UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. GRODEN,	:	94 Civ. 1074 (JSM)
Plaintiff,	:	
-against-	:	
RANDOM HOUSE, INC., THE NEW YORK TIMES COMPANY, INC., and GERALD POSNER,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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MISCELLANEOUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. GRODEN, Plaintiff, -against- RANDOM HOUSE, INC., THE NEW YORK TIMES COMPANY, INC., and GERALD POSNER, Defendants.	Docket No. 94 Civ. 1074 (JSM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants Random House, Inc. ("Random House"), The New York Times Company (incorrectly sued herein as The New York Times Company, Inc.) ("The New York Times"), and Gerald Posner ("Posner") submit this Memorandum of Law in support of their motion pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure for an Order dismissing the complaint filed by plaintiff (the "Complaint") with prejudice, or in the alternative, granting summary judgment,* on the ground that

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* This motion is styled as a motion for summary judgment as well as a motion to dismiss in view of the supporting Affirmation of Victor A. Kovner (the "Kovner Aff.") which is submitted for the sole purpose of including in the record copies of the following published, uncontested documents: Case Closed, selected published reviews and articles about Case Closed, and relevant excerpts of the book High Treason, co-authored by plaintiff Robert J. Groden. Copies of these documents are annexed as Exhibits A - C to the Kovner Aff.

it fails to state a cause of action upon which relief may be granted.*

PRELIMINARY STATEMENT

This action focuses on an advertisement announcing the publication by Random House of Case Closed, a new book analyzing the assassination of President John F. Kennedy written by writer/lawyer Gerald Posner (the "Book"). The Book concludes that the Warren Commission correctly found that Lee Harvey Oswald acted alone in assassinating President Kennedy and painstakingly debunks the arguments of conspiracy theorists such as lawyer Mark Lane, former prosecutor Jim Garrison, plaintiff Robert J. Groden ("Groden") and others who for years have espoused views to the contrary. The advertisement at issue here, which appeared in The New York Times, summarizes the Book's central theme -- "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION" -- and, echoing the Book's anti-conspiracy conclusion, asserts that six leading conspiracy theorists whose views are examined in the book are "GUILTY OF MISLEADING THE AMERICAN PUBLIC." The advertisement attributes a quote to each of the six conspiracy theorists and includes the corresponding date of each quotation.

Objecting to the advertisement's inclusion of him as one of the leading conspiracy theorists whose views Posner

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* A copy of the Complaint is annexed as Exhibit D to the Kovner Aff.

challenges, Groden brings this action under Sections 50 and 51 of the New York Civil Rights Law (the "Statute") and Section 43(a) of the Lanham Act. Groden's wide-ranging allegations in support of his claim under Sections 50 and 51 ignore the fact that the advertisement falls within two well-established exceptions to liability under the Statute and thus fails to state a cause of action. First, the advertisement, which merely highlights the salient conclusions of the Book, is protected, as a matter of law, as an incidental use of plaintiff's name and image appropriate to illustrate the nature and content of the Book. Second, the challenged language of the advertisement -- which, like the Book, deals with an issue of paramount public importance and interest, namely, the Kennedy assassination -- is protected under the "newsworthiness" exception to the Statute.

Plaintiff's Lanham Act claims represent an even more tortured attempt to find some semblance of a cause of action. Groden's claims of false attribution and misrepresentation based on the advertisement's use of an exact quote from his own published, copyrighted book is patently absurd. Also baseless is his claim that the Lanham Act may be used where the First Amendment will not tread, namely, to proscribe an advertisement's accurate summary of the Book's conclusion that the arguments of the Kennedy assassination conspiracy theorists are flawed and misleading. Equally untenable is his claim that the advertisement falsely implies his endorsement of Case

Closed -- a claim obviously undercut by his own allegations that the advertisement maligns him. His further, wholly inconsistent, claim that the advertisement falsely implies his endorsement of the views of the other conspiracy theorists featured is negated by even the most cursory reading. In fact, the advertisement makes clear that the only thing that the featured conspiracy theorists have in common is their disagreement with the Warren Commission's conclusion that Oswald acted alone and, as is illustrated by the selected quotations which appear in the advertisement, their disagreement with each other could not be more obvious. Finally, plaintiff's claim that the advertisement imputes to him criminal characteristics and accuses him of moral turpitude and a host of other sins is simply ludicrous.

What plaintiff does not assert, based either on the Book or the advertisement, is a libel claim. Accordingly, the truth of the book's contents and conclusion, and the advertisement's accurate summation of this conclusion -- that the conspiracy theorists are "guilty of misleading the American public" -- is not at issue here. Because the truth of the statement (or indeed any of the conclusions of Case Closed) is irrelevant to claims based upon mere use of name or likeness in an advertisement and for damage to trademark rights, no issue of fact as to truth can arise which would preclude the grant of defendants' motion.

Despite Groden's attempts at creative pleading, the Complaint states no viable cause of action. Instead, it represents a thinly veiled attempt to stifle the perfectly accurate summary of the Book's conclusions which, while perhaps not to Groden's liking, nevertheless represent a material contribution to the public debate on the Kennedy assassination. Accordingly, the Complaint must be dismissed in its entirety.

STATEMENT OF FACTS

A. The Book

On the thirtieth anniversary of the assassination of President Kennedy, Random House published Case Closed, a book that, through painstaking review and analysis of the available evidence, challenges the numerous conspiracy theories about the Kennedy assassination.* Based on new interviews, previously confidential government files and state-of-the-art scientific and computer enhancements of film and evidence, as well as a detailed examination of Oswald's life and personality, the Book concludes that Oswald acted alone, without the assistance of the CIA, KGB, Fidel Castro, the Mafia, or any other "co-conspirator."

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* A copy of Case Closed is annexed as Exhibit A to the Kovner Aff.

In making his case, Gerald Posner* challenges the pro-conspiracy arguments advanced by others over the years. For example, Posner disposes of the "magic bullet" theory in a passage that has been described by one reviewer as "brilliantly illuminating."** Posner also discredits key witnesses relied upon by various conspiracy buffs, dissects the imaginative accusations of New Orleans District Attorney Jim Garrison, and measures the artistic license taken by film director Oliver Stone in his motion picture "JFK."***

The debunking of the conspiracy theorists by Posner earned high praise in a lengthy review in The New York Times Book Review:

> Thirty years after the event, no one already convinced of one or another of the conspiracy theories is likely to be converted by any narrative, no matter how carefully constructed or well documented. But whatever one thinks about Mr. Posner's conclusions, no fair-minded person should

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* Gerald Posner graduated Phi Beta Kappa from the University of California at Berkeley and Summa Cum Laude from Hastings Law School, where he edited the Law Review. He worked at Cravath, Swaine & Moore before becoming a partner and then of counsel at the firm of Posner & Ferrara in New York. Case Closed is his fifth published book. His previously-published books are Mengele: The Complete Story (1986), Warlords of Crime, (1988) and The Bio-Assassins, (1989), all published by McGraw-Hill, Inc., and Hitler's Children, (1991) published by defendant Random House.

** Christopher Lehmann-Haupt, "Kennedy Assassination Answers," The New York Times, Sept. 9, 1993, at C18. The review termed Case Closed a "persuasive new study" of "force and freshness."

*** Case Closed at 139-40, 251-54, 260, 284, 423-52, 467-68.

> miss his footnotes. There, carefully segregated to keep from muddying his story, he offers a devastating record of the lengths to which sensationalists have gone to sow suspicion and sell books -- omitting inconvenient facts, misrepresenting testimony, favoring stories grown more gaudy with the passing years over those first told when details were fresh, libeling the safely dead.*

The Book was greeted with great interest and virtually unanimous critical acclaim in the leading press and has been featured in articles and reviews published throughout the country.** In addition, Case Closed was selected this year as one of the three finalists for the Pulitzer Prize in the category of history. As commercially successful as it has been critically acclaimed, the Book has gone through five printings, with more than 135,000 copies in print. In addition, it spent six weeks on The New York Times best-seller list, reaching No. 8 on that list.

Throughout the Book, Posner makes numerous specific references to Groden's conspiracy theories and challenges both his research and his conclusions. For example, he criticizes Groden's cursory consideration of Oswald's early life and his dismissal of the testimony of Dr. Renatus Hartogs and the

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* Geoffrey C. Ward, "The Most Durable Assassination Theory: Oswald Did It Alone," The New York Times Book Review, Nov. 21, 1993, § 7, at 15 (emphasis added).

** A representative sampling of the articles and reviews of the Book are annexed as Exhibit B to the Kovner Aff.

recollections of Kerry Thornley about Oswald.* Posner also challenges Groden's position that Oswald's Russian diary is a fake, his view of the CIA's "201" file as proof that Oswald was a CIA employee, his conclusion that Marina Oswald's uncle was a KGB agent, and his reliance on the testimony of Sylvia Odio, a witness soundly discredited by Posner.** Posner goes on to successfully discredit Groden's rejection of the authenticity of X-rays and photos taken of Kennedy at Bethesda, his emphasis on the apparent conflict between the descriptions by Bethesda and Parkland doctors of Kennedy's head wound, and his claim that more metal grains were found in the wrist wound of Governor Connally than were lost from the bullet that passed through him.*** Finally, he rejects Groden's theory of CIA involvement in the assassination.**** Based on his meticulous dissection of its key elements, Posner concludes that Groden's conspiracy theory -- like those of the other conspiracy theorists -- rests on a fundamentally flawed reading of the available evidence and thus creates a misleading portrait of Oswald and the history of the assassination.

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* Case Closed at 11, 13, 31.

** Case Closed at 51, 53, 55, 175.

*** Case Closed at 302-03, 308, 310, 313, 339.

**** Case Closed at 458.

B. The Advertisement

In conjunction with the Book's release, Random House announced the publication of Case Closed by placing an advertisement (the "Advertisement") in The New York Times on August 24 and 27, 1993.* The Advertisement contained quotes from, and pictures of, six leading conspiracy theorists whose views are discredited in the Book. Each quote was accompanied by the year it was published or otherwise disseminated by each conspiracy theorist. The quote from plaintiff Robert Groden, for example, was dated 1989 and stated: "Who killed President Kennedy? It took a combination of the CIA controlled Cuban exiles, Organized Crime, and the Ultra Right Wing, with the support of some politically well connected wealthy men to pull it off."** In keeping with Posner's "One Man" theory and his thorough dissection of the conspiracy theories discussed in the Book, the Advertisement stated that the six pictured conspiracy theorists are "GUILTY OF MISLEADING THE AMERICAN PUBLIC." In essence, the Advertisement accurately told prospective readers what they could expect from the Book.

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* See Exhibit A to the Complaint, a copy of which is annexed as Exhibit D to the Kovner Aff.

** See id. The language attributed to Groden is an exact quote taken from the book High Treason, which Groden co-authored with Harrison Edward Livingstone. Copies of the cover, copyright page and the page containing the relevant quotation are annexed as Exhibit C to the Kovner Aff.

C. The Complaint

Groden filed this action challenging the Advertisement -- but not the Book -- on February 17, 1994. In his First and Second Causes of Action plaintiff alleges that defendants used his name and likeness for purposes of advertising and trade without his consent in violation of Sections 50 and 51 of the New York Civil Rights Law (the "Statute"). (¶¶ 11-65, 67-69, 71-76).* In his Third Cause of Action, plaintiff alleges that the Advertisement constitutes false advertising under § 43(a) of the Lanham Act in that it falsely misrepresents the nature and content of his commercial activities -- namely, his dissemination of his conspiracy theory. Specifically, he alleges that the Advertisement falsely attributes to him views that he does not hold (Complaint ¶¶ 27, 60-62), falsely misrepresents and mischaracterizes his views on the Kennedy assassination, (Complaint ¶¶ 49-52, 53, 56, 58-59), creates a false portrait of him accompanied by an unflattering photograph (Complaint ¶¶ 49-59) and creates the false impression that he

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* Both causes of action are brought under Sections 50 and 51 of the Statute. The First Cause of Action is brought on the August 24, 1993 publication of the Advertisement, and the Second Cause of Action is based on the August 27, 1993 publication.

endorses both the Advertisement (¶ 57), and the views of the other conspiracy theorists depicted (¶¶ 52, 54).*

Plaintiff seeks compensatory damages of $25,000,000 and punitive damages of $50,000,000 on each of the First and Second Causes of Action, as well as injunctive relief, treble damages, costs and attorneys' fees on the Third Cause of Action.**

Defendants now move to dismiss or for summary judgment, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, on the grounds that: (1) the Advertisement is protected from liability under Sections 50 and 51 of the New York Civil Rights Law under the "incidental use" exception; (2) the Advertisement is further protected under the "newsworthiness" exception to the same Statute; and (3) the Complaint fails to support a claim of false advertising under Section 43(a)(2) of the Lanham Act in that it fails, on its

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* It should be noted that, despite the many allegations of "falsity" that pepper the Complaint, plaintiff does not assert -- as indeed he cannot -- a cause of action for libel. Moreover, despite his apparent assertion of a cause of action for common law misappropriation and invasion of privacy and publicity (Complaint ¶ 46), New York law recognizes no such independent cause of action. Accordingly, plaintiff's only cognizable claims are under the Statute and the Lanham Act.

** In his ad damnum clauses, plaintiff refers to seven causes of action although it is unclear as to what they are. Plaintiff appears to assert separate claims under Sections 50 and 51 on the early or "bulldog" and the "Late City" editions of The New York Times dated August 24 and 27, 1993, and a separate claim under the Lanham Act based on all such publications of the Advertisement.

face, to establish that the Advertisement -- which conveys protected political speech -- was false or misleading.

ARGUMENT

POINT I

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR VIOLATION OF SECTIONS 50 AND 51

To state a claim under Sections 50 and 51 of the Statute, a plaintiff must satisfy three distinct elements: (1) use of his or her "name, portrait or picture," (2) for purposes of "advertising" or "trade," (3) without written consent. See Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379, 383, 482 N.Y.S.2d 457, 459 (1984).*

Where the pleadings on their face fail to establish the proscribed "advertising" or "trade" use of a plaintiff's name or image, courts routinely dismiss the complaint upon a motion addressed to the pleadings. See, e.g., Finger v. Omni Publications International, Ltd., 77 N.Y.2d 138, 140, 564

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* Thus, Section 50 of the Civil Rights Law makes commercial misappropriation of a person's name or picture a misdemeanor, providing in pertinent part as follows:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

N.Y. Civil Rights Law §50 (McKinney 1976). Section 51 provides for a civil action for injunctive relief and damages against a party who violates Section 50.

N.Y.S.2d 1014, 1016 (1990); Arrington v. New York Times Co., 55 N.Y.2d 433, 443, 449 N.Y.S.2d 941, 946, cert. denied, 459 U.S. 1146, 103 S. Ct. 787 (1983); Creel v. Crown Publishers, Inc., 115 A.D.2d 414, 416, 496 N.Y.S.2d 219, 220 (1st Dep't 1985); Namath v. Sports Illustrated, 80 Misc.2d 531, 363 N.Y.S.2d 276, 280 (Sup. Ct. N.Y. Co.) aff'd, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975); Velez v. VV Publishing Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186, 190 (1st Dep't 1988); Virelli v. Goodson-Todman Enterprises, Ltd., 142 A.D.2d 479, 484, 536 N.Y.S.2d 571, 574-75 (3d Dep't 1989).

In New York State "there is no common-law right of privacy and the only available remedy is that created by Civil Rights Law §§ 50 and 51."* Freihofer v. Hearst Corp., 65 N.Y.2d 135, 140, 490 N.Y.S.2d 735, 739 (1985)(emphasis added). Accord Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 182, 485 N.Y.S.2d 220, 223 (1984) ("this court has

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* Prior to enactment of Sections 50 and 51 of the Civil Rights Law, this state did not recognize any of the so-called invasion of privacy torts. Thus, in its 1902 decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), the New York Court of Appeals held that New York common law provided no cause of action to the plaintiff, a young girl whose picture was used for advertising purposes without her consent on the defendant manufacturer's flour bags. In so ruling, the Court of Appeals stated that any redress for the unauthorized commercial use of one's name or picture must come from the Legislature and may not be created by judicial action. Roberson, 171 N.Y. at 545. The Statute was a direct legislative response to the Roberson decision, and was drafted "narrowly" to prohibit only the commercial use of an individual's name or likeness.

repeatedly held that the right of privacy is governed entirely by statute in this State"); Cohen v. Herbal Concepts, Inc., 63 N.Y.2d at 383, 482 N.Y.S.2d at 459 ("in New York privacy claims are founded solely upon sections 50 and 51 of the Civil Rights Law"); Arrington v. New York Times Co., 55 N.Y.2d at 440, 449 N.Y.S.2d at 943.*

Furthermore, consistent with the its legislative origins and express terms, the Court of Appeals repeatedly has held that the Statute is narrow in scope and provides a limited cause of action only for a purely commercial misappropriation of one's likeness. Finger v. Omni Publications International, Ltd., 77 N.Y.2d at 140, 564 N.Y.S.2d at 1016. Thus, as the Court aptly stated in Arrington v. New York Times Co.:

> [S]ections 50 and 51 ... were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in Roberson. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy.
>
> Nor has the Legislature chosen to enlarge the scope of sections 50 and 51 in the fourscore years since Roberson was handed down.

55 N.Y.2d at 439-40, 449 N.Y.S.2d at 943. Accord Freihofer v. Hearst Corp., 65 N.Y.2d at 140, 490 N.Y.S.2d at 739 ("we [have

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* Accordingly, the Complaint's allegations of misappropriation and invasion of privacy and publicity (Complaint ¶ 46) are superseded by the Statute and state no independent cause of action under New York law.

taken] cognizance of the limited scope of the statute as granting protection only to the extent of affording a remedy for commercial exploitation of an individual's name, portrait or picture, without written consent").

A. Use of Plaintiff's Name and Image on the Advertisement Falls Within the "Incidental Use" Exception to Sections 50 and 51

Although Sections 50 and 51 proscribe the use of an individual's name or likeness in commercial advertising, the New York courts have established a specific exception for advertisements by the media of their own publications. It is well-settled in New York that the incidental use of an individual's name or likeness to advertise a publication or other media product of public interest is exempt from Sections 50 and 51. The rationale for protecting uses of a plaintiff's name or image in advertising which is merely "incidental" to the underlying media work, is the valid need for media defendants to be able to fairly advertise the constitutionally protected content of lawfully disseminated items of public interest. Prohibiting the media from advertising the contents of their publications to attract interest and further sales would have the practical effect of circumventing the First Amendment protection accorded to the publications themselves. As the court found in Rand v. Hearst Corp., 31 A.D.2d 406, 298 N.Y.S.2d 405 (1st Dep't 1969), aff'd, 26 N.Y.2d 806, 309 N.Y.S.2d 348 (1970) (holding that use of plaintiff's name in excerpt from critical review on book cover did not support a

Section 50 and 51 claim) "... [to] hold otherwise would constitute an impermissable restriction on what we deem to be the right of a publisher in informing the public of the nature of his book and comparing it with the works of other authors." 298 N.Y.S.2d at 412.

The exemption for such incidental uses is long-standing and was first articulated in the case of Humiston v. Universal Film Mfg. Co., 189 A.D. 467, 178 N.Y.S. 752 (1st Dep't 1919). In Humiston, the plaintiff challenged the use of her name and picture in billboards advertising a newsreel film in which she appeared. The Court held that "the use of the plaintiff's name or picture in the approach to the theater and upon the billboards in front, as advertising what was to appear upon the screen [was] incidental to the exhibition of the film itself" and therefore not a violation of Sections 50 and 51. 178 N.Y.S. at 759.

Since Humiston, courts consistently have permitted the use of a subject's name and likeness, without his/her consent, in advertisements for a publication as long as such use is intended "to illustrate the quality and content" of the publication advertised. Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737, 744 (2d Dep't), aff'd, 11 N.Y.2d 907, 228 N.Y.S.2d 468 (1962). In Booth, for example, the Court reversed a judgment for the actress, Shirley Booth, whose photograph was republished without her consent in advertisements for Holiday, the travel magazine, in which it

had originally appeared. The Court dismissed the complaint for failure to state a claim under Sections 50 and 51, noting the practical necessity that a publisher must advertise and the fact that "the law accords an exempt status to incidental advertising of the news medium itself." 223 N.Y.S.2d at 743. The Court recognized that Sections 50 and 51 do not apply to

> so-called incidental advertising related to the sale and dissemination of the news medium .... It has been the rule that contemporaneous or proximate advertising of the news medium, by way of extract, cover, dust jacket, or poster, using relevant but otherwise personal matter, does not violate the statute.

223 N.Y.S.2d at 742.

In Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975), the professional football player objected to the use of photographs of him in printed advertisements promoting subscriptions to the magazine in which the photos had appeared (in different forms and contexts) a few years earlier. The Court affirmed the dismissal of the complaint, holding that the advertisements indicated "the general nature of the contents" of the magazine and that the use of the plaintiff's photos was therefore incidental to the magazine articles about him and exempt from the requirement of consent. See also Namath v. Sports Illustrated, 80 Misc.2d 531, 363 N.Y.S.2d 276 (Sup. Ct. N.Y. Co. 1975); Sidis v. F-R Publishing Corp., 113 F.2d 806, 810 (2d Cir. 1940) (newspaper advertisement for article in New Yorker magazine was protected:

"[S]ince it was to advertise the article on [plaintiff], and the article itself was unobjectionable, the advertisement shares the privilege of the article"); Koussevitzky v. Allen, Towne & Heath Inc., 188 Misc. 479, 485, 68 N.Y.S.2d 779, 784 (N.Y. Sup. Ct., Spec. Term), aff'd, 272 A.D. 759, 69 N.Y.S.2d 432 (1st Dep't 1947) (advertisement for biography merely "incidental" to biography and thus protected).

The incidental use privilege developed under New York law was applied by this Court in Friedan v. Friedan, 414 F. Supp. 77, 79 (S.D.N.Y. 1976). There, plaintiff's photograph appeared in television commercials advertising a magazine issue which contained an article by his former wife, feminist Betty Friedan, about her pre-feminist family life. This Court held that such use did not violate Sections 50 and 51 because "... under New York law, an advertisement, the purpose of which is to advertise the article, 'shares the privilege enjoyed by the article' if 'the article itself was unobjectionable.'") 414 F.2d at 79 (citations omitted).

The fact that plaintiff's name or likeness is used in advertising for a publication which presents plaintiff in an unflattering or negative light does not affect application of the incidental use exception. One such example is Velez v. VV Publishing Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186 (1st Dep't 1988). There, in the context of an advertisement for subscriptions, the Village Voice had reproduced the front cover of one of its past issues which featured plaintiff's picture.

Superimposed on the photograph in the advertisement was a cartoon balloon with the question "What's Your Address?" coming from plaintiff's mouth. The Court held that the use of plaintiff's photograph in such advertising was not actionable under Sections 50 and 51, recognizing that such an advertising use of plaintiff's image "is a necessary and logical extension of the clearly protected editorial content of the publication." 524 N.Y.S.2d at 187. Moreover, the fact that plaintiff's photograph had been used on the original cover to illustrate a highly unflattering investigative report* about him did not affect application of the exception. Similarly, the fact that the subsequent advertisement portrayed plaintiff as soliciting advertisements for the very publication that had criticized him was immaterial because, as the Court found, "[n]o reasonable reader would believe that plaintiff had actually endorsed the Village Voice." 524 N.Y.S.2d at 189.**

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* The article was entitled "How Ramon Velez Bleeds New York."

** The reasoning underlying the "incidental use" exception as developed under New York law has been adopted by other courts throughout the country. See, e.g., Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 462 (Cal. 1979) (advertisement for film protected as an incidental use because "[i]t would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise"); Lawrence v. A.S. Abell Co., 475 A.2d 448, 454 (Md. 1984) (following Booth, court held that use of photo of children from previous issue of newspaper to advertise newspaper was not actionable); Berkos v. National Broadcasting Co., 515 N.E.2d 668, mod. on other grounds, LEXIS slip op. (Ill. App. Ct. 1987) (promotional "teasers" for news report not deemed actionable misappropriation).

Similarly, the incidental use exception was applied in Lerman v. Flynt Distributing Co, Inc., 745 F.2d 123 (2d Cir. 1984) despite the existence of what what would appear to be compelling facts for the plaintiff. There, plaintiff was misidentified as being the subject of nude photographs appearing in a magazine article and her name appeared on the cover of the magazine in connection with the article. Subsequently, reduced-size reproductions of this same cover were used in advertisements soliciting subscriptions for the magazine. The Second Circuit held that the solicitations "were designed simply to convey the nature and content" of past issues of the magazine. 745 F.2d at 131. Accordingly, the Court found that use of plaintiff's name on such solicitations "must be considered incidental to the story [published about plaintiff] and hence not objectionable ... under § 51." 745 F.2d at 132.

Applying this settled body of law to the facts at issue here, it is clear that the Advertisement fits squarely within the "incidental use" exception to the Statute. First, there is no question that the subject of the Advertisement, the book Case Closed, is clearly the type of publication that the courts have deemed worthy of protection. Obviously, a book advancing an important theory on the Kennedy assassination is at least as important and worthy of protection as the films in Humiston and Koussevitzky, the magazines in Booth, Namath, Lerman and Friedan or the newspapers in Velez, Lawrence and Berkos.

Similarly, there is no question that the sole purpose of the Advertisement was to generate interest in, and promote sales of, Case Closed. This is made abundantly clear by the not-so-subtle language "READ: CASE CLOSED BY GERALD POSNER" which is prominently emblazoned across the bottom of the Advertisement. Moreover, the theme of the Book is Posner's conclusion that Oswald acted alone and his debunking of Kennedy assassination conspiracy theories and their proponents. By featuring six leading conspiracy theorists whose views are challenged in the Book by Posner, the Advertisement merely conveys to prospective readers what they can expect from the Book and thus provides an accurate illustration of the "content and quality" of the Book.*

Moreover, the fact that the Advertisement was designed to promote sales of Case Closed, and thus had a pecuniary or profit motive, does not defeat the protection from the Statute accorded by the courts, which have made clear that the fact that the publication advertised is operated as a business for profit is immaterial to the analysis. See Arrington v. New York Times Co., 449 N.Y.S.2d at 943 (protection from the Statute holds true "though the dissemination of news and views is carried on for a profit or that [use of the name or likeness

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* Furthermore, the inclusion of Groden among the conspiracy theorists featured is fully appropriate given the fact that Posner repeatedly refers to Groden throughout the Book and challenges his theories in detail.

is] added for the very purpose of encouraging sales of the publications"); Davis v. High Society Magazine, Inc. 90 A.D.2d 374, 457 N.Y.S.2d 308, 313 (2d Dep't 1982) (media publications protected from application of the Statute "irrespective of the fact that such publications are carried on largely, and even primarily, to make a profit"); Koussevitsky v. Allen, Towne & Heath, Inc. 68 N.Y.S.2d at 782 (protection from Statute afforded despite the fact that "all publications presumably are operated for profit..."). Accordingly, the Advertisement's use of plaintiff's name and photograph are protected under the incidental use exception even though the purpose of the Advertisement was to promote sales of Case Closed.

B. Use of Plaintiff's Name and Image on the Advertisement is Protected by the "Newsworthiness" Exception to Sections 50 and 51

In defining the reach of the Statute, the New York courts have explicitly exempted publications on matters of public interest:

> Although the statute does not itself define the terms "advertising" or "trade" purposes, courts have consistently held that the statute should not be construed to apply to publications concerning newsworthy events or matters of public interest.

Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 123, 596 N.Y.S.2d 350, 354 (1993). Accord Finger v. Omni Publications International, Ltd., 77 N.Y.2d at 141-42, 564 N.Y.S.2d at 1016 ("courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or

matters of public interest") (citations omitted); Stephano v. News Group Publications, Inc., 64 N.Y. 2d at 184, 485 N.Y.S.2d at 224 ("these terms should not be construed to apply to publications concerning newsworthy events or matters of public interest"); Freihofer v. Hearst Corp., 65 N.Y.2d at 140, 490 N.Y.S.2d at 739 ("the protection afforded by this statute to individuals does not apply to the publication of newsworthy matters or events").*

The "newsworthiness" exception "is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press." Howell v. New York Post Co., Inc., 81 N.Y.2d at 123, 596 N.Y.S.2d at 354. To effectuate the Legislature's intent to limit the Statute's ambit to commercial exploitation and address serious constitutional concerns, the Court has held that the newsworthiness exception shall be "liberally applied," and the provisions of the Statute must be narrowly construed. Stephano v. News Group Publications, Inc., 64 N.Y.2d at 184, 485 N.Y.S.2d at 225; Finger v. Omni Publications International, Ltd., 77 N.Y.2d at 143, 564 N.Y.S.2d at 1017; see also Arrington v. New York Times Co., 55 N.Y.2d at 440, 449 N.Y.S.2d at 944 ("this narrow reading of the statutory provisions has

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* The New York Court of Appeals has emphasized that "questions of 'newsworthiness' are better left to reasonable editorial judgment and discretion ..." Finger v. Omni Publications International, Ltd., 77 N.Y.2d at 143, 564 N.Y.S.2d at 1017.

not been without sensitivity to ... the values our State and Federal Constitutions bespeak in the area of free speech and free press").

Applying these principles, the courts have protected use of an individual's name or likeness in an advertisement where the subject of the advertisement is newsworthy or of public interest. For example, in Davis v. Duryea, 99 Misc.2d 933, 417 N.Y.S.2d 624 (Sup. Ct. N.Y. Co. 1979) the court held that the use of a photograph of plaintiff by a gubernatorial candidate in a campaign commercial was protected from application of the Statute on newsworthiness grounds:

> [O]ur courts have developed exceptions to narrowly construe the commercialism required for applicability of the statute in order to prevent any curtailment of "the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the right to be informed"

(citations omitted). The court went on to hold that the use of plaintiff's name and/or photograph "could not and did not transform a constitutionally protected and favored airing of a vital issue of public ... concern into a crass commercial exploitation." 417 N.Y.S.2d at 628. Similarly, in Dukas v. D.H. Sawyer & Associates, Ltd., 137 Misc.2d 218, 520 N.Y.S.2d 306, 308 (Sup. Ct. N.Y. Co. 1987), involving use of a segment of a political ad in a competing political ad, the court held that the rights of the radio announcer whose voice was used in

the segment were "far outweighed by the public's right to free and unfettered political debate."*

Here, there is no question but that plaintiff's name and image were used in the context of a newsworthy issue. Like the Book, the Advertisement focuses public attention on the continuing debate and controversy surrounding the Kennedy assassination -- by anyone's definition, clearly one of the most "newsworthy" subjects in American history.** Certainly,

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* The "newsworthiness" exception applies unless the use of plaintiff's name or likeness bears "no real relationship" to the newsworthy subject. Howell v. New York Post Co., Inc., 81 N.Y.2d at 123, 596 N.Y.S.2d at 354. Moreover, relationships between use of a plaintiff's name or image and the newsworthy subject it illustrates even when far more tenuous than here have been found to fall within the newsworthiness exception. See Arrington v. New York Times Co., 55 N.Y.2d at 441, 449 N.Y.S.2d at 944 ("real relationship" found between photograph of plaintiff and article on black middle class despite fact that plaintiff was not mentioned in the article and disagreed with its theme).

** Indeed, far less weighty topics, and topics likely to be of interest only to particular groups of people, have been deemed matters of public interest and therefore outside the scope of the Statute. See Stephano v. News Group Publications, Inc., 64 N.Y.2d at 186, 485 N.Y.S.2d at 226 (unauthorized use of plaintiff model's photograph in an article on the availability of a bomber jacket for purchase within the newsworthiness exception); Creel v. Crown Publishers, Inc., 115 A.D.2d 414, 415, 496 N.Y.S.2d 219, 220 (1st Dep't 1985) (unauthorized use of plaintiff's nude photograph in guide to nude beaches within the newsworthiness exception); Bass v. Straight Arrow Publishers, Inc., 59 A.D.2d 684, 398 N.Y.S.2d 669, 670 (1st Dep't 1977) (unauthorized use of photograph of plaintiff in a T-Shirt of rock group in article about devotees of group within the newsworthiness exception); Davis v. High Society Magazine, Inc., 90 A.D.2d 374, 457 N.Y.S.2d at 315 (photograph of partially nude female boxer deemed a "newsworthy event" protected under the Statute).

the assassination of President Kennedy and the question of who was responsible for it is a significantly more "newsworthy" topic than clothing styles, nude beaches, or a naked female boxer and is thus entitled to at least as much protection under the Statute.

Nor can it be argued that the use of Groden's name and photograph bore "no real relationship" either to the Book or to the assassination as a whole. The Complaint itself states that Groden is the author, by himself or with a co-author* of three books on the assassination (¶¶ 15, 17), and is "a preeminent independent researcher and investigator," "platform speaker," "lecturer and audiovisual presenter," "consultant to motion picture producers and directors" and "congressional committee consultant" on the subject of the Kennedy assassination. (Complaint ¶ 12). Accordingly, his name and views, as captured by the quotation from one of his co-authored books that appears on the Advertisement, obviously bear a very real relationship to the subject of the assassination. Moreoever, in light of the fact that Posner makes specific reference to Groden throughout Case Closed and refutes various elements of his arguments throughout the Book, his name and likeness certainly cannot be seen to have only a "tenuous"

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* It should be noted that on High Treason, the book which he co-authored with Harrison Edward Livingstone the language of which is at issue here, Groden's name appears before that of Livingstone.

connection to the book and its subject. Accordingly, the Advertisement's use of plaintiff's name and image is protected from application of the Statute under the newsworthiness exception as well as under the incidental use exception.

POINT II

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER § 43(A) OF THE LANHAM ACT

In order to establish a cause of action under § 43(a)(2) of the Lanham Act,* a plaintiff must show: (1) a false or misleading factual representation relating to the nature, characteristics or qualities of plaintiff's goods, services, or commercial activities, and (2) that such

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* Section 43(a) of the Lanham Act provides, in relevant part,

> (a) Any person who, on or in connection with any goods or services ... uses in commerce any ... false or misleading description of fact, or false or misleading representation of fact, which --
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> (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person, or
>
> (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1988).

representation was made in the context of commercial advertising or promotion.* Towers Financial Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820, 823 (S.D.N.Y. 1992).

Although plaintiff's Complaint is not a model of clarity on this point, he appears to base his cause of action primarily on the provisions of § 43(a)(2) for false advertising. Groden's claim for false advertising under the Lanham Act centers on essentially two elements of the Advertisement: the quotation attributed to him, and the Advertisement's headline "GUILTY OF MISLEADING THE AMERICAN PUBLIC" in connection with the conspiracy theorists featured.** In related claims sounding more in the nature of false endorsement, he further asserts that the Advertisement falsely conveys the impression that he "willingly appear[ed]" in it (¶ 57) and thus endorses its message, and similarly implies that he endorses or is otherwise affiliated with the

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* Plaintiff also must show that the false or misleading representation was used "in commerce" and that he believed that he was likely to be damaged by such false or misleading representation. These two prongs of the test are not at issue here.

** Plaintiff's other allegations that the Advertisement generally maligns him and presents him in a "criminal" light (Complaint ¶¶ 52-53, 56, 58-59) also appear to be based primarily on the headline and the conclusions plaintiff claims are drawn from it.

other conspiracy theorists featured. (Complaint ¶¶ 52, 54, 55).*

As is demonstrated below, the Advertisement contains no actionable "false or misleading" statement or representation of fact. Furthermore, the Advertisement clearly contains elements of constitutionally protected political speech and thus is patently not the type of purely "commercial" speech that is within the reach of the Lanham Act. Accordingly, plaintiff's claims, on their face, fail to meet the requirements of a cause of action under the Lanham Act.**

A. The Advertisement Does Not Constitute False Advertising In Violation of § 43(a)(2) Because It Contains No False or Misleading Statement of Fact

The courts have held that the element of falsity or clear misrepresentation is crucial in establishing a false

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* To the extent that plaintiff claims that the Advertisement falsely implies that he endorses both it and the views of the other conspiracy theorists featured, he appears to allege a cause of action for false endorsement under § 43(a)(1) as well. These claims are discussed infra.

** Under the 1988 amendments to § 43(a), innocent dissemination of false advertising in the form of a paid advertisement by a newspaper, magazine or other periodical is protected from liability under the section: "... innocent dissemination and communication of false and misleading advertising ... by the media are excluded from the reach of § 43(a)." To establish liability under the section against such a media defendant, plaintiff must make a showing of actual malice. 2 J. McCarthy, Trademarks and Unfair Competition, § 27.07[3][d] (2d ed. 1984) quoting the legislative history of the 1988 amendments to § 43(a). Accordingly, on its face, plaintiff's Complaint states no cause of action for damages against defendant The New York Times.

advertising claim under § 43(a)(2). Towers Financial Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. at 824 ("[i]f the report is not false or misleading, it is protected and cannot be restrained under the Lanham Act"); Wojnarowicz v. American Family Association, 745 F. Supp. 130, 141 (S.D.N.Y. 1990) ("it [the Lanham Act] is clearly directed only against false representations ...") (emphasis added). No element of the Advertisement can fulfill this basic threshold showing.

1. The Quotation is True and Accurate

Plaintiff alleges in the Complaint that the quotation that appears with his picture is "false and deceptive" (¶ 27), that he "did not utter or write the words" (¶¶ 60, 61), and that, by using the quotation defendants, "for their own purposes", "assign[ed] to him an opinion not held by him" (¶ 62). The quotation that the Advertisement attributes to Groden reads as follows:

> Who killed President Kennedy? It took a combination of the CIA controlled Cuban exiles, Organized Crime, and the Ultra Right Wing, with the support of some politically well connected wealthy men to pull it off.

See Exhibit A to the Complaint, a copy of which is annexed as Exhibit D to the Kovner Aff. The uncontroverted fact is that this language is an exact quotation taken from the book High Treason. It is also an uncontroverted fact that High Treason was co-authored by Groden and Harrison Edward Livingstone, and published by Conservatory Press in 1989, the same year correctly given by the Advertisement as the date of Groden's

pronouncement.* Amazingly, Groden does not claim -- as indeed he cannot -- that he was not the co-author of the book from which the quotation was taken,** or that the quotation used in the Advertisement is not a completely accurate reproduction of the statement that appears in the book. Rather, he takes the extraordinary position that the quoted language cannot be attributed to him despite the fact that it is contained in a book which he co-authored and on which he is credited as the joint copyright holder.

Groden's position that his own writings cannot be attributed to him is completely contrary to the basic principles of copyright law, namely, that by holding oneself out as the joint author and copyright holder of a work, an author necessarily holds rights in, and must take responsibility for, the statements contained therein barring disclaimer or other notice to the contrary. See 1 Nimmer on Copyright, §§ 6.03, 6.06[A], 6.08 (1991); Weissmann v. Freeman, 684 F. Supp. 1248, 1259-60 (S.D.N.Y. 1988), aff'd in part, reversed in part, 868 F.2d 1313 (2d Cir. 1989), cert. denied,

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* A paperback reprint edition of High Treason containing the complete text of the original edition was published by The Berkley Publishing Group in 1990. Copies of the front cover, copyright page, and page 421 of the Berkley edition are annexed as Exhibit C to the Kovner Aff.

** In fact, he admits that he is the co-author of High Treason. (Complaint ¶ 15).

493 U.S. 883, 110 S. Ct. 219 (1989).* The attempt to hold defendants liable for misrepresentation and false advertising based upon their reasonable reliance on an author's own published work is frivolous and far beyond the outer parameters of § 43(a). As a matter of law, the completely accurate and truthful quotation cannot be deemed a false or misleading representation or statement of fact.

2. The Advertisement's Headline Fairly Describes the Conclusions and Content of the Book

The "headline" of the Advertisement -- "GUILTY OF MISLEADING THE AMERICAN PUBLIC" -- similarly contains no false or misleading statement or representation of fact and thus fails to support a claim for false advertising. Instead, the headline merely provides a fair and accurate summary of the contents and conclusions of Case Closed.** As is described

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* Nowhere in High Treason does there appear a disclaimer or indication of any kind that any particular portion of the book reflects the views of only one of the authors. Moreover, nowhere in the Complaint does plaintiff allege that he publicly renounced that portion of High Treason attributed to him or provide any other basis for his novel position.

** Indeed, in reviewing the Book, The Chicago Tribune noted that Posner

> ... exposes the factual errors, fantasies and frauds that the conspiracy theorists have relied on to explain the events of that day.

Jeffrey Toobin, "Who Didn't Kill JFK? Gerald Posner Shines the Cold Light of Sanity on the Host of Conspiracy Theorists," The Chicago Tribune, Sept. 12, 1993, at C3.

in greater detail in the Statement of Facts and in the preceding discussion of plaintiff's claims under Sections 50 and 51, the theme of Case Closed is Posner's conclusion, based on exhaustive examination of the evidence, that Oswald acted alone and that the theories of Groden and others holding to the contrary are fundamentally flawed and thus misleading. Accordingly, the Advertisement's headline accurately describes the content of the Book and nothing more. The Advertisement makes no statement or factual representation about plaintiff other than to accurately describe the Book's contents, which is, of course, its function.

Because plaintiff has chosen not to assert a libel claim based upon the Book, or the Advertisement for that matter, the accuracy of the Book's contents and conclusion that Oswald acted alone and that the conspiracy theorists are wrong is not at issue. The Advertisement's use of the statement "GUILTY OF MISLEADING THE AMERICAN PUBLIC" for the sole purpose of accurately describing the nature of the Book to potential readers does not call into question the truth of the statement. Accordingly, the only question of truth or accuracy relevant here is whether the Advertisement accurately describes the conclusion of the Book, and not whether the conclusion of the book itself is accurate. Moreover, as is described below, by summarizing the conclusions of a constitutionally protected publication, the Advertisement's headline clearly contains political speech -- as opposed to purely commercial speech -- outside the reach of the Lanham Act.

3. Neither The Format Nor Any Other Aspect of the Advertisement Contains a False or Misleading Statement or Representation of Fact

Apart from the quotation and headline, the only other element of the Advertisement that plaintiff alleges as violative of § 43(a)(2) appears to be its format or layout, in which the use of his name and photo allegedly implies his endorsement of both the Advertisement itself, and the views of the other conspiracy theorists depicted. However, as is discussed in Part C, infra, there simply is nothing in the Advertisement that states or even suggests such an endorsement by plaintiff. Moreover, no reasonable reader could infer from the tone and content of the Advertisement taken as a whole that plaintiff was actually being accused of "moral turpitude," criminal activity, or being a "public enemy" (Complaint ¶¶ 50-59). Instead, it is obvious on its face that the Advertisement merely presents Groden as the author and proponent of a conspiracy theory which Case Closed discredits, and nothing more.*

Accordingly, the Complaint fails on its face to demonstrate that the Advertisement contains any actionable false or misleading statement or representation of fact and thus fails as a matter of law to support a cause of action under the Lanham Act.

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* Moreover, as is set forth in the footnote on page 41, infra, the Advertisement is not actionable in libel on opinion grounds, in addition to the other protections clearly available.

B. The Advertisement Does Not Constitute False Advertising In Violation of § 43(a) Because it Contains Elements of Protected Political Speech

It has long been recognized by the courts that § 43(a), while affording considerable protection in the commercial arena, may not be used as a catch-all for all disputes arising in commercial dealings:

> ...[T]he courts have been careful to recognize that § 43(a) does not have boundless application as a remedy for unfair trade practices but is limited to false advertising as that term is generally understood.

Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974). Despite the fact that § 43(a)(2), as amended, reaches a broad range of deceptive commercial practices, the legislative history of the amendment explicitly states that:

> [T]he proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires or other constitutionally protected material ... The section is narrowly drafted to encompass only clearly false and misleading commercial speech.

(emphasis added) S. 1993, 101st Cong., 1st Sess,. 135 Cong. Rec. 1207, 1217 (April 13, 1989). In defining the scope of § 43(a)(2), this Court has noted Congress' intention that the statute apply only to commercial speech and not to constitutionally-protected political speech. See Wojnarowicz v. American Family Association, 745 F. Supp. at 141-42. See also National Artists Management Co., Inc. v. Weaving, 769 F. Supp. 1224, 1232 (S.D.N.Y. 1991).

The courts have been vigilant in ensuring that the Lanham Act not be used as a vehicle to circumvent First Amendment values. For example, in Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989) (involving use of Ginger Roger's name in movie title), the Second Circuit identified the standard to be applied when § 43(a) claims concerning artistic works threatened First Amendment interests in holding that the Lanham Act "should be construed to apply ... only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." There, the Court observed that

> [c]onsumers of artistic works thus have a dual interest: They have an interest in not being misled and they also have an interest in enjoying the results of the author's freedom of expression.

875 F.2d at 998. The Court concluded that "[w]here a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work, it is not false advertising under the Lanham Act." 875 F.2d at 1000. In New Kids on the Block v. News America Publishing, Inc., 745 F. Supp. 1540, 1541 (C.D. Cal. 1990), aff'd, 971 F.2d 302 (9th Cir. 1992) (use of plaintiff's trademark in connection with a 1-900 telephone poll), this principle was emphasized by the District Court, which held that the Lanham Act would apply only if the challenged use was "wholly unrelated" to First Amendment concerns, in that case, newsgathering and dissemination.

Here, the challenged language is at the heart of one of the nation's most enduring political controversies, and thus

is the most political of speech raising these very First Amendment concerns. There can no longer be any question that the publishing and distributing of books on newsworthy matters implicates First Amendment concerns, thus limiting the Lanham Act's application to such speech. As the court noted in Rand v. Hearst Corp., 31 A.D. 406, 298 N.Y.S.2d 405, 410:

> [B]ooks and publications have a special position in the law ... book publishing, though a business, stands on a somewhat different plane than many other businesses in that freedom of the press is often involved ... Therefore, in considering books and publications, courts must take a broad view of what may or may not be written and what may or may not be said about books and their authors.

Case Closed itself obviously merits complete First Amendment protection. To the extent that the Advertisement merely accurately identifies the nature of the Book's content and conclusion -- that the Kennedy conspiracy theories are fundamentally flawed and thus misleading -- it, too, merits full First Amendment protection. See New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964) (advertisement having political overtones protected under First Amendment principles); Street v. National Broadcasting Co., 645 F.2d 1227, 1237 (6th Cir.), cert. granted, 454 U.S. 815, 102 S. Ct. 91, cert. dismissed, 454 U.S. 1095, 102 S. Ct. 667 (1981) ("Some controversial historical events like the Scottsboro trials become symbolic and take on an overlay of political meaning. Speech about such events becomes in part political

speech"). The decision of this Court in National Artists Management Co., Inc. v. Weaving, 769 F. Supp. 1224, 1235-36, is not inconsistent with this rule. There, plaintiff, a talent agency, asserted Lanham Act claims against its former president and her husband for negative statements they made about the agency's business practices when they left to establish a competing agency. In holding that plaintiff's claims did establish a false advertising cause of action under § 43(a)(2), this Court relied on the fact that the challenged statements were made in the context of a highly competitive, purely commercial dispute and that defendants' clear intention was to divert clients from their former employer. The language in controversy in Weaving thus is easily distinguishable from the language in suit here in that the statements there had no overtones of political or otherwise protected speech.

Although the Advertisement obviously is "commercial" in the sense that it promotes sales of the Book, it cannot be said to constitute pure commercial exploitation "wholly unrelated" to First Amendment concerns. Accordingly, to the extent that the Advertisement's headline contains an adverse representation about the plaintiff, plaintiff's recourse under the First Amendment is more speech, not the suppression of speech under the Lanham Act.

C. The Advertisement Does Not Imply Plaintiff's Endorsement of Either the Book or the Other Conspiracy Theorists

Plaintiff further attempts to bolster his cause of action under § 43(a) on claims that the Advertisement falsely implies that he "willingly appear[ed]" in it (Complaint ¶ 57) and that he is associated with, or otherwise endorses, the views of the other conspiracy theorists featured. (Complaint ¶¶ 52, 54). Although it is unclear from the Complaint whether plaintiff makes these claims in support of his false advertising claim under § 43(a)(2) or as separate "endorsement" claims under § 43(a)(1), the result is the same.

Plaintiff's claim that a reasonable reader of the Advertisement would conclude that he "willingly" appeared in it is patently absurd. In fact, this argument seems to be undercut most effectively by the Complaint's own conflicting allegations that the Advertisement maligns Groden and places him in a distinctly unfavorable light. In analyzing "false endorsement" claims under § 43(a) of the Lanham Act, the courts repeatedly have held that, where there is no reasonable likelihood that the public would be confused into believing that the plaintiff was associated with or otherwise endorsed the use complained of, no Lanham Act cause of action exists. See Pirone v. MacMillan, Inc., 894 F.2d 579, 585 (2d Cir. 1990) (granting summary judgment where plaintiff "cannot possibly show confusion as to source or sponsorship" of baseball calendar); Girl Scouts of United States v. Personality Posters

Mfg. Co., 304 F. Supp. 1228, 1231 (S.D.N.Y. 1969) (no reasonable reader would believe that satiric poster of pregnant Girl Scout was endorsed by official Girl Scout organization); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (denying cause of action under 43(a) on grounds that public would not mistakingly believe that entertainer had endorsed line of toilets).

Here, it is equally clear that no reader would be confused into believing that Groden willingly appeared in, or otherwise approved of, an advertisement for a book which discredits his views. In fact, the situation here is very similar to that in Velez v. VV Publishing Corp. (discussed in the context of plaintiff's claim under Section 50 and 51, supra). The court in Velez held that "no reasonable reader would believe plaintiff had actually endorsed" the newspaper which had been highly critical of him despite the fact that the challenged advertisement portrayed him as affirmatively soliciting subscriptions for the newspaper. 524 N.Y.S.2d at 189.

Moreover, it is obvious that no reasonable reader would be confused by the Advertisement's language or format into believing that Groden was associated with, or endorsed the views of, the other conspiracy theorists featured. In fact, the layout employed presents each conspiracy theorist as a independent, self-contained unit with his own picture, description, summary of his own peculiar theory and date of the

theory. The substance of the text of the quotations attributed to the conspiracy theorists further makes it clear that they espouse widely divergent views of the assassination and that the only common link between them is their rejection of the Warren Commission's conclusion. Accordingly, not only do plaintiff's claims not establish a false endorsement claim under § 43(a)(1), they similarly fail to establish any "false or misleading description ... or misrepresentation of fact" necessary to sustain a cause of action under § 43(a)(2).

In the final analysis, plaintiff is attempting to use the Lanham Act as a vehicle for the libel cause of action that he did not -- and indeed, could not -- assert.* This claim

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* In order to establish a libel cause of action, plaintiff would have to overcome significant obstacles. First, he would have to show that the Advertisement states a false statement of verifiable fact about him, as opposed to an expression of opinion about his work, as required under Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695 (1990). Here, the challenged language of the Advertisement -- "GUILTY OF MISLEADING THE AMERICAN PUBLIC" -- clearly contains elements of rhetorical hyperbole. Furthermore, the context of the Advertisement makes it clear that the challenged language is not intended to be read as a precise statement of fact but is offered to contrast the opinion of the author with those of the conspiracy theorists. Accordingly, the Advertisement falls squarely within the Milkovich delineation of protected opinion. Plaintiff also would have to overcome the even greater protection afforded to statements of opinion under New York law as articulated by the Court of Appeals in Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906 (1991), cert. denied, __ U.S. __, 111 S. Ct. 2261 (1991). Finally, assuming that he could surmount such obstacles, plaintiff, as a public figure, would have to

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lacks any of the elements of a commercial entity falsely misrepresenting the goods of his competitor to gain economic advantage and activities prohibited by the Lanham Act. Rather, it is the case of a book publisher accurately conveying to potential readers the nature of a new contribution to the debate of an important political event. While plaintiff may resent the Book's criticism of his work, and may be offended by the advertisement of this criticism, this is the price he pays for living in a free society. Just as he enjoys the right to promote his views about the Kennedy assassination, so must he respect the same right when exercised by defendants.

Continued From Previous Page

show that defendants acted with actual malice, that is, that the language was published with knowledge of its falsity or reckless disregard as to its truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S. Ct. 710, 726 (1964). In view of this, it is obvious why plaintiff eschewed a libel claim in favor of the Lanham Act.

CONCLUSION

For the reasons stated above, the Complaint fails to state a cause of action for violation of Civil Rights Act §§ 50 and 51 or under Section 43(a) of the Lanham Act. Defendants therefore respectfully request that the Complaint be dismissed in its entirety, with prejudice.

Dated: New York, New York
May 4, 1994

Respectfully submitted,

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3315R/5513q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. GRODEN, Plaintiff, -against- RANDOM HOUSE, INC., THE NEW YORK TIMES COMPANY, INC., and GERALD POSNER, Defendants.	94 Civ. 1074 (JSM) DEFENDANTS' NOTICE OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that upon the annexed affirmation of Victor A. Kovner, Esq., dated May 4, 1994 with supporting exhibits and the accompanying Memorandum of Law, and in accordance with the permission granted by the Honorable John S. Martin, the undersigned move this Court at the United States Courthouse, Foley Square, New York, New York for an Order, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, granting defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment, on the ground that the complaint fails to state a cause of action, and granting defendants such other and further relief as the Court may deem just and proper under the circumstances.