COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

JENZABAR, INC., LING CHAI, and ROBERT A MAGINN, JR.,	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO. 07-2075-H
v.	)	
LONG BOW GROUP, INC.,	)	
Defendant.	)	

DEFENDANT LONG BOW GROUP INC.'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Accepting as true the allegations of the Complaint, Longbow's motion to dismiss and Plaintiffs' opposition ("Opp.") raise three straightforward questions of law.

Defamation law. Can a non-profit documentary film producer be liable for posting on its website an excerpt from a *Boston Globe* news article regarding a character in one of its films and her business, in which the news article quoted accurately allegations from a pleading filed in a Superior Court action?

Defamation law. Can a non-profit documentary film producer be liable for posting on its website a compilation of news articles regarding a film character and her business, where there is no allegation that any of the articles are false?

Trademark law. Can a documentary film producer be liable to a software business founded by a film character for posting on its website news articles and information that refer to the name of such software business?

The answer to each legal question is negative. As a matter of law, a jury could have no role in this case. Plaintiffs have not stated a legally cognizable claim. Thus, their complaint must be dismissed.

I. The Defamation Claims Should Be Dismissed

According to Plaintiffs, the law of Massachusetts prohibits Long Bow from republishing excerpts of truthful, non-defamatory articles originally published in *The Chronicle of Higher Education*, *Business Week*, *ComputerWorld*, *Forbes*, *The Village Voice*, *The New York Times* and *The Boston Globe*, including one article that accurately reported on an allegation made and disputed during a "protracted legal proceeding" (Opp. at 4) between Plaintiffs and a former colleague. Plaintiffs' view of the law is wrong, and their defamation claims should be dismissed.

A. Long Bow Cannot Be Liable For Quoting An Allegation Made In A Civil Complaint That Was The Subject Of A Protracted Legal Proceeding

Plaintiffs' defamation claim rests in part on the notion that the public – including the press – can never report truthfully on allegations made in the course of a "protracted legal proceeding" (Opp. at 4) without risking liability for defamation. Common sense and the fair report privilege say otherwise. Plaintiffs cannot use defamation law to put a permanent muzzle on *The Boston Globe*, Long Bow, or anyone else wishing to report truthfully on Plaintiffs' long-running litigation with a former CFO.

As Plaintiffs acknowledge, the "original source" of the allegedly defamatory "Statement" posted on the Long Bow website (the "Site") was a civil complaint filed by Jenzabar's former CFO – Joseph DiLorenzo – on "March 19, 2002," which initiated a "protracted legal

proceeding." (Opp. at 3-4) According to Plaintiffs' allegations and the DiLorenzo case docket, of which this Court may take judicial notice,[1] the relevant timeline is:

- In March 2002, DiLorenzo filed suit against Jenzabar, Chai, and Maginn, alleging that Chai and Maginn took "a number of unethical, inappropriate, and/or illegal actions," which DiLorenzo objected to and, as a result, was terminated. (Opp. at 3; Reply Exh. A)

- In August 2003, *The Boston Globe* first quoted DiLorenzo's allegation in an article by business columnist Steve Bailey. (Compl. ¶ 27) By this time, the DiLorenzo litigation had been active for almost a year and a half. (Reply Exh. A) The parties and the court had taken considerable action on the complaint, including responsive pleadings, counterclaims, a motion to dismiss, multiple scheduling orders, and a confidentiality order. (Id.)

- In May 2004, Long Bow first provided a link to *The Boston Globe* article and excerpted a portion of the article on the Site. (Compl. ¶ 27) By this time, the court in the DiLorenzo case had also acted upon a motion to amend and entered another scheduling order. (Reply Exh. A)

- In February 2005, Jenzabar, Chai, and Maginn all filed summary judgment motions in the DiLorenzo litigation. (Id.) All of their motions were denied by the court in June 2005. (Id.)

- In September 2005, the parties presented a joint pre-trial memorandum. (Id.)

- In December 2005, Chai and Maginn – though not Jenzabar – were dismissed from the action by stipulation. (Id.)

- In October 2006, Jenzabar also was dismissed from the action by stipulation. (Id.)

Despite this chronology, Plaintiffs argue that the fair report privilege does not protect either *The Boston Globe* or Long Bow from liability for republishing the allegation made by DiLorenzo in his complaint. Plaintiff's view of the law is that no one may ever publicize allegations made in a complaint without risking a defamation suit.

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[1] This Court may take judicial notice of the court records in the DiLorenzo action. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002); Jackson v. Longcope, 394 Mass. 577, 581 n. 2 (1985); Brookline v. Goldsmith, 388 Mass. 443, 447 (1983); Whalen v. Commonwealth, 2006 WL 1727990, at *1 n.3 (Mass. Super., June 26, 2006). Attached as Exhibit A to this reply memorandum is a certified copy of the docket from the case captioned DiLorenzo v. Jenzabar,com, Inc., et al., C.A. No. 02-1190, Middlesex Superior Court (hereinafter "Reply Exh. A"). Plaintiffs also have explicitly incorporated this docket into their opposition. (Opp. at 4) (asserting that, by May 14, 2004, the docket "included 21 docket entries reflective of developments in the proceeding.")

Plaintiffs' view is wrong. The venerable Massachusetts cases cited by Plaintiffs all recognize the fair report privilege and make clear that the public may report on court proceedings, including the allegations made by parties during those proceedings, once some judicial action has taken place.[2] In Cowley v. Pulsifer, 137 Mass. 392, 393 (1884), the court addressed a newspaper's publication of the contents of a petition for disbarment, which had been marked as filed but then returned to the petitioner and not ever "presented to the court or entered on the docket." The privilege did not apply to the petition because it "[did] not constitute a proceeding in open court;" it threw "no light upon the administration of justice;" and "depend[ed] wholly on the will of a private individual, who may not be even an officer of the court." Id. at 394.

In Lundin v. Post Pub. Co., 217 Mass. 213, 215 (1914), the court reiterated that the fair report privilege applies "to all matters which have been made the subject of judicial proceedings." Specifically, the court held that the privilege did not apply to a newspaper's report of allegations made in a plaintiff's declaration, because "there was and is nothing to indicate that [the plaintiff's] declaration was presented to any judge for action of any kind, and ... [i]t cannot be said that there was any judicial action whatever upon that declaration." Id. at 218. Likewise, in Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 158 (1945), the court noted that the "doctrine long established in this Commonwealth is that the right to report proceedings in the courts does not extend to reporting accusations contained in papers filed by a party and not yet brought before a judge or magistrate for official action." (Emphasis added). The court added:

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[2] In more recent years, many jurisdictions have dispensed with the "judicial action" requirement altogether. See Solaia Tech. LLC v. Specialty Pub. Co., 852 N.E.2d 825, 843-45 (Ill. 2006) (noting that, in a 1980 appellate court case, Illinois had "joined a growing trend" of jurisdictions "declining to place a judicial-action limitation on the [fair report] privilege"). Massachusetts is one of the jurisdictions that "[has] not yet extended the [fair report] privilege to documents on file with a court in a case that has not yet been the subject of judicial action." Massachusetts Tort Law Manual § 7.2.5.

"To be safe, a newspaper has only to send its reporters to listen to hearings rather than to search the files of cases not yet brought before the court." Id. at 159.

Plaintiffs read these cases to impose an absolute, permanent embargo against publicizing allegations made in a complaint. In Plaintiffs' view, no one, including the press, can ever truthfully republish allegations made in a civil complaint without risking liability for defamation, no matter how long the case has been pending. This position has no support. To the contrary, the cases cited by Plaintiffs, all of which far pre-date the internet, electronic dockets, and – for that matter – photocopying machines, stand for the simple proposition that it takes more than the mere act of filing a complaint to trigger the fair report privilege. But once a complaint and the allegations within it become the subject of judicial action, the privilege protects those who report on the proceedings.[3]

The facts alleged in the Complaint and admitted by Plaintiffs in their opposition memorandum demonstrate that the fair report privilege applies as a matter of law in this case. The timeline recited above shows that neither *The Boston Globe* nor Long Bow publicized the former CFO's allegation before any judicial action in the case. To the contrary, the DiLorenzo allegations had been the subject of judicial action for almost a year and a half before *The Boston Globe* first published its article and for over two years before Long Bow first quoted *The Boston Globe* article on its website. *The Boston Globe* and Long Bow republished the former CFO's

[3] The "judicial action" requirement is not an onerous one. For example, in Britton v. Nealon, 2000 WL 1460073, at *4-5 (Mass. Super. 2000), the court found "as a matter of law" that the fair report privilege protected the republication of statements made in the transcript of an "examination" conducted during a federal civil rights action, because the transcript had been part of the summary judgment record in the civil rights action and ultimately had been ruled inadmissible in the civil rights action.

allegation only after – and long after – the case was made the subject of judicial action.[4] The fair report privilege applies, and Plaintiffs' defamation claim should be dismissed.

B. Long Bow Cannot Be Liable For Collecting Truthful, Non-Defamatory News Articles About Plaintiffs

In their opposition, Plaintiffs also try to shift focus away from the "Statement" and toward a claim that Long Bow's compilation of critical news articles about Plaintiffs is defamatory. (Opp. at 9) ("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.") (citing Compl. ¶¶ 21-23).

The only allegations cited by Plaintiffs to support this argument are the following:

- "Although Chai has been the subject of significant media attention – much of it positive – the Site presents a small and misleading sample of articles critical of her past, her political activism, and her business ventures." (Compl. ¶ 21).
- "Significantly, Long Bow has provided this material in a manner that purports to be balanced and fair but, in reality, is biased and deceptive." (Compl. ¶ 22).
- "Although the Site provides background information on many of the Film's characters, none are subject to the degree of extensive scrutiny and disparagement that Chai, and, by association, Jenzabar and Maginn, receive." (Compl. ¶ 23).

Plaintiffs do not identify the articles in question.[5] They do not allege that anything reported in these unspecified articles is untruthful, inaccurate or defamatory. They do not allege that any of the news organizations that published these articles acted negligently, much less with "actual malice," in doing so. Instead, Plaintiffs assert that Long Bow is liable for defamation simply on account of its compilation of these unspecified, truthful, non-defamatory articles about

[4] In addition, very soon after receiving notice from Jenzabar that DiLorenzo "had retracted his baseless allegations about Jenzabar's officers," Long Bow removed DiLorenzo's allegation from the Site, added a disclaimer to the Site, and posted to the Site all of Jenzabar's correspondence, including DiLorenzo's apology letter.

[5] For the reasons stated in Long Bow's initial memorandum, to state a claim for defamation under Massachusetts law, a plaintiff must identify, with specificity, any statement alleged to be defamatory. See Mem. at 8.

Chai's "past, her political activism, and her business ventures." (Compl. ¶ 21). According to Plaintiffs, the compilation as a whole is not "balanced and fair" and, therefore, is defamatory.

This radical claim has no merit. Plaintiffs cite no authority for the idea that a compilation of accurate, non-defamatory news articles can ever constitute defamation, even if the compilation is not "balanced and fair." All authority is to the contrary. First, "the law of defamation does not require balance." Shephard v. Bay Windows, Inc., 2003 WL 22225764, at *9 (Mass. Super., Sept. 22, 2003); see also Ramsey v. Fox News Network, LLC, 351 F. Supp. 2d 1145, 1154 (D. Colo. 2005) ("While the December 2002 broadcast appears to plaintiffs not to have been 'fair and balanced' towards them, it was not defamatory.")

Second, because Plaintiffs' entire claim rests on allegations of republication, they must allege – at a minimum – that the original statements themselves are defamatory. The cases Plaintiffs cite in their opposition (Opp. at 8) make this clear. See Sanford, 318 Mass. at 158 ("[I]f words are defamatory their republisher may not avoid liability by truthfully attributing them to someone else.") (emphasis added); Maloof v. Post Publishing Co., 306 Mass. 279, 280 (1940) ("[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 added). Indeed, in Appleby v. Daily Hampshire Gazette, 395 Mass. 32, 36 (1985), another case cited by Plaintiffs, the court held that the republisher of a defamatory statement is subject to the same liability as the original publisher. Id. (holding that republisher "is subject to liability as if he had originally published it"). Given that none of the republished articles is alleged to have been false or defamatory, Long Bow could not have been liable if it had been the original publisher. Simply stated, a person cannot be liable for spreading what is true and non-defamatory.

Third, the compilation of critical news articles is tantamount to the expression of an opinion based upon those news articles, and opinions are fully protected by the First Amendment and the common law of Massachusetts. See, e.g., King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987) ("Statements of fact may expose their authors or publishers to liability for defamation, but statements of pure opinion cannot. Statements of pure opinion are constitutionally protected."); Cole v. Westinghouse Broadcasting Co., Inc., 386 Mass. 303, 308-09 (1982). A critical view of Chai's "past, her political activism, and her business ventures" (Compl. ¶ 21), expressed through a compilation of critical news articles is clearly a statement of opinion, if it can be called a "statement" at all. It "cannot be characterized as [an] assertion[] of fact," and it "cannot be proved false." Cole, 386 Mass. at 312 ("An assertion that cannot be proved false cannot be held libelous.") (citations omitted).[6] The Court should reject, as a matter of law, Plaintiffs' contention that Long Bow's critical compilation of news articles is defamatory.[7]

C. Long Bow Cannot Be Liable For The Politically Motivated Republication Of Truthful News Articles About Plaintiffs

Plaintiffs argue that "under Massachusetts law, even a true statement can serve as the basis for a defamation claim." (Opp. at 15) (citing M.G.L. c. 231, § 92). According to Plaintiffs, "if a defendant acted with malice in making a defamatory statement, the plaintiff may recover –

[6] Because the basis for Long Bow's opinion is clearly disclosed in the form of the truthful, non-defamatory articles the Site excerpts, cites, and links to, Plaintiffs cannot contend that Long Bow's opinion suggests the existence of "undisclosed defamatory facts." Cole, 386 Mass. at 313.

[7] Although Plaintiffs allege that Long Bow first added the August 2003 column from *The Boston Globe* on May 14, 2004 – precisely three years before Plaintiffs filed suit – they have studiously avoided alleging when Long Bow first made this compilation of other articles available on the Site, presumably to avoid a facial statute of limitations problem.

even if the statement is true." (Opp. at 15) Plaintiffs misstate the law, and their allegations of malice are inadequate.

First, the First Amendment requires falsity in cases such as this. The Supreme Judicial Court held – in a case cited by Plaintiffs – that "[t]o apply [M.G.L. c. 231, § 92] to the defendants' truthful defamatory statement concerning a matter of public concern, even if the statement is malicious, violates the First Amendment." Shaari v. Harvard Student Agencies, Inc., 427 Mass. 129, 134 (1998); see also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-78 (1986) (holding that, as to matters of public concern, the First Amendment requires proof of falsity from even a private-figure plaintiff).

Second, even if the First Amendment were no obstacle, Plaintiffs have not alleged that common-law malice – ill will or malevolent intent – is Long Bow's primary motivation. See Dragonas v. School Committee of Melrose, 64 Mass. App. Ct. 429, 439 (2005) ("Although spite or ill will can support a finding of malice, it is not enough to show that the defendant merely disliked the plaintiff or that such animosity was part of the defendant's motivation.") Expressly to the contrary, Plaintiffs have alleged that "Long Bow's defamatory statements are motivated by malice toward Chai, as well as Long Bow's desire to discredit Chai and advance Long Bow's divergent political agenda." (Compl. ¶ 30) (emphasis added). Likewise, Plaintiffs allege in the complaint's "Introduction" that Long Bow is "[m]otivated by ill-will, [its] sympathy for officials in the Communist government of China, and a desire to discredit Chai, a former student leader in the pro-democracy movement in China's Tiananmen Square." These mixed-motive allegations fail to satisfy the "primary motivation" standard, particularly given the manifest political nature of Long Bow, the Film, and the Site. Plaintiffs cannot use the law of defamation to suppress truthful, politically motivated speech.

II. The Trademark Claims Should Be Dismissed

Anticipating that defamation law affords them no right of action, Plaintiffs attempt to cast their objections to the Site as trademark violations. Trademark law, however, does not stretch so far as to squelch the mere reference to a non-competitor's Mark on a website, as either content or a metatag.

A. Plaintiffs Have Not Properly Alleged Trademark Use

In the first instance, both trademark infringement and trademark dilution claims require that Long Bow's reference to the Marks constitute "trademark use" within the meanings of the Lanham Act and the Federal Trademark Dilution Act. 15 U.S.C. § 1114(1)(a); 15 U.S.C. § 1125(c)(1). Indeed, one of the cases cited by Plaintiffs themselves recites that a central limitation of trademark law is "the limitation of trademark protection to the protection of marks *as used* on particular goods to identify their source or sponsor." Decosta v. Viacom Int'l., 981 F.2d 602, 609 (1st Cir. 1992). To allege requisite trademark "use," Plaintiffs must assert that Long Bow placed trademarks on goods or services, improperly suggesting that the goods or services emanated from, or were authorized by Jenzabar. 15 U.S.C. § 1127; see also 1-800 Contacts v. WhenU.com, Inc., 414 F.3d 400, 408 (2d Cir. 2005).[8] They have not.

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[8] The Lanham Act defines "use in commerce," in relevant part, as follows:

> "... For purposes of this Chapter, a mark shall be deemed to be in use in commerce-
> (1) on goods when-
>
> (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and
>
> (B) the goods are sold or transported in commerce, and
>
> (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce ...."

There is no allegation that Long Bow placed any Jenzabar Mark on any good or service. Nor is there any allegation suggesting in any way that Long Bow's website emanated from Jenzabar. If anything, the alleged disparaging remarks make clear that the Site is not affiliated with Jenzabar.

Notwithstanding, Plaintiffs cite to a series of cases finding trademark use where a competitor has used a mark on its website in an attempt to somehow usurp the mark holders' customers. (Opp. at 19-20); see e.g., Boston Duck Tours v. Super Duck Tours, LLC, 2007 WL 4465464 (D. Mass. 2007) (land-water sightseeing tour sued competitor after competitor purchased sponsored links from Google).[9] Plaintiffs' reliance on these cases is misplaced.

Long Bow and Jenzabar are not competitors in any sense. Jenzabar is a software company. Compl. ¶ 5. Its customers include "private liberal arts, medical, law, state and community colleges." Id. ¶ 16. Long Bow produces documentaries principally for broadcast on public television. Id. at ¶ 15; Exh. A at 27. In addition, there is no allegation that Long Bow is selling any goods or services under the Jenzabar Marks. Nor is there any allegation that Long Bow used these marks in any way that suggests any source or origin.

There is no trademark use when a non-competitor simply refers to trademarked name or term on its website without any suggestion of source or origin. As one court noted:

> "[W]here, as here, the unauthorized use in no way competes with the mark owner's offering of goods or services, the 'in connection with goods and services' requirement is not satisfied simply

[9] The remaining cases cited by Plaintiffs also involve alleged use by either a direct competitor or a distributor seeking to usurp a trademark-holder's sales. Australian Gold, Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006) (manufacturer and distributor sue internet resellers using marks to sell indoor tanning lotions); Promatek Indus. Ltd. v. Equitrac Corp., 300 F.3d 808 (7th Cir. 2002) (cost recovery systems manufacturer sued competitor); Brookfield Communications, Inc. v. West Coast Entertainment, 174 F.3d 1036, 1056 (9th Cir. 1999) (noting that "competitive proximity of [parties'] products is actually quite high"); Buying for the Home LLC, v. Humble Abode, LLC, 459 F.Supp. 2d 310, 323 (D.N.J. 2006) (online retailer of bedroom furniture claimed trademark infringement against competitor); Edina Realty, Inc. v. The MLSonline.com, 2006 WL 737064 (D. Minn. 2006) (stating that defendant real estate brokerage firm "directly competes" with plaintiff).

> because a prospective user of the Internet may face some difficulty in finding the home page he is seeking."

Ford Motor Co. v. 2600 Enterprises, 177 F. Supp. 2d 661, 665 (E.D. Mich. 2001) (holding that there was no trademark use where non-competitor used Ford's trademark in programming code); Rescuecom Corp. v. Google, Inc., 456 F.Supp. 2d 393 (N.D.N.Y. 2006) (search engine operator's "internal use of [franchising company]'s trademark to trigger sponsored results is not a use of a trademark within the meaning of the Lanham Act...").

Given: (i) Jenzabar and Long Bow are not competitors; and (ii) the complete absence of any allegation that Long Bow placed any trademark on any goods, displays, containers or advertisements in any way that suggests source or origin, there is no actionable trademark use. Dismissal is therefore warranted. Merck & Co. v. Mediplan Health Consulting, Inc., 431 F. Supp. 2d 425, 427 (S.D.N.Y. 2006) (granting 12(b)(6) dismissal where there was no alleged trademark "use" for reference to Zocor as a keyword on website); Rescuecom Corp. v. Google, Inc., 456 F.Supp. 2d 393, 403 (N.D.N.Y. 2006) (granting 12(b)(6) dismissal: "Defendant's internal use of plaintiff's trademark to trigger sponsored results is not a use of a trademark within the meaning of the Lanham Act...."); Fragrancenet.com, Inc. v. Frangrancex.com, Inc., 493 F.Supp.2d 545, 550 (E.D.N.Y. 2007) (defendant's alleged use of trademark in keywords and metatags could not constitute trademark "use" for purposes of Lanham Act; motion to amend denied as futile); U-Haul Int'l, Inc. v. WhenU.com, Inc., 279 F.Supp.2d 723, 728 (E.D. Va. 2003) (defendant's inclusion of U-Haul mark in website URL address not deemed "use" for purposes of trademark law).

B. Long Bow's Remaining Trademark Arguments Are Not Premature

As there is no trademark use alleged, the Court's analysis of the purported trademark claims need go no further. In any case, additional reasons compel dismissal now.

Contrary to Plaintiffs' contention (Opp. Br. at 21-25, 26-27), it is not premature to consider the several deficiencies in Jenzabar's claims. Because all of Plaintiffs' claims rest exclusively on the contents of the Long Bow website, this Court may properly consider the content of the Site on a motion to dismiss without converting the motion to one for summary judgment. See, e.g., Marram v. Kobrick Offshore Fund Ltd., 442 Mass. 34, 45 n.4 (2004) ("Where, as here, the plaintiff had notice of these documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment, as required by Mass. R. Civ. P. 12(b)(6).") Viewing the Site makes clear that Long Bow's reference to the Jenzabar Marks is neither an infringing use nor disparagement.

First, Long Bow's references to Jenzabar cannot be considered infringing because the references constitute fair use and are not likely to cause any consumer confusion. Given that the parties are not competitors and the references are allegedly disparaging, there is no possibility that a person would visit the Long Bow website thinking that it was sponsored by Jenzabar. See In re Dual Deck Video Cassette Recorder Antitrust Litigation, 11 F.3d 1460, 1466-67 (9th Cir. 1993) (affirming 12(b)(6) dismissal of trademark claim where reference was descriptive fair use and there was no possibility of confusion). "[Long Bow]'s web site refers to [Jenzabar] by name in order to make statements about it. This referential use of [Jenzabar]'s trade mark is exactly what the nominative fair use doctrine is designed to allow." J.K. Harris & Co. v. Kassel, 253 F. Supp. 2d 1120, 1127 (N.D. Cal. 2003).

Second, Long Bow's references to Jenzabar are exempt from the Federal Trademark Dilution Act as both non-commercial and news commentary use. 15 U.S.C. §§ 1125(c)(3)(B), (c)(4)(B). Long Bow's site constitutes a repository of news reporting and commentary

concerning the Protests and the student leaders. (Compl. ¶ 20). Long Bow's reference to the Jenzabar marks--in connection with its portrayal of, and commentary concerning, the Protests and its student leaders--constitutes a protected "form of news reporting and news commentary." 15 U.S.C. § 1125(c)(3)(B). In addition, the website serves an informational and educational purpose, not a commercial one. See Current Website (Exh. A), at 1. In these circumstances, Long Bow's references to Jenzabar are protected, non-commercial uses. Nissan Motor Corp. v. Nissan Computer Corp., 378 F.3d 1002, 1017 (9th Cir. 2004) (Nissan Computer's negative commentary about Nissan Motor deemed non-commercial speech).[10] For both these reasons, the trademark dilution claims must be dismissed.

C. Plaintiffs Fail To Refute Long Bow's First Amendment Argument

Long Bow's opening memorandum (pp. 26-28) demonstrates that on the facts as alleged in the Complaint, the First Amendment protects Long Bow's speech from Plaintiffs' purported trademark claims. Plaintiffs' opposition devotes only a single footnote (note 14 at p. 27), which is bereft of any case citations, to Long Bow's constitutional argument. Plaintiffs have effectively conceded the point, as they must.

Plaintiffs themselves allege Long Bow's website and its references to Jenzabar are motivated by Long Bow's "desire to discredit Chai and advance Long Bow's divergent political agenda" (Compl. ¶ 30) and by Long Bow's "sympathy for officials in the Communist government of China" (Compl., Introduction). Plaintiffs have not refuted the critical fact highlighted in Long Bow's initial memorandum that the challenged site expressly states that it

[10] The allegation that one could purchase a copy of the Film through the Site does not render "commercial" Long Bow's references to Jenzabar, a software company that does not compete with Long Bow. In any case, the "initial interest doctrine" has no application here as there is no allegation that Long Bow's use of Jenzabar as a metatag steered customers to Long Bow's website and Long Bow thereby benefited. Long Bow, which does not sell or market software support for educational institutions, could not benefit from Jenzabar's alleged goodwill, about which (according to the Complaint) Long Bow is critical. See, e.g., J.G. Wentworth, S.S.C. Ltd. Partnership v. Settlement Funding LLC, 2007 WL 30115 at *7-8 (E.D.Pa. 2007) (granting Rule 12(b)(6) dismissal; defendant's use of plaintiff's registered marks as meta tags failed to state a Lanham Act claim).

"explores the origins and history of the protests, the intense international media coverage, and underlying themes such as democracy, human rights, reform and revolution, and nationalism." (Exh. A. to Motion to Dismiss). Plaintiffs cannot refute the facts regarding the nature of Long Bow's Site, because the substance is included in Plaintiffs' own Complaint. (Compl., ¶ 20).

If nothing else, Plaintiffs' opposition makes clear that their trademark claims (and all others) are about their attempting to stifle the free expression of ideas and the flow of public information. The narrow parameters of trademark law do not provide any basis to constrain Long Bow's First Amendment rights on the facts alleged. Trademark law yields to free speech in the circumstances presented by the Complaint. See Nissan, 378 F.3d at 1017-18; CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456, 462 (4th Cir. 2000) ("It is important that trademarks not be 'transformed from rights against unfair competition to rights to control language'.") Plaintiffs' trademark claims should therefore be dismissed.

If Plaintiffs' trademark claims were permitted to stand, historians such as Long Bow who publish on the internet would be at risk for referring by name to any company whose registered trademark is identical to such company's name--virtually every company in the nation. The First Amendment, the nominative fair use doctrine and the statutory exemptions for non-commercial use and news commentary protect Long Bow from liability on the facts alleged in the Complaint.

III. The Chapter 93A Claim Should Be Dismissed

Tellingly, Plaintiffs have not cited a single case or other authority for their novel contention that a c. 93A claim should survive dismissal of the defamation and trademark claims. Plaintiffs' argument at pages 27-28 of their opposition confirms that, in fact, the purported c.93A theory is nothing more than an amalgamation of defamation and trademark allegations. In these circumstances, there is no independent claim under c. 93A.

IV. Plaintiffs' Request for Leave to Amend Should Be Denied

Long Bow respectfully opposes Plaintiffs' request for leave to file an amended Complaint. From the face of the Complaint, it is clear that Plaintiffs waited to commence this action exactly three years from Long Bow's posting on May 14, 2004 of *The Boston Globe* article. Plaintiffs had those three years to develop a cognizable legal theory against Long Bow. There is no such legal claim. Nothing can or will change the absence of a claim. This conclusion is confirmed by Plaintiffs' failure to identify the additional facts it would or could allege that would state a claim. Respectfully, there are none. The dismissal should be with prejudice. See Mestek, Inc. v. United Pacific Ins. Co., 40 Mass. App. Ct. 729, 731 (1996) (dismissal pursuant to Rule 12(b)(6) is an adjudication on the merits, and therefore with prejudice).

CONCLUSION

For the reasons stated above and in Long Bow's opening memorandum, Plaintiffs' Complaint against Long Bow should be dismissed in its entirety and with prejudice.

Respectfully submitted,

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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~~/by hand

Date: 3/14/08

Dated: March 14, 2008

EXHIBIT A

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Civil Docket

MICV2002-01190
DiLorenzo v Jenzabar.Com, Inc. et al

File Date	03/20/2002	**Status**	Disposed: by Settlement (dispsetl)
Status Date	10/10/2006	**Session**	H - Cv H (9A Cambridge) New Session Woburn CtRm 520
Origin	1 - Complaint	**Case Type**	A01 - Services, labor, materials
Track	F - Fast track	**Lead Case**	**Jury Trial** Yes

DEADLINES

	Service	Answer	Rule12/19/20	Rule 15	Discovery	Rule 56	Final PTC	Judgment
Served By					10/15/2004			
Filed By	06/18/2002	08/17/2002	08/17/2002	08/17/2002		02/03/2005		07/14/2003
Heard By							03/15/2005	

PARTIES

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DiLorenzo v Jenzabar.Com, Inc. et al

Defendant
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Served: 03/27/2002
Answered: 05/06/2002
Answered 05/06/2002

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DiLorenzo v Jenzabar.Com, Inc. et al

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Served: 03/29/2002
Answered: 05/06/2002
Dismissed by agreement of parties 12/19/2005

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Answered: 05/06/2002
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Dismissed by agreement of parties 12/17/2004

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MICV2002-01190
DiLorenzo v Jenzabar.Com, Inc. et al

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Plaintiff/counterclaim Jenzabar.Com, Inc. Active 05/07/2002	**Private Counsel 058020** Joseph J Brodigan Brodigan and Gardiner 40 Broad Street Suite 220 Boston, MA 02109 Phone: 617-542-1871 Fax: 617-482-1871 Active 05/07/2002 Notify **Private Counsel 638122** Kara Moheban McLoy Drohan HughesTocchio & Morgan PC 175 Derby Street Suite 30 Hingham, MA 02043-4007 Phone: 781-749-7200 Fax: 781-740-4335 Active 12/30/2002 Notify
Defendant/counterclaim Joseph G. Dilorezo, Answered: 05/17/2002 Answered 05/17/2002	**Private Counsel 297720** Franklin H Levy Duane Morris 470 Atlantic Avenue Suite 500 Boston, MA 02210 Phone: 857-488-4200 Fax: 857-488-4201 Active 05/17/2002 Notify

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DiLorenzo v Jenzabar.Com, Inc. et al

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ENTRIES

Date	Paper	Text
03/20/2002	1.0	Complaint & civil action cover sheet filed
03/20/2002		Origin 1, Type A01, Track F.
04/01/2002	2.0	SERVICE RETURNED: Mark Martines(Defendant) 03/25/02 L&U, 617 Westford Road, Carlisle
04/08/2002	3.0	SERVICE RETURNED: Jenzabar.Com, Inc.(Defendant) 03/27/02 in hd, 17 Sellers St., Cambridge
04/08/2002	4.0	SERVICE RETURNED: Ling Chai(Defendant) 03/29/02 L&U, 14 Farwell Place, Cambridge
04/08/2002	5.0	SERVICE RETURNED: Robert A. Maginn, Jr.(Defendant) 03/29/02 L&U, 14 Farwell Place, Cambridge
04/23/2002	6.0	First Amended Complaint and Jury Demand.
05/07/2002	7.0	Motion to dismiss of Defendant, Mark Martines, in pursuant to Mass.R.Civ.P. rule 12(b)(6) counts ten and eleven of the Plaintiff's complaint, and Memo in support
05/07/2002	8.0	ANSWER by Jenzabar.Com, Inc. to COMPLAINT (claim of trial by jury reqstd)
05/07/2002		ANSWER by Robert A. Maginn, Jr. to COMPLAINT (claim of trial by jury reqstd)
05/07/2002		ANSWER by Ling Chai to COMPLAINT (claim of trial by jury reqstd)
05/07/2002		ANSWER by Mark Martines to COMPLAINT (claim of trial by jury reqstd)
05/07/2002		COUNTERCLAIM of Jenzabar.Com, Inc. v Joseph G. DiLorenzo
05/09/2002		Motion # 7 Of Deft, Mark Martines, To Dismiss In Pursuant To Mass.R.Civ.P. 12(b)(6), is; After review, DENIED for failure to comply with MRCP rule 9A. (Neel, J.) dated 5/8/02 entered on docket and notices sent 5/9/2002
05/17/2002	9.0	ANSWER: Joseph G. Dilorezo,(Defendant/counterclaim) of Jenzabar.com inc
06/13/2002	10.0	Deft Mark Martines's MOTION to Dismiss (MRCP 12b) Complaint, memo in support of, plff's opposition, deft's request for oral hearing, affidavit of compliance rule 9A
10/15/2002		Motion (P#10) DENIED after hearing-More appropriate for Summary Judgment hearing (R. Malcolm Graham, Justice) Dated October 9, 2002. Notices mailed October 15, 2002
12/27/2002	11.0	Joint MOTION to amend case schedule by (45) days
01/03/2003		Motion (P#11) Motion ALLOWED Dated: January 3, 2003 (R. Malcolm Graham, Justice) Notices mailed January 03, 2003

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Date	Paper	Text
02/11/2003	12.0	Joint motion to amend case schedule by 120 days
02/21/2003		Motion (P#12) After review, this motion is ALLOWED. The Tracking Order is set as follows: Discovery ends on June 27, 2003; Rule 56 motions are to be filed on or before July 24, 2003 and final PTC is scheduled for August 21, 2003 at 2 pm. (Elizabeth M. Fahey, Justice) Dated February 13, 2003. Notices mailed February 21, 2003
03/13/2003	13.0	STIPULATION AND PROTECTIVE ORDER: Plaintiff Joseph G. DiLorenzo ("DiLorenzo") and Defendants Jenzabar.com, Inc. ("Jenzabar"), Robert Maginn ("Maginn"), Ling Chai ("Chai") and Mark Martines "Martines") hereby agree as follows: WHEREAS, the proceedings in this action may involve the production or disclosure of confidential, sensitive or proprietary business information and trade secrets and particularly sensitive personal information, including but not limited to, tax returns, related schedules, and supporting documents; and WHEREAS, the parties are in agreement that the following Stipulated Protective Order shall govern the production or disclosure of such information during the course of this action in order to ensure the continued confidentiality of such information, as well as to ensure that no competitive advantage is obtained by any person as a result of the disclosure thereof, upon the following conditions and safeguards; IT IS HEREBY ORDERED that: 1. SOPE. This Stipulated Protective Order ("Order") shall be applicable to and govern all depositions, documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions and all other discovery taken pursuant to the Massachusetts Rules of Civil Procedure, as well as all documents produced by either party in response to informal discovery requests, and testimony aduced at trial, matters in evidence and computerized records which the disclosing party (the "Disclosing Party") designates as "Confidential Information" in accordance with the terms of this Order. Such information shall not include information that at, or prior to, disclosure to the party receiving the information (the "Receiving party") is known to or independently developed by the Receiving Party or is public knowldege or becomes available to the public without violation of this Order; that, after disclosure, is revieated to the public by a person having the unrestricted right to do so; or that is acquired by the Receiving party from a third party which lawfully possesses the information and/or owes no duty of nondisclosure to the Disclosing Party. The provisions of this Order also shall apply to any non-party who provides testimony, documents or information in such discovery proceedings and who agrees to be bound by the terms of this Order. Reference to a "party" or "parties" herein shall also include such non-parties. 2 DEFINITION OF "CONFIDENTIAL INFORMATION." For the purpose of this order, a Disclosing Party may designate as "Confidential Information" only non-public testimony, information, documents, and data that the party

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	13.0	in good faith reasonably believes contains: 1) trade secret or other confidential, competitive, or proprietary information that is used by it in or in connection with its business, and which the party takes appropriate efforts to keep confidential; 2) sensitive information of a personal nature, the protective of which is necessary to protect a party from embarrassement or annoyance, including, but not limited to, tax returns, related schedules and supporting documents; or 3) information that the Disclosing Party is otherwise required to keep confidential by agreement or law. 3. NOTICE OF DESIGNATION. Parties shall designate inforamtion as Confidential Information as following: (a) In the case of records, doucments, interrogatory answers, responses to requests for admissions, and other written discovery, by stamping the legend "Confidential" prior to theri produciton. Stamping such a legend on the cover of any multi-page document shall so designate all pages of such document, unless otherwise indicated by the Disclosing Party. Documents to be inspected shall be treated as Confidential during inspection. (b) In the case of deposition or trial testimony, designation of the portion of the transcript (including exhibits) which contains information that is Confidential Information shall be made by a statement to such effect on the record in the course of the deposition or, upon review of such transcript by counsel for the party to whose Confidential Information the deponent has had access, said counsel shall designate in writing to the other party within thrity (30) days after counsel's receipt of the transcript. Pending such designation by counsel, the entire deposition transcript, including exhibits, shall be deemed Confidential Information; if no designation is made within thrity (30) days afte receipt of the transcript, the transcript shall be considered not to contain any information that is Confidential Information. The pages of the transcript which contain Confidential Information and the numbers (but not the descriptions) of the confidential deposition exhibits shall be appropriately noted on the front of the deposition transcript and the entire transcript shall be marked as being confidential information. However, only those protions of the transcript and exhibits noted on the front of the transcript need to be treated as Confidential Information as appropriate. 4. INADVERTENT FAILURE TO DESIGNATE. Failure to designate information as Confidential at the time of production shall not be a waiver of the protection for Confidential Information provided that counsel for the Disclosing Party notifies the Receiving Party within 5 days after realizing the omission. The Receiving Party shall not be in violation of this Order for any disclosure made prior to receiving notice. Following notice, the Receiving Party shall make reasonable efforts to retrieve and approvriately reclassify the previously disclosed materials. 5. OBJECTION TO DESIGNATION. A party shall not be obligated to challenge the

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	13.0	propriety of a desgination as Confidential Information at the time made, and failure to do so shall not preclude a subsequent challenge thereto. In the event that a party disagrees at any stage of these proceedings with a designation of any information as Confidential Information, the party's counsel shall so advise the Disclosing Party in writing of such objections and the reasons therefor, and the parties shall try to resolve the dispute on an informal basis. If the Disclosing party objects to the proposed disclosure and the dispute cannot be resolved, all the terms shall be treated as Confidential pending a resolution of the parties' dispute. The burden of proving that the records or information have bee properly designated Confidential Information shall be on the party making such designation. 6. DISCLOSURE OF CONFIDENTIAL INFORMATION. Documents, things, and information desgnated as Confidential Information shall not be shown, communicated, paraphrased, summarized or disclosed, in whole or in part or in any manner whatsoever, except by prior written consent of the Disclosing Party or pursuant to a further order of the Court, to anyone other than: a. the parties' attorneys of record in this action and the employees of such attorneys who are actively engaged in assisting counsel in this action; b. independent experts and consultants not affiliated with a party who have been separately retained by the party and/or party's attorneys of records for purposes of this action subject to the provisions of paragraph 8 herein; c. any officer or employee of the Receiving party; d. the authors, addressees and copy recipients of Confidential Information, including but not limited to the producing party's present and former employees, agents, counsultants and attorneys; 3. any witnesses who appear for deposition or trial in this matter, during the course of their testimony, afte the witness has been advised of the need to keep the information confidential and agrees to do so in writing in the form of Appendix A attached hereto; f. certified court reporters taking testimony involving such Confidential Information; g. the Court, provided that any document that contains or refers to "Confidential Information" shall be filed under seal, in accordance with paragraph 11 of this Order in evelopes prominently marked with the caption of this action, the title of the document or other description identifying the material filed, and the following notation: THIS DOCUMENT IS FILED UNDER SEAL PURSUANT TO A PROTECTIVE ORDER, IT CONTAINS CONFIDENTIAL INFORMATION AND SHALL BE OPENDED ONLY AS DIRECTED BY THE COURT. and h. in response to a valid order or subpoena issued by a court of competent jurisdiction or an administrative agency, provided, however, that the Receiving Party must promptly notify the Disclosing Party and provide a copy of such order or subpoena at least 7 days in advance of producing any Confidential Information in order to permit the Disclosing Party an opportunity to lake steps to object to or quash such order or

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Date	Paper	Text
	13.0	subpoena. 7. USE OF CONFIDENTIAL INFORMATION. All Confidential Information shall be used solely for the purpose of this action and not for any business or other purpose whatsoever. 8. TERMS OF DISCLOSURE FOR EXPERTS AND CONSULTANT. Before any Confidential Information is shown, disclosed or otherwise communicated to any person referenced in paragraph 6(b), such person shall be provided with a copy of this Order and such person shall execute a written Certification in the form attached hereto as Appendix A, which Certification shall, inter alia, acknowledge that such person (a) has received a copy of this Order, (b) is familiar with the provisions of it, (c) agrees to be bound by it, (d) agrees not to copy or to use any Confidential Information for any purpose other than in connection with the above-captioned action, and (e) agrees not to reveal any or all such Confidential Information to any person not authorized by this Order. A copy of the Certification, as executed by such person, shall be maintaned by counsel for the Receiving Party and shall be availabe for inspection by the Court or counsel for the Disclosing party upon request. 9. COPYING AND ADSTRACTING CONFIDENTIAL INFORMATION. Nothing in this Order shall restrict a qualified receipient from making working copies, adstracts, digests and analyses of such information for use in connection with the above-captioned action. Such working copies, abstracts, digests and analyses shall be deemed to have the same level of protection as the information from which they were taken. Further, a qualified receipient may convert or translate such information into machine-readable form for incorporation into a data retrieval system used in connection with the above-captioned action provided that access to such information, in whatever form stored or reproduced, shall be limited to qualified recipients. 10. LIMITATION ON DISCLOSURE. No person to whom Confidential Information is disclosed shall disclose such Confidential Information in any manner whatsoever to any person to whom disclosure is not authorized by the terms hereof or make any disclosure for any purpose whatsoever, commercial or otherwise. Each person to whom disclosure is made hereby agrees to and shall subject himself or herself to the jurisdiction of the Middlesex County Superior Court, Commonwealth of Massachusetts for the purpose of contempt proceedings in the event of any violation of this Order. 11. FILING OF CONFIDENTIAL INFORMATION. Any party seeking to file Confidential Information with the Court in any form, as part of a pleading, motion, or any other paper filed with the Court, shall first or simultaneously therewith file a motion for impoundment or the Confidential Information in accordance with Massachusetts Trial Court Rule VIII, and otherwise comply with the provisions of that rule. The nofiling party shall assent to such motion for impoundment. If the Court does not allow the assented-to motion for impoundment, the parties shall consult and cooperate in

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	13.0	order to obtain an order of impoundment prior to the filing of the Confidential Information. The Confidential Information shall be sumitted to the Court in a separate sealed envelope or other sealed container which shall bear the proceeding number and name, and indication of the general nature of the contents, and the cover page of any such paper or document shall contain the notation provied in Paragaraph 6(g). 12. MAINTENANCE AND DISPOSITION OF CONFIDENTIAL INFORMATION. The Receiving party shall maintain Confidential Information in a secure, safe area and shall exercise the dame standard of due and proper care with respect to the storage, custody, use and/or dissemination of such information as is exercised by the receipient with respect to its own proprietary inforamtion. Any originals or coies of same (other than copies of exhibits or records fied with with Court) shall be returned to the Producing Party or be destroyed within sixty (60) days after the action is concluded (including all appeals) and shall not be retained by any other person, with the exception of materials which in the judgment of counsel in possession of such materials are work product materials, as to which those attorneys will take reasonable steps to ensure the continued protection of Confidential Information contained therein. No later than sixty (60) days after the conclusion of this action, Counsel shall certify in writing that all such Confidential Informaiton has been properly returned, destroyed or otherwise protected in accordance withthe terms thereof, and that Confidential Information has not been disclosed in violation of this Order, and that there has been full compliance with the terms of this Order. 13. OBJECTIONS PRESERVED. Nothing in this Order constitutes a finding or admission that any of the Confidential Information covered hereby is in fact confidential, nor does any party receiving such materials waive any right to later contest that any of these materials is not confidential, secret and/or proprietary. Nothing in this Order shall prevent any party receiving materials and or information wihich may be designated as Confidential Information from raising objections on any ground whatsoever to the admission of such materials and/or information in proceedings before the Court. 14. AMENDMENT OF THIS ORDER. This Order may be amended by agreement of the parties' attorneys in the form of a written stipulation that has been approved by the Court. 15. SURVIVAL OF TERMS. The terms and provisions of this Order shall not terminate at the conclusion of this action but rather shall survive the conclusion thereof and shall continue to be binding upon all the parties herein and their directors, officers, agents, employees and counsel, until modified, terminated, or superseded by consent of the parties or by Order of the Court. IT IS SO ORDERED. Entered this 12th day of March, 2003, (Fahey, J) entered on docket and copies maield 3/13/03
06/23/2003	14.0	Joint MOTION to amend case schedule 150 days

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Date	Paper	Text
06/27/2003		Motion (P#14) Motion ALLOWED FPTC 1/23/2004, Rule 56 12/24/2003, Disc 11/24/2003 Dated: June 26, 2003 (Thomas E. Connolly, Justice) Notices mailed June 27, 2003
07/17/2003	15.0	Deft Jenzabar.com, Inc. n/k/a Jenzabar Inc.'s APPLICATION for commission pursuant to MGL Ch.233A, Sec.10, affidavit of compliance rule 9A
07/18/2003		Application (P#15) ALLOWED, no opposition (Kenneth J. Fishman, Justice)
12/02/2003	16.0	Defts' MOTION for leave to amend their answer & counterclaim, plff's opposition, defts request for hearing, affidavit of compliance rule 9A
12/09/2003	17.0	Joint Motion to Amend Case Schedule.
01/26/2004	18.0	Plff's ASSENTED to MOTION to continue motion hearing for 2/12/04 until 2/25/04
01/26/2004		Motion (P#18) ALLOWED; motion hearing cont'd to 02/25/04 at 2:00 pm (Muse, J.) notices mailed February 10, 2004
02/25/2004		Motion (P#16) ALLOWED; discovery extended to 06/15/04 (Muse, J.) notices mailed February 26, 2004
03/01/2004	19.0	Amended ANSWER of Defendants and Amended counterclaim of Jenzabar, Inc.
0 /2004	20.0	ANSWER by Joseph G. DiLorenzo to amended COUNTERCLAIM of Jenzabar.Com, Inc.
05/13/2004	21.0	Joint Motion to amend case schedule extending the discovery deadline until August 16, 2004, extending the deadline for the service of rule 56 motions to October 15, 2004 and rescheduling the final pretrial conference for a date convenient to the court on or after November 15, 2004
05/24/2004		Notice of Annual Civil Litigation Fee mailed to plaintiff's attorney Franklin H Levy, Joseph E Haviland on May 24, 2004.
05/24/2004		MOTION (P#21) Motion ALLOWED Dated: May 18, 2004 (Kenneth J. Fishman, Justice) Notices mailed May 24, 2004
08/05/2004	22.0	JOINT MOTION to amend case schedule extending discovery till 10/15/04, rule 56 motions till 12/1/04
08/09/2004		Motion (P#22) ALLOWED; fptc 01/18/05 (Kenneth J. Fishman, Justice) notices mailed August 17, 2004
09/22/2004	23.0	Deft Jenzabar.com, Inc. n/k/a Jenzabar, Inc.'s APPLICATION for a Commission in the State of New York, affidavit of compliance rule 9A
09/30/2004		Application (P#23) APPLICATION APPROVED. (Neel, J.) Notices mailed October 01, 2004
10/01/2004	24.0	ORDER ON EFENDANTS' APPLICATION FOR A COMMISSION PURSUANT TO M.G.L. CH..233A, S10. This matter having been heard on motion for issuance of a commission to take the deposition of Alan Frishman, Apt.33D, 10 West 66th Street, New York, NY 100233, on October 14, 2004 at 10:00 a.m. in the State of New York, and it appearing to the Court that it is desirable that a Commission issue in order that the defendant take the said deposition. IT IS HEREBY ORDERED that the defendant's application for issuance of a commission is GRANTED authorizing the

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Date	Paper	Text
	24.0	law firm of Holland & Knight, LLP, 195 Broadway, New York, NY 10007 and/or Jamison Barr, Esq., to take the deposition of the above-named deponent before any notary public or other officer authorized to administer oaths in the state of New York, who shall cause the deponent be signed under oath or affirmed under local law by the witnesses, and certify and return the same to the Clerk of this Court. IT IS FURTHER ORDERED that a Commission in the form attached hereto shall issue forthwith from this Court directed to any person authorized to administer oaths and take testimony under the laws of the State of New York authorizing and empowering them to take the testimony upon oral examination of Alan Frishman at the place and stating at such date and time as is noticed by the defendant and continuing from day to day until completed. By the Court, Stephen E. Neel, Justice. Dated: September 30, 2004. Copies mailed on 10/01/04.
10/01/2004	25.0	COMMISSION TO TAKE DEPOSITION IN NEW YORK (Certified copy) The Commonwealth of Massachusetts to the Law Firm of Holland & Knight LLP and to Any Person Authorized to Take Depositions Under the Laws of New York. Pursuant to Order of the above-entitled court, obtained by the defendant, Jenzaber.Com, Inc., n/k/a Jenzabar, Inc., through its attorneys, the law firm of Holland & Knight and/or Jamison Barr, Esq., is hereby appointed, commissioned and authorized to take the oral deposition of Alan Frishman, Apt. 33D, 10 West 66th Street, New York, NY 10023 on October 14, 2004 at 10:00 a.m.. The deposition will take place at the law offices of Holland & Knight, LLP, 195 Broadway, New York, NY 10007, on the date and time above and from day to day thereafter, or at such other time and place as may be agreed upon by the parties hereto. Said deposition may be taken before a person authorized to take depositions under the laws of New York. By the Court, Stephen E. Neel, Justice. Dated: September 30, 2004. Original mailed on 10/01/04
11/29/2004	26.0	Joint MOTION to modify summary judgment deadlines
12/06/2004		MOTION (P#26) Motion ALLOWED This being the 7th extension No further continuance FPTC 3/15/2005 Dated: December 3, 2004 (Ernest B. Murphy, Justice) Notices mailed December 06, 2004
12/17/2004	27.0	Stipulation of dismissal as to Mark Martines (ONLY) with prejudice, all rights of appeal waived.
01/07/2005	28.0	Joint Motion to extend rule 56 deadline
01/11/2005		Motion (P#28) ALLOWED (Murtagh, J.) notices mailed January 11, 2005
02/07/2005	29.0	Defendant Jenzabar, Inc.'s Motion for summary judgment, Statement of undisputed material facts, and Memorandum in support
02/07/2005	30.0	Motion for summary judgment of Defendants Robert A. Maginn, Jr. and Ling Chai, Memorandum in support, Plaintiff's statement of undisputed material facts in support, Plaintiff's opposition to Defendant Jenzabar's motion, Plaintiff's opposition to Defendants Robert Maginn and Ling Chai's Motion for summary judgment, Affidavit of Matthew R. Roberts, and Defendant's request for leave to file a reply memo

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Date	Paper	Text
03/24/2005	31.0	Plff's MOTION to submit supplemental response to defts' reply memo in support of their motions for summary judgment, defts' opposition, plffs' request for hearing, affidavit of compliance rule 9A
06/08/2005		MOTION (P#29) Denied: See ruling of 6/3/05. (McIntyre, J., dated 6/3/05) Notices mailed June 08, 2005
06/08/2005		MOTION (P#30) Denied: See ruling of 6/3/05. (McIntyre, J., dated 6/3/05) Notices mailed June 08, 2005
06/08/2005	32.0	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (which see) - ORDER - For the reasons, defendants' Motrion for Summary Judgment is DENIED. (McIntyre, J., dated 6/3/05) copies sent 6/8/05
07/11/2005	33.0	Joint Motion to re-scheduled pre-trial conference to September 22, 2005 at 2:p.m.
07/12/2005		MOTION (P#33) allowed to Sept 22, 2005 (Ernest B. Murphy, Justice). Notices mailed July 14, 2005
09/23/2005	34.0	Joint pre-trial memorandum (filed in Court 9/22/05)
12/19/2005	35.0	Stipulation of partial dismissal of any and alll other claims stated, or which could have been stated against Ling Chai, with prejudice, with all rights of appeal waived
12/19/2005	36.0	Stipulation of partial dismissal of any and alll other claims stated, or which could have been stated against Robert A. Maginn, Jr., with prejudice, with all rights of appeal waived
01/11/2006	37.0	Assented to Emergency MOTION for Status Conference and Continuance
01/11/2006	38.0	Plaintiff Joseph G. DiLorenzo MOTION to Impound, Affidavit of Matthew R. Roberts. Esq, in support of
01/17/2006		Hearing on (P#37, 38, 39) Evidentiary hearing, to show cause why settlement should not be enforsed) held, matter taken under advisement. (Thomas Murtagh, Justice)
01/17/2006	38.5	(SEALED) Plff's Emergency Motion to Enforce Settlement Agreement. Filed in Court.
01/17/2006	38.6	(SEALED) Deft Jenzabar, Inc.'s Opposition to Plff's Emergency Motion to Enforce Settlement Agreement. Filed in Court.
01/20/2006	39.0	(SEALED) Plaintiff's Reply to Opposition of Defendant Jenzabar, Inc. to plaintiff's Emergency Motion to Enforce Settlement Agreement
01/27/2006	40.0	Post Hearing submission of defendant Jenzabar Inc in opposition to plaintiff's emergency motion to enforce settlement agreement
02/01/2006		(SEALED) Exhibits filed 1 envelope.
02/01/2006	41.0	(SEALED) MEMORANDUM AND ORDER RE PLAINTIFF'S EMERGENCY MOTION TO ENFORCE SETTLEMENT AGREEMENT (which see 6 pages) ORDER - Plaintiff and Emergency Motion to Enforce Settlement Agreement is DENIED. This matter is to be scheduled promptly for trial. (Murtagh, J., dated 1/30/06) copies sent 2/1/06
10/10/2006	42.0	Stipulation of dismissal of claims of plaintiff Joseph G.DiLorenzo and the counterclaims of defendant Jenzabar, Inc. (formally known as Jenzabar.com,Inc.) with prejudice, and without costs, interest, or attorneys' fees, and with all rights of appeal waived.

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MIDDLESEX, ss. *Commonwealth of Massachusetts*
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set my hand and affix the seal of said Superior Court this Fifth day of March, 2008.

Robert E. Mantz
Deputy Assistant Clerk