LAW OFFICES
ROGER BRUCE FEINMAN
PARK AVENUE ATRIUM
PENTHOUSE SUITE
237 PARK AVENUE
NEW YORK, NEW YORK 10017

(212) 551-1483

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July 8, 1994

The Honorable John S. Martin
United States District Court
Southern District of New York
United States Courthouse
40 Foley Square
New York, New York 10007-9998

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

Dear Judge Martin:

This will serve as plaintiff's response to the letter dated July 5, 1994 that Mr. Kovner has submitted to the Court.

This is an action for misappropriation of name and likeness, and for false advertising/unfair competition. After an unsuccessful attempt last October to resolve this matter with the General Counsels of both Random House and The New York Times, plaintiff filed this Complaint on February 17, 1994. Under the new waiver rules, defendants acknowledged service on March 16. On April 13, they asked to bring on a Rule 12(b)(6) motion. The motion has been fully argued and submitted.

The fact-opinion issue was fully briefed and argued. Defendants submitted an extensive, 43-page Memorandum of points and authorities, and an equally extensive sheaf of exhibits, as well as a Reply Memorandum. Lengthy oral argument was heard by the Court on June 24. At some point, argument must end. Plaintiff is ready and willing to submit further briefs, and even to appear and argue, if it will assist the Court in rendering a decision. I believe that this is unnecessary.

Defendants are inordinately obsessed with what the Complaint has *not* alleged, i.e., libel, as opposed to what *is* alleged. To this end, they continue to cite libel cases to the Court. The plaintiff has elected at this juncture not to pursue a remedy for injury to his personal reputation in his community, which is the gravamen of a libel action. He is pursuing this cause as a person who earns his livelihood in interstate commerce as an author, video producer, lecturer, and interviewee on the subject of President Kennedy's assassination. As such, he offers to sell products and services. The advertisement has damaged him in this capacity. It also happens to be libelous, and the Complaint, if reorganized only slightly, would state a claim for libel and/or false light invasion of privacy, among other cognizable causes of action.

Plaintiff has chosen, however, to cast his Complaint differently, because the remedies afforded by the New York Civil Rights Law and the Lanham Act will afford him complete relief in the most expedient and efficient manner. Certainly, he has the right to do this. In addition, it has come to my attention that Mr. Groden's onetime collaborator, Harry Livingstone, has been in contact with the General Counsel of defendant Random House since the inception of this case, and has offered his assistance. Since the two gentlemen went their separate ways, there has been an intense rivalry and some litigaton between them. I would like to spare Mr. Groden the arduous ordeal of being exposed to Mr. Livingstone's irrational and venemous behavior toward him, which has become increasingly evident over the past several years. He is an interloper and a gadfly, and the framing of the Complaint helps to assure that he will play no distracting or complicative role whatsoever in this action. Mr. Groden is capable of proving what portion of the book, *High Treason*, he wrote, and what portion Mr. Livingtone wrote. Mr. Livingstone has claimed primary authorship of that work, and that it was he who submitted the final manuscript to a publisher.

The Court is respectfully referred to the leading New York case of *Immuno AG v. J. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d•906 (NY 1991), *cert den.* 111. S.Ct. 2261, 114 L.Ed.2d 713 (1991), for a discussion of the fact-opinion dichotomy.

It is plaintiff's contention that the ad is false in several individual respects, but must also be read as a whole to be seen as false in its entirety. "Guilty of Misleading The American Public" is not some general or hyperbolic statement of opinion, but a false and misleading statement of fact made in connection with the plaintiff's services and products. He is identified as an "author". This identification of the plaintiff as a commercial entity is reinforced by the selection and identification of the other people depicted in the advertisement, each of whom has been engaged at one time or another in the sale of books or motion pictures. Furthermore, the slogan clearly relates to the quote that is wrongfully attributed to Groden. In other words, it is the total context of this advertisement that takes the slogan out of mere opinion by mischaracterizing plaintiff's alleged conspiracy theory, then attacking him for it. The quotation is attributed to him without any attribution to the specific book from which it was lifted, or any referernce to the fact that that book was co-authored by Harrison E. Livingtone. We have already cited Lanham Act cases in this regard. We pointed out in our Memorandum that, absent any identification of Mr. Groden or the quote with the book, *High Treason*, published more than five years ago, a reader could easily assume that Mr. Groden had uttered the quote in some TV or radio interview, or in one of his lectures, or that he actually maintains the substance of this quotation. In addition, please see, *Clevenger v. Baker Voorhis & Co., et al.*, 8 N.Y.2d 187, 203 N.Y.S.2d 812 (NY 1960) for an analogous discussion in the context of a libel action by New York's highest court.

The twin statements "Guilty of Misleading, etc." and "One Man. One Gun. One Inescapable Conclusion" are false statements. They state facts that are objectively verifiable, and are made in connection with products and services in interstate commerce, both the plaintiff's and the defendants'. The advertisement does not, for example, ask "Were you misled?" It does not say, "In our *opinion*, they are wrong and we are right." It accuses plaintiff of consciously lying to the public, and purports to cite an example -- unfairly we contend -- although the ad does not contain any supporting facts for that accusation.

In oral argument, counsel raised the suggestion that, since the Kennedy assassination is such a controversial and seemingly irresolvable topic, the ad must be construed as

stating an opinion. The Kennedy assassination happened over thirty years ago. Over half the population has no personal recollection of that weekend. The controversy is not a real controversy in the sense that, were the Government to reveal tomorrow that there was a conspiracy to kill the president, our lives or our society would change one iota. Also, as a private citizen, Mr. Groden is not in any position to affect the ultimate outcome of that controversy.

On the other hand, President Kennedy was either killed by one man or more than one man. This is, however, a matter that is capable of resolution. Someday his remains, and those of Governor Connally, may be exhumed.

We offer to prove, through what the Government has represented to be the original autopsy X-rays of President Kennedy now reposited in the National Archives; the Zapruder film; and other demonstrative evidence, that there is a reasonable medical and scientific basis for concluding that President Kennedy was assassinated by more than one gunman, so that a jury may decide who is guilty of misleading whom. Groden cannot try the case of Oswald's guilt or innocence in a civil action in the Southern District of New York, nevertheless, we can make a showing that there is are substantial reasons to believe that Kennedy was shot by more than one gunman. Moreover, we will show that plaintiff's belief that there was a conspiracy in the assassination is long-held, sincere, and well-founded in objective evidence. These showings would unquestionably render the advertisement false.

Under the Lanham Act, where an advertisement's claims are demonstrably false, survey evidence is not required to prove how the ad was perceived by the reading public.

Therefore, there is simply no merit to the defendants' Motion. The Complaint states two valid causes of action, and plaintiff should be permitted to proceed to his discovery.

Finally, so long so we are proffering afterthoughts to the oral argument, regarding the claim under the New York Civil Rights Law, in almost all instances in which the Courts have resolved the "newsworthiness" issue in favor of defendants, the matter concerned use of a person's photograph in a newspaper or magazine article, and the plaintiff's argument was that, since the publisher earned money from the sale of the publication, the use was therefore "for purposes of trade." The "newsworthiness" doctrine does not apply to commercial advertising, such as the advertisement at issue here.

Very truly yours,

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Roger Bruce Feinman

RBF:msw
cc. Lankenau Kovner & Kurtz
(Attorneys for Defendants)