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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

Case No. 17-CV-01436 TWR DEB

ROSETTE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: December 11, 2020
Time: 1:30 pm
Judge: Hon. Todd W. Robinson
Courtroom: 3A
Trial Date: Not Set

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I. Introduction

With no evidence to support its Lanham Act claim after three years of litigation, W&C wants a do-over of discovery on the most fundamental question in this case: whether Quechan fired W&C because it was misled by one line in Mr. Rosette's attorney biography. The only three people at Quechan's initial meeting with Rosette—Quechan's President Escalanti, Councilman White, and Mr. Rosette—have testified that Quechan's decision-makers did not review, consider, or rely on the statement that W&C challenges as false or misleading. (Dkt. Nos. 322-3–5.) The Tribe fired W&C because of the law firm's own substantial shortcomings. (*Id.*) That is the end of W&C's case against Rosette, and W&C has no contrary evidence because none exists.

Aside from improperly seeking reconsideration of discovery orders, W&C's last line of defense is trying to turn the burden of proof on its head to excuse it from proving its case. W&C's legal arguments have no support, and it makes no effort to rebut the crushing evidence against it. It cites no evidence of materiality, deception, causation, injury, or damages, and its arguments about falsity are divorced from both the evidence and common sense. To defeat summary judgment, W&C must present evidence that a reasonable jury could find for it on every element of its false advertising claim. Here, there is no evidence to find in W&C's favor on any element. Summary judgment should be granted to Rosette.

II. Argument

A. W&C's Rule 56(d) Request Is Improper and Should Be Rejected.

Unable to accept that its wild speculation never had any basis in reality, W&C now asks the Court for another chance to conduct duplicative discovery. W&C's request fails as a procedural matter because a "Plaintiff must make a motion under Rule 56(d) . . . not raise a request for relief under Rule 56(d) in an opposition brief." *Ramsey v. Cardtronics USA, Inc.*, 2012 WL 1674252, at *5 (S.D. Cal. May 11, 2012). W&C made no such motion. Moreover, "[i]n ruling on

a Rule 56(d) motion, courts consider: whether the moving party had a sufficient opportunity to conduct discovery, whether the movant was diligent, whether the information sought was based on speculation, and whether additional discovery would preclude summary judgment." *Dual Diagnosis Assessment & Treatment Ctr. Inc. v. Cal. Dep't of Health Care Servs.*, 2015 WL 13764909, at *1 (C.D. Cal. Sept. 8, 2015). W&C's request fails on all fronts.

W&C had more than enough time to conduct discovery during the eight-month fact discovery period in this case (Dkt. Nos. 232, 294);[1] it simply did not like the outcome. W&C brought numerous discovery motions (Dkt. Nos. 261, 272, 274) and informal requests, leading to six discovery conferences with Magistrate Judge Berg (Dkt. Nos. 240, 249, 260, 262, 265, 283), and six discovery orders (Dkt. Nos. 241, 251, 263, 266, 284, 296). W&C's wide-ranging attempts to gain access to privileged communications between Rosette and its clients failed. (Dkt. No. 292.) W&C's arguments were "so far afield" that the Court found them "beyond reason." (Dkt. No. 311-1 at 26:22–27:1.) W&C sought reconsideration from Judge Curiel, and that motion was denied. (Dkt. No. 313.)

W&C also chose not to depose a single witness during the case. W&C never asked to depose President Escalanti or Councilman White, even though both were previously named as individual defendants. (Rogers Decl. ¶¶ 2–3.) W&C noticed Mr. Rosette's deposition, but canceled it at the eleventh hour. (*Id.* ¶ 5.) Having elected to take no depositions, W&C cannot now complain about affidavit testimony from these key witnesses. *See Andes Indus., Inc. v. EZconn Corp.*, 770 F. App'x 821, 822 (9th Cir. 2019) ("Nothing . . . prevented [plaintiff] from conducting the discovery it needed"); *Ramsey*, 2012 WL 1674252, at *5 (same).

In addition to having a full and fair opportunity to conduct discovery, W&C has not shown that the discovery it once again seeks actually exists or that it would

[1] W&C stipulated to the case schedule and insisted that the only extension of discovery deadlines be a "one-time" and "final" continuance. (Dkt. No. 294.)

preclude summary judgment. Mr. Cochrane's declaration says only that he hopes to obtain documents related to the June 2017 meeting between Rosette and Quechan that refer to Pauma (Dkt. No. 348-1 at ¶ 7), but those documents were already requested, produced, and subject to two discovery motions. W&C requested and Rosette produced documents referring to Pauma (Dkt. No. 261 at 6); but W&C was not satisfied with what it saw and insisted that there must be more (*see* Dkt. Nos. 261 at 3–5, 274 at 1). Magistrate Judge Berg disagreed. (Dkt. No. 284 at 5.) This request is no different, and constitutes an improper request for reconsideration. Mr. Cochrane's unsupported belief that more documents exist is "pure speculation" and not a proper basis for relief under Rule 56(d). *State of Cal. v. Campbell*, 138 F.3d 772, 779–80 (9th Cir. 1998).

B. W&C's Hoped-For Presumptions Are Meritless.

Rosette's Motion demonstrated that W&C has no evidence of materiality, deception, injury, damages, or causation. (Mot. at 10–14, 23.) W&C claims that Quechan fired it and hired Rosette because of one line in Mr. Rosette's long biography, and seeks over $19 million in damages—three times the contingency fee that it had hoped to extract from the Tribe. W&C has no evidence to support this allegation; instead, the undisputed evidence shows that Quechan's new leadership (i) had planned to replace W&C long before it met Mr. Rosette; (ii) did not see or rely on a single statement in Mr. Rosette's biography; and (iii) fired W&C because of W&C's cost and performance. (Dkt. Nos. 322-4–5 ¶ 17.)

Rather than trying to identify a single disputed material fact, W&C asks the Court to deny Rosette's Motion based on a series of unsupported presumptions that W&C argues shift all of its evidentiary burdens onto Rosette. In short, W&C asserts that if it proves bad intent or the statement's literal falsity, then it has also established a rebuttable presumption of every other element of its Lanham Act claim: materiality, deception, injury, causation, and damages. W&C is wrong, and all the record evidence is against it.

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). W&C cites *Upper Deck Co. v. Panini Am., Inc.*, 2020 WL 3498175, at *6 (S.D. Cal. June 29, 2020) to argue otherwise, but that case does not refer to a materiality presumption. And while some courts find a presumption of deception based on deliberate falsity in comparative advertising, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997), this is not a comparative advertisement. Moreover, deception and causation are not the same. *See ThermoLife Int'l, LLC v. Gaspari Nutrition Inc.*, 648 F. App'x 609, 616 (9th Cir. 2016). W&C cites no authority for its recurrent efforts to confuse the two.

Nor does a finding of literal falsity trigger a cascade of presumptions leading directly to liability. (Mot. at 23–24.) 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). There are some contrary authorities, but "the 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).

If W&C is somehow right about these two presumptions, and the Lanham Act is truly the exception to the rule that a plaintiff must prove its own case, Rosette is still entitled to summary judgment because these two presumptions would not apply. As explained in the Motion and below, the biographical statement is not literally false. (Mot. at 14–20.) Nor is there any evidence that it was

published with the intent to deceive consumers. (*Id.* at 24.) W&C tries to escape this fact by incorrectly suggesting that a speaker's subjective intent is irrelevant. While subjective intent is not an element, if W&C asks for an evidentiary presumption based on intent, then it must prove deliberateness. It has not done so.

The Opposition also adds a baffling twist to the presumption arguments repeated from W&C's motion for summary judgment. Although Rosette proved that Quechan ***was not*** misled by the statement in Mr. Rosette's biography, W&C nevertheless claims that it can recover damages based on its relationship with Quechan if it shows that a generalized audience is likely to be deceived by the statement. (Opp. at 10.) This argument lacks authority and defies the Supreme Court's directives: a Lanham Act plaintiff "must show economic or reputational injury ***flowing directly from*** the deception wrought by the defendant's advertising." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). Likelihood of deception (which W&C has not proved) is, of course, different from injury, causation, and damages. And "[a] party pursuing monetary damages" under the Lanham Act "must establish actual damage to its business caused by the false advertising." *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175, 218 (D.D.C. 2014). W&C seeks money damages so it must show an actual injury proximately caused by offending advertising.[2]

W&C has not carried that burden. Although it suggests the Court should presume injury because W&C and Rosette are competitors, that presumption "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

[2] W&C mischaracterizes *Fourtek Teknoloji Ve Guvenlik Sistemleri, A.S. v. GSI-Orient, Inc.*, 2020 WL 2527754, at *8 (E.D.N.Y. Feb. 26, 2020) when it suggests that the law presumes advertising "led the parties to sit down in person in the first place." (Opp. at 5.) *Fourtek* was a default judgment decision, and the court concluded that oral statements made in the course of business dealings could not violate the Lanham Act because they are not advertisements. *FLIR Sys., Inc. v. Sierra Media, Inc.*, 903 F. Supp. 2d 1120, 1132 (D. Or. 2012) is also inapposite because it discussed comparative advertisements, which are not at issue here.

(S.D. Cal. Aug. 17, 2020). The marketing at issue is not comparative. And, in any event, the unrebutted evidence is that W&C was not injured. (Mot. at 10–14.)

C. W&C Cannot Prove the Statement Was False.

Rosette's Motion identified several reasons why the statement is not actionable as false: the word "successfully" is puffery, the statement is true and not misleading, and due process precludes W&C from arguing that Mr. Rosette did not, in fact, have a substantial role in the litigation. W&C's responses are unavailing.

The Statement Is Puffery. The key to assessing whether a statement is puffery is asking whether it is a verifiable statement of fact. *See Davis v. Avvo, Inc.*, 345 F. Supp. 3d 534, 542 (S.D.N.Y. 2018). The Motion explained that whether an attorney litigated "successfully" is inherently subjective and therefore cannot be unverified, partly because success is often based on client goals. (Mot. at 14–16.) In response, the Opposition cites a series of inapposite decisions that looked at objective, verifiable statements, none of which decide whether calling something "successful" is puffery. (Opp. at 18–19.) The Opposition goes on to cite authorities on a different subject altogether: opinion. (*Id.* at 19.) Opinions and puffery are not the same. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731–72 (9th Cir. 1999) (analyzing opinion and puffery).

The Statement Was True. Mr. Rosette's biography included the challenged statement as early as May 2011. (Dkt. No. 348-4 at 6–7.) In May 2011, Rosette had secured a preliminary injunction for Pauma that was anticipated to save Pauma $100 million. (*Id.*) There was nothing false about including that in his biography.

The Opposition tries to dissect the statement and ascribe W&C's preferred meaning to each word (Opp. at 1–3, 20–23), but "in determining facial falsity the court must view the face of the statement in its entirety, rather than examining the eyes, nose, and mouth separately and in isolation from each other." *Southland Sod*, 108 F.3d at 1139. Contrary to W&C's suggestion, the statement does not say that Mr. Rosette litigated the case from start to finish on his own, nor does it take credit

for a restitutionary judgment W&C secured years later. (Opp. at 20–23.) And W&C's later procedural motion to set aside a stay of the injunction pending appeal is a straw man. (Mot. at 17.) The appeal was short lived, and the Ninth Circuit's remand order, which preserved the injunction that Rosette obtained, had nothing to do with the stay pending appeal. (*Id.* at 5.) Finally, W&C's assertion that Rosette could only take credit for the preliminary injunction, but not its continuing effects beyond the litigation once it formed part of the final judgment, is just semantics. (Opp. at 22.) Rosette obtained the relief as described in the statement.

The Statement Was Not Misleading. Rosette's Motion explained that W&C has no evidence that the statement was misleading. (Mot. at 19.) The Opposition does not address this argument or identify any disputed material facts. The Court should therefore summarily adjudicate that the statement was not misleading.

W&C's Claim of Falsity Is Barred by Due Process. The Motion also explained that W&C's claim must be terminated because the falsity prong puts directly at issue privileged communications concerning Pauma, and Pauma (represented by W&C) refuses to waive the privilege. (Mot. at 20–22.) Due process does not allow a plaintiff to bring a claim that calls for a defense through the use of another party's privileged material. (*Id.*) W&C's only response is the suggestion that Rosette should have served a subpoena on Pauma. (Opp. at 24.) But that would not solve the problem—tribes are not subject to the Court's subpoena power and Rosette has the documents in its possession anyway. The issue is that the privilege, which Pauma cannot be forced to waive, prevents Rosette from using the documents to defend against W&C's claim. Rosette did exactly what Magistrate Judge Berg instructed to obtain permission from Pauma, and Pauma (represented by W&C) declined to permit Rosette's use of client materials to defend the case. (Dkt. No. 241 at 2.) It is now a question of due process.

D. W&C Has No Proof of Materiality.

The Opposition's professed "proof" of materiality is not evidence, just more

attorney argument. (Opp. at 11.) Rule 56 requires citation "to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A). "[A]rguments and statements of counsel are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment." *Barcamerica Int'l USA Tr. v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002).

W&C claims that attorney advertising is material as a matter of law, but none of its authorities say that. W&C asserts that one district court has held that attorney advertising is *per se* material to consumers (Opp. at 11), but in *Bennett v. Zydron*, 2017 WL 9478505 (E.D. Va. Aug. 17, 2017), all the court held was that the complaint adequately pleaded a claim for false advertising under Rule 8. *Id.* at *7–8. The court found that the plaintiff sufficiently alleged that the attorney advertisements were literally false and material, not that they were ***in fact*** or ***as a matter of law*** false or material. *Id.*[3] W&C also urges the Court to find a legal presumption of materiality for attorney advertising by citing *Rubenstein v. Florida Bar*, 72 F. Supp. 3d 1298, 1303 (S.D. Fla. 2014). (Opp. at 11–12.) Undercutting W&C's claim that consumer surveys are not appropriate in legal advertising cases, *Rubenstein* describes a survey "on public perception of lawyer advertising" in Florida that found a majority of consumers there thought "past results are an important attribute in choosing a lawyer." *Id.* That survey is not in evidence, and it does not establish materiality of attorney advertisements as a matter of law. It also does not address whether consumers rely on attorney advertising when hiring lawyers. The evidence in this case is that they do not. (Dkt. No. 322-63 at 2301.)

Finally, W&C asks the Court to find that the challenged statement was material to Quechan, despite every piece of evidence being to the contrary, based on generalizations about other tribes. W&C tells a story about how one tribe chose its attorneys (Opp. at 11–12), apparently drawing its information on the docket in

[3] W&C has no support for its claim that consumer surveys, which are typically used to prove materiality, "are really just meant for non-legal cases[.]" (Opp. at 11 n.2.)

Arizona v. Tohono O'odham Nation. It also refers to testimony from two "experts," Mr. George Forman and Mr. Anthony Miranda, both of whom claim that all tribal leaders are likely to be influenced by attorney advertising. (Opp. at 14–15.) Their testimony is riddled with problems (*see* Dkt. No. 332), but even if it is credited, neither opines about why Quechan fired W&C and neither considered the undisputed evidence in this case that Quechan's new leadership was shopping for lawyers to replace W&C due to the firm's cost and underwhelming performance before ever meeting Mr. Rosette. Likewise, how the Tohono O'odham Nation selected its attorneys is not relevant to why Quechan decided to fire W&C and hire Rosette. W&C's stereotyped views of how all Indians purportedly think do not overcome actual proof that the statement was not material or deceptive to Quechan.

E. W&C's Claim Is Barred by Laches.

In a futile attempt to avoid the equitable doctrine of laches, W&C argues that the first six years that the biographical statement was on Rosette's website should not count. (Opp. at 24–25.) W&C's argument ignores binding Ninth Circuit precedent: "the presumption of laches is triggered if any part of the claimed wrongful conduct occurred beyond the limitations period. To hold otherwise would effectively swallow the rule of laches, and render it a spineless defense." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 837 (9th Cir. 2002). "[T]he limitations period runs from the time the plaintiff knew or should have known" about the allegedly wrongful conduct. *Id.* at 838. W&C has no response to the fact that it represented Pauma in 2010, when Mr. Rosette testified under oath about his role in securing Pauma's preliminary injunction. (Mot. at 25.) W&C has no evidence that it was unaware of the biographical statement before 2017, either. All that W&C argues is that, when it was fired by Quechan, it looked for a reason to sue Rosette. (Opp. at 25.) But that is not what its partner testified. Mr. Cochrane refused to answer when he learned about the statement, only answering that it was in anticipation of litigation. (Dkt. No. 322-61 at 128:1–130:10.) W&C thus fails to

overcome the rule that "if the claim is filed after the analogous limitations period has expired, the presumption is that laches is a bar to suit." *Jarrow*, 304 F.3d at 837. W&C has no real response to Rosette's arguments about prejudice and its references to unclean hands and public policy have no record support. (Opp. at 25.)

F. W&C's Reliance on Struck Allegations and Irrelevant Accusations Concerning Another Tribe Is Highly Improper.

W&C's Opposition resorts to the same harassing tactics that it has employed throughout the litigation, but this time it ups the ante by dragging in another tribe that it is currently working to destabilize. The Opposition once again repeats irrelevant and baseless character attacks that Judge Curiel struck three times. (*Compare* Dkt. Nos. 172 at 33, 217 at 37, 285 at 19–20, *with* Opp. at 16–17.) Judge Curiel warned that any further disobedience of the Court's orders would "warrant remedial measures in the future." (Dkt. No. 285 at 19–20.) W&C finally needs to be held accountable for flouting the Court's orders. Equally troubling is W&C's use of this case as a platform to foment intra-tribal strife at Tonto Apache, another Rosette client. (Opp. at 18.) W&C submitted the declaration of an ousted, former tribal councilman of Tonto Apache that has absolutely no relevance to this case. (Dkt. No. 348-3.) The declaration is six pages of immaterial and unsupported accusations against Rosette and the Tonto Apache government. W&C's transparent effort to legitimize its interference at Tonto Apache should not be tolerated.

III. Conclusion

The Opposition offers nothing more than speculation and misstatements of law. Rosette respectfully requests that the Court grant its Motion and end this case.

Dated: November 6, 2020

Respectfully Submitted,

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