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

Document 44

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| AARON GREENSPAN,<br><br>Plaintiff,<br><br>v.<br><br>RANDOM HOUSE, INC., MEZCO, INC., BENJAMIN MEZRICH, COLUMBIA PICTURES INDUSTRIES, INC. a/k/a SONY PICTURES a/k/a COLUMBIA TRISTAR MOTION PICTURE GROUP,<br><br>Defendants. | ) | CIVIL ACTION<br>NO.: 1: 11-CV-12000-RBC |

**MEMORANDUM OF LAW IN SUPPORT OF**
**DEFENDANT COLUMBIA PICTURES INDUSTRIES, INC.'s**
**MOTION TO DISMISS COMPLAINT**

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*Pro se* plaintiff Aaron Greenspan has initiated this lawsuit as part of an ongoing quest to gain recognition for being the "real" creator of the popular social network website, Facebook.com. Like the Winklevoss twins who famously claimed that Mark Zuckerberg stole the idea for Facebook from them, Greenspan contends that Mr. Zuckerberg stole the Facebook idea from him and even filed suit against Facebook to stop the use of the name "Facebook." Now that the limelight from that lawsuit has ended, Mr. Greenspan seeks to reinsert himself into the public eye by filing this complaint alleging that the highly acclaimed motion picture *The Social Network* and the best-selling book *The Accidental Billionaires* failed to give him the recognition that he deserved for the founding of Facebook. However, as Greenspan's complaint demonstrates, this claim is frivolous and does not state a legal basis upon which relief can be granted against any of the defendants.

Plaintiff attempts to state claims for copyright infringement, unfair competition and defamation against Random House, Inc., Mezco, Inc and Benjamin Mezrich (collectively, "Mezrich"), who were responsible for the book *The Accidental Billionaires*, and against Columbia Pictures Industries, Inc. ("Columbia"), which was responsible for the motion picture *The Social Network*. Columbia, the movant here, joins in the separate motion filed on behalf of the other defendants and incorporates the arguments advanced in support of that motion. Insofar as Columbia is concerned, the Complaint fails to state a claim for copyright infringement because it does not identify a single statement in the movie that was allegedly copied from plaintiff's book, nor does it allege any other similarity of protectable expression. To the extent that the Complaint even attempts to state a claim that plaintiff was defamed by the movie—which is not at all clear from the Complaint—it fails for the simple reason that the plaintiff was

not referred to or depicted in the movie at all. For these and other reasons explained below, the Complaint against Columbia is frivolous and should be dismissed with prejudice.

## I. FACTUAL BACKGROUND

Plaintiff Greenspan is the author of *Authoritas: One Student's Harvard Admissions and the Founding of the Facebook Era* ("*Authoritas*"), which he describes as "the only published first-hand account of events that took place at Harvard University in 2003 and 2004 that collectively inspired the founding of Facebook, Inc." Compl. ¶ 2. The Complaint alleges that as an undergraduate student at Harvard, plaintiff developed a web site called houseSYSTEM that contained a component he called "The Facebook." The Complaint further alleges that Mark Zuckerberg developed his web site of the same name "based in part on principals [sic] and technologies developed by Plaintiff." *Id.* at ¶ 23.

Defendants Random House and Mezrich are the publisher and author, respectively, of the best-selling book *The Accidental Billionaires: The Founding of Facebook: A Tale of Sex, Money, Genius, and Betrayal* ("*The Accidental Billionaires*"), which reported on the development of the social networking website thefacebook.com.

Defendant Columbia is the producer and distributor of *The Social Network*, a motion picture based on an Oscar-winning screenplay authored by Aaron Sorkin.[1]

Greenspan's book is not at all similar to defendants's works. Mezrich's book and Columbia's film focus on Mark Zuckerberg and his dispute with Cameron and Tyler Winklevoss. Greenspan's memoir focuses on his houseSYSTEM website and its "The

[1] Columbia has filed a DVD copy of *The Social Network* for the Court's consideration along with this motion. Random House and Mezrich have likewise filed a copy of *Authoritas* and *The Social Network* along with their motion to dismiss. Because these works are referenced in and form an integral part of the Complaint, the Court may take judicial notice of them and consider them on a motion to dismiss brought pursuant to Rule 12(b)(6). *See Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d 357, 363 (D. Mass. 2010).

Facebook" component. Mezrich's book contains only passing references to plaintiff Greenspan and his web site. Columbia's film does not refer to plaintiff or his web site at all.

## II. ARGUMENT

### A. Legal Standard

A well-pleaded complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570); *see also Twombly*, 550 U.S. at 555 (requiring pleading of non-conclusory facts sufficiently detailed "to raise a right to relief above the speculative level").

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court "accept[s] as true all well-pleaded facts in the complaint and draw[s] all reasonable inferences in favor of the plaintiffs." *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 48 (1st Cir. 2009). However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quotation marks omitted); *see also Iqbal*, 129 S. Ct. at 1949. Likewise, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

The Complaint's sparse factual allegations regarding Columbia's film do not "state a claim for relief that is plausible on its face." *Iqbal, supra; Twombly, supra*.

**B. Plaintiff Fails to State a Claim of Copyright Infringement Against Columbia**

To state a claim for copyright infringement, plaintiff must allege "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 813 (1st Cir. 1995) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). With regard to copying, plaintiff must allege (a) actual copying (b) that "was so extensive that it rendered the offending and copyrighted works substantially similar." *Lotus*, 49 F.3d at 813. Actual copying may be alleged either through (i) direct evidence of actual copying or (ii) indirect evidence "the alleged infringer had access to the copyrighted work" plus probative similarity—that is, "that the offending and copyrighted works are so similar that the court may infer that there was factual copying." *Id.*; *see also T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 111 (1st Cir. 2006).

The First Circuit has adopted the ordinary observer test for substantial similarity. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988). The ordinary observer test asks "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Id.* (internal quotation marks omitted); *see also id.* ("In the words of Judge Learned hand, two works are substantially similar if the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.") (internal quotation marks omitted). While "[s[light or trivial variations" are insufficient to preclude substantial similarity, there is no copyright infringement when "the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are (within the context of plaintiff's work) of minimal importance either quantitatively or qualitatively." *Id.* at 608 (internal quotation marks omitted).

There is no question of substantial similarity in this case, because there are no facts alleged to indicate any similarity at all. Plaintiff does not quote even a single line from Columbia's film that is alleged to have been copied from his book. Nor does he identify any similarity of protectable expression, much less point to anything to suggest that the two works are " extensively" similar so as to render them substantially similar for purposes of finding copyright infringement.

The only factual allegations of any parallels at all between Columbia's film and plaintiff's work are contained in paragraphs 62 and 63 of the Complaint, and those allegations are wholly inadequate. Paragraph 62 merely alleges that a scene in Columbia's film depicting a meeting between former Harvard University President Lawrence Summers and Tyler and Cameron Winklevoss was "based upon" an account in Mezrich's book, "in which many aspects of descriptive detail are expressed in the same or similar fashion as *Authoritas*." Compl. ¶ 62. This allegation does not come close to alleging copyright infringement—for three reasons.

First, the Complaint candidly acknowledges that "this scene [in Columbia's film] represents a different meeting with Dr. Summers than Plaintiff's meeting." *Id.*; *see also id.* at ¶ 39 (describing Tyler and Cameron Winklevoss as "involved in a separate dispute over Facebook's origins"). The depiction of an entirely different meeting, featuring different students, does not tend to show probative or substantial similarity. *See Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1067 (C.D. Cal. 2010) (granting summary judgment for accused infringer while noting that in one allegedly similar scene, the "relationship and history between the characters is different"); *Blakeman v. The Walt Disney Co.*, 613 F. Supp. 2d 288, 308 (E.D.N.Y. 2009) (granting summary judgment for accused infringer where two

works both contained one scene depicting individuals walking into voting booth where the characters were different).

Second, the allegation that a scene in Columbia's film is "based on" a scene in Mezrich's book, which in turn bears similarities to descriptions in Greenspan's book, is not the same as an allegation that Columbia's film is substantially similar to Greenspan's book. There is not even a conclusory allegation that the two works contain any similar expressions.

Third, even if the Complaint had alleged substantial similarities between Columbia's film and plaintiff's work, it is devoid of any facts to support such a conclusion. When plaintiff alleged similarities between Mezrich's book and plaintiff's work, he at least set forth specific statements from the two works, side-by-side, in an attempt to show substantial similarities.[2] Plaintiff made no such effort with respect to Columbia's film. To survive a motion to dismiss, the Complaint must give "fair notice" of what the alleged similarities are between Columbia's film and Greenspan's book. *See Twombly*, 550 U.S. at 555. Plaintiff's Complaint fails to provide any notice whatsoever.

Paragraph 63 likewise fails to allege any facts sufficient to support a claim that Columbia's film infringes plaintiff's copyright. This paragraph concerns a scene in Columbia's film in which Mark Zuckerberg tells the Harvard University Administrative Board, "As for any charges stemming from the breach of security, I believe I deserve some recognition from this Board." Compl. ¶ 63. The Complaint does not allege that these words were copied from his work. Rather, it appears to allege that "the *idea* that Mr. Zuckerberg would expect credit from the university administration for uncovering security flaws" was derived somehow from his book—albeit from an entirely different context involving different people and different events.

[2] That is not to say that this side-by-side comparison supports any conclusion of substantial similarity. It clearly does not for the reasons stated in the motion filed by Random House and Mezrich.

*Id.* (emphasis added). But ideas, as opposed to their expression, cannot be copyrighted. *See Feist*, 499 U.S. at 344-45 ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'") (alteration in original) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)). The Complaint does not allege that the expression of this idea in Columbia's film was substantially similar to plaintiff's expression of the idea. Therefore, Paragraph 63 on its face contains no factual allegations that can support a finding of copyright infringement.

Because the only two similarities alleged in the Complaint are insufficient to show any substantial similarity between Columbia's film and his work, the plaintiff is left with purely conclusory assertions that the movie infringes his copyright. These are precisely the kinds of threadbare legal conclusions that are insufficient to survive a motion to dismiss after *Iqbal* and *Twombly*. *See Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 555.

### C. Plaintiff Fails to State a Claim of Contributory Copyright Infringement Against Columbia

Plaintiff's Second Claim purports to state a claim for contributory copyright infringement against Columbia, but again its allegations are wholly insufficient. Contributory infringement is a kind of "abettor liability" imposed on one who wrongfully authorizes infringing acts of another. *Venegas-Hernández v. Asociación de Compositores y Editores de Música Latinoamericana (ACEMLA)*, 424 F.3d 50, 57-58 (1st Cir. 2005). Contributory copyright infringement, based on the tort concept of enterprise liability, is properly imposed on "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1320 & 1333 (D. Mass. 1994) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*,

*Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)) (alteration omitted). The Complaint fails to state a claim against Columbia for contributory copyright infringement on any possible theory.

The Complaint contains no factual allegations that would support a claim that Columbia induced, caused, or materially contributed to the publication of Mezrich's book. For example, the Complaint does not allege that Columbia exercised any control over the content of Mezrich's book, or publication, distribution, or sale of that book. The Complaint does allege that *The Social Network* screenplay was written with knowledge of Mezrich's book, and indeed was based on it. Compl. ¶ 57. However, mere knowledge of Mezrich's book is insufficient to support a claim of contributory infringement. *See Jalbert v. Grautski*, 554 F. Supp. 2d 57, 72 (D. Mass. 2008) ("[M]ere knowledge [of the infringing conduct of another], even knowledge based on willful blindness, is not sufficient to show contributory infringement. Proof of contributory infringement also requires proof that a person induced, caused or materially contributed to the infringing conduct of another."). [3] Without factual allegations that Columbia induced, caused, or materially contributed to the publication of Mezrich's book, the Complaint fails to state a cause of action for contributory copyright infringement against Columbia based on Mezrich's book.[4]

In sum, plaintiff has failed to make sufficient factual allegations to support any possible theory of contributory copyright infringement against Columbia, and his claim of contributory infringement against Columbia must therefore be dismissed.

[3] Knowledge of specific instances of infringement along with "[k]nowingly providing the site and facilities for infringing activities" may also be sufficient for a claim of contributory infringement, *id.*, but the Complaint likewise contains no factual allegations that Columbia provided any site or facilities for the publication or distribution of Mezrich's book.

[4] To the extent the Complaint may be read to allege contributory or vicarious copyright infringement against Columbia based on Columbia's film, such a claim likewise fails. Contributory and vicarious copyright infringement are ways of imposing liability on a defendant for someone else's infringement. *See Resnick v. Copyright Clearance Ctr., Inc.*, 422 F. Supp. 2d 252, 258-59 (D. Mass. 2006) (contributory copyright infringement is "at bottom, a claim that the defendant encouraged, facilitated, or assisted a *third party* in copyright infringement") (emphasis added). The film is produced and distributed by Columbia, not a third party and thus any claim for secondary liability based on the film fails as a matter of law.

### D. Plaintiff Fails to State a Claim of Vicarious Copyright Infringement Against Columbia

Plaintiff's Third Claim is for vicarious copyright infringement, but it too falls far short of pleading such a claim. Vicarious infringement is rooted in the employer-employee relationship. *Polygram*, 855 F. Supp. at 1324. The elements of a vicarious copyright infringement claim are that the defendant (1) has "the right and ability to supervise the infringing activity" and (2) "a direct financial interest in the exploitation of copyrighted materials." *Jalbert*, 554 F. Supp. 2d at 71; *see also Polygram*, 855 F. Supp. at 1324 (describing "acknowledged standard" for vicarious copyright infringement as "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyright materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.") (quoting *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)).

The Complaint contains the "[t]hreadbare recitals of the elements" of a claim for vicarious infringement—that Defendants "had the right, authority, and the ability to control or supervise" and "obtained a direct financial interest" from the alleged infringement, Compl. ¶¶ 92-94—but such "[t]hreadbare recitals . . . , supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

The Complaint fails to allege any facts to support the claim that Columbia had the "right and ability to supervise" the publication of, or that it had any "direct financial interest" in the publication of Mezrich's book. *Jalbert*, 544 F. Supp. 2d at 71. While the Complaint does allege that "Defendants entered into an agreement to create a screenplay based on *The Accidental Billionaires*," that the author of *The Social Network* screenplay "collaborated closely with Defendant Mezrich," and that "[t]he Screenplay is a derivative work of the account found in *The*

*Accidental Billionaires*," these are not allegations that Columbia had the right and ability to supervise the publication of Mezrich's book. Compl. ¶¶ 56-57. The Complaint lacks any allegations that Columbia had authored or had any editorial rights over Mezrich's book, or that Columbia in any way controlled the publication, distribution, or sale of Mezrich's book. Moreover, the Complaint lacks any allegation that Columbia had a *direct* financial interest in Mezrich's book. The Complaint alleges that Columbia's film and Mezrich's book "have both been extremely successful business ventures for Defendants," but alleges no facts suggesting that Columbia obtained any of the profits or sales revenues from Mezrich's book, or that Columbia participated in any way in publishing and distributing Mezrich's book. Compl. ¶ 65. *See Gershwin Publ'g*, 443 F.2d at 1162 (noting direct financial interest existed where department store "received as rental a percentage of the [infringing] concessionaire's gross sales"); *Jalbert*, 554 F. Supp. 2d at 72 (granting summary judgment when "no evidence" that Defendant "profited, or could have profited" from the infringement of another). Because the Complaint is devoid of factual allegations supporting either element of a claim that Columbia is vicariously liable for the alleged infringement in Mezrich's book, the claim should be dismissed against Columbia.

### E. Plaintiff Fails to State a Claim of Unfair Competition and False Advertising Against Columbia

The fourth count of the Complaint purports to state a claim against all Defendants for federal unfair competition and false advertising in violation of the Lanham Act, 15 U.S.C § 1125(a) and (b). As a threshold matter, courts have repeatedly rejected attempts to convert copyright claims into Lanham Act claims where, as here, the Lanham Act relies on the same alleged copyright infringement. *See Jalbert*, 554 F. Supp. 2d at 74 ("Because the Lanham Act

claim is simply a copyright infringement claim in different clothing, it is duplicative of the copyright claim and should be dismissed.") (collecting cases).

Even if the Lanham Act claim is not dismissed as duplicative, however, the Complaint has failed to properly allege a claim against Columbia pursuant to 15 U.S.C. § 1125(a) or (b). The count itself says nothing about Columbia's film other than to refer generally, without specification, to "Defendants' "many deceptive statements intended to sell additional copies of *The Accidental Billionaires* and The Film." Compl. ¶ 102. As explained below, none of the allegedly deceptive statements referred to in the Complaint was made by Columbia. Because plaintiff has made no factual allegations that would implicate Columbia in unfair competition or false advertising, the Complaint fails to state a cause of action against Columbia pursuant to 15 U.S.C. § 1125(a) or (b).

**1. Plaintiff Fails to State a Claim of Unfair Competition Against Columbia**

A plaintiff alleging unfair competition under 15 U.S.C. § 1125(a) must allege that the defendant (1) in bad faith (2) "made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services," (3) that "actually deceives or is likely to deceive a substantial segment of the intended audience," (4) that "the deception is material in that it is likely to influence purchasing decisions," (5) that the defendant "caused the statement to enter interstate commerce" and (6) that the statement results in actual or probable injury to the plaintiffs." *Applera Corp. v. Michigan Diagnostics, LLC*, 594 F. Supp. 2d 150, 163 (D. Mass. 2009) (internal quotation marks omitted). The fundamental problem with plaintiff's unfair competition claim is that the Complaint does not allege that Columbia made any "false or misleading statement[s] of fact . . . *about the plaintiff's goods or services*." *Id.* (emphasis added). There is no allegation that Columbia made any statements, false or otherwise, regarding

plaintiff's product—that is, *Authoritas*.[5] Without an allegation that Columbia made any statements regarding Greenspan's book, plaintiff's unfair competition claim against Columbia fails as a matter of law.

**2. Plaintiff Fails to State a Claim of False Advertising Against Columbia**

A claim of false advertising pursuant to 15 U.S.C. § 1125(a) requires plaintiff to allege and prove that "(1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with it products." *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir. 2002). The Complaint fails to allege even the first element of false advertising for two reasons.

First, plaintiff fails to allege any facts indicating that Columbia made any false statements. Plaintiff repeatedly alleges that Defendant Mezrich falsely claimed that Mezrich's book and Columbia's film are factual accounts of the founding of Facebook. *See, e.g.*, Compl ¶ 68 ("Plentiful evidence to the contrary aside, Defendant Mezrich is absolutely insistent on both *The Accidental Billionaires* and The Film being 'true.'"). But the Complaint does not attribute these statements to Columbia. Indeed, the Complaint itself alleged that the author of the screenplay "made it clear that The Film was not intended to be true." *Id.* at ¶ 64.

[5] Even if a cause of action for unfair competition may be based on false or misleading statements about the Defendants' own products, the Complaint fails to allege that Columbia made any false or misleading statements about *The Social Network*. *See infra*, Part II.E.2.

Second, even if the Complaint did allege that Columbia made any false or misleading statements of fact, the Complaint does not allege that any such statement was made "in a commercial advertisement," which is an essential element of a false advertising claim. *Cashmere*, 284 F.3d at 310.

Because the Complaint does not allege that Columbia made any false or misleading descriptions or representations of fact in a commercial advertisement about Columbia's film, Mezrich's book or Greenspan's book, the false advertising claim against Columbia pursuant to 15 U.S.C. § 1125(a) must be dismissed.

**3. Plaintiff Fails to State a Claim Against Columbia Pursuant to 15 U.S.C. § 1125(b)**

The Complaint refers to 15 U.S.C. § 1125(b), but lacks any allegations that would support a claim under that section. That section provides that "[a]ny goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States." The Complaint does not allege that Columbia's film or Mezrich's book were imported into the United States, and any claims based pursuant to § 1125(b) should therefore be dismissed.[6]

**F. Plaintiff Fails to State a Claim of Defamation Against Columbia**

It is not at all clear that plaintiff intends to assert a claim for defamation against Columbia. The Fifth Claim is titled Defamation of Aaron Greenspan by Benjamin Mezrich, and the allegations that follow under that heading make no substantive reference to Columbia. The factual recitations of the Complaint, however, refer to "Defamation by Omission of Plaintiff in *The Social Network*." Complaint ¶¶ 66-70. To the extent that the Complaint attempts to state a claim for defamation against Columbia, that claim also fails as a matter of law.

[6] Because the Complaint fails to state a claim against Columbia for unfair competition or false advertising pursuant to 15 U.S.C. § 1125(a), Plaintiff is not entitled to any damages under 15 U.S.C. § 1117.

To prove defamation in Massachusetts, the burden is on plaintiff to "show that the defendant was at fault for the publication of a false statement *of and concerning the plaintiff* which was capable of damaging his or her reputation in the community and which either caused economic loss or is actionable without proof of economic loss." *Stanton v. Metro Corp.*, 438 F.3d 119, 124 (1st Cir. 2006) (emphasis added); *see also Yohe v. Nugent*, 321 F.3d 35, 39 (1st Cir. 2003) ("Defamation is the publication, either orally or in writing, of a statement concerning the plaintiff which is false and causes damage to the plaintiff.").

The Complaint fails to allege that Columbia's film made any statements "of and concerning" him. Indeed, the Complaint itself states that "Plaintiff does not appear explicitly by name in [Columbia's film], nor is any character intended to represent Plaintiff." Compl. ¶ 66. Plaintiff's theory is that Columbia's film is defamatory by omission because it leaves him out of the Facebook story, leading viewers to believe "that Plaintiff had no role in the creation of Facebook." *Id.* ¶ 69.

Plaintiff's reliance on "defamation by omission" is misplaced. Defamation by omission occurs when a statement that is "of and concerning" the plaintiff leaves out key facts, thereby leading the audience to believe something false about the plaintiff. For example, in a classic defamation by omission case, a newspaper reported that a woman shot her husband and another woman in the other woman's home. Because the newspaper did not report that two other neighbors were also in the home, the report falsely implied that the assailant's husband and the other woman were having an affair. *See Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 414 (Tenn. 1978). While the court in *Nichols* found that omitting facts can give rise to a defamatory inference, the newspaper report contained statements concerning the plaintiff. Nothing about the defamation by omission line of cases suggests that the allegedly defamatory statements need not

be of and concerning the plaintiff. Here the Complaint alleges defamation against Columbia on the ground that plaintiff is not a character in Columbia's film at all. Because *The Social Network* is not "of and concerning" Greenspan, the Complaint fails to state a cause of action against Columbia for defamation.

**CONCLUSION**

For the foregoing reasons, the Court should dismiss all claims of the Complaint against Columbia with prejudice.

Respectfully submitted,

COLUMBIA PICTURES INDUSTRIES, INC.

By its attorney,

*/s/ Dustin F. Hecker*
Dustin F. Hecker, BBO # 549171
POSTERNAK BLANKSTEIN & LUND LLP
The Prudential Tower
800 Boylston Street
Boston, MA 02199
Telephone: (617) 973-6100
Facsimile: (617) 367-2315

Kevin T. Baine (*pro hac vice*)
Megan A. Hughes (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

Dated: January 6, 2012

**CERTIFICATE OF SERVICE**

I, Dustin F. Hecker, 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/ Dustin F. Hecker*
Dustin F. Hecker