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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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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MR. AARON GREENSPAN, an individual,

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.

Civil Action No. 1:11-CV-12000-RBC

LEAVE TO FILE GRANTED ON 2/13/12

**REPLY MEMORANDUM IN SUPPORT OF
RANDOM HOUSE, INC.'S, MEZCO, INC.'S,
AND BENJAMIN MEZRICH'S MOTION TO DISMISS WITH PREJUDICE**

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Dated: February 14, 2012
Boston, Massachusetts

INTRODUCTION

In his Opposition to Defendants Random House Inc.’s, Mezco, Inc.’s, and Benjamin Mezrich’s (“Moving Defendants”) Motion to Dismiss with Prejudice (“Motion”), Plaintiff succeeds only in making Moving Defendants’ point for them. The Opposition demonstrates that this case is nothing more than a misguided attempt to enlist this Court’s aid in Plaintiff’s battle for recognition for his perceived role in the creation of facebook.com. In fact, much of the Opposition is little more than a rant about his dispute with Mark Zuckerberg over credit for the idea for Facebook. When Plaintiff finally turns to the Complaint itself, his efforts to defend his case fall well short. As to copyright, Plaintiff defends the Complaint’s clear deficiencies by pointing to a handful of unprotectable facts and passages in his book, *Authoritas*, that Plaintiff misrepresents and that are not even remotely similar to the sentences in *The Accidental Billionaires* (the “Book”) that Plaintiff claims are copied from his work. Regarding defamation, Plaintiff ignores the standard for defamatory meaning, the required elements of defamation, and the relevant context in an attempt to salvage claims based on statements that are not even disparaging, much less defamatory. Plaintiff similarly fails to defend his Lanham Act claims, focusing on his suggestion that the Book is wrongly marketed as non-fiction – which is merely a restatement of his doomed defamation by omission claim – and proposing a legal theory that promises a dangerous chilling effect on free speech.

ARGUMENT

I. Plaintiff Fails To Show Any Copying Of Protectable Elements Or Similar Expression, And His Copyright Claims Must Be Dismissed.

In their Motion, Moving Defendants demonstrated that the Complaint fails to identify any protected elements that were allegedly copied from Plaintiff’s work, *Authoritas*, and instead lists only unprotected facts, ideas, words and phrases, and common stock scenes. *See* Motion at

7-8, Appendix. In opposition, Plaintiff again points to a handful of unprotected elements that he claims were copied from his work – “the couch outside the actual office, specific references to the . . . receptionist, a description of the building’s location . . . [and] an African-American assistant.” Opp. at 10. All of these purported similarities are simply unprotected facts. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (“The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates”) (internal quotation and citation omitted).

The purported “examples” of similarity that Plaintiff misleadingly edits and references only demonstrate how frivolous his copyright claims are. *See* Opp. at 9-10. In *Authoritas* Plaintiff describes a moment in his meeting with Harvard president Lawrence Summers: “After five very long seconds, sitting like a pigeon on his couch, I regained my composure . . . ‘I know what the man said,’ I snapped in my mind. Outwardly, I swallowed.” *Authoritas* at 4. Plaintiff then claims that the following sentence copies his expression: “After he’d let a few seconds pass, so the man could at least pretend to reread their letter, Tyler cleared his throat.” Book at 128. The expression in these passages is not similar, let alone substantially similar. Among other things, the “description of an awkward pause” and the “focus on the student’s throat,” (*see* Opp. at 11), do not appear in the same sentence, as Plaintiff’s artful use of ellipsis suggests. In fact, Plaintiff omits three paragraphs of dialogue that separate the statements in a desperate attempt to manufacture the appearance of similarity. *See Authoritas* at 4. However, random similarities scattered throughout the works are insufficient to allege a copyright claim. *See Cavalier v. Random House, Inc.*, 297 F.3d 815, 825 (9th Cir. 2002). Additionally, the purported “focus on the student’s throat” is an unprotectable idea that is expressed in a completely different manner – as swallowing in *Authoritas* and clearing of the throat in the Book, and the fragmentary phrase

“the man” cannot be copyrighted. See *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (“Copyright law denies protection to fragmentary words and phrases”).

Similarly, Plaintiff’s second example is a misleading and completely different expression of an only vaguely-similar idea in the Book. In *Authoritas*, Plaintiff writes: “My hatred for the system—my teachers, my classes, my so-called friends, my activities—had reached new levels.” *Authoritas* at 89. Plaintiff argues that the following sentence is copied from his work: “He felt . . . betrayed. By this man, by the system, by the university itself.” Book at 130. First, Plaintiff again attempts to mislead the Court, suggesting that the quoted passage concerns Plaintiff’s “hatred” for Harvard University. See Opp. at 11 (describing the quoted passage as “plaintiff’s description of his own sense of outrage at the University administration”). However, the passage actually refers to Plaintiff’s time in high school. Moreover, Plaintiff does not identify a single copyrightable element of his passage that is copied: “the same type of general ire” is an unprotectable idea, there can be no copyright in rhetorical devices, and there is no copyright protection for unoriginal, individual words and phrases such as “this man” and “the system.” Moreover, these elements are not expressed in a similar fashion. They reflect different emotions, “hatred” in *Authoritas* and “betray[al]” in the Book, and those emotions are directed at different entities. Plaintiff’s copyright claims must be dismissed.¹

¹ Plaintiff offers no argument to support, and appears to abandon, his copyright infringement claim based on scenes in *The Social Network* (the “Film”). See Complaint, ¶¶ 62-63; Motion at 10-11.

II. Plaintiff's Defamation Claims Must Be Dismissed.

A. References To Plaintiff By The Wrong Last Name Fail To Meet The Standard For Defamatory Meaning.

Plaintiff suggests that mistaken references to him by an incorrect name in the hardcover edition of the Book are defamatory because “a reasonable person would detect at least a hint of apathy, perhaps intentional.” Opp. at 12-13. However, “apathy,” be it intentional or not, is insufficient to make a statement defamatory. Words are defamatory only if “they hold the plaintiff up to contempt, hatred, scorn or ridicule.” *Carmack v. National Railroad Passenger Corp.*, 486 F. Supp. 2d 58, 76 (D. Mass. 2007). Plaintiff does not even attempt to explain how referring to him as “Grossman” meets this standard, nor could he, as “Grossman” is nothing more than a different surname, which carries with it no negative connotations.

B. References To Plaintiff As “Kid” Are Not Capable Of Defamatory Meaning, As In Context They Are Simply Value-Neutral References To Age.

Plaintiff argues that the term “kid,” while clearly not disparaging on its face, is defamatory when viewed in context, including in contrast to terms used to describe Mark Zuckerberg and Eduardo Saverin.² See Opp. at 13. Viewing the statements in context, as the Court must (see *Damon v. Moore*, 520 F.3d 98, 104-05 (1st Cir. 2008)), the term “kid” is repeatedly used in the Book to describe all of the main characters – including Zuckerberg, Saverin, Sean Parker, and the Winklevoss twins – as well as the entire student bodies of both Harvard and Stanford, and college students in general.³ Indeed, Zuckerberg is referred to as

² Plaintiff also argues that “kid” is derogatory when substituted with a different word. See Opp. at 14. Needless to say, this argument is unavailing, as the Court must focus on the words actually used.

³ See, e.g., Book at 4 (referring to Saverin as “kid”); at 137 (Parker as “skinny kid”); at 68 (Winklevosses as “kids like that”); at 31 (“Harvard kids”); at 79 (“kids at Harvard”); at 84 (referring to “kids all over campus” in the same paragraph as reference to Plaintiff); at 133 (“Stanford kids”); at 140 (“college kids”).

“kid” 10 times *in the first chapter alone*.⁴ See Book at 9-10. Thus, in context, it is clear that “kid” – whether applied to Plaintiff or any of the other characters in the Book – is simply a reference to age and is not capable of holding Plaintiff up to “contempt, hatred, scorn or ridicule.” In any event, this claim also fails because Plaintiff admits that he “was of typical age for his college class,” (Opp. at 13), thereby conceding that the references to him as “kid” are true. See *Damon*, 520 F.3d at 103 (defamation requires a “false statement of and concerning the plaintiff”).

C. None Of The Statements About Plaintiff’s Website Supports A Claim For Defamation.

The statements in the Book that “hardly anyone paid attention to” Plaintiff’s Universal House Facebook website “as far as Eduardo knew” and that the website “wasn’t particularly slick,” are not capable of defamatory meaning, and are expressions of opinion, as they are not capable of being proved true or false, are subjective issues that mean different things to different people, and include a qualifier indicating that they are opinion. See Motion at 13-14, and cases cited therein. In response, Plaintiff argues that “slick” does have an agreed upon definition, and points to the Random House Dictionary as defining the word to mean “ingenious; cleverly devised.” Opp. at 14. In fact, the Random House Dictionary provides no fewer than *seven* definitions for “slick,” demonstrating that there is no one meaning for the statement at issue, and therefore it is non-actionable opinion. See *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (statement that business was a “scam” was opinion because scam “means different things to different people”). Moreover, Plaintiff does not address the argument that, even assuming

⁴ Overall, Zuckerberg is referred to as “kid” more than 80 times in the Book. Saverin is referred to as “kid” another dozen times. Accordingly, Plaintiff’s attempt to contrast the Book’s references to him with its descriptions of Zuckerberg and Saverin fails.

“slick” has the single definition he suggests, whether a particular website *fits* that definition is a subjective question that is not capable of being proved true or false.⁵ *See* Motion at 14.

Similarly, Plaintiff fails to address the clear fact that the statement “hardly anyone paid attention to” his website is non-actionable opinion because what constitutes “hardly anyone” and what counts as “paying attention” to a website are also subjective inquiries, and cannot be proved true or false.⁶ *See Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 312, 435 N.E.2d 1021 (1982) (“An assertion that cannot be proved false cannot be held libelous”).

Plaintiff also complains about the statement that his website “wasn’t about pictures and profiles.” Book at 80. First, the statement cannot subject Plaintiff to “contempt, hatred, scorn or ridicule,” and Plaintiff does not attempt to argue otherwise. Second, the statement is an expression of opinion that cannot form the basis of a defamation claim.⁷ Whether or not a website is “about” pictures and profiles is a subjective question, and the statement cannot be proved true or false. *See Cole*, 386 Mass. at 312 (statement was non-actionable opinion because its meaning was “imprecise and open to speculation [and it could not] be proved false”).

Plaintiff suggests that he was defamed by the statement that “Friendster” – another website completely unrelated to houseSYSTEM – “wasn’t exclusive, the way Mark was

⁵ Plaintiff suggests that the statements are not protected opinion because they are presented as Saverin’s opinions, rather than the narrator’s. *See* Opp. at 16. This distinction is irrelevant. *See Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263, 612 N.E.2d 1158 (1993) (statement referring to “suspicions” of sources, and not the writer, were protected opinion).

⁶ Plaintiff argues that the statement is “demonstrably untrue” because “[b]etween one-quarter and one-third of the Harvard campus signed up” for the website. Opp. at 14. Plaintiff apparently equates signing up for the website to “pa[y]ing attention” to it. However, whether signing up for a website alone constitutes “pay[ing] attention” to it is a subjective question that cannot be definitively answered in the positive or negative.

⁷ Plaintiff seems to confuse the statement in the book that his website “wasn’t *about* pictures and profiles” with the suggestion that his website “*lacked* pictures and profiles.” Opp. at 15 (emphasis added).

describing his idea.” Opp. at 15. Plaintiff’s theory is that, because the sentence appears in the same paragraph as statements concerning his website, Moving Defendants had an affirmative duty “to note that houseSYSTEM *was* exclusive to Harvard affiliates,” which they failed to fulfill. *Id.* (emphasis in original). Both factually and legally, Plaintiff is wrong. First, in the preceding paragraph the Book notes that Plaintiff’s website used “Harvard e-mails and IDs as passwords.” *See* Book at 80. Second, the statement specifically refers to Friendster, and there is no suggestion that it applies to houseSYSTEM. Thus, the statement cannot, and does not, satisfy the “of and concerning” element of defamation. *See New England Tractor-Trailer Training of Connecticut, Inc. v. Globe Newspaper Co.*, 395 Mass. 471, 483, 480 N.E.2d 1005 (1985) (plaintiff must show either that defendant intended words to refer to plaintiff and they were so understood, or that words could reasonably be interpreted to refer to the plaintiff and defendant was negligent to publish them in a way that they could be so understood).

D. Plaintiff’s Purported “Defamation By Omission” Claims Fail To Satisfy The “Of And Concerning” Element Of Defamation And Must Be Dismissed.

Plaintiff is simply wrong that “defamatory statements need not always be ‘of or concerning’ a person.” Opp. at 16. “It is a *fundamental principle* of the law of defamation that a plaintiff must show, inter alia, that the allegedly defamatory words published by a defendant were of and concerning the plaintiff.” *New England Tractor-Trailer*, 395 Mass. at 474 (emphasis added); *see also id.*, citing *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 294, 34 N.E. 462 (1893) (“In a suit for libel or slander, *it is always necessary* for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff”) (emphasis added). Plaintiff fails to address, much less distinguish, the authorities cited in the Motion demonstrating that claims like his, which fail to satisfy the “of and concerning” element of defamation, must be dismissed. *See* Motion at 15-16.

The only Massachusetts case Plaintiff cites to support his contention that the Court should ignore controlling precedent is *Sharratt v. Hous. Innovations, Inc.*, 365 Mass. 141, N.E.2d 343 (1974), which does not stand for the proposition for which Plaintiff cites it.⁸ See Opp. at 17. The *Sharratt* court simply held that attendant circumstances may be used to demonstrate that facially-innocent words are capable of defamatory meaning. 365 Mass. at 145. *Sharratt* did not address, much less purport to eliminate, the “of and concerning” element of defamation at all.⁹ The court expressly found that “[t]he facts pleaded tended to show” that the statements at issue could “be understood as *referring* to the plaintiff.” *Id.* at 145-46 (emphasis added) (internal quotation marks omitted). As Plaintiff’s claims are based on the fact that the Book does not refer to him in “key paragraphs” and the Film does not refer to him at all, they cannot satisfy this element.¹⁰

⁸ Plaintiff also cites two Michigan state court cases, neither of which supports his position. See Opp. at 16, citing *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 1994 WL 413394 (Mich. Cir. Ct. Jan. 4, 1994); *Locricchio v. Evening News Ass’n*, 438 Mich. 84, 476 N.W.2d 112 (1991). First, neither case addressed a purported “defamation by omission” claim; instead, they analyzed whether statements that referenced the plaintiff by name, and therefore were clearly “of and concerning” the plaintiff, were defamatory. See *Royal Palace Homes* at *10-*15; *Locricchio* at 91-94. Second, both cases confirm that defamation requires “a false and defamatory statement *concerning the plaintiff*.” *Royal Palace Homes* at *2 (emphasis added); *Locricchio* at 115. And finally, in each case the court *rejected* the plaintiff’s defamation claims. See *Royal Palace Homes* at *15; *Locricchio* at 134.

⁹ Notably, the above statements from the Massachusetts Supreme Court in *New England Tractor-Trailer* were made in 1985, 11 years after *Sharratt* was decided.

¹⁰ Plaintiff also advances the wholly nonsensical argument that the sections of the Book that “specifically omit[] Plaintiff” are somehow of and concerning him “because Plaintiff is missing.” Opp. at 17-18. It is specifically *because* “Plaintiff is missing” that the sections of the Book at issue are not “of and concerning” Plaintiff and cannot support a claim for defamation.

E. Plaintiff's Defamation Claim Based On The November 6, 2011 C-Span Interview Must Be Dismissed.

In the Motion, Moving Defendants explained that Plaintiff does not, and cannot, state a claim for defamation based on the C-Span interview of Mezrich because the statements Plaintiff identifies are not capable of defamatory meaning, are not "of and concerning" Plaintiff, and/or are protected expressions of opinion. *See* Motion at 17-19. In response, Plaintiff repeats his demonstrably false argument that the "of and concerning" requirement does not apply, (*see New England Tractor-Trailer*, 395 Mass. at 474), and ignores that the statements at issue: 1) were made in a portion of the interview well after his father's call had ended; 2) were made in response to a different caller's question; and 3) repeatedly referred to "writers" and "journalists" looking to get newspaper articles published, which does not apply to Plaintiff. Moreover, Plaintiff does not address, much less refute, Moving Defendants' argument that the statements at issue are non-actionable opinion, as they are not capable of being proved true or false and make repeated use of the qualifying phrase "I think." *See* Motion at 18.

III. Plaintiff's Lanham Act Claims Must Be Dismissed.

Plaintiff asserts that it was unnecessary to include in the Complaint the factual background for his allegation of "paid 'five-star' reviews" because Moving Defendants "are well aware" of those facts.¹¹ *Opp.* at 20. This suggestion is contrary to well-established pleading standards, and cannot stand. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (a complaint must allege "enough facts to state a claim to relief that is plausible on its face").¹²

¹¹ Plaintiff has apparently abandoned his allegation of "bulk purchases," as he offers no argument in support of allowing that clearly-deficient claim to proceed. *See* Complaint, ¶ 100.

¹² In any event, these factual allegations do not state a Lanham Act claim. A claim for false advertising under 15 U.S.C. § 1125(a) requires an allegation that "the defendant made a false or

As for Plaintiff's false advertising claim based on the Book and the Film being marketed as "true," it simply rehashes Plaintiff's purported "defamation by omission" claim. As previously explained, such a claim cannot satisfy the "of and concerning" element of defamation, and Plaintiff should not be allowed to circumvent this requirement simply by slapping a "Lanham Act" label on the claim. *See* Motion at 14-16.

Moreover, the chilling effect on free speech posed by Plaintiff's theory is clear and unacceptable. In Plaintiff's world, authors of non-fiction books could take their fights from the best-seller list to the courtroom simply by alleging that their competitors' books are "not true." The First Amendment cannot tolerate such a scenario. *See generally, Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) ("Freedoms of expression require 'breathing space'"). Plaintiff's remedy, if he felt that Moving Defendants presented an inaccurate version of the events at issue in the Book, was to do exactly what he did in publishing *Authoritas* – present his own version of the story. *See generally, Brown v. Hartlage*, 456 U.S. 45, 61, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (the "preferred First Amendment remedy" is "more speech, not enforced silence"). His defeat in the marketplace of ideas is no excuse for seeking to punish Moving Defendants for creating an account of history with which he disagrees.

CONCLUSION

For the foregoing reasons, Moving Defendants respectfully request that the Court grant their motion to dismiss, and dismiss with prejudice the Complaint in its entirety.

misleading description of fact or representation of fact in a commercial advertisement." *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir. 2002). Here, the statements appeared in an Amazon.com consumer review, not a commercial advertisement. *See* Opp. at 20, Exh. B to Opp. at 6. These allegations similarly cannot make out an unfair competition claim, which requires "a false or misleading statement of fact in commercial advertising or promotion about the Plaintiff's goods or services." *Applera Corp. v. Michigan Diagnostics, LLC*, 594 F.Supp.2d 150, 163 (D. Mass. 2009).

Respectfully submitted,

RANDOM HOUSE, INC., MEZCO, INC., and
BENJAMIN MEZRICH

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Dated: February 14, 2012
Boston, Massachusetts

CERTIFICATE OF SERVICE

I, Benjamin M. McGovern, 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.

/s/Benjamin M. McGovern
Benjamin M. McGovern