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12  
13 **UNITED STATES DISTRICT COURT**  
14  
15 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**  
16

17 BREAKING CODE SILENCE, a  
18 California Public Benefit Corporation,

19 Plaintiff,

20 v.

21 CHELSEA PAPCIAK aka FILER, an  
22 individual; JENNIFER WALKER, an  
23 individual; JENNA BULIS, an individual;  
24 MARTHA THOMPSON, an individual;  
25 and BREAKINGCODESILENCE, INC., a  
26 Florida Profit Corporation.,

27 Defendants.  
28

Case No. 21-cv-0918-BAS-DEB

**PLAINTIFF'S MEMORANDUM  
OF POINTS AND  
AUTHORITIES IN  
OPPOSITION TO DEFENDANT  
JENNIFER WALKER'S  
MOTION TO DISMISS  
PURSUANT TO FEDERAL  
RULE OF CIVIL PROCEDURE  
12(B)(6)**

Date: September 13, 2021  
Dept: 4B  
Judge: Hon. Cynthia A. Bashant

1 Plaintiff BREAKING CODE SILENCE (“BCS” or “Plaintiff”) submits the  
 2 following Memorandum of Points and Authorities in Opposition to Defendant Jennifer  
 3 Walker’s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)  
 4 (Dkt. 35).

## 5 **I. INTRODUCTION**

6 Defendant Jennifer Walker (“Walker”) requests this Court dismiss Plaintiff’s  
 7 complaint based on Federal Rule of Civil Procedure 12(b)(6) claiming that Plaintiff’s  
 8 Second Amended Complaint (“SAC”) fails to allege sufficient facts to support a  
 9 cognizable legal theory against Walker. A motion under Rule 12(b)(6) merely tests  
 10 the legal sufficiency of a complaint, requiring a court to construe the complaint  
 11 liberally, assume all facts as true, and draw all reasonable inferences in favor of the  
 12 plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-557 (2007).

13 Instead of pointing the court to the missing information, Defendant claims she  
 14 is a co-owner of the Trademarks at issue and that BCS cannot sue her as a joint owner.  
 15 Walker also claims that BCS cannot own any of the Trademarks or personal property  
 16 at issue as they were created before BCS’ incorporation. Walker’s attempts to rely on  
 17 issues of proof and facts outside of the complaint to support her Motion should not be  
 18 allowed as it is well established that questions of fact cannot be resolved or determined  
 19 on a 12(b)(6) motion to dismiss. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection*  
 20 *Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990). Even if the Court could take these  
 21 additional facts into consideration, which it cannot, Walker’s legal conclusions are  
 22 inaccurate and her Motion to Dismiss (“Motion”) should be denied.

## 23 **II. LEGAL ARGUMENT**

### 24 **A. Legal Standard for Motions to Dismiss under 12(b)(6).**

25 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the  
 26 sufficiency of a complaint’s well-pleaded allegations. Dismissal under Rule 12(b)(6)  
 27 is appropriate only where the complaint lacks a cognizable legal theory or sufficient  
 28 facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med.*

1 *Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). “To survive a motion to dismiss, a  
 2 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
 3 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
 4 (quoting *Twombly*, 550 U.S. at 547). A claim is facially plausible when the factual  
 5 allegations permit “the court to draw the reasonable inference that the defendant is  
 6 liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a  
 7 plausible claim for relief will . . . be a context-specific task that requires the  
 8 reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556  
 9 U.S. at 679.

10 In reviewing the plausibility of a complaint, courts “accept factual allegations  
 11 in the complaint as true and construe the pleadings in the light most favorable to the  
 12 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,  
 13 1031 (9th Cir. 2008); see *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.,*  
 14 *Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (“It is well-established that questions of fact  
 15 cannot be resolved or determined on a motion to dismiss for failure to state a claim  
 16 upon which relief can be granted.”). “The standard at this stage of the litigation is  
 17 not that plaintiff’s explanation must be true or even probable. The factual allegations  
 18 of the complaint need only ‘plausibly suggest an entitlement to relief.’” *Starr v.*  
 19 *Baca*, 652 F.3d 1202, 1216–17 (9th Cir. 2011) (citing *Iqbal*, 556 U.S. at 681).

20 Generally the court may not consider material outside the pleadings when  
 21 assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of  
 22 Civil Procedure. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir.  
 23 2018) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)).  
 24 However, the court may consider certain materials—documents attached to the  
 25 complaint, documents incorporated by reference in the complaint, or matters of  
 26 judicial notice. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); see  
 27  
 28

1 *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014).<sup>1</sup>

2 A court should not grant dismissal unless the plaintiff has failed to plead  
3 “enough facts to state a claim to relief that is plausible on its face.” (*Bell Atlantic*  
4 *Corp. v. Twombly* (2007) 550 U.S. 544, 570.) Moreover, dismissal should be with  
5 leave to amend unless it is clear that amendment could not possibly cure the  
6 complaint’s deficiencies. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th  
7 Cir.1998).

8 **1. Plaintiff Has Alleged Sufficient Facts to Support its Cause of**  
9 **Action Against Defendant Walker for Trademark**  
10 **Infringement.**

11 Plaintiff has alleged eight of the nine causes of action in its complaint against  
12 Defendant Walker, including trademark infringement, unfair competition (state and  
13 federal), injunctive relief, declaratory action, conversion, defamation, and tortious  
14 interference with prospective economic advantage. (See SAC generally, i.e. Dkt.  
15 19.) Plaintiff has alleged facts to support its use of Breaking Code Silence, BCS, and  
16 #breakingcodesilence (“Trademarks”) and its acquisition of prior rights in the  
17 Trademarks to support its claim. (SAC ¶ 12-23.) Furthermore, Plaintiff has alleged  
18 that all Defendants, including Walker, have infringed its right in its Trademarks by  
19 knowingly using the Trademarks and confusingly similar marks on social media, for  
20 webinars, and for a for profit business registered under  
21 BREAKINGCODESILENCE, Inc. (SAC ¶ 24-44; 49-53.)

22 Defendant’s reliance on *Brookfield*<sup>2</sup> is misleading as there is no registered  
23 mark at issue here. Furthermore, trademark infringement may be based on  
24 ownership of a registered mark, an unregistered mark or even a non-owner with a  
25 cognizable interest in the mark. See 15 U.S.C. §§ 1114(1); *Halicki Films, LLC v.*

26 <sup>1</sup> Plaintiff has separately objected to Defendant’s attempts to lodge information outside of the complaint in her Motion  
27 to Dismiss. If the Court is going to consider the extrinsic information, Plaintiff requests additional time to counter with  
its own evidence.

28 <sup>2</sup> Defendant refers to *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046-47 (9th Cir. 1999). (Dkt.  
35-1 p. 5, line 26-27.)

1 *Sanderson Sales and Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008). Furthermore in  
 2 *Brookfield* the court was looking at a completely different standard as Plaintiff was  
 3 seeking a preliminary injunction and therefore had the burden to show likelihood of  
 4 success on its cause of action. The burden is much lower at this stage of the  
 5 proceeding. Here, the Court must presume the truth of the facts in the light most  
 6 favorable to the nonmoving party, BCS. *Manzarek v. St. Paul Fire & Marine Ins.*  
 7 *Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); see *Cook, Perkiss & Liehe, Inc. v. N. Cal.*  
 8 *Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (“It is well-established that  
 9 questions of fact cannot be resolved or determined on a motion to dismiss for failure  
 10 to state a claim upon which relief can be granted.”). “The standard at this stage of  
 11 the litigation is not that plaintiff’s explanation must be true or even probable. The  
 12 factual allegations of the complaint need only ‘plausibly suggest an entitlement to  
 13 relief.’” *Starr v. Baca*, 652 F.3d 1202, 1216–17 (9th Cir. 2011) (citing *Iqbal*, 556  
 14 U.S. at 681).

15 Defendant also cites *Herbko Int’ v. Kappa Books*, 308 F.3d 1156, 1162 (Fed.  
 16 Ct. 2002) to support her claim that Plaintiff cannot allege infringement on a mark  
 17 that has previously been registered by other parties. (Dkt. 35-1 at 6:9-14.) Again,  
 18 the Trademarks at issue here have not been registered by anyone. Regardless,  
 19 *Herbko* does not address a motion to dismiss but cancellation on a mark through the  
 20 United States Patent and Trademark Office. Even if Defendant’s facts were correct  
 21 and BCS’ use of an unregistered mark did not have priority over Defendant’s alleged  
 22 use/ownership, the rights assigned by the third-party user as alleged in the SAC  
 23 predates all alleged use by Defendants and would suffice to support Plaintiff’s  
 24 claims. (SAC ¶ 14 wherein Plaintiff alleges the use of the assigned rights date back  
 25 to 2010.)

26 While Defendant claims no assignment occurred, it is clear Defendant does  
 27 not have any evidence to refute the assignment and that this is another question of  
 28 fact to be determined on the merits, not a motion to dismiss. Furthermore, nothing in

Defendants' RJN Exh. 1<sup>3</sup> refutes Plaintiff's claims. In fact, Record 2 out of 5 shows that Plaintiff filed a trademark application on May 6, 2021 claiming rights in BREAKING CODE SILENCE back to 2010, which supports the allegations in this case. (Dkt. 35-3 p. 4-5.)

While Walker claims she has ownership rights in the Trademarks, her alleged rights are clearly in dispute in this case and these additional facts do not support a motion to dismiss, but Plaintiff's cause proceeding to allow a decision on the merits. Taking the allegations as true as the Court must, in regards to Defendant's motion to dismiss, Plaintiff has alleged the necessary facts to support its claim for trademark infringement.

## 2. Plaintiff Has Alleged Sufficient Facts to Support its Cause of Action Against Defendants for Unfair Competition.

Plaintiff has alleged sufficient facts to support its cause of action for unfair competition. California's Unfair Competition Law ("UCL") generally prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. "[A] plaintiff may proceed under the UCL on three possible theories. First, 'unlawful' conduct that violates another law is independently actionable under Section 17200. Alternatively, a plaintiff may plead the defendants' conduct is 'unfair' within the meaning of the several standards developed by the courts. Finally, a plaintiff may challenge 'fraudulent' conduct by showing that 'members of the public are likely to be deceived' by the challenged business acts or practices." *Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 967 (N.D. Cal. 2015) (internal citations omitted). "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012).

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<sup>3</sup> RJN Exh. 1 (Dkt. 35-3) is simply a printout of five partial records relating to the Trademarks at issue. Plaintiff has separately objected to this information based on the records being incomplete and being asserted for their truth.

Here, if Plaintiff's first cause of action for trademark infringement survives, as it must, Plaintiff has also alleged enough facts to support UCL under California law. Furthermore, Plaintiff has alleged that Defendants, including Walker, have committed conversion, defamed Plaintiff and interfered with Plaintiff's economic relations and advantage. (SAC ¶ 24-44; 79-100.) While Defendant acknowledges these allegations, Defendant appears to argue their truth not that Plaintiff failed to allege sufficient facts to support its cause of action of UCL.

In addition, Plaintiff has alleged sufficient facts to support its cause of action for Federal Unfair Competition. Plaintiff's SAC alleges that all Defendants, including Walker, have infringed its right in its Trademarks by knowingly using the Trademarks and confusingly similar marks on social media, for webinars, and for a for profit business registered under BREAKINGCODESILENCE, Inc. (SAC ¶ 24-44; 49-53.)

### **3. Plaintiff Has Alleged Sufficient Facts to Support its Cause of Action Against Defendants for Injunctive Relief.**

Plaintiff has alleged sufficient facts to support its cause of action for injunctive relief. Defendant's reliance on *Brookfield* again, assumes the wrong standard at this phase of the proceedings as the standard in *Brookfield* applies to obtaining a preliminary injunction, not a motion to dismiss a cause of action for injunctive relief. Plaintiff has not sought a preliminary injunction in this case but has plead a cause of action under the Lanham Act. As stated above the standard to survive a motion to dismiss is much lower and simply requires providing sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547).

### **4. Plaintiff Has Alleged Sufficient Facts to Support its Cause of Action Against Defendants for Declaratory Relief.**

Plaintiff has alleged sufficient facts to support its cause of action for declaratory relief. The Declaratory Judgment Act provides that, "In a case of actual

1 controversy within its jurisdiction ... any court of the United States ... may declare  
 2 the rights and other legal relations of any interested party seeking such declaration,  
 3 whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). “Basically,  
 4 the question in each case is whether the facts alleged, under all the circumstances,  
 5 show that there is a substantial controversy, between parties having adverse legal  
 6 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory  
 7 judgment.” *Id.* (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273  
 8 (1941)). The Courts have found that filing a complaint is sufficient to support a  
 9 claim in controversy between the parties to warrant the issuance of a declaratory  
 10 judgment.

11 As addressed in section 1 above Plaintiff has sufficiently pled trademark  
 12 infringement. Defendant’s additional allegations provided in her Statement of  
 13 Relevant Facts clearly supports an actual controversy between the parties,  
 14 specifically Plaintiff and Defendants, including Walker in regards to the ownership  
 15 and use of the Trademarks.

### 16 **5. Plaintiff Has Alleged Sufficient Facts to Support its Cause of** 17 **Action Against Defendants for Conversion.**

18 Plaintiff has alleged sufficient facts to support its cause of action for  
 19 conversion against Defendants Bulis, Walker, Papciak and Thompson as alleged.  
 20 Plaintiff has alleged that these Defendants wrongfully exercised control over  
 21 Plaintiff’s personal property by taking possession of and/or preventing Plaintiff from  
 22 having access to its Instagram account, G suite accounts, Facebook page, Twitter  
 23 account and Squarespace accounts (“Accounts”). (SAC ¶ 28-29, 31-35, 80-85)  
 24 Specifically, Plaintiff has alleged that Walker is holding the two-factor  
 25 authentication code for BCS’ Instagram account hostage, Walker has changed  
 26 passwords to deny Plaintiff’s access to its Accounts, and Walker contacted  
 27 Squarespace and convinced them to reinstate her access to the hosting account after  
 28 her separation from BCS. (SAC ¶ 31, 32 and 35.)

1                   **6. Plaintiff Has Alleged Sufficient Facts to Support its Cause of**  
 2                   **Action Against Defendant Walker for Defamation.**

3           Plaintiff has alleged sufficient facts to support its cause of action for  
 4   defamation. To state a claim for defamation, a plaintiff must establish “the  
 5   intentional publication of a statement of fact that is false, unprivileged, and has a  
 6   natural tendency to injure or which causes special damage.” *Arikat v. JP Morgan*  
 7   *Chase & Co.*, 430 F.Supp.2d 1013, 1020 (N.D.Cal.2006) (citing *Smith v.*  
 8   *Maldonado*, 72 Cal.App.4<sup>th</sup> 637, 645, 85 Cal.Rptr.2d 397 (1999)). Publication  
 9   means “communication to a third person who understands the defamatory meaning  
 10   of the statement and its application to the person to whom reference is made.”  
 11   *Arikat*, 430 F.Supp.2d at 1020. Plaintiff alleged that all Defendants, including  
 12   Walker, made false statements in public as BCS or as a confusingly similar entity,  
 13   that these statements were false and that they injured BCS. (SAC ¶ 95-98.)  
 14   Defendant tries to insert additional facts to state that Walker could not have defamed  
 15   BCS because the post predates Plaintiff’s formation. (Dkt. 35-1 10:23-26) Whether  
 16   or not Walker was part of BCS at the time the statements were made does not excuse  
 17   or negate her part in the defamation.

18                   **7. Plaintiff Has Alleged Sufficient Facts to Support its Cause of**  
 19                   **Action Against Defendants for Tortious Interference with**  
 20                   **Prospective Economic Advantage.**

21           Plaintiff has alleged sufficient facts to support its cause of action for tortious  
 22   interference with prospective economic advantage. Plaintiff alleged the existence of  
 23   an economic relationship with several third parties, knowledge of the Defendants,  
 24   including Walker of those relationships, Defendants’ intentional acts to disrupt the  
 25   relationship, and the actual disruption. This includes BCS relationship with its  
 26   donors and Account holders. (SAC ¶ 24-44.) Plaintiff has also alleged the economic  
 27   harm to Plaintiff caused by the Defendants’ acts. *Id.* In addition, Plaintiff has  
 28   specifically alleged that Walker interfered with its Instagram, Squarespace and G-

1 Suite Accounts. (SAC ¶ 31-32, 35)

2 **B. Plaintiff has Standing to Bring this Action.**

3 “To establish standing to sue for trademark infringement under the Lanham  
4 Act, a plaintiff must show that he or she is either (1) the owner of a federal mark  
5 registration, (2) the owner of an unregistered mark, or (3) a nonowner with a  
6 cognizable interest in the allegedly infringed trademark.” See 15 U.S.C. §§ 1114(1);  
7 *Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1225 (9th Cir.  
8 2008). Defendant’s analysis suffers from a fundamental flaw. Plaintiff is not  
9 claiming that it has standing to sue for infringement of the BCS mark as a registered  
10 owner of the mark. Rather, Plaintiff asserts standing on other grounds.

11 Here Plaintiff is the owner of an unregistered mark. Furthermore, contrary to  
12 Defendant’s claim that the USPTO’s registry provides presumptive proof that  
13 Plaintiff did not register the trademark first (Dkt. 35-1 12:18-20) no one has obtained  
14 registration of the marks at issue (Exhibit 1 to Defendant’s Motion) and therefore  
15 neither Defendant nor anyone else can claim they are the owner of the registered  
16 mark. Regardless, ownership is not based on the first to register. *Halicki Films, LLC*  
17 *v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1226 (9th Cir. 2008).

18 Not only does Plaintiff plead use in commerce, but also the assignment of the  
19 rights to Plaintiff by a third party. (SAC ¶ 14.) Even if the assignment did not exist,  
20 as alleged by Defendant (Dkt. 35-1 12:24), Plaintiff would still have standing based  
21 on its unregistered rights, and its interest in the infringing mark.

22 Defendant’s reliance on *Upper Deck* is misplaced. As *Upper Deck* is an  
23 unpublished opinion regarding a licensee’s rights, not an owners. *Upper Deck* is  
24 easily distinguished from the case at hand.

25 **C. Plaintiff Has a Right to Amend Its Complaint.**

26 “[D]ismissal without leave to amend is improper unless it is clear, upon de  
27 novo review, that the complaint could not be saved by any amendment.” *Chang v.*  
28 *Chen*, 80 F.3d 1293, 1296 (9th Cir.1996). Defendant claims that the alleged defects

1 cannot be cured by amendment. However, Plaintiff is able to provide additional  
2 information and support if necessary. For instance, Plaintiff could provide the  
3 documents and additional details to support the assignment. Furthermore,  
4 Defendants request requires the Court to rely on incomplete records from the  
5 USPTO and to ignore the information in those records that contradict Defendant's  
6 position here. Plaintiff hereby requests that if the Court dismisses its complaint or a  
7 cause of action it does so with leave to amend.

8 **III. CONCLUSION**

9 For the reasons stated above, Plaintiff respectfully requests that the Court deny  
10 Walker's Motion to Dismiss.

11  
12 DATED: August 30, 2021

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

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15 By: s/Lisel M. Ferguson  
16 Lisel M. Ferguson  
17 Tiffany Salayer  
18 Attorneys for Plaintiff  
19 Breaking Code Silence  
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1 ☒ *(Federal)* **BY CM/ECF NOTICE OF ELECTRONIC FILING** by  
2 causing such document(s) listed above to be served through this Court's  
3 electronic transmission facilities via the Notice of Electronic Filing (NEF)  
4 and hyperlink, to the parties and/or counsel who are determined this date to  
5 be registered CM/ECF Users set forth in the service list obtained from this  
6 Court on the Electronic Mail Notice List.

7 ☒ *(Federal)* I declare under penalty of perjury under the laws of the State of  
8 California that the foregoing is true and correct.

9 Executed on August 30, 2021, at **San Diego**, California.

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s/Lisel M. Ferguson  
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