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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 FORTRESS SECURE SOLUTIONS
8 LLC, a Washington limited liability
9 company,

10 Plaintiff,

11 v.

12 ALARMSIM LLC, a North Carolina
13 limited liability company, and
14 RICKIE GUTHRIE, JR., an
individual,

Defendants.

NO. 4:17-CV-5058-TOR

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT AND
EXCLUSION OF TESTIMONY

15 BEFORE THE COURT are Plaintiff's Motion for Partial Summary
16 Judgment (ECF No. 108), Defendants' Motion for Summary Judgment (ECF No.
17 113), Plaintiff's Motion to Strike Expert Opinion of Scott Hampton (ECF No.
18 102), Plaintiff's Motion to Strike Expert Opinion of Nicholas Carroll (ECF No.
19 104), and Defendants' Motion to Strike Expert Opinion of Hiren Modi (ECF No.
20 116). These matters were submitted for consideration without oral argument. The

ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND EXCLUSION
OF TESTIMONY ~ 1

1 Court has reviewed the record and files herein, and is fully informed.¹ For the
2 reasons discussed below, Plaintiff's Motion for Partial Summary Judgment is
3 denied, Defendants' Motion for Summary Judgment is granted in part and denied
4 in part, Plaintiff's Motion to Strike Expert Opinion of Scott Hampton is denied,
5 Plaintiff's Motion to Strike Expert Opinion of Nicholas Carroll is granted in part
6 and denied in part, and Defendants' Motion to Strike Expert Opinion of Hiren
7 Modi is granted in part and denied in part.

8 **BACKGROUND**

9 This case arises from the business relationship between Plaintiff, a company
10 that makes and supports home security systems, and Defendants, a company and
11 its primary operator that during the relevant time period made SIM cards that were

12 _____
13 ¹ Defendants' response memoranda to Plaintiff's motions to strike
14 Defendants' experts (ECF Nos. 123, 124), Defendants' reply memorandum
15 regarding Defendants' Motion to Strike Expert Testimony of Hiren Modi (ECF
16 No. 131), and Plaintiff's reply memoranda regarding Defendants' motions to strike
17 Plaintiff's experts (ECF Nos. 133, 134) were all untimely filed. The Court
18 instructs all counsel in this matter to review Local Civil Rule 7, which
19 distinguishes between and governs the filing deadlines for dispositive and
20 nondispositive motions.

1 used in Plaintiff's security systems. The following facts are not in dispute. For
2 purposes of summary judgment, "[i]f a party fails to properly support an assertion
3 of fact or fails to properly address another party's assertion of fact as required by
4 Rule 56(c), the court may ... consider the fact undisputed." Fed. R. Civ. P.
5 56(e)(2).

6 **A. The Parties**

7 Plaintiff Fortress Secure Solutions ("Fortress") is a retail home security
8 alarm business. ECF No. 114 at 2, ¶ 1. Michael Hofeditz is the president of
9 Fortress. *Id.* at ¶ 2. Fortress's alarm systems operate using a global system for
10 mobile communications ("GSM"), which requires the use of a SIM card to
11 communicate when an alarm has been triggered. *Id.* at ¶ 3. Fortress sells the
12 hardware for the alarm system along with a three-year warranty and lifetime
13 support for its product. *Id.* at ¶ 6. During the relevant period in this case, Fortress
14 did not sell the SIM cards that were used in their security systems. *Id.* at ¶ 4. The
15 SIM cards were available from network providers AT&T and T-Mobile. ECF No.
16 114 at 3, ¶ 9.

17 Defendant AlarmSIM, LLC ("AlarmSIM") was a retail business which
18 marketed and sold SIM cards for use in home security systems. ECF No. 114 at 3,
19 ¶ 11. Defendant Ricky Guthrie, Jr. was the primary operator of AlarmSIM. *Id.* at
20 ¶ 13. In November 2013, Mr. Guthrie contacted Mr. Hofeditz to propose a

1 partnership in which Fortress would sell AlarmSIM SIM cards. *Id.* at ¶ 14. Mr.
2 Hofeditz rejected this proposal. *Id.* at ¶ 15. Later, Mr. Hofeditz and Mr. Guthrie
3 had a verbal conversation in which Mr. Hofeditz asked Mr. Guthrie, “Can you
4 provide SIM cards to my customers and provide the necessary support?” ECF No.
5 114 at 4, ¶ 17. Based on this conversation, Fortress began recommending
6 AlarmSIM to its customers for SIM cards. *Id.* at ¶ 20. By October and November
7 of 2015, Fortress was actively referring its customers to AlarmSIM. ECF No. 114
8 at 5, ¶ 28. AlarmSIM’s SIM cards used, at the customer’s option, either AT&T or
9 T-Mobile 2G or 3G networks. ECF No. 109 at 5, ¶ 20.

10 **B. The Cellular Network Transition**

11 In 2015, AT&T and T-Mobile were the primary 2G network providers in the
12 United States. ECF No. 109 at 5, ¶ 21. As technology developed in favor of the
13 3G network, AT&T announced that its 2G network was projected to terminate on
14 January 1, 2017. *Id.* at ¶ 26. T-Mobile’s 2G network was not projected to
15 terminate in 2016 and is still functioning today. ECF No. 109 at 6, ¶ 27.

16 In October 2015, Fortress announced and made available for sale its Fortress
17 Total Security System (“TSS”), which would utilize the 3G network. ECF No. 109
18 at 8, ¶¶ 44-45. Existing Fortress customers could purchase the new TSS system or
19 upgrade their existing basic system, at Fortress’s cost, to make their security
20 system compatible with 3G technology. *Id.* at ¶ 47.

1 In 2015, AlarmSIM contacted Eric Vicini to design software to permit a
2 tablet to function as a home security system using the 3G network. ECF No. 109
3 at 7, ¶ 36. AlarmSIM's new security system was named the Remote Home
4 Controller 1000 ("RHC 1000"). ECF No. 109 at 7, ¶ 38. The RHC 1000 was
5 advertised on the website www.remotehomecontroller.com ("RHC website"). ECF
6 No. 109 at 7, ¶ 39. Mr. Guthrie estimated that presales of the RHC 1000 numbered
7 about 20. ECF No. 114 at 7, ¶ 40. Mr. Vicini never finished the software, so
8 AlarmSIM never had a completed tablet security system. ECF No. 114 at 7, ¶ 39.

9 **C. The AlarmSIM Email**

10 On December 14, 2015, AlarmSIM sent the following email to its customer
11 base (the "allegedly defamatory email"):

12 Subject: Important 2G Sunset Update for Your Security System

13 Is Your Security Panel on the 3G Network? If It Doesn't Say So
14 Specifically, It Isn't.

15 Dear Customer:

16 This is an important update about your security system.

17 Many of you have contacted us with concerns about your 2G based security
18 system.

19 Some of you have already lost access to the SMS alerts.

20 The reason is because, as the 2G network is being phased out, the carriers
are moving their capacities into the 3G network. In some markets, access is
no longer available. In others, it is diminished. This is in preparation of the
final sunset of the network in 2016.

1 THIS IS A SERIOUS RISK TO THE PROPER FUNCTIONING OF YOUR
2 SECURITY SYSTEM.

3 The existing companies have been either slow or absent in their response.

4 AlarmSIM has decided to introduce its own, new 3G security panel.

5 In order to save you trouble and money, this panel is designed to work with
6 most existing wireless sensors, [sic] Furthermore, this panel will also allow
control of camera, smart home and other advanced sensors.

7 We are extending a special invitation for AlarmSIM customers to pre-
8 purchase this revolutionary alarm panel. Based on the latest Android OS, it
will get regular, automatic updates, has 2 SIM slots for added security.

9 This panel is to what is currently on the market what a computer is to a
10 calculator.

11 THIS DISCOUNTED OFFER IS LIMITED TO THE FIRST 200 ORDERS.

12 CLICK HERE TO ORDER

13 Thank you for your continued support and, as always, Stay Safe!

14 Sincerely,

15 The AlarmSIM Team

16 ECF No. 109 at 2, ¶ 1.

17 When a customer clicked on “CLICK HERE TO ORDER” in the email, the
18 customer was redirected to a “Special Invitation” page on the website

19 www.remotehomecontroller.com (the “RHC website”). ECF No. 109 at 2, ¶ 2.

20 The “Special Invitation” page included the following language:

1 Introducing the RHC 1000! This new and revolutionary, state-of-the-art,
2 home control panel is designed to replace your existing 2G home security
3 panel. If you have a “Fortress”, “PiSector” or “Kerui” system, you may be
4 particularly at risk to lose coverage due to the sunset of the 2G network.
5 Even if you bought a system labled [sic] as 3G or 4G, this may not be the
6 case. Don’t assume your system is 3G/4G.

7 ECF No. 109 at 2-3, ¶ 2.

8 **D. Response to the AlarmSIM Email**

9 Following AlarmSIM’s email, Fortress’s customers began to contact
10 Fortress with concerns about the issues raised in AlarmSIM’s email.² ECF No.
11 109 at 9, ¶ 48. Mr. Hofeditz visited the RHC website and used its Live Chat
12 feature to chat with a party identified as “Eric.” ECF No. 114 at 9, ¶ 57; ECF No.
13 135-1 at 24, ¶ 57. Eric stated that he did not work for AlarmSIM and that his
14 company was not affiliated with Fortress, but Eric stated that the RHC 1000 was
15 designed to replace Fortress systems. ECF No. 114 at 9, ¶¶ 58-60.

16 Within days of the allegedly defamatory email being sent, Fortress employed
17 the e-commerce solutions and internet marketing company Commerce Pundit to
18 design and implement a digital marketing campaign. ECF No. 109 at 10, ¶ 55.

19 ² The parties dispute the quantity and nature of this customer response, but it
20 is undisputed that some customers contacted Fortress regarding the allegedly
defamatory email. ECF No. 130 at 12, ¶ 48.

1 This campaign included aggressive pay per click advertising on Google, Amazon,
2 and other channels. *Id.* In late December 2015, Fortress sent a cease and desist
3 letter to AlarmSIM regarding the allegedly defamatory email requesting, among
4 other relief, a list of AlarmSIM's customers who had been contacted about the
5 panel. ECF No. 109 at 9-10, ¶ 52. AlarmSIM did not provide Fortress with a list
6 of customers who received the allegedly defamatory email. ECF No. 109 at 10, ¶
7 54.

8 DISCUSSION

9 A. *Daubert* Motions

10 Plaintiff moves to strike the opinions of Defendants' experts Scott Hampton
11 and Nicholas Carroll. ECF Nos. 102, 104. Defendants move to strike the opinions
12 of Plaintiff's expert Hiren Modi. ECF No. 116.

13 The admission of expert witness testimony is governed by Federal Rule of
14 Civil Procedure 702. Rule 702 provides:

15 A witness who is qualified as an expert by knowledge, skill,
16 experience, training, or education may testify in the form of an
17 opinion or otherwise if: (a) the expert's scientific, technical, or other
18 specialized knowledge will help the trier of fact to understand the
19 evidence or to determine a fact in issue; (b) the testimony is based on
sufficient facts or data; (c) the testimony is the product of reliable
principles and methods; and (d) the expert has reliably applied the
principles and methods to the facts of the case.

20 Fed. R. Evid. 702.

1 In *Daubert v. Merrell Dow Pharm., Inc.*, the Supreme Court explained that
2 trial courts must perform a “gatekeeping” function to ensure that expert testimony
3 conforms to Rule 702’s relevance and reliability requirements. 509 U.S. 579, 597
4 (1993). *Daubert* identifies four non-exclusive factors a court may consider in
5 assessing the relevance and reliability of expert testimony: (1) whether a theory or
6 technique has been tested; (2) whether the theory or technique has been subjected
7 to peer review and publication; (3) the known or potential error rate and the
8 existence and maintenance of standards controlling the theory or technique’s
9 operation; and (4) the extent to which a known technique or theory has gained
10 general acceptance within a relevant scientific community. *Id.* at 593-94. These
11 factors are not to be applied as a “definitive checklist or test,” but rather as
12 guideposts which “may or may not be pertinent in assessing reliability, depending
13 on the nature of the issue, the expert’s particular expertise, and the subject of his
14 testimony.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). The
15 ultimate objective is to “make certain that an expert, whether basing testimony
16 upon professional studies or personal experience, employs in the courtroom the
17 same level of intellectual rigor that characterizes the practice of an expert in the
18 relevant field.” *Id.* at 152.

19 “The determination whether an expert witness has sufficient qualifications to
20 testify is a matter within the district court’s discretion.” *United States v. Garcia*, 7

1 F.3d 885, 889 (9th Cir. 1993) (citation omitted). “Rule 702 contemplates a broad
2 conception of expert qualifications.” *Hangerter v. Provident Life & Accident Ins.*
3 *Co.*, 373 F.3d 998, 1015 (9th Cir. 2004) (internal quotation marks and citation
4 omitted) (“[T]he advisory committee notes emphasize that Rule 702 is broadly
5 phrased and intended to embrace more than a narrow definition of qualified
6 expert.” (citation omitted)). Where a witness has considerable experience working
7 in a specific field, the witness’s “lack of particularized expertise” in one aspect of
8 that field, “goes to the weight accorded her testimony, not to the admissibility of
9 her opinion as an expert.” *Garcia*, 7 F.3d at 889-90. In such situations,
10 “[v]igorous cross-examination, presentation of contrary evidence, and careful
11 [application of] the burden of proof are the traditional and appropriate means of
12 attacking shaky but admissible evidence.” *See Daubert*, 509 U.S. at 596.

13 The determination of whether the offered testimony will assist the Court
14 requires the Court to evaluate its relevance and reliability. *See Daubert*, 509 U.S.
15 at 591-92, 597. Evidence is relevant if “(a) it has any tendency to make a fact
16 more or less probable than it would be without the evidence; and (b) the fact is of
17 consequence in determining the action.” Fed. R. Evid. 401. The reliability of
18 expert testimony is evaluated in regard to the expert’s “basis in the knowledge and
19 experience of his discipline.” *Kumho Tire Co.*, 526 U.S. at 148 (1999) (quoting
20 *Daubert*, 509 U.S. at 592). This inquiry is “flexible,” and reliability must be

1 evaluated “in light of the particular facts and circumstances of the particular case.”
2 *Id.* at 158; *see also Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th
3 Cir. 2014).

4 *1. Scott Hampton*

5 Defendants offer Mr. Hampton as an expert on monetary damages. *See* ECF
6 No. 106-1 at 4. Plaintiff moves to preclude Mr. Hampton from offering an expert
7 opinion “on the efficacy or projected costs of certain suggested corrective
8 advertising measures” and to strike those opinions from Mr. Hampton’s expert
9 report. ECF No. 102 at 1-2.

10 Mr. Hampton is a Certified Public Accountant licensed in California,
11 Washington, and Utah. ECF No. 106-1 at 5. He has a Bachelor of Science degree
12 in accounting, has over 30 years of experience in accounting, and has offered
13 expert economic opinions in over 100 cases. *Id.* at 5-6. He was retained to render
14 an opinion on the monetary damages in this case. *Id.* at 4. Plaintiff argues Mr.
15 Hampton should be precluded from offering the four following “challenged
16 opinions”: (1) the efficacy of a two-email campaign to correct representations in
17 the alleged defamatory email; (2) the efficacy of a single letter campaign to correct
18 the same representations; (3) the cost of the hypothetical two-email campaign; and
19 (4) the cost of the hypothetical single letter campaign. ECF No. 102 at 5-6.

1 Plaintiff seeks to exclude the first two challenged opinions, regarding the
2 efficacy of two options for corrective campaigns to address the alleged defamatory
3 email, as outside of Mr. Hampton's scope of expertise. ECF No. 102 at 6-7. Mr.
4 Hampton admitted in his deposition that he is not an advertising expert, and his
5 educational and work experience do not indicate he has special experience with
6 advertising. ECF No. 106-2 at 11; ECF No. 106-1 at 4-6. However, Plaintiff's
7 motion seeks to exclude opinions that Mr. Hampton has not rendered. Mr.
8 Hampton specifically stated in his deposition that he offered opinions on the cost
9 of the various corrective campaigns, not opinions as to their efficacy. ECF No.
10 106-2 at 11. Mr. Hampton's written expert report similarly does not opine on the
11 relative efficacy of a particular corrective advertising campaign. ECF No. 106-1 at
12 8. To the extent Plaintiff seeks to preclude Mr. Hampton from offering opinions
13 that Mr. Hampton does not actually intend to offer, Plaintiff's motion is denied.

14 Plaintiff also seeks to preclude Mr. Hampton's opinions about the cost of the
15 various corrective campaigns on the ground that these calculations did not require
16 "specialized knowledge." ECF No. 102 at 7-8. Although Mr. Hampton's specific
17 calculations may not be complicated, they are based on the factual evidence
18 presented in this case and methods Mr. Hampton has developed through his
19 expertise in the field of accounting. Fed. R. Evid. 702. Plaintiff can challenge the
20 substance of Mr. Hampton's calculations on cross-examination. *See Alaska Rent-*

1 *A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (“[T]he
2 judge is supposed to screen the jury from unreliable nonsense opinions, but not
3 exclude opinions merely because they are impeachable.”) Mr. Hampton’s opinions
4 on the cost of relative corrective marketing campaigns are the proper subject of
5 expert testimony, and Plaintiff’s motion to prohibit Mr. Hampton from testifying
6 on this subject is denied.

7 *2. Nicholas Carroll*

8 Defendants offer Mr. Carroll as an expert in defamation and advertising.
9 ECF No. 98 at 3. Plaintiff moves to preclude Mr. Carroll from offering any
10 opinions at trial and to strike Mr. Carroll’s expert report. ECF No. 104 at 1.

11 As a threshold matter, the parties dispute the scope of Mr. Carroll’s
12 expertise. Plaintiff characterizes Mr. Carroll’s report and anticipated testimony as
13 offering opinions on the “operation, benefits, coverage, or functionality of the 2G
14 or 3G cellular networks.” ECF No. 104 at 7. In contrast, Defendants characterize
15 Mr. Carroll as “an expert on truth in advertising and defamation.” ECF No. 123 at
16 2. A review of Mr. Carroll’s expert report shows Mr. Carroll offers opinions on
17 both subjects. While some of Mr. Carroll’s opinions conclude that certain
18 language in the allegedly defamatory email constitutes generally acceptable
19 advertising practices, Mr. Carroll also bases these conclusions on opinions he has
20 formed regarding the transition from the 2G cellular network to the 3G cellular

1 network. ECF No. 107-1 at 6-8. Accordingly, the Court considers Mr. Carroll's
2 qualifications to opine on each subject.

3 *a. Cellular Network Technology*

4 Regarding Mr. Carroll's expertise on the subject of cellular networks, the
5 Court agrees with Plaintiff that Mr. Carroll is not sufficiently qualified to offer
6 expert opinion evidence on the 2G-to-3G transition. While Mr. Carroll has some
7 experience with digital technology, "there are limits to an expert's ability to testify
8 about customary practice. For example, a proffered travel industry expert may not
9 be in the position to testify about the customs of the cruise line business
10 specifically if he or she has never worked in the cruise industry." *Mullins v.*
11 *Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 900 (N.D. Cal. 2016) (citing
12 *Samuels v. Holland Am. Line-USA Inc.*, 656 F.3d 948, 953 (9th Cir. 2011)). Here,
13 although Mr. Carroll has a Bachelor of Science degree in Technology
14 Management, he does not appear to have any special training or work experience
15 specific to 2G or 3G cellular network functionality. ECF No. 107-1 at 4-5, 12-15.
16 In his deposition, Mr. Carroll testified to what he characterized as industry
17 perception of "mixed messages" during the 2G-to-3G transition and other
18 characterizations he asserted were "common knowledge" in the industry at the
19 time. *See, e.g.*, ECF No. 107-2 at 4, 6, 8. However, when questioned during his
20 deposition about the sources of his knowledge of industry understanding, Mr.

1 Carroll could not identify specific facts or sources to support his characterizations,
2 aside from one conversation with an IT systems administrator. ECF No. 107-2 at
3 11-12. Mr. Carroll also testified that he reviewed articles from *PC Magazine* in
4 preparation for his report, and his report cites to an AT&T official announcement,
5 two articles from *PC Magazine*, and Wikipedia as sources for the technical basis
6 for Mr. Carroll's report. ECF No. 107-1 at 7; ECF No. 107-2 at 12. These sources
7 and single conversation fall below the threshold of "intellectual rigor" necessary to
8 support expert testimony on the subject of cellular network functionality. *Kumho*
9 *Tire Co.*, 526 U.S. at 152. Although Defendants characterize Mr. Carroll's report
10 as only offering opinions on defamation and advertising, the face of Mr. Carroll's
11 report makes clear that his conclusions are based upon his opinions about cellular
12 network functionality and industry common knowledge of the same. Mr. Carroll is
13 not sufficiently qualified to give an expert opinion on these subjects, so he will not
14 be permitted to offer an expert opinion on cellular network functionality or
15 characterize industry knowledge of cellular networks. These provisions of Mr.
16 Carroll's expert report shall similarly be stricken.

17 Additionally, Mr. Carroll's chart depicting the 2G SIM Card market shall be
18 stricken for the reasons described *supra*, as well as for being unduly confusing and
19 misleading. ECF No. 107-1 at 8. This exhibit purports to demonstrate that the life
20 expectancy of the 2G network was short as of December 2015; however, the chart

1 itself documents the relative market share of the 2G network between AT&T and
2 T-Mobile, which is a distinct concept from the market's overall longevity.
3 Moreover, the chart is mathematically inaccurate. While the chart shows that only
4 two entities occupied the 2G market in 2010, with AT&T at 70% of the relative
5 market share and T-Mobile at 30% of the relative market share, these proportions
6 do not remain accurate as the chart shows the passage of time. After the chart
7 documents AT&T shuttering its 2G network in 2017, it continues to show T-
8 Mobile as holding 30% or less of the relative market share, despite being the only
9 entity in the 2G market (thus holding 100% of the relative market share). Because
10 this chart is not mathematically accurate, its risk of confusing or misleading the
11 jury outweighs its probative value. Fed. R. Evid. 403. Accordingly, Mr. Carroll's
12 chart shall be stricken from his expert report.

13 *b. Defamation and Advertising*

14 Defendants assert Mr. Carroll should be permitted to offer expert opinion
15 evidence on the subjects of defamation and advertising, and that Mr. Carroll should
16 be permitted to opine that statements in the allegedly defamatory email do not rise
17 to the level of defamation. ECF No. 123 at 2, 4. Mr. Carroll has over 30 years of
18 experience as a professional editor performing libel reviews and has nearly 30
19 years of experience in the advertising industry. ECF No. 107-1 at 4-5. Much of
20 his experience in editing and libel review and some of his experience in advertising

1 has been specific to high-tech industries. *Id.* Accordingly, Mr. Carroll is
2 sufficiently qualified to give an opinion on defamation and advertising.

3 However, Mr. Carroll’s ability to offer expert opinion testimony is not
4 without limits. “It is well-established ... that expert testimony concerning an
5 ultimate issue is not per se improper.” *Elsayed Mukhtar v. California State Univ.,*
6 *Hayward*, 299 F.3d 1053, 1066 (9th Cir. 2002), *overruled on other grounds by*
7 *Barabin*, 740 F.3d at 467. “That said, ‘an expert witness cannot give an opinion as
8 to her *legal conclusion*, i.e., an opinion on the ultimate issue of law.’” *Hangarter*,
9 373 F.3d at 1016 (quoting *Mukhtar*, 299 F.3d at 1066 n.10) (emphasis in original).

10 Mr. Carroll may properly testify to common practices in the advertising industry
11 and whether and how certain statements in the allegedly defamatory email conform
12 to certain industry practices. However, Mr. Carroll may not offer conclusions that
13 specific statements in the allegedly defamatory email are or are not defamatory.

14 These opinions are legal conclusions and are therefore not the appropriate subject
15 of expert testimony. Statements in Mr. Carroll’s report that conclude that certain
16 portions of the allegedly defamatory email are not or cannot be defamation shall be
17 stricken from Mr. Carroll’s expert report. In sum, Plaintiff’s motion to strike Mr.
18 Carroll’s expert report is granted in part and denied in part.

1 3. *Hiren Modi*

2 Plaintiff offers Mr. Modi as a fact witness regarding Plaintiff's corrective
3 advertising campaign following the alleged defamatory email. ECF No. 119 at 2.
4 Plaintiff also disclosed a document captioned "Declaration and Report of Hiren
5 Modi," pursuant to Fed. R. Civ. P. 26(a)(2)(B), which indicates Mr. Modi was
6 "asked to opine as to the reasonableness of this campaign in relation to the
7 projected negative impact of Defendants' misrepresentations." ECF No. 116-1 at
8 4. Defendants move to strike Mr. Modi's expert report and to prohibit him from
9 testifying as an expert witness on several grounds: that Mr. Modi does not qualify
10 as an expert, that Mr. Modi is a biased witness, that Mr. Modi's expert report is
11 deficient under Rule 26, that Mr. Modi's report contains improper legal
12 conclusions, and that Mr. Modi did not draft his own report. ECF No. 116 at 3-12.
13 Plaintiff responds that Defendants' motion is a pretext to exclude factual evidence.
14 ECF No. 119 at 2.

15 The Federal Rules of Evidence allow for opinion testimony from both lay
16 and expert witnesses. Fed. R. Evid. 701, 702. "[T]he distinction between lay and
17 expert witness testimony is that lay testimony 'results from a process of reasoning
18 familiar in everyday life,' while expert testimony 'results from a process of
19 reasoning which can be mastered only by specialists in the field.'" Fed. R. Evid.
20 701 (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)). "It is necessary

1 that a lay witness’s ‘opinions are based upon ... direct perception of the event, are
2 not speculative, and are helpful to the determination’ of factual issues before the
3 jury.’ *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007) (quoting
4 *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985)).

5 Although Plaintiff contends Mr. Modi is largely a fact witness, Plaintiff
6 submitted Mr. Modi’s declaration styled as a Rule 26 expert disclosure. ECF No.
7 116-1. Mr. Modi’s declaration and the excerpts of his deposition provided to the
8 Court are indeed largely factual, with the exception of Mr. Modi’s opinion that the
9 specific corrective advertising campaign undertaken by Plaintiff was a reasonable
10 response to the alleged defamatory email. *See* ECF No. 120-2 at 11. The issue
11 becomes whether this opinion constitutes a lay opinion or an expert opinion. In his
12 expert report and his deposition testimony, Mr. Modi does not indicate that he
13 formed his opinion that the corrective advertising campaign was reasonable and
14 necessary through “a process of reasoning which can be mastered only by
15 specialists in the field” of advertising. Fed. R. Evid. 701. Although Mr. Modi may
16 have an educational background and work experience in e-commerce and digital
17 marketing, Mr. Modi’s declaration and deposition testimony do not detail how he
18 applied any specialized knowledge he has to form his opinion. Instead, Mr. Modi
19 describes being informed of the contents of the alleged defamatory email and
20 working with Plaintiff to develop and place advertisements without any reference

1 to specialized concepts within the advertising field. While Plaintiff emphasizes
2 that Mr. Modi has experience and education in the subject on which he offers an
3 opinion, this is only one component of the analysis the Court engages in before
4 qualifying an expert. Fed. R. Civ. P. 702.

5 The question that Mr. Modi's opinion addresses is whether the scope of the
6 corrective advertising campaign was proportional to the amount of harm caused by
7 the alleged defamatory email. This is not the type of specialized inquiry that calls
8 for expert testimony. Mr. Modi can describe his understanding of the alleged
9 defamatory email and how, in his capacity as the owner of an e-commerce
10 business, he helped Plaintiff create a responsive advertising campaign. Mr. Modi's
11 opinion about the reasonableness of that campaign is based on his first-hand
12 experience working with Plaintiff, would be helpful to the jury in understanding
13 the damages in this case, and is not on any technical or specialized information.
14 Fed. R. Evid. 701. Accordingly, Mr. Modi may testify to the facts of this case and
15 his opinion thereof as a lay witness, not as an expert witness. Defendants' other
16 concerns about bias may be addressed on cross-examination, but they do not
17 provide grounds to completely exclude Mr. Modi's testimony. Because Mr. Modi
18 does not qualify as an expert witness, his declaration is struck as an expert report,
19 and the Court declines to address Defendants' other arguments surrounding the

1 drafting of the declaration.³ Defendants’ motion to strike Mr. Modi’s expert report
2 is granted, and Defendants’ motion to completely exclude Mr. Modi’s testimony is
3 denied.

4 **B. Summary Judgment**

5 Plaintiff moves for partial summary judgment on Plaintiff’s unfair
6 competition, false advertising and defamation claims. ECF No. 108. Defendants
7 move for summary judgment on all of Plaintiff’s pending claims. ECF No. 113.

8 The Court may grant summary judgment in favor of a moving party who
9 demonstrates “that there is no genuine dispute as to any material fact and that the
10 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling
11 on a motion for summary judgment, the court must only consider admissible
12 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).
13 The party moving for summary judgment bears the initial burden of showing the
14 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

15 _____
16 ³ This includes Plaintiff’s argument for sanctions for Defendants’ alleged
17 spoliation, which is only raised as a response to Defendants’ argument that Mr.
18 Modi’s expert report should be stricken for incompleteness. ECF No. 119 at 10. If
19 Plaintiff wishes to actually move for sanctions, Plaintiff may do so in the form of a
20 motion.

1 317, 323 (1986). The burden then shifts to the non-moving party to identify
2 specific facts showing there is a genuine issue of material fact. *See Anderson v.*
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla
4 of evidence in support of the plaintiff’s position will be insufficient; there must be
5 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

6 For purposes of summary judgment, a fact is “material” if it might affect the
7 outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. Further,
8 a material fact is “genuine” only where the evidence is such that a reasonable jury
9 could find in favor of the non-moving party. *Id.* The Court views the facts, and all
10 rational inferences therefrom, in the light most favorable to the non-moving party.
11 *Scott v. Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted
12 “against a party who fails to make a showing sufficient to establish the existence of
13 an element essential to that party’s case, and on which that party will bear the
14 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

15 *1. Claims Two and Three: Lanham Act and Common Law Unfair Competition*

16 Defendants move for summary judgment on Plaintiff’s claims under the
17 Lanham Act and for common law unfair competition. ECF No. 113 at 5-15.
18 Plaintiff also moves for partial summary judgment on the Lanham Act claim. ECF
19 No. 108 at 7-10.

20 The elements of a Lanham Act § 43(a) false advertising claim are:

1 (1) a false statement of fact by the defendant in a commercial
2 advertisement about its own or another's product; (2) the statement
3 actually deceived or has the tendency to deceive a substantial segment
4 of its audience; (3) the deception is material, in that it is likely to
5 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.

6 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). A
7 plaintiff must show that “the statement was literally false, either on its face or by
8 necessary implication, or that the statement was literally true but likely to mislead
9 or confuse consumers.” *Id.* (citation omitted). The elements of false advertising
10 under the Lanham Act are identical to the elements of unfair competition under
11 Washington common law. *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-
12 861 RSM, 2015 WL 3407882, at *7 (W.D. Wash. May 27, 2015).

13 *a. Defendants' Motion for Summary Judgment*

14 Defendants move for summary judgment based on the argument that no
15 statements in the allegedly defamatory email, on the RHC website, or Mr.
16 Hofeditz's live chat with Eric contain false information. ECF No. 113 at 7-14. “In
17 analyzing whether an advertisement ... is literally false, a court must determine,
18 first, the unambiguous claims made by the advertisement ..., and second, whether
19 those claims are false.” *In-N-Out Burgers v. Smashburger IP Holder LLC*, No.
20 SACV 17-1747 JVS (DFMx), 2019 WL 1431904, at *4 (C.D. Cal. Feb. 6, 2019)

1 (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer*
2 *Pharms, Co.*, 290 F.3d 578, 586 (3d Cir. 2002)). “When evaluating whether an
3 advertising claim is literally false, the claim must always be analyzed in its full
4 context.” *Southland Sod*, 108 F.3d at 1139. “In the Ninth Circuit, literal falsity is
5 a question of fact.” *Quidel Corp. v. Siemens Med. Sol. USA, Inc.*, No. 16-cv-3059-
6 BAS-AGS, 2019 WL 5320390, at *5 (S.D. Cal. Oct. 21, 2019) (citing *Southland*
7 *Sod*, 108 F.3d at 1144-45)).

8 Construing the evidence in the light most favorable to Plaintiff, genuine
9 issues of material fact preclude summary judgment for Defendants on the false
10 advertising claims. A reasonable jury could conclude that statements in the
11 allegedly defamatory email and on the RHC website are false. For example,
12 Defendants assert that statements in the allegedly defamatory email are not false
13 because Fortress’s products are not referenced by name. ECF No. 113 at 8.
14 However, the “full context” of the email requires consideration of the facts that
15 Fortress’s products were referenced by name when consumers clicked the link
16 within the allegedly defamatory email, and that a number of AlarmSIM’s
17 customers were referred to AlarmSIM directly by Fortress. *See* ECF No. 109 at 2-
18 3, ¶ 2; ECF No. 114 at 5, ¶¶ 27-28. Within this context, a reasonable jury could
19 conclude that warnings in the email about changing network technology posing a
20 “serious risk to the proper functioning of your security system” were specifically

1 referencing Fortress systems and falsely implying that Fortress systems were
2 incapable of adapting to the 3G network.

3 Additionally, a reasonable jury could also conclude that the statement on the
4 RHC website that “[i]f you have a ‘Fortress’... system, you may be particularly at
5 risk to lose coverage due to the sunset of the 2G network” is false. This statement
6 clearly identifies Fortress’s products by name, and Fortress has produced evidence
7 to show that it had created a 3G security panel as well as a program to upgrade
8 older Fortress panels to 3G compatibility at no cost to the customer. ECF No. 109
9 at 8-9, ¶¶ 46-47. Because Fortress produced evidence to show it had taken steps to
10 transition its older alarm systems onto the 3G network, a reasonable jury could
11 conclude that this statement on the RHC website is false.

12 In yet another example of a question of fact in this case, a reasonable jury
13 could conclude that the statement in the email that “[t]his is in preparation of the
14 final sunset of the network in 2016” is false in light of the evidence presented that
15 the 2G network as a whole was not predicted to sunset in 2016 and AT&T’s
16 network was not predicted to sunset its 2G network until January 1, 2017. ECF
17 No. 109 at 5-6, ¶¶ 25-27. These outstanding issues of fact concerning the falsity of
18 the relevant statements preclude summary judgment.

19 Defendants also argue that summary judgment is appropriate on these claims
20 because Plaintiff has not offered sufficient evidence of consumer deception or

1 confusion. ECF No. 113 at 11-14. However, “deliberate falsity yields a
2 presumption of consumer deception in cases of non-comparative advertising and a
3 presumption of consumer deception and injury in cases of direct comparative
4 advertising.” *Nat’l Products, Inc. v. Gamber-Johnson LLC*, 699 F. Supp. 2d 1232,
5 1241 (W.D. Wash. 2010); *see also Johnson & Johnson-Merck Consumer Pharm.*
6 *Co. v. Rhone-Poulenc Rorer Pharm. Inc.*, 19 F.3d 125, 129 (3d Cir. 1994) (“If a
7 plaintiff proves a challenged claim is literally false, a court may grant relief
8 without considering whether the buying public was misled.”). When a genuine
9 issue of fact exists as to whether an advertisement is literally false, “[a] domino
10 effect occurs ... [and a] presumption is created in the plaintiff’s favor with respect
11 to the remaining elements that are typically contested in Lanham Act false
12 advertising cases, thereby precluding the grant of summary judgment in favor of
13 the defendant.” *FLIR Sys., Inc. v. Sierra Media, Inc.*, 903 F. Supp. 2d 1120, 1132
14 (D. Or. 2012). Because a genuine issue of material fact exists about the falsity of
15 the advertisements in this case, it would be inappropriate to grant summary
16 judgment on Defendants’ deception argument, given the presumption of deception
17 created in Plaintiff’s favor.

18 *b. Plaintiff’s Motion for Summary Judgment*

19 Plaintiff moves for partial summary judgment on the falsity of the statements
20 in the allegedly defamatory email. ECF No. 108 at 8-10. However, when the facts

1 are construed in the light most favorable to Defendants, similar issues of fact
2 preclude Plaintiff's motion for summary judgment.

3 Plaintiff argues that the specific statements in the allegedly defamatory
4 email that the 2G network would experience a "final sunset" in 2016, that
5 AlarmSIM's customers reported experiencing problems with their 2G security
6 systems, suggestions that Fortress customers were at risk, that Fortress was slow to
7 respond to the issue, and that AlarmSIM had developed a 3G security panel are all
8 literally false statements. ECF No. 108 at 8. However, a reasonable jury could
9 conclude that the allegation of a "final sunset" in 2016 is consistent with the
10 evidence that AT&T intended to shut down its 2G network on January 1, 2017.
11 ECF No. 109 at ¶ 25. A reasonable jury could conclude that the statements about
12 Fortress customers experiencing problems with their 2G systems was true in light
13 of Mr. Guthrie's testimony that AlarmSIM received such complaints from Fortress
14 customers. *See* ECF No. 112-4 at 6-7. A reasonable jury could conclude that the
15 evidence that Fortress developed a 3G panel and offered a free 3G upgrade to
16 existing customers is evidence that Fortress's 2G customers were at risk of losing
17 service. ECF No. 109 at 8-9, ¶¶ 46-47. A reasonable jury could conclude that the
18 statement alleging a slow response by other companies is a reflection of Mr.
19 Guthrie's opinion formed from his interactions with Fortress and other companies
20 and therefore not literally false. ECF No. 112-4 at 9-10. And finally, a reasonable

1 jury could conclude that “AlarmSIM has decided to introduce its own, new 3G
2 security panel” is not false in light of evidence presented that AlarmSIM was
3 developing a 3G security panel. ECF No. 114 at 6-7, ¶¶ 32-39. These outstanding
4 issues of fact concerning the falsity of the challenged statements preclude summary
5 judgment.

6 2. *Claim Four: Defamation*

7 Plaintiff and Defendants each move for summary judgment on Plaintiff’s
8 defamation claim. ECF No. 108 at 10-11; ECF No. 113 at 5-14. The elements a
9 plaintiff must establish in a defamation case are “falsity, an unprivileged
10 communication, fault, and damages.” *Mohr v. Grant*, 153 Wash. 2d 812, 822
11 (2005). The same issues of fact regarding the falsity of the statements made
12 discussed *supra* preclude summary judgment for either side. Construing the
13 evidence in the light most favorable to each non-moving party, a reasonable jury
14 could conclude that the statements at issue either are or are not false. Accordingly,
15 neither party is entitled to summary judgment.

16 3. *Claims Five and Six: Tortious Interference with Contractual Relationships*
17 *and Business Expectancy*

18 Defendants move for summary judgment on Plaintiff’s two tortious
19 interference claims. ECF No. 113 at 15-18. The elements of a tortious
20 interference claim are: (1) the existence of a valid contractual relationship or

1 business expectancy; (2) that defendants had knowledge of that relationship; (3) an
2 intentional interference inducing or causing a breach or termination of the
3 relationship or expectancy; (4) that defendants interfered for an improper purpose
4 or used improper means; and (5) resultant damages. *Newton Ins. Agency &*
5 *Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114 Wash. App. 151, 157-58 (2002).

6 A valid business expectancy “includes any prospective contractual or business
7 relationship that would be of pecuniary value.” *Id.* at 158. Intentional interference
8 “denotes purposefully improper interference.” *Birkenwald Distrib. Co. v.*
9 *Heublein, Inc.*, 55 Wash. App. 1, 11 (1989) (“When one acts to promote lawful
10 economic interests, bad motive is essential, and incidental interference will not
11 suffice.”) (citations omitted).

12 Defendants argue Plaintiff has failed to show the first element. ECF No. 113
13 at 16-17. In response, Plaintiff does not identify evidence of a contractual
14 relationship, but argues that it has a valid business expectancy of ongoing business
15 from its clients. ECF No. 125 at 17. “A business expectancy exists when there is a
16 relationship between parties contemplating a contract.” *Nat’l City Bank, N.A. v.*
17 *Prime Lending, Inc.*, No. CV-10-034-EFS, 2010 WL 2854247, at *4 (E.D. Wash.
18 July 19, 2010) (citing *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wash.
19 2d 342, 353 n.2 (2006)). “This requires only a reasonable expectancy that the
20 contract will come to fruition, and not a completed contract.” *Nat’l City Bank,*

1 2010 WL 2854247 at *4 (citing *Scymanski v. Dufault*, 80 Wash. 2d 77, 84-85
2 (1972)). Plaintiff cites evidence that it provides its customers with a three-year
3 warranty and ongoing lifetime technical support, which Plaintiff asserts builds trust
4 with its customers such that Plaintiff can expect customers to return to purchase
5 products in the future. ECF No. 125 at 17. This type of expectation is too
6 indefinite to constitute a reasonable business expectancy. Plaintiff may hope that
7 its customers are loyal to its brand, but it has not offered facts to demonstrate that it
8 has a “reasonable expectancy” that past customers will return to contract for future
9 purchases. *Nat’l City Bank*, 2010 WL 2854247 at *4. Plaintiff similarly offers no
10 facts and develops no argument to support a finding that it has valid existing
11 contractual relationships with its customers. ECF No. 125 at 17. Even if the Court
12 were to assume that Plaintiff’s provision of warranty coverage and ongoing
13 customer support was evidence of a contractual relationship with its customers,
14 Plaintiff has offered no evidence that Defendants’ actions caused a breach of that
15 contract. ECF No. 125 at 17; *see Newton Ins. Agency*, 114 Wash. App. at 157-58.
16 Because Plaintiff cannot show that it has a valid business expectancy or contract,
17 Defendants are entitled to summary judgment on Plaintiff’s tortious interference
18 claims.

1 4. *Claim Seven: Unjust Enrichment*

2 Defendants move for summary judgment on Plaintiff’s unjust enrichment
3 claim. ECF No. 113 at 18-19. “Unjust enrichment is the method of recovery for
4 the value of the benefit retained absent any contractual relationship because
5 notions of fairness and justice require it.” *Young v. Young*, 165 Wash. 2d 477, 484
6 (2008). The elements of an implied contract unjust enrichment claim are “(1) the
7 defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense,
8 and (3) the circumstances make it unjust of the defendant to retain the benefit
9 without payment.” *Id.*

10 Here, Plaintiff argues that Defendants were unjustly enriched by Plaintiff’s
11 efforts of recommending AlarmSIM SIM cards to its customers “over a period of
12 years by phone, email, Live Chat, and reviews.” ECF No. 125 at 18. As discussed
13 *infra*, it is unclear whether a contract existed between the parties in this case.
14 However, even construing the facts in the light most favorable to Plaintiff on this
15 claim and assuming that no contract existed, Plaintiff offers no facts to support a
16 finding that it would be unjust for Defendants to retain the benefit of Plaintiff’s
17 recommendations. It is undisputed that Plaintiff recommended AlarmSIM to its
18 customers. ECF No. 114 at 4, ¶ 20. It is also undisputed that recommending
19 AlarmSIM to its customers was beneficial to Plaintiff because Plaintiff had a
20 reliable source of SIM cards to recommend to its customers that would be

1 specifically compatible with Plaintiff's alarm systems, which Mr. Hofeditz testified
2 was valuable to him, and Plaintiff did not have to worry about providing SIM cards
3 for its systems. ECF No. 114 at 3-4, ¶¶ 16, 18. Even construing the facts in the
4 light most favorable to Plaintiff, the circumstances do not make it unjust for
5 Defendants to retain the value of Plaintiff's recommendations without payment
6 because Plaintiff also derived a benefit from the parties' arrangement. Defendants
7 are entitled to summary judgment on Plaintiff's unjust enrichment claim.

8 *5. Claim Eight: Intentional and/or Negligent Misrepresentation*

9 Defendants move for summary judgment on Plaintiff's intentional and/or
10 negligent misrepresentation claim. ECF No. 113 at 19-22. To state a claim for
11 fraud or intentional misrepresentation under Washington law, a plaintiff must plead
12 the following elements: (1) representation of an existing fact; (2) materiality; (3)
13 falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it
14 should be acted upon by the plaintiff; (6) the plaintiff's ignorance of its falsity; (7)
15 the plaintiff's reliance on the truth of the representations; (8) the plaintiff's right to
16 rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block*, 130 Wash.
17 2d 486, 505 (1996).

18 To make a claim for negligent misrepresentation, a plaintiff "must prove by
19 clear, cogent, and convincing evidence that": (1) defendants supplied false
20 information for the guidance of others in their business transactions; (2) defendants

1 knew or should have known that the information was supplied to guide the plaintiff
2 in his business transactions; (3) defendants were negligent in obtaining or
3 communicating the false information; (4) the plaintiff relied on the false
4 information; (5) the plaintiff's reliance was reasonable; and (6) the false
5 information proximately caused the plaintiff's damages. *Ross v. Kirner*, 162
6 Wash. 2d 493, 499 (2007).

7 "A 'false representation' as to a presently existing fact is a prerequisite to
8 liability for both fraud and negligent misrepresentation." *Wessa v. Watermark*
9 *Paddlesports, Inc.*, No. C06-5156 FDB, 2006 WL 1418906, at *2 (W.D. Wash.
10 May 22, 2006) (citations omitted). "[A p]laintiff must set forth, as a part of the
11 circumstances constituting fraud, an explanation as to why the disputed statement
12 was untrue or misleading when made." *Id.* at *3. Additionally, a statement that
13 cannot be proven false cannot support a negligent misrepresentation claim. *Elliott*
14 *Bay Seafoods, Inc. v. Port of Seattle*, 124 Wash. App. 5, 14-15 (2004). "Promises
15 of future conduct may support a contract claim. But failure to perform those
16 promises alone cannot establish the requisite negligence for negligent
17 misrepresentation." *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*,
18 110 Wash. App. 412, 436 (2002).

19 Plaintiff argues that AlarmSIM made false representations about the
20 "capacities and suitability of AlarmSIM's SIM cards" and "AlarmSIM's ability

1 and willingness to provide ‘top-notch’ customer service to Fortress’s customers.”
2 ECF No. 125 at 19. However, Plaintiff fails to offer facts to support this argument
3 or show how these statements were untrue or misleading when made. *Id.*
4 Representations about “top-notch” customer service are the sort of “mere puffery”
5 that cannot be proven false and do not support a finding of an unfair or deceptive
6 action. *Babb v. Regal Marine Indust., Inc.*, 179 Wash. App. 1036, 2014 WL
7 690154, at *3 (Feb. 20, 2014). Although Plaintiff has produced evidence that some
8 of its customers reported dissatisfaction with AlarmSIM’s customer service, it has
9 not produced evidence that AlarmSIM did not provide customer service to
10 Plaintiff’s customers. ECF No. 126 at 30, ¶ 50. Plaintiff asserts Defendants’ call
11 center was “nonexistent,” but offers no facts to demonstrate that the call center did
12 not actually exist. ECF No. 126 at 30, ¶ 51. Plaintiff’s general assertion that
13 Defendants’ statements about the “capacities and suitability of AlarmSIM’s SIM
14 cards” does not specifically identify what statement is false. ECF No. 125 at 19.
15 To the extent Plaintiff argues that AlarmSIM’s SIM cards were not suited to work
16 with Plaintiff’s products, this argument is undercut by the evidence. Plaintiff
17 continued to recommend Defendants’ SIM cards for use in its products from 2013
18 through 2015. ECF No. 114 at 4-5, ¶¶ 20, 27-28. Mr. Hofeditz ran his own test
19 run of Defendants’ SIM card to confirm that they would work with Plaintiff’s
20 security system. ECF No. 114 at 3, ¶ 12. Some of Plaintiff’s customers reported

1 problems with AlarmSIM SIM cards. ECF No. 126 at 29, ¶¶ 48-49. However,
2 Plaintiff's employee Benjamin Murray testified that technical issues with SIM
3 cards "were a very common thing," that the issue was not exclusive to AlarmSIM
4 SIM cards, and that Plaintiff "had tons of customers that were using AlarmSIM
5 SIM cards successfully that weren't having those issues." ECF No. 113-2 at 5.

6 Plaintiff may have produced evidence that some of its customers were
7 dissatisfied with Defendants' products and customer service, but it has not
8 presented evidence to show that Defendants' statements concerning the
9 compatibility of its product with Plaintiff's product and Defendants' ability to
10 provide customer service were literally false. "Hindsight does not render the
11 statement of a proposed performance a falsehood when made." *Wessa*, 2006 WL
12 1418906, at *3. Moreover, the statements Plaintiff identifies as the subject of
13 misrepresentation are promises of future performance, not statements of presently
14 existing fact. *Micro Enhancement*, 110 Wash. App. at 436. Even construing the
15 evidence in the light most favorable to Plaintiff, Plaintiff cannot show the falsity of
16 the challenged statements. Defendants are entitled to summary judgment on
17 Plaintiff's intentional and negligent misrepresentation claims.

18 *6. Claim Nine: Breach of Agreement*

19 Defendants move for summary judgment on Plaintiff's breach of agreement
20 claim. ECF No. 113 at 22-24. A claim for breach of contract is actionable under

1 Washington law “if the contract imposes a duty, the duty is breached, and the
2 breach proximately causes damage to the claimant.” *Nw. Indep. Forest Mfrs. v.*
3 *Dep’t of Labor & Indus.*, 78 Wash. App. 707, 712 (1995) (citation omitted).

4 Defendants move for summary judgment on the grounds that there was no
5 exchange of consideration or meeting of the minds, and therefore no contract,
6 between the parties. ECF No. 113 at 22-24. “In any breach of contract action, the
7 first question a reviewing court must answer is whether an enforceable contract has
8 been created.” *Storti v. Univ. of Washington*, 181 Wash. 2d 28, 35 (2014). A valid
9 contract requires an offer, acceptance of the offer, and consideration. *Yakima Cty.*
10 *(West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash. 2d 371,
11 389-90 (1993). “An offer consists of a promise to render a stated performance in
12 exchange for a return promise being given.” *Pac. Cascade Corp. v. Nimmer*, 25
13 Wash. App. 552, 556 (1980). “Consideration may consist of an act, a forbearance,
14 the creation, modification or destruction of a legal relationship, or a return promise
15 given in exchange.” *Emberson v. Harlley*, 52 Wash. App. 597, 601 (1988). “A
16 promise for a promise is sufficient consideration to support a contract.” *Omni*
17 *Grp., Inc. v. Seattle-First Nat. Bank*, 32 Wash. App. 22, 24 (1982).
18 “Whether a contract is supported by consideration is a question of law and may be
19 properly determined by a court on summary judgment.” *Nationwide Mut. Fire Ins.*
20 *Co. v. Watson*, 120 Wash. 2d 178, 195 (1992).

1 Here, it is unclear whether a contract existed between the parties. Plaintiff
2 asserts the parties formed a valid contract during a November 11, 2013
3 conversation between Mr. Guthrie and Mr. Hofeditz. Plaintiff asserts that Mr.
4 Guthrie requested Plaintiff recommend AlarmSIM SIM cards to Plaintiff's
5 customers, that Mr. Hofeditz promised that Fortress would recommend AlarmSIM
6 SIM cards in exchange for AlarmSIM providing SIM cards, customer service, and
7 a discount to Fortress's customers, and that Mr. Guthrie agreed to these terms.
8 ECF No. 126 at 24-25, ¶¶ 9-15. Construing these facts in the light most favorable
9 to Plaintiff, a reasonable jury could conclude that an oral contract existed between
10 the parties.

11 Assuming a contract existed between the parties, a reasonable jury could
12 conclude that the contract was breached. It is undisputed that AlarmSIM provided
13 SIM cards to Fortress customers and that the SIM cards were generally compatible
14 with Fortress's security systems. ECF No. 114 at 4, ¶ 20. Although the quality is
15 disputed, it is undisputed that AlarmSIM provided customer support to its
16 customers. ECF No. 126 at 30, ¶ 50. And it is undisputed that Fortress customers
17 were able to use a discount code to receive a discount on AlarmSIM SIM cards.
18 ECF No. 126 at 26, ¶ 24. However, Plaintiff has offered evidence that the terms of
19 the contract were that Defendants would completely respond to Fortress
20 customers' inquiries about AlarmSIM SIM cards and correct at AlarmSIM's

1 expense any issues Fortress customers experienced with AlarmSIM SIM cards.
2 ECF No. 126 at 24, ¶ 12. Plaintiff has also alleged facts to demonstrate that
3 Defendants did not adequately respond to Fortress customer inquiries and did not
4 correct issues Fortress customers experienced with AlarmSIM’s SIM cards. ECF
5 No. 126 at 30, ¶¶ 50-53. Construing this evidence in the light most favorable to
6 Plaintiff, a reasonable jury could conclude that the contract was breached.
7 Defendants are not entitled to summary judgment on Plaintiff’s breach of contract
8 claim.

9 7. *Claim Ten: Washington Consumer Protection Act*

10 Defendants move for summary judgment on Plaintiff’s Washington
11 Consumer Protection Act (“CPA”) claim. ECF No. 113 at 6-15. The elements of a
12 CPA claim are: “(1) unfair or deceptive act or practice; (2) occurring in trade or
13 commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or
14 property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*
15 *Co.*, 105 Wash. 2d 778, 780 (1986). “[A]n act or practice can be unfair without
16 being deceptive” *Klem v. Wash. Mut. Bank*, 176 Wash. 2d 771, 787 (2013).
17 “A deceptive act must have the capacity to deceive a substantial portion of the
18 population ... and misleads or misrepresents something of material importance.”
19 *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1097 (W.D. Wash. 2013)
20 (internal quotes and citations omitted). “Whether an act is unfair or deceptive is a

1 question of law.” *Id.* at 1097. However, when there is a dispute of fact as to the
2 parties’ underlying conduct, a court cannot determine whether conduct is unfair or
3 deceptive as a matter of law. *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131
4 Wash. 2d 133, 150 (1997).

5 Plaintiff identifies statements in the allegedly defamatory email and the
6 RHC website as violating the CPA. ECF No. 125 at 14. Genuine issues of fact
7 preclude this Court from determining whether these statements are unfair or
8 deceptive as a matter of law. As discussed *supra*, the statements at issue could
9 reasonably interpreted as true or false. Additionally, the parties dispute how
10 widely the allegedly defamatory email was distributed, the number of Plaintiff’s
11 customers who received the email, and the number of customers the parties had in
12 common. *See* ECF No. 130 at 4, ¶ 5. These facts speak to whether the statements
13 at issue had the capacity to deceive a substantial portion of the population.
14 *McDonald*, 929 F. Supp. 2d at 1097. Because genuine issues of fact surround the
15 underlying conduct, this Court cannot determine as a matter of law that the
16 statements at issue are unfair or deceptive. Defendants are not entitled to summary
17 judgment on this claim.

18 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 19 1. Plaintiff’s Motion to Exclude Expert Testimony of Scott Hampton (ECF
20 **No. 102)** is **DENIED**.

1 2. Plaintiff's Motion to Exclude Expert Testimony of Nicholas Carroll
2 (ECF No. 104) is **GRANTED IN PART and DENIED IN PART.**

3 3. Defendants' Motion to Exclude Expert Testimony of Hiren Modi (ECF
4 No. 116) is **GRANTED IN PART and DENIED IN PART.**

5 4. Plaintiff's Motion for Partial Summary Judgment (ECF No. 108) is
6 **DENIED.**

7 5. Defendants' Motion for Summary Judgment (ECF No. 113) is
8 **GRANTED IN PART and DENIED IN PART.**

9 The District Court Executive is directed to enter this Order and furnish
10 copies to counsel.

11 **DATED** December 5, 2019.



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Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge