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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**WILLIAMS & COCHRANE, LLP**;

Plaintiff,

vs.

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

Defendants.

Case No.: 17-CV-01436 GPC MSB

**WILLIAMS & COCHRANE'S OPPOSITION TO ROSETTE DEFENDANTS' MOTION FOR SANCTIONS UNDER RULE 11 AND 28 U.S.C. § 1927 [ECF NO. 254-1]**

Date: March 13, 2020
Time: 1:30 p.m.
Dept: 2D
Judge: The Honorable Gonzalo P. Curiel

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**



///

**STATUTES**



**RULES AND REGULATIONS**



**SECONDARY SOURCES**

## INTRODUCTION

The motion for sanctions filed by the Rosette Defendants is a remarkable master class in sleight of hand. The introduction to the motion zeroes in on past allegations accusing "Mr. Rosette of malpractice, self-dealing, homophobia, election interference, criminal threatening, witness tampering, theft from tribal clients, criminal fraud of various kinds, and inciting armed rebellion on tribal lands" (*see* Dkt. No. 254-1, 5:21-25), and then tries to create some bridge between those allegations and a generalized claim that the entire Fourth Amended Complaint – the well-pled Fourth Amended Complaint – is somehow frivolous. In other words, things that are *not* in the complaint somehow show that the complaint is sanctionable. But, this motion is not really about something Williams & Cochrane, LLP ("Williams & Cochrane" or "Firm") said in the past. It is about what the Rosette Defendants do not want to do in the present.

As to that, the true origination date for this motion is not July 16, 2017 (*i.e.*, the filing date of this action) or September 25, 2019 (*i.e.*, the filing date of the Fourth Amended Complaint), but December 3, 2019 – the date on which Magistrate Judge Berg ordered the Rosette Defendants to begin producing what, in reality, is a very conservative amount of evidence on Williams & Cochrane's false advertising claim under the Lanham Act, 15 U.S.C. § 1051 *et seq*. *See* Dkt. No. 241, ¶ 1 (directing the Rosette Defendants to "produce to Plaintiff any advertisement or solicitations to potential clients" made by select employees "that mentions Mr. Rosette or his firm's involvement in the Pauma Tribe litigation"). Before this point, the Rosette Defendants simply viewed discovery as a discretionary exercise. Their original production to Williams & Cochrane that was supposed to include *all* of their relevant, non-privileged evidence pertaining to the Lanham Act claim and the situation at Quechan totaled a whopping **211 pages**. *See* Williams Decl., Exhibit A. Something so small had better be substantial to stave off scrutiny, but this production was basically all filler that consisted of historical biographies for long-since departed Rosette attorneys (including Ms. Williams and Mr. Cochrane) printed out time and time again. *See* Dkt. No. 258. The inevitable dispute raised by Williams & Cochrane

about the way in which the Rosette Defendants were (not) conducting discovery simply led them to resort to Plan B and make some *post hoc* claim that they were actually engaging in a surprise rolling production that would last for upwards of three-plus months, or significantly longer than this District would allow a large corporation dealing with a verifiably enormous amount of data to review. *See Pacific Marine Propellers, Inc. v. Wartsilia Def., Inc.,* 2017 U.S. Dist. LEXIS 176307 (S.D. Cal. 2017) (explaining that less than thirty (30) days of additional time was sufficient for a "review set" that consisted "of over 76,000 records and 30 GB of data"). Thus, by the time the Rosette Defendants went into the dispute-centered conference call with Magistrate Judge Berg on December 2, 2019, they had not produced *anything* of substance to Williams & Cochrane and seemingly had no intention of doing so.

The December 3, 2019 order was supposed to change all of that, and consequently left the Rosette Defendants with just two options: comply with the December 3rd order and begin to conduct discovery in good faith, or invent an artifice to continue blocking discovery for as long as possible. Most attorneys would choose the former; the Rosette Defendants chose the latter. And with that, they quickly conjured up the idea for this motion for sanctions and then used it as a shield against any subsequent discovery obligations on the Lanham Act claim. For the solicitation materials Magistrate Judge ordered the Rosette Defendants to produce by December 31, 2019, they simply elected to produce documents in accordance with their vague and objection-riddled response to Williams & Cochrane request for production, and *not* in accordance with Magistrate Judge Berg's December 3rd order. *See* Williams Decl., Exhibit B. For Williams & Cochrane's second round of discovery requests that sought materials and information related to the Rosette Defendants' website, they simply refused to comply. *See* Williams Decl., Exhibits C-E. And for Williams & Cochrane's third request for production of documents that sought additional solicitation materials not encompassed by Magistrate Judge Berg's initial order, they similarly refused to produce. *See* Williams Decl., Exhibit F. Thus, the pending motion for sanctions serves as an extension of the Rosette Defendant's so-far successful

plan to prevent any meaningful discovery on the Lanham Act claim – one that is now in month four and counting.

Proof that the Rosette Defendants rushed out this motion for an ulterior purpose is evident from the multitude of defects on the face of the motion, all of which the ensuing sections of the Argument will discuss in greater detail. There is the fact that the Rosette Defendants have based this motion, at least in part, on discovery responses from Williams & Cochrane despite the express text of Federal Rule of Civil Procedure 11 stating that the rule is inapplicable to such issues. *See* Fed. R. Civ. P. 11(d) ("INAPPLICABLE TO DISCOVERY. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37."). Then, there is the fact that the Rosette Defendants are also using this motion to challenge the sufficiency of a pleading (rather than obtain sanctions for one previously found insufficient) despite the Court's prior orders, the law of the case doctrine, the lapse of an immense amount of time, and the limited purpose of Rule 11 motions. *See, e.g.,* Fed. R. Civ. P. 11 Notes of Advisory Committee on Rules – 1993 Amendment ("Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes."). And there is also the fact that the motion tries to challenge a complaint based on the "harassment" legal standard despite the fact this standard is inapplicable to such pleadings. *See, e.g., Lundstrom v. Young,* 2019 U.S. Dist. LEXIS 210237, *38 (S.D. Cal. 2019) (Curiel, J.).

Any one of these defects would have given a reasonable party considering a motion for sanctions pause, but the Rosette Defendants were absolutely intent on going forward no matter what. This is a plan they would not deviate from even after Williams & Cochrane served amended interrogatory responses to recount *all* of the allegations and evidence underlying the initial complaint that showed rather clearly – just as this Court previously held – that the pleading was well-founded at the time it was filed. *See* Wil-

liams Decl., Exhibit G. It is also one they would not deviate from even after Williams & Cochrane hired an outside attorney to try and settle this issue so it would not continue to impede discovery and consume the Courts' (as in *both* Magistrate Judge Berg *and* District Judge Curiel) resources. But, that effort was futile because counsel for Rosette indicated that the *only way* her client would withdraw the pending motion and not seek sanctions against Williams & Cochrane is if the Firm voluntarily dismissed the Lanham Act claim that this Court held it has the right to pursue. *See* Williams Decl., Exhibit H. Discovery can bring out the worst in people, especially those who possesses evidence they do not want to turn over. This motion for sanctions is the epitome of this, and the only reasonable outcome at this juncture is for the Court to dismiss the pending motion and order the Rosette Defendants to cover the attorney's fees incurred by Williams & Cochrane in trying to resolve this matter without Court involvement.

**LEGAL STANDARD**

"Rule 11 of the Federal Rules of Civil Procedure… imposes a duty on attorneys to certify that (1) they have read the pleadings or the motions they file, and (2) the pleading or motion is well-grounded in fact, has a colorable basis in law, and is not filed for an improper purpose." *Lundstrom,* 2019 U.S. Dist. LEXIS 210237 at *38 (citing *Sec. Farms v. Int'l Bhd. of Teamsters,* 124 F.3d 999, 1016 (9th Cir. 1997)). "Generally, sanctions are appropriately imposed on an attorney for a filing 'if either a) the paper is filed for an improper purpose, or b) the paper if frivolous.'" *Id.* (quoting *Townsend v. Holman Consulting Corp*., 929 F.2d 1358, 1362 (9th Cir. 1990)). Yet, complaints are different from other filings, and in the Ninth Circuit those can only be challenged under Rule 11 "for 'frivolousness,' which… [is] as a 'shorthand… to denote a filing that is both baseless and made without a reasonable and competent inquiry.'" *Id.* Given this stringent standard, "[c]ases warranting imposition of sanctions for frivolous actions are 'rare and exceptional.'" *Id.* (citing, *e.g*., *Operating Eng'rs Pension Trust v. A-C Co.,* 859 F.2d 1336, 1344 (9th Cir. 1988)); *see In re Keegan Mgmt. Co. Sec. Litig.,* 78 F.3d 431, 437 (9th Cir. 1996) (explaining sanctions are an "extraordinary remedy, one to be exercised with extreme cau-

tion"). In making this determination, "[c]ourts must not construe or apply Rule 11 so as to chill an attorney's creativity or conflict with an attorney's duty to vigorously represent his or her client." *Nan Hanks & Assocs. v. Original Footwear Co.,* 2018 U.S. Dist. LEXIS 106926, *4 (E.D. Cal. 2018) (citing *Operating Eng'rs Pension Trust,* 859 F.2d at 1344)).

As for 28 U.S.C. § 1927, this statutory section explains that "[a]ny attorney… who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. "[S]ection 1927 sanctions must be supported by a finding of subjective bad faith," which "is present when an attorney knowingly or recklessly raises a frivolous argument for the purpose of harassing an opponent." *In re Keegan Mgmt. Co. Sec. Litig.,* 78 F.3d at 436. "A district court must find bad faith *and* recklessness before exercising its power to sanction under § 1927." *Nan Hanks,* 2018 U.S. Dist. LEXIS 106926 at *5 (citing, *e.g.*, *United States v. Associated Convalescent Enters. Inc.,* 766 F.2d 1342, 1346 (9th Cir. 1985)). Thus, "[f]ilings that are nonfrivolous but reckless may not be sanctioned under § 1927." *Id.* (citing *In re Keegan Mgmt. Co. Sec. Litig.,* 78 F.3d at 436).

## ARGUMENT

### I. THE MOTION FOR SANCTIONS UNDER RULE 11 HAS AT LEAST SEVEN FUNDAMENTAL DEFECTS THAT WOULD HAVE CONVINCED ANY REASONABLE PARTY TO THINK TWICE ABOUT FILING THE MOTION

#### A. The Motion for Sanctions under Rule 11 is Moot because it is Based in part on Discovery Responses that Williams & Cochrane Amended during the Twenty-One Day Safe Harbor Period (which the Rosette Defendants Knowingly Failed to Disclose to the Court)

The first failing with the motion for sanctions is that the Court lacks the ability to hear the motion since it is based in part on discovery responses that have since been amended and thus no longer exist. The general rule is that an amendment supersedes the original document and thus renders the original non-existent. *Cf. Ramirez v. County of San Bernardino,* 806 F.3d 1002, 1008 (9th Cir. 2015). Here, the interrogatories posed by the

Rosette Defendants were improper from the outset, generally asking Williams & Cochrane to identify "ALL facts, DOCUMENTS AND COMMUNICATIONS" that support some aspect and/or contention about the Lanham Act claim. *See* Dkt. No. 254-2, p. 14. The Rosette Defendants posed these sorts of open-ended interrogatories even though they are not permitted under the Federal Rules of Civil Procedure. *See IBP, Inc. v. Mercantile Bank of Topeka,* 179 F.R.D. 316, 321 (D. Kan. 1998) ("To require specifically 'each and every' fact and application of law to fact, however, would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details. The burden to answer then outweighs the benefit to be gained."). In responding to the interrogatories, Williams & Cochrane specifically objected that it was being asked to laboriously identify "ALL" such facts – including those that "may not be known, readily available, [] capable of identification without a grossly undue burden on the firm … [or] are actually within the possession, custody, or control of Rosette or others with whom it does business" – and thus indicated that it would respond to the requests "by identifying *material* and non-privileged facts, documents, and communications of which it was aware." Dkt. No. 254-2, pp. 14-15. What was not included within these materials facts was a simple rehash of all of the allegations and evidence set forth within or underlying the initial complaint in this matter; after all, the parties had already ventured out of the pleading stage and were now focused upon obtaining evidence.

But then Williams & Cochrane received the Rosette Defendants proposed motion for sanctions just a few weeks later that is identical to the one filed with this Court, which took issue with the sufficiency of the operative pleading and further alleged that the recent interrogatory responses "confirmed that W&C had no evidence that any of these events [linking the false advertisement to the events at Quechan] actually occurred – other than W&C's firing – when it filed this case." Dkt. No. 254-1, 8:13-27. Believing counsel for the Rosette Defendants failed to adequately read the specific objections to the interrogatory responses before preparing the sanctions motion, Williams & Cochrane nevertheless went back and amended the document to include *all of* the allegations and evi-

dence in and underlying the Fourth Amended Complaint, respectively, that supported the well-pled Lanham Act claim. *See* Williams Decl., Exhibit G. Consider the effect of this change just with respect to the response for Interrogatory Number 3. The initial response that is attached to the Declaration of Matthew Close listed ten material facts that support the contention that "representatives of QUECHAN OR ANY other PERSON reviewed AND were deceived by the CHALLENGED STATEMENT." Dkt. No. 254-2, p. 23. The amended interrogatory response takes these ten facts and then turns them into *at least* fifty-three by including the following allegations and/or evidence from the Fourth Amended Complaint:

- Fourth Amended Complaint, Exhibits 6
- Fourth Amended Complaint, Exhibits 7
- Fourth Amended Complaint, Exhibits 2
- Fourth Amended Complaint, Exhibits 3
- Fourth Amended Complaint, Exhibits 4
- Fourth Amended Complaint, Exhibits 5
- Fourth Amended Complaint, Exhibits 8
- Fourth Amended Complaint, Exhibits 9
- Fourth Amended Complaint, ¶ 47
- Fourth Amended Complaint, ¶ 48
- Fourth Amended Complaint, ¶ 49
- Fourth Amended Complaint, ¶ 51
- Fourth Amended Complaint, ¶ 52
- Fourth Amended Complaint, ¶ 53
- Fourth Amended Complaint, ¶ 54
- Fourth Amended Complaint, ¶ 55
- Fourth Amended Complaint, ¶ 56
- Fourth Amended Complaint, ¶ 57
- Fourth Amended Complaint, ¶ 58
- Fourth Amended Complaint, ¶ 59
- Fourth Amended Complaint, ¶ 60
- Fourth Amended Complaint, ¶ 66
- Fourth Amended Complaint, ¶ 89
- Fourth Amended Complaint, ¶ 90
- Fourth Amended Complaint, ¶ 91
- Fourth Amended Complaint, ¶ 92

- Fourth Amended Complaint, ¶ 93
- Fourth Amended Complaint, ¶ 94
- Fourth Amended Complaint, ¶ 95
- Fourth Amended Complaint, ¶ 96
- Fourth Amended Complaint, ¶ 97
- Fourth Amended Complaint, ¶ 98
- Fourth Amended Complaint, ¶ 99
- Fourth Amended Complaint, ¶ 100
- Fourth Amended Complaint, ¶ 101
- Fourth Amended Complaint, ¶ 102
- Fourth Amended Complaint, ¶ 103
- Fourth Amended Complaint, ¶ 104
- Fourth Amended Complaint, ¶ 170
- Fourth Amended Complaint, ¶ 220
- Fourth Amended Complaint, ¶ 221
- Fourth Amended Complaint, ¶ 222
- WC10994-WC11016

*See* Williams Decl. Ex. G.

A considerable amount of time and effort during the initial stage of the discovery period went into preparing these amended responses, but it had zero impact on the Rosette Defendants' conduct. They went ahead and filed their motion for sanctions on their original schedule – without *any* amendment, and thus portraying to the Court that the interrogatory responses by Williams & Cochrane attached to the Declaration of Matthew Close that supposedly show "that W&C had no evidence that any of these events [linked to the Lanham Act claim] occurred" are, in fact, the final and operative responses. Yet, this is not the case at all. The Rosette Defendants used an outdated discovery response they *knew* had been amended to advance this get-rid-of-the-Lanham-Act-claim-at-all-costs strategy, and they did so intentionally. And because the argument in the motion for sanctions turns not only upon discovery responses, but discovery responses that no longer exist, this Court should deny the motion as moot without even considering its merits.

**B. The Motion for Sanctions under Rule 11 is Improper because it Turns upon Discovery Responses**

The argument above about the continued viability of proffered discovery responses

raises an even more fundamental problem with the motion for sanctions: it is based impermissibly upon discovery matters. The final subpart of Rule 11 begins with a discreet heading set out in small caps entitled "INAPPLICABILITY TO DISCOVERY" and then goes on to state rather matter-of-factly that "[t]his rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37." Fed. R. Civ. P. 11(d); *see Nilon v. Natural Immunogenics Corp.,* 2015 U.S. Dist. LEXIS 146315, *10 (S.D. Cal. 2015) ("In light of Rule 11's express instruction that sections (a), (b), and (c) have no applicability to discovery issues, the Court DENIES Defendant's sanctions motion under Rule 11 where it is based on discovery[.]"). Here, the central thrust of the Rule 11 argument is that Williams & Cochrane's entire *case* (not just its complaint) against the Rosette Defendants is frivolous on account of a lack of sufficient allegations in the Fourth Amended Complaint *and* a dearth of evidence disclosed by Williams & Cochrane at the outset of discovery (before amendment, supplementation, or receipt of any evidence from the Defendants, that is). Thus, the two-part argument advanced by the Rosette Defendants is inextricably intertwined and *not* separable; for it to succeed, it not only needs the relevant allegations in the Fourth Amended Complaint to be frivolous, but *also* for the evidence disclosed during discovery to be of no probative value. The motion itself makes this clear by continually interlacing (and conflating) argument about the Fourth Amended Complaint with discovery. *See* Dkt. No. 254-1 (going from discussing W&C's prayer for relief in the Fourth Amended Complaint to stating that "[b]ased on its discovery responses, it is apparent that W&C had no evidence linking the challenged statement to any concrete injury when it initiated this case."). And this reality exposes the fatal flaw with the Rule 11 motion: the Rosette Defendants have constructed an argument in favor of sanctions that necessarily turns upon discovery responses, and they did so despite the relevant federal rule instructing them *not* to do just that.

**C. The Motion for Sanctions under Rule 11 was Brought for an Improper Purpose because the Rosette Defendants have Used it to Block Discovery on the Lanham Act Claim**

As explained in the Introduction, the answer as to why someone would risk filing a sanctions motion based upon outdated discovery responses comes from the Rosette Defendants' desperate attempts to avoid engaging in any discovery on the Lanham Act claim. Again, on December 3, 2019, the Rosette Defendants were ordered to produce certain advertisements and solicitations relevant to the Lanham Act claim by December 31, 2019 at the latest. *See* Dkt. No. 241, ¶ 1. The Rosette Defendants, who had produced just **211** pages of documents by this point in time, were apparently rather miffed by this order and sent the proposed motion for sanctions claiming the Lanham Act claim is frivolous to Williams & Cochrane just two weeks later. Since that time, the Rosette Defendants have simply refused to meaningfully participate in discovery on the Lanham Act claim. With respect to Magistrate Judge Berg's order imposing the December 31st disclosure deadline, the Rosette Defendants transmitted a letter on the evening of the deadline explaining that they were producing materials (completely redacted and worthless ones at that) pursuant to their response to Williams & Cochrane's request for production, which is much narrower in scope than the order. *See* Williams Decl., Exhibit C. Then, the Rosette Defendants refused to comply with a second set of requests for production and accompanying interrogatories about the firm's website. *See* Williams Decl., Exhibits C-E. And finally, the Rosette Defendants similarly refused to comply with a third set of requests for production about the firm's solicitations. *See* Williams Decl., Exhibits F. What this course of conduct shows is a couple of things. The first is that Williams & Cochrane does not harbor any illusions about the Rosette Defendants carrying out the rest of discovery in good faith. And the reason for this is the second point that everything the Rosette Defendants have done to date during discovery – including filing this motion – has been designed to burden others while they quietly try to run out the clock on the discovery period.

### D. The Motion for Sanctions under Rule 11 Improperly Relies on an Incorrect Legal Standard for Analyzing Complaints that Considers "Harassment" in addition to Frivolousness

The structure of the motion for sanctions is rather atypical in that it goes from a ba-

sic introduction to presenting two particular arguments under Rule 11: one that the Fourth Amended Complaint is frivolous and another that this pleading "was filed to harass the Rosette Defendants." Dkt. No. 254-1, pp. 7-11. What the preparation of a legal standard section for inclusion in the brief would have likely revealed is that *this very Court* explained just last year that the latter "harassment" argument cannot be used to challenge a complaint under Rule 11. *See Lundstrom v. Young,* 2019 U.S. Dist. LEXIS 210237 at *38-*39. The discussion by the Court on this point is incredibly exhaustive, so this section will only quote the most relevant portion of this order below:

> Rule 11 of the Federal Rules of Civil Procedure ('Rule 11') imposes a duty on attorneys to certify that (1) they have read the pleadings or the motions they file, and (2) the pleading or motion is well-grounded in fact, has a colorable basis in law, and is not filed for an improper purpose. *Sec. Farms v. Int'l Bhd. of Teamsters,* 124 F.3d 999, 1016 (9th Cir. 1997) (citing Rule 11(b)). Generally, sanctions are appropriately imposed on an attorney for a filing 'if either a) the paper is filed for an improper purpose, or b) the paper is 'frivolous.'' *Townsend v. Holman Consulting Corp.,* 929 F.2d 1358, 1362 (9th Cir. 1990) (quoting *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 832 (9th Cir. 1986)).
>
> However, as the Ninth Circuit has recognized, a special set of considerations pertain to Rule 11 motions directed at complaints. Unlike other filings, complaints may be challenged only for 'frivolousness,' which the Ninth Circuit uses as a 'shorthand … to denote a filing that is both baseless and made without a reasonable and competent inquiry.' *Id.* … According to the Ninth Circuit, complaints, which serves as the legal 'vehicle through which [the plaintiff] enforces his substantive legal rights,' should be preserved to the extent possible, since the successful vindication of 'those rights benefits not only individual plaintiffs but may benefit the public.' *Id*.

*Id.* Again, the point of all of this discussion is simple enough: a party attacking a complaint under Rule 11 has to do so under the frivolous standard, not the harassment one. This is a rather sensible proposition since *every* complaint in reality is likely considered harassing by a defendant. The real question is whether this type of pleading has any merit. Given that, the only portion of the Rule 11 section of the motion for sanctions that can conceivably have any validity at this point is Section II(A)(1) contending "W&C's Sole Remaining Claim is Frivolous." Dkt. No. 254-1, p. 7.

### E. The Motion for Sanctions under Rule 11 is in Reality an Improper Motion to Dismiss that Tries to Attack the Sufficiency of the Allegations in the Fourth Amended Complaint

The way a Rule 11 motion for sanctions aimed at a pleading is supposed to work from a procedural standpoint is the proponent of the motion files it along with or shortly after a motion to dismiss so the court has the basis for making the frivolousness determination. What the proponent of the motion is *not* supposed to do is use a Rule 11 motion as the means to directly attack the sufficiency of a pleading. *See CreAgri Inc. v. Pinnaclife, Inc.,* 2014 U.S. Dist. LEXIS 77484, *13-*14 (N.D. Cal. 2014) ("The Advisory Committee Notes for Rule 11 explain that 'Rule 11 motions … should not be employed … to test the sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes.'"); *see also, e.g., Safe-Strap Inc. v. Koala Corp.,* 270 F. Supp. 2d 407, 416 (S.D.N.Y. 2003) (noting that Rule 11 should not be used to raise issues of legal sufficiency that "more properly can be disposed of by a motion to dismiss or a motion for summary judgment."). And yet, this is precisely what the motion for sanctions tries to do. Look no further than the heading of the first Rule 11 sub-argument for proof of this, as it states rather simply and candidly that "W&C's Sole Remaining Claim [against the Rosette Defendants] is frivolous."[1] Dkt. No. 254-1, p. 7. From there, the argument then goes on to set forth the general premise that the "Lanham Act claim is [supposedly] based on a series of guesses that lacked any evidentiary support when W&C filed the 4AC." Dkt. No. 254-1, 8:7-8. Those supposed guesses are detailed next, with the argument claiming that the Fourth Amended Complaint rather incredibly alleges that the solicitations by the Rosette Defendants "caused Quechan's new leadership to (i) sour on W&C, (ii) evaluate how to avoid paying an incredibly high contingency fee, (iii) decide that Quechan needed new legal representation, and (iv) ultimately ask Rosette, LLP to take over the engage-

[1] Arguing a claim is frivolous is tantamount to seeking terminating sanctions, but those require that "a party *deceives* a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or *undermines the integrity of the court*." *United States v. Shaffer Equip. Co.,* 11 F.3d 450, 462 (4th Cir. 1993).

ment for a tiny fraction of what W&C was charging so that Rosette could quickly and efficiently obtain a new gaming compact with the State of California before the Legislature adjourned in a few months." Dkt. No. 254-1, 8:13-20. And how does one know these allegations are insufficient guesswork according to the Rosette Defendants? Well, that apparently comes from the various self-serving declarations the Defendants filed during the anti-SLAPP leg of this case that detail the alleged events surrounding Williams & Cochrane's termination. *See* Dkt. No. 254-1, p. 10. Yes, the same declarations for which the underlying evidence has still not been disclosed by the Defendants and the witnesses have still not been deposed by the Plaintiffs. In fact, the Rosette Defendants seem to revel in the fact that they are withholding the relevant evidence by stating that "[n]either Ms. Williams nor Mr. Cochrane witnessed these events, and they have no evidence to undermine Councilmember White's and President Escalanti's testimony." Dkt. No. 354-1, p. 10. But, piece together what the Rosette Defendants are doing and what becomes painfully clear is that they are raising a factual attack on the allegations in the Fourth Amended Complaint by using stilted declarations Williams & Cochrane has been unable to fact check during discovery. This legal quagmire of an argument has no place in a motion to dismiss let alone a Rule 11 motion.

**F. The Motion for Sanctions under Rule 11 Improperly Tries to Rehash this Court's Ruling on the First Amended Complaint that is Subject to the Law of the Case Doctrine**

Compounding the fact that the Rosette Defendants are now raising Rule 12(b)(6) arguments in connection with a Rule 11 motion is that they are doing so in the face of this Court's June 6, 2018 order holding the Lanham Act is well pled and suited for discovery. *See* Dkt. No. 89. The judicial system relies on a doctrine called the law of the case to help aid in the efficient operation of court affairs. *Milgard Tempering, Inc. v. Selas Corp. of Am.,* 902 F.2d 703, 715 (9th Cir. 1990). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe,* 235 F.3d 443, 452 (9th

Cir. 2000) (citing *Milgard Tempering, Inc.,* 902 F.2d at 715). A motion that asks a court to relitigate (not just timely reconsider) an issue previously addressed is not only barred by the law of the case doctrine but is in and of itself "evidence of an improper purpose in filing the motion." *In re Flashcom, Inc.,* 503 B.R. 99, 133 (Bankr. C.D. Cal. 2013) ("Dye and Weinstein knew or should have known that the motion in limine was barred by the law of the case and therefore frivolous. … The attempt to relitigate the issue for a third time in the bankruptcy court (and twice in court) during the time period that appellees were supposed to be preparing for trial is evidence of an improper purpose in filing the motion."). Again, the motion for sanctions makes no qualms that it is contesting the sufficiency of the allegations in the Fourth Amended Complaint on the basis that Williams & Cochrane has neither shown that the solicitations by the Rosette Defendants are actionable nor presented "any evidence of causation or damages" related to such. But, the Court already addressed *all of this* in its order on the Defendants' motions to dismiss the *First* Amended Complaint. *See* Dkt. No. 89, pp. 22-23. Therein, the Court not only held that the statements by the Rosette Defendants concerning the *Pauma* litigation were indeed actionable, but that the allegations within the First Amended Complaint sufficiently alleged a causal connection between these statements and Williams & Cochrane's claimed injuries. *See* Dkt. No. 89, pp. 24-25. According to the Court, "[t]he FAC plausibly alleges that Rosette's false statement about his role in the Pauma litigation led to Quechan's decision to discharge W&C as its counsel in the compact negotiations with California." Dkt. No. 89, pp. 24-25. The allegations referenced by the Court in this analysis of the First Amended Complaint are the very same ones the Rosette Defendants are now taking issue with in the Fourth Amended Complaint. Thus, this argument is not just an improper attack on the sufficiency of the pleadings; it is a duplicative and wholly barred improper attack on the sufficiency of the pleadings.

**G. The Motion for Sanctions under Rule 11 Improperly Raises a Rehashed and Barred Attack on the Sufficiency of the Pleadings more than Nineteen Months after the Court Issued its Initial Ruling**

The list of adjective to describe the motion for sanctions does not end with duplicative and barred, but also includes untimely. The Advisory Committee Notes to Rule 11 explain that "[o]rdinarily the motion [for sanctions hereunder] should be served promptly after the inappropriate paper is filed and, if delayed too long, may be viewed as untimely." Fed. R. Civ. P. 11 Notes of Advisory Committee on Rules – 1993 Amendment; *Gavola v. Asbra*, 2017 U.S. Dist. LEXIS 131038, *7 (N.D. Tex. 2017) (indicating that delaying a motion for sanctions until after the district court rules on the offending pleading or motion may make the motion untimely). Again, the "inappropriate paper" in this situation is really the original complaint that was filed on September 19, 2017 since it was the first to raise the allegations with which the motion for sanctions takes issue. *See* Dkt. No. 5. Thus, any motion for sanctions contending the Lanham Act claim is frivolous should have been filed in close proximity to the Rosette Defendant's initial motions to dismiss during the late winter and spring of 2018. *See* Dkt. Nos. 32 & 53. Certainly, the outer limit temporally for any such motion would have been some date shortly after the Court issued its resultant order on the Defendants' motions to dismiss on June 7, 2018 (*see* Dkt. No. 89) – a date that, for argument sake, would have only made sense if the Court had dismissed the Lanham Act claim with prejudice and thus raised a basis for contending the claim was entirely frivolous from the get go. Thus, the amount of time that has elapsed from the reasonable date upon which a motion for sanctions should have been filed is somewhere between nineteen and twenty-three months. Many cases are litigated to judgment within that time, which means the Rosette Defendant's pending motion is not just untimely, but grossly so.

**H. The Lanham Act Claim about the *Pauma* Advertisements was Reasonable at the Time it was Filed, just as the Court Previously Determined**

Somehow overcoming all of these fatal flaws affecting the motion for sanctions achieves nothing for the Rosette Defendants because the point they ultimately need to make – *i.e.*, the Lanham Act claim was frivolous at the time it was filed – is still impossible to prove. The points and authorities in support of the motion for sanctions frames

this frivolousness argument in terms of the Fourth Amended Complaint, but the proper lens is still the First Amended Complaint – the one in which the plausibility of the Lanham Act claim was actually debated and decided by the Court. *See* Dkt. No. 39. And contrary to the picture the Rosette Defendants try to paint in their underlying motion, a false advertising claim under the Lanham Act is a relatively simple thing to state with plausibility even without the use of any presumptions (*see* Argument §1(I), *infra*), as it just requires "(1) **a false statement of fact** by the defendant in a commercial advertisement about its own or another's products; (2) the statement actually **deceived** or has the tendency to deceive a substantial segment of its 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) (citing, e.g., *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Servs., Inc.,* 911 F.2d 242, 244 (9th Cir. 1990)). Here, matching up each one of these elements with the responsive paragraph(s) of the First Amended Complaint is rather straightforward. *See* Dkt. No. 39. Paragraph 147 explains that the Rosette Defendants advertise on the firm website that "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," which goes to plausibly (if not conclusively) show the fourth element of interstate commerce. *See id.* at p. 59; *Nutrition Distrib. LLC v. PEP Research, LLC,* 2019 U.S. Dist. LEXIS 25352, *9 n.3 (S.D. Cal. 2019) ("The interstate commerce requirement of a Lanham Act false advertising claim is 'virtually automatic for websites,' as for the Representations in this case." (citing *TigerShcool.com, Inc. v. Edriver Inc.,* 653 F.3d 820, 828 (9th Cir. 2011))). Paragraphs 51 to 66 explain, however, that Williams & Cochrane and *not* the Rosette Defendants successfully litigated the *Pauma* case, which goes to plausibly show falsity (and literal falsity at that) under the first element of the

test. *See* Dkt. No. 39 at pp. 21-26. Paragraphs 67 to 68 explain that the Quechan Tribe of the Fort Yuma Indian Reservation hired Williams & Cochrane in the immediate aftermath of the State of California satisfying the *Pauma* judgment, which goes to plausibly show that false advertisements about the *Pauma* suit would be considered material under the third element of the test. *See id.* at pp. 23-24. And finally, Paragraphs 116 and 196 explain how Quechan terminated Williams & Cochrane at the final moment of the compact negotiations with the assistance of the Rosette Defendants, which goes to plausibly show that the false advertisement both duped the intended audience and resulted in significant financial and reputational damage to the Firm.[2] *See id.* at pp. 44, & 74. In fact, the third paragraph of the Prayer for Relief makes this clear by requesting "[t]hat the Court award treble damages under the Lanham Act in an amount of at least $18,629,748.30 against the indicated Rosette defendants for the false advertisement(s) about the *Pauma* lawsuit, as well as require the disgorgement of any of the direct or indirect profits that they may have obtained as a result of such advertisements." *See id.* at p. 120. Thus, Williams & Cochrane has plausibly showed each and every element of the Lanham Act claim – just as the Court later verified in its order on the Defendants' motions to dismiss – which is the exact *opposite* of the scenario the Rosette Defendants need to even broach the subject of whether a certain claim was frivolous at the time it was filed.

## I. The Evidence and Allegations Supporting the Lanham Act Claim Raise a Number of Presumptions that Shift the Burden of Proof (or, better yet, Disproof) to the Rosette Defendants

One of the many things the Rosette Defendants have overlooked is that these five elements of the false advertising test collapse down into a much smaller number if a plaintiff can present credible evidence on certain subjects and thus create presumptions

[2] "[A]n attorney with information that a man walked into a room with a wet umbrella at a certain time has 'evidentiary support' for the factual contention that it was *raining* at that time." Judge Virginia A. Phillips & Judge Karen L. Stevenson, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 17:255 (The Rutter Group 2019) (citing *Lucas v. Duncan,* 574 F.3d 772, 777-78 (D.C. Cir. 2009)).

that the defendant has to rebut. For instance, a statement that is not just false but *literally* false creates presumptions of deception and materiality, which in turn means that a plaintiff can make out a prima facie case regarding a literally false advertisement on the defendant's website by just introducing proof of these two things (*i.e.*, literal falsity and a web-based situs) and an injury arising therefrom. *Nutrition Distrib, LLC,* 2019 U.S. Dist. LEXIS 15352 at *12-*13. But this is just one way to skin the promotional cat. Another way is to present evidence of willfulness (or bad faith), which in turns raises the exact same presumptions of deception and materiality. *See, e.g., Merck Eprova AG v. Brook-Stone Pharms., LLC,* 920 F. Supp. 2d 404, 417 (S.D.N.Y. 2013). Absent this, a plaintiff can still create other, lesser presumptions by doing such things as presenting evidence that the defendant is a direct competitor, which in turn creates a presumption of comercial injury if the plaintiff has shown the "defendant's misrepresentation has the tendency to deceive consumers." *Nutrition Distrib., LLC,* 2019 U.S. Dist. LEXIS 15352 at *14-*15. In other words, the allegations and evidence raised in the Fourth Amended Complaint cover the Lanham Act claim in a web of presumptions and have thus put the onus on the Rosette Defendants to disprove what has been put forward to date.

## II. THE MOTION FOR SANCTIONS UNDER SECTION 1927 IS A PERFECT EXAMPLE OF PORK-BARREL LITIGATION IN WHICH A MOVANT TACKS ON AN INSIGNIFICANT ARGUMENT TO A MOTION THAT THE AFFECTED PARTY HAS NO WAY TO REDRESS

### A. The Failure to Remove the Allegations in the Fourth Amended Complaint Relating to the Rosette Defendants' Covert Settlement Attempt in 2011 was just an Oversight Resulting from the Instructive Language Being Included in the Analysis of the RICO Predicate Acts rather than in the "Motion to Strike" Section of the Order

The sole focus of the Section 1927 portion of the motion for sanctions is Williams & Cochrane's apparent failure to heed "[t]he Court's instructions… about what [the Firm] was to include and exclude from the 4AC." Dkt. No. 254-1, 15:3-4. The allegations that comprise the corpus of this argument are previously set forth in the inapposite harassment section of the Rule 11 part of the motion, the vast majority of which for whatever reason discusses allegations that the Rosette Defendants now find objectionable, *not*

those that the Court ordered removed. This scattershot effort by the Rosette Defendants to write the complaint that they want to defend includes taking issue with allegations supposedly referring to Rosette accomplice and one-time defendant Richard Armstrong, the attorney the Rosette Defendants hired (*i.e.*, Michelle LaPena) immediately after the Court gave Williams & Cochrane leave to amend to more specifically plead how Mr. Rosette interfered with a professional services contract involving said attorney, and a "vague conspiracy involving online lending." Dkt. No. 254-1, 12:3-23. Buried within all of this fanciful re-pleading is a rather austere and strangely-worded statement that the "Court specifically directed W&C to remove allegations about the Rosette Defendants' '*assistance*' to the Pauma Tribe in 2011," and yet "[t]hose allegations reappear in the 4AC." Dkt. No. 254-1, p. 12. Simply put, this inartfully-worded statement is accurate. During the process of revising the Third Amended Complaint for refiling, the undersigned counsel looked at the material the Court ordered removed in the appropriately-labelled "Motion to Strike" section of the order, which specifically directed Williams & Cochrane to "refile" a version of the complaint that "omit[s] the allegations [at Paragraphs "110-16, 178-79, 188-93, 123, 228(a), [and] 228(2nd a)"] as well as the foregoing claims that have been dismissed." Dkt. No. 217, p. 37. The undersigned counsel complied with this instruction and actually went one step further by removing a slew of surrounding allegations in a likely futile attempt to make the revised pleading intelligible to the appellate court and outside readers. *See* Dkt. No. 220-28 (setting forth a "redline" of the revised Third Amended Complaint that shows Paragraphs 181, 182, 183, 187, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, and 204 had also been deleted). Regrettably, the undersigned counsel missed the stray remark in the analysis of "Predicate Acts of Mail and Wire Fraud" some ten pages earlier that the "Court directs that [allegations related to Rosette's attempts to settle the Pauma Tribe compact dispute in 2011] be removed from the operative pleadings." Dkt. No. 217, p. 27. This instruction was included in an unassuming portion of the order, was not set apart with any sort of emphasized text, and was also not repeated in either the "Motion to Strike" section or Conclusion of the order, which gen-

erally summarizes all of a court's rulings and the parties' responsibilities resulting therefrom. *See, e.g., Bangor & A. R. Co. v. Bhd. of Locomotive Firemen & Enginemen*, 253 F. Supp. 682, 688 (D.D.C. 1966) ("In conclusion this Court may summarize its rulings as follows…"). The failure to remove these specific allegations was nothing more than an oversight, and one that that does not come anywhere close to exhibiting the sort of recklessness *and* bad faith that warrants the Court's involvement.

**B. The Allegations at Issue may not be Relevant for Purposes of the Now-Dismissed RICO Claim, but they are to the Existing Lanham Act Claim**

What is about to be said should take nothing away from the prior subsection; if the undersigned counsel had seen the Court's instruction, he would have removed the allegations at issue accordingly. With that said, the order from the Court discusses the allegations concerning the Rosette Defendants' attempted settlement of the *Pauma* litigation exclusively in the context of whether the actions detailed therein constitute predicate acts under the soon-to-be-dismissed RICO claim, and *not* whether they are relevant to the Lanham Act claim that had moved out of the pleading stage more than a year prior. There is simply no question that these allegations are relevant (and exceptionally relevant, at that) to the Lanham Act claim. Again, the specific language in the allegedly false advertisement described in the Fourth Amended Complaint is that Mr. Rosette "successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 million." *See* Dkt. No. 220, ¶ 47. Yet, an e-mail chain from 2011 involving Mr. Rosette in which he not only admits that he is *not* counsel of record in this case, but actively undertakes efforts to sabotage said matter certainly bear on the veracity of the aforesaid advertisement. Not only that, but the previously-discussed issue of deliberateness or bad faith is one of the paramount battlegrounds for discovery under a Lanham Act claim because introduceing proof of such creates presumptions that the false advertisement both deceived the intended audience and was material. *See, e.g., Merck Eprova AG,* 920 F. Supp. 2d at 417. This evidence of the covert settlement attempt not only concerns the *exact same* subject matter of the false advertisement but also the *exact same* competitor the Rosette Defend-

ants ultimately harmed through the use of the false advertisement. This is not a situation in which the evidence at issue can be swept under the rug as supposedly going to character; it directly bears on both the falsity of the challenged statement and the Rosette Defendants' reasons for disseminating it.

**C. The Real (and Only) Reason the Rosette Defendants Want the Allegations Removed from the Fourth Amended Complaint is because They Inaccurately Believe that Doing so Will Insulate Them from Lanham-Based Discovery on the Bad Faith Issue**

Venturing back to the point of dodging discovery, the Rosette Defendants have seemingly adopted a line of thinking that "relevance" under Federal Rule of Civil Procedure 26(b)(1) is handcuffed to what is expressly stated within a complaint. *See* Fed. R. Civ. P. 26(b)(1) (describing the scope of discovery, in part, as "any nonprivileged matter that is relevant to any party's claim or defenses"). In other words, the circular logic employed by the Rosette Defendants goes something like: discovery turns on relevance, relevance turns on the claims, the claims turn on the allegations, and thus the allegations determine discovery. Of course, a party can and should obtain discovery in order to flesh out these allegations. For instance, naming the law firm of Rosette, LLP as a defendant should allow for discovery on whether it is a direct competitor of Williams & Cochrane for purposes of the Lanham Act claim. *Nutrition Distrib., LLC,* 2019 U.S. Dist. LEXIS 15352 at *14-*15. Similarly, a claim that a false advertisement was housed on a website should permit inquiry into the amount of funds expended to maintain and disseminate that advertisement. *See Obesity Research Inst., LLC v. Fiber Research Int'l, LLC,* 310 F. Supp. 3d 1089, 1124 (S.D. Cal. 2018) (explaining that the expenditure of a substantial amount of funds "justifies the existence of a presumption that consumers are, in fact, being deceived. (citing *U-Haul, Int'l, Inc. v. Jartan, Inc.,* 793 F.2d 1034, 1041 (9th Cir. 1986))). This is a rather unremarkable premise and one the Court already acknowledged at the hearing on the second round of motions to dismiss when it explained that a matter need not be stated in the complaint to be relevant in later proceedings. *See* Dkt. No. 168, 31:15-18. But, the Rosette Defendants have taken an artificially and unreasonably re-

strained view of the contents of pleadings, and they have done so explicitly for the purpose of trying to avoid discovery on the Lanham Act claim. Thus, any merit to the contention that the undersigned attorney failed to remove a particular allegation is more than counterbalanced by the improper purpose behind the instant motion.

**D. The Oversight is Insignificant and One that Williams & Cochrane could not Effectively Redress Outside the Courtroom because the Rosette Defendants Wanted much more than *just* these Allegations Removed from the Fourth Amended Complaint**

The Conclusion and Requested Relief section of the motion for sanctions tries to depict that the Rosette Defendants would have stood down and refrained from filing this part of the motion if Williams & Cochrane had just agreed to remove the allegations regarding the 2011 covert settlement attempt from the Fourth Amended Complaint. It turns out, this was not the case at all. After the service of the proposed motion for sanctions, Williams & Cochrane retained outside counsel in the hopes that he could create a more productive dialogue with counsel for the Rosette Defendants and find some way to address the grievances underlying the instant motion without Court involvement. *See* Williams Decl., ¶ 3. To that end, outside counsel for Williams & Cochrane contacted counsel for the Rosette Defendants and offered to file a revised Fourth Amended Complaint that not only removed the allegations about the 2011 covert settlement attempt but also anything and everything mentioning Michelle LaPena – a courtesy gesture that would have gone above and beyond the Court's order and addressed a subject that was apparently causing the Rosette Defendants quite a bit of consternation (probably because of the whole appearance-of-witness-tampering thing). *See* Williams Decl., Exhibit H. In other words, the proposed solution for the presence of undesirable allegations was to remove those allegations from the operative complaint. However, this offer was insufficient to the Rosette Defendants. In a response email, counsel for the Rosette Defendants made it clear that the "allegations [regarding the 2011 covert settlement attempt] are only a **small** part of the Rosette Defendants' motions for sanctions," and the motion would go forward unless Williams & Cochrane agreed to remove all the allegations at issue in the separate

Rule 11 section as well, which would seemingly include the Lanham Act claim itself. Thus, the Section 1927 argument that is claimed to have a **small** part in this motion in reality has no part at all. The actual purpose of this motion for sanctions is to get rid of the Lanham Act claim in one way or another, and there is nothing that Williams & Cochrane could have said or done short of that to redress the issue of inadvertently carried-over allegations.

**E. Any Issues with the Allegations Concerning the 2011 Covert Settlement Attempt should have been Raised Promptly after the Filing of the Fourth Amended Complaint and *not* Three Months Later**

A shorter amount of time has elapsed since the filing of the Fourth Amended Complaint than the First Amended Complaint, but the same timeliness issue raised in Argument I(G) applies to this section as well. A standard akin to the promptness requirement of Rule 11 applies to Section 1927, as "resort to [this statute] should not be unnecessarily or unreasonably delayed." *Steinert v. Winn Group, Inc.,* 440 F.3d 1214, 1223 (10th Cir. 2006). Here, the filing date for the Fourth Amended Complaint is September 25, 2019. *See* Dkt. No. 220. Constructive awareness of any improper allegations by the Defendants who are tasked with answering this pleading would have triggered on this joint filing and electronic service date, and thus the reasonable window of time for raising any issues pertaining to the allegations would be the ensuing two-week response period. *See* Fed. R. Civ. P. 15(a)(3) (stating "any required response to an amended pleading must" typically must be made "within 14 days after service of the amended pleading"). After all, simple corrective action could have then occurred before the Defendants filed responsive pleadings, thus obviating the need for a motion for leave and consequent re-filings by the parties. Yet, rather than use this window of time, the Rosette Defendants did not raise any issue with the allegations on the 2011 covert settlement attempt until December 16, 2019, or roughly *three months* after the filing of the Fourth Amended Complaint.

No reasonable justification exists for this delay, especially in light of how disruptive and incompatible this belated filing is with the fundamentally-altered state of the liti-

gation. For instance, Williams & Cochrane filed a motion for judgment on the pleadings against Quechan's counterclaims on October 2, 2019 (*see* Dkt. No. 227), meaning that taking corrective actions after the December 16, 2019 service date of the proposed motion for sanctions would have necessitated filing a motion to amend the Fourth Amended Complaint, awaiting the Court's order on the motion, filing the consequent amended pleading, affording the Defendants the requisite time to file amended answers, obtaining a new hearing date for the motion for judgment on the pleadings, and then refiling the motion with the Court. Thus, the opportunistic delay by the Rosette Defendants in filing this motion for sanctions would have caused a comparable if not significantly greater amount of detrimental delay for Williams & Cochrane in having its pending motion for judgment on the pleadings heard. Not to mention, the relatively idle days of the pleading period are no more, as the parties spent the prior fall diving headlong into the discovery process. The Answers soon gave way to a supplemental joint discovery plan which in turn gave way to a scheduling order which in turn gave way to requests for production and numerous other forms of discovery. *See* Dkt. Nos. 228, 231, 232, and 233. As part of one such form, the Rosette Defendants have conjured a defense strategy whereby they hope to use old Pauma client files to show that the "successfully litigated" statement in their advertisements is actually true because of certain work they were doing on the formative stages of the case – and even long after they were terminated during the summer of 2011. *See* Williams Decl., Exhibit I. In other words, the Rosette Defendants plan to use evidence of events occurring on and around the 2011 covert settlement attempt to prove their case; they just do not want Williams & Cochrane to have the same ability. But, putting this aside for a moment, no amount of rebuttal argument can detract from the fact that a reasonable defendant would have provided notice of its intent to pursue a motion for sanctions shortly after the filing of the Fourth Amended Complaint, if it was legitimately concerned about certain allegations contained therein, that is.

## III. AN AWARD OF ATTORNEY'S FEES AGAINST THE ROSETTE DEFENDANTS IS APPROPRIATE TO COMPENSATE WILLIAMS & COCHRANE FOR EXPENSES INCURRED

**IN TRYING TO INFORMALLY RESOLVE THIS DISPUTE RATHER THAN LET THE ILL-CONCEIVED MOTION FOR SANCTIONS BOG DOWN ONE COURT'S DISCOVERY AND ANOTHER COURT'S DOCKET**

The danger with filing a motion for sanctions is that it exposes the movant to an adverse award if the motion is itself frivolous. *See* Fed. R. Civ. P. 11 Notes of Advisory Committee on Rules – 1993 Amendment ("As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11 – whether the movant or the target of the motion – reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion."). This particular motion for sanctions is just one big ole bad idea. The Rule 11 portion of the motion relies on the wrong materials, the wrong legal standard, the wrong purpose, the wrong part of the proceeding, and it even arises at the wrong time. The Section 1927 portion fares no better, as it raises an admittedly small and insignificant grievance well after the fact in the hopes of securing the remedy the Rosette Defendants know they cannot obtain under the preceding Rule 11 argument. All of this should have been avoided, and everyone would have been better off if it was. Nevertheless, the unremitting quest for sanctions continues, as this is the *fourth* time the Rosette Defendants have filed motions requesting such, and that puts aside all of the other instances in which they have made standalone demands in other briefs. *See* Dks. Nos. 31, 52, 109, 121, 185-1. The cost of trying to resolve this inevitable and unreasonable motion should fall squarely on the shoulders of the parties (and attorneys) that insisted on bringing it.

**CONCLUSION**

For the foregoing reasons, Williams & Cochrane respectfully requests the Court to dismiss the Rosette Defendants' motion for sanctions in its entirety and award the Firm attorney's fees to cover the costs incurred in trying to resolve this situation without Court involvement (proof of which will be submitted after the issuance of the Court's order).

RESPECTFULLY SUBMITTED this 14th day of February, 2020

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