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23 **UNITED STATES DISTRICT COURT**
24 **SOUTHERN DISTRICT OF CALIFORNIA**

25 SAN DIEGO COMIC CONVENTION, a
26 California nonprofit corporation,

27 Plaintiff,

28 v.

DAN FARR PRODUCTIONS, a Utah limited
liability company; and DANIEL FARR and
BRYAN BRANDENBURG, individuals,

Defendants.

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

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT BASED ON
GENERICNESS**

Date: September 21, 2017
Time: 2:00 p.m.
Courtroom: 4A (4th Floor Schwartz)
Judge: Hon. Anthony Battaglia

AND RELATED COUNTERCLAIMS

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Declaration of Jessica D. Garcia in Support of Defendants' Motions for Summary Judgment	Garcia decl.	Filed herewith
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Title or other description	Short citation form	Location
Supplemental Expert Report of Jeffrey P. Kaplan, Ph.D. Pursuant to Fed. R. Civ. P. 26(a)(2)	Supplemental Kaplan Report	Barber decl. Ex. 8

1 Defendants and counterclaimants Dan Farr Productions, LLC, Daniel Farr, and
2 Bryan Brandenburg (collectively, “DFP”) offer the following points and authorities in
3 support of their motion for summary judgment based on genericness.

4 I. INTRODUCTION

5 DFP organizes and produces an annual event it calls “Salt Lake Comic Con.”
6 According to plaintiff and counterdefendant San Diego Comic Convention (“SDCC”),
7 DFP’s use of that name infringes trademark rights that SDCC claims to own.

8 But neither DFP nor SDCC originated either the concept or the term “comic con.”
9 By the mid-1960s, American (and British) comic-book collectors and other aficionados
10 were gathering for events they had already begun calling “comicons,” a contraction of
11 “comic-book conventions.” In 1966, three comicons were held in New York City alone.¹
12 Not until 1970 did the individuals who would later form SDCC organize their first con.

13 By a companion motion, DFP seeks summary judgment that SDCC abandoned and
14 is estopped from asserting any rights in COMIC CON (as opposed to COMIC-CON). By
15 the present motion, DFP seeks summary judgment on a more basic ground: the
16 unhyphenated compound “comic con” that DFP uses—like the hyphenated form “comic-
17 con” that SDCC uses and the concatenated form “comicon” that still others use—is
18 generic, it identifies a *type* of event rather than any *particular* event or producer, and
19 therefore cannot be appropriated as a trademark.

20 II. UNDISPUTED MATERIAL FACTS

21 A. What is a Comic Con?

22 “Comic con” is shorthand for comic convention. Early comic cons started out as
23 small gatherings between comic book enthusiasts, writers, creators and collectors; from
24 those origins, comic cons have grown into multi-day events covering a wide variety of
25 topics, not limited to comics, with attendance figures ranging up to tens of thousands or,
26 for the largest events, over one-hundred thousand people. Many comic cons now describe
27

28 ¹ See Garcia decl. Ex. 16, at DANFARR008510.

1 their respective conventions as popular culture events featuring not only comics and
2 comic books, but also graphic arts, science fiction films, fantasy films, literature and TV.²

3 Print uses of “con” as a clipping (shortened form) of “convention” date back to at
4 least 1940, when it was already being used to refer to science fiction conventions.³ In
5 1964, the first *comic* con was held in New York under the name “Comicon.”⁴ In 1965,
6 Comicon returned to New York for its second convention.⁵ Also in 1965, Detroit hosted
7 its own comic con under the name “Detroit Triple Fan Fair.” That event was produced by
8 Jerry Bails and SDCC founder Shel Dorf. In 1966, New York hosted two separate comic
9 cons, each using “Comicon” as or in its name.⁶ Between 1967 and 1969, Texas hosted its
10 own Houstoncon and Dallascon comic cons.⁷

11 In 1970, the first (and only) Disneyland Hotel Comicon was held. In 1972,
12 Chicago unveiled its own comic con under the name “Nostalgia ’72, Chicago Comic
13 Con”; by 1975 this name had changed to “Chicago Comicon.” Through the rest of the
14 1970s and into the 1980s, dozens of other comic conventions sprouted up across the U.S.
15 In 1989, Michigan hosted its first annual Motor City Comic Con.⁸

16
17 ² Garcia decl. Ex. 4, at CC169405 (New York Comic Con); Garcia decl. Ex. 8 at
18 DANFARR004930–69 (Long Beach Comic Con), DANFARR005073–76 (Tucson
19 Comic-con), DANFARR005275 (Cyprus Comic Con), DANFARR004974–76 (Motor
20 City Comic Con), DANFARR008749–53 (Wizard World Comic Cons located throughout
21 the U.S.); Garcia decl. Ex. 12, at DANFARR006088–6105, DANFARR006118; Garcia
22 decl. Ex. 16 at DANFARR008421–22; Complaint ¶¶ 10, 17 (San Diego Comic-Con and
23 Salt Lake Comic Con).

24 ³ RFN Ex. 8, at DANFARR033770.

25 ⁴ Garcia decl. Ex. 16, at DANFARR008392–93, DANFARR008421–22.

26 ⁵ Garcia decl. Ex. 16, at DANFARR008421–22.

27 ⁶ Garcia decl. Ex. 16, at DANFARR008510–11.

28 ⁷ Barber decl. Ex. 1, at DANFARR033221–25; Garcia decl. Ex. 4, at CC169405; Garcia
decl. Ex. 7, at CC371177; Garcia decl. Ex. 16, at DANFARR008372–74; Garcia decl.
Ex. 17, at DANFARR8550–52; Desmond dep. 31:11–25.

⁸ Barber decl. Ex. 1, at DANFARR033221–25, DANFARR033645–55,
DANFARR033575–83 (citing, e.g., WindyCon (1973), OrlandoCon (1974), Chicago

1 In the 1990s, still more comic cons were launched by various entities, including the
2 first Pittsburgh Comicon in 1994. Chicago Comicon was acquired by Wizard World in
3 1997 and continued under the name Wizard World Chicago Comic Con. In the 2000s,
4 even more comic cons debuted across the U.S., including at least:

- 5 • 2002: Phoenix Cactus Comic Con n/k/a Phoenix Comic Con;
- 6 • 2003: Emerald City Comic Con, in Washington;
- 7 • 2006: New York Comic-Con;
- 8 • 2012: Denver Comic Con, in Colorado; and
- 9 • 2013: Amazing Las Vegas Comic Con and Salt Lake Comic Con.

10 Wizard World’s production of comic cons over the past decade has been prodigious,
11 including at least:

- 12 • 2009: Philadelphia Comic Con and New York Big Apple Comic Con;
- 13 • 2010: Austin Comic Con, Miami Comic Con, New Orleans Comic Con, Los
14 Angeles Comic Con, Anaheim Comic Con, in California, Philadelphia
15 Comic Con, Chicago Comic Con, New York Comic Con, and Boston Comic
16 Con;
- 17 • 2012: New Orleans Comic Con, Toronto Comic Con, Philadelphia Comic
18 Con, Chicago Comic Con, and Columbus Comic Con;
- 19 • 2013: Portland Comic Con, Nashville Comic Con, St. Louis Comic Con, Big
20 Apple Comic Con, Philadelphia Comic Con, Rosemont Comic Con,
21 Columbus Comic Con, and Austin Comic Con;

22
23
24 _____
25 Comicon (held originally in 1972 under the Name “Nostalgia 72”; the name “Chicago
26 Comicon” was adopted in 1975), MidSouthCon (1977), Mid-Ohio Con (1980), BayCon
27 (1982)), DANFARR033245; Garcia decl. Ex. 5, at CC322424; Garcia decl. Ex. 12, at
28 DANFARR006088–6105 (“In 1976, there were 20 comic book conventions held
throughout the United States.”), DANFARR006118–20; Garcia decl. Ex. 16, at
DANFARR008372–74; Garcia decl. Ex. 22, at DANFARR009357 (citing the seventh
annual Chicago Comicon taking place in 1982).

- 2014: Portland Comic Con, New Orleans Comic Con, Louisville Comic Con, Nashville Comic Con, St. Louis Comic Con, Minneapolis Comic Con, Atlanta Comic Con, Philadelphia Comic Con, San Antonio Comic Con, Richmond Comic Con, Chicago Comic Con, Columbus Comic Con, Austin Comic Con, Tulsa Comic Con, Reno Comic Con, and Sacramento Comic Con.⁹

Altogether, more than 100 comic cons, happening in nearly every state in the U.S., have used “comic con” or a variant thereof in their names.¹⁰

B. San Diego Comic-Con and its Marks

SDCC was not the first to invent the concept of comic conventions or to produce a comic con, and SDCC did not coin either “comic-con” or “comic con.”¹¹ San Diego’s Golden State Comic-Minicon, the precursor to what is now SDCC’s Comic-Con International, did not take place until March 21, 1970, years after the first U.S. comic cons were held in New York, Detroit, and Texas (and years after the first British comic cons were held in Birmingham).¹² This minicon was produced by SDCC founder Shel Dorf, who prior to producing the minicon had co-produced the aforementioned “Detroit Triple Fan Fair” in 1965. The minicon was followed by San Diego’s Golden State Comic-Con, also produced by SDCC founder Shel Dorf, on August 1–3 1970. In 1972,

⁹ Barber decl. Ex. 1, at DANFARR033221–25, DANFARR033585–91, DANFARR033645–55, DANFARR033273; [REDACTED] Garcia decl. Ex. 5, at CC322431–322454, [REDACTED] CC316381; Garcia decl. Ex. 8, at DANFARR005287–90; Garcia decl. Ex. 17, at DANFARR008591, DANFARR008603, DANFARR008680; Garcia decl. Ex. 18, at DANFARR008749–55; Garcia decl. Ex. 20, at DANFARR009157.

¹⁰ See Answers to 1st Rogs at 7–8; Kaplan Report at 21–22, Ex. 2.

¹¹ Garcia decl. Ex. 16, at DANFARR008381; Garcia decl. Ex. 18, at DANFARR008741; [REDACTED]

¹² Barber decl. Ex. 1, at DANFARR033221–25; Garcia decl. Ex. 16, at DANFARR008392–93, DANFARR008421–22, DANFARR008510–11, DANFARR008550-74.

1 the nascent SDCC organization held another comic con under the name “San Diego’s
2 West Coast Comic Convention”; and in 1973, it held another comic con under the name
3 “San Diego Comic-Con.” SDCC formed as a non-profit corporation in 1975 and it
4 adopted the name “Comic-Con International” in 1995.¹³

5 SDCC was not the first and it does not try to hold itself apart from the wider world
6 of comic cons. [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 SDCC asserts at least one and maybe as many as four trademark registrations in
11 this action, viz.:

- 12 • U.S. Registration No. 2,218,236, for the word mark COMIC CON
- 13 INTERNATIONAL;
- 14 • U.S. Registration No. 3,219,568, for the word mark COMIC-CON;
- 15 • U.S. Registration No. 3,221,808, for the word-plus-design mark shown
- 16 to the left (“SDCC logo”); and
- 17 • U.S. Registration No. 4,425,806, for the word mark ANAHEIM
- 18 COMIC-COM.¹⁶



19 DFP does not and is not alleged to use INTERNATIONAL, ANAHEIM, or the eye
20 graphic from the SDCC logo in its branding. Thus SDCC’s infringement case rests
21 entirely on the fact that DFP’s brand for its convention, like each of SDCC’s registered
22 marks, uses the elements COMIC and CON. SDCC’s broadest mark is COMIC-CON,
23 which exceeds those basic elements only by the addition of a hyphen. But as further

24 _____
25 ¹³ Complaint ¶ 10; Desmond dep. 31:11–25; Garcia decl. Ex. 17, at DANFARR8550–52.

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

¹⁶ See generally Complaint.

1 discussed in DFP’s companion motion, SDCC *tried* to register COMIC CON without the
2 hyphen—but it failed and publicly abandoned its application for COMIC CON.

3 **C. Salt Lake Comic Con**

4 Defendants Bryan Brandenburg and Daniel Farr are co-founders of defendant Dan
5 Farr Productions, which organizes and produces Salt Lake Comic Con. Salt Lake Comic
6 Con is a three-day fan convention featuring the best in movies, television shows, gaming,
7 sci-fi, fantasy, and comic books. The inaugural Salt Lake Comic Con was held in Salt
8 Lake City, Utah on September 5–7, 2013.¹⁷

9 Salt Lake Comic Con filed a trademark application with the United States Patent
10 and Trademark Office for the term SALT LAKE COMIC CON on July 31, 2014 for
11 “[e]ducation and entertainment services, namely, organizing, producing and conducting
12 conventions in the fields of gaming, comics, television, movies, technology, science
13 fiction, fantasy, and popular culture for entertainment purposes.” On November 11, 2014,
14 the application for SALT LAKE COMIC CON received a priority action from the Patent
15 and Trademark Office (“PTO”), stating that the application could not be registered on the
16 principal register because the term SALT LAKE COMIC CON is “primarily
17 geographically descriptive” and required a disclaimer of the term “con” as such is
18 “generic in the context of applicant’s convention services.”¹⁸ This application *was not*
19 rejected as confusingly similar to any of SDCC’s registered marks.¹⁹

20 **D. Generic Uses and Characteristics of “Comic Con”**

21 In marshaling its evidence of genericness, DFP is challenged by an embarrassment
22 of riches. Below DFP summarizes and organizes that evidence into categories recognized
23 and mentioned in various cases.

24
25
26 ¹⁷ Brandenburg decl. ¶ 22.

27 ¹⁸ RFN Ex. 9, at DANFARR004574; RFN Ex. 10, at DANFARR004597–4600.

28 ¹⁹ *Id.*

1 Trade usage. More than 100 comic cons, taking place in nearly every state in the
 2 U.S., have names that include “comic con,” “comicon,” or “comic-con.”²⁰ And trade
 3 publications like www.comicsbeat.com (“Comics Beat”) use “comic con,” variants
 4 “comic-con” and “comicon,” and even “con” generically.²¹ For example, on March 28,
 5 2014 Comics Beat published an article titled “Emerald City Comic Con Day 0-1: The
 6 most con-like con of all” that reports: “I am here in Seattle for Emerald City Comic Con,

7 _____
 8 ²⁰ Answers to 1st rogs at 7–8; Garcia decl. Ex. 1, at CBC0043–46; Garcia decl. Ex. 5, at
 9 CC322423–56, CC323307–08; Garcia decl. Ex. 20, at DANFARR009152; Kaplan
 Report at 21–22, Ex. 2; RFN Ex. 6, at DANFARR033161–62, DANFARR033167–91.

10 ²¹ See, e.g., Barber decl. Ex. 1, at DANFARR033405–19 (“On the scene: Amazing
 11 Arizona Comic Con ... The comic con pros in the state are a very enthusiastic bunch”),
 DANFARR033349–66 (“New York Comic Con 2020: A Look Back ... turning that room
 12 into a comic con all its own”), DANFARR033444–58 (“One The Scene: The Black
 13 Comic Book Festival 2013 ... At a typical comic-con it is so easy to get swallowed up in
 14 the masses. This show is great”), DANFARR033542–59 (“New York Comic Con is
 15 really more like a county fair than a comic-con”), DANFARR033473 (“The 2014
 16 Amazing Arizona Comic Con wrapped up another remarkable show. It’s hard to believe
 17 this con started out in the cramp, strangely cool Mesa center all those years ago”),
 DANFARR033529 (“Today’s con preview is for this weekend’s Tampa Bay Comic
 18 Con”), DANFARR033560 (“Emerald City Comic Con Day 0-1: The most con-like con
 19 of all”), DANFARR033459 (“When asked about her experience at the con she said,
 20 ‘Wizard World Philly was seriously one of the most fun con experiences I’ve had ... He
 21 gave me some overall positive feedback about WWPhilly, saying it was the best con he
 22 ever tabled at ... Bryan G. Brown also wrote about his personal experience at the con ...
 23 Phil Kahn ... was tabling at the con! I asked him to sum up his experience at the con”),
 DANFARR033405–19 (“On the scene: Amazing Arizona Comic Con... The only cons I
 24 like better than ones that I can ride my bicycle to are cons that only take an hour and a
 25 half drive.”); Garcia decl. Ex. 7, at CC395932 (“How Much Did Indie Exhibitors Earn at
 26 Comic Cons? Convention Exhibitor Mega Survey 2014 Results”), CC407570 (“How
 27 Much Did Indie Exhibitors Earn at Comic Cons? 2015 Convention Exhibitor Survey
 28 Results”); Garcia decl. Ex. 10, at DANFARR005580 (“We Sent Our Jaded Comic Con
 Expert to Wizard World Philly”); Garcia decl. Ex. 14, at DANFARR006241 (“NYCC
 ’16: Why fire marshals inspect comic cons”), DANFARR006258 (“ReedPop officially
 announces comic con Seoul ... It might be the most perfect location for a comic con!”),
 DANFARR008603 (“Denver Comic Con is one year old ... This opening figure made
 history for comicon openings”); [REDACTED]

1 and this is by far the most comic-con-like comic-con I have ever been to, as far as the
 2 idea of jam packed pop culture extravaganza of comics, costumes and devotion to
 3 meekness for the joy of it.”²² In this article, Comics Beat uses both “con” and “comic-
 4 con” as terms that convey “the idea of a jam packed pop culture extravaganza of comics,
 5 costumes and devotion to meekness for the joy of it.”²³

6 As another example of generic use, on December 5, 2016, Comics Beat published
 7 an article describing the financial performance of comic con producer Wizard World. The
 8 article speculates that “Wizard World could be an attractive acquisition for a big media
 9 company that has experience in the events space. For all their woes, they have a well
 10 established brand and connections and I don’t think comic cons are going away ... just
 11 the bad ones.”²⁴ In another report on the financial viability of comic con producer Wizard
 12 World, Comics Beat published an article entitled “Comic Cons business update: \$3
 13 billion economy? Wizard convention profits up 188%.”²⁵

14 As yet another example, in June 2013, Comics Beat reported:

15 Denver Comic Con is one year old. When it opened in 2012, the con directors
 16 hoped for a total of 12,000 attending ... Instead, they clocked in at roughly
 17 26,000 ... This opening figure made history for comicon openings. In initial
 18 numbers, this still stands as the largest number for a first con ever recorded
 19 ... When Comic Book Classroom began to grow rapidly with increasing
 demand from local schools, founding a comic con, a feature lacking in the
 region, seemed like the best way to raise funds ...²⁶

20 Here, Comics Beat uses “con” as a clipping for Denver Comic Con, “comicon” in
 21 reference to many other unnamed conventions, and “a comic con” as a term
 22 conveying a type of event.²⁷

23 ²² Barber decl. Ex. 1, at DANFARR033560–74.

24 ²³ *Id.*

25 ²⁴ Garcia decl. Ex. 10, at DANFARR005597.

26 ²⁵ Garcia decl. Ex. 17, at DANFARR008595 (“Comic cons are king.”).

27 ²⁶ Garcia decl. Ex. 14, at DANFARR008603

28 ²⁷ *Id.*

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 Media usage. The general news media uses the term “comic con” and “comicon”
5 generically.³⁰ For example, *The New Yorker* published an article in its August 21, 1965
6 issue (five years before SDCC’s first event) entitled “ComiCon,” which describes a
7 comic con in New York City “[o]fficially known as the second annual ComiCon or Con.
8 (Collectors have a language of their own ...)” The article further reports that “Mr. David

9
10
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 ³⁰ Garcia decl. Ex. 7, at CC416564–65 (“It’s awkward explaining that yes, you went to a
18 comic con ... The Utah event, reported to be the third-largest comic con in the U.S ...
19 Wizard World Inc. puts on two dozen Wizard World Comic Cons ... regionally-focused
20 comic cons are available in many other cities and towns.”); Garcia decl. Ex. 17, at
21 DANFARR008591–94 (“New Yorkers get their nerd on at Comic Con ... Now in its
22 eight year, New York Comic Con is a force”), DANFARR008588 (“Jam-Packed Comic
23 Con Takes Over New York City ... New York Comic Con is a huge annual event that
24 attracts comic books fans ... from around the world.”), DANFARR008586 (“The 17
25 Coolest ‘Star Wars’ Costumes At Comic Con ... The force was strong with attendees at
26 New York Comic Con.”), DANFARR008621 (“Denver Comic-Con breaks first-year
27 record ... the second-biggest opening ever for a Comic Con, behind New York’s”),
28 DANFARR008678 (“Photos: New York Comic Con Fans ... Tickets to Comic Con are
already sold out ... a festival taking place before and during Comic Con.”); Garcia decl.
Ex. 21, at DANFARR009342–43 (“4,000 to 5,000 other collectors, dealers and
wholesalers will be at COMICON (Comic Convention), one of the largest annual comic
book conventions in America ... What: COMICON ... Where: ... Rosemont (Illinois)”);
Garcia decl. Ex. 22, at DANFARR9355–56 (“The Dr. Who convention will be part of the
seventh annual Chicago Comicon (comic convention)”). *See generally* Kaplan Report.

1 A. Kaler, the Con chairman ... told us that this was the first full-fledged national
2 ComiCon, last year's having been an informal tri-state affair ..."³¹

3 Semantic evidence. The *Oxford English Dictionary* ("OED") defines "con" as a
4 clipping used in print as early as 1940 "among enthusiasts of science fiction and role-
5 playing games" to refer to "a convention, an organized gathering of people with shared
6 interest." And the *OED* defines "comic" as "a publication, usually in magazine format,
7 containing a story or collection of stories in the form of comic strips; originally one with
8 chiefly humorous or action-based content intended for children, later also one dealing
9 with a broad range of subjects and intended for adults." Putting "comic" and "con"
10 together, Wikipedia's entry for "Comic Con" indicates that "Comic Con, ComicCon, or
11 ComiCon may in general refer to any comic book conventions" and lists a number of
12 conventions, not limited to SDCC, using "comic con," "comiccon," or "comicon" in their
13 names (that page further notes that "Wizard Entertainment is the industry leader in these
14 types of conventions, with ongoing shows in 21 American cities"). Wikipedia conversely
15 defines "Comic Book Convention" as "a comic book convention or comic-con is an event
16 with a primary focus on comic books and comic book culture ..."³²

17 Morphological and syntactical evidence. Plural forms of "comic con" and its
18 variants appear in various sources and contexts, which indicates it is being used as a
19 generic common noun. So too definite and indefinite articles and other determiners are
20 used with "comic con" and its variants, in various sources and contexts, in ways that
21 indicate "comic con" and its variants are being used as a generic common noun. Uses of
22
23
24

25 ³¹ Garcia decl. Ex. 18, at DANFARR008741–44; Barber decl. Ex. 1, at
26 DANFARR033221.

27 ³² RFN Ex. 7, at DANFARR033681; RFN Ex. 8, at DANFARR033770 ("Chicon: Fan
28 argot for 'Chicago Science Fiction Convention of 1940'."); Garcia decl. Ex 12, at
DANFARR006088, DANFARR006118–20.

1 “comic con” and its variants in various print sources and contexts also exhibit
2 capitalization patterns characteristic of generic common nouns.³³

3 III. ARGUMENT

4 As noted above, SDCC mentions four trademark registrations in its complaint; but
5 SDCC’s charging allegations are generally limited to “SDCC’s COMIC-CON mark,”
6 singular,³⁴ suggesting SDCC only claims infringement of U.S. Registration No.
7 3,219,568, for the word mark COMIC-CON.³⁵ Whether or not SDCC *meant* to allege
8 infringement of other marks, it cannot prevail without proving actionable infringement of
9 COMIC-CON. DFP brands its convention “Salt Lake Comic Con”;³⁶ DFP does not use
10 the hyphenated form “comic-con,” nor does it use the words “International,” “Anaheim,”
11 or “San Diego,” or SDCC’s registered graphic. The only elements that DFP’s branding
12 has in common with SDCC’s are “comic” and “con.” Thus unless SDCC has enforceable
13 rights in COMIC-CON, and those rights are infringed by DFP’s use of “comic con,” *all*
14 of SDCC’s claims must fail.

15 “The cases identify four categories of terms with respect to trademark protection:
16 (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.”³⁷ “A generic
17 term, also known as a common descriptive term, refers to the type or species of the
18 product at issue.”³⁸ To determine whether a mark is generic, “[c]ourts have relied upon
19 evidence such as: (i) proof of widespread use by competitors that has not been contested
20

21 ³³ See Kaplan Report at 6–21.

22 ³⁴ See Complaint ¶¶ 35–40, 45.

23 ³⁵ A more in-depth discussion of how SDCC initially obtained its trademarks is included
24 in DFP’s companion motion. In brief, SDCC submitted false (indeed fraudulent)
25 declarations stating its use of COMIC-CON was exclusive.

26 ³⁶ Complaint ¶¶ 16–18.

27 ³⁷ *Surgicenters of Am. v. Medical Dental Surgeries*, 601 F.2d 1011, 1014 (9th Cir. 1979)
28 (affirming summary judgment that “surgicenters” is generic).

³⁸ *Rudolph Int’l, Inc. v. Realys, Inc.*, 482 F.3d 1195, 1197 (9th Cir. 2007) (affirming
summary judgment that “disinfectable” is generic).

1 by the seller; (ii) generic use by the seller himself; (iii) dictionary definitions; (iv) media
 2 usage, such as newspaper or magazine articles; and (v) consumer surveys”³⁹—with this
 3 caveat: when a mark starts out generic, instead of being coined by the party claiming it,
 4 consumer surveys drop out⁴⁰ because “[n]o manufacturer can take out of the language a
 5 word, even a slang term, that has generic meaning as to a category of products and
 6 appropriate it for its own trademark use ...”⁴¹

7 “[A]lthough ... genericness ... is a question of fact, such determination may be
 8 made on a motion for summary judgment.”⁴² As shown below, DFP has assembled a
 9 mountain of evidence showing genericness in each relevant category; as against that,
 10 SDCC offers only a survey that is irrelevant because SDCC admittedly did not coin
 11 “comic con.” Summary judgment should be granted because “comic con” always has
 12 been generic and SDCC’s effort to remove it from the linguistic commons must fail.⁴³

13 _____
 14 ³⁹ *Horizon Mills Corp. v. QVC, Inc.*, 161 F. Supp. 2d 208, 214 (S.D.N.Y. 2001).

15 ⁴⁰ See *Schwan’s IP, LLC v. Kraft Pizza Co.*, 460 F.3d 971, 976 (8th Cir. 2006); *Hunt*
 16 *Masters, Inc. v. Landry’s Seafood Rest., Inc.*, 240 F.3d 251, 255 (4th Cir. 2001); *Miller*
Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 995 (7th Cir. 1979).

17 ⁴¹ *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 810 (2d Cir. 1999) (reversing
 18 judgment enjoining use of “hog”). SDCC pleads two claims against Farr:
 19 (1) infringement of a federally registered mark (or maybe more than one), under 15
 20 U.S.C. § 1114, and (2) false designation of origin, under 15 U.S.C. § 1125(a). See
 21 Complaint ¶¶ 32–48. Genericness is a defense to both. See *Harley-Davidson*, 164 F.3d at
 22 811 (“federal registration ... cannot protect a mark that is shown ... to be generic”);
 23 *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046–47 (9th Cir.
 1998) (“under § 43(a) [i.e., 15 U.S.C. § 1125(a)] ... a plaintiff must meet three basic
 elements: (1) distinctiveness, (2) nonfunctionality, and (3) likelihood of confusion ...
 [G]eneric marks ... can never meet the distinctiveness element.”).

24 ⁴² *Horizon Mills*, 161 F. Supp. 2d at 211.

25 ⁴³ Farr’s evidence establishes that “comic con” in all its forms—hyphenated (“comic-
 26 con”), elided (“comicon”), etc.—is generic. But all that is needed for Farr to defeat
 27 SDCC’s claims is a determination that “comic con,” specifically, is generic. That said: a
 28 finding that “comic con” is generic, especially when coupled with SDCC’s (periodic and
 opportunistic) insistence that “comic con” and “comicon” infringe COMIC-CON, will
 entail that the other forms—all of which share the same pronunciation—are generic too.

1 **A. “Comic Con” Simply Denotes a Comic Con**

2 The words “comic con” denote a type of event. Starting with the final part of the
 3 phrase, the *OED* describes “con” as a clipping (shortened form) of “convention” that
 4 means: “Esp. among enthusiasts of science fiction and role-playing games: a convention,
 5 an organized gathering of people with a shared interest. Freq. as the final element in the
 6 names of such events.”⁴⁴ The *OED* reports print uses extending back to a 1940 issue of
 7 *Astonishing Stories*: “If you get this issue the day it appears on your newsstands, you will
 8 have just about enough time left to make arrangements to attend the *Chicon*. (*Chicon*:
 9 Fan argot for ‘Chicago Science Fiction Convention of 1940’.)”⁴⁵

10 For “comic,” the first element in the disputed phrase “comic con,” the *OED* has:

11 A publication, usually in magazine format, containing a story or collection of
 12 stories in the form of comic strips; originally one with chiefly humorous or
 13 action-based content intended for children, later also one dealing with a broad
 range of subjects and intended for adults.⁴⁶

14 The *OED* provides exemplary print uses ranging from 1892 to 2004, including these from
 15 a 1994 issue of *Life*, a book published in 1977, and a 2004 issue of *The New York Times*
 16 *Magazine*, respectively:

17 Most soldiers don’t read books; they read comics.

18 Listen, kid, you’ve been reading too many Superman comics.

19 The fastest-growing section of your local bookstore these days is apt to be the
 20 one devoted to comics and so-called graphic novels.⁴⁷

21 Considering finally the entire compound, “comic con,” Wikipedia’s entry for
 22 “comic con” begins: “Comic con is any comic book convention”;⁴⁸ and its entry for
 23 “comic book convention” similarly begins: “A comic book convention or comic-con is an

24 ⁴⁴RFN Ex. 8, at DANFARR033770.

25 ⁴⁵ *Id.* at DANFARR033770.

26 ⁴⁶ RFN Ex. 7, at DANFARR033681.

27 ⁴⁷ *Id.* at DANFARR033681.

28 ⁴⁸ *See* Garcia decl. Ex. 12, at DANFARR006118–20.

1 event with a primary focus on comic books and comic book culture, in which comic
2 book fans gather to meet creators, experts, and each other.”⁴⁹

3 What a comic con *is* is fully told by the words themselves. “Comics conventions
4 ... have their roots in their ‘big brother’ of science fiction cons, which have been going
5 strong since the mid-1930s.”⁵⁰ “Arguably the first dedicated comics convention” was
6 organized in 1964 by “two Detroit Michigan-based comic fans”—

7 followed in 1965 by Jerry Bails (a founding father of US comics fandom)
8 teaming up with Shel Dorf [who would later found SDCC] to take over the
9 event and make it a larger convention, which they named the *Detroit Triple*
10 *Fan Fair* (still hedging their bets, “Triple” being comics, science-fiction and
11 films).⁵¹

12 SDCC itself “began in 1970 when a group of comics, movie, and science fiction fans—
13 including the late Shel Dorf ...—banded together to put on the first comic book
14 convention in southern California.”⁵²

15 **B. “Comic Con” Functions as a Common Noun, Indicating What an Event Is,
16 Not as a Mark Indicating Who or Whose an Event Is**

17 A generic term answers the question “What are you?”—in contrast to a true mark,
18 which instead “answers the questions ‘Who are you?’ ‘Where do you come from?’ ‘Who
19 vouches for you?’”⁵³ Consider, for example, “DC Comics” and “Marvel Comics.”
20 “Comics,” standing alone, is a generic term, a type of thing. But “DC Comics” is a
21 trademark, which identifies comics from the company that owns Superman, Batman, and
22 Wonder Woman, inter alia; while “Marvel Comics” is the mark that identifies comics
23 from the company that owns Captain America and Spider-Man, inter alia.

24 ⁴⁹ *Id.* at DANFARR006088.

25 ⁵⁰ Garcia decl. Ex. 17, at DANFARR008552.

26 ⁵¹ *Id.* at DANFARR008551.

27 ⁵² Barber decl. Ex. 1, at DANFARR033221–25.

28 ⁵³ *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993) (quoting 1 J. McCarthy, *Trademarks and Unfair Competition* § 12.01 (3d ed. 1992)).

1 “The task of distinguishing words or phrases functioning as trademarks from words
 2 or phrases in the ‘linguistic commons’ begins with the development of an understanding
 3 of the common meaning of words and their common usage and then proceeds to a
 4 determination of whether the would-be trademark falls within this heartland of meaning
 5 and usage.”⁵⁴ As shown above, “comic con” simply means comic con. Thus its use to
 6 identify a comic con, whether SDCC’s or any other, falls squarely within “this heartland
 7 of meaning.” SDCC’s supposedly distinctive use of “comic con” also conforms to
 8 common usage: “comic con” and its variants (“comic-con,” “comicon,” etc.) are
 9 incorporated into the names of over 100 different comic cons,⁵⁵ not just SDCC’s; and
 10 news outlets and trade publications routinely use “comic con” to refer indiscriminately to
 11 any of those 100+ events, singly or collectively, instead of using it only to refer to
 12 SDCC’s event.⁵⁶

13 _____
 14 ⁵⁴ *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 821 (4th Cir. 2001).

15 ⁵⁵ See Answers to 1st rogs at 7–8; Garcia decl. Ex. 1 at CBC0043–6; Garcia decl. Ex. 5 at
 16 CC322423–56; ██████████ Garcia decl. Ex. 20 at DANFARR009152; Kaplan report at
 21–22, Ex. 2; RFN Ex. 6 DANFARR033161–62, DANFARR033167–91.

17 ⁵⁶ See Kaplan Report; Barber decl. Ex. 1, at DANFARR033405–19, DANFARR033349–
 18 66; DANFARR033560–74, DANFARR033444–58, DANFARR033542–59,
 19 DANFARR033473, DANFARR033529, DANFARR033459; Garcia decl. Ex. 7, at
 20 CC416564–65, CC395932, CC407570; Garcia decl. Ex. 10, at DANFARR005580,
 21 DANFARR005597; Garcia decl. Ex. 14, at DANFARR006241, DANFARR006258;
 22 Garcia decl. Ex. 17, at DANFARR008591–94, DANFARR008588, DANFARR008586,
 23 DANFARR008621, DANFARR008678, DANFARR008595, DANFARR008603; Garcia
 24 decl. Ex. 18, at DANFARR008741–44; Garcia decl. Ex. 21, at DANFARR009342–43;
 25 Garcia decl. Ex. 22, at DANFARR9355–56. See also ██████████ See also
 26 *Solid 21, Inc. v. Hublot of Am.*, 109 F. Supp. 3d 1313, 1324 (C.D. Cal. 2015), *rev’d on*
 27 *other grounds*, No. 15-56036, 2017 U.S. App. LEXIS 5227 (9th Cir. Mar. 24, 2017)
 28 (“Federal courts look to a variety of sources of evidence to determine whether a term is
 generic and thus answers the question ‘what are you?’ in the view of the consuming
 public. To determine the view of the consuming public, courts look to dictionaries; use of
 the term in the media; use of the term in the relevant industry, as evidenced by trade
 publications, trade organizations, and use by competitors; use by the plaintiff; and
 customer surveys.”); *Horizon Mills*, 161 F. Supp. 2d at 214 (“Courts have relied upon
 evidence such as: (i) proof of widespread use by competitors that has not been contested

1 Finally, to corroborate the semantic points already made, DFP has engaged a
 2 linguist, Jeffrey P. Kaplan, Ph.D., to assess the evidence from morphological and
 3 syntactical perspectives.⁵⁷ Dr. Kaplan analyzed hundreds of print and other uses and
 4 determined that “comic con” functions as a common noun—an answer to the question
 5 “what are you?” not “who are you?” More specifically, Dr. Kaplan observes:

- 6 • word structures that are typical of common nouns—e.g., plural forms
 7 (“comic cons”);⁵⁸
- 8 • syntax that is typical of common nouns—notably the use of determiners
 9 such as definite and indefinite articles (“the Baltimore Comics Con,” “a
 10 comic con”) and demonstratives (“this comic con”) with “comic con,” and
 11 *how* such determiners are used with “comic con”;⁵⁹
- 12 • capitalization patterns characteristic of common nouns;⁶⁰ and
- 13 • ubiquitous use of “Comic Con,” “Comic-Con,” “ComicCon,” and
 14 “ComiCon” as a root used to form the names of more than 100 specific
 15 comic cons—“most often according to the formula ‘LOCATION COMIC
 16 CON’ (‘New York Comic Con,’ ‘Tidewater Comicon,’ ‘Bellingham
 17 ComiCon,’ etc.).”⁶¹

18
 19
 20 by the seller; (ii) generic use by the seller himself; (iii) dictionary definitions; (iv) media
 21 usage, such as newspaper or magazine articles; and (v) consumer surveys.”).

22 ⁵⁷ See *Solid 21*, No. 15-56036, 2017 U.S. App. LEXIS 5227, at *3 (“The district court
 23 abused its discretion by excluding Dr. Butters’s linguistic opinions ...”); *Steak n Shake*
 24 *Co. v. Burger King Corp.*, 323 F. Supp. 2d 983, 993 (E.D. Mo. 2004) (“since he was
 25 speaking as a ... linguist ... his testimony provides helpful guidance as to how people use
 26 the term ‘steakburger’ and the roots of this generic term”).

27 ⁵⁸ See Kaplan Report at 6–11.

28 ⁵⁹ See Kaplan Report at 11–17.

⁶⁰ See Kaplan Report at 17–21.

⁶¹ See Kaplan Report at 21–22.

1 The evidence of common meanings and usage, whether viewed semantically,
2 morphologically, or syntactically, all points to the same conclusion: “comic con” is
3 generic.

4 **C. SDCC’s Survey Is Irrelevant because this Is Not a Genericide Case**

5 To resist the mountain of evidence uniformly compelling the conclusion that
6 “comic con” is generic, SDCC offers a so-called “Teflon” survey.⁶² “A Teflon survey
7 begins with a brief lesson explaining the difference between brand names and common
8 names. It then asks respondents to classify a series of words, including the trademark at
9 issue, as either brand names or common names.”⁶³ SDCC’s survey is inapposite—as is
10 any evidence measuring consumer perceptions—because this is not a genericide case.

11 **1. Surveys Measuring Consumer Perception Matter Only in Genericide** 12 **Cases**

13 Courts have determined terms to be generic, and hence unprotectible, under
14 two principal circumstances. The first case is where a seller appropriates an
15 existing generic term and claims exclusive rights in it as a “trademark” of that
16 term. In such a case, because the term was generic before the seller used it, the
17 seller never had trademark rights in the term. An individual challenging the
18 mark need only establish that the term is generic through an examination of
19 the term itself. Notable examples include “flor-tile” as a mark for wooden
20 flooring, “The Computer Store” for computer sales services, “cola” for a type
21 of soft drink, “fontina” for a type of cheese, “baby oil” for mineral oil, and
22 “hog” for large motorcycles.⁶⁴

23 The second case in which courts have determined a mark to be generic
24 involves matters where a seller establishes trademark rights in a term which a
25 majority of the relevant public then appropriates as the name of a product. In
26 such a case, the mark is said to be a victim of “genericide” and trademark
27 rights may cease. The public’s appropriation is set in motion by two, often
28 concurrent processes, namely, (i) the trademark owner’s failure to police the

25 ⁶² I.e., a survey modeled after that approved by *E. I. Du Pont de Nemours & Co. v.*
26 *Yoshida International, Inc.*, 393 F. Supp. 502, 518–20 (E.D.N.Y. 1975).

27 ⁶³ *Elliott v. Google, Inc.*, No. 15-15809, 2017 U.S. App. LEXIS 8583, at *18 n.7 (9th Cir.
28 May 16, 2017).

⁶⁴ *Horizon Mills*, 161 F. Supp. 2d at 213 (citing cases).

1 mark, resulting in widespread usage by competitors, and (ii) the public's
2 inability to call the product by any other name than the trademarked term.
3 Notable examples include "aspirin" for acetyl salicylic acid, "cellophane" for
4 transparent cellulose sheets and films, "escalator" for a moving stairway,
5 "Murphy Bed" for a bed that folds into a closet; and "Thermos" for vacuum-
6 insulated bottles.⁶⁵

7 By statute, the test for genericide is "primary significance ... to the relevant
8 public."⁶⁶ Thus in a genericide case, consumer surveys can be "particularly helpful in
9 divining what the principal significance ... to the consuming public."⁶⁷ But surveys are
10 not needed to determine "whether a term was generic before it was applied as a
11 trademark to the products in question"⁶⁸—i.e., in a non-genericide case.⁶⁹

12 ⁶⁵ *Horizon Mills*, 161 F. Supp. 2d at 213–14 (citing cases).

13 ⁶⁶ See 15 U.S.C. § 1064(3) ("The primary significance of the registered mark to the
14 relevant public ... shall be the test for determining whether the registered mark has
15 become the generic name of goods or services on or in connection with which it has been
16 used.").

17 ⁶⁷ *Horizon Mills*, 161 F. Supp. 2d at 220.

18 ⁶⁸ See *Horizon Mills*, 161 F. Supp. 2d at 220 n. 16 (distinguishing *Gimix, Inc. v. JS & A*
19 *Group*, 699 F.2d 901, 905 (7th Cir.1983) and *Expoconsul Int'l Inc. v. A/E Sys.*, 755 F.
20 Supp. 1237, 1247 (S.D.N.Y. 1991)).

21 ⁶⁹ See *Schwan's IP*, 460 F.3d at 976 (although "consumer perception was relevant to
22 determine whether a coined term for a commercial product (i.e. aspirin, teflon, thermos)
23 had become generic," because "Brick Oven was commonly used before either party
24 began labeling their frozen pizzas with the term ... it was not error for the district court to
25 omit the survey evidence from its genericness analysis"); *Hunt Masters*, 240 F.3d at 255
26 ("The notion that whether a word is generic depends upon consumers' understanding of
27 the word is based upon a scenario involving a coined word for a commercial product
28 (such as 'aspirin,' 'teflon,' or 'thermos') that is alleged to have become generic through
common usage."); *Miller Brewing*, 605 F.2d at 995 ("The survey evidence could have
only two purposes: to prove the meaning of the word 'light' or to prove that consumers
have come to associate that word with Miller's product. As for the first purpose, the
meaning of a familiar English word of Anglo-Saxon heritage can hardly be established by
a survey of 988 beer drinkers who had endured long exposure to Miller's advertising of
the word in connection with the Miller name. When Judge Learned Hand said that
whether a word is generic depends on what 'buyers understand by the word,' *Bayer Co.*
v. United Drug Co., 272 F. 505, 509 (S.D.N.Y.1921), he was referring to a coined word
for a commercial product that was alleged to have become generic through common

1 **2. This Is Not a Genericide Case because SDCC Did Not Coin “Comic**
2 **Con”**

3 This is not a genericide case, where the public has appropriated a term coined by
4 SDCC, because SDCC was not the first to call its event a comic con. By August 21,
5 1965, for example, *The New Yorker* could report: “[a] group of collectors of old comic
6 books held a convention the other weekend ... officially known as the *second annual*
7 *ComiCon, or Con.*”⁷⁰ SDCC admitted in deposition that SDCC did not coin “comic con”:

8 Q So the term “Comic-Con” is not a term that SDCC made up itself?

9 A That’s correct.

10 Q It didn’t coin that term?

11 A That’s correct.⁷¹

12 [REDACTED]
13 [REDACTED] Because SDCC “does not claim
14 to have first coined the term” “comic con,” “it is not necessary to determine whether the
15 term has become generic through common use,” and that “render[s] [SDCC’s] customer
16 survey irrelevant.”⁷³

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21 usage. He was not suggesting that the meaning of a familiar, basic word in the English
22 vocabulary can depend on associations the word brings to consumers as a result of
23 advertising. [¶] This brings us to the second possible purpose of Miller’s new survey
24 evidence, to prove that consumers have come to associate the word with Miller’s product.
25 Proof of that fact would not advance Miller’s trademark claim, because ... if a word is
26 generic it ‘can never become a trademark.’”).

27
28 ⁷⁰ Garcia decl. Ex. 18, at DANFARR008743 (italics added).

⁷¹ Glanzer dep. 58:12–16.

⁷³ See *Hunt Masters*, 240 F.3d at 255.

1 **IV. CONCLUSION**

2 SDCC admittedly did not invent comic cons and did not coin “comic con.”
 3 SDCC’s claims are instead predicated on its hubristic notion that it has become the
 4 greatest comic con and therefore fans everywhere must be thinking of SDCC and its
 5 event whenever they see the generic phrase “comic con” conjoined with “Salt Lake.”
 6 SDCC’s event may well be the largest comic con, at least within the United States. But
 7 size does not give it a monopoly on the terminology. Others who want to put on comic
 8 cons of their own have the same unfettered right to use the terminology that SDCC
 9 availed itself of, when it started; and the fans who want other options, either instead of or
 10 in addition to SDCC’s event, have a coordinate right to clear labeling. Therefore the
 11 Court should dispose of this case by affirming the obvious: that “comic con” is generic.

12 Unlike descriptive terms, which are *protectable* and can *become* protected by
 13 acquiring secondary meaning through long and exclusive use, “[n]o amount of purported
 14 proof that a generic term has acquired a secondary meaning associating it with a
 15 particular producer can transform that term into a registrable trademark.”⁷⁴ “No
 16 manufacturer can take out of the language a word, even a slang term, that has generic
 17 meaning as to a category of products and appropriate it for its own trademark use....”⁷⁵

18 [REDACTED]
 19 [REDACTED] Because SDCC is barred by law from appropriating the
 20 generic term “comic con,” its survey is irrelevant, as is *any* evidence of consumer
 21 perceptions.⁷⁷ Setting aside SDCC’s irrelevant survey, the relevant evidence uniformly
 22

23 _____
 24 ⁷⁴ See *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 374 (1st Cir. 1980) (reversing
 injunction against use of “export sodas”).

25 ⁷⁵ *Harley-Davidson*, 164 F.3d at 810.

26 [REDACTED]
 27 ⁷⁷ See *Schwan’s IP*, 460 F.3d at 976 (although “consumer perception was relevant to
 28 determine whether a coined term for a commercial product (i.e. aspirin, teflon, thermos)
 had become generic,” because “Brick Oven was commonly used before either party

1 shows that “comic con” is and always has been generic. Therefore DFP’s motion should
2 be granted and summary judgment entered.

3 DATED: June 23, 2017

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7
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11 DANIEL FARR, AND BRYAN BRANDENBUR
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28 began labeling their frozen pizzas with the term ... it was not error for the district court to omit the survey evidence from its genericness analysis”).