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**NOT FOR PUBLICATION**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

John Covington and Deborah Covington,  
husband and wife,

Plaintiffs,

vs.

Patriot Motorcycles Corporation, a Nevada  
Corporation; Michael Attias and Jane Doe  
Attias, husband and wife; David Gernak  
and Jane Doe Gernak, husband and wife;  
Dick Simon and Jane Doe Simon, husband  
and wife,

Defendants.

No. CV-07-955-PHX-FJM

**ORDER**

Plaintiffs John and Deborah Covington brought this action against Patriot Motorcycles Corporation (“Patriot”), Michael Attias, David Gernak, and Dick and Dianne Simon (collectively, the “Simons”) alleging several causes of action arising from the sale of their motorcycle business and the licensing of associated trademarks. Patriot and Michael Attias failed to defend and default was entered against them. Plaintiffs’ claims for common law fraud and aiding and abetting tortious conduct, namely unfair competition and violations of the Lanham Act, against defendants Gernak and the Simons were tried before a jury in January 2009. After the close of evidence, the court granted directed verdict in favor of defendants as to the aiding and abetting claim. Plaintiffs’ common law fraud claim was submitted to the jury, which returned a verdict for defendants.

1 Defendant Gernak now seeks an award of \$26,201 in attorneys' fees. The Simons  
2 also seek an award of attorneys' fees in the amount of \$46,212.75. Because these motions  
3 raise nearly identical issues, we will consider them together. We have before us Gernak's  
4 motion for attorneys' fees (doc. 148), plaintiffs' response (doc. 150), and Gernak's statement  
5 of consultation and supporting memorandum (doc. 154). We also have before us the Simons'  
6 motion for attorneys' fees (doc. 147), plaintiffs' response (doc. 149), and the Simons'  
7 memorandum of points and authorities, statement of consultation, and supplemental  
8 statement of consultation (docs. 151, 152 & 153).

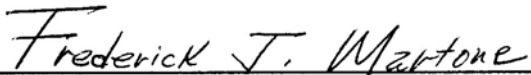
9 We must first determine whether defendants are entitled to an award of attorneys' fees  
10 in this case. Gernak and the Simons seek an award of attorneys' fees as prevailing  
11 defendants on plaintiff's Lanham Act claims. The Lanham Act provides that for trademark  
12 claims, "[t]he court in exceptional cases may award reasonable fees to the prevailing party."  
13 15 U.S.C. § 1117(a). However, the complaint does not allege a cause of action for Lanham  
14 Act violations against Gernak and the Simons, but a cause of action for aiding and abetting  
15 tortious conduct (doc. 31). Although plaintiffs attempted to show Lanham Act violations as  
16 an underlying bad act for their "aiding and abetting" claim, the cause of action arose in tort.  
17 See Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395  
18 Pension Trust Fund, 201 Ariz. 474, 485, 38 P.3d 12, 23 (2002). Defendants have not  
19 presented any theory under which they are entitled to attorneys' fees for plaintiffs' tort  
20 action.

21 Moreover, even if this were a case arising under the Lanham Act, defendants would  
22 not be entitled to attorneys' fees. The Lanham Act's provision for attorneys' fees in  
23 exceptional cases is to be construed narrowly. See Classic Media, Inc. v. Mewborn, 532 F.3d  
24 978, 990 (9th Cir. 2008). To be entitled to fees, a prevailing defendant must show that the  
25 plaintiff's case was "groundless, unreasonable, vexatious, or pursued in bad faith." Stephen  
26 W. Boney, Inc. v. Boney Serv., Inc., 127 F.3d 821, 827 (9th Cir. 1997). Defendants do not  
27 argue that plaintiffs pursued this action unreasonably or in bad faith, but argue that plaintiffs'  
28 claim was groundless.

1 Although we granted defendants’ Rule 50, Fed. R. Civ. P., motions for judgment as  
2 a matter of law on plaintiff’s aiding and abetting claim at trial, plaintiffs’ claim was not  
3 unreasonable or groundless. Plaintiffs had a good faith belief that their trademarks had been  
4 infringed, that defendants were involved with this infringement, and that they would be able  
5 to so demonstrate at trial.<sup>1</sup> In addition, it is unclear why, if the plaintiffs’ claims were  
6 groundless, as defendants now allege, neither Gernak nor the Simons filed a motion for  
7 summary judgment and instead proceeded with the time and expense of a trial by jury.

8 Accordingly, **IT IS ORDERED DENYING** defendant Gernak’s motion for  
9 attorneys’ fees (doc. 148). **IT IS FURTHER ORDERED DENYING** defendants Dick and  
10 Dianne Simon’s motion for attorneys’ fees (doc. 147).

11 DATED this 13<sup>th</sup> day of August, 2009.

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 Frederick J. Martone  
16 United States District Judge  
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27 <sup>1</sup>Indeed, plaintiffs’ belief that their trademark had been infringed was reasonable in  
28 light of Patriot’s failure to defend against their claims of infringement.