

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF  
THE TRIAL COURT

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

Plaintiffs,

v.

LONG BOW GROUP, INC.,

Defendant.

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CIVIL ACTION NO. 07-2075-H

**DEFENDANT LONG BOW GROUP INC.’S OPPOSITION TO PLAINTIFF’S  
EMERGENCY MOTION FOR PROTECTIVE ORDER**

Plaintiff Jenzabar’s emergency motion (the “Motion”) asks this Court to enter an unprecedented order prohibiting defendant Long Bow Group, Inc. (“Long Bow”) from obtaining discovery about the basis of the claims and allegations levied against it. Long Bow urges the Court to deny this motion and to grant Long Bow relief from Jenzabar’s refusal to submit to discovery.<sup>1</sup>

Although Jenzabar publicly filed this lawsuit over two years ago, it has refused to produce documents, refused to answer all interrogatories, and refused to submit for any depositions. Now, on the last business day before its Rule 30(b)(6) deposition, which was noticed almost two months ago, Jenzabar asks this Court for an order “to prevent having to

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<sup>1</sup> Simultaneous with this opposition, Long Bow has filed an Emergency Motion for Relief Pursuant to Rule 37(d), which asks this Court to sanction plaintiff Jenzabar for its refusal to answer interrogatories and failure to appear at its deposition.

further respond to discovery and testify at depositions.” Motion at 1. Jenzabar offers one reason for this refusal to disclose the evidence supporting its claims: a fear that its documents, interrogatory answers, and deposition testimony will become known to the public.

The Court should deny this Motion on two grounds.

First, the discovery that Jenzabar asks this Court to prevent is valid, proper and absolutely fundamental to this case. Long Bow is entitled to know the basis of the claims and allegations against it, if any basis exists. If Jenzabar is unwilling to disclose what evidence supports its claims, the case should be dismissed.

Second, litigation is presumptively public. Secrecy is disfavored. Confidentiality restrictions and impoundment procedures impose serious burdens on parties and courts. A long line of authorities instructs that a party seeking to hide litigation materials from the public must prove a particularized need for confidentiality and impoundment. Numerous decisions – none addressed by Jenzabar – hold that Mass. R. Civ. P. 26(c) and the First Amendment require “good cause,” particularity, proof and narrow tailoring. Broad, conclusory and unsubstantiated allegations of harm from potential publicity cannot overcome the presumption against secrecy.

Jenzabar has not attempted to shoulder this heavy burden. Nor could it. The bases for the claims and allegations in this case are not secrets. Jenzabar’s bare desire to shield from the public all evidence relating to the allegations it made in a public lawsuit it filed does not give this Court grounds to order confidentiality and impoundment.<sup>2</sup>

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<sup>2</sup> Long Bow submits the Affidavit of Adam B. Ziegler (“Ziegler Aff.”), Long Bow’s counsel, and exhibits thereto in support of this opposition to the Motion.

## FACTS

### Parties

Long Bow is a small, non-profit producer of award-winning documentary films about China. Long Bow, based in Brookline, operates a website – [www.tsquare.tv](http://www.tsquare.tv) – that contains extensive archival materials about the 1989 Tiananmen Square student protests and Long Bow’s film *The Gate of Heavenly Peace*, which studied the protests.

Plaintiff Ling Chai (“Chai”) was a key and controversial student leader in the 1989 Tiananmen Square protests. She and other key figures from the protests are profiled on Long Bow’s website. Chai is the founder and president of plaintiff Jenzabar, a computer software company that describes itself as “a leading provider of enterprise software and solutions to institutions of higher education.” Jenzabar boasts publicly on its website that it has over 700 customers and maintains offices in Boston, Cincinnati, Knoxville, and Harrisonburg, Virginia. Plaintiff Robert Maginn (“Maginn”) is Chai’s husband, and he serves as Chairman and CEO of Jenzabar.

### Procedural History

In May 2007, plaintiffs Jenzabar, Chai and Maginn sued Long Bow for defamation, trademark violations and violation of c. 93A. All claims rested on Long Bow’s website, which reports publicly available information about Chai and Jenzabar, among many other topics. The defamation claims sought to hold Long Bow liable for quoting from and linking to critical news stores about plaintiffs, which were published by major news outlets, including *The Boston Globe*, *Forbes* and *The Chronicle of Higher Education*. The trademark claims sought to hold Long Bow liable for using the “Jenzabar” trademark as a metatag on a web-page that reports information about Jenzabar.

The publicly filed complaint alleged the following, among other things, as facts:

- Long Bow is “[m]otivated by...their sympathy for officials in the Communist government of China.” Compl. at “Introduction.”
- Long Bow is “motivated by...[a] desire to discredit Chai and advance Long Bow’s divergent political agenda.” Compl. ¶ 30.
- Long Bow’s website “has resulted in numerous inquiries from and misunderstandings with Jenzabar’s clients....” Compl. ¶ 29.
- Jenzabar’s trademarks “are famous and distinctive.” Compl. ¶ 56.
- Long Bow’s use of the Jenzabar trademarks “is likely to cause confusion among consumers....” Compl. ¶ 51.
- Long Bow’s use of the Jenzabar trademarks “causes dilution of, and actually dilutes” the Jenzabar trademarks. Compl. ¶ 57.
- Long Bow’s use of the Jenzabar trademarks has caused Jenzabar to suffer “loss of business opportunities.” Compl. at “Introduction.”
- Jenzabar has suffered “monetary loss” as a result of Long Bow’s use of the Jenzabar trademarks. Compl. ¶ 53.
- Jenzabar has suffered “great detriment to its business, goodwill, reputation, and profits.” Compl. ¶¶ 59, 65, 71, 76,

On August 6, 2008, this Court dismissed plaintiffs’ defamation claims pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim. The Court declined to dismiss plaintiffs’ trademark claims and the related c. 93A claim, and allowed the case to proceed into discovery on these claims. In its ruling, however, this Court noted the apparent weakness of plaintiffs’ trademark claims:

Although Jenzabar seems unlikely to prevail on this claim because of the dissimilarity of Long Bow’s business, Jenzabar has adequately pled the likelihood of confusion element, which is all that is required to survive a motion to dismiss. The trademark claims will stand.

Decision and Order, at 7.

### **Discovery Jenzabar Seeks to Prevent**

On April 7, 2009, shortly after Jenzabar served written discovery requests on Long Bow, Long Bow served its own written discovery requests, together with deposition notices for the

three named plaintiffs: Jenzabar, Chai and Maginn. See Ziegler Aff. ¶ 2. Plaintiffs' counsel responded by asking Long Bow to agree to a modest extension of the tracking order. Id. ¶ 3. Long Bow agreed to the extension and to reschedule the depositions. Id. On April 29, 2009, the parties filed a joint motion seeking an additional six weeks of discovery time. Id. This Court amended the tracking order, setting June 19, 2009 as the new discovery deadline. Id. Plaintiffs neither proposed nor sought any confidentiality order in connection with these discussions. Id.

On May 7, 2009, plaintiffs served their objections to Long Bow's document requests. See Ziegler Aff. ¶ 4; Ziegler Exh. B. Together with their written responses, plaintiffs proposed a "Joint Motion for Entry of Protective Order," which plaintiffs have attached as Exhibit D to the Motion. Plaintiffs' proposed protective order includes the following key terms:

- Parties can designate as "Confidential" anything they believe contains confidential information (§ 2), and such information may not be disclosed to anyone who is not involved in the case and not also bound by the confidentiality order (§ 6);
- Parties can designate as "Confidential – Attorneys' Eyes Only" any confidential information they believe may cause damage if disclosed (§ 7), and such information may not be disclosed even to non-lawyer representatives of the clients;<sup>3</sup>
- Parties must follow strict procedures for impoundment and filing under seal with respect to all information marked "Confidential" or "Confidential – Attorneys' Eyes Only" (§§ 6, 12).

On May 14, 2009, during a Rule 9C conference, undersigned counsel for Long Bow informed plaintiffs' counsel that Long Bow would not agree to the proposed protective order. See Ziegler Aff. ¶ 6. Undersigned counsel noted that the case did not involve any trade secrets or other information potentially entitled to confidentiality. Id. Undersigned counsel requested plaintiffs' counsel to identify discrete categories of documents or information that posed specific

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<sup>3</sup> Jenzabar has an in-house legal department. Long Bow does not.

confidentiality concerns, so that those could be addressed appropriately with a narrowly tailored confidentiality order. Id. In subsequent conversations, Jenzabar’s counsel identified only two categories of information that Jenzabar believed qualified for confidentiality protections under Mass. R. Civ. P. 26(c): (1) the identities of Jenzabar customers not previously disclosed, such as through the many press releases on Jenzabar’s own website and (2) Jenzabar’s financial statements. Id.

On May 19, 2009, because plaintiffs’ counsel had repeatedly refused to provide any dates for depositions of the named plaintiffs, Long Bow’s counsel served amended notices of deposition for all three plaintiffs. Id. at 7; Ziegler Exh. C. In selecting the dates for these depositions – all during the first week of June – Long Bow’s counsel specifically avoided scheduling these depositions during the last week of May, because plaintiffs’ counsel represented that this week would be inconvenient to the witnesses due to an out-of-state conference. See Ziegler Aff. ¶ 7.

On May 20, 2009, plaintiffs produced 268 pages of documents in response to Long Bow’s document requests. Id. ¶ 8. During a 9C conference regarding the adequacy of this document production, plaintiffs’ counsel represented that this was plaintiffs’ complete production with respect to numerous, critical categories of documents. Id.; Ziegler Exh. D. This production, however, consisted almost entirely of public records, including copies of Long Bow’s website and Long Bow’s own corporate filings. See Ziegler Aff. ¶ 8. The only non-public documents plaintiffs produced were pre-suit communications between Long Bow and Jenzabar. Id. Despite these being non-confidential, party-to-party communications, and despite the fact that no confidentiality order is in place, Jenzabar nevertheless marked all of these communications as “Confidential.” Id.

On May 22, 2009, the date its interrogatory answers were due, Jenzabar’s counsel transmitted – by email – an unsigned Word document with the filename: “Long Bow – Jenzabar response to 1<sup>st</sup> Ints (objections only version).” See Ziegler Aff. ¶ 11; Ziegler Exh. F. On Tuesday, May 26, 2009, Jenzabar properly served an executed version of the identical, “objections only” interrogatory responses. See Ziegler Aff. ¶ 12; Ziegler Exh. G. Jenzabar provided no substantive responses to any of the interrogatories. See Ziegler Exh. G. Instead, Jenzabar flatly refused to answer every single interrogatory on the grounds that all of the information sought is secret and should be subject to confidentiality restrictions and impoundment procedures. Id.

The information sought by the interrogatories, which Jenzabar refused to answer on grounds of secrecy, includes the following:

- Communications about Long Bow and the website, including communications with customers and investors;
- The identity of persons – such as customers or investors – who were allegedly mistaken, confused or deceived by Long Bow’s alleged use of Jenzabar’s trademark;
- Specification of all of the uses of the Marks by Long Bow, which plaintiffs claim are unlawful;
- The basis for the allegation that the Marks are famous;
- The basis for the allegation that Long Bow’s use of the Marks is likely to cause confusion;
- The basis for the allegation that Long Bow’s use of the Marks causes dilution;
- The basis for the allegation that Long Bow is motivated by “sympathy for officials in the Communist government of China” and a desire to “advance Long Bow’s divergent political agenda”;
- The identify of witnesses Jenzabar intends to call at trial;
- The basis for the allegation that Long Bow’s use of the Marks caused Jenzabar to suffer “great detriment to its business, goodwill, reputation, and profits”;
- Identification of all “business opportunities” Jenzabar had lost due to Long Bow’s use of the Marks;

- Specification of the damages Jenzabar claims to have suffered due to Long Bow's use of the Marks.

Id. Jenzabar refused to provide any of this information on the ground that all of the information is secret and would only be revealed if Long Bow agreed to keep it all confidential.

On May 27, 2009, undersigned counsel informed Jenzabar's counsel by letter that Long Bow objected to Jenzabar's failure to answer interrogatories. See Ziegler Aff. 13-14; Ziegler Exh. H. Long Bow's counsel also stated that Long Bow would not agree to a broad protective order that Jenzabar was certain to abuse, as demonstrated by (a) Jenzabar's position that all evidence relating to this case was confidential and (b) Jenzabar's designation of pre-suit communications between the parties as "Confidential." See Ziegler Aff. ¶ 14. Counsel reiterated that this litigation does not involve trade secrets, and that Jenzabar's counsel had only identified two discrete categories of information that Jenzabar claimed was truly confidential.

Id. In an effort to avoid unnecessary motions, however, Long Bow agreed to entry of a narrowly drawn protective order that would encompass two categories of information about which Jenzabar had expressed particularized concerns: (1) the identities of any customers Jenzabar was contractually bound to keep confidential and (2) Jenzabar's financial statements. Id.

On May 29, 2009, during another Rule 9C conference, plaintiffs' counsel informed undersigned counsel for Long Bow that plaintiffs (a) would produce no additional documents, (b) would not answer any interrogatories, and (c) would not appear for their depositions, which were duly noticed for the following week on June 1 (Jenzabar), June 5 (Chai), and June 6 (Maginn).<sup>4</sup> See Ziegler Aff. ¶ 15. Plaintiffs' counsel confirmed this position by letter dated May

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<sup>4</sup> Long Bow first noticed the depositions of Jenzabar, Chai, and Maginn for April 29, April 30, and May 1. Long Bow agreed to reschedule the depositions in conjunction with its agreement to join a motion to extend the tracking order for six weeks. Long Bow's counsel repeatedly requested proposed dates for rescheduling these depositions, and plaintiffs refused to provide any dates. Only then did Long Bow re-notice the depositions for the first week of June. Long Bow's counsel specifically avoided the last week of May 2009, because plaintiffs' counsel had



29, 2009. Id.; Ziegler Exh. I. The only excuse offered for this refusal was the fear that discovery materials would become known to the public through Long Bow's website.

On June 1, 2009, Long Bow proceeded with the Rule 30(b)(6) deposition of Jenzabar, pursuant to the deposition notice, but neither Jenzabar nor its counsel appeared. See Ziegler Aff. ¶ 17. The deposition notice identifies 13 topics of inquiry that largely overlap with the subjects covered by Long Bow's interrogatories, and include the very basis for the claims and key allegations made by Jenzabar. See Ziegler Exh. E. On June 5 and 6, Long Bow will proceed with the duly noticed depositions of Chai and Maginn, barring an intervening order by this Court. See Ziegler Aff. ¶¶ 18-19.

#### **Information About the Lawsuit That Is Available to the Public**

The Court file is open to the public.

*The London Times*, *The New Yorker*, and *The Chronicle of Higher Education* have reported on the lawsuit, and the lawsuit has attracted attention from various China-related websites and blogs. Because this week is the 20<sup>th</sup> anniversary of the 1989 Tiananmen Square protests, the media has a significant interest in reporting on this case and the parties involved.

On its website, Long Bow has posted PDF copies of important documents from the Court file: plaintiffs' Complaint; Long Bow's Answer; the briefing by both parties on the motion to dismiss; and this Court's Memorandum of Decision and Order on the motion to dismiss. See Ziegler Aff. ¶ 20. Long Bow also has posted a narrative summary of the lawsuit. Id.

The website also includes Long Bow's "Appeal," which summarizes Long Bow's view of the important issues and principles affected by this case and asks readers to do the following: "[V]isit our website ([www.tsquare.tv](http://www.tsquare.tv)) to read the materials that have prompted this lawsuit and

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represented that that week was inconvenient for plaintiffs due to an out-of-state conference. See Ziegler Aff. ¶¶ 2-3, 7.

the legal filings from the case. We ask you to draw your own conclusions about the issues and freedoms at stake.” See Ziegler Aff. ¶ 21; Ziegler Exh. J.

Long Bow’s website also includes Jenzabar’s two-page “Response to the Appeal,” which Long Bow agreed to post at Jenzabar’s explicit request. See Ziegler Aff. ¶ 22; Exh. K.

## ARGUMENT

### **I. The Court Should Not Prohibit Long Bow From Conducting Discovery About The Basis Of The Claims And Allegations Made By Plaintiffs**

This Court should not prohibit Long Bow from conducting discovery that is valid, proper and essential. Jenzabar offers no reason and no legal authority to support its request for an unprecedented order “prevent[ing]” all discovery.

Long Bow’s document requests, interrogatories and deposition notices were properly served and seek relevant, discoverable information. As detailed above, the discovery Long Bow seeks goes directly to the heart of Jenzabar’s trademark claims and to explicit allegations made by plaintiffs in the complaint (e.g. Int. No. 6: “State the basis for your allegation that Long Bow’s use of the Marks is likely to cause confusion”; Interrogatory No. 5: “State the basis for your allegation that the Marks are famous;” Interrogatory No. 14: “State the basis for your allegation that Long Bow’s use of the Marks has caused Jenzabar to suffer great detriment to its business, goodwill, reputation, and profits”). Long Bow’s discovery easily passes muster under Mass. R. Civ. P. 26(b), which permits discovery as to any non-privileged matter that “appears reasonably calculated to lead to the discovery of admissible evidence.”

Jenzabar does not argue to the contrary in its Motion. Jenzabar offers not a single precedent in which a Court prohibited all discovery due to a plaintiff’s generalized desire for secrecy or fear of publicity. Jenzabar does not even contest Long Bow’s right to – and critical

need for – the discovery that Jenzabar asks this Court to “prevent.” Accordingly, the Court should deny Jenzabar’s Motion to prevent discovery.

**II. The Court Should Not Seal The Case File, Declare All Discovery Materials Confidential And Impounded, Or Impose A Gag Order On The Parties**

The Court also should not seal the case file, impound all discovery materials, or enjoin the parties from speaking to the press and public about the case. Although the Motion does not specifically request this relief, the necessary implication of Jenzabar’s argument is the impoundment, confidentiality and secrecy of all materials relating to this case.

**A. The Law Requires a Particularized, Substantiated Showing of Good Cause**

Massachusetts courts observe a presumption in favor of publicity, which can be overcome only upon a particularized, substantiated showing of “good cause.” See Republican Co. v. Appeals Court, 442 Mass. 218, 223 (2004) (“The public’s right of access to judicial records, including transcripts, evidence, memoranda, and court orders, may be restricted, but only on a showing of “good cause”... The exercise of the power to restrict access, however, must recognize that impoundment is always the exception to the rule, and the power to deny public access to judicial records is to be strictly construed in favor of the general principle of publicity.”) (internal citations and quotation marks omitted); Ottoway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 546 (1977) (“[O]nly in the most extreme situations, if at all, may a State court constitutionally forbid a newspaper (or anyone else) to report or comment on happenings in and about proceedings which have been held in open court; and a similar rule would apply to court files otherwise unrestricted. Such censorship is certainly in the category of prior restraint.”); Labbe v. Home Depot USA, Inc., 2007 WL 1074114, at \*3 (Mass. Super. 2007) (“While the public interest in free access to the record of trial proceedings is greater than that which pertains to the pretrial discovery record ... the publicity principle applies to the latter,

as well.”) (internal citation omitted); Clean Harbors, Inc. v. John Hancock Life Ins. Co., 2003 WL 21780980, at \*1 (Mass. Super. 2003)(“This Court does not favor confidentiality orders but recognizes their need under certain circumstances. See, e.g., Mass. R. Civ. P. 26(c). For the most part, a public court should not be litigating matters screened off by the public by such orders.”)

The Rules reflect this presumption and require a showing of good cause. Mass. R. Civ. P. 26(c) authorizes confidentiality orders and Rule 7 of the Uniform Rules of Impoundment Procedure authorizes impoundment. Both explicitly require “good cause.” See Mass. R. Civ. P. 26(c) (authorizing courts to enter protective orders only “upon a showing of good cause”); Rule 7 of Uniform Impoundment Rules (authorizing impoundment only “for good cause shown”).<sup>5</sup> Likewise, the First Amendment permits appropriately tailored confidentiality orders only upon a particularized, substantiated showing of “good cause.” See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36-37 (1984).

The party seeking an order departing from the general principles of publicity and free speech “bears the burden of persuasion” and “must show good cause by demonstrating a particular need for protection.” Lord v. Grove Mftg. Co., 1993 WL 818914, at \*1-2 (Mass. Super. 1993). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” Id.; see also G&F Indus., Inc. v. Jeffco, Inc., 2006 WL 306893, at \*2 (Mass. Super. 2006) (“Apart from describing the information in question as ‘confidential,’ Travelers does not offer any underlying facts to support its claim of confidentiality.”); Converge, LLC v. Hickox, 2001 WL 1692072, at \*1-3 (Mass. Super. 2001) (“The motion before the Court does not indicate by reference to facts that any of the parties in

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<sup>5</sup> The Uniform Rules of Impoundment also require written findings by the Court and provide explicitly that even the parties’ agreement is not sufficient by itself to establish good cause. See Rules 7, 8.

this case will suffer any particular harm as a result of the operation of the machinery of pretrial discovery. The parties have not submitted an affidavit in support of the Motion and there has been no demonstration of ‘good cause’ in support of its allowance.”); cf. Rule 2 of Uniform Rules of Impoundment ( requiring that motion “describe with particularity the material sought to be impounded” and “be accompanied by affidavit in support thereof”).<sup>6</sup>

Massachusetts trial courts routinely apply these standards and reject unsubstantiated applications for confidentiality and impoundment that rest on nothing but blanket assertions of confidential or generalized claims of harm due to publicity. See Labbe, 2007 WL 1074114, at \*5 (“[T]he defendant's blanket assertion of the proprietary and confidential nature of the materials it has withheld from discovery is rejected.”); Lord, 1993 WL 818914, at \*1-2 (“Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”) Indeed, Massachusetts courts sometimes reject even jointly proposed confidentiality or impoundment orders when the parties fail to establish good cause. See Gleba v. Daimler Chrysler Corp., 2001 WL 1029678, at \*2-4 (Mass. Super. 2001) (rejecting jointly proposed impoundment order); Converge, LLC v. Hickox, 2001 WL 1692072, at \*1-3 (Mass. Super. 2001)) (rejecting jointly proposed confidentiality order).

Finally, even when a particularized, substantiated showing of “good cause” is made, the resulting confidentiality or impoundment order must be tailored narrowly “to meet the overriding interests that justified impoundment.” Globe Newspaper Co., Inc. v. Clerk of Suffolk County Superior Court, 2002 WL 202464, at \*4 (Mass. Super. 2002) (Gants, J.); Boston Herald, Inc. v.

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<sup>6</sup> To the extent Jenzabar seeks to enjoin Long Bow from making public statements about the case, Jenzabar bears a much heavier burden than demonstrating “good cause.” See Clement v. Sheraton Boston Corp., 1993 WL 818763 (Mass. Super. 1993) (holding that an injunction prohibiting extra-judicial statements about a case “is properly characterized as a ‘prior restraint’ for the purposes of the First and Fourteenth Amendments to the United States Constitution and art. 16 of the Declaration of Rights to the Constitution of the Commonwealth”). Indeed, even “allegedly false and defamatory statements are protected from prior injunctive restraint by the First Amendment and art. 16.” Id. (quoting Nyer v. Munoz-Mendoza, 385 Mass. 184, 188 (1982)).

Sharpe, 432 Mass. 593, 605 (2000) (“If there is good cause to impound documents, a judge is required to tailor the scope of the impoundment order so that it does not exceed the need for impoundment.”)

Jenzabar discusses none of these authorities and does not even mention the “good cause” standard. Moreover, the three authorities cited by Jenzabar lend no support to its position. See Motion at ¶ 4. First, Jenzabar cites Rule 3.6 of the Rules of Professional Conduct, which impose some discrete limits on extra-judicial statements by counsel. Even if this rule applied to parties, which it does not, Jenzabar makes no argument that Long Bow’s website violates the specific provisions of the rule and no showing that the website compromises Jenzabar’s ability to get a fair trial. Second, Jenzabar cites Ottaway, 372 Mass. at 546, for the unremarkable proposition that a Court has the authority to impound files “when necessary to insure fair trial.” As noted above, however, Ottaway reaffirmed the general principle of publicity and held that “only in the most extreme situations” should a court close its files or prevent persons from commenting on litigation. Id. at 546. Third, Jenzabar cites NCR Credit Corp. v. Underground Camera, Inc., 581 F. Supp. 609, 613-14 (D. Mass. 1984), but that federal case dealt with the federal local rules, which prohibited extra-judicial statements by counsel, and the court in any event held that the plaintiff “failed to demonstrate a need for the requested order regarding publicity.” (Emphasis added).

B. Jenzabar Has Not Established Good Cause For Confidentiality Or Impoundment

Jenzabar has not shown – and cannot show – that good cause exists for the Court to order the confidentiality or impoundment of any materials in this case, much less all of the materials in this case. As detailed above, Long Bow merely seeks to discover what basis exists – if any – for the claims and allegations made publicly by Jenzabar in the complaint. Once a plaintiff chooses to initiate a public lawsuit and make public allegations against another party, as Jenzabar has

done here, it cannot insist that the entire case be shrouded in secrecy. Jenzabar's bare desire to avoid publicity, unconnected to any particularized, proven need for confidentiality, does not qualify as good cause. See George W. Prescott Pub. Co. v. Register of Probate for Norfolk County, 295 Mass. 274, 279 (1985); ("[I]t is clear that allegations of potential embarrassment, or the fear of unjustified adverse publicity, are not sufficient" [to demonstrate good cause under Mass. R. Dom. Rel. 26(c)]); Globe Newspaper Co., 2002 WL 202464, at \*4 (Gants, J.) ("The mere potential for 'embarrassment' or the fear of 'unjustified adverse publicity' is not sufficient to show good cause [for impoundment]."); Converge, 2001 WL 1692072, at \*3 ("[I]t is not uncommon that in the course of litigation, business, commercial or otherwise, information is required to be disclosed in discovery that is embarrassing or damaging to a party's interests, but that nevertheless does not qualify for protection due to the principle of publicity which lies at the heart of our public justice system.") Jenzabar has not satisfied its burden to demonstrate good cause for confidentiality or impoundment of any materials.

### **III. An Award Of Costs And Fees Is Appropriate**

Pursuant to Mass. R. Civ. P. 26(d) and 37(a)(4), the Court should award Long Bow the costs and reasonable attorneys' fees incurred in opposing this Motion. As demonstrated above, the Motion has no legal justification and no factual basis. Jenzabar should be ordered to pay Long Bow's costs and attorneys' fees.

**CONCLUSION**

For the foregoing reasons, the Court should deny the Motion and award Long Bow its costs and attorneys' fees.

Dated: June 1, 2009

Respectfully submitted,

LONG BOW GROUP, INC.



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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: June 1, 2009 