No. 23-55166

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAMS & COCHRANE, LLP,
Plaintiff-Appellant,

v.

SHARON ROSETTE; ROSETTE, LLP; ROSETTE & ASSOCIATES, PC,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
Case No. 3:17-cv-01436-RSH-DEB
The Honorable Robert S. Huie, District Judge

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees Rosette & Associates, PC and Rosette, LLP hereby state that Defendant-Appellee Rosette & Associates, PC has no corporate parents. Defendant-Appellee Rosette, LLP is owned by its law partners. No publicly held corporation owns 10% or more of Rosette & Associates, PC's or Rosette, LLP's stock. Defendant-Appellee Sharon Rosette is an individual and thus not subject to Rule 26.1.

Dated: October 16, 2023

By: */s/ Brittany Rogers*
Brittany Rogers

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Abbreviation	Description
Dkt. __	Docket No. __, *Williams & Cochrane, LLP v. Sharon Rosette, et al.*, Case No. 3:17-cv-01436-RSH-DEB (S.D. Cal.)
__-ER-__	Williams & Cochrane, LLP's Excerpts of Record (Dkt. 20-1, filed Aug. 16, 2023)
OB	Opening Brief of Appellant Williams & Cochrane, LLP
Pauma	Pauma Band of Luiseño Mission Indians
Quechan	Quechan Tribe of the Fort Yuma Reservation
Rosette	Defendants-Appellees Sharon Rosette, Rosette, LLP, and Rosette & Associates, PC
__-SER-__	Rosette's Supplemental Excerpts of Record
W&C	Plaintiff-Appellant Williams & Cochrane, LLP

INTRODUCTION

This appeal begins and ends with one question: Did Quechan fire W&C and hire Rosette because of one sentence in Robert Rosette's attorney biography about his role in a lawsuit that he filed on behalf of Pauma (the "Pauma Sentence")? Every scrap of evidence pointed to a clear answer: No. In sworn declarations, Quechan's leaders testified that this lone sentence had nothing to do with their decision to hire Rosette and fire W&C. They never discussed the Pauma Sentence, either during their initial meeting with Mr. Rosette or when they decided to hire his firm. Instead, "the unequivocal and uncontradicted evidence" showed that the Pauma Sentence did not play "any role whatsoever in the decision." 1-ER-36. Quechan hired Rosette for three reasons, none connected to the Pauma Sentence: (1) Rosette had years of experience negotiating tribal gaming compacts, the kind of work Quechan needed done; (2) Quechan was unhappy with W&C's high fees and with the pace of its work; and (3) Rosette offered to charge fees dramatically lower than W&C's fees.

W&C presented no contrary evidence. None. It would have been logical for W&C to depose any member of Quechan's Tribal Council who

decided to fire W&C, as the District Court noted, but W&C failed to take a single deposition in the case. 1-ER-47. So the District Court's decision was simple: "W&C's claimed harm—being fired by the Quechan Tribe—was not caused by the Rosette Defendants." 1-ER-36. Because causation is a necessary element of W&C's sole claim against Rosette—for false advertising under the Lanham Act—that claim necessarily fails, as the District Court found.

Lacking any evidence to support its claim on appeal, W&C is left with arguments that ignore the evidence, contradict clear Supreme Court and Ninth Circuit precedent, and conjure nonexistent legal standards. *Lexmark International v. Static Control Components*, which W&C declined to address in its Opening Brief or in its briefing below, requires W&C to prove an "economic or reputational injury flowing ***directly*** from the deception wrought by the defendant's advertising." 572 U.S. 118, 133 (2014).[1] W&C turns *Lexmark* on its head and argues that it can recover monetary damages measured by its failed relationship with Quechan so long as it can show that others in the "relevant marketplace" were deceived. OB30-40. But it presented no

[1] Emphases added throughout unless otherwise noted.

evidence to that effect and did not offer any admissible expert testimony on the subject.

W&C also argues that the District Court should have analyzed the falsity element first because, in W&C's view, if the falsity domino falls, all other Lanham Act elements fall with it. This Court's jurisprudence makes clear that the presumptions W&C tries to invoke do not apply in this case and do not stack together to excuse W&C from proving its false-advertising claim.

Finally, W&C urges this Court to overrule a discovery order applying California privilege law in a multi-party dispute among W&C, on the one hand, and Rosette and Quechan, on the other. W&C sought to compel "the production of communications between Quechan and Rosette over which Quechan had asserted the attorney-client privilege." 1-ER-54. Because all but one claim in the case arose under California law, and because discovery primarily centered around a contract dispute between Quechan and W&C subject to California law, the Magistrate Judge and then the District Court Judge correctly applied California privilege law.

W&C cites no binding authority suggesting this decision was clear error or that applying federal privilege law would have somehow changed the outcome. As the Magistrate Judge stated on the record, W&C's various privilege arguments were "beyond reason," lacked "even a hint" of evidence, and were "so far afield and such a stretch, [he had] trouble even stating that [W&C's] claim was made in good faith." 1-ER-89, 93-94. W&C's arguments are equally flawed under federal law.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 15 U.S.C. § 1051 *et seq*. Rosette otherwise concurs with W&C's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the District Court correctly held that because "W&C has no evidence that the Pauma Sentence influenced the Quechan Tribe's decision—and because the evidence establishes that it did ***not*** influence that decision—its Lanham Act claim fails for lack of proximate causation." 1-ER-35 (emphasis original).

2. Whether the District Court correctly concluded that causation and injury cannot be presumed under the Lanham Act "[i]n the absence of evidence[.]" 1-ER-41.

3. Whether the District Court correctly determined that it was not clear error for the Magistrate Judge to apply California privilege law to a multi-party discovery dispute when all but one claim in the case arose under California law.

STATEMENT OF THE CASE

I. Factual Background

A. The Rosette Firm

In 2004, Robert Rosette[2] founded law firm Rosette & Associates, PC (later Rosette, LLP). 3-SER-798. The Rosette firm exclusively represents tribes and tribal entities and has represented more than three dozen tribes in various state and federal legal disputes. *Id.*; 2-ER-205. It has represented at least two dozen tribes in negotiations over gaming compacts, compact provisions, compact amendments,

[2] W&C filed this lawsuit against Defendants Robert Rosette, Rosette & Associates, PC, and Rosette, LLP. Following Mr. Rosette's death in September 2022, his surviving wife, Sharon Rosette, was substituted for Mr. Rosette in this action. 2-ER-157-60.

binding compact interpretations, and California Gambling Control Commission compact rule promulgations. 2-ER-205.

B. The Pauma Litigation

Pauma entered into a gaming compact with the State of California ("California") in 1999 and then executed an amendment in 2004 that allowed Pauma to operate additional slot machines. 1-SER-85-86. Under the 2004 amendment, Pauma was required to pay fees to California that were nearly 25 times higher than it had paid under the 1999 compact for the same number of machines. 1-SER-88.

In 2007, Pauma retained Mr. Rosette to negotiate with state and local governments about tribal gaming. 2-ER-206. Pauma asked Mr. Rosette in 2008 to resolve a dispute with California over Pauma's 2004 compact amendment. *Id.* Leveraging his knowledge of California's tribal-state gaming compact history, Pauma's factual and legal situation, and recent trends in federal and state law, Mr. Rosette developed a legal strategy, litigation theories, and claims to challenge the validity of the 2004 amendment. *Id.*; 1-SER-83-91, 192-96. Mr. Rosette attested that he led pre-lawsuit meetings with California, including one in January 2009, during which Mr. Rosette explained

Pauma's potential litigation strategy: the 2004 amendment was a nullity because California had misrepresented the total number of available gaming machine licenses. 2-ER-206-07; 1-SER-91. All of this happened before Cheryl Williams and Kevin Cochrane—the two attorneys who now practice as W&C—were hired as associates by the Rosette firm in February 2009. 2-ER-206-07; 2-SER-558.

Ms. Williams and Mr. Cochrane admitted in deposition that when they joined the Rosette firm, neither had experience working on tribal gaming compact matters as licensed attorneys. 2-SER-504-14, 517-21, 550-55, 561-65. Mr. Rosette remained the partner in charge of the Pauma relationship and the Pauma litigation after hiring Ms. Williams and Mr. Cochrane. 2-ER-207. Following Mr. Rosette's direction and effectuating his strategy, Ms. Williams, Mr. Cochrane, and other attorneys at the Rosette firm worked on the Pauma complaint. *Id.* Mr. Rosette drafted portions of the Pauma complaint and reviewed and revised the complaint and other filings, as he testified in 2010 in a prior lawsuit. *Id.*; 1-SER-202-03. Mr. Rosette's name appeared at the top of each Rosette pleading and filing in the Pauma litigation. *See, e.g.*, 1-SER-92, 119.

A primary objective of the Pauma litigation was to restore the terms of the 1999 compact and force California to the bargaining table. 1-SER-192-96; 2-SER-524-26, 573-74. To achieve this goal, Rosette filed a motion for preliminary injunction in February 2010, which was granted in April 2010, preventing California from enforcing the higher payments required by the 2004 amendment and allowing Pauma to pay under the 1999 compact terms. 1-SER-119-49; 2-ER-207. The preliminary injunction secured by the Rosette firm would save Pauma approximately $100 million over the remaining life of the 2004 compact. 2-ER-207; 1-SER-259. California appealed the order, 1-SER-150-61, then moved to stay the injunction; the Rosette firm opposed, and the motion was denied in May 2010, 1-SER-162-63. Days later, Ms. Williams and Mr. Cochrane resigned from the Rosette firm to strike out on their own. 3-SER-705.

The Rosette firm litigated the Pauma case for another month, during which it opposed California's renewed motion to stay the injunction pending appeal. 1-SER-164-89. In June 2010, Pauma terminated the Rosette firm and hired a firm newly founded by Ms. Williams and Mr. Cochrane, W&C. 3-SER-705. In July 2010, the Ninth

Circuit entered a procedural order granting California's motion to stay. *Id.* W&C moved for relief, and the stay was set aside. 3-SER-706. In November 2010, the Ninth Circuit remanded the case in light of then-recent precedent, and the preliminary injunction remained in effect. *Id.* In March 2013, based on the theory that Mr. Rosette developed and that the original complaint articulated, Pauma—then represented by W&C only—received a judgment for $36 million to compensate it for past overpayments. 1-SER-217-47.

C. The Pauma Sentence

As early as May 9, 2011—two years before Pauma obtained a monetary damages award against California—Mr. Rosette's biography and certain Rosette promotional materials began to include a sentence about Mr. Rosette's and the Rosette firm's work for Pauma. 3-ER-529, 550-54. The Pauma Sentence 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." 3-ER-553; 1-SER-212.

Mr. Rosette wrote the Pauma Sentence because he was proud of his and his firm's role in helping Pauma save approximately $100 million by securing a preliminary injunction against enforcement of the 2004 amendment. 2-ER-208. Critically, the Pauma Sentence did not refer to the 2013 judgment or the $36 million in damages awarded to Pauma. 3-ER-553; 1-SER-212. Nor could it have. Neither occurred until two years ***after*** Mr. Rosette wrote the Pauma Sentence.

D. Rosette's Introduction to Quechan

Mr. Rosette carried on with his law practice and, in 2017, was representing the Tonto Apache Tribe of Arizona ("Tonto Apache") in gaming compact negotiations with the State of Arizona ("Arizona"). 3-SER-798. Tonto Apache reached out to other Arizona tribes, including Quechan, to attempt to build a coalition. *Id.*; 2-SER-441-42. Tonto Apache's president arranged for Mr. Rosette to meet with Quechan President Keeny Escalanti Sr. and Quechan Councilman Mark William White II on June 16, 2017, to discuss the negotiations with Arizona. 3-SER-798-99; 2-ER-213, 218-19. Mr. Rosette had not

previously met either Quechan leader. 3-SER-799-800; 2-ER-213, 218-19.

After discussing the Arizona negotiations, Quechan's leadership asked Mr. Rosette about his experience with compact negotiations in California. 3-SER-800; 2-ER-213, 219. That experience was extensive. Rosette had 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. 2-ER-205. Asked by Quechan's leadership about the cost for resolving Quechan's ongoing compact negotiations, Mr. Rosette stated that he could handle both Arizona and California compacts for a flat fee of $10,000 a month. 2-ER-209, 214, 220. As multiple sworn affidavits from Mr. Rosette, President Escalanti, and Councilman White attest, at no time during the meeting did the parties discuss Pauma, the Pauma litigation, or Mr. Rosette's or the Rosette firm's representation of Pauma or involvement in the Pauma litigation. 2-ER-209, 213, 219. President Escalanti and Councilman White attested that Mr. Rosette did not provide them with his attorney biography or any Rosette marketing materials before or during the

June 16, 2017 meeting, and neither leader reviewed Rosette marketing or biography materials before that meeting. 2-ER-213, 219.

Shortly after the meeting, Quechan's Tribal Council invited Mr. Rosette to present at a Council meeting because Quechan was interested in replacing W&C due to that firm's high fees and the length of time it was taking to complete negotiations with California. 2-ER-214, 220. Both President Escalanti and Councilman White attested that during the Tribal Council's consideration of Rosette, the Council did not discuss Pauma, the Pauma litigation, Rosette's representation of Pauma or involvement in the Pauma litigation, or any Rosette marketing materials. 2-ER-214, 220. Quechan did not wish to litigate with California; its goal was to complete compact negotiations quickly and obtain a gaming compact by the end of the 2017 legislative session. 2-ER-215, 221.

The Tribal Council was impressed with Mr. Rosette's experience in negotiating compacts in California and very much liked his willingness to work on both the Arizona and California compacts for approximately 20% of the monthly fees Quechan was paying to W&C for California negotiations alone. 2-ER-214-15, 220-21. On June 26, 2017,

Quechan's Tribal Council unanimously approved Rosette's engagement and terminated W&C. 2-ER-373, 379; 3-ER-713-15.

E. Quechan's Dissatisfaction With W&C

President Escalanti and Councilman White attested that for months before their June 2017 meeting with Mr. Rosette, Quechan had been frustrated with and intended to terminate W&C. 2-ER-212, 214, 218, 220. After Quechan's newly elected leadership was sworn into office in March 2017, they became concerned about the ongoing fees W&C was charging and the length of time it was taking to complete negotiations. 2-ER-212, 214, 218, 220. W&C had charged Quechan a flat fee of $50,000 per month since October 2016, and insisted that it was also entitled to a contingency fee of over $6 million, even if there was no litigation. 2-SER-437-38, 538-39; 1-SER-287.

In April, Quechan's leadership raised questions about W&C's high fees despite the firm's apparent inaction. 1-SER-287-88; 2-SER-436. The State had sent W&C a draft compact in December 2016, but W&C did not respond to that draft until April 13, 2017. 2-SER-291-435. And when W&C finally did respond, it did so by sending a redlined version that, according to California's lead negotiator at the time—Joginder

Dhillon, Esq.,[3] who was then employed by the Office of the Governor of California as the Senior Advisor for Tribal Negotiations—"was nearly identical to" California's December 2016 draft. 2-SER-446. Because of these concerns, Quechan contacted another attorney in April 2017 to explore the possibility of re-negotiating W&C's fee agreement. 2-SER-440.

W&C claims that Quechan's compact would have been finalized by the end of June 2017. OB15-16. But in June 2017, W&C was nowhere near a final negotiated compact, as Mr. Dhillon and Sara Drake, Senior Assistant Attorney General in the California Department of Justice, testified. 2-SER-447, 477-79, 482-85, 498-99. Mr. Dhillon confirmed under oath that when Quechan terminated W&C, there were "significant unresolved substantive and procedural issues relating to the compact[.]" 2-SER-447. For instance, W&C had not even discussed a key issue with California: whether Quechan would need to pay back $4 million in missed compact payments. 2-SER-470-74, 488-89.

[3] In January 2019, the Honorable Joginder Dhillon was appointed to the California Superior Court bench where he continues to serve.

Mr. Rosette concluded the California negotiations by the end of August 2017, securing substantial benefits for Quechan. 2-ER-373-74, 379-80. Quechan's final executed compact was not "substantively identical" to the draft compact that W&C sent to California on June 21, 2017, as W&C claims. OB16. There were substantive differences, including a different revenue-sharing structure for payments to non-gaming tribes. *Compare* 1-SER-31-33 (June 21 W&C draft), *with* 3-SER-790-94 (final compact).

II. Procedural History and Decision Below

A. W&C's Allegations

W&C filed this lawsuit less than a month after it was terminated by Quechan. As the District Court's docket shows, W&C spent the following five years publicly pursuing a personal and professional vendetta against Mr. Rosette. 4-ER-889-941.

Despite its name, the operative Fourth Amended Complaint is W&C's ***sixth*** pleading. *See* Dkts. 1, 5, 39, 100, 174, 220. Over the years, W&C asserted or tried to assert against Rosette several RICO and RICO-conspiracy claims, as well as state-law claims for intentional interference with contractual relationship, intentional interference with prospective economic advantage, and—after briefly recruiting a faction

at Quechan—legal malpractice. *See* Dkts. 1, 5, 39, 97, 100, 135, 174, 220. W&C also alleged state-law contract claims against Quechan premised on Quechan's firing of W&C. 3-SER-752-56.[4]

W&C filled its pleadings with irrelevant and false allegations personally attacking Mr. Rosette, his family, and his law firm, both before and after his death last year. The District Court struck the worst of these allegations only to see them re-appear in W&C's briefing. *See* Dkt. 217 at 27; Dkt. 285 at 19-20. The District Court sought to rein in W&C's antics, chastising the "level of acrimony" in W&C's pleadings and its frequent attempts to "clothe [its] legal contentions in personal and sarcastic barbs." Dkt. 285 at 20 n.9. "This type of lawyering," the District Court noted, was "not only disrespectful to the opposing parties and counsel, but to the Court as well. W&C's tone and style impede engagement with the substance of W&C's arguments, as the Ninth Circuit has previously noted with respect to W&C's briefing." *Id.*[5] These warnings went largely unheeded.

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[4] In November 2022, W&C and Quechan settled and stipulated to voluntary dismissal of all claims and counter-claims between them. Dkt. 389.

[5] W&C's tactics continue to plague this appeal. For example, without evidence or a logical explanation, W&C's Opening Brief accuses counsel

Every claim against Rosette, except one, was either rejected by the District Court or abandoned by W&C before summary judgment. After four rounds of motions to dismiss, W&C was left with a single claim against Rosette for false advertising under the Lanham Act, 15 U.S.C. § 1125(a): W&C alleged that Rosette violated the Lanham Act by publishing the Pauma Sentence. Litigation proceeded in conjunction with W&C's claims against Quechan.

This lone claim boils down to W&C's belief that Quechan fired it and hired Rosette ***because of*** the Pauma Sentence. OB3, 14-17; 3-SER-699, 724-30, 758; 1-ER-34. W&C claims that Quechan leaders saw and were deceived by the Pauma Sentence, causing Quechan to fire W&C and hire Rosette to handle Quechan's compact negotiations with California. OB14-17; 3-SER-758. On this suspicion alone, W&C claims it is entitled to approximately $19 million in trebled damages from Rosette—three times the contingency fee that W&C says it expected

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of trying to interfere with settlement discussions between W&C and Quechan. OB7, 25. But Rosette was not part of those discussions, and Rosette's counsel merely sent an email trying in good faith to resolve what should have been a simple substitution following Mr. Rosette's death.

from Quechan. 3-SER-758, 760. This is W&C's only theory of damages. 3-SER-758; 2-SER-463-65; 1-ER-36.

B. Discovery

During the eight-month fact-discovery period, W&C chose not to depose a single witness. 1-ER-47; 1-SER-3-4. Although President Escalanti and Councilman White were once named as individual defendants and submitted sworn affidavits early in the case, W&C never subpoenaed their depositions. 1-SER-3. W&C subpoenaed three other fact witnesses and noticed Mr. Rosette's deposition, but it ultimately canceled each deposition. 1-SER-3-4.[6]

W&C also brought numerous discovery motions (Dkts. 261, 272, 274) and informal requests, leading to six discovery conferences before Magistrate Judge Michael S. Berg (Dkts. 240, 249, 260, 262, 265, 283) and six discovery orders (Dkts. 241, 251, 263, 266, 296; 1-ER-63-68). The only discovery order at issue in this appeal is a dispute over privilege.

[6] W&C canceled each deposition between one and six days before it took place, resulting in significant and unnecessary costs for Defendants. 1-SER-3-4.

During discovery, W&C served document requests on Rosette calling for privileged communications with its client, Quechan. Given the significant volume of privileged communications that exists when a lawyer's client communications are sought, Rosette—like W&C—served a categorical privilege log in January 2020. 3-SER-688. After W&C demanded an itemized privilege log, Rosette obliged and provided further details, incurring significant expense. 3-SER-689-90.

In March 2020, W&C filed simultaneous discovery disputes with Magistrate Judge Berg concerning Rosette's and Quechan's privilege logs. 3-SER-639-86. In both filings, W&C broadly challenged Defendants' withholding of attorney-client communications between Quechan, the client, and Rosette, its counsel. *Id.* Relevant here, W&C argued that: (1) Quechan waived privilege over its communications with Rosette by filing counter-claims against W&C and seeking damages; (2) Quechan waived privilege via the crime-fraud exception; (3) privilege was waived on account of the "successor attorney's animus"; (4) no privilege attached to communications between Rosette and Quechan before they executed a formal engagement letter; and (5) no privilege

attached to communications between Rosette and Quechan concerning the current litigation. 3-SER-662-75.

In April 2020, Magistrate Judge Berg held oral argument. During the hearing, Magistrate Judge Berg stated that he would apply California law to the dispute, reasoning that: (1) Federal Rule Evidence 501 provides that "state law governs privilege regarding a claim or defense for which state law supplies the rule of the decision"; (2) W&C's state-law claims outweighed the only federal law claim against Rosette; (3) W&C's briefing failed to address whether federal or state privilege law applied to the dispute; and (4) the requested discovery pertained to W&C's state-law claims against Quechan. 1-ER-72-75. At the hearing, Magistrate Judge Berg addressed each of W&C's arguments in turn and found that each lacked merit.[7] He rejected W&C's invocation of the crime-fraud exception, concluded that the "successor attorney animus" exception did not exist, and rejected W&C's argument that no attorney-

[7] Most of the District Court's discussion on the record addressed W&C's dispute with Quechan, where W&C largely raised the same arguments. The District Court's commentary was equally applicable to the Rosette dispute, and the District Court repeatedly referred back to its previous analysis. *See, e.g.*, 1-ER-135 ("I don't think I have to further reiterate my disfavor with [W&C] even making this argument.").

client privilege existed prior to the formation of the attorney-client relationship. 1-ER-95-98.

Magistrate Judge Berg issued an order the following day, holding that communications between Rosette and Quechan were protected by the attorney-client privilege. 1-ER-63-68. Two weeks later, W&C filed a Motion for Reconsideration, seeking review one issue: Magistrate Judge Berg's application of California law. 3-SER-631-38.

In June 2020, the District Court, the Honorable Gonzalo P. Curiel, presiding, issued a 13-page Order denying W&C's Motion for Reconsideration, finding that the application of California law to the parties' privilege dispute was not "clearly erroneous or contrary to law." 1-ER-55. Judge Curiel provided an overview of W&C's reliance on California privilege law throughout the litigation and stressed that "only one claim for relief against Rosette under the federal law" remained, while "all remaining claims for relief are brought under California state law against Quechan." 1-ER-52-54, 56. Finding no reason to overturn Magistrate Judge Berg's decision, Judge Curiel acknowledged that nothing in Federal Rule of Evidence 501 mandates the application of federal privilege law to claims of privilege in a federal

question case with pendent state-law claims, and that federal courts are split on the question. 1-ER-59-61. Judge Curiel also noted that the Ninth Circuit has not decisively weighed in. *Id.*

C. Motion for Summary Judgment and Appeal

In September 2020, the parties cross-moved for summary judgment. Two years later, after several judicial transfers, the Honorable Robert S. Huie granted Rosette's Motion for Summary Judgment and denied W&C's Motion on the basis that W&C's Lanham Act claim failed for lack of proximate causation. 1-ER-34-47.

The District Court concluded that there was "a complete absence of evidence that the Pauma Sentence contained in the Rosette Bio caused the Quechan Tribe's decision to replace W&C." 1-ER-36. The only evidence showed that Quechan's "decision was made based on the fact that Rosette was offering to do the legal work at a fraction of the cost being charged by W&C, and that the Tribal Council was impressed with Rosette's experience in negotiating compacts[.]" *Id.* The District Court concluded that "W&C's claimed harm—being fired by the Quechan Tribe—was not caused by the Rosette Defendants." *Id.*

The District Court first considered and rejected W&C's factual arguments, which relied on no more than "purported evidence" and mere "articulation of suspicion." 1-ER-37-39. The District Court then systematically explained why W&C's hoped-for legal presumptions could not "change day into night"—that is, W&C could not "transform the evidence that the Pauma Sentence did not cause" Quechan to fire W&C "into a legal fiction that it did." 1-ER-41. Even if W&C's presumptions did apply to causation, the District Court concluded that Rosette had met both burdens of proof and production. *Id*. Due to the "unequivocal and uncontradicted evidence on the issue of causation," the District Court declined to address the other elements of the Lanham Act claim. 1-ER-36.

W&C timely appealed. 4-ER-885. W&C's Notice of Appeal identified 19 court orders, but its Opening Brief only discusses the District Court's Summary Judgment Order (1-ER-4-49); Order Denying Motion for Reconsideration (1-ER-50-62); and Order on Joint Motions for Determination of Discovery Disputes (1-ER-63-68). By failing to raise arguments as to the others, W&C waived appellate review of those orders. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We

review only issues which are argued specifically and distinctly in a party's opening brief.").

SUMMARY OF ARGUMENT

I. The District Court correctly granted summary judgment for Rosette, holding that "[b]ecause W&C has no evidence that the Pauma Sentence influenced the Quechan Tribe's decision—and because the evidence establishes that it did ***not*** influence that decision—its Lanham Act claim fails for lack of proximate causation." 1-ER-35 (emphasis original). That conclusion rests on a thorough analysis of the evidence and a straightforward application of Supreme Court and Ninth Circuit precedent. None of W&C's critiques call the District Court's holding into question.

A. The crux of W&C's causation theory is that the Pauma Sentence misled Quechan's leaders, causing Quechan to fire W&C and hire Rosette. The undisputed evidence shows that Quechan's leadership was dissatisfied with the pace, cost, and quality of W&C's work months before Quechan leaders even met Rosette and that leadership wanted to replace W&C. Neither the Pauma Sentence nor

Rosette's experience in the Pauma litigation played any role in Quechan's decision to hire Rosette or fire W&C.

B. W&C cannot rely on the "relevant marketplace"—contrary to all evidence here—to prove that the Pauma Sentence damaged its relationship with Quechan. While W&C speculates that someone, somewhere, ***might*** have been deceived by the Pauma Sentence, that is not enough: A Lanham Act plaintiff must "show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising." *Lexmark*, 572 U.S. at 133. And though W&C now pins its hopes on this notion, it never tried to prove how the "relevant marketplace" would react to the Pauma Sentence and does not seek damages based on a generalized theory of diverted clients. Instead, W&C submitted reports from two "expert" witnesses whose testimony was unsupported, speculative, and disconnected from the "relevant marketplace." All evidence at summary judgment showed that Quechan did not fire W&C because of the Pauma Sentence.

C. The District Court was not required to analyze every element of W&C's Lanham Act claim because the failure of proof on causation was dispositive. Nor was the District Court required to

evaluate the claim's elements in any particular order. Courts frequently grant summary judgment to a defendant where a plaintiff fails to establish a single element of a claim—without considering the remaining elements. And the array of presumptions that W&C urges the Court to adopt are either inapplicable here or unsupported by the authorities W&C cites, as the District Court correctly concluded.

D. This Court can affirm summary judgment for Rosette on the independent basis that W&C failed to raise a genuine dispute of material fact as to falsity. The Pauma Sentence referred to Mr. Rosette's work on a preliminary injunction for Pauma, a successful litigation effort that he indisputably led.

II. The District Court correctly applied California privilege law to a dispute between Rosette and Quechan on the one hand, and W&C on the other, where W&C sought production of attorney-client communications between Rosette and Quechan. Magistrate Judge Berg first applied California law to the discovery dispute, after carefully analyzing caselaw and the Federal Rules of Evidence. In a thoughtfully reasoned opinion, Judge Curiel denied W&C's Motion for Reconsideration.

A. The District Court's decision was not clear error or contrary to law. The application of state privilege law was appropriate under Federal Rule of Evidence 501 because state law provided the rule of decision for all of W&C's claims against Quechan, including claims for which W&C sought discovery. These claims outweighed the sole federal claim remaining in the case at the time. And the District Court's application of state privilege law cannot be clearly erroneous because the question of applicable privilege law in federal question cases with pendant state-law claims is not wholly settled.

B. Any error was harmless because the application of federal privilege law would not have changed the outcome of the Motion, let alone the outcome of case.

ARGUMENT

I. The District Court Correctly Granted Rosette's Motion for Summary Judgment.

The District Court correctly granted Rosette's Motion for Summary Judgment because there is no evidence that the Pauma Sentence caused Quechan to fire W&C. "A grant of summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Frlekin v.*

Apple, Inc., 979 F.3d 639, 643 (9th Cir. 2020). A defendant need only "produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Rosette negated an essential element of W&C's Lanham Act claim—causation—so judgment in Rosette's favor appropriately followed.

A. W&C Has No Evidence of Causation.

The District Court correctly held that, because W&C failed to produce any evidence that the Pauma Sentence caused Quechan to fire W&C, W&C could not prove causation in its false-advertising claim against Rosette under the Lanham Act.

To prevail on its claim, W&C must prove: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of 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).

In 2014, the Supreme Court clarified that plaintiffs bringing Lanham Act false-advertising claims must plead and 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. And that claimed injury must flow "directly from the deception wrought by the defendant's advertising." *Id.* at 133. The Supreme Court emphasized that a Lanham Act plaintiff cannot "obtain relief without ***evidence*** of injury proximately caused by [the defendant's] alleged misrepresentations." *Id.* at 140 (emphasis original). These requirements foreclose W&C's effort to overrule the District Court's decision. And W&C has no answer for them—likely why W&C never mentioned *Lexmark* in its Opening Brief and did not address it below.

All of the evidence here shows that the Pauma Sentence did not mislead Quechan's leaders or cause them to fire W&C. As the District

Court explained, "there is a complete absence of evidence that the Pauma Sentence contained in the Rosette Bio caused the Quechan Tribe's decision to replace W&C. Nor is there any evidence that any member of the Tribal Council was even aware of the Pauma Sentence or the Rosette Bio at the time of that decision." 1-ER-36.

The undisputed evidence—including testimony and affidavits from Quechan President Escalanti, Councilman White, and California's lead negotiator, Mr. Dhillon—establishes the following:

- Months before meeting or considering Rosette, the Tribal Council wanted to replace W&C because it had concerns about W&C's fees and lack of progress. 2-ER-212, 214, 218, 220. Despite sworn affidavits from President Escalanti and Councilman White attesting to these facts, W&C chose not to depose either Quechan leader or anyone on Quechan's Tribal Council. 1-ER-47.
- Quechan's leaders did not review and were not deceived by the Pauma Sentence or the scope of Mr. Rosette's role in the Pauma litigation. 2-ER-209, 213-15, 219-21; 2-SER-581-83.

- One of W&C's partners admitted under oath that W&C has no evidence that anyone at Quechan even ***saw*** the Pauma Sentence. 2-SER-529-35.
- The Pauma Sentence, which focused on litigation with California, was irrelevant to Quechan's decision-making process because Quechan was not interested in litigation at the time. 2-ER-215, 221.
- Neither the Pauma Sentence, nor Mr. Rosette's attorney biography, nor Rosette's experience in the Pauma litigation played any role whatsoever in Quechan's decision to hire Mr. Rosette or fire W&C. 2-ER-212-15, 218-21; 2-SER-533-35, 577-78.
- Quechan hired Mr. Rosette because of his experience and willingness to complete the same work for a fraction of the cost charged by W&C. 2-ER-214-15, 220-21.
- W&C was far from executing a deal with California when it was fired, as Mr. Dhillon testified, so it could not have been

entitled to any contingency fee. 2-SER-447, 477-79, 482-85, 494-95, 498-99.[8]

W&C identified no evidence—none at all—that challenges these facts. And this makes sense because no such evidence exists. But W&C did not even try to find any. It elected not to depose a single witness who could have testified about why Quechan hired Rosette and fired W&C—not Mr. Rosette, anyone present at his initial meeting with Quechan, or anyone who attended the Tribal Council meeting where Quechan retained Rosette.

As the District Court explained: "W&C makes numerous factual arguments citing purported evidence. These arguments all suffer from a common problem: They are not evidence that the Pauma Sentence in the Rosette Bio caused the Quechan Tribe to hire the Rosette

[8] W&C also had no vested interest in an unearned contingency fee in any event. Clients can discharge their lawyers at any time, for any reason. A "law firm does not own client legal matters, clients own their matter—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) ("Because 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.") (internal quotations and citations omitted).

Defendants and fire W&C. The dots do not connect." 1-ER-37. Indeed, "[m]uch of W&C's argument does not rest on facts at all, but instead on an articulation of suspicion." 1-ER-39. Suspicion is not evidence, as the District Court correctly concluded. *See id.*

B. W&C's Invocation of the "Relevant Marketplace" Does Not Fit Its Evidence or Case Theory.

While W&C chides the District Court for its "singular focus on what happened with one particular customer," W&C ignores that its entire case revolves around one particular customer. W&C claimed only that Quechan, not any other client or potential client, was misled by the Pauma Sentence, and W&C sought damages based solely on that lost relationship. 3-SER-758, 760; 2-SER-463-65. Unable to make that case, W&C now argues that it can prove causation and injury based on reactions of the "relevant marketplace," OB31—suggesting that it is owed damages because some unnamed, unknown, hypothetical clients might have been misled by the Pauma Sentence. This argument fares no better than the others, lacking any supporting evidence and disregarding *Lexmark*.

1. W&C's Claimed Harm Must Flow Directly From the Alleged Lanham Act Violation.

Rosette proved that Quechan ***was not*** misled by the Pauma Sentence, so W&C now contends that it can recover damages—calculated based on its lost relationship with Quechan—if it shows that an undefined "relevant marketplace" was likely to be deceived by the Pauma Sentence. OB31. W&C's argument improperly divorces injury from causation and defies the Supreme Court's directive that "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark*, 572 U.S. at 132. To prove proximate cause, a Lanham Act plaintiff "must show economic or reputational injury ***flowing directly from*** the deception wrought by the defendant's advertising." *Id.* at 133. W&C does not come close to making that showing.

W&C's alleged harm is that it was fired by Quechan, not that it suffered a reputational injury or that clients more generally in the "relevant marketplace" were diverted. Based on that alleged harm, W&C seeks "approximately $19 million in trebled compensatory

damages" for the contingency fee it expected from Quechan. 1-ER-36.[9] Because W&C's alleged injury and damages stem from its loss of Quechan as a client, to establish causation under *Lexmark*, W&C must prove it lost Quechan's business because of the Pauma Sentence.

W&C cannot prove that, so it suggests an altered legal framework. But W&C does not cite a single case suggesting that it can recover damages tied to its relationship with Quechan by virtue of "relevant marketplace" evidence alone. Instead, to support its attempted end-run around *Lexmark*, W&C relies on cherry-picked phrases from authorities that are either taken out of context or do not address causation under the Lanham Act.

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[9] W&C's prayer for damages included "the disgorgement of any of the direct or indirect profits that [the Rosette Defendants] may have obtained as a result of the [Pauma Sentence in the Rosette Bio]." 1-ER-36 (alterations original). But the District Court correctly concluded that W&C's "request for disgorgement suffers from the same problem as his request for damages: the only evidence . . . indicates that the hiring of the Rosette Defendants, and their consequent profits, were caused by factors other than the Quechan Tribe being deceived by the Pauma Sentence." 1-ER-37. W&C cannot recover from Rosette, whether its damages are "conceptualized in terms of losses to W&C or profits" to Rosette. *Id.*; *see TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 830 (9th Cir. 2011) (district court did not err in denying an award of profits, where the plaintiffs "didn't produce any proof of past injury or causation").

W&C relies primarily on *TrafficSchool.com*, 653 F.3d 820, to argue that Lanham Act causation and injury can be proven "using actual market experience and probable market behavior." OB31-32. But the portion of *TrafficSchool.com* that W&C relies on actually discusses the standard for demonstrating an "injury" under Article III, not the separate standard for proving a "commercial injury" under the Lanham Act. 653 F.3d at 826. The case neither excuses W&C from proving proximate causation for the specific injury it alleges nor supports W&C's arguments more broadly. Rather, *TrafficSchool.com* reinforces the District Court's reasoning by affirming a denial of damages after trial because there, as here, "Plaintiffs didn't produce ***any*** proof of past injury or causation." *Id.* at 831 (emphasis original).

W&C also relies on two unpublished, out-of-circuit district court decisions, but neither supports W&C's argument that proximate cause for the loss of a single, specific client can be proven with "relevant marketplace" evidence. OB32-35. In *Bennett v. Zydron*, 2017 WL 9478505 (E.D. Va. Aug. 17, 2017), the Magistrate Judge simply decided that a complaint adequately alleged elements of a Lanham Act false-advertising claim under Rule 8(a)(2) of the Federal Rules of Civil

Procedure. *Id.* at *7–8. The *Bennett* plaintiffs were "entitled to a chance to prove [their] case." *Id.* W&C has had that chance and failed.

Brave Law Firm v. Truck Accident Lawyers Group, 2019 WL 2073872 (D. Kan. May 10, 2019), is similarly inapposite. Like *Bennett*, *Brave* was decided on a motion to dismiss where the question was the sufficiency of pleadings. W&C relies on a portion of the *Brave* decision where the District of Kansas decided that the plaintiff did not need to specify at the pleadings stage which advertisement one of three allegedly lost clients viewed in order to maintain its Lanham Act claim. *Id.* at *6. That is not the issue in this case, either legally or factual. And *Brave* did not, as W&C contends, permit damages claims measured by specific client losses based on evidence of "how the relevant marketplace (i.e., personal injury law) would react to an advertisement." OB35. Far from excusing a causal connection between an alleged statutory violation and a claimed injury, the *Brave* court concluded that allegations concerning a different, allegedly lost client were "simply too remote from Defendants' allegedly false advertising" to

be cognizable under the Lanham Act and so dismissed that claim. 2019 WL 2073872, at *7.[10]

2. W&C Did Not Allege And Has No Evidence of Any Other Injury.

To the extent W&C now argues that it could be entitled to monetary damages for some other injury, it did not allege such an injury below and did not put forward evidence to support a damages award for one. Other than Quechan, W&C has not identified a single client or prospective client who allegedly fired W&C, limited the scope of its work, or declined to hire it because of the Pauma Sentence. 2-SER-459-62, 542-45. W&C offered no evidence that anyone—including Quechan—was ever deceived by the Pauma Sentence. 2-ER-213-15, 219-21; 2-SER-451-58, 529-35, 568-70, 577-83. W&C has no evidence that anyone—anywhere—reviewed, heard, or was moved to act or refrain from acting by the Pauma Sentence. *Id.* W&C's dearth of evidence is unsurprising given that the 32-word Pauma Sentence is a

[10] W&C's reliance on *Larry Pitt & Associates v. Lundy L., LLP*, 2013 WL 6536739 (E.D. Pa. Dec. 13, 2013), decided on a motion to dismiss, is similarly misplaced as that court explicitly noted that the plaintiff's Lanham Act claim was "better decided on a complete factual record," unlike the summary judgment record here. *Id.* at *6.

single sentence buried in a 453-word attorney biography. 3-ER-553. And W&C never attempted to prove how a "relevant marketplace," which W&C does not define, might have reacted to the Pauma Sentence. W&C conducted no consumer or marketing surveys, proffered no marketing expert, and presented no testimony from consumers who were supposedly misled by the Pauma Sentence. *See Southland*, 108 F.3d at 1140 ("Reactions of the public are typically tested through the use of consumer surveys.").

A Lanham Act plaintiff asserting a claim for false advertising cannot prevail on a non-existent record. The Second Circuit's recent decision affirming summary judgment in *Souza v. Exotic Island Enterprises, Inc.*, 68 F.4th 99 (2d Cir. 2023), is instructive. The plaintiffs in *Souza* were professional models who alleged that the defendants violated the Lanham Act by using their images without permission in social media posts promoting a "gentlemen's club." *Id.* at 105. The plaintiffs claimed two injuries: "(1) that they may have lost out on work opportunities due to the reputational hit from being linked with a 'gentlemen's club'; and (2) that they were deprived of the revenue

they would typically expect to have received directly from Defendants for an authorized use of their images." *Id.* at 119.

Emphasizing the dearth of evidence, the Second Circuit held that there was "nothing that could permit a reasonable juror to find that the posts proximately caused actual or likely 'economic or reputational' injury here." *Id.* at 120. Although the plaintiffs claimed that their association with a gentlemen's club was "***potentially*** devastating to their careers," there was "no evidence that anything of the sort actually happened." *Id.* at 119-20 (emphasis original).

The same is true here. Like the plaintiffs in *Souza*, W&C has offered no evidence that it suffered any injury because of the Pauma Sentence. 2-SER-459-62, 542-45. *See also Wall & Assocs., Inc. v. Better Bus. Bureau of Cent. Virginia, Inc.*, 685 F. App'x 277, 279 (4th Cir. 2017) (affirming dismissal where plaintiff did not "identify a single consumer who withheld or cancelled business with it or pointed to a particular quantum of diverted sales or loss of goodwill and reputation resulting directly from reliance on any false or misleading representations by Defendants"). W&C simply had zero evidence of "the

kind of injury that can sustain a false-advertising claim under the Lanham Act." *Souza*, 68 F.4th at 120.

3. The District Court Correctly Found That W&C's "Expert" Evidence Does Not Create a Genuine Issue of Material Fact.

With no evidence to support injury or causation for its Lanham Act claim, W&C tried to save its case by offering testimony from purported experts who also could not create a genuine issue of material fact on causation. W&C relied on the testimony of George Forman and Anthony Miranda, neither of whom opined about what happened at Quechan, why Quechan fired W&C, or why it hired Rosette. 1-SER-40-41, 76-77. The District Court correctly concluded that "[b]oth of these opinions are speculative, and neither is evidence that the Pauma Sentence in the Rosette Bio caused the Quechan Tribe to fire W&C." 1-ER-39.[11] Neither is qualified to opine on the impact of an advertisement on a particular audience, and neither has ever been in a position to hire attorneys on behalf of a tribe. Moreover, neither

[11] The District Court expressly noted that it had "given full consideration to the reports of W&C's experts." 1-ER-48.

provides any basis to find that W&C suffered an injury caused by the Pauma Sentence.

Anthony Miranda. Miranda, a purported "non-legal expert on tribal gaming in California," opined that tribal leaders "do not have advanced degrees or extensive education" and "would be highly likely to accept at face value a statement on an attorney's website without attempting to independently verify the statement," suggesting they are more likely than an average person to be misled. 3-ER-513, 518.

Miranda is in no position to serve as an expert about how tribal decision-makers react to advertising or what they consider when hiring or firing lawyers. Miranda has never served on a tribal council, never retained a lawyer to negotiate a gaming compact, and has had no role in gaming compact negotiations since 2006. 1-SER-59-61. He has zero training or experience in advertising, consumer perceptions, or marketing. 1-SER-50-51. He conducted no independent research, surveys, or studies. *See Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1006 (9th Cir. 2001) (expert opinion unreliable where he "provided no empirical evidence or studies to support his sweeping indictment of

the Korean business community—other than to cite newspaper articles and a few anecdotal examples").

Yet Miranda opines—based on his "general knowledge of the *Pauma* case"—that "the statement on Mr. Rosette's website would likely be an important factor in a hiring decision for a tribe such as Quechan[.]" 3-ER-518. Miranda's conclusory and unsupported generalizations about tribal leaders are pure speculation based on his personal experience "just dealing with tribes." 1-SER-54-56, 64-65, 68-69, 72-73, 80. "A layman, which is what an expert witness is when testifying outside his area of expertise, ought not to be anointed with ersatz authority as a court-approved expert witness for what is essentially a lay opinion." *White v. Ford Motor Co.*, 312 F.3d 998, 1008-09 (9th Cir. 2002). The District Court correctly concluded that Miranda's speculative and irrelevant testimony did not create a genuine issue of material fact on causation.

Forman. Forman, a tribal law attorney, offers speculative opinions about Rosette and California tribal leaders based on cultural generalizations and dangerous stereotypes. Forman opines that because of "cultural reasons, lack of business experience and/or

education, and/or infrequent interaction with lawyers," tribal leaders tend to take lawyers' representations about their abilities and accomplishments at face value and lack the "wherewithal" to verify them. 3-ER-508. This opinion is based on nothing other than Forman's patronizing view of tribes and his subjective characterizations of tribal leaders. Forman confirmed at deposition that his opinions about tribal susceptibility to false advertising are based on his personal experience and "observations" alone, as opposed to a survey or academic research. 1-SER-44-45. As Forman testified, the only "survey" he conducted was a "[s]urvey, ***in [his] own mind*** . . . [of] 50 years of experience representing California tribes [and] interacting with tribal leaders[.]" 1-SER-37.

As this Court has explained, a witness who interacts with a particular ethnic or cultural group as part of her job cannot cloak anecdotal, "impressionistic generalizations" about that group with the authority of expert testimony. *Jinro*, 266 F.3d at 1006-07 (expert witness's "cultural stereotyping" based on "sweeping generalizations, derived from his limited experience and knowledge—plainly a skewed sample—were unreliable and should not have been dignified as expert

opinion"). Like Miranda, Forman's testimony does not create a genuine issue of material fact about how the Pauma Sentence would have been received by Quechan, or anyone else.

C. The District Court Correctly Rejected W&C's Proposed Evidentiary Presumptions As Unsupported By Law and Contradicted By Evidence.

Having taken no depositions and having no evidence to support the essential element of causation, W&C asks this Court to endorse a series of unsupported presumptions that—in W&C's warped view—would shift all of its evidentiary burdens onto Rosette. W&C believes that if it proves the Pauma Sentence is literally false, 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 incorrect. The cascade of presumptions that W&C presents as legal inevitabilities either do not apply here or do not exist.

1. The District Court Was Not Required to Analyze Falsity Before Causation.

According to W&C, the Ninth Circuit imposes a "burden-shifting methodology" that "begins with looking at the truth or falsity of the statement at issue" when evaluating a Lanham Act claim. OB47. But none of W&C's authorities require a court to consider the falsity of a

statement before evaluating proximate cause, and such a mandate would make no sense because causation is essential to statutory standing under the Lanham Act. Courts—including this one—routinely analyze proximate cause under the Lanham Act before or without addressing falsity. *See ThermoLife Int'l, LLC v. BPI Sports, LLC*, 2022 WL 612669, at *2-3 (9th Cir. Mar. 2, 2022) (affirming dismissal of Lanham Act false-advertising claim because "Plaintiffs failed to plead 'an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations'" without addressing falsity) (citing *Lexmark*, 572 U.S. at 140); *ThermoLife Int'l, LLC v. Am. Fitness Wholesalers, LLC*, 831 F. App'x 325, 326 (9th Cir. 2020) (same).

Lexmark's holding—"that a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising"—"squarely implicates whether 'the plaintiff is [even] entitled to an opportunity to prove' the Lanham Act claim in the first instance[.]" *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App'x 778, 791-92 (10th Cir. 2016) (citing *Lexmark*, 572 U.S. at 1391 n.6).

Lexmark's focus on statutory standing—"a threshold issue that must be addressed before turning to the merits," *Matter of E. Coast Foods, Inc.*, 80 F.4th 901, 905 (9th Cir. 2023)—belies W&C's argument that the District Court was required to address falsity.

W&C also ignores that courts can, and regularly do, grant summary judgment to a defendant where a plaintiff fails to establish an element of a claim, without considering the remaining elements. *See Ratha v. Phatthana Seafood Co.*, 35 F.4th 1159, 1175 (9th Cir. 2022) ("If Plaintiffs failed to raise a triable issue on any of these elements, we need not consider the rest."); *King v. AC & R Advert.*, 65 F.3d 764, 769 (9th Cir. 1995) (plaintiff failed to raise a triable issue of fact on "one of the essential elements" so the court "need not address the remaining elements"); *Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir. 1992) (same). Because of the "unequivocal and uncontradicted evidence on the issue of causation," the District Court properly "decline[d] to address the other elements of W&C's Lanham Act claim." 1-ER-36.

2. W&C's Hoped-For Presumptions Do Not Exist or Do Not Apply Here.

W&C's theory on appeal hinges on a framework of presumptions invented by W&C but presented to this Court as fact. According to

W&C's Opening Brief, the Ninth Circuit has already adopted a burden-shifting regime in which, once an advertisement is deemed literally false, a Lanham Act plaintiff is not required to prove anything else: A finding of literal falsity supposedly triggers presumptions of materiality, deception, and when the case involves competitors, injury and causation. OB46-51. W&C cites no Ninth Circuit authority adopting or applying such a regime.

Indeed, W&C's authorities not only fail to suggest that a finding of falsity creates a presumption of causation or injury in Lanham Act cases like this one but also directly oppose that notion. *See Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144, 161 (2d Cir. 2007) ("In general, [t]he likelihood of injury and causation will not be presumed, but must be demonstrated in some manner.") (internal quotations omitted); *TrafficSchool.com*, 653 F.3d at 831 (affirming dismissal of Lanham Act claim where plaintiffs "didn't produce ***any*** proof of past injury or causation") (emphasis original); *ThermoLife Int'l, LLC v. Gaspari Nutrition Inc.*, 648 F. App'x 609, 616 (9th Cir. 2016) (presumption of injury requires "evidence of causality and consumer deception").

Certain evidentiary presumptions arise in "false ***comparative*** advertising cases, where it's reasonable to presume that every dollar defendant makes has come directly out of plaintiff's pocket." *TrafficSchool.com*, 653 F.3d at 831 (emphasis original). But this is not a comparative advertising case. As the District Court rightly explained, Mr. Rosette's attorney biography "nowhere mentions W&C and the Pauma Sentence does not compare Rosette's and W&C's services." 1-ER-43; *see also Quidel Corp. v. Siemens Med. Sols. USA, Inc.*, 2021 WL 4622504, at *2 (9th Cir. Oct. 7, 2021) ("The presumption is inapplicable when, as here, the 'advertising does not directly compare defendant's and plaintiff's products.'"); *FLIR Sys., Inc. v. Sierra Media, Inc.*, 903 F. Supp. 2d 1120, 1132 (D. Or. 2012) ("With respect to false comparative advertising, a court's summary judgment analysis largely turns on element one[.]").

W&C's primary authority for its presumption framework—*Southland Sod Farms v. Stover Seed*—addressed comparative advertising, so it is inapplicable here. 108 F.3d at 1146 (plaintiff alleged "comparative advertisement claims were deliberately false."); *see also Souza*, 68 F.4th at 119 ("although such injury may be presumed

from a direct competitor's false comparative advertising claim, in all other cases, a plaintiff must present some affirmative indication of actual injury and causation") (internal citation and quotation omitted).

Finally, while there is some mixed caselaw on whether literal falsity leads to a presumption of materiality,[12] the majority of courts have found it does not. 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 Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1111 (9th Cir. 2012) (analyzing evidence of materiality for a literally false statement); *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995) (no materiality despite falsity); *Select Comfort Corp. v. Baxter*, 996 F.3d 925, 939 (8th Cir. 2021) (finding of literal falsity "does not appear to suggest in any direct manner that the statement is material"); *Johnson & Johnson Vision Care, Inc. v. 1-800*

[12] W&C relies on an unpublished case from the District of Arizona to support this presumption, but the court there noted that the presumption was rebuttable and denied summary judgment because there was a "genuine dispute as to other elements of the [Lanham Act] claim." *World Nutrition Inc. v. Advanced Enzymes USA*, 2023 WL 4105345, at *7 (D. Ariz. June 21, 2023).

Contacts, Inc., 299 F.3d 1242, 1250-51 (11th Cir. 2002) ("[W]e stand with the First and Second Circuits, concluding that the plaintiff must establish materiality even when a defendant's advertisement has been found literally false."); *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 312 n.10 (1st Cir. 2002) ("even when a statement is literally false or has been made with the intent to deceive, materiality must be demonstrated").

Because W&C seeks damages, "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) (emphasis original); *see also VBS Distrib., Inc. v. Nutrivita Lab'ys, Inc.*, 811 F. App'x 1005, 1007 (9th Cir. 2020). That evidence is absent here.

And the evidence that exists—all of which shows that the Pauma Sentence did not cause W&C's alleged injury—further dooms W&C's hoped-for presumptions. Those presumptions "do not apply to change day into night" or "transform the undisputed evidence" that the Pauma Sentence did not cause Quechan to fire W&C "into a legal fiction that it did." 1-ER-41. A presumption is just that—once rebutted by evidence,

it disappears. Here, the "only evidence before the Court on the summary judgment briefing [was] that the Pauma Sentence was not the cause of the Quechan Tribe's decision to replace W&C." 1-ER-43-44. If the burden of proof or production shifted to Rosette at summary judgment, Rosette "met both burdens." 1-ER-43.

D. The Judgment Also Should Be Affirmed Because the Pauma Sentence Was Not False.

Even setting aside W&C's failure of proof on causation, the Court can and should affirm summary judgment on the alternative basis that W&C failed to raise a genuine dispute of material fact as to falsity. *See Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004) (court "may affirm the grant of summary judgment on any basis supported by the record").

"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*, 108 F.3d at 1139. W&C failed to carry this burden.[13]

[13] In an attempt to establish falsity in lieu of actual evidence, W&C mischaracterizes the District Court's order granting Rosette's Motion to

Again, the Pauma Sentence took two similar 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." 3-ER-553; 1-SER-212. Both iterations of the Pauma Sentence are true.

Success in the litigation context is highly dependent on a client's goals and expectations. A key goal of the Pauma litigation was to restore the terms of its 1999 compact, and obtaining a preliminary injunction was a critical strategic victory. 1-SER-195-96.

It is undisputed that the Rosette firm, under Mr. Rosette's leadership, secured Pauma's preliminary injunction, which gave Pauma the

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Substitute, which W&C claims "tacitly acknowledged that it was dealing with a literally false commercial advertisement made by a direct competitor in a niche market." OB7, 29. The District Court did nothing of the sort; the District Court simply noted that it "did not address whether the Rosette Defendants in fact engaged in false commercial advertisement." 1-ER-160.

immediate relief it needed. 2-ER-207; 1-SER-199. Mr. Rosette was the only partner listed on the pleadings, and he bore ultimate responsibility for the outcome of the case. 2-ER-207. That Ms. Williams and Mr. Cochrane played a role in drafting filings in the Pauma litigation—while employed at the Rosette firm—or that the litigation continued to a judgment after Pauma terminated Rosette, does not render the Pauma Sentence about Mr. Rosette's role false.

There is also nothing false about the statement that the preliminary injunction stood to save Pauma $100 million. Notably, W&C repeatedly made the same claim as early as 2013. 1-SER-249. The preliminary injunction allowed Pauma to stop paying California under its 2004 amendment and start paying under its 1999 compact. 2-ER-207. The $100 million figure is the estimated difference between Pauma's going-forward obligations under the two agreements. 2-ER-207; 1-SER-249, 272; 3-SER-629. The Pauma Sentence, first published as early as May 2011, only referred to going-forward savings obtained through the preliminary injunction. It did not, and could not, refer to the $36 million award obtained years later by W&C.

W&C urges the Court to find literal falsity based on the disputed testimony of grammarian and lexicographer Bryan A. Garner, who opined that the Pauma Sentence is "literally false" and "misleading" based on his personal assessment of the statement's words, an incomplete set of documents from the Pauma litigation, and limited background that W&C provided. 3-ER-483, 485. This testimony does not show the Pauma Sentence was false.

In addition to improperly offering testimony about an ultimate legal issue in the case, 3-ER-485,[14] Garner's opinion is based on three false assumptions: (1) that the Pauma Sentence takes credit for "the Pauma Band case" in general, 3-ER-483, as opposed to the preliminary injunction, specifically; (2) 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, 3-ER-484; and (3) that

[14] Several courts have excluded Garner's testimony on this very basis. *See Diamondback Indus., Inc. v. Repeat Precision, LLC*, 2019 WL 7761432, at *2 (W.D. Tex. Aug. 20, 2019) (excluding Garner's opinions that were "clearly directed precisely at the ultimate decision this Court must determine"); *Lind v. Int'l Paper Co.*, 2014 WL 11332304, at *3 (W.D. Tex. Mar. 11, 2014) ("Garner's commentary and opinion regarding the meaning and import of the terms of the bonus provision are inadmissible because it constitutes legal argument . . . and therefore must be excluded.").

W&C was solely responsible for the legal theory that led to a $36 million award in 2013—even though the theory was developed by Mr. Rosette before Ms. Williams and Mr. Cochrane, both of whom had no prior experience as lawyers with tribal gaming compact matters, joined his firm, 3-ER-484; 1-SER-92-118; 2-ER-206-07.

"In the absence of such literal falsity, an additional burden is placed upon the plaintiff to show that the advertisement, though explicitly true, nonetheless conveys a misleading message to the viewing public." *Clorox Co. Puerto Rico v. Proctor & Gamble Com. Co.*, 228 F.3d 24, 33 (1st Cir. 2000). As discussed above, W&C produced zero evidence—no market research, consumer surveys, marketing experts, or customer testimony—to show that the Pauma Sentence was misleading.

II. The District Court Correctly Denied W&C's Motion for Reconsideration on the Privilege Ruling During Discovery.

This Court "will overturn the district court's denial of a motion to reconsider the magistrate judge's pretrial discovery order only if the denial was 'clearly erroneous or contrary to law.'" *In re Optical Disk Drive Antitrust Litig.*, 801 F.3d 1072, 1076 (9th Cir. 2015) (quoting *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002)).

The District Court's denial of W&C's Motion for Reconsideration below was neither clearly erroneous or contrary to law.[15] Its analysis was consistent with Federal Rule of Evidence 501 and did not conflict with any binding authority. And if the application of California privilege law was incorrect, any resulting error was harmless.

A. The District Court's Denial of W&C's Motion for Reconsideration Was Neither Clearly Erroneous Nor Contrary to Law.

Federal Rule of Evidence 501 provides that federal common law ordinarily applies to privilege claims in federal cases but that, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501; *see also* H. Rpt. 93-1597; *Lewis v. United States*, 517 F.2d 236, 237 n.2 (9th Cir. 1975) ("[S]tate privilege law is binding in federal civil proceedings in which state law provides the rule of decision."). The purpose of Rule 501 is to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis" using their own judgment, based on

[15] W&C's Opening Brief failed to include the legal standard applicable to this Court's review in violation of Rule 28(a)(8)(b) of the Ninth Circuit Federal Rules of Appellate Procedure. Rosette respectfully submits that the standard is "clearly erroneous or contrary to law," but the outcome would be the same if *de novo* review applies.

the facts of the cases before them. *Trammel v. United States*, 445 U.S. 40, 47 (1980) (internal citations omitted).[16] W&C's argument that a "uniform rule" requires the application of federal privilege law in all federal question cases with pendant state-law claims directly conflicts with this purpose and Ninth Circuit authority.

The facts before the District Court called for the application of state privilege law. W&C's Motion for Reconsideration challenged the Magistrate Judge's order applying California privilege law to two overlapping discovery disputes brought by W&C: one filed against Quechan and one filed against Rosette. 3-SER-631-38. W&C broadly sought privileged communications between Rosette and Quechan exchanged during their attorney-client relationship to support its state-

[16] The goal of flexibility is also evident in Rule 501's legislative history. As initially proposed, Rule 501 would have "abolish[ed] completely the preexisting rules of privilege, save for those that were creatures of statute or rule and those required by the Constitution; the effect was to do away with the common law rules of privilege, most of which were then reconstituted in the remaining twelve rules of the article." Wright et al., Fed. Prac. & Proc. Evid. § 5421 Statutory History (2023). Congress "completely rejected" the Advisory Committee's proposal, *id.* § 5422, and adopted the current version of Rule 501, which effectively "dump[ed] the problem" of who should be entitled to assert evidentiary privileges in federal court "back on the courts to be resolved 'in light of reason and experience.'" *Id.*

law contract claims against Quechan. 3-SER-662-64; 1-ER-56-57. W&C had only one federal claim at the time—the Lanham Act claim at issue here. 1-ER-56-57.

Given this configuration of claims and evidence, as well as the guiding principles of Rule 501, Magistrate Judge Berg applied "California privilege law to analyze the attorney-client privilege claims pertinent to Quechan," the holder of the attorney-client privilege. 1-ER-72. As explained on the record: "[I]t appears to the Court that the only federal claim is the Lanham Act claim. All the other claims are California-type claims, and Judge Curiel [has] applied California law. The claims between Williams & Cochrane and Quechan [] — and Quechan v. Williams & Cochrane are all California claims, and I think those claims overweigh the federal claim[.]" 1-ER-75.

The District Court's 13-page order analyzing the Magistrate Judge's application of California privilege law echoed these considerations. 1-ER-50-62. As the District Court explained, "W&C asserts only one claim for relief against Rosette under the federal law (i.e., the Lanham Act claim); all remaining claims for relief are brought under California state law against Quechan." 1-ER-56. The District

Court further recognized that Quechan "ha[d] asserted the attorney-client privilege," and that the "challenged communications relate to W&C's state-law contact claims against Quechan rather than W&C's federal Lanham Act claim against Rosette." 1-ER-56-57.

Before finding that the Magistrate Judge's application of California privilege law in this specific context was not clearly erroneous, the District Court examined the facts, Rule 501's text and legislative history, and mixed caselaw coming out of district courts across the country. 1-ER-57-61. The Magistrate Judge's decision could not be clearly erroneous, the District Court reasoned, "because, frankly, the law in this context is unclear and courts have adopted a multiplicity of approaches." 1-ER-60-61. But "there is nothing in the statutory text of Rule 501 that states a district court must apply federal privilege law to claims of privilege in a federal question case with pendent state claims." 1-ER-60. "[G]iven that this litigation is mostly centered on California based contract claims," the District Court rightly concluded that "it is fair, logical and reasonable to apply California privilege law to the dispute[s] raised herein." 1-ER-61.

"A ruling usually cannot be clearly erroneous if there is no Ninth Circuit authority on point, or the question has not been addressed by any circuit court." *In re Mersho*, 6 F.4th 891, 898 (9th Cir. 2021) (citations omitted); *see also In re Morgan*, 506 F.3d 705, 713 (9th Cir. 2007) ("Because no prior Ninth Circuit authority prohibited the course taken by the district court, its ruling is not clearly erroneous."). Here, because the question of what law to apply in these circumstances is unsettled, the District Court's decision to apply state privilege law, like the Magistrate Judge's decision, was not clearly erroneous.

The flexibility built into Rule 501 "has created somewhat inconsistent case law regarding the application of federal privilege doctrine to pendent state-law claims in federal question cases" at the district court level. *Love v. Permanente Med. Grp.*, 2013 WL 4428806, at *2 (N.D. Cal. Aug. 15, 2013). W&C's critiques of the District Court's decision rely on cases from one side of this divide, none of which address the facts presented below and none of which bind this Court. *See Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) ("[T]he binding authority principle applies only to appellate decisions, and not to trial

court decisions[.]").[17] W&C relies primarily on a Ninth Circuit decision that concludes, without explanation, that where "federal question claims and pendent state law claims" are present, "the federal law of privilege applies." *Agster* v. *Maricopa Cnty.*, 422 F.3d 836, 839 (9th Cir. 2005). *Agster*, however, did not involve a situation where ***only*** state-law claims were asserted against the defendant claiming privilege (here, Quechan). Where, as here, there are two permissible outcomes under the Circuit's caselaw, the District Court's choice is not clear error and the decision should stand. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) ("clearly erroneous" standard

[17] W&C cites various other district court cases from the Ninth Circuit, but these cases do not support W&C's position. *See, e.g.*, *Swan v. Miss Beau Monde, Inc.*, 566 F. Supp. 3d 1048, 1052 n.2 (D. Or. 2021) (while "[m]ost courts hold that when federal and state law claims are joined in the same action, privilege issues are resolved under federal law . . . the Supreme Court, however, has not resolved this question."); *S. Cal. Hous. Rights Ctr. v. K3 Holdings, LLC*, 2022 WL 17333390 (C.D. Cal. Oct. 18, 2022) (same set of allegations against all defendants and did not include express determination that the evidence sought relates to specific claims against specific defendants); *Olfati v. City of Sacramento*, 2023 WL 1869007 (E.D. Cal. Feb. 9, 2023) (complaint alleged substantive federal and state-law claims based on identical conduct). Other cases also demonstrate that which privilege applies is likely to result in harmless error. *See Conyers v. Cano*, 2020 WL 7084546, at *3 (C.D. Cal. Sept. 25, 2020) ("[E]ven if California privilege law controlled, the outcome would remain the same.").

requires that this Court be "left with the definite and firm conviction that a mistake has been committed").

Arguing otherwise, W&C primarily relies on its own lawsuit to enforce a subpoena issued in this action and served on a third-party, REDW LLC, in Arizona. OB42-43. W&C asserts that *Williams & Cochrane LLP v. REDW LLC*, 2020 U.S. Dist. LEXIS 138296 (D. Ariz. Aug. 3, 2020), stands for the proposition that the District Court's application of state privilege law was wrong. OB42. As an initial matter, one district court's unpublished decision is not binding on another district court, and it certainly is not binding here. W&C's reliance on *REDW* is also substantively misplaced. Unlike the discovery dispute facing the District Court below, "the subpoenaed information appear[ed] to concern both" W&C's federal and state-law claims. 2020 U.S. Dist. LEXIS 138296, at *13. Flexibility means that different courts can reach different outcomes on different facts, and that is what happened in Arizona.

The *REDW* court acknowledged the same legal uncertainty identified by the District Court, observing that the "seemingly clear distinction between the circumstances under which federal or state

privilege law applies has not been uniformly applied by district courts in this Circuit." *Id.* at *9-10. In fact, the *REDW* court recognized that courts have "found federal privilege law inapplicable" to "discovery disputes where their subject matter jurisdiction relied on federal question for a federal claim and supplemental jurisdiction for pendant [sic] state law claims against the same parties," as was the case below. *Id.* at *10. These observations reinforce the conclusion that the District Court's application of state privilege law was not "clearly erroneous."

W&C also cites a decision emanating from the Southern District of California, *EpicentRx, Inc. v. Carter*, 2020 WL 6158939 (S.D. Cal. Oct. 20, 2020), for the proposition that federal courts presiding over federal question cases must apply federal privilege law to pendant state-law claims. OB43-44. That was not *EpicentRx*'s holding. Instead, since neither party briefed the issue, the Magistrate Judge in *EpicentRx* applied federal privilege law based solely on the jurisdictional basis of the case. 2020 WL 6158939, at *4 & n.2. Once again, this difference of opinion, animated by different case considerations, represents precisely what Rule 501 contemplates: flexibility.

B. Any Choice-of-Law Error Was Harmless.

W&C does not—and cannot—explain how the outcome would have differed had the District Court applied federal, rather than state, privilege law to each of W&C's arguments in its initial Joint Motion for Determination of Discovery Dispute. As demonstrated below, and as argued in briefing in the District Court, there is no evidence that this purported error "more probably than not [] . . . tainted the outcome." *Coffey v. Mesa Airlines, Inc.*, 812 F. App'x 657, 659 (9th Cir. 2020) (citation omitted); *Prudential Ins. Co. of Am. v. L.A. Mart*, 68 F.3d 370, 378 (9th Cir. 1995) ("But inclusion of the extrinsic evidence relied upon by Prudential would not change the tenor or outcome of this case. If the district court erred in failing to consider this evidence, its error was harmless."). So, if the District Court erroneously applied state privilege law, that error was harmless. *See Agster*, 422 F.3d at 838 (in dicta, deeming the "impropriety of the discovery order" irrelevant if the Court "found the error harmless.").

W&C claimed below that Quechan categorically waived its privilege with Rosette, rendering all of its communications with its attorneys at Rosette discoverable. 3-SER-640-43. But all of W&C's

various arguments in support of that position lack merit—regardless of the applicable privilege law.

First, W&C argued that Quechan's counter-claims placed Rosette's representation at issue. But Quechan's counter-claims against W&C, including for malpractice, were against W&C, not Rosette. There is no controlling federal authority suggesting that a malpractice plaintiff loses its privilege with a successor attorney. And under California law, which can be referenced where federal common law has gaps, *see Lewis*, 517 F.2d at 237, the "statutory exception is limited to communications between the client and the attorney charged with malpractice." 1-ER-78.[18]

Second, W&C raised the crime-fraud exception. But for that exception to apply, W&C would have to show that (1) Quechan was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further that scheme and (2) the communications sought are "sufficiently related to" and were made "in furtherance of

[18] The only federal authority W&C cited below, *Rutgard v. Haynes*, 185 F.RD. 596 (S.D. Cal. 1999), has been widely criticized and was premised on an Illinois state court case that was later overruled by the Illinois Supreme Court.

intended, or present, continuing illegality." *In re Grand Jury Proceedings*, 87 F.3d 377, 381-83 (9th Cir. 1996). As the Magistrate Judge explained, "[n]ot only is there no evidence that the [T]ribe sought to commit fraud, there's not even a hint that the [T]ribe sought an attorney's help in committing a crime or fraud." 1-ER-89.

Third, W&C argued that an "attorney cannot claim privilege with respect to a specific representation if he or she exhibited actual malice[.]" 3-SER-669. This argument was based exclusively on inapplicable Illinois state law applied in *Marc Dev. Inc. v. Wolin*, 904 F. Supp. 777, 784 (N.D. Ill. 1995), which did not even address the attorney-client privilege. The Magistrate Judge reflected that this argument was "so far afield and such a stretch, I have trouble even stating that this claim was made in good faith. I am really sorely disappointed that I am even having to spend time addressing it. To me, that plaintiff even makes this argument is beyond reason[.]" 1-ER-93-94. It is no more reasonable under federal law.

W&C's remaining arguments would not have passed muster under federal law, either. For example, W&C argued that no privilege existed for communications predating a signed engagement letter between

Quechan and Rosette. 3-SER-671-73. But the "attorney-client relationship is formed when an attorney renders advice directly to a client who has consulted him seeking legal counsel." *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1505 (9th Cir. 1993). W&C's "position completely disregards the fact that consultations and other communications of prospective clients are privileged, regardless of whether the attorney is ever hired." 1-ER-95. Even the Magistrate Judge was "surprised" W&C raised the argument, since it is "Ethics 101, taught in the first-year [of] law school." *Id*.

Finally, W&C argued that no privilege existed for communications about this lawsuit because Quechan ultimately retained another law firm to represent it. 3-SER-673-74. But privilege is not destroyed if an attorney declines to take a case following consultation or is later conflicted. Again, under federal law, the attorney-client relationship is formed regardless of whether the client ultimately hires the attorney; all that matters is that the client "has consulted him seeking legal counsel." *Waggoner*, 991 F.2d at 1505.

The application of federal privilege law would not have changed the outcome of the discovery dispute, let alone the case. As a result, any error is harmless.

CONCLUSION

For these reasons, this Court should affirm the judgment.

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Respectfully submitted,

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 23-55166

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