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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 the May 5, 2005 letter of Deborah Lans ("Lans Letter"), in opposition to Defendants' application for additional discovery. As the Court is aware, the discovery Defendants seek will support their position that attorneys' fees and other conditions should be placed on Landmark's Rule 41(a)(2) dismissal.

A. PLAINTIFFS HAVE IGNORED THE PREVIOUSLY SUBMITTED EVIDENCE DEMONSTRATING THAT THEIR COMPLAINT WAS BROUGHT IN BAD FAITH, RAISING THE CLEAR IMPLICATION THAT ADDITIONAL DISCOVERY WILL FURTHER ESTABLISH DEFENDANTS' ENTITLEMENT TO FEES AND CONDITIONS.

Landmark's kitchen-sink Complaint asserts *seven* causes of action against Defendants, including *inter alia* disparagement, violation of the Lanham Act, consumer fraud, prima facie tort, and two species of tortious interference. Yet, to read Ms. Lans's Letter, one might conclude that Landmark sued solely for disparagement, and solely on the grounds that it had been labeled a "cult" that engages in "brainwashing."¹

¹ See Lans Letter at 5, minimizing the relevance of, e.g., "claims of personal psychic injury . . . made by participants" and characterizing "this action" as one merely "asserting the falsity of defendants' specific claims that Landmark is a 'cult' involved in 'brainwashing.'"



Putting aside the six other causes of action and focusing on Landmark's disparagement claim, the Court should note that the Lans Letter fails to address the myriad examples set forth in Defendants' April 28, 2005 letter that demonstrate – even in the absence of Plaintiffs providing Defendants with any meaningful discovery – that Plaintiffs intentionally brought, in bad faith, allegations related, *inter alia*, to Defendants publication of statements concerning (1) Landmark's use of bullying and humiliation techniques; (2) Landmark's subjecting participants to authoritarian control; (3) Landmark's discouragement of bathroom breaks during the Forum; (4) Landmark's verbal and emotional abuse of participants; (5) the fact that Landmark's programs are physically, mentally and emotionally stressful; and (6) that Landmark's programs are potentially very dangerous and can result in mental problems.

Indeed, the only two allegations in their Complaint that Plaintiffs *do* address here – that Landmark is a “cult” and uses “brainwashing” – are statements that Mr. Ross has never made,² even if they were capable of some concrete defamatory meaning.³ Landmark's argument seems to

² Representative of the comments Mr. Ross actually made – as opposed to Plaintiffs' misleading quotations from and paraphrases of those comments – are the statements he made to an Australian radio program, which Landmark alleges to be disparaging in paragraph 36 of its Complaint:

Host: Would you class this organization as a cult?

Mr. Ross: No, I would not classify Landmark Education as a cult per se, but people have identified certain persuasion techniques and methods used by the organization as cult-like.

Triple J (Australian Radio) Interview with Rick Ross (October 28, 2003).

³ While it is almost beside the point on this application – especially because Mr. Ross has never applied these terms to Landmark – we anticipate that Landmark will rely on the same distortion of legal precedent advanced in its Rule 41(a) Memorandum (at 6) to assert that “decisions have specifically held” that use of the terms “cult” and “brainwashing” are “statement[s] of fact” rather than opinion. For this proposition, Landmark relies on the decision denying summary judgment to defendants in *Landmark Education Corp. v. The Conde Nast Publication, Inc.*, 1994 WL 836356 (Sup. Ct. N.Y. Co. July 7, 1994) (annexed to the Declaration of Arthur Schreiber as Exhibit F). But Landmark fails to explain that the *Conde Nast* court noted that the “Self” Magazine article in question “provid[ed] [its own] definition of cult” (Schreiber Dec. Ex. F, at 2), “specifically identifie[d] the Forum” as one (*id.*, at 3), and held only that “cult has a precise meaning which is readily understood *as it was defined in the article*” (*id.*, at 6; emphasis added). Landmark relies, too, on *New Testament Missionary*



be that notwithstanding the fact that vast majority of the causes of action it has asserted are wholly baseless, and the vast majority of its litany of “disparaging” statements are either true or protected opinion, it should not be held accountable – and not be subject to further discovery – because it maintains that a handful of its allegations have some pretext of validity.

Indicative of Landmark’s astonishing misrepresentation – or myopia – is its claim that “[t]here is no issue in this case as to whether Landmark’s programs are, in some abstract way, ‘dangerous.’” Lans Letter at 5. Perhaps Landmark has forgotten that in scraping together the blunderbuss inventory of “disparaging” statements for which it sued Ross, its list included that Landmark’s programs are “downright dangerous” and “destructive.” Complaint ¶ 22(5)

Nearly as disingenuous, the Lans Letter virtually *ignores* Defendants’ April 28, 2005 allegations of Landmark’s bad faith for suing Ross over statements, *inter alia*, that (1) Attendees at the Landmark Forum “endured days of physical and emotional discomfort . . . wrapped up in constant sales pitches, not unlike a timeshare seminar” as well a “bullying” and “humiliation” (Complaint ¶ 18(c)); (2) People have suffered “psychiatric breaks” after participation in the programs (*id.* ¶ 36(v)); and (3) Landmark’s programs are “verbally or emotionally abusive,” and their “controversial” methods may cause participants to “unravel” (*id.* ¶ 39(1)). Defendants’ application for additional discovery is predicated, in part, by the substantial evidence that Landmark and its attorneys knew that Landmark’s own training and application materials demonstrate that Landmark: (a) requires participants to undergo a series of sixteen-hour marathon training sessions with little food or rest (*Self Mem.* at 28-29; 4/28/05 letter, Ex. C); (b) subjects participants to authoritarian discipline, obedience and control (*id.* at 29-32); (c)

Fellowship v. E.P. Dutton & Co., 112 A.D.2d 55 (1st Dep’t 1985), but if the proposition Landmark purports to extract from that opinion is not drawn from whole cloth, it is surely stitched together from gossamer threads. Common sense, common understanding, and several courts, understand that “cult” and “brainwash” are – depending upon context – often no more than loose, figurative terms that convey no more than the speaker’s opinion. See *e.g.*, *Landmark Education Corp. v. Hachette Filipacchi Medias Group*, Index. No. 115873/98 (N.Y. Sup. Ct. April 28 1999), Slip Op. at 6 (Schreiber Decl., Ex. L) (holding that statements directly analogous to those complained of here are “constitutionally protected expressions of opinion.”); *Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alaska 2001) (statements alleging that plaintiff was a “cult” or “cult recruiter” are non-actionable matters of opinion); *Holy Spirit Assoc. v. Harper & Row, Publishers, Inc.*, 101 Misc.2d 30, 33-34, 420 N.Y.S.2d 56, 59 (Sup. Ct. 1979) (statements comparing Church to occult groups in Nazi Germany and Church’s indoctrination techniques to brainwashing are “statements of opinion”); *Cera v. Mulligan*, 79 Misc.2d 400, 358 N.Y.S.2d 642 (Sup. Ct. 1974) (“Letter [allegedly libeling plaintiff] did no more than espouse an *opinion* that chiropractors are a ‘dangerous cult’”) (emphasis added).



indoctrinates participants with a code-like jargon (*id.* at 35); and, (d) based on advice given to Landmark by mental health professionals, warns participants who may not be “feeling well” that participation in the Forum may jeopardize their well-being.

The Lans Letter – and Landmark’s motion – mistakenly conclude that Defendants are attempting to litigate the merits of Landmark’s lawsuit. *See, e.g.*, Lans Letter at 2 (Defendants hope to prove that “cult” and “brainwashing” statements are true); Lans Letter at 3 (Defendants seek discovery “on the ground that whether Landmark is a cult is relevant”); Lans Letter at 4 (discovery “concerning the ‘truth’ that Landmark is a cult and/or engages in brainwashing must be denied” as an inappropriate attempt to try “a defamation case on its merits”).

In keeping with Landmark’s misguided view of the intent of this application, virtually all of its arguments for not producing the discovery Defendants have requested are premised upon the notion that the documents and information sought are irrelevant because they will not “prove” whether or not Landmark is a “cult” or engages in “brainwashing.” But it is not the “truth” of statements published on Defendants’ web site that Defendants intend to establish through the discovery sought here.⁴ Putting aside that the evidence Defendants submitted in their April 28, 2005 letter – including excerpts from Landmark’s own training manuals and application materials – already demonstrate that most of the allegedly disparaging *factual* statements published by Defendants are most likely true, the question of whether Landmark is or is not a “cult” that “brainwashes” is ultimately irrelevant.⁵

Instead, that discovery is intended to cast light on what Landmark *knew* about its own policies and procedures, about its own litigation history, and about the content of its own documents when it dropped the rock of the spurious Complaint from under which it now seeks to crawl. *Those* are the issues that are relevant to Landmark’s bad faith in bringing its Complaint, to the outlandish allegations that Landmark could not have reasonably believed in the face of all the evidence, and to Defendants’ entitlement to attorneys’ fees and the imposition of conditions on dismissal as sanctions for Landmark’s conduct.

⁴ If plaintiff had been a proselytizer of a “flat-earth” theory and brought suit against defendant for criticizing and defaming plaintiffs’ belief system, it would hardly be incumbent upon the defendant to prove that the earth was round in order to recover sanctions for the plaintiff having brought a frivolous lawsuit.

⁵ Again, that is particularly true where Landmark *knew* that Mr. Ross had publicly stated that he did *not* believe Landmark was a “cult,” and where Defendants expressed constitutionally-protected *opinions* based on facts that invite direct comparison to recognized cults and traditional “brainwashing” and “mind control” techniques.



B. DEFENDANTS NEED ADDITIONAL DISCOVERY TO REBUT THE FALSE AND MISLEADING ASSERTIONS ADVANCED BY LANDMARK.

1. Arthur Schreiber's Declaration in Support of Landmark's 41(a)(2) Motion is Untruthful.

Landmark's principle argument for not producing discovery related to their prior litigations is its contention that "All relevant information concerning Landmark's history of bringing lawsuits is set forth in Landmark's [Rule 41(a)] motion." Lans Letter at 4. The argument that everything "relevant" has now been produced of course pre-supposes that Landmark, and its Chairman of the Board/General Counsel, Arthur Schreiber, were truthful and candid in their submission to the Court. They were not.

Mr. Schreiber, in his sworn declaration states:

- . . . Landmark is not in the practice of bringing lawsuits at all. In our 14-year history, apart from this action, we have brought *all of four actions in the federal and state courts of the United States*. *Id.* ¶ 29 (emphasis added).
- The cases were not, as defendants claim, against members of the public. They were against either media giants or self-styled cult experts and their organizations. *Id.*
- The last of the cases was filed in 1998, *i.e.*, six years before this action was filed. *Id.*

In Landmark's letter to the Court, it states:

- The documents show that Landmark has *never* brought an action that it withdrew voluntarily. . . . Lans Letter at 4 (emphasis in original).

Each of the above statements, including those made by Mr. Schreiber under oath and penalties of perjury, is false. On September 6, 2001, in Santa Clara County, California, Landmark brought a lawsuit, not disclosed in Mr. Schreiber's purportedly all-encompassing declaration, against the author of an e-mail message who made virtually the same allegations that Landmark has sued over in all of its other litigations. A copy of the complaint in that case, *Landmark Education Corp. v. Does 1-20*, CV801252 (2001) is attached hereto as Exhibit A. In that complaint, Landmark brought claims against the defendant for tortious interference and defamation based upon purportedly false and defamatory e-mails sent to its employees and volunteers, purportedly stating that "Landmark is a cult and that Landmark engages in sleep deprivation, food deprivation and humiliation as coercive tactics." *Id.* ¶ 11. However, perusal of the actual e-mail Landmark



attaches to that complaint reveals another example of its preferred tactic of distortion through paraphrase. The e-mail, like the statements attributed to Mr. Ross here, does not actually call Landmark a cult, but rather, states that “. . . Landmark borrows heavily from successful cult operations . . .” Email at 3 (Ex A). Further, the actual criticism in the e-mail speaks not of sleep or food “deprivation,” but instead exposes the very food restrictions and time demands that are prescribed in Landmark’s own training manuals. Compare *id.* to Defendant’s April 28, 2005 letter, Ex. C, at 28-29. Similarly, Defendants previously demonstrated that Landmark’s training manuals endorse – if not require – the humiliation of Forum participants. See Defendant’s April 28, 2005 letter, at 4-5 & Ex. C.

In the internet age, *John Doe* suits have become the newest arrow in the litigious defamation plaintiff’s quiver. By filing a suit against *John Doe* defendants in the 2001 Santa Clara County suit, Landmark had the ability to subpoena the anonymous e-mail author’s internet service provider, Yahoo! (which Landmark’s attorneys almost certainly did) to seek to obtain his identity. This tactic, too, is strikingly similar to Landmark’s strategy in this case, where it sought an order from this Court requiring Defendants to reveal the identities of anonymous users of Mr. Ross’s website.

If a plaintiff like Landmark is able to obtain an e-mail user’s true identity, it is able to achieve its improper litigation objective of frightening off and/or silencing its critic, or otherwise causing the internet service provider to shut down the user’s account. Since Mr. Schreiber’s artful declaration failed to disclose this *John Doe* suit, it remains unclear what Landmark did to achieve its litigation objectives in that case. What is clear, however, is that on November 1, 2001, Landmark requested and obtained a *voluntary dismissal* (attached hereto as Exhibit B) – something Ms. Lans represented that Landmark has never before done.

Based solely upon the Santa Clara County *John Doe* suit, it is accurate to say that: (1) Schreiber’s testimony that Landmark only filed four lawsuits in the United States was *false*; (2) Schreiber’s testimony that Landmark has never filed a lawsuit against a member of the public was *false*; (3) Schreiber’s testimony that Landmark has not filed a lawsuit since 1998 was *false*; and (4) Landmark’s contention that it has never previously withdrawn a lawsuit voluntarily was *false*.

The Santa Clara County suit, however, is only the tip of the iceberg. General Counsel Schreiber – a member of the California bar – has engaged in a wide-ranging lack of candor with this Court. On April 9, 1997, Ms. Lans’s former law firm, Morrison Cohen Singer & Weinstein, LLP, filed a Summons with Notice in the New York Supreme Court in *Landmark Education Corp. v. Garvey* (Index No. 97/106465) (attached hereto as Exhibit C) against Kevin Garvey, another outspoken



critic of Landmark and its programs.⁶ The notice, which seeks damages for Mr. Garvey's alleged defamation and libel of Landmark was, upon information and belief, based upon sharply critical statements about Landmark he made to the *Riverfront Times*, a weekly periodical based in St. Louis, which were published in that paper's March 27-April 2, 1996 edition. A copy of the article is attached hereto as Exhibit D.⁷ Notably, in addition to the Garvey comments reported in the article, Schreiber is quoted on the last page of the article as having threatened the *Riverfront Times* with legal action prior to publication.⁸

Furthermore, the Court should note that Schreiber carefully circumscribes his sworn assertion that "Landmark is not in the practice of bringing lawsuits at all" to only those lawsuits Landmark has brought "in the federal and state courts of the *United States*." As its General Counsel knows perfectly well, Landmark has brought litigation in some – perhaps several – of the "twenty-three other countries" (Schreiber Dec. ¶13) in which it operates.

- On or about May 30, 2000, Landmark commenced *Landmark Education Corp. v. NOW Magazine*, 00-CV-194254 (Ontario Superior Court of Justice), an action against a Canadian publisher claiming that it had been defamed by an article in the April 20-26, 2000 edition of the weekly publication "NOW" (yet another action brought after 1998). Named in the litigation were not only *NOW Magazine* and its employees, but also one of the sources of the story – the aforementioned and previously-named Kevin Garvey, an American citizen. A copy of the notice served on the defendants in the *NOW Magazine* case, which includes a copy of the article, is attached hereto as Exhibit E. A copy of

⁶ In New York State court, a plaintiff need only file a summons and notice to commence a lawsuit.

⁷ Upon further information and belief, Landmark permitted its suit against Mr. Garvey to lapse, perhaps realizing it had filed approximately one week after New York's one-year libel statute of limitations had run.

⁸ Although, as demonstrated here, Landmark has in fact *sued* both media and non-media defendants far more often than the "all of four" lawsuits trumpeted by Schreiber, the calculatedly misleading nature of his aggrieved white-hat proclamation that "Landmark is not in the practice of *bringing* lawsuits at all" is exposed by Landmark's extensive history of *threatening* lawsuits against its critics, discussed *infra*.



Landmark's November 13, 2000 Notice of Discontinuance of the action is attached hereto as Exhibit F.⁹

- Upon information and belief, in or about 1997, Landmark brought a lawsuit in Germany in a failed attempt to enjoin publication of a book by Martin Lell, another outspoken Landmark critic who allegedly suffered "a total psychological and physical breakdown" after attending the Forum.¹⁰

Defendants' document demands and interrogatories did not, of course, limit the information and documents sought to cases filed within the United States. Such documents relating to lawsuits filed outside the United States are not only relevant to establish the scope of Plaintiffs' litigation activities, but are particularly fair game in light of Landmark's inclusion of allegations complaining about Mr. Ross's statements made to the media in Australia and Canada. See Complaint ¶¶ 36, 41. Although Defendants' own investigations of Landmark's extraterritorial litigation continues, evidence Defendants have already gathered on their own initiative concerning lawsuits Landmark has filed outside the United States should more than suffice to shift the burden of further such discovery back where it belongs – on Landmark.¹¹

2. Schreiber's Declaration in Support of Landmark's 41(a)(2) Motion Selectively Attaches Certain Documents While Carefully Omitting Other Documents and Information Damaging to Landmark.

Based upon the above, it is more than clear that "all relevant information concerning Landmark's history of bringing lawsuits" is *decidedly not* "set forth in Landmark's motion." See Lans Letter at 4. Nevertheless, Defendants wish to underscore that the carefully selected documents attached as exhibits to Landmark's motion do not remotely resemble anything approaching the meaningful discovery that Defendant's have requested. For example, in the Declaration he filed in support

⁹ Apparently, Mr. Schreiber did not believe that its year 2000 litigation in Toronto, naming a resident of Connecticut, was relevant to the number of actions Landmark had commenced, whether or not Landmark is in the "practice of bringing lawsuits at all," or whether Landmark has brought legal action in the last six years.

¹⁰ Demonstrating a First Amendment-like sensibility, the German court dismissed Landmark's complaint, apparently concluding *inter alia* that the author's use of the term "brainwashing" was not a factual contention but a mere "acceptable assessment."

¹¹ Indeed, Defendants' independent investigation has yielded materials in several of the categories addressed by this application to compel discovery from Landmark. Only a subset of those materials are described here; others will provide a useful check of the extent of Landmark's compliance with any order entered by the Court.



of Landmark's Rule 41(a)(2) motion, Schreiber attaches only – as part of Exhibit K – (i) the first four pages of the Special Motion to Strike under the California anti-SLAPP statute that was filed by the defendants in *Landmark Education v. Singer*, and (ii) the order denying that motion.¹²

Had Defendants not already been in possession of the other 18 pages of the Singer motion to strike (attached as Exhibit G), Defendants and the Court would remain blissfully unaware of the existence and contents of the four declarations filed with that motion. Notably, in the Declaration of Margaret Thaler Singer (attached as Exhibit H), Dr. Singer, the late cult expert who was sued by Landmark in that case, states – just as Mr. Ross has here – that notwithstanding Landmark's allegations, she had never “characterized est or The Forum as a ‘cult’ in any of [her] writings, public talks, or judicial testimony.” Singer Decl. ¶ 19. If Defendants had not independently obtained the Singer Declaration, they would not have learned of all of the evidence that gave rise to Dr. Singer's testimony that Landmark's lawsuit “fit [a] pattern of intimidation and harassment for [her] speaking about [Landmark] critically in the courts and in the press and media and to the public at large.” Singer Decl. ¶ 55. Nor would this Court have learned, had Defendants not already been in possession of Dr. Singer's Declaration, that it attached, *inter alia*, a 1993 internal memorandum from Landmark's Chief Operating Officer, Harry Rosenberg (brother of “Werner Erhard”), in which Landmark adopts a policy of “aggressively” responding to media statements that are contrary to “the facts” as it sees them. Singer Decl. ¶¶ 23, 44. Defendants have thus far been unable to obtain that 1993 internal memorandum, or several other exhibits to the declarations filed with the defendants' motion to strike. This is precisely the type of discovery that is “reasonably calculated to lead to the discovery of admissible evidence”; yet Landmark, which has attached four of the motion's eighteen pages and none of its declarations, has the *chutzpah* to argue that it has already provided “all relevant information.”¹³

¹² Significantly, the precedent upon which the California trial court based its denial of defendants' anti-SLAPP motion, *Xi Zhao v. Wong*, 48 Cal. App.4th 1114 (1st Dist. August 20, 1996) – which had been decided fewer than 20 days before the Singer motion – has since been overturned by the California Supreme Court. See *Briggs v. Eden Council for Hope and Opportunity*, 81 Cal. Rptr. 2d 471 (1999).

¹³ Similarly absent from Schreiber's declaration is any reference to the summary judgment motion filed by Cynthia Kisser in the *Cult Awareness Network* case, and the actual settlement agreement she entered into with Landmark soon after the motion was filed. Instead, Schreiber includes only the statements Landmark managed to extract from Ms. Kisser as a condition of that settlement. Defendants are entitled to all of those documents.



Notwithstanding the fact that Defendants' Document Request 6 specifically calls for, *inter alia*, 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-initiated litigation, and notwithstanding the demonstrated relevance of these documents to Defendants' application for attorneys' fees and conditions, Landmark has refused to produce them.¹⁴

Moreover, had Defendants not already had access to the papers submitted on the *Singer* motion, they would not have learned about the Declaration of Steven Pressman (attached as Exhibit I). Pressman is the author of a biography on "Werner Erhard." After receiving threats of litigation directly from none other than Landmark's own Arthur Schreiber, Pressman was sued by an entity related to Werner Erhard and Landmark – the Hunger Project. Subsequently, Landmark brought a separate lawsuit against Mr. Pressman in its own name (yet *another* suit in the "federal and state courts of the United States" that Schreiber's sworn Declaration fails to disclose to the Court), *Landmark Education Corp. v. Pressman*, Case No. 989890 (San Francisco Sup. Ct. 1997). In that case, Landmark filed a "Complaint for Order Compelling Answers to Deposition Questions" (attached hereto as Exhibit J) – a lawsuit *purportedly* brought to compel Mr. Pressman to answer questions related to Landmark's lawsuit against the Cult Awareness Network. In actuality, *Landmark v. Pressman* was a ploy through which Landmark harassed Mr. Pressman regarding matters wholly unrelated to the *Cult Awareness Network* litigation.

Schreiber's "aw shucks" assertion that Landmark is not really litigious at all is rendered additionally misleading when one considers that for every lawsuit Landmark *files*, it *threatens* legal action against numerous other publishers, authors and public critics. In just those articles republished on Defendants' web site, Schreiber or some other Landmark official is quoted as having threatened litigation against at least four entities or individuals not previously mentioned. Excerpts from those articles, threatening litigation against *Westword*, *The Phoenix New Times*, *The Metro News*, and Ms. Liz Sumerlin, an anti-Landmark activist, are attached hereto as Exhibit K. Moreover, another exhibit to Dr. Singer's declaration contains a series of newspaper articles in which Landmark has apparently demanded retractions under threat of legal action. Excerpts

¹⁴ Document Request 7 calls for the production of similar documents produced in relevant lawsuits and arbitrations filed *against* Landmark, typified by the documents from *Neff v. Landmark Education*, previously submitted to the Court as Exhibits D-H to Defendants' April 28 letter application. All such documents are equally relevant. Landmark's vigorous opposition to producing the documents sought by this application apparently reflects its strong preference that documents such as those identified here and in Defendants' April 28 submission will not be among the evidence before Judge Lifland when the Court decides what fees or conditions should be placed upon Landmark's proposed dismissal.



from that exhibit (attached hereto as Exhibit L) demonstrate that *Guidepost*, *The Legal Times* and *Redbook* avoided litigation by making some form of retraction – the latter two to recant some purported inference on their pages that Landmark is a “cult.” Indeed, the number of targets of Landmark’s litigation threats uncovered by Defendants’ informal investigation is too numerous to reasonably detail here. This evidence militates in favor of ordering Landmark to respond to Defendants’ document demand that calls for Landmark to produce all correspondence threatening litigation (and all responses thereto), which Landmark has refused to produce. A copy of Defendants’ outstanding Document Request No. 42, seeking such documents, and Plaintiffs’ Response, are attached hereto as Exhibit M.¹⁵

3. Arthur Schreiber’s Declaration in Support of Landmark’s 41(a)(2) Motion Quotes From An Undisclosed Document, Waiving Any Privilege That Might Have Applied to the Communications.

The Schreiber Declaration (at ¶18) quotes selectively from an undisclosed document that purports to be the opinion of a forensic linguistics expert named Gerald McMenam. Schreiber implies that Landmark’s allegations that Mr. Ross had somehow authored various anonymously posted messages on his web site were brought in good faith because Landmark relied upon McMenam’s opinion. But even were these accusations not wholly spurious, Schreiber cannot rely upon those parts of the expert’s opinion that purport to justify Landmark’s allegations while excluding parts of the opinion and all other correspondence with the expert that may or may not support Landmark’s claim that its lawsuit was meritorious. Because Landmark put the subject matter of the opinion in play, all communications with Dr. McMenam are relevant to Plaintiffs’ Rule 41(a)(2) application.

While Schreiber indicates that Landmark consulted McMenam “through counsel,” it is well established that testimony that reveals only part of an otherwise privileged communication constitutes a subject matter waiver of all such communications. In construing the applicability of the attorney-client or work product privilege, federal courts are subject to state law. *See* Federal Rule of Evidence 501. New Jersey law provides:

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any person while the holder thereof has . . . without coercion and with knowledge of his right or privilege, made disclosure of any part of

¹⁵ Defendants’ request for such materials supplements the requests in the form of order submitted on April 28, 2005. In light of the new evidence concerning litigation threats proffered above, that supplement is eminently reasonable. *See* Amended Proposed Form of Order, attached hereto as Exhibit N.



the privileged matter or consented to such disclosure made by anyone.

N.J.S.A. 2A:84A-29; N.J.R.E. 530.

As one New Jersey court noted, the attorney-client privilege is waived:

. . . where the client discloses, or consents to counsel's disclosure, of some of the privileged information where the purpose of such disclosure is to advance the client's own self-serving objectives. It makes no difference in such a situation that only a part of the privileged information is disclosed, as a partial waiver of privileged communication effectively waives the entirety thereof. . . . A party cannot choose to disclose only so much of an allegedly privileged matter as is helpful to his case; once a party begins to disclose a confidential communication for a purpose outside the scope of the privilege, the privilege is lost.

Sipca North America, Inc. v. Donaldson Enterprises, Inc., 179 N.J. Super. 56, 61-62 (Ch. Div. 1981).

Courts from various jurisdictions hold that such a waiver of the attorney-client and work product privileges applies not only to the disclosed document, but to all communications related to the same subject matter. See *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 485 (S.D.N.Y. 1993) ("a voluntary disclosure of privileged communications . . . operates as an implied waiver as to *all such communications concerning the particular matters addressed in the disclosed communications*," emphasis added); *U.S. v. Cote*, 465 F.2d 142, 144-45 (8th Cir. 1972) (holding that a certain disclosure "effectively waived the privilege not only to the transmitted data but also as to the details underlying the information.")

As one court explained, this "'subject matter waiver' doctrine is based on 'fairness considerations,' which 'aim to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information.'" See *Equal Employment Opportunity Comm'n v. Johnson & Higgins, Inc.*, 1998 WL 778369, at *8 (S.D.N.Y. Nov. 6, 1998) (quoting *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987)). Accordingly, "[s]ubject matter waiver applies where the privilege holder puts the privileged communications in issue by virtue of his claims or defenses and prejudices the opposing party, in other words, seeks to use the privilege *as both a 'sword' and a 'shield.'*" *Id.* (emphasis added; citations omitted); accord *American Medical Systems, Inc. v. Nat'l Union Fire Insur. Co. of Pittsburgh, Inc.*, 1999 WL 970341, at *2 (E.D. La. 1999) (citing *Conklin v. Turner*, 883 F.2d 431 (5th Cir. 1989) and *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982)). For these reasons,



documents related to all communications with Gerald McMenemy, including any sample writings that were provided to him, should also be produced. See Proposed Form of Order (Exhibit N).

C. THIS COURT HAS BROAD AUTHORITY TO GRANT DEFENDANTS' DISCOVERY APPLICATION.

The main thrust of Landmark's argument is that it can seek sanctuary from the Court's express power to order discovery under the Federal Rules of Civil Procedure based upon a selective and myopic reading of a few cases decided under Rule 41. Not only is Plaintiffs' analysis of Rule 41 unpersuasive, but indeed, Plaintiffs ignore the fact, set forth in Defendants April 4, 2005 letter (at 12-13), that Defendants seek attorneys' fees and costs based not only upon Rule 41(a)(2), but also under the Lanham Act, under Rule 54(d), and under the inherent authority of the court to award attorneys' fees.

That this Court has broad discretion to order discovery under Rule 26(b)(1) is incontestable:

For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.

The fact that the present application for discovery is brought to assist Defendants in opposing a Rule 41 motion neither vitiates the Court's power nor changes that calculus. As the Court observed during the April 6 status conference, Defendants' need for discovery here is akin to the need frequently satisfied pursuant to Rule 56(f) in the context of opposing a summary judgment motion – to provide the opposing party the opportunity to discover “facts essential to justify the party's opposition.” F.R.C.P 56(f).

The decision upon which Plaintiffs rely, *Wilson v. Eli Willy and Co.*, 222 F.R.D. 99 (D. Md. 2004) – and which they identify as “the only case [they] have located on point” (Lans Letter at 1) – involved the vastly different landscape of a defendant's request for discovery in furtherance of a potential statute of limitations problem. *Wilson* – where the court expressly acknowledged that “there is no suggestion whatsoever that plaintiff [had] acted in bad faith” (222 F.R.D. at 100) – has no relevance here, where Plaintiffs' litigation conduct is precisely the issue. Moreover, notwithstanding Plaintiffs' converse intimation, it is not unprecedented for a court to order production of discovery in the context of a Rule 41 motion where the Defendants will be prejudiced absent such production. In *Alliance for Global Justice v. District of Columbia*, 2005 U.S. Dist. LEXIS 2855 (D.D.C. February 7, 2005), the Court ordered three plaintiffs who sought



voluntary dismissal of their claims¹⁶ to answer all outstanding discovery as a condition of their dismissal from the case, which was still being prosecuted by other plaintiffs. The court noted:

Defendants' main concern is that the dismissal of the [three] plaintiffs – without the imposition of any conditions regarding outstanding discovery – prevents them from accessing information to which they are entitled via the interrogatories, documents requests, and notices of 30(b)(6) depositions they served during the discovery period. Thus, the prejudice to defendants is not purely financial; it is the loss of relevant information and the burden of seeking the information they already demanded via other means, such as Rule 45 subpoenas.

Prejudice to Defendants arises here in a different context: absent the relevant discovery, Defendants cannot fully document those abuses of the litigation process by Landmark that will justify an award of attorneys fees and the imposition of conditions upon the requested dismissal. Significantly, the *Alliance* court required production of discovery to defendants notwithstanding its acknowledgment that they had alternative means (“such as Rule 45 subpoenas”) to obtain all of the discovery they sought; here, the vast majority of the documents Defendants are seeking – including those that have previously been shielded by protective orders – will forever remain out of reach unless this Court orders Landmark to produce them.

Case law aside, in ruling upon Defendants' application, Defendants urge the Court to consider the unique facts and circumstances of this case – where Plaintiffs are *unquestionably* in possession of relevant documents and information, and where that material will *unquestionably* be directly relevant to an assessment of Landmark's good faith *vel non* in bringing this and many similar actions. Such discovery is necessary for Defendants to learn the “facts essential to justify [their] opposition” (*c.f.* F.R.C.P 56(f)) to a Rule 41 dismissal that would otherwise permit Landmark to slink away, unscathed, unchastised and undaunted, from yet another baseless lawsuit in which it has imposed substantial costs, inconvenience and related burdens on another in the legions of its critics.

¹⁶ It is not clear from the decision whether the Rule 41(a) dismissals adjudicated in the case were *with prejudice* or *without prejudice*, nor is this distinction essential to construe the fundamental holding of the Court.



D. DEFENDANTS HAVE MERITORIOUS GROUNDS FOR SEEKING ATTORNEYS' FEES AND COSTS.

As previously noted, Defendants will seek attorneys' fees and costs based upon: (a) Rule 41(a)(2), (b) the Lanham Act, (c) Rule 54(d), and (d) the inherent authority of the court to grant attorneys' fees and costs. As Plaintiffs implicitly acknowledge (*see* Lans Letter at 3), the touchstone for granting attorneys' fees under most of these provisions is a finding of some form of "exceptional circumstances." *See Gilbreth International Corp. v. Lionel Leisure, Inc.*, 587 F. Supp. 605, 614 (E.D. Pa. 1983) (Rule 41(a) attorneys fees permissible where there are "exceptional circumstances."); *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1528-29 (10th Cir. 1997) (same, and noting that the court may award attorneys' fees under its inherent authority where a party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."); *Ford v. Temple Hospital*, 790 F.2d 342, 346 (3d Cir. 1986) (court has inherent power to award attorneys' fees where "opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."); *Motown Productions, Inc. v. Cacomm, Inc.*, 849 F.2d 781, 782 (2d Cir. 1988) (Lanham Act §35 provides for an award of attorneys' fees to a prevailing party under "exceptional circumstances," which include where an attorney prosecutes a case in bad faith); *see also In re Paoli Railroad Yard PCB Litigation*, 221 F.3d 449, 462 (3d Cir. 2000) (Rule 54(d) costs awarded to prevailing party *as of course*).

Landmark advances the dubious proposition that there is no authority supporting the view that "lack of good faith in bringing this action is . . . an exceptional circumstance" under Rule 41(a)(2). Lans Letter at 3. It rationalizes its position both by reference to the relative infrequency with which courts have applied the "exceptional circumstances" test under Rule 41(a)(2), and by declaring that the Schreiber Declaration establishes the lack of a "factual predicate" for applying that test here. *Id.* First, it hardly needs further emphasis that the truthfulness of any "factual support for Landmark's claims" set forth in the Schreiber Declaration must be viewed with a large dollop of skepticism. *Second*, as noted, Defendants have grounds for seeking attorneys' fees and costs that are wholly independent of Rule 41. *Third*, an "exceptional circumstances" fee award is hardly a novel concept in the federal courts; it is instead the standard by which fees are awarded under both the Lanham Act and the Patent Statute. *Fourth*, the myriad federal courts that have adjudicated attorney fee applications under the tried and tested "exceptional circumstances" standard have all but uniformly concluded that *bad faith* is an important signpost *en route* to a finding of "exceptional circumstances" – although certainly not the only one. *See, e.g., Securacomm Consulting, Inc. v. Securacom Inc.*, 224 F.3d 273, 280-83 (3d Cir. 2000) (holding that "bad faith" "fraud," and "malice" are examples of culpable conduct that might warrant finding of "exceptionality" under the Lanham Act); *Taj Mahal Enterprises, Ltd. v. Trump*, 745 F. Supp. 240, 253 (D.N.J. 1990) ("A case is exceptional [under the Lanham Act] if it is 'groundless, unreasonable, vexatious or pursued in bad faith'"); *Motown*, 849 F.2d at 782 ("exceptional circumstances" exist, under the Lanham Act, where an attorney prosecutes a case in bad faith); *Phonometrics, Inc. v. Westin Hotel Co.*, 350 F.3d 1242, 1245-46 (Fed. Cir. 2004) (the



prevailing party in a patent litigation may prove the existence of an “exceptional case” by showing, *inter alia*, vexatious, unjustified, and otherwise bad faith litigation).

Plaintiffs’ argument that Defendants cannot seek an attorneys’ fee sanction *under Rule 11* for Landmark’s bad faith is a red herring. Defendants have not sought Rule 11 sanctions, and Plaintiffs certainly may not claim the protection of that Rule’s safe harbor provisions until and unless Defendants do so. Various courts, including the Supreme Court, have recognized that the existence of Rule 11, and the sanctions and attorneys’ fees available thereunder, are not mutually exclusive of the various other mechanisms for seeking attorneys’ fees in federal court. For example, in *Chambers v. Nasco, Inc.*, 501 U.S. 32, 50 (1991), the Supreme Court explained that “[t]here is . . . nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney’s fees as a sanction for bad-faith conduct.” Similarly, in *Motown*, 849 F.2d at 786, after rejecting the “contention that the availability of other sanctioning tools, such as [Rule] 11 and 28 U.S. § 1927, renders unnecessary [the] discussion of Section 35 [of the Lanham Act] as the basis for a fee award,” the Second Circuit concluded:

Each statutory or common law basis for imposing sanctions stands alone and should be examined separately: while the mechanisms may be congruent, they are not necessarily coextensive.

Id. (emphasis added). *Accord Securacomm Consulting, Inc. v. Securacom, Inc.*, 224 F.3d 273 (3d Cir. 2000) (“we see no inconsistency with the District Court’s decision to deny Rule 11 sanctions in dismissing an action filed by [the party] but to award fees in the Lanham Act case after making a factual finding concerning the culpable conduct involved in the case as a whole”).

Plaintiffs’ odd decision to chase themselves down a Rule 11 rabbit hole stems from a brief citation to the Rule Defendants included on Page 8 of their April 28, 2005 letter to the Court as a commonplace reference to a legal principle analogous to the issues actually raised on this application. Since Rule 11 stands as the paradigmatic standard for appropriate conduct in commencing litigation, it should hardly surprise Plaintiffs that Defendants would refer to the Rule as a prism through which the type of conduct that might instead be deemed “exceptional” and in “bad faith” can most readily be recognized and scrutinized.

Plaintiffs’ reliance upon Judge Bassler’s opinion in *National Kitchen Products Co. v. Butterfly Co., Inc.*, 1994 WL 391422 (D.N.J.) is inapposite; the holding Plaintiffs rely upon directly addresses the advancement of a Rule 11 motion, not any of the grounds Defendants will actually rely upon here. Moreover, the court’s factual analysis of Rule 11 in *National Kitchen* stands in stark contrast to the circumstances now before this Court. There, Judge Bassler observed that under a Rule 11 analysis, the Court judges an attorney’s conduct “by what was reasonable to believe at



the time the pleadings, motion, or other paper was submitted,” and concluded there were no grounds for sanctions in that case “as viewed from the time they were filed.” *Id.* at *9. Here, by comparison, prior to commencing this frivolous action, Landmark and its attorneys were necessarily and unquestionably aware of the satchel-full of razor-edged documents – a mere smattering of which are attached and referred to here and in Defendants’ April 28, 2005 letter – that will eviscerate Landmark’s continuing defiant insistence upon the legitimacy of its suit.

E. PLAINTIFFS HAVE FAILED TO REBUT THE ARGUMENTS AND EVIDENCE DEMONSTRATING THAT THE DOCUMENTS AND INFORMATION SOUGHT BY DEFENDANTS ARE RELEVANT TO THEIR REQUEST THAT THE COURT IMPOSE SANCTIONS ON LANDMARK.

All of Landmark’s arguments that the discovery Defendants seek is somehow irrelevant lack merit.

- As set forth above, Plaintiffs have not produced all relevant information related to their past lawsuits. While Landmark falsely asserts that it has only brought four lawsuits, Defendants have *thus far*, through independent investigation, uncovered in the neighborhood of *nine*. Moreover, while Defendants have requested that Plaintiffs produce all of the “briefs, certifications, affidavits and other documents, including all exhibits, filed by any party in connection with any dispositive motion, and/or any appeal” in Landmark-initiated suits, Plaintiffs have produced *none* of these materials. But the documents Defendants have obtained on their own demonstrate that such materials could not be more germane. For the same reasons, the transcripts of the depositions of Landmark’s witnesses are also highly pertinent.
- Plaintiffs have provided no information whatsoever about the lawsuits, arbitrations and other complaints brought *against* Landmark for injuries and related claims arising out of “Forum” attendance. As explained in Section A, *supra*, Plaintiffs’ entire argument that such matters are irrelevant is based upon the erroneous premise that Defendants are merely attempting to litigate the merits of Landmark’s narrow, revisionist “cult and brainwash” construct of its Complaint. To the contrary, the issue actually before the Court in connection with Defendants’ application for sanctions is 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. If, for example, Landmark was aware of numerous claims of psychological injuries caused by attending the Forum, and nevertheless sued Mr. Ross on the grounds that stating his opinion that the Forum is “dangerous” constitutes disparagement, tortious interference and consumer fraud, the Court would be more than justified in awarding attorneys’ fees to sanction Landmark for advancing a theory wholly inconsistent with



the facts as it knew them to be (not to mention inconsistency with established law). Information and documents related to Plaintiffs' application materials and screening processes are equally germane to proving Plaintiffs' knowledge and state of mind.

- Apparently unable to muster even a semblance of an argument to justify withholding its training manuals, Landmark relegates a half-hearted opposition to a footnote that repeats the stale "trade secret" refrain. Lans Letter at 6, n.3. As Defendants previously established, those manuals will demonstrate that numerous of the purportedly "disparaging" statements regarding the nature of Landmark's programs were known by Landmark to be true when this lawsuit was filed. As floodlights that will illumine those truths about Landmark that it carefully and repeatedly shrouds in darkness through offensive lawsuits and unjustifiable protective orders, the training manuals must be produced.

Landmark is a recidivist abuser of the judicial process. In apparent pursuit of Harry Rosenberg's policy of "aggressively" responding to media statements that fail to report "the facts" as Landmark prefers to see them, it has repeatedly sued not to "protect its rights" (Schreiber Decl. ¶2), to vindicate legitimate legal grievances or to recoup damages unfairly sustained, but to bully, harass, intimidate and chill the speech of its critics. Landmark uses litigation – and threats of litigation – to control the public discourse. Until now, that wholly improper tactic has been distressingly successful.

Landmark's misguided understanding of the legitimate purposes of litigation is reflected in the very words its General Counsel wears as a badge of honor. Schreiber, who is keenly aware of the very thick connective tissue between Landmark and its predecessor "est," and who deemed it an appropriate extension of Landmark's mission to personally threaten Steven Pressman with suit over his biography of est's "Werner Erhard," nevertheless unabashedly explains that he sues Ross here for "linking [Landmark] to est." Schreiber Decl. ¶7. More egregiously, Schreiber justifies this suit by Ross's "refusal to post positive materials," to "present a factually balanced view and to substantiate his *opinions*." *Id.* ¶ 7 and note 2 (emphasis added). But it is fundamental First Amendment law that Ross has neither an obligation to justify his constitutionally-protected opinions, nor – as an internet publisher – to present a "factually balanced" view.¹⁷

¹⁷ See generally *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), where the Court held unconstitutional -- as an impermissible intrusion into the editorial function -- a statute requiring the media to publish a "reply" to previously published criticism:

The choice of material to go into a newspaper, and the decision made as to limitations on the size and content of the paper, and treatment of public issues



Those are illegitimate uses of the judicial system. They are illegitimate here and – as the documents already in hand strongly suggest – were no less illegitimate when Landmark sued Pressman, Singer, Garvey, Lell, Kissner, John Doe, *Self*, *Elle*, *NOW* and *CAN*, and threatened to sue *The Riverfront Times*, *Westword*, *Phoenix New Times*, *Metro News*, *Guidepost*, *The Legal Times*, *Redbook* and Summerlin. The documents Defendants seek on this application will establish that the time for the judicial process to say “hold, enough” is long past due.

CONCLUSION

For all of the reasons stated above, and for the reasons set forth in Defendants’ letters of April 4, 2005 and April 28, 2005, the Court should grant Defendants’ application to compel Plaintiffs’ production of relevant discovery. In light of the factual assertions made in the recently filed Declaration of Arthur Schreiber in support of Plaintiffs’ motion for voluntary dismissal, and other recently discovered information detailed above, Defendants respectfully request that the Court enter a modified form of order, which is attached hereto as Exhibit N. The information and documents requested should be produced without further deception or delay.

Respectfully submitted,

Peter L. Skolnik /mn

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cc: Deborah Lans, Esq. (via facsimile w/o enclosures and electronic mail)
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and public officials -- *whether fair or unfair* -- constitute the exercise of editorial control and judgment. (Emphasis added)

The principles of *Miami Herald* have been construed broadly in this nation’s First Amendment jurisprudence, and unquestionably protect Ross’s editorial judgment from the judicially-enforced “balance” Landmark advocates.

