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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP,

Plaintiff,

v.

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

Defendants.

AND ALL RELATED COUNTER CLAIMS

REDACTED

Case No. 17-CV-01436 TWR DEB

ROSETTE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56 AGAINST ROSETTE DEFENDANTS ON THIRD CLAIM FOR RELIEF IN FOURTH AMENDED COMPLAINT

[Response to Separate Statement of Undisputed Material Facts Filed Concurrently]

Date: December 11, 2020
Time: 1:30 pm
Judge: Hon. Todd W. Robinson
Courtroom: 3A
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I. Introduction

Plaintiff Williams & Cochrane, LLP's ("W&C") Motion for Summary Judgment proves there is no evidence to support its only claim against Robert Rosette, Rosette & Associates, PC, and Rosette, LLP ("Rosette"). Instead of trying to show undisputed facts entitling it to judgment as a matter of law, W&C asks the Court to apply a web of exaggerated and baseless presumptions that would excuse it from proving its case altogether. W&C is wrong about the law, and its Motion ignores the overwhelming undisputed evidence that its claim must be dismissed.

W&C claims that one of its clients, Quechan, fired it because of one line in Mr. Rosette's attorney biography, and it asserts that this single sentence entitles it to three times a contingency fee that it had hoped to extract from the Tribe—over $19 million. This theory relies on W&C's unsubstantiated contention that Quechan's President and Tribal Council saw the statement and were deceived by it, and that this caused the Tribe to fire W&C, thereby depriving W&C of a $6.3 million fee it might have earned had it not been fired. But there are no facts to support this dubious theory; the undisputed facts demonstrate that W&C's speculation is flat wrong. Quechan's then-President and Councilman have testified that Quechan's decision-makers did not review and were not deceived by the statement. (Dkt. Nos. 322-4–5 ¶¶ 15–20.) Their unrebutted testimony under oath is that they were dissatisfied with W&C's performance and high cost and were looking to replace the firm before they ever met or considered hiring Rosette. And that testimony is corroborated by contemporaneous documents. The undisputed testimony from Quechan is that it hired Mr. Rosette because of his experience and willingness to do the work for a fraction of the price. (Dkt. Nos. 322-4–5 ¶ 17.)

W&C built no factual record to support its case. It took no depositions and tried to block depositions of its experts. And it produced fewer than 100 documents to Rosette. Now, stuck with a record that only supports Defendants, W&C's Motion is an amalgam of speculation, complaints about discovery, and—although

W&C has been chastised by the presiding judicial officers multiple times—irrelevant allegations that have been repeatedly struck as harassing.[1]

Rosette respectfully asks the Court to deny W&C's Motion.

II. Statement of Facts

The Pauma Litigation. Robert Rosette founded his own law firm in 2004, after eight years of practicing federal Indian law. (Dkt. No. 322-3 ¶ 4.) The firm employs 24 attorneys across five offices. (Dkt. No. 322-3 ¶ 6.) Beginning in 2007, Mr. Rosette was the lead attorney representing the Pauma Band of Luiseño Mission Indians ("Pauma") in negotiations with state and local governments about tribal gaming. (Dkt. No. 322-3 ¶ 9.) Pauma had a gaming compact with California starting in 1999, and it had executed an amendment in 2004 to permit additional slot machines, but at greater expense. (Dkt. No. 322-8.) Pauma wanted to build a new casino until the global financial crisis intervened. (Dkt. No. 322-3 ¶ 11.) [redacted]. (*See* Dkt. No. 322-9 at 72–74.)

Leveraging his knowledge of California's tribal-state gaming compact history, Pauma's factual and legal situation, and recent legal trends, Mr. Rosette developed a legal strategy, case theories, and claims to challenge Pauma's 2004 amendment. (Dkt. Nos. 322-3 ¶ 13, 322-9, 322-19 at 77:8–81:15.) He led pre-lawsuit meetings with the State and described the legal theory he developed: the 2004 amendment was a nullity because the State misrepresented the total number of available machine licenses. (Dkt. No. 322-3 ¶ 14.) Mr. Rosette hired Cheryl Williams and Kevin Cochrane in late February 2009, after he devised the Pauma strategy, developed the claims, and conducted preliminary meetings with the State. (Dkt. No. 322-3 ¶ 15.) [redacted]

[1] Mot. at 3:20–4:10; Dkt. Nos. 172 at 33, 217 at 37, 285 at 19–20.

[redacted]. (Dkt. Nos. 322-61 at 20:20–22, 322-62 at 63:24–64:25.) [redacted]. Mr. Rosette remained the partner in charge after Ms. Williams and Mr. Cochrane were hired, but he relied on them and other Rosette associates to assist with supportive legal research and draft documents implementing his directives, including the complaint. (Dkt. Nos. 322-3 ¶¶ 17–19, 322-62 at 90:12–92:2.) Mr. Rosette reviewed and revised filings, and his name appeared at the top of each Pauma pleading. (*Id.*) He was responsible for the case, whether it was a success or failure.

The litigation's primary objective was to restore the terms of the 1999 compact and force the State to the bargaining table. (Dkt. No. 322-19 at 77:8–81:15.) To achieve this goal, Rosette filed a motion for preliminary injunction in February 2010, after briefing a motion to dismiss. (Dkt. Nos. 322-10 ¶¶ 13, 59, 60, 322-11.) The district court granted the preliminary injunction in April, allowing Pauma to begin paying the State under its 1999 compact. (Dkt. Nos. 322-12, 322-3 ¶ 21.) This saved Pauma approximately $100 million over the life of the 2004 compact. (Dkt. Nos. 322-3 ¶ 22, 322-19 at 79:17–81:15, 322-25 at 641.) The State appealed the district court's order and asked the district court to stay the injunction. (Dkt. Nos. 322-13–14.) Rosette opposed, and the motion was denied on May 7, 2010. (*Id.*) Ms. Williams and Mr. Cochrane resigned from Rosette days later.

Rosette litigated the case for another month, during which the firm opposed the State's renewed motion to stay the injunction pending appeal. (Dkt. No. 322-15.) Then in mid-June 2010, Pauma terminated Rosette and hired a new firm founded by Ms. Williams and Mr. Cochrane, W&C. A month and a half after W&C took over, the Ninth Circuit entered a procedural order granting the State's motion to stay pending appeal. (Dkt. No. 322-16.) W&C moved for relief, and the stay was set aside on August 23, 2010. (Dkt. Nos. 322-17–18.) About three months passed before the Ninth Circuit remanded the case, rejecting the appeal due to then-recent precedent, and the stay became moot. (Dkt. No. 322-20.) A couple

of years later, based on the misrepresentation theory that Rosette developed and that the original complaint encompassed, Pauma (represented by W&C) received a restitutionary judgment for $36 million to compensate it for past overpayments to the State. (Dkt. No. 322-23.)

The Biographical Statement. Mr. Rosette's attorney biography lists many career achievements. (Dkt. No. 322-50.) It covers four printed pages, and the primary text (not including his background and education) comprised 453 words when this dispute originated. (*Id.*) As early as May 9, 2011, it and certain Rosette proposal materials listed among those achievements Mr. Rosette's and the Rosette firm's work for Pauma. (Dkt. Nos. 32-2 ¶ 7, 322-23, 322-61 at 130:16–131:9.) The statement took two slightly different forms: (1) "Mr. Rosette also successfully litigated a case saving [Pauma] over $100 million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger"; and (2) "Rosette brought suit against the State of California and then-Governor Schwarzenegger and successfully obtained a preliminary injunction against the State, saving the tribe over $100 million in Compact payments allegedly owed to the State." (Dkt. Nos. 322-21, 322-50 at 1056.) Mr. Rosette wrote the statement because he was proud of his and his firm's work helping Pauma achieve approximately $100 million in savings by securing the preliminary injunction, which immediately ended Pauma's obligation to pay the elevated fees. (Dkt. No. 322-3 ¶ 26.) Rosette continued to represent Pauma in unrelated matters. Neither W&C nor Pauma raised any concerns about Mr. Rosette's biography.

Mr. Rosette's Introduction to Quechan. In 2017, Mr. Rosette represented the Tonto Apache Tribe of Arizona in gaming compact negotiations with the State of Arizona. (Dkt. No. 52-2 ¶¶ 6–7.) Seeking to build a coalition, Tonto Apache President Calvin Johnson wrote to various tribal leaders, among them newly elected Quechan President Keeny Escalanti, requesting a meeting to discuss the Arizona negotiations. (Dkt. Nos. 322-26, 322-37–39.) President Johnson arranged for Mr.

Rosette to meet with President Escalanti and Quechan Councilman William White at a June 2017 conference to discuss strategy in Arizona. (Dkt. Nos. 52-2 ¶¶ 9–18, 322-4–5 ¶ 7.) This was Mr. Rosette's first meeting or discussion with either representative. (Dkt. Nos. 52-2 ¶ 19, 322-4–5 ¶ 7.)

After discussing the Arizona negotiations, Quechan's leadership asked Mr. Rosette if he had experience with California compact negotiations. (Dkt. Nos. 52-2 ¶¶ 22–25, 322-4–5 ¶ 10.) Mr. Rosette said he had a great deal of experience, which he did. (*Id.*) Over the last 24 years, Rosette has represented at least two dozen tribes in negotiations over gaming compacts, compact provisions, compact amendments, binding compact interpretations, and California Gambling Control Commission compact rule promulgations. (Dkt. No. 322-3 ¶ 5.) When President Escalanti asked about the cost for resolving Quechan's compact negotiations in both states, Mr. Rosette stated that he could handle the work for $10,000 a month. (Dkt. Nos. 322-3 ¶ 34, 322-4–5 ¶ 13.) At no time during the meeting did the Pauma litigation come up. (Dkt. Nos. 322-3 ¶ 35, 322-4–5 ¶ 11.) Unbeknownst to Mr. Rosette, in the months before this June meeting the Tribe's new leadership began looking to replace W&C. Mr. Rosette did not send Quechan's leaders any Rosette materials before the meeting, and neither leader reviewed Rosette marketing or biography materials beforehand. (Dkt. Nos. 322-4–5 ¶ 9.)

Quechan's Tribal Council then invited Mr. Rosette to make a presentation on June 19, 2017, because the Tribal Council was interested in replacing its lawyers, W&C, due to the cost and pace of W&C's unsuccessful negotiations with the State of California. (Dkt. Nos. 322-4–5 ¶ 13.) Again, the subject of the Pauma litigation never came up. (*Id.*) Quechan was not interested in litigating against the State of California. (*Id.* ¶ 18.) Its goal was to reach agreement on a compact in time for ratification during that year's legislative session, which was quickly coming to a close. (*Id.*) The Tribe was impressed with Rosette's experience and willingness to work on both the Arizona and California compacts for one-fifth or less of the

monthly fees the Tribe was paying W&C. (*Id.* ¶ 17.) Rosette was hired and wrapped up negotiations with the State of California by the end of August, securing substantial benefits for the Tribe in the process. (Dkt. No. 29-2–3 ¶ 19.)

Quechan's Dissatisfaction with W&C. The Tribe had grown dissatisfied with W&C's work before Mr. Rosette's introduction to Quechan. (Dkt. Nos. 322-4–5 ¶¶ 4–5, 13.) After new leadership took office, they began looking for new lawyers, months before their first meeting with Mr. Rosette. (*Id.*) And in April 2017, still months before meeting Rosette, they began to raise questions about W&C's performance and fees. (Dkt. No. 322-28.) W&C had charged the Tribe $50,000 a month since October 2016, and the Tribe was not seeing results. (Dkt. Nos. 322-42, 322-61 at 290:10–291:12.) Yet W&C insisted that it was entitled to a contingency fee of over $6 million. (Dkt. No. 322-28.) Councilman White contacted attorney Wilson Pipestem in April to discuss W&C's attorney fee agreement, because he believed that W&C had not "provided services adequate of the level of compensation." (Dkt. No. 322-35.)

Even in June 2017, when Mr. Rosette had his initial meeting with Quechan, W&C was nowhere near a final negotiated compact. (Dkt. Nos. 322-37–39.) W&C had already charged Quechan approximately $400,000, and time was running out to reach an agreement that could be ratified in the legislative session. (Dkt. Nos. 322-42, 322-61 at 290:10–291:12.) [redacted]. (Dkt. No. 322-59 at 162:22–168:11, 284:5–285:11.) Then W&C told Quechan that it would need to hire an expensive lobbyist to finalize the compact. (Dkt. No. 322-44.) Neither Ms. Williams nor Mr. Cochrane had ever negotiated a final, executed compact with the State of California, or any other state. (Dkt. Nos. 322-55 at 1124–25, 322-59 at 34:14–35:2, 322-60 at 20:11–14.) So when the Tribal Council met Mr. Rosette, whose firm was significantly less expensive and significantly more experienced in forging intergovernmental deals,

Quechan made the logical choice to change lawyers. (Dkt. No. 322-4–5 ¶ 17.) W&C filed a lawsuit less than a month later.

* * * * * *

Each and every claim against Rosette, except one, has been abandoned by W&C or rejected by the Court. All that remains is one piece of one claim for false advertising under the Lanham Act, 15 U.S.C. section 1125(a): W&C alleges that Rosette violated federal unfair competition law by representing that it "successfully litigated a case saving [Pauma] over $100 million in Compact payments allegedly owed to the State of California." (*See, e.g.*, 4AC ¶ 47.)

III. Argument

Under Federal Rule of Civil Procedure 56(a), "[w]here the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). To prevail on its claim for false advertising under the Lanham Act, W&C "must establish: (1) a false statement of fact by the defendant in a commercial advertisement . . . ; (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." *In re Outlaw Lab., LP Litig.*, 424 F. Supp. 3d 973, 980 (S.D. Cal. 2019). W&C must also show that it suffered damages proximately caused by the violation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 (2014). Instead of trying to meet this standard, W&C improperly asks the Court to shift all of its burdens onto Rosette. This attempt to declare victory without a shred of evidence must fail.

A. W&C Is Not Entitled to Summary Judgement on Falsity.

Judge Curiel has already held that "the statement that Rosette was involved

with, or even 'litigated,' the Pauma case is not actionable." (Dkt. No. 89 at 23–24.) The only question is whether Rosette violated the Lanham Act by using the word "successfully" or by referring to $100 million in future savings. (*Id.*) "To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may 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 or confuse consumers." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). W&C is not entitled to summary judgment as to either.

1. The Statement Is Not Literally False.

"In the Ninth Circuit, literal falsity is a question of fact, and summary judgment should not be granted where a reasonable jury could conclude a statement is not false." *LegalZoom.com Inc. v. Rocket Lawyer Inc.*, 2013 WL 12121303, at *4 (C.D. Cal. Oct. 17, 2013). The question of falsity should not get to a jury because the word "successfully" is subjective and constitutes inactionable puffery. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990). But if this case goes to trial, a reasonable jury could easily conclude that the statement was true, and W&C has not proven otherwise.

A key goal of the Pauma litigation was to restore the terms of its 1999 compact, and obtaining a preliminary injunction was a critical part of the strategy. (Dkt. No. 322-19 at 80:13–81:15.) In fact, "[t]he decision whether to grant a preliminary injunction may be the single most important decision in a case since the outcome of that decision more often than not ends the litigation." 6 William F. Patry, *Patry on Copyright* § 22:7 (2020). Rosette secured Pauma's preliminary injunction, which gave Pauma the immediate relief it needed. (Dkt. No. 322-3 ¶ 21.) That was a success (Dkt. No. 322-19 at 88:15–18), and touting team victories under an individual's name "is a standard practice in the legal profession and understood by prospective clients when reviewing a lawyer's biographical information." (Dkt. No. 322-63 ¶ 55.)

That Rosette associates, including Ms. Williams and Mr. Cochrane, played a substantial role in drafting pleadings and filings, and appeared at the preliminary injunction hearing, or that the litigation continued to a restitutionary judgment after Rosette was replaced, does not render the statement false. Mr. Rosette has always credited his team's contributions, while consistently testifying that he developed the litigation strategy, reviewed and revised key filings and documents, and directed the team how to build the factual record to obtain relief. (*See*, *e.g.*, Dkt. No. 322-19 at 85:11–86:19.) He was the only partner on the pleadings, and he bore responsibility for the case, not two associates with no relevant gaming compact experience.

A reasonable jury could (and should) also determine that there is nothing false about stating that the preliminary injunction stood to save Pauma $100 million. W&C repeatedly made the same claim as early as 2013. (Dkt. No. 322-24.) This admission should end the Court's inquiry. The injunction allowed Pauma to start paying the State under its lower-cost 1999 compact. (Dkt. No. 322-3 ¶ 21.) The $100 million figure is the estimated difference between Pauma's going-forward obligations under the two agreements. (*Id.* ¶ 22.) And it is a conservative one. After starting her own firm, Ms. Williams told potential clients that the injunction would save Pauma much more—at least $148.7 million. (Dkt. No. 322-69 at 2516.) The statement, first published as early as May 2011, could have referred only to going-forward savings obtained through the preliminary injunction. (Dkt. 32-2 ¶ 7.) It did not refer to a $36 million award obtained years later, as Rosette's proposal materials confirm: "Rosette brought suit against the State of California and then-Governor Schwarzenegger and ***successfully obtained a preliminary injunction against the State*** . . . ." (Dkt. No. 322-21 at 589.)

Advertisements must be analyzed in their "full context" when assessing falsity under the Lanham Act. *Southland Sod*, 108 F.3d at 1139. That context shows that the statement was not false. The evidence in favor of its truthfulness, and the inferences reasonably drawn from it, compel denial of W&C's Motion.

a. W&C's Authorities Do Not Establish Literal Falsity.

W&C argues that the statement is literally false because of: (1) outdated dictionary definitions; (2) the meaning of the phrase "actually litigated" in the issue preclusion context; and (3) two decisions denying motions to dismiss Lanham Act claims. None of these authorities warrant judgment in W&C's favor.

Dictionary Definitions Are Not Dispositive. With no legal support, W&C argues that the Court should adjudicate literal falsity based on an 80-year-old edition of Webster's Dictionary. (Mot. at 9–10.) Citing that text, W&C claims that an attorney can only "successfully litigate" a case if he or she prosecutes it from start to finish, resulting in favorable termination. (*Id.*) Needless to say, there are plenty of alternative definitions available in more modern sources that undermine W&C's argument. Webster's Third Edition, for example, lists one definition of "litigate" as "to carry on a legal contest by judicial process." *Litigate*, *Webster's New International Dictionary* (3d ed. 2002); *see also Litigate*, Black's Law Dictionary (11th ed. 2019) ("take or defend against a claim or complaint in a court of law"). One meaning of "successful" is to have "the desired effect." *Success*, *Webster's New International Dictionary* (3d ed. 2002). These definitions support the statement's truthfulness: Rosette carried on a legal contest by judicial process, including by initiating and maintaining an action, and that work had the desired effect—a preliminary injunction.

In any event, W&C's argument is just that, argument based on its own interpretations of an ancient dictionary. "Attorney argument is not evidence." *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017). "[D]ictionaries provide general definitions, rarely in sufficient detail to resolve close questions in particular contexts." *Toro Co. v. White Consol. Indus., Inc.*, 199 F.3d 1295, 1300 (Fed. Cir. 1999). They resolve no questions here.

Issue Preclusion Authorities Are Irrelevant. To shore up its strained reading of "successfully litigated" as meaning "litigated from start to finish," W&C

also cites authorities on issue preclusion. (Mot. at 11–12.) But issue preclusion cases ***only*** arise when an earlier case has been terminated. So when courts interpret "actually litigated" in the issue preclusion context, it is inherently necessary that the analysis involve a terminated case. That says nothing about the meaning of "litigated" in an attorney biography or myriad other contexts, or whether an attorney can truthfully say he or she successfully litigated a particular matter.

W&C Misinterprets the* Brave *and* Bennett *Decisions. W&C also relies on two attorney advertising cases—the *Brave* and *Bennett* cases—to argue that it is *per se* false for attorneys to advertise their involvement in a case if they are not "materially involved at the end" or if they did not "actually [do] the work." (Mot. at 13–14.) Neither decision supports W&C's argument.

In *Brave Law Firm v. Truck Accident Lawyers Group*, a personal injury firm alleged that a competitor falsely advertised how much money it obtained for its clients. 2019 WL 2073872, at *1 (D. Kan. May 10, 2019). In one instance, the plaintiff alleged that the defendants advertised a $9 million settlement, despite being terminated before the final settlement. *Id.* at *1. The court denied the defendants' motion to dismiss. In doing so, it held that the plaintiff's complaint sufficiently alleged facts, when accepted as true, to satisfy Rule 8. *Id.* at *8. It did not hold, as W&C tells the Court, that the advertisement was ***in fact*** literally false. (Mot. at 13.) Ultimately, when the defendants produced evidence of their involvement in the settlement, the court dismissed the case. (*Id.*)

Bennett v. Zydron is also inapposite. 2017 WL 9478505, at *1 (E.D. Va. Aug. 17, 2017). In *Bennett*, the defendants' website described more than 40 cases that the defendants allegedly had no role in. *Id.* at *1. Seven of the descriptions also featured news articles that were altered to delete the plaintiff's name or image and replace them with references to the defendants. *Id.* at *2. Even with these egregious allegations, all the court held was that the complaint adequately pleaded a claim for false advertising under Rule 8. *Id.* at *7–8. It held that the plaintiff had

sufficiently alleged the representations were literally false, not that they were ***in fact*** literally false. *Id.* W&C's Motion elides this critical distinction.

b. W&C's Expert Does Not Establish Literal Falsity.

W&C also tries to prove literal falsity using expert testimony, but that testimony is improper, unreliable, and unhelpful. W&C's expert on falsity, Bryan A. Garner, a law professor and grammarian, opines that the statement is "literally false" based on his personal assessment of the statement's words, cherry-picked Pauma litigation documents, and incomplete background provided by W&C. (Dkt. No. 322-64 ¶ 7.) He conducted no research and cites no authorities.

Mr. Garner's testimony is problematic for several of reasons. First, he "offer[s] a legal opinion on an ultimate issue" in the case, and the "law states in no uncertain terms that experts are forbidden from testifying to an ultimate legal conclusion." *Bona Fide Conglomerate, Inc. v. SourceAmerca*, 2019 WL 1369007, at *3, *13 (S.D. Cal. Mar. 26, 2019). Mr. Garner's testimony has been excluded by other courts for this reason in the past. *See Diamondback Indus., Inc. v. Repeat Precision, LLC*, 2019 WL 7761432, at *1 (W.D. Tex. Aug. 20, 2019); *see also Lind v. Int'l Paper Co.*, 2014 WL 11332304, at *3 (W.D. Tex. Mar. 11, 2014).

Second, his opinion is based on several incorrect assumptions. According to his report, Mr. Garner analyzed whether it was literally false and misleading for Mr. Rosette to represent that "he 'successfully litigated' the Pauma Band case and that he 'sav[ed] the [client] over $100 million in Compact payments.'" (Dkt. No. 322-64 ¶ 7.) In framing the question this way, Mr. Garner assumes that the statement takes credit for the entire case, from start to finish. This explains, for example, Mr. Garner's conclusion that, because the Pauma litigation "lasted nearly seven years and . . . Mr. Rosette was replaced as counsel within the first year of its pendency, it is impossible to say truthfully that he 'successfully litigated' the case." (*Id.* ¶ 13.) But the duration of Mr. Rosette's involvement is a red herring. The statement describes a specific critical victory achieved during that representation: a

preliminary injunction obtained for Pauma in 2010. And by expressly quantifying the victory it champions ($100 million in compact payments), the statement links itself directly to the facts of the preliminary injunction, and not the future relief W&C would obtain for Pauma.[2] Mr. Garner does not appear to see the difference.

Mr. Garner also incorrectly assumes that the Pauma case was successful only because of W&C's emergency motion to set aside a stay of the injunction pending appeal, rather than the injunction itself. (*Id.* ¶ 10.) Obviously, securing a key trial court victory on a discretionary matter like a preliminary injunction is no less important than a later appellate ruling rejecting the losing party's appeal. Notably, Mr. Garner did not review the Ninth Circuit's 2010 decision remanding the case, which rejected the State's appeal due to then-recent precedent and preserved Rosette's victory on the preliminary injunction. (*Id.* ¶ 6.) Because he did not review the full record, Mr. Garner does not know that W&C's emergency motion had no bearing on the merits. Mr. Garner likewise assumes that W&C was solely responsible for the legal theory that led to a $36 million judgment. (*Id.* ¶ 11.) But the original complaint, under Mr. Rosette's direction, introduced and encompassed the winning theory. (Dkt. No. 322-3 ¶¶ 13–14; Dkt. No. 322-10.) Mr. Garner conflates the $36 million restitutionary award with Rosette's preliminary injunction win, inexplicably claiming that the statement is false because Pauma received $36 million, as though both could not be true. (Dkt. No. 322-64 ¶ 11.) And Mr. Garner concludes with no support (or marketing expertise) that "an average person . . . would consider Mr. Rosette's website statement to be both false and misleading." (*Id.* ¶ 16.) There is no evidence that anyone at Quechan or in the relevant market

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[2] An alternate version of the statement reads: "Rosette brought suit against the State of California and then-Governor Schwarzenegger and successfully ***obtained a preliminary injunction against the State***, saving the tribe over $100 million in Compact payments allegedly owed to the State." (Dkt. No. 322-21 at 588–89.)

shares his approach to English.

In stark contrast, Rosette offered the testimony of Lynda Shely, an attorney who has worked extensively on attorney advertising and ethics issues. (Dkt. No. 322-63.) Ms. Shely opined that "[l]aw firm partners who establish a client relationship and conceive the strategies to achieve a client's goals ethically and practically can tout the successes obtained by their firm for their clients" and "it is customary and routine" to do so "by using terms like 'litigated' and 'successfully.'" (*Id.* ¶ 54.) "This is a standard practice . . . and understood by prospective clients when reviewing a lawyer's biographical information." (*Id.* ¶ 55.) Her testimony is undisputed and, at a minimum, creates a genuine issue of material fact as to falsity.

2. The Statement Is Not False by Necessary Implication.

W&C also posits that it is entitled to summary judgment because the statement is false by necessary implication, but once again, W&C misconstrues the law. "Courts recognize literal falsity by necessary implication when a consumer 'will necessarily and unavoidably' receive a false message 'from the product's name and advertising.'" *Nutrition Distrib. LLC v. PEP Rsch., LLC*, 2019 WL 652391, at *4 (S.D. Cal. Feb. 15, 2019); *see also Design Res. v. Leather Indus. of Am.*, 789 F.3d 495, 502–03 (4th Cir. 2015).

W&C argues without evidence or legal support that the statement about Mr. Rosette's role in the Pauma litigation necessarily implied that W&C was not also involved. (Mot. at 14.) But that conclusion does not follow. First, the statement refers only to part of the case. Second, clients "who pay millions for substantial projects . . . know full well that it takes [a] team" to perform complex work, and "[t]hey also know that teams have leaders[.]" *Gensler v. Strabala*, 764 F.3d 735, 738 (7th Cir. 2014). Many attorneys and multiple law firms are regularly involved in different aspects of civil cases. "To demonstrate falsity by necessary implication, there must be evidence showing that a particular unambiguous conclusion necessarily flow[s] from the [statement] in the context of the []

marketing, and that the conclusion is false." *Nutrition Distrib.*, 2019 WL 652391, at *6. W&C makes no such showing, and viewing the statement in its proper context—an attorney's biography—there is no basis to conclude that an audience would read it to mean that no one else was involved in the case. "Particularly on large litigation matters, prospective entity clients understand that litigation is handled by more than one lawyer." (Dkt. No. 322-53 ¶ 55.)

3. The Statement Is Not Misleading.

W&C also has not carried its burden to prove the statement is misleading. "[W]hen a plaintiff alleges that an advertisement is misleading, it carries an additional burden of proving that the advertisement, though explicitly true, nonetheless conveys a misleading message to the viewing public." *SKEDKO, Inc. v. ARC Prods., LLC*, 2014 WL 2465577, at *4 (D. Or. June 2, 2014). It "must produce evidence, usually in the form of market research or consumer surveys, showing exactly what message ordinary consumers perceived." *Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 549 F. Supp. 2d 1168, 1182 (N.D. Cal. 2007). W&C produced no evidence to suggest that the statement misled anyone. "Reactions of the public are typically tested through the use of consumer surveys." *Southland Sod*, 108 F.3d at 1140. W&C has no such surveys, which supports "an inference that the results of such a survey would be unfavorable." *Univision Music LLC v. Banyan Entm't*, 2004 WL 5574359, at *3 (C.D. Cal. Nov. 15, 2004). W&C also has no marketing experts or direct customer testimony.

W&C nevertheless asks the Court to find the statement misleading by claiming that the normal standards of proof do not apply to attorney advertising. (Mot. at 15.) W&C cites two cases to support its incredible assertion, but neither does. *FTC v. Colgate-Palmolive* is not a Lanham Act case, and it does not involve attorney advertising. 380 U.S. 374 (1965). The decision only stands for the proposition that the FTC can build a record of deception under its own regulations without surveying the viewing public. *See id.* at 391–92. The case does not hold,

as W&C postulates, that a judge can decide that attorney advertising is misleading under the Lanham Act "by just looking at the advertisement." (Mot. at 15.)

Brockey v. Moore does not help W&C either. 107 Cal. App. 4th 86, 100 (2003). In *Brockey*, a jury found that listing a non-lawyers' services using names like "legal aid" and "legal aid services" violated California law. *Id.* at 89–90. Numerous witnesses testified at trial that they were actually misled by the listing and contacted the defendant expecting to find a legal aid organization. *Id.* at 91–92. The court of appeal upheld the verdict, highlighting the proof of more than "a few isolated examples" of consumers being misled. *Id.* at 99–100. W&C has no examples of consumers being misled or even reading the 26 words buried deep in a four-page biography. One of W&C's partners even admitted at deposition that [redacted]. (Dkt. No. 322-61 at 186:19–187:22.) And nothing in *Brockey*, which interprets state law, supports W&C's claim that courts can find advertisements misleading without ***any*** evidence.

B. The Presumptions That W&C Tries to Invoke Are Unsupported By Law and Directly Contradicted By Evidence.

For the other elements of its claim—deception, materiality, causation, injury, and damages—W&C eschews any evidentiary showing and tries to shift its burdens of proof onto Rosette through a series of specious presumptions. This is because the evidence does not support W&C. But neither does the law. W&C cannot prove, and has not established, that it is entitled to summary judgment on these elements. And failure to prove ***any one*** of them defeats W&C's Motion.

1. The "Two Major" Presumptions W&C Relies on Do Not Entitle It to Summary Judgment.

W&C hopes to ride a wave of presumptions triggered by bad intent or literal falsity. According to the Motion, if W&C establishes either, then it has also established a rebuttable presumption of materiality, deception, and causation. W&C is wrong at every step of its analysis.

On the subject of intent, there is no evidence that Rosette meant to publish a false statement. W&C cites none. (Mot. at 6–7.) The evidence instead shows that Mr. Rosette wrote the statement because he was proud of his and his firm's work helping Pauma obtain a preliminary injunction, which tipped the litigation in Pauma's favor. (Dkt. No. 322-3 ¶ 26.) Back in 2010, he testified about this work and his role in a case where Pauma was the plaintiff, and no one ever suggested they disagreed with his view. (Dkt. No. 328-55.) Because there is no evidence of ill intent, W&C could not be entitled to a presumption if one existed. And the presumption does not exist, at least not in the form that W&C submits. There is no presumption of materiality flowing from a finding of intentional wrongdoing under the Lanham Act. *See Nichia Am. Corp. v. Seoul Semiconductor Co.*, 2008 WL 11342571, at *8 (C.D. Cal. Oct. 7, 2008) (finding no legal support for materiality presumption). And while some courts find a presumption of deception based on intentional wrongdoing, deception and causation are not the same—as W&C claims. *See ThermoLife Int'l, LLC v. Gaspari Nutrition Inc.*, 648 F. App'x 609, 616 (9th Cir. 2016) (requiring "evidence of causality ***and*** consumer deception") (emphasis added). W&C cites no authority for its persistent attempts to conflate the two. (Mot. at 6, 16–19); *cf. Brave Law Firm*, 2019 WL 2073872, at *7 ("[A] plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury ***flowing directly from the deception***") (emphasis added).

Nor does a finding of literal falsity trigger a series of cascading presumptions leading directly to liability. (Mot. at 6–7.) No authority cited by W&C suggests that literal falsity creates a presumption of causation. And no presumption of materiality arises from a finding of literal falsity in the Ninth Circuit. *See William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995) (finding no materiality despite falsity); *see also Obesity Rsch. Inst., LLC v. Fiber Rsch. Int'l, LLC*, 310 F. Supp. 3d 1089, 1125 (S.D. Cal. 2018) (noting Ninth Circuit has not "determined that materiality is presumed for actually false statements").

While there is some mixed case law on whether literal falsity leads to a presumption of materiality, the weight of authority militates against it. "[T]he majority of circuits, including the Ninth Circuit, require a separate showing of materiality for literally false statements." *LivePerson, Inc. v. [24]7.ai, Inc*., 2018 WL 5849025, at *6 (N.D. Cal. Nov. 7, 2018); *see also Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1111 (9th Cir. 2012) (analyzing evidence of materiality for a literally false statement). The district court authorities that W&C cites in support of the presumption rely on out-of-circuit precedent. *See, e.g.*, *Youngevity Int'l v. Smith*, 2019 WL 2918161, at *3 (S.D. Cal. July 5, 2019); *AECOM Energy & Constr., Inc. v. Ripley*, 348 F. Supp. 3d 1038, 1056 (C.D. Cal. 2018); *cf. Nutrition Distrib.*, 2019 WL 652391, at *5 (noting Ninth Circuit has not "determined that materiality is presumed for actually false statements, nor has [the movant] cited to a Ninth Circuit case stating this"). In short, the statement is not literally false, but even if it was, no presumption of materiality should apply.

2. W&C Lacks Evidence of Deception and Cannot Prove It Through a Presumption.

W&C must also prove the statement "actually deceived or has the tendency to deceive a substantial segment of its audience." *Outlaw*, 424 F. Supp. 3d at 980. But W&C has no evidence that anyone at Quechan was deceived by the statement. To the contrary, the undisputed testimony from former President Escalanti and Councilman White proves unequivocally that Quechan's decision-makers did not review and were not deceived by the statement. (Dkt. Nos. 322-4–5 ¶¶ 15–20.) W&C has no evidence that the statement deceived anyone else. Instead, W&C asks the Court to summarily find that the statement has the tendency to deceive based on the inadmissible opinions of questionable "experts" and another series of unsubstantiated presumptions. W&C's inability to produce a single witness who read the specific sentence buried in Mr. Rosette's biography in the approximately seven years the sentence was used, much less who was deceived by it, demonstrates

exactly why a presumption of deception makes no sense.

W&C argues that two of its experts provide evidence that the statement is deceptive, but neither has any background in marketing, advertising, or evaluating consumer perceptions. One is a purported "non-legal expert on tribal gaming in California" who has never testified as an expert on anything, and the other is a tribal law attorney who merely interacts with tribes as part of his job. (Dkt. Nos. 328-5, 328-7.) Both offer their opinions based on nothing more than their personal experiences and a stereotyped view that Indians are particularly susceptible to deception. (*Id.*) As the Ninth Circuit has explained, a witness who interacts with a particular ethnic group as part of his or her job cannot cloak anecdotal generalizations about that group with the authority of expert testimony. *See Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1006 (9th Cir. 2001). And both witnesses acknowledged at their depositions that it is not possible to generalize about how a tribe might react to attorney advertising. (Dkt. No. 329-46 at 182:10–19; Dkt. No. 332-5 at 103:9–104:22.) Their testimony is unreliable and irrelevant, and it certainly does not establish deception as a matter of law.

Without any facts to support a finding of deception, W&C tries to invoke even more presumptions, each on shakier ground than the last. None permit summary judgment in W&C's favor. First, W&C argues that deception should be presumed because Rosette supposedly expended substantial funds on disseminating the statement. (Mot. at 16.) W&C does not tell the Court how much Rosette spent on printing brochures or operating a website that contains substantial content that has nothing to do with the one sentence at issue in this case, even though Rosette produced all relevant invoices. (*Id.*) W&C merely asks the Court to assume that "[w]hatever the actual cost, it is certain to be substantial." (*Id.*) Again, attorney argument is not evidence, and cases that find deception based on expenditure of substantial sums involve multi-million-dollar advertising campaigns. *See, e.g.*, *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1042 (9th Cir. 1986) (defendant

spent $6 million). There is no evidence that Rosette spent anything close to that. In fact, W&C has presented no evidence at all.

Second, W&C claims that the chronology of events gives rise to a presumption of deception and causation, once again conflating the two elements. (Mot. at 17.) W&C's speculation about what might have happened at the meeting between Rosette and Quechan's leaders in June 2017 is flatly contradicted by actual evidence of what did happen at the meeting, and W&C filed this Motion with that evidence in hand. (Dkt. Nos. 322-3–4 ¶¶ 8–11.) "[I]nferences of causation based solely on the chronology of events . . . [will not suffice] where the record contains . . . [evidence of] other equally credible theories of causation." *A.L.S. Enters., Inc. v. Robinson Outdoor Prod., LLC*, 2017 WL 393307, at *8 (W.D. Mich. Jan. 30, 2017). And the undisputed evidence about what happened at the meetings is corroborated by documents demonstrating (i) how the meeting came about (initiated by another tribe to form alliances in Arizona) and (ii) why Quechan was dissatisfied with W&C for months and looking to replace it: price and performance.

Finally, W&C makes the unsupported argument that deception should be presumed because this case involves attorney advertising. (Mot. at 17–18.) W&C cites no authority for this proposition. It simply mentions *Bennett* once again and makes the unremarkable observation that "an attorney has to take ownership for the effects of its false advertising." (*Id.* at 18.) That is not a legal presumption entitling W&C to judgment as a matter of law. And where a plaintiff "seek[s] to recover monetary damages . . . a violation can only be established by proof of actual deception (i.e., evidence that individual consumers perceived the advertisement in a way that misled them about the plaintiff's product)." *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 690 (6th Cir. 2000). W&C has no such proof.

3. W&C Lacks Evidence of Materiality and Cannot Prove It Through a Presumption.

W&C also fails to show materiality. "The test is whether the deception is

material, in that it is likely to influence the purchasing decision . . . ." *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003). Materiality is typically proven through surveys, although evidence from customers or potential customers can also suffice. *See Skydive Arizona*, 673 F.3d at 1110. But W&C has no marketing experts, surveys, or direct testimony from consumers who claim they were misled. The only client declarations come from Quechan, whose leaders have testified that the statement was ***not*** material to their decision to fire W&C. (Dkt. Nos. 322-3–4 ¶ 18.) And according to market research, only 6% of consumers find lawyers through advertising, and tribes—which have experience running complex organizations and hiring lawyers—are even less likely to rely on "statements on a website or marketing brochure in deciding which lawyer to hire." (Dkt. No. 322-63 at 2301.)

W&C's Motion dismisses this evidence entirely, calling it "absurd," and tries to invoke yet another inapplicable presumption. (Mot. at 19.) Certain cases hold that, where a relevant market consists of between two and five competitors, and the challenged statement is key to a marketing campaign or part of a comparative advertisement, there may be a presumption of materiality. *See, e.g.*, *Allen v. Ghoulish Gallery*, 2007 WL 4207923, at *9 (S.D. Cal. Nov. 20, 2007) (statement was "the first few words on the website's main page" and in a four-competitor market). None of those factors are present. There is a substantial market for tribal legal services with many lawyers competing for this work (*see, e.g.*, Dkt. No. 322-59 at 190:10–194:15), and the statement is not prominent in Rosette's advertising or Mr. Rosette's attorney biography. W&C's unsupported assertions to the contrary show how unreliable its advocacy has become in this case. And W&C's suggestion that the statement must be material to tribes because it was included in Mr. Rosette's biography in the first place would eviscerate the element altogether. If materiality could be proven because something was included in an advertisement, then any challenge to any advertisement would necessarily meet the materiality threshold. That is not the law. *Obesity Rsch. Inst.*, 310 F. Supp. 3d at 1125

(requiring "evidence to show that the falsity in [a challenged] statement is materially deceiving").

C. W&C Is Not Entitled to Summary Judgement on Causation, Injury, or Damages.

A plaintiff suing under section 1125(a) "must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations." *Lexmark*, 572 U.S. at 140. "To establish proximate cause . . . a plaintiff ordinarily must show economic or reputational injury ***flowing directly*** from the deception wrought by the defendant's advertising." *Outlaw*, 424 F. Supp. 3d at 982 (emphasis added). W&C has no evidence of causation, injury, or damages, and the Motion fails to show that no genuine issue of material fact exists such that W&C is entitled to judgment as a matter of law.

Even before most of the evidence was produced in this case, Judge Curiel observed W&C's fundamental causation problem: "W&C . . . cannot plausibly allege that Rosette's actions proximately caused Quechan to terminate the attorney-client contract, since termination could have resulted from any number of issues with the firm's performance." (Dkt. No. 217 at 28–29.) Now, after discovery, the evidence is overwhelming and undisputed that one sentence at the bottom of Mr. Rosette's biography ***did not*** cause Quechan to terminate W&C. The mountain of evidence showing that W&C was terminated because of its own failings defeats any attempt to show otherwise. (*See, e.g.*, Dkt. No. 322-4–5 ¶¶ 4–5, 13.) And these credible alternative explanations for W&C's firing foreclose the ability to infer causation from unsupported guesses. (*See* Dkt. No. 217 at 28–29); *see also, e.g.*, *Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292, 301 (4th Cir. 2017).

As with the other elements of its claim, W&C hopes to prevail without evidence by trying to presume its way to a favorable judgment. W&C bypasses causation and claims that injury should be presumed because W&C competes directly with Rosette. According to W&C, damages can then be estimated based on

whatever metric the Court deems fair. (Mot. at 22–23.) Again, W&C is incorrect. Because W&C seeks damages, not an injunction, "actual evidence of some injury resulting from the deception is an essential element of the plaintiff's case." *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 210 (9th Cir. 1989) (failure to present evidence of actual injury required judgment notwithstanding verdict). W&C's inability to prove any cognizable injury is fatal to its claim. *See Societe Civile Succession Richard Guiono v. Beseder Inc.*, 2007 WL 3238703, at *4 (D. Ariz. Oct. 31, 2007) ("[E]vidence of some damage or harm to a Lanham Act plaintiff is still required to justify [a monetary] award."). W&C had no cognizable interest in future legal fees from Quechan. Clients can discharge their lawyers at any time, for any reason—just as Pauma fired Rosette and hired W&C. "[A] law firm does not own client legal matters . . . —clients have the right to transfer their matters to new counsel, to terminate representation, and to hire new counsel." *Diamond Tr. of Estate of Howrey LLP v. Hogan Lovells US LLP*, 950 F.3d 1200, 1209 (9th Cir. 2020). It follows that, "[b]ecause clients retain all rights associated with representation of their legal matters, law firms do not have a reasonable expectation, or legitimate claim of entitlement . . . that they will continue working on these client matters and earn future fees." *Id.* This authority is consistent with Judge Curiel's earlier ruling that W&C was never "'entitled'—under any understanding of that term—to any of the net recovery it obtained as a result of the compact it signed with California." (*See* Dkt. No. 89 at 15.)

W&C has no evidence of any other injury to a commercial interest in sales or business reputation. W&C cannot identify a single client or prospective client that fired W&C, limited the scope of its work, or declined to hire it because of Rosette's statement. (Dkt. No. 322-55 at 1099–102.) W&C has no evidence that anyone was ever deceived by the statement. (Dkt. Nos. 322-4–5 ¶¶ 13–2, 322-55 at 1095–102.) In fact, W&C has no evidence that anyone else—anywhere—reviewed, heard, or was moved to act or refrain from acting by the statement. (Dkt. No. 322-55 at

1095–102.) "[W]hen a plaintiff cannot prove a diversion of sales, or does not account for clearly established external factors—such as the presence of other competitors, pricing differentials, etc.—the plaintiff cannot recover its lost profits." *See Church & Dwight Co. v. SPD Swiss Precision Diagnostics GmbH*, 2018 WL 4253181, at *15 (S.D.N.Y. Sept. 5, 2018).

W&C asserts that once it shows a customer switched its account from a plaintiff to a defendant, it has established "credible proof of the fact of damages, if not the base amount of such." (Mot. at 22.) Not so. First, Quechan did not fire W&C or hire Rosette because of the statement. Second, W&C's reliance on *Lindy Pen Co. v. Bic Pen Corp.* for this argument is misplaced. (Mot. at 7, 22.) *Lindy Pen* is not a false advertising case; it is a trademark case with different standards. 982 F.2d 1400, 1411 (9th Cir. 1993). Third, a recent decision in this district holds that the presumption of injury when the parties are direct competitors "does not apply when advertising does not directly compare defendant's and plaintiff's products." *Quidel Corp. v. Siemens Med. Sols. USA, Inc.*, 2020 WL 4747724, at *9 (S.D. Cal. Aug. 17, 2020). The statement does not compare Rosette and W&C.

W&C's cursory demands for Rosette's profits and treble damages must also be rejected. "[S]ection 1125(a) was not intended to provide a windfall," *Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 161 (1st Cir. 1977), and the express language of the Lanham Act provides that monetary damages can only "constitute compensation and not a penalty." 15 U.S.C. § 1117(a). A defendant's profits should only be awarded "in a situation where defendant benefits directly from its wrongful conduct." *Lincoln Diagnostics, Inc. v. Panatrex, Inc.*, 2009 WL 3010840, at *12 (C.D. Ill. Sept. 16, 2009). W&C's assertion that the statement "has been extremely lucrative" has zero evidentiary support. (Mot. at 23.) Since W&C has not shown that Rosette "derived any actual benefit . . . there is no basis for awarding Plaintiff compensation for its losses or for Defendant's unjust enrichment." *Id.* And W&C makes no showing that awarding Rosette's profits

(which it does not quantify) is a proper measure of compensation. *See Skydive Arizona*, 673 F.3d at 1115 (reversing damages multiplier as punitive).

D. Rosette's Expert Is Qualified and Offers Reliable Testimony.

W&C's request to exclude Lynda Shely's expert report should also be denied. Ms. Shely—who W&C did not bother to depose—is a legal ethics expert with significant experience in attorney advertising. (Dkt. No. 322-63 ¶¶ 3, 54.) She opined that attorneys may ethically and practically tout their firms' accomplishments, as Mr. Rosette did. (*Id.* ¶ 53.) This is a common practice and well understood by legal consumers. (*Id.* ¶ 55.) W&C's only objection to Ms. Shely's testimony, other than framing it as a legal conclusion, is that she is not an expert in market research. (Mot. at 24–25.) But she never claimed to be. Her report cites research conducted by others, and her conclusions are drawn from her research and substantial professional experience. (Dkt. No. 322-63.) That she did not conduct the studies does not undermine her conclusions. "Experts need not conduct studies of their own in order to opine on a topic; a review of other studies and scientific literature can be enough to qualify experts to testify and to make that proposed testimony reliable." *In re Mirena IUD Prod. Liab. Litig.*, 169 F. Supp. 3d 396, 412 (S.D.N.Y. 2016). And W&C's challenges to the studies she relies on go to weight and credibility, not admissibility. *Id.* at 421.

IV. Conclusion

W&C's Motion shows only that W&C has no evidence whatsoever. W&C's Motion should be denied, and Rosette's Motion should be granted. (Dkt. No. 322.)

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Respectfully Submitted,

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