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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91277861
Party	Plaintiff Katherine McNamara
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Submission	Motion to Amend Pleading/Amended Pleading
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Date	08/27/2023
Attachments	Second Amended Notice of Opposition 91277861.pdf(138445 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Katherine McNamara	)	
Opposer	)	Opposition No.: 91277861
	)	
v	)	
	)	Marks: BREAKING CODE SILENCE &
Breaking Code Silence	)	BREAKING CODE SILENCE
Public Benefit Corporation	)	
Applicant	)	

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SECOND AMENDED NOTICE OF OPPOSITION

Pursuant to page 8 of the TTAB’s order dated August 7, 2023, Opposer hereby submits a second amended notice of opposition with respect to the fraud claims, as set forth in enhanced paragraphs 10-12 herein.

Katherine McNamara, a natural person residing at 5239 Rosemead Blvd Unit D, San Gabriel, CA 91776 (“Opposer”) believes that she will be damaged by registration on the Principal Register of the marks BREAKING CODE SILENCE shown in applications SN 90693777 and 90692440, and hereby opposes the same.

As grounds for opposition it is alleged:

1. Opposer is an adult survivor of the Troubled Teen Industry (“TTI”). Opposer presently is, and for many years in the past has been, engaged in activist, lobbying, testimonial, and promotional activities related to raising awareness of the problems in TTI and breaking code silence used in many TTI programs in the United States.

2. As part of her activities Opposer served as a board member of the Applicant Breaking Code Silence Public Benefit Corporation (“Applicant”) for several months, and registered the

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domain name “breakingcodesilence.org” on March 11, 2020 more than a year before the March 22, 2021 incorporation date of Applicant. Opposer continues to own that domain name in her name alone, and she alone has paid the necessary fees for keeping the domain name in force. At one time Opposer consented to Applicant’s use of breakingcodesilence.org although that consent was long ago removed yet Applicant continues to use that domain name.

3. Opposer broke all ties with Applicant many months ago as a result of abuse by employees of Applicant and what Opposer considered to be unethical activities by employees of Applicant. Since cutting all ties with Applicant Opposer has required Applicant to cease using Opposer’s intellectual property, which Applicant has refused to do.

4. Opposer has since before 2019 used” breaking code silence” as a merely descriptive, in fact generic, term and has been the owner of the breakingcodesilence.org domain name since March 11, 2020, before Applicant was organized. A copy of the initial ownership record of breakingcodesilence.org is attached as Exhibit A.

5. Opposer’s grounds of opposition are as follows:

6. The mark at issue, BREAKING CODE SILENCE as applied to the services descriptions in classes 035 and 041, is merely descriptive under 15 USC 1052(e)(1) [TBMP 309.03(c)(1) ground #2] since the mark itself describes a quality or characteristic of the mark's services. Since at least as early as 2014 “breaking code silence” has been a social media campaign organized by activists and survivors of institutional child abuse to raise awareness of the problems in the TTI and the need for reform. Many troubled teen programs employ punishment called “code silence” to control teens through social isolation until they reach a breaking point. The social media campaign includes a hashtag #BreakingCodeSilence meaning that the activists are breaking their silence on the abuses in the TTI. As specifically set forth in a

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May, 2021 publication of Applicant: “‘Code Silence’ refers to a form of isolation used in WWASP<sup>1</sup> programs in which detainees were not allowed to speak. This could last for days, months, or even years. ‘Breaking Code of Silence’ refers to the radical act of using our voices. We are survivors of the Troubled Teen Industry, or facilities falsely advertised as ‘fixing’ children who are ‘troubled.’”

7. In addition to Opposer using “breaking code silence” in a merely descriptive manner presently, and in the past, the relevant general public of survivors and activists re the TTI uses (and has since at least 2014 used) the term “breaking code silence” merely descriptively in promoting public awareness of the need for preventing institutional child abuse and empowering adult survivors to engage in positive self-advocacy by means of public advocacy and promoting the interests of troubled teens by means of public advocacy (the services description of SN 90692440), and by providing websites (breakingcodesilence.net, breakingcodesilence.org and breakingcodesilence.com) featuring on-line articles, supportive personal stories, news stories, and blogs in the field of preventing institutional child abuse and empowering adult survivors to engage in positive self-advocacy, and by providing a website featuring on-line recorded and live webcasts and videos featuring speakers in the field of preventing institutional child abuse and empowering adult survivors to engage in positive self-advocacy (the services description of SN 90693777). If Opposer is precluded from using “breaking code silence” in promoting public awareness of institutional child abuse and promoting the interests of troubled teens and adult survivors Opposer will be greatly harmed and damaged, therefore Applicant cannot be allowed to register the merely descriptive mark for its services.

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<sup>1</sup> “WWASP” means “World Wide Association Of Specialty Programs.” This footnote is not in the quoted article.

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8. The mark at issue is also generic under 15 USC 1052(e)(1) [TBMP 309.03(c)(1) ground #26] as used with the services set forth in SNs 90692440 (“‘440’”) and 90693777 (“‘777’”) because the mark sought to be registered is a term that members of the relevant public (activists and survivors with respect to the TTI) primarily use or understand to refer to the genus of services in question, namely those listed in the ‘440 and ‘777 applications.

9. Applicant is not (and was not, at the times of the filing of the ‘440 and ‘777 applications) the rightful owner of the mark of the ‘440 and ‘777 applications sought to be registered [TBMP 309.03(c)(1) ground #7]. Many others have used, and continue to use, “breaking code silence” associated with many goods and services including the services descriptions in the ‘440 and ‘777 applications long before Applicant was formed and either others, or no one, has the exclusive right to use “breaking code silence” even if not generic.

10. Applicant has committed fraud in attempting to secure registration of the ‘440 and ‘777 applications [TBMP 309.03(c)(1) ground #19]. This allegation is pled without admission that Breaking Code Silence is a legitimate trademark since Opposer also alleges that it is merely descriptive and/or generic as applied to the services of the ‘440 and ‘777 applications.

11. With respect to the ‘440 application, the application alleges a date of first use of December 11, 2019 and it was filed on May 5, 2021. However, the “mark” Breaking Code Silence was never used on the services of the ‘440 application on or prior to May 5, 2021 and Applicant knew that it had not be so used. Applicant based its allegations of the date of first use on an illegitimate and fraudulent belief that if it acquired the domain name breakingcodesilence.net it could allege the December 11, 2019 date that the domain name was purchased by Jennifer Walker, who ultimately transferred it to Chelsea Papciak aka Chelsea Filer et al, as a date of first use of the “mark” Breaking Code Silence. However, Applicant knew at the

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time of filing of the '440 application on May 5, 2021 that it did not have ownership of the domain name breakingcodesilence.net, and Applicant has never acquired the rights to that domain name; and Applicant further knew that the mere acquisition of the domain name (even if it occurred) was not the same as use of the "mark" Breaking Code Silence on the services set forth in the '440 application. Also, Applicant knew that the owners of the domain name had never used the "mark" on the services set forth in the '440 application on or prior to May 5, 2021, just as Applicant knew that it had not used the "mark" on those services on or prior to May 5, 2021. Regardless of whether it owned or owns particular websites Applicant had not otherwise used its mark in commerce or interstate commerce on or prior to May 5, 2021 on any services in the '440 application and Applicant knew that it had not used its mark and filed the '440 application for nefarious purposes not because it had an actual belief that it had used the mark on services in the '440 application. Fraud exists because there was actual intent by Applicant to mislead the PTO that it had used the "mark" on the services in the '440 application on or prior to May 5, 2021 despite the fact that it or any predecessor that it had rights to had not, and/or because there was gross disregard by Applicant as to the legitimacy of its representations made to the PTO that it or any predecessor that it had rights to had used the "mark" on the services of the '440 application on or prior to May 5, 2021. Obviously the fraudulent representations are material since a registration cannot issue when there is non-use of a mark on or before the date that a use application is filed.

12. With respect to the '777 application, the application alleges a date of first use of October 18, 2010 and it was filed on May 6, 2021. However, the "mark" was never used on the services of the '777 application prior to May 6, 2021 and Applicant knew that it had not been so used. Applicant made its allegations with respect to the '777 application because some of its

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representatives, before Applicant was incorporated on March 22, 2021, purchased the domain name breakingcodesilence.com from Joshua Scarpuzzi. Mr. Scarpuzzi purchased that domain name in 2018. Applicant knew that Mr. Scarpuzzi had only used that domain name for his free online e-book and had never used the “mark” Breaking Code Silence for the services of the ‘777 application. Nor did Applicant ever use the “mark” Breaking Code Silence for the services set forth in the ‘777 application on or prior to May 6, 2021. Regardless of whether it owned or owns particular websites Applicant had not otherwise used its mark in commerce or interstate commerce on or prior to May 6, 2021 on any services in the ‘777 application and Applicant knew that it had not used its mark and filed the ‘770 application for nefarious purposes not because it had an actual belief that it had used the mark on services in the ‘770 application. Fraud exists because there was actual intent by Applicant to mislead the PTO that it had used the “mark” on the services in the ‘777 application on or prior to May 6, 2021 despite the fact that it or any predecessor that it had rights to had not, and/or because there was gross disregard by Applicant as to the legitimacy of its representations made to the PTO that it or any predecessor that it had rights to had used the “mark” on the services of the ‘777 application on or prior to May 6, 2021. Obviously the fraudulent representations are material since a registration cannot issue when there is non-use of a “mark” before a use application is filed.

13. Wherefore Opposer requests that the registration of the mark sought to be registered in SNs 90692440 and 90693777 be denied and that this opposition be sustained.

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Katherine McNamara

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Attorney for Opposer Katherine McNamara

Dated: August 27, 2023

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served August 27, 2023 by email to Rexford Brabson, [rex@t-rexlaw.com](mailto:rex@t-rexlaw.com) and [sasha@t-rexlaw.com](mailto:sasha@t-rexlaw.com), 7040 Avenida Encinas #104-333, Carlsbad, CA 92011, the attorney of record for Applicant.

//s//

Robert A. Vanderhye