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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 Judge Robert B. Collings

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RELIEF FROM A JUDGMENT OR ORDER PURSUANT TO RULE 60(b)(5) [LEAVE TO FILE GRANTED ON MAY 8, 2014]

INTRODUCTION

Defendants Random House, Inc., Mezco, Inc., Benjamin Mezrich, and Columbia Pictures Industries, Inc. collectively oppose Plaintiff's Motion for Relief from a Judgment or Order Pursuant to Rule 60(b)(5). They argue that Plaintiff's motion is frivolous and sanctionable, that

it ignores "the controlling circuit law," and that Plaintiff must be prevented from filing further motions.

Plaintiff's motion is not frivolous. Less than a month after the Supreme Court handed down its ruling in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, ___ S.Ct. ___, No. 12-873, 2014 WL 1168967 (Mar. 25, 2014), several other cases have already cited *Lexmark* due to its massive significance in unfair competition and false advertising cases. "In one fell swoop, the Supreme Court recently abrogated essentially all of the prudential standing doctrine related to false advertising." *Goodman v. Does 1-10*, Dist. Court, Case No. No. 4:13-CV-139-F, Footnote 3 (E.D. N. Carolina 2014). There is at least a colorable argument to be made that *Lexmark* impacts this Court's assessment of Plaintiff's standing to sue given the facts pled in his initial Complaint, and therefore no sanctions of any kind are reasonable.[1] Furthermore, Plaintiff is hardly the first litigant to file more than one motion for reconsideration under Rule 60(b); such filings are routine and rarely, if ever, properly subject to sanctions. *See De La Vega v. San Juan Star, Inc.*, 377 F. 3d 111 (1st Cir. 2004)*; Aybar v. Crispin-Reyes*, 118 F. 3d 10 (1st Cir. 1997); *US v. Alexander*, 106 F. 3d 874 (9th Cir. 1997). Nor did the present motion did not contain any repetitive argument relative to the last motion; the cause for filing was entirely distinct owing to the Supreme Court's material decision in late March, 2014, months after Plaintiff's first motion for reconsideration was ruled upon.

Defendants now argue, somewhat curiously given their previous arguments, that Plaintiff's standing was never in question. Columbia Pictures Industries Opposition (Docket No.

70) at 3. While this Court's Dismissal Order (Docket No. 50) did not explicitly use the term "standing" in relation to the dismissal of Plaintiff's Lanham Act claim, it is clear that the Court took the position that not enough facts had been alleged for the claim to proceed. What *Lexmark* makes clear is that even *without* facts demonstrating an explicit loss of sales, or bad faith, or definitive impact on consumer purchasing decisions, or even direct competition, a Lanham Act claim under § 43a may still proceed so long as the Defendants' actions are the proximate cause of the Plaintiff's *likely* loss and "within the zone of interests protected by the statute." *Id*.

Plaintiff's [Second Proposed] First Amended Complaint (hereinafter "SPFAC"), submitted concurrently with this motion, not only alleges in no uncertain terms that Defendants' actions directly (and therefore proximately) caused Plaintiff's harm, but it further alleges facts that satisfy all of the Court's pre-*Lexmark* concerns, going far beyond the Supreme Court's new *Lexmark* threshold for standing. ¶ 92 of the SPFAC cites two separate academic articles indicating that on-line consumer reviews influence consumer purchasing decisions, and that such reviews are subject to manipulation. ¶¶ 16 and 93 of the SPFAC allege bad faith in connection with at least one of Defendants' on-line reviews. SPFAC ¶ 104 explains that the books in question are rival works and that their authors are direct competitors. SPFAC ¶¶ 106-108 allege a loss of sales, and although the exact amount of loss is unknown, it is not required to be known for Plaintiff to have standing.

Regarding *Comfort v. Lynn School Committee*, 560 F.3d 22, 26 (1st Cir. 2009), the points raised by Defendants are noted, and Plaintiff would be the first to focus on matters other than

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[1] This Court did not issue an opinion in response to Plaintiff's first motion for reconsideration, making it difficult to ascertain the Court's rationale for denial. Defendants have not alleged that Plaintiff violated a single rule or court order. Nor have Defendants filed a separate motion for sanctions as required by Rule 11. Nor did Defendants Random House, Mezrich or Mezco provide notice that they intended to request sanctions. Since Defendants have successfully fought to prevent discovery thus far, no discovery sanctions are available. Plaintiff's *pro se* status means that 28 U.S.C. § 1927 sanctions are also unavailable, as Plaintiff is not an attorney, leaving only the Court's inherent ability to grant sanctions. Yet Plaintiff's conduct has been consistently respectful, rule-abiding, and according to the Court at the February 16, 2012 hearing in this case, "better than some lawyers." Essentially, Defendants argue for sanctions because they are tired of having to defend their egregious and illegal misconduct.

litigation if the circumstances caused by Defendants allowed Plaintiff any kind of finality. Yet that is not the case—Plaintiff is injured on an ongoing basis by Defendants' apparently incessant need to lie—and Defendants overlook the actual purpose of the Court's decision in *Comfort*: "This narrow interpretation of prospective force makes eminent sense. When a long-term injunction or consent decree is in play, there is good reason to weigh the interests of finality and equity differently; such measures, by their very nature, envision the regulation of future conduct. See *Rufo*, 502 U.S. at 380-81, 112 S.Ct. 748." Here, the Court's Orders and Judgment—effectively a long-term injunction against Plaintiff from raising legitimate concerns about Defendants' ongoing illegal conduct—have provided Defendants with a free pass (as described in the last motion for reconsideration, Docket No. 60) to make more false statements on national television, author more fake book reviews, divert more sales from other legitimate authors and publishers, and spread more lies, which will inevitably lead to more litigation,[2] and ultimately, a definitive lack of finality and use of judicial resources. After all, Plaintiff is not the only individual or entity that Defendants have injured or are injuring. Surely, this is not the kind of "future conduct" the Court wishes to encourage.

Generally, *Comfort* misses the forest for the trees, and contrary to Defendants' assertions, it is not the controlling authority on Rule 60(b)(5). More important, more recent, and more binding than the First Circuit's forty-two-year-old,[3] self-nullifying direct-link precedent—for it renders Rule 60(b)(5) practically pointless given the existence of the appeals process, which hardly needs the Rule to overturn directly-linked cases—is the Supreme Court's 1997 interpretation of the Rule.

[2] Journalist Haley Hintze has already started raising a litigation fund to pursue claims against Defendant Mezrich.
[3] *Comfort* is rooted in the outdated and narrow doctrine of *Lubben v. Selective Serv. Sys. Local Bd. 27*, 453 F.2d 645, 650 (1st Cir. 1972). Despite the First Circuit's claim in 2009 that, "This interpretation of Rule 60(b)(5) is fully consistent with the authorities elsewhere," *Comfort*, *supra*, at 27, the First Circuit admitted eight years prior that its views were actually far out of alignment with the Supreme Court and other Circuits. "Although many courts have

> "In *Rufo v. Inmates of Suffolk County Jail*, *supra*, at 384, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.' A court may recognize subsequent changes in either statutory or decisional law. See *Railway Employees v. Wright*, 364 U.S. 642, 652-653 (1961) (consent decree should be vacated under Rule 60(b) in light of amendments to the Railway Labor Act); *Rufo*, *supra*, at 393 (vacating denial of Rule 60(b)(5) motion and remanding so District Court could consider whether consent decree should be modified in light of *Bell v. Wolfish*, 441 U. S. 520 (1979)); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 437-438 (1976) (injunction should have been vacated in light of *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971)). A court errs when it refuses to modify an injunction or consent decree in light of such changes. See *Wright*, *supra*, at 647 ('[T]he court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong' (internal quotation marks omitted))."

Agostini v. Felton, 521 U.S 203 (1997).

The Supreme Court in *Agostini* makes the obvious point that "finality" for its own sake does nothing to further the cause of justice, and in fact can lead to the opposite: the transformation of the courts into "an instrument of wrong." Given the ongoing pattern of deception and illegal activity perpetrated by Defendants, and given the use of this Court's orders to justify and excuse the most notorious of crimes,[4] this Court is, respectfully, already well past that threshold. *Lexmark* has completely transformed the unfair competition and false advertising landscape because of cases such as this one.

As to the timeliness of the motion, it is simply absurd to think that it could have been filed any sooner. Filing within days of the *Lexmark* decision was more than "reasonable," and Rule 60(b)(5) does not have a one-year time limitation from the date of judgment for a reason. In *Agostini*, *supra*, the Supreme Court granted petitioner's Rule 60(b)(5) motion 12 years after an injunction was entered. Defendants have not been prejudiced due to timing in the least.

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indicated that Rule 60(b) motions should be granted liberally, [the First] Circuit has taken a harsher tack." *Davila-Alvarez v. Escuela de Medicina Universidad Central del Caribe*, 257 F.3d 58, 63-64 (1st Cir. 2001).

[4] See Docket No. 61 at 7.

CONCLUSION

Plaintiff has demonstrated that ample cause exists, under either Rule 60(b)(5) or in the alternative, Rule 60(b)(6), to reverse this Court's prior Orders and Judgment and to allow for the filing of the SPFAC in these proceedings. No sanctions against Plaintiff are warranted.

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 21st day of April, 2014.

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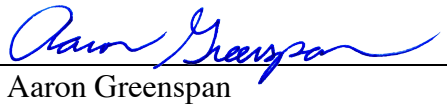
CERTIFICATE OF SERVICE

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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