

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 07-2075

JENZABAR, INC., LING CHAI, and
ROBERT A. MAGINN, JR.,

Plaintiffs,

v.

LONG BOW GROUP, INC.,

Defendant.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
LONG BOW GROUP, INC'S MOTION TO DISMISS**

Plaintiffs Ling Chai ("Chai"), Robert Maginn ("Maginn"), and Jenzabar, Inc. ("Jenzabar" and, collectively "Plaintiffs") hereby oppose Defendant Long Bow Group, Inc's ("Long Bow") Motion to Dismiss (the "Motion"). Because each Count in Plaintiffs' Complaint states a viable claim for relief against Long Bow, the Motion should be denied.

Facts

For purposes of this Opposition, and so as not to burden the Court, Jenzabar relies on the facts alleged in the Complaint, and limits the discussion herein to addressing factual inaccuracies raised by the Motion.¹

Long Bow maintains a website at <http://www.tsquare.tv/film> (the "Site"), which provides information about its film, *The Gates of Heavenly Peace* (the "Film"), including the Film's production and its main characters. Comp. ¶¶ 19-20. The Site's objective, as identified on its

¹ To the extent that this Opposition references facts not sufficiently alleged in the Complaint, Plaintiffs seek leave to amend pursuant to Mass. R. Civ. P. 15(a).

home page, states “[t]his website explores the origins and history of the protests, the international media coverage, and underlying themes such as democracy, human rights, reform and revolution, and nationalism.” Id. In this regard, the Site serves as a promotional tool for the Film, as well as a source of information about the protest movement in Tiananmen Square (the “Protests”). Id.

In connection with its description of the Film, the Site provides biographical information regarding the 15 characters portrayed in the Film. Id. ¶ 23. Notably – and indicative of Long Bow’s particular animus – only Chai’s biography is followed by the statement: “**More information about Chai Ling and the controversy that has followed her to Jenzabar is available here.**” See Long Bow’s current website, attached to Motion to Dismiss, at Ex. A,² pp. 3-4 (emphasis in original). Use of the hyperlink launches the reader to web pages that provide critical commentary on the business practices of Chai, Maginn, and the business they founded together, Jenzabar. Id.; Comp. ¶¶ 21-23. In contrast to Long Bow’s assertion, see Motion at 3, *none* of the Film’s other characters receive this type of treatment. Comp. ¶ 23. Indeed, there is virtually no commentary provided concerning the business or professional endeavors of any other character. See Motion, Ex. A.

The Site’s focus on Chai’s entrepreneurial efforts is singularly unique, not only compared with the treatment afforded other characters in the Film, but likewise for its contrast to the Site’s mission as a whole. See id. Chai’s business endeavors in serving higher education institutions are wholly unrelated to the Site’s purported objective of exploring the origins and history of the

² The exhibits to Long Bow’s Motion to Dismiss are cited to herein as, “Ex. A” and “Ex. B.”

Protests, human rights, and reform. See *id.* Moreover, while offering a biographical pretense for this commentary, and thereby attempting to suggest impartiality, the web pages dedicated to Chai are far from fair and balanced. Comp. ¶¶ 21-23. Instead, Long Bow has republished select segments of negative press – many from the 1990’s – combined in a way to create a distinct message that Plaintiffs have engaged in questionable, improper business practices. *Id.* ¶ 21. Moreover, Long Bow’s particular animus is highlighted by its exclusive focus on these negative and outdated sources, in such a way that falsely suggests the existence of a current controversy.³

In connection with the message and implication conveyed by the collection of negative excerpts, from May 14, 2004, for a period of nearly three years, the Site referred to “a few articles that reported certain concerns third parties expressed with respect to Chai Ling and Jenzabar.” *Id.* ¶ 27. As evidence of this “concern,” the Site contained an excerpt from a *Boston Globe* column, which read: “[a]ccording to an August 2003 Boston Globe column, ‘five former executives have sued Jenzabar, including the former CEO [Joseph DiLorenzo], who accused Chai and Maginn of a ‘number of unethical, inappropriate, and/or illegal actions.’” *Id.* ¶ 27 (hereafter, the “Statement”). Tellingly, Long Bow edited this excerpt to omit the very next sentence from the article, which stated, “[t]he former CFO, the company says, couldn’t do his job and is trying to shake the company down for a settlement.”

Moreover, Long Bow published the Statement on the Site in May 2004, notwithstanding the fact that the original source of this allegation – DiLorenzo’s civil complaint (the “DiLorenzo Complaint”) was filed more than two years earlier, on March 19, 2002. Indeed, the DiLorenzo

³ For example, Long Bow’s website currently publishes a page entitled “Harvard *Accuses* Chai Ling’s Company of ‘Misleading the Public.’” See <http://tsquare.tv/film/harvard.html> (emphasis added). Contrary to Long Bow’s use of the present tense – clearly intended to imply that this is a recent and ongoing issue – the Boston Globe article republished on this page is dated *July 25, 1999*. The “metatags” to this page establish that Long Bow has chosen to place this title in present tense, without regard to the fact that Jenzabar and Harvard resolved any issues between them in or about 2000. Again, this is only one example of the manner in which Long Bow attempts to defame Plaintiffs and place them in a false light.

Complaint was the first document filed in a protracted legal proceeding which, as of May 14, 2004 – the time of Long Bow’s publication – included 21 docket entries reflective of developments in the proceeding. True to the excerpt of the *Globe* article Long Bow that intentionally omitted, in December 2005 DiLorenzo voluntarily dismissed his Complaint, and in September 2006 he issued a written apology stating, *inter alia*, that his “*allegations [were] not warranted and not supported by the evidence.*” *Id.* ¶¶ 31-36 (emphasis supplied).

Similarly, the Site inaccurately implies that “five former executives” found Jenzabar’s conduct unethical, inappropriate, and/or illegal. *Id.* ¶ 27. In fact, Jenzabar was sued by four, not five, former executives (including DiLorenzo) and each of these suits have been deemed utterly meritless. Indeed, in one such case, the *plaintiff* was found liable for misrepresentations and Jenzabar was awarded nearly \$2 million.

Compounding these inaccuracies, since its publication, Long Bow has sought to disseminate the Statement and the remaining defamatory content as widely as possible, particularly to those interested in Jenzabar. Toward this end, Long Bow is using the Marks as well as Chai’s name as metatags embedded within the Site. *Id.* ¶ 24. As a result, the Site, and its false and defamatory content, is among the very first “hits” retrieved in a search of “Jenzabar” or “Ling Chai” through Google and other online search engines. *Id.* ¶ 25. Through this process, Long Bow succeeds in diverting consumers who are searching for Jenzabar’s products and services to the derogatory and inaccurate content published on the Site. *Id.* ¶ 26.

On February 9, 2007, Jenzabar notified Long Bow in writing that the Site contained false and defamatory information and that Long Bow was engaging in unauthorized use of Jenzabar’s trademarks (the “Marks”). Notwithstanding this information, Long Bow continued to publish the

defamatory material until on or around April 11, 2007. Notably, contrary to Long Bow's suggestion, see Motion at 4, there was *no* disclaimer in place with respect to the information on the Site about Chai, Maginn, and Jenzabar, until that time, and even now not every page concerning Jenzabar includes a disclaimer. Nor does the Site acknowledge the fact that Chai refused to be interviewed by Long Bow in connection with the Film or that, prior to making the Film, the producers were openly critical of Chai and misrepresented aspects of her involvement in the Protests. Id. ¶ 17.

Standard Of Review

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inference which can be drawn therefrom, in the plaintiffs' favor. Nader v. Citron, 372 Mass. 96, 98 (1977). Accordingly, a plaintiff's burden is "relatively light." Gibbs Ford, Inc. v. United Truck Leasing Corp., 399 Mass. 8, 13 (1987). "All that a plaintiff need do to resist such a motion is present a complaint that does no more than sketch[] the bare silhouette of a cause of action." Brum v. Town of Dartmouth, 44 Mass. App. Ct. 318, 322 (1998), rev'd on other grounds, 428 Mass. 684 (1999) (internal quotations omitted). As a result, "dismissals on the basis of pleadings, before facts have been found, are discouraged." Gennari v. City of Revere, 23 Mass. App. Ct. 979 (1987). Massachusetts courts have often described the review of a complaint's sufficiency as "extremely lenient."⁴ See, e.g., Brum, 44 Mass. App. Ct. at 322.

⁴ As set forth herein, it is clear that each Count of the Complaint states a claim for relief. Should the Court find otherwise, however, Plaintiffs reserve the right to seek leave to amend pursuant to Mass. R. Civ. P. 15(a).

ARGUMENT

I. Plaintiffs State Claims for Defamation in Counts I and II

A. Long Bow Incorrectly Asserts a Heightened Pleading Requirement

Contrary to Long Bow's assertion, no stricter pleading standard applies to claims for defamation. See Motion at 7-8; Moriarty v. Sullivan, 2006 WL 2089773 (Mass. Super. 2006). Rather, courts analyze such claims under the traditional Rule 12(b)(6) standard set forth in Nader v. Citron, 372 Mass 96, 98 (1977). See Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 429 (1991) (defamation claims "should be analyzed under the traditional standard governing rule 12(b)(6)" with defects, if any, "to await exposure at the summary judgment stage or later"). Unless it appears "beyond doubt" that a plaintiff will be unable to prove a set of facts that would support a finding that the defendant's statements were defamatory, a motion to dismiss must be denied. See Moriarty, 2006 WL at *3, citing Nader, 372 Mass at 98.

Notably, Long Bow's reference to a heightened pleading standard derives not from the actual holding in Eyal, cited above, but from dicta within a footnote that focuses exclusively on the treatment of defamation claims under *federal* law. See 411 Mass. at 432, n.7. Moreover, since Eyal, the First Circuit has effectively overturned cases requiring a heightened pleading standard.⁵ See Bleau v. Greater Lynn Mental Health & Retardation Assoc., 371 F. Supp. 2d 1, 2 (D. Mass. 2005); North Shore Pharmacy Services, Inc. v. Breslin Associates Consulting, 491 F. Supp. 2d 111, 124 (D. Mass. 2007) ("claims for defamation are subject to the notice pleading requirements set forth in Fed. R. Civ. P. 8, rather than the heightened pleading requirements of Rule 9"); Davidson v. Cao, 211 F.Supp.2d 264, 276 (D. Mass. 2002) (same).

⁵ Long Bow's suggestion that defamatory statements must be alleged "verbatim" has also been rejected. See Breslin, 491 F.Supp. at 124 ("Plaintiffs are not required to set forth the allegedly defamatory statement verbatim."). Nevertheless, even were this exacting standard applicable, the Statement itself satisfies this heightened requirement.

Accordingly, Massachusetts law is settled that a defamation claim should not be dismissed unless there is no way that the statement complained of could reasonably be understood to discredit the plaintiff in the minds of a considerable and respectable portion of the community. See Poland v. Post Pub. Co., 330 Mass. 701, 704 (1953); Nader, 372 Mass. at 98. Applying this standard, taking all reasonable inferences in the Plaintiffs' favor, it cannot be said that it appears "beyond doubt" that the Plaintiffs "can prove no set of facts in support of their claim which would entitle them to relief." Eyal, 411 Mass. at 231.

B. The Complaint Properly Alleges all Elements of Defamation

To state a claim for defamation, Plaintiffs must allege that "the defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss." White v. Blue Cross & Blue Shield of Mass., Inc., 442 Mass. 64, 66 (2004); Draghetti v. Chmielewski, 416 Mass. 808, 812 (1994) ("Defamation involves the unprivileged publication to a third party of a false statement concerning another that exposes its subject to ridicule or contempt"). The Complaint sufficiently alleges each of the aforementioned elements.

1. The Complaint Properly Alleges That the Content of the Site is Capable of Damaging the Plaintiffs' Reputations

A publication is defamatory when it tends to injure one's reputation in the community and expose him to hatred, ridicule, and contempt. Brauer v. The Globe Newspaper Co., 351 Mass. 53, 55-56 (1966); White, 442 Mass. at 66 (question is whether communication is capable of discrediting plaintiffs in the minds of any considerable, respectable class of the community). Massachusetts courts have therefore found statements imputing criminal behavior actionable. Shafir v. Steele, 431 Mass. 365, 373 (2000). Similarly, "words which cast aspersions upon a businessman's or business corporation's honesty, credit or business character may be

actionable.” Ricciardi v. Latif, 3 Mass. App. Ct. 714, 714-15 (1975) (falsely stating that plaintiff refused to pay for defendant’s products was capable of a defamatory meaning) (citation omitted).

The Complaint clearly alleges that content on the Site is capable of discrediting the Plaintiffs in the minds of a considerable and respectable portion of the community. See Brauer, 351 Mass. at 55. Specifically, the Site states that Plaintiffs had been sued by “five former executives” and that Jenzabar’s former CEO had accused Plaintiffs Chai and Maginn of “a number of unethical, inappropriate, and/or illegal actions.” The Statement imputes criminal behavior – *i.e.*, “illegal actions” – to Chai and Maginn, and draws into question the Plaintiffs’ “honesty, credit or business character.”⁶ See id.; Ricciardi, 3 Mass. App. Ct. at 714-15. Certainly the Statement is sufficient to discredit the Plaintiffs in the minds of a portion of the community. See id.

Moreover, Long Bow’s principal defense – that it only published what *others* said – is no defense at all. Instead, it is well settled that “if words are defamatory their republisher *may not avoid liability by truthfully attributing them to someone else.*” Sanford v. Boston Herald-Traveler, 318 Mass. 156, 158 (1948), quoting Maloof v. Post Publishing Co., 306 Mass. 279, 280 (1940) (“It is elementary law that a defendant cannot free himself from responsibility for spreading defamation by stating that the charges were made by another, and not by the defendant”) (emphasis supplied). The republisher of a defamatory statement “is subject to liability as if he had originally published it.” Appleby v. Daily Hampshire Gazette, 395 Mass. 32, 36 (1985). Thus, Long Bow cannot hide behind the Statement’s original publication elsewhere to avoid liability. See id.

⁶ Allegations of criminal conduct are defamatory *per se* and, as such, are actionable without proof of damages. Sietins v. Joseph, 238 F. Supp. 2d 366, 378 (D. Mass. 2003).

Further, contrary to Long Bow's suggestion, Plaintiffs' claim is *not* limited to the single Statement identified above. Rather, Plaintiffs allege that Long Bow uses the Site to collect and republish select excerpts from negative articles, and to present them in such a way so as to imply professional misconduct on the part of the Plaintiffs. Comp. ¶¶ 21-23. In considering the totality of a publication, courts must consider not only the words themselves, but the *inferences* which might be drawn by a considerable and respectable segment of the community. See Mabardi v. Boston Herald-Traveler Corp., 347 Mass. 411, 413 (1964) ("it is not required that there be direct and explicit language tending to discredit the plaintiff ... Words, pictures or signs, singly or in combination, understood as mankind in general would understand them, conveying such an imputation render the publication libelous"); Thayer v. Worcester Post Co., 284 Mass. 160, 162 (1993) ("An insinuation may be as actionable as a direct statement"). Similarly, courts have recognized that words, even when not actionable in themselves, may imply the existence of undisclosed defamatory facts. See, e.g., Milkovich, 497 U.S. 1, 20-21 (1990) (recognizing that the connotation suggested by article implied that plaintiff had committed perjury, the insinuation of which was sufficient to state a claim for defamation).

The Complaint adequately alleges that the content on the Site – including its negative, expansive treatment of Chai juxtaposed to that of the other 15 characters in the Film – implies a defamatory meaning and suggests the existence of undisclosed defamatory facts. See Comp. ¶¶ 21-23. While implying balance, the Site employs dated sources, and makes no attempt to provide more recent or favorable stories. In contrast to the brief biographical sections associated with each of the Film's other characters, and the occasional links to articles concerning the Protests and political reform, Long Bow dedicates several web pages to Chai; web pages that have *no* connection to Chai's role in the Protests, China, or politics. Indeed, only Chai's

biography is followed by the ominous hyperlink: “**More information about Chai Ling and the controversy that has followed her to Jenzabar is available here.**” (Emphasis in original). By cobbling together select and dated segments of negative press – wholly unrelated to the Site’s stated mission – Long Bow implies that Plaintiffs have engaged in improper business practices. See id.

Indeed, the Statement’s reference to Jenzabar having been sued by “five former executives” – a fact which fails, first and foremost, in accurately tallying the referenced lawsuits – implies that these executives found Plaintiffs’ conduct to be unethical or illegal. Conspicuously absent from this reference is any acknowledgement that *none* of the claims against Plaintiffs were successful.

It can therefore not be said that the content of the Site in general, and the Statement in particular, is incapable of discrediting the Plaintiffs in the minds of a considerable and respectable class of the community; the Statement explicitly accuses Plaintiffs of illegal, improper, and unethical acts, and the connotation and implication of the collection of background pages about Chai reinforce this position. See Poland v. Post, 330 Mass. at 704 (question of whether a publication is defamatory will not be taken from jury unless statement is not reasonably capable of being understood in a defamatory sense); see also Jones v. Taibbi, 400 Mass. 786, 792 (1987) (“Where a communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury”).

2. Long Bow Is Not Protected by a Privilege to Make Defamatory Statements

Long Bow argues that it is immune from liability for the defamatory content on the Site based on certain conditional privileges. As an initial matter, although Massachusetts law recognizes certain privileges to publish defamatory material, consideration of these privileges

requires the evaluation of materials outside the four-corners of the Complaint. As such, Long Bow's assertions are not properly considered now. See Chan v. Immunetics, Inc., 1999 WL 218490 (Mass. Super. 1999) (internal citations omitted) (consideration of whether allegedly defamatory statements were privileged required review of materials outside purview of Rule 12(b)(6)).

That fact aside, the Complaint establishes that neither the fair report nor the reputable news source privilege protects Long Bow.⁷

a. The Fair Report Privilege is Unavailable

The "fair report privilege" derives from the recognition that "the general public has the right to know of *official government actions* that affect the public interest, that news outlets are the best way to disseminate such information, and that news outlets would be willing to make such reports only if they were free from liability." Reilly v. Associated Press, 59 Mass. App. Ct. 764, 777 (2003) (emphasis supplied). Ultimately, protection for this type of communication furthers the public interest that information be made available as to what takes place in "certain kinds of judicial, legislative, and other public proceedings." Prosser and Keeton on Torts § 115 (5th ed. 1984); see also Restatement (Second) of Torts § 611 (1977), Cmt. A ("[t]he basis of [the fair report] privilege is the interest of the public in having information made available to it *as to what occurs in official proceedings and public meetings*") (emphasis supplied).

The rationale and origins of this privilege highlight its inapplicability in this context. Clearly, the content of the Site, including the Statement, cannot be said to be an effort to keep the public informed of official actions or public meetings. See id. Notably, Massachusetts has long recognized that "allowing fair reports of the proceedings of courts of justice have no application

⁷ In addition, Long Bow focuses exclusively on its privilege to publish the *Statement*, which, even if successful, will not provide immunity for the defamatory content of the Site as a whole.

whatever to the contents of *a preliminary written statement of a claim or charge*. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice.” Cowley v. Pulsifer, 137 Mass. 392, 393 (1884) (emphasis supplied); see also Sanford, 318 Mass. at 158-59; Lundin v. Post Pub. Co., 217 Mass. 213 (1914) (“A fair report in a newspaper of *pending* judicial proceedings is proper.... But this principle is limited to matters which really have been made the subject of judicial action. It does *not give the right to publish statements made in declarations or other papers filed in court on the ground merely that they have been placed on the files of the court...*”) (emphasis supplied). In this regard, Long Bow’s publication of the baseless allegation from the DiLorenzo Complaint “throws no light upon the administration of justice.” See Cowley, 137 Mass. at 393.

Of equal importance, the fair report privilege can be abused, and thereby lost, when the publisher does not give a *fair and accurate report* of the proceeding. See Restatement (Second) § 611 (noting that the privilege only applies if “the report *is accurate and complete or a fair abridgement* of the occurrence reported”) (emphasis supplied). Specifically, “it is necessary that *nothing be omitted or misplaced in such a manner as to convey an erroneous impression* to those who hear or read it....” Id. (emphasis supplied). Toward this end, when a newspaper publishes the report of a judicial proceeding, it may not, after reporting derogatory parts, fail to publish further proceedings that tend to vindicate the person defamed. Id.

Finally, a lapse in time between the events and the reporting can reflect improper circumstances for the application of this privilege. See Naegele v. Macfadden Publications, 161 Misc. 684, 292 N.Y.S. 851 (1936) (privilege unavailable where an article regarding a lawsuit was published three years after the trial; lapse of time between trial and publication was evidence that article was written and published *as a story* rather than as a report of a judicial proceeding);

Costello v. Ocean County Observer, 136 N.J. 594, 643 A.2d 1012 (1994) (article did not qualify for privilege because reader receives conflicting information regarding status of the matter by giving impression that litigation was still pending).

Here, the Complaint sufficiently asserts that the original source of the Statement was a preliminary allegation filed *more than two years* before it ended up on the Site. Moreover, these were allegations that Long Bow knew, based on the *Globe* article, were hotly contested by Jenzabar. In deciding to republish the Statement in 2004, specifically omitting the *Globe*'s reporting that Mr. DiLorenzo's accusations might be financially motivated or any reference to the Plaintiffs' responsive pleadings, Long Bow failed to offer the type of fair and balanced report required to claim this privilege. See Restatement (Second) § 611. Indeed, Long Bow's use of the Statement within the context of the Site demonstrates that it published the Statement as a *story*, rather than as a report of a judicial proceeding. See Naegele, 292 N.Y.S. at 853-54. Consequently, Long Bow is not able to claim protection of this privilege.⁸

b. The Reputable News Sources Privilege Is Unavailable

The "reputable new source" privilege is similarly unavailing. This privilege is based on the premise that "to operate efficiently, newspapers must be able to trust wire services, and wire services must be able to trust newspapers for original nonwire service generated material." Reilly, 59 Mass. App. Ct. at 780-81. In both the Appleby and Reilly decisions relied on by Long Bow, the courts considered real-time reporting needs of daily newspapers and wire services. See Appleby v. Daily Hampshire Gazette, 395 Mass. 32, at 38-39 (1985) ("No newspaper could ...

⁸ Long Bow's reliance on the privilege discussed in Striberg v. Raymond is likewise misplaced. See 307 Mass. 105, 108 (1976). Striberg held that an allegedly defamatory statement was privileged when contained in a communication mailed by an attorney to a person against whom the attorney was threatening to bring a lawsuit. Id. at 108-09. In so holding, it relies on the public policy of "permitting *attorneys* complete freedom of expression and candor in communication in their efforts to secure justice for their clients..." Striberg, 307 Mass. at 109 (emphasis supplied), and is thus completely inapplicable in these circumstances.

assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, *while at the same time publishing timely stories of worldwide or national interest...*) (internal citations omitted, emphasis supplied); Reilly, 764 Mass. at 780-81 (requiring newspapers to verify stories obtained through reputable wire services “would impose a heavy burden on the media’s ability to disseminate newsworthy material”). These decisions confirm that the privilege is based on the time-sensitive nature of news reporting and the need to convey information to the public in an efficient manner.

In contrast, far from disseminating breaking news necessitating timely publication, Long Bow republished the Statement on the Site – and numerous other articles as well – *years* after its initial publication, making this privilege inapplicable.

3. The Complaint Properly Alleges Falsity

The Complaint sufficiently pleads not only that the Statement is false but, moreover, that the Site as a whole implies and insinuates false and defamatory facts. See Comp. ¶¶ 21-23.

Certainly, the Complaint alleges the falsity of the Statement. Specifically, the Plaintiffs did *not* engage in a “number of unethical, inappropriate, and /or illegal actions.” Comp. ¶¶ 31-35. Indeed, DiLorenzo ultimately dismissed his action, issued a written apology to Plaintiffs, and offered a retraction with respect to the damaging statements within his Complaint. See id. In this regard, Long Bow’s attempt to escape liability by attributing the Statement to someone else, *i.e.*, the *Globe* and DiLorenzo, is unavailing, as a defendant cannot escape liability by “truthfully attributing [defamatory words] to someone else.” See supra at 8; see also Jones v. Taibbi, 400 Mass. at 792 (internal quotations omitted) (“Liability for a defamatory statement may not be avoided merely by addressing a truthful preface that someone else has so stated”).

Moreover, Long Bow has again improperly assumed that Jenzabar's entire claim rests on the Statement set forth above. Instead, the Complaint adequately alleges the falsity of the Site, based on the totality of its content, and the implication that Plaintiffs engaged in improper and unethical business practices, implications which are demonstrably false. See Comp. ¶¶ 21-23.

a. Truth is No Defense if There is Malice

Furthermore, under Massachusetts law, even a true statement can serve as the basis for a defamation claim. M.G.L. c. 231, § 92, provides: "The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification *unless actual malice is proved.*" (emphasis supplied). Thus, if a defendant acted with malice in making a defamatory statement, the plaintiff may recover – even if the statement is true. G.L. c. 231, § 92; Shaari, 427 Mass at 130; Ravnikar v. Bogojavlensky, 438 Mass. 627, 630 n.3 (2003). In this context, "actual malice" is proved through evidence of ill will or malevolent intent. See Gilbert v. Berhard, 4 Mass. L. Rptr. 143 n.2 (Mass. Super Ct. 1995); Fay v. Harrington, 176 Mass. 270, 274 (1900) (plaintiff may introduce evidence of defendant's malevolent intent to negate defense of truth).

The Complaint undeniably asserts that Long Bow's disparate treatment of Chai, vis à vis the other characters in the Film, is motivated by malice and an intent to discredit Chai. Comp. ¶ 30. This is particularly evident through Long Bow's decision to omit statements from the *Globe* story that provided an explicit denial of the negative allegations. The Complaint's allegations of falsity, coupled with the allegations of ill will and animus on the part of Long Bow toward Plaintiffs, sufficient facts are alleged to state a claim for defamation.

4. The Complaint Properly Alleges Fault

Finally, the Complaint alleges fault. The burden in proving falsity varies depending on whether a plaintiff is a private or public figure. In Massachusetts, a private figure need prove only that the defendant acted with negligence in publishing a false statement concerning the plaintiff. See, e.g., Schrottman v. Barnicle, 386 Mass. 627, 630 (1982).⁹

Long Bow claims that Plaintiffs fall into a middle category between the two extremes, namely, that of “limited issue public figures.” See Motion at 14. The Supreme Court explained this characterization in Gertz v. Robert Welch, Inc., reasoning that when “an individual voluntarily injects himself or is drawn into a particular public controversy, [she] thereby *becomes a public figure for a limited range of issues.*” 418 U.S. at 351-52 (emphasis supplied); see also Mateira v. Huff, 394 Mass. 328, 331 (1985).

Whether an individual is a limited issue public figure is determined by whether (1) there is a public controversy; (2) the plaintiff played a sufficiently central role in controversy; and (3) *the alleged defamatory statement was germane to plaintiff's participation in the controversy.* Gertz, 418 U.S. at 351-52. Where the defamatory statements meet these criteria, a plaintiff must show that the defendant acted with “actual malice” in publishing the statements. It should be noted that “actual malice” here has a different meaning than under G.L. c. 231, discussed with regard to falsity above. Here, a statement is published with “actual malice” if it is published with knowledge that it is false or with reckless disregard for its truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

⁹ In contrast, if a plaintiff is a “public figure” such that he is a household name on a national scale, courts require that a defendant have acted with a greater degree of fault, namely, “actual malice” in publishing a false statement. Bowman v. Heller, 420 Mass. 517 (1995); Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974).

Plaintiffs acknowledge that Chai is “frequently honored and profiled for her role as a student-leader during the 1989 protests in Tiananmen Square, China.” Comp. ¶ 8. As such, with respect to statements concerning Chai’s participation in the Tiananmen Square Protests, characterization of her as a limited issue public figure is likely appropriate.

Long Bow, however, ignores the limits of this status. Specifically, the premise of being a “limited issue” public figure is, just as it says, designed to *limit* the range of topics about which defamatory content is protected. The Site, despite its purported focus on the origins and history of the Protests, takes a distinct tangent in addressing its commentary on the business practices of Chai, and then Maginn and Jenzabar, for whom there is absolutely no basis for any status other than private figures. The business endeavors of Chai – let alone Maginn and Jenzabar – in Boston, Massachusetts have nothing to do with Chai’s role as a student leader, nearly two decades earlier, in Beijing, China. As such, this commentary is in no way “germane to the controversy” – *i.e.* Tiananmen Square, thereby failing the test established in *Gertz* for limited issue public figure status. See 418 U.S. at 351-52; see also Mateira, 394 Mass. at 330 (it is a function of the jury to determine whether the plaintiff is a public figure unless facts bearing on the issue are uncontested). Moreover, there is no evidence that Maginn or Jenzabar have voluntarily injected themselves, or been drawn into, any public controversy. See Gertz, 418 U.S. at 351-52. As such, Long Bow’s characterization of them as public figures, even for a limited issue, is unsupportable.

To the extent that Chai, Maginn, or Jenzabar have been the subjects of media coverage related to their work in educational technology, such coverage is insufficient to convert them to limited issue public figures. Indeed, Long Bow’s suggestion that “media articles about Plaintiffs demonstrate beyond dispute that they are public figures with respect to the content of those

media articles...” is entirely circular and unpersuasive. Motion at 14. Under such an interpretation, a plaintiff could never succeed on a claim for libel, rising and falling as such claims often do, on the fact that defamatory statements were published by the media. The law is clear that “[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” Jones v. Tabibbi, 400 Mass. at 798, quoting Wolston v. Reader’s Digest Ass’n, 443 U.S. at 167.

Consequently, for purposes of the defamatory content at issue, the Plaintiffs are all private figures, the fault standard for which requires only that Plaintiffs show that Long Bow acted *negligently* in publishing defamatory statements. See Schrottman, 386 Mass. at 630. Nevertheless, in light of the circumstances, including *inter alia*, the inherent unreliability of the Statement, the passage of time since its issuance, and the developments in the case, *i.e.*, DiLorenzo’s dismissal, retraction, and apology, throughout which time Long Bow *continued* to publish the Statement on the Site, the Complaint alleges that Long Bow was not merely negligent but, at best, extremely reckless in failing to properly investigate. See, e.g., Friedman v. Boston Broadcasters, Inc., 402 Mass. at 381-82 (issue of material fact whether broadcaster made sufficient investigation of plaintiff’s records before broadcasting defamatory falsehood, where records tended to refute or undercut key facts reported in news story).

The Complaint adequately alleges a level of fault in excess of that required in light of Plaintiffs’ status as private figures. Indeed, the *Globe’s* specific report that DiLorenzo’s accusations might be financially motivated was sufficient to put Long Bow on notice of the need for further investigation into the status of the proceeding – which would have shed doubt on the veracity of the Statement. It therefore cannot be said that it is “beyond doubt” that Plaintiffs state a claim for defamation, and the Motion should be denied with regard to Counts I and II.

II. The Complaint States Claims For Trademark Infringement

To prevail on a trademark infringement claim, “a plaintiff must show 1) that he uses, and thereby ‘owns,’ a mark, 2) that the defendant is using that same or a similar mark, and 3) that the defendant’s use is likely to confuse the public, thereby harming the plaintiff.” Northern Light Tech., Inc. v. Northern Lights Club, 97 F. Supp. 2d 96, 109 (D. Mass. 2000), citing DeCosta v. Viacom Inter., Inc., 981 F.2d 602, 605 (1st Cir. 1992); Star Fin. Servs., Inc. v. Aastar Mortgage Corp., 89 F.3d 5, 9 (1st Cir. 1996). The Complaint sufficiently states infringement claims.

A. Jenzabar owns a Valid Trademark

Long Bow does not – nor could it – dispute that Jenzabar owns at least two trademarks: JENZABAR and JENZABAR.COM.¹⁰ The fact that both of these distinctive Marks are federally registered on the principal register with the U.S. Patent and Trademark Office is *prima facie* evidence of their validity and Jenzabar’s ownership. 15 U.S.C. § 1057(b). In addition, the Marks have been used continuously and extensively by Jenzabar for many years in connection with its products and services and have valuable goodwill and reputation among consumers. Comp. ¶¶ 10-14. Each Mark is a valid and protectable trademark and/or service mark. Comp. ¶ 50.

B. Long Bow is using Jenzabar’s Marks in Commerce

The Complaint also sufficiently pleads that Long Bow is using Jenzabar’s Marks in commerce. Notwithstanding Long Bow’s assertion to the contrary, it has been well established that use of another’s trademark online constitutes “use” in interstate commerce sufficient to give rise to liability under the Lanham Act. See, e.g., Boston Duck Tours v. Super Duck Tours, LLC, 2007 WL 4465464, *2 (D. Mass. 2007) (“Because sponsored linking necessarily entails the ‘use’

¹⁰ Counts III through VII are brought solely by Jenzabar, and not by the other plaintiffs.

of the plaintiff's mark as part of a mechanism of advertising, it is 'use' for Lanham Act purposes"). In fact, numerous courts have specifically held that unauthorized use of another's trademark within "metatags" – the type of infringement specifically alleged here – constitutes actionable "use" for purposes of trademark infringement under the Lanham Act.¹¹ See, e.g., Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1239 (10th Cir. 2006) (affirming denial of defendant's motion for judgment as a matter of law on Lanham Act claims based on defendant's use of plaintiff's trademarks in metatags); Promatek Indus., LTD v. Equitrac Corp., 300 F.3d 808, 814 (7th Cir. 2002) (affirming preliminary injunction on Lanham Act claim based on defendant's use of the mark in metatags); Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1066 (9th Cir. 1999) (defendant's use of trademarks in metatags constituted trademark infringement); Buying for the Home, LLC v. Humble Abode, LLC, 459 F. Supp. 2d 310, 323 (D. N.J. 2006) (purchase of keywords is Lanham Act use); Edina Realty, Inc. v. TheMLSonline.com, 2006 WL 737064, *3-8 (D. Minn. 2006) (same).

As alleged in the Complaint, Long Bow is using the Marks as metatags embedded within the Site. Comp. ¶¶ 19, 24. As a result, the Site is among the top "hits" for Internet users searching for Jenzabar through Google and other popular search engines. Id. ¶ 25. Through this technique, Long Bow is diverting consumers searching for Jenzabar's products and services to the Site, thus ensuring greater publication of the defamatory content. Id. ¶ 26. Just as in the above cases, here Long Bow is using the Marks "to provide a computer user with direct access

¹¹ "Metatags" and "keywords" are accepted terms of art. "Search engines look for keywords in places such as domain names, actual text on the web page, and metatags. Metatags are HTML code intended to describe the contents of the web site. There are different types of metatags, but those of principal concern to us are the "description" and "keyword" metatags. The description metatags are intended to describe the web site; the keyword metatags, at least in theory, contain keywords relating to the contents of the web site. The more often a term appears in the metatags and in the text of the web page, the more likely it is that the web page will be 'hit' in a search for that keyword and the higher on the list of 'hits' the web page will appear." Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1045 (9th Cir. 1999), citing Niton Corp. v. Radiation Monitoring Devices, Inc., 27 F. Supp. 2d 102, 104 (D. Mass. 1998).

(i.e. a link) to defendant's website." Buying for the Home, 459 F. Supp. 2d at 323. Jenzabar properly alleges that such unauthorized use of the Marks gives rise to liability under federal, state, and common law.

C. Jenzabar has Properly Alleged that Long Bow's Use is Likely to Cause Confusion

Jenzabar has also sufficiently alleged that Long Bow's unauthorized use of the Marks is likely to cause confusion among consumers. See, e.g., Comp. ¶ 51. Long Bow's contrary assertion conflicts with the well-pleaded allegations, and must be disregarded.

Moreover, the Complaint's allegations support a finding of infringement under the initial interest confusion doctrine, which has been adopted by courts in at least seven Circuits.¹² While the First Circuit has not yet specifically adopted the initial interest confusion doctrine, a District of Massachusetts court implicitly endorsed the theory. See Big Top USA, Inc. v. Wittern Group, 998 F. Supp. 30, 52 (D. Mass. 1998) ("The Lanham Act 'forbids a competitor from luring potential customers from a producer by initially passing off its goods as those of the producer's, even if confusion as to the source of the goods is dispelled by the time any sales are consummated.'") (internal citations omitted).

¹² See Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 204 (5th Cir. 1998) ("Infringement can be based upon confusion that creates initial customer interest, even though no actual sale is fully completed as a result of the confusion."); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1405 (9th Cir. 1997) ("The use of . . . the confusingly similar title to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement."); Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999) (adopting initial interest confusion doctrine and finding infringement where marks were used in metatags); Australian Gold v. Haeld, 436 F.3d 1228, 1238-39 (10th Cir. 2006) (same); HRL Associates, Inc. v. Weiss Associates, Inc., 12 USPQ2d 1819 (TTAB 1989), aff'd on other grounds, 902 F.2d 1546 (Fed. Cir. 1990); Forum Corp. of North Am. v. Forum, LTD, 903 F.2d 434, 442 n.2 (7th Cir. 1990) ("The fact that confusion as to the source of a product or service is eventually dispelled does not eliminate the trademark infringement which has already occurred."); Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 258 (2d Cir. 1987) (finding "likelihood of confusion not in the fact that a third party would do business with Pegasus Petroleum believing it related to Mobil, but rather in the likelihood that Pegasus Petroleum would gain crucial credibility during the initial phases of the deal"; "an oil trader might listen to a cold phone call from Pegasus Petroleum - an admittedly oft used procedure in the oil trading business - when he otherwise might not, because of the possibility that Pegasus Petroleum is related to Mobil").

As noted above, Long Bow's unauthorized use of the Marks as metatags results in a high ranking of the Site in online search engine hits. As a result, consumers looking for Jenzabar's products or services are diverted to the Site. Notably, under the initial interest confusion doctrine, courts have found liability for trademark infringement notwithstanding the fact that consumers may ultimately realize the goods and services they purchase are not those of the senior trademark owner. See, e.g., Brookfield Communications, Inc., 174 F.3d at 1036.

Notwithstanding Long Bow's assertion to the contrary, the current use of a disclaimer on the Site does not preclude a finding of initial interest confusion, and therefore does not make a substantive difference for purposes of the Court's analysis at this procedural stage. See Australian Gold, 436 F.3d at 1243 (rejecting defendant's assertion that disclaimer could remedy any evidence of a likelihood of confusion and finding that a disclaimer "would not prevent Defendants from impermissibly using Plaintiffs' trademarks in Defendants' metatags" or "from capitalizing on consumers' initial interest confusion"). Moreover, it must be noted that the disclaimer was only placed on the Site in or around April 2007 and only after repeated attempts by Jenzabar to force Long Bow to cease its infringement. At any rate, because additional facts not yet in the record are needed in order to evaluate Long Bow's use of a disclaimer as part of the analysis of Jenzabar's claims, this defense is not available here.

In addition, despite the fact that its Motion is meant to test the sufficiency of the Complaint, Long Bow prematurely argues that its use of the Marks constitutes nominative fair use. Not only is such an argument inappropriate at this time, but it is also wholly misplaced. See infra at p. 24.

D. Likelihood of Confusion is a Fact-Intensive Analysis Inappropriate for Determination on a Motion to Dismiss

Contrary to Long Bow's assertion, Jenzabar has properly alleged likelihood of confusion. Comp. ¶ 51. Long Bow's invitation for the Court to decide the issue now is inappropriate, as such a determination involves fact intensive inquiries utilizing an eight factor test, not appropriate for determination on a motion to dismiss. See I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 43 (1st Cir. 1998) (setting forth eight factors to be considered for determining likelihood of confusion); see also FragranceNet.com, Inc. v. FragranceX.com, Inc., 493 F. Supp. 2d 545, 552 (E.D.N.Y. 2007), citing Eliya, Inc. v. Kohl's Dep't Stores, 2006 WL 2645196, *3, n. 2 (S.D.N.Y. Sept. 13, 2006) (“[A]n application of the so-called [likelihood of confusion] factors on a motion to dismiss would be inappropriate because it would involve premature factfinding.”); Merck & Co., 425 F. Supp. 2d at 412 (“The likelihood of confusion test is a *fact-intensive analysis* that ordinarily does not lend itself to a motion to dismiss”); Hearts on Fire Co., LLC v. L C Int'l Corp., 2004 WL 1724932, at *4 (S.D.N.Y. 2004) (“[P]roof of a likelihood of confusion requires an analysis of the [likelihood of confusion] factors, *resolution of which would constitute premature fact finding inappropriate upon a motion to dismiss*”) (all emphases supplied). Jenzabar “has clearly alleged likelihood of confusion and the Court must take such allegations as true for purposes of this motion.” FragranceNet.com, 493 F. Supp. 2d at 552.

Jenzabar has therefore stated claims under Counts III, V and VI of the Complaint.

E. Long Bow's Nominative Fair Use Defense Is Unfounded and Premature

Long Bow's citation to 15 U.S.C. § 1115(b)(4) in an attempt to underpin a nominative fair use defense is similarly misplaced. This statutory defense of fair use is a *classic* – not *nominative* – fair use defense, as claimed by Long Bow. Under the Lanham Act, classic fair use requires that Long Bow's use of the Marks be “use, *otherwise than as a mark*, of the party's

individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin.” 15 U.S.C. § 1115(b)(4) (emphasis supplied). Long Bow evidently acknowledges that, by definition, the facts of this case cannot support a classic fair use defense, as Long Bow is using the Marks *as marks* to refer to Plaintiff.

A nominative fair use defense requires that Long Bow show (1) that the use of Jenzabar’s Marks is necessary to describe both Jenzabar’s products or services and Long Bow’s products or services; (2) that Long Bow is using only as much of the Marks as is necessary to describe Jenzabar’s product; and (3) that Long Bow’s conduct or language reflect the true and accurate relationship between Jenzabar and Long Bow’s products or services. Edina Realty, Inc. v. Themsonline.com, 2006 WL 737064, *4-5 (D. Minn. 2006), citing Century 21 Real Estate Corp. v. Lendingtree, Inc., 425 F.3d 211, 222 (3rd Cir. 2005). Proving each of these required elements necessitates factual determinations inconsistent with the limited purposes of – and generous pleading standards recognized by – a Rule 12(b)(6) motion.¹³

In addition, the nominative fair use defense that Long Bow claims has not been recognized by either the First Circuit or any Massachusetts court.

Moreover, such a defense has been rejected as a matter of law where, as here, the defendant used the plaintiff’s mark in metatags. See Edina Realty, Inc., 2006 WL 737064 at *6-7. In Edina Realty, the court found that it was unnecessary for the defendant to use the plaintiff’s mark to advertise its services; there were other common descriptive terms that the defendant

¹³ While the merits of Long Bow’s nominative fair use argument need not be considered for purposes of this motion, it should be noted that in J.K. Harris & Co. v. Kassel, 253 F. Supp. 2d 1120 (N.D. Cal. 2003), upon which Long Bow heavily relies, the court was reconsidering a motion for a preliminary injunction, not a motion to dismiss

could have used as metatags to attract consumers to its website. The same is true here. As the stated mission of Long Bow's website is to share information with the public regarding the origins and history of the protest movement in Tiananmen Square, which occurred two decades ago, there is no legitimate reason to use the Marks as metatags within the Site. Jenzabar did not exist during, and has no relevance to, the Protests.

In sum, the nominative fair use defense asserted by Long Bow is not properly considered at this procedural stage; not recognized in this jurisdiction; and – even putting those points aside – not satisfied on the facts of this case.

IV. Jenzabar Has Sufficiently Pled Claims for Dilution in Counts IV and VII

To prevail on a claim for trademark dilution under the Lanham Act, one must prove (1) that it owns a famous, distinctive mark; and (2) the defendant is using a mark in commerce which is likely to cause dilution by blurring or tarnishment of the famous mark. 15 U.S.C. § 1125(c)(1). The allegations in Jenzabar's Complaint sufficiently plead both of these required elements. It must first be noted that the standard for dilution set forth by Long Bow in its Motion – that *actual* dilution must be proven – is incorrect. Motion at 23. Congress revised the Federal Trademark Dilution Act in 2006 in response to the U.S. Supreme Court's holding in Moseley v. Victoria's Secret Catalogue, Inc., 537 U.S. 418 (2003), making it explicitly clear that only a *likelihood* of dilution, and not actual dilution, must be shown to prevail on a dilution claim.

A. The Marks are Famous and Distinctive

It is undisputed by Long Bow that Jenzabar owns famous, distinctive marks. Comp. ¶ 56. As set forth in the Complaint, Jenzabar has been marketing and distributing its products and

the complaint. As such, it was appropriate for the court in that case to look beyond the allegations in the complaint. The same is not true here.

services under the Marks throughout the world from at least as early as October 2001 and February 1999. Comp. ¶ 11. Jenzabar's JENZABAR.NET and JENZABAR.COM domains have a high 3-month reach (as that term is defined in footnote 2 of the Complaint). Comp. ¶ 12. The Marks have developed great and valuable goodwill. Comp. ¶ 13. Moreover, as indicated above and in the Complaint, these Marks are federally registered with the U.S. Patent and Trademark Office on the principal register, thus establishing *prima facie* evidence that they are distinctive marks. 15 U.S.C. § 1057. Thus, there cannot be any dispute that Jenzabar has proven that it owns famous and distinctive marks.

B. Long Bow is Using an Identical Mark in Commerce Which is Likely to Dilute the Marks

Likewise, Jenzabar sufficiently alleges that Long Bow adopted, used and continues to use the JENZABAR Marks after the JENZABAR Marks became famous. Comp. ¶ 57. Such unauthorized use causes actual dilution of the distinctive quality of the Marks. *Id.*

As with its arguments regarding Jenzabar's trademark infringement claims, Long Bow first asserts that Jenzabar's dilution claims fail to plead sufficient use of the Marks by Long Bow under the Lanham Act. For reasons already discussed above, that argument is without merit, as many courts have found trademark "use" by a defendant using a plaintiff's mark online, including use as a metatag in the defendant's website. *See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999). Long Bow's second argument is that it is immune from liability under a dilution claim because its use of the Marks is nominative fair use. Here again, as already discussed above, this is a question of fact which is not appropriate, or possible, to resolve as part of a motion to dismiss. *See supra* at p. 23.

Long Bow's third argument is that its actions fall under one of the other enumerated defenses to dilution under the Lanham Act, namely, that its use is non-commercial and is news

commentary. Here again, those are defenses which, like a likelihood of confusion analysis, are fact intensive and not appropriate to resolve on a motion to dismiss. Because additional facts are relevant to Jenzabar's claims – and to Long Bow's asserted defenses – which are not yet in the record, it would be premature to consider the merits of Long Bow's arguments.¹⁴

To the extent that the Court entertains Long Bow's arguments, however, it should be noted that the Site does indeed have a commercial purpose – to promote Long Bow's documentary films, which one can *purchase* through a link through the Site. Moreover, the controversial content on the Site is meant to defame Chai and unnecessarily tarnish the good reputation associated with the Marks. By posting such controversial comments on the Site, Long Bow is attempting to increase its commercial sales of its documentary. Indeed, Long Bow is capitalizing upon the goodwill associated with the Marks and Ling Chai's name in an attempt to lure unsuspecting online consumers to its own website, only to share disparaging remarks in a willful attempt to divert the public from Jenzabar's products and services.

V. The Complaint States a Claim Under G.L. c. 93A

Finally, because the Plaintiffs properly stated claims for defamation and trademark infringement, and in light of the fact that the G.L. c. 93A claim is, at least in part, derivative of such claims, the G.L. c. 93A claim must survive.

Plaintiffs c. 93A claim is not, however, solely derivative. Even were the other claims dismissed, Plaintiffs have adequately alleged independent conduct sufficient to state a claim under this Act, conduct *not* isolated to separate instances of trademark infringement and

¹⁴ Long Bow also attempts to hide its improper actions behind the protection of the First Amendment. While it is undisputed that the First Amendment provides important rights of free speech, it most certainly does not provide *carte blanche* for a party to defame, infringe or dilute another's intellectual property rights. As indicated above, Long Bow's website is not only defamatory, but also commercial in nature. As such, it is entitled to little, if any, protection under the First Amendment.

defamation. Rather, the Complaint alleges that Long Bow has engaged in an unfair pattern and practice of behavior specifically designed to discredit and place the Plaintiffs in a false light through the dissemination of false and misleading information, and infringes on Jenzabar's trademarks to accomplish these goals. Long Bow uses the Site to foster distrust for the Plaintiffs' business practices and professional endeavors. Use of the Marks in the Site's metatags, for the express and singular purpose of diverting legitimate consumers of Jenzabar's products by derogatory and inaccurate commentary, constitutes unfair and deceptive trade practices in violation of c. 93A. The Complaint adequately alleges that Long Bow is using the Site to wage a personal vendetta against Chai and her associates, which conduct cannot be said to be "beyond a doubt" insufficient to state a claim for violation of this statute.

CONCLUSION AND REQUEST FOR LEAVE TO AMEND

WHEREFORE, for the reasons stated herein, Defendants' Motion to Dismiss should be denied. To the extent that the court believe it appropriate to grant the Motion in any respect, Plaintiffs hereby respectfully request leave to amend pursuant to Mass. R. Civ. P. 15(a).

Respectfully submitted,

JENZABAR, INC., ROBERT A. MAGINN, JR.,
and LING CHAI

By their attorneys,



Lawrence M. Kraus (BBO # 564561)
Erica Templeton Spencer (BBO # 651967)
FOLEY & LARDNER LLP
111 Huntington Avenue
Boston, Massachusetts 02199
(617) 342-4000 Telephone
(617) 342-4001 Facsimile

CERTIFICATE OF SERVICE
I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail/hand
Date: 2/20/08 Lawrence M. Kraus

Dated: February 20, 2008