UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TODD C. BANK,

Plaintiff,

v.

NFL PROPERTIES LLC,

Defendant.

Case No. 1:25-cv-03981-CM

REPLY IN SUPPORT OF DEFENDANT NFL PROPERTIES LLC'S MOTION FOR COSTS PURSUANT TO FED. R. CIV. P. 41(d)

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"Bank, upon reviewing NFLP's standing argument, concluded that NFLP was right."

"NFLP had the right to seek dismissal in Bank I for lack of standing, which it did."

Bank Opposition to NFLP's Rule 41(d) Motion ("Opp.") at 2, 6.

* * *

There is no ambiguity here: Plaintiff Todd Bank openly acknowledges that he lacked standing when he initiated *Bank I*. He filed a plainly deficient complaint in that action not once, but twice, despite being on notice from both NFLP and the Court that his complaint was deficient.

Rule 41(d) permits an award of costs where "a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant[.]" NFLP has demonstrated that both the text and the purpose of the rule are satisfied here. Bank does not dispute that *Bank II* is based on the same claim as *Bank I*. He does not dispute that both actions were brought by the same plaintiff against the same defendant. He does not dispute that Rule 41(d) allows an award of fees even where bad faith or vexatious litigation is not present (although Bank has engaged in such conduct, in any event). He also does not dispute that an award of costs includes attorneys' fees in the Second Circuit. And, most importantly, he does not dispute that he filed *Bank I* without satisfying his duty to ensure he had standing to do so.

Instead, Bank spends his opposition brief arguing against an incorrect standard he invented: "The question . . . is whether, following the plaintiff's voluntarily dismissal of a prior action . . ., the plaintiff brings a second action that, *vis-à-vis* the first action, is brought improperly." Bank cites no case law that supports the application of this made-up test. Bank's conduct satisfies the requirements set forth in Rule 41(d) under applicable law, justifying an award of costs and fees.

ARGUMENT

Bank's filing of two successive lawsuits asserting identical claims squarely satisfies the Rule 41(d) factors, as set forth in NFLP's initial Motion for Costs Pursuant to Rule 41(d) ("Mot."). Mot. at 4-5. Filing *Bank II* to purportedly cure a standing defect in *Bank I* does not absolve Bank from Rule 41(d) liability.

In *ILC Dover LP v. Floodbarrier, Inc.*, No. 20-CIV-21350, 2020 WL 9935650 (S. D. Fla. July 15, 2020), a court faced very similar facts and granted the defendant Rule 41(d) relief. In that case, the plaintiff filed a patent suit, but did not own the patents it placed at issue and therefore lacked standing. When it realized this, it stipulated with the defendant to dismiss the case and refiled it a month later after allegedly curing the defect. The court found that an award of costs was proper under the circumstances:

> ILC Dover's filing of the instant lawsuit after bringing an action where it lacked Article III standing is the type of conduct Rule 41(d) is intended to deter and provide compensation for. ILC Dover should have confirmed its ownership of the patent—a most basic query—before it haled FloodBarrier into court and forced it to defend an action for seven months. . . . ILC Dover's failure to discover its own lack of standing forced the defendant, FloodBarrier, to expend time and costs defending an action that should not have been brought.

Id., at *3-4.

Similarly, in *Loubier v. Mod. Acoustics*, 178 F.R.D. 17 (D. Conn. 1998), the plaintiffs voluntarily dismissed a suit based on lack of standing upon realizing they inadvertently failed to add all necessary parties to the suit. Much like Bank, the plaintiffs argued that "they should be 'applauded' for voluntarily dismissing the prior action, thus promoting the interests of judicial economy." *Id.* at 22. But the court did not agree: "While the mistake that plaintiffs sought to correct may have been unintentional, it was a mistake that was readily discoverable by plaintiff-trustees through a careful reading of the trust documents. Moreover, it is the plaintiffs'

responsibility to ensure that a court has subject matter jurisdiction before filing suit." *Id.* at 22 (awarding costs and fees).

Like the plaintiffs in these cases, Bank—inadvertently or not—failed to reasonably assess his standing prior to bringing *and then amending Bank I*, which resulted in NFLP having to move *twice* to dismiss his complaints in *Bank I* (and now a third time in *Bank II*). Rule 41(d) is the remedy for the cost and inconvenience to NFLP that Bank has caused.

Notably, neither *ILC Dover* nor *Loubier*—nor any case Bank cites—applies Bank's invented standard for assessing the applicability of Rule 41(d), namely, "whether a second action was brought improperly *vis-à-vis* the previous action." Opp. at 7. The case Bank incorrectly cites for this standard, *Advanced Video Techs. LLC v. HTC Corp.*, No. 11-CIV-06604, 2019 WL 13214942 (S.D.N.Y. Jan 31, 2019) (McMahon, J.) (Opp. at 1), does not say this. In that case, this Court determined that an award under Rule 41(d) was not available where the earlier-filed action had been dismissed by the Court, rather than voluntarily by the plaintiff. That is not at issue here: Bank voluntarily dismissed his suit in *Bank I.* The *Advanced Video Technologies* case does not otherwise expound upon or modify the standard for a Rule 41(d) award. Similarly, *Horowitz v. 148 South Emerson Assocs. LLC*, 888 F.3d 13 (2d Cir. 2018), does not utilize Bank's proposed test for Rule 41(d) either, and the factual distinctions he raises between this case and *Horowitz* are irrelevant.

Bank argues that he had no choice but to refile his claim if he wanted to establish standing and allow his case to progress. Opp. at 2. This does not preclude a Rule 41(d) award of costs. *See Cure Consulting, LLC v. Torchlight Tech. Grp. LLC*, No. 21-CIV-04187, 2023 WL 2186566, at *1 (E.D. Pa. Feb. 23, 2023) (granting motion for costs and fees where, "[a]fter amending their Complaint, [plaintiffs] sought to withdraw the case so they could establish standing for the

infringement claim. The Court allowed them to do so, while noting that [Rule 41(d)] allows the Court to order plaintiffs to pay all or part of the costs of the previous action[.]"). If he wanted to avoid this outcome, Bank could have sought a stipulation from NFLP regarding costs before unilaterally withdrawing *Bank I*. *Cf. ILC Dover,* 2020 WL 9935650, at *1-2. Or he could have petitioned the court for leave to file a supplemental complaint. *See, e.g.*, *Duffy v. Illinois Tool Works, Inc.*, No. 15-CV-7407, 2021 WL 9471902, at *3 n.2 (E.D.N.Y. Sept. 30, 2021) (suggesting that Second Circuit authority permits plaintiffs to cure standing defects by filing supplemental pleadings pursuant to Rule 15). Regardless, what Bank *did* do—withdraw his amended complaint and refile it while adding 30 pages of legal argument—amplifies the impropriety of his initial course of conduct and underscores the need for an award of costs here.

Bank's bad faith further demonstrates the propriety of a costs award in this case. As explained in NFLP's Motion, while a showing of bad faith is not required, it can be instructive as to whether the court should exercise its discretion to award costs. Mot. at 5. Bank acknowledges that "[t]he purpose of [] [R]ule [41(d)] is to serve as a deterrent to forum shopping and vexatious litigation by preventing plaintiffs from voluntarily dismissing and re-filing cases." Opp. at 1 (citing *Advanced Video Techs.*, 2019 WL 13214942 at *4).

Bank filed *Bank I* in bad faith because he sued despite his blatant—and now acknowledged—lack of standing. As the plaintiff, Bank was obligated to investigate his standing to bring suit before filing his initial complaint. *See Loubier*, 178 F.R.D. at 22. His failure to do so is indefensible.[1] It is a clear legal principle that a plaintiff in a trademark declaratory judgment action must "adequately allege that he or she 'has engaged in a course of conduct *evidencing a*

[1] As an attorney, Bank is not treated as a typical *pro se* plaintiff—he should know better. *See Anthes v. Nelson*, 763 F. App'x 57, 60 n.2 (2d Cir. 2019) (attorneys representing themselves are "not entitled to the special solicitude and latitude courts traditionally afford to *pro se* litigants").

definite intent and apparent ability to commence use of the marks on the product'" to establish a case or controversy. *Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 354 (2d Cir. 2020) (quoting *Starter Corp. v. Converse, Inc.*, 84 F.3d 592, 595-96 (2d Cir. 1996)) (emphasis added). Bank, in fact, is personally familiar with the standing requirements in trademark cases because he was ordered to pay the defendant's costs and fees the last time he sought to invalidate a trademark where he lacked standing. *See Bank v. Al Johnson's Swedish Rest. & Butik, Inc.*, 795 F. App'x 822, 823-25 (Fed. Cir. 2019).

Bank's improper filing of his initial complaint in *Bank I* was compounded by his filing of an *amended* complaint in *Bank I*, for which there can be no excuse. Bank was initially put on notice by this Court that his original complaint was seriously deficient when the Court stated, "Having read the complaint, I assume the response will be a motion to dismiss and possibly for sanctions." *Bank I*, ECF 15. The NFLP further notified Bank of his deficiencies in its first motion to dismiss, which articulated his failure to meet the standing requirements. *Bank I*, ECF 20 at 6-8. Bank nevertheless persisted on filing his amended complaint, which merely rephrased his original, deficient complaint and added additional hypothetical language changing what Bank "wished" to do with what Bank allegedly "will" do. *Compare Bank I*, ECF 1 ¶¶ 16-17 *with Bank I*, ECF 21 ¶¶ 28-40. Bank concedes that these changes were still deficient. Opp. at 2.

Bank's bad faith is also apparent on the face of his complaint in *Bank II*, which remains legally deficient. The complaint contains thirty pages of improper legal argument that Bank filed in avoidance of the page limit and due date applicable to an opposition brief. Bank's vexatious approach to litigation is further apparent from his recent 40-page opposition brief, his denied request for a 27-page sur-reply, and the multiple letters he has sent NFLP's counsel and the Court

in just the last two weeks—after the Court denied his sur-reply request—seeking further submissions in addition to his prior three complaints and 40-page opposition.

Bank accuses NFLP of "seeking to use Rule 41(d) to revive what might have been its Rule 11 motion in *Bank I*." Opp. at 7. This is not the case. Rule 11 and Rule 41(d) have separate and distinct purposes and operate in different contexts. One does not substitute, or act as a "fallback," for the other. *Id*. Bank's compliance with the Rule 11 safe harbor provision does not immunize him from an award of costs under Rule 41(d) now that he has refiled the same claims in *Bank II*. To argue otherwise would encourage vexatious litigants like Bank to force defendants to defend a meritless action and then drop the lawsuit before the Rule 11 safe harbor period ends, only to bring the same claims a second time. While Rule 11 may not govern such conduct, Rule 41(d) does.

Bank also accuses NFLP of citing to his prior conduct and legal actions to "prejudice the court against Bank." Opp. at 8. NFLP raised these points to identify Bank's pattern of filing meritless, frivolous suits that waste courts' and parties' time and resources. Preventing vexatious litigation is a core purpose of Rule 41(d). *Horowitz*, 888 F.3d at 23. Therefore, although a showing of bad faith is not required, understanding Bank's prior acts is relevant to the Court's analysis of whether it should exercise its discretion to award costs. The *Bank I* case history and the other Bank cases NFLP has cited show the time, money, and effort that parties, including NFLP, have unnecessarily expended in responding to blatantly deficient claims put forth by Bank—which he now concedes.

As stated in NFLP's pending motion to dismiss in *Bank II*, Bank is not a t-shirt manufacturer. He is a lawyer who has filed a slew of meritless lawsuits and litigated them vexatiously. This behavior comes with a substantial cost to defendants and the judicial system. An award of costs, including attorneys' fees, will, hopefully, deter such behavior in the future.

CONCLUSION

NFLP respectfully requests that the Court grant its motion and award costs and fees associated with the *Bank I* action, pursuant to Rule 41(d), as well as such other relief as the Court deems just and proper.

Dated: July 18, 2025

Respectfully submitted,

/s/ Craig B. Whitney

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(c) of the United States District Court for the Southern District of New York, I hereby certify that this motion contains 2,105 words. In making this certification, I have relied on the word count feature of Microsoft Word, the computer program that I used to prepare this brief.

Dated: July 18, 2025

/s/ *Craig B. Whitney*
Craig B. Whitney