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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION,

Plaintiff,

vs.

STEVEN PRESSMAN,

Defendant.

Case No: 989890

Date: December 19, 1997
Time: 10:30 a.m.
Dept: Discovery, Room 610

Date Action Filed: September 26, 1997
Trial Date: Not set

MEMORANDUM OF POINTS AND AUTHORITIES

IN OPPOSITION TO MOTION FOR ORDER COMPELLING

ANSWERS TO DEPOSITION QUESTIONS

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I. INTRODUCTION.

The efforts of Landmark Education Corporation ("Landmark") to obtain protected information from Steven Pressman ("Pressman") represents yet another effort by a Werner Erhard-related entity to harass its critics. Pressman, a journalist for the past 20 years, wrote Outrageous Betrayal: The Dark Journey of Werner Erhard from Est to Exile, a book about Werner Erhard and various entities that grew out of Erhard Seminar Training, known as est. Included in the book is information about Landmark and The Forum. The book was published in 1993 by St. Martin's Press.

In 1994 Landmark filed suit against Cult Awareness Network ("CAN") and certain affiliates and affiliated individuals ("the Illinois defendants") in the Circuit Court of Cook County, Illinois, case number 94-L-11478 ("the Illinois action"). The complaint in the Illinois action alleges causes of action for defamation, injurious falsehood, interference with prospective economic advantage, false light invasion of privacy, commercial disparagement, conspiracy, deceptive trade practices, and consumer fraud. Declaration of Judy Alexander filed in connection with Defendant's Motion to Strike Complaint (see Defendant's Request for Judicial Notice filed herewith) ("Alexander Decl."), ¶ 2 and Exh. A. The only mention of Steven Pressman or his book, Outrageous Betrayal, in the voluminous complaint is in an exhibit reproducing content from CAN's website, where Pressman's book was offered for sale. Id. The complaint contains no allegation that any facts in Outrageous Betrayal are false or that Outrageous Betrayal in any other way injured Landmark.[1] Id. Pressman is not a defendant in the Illinois action. Id.

Nonetheless, claiming without stated basis that Landmark has reason to believe that Pressman provided information about Landmark directly to the Illinois defendants (Motion to Compel, 2:7-9), which he did not (Declaration of Steven Pressman filed in connection with Defendant's Motion to Strike Complaint (see Defendant's Request for Judicial Notice filed

[1] Although Landmark claims that Outrageous Betrayal "contains some of the defamatory material about Landmark that gave rise to [the Illinois action]" (Memorandum of Points and Authorities in Support of Motion for Order Compelling Answers to Deposition Questions, and for Sanctions ("Motion to Compel"), 2:6-7), the complaint does not so allege.

herewith) ("Pressman Decl."), ¶ 8), Landmark served a subpoena for Pressman's deposition. Pressman appeared on the agreed date and responded to all questions except those he was instructed not to answer by his counsel, Judy Alexander, based on his rights as a journalist. The questions Pressman was instructed not to answer were questions that, if answered, would have revealed information about Pressman's news sources and/or other unpublished information obtained or prepared by Pressman while he was a journalist engaged in newsgathering for dissemination of information to the public. Pressman Decl., ¶ 9.

Landmark made no effort to meet and confer about the questions Pressman had declined to answer until shortly before Landmark's deadline for filing a motion to compel further answers, when Landmark sought and was granted a two-week extension. Alexander Decl., ¶ 5; Declaration of Carol LaPlant in Support of Motion for Order Compelling Answers to Deposition Questions, and for Sanctions ("LaPlant Decl."), Exh. C. During the meet and confer, conducted primarily by letter, Landmark made various arguments about why Article I, section 2(b) of the California Constitution and Evidence Code section 1070 (collectively, the "California shield law") were not applicable to the specific questions to which Landmark sought further answers. Id., Exhs. D and D-3. In response to Landmark's arguments, Pressman, through his counsel, agreed to provide answers to a few questions if Landmark agreed not to assert that supplying such answers was a waiver of Pressman's rights as a journalist. See Id., Exhs. D-3 and D-5. Pressman also agreed to provide under oath answers to all the remaining questions to which Landmark sought answers for all periods of time except when he was directly engaged in newsgathering. Id., Exhs. D-5 and D-7. Landmark rejected these offers of further answers. Id., Exhs. D-4 and D-6. It was not until its last meet and confer letter dated September 30 that Landmark asserted for the first time that the California shield law is not applicable to a journalist writing a book. In response Pressman's counsel noted that even if Landmark's assertion were true, which it is not, Pressman was still privileged under the federal journalist's privilege to decline to answer questions where to do so would reveal news sources and unpublished information obtained or prepared in newsgathering. Id., Exh. D-7. Landmark then filed a complaint and the instant motion.

Landmark's efforts to compel disclosure of Pressman's sources and unpublished information is an unmeritorious attempt to harass and punish Pressman for writing a book critical of Landmark and its predecessors. Because Pressman is entitled under both California and federal law to refuse to disclose the information sought by Landmark, and because the information sought by Landmark has no relevance whatsoever to the Illinois action, Landmark's motion to compel should be denied and Pressman should be awarded sanctions.

II. PRESSMAN IS ENTITLED TO REFUSE TO ANSWER THE QUESTIONS TO WHICH LANDMARK SEEKS TO COMPEL RESPONSES.

A. The California shield law provides an absolute privilege to refuse to reveal unpublished information and sources.

Under Article I, section 2(b) of the California Constitution[2] (together with California Evidence Code section 1070, "the California shield law") a journalist cannot be held in contempt "for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." When, as here, unpublished and source information is sought from one who is a non-party witness in a civil action, the protection afforded is virtually absolute. New York Times Co. v. Superior Court, 51 Cal. 3d 453, 461 (1990); Mitchell v. Superior Court, 37 Cal. 3d 268, 274 (1984). The protection afforded by the California shield law is given to publishers, editors, reporters, and any "other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed." Cal. Const., art. I, § 2(b) (Deering 1997). There can be no doubt that Pressman, even during the period he was writing Outrageous Betrayal, is a person protected by the shield law.

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[2] This provision was enacted in 1980 and is nearly identical to California Evidence Code section 1070 as amended in 1974.

Pressman has been a journalist "connected with" newspapers and magazines since he graduated from college in 1977. Pressman Decl., ¶ 3. During the entire time Pressman was researching and writing Outrageous Betrayal he continued to be "connected with" both magazines and newspapers. During that period Pressman wrote and published articles for California Lawyer magazine, the Legal Times newspaper and California Republic, a tabloid published by the Daily Journal Corporation, publisher of the Los Angeles and San Francisco Daily Journal. He also served as a senior editor for California Republic. Moreover, some of the articles he wrote during this period were based on investigation, research, and interviews done for the book. Pressman Decl., ¶ 5. Thus not only was he connected with newspapers and magazines, but his newsgathering done for the book was also done as the basis for newspaper and magazine publications.[3] Landmark's efforts to separate Pressman's book-writing activities from his activities as a newspaper and magazine editor and reporter are not grounded in reality.

Moreover, even if it was possible to separate Pressman's book efforts from his other journalism, Landmark's assertion that the California shield law does not apply to a journalist engaged in writing a book is without merit. The shield law cannot be so narrowly construed.

The California courts have made clear that the California shield law is to be given a very broad interpretation. See Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 14 (1984) (legislative history reflects strong state interest in providing newspersons with the highest possible level of protection from compelled disclosure); Hammarley v. Superior Court, 89 Cal. App. 3d 388 (1979), disapproved on other grounds in Delaney v. Superior Court, 50 Cal. 3d 785 (1990) (statute to be given broad interpretation to further statutory purpose of maintaining free flow of information). In the only recent California decision to consider what persons are protected by the California shield law, the court held that the shield law provided a freelance writer with protection even when he was not under contract with or

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[3] Landmark's repeated assertions that Pressman's book is his only publication dealing substantively with Landmark and the Forum or the subject matter of the book (Motion to Compel, 4:6-9; 8:11-12; 9:3-5; 12:6-7) are simply false. The deposition testimony cited to support these assertions does not say what Landmark claims.

employed by a magazine. People v. Von Villas, 10 Cal. App. 4th 201, 232 (1992), cert. denied, 508 U.S. 975 (1993). The fact that the free-lancer at issue had been a reporter for thirteen years led the court to conclude that his newsgathering activities were protected even when not directly connected with a newspaper or periodical publication. Id. In light of this authority, it is clear that Pressman's newsgathering activities in preparation for writing Outrageous Betrayal are protected by the California shield law.

It is also clear that the California shield law protects Pressman from being forced to answer the questions he has declined to answer. These questions fall into several categories. Some ask Pressman to reveal if he has talked to or met a named individual, engaged in a transaction with a named individual, or read a named individual's works. The questions numbered 10, 11, 12, 13, 16, 17, 26, 27 and 29 fall into this category.[4] Other questions ask Pressman to reveal if he has ever been to a particular place, participated in or graduated from a particular program, attended a particular event, or observed a particular person giving a presentation. (See questions 1, 2, 5, 6, 7, 8, 22, and 31.) Other questions ask if Pressman has ever written to specified persons, given or told information to specified persons, or received information from specified persons. (See questions 9, 18, 19, 20, 24, 25 and 30.) Other questions ask Pressman to reveal if he has ever used a fictitious name or if he has seen or is familiar with certain materials or event. (See questions 3, 15 and 21.) Finally, other questions ask Pressman when he met or became familiar with a specified individual and whether a published article was researched. (See questions 4, 14, 23 and 28.) Pressman made clear during the meet and confer process that he had no substantive responses to these questions outside of information obtained during or revealing his newsgathering activities.[5]

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[4] Question numbers refer to those numbers given to the questions to which Landmark seeks further answers in Declaration of Judy Alexander in Support of Opposition to Motion to Compel ("Second Alexander Decl."), ¶ 3 and Exhibit A.

[5] Contrary to Landmark's assertion that Pressman thus refused to answer the propounded questions for any time period during his entire adult life (Motion to Compel, 6:11-14), Pressman merely refused to respond to the questions with respect to times that he was actually engaged in newsgathering. Pressman has made clear that while engaged in non-reporting activity, even if during years when he was working as a journalist, Pressman has not spoken to or interacted with any of the specified individuals or engaged in any of the specified activities.

He also made clear that no inference should be drawn from this regarding his contacts and activities while newsgathering. Because Pressman has not talked to any of the identified people, or read the identified works, written to the identified people, or engaged in the identified activities outside of his newsgathering, if required to answer these questions Pressman would clearly be revealing information about his news sources and other unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. This is exactly what the California shield law entitles him to refuse to do.[6]

B. The discovery sought by Landmark is also barred by the newsperson's privilege under the free speech clauses of the federal and state constitutions.

The California shield law clearly is applicable to an investigative journalist like Pressman who publishes a book. However, even if it were not, Pressman is privileged to refuse to disclose unpublished information and sources under the First Amendment to the United States Constitution and the California Constitution's free speech clause, contained in Article I, section 2(a), and he has not waived this privilege.

1. The constitutional privilege against compelled disclosure of unpublished information and sources is applicable.

Since the United States Supreme Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), the federal courts have consistently recognized that the First Amendment provides a qualified privilege against compelled disclosure of information obtained in the newsgathering process. By now, this privilege has been recognized by virtually all of the federal circuit courts of appeals.[7] Furthermore, it has expressly been recognized and applied

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[6] With respect to questions 24 and 25, Landmark asserts that Pressman has waived his shield law rights because these questions allegedly concern a statement made by Pressman in a declaration. However, in a portion of the deposition not provided by Landmark, Pressman explained the meaning of his declaration statement. Second Alexander Decl., ¶ 4 and Exh. B. In light of this explanation, it is clear that questions 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.

[7] The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia circuits have all expressly recognized a qualified privilege for newspersons to resist compelled discovery. See Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Burke, 700

by the California courts. Mitchell, 37 Cal. 3d 268; KSDO v. Superior Court, 136 Cal. App. 3d 375, 384-86 (1982). In California, the privilege has been accepted as arising from the free speech provision of the California constitution (Cal. Const., art. I, sec. 2(a)), as well as from the First Amendment. See Mitchell, 37 Cal. 3d at 274, 283-84 (recognizing that reporters asserted "a nonstatutory privilege" based on the First Amendment and the California constitution, and holding that, contrary to the superior court's holding that there "was no reporter's privilege in California," "the California courts should recognize a qualified reporter's privilege . . . .").

Furthermore, the privilege is indisputably applicable not just to newspaper and television reporters, but book authors and others involved in "gathering news for dissemination to the public." Schoen v. Schoen, 5 F.3d 1289, 1293 (9th Cir. 1993) ("Schoen I"); von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 144-45 (2d Cir. 1986), cert. denied, Reynolds v. von Bulow by Auersperg, 481 U.S. 1015 (1987). See also Silkwood, 563 F.2d 433 (applying qualified First Amendment privilege to former free-lance reporter involved in preparation of documentary motion picture); Schoen v. Schoen, 48 F.3d 412, 414-15 (9th Cir. 1995) ("Schoen II") (reaffirming Shoen I and articulating applicable test for application of the privilege). As the court of appeals explained in Schoen I:

F.2d 70, 77 (2d Cir.), 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). The Eleventh Circuit inherited the privilege from the Fifth Circuit (see Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981), and has since recognized the privilege itself (see 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). The Seventh Circuit Court of Appeals itself has not ruled on the question, but a number of district courts in the Seventh Circuit have recognized and applied the privilege. See, e.g., Warzon v. Drew, 155 F.R.D. 183, 186-87 (E.D. Wis. 1994); May v. Collins, 122 F.R.D. 535 (S.D. Ind. 1988); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978). The Sixth Circuit, in dicta, refused to apply the privilege to prevent enforcement of a grand jury subpoena. See In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) (declining to recognize the privilege but holding that even if the First Amendment provided a qualified privilege it was overcome in the circumstances of that case). However, at least one federal district court in the Sixth Circuit has since recognized that holding as dicta, limited it to its facts, and applied the First Amendment privilege to preclude discovery in a civil case. Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303, 1310-12 (W.D. Mich. 1996).

> [I]t makes no difference whether "[t]he intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill" because "'[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. . . .'" The journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light "newsworthy" facts on topical and controversial matters of great public importance.

Schoen I, 5 F.3d at 1293, quoting von Bulow, 811 F.2d at 144. Thus, in applying the constitutional privilege the question is not whether the person invoking the privilege is the author of a newspaper story, a magazine article, or a book, but rather "whether she is gathering news for dissemination to the public." Schoen I, 5 F.3d at 1293. In other words, the privilege applies so long as the person invoking it "had 'the intent to use material—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.'" Schoen I, 5 F.3d at 1293, quoting von Bulow, 811 F.2d at 144.

There is no question that the constitutional privilege applies in this case, and has been properly invoked by Pressman. All of the investigation, research and interviews done by Pressman regarding Werner Erhard, the Hunger Project and Landmark was done with the intent of writing the book and/or articles for dissemination to the public. Pressman Decl., ¶¶ 4, 5. Furthermore, as explained below, there is no question that the information sought by Landmark from Pressman is protected by the constitutional privilege.

2. The constitutional privilege prohibits compelled disclosure of the information sought by Landmark.

The privilege afforded by the California constitution provides, at a minimum, a qualified privilege against compelled disclosure of confidential sources and of unpublished information. Mitchell, 37 Cal. 3d at 279. The First Amendment privilege protects all sources and unpublished information, regardless of whether they are confidential or not. Schoen I, 5 F.3d at 1294-95; von Bulow, 811 F.2d at 142. See also Cuthbertson, 630 F.2d at 147; LaRouche, 841 F.2d at 1182.

By its present action, Landmark seeks to compel Pressman to disclose precisely such information. As shown above, Landmark seeks to compel Pressman to identify sources and provide unpublished information. In order to obtain the discovery sought in this action, Landmark must meet the requirements necessary to overcome the constitutional privilege. It cannot do so.

3. Landmark cannot meet any of the requirements for overcoming the constitutional privilege.

Although the tests articulated by the courts applying the constitutional privilege vary, the fundamental requirements remain the same. A party seeking to compel the disclosure of information subject to the privilege must show, at a minimum, that the information sought is clearly relevant to a central issue in the litigation for which the information is sought, and the information is unavailable despite the exhaustion of all alternative sources.

The California Supreme Court has held that, in applying the constitutional privilege, the California courts should consider the following factors: (1) whether the person from whom information is sought is a party to the litigation; (2) whether the information sought "goes 'to the heart of the plaintiff's claim;'" (3) whether the party seeking the information has "exhausted all alternative sources of obtaining the needed information;" (4) the importance of protecting confidentiality in the case at hand; and (5) in a libel action where the journalist is a party, whether the plaintiff has made a prima facie showing that the alleged defamatory statements are false. Mitchell, 37 Cal. 3d at 279-83. Accord KSDO, 136 Cal. App. 3d at 385.

Similarly, the Ninth Circuit has held that, to justify disclosure, the party seeking disclosure must demonstrate that the information sought is: "(1) unavailable despite exhaustion of all reasonable alternatives; (2) noncumulative; and (3) clearly relevant to an important issue in the case." Schoen II, 48 F.3d at 416. In addition, the Ninth Circuit has held that "there must be a showing of actual relevance; a showing of potential relevance will not suffice." Id. Applying these principles to Landmark's motion to compel, it is apparent

that Landmark has not met any of the requirements for compelling disclosure of constitutionally privileged information.

First, Pressman is not a party to the Illinois action for which Landmark seeks the discovery.

Second, Landmark has not identified in its complaint, its motion to compel, or in any of the other papers filed in this action any effort whatsoever to obtain the information sought from Pressman from any other source--even where such information could be obtained easily from other sources. For example, Landmark could propound interrogatories to or depose Cynthia Kisser, a defendant in the Illinois action, to determine if Ms. Kisser has ever spoken to Pressman (see question 13). Similarly, Landmark could learn from the many other individuals identified in Landmark's questions whether any of them has ever spoken to, received letters from or interacted with Pressman (see questions 1, 10, 11, 12, 16, 17, 18, 19, 20, 26, 27, 28, 29, and 30). Landmark must exhaust alternative sources before it can seek to compel Pressman to reveal constitutionally privileged information.

Finally, as demonstrated below, the information sought by Landmark from Pressman in not even marginally relevant to Landmark's claim in the Illinois action, let alone information which goes to the heart of Landmark's claim. Landmark's attempts to justify Pressman's deposition are all based on the premise that the information sought may lead to relevant evidence.[8] This is not sufficient justification to compel the disclosure of Pressman's sources and unpublished information. See Hinshaw v. Superior Court, 51 Cal.App.4th 233, 239 (1996), quoting Board of Trustees v. Superior Court, 119 Cal.App.3d 516, 525 (1981) ("'When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information.'"). Even if the information sought from Pressman might lead to proof of actual malice, this is insufficient to

[8] Landmark asserts that Pressman's deposition was necessary because he was believed to have knowledge concerning the efforts of the Illinois defendants to malign Landmark and The Forum (Motion to Compel, 5:1-3), he was believed to have knowledge that could lead to the identification of potential witnesses (Motion to Compel, 5:3-4), and he was expected to have evidence to establish actual malice (Motion to Compel, 5:5-6).

compel disclosure of constitutionally protected information. See Board of Trustees v. Superior Court, 119 Cal.App.3d at 526 (that disclosure of personnel file might lead to proof of malice was not sufficient to require disclosure of information protected by constitutional right of privacy).

Because Landmark has not made a showing sufficient to overcome the qualified constitutional privilege accorded to journalists, its motion to compel should be denied.

C. The information sought by Landmark is not relevant to the Illinois action.

Even if the California shield law and the constitutional reporter's privilege did not provide Pressman with protection from disclosing the information sought by Landmark, Landmark is still not entitled to the information it seeks from Pressman because such information does not meet the threshold for discovery under California law. To be discoverable, the information sought by Landmark must be relevant to the Illinois action and either admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence therein. Civ. Proc. Code § 2017(a). The complaint in the Illinois action does not allege that any information in Pressman's book is false or injurious to Landmark. Alexander Decl., ¶ 2 and Exh. A. Pressman provided no information to the Illinois defendants about Landmark or The Forum. Pressman Decl., ¶ 8. The questions to which Landmark seeks answers have virtually no relation to the torts alleged to have been committed by the Illinois defendants.

Without explanation, Landmark asserts that Pressman's deposition was necessary because he was believed to have knowledge concerning the efforts of the Illinois defendants to malign Landmark and The Forum. Motion to Compel, 5:1-3. However, with only a couple of exceptions, the questions to which Landmark seeks answers do not ask anything at all about the Illinois defendants or their efforts to malign Landmark or The Forum. Moreover, Landmark has provided no basis (other than its bald assertion) for its belief that Pressman has any knowledge about the activities of the Illinois defendants.

Landmark also claims that it believed Pressman had knowledge that could lead to the identification of potential witnesses. Motion to Compel, 5:3-4. However, questions seeking

information about what materials Pressman saw and read and what programs and events, such as The Forum or the Afremow trial, he did or did not attend, cannot by any logic lead to identification of potential witnesses with information relevant to the Illinois action. Moreover, in light of the fact that Pressman provided no information about Landmark or The Forum to the Illinois defendants, questions seeking information about the people with whom Pressman had contact also will not lead to identification of witnesses with relevant information.

Finally, Landmark asserts that testimony from Pressman was expected to establish actual malice. Motion to Compel, 5:5-6. However, because the questions asked of Pressman do not ask about the truth or falsity of information, or anyone's belief in the truth or falsity of information, they have no relevance to the issue of the actual malice or lack thereof of the Illinois defendants.

Thus, when viewed in the context of the allegations of the complaint in the Illinois action, it is clear that the information which Landmark seeks from Pressman is not relevant to its claims and is not reasonably calculated to lead to the discovery of admissible evidence in the Illinois action.

III. PRESSMAN HAS NOT WAIVED HIS OBJECTIONS TO LANDMARK'S DEPOSITION QUESTIONS.

Rather than confront the fact that its attempt to compel Pressman's testimony is prohibited by both California law and the First Amendment, and that the discovery it seeks is not relevant to any issue in the Illinois action, Landmark simply contends that objections on these grounds have been waived. There is no merit to this contention.

Landmark asserts that any claim of privilege based on the First Amendment to the United States Constitution has been waived. Motion to Compel, 10:1-7. This assertion is clearly wrong. First, it has been expressly held that Code of Civil Procedure section 2025(m)(1), upon which Landmark's contention is premised, effects a waiver only of matters of evidentiary privileges and work product privilege, and does not apply to constitutionally-

based privileges. Boler v. Superior Court, 201 Cal. App. 3d 467, 472 n.1 (1987). This conclusion is compelled by rules of precedence: a state cannot by statute deprive a person of a right guaranteed by the state or federal constitutions. See Mitchell, 37 Cal. 3d at 274 n.3 (state statute "obviously cannot bar privileges based on constitutional provisions"). As noted above, the privilege asserted by Pressman is rooted in both the First Amendment to the United States Constitution and in Article I, Section 2 of the California constitution.

Second, it is uniformly recognized that "'[a] waiver of First Amendment rights may only be made by a "clear and compelling" relinquishment of them. . . .' 'Moreover, it is well established that courts closely scrutinize waivers of constitutional rights, and "indulge every reasonable presumption against a waiver."'" City of Glendale v. George, 208 Cal. App. 3d 1394, 1398 (1989) (citations omitted). See also People v. Mancheno, 32 Cal. 3d 855, 864 (1982) ("Of course, there can be no waiver of a constitutional right absent 'an intentional relinquishment or abandonment of a known right or privilege.'"); People v. Resendez, 12 Cal. App. 4th 98, 114 (1993) (mere silence insufficient to establish waiver of constitutional right). Therefore, Pressman's reliance on his state constitutional privilege not to reveal confidential sources or unpublished information cannot possibly be deemed an intentional waiver of his rights under the First Amendment.

Landmark has also asserted, in correspondence exchanged during the proceedings in this matter, that Pressman has waived any objections to the relevance of the information sought by Landmark. However, Landmark's assertion is belied by the very statute upon which Landmark apparently relies. Section 2025(m)(3) of the Code of Civil Procedure states as follows: "Objections to the competency of a deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced *are unnecessary and are not waived by failure to make them before or during the deposition.*" Civ. Proc. Code § 2025(m)(3) (Deering 1997) (emphasis added).

Thus, there is no merit whatsoever to Landmark's assertions that Pressman has waived these objections. Pressman's refusal to respond to Landmark's improper and

irrelevant questions is, therefore, completely justified. Landmark's motion to compel is without foundation and should be denied.

IV. PRESSMAN SHOULD BE AWARDED SANCTIONS.

Based only on its bald assertion that it believed Pressman to have information that might lead to admissible evidence in the Illinois action, Landmark insisted on taking Pressman's deposition even after being advised that Pressman would assert his rights as a journalist to refuse to disclose sources and unpublished information obtained or prepared as part of his newsgathering activities. Second Alexander Decl., ¶ 2. During his deposition, Pressman did assert his rights as a journalist. Moreover, during the meet and confer process Pressman offered to respond to each of the questions to which Landmark sought further responses for all periods of time when he was not actively engaged in newsgathering activities, thus making clear that any further responses would encroach on his rights as a journalist.

Nonetheless, despite the clear applicability of the California shield law and the federal and state constitutional journalist's privilege, Landmark has pursued this motion to compel further responses. Under section 2023(a)(1) of the Code of Civil Procedure, "[p]ersisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery" is an abuse of the discovery process. Code of Civil Procedure section 2023(b)(1) authorizes the court to "impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct."

Because Landmark and its counsel have persisted in seeking without substantial justification to obtain clearly privileged information, Pressman respectfully requests that he be awarded his attorney's fees and costs incurred in defending Landmark's complaint and motion to compel further responses.

V. CONCLUSION.

For all of the foregoing reasons, Pressman respectfully asks this court to deny Landmark's motion to compel further answers to deposition questions, and to award Pressman his costs and reasonable attorney's fees incurred in defending Landmark's complaint and motion to compel.

Dated: December 12, 1997.

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