SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LANDMARK EDUCATION CORPORATION, Plaintiff, - against - THE CONDE NAST PUBLICATIONS, INC., d/b/a SELF MAGAZINE, ADVANCE MAGAZINE PUBLISHERS, INC., d/b/a SELF MAGAZINE, and DIRK MATHISON, Defendants.	Index No. 114814/93 I.A.S. Part 3 Justice Davis

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MORRISON COHEN SINGER & WEINSTEIN
750 LEXINGTON AVENUE, NEW YORK, N.Y. 10022
(212) 735-8600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LANDMARK EDUCATION CORPORATION, Plaintiff, - against - THE CONDE NAST PUBLICATIONS, INC., d/b/a SELF MAGAZINE, ADVANCE MAGAZINE PUBLISHERS, INC., d/b/a SELF MAGAZINE, and DIRK MATHISON, Defendants.	Index No. 114814/93 I.A.S. Part 3 Justice Davis

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of plaintiff Landmark Education Corporation ("Landmark") in opposition to the defendants' pre-discovery motion for summary judgment.

Landmark is an employee-owned for-profit corporation engaged in the business of making educational programs available to the general public on a variety of subjects including communication, time management and productivity. Landmark's basic program is the Landmark Forum ("the Forum"), a seminar which takes place during three days and one evening session. Landmark has no "members." Participants in the program make no donations, under any guise, to it. They merely pay tuition ($290 for the four-session Forum) to participate.

Landmark sued defendants for publishing a defamatory article entitled "WHITE COLLAR CULTS -- THEY WANT YOUR MIND" in the February 1993 issue of Self Magazine. The article charges that Landmark is among "America's most-wanted cults" and falsely alleges (among other things) that Landmark (a) is a "cult"[1] which (b) uses "brainwashing" and other "mind-control techniques," (c) practices "manipulative recruitment," (d) causes "psychological and emotional damage" to participants, (e) engages in "fraud and deceit in fund-raising," (f) harasses its critics and their families as well as former followers, and (g) cuts participants off from family and friends.

The facts relevant to a determination of this motion are set forth in the accompanying affidavits of several Landmark employees:

Arthur Schreiber - Landmark's General Counsel and Chairman of its Board of Directors ("Schreiber Aff.");

Stephen Zaffron - Landmark's Director of Leadership Training ("Zaffron Aff."); and

---

[1] The article specifically defines the word "cult" as follows:

> What makes a cult? ... "[It is] a group that, one, uses coercive pressure and deception to get people to join in and, two, uses mind-manipulation techniques without the consent or knowledge of the participants."
>
> * * * * *
>
> [After joining] members [of a cult] have cut their ties to the outside world, abdicated their decision-making abilities and surrendered their psyches as well as, in many cases, any assets they may have.

(Lans Aff. Ex. 1, pp. 121, 123).

Randy McNamara - Landmark's Senior Programs Director ("McNamara Aff.");

and as well as in the affidavits of four individuals who have participated in the Landmark Forum and have no financial affiliation with any of the parties to this lawsuit:

Alvin H. Goldstein - a journalist whose numerous credits include service as Producer of the CBS Evening News with Walter Cronkite and Executive Producer of the McNeil/Lehrer News Hour ("Goldstein Aff.");

Edward H. Lowell, M.D. - a psychiatrist with expertise in the fields of "brainwashing" and "mind-control" who has spent the past 35 years in private practice and as a consultant for several government agencies, including the United States Department of Health, Education and Welfare ("Lowell Aff.");

Lowell D. Streiker, Ph.D. - a minister, educator, and therapist who counsels individuals whose lives have been disrupted by cults and who has written four books and numerous articles on cults ("Streiker Aff."); and

Father Edward Zogby - a Jesuit priest who has spent the last 14 years as a teacher and administrator at Fordham University ("Zogby Aff.").

In addition, documents pertinent to the motion are annexed as exhibits to the affirmation of Landmark's attorney, Deborah E. Lans. ("Lans Aff.").

Defendants have moved for summary judgment (prior to appearing and testifying at duly noticed examinations before trial) on the grounds that the challenged statements (1) are substantially true assertions of fact, (2) are constitutionally privileged expressions of opinion, and/or (3) are not "of and concerning" plaintiff Landmark.

To make these arguments, defendants have resorted to examining the challenged statements in isolation, out of context, and in their narrowest sense, and have then

subjected them to the following benign (and strained) interpretation -- that at least one anti-cult group has received at least one complaint that the Forum engages in at least one practice that, in the "opinion" of the article's author, constitutes a cult-like activity. It is a clever but unavailing attempt at spin control.

In fact, as explained below and as alleged in plaintiff's complaint, the article's false and defamatory assertions regarding Landmark are much broader in scope than defendants would have this Court believe. On this motion, defendants have confined their legal analysis and accompanying offer of proof to the limited charge that anti-cult organizations have received a small number of complaints about the Forum. However, the article asserts, and Landmark's pleading alleges that it asserts, not simply that complaints were received, but also that *the substance of those complaints is true*. In other words, although defendants have put together a well-crafted set of papers, they attack a straw man; they have utterly failed to offer any proof (especially in admissible form) that the challenged statements, *when afforded the reasonable defamatory meaning alleged by plaintiff*, are substantially true.

Defendants' motion must be examined within the context of the following well-established principles of libel law: (1) a challenged statement must be read in context, against the background of its issuance, and under the circumstances of its publication; (2) words must be tested against the understanding of the average reader and courts will not strain to interpret them in their mildest and most inoffensive sense; (3) if a challenged statement is reasonably susceptible of more than one interpretation, its meaning presents a factual issue to be resolved by a jury; (4) a plea of truth as justification must be as broad as the libel alleged

and must establish the truth of the precise charge complained of; (5) if an allegation is capable of being proven true or false, it is a factual assertion, not an expression of opinion, and (6) statements that are couched as opinion, but which are premised on facts that are either undisclosed or falsely reported to the reader, are actionable as "mixed" expressions of fact and opinion.

After applying these legal principles, this Court should conclude as follows:

(1) the substantial truth defense is inapplicable to this action because defendants have failed to offer proof in admissible form of the precise charges alleged in plaintiff's libel complaint (answering defendants' Point I);

(2) the opinion privilege does not apply to this action because the challenged statements, though couched as opinion, are premised on undisclosed or falsely reported facts (answering defendants' Point II); and

(3) the challenged statements could be found by a reasonable jury to be of and concerning Landmark (answering defendants' Point III).

For all of the reasons discussed herein, defendants' motion for summary judgment should be denied in its entirety, and the discovery process in this litigation should be expeditiously resumed.

STATEMENT OF FACTS

The Parties

Plaintiff Landmark Education Corporation ("Landmark") is an employee-owned for-profit corporation which was formed in 1991. (Schreiber Aff. ¶4). Landmark's

sole business is the development and delivery of educational programs to the general public -- including individuals, communities, and organizations -- through its more than 40 offices worldwide. (Id.). Landmark offers programs on a variety of subjects including communication, time management and productivity. (Id. at ¶6).

Landmark has no "members" (Schreiber Aff. ¶5) and its programs are not based on the writings or teachings of an authoritarian leader. (Streiker Aff. ¶4). Landmark courses utilize the Socratic method and are led by employees of Landmark (approximately 40 in all) who have undergone extensive training. (Zaffron Aff. ¶¶1 and 7).

Participants in Landmark's programs pay tuition. The cost of Landmark's basic program, The Forum (which is identified by name in the Self magazine article that gave rise to this lawsuit), is $290 for a seminar which extends over three days and one evening session. (Schreiber Aff. ¶5). With the sole exception of the cost of their tuition, participants in Landmark's educational programs are neither solicited nor permitted to make any financial contributions or donations to Landmark. (Schreiber Aff. ¶5). For example, Forum participants are not solicited to buy, nor offered for sale, any books, tapes, videos, or any other materials of any kind. (Id.). In addition, Landmark has no residential facilities. (Zogby Aff. ¶12). Particpants live in their own houses and generally, maintain full-time jobs. Participants do not pay Landmark any form of rent.

Landmark has never been charged by any government entity with any kind of misconduct, including fraud in fund raising or deceptive advertising. Similarly, Landmark has never been sued by any individual, entity or group in connection with its delivery of educational programs, including the Forum. (Schreiber Aff. ¶21).

Defendant Advance Magazine Publishers, Inc. ("Advance") is a for-profit publishing company, based in New York, which, through its division, The Conde Nast Publications, Inc. ("Conde Nast"), publishes a nationally distributed monthly magazine known as Self magazine.

Defendant Dirk Mathison ("Mathison") is a writer who resides in California. He has written extensively for People and Time magazines in the fields of religion and popular culture.

The False And Defamatory Publication

In the February 1993 issue of Self Magazine, defendants published a non-fiction article, authored by Mathison, entitled "White Collar Cults -- They Want Your Mind . . . ." The Table of Contents of the February issue describes this article as follows:

> *WHITE-COLLAR CULTS: THEY WANT YOUR MIND*
> A harrowing account of the human-potential movement at its most manipulative. Plus-Caution: cults at work. And: America's most-wanted cults. By Dirk Mathison. (Lans Aff. Ex. 1).

The "Contributors" page of the same issue describes the expertise of the article's author:

> *Dirk Mathison* ("White-Collar Cults: They Want Your Mind," page 120) knows zealotry from way back. His father wrote the classic *Faiths, Cults & Sects of America*, about the dangers of brainwashing among religious groups. Undoubtedly, Mathison's early exposure to this material inured him to the cults he investigated. "They're very powerful," he says, "but understanding real life takes a lifetime, not a weekend." (Lans Aff. Ex. 1).

The article itself spans six pages. Its first page consists solely of the red, yellow and white title "WHITE COLLAR CULTS: THEY WANT YOUR MIND . . ." above 14 smiling, but refracted images of white, young people who appear to range in age from their early twenties to their late thirties. The pictured individuals look as though they are grinning into a mirror at an amusement park fun-house. The message is obvious -- involvement with the groups discussed in the following article causes a distortion of reality and psychological damage. (Similar pictures are used to illustrate the text of the article).

The text of the article begins on the following page, underneath large, bold red type which reads:

And your money, and six of your friends. A look at the new, white collar world of cults – where 'personal growth' means brainwashing.

The article's text includes the following false and defamatory statements concerning plaintiff:

> What makes a cult? ... "[It is] a group that, one, uses coercive pressure and deception to get people to join in and, two, uses mind manipulation techniques without the consent or knowledge of the participants."
>
> Slicker than hard-core religious sects..., the new cults keep a sophisticated, modis-wise profile....
>
> ... It's a pyramid marketing scheme that dates back to the pyramids themselves....
>
> [They] rely upon deception and aggressive marketing to keep warm bodies running through the training pipeline. ...
>
> [After joining] members have cut their ties to the outside world, abdicated their decision-making abilities and surrendered their psyches as well as, in many cases, any

assets they might have. The cult is all the convert has left, which is why so many stay.

* * * * *

America's most-wanted-cults

What makes a cult? ... The leading cult-awareness organizations cite the groups below -- which range from sleek and sophisticated "transformational workshops" to fundamentalist sects -- as having been the subject of complaints for activities that include: trance-induction; manipulative recruitment; thought reform or mind control; harassment of critics and their families and former followers; psychological and emotional damage; and fraud and deceit in fund raising. ...

Personal growth/transformational/therapy. Corporate in style, these groups may own clusters of legitimate businesses, publish books and retain top public relations counsel:

■The Forum (also est and the Hunger Project): Founded by Werner Erhard. Personal growth, success and sometimes the salvation of the world. Celebrity member: John Denver. (Lans Aff. Ex. 1).

In its libel complaint, which is annexed as Exhibit 5 to the Lans Affirmation, plaintiff has alleged that the article, as well as the Table of Contents and "Contributors" pages of the February 1993 issue of Self Magazine, by the use of the particular words set forth above, when read in context, conveyed the following false and defamatory meanings of and concerning plaintiff:

a. The Landmark Forum is a cult;

b. Landmark brainwashes participants in the Forum and utilizes mind-manipulation techniques to induce mind control, thought reform and trance-like activity;

c. Landmark uses manipulative recruitment techniques;

d. Participation in the Forum causes psychological damage;

e. Landmark engages in fraud and deceit in fund raising and induces Forum participants to surrender their personal assets;

f. Landmark harasses critics of the Forum and their families as well as former participants in the Forum; and

g. "Members" of the Landmark cult are induced by Forum to isolate themselves from their friends and families.

See, Lans Aff. Ex. 5, ¶¶18-20.

Evidence of Falsity

An examination of the affidavits, letters and documents submitted in opposition to defendants' motion for summary judgment demonstrates that the challenged statements are false. Space limitations preclude a review of all of the evidence marshalled by plaintiff. Accordingly, Landmark respectfully refers this Court to the seven affidavits submitted herewith and the documents annexed to the Lans Affirmation for review in their entirety. A sample of such proof, broken down by factual allegation, is set forth below.

A. **The Forum is Not "a Cult"**

The article specifically defines the word "cult" as follows:

> What makes a cult? . . . "[It is] a group that, one, uses coercive pressure and deception to get people to join in and two, uses mind-manipulation techniques without the consent or knowledge of the participants."

* * * * *

> [After joining] members [of a cult] have cut their ties to the outside world, abdicated their decision-making abilities and surrendered their psyches as well as, in many cases, any assets they may have. (Lans Aff. Ex. 1, pp. 121, 123).

Landmark does not fit the defendants' description. Lowell D. Streiker, Ph.D. is a minister with the United Church of Christ who has spent years counseling victims of cults, including many survivors of the People's Temple in Jonestown, Guyana. (Streiker Aff. ¶2). In addition, he is the author of numerous books and articles about cults. (Id.). He has no personal, professional or financial affiliation with Landmark. (Streiker Aff. ¶1). Dr. Streiker has participated in the Forum and has read the Self magazine article. (Streiker Aff. ¶¶3 and 5). Based on his personal and professional knowledge, he has attested that Landmark possesses none of the elements identified by the article as a characteristic of a cult:

> I understand the article to be asserting as statements of fact the following: . . . that Landmark uses coercive pressure, brainwashing and other mind-manipulation techniques to persuade individuals to enroll and re-enroll in The Forum and its other courses; [and] that participation in The Forum and its related courses causes psychological and emotional damage. . . . In my experience -- including taking The Forum, counselling countless victims of cults, reading constantly in the area of cult studies -- these allegations are simply false . . . . Based on my personal experience with The Forum and my professional expertise, I can state unequivocally that neither Landmark nor The Forum is a cult. (Streiker Aff., ¶¶4 and 6) (Emphasis added).

Father Edward Zogby, a Jesuit Priest who has spent the last 14 years as Assistant Vice President for the Lincoln Center Campus of Fordham University, has also participated in the Forum and read defendants' article. He has stated that

> The Forum requires no continuing participation -- it lasts only three days and one evening. Then it is over and the individual is left independently to continue his or her own learning. Rather than isolate a community of "believers", Landmark and The Forum inspires participants to enliven and strengthen their relationships with their families and friends. (Zogby Aff. ¶5).

Similarly, Edward H. Lowell, M.D., a psychiatrist who has spent the past 35 years practicing psychotherapy and serving as a consultant to many government agencies including the United States Department of Health, Education and Welfare, has also participated in the Forum and read the Self Magazine article. He has explained that

> In my experience -- including my participation in The Forum and other courses, and practicing psychiatry for over three decades -- the Article's assertions, including its labeling of Landmark and The Forum as a "cult," are wholly groundless, false and harmfully misleading. (Lowell Aff. ¶8) (Emphasis added).

All three of the individuals quoted above have (1) participated in the Forum, (2) read the article in question, and (3) understood the author's use of the term "cult". All unequivocally dispute the defendants' characterization of Landmark as a "cult".

B. Landmark Does Not Brainwash Participants in The Forum or Use Mind-Manipulation to Induce Mind Control, Thought Reform or Trance-Like Activities

Dr. Lowell, a psychiatrist who has been specifically trained in the tactics and techniques of "brainwashing" has stated that

> I am personally and professionally outraged by this Article because it represents a false and inaccurate portrayal of Landmark as engaging in "brainwashing" and similar practices and uses this as a false assumption upon which to proclaim that The Forum is a "cult."

> Brainwashing requires the following basic conditions, not one of which exists in The Forum: (a) physical entrapment, (b) power to inflict bodily harm or death, or other punishing experience, (c) no chance of physical escape, and (d) no contact with friends and family . . . Further, "brainwashing" techniques also necessarily involve the intrusive inculcating of a particular ideation or doctrine and the disenchantment of a subject with his previous affiliations, loyalties, support groups and principles. In no way does The Forum even address such areas, let alone focus upon them. (Lowell Aff. ¶¶5 and 7).

Steven Zaffron, Landmark's Director of Leadership Training, has explained the structure and rationale behind the structure of The Forum:

> Defendants' motion asserts that the Forum is structured to induce sleep deprivation in participants, thereby rendering them vulnerable to "mind-control" and "brainwashing" techniques. These assertions are at odds with the facts. The Forum runs three days and one evening session. The day sessions begin at 9:00 a.m. and end around midnight. The evening session begins at 7:30 p.m. and ends by 10:45 p.m. These scheduling facts are not hidden from participants. Rather, the hours are set forth explicitly in the Information Packet sent to all registrants in advance. (A copy is attached as Exhibit R to the Callagy Affidavit. See page Bates No. A 003). The reason for the "long" hours is not to induce sleep deprivation. First, it is doubtful sleep deprivation could be achieved this way -- even where the seminars last the maximum allocated time, there remains 4 hours of breaks from the course and 8 additional hours in which to get some sleep. Rather, the reason for this scheduling is that, in our experience, there must be a fair investment of time made in order for participants to benefit from the program. Since the program is not a "live-in" situation, and because we try not to disrupt participants' normal work week, or interfere with their family obligations and other commitments, it is necessary to run the program mainly on weekend days. The choice is several long days or hours, or shorter hours stretched over many weekends. We believe the latter "solution" would be more burdensome on the participants and intrusive on their other commitments. (Zaffron Aff. ¶2).

Alvin Goldstein, a former producer of the Evening News With Walter Cronkite and The McNeil/Lehrer News Hour, has taken the Forum and has emphasized that he "saw no fraud, deceit or coercion. No attempt was made to 'control' thought, nor induce 'trances'". (Goldstein Aff. ¶6).

Father Zogby, the Fordham University administrator, has explained his reaction to defendants' "mind control" charges:

> As a professional educator, I am struck by the thought that if Landmark's educational program can be criticized in these ways, then so too may the education at Fordham and any other major universities be deemed to involve "thought reform" and "mind control," because we use the same techniques -- an effort to engage the student in rigorous examination and re-examination of precepts and logic. (Zogby Aff. ¶15).

C. Landmark Does Not Use Manipulative Recruitment Techniques

Several letters sent to defendants shortly after the publication of the article emphasize that Landmark does not engage in manipulative recruitment techniques. For example, Annette Tressell wrote to defendants and explained that

> The Forum doesn't rely upon deception and aggressive marketing for their enrollment. There is a guest project in which you are invited to participate. There are no problems with declining the invitation. Membership is not the goal.
>
> Never during The Forum or any of the following courses did I receive calls before or after 7 every morning from someone in the group with a list of goals to achieve especially not who I was going to enroll that day [all as stated in the article]. (Lans Aff. Ex. 3 at D 256).

Similarly, Diane S. Cline wrote and advised defendants as follows:

> While it is true that some enthusiasts in any group (even churches) may feel pressure to recruit (witness), it was never my experience with The Forum that this was a REQUIREMENT . . . . I met many happy people who benefitted from associating with these "cults". No, they're not for everyone, but I've had more pressure from church groups than I ever experienced with the "cults" I've belonged to. (Lans Aff. Ex. 3 at D 264).

Andrea Brown, who has participated in the Forum, also sent defendants a letter emphasizing that

> I have never been pressured to take any courses or to continue with additional seminars, courses, etc.
>
> I do not receive any "emotional strokes" for bringing in "recruits," nor am I reprimanded or ostracized for not. How dare you make up these fabrications. Maybe that is the premise of some other groups. It just isn't appropriate to categorize the way you have.
>
> If I am not interested in participating in a course, I don't. No one calls me to come back. They appreciate that we are all adults and take responsibility for ourselves and our own choices. When I want to take a seminar, I do. (Lans Aff. Ex. 3 at D 241-242).

Sister Miriam Quinn, Education Director for the Office of the Social Apostolate of the Archdiocese of New Orleans, also wrote that "participation [in the Forum] is always by invitation." (Schreiber Aff. Ex. C).

Alvin Goldstein, formerly a producer with CBS News, has also disputed defendants' characterization of Landmark's recruiting tactics:

> Having attended The Forum, I know firsthand that the Article's allegations regarding Landmark and The Forum are false. For example, Landmark used no manipulative, deceitful or otherwise inappropriate recruitment devices. (Goldstein Aff. ¶6).

D. Participation in the Forum Causes No Psychological Damage

All of the experts who have actually participated in the Forum agree that Landmark causes no psychological damage. For example, Dr. Lowell D. Streiker, who has spent much of the past 15 years counseling victims of cults and their families, has explained that:

> I understand the article to be asserting as [a] statement [ ] of fact . . . that participation in the Forum and its related courses causes psychological and emotional damage; . . . In my experience -- including taking the Forum, counselling countless victims of cults, reading constantly in the area of cult studies -- [this] allegation [is] simply false. (Streiker Aff. ¶6).

Similarly, psychiatrist Edward H. Lowell, M.D. has attested that Landmark is "a unique and valuable educational opportunity that allows participants to gain a greater sense of independence and confidence in their ability and accomplishments in life." (Lowell Aff. ¶4). See also, Schreiber Aff. Ex. C.

E. Landmark Does Not Engage In Fraud or Deceit In Fund Raising

In their moving papers, defendants have offered *no* evidence which purports to provide that Landmark engages in fraud and deceipt in fund-raising. The simple reason is that Landmark engages in no fund-raising whatsoever.

As Arthur Schreiber, Landmark's Chairman, explains:

> The simple fact is that Landmark does no fund-rising. It "raises" money only by offering its programs -- and receiving tuition payments from participants, which tuition amount is not significant. For example, tuition for The Forum is $290, for a

> 3 day/1 evening seminar. Landmark publishes no written or other materials, accepts no "contributions" or "donations", and runs no facility of any kind from which it raises funds (other, of course, than tuition). (Schreiber Aff. ¶23).

The affidavits of Father Edward Zogby and former CBS Producer Alvin Goldstein attest to the truth of Schreiber's statements. Father Zogby unequivocally states that

> Participants in The Forum are neither required nor requested nor permitted to donate all or even a portion of their assets to Landmark or any other entity, group or individual. Indeed, to my knowledge, Landmark accepts no donations. Certainly, it never solicits them. Participants in The Forum pay $290 as tuition to Landmark which covers the cost of the three day and one evening session. That (and tuition for other programs in which participants partake) are the only charges. No books or other materials are sold. Tuition is the entire financial picture. (Zogby Aff. ¶12).

Goldstein had a similar experience with the Forum:

> I was never asked to pay any funds, except the cost of the tuition for the program (that sum was reasonable in comparison to similar programs). (Goldstein Aff. ¶6).

F. Landmark Does Not Harass Critics of the Forum And Their Families or Former Participants

Defendants' motion papers also contain *no* evidence which purports to support their allegation that Landmark harasses critics of the Forum, their families and former participants. The charge is patently false. Dr. Streiker has emphasized:

> I understand the Article to be asserting as statements of fact the following: . . . that Landmark harasses critics of the Forum and their families as well as former participants in the Forum who discontinue their connection with the organization. In my experience -- including taking the Forum . . . [this] allegation [is] simply false. (Streiker Aff. ¶6).

See also, Goldstein Aff. ¶¶4 and 6; Schreiber Aff. ¶18.

G. Landmark Does Not Induce Forum Participants To Isolate Themselves From Their Friends and Families

Defendants' motion papers also offer *no* evidence that the participants in the Forum isolate themselves from their friends and families. This fact is not surprising. First, Landmark operates no residential facilities, there is nothing to "join" and no place where "members" congregate. Second, as numerous participants in the Forum have attested, the program puts a strong emphasis on family unity and reconciliation with friends and family members. For example, after participating in the Forum, Dr. Streiker has noted that

> what I have observed are people becoming more engaged with their family and community lives rather than removed from them. There is a strong emphasis in the Landmark programs on reconciliation between estranged family members and on responsible behavior within one's business and civic life. (Streiker Aff. ¶3).

Similarly, Father Zogby has explained that

> Participants in the Forum are not required or requested to cut themselves off, or isolate themselves from their family and friends. They do not live in a communal setting -- people who participate in the Forum return to their homes in the same manner as if they took adult education courses at an urban college. Landmark has no residential facilities. Since the program only occupies weekend or evening times, by definition it cannot effect the isolation of participants. (Zogby Aff. ¶14).

After reading the article, Melissa Hastings wrote a letter to defendants in which she asserted as follows:

> All I know is that the Forum worked for me in my life. I forgave my parents for not living up to my expectations of who

> I thought they should be and let them be themselves. I now have an exceptional relationship with my mother, who lives close to me. She and I can talk in a way, an intimate way, that just wasn't possible before I did the Forum. (Lans Aff. Ex. 3 at D 243).

Furthermore, Dayle Brenner wrote to inform defendants that

> The Forum, offered by Landmark Education Corporation, by no means parades as a panacea, as Mr. Mathison implies. Marketed as a tool for self awareness and enhanced overall effectiveness, there are no claims made of eternal euphoria. The facts, however, would have been worth mentioning. *Families are re-united, marriages are re-ignited*, and there is often increased productivity. (Lans Aff. Ex. 3 at D 255) (Emphasis added).

Evidence of Readers' Understanding of the Challenged Statements

There can be no serious doubt that readers of the article understood the challenged statements to constitute assertions of fact which concern or refer to Landmark and the Forum.[2] First, the letters sent by readers to defendants which were produced (by defendants) in discovery evidence just that. For example, Annette Tressell wrote to Self

---

[2] The readers of the article who had any familiarity with Landmark or The Forum understood all of its references to The Forum as references to Landmark. For example:

> When reading the Article, I understood each of its references to the Forum to refer to Landmark. Because the Forum is Landmark's core program, I associate the two. I also believe that other participants of the Forum or of any of Landmark's other seminars, guests who are invited to learn about the Forum and Landmark's other seminars, and even those who have not participated but have heard about the Forum or Landmark's other seminars would associate the Forum with Landmark and believe that references to the Forum are to Landmark as well. (Zogby Aff. ¶7).

magazine and provided a point-by-point refutation of the article's defamatory allegations that the Forum (1) uses manipulative recruiting techniques, (2) brainwashes participants and resorts to other mind-control tactics, and (3) is a cult:

> I recently read an article entitled "They Want Your Mind . . ." in the February 1993 of Self. . . .
>
> The Forum does not claim to solve problems as immense as mental illness. The Forum is not a mass therapy group. On their registration form they state specifically that the Forum is not therapeutic and that the Forum Leaders are not trained mental health professionals. Issues which are best dealt with in therapy will not be addressed.
>
> When I was in the Forum I was allowed to go to the bathroom whenever I needed to.
>
> The Forum doesn't rely upon deception and aggressive marketing for their enrollment. There is a guest project in which you are invited to participate. There are no problems with declining the invitation. Membership is not the goal.
>
> Never during the Forum or any of the following courses did I receive calls before or after 7 every morning from someone in the group with a list of goals to achieve especially not who I was going to enroll that day [as the article states] . . . .
>
> The Forum is listed under America's most-wanted cults. My experience of the Forum wasn't anything like cult is defined by Webster's II New Riverside Dictionary. I found my experience to be about choice, enlivenment, possibility and support. (Lans Aff. Ex. 3 at D 256).

Judith Lewis also wrote to Self, and her letter clearly indicates that she understood the article's allegations about brainwashing, manipulative recruitment, and fraud and deceit in fund-raising to refer to the Forum:

> Your article "White Collar Cults - They Want Your Mind . . ." that indicted many "personal growth" organizations and labeled

them as deceptive, aggressive, profit motivated, fraudulent and guilty of brainwashing is a good example of the brainwashing done daily by the various media. . . . While I have only participated with one of the mentioned groups, "the Forum" . . . I speak for those thousands of people who are not brainwashed, not neurotic, and have not given up any of their ability to make up their own mind. (Lans Aff. Ex. 3 at D 245).

Similarly, a letter by Robert Tomsich to defendants evidences his understanding that the article asserts that the Forum causes psychological damage and utilizes brainwashing tactics:

> In December '92, I attended a three day "Forum" session by Landmark Education. The most visible damage done to me included these atrocious personality changes:
>
> 1. In December I was able to tell my parents I love them.
>
> 2. In January I spent one and a half weeks with them in Florida. The three of us spent the time talking, listening and sharing.
>
> 3. After years of stagnant dating, my girlfriend and I are communicating with future possibilities unthought of before the Forum.
>
> Somebody better stop this kind of brainwashing before world peace breaks outs. (Lans Aff. Ex. 3 at D 247).

Second, the affidavits from independent third parties reflect the same understanding. For example, Father Zogby has stated as follows:

> I . . . understood the Article to be stating that Landmark engages in trance-induction, manipulative recruitment, thought reform or mind control, harassment of critics and their families and former followers, that participation carries psychological and emotional damage, and that Landmark uses fraud and deceit in fund-raising. In addition, the Article brands Landmark a "cult." I understood the Article to be making factual assertions on each of these points -- charging in essence that Landmark

regularly engages in the immoral and illegal activities noted above and that, by virtue of such objectively verifiable "misconduct" Landmark is properly revealed as a "cult." (Zogby Aff. ¶8).

Moreover, Dr. Streiker has attested as follows:

I understand the article to be asserting as statements of fact the following:

1. that Landmark uses coercive pressure, brainwashing and other mind-manipulation techniques to persuade individuals to enroll and reenroll in the Forum and its other courses;

2. that participation in the Forum and its related courses causes psychological and emotional damage;

3. that Landmark engages in deceptive and even fraudulent fund-raising tactics; and

4. that Landmark harasses critics of the Forum and their families as well former participants in the Forum who discontinue their connection with the organization. (Streiker Aff. ¶6).

Finally, Mr. Goldstein has explained that

With respect to this Article, I understood it to be making the following factual assertions regarding Landmark (and the Forum): (a) that it uses coercive pressure and deception to get people to join; (b) that it uses mind-manipulation techniques without the consent or knowledge of the participants; (c) that it engages in pyramid marketing and in marketing employs "schemes"; (d) that it relies upon deception and aggressive marketing to "recruit"; (e) that its participants routinely cut their ties to the outside world, abdicate their decision-making abilities and surrender their psychological health and monetary assets; (f) that its participants are members of a "cult" and that its program utilizes trance-induction, manipulative recruitment, thought reform or mind control; (g) that Landmark regularly harasses critics and their families; (h) that it causes participants

psychological and emotional damage; and (i) that it utilizes fraud and deceit in fund-raising. (Goldstein Aff. ¶4).

In sum, the article is read, by everyone (save only defense counsel) to accuse Landmark of being a cult and engaging in all of the "cult-like" practices identified in the Self magazine article. The fact is, substantial evidence shows that Landmark is *not* a cult and does *not* engage in such practices.

ARGUMENT

I.

PREVAILING SUMMARY JUDGMENT STANDARDS MANDATE DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In deciding the propriety of a summary judgment motion, all evidence favorable to the party opposing the motion *must* be accepted as true.[3] See, e.g., Patrolmen's Benevolent Association v. City of New York, 27 N.Y.2d 410, 415, 318 N.Y.S.2d 477, 480, 267 N.E.2d 259, 261 (1971); Cohn v. Lionel Corp., 21 N.Y.2d 559, 562, 289 N.Y.S.2d 404, 407, 236 N.E.2d 634, 636 (1968); and, Creighton v. Milbauer, 191 A.D.2d 162, 594 N.Y.S.2d 185 (1st Dep't 1993). In addition, the motion court "must draw all reasonable inferences in favor of the non-moving party," Dauman Displays, Inc. v. Masturzo, 168 A.D.2d 204, 562 N.Y.S.2d 89, 90 (1st Dep't 1990), and the court's decision "must be made on the version of the facts most favorable to [the non-moving party]." McLaughlin v.

[3] The same standards apply to defamation actions as to all other civil actions. Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 562-63, 416 N.E.2d 557 (1980); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 n. 7 (1986).

Thaima Reality Corp., 161 A.D.2d 383, 384, 555 N.Y.S.2d 125, 126 (1st Dep't 1990). See also, Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521, 544 N.Y.S.2d 834, 835 (1st Dep't 1989).

As the First Department has repeatedly held:

> the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue (Moskowitz v. Garlock, 23 A.D.2d 943, 944, 259 N.Y.S.2d 1003) or where the issue is even arguable (Barrett v. Jacobs, 255 N.Y. 520, 522, 175 N.E. 275), since it serves to deprive a party of his day in court. (Emphasis added).

Gibson v. American Export Isbrandtsen Lives, Inc., 125 A.D.2d 65, 73, 511 N.Y.S.2d 631, 636 (1st Dep't 1987). See also, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141, 145, 385 N.E.2d 1068, 1072 (1978), and Henderson v. City of New York, 178 A.D.2d 129, 576 N.Y.S.2d 562, 564 (1st Dep't 1991).

The burden is on the moving party to produce evidence which clearly removes any doubt as to the existence of a triable issue of fact "even when the opposing papers may be insufficient to defeat the motion." Matter of Redemption Church of Christ v. Williams, 84 A.D.2d 648, 649, 444 N.Y.S.2d 305, 307 (3d Dep't 1981), cited with approval in Halloran v. Spina Floor Covering, Inc., 185 A.D.2d 149, 586 N.Y.S.2d 787, 788 (1st Dep't 1992). Particular care must be taken before granting the extreme remedy of summary judgment where, as here, the interpretation sought by the moving party would produce an unreasonable result. Telemundo Group, Inc. v. Alden Press, Inc., 181 A.D.2d 453, 580 N.Y.S.2d 999, 1000 (1st Dep't 1992); Mandelblatt v. Devon Stores, Inc., 132 A.D.2d 162, 167, 521 N.Y.S.2d 672, 675 (1st Dep't 1987).

Accepting as true all of the factual assertions in the affidavits submitted in opposition to defendants' motion, viewing all other facts in the light most favorable to Landmark, and drawing all inferences in plaintiff's favor, it is apparent that this Court must deny defendants' motion for summary judgment in its entirety. This conclusion is dramatically underscored by the fact that defendants have failed to submit *any evidence whatsoever* in admissible form to support their invocation of the substantial truth defense.

II.

HEARSAY EVIDENCE IS INADMISSIBLE TO SUPPORT A MOTION FOR SUMMARY JUDGMENT

Summary judgment is unavailable to a movant absent "tender of evidentiary proof *in admissible form*." Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597, 404 N.E.2d 718, 719 (1980); Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790, 791-792, 390 N.E.2d 298, 299 (1979) (Emphasis added).[4] Significantly, even though defendants have moved for summary judgment on the ground of substantial truth, they have not presented this Court with evidence which is admissible to show the truth of the challenged statements in the Self magazine article.

---

[4] However, as the Court of Appeals reiterated in Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 N.Y.2d at 1067-1068, 416 N.Y.S.2d at 791-792: "The rule with respect to *defeating* a motion for summary judgment . . . is more flexible. . . . [T]he opposing party, *as contrasted with the movant*, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form." (Emphasis added).

Annexed as exhibits to the moving affidavit of defendants' counsel are a number of documents that are clearly inadmissible. For example, defendants have attempted to rely on unsworn letters which purport to demonstrate that the Forum engages in certain "cult-like" practices. (See e.g., D. Mem. at 11-14 quoting excerpts from Callagy Aff. Ex. N).[5] It is well-settled that unsworn letters are not admissible to prove the truth of the statements they contain. See e.g., Lindt v. Henshel, 25 N.Y.2d 357, 306 N.Y.S.2d 436, 254 N.E.2d 746 (1969) (letter asserting title to sculpture inadmissible to prove title); Boschen v. Stockwell, 224 N.Y. 356, 120 N.E. 728 (1918) (physician's letter regarding patient's mental condition inadmissible to show lack of capacity); and Lumpkin v. Aetna Casualty & Surety Co., 21 A.D.2d 860, 251 N.Y.S.2d 203 (1st Dep't 1964) (letter stating writer had no insurance inadmissible to show that writer's automobile was uninsured). See also, Kourtalis v. City of New York, 191 A.D.2d 480, 594 N.Y.S.2d 325 (2d Dep't 1993) (civilian complaints against police officer inadmissible as hearsay in action against officer for assault and battery, false arrest and malicious prosecution).

Similarly, defendants have attempted to rely on newspaper articles to prove that the Forum is a "cult". (See e.g., D. Mem. at 15-18 relying upon Callagy Aff. Ex. I).[6] It is equally well-settled that newspaper articles are inadmissible to prove the truth of the subject matter on which they report. See e.g., People v. Goetz, 68 N.Y.2d 96, 116, 506

---

[5] See also D. Mem. at 6 which alleges that "the statements complained of are substantially true. . . . The Forum has been the subject of numerous complaints . . . about its cult-like activities."

[6] See also D. Mem. at 6 which alleges that "the statements complained of are substantially true. . . . The Forum . . . has been identified as a cult by . . . numerous articles published prior to the Article."

N.Y.S.2d 18, 30-31, 497 N.E.2d 41, 53 (1986) (statements in Daily News column inadmissible to support dismissal of indictment), and Simmon v. Van Alstyne, 65 A.D.2d 869, 410 N.Y.S.2d 400 (3d Dep't 1978) (testimony of witness inadmissible when based solely on review of newspaper articles).

It is quite common for courts to refuse to consider hearsay evidence offered in support or opposition to a summary judgment motion. See e.g., Grasso v. Angerami, 79 N.Y.2d 813, 580 N.Y.S.2d 178, 588 N.E.2d 76 (1991) (unsworn doctor's report tendered by accident victim as proof of serious injury not considered) and Rue v. Stokes, 191 A.D. 2d 245, 594 N.Y.S.2d 749 (1st Dep't 1993) (unsworn reports, letters and transcripts not considered).

Plaintiff urges this Court to disregard the exhibits annexed to the Callagy Affidavit on the ground that they constitute inadmissible hearsay, and deny defendants' motion for summary judgment on the substantial truth issue for failure to "tender evidentiary proof in admissible form."

III.

THE STATEMENTS COMPLAINED OF, WHEN AFFORDED A REASONABLE DEFAMATORY MEANING, ARE NOT SUBSTANTIALLY TRUE

A. Defendants' Offer of Proof Does Not Meet The Allegations of Plaintiff's Complaint

The substantial truth defense is inapplicable to this action because defendants have failed to offer proof which meets all (or even nearly all) of the allegations contained in plaintiff's libel complaint. Rather, defendants' proffer is far narrower than the libels themselves, and as such it is inadequate. The Court of Appeals has unambiguously held that

> *A plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge therein made.* See e.g., White v. Barry, 288 N.Y. 37, 39, 41 N.E.2d 448, 449; Fleckenstein v. Friedman, 266 N.Y. 19, 23, 193 N.E. 537, 538; see also, Seelman on the Law of Libel and Slander, [1933]. §171, p. 146.

Crane v. New York World Telegram Corp., 308 N.Y. 470, 475, 126 N.E.2d 753 (1955) (emphasis added).

In Crane, a newspaper had published an article which asserted that the plaintiff was "now under indictment." 308 N.Y. at 472. A libel complaint was then filed which alleged that the challenged statement falsely implied that a grand jury had met and voted to commence a criminal prosecution against the plaintiff. Defendant subsequently moved for summary judgment on the ground that the challenged statement was substantially true in that plaintiff, though never "indicted" by a grand jury, had been accused of a number of indictable crimes by various people. (Id.). The evidence that defendant submitted in support

of its motion was addressed to an *interpretation* of the challenged statement which, although defamatory, *differed from the interpretation alleged in plaintiff's complaint*. Accordingly, the Court denied defendants' motion and held that the substantial truth defense was inapplicable because the proof offered did not refute the pleaded claim. 309 N.Y. at 475-476.

Similarly, in this action, the evidence submitted by defendants in support of their motion does not address the substance of the claimed libels set forth in Landmark's complaint. Just as there is a major difference between saying that an individual has been accused by colleagues of a crime and reporting that the individual has been indicted by a grand jury, there is also a major difference between saying that an organization has been the subject of a limited number of complaints regarding some cult-like practices and reporting that the organization *in fact* routinely engages in numerous cult-like practices. Accordingly, this Court should also deny defendants' motion because the "proof" offered does not refute the "precise charges" alleged in Landmark's complaint.[7]

The Court of Appeals' analysis in Crane is often applied when libel defendants move for summary judgment on substantial truth grounds in an effort to avoid liability for the defamatory import of a false factual assertion. For example, in Malone v. Longo, 463 F. Supp. 139 (E.D.N.Y. 1979), a nurse sued a fellow nurse for libel for submitting a report which stated that "[plaintiff] told me to give a medication that she did not have an order for, and insisted upon me giving that order." 463 F. Supp. at 141. The defendant then moved

---

[7] See also, Yarmove v. Retail Credit Company, 18 A.D.2d 790, 236 N.Y.S.2d 836, 837 (1st Dep't 1963) ("[O]ne defamatory charge may not be justified by proof of another") and W. Prosser and W. Keeton, The Law of Torts §116 at 841 (5th ed. 1984 and Supp. 1988) ("[T]he justification must be as broad, and as narrow, as the defamatory imputation itself.").

for summary judgment on substantial truth grounds and offered evidence to prove that plaintiff gave an order for the wrong medication after misreading a doctor's handwriting. (Id). In opposing the motion, plaintiff argued that her complaint had alleged that the statement in question conveyed the following defamatory meaning: that *she had no doctor's order at all* when she instructed the defendant to administer medication. 463 F.Supp. at 143-144. The Court denied defendant's motion because "*the statement is ambiguous and all doubts [as to its meaning] must be resolved in favor of a party opposing a motion for summary judgment.*" 463 F. Supp. at 144 (emphasis added). The Court explained its reasoning as follows:

> While these are the only words alleged to be defamatory, they are nonetheless susceptible of various interpretations that preclude a conclusion that the words reflect the substantial truth. Since the defense of truth must be as broad as the charge, the court cannot grant judgment on the pleadings when, taken as a whole, the statements are capable of more than one meaning.

Id. at 143 (emphasis added).

Rozanski v. Fitch, 134 A.D.2d 944, 521 N.Y.S.2d 950 (4th Dep't 1987), is another example of a case in which a motion for summary judgment based on the substantial truth defense was denied after a court concluded that the challenged statement was susceptible of more than one meaning. In Rozanski, a man brought a libel suit against his wife's business competitor for asserting that the plaintiff-husband "has been sleeping with [his] daughter since she was 10 years old." The daughter was 16 years old when the defamatory statement was made. 134 A.D.2d at 945, 521 N.Y.S.2d at 950. In his motion for summary judgment, defendant failed to present proof of incest, but did present evidence

that the plaintiff and his daughter "shared a bed on at least one occasion under unusual circumstances." 134 A.D.2d at 945, 521 N.Y.S.2d at 952. In reinstating plaintiff's libel claim after it had been dismissed by the trial court on substantial truth grounds, the Fourth Department explained that:

> there can be no doubt that the words alleged . . . are susceptible of a defamatory meaning which was not demonstrated to be true on defendant's motion for summary judgment. Id.

In Crain, Malone and Rozanski, motions for summary judgment were all denied even though the libel defendants had presented evidence to prove the truth of the challenged statements in question. However, in those three cases, as in this action, the substantial truth defense was inapplicable because the evidence presented did not establish the truth of the charged libel in full, as alleged in the plaintiff's defamation complaint.

B. The Challenged Statements Are Susceptible Of The Defamatory Meanings Alleged By Plaintiff

There can be no serious dispute that the challenged statements are susceptible of the defamatory meanings alleged by plaintiff because many individuals have already signed affidavits and letters confirming that they understood the article to refer to Landmark and to assert as statements of fact the very direct, accusatory meanings alleged in plaintiff's complaint. See e.g., Zogby Aff. ¶8, Streiker Aff. ¶6, Goldstein Aff. ¶4, and Lans Aff. Ex. 3.

Moreover, it is well-settled that statements which disparage the basic integrity of a business are libelous per se. See e.g. Ruder & Finn, Inc. v. Seaboard Surety Co., 52

Y.2d 663, 670, 439 N.Y.S.2d 858, 862, 422 N.E.2d 518 (1981); and Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 440, 199 N.Y.S.2d 33, 37, 166 N.E.2d 319, 321 (1960). See also, Restatement (Second) of Torts §561 at 159 (1977) and W. Prosser and W. Keeton, The Law of Torts, §111 at 779 (5th Ed. 1984). Indeed, in their moving papers, defendants never suggest that the challenged statements are not susceptible of a defamatory meaning.

The parties *do* dispute the sense in which the article was understood by the readers of Self magazine. Plaintiff alleges that the article charges that Landmark (a) is a "cult" which (b) uses "brainwashing" and other "mind-control techniques," (c) practices "manipulative recruitment," (d) causes "psychological and emotional damage" to participants, (e) engages in "fraud and deceit in fund-raising," (f) harasses its critics and their families as well as former followers, and (g) cuts participants off from family and friends. (See Lans Aff. Ex. 5, ¶18-20). Moreover, plaintiff supports its view with affidavits and with letters received by defendants as a result of publishing the article. (See Lans Aff. Ex. 3). Defendants have denied plaintiff's allegations offering (purely through their lawyers' ipse dixit) the strained interpretation that the article does not accuse Landmark of anything, but rather merely reports that some complaints of some cult-like activities by Landmark have been received by some "anti-cult" groups.

On this motion, the Court need not and, indeed, may not decide whose interpretation is "correct" because:

> [i]f the contested statements are reasonably susceptible of a defamatory connotation, then it becomes the jury's function to

> say whether that was the sense in which the words were likely to be understood by the ordinary and average reader.

James v. Gannett, Co., Inc., 40 N.Y.2d 415, 419, 386 N.Y.S.2d 871, 874, 353 N.E.2d 834 (1976), quoting Mencher v. Chesley, 297 N.Y.94, 100, 75 N.E.2d 257, 259 (1947). See also, Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 523 N.Y.S.2d 480, 482, 517 N.E.2d 1365 (1987) and Silsdorf v. Levine, 59 N.Y.2d 8, 12-13, 462 N.Y.S.2d 822, 825 449 N.E.2d 716, cert. denied, 464 U.S. 831 (1983).

Thus, when a statement is capable of more than one meaning, a question of fact exists and summary judgment is inappropriate. See e.g., Carney v. Memorial Hospital and Nursing Home of Greene County, 64 N.Y.2d 770, 772, 485 N.Y.S.2d 984, 985, 475 N.E.2d 451, 452 (1985) and Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, cert. denied, 434 U.S. 969 (1977).[8]

Moreover, when analyzing the defamatory connotation of challenged statements, courts may not strain to read them as mildly as possible. Weiner v. Doubleday & Co., Inc., 74 N.Y.2d 586, 588, 550 N.Y.S.2d 251, 253, 549 N.E.2d 453, cert. denied, 495 U.S. 930 (1990), James v. Gannett Co., 40 N.Y.2d at 419-20, 386 N.Y.S.2d at 874, and Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 440, 199 N.Y.S.2d 33, 36, 166 N.E.2d 319, 321 (1960). Furthermore, on a dispositive motion, a court may not usurp the role of the jury. "The issue is not whether *the court* regards the language as libelous, but whether it is reasonably susceptible of such a construction." Kelly v.

---

[8] See also, November v. Time, Inc., 13 N.Y.2d at 178-79. 244 N.Y.S.2d at 311-12, Rovira v. Boget, 240 N.Y.314, 317, 148 N.E.2d 534 (1925) and Demos v. New York Evening Journal Publishing Co., 210 N.Y. 13, 103 N.E. 771 (1913).

Schmidberger, 806 F.2d 44, 46 (2d Cir. 1986) (emphasis added) citing Sharon v. Time, Inc., 575 F. Supp. 1162, 1165 (S.D.N.Y. 1983) and Mencher v. Chesley, 297 N.Y. at 102, 75 N.E.2d at 260. In sum,

> [t]he publisher of a libel may not, of course, escape liability by veiling a calumny under artful or ambiguous phrases and, if any common sense construction of what was written justifies or supports a defamatory meaning, it will be for the jury, not the court on motion, to [resolve any ambiguity].

Nichols v. Item Publishers, Inc., 309 N.Y. 596, 601, 132 N.E.2d 860, 862 (1956).

Finally, where the defendants have juxtaposed or combined their published statements so as to convey a defamatory meaning, they may be found liable *even if* none of the published statements is itself (in isolation), false or defamatory.[9] A clear illustration of this principle is presented in Herbert v. Lando, 781 F.2d 298, 307 n.4 (2d Cir.), cert. denied, 476 U.S. 1182 (1986):

> If, for example, a newspaper account of a rash of neighborhood thefts also reported that a public figure had recently moved into the neighborhood, purchased tools commonly used in burglaries, and had been seen near a number of homes where burglaries had occurred, a reader would be led to believe that the individual described had committed the crimes. Such a deductive inference might well be actionable if these is proof that the article was published with actual malice. While each individual statement alone might be literally accurate, in the aggregate they give rise to a false and defamatory inference. (Citations omitted).

---

[9] See, W. Prosser and W. Keeton, Prosser and Keeton on the Law of Torts, §116 at 117 (5th ed. 1984 and Supp. 1988): "[I]f the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct."

Thus, even if each one of the challenged statements is true when analyzed in isolation, the statements may be actionable when read together in the context of the entire article.

In this case, the challenged statements in the Self Magazine article are reasonably susceptible of the meanings alleged in plaintiff's complaint. When analyzed in light of those charged meanings, the statements are also demonstrably false.

C. Plaintiff's Burden Is Only To Prove Falsity By A Preponderance of the Evidence

Defendants' memorandum misstates the level of plaintiff's burden of proof on the truth issue. Defendants allege that

> because plaintiff is, at the least, a limited purpose public figure, it has the burden of establishing falsity by clear and convincing proof, not a mere preponderance of the evidence.

D. Mem. at 8 n.6. Defendants are incorrect for two reasons: First, Landmark is not a public figure, and second, even if it were, the clear and convincing standard applies *only* to the actual malice element of a libel claim, and not to any of the other elements in a public figure's defamation cause of action.

The law is clear that Landmark is not a public figure because it has never voluntarily injected itself into a public controversy. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) and Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). Furthermore, as this Court observed in Behr v. Weber, 18 Media L. Rep. (BNA) 1581, 1583 (Sup. Ct. New York Co. Jan. 5, 1990) (Davis, J.), "the mere fact that a business enterprise

is successful is an insufficient reason to deem it a public figure." See also, Bruno and Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 592 (1st Cir. 1980).

Moreover, even if plaintiff *is* deemed a public figure (and is thus required to establish "actual malice" with convincing clarity), plaintiff's burden on the falsity issue remains the preponderance of the evidence standard because "actual malice" is the *only* element of a libel claim that a public figure libel plaintiff must establish with the higher standard of proof. See, e.g., Restatement (Second) of Torts § 580A comment f (1977), which specifies:

> f. Weight of evidence. [t]he plaintiff [has] the burden of raising the issue of knowledge or reckless disregard and of proving that . . . "with convincing clarity" . . .
>
> Proof by more than a preponderance of the evidence has not been specifically required for any other factual issue in a defamation action. (Emphasis added).

See also, Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S.1049 (1970) (expressing view that preponderance of evidence standard applies to issue of falsity in public figure defamation action), and Nevada Independent Broadcasting Corp. v Allen, 99 Nev. 404, 410 n.2, 664 P.2d 337, 342 n.2 (1983) (rejecting view that clear and convincing standard applies to fact/opinion issue in public figure libel suit).[10]

---

[10] In their memorandum, defendants erroneously assert that Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986) stands for the preposition that a public figure libel plaintiff has the burden of proving falsity by clear and convincing evidence. (D. Mem. at 8 n.6). It does not so hold. Indeed, three years later, in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989), the Supreme Court, while *specifically* reserving judgment on this issue, upheld a jury verdict in which the jurors had been asked to determine whether falsity and defamatory meaning had been established by a "mere" preponderance of the evidence (rather than by clear and convincing proof).

In any event, as the United States Supreme Court explained in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986), even when the clear and convincing standard of proof is applicable to a ruling on a summary judgment motion,

> [t]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. (Emphasis added).

Here, it is more than likely that a jury would return a verdict in plaintiff's favor -- given the demonstrated falsity of the statements at issue.

IV. THE CHALLENGED STATEMENTS ARE NOT CONSTITUTIONALLY PROTECTED EXPRESSIONS OF OPINION

After spending the first thirty (30) pages of their legal argument in a vain attempt to prove that the charges made against Landmark are empirically true, defendants made a 180° turn and proceeded to argue that the challenged statements are not factual at all in nature, but instead constitute privileged expressions of opinion. As discussed below, none of the challenged statements are protected by the opinion privilege because none are based on disclosed facts which are true.

A. The United States Constitution Does Not Afford First Amendment Protection to Expressions Of Opinion

Defendants have erroneously alleged that the challenged statements are "protected" under the United States Constitution as expressions of opinion. (D. Mem. at 37-38). As the Court of Appeals of the State of New York explained in Gross v. New York

Co., 82 N.Y.2d 603, 146 N.Y.S.2d 813, 623 N.E.2d 1163, 1993 N.Y. LEXIS 3358 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-21 (1990):

> the Supreme Court has rejected the notion that there is a special categorical privilege for expressions of opinion as opposed to assertions of fact.

N.Y. LEXIS 3358, *9, 21 Media L. Rep. at 2144.

The Challenged Statements Do Not Constitute Expressions Of Opinion Privileged Under The New York State Constitution

The challenged statements all constitute *either* actionable false assertions of *or* actionable "mixed opinions." (See infra at pp. 39-40). None of them is a privileged ression of "pure opinion."

The dispositive inquiry in evaluating defendants' opinion defense is "whether a sonable [reader] could have concluded that the [challenged statements] conveyed *facts* out [Landmark]." See, Gross v. New York Times Co., 82 N.Y.2d 146, 603 N.Y.S.2d 3, 623 N.E.2d 1163, 1993 N.Y. LEXIS 3358, *10, 21 Media L. Rep. (BNA) 2142, 2144 t. 21, 1993); 600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130, 138, 589 .S.2d 825, 829, 603 N.E.2d 930, 934 (1992), cert. denied, __ U.S. ___, 113 S. Ct. 41 (1993) (emphasis added). Since falsity is a necessary element of a libel claim and only facts" are capable of being proven false, "it follows that only statements alleging facts can perly be the subject of a defamation action." Gross, 1993 N.Y. LEXIS 3358, *10, 21 edia L. Rep. at 2144; Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 254, 566 .S.2d 906, 916, 567 N.E.2d 1270, cert. denied, ___ U.S. ___, 111 S. Ct. 2261 (1991).

Under New York law, a court's inquiry entails an examination of the challenged statements with a view toward

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context are such as to "signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."

Gross, 1993 N.Y. LEXIS 3358, *10-11, 21 Media L. Rep. at 2145, quoting Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). Accordingly, New York courts do not isolate the particular challenged statements, rather, they consider them within the full context of the publication as a whole, and the broader social setting in which the communication was made. Gross, 1993 N.Y. LEXIS 3358, *14-17, 21 Media L. Rep. at 2145-46; Immuno, 77 N.Y.2d at 243, 566 N.Y.S.2d at 909-910; Steinhilber v. Alphonse, 68 N.Y.2d 283, 292, 508 N.Y.S.2d 901, 905, 501 N.E.2d 550 (1986) and Silsdorf v. Levine, 59 N.Y.2d 8, 16, 462 N.Y.S.2d 822, 826-27, 449 N.E.2d 716, cert. denied, 464 U.S. 831 (1983). They also take into account the tone and general tenor of the publication, Immuno, 77 N.Y.2d at 244, 566 N.Y.S.2d at 910-11, as well as the scope of its research and the length of time available to prepare the article in question. Gross, 1993 N.Y. LEXIS 3358, *15-17, 21 Media L. Rep. at 2146; 600 West 115th Street Corp., 80 N.Y.2d at 143-45, 589 N.Y.S.2d at 831-32.

However, the Court's inquiry must not end there. Even if a statement constitutes an expression of opinion, it must be examined and categorized as *either* a "pure

opinion," which is privileged, and thus may not serve as the basis for a defamation action, *or* a "mixed opinion," which *is* actionable. A "pure opinion" is a statement of opinion accompanied by a recitation of the (true) facts on which it is based, or one that does not imply the existence of unknown facts. In contrast, a "mixed opinion" is a statement of opinion which implies that it is based upon facts that justify the opinion, but are undisclosed to the reader. Gross, 1993 N.Y. LEXIS 3358, *12, 21 Media L. Rep. at 2145; Steinhilber, 69 N.Y.2d at 289-290, 508 N.Y.S.2d at 904; Silsdorf, 59 N.Y.2d at 14, 461 N.Y.S.2d at 825. In addition, there is a third category -- an opinion based on disclosed facts which are false or grossly distorted. This type of statement, though difficult to catagorize as a fact or an opinion, is always actionable. See e.g. Steinhilber, 68 N.Y.2d at 289, 508 N.Y.S.2d at 903. In sum, *all* statements are potentially actionable unless they express opinions based on disclosed facts which are true.

For the following reasons, an examination of the Self magazine article reveals that it appears to its readers to constitute a thoroughly researched objective piece of investigative journalism, authored by an authority in the "cult" field, whose assertions regarding Landmark and the Forum are based on undisclosed facts:[11]

(1) The "Contributors" section provides a description of the article's author, Dirk Mathison, which asserts that he is "inured" to "*the cults that he investigated*" because "[h]is father wrote the classic Faith, Cults & Sects of America (Lans Aff. Ex. 1, p. 2) (emphasis added). Thus, the reader is led to believe that Mathison has, or is able to

[11] Those undisclosed "facts," which readers understandably *presume* must be true, are, of course, in reality, *false.*

[illegible], expertise regarding "cults" and that he has conducted his own investigation [illegible]ing each of the cults he identifies by name in his article;

(2) The article itself quotes from the seven sources, the first four of which [illegible]dentified as "experts" within the article:

> Margaret Thaler Singer, Ph.D. - Professor Emeritus of Psychology of the University of California at Berkley;
>
> Cynthia Kisser - Executive Director of the Cult Awareness Network;
>
> Marcia Rudin - Director of the International Cult Education Program;
>
> Rachel Andres - Director of the Commission on Cults and Missionaries;
>
> John Hanley - Founder of Lifespring, one of the nine entities specifically identified in the article as one of "America's most-dangerous cults";
>
> Michael Flomenhaft, Esq. - an attorney who contends that his client still requires psychiatric care after having a severe psychotic breakdown as a result of attending a Lifespring seminar 10 years ago; and
>
> Karen Thorson - a woman who the article asserts had been unwittingly "brainwashed" while attending workshops conducted by an unidentified "white-collar cult;"

(3) The article then provides an historic overview of cults. For example, it [illegible]tes evidence found by anthropologists pertaining to cults "throughout history", and it traces [illegible]e modern rise of "new age cults" from "group therapy sessions" in the 1950s, to

"encounter sessions" in the 1960s, through the "mass training businesses" in the 1970s and early 1980s, up to the currently popular "white collar cults" of the 1980s and 1990s;

(4) The article discusses lawsuits filed by and against these "cults"; it cites their enrollment figures and tuition costs; it identifies their founders and celebrity "members;" and it describes in detail the various psychological techniques they utilize. It then contrasts the tactics of these "cults" with the treatment accorded POWs in the Korean War;

(5) The article includes a list of America's [nine] "most-wanted" cults, a/k/a the "most-dangerous", and identifies the Forum by name as the first such cult on its list; and

(6) The article spans six pages, is published in a reputable monthly magazine put out by Conde Nast and distributed by Advance Magazine Publishers, Inc., and does not contain "hot news." Therefore, its readers are led to conclude that its author had ample time to conduct a thorough investigation without confronting an imminent publication deadline.

In sum, in this action, as in Gross v. New York Times Co., 1993 N.Y. LEXIS 3358, *17, 18, 21 Media L. Rep. at 2146, the libelous statements were

> made in the course of a lengthy, copiously documented [magazine article] that was written only after what purported to be a thorough investigation. [Thus,] the circumstances under which [the challenged statements] were published encouraged the reasonable reader to be less skeptical and more willing to conclude that they stated or implied facts.

Moreover, since none of the specific information included in the text of the article discusses either the contents of the Forum's program, or the nature of the experience of a Forum participant, readers are left to conclude that Mathison *must have* (a) interviewed former participants in the Forum who shared their experiences with him, (b) discussed the Forum with some or all of the four "experts"' identified and quoted in the article -- Dr. Margaret Singer, Cynthia Kisser, Marcia Rudin and Rachel Andres -- and/or (c) located other undisclosed information about Landmark on which he based the challenged statements.

In moving for summary judgment on "opinion" grounds, defendants have chosen to ignore the context in which the article was published and instead have focused exclusively on (1) arguing that the challenged statements constitute "commentary" regarding "religious groups" and are thus privileged under the "freedom of religion provisions of the First Amendment" (D. Mem. at 39-40), and (2) citing specific cases which analyze the use of words such as "cult" and "brainwashing," and then attempting to rely on their holdings as precedent for this action. (D. Mem. at 41-43). Defendants' approach is unsatisfactory for two reasons.

First, it is clear that the challenged statements do not concern a "religious" group or "the freedom of religion provisions of the First Amendment." The article focuses on "white collar" or "new age" cults which are then specifically contrasted with religious cults. For example, the article states that:

> the groups mask themselves as scientific, success-oriented, professional. They model their style and language on America's managerial class . . . . Slicker than the hard-core religious sects (such as the Unifcation Church and the Boston Church of Christ), the new cults

> keep a sophisticated, media-wise profile . . . . The customers are people who wouldn't consider being involved with the Moonies or another religious cult. (Lans Aff. Ex. 1, pp. 121-122) (emphasis added).

This case simply does not involve "comments" about "religious practices." (See D. Mem. at 39).[12]

Second, defendants suggest that because the word "cult" was deemed nonactionable as opinion in one case, Cera v. Mulligan, 79 Misc. 2d 400, 406, 358 N.Y.S.2d 642 (Sup. Ct. Monroe Co. 1974), the word must be held nonactionable opinion per se in all other actions, including this one. Moreover, based solely on the Cera decision, with breathtaking illogic defendants conclude that "[s]imilarly, statements regarding 'thought reform,' 'mind control,' 'mind manipulation,' manipulative recruitment' and brainwashing' are non-actionable opinion, as is the statement that participants in these groups surrendered their psyches.'" (D. Mem. at 42).

Cera is not dispositive of Landmark's defamation claim. In the Self magazine article, defendants set forth a *specific* definition of the word cult which was provided in part by "cult expert" Marcia Rudin. Then, by subsequently identifying the Forum as a "cult," the article directly implies that Landmark fulfills all four elements set forth in defendants' earlier definition. As a result, within the *context* of the article, the word "cult" is used as a facutal assertion, capable of being proven true or false by the application of the proferred four-prong test.

---

[12] Further, as the affidavits of Father Edward Zogby and Arthur Schreiber explain, Landmark's Forum does not advance any religious or pseudo-religious dogma, doctrine or philosophy. (Zogby Aff. ¶11; Schreiber Aff. ¶6).

Similarly, defendants quote from an interview with Margaret Thaler Singer, Ph.D., a psychologist whom they identify as a former Berkeley professor. In the interview, Dr. Singer describes in detail brainwashing and mind-manipulation techniques, and compares the tactics of certain modern cults to the strategies used by the Chinese to control American POWs during the Korean War. The ensuing charges that Landmark engages in "brainwashing," "thought control," and "mind manipulation" consitute factual assertions, *not* expressions of opinion, because they are made within the *context* of the interview with Dr. Singer, and are capable of being proven true or false when measured against the yardstick of Singer's depiction.[13] It is precisely because the article purports to provide expertise, data, definition and criteria that it must be seen as making factual assertions, which are actionable.

Indeed, the better authority in New York has found the words "cult" and "brainwashing" to be actionable statements of fact. For example, in New Testament Missionary Fellowship v. E. P. Dutton & Co., Inc., 112 A.D.2d 55, 491 N.Y.S.2d 626 (1st Dep't 1985), the First Department reinstated a number of claims in a libel suit brought by members of a religious group against the publisher of a book on deprogramming which had alleged that plaintiffs had "brainwashed" some of their followers. In its decision, the First Department concluded as follows:

---

[13] Edward H. Lowell, M.D. is a psychiatrist who spent his residency observing and treating American soldiers who, as POWs during the Korean War, had been subjected to psychological abuse by the Chinese. (Lowell Aff. ¶2). Dr. Lowell, who has read the article and participated in the Forum, has expressed his personal and professional outrage that the article "inaccurately" portrays Landmark as engaging in "brainwashing" and similar practices. (Id. ¶¶5-7).

> We find that plaintiffs have alleged libels *per se* other than in those subdivisions of the complaint retained by Special Term. Paragraph 15(b) accuses plaintiffs of entrapping a young man, putting him through a marathon of prayer sessions, to leave him emotionally exhausted with his resistance broken so that they could "hammer" him with denunciations of his university, his government, and his family as works of Satan. Paragraph 16(b) ties plaintiff Hannah Lowe to a movement whose pattern is the employment of "psychological fear," "turning of the kids against their families," "rip-offs" and "glorification of the cult leader." Paragraph 16(d) has the author Patrick trying to persuade a newspaper editor that what happened to Patricia Hearst is identical to what happens to the followers of Hannah Lowe. All of paragraph 17, except 17(a) and (g) which merely state opinions, tars all the groups covered by the book with the same brush, citing language that is libelous *per se*, for example: that they use mind control to ensnare young people "who sign over their lives and property to con men they have been duped into believing are the Messiah"; "parents are blackmailed into contributing large sums of money to the cult." No innuendo is necessary to bring out the defamatory character of such words. It is for a jury to determine whether these words, directed generally to the "cults" covered in the book, would lead the reasonable reader to believe, in the context of the whole book, that the plaintiffs had indulged in these practices.

112 A.D.2d at 57, 491 N.Y.S.2d at 627-28. Similarly in Madsen v. Buie, 454 So. 2d 727 (Fla. 1st DCA 1984), the Florida First District Court of Appeal reinstated a defamation claim based on a letter to a newspaper which charged as follows about a Professor of Psychology at Florida State University:

> [T]he behavior modification techniques that are advocated by [plaintiff] are the ones used in brainwashing prisoners of war and by the Russian communists in their efforts to reduce their people to roles of passive compliance and non-judgmental acceptance of the authority of their government. These techniques are

> very effective but they are also very destructive of the human spirit.

The Court held that the statements quoted above "did not constitute pure opinion, but at most, were a mixed expression of opinion," and remanded the lawsuit to the trial court to afford the plaintiff the opportunity to present his case to a trier of fact. 454 So. 2d at 729-730.

Similarly, in the instant action, all of the challenged statements constitute factual assertions or mixed opinions because within the context of the Self magazine article, they are capable of being proven true or false.[14]

V. THE CHALLENGED STATEMENTS ARE "OF AND CONCERNING" PLAINTIFF

Defendants have alleged that the statements complained of are not "of and concerning" plaintiff because they are "not applicable to any specific organization, and certainly not to the Forum." (D. Mem. at 45). Given the ferocious tenor of the article, the argument is audacious. It is also incorrect.

Defendants' argument ignores wholly the well-setttled law regarding actionable group defamation. Instead, defendants rely exclusively on one readily distinguishable case, Cohn v. Brecher, 20 Misc. 2d 329, 192 N.Y.S.2d 877 (Sup. Ct. New York Co. 1959), a

---

[14] See also, Daniel Goldreyer, Ltd. v. Van De Wetering, N.Y.L.J., Dec. 6, 1993, at 28, col. 4 (Sup. Ct. New York Co. Dec. 4, 1993), construing Gross v. New York Times Co., and holding statements that a painting (a) was "murdered" by an expert in art restoration, and (b) "no longer exists," to be actionable expressions of mixed opinion because *in context* a reasonable reader "would infer that . . . . the writer knows certain facts which support the opinion and are detrimental to plaintiff."

thirty-five year old trial court decision that has *never* been cited by *any* court in *any* jurisdiction for *any reason whatsoever*.

The Self magazine article constitutes a classic example of actionable group defamation. In it, defendants make a number of defamatory allegations concerning a group of entities they describe generally as "white collar cults." They then go on to identify nine such "cults" by name, including, of course, Landmark's Forum.

The rule regarding reference to an individual libel plaintiff in the context of group defamation was set forth by the Court of Appeals in Gross v. Cantor, 270 N.Y. 93, 96, 200 N.E. 592, 593 (1936):

> *[I]f the words may, by any reasonable application, import a charge against several individuals under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide whether the charge has the personal application averred by the plaintiff.* (Emphasis added).

The rule was reaffirmed by a New York court as recently as 1981, in Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 228, 445 N.Y.S.2d 786, 790 (2d Dep't 1981).

Here, there can be little question that readers understood the article to charge Landmark with cultic practices. See pages 31-35 supra. See also Lans Aff. Ex. 3; Zogby Aff. ¶¶7-8; Streiker Aff. ¶6 and Goldstein Aff. ¶4. And, accordingly, in Landmark's suit, as in Gross and Brady, the question of whether "the charge[s] ha[ve] the personal application averred by the plaintiff" presents a factual issue that must be resolved by a jury. Accord, Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980), where the Second Circuit *reversed* a District Court order dismissing a libel complaint for failing to aver that each separate

statement complained of was demonstrably "of and concerning" the plaintiff, and held instead that:

> We need not determine at this early juncture whether the "of and concerning" requirement *of each of appellant's causes of action* can be sustained on the basis of the pleaded facts alone. *We do note that the issue is generally left for resolution by the trier of fact*, Fetler v. Houghton-Mifflin Co., supra, 364 F.2d at 653; Brayton v. Crowell-Collier Publishing Co., supra, 205 F.2d at 645; Bridgewood v. Newspaper PM, Inc., 276 App. Div. 858, 93 N.Y.S.2d 613 (2d Dep't 1949); see also, United Medical Laboratories, Inc. v. CBS, 404 F.2d 706, 708 (9th Cir. 1968), cert. denied, 394 U.S. 921, 89 S. Ct. 1197, 22 L.Ed.2d 454 (1969); Rosenbloom v. Metromedia, Inc., 289 F.Supp. 739 (E.D. Pa. 1968); rev'd on other grounds, 415 F.2d 892 (3d Cir. 1969), aff'd, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971); *especially where plaintiff has been personally designated.*

616 F.2d at 640 (emphasis added).

Furthermore, it is irrelevant to this motion whether or not defendants *intended* all of the challenged statements to refer to Landmark. As the Court of Appeals has explained in Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64, 126 N.E. 260, 262 (1920):

> The fact that the publisher had no actual intention to defame a particular [plaintiff] or indeed to injure any one, does not prevent recovery of . . . damages by one who connects himself with the publicaiton . . . . The question is not so much who was aimed at, as who was hurt. (Emphasis added).

See also, Restatement (Second) of Torts §564 at 165 (1977) ("[A] defamatory communication is made concerning the person to whom its recipient correctly, *or mistakenly* but reasonably,

derstand that it was intended to refer") (emphasis added), and R. Sack, Libel, Slander and Related Problems, § II.8.1 at 112 (1980) ("A showing that the defendant did or did not have the plaintiff in mind is . . . irrelevant").

In addition, it is not necessary that *every* reader of the article identify Landmark as the subject of the challenged statements provided that there are at least some who reasonably do. See e.g., Geisler v. Petrocelli, 616 F.2d at 639; Fetler v. Houghton-Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966), and Naantaanbuu v. Abernathy, 746 F. Supp. 378, 380 (S.D.N.Y. 1990), all quoting Miller v. Maxwell, 16 Wend. 1, 9, 18 (N.Y. Sup. Ct. 1836): "It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant." See also, Restatement (Second) of Torts, §564 comment b at 165 (1977) ("It is not necessary that everyone recognize (the plaintiff) as the person intended; it is enough that *any* recipient of the communication reasonably so understands it.") (Emphasis added).

Defendants rest their argument on Cohn v. Brecher, 20 Misc. 2d at 330-31, 192 N.Y.S.2d at 878-79. In Cohn, an employer had stated privately to the plaintiff and two of his fellow employees that "one of you is a crook." 20 Misc. 2d at 330-31, 192 N.Y.S.2d at 878. Plaintiff then brought a libel suit against the employer and alleged in his complaint that it was "the intent of defendant to identify him [specifically] as the one charged with dishonesty" because the employer had looked at him directly in the eye when making the challenged statement. 20 Misc. 2d at 331; 192 N.Y.S.2d at 879. (Emphasis added). The trial court dismissed the complaint because it did "not agree that it should be left to a jury to

determine whether the alleged remark was specifically directed [illegible] [plaintiff] alone." (Id.).

The Cohn decision cannot carry the weight of defendant's argument. First, Special Term Justice Loreto acknowledged the "general rule" that "if defamatory language is used [as] to an entire group, including every one of them, it may be said to refer to each member of the group, so that each may sue." (192 N.Y.S.2d at 878). However, the Court found the Cohn case to fall within a narrow exception where "words are used [only] to a small or restrictive group", in which case, he found, plaintiff must prove the "slander was uttered of the plaintiff alone." (Id., at 879) (emphasis added).[15] In fact here, the words were "used to" (i.e. disseminated among) the entire readership of Self magazine and accordingly the general rule applies. Second, if Cohn is read to mean that defendant cannot commit libel if he falsely accuses numerous parties of what would plainly be actionable in a direct accusation, it is simply at odds with the settled law discussed above.

The prevailing case law, along with the letters produced by defendants and the affidavits introduced by plaintiffs, conclusively demonstrates that in this action, the "of and concerning" issue raises a question of fact to be resolved by a jury.

---

[15] In other words, Cohn is explicable by the fact that the 3 listeners there were all accused of the same conduct in a setting in which there were no others present to read or hear the accusation.

CONCLUSION

For all of the foregoing reasons, defendants' motion for summary judgment should be denied in its entirety, and the Court should grant such further relief as it deems just and proper.

Dated: New York, New York
January 18, 1994

Respectfully submitted,

Morrison Cohen Singer & Weinstein
Attorneys for Plaintiff
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

Of Counsel:
Deborah E. Lans
Nina J. Spiegel