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Massachusetts District Court
Case No. 1:11-cv-12000-RBC
Greenspan v. Random House, Inc. et al

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PRO SE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

AARON GREENSPAN, Plaintiff, v. **RANDOM HOUSE, INC.; MEZCO, INC.; BENJAMIN MEZRICH; COLUMBIA PICTURES INDUSTRIES, INC. a/k/a SONY PICTURES a/k/a COLUMBIA TRISTAR MOTION PICTURE GROUP**, Defendants.	Case No.: 1:11-cv-12000-RBC Judge Robert B. Collings

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RELIEF FROM A JUDGMENT OR ORDER PURSUANT TO RULE 60(b)(5)

Plaintiff Aaron Greenspan (hereinafter "Plaintiff"), *pro se*, hereby submits this memorandum of law in support of his motion pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, and in support thereof states as follows:

ARGUMENT

I. The May 9, 2012 Orders and Judgment Should Be Amended, Modified or Vacated Due to the United States Supreme Court's March 25, 2014 Ruling in *Lexmark International, Inc. v. Static Control Components, Inc.*

Federal Rule of Civil Procedure 60(b)(5) states that, "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Rule 60(b). Here, the Court's Orders and Judgment are specifically based on earlier judgment(s) that have been reversed.

On March 25, 2014, the United States Supreme Court issued its unanimous ruling in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. ____ (2014). The discussion in *Lexmark* centers around the requirements for standing in Lanham Act cases where competitors may or may not be considered "direct." Given that this motion is being filed one week after the issuance of the Supreme Court ruling, it is well within a "reasonable time;" action could hardly have been taken any sooner. *US v. Boch Oldsmobile, Inc.*, 909 F. 2d 657 (1st Cir. 1990).

In *Lexmark*, the Supreme Court makes a number of statements relevant to the present case. "Even when a plaintiff cannot quantify its losses with sufficient certainty to recover damages, it may still be entitled to injunctive relief under §1116(a) (assuming it can prove a likelihood of future injury) or disgorgement of the defendant's ill-gotten profits under §1117(a). See *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F. 3d 820, 831 (CA9 2011); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F. 2d 186, 190 (CA2 1980)." *Id.* Plaintiff has already pointed out numerous examples of the injuries that ensued from the publication of Mezrich's book: (1) being called a "fool" in public; (2) being ridiculed, in a false and deliberately harmful and scornful

manner, on social media sites as mentally ill; and (3) lost book sales. This showing goes far beyond the mere "likelihood of future injury" required by *Lexmark*.

To be clear, as authors of books on similar topics, both categorized as "non-fiction," Plaintiff and Defendant Mezrich are direct competitors. As the 100% shareholder of Think Computer Corporation, the owner of the Think Press publishing imprint that published Plaintiff's book *Authoritas*, Plaintiff is also a direct competitor of Defendants Random House and Mezco (since Mezco's purpose is likely to hold the ill-gotten profits of Mezrich's various publishing endeavors). But according to the Supreme Court in Lexmark, direct competition is not even a necessary prerequisite for a Plaintiff to have Lanham Act standing. The factors previously cited by this Court as necessary in its Order, such as an "assertion that the purported misrepresentations made by the defendants, i.e., buying 'five-star' reviews and boosting sales numbers, influenced, or would likely influence, consumer purchasing decisions," are totally irrelevant to a proper standing analysis. To the extent that allegations of harm to Plaintiff's business and goodwill were absent in the section of the original Complaint pertaining to the Lanham Act (though other relevant paragraphs were incorporated by reference), they were certainly present in the proposed First Amended Complaint (*see* ¶ 141 at least).

"[A] rule categorically prohibiting all suits by noncompetitors would read too much into the Act's reference to 'unfair competition' in §1127. By the time the Lanham Act was adopted, the common-law tort of unfair competition was understood not to be limited to actions between competitors. One leading authority in the field wrote that 'there need be no competition in unfair competition,' just as '[t]here is no soda in soda water, no grapes in grape fruit, no bread in bread fruit, and a clothes horse is not a horse but is good enough to hang things on." Rogers, 39 Yale L. J., at 299; accord, *Vogue Co. v. Thompson-Hudson Co.*, 300 F. 509, 512 (CA6 1924); 1 H. Nims, The Law of Unfair Competition and Trade-Marks, p. vi (4th ed. 1947); 2 *id.*, at 1194-

1205. It is thus a mistake to infer that because the Lanham Act treats false advertising as a form of unfair competition, it can protect *only* the false-advertiser's direct competitors" (emphasis in original). *Id*.

The reasoning behind this Court's perfunctory footnote 3 in its Memorandum and Order on Motion for Leave to File First Amended Complaint is similarly defeated by *Lexmark*. The Supreme Court has clarified that standing under the Lanham Act is established for anyone "whose position in the marketplace has been damaged by [the defendant's] false advertising. §1127. There is no doubt that it is within the zone of interests protected by the statute." *Id*. Plaintiff fits this description perfectly.

Lexmark even comes full circle to Plaintiff's claims of defamation. "The District Court emphasized that Lexmark and Static Control are not direct competitors. But when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant's aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage. Consider two rival carmakers who purchase airbags for their cars from different third-party manufacturers. If the first carmaker, hoping to divert sales from the second, falsely proclaims that the airbags used by the second carmaker are defective, both the second carmaker and its airbag supplier may suffer reputational injury, and their sales may decline as a result. In those circumstances, there is no reason to regard either party's injury as derivative of the other's; each is directly and independently harmed by the attack on its merchandise." *Id*. Defendant Mezrich did not write that Plaintiff manufactured defective airbags—instead he wrote that Plaintiff's work "wasn't particularly slick."

Defendants have done considerable damage to Plaintiff's book sales and reputation, and the Supreme Court's ruling in *Lexmark* addresses this very situation. In fact, Rule 60(b)(5) was enacted with this exact type of scenario in mind. "The Supreme Court's decision in *Burns v*.

Alcala, 420 U.S. 575, 95 S.Ct. 1180, 43 L.Ed.2d 469 (1975), construing 42 U.S.C. § 606(a), represented a fundamental change in the legal predicates of the consent decree. This is arguably the kind of situation in which relief should be available under Rule 60(b)(5)." *Theriault v. Smith*, 523 F. 2d 601 (1st Cir. 1975). With the rare benefit of this crystal-clear precedent, Plaintiff once again requests the Court's permission to file an updated First Amended Complaint.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Plaintiff respectfully requests that this Court grant his Motion for Relief from a Judgment or Order Pursuant to Rule 60(b)(5).

Respectfully submitted this 1st day of April, 2014.

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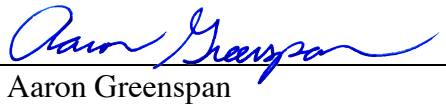
CERTIFICATE OF SERVICE

I, Aaron Greenspan, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

By 

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