

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

JENZABAR, INC., LING CHAI, and
ROBERT A MAGINN, JR.,

Plaintiffs,

v.

LONG BOW GROUP, INC.,

Defendant.

CIVIL ACTION NO. 07-2075-H

**MOTION FOR RECONSIDERATION OF ADMISSION PRO HAC VICE
OF PAUL ALAN LEVY AND MICHAEL KIRKPATRICK
OF PUBLIC CITIZENS LITIGATION GROUP**

Pursuant to Superior Court Rule 9D, the plaintiff, Jenzabar, Inc. (“Jenzabar”), submits this motion for reconsideration of the previously unopposed motion for admission pro hac vice of Paul Alan Levy and Michael Kirkpatrick of Public Citizens Litigation Group (“PCL”)¹ to represent the defendant, Long Bow Group, Inc. (“Long Bow”). In short, within a few days of their admission to this court, PCL counsel were publishing blogs and extrajudicial statements about this case (including references to inadmissible evidence), thereby severely prejudicing Jenzabar, in disregard and violation of Rules 3.6 and 3.7 of the Supreme Judicial Court’s Rules of Professional Conduct.

More specifically, Jenzabar states:

¹ PCL’s website states that it is a national nonprofit consumer advocacy organization, which includes a litigation group.

1. On or about October 9, 2009, Long Bow's existing counsel contacted Jenzabar's counsel and advised that PCL's counsel, Messrs. Levy and Kirkpatrick, intended to enter an appearance in the case. As a courtesy, Jenzabar's counsel stated that it would not oppose their admission. Therefore, Long Bow proceeded to file an unopposed motion for admission pro hac vice. The motion was accompanied by affidavits from both Messrs. Levy and Kirkpatrick reciting that each "will abide by the rules of this court."

2. A few days later, on October 13, 2009, both Mr. Levy and PCL published statements on their blogs and website about the case. Mr. Levy's article is entitled "Jenzabar Joins Trademark Abusers Hall of Shame" and PCL's is entitled "Faulty Trademark Case Pits Tiananmen Square Protest Leader Against Filmmaker." Copies attached as Exhibits A and B.

3. The Supreme Judicial Court's Rules of Professional Conduct prohibit lawyers from making extrajudicial statements which may prejudice a pending matter.

Rule 3.6 provides:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The official comments to the Rule specifically highlight that counsel should not disclose "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial."

4. The statements published by Levy and PCL violate Rule 3.6 and were and are intended to harm Jenzabar and prejudice it in this action. By publication on the internet, they were intended to be disseminated as widely as possible, all to the detriment of Jenzabar.

5. Moreover, Levy and PCL proceeded to also publish on the internet Long Bow's brief in support of its motion for summary judgment (which has not yet even been filed with this court)- - which motion is based on highly prejudicial inadmissible hearsay evidence. More specifically, Long Bow attaches to its motion a blog from an individual claiming that Google's search engine does not consider keyword metatags- and Long Bow relies upon this inadmissible hearsay as support for the section in its memorandum entitled "Jenzabar Cannot Prove Causation". That blog statement is not authenticated in any manner whatsoever, there is no accompanying affidavit from Google, nor is it the official statement of Google. The blog statement, therefore, constitutes inadmissible hearsay.² See, eg. *United States v. Jackson*, 208 F. 3d 633 (7th Cir. 2000) (web postings constitute inadmissible hearsay); *Commonwealth v. Handrahan*, 75 Mass. App. Ct. 1101 (2009) (witness testimony describing information seen online inadmissible as hearsay); *Lorden v. Town of Pepperell*, 2003 WL 22739405 (Mass. Land Ct. 2003) (striking portions of affidavit referencing web site statements). (Contemporaneous with serving its opposition to Long Bow's motion for summary judgment, Jenzabar intends to file a

² On July 30, 2009, this Court specifically granted Jenzabar leave to serve a subpoena on Google for records regarding its search engine. Upon threat of a motion to compel, Google ultimately responded with an affidavit of one of its representatives that she was duly authorized by Google to submit the affidavit, referencing specific pages on Google's website as responsive to the subpoena, and that said pages were kept in the ordinary course of Google's business. The "blog statement", which Long Bow now seeks to introduce is not included in that affidavit from Google, nor authenticated in any other way.

motion to strike all references to the inadmissible blog in the affidavit, statement of facts and Long Bow's memorandum in support of summary judgment.)

6. Therefore, Levy and PCL have also violated the official comments to Rule 3.6 because they knew or should have reasonably known that the evidence (blog) would be inadmissible - - which they have now circulated publicly for widespread dissemination- - further prejudicing Jenzabar (and before this court has had any opportunity to rule on this matter).

7. In addition, Levy and PCL have also now conceivably made themselves witnesses in the action, creating a potential conflict in violation of Rule 3.7 of the Supreme Judicial Court's Rules of Professional Conduct.

WHEREFORE, Jenzabar regrettably requests that the admissions pro hac vice be rescinded and other appropriate sanctions be entered against Long Bow.³

³ This is not the first time that Long Bow has engaged in extrajudicial statements and public communications to create controversy and prejudice Jenzabar. Long Bow actively pursued and communicated with reporters at, *inter alia*, the Boston Globe and PRI's "The World", and stated Long Bow was being "driven into bankruptcy" and was on "borrowed money" and its officers were using their "own salaries to defend" this lawsuit, which statements were then quoted in published articles in June, 2009. (Copies attached as exhibits C and D). None of these statements, however, were true and they were recklessly made by Long Bow. (Hinton, pp. 107-108, 202; Gordon, pp. 96, 105.) Long Bow knowingly made these statements -in order that they be incorporated into the media articles published on the internet, which articles Long Bow has links to on its website further promoting its own false statements - all to further prejudice Jenzabar.

Respectfully submitted,

PLAINTIFF

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DATED: November ___ 2009