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**MARTHA THOMPSON, JENNA
BULIS, CHELSEA FILER, and
BREAKINGCODESILENCE, INC.**

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

BREAKING CODE SILENCE, a
California Public Benefit
Corporation,

Plaintiff,

vs.

CHELSEA PAPCIAK aka FILER, an
individual, JENNIFER WALKER, an
individual, JENNA BULIS, an
individual, MARTHA THOMPSON,
an individual, and
BREAKINGCODESILENCE, INC.,
a Florida corporation

Defendants.

Case No.: 21-cv-0918-BAS (DEB)

**DEFENDANTS' REPLY
MEMORANDUM TO PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
MOTION FOR ATTORNEY'S FEES**

Date: May 16, 2022

Dept.: 4B

Judge: Hon. Cynthia A. Bashant

LAW AND ARGUMENT

Plaintiff's opposition attempts the much-made and frequently-overruled opposition to motions for Lanham Act attorney's fees on the basis that this case is not "exceptional case" based on a claim that "exceptional" requires a monumental outlier of circumstances, when the Ninth Circuit has clearly stated that "conduct neither has to be egregious, nor in bad faith to be exceptional." *Fifty-Six Hope Road Music, Ltd.*, supra, 778 F.3d at p. 1078. The Supreme Court has also watered down the standard to include activity that would not be sanctionable. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553-554, 134 S.Ct. 1749, 1756, 188 L.Ed.2d 816 (2014). The only standard is an analysis of whether this case "stands out from the others with respect to substantive strength of a party's litigation position or the unreasonable manner in which the case was litigated." *Octane Fitness*, at p. 554, citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). Here, there is both.

A. Defendants Were Prevailing Parties

Plaintiff attempts to assert that Defendants were not prevailing parties because Plaintiff dismissed the case without prejudice. *Oppo. p. 10*, citing *Cadkin v. Loose*, 569 F.3d 1142, 1148-1149. However, Plaintiff conveniently left out that Defendants were successful on their first motion to dismiss, resulting in Plaintiff taking the arguments as meritorious and choosing to amend the complaint, as well as Defendants being successful on the motion to dismiss on the amended complaint. Plaintiff also omits the fact that Plaintiff failed to file a second amended complaint timely, resulting in an OSC regarding this Court's involuntary dismissal of the case just before Plaintiff chose to dismiss its entire complaint.

It should be first noted that this case is factually distinguishable from *Cadkin* and *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 604; 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), on which *Cadkin* relies

upon. In both of those cases, the plaintiffs therein had amended their complaints after the Rule 12b motions had been granted thereby preserving their uninhibited rights in any future filing. Here, Plaintiff waited until after the time for amendment had expired [*see Rule 41(b)*], thereby prejudicing its own rights, and in the fact of an imminent involuntary dismissal, filed a voluntary one. However, the prejudice to Plaintiff's case had already been laid in stone. Plaintiff had consented. See *SD CA L.R. 7.1(f)(3)*.

First, pursuant to Rule 41, subd. (a)(1)(B), Plaintiff's rights have been altered in the effect that there are presumptive effects of any subsequent dismissal. *F.R.Civ.Pro., Rule 41(a)(1)(b)*. Secondly, since Plaintiff failed to amend the complaint in the time given, there are issue preclusive effects for any subsequent filings pursuant to the sham pleading doctrine. See *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.* 744 F3d 596, 900 (9th Cir. 2014).

Plaintiff does not simply get a fresh start on any subsequent complaint, and that is because of its acquiescence to the first motion to dismiss, the defeat on the second motion to dismiss, and their failure to amend to complaint after the second motion to dismiss. *Ferdik v. Bonzelet*, 963 F.2 1258, 1263 (9th Cir. 1992). Because of these material alterations in the Plaintiff's abilities now and on any subsequent filings, Defendants have satisfied the standard for prevailing parties laid out in *Cadkin* and *Buckhannon*.

B. This Case is the Poster Child for Exceptional Circumstances Under Lanham

While this Court is not allowed to look at the evidence of this case in the motions to dismiss, the Court is allowed to look at the evidence provided already on the docket. *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.*, 839 F.3d 1179, 1181 (9th Cir. 2016). Plaintiff's case is clearly unfounded and meritless to the point of frivolity.

1 Plaintiff asserted that it had rights to a trademark that it claimed first use of
2 prior to its very existence. *Dkt. Nos. 36-3, Decl. Papciak, pp. 6-7; 36-5, RJN, Ex. B.*
3 The California Secretary of State’s Business Registry stores these documents, and
4 are the clear subject of judicial notice (see *F.R.Evi. Rule 201*), and clearly state that
5 Plaintiff did not exist prior to its claimed first use of the trademark in 2010. *Cf. Dkt.*
6 *No. 1, Compl., p. 4, ¶ 14, and Dkt. No. 19, Am. Compl., p. 4 ¶ 14.*

7 This alleged assertion was based on a claim that JOSH SCARPUZZI had (1)
8 used the trademark in commerce and (2) subsequently transferred it to Plaintiff. *Ibid.*
9 However, prior to Plaintiff filing the last amended complaint, Mr. Scarpuzzi had
10 posted a complete refutation of the claims on his Facebook Page, and signed a
11 declaration to its veracity, which was filed with Defendants’ first motion to dismiss.
12 *Dkt. No. 36-4, Decl. Scarpuzzi, p. 2.*

13 Plaintiff knew that their claims were not only false, but unprovable, yet it
14 continued to litigate on the same exact grounds despite its acquiesced to Defendants’
15 arguments. See *SD CA L.R. 7.1(f)(3)*. Plaintiff clearly was lying on its pleadings
16 with full knowledge that it had no evidentiary support. This qualifies as
17 “exceptional” under the Lanham Act. *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, No. C
18 04-00371 JW, 2005 WL 2007932, at p. 4 (N.D. Cal. 2005) (quoting *Neitzke v.*
19 *Williams*, 490 U.S. 324, 327–28 (1989)).

20 **C. Attorney’s Fees are Needed Here to Encourage Defendants to**
21 **Defend**

22 Plaintiff asserts that Sophia is inapplicable herein because it deals with a
23 copyright issue, not a trademark. *Oppo. p. 14.* However, copyright cases have
24 routinely been used to support attorney’s fees motions under Lanham, including the
25 Ninth Circuit in *SunEarth, Inc., supra*, which incorporated the entire *Octane Fitness*
26 standard from copyright to trademarks under Lanham. *SunEarth, Inc., supra*, 839
27 F.3d at 1181. So, it would be absurd not to allow Sophia to inform this Court’s

1 decision herein. In fact, it already has been utilized. See *Reflex Media, Inc. v. Chan*,
2 2021 WL 5936912, p. 12 (CD Cal. 2021).

3 With that being put to rest, the principals of law and equity require an
4 attorney's fees award in this case. Here, Plaintiff with hundreds of thousands of
5 dollars to dedicate to this lawsuit sued Defendants, who were young individuals with
6 next to no means. Defendant Thompson was forced to forego medical school and
7 use her tuition that she had saved to fund this defense. *Decl. Stilwell*, p. 5, ¶ 25. A
8 defense to a completely meritless and hostile litigation.

9 If these Defendants are not awarded reimbursement for the moneys they have
10 had to expend in their defense of this case, then other like defendants will be very
11 likely to forego a defense against a much larger entity like BCS, with large firm
12 lawyers like Procopio. Defendants literally risked their futures and financial stability
13 to defend their name, and they were successful against their Goliath opponent.
14 However, they will not be made whole, to the point of having lost regardless of the
15 outcome, if they are not allowed to recoup the cost of this litigation, including their
16 attorney's fees. See *Sophia & Chloe, Inc. v. Brighton Collectibles, Inc.*, 2019 WL
17 1429588 at p. 5 (S.D. Cal., 2019).

18 **D. Defendants' Fee Request is Reasonable**

19 Plaintiff's argument regarding the lodestar factors misstates the law. The four
20 factors that Plaintiff is citing from *Cabrales* relate to lodestar multipliers, not the base
21 lodestar calculation. *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1464 (9th
22 Cir.1988), reinstated, 886 F.2d 235 (1989), cert. denied, 494 U.S. 1091, 110 S.Ct.
23 1838, 108 L.Ed.2d 966 (1990). Defendants are not seeking a lodestar multiplier in
24 this case. Defendants is only seeking payment for its reasonable hours at its
25 reasonable rate, as determined by the Laffey Index. *Hensley v. Eckerhart*, 461 U.S.
26 424, 433 (1983); *Lehman Brothers Holdings, Inc. v. PMC Bancorp*, 2017 WL
27 11634506, p. 7 (CD Cal. 2017); *Pennsylvania v. Delaware Valley Citizens' Council*

1 *for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), rev'd on
2 rehearing other grounds, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987).

3 Plaintiff's confusion is to the 1.44% increase in the reasonable hourly rate
4 utilized in the Laffey Index for adjustment to reasonable hourly rates for attorneys in
5 San Diego. *Oppo*. p. 14; see *Lehman Brothers*, at p. 7, fn. 5 citing *Camacho v.*
6 *Bridgeport Financial, Inc.*, 523 F.3d 973, 979-80 (9th Cir. 2008) (When determining
7 the proper award of attorney's fees, the amount should be adjusted to account for the
8 prevailing rate in the "relevant community." Moreover, "the relevant community is
9 generally defined as 'the forum in which the district court sits.'"). This is not a
10 lodestar multiplier, it is an adjustment to the rate based on the "prevailing rate in the
11 relevant community," i.e., San Diego.

12 Defendants' counsel provided a breakdown of the time spent on each category
13 in the points and authorities, however, Defendant provided a complete accounting of
14 the actual time spent on this case in the supporting declaration. See *Dkt. No. 54*,
15 *Decl. Stilwell, Exh. A*. Therefore, Plaintiff's argument that the motion is not
16 supported by documentation of hours (see *Oppo*. p. 15) is completely unfounded.
17 See *Hensley, supra*, 461 U.S. at 433.

18 Lastly, Plaintiff's claim that usage of the Laffey Index does not meet the *Kerr*
19 factors simply is not the law. *Oppo*. p. 15; see also *Kerr v. Screen Guild Extras, Inc.*,
20 526 F.2d 67, 70 (9th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d
21 195 (1976). The Laffey Index is simply a tool that has been regularly adopted by
22 courts to support and identify what are the reasonable rates for attorneys. As Plaintiff
23 admits, "there is a **strong presumption** that **only in rare instances** should the
24 lodestar figure be adjusted on the basis of other considerations." *Oppo*., p. 16
25 (**emphasis added**), quoting *Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994); *Oviatt*
26 *v. Pearce*, 954 F.2d 1470, 1482 (9th Cir.1992). This case is not a "rare instance"
27 contemplated in *Harris* or *Oviatt*, and therefore Defendants' attorney's fees request

1 based on the well-respected lodestar calculations and Laffey Index should be
2 approved.

3 **CONCLUSION**

4 THEREFORE, Defendants respectfully request that this honorable Court grant
5 their motion for attorney's fees.

6 **CONTRERAS LAW FIRM**

7 

8 Date: May 9, 2022

9 By:

10 Andrew Stilwell, Esq.
11 Attorneys for Defendants,
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13 **BULIS, CHELSEA FILER, and**
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