

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.)

REPLY MEMORANDUM SUPPORTING AWARD OF ATTORNEY FEES

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Defendant Long Bow's opening brief in support of its application for an award of attorney fees showed that plaintiff Jenzabar filed an utterly groundless trademark claim, not because there was any reason to believe that Internet users would be confused about whether Jenzabar was the sponsor of a ten-year-old web page that criticizes Jenzabar, but to suppress public access to Long Bow's criticism, and more generally to use litigation as a weapon to oppress the makers of a documentary that criticizes Jenzabar's founder. The Court dismissed the case on summary judgment, and Jenzabar now opposes Long Bow's motion for an award of attorney fees, largely on the ground that the summary judgment order was wrong. But because Jenzabar has opted not to seek reconsideration of the summary judgment, its attack on the summary judgment decision, raising the same arguments that were briefed at length and argued at the summary judgment hearing, are beside the point.

To the extent that Jenzabar's opposition to attorney fees rests on anything other than a quarrel with the summary judgment order, Jenzabar presents a supposed standard for fees that is squarely contrary to settled First Circuit authority, and rests on a contention that is often stated but never shown — that its invocation of trademark claims based on the use of HTML code to characterize a web page about a trademark holder presents “novel questions.” In fact, as Jenzabar did during the litigation on the merits, it ignores the unanimous authority arrayed against it on the merits, just as it ignores the extensive evidence that this entire litigation was brought for the improper purpose of punishing or suppressing criticism. The motion for an award of attorney fees should be granted.

I. Bad Faith Is Not Needed for Fees to Be Awarded Under the Lanham Act.

In its opening brief, Long Bow urged an award of fees based on the well-established standard for awarding fees under the Lanham Act's “exceptional” cases standard. Courts decide whether to award attorney fees under the totality of the circumstances, applying traditional principles of equity, including the plaintiff's litigating conduct, whether plaintiff's behavior included economic coercion,

plaintiff's use of groundless arguments, failure to cite controlling law, and the generally oppressive nature of the case. Fee Mem. 7-8. Jenzabar argues, however, that the Lanham Act imposes an "extraordinarily high standard" for awarding fees, Fee Opp. 5, more restrictive even than the common law "bad faith" exception to the American Rule. According to Jenzabar, fees cannot be awarded without "clear and convincing evidence that this case was utterly meritless [and] brought in bad faith **both of which** are mandatory for an award of fees." Fee Opp. at 5. *See also id.* at 1 ("It is well settled in numerous courts that a prevailing defendant must prove that the plaintiff had a bad faith intent in pursuing its trademark claims **and** that the claims were wholly without merit,").

In fact, although Jenzabar cites several cases for the proposition that defendants seeking fees "have been required to demonstrate . . . 'bad faith,' 'fraud,' 'oppressive behavior,' or 'harassment,'" *id.* at 6 (emphasis added), Jenzabar ignores the disjunctive "or" in its own quotation as well as in the cases that it cites.¹ Indeed, even the "bad faith" exception to the American Rule on attorney fees does not require bad faith **intent**, *Dubois v. U.S. Dept. of Agriculture*, 270 F.3d 77, 81 (1st Cir. 2001), but only that "a party maintains an unfounded action or defense without any reasonable hope of prevailing on [the] merits." *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 14 (1st Cir. 1995). Yet Jenzabar contends that in adding a fee provision to protect against abusive Lanham Act lawsuits, Congress meant to **limit** fees to cases of subjective bad faith.

Moreover, the First Circuit expressly rejected the proposition that "bad faith" must be shown

¹For example, Jenzabar's footnote 2 on page 6 cites cases as follows without acknowledging that bad faith or bad intent is cited as a ground only in the disjunctive: "*Nat'l Ass'n of Prof'l Baseball Leagues v. Very Minor Leagues*, 223 F.3d 1143, 1149 (10th Cir. 2000) (requiring that a suit be 'unfounded' or brought for harassment and the like'); *Scott Fetzer Co. v. Williamson*, 101 F.3d 549, 555 (8th Cir. 1996) ('When a plaintiff's case is groundless, unreasonable, vexatious or pursued in bad faith, it is exceptional.')

for an award of fees under the Lanham Act in *Tamko Roofing Products v. Ideal Roofing Co.*, 282 F.3d 23, 32 (1st Cir. 2002): “Fraud or bad faith may justify an attorneys’ fees award in some cases, but a finding of bad faith or fraud is not a necessary precondition.” The court explained,

There are two reasons we reject a bad faith or fraud requirement as a precondition to an award of attorneys’ fees. First, the legislative history of section 35 links such exceptional cases to situations where the acts are malicious or fraudulent or deliberate or willful, and where equity justifies the award. Congress’s list does not stop with “malicious” or “fraudulent,” and we are loath to strip “deliberate” and “willful” of meaning. Second, the purpose of the attorneys’ fees amendment to the Lanham Act was to provide for an award in exceptional cases in which equity called for an award in the sound discretion of the district judge. We would be hard pressed to say that such a case can never arise unless there is fraud or bad faith.

Id.

This reasoning applies equally to fee awards in favor of prevailing defendants. Moreover, as the District of Massachusetts remarked in *Yankee Candle Co. v. Bridgewater Candle Co.*, 140 F. Supp. 2d 111 (D. Mass.) *aff’d*, 259 F.3d 25 (1st Cir. 2001), Congress provided for awards of attorney fees in exceptional cases against the backdrop of the American Rule on attorney fees, which allows awards of fees when one side to the case has litigated in bad faith. If “exceptional” also required bad faith, the statutory provision would have added nothing, and it is a cardinal rule of statutory construction that statutes “should not be presumed to enact mere surplusage.” *Id.* at 119-22.

Although *Tamko* was dealing with an award of attorney fees in favor of a prevailing plaintiff and not a prevailing defendant, the Lanham Act’s fees provision does not provide for a different standard depending on which party prevailed. Indeed, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Court ruled that intellectual property statutes providing for fees for a prevailing party must be applied in an evenhanded way between plaintiffs and defendants. The Court did not specify what standard should apply, but whatever standard a given circuit adopts, the same measure of fee

liability should apply to prevailing plaintiffs and prevailing defendants. It follows that, because the First Circuit has refused to require fraud or bad faith before fees may be awarded to prevailing plaintiffs, neither fraud nor bad faith can be required for fee awards for prevailing defendants.

Jenzabar faults Long Bow for citing *Fogerty* because the issue in that case was the standard for attorney fees awards under the Copyright Code. Fee Opp. 6. But Jenzabar ignores the fact that *Fogerty* derived its principle of evenhandedness, in part, from the Lanham Act:

We note that the federal fee-shifting statutes in the patent and trademark fields, which are more closely related to that of copyright, support a party-neutral approach. Those statutes contain language similar to that of § 505, with the added proviso that fees are only to be awarded in “exceptional cases.”

510 U.S. at 525 n.12.

Following *Fogerty*, several courts of appeals have changed their approach to attorney fees under the Lanham Act, understanding the Supreme Court to have **required** an evenhanded approach to fees for prevailing trademark plaintiffs and prevailing trademark defendants. See *TE-TA-MA Truth Foundation-Family of URI v. World Church of the Creator*, 392 F.3d 248, 259 (7th Cir. 2004), citing *Securacomm Consulting v. Securacom Inc.*, 224 F.3d 273, 280 n.1 (3d Cir. 2000) and *Stephen W. Boney v. Boney Servs.*, 127 F.3d 821, 827 (9th Cir.1997). Consequently, in the First Circuit, neither bad faith nor fraud can be a precondition for attorney fee awards for prevailing defendants.

Jenzabar also cites a recent Federal Circuit decision construing the attorney fees provision in the patent code, 37 U.S.C. § 285, stating that First Amendment considerations limit attorney fees awards to cases brought in bad faith, because absent a requirement of bad faith and a clear and convincing evidence requirement, the prospect of an award of attorney fees could impinge on the First Amendment right to bring and defend litigation. *Ilor, Inc. v. Google, Inc.*, 2011 WL 140358

(Jan. 11, 2011). But the First Circuit has squarely rejected the Patent Code’s attorney fees provision as a basis for deciding what Lanham Act cases are “exceptional.” In *Tamko*, while acknowledging that some First Circuit patent decisions suggest a bad faith requirement for fees, the First Circuit expressly held that those cases do **not** apply to trademark fee applications because of the distinctive legislative history of the Lanham Act. 282 F.3d at 32 n.8.

Moreover, the First Amendment argument that the Federal Circuit invoked is fundamentally flawed—if the First Amendment right to bring and defend litigation barred attorney fees absent bad faith, then the fee shifting provisions of Title VII and similar state civil rights laws would be unconstitutional, as would the Massachusetts anti-SLAPP statute. Indeed, Rule 11 of the Federal Rules of Civil Procedure, which provides for awards of attorney fees against lawyers and parties that bring cases without having made sufficient inquiry into whether the case is well-founded, would similarly be unconstitutional. But that is scarcely the law.²

Finally, although the First Circuit has not expressly addressed and rejected *Jenzabar*’s proposed evidentiary requirement of clear and convincing evidence, the First Circuit approved the award of attorney fees in *Tamko* without applying any such standard of proof, and indeed none of the several First Circuit decisions discussing attorney fees under the Lanham Act even hints at a requirement of clear and convincing evidence. *E.g.*, *Ji v. Bose Corp.*, 626 F.3d 116, 129 (1st Cir. 2010); *Visible Sys. Corp. v. Unisys Corp.*, 551 F.3d 65, 81 (1st Cir. 2008). Thus, none of *Jenzabar*’s

² *Jenzabar* goes on at length about *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49 (1993), Fee Opp. 7-8, but no claim for attorney fees was at issue in that case. The plaintiff brought an antitrust counterclaim against the plaintiff in a copyright action, asserting that the lawsuit represented an antitrust conspiracy and that the lawsuit was a “mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.” The case is irrelevant to the construction of the Lanham Act’s attorney fee provision.

efforts to limit the bases for an attorney fee award should be accepted.³

II. This Action Did Not Involve Novel Issues of Trademark Law.

Jenzabar argues that attorney fees should not be awarded here because “the underlying claims are based on novel or unsettled legal theories.” Fee Opp. 8. But although Jenzabar repeats the word “novel” and “unsettled” like a mantra, it never points to the legal theories that are supposedly novel or unsettled. The central issue in this case was whether a meta tag (or, in the proposed amended complaint, a title tag) for a web page about a trademark holder may include the trademarked term. **Every** case to address that subject has held that it may. Indeed, the cases also hold that the **domain name** or post-domain path for a commentary page about a trademark holder may use the trademarked name. Long Bow cited these lines of cases in its merits briefs. SJ Mem. 20; Opp. to Motion to Amend 9-10, 15. But Jenzabar has never addressed those cases, not to speak of explaining either why it thinks they are wrong or why they should not be applied here.

Similarly, Long Bow cited the more fundamental pre-Internet cases that gave birth to the cases about uses of marks online for pages that discuss the trademark holder, such as the cases about the titles of movies and books, SJ Mem. 9; Opp to Motion to Amend 7-8, or the uses of trademarks in art that comments on the markholder, SJ Mem. 9; Opp to Motion to Amend 7-8, and Justice Holmes’ foundational precept of trademark law that the use of a trademark to “tell the truth” about the item to which the trademark is appended “is not taboo.” SJ hearing Tr. 7; Fee Mem. 8. Yet not one of these cases has managed to grace Jenzabar’s briefs on the merits or indeed on attorney fees.

³Long Bow sought discovery sanctions including attorney fees based on Jenzabar’s bad faith in pursuing discovery. Because bad faith is not needed for a fee award under the Lanham Act, the denial of that motion does not preclude Long Bow’s reference to Jenzabar’s abusive discovery as one of several factors supporting treatment of this case as “exceptional.”

This fact alone shows that Jenzabar has not pursued this trademark action either reasonably, or indeed in good faith, in an effort to secure a reversal of existing law. Its post-hoc effort to portray this case as presenting a novel issue that should not be chilled through an award of attorney fees should be rejected.

Indeed, Jenzabar's only argument for the proposition that the legal issues in this case are novel or unsettled is the fact that Long Bow is receiving pro bono representation from Public Citizen and its "nationally-known *pro bono* counsel" Mr. Levy. Opp. 4, 9. As tempting as it is for counsel to accept this backhanded compliment, Jenzabar's argument is contradicted by the record, which shows that Mr. Levy agreed to take the case **despite** the obvious weakness of Jenzabar's claims. Levy Aff. ¶ 17. Public Citizen took the case because it represents trademark bullying at its worst and because "defendant was running out of funds to defend its free speech." *Id.*⁴

III. The Trademark Claims Were Brought for the Improper Purpose of Suppressing Criticism, Not to Avoid Consumer Confusion about Whether Jenzabar Was the Sponsor of Long Bow's Web Page About Jenzabar.

In its opening brief on fees, Long Bow demonstrated through detailed citations to the record that the reason why Jenzabar pursued its trademark claims was to punish a critic and, at best, to

⁴ Jenzabar cites two Fifth Circuit decisions declining to consider disparity between the plaintiff and defendant, Fee Opp. 19 n.19, but several other courts have based their awards of attorney fees to successful defendants by relying in part on the fact that it is a large company that has picked on an underfunded opponent in the hope that the mere cost of a self-defense will drive the defendant into submission. *Noxell Corp. v. Firehouse No. 1 Barbeque Rest.*, 771 F.2d 521, 526-527 (D.C. Cir. 1985) (plaintiff was large conglomerate; defendant was a firefighter trying to start a restaurant); *Ale House Mgmt. v. Raleigh Ale House*, 205 F.3d 137, 144 (4th Cir. 2000) (successful company tried to block a new venture). The Seventh Circuit has similarly suggested that "disparity in resources" between the parties is a valid consideration in deciding whether a case is exceptional. *Door Systems v. Pro-Line Door Systems*, 126 F.3d 1028, 1031 (7th Cir. 1997); *see also Nightingale Home Healthcare v. Anodyne Therapy*, 626 F.3d 958, 864 (7th Cir. 2010) ("Disparity in size will often be relevant in evaluating the legitimacy of the suit or defense").

prevent its potential customers from learning unflattering facts about Jenzabar. Fee Mem. 9, 11-12. See also Abraham, *Beijing Lesson Unlearned*, Boston Globe (June 7, 2009) (copy attached) (Jenzabar explains trademark suit as a response to fact that “Long Bow has gratuitously maligned Ling Chai for decades. [N]ow that she has the resources to fight back, they don’t like it.”). Jenzabar’s opposition to a fee award repeatedly denies this motivation, at 2, 3, but it never explains away the evidence supporting this motivation, or points to evidence showing a different one. This evidence of improper purpose provides a strong basis for an award of attorney fees.⁵

Jenzabar’s opposition, at 3, represents that its only aim in this case was to avoid confusion about the source of Long Bow’s web pages about Jenzabar, but Jenzabar points to no evidence of such motivation. Nor does Jenzabar identify any evidence that consumers were confused, or indeed likely to be confused, about whether Jenzabar was the sponsor of those pages about Jenzabar that had Jenzabar’s name in their keyword meta tags or the one page that had Jenzabar’s name in the title tag. Instead, Jenzabar claims that its concern was that consumers viewing the Google search result might not understand that it led to a page about Jenzabar that Jenzabar had not approved. But again, Jenzabar identifies not a single piece of evidence showing that such confusion existed. Its only argument is that a discrete number of Internet users conducted a Google search using “Jenzabar” as

⁵Jenzabar defends its outrageous questions to Carma Hinton during her deposition about how many times she had met Zhou Enlai or how many of her high school classmates had eventually become members of the Chinese Communist Party, by arguing that the questions were relevant “to issues of intent.” Fee Opp. 20 n.20. But the only “intent” that matters in a trademark case is “intent to confuse consumers about source.” In the theory propounded by Jenzabar’s propaganda campaign against Long Bow, Carma Hinton’s history of growing up in China explains her attitudes toward Ling Chai, which, in Jenzabar’s telling, is the reason why the Long Bow’s documentary says negative things about Ling Chai. It is doubtful that this theory of intent bears even on the issue of common law malice. But the fact that Jenzabar persists in characterizing these deposition questions as being about “intent” shows that the trademark case was brought to further Jenzabar’s agenda of attacking Long Bow over Hinton’s imagined politics.

a search term, and then clicked on the search result for the Long Bow page. Fee Opp. 12. But Jenzabar points to no evidence that those search engine users were looking for Jenzabar's own web site as opposed to a web site that would provide a contrary view to Jenzabar's own, as part of the "due diligence" that Jenzabar says its customers conduct. Indeed, Jenzabar's complaint and its argument on summary judgment were that Long Bow was hurting its business to the extent that its customers found Long Bow's criticisms as part of their due diligence efforts. And as Judge Cratsley stated in explaining why he did not regard such alleged "diversion" as examples of actual confusion, SJ Opin. 11, "this initial uncertainty does not qualify as confusion and is an inevitable part of web searching." Put another way, confusion that relates only to the search result is not actionable, because it is only an example of so-called "initial interest confusion" that is neither a valid doctrine nor, if valid, applicable to the facts of this case. Rather than address this point in explaining its "novel theories" contention, Jenzabar simply ignores the point.

Nor, indeed, was there any evidence that it was Long Bow that determined the contents of the search listing. Rather, it was Google that created the search listing. Again, these are among the arguments that Long Bow made in support of summary judgment on the merits. Jenzabar fails to address them in showing why it should not be subject to an attorney fee award, just as it failed to address them during the summary judgment argument.

Equally telling is the fact that, as Jenzabar acknowledges, the content of the search listing no longer has the supposedly confusing language on which Jenzabar's amended complaint rests. Now, when a Google user conducts a search using "Jenzabar" as the search string, the following appears amid the first page of search results:

Jenzabar

Jenzabar has tried to censor this web page because it carries critical information about the software company that Chai Ling started with her husband.

www.tsquare.tv/film/jenzabar.html - Cached

This result was obtained because, after the Court granted summary judgment in Long Bow's favor, Long Bow added a description meta tag to the web page. Unlike keyword meta tags, which the summary judgment record shows are completely ignored by the Google algorithm, Google does sometimes consider the description meta tag, not in assessing search rank, but in determining the content of the search listing. No search engine user looking at this search result could possibly think that clicking this link is going to take the user to a page endorsed by Jenzabar.

But Jenzabar **still** is not satisfied; rather, it has appealed the summary judgment ruling. The reason why Jenzabar is still pursuing its trademark claims is that this lawsuit has nothing to do with customer confusion and everything to do with Jenzabar's desire to keep its customers from learning about Long Bow's criticisms. The equities call for an award of attorney fees here. For that reason, as well as the reasons set forth in Long Bow's opening brief, fees should be awarded.⁶

CONCLUSION

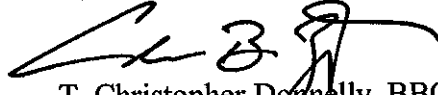
Long Bow should be awarded \$405,825.73 in attorney fees and expenses, plus additional fees and expenses for work done on this reply brief and on the oral argument, should one be held.

Respectfully submitted,

⁶ In the course of arguing that the decision below was wrong, Jenzabar repeatedly mischaracterizes and misquotes the decision, usually without providing any citations. For example, in the litany of supposed errors that appear in single spaced type on page 12, Jenzabar quotes phrases (with no page citations) that do not appear anywhere in the decision, and that in any event do not fairly characterize the decision. The enumeration supposedly shows that Judge Cratsley ignored genuine issues of material fact, but not only are there hardly any citations to the record, but the brief largely relies on case citations, showing that at most there is a disagreement about the legal significance of the largely undisputed facts.

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CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of
the above document was served upon the
attorney of record for each party by mail ~~by hand~~

Date: 2/25/11 

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YVONNE ABRAHAM

Beijing lesson unlearned

By Yvonne Abraham, Globe Columnist | June 7, 2009

You've heard a lot about Tiananmen Square lately, since Thursday was the 20th anniversary of the Chinese government's brutal crackdown on prodemocracy demonstrators.

What you might not have heard about is how a leader of that crushed movement is trying to put the boot into a pillar of democracy right here in Boston.

Ling Chai, sometimes called commander in chief of the 1989 demonstrations, now lives in Massachusetts and heads a successful software company, Jenzabar Inc. In the years since she fled China, she has spoken passionately about the importance of free speech.

And yet Jenzabar is using the courts to bring two filmmakers to near-ruin because their website contains excerpts from, and links to, articles critical of Chai and her firm.

First, some background. In the years since she arrived in the United States, debate has surrounded Chai. Some of her contemporaries, as well as some historians, say that Chai and other student leaders made mistakes in the last hours of the standoff with the Chinese government and that their decision to remain in Tiananmen Square led to more deaths. It's an allegation bolstered by Chai's own words, according to a translation of an interview she gave in those chaotic final days.

The interview is included in an award-winning documentary, "The Gate of Heavenly Peace." In it, Chai says: "How can I tell [our followers] that we actually are hoping for bloodshed, the moment when the government is ready to butcher the people brazenly. Only when the square is awash in blood will the people of China open their eyes."

Chai has long said that comment was mistranslated and taken out of context, and some other student leaders support her view.

Carma Hinton and Richard Gordon stand by their film, and other Chinese leaders support them. They also maintain a website, with updates on Chai that refer to stories and columns on Jenzabar, some unflattering, including one published in the Globe.

Jenzabar sued the filmmakers' company, Long Bow Films, for defamation - just for directing readers to the articles Chai and her company say are offensive and inaccurate. A Suffolk Superior Court judge wisely threw the defamation charge out. The First Amendment guarantees the people's right to say - and cite - even things you don't like, after all.

But the case has dragged on because Jenzabar is also contending that just by using the company's name as a tag on its website, Long Bow is guilty of trademark infringement - that somebody googling Jenzabar might land on the Long Bow site and get confused.

That's bosh.

"The idea that somebody would be confused is so remote as to not pass the giggle test," said Harvey Silverglate, a lawyer who specializes in First Amendment cases. Even the judge said Jenzabar is unlikely to win. And yet Chai perseveres.

Why? There is more than one way to skin free speech. Jenzabar has buckets of money. Hinton and Gordon

don't. Chai's suit has cost them 70 grand so far. Even though she will probably lose the court battle, she could win the war by shutting Long Bow down.

"It has drained a lot of our resources," Hinton said. "We may be driven into bankruptcy before we see our day in court."

There's more. Last week, Jenzabar attorneys asked a judge to prevent Long Bow from updating their website on the continuing court case. On Thursday, the judge knocked them down, saying "fear of bad publicity" isn't grounds for a gag order.

Lawyers for both sides declined comment.

"Long Bow has gratuitously maligned Ling Chai for decades," said Rob Gray, spokesman for Jenzabar. "And now that she has the resources to fight back, they don't like it."

But the problem isn't that Chai is fighting back. It's how she's fighting back. She's using the justice system to attack the very freedoms for which her fellow students gave their lives.

Yvonne Abraham is a Globe columnist. Her e-mail address is abraham@globe.com. ■