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July 5, 1994

BY HAND

The Honorable John S. Martin
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 20007-9998

Re: Groden v. Random House, et al.
94 Civ. 1074 (JSM)

Dear Judge Martin:

I write this letter to seek guidance from the Court on the need for further briefing of an issue focused on by Your Honor at the parties' June 24 oral argument of defendants' motion to dismiss in the above referenced matter.

At that argument, Your Honor addressed the issue of whether the advertisement's headline "GUILTY OF MISLEADING THE AMERICAN PUBLIC" could be found to constitute a "false or misleading" statement actionable under § 43(a)(2) of the Lanham Act. Specifically, Your Honor questioned whether this statement misrepresented plaintiff's "product" -- whatever that may be -- as opposed to misrepresenting defendants' product, the book Case Closed. Since this issue was not the focus of plaintiff's complaint or papers and thus was not discussed in detail in defendants' moving or reply papers, the Court may find helpful supplemental briefs by the parties (of less than the permitted length of reply briefs) on this limited issue.

Defendants' supplemental brief would demonstrate that under both standard First Amendment analysis and false advertising cases applying § 43(a), a verifiable false fact must be present for an action to proceed. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695 (1990); McNeil-P.C.C., Inc. v. Bristol Meyers Squibb Co., 938 F.2d 1544 (2d Cir. 1991) (in determining actionability under § 43(a) of comparative advertising of analgesics, court looks to verifiability of statements by test studies and consumer surveys). The brief would analyze decisions which hold that "mere puffing" or clearly hyperbolic statements, as in this obviously provocative headline, are not intended to be taken literally and are not actionable under § 43(a). See Cook, Perkiss & Liehe, Inc. v. Northern California Collection Serv. Inc., 911 F.2d 242, 244-46 (9th Cir. 1990). There are no authorities applying § 43(a) to language resembling the hyperbolic and opinionated editorial comment before the Court.

Further, defendants' brief would demonstrate that the action may not be re-cast under the rubric of "product disparagement." Had plaintiff asserted some sort of defamation claim, the challenged headline plainly would be protected as opinion and hyperbole under the legal theories and authorities cited in defendants' moving brief at pp. 41-42. Thus, finding a statement of fact in the observation that Groden's conspiracy theory, as quoted in the advertisement, was "misleading" would require this Court to determine the truth or falsity of the conclusion of the Warren Commission. Also relevant are authorities holding that opinion that is not actionable as defamation does not become actionable because it is presented under another label. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57, 108 S. Ct. 876, 883 (1988) (when a claim for defamation fails because defendant's speech is constitutionally protected, claim for intentional infliction of emotional distress "cannot, consistently with the First Amendment, form a basis for the award of damages").

If Your Honor would find further discussion of such arguments and authorities helpful, defendants would be happy to submit a supplemental brief on a schedule to be determined by the Court.

Respectfully submitted,

Victor A. Kovner

cc. Roger Bruce Feinman, Esq.
(Attorney for Plaintiff)

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