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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)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT, MARTHA
THOMPSON'S, MOTION TO
DISMISS PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE
12(b)(6).**

Date: July 26, 2021
Dept.: 4B
Judge: Hon. Cynthia A. Bashant

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

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1 **INTRODUCTION**

2 Defendant's name is listed in the caption, she is alleged in the "Parties" section,
3 however, Plaintiff fails to make any cognizable allegation of wrongdoing against
4 Defendant in the entire remainder of the complaint. Several specific acts are alleged
5 against the other defendants, yet no allegations allege anything against MARTHA
6 THOMPSON. Under the well-established *Twombly/Iqbal* standard, the facts
7 alleged must state a "facially plausible" claim for relief. Plaintiff has simply failed
8 to do so. For this reason, Defendant, MARTHA THOMPSON, respectfully request
9 this honorable Court to grant this motion to dismiss the claims against her in the
10 complaint.

11 **STATEMENT OF RELEVANT FACTS AND PROCEDURE**

12 In September 2020, six mutually interested people decided to start a non-profit
13 organization with the mission to assist survivors of troubled teen programs and
14 boarding schools. They had all been survivor's themselves and each had their own
15 gifts they brought to the project. All were volunteers, and working towards making
16 the organization viable to support a payroll as well as its mission. Defendant,
17 MARTHA THOMPSON ("THOMPSON") as the de facto CFO of the organization
18 that was intended to be named BREAKING CODE SILENCE.

19 In September 2020, the six partners submitted a trademark application for
20 BRAKINGCODESILENCE and BREAKING CODE SILENCE. The six partners
21 will be referred to as the "Joint Owners." When the other Joint-Owners discovered
22 that two of them had filed for a corporation without them, they voiced their objection,
23 the rogue partners shut them all out of everything.

24 Then in May 2021, Plaintiff filed an application with the US Patent and Trade
25 Office for the trademarks of BREAKINGCODESILENCE and BREAKING CODE
26 SILENCE. That same month, Plaintiff filed the instant lawsuit claiming trademark
27 infringement, unfair business practices and competition, conversion, false light, and
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1 intentional interference with economic relationships and opportunities. *Dkt. No. 5.*

2 However, the complaint does not make any substantive allegation against
3 THOMPSON or describe any acts that THOMPSON did to give rise to these claims.
4 She is simply lumped into the allegation.

5 LAW AND ARGUMENT

6 A. Plaintiff's Claims Against THOMPSON Are Not Plausible Under 7 *Twombly/Iqbal*

8 To determine whether a pleading adequately states a plausible claim for relief,
9 a court must first take "note of the elements a plaintiff must plead to state a claim."
10 Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S.Ct. 1937, 1947 (2009). To establish a
11 "plausible" claim, the complaint must contain "more than labels and conclusions" or
12 "formulaic recitations of the elements of a cause of action." Bell Atlantic Corp. v.
13 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007). The *Twombly/Iqbal*
14 standard requires a complaint to contain sufficient factual allegations to show a
15 "plausible" claim for relief. Bissessur v. Indiana Univ. Bd. of Trustees, 581 F.3d 599,
16 603 (7th Cir. 2009).

17 Plaintiff only alleges anything against THOMPSON in five of the 105 total
18 paragraphs of the complaint, even though THOMPSON is included in the headings
19 for 8 of the 9 claims alleged therein. Further, one of the allegations is that
20 THOMPSON is a resident of Texas, which has not substantive value to the claims
21 beyond jurisdiction. *Dkt. No. 5, p. 3.*

22 Paragraph 24 alleges that THOMPSON was "involved with BCS from 2019
23 through early 2021," and separated from BCS "in or around February or March
24 2021." *Dkt. No. 5, p. 6.* Paragraph 32 alleges that THOMPSON changed her G-Suite
25 password and Plaintiff cannot gain access. *Dkt. No. 5, p. 7.* Paragraph 43 alleges
26 that Plaintiff sent THOMPSON a demand letter. *Dkt. No. 5, p. 8.* Lastly, paragraph
27 67 alleges that a judicial determination is necessary regarding the trademarks and
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1 THOMPSON's ownership or abandonment of them. *Dkt. No. 1, p. 12.*

2 **1. Plaintiff Has Not Pled a Claim for Trademark Infringement**
3 ***Against THOMPSON***

4 To resolve whether Plaintiff has a claim for trademark infringement for
5 THOMPSON's alleged use of "BREAKING CODE SILENCE" or
6 "BREAKINGCODESILENCE," Plaintiff must first show whether Plaintiff has a
7 valid, protectable trademark interest in the marks. Brookfield Commc'ns, Inc. v. W.
8 Coast Ent. Corp., 174 F.3d 1036, 1046-1047 (9th Cir. 1999). Registration of the
9 mark on the Principal Register in the Patent and Trademark Office constitutes prima
10 facie evidence of the validity of the registered mark and of the owner's exclusive right
11 to use the mark on the goods and services specified in the registration. See 15 U.S.C.
12 §§ 1057(b); 1115(a).

13 According to the U.S. Patent and Trade Office's ("USPTO") registry (known
14 as "TESS"), the marks were originally registered under the original Joint-Owners in
15 September 2020. See *Decl. Stilwell*, pp. 3-4, and *RJN*, Ex. A Further, according to
16 the California Secretary of State's registry, Plaintiff was not in existence at that time,
17 having been incorporated in March of 2021. See *Decl. Stilwell*, pp. 4-5, and *RJN*,
18 Ex. B THOMPSON cannot be alleged to have infringed on a mark that she is a co-
19 owner of, nor can Plaintiff allege ownership when it was not in existence when the
20 mark was originally registered by the six partners.

21 Plaintiff has alleged that the mark was abandoned by the Joint Owners (*Dkt. 5*,
22 *Compl.*, p. 12, ¶ 67), however the TESS registry does not indicate that the six partners
23 abandoned their trademark application. Plaintiff also tries to allege that the marks
24 were "assigned" (*Dkt. 5, Compl.*, p. 12, ¶ 67), however this is a conclusory remark,
25 not a factual allegation. See Twombly, supra, 550 U.S. at p. 555, 127 S.Ct. at p.
26 1965. Plaintiff provides no allegations as to how it was assigned, when it was
27 assigned, and whether all six owners had assigned the mark to Plaintiff. In fact,

1 according to the USPTO, the six Joint Owners still own the mark. This judicially
2 noticeable evidence controverts Plaintiff's claims on the face of the complaint, and
3 her lack of factual allegations to support the conclusory remarks leaves this claim
4 "unplausible" under the *Iqbal/Twombly* standard.

5 **2. Plaintiff Has Not Pled A Claim for Unfair Competition Against**
6 **THOMPSON**

7 To establish a trademark infringement claim under section 32 of the Lanham
8 Act or an unfair competition claim under section 43(a) of the Lanham Act, Plaintiff
9 must establish that THOMPSON is using a mark confusingly similar to a valid,
10 protectable trademark of Brookfield's. Brookfield Commc'ns, Inc. v. W. Coast Ent.
11 Corp., 174 F.3d 1036, 1046 (9th Cir. 1999). Plaintiff has made no allegations that
12 THOMPSON has used the marks at all. The only allegation is that THOMPSON
13 changed her G-Suite password. *Dkt. No. 5, p. 7*. There are no other factual
14 allegations of any actions taken by THOMPSON. Further, the exhibits that Plaintiff
15 filed with its complaint only mention THOMPSON once. *See Dkt. 5-1, Compl., Ex.*
16 *A*. However, that is only THOMPSON's name (without any mention of BREAKING
17 CODE SILENCE) on the side bar entitled "People also viewed" attached to
18 CHELSEA FILER's *Linked In* page. *Dkt. 5-1, Compl., Ex. A, p. 2*. It's not even
19 THOMPSON's page. There is no allegation whatsoever that THOMPSON ever used
20 the mark at all.

21 Additionally, Plaintiff has not alleged that they actually own the marks, and
22 the judicially noticeable evidence states that the Joint Owners actually own it.
23 Therefore, Plaintiff cannot allege infringement of what it does not own.

24 **3. Plaintiff Has Not Pled A Claim for Injunctive Relief Against**
25 **THOMPSON**

26 "A plaintiff is entitled to a preliminary injunction in a trademark case when he
27 demonstrates either (1) a combination of probable success on the merits and the
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1 possibility of irreparable injury or (2) the existence of serious questions going to the
2 merits and that the balance of hardships tips sharply in his favor.” Brookfield
3 Commc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1046 (9th Cir. 1999).

4 From the face of the complaint and from the judicially noticeable evidence
5 before this Court, Plaintiff cannot show either of the above elements. Plaintiff has
6 not pled any allegations against THOMPSON indicating trademark infringement.
7 According to the USPTO, Plaintiff is not an owner of the marks. Lastly, Plaintiff has
8 not shown any hardship from any act that THOMPSON has allegedly taken,
9 especially since Plaintiff has not alleged that THOMPSON has taken any action
10 towards Plaintiff or its alleged rights.

11 **4. Plaintiff Has Not Pled A Claim for Declaratory Relief Against**
12 **THOMPSON**

13 The Declaratory Judgment Act provides that, “[i]n a case of actual controversy
14 within its jurisdiction ... any court of the United States ... may declare the rights and
15 other legal relations of any interested party seeking such declaration, whether or not
16 further relief is or could be sought.” 28 U.S.C. § 2201(a); MedImmune, Inc. v.
17 Genentech, Inc., 549 U.S. 118, 126, 127 S. Ct. 764, 770–71, 166 L. Ed. 2d 604
18 (2007).

19 Plaintiff’s complaint alleges only that “a controversy exists” (*Dkt. 5, Compl.*
20 *p. 11, ¶ 66*), however never allege what the controversy is, or how there is a
21 controversy between Plaintiff and THOMPSON. Plaintiff goes on to allege only that
22 “Defendants deny all of Plaintiff’s contentions,” as its basis for an actual controversy.
23 However, the controversy does not exist. The USPTO clearly states that Plaintiff is
24 not an owner of the marks that Plaintiff is alleging THOMPSON infringed upon.
25 Therefore, there is no controversy about who owns the marks. Additionally, Plaintiff
26 cannot claim that it used the marks first in commerce since it did not exist at the time
27 that the six partners registered the trademark with the USPTO. See 15 U.S.C. §§
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1 1057(b); 1115(a); Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036,
2 1046-1047 (9th Cir. 1999) [presumption of ownership created by the USPTO registry
3 can only be overcome by a showing of first use, however Plaintiff did not exist then].

4 Therefore, Plaintiff has failed to allege an actual controversy, and any implied
5 controversy that Plaintiff has attempted to make through bare conclusory remarks (in
6 violation of the *Iqbol/Twombly* standard) is clearly resolved by the USPTO registry.
7 A declaratory judgment claim has therefore failed to be alleged, and is ripe for
8 dismissal. *FRCP*, 12(b)(6).

9 **5. Plaintiff Has Not Pled A Claim for Violation of California**
10 ***Business & Professions Code § 17200 Against THOMPSON***

11 California's statutory Unfair Competition Law (UCL, Bus. & Prof. Code §
12 17200 et seq.) prohibits, and provides civil remedies for, “unfair competition,”
13 defined as “any unlawful, unfair or fraudulent business act or practice.” Bank of the
14 West v. Sup.Ct. (Industrial Indem. Co.), 2 Cal.4th 1254, 1266-1267 (1992).

15 Plaintiff has failed to allege any “unlawful, unfair, or fraudulent business act
16 or practice” by THOMPSON. Again, the only allegation is that she changed her G-
17 Suite password. *Dkt. No. 5, Compl.*, p. 7, ¶ 32. Further, any usage of the marks by
18 THOMPSON alleged within the complaint would not be “unlawful,” because
19 Plaintiff is not one of the Joint Owners of the marks. *See Decl. Stilwell*, p. 2-3, and
20 *RJN, Ex. B*. Also, Plaintiff has not alleged any fraudulent business act or practice,
21 and any allegations that imply such are inappropriate because fraud has to be pled
22 with specificity. *FRCP*, 9(b). Therefore, a claim under the UCL has not been alleged
23 against THOMPSON, and is ripe for dismissal. *FRCP*, 12(b)(6).

24 **6. Plaintiff Has Not Pled A Claim for Conversion Against**
25 ***THOMPSON***

26 Conversion is the wrongful exercise of dominion over the personal property of
27 another. Mendoza v. Rast Produce Co., Inc., 140 Cal.App.4th 1395, 1403-1404
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(2006). The elements for a claim of conversion are: “(1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property right; and (3) damages.” IIG Wireless, Inc. v. Yi, 22 Cal.App.5th 630, 650 (2018).

The only actual thing that Plaintiff has alleged THOMPSON did was change the password to her G-Suite account. Plaintiff has not alleged that Plaintiff is the rightful owner of the G-Suite account, nor has Plaintiff alleged how THOMPSON's changing of the password has interfered with Plaintiff's rights to the G-Suite account. If Plaintiff was the owner of the account, it could just contact Google and have the passwords overridden or changed and THOMPSON locked out. The fact that Plaintiff has been unable to do so, and has failed to allege ownership is an admission by implication that Plaintiff is not the owner of the G-Suite account and therefore does not have standing to bring an action for conversion. *Ibid*.

7. Plaintiff Has Not Pled a Claim for False Light Against THOMPSON

False light claims may be maintained only by individuals. False light implicates an invasion of privacy, which at common law in California is a right reserved exclusively for actual persons, since, as commonly understood, a corporation is not susceptible to the injured feelings associated with invasion of privacy torts. Holomaxx Technologies v. Microsoft Corp., 783 F. Supp. 2d 1097, 1107 (N.D. Cal. 2011) (applying California law).

By its own admission, Plaintiff is a California corporation. *Dkt. 5, Compl., p. 2, ¶ 5, see Decl. Stilwell, p. 4-5, and RJN, Ex. B*. Therefore, Plaintiff has no right to bring an action for false light. Holomaxx Technologies, *supra*, 783 F. Supp. 2d at p. 1107.

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1 **8. Plaintiff Has Not Pled a Claim for Intentional Interference with**
2 **Prospective Economic Advantage Against THOMPSON**

3 The elements of a claim for intentional interference with prospective economic
4 relations are: (1) an existing economic relationship between plaintiff and a third
5 party, with the probability of future economic benefit to plaintiff; (2) defendant's
6 knowledge of the relationship; (3) intentional acts on the part of defendant designed
7 to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic
8 harm to plaintiff proximately caused by defendant's acts. Roy Allan Slurry Seal, Inc.
9 v. American Asphalt South, Inc., 2 Cal.5th 505, 512 (2017).

10 Plaintiff has made only conclusory statements that “Defendants have
11 maliciously and wrongfully obstructed and interfered with BCS’s business
12 relationships with its customers by passing themselves off as BCS and making false
13 statements about BCS.” *Dkt. 5, Compl., p. 16-17, ¶ 102*. Plaintiff has not alleged
14 any existing economic relationship at all, nor the probability of future economic
15 benefit. Further, Plaintiff has not identified any actions that THOMPSON has made
16 to interfere with these mysterious relationships. Also, Plaintiff has not identified how
17 those mysterious relationships have been injured, or how Plaintiff has been actually
18 injured. Lastly, Plaintiff has made no causal connection between anything
19 THOMPSON has allegedly done (only changing her password to her G-Suite) has
20 proximately caused harm.

21 **B. Leave to Amend Should Not Be Granted**

22 Despite the Court’s policies on liberal amendment, where it is clear that
23 amendment cannot be cured by amendment, leave to amend should not be granted.
24 Lucas v. Department of Corrections, 66 F.3d 245, 248 (9th Cir. 1995). Plaintiff’s
25 claims for trademark infringement, unfair competition, and injunctive relief under the
26 Latham Act should be dismissed without leave to amend because THOMPSON’s
27 judicially noticeable evidence that the USPTO shows that Plaintiff is not an owner
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1 of the marks negates Plaintiff's trademark claims in totality. The only exception to
2 the presumption of earlier use in the marketplace, however, the USPTO's registry
3 pre-dates Plaintiff's existence, so there is no way that Plaintiff could overcome the
4 presumption that the USPTO's registration creates. See *15 U.S.C. §§ 1057(b);*
5 *1115(a); Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046-
6 1047 (9th Cir. 1999).

7 Similarly, Plaintiff's claims of a violation of California Business &
8 Professions Code § 17200, declaratory judgment, and conversion should be
9 dismissed without leave to amend because Plaintiff's claim is based on the trademark
10 infringement claim, which is fully negated, and no amendment could cure the claim.
11 Plaintiff's claim for false light fails completely because Plaintiff is a corporation and
12 therefore does not have any standing to bring a claim for false light. There is nothing
13 that will change the fact that Plaintiff is a corporation, and therefore an amendment
14 would be useless.

15 Lastly, Plaintiff's claim of intentional interference with prospective economic
16 advantage should not be allowed an amendment because Plaintiff cannot allege that
17 it is the owner of any rights to any of the social media platforms or trademark rights
18 that would give it claim to the wrongful usage of the platforms. Further, Plaintiff
19 cannot, and has not, asserted any claims to ownership of the G-Suite program rights,
20 which are the only allegations made against THOMPSON.

21 CONCLUSION

22 THEREFORE, Defendant, THOMPSON, respectfully asks this honorable
23 Court to grant her motion to dismiss the complaint without leave to amend as it relates
24 to claims against her.

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CONTRERAS LAW FIRM

Date: June 11, 2021

By: /s/ ANDREW R. STILWELL

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