Lisel M. Ferguson (Bar No. 207637)
Tiffany Salayer (Bar No. 226189)
PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: 619.238.1900
Facsimile: 619.235.0398
Email: Lisel.Ferguson@procopio.com
Email: Tiffany.Salayer@procopio.com

Attorneys for Plaintiff
BREAKING CODE SILENCE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BREAKING CODE SILENCE, a California Public Benefit Corporation; Plaintiff, v. CHELSEA PAPCIAK aka FILER, an individual; JENNIFER WALKER, an individual; JENNA BULIS, an individual; MARTHA THOMPSON, an individual; and BREAKINGCODESILENCE, INC. a Florida Profit Corporation. Defendants.	Case No. 3:21-cv-0918-BAS-DEB **BREAKING CODE SILENCE'S OPPOSITION TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES AFTER DISMISSAL** Complaint Filed: May 13, 2021 Hon. Judge Cynthia Bashant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES, REGULATIONS, AND RULES

STATE STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

Plaintiff BREAKING CODE SILENCE ("BCS" or "Plaintiff") submits the following Memorandum of Points and Authorities in Opposition to Defendant's Motion for Attorney's Fees After Dismissal (Dkt. 54-1).

I. INTRODUCTION

Defendants request this Court award them attorney's fees under the Lanham Act pursuant to 15 U.S.C. § 1117(a). While Defendant acknowledges that the facts of the case must be exceptional for the Court to grant their request for attorney's fees under the Lanham Act, Defendants fail to show they are entitled to attorney's fees. Specifically, Defendants claim that Plaintiff's claims were frivolous, Plaintiff's actions were objectively unreasonable, Plaintiff's motivation was inequitable, and an award of attorney's fees would encourage defendants or others to raise its valid defenses. However, Defendants fail to address the elements of their request, specifically Defendants failed to show they were the prevailing party, that this case was exceptional, and that their attorneys' fees are reasonable. The Court should deny Defendants' Motion for Attorney's Fees.

II. BACKGROUND

A. Factual Background

Plaintiff Breaking Code Silence ("BCS") is a nonprofit public benefit corporation incorporated by survivors of institutional child abuse and activists. Second Amended Complaint ("SAC") ¶ 12, Dkt. 19. The mission of BCS is to raise awareness of the problems in the troubled teen industry and the need for reform. (*Id.*) In 2019, a group of survivors of troubled teen residential facilities joined together to formalize BCS as an organization. SAC ¶ 16. The group started with informal meetings and then established a further presence through a website, online community, social media accounts, email account, and webhosting account. *Id.* ¶¶ 15–16. The website and social media account handles all include part or all of the phrase "breakingcodesilence." See *id.* ¶ 16 (listing various accounts). Katherine McNamara applied for two trademarks listing herself, Jen Robison, Jenna Bulis, Chelsea Papciak, Rebecca Moorman, and Emily Carter as the owners.[1]

The BCS group started applying for grants by October 15, 2020, including from the Conrad N. Hilton Foundation. FAC ¶¶ 17–18. On March 22, 2021, BCS was incorporated with the California Secretary of State. *Id.* ¶ 19.

BCS uses the trademarks BREAKING CODE SILENCE, BCS, and #breakingcodesilence to brand its services, mission, and publications SAC ¶ 21 and has filed several trademark applications with the U.S. Patent and Trademark Office ("USPTO"). *Id.* Plaintiff's rights to the Breaking Code Silence mark date back to 2010 when one of its former volunteers, Joshua Scarpuzzi, started branding "Breaking Code Silence" with his books, blogs, posts and speaking engagements aimed at helping survivors of the troubled teen industry. SAC ¶ 14. This branding continued to be used in the community, including for websites and articles. *Id.* These rights have been assigned to BCS pursuant to a written agreement between Plaintiff and Mr. Scarpuzzi. Mr. Scarpuzzi informed Plaintiff at the time of the agreement that he believed that BCS should have the rights to the mark and that he would have independent counsel review the agreement on his behalf. Later, when Mr. Scarpuzzi separated from Plaintiff, Mr. Scarpuzzi claimed for the first time that he had never owned rights in the "Breaking Code Silence" mark and that the contract was therefore invalid, while simultaneously demanding the "Breaking Code Silence" website and Facebook page be returned to him as rightful owner of the mark. To date, the contract has not invalidated and Plaintiff has continued to use the mark in commerce.

Chelsea Papciak (also known as Chelsea Filer), Jennifer Walker, Jenna Bulis, and Martha Thompson were involved with BCS from 2019 through early 2021. SAC ¶ 24. In early 2021, these Defendants publicly separated themselves from BCS and no longer actively participated in the organization. *Id.* However, these Defendants began using the BREAKING CODE SILENCE mark without Plaintiff's permission,

[1] At the time of filing the complaint in this action, half of those listed as owners, Katherine McNamara, Rebecca Moorman, and Emily Carter were all working with Plaintiff. The other half are the Defendants in this case.

including through Defendants Filer and Bulis representing themselves as officers at Breaking Code Silence. *Id.* ¶¶ 25–27. In addition, Defendants took Plaintiff's social media and email accounts and are holding them hostage and will not return them to Plaintiff despite numerous requests. SAC ¶ 28.

In April 2021, Defendants Bulis and Filer filed a registration for a Florida, for profit corporation, using the name BREAKINGCODESILENCE INC., which is the final named Defendant. *Id.* ¶ 42. Defendants used the Florida entity to confuse the public as it was created after publicly falsely accusing Plaintiff (a nonprofit) of attempting to profit from the troubled teen survivor movement. *Id.* Defendants also made public posts on social media alleging that Plaintiff is committing theft, bullying, and threatening survivors, which caused the public to question Plaintiff's integrity. *Id.* ¶ 40.

Based on these allegations, Plaintiff initiated this action alleging nine causes of action against the Defendants, including trademark infringement, unfair competition under the Lanham Act, conversion, and defamation.[2] SAC ¶¶ 45–107. Soon after filing the Complaint, the slanderous comments stopped and BREAKINGCODESILENCE INC. was dissolved on June 14, 2021. During this case, Defendants have claimed priority in the mark. However, their stated first use of the mark was in 2014, over four years after the mark had been used continuously by Mr. Scarpuzzi.

B. <u>Procedural History</u>

Plaintiff filed this case on May 13, 2021 initiating the case against Walker and the other Defendants[3]. Dkt. 1. On May 17, 2021, Plaintiff filed its First Amended Complaint to correct a typo before serving any of the defendants. Dkt. 5. On June 23, 2021, Plaintiff filed its Second Amended Complaint, Dkt. 19, to address concerns

---

[2] Seven of the causes of action were alleged against all Defendants.

[3] Walker is named separately throughout as she has separate counsel and has filed her motion for attorney's fees separately. The term Defendants will refer to all other defendants, namely Martha Thompson, Jenna Bulis, Chelsea Filer, and BREAKINGCODESILENCE, Inc.

raised by Defendants in a motion to dismiss. On July 9, 2021, Defendant Jennifer Walker (hereinafter "Walker") objected to the filing of the SAC. Dkt. 23-24. On July 19, 2021 the Court issued an order finding: "(1) Plaintiff has sufficiently shown, under Rule 15(a)(2), that all Defendants consented in writing to the submission of the SAC. Thus, Defendant Walker's objection to the filing of the SAC, Dkt. 24, which the Court construes as a motion to strike, is DENIED. (2) The Clerk is instructed to DENY Plaintiff's requests to enter default against all Defendants. Each Defendant shall have until August 2, 2021 to file a response to the SAC. If Defendants fail to timely comply, Plaintiff may renew its requests for entry of default. (3) Because the SAC is the operative pleading, Defendant Martha Thompson's Motion to Dismiss the First Amended Complaint, Dkt. 15, is DENIED AS MOOT."

On August 2, 2021, Defendants filed motions to dismiss and strike (Dkt. 35-36). August 9, 2021 was the deadline to provide Initial Disclosures in this case. Declaration of Lisel Ferguson ("Ferguson Dec.") at ¶ 3. While Walker and Plaintiff provided their Initial Disclosures, Defendants have not provided any Initial Disclosures in this case. *Id.* An Early Neutral Evaluation Conference ("ENE") was held on September 30, 2021 and a second settlement conference was set for October 28, 2021. Dkt. 44. At the Parties' request, the telephonic Settlement Conference on October 28, 2021 was vacated. Dkt. 45. On October 29, 2021, Plaintiff propounded its first set of discovery on Defendants. Ferguson Dec. ¶ 4. On November 4, 2021, the CMC was held and a Scheduling Order issued setting this case for trial on February 14, 2023. Dkt. 46.

On November 26, 2021, Walker responded to the first set of discovery and propounded her first set of discovery on Plaintiffs. Ferguson Dec. ¶ 5. On December 14, 2021, Defendants provided their responses to Plaintiff's first set of discovery requests. Ferguson Dec. ¶ 6. However, no responses were or documents were provided in response to the requests for production of documents and no verifications were ever provided by Defendants. *Id.* Plaintiff attempted to meet and confer the same day, and followed up several times. *Id.* Plaintiff responded to Walker's discovery and produced documents on December 27, 2021. Ferguson Dec. ¶ 7. On January 7, 2022 Plaintiff emailed the Court informing the Court of the Parties agreement to extend the discovery procedures related to the discovery that had been propounded at that time until March 11, 2022 so that if Motions to Compel were necessary they could be filed and heard simultaneously.[4] Ferguson Dec. ¶ 8.

On February 11, 2022 the Court issued its ruling on the motions to dismiss, dismissing BCS's first, second, third, and fourth claims, SAC ¶¶ 45–70), with leave to amend. Dkt. 47. March 8, 2022 the Court issued an order to show cause why it should not dismiss this case for failure to prosecute pursuant to this Court's February 11, 2022 Order. Dkt. 50. On March 9, 2022, Plaintiff voluntarily dismissed Defendants without prejudice and they were terminated from the case. Dkt. 52; Ferguson Dec. ¶ 9 and Ex. 1 thereto. On March 31, 2022, Plaintiff voluntarily dismissed Walker without prejudice, however the Court has not terminated Walker from the case at this time. Dkt. 53. On April 6, 2022, Defendants filed their Motion for attorneys' fees. Dkt. 54 Walker filed her motion for attorney's fees on April 11, 2022. Dkt. 56.

III. ARGUMENT

A. Defendants Fail to Prove They Are the Prevailing Party.

The pertinent portion of Section 1117(a) states "The court in exceptional cases may award reasonable attorney fees to the prevailing party." While Defendants cite 15 U.S.C. § 1117 of the Lanham Act in support of their request for attorney's fees, and conclude they were "completely victorious" Dkt. 54-1 at 7:26-27. Defendants completely ignore that they have the burden to prove that they are the prevailing party and have failed to set forth evidence to support their conclusion.

The Ninth Circuit has recognized two judicial outcomes under which a party may be considered a prevailing party for the purpose of awarding attorney's fees: (1)

[4] Defendants Filer, Bulis, Thompson and BREAKINGCODESILENCE, INC. did not propound any discovery in this case.

an enforceable judgment on the merits; or (2) a settlement agreement enforceable through a court-ordered consent decree. P*erez-Arellano v. Smith,* 279 F.3d 791, 793 (9th Cir.2002). This case however was dismissed against Defendants without prejudice. Because the defendant "remain[s] subject to the risk of refiling," the Ninth Circuit explained, a voluntary dismissal without prejudice "does not alter the legal relationship with the parties." *Cadkin v. Loose,* 569 F.3d 1142, 1149 (9th Cir. 2009).[5]

B. Exceptional Circumstances Do Not Exist to Support the Request for Attorney's Fees.

The Lanham Act provides that the "court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). In the Ninth Circuit, "[a]n action may be considered exceptional when a plaintiff's case is groundless, unreasonable, vexatious, or pursued in bad faith." *Secalt S.A. v. Wuxi Shenxi Constr. Machinery Co., Ltd*., 668 F.3d 677, 687 (9th Cir.2012). Although the "line distinguishing exceptional cases from non-exceptional cases is far from clear" and is "especially fuzzy where the defendant prevails due to [a] plaintiff's failure of proof," the Ninth Circuit has held that "an action is exceptional under the Lanham Act if the plaintiff has no reasonable or legal basis to believe in success on the merits." *Id*. (emphasis in original).

Defendant fails to address the standard above and instead relies on the Supreme Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 134 S.Ct. 1749, 188 L.Ed.2d 816 (2014). In *Octane Fitness* the meaning of "exceptional" was considered in the Patent Act's fee provision, which provides — like the Lanham Act does — that a district court may award fees "in exceptional cases." *Id.* at 1753; *see also* 35 U.S.C. § 285. However, the meaning of exceptional in the *Octane Fitness* case is even more vague as it defines an exceptional case as "simply one that stands out from other with respect to the substantive strength of a party's

[5] Defendant has waived this issue as she did not raise it in her Motion and arguments made for the first time in a reply brief are waived. *See U.S. v. Alcan Elec. and Engineering, Inc.,* 197 F.3d 1014, 1020 (9th Cir.1999).

litigation position ... or the unreasonable manner in which the case was litigated." *Id.* at 1756.

While some district courts have applied *Octane Fitness*'s holding to trademark cases under the Lanham Act based on the idea that the Lanham Act's fee-shifting provision is "identical" to that of the Patent Act, the matter is not settled. Even if the Court were to apply the *Octane Fitness* rule to this case, it would determine that this case does not "stand out" and therefore that an award of attorneys' fees under the Lanham Act would be unwarranted.

1. <u>Plaintiffs' Claims Are Not Frivolous</u>

Defendants claims that Plaintiff's case was in bad faith and/or frivolous is without support. When evaluating whether a complaint is frivolous or without evidentiary support, one must look at whether the complaint is legally or factually baseless from an objective perspective. Here, Defendants appear to claim that Plaintiff's complaint was without legal support. However, the inaccuracies highlighted by Defendants are easily disputed.

For example, Defendants continue to rely on the falsity that Plaintiffs claims required Plaintiff to have registered the trademark. Motion 6:6-7. This is simply inaccurate and recognized by this Court on February 11, 2022[6] and in Defendant Walker's motion for attorney's fees when she stated the standard as "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), emphasis added. Dkt. 57-1 4:12-14. Here Plaintiff clearly has an interest in the infringed mark as it is identical and confusingly similar to Plaintiff's entity name. Next Defendants claim that "Plaintiff did not exist when it claimed first usage in commerce rights under common law trademark. Plaintiff is a

---

[6] February 22, 2022 Order stated: "To establish standing to sue for trademark infringement under the Lanham Act, a plaintiff must show that he or she is either (1) the owner of a federal mark registration, (2) the owner of an unregistered mark, or (3) a nonowner with a cognizable interest in the allegedly infringed trademark." *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008) (citing 15 U.S.C. §§ 1114(1), 1125(a)). Dkt. 47 at 6:13-18.

distinct entity from any alleged individual who might have such a claim." Motion 6:12-16. While Defendants are correct Plaintiff did not exist in 2010, Plaintiff acquired all rights and goodwill in the mark via a proper assignment pursuant to 15 U.S.C. 1060.

Plaintiff has not claimed it had registered rights in the mark. What Defendants claim as bad faith/frivolous is a clear question of fact that would have been decided by the case. Again, Defendants fail to explain why they conclude a business using the name of the mark has no interest in the infringed mark. For these reasons, Plaintiff's alleged violation of section 1125(a) of the Lanham Act is not objectively legally or factually baseless.[7]

2. **Defendants Claims That Plaintiff's Motivation for Filing Its Complaint Was Inequitable Are Without Support.**

As this Court recognized in its February 11, 2022 Order "This lawsuit is a trademark and organizational dispute between various parties involved in a movement to raise awareness of problems in the troubled teen industry. The crux of the dispute is: Who—if anyone—has the right to control the use of the phrase BREAKING CODE SILENCE?" Dkt. 47, Background. All parties, except BREAKINGCODESILENCE, INC. a Florida Profit Corporation, had filed trademark applications with the USPTO prior to this case. However, none of the marks had registered and a valid dispute arose over the marks, the use of the marks, the products and services provided in connection therewith and the social media using same. The Parties had engaged in communications before filing the complaint and both Plaintiff and Defendants had sent demand letters claiming rights to the same materials. When the parties were unable to come to an understanding Plaintiff filed suit to address the grievances.

[7] Plaintiff complaint included nine causes of action, seven of which were alleged against all Defendants. Defendants fail to address the complaint as a whole and only address the limited subjects addressed herein. Furthermore, Defendants has waived their opportunity to address the additional causes of action as they did not raise it in the Motion and arguments made for the first time in a reply brief are waived. *See U.S. v. Alcan Elec. and Engineering, Inc.*, 197 F.3d 1014, 1020 (9th Cir.1999).

Defendants claim Plaintiff's motives for filing suit were to secure a competitive advantage. Motion B. 3. Defendants have alleged serious allegations against the Plaintiff however that is all they are, allegations. Defendants have not supplied any evidence or support for their claims that Plaintiff had any other motive than to address the grievance between the parties. Here, Plaintiff is a nonprofit organization. Plaintiff is not engaged in selling videocassettes or anything else for a profit; its only "business" is to help those who were victims of abusive in-patient residential facilities for troubled teens. Plaintiff is a corporation that was formed by individuals with trademark rights and Plaintiff was further assigned trademark rights. Plaintiff filed suit to enforce those rights after Defendants' actions threatened a legitimate and substantial research grant that Plaintiff was awarded. The suit was also intended to help ensure that Plaintiff would be able to provide consistent messaging in the survivor community, and alleviate the confusion caused by Defendants. Plaintiff's actions were not unreasonable.

3. Lastly Defendants Claim That Attorneys' Fees Should be Awarded to Them to Encourage Defendants/Others to Present Valid Defenses.

Without explanation or drawing a connection, Defendants rely on a copyright case to support their request for attorney's fees on the basis that awarding them attorneys' fees would encourage other defendants to present valid defenses. (Motion B.4.) Defendants claim that an award of attorney's fees will encourage defendants and others to defend themselves when they have a valid defense. Id. However, the case cited to support Defendants' argument is pursuant to the Copyright Act, *Sophia & Chloe, Inc. v. Brighton Collectibles, Inc*. (2019) WL 1429588 (S.D. Cal., 2019). Furthermore, attorney's fees in that case are based on a different statute then the one at issue here as no copyright claims are at issue in this case. While the case cited by Defendants is not relevant to this case, even if it was it does not support Defendants conclusion that they are entitled to attorneys' fees.

While the Court in *Sophia* considered the factor argued by Defendants, it was one of several factors and the Court concluded that neither party was entitled to fees. (*Sophia & Chloe, Inc. v. Brighton Collectibles, Inc.* (2019) WL 1429588 (S.D. Cal., 2019).) The court found the plaintiff's litigation position was reasonable, but that the defendant's defense position was also reasonable, and therefore even though the defendant prevailed, a fee award to either party would deter those who should be properly prosecuting and defending claims under the Copyright Act. *Id*. While the *Sophia* case does not apply to trademark cases or the statute under which Defendants have requested attorney's fees, even the *Sophia* case requires Defendants be the prevailing party to obtain attorneys' fees. As stated above in section III. A., Defendants are not the prevailing party as they were dismissed without prejudice. Furthermore, under the Lanham Act the Court is not allowed to grant attorney's fees unless the case is exceptional. Here, it appears Defendants are attempting to bypass this requirement and seeking attorney's fees for simply participating in the case.

IV. <u>DEFENDANTS ATTORNEY'S FEES ARE UNREASONABLE.</u>

Defendants claim to be entitled to $83,223.91 in attorney's fees under the lodestar method, which represents a 1.44% increase over their attorney's actual rates. Pursuant to the cases cited to by Defendants the "'lodestar' is calculated by multiplying the number of hours the prevailing party **reasonably expended** on the litigation by a reasonable hourly rate. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) citing *McGrath v. County of Nevada,* 67 F.3d 248, 252 (9th Cir.1995), emphasis added. While Defendants appear to agree with this definition, Defendants simply provide the total hours spent on the case, their attorney's hourly rate, and then request an additional 1.44%. Among the subsumed factors presumably taken into account in either the reasonable hours component or the reasonable rate component of the lodestar calculation are: "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, ... (4) the results obtained," *Cabrales v. County of Los Angeles,* 864 F.2d 1454, 1464 (9th Cir.1988), *reinstated,* 886 F.2d 235 (1989), *cert. denied,* 494 U.S. 1091, 110 S.Ct. 1838, 108 L.Ed.2d 966 (1990), and (5) the contingent nature of the fee agreement, *City of Burlington v. Dague,* 505 U.S. 557, 565–67, 112 S.Ct. 2638, 2643, 120 L.Ed.2d 449 (1992).

Defendants have only addressed two factors of the lodestar method and have not fully addressed either of those factors as they have not addressed the above factors which are subsumed in the reasonable hors or the reasonable rate components of the lodestar calculations. Notably, Defendants do not address the reasonableness of the time spent by counsel in this case. For instance, Defendants claim their attorney performed 23.2 hours of research in this case. Motion 9:14. This appears to be unreasonable based on the complexity and issues addressed to date in the case. Regardless, Defendants fail to show how every minute their counsel spent researching is reasonable under the circumstances here. This is just one example as Defendants have failed to show that the time spent by their attorney was reasonable. Defendants fail to provide enough detail regarding their relationship with their attorney to apply the *Kerr* factors. For instance, Defendants do not address whether their attorney's fees were fixed or contingent. Defendants have also failed to provide actual billing records created at the time the work was performed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983).

Furthermore, after making the lodestar computation, the court then assesses whether it is necessary to adjust the lodestar figure on the basis of the *Kerr* factors[8] that are not already subsumed in the initial lodestar calculation. *Id.; Cunningham v. County of Los Angeles,* 879 F.2d 481, 487 (9th Cir.1988), *cert. denied,* 493 U.S. 1035,

[8] There are twelve *Kerr* factors bearing on the reasonableness of the lodestar calculation. They are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr v. Screen Guild Extras, Inc.,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

110 S.Ct. 757, 107 L.Ed.2d 773 (1990). Adjusting the lodestar on the basis of subsumed reasonableness factors after the lodestar has been calculated, instead of adjusting the reasonable number of hours or reasonable hourly rate at the first step, i.e. when determining the lodestar, is a disfavored procedure. *Corder v. Gates,* 947 F.2d. Defendants failed to address these issues. Regardless, there is a strong presumption that "Only in rare instances should the lodestar figure be adjusted on the basis of other considerations." *Harris v. Marhoefer,* 24 F.3d 16, 18 (1994); *Oviatt v. Pearce,* 954 F.2d 1470, 1482 (9th Cir.1992).

Without addressing the *Kerr* factors that are subsumed in the lodestar calculation, Defendants conclude their counsel's rate of $750 per hour is reasonable and switch to the USAO/Laffey Attorney's Fees Matrix for 2021-2022 for support thereof. Motion 9. Lastly again pointing to the USAO/Laffey Attorney's Fees Matrix for 2021-2022 Defendants argue its attorneys' fees should be increased to account for the prevailing rate in San Diego County. While the Court need not reach this analysis as the Defendants were not the prevailing party, Defendants are requesting a windfall, essentially more attorneys' fees than they are responsible for. This is clearly outside the spirit and written law regarding attorneys' fees under the Lanham Act.

V. CONCLUSION

As set forth above, Defendants clearly do not meet the exceptional case standard for seeking attorney's fees under 15 U.S.C. § 1117(a), and this Motion should be denied.

DATED: May 2, 2022

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: s/Lisel M. Ferguson
Lisel M. Ferguson
Tiffany Salayer
Attorneys for Plaintiff
BREAKING CODE SILENCE

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On **May 2, 2022**, I served the forgoing document(s):

☑ *(Federal)* **BY CM/ECF NOTICE OF ELECTRONIC FILING** by causing such document(s) listed above to be served through this Court's electronic transmission facilities via the Notice of Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are determined this date to be registered CM/ECF Users set forth in the service list obtained from this Court on the Electronic Mail Notice List.

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

Executed on May 2, 2022, at **San Diego**, California.

s/Lisel M. Ferguson
Lisel M. Ferguson