

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 STRIKE

According to Jenzabar’s complaint, the only basis for contending that Long Bow infringed or diluted the Jenzabar trademark is that the keyword meta tags on four separate pages of Long Bow’s web site about its film “The Gate of Heavenly Peace” — each of them a web page that discusses Ling Chai’s subsequent career as the founder of Jenzabar — contains the term “Jenzabar” in its keyword meta tags. Jenzabar’s factual theory is that the supposed misuse of its mark as a keyword meta tag causes one of these pages, found at <http://tsquare.tv/film/jenzabar.html>, to appear near the top of Google search results for Internet users who have performed a search for the term “jenzabar.” Jenzabar’s legal theory is that the appearance of this page near the top of the search results creates a likelihood that Internet users will experience “confusion” about whether Jenzabar is the sponsor of the <http://tsquare.tv/film/jenzabar.html> web page, or, more precisely, that they will experience “initial interest confusion.”

In support of Long Bow’s motion for summary judgment, Long Bow included an affidavit

from Nora Chang that authenticated a web page that she had downloaded from the Google web site, <http://googlewebmastercentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html>, and recited statements that she was able to hear on the video appearing on that page; the video repeated the following two statements that appear in print on the same page:

Q: Does Google ever use the “keywords” meta tag in its web search ranking?

A: In a word, no. . . . Our web search (the well-known search at Google.com that hundreds of millions of people use each day) disregards keyword metatags completely. They simply don’t have any effect in our search ranking at present.

and

Q: Why doesn’t Google use the keywords meta tag?

A: . . . Because the keywords meta tag was so often abused, many years ago Google began disregarding the keywords meta tag.

Jenzabar moves to strike the paragraph of the Chang Affidavit that authenticates a printed copy of a page that she found on the Google web site, as well as the supporting affidavit, on the ground that they are impermissible hearsay.

The motion should be denied, for three reasons that are more fully discussed below. First, the affidavit in question merely authenticated a publicly available statement by Google, of which the Court could have taken judicial notice. Second, a party moving for summary judgment on an issue on which the summary judgment opponent has the burden of proof is permitted to rely on materials that are not admissible at trial to show the absence of genuine issue of material fact, and the blog post relates to an issue (whether the keyword meta tags “caused” the alleged likelihood of confusion) on which Jenzabar plainly has the burden of proof. And third, in any event, there is no question, in light of evidence described below, that Google has affirmed that the statement in question is an official statement by Google.

First, Ms. Chang, like any Internet user, is perfectly capable of authenticating a written copy of a document that she found online on a certain date, just as the Court itself could take judicial notice of the fact that a given page appeared online on a certain date. Indeed, courts routinely take judicial notice of materials that appear online. *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005); *Denius v. Dunlap*, 330 F.3d 919, 926-927 (7th Cir. 2003); *Spottiswoode v. Son*, 593 F. Supp.2d 347, 350 (D. Mass. 2009).

Second, Jenzabar's motion to strike ignores the reason why the Google statement was offered in this case, and why the Court should consider that Google statement despite the fact that the statement could not be offered to prove that Google does not, in fact, take keyword meta tags into account in determining search ranking.

In that regard, Long Bow does not have any burden of proving that keyword meta tags play a role in search rankings. Because Jenzabar contends that the likelihood of confusion (or likelihood of dilution) on which its trademark claims rest occurs "as a result" of use the marks in the keyword meta tags, it is Jenzabar that has the burden of proof on the issue of causation, *Narducci v. Contributory Retirement Appeal Bd.*, 68 Mass. App. Ct. 127, 129 (2007), and causation, like any other element of a claim, must be established by **evidence** if Jenzabar is to withstand summary judgment. *Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. 221, 226 (Mass. App. Ct. 1999); *Best Western Intern., Inc. v. Furber*, 2008 WL 4182827, at *13 (D. Ariz. Sept. 5, 2008). To obtain summary judgment, Long Bow is not required to present proof that Google does not take keyword meta tags in to account. It is sufficient for Long Bow to show that Jenzabar has not offered sufficient admissible evidence to create a genuine issue of fact on the issue of causation, by showing that Jenzabar could carry its burden of proof on causation at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,

325-327 (1986). And because Long Bow does not have the burden of proof on this issue, the materials that it identifies to show the absence of a genuine issue of fact need not be, themselves, admissible at trial. *Id.* at 723. *Accord, Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714-716 (Mass. 1991). Indeed, “if the factual context renders [Jenzabar’s] claim implausible . . . [Jenzabar] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary.” *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Regardless of whether it is admissible at trial, Google’s blog post — stating categorically that it does not use keyword meta tags in formulating search rankings — provides the factual context that requires Jenzabar to make a particularly persuasive showing on causation before it should be allowed to impose on Long Bow the burden of going to trial on its claim that the use of the Jenzabar name in the keyword meta tags for pages about Jenzabar causes a likelihood of confusion. Jenzabar has provided **no admissible evidence on that issue**. Indeed, Jenzabar admitted at its Rule 30(b)(6) deposition that it did not know what impact the keyword meta tags had on the placement of the main Jenzabar-related page on the tsquare.net web site — “What impact? I don’t know. It’s a great mystery.” Maginn Dep. at 32-33. Later in that same deposition, Jenzabar’s CEO expressed the hope that Google would reveal its search algorithm so that the public will know for sure the role played by meta tags. *Id.* at 62. Jenzabar’s counsel expressed a similar hope for a specific statement from Google: at the hearing on the July 30 hearing, Tr. at 27, he said, “I think Google will tell us that’s why theirs comes in this way, and it goes to our issue that it’s the metatags. Or they’ll tell us that it has nothing to do with it.” Tr. at 27. The best that Jenzabar has been able to provide are two pages from Google’s web site — both attached to Jenzabar’s motion to strike — that make no mention of considering keyword meta tags, while stating that Google has a superior search engine

because it avoids reliance on factors, such as meta tags, that are easily manipulated by webmasters. In light of the fact that Google itself has stated that keyword meta tags have no such impact, Jenzabar's inability to produce any evidence of impact is an important reason to grant summary judgment dismissing its trademark claims.¹

As the Supreme Court noted in *Celotex*, summary judgment procedure provides a needed protection against the unwarranted consumption of resources that would be imposed on Long Bow — and on the Court — by allowing Jenzabar to take to trial a claim that rests on factual assumptions (here, about causation) on which it has no proof. 477 U.S. at 327. *Accord, Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (Mass. 1991) (summary judgment should be granted when “the party opposing the motion has no reasonable expectation of proving an essential element of that party’s case”). Firm application of summary judgment principles is especially needed to protect First Amendment principles where the plaintiff has sued for defamation, *Mulgrew v. City of Taunton*, 410 Mass. 631, 632 (Mass. 1991), because the “costs of litigation may induce an unnecessary and undesirable self-censorship.” *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987). The same need for summary judgment applies where, as here, the sole remaining claim is a trademark claim that objects to the prominence that an alleged trademark violation gives to the substance of allegedly

¹In opposition to summary judgment, Jenzabar has offered the affidavit of a so-called expert who opines, based on his review of those two pages, but without any mention of Google's own statement about meta tags, that Google takes keyword meta tags into account. Despite the impressive credentials on other subjects set forth in the expert's resume, such as his scores on mathematics examinations while in high school, Long Bow will be filing a *Daubert/Lanigan* motion to exclude that affidavit from consideration in this case. Curiously, the resume of the “expert” does not claim any experience or expertise with respect to search engine optimization. Moreover, the expert's own web site does not contain any keyword meta tags (and apparently has never contained keyword meta tags) to make his site rank higher on search engines, and like his resume his site does not mention his supposed expertise or experience in this area.

defamatory content.² Here, as in a defamation case, “[a]llowing a trial to take place in a meritless case ‘would put an unjustified and serious damper on freedom of expression.’” *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985). To avoid that damper on freedom of expression, Long Bow has properly called attention to Google’s own statement negating the impact of keyword meta tags on search rankings, pointing up the absence of any plausible or admissible evidence of causation.

In that regard, Jenzabar concedes that the evidence can be excluded as hearsay only when offered to prove the truth of the matter asserted — here, that Google’s search ranking does not take keyword meta tags into account. Motion to Strike at 2, citing *G.E.B. v S.R.W.*, 422 Mass. 158, 168 (1996). However, the Statement of Fact that the evidence supports, ¶ 22, is **not** that Google in fact does not use keyword meta tags to determine search rankings, but only that Google has “stated” that it does not consider such meta tags, and has not considered them for many years. The reason why Google’s statement is relevant is that it sets the framework for consideration of whether Jenzabar has met its burden of proving that Long Bow’s alleged misuse of its mark in the keyword meta tags for pages about Jenzabar had some actual impact on the exposure of Internet users to a search result that could have created a likelihood of confusion about the source or sponsorship of Long Bow’s web site.

Third, Jenzabar itself has asked the Court to accept its proffer of the two web pages attached to the Abbott affidavit because, it contends, they set forth Google’s “official statement in this matter,” Motion to Strike, at 6 (section caption), or its “official position on the matter.” *Id.* at 6

²Long Bow’s Memorandum Supporting Summary Judgment, at 9, took note of the exceptionally expensive nature of trademark litigation.

(text). This “official position” provided by the Abbott affidavit’s exhibits, however, does not say **anything** positive about keyword meta tags. It is the web page attached to the Chang affidavit that sets forth Google’s “official position” on that issue. That web page, on Google’s own “Blogspot” blogging platform, is entitled “Official Google Webmaster Central Blog,” and the subtitle that Google has given this blog is, “Official News on crawling and indexing sites for the Google index.” See Chang Affidavit, ¶ 10. Moreover, the “Official Google Webmaster Central Blog” can be found by following a link from one of the very pages that Jenzabar deems official. The link to the “Webmaster Guidelines” in the penultimate paragraph of Abbott Affidavit Exhibit B, leads to the Guidelines page at <http://www.google.com/support/webmasters/bin/answer.py?answer=35769> (Second Chang Affidavit ¶ 2). One of the links from the left-hand side of that page takes users to Google’s “Webmaster Central blog” at <http://googlewebmastercentral.blogspot.com/>. *Id.* ¶ 3. The blog post that Jenzabar seeks to strike here appears on that blog. *Id.* ¶ 4. Thus, the blog is every bit as official as the documents that Jenzabar had offered to the Court as an official statement of Google’s position. The difference is that the document offered by Long Bow states a clear position about the use of keyword meta tags that supports Long Bow’s position, while the documents offered by Jenzabar largely speak to other issues (and to the extent they involve meta tags as all, they do not help Jenzabar).

Moreover, although Jenzabar’s Motion to Strike sneers at Matt Cutts, the signer of “Webmaster Central Blog” page on keyword meta tags, as “an individual [Chang] alleges to be a Google representative,” Motion at 2, Mr. Cutts has appeared as Google’s representative in other litigation, *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 684 (N.D. Cal. 2006). Several different sources

identify him as a senior Google representative on search engine issues.³ Thus, even on its own terms, Exhibit 10 to the First Chang Affidavit merits consideration as Google's official statement on the relevance of keyword meta tags to Google search results.

Indeed, perhaps the best reason to believe that Mr. Cutts' statement accurately sets forth the lack of impact that keyword meta tags have on search rankings is that, after Long Bow moved for summary judgment on this issue, Jenzabar proposed amendments to its complaint that drastically revise the legal theories advanced for its trademark claims against Long Bow. Instead of relying on the use of keyword meta tags as the entire basis for its trademark claims, Jenzabar now relies primarily on the fact that the **title** of the main Jenzabar-related page is "Jenzabar."⁴

Finally, the Court need not decide whether the original submission represents Google's official views, because in response to Jenzabar's motion, we have obtained the attached affidavit

³ *E.g.*, "Matt has been a Google software engineer since 2000 and is the head of Google's Webspam team," Google Ad Words: Ad Traffic Quality Resource Center, <http://www.google.com/adwords/adtrafficquality/tech.html>; "Matt Cutts is the head of the webspam team at Google where he specializes in search engine optimization (SEO) issues." PubCon 2009 Speaker Biographies, http://www.pubcon.com/bios/matt_cutts.htm; "If you're unfamiliar with the different parts of a Google search result, you might want to check out the anatomy of a search result video by Google engineer Matt Cutts." Google's Search Engine Optimization Starter Guide, Version 1.1, published 13 November 2008, <http://www.google.com/webmasters/docs/search-engine-optimization-starter-guide.pdf>. The well-known Techdirt blog asserts flatly that Cutts "regularly speaks for Google on these sorts of issues," <http://www.techdirt.com/articles/20091106/0339376831.shtml>, and IT newsletter The Register reported Google's original statement on keyword meta tags as coming from "[t]he company's search wonk Matt Cutts." http://www.theregister.co.uk/2009/09/22/google_keywords_meta_tag/. Eric Goldman, the leading scholar on legal issues relating to search engines, put it this way: "Google's star techie Matt Cutts says in plain language that Google's core search algorithm ignores keyword metatags." http://blog.ericgoldman.org/archives/2009/09/google_confirms.htm.

⁴ Long Bow will be opposing that motion both because it is legally futile and because it seeks to inject a series of completely new issues, on which there has been no opportunity for discovery, thus severely prejudicing Long Bow.

from Suzanne Abbott, which specifically verifies that the Matt Cutts web post in question represents Google's own statement. In fact, she describes the blog whose page Ms. Chang attached to her affidavit (and that Ms. Abbott has also provided as an exhibit) as part of Google's "official news on crawling and indexing sites for the Google index." This plainly establishes Google's official position on the issue of keyword meta tags — Google does not use keyword meta tags in determining the rankings of its search results — and established beyond peradventure that Jenzabar cannot show causation.

CONCLUSION

The motion to strike a portion of the affidavit of Nora Chang, and one of the exhibits to that affidavit, should be denied.

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