

Case No. 17-9031

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

JOHANNES T. MARTIN – PETITIONER

vs.

**WENDY'S INTERNATIONAL INC., and
GUINNESS WORLD RECORDS LIMITED
RESPONDENTS**

PETITION FOR REHEARING

TED MARTIN

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DES PLAINES, IL 60016

Phone # (847) 824-6528

GROUND'S FOR GRANTING PETITION FOR REHEARING

The District Court's judgment was obtained by the Defendants' blatant undeniable fraud as to the proper legal standards that applied to the case. The Defendants even went so far as to materially misrepresent a unanimous decision by this United States Supreme Court. See page #2,3, and 4 of this PETITION FOR REHEARING.

The lower courts have repeatedly ignored all evidence of fraud committed by the Defendant and thus denied this *Pro Se* plaintiff the opportunity to present my case in a court of law in violation of my constitutional right to due process under the Fourteenth Amendment.

The Defendants' fraud has been documented in every single brief submitted by this *Pro Se* plaintiff and is documented here again in the following five page PETITION FOR REHEARING.

My name is Ted Martin. I hold the record for most consecutive kicks of a footbag. (a.k.a. Hacky Sack)

The Defendants, Wendy's International, Inc. and Guinness World Records Limited, held a promotion in the U.S. and Canada from August 12th to September 22nd 2013 in which they directly connected my name and world record of 63,326 kicks to their promotional footbag.

The consumer was given the choice of one of six toys with every Wendy's Kid's Meal purchase. Each toy, including the footbag, was described as "record-breaking" on both sides of the Kid's Meal Bag.

When chosen, the footbag would be included in the Wendy's Kid's Meal bag and come sealed in a separate plastic bag with the Defendants' logos prominently displayed on the plastic bag.

Sealed inside the plastic bag with the footbag was a card. The Defendant's logos were prominently displayed on the card. **In a direct commercial communication to the consumer, the card states,**

"How many times in a row can you kick this footbag without hitting the ground? Back in 1997, Ted Martin made his world record of 63,326 kicks in a little less than nine hours! Practice makes perfect, so first try flicking the footbag from one foot to the other or to your knee."

The mere use of my name in the Defendants' promotion is a violation of my rights under the IL Right of Publicity Act. (765 ILCS 1075/) How the Defendant used my name and record is a violation of my rights under both the false endorsement and false advertising arms of the Lanham Act. (15 U.S.C. § 1125)

To begin with, right of publicity law has prohibited the unauthorized commercial use of an individual's "name" since the inception.

The right of publicity was originally part of the right of privacy under common law. Professor Dean Prosser wrote an influential article in 1960 that delineated four distinct types of the right of privacy: (1) intrusion upon one's seclusion or solitude, (2) public disclosure of embarrassing private facts, (3) publicity which places one in a false light, and (4) appropriation of one's name or likeness for the defendant's advantage. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960)

The first three types continued to be referred to as the right of privacy. (The right to be let alone) The fourth and last type came to be known as the right of publicity. However, the courts did not hold that the right of publicity protected only an individual's "name or likeness". The courts held that the law protected the broader concept of an individual's "identity".

The District Court's dismissal of my right of publicity claim is conflict with the precedence established in countless cases going back more than fifty years.

In *Palmer v. Schonhorn Enterprises, Inc.* 96 N.J. Super. 72 (1967) 232 A.2d 458, the Court stated,

"There is little doubt that a person is entitled to relief when his name has been used without his consent, either to advertise the defendant's product or to enhance the sale of an article."

In defense, the Defendants engaged in a concerted effort to deceive the District Court as to the proper legal standards that applied to my case to support their demonstrably false assertion that their use of my name and record was some sort of "constitutionally immune noncommercial speech".

On page #7-8 of the MEMORANDUM OPINION AND ORDER, the District Court states,

"It is clear that defendants publically used or held out plaintiff's identity for a promotional purpose by using his name in their promotion, which meets the second prong of the "commercial purpose" definition."

At this point, the District Court should have recognized that the Defendants had clearly violated my right of publicity and gone on to address my other claims. However, the Defendants had made so many false and misleading representations of fact to justify their unauthorized commercial use of my name and record that the Court appears not to have understood the applicable laws governing the case.

The Court's confusion is clearly demonstrated in the following statement on page #8-9 of the opinion:

"Plaintiff does not challenge Guinness's right to list his record in its book, and it would be nonsensical to hold that law prohibits Guinness from reciting that bare fact in a promotional item but permits it to include the fact in the book it sells. Plaintiff fails to state a claim for violation of his right of publicity under the IRPA."

The District Court in my case fundamentally does not understand right of publicity law to the point where the Court fails to recognize the distinction between commercial and noncommercial speech.

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) It is the "commercial use" of the person's "identity" that the law protects.

Guinness is permitted to list my name and record in its book under Sec. 35(a)(b)(1) of the IL Right of Publicity Act (765 ILCS 1075/) provided that the use "does not constitute in and of itself a commercial advertisement for a product, merchandise, goods, or services".

The Defendants in this case clearly used my "identity" for commercial purposes when they used my name and record in connection with their logos and products.

The Defendants in this case made so many false representations to the court that I cannot even begin to list them all in the confines of this PETITION FOR REHEARING. The following example is so egregious that this United States Supreme Court's collective hair should be on fire.

To discredit my claims under the Lanham Act, the Defendants went so far as to misrepresent this United States Supreme Court's unanimous decision in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct. 1337 (2014)."

Under the heading of **“Standing to bring a Lanham Act § 1125(a) Claim”** on page #4-5 of Defendants’ JOINT MOTION TO DISMISS, the Defendants state,

“Under the Supreme Court’s recently-decided *Lexmark* case, to assert a cause of action under Lanham Act §1125(a), “a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.” 134 S.Ct. at 1395. To establish proximate causation, a plaintiff need not show that he was in direct commercial competition with the defendant, *see id.* at 1394, but he must allege that he suffered “economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.” *Id.* at 1391. Proximate cause requires that the “alleged harm ... is (not) ‘too remote’ from the defendant’s unlawful conduct,” and the “harm alleged has a sufficiently close connection to the conduct the statute prohibits.” *Id.* at 1390.”

In the above statement, the Defendants changed the prefix of an actual quote in a concerted effort to misrepresent this Supreme Court’s unanimous decision in *Lexmark v. Static Control Components, Inc.*

The actual quote from *Lexmark v. Static Control* appears on page #15 of the opinion and is as follows:

“We thus hold that a plaintiff suing under §1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.”

The Defendants changed, “We thus hold that a plaintiff suing under §1125(a) ordinarily must show” to “he must allege that he suffered” in a deliberate attempt to falsely assert that this plaintiff is required to allege that the Defendants’ actions caused consumers to withhold trade from this plaintiff in order for this plaintiff to have standing to bring suit under the Lanham Act.

The Defendants then used their blatant misrepresentation of *Lexmark* to undermine the precedence established in Lanham Act false endorsement cases as well.

Under the heading of **“False Endorsement”** on page #5 of Defendants’ JOINT MOTION TO DISMISS, the Defendants state,

“As the Seventh Circuit explains, one basis of liability under the Lanham Act includes “false representations concerning the origin, association or endorsement of goods or services through the wrongful use of another’s distinctive mark, name, trade dress or other device.” *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) *abrogated by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1380 (2014) on other grounds.”

The Defendants’ misrepresentation of *Lexmark* was just one of many false representations documented in the PAGE BY PAGE ANSWER TO DEFENDANTS’ MOTION TO DISMISS. (See page #5) The District Court none-the-less accepted the Defendants’ false representation of *Lexmark* despite this plaintiff specifically bringing the Defendants’ misrepresentation of *Lexmark* to the Court’s attention.

On page #8 of the MEMORANDUM OPINION AND ORDER, the District Court states,

"15 U.S.C. § 1125(a)(1). Thus, there are two bases for liability: false association or endorsement, under subsection (A); and false advertising, under subsection (B). *Tecnomatic, S.p.A. v. Remy, Inc.*, No. 1:11-CV-00991-SEB, 2012 WL 2376066, at *15 (S.D. Ind. June 22, 2012) (citing *L.S. Heath & son, Inc. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014))."

On page #9 of the MEMORANDUM OPINION AND ORDER, the District Court states,

"The Supreme Court recently explained that a plaintiff has "standing" under section 43(a) of the Lanham Act, or a claim within the scope of the statute's provisions, if he can properly plead and prove "an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentation." *Lexmark*, 134 S. Ct. at 1390, 1395. To show proximate cause, a Lanham Act plaintiff must show "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and . . . that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Id* at 1391.⁴"

On page #10 of the MEMORANDUM OPINION AND ORDER, the District Court states,

"Defendants correctly point out that he has no standing to raise any claim based on any potential injury to that particular future commercial activity because any such injury is purely speculative at this point."

The District Court granted the Defendants' motion to dismiss without prejudice. I documented the Defendants fraudulent assertions in the AMENDED COMPLAINT filed on May 23, 2016 and specifically addressed the Defendants misrepresentation of *Lexmark* on page #14.

In RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT AND MOTION FOR SUMMARY JUDGMENT filed on July 5, 2016, I again brought up the Defendants misrepresentation of *Lexmark* on page #31-32.

On page #9 of the new MEMORANDUM OPINION AND ORDER, the District Court states,

"15 U.S.C. § 1125(a)(1). Thus, there are two bases for liability: false association or endorsement, under subsection (A); and false advertising, under subsection (B). *Tecnomatic, S.p.A. v. Remy, Inc.*, No. 1:11-CV-00991-SEB, 2012 WL 2376066, at *15 (S.D. Ind. June 22, 2012) (citing *L.S. Heath & son, Inc. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)).

Plaintiff's amended complaint and response brief include virtually no additional facts that might be relevant to his Lanham Act claims, so for the most part, there is no reason for this Court to revisit its earlier analysis of these issues."

The Defendants' demonstrably false assertions as to the proper legal standards that applied to the case is a violation of the signing requirements under FRCP Rule 11(b)(2) and 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 Defendants clearly "intended to deceive" the Court as to the proper legal standards that applied to the case.

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."

If a Defendant is allowed to escape justice by blatantly violating the Federal Rules of Civil Procedure, we cease to be a nation of laws.

This United States Supreme Court should grant this *Pro Se* plaintiff's PETITION FOR REHEARING to preserve the integrity of the federal judicial system.

October 22, 2018

Respectfully Submitted,

A handwritten signature in black ink that reads "Ted Martin". The signature is written in a cursive, flowing style.

Ted Martin

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CERTIFICATION OF UNREPRESENTED PARTY

I, Ted Martin, do declare under penalty of perjury that this PETITION FOR REHEARING is being presented in good faith and not for delay.

October 22, 2018

Signed: Ted Martin

Ted Martin

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CERTIFICATE

I, Ted Martin, do hereby state that the grounds for granting this PETITION FOR REHEARING are of substantial and controlling effect and are limited to Defendant's blatant undeniable fraud as to the proper legal standards that applied to the case.

November 2, 2018

Signed: 

Ted Martin

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A copy of this certificate has been sent by first-class U.S. mail on this date to the Defendant's Counsel of Record:

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