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

Attorneys for Defendant
STEVEN PRESSMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION, Plaintiff, vs. STEVEN PRESSMAN, Defendant.	Case No: 989890 Date: November 18, 1997 Time: 9:30 a.m. Dept: 10, Room 414

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF DEMURRER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

I. INTRODUCTION.

The factual background of this action is set out in greater detail in Defendant's motion to strike the complaint, filed herewith. Suffice it to say that this action is yet another effort to harass and punish Defendant Steven Pressman ("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 plaintiff Landmark Education Corporation ("Landmark").

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.[1] 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 Mr. Pressman's book was offered for sale. The complaint contains no allegation that any facts in Outrageous Betrayal are false or that Outrageous Betrayal in any other way injured Landmark.[2] Mr. Pressman is not a defendant in the Illinois action.

Nonetheless, claiming without stated basis that Landmark has reason to believe that Mr. Pressman provided information about Landmark directly to the Illinois defendants (Motion to Compel, 2:7-9), which he did not, Landmark served a subpoena for Mr. Pressman's deposition. Pressman appeared on the agreed date and responded to all questions

---

[1] See Declaration of Judy Alexander ("Alexander Decl."), filed herewith, ¶ 2 and Exh. A. Defendant requests the Court to take judicial notice of the complaint in the Illinois case, pursuant to Evidence Code section 452(d).

[2] 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.

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.

Although Pressman answered any questions to which he could respond without waiving his privilege to refuse to disclose unpublished information and undisclosed sources, and despite his offer to provide responses that would make it clear that all the information he was refusing to disclose was obtained in the newsgathering process, Landmark filed the present action in an effort to compel the disclosure of protected information. However, because the protection afforded to this information by the First Amendment, by the California constitution, and by California law is applicable as a matter of law, the relief sought by Landmark is simply not available. The demurrer should be sustained, and the complaint should be dismissed without leave to amend.

II. THE COMPLAINT FAILS TO ASSERT FACTS SUFFICIENT TO STATE A CAUSE OF ACTION, BECAUSE THE CONDUCT UPON WHICH IT IS BASED IS PRIVILEGED.

A. Prompt disposition is favored in cases based upon conduct protected by the First Amendment, such as this one.

It is well established that summary disposition is favored in cases presenting claims based on conduct protected by the First Amendment. See, e.g., Reader's Digest Assn. v. Superior Court, 37 Cal. 3d 244, 251 (1984), cert. denied, 478 U.S. 1009 (1986) ("'because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.'") (citations omitted); Okun v. Superior Court, 29 Cal. 3d 442, 460 (1981) (reversing overruling of demurrer and holding that "'speedy resolution of cases involving free speech is desirable' to avoid 'a chilling effect upon the exercise of First Amendment rights.'"), cert. denied, Maple

Properties v. Superior Court, 454 U.S. 1099 (1981) (citation omitted); Jensen v. Hewlett-Packard Co., 14 Cal. App. 4th 958, 965 (1993) (affirming nonsuit).

Although this is not a traditional action for damages, it nonetheless implicates conduct that is protected by the First Amendment to the United States Constitution and by the free speech provisions of the California constitution (Cal. Const., art. I, § 2). As explained below, the gathering and publication of information, as well as the protection of unpublished information and sources acquired in that process, are all protected by the First Amendment and the California constitution. The danger of chilling such conduct is present here, just as it is in a defamation or invasion of privacy claim. Therefore, prompt disposition of this action is favored, and should be granted.

B. The demurrer is proper and should be sustained, because the complaint is based on conduct that is privileged.

As a general rule, "[w]here an affirmative defense appears on the face of the complaint that defense may be raised by a demurrer for failure to state a cause of action." Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 800 (1985). Furthermore, "'[w]here the existence of privilege is disclosed on the face of the complaint, the privilege is available as a matter of defense on demurrer.'" Green v. Uccelli, 207 Cal. App. 3d 1112, 1124 (1989), quoting Whelan v. Wolford, 164 Cal. App. 2d 689, 693 (1958). Whether or not a privilege exists is a matter of law to be decided by the court. Jennings v. Telegram-Tribune Co., 164 Cal. App. 3d 119, 128 (1985); Williams v. Daily Review, Inc., 236 Cal. App. 2d 405, 418-19 (1965).

Landmark's complaint leaves no question that it is premised directly on conduct that is protected by the First Amendment and the California Constitution, specifically Pressman's refusal to answer questions that required disclosure of unpublished information and sources acquired in the newsgathering process. See Complaint for Order Compelling Answers to Deposition Questions ("Complaint," ¶¶ 4, 8), and Declaration of Carol P. LaPlant in Support of Motion for Order Compelling Answers to Deposition Questions ("LaPlant Decl."), and

exhibits thereto. Because this conduct is privileged under California law and under the First Amendment, the demurrer is proper and should be sustained.

C. Under the California Shield Laws, Pressman has an absolute right to refuse to disclose the information sought.

Under Article I, section 2(b) of the California Constitution[3] (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 done for the book. Pressman Decl., ¶ 5. Thus not only was he connected with newspapers

---

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

and magazines, but his newsgathering done for the book was also done as the basis for newspaper and magazine publications.[4] 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. Some ask Pressman to reveal if he has talked to or met a named individual, engaged in a

---

[4] 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.

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.[5] 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.

D. Pressman's right to refuse to disclose the information sought is also protected by the First Amendment and the California constitution.

The California shield law clearly is applicable. However, even if it were not, Pressman is privileged to refuse to disclose unpublished information and sources under the

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

First Amendment to the United States Constitution and the California constitution's free speech clause, contained in Article I, section 2(a). Because the constitutional privilege is plainly applicable, the complaint fails to assert facts sufficient to justify the relief it seeks, and the demurrer should be sustained without leave to amend.

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.[6] Furthermore, it has expressly been recognized and applied 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 (recognizing that reporters asserted "a nonstatutory privilege" based on the First Amendment and the California constitution, and

---

[6] FN5. 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. 1983), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir.1980), cert. denied, 449 U.S. 1126 (1981); LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir. 1986), 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).

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 . . . .").

In addition, as explained in detail in the memorandum of points and authorities filed in support of Pressman's motion to strike the complaint, the privilege is indisputably applicable not just to newspaper or 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 v. Kerr-McGee Corporation, 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).

Thus, 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 1293; 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, 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, in order 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 I, 48 F.3d at 416. In addition, the Ninth Circuit has held that "there must be a showing of actual relevance; as 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 Mr. Pressman from any other source. The

complaint does not explain or justify the relevance of the information sought, much less does it show why that information is directly and demonstrably relevant to any important issue in the Illinois litigation. Even if the other papers filed in connection with the motion to compel could be relied upon to remedy the deficiencies of the complaint, which they cannot, there is no support for such a finding anywhere in those documents. Indeed, it is clear that Pressman provided no information whatsoever to CAN. Therefore, none of the information sought by Landmark can possibly be relevant to any issue in the Illinois litigation.

Landmark has failed to justify its request for information protected from compelled disclosure by the First Amendment and the California constitution. Its complaint and motion to compel are without merit, fail to state a cognizable basis for the relief they seek, and should be dismissed without leave to amend.

III. CONCLUSION.

For all of the foregoing reasons, Landmark's complaint fails to state a cause of action on which relief can be granted, and the defects in the complaint cannot be cured by amendment. Thus Pressman respectfully asks this court to sustain his demurrer and dismiss Landmark's complaint without leave to amend.

Dated: Nov. 3, 1997.

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

By Judy Alexander
Judy Alexander

Attorneys for Defendant STEVEN PRESSMAN