UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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
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,"	:	Honorable Mark Falk
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A VOLUNTARY DISMISSAL

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PRELIMINARY STATEMENT

Plaintiffs Landmark Education LLC, Landmark Education International, Inc. and Landmark Education Business Development, Inc. (together, "Landmark"), respectfully submit this memorandum of law in support of their motion for dismissal of this action pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. This Memorandum demonstrates that the Court should grant dismissal, with prejudice but without any further conditions.

STATEMENT OF FACTS

I. Background

Landmark Education LLC ("Landmark Education") is an employee-owned company that delivers educational programs to the public in the United States. (See the accompanying Declaration of Arthur Schreiber dated May 3, 2005 at ¶ 3 (the "Schreiber Decl.").) Landmark Education International, Inc. ("Landmark International") delivers Landmark Education's programs to the public in twenty-three other countries. Id. Both companies commenced operations in 1991. Id.

Landmark Education offers a four-part Curriculum For Living. (Schreiber Decl. at ¶ 3.) The basic program is the Landmark Forum, a three-day program (plus one follow-up evening session). Id. The curriculum is directed to enhancing communication, creativity and productivity. Id. Landmark Education's courses are sold to individuals. Id. To date, more than 820,000 people have participated in

Landmark Education and Landmark International programs. Id. Graduates of Landmark's programs include highly credentialed individuals such as: Sir Christopher Ball, University of Derby Chancellor Emeritus; Bill Bradbury, State of Oregon, Secretary of State; Paul Fireman, Reebok International Ltd., Chief Executive Officer; and The Honorable Moody Tidwell, United States Federal Court of Claims, to name just a few. Id. In addition, many businesses seeking to improve performance, creativity and organizational effectiveness, including Fortune 500 companies such as IBM and public sector entities such as the United States Postal Service, encourage their employees to attend the Landmark Forum by reimbursing them for the cost of tuition. Id. Landmark Education is an accredited member of the International Association for Continuing Education and Training, and people who participate in Landmark Education courses receive continuing education units. Id.

Landmark Education Business Development, Inc. ("LEBD") which commenced operations in 1993, is a global consulting firm providing services directly to corporate customers and public sector entities. (Schreiber Decl. at ¶ 4.) LEBD's engagements encompass a full range of consulting services: strategic planning sessions, building and coaching high-performance executive and management teams and implementing large-scale initiatives in workforce mobilization. Id. Private corporations which have used LEBD's services include

athletic and fitness giant Reebok International and UNUM, the leading provider of group disability insurance. Other LEBD clients have included Magma Copper Company, New Zealand Steel, various public utilities and numerous small, high growth companies in sectors such as health care. Id.

Defendant Rick Ross is a self-styled expert on cults. (Schreiber Decl. at ¶ 5.) Ross earns a livelihood as an expert witness and by conducting "de-programmings" for the families of cult members. Id. In 1976, Ross was convicted of conspiracy to commit grand theft. Id. In 1995, he was found civilly liable for $3,375,000 on account of his tortious abuse of an individual in the course of "de-programming" him. Id. Defendant The Ross Institute is a recently-formed not-for-profit entity. Id. Defendants operate Internet websites promoting Ross's alleged expertise and offering a "database" of information about cults. Id. Ross has never attended any Landmark program, despite Landmark's having invited him to do so. Id.

Defendants constantly conflate Landmark and its programs with programs delivered in the 1970s and 1980s by Werner Erhard, popularly known as "est." (Schreiber Decl. at ¶ 6.) Defendants are either being deliberately misleading or grossly negligent in doing so. Id. When Landmark Education was founded in January 1991, it licensed certain program materials from Werner Erhard & Associates. Id. In the 14 years since, Landmark Education's programs have

evolved into very different offerings from those early materials. Id. Landmark Education has never paid Erhard under the license agreements (he assigned his rights to others). Erhard has no financial stake in Landmark. Id. Indeed, he has never had any financial interest in Landmark and does not now serve, and never has served, as an officer, director, employee of or consultant to Landmark. Id.

II. The Bases of Landmark's Complaint

Landmark's complaint stems from defendants' posting of disparaging materials on their websites about Landmark's educational programs (and linking Landmark to est), defendants' refusal to post positive materials about Landmark's programs, and defendants' false statements about Landmark's programs published in the media. (Schreiber Decl. at ¶ 7.) The false charges include likening Landmark's programs to "cults," representing that participants in the programs are subject to "hypnosis," "brainwashing" or "mind control" and stating that the programs are "destructive" and "dangerous." Id.

Landmark's complaint alleges seven causes of action, sounding, inter alia, in product disparagement and tortious interference. (Schreiber Decl. at ¶ 8.) The common elements of Landmark's claims are that the comments, stories and discussion threads posted by defendants on the websites concerning Landmark are false and derogatory statements of fact that have damaged Landmark. Id. At the

time it filed this action, and now, Landmark has strong factual support for its position. Id.

A. Defendants' Postings Are False

Landmark has considerable proof that defendants' charges that it is a cult and that it hypnotizes, brainwashes and/or exercises mind control over participants are untrue. As set forth in great detail in the Schreiber Declaration, numerous experts on cults, psychiatrists and psychologists, members of the clergy and highly-successful graduates have gone on record that Landmark is not a cult and that its programs, quite to the contrary, are extraordinarily beneficial. (See Schreiber Decl. at ¶ 10.) Additionally, studies conducted by such reputable institutions as the University of Southern California Marshall School of Business and The Talent Foundation attest to the value that Landmark provides to individuals and business consumers. Id (describing these and other studies).

B. Defendants' Postings Are Derogatory

The test to determine whether a statement is derogatory is the fair and natural meaning that will be given to the statement by reasonable persons of ordinary intelligence taking into consideration the context in which the statement is made. DeAngelis v. Hill, 180 N.J. 1, 14-15 (2004). The fair and natural meaning given by persons of ordinary intelligence to the allegation that a group is a "cult," appearing on a database of allegedly "destructive" groups, is inarguably

derogatory. See Landmark Education Corp. v. The Conde Nast Publication, Inc., 1994 WL 836356 (Sup. Ct. N.Y. Co. July 7, 1994) (copy of decision attached as Exhibit F to the Schreiber Declaration); New Testament Missionary Fellowship v. E.P. Dutton & Co., 112 A.D.2d 55 (1st Dep't 1985) (allegations that a group is a cult and that it engages in mind control are libelous per se).

C. Defendants' Postings Are Misstatements of Fact, Not Opinion

Landmark believes, and decisions have specifically held, that the allegation that an organization is a "cult" and "brainwashes" or exerts "mind control" over participants is a statement of fact that is capable of being proven either true or false. Landmark Education Corp. v. The Conde Nast Publication, Inc., 1994 WL 836356 (Sup. Ct. N.Y. Co. July 7, 1994) (Schreiber Decl. Exhibit F); New Testament Missionary Fellowship v. E.P. Dutton & Co., 112 A.D.2d 55 (1st Dep't 1985).

Landmark has been prepared, as its Rule 26(a)(1) disclosure states, to offer expert testimony as to: (a) the characteristics of cults; (b) the fact that Landmark is not a cult; and (c) the fact that Landmark's programs do not use brainwashing techniques. First, experts agree that to be a "cult," an entity must possess certain characteristics and that "brainwashing" involves definable activities. For example, as described by one expert:

> [a cult] is a religion or religion-like sect generally considered to be extremist or false, with its followers believing or living in an unconventional manner under the guidance of an authoritarian or charismatic leader. There is a special reverence or devotion to such person. There is often a non-scientific method or regimen claimed by its originator or proponent to have exclusive or exceptional power. In a cult, there is an inculcation or indoctrination of a new idea to displace participants' usual, familiar and conventional ideas by subjecting them to repetitive instruction, indoctrination, sense of duty, etc. Similarly, brainwashing involves (1) intensive, forcible indoctrination aimed at destroying a person's basic convictions and attitudes and replacing them with an alternative set of fixed beliefs; and (2) the application of a concentrated means of persuasion, such as repeated suggestion, in order to develop a specific belief or motivation. Necessarily involved are a kind of physical entrapment, power to inflict harm or detrimental effects, and secluding one from contact with friends and family.

(Schreiber Decl. at ¶¶ 13-14.)

Second, as set forth in detail in the Schreiber Declaration (at ¶¶ 10 and 13-14), highly-credentialed experts on cults and mind control, psychiatrists and

psychologists have opined that Landmark is not a cult and does not employ any brainwashing or mind control techniques.

Landmark's Rule 26(a)(1) disclosure (the "Rule 26 Disclosure") is attached to the Schreiber Declaration as Exhibit G. Section B identifies Landmark's witnesses. Other witnesses listed thereon as persons capable of refuting defendants' charges against Landmark included, among others, members of the clergy, law enforcement and health care professionals. (See the Rule 26 Disclosure, Section B, identifying witnesses.)

D. Landmark Has Suffered Damages

Landmark brought this action both to recover for damages suffered and in the hope that defendants would reconsider the one-sided nature of their postings. Landmark has produced to defendants information as to damages, including documentation concerning a number of individuals who cancelled their registration in Landmark's programs as a result of defendants' actions. (Schreiber Decl. at ¶ 16.) Furthermore, defendants' own websites contain proof of damages. For example, numerous postings on defendants' websites contain statements to the effect that the author or someone known to the author opted not to participate in the Landmark Forum after reviewing information found on defendants' websites. Id.

E. The Authorship of The Posts on Defendants' Websites

Landmark has long suspected that Ross, for his own self-serving purposes, has himself authored certain of the more damning comments, stories and discussion threads posted on defendants' websites. (Schreiber Decl. at ¶ 17.)

Prior to filing the complaint, Landmark, through counsel, consulted a noted forensic linguist, Dr. Gerald McMenamin, who has qualified as an expert in numerous federal and state courts to opine on issues concerning questioned authorship. (Schreiber Decl. at ¶ 18.) This expert was presented with: (1) a sampling of the admitted writings of Mr. Ross; and (2) a sampling of the "visitor comments," and "personal stories" from defendants' websites concerning Landmark. Id. Dr. McMenamin, after study of the material, concluded that the latter materials, though posted as anonymous third-party submissions on defendants' websites, were in fact authored by Mr. Ross. Id. Landmark's complaint, thus, was based in part on statements made by Mr. Ross himself (including statements deceitfully posted by defendants as having been authored by others) and on defendants' selective selection of the materials they posted, which eliminate Landmark-favorable materials. Id.

III. The State of The Law When This Action Was Commenced

Landmark commenced this action in June 2004. (Schreiber Decl. at ¶ 19.) At that time, there was no case from any court within the Third Circuit or the New

Jersey state court system addressing the applicability to website hosts of the immunity granted by the Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (the "CDA") from state-law tort liability arising from statements authored by persons other than the defendant but republished on the Internet by the defendant.[1] Specifically, the relevant unsettled legal questions concerned whether (1) Internet websites such as those operated by the defendants are entitled to the same immunity granted to Internet service providers ("ISPs") such as America Online; and (2) if so, whether that immunity is negated where website hosts such as the defendants edit the content provided to the website or take an active role in the selection of the third-party content that is included thereupon.[2]

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[1] The CDA creates special legal rules and preempts state tort laws concerning statements published on the Internet. There is no doubt that these defendants could be held liable for republishing derogatory information concerning Landmark's programs offered by others if they had done so in a magazine or newspaper, or on television or radio.

[2] The CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." The CDA defines "information content provider" as any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. 47 U.S.C. § 230.

Notably, defendants' answer, filed in September 2004, did not assert the CDA as a defense to Landmark's claims. (Schreiber Decl. Exhibit H.)

Landmark was prepared to urge this Court to hold that defendants are not providers of an "interactive computer service" because, unlike ISPs, by operating websites they do not "enable computer access by multiple users to a computer server" and because, unlike ISPs, they have full control over the third-party content that they permit to be posted and therefore are not entitled to claim the same limited protection that Congress intended to provide to ISPs who do no more than act as mere conduits for information. Landmark was also prepared to urge this Court to hold, if it found that the CDA applies to website operators, that the immunity is lost if the defendants edited or engaged in active selection of the third-party content appearing on their websites because those actions cause them to become "information content providers" under the definition set forth in the CDA.

IV. The January 2005 Change In The Law -- Donato v. Moldow

On January 31, 2005, the Appellate Division of the Superior Court of the State of New Jersey handed down a decision that forecloses the arguments sought to be made by Landmark concerning the non-applicability of the CDA to its claims against the defendants. See Donato v. Moldow, 374 N.J. Super 475 (App. Div. 2005).

Donato considered the potential liability of a website based upon allegedly actionable messages posted anonymously by others, id. at 479, and is thus exactly on point. The Appellate Division affirmed the trial court's grant of a dismissal in favor of the website operator defendant. Id. Noting the lack of any controlling authority in New Jersey, the court looked to decisions from other jurisdictions. Id. at 487. The court held that website operators are providers or users of "interactive computer services" such that the CDA's grant of immunity for publications by third parties applies to them, id. at 487-89, and that a website operator does not become an "information content provider" such as to negate that immunity by actively participating "in selective editing, deletion and re-writing of anonymously posted messages," or by controlling the "'content of the discussion' by posting messages of his own, commenting favorably or unfavorably on messages posted by others, selectively deleting some messages while allowing others to remain, and selectively banning users whose messages he deems disruptive to the forum." Id. at 497-99. Moreover, the court held that immunity was not negated by the fact that the website operator actually harbored ill-will toward the plaintiff because, irrespective of defendant's motive, plaintiff had not alleged any acts outside of the traditional publisher's editorial functions. Id. at 500.

Notably, in February 2005, after Donato was published, counsel for defendants requested that Landmark stipulate to permit defendants to amend their answer to assert the CDA as an affirmative defense. (Schreiber Decl. at ¶ 24.)

Although Landmark may still be able to pursue claims based upon certain of the website postings whose "anonymous" or allegedly identified author is in fact Ross, Donato leaves Landmark without any viable cause of action as to the remainder of the derogatory posts. Further, for Landmark to prove that its damages flowed from a third-party's receipt of a Ross-authored post rather than a post actually authored by a third-party as to which defendants have immunity -- a distinction not previously important but now a likely prerequisite to recovery of damages -- would be extraordinarily difficult, if not impossible.

Landmark has, since the Donato decision, considered its options in this matter. (Schreiber Decl. at ¶ 26.) While Landmark believes that Donato is incorrectly decided and the relevant courts may eventually reject its holdings, at the same time, Landmark, an educational institution, does not perceive its mission to be well served by a protracted and costly legal fight on this issue. Id.

V. Additional Relevant Facts

In connection with Landmark's request to Magistrate Judge Falk for permission to make this motion, defendants took the position that Landmark was in the practice of bringing lawsuits to bully members of the public into foregoing

their beliefs that Landmark is a cult and then, when confronted by discovery requests, withdrawing these suits. (Schreiber Decl. at ¶ 27.)

The claim is false, on a number of fronts. (Schreiber Decl. at ¶ 28.)

First, Landmark is not in the practice of bringing lawsuits at all. (Schreiber Decl. at ¶ 29.) In the 14-year history of the three plaintiffs, apart from this action, they have brought all of four actions in the federal and state courts of the United States. Id. Landmark takes deep pride in its programs and the value the programs provide to participants. Id. In each of the four cases Landmark sued to obtain correction of false accusations against it of being a cult and/or engaged in brainwashing. Id.

In three of the four cases, we engaged in discovery on the merits and defeated substantive motions (to dismiss or for summary judgment) brought by the defendants. In each of those three, Landmark's claims were validated by settlements made by the defendants. (Schreiber Decl. at ¶ 29.) In the fourth, Landmark's claim was dismissed on New York pleading grounds and it chose not to appeal. Id. The last of the cases was filed in 1998, i.e., six years before this action was filed. Id. (See also Schreiber Decl. ¶ 30 and Exhibits I through L.)

PROCEDURAL HISTORY

The complaint was filed on June 25, 2004 and served on July 13, 2004. (See the accompanying Declaration of Gary I. Lerner dated May 2, 2002 (the "Lerner

Decl.") at ¶ 2.) The Rule 16(f) conference was held on November 22, 2004. Id. On December 10, 2004, the parties exchanged Rule 26(a)(1) statements. Id. Plaintiffs' statement was 15 pages long and listed, among others, 66 potential witnesses, including 16 who would speak to damages. Id. Plaintiffs served document requests and interrogatories on defendants and defendants served two sets each of document requests and interrogatories on plaintiffs. Id.

The parties, prior to the Rule 16(f) conference, had begun to discuss the manner in which electronic materials would be produced -- in electronic or paper form and, if the latter, in which format. (Lerner Decl. at ¶ 3.) The question of format was never resolved. Id. As a result, when each party made its initial production, only paper documents were produced. Id. Plaintiffs produced 1,392 pages and responded to both sets of defendants' interrogatories. Id. Defendants produced 325 pages in all in an initial and a supplemental production. Id.

Each party raised certain objections to discovery. (Lerner Decl. at ¶ 4.) During January 2005, those objections were discussed. Id. Some were resolved, others were not. Id. A conference with Magistrate Judge Falk was held on February 9, 2005. Id. As a result of the conference, the parties undertook to present the remaining discovery controversies by motion. Id.

The discovery motions were not, however, made, as plaintiffs sought permission to dismiss the case shortly thereafter. (Lerner Decl. at ¶ 5.)

As of the time when plaintiffs sought to dismiss, neither defendants nor plaintiffs had produced any electronic documents or other electronic materials, neither defendants nor plaintiffs had produced any materials pursuant to the negotiated understandings, and the parties had not yet prepared motions which would resolve the remaining issues. (Lerner Decl. at ¶ 6.)

ARGUMENT

THE LAW AS TO VOLUNTARY DISMISSAL

To dismiss an action voluntarily after an answer has been filed, plaintiff must obtain the defendant's consent or an order for from the court. Fed. R. Civ. P. 41(a)(2).

The decision to permit a dismissal without prejudice is within the sound discretion of the Court; by contrast, where the plaintiff seeks dismissal with prejudice, and accordingly the dismissal will be a bar to a further action on point between the parties, the Court should not refuse to order such a dismissal and thereby force an unwilling plaintiff to go to trial. Photocomm Corp. v. Novell Advanced Servs., Inc., 171 F. Supp. 2d 459, 471 (E.D. Pa. 2001); Spring City Corp. v. American Buildings Co., 1999 WL 1212201, at *1-2 (E.D. Pa. Dec. 17, 1999). Accord, Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964) ("[w]e know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to

dismiss his action with prejudice, the client being agreeable"); Shepard v. Egan, 767 F. Supp. 1158, 1165 (D. Mass. 1990) (same); 9 Fed. Prac. & Proc. Civ. 2d § 2364 (same).

In connection with Landmark's request to Magistrate Judge Falk for permission to make this motion, defendants conceded that Landmark cannot be forced to litigate but sought to have the Court condition the dismissal. It is to the two conditions requested by defendants that this memorandum of law now turns.

A. Dismissal Should Not Be Conditioned On Payment of Attorneys' Fees

Defendants seek an award of legal fees as a condition of dismissal. Although it is not uncommon for courts to award attorneys' fees to the defendant when a voluntary dismissal is without prejudice, such an award is not proper where the plaintiff seeks a dismissal with prejudice. Sokoloff v. General Nutrition Cos., 2001 WL 536072, *3 n.2 (D. N.J. May 21, 2001) ("the award of attorney's fees is not appropriate under [Rule 41] when an action is voluntarily dismissed with prejudice"); Horizon Unlimited, Inc. v. Silva, 1999 WL 675469, at *2 (E.D. Pa. Aug. 31, 1999) (same); Selas Corp. of Am. v. Wilshire Oil Co. of Tx., 57 F.R.D. 3, 7 (E.D. Pa. 1972) (same). Accord, 9 Fed. Prac. & Proc. Civ. 2d § 2366 (same).

The reason for this rule is explained by the Tenth Circuit:

> When a plaintiff dismisses an action without prejudice, a district court may seek to reimburse the defendant for his attorneys' fees because he faces a risk that the plaintiff will refile the suit and impose duplicative expenses upon him. . . . In contrast, when a plaintiff dismisses an

> action with prejudice, attorneys' fees are usually not a proper condition of dismissal because the defendant cannot be made to defend again. [Citation omitted.]

Aerotech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997). See also, Cauley v. Wilson, 754 F.2d 769 (7th Cir. 1985) (same); Colombrito v. Kelly, 764 F.2d 122 (2d Cir. 1985) (same); Machne Menachem, Inc. v. Hershkop, 2003 WL 1193528, *2 (E.D.N.Y. Jan. 31, 2003) (same); Sovereign Partners Ltd. P'ship v. Restaurant Teams Int'l, Inc., 2001 WL 30665 (S.D.N.Y. Jan. 12, 2001) (same); York v. Ferris State Univ., 36 F. Supp. 2d 976 (W.D. Mich. 1998) (same); Horton v. Trans World Airlines Corp., 169 F.R.D. 11 (E.D.N.Y. 1996) (same); Murdock v. Prudential Ins. Co., 154 F.R.D. 271 (M.D. Fla. 1994) (same).[3]

The rule against awarding attorneys' fees in connection with a dismissal with prejudice applies even when the defendant alleges bad faith by the plaintiff. Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1966). In Smoot, the plaintiff sought to dismiss his libel claims against the defendants with

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[3] An award of attorneys' fees would be inappropriate here even if the Court were to look to the factors considered in connection with a without-prejudice dismissal: (1) the degree to which defendant would face duplicative expense in a second litigation; (2) the effort and expense incurred by a defendant in preparing for trial; (3) the extent to which the pending litigation has progressed; and (4) the movant's diligence in seeking dismissal. United States v. Omega Institute, Inc., 25 F. Supp. 2d 510, 515-16 (D. N.J. 1998). First, as the dismissal will be with prejudice, defendants face no risk of a duplicative litigation. Second, this action is still in its earliest stage. Document discovery is not complete. There have been no depositions, no discovery motions and no dispositive motions. Finally, Landmark moved for dismissal expeditiously, after taking a short time to analyze the Donato decision and its options.

prejudice. Id. at 831. The 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 inconsistent with a Rule 41 dismissal. Id. at 832. The court also explained that defendants' request impermissibly sought to turn the Rule 41 motion into an action for damages for malicious prosecution. Id. Specifically addressing the availability of attorneys' fees in connection with a Rule 41 dismissal, the court stated:

> The cases permit allowance of attorney's fees against the dismissing party where the action is dismissed without prejudice. . . . The reasoning behind the rule where the action is dismissed without prejudice is to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum. . . . A dismissal with prejudice, however, finally terminates the cause and the defendant cannot be made to defend again.

Id. at 833 (citations omitted).

Defendants seek to avoid the prevailing rule by relying on dicta in two cases that "exceptional circumstances" might exist on which an award of attorneys' fees might be appropriate in a Rule 41(a)(2) with-prejudice dismissal case if "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 . . ." Aerotech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997); Colombrito v. Kelly, 764 F.2d 122, 134 (2d Cir. 1985). We note in this respect: (1) no case in this Circuit has even raised the possibility of such an exception, much less endorsed it; (2) in the two cases which mention the possibility in dicta, no fees were awarded; and (3) there is no factual predicate for applying such an analysis here.

A plaintiff is entitled to seek redress in the courts for injury to reputation and good will.[4] Landmark has exercised that right on a limited number of occasions. In the 14-year history of the three plaintiffs, apart from this action, a total of four actions have been brought in the federal and state courts of the United States. In three of the four, Landmark defeated substantive motions brought by the defendants and its claims in those cases were validated by settlements made by the defendants. In the fourth, Landmark's claim was dismissed on New York pleading grounds and it chose not to appeal. Landmark has never sought a dismissal, except of course in tandem with settlement. Thus, Landmark's litigation track record, if four cases a track record make, is largely successful in result and does not in any way support the notion that Landmark abuses the system. To the contrary, Landmark should be praised, not penalized, for this single instance of voluntary

[4] Indeed, the failure to confront defamation can cause such harm to reputation that, among other things, a plaintiff's attempts to confront subsequent defamation become substantially more difficult (and perhaps impossible).

dismissal based as it is upon a change in applicable law which renders Landmark's claims in large part no longer viable. Landmark's motion, while saving it from its own costs of continuing this action, confers the same benefit on both defendants and the judicial system.

Interestingly, the court in Colombrito found no "exceptional circumstance" sufficient to award attorneys fees in connection with a voluntary dismissal with prejudice even where there had been a previous voluntary dismissal. Colombrito v. Kelly, 764 F.2d 122, 134 n.8 (2d Cir. 1985). In Colombrito, a member of the "Unification Church" sued a de-programmer for civil rights violations. In connection with plaintiff's motion for voluntary dismissal, the court stated:

> Although [the district court] made findings about the existence of another case brought by a Unification Church Member . . . against [defendant] that was dropped and about an organized movement by cultists to drive [defendant] out of the deprogramming business, these findings do not suffice to demonstrate that this action was brought only to harass [defendant] rather than to pursue to judgment non-frivolous claims against him. . . . The prior discontinuation of one other suit against [defendant] by a Church member does not reveal a pattern of Church-controlled suits brought without the intention of pursuing the claims to judgment.

Id.

B. The Dismissal Order Should Not Make Findings of Fact

Defendants also seek a dismissal order that would preclude Landmark from ever again seeking to protect its reputation and good will in any subsequent judicial forum. To that end, defendants wrote to Magistrate Judge Falk that they would

request language in the dismissal order: (1) taking "judicial notice" that Landmark had a full and fair opportunity to litigate but chose not to do so; (2) deeming the dismissal to be the equivalent of a decision on the merits; and (3) deeming that every issue that Landmark could have raised in this litigation should be deemed to have been raised unsuccessfully. (See the letter from counsel for defendants, Peter L. Skolnik, to Magistrate Judge Falk dated April 4, 2005.)

Defendants cited no authority to Magistrate Judge Falk for the imposition of such an extraordinary "term or condition" to a voluntary dismissal and plaintiffs have found none. In fact, the law is quite to the contrary.

The "terms and conditions" that a court may impose pursuant to Rule 41 are only those that will alleviate any legal prejudice that the defendants might suffer as a result of the dismissal of the action. 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).

Imposition of this condition would be predicated on the Court's assumption that future cases that might be brought by Landmark might lack merit; the Court

would accordingly be impermissibly issuing "an advisory opinion about a [future] matter not now involved in dispute and therefore not a case or controversy." Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578, 728 F. Supp. 1142, 1147 (D. N.J. 1990) (on a Rule 41 motion the court may not ever decide the remedies for future violations of the conditions thereby imposed; in that case in which the stipulated dismissal of certain defendants was opposed by the remaining defendants the Court held that it could not determine in advance whether injunctive relief would be granted if any of the dismissed parties violated the conditions of settlement).

CONCLUSION

Plaintiffs' motion should be granted and this action dismissed with prejudice and without other conditions.

Dated: May 4, 2005

BLOOM RUBENSTEIN KARINJA
& DILLON, P.C.

By: _____
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- and -

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