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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SWARMIFY, INC.,

No. C 17-06957 WHA

Plaintiff,

v.

**ORDER GRANTING IN
PART MOTION FOR
ATTORNEY'S FEES**

CLOUDFLARE, INC.,

Defendant.

INTRODUCTION

In this action for trade secret misappropriation, defendant moves for attorney's fees and costs. For the reasons stated below, the motion is **GRANTED IN PART**.

STATEMENT

Plaintiff Swarmify, Inc., a small start-up, formed in 2013 with the sole purpose of creating and bringing to market a method for more reliable and affordable internet video streaming. In February 2016, Swarmify contacted defendant Cloudflare, Inc., a corporation that formed in 2009 and uses a network of data centers to offer reverse-proxy and content delivery services to other companies, about a potential business deal. In April 2016, the parties entered into a non-disclosure agreement and negotiations ensued. In May 2016, however, negotiations broke down and the parties parted ways.

In September 2017, defendant Cloudflare, Inc., published two blog posts — which provoked the instant action — marking the launch of its own video streaming service “Cloudflare Stream.” Upon reading the blog posts, Swarmify CEO Nathan Barnett suspected Cloudflare of using Swarmify's purported proprietary technology in violation of the parties'

1 non-disclosure agreement. He quickly raised the issue with Cloudflare’s in-house counsel,
2 stating that he was “still operating under the assumption that this [was] just an oversight made
3 in the chaos of a fast growing organization” and that he was “happy to resolve in a way that
4 makes sense on all sides.” Cloudflare’s in-house counsel promised to investigate. After
5 Cloudflare’s failure to follow up, Swarmify again requested, this time formally through its
6 counsel, an explanation of the blog post. In December 2017, after Cloudflare again failed to
7 respond by Swarmify’s requested October 25 deadline, Swarmify filed this instant action,
8 alleging trade secret misappropriation and related state law violations (Dkt. No. 167-1 ¶¶ 4–7,
9 Exh. 3).

10 Later the same day this action was filed, Cloudflare responded, claiming it had evidence
11 disproving misappropriation of Swarmify’s technology and that it would provide Swarmify with
12 that evidence by the end of that week. Swarmify’s counsel requested that the purported
13 evidence be shared under a protective order, stated that Swarmify would “of course not continue
14 to pursue the case” if the evidence disproved its case, and further requested Cloudflare to
15 provide a protective order agreement. Six days later, when no protective order agreement was
16 offered, Swarmify served its complaint on Cloudflare. Upon being served, Cloudflare then
17 responded, stating that it would send Swarmify an agreement. On December 22, 2017, when no
18 agreement or evidence materialized one week after, Swarmify filed its motion for preliminary
19 injunction. On February 27, 2018, the motion was denied (Dkt. No. 83; Dkt. No. 167-7 ¶¶ 2, 5,
20 7, Exh. 1).

21 Swarmify maintains that throughout most of this litigation, Cloudflare’s defense rested
22 on the grounds that Swarmify’s video streaming technology did not constitute a trade secret
23 because (1) many parts of the technology are publicly available, and (2) Cloudflare created the
24 technology at issue independently. On May 9, however, Cloudflare “sprung a new defense”
25 during a mediation session supervised by Judge Jacqueline Corley that “radically altered this
26 case” — namely, [REDACTED]

27 [REDACTED]

28 [REDACTED] Upon confirming this new defense, Swarmify sought to settle with Cloudflare.

1 When settlement talks fell through, Swarmify moved to dismiss the instant action — initially
2 without prejudice on June 14, and subsequently with prejudice pursuant the undersigned judge’s
3 advisement during the hearing on Swarmify’s request to stay discovery pending ruling on the
4 motion to dismiss. On July 10, the instant action was dismissed with prejudice (Dkt. Nos. 135,
5 145, 150, 167 at 8; Dkt. No. 167-1 ¶ 8).

6 Cloudflare now moves for attorney’s fees and costs under the California Uniform Trade
7 Secrets Act, the federal Defend Trade Secrets Act, and the Court’s inherent powers to award
8 attorney’s fees. Specifically, Cloudflare seeks attorney’s fees and costs — amounting to
9 \$199,599.71 — incurred following the February 27 order denying Swarmify’s motion for
10 preliminary injunction until the case was dismissed with prejudice on July 10. Cloudflare
11 contends that since at least the order denying the motion for preliminary injunction, Swarmify
12 maintained the instant action in bad faith.

13 This order follows full briefing and oral argument.

14 ANALYSIS

15 Under the California Uniform Trade Secrets Act and the federal Defend Trade Secrets
16 Act, a prevailing party may be awarded reasonable attorney’s fees and costs if a claim of
17 misappropriation is made in bad faith. CAL. CIV. CODE § 3426.4; 18 U.S.C. § 1836(b)(3)(D).
18 Courts also have the inherent authority to award attorney’s fees. *Tapgerine, LLC v. 50Mango,*
19 *Inc.*, No. C 16-06504 WHA, 2017 WL 1956874, at *1 (N.D. Cal. May 11, 2017).

20 Because neither the California Uniform Trade Secrets Act nor the federal Defend Trade
21 Secrets Act defines “bad faith” in the context of trade secret misappropriation, “courts generally
22 adopt a two-pronged standard for the evaluation of such claims.” *Farmers Edge Inc. v.*
23 *Farmobile, LLC*, No. C 16-191, 2018 WL 3747833, at *6 (D. Neb. Aug. 7, 2018) (Judge Joseph
24 F. Bataillon). The party seeking attorney’s fees must show (1) the objective speciousness of the
25 claim, and (2) the subjective bad faith in bringing or maintaining the claim. *CRST Van*
26 *Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1111 (9th Cir. 2007) (quoting
27 *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 1262
28 (2002)).

1 Objective speciousness “exists where the action superficially appears to have merit but
2 there is a complete lack of evidence to support the claim.” *Gabriel Techs. Corp. v. Qualcomm*
3 *Inc.*, No. C 08-1992 AJB (MDD), 2013 WL 410103, at *7 (S.D. Cal. Feb. 1, 2013), *aff’d*, 560 F.
4 App’x 966 (Fed. Cir. 2014) (Judge Anthony J. Battaglia) (quoting *FLIR Sys.*, 174 Cal. App. 4th
5 at 1276 (2009). “Objective speciousness may be shown by, among other factors, demonstrating
6 that there was no misappropriation or threatened misappropriation or that the opposing party
7 could not have suffered any economic harm.” *Ibid*.

8 Subjective bad faith “means the action was commenced or continued for an improper
9 purpose, such as harassment, delay, or to thwart competition.” *SASCO v. Rosendin Elec., Inc.*,
10 207 Cal. App. 4th 837, 847 (2012). “The timing of the action may raise an inference of bad
11 faith. Similar inferences may be made where the plaintiff proceeds to trial after the action’s
12 fatal shortcomings are revealed by opposing counsel.” *FLIR Sys., Inc. v. Parrish*, 174 Cal. App.
13 4th 1270, 1278 (2009) (citations omitted). “The absence of evidence alone, even after
14 discovery,” however, “does not support a finding of subjective bad faith.” *SASCO*, 207 Cal.
15 App. 4th at 847.

16 This order finds that the record, as a whole, does not provide sufficient evidence to infer
17 subjective bad faith while Swarmify pursued its claims against Cloudflare’s original defenses.
18 Upon learning of and confirming Cloudflare’s new defense raised during mediation, however,
19 Swarmify should have immediately sought to dismiss the instant action, as the new defense
20 unquestionably rendered Swarmify’s misappropriation claim objectively specious. This order
21 therefore finds that Swarmify maintained the instant action in bad faith from May 23, after
22 Swarmify verified Cloudflare’s new defense, to June 10, right before Swarmify first offered to
23 dismiss this case.¹

24 *First*, the timing of Swarmify’s conduct indicates that Swarmify’s initial primary
25 concern in bringing this suit — regardless of how specious its claims may be — was to protect
26 its alleged trade secrets. For example, soon after Cloudflare published the two blog posts that
27

28 ¹ The parties have agreed to disclose confidential settlement material for the purposes of this motion,
notwithstanding the provisions of Federal Rule of Evidence 408 and ADR Local Rule 7-4 (Dkt. No. 168).

1 set off the instant litigation, Swarmify’s CEO emailed Cloudflare’s in-house counsel, stating
2 that he believed the posts described Swarmify’s trade secrets but that he was giving Cloudflare
3 the benefit of the doubt, and expressing his desire to resolve the issue “in a way that makes
4 sense on all sides” (Dkt. No. 167-1, Exh. 3). Moreover, Swarmify continuously expressed its
5 desire to take Cloudflare up on its offer to see evidence disproving misappropriation (*see, e.g.*,
6 Dkt. No. 167-7, Exh. 1).

7 *Second*, Cloudflare suggests that Swarmify’s continued pursuit of the instant action at
8 least since the order denying Swarmify’s motion for preliminary injunction shows that
9 Swarmify knowingly pursued a meritless claim in bad faith. It is true that previous orders,
10 including the preliminary injunction order, have expressed skepticism over the merits of
11 Swarmify’s trade secret claims, particularly given Swarmify’s ever-shifting descriptions of its
12 technology. This order, however, does not find Swarmify’s continued advocacy of its trade
13 secret claims (before learning of the new defense) — regardless of their merits — as evidence
14 amounting to subjective bad faith. As Swarmify notes, the preliminary injunction order
15 explicitly declined to reach the likelihood of success of Swarmify’s claims (Dkt. No. 88 at 10).
16 And, the instant action was dismissed before any further chance to reach the merits of
17 Swarmify’s trade secret claims (and Cloudflare may not use a motion for attorney’s fees as a
18 backdoor way to do so).

19 As for Swarmify’s amended disclosures, Swarmify clarified that it believed the order
20 denying its motion for preliminary injunction amounted to “an instruction to provide
21 clarification on [Swarmify’s] claimed trade secrets” and that if that was not the message of the
22 order, it would be “content to stand on its Original Disclosure” (Dkt. No. 107 at 2). After the
23 order granting in part Cloudflare’s motion to strike the amended disclosures gave Swarmify an
24 option between the two disclosures (subject to conditions), Swarmify chose to stick with its
25 original disclosures (Dkt. Nos. 123 at 5–6; 124). As such, Swarmify’s amended disclosures do
26 not, under the current record, support a finding of subjective bad faith.

27 *Third*, Cloudflare contends that it has borne much of the discovery burden following the
28 hearing for motion for preliminary injunction and that Swarmify had “refused” to participate in

1 discovery. As such, according to Cloudflare, Swarmify used written and document discovery
2 “as a cost-effective way to impose asymmetrical discovery costs on Cloudflare in an attempt to
3 create settlement leverage” (Dkt. No. 156 at 6). As Swarmify points out, however, once
4 Cloudflare revealed its new defense during mediation, Judge Corley directed Cloudflare to
5 produce documents responsive to Swarmify’s requests for production to enable Swarmify to
6 verify Cloudflare’s new defense (Dkt. No. 167-7 ¶ 9).

7 Moreover, Swarmify itself sought to dismiss its own case. Clearly, Swarmify’s reason
8 for dispensing with discovery was because it chose not to prosecute its own case at that stage
9 rather than for some other bad faith purpose. This is reflected in its request to stay discovery
10 pending ruling on its initial motion to dismiss without prejudice, as Cloudflare itself continued
11 to seek discovery (*see* Dkt. No. 139). *Stilwell Development Inc. v. Chen*, No. C 86-4487, 1989
12 WL 418783, at *5 (C.D. Cal. Apr. 25, 1989) (Judge George H. King), is thus distinguishable,
13 which Cloudflare cites for the proposition that “knowing persistence in an invalid claim also
14 demonstrates . . . subjective bad faith in causing the needless expenditure of money in defense
15 of the trade secret claim.” There, the plaintiffs knew they had no proof of trade secret
16 misappropriation, yet pursued the claim through their case in chief — and caused needless
17 expenditure in defense. *Ibid.* As such, though Cloudflare bore the lion’s share of the discovery
18 process, the record does not sufficiently suggest the ulterior motives of which Cloudflare
19 accuses Swarmify.

20 *Fourth*, Cloudflare mischaracterizes Swarmify’s initial desire to dismiss this action
21 without prejudice. There is no indication that Swarmify sought a “mulligan” in order to “refile
22 its case, in a different forum, and free from” this Court’s rulings, as Cloudflare asserts (Dkt. No.
23 156 at 7). Rather, the record indicates that Swarmify, recognizing its premature action, sought
24 to maintain the ability to protect what it believes are its trade secrets [REDACTED]
25 [REDACTED] (*see* Dkt. No. 135 at 7). Swarmify
26 itself offered to agree to require any future-filed suit to be returned to this Court in the same
27 procedural posture. This evidences its good faith in seeking dismissal (*id.* at 11–12).
28

1 *Fifth*, this order is not persuaded that Swarmify’s initial conduct during settlement
2 discussions demonstrates subjective bad faith. Swarmify’s initial settlement demands proffered
3 in its settlement statement — which were made before learning of Cloudflare’s new defense —
4 were not so inflammatory such that they demonstrate bad faith. The settlement demands, even
5 if arguably excessive, were negotiating standpoints.

6 Upon learning of and confirming Cloudflare’s new defense, however, Swarmify should
7 have immediately sought to dismiss the instant action. At the May 9 mediation session
8 supervised by Judge Corley, Cloudflare revealed its new defense that [REDACTED]
9 [REDACTED] — at which point Swarmify readily
10 conceded that, if the defense was proven true, it no longer had a case and was therefore ethically
11 prohibited from moving forward with its misappropriation claim (Dkt. No. 167-1 ¶ 8).

12 Based on Cloudflare’s revelation during mediation, Judge Corley set a schedule to allow
13 Swarmify to confirm the veracity of Cloudflare’s newly asserted defense. A phone call between
14 Swarmify CEO Nathan Barnett and a Cloudflare engineer was set for May 22, during which Mr.
15 Barnett could (and did) confirm Cloudflare’s new defense. Judge Corley also instructed
16 Cloudflare to produce by May 14 documents showing [REDACTED]
17 [REDACTED] so that Mr. Barnett could discuss them with the Cloudflare engineer
18 if necessary (Dkt. No. 167-1 ¶ 9; Dkt. No. 172, Exh. 4).

19 On June 11, Swarmify offered during settlement discussions to dismiss the instant action
20 *without* prejudice — a procedural posture it believed was necessary to retain the ability to bring
21 a future misappropriation claim [REDACTED]
22 [REDACTED]. When it became clear that Cloudflare would only agree to a
23 dismissal *with* prejudice — a procedural posture Cloudflare believed would prohibit Swarmify
24 from ever bringing a misappropriation claim again — Swarmify moved to dismiss without
25 prejudice on June 14.

26 Swarmify argues that Cloudflare [REDACTED]
27 [REDACTED] (Dkt. No. 174 at 2). Instead,
28 Cloudflare “wast[ed] the time of Swarmify and its counsel” by “permitt[ing] Swarmify to go on

1 believing for seven months after Swarmify first raised the issue” that [REDACTED]
2 [REDACTED] (Dkt. No. 174 at 5; Exh. 4 at 4–5). It was thus Cloudflare’s
3 [REDACTED], Swarmify argues, that instigated this action and therefore
4 its attempt to settle was warranted. During these settlement talks, Swarmify asserted that it had
5 a [REDACTED] and thus it may bring a separate
6 action to pursue the claim (Dkt. No. 172, Exh. 4 at 4–5).

7 The fact remains, however, that Swarmify was ethically obligated to drop its
8 misappropriation claim once Cloudflare proved its new defense on May 22 (as Swarmify itself
9 readily concedes) — a defense which indisputably rendered Swarmify’s misappropriation claim
10 objectively specious. Swarmify failed to do so and instead attempted to settle (and thus extract
11 some gain from Cloudflare) before offering to freely dismiss the case (without prejudice) on
12 June 11. Its failure to do so immediately is sufficient to infer subjective bad faith. This order
13 thus finds that Swarmify maintained the instant action in bad faith from May 23 to June 10 and
14 accordingly awards Cloudflare attorney’s fees and costs for this time period in the amount of
15 \$9,730.50.²

16 **CONCLUSION**

17 For the foregoing reasons, Cloudflare’s motion for attorney’s fees and costs is
18 **GRANTED IN PART**. Cloudflare is hereby awarded \$9,730.50 in fees and costs.

19
20 **IT IS SO ORDERED.**

21
22 Dated: September 28, 2018.

23 
24 _____
25 WILLIAM ALSUP
26 UNITED STATES DISTRICT JUDGE
27

28 _____
² This order notes that Swarmify does not dispute the reasonableness of Cloudflare’s requested attorney’s fees and costs.