

No.

**IN THE
SUPREME COURT OF THE UNITED STATES**

JOHANNES T. MARTIN – PETITIONER

vs.

LIVING ESSENTIALS, LLC – RESPONDENT

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the District Court in this case violate this *pro se* plaintiff's constitutional rights to due process and equal protection under the law by refusing to accept as true this plaintiff's factual allegation that "the record for Hacky Sack" is a specific reference to my particular record?

Whether the United States Court of Appeals, Seventh Circuit's dismissal of this plaintiff's right of publicity claim is in conflict with the United States Court of Appeals, Sixth Circuit's decision in *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983)?

Whether the United States Court of Appeals, Seventh Circuit's dismissal of this plaintiff's Lanham Act false endorsement claim is in conflict with the United States Court of Appeals, Ninth Circuit's decision in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992)?

Whether the United States Court of Appeals, Seventh Circuit's dismissal of this plaintiff's Lanham Act false advertising claim conflicts with this United States Supreme Court's unanimous decision in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct. 1337 (2014)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

*This case was improperly dismissed under the doctrines of res judicata and collateral estoppel. The opinions from the original case are also included.

The opinion of the United States Court of Appeals, Seventh Circuit in the original case appears at Appendix D to the petition and is unpublished.

The opinion of the United States District Court in the original case appears at Appendix E to the petition and is unpublished.

JURISDICTION

The date the United States Court of Appeals, Seventh Circuit decided my case was November 9, 2017.

A timely petition for rehearing was denied by the United States Court of Appeals, Seventh Circuit on December 6, 2017 and a copy of the order denying rehearing appears at Appendix C to the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The IL Right of Publicity Act (IRPA) (1075 ILCS 1075/)

The Lanham Act (15 U.S. Code § 1125)

STATEMENT OF THE CASE

My name is Ted Martin. I hold the world record for most consecutive footbag kicks. (a.k.a. Hacky Sack) My 63,326 kick record is universally recognized as “the record for Hacky Sack” by every authority.

This case involves advertising law and would be an exceptionally easy case to decide in this plaintiff’s favor if this *pro se* plaintiff was actually given a full and fair opportunity to be heard.

In a nationally televised commercial that can be viewed if you Google “The Last Five Hours: Bigfoot”, the Defendant’s spokesman states, “I mastered origami, while beating the record for Hacky Sack.” and “How do I do all this? 5-hour ENERGY.”

- (1) The Defendant clearly used “the record for Hacky Sack” in the Defendant’s commercial.
- (2) The Defendant’s spokesman clearly asserts that he holds “the record for Hacky Sack”.
- (3) The Defendant’s spokesman clearly asserts that “the record for Hacky Sack” was achieved because of 5-hour ENERGY.

The mere use of “the record for Hacky Sack” in the Defendant’s television commercial is a violation of my rights under the IL Right of Publicity Act. (765 ILCS 1075/) How the Defendant used “the record for Hacky Sack” is a violation of my rights under both the false endorsement and false advertising arms of the Lanham Act. (15 U.S.C. § 1125)

- (1) The Defendant used “the record for Hacky Sack” for commercial purposes without having obtained my previous written consent in violation of my rights under the IL Right of Publicity Act.
- (2) The Defendant’s spokesman asserts that he holds “the record for Hacky Sack” in violation of my rights under the false endorsement arm of the Lanham Act.
- (3) The Defendant’s spokesman asserts that “the record for Hacky Sack” was achieved because of 5-hour ENERGY in violation of my rights under the false advertising arm of the Lanham Act.

In other words, this entire case is about the unauthorized commercial use of “the record for Hacky Sack”.

I have now had two complaints dismissed by the same District Court judge who refuses to accept the fact that “the record for Hacky Sack” is a specific reference to my particular record.

In the original case, the District Court refused to accept the fact that “the record for Hacky Sack” is a specific reference to my particular record despite federal notice pleading standards requiring the Court to accept as true all of the well-pleaded facts alleged by the plaintiff in the pleading stage.

In the second case, the District Court still refused to accept the fact that “the record for Hacky Sack” is a specific reference to my particular record despite this *pro se* plaintiff producing overwhelming evidence that “the record for Hacky Sack” is indeed a specific reference to my particular record.

In each case, the United States Court of Appeals, Seventh Circuit completely failed to exercise even minimum due diligence, affirmed the District Court’s dismissal, and denied my PETITION FOR REHEARING.

THE ORIGINAL COMPLAINT

To begin with, the District Court failed to even acknowledge the correct law that this plaintiff invoked.

I brought suit under the IL Right of Publicity Act. (765 ILCS 1075/) The District Court referred to my right of publicity claim as “invasion of privacy” on page #1 of the original ORDER. The District Court then reinforced the error by referring to the IL Right of Publicity Act (IRPA) as “the Right to Privacy Act” in the footnote on page #4 of the original ORDER.

The District Court then refused to accept as true my factual allegation that “the record for Hacky Sack” is a reference to my particular record. All of my claims are based on the fact that “the record for Hacky Sack” is a reference to my particular record. **This entire case is about the meaning of “the record for Hacky Sack”.**

In the original case, I clearly stated that “the record for Hacky Sack” is a reference to my particular record and produced a copy of my Upper Deck trading card that clearly identifies this plaintiff as holding the world record for most consecutive kicks.

To show that “the record for Hacky Sack” is the record for most consecutive kicks, I produced an article from the Chicago Tribune about my previous world record. The Chicago Tribune article states,

“Now imagine kicking it 51,155 consecutive times. That’s the world record for Hacky Sack, or footbag, kicks, set by Ted Martin, 37, of Des Plaines. He did it in 7 hours, 1 minute and 37 seconds in ’93 and made the Guinness Book of World Records.”

In defense, the Defendant asserted that “the record for Hacky Sack” is a “vague” and “ambiguous” term that could be referring to any record using a Hacky Sack. **The Defendant’s assertion is false.**

The record for Hacky Sack is the record for most consecutive kicks. The objective of the game of Hacky Sack is to see how many consecutive kicks you can achieve without a miss. This is common knowledge for anyone who has ever seen, played, or even heard of Hacky Sack. The public has referred to the consecutive kicks record as “the record for Hacky Sack” ever since John Stalberger and Mike Marshall invented the game in 1972.

The District Court inexplicably accepted the Defendant’s unsupported assertions about the meaning of “the record for Hacky Sack” over the supported assertions of a documented world record holder.

On page #6 of the MEMORANDUM OPINION AND ORDER in the original case, the District Court states,

“Martin contends that “the record for Hacky Sack” is a phrase that identifies him particularly, but the phrase is far too ambiguous to do so. The language and graphic of the Commercial depict vague generalities regarding “the record for Hacky Sack” and do not clearly indicate that someone has broken the specific record that Martin set (or any other particular hacky sack record). Living Essentials points to the diverse array of hacky sack records (at least 14 different records, Mem. in Supp. 8 n.7), arguing that Martin’s assertion that he holds **the** record is a mischaracterization. *Id.* 7-8. The Commercial, moreover, depicts a man kicking two footbags, not one. *Id.* Ex. A.”

- (1) The District Court acknowledges my factual allegation that “the record for Hacky Sack” is a specific reference to my particular record and then rejects my factual allegation as true.
- (2) The District Court directly attributes the Court’s rejection of my factual allegation to the false and misleading representations made by the Defendant.

The District Court is required to accept as true all of the well-pleaded facts alleged by the plaintiff and all reasonable inferences that can be drawn therefrom. *See Barns v. Briley*, 420 F.3d 673, 677 (7th Cir. 2005).

In addition to fraudulently asserting that “the record for Hacky Sack” was a “vague” and “ambiguous” term, the Defendant also fraudulently asserted that “parody” was a legitimate defense to all of my claims.

In the MEMORANDUM IN SUPPORT OF THE DEFENDANT’S MOTION TO DISMISS in the original case, the Defendant states in the INTRODUCTION on page #1-2,

“Plaintiff’s Lanham Act claim fails because the ad makes no false representations of fact; the ad merely makes obviously absurd claims in a comedic fashion that could not possibly confuse even an unsophisticated consumer. The ad is nothing more than non-actionable parody or puffery. And though its parodic nature is obvious, the point is driven home by the disclaimers that read: **“For comedic purposes only. Not actual results.”** and **“Not proven to improve physical performance, dexterity or endurance.”** The commercial simply cannot be understood to depict anyone actually breaking any record. Plaintiff’s claims should be dismissed accordingly.”

As a direct result of the Defendant’s “parody” defense argument, the District Court repeatedly chided this *pro se* plaintiff for not having a sense of humor and then dismissed my complaint with prejudice because of the farcical nature of the commercial.

On page #13 of the MEMORANDUM OPINION AND ORDER in the original case, the District Court states,

“And because repleading will not change the farcical nature of the commercial, the dismissal is with prejudice.”

On page #2-3 of the Final Judgment, the United States Court of Appeals, Seventh Circuit states,

“With advertising, even a parody of a celebrity can trigger liability; the critical question is whether consumers are likely to be confused and believe that the aggrieved party endorses or approves of a product. *See White v. Samsung Elec. Am.*, 971 F.2d 1395, 1396, 1399-1401 (9th Cir. 1992) (remanding for trial on claim by TV hostess Vanna White that VCR ads featuring robot posed in wig and gown on Wheel of Fortune set implied her product endorsement and emphasizing importance of celebrity’s level of public recognition).”

*In *White v. Samsung*, the United States Court of Appeals, Ninth Circuit explicitly rejected “parody” as a legitimate defense to either a right of publicity claim or a Lanham Act false endorsement claim.

The United States Court of Appeals, Seventh Circuit seemingly rejected the Defendant’s “parody” defense but somehow overlooked the Defendant’s other clearly fraudulent assertion that “the record for Hacky Sack” is a “vague” and “ambiguous” term that could be referring to any record using a Hacky Sack.

The United States Court of Appeals, Seventh Circuit denied my PETITION FOR REHEARING without comment.

THE SECOND COMPLAINT

The Defendant's assertion that "the record for Hacky Sack" is a "vague" and "ambiguous" term that could be referring to any record using a Hacky Sack is a fraud upon the Court.

"Fraud" is defined at <https://legaldictionary.net/res-judicata/> as follows:

"Fraud – A false representation of fact, whether by words, conduct, or concealment, intended to deceive another."

The Defendant clearly "intended to deceive" the Court into believing that "the record for Hacky Sack" was not a specific reference to my particular record.

Fraud is an expressed ground for relief from a judgment under FRCP Rule 60.

On page #4 of FRCP Rule 60, the Advisory Committee on Rules states,

"Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are expressed grounds for relief by motion under subdivision (b). There is no sound reason for their exclusion."

On page #3 of FRCP Rule 60, the Advisory Committee on Rules states,

"The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment."

I filed a new independent action and **over my objections** the Clerk's Office improperly insisted on sending the 2017 Complaint back to the same District Court judge that heard the original Complaint.

The 2017 Complaint contains irrefutable evidence that "the record for Hacky Sack" is a specific reference to my particular record. (Exhibits A,B,C,D, & F of the 2017 Complaint are bundled together in **APPENDIX G**)

Exhibit A contains a copy of my Upper Deck trading card that clearly identifies this plaintiff as holding "the world record for consecutive kicks".

Exhibit B contains a copy of a Chicago Tribune Article about my previous world record which states,

"Now imagine kicking it 51,155 consecutive times. That's the world record for Hacky Sack, or footbag, kicks, set by Ted Martin, 37, of Des Plaines. He did it in 7 hours, 1 minute and 37 seconds in '93 and made the Guinness Book of World Records."

Exhibit C shows what happens when you Google "the record for Hacky Sack".

The first thing Google lists is the quote from the Chicago Tribune article referenced above followed by a link to the Chicago Tribune article itself. (This article is about my previous world record not my current world record.)

The next thing Google lists is a link to a page on the World Footbag Association website which states in the heading, "Record Holder. Ted Martin / Des Plaines, Illinois, USA Category: Open Singles Footbag Consecutive. Date of Record; June 14, 1997"

Exhibit D contains letters from seven Hacky Sack experts including John Stalberger, the co-inventor of Hacky Sack, and Bruce Guettich, the founder and president of the World Footbag Association. (The World Footbag Association is the governing and sanctioning body of the sport.)

All of these experts clearly state that "the record for Hacky Sack" is a specific reference to my particular record.

John Stalberger, the co-inventor of Hacky Sack, concludes his letter with the following statement:

"Ted Martin's record of 63,326 kicks is recognized the world over as "the record for of Hacky Sack"."

No reasonable person can argue with John Stalberger about the meaning of "the record for Hacky Sack".

After reading the 2017 Complaint, the Defendant filed a Motion to Dismiss based on the doctrines of res judicata and collateral estoppel.

As in the original case, the District Court ignored all evidence presented by this plaintiff and granted the Defendant's Motion to Dismiss based solely on the Defendant's assertion that these doctrines applied.

On page #12 of an article titled, "AFFIRMATIVE DEFENSES: RES JUDICATA AND COLLATERAL ESTOPPEL" from the North Carolina Conference of Superior Court Judges Fall 2006 Conference, the authors state,

"A judgment obtained by "extrinsic" fraud is considered void. See *Stokely v. Stokely*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (1976) ("Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party has been prevented from participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time.").

The District Court's judgment that "the record for Hacky Sack" is a "vague" and "ambiguous" term was clearly obtained by "extrinsic" fraud and should be considered void.

On page #13 of an article titled, "AFFIRMATIVE DEFENSES: RES JUDICATA AND COLLATERAL ESTOPPEL" from the North Carolina Conference of Superior Court Judges Fall 2006 Conference, the authors state,

"The party asserting a prior judgment as res judicata or collateral estoppel has the burden to showing the existence of the necessary elements. The burden includes proof that the claim or issue was litigated. If the reason for the judgment is not clear and the reason cannot be clearly established by other proof, then the judgment may not be considered "on the merits." See *S.M.B. v. A.T.W.*, 810 S.W. .2d 601, 605 (Mo. App. 1991) ("Before res judicata bars a claim, the previous determination must have been on the merits of the claim ... Where there is a question whether the previous decision went to the merits of the case, no preclusive effect is given to the earlier decision.").

The District Court's judgment that "the record for Hacky Sack" is a "vague" and "ambiguous" term "cannot be clearly established by other proof" and therefore may not be considered "on the merits."

No proof exists that "the record for Hacky Sack" is a "vague" and "ambiguous" term. The Defendant has just been pointing to records using a Hacky Sack which are categorically not "the record for Hacky Sack".

On page #9 of the original MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, the Defendant states,

"The Commercial is, at minimum, ambiguous. At no time did the Commercial indicate that anyone had beaten Plaintiff's *particular* record. It depicts only vague (and clearly fictional) generalities regarding "the record for Hacky Sack," subject to a myriad of interpretations and meanings. Even if the Commercial could be understood to refer to a record involving only *one* Hacky Sack, given the diverse array of Hacky Sack records, the Commercial could just as well have been referring to "the record" for "Open five-minute Timed Consecutive" (held by Andy Linder; see Exhibit C)."

Exhibit D of the 2017 Complaint contains a letter from Andy Linder. In his letter Andy Linder states,

"The public typically refers to the Open Singles Footbag Consecutives record as "the record for Hacky Sack." Currently, that record is 63,326 kicks and is held by Ted Martin."

So there you have it. A direct rebuttal of the Defendant's purported "evidence" from the person whose record the Defendant claims "the record for Hacky Sack" could be referring to.

The Defendant's fraud is blatant, documented, and undeniable.

On page #6-7 of the District Court's 2017 ORDER, the District Court states,

"Finally, as someone so acutely concerned with reputation, Martin should be cautious about accusing the defendant and its lawyers of perpetrating a fraud on this Court, or as he says in his "motion"⁴ for sanctions, acting in "bad faith," "spinning a web of deceit that includes false assertions" and "try(ing) to deceive the court on every legal standard, definition, and issue." Pl. Resp. 8, EFC No. 17. Fraud on the Court is a serious accusation, and Martin has nothing to back up his accusations other than disagreement with the defenses that were raised in his first case, most of which both this Court and the Seventh Circuit found to be meritorious, not sanctionable. Mr. Martin is advised to exercise greater restraint in tossing out unsupported allegations of serious misconduct simply because he is dissatisfied with the outcome of his lawsuit. Moving for sanctions based on scurrilous, unsupported allegations of bad faith or unethical conduct is itself bad faith conduct, rendering it sanctionable under Rule 11(b)(1)'s prohibition on filings for an improper purpose or this Court's inherent power to impose a sanction for bad-faith conduct, *see, e.g., Secrease v. W. & S. Life Ins. Co.*, 800 F.3d 397, 401 (7th Cir. 2015). Sanctions are also available for and actions that "multip(y) the proceeding . . . unreasonably and vexatiously," 28 U.S.C.A. § 1927, and for the filing of frivolous complaints, *see Fed. R. Civ. P. 11(b)(2)*. This attempt to relitigate claims that this Court and the Seventh Circuit have already rejected arguably contravenes both of these standards, requiring another motion and briefing by the defendant and another opinion from this Court. With the expectation that Mr. Martin will heed this admonition, however, this Court will not invite or take action with respect to sanctions against him at this time."

***To be clear, this *pro se* plaintiff produced irrefutable evidence of fraud committed by the Defendant.**

The District Court's response to irrefutable evidence of fraud was to deny the existence of any evidence and to go so far as to threaten this *pro se* plaintiff with sanctions for bringing the Defendant's fraud to the Court's attention.

***No reasonable person can read the first three pages of the 2017 Complaint and the referenced Exhibits and not realize that "the record for Hacky Sack" is a specific reference to my particular record.**

On page #2 of the 2017 Appeals Court ORDER, the United States Court of Appeals, Seventh Circuit states:

"The district court painstakingly examined Martin's new, 31-page complaint and explained why the doctrine of res judicata prevents Martin going forward with the case. We agree that the district court got it right and have nothing to add to its thorough and well-reasoned opinion. We therefore adopt the district court's opinion as our own in this appeal."

In a futile effort to try to get the Court of Appeals to acknowledge the evidence that I had presented; I directly addressed a member of the panel on the cover page of the PETITION FOR REHEARING with the following plea:

"Dear Judge Kanne,

In *Toney v. L'Oreal, Inc.*, you were one of three Judges on the panel in which this Court of Appeals reversed itself after it became clear that the Court had been operating under an incorrect assumption.

This Court of Appeals has been operating under the incorrect assumption that "the record for Hacky Sack" is a "vague" and "ambiguous" term when in fact it is a specific reference to my particular record.

In the original case, I clearly stated that "the record for Hacky Sack" was a reference to my particular record but the District Court did not accept my factual allegation as true.

This entire case is about the meaning of "the record for Hacky Sack". All of my claims are based on the fact that "the record for Hacky Sack" is a reference to my particular record.

In the following letter, John Stalberger, the co-inventor of Hacky Sack, defines "the record for Hacky Sack" and positively identifies this plaintiff as the record holder.

I implore the Court to please afford this *pro se* plaintiff the opportunity to be heard by reading this one page letter and the following petition. The doctrines of res judicata and collateral estoppel clearly do not apply to this 2017 Complaint."

The United States Court of Appeals, Seventh Circuit's entire response is as follows:

"On consideration of plaintiff-appellant's petition for rehearing filed on November 22, 2017, in connection with the above-referenced case, all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, ORDERED that the petition for rehearing is DENIED."

The District Court dismissed my original complaint by rejecting the fact that “the record for Hacky Sack” is a specific reference to my particular record.

The District Court dismissed my second complaint by rejecting the fact that “the record for Hacky Sack” is a specific reference to my particular record.

This entire case is about the meaning of “the record for Hacky Sack”. All my claims are based on the fact that “the record for Hacky Sack” is a specific reference to my particular record.

It is literally impossible for anyone to read the 2017 Complaint and not realize that “the record for Hacky Sack” is a specific reference to my particular record.

In addition to that, I specifically informed the District Court at the initial status hearing on May 3, 2017 that “the record for Hacky Sack” was a specific reference to my particular record and that the 2017 Complaint contained letters from the co-inventor of Hacky Sack and the president of the World Footbag Association.

There is no sound reason for the District Court to not know that “the record for Hacky Sack” is a specific reference to my particular record.

By producing clear and convincing evidence that “the record for Hacky Sack” is a specific reference to my particular record, this plaintiff has conclusively shown the following:

- (1) The Defendant committed a fraud upon the Court by asserting that “the record for Hacky Sack” is a “vague” and “ambiguous” term that could be referring to any record using a Hacky Sack.
- (2) The District Court violated my due process rights by not accepting as true my factual allegation that “the record for Hacky Sack” is a specific reference to my particular record.
- (3) The District Court did not litigate the meaning of “the record for Hacky Sack” in the original case and therefore did not actually litigate any of my claims “on the merits”.
- (4) The District Court improperly applied the doctrines of res judicata and collateral estoppel and dismissed my 2017 Complaint without just cause.

The District Court in this case has so far departed from the accepted and usual course of proceedings that the District Court’s judgments threaten the very integrity of the legal system itself.

The United States Court of Appeals, Seventh Circuit’s sanctioning of the District Court’s blatant departure from accepted norms demands that the United States Supreme Court exercise its supervisory power under Rule 10.

The United States Court of Appeals, Seventh Circuit’s dismissal of my right of publicity claim is in conflict with *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

The United States Court of Appeals, Seventh Circuit’s dismissal of my Lanham Act false endorsement claim is in conflict with *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

The United States Court of Appeals, Seventh Circuit’s dismissal of my Lanham Act false advertising claim conflicts with this Court’s unanimous decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1337 (2014)

THE RIGHT OF PUBLICITY

The right of publicity is often described as the “inherent right of every human being to control the commercial use of his or her identity.” J. Thomas McCarthy, Melville B. Nimmer and the Right of Publicity: A Tribute, 34 U.C.L.A.L. Rev. 1703, 1704 (1987)

The IL Right of Publicity Act recognizes and protects the right of every human being to control the commercial use of their “identity”.

(765 ILCS 1075/10)

Sec. 10. Recognition of right of publicity. The right to control and to choose whether and how to use an individual’s identity for commercial purposes is recognized as each individual’s right of publicity.

(Source: P.A. 90-747, eff. 1-1-99.)

The IL Right of Publicity Act defines the key terms used in the Act to eliminate any possible confusion as to the intent of the lawmakers.

(765 ILCS 1075/5)

Sec. 5. Definitions. As used in this Act:

“Commercial purpose” means the public use or holding out of an individual’s identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising.

“Identity” means any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.

“Individual” means a living or deceased natural person, regardless of whether the identity of that individual has been used for a commercial purpose during the individual’s lifetime.

The IL Right of Publicity Act strictly prohibits any unauthorized commercial use of an individual’s “identity”.

(765 ILCS 1075/30)

Sec. 30. Limitations regarding use of an individual’s identity.

(a) A person may not use an individual’s identity for commercial purposes during the individual’s lifetime without having obtained previous written consent from the appropriate person or person’s specified in Section 20 of this Act or their authorized representative.

There are only three elements that need to be established for a defendant to be found liable under the IL Right of Publicity Act. These elements are (1) identity, (2) commercial purpose, and (3) lack of consent.

In a nationally televised commercial that can be viewed if you Google "The Last Five Hours: Bigfoot", the Defendant's spokesman states, "I mastered origami, while beating the record for Hacky Sack." and "How do I do all this? 5-hour ENERGY."

- (1) "Identity" means "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener".

I have conclusively shown that "the record for Hacky Sack" is a specific reference to my particular record.

As the record holder, "the record for Hacky Sack" is clearly an attribute that serves to identify this plaintiff.

When you Google "the record for Hacky Sack", Google identifies this plaintiff as the record holder.

"The record for Hacky Sack" is clearly my "identity" as defined by the IL Right of Publicity Act.

- (2) "Commercial purpose" means "the public use or holding out of an individual's identity ... for purposes of advertising and promoting products".

The Defendant clearly used my "identity" for purposes of advertising and promoting 5-hour ENERGY.

- (3) "Consent" is defined in Section 30 as "previous written consent". (765 ILCS 1075/30)

The Defendant clearly used my "identity" for commercial purposes without having obtained my previous written consent.

The Defendant is in clear violation of Section 30 of the IL Right of Publicity Act. (765 ILCS 1075/30)

(765 ILCS 1075/40)

Sec. 40. Violations; monetary relief.

(a) A person who violates Section 30 of this Act may be liable for either of the following, whichever is greater:

- (1) actual damages, profits derived from the unauthorized use, or both; or
(2) \$1,000.

(b) Punitive damages may be awarded against a person found to have willfully violated Section 30 of this Act.

Besides actual damages and the profits derived from the unauthorized use of an individual's identity, the IL Right of Publicity Act allows for punitive damages to be awarded against any person found to have willfully violated Section 30 of the Act.

The Defendant in this case not only chose to use "the record for Hacky Sack" but went so far as to claim that this plaintiff's record was achieved because of 5-hour ENERGY. It is difficult to even imagine a more willful violation of an individual's right of publicity than a case where the defendant actually takes credit for the plaintiff's accomplishment.

The Defendant should be found liable for willfully violating my rights under the IL Right of Publicity Act.

FALSE ENDORSEMENT UNDER THE LANHAM ACT

Sec. 43(a)(1)(A) is the false endorsement arm of the Lanham Act (15 U.S. Code § 1125) and is as follows:

“Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which---

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 ... 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.”

The Lanham Act prohibits an advertiser from using any false representation of fact which is likely to cause confusion as to the “affiliation, connection, or association” of the advertiser with a person or as to the approval of the advertiser’s “goods” by a person.

In a nationally televised commercial that can be viewed if you Google “The Last Five Hours: Bigfoot”, the Defendant’s spokesman states, “I mastered origami, while beating the record for Hacky Sack.” and “How do I do all of this? 5-hour ENERGY.”

My “persona” in this case is invoked by a false representation of fact. The Defendant’s spokesman states, “I mastered origami, while beating the record for Hacky Sack.” The Defendant’s spokesman claims to have mastered origami while beating the record for Hacky Sack. Only the record holder can claim to have done anything while beating the record for Hacky Sack. The Defendant willfully identifies their spokesman as the Hacky Sack record holder, as Ted Martin, with this statement.

The Defendant’s spokesman then goes on to say, “How do I do all of this? 5-hour ENERGY.”

The Defendant’s spokesman clearly emphasizes his approval of 5-hour ENERGY based on the false representation of fact that he is the Hacky Sack record holder. **This is text book false endorsement.**

In defense, the Defendant asserted that “the record for Hacky Sack” was a “vague” and “ambiguous” term and that the commercial was nothing more than a “non-actionable” parody.

In *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (1992) the United States Court of Appeals, Ninth Circuit explicitly rejected “parody” as defense to either a right of publicity claim or a Lanham Act false endorsement claim. (Game show hostess Vanna White was portrayed in a print ad as a robot dressed in wig, gown, and jewelry posing next to a mock Wheel of Fortune game show set.)

The United States Court of Appeals, Ninth Circuit looked for guidance to the seven applicable factors enunciated in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979) to determine whether the plaintiff raised a genuine issue of material fact as to likelihood of confusion over endorsement.

In *White*, a majority of the factors favored the plaintiff. In this case, all seven factors favor this plaintiff:

(1) Strength of plaintiff's mark; in cases involving confusion over endorsement by a celebrity plaintiff, "mark" means the celebrity's "persona". The "strength" of the mark refers to the level of recognition the celebrity enjoys among members of society. Except for a period of 50 days in 1997, I have held "the record for Hacky Sack" since 1988. I am universally recognized as the record holder by every authority, including the World Footbag Association, Guinness World Records, the Chicago Tribune, Upper Deck, and Google. This plaintiff's "mark" is strong.

(2) Relatedness of goods; in cases concerning confusion over celebrity endorsement, the plaintiff's "goods" concern the reason for or source of the plaintiff's fame. The reason for and source of my fame is "the record for Hacky Sack". The Defendant connected my "goods" with the Defendant's "goods" in the most unseemly manner imaginable. The Defendant claimed that my "goods" were achieved because of 5-hour ENERGY.

(3) Similarity of the marks; the Defendant's spokesman directly appropriates my "mark" or "persona" by stating "I mastered origami, while beating the record for Hacky Sack." The Defendant's spokesman clearly identifies himself as the Hacky Sack record holder, as Ted Martin, with this statement.

(4) Evidence of actual confusion; I produce evidence of actual confusion in Exhibit F of 2017 Complaint. A blogger clearly believes that the Defendant's spokesman is this plaintiff. (Exhibit F is in Appendix G)

(5) Marketing channels used; this commercial had 382 national television airings according to iSpot.tv. The public is well aware of the meaning of "the record for Hacky Sack" and in the unlikely event that someone did not know the meaning of "the record for Hacky Sack"; they could Google it and find out.

(6) Likely degree of purchaser care; the Defendant's spokesman specifically identifies himself as the Hacky Sack record holder. Under the Lanham Act, it is not incumbent upon the consumer to determine whether or how an advertisement is false or misleading and then disregard the advertisement; it is incumbent upon the advertiser not to use any false or misleading representations of fact in the first place.

(7) Defendant's intent in selecting the mark; the Defendant's intent is directly stated in the commercial by the false representations of fact; the Defendant not only wanted the consumer to believe that the Hacky Sack record holder was endorsing 5-hour ENERGY, but also that "the record for Hacky Sack" was achieved because of 5-hour ENERGY. My "mark" was selected because of the concentration, athleticism, strength, and endurance needed to achieve "the record for Hacky Sack". The Defendant wanted the consumer to think that 5-hour Energy will give them all of these traits.

*Existing law does not recognize "parody" as a legitimate defense to a false endorsement claim. The reason why "parody" is not recognized as a legitimate defense to a false endorsement claim is because celebrities routinely consent to being parodied in commercials and therefore the consumer rightfully assumes that the parodied individual consented to the commercial and approves of the advertiser's goods or services.

The Defendant should be found liable for violating my rights under the false endorsement arm of the Lanham Act.

FALSE ADVERTISING UNDER THE LANHAM ACT

Sec. 43(a)(1)(B) is the false advertising arm of the Lanham Act (15 U.S. Code § 1125) and is as follows:

“Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

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.”

The Lanham Act prohibits an advertiser from using any “false or misleading representation of fact” which misrepresents the “nature, characteristics, qualities, or geographic origin” of the advertiser’s own “goods”.

In a nationally televised commercial that can be viewed if you Google “The Last Five Hours: Bigfoot”, the Defendant’s spokesman states, “I mastered origami, while beating the record for Hacky Sack.” and “How do I do all of this? 5-hour ENERGY.”

The Defendant’s spokesman states, “How do I do all this? 5-hour ENERGY.”

The “all this” clearly includes “the record for Hacky Sack”.

The Defendant clearly asserts that “the record for Hacky Sack” was achieved because of 5-hour ENERGY.

In an article titled, “9 Key Questions About Lanham Act False Advertising Suits” at an ALM website called Corporate Council; the author’s answer to the following question should be informative.

5. What if my competitor’s advertising is literally true but is nevertheless misleading?

“Truthful advertising can give rise to a Lanham Act claim if found to convey a misleading message, despite the literally truthful language of the ad.

Generally speaking, Lanham Act plaintiffs can assert “literal” or “implied” claims. A literally false claim is one that is false on its face: “Product X relieves pain more effectively than Product Y,” where Product Y is in fact more effective or just as effective as product X.

If a Lanham Act plaintiff persuades the court that the challenged advertisement is literally false, the court may grant relief without considering extrinsic evidence of consumer reaction to the ad.”

The Defendant’s assertion that “the record for Hacky Sack” was achieved because of 5-hour ENERGY can only be determined to be literally false. 5-hour ENERGY did not even exist as a product when this plaintiff set “the record for Hacky Sack” on June 14, 1997.

STANDING UNDER THE FALSE ADVERTISING ARM OF THE LANHAM ACT

In the following case, the United States Supreme Court made clear in a unanimous decision how courts are to determine who has standing to bring suit under the false advertising arm of the Lanham Act.

Lexmark International, Inc. v. Static Control Components, Inc. Case No. 12-873. Decided: March 25, 2014.

On page #16 of the Opinion of the Court, the Supreme Court rejected all previously used balancing tests:

“While none of these tests is wholly without merit, we decline to adopt any of them. We hold instead that the direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue.”

On page #20 of the Opinion of the Court, the Supreme Court elaborated further on the question of standing and the proximate-cause requirement with the following statement:

“As we have observed, a defendant who ‘seeks to promote his own interests by telling a known falsehood to or about the plaintiff or his product’ may be said to have proximately caused the plaintiff’s harm. *Bridge*, 553 U.S., at 657 (quoting Restatement (Second) of Torts § 870, Comment *h* (1977)); emphasis added in *Bridge*).

The District Court emphasized that Lexmark and Static Control are not direct competitors. But when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant’s aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage.”

In a nationally televised commercial that can be viewed if you Google “The Last Five Hours: Bigfoot”, the Defendant’s spokesman states, “I mastered origami, while beating the record for Hacky Sack.” and “How do I do all this? 5-hour ENERGY.”

This plaintiff claims “reputational injury from disparagement” as the direct result of the false representations put forth by the Defendant.

The Defendant clearly asserts that “the record for Hacky Sack” was achieved because of 5-hour ENERGY.

Any assertion regarding “the record for Hacky Sack” is obviously within this plaintiff’s zone-of-interests.

The Defendant clearly sought to “promote his own interests by telling a known falsehood” about how this plaintiff achieved “the record for Hacky Sack” and therefore proximately caused this plaintiff’s harm.

*Parody is not a defense to a false advertising claim in which the advertiser misrepresents the nature, characteristics, and qualities of the advertiser’s own “goods”. See Sec. 43(a)(3)(A)(ii) of the Lanham Act.

The Defendant should be found liable for violating my rights under the false advertising arm of the Lanham Act.

REASONS FOR GRANTING THE PETITION

First of all, the District Court clearly violated this *pro se* plaintiff's constitutional right to due process by not accepting as true this plaintiff's factual allegation that "the record for Hacky Sack" is a specific reference to my particular record.

On page #6 of the MEMORANDUM OPINION AND ORDER in the original case, the District Court states,

"Martin contends that "the record for Hacky Sack" is a phrase that identifies him particularly, but the phrase is far too ambiguous to do so. The language and graphic of the Commercial depict vague generalities regarding "the record for Hacky Sack" and do not clearly indicate that someone has broken the specific record that Martin set (or any other particular hacky sack record). Living Essentials points to the diverse array of hacky sack records (at least 14 different records, Mem. in Supp. 8 n.7), arguing that Martin's assertion that he holds **the** record is a mischaracterization. *Id.* 7-8. The Commercial, moreover, depicts a man kicking two footbags, not one. *Id.* Ex. A."

- (1) The District Court acknowledges my factual allegation that "the record for Hacky Sack" is a specific reference to my particular record and then rejects my factual allegation as true.
- (2) The District Court acknowledges that this plaintiff is a world record holder but refuses to even entertain the possibility that "the record for Hacky Sack" could be a specific reference to my particular record.

In his letter in **Exhibit D** of the 2017 Complaint, John Stalberger, the co-inventor of Hacky Sack, defines "the record for Hacky Sack" and positively identifies this plaintiff as the record holder. Mr. Stalberger states,

"My name is John Stalberger. In 1972, the late Mike Marshall and myself created a new kicking game using a small beanbag. We called this new game "footbag" and would go on to market this new game under the brand name "Hacky Sack". The term "Hacky Sack" can refer to the game of Hacky Sack or the object used to play the game. The objective of the game of Hacky Sack is to achieve the maximum number of kicks possible without a miss. I personally set the first official world record with 1,518 kicks. For the reasons stated above, I am honored to have been given the title of "Mr. Hacky Sack".

The popularity of this new sport exceeded our wildest dreams. In the first ten years alone, several million Hacky Sacks were sold. We created new games using a footbag and held tournaments that drew competitors and spectators from around the world. The main event in these early years was singles footbag consecutives because the stated objective of the original game was to achieve the maximum number of kicks possible. The ultimate goal of every player was to break my record. The record for most consecutive footbag kicks is the record for the game of Hacky Sack. This record is commonly referred to as either "the footbag world record" or "the record for Hacky Sack".

Today, the singles footbag consecutive record is 63,326 kicks and is held by Ted Martin. This record was established on June 14, 1997 at the Midwest Regional Footbag Championships in Mt Prospect, IL. Ted Martin's record of 63,326 kicks is recognized the world over as "the record for Hacky Sack".

At the initial status hearing on May 3, 2017, fighting just to get a word in edgewise, I directly informed the District Court that “the record for Hacky Sack” is a specific reference to my particular record and that the 2017 Complaint contained letters from the co-inventor of Hacky Sack and the president of the World Footbag Association to prove it.

The District Court dismissed the 2017 Complaint without even acknowledging the overwhelming evidence that “the record for Hacky Sack” is a specific reference to my particular record.

This plaintiff has clearly not been given a full and fair opportunity to be heard when the District Court refuses to even acknowledge any of the evidence that this *pro se* plaintiff has presented.

Under Supreme Court Rule 10(a), one reason for granting a Writ of Certiorari is when a United States court of appeals has entered a decision that “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power”.

A brief review of the District Court’s and the United States Court of Appeals, Seventh Circuit’s actions follows:

- (1) The District Court in the original case did not even acknowledge the correct law that this plaintiff brought suit under. I brought suit under the IL Right of Publicity Act. The District Court referred to my right of publicity claim as “invasion of privacy”. (A completely different law)
- (2) The District Court in the original case did not accept as true this plaintiff’s supported factual allegation that “the record for Hacky Sack” is a specific reference to my particular record despite federal notice pleading standards requiring the District Court to accept as true all of the well-pleaded facts alleged by the plaintiff in the pleading stage.
- (3) The District Court in the original case admonished this plaintiff for not having a sense of humor and dismissed my complaint “with prejudice” because of “the farcical nature of the commercial” when existing law does not recognize “parody” as a legitimate defense to any of my claims.
- (4) The District Court in the second case refused to even acknowledge the overwhelming evidence that “the record for Hacky Sack” is a specific reference to my particular record.
- (5) The District Court in the second case refused to even acknowledge the overwhelming evidence that the Defendant had committed multiple frauds on the Court in the original case.
- (6) The District Court attempted to intimidate this *pro se* plaintiff from taking any further action by threatening to sanction this plaintiff for the presumed offense of bringing overwhelming evidence of the Defendant’s fraud to the Court’s attention.
- (7) The District Court dismissed my second complaint under the doctrines of res judicata and collateral estoppel when the Defendant clearly did not meet the burden of proof required for such a dismissal.

On page #2 of the 2017 Appeals Court ORDER, the United States Court of Appeals, Seventh Circuit states:

“The district court painstakingly examined Martin’s new, 31-page complaint and explained why the doctrine of res judicata prevents Martin going forward with this case. We agree that the district court got it right and have nothing to add to its thorough and well-reasoned opinion. We therefore adopt the district court’s opinion as our own in this appeal.”

The United States Court of Appeals, Seventh Circuit appears to have just assumed that the District Court had exercised due diligence when in fact the District Court did not follow accepted procedure at all.

At no time throughout the entire proceeding does the District Court ever even acknowledge the existence of any evidence that “the record for Hacky Sack” is a specific reference to my particular record.

At no time throughout the entire proceeding does the United States Court of Appeals, Seventh Circuit ever even acknowledge the existence of any evidence that “the record for Hacky Sack” is a specific reference to my particular record.

There is no legitimate reason for the District Court or the Court of Appeals to have overlooked the fact that “the record for Hacky Sack” is a specific reference to my particular record.

The District Court’s refusal to examine evidence is a refusal to hear the case and equates to the District Court openly advocating for the Defendant.

Meaningful access to the Courts is a fundamental constitutional right under the Fourteenth Amendment and this *pro se* plaintiff has thus far been denied this most basic fundamental right.

The Supreme Court has “EQUAL JUSTICE UNDER THE LAW” etched in marble on the front of the building for good reason.

Insuring that every citizen has meaningful access to the courts is the Supreme Court’s primary responsibility and is of the utmost national importance.

Under Supreme Court Rule 10, another reason for granting a Writ of Certiorari is when a United States court of appeals “has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” or “has decided an important federal question in a way that conflicts with relevant decisions of this Court.”

The United States Court of Appeals, Seventh Circuit’s dismissal of my right of publicity claim is in conflict with *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

The United States Court of Appeals, Seventh Circuit’s dismissal of my Lanham Act false endorsement claim is in conflict with *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

The United States Court of Appeals, Seventh Circuit’s dismissal of my Lanham Act false advertising claim conflicts with this Court’s unanimous decision in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct. 1337 (2014).

The United States Court of Appeals, Seventh Circuit’s dismissal of all of my claims conflicts with the precedence established in numerous cases and the law itself.

The District Court specifically dismissed all of my claims “with prejudice” because of the “farcical nature” of the commercial. The United States Court of Appeals, Seventh Circuit affirmed that dismissal and denied my PETITION FOR REHEARING for reasons that are completely unclear.

The IL Right of Publicity Act does not recognize “farcical nature” as a defense to the unauthorized commercial use of an individual’s “identity”.

(765 ILCS 1075/35)

Sec. 35. Applicability.

(a) This Act applies to acts or events that take place after the effective date of this Act.

(b) This Act does not apply to the following:

- (1) use of an individual’s identity in an attempt to portray, describe, or impersonate that individual in a live performance, a single and original work of fine art, play, book, article, musical work, film, radio, television, or other audio, visual, or audio-visual work, provided that the performance, work, play, book, article, or film does not constitute in and of itself a commercial advertisement for a product, merchandise, goods, or services;
- (2) use of an individual’s identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign;
- (3) use of an individual’s name in truthfully identifying the person as the author of a particular work or program or the performer in a particular performance;
- (4) promotional materials, advertisements, or commercial announcements for a use described under paragraph (1), (2), or (3) of this subsection; or
- (5) use of photographs, videotapes, and images by a person, firm, or corporation practicing the profession of photography (“professional photographer”) to exhibit in or about the professional photographer’s place of business or portfolio, specimens of the professional photographer’s work, unless the exhibition is continued by the professional photographer after written notice objecting to the exhibition has been given by the individual portrayed.

(Source: P.A. 90-747, eff. 1-1-99.)

Sec. 35 of the IL Right of Publicity Act does not list “farcical nature” as a use of an individual’s “identity” for which the Act does not apply.

The IL Right of Publicity Act supplanted common law right of publicity in the State of Illinois with a more robust and well-defined law on January 1, 1999 but the basic concept derived from common law remains the same.

The United States Court of Appeals, Seventh Circuit’s dismissal of my right of publicity claim is in conflict with *Carson v. Here’s Johnny Portable Toilets Inc.*, 698 F.2d 831 (6th Cir. 1983)

This case involved the unauthorized commercial use of a distinctive catch phrase. Plaintiff Johnny Carson was introduced every night as host of “The Tonight Show” with the distinctive phrase “Here’s Johnny”. This phrase was clearly associated with the plaintiff. The phrase in this case was not even used to describe an individual, but rather as a joking reference to the portable toilet itself. The defendant went even further with the word play by use of the line, “The World’s Foremost Comedian”.

The United States Court of Appeals, Sixth Circuit found in favor of plaintiff Johnny Carson on his common law right of publicity claim despite the “farcical nature” of the advertisement.

Any unauthorized commercial use of an individual’s “identity” is a violation of that individual’s right of publicity regardless of the context of the use.

In the MEMORANDUM IN SUPPORT OF THE DEFENDANT'S MOTION TO DISMISS in the original case, the Defendant asserts that "parody" is a defense to all of my claims on page #1-2 of the INTRODUCTION:

"Plaintiff's Lanham Act claim fails because the ad makes no false representations of fact; the ad merely makes obviously absurd claims in a comedic fashion that could not possibly confuse even an unsophisticated consumer. The ad is nothing more than non-actionable parody or puffery. And though its parodic nature is obvious, the point is driven home by disclaimers that read: **"For comedic purposes only. Not actual results."** and **"Not proven to improve physical performance, dexterity or endurance."** The commercial simply cannot be understood to depict anyone actually breaking any record. Plaintiff's claims should be dismissed accordingly."

The Defendant begins the paragraph by misdirecting the Lanham Act's "confusion" standard away from false endorsement and to the claims made in the commercial.

The Defendant states, "Plaintiff's Lanham Act claim fails because the ad makes no false representations of fact; the ad merely makes obviously absurd claims in a comedic fashion that could not possibly confuse even an unsophisticated consumer."

The Lanham Act's "confusion" standard applies to false endorsement not the claims made in the commercial.

*The false advertising arm of the Lanham Act prohibits any action by an advertiser which misrepresents the "nature, characteristics, qualities, or geographic origin" of the advertiser's own "goods".

The Defendant states, "The ad is nothing more than non-actionable parody or puffery."

The Defendant directly asserts that "parody" is an affirmative defense when existing law does not recognize "parody" as legitimate defense to any of my claims. The Defendant then goes on to repeatedly emphasize that the commercial is comedic and farcical throughout the entire proceeding to sell the false assertion.

The Defendant states, "The commercial simply cannot be understood to depict anyone actually breaking any record. Plaintiff's claims should be dismissed accordingly."

The Defendant directly asserts that the consumer is required to believe the individual depicted is "actually" the individual depicted for all of my claims to succeed. **The Defendant's assertion is false.**

The Lanham Act does not require the consumer to believe that the individual depicted is "actually" breaking any record. The false endorsement arm of the Lanham Act prohibits the Defendant from asserting that their spokesman is the Hacky Sack record holder.

*The false endorsement arm of the Lanham Act prohibits any action by an advertiser which is likely to cause "confusion" as to the "affiliation, connection, or association" of the advertiser with a person or as to the approval of the advertiser's "goods" by a person.

As the direct result of the Defendant's false assertions, the District Court repeatedly chided this *pro se* plaintiff for not having a sense of humor (like I was suing Saturday Night Live for spoofing me in a skit) and dismissed all of my claims "with prejudice" because of the "farcical nature" of the commercial.

The United States Court of Appeals, Seventh Circuit's dismissal of my Lanham Act false endorsement claim is in conflict with *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992)

This case involved a print ad that featured a robot dressed in a wig, gown, and jewelry posing next to a mock "Wheel of Fortune" game show set. Plaintiff Vanna White was the established hostess for "Wheel of Fortune". The ad clearly invoked her "identity" and "persona" through the most unconventional of means.

The United States Court of Appeals, Ninth Circuit found in favor of plaintiff Vanna White on her common law right of publicity claim and her Lanham Act false endorsement claim.

The United States Court of Appeals, Ninth Circuit explicitly rejected "parody" as a legitimate defense to either a right of publicity claim or a Lanham Act false endorsement claim.

The Defendant's assertion that the consumer is required to believe that the individual depicted is "actually" the individual depicted is not the correct legal standard for a Lanham Act false endorsement claim. No one would believe that the robot was actually Vanna White but the ad clearly invoked her "persona".

In my case, a blogger clearly believes that the Defendant's spokesman is this plaintiff. (Last Exhibit Appendix G)

Sec. 43(a)(3) is the exclusion section of the Lanham Act and is as follows:

(3) Exclusions The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with—

- (i) advertising or promotion that permits consumers to compare goods or services; or
- (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

(B) All forms of news reporting and news commentary.

(C) Any noncommercial use of a mark.

Sec. 43(a)(3)(ii) excludes "parodying ... the goods ... of the famous mark owner."

Sec. 43(a)(3)(ii) does not exclude "parodying" the advertiser's own goods in an effort to misrepresent the "nature, characteristics, qualities, or geographic origin" of the advertiser's own goods.

The Defendant's spokesman asserts that he beat "the record for Hacky Sack" because of 5-hour ENERGY in what can only be considered a blatant effort to present 5-hour ENERGY as a performance enhancing drug.

The Lanham Act prohibits an advertiser from using any “false or misleading representation of fact” which misrepresents the “nature, characteristics, qualities, or geographic origin” of the advertiser’s own goods.

The United States Court of Appeals, Seventh Circuit’s dismissal of my Lanham Act false advertising claim conflicts with this Court’s unanimous decision in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct 1337 (2014)

On page #20 of *Lexmark v. Static Control Components, Inc.*, 134 S. Ct 1337 (2014), the Supreme Court states,

“As we have observed, a defendant who ‘seeks to promote his own interests by telling a known falsehood to or about the plaintiff or his product’ may be said to have proximately caused the plaintiff’s harm. *Bridge*, 553 U.S., at 657 (quoting Restatement (second) of Torts § 870, Comment *h* (1977); emphasis added in *Bridge*).

The District Court emphasized that Lexmark and Static Control are not direct competitors. But when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant’s aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage.”

The Defendant clearly sought “to promote his own interests by telling a known falsehood” about how this plaintiff achieved “the record for Hacky Sack” and therefore proximately caused this plaintiff’s harm.

It is a matter of significant national importance that the laws that govern commerce are enforced in a uniform and consistent manner to insure that each and every individual has the right to control the commercial use of their “identity” and that the consumer is not subjected to false and misleading advertising.

The United States Supreme Court should grant certiorari in this case and reverse the Seventh Circuit’s decision because it is fundamentally unfair for people in other circuits to be afforded rights under the Lanham Act when people in the Seventh Circuit are denied these exact same rights.

I will now conclude this section by addressing the huge elephant in the room. It is abundantly clear that the United States Court of Appeals, Seventh Circuit failed to exercise even minimum due diligence in this case.

The United States Court of Appeals, Seventh Circuit did not even acknowledge the existence of any evidence that “the record for Hacky Sack” is a specific reference to my particular record even when this plaintiff pleaded with the Court on the cover page of the PETITION FOR REHEARING to acknowledge the evidence in this case.

Saying that a plaintiff has the right to appeal is utterly meaningless when the United States Court of Appeals, Seventh Circuit does not even exercise enough due diligence to get the facts strait.

The Defendant’s spokesman states, “I mastered origami, while beating the record for Hacky Sack” and “How do I do all of this? 5-hour ENERGY.”

The Defendant freely admits that their spokesman makes these statements in the Defendant’s television commercial and includes these statements in the Defendant’s STATEMENT OF FACTS in the original case.

There is nothing to argue about. The Defendant is strictly prohibited from making these statements under the IL Right of Publicity Act and both the false endorsement and false advertising arms of the Lanham Act.

The mere use of "the record for Hacky Sack" in the Defendant's television commercial is a violation of my rights under the IL Right of Publicity Act.

The spokesman's assertion that he holds "the record for Hacky Sack" is a violation of my rights under the false endorsement arm of the Lanham Act.

The spokesman's assertion that he beat "the record for Hacky Sack" because of 5-hour ENERGY is a violation of my rights under the false advertising arm of the Lanham Act.

CONCLUSION

I respectfully ask for this Court to grant this *pro se* plaintiff Summary Judgment and order this case to be randomly assigned to a different district court judge for further proceedings.

I respectfully ask for this Court to take whatever measures are necessary to insure that this *pro se* plaintiff's rights are respected and not violated any further than they already have been.

This petition for a writ of certiorari should clearly be granted for multiple reasons.

February 28, 2018

Respectfully Submitted,

A handwritten signature in black ink that reads "Ted Martin". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Ted Martin

359 Woodbridge

Des Plaines, IL 60016

Phone # (847) 824-6528

Fax # (847) 824-6533