

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.)

CIVIL ACTION NO. 07-2075-H

**DEFENDANT LONG BOW GROUP’S MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE THE AFFIDAVIT OF FRANK FARANCE
FILED IN OPPOSITION TO LONG BOW’S MOTION FOR SUMMARY JUDGMENT**

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In the papers submitted in support of its motion for summary judgment, Long Bow showed that Google itself has stated that it does not consider keyword meta tags in computing search rankings, and that Jenzabar admitted in its Rule 30(b)(6) deposition that it did not know how Google computed search rankings. Rather, Jenzabar simply assumed that, because one of the several pages about Jenzabar on Long Bow's tsquare.tv web site ranks in the top ten search results, Google must base search rankings on keyword meta tags. Accordingly, one ground on which Long Bow sought summary judgment was that Jenzabar could not prove that the alleged infringement effected by the use of the term "jenzabar" in the keyword meta tags "caused" the alleged confusion. Seeking to create a genuine issue of fact on this issue of causation, Jenzabar has submitted an affidavit from a putative expert witness, Frank Farance, who opines in paragraph 26 of his affidavit that Long Bow's

incorporation of Jenzabar's registered marks, as both keyword meta-tags in the source code for pages on LB's website, together with "JENZABAR" as the title tag, is a primary reason for why Web search engines, including Google, Bing and others rank LB's website so high on a search of the term "jenzabar."

Farance's affidavit does not meet well-established standards for expert testimony.

I. JENZABAR MUST ESTABLISH THAT FARANCE'S TESTIMONY MERITS WEIGHT IN CONSIDERING RELEVANT ISSUES PERTAINING TO TRADEMARK INFRINGEMENT OR DILUTION CLAIMS.

Before an expert witness is permitted to present evidence, the Court plays a "gatekeeper role" to ensure the reliability of proposed expert testimony. *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994). Under decisions of the United States Supreme Court in *Daubert* and *Kumho*,¹ which have been embraced in Massachusetts in *Lanigan* and other cases,

The trial judge has a significant function to carry out in deciding on the admissibility of a scientific expert's opinion. If the process or theory underlying a scientific expert's opinion lacks reliability, that opinion should not reach the trier of fact. Consequently, the judge must rule first on any challenge to the validity of any process

¹*Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-3 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145 (1999).

or theory underlying a proffered opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Lanigan, 419 Mass. at 25-26.

Before allowing the testimony, the Court must find each of the following: (1) that the testimony is grounded on “sufficient facts or data;” (2) that the testimony “is the product of reliable principles and methods;” and (3) that “the witness has applied the principles and methods reliably to the facts of the case.” Mass. Guide to Evid. § 702. “In so doing, the [trial] court must ‘make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’ *Kumho Tire Co.*, 526 U.S. at 152.” *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 48 (2d Cir. 2004). The party offering the expert testimony has the burden of establishing that the testimony meets the standards of Section 702. *Commonwealth v. Sok*, 425 Mass. 787, 798 (1997); *United States v. Monteiro*, 407 F. Supp.2d 351, 356 (D. Mass. 2006).

Moreover, even apart from the issue of admissibility, courts are skeptical of a party’s efforts to buy its way out of summary judgment by hiring an expert at the last minute to create an issue of fact that would not otherwise exist. “The evidentiary rules regarding expert testimony at trial were not intended . . . to make summary judgment impossible whenever a party has produced an expert to support its position.” *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 98 (1st Cir. 1993).²

For example, in *Smith v. Wal-Mart Stores*, 537 F. Supp.2d 1302 (N.D. Ga. 2008), Wal-Mart sued the creator of several parody T-shirts for trademark infringement and dilution, and presented a

²See also *Scott Fetzer v. House of Vacuums*, 381 F.3d 477, 488 (5th Cir. 2004); *Davis v. 575 Worcester Road*, 893 N.E.2d 1286 (Table), 2008 WL 4414607 (Mass. App. Ct. 2008) (expert opinions were “insufficient to raise an issue of fact”).

series of consumer surveys designed by a “nationally renowned trademark survey expert who has testified hundreds of times.” *Id.* at 1323. The trial judge carefully reviewed the survey and held that, although the expert’s testimony was not to be excluded from the summary judgment record, the expert’s analysis “was so flawed that it does not create a genuine issue of material fact.” *Id.* at 1334-1335. Similarly in this case, for the reasons that follow, Farance’s analysis is not reliable enough to create an issue of fact in this case even if the Court finds that Farance has sufficient generalized expertise in the operation of search engines.³

Farance is presented as an expert on search engine optimization (“SEO”) based solely on his personal experience helping four retail clients optimize their web sites over a period of six years. He does not claim to have authored any published work on the subject, peer-reviewed or otherwise, or to have made presentations on that subject to any conferences. Nor does he cite any publications (his own or others) about the impact of keyword meta tags on search results. Although he mentions having conducted experiments for his clients that tested the manner in which changes to their web sites could affect their search ranking, he has not presented any of those experiments to the Court for its consideration. Indeed, he does not even claim that any specific experiment, either of his own

³Although Farance avers that he has advised certain major retailers “in connection with search-engine optimization,” Aff. ¶ 7, no activities of the sort appear either on his eight-page CV or on his web site at www.farance.com. The resume provides an impressive listing of his background as a “software architect, developer and engineer,” and goes on at great length about his many publications, committees, and honors. The listing includes such minutiae as Farance’s successes as a high school math student. But the one thing that is most conspicuous is the absence of any claimed experience or expertise in search engine operation or optimization. Similarly, Farance’s web site at www.farance.com recites his various experiences and current projects, and again what is conspicuous by its absence is any claimed involvement in activities pertaining to search engines or the optimization of web sites to be found by search engines. Although Farance avers that he was qualified to testify as an expert witness in three cases, Aff. ¶ 9, none of them involve search engine issues. His resume (at 2) identifies **eight** cases in which he was an expert witness; again, none involved search engine issues.

or conducted by others, resulted in a finding that a keyword meta tag had any specific impact on search ranking on Google, or any other search engine.

Even the most “supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method.” *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004); *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999). The expert’s opinions can be admitted if they are generally accepted in the relevant community of experts, if “‘the theory or process is so logically reliable,’ or if its reliability can be determined by some other pertinent, but not controlling means, such as examining whether the theory or technique can be or has been tested, or if it has been subject to peer review or publication.” *Rotman v. National R.R. Passenger Corp.*, 41 Mass. App. Ct. 317, 319 (1996). A “very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.” *Daubert v. Merrell Dow Pharmaceuticals*, 43 F. 3d 1311, 1317 (9th Cir. 1995) (“*Daubert I*”), on remand from the Supreme Court’s ruling in *Daubert. Accord, Smith v. General Elec. Co.*, 2004 WL 870832 *3 (D. Mass. Apr. 23, 2004). If the evidence is not based upon independent research, the district court must determine whether there exists any “other objective, verifiable evidence that the testimony is based on scientifically valid principles.” *Daubert II*, 43 F.3d at 1317-18 (internal quotation marks omitted). “Peer review is the chief way of satisfying this requirement, though it may also be met by precisely [explaining] how [the experts] went about reaching their conclusions and point[ing] to some objective source — a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like — to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.” *Id.* at

1318-19. The Farance affidavit does not come close to meeting this test with respect to **any** of the testimony that he offers.⁴

II. FARANCE’S AFFIDAVIT DOES NOT MEET *DAUBERT/LANIGAN* STANDARDS.

A. Jenzabar Has Not Shown That Farance’s Opinion About the Impact of Keyword Meta Tags Is Reliable.

Although Farance avers that his SEO work for his retail clients includes conducting controlled experiments whereby he makes a series of changes in web sites that affect how they appear in search rankings, Aff. ¶ 7, he did not conduct any experiments before opining about how rankings of web sites are affected by presence or absence of keyword meta tags when Internet users use the term “Jenzabar” as the search term. Instead, his opinion rests exclusively on a recitation of certain web sites that he has read, which he analyzes for the Court’s benefit. The fact that Farance has not employed in this case the “intellectual rigor” that he employs for his retailer clients — conducting experiments to judge the impact of specific factors on search ranking — alone condemns his testimony. But even taking his proposed testimony on its own terms, Farance significantly misstates the contents of the web pages he invokes, omits limitations revealed on those pages, and completely ignores contrary information that is either available online or in the record of this case. Moreover, his testimony is internally contradictory and employs unexplained leaps of logic that bar Jenzabar from relying on his affidavit to prevent summary judgment on the issue of causation.

Farance begins his analysis with several paragraphs that define and describe various meta tags, including the keyword meta tag and the description meta tag. ¶¶ 12-16. Farance’s recognition of the fact that there are different categories of meta tag is noteworthy, because although he mentions

⁴Farance’s report was provided only after Long Bow moved for summary judgment, after discovery was closed. In the event the Court does not reject his opinions out of hand, Long Bow will seek leave to take his deposition.

“description meta tags” or “meta tags” generally in the ensuing paragraphs of his analysis, he does not again mention keyword meta tags in particular until the conclusion of his analysis in ¶ 26, and then again in ¶ 31 when he is discussing the actual meta tags on Long Bow’s web pages.

In paragraph 16 of his affidavit, Farance draws on the Internet standard for HTML 4, which appears on the Web at www.w3.org/TR/html4, as setting forth the purpose of keyword meta tags: to help search engines “index” web pages. One thing about this standard that Farance does not include in his affidavit is the **date** of this standard: “24 December 1999.” *See* Chang Third Affidavit Exhibit 58. That date is significant because the prominence of different search engines has changed so much in the past ten years. In 1999, Google had barely been founded, and it did not rise to prominence until the following year. http://en.wikipedia.org/wiki/Web_search_engine. Today, Google is by far the dominant player in search and commands at least two-thirds and perhaps as much as five-sixths of the global market, depending on the survey. Chang Third Affidavit Exhibit 57. And the HTML standard that Farance quotes makes clear that it is not **every** search engine that pays attention to keyword meta tags, even for the purpose of indexing: “**Some** indexing engines look for META elements that define a comma-separated list of keywords/phrases . . .” (emphasis added).

In the next several paragraphs, Farance discusses generally the use of various elements to determine how the page “**should be indexed.**” Throughout these paragraphs, Farance refers generally to “meta tags” without distinguishing between keyword, description, or the many other types of meta tags. *See A Dictionary of HTML META Tags*, <http://vancouver-webpages.com/META/>. Then, in paragraphs 20 to 22, Farance moves to a discussion of search rankings, and never once mentions keyword meta tags. Paragraph 20 says that “different Web search engines use different algorithms that assign different importance” to different elements, and lists “metatags” as among those elements. Paragraph 21 then lists eleven different factors that search engines use “to

determine the ranking of a web page in a list of search results.” These eleven factors include “the title of the page as set out in the title tag” and “the description of the page as set out in the ‘description’ meta tag.”⁵ Farance does not list the **keyword** meta tag as one of the eleven factors. Paragraph 22 then says that the weight assigned to the factors varies between search engines, but “title tags and meta tags are used by every Web search engine to determine search results and ranking.” Again, Farance makes no specific averment here about keyword meta tags. Similarly, in paragraph 24, Farance says that search engines besides Google, “(such as Bing Yahoo, etc.) similarly use title tags and metatags to rank search results.” Again, he says nothing specific about **keyword** meta tags; he just mentions that specific kind of meta tag in his conclusion.

Even with respect to the factors that he says have impact in these paragraphs (one of which is title tags), Farance’s opinion is unworthy of credence because he has offered them on his own say-so, without pointing to any specific study in this case or elsewhere, any published literature by other search engine experts (or even by Farance), or any other basis for the Court’s taking his analysis as reliable. These paragraphs are examples of an expert who tries to “waltz into the courtroom,” *McDowell, supra*, offering opinions that have not been shown to be based on any scientific method, and even the interim steps in his analysis, ¶¶ 20-22, should not be a basis for denying Long Bow’s motion for summary judgment. In other *Daubert* cases, courts have been at pains to say that the mere fact that an expert **asserts** that a given analysis is generally accepted in his field is not sufficient, because the expert must show the basis for her contention so that the court may make its own judgment. *Moore v. Ashland Chem.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc); *Daubert II*,

⁵Farance notes, ¶ 15 n.4, that the title tag is not a meta tag. Meta tags are HTML code that are designed to be invisible to the web browser. ¶ 12. The title tag, however, appears in the title bar at the top of the web browser.

43 F.3d 1311, 1316 (9th Cir. 1995). Here, Farance does not even testify that his listing of relevant factors has been adopted by anybody in his field, other than in his expert affidavit.

In paragraph 23, Farance discusses two web pages from Google's web site (Exhibit 34), citing out of context language saying that page-based text "can be manipulated by site publishers through meta-tags," (*Technology Overview* page), and that "we process information included in key content tags and attributes, such as Title tags." (*Google Basics* page). Not only does neither of these pages indicate that Google considers keyword meta tags either in its search results or in its search ranking, but the context of the two quotations plainly reveals that Google does **not** take keyword meta tags into account in computing search rank.

Review of the entire *Technology Overview* page shows that Google cited the danger of manipulation of meta-data, not to say that it considers it in computing search rank, but to explain its own superiority to search engines that **do** consider such materials:

Traditional search engines rely heavily on how often a word appears on a web page. We use **more than 200 signals**, including our patented PageRank™ algorithm, to examine the entire link structure of the web and determine which pages are most important. We then conduct hypertext-matching analysis to determine which pages are relevant to the specific search being conducted. By combining overall importance and query-specific relevance, we're able to put the most relevant and reliable results first.

PageRank reflects our view of the importance of web pages by considering **more than 500 million variables and 2 billion terms**. . . . Our search engine also analyzes page content. However, instead of simply scanning for page-based text (which can be manipulated by site publishers through meta-tags), our technology analyzes the full content of a page and factors in fonts, subdivisions and the precise location of each word. We also analyze the content of neighboring web pages to ensure the results returned are the most relevant to a user's query.

(emphasis added).

Google does not say here that **it** allows itself to be manipulated by meta tags, but that **other** search engines can be manipulated, which is why Google is better. Indeed, Google's phenomenal success

has generally been attributed to Google's construction of a ranking system that outperformed its predecessors by returning search results that more prominently display results that its users are interested in seeing. <http://www.seoconsult.com.au/google-seo/what-is-google-pagerank/>.

Similarly, the language that Farance excerpts from the *Google Basics* page (he calls it "Webmasters and Site Owners Help"), is taken out of context. The statement about processing "key content tags . . . such as Title tags" appears under the heading "Indexing" but **not** under the subsequent heading, "Serving Results." That section of the page says nothing about keyword meta tags **or** title tags, but says, "our machines search the index for matching pages and return the results we believe are the most relevant to the user. Relevancy is determined by over 200 factors, one of which is the PageRank for a given page."

Finally, after several paragraphs discussing "meta tags" generally, Farance slips the phrase "keyword meta-tags" into the conclusion that he states in paragraph 26 of his affidavit. However, as is apparent from the foregoing discussion, nothing in the preceding part of his affidavit shows how he reached any conclusions about the impact of keyword meta tags based on the data available to him, and the Court should not accept this opinion as creating a genuine issue of fact on that question.

Moreover, even if Farance had offered the Court a basis for accepting as more than ipse dixit his opinions about keyword meta tags and title tags being considered in search rankings on Google or any other significant search engine, he still offers no basis for his opinion that it is these two factors that brought the main Jenzabar related page ("MJP") into the first ten search results on Google or elsewhere. After all, Farance admitted in paragraph 21 that there are **eleven** factors that search engine algorithms "generally use," and the documents from Google's web site that he accepted as authoritative assert that Google considers 200 signals, and even more variables and terms, in its PageRank algorithm. Why does he conclude that these two factors drove the MJP to

its high search ranking? He does not, for example, report having compared the MJP's characteristics to the characteristics of other pages in the first 50 or 100 search listings, considering all of the factors that the literature deems significant.⁶ He does not report having studied the relative positions of the highly ranked pages over time, or to have used experimentation with different pages to determine how ranking changes. He simply offers his opinion without any "objective, verifiable evidence that the testimony is based on scientifically valid principles." *Daubert*, 43 F.3d at 1317-18. The opinion expressed in ¶ 26 does not pass *Daubert* scrutiny.⁷

Indeed, Farance's affidavit is as striking for what he does not discuss as what he does discuss. Most notably, he makes no mention of Google's own unequivocal announcement, issued more than one month before his undated affidavit was served, that it does not consider keyword meta tags in computing the rankings of search results, <http://googlewebmastercentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html>; nor does he even take note of the widespread reaction of the SEO industry, as well as academic commentators who follow search issues, who hailed Google for finally placing its official imprimatur on a fact that had long been understood to be true. http://blog.ericgoldman.org/archives/2009/09/google_confirms.htm; <http://blog.searchenginewatch.com/091007-161534> (attached to Chang Third Aff. as Exh. 59). He provides no reason for

⁶ In a recent search, among the top search results on a Google search for "jenzabar" were <http://www.jenzabar.com/aboutus.aspx?id=80>, <http://www.thejenzabarfoundation.org/ics>, and <http://www.myjenzabar.net/ics>, but none of those pages have keyword meta tags that include "Jenzabar." Third Chang Aff. ¶ 2 & Exh. 55. Some of the other pages in the top ten include Jenzabar in keyword meta tags, but several others, not cited here, do not. Plainly, Farance's opinion about the significance of keyword meta tags does not explain these search rankings.

⁷There is reason to doubt the sincerity of Farance's opinion about the impact of keyword meta tags because a review of his own web site, at www.farance.com, reveals that he does not have any keyword meta tags, yet his site is listed among the top search results on Google. Third Chang Aff. ¶ 3 & Exh. 56.

discounting Google's own characterization of its algorithm. Nor does he acknowledge the language on the Google web pages that he does cite that runs counter to his analysis. Nor does he take account of the many discussions of SEO in the years preceding Google's announcement that had flatly stated that Google does not consider keyword meta tags in search rankings, one of which was even discussed in the Chang Deposition.⁸ Indeed, as early as 2002, the academic literature quoted Google representatives stating that Google does not rely on meta tags. Greta de Groat, *Perspectives on the Web and Google: Monika Henziger, Director of Research, Google*, *Journal of Internet Cataloging*, Vol. 5(1) (2002), pp. 17-28, quoting Henziger: "[W]e don't trust metadata because we are afraid of being manipulated." Although this work was published a year before Farance began his SEO work, it is quoted on Wikipedia, http://en.wikipedia.org/wiki/Meta_element, n.15, Third Chang Aff. Exh. 60; Farance has no excuse for not having taken notice of any of these statements and given the Court a specific explanation for rejecting them.

Moreover, not only does Farance not provide any experimental data of his own devising to show that keyword meta tags have a significant impact on the ranking of search results, but he pointedly ignores the data in the record that undercuts his opinion. The record reveals that there are four separate Jenzabar-related pages on the tsquare.tv web site that incorporate the Jenzabar name into the keyword meta tags, but only one of the four — the main Jenzabar related page, or "MJP" — appears in any of the several pages showing the top ten results that appear in the record (Tabs 18, 37, 38, 49). Moreover, the First Chang Affidavit (Tab 2) reveals that the other three Jenzabar-related pages do not even appear in the **first one hundred** search results. This is the sort of data that a

⁸*E.g.*, Search Engine Optimization Basics Part 3 - Meta Tags (June 2003), <http://www.searchengineguide.com/andy-beal/search-engine-optimization-basics-part-3-meta-tags.php>; Sullivan, Death of a Meta Tag (Oct. 2002), <http://searchenginewatch.com/2165061>. Chang Third Aff. Exh. 61. Chang discussed the latter article at her deposition. Tr. 93-95; Chang Third Aff. ¶ 9.

neutral scientist would have considered in deciding whether it was the keyword meta tags on the MJP, as opposed to something else about that page, that had a causal impact on the page's appearance near the top of the Google search rankings.

What's more, although Farance's conclusion paragraph casually tosses in the name of Bing, another search engine besides Google that supposedly takes keyword meta tags into account in computing search rank, nothing in the analysis portion of his affidavit provides any reason for this conclusion. Again, Farance points to no peer reviewed studies, indeed no publications of any kind, no experimental data of his own or anybody else's, and nothing from Bing's own statements about its search algorithm or what webmasters should do to position their sites for search on Bing — again, it is simply the Gospel According to Farance.

Equally important, Farance provides no reason to believe that whatever Bing does or does not do has any practical relevance for this case. The Internet literature reveals that Bing has roughly 3% of the global search market, Third Chang Aff. Exh. 57, and the log files that Farance himself analyzed reveal that it was only a tiny fraction of all hits resulting from the use of search engines came from the use of Bing: out of the roughly 600 visits to the web site resulting from the use of "Jenzabar" as a search term (Farance ¶ 28), only **three** resulted from the use of Bing. Wilson Aff. ¶ 8. Wilson's affidavit (¶ 7) reveals that, taking all search strings into account, Bing produced roughly 2.1 percent of all hits to the web site resulting from the use of search engines.

In sum, Farance provides no basis for his opinion about why the main Jenzabar-related page appears near the top of Google or other search engines' search results, other than his own supposed expertise, and a meticulous examination of his reasoning shows that he simply leaps from one unsupported argument to another while ignoring both contrary data and the widespread contrary conclusions of experts in his field. When a proffered expert offers testimony based on "methods

of the vaguest description,” and fails to describe “[t]he origin, source, prior use, testing, general acceptance and foundation of and for the models,” the expert testimony should be rejected. *Hicks v. Brox Industries*, 47 Mass. App. Ct. 103, 107 (1999). Here, Farance similarly fails to establish “the origin, source, prior use, testing, general acceptance and foundation” of his methodology. There has been no showing that Farance’s opinions “have a reliable basis in the knowledge and experience of his discipline.” *Lanigan*, 419 Mass. at 25. His opinion cannot block summary judgment on the issue of causation.

B. Farance’s Data About Visits to Long Bow’s Web Site from Computers at Colleges and Universities and Through the Use of the Search Term Jenzabar Fails the Tests of Both Reliability and Relevance.

In paragraphs 27 to 30, Farance offers some statistical information about visitors to eight specified Jenzabar-related pages on the tsquare.tv web site, providing statistical information about the number of visits that were occasioned by “an internet search for Jenzabar,” ¶ 28, and whether visits “were from education-specific domains.” ¶ 30. Farance explains that he looked for that information because Jenzabar’s customer base is institutions of higher learning and he wanted to “isolate and identify those visitors to the Jenzabar-related pages . . . who were associated with colleges and universities.”

There are several reasons to reject this data. First, the universe of data that Farance chose to examine is questionable. He based his figures on data that Jenzabar subpoenaed from Aplus.net for the period June to August 2009, and explains this limitation on the ground that he was informed “that neither Long Bow, nor Aplus, preserved records or data for periods prior to the past 90 days.” Farance Aff. ¶ 27. Farance was given false information (regrettably, he does not identify the source of this falsehood). As the Second Chang Affidavit and the Affidavit of Adam Ziegler report, Long Bow downloaded and printed more than 1200 pages of data about visits to the tsquare.tv web site

during many months, and produced that information to Jenzabar in discovery. Indeed, eight pages of this data were submitted with Jenzabar's opposition to the motion for summary judgment, Tab 42, and among the data contained in those eight pages alone is information about how many hits to the web site in June 2009 resulted from various search strings (there were 294 hits from the Jenzabar search string, less than four percent of all search engine hits in that month and less than .01% of all hits to the web site). The printed data produced to Jenzabar included such summary data for many other months besides June 2009. By concealing this evidence from its expert witness, Jenzabar ensured that his opinion would not be reliable.

Nor is Farance's data sufficiently detailed to be relevant to the issues before the Court. Jenzabar's current theory of the case, as set forth in its opposition to the motion for summary judgment, is that Long Bow's use of its trademark in the meta tags for four separate pages on its web site violates Jenzabar's trademark rights because it brings Long Bow's criticisms of Jenzabar, and Long Bow's web site itself, to the attention of Jenzabar's buyers and potential buyers and hence causes initial interest confusion on the part of individuals involved in the decision-making process at colleges and universities about whether to buy its products. But, as we now explain, the two raw figures that Farance reports — how many visitors reached any part of Long Bow's web site as a result of using Jenzabar as a search term, and how many visitors to any of eight Jenzabar-related pages on Long Bow's web site used computers associated with "education-specific domains" — are simply too crude to be helpful in resolving those trademark issues, for several reasons. In *Daubert* terms, Jenzabar has not established "fit" between the statistical testimony and the factual issues in the case. 509 U.S. at 591. "[T]here is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

First, the quantity of persons who reached the Long Bow web site by conducting a search

engine search using “Jenzabar” as a search term is not relevant unless (1) the users arrived at one of the four pages that allegedly violate Jenzabar’s trademark rights, (2) the users who reached the Long Bow web site were plaintiff’s actual or potential customers, and (3) the persons using Jenzabar as a search term were looking for Jenzabar’s own web site and not looking generally for information about Jenzabar. According to Farance’s own testimony, at most, it was only a fraction of searchers using computers in the .edu and .ac domains whose searches using “Jenzabar” as a search term are relevant; yet Farance has only provided a number of all searchers using the Jenzabar search terms (not just users at colleges and universities using those terms). Data identifying only college and university users who did that search could have been found in the data obtained from Aplus, by checking **both** the search term field and the user domain field simultaneously. An IT professional at Public Citizen did conduct such a check of the Aplus data, and the number he derived — less than 50 users, Wilson Affidavit ¶ 8 — is considerably fewer than the gross figure (more than 600) of all searchers for the term “Jenzabar” provided in the Farance affidavit. The 48 searchers represented roughly 0.2% of all hits to the web site by Internet users using search engines and 0.004% of all hits to the web site. Jenzabar has invoked Farance’s 607 number in its Statement of Additional Facts, ¶ 56, arguing that Farance’s affidavit shows that Long Bow’s alleged trademark violations are responsible for a “substantial increase” in relevant traffic to Long Bow’s web site. But even if Long Bow’s use of keyword meta tags brought 48 more higher education visitors, compared with the more than 1,200,000 hits to its web site during the period covered by the Aplus data, such minuscule numbers are too trivial to form the basis for a trademark lawsuit. *De minimis non curat lex.*

Moreover, Farance’s data fails Section 702’s foundation requirement of relevance because the mere fact that relevant searchers came to the Long Bow web site is not enough to make out a case of initial interest confusion, as Jenzabar apparently assumes (Farance has not opined on the subject,

because he does not purport to be an expert on consumer confusion). In this regard, this case is on all fours with an unreported decision of the United States Court of Appeals for the Fifth Circuit, *Southwest Recreational Indus. v. FieldTurf, Inc.*, 2002 WL 32783971, at *7 (Aug. 13, 2002). In *Southwest*, the maker of AstroTurf, claiming initial interest confusion, was suing a competitor that placed its trademark in the meta tags of web pages that offered comparative advertising explaining why FieldTurf was better than AstroTurf. The plaintiff's expert witness tried to show that a web browser search for "AstroTurf" would generate hits on FieldTurf's website, but the Fifth Circuit noted that the use of a trademark in the meta tags is permissible when the defendant is making statements about the plaintiff. *Id.*, citing *Playboy Enters v. Welles*, 279 F.3d 796 (9th Cir. 2002). The Fifth Circuit held that the expert had not shown that any customers visited FieldTurf's website intending to purchase AstroTurf (i.e., there was no proof that these hits actually or initially confused consumers). *See also* Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L. J. 507, 521-526 (2005) ("Simply put, one cannot make any legally-supportable inferences about searcher objectives based on the keywords used.")

Here, neither Farance nor Jenzabar has shown that search engine users who entered "Jenzabar" as a search term were seeking only Jenzabar's official web site. (Jenzabar does not contend, nor can it, that search engine users looking for Jenzabar's official site will see Long Bow's site as the first search result when the term "Jenzabar" is entered; the **first two search results** are Jenzabar's official web site). Indeed, Jenzabar acknowledges that because colleges and universities care about whom they are doing business with, they engage in "due diligence" by looking for any information that would have a bearing on whether they should hire Jenzabar. Long Bow Statement of Undisputed Fact ¶¶ 27, 41 (undisputed by Jenzabar); Jenzabar Statement of Additional Fact ¶ 47. Such searchers, assuming that they are the ones who conducted a "Jenzabar" search, were actually

looking for sites like Long Bow's. The raw number of searchers for the term "Jenzabar" that Farance derived from his analysis of the Aplus CD's data should be excluded as irrelevant.

The raw number of domains associated with colleges or universities that visited one of the eight Jenzabar related pages is also too crude a measure to be relevant in this case, for several reasons. First, the number includes visitors who came to pages where there are no meta tags that are alleged to have violated Jenzabar's trademarks, and it includes visitors who reached Long Bow's pages through methods other than using Jenzabar as a search term, and even without using a search engine. For example, the number of users at educational institutions who followed links from news articles or blog posts about this litigation has no bearing on Jenzabar's trademark claims. Equally important is that the number of computers visiting from the .edu and .ac domains would include Internet users who have no decision-making power or even input into decisions about whether to use Jenzabar as a product or service provider. It could include students or staff, or even visitors to a library or dorm room where the Internet connection is made through the school's system. Farance's data does not distinguish between relevant and irrelevant Internet users who reach Long Bow's web site using computers associated with colleges and universities. It is, therefore, inadmissible.

C. Farance's Opinion About Long Bow's Purpose for Using Keyword Meta Tags Is Inadmissible.

Finally, Farance offers his "professional opinion", ¶ 31, that Long Bow's purpose for the inclusion of Jenzabar's name in the keyword meta tags for four of the eight Jenzabar-related pages was to increase the extent to which those pages would be found in web searches; Jenzabar uses this opinion to support its effort to contest one sentence in ¶ 18 of Long Bow's undisputed facts — that, based on Chang's affidavit, Long Bow was not trying to affect the pages' search rank. This opinion should be stricken on several grounds.

First, Farance provides no ground for concluding that he has any expertise in assessing the motivations of web hosts in creating web pages. He does claim to have aided four major retailers with SEO in the past six years, but that experience would not give him any insight into the motivations of a small-time web host like Long Bow, not to speak of an employee like Nora Chang who does not have extensive experience in working with web pages. Indeed, because it is undisputed that the Jenzabar-related search terms have been in the keyword meta tags since the late 1990's, Long Bow's Undisputed Facts ¶ 13, there is no reason to believe that Farance's experiences with SEO since 2003 would provide him with any basis for assessing what a person would have been thinking when using keyword meta tags several years before 2003.

As he fails to do in supporting his other opinions, Farance does not point to any published studies about the motivations of web hosts or other basis for deeming his opinions scientific. And, like his other opinions, the reasoning that he sets forth for his opinions reflects a focus on only a small portion of the available data and a determination to ignore contrary indications. He begins with three generalizations, but instead of providing the Court with the entire data set so that the Court (and the opposing party) can test his conclusions, he supports the generalizations with a pair of carefully selected examples. Each of his examples is based on incomplete data.

His first contention is that "most pages on tsquare.tv have similar descriptive data" and hence reflects a lack of "cataloguing effort" (terms whose precise parameters he never defines so that the Court can check his work). However, the Second Chang Affidavit, ¶ 5, gave several examples of different pages with keyword meta tags, that Farance chose to ignore. Without providing a chart identifying each of the pages on the web site, and listing the precise meta tags for each, the Court cannot assess the accuracy of Farance's analysis, especially since Farance's second generalization acknowledges the existence of a number of pages on the site that do have varying keyword meta tags.

That second generalization asserts that, on pages that received “more cataloguing” effort, it is only on the Jenzabar-related pages that the words in the keyword meta tags actually appeared in the visible text of the web page. However, Jenzabar itself has contradicted Farance’s assertion in its own Statement of Additional Fact, ¶ 62 — Jenzabar identifies a page with several different names in the keyword meta tags, and **complains** that one of the key word meta tags is Ling Chai, even though her name does not appear in the text.

Farance’s third claim is that the MJP lists three Jenzabar-related names in the keyword meta tags, which, he says, “highlighted every conceivable machination of ‘Jenzabar’” even though the web addresses jenzabar.net and jenzabar.com “are not significant elements of the text — they are mentioned only once.” But all three names admittedly stand for Jenzabar, and these three are scarcely the only “conceivable” variations on the name Jenzabar. Considering domain names alone, Jenzabar’s Statement of Additional Fact, ¶ 45, asserts that Jenzabar maintains “numerous websites” and identifies choosejenzabar.net and seojenzabar.net as examples; other domain names using Jenzabar’s name that Farance could easily have found by searching either Google or whois.net are myjenzabar.com, myjenzabar.net, jenzabarfoundation.org, and thejenzabarfoundation.org. Many other variations are “conceivable.” Farance’s embrace of Jenzabar’s penchant for exaggeration undercuts Jenzabar’s claim that his opinions are reliable.

Moreover, Farance ignored undisputed evidence in the record that tended to negate his assumptions about what Long Bow’s motivations must have been. Long Bow Undisputed Fact ¶ 26, **admitted by Jenzabar**, is that Long Bow did not know even where MJP or other pages of the Web site ranked among search engine results for the word “jenzabar,” until Jenzabar itself brought the MJP’s page rank to Long Bow’s attention in August 2006. Yet surely the fact that Long Bow never paid attention to the search rank of web pages containing the term “Jenzabar” in the keyword meta

tags tends to suggest that Long Bow never had the intention of affecting those pages' search rank. Indeed, when Farance did SEO work for his major retailer clients, he would conduct "experiments" about the impact of various changes, which would involve reviewing the impact of each change on the page's search rank. It stands to reason that anybody who cares about search rank, and who includes materials in the page to affect rank, would check on the page's search rank. The fact that Long Bow never even knew about the search rank of these pages speaks volumes about its intent. Farance's expert report does not explain why he chose to ignore this undisputed fact. Farance's opinion about Long Bow's intentions, like the rest of his affidavit, should be stricken as unreliable.

CONCLUSION

The motion to strike the affidavit of Frank Farance should be granted. Even if the affidavit is not stricken, his opinions should be given no weight in determining whether there are genuine issues about the material facts.

Respectfully submitted,
LONG BOW GROUP, INC.

By its attorneys,

Paul Alan Levy (pro hac vice)⁹
plevy@citizen.org
Michael Kirkpatrick (pro hac vice)
mkirkpatrick@citizen.org
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

T. Christopher Donnelly, BBO #129930
tcd@dcglaw.com
Adam B. Ziegler, BBO #654244
abz@dcglaw.com
Donnelly, Conroy & Gelhaar, LLP
One Beacon Street, 33rd Floor
Boston, Massachusetts 02108
(617) 720-2880

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