

1 JAMES A. LASSART (SBN 40913)
CAROL P. LaPLANT (SBN 85745)
2 ROPERS, MAJESKI, KOHN & BENTLEY
670 Howard Street
3 San Francisco, California 94105
Telephone: (415) 543-4800
4 Facsimile: (415) 512-1574

5 Attorneys for Plaintiff
LANDMARK EDUCATION CORPORATION

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE CITY AND COUNTY OF SAN FRANCISCO

10
11 LANDMARK EDUCATION CORPORATION,

12 Plaintiff,

13 v.

14 STEVEN PRESSMAN,

15 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

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21 **I. INTRODUCTION**

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

1 his counsel's persistent instructions not to answer, all of which were made solely on the basis that
2 Landmark's questions asked the witness to reveal sources of information for his book, *Outrageous*
3 *Betrayal: The Dark Journey of Werner Erhard from Est to Exile*, and that the California newsman's
4 shield (Evidence Code § 1070 and California Constitution, Article I, § 2(b)) exempted
5 Mr. Pressman from revealing sources of information for his book. (Pressman Deposition, 22:13-
6 23.)

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

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

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

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27 ¹ The Declaration of Judy Alexander in Mr. Pressman's Opposition includes a reproduction of
28 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.

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

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

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

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

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

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

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

5 II. THE SHIELD IS SUBSTANTIVELY INAPPLICABLE TO THESE 6 QUESTIONS

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

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

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

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

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27 ³ Characteristic of the inconsistency and arbitrariness of his counsel's instructions not to
28 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.

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

3 Although the shield, if applicable, protects disclosure by the newsman of his sources, the
4 shield has never been expanded beyond its explicit scope to cover the newsman's dissemination of
5 information to others. Indeed, under the traditional analysis of waiver and privilege, such
6 disclosure of otherwise protected information would constitute a waiver. Evidence Code
7 section 912(a); *People v. Von Villas* (1992) 11 Cal.App.4th 175, 220-221. Questions Nos. 9, 18, 19,
8 20 and 30 inquire about Mr. Pressman's communication of information to parties in the Illinois
9 action and others.

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

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27 ⁴ One exception is Question No. 23, which asked whether a magazine article Mr. Pressman
28 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.

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

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

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

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

20 **III. THE SHIELD IS INAPPLICABLE TO RESEARCH FOR A BOOK**

21 The instructions not to answer were made explicitly on the basis that the questions at issue
22 would somehow reveal sources of information for Mr. Pressman's book and that the California
23 newsman's shield protects such sources from disclosure. On its face, however, the California
24 newsman's shield does not apply to the writing of books, but rather to a "person connected with or
25 employed upon a newspaper, magazine, or other periodical publication" who publishes material in
26 "a newspaper, magazine or other periodical publication". (Evid. Code § 1070; Cal. Const., Art. I,
27 § 2(b).)

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

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

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

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

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22 ⁵ Of the three cases cited in this context by the Opposition (Memo. Pts & Auth., p. 4), none
23 provides authority for the assertion that the California shield applies to the writing of books.
24 *Playboy Enterprises v. Superior Court* (1984) 154 Cal.App.3d 14, applies the shield to discovery of
25 a journalist's sources in connect with the *writing of a magazine article*, and the court held that other
26 information, such as the address of the journalist, was not similarly protected. *Id.* at 28-29. In
27 *Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388, the court considered whether the shield
28 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.

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

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

14 The Opposition makes a convoluted argument that because the federal newsman's shield
15 relies on the United States Constitution, rather than a statute, an objection based on the federal
16 shield cannot be waived even though never made during the deposition. This argument fails for at
17 least three reasons. First, the federal shield can only be asserted where federal law is otherwise
18 applicable. Second, section 2025(m)(1) of the Code of Civil Procedure states that privileges not
19 asserted in deposition are waived. While technically not a privilege, the newsman's shield is
20 functionally the equivalent of a limited evidentiary privilege, in that it provides an absolute
21 immunity from contempt for failure to produce evidence, and the California Supreme Court has
22 described it as a "reporter's privilege". *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 276.⁶

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

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27 ⁶ As explained by the Court, "Since contempt is generally the only effective remedy against a
28 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.

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

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

12 IV. SANCTIONS SHOULD BE AWARDED TO LANDMARK

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

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

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

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

12 V. CONCLUSION

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

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

23 DATED: December 17, 1997

Respectfully submitted,

24 ROPERS, MAJESKI, KOHN & BENTLEY

25
26 By Carol P. LaPlant
27 CAROL P. LaPLANT
28 Attorneys for Plaintiff
LANDMARK EDUCATION CORPORATION

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

3 **PROOF OF SERVICE**

4 I am a citizen of the United States. My business address is 670 Howard Street, San
5 Francisco, California 94105. I am employed in the county of San Francisco where this service
6 occurs. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with
7 my employer's normal business practice for collection and processing of correspondence for mailing
8 with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S.
9 Postal Service the same day as the day of collection in the ordinary course of business.

10 On the date set forth below, following ordinary business practice, I served a true copy of the
11 foregoing document(s) described as:

12 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
13 **MOTION FOR ORDER COMPELLING ANSWER TO DEPOSITION QUESTIONS, AND**
14 **FOR SANCTIONS**

15 ☒ (BY FAX) by transmitting via facsimile the document(s) listed above to the fax
16 number(s) set forth below, or as stated on the attached service list, on this date
17 before 5:00 p.m.

18 ☒ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be
19 placed in the United States mail at San Francisco, California.

20 ☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand
21 this date to the offices of the addressee(s).

22 ☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an
23 overnight delivery carrier with delivery fees provided for, addressed to the
24 person(s) on whom it is to be served.

25 Judy Alexander, Esq.
26 Law Offices of Judy Alexander
27 824 Bay Avenue, Suite 10
28 Capitola, California 95010
Facsimile: (408) 479-3488

James Chadwick, Esq.
Genesis Law Group
160 West Santa Clara Street, Suite 1300
San Jose, California 95113
Facsimile: (408) 975-4001

29 **Attorney for Defendant Steven Pressman**
30 **BY FAX & MAIL**

31 **Attorney for Defendant Steven Pressman**
32 **BY MAIL ONLY**

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

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

36 
37 ALONZO REESE