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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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EXHIBIT A

[Proposed] Reply Memorandum in Support of Plaintiff's Motion For Relief From a Judgment or Order Pursuant To Rule 60(b)

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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

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

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), and in so doing, they admit a shocking amount through their silence. Defendants deny none of the factual assertions that Plaintiff makes in his motion. They do not

deny that Mezrich's various business associates, their spouses, and the Defendants themselves profited financially from writing, posting, and soliciting others to write and post false and deliberately misleading reviews of Defendants' products on the internet. They do not deny that these actions violated the Lanham Act. They do not deny Plaintiff's allegations concerning the manner in which newly-identified associates are connected to the Defendants. They do not deny that the Defendants and/or their associates (including counsel) deleted material evidence while the case was proceeding. They do not deny having made misrepresentations to this Court and the First Circuit. They do not deny that such actions are worthy of sanctions. They do not deny that much of the new evidence cited by Plaintiff—most of which came into existence since this Court's decision was handed down,[1] and much of which did not even exist throughout the appellate process—is defamatory of Plaintiff. They do not deny that the Court made at least one serious, material error involving a wiki citation, among several errors peppered throughout its various May 9, 2012 Orders. They do not deny that the circumstances surrounding the citation error in particular are "exceptional"—they even go so far as to call the issue "novel," which has the same meaning. They do not even deny that the precedent set by this Court concerning the Lanham Act is dangerous in light of how it has already been cited by other courts. And they do not deny that Defendants continue to engage in a pattern of additional illegal activities of the same nature as alleged in the initial Complaint that, through its Judgment, this Court has unintentionally allowed to transpire, causing undue hardship to Plaintiff and to others.

Defendants only meekly point out that none of the above really matters because of a deadline that does not even apply in these circumstances, and for good measure, they deny that they ever made any misrepresentations—itself a misrepresentation. By this point, it is

[1] Defendants' opposition papers are inconsistent. While Defendants Random House, Mezco and Mezrich misrepresent, "Plaintiff's 'new' evidence was *all* available long ago," their Co-Defendant Columbia Pictures contradicts them: "*Much* of this purported 'evidence' existed prior to the Court's final judgment" (emphasis added). Scare quotes aside, Plaintiff has presented new evidence here; Defendants simply cannot agree on how best to lie.

abundantly clear that Defendants and their counsel have a serious allergy to the truth, one that makes them prevaricate uncontrollably.

ARGUMENT

I. The Court's Citation Error is Material, "Novel," and Exceptional, Making the One-Year Time Bar Irrelevant

Plaintiff takes the Court's and Defendants' point that not every sentence in a work designated non-fiction is necessarily guaranteed to be 100% correct, nor can an author always convey every tiny detail of a situation. But Plaintiff has never argued that works designated as "non-fiction," "true," and "accurate," as Defendant Mezrich has called *The Accidental Billionaires*, should be flawless to the point of perfection. Rather, Plaintiff argues, and has argued consistently, that there is some standard of rigor that any author should have to meet in order to earn the designation. That standard involves research, fact-checking, documentation of sources, an attempt to provide some objective look at factual content, and refusal to include concocted, imaginary and/or questionable material.[2]

As Defendant Columbia Pictures points out, "history textbooks are replete with competing accounts of previous events, all intending to be true." Yet the notion that Defendant Mezrich's work is somehow comparable to a "history textbook" is either a dark attempt at humor by Defendants' counsel, or a sad comment on the declining state of education (including legal education) in this country. First, *The Accidental Billionaires* does not provide "competing accounts," but rather one admittedly imagined (and thoroughly disclaimed) account by a man

[2] On November 8, 2013, two days after this motion was filed, the popular CBS television news magazine *60 Minutes* retracted a story about the terrorist attack in Benghazi, Libya. The story was aired in connection with a book published by CBS subsidiary Simon & Schuster, Inc., also Defendant Mezrich's most recent publisher. Though both the book and news segment at first appeared to meet the standard for non-fiction described above, it was later determined that neither did. The book was subsequently pulled from shelves and CBS issued a public retraction, demonstrating that A) the "non-fiction" designation matters a great deal; and B) even with a liberal interpretation of the meaning of non-fiction, there existed no set of facts upon which the book and news segment were based.

who was not present to document the barely-researched events he attempts to describe. Second, history textbooks do not contain such carefully worded disclaimers intended to waive legal liability because virtually everything inside is a flat-out lie. Yet *The Accidental Billionaires* does. The only kind of history textbook Mezrich's work resembles is the kind one might find in a former Soviet, or perhaps present-day North Korean, classroom—which is to say, a work of pure fiction.

The exact definition of non-fiction is central to this discussion because Defendant Mezrich's book is so categorized, deliberately, to increase sales. This alone makes the veracity of the designation material pursuant to § 43(a)(1)(A) of the Lanham Act, considering that the non-fiction designation is a "false or misleading description of fact, or false or misleading representation of fact" concerning "goods or services…in commerce."[3] As previously pointed out, Plaintiff "believes that he [] *is or is likely to be* damaged by such act," as the author of a competing (and *actually* non-fiction) memoir sold in interstate commerce concerning some of the same subject matter (emphasis added). 15 U.S.C. § 1125(a).

Plaintiff did not—and still does not—have proper notice of the definition of non-fiction intended to be used by the Court on page 27 of its Dismissal Order, and Defendants do not suggest otherwise. All parties to this case also agree, or refuse to deny, that Plaintiff is entitled to such notice as a matter of law. Therefore, the one-year clock has not yet started ticking.

The impact upon Plaintff's legal rights here is plainly material. Confused by the utter lack of consistency between the text of the Court's Order and that of the Court's apparent, but incorrectly-cited, wiki source, Plaintiff actually argued that the Court had *invented* a definition of its own—an argument that would on the surface appear specious because *a source*, however faulty and untraditional, was cited. Had the proper citation and definition been made available to

Plaintiff, he could have argued in both the First Circuit[4] and Supreme Court that the cited definition was:

(a) not used in context, but actually less than 14% of the cited definition;

(b) totally misconstrued by the Court's extraneous addition of the word "only;"

(c) intended to mean the opposite of what this Court apparently took it to mean, as evidenced by the omitted "`Fiction means not real, fake.`" and "**N**on-**F**iction= **N**ot **F**ake and **F**iction =**F**ake;"

(d) anonymously edited and even merged with other wiki "answers" a number of times prior to the state in which the Court found it;

(e) only one of at least three different and conflicting definitions for the term "non-fiction" simultaneously available on wiki.answers.com; and

(f) an abuse of the Court's discretion given the lack of consistency between definitions for the exact same term on the exact same web site.

Generally, these points are considerably more compelling than the argument Plaintiff actually made, which at the time was the best argument Plaintiff could make given the deficient Dismissal Order. Whether or not the above arguments are perceived as "good" is irrelevant; the

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[3] Pursuant to the same section, sub-part (a)(1)(B), Plaintiff has also argued that "non-fiction" (along with "true" and "accurate") is a "term" that "in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities" of "goods," namely, Defendants' book and film at issue in this case. 15 U.S.C. § 1125(a).

[4] Plaintiff's case was not even properly heard in the First Circuit. According to two recent clerks for Judge Boudin (a member of Plaintiff's First Circuit panel), in the First Circuit and other appellate courts, *pro se* cases are handled quite differently than cases where all parties are represented. Staff attorneys review and summarize hundreds of cases for the panel in a few sentences each, and the briefs are never actually read in chambers. The presumptive purpose of this outrageous practice is greater judicial efficiency. *See* "Case Management Procedures in the Federal Courts of Appeals," Federal Judicial Center, Second Edition (2011) at 12. *See also* Pether, Penelope J., *SORCERERS, NOT APPRENTICES: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (Spring 2007). This practice is blatantly unconstitutional and further renders Plaintiff's appeal invalid. "[A]ny attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overzealous protection of trial court dockets." *Link v. Wabash R. Co.*, 370 U.S. 626 (1962).

point is that Plaintiff should have been afforded the opportunity to make them, as was his legal right, and that this Court cannot know what the First Circuit may have decided in that circumstance. Plaintiff's legal rights were precluded by the Court's unintentional error. However unfortunate, the extra underscore in the Court's Order rendered the entire appeal "infected with an[] error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." *United States v. Addonizio*, 442 U.S. 178 (1979). Plaintiff's Lanham Act arguments, made sequentially prior to the defamation arguments, likely also colored the First Circuit's view of Plaintiff's defamation claim, which also hinges upon whether or not what Defendant Mezrich wrote was actually true.

The Supreme Court has stated that such "infections" have same effect as equitable tolling, although given the nature of Rule 60(b), the process involves shifting the argument of error from Rule 60(b)(1) to 60(b)(6), for each prong of Rule 60(b) is mutually exclusive for any given point.[5] Here, Plaintiff was not at fault for the Court's error, nor was Plaintiff at fault for failing to detect it given the exceptional and "novel" nature of the error. As explained in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993):

> As explained by Justice Black:
>
> > "It is contended that the one-year limitation [of subsection (1)] bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one-year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend . . . due to inadvertence, indifference, or careless disregard of consequences." *Id.*, at 613.
>
> Justice Frankfurter, although dissenting on other grounds, agreed that Klapprott's allegations of inability to comply with earlier deadlines took his case outside the

[5] Each error, each new piece of evidence, each misrepresentation by another party, and each new, overturning precedent is an independent point to be considered under Rule 60(b)'s various prongs.

> scope of "excusable neglect" "because 'neglect' in the context of its subject matter carries the idea of negligence and not merely of non-action." *Id*., at 630.
>
> Thus, at least for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. Because of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "neglect."

For the purposes of the Court's material citation error, Plaintiff's failure to file this motion within one year from this Court's Orders and Judgment was "beyond his [] control" and is therefore "not considered to constitute 'neglect.'" *Id*. Rather, "extraordinary circumstances" are present here—or to again use Defendants' preferred term, "novel" circumstances. *Id*.

Judicial error has served as the basis for relief under Rule 60(b)(6) in the past under very similar circumstances.[6] Footnote 11 of *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847 (1988) states:

> We conclude that the basis for relief in this case is extraordinary and that the motion was thus proper under clause (6). See *infra*, at 865-867. Of particular importance, this is not a case involving neglect or lack of due diligence by respondent. Any such neglect is rather chargeable to Judge Collins. Had he informed the parties of his association with Loyola and of Loyola's interest in the litigation on March 24, 1982, when his knowledge of the University's interest was renewed, respondent could have raised the issue in a motion for a new trial or on appeal without requiring that the case be reopened. Moreover, even if respondent had taken the unusual step of reviewing the judge's financial disclosure forms — which reveal that he was a member of the Board of Trustees — the conflict would not have been brought to its attention. The conflict arose not simply from the judge's service on the Board of Trustees, but from his service on the Board while the University was involved in its dealings with Liljeberg. This latter fact would not have been made apparent through examination of the disclosure reports and,

[6] Defendants suggest that Plaintiff's motion is untimely under Rule 60(b)(5) and (6). The motion was filed only days after the Court's serious citation error was discovered. "For example, a 'reasonable time' for bringing a motion under Rule 60(b)(4)-(6) may occasionally be more than the one-year outside limit provided for motions under Rule 60(b)(1)-(3). *See United States v. Boch Oldsmobile, Inc*., 909 F.2d 657, 660-61 (1st Cir.1990)." *Teamsters, Chauffeurs Local No. 59 v. Superline Tr*., 953 F. 2d 17 (1st Cir. 1992). "Parties seeking relief under Rule 60(b)(6), however, must file their motion within a 'reasonable' time, which ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief. See *Emergency Beacon Corp*., 666 F.2d at 760 (holding that trustee's motion to vacate order authorizing debtor in possession to issue certificates of indebtedness filed twenty-six months after entrance of order was filed within a reasonable time); *In re Pacific Far East Lines*, 889 F.2d 242 (9th Cir.1989) (eighteen months not untimely nor unreasonable under circumstances); *Menier v. United States*, 405 F.2d 245 (5th Cir.1968) (two years not unreasonable)." *Olle v. Henry & Wright Corp*., 910 F. 2d 357 (6th Cir. 1990).

> according to respondent, was not a matter of public record at the time the case was tried and decided.

Defendants suggest that Plaintiff should have performed his revealing Google search earlier. In fact, Plaintiff performed a large number of searches about the Court's Dismissal Order after receiving it, but aside from it not being Plaintiff's responsibility to proofread the Court's publications, even these reasonable searches did not reveal the Court's real apparent source. As in *Liljeberg*, even though Plaintiff took the "unusual step of reviewing" each character in the Court's cited URL to ensure that the URL was both valid and a hyperlink to a definition of the term "non-fiction," it was still not possible to find the parallel version, off by one character, that the Court apparently intended to cite. Therefore, pursuant to Rule 60(b)(6), Plaintiff should be granted leave to amend his complaint with the entire slew of new facts described in his motion—including, but not limited to, a dictionary definition of "non-fiction."[7]

II. Defendants' Continuing Pattern of Deception is an Extraordinary Circumstance That Has Caused Undue Hardship

Plaintiff is a private citizen attempting to make a living as an entrepreneur in the competitive market for computer technology. His attempts are understandably confounded every time he is called a "fool" in public thanks to *The Accidental Billionaires* (as he was on May 17, 2012, after this Court's May 9, 2012 Judgment) or falsely accused by a Mezrich admirer (or possibly associate) of being a "megalomania[c]" who launders money from his memoir's proceeds to purchase "psychiatric medication" (as was stated publicly as recently as late September, 2013) thanks to Defendants' portrayal of Plaintiff, or lack thereof. Meanwhile, as Plaintiff is forced to spend time and energy defending his reputation against these spurious claims, Defendants, their associates, and apparently even their spouses, are energetically complicit in the continuous and ongoing effort to illegally prop up sales of Defendants' new,

inaccurate, and misleading works by authoring and publishing more fake on-line reviews and comments. The still-mounting evidence is therefore not cumulative, and no court has had the opportunity to see any of it. The hardship to Plaintiff (and others similarly affected) from defamation, harassment, and lost book sales is real and certainly undue.[8]

This goes to Defendants' statement, "The time is long past for this litigation to end. Plaintiff cannot be allowed to litigate the same issues *ad infinitum*." If anonymous individuals—who may in fact be connected to the Defendants—had stopped harassing Plaintiff,[9] and if Defendants had halted their campaign of lies, this would be a reasonable sentiment. Yet these proceedings, which never even proceeded to discovery, have hardly been lengthy by judicial standards, and for the time being, the only thing transpiring *ad infinitum* is Defendants' deliberate deception and the unfortunate consequences thereof. Litigation is a cumbersome, expensive, exhausting, and as these proceedings have demonstrated, error-prone affair. The only thing worse is the injustice that Defendants have inflicted upon Plaintiff that this very litigation seeks to correct. Plaintiff would be remiss not to motion for relief accordingly.

"Once litigation has run its course and all available avenues of appeal have been exhausted, the parties must be able to depend upon the certainty and stability of the resultant judgment. See *United States v. Rodríguez*, 527 F.3d 221, 225 (1st Cir.2008); *Boch Olds.*, 909

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[7] Plaintiff's previously proposed First Amended Complaint is at this point moot in light of the new facts. Plaintiff plains to perfect the Lanham Act and defamation claims, add at least one new claim, and add new defendants in light of the information that has come to light since the Court's Judgment.

[8] Defendants cite *Comfort v. Lynn School Committee*, 560 F.3d 22 (1st Cir. 2009) to suggest that Rule 60(b)(5) should not apply here. Yet *Comfort* should hardly comfort Defendants. It cites *US v. Kayser-Roth Corp.*, 272 F. 3d 89 (1st Cir. 2001) as an example of when Rule 60(b)(5) *should* apply. That case states, "In considering Kayser-Roth's request for relief, Judge Torres found that the 1990 declaratory judgment, applied to Kayser-Roth for future response costs, would have prospective effect and would inflict undue hardship on Kayser-Roth, two requirements for relief under Rule 60(b)(5)." Here, the Dismissal Order has had prospective effects: a negative impact on Plaintiff's book sales, not to mention clearing Lance Armstrong of any liability for lying in his books; and it has caused Plaintiff undue hardship by permitting continuous defamation and harassment of Plaintiff.

[9] Plaintiff retained counsel for the express purpose of obtaining a subpoena to determine the identity of the anonymous individual(s) harassing and defaming Plaintiff. The Clerk of Court informed Plaintiff that as a *pro se* litigant it would not be possible to obtain a subpoena without counsel. The subpoena was never obtained because the case never proceeded to discovery. Plaintiff asked counsel to withdraw long ago; counsel did not, contrary to Plaintiff's wishes. Plaintiff's briefs have been drafted by Plaintiff alone with no outside input from any attorney.

F.2d at 660." *Comfort v. Lynn School Committee*, 560 F. 3d 22 (1st Cir. 2009). Unfortunately, when the resultant judgment is neither certain nor stable—anonymous users edit, merge and split one of the Court's fundamental sources on a daily basis—all bets are off.

CONCLUSION

Plaintiff has demonstrated that ample cause exists to allow for a new, re-drafted First Amended Complaint in these proceedings. The case so far has been tainted not only by the persistent, deliberate misrepresentations of Defendants, but now by the Court's own error, however unintentional. The consequences of such error are already readily apparent and impacting Plaintiff (and consumers of non-fiction books, as well as cycling fans) in a decidedly negative manner. Plaintiff therefore requests fourteen (14) days to prepare and file a First Amended Complaint with a number of material changes that hold Defendants and their various associates accountable for their persistent unlawful actions that they have all but admitted.

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).

Respectfully submitted this 25th day of November, 2013.

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