

IMMEDIATE STAY REQUESTED:  
Irreversible media destruction  
required beginning October 17 to  
meet October 22 injunction  
compliance deadline.

**No. 18-56221**

IN THE  
**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

---

**SAN DIEGO COMIC CONVENTION,**  
*Plaintiff-Appellee,*

v.

**DAN FARR PRODUCTIONS, DANIEL FARR, and BRYAN  
BRANDENBURG,**  
*Defendants-Appellants.*

---

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
ANTHONY J. BATTAGLIA, DISTRICT JUDGE • CASE NO. 14-CV-1865-AJB-JMA

---

---

**APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3  
TO STAY ENFORCEMENT OF MONEY JUDGMENT AND  
PARTIALLY STAY PERMANENT INJUNCTION  
PENDING APPEAL;  
DECLARATIONS OF UTAH ATTORNEY GENERAL SEAN REYES,  
BRYAN BRANDENBURG, DANIEL FARR, WILLIAM SMELKO, AND  
CLARKE NELSON**

---

---

**HORVITZ & LEVY LLP**  
JOHN A. TAYLOR, JR.  
PEDER K. BATALDEN  
ERIC S. BOORSTIN  
3601 WEST OLIVE AVENUE, 8TH FLOOR  
BURBANK, CALIFORNIA 91505-4681  
(818) 995-0800

**MASCHOFF BRENNAN PLLC**  
MICHAEL I. KATZ  
L. REX SEARS  
20 PACIFICA, SUITE 1130  
IRVINE, CALIFORNIA 92618  
(949) 202-1900

ATTORNEYS FOR DEFENDANTS-APPELLANTS  
**DAN FARR PRODUCTIONS, DANIEL FARR, AND BRYAN BRANDENBURG**

## CIRCUIT RULE 27-3 CERTIFICATE

Counsel for Plaintiff-Appellee  San Diego Comic Convention	Callie A. Bjurstrom Peter Hahn Michelle A. Herrera Pillsbury Winthrop Shaw Pittman LLP 501 West Broadway, Suite 1100 San Diego, CA 92101 callie.bjurstrom@pillsburylaw.com peter.hahn@pillsburylaw.com michelle.herrera@pillsburylaw.com
Counsel for Defendants-Appellants  Dan Farr Productions, Daniel Farr, and Bryan Brandenburg	Michael I. Katz Lannie Rex Sears Maschoff Brennan PLLC 20 Pacifica, Suite 1130 Irvine, CA 92618 mkatz@mabr.com rsears@mabr.com
	John A. Taylor, Jr. Peder K. Batalden Eric S. Boorstin Horvitz & Levy LLP 3601 West Olive Avenue, 8th Floor Burbank, CA 91505-4681 (818) 995-0800 jtaylor@horvitzlevy.com pbatalden@horvitzlevy.com eboorstin@horvitzlevy.com

### Facts showing the existence and nature of the emergency

Dan Farr Productions, LLC (DFP), and its principals, Daniel Farr and Bryan Brandenburg, were sued by San Diego Comic Convention (SDCC) for trademark infringement because they named their comic

convention “Salt Lake Comic Con.” According to SDCC, using a name that includes “comic con”—a commonplace abbreviation for comic conventions, attended by fans of comic books and related media—was infringement. The jury awarded just \$20,000 in damages, and found no willful infringement. The district court nonetheless declared the case “exceptional” and awarded SDCC over \$3.9 million in attorney fees and costs, plus injunctive relief irreversibly harmful to DFP. Defendants appealed.

The district court has denied a stay of enforcement and ordered compliance with the injunction by October 22. Practically, this means that no later than October 17, DFP must start irreversibly deleting historical posts from its social media sites or risk noncompliance. If this Court does not immediately stay enforcement, DFP and its principals will be irreparably harmed because DFP cannot bond the fees award; its revenues are generated from annual events fueled by human capital, not hard assets that could collateralize a bond. SDCC has sought permission to register the judgment in Utah so it can seize DFP’s operating capital and the homes and assets of its principals. (*See* Exs. 20, 21.)

SDCC's enforcement efforts would likely foreclose appellate review of the questionable verdict and the erroneous determination that this case is "exceptional," purportedly justifying \$3.9 million in fees on a \$20,000 judgment. And if SDCC enforces the judgment, DFP's destruction will cost Salt Lake City's economy millions of dollars. But a stay likely wouldn't harm SDCC: its likelihood of collecting the judgment *increases* if DFP is not driven into bankruptcy, and DFP has already changed the name of its future conventions.

This Court should immediately, temporarily stay enforcement to allow timely adjudication of this motion. The Court should then stay enforcement of the fees award and key components of the injunction pending appeal.

#### **Notice to other parties**

On October 9, 2018, Defendants' counsel, Rex Sears, emailed SDCC's counsel, Michelle Herrera, that Defendants would be filing this emergency motion. Mr. Sears next alerted this Court's on-duty motions attorney. SDCC's counsel were served by ECF and separate email.

### Relief sought in the district court

On September 18, Defendants applied *ex parte* for the relief sought by this motion—a stay of enforcement pending appeal. (Ex. 16.) SDCC responded on September 21. On October 5, the district court denied a stay, and ordered compliance with the injunction by October 22. (Ex. 25.) Defendants therefore request a stay from this Court. Fed. R. App. P. 8(a)(2)(A)(ii).

## TABLE OF CONTENTS

CIRCUIT RULE 27-3 CERTIFICATE.....	i
INTRODUCTION.....	1
STANDARDS .....	4
ARGUMENT .....	6
I.    This appeal will raise serious questions about the verdict, fees award, and injunction. ....	6
A. <i>The verdict</i> : The district court erroneously barred Defendants from pursuing a powerful defense—that COMIC-CON was generic when SDCC adopted it—and improperly excluded additional genericness evidence. ....	6
1.    The district court erred in ruling that “[t]here ain’t no generic ab initio,” and in excluding evidence about phonetic equivalents. ....	6
2.    The district court erroneously excluded additional, probative genericness evidence.....	9
B. <i>The fees order</i> : The award of nearly \$4 million in fees on a \$20,000 verdict is likely to be reversed. ....	10
1.    If the verdict falls, so will the fees order. ....	10
2.    The district court erroneously grounded its award on unexceptional zealous advocacy.....	11
3.    The district court erroneously based its fees order on out-of-court speech protected by the First Amendment. ....	15
4.    The excessive fees award bears no relationship to the alleged misconduct.....	17
C. <i>The injunction</i> : The overbroad injunction is likely to be reversed because it covers noninfringing conduct.....	19

II. Immediately enforcing the monetary judgment will destroy Defendants, but a stay will not harm SDCC..... 20

III. The injunction also threatens irreparable harm to Defendants, which is not offset by any benefit to SDCC. .... 23

IV. Staying enforcement serves the public interest. .... 25

V. The *Dillon* factors also support a stay. .... 25

CONCLUSION..... 26

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT AND  
FORMAT REQUIREMENTS..... 28

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Advertise.com, Inc. v. AOL Advertising, Inc.</i> , 616 F.3d 974 (9th Cir. 2010) .....	9
<i>Amusement Art, LLC v. Life is Beautiful, LLC</i> , No. 2-14-CV-08290-DDP-JPR, 2017 WL 2259672 (C.D. Cal. May 23, 2017).....	19
<i>Ault v. Hustler Magazine, Inc.</i> , 860 F.2d 877 (9th Cir. 1988) .....	12
<i>BellSouth Corp. v. DataNational Corp.</i> , 60 F.3d 1565 (Fed. Cir. 1995) .....	6
<i>In re Bose Corp.</i> , 580 F.3d 1240 (Fed. Cir. 2009) .....	14
<i>Christensen v. Stevedoring Services of America, Inc.</i> , 430 F.3d 1032 (9th Cir. 2005) .....	12
<i>Dan Farr Productions v. United States District Court</i> , 874 F.3d 590 (9th Cir. 2017).....	<i>passim</i>
<i>Dillon v. City of Chicago</i> , 866 F.2d 902 (7th Cir. 1988) .....	5, 25, 26
<i>Elem Indian Colony of Pomo Indians v. Ceiba Legal, LLP</i> , 230 F. Supp. 3d 1146 (N.D. Cal. 2017) .....	17
<i>Elliott v. Google, Inc.</i> , 860 F.3d 1151 (9th Cir. 2017) .....	6
<i>GoPets Ltd. v. Hise</i> , 657 F.3d 1024 (9th Cir. 2011) .....	19
<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987).....	4, 5



<i>Hoffman v. Tonnemacher</i> , 593 F.3d 908 (9th Cir. 2010).....	12
<i>Interactive Products Corp. v. a2z Mobile Office Solutions, Inc.</i> , 326 F.3d 687 (6th Cir. 2003).....	20
<i>Kellogg Co. v. National Biscuit Co.</i> , 305 U.S. 111 (1938).....	15
<i>Ketab Corp. v. Mesriani &amp; Assocs.</i> , 734 F. App'x 401 (9th Cir. 2018).....	17
<i>Leiva-Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011).....	4
<i>Leon Finker, Inc. v. Schlusser</i> , 469 F. Supp. 674 (S.D.N.Y. 1979).....	8
<i>Lovell ex. rel. Lovell v. Poway Unified School District</i> , 90 F.3d 367 (9th Cir. 1996).....	10
<i>Miller Brewing Co. v. G. Heileman Brewing Co.</i> , 561 F.2d 75 (7th Cir. 1977).....	8
<i>Monolithic Power Systems, Inc. v. O2 Micro International Ltd.</i> , 726 F.3d 1359 (Fed. Cir. 2013).....	18
<i>Mountz, Inc. v. Northeast Industrial Bolting &amp; Torque, LLC</i> , No. 15-CV-04538-JD (MEJ), 2017 WL 780585 (N.D. Cal. Jan. 27, 2017).....	17
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	4, 5
<i>O.W. Bunker Malta Ltd. v. M/V Trogir</i> , No. CV 12-5657-R, 2013 WL 12131547 (C.D. Cal. June 17, 2013).....	5
<i>Octane Fitness, LLC v. ICON Health &amp; Fitness, Inc.</i> , 134 S. Ct. 1749 (2014).....	11

<i>Park 'N Fly, Inc. v. Dollar Park &amp; Fly, Inc.</i> , 469 U.S. 189 (1985).....	8
<i>Providence Journal Co. v. FBI</i> , 595 F.2d 889 (1st Cir. 1979) .....	20
<i>Rembrandt Technologies, LP. v. Comcast of Fla/Pa</i> , 899 F.3d 1254 (Fed. Cir. 2018) .....	17, 18
<i>In re Revel AC, Inc.</i> , 802 F.3d 558 (3d Cir. 2015) .....	5
<i>ROAR, LLC v. ROAR Glob. Ltd.</i> , No. 2:15-CV-05865-ODW(AFM), 2016 WL 7115902 (C.D. Cal. Dec. 5, 2016) .....	17
<i>Standard Havens Products, Inc. v. Gencor Industries, Inc.</i> , 897 F.2d 511 (Fed. Cir. 1990) .....	20
<i>SunEarth, Inc. v. Sun Earth Solar Power Co.</i> , 839 F.3d 1179 (9th Cir. 2016) (en banc) .....	11
<i>TE-TA-MA Truth Found. v. World Church of the Creator</i> , 297 F.3d 662 (7th Cir. 2002).....	8
<i>Tennison v. Circus Circus Enterprises</i> , 244 F.3d 684 (9th Cir. 2001).....	12
<i>Toyota Motor Sales, U.S.A., Inc. v. Tabari</i> , 610 F.3d 1171 (9th Cir. 2010).....	20, 24
<i>United States v. Benoit</i> , No. 08cv2140-MMA (JMA), 2012 WL 12952680 (S.D. Cal. Jan. 23, 2012).....	5
<b>Rules</b>	
Civil Local Rule 7 (S.D. Cal.) .....	14
Federal Rule of Appellate Procedure 8 .....	4
Federal Rule of Civil Procedure 50.....	12

Federal Rule of Civil Procedure 54 .....	12
Federal Rule of Civil Procedure 62 .....	5
Federal Rule of Civil Procedure 69 .....	26
<b>Statutes</b>	
15 U.S.C. § 1065 .....	8
15 U.S.C. § 1117 .....	11, 17, 19

## INTRODUCTION

DFP described its comic fan conventions in Salt Lake City as “Salt Lake Comic Con.” Over 100 other American cities have had similar events using the commonplace term “comic con” in their name. *Dan Farr Prods. v. U.S. Dist. Court*, 874 F.3d 590, 591 (9th Cir. 2017). One organization, SDCC, claiming exclusive rights in the term “comic-con,” sued Defendants for trademark infringement. A jury found no willful infringement and awarded SDCC damages of \$20,000.

Defendants could have survived that verdict. But the district court transformed the judgment into a death sentence by declaring the case “exceptional” based on how the case was defended—not the underlying merits—and awarding \$3.9 million in fees and costs. DFP cannot bond that sum; immediate enforcement would destroy DFP.

The district court also imposed sweeping injunctive relief that will irreversibly damage DFP’s online presence, one of its most valuable assets. For example, the injunction forbids DFP from re-registering legacy domain names—which is *not* trademark infringement—threatening DFP with permanent loss of internet domains.

Unless this Court stays enforcement of the judgment (especially the fees award and aspects of the injunction), DFP will be destroyed and Defendants' meritorious appeal will likely be abandoned. DFP's contribution to the Utah economy—110,000 annually attend DFP's conventions—will be lost. The situation is so dire that Salt Lake County's mayor and Utah's Attorney General have provided declarations supporting relief.

Last year, in this same case, this Court issued mandamus relief directing the district court to vacate as unconstitutional “a sweeping set of ‘suppression orders’” silencing Defendants' commentary about this case. *Dan Farr Prods*, 874 F.3d at 591. Undeterred, the district court relied on some of that commentary in imposing fees. That abuse of discretion is unlikely to survive appellate review—a factor favoring a stay. The remainder of the fees order addresses unremarkable examples of zealous advocacy. The district court chided Defendants for raising arguments more than once, but that was by the court's request and it positioned key issues for appeal. Critically, also, the court failed to link purported misconduct to the amount of fees it awarded.

Apart from fees, Defendants' appeal raises serious questions about the underlying verdict and injunction. The verdict rests on the erroneous exclusion of a critical genericness defense and key evidence. The injunction proscribes noninfringing conduct. Defendants make a strong showing on the merits.

The remaining stay factors also favor Defendants. Absent a stay, Defendants will suffer irreparable harm. Enforcement may bankrupt all of them, and DFP's reputation and internet property losses may be irreversible. In contrast, staying enforcement not only won't harm SDCC, which is financially sound, but the judgment is more likely to be fully satisfied if DFP stays in business. Thus, SDCC's ongoing, aggressive efforts to enforce the judgment reveal its true intentions—eliminating a competitor and impeding appellate review.

This Court should immediately, temporarily stay enforcement, permitting SDCC to respond and giving the Court time to consider this motion in due course. The Court should then stay enforcement of the judgment (at least, the fees order and aspects of the injunction described below) pending appeal.

## STANDARDS

Federal Rule of Appellate Procedure 8(a) authorizes this Court to stay enforcement pending appeal. Four factors inform the analysis “governing stays of civil judgments”:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). “The first two factors ... are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009).

On the initial factor, appellants “need not demonstrate that it is more likely than not that they will win on the merits.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). That would put merits briefing “on an expedited schedule,” and require the Court to accurately predict, “without adequate briefing and argument,” how complicated issues should be resolved. *Id.* at 967. Instead, a movant need only show “a substantial case on the merits,” or that “serious legal questions are raised.” *Id.* at 967-68 (citations omitted). The harm factors, by contrast, are considered under the more-likely-than-not standard. *Id.* at 968.

For the money judgment, the district court applied a five-factor standard that *Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988), endorsed for district courts entertaining motions to waive bond under Federal Rule of Civil Procedure 62(d). (Ex. 25, at 248-250.) This Court has never applied *Dillon*, and it shouldn't now. *Nken* explained, in the broadest terms, that *Hilton's* four-factor test is the "traditional standard governing the grant of stays"; and *that* is the standard which applies, absent contrary legislation. *Nken*, 556 U.S. at 431. Consequently, courts use the *Hilton* factors to determine whether to stay enforcement of money judgments or similar payment orders. *E.g.*, *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (bankruptcy court sale order); *United States v. Benoit*, No. 08cv2140-MMA (JMA), 2012 WL 12952680, at \*1-2 (S.D. Cal. Jan. 23, 2012) (money judgment); *O.W. Bunker Malta Ltd. v. M/V Trogir*, No. CV 12-5657-R, 2013 WL 12131547, at \*2 (C.D. Cal. June 17, 2013) (order directing payment of money). Nonetheless, Defendants also address the *Dillon* factors below.



## ARGUMENT

I. This appeal will raise serious questions about the verdict, fees award, and injunction.

A. *The verdict*: The district court erroneously barred Defendants from pursuing a powerful defense—that COMIC-CON was generic when SDCC adopted it—and improperly excluded additional genericness evidence.

1. The district court erred in ruling that “[t]here ain’t no generic ab initio,” and in excluding evidence about phonetic equivalents.

Generic terms are ineligible for trademark protection. *Elliott v. Google, Inc.*, 860 F.3d 1151, 1155 (9th Cir. 2017). Genuine trademarks identify products’ sources, while generic terms identify types of services (or goods) using “‘common descriptive’ names.” *Id.*

A mark may be generic “ab initio [i.e., when first adopted] [citation], or it may become generic,” *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1569-70 (Fed. Cir. 1995) (citation omitted), in which case it suffers “genericide,” *Elliott*, 860 F.3d at 1156. Defendants sought to prove COMIC-CON was generic ab initio because the term was already in use as a common descriptive name for a comic convention when SDCC adopted it.

SDCC's putative mark is traceable to the 1930s, when science fiction fans began holding conventions called "con[s]." (Ex. 7, at 59-60.) In the 1960s, comic book fans began emulating sci-fi fans and agitated for a "comicon." (*Id.*) A 1963 issue of *The Comicollector* describes the "Traveling Comicon," a bus trip to visit comic fans: "we were already planning the next get-together, possibly at some form of Comicon"; "I'm quite sure a comicon is inevitable." (*Id.* at 62 (citation omitted).) The New York Comicon launched the next year. (*See id.*) A 1965 issue of *The New Yorker* reported on the second New York Comicon, under the heading "ComiCon": "[c]ollectors of old comic books held a convention ... officially known as the second annual ComiCon, or Con.' ... '[T]he Con chairman ... told us that this was the first full-fledged national ComiCon.'" (*Id.* at 64 (citation omitted).)

The district court excluded this and all other evidence of use before 1970, when SDCC claims it began using COMIC-CON. According to the court, "[t]here ain't no generic ab init[i]o" (Ex. 13, at S118:25), only genericide. The court later qualified its stance, ruling that genericness ab initio cannot be asserted against an incontestably registered mark, and in the alternative, that evidence concerning pre-1970 use of

phonetically equivalent variants for “Comic-Con” is irrelevant. (Ex. 10, at 106:25-28, 107:24-108:9.) The court was wrong in both respects.

First, apparent incontestability doesn’t bar a genericness ab initio defense. Ordinarily, a mark’s registration can be made “incontestable” after five years. 15 U.S.C. § 1065 (2012). But “an incontestable mark does not confer any rights to a phrase that was generic at the outset.” *TE-TA-MA Truth Found. v. World Church of the Creator*, 297 F.3d 662, 665 (7th Cir. 2002). By statute, “no incontestable right shall be acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered.” 15 U.S.C. § 1065(4); *see also Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985) (“no incontestable right can be acquired in a mark that is a common descriptive, *i.e.*, generic, term”). Thus, the district court erred. Defendants were entitled to present proof that COMIC-CON was generic ab initio, in which case SDCC’s registration never became incontestable.

Second, if phonetic equivalents were generic ab initio, so was COMIC-CON. Just as “a generic term ... cannot become a protected trademark,” “[n]or can the phonetic equivalent.” *Leon Finker, Inc. v. Schlusel*, 469 F. Supp. 674, 678 (S.D.N.Y. 1979); *accord Miller Brewing*

*Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 77 (7th Cir. 1977) (holding that “light” is generic as to beer, so its phonetic equivalent “lite” cannot be trademarked for beer). The district court’s error is perplexing because it later treated phonetic equivalents as legally equivalent in enjoining Defendants from using “confusingly similar marks (i.e. Comicon or Comiccon), or any phonetic equivalents, (i.e. ComiKon or ComicKon).” (Ex. 11, at 126:26-27.)

**2. The district court erroneously excluded additional, probative genericness evidence.**

A genericness inquiry may begin by assessing a mark’s component parts separately, and dictionaries are properly consulted for that purpose. *See Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 977-78 (9th Cir. 2010).

This Oxford English Dictionary entry for “con” is probative: “Esp. among enthusiasts of science fiction and role-playing games: a convention, an organized gathering of people with a shared interest. Freq. as the final element in the names of such events.” (Ex. 8, at 64.)

The entry’s illustrations confirm the point:

1940 *Astonishing Stories* Oct. 108/2 If you get this issue the day it appears on your newsstands, you will have just about enough time left to make arrangements to attend the

*Chicon.* (‘*Chicon*’: Fan argot for ‘Chicago Science Fiction Convention of 1940’.)

(*Id.*) The district court kept this highly relevant evidence from the jury.

(*Id.* at 65.)

In addition, as Defendants’ new trial motion recounts (Exs. 8-9), the court erroneously excluded expert linguistic testimony, plus scores of newspaper articles using “comic con” generically, like ones recalling “comic-cons ... throughout the country,” “Comic Cons popping up around the state,” “the most comic-con-like comic-con,” and “the second-biggest opening ever for a Comic Con, behind New York’s 32,000” (Ex. 8, at 55, nn.47-49 (citations omitted); *see also id.*, at 55-56, n.51). The court even excluded critical admissions from SDCC executives on genericness (and other key issues). (Ex. 3, at S10-S11.)

**B. *The fees order:*** The award of nearly \$4 million in fees on a \$20,000 verdict is likely to be reversed.

**1. If the verdict falls, so will the fees order.**

If this Court agrees with any of the arguments above, a new trial is required and the fees order will topple because it rests on SDCC prevailing at trial. *See, e.g., Lovell ex. rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373-74 (9th Cir. 1996).

**2. The district court erroneously grounded its award on unexceptional zealous advocacy.**

The district court rejected SDCC's contention that the merits were so lopsided as to render the case legally or factually "exceptional" (Ex. 12, at 148), and the jury found no willful infringement (Ex. 5, at 32). To justify awarding fees, the court relied on the supposedly "unreasonable manner" in which Defendants litigated this action. (Ex. 12, at 135.) But none of the cited conduct justifies that finding. In reality, the court punished Defendants for the type of advocacy attorneys typically employ, and *should* employ, in high-stakes litigation.

The Lanham Act authorizes fees to prevailing parties in "exceptional cases" only. 15 U.S.C. § 1117(a) (2012). A court should examine the "totality of the circumstances," exercising discretion in light of various nonexclusive factors. *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179, 1181 (9th Cir. 2016) (en banc) (citation omitted). These factors include deterring misbehavior. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 n.6 (2014). An exceptional case "stands out from others with respect to ... the unreasonable manner in which the case was litigated." *Id.*

Because the “chief duty” of attorneys “is to advocate zealously on behalf of their clients,” *Christensen v. Stevedoring Servs. of Am., Inc.*, 430 F.3d 1032, 1036 (9th Cir. 2005), courts should not impose sanctions that will “chill zealous advocacy,” *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 884 (9th Cir. 1988).

Here, to justify awarding fees, the district court faulted Defendants for raising a “generic ab initio” defense in limine and in a post-trial motion, after Defendants unsuccessfully sought summary judgment. (Ex. 12, at 138.) But a district court may always reconsider prior rulings before judgment, Fed. R. Civ. P. 54(b), and judges sometimes view old summary judgment issues in a new light when a full trial record is made, *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010). Indeed, the availability of a new trial motion *presupposes* that parties may properly seek reconsideration of prior rulings. Briefing the issue again was not improper.

A litigant may even be *required* to reassert arguments throughout litigation to preserve them. *Tennison v. Circus Circus Enters.*, 244 F.3d 684, 689 (9th Cir. 2001); *see* Fed. R. Civ. P. 50(b). Here, rebriefing the genericness ab initio issue *was* required because the court *directed*

appellants to file an in limine motion on “[t]he issue of genericness and the relevance as to time,” (Ex. 4, at 20:6), and adopted a new rationale for its “ab initio” position at trial (*see* Ex. 8, at 57:5-9 & n.59).

Other conduct cited by the district court was reasonable and did not remotely make this case “exceptional”:

- The court faulted Defendants for reasserting a naked licensing defense in motions in limine and for new trial after unsuccessfully seeking summary judgment on the issue. (Ex. 12, at 137-38.) That was wrong, because, as explained above, prudent advocacy requires raising similar issues at different procedural junctures. Also, the district court *invited* the very offer of proof it punished Defendants for providing. (Ex. 4, at 16:20-25 (“That would be very helpful ... I appreciate the offer on that.”).)

- The district court asserted Defendants should not have relied on the dictionary definition of “con.” (Ex. 12, at 139.) That assertion was legally erroneous, as explained above.

- The district court asserted DFP violated a local rule by “fil[ing] two summary judgment motions that totaled over forty pages in length.” (Ex. 12, at 136:7-12.) But the court “g[a]ve the defense the leave



to have done what they have done.” (Ex. 1, at 6:16-18.) Imposing millions of dollars in sanctions for a few extra pages of briefing—for which the court must have found good cause, *see* S.D. Cal. Civ. R. 7(1)(h)—is bewildering.

- The district court alleged DFP violated rules in “expressly referenc[ing] testimony ... designated ‘Confidential–Attorneys’ Eyes Only.” (Ex. 12, at 137:4-7.) That never happened. Defendants made general reference to deposition testimony without quoting or revealing its contents; when SDCC objected, Defendants offered to redact the references. (*See* Ex. 2, at S5:21-S7:8.) SDCC rejected the offer and pushed for the “sweeping set of ‘suppression orders’” this Court vacated on mandamus. *Dan Farr Prods.*, 874 F.3d at 591.

- The district court faulted Defendants because, in moving to amend their answer to add a defense based on SDCC’s submitting a false declaration to the Patent & Trademark Office, Defendants labeled the defense “inequitable conduct” and cited patent cases. (Ex. 12, at 140:19-141:6.) While “fraudulent procurement” is the preferred label in the trademark context, the defenses are similar. *See In re Bose Corp.*, 580 F.3d 1240, 1244-45 (Fed. Cir. 2009) (comparing the defenses in patent

and trademark cases). The district court's own order refers to "inequitable conduct" in this trademark case. (Ex. 12, at 134:17.)

- The district court criticized Defendants' reliance on the seminal "Shredded Wheat" case, *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938). (Ex. 12, at 142:1-21 (citation omitted).) A party cannot engage in misconduct by citing a foundational Supreme Court decision on genericness where that is the action's most heavily litigated defense.

- The district court faulted DFP for registering its Salt Lake Comic Con mark in response to SDCC's cease and desist letter. (Ex. 12, at 143-44.) But the PTO allowed registration. That means it must have found *no* likelihood of confusion with SDCC's—demonstrating the *reasonableness* of DFP's conduct. The district court punished DFP simply for exercising its First Amendment right to petition.

These and other examples establish serious questions about the viability of the district court's exceptionality finding.

**3. The district court erroneously based its fees order on out-of-court speech protected by the First Amendment.**

The district court also ruled that fees were justified because "turning to the media to litigate a trademark infringement case in the court of 'public opinion' is objectively irrational." (Ex. 12, at 149:17-18.)

The award is thus punishment for Defendants' exercising their First Amendment rights, whose restraint this Court earlier precluded.

This Court struck down the district court's prior restraints on extra-judicial speech for failure to articulate any "serious and imminent threat to SDCC's right to a fair trial." *Dan Farr Prods.*, 874 F.3d at 593. This Court suggested "retrospective damages" *might* be a "proper remedy" if the speech "was *transgressive* rather than just effective, persuasive, or opinionated." *Id.* at 596 n.8. But now as then, the district court cited "no evidence in the record" of any such speech, let alone speech adversely affecting trial proceedings.

This Court previously refused to indulge reasoning that "would justify imposition of prior restraints in almost any situation where an article is written or a statement is made in a public forum." *Id.* at 596. But the specter of retribution for extra-judicial statements stifles speech by future litigants just as effectively as a prior restraint. The district court's finding that "turning to the media ... is objectively irrational," (Ex. 12, at 149:17-18), does not support the sanctions here because Defendants' choice to speak was eminently rational. Defendants had to

preserve customer relationships and their reputation; it was reasonable for Defendants to explain their litigation views to those customers.

**4. The excessive fees award bears no relationship to the alleged misconduct.**

The nearly \$4 million award is wildly excessive—between 10 and 100 times awards published in recent, local Lanham Act cases. *See Ketab Corp. v. Mesriani & Assocs.*, 734 F. App'x 401, 412 (9th Cir. 2018) (\$292,202); *Elem Indian Colony of Pomo Indians v. Ceiba Legal, LLP*, 230 F. Supp. 3d 1146, 1155 (N.D. Cal. 2017) (\$118,366); *Mountz, Inc. v. Ne. Indus. Bolting & Torque, LLC*, No. 15-CV-04538-JD (MEJ), 2017 WL 780585, at \*4 (N.D. Cal. Jan. 27, 2017) (\$44,050); *ROAR, LLC v. ROAR Glob. Ltd.*, No. 2:15-CV-05865-ODW(AFM), 2016 WL 7115902, at \*8 (C.D. Cal. Dec. 5, 2016) (\$71,262).

The award is not merely eye-popping. It is legally defective. It includes fees indisputably unrelated to the litigation conduct the district court cited to justify its “exceptional case” determination. Exceptional case awards should be “compensatory, not punitive,” and “[d]eterrence ‘is not an appropriate consideration in determining the *amount* of a reasonable attorney fee.” *Rembrandt Techs., LP. v. Comcast of Fla/Pa*, 899 F.3d 1254, 1278 (Fed. Cir. 2018). Accordingly, “an exceptional case

finding based on litigation misconduct”—as opposed to, say, willful infringement—“usually does not support a full award of attorney’s fees.” *Monolithic Power Sys., Inc. v. O2 Micro Int’l Ltd.*, 726 F.3d 1359, 1369 (Fed. Cir. 2013) (citation omitted). Rather, an award “must bear some relation to the extent of the misconduct,” and compensate a party only “for the extra legal effort to counteract the misconduct.” *Id.*

Because the jury found no willful infringement, the district court “was required to find” a “causal connection’ ... between the misconduct and the fees it awarded.” *In re Rembrandt*, 899 F.3d at 1280. But the court made no attempt to link the fees it awarded to Defendants’ supposed misconduct. Instead, the court based its award on SDCC’s *total fees for the entire action*. That was reversible error.

The *first* instance of litigation “misconduct” cited by the district court—filing two summary judgment motions and moving to amend the complaint—occurred in June 2017. But the award includes more than \$1.4 million in fees incurred *for three preceding years*. (Ex. 12, at 160-61; Ex. 6, at S15-S65.) The award includes \$475,000 in fees incurred between the in limine hearing and the end of trial, though no alleged misconduct required SDCC to do extra trial work. (Ex. 6, at S66-S76.)

The award even includes SDCC's motions for the "sweeping set of 'suppression orders'" this Court vacated. *Dan Farr Prods.*, 874 F.3d at 591.

Finally, the award includes \$212,000 in expert witness fees, which the Lanham Act forbids, *Amusement Art, LLC v. Life is Beautiful, LLC*, No. 2-14-CV-08290-DDP-JPR, 2017 WL 2259672, at \*9 (C.D. Cal. May 23, 2017) (collecting authorities), *appeal filed*, No. 17-55888 (9th Cir. June 23, 2017). (Ex. 12, at 165:20-21.) Regardless, SDCC's expert fees lack any nexus to the misconduct cited by the court.

**C. *The injunction:* The overbroad injunction is likely to be reversed because it covers noninfringing conduct.**

The serious questions about the verdict also mean there are serious questions about the viability of the permanent injunction. But even if the verdict survives, there will be serious questions about certain prohibitions in the injunction, including:

- "registering ... a domain name that incorporates" any variant of "comic con," (Ex. 11, at 127:15-20), because registering a domain name, "without more," is not infringement, *GoPets Ltd. v. Hise*, 657 F.3d 1024, 1035 (9th Cir. 2011);

- “utilizing www.saltlakecomiccon.com,” DFP’s original address, “as a forwarding address to their [new] www.fanxsaltlake.com website,” (Ex. 11, at 127:21-23), which is not infringement because “consumers don’t form any firm expectations about the sponsorship of a website until they’ve seen the landing page—if then,” *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010); and

- using any “URL” that includes “comiccon” (Ex. 11, at 125:2-5)—as DFP’s social media page URLs do in their post-domain paths (i.e., the part following the top-level domain such as “.com”)—even though “post-domain paths do not typically signify source” and thus “it is unlikely that the presence of another’s trademark in a post-domain path of a URL would ever violate trademark law,” *Interactive Prods. Corp. v. a2z Mobile Office Sols., Inc.*, 326 F.3d 687, 698 (6th Cir. 2003).

## **II. Immediately enforcing the monetary judgment will destroy Defendants, but a stay will not harm SDCC.**

Defendants’ motion should be granted to avoid “irreparable harm in the form of employee layoffs, immediate insolvency, and, possibly, extinction,” *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 515 (Fed. Cir. 1990), and also to preserve “appellants’ rights to secure meaningful review,” *Providence Journal Co. v. FBI*, 595 F.2d 889,

890 (1st Cir. 1979). Without relief Defendants will be destroyed before they can prosecute their appeal from the instrument of their destruction. Staying enforcement also increases SDCC's prospects for full recovery on the judgment, should it be affirmed.

Defendants tried to obtain a supersedeas bond, but their applications were refused for inadequate security. (Declaration of William Smelko ¶¶ 2-6.) The problem is the *type* of Defendants' wealth, not its *sufficiency*. Instead of liquid or hard assets that could be pledged as collateral to a third-party surety, Defendants' principal asset is an ongoing business—together with related intangibles such as reputation, fan-base, expertise, social media channels, and industry connections. (Ex. 18, at 198.)

DFP's conventions have a sustained track record of generating substantial positive cashflow. (Declaration of Clarke Nelson ¶¶ 3-6.) Over the past several years, DFP's cashflow has funded \$2.2 million in extraordinary expenses (primarily attorney fees) associated with this litigation. (Ex. 23, at 237-38.) DFP's performance has been so robust that it has been approached by major industry players interested in acquiring its conventions, whose valuations range from five to twelve



times EBITDA. (Brandenburg Decl. ¶ 12.) With 2017 adjusted EBITDA exceeding \$1 million, DFP's earnings and buyer interest establish a valuation far in excess of the \$3.9 million fees award. (*Id.*; Nelson Decl. ¶ 5.)

Thus, if DFP survives, any affirmed judgment could be satisfied with a lump sum payment funded by a sale of DFP's conventions or, if DFP does not sell, by installment payments from convention revenues. To that end, if a stay is granted Defendants will refrain from encumbering DFP or its business, and if the business sells they will escrow enough to cover the judgment, for the duration of the appeal. (Brandenburg Decl. ¶¶ 13-16; Declaration of Daniel Farr ¶¶ 2-4.)

Conversely, immediate execution on DFP's accounts would destroy DFP because it needs money from this year's convention to seed its next convention. (Ex. 18, at 198; Nelson Decl. ¶¶ 6-8.) SDCC would thus achieve only a fractional recovery on the judgment because the shortfall between DFP's liquidation value and the judgment is too great to be bridged by the individual Defendants' personal wealth. (*See* Ex. 17, at 190; Ex. 18, at 198.)

There is no evidence SDCC—a nonprofit with over \$20 million in the bank (Nelson Decl. ¶¶ 9-10)—needs immediate, fractional satisfaction now more than full satisfaction later. Yet SDCC has moved to enforce and register the judgment on an expedited basis, despite agreeing that Defendants “do not have sufficient assets to obtain a bond to stay enforcement.” (Ex. 21, at 218.) Demolishing DFP, Brandenburg, and Farr seems to be the purpose of SDCC’s enforcement efforts, not the byproduct.

**III. The injunction also threatens irreparable harm to Defendants, which is not offset by any benefit to SDCC.**

Regarding the injunction, Defendants seek relief from prohibitions on (1) registering domain names; (2) using legacy domain names as forwarding addresses for websites; (3) using legacy domain names in email addresses to receive (but not send) email; (4) maintaining their Facebook group and YouTube channel at URLs that include “slcomiccon” in their post-domain paths; and (5) preserving historical social media posts.

If Defendants cannot renew or maintain existing domain-name registrations, those domains could be appropriated by others and used to poach DFP’s patrons; DFP likely would be unable to reclaim the domains

after appeal. (*See* Ex. 18, at 199.) The ban on using legacy domains to forward internet traffic and receive email threatens irreversible disruption of customer relationships. (*Id.* at 201.) Conversely, staying those aspects of the injunction will not harm SDCC because DFP's landing page dispels any notion of SDCC sponsorship. *See Toyota Motor Sales U.S.A., Inc. v. Tabar*, 610 F.3d 1171, 1179 (9th Cir. 2010) (reasoning that a website's landing page, not its URL, usually drives consumer impressions of source).

The social media accounts threatened by the ban on post-domain uses of "comiccon" are tremendously valuable: they connect DFP to persons keenly aware that DFP is unaffiliated with SDCC, and they rely on URLs that cannot be modified (only deleted). (Ex. 18, at 198-201.) The destruction of old posts on those and other accounts would irreversibly destroy years of accumulated communal memories and associated goodwill. (Brandenburg Decl. ¶¶ 6-10.) These harms to Defendants are not counterbalanced by any legitimate SDCC interest because the affected social media sites are frequented by super-fans, and neither the super-fans nor other visitors will be misled by the existence

of old content from prior conventions that users will find only if they scroll past current content.

#### **IV. Staying enforcement serves the public interest.**

Defendants are prominent members of Utah’s business community. Utah’s Attorney General and Salt Lake County’s mayor have submitted declarations explaining how DFP’s annual convention invigorates the region’s economy and cultural fabric. (Declaration of Sean Reyes ¶¶ 3-6; Ex. 19, at 205.)

This case “has drawn nationwide attention ... in part because ‘comic cons’ have been held in hundreds of venues across the United States,” “in nearly every state,” by “over 100 competitors us[ing] the unhyphenated form of Plaintiff’s trademark.” *Dan Farr Prods.*, 874 F.3d at 591, 592 n.1. Producers of other cons want this appeal resolved on the merits, to reduce uncertainty about whether they too will face expensive litigation. Patrons of other cons don’t want confusing name changes for their favorite events. None of these interests is served if SDCC destroys Defendants via enforcement before this Court can resolve the appeal.

#### **V. The *Dillon* factors also support a stay.**

The *Dillon* factors, which also favor a stay if considered, are:

(1) the complexity of the collection process; (2) ... time required to obtain a judgment after [affirmance]; (3) ... availability of funds to pay the judgment; (4) whether “... ability to pay ... is so plain that the ... bond would be a waste of money”; and (5) whether the defendant is in such a precarious financial situation that ... bond[ing] would place other creditors ... in an insecure position.

*Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (citations omitted).

The process of collecting a judgment against Defendants under Fed. R. Civ. P. 69 is neither unusually complex (factor 1) nor time-consuming (factor 2)—unlike the “cumbersome,” “uncertain” process for enforcing a judgment against Illinois decried in *Dillon*, 866 F.2d at 904. DFP can pay an affirmed judgment (factor 3) from the proceeds of a sale or out of show-generated revenues *if* a stay is granted, but Defendants will face bankruptcy if a stay is denied (factor 5). *Supra* pp. 20-23.

## CONCLUSION

This Court should grant an immediate, temporary stay of enforcement of the judgment to allow this motion to be adjudicated in due course. This Court should then stay enforcement pending appeal, especially of the fees award and the following aspects of the permanent injunction:

- Prohibitions on registering domain names, and using domain names that include “comiccon” to forward internet traffic or receive email;
- Prohibitions on maintaining social media accounts that include “comiccon” in their post-domain paths; and
- Any requirement to destroy existing social media posts.

October 10, 2018

**HORVITZ & LEVY LLP**  
JOHN A. TAYLOR, JR.  
PEDER K. BATALDEN  
ERIC S. BOORSTIN  
**MASCHOFF BRENNAN PLLC**  
MICHAEL I. KATZ  
L. REX SEARS

By: \_\_\_\_\_ s/ L. Rex Sears

Attorneys for Defendants-Appellants  
**DAN FARR PRODUCTIONS, DANIEL  
FARR, AND BRYAN BRANDENBURG**

**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT AND  
FORMAT REQUIREMENTS**

I certify that, pursuant to Circuit Rules 27-(1)(d) and 32-3(2), the attached motion contains 5,568 words and is prepared in a format, type face, and type style that comply with Fed. R. App. P. 32.

October 10, 2018

By: s/ L. Rex Sears

## DECLARATION OF SEAN REYES

I, Sean Reyes, declare as follows:

1. I am the Attorney General of Utah, a position that I have held since December 2013.
  2. As a resident of Utah and Utah's Attorney General, I am familiar with the comic conventions organized by Dan Farr Productions, LLC (the "Conventions.")
  3. The Conventions have a positive impact on the economy of Utah.
  4. The Conventions also frequently undertake partnerships with local nonprofits, which benefit our community.
  5. On March 10, 2015 I honored Dan Farr Productions, LLC, Daniel Farr, and Bryan Brandenburg with a declaration recognizing that the Conventions "ha[d] directed national attention and ha[d] put Utah on the map in a new and exciting way," had "drawn attendees from across the nation, having a positive impact on Utah's economy," and "encourage[] each of us to find the crime fighting hero within." A true and correct copy of this declaration is attached hereto as Exhibit A.
  6. These observations from my declaration remain true today. The Conventions continue to be an important part of the cultural and economic fabric of Utah and ending them would have a negative impact on the public of the state.
- I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my personal knowledge.

Executed on September 16, 2018

By: \_\_\_\_\_

  
Sean Reyes



# **EXHIBIT A**



## *Declaration*

*Whereas*, Salt Lake Comic Con has directed national attention and has put Utah on the map in a new and exciting way;

*Whereas*, each Salt Lake Comic Con event has drawn attendees from across the nation, having a positive impact on Utah's economy;

*Whereas*, Salt Lake Comic Con brings celebrities such as Sir Patrick Stewart, William Shatner, Lou Ferrigno, Adam West, Nathan Fillion, Karl Urban, Karen Gillan, Billy Dee Williams, Ron Perlman, John Barrowman, Stephen Amell, Alan Tudyk, Barbara Eden, Jon Heder, Eliza Dushku, Edward James Olmos, Danny Glover, and Stan Lee to the great state of Utah;

*Whereas*, Salt Lake Comic Con has broken records for the largest convention in Utah, the largest first year comic con in North America, the largest comic con in North America per Capita, and the third largest comic con in the United States;

*Whereas*, Stan Lee himself declared Salt Lake Comic Con to be "the greatest comic con in the world";

*Whereas*, Dan Farr and Bryan Brandenburg are the founders of Salt Lake Comic Con;

*Whereas*, Salt Lake Comic Con encourages each of us to find the crime-fighting hero within;

*Now, Therefore*, I, Sean D. Reyes, Attorney General of the State of Utah, do hereby declare March 10, 2015, as

*Fighting Crime with Salt Lake Comic Con*

*Day in Utah*

A handwritten signature in black ink, appearing to read "Sean D. Reyes", written in a cursive style.

Sean D. Reyes  
Attorney General

## **DECLARATION OF BRYAN M. BRANDENBURG**

I, Bryan M. Brandenburg, declare as follows:

1. I am the Chief Marketing Officer and Co-Founder of Dan Farr Productions, LLC (“DFP”). I make this declaration based on my own personal knowledge and based on records maintained by DFP in the ordinary course of business, to which I have access and upon which I rely in performing my duties to DFP.

2. DFP organizes and produces comic conventions in Salt Lake City, Utah. DFP held its first convention in September 2013 and it has held a convention every September since. Through 2017, DFP’s September event was called “Salt Lake Comic Con.” Starting this year, DFP is branding its September event “FanX Salt Lake Comic Convention.”

3. From 2014 to 2017, DFP also produced a smaller convention in the spring (between January and April) called “FanX Salt Lake Comic Con.” The demands of litigation prevented DFP from producing its spring show this year, but DFP expects to resume production of its spring show in April 2019.

## **Social media and internet domains**

4. From its launch, DFP's success has been fueled by and dependent on a strong online presence—including both its own website and social media. DFP communicates with its public through Twitter, Instagram, Tumblr, Pinterest, Facebook, and YouTube. On Facebook, DFP maintains both a public page and a group page.

5. After the jury returned its verdict in this case, on December 8, 2017, DFP rebranded its website and relocated it, first to the domain [saltlakecomicconvention.com](http://saltlakecomicconvention.com) and then to the domain [fanxsaltlake.com](http://fanxsaltlake.com). DFP still owns registrations for the domains [saltlakecomiccon.com](http://saltlakecomiccon.com) and [slcomiccon.com](http://slcomiccon.com). DFP continues to receive but not send emails at addresses on those domains—e.g., [bryan@slcomiccon.com](mailto:bryan@slcomiccon.com); and DFP has been forwarding internet traffic from [www.saltlakecomiccon.com](http://www.saltlakecomiccon.com) to [fanxsaltlake.com](http://fanxsaltlake.com). (After this year's show ended, DFP tested the impact of forwarding by temporarily stopping it. Overall traffic to DFP's website was materially diminished during the period that traffic was not forwarded.)

6. After the jury's verdict, DFP also changed its Twitter, Instagram, Tumblr, and Pinterest handles, and its public Facebook page, so they no longer use "comic con" in any form. DFP changed the branding

on *all* its social media sites from “Salt Lake Comic Con” to “FanX Salt Lake Comic Convention.” However DFP has been unable to migrate either its Facebook group page or its YouTube channel to URLs that do not include “comiccon.” More precisely, although the URLs do not include any form of “comic con” in the domain, they do include “comiccon” in the post-domain paths. Specifically, the URL for the Facebook group page is [www.facebook.com/groups/saltlakecomiccon](http://www.facebook.com/groups/saltlakecomiccon); for the YouTube channel, [www.youtube.com/user/SLComicCon](http://www.youtube.com/user/SLComicCon). So far as DFP has been able to ascertain, the operators of those platforms do not provide DFP the technical capability of altering the URLs at which its content is hosted. Because DFP cannot change the URLs, if it is not allowed to continue using the URLs then it will have to abandon the content and the followers.

7. DFP’s Facebook group page has 33,000 followers. Unlike DFP’s public Facebook page, which is accessible to anyone, access to the group page is limited to members—i.e., Facebook subscribers who have applied for access and had their applications approved by DFP. We describe group page followers as “super fans.” As a precaution, DFP launched a new Facebook group page several weeks ago at a new URL and invited members of the original group page to also apply and join the

new group. About 8,000 of the 33,000 members of the original group page have been subscribed to the new page. Thus DFP still stands to lose its established communication channel with 25,000 super fans—as well as *all* the content (posts, likes, links, etc.) on the original group page, if forced to abandon the original URL.

8. DFP’s YouTube channel receives hundreds of thousands of impressions a month and has totaled millions of views over its life.

9. Based on metrics developed using the various analytical tools provided by the different social media platform providers, DFP’s social media sites, collectively, have about 350,000 posts and shares—including tens of thousands of photographic images and videos. In those posts—and associated likes, links, and shares—live DFP’s collective memory and historical consciousness, and the Internet’s memory and awareness of DFP. The posts include the personal photos of tens of thousands of customers that are linked from personal pages. They also include thousands of more broadly significant images and video, including one of the last appearances by Carrie Fisher (Princess Leia from Star Wars), the second-to-last appearance by Leonard Nimoy (Spock from Star Trek), and the Guinness World Record-breaking gathering of costumed fans at one of DFP’s events. All that content is in turn embedded in a wider

universe of likes, links, and shares, all of which together makes up one of DFP's most powerful assets for cultivating and maintaining an emotional connection with its fan base. The greatest harm to DFP that is threatened by the district court's injunction is the irreversible loss of most or all that content.

10. Removing "comic con" from all those posts is a practical impossibility: there is no "find and replace" tool to reach into and separately modify each text post, so forcing DFP to scrub all "Salt Lake Comic Con" references is the same as ordering DFP to remove the posts themselves; and images and video are not searchable *at all*. Due to their sheer number, the posts would have to be removed en masse, because they could not be individually assessed and removed. The resulting loss would be irreversible: even if some posts could be restored, they would have none of the temporal indexing that causes them to resurface—and all the likes, links, and shares to them would be forever lost; and commentary and recognition from the likes of Chris Evans (Captain America) and Stan Lee (Founder of Marvel) would be erased from history.

11. I estimate that destroying all social media posts including any "comic con" references would take at least five days.

## **Market valuation**

12. Since DFP produced its first show in 2013, it has entertained and engaged in serious acquisition discussions with several large industry participants with multiple comic convention shows, like ours, in their portfolios. Some of those discussions are ongoing. Valuation parameters in those discussions have typically been set as multiples of EBITDA; specifically, the parameters have ranged from five to twelve times EBITDA. Excluding extraordinary litigation expenses, this yields a valuation of \$5–\$12 million, which is more than enough to pay the judgment. This has been borne out in ongoing discussions, in which a potential acquirer familiar with the \$4 million fees award has pointed out that the entire judgment could be paid from the acquisition price, leaving some residual for DFP’s members and a comic convention in its fans’ hometown.

13. If the judgment is affirmed on appeal, paying the full judgment from proceeds of a sale of our events would provide the quickest route to full payment. Failing that, ongoing revenues will allow the full judgment to be paid over time. But if enforcement is not stayed, our means to produce the next show will be gone and the ongoing value and goodwill with our over one hundred thousand customers will evaporate.



14. Daniel Farr and I, between us, own 100% of the membership interests in DFP. If enforcement is stayed then during the pendency of this appeal, we will continue to operate the business enterprise (including payments to trade and other creditors) as we have done historically.

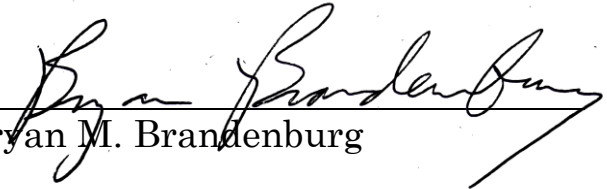
15. If enforcement is stayed then during the pendency of this appeal, we will not lien, hypothecate, encumber, our equity interests in DFP, or in its business, to be used as security for the repayment of any debt other than the judgment without obtaining either written approval from SDCC or an order of this Court authorizing such securitization.

16. If enforcement is stayed then any net proceeds from the sale, transfer, or assignment of any of our equity interests in DFP, or in its business, while this appeal is pending, up to the amount of the judgment, will be placed in escrow pending resolution of the appeal, to stand as security for the judgment (if affirmed).

17. I understand the purpose of a supersedeas bond is to safeguard the judgment's creditor ability to collect on the judgment. Given the nature of our business operations and the make-up of our collective asset structure, preventing immediate collection activity will

accomplish that goal far better than wholesale dismemberment of our assets and the destruction of our going concern value and income stream.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Salt Lake City, Utah this 9<sup>th</sup> day of October 2018.

  
Bryan M. Brandenburg

## DECLARATION OF DANIEL FARR

I, Daniel Farr, declare as follows:

1. I am the Producer and Co-Founder of Dan Farr Productions, LLC (“DFP”). I make this declaration based on my own personal knowledge and based on records maintained by DFP in the ordinary course of business, to which I have access and upon which I rely in performing my duties to DFP.

2. Bryan Brandenburg and I, between us, own 100% of the membership interests in DFP. If enforcement is stayed then during the pendency of this appeal, we will continue to operate the business enterprise (including payments to trade and other creditors) as we have done historically.

3. If enforcement is stayed then during the pendency of this appeal, we will not lien, hypothecate, or encumber our equity interests in DFP, or in its business, to be used as security for the repayment of any debt other than the judgment without obtaining either written approval from SDCC or an order of this Court authorizing such securitization.

4. If enforcement is stayed then any net proceeds from the sale, transfer, or assignment of any of our equity interests in DFP, or in its business, while this appeal is pending, up to the amount of the judgment,

will be placed in escrow pending resolution of the appeal, to stand as security for the judgment (if affirmed).

I declare under penalty of perjury that the foregoing is true and correct. Executed in Salt Lake City, Utah this 9<sup>th</sup> day of October 2018.

A handwritten signature in cursive script that reads "Daniel Farr". The signature is written in black ink and is positioned above a horizontal line.

Daniel Farr

## DECLARATION OF WILLIAM SMELKO

I, William Smelko, declare as follows:

1. I am an attorney retained by Appellants Daniel Farr, Bryan Brandenburg, and Dan Farr Productions. I am licensed to practice law in the State of California and am admitted before the Ninth Circuit Court of Appeals. I have personal knowledge of the matters and facts set forth in this declaration and if called as a witness, could and would testify competently thereto.

2. On September 6, 2018 and again on two occasions thereafter, after being retained by Appellants, I contacted two different insuring or bonding entities seeking to obtain a supersedeas bond for Appellants in connection with the judgment entered on August 23, 2018 in favor of San Diego Comic Convention in the United States District Court for the Southern District of California.

3. The first representative and corporate agent I spoke with was headquartered in Chicago, in the national office of CNA Insurance and Surety Company. She explained that given the size of the judgment (nearly \$4 million), the Appellants would be required to post hard collateral in the amount of the judgment, plus interest, to obtain the

bond. By hard collateral, the agent explained that to issue a supersedeas bond her company required cash, cash equivalents, deposit accounts, and appraised real property valued with a net equity above \$4.0 million.

4. The CNA agent further explained that her company would not provide any type of bond in the absence of sufficient hard collateral to securitize the full bond amount if the appeal proved unsuccessful. I responded that Appellants not only had a successful track record of producing profitable shows that generated income, but also that such income would grow over the course of the time period required for the Appeal to be decided. She nonetheless reaffirmed that her Company would not use income or business operating value as collateral security to issue a supersedeas bond.

5. On September 10, 2018, I spoke with the Vice President and Court Bond Underwriting Director at Tokio Marine HCC in Los Angeles. She, too, informed me that her company would not consider posting a supersedeas bond for Appellants without hard collateral valued in excess of the bond amount. The collateral she said would be acceptable was similar to that referenced by CNA.

6. The Tokio Marine VP told me that her organization likewise would not use going concern value as collateral. Furthermore, given the

size of the judgment, her company would not be able to post a supersedeas appeal bond without security in the form of cash, marketable securities, or appraised real property valued in excess of the amount of the Judgment.

I declare under penalty of perjury that the foregoing is true and correct. Electronically executed in San Diego, California this 9<sup>th</sup> day of October 2018.

s/ William Smelko  
\_\_\_\_\_  
William Smelko

## DECLARATION OF CLARKE B. NELSON

I, Clarke B. Nelson, declare as follows:

1. I am a Certified Public Accountant (CPA) and a Chartered Global Management Accountant (CGMA); and I am Accredited in Business Valuation (ABV) and Certified in Financial Forensics (CFF) by the AICPA. I hold a B.S. in accounting from Brigham Young University and an M.B.A. from the Wharton School, University of Pennsylvania. Attached as **Attachment 1** is my curriculum vitae, which further outlines my background, qualifications, and experience.

2. I have been asked to summarize certain financial and accounting information pertaining to both Dan Farr Productions, LLC (“DFP”) and San Diego Comic Convention (“SDCC”).

### **Dan Farr Productions**

3. I was provided electronic access to the accounting system kept and used by DFP in its ordinary course of business. Based on my review of DFP’s accounting records, DFP revenue increased from approximately \$1.8 million in 2013, the first year it produced an event, to \$7.8 million in 2017. In 2013, DFP produced only one event, in the fall. Starting in 2014, DFP began producing two comic conventions each year, one in the



spring and another in the fall. From 2014 to 2017, DFP's revenues grew at a compound annual growth rate of 10.7% (see **Attachment 2**).

4. While DFP has produced two comic convention events each year since 2014, it only produced one event in 2018. Because DFP's fall 2018 event occurred very recently, September 6–8, its accounting records for this event and 2018 overall are not yet complete. Notwithstanding, I understand that nearly all of the revenue attributable to the fall 2018 event has been recorded, which revenue totals approximately \$4.9 million (net of sales tax that has been collected but has not yet been paid). The \$4.9 million in revenue for the fall 2018 event compares to \$4.5 million in revenue for its fall 2017 event, which represents year-over-year growth of approximately \$0.4 million or 9%.

5. DFP's adjusted EBITDA (earnings before interest, taxes, and depreciation) for its most recent complete year, 2017, totals approximately \$1.1 million. This amount includes guaranteed payments/salary paid to DFP principals and excludes amounts paid for extraordinary litigation expenses (see **Attachment 2**).<sup>1</sup>

---

<sup>1</sup> The accompanying attachments generally present information at a summary level, rather than in the same detail as the accounting records I reviewed.

6. From its earned revenues, DFP pays various operational costs to produce its convention events held in Salt Lake City, Utah. Such operational expenses include, but are not limited to, celebrity fees, celebrity travel and lodging, facilities rental, labor and payroll (including payroll taxes), and marketing and advertising. In addition, between 2014 and 2017, DFP also paid litigation expenses (i.e., attorney fees, expert fees, and other costs) of approximately \$1.6 million to Maschoff Brennan, which I understand to be DFP's legal counsel in this matter (see **Attachment 3**).<sup>2</sup>

7. Based on my review of DFP's accounting records, I understand that DFP typically begins incurring expenses for its events several months prior to the actual date of such events. For example, according to DFP's accounting records, as of December 31, 2017, just three months after its fall 2017 event and before it began realizing any revenue from its upcoming fall 2018 event, DFP had incurred approximately \$153,000 of expenses related to anticipated future events.

8. I understand that DFP has never established any credit facilities, other than financing some of its operations through use of

---

<sup>2</sup> The \$1.6 million figure is through 2017. To date, DFP has paid Maschoff Brennan approximately \$2.2 million in litigation expenses.

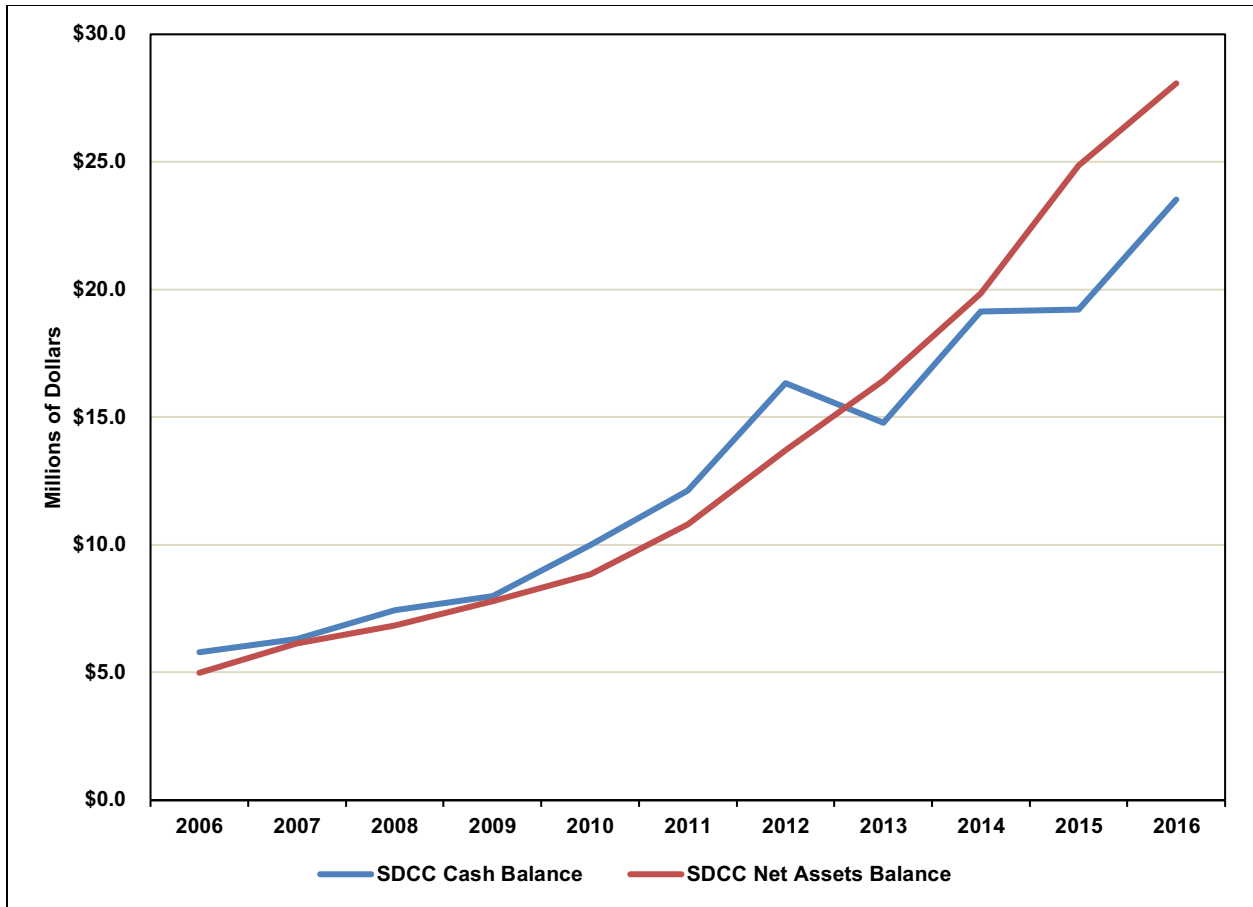
personal credit cards. Other than capital loaned for DFP's first event by Daniel Farr, it appears that the only sources of operating capital that have been historically used by DFP are the remaining revenues generated by each convention event after expenses. This understanding is consistent with DFP's accounting records, which indicate that DFP has incurred only \$220 in interest expense between 2013 and 2017.

### **San Diego Comic Convention**

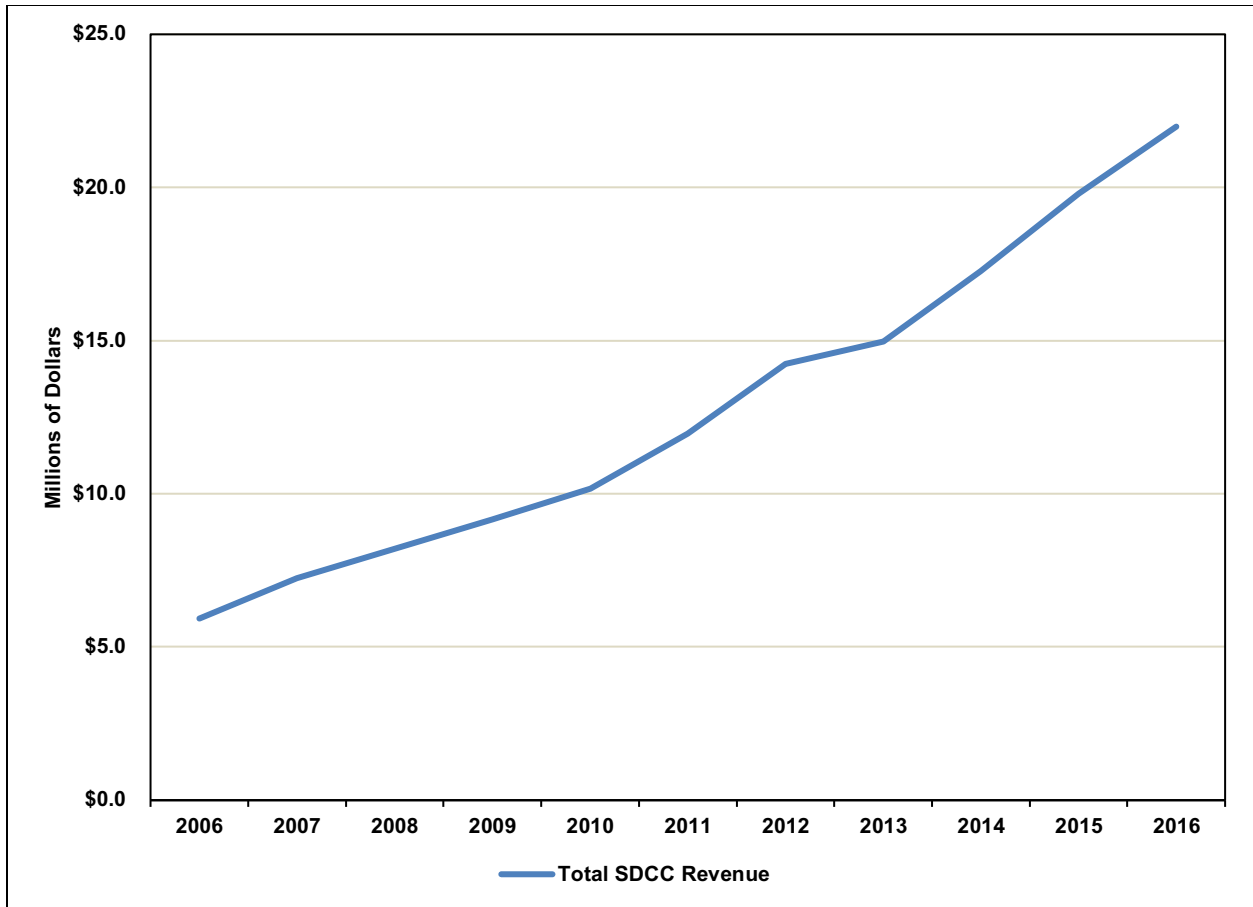
9. SDCC is a nonprofit educational organization, which I understand is required to publish its annual Form 990 tax returns. I have reviewed such tax forms through SDCC's fiscal year ended August 31, 2016. (SDCC's tax forms for the fiscal years ended August 31, 2017 and 2018 have not yet been published.) As of August 31, 2016, SDCC reported approximately \$23.5 million in cash on hand, and over \$28 million in net assets (see **Attachment 4**). The following chart shows the growth of SDCC's cash and net asset balances from 2006 to 2016, including its cash purchase of an office building in 2016.<sup>3</sup>

---

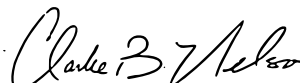
<sup>3</sup> <http://www.latimes.com/local/lanow/la-me-ln-barrio-comic-con-20160829-snap-story.html>.



10. Since its fiscal year 2006 (the earliest year for which I have ready access to data), SDCC’s revenue has consistently grown each year, from approximately \$5.9 million in 2006 to nearly \$22 million in 2016, which equates to a compound annual growth rate of 14.0% for that time period (see **Attachment 4**). The following chart shows the trend of revenue growth experienced by SDCC.



I declare under penalty of perjury that the foregoing is true and correct. Executed in Salt Lake City, Utah this 9<sup>th</sup> day of October 2018.

  
Clarke B. Nelson

## Curriculum Vitae



### **Clarke B. Nelson, CPA, ABV, CFF, CGMA, MBA**

Senior Managing Director & Founder

InFact Experts LLC

[cnelson@infact-experts.com](mailto:cnelson@infact-experts.com)

### **Salt Lake City Office**

265 East 100 South, Suite 307

Salt Lake City, UT 84111

Office: 801.903.2038

Cell: 801.232.3793

Clarke B. Nelson is a Senior Managing Director with InFact Experts and leads the firm's Commercial Damages Practice. With more than two decades of professional experience, Mr. Nelson has been qualified as an expert in various federal and state courts, issued findings on matters in arbitration, mediation, and the International Trade Commission (ITC) and has testified in numerous high-profile matters, including claims for 10-figure damages.

In addition to his experience in intellectual property matters including patent infringement, trademark infringement, trade secret misappropriation, copyright infringement, and royalty compliance audits, Mr. Nelson also provides expert analysis in forensic accounting, antitrust, breach of contract, business valuation, financial and fraud investigations, IP licensing and strategy, and other matters. Prior to InFact, he spent many years at international forensic and litigation consulting firms, including a "Big Five" accounting and consulting firm.

Mr. Nelson received his MBA degree from The Wharton School, University of Pennsylvania and his bachelor of science degree in accounting from Brigham Young University. He is a Certified Public Accountant, a Chartered Global Management Accountant, Accredited in Business Valuation, and Certified in Financial Forensics by the AICPA.

### **Expert Testimony**

Mr. Nelson has testified in court proceedings (jury and bench) in various jurisdictions including:

- Northern District of California
- Southern District of California
- Northern District of Indiana
- Western District of Tennessee
- Eastern District of Texas
- California Superior Court
- Utah Third District Court
- Utah Fourth District Court
- American Arbitration Association (Texas, California, Utah)

In addition, Mr. Nelson has testified in deposition in many other jurisdictions including:

- Central District of California
- Middle District of Florida
- Northern District of Georgia
- Northern District of Illinois
- Southern District of New York
- District of Maryland
- Northern District of Ohio
- Western District of Pennsylvania
- Southern District of Texas
- District of Utah
- Eastern District of Virginia
- Western District of Washington

Mr. Nelson has testified as an expert witness and/or consulted on a variety of matters including:

- Accounting / GAAP
- Alter Ego
- Antitrust
- Bankruptcy
- Breach of Contract
- Breach of Fiduciary Duty
- Class Action
- Construction
- Copyright Infringement
- False Advertising (Lanham Act)
- Forensic Investigations / Fraud
- Trademark Infringement
- Trade Secret Misappropriation
- Government Contracts
- Joint Venture and Profit Sharing
- Licensing and Market Assessment
- Patent Infringement
- Product Liability
- Real Estate
- Revenue Recognition
- Royalty Audit / Compliance
- Securities
- Solvency
- Trade Dress
- Unfair Competition
- Valuation

## **Representative Industries**

- Airline
- Ammunition
- Apparel / Fashion
- Asphalt Paving
- Automotive
- Banking
- Biotech
- Building Materials
- Call Center
- Computers
- Construction
- Consumer Electronics
- Consumer Goods
- Credit Card Processing
- Educational software
- Financial Services
- Flooring
- Gaming / Gambling
- Government
- Hard Drive
- Healthcare
- Health & Fitness
- Home Security
- Insurance
- Medical Laboratory
- Medical Information
- Newspaper Publishing
- Nutritional Supplement
- PCI Compliance
- Pest Control
- Pharmaceutical
- Plumbing
- Real Estate Development
- Retail / Department Store
- Satellite TV
- Semiconductor
- Software
- Telecom
- Video Game & Devices
- Video Game Publishing
- Wearable Devices
- Wireless Communication

## **License / Certifications**

During his career, Mr. Nelson has earned the following licenses and certifications:

- Certified Public Accountant (CPA)
- Accredited in Business Valuation (ABV)
- Certified in Financial Forensics (CFF)
- Chartered Global Management Accountant (CGMA)

## **Education**

- Master of Business Administration, The Wharton School, University of Pennsylvania
- Bachelor of Science, Accounting, Brigham Young University

## **Current / Past Professional Affiliations**

- Licensing Executives Society, Chair, Salt Lake Chapter
- American Institute of Certified Public Accountants
- Utah Association of Certified Public Accountants



- Intellectual Property Owners Association
- BYU Management Society, Board of Directors, Salt Lake Chapter
- Utah Information Technology Association (now Utah Technology Council)

### **Publications / Presentations / Speaking Engagements**

- “Intellectual Property Damages Panel,” Utah Bar Association, IP Summit
- “Are the Bridges to Commerce Safer? A Panel Discussion of Federal and State ‘Anti-Troll’ Measures,” Licensing Executives Society
- “Economic Hurdles to Injunctions and Exclusion Orders,” Licensing Executives Society Webinar
- “Patent Infringement Damages and Expert Reports,” Brigham Young University, J. Reuben Clark Law School
- “Intellectual Property Portfolio Management – When and How to Deal with Underreporting,” The IP Legal Minute
- “The Convergence of Recent Case Law and How Uniloc, ResQnet, and Cornell Federal Circuit Decisions May Impact the Value of Your IP,” Licensing Executives Society, San Francisco, CA Chapter
- Panelist – “Enforcing the License Agreement: Royalty Audits, Collections, and Litigation,” State Bar of California
- “Patent Infringement Damages,” Brigham Young University, J. Reuben Clark Law School
- Guest Lecturer – “Patent Law Remedies & Patent Damages,” University of Utah Law School
- “Working with Consultants and Expert Witnesses,” General Counsel/External Counsel forum (co-presented with Howrey LLP)
- “Intellectual Property Royalty Compliance,” Licensing Executives Society, Salt Lake City Chapter
- “Recent Decisions Affecting Damages in Patent Litigation,” Law Seminars International.
- “Patent Damages After eBay,” California Society of CPAs
- “Consulting Case Competition,” Brigham Young University
- “Commonly Debated Issues in Performing Economic Damages Analyses in Intellectual Property Matters,” Chapter 5 in Economic Damages in Intellectual Property - A Hands-On Guide To Litigation, Wiley, 2006 (co-authored with Chase Perry, Elizabeth Whitaker).
- “Recent CAFC Decisions Affecting Damages,” IP Section, Utah State Bar
- “Intellectual Property Law,” Salt Lake Community College
- “Financial Consulting in Litigation,” Brigham Young University, Management Consulting Club

## **Professional Experience**

- **InFact Experts LLC**, Senior Managing Director / Founder, 2016 – Present
- **Fact Forensics LLC**, Managing Member, 2016 – Present
- **Berkeley Research Group, LLC**, Managing Director, 2011 – 2016
- **FTI Consulting, Inc.**, Senior Managing Director, 2003 – 2011
- **LECG LLC**, Managing Consultant, 2002 to 2003
- **Arthur Andersen LLP**, Manager, 1997 – 2002

*San Diego Comic Convention v. Dan Farr Productions, et al.*  
**Summary of DFP Profit & Loss Statements**

Attachment 2

	2013		2014		2015		2016		2017		Total	
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
Total Income	\$ 1,778,530	100.0%	\$ 5,216,418	100.0%	\$ 6,455,744	100.0%	\$ 7,267,944	100.0%	\$ 7,842,089	100.0%	\$ 28,560,726	100.0%
Total Cost of Goods Sold	\$ 1,101,618	61.9%	\$ 3,339,391	64.0%	\$ 4,100,851	63.5%	\$ 4,239,049	58.3%	\$ 3,695,538	47.1%	\$ 16,476,447	57.7%
Gross Profit	\$ 676,912	38.1%	\$ 1,877,026	36.0%	\$ 2,354,892	36.5%	\$ 3,028,896	41.7%	\$ 4,146,552	52.9%	\$ 12,084,278	42.3%
Total Expenses	\$ 657,651	37.0%	\$ 2,118,559	40.6%	\$ 2,242,596	34.7%	\$ 3,020,107	41.6%	\$ 4,161,010	53.1%	\$ 12,199,922	42.7%
<b>Net Ordinary Income</b>	<b>\$ 19,261</b>	<b>1.1%</b>	<b>\$ (241,532)</b>	<b>-4.6%</b>	<b>\$ 112,297</b>	<b>1.7%</b>	<b>\$ 8,789</b>	<b>0.1%</b>	<b>\$ (14,459)</b>	<b>-0.2%</b>	<b>\$ (115,644)</b>	<b>-0.4%</b>
Add Back: Depreciation Expense	5,072	0.3%	7,500	0.1%	6,468	0.1%	-	0.0%	3,421	0.0%	22,461	0.1%
Add Back: Interest Expense	79	0.0%	14	0.0%	120	0.0%	7	0.0%	-	0.0%	220	0.0%
Add Back: Litigation Expenses	-	0.0%	12,532	0.2%	178,967	2.8%	359,610	4.9%	1,070,000	13.6%	1,621,109	5.7%
Adjusted EBITDA	\$ 24,413	1.4%	\$ (221,487)	-4.2%	\$ 297,852	4.6%	\$ 368,406	5.1%	\$ 1,058,962	13.5%	\$ 1,528,146	5.4%
<b>Total Revenue CAGR (2014 through 2017)</b>	<b>10.7%</b>											

Notes:

Source: QuickBooks Online Plus File for Dan Farr Productions as of October 8, 2018.

*San Diego Comic Convention v. Dan Farr Productions, et al.*  
Summary of DFP Litigation Expenses

Attachment 3

	<u>Amount</u>
Subtotal 2014-2017	\$ 1,621,109
Subtotal 2018	\$ 540,000
<b>Total</b>	<b><u><u>\$ 2,161,109</u></u></b>

San Diego Comic Convention v. Dan Farr Productions, et al.  
Summary of SDCC Form 990 Returns

	FY 2006 (Tax Year 2005)		FY 2007 (Tax Year 2006)		FY 2008 (Tax Year 2007)		FY 2009 (Tax Year 2008)		FY 2010 (Tax Year 2009)	
	\$	%	\$	%	\$	%	\$	%	\$	%
<b>Revenue</b>										
Program Service Revenue										
Membership	\$ 2,472,696	41.7%	\$ 2,999,585	41.4%	\$ 3,903,306	47.5%	\$ 4,203,915	45.8%	\$ 5,091,151	50.1%
Tradeshows Income	3,023,921	51.0%	3,484,211	48.1%	3,479,763	42.4%	4,087,454	44.6%	3,903,728	38.4%
Tradeshows Sponsorship <sup>1</sup>	111,420	1.9%	160,266	2.2%	485,044	5.9%	562,550	6.1%	833,616	8.2%
Advertising <sup>2</sup>	31,800	0.5%	27,300	0.4%	71,908	0.9%	-	0.0%	-	0.0%
Art Auction	28,501	0.5%	24,710	0.3%	18,031	0.2%	-	0.0%	-	0.0%
Royalties from Licensing	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%
Other Income	-	0.0%	-	0.0%	-	0.0%	106,143	1.2%	239,085	2.4%
Total Program Service Revenue	\$ 5,668,338	95.6%	\$ 6,696,072	92.4%	\$ 7,958,052	96.9%	\$ 8,960,062	97.7%	\$ 10,067,580	99.1%
Royalties	-	0.0%	-	0.0%	-	0.0%	37,178	0.4%	18,397	0.2%
Advertising	75,610	1.3%	199,406	2.8%	63,695	0.8%	98,765	1.1%	68,403	0.7%
Investment Income <sup>3</sup>	164,529	2.8%	287,046	4.0%	189,265	2.3%	73,297	0.8%	5,098	0.1%
Rental Income	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%
Other Income	18,902	0.3%	63,293	0.9%	1,157	0.0%	-	0.0%	-	0.0%
Total Revenue	\$ 5,927,379	100.0%	\$ 7,245,817	100.0%	\$ 8,212,169	100.0%	\$ 9,169,302	100.0%	\$ 10,159,478	100.0%
<b>Expenses</b>										
Program Services										
Compensation of Current Officers, Directors, Trustees, and Key Employees	\$ 54,936	0.9%	\$ 55,058	0.8%	\$ 53,298	0.6%	\$ 155,806	1.7%	\$ 217,326	2.1%
Other Salaries & Wages	530,961	9.0%	612,476	8.5%	803,630	9.8%	958,521	10.5%	895,494	8.8%
Employee Benefits <sup>4</sup>	4,343	0.1%	-	0.0%	-	0.0%	11,072	0.1%	-	0.0%
Payroll Taxes	46,914	0.8%	51,009	0.7%	69,745	0.8%	74,253	0.8%	83,877	0.8%
Non-Employee Services <sup>5</sup>	413,408	7.0%	287,390	4.0%	434,760	5.3%	423,882	4.6%	841,717	8.3%
Advertising & Promotion <sup>6</sup>	368,877	6.2%	443,169	6.1%	396,880	4.8%	367,305	4.0%	237,744	2.3%
Information Technology <sup>7</sup>	6,595	0.1%	5,899	0.1%	14,878	0.2%	11,019	0.1%	28,622	0.3%
Occupancy <sup>8</sup>	307,786	5.2%	381,172	5.3%	435,444	5.3%	413,746	4.5%	399,520	3.9%
Travel	99,693	1.7%	101,719	1.4%	101,420	1.2%	109,492	1.2%	159,962	1.6%
Depreciation, Depletion, and Amortization	16,045	0.3%	17,869	0.2%	17,865	0.2%	20,105	0.2%	25,965	0.3%
Insurance	96,042	1.6%	117,984	1.6%	175,618	2.1%	64,940	0.7%	217,090	2.1%
Equipment Rental <sup>9</sup>	572,212	9.7%	814,986	11.2%	750,533	9.1%	1,057,412	11.5%	1,226,031	12.1%
Security	404,012	6.8%	777,440	10.7%	1,236,853	15.1%	1,049,600	11.4%	1,227,566	12.1%
Casual Labor	458,495	7.7%	515,367	7.1%	684,510	8.3%	737,244	8.0%	606,221	6.0%
Printing & Publications <sup>10</sup>	375,160	6.3%	497,517	6.9%	513,536	6.3%	599,678	6.5%	463,661	4.6%
Other Expenses	936,105	15.8%	992,655	13.7%	1,254,540	15.3%	1,577,801	17.2%	1,879,436	18.5%
Total Program Services	\$ 4,691,584	79.2%	\$ 5,671,710	78.3%	\$ 6,943,510	84.6%	\$ 7,631,876	83.2%	\$ 8,510,232	83.8%

	FY 2006 (Tax Year 2005)		FY 2007 (Tax Year 2006)		FY 2008 (Tax Year 2007)		FY 2009 (Tax Year 2008)		FY 2010 (Tax Year 2009)	
	\$	%	\$	%	\$	%	\$	%	\$	%
Management & General										
Compensation of Current Officers, Directors, Trustees, and Key Employees	\$ -	0.0%	\$ -	0.0%	\$ -	0.0%	\$ -	0.0%	\$ -	0.0%
Other Salaries & Wages	65,100	1.1%	117,800	1.6%	151,223	1.8%	169,151	1.8%	158,028	1.6%
Employee Benefits <sup>4</sup>	483	0.0%	9,267	0.1%	12,739	0.2%	1,954	0.0%	18,474	0.2%
Payroll Taxes	5,213	0.1%	9,002	0.1%	12,307	0.1%	13,104	0.1%	14,802	0.1%
Non-Employee Services <sup>5</sup>	20,670	0.3%	28,739	0.4%	48,307	0.6%	47,098	0.5%	93,524	0.9%
Information Technology <sup>7</sup>	733	0.0%	655	0.0%	1,653	0.0%	1,224	0.0%	3,180	0.0%
Occupancy <sup>8</sup>	16,199	0.3%	42,352	0.6%	48,383	0.6%	182,715	2.0%	44,391	0.4%
Travel	-	0.0%	10,172	0.1%	11,269	0.1%	12,166	0.1%	17,774	0.2%
Depreciation, Depletion, and Amortization	1,604	0.0%	1,787	0.0%	1,985	0.0%	2,234	0.0%	2,885	0.0%
Insurance	10,671	0.2%	13,109	0.2%	19,513	0.2%	7,216	0.1%	24,121	0.2%
Casual Labor	45,849	0.8%	51,537	0.7%	76,057	0.9%	21,579	0.2%	67,357	0.7%
Printing & Publications <sup>10</sup>	41,684	0.7%	55,280	0.8%	57,060	0.7%	17,552	0.2%	51,518	0.5%
Other Expenses	45,790	0.8%	57,874	0.8%	87,357	1.1%	105,977	1.2%	97,575	1.0%
Total Management & General	\$ 253,996	4.3%	\$ 397,574	5.5%	\$ 527,853	6.4%	\$ 581,970	6.3%	\$ 593,629	5.8%
Total Expenses	\$ 4,945,580	83.4%	\$ 6,069,284	83.8%	\$ 7,471,363	91.0%	\$ 8,213,846	89.6%	\$ 9,103,861	89.6%
Profit (Revenue Less Expenses)	\$ 981,799	16.6%	\$ 1,176,533	16.2%	\$ 740,806	9.0%	\$ 955,456	10.4%	\$ 1,055,617	10.4%
Add Back: Depreciation Expense	17,649	0.3%	19,656	0.3%	19,850	0.2%	22,339	0.2%	28,850	0.3%
<b>EBITDA</b>	<b>\$ 999,448</b>	<b>16.9%</b>	<b>\$ 1,196,189</b>	<b>16.5%</b>	<b>\$ 760,656</b>	<b>9.3%</b>	<b>\$ 977,795</b>	<b>10.7%</b>	<b>\$ 1,084,467</b>	<b>10.7%</b>
Cash Balance at the End of the Fiscal Year <sup>11</sup>	\$ 5,795,005		\$ 6,305,097		\$ 7,434,526		\$ 7,997,959		\$ 9,999,107	
Net Assets Balance at the End of the Fiscal Year	\$ 4,986,406		\$ 6,125,026		\$ 6,827,919		\$ 7,783,375		\$ 8,838,992	
Total Revenue CAGR (FY 2006 through FY 2016)	14.0%									
Total Revenue CAGR (FY 2013 through FY 2016)	13.7%									
Total Profit (Revenue Less Expenses) CAGR (FY 2006 through FY 2016)	12.4%									
Total Profit (Revenue Less Expenses) CAGR (FY 2013 through FY 2016)	3.3%									

Notes:

Source: CC007727-756; CC007757-779; CC007519-540; CC007541-562; CC007563-585; CC007586-612; CC007613-636; CC007637-660; CC007485-518; CC418750-789. SDCC's fiscal year ends on August 31.

<sup>1</sup> Includes "SPONSORSHIPS" and "TRADESHOW SPONSORSHIP."

<sup>2</sup> Includes "PROGRAM ADVERTISING" and "ADVERTISING REVENUE."

<sup>3</sup> Includes "Interest on savings & temporary cash invmnts" and "Investment income."

<sup>4</sup> Includes "Other employee benefits," "Pension plan contributions," and "Pension plan accruals and contributions."

<sup>5</sup> Includes "PROFESSIONAL SERVICES" and "Fees for services (non-employees)." For FY 2016, this amount includes "Legal," "Accounting," and "OUTSIDE SERVICE."

<sup>6</sup> Includes "AD PREPARATION," "ADVERTISING," "PROMOTIONS," and "Advertising and promotion."

<sup>7</sup> Includes "COMPUTER EXPENSE" and "Information technology."

<sup>8</sup> Includes "FACILITIES RENTAL" and "Occupancy."

<sup>9</sup> Includes "Equipment rental and maintenance" and "EQUIPMENT RENTAL."

<sup>10</sup> Includes "Printing and publications," "PRINTING," and "PRINTING AND PUBLICATIONS."

<sup>11</sup> Includes "Cash—non-interest-bearing" and "Savings and temporary cash investments."

San Diego Comic Convention v. Dan Farr Productions, et al.  
Summary of SDCC Form 990 Returns

	FY 2011 (Tax Year 2010)		FY 2012 (Tax Year 2011)		FY 2013 (Tax Year 2012)		FY 2014 (Tax Year 2013)		FY 2015 (Tax Year 2014)		FY 2016 (Tax Year 2015)		Total	
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
<b>Revenue</b>														
Program Service Revenue														
Membership	\$ 5,928,774	49.5%	\$ 7,648,141	53.7%	\$ 8,295,991	55.4%	\$ 9,947,079	57.6%	\$ 11,242,580	56.8%	\$ 12,505,836	56.9%	\$ 74,239,054	52.7%
Tradeshow Income	4,764,125	39.8%	4,590,448	32.2%	4,626,616	30.9%	4,886,324	28.3%	5,594,231	28.3%	6,579,459	29.9%	49,020,280	34.8%
Tradeshow Sponsorship <sup>1</sup>	1,133,877	9.5%	1,236,094	8.7%	1,183,761	7.9%	1,625,862	9.4%	2,336,673	11.8%	1,554,115	7.1%	11,223,278	8.0%
Advertising <sup>2</sup>	-	0.0%	577,637	4.1%	743,360	5.0%	587,355	3.4%	310,305	1.6%	347,850	1.6%	2,697,515	1.9%
Art Auction	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	71,242	0.1%
Royalties from Licensing	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	622,382	2.8%	622,382	0.4%
Other Income	15,725	0.1%	9,354	0.1%	35,936	0.2%	18,198	0.1%	6,303	0.0%	20,225	0.1%	450,969	0.3%
<b>Total Program Service Revenue</b>	<b>\$ 11,842,501</b>	<b>98.9%</b>	<b>\$ 14,061,674</b>	<b>98.8%</b>	<b>\$ 14,885,664</b>	<b>99.4%</b>	<b>\$ 17,064,818</b>	<b>98.9%</b>	<b>\$ 19,490,092</b>	<b>98.4%</b>	<b>\$ 21,629,867</b>	<b>98.4%</b>	<b>\$138,324,720</b>	<b>98.1%</b>
Royalties	20,145	0.2%	57,793	0.4%	89,053	0.6%	193,805	1.1%	306,436	1.5%	-	0.0%	722,807	0.5%
Advertising	109,485	0.9%	114,295	0.8%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	729,659	0.5%
Investment Income <sup>3</sup>	2,149	0.0%	1,117	0.0%	1,315	0.0%	1,940	0.0%	1,508	0.0%	16,887	0.1%	744,151	0.5%
Rental Income	-	0.0%	-	0.0%	-	0.0%	-	0.0%	2,802	0.0%	248,430	1.1%	251,232	0.2%
Other Income	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	93,000	0.4%	176,352	0.1%
<b>Total Revenue</b>	<b>\$ 11,974,280</b>	<b>100.0%</b>	<b>\$ 14,234,879</b>	<b>100.0%</b>	<b>\$ 14,976,032</b>	<b>100.0%</b>	<b>\$ 17,260,563</b>	<b>100.0%</b>	<b>\$ 19,800,838</b>	<b>100.0%</b>	<b>\$ 21,988,184</b>	<b>100.0%</b>	<b>\$140,948,921</b>	<b>100.0%</b>
<b>Expenses</b>														
Program Services														
Compensation of Current Officers, Directors, Trustees, and Key Employees	\$ 250,283	2.1%	\$ 209,841	1.5%	\$ 223,258	1.5%	\$ 240,515	1.4%	\$ 255,701	1.3%	\$ 491,650	2.2%	\$ 2,207,672	1.6%
Other Salaries & Wages	1,120,347	9.4%	1,319,313	9.3%	1,274,747	8.5%	1,412,404	8.2%	1,976,989	10.0%	2,453,790	11.2%	13,358,672	9.5%
Employee Benefits <sup>4</sup>	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	-	0.0%	15,415	0.0%
Payroll Taxes	111,467	0.9%	124,534	0.9%	122,257	0.8%	132,464	0.8%	173,454	0.9%	214,392	1.0%	1,204,366	0.9%
Non-Employee Services <sup>5</sup>	1,150,798	9.6%	1,291,224	9.1%	1,627,658	10.9%	3,007,720	17.4%	2,943,018	14.9%	4,101,797	18.7%	16,523,372	11.7%
Advertising & Promotion <sup>6</sup>	254,640	2.1%	221,197	1.6%	138,538	0.9%	132,186	0.8%	133,216	0.7%	102,717	0.5%	2,796,469	2.0%
Information Technology <sup>7</sup>	18,885	0.2%	17,593	0.1%	37,804	0.3%	49,146	0.3%	50,716	0.3%	262,019	1.2%	503,176	0.4%
Occupancy <sup>8</sup>	553,830	4.6%	548,341	3.9%	833,096	5.6%	774,278	4.5%	776,193	3.9%	1,055,414	4.8%	6,478,820	4.6%
Travel	208,362	1.7%	143,074	1.0%	128,336	0.9%	175,418	1.0%	137,404	0.7%	98,047	0.4%	1,462,927	1.0%
Depreciation, Depletion, and Amortization	26,836	0.2%	34,716	0.2%	48,414	0.3%	64,012	0.4%	60,882	0.3%	62,238	0.3%	394,947	0.3%
Insurance	259,189	2.2%	316,635	2.2%	341,433	2.3%	337,442	2.0%	474,523	2.4%	659,020	3.0%	3,059,916	2.2%
Equipment Rental <sup>9</sup>	1,199,903	10.0%	1,011,175	7.1%	1,007,318	6.7%	1,072,334	6.2%	1,094,746	5.5%	1,158,539	5.3%	10,965,189	7.8%
Security	1,351,081	11.3%	1,619,585	11.4%	1,546,213	10.3%	1,792,444	10.4%	1,927,473	9.7%	2,192,081	10.0%	15,124,348	10.7%
Casual Labor	641,116	5.4%	1,113,488	7.8%	1,432,396	9.6%	867,797	5.0%	942,846	4.8%	878,360	4.0%	8,877,840	6.3%
Printing & Publications <sup>10</sup>	639,444	5.3%	487,584	3.4%	391,979	2.6%	482,199	2.8%	519,700	2.6%	495,570	2.3%	5,466,028	3.9%
Other Expenses	1,468,425	12.3%	2,027,062	14.2%	2,019,837	13.5%	2,589,775	15.0%	2,960,564	15.0%	3,472,816	15.8%	21,179,016	15.0%
<b>Total Program Services</b>	<b>\$ 9,254,606</b>	<b>77.3%</b>	<b>\$ 10,485,362</b>	<b>73.7%</b>	<b>\$ 11,173,284</b>	<b>74.6%</b>	<b>\$ 13,130,134</b>	<b>76.1%</b>	<b>\$ 14,427,425</b>	<b>72.9%</b>	<b>\$ 17,698,450</b>	<b>80.5%</b>	<b>\$109,618,173</b>	<b>77.8%</b>

San Diego Comic Convention v. Dan Farr Productions, et al.  
Summary of SDCC Form 990 Returns

Attachment 4

	FY 2011 (Tax Year 2010)		FY 2012 (Tax Year 2011)		FY 2013 (Tax Year 2012)		FY 2014 (Tax Year 2013)		FY 2015 (Tax Year 2014)		FY 2016 (Tax Year 2015)		Total	
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
Management & General														
Compensation of Current Officers, Directors, Trustees, and Key Employees	\$ -	0.0%	\$ 37,031	0.3%	\$ 39,398	0.3%	\$ 42,444	0.2%	\$ 45,124	0.2%	\$ 100,699	0.5%	\$ 264,696	0.2%
Other Salaries & Wages	241,876	2.0%	232,820	1.6%	224,956	1.5%	249,248	1.4%	348,880	1.8%	419,085	1.9%	2,378,167	1.7%
Employee Benefits <sup>1</sup>	23,944	0.2%	29,763	0.2%	30,548	0.2%	34,308	0.2%	41,896	0.2%	47,198	0.2%	250,574	0.2%
Payroll Taxes	19,671	0.2%	21,977	0.2%	21,575	0.1%	23,376	0.1%	30,609	0.2%	37,834	0.2%	209,470	0.1%
Non-Employee Services <sup>5</sup>	127,867	1.1%	143,469	1.0%	180,850	1.2%	-	0.0%	-	0.0%	14,649	0.1%	705,173	0.5%
Information Technology <sup>7</sup>	2,098	0.0%	1,955	0.0%	4,200	0.0%	5,461	0.0%	5,635	0.0%	29,113	0.1%	55,907	0.0%
Occupancy <sup>8</sup>	61,537	0.5%	60,927	0.4%	92,566	0.6%	86,031	0.5%	86,244	0.4%	76,163	0.3%	797,508	0.6%
Travel	23,151	0.2%	15,897	0.1%	14,260	0.1%	19,491	0.1%	15,267	0.1%	10,894	0.0%	150,341	0.1%
Depreciation, Depletion, and Amortization	2,982	0.0%	3,857	0.0%	5,379	0.0%	7,112	0.0%	6,765	0.0%	6,915	0.0%	43,505	0.0%
Insurance	28,799	0.2%	35,182	0.2%	37,937	0.3%	37,494	0.2%	52,725	0.3%	56,538	0.3%	323,305	0.2%
Casual Labor	71,233	0.6%	123,721	0.9%	159,155	1.1%	96,422	0.6%	104,761	0.5%	97,596	0.4%	915,267	0.6%
Printing & Publications <sup>10</sup>	71,049	0.6%	54,176	0.4%	43,553	0.3%	53,578	0.3%	57,744	0.3%	55,000	0.3%	558,194	0.4%
Other Expenses	87,046	0.7%	80,485	0.6%	79,122	0.5%	72,942	0.4%	85,954	0.4%	172,321	0.8%	972,443	0.7%
<b>Total Management &amp; General</b>	<b>\$ 761,253</b>	<b>6.4%</b>	<b>\$ 841,260</b>	<b>5.9%</b>	<b>\$ 933,499</b>	<b>6.2%</b>	<b>\$ 727,907</b>	<b>4.2%</b>	<b>\$ 881,604</b>	<b>4.5%</b>	<b>\$ 1,124,005</b>	<b>5.1%</b>	<b>\$ 7,624,550</b>	<b>5.4%</b>
<b>Total Expenses</b>	<b>\$ 10,015,859</b>	<b>83.6%</b>	<b>\$ 11,326,622</b>	<b>79.6%</b>	<b>\$ 12,106,783</b>	<b>80.8%</b>	<b>\$ 13,858,041</b>	<b>80.3%</b>	<b>\$ 15,309,029</b>	<b>77.3%</b>	<b>\$ 18,822,455</b>	<b>85.6%</b>	<b>\$ 117,242,723</b>	<b>83.2%</b>
<b>Profit (Revenue Less Expenses)</b>	<b>\$ 1,958,421</b>	<b>16.4%</b>	<b>\$ 2,908,257</b>	<b>20.4%</b>	<b>\$ 2,869,249</b>	<b>19.2%</b>	<b>\$ 3,402,522</b>	<b>19.7%</b>	<b>\$ 4,491,809</b>	<b>22.7%</b>	<b>\$ 3,165,729</b>	<b>14.4%</b>	<b>\$ 23,706,198</b>	<b>16.8%</b>
Add Back: Depreciation Expense	29,818	0.2%	38,573	0.3%	53,793	0.4%	71,124	0.4%	67,647	0.3%	69,153	0.3%	438,452	0.3%
<b>EBITDA</b>	<b>\$ 1,988,239</b>	<b>16.6%</b>	<b>\$ 2,946,830</b>	<b>20.7%</b>	<b>\$ 2,923,042</b>	<b>19.5%</b>	<b>\$ 3,473,646</b>	<b>20.1%</b>	<b>\$ 4,559,456</b>	<b>23.0%</b>	<b>\$ 3,234,882</b>	<b>14.7%</b>	<b>\$ 24,144,650</b>	<b>17.1%</b>
<b>Cash Balance at the End of the Fiscal Year<sup>11</sup></b>	<b>\$ 12,138,553</b>		<b>\$ 16,337,867</b>		<b>\$ 14,785,275</b>		<b>\$ 19,152,553</b>		<b>\$ 19,217,218</b>		<b>\$ 23,530,891</b>			
<b>Net Assets Balance at the End of the Fiscal Year</b>	<b>\$ 10,797,413</b>		<b>\$ 13,705,670</b>		<b>\$ 16,445,838</b>		<b>\$ 19,848,360</b>		<b>\$ 24,858,609</b>		<b>\$ 28,080,797</b>			

Total Revenue CAGR (FY 2006 through FY 2016)

Total Revenue CAGR (FY 2013 through FY 2016)

Total Profit (Revenue Less Expenses) CAGR (FY 2006 through FY 2016)

Total Profit (Revenue Less Expenses) CAGR (FY 2013 through FY 2016)

Notes:

Source: CC007727-756; CC007757-779; CC007519-540; CC007541-562; CC007563-585; CC007586-612; CC007613-636; CC007637-660; CC007485-518; CC418750-789. SDCC's fiscal year ends on August 31.

<sup>1</sup> Includes "SPONSORSHIPS" and "TRADESHOW SPONSORSHIP."

<sup>2</sup> Includes "PROGRAM ADVERTISING" and "ADVERTISING REVENUE."

<sup>3</sup> Includes "Interest on savings & temporary cash invmnts" and "Investment income."

<sup>4</sup> Includes "Other employee benefits," "Pension plan contributions," and "Pension plan accruals and contributions."

<sup>5</sup> Includes "PROFESSIONAL SERVICES" and "Fees for services (non-employees)." For FY 2016, this amount includes "Legal," "Accounting," and "OUTSIDE SERVICE."

<sup>6</sup> Includes "AD PREPARATION," "ADVERTISING," "PROMOTIONS," and "Advertising and promotion."

<sup>7</sup> Includes "COMPUTER EXPENSE" and "Information technology."

<sup>8</sup> Includes "FACILITIES RENTAL" and "Occupancy."

<sup>9</sup> Includes "Equipment rental and maintenance" and "EQUIPMENT RENTAL."

<sup>10</sup> Includes "Printing and publications," "PRINTING," and "PRINTING AND PUBLICATIONS."

<sup>11</sup> Includes "Cash—non-interest-bearing" and "Savings and temporary cash investments."



9th Circuit Case Number(s) 18-56221

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When Not All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)