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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION, Plaintiff, v. STEVEN PRESSMAN, Defendant.	CASE NO. 989890 REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING ANSWERS TO DEPOSITION QUESTIONS, AND FOR SANCTIONS **DISCOVERY HEARING** Date: December 19, 1997 Time: 10:30 a.m. Discovery Dept: Room 610 Trial Date: Not Applicable

I. INTRODUCTION

Landmark Education Corporation ("Landmark") took the deposition of Steven Pressman as part of the discovery that Landmark is conducting in a case filed in Illinois state court, *Landmark Education Corporation v. Cult Awareness Network, et al.*, No. 94-L-11478 ("the Illinois action"). Landmark obtained a subpoena and commission for Steven Pressman's deposition from the Illinois court, and the San Francisco Superior Court issued a subpoena for Mr. Pressman's deposition based on the Illinois authority. Mr. Pressman did not move for a protective order and appeared for his deposition. Landmark's attempts to question Mr. Pressman, however, were largely obstructed by

his counsel's persistent instructions not to answer, all of which were made solely on the basis that Landmark's questions asked the witness to reveal sources of information for his book, *Outrageous Betrayal: The Dark Journey of Werner Erhard from Est to Exile*, and that the California newsman's shield (Evidence Code § 1070 and California Constitution, Article I, § 2(b)) exempted Mr. Pressman from revealing sources of information for his book. (Pressman Deposition, 22:13-23.)

Landmark's primary disagreement with Mr. Pressman's counsel is that the questions at issue *do not seek the identity of sources* and are entirely *foundational* in nature. For example, Mr. Pressman was instructed not to answer whether he had ever used a fictitious name. (Pressman Deposition, 24:24-25:1, identified as No. 3 by defendant.[1]) As set forth in Landmark's Separate Statement, none of these questions ask Mr. Pressman to identify sources of information for his book, and each question was intended to lay foundation for questions relating to the Illinois action. Notably, Mr. Pressman has not submitted his own Separate Statement or otherwise made any effort to explain specifically how each of these foundational questions could possibly fall within the scope of the newsman's shield. Instead, the Opposition is premised on the sweeping assertion that these questions are somehow within the scope of the shield, without explaining how law or logic supports that key assumption.

Mr. Pressman also improperly refused, on the same basis, to answer questions about the content of his own declaration issued in support of defendants in the case of *Landmark Education Corporation v. Margaret Singer, et al.*, San Francisco Superior Court Case No. 976037, even though the newsman's shield is unavailable to protect statements made by a newsman who voluntarily enters into the litigation forum. (Nos. 24 and 25: Pressman Deposition, 59:17-23, 60:10-13, 62:20-63:8, 63:22-25.)

A secondary area of disagreement – albeit an area that may prove to be wholly academic, because the questions at issue do not inquire into the identity of sources for Mr. Pressman's book –

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[1] The Declaration of Judy Alexander in Mr. Pressman's Opposition includes a reproduction of Landmark's Separate Statement with chronological numbers assigned to the questions at issue. For convenience, Landmark will use this numbering system for reference to questions.

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is that the California newsman's shield, by its explicit terms, does not cover the writing of a book. Mr. Pressman testified that the two years he spent writing his book, under contract with St. Martin's Press, were a departure from his career as a journalist and that none of his journalism involved the same subject matter as the book. (Pressman Deposition, 20:20-21:5, 21:3-9, 21:21-22:2, 30:10-31:4, 32:19-33:1.)

In subsequent meet and confer correspondence, Mr. Pressman's counsel conceded that seven of her instructions not to answer were inappropriate but she remained intractable on the others.[2] In order to resolve these discovery disputes, Landmark filed a complaint in the San Francisco Superior Court for an order compelling answers to deposition questions and for sanctions due to the disruption of Mr. Pressman's deposition by his counsel's continuously giving unfounded instructions not to answer. Shortly thereafter the present motion was filed on October 2, 1997.

Rather than deal with the merits of this motion, Mr. Pressman's counsel has put forth a mighty effort to derail and delay the hearing of this motion. At the request of Mr. Pressman's counsel, the hearing date was continued for her convenience from November 10 to November 20. (Decl. of Carol LaPlant in Reply, ¶ 2.) Mr. Pressman then filed a demurrer and motion to strike, attacking Landmark's complaint, even though the complaint was merely a vehicle to obtain a discovery order. The hearing of the demurrer and motion to strike was scheduled for November 18.

The demurrer and motion to strike attempted to argue the merits of the present discovery motion, but in Law and Motion, with the issues and evidence mischaracterized. Mr. Pressman's counsel refused Landmark's request to allow the discovery motion to be heard first, expressing concern that the Discovery Commissioner might agree with Landmark's position. (Decl. of Carol LaPlant in Reply, ¶ 3.) Landmark then appeared ex parte in Law and Motion on November 6 and obtained an order taking all motions off calendar until the court could consider, on shortened time, Landmark's motion to have the discovery motion heard before defendant's motions. On November 18, Judge Garcia granted plaintiff's motion to have this discovery motion heard first.

The results of Mr. Pressman's delay tactics are that this discovery motion is finally being

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[2] Judy Alexander letter of September 22, 1997, Exh. D-3 to Decl. of Carol LaPlant in Support of Motion to Compel, page 3.

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heard more than two and one-half months after being filed and served, and Landmark has needlessly had to expend time and money on additional motions simply to obtain this hearing. Mr. Pressman has gone to extraordinary lengths to avoid the resolution of these discovery questions, belying the merit of his opposition arguments.

II. THE SHIELD IS SUBSTANTIVELY INAPPLICABLE TO THESE QUESTIONS

A. No Inquiry Is Made into Mr. Pressman's Sources

Not one of the questions at issue asks Mr. Pressman to identify his sources of information for his book. The only questions concerning sources of information (Nos. 24 and 25) pertain to statements made in Mr. Pressman's declaration in *Landmark Education Corporation v. Margaret Singer, et al.* Even if the newsman's shield were otherwise applicable to the questions about his declaration, the law is well settled that a newsman who voluntarily enters the litigation forum cannot use the shield to prevent discovery regarding the veracity of statements that he has placed before the court. *Dalitz v. Penthouse International* (1985) 168 Cal.App.3d 468, 480-481.

As set forth in Landmark's Separate Statement, most of the remaining questions seek to determine, as foundation, Mr. Pressman's possible areas of relevant knowledge in regard to facts, witnesses and issues in the Illinois action. For example, the questions included whether Mr. Pressman ever spoke with Cynthia Kisser (No. 13), a named defendant in the Illinois action, when he first became familiar with her name (No. 14), and whether he had seen advertisements by Illinois defendant Cult Awareness Network (No. 15).[3] Mr. Pressman was also not allowed to answer general questions about his identity, such as whether he had ever used an alias (No. 3), or his legal commitments, such as whether he signed a confidentiality agreement in conjunction with (Landmark's seminar) the Forum (No. 7).

Many of the instructions not to answer are additionally inappropriate because they are inconsistent and arbitrary. For example, Mr. Pressman was allowed to testify as to whether he had

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[3] Characteristic of the inconsistency and arbitrariness of his counsel's instructions not to answer, he was allowed to answer whether he had seen an advertisement by the Cult Awareness Network for his book, but not the more general question of whether he had seen the organization's advertisements.

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ever met various individuals (other than Mr. Kadavi, No. 26, another inconsistency), but he was not allowed to answer whether he had ever had any communication with them (e.g., Nos. 12, 16, 17).

Although the shield, if applicable, protects disclosure by the newsman of his sources, the shield has never been expanded beyond its explicit scope to cover the newsman's dissemination of information to others. Indeed, under the traditional analysis of waiver and privilege, such disclosure of otherwise protected information would constitute a waiver. Evidence Code section 912(a); *People v. Von Villas* (1992) 11 Cal.App.4th 175, 220-221. Questions Nos. 9, 18, 19, 20 and 30 inquire about Mr. Pressman's communication of information *to* parties in the Illinois action and others.

Not only are the questions at issue outside the scope of the shield, because they do not inquire in any way into the sources of information for Mr. Pressman's book, they are also outside the scope of the shield because they are nonspecific as to time.[4] Mr. Pressman testified that he researched and wrote his book between 1991 and 1993. Now, however, the Opposition (Memo. Pts and Auth., at Ftn. 5) attempts to bolster Mr. Pressman's position by changing the questions and gratuitously answering off the record, asserting conveniently that he had no involvement with the subject matter of each question except while he was performing research to which, he further asserts, the shield applies. Implicit in the logic behind these self-serving assertions, however, is the concession that even though the questions at issue are themselves properly discoverable foundation, the discovery should not be ordered because the follow-up questions might possibly get into a protected area. In effect, the Opposition gratuitously reveals that these individuals and events may have been sources of information for his book, in an apparent attempt to position them as off-limits, even though the actual questions asked in the deposition were permissible and outside the scope of the shield. This Opposition argument fails both because, fundamentally, Landmark never asked whether these individuals and events had anything to do with his book, and because Mr. Pressman now takes the position that the time span of his protected research was unlimited, despite his

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[4] One exception is Question No. 23, which asked whether a magazine article Mr. Pressman wrote about Scientology was subsequent to an investigative period. Here, the instruction not to answer is particularly puzzling because the shield would apply to the investigative period but the witness declined to answer whether he even conducted an investigation.

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testimony that he worked on the book only between 1991 and 1993. For example, Questions Nos. 24 and 25 deal with a declaration issued by Mr. Pressman in 1996.

B. Landmark's Questions Were Relevant to the Illinois Action

Evincing Mr. Pressman's difficulty in justifying these instructions not to answer, the Opposition raises an exceedingly disingenuous and untimely argument that the questions at issue are not sufficiently relevant to the issues before the Illinois court to justify discovery. This argument fails for several reasons. First, Landmark was precluded from pursuing lines of relevant, necessary questioning because Mr. Pressman was instructed not to answer the foundational questions on which further, relevant questions would necessarily be based. Second, the stated reason for instructing the witness not to answer was the California newsman's shield, and no relevance objection was made. Although section 2025(m)(3) of the Code of Civil Procedure provides that relevance objections are not waived for purposes of admissibility of testimony *at trial*, the instructions not to answer were made, and must be defended, for the reasons stated on the record by Mr. Pressman's counsel. Moreover, relevance is not a permissible basis for refusing to answer.

Finally, the Opposition bases its relevancy argument on nothing more than its own bald assertion that these questions are outside the broad scope of permissible discovery permitted in furtherance of the Illinois action. While the Opposition's narrow view of discovery is at odds with California discovery law, the speciousness of the argument is particularly manifest in connection with questions that involve name parties in the Illinois action (e.g., Nos. 8, 13-15, 24, 25 and 31.)

III. THE SHIELD IS INAPPLICABLE TO RESEARCH FOR A BOOK

The instructions not to answer were made explicitly on the basis that the questions at issue would somehow reveal sources of information for Mr. Pressman's book and that the California newsman's shield protects such sources from disclosure. On its face, however, the California newsman's shield does not apply to the writing of books, but rather to a "person connected with or employed upon a newspaper, magazine, or other periodical publication" who publishes material in "a newspaper, magazine or other periodical publication". (Evid. Code § 1070; Cal. Const., Art. I, § 2(b).)

Mr. Pressman testified that his work on the book was separate from his work as a journalist,

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was done under contract with a book publisher, and that none of his periodical articles covered the subject matter of the book. (Pressman Deposition, 21:3-9, 21:21-22:2, 20:20-21:5, 30:10-31:4, 32:19-33:1.) Subsequently, Mr. Pressman has attempted to diffuse his deposition testimony by stating in a declaration that he did some work as a journalist while writing his book, but his declaration offers no new facts to indicate that his testimony regarding the time period or use of his research for his book was incorrect or incomplete. Specifically, he has not claimed to have written any periodical article that dealt with the subject matter of the book.

The Opposition tacitly acknowledges that the California newsman's shield is inapplicable to the writing of books. This acknowledgment takes two forms. First, *no case is cited where the California shield was applied to the writing of books.*[5] Second, the Opposition attempts to justify its instructions not to answer on grounds that were *never articulated* during the deposition, "Mr. Pressman was still privileged under the federal journalist's privilege to decline to answer questions..." (Memo. Pts & Auth., at 2:24-28.) The federal journalist's privilege, however, is inapplicable here because the Illinois action is not a federal case and the deposition was taken pursuant to the laws of the states of Illinois and California. Moreover, Mr. Pressman's counsel never objected to these questions, during the deposition, on the basis of federal law, and objections based on evidentiary privilege not made at the time of the deposition are waived, pursuant to section 2025(m)(1) of the Code of Civil Procedure.

The express purpose of belatedly asserting the federal newsman's shield is that some federal courts have applied it to the writing of books. The application of the federal shield, however,

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[5] Of the three cases cited in this context by the Opposition (Memo. Pts & Auth., p. 4), none provides authority for the assertion that the California shield applies to the writing of books. *Playboy Enterprises v. Superior Court* (1984) 154 Cal.App.3d 14, applies the shield to discovery of a journalist's sources in connect with the *writing of a magazine article*, and the court held that other information, such as the address of the journalist, was not similarly protected. *Id.* at 28-29. In *Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388, the court considered whether the shield applied to the notes of a *reporter for the Sacramento Union newspaper* that were made while investigating a story for the newspaper. *Id.* at 392. Finally in *People v. Von Villas* (1992) 10 Cal.App.4th 201, the appellate court ruled that a trial court did not abuse its discretion in applying the shield to the notes of a freelance journalist of thirteen years experience, where the journalist was "connected with or employed upon" two *magazines* that subsequently entered into a contract for his article, particularly where the pre-contract notes were found "to be both insignificant and irrelevant" to the underlying action. *Id.* at 231-232.

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requires a preliminary determination that federal law is applicable to the case. For example, in *Von Bulow v. Von Bulow* (2d Cir. 1986) 811 F.2d 136, relied upon by Mr. Pressman, the federal court applied the federal newsman's shield, as opposed to the New York state shield that, like the California shield, explicitly excluded the writing of books, only after determining that federal, rather than state, law was applicable. *Id.* at 141, 144.

Contrary to the Opposition's assumption that the federal newsman's shield automatically protects writers of books because the federal shield is based on Constitutional analysis, only the 2nd and 9th Circuits have ever extended the federal newsman's shield to the writers of books, and no federal court has applied the shield to "a person writing a book about a recent historical figure . . . where the intent, arguably, is not the dissemination of 'news,' but the writing of history". *Schoen v. Schoen* (9th Cir. 1993) 5 F.3d 1289, 1293, 1294 ftn. 9. Indeed, Mr. Pressman's book fits the exception described by the 9th Circuit, because the book is a perspective on a recent historical figure.

The Opposition makes a convoluted argument that because the federal newsman's shield relies on the United States Constitution, rather than a statute, an objection based on the federal shield cannot be waived even though never made during the deposition. This argument fails for at least three reasons. First, the federal shield can only be asserted where federal law is otherwise applicable. Second, section 2025(m)(1) of the Code of Civil Procedure states that privileges not asserted in deposition are waived. While technically not a privilege, the newsman's shield is functionally the equivalent of a limited evidentiary privilege, in that it provides an absolute immunity from contempt for failure to produce evidence, and the California Supreme Court has described it as a "reporter's privilege". *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 276.[6]

Third, the authority relied upon in the Opposition, *Boler v. Superior Court* (1987) 201 Cal.App.3d 467, is inapposite. *Boler* arose from an order compelling a defendant in a sexual harassment suit to disclose the identity of former sexual partners. *Id.* at 469. Consistent with the

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[6] As explained by the Court, "Since contempt is generally the only effective remedy against a nonparty witness, the California enactments [Evid. Code § 1070 and the state constitutional amendment] grant such witnesses virtually absolute immunity against compelled disclosure." *Mitchell* at 274.

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position of Landmark, the court observed, "It does seem that an objection to a deposition question must state the specific ground, and unstated grounds are waived." *Id.* at 472, Ftn. 1. The court found that the privacy rights of nonparties are protected by the state and federal constitutions and could not be waived without notice to them. *Ibid.* No evidentiary privilege was involved. Equally inapposite, the Opposition also relies on *Mitchell v. Superior Court, supra,* at 274, Ftn. 3, which states that section 911 of the Evidence Code precludes the creation of a common law reporter's privilege in California but cannot bar the creation of "privileges based on constitutional provisions".

No state court, however, has created the book writer's privilege that Mr. Pressman seeks to invoke. The Opposition provides no authority for its strident, belated assertion that the First Amendment extends a shield to the writers of books in California or that the qualified privilege available to the writers of "investigative" books in the Ninth Circuit has any application here.

IV. SANCTIONS SHOULD BE AWARDED TO LANDMARK

Mr. Pressman's request for sanctions is substantively and procedurally improper. Substantively, Mr. Pressman complains that Landmark "insisted" on taking his deposition after being advised that Mr. Pressman would assert his rights under the California newsman's shield. Mr. Pressman could, however, have moved for a protective order if, indeed, there was a legally cognizable reason why he should not be deposed, and this motion arises from his counsel's persistent, unwarranted instructions not to answer. Procedurally, Mr. Pressman's request for sanctions is improper, because he failed to comply with the requirements of section 2023(c) of the Code of Civil Procedure for a declaration supporting the monetary amount of any sanction request.

On pages 1 and 3 of the Opposition Memorandum of Points and Authorities, Mr. Pressman accuses Landmark of trying to "harass and punish" him for writing a book critical of Landmark. Not only is this accusation unsupported by any evidence, the record indicates that Mr. Pressman is, instead, trying to harass and punish Landmark. For example, Mr. Pressman voluntarily issued a declaration critical of Landmark in *Landmark Education Corporation v. Margaret Singer,* then, when asked in deposition about statements made in the declaration (Questions Nos. 24 and 25), improperly asserted the California newsman's shield to refuse to answer. Moreover, as demonstrated by this motion, his deposition was disrupted by his counsel's frequent assertion of the

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shield, preventing Landmark from obtaining answers to questions that did not inquire into sources of information for his book. Finally, Mr. Pressman's outrageous campaign to prevent or delay the hearing of this motion, demonstrate both bad faith and an awareness that his position is indefensible.

Accordingly, Landmark is entitled to the requested, very conservative sanction of $3654, supported by the Declaration of Carol LaPlant in Support of Motion to Compel, paragraph 11. The continuous, ill-founded instructions not to answer prevented Landmark from taking a meaningful deposition of this witness. Accordingly, an award of sanctions is merited under sections 2023(a)(5) and (a)(8) of the Code of Civil Procedure. Moreover, the extraordinary delay tactics employed by Mr. Pressman's counsel in regard to the hearing of this motion constitute a manifest misuse of the discovery process, additionally deserving of sanctions, pursuant to section 2023(b)(1).

V. CONCLUSION

Mr. Pressman refused to answer the questions at issue on the basis that the California newsman's shield protected the disclosure of sources of information obtained in the writing of his book. These refusals were improper for two reasons. First, none of the questions was within the scope of the California shield because none asked the witness to reveal his sources, and, second, the shield does not apply to the writing of books. Mr. Pressman's argument that the writing of books is protected under federal caselaw is spurious because the deposition was taken pursuant to the state law of Illinois and California.

For all these reasons, Landmark requests that answers to all the questions at issue be compelled, as well as questions previously agreed to by counsel, and that sanctions be awarded to Landmark.

DATED: December 17, 1997

Respectfully submitted,

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CASE NAME: **Landmark Education Corporation v. Steven Pressman**
ACTION NO.: **989890**

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☒ *(State)* I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **December 17, 1997**, at San Francisco, California.

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