



February 7, 2005

VIA FEDERAL EXPRESS

Hon. Mark Falk, U.S.M.J.
Martin Luther King, Jr. Federal Building
and U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

**Landmark Education LLC et al. v.
The Rick A. Ross Institute et al.
04-3022 (JCL)**

Dear Judge Falk:

We represent the Electronic Frontier Foundation ("EFF"), a non-profit public interest organization, working through litigation and public education to secure civil liberties online and to support free expression and privacy in the digital world. Founded in 1990, EFF has over thirteen thousand members from across the United States and maintains one of the most linked-to Web sites in the world (<http://www.eff.org>).

EFF seeks leave to participate as *amicus curiae* in the above-captioned matter for the limited purpose of bringing to this Court's attention significant issues raised by the pending request by plaintiffs Landmark, *et al.*, to compel discovery. (Is it possible that others also may seek to join EFF's brief as *amici*.)

As we understand it, Landmark insists that the defendants should disclose the true identities of certain anonymous individuals who, although they are not parties to this action, have made postings about Landmark to defendants' website. Given defendants' apparent refusal to disclose those identities, Landmark has sought leave to compel.

Should EFF's request to participate be granted, its brief would argue the following principal points:

1. New Jersey law does not permit this Court to compel the disclosure Landmark seeks until Landmark has satisfied the so-called *Dendrite* test, which, for a variety of reasons summarized below, Landmark cannot possibly satisfy. *See Donato v. Moldow*, 2005 WL 201128 (App. Div., January 31, 2005) (copy

enclosed); *Dendrite Int'l, Inc. v. Doe*, 342 N.J. Super 134, 141-42 (App. Div. 2001).

2. Application of the *Dendrite* rule to this case is not only good policy, it is required under the "outcome determinative test," applied by federal courts, sitting in diversity, adjudicating state law claims of the sort pled here by Landmark. See *Chamberlain v. Giampapa*, 210 F. 3d 154 (3rd Cir. 2000).
3. Chief among the reasons why Landmark cannot "pursue their *Dendrite* remedies or otherwise determine the identity of any anonymous poster," *Donato* at *3, is that Landmark's Complaint expressly alleges that the only damages it purportedly has suffered flow solely from the conduct of the defendants and not from any statements made by anonymous posters on defendants' website. Complaint ¶¶ 36-42. *Dendrite*, however, requires a *prima facie* showing that the statements made by the anonymous poster have caused the harm for which a plaintiff seeks redress. *Dendrite*, 342 N.J. Super. 152. Here, the anonymous posters are not alleged to have caused **any** injury to Landmark **and** Landmark claims to have no intention of ever suing these anonymous posters. See Jan. 7, 2005 letter from Deborah E. Lans to this Court at 2, 5 (professing no interest in suing the anonymous posters).
4. For these reasons, Landmark is simply wrong to argue that this Court can ignore the anonymity rights of non-parties who have not been alleged to have committed any wrongs. If anything, the underlying rationale of *Dendrite* applies with even greater force to the facts alleged in this dispute.

As we are prepared to explain in more detail, *Dendrite* and *Donato* preclude disclosure of the true identity of the anonymous posters. We believe the public interest would be served by permitting EFF the opportunity to brief these issues on any reasonable schedule the Court deems appropriate so that it will have a complete record on which to assess the merits of any Landmark motion to compel.

Respectfully yours,


Bruce P. Keller

cc: Hon. John C. Lifland (w/o enclosure)

Deborah E. Lans, Esq.
Peter L. Skolnik, Esq. (w/o enclosure)