

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. )

**OPPOSITION TO MOTION TO REVOKE ADMISSION PRO HAC VICE**

In an effort to punish the exercise of First Amendment rights and to deprive defendant Long Bow Group of its chosen pro bono counsel, plaintiff Jenzabar has moved the Court to retract the pro hac vice admissions of undersigned counsel Paul Alan Levy and Michael Kirkpatrick. Jenzabar asserts that a blog post written by Mr. Levy that included mention of one of the documents filed in support of the motion for summary judgment, and a second post written by a different employee of Public Citizen, allegedly violated Court rules.

The motion is frivolous and should be denied. Not only does the First Amendment protect a lawyer’s right to comment on matters of public interest that are involved in litigation, but Mr. Levy’s comments were about a public record, which is a topic that is expressly exempted from the rule limiting pretrial publicity. Nor is there any evidence either that the topic that Mr. Levy discussed — a Google blog post that had already received extensive publicity — is likely to

materially prejudice the trial on the merits or that Mr. Levy had any intent to do so. Moreover, Jenzabar is simply wrong that the document is excludable as hearsay.

### **FACTS**

On October 9, 2009, Long Bow moved the Court to admit its new lead counsel pro hac vice. Messr's Levy and Kirkpatrick are employed by a public interest law firm, Public Citizen Litigation Group, and are providing their services to Long Bow pro bono. Mr. Levy is the founder of Public Citizen's Internet Free Speech project, and has specialized in those issues since 1999, with particular reference to the use of trademark claims to suppress free speech. Although this is his first pro hac vice appearance in Massachusetts, he has appeared many times in state and federal courts across the country. Levy Affidavit ¶ 2.

On October 13, 2009, after Jenzabar was served with a copy of Long Bow's motion for summary judgment and supporting papers, Public Citizen Litigation Group placed its memorandum in support of summary judgment on the Litigation Group's web site at <http://www.citizen.org/litigation/forms/cases/CaseDetails.cfm?cID=575>. Most of its briefs prepared on the issue of internet free speech, and indeed on other issues, are posted on the Public Citizen web site so that they are available as a resource for other lawyers addressing similar issues. Levy Affidavit ¶ 8; <http://www.citizen.org/litigation/forms/cases/casesbytopic.cfm>. The brief was also added to the archive of documents relating to this case on tsquare web site. <http://www.tsquare.tv/film/lawsuit-documents.html>. That archive includes the briefs filed by both sides.

Mr. Levy posted to the Consumer Law and Policy Blog a discussion of the arguments in the brief and linked to the Litigation Group web page where the brief could be read in its entirety. Mr. Levy routinely blogs about internet free speech cases handled by Public Citizen Litigation Group,

as well as about other significant cases involving Internet issues, because public education is an important component of Public Citizen's work. Public attention to significant Internet cases educates Internet users both about the risks that they can incur when they speak online as well as about the legal protections that are available for speech. At the same time, many Internet users want to know about how parties abuse litigation to suppress free speech, so that they can make their own opinions heard to change the law to restrict such abusive litigation or to chastise the abusers, such as by contacting the abusers to express their displeasure or by refraining from doing business with (or from voting for) those who seek to suppress free speech through abusive litigation. Moreover, blog posts can draw comments from members of the community of Internet users who may have useful insights about evidence or the arguments presented during the litigation. Levy Affidavit ¶¶ 8-9.

Mr. Levy's blog post expressed the opinion that Jenzabar's trademark arguments are so tenuous as to suggest that its real motive is to suppress criticism while running up the litigation expenses of a small adversary, and questioned why the leadership of a supplier for institutions of higher education sought to suppress free speech. <http://pubcit.typepad.com/clpblog/2009/10/jenzabar-joins-trademark-abusers-hall-of-shame.html>. Also on October 13, 2009, Joe Newman, an employee of Public Citizen, posted a different blog post expressing his opinions about the litigation. <http://citizenvox.org/2009/10/13/faulty-trademark-cases-pits-tianamen-square-protest-leader-against-filmmaker/>. Both posts were directed to a national audience of those interested in Internet issues and consumer rights; neither was directed at citizens or potential jurors in Suffolk County, Massachusetts. One of the issues mentioned in the blog post was the fact that Google itself has said that it does not consider keyword meta tags in search rankings. Before Mr. Levy made his post,

Google's statement had received extensive publicity online. Levy Affidavit ¶ 10.

In the immediate aftermath of this posting, Jenzabar gave no indication that it considered either posting to be in violation of Massachusetts law. Indeed, counsel for Jenzabar contacted Mr. Levy to ask whether Long Bow would be willing to consider a settlement. After Mr. Levy said that he would entertain any specific written offer, Jenzabar's counsel responded that he would forward a written settlement offer from his client. However, he has never done so. Levy Affidavit ¶¶ 3-7.

Jenzabar is aware that, before Mr. Levy entered the case, Long Bow was suffering from the fact that its limited resources were being taxed by the high litigation expenses required to defend this case, and faced a choice between accepting limits on its free speech rights and continuing to fund litigation that it could not afford. Jenzabar was also aware that, now that Long Bow's lead counsel is appearing pro bono, Long Bow no longer faces that sort of pressure to settle on unfavorable terms that Jenzabar can never win in litigation. Instead of presenting the promised settlement offer, Jenzabar has filed this motion, attempting to divest Long Bow of its chosen counsel and the benefits of pro bono representation and to suppress public criticism. However, its arguments are baseless, and the Court should recognize the motion for what it is: an impermissible tactical maneuver of the type that the Massachusetts courts deplore.

### **ARGUMENT**

As the Appeals Court of Massachusetts recently stated in *Steinert v. Steinert*, 73 Mass. App. Ct. 287, 288 (2008),

A party generally enjoys the right to the counsel of his or her choice, see *Mailer v. Mailer*, 390 Mass. 371, 373, 455 N.E.2d 1211 (1983), and "courts 'should not lightly interrupt the relationship between a lawyer and [a] client.'" *Slade v. Ormsby*, 69 Mass.App.Ct. 542, 545, 872 N.E.2d 223 (2007), quoting from *G.D. Mathews & Sons Corp. v. MSN Corp.*, 54 Mass.App.Ct. 18, 20, 763 N.E.2d 93 (2002). The burden

thus rests on the party seeking disqualification to establish the need to interfere with the relationship. Where, as here, it is opposing counsel who seeks disqualification, we must “be alert that the Canons of Ethics are not brandished for tactical advantage.” *Serody v. Serody*, 19 Mass.App.Ct. 411, 414, 474 N.E.2d 1171 (1985). See *Byrnes v. Jamitkowski*, 29 Mass.App.Ct. 107, 109, 557 N.E.2d 79 (1990) (recognizing “repeated use of a disqualification motion as a litigation tactic”).

“Courts should hesitate to order disqualification ‘except when absolutely necessary.’” *G.D. Mathews*, 54 Mass. App. Ct. at 21, quoting *Adoption of Erica*, 426 Mass. 55, 58 (1997). No showing of necessity has been made here, and indeed the timing of the motion suggests that the motion to revoke the pro hac vice admission has been put forward as a litigation tactic.

Jenzabar’s motion relies principally on Rule 3.6 of the Rules of Professional Conduct, but Rule 3.6(b)(2) provides, “Notwithstanding paragraph (a), a lawyer may state . . . (2) the information contained in a public record.” The blog post in question simply related information contained in briefs and affidavits that were prepared for filing in the public record, and which are, in fact, now filed in court. The public has a First Amendment and common law right of access to inspect and copy judicial records and documents, including the parties’ briefs. *Nixon v. Warner Communications*, 435 U.S. 589 (1978); *Federal Trade Commission v. Standard Financial Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir.1987); *Republican Co. v. Appeals Court*, 442 Mass. 218 (Mass. 2004). Accordingly, reference to materials in publicly accessible court records does not violate the rule given the “public record” exception. *Attorney Grievance Com’n of Maryland v. Gansler*, 377 Md. 656, 690-691, 835 A.2d 548, 568 (Md. 2003).

Moreover, the First Amendment protects the rights of lawyers, like other citizens, to comment on litigation, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1066 (1991); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249-253 (7th Cir. 1975), so long as the speech does not

contravene a constitutional interest of equal or greater weight — such as the constitutional right to a fair trial. Accordingly, court rules must be narrowly construed to be sure that they go no further than required to protect a fair trial: “Rules which deny a lawyer his First Amendment rights in the interest of a fair trial must be neither vague nor overbroad.” *Chicago Council of Lawyers, supra*, 522 F.2d at 249. Comment [1] to Rule 3.6 recognizes the “vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public . . . has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”

Consequently, Rule 3.6 is limited to disclosures that “the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter,” and as plaintiff acknowledges, the “material prejudice” that must be “substantially likely” is “the risk of prejudicing an impartial trial.” Motion to Disqualify at 2. Thus, although Jenzabar repeatedly complains about statements made by Long Bow and its counsel that will “prejudice” Jenzabar, in the sense of making potential customers think less of it,<sup>1</sup> for the motion to succeed under Rule 3.6, Jenzabar must show that the statements are likely to adversely affect a trial. Jenzabar has not made any such showing.

Jenzabar makes an effort to show that the blog post relies on information that cannot be considered in connection with the pending motion for summary judgment; Long Bow responds to that argument in our opposition to the motion to strike, and that argument is incorporated by

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<sup>1</sup> Motion to Disqualify at 1, 3 ¶ 4, 4 ¶ 6 and n.3.

reference here. Among other things, Long Bow shows in those papers that Jenzabar's motion to strike relies on the wholly false assumption that a party moving for summary judgment on an issue on which the opponent of summary judgment has the burden of proof may only rely on submissions that are, themselves, admissible at trial, and in any event that Google has now submitted an affidavit specifying that the post in question is its official statement. Because the movant can rely on other materials in arguing for summary judgment, it follows that an attorney who desires to exercise his First Amendment right to discuss the briefs publicly may, in turn, include in that discussion references to materials even if they are not admissible.

Moreover, plaintiff makes no effort to show either that counsel "knew or should have known" that the evidence was improperly attached to the motion for summary judgment, or that the disclosure of this information in a blog post "creates a substantial risk of prejudicing an impartial trial." A blog post about whether Google does or does not incorporate keyword meta tags into its ranking algorithm is scarcely the sort of datum that is likely to remain in the minds of any jurors who are selected to decide this case — if, indeed, plaintiff's trademark claims survive summary judgment. Indeed, because Google's own public announcement of this fact was widely publicized before Mr. Levy mentioned it, Jenzabar cannot show that Mr. Levy's comment will have increased potential jurors' awareness of this fact. This information is scarcely comparable to information about a defendant in a widely publicized criminal proceeding that has been featured in the local broadcast and print media, which forms the prototypical case at which Rule 3.6 is directed.

In sum, plaintiff has not made the needed showing of a substantial likelihood that comments made on the Consumer Law and Policy blog will so pollute the potential jury pool that there is a compelling interest in overriding the First Amendment rights of Long Bow Group and its counsel

to alert the public to Jenzabar's abuse of the trademark laws to run up Long Bow's litigation expenses. Accordingly, Long Bow and its counsel intend to continue to comment on the litigation, just as Jenzabar has done by furnishing a statement about the case, drafted by Jenzabar's counsel, for publication on the Long Bow web site,<sup>2</sup> and by retaining a public relations consultant "to communicate with the media about Jenzabar's litigation matters." Gray Declaration ¶ 5, Ziegler Affidavit, Exhibit 1. Similarly, Jenzabar's CEO, plaintiff Maginn, has had no compunction about posting blistering attacks on Long Bow's position in this litigation in comments on newspaper blogs. *See* Ziegler Affidavit, Exhibit 2. In this regard, if plaintiff believes that it can make the case for the issuance of a gag order against further public discussion of this case, it should file such a motion and the parties can debate the need for such restrictions in that context.<sup>3</sup>

## CONCLUSION

The motion to revoke the pro hac vice admission of Long Bow's pro bono counsel should be denied.<sup>4</sup>

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<sup>2</sup>The statement is published at <http://www.tsquare.tv/film/appeal-online.html>. During her deposition, Chai admitted that the statement was drafted by her counsel. Dep. at 147. However, lawyers may not evade restrictions on pretrial publicity by preparing statements for publication by others that they, themselves, are forbidden to make.

<sup>3</sup>Jenzabar makes a conclusory argument that the blog post "conceivably" makes Levy a witness in the action. Motion to Disqualify at 4 ¶ 7. Inasmuch as the blog post simply repeats statements made in the briefs, this makeweight argument should be rejected out of hand.

<sup>4</sup>Although the motion for disqualification is frivolous, and the circumstances suggest that the motion was filed as a litigation tactic, defendant does not seek sanctions for its filing. However, once the litigation is over, defendant will seek an award of attorney fees under the Lanham Act, and litigation tactics that impose "economic coercion" on a smaller company by needlessly increasing the cost of defending is a factor that can support an award of attorney fees. *Noxell Corp. v. Firehouse No. 1 Barbeque Rest.*, 771 F.2d 521, 526-527 (D.C. Cir. 1985); *Ale House Mgmt. v. Raleigh Ale House*, 205 F.3d 137, 144 (4th Cir. 2000).

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