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

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

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INTRODUCTION

This is a prime example of conduct where the court may properly and soundly exercise its discretion to award Defendant's costs and fees to date under Rule 41. Plaintiff Todd Bank, an attorney representing himself, has spent the last six months pursuing a meritless declaratory judgment action against Defendant NFL Properties LLC ("NFLP"). After both his original and amended complaints were met with motions to dismiss, Bank voluntarily dismissed his amended complaint under Rule 41(a)(1), only to later re-file it as a new action rather than oppose NFLP's motion or seek leave to amend further in the original action. The latest iteration of the complaint adds dozens of pages of improper legal argument in response to NFLP's prior motions to dismiss, but few substantive factual changes other than perfunctory steps in a misguided attempt to overcome the lack of a justiciable controversy identified in the motions. Bank's dismissal under Rule 41, therefore, served no purpose other than to allow Bank to evade the timing and page limitations of an opposition to a motion to dismiss—while causing NFLP to expend unnecessary time, money, and resources on multiple motions and other case activities. Bank's current action asserts the same claim against the same defendant as his prior action. He should be penalized by an award of costs and fees to NFLP for the time and money it expended on responding to his first attempt at litigating this case.

PROCEDURAL HISTORY

This case has been ongoing for over six months. Notwithstanding NFLP's diligence and significant expenditure of resources, it has not progressed past a third attempt at a complaint.

On November 19, 2024, Bank filed a complaint against NFLP. *Bank v. NFL Properties LLC*, No. 24-cv-08814 (S.D.N.Y. Nov. 19, 2024) ("*Bank I*"), ECF 1. The complaint sought a declaratory judgment that Bank would not violate various provisions of the Lanham Act if he sold unspecified merchandise bearing trademarks owned by NFLP. *Id.* at 5. He also attached a letter

he wrote to the NFL explaining the legal theories underlying his complaint, where he purported to be writing on behalf of a "John Doe" client, but was really writing on behalf of himself. *Id.*, Ex. A. The case was assigned to the Hon. Colleen McMahon.

The Court issued an order the next day requiring the parties to either submit a case management plan or appear at a conference on January 30, 2025. *Bank I*, ECF No. 5. The parties spent several hours conferring over e-mail and videoconference about potential schedules for briefing and discovery, but ultimately could not agree on a joint submission. The parties informed the Court of this on December 20, 2024. *Bank I*, ECF 13.

On January 6, 2025, the parties sought an extension of the response and briefing deadlines due to health issues experienced by NFLP's counsel. *Id.*, ECF 14. The Court granted the request. ECF 15. In its order doing so, the Court noted that, after reading the complaint, it "assume[d] the response will be a motion to dismiss, and possibly for sanctions[.]" *Id.*, ECF 15. It also suspended the initial conference until after the motion to dismiss was decided, "if at that point any conference is necessary." *Id*.

Bank responded via letter the next day, January 8, 2025, admonishing the Court for "giving legal advice to a party," accusing it of partiality, and demanding recission of its suggestion regarding sanctions. *Id.*, ECF No. 16. The Court acknowledged receipt of the letter that same day, and assured Bank of its competency to evaluate the complaint impartially. *Id.*, ECF No. 17.

NFLP moved to dismiss Bank's complaint on February 12, 2025, arguing that Bank had pleaded neither a justiciable controversy nor a plausible claim. *Id.*, ECF 19, 20. Rather than oppose NFLP's motion, Bank amended his complaint on March 5, 2025. *Id.*, ECF No. 21. The amended complaint made minor factual amendments, but still failed to adequately support Bank's contentions, so NFLP again moved to dismiss on March 19, 2025. *Id.*, ECF 22, 23. Instead of

opposing the motion or seeking leave to file another amended complaint, Bank voluntarily dismissed his case on April 1, 2025, the day before his opposition was due. *Id.*, ECF 24.

Nearly six weeks after his opposition brief was due, on May 12, 2025, Bank filed yet another complaint asserting the same claim against the same defendant. *Bank v. NFL Properties LLC*, No. 25-cv-3981 (S.D.N.Y. May 12, 2025) ("*Bank II*"), ECF 1. The new complaint added thirty pages of legal argument—notably, more than the twenty-five pages Bank would have been allowed in responding to NFLP's motion to dismiss. *Id.* at 1-31. The factual allegations were largely identical to those in Bank's two prior complaints. The civil cover sheet filed with the complaint identified *Bank II* as the same case as *Bank I*. *Id.*, ECF 3.

ARGUMENT

I. Legal Standard

Fed. R. Civ. P. 41(d) provides that "[i]f a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court . . . may order the plaintiff to pay all or part of the costs of that previous action." It also permits the court to "stay the proceedings until the plaintiff has complied" (*id.*), although "there is nothing in the text of the rule that requires the Court to issue a stay upon an award of costs." *Lombardo v. R.L. Young, Inc.*, No. 18-CV-188, 2018 WL 6727356, at *3 (D. Conn. Dec. 21, 2018).

The purpose of Rule 41(d) is to deter "forum shopping and vexatious litigation." *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 23 (2d Cir. 2018) (quoting *Andrews v. America's Living Ctrs., LLC*, 827 F.3d 306, 309 (4th Cir. 2016)). While "a defendant need not show that a plaintiff acted in bad faith in order to recover," "the Court may take into consideration a plaintiff's motives in dismissing a prior action." *Preferred Freezer Servs., LLC v. Americold Realty Tr.*, No. 19-cv-2926, 2020 WL 774132, *3 (S.D.N.Y. Feb. 18, 2020) (internal citations omitted).

A plaintiff's later-filed complaint need not be identical to its earlier-filed one to be subject to Rule 41(d). The complaints can involve different or additional facts, claims for relief, or theories of recovery, so long as they are based on the same underlying claims or depend on the same core showings. *Horowitz*, 888 F.3d at 23-24.

II. The NFL is Entitled to Costs, Including Attorneys' Fees, Under Rule 41(d)

A. Bank's Complaints are Based on the Same Claim Against the Same Defendant

Although they differ in length, the complaints in *Bank I* and *Bank II* "depend on the same core showing about the same trademarks," and thus are subject to Rule 41(d). *Horowitz*, 888 F.3d at 23 (affirming award of costs, including attorneys' fees, pursuant to Rule 41(d)).

In both cases, Bank seeks a declaratory judgment permitting him to sell unlicensed merchandise bearing trademarks owned by NFLP. *See Bank I*, ECF 1 at 5, ECF 21 at 10; *Bank II*, ECF 1 at 36-37. As explained more fully in NFLP's latest motion to dismiss, filed concurrently herewith, the only substantive factual addition in Bank's latest complaint is the minimal steps that Bank allegedly took to attempt to manufacture a justiciable controversy in response to NFLP's criticisms in its prior motions to dismiss. *See* Motion to Dismiss at 5-6. This is not a sufficient factual difference to save Bank from an adverse ruling under Rule 41(d). *Cf. Horowitz*, 888 F.3d at 23-24 ("The different assertions in these actions are certainly 'based on' the same underlying claims of [trademark] ownership and use rights. . . . that certain alleged acts occurred after the filing of the [earlier-filed] action does not alter the underlying claim upon which both actions are based: that [the defendant] did not own and had no right to use [the] trademarks.").

The *Bank II* complaint is considerably longer than either complaint in *Bank I*, but none of the additional content renders the *Bank II* complaint sufficiently distinct from the *Bank I* complaints. Virtually *all* the extra length is attributable to *thirty pages* of legal argument, which

is inappropriate in a pleading and should be disregarded for purposes of the Rule 41(d) analysis. *See Hayles v. Aspen Props. Grp., LLC*, No. 16 Civ. 8919, 2018 WL 3849817, at *4 (S.D.N.Y. Aug. 13, 2018) (vacated in part on other grounds) ("[I]t is inappropriate to include a legal argument and briefing within a complaint"); *Anthes v. N.Y. Univ.*, No. 17-cv-2511, 2018 WL 1737540, at *19 (S.D.N.Y. Mar. 12, 2018) (same). Stripping away the excess, the complaints in *Bank I* and *Bank II* are alike in every meaningful way.

B. Bank Initiated a New Action in Bad Faith

Although a showing of bad faith is not required, *Preferred Freezer*, 2020 WL 774132, at *3-4, the Court should recognize and account for Bank's ulterior motive in dismissing and refiling his complaint: to have the benefit of an opposition to NFLP's motion to dismiss without the restrictions of a deadline or page limit.

The content of the *Bank II* complaint demonstrates Bank's attempt to manipulate the litigation process to his benefit. As discussed above, the content added to the *Bank II* complaint consists predominantly of legal, not factual, assertions. *See Bank II*, ECF 1, ¶¶ 1-10, 17-72. Bank's arguments should have been presented instead as an opposition to NFLP's motion to dismiss the amended complaint in *Bank I*. Bank could have also sought leave to further amend his amended complaint to add the factual allegations he made in *Bank II*. But Bank chose not to follow this procedure clearly outlined in the Federal Rules. *See* Fed. R. Civ. P. 15(a). Rather, he took an extra six weeks to seek to invent a case or controversy and pasted thirty pages of legal arguments into a revised pleading, where they do not belong. This allowed him to skirt the 25-page limit for

opposition briefs and submit it on his own time rather than on the due date. These acts of procedural gamesmanship should be discouraged.

C. The Costs Awarded Should Include Attorneys' Fees

Attorneys' fees are included in the "costs" that can be recovered under Rule 41(d)(1). *See Horowitz*, 888 F.3d at 25 ("Rule 41(d) evinces an unmistakable intent for a district court to be free, in its discretion, to award attorneys' fees as part of costs."); *Preferred Freezer*, 2020 WL 774132, at *4-5. An award of attorneys' fees is appropriate here because Bank's protracted and vexatious litigation strategy resulted in substantial unnecessary expenditures by NFLP. Indeed, the fees incurred from the parties' correspondence and two rounds of needless motion-to-dismiss briefing will not streamline the proceedings in *Bank II*, and NFLP should be compensated accordingly.[1]

III. The Court has Discretion to Impose a Stay in this Matter

Pursuant to Rule 41(d)(2), the Court has discretion to stay this matter pending Bank's payment of costs to NFLP. NFLP defers to the Court's judgment on whether a stay is necessary. NFLP believes Bank's complaint in this matter is as meritless as its prior iterations presented in *Bank I* and is prepared to proceed with its latest motion to dismiss expeditiously. As noted, however, the Court has discretion to stay the action if it believes a stay pending Bank's payment of costs would be appropriate.

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).

[1] It is customary for courts deciding Rule 41(d) motions to first decide whether the movant is entitled to an award, and then rule on the amount of the award after further submissions by the parties. *See, e.g.*, *Preferred Freezer*, 2020 WL 774132, at *3 (citing *Horowitz v. 148 S. Emerson Assocs., LLC*, 2016 WL 11508981at *4 (E.D.N.Y. Oct. 19, 2016)); *ML Fashion, LLC v. Nobelle GW, LLC*, No. 21-cv-00499, 2022 WL 1796993 , at *1-2 (D. Conn. Jun. 2, 2022). Accordingly, NFLP intends to provide specific evidence of the amount and reasonableness of the costs it incurred in connection with *Bank I* following the Court's decision on this motion.

Dated: June 10, 2025

Respectfully submitted,

/s/ Craig B. Whitney

PROSKAUER ROSE LLP
Craig B. Whitney
Jeffrey Warshafsky
Nicole Sockett
Nicole Swanson
Eleven Times Square
New York, NY 10036
T: (212) 969-3241
cwhitney@proskauer.com
jwarshafsky@proskauer.com
nsockett@proskauer.com

Attorneys for Defendant
NFL Properties LLC

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 2,017 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: June 10, 2025

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