LAW OFFICES OF JUDY ALEXANDER
JUDY ALEXANDER #116515
824 Bay Avenue, Suite 10
Capitola, CA 95010
Telephone: (408) 479-3488

GENESIS LAW GROUP, LLP
JAMES CHADWICK #157114
160 W. Santa Clara St., Suite 1300
San Jose, CA 95113
Telephone: (408) 975-4000

Attorneys for Defendant, STEVEN PRESSMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION,

Plaintiff,

vs.

STEVEN PRESSMAN,

Defendant.

Case No: 989890

DECLARATION OF JAMES CHADWICK IN REPLY TO OPPOSITION TO MOTION TO STRIKE AND DEMURRER

Date: January 16, 1998
Time: 9:30 A.M.
Dept: 10
Judge: Hon. David A. Garcia
Date Action Filed: September 26, 1997
Trial Date: Not set

I, James Chadwick, declare as follows:

1. I am an attorney with the Genesis Law Group, LLP, co-counsel for Defendant, Steven Pressman ("Pressman"). I am duly licensed and admitted to practice before this Court. I have personal knowledge of the following matters, and if called as a witness could and would testify thereto.

2. I was one of the attorneys who represented John Hubner, a reporter for the San Jose Mercury News who wrote a series of articles critical of Werner Erhard and entities associated with Erhard, such as Plaintiff Landmark Education Corporation ("Landmark"). Prior to the publication of those articles, Mr. Hubner and the Mercury News were threatened with litigation by attorneys representing Erhard. Following the publication of the articles, Hubner was sued by Werner Erhard in Illinois, and by his daughter, Celeste Erhard, in San Francisco Superior Court (San Francisco Superior Court case number 944412, filed in or about August1992). The Illinois lawsuit was voluntarily dismissed by Werner Erhard. The San Francisco case resulted in a summary judgment in favor of Mr. Hubner and the Mercury News. In my opinion, based on the nature of the claims and the manner in which the litigation was pursued, the primary purpose of the litigation was to punish and harass Mr. Hubner and the Mercury News.

3. I was one of the attorneys who represented Pressman in an appeal in a prior proceeding brought against him in the San Francisco Superior Court by the Global Hunger Project (case number 961959, filed on or about June 28, 1994). The Global Hunger Project was founded and supported by Werner Erhard and entities associated with Erhard. In that lawsuit, the Global Hunger Project named only Pressman, and did not name his publisher, St. Martin's Press. An anti-SLAPP motion filed by Mr. Pressman's trial court counsel in that case was denied, but a petition for a writ of mandate filed on behalf of Mr. Pressman resulted in the matter being stayed and briefing on the merits ordered by the Court of Appeal. Thereafter, the Hunger Project quickly agreed to settle on terms highly favorable to Pressman, without any admission of liability or payment of damages.

4. Landmark has initiated other litigation against persons who have criticized it. In 1996 Landmark filed a lawsuit against Dr. Margaret Singer, an expert on coercive persuasion and a well-known critic of Erhard and his associated entities, such as Landmark (San Francisco Superior Court case number 976037, filed in or about April 1996). An anti-SLAPP motion was also filed in that case, based on the contention that the litigation was without merit and was designed to harass and punish Dr. Singer. A true and correct copy of

that motion is attached hereto as Exhibit A. The litigation was eventually settled on terms that required neither the payment of any damages nor any admission of liability on the part of the defendants. A true and correct copy of the settlement is attached hereto as Exhibit B.

5. As co-counsel for Pressman in the present action, I participated in the decision to file a motion to strike pursuant to Code of Civil Procedure section 425.16. This motion was not made in order to increase the expense of this proceeding for Landmark, nor to delay the resolution of this action. On the contrary, this motion was made for three reasons: (1) Because the conduct of Landmark in persisting to demand that Pressman respond to deposition questions despite the fact that the information sought was clearly privileged and irrelevant to any issue in the underlying litigation demonstrated that Landmark's purpose was not merely to obtain discovery but to punish and harass Pressman with meritless litigation, and because it was clear that the deposition and motion to complaint arose from Pressman's publication of book and submission of a declaration in the Singer case mentioned above; (2) because counsel for Pressman believed that the action could and should be resolved on the basis of either the demurrer or motion to strike, so that any further briefing or consideration of the motion to compel would be unnecessary; and (3) a motion pursuant to section 425.26 offered Pressman the prospect of recovering some of the costs he has incurred and will incur in defending himself against Landmark's improper litigation. Landmark's speculation that the motion to strike was brought for an improper purpose is entirely false.

6. Similarly, the demurrer was not brought to delay this action or increase the costs. On the contrary, the demurrer was brought for two reasons: (1) To try to effect a prompt resolution and avoid any further briefing or consideration of the motion to compel; and (2) because under California law Pressman was required either to answer the complaint or demur to it, and given the apparent application of the First Amendment and California Constitutional protections to the information Landmark seeks to compel, a demurrer was the more appropriate response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of January, 1998 at San Jose, California.

James Chadwick

LAW OFFICES OF JUDY ALEXANDER
JUDY ALEXANDER #116515
824 Bay Avenue, Suite 10
Capitola, CA 95010
Telephone: (408) 479-3488

GENESIS LAW GROUP, LLP
JAMES CHADWICK #157114
160 W. Santa Clara St., Suite 1300
San Jose, CA 95113
Telephone: (408) 975-4000

Attorneys for Defendant, STEVEN PRESSMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION, Plaintiff, vs. STEVEN PRESSMAN, Defendant.	Case No: 989890 REPLY TO OPPOSITION TO MOTION TO STRIKE Date: January 16, 1998 Time: 9:30 A.M. Dept: 10 Judge: Hon. David A. Garcia Date Action Filed: September 26, 1997 Trial Date: Not set

I. INTRODUCTION.

Landmark Education Corporation ("Landmark") attempts in its opposition to this motion to portray itself as the hapless victim of an evil journalist and his scandalously unethical counsel. Nothing could be further from the truth. This litigation is, indeed, entirely unnecessary, but Defendant, Steven Pressman ("Pressman"), did not initiate it. Landmark did, and having done so it cannot now deny Pressman the opportunity to respond to this action in the manner provided for by California law.

Landmark asserts that section 425.16 of the Code of Civil Procedure ("section 425.16") has no application to this action. That assertion is false. As Landmark itself makes clear, this lawsuit arises out of two actions by Pressman: his publication of a book which criticizes Landmark, and his submission of a declaration in another action filed by Landmark against Dr. Margaret Singer, a well-known expert on coercive persuasion and a long-standing critic of Landmark and its founder, Werner Erhard. It is beyond dispute that, but for these actions, Landmark would never have sought to depose Pressman, and would never have brought this action. It is, therefore, beyond dispute that this action arises from Pressman's exercise of his rights of free speech and petition protected by the First Amendment and the California Constitution.

In light of the responses Pressman offered to provide to each of the questions at issue, stating that he had no responsive information obtained outside of the newsgathering process, it is clear that, contrary to Landmark's contention, *all* of the information sought by Landmark is privileged. Thus, *all* of the relief sought by Landmark is barred by the First Amendment and California law. Furthermore, it is clear that none of the information sought is even arguably relevant. There is, in short, no reasonable likelihood that Landmark will prevail.

Finally, although the issue of establishing that a legal action is brought to punish or harass is always a difficult one, the record of Landmark and other entities affiliated with Werner Erhard, as well as that of Erhard himself, betray a pattern of unmeritorious litigation against their critics. This is precisely the kind of action that the anti-SLAPP statute was intended to reach. Landmark's attempt to portray itself as the victim in this litigation is belied not only by its conduct in this litigation, but by history.[1]

---

[1] As an example, Pressman asked that the hearing on the demurrer and motion to strike be continued until after Commission Best has issued a ruling on Landmark's motion to compel. Landmark's counsel felt such a continuance was unnecessary and wished to proceed with the hearing as scheduled. See Declaration of Judy Alexander in Support of Opposition to Motion for Sanctions, on file herein, at ¶ 3.

II. PRESSMAN'S MOTION TO STRIKE LANDMARK'S COMPLAINT IS WELL TAKEN AND SHOULD BE GRANTED.

A. The anti-SLAPP statute plainly applies to this action, which arises from Pressman's publication of a book critical of Landmark and his filing of a declaration in another lawsuit involving Landmark.

In opposing the motion to strike, Landmark makes two primary arguments. First, Landmark asserts that the motion to strike is improper because it is not, by this action, seeking to compel Pressman to disclose any privileged information. Memorandum of Points and Authorities in Opposition to Motion to Strike Complain ("Opposition"), 1:24-2:4. Second, Landmark asserts that section 425.16 does not apply unless an action arises from "defendant's exercise of free speech on a public issue and in a public forum," and that the present suit is not such an action. Opposition, 8:9-11. Neither argument has any merit.[2]

Landmark's claim that section 425.16 does not apply because it is not seeking to compel testimony regarding privileged information misconstrues section 425.16. In determining whether that statute applies, the question is not the relief sought, as Landmark apparently believes, but rather whether the action arises out of "an act in furtherance of a person's right of petition or free

---

[2] Landmark also attempts to misconstrue the scope and application of the section 425.16. Contrary to Landmark's assertion, the application of section 425.16 is *not* limited to speech that concerns a public issue and is made in a public forum. Rather, the term "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" is expressly defined to include all of the following:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) *or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*

Civ. Proc. Code § 425.16(e) (West 1998) (emphasis added). As previously noted, this fourth definition was added to clarify the legislature's original intent with regard to the application of the statute. See Declaration of Judy Alexander filed in support of Motion to Strike, Exh. C. Thus, by its own terms, section 425.16 applies to *any* conduct in furtherance of free speech rights in connection with an issue of public interest. Furthermore, the legislature has made it clear that the statute is to be "construed broadly." Civ. Proc. Code § 425.16(a) (West 1998). See also Averill v. Superior Court, 42 Cal. App. 4th 1170, 1176 (1996) ("we conclude the Legislature intended the statute to have broad application"). Any doubt as to the statute's scope must be resolved in favor of finding it applicable.

speech under the United States of California Constitution in connection with a public issue." Civ. Proc. Code § 425.16(b) (West 1998). Because this action arises from Pressman's exercise of his free speech and petition rights, the nature of the relief sought is irrelevant to the application of the statute.

Furthermore, Landmark's assertion that it is not seeking privileged information is false. Prior to Landmark's filing of this action, Pressman agreed to provide answers to the few questions that arguably did not seek privileged information, and with regard to all others he offered to testify that he had no information responsive to the question other than information obtained during newsgathering for his book or magazine article. Declaration of Carol LaPlant in Support of Motion for Order Compelling Answers, Exhs. D-3 and D-5. It was therefore clear, prior to the filing of this action, that *all* of the information Landmark seeks is privileged.[3] Moreover, Landmark has never demonstrated that any of the testimony it seeks to compel is in any way relevant or reasonably calculated to lead to the discovery of evidence relevant to the issues in the Illinois action. Therefore, even if the information sought were not privileged, the motion to compel would still be baseless and improper.

Landmark's argument that section 425.16 is inapplicable to a discovery proceeding is premised on the false assertion that this action is based exclusively on deposition questions posed to Pressman and his responses to those objections. See Opposition, 8:22-23. However, this deposition did not occur in a vacuum. As Landmark's complaint and moving papers make clear, but for Pressman's newsgathering for and publication of a book concerning Werner Erhard and

---

[3] Landmark asserts that Pressman has waived his shield law rights because certain questions allegedly concern a statement made by Pressman in a declaration. Pressman did not waive his rights by providing the declaration, and the case upon which Landmark relies is inapposite because it involved newspersons who filed a counterclaim that raised issues to which the information sought to be protected pertained, not a third party witness with no connection to the underlying litigation. See Dalitz v. Penthouse International, Ltd., 168 Cal. App. 3d 468 (1985).

Moreover, in a portion of the deposition not provided by Landmark, Pressman answered Landmark's questions and explained the meaning of his declaration. Declaration of Judy Alexander in Support of Opposition to Motion to Compel, Exh. B. In light of this explanation, it is clear that the questions at issue (numbered 24 and 25) seek information unrelated to Pressman's declaration. Thus, even if Pressman waived his rights with respect to statements in the declaration, any such waiver does not apply to questions 24 and 25, and Landmark's action cannot be justified on the basis of these two questions.

Landmark the deposition would never have occurred. See, e.g., Complaint, ¶ 4; Motion to Compel, 2:4-9, 3:16-4:11. Pressman's conduct in gathering information for and publishing this book, and the unsupported (and false) allegation that as a result Pressman acquired information relevant to issues in the Illinois action, are the only explanation that Landmark has ever provided for taking his deposition. Thus, Landmark's complaint and motion to compel arise not so much from Pressman's exercise of his constitutional free speech rights during the deposition itself as from his conduct in gathering and publishing information concerning Werner Erhard and Landmark that Landmark deems objectionable.

As previously explained, there can be no doubt that the publication and distribution of a book concerning a prominent and controversial public figure such as Werner Erhard constitutes an act "in furtherance of [Pressman's] right of petition or free speech under the United States or California Constitution in connection with a public issue." Civ. Proc. Code § 425.16(b)(1) (West 1998). Similarly, given the protection afforded to the newsgathering process by both the First Amendment and the California Constitution, there is no question that the process of gathering information for such a book also constitutes the exercise of speech rights within the meaning of section 425.16.

However, even if this action arose purely from Pressman's conduct at the deposition, Landmark's claim that section 425.16 is inapplicable would still be entirely without merit. The courts have consistently recognized that the process of gathering information for dissemination to the public is protected by the First Amendment. United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978), citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Davis v. East Baton Rouge Parish School Board, 78 F.3d 920, 926 (5th Cir. 1996) ("The First Amendment provides at least some protection for the news agencies' efforts to gather the news."); Boddie v. American Broadcasting Co., Inc., 881 F.2d 267, 271 (6th Cir. 1989), cert. denied, 493 U.S. 1028 (1990) ("newsgathering does 'qualify for First Amendment protection'" because "'without some protection for seeking out news, freedom of the press would be eviscerated.'"); Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509, 513, 519 (1986) ("The First Amendment therefore bars interference with this traditional function of a free press in seeking out information

by asking questions."). Protection for newsgathering is also guaranteed by the California Constitution. Mitchell v. Superior Court, 37 Cal. 3d 268, 274-75, 283-84 (1984). The courts have also consistently held that a person involved in newsgathering has a constitutional right to refuse to disclose unidentified sources and unpublished information obtained in the newsgathering process.[4] Therefore, it is beyond dispute that, even considering only Pressman's invocation at the deposition of his right not to disclose unidentified sources and unpublished information, the present action arises from the exercise of rights provided by the free speech provisions of the First Amendment and the California Constitution.

It is also apparent that Pressman's invocation of his constitutional right to refuse to disclose unidentified sources and unpublished information constitutes the exercise of free speech rights in connection with an issue of public interest. The entire purpose of the California Shield Law and the privilege afforded by the First Amendment is to promote the public interest in receiving information by ensuring that the newsgathering process is not unduly hampered by entities such as Landmark. As the California Supreme Court has stated:

> "Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establish a relationship with an informant."

Mitchell, 37 Cal. 3d at 274-75, quoting Zerilli, 656 F.2d at 710-11. Therefore, Pressman's invocation of these rights and the attempt by Landmark to intrude on the newsgathering process is inherently a matter of public interest. In addition, as discussed above, there can be no doubt

---

[4] See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir.1980), cert. denied, 449 U.S. 1126 (1981); LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818 (1986); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir.1980), cert. denied, 450 U.S. 1041 (1981); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 & n.9 (8th Cir.1972), cert. denied, 409 U.S. 1125 (1973); Farr v. Pitchess, 522 F.2d 464, 467-69 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir.1977); Zerilli v. Smith, 656 F.2d 705, 714 (D.C.Cir.1981);and United States v. Caporale, 806 F.2d 1487, 1503-1504 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987) and, cert. denied, 483 U.S. 1021 (1987).

that the gathering and dissemination of information concerning a controversial public figure such as Werner Erhard is a matter of public interest.

Furthermore, Landmark's opposition ignores the fact that the present action arises not only from Pressman's publication of a book, but also from his conduct in providing a declaration on behalf of the defendants in Landmark's lawsuit against Dr. Margaret Singer, a well-known critic of Werner Erhard and Landmark. However, Landmark has repeatedly emphasized the importance of that declaration in this litigation. See, e.g., Opposition, 6:24-7:2. It deposed Pressman regarding the declaration. See Landmark's Separate Statement of Questions and Responses in Dispute, pp. 11-12. Therefore, it cannot dispute that the deposition and this litigation arise at least in part from Pressman's conduct in providing that statement. Therefore, the protections of the anti-SLAPP statute for Pressman's constitutional right of petition are also invoked.

Section 425.16 applies not only to the exercise of free speech rights, but also to all written or oral statements made before or in connection with any judicial or other official proceeding. Civ. Proc. Code § 425.16(e). The statute applies to such statements regardless of whether or not the judicial or other official proceeding involves a "public issue." Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 650 (1996); Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, 1045-48 (1997). Mr. Pressman's declaration in the Singer case is unquestionably a "written or oral statement or writing" made before a judicial proceeding or in connection with an issue under consideration by a judicial body. See Civ. Proc. Code § 425.16. For this reason alone, then, the anti-SLAPP statute applies, regardless of whether or not this action arises from Pressman's exercise of his free speech rights.

Finally, Landmark's assertion that "Pressman must show that the complaint is meritless" (Opposition, 9:7-8) is simply false. Not only does the authority Landmark cites fail to support this proposition, it is contrary to the plain language of section 425.16, which provides that a motion to strike must be granted "unless the court determines that the *plaintiff* has established that there is a probability that the plaintiff will prevail on the claim." Civ. Proc. Code § 425.16(b) (West 1998) (emphasis added).

Landmark's claim that the anti-SLAPP statute does not apply is wrong. The statute plainly applies, and Landmark is therefore required to demonstrate a probability that it will prevail in this action. That it has failed to do.

B. Landmark has not demonstrated any possibility of prevailing in this action, and it cannot do so because all of the information is seeks is both privileged and entirely irrelevant to the Illinois litigation.

Landmark has not offered any evidence whatsoever in opposition to the motion to strike. Instead, it has elected to disparage Pressman and his counsel, and to rely on its claim that section 425.16 does not apply to this action. However, the statute clearly applies, and Landmark's tirade is not a substitute for evidence. Furthermore, Landmark cannot prevail in this action for two reasons. First, all of the testimony that Landmark seeks to compel is protected by the First Amendment and the California Constitution. Second, Landmark has failed to demonstrate that any of the information it seeks is either relevant or reasonably calculated to lead to the discovery of admissible evidence.

The application of the First Amendment and the California Shield Law to the information sought by Landmark has been explained in detail in the original memorandum in support of this motion and in Pressman's opposition to Landmark's motion to compel. That explanation will not be repeated here. Landmark's main contention in opposing the motion to strike is that it has never sought to compel Pressman to testify regarding privileged information, because its motion seeks answers only to those questions that are not subject to any privilege. Opposition, 1:24-2:2. However, if that assertion were true, Landmark would never have brought this motion. As noted above, Pressman offered to answer the few unprivileged questions prior to the commencement of this action, and as to the remaining question he made it clear that he had no information except that obtained during his newsgathering process. That information is plainly privileged, and it is the *only* information at issue in this action. Landmark's bizarre assertion that it is not seeking to compel Pressman's testimony as to any privileged information is, therefore, patently absurd.

Second, Landmark's entire action is premised on a proposition that is contradicted by undisputed evidence. Landmark has offered only one explanation for the potential relevance of

the information it seeks to compel Pressman to provide: "Mr. Pressman is believed to have knowledge concerning the facts and potential witnesses in the Illinois action, as well as information that could be used to establish actual malice." Opposition, 4:15-18. Landmark has not offered any evidence to explain or support this contention, and has not even provided a single declaration by any party who "believes" this to be true. In short, Landmark has offered no basis for its contention that the information it seeks is relevant or reasonably calculated to lead to the discovery of admissible evidence. On the other hand, Pressman has testified unequivocally that he never provided information concerning Landmark to any of the defendants in the Illinois action. Declaration of Steven Pressman, ¶ 8. Therefore, there is no reason why he would have any information relevant to the claims in the Illinois action, all of which arise from alleged dissemination of information detrimental to Landmark.

In short, Landmark has not even attempted to demonstrate a reasonable probability that it will prevail in this action, for the simple reason that it cannot do so. Therefore, the motion to strike is proper and should be granted.

C. This action is intended to punish and harass Pressman for his criticism of Landmark and Werner Erhard, and is part of a pattern of such litigation.

Landmark's motivation in bringing this action is not relevant to the application of section 425.16. However, to the extent that motivation bears on the consideration of this motion, it is clear that this action was not intended as a legitimate discovery effort, but rather was intended primarily to punish and harass Pressman for his conduct in publishing a book critical of Werner Erhard and Landmark and in providing a declaration in support of another of Landmark's targets, Dr. Margaret Singer.

Landmark has pursued this litigation despite Pressman's testimony that he has never provided any information to any defendant in the Illinois action, and despite the obvious application of the First Amendment and the California Shield Law to the information sought. It has made utterly ridiculous arguments in its effort to compel Pressman's testimony, asserting—for example—that the First Amendment does not apply to proceedings in the California state courts. Reply in Support of Motion for Order Compelling Answers to Deposition Questions,

7:19-8:5. It sought to intimidate Pressman into abandoning his rights by threatening to seek sanctions against him. Declaration of Carol LaPlant in Support of Motion for Sanctions, Exhs. A and C.

In addition, Werner Erhard and entities associated with him, including Landmark, have engaged in a pattern of litigation against their critics. Declaration of James Chadwick in Reply to Opposition to Motion to Strike and Demurrer ("Chadwick Decl,"), ¶¶ 2-4. This litigation has uniformly been resolved either by voluntary dismissal, settlements not entailing any payment of damages or admission of liability, or summary judgment in favor of the defendants. Chadwick Decl., ¶¶ 2-4. The clear purpose of this litigation has been to silence any criticism of Erhard or Landmark. The present litigation is no exception.

III. CONCLUSION.

For all of the foregoing reasons, the motion to strike is entirely proper, and should be granted. In addition, Pressman should be awarded attorneys' fees and costs, as required by section 425.16, in an amount to be determined by costs bill.

Dated: January 14, 1998.

LAW OFFICES OF JUDY ALEXANDER
JUDY ALEXANDER #116515
824 Bay Avenue, Suite 10
Capitola, CA 95010

GENESIS LAW GROUP, LLP
JAMES CHADWICK #157114
160 W. Santa Clara St., Suite 1300
San Jose, CA 95113

By _____
James Chadwick

Attorneys for Defendant STEVEN PRESSMAN

LAW OFFICES OF JUDY ALEXANDER
JUDY ALEXANDER #116515
824 Bay Avenue, Suite 10
Capitola, CA 95010
Telephone: (408) 479-3488

GENESIS LAW GROUP
JAMES CHADWICK #157114
160 West Santa Clara Street, Suite 1300
San Jose, CA 95113
Telephone: (408) 975-4000

Attorneys for Defendant
STEVEN PRESSMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION,

Plaintiff,

vs.

STEVEN PRESSMAN,

Defendant.

Case No: 989890

REPLY BRIEF IN SUPPORT OF DEMURRER TO COMPLAINT

Date: January 16, 1998
Time: 9:30 A.M.
Dept: 301
Judge: Hon. David A. Garcia
Date Action Filed: September 26, 1997
Trial Date: Not set

I. INTRODUCTION.

The Memorandum of Points and Authorities in Opposition to Demurrer to Complaint ("Demurrer Opposition") filed by Plaintiff Landmark Education Corporation ("Landmark") simply reiterates the same meritless arguments Landmark has made throughout this dispute. In essence Landmark's contentions boil down to the following: (1) the demurrer is improper because Landmark's complaint was filed simply as a procedural vehicle to obtain a ruling on a discovery dispute (Demurrer Opposition, 1:19-21; 2:24-26; 5:9-11); (2) because Landmark's

complaint seeks only to compel answers to questions where the shield law does not apply, the complaint cannot be attacked on the basis of privilege (Demurrer Opposition, 3:3-15; 6:1-5), and even if it could, the applicability of the journalist's privilege cannot be determined from the face of the complaint (Demurrer Opposition, 3:10-12; 5:18-26; 8:5-8; 8:17-18; 8:21-23); and (3) the demurrer improperly incorporates arguments regarding relevancy of the deposition questions and the merits of the underlying discovery dispute (Demurrer Opposition, 3:16-20; 6:20-21). As shown more fully below, these arguments fail because they confuse the demurrer of Defendant Steven Pressman ("Pressman") with Pressman's motion to strike the complaint, they misrepresent Pressman's legal position and the authority on which he relies, they are based on an attempt to transform erroneous legal conclusions in the complaint into disputed factual allegations, and they ignore the law. Pressman's demurrer is not improper and should be sustained if Commissioner Best upholds Pressman's claim of privilege.

II. PRESSMAN'S DEMURRER IS NOT IMPROPER.

A. Pressman is obliged and entitled to respond to the complaint in this action, and is entitled to a hearing on his objections to the complaint.

By asserting that Pressman's demurrer is pointless because Landmark's complaint was merely a procedural vehicle to obtain resolution of a discovery dispute, Landmark has once again resurrected its unsupported claim that Pressman was not entitled to respond to the complaint. To the contrary, however, Pressman was both obliged and entitled to respond, and has the right to respond in any legally permissible manner.

Under California law, Pressman was obligated to respond to the complaint within 30 days. See Civ. Proc. Code §§ 412.20(a)(3), 430.30, 435. His failure to do so could have had a number of significant consequences, including waiving his objections to the complaint (Civ. Proc. Code § 430.80), having the allegations of the complaint be deemed true (Civ. Proc. Code § 431.20), and having a default taken against him, resulting in an order granting the relief sought in the complaint (Civ. Proc. Code § 585(b)). Whether or not Landmark

would have sought to impose any of these consequences is irrelevant, because Pressman was not required to incur the risk that they might.

Nor can it be doubted that Pressman had the right to determine the manner in which he would respond to Landmark's complaint. California law clearly provides defendants with just such a right. See, e.g., Civ. Proc. Code §§ 430.10 ("party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer"); 425.16(f) (special motion to strike may be filed within 60 days of complaint); 432.10 ("party served with a cross-complaint may . . . move [to strike], demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint"); 435(b)(1) ("any party . . . may serve and file a notice of motion to strike the whole or any part" of any pleading).

Pressman responded to the complaint by filing a special motion to strike under Code of Civil Procedure section 425.16 ("section 425.16") and a demurrer. He had hoped that a hearing on these responses would resolve all issues and make a hearing on Landmark's discovery motion unnecessary. Declaration of James Chadwick in Reply to Opposition to Motion to Strike and Demurrer ("Chadwick Declaration"), ¶¶ 5, 6. Thus the demurrer and motion to strike were not "pointless," but rather were intended to promote a prompt and efficient resolution of all issues in the case. Alternatively, Pressman requested that all of the motions be heard by this Court. Declaration of Judy Alexander in Support of Opposition to Motion for Sanctions, Exh. A. Nonetheless, this Court decided that the issue of the applicability of the journalist's privilege to the deposition questions in dispute should be decided by the Discovery Commissioner, and it has thus become necessary to have the demurrer and motion to strike heard separately.

B. Landmark's complaint seeks to compel Pressman to supply privileged information, and the applicability of the privilege is apparent from the complaint and documents subject to judicial notice.

To support its claim that Pressman's demurrer is groundless, Landmark disingenuously asserts that the complaint seeks only to compel Pressman to answer questions that are not subject to the newsman's shield or any privilege. Landmark fails to

acknowledge, however, that the relief sought by the complaint is premised on the unsupported legal conclusion in the complaint that all of the questions Pressman declined to answer are questions not subject to the newsman's shield or any privilege. Complaint for Order Compelling Answers to Deposition Questions (¶¶ 9-10). Thus the complaint clearly seeks an order compelling answers to all the questions Pressman declined to answer, and the demurrer argues that all such questions seek information covered by a privilege apparent from the complaint and matters of which the Court can take judicial notice.

Nor are Pressman and the Court required to admit Landmark's allegation that the deposition questions at issue do not seek privileged information. Although for purposes of a demurrer all properly pleaded *facts* must be assumed true, one may not assume the truth of contentions, deductions, or conclusions of fact or law. Moore v. Regents of University of California, 51 Cal. 3d 120, 125 (1990), cert. denied, 499 U.S. 936 (1991). Landmark's allegations that the deposition questions in dispute are proper discovery and not within the scope of the journalist's privilege are clearly legal conclusions and not factual allegations.

Pressman's demurrer asserts that the information sought by Landmark is privileged under both the federal and California constitutions. Landmark's repeated incantation that the applicability of the privilege cannot be determined from the face of the complaint (Demurrer Opposition, 5:25-26; 8:5-8; 8:17-18; 8:21-23) simply ignores that the Court in ruling on a demurrer is entitled to consider any matter of which the court is required to or may take judicial notice. Civ. Proc. Code § 430.30. Moreover, so long as the existence and applicability of the privilege can be determined from the complaint and matters of which the Court can take judicial notice, the complaint can be attacked by way of general demurrer. See Hancock v. Burns, 158 Cal. App. 2d 785 (1958).

All of the facts necessary to determine that Pressman's refusal to answer the deposition questions at issue was justified by his rights under the federal and California constitutions are contained in the complaint and Landmark's papers filed in support of its motion to compel. See Complaint (¶¶ 4, 8), Separate Statement of Questions and Responses in Dispute, and Declaration of Carol P. LaPlant in Support of Motion for Order Compelling

Answers to Deposition Questions, and for Sanctions, and the exhibits thereto. These are all matters within the scope of judicial notice. Evidence Code section 452(d) (West 1998) (judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States"); Day v. Sharp, 50 Cal. App. 3d 904, 914 (1975) (same); Del E. Webb Corporation v. Structural Materials Company, 123 Cal. App. 3d 593, 604-605 (1981) (court may take judicial notice of plaintiff's affidavits).

Contrary to Landmark's assertions (Demurrer Opposition, 6:6-10), Pressman's demurrer makes no reference to records in the previous lawsuit filed against Pressman by the Global Hunger Project.[1] Nor does Pressman's demurrer assert or rely on facts contrary to those pleaded in Landmark's complaint. The only facts relied upon by Pressman in his demurrer are those contained in documents filed by Landmark. These documents are clearly subject to judicial notice. Del E. Webb Corporation, 123 Cal. App. 3d at 604-605.

C. Pressman's arguments regarding the merits of the motion to compel address only the existence and applicability of the journalist's privilege and thus are proper in a demurrer.

Landmark alleges that Pressman's demurrer is improper because it includes arguments regarding relevancy of the information sought from Pressman to the underlying Illinois action (Demurrer Opposition, 3:18-20) and regarding the merits of the motion to compel (Demurrer Opposition, 6:20-21). Contrary to Landmark's contention that such arguments are extraneous, they in fact go to the heart of the applicability of the journalist's privilege and thus to the sufficiency of the complaint.

Landmark's complaint alleges that Pressman improperly refused to answer deposition questions and seeks an order compelling testimony from Pressman. Pressman's demurrer asserts that the conduct of which Landmark complains is privileged. This question of

---

[1] Although Pressman asked the Court to take judicial notice of records in Global Hunger Project v. Pressman, case number 961959, Pressman made reference to these records only in his motion to strike. Thus Landmark's reliance on Bach v. McNelis, 207 Cal. App. 3d 852, 865 (1989) is misplaced, as Pressman in his demurrer has not asked the court to consider contents of a declaration filed in another case.

privilege is a matter of law to be decided by the court. Jennings v. Telegram-Tribune Co., 164 Cal. App. 3d 119, 128 (1985); Williams v. Daily Review, Inc., 236 Cal. App. 2d 405, 418-19 (1965). If Pressman was privileged to decline to answer the deposition questions at issue, and that privilege is apparent from the complaint and matters of which the Court may take judicial notice, then the complaint is subject to demurrer. Thus the merits of the motion to compel and the merits of the demurrer are synonymous, and Pressman's demurrer can hardly be deficient because it includes arguments regarding the merits of the motion to compel.

Similarly, as discussed in the Memorandum of Points and Authorities in Support of Demurrer, 9:4-10:7, the relevance of the deposition questions at issue to the underlying lawsuit is a factor that directly affects the applicability of the journalist's privilege. Thus Pressman's arguments about such relevance are not extraneous to the merits of the demurrer or improper.

III. CONCLUSION.

Landmark filed a complaint against Pressman alleging that Pressman improperly refused to answer deposition questions. Entitled and obligated to respond to the complaint, Pressman filed a demurrer and motion to strike, hoping that a hearing on these responses would fully resolve this matter. This Court determined that the privilege issue should be decided by the Discovery Commissioner. If the Discovery Commissioner rules that

Pressman was privileged to refuse to answer the deposition questions in dispute, Pressman's demurrer should be granted and Landmark's complaint dismissed without leave to amend.

Dated: January 14, 1998.

LAW OFFICES OF JUDY ALEXANDER
JUDY ALEXANDER #116515
824 Bay Avenue, Suite 10
Capitola, CA 95010

GENESIS LAW GROUP
JAMES CHADWICK #157114
160 West Santa Clara Street, Suite 1300
San Jose, CA 95113

By Judy Alexander
Judy Alexander

Attorneys for Defendant STEVEN PRESSMAN