

EXHIBIT 97

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August 23, 2023

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**Re: Breaking Code Silence v. McNamara, et al.
CDCA Civil Case No. 2:22-cv-02052-MAA**

Dear Counsel,

We write on behalf of our clients, Katherine McNamara and Jeremy Whiteley, pursuant to Local Rule 7-3, to initiate the meet-and-confer process related to Ms. McNamara's and Mr. Whiteley's forthcoming motions for summary judgment. If you would like to discuss the factual and legal arguments raised in this correspondence, please contact us at your convenience.

I. THERE ARE NO FACTUAL OR LEGAL GROUNDS TO SUPPORT THE COMPLAINT'S ALLEGATIONS.

We previously sent correspondence dated June 1, 2022, to those DLA Piper LLP ("DLA Piper") attorneys then representing Breaking Code Silence ("BCS") (the "June 1 Letter",

attached as Exhibit 1) advising DLA Piper of our intent to pursue Federal Rule of Civil Procedure 11 (“Rule 11”) sanctions for filing the Complaint in this action. At that time, BCS and its counsel almost certainly knew the Complaint contained false statements and allegations unsupported by facts. *See* FRCP Rule 11; *see also* BCS’s Complaint for Damages filed March 28, 2022 (the “Complaint”, attached as Exhibit 2). Also in the June 1 Letter, we requested that you provide evidence supporting the Complaint’s factual allegations. *See* June 1 Letter. Up to now, you have neither provided us nor produced in discovery any evidence that establishes any factual or legal grounds for the Complaint’s allegations.

A. After Nearly 15 Months of Discovery, the Record of Documents and Testimony Demonstrates There is Now, as There was in March 2022, Neither a Factual nor Legal Predicate to Support the Complaint’s Allegations.

Specifically, the evidence establishes the following facts which are contrary to many of the Complaint’s allegations:

- Most notably, BCS did not “immediately” retain “forensic data privacy experts” to investigate the unauthorized access¹, *see* Complaint para. 40, but rather relied on its webmaster and a glorified IT manager. Both the webmaster and the IT manager testified that they have no training or experience in detecting, investigating, or remediating unauthorized access to “protected computers.” *See* 18 U.S.C. § 1030(e)(2)(B); *see also* Jesse Jensen Deposition (“Jensen Depo.”) 31:10-45:4 (excerpts attached as Exhibit 3); Noelle Beauregard Deposition (“Beauregard Depo.”) 19:7-24 (excerpts attached as Exhibit 4).
- As such, no professional forensic investigator, nor any other person with credible training or experience in the forensic investigation of unauthorized access of protected computers, made any competent forensic investigation of the alleged unauthorized access. This would have involved, for instance, conducting analysis that results in the discovery, collection, and preservation of digital evidence that could have determined whether someone accessed a BCS protected computer without authorization. That digital evidence could have also determined whether Ms. McNamara or Mr. Whiteley were the ones who made the unauthorized access. *See* Initial Expert Report of Clark Walton (“Initial Walton Report”), para. 10 (attached as Exhibit 5); *see also* Supplemental Expert Report of Clark Walton (“Supp. Walton Report”), para. 52-58 (attached as Exhibit 6); *see also* Jensen Depo. 31:10-45:4; 226:7-15; Beauregard Depo. 20:4-18.
- Therefore, not having conducted an effectual investigation, BCS possessed, at the time it filed the Complaint, no credible, admissible evidence that any BCS protected computers were actually accessed without authorization, or that Ms. McNamara or Mr. Whiteley were the ones who gained such access without authorizations. Further, BCS now continues not to possess any evidence of such unauthorized access, as none was uncovered during the past 15 months of discovery. *See* Supp. Walton Report, para. 20-23, 26, 29, 32, 35-36, 41, 43, 45 and 51; *see also* Vanessa Hughes Deposition,

¹ For purposes of this correspondence, all instances of “unauthorized access” include “exceeding authorized access.” *See* 18 U.S.C. § 1030(a)(1).

Confidential (“Hughes Depo. Conf.”) 48:16 - 25 (excerpts attached as Exhibit 7); Jensen Depo. 31:10-45:4; Beauregard Depo. 26:9-27:14; 53:2-21; 62:6-63:9; 73:19-25; 82:17-83:4; 86:4-25; 87:1-14; 100:15-25.

- To the contrary, based on the documents and testimony in this action, and to the extent a de-indexing even occurred, it is much more likely that BCS triggered its own de-indexing. This was done, possibly inadvertently, by including a “no index” tag in the HTML code of one of its webpages. Alternately, de-indexing could also have been caused temporarily by Google because in the days preceding the alleged de-indexing, one or more BCS volunteers submitted multiple sitemaps for its website that contained errors. Google may temporarily de-index a website as a security precaution, and submitting multiple site maps in a short period is one indicator Google uses to detect website malfeasance and protect security. In this instance, however, BCS had simply submitted faulty sitemaps. *See* Jensen Depo. 98:18-24; Beauregard Depo. 99:3-100:25; *see also* Supp. Walton Report, para. 20.
- Also based on documents produced by BCS and testimony by BCS’s own PMQ witness as well as by a former volunteer involved in the so-called “investigation” of the alleged de-indexing, BCS has not incurred any economic damages due to the alleged unauthorized access that exceed \$5,000 and that are the types of economic damages included in the definition of “loss” under the Computer Fraud and Abuse Act (the “CFAA”) and related caselaw. *See* 18 U.C.S. § 1030(e)(11); *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *Andrews v. Sirius XM Radio, Inc.*, 932 F.3d 1253 (9th Cir. 2019); *see also* Expert Report of Brian Bergmark (“Bergmark Report”), para. 29 (attached as Exhibit 8); Jensen Depo. 168:8-13; 198:8-11; 210:5-7; 221:17-19; 224:17-19; 229:18-20; 234:11-13; Beauregard Depo. 75:6-22; 76:13-78:17; 84:7-85:1; 90:13-21; 91:24-92:7; 93:15-21.
 - For instance, BCS knows of no forensic investigator that ever billed the organization any amount of money. Further, BCS knows it is “run by volunteers” and “unable to quantify monetary value of [BCS’s] employees.” *See* BCS’s 2nd Amended Responses to Katherine McNamara’s First Set of Interrogatories served January 13, 2022, Interrogatory No. 9.
 - Nevertheless, BCS alleges at least \$5,000 in loss in its Complaint, which is not possibly accurate. *See* Complaint para. 47. The inability to establish at least \$5,000 in loss is ultimately fatal to BCS’s CFAA claim.
- Perhaps most damningly, BCS’s own communications demonstrate the unambiguous intent of its principals, including without limitation, Ms. Hughes and Ms. Magill, to exact revenge on Ms. McNamara and Mr. Whiteley for perceived wrongs by filing a lawsuit against them. *See, e.g.*, BCS_0159792; BCS_0570202; BCS_0581149; BCS_0577638 (attached as Exhibits 9-12); *see also* BCS_0770556 (attached as Exhibit 13). Ms. Hughes and Ms. Magill opportunistically used the alleged de-indexing as the auspicious spark for their legal action against Ms. McNamara and Mr. Whiteley, knowing full well the professional ramifications and the financial, physical, and emotional suffering our clients would face owing to BCS’s false accusations of unauthorized access

of a protected computer belonging to a nonprofit with, at least publicly facing, a worthwhile mission. *See* Vanessa Hughes Deposition (“Hughes Depo.”) 126:23-127:6 (excerpts attached as Exhibit 14); *see also* BCS_0570202; BCS_0157578 (attached as Exhibit 15); CP 010934 – CP 010950 (attached as Exhibit 16); Jensen Depo. 150:3-24; 226:7-15; BCS 0777934 (attached as Exhibit 17).

- Finally, according to the testimony of BCS’s own PMQ witness, BCS already has affirmatively abandoned at least two of the allegations in the Complaint, i.e., those related to alleged unauthorized access of BCS’s WordPress-based website and its webhosting provider account. *See* Jensen Depo. 186:10-15; 200:17-21.

B. BCS’s Principals Plotted to Sue Ms. McNamara and Mr. Whiteley to Avenge Perceived Wrongs.

As stated above but worth repeating, BCS and third parties have produced documents establishing the unambiguous intent and plain malice of BCS’s principals, including Ms. Hughes and Ms. Magill, in pursuing litigation against Ms. McNamara and Mr. Whiteley. BCS expected the litigation to be costly for our clients, and possibly yield a large insurance settlement in its own favor. *See, e.g.*, BCS_0780468 (attached Exhibit 18); CP 010924-010950; BCS_0159792; BCS_155067. Ms. Magill stated she wanted to ruin Ms. McNamara “financially and social[ly].” BCS_0770556. Ms. Hughes stated she wanted to “screatch [*sic*] off all Jer’s flesh.” BCS_0778859 (attached as Exhibit 19).

- The plotters planned to manufacture nonexistent grounds to support their planned retributive lawsuit. Ms. Beauregard testified that Ms. Hughes flatly informed her that Ms. McNamara and Mr. Whiteley had made unauthorized access of a BCS protected computer, and Ms. Beauregard simply accepted Ms. Hughes’ word as the truth. Beauregard Depo. 20:4-14; 62:16-19. Mr. Jensen testified that Ms. Hughes apprised him of the “history” of our clients, such that Mr. Jensen thereafter considered Ms. McNamara and Mr. Whiteley to be “known hostiles.” *See* Jensen Depo. 150:17.
 - Thereafter, Mr. Jensen did not question Ms. Magill and Ms. Hughes’ assertions, and proceeded, although not being in any way qualified as computer forensic investigator or analyst, to conduct his so-called “investigation” already having decided, based on Ms. Hughes and Ms. Magill’s statements, on the identity of the “hostile entities”. *See* Jensen Depo. 114:22-115:15; 150:4-152:4; 167:18; 226:7-15.
 - Mr. Jensen even testified under oath that he had no regard for determining the truth of what actually occurred and even during the incident investigation. Mr. Jensen operated under the erroneous belief that it was up to Ms. McNamara or Mr. Whiteley to prove to BCS that they did not access any BCS protected computer without authorization. *See* Jensen Depo. 101:4-10; 164:13-15.
 - As such, no one who was not in a vulnerable position to be strongly influenced by or deferential to Ms. Hughes and Ms. Magill made an independent or unbiased investigation of the alleged de-indexing and unauthorized access of a BCS protected computer. *See* Jensen Depo. 114:3-21; *see also* Beauregard Depo. 44:13-23. Certainly, no one at all who was suitably trained in the forensic analysis of computer

intrusions conducted any investigation of the allegations of unauthorized access or the allegations that it was our clients who made that unauthorized access. *See id.*

- Then BCS found a law firm willing to represent it pro bono, apparently without conducting any further investigation of BCS's protected computers to determine the basis for BCS's claims, and Ms. Hughes and Ms. Magill were able to finally seek retribution through a lawsuit against Ms. McNamara and Mr. Whiteley in retaliation, in part, for raising claims against Ms. Hughes for sexual harassment and discrimination during their time as BCS volunteers.
- Nevertheless, BCS, through DLA, filed its complaint knowing that Mr. Whiteley had made public allegations against Hughes and Magill for discrimination just before they decided to add him to this lawsuit, *see* BCS_0582136, and has continued to prosecute it for 17 months despite the wealth of documents and testimony uncovered in discovery that demonstrate there is no evidence of any unauthorized access, that Ms. McNamara or Mr. Whiteley made such unauthorized access, or that BCS suffered the minimum amount of monetary loss required as an element of the statute.
- And even after litigation was initiated, Ms. Hughes attempted to convince BCS' chief operating officer, Robert Cook, to sue Ms. McNamara and split an anticipated insurance payout with her to facilitate repayment owed to Ms. Papciak as part of a settlement between her and BCS. *See* Bobby Cook Deposition ("Cook Depo.") 58:17-60:20 (excerpts attached as Exhibit 20).

C. Our Clients Intend to File an Action for Malicious Prosecution Against Attorneys Involved in Initiating the Complaint or Continuing the Prosecution.

Taken together, the facts set forth in Sections I.A-B. above demonstrate that BCS had no reasonable basis or probable cause to file its Complaint and, in fact, made false statements in the Complaint. *See, e.g.,* Complaint para. 33-39, 43-47. Accordingly, this letter also serves as a renewal and extension of notice previously provided to Ms. Bentz and Mr. Lueddeke during telephonic meet and confer conferences on March 6 and 7, 2023, that Ms. McNamara and Mr. Whiteley intend to file a complaint for malicious prosecution at the conclusion of this litigation, naming individually each attorney and BCS principals involved in the filing of the Complaint and/or the continued prosecution of the allegations therein once it became apparent BCS had no factual predicate or legal basis for its claims. The BCS principals who will be named individually, including without limitation and subject to change, are Ms. Hughes, Ms. Magill, and Mr. Jensen.

There is no evidence anyone conducted a *competent* investigation of BCS's claims before the Complaint was filed. Any adequate analysis would have shown BCS's claims to be factually and legally insufficient. And based on its lack of evidence establishing monetary loss under the CFAA, it appears as if no one made a competent analysis of whether BCS could even demonstrate it satisfied the elements for a civil prosecution under the CFAA.

Specifically, as to those attorneys continuing to pursue this litigation, we presume that by now, close to the end of discovery, all parties and counsel have:

- attended or reviewed the depositions of Ms. Hughes, Mr. Jensen, and Ms. Beauregard, among others, which demonstrate BCS has no reasonable grounds to believe Ms. McNamara and Mr. Whiteley gained unauthorized access to a BCS protected computer, *see, e.g.*, Jensen Depo. 111:18-113:22, 100:16-102:12, 192:21-193:14, 223:8-226:15, 226:7-15; Hughes Depo. 126:23-127:6; Beauregard Depo. 19:7-9; Bill Boyles Deposition (“Boyles Depo.”) 27:22-31:16, 71:2-72:22, 78:12 -79:17 (excerpts attached as Exhibit 21); Chelsea Papciak Deposition (“Papciak Depo.”) 41:18-42:7; 65:22-69:10; 72:2-75:9 (excerpts attached as Exhibit 22);
- reviewed the parties’ document productions, which show, *inter alia*, BCS’s plot to sue our clients and simultaneously fails to show any unauthorized access of a BCS protected computer by any person, including Ms. McNamara and Mr. Whiteley, *see, e.g.*, BCS_0159792; BCS_0227935 (attached as Exhibit 23);
- attended or reviewed the technical inspection of BCS’s computer assets by Ms. McNamara and Mr. Whiteley’s forensic expert, at which Mr. Walton found no forensic evidence of any unauthorized access by any person, including Ms. McNamara and Mr. Whiteley, *see* Supp. Walton Report, para. 4;
- reviewed the report of our clients’ forensic expert, a former CIA and FBI cyber threat analyst as well as a former prosecutor and computer crimes law professor, which states to a “reasonable degree of forensic certainty” there is no evidence that either Ms. McNamara or Mr. Whiteley made any unauthorized access of a BCS protected computer, *see* Supp. Walton Report, para. 23, 26, 29, 32, 36, 38, 40 and 48;
- and reviewed the report of our clients’ damages expert, wherein a qualified accountant and expert on business loss states that, based on the evidence reviewed, BCS cannot possibly meet the statutory requirement of \$5,000 in loss, as defined by the CFAA, *see* Bergmark Report, para. 29.

After reviewing and analyzing the preceding materials, no reasonable person could possibly identify factual or legal grounds for continuing to pursue this litigation. Continuing to litigate therefore constitutes further violation of Rule 11, which provides that once it becomes clear there is no legal and factual predicate for a lawsuit, the attorney and client must not continue to prosecute it. *See* Rule 11.

D. Notice to Preserve Relevant Documents in Advance of Litigation.

PLEASE TAKE NOTICE THAT ALL PERSONS RECEIVING
THIS CORRESPONDENCE MUST PRESERVE ALL
DOCUMENTS AND COMMUNICATIONS POTENTIALLY
RELEVANT TO ANY CLAIM OR DEFENSE IN ANY
FUTURE LITIGATION RAISED HEREIN.

BCS, including all its directors, officers, and other principals, and DLA Piper, including all individual recipients of this correspondence, even if no longer with, or later departed from, DLA Piper, are directed to take all steps necessary to preserve documents and communications

that may be relevant to any claim or defense in a future malicious prosecution action. We note that in a malicious prosecution action, if the defendant raises the affirmative defense of advice of counsel, the attorney-client privilege is waived as to those communications. *See, e.g., SNK Corp. of Am. v. Atlas Dream Entm't Co., Ltd.*, 188 F.R.D. 566, 571 (N.D. Cal. 1999). In particular, since at least four DLA Piper attorneys that have worked on the case and advised BCS have already left, or are departing, DLA, including Mr. Corea, Mr. Kintzele, Mr. Brown, and Ms. Bentz, DLA Piper must take steps to ensure that their documents and communications are preserved.

II. PREVIEW OF FACTUAL AND LEGAL ARGUMENTS TO BE ARTICULATED ON MOTION FOR SUMMARY JUDGMENT AND IN ANTICIPATED MALICIOUS PROSECUTION LITIGATION.

In addition to the factual and legal arguments articulated above, the following additional factual and legal grounds support Ms. McNamara's and Mr. Whiteley's motions for summary judgment and anticipated lawsuit for malicious prosecution. Please consider this a preview of the factual and legal arguments we anticipate raising in our clients' forthcoming motions for summary judgment as well as in future malicious prosecution litigation. The following is subject to change and addition as facts continue to develop.

A. There was No Unauthorized Access of a BCS Protected Computer.

- No witness articulated any reasonable factual predicate to assume that a protected computer belonging to BCS had been accessed without authorization.
 - As discussed above, Mr. Jensen and Ms. Beauregard had no qualifications to investigate a possible instance of unauthorized access of a BCS protected computer, and the findings of this investigation were predetermined as they were informed by Ms. Hughes and Ms. Magill who had 'hacked' BCS. *See, e.g.,* Jensen Depo. 31:10-45:4; 114:3-115:9; 150:4-152:4; 226:7-15; Beauregard Depo. 19:7-24; 62:14-63:9.
 - Further, Ms. Beauregard testified that she observed the BCS website was not appearing in a Google search for "Breaking Code Silence." Beauregard Depo. 20:25-21:13.
 - Ms. Beauregard also stated that she observed a user who she assumed to be Ms. McNamara grant Google Search Console access to Mr. Whiteley. Beauregard Depo. 56:19-22; 62:25-63:16. But Ms. Beauregard had no independent factual basis to assume that Ms. McNamara's own changes to her domain's administrators was itself an unauthorized access of a BCS protected computer. *See* Beauregard Depo. 74:19-76:12.
 - Like Mr. Jensen, Ms. Beauregard was informed by Ms. Hughes that Ms. McNamara and Mr. Whiteley were suspected in the alleged unauthorized access. Beauregard Depo. 62:14-63:9.

- Ms. McNamara’s and Mr. Whiteley’s expert, Clark Walton, in his examination of the evidence, found that, to a reasonable degree of forensic certainty, there was no evidence of unauthorized access of a BCS protected computer.
 - Mr. Walton conducted an inspection of BCS’s computer assets and further found no evidence of unauthorized access of a BCS protected computer.
- What Mr. Walton did find evidence of includes “over 40 ‘alerts’ for the property, many of which appeared to be unread or unopened, dating back to the time period of the alleged de-indexing,” and that BCS “seems to put a low level of effort into properly maintaining its web site’s search engine optimization (‘SEO’) and investigating issues associated with SEO.” *See* Supp. Walton Report, para. 21.
- There are a number of alternative possibilities that may have resulted in BCS’s website being temporarily de-indexed from Google search results and that are supported by evidence uncovered in discovery, including, for example:
 - Someone redesigning BCS’s website added, perhaps inadvertently, a “no index” tag was added to a webpage on the .org domain. That tag told Google not to index BCS’s entire website. BCS had been making substantial changes to its website in the days leading up to the alleged de-indexing and unauthorized access. Most likely, BCS’s own error caused its own website to temporarily not appear in Google search results. Importantly, this did not result in BCS’s webpage being inaccessible, and BCS does not allege such anymore. *See* Jensen Depo. 181:23-182:21; 201:4-202:5.
 - Submitting multiple sitemaps with errors caused Google to temporarily de-index the site.
 - Or, possibly, another BCS volunteer with access to the relevant computer assets inadvertently or intentionally caused the de-indexing by adding a “no index tag” or by causing sitemap issues, or by taking some other undiscovered action that caused Google to temporarily de-index BCS’s website. It appears from the deposition testimony that no one investigated any other possible suspects besides Ms. McNamara and Mr. Whiteley. *See* Beauregard Depo. 20:4-14; 62:16-19; Jensen Depo. 114:22-115:9.
- Some conduct does not constitute unauthorized access, including (1) not returning credentials after departing; (2) accessing the administrative end of a domain by the domain’s owner; (3) assignment of administrative privileges for the domain to a new user by the domain owner. *See LVRC Holdings LLC v. Brekka* 581 F.3d 1127, 1132 (9th Cir. 2009) (a defendant’s liability for accessing a computer without authorization does not turn on whether the defendant breached a state law duty of loyalty to an employer, and absent evidence of unauthorized use of the credentials to access a computer, the mere refusal to return the credentials does not amount to intentional access).

B. No Evidence Exists That Shows Ms. McNamara or Mr. Whiteley Made Any Unauthorized Access of BCS's Protected Computers.

- The only indication that Ms. McNamara or Mr. Whiteley accessed a BCS protected computer without authorization was said by Ms. Hughes to Mr. Jensen during his investigation of the alleged “attack.” She told him that Ms. McNamara and Mr. Whiteley had accessed a BCS computer without authorization, and Mr. Jensen believed her without question or further analysis of his own.
 - The .org Domain is owned by Ms. McNamara. *See* Papciak Depo. 41:18-42:7; 65:22-69:10; *see also* Hover.com Receipts, 2020-2023 (“Hover Receipts”) (attached as Exhibit 24).
 - BCS did not demand the .org domain from Ms. McNamara when she left so even if its posture was that it owned the domain, it never explicitly revoked authorization. *See* 2022-01-21 – BCS Demand Letter to Katherine McNamara (“BCS’ January 2022 Demand Letter”) (attached as Exhibit 25); *See also* 2022.02.23 - Unsilenced – Cease and Desist re. Misappropriation of BCS Assets (“BCS’ February 2022 Demand Letter”) (attached as Exhibit 26); *see also* *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058 (9th Cir. 2016).
 - There was no valid intellectual property assignment of the .org domain from Ms. McNamara to BCS despite that Ms. Magill, BCS’s CEO, reached out to McNamara to sign one following Ms. McNamara’s resignation. *See* DEF-0058280; DEF-0041211 (attached as Exhibits 27-28).
 - The .org Domain is in the name of Ms. McNamara. *See* Hover Receipts.
- Ms. McNamara originally purchased domain with her personal credit card. *See* Hover Receipts. Ms. McNamara continues to pay for domain registration. *See* Hover Receipts.
 - Registrants of domain names have a property right in their domain names. *See* *Kremen v. Cohen*, 337 F.3d 1024, 1029-1030 (9th Cir. 2003); *see also* *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 903 (9th Cir. 1992) (finding that a property right exists when there is an interest capable of precise definition, it is capable of exclusive possession or control, and the putative owner has established a legitimate claim to exclusivity).
 - Ms. McNamara permitted BCS to access her domain and to temporarily use her domain as the URL for BCS’s website. But that does not convey ownership.
 - Ms. McNamara explicitly revoked Breaking Code Silence’s access to her domain on 3/18/2022 via demand letter. *See* 2022.03.18 Letter to BCS (“McNamara’s March 2022 Demand Letter”) (attached hereto as Exhibit 29). Nevertheless, BCS continues to make use of McNamara’s domain without Ms. McNamara’s current authorization.

- Mr. Jensen stated at deposition that the DNS TXT Record was likely created and granted authorization prior to McNamara and Whiteley's resignations and was not inherently malicious. *See* Jensen Depo 55:20-57:9.
- Google Search Console/Google Webmaster Central and Google Admin Central belong to the domain owner per Google's terms of service.
 - Ms. McNamara was authorized to access both Google Search Console/Google Webmaster Central and Google Admin Central. *See Verify your site ownership*, Google.com, available at: https://support.google.com/webmasters/answer/9008080?sjid=10915854968804866419-NA#domain_name_verification&zipy=%2Cdomain-name-provider, last accessed August 18, 2023.
 - Ms. McNamara had received notification from Google of changes to the domain's administrative accounts. *See* McNamara Depo 259:15-260:24.
 - She logged in as a precaution, and as a further precaution, as the domain owner, granted Mr. Whiteley access so that someone else, a third party, could observe what was happening to Ms. McNamara's domain.
- As to the allegations in the Complaint related to social media and internet-services accounts, BCS has produced no documents or communications that constitute evidence that anyone acquired unauthorized access to those accounts, let alone Ms. McNamara and Mr. Whiteley. Deposition testimony of BCS's PMQ witness indicated there was no investigation of the claims related to the social media and internet-services accounts, and that he took Ms. Magill's word for those claims. *See, e.g.*, Jensen Depo. 226:7-15.

C. BCS Cannot Establish it Sustained \$5,000 in Monetary Losses Under the CFAA, and Failure to Establish that Element is Fatal to its CFAA Claim.

- The CFAA requires a civil plaintiff to incur \$5,000 in monetary loss. *See* 18 U.S.C. § 1030(e)(11).
- "Loss" is not the same thing as "damages." *See Andrews, supra; Van Buren, supra*. "Loss" must be monetary loss related to investigating or remediating the unauthorized access. *See id.*
 - As a predicate, there was no unauthorized access, so there can be no loss.
 - But assuming for the sake of argument that there was, BCS did not incur any monetary costs in investigating or mitigating the alleged access. *See* Bergmark Report, para. 29.
- All of the persons involved in the investigation and remediation were volunteers who were not compensated monetarily for their time or services. *See* Jensen Depo. 167:25-168:13; Hughes Depo. 68:16-69:7; 70:13-71:4; 74:4-13; 75:18-76:21, 79:19-80:6;

85:17-19; 93:2-14; 98:16-22; 105:4-25; 110:20-111:20; 113:10-114:3; *see also Van Buren, supra*, 141 S. Ct. 1648; *Andrews, supra*, 932 F.3d 1253.

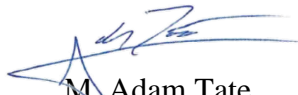
- BCS has admitted, through its PMQ Jensen, that it did not hire a forensic computer expert to investigate at the time of the alleged unauthorized access. Jensen Depo. 31:16-19.
- BCS has further admitted, through its PMQ Hughes, that it further did not, in the time between the alleged unauthorized access and her deposition, hire a forensic computer expert to investigate or remediate the alleged unauthorized access. Hughes Depo. Conf. 46:11-49:3.
- BCS does not allege that any damages were incurred directly due to an interruption of service nor as a "loss" in terms of the reasonable cost of restoring data, programs, systems, or information to its condition prior to the offense. *See Andrews, supra*.
 - BCS has tried to claim that the Zotero database was "stolen," but its own correspondence with Zotero's support team demonstrates that Zotero adjudicated the matter finding that Ms. McNamara, having created the database in question, owned the database. *See BCS_0227224*. Nevertheless, it is public, and the data is not "lost." It is accessible by BCS at any time. *See Boyles Depo. 45:9-46:7, Beauregard Depo. 83:14-20, Cook Depo. 100:3-102:8*. Hughes admitted in a draft email to Zotero that the documents linked in the Zotero database – which reside on McNamara's personal Google Drive – belong to Ms. McNamara and that Ms. McNamara collected that data. *See BCS_0774553* (attached as Exhibit 30).

III. CONCLUSION

Please do not reply with long dissertations on Rule 11, the federal summary judgment standard, or the viability of malicious prosecution claims. It is not an efficient use of any parties' or counsels' time. We are aware of the existing authority and are confident in our analysis of the facts and law.

Notwithstanding, if you have *factual* disputations of anything raised in this correspondence, and those factual disputations are supported by evidence, please identify it by Bates number or transcript page and line, as we would be very interested in reviewing that evidence as soon as possible.

Very truly yours,



M. Adam Tate
Catherine A. Close
Adam J. Schwartz

From: Adam Tate

#:6999

Sent time: 09/15/2023 09:46:02 AM

To: Lueddeke, Jason <Jason.Lueddeke@us.dlapiper.com>; Kiker, Dennis <Dennis.Kiker@us.dlapiper.com>; Gibson, John <John.Gibson@us.dlapiper.com>

Cc: Catherine Close; Adam J Schwartz <adam@ajschwartzlaw.com>; Bekah Chamberlin

Subject: RE: 3MCW01-01

Jason,

I've been trying to get this information from you for over a month now.

We are bringing a motion for summary judgment on behalf of each Defendant separately. As outlined in my August 23 letter, I don't know which claims to attack for each Defendant because BCS has been wildly inconsistent in its contentions throughout this action. By way of example:

- The Complaint alleges that "both Defendants" de-indexed the .Org Domain.
- Appendix A to BCS' Response to Interrogatories suggests that only McNamara de-indexed the .Org Domain.
- Vanessa Hughes (the PMK) testified that Whiteley was involved in the alleged de-indexing of the .Org Domain.
- Later, Jesse Jensen (also a PMK) testified that BCS doesn't know whether it was McNamara or Whiteley who supposedly de-indexed the .Org Domain.

Another example:

- The Complaint alleges that McNamara refused to return Facebook credentials, but there is no specific mention of the Facebook financial administrative credentials.
- Appendix A suggests that that Whiteley (not McNamara) engaged in unauthorized access by refusing to return his Facebook financial administrative credentials.
- Vanessa Hughes testified that BCS does not believe that Whiteley accessed the Facebook financial administration account after his resignation.
- I've tried to explain that the failure to return administrative credentials is not a violation of the CFAA, but as far as I can tell, BCS is still claiming that it is.

Another example:

- The Complaint alleges that both Defendants have "attempted or succeeded at changing the content of the website", which I understand would require access to the WordPress.
- Jesse Jensen's initial report also says that "There have also been malicious attempts to access the WordPress admin console."
- Jesse Jensen testified that he included this in his report because he was told it happened but that he couldn't find any evidence of it actually happening.
- Appendix A says nothing about the content of the website being changed or Defendants accessing the WordPress.
- As far as I can tell, the claim has been abandoned, but BCS never amended its complaint.

The above examples are illustrative. It is impossible to tell which claims BCS is still pursuing against each defendant.

Please consider this a further effort to meet and confer with you regarding the motions for summary judgment. Pursuant to the Local Rules, we also need to have a phone conversation about this, but the conversation is unlikely to be productive unless we know what claims were even talking about.

Thank you,

Adam

From: Adam Tate

Sent: Thursday, September 07, 2023 8:16 AM

To: Lueddeke, Jason <Jason.Lueddeke@us.dlapiper.com>; Kiker, Dennis <Dennis.Kiker@us.dlapiper.com>; Gibson, John <John.Gibson@us.dlapiper.com>

Cc: Catherine Close <cac@jbblaw.com>; Adam J Schwartz <adam@ajschwartzlaw.com>; Bekah Chamberlin <Bekah@jbblaw.com>

Subject: RE: 3MCW01-01

Thanks,

Adam

From: Adam Tate
Sent: Tuesday, August 29, 2023 9:57 AM
To: Lueddeke, Jason <Jason.Lueddeke@us.dlapiper.com>; Kiker, Dennis <Dennis.Kiker@us.dlapiper.com>; Gibson, John <John.Gibson@us.dlapiper.com>
Cc: Catherine Close <cac@jbblaw.com>; Adam J Schwartz <adam@ajschwartzlaw.com>; Bekah Chamberlin <Bekah@jbblaw.com>
Subject: RE: 3MCW01-01

Sure.

Appendix A lists witnesses who supposedly have knowledge for each alleged instance of unauthorized access. At the depositions of Bobby, Noelle, Jensen, etc., I used the Appendix as an exhibit and went line by line asking the witnesses what they knew. By and large the witnesses testified that they didn't know anything about most of the allegations and they didn't know why they were listed as persons who had knowledge of the allegations.

Here is an example from Bobby Cook's depo.

Q. Going down to the next line, it was Hootsuite account.

Do you see that?

A. Yes.

Q. Once again, you are listed as a person that has knowledge relating to my client's supposedly hacking of the Hootsuite account.

Can you tell us what knowledge you have?

A. I have no knowledge of any hacking of the Hootsuite account. (98:18-99:2)

Hope this helps,

-Adam

From: Lueddeke, Jason <Jason.Lueddeke@us.dlapiper.com>
Sent: Tuesday, August 29, 2023 9:22 AM
To: Adam Tate <Adam@jbblaw.com>; Kiker, Dennis <Dennis.Kiker@us.dlapiper.com>; Gibson, John <John.Gibson@us.dlapiper.com>
Cc: Catherine Close <cac@jbblaw.com>; Adam J Schwartz <adam@ajschwartzlaw.com>; Bekah Chamberlin <Bekah@jbblaw.com>
Subject: RE: 3MCW01-01

Adam, we are reviewing BCS's discovery responses with respect to the issues raised below. Can you please clarify why you believe "the list of witnesses is inaccurate"?

Jason

Jason Taylor Lueddeke
Associate

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DLA Piper LLP (US)
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From: Adam Tate <Adam@jbblaw.com>
Sent: Monday, August 28, 2023 11:12 AM
To: Lueddeke, Jason <Jason.Lueddeke@us.dlapiper.com>; Rappoport, Gaspard <Gaspard.Rappoport@us.dlapiper.com>; Kiker, Dennis <Dennis.Kiker@us.dlapiper.com>; Gibson, John <John.Gibson@us.dlapiper.com>
Cc: Catherine Close <cac@jbblaw.com>; Adam J Schwartz <adam@ajschwartzlaw.com>; Bekah Chamberlin

Subject: RE: 3MCW01-01



Jason,

It's been 20 days since I sent this email and you haven't responded. Please either agree to supplement the response, or give me two dates this week so that we can meet and confer.

-Adan

From: Adam Tate
Sent: Tuesday, August 08, 2023 2:30 PM
To: Lueddeke, Jason <Jason.Lueddeke@us.dlapiper.com>; Rappoport, Gaspard <Gaspard.Rappoport@us.dlapiper.com>
Cc: Catherine Close <cac@jbblaw.com>; Adam J Schwartz <adam@ajschwartzlaw.com>; Bekah Chamberlin <Bekah@jbblaw.com>
Subject: 3MCW01-01

Jason,

At the depositions of Jesse Jensen, Bobby Cook and Noelle Beauregard, it became clear that some of BCS's written responses are inaccurate. Of particular note is the "Appendix A" which BCS used to answer Interrogatories 1-3. At a minimum, the list of witnesses is inaccurate. In addition, Jesse Jensen, acting as a PMK, testified that there were substantive inaccuracies with the Appendix. (See, e.g., Jensen Depo. 180:11-187:3-13.) Can you please have BCS amend any of its inaccurate discovery responses including Appendix A?

On a related note, I am trying to isolate which instances of alleged unauthorized access BCS believes that Jeremy Whiteley was responsible for. Unfortunately, BCS's pleadings, deposition testimony, and written discovery responses are all over the place. When you supplement Appendix A, can you please make that clear?

Thank you,

Adam



M. Adam Tate
Partner

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