

February 11, 2020

VIA EMAIL (CELLERBACH@FENWICK.COM)

Ms. Connie Ellerbach
Fenwick & West LLP
801 California Street
Mountain View, CA 94041

Re: “Outgrowing Gusto?” Billboard

Dear Gusto:

Our billboard struck a nerve, it seems. And so you phoned your legal teams, who started shouting, “Cease!” “Desist!” and other threats too long to list.¹

Your brand is known for being chill.² So this just seems like overkill. But since you think we’ve been unfair, we’d really like to clear the air:

In general, we think Gusto’s neat for Mom & Pop stores down the street.³ You handle small-batch tasks like pros—like payroll, HR, all of those.

But businesses are growing creatures, and as they scale they need more features. You know as well as us it’s true⁴, because it happened once to you.

When Gusto tried to scale itself, we saw what you took off the shelf. Your software fell a little short. You needed Workday for support.⁵

The truth is firms—both big and small—need power features for it all: Advanced reports for all locations, seamless Netsuite integrations.

We know it might sound like a flex, but we can handle the complex. In short, we help a business run—with HR, IT all-in-one.

So Gusto, do not fear our sign.⁶ Our mission and our goals align. Let’s keep this conflict dignified—and let the customers decide.⁷

Sincerely,



Vanessa Wu
General Counsel

1 Both Rippling and our billboard vendor received cease and desist letters from Gusto threatening “formal action” and demanding we “immediately” take down our “OUTGROWING GUSTO?” ad. Thankfully, our right to compare our product to our competitors is protected by robust legal precedent. In your haste to have our

billboard removed, we noticed you forgot to cite any legal authority to support your demand. So we're at a bit of a loss for what your legal case might be. Just to cover our bases:

- Was it that we mentioned Gusto's name? We hope not. Since the 1970s, the FTC has been clear that it "encourages the naming of, or reference to competitors." See Federal Trade Commission's *Statement of Policy Regarding Comparative Advertising*, dated August 13, 1979.
- Was it the threat of an emerging competitor? The Supreme Court has consistently determined that competition is good! Better products! More options! Lower prices! Democracy! See, e.g., *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1 (1958).
- Maybe you just didn't like the ad? We sympathize, but the First Amendment unequivocally protects commercial speech. See *Edenfield v. Fane*, 507 U.S. 761 (1993).
- Perhaps you really do think the ad is "factually inaccurate," but we've yet to find any statements of fact in our two-word question. It is also well-settled that subjective claims in advertising are lawful. See, e.g. *Newcal Indus., Inc. v. Ikon Office*, 513 F.3d 1028 (9th Cir. 2008). But even if our ad did say, "Gusto can be outgrown!" we'd still be on solid legal footing -- because it's true. See endnotes 3 through 5 below.

2 See <https://www.theladders.com/career-advice/the-employees-at-this-company-dont-wear-shoes-and-its-gross>

3 We think it's great that Gusto serves small businesses (we do too). But you write the implication "that a company can outgrow Gusto's software and services" is "factually inaccurate." This gave us a chuckle. We're surprised you found this idea controversial. Gusto typically embraces its status with small businesses. CEO Joshua Reeves himself celebrated Gusto's most recent fundraising round with a blog post titled "Building Gusto's Business to Serve Small Businesses," and described Gusto's opportunity ahead as helping "small businesses (with <100 employees)." See <https://gusto.com/company-news/series-d-funding>. Even positive reviews of Gusto note: "Gusto focuses on the SMB and is known to be effective for firms with less than 50 employees. They're also known for not scaling past that size." See HR Wins at <https://larocqueinc.com/gusto-raises-200m-series-d-eyeing-ondemand-pay-and-healthcare-benefits-with-increased-rd-in-nyc/>.

4 The only evidence you provide to the contrary is that "Gusto counts as customers multiple companies with 100 or more employees" and "does not state that businesses will 'outgrow' their platform at a certain size." Yet according to former Gusto customers (Customers?), you routinely tell your larger companies they can expect declining functionality on your platform as they grow.

5 Gusto's internal use of a competing HR solution like Workday seems like an implicit acknowledgment that your product does not perfectly meet the needs of larger companies and can be "outgrown."

6 You got our billboard taken down by threatening our vendor with a baseless lawsuit. Next time, let's fight fair, and leave those backroom tactics to the pros. See, e.g., https://ballotpedia.org/Presidential_candidates_2020.

7 We believe customers deserve choice in the marketplace. We hope you agree.