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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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT Date: January 16, 1998 Time: 9:30 a.m. Dept: Law and Motion, Room 301 Trial Date: Not Applicable

I. INTRODUCTION

This demurrer is both pointless and meritless. The demurrer is pointless, because it attempts to attack a complaint that is merely a vehicle to obtain necessary resolution in the San Francisco Superior Court of a discovery dispute in a case pending in Illinois state court. The discovery dispute is now close to resolution, following a hearing on December 19, 1997 before Discovery Commissioner Richard E. Best, who took the matter under submission. When the deposition that gave rise to this dispute is completed, the complaint will be dismissed. (Declaration of Carol P. LaPlant, ¶ 2.)

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The discovery dispute to which the complaint is addressed consisted of the refusal of a non-party witness in the Illinois action, Steven Pressman, to answer questions in a deposition taken on June 5, 1997 in San Francisco under authority of a commission and subpoena issued by the Illinois court and a subpoena issued by the San Francisco Superior Court. Mr. Pressman refused to answer these questions on the basis of California law, specifically the newsman's shield (Evidence Code § 1070; California Constitution, Art. I, § 2(b)). Plaintiff maintains that most of the questions at issue are outside the scope of the newsman's shield and that, in regard to the remainder, Mr. Pressman waived the shield by issuing a declaration, in other litigation, concerning the subject matter of these questions.

When meet and confer efforts were unsuccessful, plaintiff filed the instant complaint for order compelling answers to deposition questions on September 26, 1997, along with a motion to compel, originally scheduled for hearing in the Discovery Department on November 18, 1997. In response, Mr. Pressman has made an enormous effort to prevent or delay the hearing of the motion to compel and to increase plaintiff's expenses in this matter, including the filing of this demurrer and an accompanying motion to strike, as well as an ex parte application to have plaintiff's discovery motion stayed until after the hearing of Mr. Pressman's motion to strike. The latter was denied by this court on November 6, 1997.

Over the protestations of Mr. Pressman, on November 18, 1997 this court granted plaintiff's motion to have its discovery motion heard prior to Mr. Pressman's motions, and the motion to compel was finally heard before Discovery Commissioner Richard E. Best on December 19, 1997. Commissioner Best took the motion to compel under submission and, as of the date of this opposition, has not yet ruled.

The simple objective of the complaint was to obtain a hearing and order regarding this discovery matter and is now substantially accomplished. This demurrer serves only to waste time and cause additional expense by needlessly attacking a complaint that merely served to obtain resolution of a discovery dispute. Moreover, if the demurrer were granted, the anomalous result

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would be that the forthcoming rulings of the Discovery Commissioner would lack a jurisdictional basis.

In addition to serving no purpose other than to further waste the time and resources of the court and plaintiff, this demurrer is also meritless. The notice of demurrer states,

> "The demurrer will be made on the grounds that the complaint does not state facts sufficient to state any cause of action against Defendant, in that the relief sought therein is barred by the First Amendment to the United States Constitution, by Article I, section 2 of the California Constitution, and by California law." (Notice, 1:25-2:1.)

The only relief requested in the complaint, however, is an order, "compelling Mr. Pressman to answer questions that *are not subject to the newsman's shield* or any privilege." (Complaint, ¶ 10. Emphasis added.) There is manifestly nothing in the complaint that seeks relief barred by the federal or state Constitutions or otherwise provides any support whatsoever for the stated ground for the demurrer. The complaint explicitly requests an order compelling responses only to questions that are outside the scope of the shield, yet the entire demurrer is based on the mischaracterization of the complaint as somehow requesting an order compelling answers to questions that are protected by the shield.

In addition to focusing its arguments on an intentional misreading of the complaint, the memorandum in support of this demurrer incorporates a large amount of gratuitous argument on such extraneous subjects as the relevancy of Mr. Pressman's testimony to the underlying Illinois action and the applicability of possible objections, never made at the deposition, on the basis of federal law. Such arguments are extraneous and improper in a demurrer. "It is 'black-letter law' a demurrer tests the pleading alone." *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1144.

In view of the above, on November 21, 1997 plaintiff requested, to no avail, that Mr. Pressman withdraw this pointless and meritless demurrer. (Declaration of Carol P. LaPlant, ¶ 3.) Accordingly, plaintiff has filed a motion for sanctions, pursuant to section 128.7 of the Code of Civil Procedure, scheduled for hearing on the same date as the demurrer.

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II. FACTS

Plaintiff Landmark Education Corporation ("Landmark") is a California corporation that conducts seminars for businesses and individuals on a variety of topics, such as managerial skills and personal effectiveness. Landmark is conducting discovery in a case filed in the Circuit Court of Cook County, Illinois, *Landmark Education Corporation v. Cult Awareness Network, et al.*, Action No. 94-L-11478 ("the Illinois action"). Defendant Steven Pressman is a resident of San Francisco and not a party to the Illinois action. As part of plaintiff's discovery efforts, plaintiff obtained a subpoena and commission from the court in the Illinois action to take the deposition of Mr. Pressman in San Francisco.

On the basis of the subpoena and commission, plaintiff obtained a subpoena for Mr. Pressman's deposition from the San Francisco Superior Court, and the subpoena was then served on Mr. Pressman, who did not move for a protective order and appeared for his deposition on the agreed date of June 5, 1997. Landmark, however, was prevented from taking a reasonable and complete deposition of Mr. Pressman, because his counsel, Judy Alexander, frequently interposed objections and instructed her client not to answer, always asserting the California newsman's shield.

At the time of the deposition and subsequently in meet and confer correspondence, plaintiff's counsel maintained that the newsman's shield was inapplicable to the specific questions asked of Mr. Pressman and that, in regard to a few questions, any applicable shield had been waived by Mr. Pressman's issuing a declaration in other Landmark litigation in which he was not a party. Although Ms. Alexander eventually changed her position in regard to certain questions, some 34 questions remained in dispute as to whether the newsman's shield was applicable. Consequently, plaintiff filed the present complaint in the San Francisco Superior Court for an order compelling answers to deposition questions, along with a motion to compel. The motion to compel was first set for hearing in the Discovery Department on November 10, 1997 and, at the request of Ms. Alexander, re-scheduled for hearing on November 20, 1997. (Declaration of Carol . LaPlant in Support of Motion for Sanctions, ¶ 3.)

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Instead of responding to plaintiff's motion to compel, on November 3, 1997, Mr. Pressman filed this demurrer, along with an anti-SLAPP motion to strike, with both of his motions set for hearing prior to the motion to compel. On November 6, 1997, Ms. Alexander made ex parte application to have plaintiff's motion to compel taken off calendar until after the hearing of Mr. Pressman's motions, and this court denied that application. On November 18, 1997 this court granted plaintiff's motion to have the discovery motion heard first, and on December 19, 1997 the motion to compel was heard by Discovery Commissioner Best and taken under submission.

III. THE DEMURRER IS MERITLESS

The complaint herein was plaintiff's procedural method of obtaining a hearing in the San Francisco Superior Court for Landmark's discovery motion and is in the nature of a special proceeding. The procedure itself is not challenged by defendant. Instead, defendant ostensibly attempts to attack the content of the complaint. The complaint, however, is simple and straightforward, reciting the procedural background that brought this matter to the San Francisco Superior Court (Complaint ¶¶ 3, 5, 7, 8) and the relief requested (Complaint ¶ 10). Specifically, the complaint seeks, "An Order compelling Mr. Pressman to answer all questions he has refused to answer that are *outside the proper scope of the asserted newsman's shield* and are not subject to any privilege." (Complaint, 3:10-12. Emphasis added.)

In order to prevail on a demurrer, defendant must show, pursuant to section 430.30 of the Code of Civil Procedure, that the complaint, *on its face*, falls into the categories for demurrer contained in section 430.10. Here, the actual deposition questions in dispute are not set forth in the complaint, but rather they appear in the Separate Statement of Questions and Responses in Dispute that was filed with the motion to compel pursuant to California Rule of Court 335(a). Plaintiff contends that the questions are not within the scope of the newsman's shield, and Mr. Pressman contends that they are within the scope of the shield. This dispute is the crux of the motion to compel. There is nothing in the complaint, however, that allows the court to determine whether the questions are, or are not, within the scope of the shield.

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Defendant's stated ground for demurrer is the bald assertion that the relief sought in the complaint is barred by the federal and state Constitutions. (Notice of Demurrer, 1:25-28.) The complaint, however, seeks an order "compelling Mr. Pressman to answer deposition questions *that are not subject to the newsman's shield*". (Complaint, ¶ 10. Emphasis added.) The complaint on its face, therefore, seeks relief that is exactly the opposite of defendant's ground for demurrer.

A demurrer may also be based on matters that are subject to judicial notice, and defendant's demurrer asks the court to take judicial notice of the underlying complaint in the Illinois action and various declarations filed in support of Mr. Pressman's unsuccessful anti-SLAPP motion in a previous lawsuit in which Landmark was not a party. The content of these documents is irrelevant to the demurrer, and reference to them is improper. In the context of a demurrer, judicial notice may be taken only of matters "which are not reasonably subject to dispute and are easily verified." *Gould, supra,* at 1145. It is error for the court, in a demurrer, to consider the contents of a sworn declaration filed in another case. *Bach v. McNelie* (1989) 207 Cal.App.3d 852, 865.

Mr. Pressman's demurrer consists entirely of insinuation about plaintiff's purportedly ulterior motives for moving to compel his answers to deposition questions, and the specious legal arguments he offers are founded entirely on a misreading of the plain language of the complaint. For example, the refrain that runs through defendant's memorandum is, "Landmark filed the present action in an effort to compel the disclosure of protected information." (Memo. of Pts and Auth., 2:9-10.) The complaint, however, explicitly states that it seeks the exact opposite.

Additionally, Mr. Pressman's supporting memorandum is defective because it relies on arguments and allusions to evidence concerning the merits of the motion to compel. A speaking demurrer, based on extrinsic evidence and argument, is improper and cannot be granted. *Ion Equipment Corporation v. Nelson* (1980) 110 Cal.App.3d 868, 881.

> "When any ground for objection to a complaint ... does not appear on the face of the pleading, the objection may be taken by answer.' (Code Civ. Proc., § 430.30(b).) 'Defendants cannot set forth allegations of fact in their demurrers which, if true, would defeat plaintiff's complaint.' (Citation.)" *Gould, supra,* at 1144.

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Instead, in considering a demurrer, the court must assume the complaint's "material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125. Here, the *only* material allegations in the complaint are that Mr. Pressman refused to answer questions on the asserted basis of the California newsman's shield, Landmark disagreed that the shield was applicable to those questions, and Landmark therefore seeks an order compelling answers to those questions that are indeed outside the scope of the shield.

Regardless of the outcome of the motion to compel, the demurrer presents no proper argument. A complaint need only establish the possibility that plaintiff is entitled to relief. "We do not concern ourselves with possible difficulties of proof [in considering a demurrer], only with whether the pleaded facts show that the pleader may be entitled to some relief." *T.R.E.E.S. v. Department of Forestry and Fire Protection* (1991) 233 Cal.App.3d 1175, 1179. Landmark's complaint fulfills this criteria by establishing that it is entitled to a hearing on its motion to compel. "A general demurrer admits the truth of all material factual allegations of the complaint; plaintiff's ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court." *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1267. "A complaint survives a demurrer if it states facts disclosing some right to relief." *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22.

A just and fair resolution of the discovery dispute is all that this complaint seeks, and a liberal standard with the objective of attaining substantial justice is appropriate in considering demurrers.

> "We liberally construe the allegations of the complaint with a view to attaining substantial justice among the parties. It is error to sustain a demurrer where a plaintiff has stated a cause of action under any possible legal theory." *Merced v. Mutual Fire Insurance Co.* (1991) 233 Cal.App.3d 765, 771.

No conceivable purpose would be served by sustaining this demurrer, which is directed at a complaint that forms the procedural underpinnings of a motion to compel that has already been heard. Mr. Pressman cites a great deal of inapposite authority. For example, *Okun v. Superior*

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Court (1981) 29 Cal.3d 442, 460 is cited for the proposition that speedy resolution of cases involving free speech and First Amendment rights is desirable. (Memo. of Pts and Auth., 2:25-27.) *Okun*, however, involved specific determinations by the court that the allegations of the complaint did not support causes of action for libel, slander and conspiracy to commit libel and slander. *Okun* at 451, 454, 457 and 459. Here, the comparison does not hold because there is nothing on the face of Landmark's complaint that allows the examining court to make a determination as to the applicability of free speech or the First Amendment considerations to any of the deposition questions that were the subject of Landmark's discovery motion. Instead, Landmark's complaint explicitly asks for an order compelling answers to those questions that are not subject to such considerations.

Similarly inapposite, Mr. Pressman relies on *Green v. Uccelli* (1989) 207 Cal.App.3d 1112, 1124, for the proposition that a demurrer is appropriate where the existence of a privilege is disclosed on the face of a complaint. (Memo. of Pts and Auth., 3:15-18.) In *Green*, plaintiff sued his ex-wife's divorce attorney for abuse of process and intentional infliction of emotional distress based, as stated in his complaint, on Uccelli's representation of plaintiff's wife in the divorce action. The demurrer was granted because the complaint indicated, on its face, that Uccelli's acts were performed in the course of a judicial proceeding and were therefore privileged pursuant to Civil Code section 47(2). *Green* at 1124. Unlike *Green*, there is absolutely nothing on the face of the present complaint which is indicative of any privilege. Moreover, the *Green* court observed that demurrers cannot be sustained "where the complaint raised a factual question as to whether" a privilege was applicable. *Green* at 1124-1125, citing *Fuhrman v. California Satellite Systems* (1989) 179 Cal.App.3d 408, 420-423. Here, there is nothing on the face of the complaint that allows the court to make a legal determination in regard to the thirty-four questions to which the motion to compel is addressed. Instead, Landmark's complaint itself consists only of a request for the court to determine whether the immunity provided by the newsman's shield is applicable to the deposition questions in dispute and, if not, to compel answers.

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