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April 4, 2005

VIA HAND DELIVERY AND FACSIMILE (WITHOUT EXHIBITS)

Honorable Mark Falk, U.S.M.J.
United States District Court
United States Post Office & Courthouse
Room 457
1 Federal Square
Newark, NJ 07102

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

Dear Judge Falk:

This letter will respond to Deborah Lans's letter of April 1, 2005, in which Plaintiff Landmark Education LLC ("Landmark") seeks leave to file a motion to voluntarily dismiss its claims against the Defendants pursuant to Federal Rule 41(a)(2). Landmark seeks to have its own complaint dismissed in a format that could easily be mistaken for an April Fools prank; it proclaims that its suit initially had merit, repeating all of the baseless allegations and personal attacks on Mr. Ross contained in its complaint as if those allegations and canards are established fact. Indeed, in a letter that seeks to justify withdrawal of its complaint, Landmark insists that the various "charges" against Landmark contained on Defendants' website are "false" – but does so from the safety of a posture that avoids the obligation it would face in the litigation to *prove* falsity.

The very purpose of Rule 41's requirement that, absent a stipulation, "an action shall not be dismissed at the plaintiff's instance save upon order of the court *and upon such terms and conditions as the court deems proper*" (F.R.C.P. 41(a)(2); emphasis added) is "primarily to prevent voluntary dismissals which unfairly affect the other side and to permit the imposition of curative conditions." Gilbreth International Corp. v. Lionel Leisure, Inc., 587 F. Supp. 605, 614 (E.D. Pa 1983). For the reasons set forth below, Defendants will oppose Plaintiff's proposed motion and, pursuant to Rule 41(a)(2), seek "terms and conditions" of Landmark's dismissal, in the form of attorneys' fees, costs, and an order that provides persuasive authority upon which any future court in which Landmark brings a similar complaint can determine that Landmark should

be precluded from relitigating various of the claims and issues it has raised in the action it now seeks to dismiss with prejudice.

A. Background

Landmark is a privately-owned for-profit company that sells controversial large group awareness training programs to the public, at costs ranging from hundreds to thousands of dollars. "Werner Erhard," a/k/a Jack Rosenberg – a high school graduate and former used car salesman – was labeled by *Forbes Magazine* the "millionaire guru of est" by creating a course curriculum that is now the basis of "The Landmark Forum." Amidst extensive unfavorable media coverage, "Erhard" sold his company in 1991 to several employees, who then formed plaintiff Landmark Education. Landmark is now run by Harry Rosenberg, "Werner Erhard's" brother, and has paid substantial annual licensing fees to Erhard for his "est" (Erhard Seminars Training) "technology." The press has referred to that "technology" – as currently used by Landmark – as "brainwashing," "mumbo-jumbo," "drive-thru deliverance," and "culty"; and has categorized Landmark as among various "white collar cults." For as long as Landmark – and est before it – has been in business, Plaintiff has been widely and publicly criticized by many former participants and scholars for using methods that are described as "bullying," "harassing," "destructive," and "potentially dangerous." Many persons have complained that Landmark uses inappropriately aggressive recruiting techniques, and intimidates participants who wish to leave the program – or even use the bathroom, eat or take medication during the Landmark Forum.

The programs "Erhard" devised under the former "est" moniker were associated and/or linked – in articles appearing in the distinguished American Journal of Psychiatry – to "psychiatric disturbances" and "psychosis." Defendants are not aware of any peer-reviewed scientific studies that have ever been published to substantiate that the programs offered by Landmark produce any meaningful measured results.

Mr. Rick Ross, the founder and Executive Director of The Ross Institute, is an internationally known expert on cults and other radical, extreme and often unsafe groups, as well as an expert on many other controversial entities such as Landmark. Ross has lectured at some of the most prestigious universities and colleges in the country, including the University of Chicago, Rutgers, Carnegie Mellon, Baylor, and the University of Pennsylvania. He has been qualified and accepted as an expert witness in eight States regarding cults and cult behavior, and appears regularly in the national and international media – including service as a paid consultant for television networks in the United States (CBS), Canada (CBC) and Japan (Nippon). Mr. Ross, in response to requests for his services from individuals' families and/or friends who have identified and determined their concerns before contacting Ross, has conducted numerous interventions or "de-programmings."

Defendants operate the websites www.rickross.com, www.cultnews.com, and www.culteducation.com, which serve as an Internet-based educational database and archive that contains thousands of documents about hundreds of groups and leaders, and that permit visitors to both examine, without charge, information about cults, destructive cults, controversial groups and movements and many other entities, as well as to provide and discuss information, personal experiences and personal opinions about such entities. The Ross Institute database and archive contains, *inter alia*, court documents, news articles, wire service reports and personal testimonies about a wide range of controversial groups and movements. As such, it records the history of various groups and the controversies that have surrounded them.

In the course of operating the websites, Defendants receive various complaints concerning the groups about which they collect information. Many of those complaints are posted on the website in the form of bulletin board messages and personal stories. Mr. Ross receives more complaints about Landmark than any other group that he covers on the websites, and the reports he reviews confirm that Landmark can present an extreme danger to some of its participants. Less than a month ago, Mr. Ross received an e-mail from a woman seeking more information about Landmark after learning that events taking place in the Landmark Forum were apparently directly related to her sister's recent suicide.

There have been several lawsuits filed against Landmark in the past, including one currently pending in Oklahoma in which Landmark participation is alleged to be the proximate cause of a murder committed by a Landmark Forum attendee. Notably, Landmark requires all participants to sign a waiver of liability for any injury that may be inflicted by participation in the Landmark Forum; yet, astoundingly, Landmark has refused to produce this waiver form in discovery in this case. Nor would Landmark produce any of the evidence related to past lawsuits against it, or evidence that related to the psychological damage that Landmark has caused numerous participants in the past. The statements posted on Defendants' websites claiming that Landmark presents "risk of physical and/or mental/emotional harm to participants" (Lans Letter at 3) are *documented*; Landmark's desire to drop this lawsuit stems from their awareness that continued discovery would reveal that fact.

B. Landmark's Egregious Pattern of Instigating Meritless Defamation Lawsuits.

As we have previously expressed to Your Honor, Landmark's lawsuit is, and has always been, what is known in various American jurisdictions as a SLAPP suit: *i.e.*, a Strategic Lawsuit Against Public Participation; a lawsuit brought not for its merits, but for the specific purpose of silencing a vocal critic who is unlikely to have the financial resources to defend himself against a well-funded plaintiff. Indeed, as originally conceived, the lawsuit was not only brought to silence Mr. Ross, but to further chill the free speech activities of the users of Defendants' websites. By inventing the *fiction* that most or all of the allegedly disparaging comments come

not from anonymous third-party website users, but are instead disguised messages coming directly from Mr. Ross, Landmark developed the ploy by which it could claim it needed to discover the identities of the anonymous users and subpoena them. If Landmark had succeeded and word had spread that anyone posting a negative message about Landmark would be served with a subpoena, the vigorous free speech engaged in on Defendants' websites would have been effectively halted – and Landmark's litigation goals would have been largely achieved.

As Plaintiff concedes, its allegations that Mr. Ross has somehow fabricated most of the anonymous postings on the websites is based solely upon the undisclosed opinion of an unidentified so-called forensic linguistics expert, who has supposedly concluded that various anonymously signed writings were actually written by Mr. Ross. It goes without saying that it is fairly easy, even when subject to meticulous deposition and trial cross-examination, to find some expert to say just about anything. Comparatively speaking, getting an expert to merely aid a vexatious litigant in pushing the outer limits of the Rule 11 *pleading* requirements *is child's play*.

On a related matter, in seeking dismissal of this action, Landmark avoids the obligation to subject both its so-called experts and the opinions of its oft-quoted stable of praise-singers, upon whom Plaintiff relies yet again here (*see* Lans Letter at 4-6, and exhibits), to depositions or other discovery of their relationship with Landmark, and the circumstances and/or payments through which Landmark obtained these encomiums. Landmark has further avoided the requirement that these "experts" be subject to rebuttal experts, yet wishes the Court to all but conclude that their opinions are unassailable.

Nearly all of the statements upon which Landmark bases the allegations in its Complaint – and that Plaintiff repeats in its letter (at 2-3) – are matters of unverifiable opinion and are legally incapable of a defamatory meaning. Allegations based upon these statements were frivolous before Plaintiff filed its complaint, and no recent court decisions have changed the applicable law.

As will be explained below, Landmark seeks to withdraw its complaint not because of the recent decision in *Donato v. Moldow*, 374 N.J. Super. 475 (App. Div. Jan. 31, 2005), which bars only a small portion of Landmark's claims, but rather, because:

- Landmark did not anticipate that Mr. Ross, who makes some $30,000 - $40,000 a year, would be able to secure *pro bono* counsel who would vigorously defend against Landmark's meritless claims;

- After the parties exchanged deficiency letters, Your Honor, during the last status conference, advised Landmark's counsel that:

- the Court was not likely to grant any motion to reveal the identities of the anonymous posters – thwarting a major (and improper) litigation objective of Landmark;

- if motion practice for discovery ensued, Landmark would likely be required to produce documents that Landmark recognized would not only damage its case, but would further establish that its complaint was, from day one, brought in bad faith; and

- continued discovery might force Landmark to produce inculpatory documents it has previously protected by confidentiality orders – since the law is looking far less favorably on orders protecting the disclosure of evidence produced in litigation.

Chief among the documents Landmark seeks to protect are papers related to prior litigations – both prior defamation suits brought by Landmark against a series of other defendants; and prior lawsuits and other documents demonstrating that numerous individuals have made the very same allegations against Landmark that its Complaint in this action alleges "*simply could not be made by any person who had attended The Landmark Forum.*" (Complaint ¶ 19; emphasis added). Significantly, at the last status conference, the Court ordered Plaintiffs to turn over the docket numbers of the lawsuits identified in Defendants' document requests, yet Plaintiffs have, to date, failed to do so.

Based only upon those prior lawsuits *about which Defendants are aware*, it is indisputable that Landmark has, on multiple occasions, brought similar defamation and/or disparagement lawsuits against critics who have made some of the same allegations complained about here. For example, in *Landmark Education Corporation v. Conde Nast Publications, et al.* (NY Sup. Ct. Index No. 114814/93), Landmark alleged that Self Magazine published false and defamatory statements *inter alia*: that "Plaintiff 'uses mind-manipulation techniques without the consent or knowledge of the participants;'" (Self Complaint ¶ 18(b); *see also* 19(b)); that "Members have cut their ties to the outside world . . ." (*id.* ¶ 18(e)); that "Individuals who participate in The Forum are members of 'a cult.'" (*id.* ¶ 18(f); *see also* 19(l)); and that "Plaintiff has 'been the subject of complaints for activities that include: trance-induction; manipulative recruitment; thought reform or mind control; harassment of critics and their families and former followers; psychological and emotional damage . . . " (*id.* ¶ 18(g) *see also* ¶ 19). A copy of the Amended Verified Complaint in that matter is attached hereto as Exhbit A.

Landmark's complaint in this case asserts liability for almost identical allegations. Here, Landmark alleges:

- that "commentaries accuse Landmark of 'hypnotizing' and 'brainwashing' participants, attempting 'cult recruitment' and 'mind control' and of constituting 'cultish-ness.'" (Complaint ¶ 18)

- that "The Landmark Forum encourages participants 'to cut themselves off' from people who are not associated with the program;" (*Id.* ¶ 18(a))

- that "(1) Landmark's program make 'a deliberate assault on your mind;' . . . (4) Landmark's program are a 'form of mind control,' (5) Landmark's programs are 'downright dangerous' and 'destructive,' (6) Landmark's programs are designed to make participants 'vulnerable to suggestion;' (7) Landmark's programs have 'cult attributes;' and (8) Landmark's programs are a form of 'subtle brainwashing.'" (*Id.* ¶ 22)

Notably, Plaintiff's counsel, Deborah Lans, was counsel for Landmark in the Self Magazine litigation.

Next, in *Landmark Education Corp. v. Cult Awareness Network* (Cir Ct., Cook Cnty, IL, No. 94L-11478), Landmark brought a defamation and disparagement action against a non-profit cult information provider, and its executive director, Cynthia Kisser, for publishing statements that accuse Landmark of, *inter alia*, having "harmful effects," (CAN Complaint ¶8(b)), causing "psychological deterioration" (*id.*) and using "techniques of mind control." *Id.* ¶8(c). A copy of Landmark's CAN complaint is attached hereto as Exhbit B.

While the CAN suit was still pending, Landmark brought another libel action, *Landmark Education Corp. v. Singer* (N.Y. Sup. Ct., Index No. 102797/96), in which Landmark claimed to have been libeled by the author of the book, "Cults in our Midst." In that case, Landmark complained about assertions that it, *inter alia*, "causes and caused the participants of the Landmark Forum program to suffer nervous breakdowns," (Singer Complaint ¶26(d)), that Landmark "engages in brainwashing" and "harasses those participants who do not stay in the Landmark Forum program" (*id.* ¶26(f)), that "the Landmark Forum program uses coercive psychological influence on participants" (*id.* ¶26(g)), and "uses the same influence techniques as a cult." *Id.* ¶26(n). A copy of Landmark's Complaint in the Singer case is attached hereto as Exhibit C.

Yet again, in *Landmark Education Corp. v. Hachette Filipacchi Medias Group, et al.*, (N.Y. Sup. Ct., Index No. 115873/98), Landmark alleged that it had been libeled by an article in Elle Magazine that allegedly accused Landmark of, *inter alia*, "Engag[ing] in coercive thought reform" (Elle Complaint ¶14(d)), "engag[ing] in informal hypnotic processes" (*id.* at ¶14(k)), "us[ing] subtle coercive influence" (*id.* at ¶14(l)), and "engag[ing] in mind control and brain-washing." *Id.* at ¶ 14(n). In that case, the New York trial court granted the defendants motion

to dismiss for failure to state a cause of action. A copy of Landmark's Verified Complaint, and the Court's May 3, 1999 memorandum decision dismissing the complaint in the Elle suit, are attached hereto as Exhibit D.

The decision in the Elle suit, dismissing Landmark's complaint, was apparently an insufficient deterrent to discourage Landmark from bringing this equally meritless suit against Mr. Ross and the Rick Ross Institute. Upon information and belief, Landmark has never prevailed in *any* of the above-referenced lawsuits, or any other defamation or disparagement litigation. Indeed, legal victories are not Landmark's aim in bringing these suits; its real goal is to silence its critics, both those whom it has sued and those journalists and former Landmark participants who might otherwise engage in frank and sharp criticism of Landmark, but are fearful of being sued. Our understanding is that each of Landmark's prior lawsuits has ended in a court dismissal, a confidential settlement or, as Landmark seeks here, a voluntary dismissal. Upon further information and belief, Landmark typically walks away once the defendant puts up strenuous resistance. It is, however, difficult to assess the full extent of Landmark's abuse of the legal system: it has, without basis, refused to answer Defendants' interrogatory seeking information about the outcome of each of its prior lawsuits.

This lawsuit, against Ross and the Ross Institute, is *at least* the fifth lawsuit in which Landmark has raised baseless allegations about the comments people have repeatedly made about Landmark for some 15 years – comments that if taken to trial, would be proven to be true and/or shown to be matters of opinion that are incapable of having a defamatory meaning. Defendants' opposition to Landmark's proposed "walk-away" dismissal is an effort to have this lawsuit be the *last* lawsuit in which Landmark raises the same spurious allegations, and to have Mr. Ross be the *last* defendant subjected to Landmark's egregious abuse of process.

C. The Recent Decision in *Donato v. Moldow* Does Not Alter Plaintiff's Culpability in Bringing an Utterly Meritless Lawsuit.

Landmark's reliance on the recent decision in *Donato v. Moldow* as the basis for its sudden decision to drop its lawsuit is a diversionary tactic. As Plaintiffs readily admit, the central holding in *Donato* is that electronic bulletin board operators like Mr. Ross are, under the federal Communications Decency Act, not liable for statements posted by third-parties. Lans Letter at 9-10. However, the central thrust of Landmark's complaint is *not* that any of the statements on Mr. Ross's website were made by third-parties, and that Mr. Ross is *vicariously* liable for those statements. The overwhelming bases for Landmark's complaint are statements allegedly made by Rick Ross himself – whether they be statements that Landmark attributes to Mr. Ross or statements that were undeniably made by Mr. Ross. For example, Landmark's complaint alleges that:

- [D]efendants are engaging and have engaged in a campaign to portray Landmark's programs in a false light, fostering public confusion, suspicion and fear about Landmark's programs. Complaint ¶16.

- Many of these "visitor comments" are not truly authored by "visitors" at all, but rather are authored by or at the direction of defendants. *Id.* ¶20

- Many if not all of the discussion threads found on the "forum" section of defendants' web sites are not authored by chat room guests at all but rather are authored by or at the direction of defendants. *Id.* ¶27.

- [T]he structure and design of defendants' web sites imply defendants expert opinion that Landmark is a cult. *Id.* ¶ 30.

- Defendants refuse to Post Positive Material. *Id.* ¶¶33-35

Importantly, Landmark's letter completely glosses over the Complaint's allegations that Mr. Ross's statements to a) an Australian radio show, b) a Minneapolis news program, c) a Seattle radio program, and d) various statements on Defendants' website expressly attributed to Mr. Ross, were also false and disparaging. *See id.* ¶¶ 36-39.

Moreover, Plaintiff neglects to remind the court that the primary basis for its damages claim is an article appearing in a Montreal newspaper, *La Press*, which quoted Mr. Ross. *See id.* ¶¶41(a). None of the information produced by Landmark begins to establish that any registrant canceled because of what Mr. Ross said (as opposed to the several other people cited in the Canadian article), and any such damages that Landmark could establish (indeed, the only basis for its claim of proximately-caused damages) flow not from the "*Donato*-protected" website, but from Ross's non-internet speech. Special damages and actual economic injury are *required* to prove a product disparagement claim.

Further, Plaintiff disengenuously ignores all but its first cause of action (disparagement) – neglecting entirely to address its equally baseless claims for Tortious Interference with Ongoing Business Relations (Second Claim), Tortious Interference with Prospective Business Relations (Third Claim), Lanham Act violations (Fourth Claim), Consumer Fraud (Fifth Claim), Unfair Competition (Sixth Claim), and Prima Facie Tort (Seventh Claim). All of these other causes of action are allegations premised exclusively upon Defendants' purported intentional or fraudulent actions – *not* upon the passive act of publishing the statements of others that is immunized by the Communications Decency Act and the case law interpreting it, including

Donato.[1] As a whole, *Donato* impacted a relatively small subset of Plaintiff's Complaint. By Landmark's exclusive reliance upon *Donato* for its decision to withdraw its case, it implicitly concedes that none of the other claims upon which it brought this lawsuit had any merit to begin with.

D. The Court Should Carefully Consider, After Completion of Relevant Discovery and Upon Notice of Motion, the Terms and Conditions of the Dismissal of Plantiff's Complaint.

Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court *and upon such terms and conditions as the court deems proper.*" *Id.* (emphasis added). As stated by the court in *Gilbreth International Corp*, 587 F. Supp. at 614, "the purpose of Rule 41(a)(2) is primarily to prevent voluntary dismissals which unfairly affect the other side and to permit the imposition of curative conditions." In *Gibreth*, a patent case, the court said

> Where the dismissal sought is with prejudice, it has been stated that an award of attorney's fees is inappropriate unless the case is of a kind in which an attorney's fee might otherwise be ordered after termination of the case on the merits **or there are exceptional circumstances.**

Id. at 615 (emphasis added). *Accord, Aerotech, Inc. v. Estes*, 110 F.3d 1523 (10th Cir. 1997) (cited in Lans letter at 11 (". . .a defendant may not recover attorneys' fees when a plaintiff dismisses an action with prejudice *absent exceptional circumstances*") emphasis added)). In the

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[1] It is interesting that when Plaintiff previously disagreed with a decision of the New Jersey Appellate Division that interprets federal law, specifically, *Dendrite Int'l, Inc. v. Doe*, 342 N.J. Super. 134 (App. Div. 2001), Plaintiff was quick to urge that the decision's "reasoning [has not been] adopted by any federal court within this Circuit." *See* Letter of Deborah Lans, dated January 7, 2005 (arguing for discovery of the identities of anonymous posters on Defendants' website). In contrast, when Plaintiff finds itself an unlikely bedfellow of the New Jersey Appellate Division, and seeks the benefit of that court's interpretation of a different federal law issue to justify Landmark's decision to fold its tent and steal away into the night, it deems the decision virtually impervious to attack. *See* Lans Letter at 9-10.

Gilbreth case, the court, looking to both Rule 41(a)(2) and the fee shifting provision of the federal patent law,[2] which also provides for attorneys fees in exceptional circumstances, held:

> [b]ecause this Court has found this litigation to be such an exceptional case, one upon which the defendants would surely prevail after trial on the merits, the Court may condition even a voluntary dismissal with prejudice upon plaintiff's payment to defendant of its attorneys' fees and costs.

Id. Moreover, while Plaintiff surprisingly cites *Aerotech* for the undisputed proposition that attorneys' fees are "usually not" a proper condition of a voluntary dismissal with prejudice (Lans Letter at 12), Plaintiff perhaps hopes the Court will turn a blind eye, as Plaintiff has, to the Court's very next sentence:

> **OF COURSE, WHEN A LITIGANT MAKES A REPEATED PRACTICE OF BRINGING CLAIMS AND THEN DISMISSING THEM WITH PREJUDICE AFTER INFLICTING SUBSTANTIAL LITIGATION COSTS ON THE OPPOSING PARTY AND THE JUDICIAL SYSTEM, ATTORNEYS' FEES MIGHT BE APPROPRIATE.**

Aerotech, 110 F.3d at 1528 (emphasis added).

This is in accord with the Second Circuit case that Plaintiff also cites, *Colombrito v. Kelly*, 764 F.2d 122 (2d Cir. 1985), which noted similar circumstances in which the prevailing defendant could recover attorneys fees, even absent bad faith:

> Our reading of Rule 41(a)(2) does not altogether foreclose fees in the event of a dismissal with prejudice. Conceivably such an award might be one of the appropriate "terms or conditions" authorized by Rule 41(a)(2), **e.g., if a litigant had made a practice of repeatedly bringing potentially meritorious claims and then dismissing them with prejudice after inflicting substantial litigation costs on the opposing party and the judicial system.**

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[2] Notably, the Lanham Act, upon which the Plaintiff bases its Fourth Claim, has such a fee shifting provision (*see* Lanham Act § 35), and Defendants will seek attorneys' fees on the basis of having prevailed as to that claim.

Id. at 134-35 (emphasis added). The Second and Tenth Circuit's point in *Colombrito* and *Aerotech* could not be more relevant here, where 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.

Indeed, both *Colombrito* and *Aerotech* are in accord with the Third Circuit in recognizing another important exception to American Rule that generally disfavors fee shifting. That exception is the court's "inherent authority to award fees when a party litigates frivolously or in bad faith." *Colombrito*, at 133. *Accord, Ford v. Temple Hospital*, 790 F.2d 342 (3d Cir. 1986) (federal court authorized to "award counsel fees to a successful party 'when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."); *Aerotech*, 110 F.3d at 1529.

Furthermore, since the parties are in agreement that the Tenth Circuit's opinion in *Aerotech* provides persuasive authority here, it is important to discuss another of that court's holdings, this one regarding fee shifting under Rule 54(d)(1), for "Costs Other than Attorneys' Fees." That rule provides:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed *as of course* to the prevailing party unless the court otherwise directs . . . .

Id. (emphasis added).

In *Aerotech*, the district court had denied the defendant's request for costs after the plaintiff voluntarily dismissed its claim with prejudice. There, the lower court declined the award based upon the reasoning that plaintiff "terminated [the] litigation early in the litigation" and "the litigation was not initiated in bad faith or frivolously." *Id.* at 1527. The Tenth Circuit reversed, holding that "the district court abused its discretion in refusing to award [the defendant's] costs under Rule 54(d)," and noted that "[n]othing in Rule 54(d) or our case law suggests that we should penalize a party for prevailing early." *Id.* While the *Aerotech* court notes that a district court may decline to award the prevailing party costs if there is a "valid reason," the development in the law occasioned by the New Jersey Appellate Division's recent decision in *Donato v. Moldow*, would not be a "valid" reason for denying rule 54(d) costs under the law of the Third Circuit or the Tenth Circuit. Indeed, in *In re Paoli Railroad Yard PCB Litigation*, 221 F.3d 449, 468 (3d Cir. 2000), the Third Circuit expressly held that in reviewing the award of costs, the district court may only consider (a) "the prevailing party's unclean hands, bad faith, dilatory tactics, or failure to comply with process during the course of the instant litigation of the costs award proceeding" and (b) "each of the losing parties' potential indigency or inability to pay the full measure of costs award levied against them." Neither of these factors is remotely

relevant here. In contrast, "a district court may not consider (1) the losing parties' good faith in pursuing the instant litigation (although a finding of bad faith on their part would be a reason not to reduce costs); [and] (2) the complexity or closeness of the issues – in and of themselves – in the underlying litigation . . . ." *Id.*

In this case, Defendants' attorneys have thus far accrued fees in the amount of $275,690 and expenses in the amount of $7,476.58.[3]

In light of the reasons identified above, Defendants wish to be heard in opposition to Plaintiff's 41(a)(2) motion – and to seek the imposition of monetary conditions upon Plaintiff's proposed dismissal – on *at least*[4] the following four grounds:

1. Prevailing party attorneys' fees under §35 of the Lanham Act, which provides for reasonable attorneys fees in "exceptional cases" to the extent Defendants' fees were incurred in defending against Plaintiff's Lanham Act claim;

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[3] We leave for another day the question of how much of Defendants' expenses are "taxable costs" recoverable under Rule 54(d) and 28 U.S.C. § 1920. *See generally Paoli Railroad*, 221 F.3d at 457-458.

[4] Defendants' counsel are currently researching other avenues for the recovery of its attorneys fees and costs of defending this action.

In this regard, we note for the record that while we believed ourselves to be engaged in good faith negotiations with Landmark about the terms by which the parties would settle this matter and stipulate to a dismissal, we abruptly received, on the afternoon of Thursday, March 31, a letter from Ms. Lans giving Defendants 24 hours to decide if they would stipulate to the proposed walk-away dismissal. Quite literally, within a minute of sending an April 1, 4:25 p.m. e-mail to Ms. Lans (annexed hereto as Exhbit E) that attached a letter rejecting Plaintiff's form of stipulation, we received the fax of Plaintiffs' already-prepared 12-page letter to the Court advocating for the dismissal of its lawsuit. We note that Ms. Lans's fax bears an upper left hand corner time stamp of April 1, 4:25 p.m.

Putting aside the question of whether Plaintiff's counsel should be admonished or admired for her gamesmanship, the short amount of time Defendants have had to prepare this response to Plaintiff's exegesis underscores the need to resolve Plaintiff's application by formal motion, after careful consideration of a complete record and argument.

2. Attorneys' fees under Rule 41(a)(2);

3. Attorneys fees pursuant to the inherent authority of the court to grant attorneys' fees; and

4. Costs pursuant to Rule 54(d) and 28 U.S.C. § 1920.

Furthermore, while we had, from the outset of this litigation, intended publicly to vindicate Defendants' rights by an appropriately timed motion for summary judgment, we recognize the practical impossibility of continuing to litigate against an unwilling plaintiff. We further recognize that for Defendants, a dismissal with prejudice will be deemed a final adjudication, no different than a decision on the merits. *See Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 80 F.R.D. 103, 108 (S.D.N.Y. 1978) ("[A] dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant.").

However, while an award of attorneys' fees and costs may, in and of themselves, act to deter Landmark from continuing to engage in its pattern of bringing meritless defamation and disparagement lawsuits against anyone who would dare to speak out against it, it is a decision on the merits that is most likely to have a preclusive effect barring Landmark from litigating the same issues yet again against some future defendant.[5] Since a traditional decision on the merits is impractical at this juncture, we will request, in our opposition to Plaintiff's 41(a)(2) motion, that the court fashion a reasonable solution to this apparent dilemma.

The issue of what collateral estoppel effect any mere order of dismissal with prejudice has on a future litigation is, to the best of our knowledge, a largely undeveloped area of law. *See generally*

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[5] At least under New Jersey law,

> [c]ollateral estoppel may apply if the party asserting the bar demonstrates that: (1) the issue to be precluded is identical to the issue decided in the first proceeding; (2) the issue was actually litigated in the prior action, that is, there was a full and fair opportunity to litigate the issue in the prior proceeding; (3) the final judgment on the merits was issued in the prior proceeding; (4) determination of the issue was essential to the prior judgment; (5) the party against whom issue preclusion is asserted was a party to the prior proceeding.

Houbigant, Inc. v. Federal Insurance Co., 374 F.3d 192 (3d Cir. 2004) (citing *Pace v. Kuchinsky*, 347 N.J. Super. 202 (2002)).

18 Moore's Federal Practice § 132.03[2][l] (3d Ed. 2004). However, if ever there was a case that cried out to have future issue preclusive effect as to a particular Plaintiff, it is this one. We recognize, too, that this Court has no control over what a future court may do, should Landmark continue its persistent pattern of bringing the same baseless allegations over and over again. But this Court can, in its order of dismissal, take judicial notice of what it deems just and proper: *e.g.*, that Landmark had "a full and fair opportunity to litigate" but chose not to; that the "with prejudice" dismissal should be deemed the equivalent of a decision on the merits; and that every issue that Landmark could have raised in this litigation should be deemed to have been raised unsuccessfully. The special circumstances of this case merit an extraordinary remedy, and we would like an opportunity to address this issue more fully in opposition to Landmark's Rule 41(a)(2) motion.[6]

Further, before the Court grants leave for Plaintiff to bring its Rule 41(a)(2) motion, we would respectfully request that the Court resolve those of the parties' disputes over discovery items that are directly relevant to Defendant's attorneys' fees application, and to the issue of whether Plaintiffs have brought this lawsuit in bad faith. Since a status conference is already scheduled for this Wednesday morning at 11:00 a.m., we would respectfully ask that the Court address these issues at that time.

Respectfully submitted,

Peter L. Skolnik /nvl

Peter L. Skolnik

PLS:nvl

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cc: Paul J. Dillon, Esq. (via hand delivery and facsimile w/o exhibits)
Deborah E. Lans, Esq. (via e-mail and facsimile w/o exhibits)

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[6] This request, intended to benefit the public at-large, stems not from defense counsel's "messianic attitude," (Lans Letter at 1) but rather reflects the fact that Mr. Ross has dedicated his life to protecting people from dangerous groups like Landmark, and does not wish to agree to a stipulation that would allow Landmark to continue its assault on First Amendment rights by targeting future defendants with its oppressive litigation machinery.