

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION**

LANDMARK EDUCATION CORP.,)	
)	
Plaintiff,)	
v.)	Case No. 94 L 11478
)	
CYNTHIA KISSER et al.,)	Judge Cohen
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF KISSER'S MOTION FOR
SUMMARY JUDGMENT**

Cynthia Kissar ("Kisser") submits this Memorandum of Law in support of her motion for summary judgment. Following extensive, time-consuming and costly discovery, involving numerous depositions, it is clear that Landmark Education Corporation ("LEC") should not be permitted to proceed to trial on its claims.

INTRODUCTION

This suit is one of many that LEC has brought or has threatened to bring all over the world in an effort to smother criticism of its programs. When LEC was formed in 1991, it purportedly acquired certain assets of a corporation run by the highly controversial Werner Erhard and continued to run certain of Erhard's programs, including one called the Forum. Since then, LEC has been operated by, among others, Harry Rosenberg (Werner Erhard's brother) and Joan Rosenberg (Werner Erhard's sister). Werner Erhard is perhaps best known for developing "est" training, an intense and highly confrontational program that was popular among some people in the early 1970's before

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being criticized by both former participants and outside observers. (Werner Erhard is a pseudonym selected by Jack Rosenberg at about the time he began offering his est self-help seminars.) Before selling to LEC, Erhard attempted to appease his critics and maintain his customer base by claiming to have changed the program to a less-confrontational format, called the Forum, offered by Werner Erhard & Associates.

Once LEC acquired Erhard's assets in the Forum program in 1991, the nature and extent of any additional changes to the Forum program format are the subject of some dispute, but it is undisputed that LEC consciously decided to continue offering the program under the Forum name despite public concerns that it was a "cult" or "cult-like". Since 1991, LEC has brought not only this suit but one in Germany seeking to preclude its labeling as a cult (in which LEC lost and may be called cult-like) (see attached Exh. A), against Conde Nast publications, *Landmark Education Corp. v. The Conde Nast Publications, Inc.*, No. 114814/93, Supreme Court, New York County, and, recently, one against Elle magazine and its reporter for publishing an article reflecting nothing more than the reporter's thoughts, observations and opinions about a Forum that the reporter attended (See lawsuit attached as Exh. B hereto and article attached as Exh. C hereto). LEC also has threatened a lawsuit against a non-profit organization known as Watchman Fellowship (See Exh. D hereto). LEC also has threatened one of the people who is listed as a witness for Kissler, Liz Sumerlin, with a lawsuit based on Ms. Sumerlin's publication of reading lists and other information about LEC (see Sumerlin statement, Exh. E hereto). The common focus of these litigation activities is the effort to prevent the dissemination of any opinion that LEC or its programs are a "cult" or "cult-like".

LEC brought this suit against Cult Awareness Network (National Office) (“CAN”), several local CAN affiliates, and several officers or directors of CAN. CAN filed for bankruptcy protection and LEC has settled with all except Kissler, who was the Executive Director of CAN from 1987 to 1996. Thus, the only claims that are still under discussion are LEC’s claims that Kissler personally defamed LEC in its business. Specifically, LEC claims that Kissler defamed LEC in the following respects:

1. By distributing a flyer printed in 1990, as part of CAN’s brochure that was routinely distributed to callers inquiring about cults or cult-like groups, which identified “The Forum/est/The Hunger Project” as a group about which CAN had received complaints (see Flyer, Exh. F hereto);

2. By overseeing the development of an internet website that listed “est/Forum” as a group or organization for which CAN had available copies of published materials (see Website page, Exh. G hereto);

3. By collecting magazine and newspaper articles about LEC’s Forum and its predecessors and duplicating them in a packet of materials to be sent to those who contacted CAN about those groups, which packet was transmitted with a cover sheet reading as follows:

The opinion in this public service packet, which consists largely of magazine and newspaper reports, do not necessarily reflect the opinions of the Cult Awareness Network, its staff, directors, or advisors. The compilation of a packet on a particular group does not necessarily mean that it is a cult or is destructive, only that CAN receives inquiries about it.

(See Exh. H hereto).

LEC has charged that, in carrying out the foregoing conduct, Kissler has defamed it as being a cult or cult-like. For purposes of this motion, Kissler does not attempt to prove that LEC is a cult or that it has engaged in cult-like behavior, although there is ample opinion in the public domain that such an opinion would be justifiable. Instead, for purposes of this motion only, Kissler will not take a position one way or the other regarding LEC's status as a cult or its cult-like tendencies. Regardless of LEC's or Kissler's opinions on that subject, however, there is no basis for a defamation claim against Kissler.

ARGUMENT

There are six principal reasons that LEC's claims against Kissler should be rejected:

1. As LEC's own Opinion Witness Disclosure aptly reflects, any characterization of any group as a "cult" or "cult-like" is a matter of opinion, not subject to verifiable proof or disproof and therefore cannot be a basis for a defamation claim;
2. Any statements that could even arguably be attributed to Kissler are true;
3. Certain of the statements were published sufficiently long ago that any claim is barred by the statute of limitations;
4. The statements created by CAN or Kissler do not identify LEC by name, and certain of them could not possibly refer to LEC because they were published before LEC existed;

5. Cynthia Kisser is not the author of the flyer or the website and there is no evidence that Kisser doubted the truth of any statements published or republished by CAN and thus any republication falls within the fair comment doctrine.
6. There is no evidence that any statement arguably authored by Kisser caused any change in the public's perception of LEC or its Forum.

I. CHARACTERIZATION OF A GROUP AS A CULT IS OPINION

A fundamental tenet of defamation law is that an opinion or vague characterization that is so imprecise as to defy objective verification cannot form the basis of a defamation claim. See *Catalano v. Pechous*, 83 Ill. 2d 146, 163, 419 N.E.2d 350, 358 (1980). Unfortunately for LEC's claim, the characterization of an organization as a "cult" or "cult-like" is just such an opinion or vague characterization, and one need look no further than LEC's own filings in this matter.

LEC's Opinion Witness Disclosure identifies a number of witnesses, all of whom are expected to be testifying to their opinion that LEC and its Forum are not a cult or cult-like organization. Although Kisser disputes the relevance of such testimony—given her position that she has not ever put forth an opinion regarding the cult status of LEC or its Forum—it is clear that LEC itself concedes that the "cult" characterization is mere opinion and not a matter of fact.

Dr. Lowell Streiker, the principal opinion witness who has been retained by LEC to prepare a formal written report on his analysis of LEC, has stated unequivocally that there is no precise definition of a cult:

"The term cult does not have a precise scientific meaning." Streiker Report, Exh. I hereto, p. 3.

"Yes, 'cult' has become a pejorative term. . ." (*Id.*, p. 4), [but there is also a] "proper non-pejorative use of cult. . ." (*Id.*, p. 5) emphasis added.

Based on such admissions by LEC's own opinion witnesses, there can be no question that the characterization of a group as a cult is a matter of opinion or vague assertion so imprecise as to be incapable of exact proof or disproof, and thus not actionable under defamation law.

II. STATEMENTS CHARGED TO KISSER ARE TRUE

Although Kissler will be able to prove at trial that she did not personally author any of the allegedly defamatory statements, there is no evidence that any statement that is even arguably attributable to Kissler will be proven false.

FLYER: The flyer containing the list of groups about which CAN had received complaints, even if it could be attributed to Kissler, is demonstrably true and cannot be controverted by LEC. It is undisputed that CAN received complaints about every group listed on the flyer, including the Forum in both pre- and post-LEC incarnations (See phone sheets attached as Exh. J). Some of the CAN phone sheets recording calls from people reflect criticism of LEC: "threatened her & were rude to her," 4/24/95 sheet; "lots of problems," 4/6/95 sheet; "did not like it," 2/24/94 sheet; "Daughter involved - asking all her relatives for \$20.00 each to attend a seminar," 2/8/94 sheet; "Spouse joined. . . now divorced. . ." 5/10/94 sheet; "critical of it - was associated with it for 12 years - had worked there for 2 years - had run training - failed promises by management - hidden agenda - character defamed," 6/29/94 sheet; "critical of it," 6/14/94

sheet; "bizarre terminology - lots of pressure to sign-up," 10/27/94 sheet; "has concerns about it," 11/9/94 sheet.

WEBSITE: Any reference to the Forum in the website does nothing more than advise readers that CAN has certain publications available and identifies "est/Forum" as one group for which there was public material available.¹ LEC cannot hope to contradict this statement.

PACKET: The packet of materials cannot be a source of defamation. First, LEC has brought forth no evidence, either in its identification of fact witnesses or in its identification of opinion witnesses, that establishes that any of the publications contained in CAN's packet were defamatory. Second, even if such publications were arguably defamatory, LEC must concede that Kissler did not author those publications. Kissler was responsible for overseeing the selection of articles and for distribution (but not authorship) of the cover sheet for the packet, which has been prepared by a lawyer for CAN and which read simply and truthfully:

The opinion in this public service packet, which consists largely of magazine and newspaper reports, do not necessarily reflect the opinions of the Cult Awareness Network, its staff, directors, or advisors. The compilation of a packet on a particular group does not necessarily mean that it is a cult or is destructive, only that Can receives inquiries about it.

The exoneration of Kissler for copying articles authored by others is examined in detail below, but the statement on the cover of the packet, to the extent that such statement is even arguably attributable to Kissler, is undeniably true.

¹ Upon its closing in bankruptcy, CAN also noted in a separate part of the website that LEC has sued CAN.

III. ANY ACTION BASED ON THE FLYER IS BARRED

An independent ground for barring any claim based on the flyer is that it was first published in 1990 (See Flyer, Exh. F hereto), and this action was not filed until 1994. Moreover, CAN revised the Flyer in 1992 and removed the list of groups, (Kisser dep., Exh. K hereto, pp. 1951, 1953-1955). It is well-established law that any entity that has originally published certain matter alleged to be defamatory may not be sued on that matter more than one year after publication, even if that entity re-copies and re-publishes that same material long after the original publication date and within the limitations period. See, for example, *Winrod v. Time, Inc.*, 334 Ill. App. 59, 78 N.E.2d 708 (1948); *Founding Church of Scientology v. American Medical Ass'n*, 60 Ill. App. 3d 586, 377 N.E.2d 158 (1978); *Wathan v. Equitable Life Assur. Society*, 636 F. Supp. 1530, 1534 (C.D. Ill. 1986).

Based on the foregoing law, therefore, any transmission of the flyer in question may not form the basis for a claim in 1994, because any claim that existed arose no later than the 1990 publication date of the flyer.

IV. LEC HAS NOT SHOWN THAT THESE STATEMENTS IN THE FLYER AND WEBSITE ARE RECEIVED AS STATEMENTS ABOUT LEC

Any defamation claim must prove a false statement concerning the plaintiff was published to a third party, *Padya v. Hoerchler*, 256 Ill. App. 3d 669 (1st Dist. 1993). Here, it is undisputed that a program known as the "Forum", operated by an organization directly related to LEC not only as a corporate predecessor in interest in certain of the assets but also in the familial relationship of the owners of the two organizations, already was a controversial program that was the subject of regular complaints and inquiries to

CAN. Again assuming *arguendo* that any of these statements can be attributable to Kissler, a review of the statements themselves will reveal that neither the flyer nor the website ever mentions LEC by name. The reference to "Forum" does not, in itself, specify either the pre-LEC or the post-LEC program. LEC has adduced no fact or opinion evidence that the flyer or the website must be read to imply only the LEC Forum; thus, a crucial element of any defamation claim is missing as to the flyer and website.

V. **KISSER IS NEITHER AN AUTHOR NOR A MALICIOUS RE-PUBLISHER**

In order to be liable for defamation, Kissler must be either an author of a defamatory statement or a malicious re-publisher; that is, Kissler must have originated a defamatory statement or have re-published a defamatory statement either knowing the statement to be false or without a reasonable basis for believing it to be true. *Catalano, supra*, 83 Ill. 2d at 168-169; 419 N.E.2d at 361 ("cannot be held liable [for re-publication] unless he himself knew at the time when the statement was published that it was false or acted in reckless disregard of its truth or falsity."). None of the allegedly defamatory statements falls within this definition.

FLYER AND WEBSITE: There is absolutely no evidence that Kissler authored the flyer containing the list of names of groups for which CAN had received complaints or the website listing the groups for which CAN had available published materials; indeed, to the contrary, the record is clear that others prepared the list of groups for the 1990 flyer and others in a position of higher authority than Kissler at CAN directed that the list of groups be published in the 1990 flyer. Moreover, others in a position of higher authority than Kissler at CAN directed the content of the website. (Kissler dep., Exh. K

hereto, pp. 1942, 1947, 1955, 1959-1960). Based on such evidence, there is no basis for finding that Kisser exercised the sort of discretion and independent judgment that is tantamount to authorship of these materials. To the extent that Kisser is charged with re-publishing the flyer and website as the defamatory statements of others, there is no evidence that she doubted or had reason to doubt the truth of the statements contained in the flyer or website.

PACKETS: It is even clearer that Kisser did not author any of the articles that were included in the packets that were sent to those who inquired or complained about the Forum in any of its incarnations (pre-LEC or post-LEC). Kisser did exercise some discretion or judgmental authority, however, in deciding which articles to include in the packet labeled “est/Forum”. In assessing whether Kisser exercised that discretion in a manner that would preclude liability for defamation, this Court must apply the standard test: did Kisser either know that the contents of the materials were false or have reason to doubt the truth of the contents of the materials she was re-publishing. The answer to both questions is clearly “no”.

First, the contents of the packets were articles that had appeared in newspapers and magazines the journalistic integrity of which Kisser had no reason to question and which had not issued any retraction or qualification of the articles at the time that article was included in the packet (Kisser dep., Exh. K hereto pp. 33, 362-363); Neither Kisser nor CAN had any policy of including only negative information (*Id.*, pp. 705-706). Second, LEC has not brought forth any evidence of independent public analyses, statements or opinions of it or its Forum program that were ever brought to Kisser’s

attention in any effort to have those articles included in any packet on est/Forum. There is, in short, no evidence that Kissler had any reason to doubt the truth of any of the information contained in the packet.

VI. THERE IS NO EVIDENCE OF COMMUNICATION OF DEFAMATORY STATEMENTS BY KISSER CAUSING INJURY

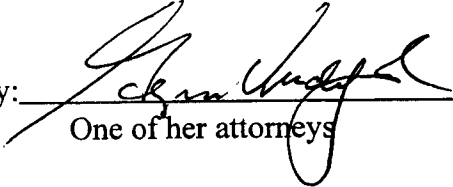
A fundamental element of a defamation claim is the communication of a defamatory statement to a third party and resultant injury. LEC has not adduced any evidence that any statement arguably authored or re-published by Kissler has been communicated to the general public in a manner that has caused LEC injury. LEC's opinion witness disclosure statement references several witnesses who purportedly will identify such injury; however, it is clear that the claims are vague, anecdotal hearsay that will not withstand the rigors of evidentiary rules. For example, Lois Yoon supposedly will testify that LEC's business has been injured by Kissler's statements, but for any specific entity for which LEC claims to have lost business, Yoon cannot identify the source of that entity's concern about LEC's cult characterization and thus cannot attribute that concern to any statement by Kissler (Yoon dep., Exh. L hereto, pp. 32-47).

Likewise, although Yoon claims that she talks with people almost every day who refer to CAN and Kissler as the source of their knowledge about LEC's cult characterization, she cannot identify a single person or entity who specifically identified Kissler as the source of the concern about LEC's cult status (Yoon dep., pp. 51-52). Such unfounded testimony will never be admissible at trial and may not defeat a motion for summary judgment.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Kissler's motion for summary judgment, Kissler respectfully urges this Court to grant her motion and enter judgment in her favor and against LEC on all remaining claims.

Respectfully submitted,
CYNTHIA KISSER

By:  _____
One of her attorneys

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VERIFICATION

Under penalties as provided by law pursuant to §1-109 of the Code of Civil Procedure, the undersigned certifies that the attached exhibits to this instrument are true and authentic copies are true and correct, except as to matters stated therein to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true as follows:

A. True and correct copy of publicly available information regarding the German lawsuit brought by Landmark.

B. True and correct copy of complaint filed by Landmark against *Elle* Magazine.

C. True and correct copy of *Elle* magazine article.

D. True and correct copy of Watchman publication relating to Landmark.

E. True and correct copy of Kisser's Opinion Witness Disclosure Statement, approved by Sumerlin and attached signed statement from Sumerlin.

F. True and correct copy of CAN Flyer identified in discovery in this case and as one of the exhibits to Landmark's complaint.

G. True and correct copy of CAN website referenced in discovery in this case and as one of the exhibits to Landmark's complaint.

H. True and correct copy of CAN packet cover sheet.

I. True and correct copy of report prepared by Dr. Lowell Streiker and tendered to Kisser's attorneys by CAN's attorneys.

J. True and correct copies of telephone sheet reflecting notes of phone calls received by CAN employees, all of which have been previously produced in discovery and have been the subject of deposition inquiry.

K. True and correct copies of Kisser deposition excerpts.

L. True and correct copies of Yoon deposition excerpts.

FURTHER AFFIANT SAYETH NAUGHT

Date: _____

11/30/98

