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June 10, 2005

VIA FEDERAL EXPRESS AND FACSIMILE (WITHOUT EXHIBITS)

Honorable Mark Falk, U.S.M.J.
United States District Court
United States Post Office & Courthouse
1 Federal Square, Room 457
Newark, New Jersey 07101

**Re: Landmark Education LLC, et al. v. The Rick A. Ross
Institute of New Jersey, et al., Civil Action No. 04-3022 (JCL)**

Dear Magistrate Judge Falk:

On behalf of plaintiffs ("Landmark"), we write in response to the May 25, 2005 reply letter brief (the "Reply") from Peter L. Skolnik, counsel for defendants, submitted in support of defendants' application, made by letter dated April 28, 2005, for discovery in connection with Landmark's pending motion for a Rule 41(a)(2) dismissal (the "Discovery Application").

Defendants continually change the basis upon which they say conditions should attach to Landmark's voluntary dismissal of this action with prejudice. Consequently, the basis upon which they say they seek discovery likewise shifts.

On April 4, 2005, defendants responded to Landmark's request for permission to file the Rule 41 motion (the "April 4 Letter"), asserting as the basis for seeking terms and conditions on the dismissal that "Landmark is a recidivist walk-away litigant that repeatedly brings the same baseless charges -- only to withdraw them before they can be decided on the merits." (April 4 Letter at 11.)

Based on this assertion -- which Landmark very specifically refuted at the April 6, 2005 conference -- the Court determined that Landmark should make its Rule 41 motion and the

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defendants could make a discovery application concerning the "recidivist walk-away litigant" charge.

Defendants submitted their Discovery Application on April 28, before Landmark submitted its Rule 41 motion.¹ Knowing that Landmark intended to refute their baseless charge, defendants added a second basis on which they said they would seek terms and conditions to the dismissal with prejudice (an opposition they have still not submitted) -- that some of the statements made by defendants concerning which Landmark sued are true. For example, in support of their request for an order compelling Landmark to produce its training manuals, defendants argued that those manuals "go to the very truth of allegedly defamatory statements attributed to Defendants." (Discovery Application at 9, emphasis added.) As another example, defendants claimed that they were entitled to "[d]ocuments related to complaints made about Landmark that are relevant to establishing the truth of statements alleged to be false and disparaging in the Complaint." (Id. at 2, emphasis added.) However, in their Reply, defendants shift ground yet again. Abandoning the argument made in their previous submission, defendants now claim that "it is not the 'truth' of statements published on Defendants' web site that Defendants intend to establish through the discovery sought here." (Reply at 4, emphasis added.)

Defendants' latest submission is disingenuous on its face. They continue to allege a right to merits discovery, now relying upon the theory that Landmark brought the action in "bad faith." (Reply at 1-4.) Semantics aside, defendants continue to seek documents relating to the alleged "truth" of defendants' website postings. (See Discovery Application at 2-3.)

Defendants' Reply makes the "bad faith" allegation their central argument. Why? Because, Landmark's Rule 41 motion clearly demonstrates that Landmark is not a "recidivist walk-away litigant" (see the May 3, 2005 Declaration of Arthur Schreiber at ¶¶ 27-31 (the "May 3 Schreiber Decl.")) -- the allegation that set the Court and the parties on the unprecedented and twisted path that we now find ourselves traveling. Defendants also dispute the May 3 Schreiber Declaration. (Reply at 5-8.) However, as explained in the accompanying Reply Declaration of Arthur Schreiber made on June 10, 2005 (the "Schreiber Reply Decl."), and as briefly summarized below, the matters that defendants claim should have been disclosed in the May 3 Schreiber Declaration are not even cases, are off-point and certainly do not support defendants' charge that Landmark is a "recidivist walk-away litigant."

As explained below (in what Landmark hopes will be the last time it is forced to refute a new basis set forth by defendants for unwarranted discovery), while Landmark brought this action in good faith, the issue of Landmark's "faith" in bringing this action is not a proper issue

¹ On May 5, 2005, Landmark filed its Rule 41 motion and filed its opposition to defendants' Discovery Application.

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to be litigated in the context of a Rule 41 motion and thus any discovery sought by defendants on that basis should be denied.

I. "Bad Faith" Is Not A Rule 41 Issue

Conspicuously absent from defendants' argument (Reply at 1-4) is any discussion of the relevant case law that holds that bad faith is not a basis for conditioning a dismissal, see, Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1966). Smoot makes clear that the rule against awarding attorneys' fees in connection with a voluntary dismissal with prejudice applies even when the defendant alleges bad faith by the plaintiff. (See Landmark's May 5, 2005 letter brief in opposition to defendants' Discovery Application ("Opp. Br.") at 3-4.)

The only issue presented by a Rule 41 motion seeking dismissal with prejudice, as here, is whether any terms or conditions must be placed on the dismissal in order to avoid prejudice to the defendant. Schillachi v. Flying Dutchman Motorcycle Club, 1991 WL 24696, at *3 (E.D. Pa. Feb. 25, 1991), aff'd, 944 F.2d 898 (3d Cir. 1991). Accord, American Nat'l Bank & Trust Co. of Sapulpa v. BIC Corp., 931 F.2d 1411, 1412 (10th Cir. 1991) ("[t]he district court . . . should impose only those conditions which actually will alleviate harm to the defendant"); LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604-05 (5th Cir. 1976) (same); Gonzales v. City of Topeka, Kan., 206 F.R.D. 280, 282-283 (D. Kan. 2001) (same).

As the court in Smoot recognized, a litigant's alleged "bad faith" in bringing an action does not bear on whether the defendant will be prejudiced by the dismissal. Thus, in Smoot, the court denied the defendant's request for discovery in aid of defendants' claim that the plaintiff had brought his libel action in bad faith -- a request that the Court properly recognized to be seeking merits discovery concerning the truth of the challenged statements. Smoot, 353 F.2d at 831-32.

Here, as in Smoot, discovery that relates to Landmark's alleged "bad faith" (including whether or not certain of the statements posted on defendants' websites are true) must be denied. Litigation of that issue has no bearing on a Rule 41 motion, where the sole question is whether terms must be imposed to remedy actual prejudice to defendants, if any, resulting from the dismissal. American Nat'l Bank & Trust Co. of Sapulpa, 931 F.2d 1411.

II. Merits Discovery Has No Bearing On A Dismissal

Moreover, defendants' Discovery Application, even in its latest incarnation, in fact seeks nothing more than merits discovery. For example, defendants allege a right to discovery concerning the truth of their website postings that: (1) Landmark uses bullying and humiliation techniques; (2) participants are subject to authoritarian control; (3) Landmark discourages participants from taking bathroom breaks; (4) Landmark verbally and emotionally abuses participants; and (5) Landmark's programs are physically, mentally and emotionally stressful,

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can be dangerous and can result in mental problems. (Reply at 2-3.) That these statements are false was an allegation made in Landmark's complaint pertaining to Landmark's substantive claims against defendants, about which discovery is no longer relevant.²

As discussed above, the court in Smoot denied the defendant's request for merits discovery to oppose a Rule 41 motion. Smoot, 353 F.2d at 831-32. Additionally, the authority cited by Landmark in its Opposition Brief (at 1-2), Wilson v. Eli Willy & Co., 222 F.R.D. 99 (D. Md. 2004), is precisely on point. In Wilson, defendants responded to plaintiff's motion for a voluntary dismissal with a request for merits discovery aimed at supporting their opposition to the dismissal based on their contention that they would be prejudiced if plaintiffs could re-file the action in a different jurisdiction with different rules concerning the statute of limitations. The court rejected defendant's application "out-of-hand" as "an inappropriate approach to the determination of Rule 41(a)(2) motions" and granted the dismissal. Id. at 101. Wilson expressly rejects the proposition that merits discovery may be granted to determine whether a dismissal should be conditioned (or even denied outright, in the case of a dismissal without prejudice).³

III. Defendants' Charge That the May 3 Schreiber Declaration Lacks "Candor" Itself Lacks "Candor"

In refuting defendants' accusation that Landmark is a "recidivist walk-away litigant," Mr. Schreiber's declaration set forth the procedural histories and outcomes of the four lawsuits that Landmark has brought over its 14-year history in federal or state courts in which Landmark has litigated against "public critics" -- the class of lawsuits about which defendants sought discovery. (See Discovery Application at 2.) Defendants attack the declaration as "untruthful," "false" and/or lacking "candor." (Reply at 5-6.) None of defendants' hotheaded accusations is true, fair or honest.

A. Domestic Lawsuits

1. The Facts

Defendants claim that there are three domestic litigations that Mr. Schreiber should have disclosed. (Reply at 5-8.) As described in detail in the Schreiber Reply Declaration, none of the three was even an "action," much less an action that Landmark used to harass public critics. In

² Defendants' lengthy footnote (Reply at 2-3) concerning whether the accusation that a group is a "cult" is a statement of fact or one of opinion highlights the extent to which defendants seek to transform the Rule 41 motion into a trial on the merits.

³ Defendants attempt to distinguish Wilson as an action where bad faith on the part of the plaintiff was not alleged. (Reply at 13.) But that difference is irrelevant to the point that merits discovery, for whatever reason sought, is inappropriate in connection with a Rule 41 motion.

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fact, defendants' reliance on these cases to imply deceit by Landmark is itself deceiving. In brief:

- John Does 1-20: In September 2001, Landmark instituted a John Doe proceeding in order to seek discovery from an Internet Service Provider as to the identity of the author of a defamatory email sent to Landmark's program participants. After the destruction of Landmark's New York office at the World Trade Center, the company's largest office, on September 11, 2001, Landmark withdrew the application before it was ever heard, because it had far more pressing internal concerns. No lawsuit was ever served on "a public critic" of Landmark;
- Garvey: Landmark purchased a New York index number and filed a form summons with notice that was never served and that therefore became a nullity after 120 days pursuant to New York Law. Landmark and its outside counsel searched their records to find all litigations necessary to include in Mr. Schreiber's declaration. However, Landmark's outside counsel of record never opened a file for this matter and neither outside counsel nor Landmark maintained any physical file concerning this non-"action." Landmark simply did not know about the Garvey summon when Mr. Schreiber signed his declaration and Landmark still lacks any information about the circumstances of how the summons came to be filed; and
- Pressman: As part of a litigation against the Cult Awareness Network ("CAN") disclosed in the May 3 Schreiber Declaration, Landmark took the deposition of an out-of-state witness. Judicial intervention collateral to that litigation was required to compel the witness to answer certain questions.

(See Schreiber Reply Decl. at ¶ 5.) None of these facts supports defendants' assertion that Landmark is a "recidivist walk-away litigant." Nor do they support defendants' contention that Landmark litigates "far more often" than Mr. Schreiber described. (Reply at 7, n.8.)

2. Defendants' Absurd Accusations

Moreover, defendants make statements about Landmark's conduct and motivations in an unabashedly speculative, shoot-from-the-hip fashion. For example:

- As to John Does 1-20, defendants ascribe to Landmark an "[a] improper litigation objective of [b] frightening off and/or [c] silencing its critic, or [d] otherwise causing the internet service provider to shut down the user's account." (Reply at 6.) No evidence is offered to support any of these accusations. Additionally, defendants compare Landmark's attempt to discover the identity of the email's author with Landmark's alleged desire in this action to unmask the identity of

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allegedly anonymous users of defendants' websites. However, as defendants well know and as Landmark previously represented to the Court, Landmark's goal here was not to identify anonymous users of defendants' websites but rather to unmask Mr. Ross as the true author of certain postings alleged to have been received by him from anonymous users (see Landmark's January 7, 2005 letter to the Court at 5);

- As to Garvey, defendants assert that the claim Landmark never pursued was based on statements made by Mr. Garvey to the Riverfront Times and that Landmark allowed the summons to lapse because it realized after the fact that it had missed the statute of limitations. (Reply at 7.)⁴ One can only wonder from what divine source defendants may have derived such knowledge, given that Landmark's own General Counsel and its outside attorneys of record in that action have no memory of filing the summons and given that each conducted a thorough search of their records which yielded no documents from which either could swear to the circumstances that gave rise to the filing of that summons, including the time, place and manner of the libel referenced therein;⁵ and
- As to Pressman, defendants assert that Landmark sought to harass Mr. Pressman about matters unrelated to the CAN litigation. Once again, a charge is made by defendants without any substantiation and contrary to the written record. Moreover, the charge is blatantly untrue, as Landmark never "harassed" Mr. Pressman.

B. Foreign Lawsuits

Landmark has never hidden the fact that the May 3 Schreiber Declaration disclosed only domestic actions. (See that Declaration at ¶ 29.) Indeed, Landmark believes that these are the only even arguably relevant matters. Certainly, Landmark did not seek to deceive the Court as to the scope of its disclosure. Mr. Schreiber said, with simple candor, "we have brought all of four actions in the federal and state courts of the United States." (Id.)

In their April 4 Letter (at 5-7), defendants cited four domestic actions as evidence that Landmark is a "recidivist walk-away litigant." Defendants' characterization of Landmark was not stated to be based on any litigation conduct by Landmark in any foreign jurisdiction. To the extent that defendants could be said to have somehow succeeded through their April 4 Letter in

⁴ Landmark did not litigate against the Riverfront Times, a fact which serves to show that Landmark is not the "recidivist" "litigant" that defendants claim it to be.

⁵ The supposition that Landmark would wait over a year to file suit and allow a statute of limitation to run is also antithetical to defendants' theme that Landmark is an aggressive litigant.

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shifting the burden to Landmark of explaining its prior domestic litigation conduct, Landmark has satisfied that burden by thoroughly explaining the procedural history and substantive outcomes of those four actions upon which defendants relied, which are the only four relevant domestic cases. (See May 3 Schreiber Decl. at ¶¶ 27-31 and above at 4-5.)

Now that Landmark has debunked defendants' original charge, defendants have changed the question, now asserting that Landmark must also disclose its foreign litigation, because defendants might somehow still find in that domain some evidence that Landmark walks away from its cases. (Reply at 7-8.) This is nonsense. The only basis on which any litigation history might even arguably be relevant is dicta in a few Rule 41 cases stating that a litigant's abuse of the judicial system by habitually commencing and then walking away from cases might constitute an "exceptional circumstance" under which an award of attorneys' fees might be appropriate even when a voluntary dismissal will be with prejudice. Nothing in that dicta suggests that a federal court should, in determining whether to condition a dismissal, conduct an inquisition into a party's conduct, worldwide, in order to uncover "exceptional circumstances."

Further, given the procedural and substantive differences in the laws of, and the idiosyncrasies of, various foreign legal systems, Landmark questions whether this Court would even be in a position to evaluate the conduct in those foreign jurisdictions, if disclosed.

Before Landmark is put to the task of demonstrating its good faith in foreign litigations, something more than the silly assertion that because Landmark operates in twenty-three other countries it must a fortiori have abused those countries' legal systems must be required of defendants.⁶ Defendants have offered nothing.

C. No Relevant Documents Were Omitted From The May 3 Schreiber Declaration

Defendants, in equally off-point accusations, attack Mr. Schreiber's veracity by claiming that material information was omitted from the exhibits attached to his declaration concerning two of the four cases he described -- the Singer and CAN cases. (Reply at 8-9.) This, too, is nonsense.

In Mr. Schreiber's declaration, concerning Landmark's action against Margaret Singer Mr. Schreiber wrote that Landmark defeated a "Special Motion to Strike." (May 3 Schreiber Decl. at ¶ 30.) Attached as Exhibit K to the declaration, among other things, was the cover page

⁶ Defendants also allege that Landmark somehow opened the door to inspection of its foreign litigations by complaining in this case about statements made by Ross in a Canadian newspaper and on the radio and Australia. (Reply at 8.) This wholly illogical assertion is unexplained.

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and table of contents of Ms. Singer's motion, as well as the court's order denying it.⁷ The table of contents to the motion was specifically included to demonstrate that what was litigated was not a mere procedural issue but rather a substantive one that addressed most or all of the arguments that are typically made by libel defendants. No further information was necessary for the purpose of describing the procedural history or disposition of the action. Contrary to defendants' claims, the content of the actual declarations submitted by Singer and her co-defendants in support of their motion were not necessary to the issue before this Court. Indeed, these materials are patently irrelevant to the question whether Landmark "walked-away" from the Singer litigation.

As to Landmark's action against CAN, defendants complain that Landmark did not attach the settlement agreement reached with CAN's co-defendant, Cynthia Kissler, as part of Exhibit J to the May 3 Schreiber Declaration. At the insistence of Ms. Kissler, that document was made subject to a strict confidentiality provision which Landmark is not free to disregard. However, the relevant facts have been disclosed, *i.e.*, that Landmark did not withdraw the case; rather a settlement was reached that resulted in the statement included in Exhibit J.⁸

D. Defendants' New Request For Threatened Litigations

Finally, defendants claim that the May 3 Schreiber Declaration is deceptive because it does not list instances in which Landmark sought retractions and "threatened" legal action

⁷ Landmark cannot fathom the potential relevance of defendants' footnote 12 (Reply at 9), which asserts that a precedent referred to by that court in its order has since been overruled, unless defendants now also want to challenge judicial rulings in Landmark's favor in the other cases as part of the Rule 41 colloquy.

⁸ Defendants cite to their Document Request No. 6, to which Landmark objected and which called for the production of "all briefs, certifications, affidavits and other documents, including exhibits, filed by any party in connection with any dispositive motion, and/or any appeal" in Landmark's lawsuits against "public critics" as constituting the documents concerning Landmark's prior litigations which are sought in their Discovery Application. (Reply at 10.) Defendants have made no showing that such documents bear on any issue relating to the appropriate terms and conditions that should be placed on a voluntary dismissal with prejudice. To the contrary, the substantive motion papers sought by defendants could only be relevant to the merits of Landmark's claims. Indeed, defendants' constant references to their discovery request served prior to Landmark's decision to seek dismissal (*see*, for example, defendants' proposed order, Reply Exhibit N, which is framed to compel compliance with various previous requests), highlights the fact that defendants are seeking merits discovery. Defendants appear to be incapable of distinguishing a garden variety discovery motion made in connection with an ongoing case from the unprecedented request that they have made in connection with Landmark's Rule 41 motion.

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against “public critics.” (Reply at 10-11.) Of course, neither defendants’ April 4 Letter nor their Discovery Application placed “threats” of legal action in issue; none of the cases on whose dicta defendants rely for the notion that prior litigation conduct is relevant even remotely suggests that retraction demands and the like are relevant; why then would any one address the issue? This is yet another example of defendants presenting Landmark with a moving target.

Defendants now seek to have the Court include in its order a provision compelling production of such “threats.” The request is absurd. First, the request (if genuine) should have been made in the Discovery Application, not in the Reply. Although defendants contend that the request is based on “new evidence” (Reply at 11, n.15), their assertion is demonstrably untrue. Just one page earlier, defendants admit that the information about “threats” made against “public critics” by Landmark cited in the Reply were taken from defendants’ own websites. (Reply at 10.)

Second, the fact that Landmark has corresponded with potential defendants against whom it did not commence litigation has no bearing on any issue properly before the Court. First, Landmark, like any other individual or entity, has the right to seek to dissuade others from spreading disparaging material. Second, Landmark’s exercise of that right certainly does not support defendants’ assertion that Landmark is a “recidivist walk-away litigant.” Third, that Landmark did not bring suits undermines defendants’ portrait of Landmark as repetitively bringing baseless lawsuits.

IV. Communications Between Landmark’s Counsel and Dr. McMenamain Are Not Relevant To The Rule 41 Motion

Since the first conference in this action, defendants’ counsel has exhibited a holier-than-thou attitude that has been accompanied by formulaic and false charges of bad faith against Landmark. Specifically, defendants have said that Landmark wanted to learn the identity of supposedly anonymous posters on defendants’ websites so as to harass these individuals. Landmark has repeatedly countered that it seeks, quite to the contrary, to identify Ross as the true author. In that connection, Landmark’s Rule 41 motion included a quotation from the opinion of the forensic linguist, Dr. Gerald McMenamain, that Ross in fact authored certain of the website postings attributed to anonymous visitors. (See Schreiber Decl. at ¶¶ 17-18.) The motion in no way depends upon the Court’s evaluation of that opinion. Nonetheless, defendants are now requesting the production of all communications between Landmark’s counsel and Dr. McMenamain, devoting two pages of their Reply to the irrelevant assertion that Landmark has waived the attorney-client and work-product privileges. (Reply at 11-13.)

Defendants’ argument misses the point. For a privileged document to be subject to production, the privilege must not only have been waived but, and as a prior and threshold matter, there must be a real need for the document(s). As stated by the New Jersey Appellate Division:

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[t]here are many reported cases holding that once a party discloses privileged communications, he may have waived the privilege with respect to related privileged information pertaining to the same subject matter. . . . Before such confidential communications may be required to be revealed, however, a court must determine that there is a real need for such evidence in the proceeding . . .

Weingarten v. Weingarten, 234 N.J. Super. 318, 326 (App. Div. 1989) (emphasis added).

See also, Corning Inc. v. SRU Biosystems, LLC, 223 F.R.D. 189, 191 (D. Del. 2004) (although defendants had waived the attorney-client privilege by disclosing the documents to a third party, plaintiffs were nonetheless not entitled to discovery of documents that had no relevance).

Thus, whether or not Landmark waived applicable privileges with respect to Dr. McMenamín's opinion (yet another side issue this Court need not address) discovery is not appropriate because communications with Dr. McMenamín bear no relevance to the Rule 41 motion.⁹

V. There Is No Legal Basis on Which To Grant The Discovery Application

Landmark showed in its Opposition Brief (at 1-2) that there is no legal basis for the requested discovery. In their Reply, defendants obfuscate the relevant law.

A. Rule 41

As the Court knows, the rule is that attorneys' fees will not be awarded as a condition to a dismissal with prejudice unless there are "exceptional circumstances." (Reply at 15.) Defendants argue that Landmark's putative lack of good faith in bringing this action qualifies as an exceptional circumstance. As discussed above (at 3), under the law it does not. Moreover, as detailed in the May 3 Schreiber Declaration, even if the law permitted such an argument, the facts do not.

But, finally, even if defendants could surmount all those hurdles, their argument that Landmark's conduct justifies an order compelling discovery is without any legal basis.

⁹ Furthermore, the authorities cited by defendants are inapposite; all center around the waiver of a privilege under circumstances where the privilege holder put the privileged information at issue in a claim or defense on the merits, making the privileged information relevant, and thus attempted to use the privilege as both a sword and a shield. See, e.g., Equal Employment Opportunity Comm'n v. Johnson & Higgins, Inc., 1998 WL 778369, at *8 (S.D.N.Y. Nov. 6, 1998). Here, Landmark used Dr. McMenamín's opinion to respond to defendants' repeated unjustified attacks on Landmark's motives.

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Defendants rely on a single authority, Alliance For Global Justice v. District of Columbia, 2005 U.S. Dist. LEXIS 2855 (D. D.C. Feb. 7, 2005). That case does not, in fact, support their argument.

Alliance For Global Justice did not involve a complete dismissal with prejudice. Instead, certain but not all of the plaintiffs sought a voluntary dismissal, which was granted by the District Court without imposition of terms or conditions. Thereafter, the Magistrate Judge recommended to the District Court Judge that the prior dismissal order be vacated and a new order be entered conditioning the dismissal upon the dismissing plaintiffs answering outstanding discovery requests. The Magistrate Judge's rationale was that the case was not over for the defendants because other plaintiffs remained to prosecute the case and therefore defendants would suffer prejudice if the discovery was not had. *Id.* at *8. Thus, compliance with outstanding discovery requests was recommended (a) as a term or condition of dismissal, and (b) to prevent an actual cost the defendants would otherwise incur. Defendants here, however, do not seek Landmark's compliance with discovery as a condition of dismissal in connection with an ongoing litigation. Rather, they request discovery addressed to whether terms or conditions may be appropriate. Alliance For Global Justice does not even remotely support that request.¹⁰

Because the law precludes the position defendants are taking, defendants are left asking this Court to put "[c]ase law aside," and to do so because Landmark possesses information relevant to the merits of its lawsuit and consequently whether or not it brought this action in good faith. (Reply at 14.) First, this is a court of law and this Court should not put the law aside. Second, defendants' argument, carried to its logical conclusion, would suggest that defendant's application is commonplace, rather than unprecedented. In most if not all actions in which a plaintiff seeks a voluntary dismissal the plaintiff will possess information relevant to the merits of its action and its own good faith. Yet, defendants cannot point to a single authority supporting an order compelling discovery of such information in connection with a defendant's attempt to oppose a Rule 41 motion.¹¹

Defendants also argue that if their Discovery Application is not granted the materials they seek will "forever remain out of reach." (Reply at 14.) If so, so what? This Court's role is not to serve as a research arm for Ross.

¹⁰ It is also obvious that since there was a continuing case in Alliance For Global Justice, defendants could have obtained the discovery eventually through subpoenas issued to the dismissing plaintiffs, but with added cost and delay.

¹¹ In their discussion on this point, defendants engage in yet another unbridled, unsubstantiated ad hominem attack, referring to Landmark as attempting to "slink away, unscathed, unchastised and undaunted from yet another baseless lawsuit." (Reply at 14.) The Court should ignore such specious invective.

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Finally, defendants complain that Landmark has “imposed substantial costs, inconvenience and related burdens” on defendants. (Reply at 14.) To the contrary, it is defendants who are imposing costs upon themselves. Since Landmark proposed dismissing this action with prejudice on April 1, 2005, defendants have relished spending money in their effort to promote themselves and inflict harm on Landmark, as evidenced by their refusal to allow this case to end. Given that no substantive motions were made in this case and only limited discovery was had prior to Landmark proposing dismissal, it is entirely likely that defendants have spent or will soon spend more fighting dismissal than they did defending the lawsuit.

B. Other Alleged Bases For Granting Discovery

Defendants mention other authorities allegedly supporting their Discovery Application. None supports the application.

First, defendants refer to Rule 26, which governs discovery of “relevant” evidence, and claim that this Rule gives the Court broad authority to order any discovery relevant to the Rule 41 motion. (Reply at 13.) Beside the fact that the requested discovery is not relevant (see 3-4 above), Rule 26 furnishes no basis for Rule 41 discovery. Nor is any case cited by defendants to show that it does.

Second, defendants refer to Rule 56(f) which permits a court to order discovery of “facts essential to justify the party’s opposition” to a summary judgment motion. (Reply at 13.) Reliance on Rule 56(f) is misplaced. This is not a summary judgment motion. Summary judgment motions search the merits. Rule 41 contains no analogous discovery provision and serves a different function.

Third, defendants argue that they are entitled to costs (other than attorneys’ fees) pursuant to Rule 54(d)(1). (Reply at 13.) Whether or not defendants are entitled to costs under Rule 54(d) is a purely legal question and will not turn on Landmark’s litigation history or the merits of its claims. In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 458 (3d Cir. 2000).

Fourth, defendants state that they will seek attorneys’ fees under the Lanham Act. (Reply at 13.) While it is true that attorneys’ fees are available under the Lanham Act under exceptional circumstances, defendants do not cite a single authority for the proposition that (1) an award of attorneys’ fees pursuant to the Lanham Act is permissible in connection with a Rule 41 dismissal, or (2) more relevant at present, a party is entitled to conduct discovery to show that exceptional circumstances exist.¹²

¹² Additionally, any claim, if viable, would be de minimus, as defendants would have to parse out from their aggregate attorneys’ fees that portion allegedly spent to defend specifically against the Lanham Act claim.

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Fifth, although defendants disclaim reliance on Rule 11 (Reply at 16), they nonetheless contend that discovery is intended to cast light on what Landmark knew about the facts of its case when it filed the complaint (Reply at 4). This justification for discovery clearly signals that defendants intend to make Rule 11 arguments in connection with Landmark's Rule 41 motion. For the reasons detailed in Landmark's Opposition Brief (at 2-3), because defendants failed previously to file a Rule 11 motion, defendants may not so move now, explicitly or implicitly, in response to Landmark's Rule 41 motion. Moreover, defendants cite no authority permitting discovery in connection with such a sanctions application, even if one were permissible.

Finally, defendants note the Court's inherent authority to award sanctions. (Reply at 15.) Defendants' reliance on that authority is misplaced. Although defendants are correct that federal courts retain inherent authority to sanction litigants independent of any other statutory basis for such sanctions, defendants ignore the fact that exercise of a court's inherent power to sanction is not permitted when an existing statutory basis for the sanction would not allow such an award. As stated by the United States Supreme Court in an opinion relied on by defendants:

the exercise of the inherent power of lower federal courts can be limited by statute or rule.

Chambers v. Nasco, Inc., 501 U.S. 32, 47 (1991). As more specifically stated by the First Circuit:

[courts] retain their *inherent* power to impose sanctions unless its exercise directly conflicts with subsequently promulgated rules or enactments.

United States v. Kouri-Perez, 187 F.3d 1, 8 (1st Cir. 1999) (italics in original, underline added). Put yet another way:

there are limits to a court's inherent powers, particularly in instances where the Civil Rules are on all fours. When, as in this case, the Civil Rules limit the nature of the sanction that can be imposed, a court may not use its inherent powers to circumvent the Rules' specific provisions.

United States v. One 1987 BMW 325, 985 F.2d 655, 661 (1st Cir. 1993).

Directly on point is Hamil v. Mobex Managed Servs. Co., 208 F.R.D. 247, 251 (N.D. Ind. 2002), in which the court stated "the sanctions [defendant] seeks are clearly governed by Fed.R.Civ.P. 11. Indeed, had [defendant] acted at the appropriate time, Rule 11 may have provided a remedy. However, [defendant] took no action to preserve its right to seek sanctions. Accordingly, the Court does not believe the circumstances of this case warrant the Court invoking its inherent authority to sanction Plaintiffs."

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Here, there are two Federal Rules directly on point: Rule 11, which governs the award of sanctions for bad faith litigation, the requirements of which defendants have not satisfied (see Opp. Br. at 2-3), and Rule 41, which permits an award of attorneys' fees only when a dismissal is sought without prejudice or under exceptional circumstances not shown here. This Court's exercise of its inherent powers to award attorneys' fees to defendants would circumvent both rules.

In arguing that this Court may exercise its inherent authority to sanction Landmark, defendants attempt to distinguish National Kitchen Prods. Co. v. Butterfly Co., 1994 WL 391422 (D. N.J. Dec. 8, 1999) (see Opp. Br. at 2-3) as limited to sanctions sought pursuant to Rule 11. However, the principal holding of that case -- that a party should not be penalized for voluntarily dismissing its claims and thereby saving time and expense for the Court and the parties, id. at *9 -- is equally apposite to a court's exercise of its more limited inherent authority to sanction as it is to the exercise of a statutory authority.

Indeed, even if, *arguendo*, this Court could exercise its inherent power to sanction for bad faith litigation, defendants have not cited a single authority in which a court granted discovery to aid it in determining whether the exercise of its inherent power was appropriate -- the attenuated argument defendants now make.

VI. Defendants Are Improperly Attempting To Shift To Landmark The Burden of Establishing The Lack of Relevance of the Requested Documents

As explained above, defendants have failed to explain the relevance of any of the discovery they seek to the issue of whether the dismissal of this action should be subject to terms or conditions. Having failed to make a showing that the discovery sought is relevant, defendants argue that it is Landmark's burden to prove irrelevance. (Reply at 17-19.) However, this is defendants' application and they carry the burden of proof, not Landmark. Kopacz v. Delaware River & Bay Auth., 225 F.R.D. 494 (D. N.J. 2004). Moreover, defendants cannot prove genuine relevance because all the requested discovery concerns the truth or falsity of the challenged website postings.

For example, defendants seek information about lawsuits and complaints against Landmark for personal injuries alleged to have arisen out of a participant's attendance at a Landmark program. According to defendants, this information is relevant to "what Landmark *knew* -- about its own policies and procedures, about its own litigation history, and about the content of its own documents -- when it filed this lawsuit." (Reply at 17, *emphasis in original*.) However, what Landmark knew when it filed this lawsuit could bear only upon a Rule 11 motion, which, as set forth above (at 13), defendants may not make. What Landmark knew when it filed this action has nothing to do with whether the dismissal will cause defendants any prejudice, such as to warrant curative measures.

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Moreover, defendants refer to allegations made about Landmark's programs in lawsuits or complaints as "facts." (See, e.g., Reply at 18.) Of course, allegations are only allegations and the content of complaints or lawsuit pleadings could not possibly form a basis for the Court to conclude that Landmark made allegations here that are contrary to "fact."

As another example, defendants seek production of Landmark's training manuals on the ground that those documents will shed light on what Landmark knew about the nature of its programs. (Reply at 18.) Again, such knowledge bears only on unavailable Rule 11 sanctions, not Rule 41 terms and conditions.

VII. Defendants' Refusal To Let This Case End is Based on an Improper Motive, Not Their Stated Reasons

The Court should understand that the real motivation for defendants' Discovery Application is to gain additional material for their websites in order to generate further business for Ross's "de-programming" and expert services and to injure Landmark. Indeed, in an article published by Ross on his website publicizing this very action, he makes clear his strong desire to use the action to gain additional negative materials to post concerning Landmark. (See Exhibit A.) There, he states:

[i]n this "Information Age" the public increasingly has turned to the Internet for background about people, companies, organizations and movements. . . . Landmark Education, despite its name, seems intent upon making sure that essentially only self-serving promotional advertising and/or propaganda largely appears on the Internet about the company and its courses. . . . However, instead the Landmark Education lawsuit is likely to become another landmark for freedom of information on the Internet.

One of Ross's modus operandi is to deprive his targets of the value of their work product by stealing and publishing it. See, e.g., NXIVM Corp. v. Ross Institute, et al., United States District Court for the Northern District of New York, 2003, Docket Number 03-7052. In that case, Ross was sued for posting a copyrighted manual on his websites obtained from a former student of the plaintiff educational institution and who gave the manual to Ross in violation of a non-disclosure agreement. (A copy of the complaint is attached as Exhibit B.) It is obvious that Ross's quest for Landmark's materials is intended to garner more material for him to publish -- material that Landmark holds as a valuable trade secret. (See Landmark's letter to the Court dated January 6, 2005.)

VIII. Conclusion

While defendants accuse Landmark of lacking candor, it is defendants who consistently

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make ballistic, false accusations without trying to discover, or by deliberately ignoring, the truth. If attorneys' fees are to be awarded here, it is defendants and their counsel who should be paying them to Landmark to cure the harm that Landmark has suffered from having to defend itself against the malicious and baseless allegations defendants have made about Landmark to this Court in connection with the Rule 41 motion. The Court should end this long-running misbehavior, deny discovery and direct defendants to respond to the Rule 41 motion. More than two months have already passed since Landmark first proposed dismissal.

Respectfully,

A handwritten signature in black ink, appearing to read 'D. Lans', with a long horizontal flourish extending to the right.

Deborah E. Lans

Enclosures

cc: Peter L. Skolnik, Esq. (via Federal Express and facsimile w/o enclosures)
Paul J. Dillon, Esq. (via Federal Express and facsimile w/o enclosures)

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

-----X		
LANDMARK EDUCATION LLC,	:	
LANDMARK EDUCATION INTERNATIONAL,	:	
INC. and LANDMARK EDUCATION	:	
BUSINESS DEVELOPMENT, INC.,	:	
	:	
Plaintiffs,	:	
	:	Civil Action No. 04-3022 (JCL)
vs.	:	
	:	Honorable John C. Lifland
	:	Honorable Mark Falk
THE RICK A. ROSS INSTITUTE OF NEW	:	
JERSEY a/k/a/ THE ROSS INSTITUTE a/k/a/	:	
THE ROSS INSTITUTE FOR THE STUDY OF	:	
DESTRUCTIVE CULTS, CONTROVERSIAL	:	
GROUPS AND MOVEMENTS and RICK ROSS	:	
a/k/a/ "RICKY ROSS,"	:	Reply Declaration
	:	<u>of Arthur Schreiber</u>
	:	
Defendants.	:	
-----X		

Arthur Schreiber, hereby declares under the penalties of perjury, pursuant to 28 U.S.C. § 1746:

1. I am the General Counsel of Landmark Education LLC, Landmark Education International, Inc. and Landmark Education Business Development, Inc. (together, all plaintiffs are referred to as "Landmark"). I am a member of the Bar of the State of California. I make this declaration in opposition to defendants' request for discovery in connection with Landmark's pending motion for a dismissal pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, and specifically, to address certain of the matters set forth in the May 25, 2005 reply letter brief submitted by Peter L. Skolnik, counsel for defendants, in support of defendants' discovery request (the "Reply").

2. Defendants have taken the position that Landmark has a practice of bringing lawsuits to bully public critics into foregoing their beliefs that Landmark is a cult and then, when

confronted by discovery requests, withdrawing those suits. (See the April 4, 2005 letter to the Court from Peter L. Skolnik at 11.) I refuted that accusation in my declaration in support of Landmark's Rule 41 motion (at ¶¶ 27-32 and Exhibits I through L), in which I set forth the procedural histories and outcomes of the four lawsuits that Landmark has brought over its 14-year history in federal or state courts which constitute litigations against arguably "public critics."

3. In their Reply, defendants mischaracterize my prior declaration as being "untruthful" and/or as lacking "candor." (Reply at 5-6.) As General Counsel of Landmark, I am well aware of my obligations as an officer of the Court, and I honored those obligations.

4. Defendants base their insulting charges against me on three other domestic matters that defendants claim I should also have disclosed. However, as set forth below, none was "litigation against public critics" of Landmark -- the charge made by defendants and to which my declaration was addressed.

5. The matters cited by defendants are:

- 1) Name; Venue. Landmark Education Corp. v. Does 1-20, Superior Court of the State of California, Santa Clara County (cited in Reply at 5)
Docket Number. 01CV801252
Filing Date. September 2001
Claims. Interference with prospective economic advantage, defamation
Procedural History. Landmark brought a John Doe action and sought an order requiring an Internet Service Provider to disclose the identity of the author of a defamatory email concerning Landmark sent to Landmark's program participants. The court refused to decide Landmark's disclosure

application on an expedited basis. Three days later, on September 11, 2001, Landmark's New York City office in the World Trade Center, the company's largest office, was destroyed. Thereafter, Landmark made the decision to focus its resources on far more pressing internal concerns. It therefore withdrew its disclosure application and dismissed the action. This disclosure issue never ripened into a lawsuit "against a public critic of Landmark" or anyone else. Neither the author of the email nor any other defendant was ever served with process. Moreover, in light of the tragic circumstances, Landmark's withdrawal of the application could only be characterized as an abuse of the judicial system by someone who either declined to learn the facts or who willfully made false accusations.

2) Name; Venue. Landmark Education Corp. v. Garvey, Supreme Court of the State of New York, New York County (cited in Reply at 6)

Docket Number. 97/106465

Filing Year. 1997

Claims. Libel.

Procedural History. This "action" consisted of nothing more than Landmark purchasing an index number and filing a form summons that was never served and thus became a nullity after 120 days pursuant to New York law. I and Landmark's outside counsel of record searched our records to find all litigations necessary to include in my declaration. However, Landmark's outside counsel never opened a matter number for this summons and neither of us maintained any physical file concerning

this non-“action.” We simply did not know about Garvey when I signed my declaration and notwithstanding the existence of a summons, I still have no knowledge of such a litigation.

3) Name; Venue. Landmark Education Corp. v. Pressman, Superior Court of the State of California, San Francisco County (cited in Reply at 10)

Docket Number. 989890

Filing Year. 1997

Claims. Action to compel compliance with subpoena.

Procedural History. Defendants’ citation to this “action” as a litigation undisclosed by me is absurd. My prior declaration disclosed (at ¶ 30) Landmark’s lawsuit against the Cult Awareness Network (“CAN”). As the very exhibit on which defendants rely clearly shows (see Exhibit J to their Reply), as part of the CAN action Landmark obtained a commission from the Illinois court in which the action was pending to take the out-of-state deposition of a witness, Mr. Pressman, a California resident.

Pursuant to the Illinois commission, the California court issued a subpoena that was duly served on the witness. Mr. Pressman appeared for the deposition but refused to answer certain questions. The “action” cited by defendants was Landmark’s application to the California court for an order compelling responses to the discovery in the CAN case.

6. In short, none of the three “cases” that defendants cite even remotely supports defendants’ reckless assertion that I misrepresented facts or that Landmark is a “recidivist walk-away litigant.”

7. Defendants also criticize my declaration as disclosing only domestic actions. The letter of Deborah E. Lans dated June 10, 2005 addresses this issue and the other false and inflammatory points made by defendants' counsel.

Made this 10th day of June, 2005 in San Francisco, California.


Arthur Schreiber