

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Blockchain Innovation, LLC v. Franklin Resources, Inc.

Blockchain Innovation · No. 21-cv-08787-TSH · Decided March 3, 2025

SUMMARY

The United States District Court for the Northern District of California denied Defendants’ motion for reconsideration in Blockchain Innovation, LLC v. Franklin Resources, Inc. Defendants sought reconsideration of rulings concerning objections to a declaration and the striking of expert rebuttal opinions. The Court held that Defendants’ arguments regarding the declaration were waived or improperly raised for the first time, and that the declaration did not justify reinstating the expert reports.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Thomas S. Hixson
JURISDICTION	United States District Court for the Northern District of California
DECIDED	March 3, 2025
DOCKET	21-cv-08787-TSH
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved for reconsideration of portions of the court's prior summary-judgment order and order striking expert rebuttal opinions.
STANDARD OF REVIEW	Reconsideration of an interlocutory order is disfavored and may be granted under Civil Local Rule 7-9 only upon a material difference in fact or law previously unknown despite reasonable diligence, newly emerging material facts or a change in law, or a manifest failure to consider material facts or dispositive legal arguments. Reconsideration is not available to raise arguments or evidence that could have been presented earlier or to reargue matters previously submitted.
PRECEDENTIAL VALUE	Unknown
PARTIES	Franklin Resources, Inc. d/b/a Franklin Templeton, FT FinTech Holdings, LLC, Franklin Templeton Companies, LLC v. Blockchain Innovation, LLC

TOPICS

motion for reconsideration

expert testimony

evidence

trade secrets

misappropriation of trade secrets

PRACTICE AREAS

civil procedure

evidence

trade secret litigation

commercial litigation

intellectual property

QUESTIONS PRESENTED

1. Whether defendants were entitled to reconsideration of the court's ruling overruling their objections to the Trombley Declaration based on an argument that the declaration contained expert testimony under Federal Rule of Evidence 702.
2. Whether the later admission of the Trombley Declaration constituted a material difference in fact or law warranting reconsideration of the order striking the Kim Report and portions of the Melvin Report as improper rebuttal opinions.
3. Whether defendants could assert substantial justification for serving the Kim and Melvin reports as rebuttal reports, or propose a new rebuttal-report process, for the first time on reconsideration.

HOLDINGS

1. Reconsideration was not warranted because defendants raised the Rule 702 argument for the first time on reconsideration and had previously argued the opposite—that Trombley's statements were based only on personal knowledge and were insufficient for summary judgment.
2. Trombley may testify as a lay witness about his personal knowledge and experience, including admissible lay opinions under Rule 701, but may not testify that the alleged trade secrets were unique in the industry or that no other companies developed them when those opinions are not rationally based on his perception.
3. The admission of the Trombley Declaration did not create a material difference in fact or law warranting reconsideration of the order striking the Kim Report and portions of the Melvin Report.
4. Defendants waived their substantial-justification argument by failing to raise it in opposition to the original motion to strike, and the court rejected the proposed new rebuttal-report process because it would disrupt the case schedule and substantially burden Blockchain.

KEY QUOTATIONS

“A motion for reconsideration ‘may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.’”

“The Court agrees with Plaintiff that Trombley may testify about his knowledge but agrees with Defendants that his declaration purported to do more than that.”

“The Court will not allow him to testify about whether the alleged trade secrets are unique in the industry or that no other companies have developed them.”

“The Court DENIES Defendants’ motion for reconsideration of the portions of the Court’s October 3, 2024 Order on Motion to Strike striking the Kim Report and portions of the Melvin Report.”

FACTUAL BACKGROUND

Onsa developed blockchain technology to tokenize financial assets and was acquired or funded through an agreement involving FT FinTech. After Onsa's operations ceased, its assets and legal claims were transferred through an assignment for the benefit of creditors and later purchased by Blockchain Innovation. Blockchain asserted that Franklin-related defendants misappropriated alleged trade secrets in developing and launching blockchain-related financial products. In opposing summary judgment, Blockchain submitted a declaration from Onsa founder Austin Trombley, while defendants relied on expert reports from Dr. Seoyoung Kim and Dr. Stephen Melvin concerning whether the alleged trade secrets were generally known.

PROCEDURAL HISTORY

Blockchain Innovation filed the action in the Northern District of California on November 12, 2021 and later filed a Third Amended Complaint asserting Defend Trade Secrets Act, breach-of-contract, breach-of-fiduciary-duty, and aiding-and-abetting claims. The court granted in part and denied in part the parties' summary-judgment motions on November 27, 2024, overruling objections to Austin Trombley's declaration. The court had previously struck the Kim Report and portions of the Melvin Report as improper rebuttal expert opinions. Defendants sought reconsideration under Northern District of California Civil Local Rule 7-9, and the court denied the motion.

DISPOSITION

other

CASES CITED

- McDowell v. [citation omitted in source]
- Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009)
- Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000)
- Siebert v. Gene Sec. Network, Inc., 75 F. Supp. 3d 1108, 1114 (N.D. Cal. 2014)
- Abdo v. Fitzsimmons, 2020 WL 4051299, at *2 (N.D. Cal. July 20, 2020)

OPINION

Blockchain Innovation, LLC v. Franklin Resources, Inc.

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 BLOCKCHAIN INNOVATION, LLC, Case No. 21-cv-08787-TSH 8 Plaintiff,

ORDER DENYING MOTION FOR

9 v. RECONSIDERATION (PUBLIC
VERSION OF ECF NO. 473)

10 FRANKLIN RESOURCES, INC., et al., Re: Dkt. No. 397 11 Defendants. 12

13 I. INTRODUCTION

14 Pending before the Court is a Motion for Reconsideration brought by Defendants Franklin 15
Resources, Inc. d/b/a Franklin Templeton (“FRI”), FT FinTech Holdings, LLC (“FT FinTech”), 16
and Franklin Templeton Companies, LLC (“FT Companies”). ECF No. 397.1 Plaintiff 17
Blockchain Innovation, LLC (“Blockchain”) filed an Opposition (ECF No. 412) and Defendants
18 filed a Reply (ECF No. 444). In their motion, Defendants ask the Court to reconsider portions
of 19 this Court’s October 3, 2024 Order Granting in Part and Denying in Part Motion to Strike
Expert 20 Rebuttal Opinions (“Order on Motion to Strike,” ECF No. 364) and of this Court’s
November 27, 21 2024 Order Granting in Part and Denying in Part Motion for Summary
Judgment and Granting in 22 Part and Denying in Part Cross-Motion for Partial Summary
Judgment (“Summary Judgment 23 Order,” ECF No. 391). The Court finds this matter suitable for
disposition without oral argument. 24 See Civ. L.R. 7-1(b). For the reasons stated below, the Court
DENIES the motion.² 25 1 For precision’s sake, citations herein are to the unredacted versions of
Defendants’ motion and 26 reply (ECF Nos. 398-3 and 445-2) and Defendants’ declarations and
exhibits in support of their motion and reply, which were filed under seal. Most sections of these
documents cited within this 27 order can be found in redacted versions Defendants filed on the
public docket. See ECF Nos. 397

1 II. BACKGROUND

2 The Court summarized the facts in its November 27, 2024 Summary Judgment Order: 3 Onsa
was a startup company that “developed . . . blockchain technology to tokenize financial assets.”
[Third Amended Complaint 4 (“TAC”)] ¶ 2. On October 28, 2019, Defendant FT FinTech invested
in Onsa – then called TokenVault, Inc. – through a stock purchase 5 agreement (“SPA”). TAC ¶ 4;
see Defs.’ Ex. 39 (SPA). Under the terms of the SPA, FT FinTech paid \$5.5 million to Onsa and \$1
6 million to its founder, Austin Trombley, in exchange for 100% of Onsa’s voting shares and
roughly a quarter of Onsa’s non-voting 7 shares. SPA §§ 1.1(b), 1.1(e)(i); TAC ¶ 96. The SPA
provided that Onsa’s board would be “initially comprised” of Bayston as Onsa’s 8 sole board
member. SPA § 9.5; see TAC ¶ 4. Under the terms of the SPA, [Defendant] Bayston was appointed
as interim president, 9 interim secretary, interim treasurer, and interim Chief Executive Officer.
SPA § 9.6. The SPA established certain milestones for Onsa 10 to reach, upon which FT FinTech
would make additional payments of \$1 million to Mr. Trombley and \$2.5 million to Onsa and
purchase 11 additional shares of non-voting Onsa stock (Schedule A milestones), plus additional
payments if Onsa met the Schedule B milestones. 12 TAC ¶ 198; SPA §§ 1.1(e)(ii), 1.1(e)(iii),
1.1(f). 13 In July 2020, Bayston allegedly terminated Onsa’s then-CEO and “all other significant
employees” and ceased all Onsa business operations 14 with Johnson’s knowledge and approval.
TAC ¶ 7. Plaintiff alleges that at the time, Onsa was on its way to reaching the first milestone, 15

which would trigger a \$1 million payment to Mr. Trombley and a capital infusion of \$2.5 million by FT FinTech to Onsa. TAC ¶¶ 173, 16 198; SPA §§ 1.1(e)(ii), 1.1(f)(1). In November 2020, Onsa’s board of directors, which consisted solely of Bayston, voted to approve an 17 assignment for the benefit of creditors (“ABC”), which transferred all of Onsa’s assets to a liquidator called BLKCHN, LLC. Onsa’s assets 18 included its intellectual property and legal claims. TAC ¶ 10. 19 In October 2020, Franklin Templeton “began a multi-phase development effort including code development, internal product 20 launch and review, scale testing and benchmarking, internal usage testing, and expansion” to develop its own blockchain technology. 21 Defs.’ Mot. at 11; see generally Defs.’ Ex. No. 78 (October 2, 2020 email and attached presentation of development plan). In April 2021, 22 FT FinTech launched the “Benji” app and Franklin OnChain U.S. Government Money Fund. Defs.’ Ex. 80. The Franklin OnChain 23 U.S. Government Money Fund was “the first U.S.-registered mutual fund to use a public blockchain to process transactions and record 24 share ownership.” Defs.’ Ex. 95. 25 In August 2021, Plaintiff Blockchain purchased all of Onsa’s assets, including any causes of action Onsa had, from BLKCHN through an 26 asset purchase agreement (“August 2021 APA”). TAC ¶ 12; Defs.’ Ex. 40. 27 1 Blockchain filed this case in this Court on November 12, 2021, and filed the operative TAC on July 22, 2024. ECF Nos. 1, 246. In its 2 TAC, Plaintiff alleges claims against FT Defendants for trade secret misappropriation under the federal Defend Trade Secrets Act 3 (“DTSA”), 18 U.S.C. § 1836(b), and for breach of contract; against Roger Bayston, FT FinTech, and FRI for breach of fiduciary duty; 4 and against Defendant Johnson for aiding and abetting the other defendants’ alleged breaches of fiduciary duty. TAC ¶ 64. . . . Fact 5 discovery closed on May 31, 2024, and expert discovery closed on August 2, 2024. ECF No. 210. 6 7 Summ. J. Order at 2–4. 8 On August 19, 2024, Defendants filed a motion for summary judgment on all claims. ECF 9 No. 275. In support of its opposition to Defendants’ motion for summary judgment, Plaintiff 10 submitted a declaration from Onsa’s founder, Austin Trombley (“Trombley Declaration”), to 11 support its assertion that the asserted trade secrets (“ATS”) were not generally known and derived 12 value from not being generally known. Decl. of Austin Trombley, ECF No. 312-2.3 Defendants 13 objected to Trombley’s declaration in their summary judgment reply brief (“Defendants’ 14 Summary Judgment Reply”). Defs.’ Summ. J. Reply, ECF No. 335-2 at 2–3. On November 27, 15 2024, the Court granted in part and denied in part Defendants’ motion for summary judgment and 16 granted in part and denied in part Plaintiffs’ cross-motion for summary judgment. Summ. J. Order 17 at 27. In the Court’s summary judgment order, the Court overruled Defendants’ objections to the 18 Trombley Declaration. Id. at 6. 19 On August 9, 2024, Plaintiff moved to strike in its entirety the expert report of Dr. 20 Seoyoung Kim (“Kim Report”) and portions of the expert report of Dr. Stephen Melvin (“Melvin 21 Report”), both of which Defendants had served as rebuttal expert reports. Motion to Strike, ECF 22 No. 262. On October 3, 2024, the Court granted Plaintiff’s motion to strike the Kim Report and 23 portions of the Melvin Report, both of which discussed whether the ATS qualify as trade

secrets. 24 ECF No. 364, Order on Mot. to Strike at 4, 14, 21. In its Order on Plaintiff's Motion to Strike, the 25 Court found that Dr. Kim was "an affirmative expert and her rebuttal report [was] improperly 26 designated as such." Id. at 11. The Court likewise found that Dr. Melvin's opinions on whether 27 1 the ATS qualify as trade secrets were not proper rebuttal opinions. Id. at 14–16. 2 On December 18, 2024, Defendants requested leave to file a Motion for Reconsideration 3 ("Motion") pursuant to Northern District of California Civil Local Rule 7-9(b). The Court granted 4 Defendants leave to file the Motion and treated Defendants' motion for leave as Defendants' 5 motion for reconsideration. Order Granting Leave, ECF No. 401. 6 In their Motion, Defendants ask the Court to reconsider the portion of the Court's 7 Summary Judgment Order overruling Defendants' objections to the Trombley Declaration on the 8 basis that there was a "manifest failure by the Court to consider material facts or dispositive legal 9 arguments which were presented to the court before" the Court's Summary Judgment Order. Civ. 10 L.R. 7-9(b)(3); Mot. at 2, 7, ECF No. 398-3. In the alternative, Defendants ask the Court to 11 reconsider its order striking the Kim Report and portions of the Melvin Report on the basis that the 12 Court's admission of the Trombley Declaration is "a material difference in fact or law" than "what 13 was presented to the Court" when the Court decided Plaintiff's Motion to Strike. Civ. L.R. 7- 14 9(b) (1)–(2); Mot. at 11. 15 Blockchain filed its opposition to the motion on January 6, 2025. ECF No. 412. 16 Defendants filed their reply on January 17, 2025. ECF No. 445-2.

17 III. LEGAL STANDARD

18 Under Civil Local Rule 7-9(a), a motion for reconsideration may be granted before entry of 19 judgment adjudicating all of the claims and rights and liabilities of all the parties in a case. Civ. 20 L.R. 7-9(a). A motion for reconsideration may be made on three grounds: (1) a material 21 difference in fact or law exists from that which was presented to the court, which, in the exercise 22 of reasonable diligence, the moving party did not know at the time of the order for which 23 reconsideration is sought; (2) the emergence of new material facts or a change of law; or (3) a 24 manifest failure by the court to consider material facts or dispositive legal arguments. Civ. L.R. 25 7-9(b). Motions for reconsideration are disfavored and "should not be granted, absent highly 26 unusual circumstances, unless the district court is presented with newly discovered evidence, 27 committed clear error, or if there is an intervening change in the controlling law." *McDowell v. 1* omitted). Furthermore, "[a] motion for reconsideration 'may not be used to raise arguments or 2 present evidence for the first time when they could reasonably have been raised earlier in the 3 litigation.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th 4 Cir. 2009) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). 5 Further, the moving party may not reargue any written or oral argument previously asserted to the 6 court. Civ. L.R. 7-9(c).

7 IV. DISCUSSION

8 Defendants request reconsideration of the portion of the Court's Summary Judgment Order 9 overruling Defendants' objections to the Trombley Declaration. In the alternative, Defendants ask

10 the Court to reconsider portions of the Court's Order on Motion to Strike, specifically the
portions 11 striking the Kim Report and portions of the Melvin Report. 12 A. Trombley
Declaration 13 As the basis for their motion to reconsider the portion of the Court's Summary
Judgment 14 Order overruling Defendants' objections to the Trombley Declaration, Defendants
point to Civil 15 Local Rule 7-9(b)(3), which requires the moving party to show that there was a
"manifest failure 16 by the Court to consider material facts or dispositive legal arguments which
were presented to the 17 Court before such interlocutory order." Mot. at 2, ECF No. 397; see Civ.
L.R. 7-9(b)(3). 18 Defendants contend the Court manifestly erred by considering whether the
Trombley Declaration 19 "offer[ed] fact, rather than expert, testimony" and not whether it offered
opinions based on 20 "scientific, technical, or other specialized knowledge" that would bring
Trombley's testimony 21 within the scope of Federal Rule of Evidence 702. Mot. at 7-9. 22 1.
Scope of Motion for Reconsideration re Trombley Declaration 23 As a preliminary matter,
Plaintiff contends that Defendants only objected to select 24 paragraphs of the Trombley
Declaration in the first instance and that Defendants' motion for 25 reconsideration must therefore
be limited to those paragraphs. Opp'n at 1. The Court finds 26 Defendants clearly objected to the
Trombley Declaration in its entirety in their summary judgment 27 reply. See Defs.' Summ. J.
Reply at 2 (stating "the Declaration should be struck[,] " [t]he 1 contends that the [Trombley]
Declaration contains fact, not expert, testimony, it should still be 2 struck as untimely."").
Defendants' citation of certain paragraphs of the Trombley Declaration 3 does not obviate the fact
that Defendants previously objected to the declaration in its entirety. The 4 Court therefore treats
Defendants' motion as one for reconsideration of Defendants' objection to 5 the Trombley
Declaration in its entirety. 6 2. Waiver of Argument Regarding Trombley Declaration 7 In
Defendants' Summary Judgment Reply, Defendants asserted that the Trombley 8 Declaration
should be struck under Rule 37 because it was untimely. Defs.' Summ. J. Reply at 2. 9 They said:
"[T]he Declaration should be struck because it offers opinions that are untimely and 10 improper.
See Fed. R. Civ. P. 37(c)(1). . . . There is no justification for withholding these new 11 opinions
until now, months after the close of discovery, and Plaintiff does not even attempt to 12 justify its
late disclosure." Id. They argued that the declaration "contains new, previously 13 undisclosed
opinions and should be struck as an untimely supplemental expert report." Id. They 14 stated that
"whether the ATS were generally known is an issue on which Plaintiff bears the burden 15 of
proof and such opinions should have been disclosed in Plaintiff's initial expert reports." Id. 16 And
they argued that "[i]f Plaintiff contends that the Declaration contains fact, not expert, 17 testimony,
it should still be struck as untimely. Defendants requested all evidence relevant to 18 Plaintiff's
trade secret claim, but Plaintiff chose not to provide the Declaration in discovery. A 19 party
cannot avoid summary judgment by producing evidence for the first time in Opposition, and 20
any such evidence should be struck." Id. at 3 (citations omitted). 21 The Court found that the
declaration was timely because it was based on Trombley's 22 personal knowledge and
experience, "rather than on any purported qualifications as an expert," 23 and therefore did not

need to comply with the deadline for an expert report. Summ. J. Order at 6. 24 The first time Defendants made their current argument that the Trombley Declaration is 25 “based on scientific, technical, or other specialized knowledge within the scope of Rule 702” (Fed. 26 R. Evid. 701(c)) is in their motion for reconsideration. They did not make this argument in their 27 briefing on the summary judgment motion. Defendants go on for pages in their reconsideration 1 technical, or other specialized knowledge. 2 Defendants’ new argument is not only new, it is the opposite of what they argued on 3 summary judgment. On page 4 of their summary judgment reply brief, Defendants argued that 4 “[t]he law is clear that conclusory statements of uniqueness, based simply on a witness’s personal 5 knowledge, cannot create a triable issue on whether the alleged trade secrets were generally known 6 or not.” Defs.’ Summ. J. Reply at 4 (emphasis added). Defendants then argued that “Trombley’s 7 conclusory statements that the ATS were ‘unique’ are based entirely on his alleged personal 8 knowledge of the field (which is contradicted by the facts of his experience) and not on any 9 literature review or research. Trombley’s statements on alleged uniqueness, thus, fail to create a 10 triable issue on whether the ATS were not generally known and qualify as trade secrets.” Id. 11 (emphasis added). Defendants argued that Trombley’s declaration was insufficient to create a 12 triable question of fact precisely because it was based only on his personal knowledge and not on 13 things that an expert would rely on such as a literature review or research. Defendants’ new 14 argument that the Trombley Declaration is “based on scientific, technical, or other specialized 15 knowledge within the scope of Rule 702” is a reversal in position. 16 Consider what Defendants’ reply brief would have looked like if they made the argument 17 they did make, and if they had also made the new argument they now make. Their first argument 18 (the one they did make) would have been that Trombley’s declaration cannot create a triable 19 question of fact as to the “not generally known” prong of a trade secret claim because it is based 20 on his personal knowledge, and a declaration based on personal knowledge cannot create a triable 21 question of fact as to “not generally known.” And then their next argument (the one they make 22 now but didn’t back then) would have been that Trombley’s declaration is based on scientific, 23 technical, or other specialized knowledge within the meaning of Rule 702. Those arguments are 24 the opposite of each other. The second one flatly contradicts the first. 25 Defendants’ motion for reconsideration also criticizes the Court for not considering the 26 new argument that Defendants didn’t make on summary judgment. Defendants contend: “The 27 Court asked whether the ‘declaration offers fact, rather than expert, testimony.’ But the question 1 opinions that are ‘based on scientific, technical, or other specialized knowledge within the scope 2 of Rule 702.’” Mot. at 7-8 (emphasis added). But the reason the Court did not address that 3 argument is because Defendants did not make it. 4 It would obviously be a bad idea to allow a party to fully litigate a summary judgment 5 motion, see what the court’s order is, and then move for reconsideration based on new arguments 6 that were not presented to the court, including arguments that are the opposite of the ones that 7 were presented. If courts permitted that type of behavior, no orders would ever be final. 8 Unfortunately, that is what Defendants are attempting

here. 9 It was not error, clear or otherwise, for the Court not to address an argument that wasn't 10 made. And as noted, a motion for reconsideration may not be used to raise arguments or present 11 evidence for the first time when they could reasonably have been raised earlier in the litigation. 12 *Marlyn Nutraceuticals*, 571 F.3d at 880. The Court will not reconsider its summary judgment 13 order based on an argument that Defendants did not make in their summary judgment briefing. 14 Accordingly, the Court DENIES Defendants' motion for reconsideration of the portion of the 15 Court's Summary Judgment Order overruling Defendants' objections to the Trombley 16 Declaration. 17

B. Expert Opinions of Dr. Seoyoung Kim and Dr. Stephen Melvin 18 In the alternative to reconsidering Defendants' objection to the Trombley Declaration, 19 Defendants ask the Court to reconsider the portions of the Court's October 3, 2024 Order on 20 Motion to Strike. As a basis for their motion as to the expert opinions of Dr. Kim and Dr. Melvin, 21 Defendants argue that "[t]he Court's admission of the Trombley Declaration on November 27, 22 2024 is 'a material difference in fact or law' than what 'was presented to the Court', . . . and 23 Defendants could not have been aware of this development when the Court entered its Motion to 24 Strike Order in October." Mot. at 11. Defendants maintain that the Kim and Melvin reports 25 "would have unquestionably been proper rebuttal" had Trombley's testimony been properly 26 disclosed. Mot. at 1. Defendants further assert that Plaintiff will not suffer prejudice from the 27 reinstatement of the Kim and Melvin Reports because the Trombley Declaration addressed the 1 12. This argument is premised on the notion that the Trombley Declaration is an expert opinion. 2 Because the Court has already ruled on summary judgment, and will not reconsider its 3 order based on Defendants' new argument and change of position, the relevant issue is trial. And 4 it is obvious what the correct outcome is: Trombley cannot give any expert testimony on whether 5 the alleged trade secrets were generally known. Blockchain never offered Trombley as an expert 6 on that subject and does not say he is an expert on it now. Rather, Blockchain defends Trombley's 7 declaration on the ground that it is permissible lay testimony. Because Trombley was not 8 disclosed as an expert on that subject, and neither side advances any argument that he has the 9 qualifications to be an expert on it, he is limited to giving lay testimony. In other words, even 10 though the Court will not reconsider its summary judgment order based on a new argument made 11 on reconsideration, the Court will be mindful of this new argument in policing what Trombley can 12 say at trial. 13 So, let's talk about that. Federal Rule of Evidence 701 provides that: 14 If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: 15 (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to 16 determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge 17 within the scope of Rule 702. 18 Fed. R. Evid. 701. The Committee Notes on 2000 Amendment provide a further gloss on Rule 19 701(c), noting that: 20 Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple 21 expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized

under the rules 22 regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized 23 knowledge within the scope of Rule 702. 24 Fed. R. Evid. 701, adv. committee note (2000). At the same time, the Committee Notes 25 recognized that: 26 courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of 27 qualifying the witness as an accountant, appraiser, or similar expert. to give lay opinion testimony as to damages, as it was based on his 1 knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, 2 training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue 3 of his or her position in the business. The amendment does not purport to change this analysis. 4 5 Id. “Where . . . a witness is testifying as to institutional operations and practices based on personal 6 knowledge that the witness has accrued over the course of several years of employment, the 7 witness is providing lay testimony not subject to Rule 702.” Siebert v. Gene Sec. Network, Inc, 75 8 F. Supp. 3d 1108, 1114 (N.D. Cal. 2014). 9 The Trombley Declaration is largely a factual account of Trombley’s work for Onsa and 10 the development of the ATS. However, the Declaration includes some assertions that amount to 11 opinion, rather than fact testimony. These include Trombley’s belief that certain elements of the 12 ATS are “unique.” Trombley Decl. ¶¶ 28, 31, 33, 35, 37, 40, 42, 45, 55. These are the opinions 13 Defendants challenge in their motion for reconsideration. Plaintiff responds that “when read in 14 context, it is apparent that Trombley meant that he had not encountered another [company] that 15 had come up with the asserted trade secret, which is a fact, not an opinion.” Opp’n at 16. “In 16 other words . . . Trombley is stating that, to his knowledge, the trade secrets were unique because 17 he was aware of no other company that had developed them. This is not an opinion. It is a 18 statement of Mr. Trombley’s knowledge.” Id. at 17. 19 The Court agrees with Plaintiff that Trombley may testify about his knowledge but agrees 20 with Defendants that his declaration purported to do more than that. Consider this excerpt from 21 paragraph 31: “Based on my understanding and knowledge of the industry, this was a unique 22 solution that no one else was doing. I have not seen any other company that had advanced down 23 the path we were following or succeeded in solving the problems we were trying to solve.” The 24 second sentence is fine under Rule 701. But the first sentence is not because it is not “rationally 25 based on the witness’s perception.” Paragraph 28 of his declaration has the same problematic 26 quality that his opinion about the entire industry is not rationally based on his perception. 27 On the issue of whether the asserted trade secrets were generally known, the Court will 1 and has not seen, as well as how he gained that awareness and knowledge. But the Court will not 2 allow him to testify about whether the alleged trade secrets are unique in the industry or that no 3 other companies have developed them. Nor can he offer those opinions by prefacing them with “I 4 think” or “I believe.” The problem with those opinions is not, as Defendants wrongly state, that 5 they are based on “scientific, technical, or other specialized knowledge within the scope of Rule 6 702.” There is actually no basis to think that

Trombley has that kind of specialized knowledge. 7 The problem with those opinions is that they are not rationally based on his perception. 8 This ruling disposes of Defendants' alternative argument for the Court to reconsider its 9 order on the motion to strike. Trombley was not disclosed as an expert on whether the alleged 10 trade secrets were generally known, and he won't be giving any expert testimony about that or 11 anything else at trial. He was certainly disclosed as a fact witness, and he will be able to give fact 12 testimony at trial, including lay opinion testimony that is admissible under Rule 701. The Court 13 therefore finds that the Trombley Declaration does not create a "material difference in fact or law" 14 to justify reconsideration of the Kim and Melvin reports. 15 Defendants maintain that the Kim and Melvin reports "would have unquestionably been 16 proper rebuttal" had Trombley's testimony been properly disclosed. Mot. at 1. Defendants further 17 assert that Plaintiff will not suffer prejudice from the reinstatement of the Kim and Melvin Reports 18 because the Trombley Declaration addressed the same subject as the Kim Report and portions of 19 the Melvin Report that the Court struck. Mot. at 12. This argument is premised on the notion that 20 the Trombley declaration is an improper expert opinion. But an expert rebuttal opinion must 21 "contradict or rebut evidence on the same subject matter identified by" another party's expert. 22 Fed. R. Civ. P. 26(a)(2)(D)(ii). As discussed above, the Court finds the Trombley Declaration 23 does not constitute expert testimony. Portions of his declaration are inadmissible lay opinion 24 testimony under Rule 701 because they are not rationally related to his perception, but none of it is 25 based on scientific, technical or specialized knowledge within the scope of Rule 702. Indeed, as 26 noted, there is no reason think Trombley possesses such specialized knowledge. Meanwhile, Dr. 27 Kim and Dr. Melvin clearly offered expert opinions based on their "scientific, technical, or other 1 (Melvin Report). Dr. Kim provided a 364-paragraph report and a lengthy appendix listing the 2 legal documents, SEC filings, academic articles and publicly available documents upon which she 3 relied to address whether the ATS are generally known. Kim Report, ECF No. 266-3. Dr. 4 Melvin, meanwhile, used specialized knowledge and scientific and technical tools to reach his 5 conclusions that the ATS do not qualify as trade secrets. See, e.g., Melvin Report ¶¶ 128, 250, 6 298–305, ECF no. 266-7. In the absence of an affirmative expert opinion by the Plaintiff as to 7 whether the ATS were generally known, Dr. Kim's opinion and the expert opinions of Dr. Melvin 8 are not proper rebuttal. Setting aside the Order on Motion to Strike would prejudice Plaintiff by 9 introducing expert testimony to rebut a small number of lay opinions based on Trombley's work at 10 Onsa. 11 Defendants further assert that the Trombley Declaration creates a material difference in 12 fact and prejudices Defendants because Plaintiff did not include "any disclosure that Trombley 13 would offer the opinions on which Plaintiff intended to rely to show that the ATS were not 14 generally known" in its Motion to Strike the Kim Report and portions of the Melvin Report.

15 Reply at 12. But a party seeking to strike an improper rebuttal expert report need only show that

16 the expert's testimony does not "contradict or rebut evidence or theories of the opposing expert

17 witness.” *Abdo v. Fitzsimmons*, 2020 WL 4051299, at *2 (N.D. Cal. July 20, 2020) (citations
18 omitted). The Court previously held in its Summary Judgment Order, “expert testimony is not
19 necessarily required to create a triable issue” of fact as to whether an asserted trade secret is
“not 20 generally known.” Summ. J. Order at 7. Defendants offer no support for their suggestion
that 21 Plaintiff’s motion to strike improper expert rebuttal need also have identified lay witnesses
who 22 would provide evidence that the ATS were not generally known. Nor do Defendants offer
any 23 case law indicating that Defendants would be unduly prejudiced if Plaintiff’s Motion to
Strike 24 failed to devote space to such an explanation. Accordingly, the Court finds Defendants
have not 25 identified a “material difference in fact or law” to justify reconsideration of the Kim
and Melvin 26 reports. 27 a. Substantial Justification and Proposed Stipulation to Allow Plaintiff 1
Rebuttal Report 2 Finally, Defendants argue that even if the Kim and Melvin Reports should have
been 3 served as opening, rather than rebuttal, reports, Defendants were substantially justified in
waiting 4 to serve them as rebuttal reports. The Court finds Defendants have waived this
argument, as 5 Defendants did not raise substantial justification as an argument in their Opposition
to Plaintiff’s 6 Motion to Strike the Kim and Melvin Reports. See generally Opp’n to Mot. to
Strike, ECF No. 7 280. 8 Defendants offer to stipulate to allowing Plaintiff to prepare and submit a
rebuttal expert 9 report in response to the Kim and Melvin Reports. Mot. at 12 n.6; Reply at 14
n.2. First, the 10 Court finds Defendants have waived this argument, as they failed to raise it in
their Opposition to 11 Plaintiff’s Motion to Strike. See generally Opp’n to Mot. to Strike, ECF No.
280. Further, 12 allowing Plaintiff to submit a rebuttal in response to the Kim and Melvin Reports
would be 13 incompatible with the existing case management schedule and would impose a new
and 14 substantial burden on Plaintiff. Less than two months remain until trial. Expert discovery
closed 15 on August 2, 2024, and the deadline for submitting Daubert motions was September 3,
2024. See 16 ECF Nos. 210, 272. The deadlines to exchange pretrial disclosures, proposed jury
instructions, 17 motions in limine and other pretrial documents have all passed. See ECF No. 372
(October 9, 18 2024 Case Management Order). The addition of a rebuttal expert at this late stage
of litigation 19 would require a new case management schedule to allow for the preparation of a
rebuttal report, 20 the deposition of Plaintiff’s rebuttal expert, further Daubert briefing, and a
reduplication of pretrial 21 efforts, including likely changes to pretrial disclosures, motions in
limine, proposed jury 22 instructions and trial briefs. An expert rebuttal report would thus delay
trial for several months. 23 Accordingly, the Court rejects this proposal. 24 The Court DENIES
Defendants’ motion for reconsideration of the portions of the Court’s
25 October 3, 2024 Order on Motion to Strike striking the Kim Report and portions of the Melvin
26 Report. 27

1 V. CONCLUSION

2 For the reasons stated above, the Court DENIES Defendants’ motion for reconsideration. 3 IT IS
SO ORDERED. 4 5 Dated: January 30, 2025 6 7 TAA. lj □□

g THOMAS S. HIXSON

United States Magistrate Judge 9 10 ll a 12 14 © 15 4 16 17 Zz 18 19 20 21 22 23 24 25 26 27 28

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