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 OPPOSITION TO MOTION FOR CONTINUANCE OF HEARING ON DEFENDANT'S DEMURRER AND MOTION TO STRIKE Date: November 18, 1997 Time: 9:30 A.M. Dept: 10 (Room 414) Judge: Hon. David A. Garcia Date Action Filed: September 26, 1997 Trial Date: Not set

I. INTRODUCTION.

Defendant Steven Pressman ("Pressman") opposes the motion of Plaintiff Landmark Education Corporation ("Landmark") to continue the hearing on his demurrer and motion to strike until after the hearing on a motion to compel made by Landmark, and opposes Landmark's request that discovery proceedings in this matter move forward contrary to the mandate of Code of Civil Procedure section 425.16(g).

Landmark's papers in support of its motion for a continuance of the hearing on Pressman's demurrer and motion to strike are a nearly incomprehensible blizzard of irrelevant and often false factual assertions, illogical and impenetrable argument, and

unsupported legal conclusions. Attempting to decipher any cogent positions from them is nearly impossible. However, the following assertions appear to constitute the primary bases for Landmark's motion: (1) Although Landmark has filed a complaint against Pressman, this is a "discovery matter" (Application for Order Shortening Time and Interim Continuance, hereafter "Application," 4:26-5:1), that the "complaint is merely ancillary to the motion to compel" (Application, 2:21), and therefore Pressman is not required or entitled to respond to the complaint in any fashion; (2) that this Court cannot properly address the merits of Pressman's demurrer and motion to strike, because the Discovery Commissioner must necessarily first rule on the merits of the motion to compel (Application, 3:11-14; Memorandum of Points and Authorities in Support of Motion for Continuance of Demurrer and Motion to Strike, hereafter "Points and Authorities," 3:2-3), and thus Landmark is entitled to relief from the mandatory stay of discovery imposed by Code of Civil Procedure section 425.16(g) (Application, 6:5-7, 7:10-13; Points and Authorities 3:6-8), and (3) that the relief requested by Landmark will somehow promote judicial economy (Application, 3:19-4:2; Points and Authorities, 3:5-6).

Even a cursory examination of these claims demonstrates that they are specious. For the reasons discussed below, Landmark's motion for a continuance is completely without merit. It should be denied, and the hearing on Pressman's demurrer and motion to strike should be set for hearing forthwith.

II. LANDMARK'S MOTION FOR CONTINUANCE IS COMPLETELY WITHOUT MERIT, AND SHOULD BE DENIED FORTHWITH.

A. Pressman is obliged and entitled to respond to the complaint in this action, and is entitled to a hearing on his objections to the complaint.

A fundamental premise of Landmark's motion is that Pressman is neither obliged nor entitled to respond to its complaint in this action. This premise forms the foundation for Landmark's argument that this action is purely a "discovery matter" and thus the complaint is "merely ancillary to the motion to compel." Landmark provides no authority for this

remarkable assertion, because there is none. On the contrary, it is indisputably established that Pressman has the obligation to respond to the complaint, and the right to respond in any legally permissible manner.

Under California law, Pressman was obligated to respond to the complaint within 30 days. See Civ. Proc. Code §§ 412.20(a)(3), 430.30, 435. His failure to do so could have had a number of significant consequences, including waiving his objections to the complaint (Civ. Proc. Code § 430.80), having the allegations of the complaint be deemed true (Civ. Proc. Code § 431.20), and having a default taken against him, resulting in an order granting the relief sought in the complaint (Civ. Proc. Code § 585(b)). Whether or not Landmark would have sought to impose any of these consequences is irrelevant, because Pressman was not required to incur the risk that they might.

Nor can it be doubted that Pressman had the right to determine the manner in which he would respond to Landmark's complaint. California law clearly provides defendants with just such a right. See, e.g., Civ. Proc. Code §§ 430.10 ("party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer"); 425.16(f) (special motion to strike may be filed within 60 days of complaint); 432.10 ("party served with a cross-complaint may . . . move [to strike], demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint"); 435(b)(1) ("[a]ny party . . . may serve and file a notice of motion to strike the whole or any part" of any pleading).

It cannot, therefore, be disputed that Pressman had both the obligation and the right to respond to Landmark's complaint, and the right to avail himself of any legally permissible means of doing so. Obviously, it would be both logically and legally insupportable to concede that Pressman has a right to respond and object to the complaint, and then deny him a meaningful hearing on his objections. See, e.g., Payne v. Superior Court, 17 Cal. 3d 908, 909 (1976) (due process requires "at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."). A hearing on Landmark's motion to compel will not provide Pressman with that opportunity, because it

cannot and will not reach the merits of his motion to strike the complaint, and will not provide him with the procedural protections and benefits conferred by Code of Civil Procedure section 425.16.[1] Therefore, Pressman is plainly entitled both to respond to the complaint, and to a hearing on his response.

B. A ruling on Landmark's motion to compel before determination of Pressman's motion to strike is precluded by law.

Again without citation to any legal authority, Landmark asserts that its "discovery motion must be decided before the demurrer and motion to strike can be considered." Points and Authorities, 3:2-3.[2] However, Code of Civil Procedure section 425.16(g) ("Section 425.16(g)") explicitly precludes hearing Landmark's motion to compel before determination of Pressman's motion to strike the complaint.

Section 425.16(g) provides that "[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. . . . The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion [to strike]." Landmark appears to argue that this court can exercise its inherent power to control litigation before it to overrule this statutory procedural mandate. Points and Authorities, 3:15-19. However, there can be no doubt that regardless of the broad statutory and inherent powers of the courts, judges have no authority to issue orders or rules which conflict with any statute or are inconsistent with law. Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953, 966

---

[1] Code of Civil Procedure section 425.16(b) places the burden on plaintiff to establish the probability that plaintiff will prevail on its claim. This must be established by admissible evidence. Evans v. Unkow, 38 Cal. App. 4th 1490, 1497 (1995). Under Code of Civil Procedure section 425.16(c), if defendant prevails in his motion to strike, he is entitled to his attorney's fees and costs.

[2] Landmark supports this assertion by attacking the merits of Pressman's demurrer and motion to strike. Points and Authorities, 3:24-5:6. Aside from the fact that these arguments are irrelevant here because they should be made in opposition to the demurrer and motion to strike, the underlying premise of the arguments is wrong. By arguing that the demurrer does not comply with section 430.30 of the Code of Civil Procedure (Points and Authorities, 3:26-4:4), Landmark apparently takes the position that this court may not take judicial notice of the papers filed in this case. This is clearly erroneous. Evidence Code section 452(d) provides that judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." See also Day v. Sharp, 50 Cal. App. 3d 904, 914 (1975) ("A trial court may properly take judicial notice of the records of any court of record of any state of the United States.") By separate request filed herewith, Pressman requests this court to take judicial notice of all records filed in this action.

(1997). See also Kalivas v. Barry Controls Corporation, 49 Cal. App. 4th 1152, 1158 (1996) (local court rule or practice inconsistent with statute is invalid); Lang v. Superior Court, 153 Cal. App. 3d 510, 515 (1984) (local rules cannot be inconsistent with law or Judicial Council rules). When an existing statute may reasonably be read to prescribe the procedure to be followed, a court may not exercise its inherent or statutory powers to change that statutory process. McKendrick v. Western Zinc Mining Co., 165 Cal. 24, 29 (1913) (power conferred by Code of Civil Procedure section 187 should not be used when statute prescribes procedure); Conae v. Conae, 109 Cal. App. 2d 696, 697 (1952) (an order attempting to change procedural requirements prescribed by statute is a nullity and void).

Landmark may also be contending that it is entitled to a relief from the stay of discovery mandated by Section 425.16(g) based on the provisions of that section. If so, Landmark is clearly wrong. Section 425.16(g) provides that "[t]he court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." Here, Landmark is not seeking an order allowing it to conduct "specified discovery." Rather, Landmark is seeking an order allowing a discovery motion to be heard. The relief sought by Landmark is not permitted under the plain language of the statute. Moreover, the only case substantively interpreting Section 425.16(g) indicates that the good cause justifying relief from stay is a need by the plaintiff to conduct discovery to obtain evidence necessary to establish plaintiff's prima facie case. See Lafayette Morehouse, Inc. v. Chronicle Publishing Company, 37 Cal. App. 4th 855, 868 (1995), cert. denied, 117 S.Ct. 53 (1996).

There can be no doubt that this Court has the jurisdiction to hear and decide Pressman's demurrer and motion to strike, including the issue of applicability of the constitutional and statutory reporter's privileges to the deposition questions Landmark asked Pressman to answer. Pacific States Savings & Loan Co. v. Superior Court, 217 Cal. 517, 521 (1933) (a court with jurisdiction over parties and subject matter has power to determine all questions of law and fact). That San Francisco Superior Court Local Rule 11(d) requires discovery motions to be noticed for hearing in the Discovery Department does not change

this fact. See Dikkers v. Superior Court, 88 Cal. App. 2d 816, 818 (1948) (jurisdiction cannot be limited or enlarged by local rule); Hubert v. Hubert, 78 Cal. App. 2d 498, 502 (1947) (same). Because Section 425.16(g) mandates a stay of Landmark's discovery motion, this court must determine Pressman's demurrer and motion to strike before Landmark's motion to compel is heard.

C. The continuance sought by Landmark will defeat rather than promote judicial economy.

Finally, Landmark asserts that a continuance of the hearing on Pressman's demurrer and motion to strike until after the hearing on the motion to compel will eliminate "duplicative and unnecessary hearings." Even if this Court could order the discovery motion to be heard first to promote judicial economy, which it cannot, the relief sought by Landmark would have precisely the opposite result.

Landmark does not explain why postponing the hearing on the demurrer and motion to strike would eliminate the need for duplicative hearings. The reason for this omission is simple: there is no explanation. For the reasons set forth above, Pressman is unquestionably entitled to a hearing on his demurrer and his motion to strike the complaint. The merits of Pressman's demurrer and motion to strike are not before the discovery commissioner, and cannot be addressed in the motion to compel. Even if the discovery motion were heard first, and even in the extremely unlikely event that the discovery commissioner held that the information sought by Landmark is not protected from compelled disclosure by the California Shield Law, the California constitution, or the First Amendment, that ruling would not eliminate the necessity for a hearing on Pressman's demurrer and motion to strike. The only doctrine that might preclude litigation of the application of those protections to the information sought by Landmark in the context of a subsequent hearing of Pressman's demurrer and motion to strike is the "law of the case" doctrine. However, that doctrine applies only if an appellate court has addressed and decided, on the merits, the issue in question. People v. Scott, 16 Cal. 3d 242, 246 (1976); Lennane v. Franchise Tax Board, 51

Cal. App. 4th 1180, 1186 (1996). Therefore, any decision by the discovery commissioner could not and would not bind this Court.[3]

On the other hand, were the Court to grant either the demurrer or the motion to strike, or both, this matter would be fully resolved and there would be no jurisdictional basis for a hearing on Landmark's discovery motion. Thus, only if the demurrer and the motion to strike are heard first can the possibility of duplicative hearings be prevented.

Furthermore, granting Landmark's motion for a continuance could confront Pressman with an insoluble dilemma. If, contrary to the law, the discovery commissioner compelled Pressman to answer any of the deposition questions at issue before he was given a hearing on the merits of his demurrer and motion to strike, he would be forced to choose between answering and thereby waiving the very rights those motions were brought to protect, and refusing to answer and being held in contempt for failure to comply with the order of the discovery commissioner. No doubt this is precisely the position in which Landmark would like to place Pressman; hence its current motion. However, Pressman cannot equitably be compelled to make such a Hobson's choice.

In summary, the procedure advocated by Landmark not only fails to promote judicial economy, it would positively defeat it. To grant Landmark the relief it seeks would simply permit it to continue its campaign of harassment and intimidation—precisely the result that section 425.16 is intended to prevent.

III. CONCLUSION.

For all of the reasons set forth above, Pressman respectfully requests that this court deny Landmark's Motion For Continuance Of Demurrer And Motion To Strike, Until After

---

[3] For the same reasons, Landmark cannot justifiably assert that a decision by the discovery commissioner favorable to it would constitute a determination that there was a "probability" that it would prevail in its effort to compel Pressman's testimony, under Code of Civil Procedure section 425.16. The discovery commissioner's ruling would not be binding on this Court, which would be required to conduct its own independent consideration of Landmark's probability of success.

Hearing of Motion to Compel, and For Relief From Stay. Pressman further requests that this court set his Demurrer to Complaint and Motion to Strike Complaint for hearing forthwith.

Dated: November 13, 1997.

LAW OFFICES OF JUDY ALEXANDER
JUDY ALEXANDER #116515
824 Bay Avenue, Suite 10
Capitola, CA 95010

By Judy Alexander
Judy Alexander

Attorneys for Defendant STEVEN PRESSMAN