

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.)

DEFENDANT LONG BOW GROUP INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Long Bow Group Inc. (“Defendant” or “Long Bow”) respectfully submits this memorandum in support of its motion to dismiss the claims made against it by Plaintiffs Jenzabar, Inc. (“Jenzabar”), Ling Chai, and Robert A. Maginn, Jr. (“Plaintiffs”), pursuant to Mass. R. Civ. P. 12(b)(6).

INTRODUCTION

This case presents the question whether Plaintiffs-- a noted public figure and controversial student leader during the Tiananmen Square protests, her business partner, and their software company-- can use the Massachusetts courts to suppress the efforts of Defendant, a Brookline-based producer of a documentary film about Tiananmen Square, to use its website to inform the public about Plaintiffs.

The claims asserted against Long Bow all rest entirely on the content of Long Bow’s website. Though segmented into eight counts, the claims fall into three categories: (1) defamation; (2) trademark misuse; and (3) unfair business practices. All of these claims must be dismissed pursuant to Mass.R.Civ.P. 12(b)(6).

First, the defamation claims are not based on any statement made by Long Bow. Instead, the only specific alleged defamatory statement was made by Jenzabar’s former chief financial officer in connection with a lawsuit he brought against the company. The *Boston Globe* truthfully reported that these allegations had been made by the CFO and denied by Plaintiffs. Long Bow, in turn, quoted the *Globe* article, including Plaintiffs’ denial of the allegations. As shown below, there is no basis for a defamation claim under these circumstances.¹

Second, Plaintiffs similarly seek to stretch trademark law to censor any statements critical of Jenzabar. Trademark law, however, is narrowly construed particularly where First

¹ Plaintiffs have not sued *The Boston Globe* for its publication of the statements at issue-- either initially when the statements were made in 2003 or as part of this suit (even though the article at issue remains on the web today at http://www.boston.com/business/globe/articles/2003/08/08/american_dream?mode=PF).

Amendment interests are implicated. Long Bow has not “used” the Jenzabar marks within the meaning of the Lanham Act. In addition, any reference to Jenzabar on the website itself constitutes protected fair use. Finally, there is no likelihood of confusion because no reasonable viewer of these allegedly disparaging comments would believe that they emanated from, or were endorsed by, Plaintiffs. As a result, Plaintiffs have failed to state any trademark claim under federal or state law.

Finally, the unfair business practices claim, premised on Mass. Gen. Law ch. 93A, is derivative of the defamation and trademark claims. For the same reasons, it fails to state a claim.

FACTUAL BACKGROUND

The Parties

Defendant Long Bow is a documentary film producer located in Brookline, Massachusetts. See Complaint (“Compl.”) ¶¶ 4, 15. Long Bow was founded in 1982 to produce and disseminate educational media. See Current Website (Exhibit A (“Exh. A”)) at 27.² Long

² Facts concerning the content of the website are based on the Complaint and on the relevant excerpts of the website itself, which are attached as exhibits to this Memorandum. See Current Website (Exh. A); Former Website (Exh. B). Because Long Bow modified the content of its website in response to Plaintiffs’ initial complaints, the exhibits to this motion include the relevant content of the website both before and after modification.

The Supreme Judicial Court has made clear, in a case concerning allegations of negligent misrepresentation and unfair and deceptive trade practices, that documents relied on by a plaintiff in framing its complaint may be made part of the record on a motion to dismiss without converting the motion to one for summary judgment. See Marram v. Kobrick Offshore Fund Ltd., 442 Mass. 34, 45 n.4 (2004) (“Where, as here, the plaintiff had notice of these documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment, as required by Mass. R. Civ. P. 12(b)(6).”) The Superior Court recently applied this rule in a defamation case that, like this case, involved statements made in news articles. See Moriarty v. Sullivan, 2006 WL 2089773, at *1 n.3 (Mass. Super. 2006) (“Because several of Moriarty’s claims are dependent upon the statements published in the cited newspaper articles, said articles become incorporated into the pleadings and may be reviewed by this Court in deciding MHC’s motion to dismiss under Rule 12(b)(6) without converting the motion into one for summary judgment.”) (citing Harhen v. Brown, 431 Mass. 838, 839-40, 730 N.E.2d 859 (2000); Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)). Numerous courts outside of Massachusetts have reached the same conclusion. See, e.g., Iosa v. Gentiva Health Servs., Inc., 299 F. Supp. 2d 29, 37 (D. Conn. 2004) (considering memorandum containing allegedly defamatory statements because plaintiff relied on it in framing her complaint); McGee v. Simon & Schuster, Inc., 154 F. Supp. 2d 1308, 1311 n.3 (S.D. Oh. 2001)). This rule applies with particular force in this case because all of Plaintiffs’ claims rest exclusively on the contents of the Long Bow website. The Court cannot consider the facial validity of these claims without a complete, accurate appreciation of the website itself.

Bow's films have been broadcast on PBS and BBC, among others. *Id.* In 1995, Long Bow produced a documentary entitled *The Gate of Heavenly Peace* (the "Film") concerning the 1989 student-led protests in Tiananmen Square, China (the "Protests"). *Id.* at ¶ 15.

Chai was one of the student leaders in the Protests, and she has frequently been honored and profiled for her role in the Protests. *See* Compl. at ¶ 8. Not surprisingly, Chai "has been the subject of significant media attention – much of it positive." *Id.* at ¶ 21. She also is founder, President, and Chief Operating Officer of Plaintiff Jenzabar, Inc., which provides enterprise software and other technology to institutions of higher education. *Id.* at ¶¶ 5, 8. Jenzabar's customers include "private liberal arts, medical, law, state and community colleges." *Id.* ¶ 6. Plaintiff Robert Maginn is Jenzabar's Chief Executive Officer and Chairman of its Board. *Id.* at ¶ 9.³

Long Bow's "T Square" Website

Long Bow maintains a website -- www.tsquare.tv -- which provides viewers with a large amount of information about the Film, the Protests, and the key figures in the Protests, including Chai. Compl. ¶¶ 19-20; *See* Exh. A, at 1-32.⁴ For each of approximately 15 key figures (or "Characters"), the website provides a photograph, a brief biography, links to articles, interviews, or other sources of relevant information, and a description of the figures' recent activities. *See* Exh. A, at 3-9 (the "Character Page"). Like entries pertaining to other key figures, the entry for Chai provides a photograph, a description of her role in the Protests, and a biography that mentions her founding of Jenzabar. *Id.* at 3-4.

³ Maginn and Chai also are married.

⁴ In all, the website contains more than 2,000 pages of information.

In addition, the Character Page provides a link for viewers who wish to see “[m]ore information about Chai Ling and the controversy that has followed her to Jenzabar.” Id. at 4. Viewers who select the link are passed through to another web page focusing exclusively on Chai. Id. at 10-12 (the “Chai Page”). The Chai Page describes the media attention-- both positive and negative-- Chai has received. It refers to articles published in *The Chronicle of Higher Education*, *Business Week*, *ComputerWorld*, *Forbes*, *The Boston Globe*, and *The Village Voice*, as well as an article by Chai herself, and a book in which the author describes a 1999 meeting with Chai. Id. at 10-12. The Chai Page quotes excerpts from many of these articles. Id. It also provides viewers with a link to Jenzabar’s website. Id. at 10. The top of the Chai Page recites the following disclaimer:

The information on these pages about Chai Ling and Jenzabar, the software company she runs with her husband, Robert Maginn, contains excerpts from and links to articles about Jenzabar in *The Boston Globe*, *Forbes*, *Business Week*, and other publications, and is intended to provide the reader with additional information about Chai Ling, one of the most well-known and controversial figures from the Tiananmen Square protests of 1989. These web pages are the sole responsibility of the Long Bow Group, and are in no way affiliated with or sponsored by Jenzabar, Inc.

Id.

The Chai Page links to another web page concerning “the press attention given to Jenzabar focus[ing] on Chai Ling’s role in the 1989 Tiananmen Square protests, and how that experience has informed her new role in leading an internet company.” Id. at 13-16 (the “News Accounts Page”). The News Accounts Page includes a series of excerpts from articles “that reported certain concerns third parties expressed” regarding Chai and Jenzabar. Id. at 13. The News Accounts Page refers specifically to five articles – two articles from the *Boston Globe* (from 1999 and 2003), two articles from *The Chronicle of Higher Education* (from 1999 and 2004), and one article from *Forbes* (from 2003). Id. at 13-16.

In the former version of its website, Long Bow quoted one of the *Boston Globe* articles as follows:

According to an August 2003 Boston Globe column, "A lawsuit filed in March is the latest in a series of suits against the company. Five former executives have sued Jenzabar, including the former chief financial officer, who accused Chai and [her husband Robert] Maginn of 'a number of unethical, inappropriate, and/or illegal actions.' Jenzabar has denied the claims and resolved some of the disputes... After Tiananmen, Chai detractors said her hero's image did not square with her hardball tactics. Now her critics are saying much the same again, this time about her corporate life."

See Exh. B, at 1.

Jenzabar's Cease and Desist Letters

Between February and April of 2007, Jenzabar and Long Bow exchanged a series of letters regarding the content on the website. Jenzabar notified Long Bow that its web pages purportedly contained defamatory material, insofar as its excerpt from the *Boston Globe* referred to allegations of "unethical, inappropriate, and/or illegal actions." Compl. ¶ 32. The accuser, Jenzabar's former CFO had, according to Jenzabar, "retracted his baseless allegations about Jenzabar's officers." Id.⁵

In response to these objections, Long Bow made several changes to its website. First, Long Bow added an express disclaimer stating that it is "in no way affiliated with or sponsored by Jenzabar, Inc." See Exh. A, at 10, 16. Second, Long Bow omitted the Jenzabar former CFO's accusations of "unethical, inappropriate, and/or illegal actions" from its site. Instead, the website simply recites that the *Boston Globe* reported that a group of former executives sued Jenzabar. Id. at 14. Finally, Long Bow posted Jenzabar's cease and desist letters, as well as all of the other correspondence between the parties, on its website. Id. at 17-25 (the

⁵ The Complaint refers to the accuser, Joseph DiLorenzo, as "Jenzabar's former CEO." Compl. ¶ 32. In fact, Mr. DiLorenzo appears to have been the company's CFO.

“Correspondence Page”). Jenzabar’s objections to the statements at issue (and the former CFO’s apology letter) are therefore available for any visitors to the web site.

Notwithstanding, Jenzabar continues to claim that the website “presents a small and misleading sample of articles critical of [Chai’s] past, her political activism, and her business ventures.” Compl. ¶ 21. The Plaintiffs allege that Long Bow is motivated by “sympathy for officials in the Communist government in China” and an alleged effort to “advance Long Bow’s divergent political agenda.” *Id.* at Introduction; *id.* ¶ 30.⁶

Long Bow’s Alleged Use of the “Jenzabar” Trademark

Plaintiffs allege that, in addition to posting excerpts from news articles on its website, Long Bow “is using the JENZABAR Marks as metatags embedded within the Site.” Compl. at ¶ 24. According to the Complaint, this alleged use of metatags is causing the Long Bow site to be “among the top ‘hits’ an Internet user receives” when searching for information about Jenzabar through Google or other search engines. *Id.* at ¶ 25. This allegedly has the effect of “diverting customers who are searching for Jenzabar’s products and services to the derogatory content published on the” Long Bow website. *Id.* at ¶ 26.

⁶ While it is not necessary to resolve these claims before granting dismissal, Long Bow disputes Plaintiffs’ wholly unsupported allegations concerning its alleged “political agenda” and alleged “sympathy for officials in the Communist government of China.” Far from sympathizing with the Communist government, Long Bow was viewed as anti-Communist by the Chinese government at the time it launched the Film. On April 19, 1996, for example, the Chinese Embassy to the United States issued an “open letter” to the press seeking to have the Film removed from film festivals:

“As is well known, a very small number of people engaged themselves in anti-government violence in Beijing in June 1989 but failed. The film “The Gate of Heavenly Peace” sings praise of these people in total disregard of the facts. If this film is shown...it will mislead the audience and hurt the feelings of 1.2 billion Chinese people. Therefore, it is necessary and appropriate to withdraw this film from the festival.”

Even today, the Film-- and website-- are still banned in China.

Outside of China, the Film was widely acclaimed as complex and balanced. For example, it was awarded a George Foster Peabody Award for “[giving] voice to a wide range of Chinese citizens who participated in the protests” and “providing critical needed context to the history and political attitudes shaping [the Protest’s] development, and reflecting the drama, absurdity, heroism, and finally, the tragedy of the period.”

ARGUMENT

I. The Defamation Claims Should Be Dismissed

Plaintiffs have been the subjects of numerous news articles – many of them negative – that report on Chai’s background, her political activities, her business activities, and the problems her business has encountered, including a variety of accusations of improper business practices. Because Long Bow’s website excerpts some of these negative news articles, Plaintiffs wish to suppress it by asserting a wide-ranging defamation claim against Long Bow. This suppression attempt must fail. While Plaintiffs repeatedly assert that Long Bow has published false and defamatory material, the complaint identifies only one specific alleged defamatory statement: Long Bow’s excerpt from the *Boston Globe* article quoting Jenzabar’s former CFO. This statement, however, provides no basis for a defamation claim.

A. Pleading Standard For Defamation Claims

The Complaint contains several generalized allegations of false statements. For example, Plaintiffs contend that Long Bow “has published false content concerning the Plaintiffs on the website it maintains and has collected a misleading sample of statements from outdated articles to circulate half-truths and falsehoods, and to create false impressions about Jenzabar, Chai, and Maginn.” Compl. at “Introduction.” Plaintiffs further assert that the Long Bow website “presents a small and misleading sample of articles critical of [Chai’s] past, her political activism, and her business ventures.” *Id.* at ¶ 21. Plaintiffs similarly claim that “Long Bow has provided this material in a manner that purports to be balanced and fair but, in reality, is biased and deceptive.” *Id.* at ¶ 22.

These generic, broad-brush assertions do not satisfy the pleading requirement for defamation claims. The Supreme Judicial Court has made clear that a defamation plaintiff must

set out the allegedly defamatory statements verbatim and must state with particularity extrinsic facts relating to the publication and falsity of the statements. Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 432 n.7 (1991); Endodontic Assoc. of Lexington, Inc. v. Johnston-Neeser, 2006 WL 933427 (Mass. Super. 2006).⁷ Only if these aspects of the claim are alleged with specificity may a complaint be analyzed under the traditional Rule 12(b)(6) standard of review, Eyal, 411 Mass. at 432 n.7. Accordingly, Plaintiff's conclusory allegations concerning, for example, unspecified "half-truths and falsehoods," are not sufficient to allege a defamation claim.

Leaving aside these generic allegations, the Complaint identifies only a single specific statement from the former Long Bow website that is allegedly defamatory:

In particular, from May 14, 2004, for a period of nearly three years, the Site referred to: "a few articles that reported certain concerns third parties expressed with respect to Chai Ling and Jenzabar." As evidence of this "concern," this Site contained an excerpt from a *Boston Globe* column, which read: "[a]ccording to an August 2003 *Boston Globe* column, 'five former executives have sued Jenzabar, including the former CEO [DiLorenzo], who accused Chai and Maginn of a 'number of unethical inappropriate, and/or illegal actions.'"

Compl. ¶ 27.⁸ Plaintiffs assert that this verbatim republication of a quote-within-a-quote from the *Boston Globe* makes Long Bow liable for business defamation and defamation. As shown below, this assertion has no merit, and Plaintiffs' defamation claims must therefore be dismissed pursuant to Rule 12(b)(6).

⁷ The decision in Moriarty v. Sullivan, 2006 WL 2089773 (Mass. Super. 2006), does not suggest a different pleading standard. The complaint in Moriarty, in contrast to the Complaint in this case, specifically identified several allegedly false statements that were made by defendants and published in various news articles. Id. at *3.

⁸ This Paragraph of the Complaint is misleading. In truth, the Long Bow website quoted more extensively from the *Boston Globe* column and specifically included the pronouncement that "Jenzabar has denied the claims and resolved some of the disputes." Former Website (Exh. B), at 1.

B. Liability Standard For Defamation Claims

To state a claim for defamation, a plaintiff must allege that: (1) the defendant published a false statement of fact regarding the plaintiff; (2) the false statement was capable of damaging the plaintiff's reputation in the community; (3) the false statement either caused economic loss or is actionable without proof of economic loss; and (4) the defendant was at fault for publishing the false statement. White v. Blue Cross & Blue Shield of Mass., Inc., 442 Mass. 64, 66 (2004).⁹ A claim for business defamation requires, in addition, allegations that the false and defamatory statement "prejudices the plaintiff in the conduct of its business and deters others from dealing with it." Mass. School of Law at Andover v. Amer. Bar. Ass'n, 952 F. Supp. 884, 888 (D. Mass. 1997) (internal quotation marks and citations omitted). As set forth below, the allegations of the Complaint make clear that Long Bow's republication of the *Boston Globe* article is privileged and therefore immune from Plaintiff's claim for defamation. Moreover, the Complaint on its face fails to properly allege several of the requisite elements of defamation including falsity, defamatory meaning and fault.

1. Long Bow's Republication Of The *Boston Globe* Excerpt Is Privileged

While it is true that, "[g]enerally speaking, the republisher of a defamatory statement is subject to liability as if he had originally published it," Appleby v. Daily Hampshire Gazette, 395 Mass. 32, 36 (1985), the Massachusetts courts have adopted two privileges which foreclose Plaintiffs' claim against Long Bow for defamatory republication: (1) the reputable news source privilege and (2) the fair report privilege. Because the Complaint itself alleges facts that support these privileges, Plaintiffs have failed to state a claim.

⁹ "Defamation is the publication by one without privilege to do so which ridicules or treats [one] with contempt." Correilas v. Viveiros, 410 Mass. 314, 319 (1991). A statement is defamatory if it "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." Phelan v. May Dept. Stores Co., 443 Mass. 52, 56 (2004) (quoting Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 853 (1975)).

First, Plaintiffs' defamation claim is barred because it is based entirely on Long Bow's verbatim republication of a statement made by a reputable news source – the *Boston Globe*. See id. at 37-38 (holding that “no jury could reasonably find that a newspaper had acted negligently in relying on the accuracy of a story from a reputable wire service.”); Reilly v. Associated Press, 59 Mass. App. Ct. 764, 779-80 (2003) (holding that a wire service cannot be negligent for republishing a story from a reputable news source – the *Boston Herald* – so long as nothing on the face of the story appears “inherently improbable or inconsistent”).

In Appleby, 395 Mass. at 36, the court held that the *Boston Globe*, the *Daily Hampshire Gazette*, and other newspapers were entitled to rely on the accuracy of stories published by reputable wire services – the Associated Press (AP) and United Press International (UPI). In Reilly, 59 Mass. App. Ct. at 779-80, the court similarly held that the Associated Press was entitled to rely on a story printed in the *Boston Herald*. Long Bow stands in precisely the same position as the newspapers in Appleby and the Associated Press in Reilly. In publishing a verbatim quote from the *Boston Globe*, it merely relied on the accuracy of the reporting offered by a reputable news source. Plaintiffs make no allegation – nor could they – that the story was “inherently improbable or inconsistent” on its face. If the Associated Press or other media outlets would be protected from suit based on their republication of the very same article, then so must Long Bow.

Second, Plaintiff's defamation claim is barred because it is based entirely on Long Bow's republication of a statement made during a judicial proceeding by Jenzabar's former CFO. Massachusetts courts have long held “that statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding.” Sriberg v. Raymond, 370 Mass. 105, 108 (1976)

(collecting cases). Other persons have a protected right to publish a fair report of such proceedings. See Jones v. Taibbi, 400 Mass. 786, 794 (1987) (“There is a well established privilege to publish reports of judicial, legislative, or other official proceedings.”) The Complaint does not allege – nor could it – that the *Boston Globe* unfairly reported the facts that Jenzabar’s former CFO had made an allegation of improper conduct by Plaintiffs and that Plaintiffs had denied these claims. Instead, the *Boston Globe* accurately reported statements made by Jenzabar’s former CFO during the course of litigation. The *Boston Globe*’s report of the judicial proceeding therefore is privileged, and Long Bow’s verbatim republication of that report enjoys the same privilege.

2. The Complaint Fails To Allege Falsity

Even if these privileges somehow were inapplicable (which they are not), Plaintiffs’ defamation claims would still fail because they have not adequately alleged falsity. In fact, Plaintiffs do not allege that any specific statements republished by Long Bow are false. Plaintiffs do not allege, for example, that Long Bow inaccurately reported either the fact or content of the 2003 *Boston Globe* column. Nor do Plaintiffs allege that the *Boston Globe* itself inaccurately reported what was stated in the complaint filed against Plaintiffs by Jenzabar’s former CFO.

Instead, Plaintiffs appear to challenge the truth of the underlying statement made by Jenzabar’s former CFO in his lawsuit against Jenzabar – in which he accused Chai and Maginn of a “number of unethical, inappropriate, and/or illegal actions.” Id. at ¶ 32. According to Plaintiffs, this statement made by Jenzabar’s former CFO in his lawsuit is “demonstrably false.” Id. at ¶ 35. Plaintiffs allege that this statement is demonstrably false because the former CFO has – in subsequent years – “retracted his baseless allegations,” id. at ¶ 32, “dismissed his

complaint,” *id.* at ¶ 33, and supplied an apology letter, which states that “subsequent and extensive discovery that was conducted demonstrated that the information provided to me by others that led to the allegations was not warranted and not supported by the evidence,” *id.* at ¶ 34.

Plaintiffs thus premise their entire defamation claim on Long Bow’s accurate quotation from the *Boston Globe*’s accurate report of the statements made by Jenzabar’s former CFO in a lawsuit. Even if the former CFO’s allegations were ultimately deemed unfounded, Long Bow cannot be liable for accurately quoting from a *Boston Globe* article that accurately reported those allegations, together with Plaintiffs’ denial of those allegations. That the underlying allegations were eventually dismissed does not change the fact that the claim was made.¹⁰ The website says nothing more.

This is not a case in which Long Bow or the *Boston Globe* adopted and republished the former CFO’s allegation as the truth. To the contrary, Long Bow merely reported – through a verbatim excerpt from the *Boston Globe* article – *the fact* that the former CFO had made such a claim, and *the fact* that Plaintiffs denied that claim. Every element of that report was true, and the Complaint alleges nothing to the contrary. The Complaint therefore fails to allege that Long Bow made any false statement.

3. The Complaint Fails To Allege Defamatory Meaning

“[I]n a defamation action, a threshold issue is whether the statement is reasonably susceptible of a defamatory meaning, and that determination is a question of law for the court.” Foley v. Lowell Sun Pub. Co., 404 Mass. 9, 11 (1989). “Statements alleged to be libelous must

¹⁰ The apology letter itself – which is quoted in the Complaint and referenced in the Complaint as a basis for Long Bow’s purported knowledge of falsity, *id.* at ¶¶ 33-34 – is dated September 22, 2006, and states that the former CEO “voluntarily withdrew [his] claims in early December, 2005 without receiving settlement payments to do so.” See Current Website (Exh. B), at 26.

be interpreted reasonably.” Id. (quoting King v. Globe Newspaper Co., 400 Mass. 705, 711-712 (1987)). “This interpretation ‘requires that the court examine the statement in its totality in the context in which it was uttered or published...’” Id. (quoting Myers v. Boston Magazine Co., 380 Mass. 336, 341-342 (1980)).

The statements attributed to Long Bow by Plaintiffs, when read in their entirety and in the context of their republication, are not reasonably susceptible of a defamatory meaning. Both Long Bow and the *Boston Globe* reported the former CFO’s accusation as merely an allegation, not as a statement of fact. Significantly, Long Bow and the *Boston Globe* also reported that Plaintiffs denied the former CFO’s claim. Taken together, as they must be, these statements indicate merely that Plaintiffs were involved in a dispute with their former CFO. No reasonable person could construe these statements-- that Plaintiffs faced, and denied, allegations of “unethical, inappropriate, and/or illegal actions”-- as defamatory.

4. The Complaint Fails to Allege Fault

For purposes of defamation, the alleged fault varies for public figures and non-public figures. Public figures must allege that the defendant acted with “actual malice” in publishing any false and defamatory statements. Jones, 400 Mass. at 797-98. A defendant acts with “actual malice” if it publishes a false statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” Murphy v. Boston Herald, Inc., 449 Mass. 42, 48 (2007). By contrast, non-public figures need only allege negligence. Id. at 797.

A limited issue public figure “ ‘voluntarily injects [herself] or [is] drawn into a particular public controversy and thereby [becomes] a public figure for a limited range of issues,’ and consequently achieved ‘special prominence in the resolution of public questions.’” Id. at 798 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)). To determine whether

Plaintiffs are limited issue public figures, a court “must look to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.” Id. (internal citations and quotation marks omitted).

Here, the Complaint acknowledges that “Chai has been the subject of significant media attention,” including articles relating to “her past, her political activism, and her business ventures.” Compl. ¶ 21. The Complaint also admits that Chai is “frequently honored and profiled for her role as a student-leader during the 1989 protests in Tiananmen Square, China.” Id. at ¶ 8. Chai has parlayed her public profile as a student leader into her business activities at Jenzabar, which purports to be a “leading provider of enterprise software and solutions to institutions of higher education.” Id. at ¶ 5.

To that end, as the articles referenced in the Complaint make clear, Chai, Maginn, and Jenzabar have all been the focus of significant media attention concerning their business practices. Indeed, the very nature of their defamation claims -- which are based entirely on Long Bow’s republication of media articles about Plaintiffs -- demonstrates beyond dispute that they are public figures with respect to the content of those media articles. Plaintiffs clearly have therefore taken on the status of limited issue public figures.

Although Plaintiffs are limited issue public figures, the Complaint wholly fails to allege that Long Bow acted with anything approaching “actual malice.” The Complaint does not, for example, allege that Long Bow published a false statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” Murphy v. Boston Herald, Inc., 449 Mass. 42, 48 (2007). Nor could it so allege. As shown above, the *Boston Globe* column republished by Long Bow merely reported that Jenzabar’s CFO had made a claim that Plaintiffs engaged in “a number of unethical, inappropriate, and/or illegal actions” and that Plaintiffs, in

turn, denied those claims. Because this report of the dispute between Plaintiffs and Jenzabar's former CFO is not false (and never has been false), there is no set of facts or inferences which would support a finding that Long Bow acted with actual malice in republishing the *Boston Globe*'s report.

In fact, the sequence of events makes clear that Long Bow could not have acted with any knowledge or reckless disregard of the falsity of the former CFO's accusations when it republished the excerpt from the *Boston Globe* column. The Complaint alleges that, in March 2007, Jenzabar informed Long Bow that the former CFO had dismissed his complaint, retracted his allegations, and provided a letter of apology to Plaintiffs. Compl. ¶¶ 32-34. The apology letter itself -- which is cited and quoted in the Complaint -- makes clear that the former CFO did not "apologize" to Plaintiffs until September 2006. See Current Website (Exh. B), at 26. Thus, even if Plaintiffs were correct that these recent events demonstrate the falsity of the former CFO's accusation, Long Bow could not have known this before September 2006. The *Boston Globe* excerpt republished by Long Bow, however, was written in August 2003 and, according to the Complaint, has been on the Long Bow website since at least May 2004. Compl. ¶ 27. Long Bow could not have known in 2003 and 2004 that the former CFO would retract his allegations years later.

Finally, the defamation claim is premised on an incorrect theory of fault. Plaintiffs suggest that Long Bow had a continuing duty, after posting the *Boston Globe* excerpt, to investigate the accuracy of the *Boston Globe* story and the merits of the former CFO's underlying claims. The Complaint further suggests that this continuing duty required Long Bow to modify its website as events in the underlying lawsuit unfolded. There is, however, no such

continuing duty. See, e.g., Appleby, 395 Mass. at 39 (stating that newspapers relying on reputable wire services do not have a duty to conduct independent investigations).

For all of these reasons, the Complaint fails to state a claim for defamation or business defamation, and the Court should dismiss those claims pursuant to Mass. R. Civ. P. 12(b)(6).

II. The Trademark Claims Should Be Dismissed

A. Plaintiffs Have Failed to State A Claim for Trademark Infringement or False Designation of Origin

Plaintiffs allege that Long Bow's reference to the Jenzabar Marks on its website constitutes trademark infringement and false designation of origin. Plaintiffs raise these claims under the Lanham Act (Count III), the Massachusetts Trademark statute (Count VI), and common law (Count V). The analysis under all three is substantially the same. See, e.g., R.K. Enterprises, Inc. v. 2 Tech Automotive, LLC, 2004 WL 2003194, *3 (Mass. Super. 2004) (stating that federal trademark law "closely resembles state law").

To state a claim, Plaintiffs must allege that (i) they possess a mark; (ii) Long Bow used the mark; (iii) Long Bow's use of the mark occurred "in commerce;" and (iv) Long Bow used the mark in a manner likely to confuse consumers. See, e.g., DeCosta v. Viacom Int'l. Inc., 981 F.2d 602, 605 (1st Cir. 1992) (reciting elements). As set forth below, Long Bow's alleged use of the Jenzabar Marks is not actionable because (i) Long Bow's alleged use of the Jenzabar Marks as a metatag does not constitute trademark "use;" (ii) Long Bow's alleged reference to Jenzabar Marks constitutes permissible fair use; and (iii) there is no likelihood of confusion because no reasonable viewer would believe that the allegedly disparaging comments emanated from, or were endorsed by, Plaintiffs.

1. Defendant Has Not “Used” The Marks Within the Meaning of Trademark Law

Long Bow’s alleged reference to Jenzabar as metatags does not constitute “use” for purposes of the Lanham Act. Metatags are invisible to the public. Rescuecom Corp. v. Google, Inc., 456 F.Supp.2d 393, 403 (N.D.N.Y. 2006). In essence, the metatags serve as an internal cataloging system for a search engine. Bihari, 199 F. Supp. 2d at 323. Trademark use, however, requires more than simply referencing a mark. Instead, “use” ordinarily requires that the alleged infringer placed trademarks on goods or services, suggesting that the goods or services emanated from, or were authorized by, the owner of the mark. 1-800 Contacts v. WhenU.com, Inc., 414 F.3d 400, 408 (2d Cir. 2005).

In Site Pro-1 v. Better Metal, LLC, -- F.Supp. 2d--, 2007 WL 1385730 (E.D.N.Y., May 9, 2007), the court recently considered the use of metatags as the basis for a trademark claim. Site Pro-1 alleged that its competitor, Better Metal, impermissibly used Site Pro’s trademark in the metatags of Better Metal’s website. Id. at *1. Better Metal moved to dismiss the trademark claim on the grounds that its use of the mark as a metatag did not constitute trademark use. The court agreed. In reaching its holding the court observed, “The key question is whether the defendant placed plaintiff’s trademark on any goods, displays, containers, advertisements, or used plaintiff’s trademark in any way that indicates source or origin. Here, there is no allegation that Better Metal did so, and therefore no Lanham Act ‘use’ has been alleged.” Id. *4.^{11, 12}

¹¹ Accord Frangrancenet.com, Inc. v. Frangrancenex.com, Inc., 493 F.Supp.2d 545, 550 (E.D.N.Y. June 12, 2007) (holding that use of trademark in keywords and metatags does not constitute “use” for purposes of Lanham Act); Merck & Co. v. Mediplan Health Consulting, Inc., 431 F. Supp. 2d 425, 427 (S.D.N.Y. 2006) (holding that there was no trademark “use” for reference to Zocor as a keyword on website); see also Rescuecom Corp. v. Google, Inc., 456 F.Supp. 2d 393 (N.D.N.Y. 2006) (“Defendants internal use of plaintiff’s trademark to trigger sponsored results is not a use of a trademark within the meaning of the Lanham Act...”).

¹² Some courts have held that the use of metatags can constitute trademark infringement where the mark is used by a competitor and there is a risk of confusion. See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999) (holding that video rental chains’ use of term “movie buff” as

The same result must be reached here. There is no allegation that Long Bow placed the Jenzabar Marks on any product, good, or service. Nor is there any allegation that Long Bow used these marks in any way that suggests any source or origin. Indeed, the website contains an express disclaimer alerting the reader that Long Bow was “in no way affiliated with or sponsored by Jenzabar, Inc.” Current Website (Exh. A), at 10, 16. Long Bow’s use of the marks to catalog its own site does not constitute trademark “use.” Fragrancenet.com, Inc., 493 F.Supp.2d at 550 (“[N]o Lanham Act ‘use’ exists for the use of a trademark in a keyword or metatag.”); Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402, 415 (S.D.N.Y. 2006) (holding that defendants use of the mark “Zocor” as a keyword on its website constituted internal use and was “not use of the mark in a trademark sense”); see also, Site Pro-1, at *4 (same); Rescuecom Corp., 456 F.Supp. 2d at 403 (same); U-Haul Int’l, Inc. v. WhenU.com, Inc., 279 F.Supp.2d 723 (E.D. Va. 2003) (dismissing infringement claim where defendants inclusion of U-Haul mark in website URL address not deemed “use” for purposes of trademark law).

In the absence of any trademark “use,” Plaintiff’s claims for false designation of origin and trademark infringement necessarily fail and must be dismissed.

2. Defendants’ References to the Jenzabar Marks Constitute Nominative Fair Use

Even if Plaintiffs could somehow allege trademark “use,” any references to the Jenzabar Marks on Long Bow’s website constitute nominative fair use. Trademark law recognizes a fair use defense where a mark is used to identify a party or its goods or services. 15 U.S.C. § 1115(b)(4). To determine fair use, courts employ a three-part test. New Kids on the Block v.

metatag was actionable under Lanham Act because there was a likelihood of confusion); Niton Corp. v. Radiation Monitoring Devices, Inc., 27 F.Supp. 2d 102 (D. Mass. 1998) (holding that direct competitor’s copying Niton’s metatags and keywords actionable). These cases, however, are plainly distinguishable. Here, there is no allegation that Jenzabar and Long Bow are competitors. They are not. In fact, they are in entirely different industries (software and film). In addition, there is no likelihood of confusion -- initial or otherwise. Indeed, there is no risk that anyone would reach the Long Bow website thinking that they had arrived at the Jenzabar website. See infra at pp. 20-22.

New Am. Publ'g., Inc., 971 F.2d 302, 308 (9th Cir. 1992). *First*, the product or service must not be readily identifiable without reference to the trademark. *Second*, the defendant must use only so much of the mark as is reasonably necessary to identify the product or service. *Third*, the defendant must do nothing that suggests that the trademark holder sponsored or endorsed the use. Id.; see also Playboy Enters., Inc. v. Welles, 47 U.S.P.Q.2d 1186 (S.D. Cal. 1998) (holding that former Playboy Playmate entitled to use the trademarks “Playboy” and “Playmate” as metatags for her website as nominal fair use).

The court applied this three-part test in J.K. Harris & Co. v. Kassel, 253 F. Supp. 2d 1120 (N.D. Cal. 2003). There, plaintiff and defendants were competitors in the tax representation business. Id. at 1122. Plaintiff alleged that defendants infringed the trade name “J.K. Harris” by placing unfavorable information about J.K. Harris on its website. Id. The defendants’ website, for example, contained a page entitled “JK Harris Employees Tell of Wrongdoing While Complaints Pile Up.” Id. In addition, defendants allegedly used the mark “J.K. Harris” as keyword and as a “header Tag” to increase search engine results. Id. at 1122-23.

The court held that defendants use of the mark “J.K. Harris” constituted fair use. First, the court observed that J.K. Harris was not readily identifiable without use of the mark. Id. at 1126. In other words, defendants had to use the trade name to identify J.K. Harris. Second, it was clear from the context of the website-- particularly the remarks critical of J.K. Harris-- that the plaintiff did not sponsor or endorse the site. Id. Finally, the court held that the defendants used only so much of the mark as reasonably necessary to identify the plaintiff. Id. at 1126-27. Although the site contained “frequent references” to J.K. Harris, the court held that the use of the mark served a “legitimate referential purpose.” Id. at 1126. The court stated:

“Defendants web site refers to J.K. Harris by name in order to make statements about it. This referential use of Plaintiff’s trade

mark is exactly what the nominative fair use doctrine is designed to allow.”

Id. at 1127.

Here, Long Bow’s alleged use of the Jenzabar Marks similarly constitutes a nominal fair use. Like the defendants in Harris, Long Bow’s site contains complaints against Plaintiffs. Long Bow’s reference to these complaints similarly satisfies the three-part test of fair use. First, there is no allegation that Long Bow used anything other than Jenzabar’s trade name. Long Bow could not refer to Jenzabar without reference to its company name; the trademarked term is the only way to identify the company. Second, Long Bow has only used so much of the names as necessary to identify Jenzabar. Long Bow did not use Jenzabar’s logo, lettering or tag line. It simply used its corporate name. This referential use of the mark is permissible. See Harris, 253 F. Supp. At 1126-27; New Kids on the Block, 971 F.2d at 307-07 (“Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company, or product by using its trademark.”). Finally, there is no suggestion that Jenzabar endorsed the Long Bow website. To the contrary, the statements at issue--at least according to the Plaintiffs--are critical of Jenzabar and Chai. Under these circumstances, is clear that the statements at issue did not emanate from Jenzabar.

Long Bow’s referential use of the Jenzabar Marks is therefore permissible nominative fair use. The trademark claims thus must be dismissed.

3. Plaintiffs Fail to Allege Any Facts Supporting Any Likelihood of Confusion

The gravamen of Plaintiff’s trademark claims is that Long Bow’s use of the Jenzabar Marks has allegedly misdirected Jenzabar customers (and would-be customers) to the Long Bow website. By itself, misdirection does not give use to a trademark claim. Bihari v. Gross, 119

F.Supp.2d 309, 320 (S.D.N.Y. 2000); see also, Ford Motor Co. v. 2600 Enterprises, 177 F. Supp. 2d 661 (E.D. Mich. 2001) (holding that Ford failed to establish a likelihood of success on trademark infringement and dilution claims solely on the basis that defendant's domain contained a hyperlink automatically directing users to ford.com). Instead, there must be some likelihood of confusion as to the origin, sponsorship or approval of the defendant's goods, services or commercial activity. 15 U.S.C. §1125(a)(1)(A); see also Int'l Assn of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir 1996). Although Count III perfunctorily recites that Long Bow's use of the Jenzabar Marks "is likely to cause confusion among consumers," Compl. ¶ 51, Plaintiffs have not alleged sufficient facts to support any alleged confusion.¹³ To the contrary, the alleged facts make clear that there is no likelihood for any confusion.

Because Plaintiffs allege that the statements on the website are critical of Jenzabar and Chai, Compl. ¶¶ 19, 21, 24, no reader would conclude that the remarks emanated from, or were endorsed by, the Plaintiffs. In Bihari, 119 F.Supp.2d 309, a disgruntled customer set up websites critical of an interior designer. The websites contained metatags for the trademarked term "Bihari Interiors." Id. at 316. In addition, the text of the sites was critical of Bihari, stating the site contained a discussion of "Marianne Bihari, fraud and deceit and interior decorating." Id. at 313. The court held there was no likelihood of confusion because the site was plainly critical of the mark holder. (Id. at 320). The court observed, "Because the purpose of the websites is to injure Bihari Interiors commercially, no reasonable viewer would believe that the disparaging comments about Bihari's business ethics... are endorsed by Bihari." (Id. at 319).

¹³ Plaintiffs have not alleged any likelihood of confusion with respect to their Common Law Trademark Infringement (Count V) and State Law Infringement (Count VI) claim.

Similarly, there is no likelihood of confusion here. First, as the Complaint concedes, Jenzabar and Long Bow are not competitors. They are not even in the same industry. Jenzabar provides enterprise software to institutions of higher education, including “private liberal arts, medical, law, state and community colleges.” (Compl. ¶¶ 5, 6). By contrast, Long Bow produces educational films for broadcast on PBS and the BBC, among others. (Id. ¶ 15; Exh. A at 27). Second, Long Bow’s web site does not contain any information that would confuse visitors into thinking that they had arrived at a site created or endorsed by Plaintiffs. To the contrary, Plaintiff alleges that Long Bow’s site contains “selective,” “misleading” and “disparaging” content “critical of [Chai’s] past, her political activism, and her business ventures.” (Compl. ¶¶ 19, 21, 24).¹⁴ Plaintiffs cannot have it both ways; they cannot claim that the site contains demonstrably false and misleading statements about them, and, at the same time, contend that the web site visitors will likely be confused into thinking that Plaintiffs endorsed the site. Disparagement is the antithesis of endorsement. Based on the facts alleged, no reasonable viewer could conclude that Jenzabar or Chai endorsed the Long Bow web site. Bihari, 119 F. Supp. 2d at 319. There is, therefore, no likelihood of confusion and Plaintiffs’ trademark infringement and false designation of origin claims must be dismissed.

B. Plaintiffs Have Failed to State A Claim for Trademark Dilution Under Either Federal (Count IV) or State (Count VII) Law

Perhaps recognizing the absence of any likely confusion, Plaintiffs have also alleged trademark dilution claims. The anti-dilution statutes emerged “to curb the unauthorized use of marks where there is no likelihood of confusion between the original use and the infringing use.”

¹⁴ Long Bow disputes that its site sets forth “selective,” “misleading” or “disparaging” content. Unlike the plaintiff in Bihari (whose sole purpose was to criticize the interim designer), Long Bow seeks to provide information – both good and bad – about the Protests and the student leaders principally for historical and educational purposes. In any event, dismissal need not await resolution of this factual dispute. Because plaintiffs allege Long Bow’s website disparages them, it is impossible for a fact finder to conclude that Plaintiffs, at the same time, endorsed Long Bow’s website.

L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 30 (1st Cir. 1987). To state a claim for dilution, Plaintiffs must show: (1) their marks are famous within the meaning of the statutes; and (2) Long Bow's use of the marks caused actual dilution of the mark. See, e.g., Savin Corp. v. Savin Group, 391 F.3d 439, 455 (2d Cir. 2004); see also L.L. Bean, 811 F.2d at 30. As set forth below, there are no set of facts that support the trademark dilution claims.

1. Plaintiff's Trademark Dilution Claim Fails Because There Is No Trademark "Use."

In the first instance, Plaintiffs must allege trademark use to support a dilution claim. See Rescuecom, 456 F.Supp.2d at 403-04.¹⁵ As set forth above at pages 16-18, Long Bow's use of the Jenzabar Marks does not constitute trademark use. In the absence of any trademark use, the dilution claims must be dismissed. Id. (dismissing dilution claim because Google's use of keywords did not constitute trademark "use"); U-Haul Intern. Inc., 279 F.Supp.2d at 729 (entering judgment as a matter of law for defendant on trademark dilution claim because the plaintiff was "unable to show that WhenU was using U'Haul's marks as defined in the Lanham Act.>").

2. Long Bow's Use of the Marks Is Excluded from the Federal Trademark Dilution Act

The Federal Trademark Dilution Act ("FTDA") provides that "any fair use" "shall not be actionable as dilution..." 15 U.S.C. § 1125(c)(3). Because Long Bow's reference to the Jenzabar Marks constitutes nominative fair use (see infra pp. 18-20), there is no basis for a dilution claim.

In addition to fair use, the FTDA provides two additional specific exclusions for non-commercial use and news commentary, both applicable here.

¹⁵ The Federal Trademark Dilution Act provides, "The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's *commercial use in commerce of a mark or trade name*, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark..." 15 U.S.C. § 1125(c)(1) (emphasis supplied).

(a) Defendant's References to the Marks Constitutes a Permissible Non-Commercial Use

The FTDA provides that "any non-commercial use of a mark" is not actionable. 15 U.S.C. § 1125(c)(4)(b). Here, the allegations suggest that Long Bow has used the names Jenzabar and Chai on its web site and as metatags. (Compl. ¶¶ 19-30). It is well settled, however, that "[t]he mere use of another's name on the Internet... is not per se commercial use." Bally Total Fitness Holding Corp. v. Faber, 29 F.Supp.2d 1161, 1166 (C.D. Cal. 1998).

The Complaint is devoid of any factual allegations that Long Bow is using these marks in connection with commerce. There is, for example, no factual allegation that Long Bow is selling any goods or services under the Jenzabar Marks. Nor is there any allegation of advertising. In fact, there are no advertisements on the website. In sum, there is no factual allegation that Long Bow seeks any profit in connection with the references to Jenzabar or Chai.

To the contrary, the Complaint itself makes clear that Long Bow's alleged motives were not commercial. Indeed, Plaintiffs expressly allege that Long Bow was motivated not by commercial interests, but by a political agenda. For example, Plaintiffs allege that Long Bow's motivation was rooted in an alleged "desire to discredit Chai and advance Long Bow's divergent political agenda." (Compl. ¶ 30).¹⁶

While Plaintiffs obviously disagree with the substance of the website, neither the FTDA nor the Massachusetts trademark statute provides redress. As one court observed:

This court does not believe that Congress intended the FTDA to be used by trademark holders as a tool for eliminating internet links that, in the trademark holder's subjective view, somehow disparage its trademark. Trademark law does not permit the Plaintiff to enjoin persons from linking to its homepage simply because it does not like the domain name or other content of the linking webpage.

¹⁶ Although Long Bow disputes these allegations, the Court need not resolve the factual dispute before dismissing the case. For present purposes, it is sufficient to note that the Complaint itself makes clear that Long Bow's statements constituted non-commercial use of the marks. Accordingly, Plaintiff's dilution claim necessarily fails.

Ford Motor Co. v. 2600 Enterprises, 177 F.Supp.2d 661 (E.D. Mich. 2001) (denying Ford's motion for injunction against entity that owned domain name "fuckgeneralmotors.com" which contained a hyperlink to "ford.com"); see also Bihari, 119 F.Supp.2d at 319 (denying injunction where critical statements not covered by trademark law).

Because the reference to the Jenzabar Marks is plainly non-commercial speech, it is exempt from the FTDA. The trademark dilution claims must therefore be dismissed.

(b) The Statements At Issue Are Exempt From the FTDA On the Basis That They Constitute News Reporting or News Commentary

In addition to fair use and noncommercial use, the FTDA also specifically exempts "all forms of news reporting and news commentary." 15 U.S.C. § 1125(c)(3)(B). Even accepting the allegations in the Complaint, the site constitutes a repository of news reporting and commentary concerning the Protests and the student leaders. For example, the Site "contains links to a variety of articles and discussions including, *inter alia*, web pages dedicated to an examination of Chai's involvement in the Protests and her subsequent founding of Jenzabar." (Compl. ¶ 20). In addition, the statement that forms the basis for the defamation claim was published in the *Boston Globe*. (Compl. ¶ 27).

Long Bow's reference to the marks-- in connection with its portrayal of, and commentary concerning, the Protests and its student leaders-- constitutes a "form of news reporting and news commentary." 15 U.S.C. § 1125(c)(3)(B). It is therefore exempt from a dilution claim. Id; see also L.L. Bean, 811 F.2d at 33 (stating that the anti-dilution statute does not "encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context.")

3. Long Bow's References to Jenzabar and Chai Ling Are Protected By the First Amendment

By this action, Plaintiffs wish to control the content of Long Bow's website, in part, under the guise of trademark law. That effort, however, impermissibly stretches the bounds of the Lanham Act and is entirely inconsistent with the First Amendment.

It is well settled that the Lanham Act is narrowly construed when First Amendment interests are implicated. ESS Entertainment 2000 v. Rock Star Videos, Inc. 444 F.Supp.2d 1012, 1038 (C.D. Cal. 2006). Faced with the intersection of free speech and trademark, courts ordinarily balance the public interest in free expression against the public interest in avoiding consumer confusion. Id. at 1038; see also Yankee Publishing Inc. v. News Am. Publishing, Inc., 809 F.Supp. 267, 276 (S.D.N.Y. 1992) ("Thus, where the unauthorized use of a trademark is for expressive purposes of comedy, parody, allusion, criticism, news reporting, and commentary, the law requires a balancing of the rights of the trademark owner against the interests of free speech."). In this case, the balance tips squarely in favor of dismissal.

First, the Complaint fails to allege any risk of customer confusion. Long Bow and Jenzabar are not competitors in any sense. Jenzabar is a software company. Compl. ¶ 5. Its customers include "private liberal arts, medical, law, state and community colleges." Id. ¶ 16. Long Bow produces documentaries principally for broadcast on public television. Id. at ¶ 15; Exh. A at 27.

Moreover, no one could reasonably conclude that the statements emanated from, or were endorsed by, Jenzabar. On its face, the site sets forth an express disclaimer stating that the site is not affiliated with Jenzabar. In addition, the statements at issue are allegedly critical of Jenzabar and Chai. Under these circumstances, no one would conclude that Jenzabar issued statements critical of itself and its founder. There is, therefore, no risk of customer confusion.

At the same time, Long Bow has a strong interest in free expression. The speech at issue is non-commercial. As the Supreme Court explained, the “core notion” of commercial speech includes “speech which does no more than propose a commercial transaction.” Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66 (1983). “If speech is not purely commercial—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.” Nissan Motor Corp. v. Nissan Computer Corp., 378 F.3d 1002, 1017 (9th Cir. 2004).

The website at issue primarily serves an informational and educational purpose, not a commercial one. For example, the website recites that it “explores the origins and history of the protests, the intense international media coverage, and underlying themes such as democracy, human rights, reform and revolution, and nationalism.” Current Website (Exh. A), at 1. The website’s recitation of events and related commentary concerning the Protests and the student leaders is, therefore, non-commercial. Nissan Motor Corp., 378 F.3d at 1017 (holding that negative commentary about Nissan Motor Corp. was non-commercial speech). It is, therefore, entitled to full First Amendment protections. Id.

Although Plaintiffs obviously disagree with Long Bow’s portrayal of these events (and of Chai), they cannot use the Lanham Act to squelch this protected, non-commercial speech. As one court observed, “[i]t is important that trademarks not be ‘transformed from rights against unfair competition to rights to control language’.” CPC Int’l, Inc. v. Skippy, Inc., 214 F.3d 456, 462 (4th Cir. 2000) (citation omitted). Yet that is precisely what Plaintiffs seek to do here. Neither the Lanham Act nor the Massachusetts trademark statute provides Plaintiffs with the right to constrain Long Bow’s message. Nissan Motor Co., 378 F.3d at 1017-18 (holding that FTDA did not support constraining disparaging comments about Nissan Motor on nissan.com

web site); CPC Int'l, 214 F.3d at 462-63 (holding that trademark law could not support injunction censoring a partisan account of dealings between CPC and Skippy);

For all of the above reasons, the trademark dilution claims must be dismissed.

III. The 93A Claim Should Be Dismissed

Because Plaintiffs' claim under M.G.L. c. 93A is entirely derivative of its claims for defamation and trademark misuse, that claim fails for all of the reasons expressed above. See Dulgarian v. Stone, 420 Mass. 843, 853 (1995) (“[W]here allegedly defamatory statements do not support a cause of action for defamation, they also do not support a cause of action under G.L. c. 93A.”); J.K. Harris, 253 F. Supp. 2d at 1130 (denying injunctive relief where plaintiff's unfair business practices claims “largely restate[d]” its Lanham Act claims).

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint against Long Bow should be dismissed in its entirety and with prejudice.

Respectfully submitted,

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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: 10/7/07 Matthew N. Kane

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