COHEN LANS LLP

(212) 326-1704
clans@cohenlans.com

885 Third Avenue 32nd Floor New York NY 10022
T 212 980 4500 F 212 980 3448

May 5, 2005

VIA HAND

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 April 28, 2005 letter from Peter L. Skolnik, counsel for defendants, seeking discovery in connection with Landmark's motion for a Rule 41(a)(2) dismissal (the "Discovery Application"). A courtesy copy of Landmark's motion, being electronically filed today, is enclosed.

I. Discovery Is Not Available On A Rule 41 Dismissal Motion

In the only case we have located on point, the court held that discovery in connection with a Rule 41(a)(2) dismissal motion is improper even where, as there, dismissal is requested without prejudice. In Wilson v. Eli Lilly & Co., 222 F.R.D. 99 (D. Md. 2004), plaintiff sued numerous pharmaceutical companies for injuries she sustained as a result of her mother's ingestion of DES. Id. at 99. Plaintiff sought a voluntary dismissal without prejudice, which was opposed by several defendants on the ground that the claims asserted would be barred by the statute of limitations if litigated in the current forum, but might not be barred if plaintiff were to re-file in another jurisdiction with different rules concerning latent harm and discovery of the claims. Id. at 100. The court nevertheless granted plaintiff's motion, holding that to determine the viability of the limitations defense, defendants first would have to conduct discovery and:

> [t]o the extent that defendants seek to conduct discovery in aid of their objection to plaintiff's motion, I reject out-of-hand such an inappropriate approach to the determination of Rule 41(a)(2) motions.

Id. at 101.

II. Defendants Cannot Transform Plaintiffs' Rule 41 Motion Into Defendants' Rule 11 Application

Defendants allegedly seek discovery so as to prove to the Court that Landmark brought this action without a good faith basis because, defendants say, defendants' statements that Landmark is a cult that engaged in brainwashing are true. Defendants go so far as to invoke the possibility of Rule 11 sanctions. (Discovery Application at 8.) However, there is no Rule 11 motion before this Court, and defendants could not now so move in light of plaintiffs' Rule 41 application.[1]

Rule 11 states in relevant part:

> A motion for sanctions under this rule shall be made separately from other motions or requests . . .. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Fed. R. Civ. P. 11(c)(1)(A) (emphasis added). This Court, like every other federal court considering the issue, has often recognized that strict compliance with the "safe harbor" provision, is necessary before a court can grant a litigant's request for sanctions. See, e.g., Cannon v. Cherry Hill Toyota, Inc., 190 F.R.D. 147, 158-59 (D. N.J. 1999); Farris v. County of Camden, 61 F. Supp. 2d 307, 334 (D. N.J. 1999); Zuza v. Memoli, 1999 WL 1271644, at *3 (D. N.J. Dec. 8, 1999); National Kitchen Prods. Co. v. Butterfly Co., 1994 WL 391422, *8 (D. N.J. Apr. 5, 1994). Accord, Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1328 (2d Cir. 1995).

Defendants never served a Rule 11 motion or complied with the safe harbor provision. They cannot now, in the guise of seeking conditions under Rule 41(a)(2), litigate whether plaintiffs violated Rule 11. As Judge Bassler wrote in National Kitchen Prods. Co., 1994 WL 391422, at *9:

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[1] We believe defendants are in fact motivated by a desire to obtain materials to post on their websites.

> on account of [plaintiff's] voluntary withdrawal of portions of its claims against the defendants, the Court has issued no ruling as to the merit of those claims, and will not do so now. The Court encourages parties to police their own litigation practice to save time and expense for the Court and the parties. This is the very reason for the "safe harbor" provision in [Rule 11]. The Court applauds such conduct [the Rule 41 dismissal] and in no way finds it sanctionable. Under the circumstances of this case, it would be an abuse of Rule 11 for the Court to use [plaintiff's] withdrawal of portions of its Complaint as the instrument through which to issue sanctions. (Emphasis added.)

Since defendants cannot seek sanctions, no discovery in aid of a sanctions argument would be proper.

III. This Rule 41(a)(2) Dismissal Motion Is Not A Proper Vehicle For Litigating The Merits of Plaintiffs' Claims

Defendants also seek discovery on the ground that whether Landmark is a cult is relevant to whether (and what) conditions should be imposed on dismissal. (Discovery Application at 1-2.) First, there is no logical connection between the two issues. Second, there is no legal authority for the position that the merits of (or a plaintiff's alleged lack of good faith in bringing) an action are relevant to whether a court should impose conditions.

Since defendants indeed cite no authority on point, we assume that they rely instead, as they did in their April 4, 2005 letter to the Court, on cases which state that an award of attorneys' fees, although unavailable when plaintiff seeks a dismissal with prejudice (as Landmark has), might conceivably be imposed if "exceptional circumstances" were presented. See, Aerotech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997); Gilbreth Int'l Corp. v. Lionel Leisure, Inc., 587 F. Supp. 605 (E.D. Pa. 1983). Based on these cases, defendants argue that plaintiffs' alleged lack of good faith in bringing this action is such an exceptional circumstance. But: (1) there is no authority for this proposition; indeed, as discussed below, the law is to the contrary; and (2) there is no factual predicate for applying such an exception in this case. (See the Declaration of Arthur Schreiber submitted in support of Landmark's Motion For Rule 41(a)(2) Dismissal, which details the factual support for Landmark's claims.)

Furthermore, defendants would be wrong to argue that this "exceptional circumstance" exception supports their request for discovery concerning Landmark's bases for bringing this action. The rule against awarding attorneys' fees in connection with a dismissal with prejudice applies even when the defendant alleges bad faith by the plaintiff. In Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1966), plaintiff moved to dismiss his libel claims with prejudice. Id. at 831. Defendants requested an award of attorneys' fees on the basis "that the statements of defendants, which are the basis of these libel actions are true and privileged and that said actions are groundless and were brought and maintained by plaintiff in bad faith

vexatiously and for oppressive purposes." Id. The court denied the defendants' request, holding that, under the guise of establishing plaintiff's bad faith, defendants were seeking a trial on the merits that is not permitted in connection with a Rule 41 dismissal. Id. at 832.

The argument asserted by the defendants here is the same as that rejected by the court in Smoot. Because a Rule 41(a)(2) dismissal motion is an inappropriate vehicle for trying a defamation case on its merits, the discovery sought by defendants concerning the "truth" that Landmark is a cult and/or engages in brainwashing must be denied.

IV. The Discovery Requested By The Defendants

Even were these three doctrines not preclusive of the discovery requested by defendants, their Discovery Application should be denied, as unnecessary to determining the Rule 41 motion.

A. Landmark's History As A Defamation Plaintiff

Defendants maintain that "this suit perpetuates a pattern pursuant to which Landmark has repeatedly commenced [and then voluntarily withdrawn] frivolous litigation for the improper purpose of intimidating and silencing its most vocal public critics" (Discovery Application at 1). Defendants request discovery "related to Plaintiffs' litigation against other public critics of Landmark" (id. at 2).

All relevant information concerning Landmark's history of bringing lawsuits is set forth in Landmark's motion. The documents show that Landmark has never brought an action that it withdrew voluntarily (except, of course, in the context of a settlement). The documents also show that in three of the four cases Landmark brought, Landmark successfully defeated substantive motions challenging the sufficiency of Landmark's claims before the settlements were reached.

B. Lawsuits Against Landmark

Defendants seek discovery "related to lawsuits and arbitrations brought against Plaintiffs by persons claiming injury arising out of attendance at the Landmark Forum or arising out of the misconduct of Landmark leaders or employees." (Discovery Application at 2, emphasis added.) Defendants are not entitled to this discovery.

Defendants claim, first, that they want to show that Landmark was aware that some participants in Landmark's programs have claimed that the programs caused them psychological injuries. Defendants would have the Court thereby infer that Landmark did not have a good faith basis for alleging that defendants' website postings, calling Landmark a destructive and dangerous "cult" engaged in "brainwashing," are actionable. But, the merits of this action and Landmark's basis for commencing it are not issues that may be litigated on this Rule 41(a)(2)

dismissal motion. See above. Moreover, even assuming claims of personal psychic injury were made by participants, the existence of such claims would hardly prove that Landmark acted in bad faith in bringing this action asserting the falsity of defendants' specific claims that Landmark is a "cult" involved in "brainwashing."

Second, defendants claim that suits by Landmark attendees arising out of "misconduct" by Landmark employees, is relevant to this motion. Indeed, defendants' Discovery Application goes on for three pages (at 6-8) about an action brought by Tracy Neff, who alleged that a Landmark center manager (a person holding an administrative position having nothing whatsoever to do with the delivery of programs) had raped her and that Landmark had negligently hired and retained the employee. Landmark settled that action and fired Ms. Neff's assailant. Landmark's complaint in this action makes no reference to the Neff lawsuit or facts. The incident itself obviously does not bear on whether participation in Landmark's programs cause psychic harm. Defendants' 3-page exegesis on the Neff case is simply and no more than an obvious, inappropriate attempt to prejudice the Court with irrelevant information.

C. **Informal Complaints**

Defendants seek discovery concerning informal complaints: (1) concerning whether Landmark is a dangerous and destructive cult and/or engaged in brainwashing; (2) as to psychiatric problems alleged to have resulted from attendance at the Landmark Forum; and (3) made by Landmark's own employees regarding Landmark's policies and business methods. (See Discovery Application at 2-3.)

No such discovery is relevant to Rule 41(a)(2) conditions. The fact that other persons may have complained about Landmark in the past does not bear on any issue relevant to conditions nor even to Landmark's alleged bad faith in bringing this action. Unadjudicated, informal complaints, moreover, have no probative value.

D. **Application Materials**

Defendants seek discovery of "Landmark's warnings to and screening of applicants" (Discovery Application at 2), purportedly to demonstrate that Landmark "knew that the Landmark Forum was potentially dangerous" when Landmark brought this action.[2]

There is no issue in this case as to whether Landmark's programs are, in some abstract way, "dangerous." Landmark's main contention is that defendants' accusation that Landmark is a "dangerous cult" engaged in "brainwashing" is false. The fact that Landmark recognizes

[2] Landmark warns its applicants that its programs -- which focus on issues of interpersonal relations -- can be stressful and screens applicants to determine whether they have a history of emotional instability.

through its warnings and screening procedures that its programs are rigorous and not appropriate for everyone has no bearing on Landmark's good faith in challenging defendants' accusations.[3]

V. Conclusion

For the foregoing reasons and based on the facts and law set forth in Landmark's Rule 41(a)(2) dismissal motion, Landmark respectfully requests that defendants' Discovery Application be denied. If, however, the Court is inclined to order discovery, it should not do so based on an exchange of letters. Rather, Landmark believes that the better practice would be for the Court to require defendants to make a formal motion for the discovery they seek, which would result in the creation of a proper record from which, if necessary, a party could appeal.

Respectfully,

Deborah E. Lans

Enclosures

cc: Peter L. Skolnik, Esq.
Paul J. Dillon, Esq.

[3] Defendants also seek to discover Landmark's training manuals "including but not limited to the Forum Supervisors Manual, Forum Production Supervisors Manual and the Forum Registration Manual" (Discovery Application at 3 and 9). As explained in detail in Landmark's January 6, 2005 letter to the Court, Landmark's training manuals are highly sensitive, confidential, trade secret materials. Obviously, the manuals have no bearing on whether dismissal with prejudice of Landmark's complaint should be conditioned on payment of fees.