

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

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11 LANDMARK EDUCATION CORPORATION,

12 Plaintiff,

13 v.

14 STEVEN PRESSMAN,

15 Defendant.

CASE NO. 989890

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SANCTIONS
[CCP § 128.7]

Date: January 16, 1998
Time: 9:30 a.m.
Law and Motion: Room 301

Trial Date: Not Applicable

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19 I. INTRODUCTION

20 Plaintiff LANDMARK EDUCATION CORPORATION ("Landmark") took the deposition
21 of STEVEN PRESSMAN ("Mr. Pressman") on June 5, 1997 in San Francisco, pursuant to a
22 subpoena and commission issued by the Circuit Court of Cook County, Illinois, in the case of
23 *Landmark Education Corporation v. Cult Awareness Network, et al.*, No. 94-L-11478 ("the Illinois
24 action"). The San Francisco Superior Court issued a subpoena for Mr. Pressman's deposition, based
25 on the Illinois authority. In deposition, Mr. Pressman refused to answer numerous questions, on the
26 asserted basis of the California newsman's shield (Evidence Code section 1070 and California

1 Constitution, Article I, section 2(b)). Plaintiff disputed that these questions were within the scope of
2 the newsman's shield, and plaintiff maintained also that Mr. Pressman had waived the shield in
3 regard to statements made in a declaration he issued in support of defendant in the San Francisco
4 Superior Court case of *Landmark Education Corporation v. Margaret Singer, et al.*, No. 976037.

5 Plaintiff made a good faith attempt to meet and confer on these matters. (Declaration of
6 Carol P. LaPlant, ¶ 2.) When resolution proved to be impossible, on September 26, 1997 plaintiff
7 filed the instant complaint in the San Francisco Superior Court requesting only a hearing on the
8 discovery dispute and an order compelling Mr. Pressman to answer the contested questions.
9 Thereafter, on October 2, 1997, plaintiff filed a motion to compel, scheduled for hearing in the
10 Discovery Department on November 10, 1997.

11 Although Mr. Pressman's counsel, Judy Alexander, had notice of the scheduled hearing date
12 prior to the filing of the motion to compel, Ms. Alexander subsequently claimed that the date was
13 inconvenient and requested a continuance. Accordingly, the hearing was re-noticed for November
14 20, 1997. (Declaration of Carol P. LaPlant, ¶ 3.)

15 Mr. Pressman then filed the instant demurrer and motion to strike, set for hearing on
16 November 18, 1997, two days before the motion to compel. Mr. Pressman's motions were founded
17 on the premise that the motion to compel had no merit. Mr. Pressman's counsel, however, refused
18 Landmark's request to allow the discovery motion to be heard first and, instead, brought an ex parte
19 application on November 5, 1997 to have the discovery motion taken off calendar. (Declaration of
20 Carol P. LaPlant, ¶ 4.) On the same date, however, Landmark's counsel appeared ex parte on an
21 application to have heard, on shortened time, a motion to have Landmark's discovery motion heard
22 first. The court granted Landmark's application. Thereafter, on November 18, 1997, the court
23 granted Landmark's motion to have the discovery motion heard first. The discovery motion was
24 heard on December 19, 1997 by Commissioner Richard E. Best and has been taken under
25 submission.

26 On November 21, 1997, Landmark's counsel faxed a letter to Mr. Pressman's counsel stating

1 that Landmark would bring the present motion for sanctions pursuant to section 128.7 of the Code
2 of Civil Procedure unless the demurrer and motion to strike were withdrawn within the next 30 days.
3 (Declaration of Carol P. LaPlant, ¶ 5 and Exhibit A thereto.) Mr. Pressman's counsel refused to
4 withdraw the demurrer and motion to strike and, instead, incorrectly asserted that Landmark had
5 conceded, during the hearing on priority, that Mr. Pressman was entitled to proceed with his
6 motions. (*Ibid.* and Exhibit B thereto.) Landmark's counsel responded that the technical right to
7 have the motions heard is irrelevant to the merits of the motions, and that the motion for sanctions is
8 addressed entirely to the merits. (*Ibid.* and Exhibit C thereto.)

9 Now that the discovery motion has been heard and is under submission, Landmark is
10 burdened by having to respond to the demurrer and motion to strike, even though Landmark has
11 obtained the requested hearing and will dismiss its complaint against Mr. Pressman at the conclusion
12 of Mr. Pressman's deposition. (Declaration of Carol P. LaPlant, ¶ 6.) No conceivable useful
13 purpose is served by hearing Mr. Pressman's motions.

14 II. APPLICABLE LAW

15 Section 128.7 of the Code of Civil Procedure provides in pertinent part,

16 “(b) By presenting to the court ... [a] written notice of motion ... an attorney ... is certifying
17 that to the best of the person's knowledge, information, and belief ... all of the following
conditions are met:

18 “(1) It is not being presented primarily for an improper purpose, such as to harass or to cause
19 unnecessary delay or needless increase in the cost of litigation.

20 “(2) The claims ... and other legal contentions therein are warranted by existing law...

21 “(c) If, after notice and a reasonable opportunity to respond, the court determines that
22 subdivision (b) has been violated, the court may ... impose an appropriate sanction upon the
attorneys, law firms, or parties that have violated subdivision (b)...”

23 As explained by the state Supreme Court, section 128.7 is intended to broaden the powers of
24 the court to sanction abusive litigation tactics that needlessly waste the resources of the courts and
25 opposing counsel.

26 “Among other expansions in the trial court's powers to sanction misconduct by counsel or a
party, the new statute suspends the operation of section 128.5 for four years and substitutes

1 in its place the text of federal rule 11, modified in minor particulars. The new statute
2 authorizes trial judges to sanction attorneys, their firms and clients for violating a
3 certification that a complaint (as well as other filings) is not filed 'primarily for an improper
4 purpose,' that the claims are warranted by existing law (with certain exceptions), and that
5 allegations have factual support. (Assembly Bill No. 3594, enacting Code Civ. Proc., § 128.7
6 (b).)' *Crowley v. Katleman* (1994) 8 Cal.4th 666, 702, fn 2.

7 It is well settled that sanctions may be awarded for bad faith tactics, such as the filing of
8 meritless motions requiring the expenditure of time and money by opposing counsel. *Abandonato v.*
9 *Coldren* (1995) 41 Cal.App.4th 264, 267.

10 Finally, Landmark has complied with the 30 day notice requirement of section 128.7(c)(1),
11 and Mr. Pressman has nonetheless refused to withdraw his motions.

12 **III. THE DEMURRER AND MOTION TO STRIKE ARE FRIVOLOUS AND IMPROPER**

13 No useful purpose is served by proceeding with the hearing of Mr. Pressman's motions.
14 Landmark's objective in filing the instant complaint has largely been accomplished, because
15 Landmark's motion to compel has been heard and a ruling is expected in the near future. If,
16 somehow, Mr. Pressman's motions were successful and Landmark's complaint were to be
17 involuntarily dismissed, the forthcoming rulings of Discovery Commissioner Best would be left
18 without a jurisdictional foundation. In addition to creating a legally anomalous situation, Mr.
19 Pressman would thereby avoid having Landmark's discovery matter heard in the Discovery
20 Department, or heard at all. Such a result would be a waste of the court's resources, as well as
21 Landmark's.

22 Mr. Pressman's asserted ground for demurrer, stated in his Notice, is improper because the
23 demurrer is not made on any ground contained in section 430.10 of the Code of Civil Procedure.
24 Moreover, the asserted ground for demurrer, stated in the Notice, that "the relief sought therein is
25 barred by the First Amendment to the United States Constitution, by Article I, section 2 of the
26 California Constitution, and by California law" is not based on matter appearing on the face of the
complaint or from any matter of which the court may take judicial notice, as required by section
430.30 of the Code of Civil Procedure. A demurrer based on extrinsic evidence, is improper and

1 cannot be granted. *Ion Equipment Corporation v. Nelson* (1980) 110 Cal.App.3d 868, 881.

2 The demurrer is based on the gratuitous argument that plaintiff's motion to compel will
3 ultimately be unsuccessful. The demurrer is therefore improper, because a demurrer must admit all
4 facts alleged in the complaint, even where disputed by defendant. *Committee on Children's*
5 *Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214. The complaint alleges that
6 the deposition questions in dispute are not within the scope of the newsman's shield, are proper
7 discovery, and, as such, Mr. Pressman's answers should be compelled. The complaint seeks an
8 order, "compelling Mr. Pressman to answer deposition questions *that are not subject to the*
9 *newsman's shield*". (Complaint, ¶ 10. Emphasis added.) If the allegations in the complaint are
10 admitted, then the ostensible basis for bringing the demurrer collapses.

11 Similarly unfounded is Mr. Pressman's motion to strike, brought as an anti-SLAPP motion
12 pursuant to section 425.16 of the Code of Civil Procedure. The motion is falsely premised on the
13 assertion, in the Notice, that plaintiff has no possibility of winning its motion to compel and that the
14 "complaint arises from acts in furtherance of Defendant's free speech rights". As set forth in
15 sections 425.16(a) and (e), however, such suits must concern defendant's exercise of free speech on
16 a *public* issue and in a *public* forum. These requirements are mandatory. *Zhao v. Wang* (1996) 48
17 Cal.App.4th 1114, 1125-1127. Nowhere is there any authority for defendant's novel position that
18 objections to questions asked in a deposition somehow constitute the exercise of protected free
19 speech, nor is there any caselaw to suggest that a motion under section 425.16 has ever been used to
20 block the hearing of a motion to compel. Moreover, pursuant to section 425.16(b), motions under
21 this section are limited to complaints based on the exercise of free speech or right of petition; in stark
22 contrast, the only speech at issue here consists of the objections and instruction not to answer made
23 by Mr. Pressman's attorney.

24 IV. THE SANCTIONS REQUESTED ARE APPROPRIATE

25 Landmark has expended substantial time and effort in obtaining a hearing of its motion to
26 compel and fending off Mr. Pressman's attempt to derail or delay that hearing. (Declaration of

1 Carol P. LaPlant, ¶ 7.) The resources of this court, also, have been unnecessarily expended by the
2 frivolous, bad faith tactics of Mr. Pressman and his counsel. Accordingly, Landmark requests a
3 monetary sanction of \$2850 as compensation for attorneys' fees expended as a result of Mr.
4 Pressman's efforts to block the hearing of the motion to compel. Payment of attorneys' fees,
5 however, will only redress part of the damage done to Landmark. The delay caused by Mr.
6 Pressman's maneuvering has done irreparable damage to Landmark. Accordingly, sanctions are well
7 deserved.

8
9 Dated: December 29, 1997

10 ROPERS, MAJESKI, KOHN & BENTLEY

11
12 By Carol P. LaPlant
13 CAROL P. LaPLANT
14 Attorneys for Plaintiff
15 LANDMARK EDUCATION CORPORATION
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1 **CASE NAME: Landmark Education Corporation v. Pressman**
2 **San Francisco County Superior Court Action No.: 989890**

3 **PROOF OF SERVICE**

4 I, Jennifer Jones, declare as follows:

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

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

13 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
14 **MOTION FOR SANCTIONS [CCP § 128.7]**

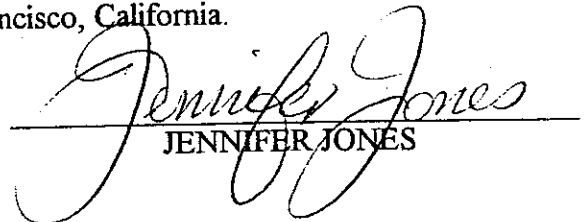
- 15 (BY FAX) by transmitting via facsimile the document(s) listed above to the fax
16 number(s) set forth below, or as stated on the attached service list, on this date
17 before 5:00 p.m.
- 18 (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be
19 placed in the United States 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 by
23 an overnight delivery carrier [Federal Express] with delivery fees provided for,
24 addressed to the person on whom it is to be served.

25 Judy Alexander
26 Attorney at Law
Law Offices of Judy Alexander
824 Bay Avenue, Suite 10
Capitola, California 95010

James Chadwick
Genesis Law Group
160 West Santa Clara Street, Suite 1300
San Jose, California 95113

- 27 (State) I declare under penalty of perjury under the laws of the State of California
28 that the above is true and correct.

29 Executed on December 29, 1997 at San Francisco, California.

30 
31 JENNIFER JONES