UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MR. AARON GREENSPAN, an individual, Plaintiff, v. RANDOM HOUSE, INC.; MEZCO, INC.; BENJAMIN MEZRICH; COLUMBIA PICTURES INDUSTRIES, INC. a/k/a SONY PICTURES a/k/a COLUMBIA TRISTAR MOTION PICTURE GROUP, Defendants.	Civil Action No. 1:11-CV-12000-RBC

RANDOM HOUSE, INC.'S, MEZCO, INC.'S,
AND BENJAMIN MEZRICH'S OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

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INTRODUCTION

Belatedly recognizing the obvious deficiencies in his Complaint, Plaintiff seeks leave to file a first amended complaint ("FAC"). However, the new material consists largely of argument and a few new "fact" allegations, none of which adds anything to Plaintiff's old claims or adds up to new claims. Quite to the contrary, with his proposed FAC Plaintiff's case has gone from the merely patently deficient to the absurd. For example, Plaintiff now alleges that:

- Benjamin Mezrich's polite request that Plaintiff act as a source for the Book amounted to an implicit, extortionate threat;
- Defendants' marketing, distribution, and sales of *The Accidental Billionaires* (the "Book") and *The Social Network* (the "Film") constituted mail and wire fraud;
- Collectively, Defendants constitute a criminal enterprise under the Racketeer Influenced and Corrupt Organizations Act ("RICO");
- Simon & Schuster, Inc., which has absolutely no connection to the events at issue in this matter, is a co-conspirator in the criminal enterprise by virtue of having published an earlier book by Benjamin Mezrich;
- As a result of the Book and the Film, which Plaintiff admits barely mention him, Plaintiff is unable to secure venture capital funding for his endeavors;
- The Book's use of the term "kid" is not defamatory standing alone, but is defamatory when paired with Plaintiff's last name;
- A Random House lawyer participated in a scheme to defraud Plaintiff by allowing Random House to market the Book as non-fiction; and
- Tonya Mezrich, Defendant Benjamin Mezrich's wife, committed copyright infringement, defamation, fraud, violated the Lanham Act, was unjustly enriched, and is a member of a criminal enterprise engaged in a pattern of racketeering activity, all because she posted a consumer review on Amazon.com praising her husband's book.

These frivolous contentions cannot be allowed to prolong this case, and the Court should deny the motion.

ARGUMENT

I. Legal Standard

Leave to amend should be "freely given when justice so requires." Fed. R. Civ. P. 15(a). However, when amendment of a complaint would be futile, leave to amend should not be granted. *Ardorno v. Crowley Towing and Transportation Co.*, 443 F.3d 122, 126 (1st Cir. 2006). "In assessing futility, the district court must apply the standard which applies to motions to dismiss under Fed. R. Civ. P. 12(b)(6)." *Id*. Thus, leave to amend should be denied where the Plaintiff does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

II. Plaintiff Adds No Additional Facts To His Claims For Copyright Infringement, Which Fail To State A Claim For Relief

Plaintiff alleges no additional facts in support of his copyright claims, and instead adds only the phrase "Total Feel and Experience" to his list of purported similarities. FAC, ¶ 54. This addition does nothing to save these claims, which Defendants already demonstrated are deficient in their Motion to Dismiss. Therefore, allowing Plaintiff to amend would be futile.

III. Plaintiff Fails To Allege Any Additional Facts That Rescue His Doomed Lanham Act Claim

The only new allegations that Plaintiff adds to his flawed Lanham Act claim are: (1) additional instances of consumer reviews on Amazon.com purportedly written by "partners, employees, contractors, and/or affiliates" of the Defendants; and (2) a statement that Plaintiff is a competitor of Random House and Benjamin Mezrich because Plaintiff has written and self-published one book. However, even taking these new allegations into account, Plaintiff fails to state a cause of action, and accordingly it would be futile to allow him to amend the Complaint.

A claim for false advertising under 15 U.S.C. § 1125(a) requires allegations 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." *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-311 (1st Cir. 2002). First, nowhere does Plaintiff allege that these consumer reviews contain false or misleading descriptions or representations of fact; he merely alleges that the reviewers failed to disclose their purported connections to the Defendants. That is insufficient. Second, the reviews are not "commercial advertisement[s]," they are simply consumer reviews on Amazon.com.[1] And third, Plaintiff does not, because he cannot, allege that any purported misrepresentations are likely to make a difference to purchasers.

Moreover, Plaintiff still fails to allege the competitive injury required to state a false advertising claim. To do so, a plaintiff must allege that it "has been or is likely to be injured as a result of the misrepresentation [in the advertisement], *either by direct diversion of sales or by a lessening of goodwill associated with its products*." *Cytologix Corp. v. Ventana Medical Systems, Inc.*, 2006 WL 2042331, at *5 (D. Mass. July 20, 2006), citing *Cashmere & Camel Hair Mfrs. Inst.*, 284 F.3d at 310-311 (emphasis added). Plaintiff alleges no facts supporting his conclusory assertion that "[a]s an actual and proximate result of Defendants' willful and intentional actions, Plaintiff has suffered damages . . . ." FAC, ¶ 142. Plaintiff does not and cannot allege that he has lost sales of *Authoritas* as a result of Defendants' purported false advertising, or that *Authoritas* has experienced a loss of goodwill as result of Defendants' statements. Initially, it is ridiculous to suggest Plaintiff competes with any of the Defendants

[1] Plaintiff also improperly attempts to bootstrap a purported violation of FTC advertising guidelines into a Lanham Act claim. However, even assuming that the consumer reviews violated the guidelines, which they do not, the penalty for a violation is an action by the FTC under the FTC Act, which provides no private right of action. *See Federal Trade Commission v. Klesner*, 280 U.S. 19, 25, 50 S.Ct. 1, 74 L.Ed. 138 (1929). Plaintiff cannot use the Lanham Act as a proxy in order to avoid this rule, nor can he avoid properly alleging the elements of a Lanham Act claim simply by invoking the FTC guidelines.

based solely on the fact that he self-published his life story. In any event, *Authoritas* and the Book simply do not compete. While the entirety of the Book is dedicated to the founding of Facebook, *Authoritas* is Plaintiff's autobiography in which his "houseSYSTEM" and his contact with Mark Zuckerberg are only discussed in the last 40 pages of the 333-page book. *See Authoritas*, Chs. 26-30, Epilogue. Accordingly, nothing in Plaintiff's proposed FAC saves his fatally deficient Lanham Act claim.

IV. Plaintiff Cannot Allege Facts Supporting A RICO Claim

According to Plaintiff's latest allegations, there is a vast criminal conspiracy arrayed against him made up of Random House, Inc., Simon & Schuster, Inc., Sony Pictures, Inc., Benjamin Mezrich, his wife, Tonya, and other co-conspirators. In furtherance of this alleged conspiracy, Plaintiff alleges that Benjamin Mezrich's email request that he act as a "knowledgeable source" for the Book amounted to criminal extortion – a threat against "Plaintiff's business, financial condition and reputation." FAC, ¶ 152. He further alleges that Defendants committed mail and wire fraud by distributing the Book and the Film, by posting consumer reviews on Amazon.com, by transferring the proceeds from the Book and the Film, and by filing court papers in this case. FAC, ¶ 153. Each of these contentions is frivolous on its face, and Plaintiff utterly fails to allege any cognizable claim, let alone facts that would meet the heightened pleading requirement for RICO claims. *See Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 449-450 (1st Cir. 2000).

For example, even as Plaintiff acknowledges that there has been no written or otherwise explicit threat against him, he alleges that he perceived a purported threat not based on Mezrich's words or conduct towards him, but rather based on newspaper articles about Mezrich's previous work. FAC, ¶ 38. Plaintiff concedes that when he declined to be a source for the Book, Mezrich's response was not anger, much less a threat, but simply, "Understood. Thanks for your

time, I'll do my best to do the story justice and make it as entertaining as possible." FAC, ¶ 42. Even with extra sensory perception, no reasonable person could possibly find a threat or an effort to extort in Mr. Mezrich's response.

Similarly, Plaintiff alleges the conspirators committed mail and wire fraud, evidently by shipping or mailing the Book and Film in interstate commerce and by writing reviews on-line. How do those benign activities amount to racketeering activity? Although he is not explicit, Plaintiff appears to be alleging that they do so because, in his opinion, the items transmitted, mailed or posted on-line are not true. Thus, the FAC comes full circle to the essence of Plaintiff's complaint – alleged torts and now crimes committed against him because Defendants have not properly acknowledged his contributions to the founding of facebook.com. Never mind that Plaintiff has utterly failed to meet the technical requirements of pleading a RICO claim, he has still not pleaded a single fact that could give rise to any claim whatsoever. [2] For this reason, the Court should not allow Plaintiff to file the FAC, because it would be futile to do so.

[2] Allegations of fraud as a RICO predicate offense must satisfy the heightened pleading standard for fraud. *See* Fed. R. Evid. 9(b). Under this standard, Plaintiff is required to "go beyond a showing of fraud and state the time, place and content of the alleged mail and wire communications perpetrating that fraud." *See In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 456 F.Supp.2d 131, 151 (D. Me. 2006), quoting *Cordero-Hernandez v. Hernandez-Ballesteros*, 449 F.3d 240, 244 (1st Cir. 2006). Plaintiff includes only general allegations, and fails to specifically allege even a single act of fraud. *See* FAC, ¶ 153. Moreover, Plaintiff "fails utterly to identify any recipient" of any of the purported uses of the mail and/or wires. *In re Compact Disc*, 456 F.Supp.2d at 151. Plaintiff also fails to sufficiently allege injury, as he does not suggest that *he* was defrauded, and instead merely generally asserts that he has been injured. FAC, ¶ 156. Finally, Plaintiff does not allege facts making out either fraudulent intent or a "scheme or artifice to defraud" – alleging neither who Defendants sought to defraud, nor of what Defendants sought to deprive them.

V. Allowing Plaintiff To Amend His Defamation Claims Would Be Futile

A. Plaintiff Alleges No New Facts That Save His Explicit Defamation Claim

Plaintiff offers no new facts to salvage his defamation claims based on references to him by incorrect names, references to his website not being "particularly slick," and the C-Span interview. Instead, Plaintiff merely adds argument to his pleading. As to references to Plaintiff as "kid," Plaintiff argues that Mezrich "uses [kid] in a general sense for those characters he favors, such as Mark Zuckerberg, and directly next to the names of those characters on whom he wishes to cast aspersions." FAC, ¶ 60. First, Plaintiff's predicate is false – the Book refers to Zuckerberg in *the exact same manner* on multiple occasions, and even in less flattering terms elsewhere. *See* Book at 63, 71 (referring to "this Zuckerberg kid"), and at 10 ("awkward kid"); 21 ("geeky kid[]"); 90 ("geeky kid"); 131 ("damn kid"). Second, Plaintiff still fails to include facts showing that referring to a college age student as a "kid" would cause others to consider him with "contempt, hatred, scorn or ridicule."

As for the statement that Plaintiff "had gotten in trouble" for making a website that used students' "Harvard emails and IDs as passwords," in *Authoritas* Plaintiff describes at length how Harvard repeatedly threatened him with disciplinary action over his website's use of students' university email passwords. *See Authoritas* at 2; 240; 247; 254-55. True statements, of course, cannot form the basis of a defamation claim. In any event, the statement – even if it were false – is not capable of holding Plaintiff up to "contempt, hatred, scorn or ridicule." *Carmack v. National Railroad Passenger Corp.*, 486 F. Supp.2d 58, 76 (D. Mass. 2007).

B. Plaintiff's Proposed Amended Claim For Defamation By Omission Does Not Satisfy The "Of And Concerning" Standard For Defamation

In their Motion to Dismiss, Defendants demonstrated that the Book and the Film cannot defame Plaintiff by failing to refer to him, because defamatory statements must be "of and

concerning" Plaintiff. *See* Motion at 14-16; Reply at 7-8. In response, Plaintiff does not allege any new facts satisfying the "of and concerning" requirement. Despite his insistence that some individuals he knows expected him to have a larger role in the Book and the Film, FAC, ¶ 97, he cannot satisfy the standard for "of and concerning" under Massachusetts law:

> [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. *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 395 Mass. 471, 483, 380 N.E.2d 1005 (1985) (emphasis added).

Plaintiff cites to no words that refer to him in either the Book or the Movie to support his purported "defamation by omission" claim. He relies solely on the fact that Defendants marketed the Book and the Movie as true. However, this cannot be interpreted to be some intended reference to Plaintiff, and therefore, by definition, cannot satisfy the "of and concerning" requirement. Accordingly, it would be futile to allow Plaintiff to amend this claim.

VI. Plaintiff Cannot Make Out A Claim For Unjust Enrichment

Plaintiff's proposed unjust enrichment claim is meritless, and it would be futile to allow him to amend the Complaint to add such a claim. First, to the extent that the claim is based on the same facts Plaintiff's frivolous copyright infringement claim, *see* FAC, ¶¶ 169, 171, it is preempted by federal law and cannot survive as a stand alone claim. *See Dunn v. Brown*, 2011 WL 4499007 at *6 (D. Mass. Aug. 16, 2011). Second, the allegations do not satisfy the elements of the claim: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) an acceptance or retention of the benefit by the defendant under circumstances which make such acceptance or retention inequitable." *Katz*

v. Pershing, LLC, 806 F.Supp.2d 452, 460 (D. Mass. 2011). Plaintiff has not and cannot allege he conferred any benefit on Defendants, and thus, cannot state a claim for unjust enrichment. *Id*.

VII. Plaintiff Cannot Allege Facts Stating A Claim For Fraud

Plaintiff alleges that the following conduct constitutes fraud: classifying, referring to, and marketing the Book as non-fiction and "true," referring to the Film as "true," and purportedly misrepresenting certain facts in "pleadings and representations before this Court."

However, to plead a claim for fraud under Massachusetts law, a Plaintiff must allege that "[1] the defendant made a false representation of material fact [2] with knowledge of its falsity [3] for the purpose of inducing the plaintiff to act thereon, and [4] that the plaintiff reasonably relied upon the representation as true and [5] acted upon it to his damage." *Taylor v. American Chemistry Council*, 576 F.3d 16, 31 (1st Cir. 2009) (internal quotation marks omitted). Nowhere in his FAC does Plaintiff allege that any of Defendants' purported misrepresentations were made for the purpose of inducing him to act. Nor does Plaintiff allege that he reasonably relied on Defendants' statements as true and acted upon them to his damage. It would be fundamentally inconsistent for him to do so, of course, since he alleges that he supposedly knew from the outset that he could not expect to be fairly represented in the Book. *See* FAC, ¶¶ 36-38. Under Plaintiff's own theory, he has been damaged not by his actions in reliance of Defendants' statements, but rather by the beliefs formed by third persons as a result of reading the Book or seeing the Film. *See* FAC, ¶¶103.[3] This does not make out a claim for fraud.

[3] Of course, Plaintiff also fails to satisfy the technical and heightened pleading standards required by Federal Rule of Civil Procedure 9(b), which requires "specification of the time, place and content of an alleged false representation." *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985) (internal quotation marks omitted).

CONCLUSION

Especially in cases involving the exercise of First Amendment rights, and the attendant chilling effect litigation invariably has, swift termination of meritless claims is particularly important. *See, generally, Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Sipple v. Chronicle Publishing Co.*, 154 Cal.App.3d 1040, 1046 (1984). Plaintiff's latest attempt to bolster his case only serves to prove that he has no legal claim against any of the Defendants. To allow Plaintiff to amend would be a futile act, because Plaintiff does not and cannot allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). To put it charitably, Plaintiff's FAC lacks factual support and is implausible on its face. This Court should not allow the FAC to be filed, and should grant Defendants' motions to dismiss with prejudice, bringing this misguided litigation to an end.

Respectfully submitted,

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

By their attorneys,

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CERTIFICATE OF SERVICE

I, Benjamin M. McGovern, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/Benjamin M. McGovern
Benjamin M. McGovern