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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
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

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

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INTRODUCTION

After attempting to employ a number of inventive and spurious defense strategies, such as a) attempting to convince the Court that Plaintiff was "using" the judicial system as a way of continuing a (settled) battle with third parties; b) purporting that Plaintiff's anger at Mark Zuckerberg was misdirected at Defendant Benjamin Mezrich; c) needlessly requesting oral argument (so that Defendants could, in person, merely plead "on the papers") for the primary purpose of increasing Plaintiff's expenses, in violation of Federal Rule of Civil Procedure 11(b)(1); and d) Mr. Ellis encouraging the Court (at the resulting hearing) not to sit "in judgment over true…uh…or what is a true or not historical event" in Defendants' published works, Defendants are now sufficiently worried that they have finally resorted to their last line of defense: e) trying to convince this Court that Plaintiff is mad. In stating in their Opposition that, "Plaintiff's case has gone from the merely patently deficient to the absurd," Moving Defendants make every excuse they can possibly think of to focus the Court's attention on Plaintiff and away from where it should be: namely, the various unlawful acts of Defendants. Why? Because this Motion results from the discovery of *even more* of these acts.

STATEMENT OF FACTS

Defendants have collectively produced a book, *The Accidental Billionaires: The Founding of Facebook: A Tale of Sex, Money, Genius and Betrayal* ("The Accidental Billionaires"), and a movie, *The Social Network* ("The Film"). The Accidental Billionaires and The Film have been read and seen by millions of individuals to the point where they are the *de facto* history of Facebook, Inc.'s founding. Among many other reasons, Facebook, Inc. is of current interest to the public due to its impending $100 billion initial public offering.

Defendant Benjamin Mezrich, the author of The Accidental Billionaires, has been the subject of numerous highly critical news articles in *The Boston Globe*, *Boston Magazine*, *The*

New York Times, *Gawker*, *The Tech*, and various other publications due to his shockingly enthusiastic conflation of fiction and fact—a style he refers to as "non-fiction." Historically, his publishers and other partners, such as Defendant Sony Pictures, have been entirely supportive (at least in public) of his deliberate misrepresentations. Sony Pictures obtained rights in The Accidental Billionaires before it was even written. Combined, Defendants have earned hundreds of millions of dollars in revenue from Defendant Mezrich's books and derivative works.

Defendant Mezrich requested Plaintiff's cooperation on The Accidental Billionaires in 2008—a request that Plaintiff denied in large part due to fear of inevitable defamation, based on the aforementioned prior coverage of Defendant Mezrich's business tactics. Defendant Mezrich was not present for or even aware of the events he intended to write about in The Accidental Billionaires, and so he proceeded to rely upon Plaintiff's book *Authoritas: One Student's Harvard Admissions and the Founding of the Facebook Era* ("Authoritas"), citing Authoritas in his bibliography. There exist a number of passages in The Accidental Billionaires that are substantially similar to passages in Authoritas, especially in a scene involving the former president of Harvard University. That scene appears in The Film as well, by virtue of The Film's screenplay being based directly on The Accidental Billionaires, to the point where Defendant Mezrich and Mr. Aaron Sorkin, the screenwriter, spent many hours together in hotel and meeting rooms collaborating. Defendant Mezrich has recounted publicly how he handed off chapters to Mr. Sorkin as he finished writing them.

The Accidental Billionaires and The Film have been widely marketed, and consequently, even almost four years later, Defendant Benjamin Mezrich is still sought after as a public speaker. In his numerous public appearances on national television, at trade shows, and in print, Defendant Mezrich has (for years now) called The Accidental Billionaires "true," "non-fiction," and work that he will "stand by," even as he simultaneously admits that scenes and dialogue

were completely fabricated to make the works more likely to sell. He does not like to discuss material scenes or key individuals he has omitted, and he has also defended blatant falsehoods in his writing on at least one occasion on C-SPAN on November 6, 2011. On that day, Plaintiff's father called into C-SPAN, and in response to his question (about fiction versus non-fiction), Defendant Mezrich referred to both Plaintiff and his father in a defamatory manner.

The Accidental Billionaires is available for sale in several formats on Amazon.com. Several of its five-star reviews on Amazon.com (indicating the highest rating possible) were written by Defendants or by affiliates of Defendants—a scheme known as "astroturfing"—who who did not disclose their connection(s) to the book. Specifically, one of these reviews was written by Defendant Mezrich's public relations manager, and another was written by a pseudonymous individual who had posted to her Amazon.com account photographs of Defendant Benjamin Mezrich's wife, Tonya Mezrich, at home with her pug, and who had reviewed other works related to pugs. Both of these reviews of The Accidental Billionaires were written in a false and deliberately misleading manner as to suggest absolutely no connection between their respective authors and Defendants. Several other five-star reviews on Amazon.com exhibit characteristics similar to these specific reviews, involving "talking points" frequently echoed by Defendant Benjamin Mezrich. Plaintiff was not aware of these odd coincidences until after a few days after the February 16, 2012 scheduling conference and hearing, and filed this Motion for Leave immediately thereafter.

ARGUMENT

I. Standard of Review

Federal Rule of Civil Procedure 15(a) provides that a trial court should grant leave to amend "freely when justice so requires." The United States Supreme Court, the First Circuit, and this Court have repeatedly reaffirmed that leave to amend is to be granted with "extreme

liberality." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Rule 15 therefore embodies a very liberal amendment policy, and "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 36 (1st Cir. 1988). Regarding motions for leave to amend in particular, the First Circuit has stated:

> A plaintiff is permitted to amend a complaint once as a matter of right prior to the filing of a responsive pleading by the defendant. Thereafter, the permission of the court or the consent of the opposing party is required. The default rule mandates that leave to amend is to be freely given when justice so requires, unless the amendment would be futile, or reward, *inter alia*, undue or intended delay.
>
> As a case progresses, and the issues are joined, the burden on a plaintiff seeking to amend a complaint becomes more exacting. Scheduling orders, for example, typically establish a cut-off date for amendments[.] Once a scheduling order is in place, the liberal default rule is replaced by the more demanding "good cause" standard of Fed. R. Civ. P. 16(b). This standard focuses on the diligence (or lack thereof) of the moving party more than it does on any prejudice to the party-opponent. Where the motion to amend is filed after the opposing party has timely moved for summary judgment, a plaintiff is required to show "substantial and convincing evidence" to justify a belated attempt to amend a complaint.

"The appropriateness *vel non* of a district court decision denying a motion to amend on the ground of futility depends, in the first instance, on the posture of the case." *Hatch v. Department for Children, Youth & Their Families*, 274 F.3d 12, 19 (1st Cir. 2001). The First Circuit has clarified:

> If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, the accuracy of the "futility" label is gauged by reference to the liberal criteria of Federal Rule of Civil Procedure 12(b)(6). In this situation, amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief against the defendant on some cognizable theory.

Even in those situations *least* favorable to amending pleadings, such as those when discovery has already begun, otherwise "futile" amendments are *still to be permitted* that are "supported by substantial evidence." *Hatch*, 274 F.3d 12, 19 (1st Cir. 2001) (emphasis supplied); see also *Adorno v. Crowley Towing and Transp. Co.*, 443 F.3d 122, 126 (1st Cir.

2006) (requiring showing of "substantial and convincing evidence"); *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 253 (1st Cir. 1994) (same); *Torres-Matos v. St. Lawrence Garment Co., Inc.*, 901 F.2d 1144, 1146 (1st Cir. 1990) (same).

In this case, a scheduling order is in place but discovery has not yet begun. Regardless, there is evidence aplenty, as demonstrated by the twelve appendices that Plaintiff intends to attach to its proposed First Amended Complaint ("FAC"). Furthermore, as has already been established by Plaintiff's response to Defendants' respective Motions to Dismiss, "In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001).

II. Moving Defendants Willingly Ignore All New Facts In An Attempt To Convince The Court That Plaintiff's Amendment Would Be "Futile"

A. Contrary to Moving Defendants' Assertion, Plaintiff Has Pled New Facts In Support of His Copyright Infringement Claims

Moving Defendants assert "Plaintiff alleges no additional facts in support of his copyright claims," Opposition at 2, but this is untrue. Newly added ¶ 48 of the FAC clearly supports Plaintiff's copyright infringement claims. It states, "Reviews of The Accidental Billionaires, such as a review in *The New York Times* by Janet Maslin, attached hereto as Exhibit E, frequently highlighted the almost unending problems with the author's writing style, sloppy editing, and propensity to exaggerate and invent material." This review speaks directly to Defendant Mezrich's disdain for detailed research and accurate, careful writing. Whereas a writer widely regarded as meticulous and detail-oriented would have a clear defense against copyright infringement allegations—namely, a source for every fact or allegation in his or her text—Defendant Mezrich does not. Large sections of expression in his chapter describing the Summers meeting appear to have no possible source except for Authoritas. Defendant Mezrich

admits that he invents scenes and dialog where he pleases, cutting and pasting the whole way through, which makes it all the more plausible that some extra protected material of Plaintiff's might have been pasted into Defendant Mezrich's word soup.

B. Contrary to Moving Defendants' Assertion, Plaintiff's Lanham Act Claim Is Solid and Based Upon Extensive Written Evidence, Not "Doomed"

Plaintiff's Lanham Act claim meets the standard that Moving Defendants themselves cite from 15 U.S.C. § 1125(a), which requires that "'the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement [and that] the misrepresentation is material, in that it is likely to influence the purchasing decision.' (citation omitted)." Opposition at 2-3.

The Accidental Billionaires is effectively a massive collection of false and misleading material misrepresentations that, as alleged in FAC ¶ 115, have been demonstrated to negatively influence the decision of businesspeople to engage in commerce with Plaintiff (completely unrelated to Facebook). Every one of Defendant Benjamin Mezrich's numerous public speeches about his recent work (some of them assuredly paid talks) represents such a commercial[1] advertisement. Every advertorial (or "astroturfed" review) on Amazon.com or a similar web site further represents a commercial advertisement, especially given statements contained within those reviews such as, "Bring it to the beach with you… You won't regret it!" that propose a commercial transaction.[2] Every one of these commercial advertisements contains at least one, but often more than one, material misrepresentation of fact. Every one of those misrepresentations of fact is specifically intended to influence the purchasing decisions of those in the audience. In FAC ¶ 107, Plaintiff even delineates the mechanism by which each

[1] Moving Defendants cannot argue that Defendant Mezrich's discussion (in any medium) of his own work, which provides his primary source of income, is not commercial speech. In many instances Defendant Mezrich explicitly encourages listeners or viewers to go out and buy his books, explicitly proposing a commercial transaction.

individual review's star rating is averaged into an aggregate rating that purchasers in turn rely upon to make purchasing decisions. For Moving Defendants to somehow argue that *none* of this could be construed as meeting the Lanham Act standard for false advertising is truly breathtaking in its dishonesty.

Moving Defendants complain that Plaintiff fails to analyze every sentence of every questionable review of The Accidental Billionaires on Amazon.com. This is hardly necessary when each review constitutes a giant, misleading fact in and of itself, specifically intended to persuade consumers to buy a product. Any positive, legitimate consumer review by definition represents a fact: that the reviewer enjoyed the product enough to recommend it. The reviews in question here convey that same message (with five stars), but misleadingly so. They are really present because their authors are *connected to the product's creator*, or *paid*, to recommend the product highly. Such deception is more than sufficient to meet the Lanham Act standard for false advertising. *Axact (Pvt.), Ltd. v. Student Network Resources, Inc.*, 2008 WL 4754907 (D. N.J. Oct. 22, 2008). Finally, in ¶ 107 of the FAC, contrary to Moving Defendants allegation that "Plaintiff does not…allege that any purported misrepresentations are likely to make a difference to purchasers," Plaintiff specifically states, "fraudulent reviews raise the overall rating for the product, *which consumers use to guide their purchasing decisions*" (emphasis added).

Moving Defendants continue by stating that "Plaintiff still fails to allege the competitive injury required to state a false advertising claim." Opposition at 3. At the very least, Plaintiff states the claim in FAC ¶ 141, and competitive injury is a more than reasonable inference given all of the attending circumstances. Authoritas has sold fewer than 1,000 copies compared to many thousands of copies sold of The Accidental Billionaires.

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[2] Consumer reviews and commercial advertisements are not by definition mutually exclusive as Moving Defendants allege on page 3 of their Opposition; hence the FTC rules on advertorials, which are by definition the intersection of the two, i.e. advertisements *disguised* as editorials or reviews.

Moving Defendants state with absolutely no substantive basis that "it is ridiculous to suggest Plaintiff competes with any of the Defendants…" Plaintiff arranged for Authoritas to be sold in same non-fiction sections of the same stores serviced by the same distributors that market to the same consuming public as Moving Defendants. Authoritas is additionally available on-line from the some of the same major vendors that sell products for Defendants Random House and Sony Pictures. In his query letter to literary agents, Plaintiff even made explicit reference to the possibility of selling film rights in his manuscript, in addition to the obvious purpose of the letter, which was to sell publishing rights. Moving Defendants admit that the books overlap topically. Opposition at 4. To allege that Plaintiff is in no way competitive with Moving Defendants utterly defies logic.

C. "You Know What You're Getting Into" –Benjamin Mezrich, November 6, 2011: Plaintiff's RICO Claim Is Well Substantiated And Based On Plentiful Facts

Moving Defendants attempt to exaggerate Plaintiff's RICO claim to make it appear unbelievable, but the facts speak for themselves. Whether or not the criminal enterprise is actually "vast" in scope, it is a matter of record that Defendant Mezrich has a pattern of falsifying true stories, calling them "true," and making millions of dollars as a result. Not even the most capable self-made man is smart enough or able enough to earn millions of dollars alone. Defendant Mezrich is no exception to this rule.

Rather, Defendant Mezrich has depended upon a number of individuals and corporations, ranging from lawyers to publicists to his own wife, to justify and legitimize his attempts to defraud the consuming public by selling a "true" story nationwide that actually is not. Plaintiff's contentions—only "frivolous" from the perspective of unjustly enriched repeat offenders who consider mere details such as fact and the reputations of others below their pay grade—are quite serious from Plaintiff's standpoint.

Defendant Mezrich was extremely well known for his reckless disregard for the truth by July, 2008, in the very same way that a notorious mobster might be known for leaving broken kneecaps in his wake. In this vivid context, of which both Plaintiff and Defendants were keenly aware, Defendant Mezrich's request for cooperation, completely *regardless of its content*, was a potential threat, just by virtue of association with his name. At the end of their e-mail exchange, Defendant Mezrich's promise to Plaintiff, to "do [his] best to do the story justice and make it as entertaining as possible," cited in the FAC, was in fact *confirmation* of Plaintiff's well-founded fears. Plaintiff did not ask for or want the story to be represented by anyone in a manner designed to be "entertaining," let alone "as entertaining as possible," for entertainment can mean vastly different things to different people. Here, "entertaining" is a code word used by Defendant Mezrich to indicate that he intended to give Plaintiff's set of facts the same treatment that he gives all facts: total and reckless disregard, so that he might maximize his own profits.

Moving Defendants go on to insinuate that the contents of the false and misleading information transmitted by mail and wire, constituting mail and wire fraud, are only untrue in Plaintiff's solitary opinion. This assertion is directly and emphatically contradicted by the written record in several newspaper articles and book reviews, which Moving Defendants have attempted to strike from the record once, and are therefore attached to the FAC as exhibits now. Moving Defendants also seek information regarding the time, place and recipient of each instance of mail and wire fraud. Plaintiff expects to fill out a long list of times and places by the end of the discovery stage of these proceedings, but in the meantime, Moving Defendants can find a robust list to start with in FAC ¶¶ 69 and 108; the recipients are too plentiful to count.

III. Moving Defendants Contradict Their Own Arguments and Refuse To Acknowledge The Court's Deliberate Flexibility on the "Of And Concerning" Defamation Standard Given That Defamation by Omission Claims Are Nothing New

Moving Defendants now posit the novel argument that because Mark Zuckerberg was referred to in a derogatory manner two times in The Accidental Billionaires, it is alright for Defendant Mezrich to have referred to Plaintiff in a derogatory manner all the time, or not at all when it was appropriate for him to do so based on the factual record. Moving Defendants also utterly fail to address Plaintiff's repeated argument that Defendant Mezrich only finds negative things to write about him in The Accidental Billionaires, whereas other characters are given more even-handed or unbelievably positive treatment. Were there some factual basis for such discrepancies in this "non-fiction" portrayal, they might be understandable, but there is none, which explains why Moving Defendants fail to cite any facts to substantiate their clear bias.

Moving Defendants contradict themselves on page 6 of their Opposition, in arguing that using "Harvard emails and IDs *as* passwords," as The Accidental Billionaires incorrectly describes, is somehow the same as discussing a Harvard "website's use *of* students' university email passwords" (emphasis added). Moving Defendants cannot use truth as a defense when the underlying material is facially untrue.

Plaintiff's houseSYSTEM software never used Harvard e-mail addresses or IDs as passwords, as explained at length in Authoritas. Nor does The Accidental Billionaires provide context regarding the ways in which Plaintiff's software *did* handle passwords so that students' information would be safe (unlike thefacebook.com at the time; see FAC Exhibit K, line 26).

Paragraphs 97 and 98 of the FAC include new verbiage to make the application of the Massachusetts "of and concerning" standard abundantly clear in this case. Simply shifting the emphasis in Moving Defendants' citation of *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 395 Mass. 471, 483, 380 N.E.2d 1005 (1985) makes it clearer still:

> [T]he plaintiff must prove either that the defendant intended its words to refer to the plaintiff and that they were so understood, *or that the defendant's words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood*.

It has already been established that The Accidental Billionaires *does* refer to Plaintiff explicitly, but not everywhere a reasonable reader would expect considering the historical record. Plaintiff writes in ¶ 97 of the FAC, "This early exposure to Plaintiff created a basic expectation by the members of those communities that any nominally serious treatment of the topic of Facebook's origins *should involve Plaintiff*" (emphasis added). Members of those communities *actually* interpreted Defendants' works to be referring indirectly to Plaintiff, even with Plaintiff in absentia, because of their prior extrinsic exposure to Plaintiff and/or his story.

Moving Defendants' citation of *New England Tractor* is, of course, incomplete. As Plaintiff stated at the February 16, 2012 hearing, the Court went on to explain (emphasis added):

> "To the extent that Hanson requires proof that the alleged defamatory matter was of and concerning the plaintiff, we adhere to that rule. *However, to the extent that Hanson appears to require a plaintiff to prove that the defendant actually intended to refer to the plaintiff before liability may attach, we decline to follow it*. Rather, we adopt the view that "[*t]he question is not so much who was aimed at, as who was hit*," *Corrigan v. Bobbs-Merrill Co*., 228 N.Y. 58, 63-64 (1920), with one all-important proviso. While the plaintiff need not prove that the defendant 'aimed' at the plaintiff, he or she must prove that the defendant was negligent in writing or saying words which *reasonably* could be understood to 'hit' the plaintiff. *Davis v. R.K.O. Radio Pictures, Inc*., 191 F.2d 901, 904 (8th Cir. 1951) ('The issue [is] whether persons who knew or knew of the plaintiff could reasonably have understood the exhibited picture to refer to him' [emphasis in original]) *Bee Publications, Inc. v. Cheektowaga Times, Inc*., 107 A.D.2d 382, 385 (N.Y. 1985) ('[W]here extrinsic facts are relied on to prove the reference to a plaintiff, he must show that the conclusion that the publication refers to him is reasonable and that the extrinsic facts upon which that conclusion is based were known to those who read or heard the publication')." *Id*. at 477-478.

As an individual clearly "hit" by the impact of The Film, Plaintiff writes further in FAC ¶ 98 concerning a separate scenario involving "the actual act of defamation taking place not contemporaneous with exposure to The Social Network, but upon learning of Plaintiff (perhaps long) afterward and because of prior extrinsic exposure to The Social Network."

Oddly, Moving Defendants argue that "Plaintiff cites to *[sic]* no words that refer to him in either the Book or the Movie to support his purported 'defamation by omission' claim." They are correct—if Plaintiff *could* cite words that referred to him in the context of a defamation by omission claim, Plaintiff would not be omitted, and there would be no claim! Plaintiff need only cite *extrinsic* facts to establish a reasonable basis for inclusion in the works in question. Given the ample extrinsic facts that Plaintiff has cited regarding a) his role in the creation of Facebook, Inc. (FAC, ¶ 26); b) his relationship with Mr. Zuckerberg (FAC, ¶¶ 28-30); c) the topical focus of The Accidental Billionaires (FAC, ¶ 40); d) the topical focus of The Film (FAC, ¶ 70); and e) Defendant Mezrich's own purported interest in Plaintiff's role (FAC, ¶¶ 35, 43), Plaintiff has met the standard necessary, as set out broadly by the Mass. Supreme Judicial Court in *Sharratt v. Housing Innovations, Inc.*, 310 NE 2d. 343 (1974):

> "[A]ttendant circumstances may be shown as proof of the defamatory nature of the words. We believe that to be sound policy, and we so hold. To be actionable as libel, words need not hold a plaintiff up to ridicule or damage his reputation in the community at large, or among all reasonable men. It is enough that they do so among 'a considerable and respectable class' of people. *Peck v. Wakefield Item Co.* 280 Mass. 451, 454 (1932). *Ingalls v. Hastings & Sons Publishing Co.* 304 Mass. 31, 33 (1939)."

IV. Plaintiff Has Outlined a Clear Unjust Enrichment Claim

The language of Plaintiff's claim in the FAC is not vague or confusing: Plaintiff's unjust enrichment claim does not arise from copyright infringement alone. ¶ 169 of the FAC discusses the Defendants' "unauthorized, unlawful and unjust misappropriation of Plaintiff's intellectual property," which is not limited to copyright infringement. ¶ 170 then states that "Defendants Benjamin and Tonya Mezrich have been unjustly enriched by Defendant Tonya Mezrich's fraudulent five-star pseudonymous reviews of Defendant Benjamin Mezrich's work, including The Accidental Billionaires. Such false reviews for years have misled the consuming public into having a more favorable impression of Defendant Mezrich's work than is actually warranted." ¶ 171 continues by stating that "Defendant Benjamin Mezrich has been unjustly enriched by

earning speaking fees and other fees for public appearances as a result of his work and unjust financial success stemming from The Accidental Billionaires and the unauthorized, unlawful and unjust misappropriation of Plaintiff's intellectual property."

Plaintiff's allegations meet the standard set out in Moving Defendants' Opposition. As stated in ¶ 41 of the FAC, Plaintiff conferred upon Defendant Mezrich the valuable and unique information contained within Authoritas, an actual non-fiction account of Facebook's origins, so that Defendant Mezrich might represent it accurately in his book, satisfying the first condition of "a benefit conferred upon the defendant by the plaintiff;" Defendant Mezrich signaled his "knowledge" and "appreciation" of said benefit by citing Authoritas in the bibliography to The Accidental Billionaires, satisfying the second condition of "an appreciation or knowledge of the benefit by the defendant;" and Defendant Mezrich thereafter proceeded to claim that purportedly because it cited non-fiction sources, his own book was also a non-fiction account, if not *the* non-fiction account, of Facebook's origins. This caused Defendant Mezrich to be showered with benefits, including but not limited to monetary benefits, when in fact his statements in and about The Accidental Billionaires were largely untrue, thereby satisfying the third requirement, "an acceptance or retention of the benefit by the defendant under circumstances which make such acceptance or retention inequitable." Plaintiff's copyright claims do not even need to figure into the equation in order for the claim to be valid, but to the extent that they might, they only strengthen Plaintiff's argument insofar as those "circumstances which make such acceptance [of the benefit] or retention inequitable."

V. Plaintiff's Fraud Claim Meets the Applicable Standard

In ¶ 43 of the FAC, Plaintiff emphasizes that Defendant Mezrich, having referred to his project as a "thriller," reasonably established in Plaintiff's mind that the proposed book would be a work of fiction. Plaintiff states that in his response to Defendant Mezrich, "Plaintiff

specifically referred to Defendant's project as a 'novel,' indicating that Plaintiff expected the work to be marketed as fiction." *Id*. Of course, we now know that (according to Defendants), the work was not intended to be fiction, but rather, "non-fiction." Had Defendant Mezrich represented this rather important and material fact to Plaintiff in July, 2008, Plaintiff might have been inclined to cooperate with a non-fiction endeavor, avoiding the events that led to these proceedings entirely. Of course, as we now know, Defendant Mezrich prefers to have his cake and eat it too, by researching fictitious "thrillers" that later transform themselves into "true" "non-fiction" books for marketing purposes. Therefore, Defendant Mezrich unquestionably did make a "false representation of material fact" to Plaintiff "with knowledge of its falsity," "for the purpose of inducing the plaintiff to act thereon," e.g. agreeing to cooperate on The Accidental Billionaires. In turn, Plaintiff "reasonably relied upon the representation as true" and "acted upon it to his damage," by refusing to cooperate. (Of course, had Plaintiff acted by cooperating, he may have also been injured.) The fraud might also be construed as giving Plaintiff the false appearance that he had any choice in the matter at all, for what does it mean to "cooperate" with someone who ignores fact and reaps all of the benefits as a result?

VI. Plaintiff Should Be Permitted To Further Amend the Proposed First Amended Complaint If The Court Sees Fit

Given the liberal standard historically applied to motions for leave to amend, Plaintiff respectfully requests that the Court grant Plaintiff a short window to make minor modifications to the FAC (such as specifically excluding Tonya Mezrich from copyright infringement claims) before its submission, rather than dismiss the case in its entirety.

CONCLUSION

Contrary to the allegations of Defendants—who, having already brazenly encouraged the Court to ignore the truth, cannot be trusted—the claims presented in this case are neither

meritless nor frivolous. They are not an elaborate charade designed to waste the Court's time, or retaliation aimed at individuals outside the suit. They are not the result of putative "absurdity."

The claims described in the FAC are the result of illegal activity, plain and simple. Benjamin Mezrich was once an author with a good sense of humor who wrote "trashy" (in his words) science-fiction thrillers. At some point, he got greedy. He found that by twisting the truth ever so slightly, and then some, he could literally make his dreams—of being wealthy, of being famous, of hanging out with the "cool kids"—all come true. His business partners, some of whom are already defendants in this case, saw no problem with that so long as their profits kept increasing. Perhaps they believed that they were doing no wrong, without anyone clearly articulating that they had been hurt.

These pleadings constitute such an articulation. I have been written off and ridiculed by so many people, I have lost count—not because most of these people are real critics who know my work well enough to think it truly deficient, or my thoughts well enough to judge them inferior to those of my classmates described in The Accidental Billionaires. These people scorn me—telling me, sometimes explicitly, to simply shut up—because I insist upon the truth even though I wasn't in the movie they saw, or portrayed well (to the extent I was portrayed at all) in the one book they bothered to read about events that, however unfortunately, have come to define a substantial part of my life. I did nothing to deserve such widespread and deep scorn, and if nothing else—if these proceedings fail to bring justice to the Defendants, their co-conspirators, and their many lawyers—then I hope that they are at the very least ashamed of their nominal success, for it has come at my expense, and the expense of others.

WHEREFORE, Plaintiff respectfully requests that this Court grant his Motion for Leave to File his First Amended Complaint.

Respectfully submitted this 2nd day of March, 2012.

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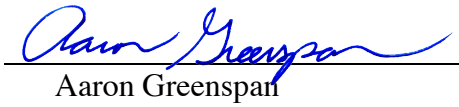
CERTIFICATE OF SERVICE

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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