Michael W. Jacobs (SBN 174885)
Mjacobslaw12@gmail.com
Janine R. Menhennet (SBN 163501)
jmenhennetlaw@gmail.com
THE LAW OFFICES OF MICHAEL W. JACOBS
11353 Meadow View Road
El Cajon, California 92020
Phone: (619) 277-0461

Counsel for Defendant JENNIFER WALKER

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) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT JENNIFER WALKER'S MOTION FOR ATTORNEY'S FEES AFTER DISMISSAL** Date: May 16, 2022 Dept.: 4B Judge: Hon. Cynthia A. Bashant

I. INTRODUCTION

Stated simply, plaintiff Breaking Code Silence ("BCS") and its counsel were fully aware both before the case was filed and at all thereafter that it had no merit, but litigated it maliciously and in bad faith.

Not only did BCS not have a registered mark, as required by 15 U.S.C. Sec. 1114(1), they also knew that there was no legitimate claim to any common law mark. Despite these undisputed facts, BCS not only maintained the case until it was tossed out by this Court, it and its attorneys fabricated evidence and lied to the court.

Taking all of these facts together, and considering the actions of both plaintiff and its counsel, attorney fees must be awarded.

All defendants were dismissed from this matter after filing their motions to dismiss under Rule 12(b)(6), underscoring the pure folly of this lawsuit and justifying not just fees in this matter, but also a multiplier of the lodestar.

Because many of the arguments and facts underlying the motions to dismiss were the same, defendant Jennifer Walker hereby incorporates the arguments and facts more fully detailed in the companion motions for fees filed by defendants Papciak, *et alia*. (Dkt. 54 *et seq.*)

II. STATEMENT OF RELEVANT FACTS

The facts upon which this motion is based are simple, undisputed, and conclusively establish that fees must be awarded to Walker [and all of the other defendants].

Defendant Papciak created subject marks in 2014. *Decl. Jacobs,¶ 3.* Defendant Filer, together with defendants Walker, Bulis and **plaintiff's own former CFO McNamara**, applied for trademark protection for the subject marks in September 2020, **some seven months before the Plaintiff corporation was created.**[1] *Decl. Jacobs, ¶ 2.*

BCS was thereafter formed in March 2021, and then inexplicably filed for **identical** trademarks with the USPTO. BCS then filed this lawsuit, asserting without a registered trademark, or any other protectable rights in the marks.

Recognizing their total lack of standing to bring this suit, BCS and its attorneys created "evidence" out of whole cloth by falsely asserting in Paragraph 14 of the SAC that one of its volunteers [Josh Scarpuzzi], started using the Breaking Code Silence brand in 2010 and "assigned" his rights to BCS. *Id.* But this was a lie, which BCS and its attorneys understood, so they did not attach the alleged assignment document to the SAC, which ultimately formed the basis of the dismissal under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. (Dkt. 47)

Despite BCS and its attorney's best efforts to hide their subterfuge the defendants were able to obtain damning emails that Josh Scarpuzzi exchanged with BCS' attorneys in **July and August 2021,** wherein he flatly told attorney Greta Proctor that he had **no rights** in the subject marks and any purported assignment from his was **invalid.** *Jacobs Decl., ¶ 3.*

- Mr. Scarpuzzi thereafter posted publicly to the entire survivor community that he had no rights in any mark, had not made a valid assignment, and had been harassed by BCS and its attorneys. He signed a declaration under penalty of perjury stating the same. *Jacobs Decl., ¶ 4.*
- When asked in discovery for the communications between Mr. Scarpuzzi and its attorneys, BCS improperly and in what can only be considered an abuse of the discovery process refused to produce the communications, asserting **relevance**. *Jacobs Decl., ¶ 5.*

---

[1] BCS has now turned against Ms. McNamara and has filed a lawsuit against her that makes many of the same claims there as here. *See*, 2:22-cv-002052.

Given the abject falsity of the alleged assignment by Mr. Scarpuzzi, which was the only basis of the entire suit, coupled with the bad acts described above, attorney's fees must be awarded. There must be consequences for such abhorrent conduct.

III. LAW AND ARGUMENT

This case, due to the bad acts of BCS and its attorneys, is exceptional and an award of attorney's fees is warranted pursuant to 15 U.S.C. § 1117(a). All that need be shown by moving party is that the bad acts are exceptional and the fees sought reasonable. Both clearly exist here.

A. BCS <u>and</u> its attorneys acted in bad faith.

Courts analyzing a request for fees under the Lanham Act examine the "totality of the circumstances" to determine if the case was exceptional, exercising equitable discretion in light of the nonexclusive factors identified in *Octane Fitness* and *Fogerty*, and using a preponderance of the evidence standard. *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.*, 839 F.3d 1179, 1181 (2016) (citing *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553-54 (2014), and *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). The Ninth Circuit also defined an exceptional case as one that simply "stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Id*. at 1180 (citation omitted).

Courts are therefore to consider "frivolousness, motivation, objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence," in their determination of "bad faith" or "baselessness." *Octane Fitness* at 554 (citing *Fogerty* at 534). The conduct neither has to be egregious, nor in bad faith to be exceptional. *Fifty-Six*

Hope Road Music, Ltd., 778 F.3d 1059, 1078 (9th Cir. 2015). Nor does the conduct have to rise to the level of sanctionable. *Octane Fitness,* at 554.

Here, the conduct is clearly both egregious and in bad faith. BCS never had a colorable claim to the mark, at all times knew it, and therefore **made up the knowingly false claims** that one of its "volunteers" had a claim, and assigned it to BCS. Both are categorically false. This is not just a case of an attorney relying on information from a client. Here, the BCS attorneys actively participated in the scheme and were in direct contact with Mr. Scarpuzzi.

Even the most kind/favorable interpretation of the facts and law in BCS' benefit renders their actions and deeds farcical. An application for a trademark with the USPTO is not enough to confer standing upon a plaintiff to bring a claim under the Lanham Act. Plaintiff must have a registered trademark, be the owner of an unregistered mark, or have some interest in an infringed mark. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008). BCS never had any of these. There could be no legitimate or good faith basis to bring or continue the case. And yet it did until the SAC was dismissed by the court.

It is also critical to note that BCS did not come into existence until March 2021, long after the defendants had applied for a mark of their own, and years after the mark was created and put into use by Papciak.

There was simply no basis to bring the suit, to make up evidence or to make false pleadings, making this is the exceptional case warranting the imposition of an attorney's fee award.

B. Fees being sought are reasonable.

The lodestar method is used to determine a presumptively reasonable attorney fee award in trademark infringement cases under 15 U.S.C. § 1117(a). *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210 (9th Cir. 2003). Counsel for Walker was retained on or about May 19, 2021. Since that time, through the filing of this motion, a total of 59.0 hours of time were spent, at a rate of $350. Given the facts in this matter, the time should be considered presumptively reasonable. Defendant Walker answered the first amended complaint, and then prepared a motion to dismiss and a reply to the second amended complaint. During this time, there were multiple objections and related pleadings filed with respect to the status of the operative complaint. The parties engaged in multiple email and telephone calls with respect to the Rule 26 requirements, and all parties engaged in discovery, meeting and conferring, and determining whether discovery motions would be necessary. All of the work done was done by attorneys Jacobs and Menhennet.

Mr. Jacobs has specialized in litigation since 1994. During this period attorney Jacobs has handled hundreds of cases and tried over 25 jury and bench trials, in addition to many more binding arbitrations, administrative and other hearings. *Jacobs Decl.,* ¶ *2*. Ms. Menhennet has been practicing in litigation since 1993 during which she has handled hundreds of cases in federal and state court, as described in her declaration filed concurrently herewith.

In total, Walker has incurred **$20,650.00** in attorney's fees and costs. The billing is attached to the Declaration of Michael W. Jacobs as Exhibit 6.

Importantly, counsel for Walker was in almost constant email communication with counsel for BCS [and counsel for the other defendants], at all times explaining and advising them that their case was meritless and should be dismissed, and that the continuing refusal to do so would lead directly to the very situation they find themselves in now. *Jacobs Decl.,* ¶ *2.*

Given the circumstances of the case, Walker also requests that the court impose a lodestar multiplier of 2, for a total fee and cost award of **$41,300**. Lodestar multipliers are allowable for unusual cases, such as this one, in which an outstanding result was achieved. Although the lodestar amount is presumptively reasonable, the court may adjust it, using a positive or negative multiplier. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011). In determining an appropriate multiplier, courts consider "a host of 'reasonableness' factors, 'including the quality of representation, the benefit obtained . . ., [and] the complexity and novelty of the issues presented. . . .'" *Id.* at 942 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)(citation omitted)). Defendant Walker's prevailing on her motion to dismiss this frivolous case can be considered an outstanding result justifying a multiplier in this matter.

IV. CONCLUSION

THEREFORE, WALKER respectfully asks the Court to grant her motion for fees and costs, in full, with a multiplier of two.

Dated: April 11, 2022

Respectfully Submitted,
LAW OFFICES OF MICHAEL W. JACOBS

By:

/s/ MICHAEL W. JACOBS
Michael W. Jacobs
Counsel for Defendant JENNIFER WALKER
Mjacobslaw12@gmail.com