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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: November 18, 1997 Time: 9:30 Dept: 10, Room 414

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION TO STRIKE COMPLAINT

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I. INTRODUCTION.

This complaint filed by Landmark Education Corporation ("Landmark") is yet another effort by a Werner Erhard-related entity to harass its critics. Defendant Steven Pressman ("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 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 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

[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.

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 ("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

The present action is a unmeritorious attempt to harass and punish Pressman for writing a book critical of Landmark and its predecessors. However, because it arises from actions in furtherance of his right to free speech, Landmark's action is subject to a special

motion to strike under Code of Civil Procedure section 425.16 ("section 425.16"). Because Landmark cannot demonstrate a probability that it will prevail in its efforts to compel Pressman to disclose unpublished information and sources acquired in his newsgathering process, the complaint should be stricken and the motion to compel should be dismissed.

II. THE ANTI-SLAPP STATUTE APPLIES TO LANDMARK'S COMPLAINT AND MOTION TO COMPEL, BECAUSE THIS ACTION ARISES FROM ACTS IN FURTHERANCE OF PRESSMAN'S FREE SPEECH RIGHTS.

SLAPP suits, such as the present action, are "'civil lawsuits . . . aimed at preventing citizens from exercising their political rights or punishing those who have done so.'" Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815 (1994) (citation omitted); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 645 (1996). Section 425.16 was enacted in order to provide a method for resolving such actions expeditiously. Wollersheim, 42 Cal. App. 4th at 645. "Section 425.16 is designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition. It is California's response to the problems created by meritless lawsuits brought to harass those who have exercised these rights." Id. at 644.

Section 425.16 provides as follows: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, 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) (Deering 1997) (emphasis added). Thus, a motion to strike may be brought if an action arises from any act in furtherance of the defendant's rights of petition or free speech in connection with a public issue. Wollersheim, 42 Cal. App. 4th at 647. In addition, the statute includes a nonexclusive list of specific examples of protected conduct, including "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." Civ. Proc. Code § 425.16(e)(3) (Deering 1997). Section 425.16 clearly applies.[2]

The present action is precisely the type of action at which section 425.16 was aimed. First, it cannot seriously be contended that the publishing of a book on a topic of public interest is not an act "in furtherance" of the right of free speech. Such conduct is one of the quintessential acts traditionally protected as free speech under the First Amendment. See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64, n.6 (1963); Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 746 (1962).[3] In any event, petitioner's book falls within the ambit of subdivision (e) of section 425.16. There can be no question that a book published for public distribution and available in bookstores and libraries is a "writing" "made in a place open to the public or a public forum" within the meaning of section 425.16; indeed, to interpret the statute any other way would be absurd. The purpose of section 425.16 is to protect fundamental First Amendment rights by providing an expedited procedure to expose and dismiss "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition" (Civ. Proc. Code § 425.16(a)). It would be manifestly contrary to this explicit statement of legislative intent to interpret

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[2] The applicability of section 425.16 is further demonstrated by a recent amendment. In August 1997, section 425.16(e) was amended to include the following additional definition of "'act in furtherance of a person's right of petition or free speech . . .' (4) or any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest." Alexander Decl., ¶ 3 (Exh. B). This language was added not to expand the scope of the statute, but to clarify that this was the original intent of the legislation, and correct some courts that had construed the statute too narrowly. Alexander Decl., ¶ 4 (Exh. C). In light of this clarification of the legislative intent that the statute be applied broadly, there can be no doubt that it applies to this action.

[3] Moreover, Landmark's action shares a number of the "conceptual features" of a typical SLAPP suit (see Wilcox, 27 Cal. App. 4th at 815-17). Another entity associated with Werner Erhard, the Global Hunger Project, previously agreed to dismiss its defamation action against Pressman when it became clear that the California Court of Appeal intended to reverse the denial of an anti-SLAPP motion in that case. Now Landmark, which is also closely associated with Werner Erhard and which is a large corporate entity with considerable financial resources, has sued Pressman, an individual with very limited resources, in order to subject him to further questioning in a purposeless and unnecessary deposition. All of this legal harassment arises directly from Pressman's exercise of his free speech rights. This action's lack of merit, and the history of Erhard-associated entities harassment of Pressman with unmeritorious litigation, strongly indicates that Landmark filed this action primarily "for delay and distraction" and "to punish [him] by imposing litigation costs on [him] for exercising [his] constitutional right to speak." Dixon v. Superior Court, 30 Cal. App. 4th 733, 741 (1994). See also Wollersheim, 42 Cal. App. 4th at 648-49 (a "course of oppressive litigation conduct" justifies application of the anti-SLAPP statute).

subdivision (e) to be inapplicable to the publication of a book.[4] The First Amendment right of free speech applies to all forms of information dissemination. See Schoen v. Schoen, 5 F.3d 1289, 1293 (9th Cir. 1993) ("Schoen I") (for the purposes of application of First Amendment newsperson's privilege "it 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.'"). There is no rational reason for creating such artificial distinctions in the application of the anti-SLAPP statute either.

Second, other activities in furtherance of Pressman's free speech rights support the application of section 425.16: his newsgathering in connection with reporting—in his book and elsewhere—on Werner Erhard and entities founded by and associated with Erhard (such as Landmark), and his invocation of his right not to disclose unpublished information and sources generated in the newsgathering process. Both of these activities are protected by the First Amendment and the California constitution. The courts have consistently recognized that "newsgathering is an activity 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).[5] The recognition of this constitutional protection for newsgathering has led to the nearly uniform adoption of the constitutional privilege against compelled disclosure of unpublished information and sources acquired in the newsgathering process, as discussed below. Landmark's effort to compel Pressman to disclose such information therefore

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[4] It is well settled that a literal construction of a statute should be eschewed if it will result in consequences that are absurd or inconsistent with the purpose of the legislation. See, e.g., Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1165-66 (1991); Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3d 247, 259 (1972).

[5] See also 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.").

indisputably arises from conduct that is "in furtherance of [his] right of petition or free speech under the United States of California Constitution." Civ. Proc. Code § 425.16(b) (Deering 1997).

Nor can there be any dispute that Pressman's newsgathering and publication activities were conducted "in connection with a public issue." Civ. Proc. Code § 425.16(b). "[M]atters of public interest . . . embrace all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). Werner Erhard and the activities and entities with which he is associated, such as "est" (Erhard Seminar Training), The Forum, Landmark, and the Global Hunger Project, have been the subject of considerable controversy and of innumerable media articles and broadcasts.[6] Erhard and Landmark were at the center of the "self-help" movement of the 1970's and 1980's, and, as Landmark itself states, "he and his est seminars gained prominence and became a force in popular culture . . . ." Motion to Compel, 10:15-17.

In short, Landmark's complaint, and the motion to compel that depends upon that complaint, are subject to a motion to strike under Code of Civil Procedure section 425.16. As explained below, Landmark has not shown and cannot establish a probability of prevailing in this action. Therefore, the complaint should be stricken and the motion to compel should be dismissed.

[6] Pursuant to Evidence Code section 452(d), Pressman requests the Court to take judicial notice of all records in the case of Global Hunger Project v. Pressman, San Francisco Superior Court Case No. 961959, filed on or about June 28, 1994. Specifically in connection with this reference, Pressman refers the Court to the following: Declaration of Steven Pressman in Support of Defendant's Special Motion to Strike, and exhibits thereto; Declaration of Carol Giambalvo in Support of Defendant's Special Motion to Strike, and exhibits thereto; and Declaration of Anna Marie Stenberg in Support of Defendant's Special Motion to Strike, and exhibits thereto.

III. LANDMARK CANNOT POSSIBLY PREVAIL ON ITS MOTION TO COMPEL, SO THE COMPLAINT SHOULD BE STRICKEN AND THE MOTION TO COMPEL SHOULD BE DISMISSED.

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

Under Article I, section 2(b) of the California Constitution[7] (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.

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

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

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.[8] 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 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.

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[8] 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 MPA, 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.

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, 29, 31 and 33 fall into this category.[9] 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, 3, 6, 7, 8, 23, and 35.) 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, 27, 28 and 34.) 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 4A, 15 and 22.) Finally, other questions ask Pressman when he met or became familiar with a specified individual and whether a published article was researched. (See questions 5, 14, 24 and 32.) Pressman made clear during the meet and confer process that he had no substantive responses to these questions outside of information obtained in or revealing his newsgathering 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, and that is exactly what the California shield law entitles him to refuse to do.

As a result, Landmark cannot prevail in its efforts to compel answers to the questions Pressman declined to answer.

[9] Question numbers refer to those numbers given to the questions to which Landmark seeks further answers in Exhibit D-3 to the LaPlant Decl.

B. The discovery sought by Landmark is also barred by the newsperson's privilege provided by 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, the 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). Because this constitutional privilege is plainly applicable, and because Landmark has not established any of the prerequisites necessary to overcome that privilege, it cannot prevail in this action, and its complaint and motion to compel should be dismissed.

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

Since the United States Supreme Court's decision in Branzburg, 408 U.S. 665, 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.[10] Furthermore, it has expressly been recognized and applied by the California

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[10] 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 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).

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 I, 5 F.3d at 1293; 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:

> [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 complaint, it is apparent that Landmark has not met any of the requirements for compelling disclosure of constitutionally privileged information. Neither the complaint nor any of the accompanying papers identify any effort whatsoever to obtain the information sought from Pressman from any other source. Moreover, as shown below, the information sought by Landmark from Pressman in not even marginally relevant to Landmark's claim in the Illinois action.

Landmark cannot justify its request for information protected from compelling disclosure by the First Amendment and the California constitution. Its complaint and motion to compel should be dismissed.

C. The information sought by Landmark is neither relevant nor reasonably calculated to lead to the discovery of relevant or admissible evidence.

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 still cannot prevail in this action because it cannot show that the information it seeks from Pressman is relevant to the Illinois action or calculated to lead to the discovery of admissible evidence therein. 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 MPA, 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. 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 MPA, 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 attended, 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 MPA, 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 questions to which Landmark seeks answers from Pressman will not, if answered, provide any information relevant to the Illinois action or likely to lead to evidence admissible therein.

IV. CONCLUSION.

For all of the foregoing reasons, Landmark cannot prevail in its action seeking an order compelling further answers from Pressman. Thus Pressman respectfully asks this court to strike Landmark's complaint and dismiss its motion to compel further answers to deposition questions.

Dated: Nov. 3, 1997.

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