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I. Introduction and Summary of Proceedings to Date

In this case, Jenzabar, a large software company, and its two principals, Ling Chai and Robert Maginn, sued a documentary film company that made a movie about the Tiananmen Square protests and the resulting massacre. As they made clear throughout this litigation, *e.g.*, Hinton Dep. 236-240, Chai and Maginn were unhappy about the documentary's inclusion of an interview with Chai, then one of the leaders of the students protesting at Tiananmen, during which she expressed hope that the Chinese government would use military force against the protesting students, because "[o]nly when the Square is awash with blood will the people of China open their eyes" to the true nature of the Communist regime. http://tsquare.tv/film/transcript_may27.php.

Not surprisingly, having matured, and with benefit of the hindsight gained when her wish came true, Chai regrets her words as a young radical, claiming that her words were mistranslated or taken out of context. http://en.wikipedia.org/wiki/Chai_Ling#Documentary_dispute. But although their complaint refers again and again to Long Bow's criticism of Chai, ¶¶ 1, 16-18, 21, 23, plaintiffs did not bring a defamation claim over Long Bow's translation of her remarks, either in the documentary itself or as reproduced on a web site, www.tsquare.tv, that was created in the late 1990's to further educate the public about the subject of the movie and about its principal characters, including Ling Chai. Instead, plaintiffs brought defamation claims about the web site's republication of material from the Boston Globe's own web site, reporting financial controversies involving Jenzabar, a company that Chai formed with Maginn, whom she married after she emigrated to the United States. *Id.* ¶¶ 27, 32-35

In addition, plaintiff Jenzabar brought trademark claims. It alleged that Long Bow infringed and diluted the trademark in the company name when, in the course of creating a web page about Jenzabar in 1999, Long Bow used the Jenzabar name (including its original name, Jenzabar.com)

in the keyword meta tags of that page. The meta tags, Jenzabar alleged, were unfairly increasing the impact of Long Bow's defamatory criticism on its reputation and hence its business, *Id.* ¶¶ 1, 25-26, 29, because the meta tags were supposedly responsible for the inclusion of the page about Jenzabar in the first few Google search results. *Id.* ¶¶ 24-25. Consequently, Jenzabar complained, Jenzabar's potential customers would find the allegedly false criticism when doing their due diligence before adopting Jenzabar's enterprise software.

The defamation claims were dismissed on the face of the complaint, on the ground that the statements about Jenzabar were nonactionable opinion. But in opposition to Long Bow's motion to dismiss the trademark claims, Jenzabar argued principally that it would be "premature" to reject the trademark claims at the pleading stage. Because Jenzabar's complaint used labels, conclusions, and allegations that the Court felt rule-bound to accept, the Court declined to dismiss the trademark claims but noted the likelihood that Jenzabar's claims would fail.

The case lay fallow for roughly a year after the motion to dismiss was granted as to the defamation claims and denied as to the trademark claims. Then, in the spring of 2009, Jenzabar replaced its original counsel and the case sprang to life, with extensive discovery, including depositions in which Jenzabar interrogated Long Bow's principals about their political views, family histories, personal travel, its making of documentary films, the accuracy of statements on the web site, and what Long Bow does when inaccuracies on the web site are called to its attention. None of these issues had anything whatsoever to do with the case, and in the end Long Bow had to get a protective order against such inquiries. Donnelly Affidavit ¶ 8. These included such outrageous questions about whether Hinton, who grew up in China, or others in her family, had belonged to the Red Guard or tried to join it, Hinton Dep. 248-249, or whether some of her teachers, or the children

with whom she grew up, had parents in the Communist leadership or had become Communist leaders. *Id.* 242-244. *See generally* Donnelly Affidavit, Exhibit B. None of these questions had anything whatsoever to do with the case, and in the end Long Bow had to get a protective order against such inquiries. Jenzabar's representatives persistently complained that Carma Hinton would not meet personally with Chai to discuss Chai's belief that Hinton is responsible for what Chai regards as Long Bow's lies about her, Hinton Dep. 127-136, 142-144, Gordon Dep. 85-87, 144-151, Chai Dep. 122-123, a subject that is related to Jenzabar's propaganda war against Long Bow but had no bearing on its trademark claims. It is no coincidence that the nastiest of the questions were directed to Hinton, because Chai made clear during her deposition that she holds Hinton personally responsible for the statements about Chai in the film and on the web site that she considers lies, inasmuch as it is Hinton who knows the most about China and about Chai's role at Tiananmen Square. Chai Dep. 121-123. Similarly, Jenzabar used its depositions to inquire at length about statements on the site that they deemed inaccurate, and about Long Bow's dealings with the press. *E.g.*, Hinton Deposition 66-93, 119-126, 195-200, 216-220, 224-227, 231-233. Jenzabar thus abused its access to the discovery power to seek information that is irrelevant to a trademark claim, but quite useful in propagandizing about Long Bow.

The depositions were re-set under instructions that barred repetition of the political inquiries, while also barring lawyers from raising relevance objections; only objections on clear issues of privilege were to be made. Transcript of July 30 Hearing, 7-8, 15, 21-22, 29-30. Jenzabar nevertheless again asked irrelevant, politically oriented questions. Chang Dep. 204-208, 237-238-243, 246-251, 252-253.

This action was a classic SLAPP suit – a suit that is brought not in any realistic expectation

of victory, but in the hope that the very expense of litigation might wear down the defendant and force it to negotiate its way out by promising to refrain from future criticism. That strategy came close to succeeding in this case, Gordon Dep. 152-154, until, after paying well over \$200,000 in legal fees, Long Bow was lucky to find a pro bono lawyer who obtained a summary judgment ruling in Long Bow's favor.

Long Bow presented several different grounds for summary judgment, **each of which would have been sufficient to warrant judgment as a matter of law:**

1. The meta tags were factually irrelevant, because Google, the overwhelmingly dominant search provider, has told the world that its search algorithm has ignored key word meta tag for many years.

2. The speech about Jenzabar on the pages bearing the meta tags was non-commercial criticism of Jenzabar; hence the use of the meta tags was protected for two separate reasons:

(a) The First Amendment protects truthful non-commercial speech, and the meta tags are truthful – they denote the pages as being about Jenzabar; and

(b) The trademark laws simply do not apply to non-commercial speech.

3. Jenzabar's claim rests on a theory — initial interest confusion (that is, people may click on the link leading to the page about Jenzabar not understanding that the page is not put up by Jenzabar; but they will know that immediately when they reach the page) — that is not valid here, even if it is ever valid.

4. Construed narrowly in light of the First Amendment, when a trademark is used in the title of an expressive work, the trademark holder must show that mark is not relevant to the content of the work.

5. There was no proof of likelihood of confusion, applying the standard likelihood of confusion factors.

6. The use of Jenzabar's name is nominative fair use.

7. Even back when they had causal impact, meta tags were a legally permissible and indeed entirely proper way to call attention to the content of web

pages, just as the title of a book or the subject card in a library card catalogue may do.

8. The claims, having been filed eight years after the meta tags were first used, were untimely.

Long Bow offered two more reasons for summary judgment against the dilution claims (that did not apply to infringement claims):

9. Dilution claims may only be brought against “famous” marks, and a 1996 amendment to the Lanham Act provided that marks are famous only if widely known to “the general consuming public of the United States,” but Jenzabar claimed only that its name was widely known only in the higher education community.

10. Using a trademark to denote expression about the trademark holder is not dilution — it reinforces association of the mark with its owner, and hence is not blurring; and use of a trademark to identify the subject of criticism is not tarnishment.

Jenzabar responded to the motion for summary judgment by trying to amend its complaint in ways that it thought could avoid several of these arguments. But even if the belated amendments had been allowed, it would have done Jenzabar no good. Jenzabar tried to avoid the non-commercial speech aspects of the argument by alleging that Long Bow’s web site was trying to promote sales of its documentary, and that Long Bow had cynically created a web page about Jenzabar to take advantage of Jenzabar’s strong trademark to obtain attention for its web site. Proposed Amended Complaint ¶5, Caption before ¶ 45; Mem. in Opp. to SJ 1, 3-4, 10. These arguments failed, however, because the mere fact that a work contains advertising does not make it commercial speech — the Boston Globe carries ads and is sold to customers, but that does not make its articles about the Celtics commercial speech. The argument made no sense factually, either, because on the undisputed facts, in 1999 when the page was created (and when the meta tags and indeed the title tag were put on the page, Chang Dep. 194), Jenzabar was just another start-up. Jenzabar tried to address Google’s non-use of keyword meta tags by adding allegations about the **title tag** of the one

page about Jenzabar that appears high in Google's search results, and then complaining that the content of the search result did not clearly indicate that Long Bow was the author of the web page, Amended Complaint ¶¶ 56, 57, 63, 66; Opp. to SJ 5-6, 21, 22; it also produced an expert affidavit asserting that the title tag and meta tags combined contributed to the web page's high Google search rank. Farance Aff. ¶ 26. But these arguments made no difference to the outcome both because the expert never opined that the keyword meta tags alone had any impact, and because allegations about impact of the title tag failed to overcome the many other hurdles to a successful trademark claim. Finally, Jenzabar tried to avoid the flaws in its trademark dilution claim by dropping the Lanham Act dilution claim and alleging a state-law dilution claim. But that change did not succeed because even if state-law famousness has a broader scope than federal-law famousness, the many other grounds for rejecting dilution claims remained, such as that dilution law cannot apply to non-commercial speech, that there was still no evidence of dilution, and that fair use is a defense to dilution as it is to infringement.

The Court granted summary judgment on grounds 5, 6, and 10 (footnote 1 of the Court's opinion indicates that ground 1 may also have been accepted); it therefore did not need to reach the many other grounds for summary judgment. Nor did the Court have to address whether the motion for leave to amend should be granted, because even as amended plaintiff's suit was subject to summary judgment.

Having failed to intimidate Long Bow, having failed to wear it down and force it to beg for mercy, and having finally lost the case on summary judgment, Jenzabar must now pay the piper. The Lanham Act provides for awards of attorney fees in favor of the prevailing party in "exceptional" cases, whether that party be the defendant or the plaintiff. As we show in this brief, Jenzabar's

utterly meritless and highly oppressive suit against Long Bow easily meets the standards for awards of attorney fees under the Lanham Act, and Long Bow's claim for \$405,825.73 in attorney fees and expenses should be granted.

II. This "Exceptional" Case Warrants an Award of Attorney Fees.

In "exceptional cases" brought under the Lanham Act, a court "may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). Fees are equally awardable in favor of prevailing plaintiffs and prevailing defendants, and the Supreme Court of the United States has instructed that the standards for awarding fees under the intellectual property laws should not discriminate between plaintiffs and defendants. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The IP statutes are thus unlike the civil rights laws, which generally favor attorney fees for the plaintiff.

When the prevailing party is the plaintiff, an "exceptional" case is one involving "malicious, fraudulent, deliberate, or willful infringement." *Schroeder v. Lotito*, 747 F.2d 801, 802 (1st Cir. 1984) Although the First Circuit has not yet fixed a standard for awarding fees for prevailing defendants, it has held that a prevailing plaintiff can be awarded fees regardless of whether the defendant's infringement was in bad faith. *Tamko Roofing Products v. Ideal Roofing Co.*, 282 F.3d 23, 32 (1st Cir. 2002). Thus, in accord with the *Fogerty* rule of non-discrimination, and in agreement with most of the federal courts of appeals, the District of Massachusetts has held that fees can be awarded without a finding of either bad faith or frivolousness on the part of the plaintiff. *Yankee Candle Co., Inc. v. Bridgewater Candle Co.*, 140 F. Supp. 2d 111, 119-22 (D. Mass. 2001), *aff'd on other grounds*, 259 F.3d 25 (1st Cir. 2001). In reaching this conclusion, the district court considered the First Circuit's analysis in *Volkswagenwerk Aktiengesellschaft v. Wheeler*, 814 F.2d 812, 821 (1st Cir. 1987), which involved fees for a prevailing plaintiff, and that opinion's reliance

on the legislative history of the Lanham Act's fees provision, S. Rep. No. 1400, 93rd Cong., 2d Sess. 5, reprinted in 1974 U.S.Code Cong. & Admin. News 7132-33. The court concluded,

The most persuasive cases on the standard for attorneys' fees are consistent with the Senate Report cited in *Volkswagenwerk*: that courts should consider the exceptional nature of the case under the totality of the circumstances, applying traditional principles of equity. See *Securacomm Consulting, Inc. v. Securacomm, Inc.*, 224 F.3d 273, 281 (3d Cir.2000); [*Nat. Ass'n of Prof'l Baseball Leagues v. Very Minor Leagues*, 223 F.3d [1143], 1146-49 [(10th Cir. 2000)]; *Noxell [Corp. v. Firehouse No. 1 Bar-B-Que Rest.]*, 771 F.2d [521], 526-527 [(D.C. Cir.1985)]. By using the phrase "equitable considerations" in the Senate Report to describe what is "exceptional," "Congress intended to invoke the tradition of equity, a hallmark of which is the ability to assess the totality of the circumstances in each case." *Securacomm*, 224 F.3d at 281. As the Third Circuit has stated, "whether a case qualifies as exceptional ultimately turns on consideration of the equities in full." *Id.* The court may examine the plaintiff's "litigating conduct," *id.* at 280; whether plaintiff's behavior included "economic coercion," *Noxell*, 771 F.2d at 526; plaintiff's use of "groundless argument[s]," *id.* at 527; failure to cite controlling law, *id.*, and the generally "oppressive" nature of the case, *Door Systems [v. Pro-Line Door Systems]*, 126 F.3d [1028], 1032 [(7th Cir. 1997)]. A showing of bad faith would satisfy this standard, but is not necessary. See [*Stephen W.] Boney [v. Boney Services]*, 127 F.3d [821], 827 [(9th Cir. 1997)].

Yankee Candle, 140 F. Supp.2d at 121.

This case easily meets the standard of being exceptional. First, this case never had a realistic chance of surviving summary judgment. Justice Oliver Wendell Holmes said nearly 90 years ago that trademark law does not prevent the use of a word "to tell the truth. It is not taboo." *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924). In Justice Holmes' terms, the meta tags simply "tell the truth" about the contents of the web pages that are about Jenzabar. Jenzabar barely survived the motion to dismiss, with Judge Holtz allowing the case to go forward based on the successful pleading of conclusory allegations of likelihood of confusion, while at the same time she expressed grave doubt that infringement or dilution would be proved. By the time the case reached the summary judgment stage, there were several different independent grounds for rejecting Jenzabar's

trademark claims, outlined at the outset of this memorandum. Indeed, Jenzabar implicitly admitted the baselessness of its original claims when, in its motion for leave to amend its complaint, it dropped the federal dilution claim, switched its emphasis away from keyword meta tags to stress the title tag and the allegedly confusing appearance of the Google search result for the one page that **had** Jenzabar's name in the title tag, and tried to cast Long Bow's motives as commercial ones. Even those changes did not survive summary judgment.

Second, just as the case was never about consumer confusion about whether Jenzabar was the source of Long Bow's web pages, it was **always** about Jenzabar's concern that its customers and potential customers would see that page and wonder about whether the criticisms carried there were true.¹ This concern cropped up repeatedly in Jenzabar's papers, even after it tried to amend its complaint to argue that Long Bow was preying on Jenzabar's fame to get more buyers for its film. Proposed Amended Complaint ¶¶ 66-77; Statement of Additional Material Facts ¶¶ 57-59; Maginn Aff. ¶¶ 12-13, 16; Maginn Dep. 261-267. Similarly, Jenzabar sought to use this litigation to obtain a gag order against public criticism, which Judge Brassard firmly rejected. Transcript of July 30 Hearing, at 35-39 ("I am not going to regulate what people can do on the Internet"). Despite this ruling, Jenzabar tried to cut off Long Bow's access to pro bono legal counsel by seeking their disqualification because one of the two attorneys had publicly criticized Jenzabar's suit as frivolous. See Motion for Reconsideration of Admission Pro Hac Vice. But concern about the impact about criticism on reputation and business income is not trademark injury. *Universal Commc'n Sys. v.*

¹Nor was there any reason to worry that online searchers could not locate Jenzabar online because of the use of keyword meta tags or the title tag. As Judge Cratsley's summary judgment ruling noted, at 3 n.2, the first two search hits on a search for "Jenzabar" were Jenzabar's own web site, and most of the rest were endorsed or sponsored by Jenzabar. Jenzabar's only goal in this case was to suppress public access to criticism.

Lycos, Inc., 478 F.3d 413, 423 (1st Cir. 2007). Jenzabar's invocation of trademark theories to suppress the prominence of a critical web page in the list of Google's search results, simply because Jenzabar did not like the criticism, was an abuse of process. The most recent appellate analysis of the standard for fees under the Lanham Act, which attempts to reconcile the varying approaches of different federal circuits, treats "the use of the litigation process for an improper purpose" as an especially strong basis for treating the case as exceptional, and hence meriting an award of fees. *Nightingale Home Healthcare v. Anodyne Therapy*, 626 F.3d 958, 963 (7th Cir. 2010).

Third, gross disparity of resources between the parties is another factor warranting an award of attorney fees in this case. Jenzabar is a large company that claims to be the technology partner of choice "on more than 700 campuses worldwide" <http://www.jenzabar.com/aboutus.aspx?id=69>; it has three hundred employees, and offices across the United States and even abroad. <http://www.jenzabar.com/newsdetails.aspx?id=529>. Jenzabar is so profitable that its own private foundation makes "millions of dollars of grants," Mem. in Opp. to SJ 14, apparently funding more than a hundred separate projects across the United States. http://www.thejenzabarfoundation.org/ICS/Campus_Life/. Long Bow, by contrast, is a tiny non-profit with one employee apart from its two principals. Hinton Dep. 42-43. Jenzabar deliberately exploited this differential, forcing Long Bow to run up nearly \$250,000 in attorney fees, Donnelly Affidavit ¶ 4; by the summer of 2009, Long Bow felt that its defense this case could not be sustained given its enormous cost, Gordon Dep. 152-154. It was only because Long Bow found pro bono counsel that it could pursue summary judgment and defend the appeal that has already been filed.

Fourth, the Seventh Circuit has noted the need for attorney fees as an incentive to defend intellectual property cases. *Woodhaven Homes & Realty v. Hotz*, 396 F.3d 822 (7th Cir. 2005).

Plaintiffs in real IP cases — that is, cases with a realistic chance of success — have the motivation of a possible damages award to pursue litigation against an infringing defendant; the damages can help offset the cost of litigation even if fees are never awarded. But that incentive does not exist for a defendant: “[w]ithout the prospect of such an award, [a defendant] might be forced into a nuisance settlement or deterred all together from exercising his rights.” *Id.* at 824. Although *Woodhaven* was decided under the Copyright Act, similar considerations apply when a trademark defendant successfully defends against a suit aimed at his free speech rather than at vindicating interests genuinely protected by the trademark laws. Moreover, these considerations are heightened when non-commercial and artistic expression is what the trademark holder is trying to suppress. The Ninth Circuit remanded for consideration of an award of attorney fees when a huge national company brought an action against an artist who created parodies of its trademarked “Barbie” character. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 816 (9th Cir. 2003). Noting that the defendants’ “use constituted nominative fair use and was protected by policy interests in free expression,” the court directed the district court to decide whether the plaintiff’s claims were “groundless or unreasonable”; if so, fees were to be awarded. *Id.*

Similarly, here, the disparity in size and groundlessness of the lawsuit are alone sufficient to warrant an award of attorney fees, given that the trademark claims were pursued to suppress Long Bow’s free speech.

Finally, Jenzabar’s litigation tactics are another basis for deeming this case exceptional. As recounted in the Donnelly affidavit, Jenzabar resisted Long Bow’s efforts to discover “even the most fundamental information about plaintiff’s allegations,” while at the same time conducting discovery into the political views, family history, personal travel, and documentary film-making activities of

Long Bow's principals, information that may have been relevant to plaintiff's propaganda war against Long Bow but without any bearing on the trademark issues in the case. Donnelly Affidavit ¶ 8 and Exhibit B; see generally evidence cited on page 3, *supra*. Judge Brassard ultimately had to rule such issues off-limits, July 30 Tr. at 7-8, 15, 21-22, but this sort of "totally unjustified and reprehensible intrusion into personal family history" and other irrelevant matter fully justifies the court's condemnation. *Eggleston v. Chicago Journeymen Plumbers' Local 130*, 657 F.2d 890, 897-899 (7th Cir. 1981). Jenzabar's discovery tactics needlessly raised the cost of the litigation, Donnelly Affidavit ¶ 9, and form yet another basis for deeming this case "exceptional."

III. The Court Should Award \$405,825.73 in Attorney Fees and Expenses

The "guiding light" for the award of attorney fees under federal fee shifting statutes is the "lodestar" method. *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010); *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002). Under the lodestar method, "the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This approach is generally followed by the Massachusetts courts, especially in cases where federal law provides the rule of decision. See *Fontaine v. Ebtac Corp.*, 415 Mass. 309, 325, 613 N.E.2d 881, 891 (1993); *Stratos v. Dep't of Public Welfare*, 387 Mass. 312, 322, 439 N.E.2d 778, 786 (1982).

The reasonable hourly rate of counsel is the rate that they would command in the open market. For lawyers in private practice, the lawyers' billing rate is presumptively the proper rate for awarding fees for their work. *Edge v. Norfolk Financial Corp.*, 2005 WL 2323193 (D. Mass. Aug. 29, 2005). The affidavit of Christopher Donnelly shows that the attorneys and paralegals with Donnelly, Conroy & Gelhaar billed Long Bow at the following rates:

Attorney	Year of Graduation	Hourly Rate
Donnelly	1980	\$425
Kane	1997	365
Ziegler	2002	325
Ernst	2003	325
Hoffman	2008	275
Paralegals		120

Mr. Donnelly avers that these rates were significantly discounted in light of Long Bow's limited ability to pay, Aff. ¶¶ 14-15, and the law is clear that when an attorney in private practice bills low rates because of their dedication to certain types of cases, or in recognition of the clients' limited ability to pay, the attorneys are nevertheless entitled to seek a fee award at ordinary market rates. *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993); *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C.Cir.1988) (en banc). When the lawyer chooses for charitable reasons to charge a client a discounted rate, "the value of the lawyer's gift inures to the favored cause, and not to the adversary in litigation." *Barrow v. Falck*, 977 F.2d 1100, 1105 (7th Cir. 1992). However, the Donnelly firm has decided to apply for an award of its fees at its discounted rate.

Paul Alan Levy, Long Bow's lead counsel at the summary judgment stage, and his colleagues at Public Citizen's Litigation Group, are public interest lawyers who represented Long Bow pro bono, and indeed do all their work pro bono. Nonetheless, fee awards for such lawyers must be made at ordinary market rates. *Blum v. Stenson*, 465 U.S. 886 (1984). Mr. Levy is one of the leading specialists in litigation over the application of the intellectual property laws in the Internet free speech context, and frequently addresses bar or international conferences and scholarly meetings about these subjects. The Donnelly affidavit attests to Mr. Levy's market rate in Boston, ¶ 23, and

the affidavits of Mr. Levy and his colleagues, and their attachments, present counsel's qualifications and further evidence about their proper market rates. This evidence includes among other things the *Laffey* matrices that are used by federal judges in Washington, DC to avoid the transaction costs of extensive litigation over rates by setting presumptive rates based on years of experience, Exhibit 2, 3, and the biennial report of the American Intellectual Property Lawyers Association, whose surveys show the normal hourly rates charged for IP litigation by lawyers in the Boston area. Exhibit 5. These materials show that proper hourly rates for the Public Citizen lawyers are as follows:

Attorney	Year of Graduation	Hourly Rate
Levy	1976	\$575
Kirkpatrick	1991	\$420
Beck	2004	\$325

The amount of time reasonably spent on the merits of this case is established by the affidavits of counsel, which provide their bills (for the Donnelly firm's lawyers and paralegals), and information from the lawyers' time records (for the Public Citizen) attorneys, as follows:

Attorney	Time Spent on Merits
Donnelly	158.7
Kane	64.6
Ziegler	411.8
Ernst	2.2
paralegals	54.4
Levy	232.6
Kirkpatrick	14.08
Beck	6.7

As shown by counsel's affidavits, these time calculations reflect the exercise of billing judgment. Moreover, Long Bow achieved complete success in the litigation. Accordingly, the time spent by counsel should not be reduced.

Finally, Mr. Levy's affidavit, ¶ 25, reflects that he spent an additional 27.5 hours after the Court issued its decision, first trying once more to determine whether the parties could resolve the case in whole or in part, and then preparing his affidavit and this memorandum of law in support of an award of attorney fees. Mr. Donnelly's affidavit indicates that he and his colleagues spent an additional 21.8 hours after the Court issued its decision. Time spent on the fee application is itself compensable. *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978). Moreover, although there is First Circuit authority under statutes in which a fee award is presumptively proper, that a lesser rate **may** be applied to time spent on the fee issue because "time spent in this exercise often amounts to little more than documenting what a lawyer did and why he or she did it." *Brewster v. Dukakis*, 3 F.3d 488, 494 (1st Cir. 1993) (internal quotation marks omitted), that analysis does not apply here because there is no presumption favoring attorney fees in Lanham Act cases. The bulk of time recorded on fees was devoted to establishing that an award is appropriate, not to determining the amount to be awarded. Moreover, as a practical matter, lawyers are required to devote their own time to their fee affidavits, so if an attorney's hourly rate is reduced for the time spent establishing the amount of fees to be awarded, then as a practical matter, the incentive to handle cases is reduced. For both reasons, the full hourly rate should be applied to counsel's work on the fees issue as well.

In summary, the total amount of fees to be awarded for the defense of the case is as follows:

Attorney	Hourly Rate	Time Spent	Fee
Donnelly	\$425	164.6	\$ 69955
Kane	365	38.5	14052.50
Ziegler	325	415.5	135037.50
Ernst	325	2.2	715
Hoffman	275	8.9	2447.50
paralegals	120	57.7	6924
Levy	575	256.1	149557.50
Kirkpatrick	420	14.08	5913.60
Beck	325	6.7	3256.70
TOTALS		964.28	\$387859.30

Moreover, the affidavits of counsel show that the following categories of out-of-pocket expenses were incurred, which should be awarded along with their attorney fees:

Category	Amount
Donnelly Gelhaar	\$10667.38
Public Citizen	530.75
Costs paid directly by Long Bow	6768.30
TOTAL	\$405825.73

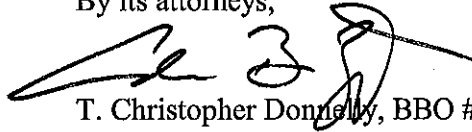
CONCLUSION

Long Bow's motion for an award of attorney fees should be granted. The Court should award Long Bow \$405,825.73 in attorney fees and expenses.

Respectfully submitted,

LONG BOW GROUP, INC.

By its attorneys,



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Dated: February 1, 2011

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: 2/1/11

