ORIGINAL

U.S. DISTRICT COURT
DISTRICT OF NEW JERSEY - NEWARK
DOCKET NO. 04-CV-3022 (JCL)

LANDMARK EDUCATION, LLC, et al., Plaintiffs, vs. RICK ROSS INSTITUTE OF NEW JERSEY, et al., Defendants.	TRANSCRIPT OF MOTION

Place: U.S. District Court
50 Walnut Street
Newark, NJ 07102

Date: September 8, 2005

B E F O R E:

HONORABLE MARK FALK, J.D.C.

TRANSCRIPT ORDERED BY:

MICHAEL A. NORWICK, ESQ., (Lowenstein Sadler, PC, 65 Livingston Avenue, Roseland, New Jersey 07068)

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I N D E X

9/8/05

THE COURT: All right. Good morning. This is the case Landmark v. Ross, et al., and it's Docket No. 04-3022.

Can I have your appearances, please?

MR. DILLON: Your Honor, Paul Dillon on behalf of plaintiff. With me today are Deborah Lans and Gary Lerner of the firm of Cohen Lans. They've been admitted pro hoc vice.

THE COURT: Okay.

MR. SKOLNICK: Good morning, Your Honor, Peter Skolnick of Lowenstein Sadler for all the defendants, and with me my associate Michael Norwick.

THE COURT: Good morning.

All right. I believe we are here today to address the defendants' motion to compel discovery. But it's not, in some sense, is an ordinary request to compel discovery because it comes in the context of a -- a Rule 41(a)(2) motion or an expected motion. I guess part of -- has this filed already?

MS. LANS: It was --

THE COURT: Remind me.

MS. LANS: -- actually filed in April, Your Honor.

THE COURT: A long time ago. But it hasn't been responded to yet?

MS. LANS: Right. That's correct.

THE COURT: A motion to -- to voluntarily dismiss this case with prejudice, correct?

MS. LANS: Correct, Your Honor.

THE COURT: Okay. And it's quite an interesting issue. It was rather extensively briefed in letter briefs and certifications. And I want to say before I hear from you that I -- I enjoyed reading both side's papers. I think they were both exceptionally well done and well written.

But, in any event, Mr. Skolnick, this is really your application, and would you like to be heard?

MR. SKOLNICK: I would, Your Honor.

THE COURT: Okay.

MR. SKOLNICK: And thank you.

THE COURT: Sure.

MR. SKOLNICK: The argument today is -- is really about the documents that Landmark doesn't want Judge Lifland to see on the 41(a) application. And it certainly makes one wonder what is in them. Once thing that I think is certainly in them is proof that Landmark's programs pose a genuine risk of emotional harm to participants. And I think that that raises a legitimate public safety issue. But we know -- and we

know that from -- from, among other places, excerpts from Landmark's own documents that were quoted in a brief filed in the New Jersey State litigation against Self magazine, and one of the documents that we are now seeking is the attorney's affidavit that attaches all of those Landmark documents.

But, Your Honor, I think Your Honor immediately understood the nature of our present situation during our April 6th status conference, when -- when you referred to Rule 56(f), and noted that -- that the defendants' need for discovery here is really analogous to the frequently satisfied need for discovery to oppose a summary judgment motion. In other words, discovery of facts essential to justify a party's opposition.

Now plaintiffs' opposition to our application tries to make today's argument seem to be about everything except what it's actually about. It's not about Rule 11. The argument today is not about the appropriateness of attorney's fees or other conditions being imposed on a Rule 41 motion. That's for Judge Lifland.

THE COURT: Yes.

MR. SKOLNICK: It's also not about whether Landmark is a cult, or whether Landmark engages in

brainwashing. Although to -- to read Landmark's papers, I think you would think that those are the only statements that it complains about, and that disparagement is its only cause of action. Remarkably, Landmark claims that there is no issue in this case about whether or not Landmark's programs are in some abstract way dangerous. But they haven't read their own complaint, Your Honor. In -- in Paragraph 25-5 of the complaint, they allege that Ross' statement that Landmark's programs are dangerous is actionable.

In fact, the -- the pending motion to Judge Lifland acknowledges in the Schreiber (phonetic) affidavit it repeats that same position that the allegedly false statements by Ross, about which they are suing, include a statement that Landmark's programs are dangerous. So it's not about that. And it's not -- certainly not about discovery to prove that Landmark is a cult or engages in brainwashing. Nor is it legitimately about whether or not the Donato v. Moldow case has so changed the landscape that Landmark's complaint has now been neutered. Landmark brought seven causes of action, Your Honor, and Donato only disposes of a small piece of its claims.

This lawsuit is far more, and it has always been far more, about statements allegedly made by Rick

Ross himself in his own name both on -- on written statements on his website attributed to him and in the broadcast media. It's not really so much about the vicarious liability for internet statements that are attributed to others, which is what the Donato case addresses.

So having just told you what I think the argument isn't about, let me suggest what I think it is about. It's about what Landmark knew when it filed its complaint. It's about discovery that will permit defendants to show that Landmark brought the suit in bad faith, it has repeatedly brought similar suits against its critics in bad faith, and that there is an appropriate basis to impose conditions on the dismissal that Landmark seeks as to both -- to both sanctionous conduct here and to dissuade or disert (sic) -- deter similar conduct against other defendants in the future.

Now Landmark supported its -- its Rule 41 motion with a brief that contains argumentives that defendant's postings are false; that defendant's postings are derogatory; that defendant's postings are misstatements of fact, not opinion; that Landmark has suffered damages, and that Ross is, in fact, the author of anonymous postings that have been attributed to others.

Now Landmark clearly considers those issues relevant to its Rule 41 motion, otherwise, why would they argue that? But it -- but it wants to be, Your Honor, the only one to be able to argue them. It wants Judge Lifland to simply take their word for it. It wants to prevent the defendants from obtaining the discovery that is necessary to respond to those arguments. And, in fact, it even goes so far, Your Honor, to say that we shouldn't get the discovery about its forensic linguistics expert, because even though they devoted an entire section of their brief to Judge Lifland about -- about if -- in an argument that advances his opinions they claim that their communications with him bear no relevance to the motion.

So how -- how can they be permitted, Your Honor, to repeat what I -- what I suggest are bad faith allegations yet again in a court of law, while tying their adversary's hands behind his back? If the litigation were to continue, it would be Landmark's burden to prove all of the matters they allege in their complaint. But -- but with a dismissal, without the discovery that we are now seeking, they would not only have the last word, Your Honor, they would have the only word. We -- and we have shown, Your Honor, that

-- that that word, at least in the guise of the Schreiber affidavit, is highly suspect. Landmark tells the Court that it has provided all of the relevant information about Landmark's litigation conduct. Schreiber's sworn statement about only four United States' suits is false. He omitted at least suits against -- against Garvey (phonetic), against the Does in California, and -- and the Pressman action, whatever the nature of that beast was.

His sworn statement about not suing members of the public is false. The -- the -- that omits at least the California John Doe suit. His sworn statement about not suing since 1998 was false. That also omits the California suit. His sworn statement about never previously withdrawing a suit voluntarily was false. The Doe suit in California was withdrawn, and the Garvey suit was allowed to lapse, which I suggest is tantamount to withdrawing it. He omitted lawsuits in at least Canada and Germany. He attached excerpts from documents that had the affect of hiding damaging information, like an internal Landmark memo that calls for aggressive responses to media criticism, which I suggest was Landmark taking a page out of a Scientology play book.

He failed entirely to acknowledge Landmark's

frequent threats of litigation as an alternative path to silencing its critics, Westward, Phoenix New Times, Metro News, Liz Somerling (phonetic), Guy Post (phonetic), Legal Times, Redbook, and who knows what else. Well, Landmark does, but we don't, and Your Honor doesn't. We -- we've identified just those that we know about that Landmark threatened and -- and seek discovery of those in -- in one of the paragraphs of our proposed form of order.

Now defendants recognize and -- and accept that in opposing Landmark's Rule 41(a) motion the burden is going to shift to us, not -- not on the merits, but on the appropriateness of imposing terms and conditions on the settlement -- on the -- on the dismissal that they seek. We are not seeking discovery to refute Landmark's allegations about Ross' conduct, we're seeking discovery to prove the very different issue of Landmark's conduct. What we allege is its bad faith, its abuse of the litigation process, its harassment and intimidation of its critics, its repeated pattern of bringing suits with no intention of pursuing those claims to judgment, Your Honor. I mean, instead Landmark, when they settle, they settle for no money, and they extract a statement from the defendant that he in fact never said what it is that Landmark has

sued him for saying.

The rules require a -- a motion for a voluntary dismissal. It's not an automatic thing. They require the filing of a motion, and they give the Court discretion to impose conditions on granting that motion. Our application is for discovery to place before Judge Lifland that information that will enable him to determine whether or not conditions are appropriate. This is -- this is predominantly a sub-set of discovery that we would have had earlier, if they had responded to our initial discovery request. And there are some additions that are -- that are based upon our subsequent investigation, and things that were suggested by their very opposition to this application.

But let's keep in mind, Your Honor, that as plaintiffs, Landmark brought a suit that places its own procedures at issue by claiming that they were defamed by false statements about those very procedures. And when we seek documents that we know exist, which will establish their bad faith, their response is, oh, no, those are trade secrets. We can't give you those. I mean, Landmark has -- has commented, and Your Honor has commented that -- that this isn't a garden variety discovery application, and that what we are seeking is extraordinary. And -- and to some extent, Your Honor,

I think that's true.

THE COURT: Uh-huh.

MR. SKOLNICK: But it's also true that unlike a garden variety discovery application that -- that comes before Your Honor on a -- on a daily basis in which discovery is -- is liberally granted on -- on a showing that the document could have some relevance, could tend to be relevant, even without knowing what's in them, we -- we, on the other hand, have made what I -- what I think is an extraordinary and unparallel showing in some cases of precisely what it is that is in the documents that Landmark doesn't want Judge Lifland to see, and what it is that we would use those documents to show. We're not just speculating about these documents, Your Honor. That -- that point is exemplified by -- by the Calagy (phonetic) affidavit that was submitted in the Self magazine case in New York. We know that they have it, we know what it says, we know what we think it shows, and we know that the documents attached to it will be completely antithetical and cannot be reconciled with Landmark having filed this case in good faith.

Out of fairness, we need all of those training manuals and the other documents that -- that -- that the Calagy affidavit cites to and -- and

attaches, because, otherwise, on its reply to the 41 motion, after we have responded without that kind of information, Landmark is simply going to claim that we took the statements from Calagy's brief out of context. And we won't be able to argue that because we won't have the context. Being on an even playing field with Landmark in the 41(a) motion is -- is, to a very real extent, the reason that we need their discovery. They -- they submit a Schreiber declaration that is packed with half truths and distortions, and, if nothing else, only half the story. And then they claim that everything that we need is in the declaration.

Whey does Landmark get to put in front of Judge Lifland their own construct of what a domestic litigation is, without full disclosure of their international litigations, and those domestic lawsuits that Landmark has somehow either forgotten, or they say that they don't count, or they can't remember following. On -- on the international litigation front, Your Honor, I -- I would simply submit that -- that knowing misrepresentation to any court system should really transcend international boundaries.

But why should they be able to tell Judge Lifland that they are not in the habit of bringing lawsuits at all, without placing that in the context of

the threats of litigation that have forced many critics to -- to submit to shut their mouths; and, therefore, to avoid the litigation that has been threatened? Why should they be able to argue to Judge Lifland that the complaint was brought in good faith because they relied on a linguistic's expert, and not disclose the actual opinion in communications with the linguistic's expert? I mean, their -- their explanations for not turning over documents that may directly contradict the Schreiber affidavit is that they are not relevant to the motion. But if documents contradicting Schreiber are not relevant, then why would they put the Schreiber declaration before Judge Lifland?

The transparent theme in -- in the sur reply that you allowed them to file seems to be that -- that one particular argument that we made in our first letter on the subject back on April 4th, a letter that we wrote over a weekend once we -- and we asked to be heard because we heard that Landmark was -- was seeking to -- a voluntary dismissal without any motion practice, we -- we introduced the notion of Landmark being a recidivist walk-away litigant. And -- and -- the -- the theme of their reply is that somehow that's the only argument that we've ever made, and -- and it's the only argument that we can make now, or that we can

make before Judge Lifland.

The -- the sur reply suggests that -- that everything that we ask for in terms of discovery somehow has to meet that recidivist walk-away litigant test. And -- and for that matter, Your Honor, Landmark has a pretty narrow view of what a recidivist walk-away litigant is, when you consider that they -- that they typically sue for millions of dollars, ten million dollars based upon wide-ranging allegations that they cause harm and -- and -- and are dangerous, and then they settle for some form of retraction that amounts to the author doesn't know that they are per se a cult.

I mean, here -- here's what -- what they got in settlement of their multi-million-dollar lawsuit. In the Self magazine suit, they got an admission that the defendant has no first-hand knowledge that Landmark is a cult. In the -- in the -- in the Cult Awareness Network suit, they got the statement that we don't hold and never have that Landmark is a cult. In fact, we have no opinion whether it is or it isn't. In -- in the Singer suit, they got the statement, I don't believe Landmark is a cult. Even though Dr. Singer, like Mr. Ross, had never said that it was a cult. And the Aero (phonetic) magazine suit was, in fact, dismissed not simply on New York pleading grounds, as

Landmark repeatedly tells you, but also on the ground that the statements at issue in that case were found to be a non-actionable opinion.

So but they hide behind this -- this walk-away recidivist litigant ploy, and then they get to claim that Mr. Schreiber rightfully withheld disclosure of lawsuits, that, in their opinion, didn't fit that mold. I mean a case in point, Your Honor, is -- is the John Doe suit in California. They -- they withheld information about the suit, they refused to provide us with any information about it. We take the extraordinary step of finding out about the suit, finding the suit, ordering all of the documents in the -- in the docket, do our best to figure out how Landmark in fact proceeded in that action, and now they accuse us of making statements that are unabashively speculative about what happened there. And they insist that we and the Court should simply take their word for what actually happened there.

Now we'll be happy, Your Honor, to not have to speculate any longer, and -- and we won't have to if Landmark is ordered, as they should be, to produce the documents that we're seeking. I mean, apparently they file so many lawsuits that they can't even track of when, or whether, or how, or why some cases were filed.

There's this Garvey (phonetic) lawsuit, well, they don't know if it was filed, when it was filed, whether it was.

I mean, contrary to -- to Landmark's premise that we keep shifting the grounds for our application, Your Honor, it -- it is their position that -- that shifts grounds. First Mr. Schreiber says all of four U.S. lawsuits without any modifiers, now it's all of four lawsuits against public critics, or all of four lawsuits that have something to do with being a recidivist walk-away litigants, or all of four lawsuits that they can remember.

Landmark's explanation about why Schreiber didn't include foreign suits, because defendants didn't explicitly make reference to foreign jurisdictions, that explanation might be more credible, Your Honor, if they -- if they then didn't go on in their papers to so vociferously argue that a Federal Court should ignore Landmark's foreign conduct. I mean, it -- it certainly makes you wonder what foreign conduct it is that they are so anxious to hide.

To the law on -- on the issue of -- of discovery and -- and attorney's fees, Landmark admits that the only case they have found on point about discovery in connection with a Rule 41(a) -- 41(a)

motion is the Wilson v. Eli Lily case. And -- and I suggest, Your Honor, that it is -- it is hard to imagine a more vastly different scenario than the one we have here. The request in that case came within two months of filing. There had been absolutely no discovery. There were no allegations of bad faith, which the Court in that case explicitly went out of its way to -- to comment on. The plaintiff had offered to pay the litigation costs of the defendants. And the opposition to the Rule 41 motion was addressed to this -- this statute of limitations issue, but the Court noted that absent any discovery, he couldn't even be sure of what the merits of the statute of limitations defense would be in his own jurisdiction, let alone in the foreign jurisdictions. And on top of that, the 4th Circuit had already ruled explicitly that -- that limitations was not an issue on -- on Rule 41 motions.

Now I suggest, Your Honor, that the entire issue of the availability of attorney's fees on a Rule 41(a) motion has been raised prematurely by Landmark. I think that's solely an issue for Judge Lifland on the actual 41(a) motion. But in that context, Landmark relies heavily on a case called Smoot. It's a 1965 case from the 6th Circuit which -- which looked at the quite different question of whether or not attorney's

fees can be considered costs, after the 6th Circuit had refused to allow a libel case to go to trial with an unwilling plaintiff who had filed a Rule 41 motion. Landmark's sur reply papers make the incredible pronouncement that, and I'm quoting now, "Here, as in Smoot, discovery that relates to Landmark's alleged bad faith must be denied."

Now why did say that's incredible? It's incredible, Your Honor, because Smoot wasn't about discovery at all. It was only about attorney's fees. Discovery had apparently been completed. The case in Smoot was ready to go to trial, and it didn't consider the issue of whether or not attorney's fee awards are appropriate as a condition for a fall -- Rule 41 dismissal. There was no issue there of a plaintiff repeatedly bringing lawsuits in bad faith. The -- the defendant in Smoot opposed -- in opposing the Rule 41(a) motion, first sought a trial on the grounds that they were entitled to bring their side of the story to a jury. And when the 6th Circuit appropriately said, "Go away kid, you bother me," they then sought a two-week evidentiary hearing to present evidence on their application for attorney's fees.

And, finally, Your Honor, Smoot, which is I say is the only case they suggest to you is on point,

is, in fact, inapposite because the case predates by decades developments in the law, such as the whole concept of slap suits. It's selective litigation against public participation. And it precedes by decades the more recent decisions that we have cited, and which plaintiffs' acknowledge provide for Rule 41 attorney's fees under the inherent authority of the Court in exceptional -- in exceptional circumstances. That's the Aero case, Aero Tech case, and the Gilbreth (phonetic) case. I mean, in Aero Tech, 1997, the 10th Circuit expressly noted that attorney's fees might be appropriate when a party repeatedly brings and dismissed claims after inflicting substantial litigation costs on the opposing party and the judicial system. The 2nd Circuit said precisely the same thing in the Colanbrido (phonetic) case in 1985. The 3rd Circuit held in a 1986 case, Ford v. Temple Hospital, that the Court has inherent authority to award fees where the opponent has acted in bad faith, vexatiously, or for oppressive reasons.

THE COURT: In a 41(a) context?

MR. SKOLNICK: In the 41(a) context.

THE COURT: But what's the cite of that case? You know, that's -- I -- I think I've read all the cases that were cited, but somehow I missed that one.

Ford, you said 3rd Circuit case?

MR. SKOLNICK: It's a 3rd --

THE COURT: What's the --

MR. SKOLNICK: -- Circuit case.

THE COURT: What's the -- what's the cite?

MR. SKOLNICK: Well, Your Honor, I -- I may have spoken too quickly when I said --

THE COURT: Okay.

MR. SKOLNICK: -- specifically in -- in the 41(a).

THE COURT: Okay.

MR. SKOLNICK: It's on, I believe -- it's certainly on the inherent authority of a court.

THE COURT: I don't think there's any real dispute that the Court has an inherent authority to assess a -- I mean, I guess there's some statements in some of the cases to the contrary, but I -- I think that that is a clear statement. But I just -- that -- so it's not a 41(a) case, Ford, right?

MR. SKOLNICK: I think it probably is not.

THE COURT: Okay.

MR. SKOLNICK: We can and we'll check that for you.

THE COURT: If it is, I'll -- I want to get it printed out and have a look at it. But go ahead.

MR. SKOLNICK: Okay.

THE COURT: Go on, Mr. Skolnick.

MR. SKOLNICK: Now, I mean, I'm -- I'm delighted to hear Your -- Your Honor make that comment about -- about inherent authority because I think that -- that Landmark's position with respect to Smoot, and a -- and a few other non-controlling cases dealing with inherent authority, seems to be that -- that Judge Lifland shouldn't have all of the facts before deciding which precedents on inherent authority should be applied in this case and in this judicial district because one court from some other district might see things different.

THE COURT: But I think that the one of -- the argument I don't -- it may be the argument about inherent authority is that it can be limited by statute or rule, that kind of thing. So I suppose in a certain sense they might be arguing it that it was supplanted by Rule 11, and you're not really making a Rule 11 application here.

MR. SKOLNICK: We're not making --

THE COURT: Or you may, or you -- but you haven't yet. I don't know if the safe harbor business precludes it or not. I guess you could argue over that. But go -- go on.

MR. SKOLNICK: And certainly, Your Honor, you're quite right, we are not making a Rule 11 application certainly not now, and on the -- on the issue of the interception of inherent authority of the Court and -- and the rules, I -- I would remind Your Honor about what the United States Supreme Court said in Chambers v. Nasco (phonetic). The Court said, "Although a court ordinarily should rely on such rules, when there is bad faith conduct in the course of litigation that could be adequately sanctioned under the rules, the Court may safely rely on its inherent -- on its inherent power, if in its informed discretion, neither the statutes nor the rules are up to the task."

And Landmark relies on one District Court case from Indiana, the Hamil v. Mobex (phonetic) case, in which Rule 11 was -- was apparently up to the task, but -- but here where -- where based upon Landmark's past conduct there are -- there are lots of reasons to conclude that Rule 11 isn't the appropriate path down which we should travel, there is a -- a very good argument for inherent authority sanctions. But -- but that too, Your Honor, is for Judge Lifland to decide based upon a full record. And all we are seeking today from Your Honor is to be given the discovery that we need to be able to present that full record to Judge

Lifland. Thank --

THE COURT: Thanks.

MR. SKOLNICK: Thank you, Your Honor.

THE COURT: I have a few questions though, Mr. Skolnick, --

MR. SKOLNICK: Happy to.

THE COURT: -- if you would help me with them. I guess first, when was this discovery propounded? And I don't mean the exact date, but was this propounded after you learned that the plaintiffs sought to voluntarily dismiss the complaint or before?

MR. SKOLNICK: When you -- when you say "this discovery," the discovery that we're now --

THE COURT: The discovery --

MR. SKOLNICK: -- seeking?

THE COURT: -- that you're seeking today. Yeah, now.

MR. SKOLNICK: Most of it, Your Honor.

THE COURT: Okay.

MR. SKOLNICK: Most of it was propounded in our initial discovery requests that were filed back in, I don't know, December or January.

THE COURT: And were they responded to?

MR. SKOLNICK: The requests were responded to, but the documents that we are now seeking we did

not get at all. In other words, their responses basically said, in one way or another, no, you know, it's irrelevant, it's --

THE COURT: It's not relevant?

MR. SKOLNICK: I think that the -- that the --

THE COURT: And that's when the merits of the case were an issue?

MR. SKOLNICK: Well, certainly the merits in the case were an issue --

THE COURT: You may --

MR. SKOLNICK: -- at that point.

THE COURT: You may feel they're still an issue, but I'm just saying that -- that clearly at that time we were dealing with the merits of discovery?

MR. SKOLNICK: Exactly, Your Honor.

THE COURT: And but they were responded to, and the responses were that they weren't relevant?

MR. SKOLNICK: The responses were that they weren't relevant. In some cases, the responses were that Landmark had -- had interposed a -- a general objection to all discovery that preceded 1996.

THE COURT: Okay.

MR. SKOLNICK: I suppose that their logic was that that's when Ross's websites first went live. But

the fact is that Ross's websites contains a great deal of information and rely on the entire history of Landmark's conduct. I mean, the Calagy affidavit and -- and all of those documents predate 1996, Your Honor. That -- that was a pre-1996 case. So we didn't get anything at all prior to 1996.

THE COURT: Understood. I'm just looking at this for context, and we can get to the specifics later if we -- if we get there. But so then and did you raise that with me, with the Court the insufficiency of their responses at all?

MR. SKOLNICK: Well, --

THE COURT: I just want to remember the chronology.

MR. SKOLNICK: I understand, Your Honor. And -- and, incidentally, let -- let me also make sure that I am -- that I am not inadvertently miss -- misstating. The discovery that we are seeking now, while I say is largely discovery that was in those -- in those December and January requests, some additional material is now being sought as a function of things that we have subsequently learned. For example, all of the requests that we make for information about their threats of litigation, that is something that we have only now added to the --

THE COURT: Understood.

THE COURT: -- order that we put in front of Your Honor.

MR. DILLON: I think that was largely in the discovery request before anyway, we just didn't put it in the application -- in the first brief of this application.

MR. SKOLNICK: Fair enough.

THE COURT: And I guess what I'm trying to get is --

MR. SKOLNICK: But in terms of chronology --

THE COURT: Right. Chronology is what I'm --

MR. SKOLNICK: In terms of chronology, the -- the parties had a status conference I think in February, had identified for Your Honor that while there were some discovery disputes that had been resolved, there were others that had not been, and that apparently could not be. And it was at that point decided that the parties would file appropriate motions with Your Honor to try to resolve those disputes. Before either party filed those motions, Landmark sought the voluntary dismissal. So that -- that's --

THE COURT: That's what I needed to hear.

MR. SKOLNICK: -- that's the sequence.

THE COURT: Okay.

MR. SKOLNICK: Those disputes were, in fact, never teed up to you, except in a general way during our discussions at a status conference.

THE COURT: Understood. Now you mentioned early on public safety?

MR. SKOLNICK: Yes.

THE COURT: Is it the defendant's position that a court could condition a dismissal with prejudice and take into account the public safety as in -- in determining condition?

MR. SKOLNICK: (No verbal response)

THE COURT: Is that part of your argument?

MR. SKOLNICK: Well, --

THE COURT: I hadn't see anything about public safety. I understand generally your view on that subject, your client's view, but is that something that we're considering here?

MR. SKOLNICK: Your Honor, you're quite right that there haven't been anything in the papers thus far, and it hasn't been teed up because, frankly, it is -- is the kind of issue that -- that if we find additional evidence in their papers on -- on those kinds of things where we had asked for information about their lawsuits from people who claimed psychological and emotional damage from attending their

-- their programs, we -- we might or might not tee that up further. I mean, the public safety issue is also relevant as -- as, if you will, an extension of the Pansy factors that might come into play if they take the position if Your Honor were to order some discovery and they say, well, we want a protective order, we'll first have to deal with that whole situation. But -- but documents that -- that implicate public safety considerations I think is something that Pansy would certainly want Your Honor to -- to be looking at in terms of shielding them at all.

THE COURT: Uh-huh. Now I guess if you were to discuss the law in this area, because the law is -- I think is -- is, in some senses, problematic for your position, and in another sense it's not. But it seems if I were to summarize the cases that I read about dismissals with voluntarily -- voluntary dismissals with prejudice, that the simple statement you might make from that is almost all the time they will be granted, and granted without the assessment of attorney's fees, and/or conditions. Do you agree with that?

MR. SKOLNICK: Your Honor, I -- I think -- I think in fairness it is certainly true that in most instances that would be the case. The -- the cases

upon which we have relied, and there are more than one or two, are those that -- that carve out as the exception the exceptional circumstance case.

THE COURT: And the exceptional circumstance case could be if the -- if an underlying statute, for example, allowed for the award of attorney's fees. For example, there are certain cases like the -- the patent cases that are cited. And in a 41(a) context there, courts have assessed attorney's fees, correct?

MR. SKOLNICK: Well, that -- that's certainly all true, but -- but what I'm also suggesting the cases stand for is that the -- the -- the view of exceptional circumstances that could come into play on a 41(a) is -- is analogous to the view of exceptional circumstances and the test for exceptional circumstances that is applied by courts in a trademark, or a patent context, or under other statutory rubrics.

I'm saying that it is not that the exceptional circumstances won't apply unless you are dealing with a patent case or a trademark case. I'm saying that exceptional circumstances you look at -- you look at that question through the same kind of lense that you apply to find exceptionality in patent and trademark, and one of the factors that that lense leads to you is bad faith. So what -- what I am saying

is that the cases stand more broadly for the proposition that -- that bad faith, and oppressive, and vexatious conduct on the part of a litigant is a factor to be considered as an exceptional circumstance under 41(a).

THE COURT: And the plaintiffs had a Lanamack (phonetic) claim here as well, correct?

MR. SKOLNICK: They did indeed, Your Honor.

THE COURT: Okay. And let me just see if I had any other questions right now. I didn't find any cases that discussed the issue of discovery in the context of a 41(a)(2) dismissal with prejudice, did you?

MR. SKOLNICK: No. And, in fact, the -- the only case that -- that plaintiffs found was -- was the Smoot case, which for a lot of reasons all of which I won't bore you with by telling you again, --

THE COURT: No, no, I read Smoot. I know. But all --

MR. SKOLNICK: So --

THE COURT: -- that Smoot -- well, and then you cited a case where in the context of a dismissal, the Court can place the condition of requiring the party to answer some discovery.

MR. SKOLNICK: Yeah.

THE COURT: What was a without prejudice dismissal as to some plaintiffs, but not as -- or I think as to some plaintiffs, but not as to all the plaintiffs.

MR. SKOLNICK: That's precisely right, Your Honor. That's the -- that's the Alliance for Global Justice case from -- from the District of the District of Columbia.

THE COURT: Right.

MR. SKOLNICK: And I will also point out, Your Honor, that -- that in that case discovery was ordered in a Rule 41(a) motion context, even though, unlike here, the defendants had alternative means of getting the discovery that they were seeking. The Court pointed out that they could have gotten it through subpoenas, for example.

THE COURT: You know, it seems to me that we're on really virgin ground here in this particular issue in this case. I mean, it's a fascinating case, and it -- there's a lot at stake, but let me ask this, and then I'll let you be. You're absolutely right, and I think it may be one of the strongest arguments that you have, that in the brief that was submitted on the 41(a) the plaintiffs did make those assertions, factual type assertions, and we'll deal with that. And you've

also made the claim, which they strongly deny, that Mr. Schreiber's affidavit was incomplete, shall we say, and you actually say false, and you've given some information. Why is that record not sufficient for Judge Lifland? In other words, you have refuted the Schreiber affidavit here, doesn't it get down to a matter of degree? In other words, what kind of a record need the Judge have in a 41(a)(2) in assessing whether conditions should be applied?

I think my question is, I suppose we could -- you could go and retry each of those cases in the other districts. You could have endless discovery. So the question is, what's necessary? It seems to me that an argument could be made that you have the information you need. They have the Schreiber affidavit, you have the impeachment, shall we say, of the Schreiber affidavit. Isn't that enough for Judge Lifland?

MR. SKOLNICK: Your Honor, respectfully, I -- I think it's not. And -- and I think it's not precisely because it -- it puts us in the position that we have already found ourselves in where -- where Landmark provided some information in the Schreiber declaration, we refuted that by -- by pointing out some of the information we had been able to discover, but discover only in a kind of a surface way for our own

investigation. And they come back and say, ah, hah, you are all speculating. You don't know what it is that really went on, let me tell you. And my concern is that precisely the same thing magnified and multiplied several times will happen in the Rule 41(a) context. We would be left with -- with no more than we have now, which I think certainly is damming in terms of Landmark's position, but we are -- we are susceptible to them simply saying, ah, you're taking it all out of context, you don't understand what really happened, here are our declarations, and we won't have the ability to meet them on a -- on a level playing field with both sides knowing what the record is, and being able to make their arguments about whether or not that does or does not lead to attorney's fees and sanctions with equal information. Not with a hide-the-ball situation.

THE COURT: You know, I think, of course, as you say, the real underlying issue is for Judge Lifland. On the other hand, just trying to look at the context here and what I'm asked -- being asked to decide, I could make certain assumptions. I'm not saying that I am, but I could make certain assumptions about what your client is really seeking. Perhaps your client is seeking to, for once and all now in this

case, to put an end to this, and put an end to these cases that you claim they're filing frivolously or harassing people. I don't know if that's what you're trying to do or not.

But a question that I do have to ask, and as I say, it's not something I'm deciding, is is the 41(a)(2) the proper venue, the proper forum for that? In other words, couldn't -- could you not file a micial (sic) -- malicious abuse of process case at the conclusion of this? Could you not file a Rule 11 motion, if you so chose, or, you know, subject to the safe harbor business? But isn't that really a more appropriate forum for raising this?

MR. SKOLNICK: Your Honor, it -- it is certainly -- it is certainly a possible forum.

THE COURT: Uh-huh.

MR. SKOLNICK: I am not sure that I would agree that it is the more appropriate forum for a couple of reasons. One of which is I -- I am reminded and -- and, unfortunately, I can't cite the case for you, but I'm reminded that the Appellate Division in an opinion I believe by Judge Pressler was -- was confronted with -- with issues that -- that touched on the whole -- the whole general area of slap suits. And Judge Pressler went out of her way to recognize that

slap suits had not yet been formally recognized in New Jersey. And that, as of now, the state of play was that -- that a -- a defendant who felt aggrieved in that way had the potential remedy of a malicious prosecution suit afterwards. She all but acknowledged that she found that that was a -- a if not an adequate, it was a -- a non-expeditious way of dealing with the things. She was all but inviting the Legislature to pass a slap suit or inviting the -- the Supreme Court to authorize some quicker mechanism to -- to deal with these things.

So the answer is yes there are -- there are other ways of approaching it, but, frankly, I don't particularly want to be in the position as -- as a pro bono attorney of now first commencing another piece of litigation to vindicate a position that I think we -- we can and should be teeing up adequately within the four corners of -- of the little judicial system we have created here.

MR. SKOLNICK: Thank you very much, Mr. Skolnick.

Ms. Lans, are you going to argue?

MS. LANS: Thank you, Your Honor.

THE COURT: Thank you.

MS. LANS: Your Honor, your last question was

interesting because it brings us back to the focus of what we're here about. We're here in connection with an application which has no precedent as you said, except a case that may or may not be factually analogous, but certainly denies the discovery as on the question of whether a Rule 41(a)(2) can become it's own cottage industry satellite litigation within a litigation. Now there may not be a lot of cases that say that we can't have discovery in this context, but there were a lot of Rule 41(a)(2) cases. And if you look at those cases, what you see is that there's never any discovery conducted, number one. Number two, that the cases say this is not about the merits, and in addition to the cases that we cited in our filings, there's actually another recent Southern District New York case called Shady Records v. Florist Enterprises (phonetic), and it's at 371 F.2d 394. It's another case saying a Rule 41(a)(2) motion is not the vehicle for discussing the merits of the case, and it's not a vehicle for imposing conditions that go beyond the rare circumstance that may be present where attorney's fees can be awarded.

So I don't think there's any serious question in the law that assuming that the defendant's motive is, as you put it, and I don't think that's the real

motive, I think their motive is about finding materials that they can post on their website, and that's what they do. But even assuming that were their motive for seeking discovery, it -- it doesn't lead to a judicially-sanctioned act because the -- the cases make it clear that the Rule 41 motion is not a vehicle for imposing the kind of conditions that Mr. Skolnick was talking about.

If you come around to the question of attorney's fees, apart from the fact that there is no case in this context in which the Court allows the party to take discovery in aid of seeking as a term of a dismissal fees, it is clear that the Courts do not want to see that motion turn into a sideshow alternate litigation. And that's exactly what Mr. Skolnick is inviting to occur here.

We have -- we started down this road, and I think the chronology is important, prior to the letter that we wrote to Your Honor on April 1st saying that we wished to make a motion to dismiss with prejudice, we picked up the phone and we called Mr. Skolnick and we said we want to do this, do you consent, he said no. We then filed a letter application for leave to make a motion and he responded. And he said we will take the position that Landmark is a litigant who brings cases,

and then as soon as discovery is heating up, they run away from the cases and dismiss them.

In that context of that charge that he made, okay, we responded with respect to the facts. There are a few cases under Rule 41 which the Court says in dicta the general rule, and as Your Honor said before, that when a case is dismissed with prejudice, attorney's fees will not be awarded. There might be a circumstance the Courts come onto, there might be in which you have a litigant who consistently abuses the process by bringing lawsuits, and maybe the rule would be different there.

In fact, there's no case in which the fees have been awarded on the basis of that dicta noted potential exception. And in the Colanbrido case, which is a 2nd Circuit case, the Court makes the point that there's actually no decision -- they surveyed the law at that point --

THE COURT: Uh-huh.

Ms. LANS: -- there's no decision in which attorney's fees were ever awarded where there was not some statutory basis for the award of fees. In other words, that exception that the Courts -- the Courts occasionally speak of has never actually been invoked.

But be that as it may, Mr. Skolnick said

that's the pattern that Landmark engages in, and we responded to that. And what we showed was that there were four cases, and I'll come back to the three instances that he says are cases that we didn't talk about, four cases. In three of the four -- and, again, point -- point yourself to the allegation that he made, which was, and as soon as discovery gets heated, they run away from the case. And in those four cases, in one of them a New York State Supreme Court Judge, which is our general trial court, dismissed the case on a pleading that -- and indeed because he found that the particular statements in that article were quite different from those that we're talking about here were opinion. It was an adjudication and Landmark made a decision not to appeal it. So be it.

And the other three cases there was substantive motions made, one a substantive motion to dismiss, and the other two cases motions for summary judgment, and Landmark won all of those. And, ultimately, it did what 97, 98 percent of all litigants do, it settled those cases. It didn't run away from the cases, it won substantive motions and then the cases were resolved.

Now Mr. Skolnick may think that the resolutions don't tell us much, he may not agree with

the decisions that were rendered by those courts, but we're hardly here to re-litigate those cases. The only relevant information about those cases is the disposition of those cases because it disproves the assertion that he made in an attempt to fit into dicta in some cases that's never actually been applied. Did Mr. Schreiber's declaration omit material information? I don't think so. There are three situations that he points to, and -- and none of them bears on this allegation. There is this Garvey summons that was filed. In New York State practice you can file a summons without a complaint, and that has the affect of commencing an action for -- for limitation purposes. Apparently a summons was filed, and then nothing more happened in the case, and according to the law, the summons lapsed. Mr. Schreiber had no record of it, the law firm that filed it had no record of it. We have nothing to say about it because no one has either recollection or record. There's a piece of paper, obviously it was filed. It doesn't signify anything to me, frankly.

Second, there was a proceeding brought against a Mr. Pressman (phonetic) which was a proceeding in aid of enforcing discovery coming out of one of the cases that was disclosed in the Schreiber

affidavit. It's not a case. Okay. It's a -- it's an ancillary application to enforce a discovery obligation, and it was pursued, and it's of no event to this issue.

And, lastly, there is the -- the Jilo (phonetic) litigation which was an action, as I understand it, -- it was an application for discovery with respect to the identity of an anonymous internet poster. It was brought on September 6th, 2001. Landmark apparently made an application for expedited discovery; that was denied. September 11th happened. Landmark's offices in New York were in the World Trade Center. They were destroyed. They made a decision not to pursue -- having to focus not merely obviously on that litigation, not to pursue that litigation, and not to pursue a lot of other things, and to take care of the business close to hand. And the Court record shows a discontinued action, period, that was never pursued beyond an initial stage. There was certainly no request for discovery from the other side, there was nothing. Five, six, seven days into things, it too lapses due to world events quite unrelated to the kinds of accusations that are being made here.

So I come back to your point, to Mr. Skolnick, which is, don't we know enough now to decide

this issue under Rule 41? There's some language in the decision -- the decision of Judge Bassler from this district which I -- I think is very much to the point here. It's a case in which there was a voluntarily dismissal --

THE COURT: This is the Kitchen case?

MS. LANS: Exactly, Your Honor.

THE COURT: Could you -- could you just it -- what's the name -- the cite of the case, and put it on there record?

MS. LANS: Yeah. It's National Kitchen Products Co. --

THE COURT: Right.

MS. LANS: -- v. The Butterfly Company, Inc.

THE COURT: Thank you.

MS. LANS: And he makes the point that there was an effort there to seek sanctions under Rule 11, but I think his point has to do not simply with Rule 11, but with the notion of using a Rule 41 motion in the terms and conditions provision as a vehicle for seeking sanctions generally speaking. And what he says is, "Moreover, on account of NKP's, National Kitchen Products voluntary withdrawal of portions of its claims against the defendants, the Court has issued no ruling as to the merit of those claims, and will not do so

now. The Court encourages parties to police their own litigation practice to save time and expense for the Court and the parties. This is the very reason for the safe harbor provision in the amended rule. The Court applauds such conduct and in no way finds it sanctionable. Under the circumstances of this case, it would be an abuse of Rule 11 for the Court to use NKP's withdrawal of portions of its complaint as the instrument through which to issue sanctions."

Now if you -- if you look at that decision, it -- it is obvious that to use a Rule 41 motion as an instrument to allow discovery in aid of an inappropriate motion for sanctions is all the more improper. And that's what we're talking about here, taking this case which -- in which we shortly after the inception of the case, before there had been meaningful discovery, made a decision to withdraw the case with prejudice, and now turn that application, which has been pending at this point since May, turn that application into a vehicle for all sorts of satellite issues to -- to come before the Court. There's -- there's certainly no law that supports it. And I don't think that there is any inequity to the defendants in seeking any proper conditions, proper conditions that the Courts would permit in allowing it to respond to

our motion based on the information which is very considerable that it has already gathered and that we have put out in front of the Court.

But if you -- Your Honor has no questions, I'll leave it there.

THE COURT: Well, I -- I do have a question or two. You do have an exposition in your brief in support of the motion for voluntary dismissal where you repeat and explain or argue briefly some of the same allegations that are made in the complaint. And as I, off the record offhandedly, said at -- at an earlier conference, I guess I -- I wondered why this wasn't analogous to a 56(f) or type situation where if someone files a summary judgment motion, and the other side feels that further facts or information are necessary, that discovery is -- is appropriate. And as I mentioned, when I questioned Mr. Skolnick, that seems to be something of a -- a stronger argument here, and I wondered how you would respond to it. In other words, you have placed in this motion -- I suppose the motion could have been -- I don't -- how you do it, of course, is your own strategy, but the motion could have been filed saying the complaint alleged X, and for other reasons, or because of the Appellate Division decision in the State of New Jersey we've decided to voluntarily

dismiss the case. But the brief doesn't say that. It goes on and it really repeats that there's the -- that they've made false statements, that they've disparaged X, et cetera, et cetera. So why shouldn't they have the right to respond to that?

MS. LANS: Well, maybe what you said is the right answer. I think there's several reasons. One is, as -- as you said, we could have made a motion without saying any of those things, and the motion would not have been deficient for that reason.

THE COURT: Right.

MS. LANS: Which is another way of saying perhaps politely only as extraneous, and all -- if all of that is extraneous to the motion, and extraneous to the Court's decision of the motion, then the fact that it's there doesn't give rise to an opportunity on the defendant's part to do discovery about it. You know, in -- in Rule 56, the issue for the Court is are there material issues of fact that warrant a trial in this case. That's not the -- and -- and subsidiary to that, you know, is there information that the resisting party needs and doesn't apparently have.

Well, that's not what we're talking about here. There's no issue to be tried on a Rule 41 motion. And if the issue to be tried on a Rule 41

motion were theoretically something to do with the merits of this case, then Judge Lifland couldn't even try it without giving us the right to a jury trial, which one of the cases points out. I mean, by way of saying why a Rule 41 motion is not about the merits of the case.

So the fact that, in my view by way of background and -- and because my client feels it important, feels strongly about its reputation. We put material into our papers which may be irrelevant to the Judge's disposition of the case. It certainly doesn't open a door that isn't open anyway.

THE COURT: Thank you very much.

MS. LANS: Uh-huh.

THE COURT: Anything further Mr. Skolnick?

MR. SKOLNICK: Your Honor, yeah.

THE COURT: Okay.

MR. SKOLNICK: If I -- if I might?

THE COURT: Sure.

MR. SKOLNICK: On the last point that -- that you and Ms. Lans were -- were talking about, I think that -- and I think that one of their -- one of their papers, perhaps the sur reply even makes the point that -- that they put all of those repetitions of their allegations against Mr. Ross into their 41(a) motion to

-- to confront and deal head on with what we had clearly signaled was going to be a -- a -- a dispute about their bad faith. So I think that -- that they were trying to, you know, get ahead of that game, if you will.

But that just leads us back full circle to the fact that -- that as -- as Ms. Lans had said earlier, Rule 41 is -- is not about the merits. We agree that it's not about the merits, because the merits would be about Mr. Ross' conduct, and we believe that the proper debate on the 41(a) is about Landmark's conduct. And the things that they assert in their brief, where they repeat their, I believe, clearly false allegations about Mr. Ross, were to say, oh, well, we had a good faith basis for saying this. We -- we believe this, we believe this, we have Mr. McMiniman (phonetic), we have this thing, we have that thing. So they have -- they have placed those -- those matters at issue as a matter of whether or not they, in fact, have filed this lawsuit in bad faith. That is what we want discovery to respond to. That is what we believe is the -- the thrust of our opposition on the motion. And as I've said several times, we want to be on a level playing field in terms of being able to do that.

Just a couple of other --

THE COURT: Uh-huh.

MR. SKOLNICK: -- points that you had made earlier, Your Honor. I mean, I tend to agree that -- that to some very real extent we are in virgin territory here.

THE COURT: Uh-huh.

MR. SKOLNICK: To say that the -- that the law is undeveloped on the question of whether or not there should be discovery in aid of opposing a Rule 41(a) motion would be a polite way of phrasing it.

THE COURT: Uh-huh.

MR. SKOLNICK: This whole question of whether or not we have misstated or misrepresented what it is that -- that Landmark does as a litigation ploy, our -- our primary assertion, Your Honor, is that they bring cases with no intention of actually prosecuting those cases to judgment. They -- and -- and in a certain way the -- the Garvey suit is -- is an illustration of that. Ms. Lans acknowledges that the Garvey suit was file, and then explains why, you know, for Landmark this was sort of a non-event. Well, I tend to think that for Mr. Garvey it was not a non-event, you know?

THE COURT: Uh-huh.

MR. SKOLNICK: Finally, Your Honor, the --

the -- the Judge Bassler decision in Kitchen Products, or whatever it is, it seems to me that -- that the key phrase in -- in the quote that you and Ms. Lans were looking at is "under the circumstances of this case." I think here we have a very different one, Your Honor.

THE COURT: Understood.

All right. Well, thank you for the argument. I don't have a prepared opinion in this case. On the other hand, I'm -- I am going to give you an opinion. So what I'd like to do is take a -- about a five-minute recess and put some notes together, and I'll -- I'll come out and give you my decision.

MR. SKOLNICK: Thank you, Your Honor.

THE COURT: Thank you.

MS. LANS: Thank you.

(Recess)

THE COURT: All right, Counsel. Just bear with me. This is the defendant's application for discovery relating to the plaintiff's motion to dismiss with prejudice under Rule 41(a)(2). I'm not going to review all the facts of the case and the background, which are well known to the -- to the parties. I am going to review some of the arguments that were made in the papers, and bear with me, I'm taking this from your papers.

It's defendant's position that monetary and non-monetary conditions must be imposed on plaintiff's requested dismissal for two reasons, as said in the initial papers, because the suit perpetuates a pattern pursuant to which Landmark has repeatedly commenced frivolous litigation for the purpose of intimidating and silencing its most vocal public critics. And, two, that plaintiffs brought the current lawsuit for product disparagement with no basis in law or fact, and plaintiffs have actual knowledge that those are the statements attributed to the defendant, Mr. -- or to Mr. Ross about which it complains, if not constitutionally protected matters of opinion are unquestionably true.

Defendant's counsel states in his papers and stated at argument that he's handling this case on a pro bono basis, and believes that the case is an exceptional case in which special conditions should be imposed on the plaintiff as part of the dismissal. Most of what we discussed today had to do with the defendant's entitlement to discovery, rather than the specific requests that were made. That's not to say that the specific requests weren't addressed in some of the papers; they weren't discussed much at argument. But I think it is fair to say that the thrust of the

motion was the issue of entitlement to discovery in this context, rather than the specific requests.

But I want to list using the summary that Mr. Skolnick did in his initial brief that they're seeking documents and information related to plaintiff's litigation against other public critics of Landmarks, documents and information related to lawsuits and arbitrations brought against plaintiffs by persons claiming injury or rising out of attendance at the Landmark forum, or rising out of the misconduct of Landmark leaders or employees, documents related to complaints made about Landmark that are relevant to establishing the truth of statements alleged to be false, documents and information related to complaints about psychiatric problems arising from attendance at the Landmark forum, documents related to Landmark's warnings to and screening of applicants.

Defendants claim that plaintiff and their attorneys failed to conduct an inquiry reasonable under the circumstances regarding the allegations and other factual contentions in the complaint. And as part of the discovery, they want to inquire whether the allegations against the defendants were brought entirely in bad faith. They note that the requests are largely encompassed within existing document requests

and interrogatories that were served prior to Landmark claiming -- not claiming, announcing that they wished to dismiss the case, and which apparently we heard were responded to by claiming they were irrelevant or not proper subjects for discovery for some other reason.

Now the plaintiff claims that discovery is not available on a Rule 41 dismissal motion. And they cite the Wilson v. Eli Lily case, 222 F.rd (sic) 99, which was discussed at argument. I'm not going to go into that too much right now. But they do quote from that case which states, "To the extent the defendants seek to conduct discovery in aid of their objection to plaintiff's motion, I reject out of hand such an inappropriate approach to the determination of a 41(a)(2) motion." They point out that there's no Rule 11 application before the Court. They say that a Rule 41(a)(2) dismissal motion is not a problem vehicle for litigating the merits of the claims. I don't think anyone really disputes that. And it goes on to discuss certain other cases which I will get to. I guess part of the argument is that in the context of a dismissal with prejudice -- a voluntary dismissal with prejudice, attorney's fees are not appropriate in -- in large measure in most cases.

And they also discuss at length the case of

Smoot v. Fox, which was quoted to -- quoted from in the papers and also discussed argued at argument, 353 F.2d 830, in which a court denied the defendant's application at that point for an award of attorney's fees saying essentially that defendants were seeking a -- a trial on the merits, which is not permitted in connection with a Rule 41 dismissal. And they say in their papers that Landmark has never brought an action that it withdrew voluntarily, and they say that there were four cases that Landmark brought.

The response from the defendant was that indeed they criticized the Schreiber affidavit as being false and incomplete. And, indeed, they have pointed to other litigations. They say they're litigations, the plaintiff says they're not real actions, but certainly they were not included in the Schreiber allegation, that there apparently were some other court actions. They point out that the Schreiber affidavit did not include any of the suits brought in foreign countries. And, of course, the plaintiffs come back and say that Mr. Schreiber was clear, and that he was only referring to suits brought in the United States.

And they clarify that the discovery they seek is intended to cast light on what Landmark knew about its own policies and procedures, about its own

litigation history, and the contents of its documents, and they feel those issues are relevant to Landmark's bad faith in bringing its complaint. And there's an extensive discussion of why the Schreiber affidavit is, in their view, incomplete and false.

And there is also a discussion of the law, and they make clear the -- this is the -- the defendants make clear that they're seeking attorney's fees and costs, not only on Rule 41(a)(2), but also under the Lanham Act, and under Rule 54(d), and under the inherent authority of the Court to award attorney's fees. And they cite this Court's broad authority to order discovery under 26(b)(1), the well-known standard, which is for good cause. The Court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence. And they state that the fact that the present application for discovery is brought to assist defendants in opposing a Rule 41 application neither vitiates the Court's power nor changes that calculus.

They claim that prejudice -- that they would be prejudiced if they get no discovery, because absent

the discovery they wouldn't be able to fully document those abuses of the litigation process by Landmark that will justify an award of attorney's fees and the imposition of conditions on the requested dismissal. And then they go on and state -- defendants once again, "Case law aside in ruling on defendants's applications, defendants urge the Court to consider the unique facts and circumstances of this case where plaintiffs are unquestionably in possession of relevant documents and information, and where the material will unquestionably be directly relevant to an assessment of Landmark's good faith going on in bringing this and many similar actions."

There's a further exposition of the authority for allowing attorney's fees and costs under the Lanham -- 41(a)(2) under the Lanham Act, 54(d), and the inherent authority of the Court, and a lot of discussion of the exceptional circumstances standard that seems to be stated. They go on to say they have not brought -- there's no Rule 11 claim here at this point. And, of course, there is a -- a bit of a theme through the papers that Landmark, as we said, as Mr. Skolnick said, is a recidivist abuser of the judicial process.

Finally, we have a reply, sur reply which I

permitted in this case, and, to some extent, it goes back over the law and states that Rule 41(a)(2) and bad faith is -- is not -- rather bad faith is not a basis for conditioning a dismissal under 41(a)(2). Further discussions of the -- some of the cases we heard about today, and certainly Smoot, and, of course, in the -- the sur reply there's explanations for the -- why the Schreiber -- Schreiber affidavit said what it said, and didn't say what it didn't say, et cetera, which brings us now down to the issue.

I want to cite from two cases before I go on to give the decision. And one case is Gilbreth International v. Lionel Leisure (phonetic), which is 587 F. Sup. 605. And that is from the Eastern District of Pennsylvania. And I'm now quoting from this case. "Where the dismissal" -- we're talking about a dismissal under 41(a) -- "Where the dismissal sought is with prejudice, it has been stated that an award of attorney's fees is inappropriate, unless the case is of a kind in which an attorney's fee might otherwise be ordered after termination of the case on the merits, or there are exceptional circumstances." This is the standard that we've been discussing today.

Later on in the opinion quoting, "There is authority exists for awarding fees where there has been

grossly negligent, or reckless conduct, or bad faith conduct in connection with either the obtaining of a patent, or -- or the Federal Court litigation, or both." And, of course, that relates to that particular case.

And now from the Colanbrido case, which is Colanbrido v. Kelly, discussed at argument here and it's 765 F.2d 122, and I'm quoting. "We have found only one case that awarded fees under Rule 41(a)(2) following a dismissal with prejudice without relying on some statutory authority, see Crousno v. Sachs & Perry (phonetic), 58 F. Sup. 828." There's some discussion of that, and then the only other case we have uncovered awarding fees under 41(a)(2) as a condition of dismissal with prejudice relied on both the presence of exceptional circumstances and on -- and on a statutory fee authority in the patent law, and they cite Gilbreth.

But then, as discussed here, I think very candidly by both sides, I think as Mr. Skolnick or perhaps Ms. Lans said, the Court goes on. "Our reading of 41(a)(2) does not altogether foreclose fees in the event of a dismissal with prejudice. Conceivably, an award might be one of the appropriate terms or conditions authorized by Rule 41(a)(2), e.g., if a

litigation has made a practice of repeatedly bringing potentially meritorious claims and then dismissing them with prejudice after inflicting substantial litigation costs on the opposing party and the judicial system." In any event, they say this is not such a case, meaning the Colanbrido case.

What we have -- now to get down to the -- to the real issue, what we have here is, in my view, and the Court's view, a unique situation, at least in terms of precedent. I have not find -- found any binding precedent on this subject. And, of course, there was extensive briefing, and I myself did my own research to see if I could find. I don't think there's any question that the thrust of the case law is that when you have a dismissal with prejudice, the Court wants the matter to be done. And they certainly -- and in -- in almost all of the cases, no attorney's fees or conditions are imposed. There's certainly no discussion of discovery.

On the other hand, it's not entirely foreclosed, as we see -- as we just heard in the Colanbrido case, which is a 2nd Circuit case from 1985. The second major point in the law I want to point out is there's no question -- I don't think there's any -- even a hint in any of the case law that I've seen that

the Court would permit getting into the merits of a case, when a party seeks to dismiss a case with prejudice. I think that Judge Bassler's decision in the Kitchen case is distinguishable here, but I think there is something that comes from that, and that is we're certainly not going to get into the merits of discovery. I think that would be a terrible precedent to set, and if -- if that really is necessary, and if it's really important to move ahead with that kind of an issue, if the merits are so important for other reasons, I think there are other fora to -- to address that in. Once again, there's no direct authority on it. There's certainly direct authority saying you're not going to get into the merits on a 41(a)(2) motion.

But, of course, the question is really where to draw the line. It's this Court's view for -- and some the reasons that were cited from the papers, and the case law that the Court does have authority under Rule 26 to order discovery at any stage of the proceeding, including this one. It's very -- it seems, as I stated from the cases, that the award of attorney's fees in connection with a -- a voluntarily dismissal with prejudice is extremely unusual. On the other hand, this is an unusual case. And perhaps this is the exceptional case. Perhaps it's not. There's

certainly the possibility under the case law for the award of attorney's fees.

One, under the inherent authority that the Court has. Two, perhaps as a condition under 41(a)(2). There's no clear answer one way or the other about that. Some courts have said absolutely not, but we just heard of the -- the Colanbrido footnote that says conceivably such an award could be had. And, finally, there's no question that under the Lanham Act in exceptional circumstances attorney's fees could be awarded.

I believe that there are some analogies to the present -- to the discovery issue in the present motion and the 56(f) situation. There's no question, as Ms. Lans points out, that -- that when you're dealing with a 56 -- Rule 56, you're dealing with summary judgments, the merits of the case one way or the other.

On the other hand, the discovery aspect is that someone has filed -- a party has filed a motion, and certain claims are made in that motion. And Rule 56 provides a -- a procedure where the party who is faced with that motion can come back to the Court and seek some discovery. I'm not saying it's directly on point. It's very different, because here we have a

party who wishes to dismiss a case. But I just think there are some analogies.

I will point out, as I did, that the plaintiffs in their motion to voluntarily dismiss this case made various statements in their brief. I just have to find that. Okay. I apologize, I left it on my desk. Will you -- I'll be right back out.

(Judge leaves courtroom)

(Judge returns to courtroom)

THE COURT: Are we on the record, Mar?

Okay. Now I'm quoting from the plaintiff's memorandum of law in support of the motion for a voluntary dismissal. And there's a section that goes into the bases of Landmark's complaint. "Subsection A, defendant's postings are false. B, defendant's postings are derogatory. C, defendant's postings are misstatements of fact, not opinion. D, Landmark has suffered damages. E, the authorship of the posts on defendant's websites."

So that is out there, and that is before Judge Lifland for whatever reason. Whether that's relevant to this issue or not is a very serious question. And I in no way suggest that simply because that is put into the -- into the brief that there's going to be any exposition or -- or there's going to be

any intensive discovery on those subjects. I think that would highly inappropriate. That would be getting into the merits, and I think that that flies in the face of the -- of the case law and the rules. As stated by Judge Bassler, that when a party is seeking to voluntarily dismiss a case, we're not going to get into the merits at that point and have a -- a mini trial at that -- at that point, but it has been placed in the -- in the brief.

I'll also point out that there are some issues with regard to the Schreiber certification. There is a dispute as to what -- what's true and what's not. And I don't think on this motion -- not this motion, I don't think on the motion before Judge Lifland that's going to be an issue that's going to be decided. On the other hand, I think that Mr. Skolnick does raise a point that certain documents that were referred to were somewhat incomplete, and -- and that's another factor that I have taken into account. What we have is an extremely unusual case, and an extremely close question in some regards. As with everything in the law, I think discovery especially is a -- a matter of degree, as I stated.

Under the circumstances, and considering everything that has occurred here, including the unique

circumstances and facts in the case, I am going to allow very strictly limited document production in this case. I am not -- I am denying the request for any broad discovery going to merits. I will say that in reading the -- the actual document requests that were attached to the briefs or to the certifications, that I think they are over-broad in this context because they get into the merits. And I don't believe there's any authority for that. And, as I say, I think that's contrary to the spirit and intent of Rule 41(a)(2).

So I haven't given you -- the parties much guidance. I'm making it clear that I'm denying the request and the order to answer the discovery that has been propounded. On the other hand, I do believe that it's appropriate for the defendant to judiciously and carefully seek certain documents that have been alluded to and not provided, that have been raised in the Schreiber certification, et cetera, to have those documents so that they can respond to the motion.

This motion has been pending for a long time, and, once again, this is in the context of a party seeking to dismiss a case with prejudice. And I don't think that discovery should stand in the way of that. So what I am going to order is that the parties immediately confer. I'll allow the parties to use my

jury room right now. If you can't do it right now for some other reason, then we'll do it very soon, and see if you can agree on a list, a very limited list of documents that the defendant seeks that go to the issue of responding to the motion, rather than the merits of the case. If, indeed, it encroaches on the merits a little, that may be okay. Because specific type requests were not dealt with in detail before me, there's no way for me to really respond. I'm saying that what was requested is too broad, and I'm not permitting it.

On the other hand, if you take the time right now, you can make a list, and I will be here all day, and I'll be happy to address each one on the record specifically. If that's not possible, I'll do it in short order. My point is, I want to get this done quickly, I want to get the response to the motion before Judge Lifland done quickly, and I'm sure that's what the Judge wants so we can get this issue decided.

So are you able to do that right now, Counsel?

MS. LANS: For a brief time, not for a terribly extended time.

THE COURT: Well, I suggest that you take the time to at least begin to confer, and -- and then I can

make more specific rulings if I need to -- to do that, and then I'll be happy, of course, to enter an order based on this. But I do want you to understand that I -- I think this is something that we need to get done very quickly so that the issue of dismissal of this case with prejudice can be raised before Judge Lifland.

Mr. Skolnick?

MR. SKOLNICK: Your Honor, just by way of clarification, when -- when you suggest that we come up with a list of specific documents, I assume you mean specific categories of documents. I mean, we -- we have some knowledge of the existence of certain documents, the Calagy affidavit, for example, with all of its exhibits, but --

THE COURT: I think that should be provided.

MR. SKOLNICK: Well, --

THE COURT: I'm giving you an example. That's the kind of thing I'm talking about. It has been raised, it has been put before the Court, it's been discussed, and I think it should be provided. If there are other problems with the -- the discovery of such a document, then I will have to decide them. Meaning privilege or other things like that. But I guess categories of documents, but I -- I think I've -- I've made myself clear, Mr. Skolnick, that I'm not

authorizing normal discovery or free-ranging discovery, and certainly no depositions, perhaps an interrogatory question or two if it was highly focused. So I guess what I'm really asking is that you go back, and taking into mind what I've said here, make a -- a circumscribed discovery request. And my suggestion is you discuss it directly with Ms. Lans today. It may be that you can agree on nothing, I understand that. But then at least we can see what you don't agree on, and I can make more specific rulings as well.

MR. SKOLNICK: I understand.

THE COURT: Okay.

MR. SKOLNICK: We certainly can have that preliminary conversation. My guess is that -- that given the restrictions that -- that you want to place here, I'm going to need a little bit of time to sort of thing through how to -- how to -- how to focus that.

THE COURT: That is understandable as well. But I guess what I'm trying to get across to you is despite the heavy caseload and motion list before myself and Judge Lifland, this has been out there for some time. I want to -- I want to move on it, I want to get it done, whatever it might be. If, you know, someone has a -- wants to appeal, whatever, I just want to get this done to get the motion before Judge

Lifland.

MR. SKOLNICK: I understand.

THE COURT: Okay. So I think you should take a, you know, at least 15 minutes or so now. If you spend more time, that's fine, but if -- if you'd rather go back and do it in the next couple of days, that's fine. Okay.

MR. SKOLNICK: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

(Proceedings concluded)

CERTIFICATION

I, Charlene P. Scognamiglio, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the U.S. District Court of New Jersey, on September 8, 2005, on CD No. 9/8/05, Index Nos. 9:37:40 to 10:39:28 and 10:57:30 to 11:26:25, is prepared in full compliance with the current Transcription Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings to the best of my knowledge and ability.

Charlene P. Scognamiglio 9/21/05

Charlene P. Scognamiglio, AD/T #473 Date

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