation to DFP’s unsuccessful motion  
28 for sanctions. (Doc. Nos. 484, 522; Doc. No. 532 at 3.) The Court disagrees with DFP that  
the award should be reduced by \$23,238, which is the amount SDCC initially requested.  
(Doc. No. 532 at 3.)