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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP;

vs.

ROBERT ROSETTE; **ROSETTE & ASSOCIATES, PC**; **ROSETTE, LLP**; **RICHARD ARMSTRONG**; **QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION**, *a federally-recognized Indian tribe*; *and* **DOES 1 TO 100**.

FRANCISCO AGUILAR, **MILO BARLEY**, **GLORIA COSTA**, **GEORGE DECORSE**, **SALLY DECORSE**, *et al., on behalf of themselves and all those similarly situated*;

vs.

ROBERT ROSETTE; **ROSETTE & ASSOCIATES, PC**; **RICHARD ARMSTRONG**; *and* **DOES 1 TO 100**.

Case No.: 17-CV-01436 GPC MSB

WILLIAMS & COCHRANE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND ENTRY OF FINAL JUDGMENT ON THE THIRD CLAIM FOR RELIEF IN THE THIRD AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 56(A) AND 54(B), RESPECTIVELY

Date: August 30, 2019
Time: 1:30 PM
Dept: 2D
Judge: The Honorable Gonzalo P. Curiel

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INTRODUCTION

Through this motion, Williams & Cochrane, LLP ("Williams & Cochrane" or "Firm") moves for summary judgment under Federal Rule of Civil Procedure 56(a) on its Third Claim for Relief in the Third Amended Complaint alleging that the Defendants Robert Rosette, Rosette & Associates, P.C., and Rosette, LLP (collectively, the "Rosette Defendants" for purposes of this motion alone) violated the Lanham Act, 15 U.S.C. § 1051 *et seq*., as a result of their false advertisements about the *Pauma* suit. *See* Dkt. No. 174, pp. 76-78. As the Court is aware, the Pauma Band of Mission Indians ("Pauma") is a federally-recognized tribe in northern San Diego County that brought suit against the State of California in 2009 in order to void a financially-onerous amended compact under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*. *See Pauma Band of Luiseno Mission Indians v. California,* No. 09-01955, Dkt. No. 1 (S.D. Cal. Sept. 4, 2009). An advertisement on the Rosette, LLP website that was removed sometime after the service of the complaint in this case (*i.e*., post-December 2017) claimed that Robert Rosette was responsible for litigating this *Pauma* case:

> Mr. Rosette also successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger.

See Separate Statement of Undisputed Material Facts ("SSUMF"), ¶ 25; Declaration of Cheryl A. Williams ("Williams Decl."), Exs. 6-7. Moreover, an Executive Assistant who has been with Rosette, LLP for at least ten years and is in charge of "manag[ing] the creation and distribution of the firm's marketing materials" testified in a declaration earlier in this case that the firm "commissions" marketing brochures in the ordinary course of business, and, one such brochure that was uploaded to the firm's shared drive on May 9, 2011 contains a substantively-identical but typographically-distinct[1] representation as the one on the website: "Mr. Rosette also successfully litigated a case saving the Pauma Band of

[1] This statement in the marketing brochures differs from the website advertisement in that it hyphenates "then-Governor Schwarzenegger." Thus, this is not the case of the Rosette Defendants plastering a single statement in all of its advertising materials.

Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then-Governor Schwarzenegger." *See* SSUMF, ¶ 26; Williams Decl., Ex. 8.

The problem with these advertisements is that they are *absolutely* not true; they are, in fact, quite literally false. It is true that the attorneys of Williams & Cochrane were previously employed as associates at the Rosette firm for portions of 2009 and 2010, during which time they litigated the formative stage of the *Pauma* suit by filing the original complaint and then moving for and obtaining a preliminary injunction reducing the tribe's revenue sharing payments to the State of California from those imposed by the amended compact to those of the original compact. *See* SSUMF, ¶¶ 5-12; Williams Decl., Exs. 3, 9-10. But it is not true that the Rosette firm accomplished more than this. In fact, it accomplished quite less. As to that, shortly after the district court issued its order granting the preliminary injunction, the attorneys of Williams & Cochrane left the Rosette firm and soon thereafter started their current firm. *See* SSUMF, ¶ 13. During the one-month period that the Rosette firm had custody of the *Pauma* suit without the aid of the attorneys of Williams & Cochrane, it filed a single substantive brief (*i.e.*, a motion opposing the State's request to stay the preliminary injunction) and received a single devastating decision that unspooled all the work from the prior ninth months – one by the United States Court of Appeals for the Ninth Circuit staying the preliminary injunction. *See* SSUMF, ¶¶ 14-15; Williams Decl., Exs. 11-12. The Rosette firm was terminated by Pauma in the days after the filing of the ineffective brief, which means that its representation of Pauma in the lawsuit did not produce *any* effective remedies for the tribe, whether preliminary or final in nature. *See* SSUMF, ¶ 16; Williams Decl., Ex. 20. Not to mention, the claim alleging the State of California misrepresented Pauma's contract rights that ultimately served as the basis for the judgment in the case was not added to the complaint until more than a year after the Rosette firm's termination. *See* SSUMF, ¶ 20; Williams Decl., Ex. 16.

Of course, this misrepresentation claim was devised and incorporated into the com-

plaint by the attorneys for Williams & Cochrane after their firm assumed the representation of Pauma in the lawsuit. *See* SSUMF, ¶ 20; Williams Decl. Ex. 16. In fact, every single material achievement in the case is due to Williams & Cochrane – from it obtaining the order reinstating the injunction, to amending the complaint to include the misrepresentation claim, to obtaining the judgment rescinding the amended compact and restituting $36.3 million on account of the misrepresentation claim, to successfully defending the tribe on appeal to the Ninth Circuit *and* petition for writ of certiorari to the Supreme Court of the United States. *See* SSUMF, ¶¶ 17-23; Williams Decl., Exs. 13-17, 21-22. Thus, for over *six years*, Williams & Cochrane singlehandedly represented Pauma in the compact suit and successfully navigated the tribe through *every* stage and *every* level of the federal court system.

A monumental if not generational accomplishment like this is sure to produce additional work, and that is precisely what happened. Right after newspapers around California broke word that Governor Edmund G. Brown, Jr. was prepared to sign the appropriation bill that would pay Pauma its judgment in the compact case, another federally-recognized tribe named the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan" or "Tribe") reached out to Williams & Cochrane to inquire whether the Firm would represent the Tribe in a dispute with the State of California over an amended compact that involved similar legal issues but remarkably different facts. *See* SSUMF, ¶¶ 29-30; Williams Decl., Exs. 21-24. Following the execution of a largely contingency-based Attorney-Client Fee Agreement, Williams & Cochrane spent the next eight months – not six years – effectuating a negotiated settlement to the dispute that would provide Quechan with a replacement compact the State of California's compact negotiator even estimated would save the Tribe *at least* $4 million per year for the duration of the twenty-five-plus-year agreement. *See* SSUMF, ¶¶ 31-34; Williams Decl., Exs. 26-29.

Yet, somehow, when virtually everything in the negotiations was done save for the ministerial task of getting the signatures on the compact, Robert Rosette and his firm discreetly and inexplicably entered the picture. As Quechan's Answer and declarations from

the implicated parties both admit, Robert Rosette and the putative President of Quechan apparently met right after Williams & Cochrane's final negotiation session with the Office of the Governor and had an in-depth discussion about Mr. Rosette's experience with California compacts – the only noteworthy example of such, according to his website and now-disclosed marketing brochures, is his supposed success in litigating the *Pauma* suit. *See* SSUMF, ¶ 36; Williams Decl., Exs. 5, 23-24. After this meeting, Quechan terminated Williams & Cochrane, informed the Firm it would not pay the contingency fee or a reasonable fee in lieu thereof, and supposedly hired Robert Rosette and his firm – who obtained a copy of Williams & Cochrane's final draft compact for the Tribe to execute by threatening to ruin "the reputation of the firm in Indian Country and the State of California." *See* SSUMP, ¶¶ 37-39; Williams Decl., Ex. 32. This event was the culmination of Robert Rosette's efforts to interfere with Williams & Cochrane's business, and caused the Firm to suffer very real and very concrete losses as a result of the Rosette firm's false advertisements. *See* SSUMP, ¶¶ 28, 43; Williams Decl., Exs. 4, 23, 26, 28, 30, 32. What is more, Robert Rosette and his firm have seemingly made millions upon millions of dollars over the years – including from Quechan – by obtaining clients as a result of the false advertisement that Mr. Rosette (and not Williams & Cochrane) successfully litigated the *Pauma* suit.

The few material and undisputed facts related to the Rosette firm's false advertisements in this case – most of which were disclosed by the Defendants earlier in this action – unequivocally show that summary judgment in favor of Williams & Cochrane on its Lanham Act claim is appropriate. In terms of a remedy, the Court should begin by awarding damages against the Rosette Defendants in the amount of Williams & Cochrane's lost profits at Quechan (*see, e.g.,* 15 U.S.C. § 1117(a)), with the total adjusted to reflect pre- and post-judgment interest at the more-equitable State of California rate of 7% per annum. *See* Cal. Const. art. XV, § 1. From there, the Court should also consider requiring the Rosette Defendants to disgorge the likely considerable profits they obtained over the years with the aid of the false advertisements about the *Pauma* suit. *See, e.g.,* 15 U.S.C. §

1117(a). Further, the Court should also consider trebling the total damage award – whether based on Williams & Cochrane's lost profits alone or that amount combined with the Rosette Defendants' profits – in order to deter the Rosette Defendants from engaging in such willful and unethical behavior in the future. *See id.* If the circumstances of the case warrant a monetary damage award along the lines of that described in this paragraph, then Williams & Cochrane further requests that the Court enter a final judgment on the Lanham Act claim under Rule 54(b) given the amount of time that has elapsed since the inception of the suit and the distinctness of the Lanham Act claim in comparison to the contract-related claims that remain to be litigated against the Quechan Defendants. *See* Fed. R. Civ. P. 54(b).

STATEMENT OF FACTS

Williams & Cochrane and Rosette, LLP are direct competitors that both represent Indian tribes on federal Indian law issues like gaming compact negotiations under IGRA and complex litigation related thereto. *See* SSUMF, ¶¶ 1-3; Williams Decl., Exs. 1-2, 4-5, 23-25, 32-33. Their difference lies in their size. Rosette, LLP is a self-proclaimed national law firm that employs dozens of attorneys. *See* SSUMF, ¶ 1; Williams Decl., Ex. 1. Conversely, Williams & Cochrane is a boutique law firm that consists of just two partners – Cheryl A. Williams and Kevin M. Cochrane. *See* SSUMF, ¶ 2; Williams Decl., Ex. 2. These two partners were once associate attorneys at the Rosette firm. *See* SSUMF, ¶ 5; Williams Decl., Exs. 3, 20. Robert Rosette is not one to do litigation work himself, as he previously testified during a deposition that he "ha[s] employees that work for [him] that conduct research, draft, make court appearances, and so on and so forth." *See* SSUMF, ¶ 4; Williams Decl., Ex. 20. Thus, Robert Rosette hired Ms. Williams and Mr. Cochrane in anticipation of a dispute arising between the State of California and Pauma concerning the validity of an amended compact under IGRA. *See* SSUMF, ¶ 5; Williams Decl., Exs. 3, 20. That case was filed in the Southern District on September 4, 2009, and Cheryl Williams was the signatory for both the initial complaint and the subsequent motion for preliminary injunction. *See* SSUMF, ¶¶ 6-9; Williams Decl., Exs. 3, 9.

On April 12, 2010, the district court granted the preliminary injunction requested by Pauma in its underlying motion, reducing the tribe's payment obligations under the compact from the high amount of the amended compact to the more modest one of the original compact. *See* SSUMF, ¶ 12; Williams Decl., Ex. 10. The month following the issuance of this order, both Cheryl Williams and Kevin Cochrane left the Rosette firm and soon thereafter formed their current firm of Williams & Cochrane. *See* SSUMF, ¶ 13; Dkt No. 174, ¶ 12. The Rosette firm retained custody of the *Pauma* case and filed its first substantive brief on June 11, 2010 – an opposition to a motion to stay the preliminary injunction which the State lodged with the Ninth Circuit. *See* SSUMF, ¶ 14; Williams Decl., Ex. 11. The Ninth Circuit subsequently granted the State's motion to stay. *See* SSUMF, ¶ 15; Williams Decl., Ex. 12. Just two days after the Rosette firm filed its ineffective opposition brief, the Pauma tribe voted to terminate the firm and replace it with Williams & Cochrane. *See, e.g.,* SSUMF, ¶ 16; Williams Decl., Ex. 20.

After assuming the representation, Williams & Cochrane filed an emergency motion seeking to reinstate the preliminary injunction on August 17, 2010, which the Ninth Circuit granted roughly a week later on August 23, 2010. *See* SSUMF, ¶¶ 17-18; Williams Decl., Exs. 13-14. For the next six-plus years, Williams & Cochrane would singlehandedly and successfully litigate the case from the initial pleading stage through post-judgment collection matters – amending the complaint to add a claim for misrepresentation on September 9, 2011, defending against the State's motions to dismiss, completing discovery, obtaining summary judgment on the basis of the newly-added misrepresentation claim, and defending the case on appeal to the Ninth Circuit and petition for writ of certiorari to the Supreme Court. *See* SSUMF, ¶¶ 20-23; Williams Decl., Exs. 16-17. After all of this, the judgment awarding Pauma rescission of its amended compact and restitution of approximately $36.3 million took effect on June 28, 2016 (*i.e.*, six years after Robert Rosette's termination), and just over a month later Governor Edmund G. Brown, Jr. would sign a legislative bill entitled Senate Bill 1187 in order to appropriate "[t]he sum of… $36,320,286.61… to pay the judgment and any applicable interest in Pauma

Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. State of California, et al. (United States District Court for the Southern District, Case No. 09CV1955)." *See* SSUMF, ¶¶ 22-23; Williams Decl., Exs. 21-2.

The judgment in the Pauma case was *easily* the largest monetary award that the State of California had paid to an Indian tribe since the enactment of IGRA (*see Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050 (9th Cir. 1997) (returning a much smaller amount of simulcast-wagering fees)), and the approval of Senate Bill 1187 generated quite a bit of media attention around the State as a result. *See* SSUMF, ¶ 29; Williams Decl., Exs. 21-22. Shortly after the publication of these news reports, the President of the Quechan Tribe contacted the attorneys of Williams & Cochrane to ascertain whether they could help solve a similar dispute his Tribe had with the State of California regarding the financial terms of an amended compact that were significantly in excess of those in its original compact. *See, e.g.,* SSUMF, ¶ 30; Williams Decl., Exs. 23-24. [redacted] *See* Williams Decl., Ex. 30. The parties soon thereafter executed an Attorney-Client Fee Agreement containing a hybrid fee structure, with one part being a flat monthly fee of $50,000 and the other a contingency fee of 15% of "any [negotiated] credit, offset, or other reduction in future compact payments to the State in a successor compact (whether new or amended) as a result of excess payments made under" Quechan's amended compact. *See* SSUMF, ¶¶ 31-33; Williams Decl., Ex. 26.

Negotiations between Quechan and the State of California soon commenced, and on December 6, 2016, the Office of the Governor sent the tribe a draft compact that – according to the cover letter and accompanying sample invoice from the State's negotiator – "would reduce the Quechan Tribe's existing payment obligations by approximately $4 million annually" for the duration of the twenty-five-plus-year agreement. *See* SSUMF, ¶ 34; Williams Decl., Exs. 27-29. With the revenue sharing fees all but eliminated, Wil-

liams & Cochrane turned its attention to bolstering the non-monetary concessions of the compact during the remainder of the negotiations; to that end, the Firm met with representatives for the Office of the Governor for a final negotiation session on June 14, 2017 in order to address topics like the number of permitted slot machines and authorized gaming facilities, and then sent the sent the State one last draft compact on June 21, 2017 to memorialize the terms agreed upon and otherwise discussed at the meeting so the parties could wind up the negotiations by the end of the month. *See, e.g.,* SSUMF, ¶ 35; Williams Decl., Ex. 31.

However, on June 26, 2017, Quechan prepared a termination letter for Williams & Cochrane that the Tribe would transmit the following day – one that explained the Tribe was "terminating the services of Williams & Cochrane, LLP, effective immediately upon your receipt of this letter" and "will not pay any contingency fee or 'reasonable fee for the legal services provided in lieu' thereof" as required by the Attorney-Client Fee Agreement. *See* SSUMF, ¶ 37; Williams Decl., Ex. 32. A warning within the letter tried to convince Williams & Cochrane to walk away from the contract by stating that, "[w]e strongly advise you against pressing your luck further out of concern for the reputation of your firm in Indian County and the State of California." *See* SSUMF, ¶ 38; Williams Decl., Ex. 32. To end the June 26th letter, Quechan explained that Williams & Cochrane – if it had anything to say – should "direct all communications regarding this matter to Robert A. Rosette: Rosette@Rosettelaw.com, (480) 889-8990." *See* SSUMF, ¶ 39; Williams Decl., Ex. 32.

The emergence of Robert Rosette at Quechan is discussed in three documents the Defendants filed earlier in this case – the Answer by Quechan and declarations by Mr. Rosette and putative Quechan President Keeny Escalanti. *See* SSUMF, ¶ 36; Williams Decl., Exs. 5, 23-24. Each one of these filings discusses how President Escalanti somehow met with Mr. Rosette on June 16, 2017 – just two days after the final negotiation session between Williams & Cochrane and the Office of the Governor – and inquired about his experience with compacts in California. *See* SSUMF, ¶ 36; Williams Decl.,

Exs. 5, 23-24. That question in turn prompted a response by Mr. Rosette that "he had a great deal of experience in that area," at which point he "discussed the subject in further detail." *See* SSUMF, ¶ 36; Williams Decl., Exs. 5, 23-24. What is notable is the only California compact experience that Robert Rosette advertised on his website before this meeting is that he – and not the attorneys of Williams & Cochrane – was responsible for successfully litigating the *Pauma* case that served as the basis for the Quechan work:

> Mr. Rosette also successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger.

See SSUMF, ¶ 25; Williams Decl., Exs. 6-7. Similarly, an Executive Assistant at the Rosette firm who is responsible for "manag[ing] the creation and distribution of the firm's marketing materials" filed a declaration earlier in this case in which she testified that the Rosette firm has long included a nearly-identical statement about Mr. Rosette's handling of the *Pauma* case in the marketing brochures it distributes to prospective clients – one that again states "Mr. Rosette also successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then-Governor Schwarzenegger." *See* SSUMF, ¶ 26; Williams Decl., Ex. 8.

After securing the Quechan compact work at the final moment, the Rosette firm e-mailed Cheryl Williams the day after the transmission of the termination letter in order to obtain a copy of the final draft compact so the firm could get the State to execute the agreement before the end of the legislative session. *See* SSUMF, ¶ 40; Williams Decl., Ex. 33. As to that, the June 27th email stated that the Rosette firm "ha[d] been retained to represent the Fort Yuma Quechan Indian Tribe in their compact negotiations with the State" and "[w]hile there is a formal file request forthcoming, it is imperative that we receive, immediately, the last compact, with any redlines, that was transmitted to the State during your negotiations." *See* SSUMF, ¶ 40; Williams Decl., Ex. 33. On June 3, 2017, Cheryl Williams complied with this request by e-mailing a copy of the June 21st final

draft compact to representatives for both Quechan and the Rosette firm, thereby enabling the Tribe to execute the compact and have it go into effect with its publication in the Federal Register on January 22, 2018. *See, e.g.,* SSUMF, ¶¶ 41-42; Williams Decl., Exs. 33-34. Thus, the false advertisements that enabled the Rosette firm to secure the Quechan compact work right at the end of the negotiations caused Williams & Cochrane to lose the monthly flat fees under the Attorney-Client Fee Agreement for the period of June 1, 2017 through January 22, 2018 as well as the 15% contingency fee for the steep revenue sharing reduction in the negotiated compact. *See* SSUMF, ¶ 43; Williams Decl., Exs. 23, 26, 28, 30, 32.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." T.*W. Elec. Serv., Inc. v. Pac. Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). "When the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This situation arises when the evidence is "so one-sided" – like where the non-movant's offerings are "merely colorable" or "not significantly probative" – that the moving party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). This same standard applies to the elements of a Lanham Act claim; for instance, "a Court may properly grant summary judgment [to the plaintiff on the issue of literal falsity] where no reasonable jury could conclude that the… statements are [not] literally false." *Kwan Software Eng'g, Inc. v. Foray Techs, LLC,* 2014 U.S. Dist. Lexis 17376, *18 (N.D. Cal. 2014) (citation omitted).

ARGUMENT

I. SUMMARY JUDGMENT IN FAVOR OF WILLIAMS & COCHRANE ON ITS LANHAM ACT CLAIM IS PROPER SINCE THE EVIDENCE – MUCH OF WHICH THE DEFEND-

ANTS VOLUNTARILY DISCLOSED EARLIER IN THIS CASE – INDISPUTABLY PROVES THAT (I) THE ROSETTE DEFENDANTS VIOLATED THE LANHAM ACT ON ACCOUNT OF THE LITERALLY FALSE ADVERTISEMENTS ABOUT THE *PAUMA* SUIT ON THE FIRM'S WEBSITE AND IN THE FIRM'S MARKETING BROCHURES, AND (II) THE CONSEQUENT DAMAGE AWARD SHOULD BE EQUIVALENT TO *AT LEAST* WILLIAMS & COCHRANE'S LOST PROFITS AT QUECHAN (PLUS INTEREST) *IF NOT* THAT AMOUNT COMBINED WITH THE ROSETTE DEFENDANTS' PROFITS *IF NOT* THAT AMOUNT TREBLED FOR DETERRENCE'S SAKE

Amongst other things, the Lanham Act prohibits the use of false designation or origin, false descriptions, and false representations in the advertising and sale of goods and services. *See* 15 U.S.C. § 1125(a). A false advertising claim under the Lanham Act generally turns upon the five elements listed below:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of the audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997). In actuality, this five-factor test truly boils down to a single element when – as is the case here – a direct competitor places a literally false advertisement on its website or in its promotional materials that it distributes to customers. Proof of literal falsity in the first element of the test creates presumptions that the statement was both material and deceived the intended audience. *See* Argument, § I(b) & (c), *infra*. Further, proof that the defendant is a direct competitor of the plaintiff creates a second presumption of injury. *See* Argument § I(e). Thus, when taken together, these presumptions mean that all that stands between the plaintiff's summary judgment motion and the district court fashioning appropriate relief in the case of a direct competitor placing a literally false advertisement on its website is the rival defendant doing the improbable (if not impossible) and coming forward with some probative (and credible) evidence to show its literally false advertise-

ment was neither material, deceptive, nor the cause of the injury.

A. Falsity

Quite simply, the Rosette Defendants are wholly incapable of rebutting these presumptions arising from their website and written advertisements that this Court is capable of holding are false in three different manners. "To demonstrate falsity within the meaning of the Lanham Act, a plaintiff must show that the statement was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead the consumers." *Aussie Nads U.S. Corp. v. Sivian,* 41 F. App'x 977, 977 (9th Cir. 2002) ("*Aussie Nads*") (quoting *Southland Sod Farms,* 108 F.3d at 1139). A court can make a determination that a statement is literally false on its own without considering extrinsic evidence of consumer confusion. *See, e.g., Time Warner Cable, Inc. v. DIRECTV, Inc.,* 497 F.3d 144, 158 (2d Cir. 2007) (citing, *e.g.*, *American Brands, Inc. v. R.J. Reynolds, Co.,* 413 F. Supp. 1352, 1356-57 (S.D.N.Y. 1976) ("If a statement is actually false, relief can be granted on the court's own findings without reference to the reaction of the buyer or consumer of the product…"). The process of analyzing whether a statement is literally false generally requires parsing the statement to determine whether certain language when viewed in full context is grammatically untrue. *See American Home Prods. Corp. v. Johnson & Johnson,* 577 F.2d 160, 165 (2d Cir. 1978) (quoting *American Brands,* 413 F. Supp. at 1352). Thus, a single untrue modifier – like the use of the adjective phrase "All Natural" or "100% Natural" for an Iced Tea beverage that "contained the non-natural ingredients high fructose corn syrup and citric acid" – is enough to make an entire statement false. *Davidson v. Kimberly-Clark Corp.,* 889 F.3d 956, 968 (9th Cir. 2018) (citing *Ries v. Az. Beverages USA LLC,* 287 F.R.D. 523, 527 (N.D. Cal. 2012)).

Here, the statement at issue from the Rosette firm website explicitly says: "Mr. Rosette also successfully litigated a case savings the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger." *See* SSUMF, ¶ 25; Williams Decl., Exs. 6-7.

Moreover, the longtime Executive Assistant at the Rosette firm who is responsible for managing the creation and distribution of marketing materials earlier supplied the Court with one of the firm's marketing brochures that contains the substantively identical statement "Mr. Rosette also successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then-Governor Schwarzenegger." *See* SSUMF, ¶ 26; Williams Decl., Ex. 8. Each one of these statements is grammatically and literally untrue for multiple reasons. First, the transitive verb "litigate" has a particular definition that means an attorney or a party did more than just file a lawsuit; it means it actually obtained a judicial determination on the underlying issues. *See* Merriam-Webster, *Definition of Litigate* (May 29, 2019), *available at* https://www.merriam-webster.com/dictionary/litigate (defining the transitive verb litigate to mean "to decide and settle in a court of law"); *see also, e.g., Ghalehtak v. Fay Servicing, LLC,* 304 F. Supp. 3d 877, 888 (N.D. Cal. 2018) (explaining "actually litigated" means the issue was "contested by the parties and submitted for determination by the court" (citing *Janjua v. Neufeld,* 2017 U.S. Dist. Lexis 104519, *10 (N.D. Cal. 20017))); *Tocci Bldg. Corp. v. Zurich Am. Ins. Co.,* 659 F. Supp. 2d 251, 257 (D. Mass. 2009) (defining the same as existing where "an issue has been properly raised, submitted for determination, and necessarily determined"). The Rosette firm never did this much. It had custody of the *Pauma* case during the first nine months of a seven-year case, with its final act being opposing a motion to stay a preliminary remedy that the Ninth Circuit would ultimately grant. *See, e.g.,* SSUMF, ¶¶ 6-16; Williams Decl., Exs. 3, 11, 20. The posture of the suit as a result of the Rosette firm's representation, in other words, was that Pauma did not have *any* effective preliminary remedies let alone a decision on the merits of the case. In fact, the Rosette firm had not even navigated the case out of the initial pleading stage. *See* SSUMF, ¶ 20; Williams Decl., Ex. 16. Given this, just the core portion of the statement that the Rosette defendants "litigated" the Pauma case is objectively untrue. The statement becomes even worse once one adds in the extra details. The adverb "successfully" that modifies the verb "litigated" indicates the Rosette

firm obtained a favorable disposition of the "case," and the post modifier of "saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments" quantifies the ultimate remedies the Rosette firm allegedly obtained as a result of this favorable disposition. *All* of this is literally untrue. The Rosette Defendants did not successfully litigate a case saving Pauma $100 million in compact payments; they did not even successfully litigate a preliminary injunction saving Pauma a fraction of the claimed amount. It is, quite simply, literally false for the Rosette Defendants to advertise that they successfully litigated a case that another firm actually did. *Cf. AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp.,* 748 F. App'x 115, 119 (9th Cir. 2018) (explaining the defendant's statements misappropriating the plaintiff's corporate history were literally false).

This leads into the second point that this statement is not only literally false from an express perspective, but also by necessary implication because it implies that Williams & Cochrane was *not* responsible for successfully litigating the *Pauma* case. A second form of literal falsity occurs if a statement is false by necessary implication. *See Aussie Nads,* 41 F. App'x at 977 (citing *Southland Sod Farms,* 108 F.3d at 1139). For example, a message in an advertisement by a competitor to Cuisinart that stated "Robot-coupe: 21, Cuisinart: 0" in order to impliedly suggest a group of French restaurateurs would choose the Robot-coupe food processor over Cuisinart's as a matter of course if given the choice was literally false even though the ad did not "make the statement in *haec verba*." *Castrol, Inc. v. Pennzoil Co.,* 987 F.2d 939, 946 (3d Cir. 1993) (citing *Tambrands, Inc. v. Warner-Lambert Co.,* 673 F. Supp. 1190, 1193-94 (S.D.N.Y. 1987)). This situation is no better than the one in the *Cuisinart* case because the statement at issue, in a way, is the equivalent of saying "Rosette: 1, Williams & Cochrane: 0" when it comes to the question of whom successfully litigated the *Pauma* case. Worse yet, the statement is actually more reflective of "Rosette: 1" because it omits to mention Williams & Cochrane *at all*. A million different ways existed for the Rosette Defendants to write an expressly false advertisement that would still have *not* carried such false implications. For instance, the Rosette Defendants *could have said* that they "successfully co-litigated with Williams &

Cochrane a case saving the Pauma Band of Luiseno Mission Indians over $100 Million" or even just "successfully co-litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million." While this still would be untrue, it would at least put the viewing public on notice that some other entity bore at least partial responsibility for obtaining the judgment in that case. But, the Rosette Defendants were focused upon taking sole credit for something they did not do, and thereby falsely represented Williams & Cochrane was not responsible for something it actually did do.

The best case scenario for the Rosette Defendants is that this cross-medium statement about the *Pauma* suit in all of its advertisements is still misleading because it fails to mention a bevy of important contextual information. *See American Home Prods.,* 577 F.2d at 165 (explaining the Lanham Act "encompasses more than literal falsehoods," because otherwise, "clever use of innuendo, indirect intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed"). Unfortunately for the Rosette Defendants, a finding that the statement is misleading is one that can still come from the Court without the aid of extrinsic evidence like consumer reaction surveys. As to that, federal courts are able to assess the truth or falsity of more amorphous misleading statements "based on their own independent reaction[s]" to the statements at issue. *See, e.g., Cottrell, Ltd. v. Biotrol Int'l, Inc.,* 191 F.3d 1248, 1252 (10th Cir. 1999). Typically, this is not something a federal court will do when the statement concerns a subject in the marketplace that your everyday commercial spendthrift is better positioned to address, like the efficacy of food processors or the labeling of pomegranate blueberry juice that may be neither pomegranate nor blueberry. *See POM Wonderful LLC v. Coca-Cola Co.,* 573 U.S. 102 (2014). Yet, one thing that falls squarely within a judge's purview is assessing the accuracy of a claim by an attorney to having "successfully litigated a case" within the judge's district. Given their supreme legal expertise and position at the pinnacle of the field, judges are quite simply *the best* source to consult to determine whether an attorney's advertisement about his supposed successes in the legal field is accurate or not; after all, what is misleading to

a judge in this circumstance will surely be misleading to prospective clients as well.

B. Deception

This connection between falsity and deception is so strong that a presumption arises that a literally false statement actually did deceive consumers. *See Nutrition Distrib. LLC v. PEPE Research, LLC,* 2019 U.S. Dist. Lexis 15352, *12-13 (S.D. Cal. 2019) (citing, *e.g.*, *William H. Morris Co. v. Group W. Inc.,* 66 F.3d 255, 258 (9th Cir. 1995); *Harper House, Inc. v. Thomas Nelson, Inc.,* 889 F.2d 197, 209 (9th Cir. 1989); *Hall v. Bed Bath & Beyond, Inc.,* 705 F.3d 1357, 1367 (Fed. Cir. 2013) (stating "no extrinsic evidence of consumer confusion is required" to show literally false statements)). Logically enough, this presumption exists irrespective of whether or not the statement in question actually mentions the plaintiff or plaintiff's goods or services. *See Harper House,* 889 F.2d at 209. But even if this presumption did not exist, another presumption of deception arises if the defendant expended "substantial funds in an effort to deceive consumers and influence their purchasing decisions." *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC,* 310 F. Supp. 3d 1089, 1124 (S.D. Cal. 2018) (citing *U-Haul Int'l, Inc. v. Jartran, Inc.,* 793 F.2d 1034, 1041 (9th Cir. 1986)). After all, according to the Ninth Circuit, one "who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he [or she] succeeded." *U-Haul Int'l,* 793 F.2d at 1041. Here, there is absolutely no question that the Rosette Defendants expended substantial money in making and disseminating the false statement about the Pauma case. The statement existed on the website for the Rosette firm, which means the Rosette Defendants had to expend money in hiring an IT professional to update the website with the advertisement about the *Pauma* suit when they decided it was appropriate to jump on the opportunity. *See* SSUMF, ¶ 25; Williams Decl., Exs. 6-7. Not to mention, the Rosette firm employs and thus pays a long-tenured and dedicated Executive Assistant to *manage* the creation and distribution of promotional materials, which apparently for some time have contained the same false statement. *See* SSUMF, ¶ 26; Williams Decl., Ex. 8. Part of this management responsibility encompasses in turn "commission[ing]" a professional

graphic designer and printer to create the same promotional materials. *See* SSUMF, ¶ 26; Williams Decl., Ex. 8. These four paid professionals – *i.e.*, the IT professional, Executive Assistant, graphic designer, and printer – are just the four known examples of the Rosette firm devoting financial resources to disseminating the false statement regarding the *Pauma* suit, and they still likely total tens if not hundreds of thousands of dollars – a showing that should easily suffice for a presumption of deception.

Even without these two presumptions, the unique makeup of the legal field shows why the false statement about the *Pauma* suit would deceive the intended audience. First, attorneys licensed to practice in California – like Mr. Rosette – are subject to the California Rules of Professional Conduct, the operative rules of which at the time of the events in this case proscribed an attorney from making any untrue or deceptive statement in connection with any communication "concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain." Cal. Rules of Prof'l Conduct R. 1-400(D) (Sept. 14, 1992). Put more succinctly with the aid of the substantively-similar updated rules, an attorney "shall not make a false or misleading communication about the lawyer or the lawyer's services." Cal. Rules of Prof'l Conduct R. 7.1(a) (Nov. 1, 2018). Thus, if an attorney claims he successfully litigated a certain federal lawsuit in order to procure similar employment, then a client is entitled to believe that the attorney did just that. A client has the right to take his attorney at his word, after all. And there is good reason for this: there is an incredible informational and experiential asymmetry between attorneys and clients. Disproving a claim that an attorney obtained a certain federal litigation victory is rather difficult for a lay person given the fragmented structure of the federal district and circuit courts (which are not even provided for in the Constitution) and the general inaccessibility of court filings therein to those who are not previously and personally familiar with federal litigation.

C. Materiality

Proof of a literal falsehood also affects the materiality analysis such that the "burden to prove [the] materiality may be reduced or eliminated." *Nutrition Distrib.,* 2019

U.S. Dist. Lexis 15352 at *13. What this means is that a court, "with respect to [the] materiality" inquiry, will presume that a literally false statement was material and thus influenced the purchasing decision of the customer. *See, e.g., Pizza Hut, Inc. v. Papa John's Int'l,* 227 F.3d 489, 497 (5th Cir. 2000) (explaining "[w]ith respect to materiality," that a "court will assume… the statements actually misled consumers"). As with the prior deception element, this is not the only presumption that arises with respect to materiality. Another presumption arises if a competitor makes a false or misleading statement in a small market. *See Allen v. Ghoulish Gallery,* 2007 U.S. Dist. Lexis 86224, *29 (S.D. Cal. 2007) ("*Ghoulish Gallery*"). For example, a misleading statement by one of "four known competitors within the [portrait-company] marketplace" that seeks to inequitably put that portrait company on better footing than its competitors is presumed to have an impact on the purchasing decisions of the general public. *See id.* (indicating that a misleading statement about how long one has been in business is material). Here, the Answer filed by Quechan makes no qualms that the Tribe had a dispute with the State of California regarding an amended compact under which the Tribe was *way* behind in payment. *See* SSUMF, ¶ 30; Williams Decl., Ex. 24. This is *not* the case of a tribe seeking to negotiate a new compact through the remedial process set forth in IGRA. *See, e.g.,* 25 U.S.C. § 2710(d)(7). Rather, this is a tribe with a valid compact that was trying to *force* a change in its existing contractual relationship with the State of California. Very few tribes *anywhere* have ever done this, and the only documented instance of such in California is Pauma – whose judgment came out immediately before Quechan contacted Williams & Cochrane and whose legal name is rife within the allegations of the Tribe's Answer. *See* SSUMF, ¶¶ 22-23, 29-30; Williams Decl., Exs. 21-22, 24. Thus, the relevant market is simply two competitors – one fraudster, one legitimate – and a false statement by one taking credit for the success of the other is certain to have an impact on customers who are seeking help in solving factually-similar problems. The reaction by Quechan to the evidence of this success not only helps to prove the secondary presumption, but also the base fact that the false advertisement by the Rosette firm *was* indeed material.

D. Interstate Commerce

The analysis of the interstate commerce element of the Lanham Act test is as simple as they come because satisfying the requirement is "virtually automatic for websites." *Nutrition Distib.,* 2019 U.S. Dist. Lexis 15352 (S.D. Cal. 2019) (citing *TrafficSchool.com v. Edriver Inc.,* 653 F.3d 820, 828 (9th Cir. 2011)). Here, the false statement by the Rosette firm was located on the company website. *See* SSUMF, ¶ 25; Williams Decl., Exs. 6-7. Additionally, even if this were not the case, the declaration filed earlier in the case by the Executive Assistant charged with managing the creation and distribution of the Rosette firm's marketing brochures acknowledges that she (or the firm) receives a tangible professionally-made marketing brochure, scans and thereby converts it into an electronic file, uploads the file to her computer, and then stores said file on the firm's shared drive. *See* SSUMF, ¶ 26; Williams Decl., Ex. 8. From there, the Executive Assistant admittedly "distribut[es]" the file, and the only reasonable inference to draw from this is that the file goes from an intranet-linked device to an external e-mail address given that she has gone to such great lengths to have the material readily available in electronic format. Thus, invariably somewhere in the process of document conversion to document transmission is the use of the internet and accordingly the entry into interstate commerce.

E. Injury

Injury is much the same as the second and third elements of deception and materiality, respectively, in that the analysis starts with a presumption that the defendant is required to rebut. In this instance, a commercial injury is "generally presumed 'when defendant and plaintiff are direct competitors and defendant's misrepresentation has a tendency to mislead consumers.'" *Pipe Restoration Techs., LLC v. Coast Bldg. & Plumbing, Inc.,* 2018 U.S. Dist. Lexis 196094, *12 (C.D. Cal. 2018) (citing, *e.g.*, *Thermolife Int'l, LLC v. Gaspari Nutrition, Inc.,* 648 F. App'x 609, 619 (9th Cir. 2016)); *see also Merck Eprova AG v. Gnosis S.p.A.,* 760 F.3d 247, 260 (2d Cir. 2014) ("[A] predicate finding of intentional deception, as a major part of the defendant's marketing efforts, contained in comparative advertising, encompasses sufficient harm to justify a rebuttable

presumption of causation and injury in fact." (quoting *Porous Media Corp. v. Pall Corp.,* 110 F.3d 1329, 1336 (8th Cir. 1997))). Here, the information on the websites for Rosette, LLP and Williams & Cochrane shows that the two firms are direct competitors, both of whom are involved in representing Indian tribes in federal Indian law concerns like gaming compact negotiations under IGRA. *See, e.g.,* SSUMF, ¶¶ 1-3; Williams Decl., Exs. 1-2. If this were not enough, the Rosette firm *tried* to settle the *Pauma* suit after its termination without Williams & Cochrane's knowledge, and actually *did* succeed in displacing the Firm at Quechan. *See* SSUMF, ¶¶ 28, 37-39; Williams Decl., Exs. 4, 32. Thus, it has spent *years* discreetly and directly vying for Williams & Cochrane's preexisting work, and the final instance of such at Quechan where the Tribe decided to switch firms not only establishes the presumption but proof of actual injury as well. *See Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1411 (9th Cir. 1993) (explaining that "at least one wholesale distributor engaged in switching [companies] is credible proof of the fact of damage."). Any doubt about the relevance of the false statement to the firm switch disappears when one considers that both Quechan (through its Answer and the declaration of putative President Keeny Escalanti) and Robert Rosette admit they had at least one meeting in advance of the termination at which they discussed Mr. Rosette's compact work in California – the only noted example of such on his website was the false advertisement about the *Pauma* suit (*i.e.*, the very matter that resulted in Williams & Cochrane obtaining the Quechan work in the first place). *See* SSUMF, ¶ 26; Williams Decl., Exs. 5, 23-24.

F. Damages

One binary element with a yes or no answer, three presumptions, and an interstate commerce requirement that is "virtually automatic for websites" comprise *all* that goes into a claim of false advertising by a direct competitor before a court turns to the question of damages. With respect to that inquiry, the "plaintiff shall be entitled… subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." 15 U.S.C. § 1117(a). "An inability to show actual damages does not preclude relief under this section [of the Lanham Act]… [since]

the 'publication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance.'" *Ghoulish Gallery,* 2007 U.S. Dist. Lexis 86224 at *30-31. Even where damages are presumed rather than being actually proven, the district court can still award the plaintiff any just monetary relief and should fashion such relief "based on the totality of the circumstances" so it constitutes "compensation for the Plaintiff's losses or the defendant's unjust enrichment and is not simply a penalty for the defendant." *Southland Sod Farms,* 108 F.3d at 1146 (citing *Badger Meter, Inc. v. Grimmel Corp.,* 13 F.3d 1145, 1157 (7th Cir. 1994)). Though helpful, the latitude the remedial rules afford for issuing damages awards in cases of presumed injuries is unnecessary because the injury subsection, *supra*, shows rather clearly that an actual and significant injury resulted in this case. As to that, Williams & Cochrane was hired by a client who had a dispute regarding the payment terms of an amended compact immediately after news broke that the Firm had solved a similar dispute for another tribe in a historic manner. *See* SSUMF, ¶¶ 29-31; Williams Decl., Exs. 21-22, 26. Then, right before the work was finished, Williams & Cochrane was fired by the same client who had a dispute regarding the payment terms of an amended compact immediately after it met with a directly-competing firm that claimed to have solved the aforesaid dispute for the other tribe in a historic manner. *See, e.g.,* SSUMF, ¶¶ 25-26; Williams Decl., Exs. 6-8. The lost profits Williams & Cochrane experienced at Quechan – both in terms of the monthly flat fees from June 2017 through January 22, 2018 and the contingency fee – are directly attributable to the false advertisements about the *Pauma* case, and the Rosette Defendants must now cover these losses as part of the ultimate damages award in this case.

With that said, the total amount of damage should not stop at Williams & Cochrane's lost profits. As Section 1117 of the Lanham Act explains, any award in this case should also include the likely-considerable profits the defendants have made on account of their false advertisements. *See* 15 U.S.C. § 1117(a). The prevailing view is that "there needs to be a showing of 'willful deceptiveness'" in order to disgorge a defendant's profits from a false advertisement. *See Pipe Restoration Techs.,* 2018 U.S. Dist. Lexis 106094

at *13 (collecting cases). If one word aptly describes the Rosette Defendants actions with respect to the *Pauma* suit over the years, it is deliberate. Robert Rosette was fired from the *Pauma* case and admitted as much during a deposition on October 26, 2011:

> Q: And then what is the current status of the case?
> A: I don't know. I'm not – I was removed. …
> Q: And why were you terminated from representing Pauma?
> A: They chose different legal counsel. Specifically, Cheryl Williams had left my firm and started her own firm and took the case with her.
> Q: Is she a solo practitioner now?
> A: She's got a law partner, but I don't – I don't know how they're formed or structured of anything. I don't – I don't care.
> Q: And so she left your firm and simultaneously the matter transferred with her; is that right?
> A: No, I had the matter for probably over a month. I actually filed the initial – I just took it over myself for a while, just because I was the main attorney. I just handled it myself for about 45 days and actually filed the preliminary answers in federal court, and then I was told shortly thereafter that I was being removed.

See SSUMF, ¶ 24; Williams Decl., Ex. 20. Accompanying this termination was a complete deprogramming about the *Pauma* suit, as Robert Rosette openly admitted to *not* knowing the status of the case just over a year after that event. *See* SSUMF, ¶ 24; Williams Decl., Ex. 20. And yet, an attorney who knew nothing about the status of a case from which he was fired and could not even properly identify the type of document he filed while in sole possession of the case nevertheless advertised on his website that he successfully litigated the case to the tune of a $100 million remedy. *See* SSUMF, ¶ 25; Williams Decl., Exs. 6-7. Not only that, but an Executive Assistant at his firm filed a declaration earlier in this case to disclose that the Rosette firm has been distributing marketing brochures for years on end that contain the same false advertisement. *See* SSUMF, ¶ 26; Williams Decl., Exs. 8. And the Rosette Defendants have been doing all of this while apparently trying to sever any contracts Williams & Cochrane has that are in any way related to the *Pauma* work. *See* SSUMF, ¶¶ 28, 37-39; Williams Decl., Exs. 4, 32. There is simply no telling how much money the Rosette Defendants have made over the years on

account of this false advertisement, and the ultimate remedy in this case needs to be more than a zero sum game for the complicit individuals and entities, as they just shift some of their ill-gotten gains to cover the losses suffered by Williams & Cochrane at Quechan.

G. Enhanced Damages

The factual background of this case that is rife with deliberate actions designed to usurp the goodwill and other intangible benefits belonging to others exemplifies a situation where treble damages is appropriate. Section 1117(a) of the Lanham Act empowers a court to increase a damage award up to three times and to increase an award of profits by any amount if the court determines the profit recovery is inadequate. *See* 15 U.S.C. § 1117(a). Some district courts have found that enhanced damages are appropriate where "the false and misleading statements [by the defendant] were intentionally and/or willfully designed to unfairly compete and make sales that otherwise would not have been made" since it would "advance the cause of deterring Defendants and others similarly situated from repeating the type of unfair and deceptive behavior." *OmniGen Research, LLC v. Yongqiang Wang,* 2017 U.S. Dist. Lexis 189543, *49 (D. Or. 2017) (collecting cases). In yet other circumstances, some district courts have also awarded enhanced damages in order to "reflect the intangible benefits that accrued to [the Defendant] as a result of its false advertising, and in particular, [Defendant's] usurpation of [Plaintiff's] market share." *Merck Eprova,* 760 F.3d at 247 (citing *Merck Eprova AG v. Gnosis S.p.A.,* 901 F. Supp. 2d 436, 460 (S.D.N.Y. 2012)). Here, both of these considerations are in play: the Rosette Defendants took credit for one of Williams & Cochrane's signature litigation victories to accomplish the twin aims of filling its own book of business with clients it cannot capably represent while also putting the Firm out of business. The false advertisement took a large step towards accomplishing this at Quechan, and the Rosette Defendants have spent the majority of the last eighteen months of this lawsuit attacking Williams & Cochrane's remaining professional relationships in the hopes the Firm will go out of business before the Court can hear the Lanham Act claim. *See* Dkt. No. Dkt. No. 174, ¶¶ 177-83; 201-1. Enhanced damages – whether trebled or otherwise – are not just warrant-

ed, they are necessary.

H. Pre- and Post-Judgment Interest

Finally, the district court should adjust the ultimate damages award to account for pre- and post-judgment interest at the prevailing State of California rate rather than the inequitable Treasury Bill rate. Awards of prejudgment interest rest in the sound discretion of the district court and are "governed by considerations of fairness and are awarded when it is necessary to make the wronged party whole." *Purcell v. United States,* 1 F.3d 932, 942-43 (9th Cir. 1993). Given this talk of fairness and necessity, the purpose of pre-judgment interest is to rather logically "compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered." *Barnard v. Theobald,* 721 F.3d 1069, 1078 (9th Cir. 2013). "Federal law may apply to the calculation of prejudgment interest when a substantive claim derives from federal law alone." *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.,* 513 F.3d 949, 961 (9th Cir. 2008). However, "[e]ven in a federal question case, where the federal interest rate ordinarily applies, the court may choose a different rate if 'the equities of a particular case demand a different rate.'" *In re Zenovic,* 2017 Bankr. Lexis 270, *18 (B.A.P. 9th Cir. 2017) (quoting *SEC v. Platforms Wireless Int'l Corp.,* 617 F.3d 1072, 1099 (9th Cir. 2010)); *see W. Pac. Fisheries, Inc. v. S.S. President Grant,* 730 F.2d 1280, 1289 (9th Cir. 1984) (explaining a district court may deviate from the federal statutory interest rate if it "finds, on substantial evidence, that the equities of a particular case require a different rate"). Here, the 52 week Treasury Bill rate provided for under federal law is still hovering around 2.23% at the time of filing of this motion. *See* United States Department of the Treasury, *Daily Treasury Bill Rates* (May 29, 2019), *available at* https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billrates (last visited May 29, 2019). This rate has been abnormally if not historically low for quite some time, and it pales in comparison to the standard rate in the State of California of 7% that is set forth in the State Constitution. *See* Cal. Const. art. XV, § 1. This State rate of 7% is quite simply a better barometer of the time value of money since June of 2017 (*i.e.*,

the time of injury), especially considering that the United States market has been in an unprecedented bull run over the past two years.

II. THE DISTRICT COURT SHOULD ENTER A FINAL JUDGMENT ON THE LANHAM ACT CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 54(B) GIVEN THE AMOUNT OF TIME THAT HAS ELAPSED SINCE THE FILING OF THE SUIT AND THE FACT THAT THE CONTRACT-RELATED CLAIMS AGAINST THE QUECHAN DEFENDANTS ARE COMPLETELY SEPARABLE FROM THE ISSUE OF THE FALSE ADVERTISEMENTS

Finally, the district court should enter a final judgment on the Lanham Act claim pursuant to Rule 54(b) should it find that Williams & Cochrane is entitled to a monetary award along the lines of that specified in Section I of the Argument. Rule 54(b) allows a court to "direct entry of final judgment on one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). The no-just-reason-for-delay analysis typically looks at "judicial administrative interests… such as whether the claims under review were separable from the others remaining to be adjudicated…. and (2) the equities involved in the case." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty v. California,* 2009 U.S. Dist. Lexis 77757, *8-9 (E.D. Cal. 2009) (citing *Curtis-Wright Corp. v. GE,* 446 U.S. 1, 8 (1980)). Here, this issue really comes down to two considerations. First, the case is nearly two-years old and still stuck in the pleading stage, which means a judgment in the normal course may still be years off. And second, entering a partial judgment at this point in time should have no adverse effect on the disposition of the remainder of the case, including the resolution of the contract-related claims against the Quechan Defendants.[2]

CONCLUSION

For the foregoing reasons, Williams & Cochrane respectfully requests the Court grant the Firm summary judgment on its Lanham Act claim, and enter a final judgment under Rule 54(b) along the lines of that specified in Section I of the Argument, *supra*.

[2] Williams & Cochrane is amenable to staying its claim against the Rosette Defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*., in the event it at least recovers its actual damages from the Rosette Defendants under the Lanham Act claim.

RESPECTFULLY SUBMITTED this 30th day of May, 2019

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