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10
 11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 12 FOR THE CITY AND COUNTY OF SAN FRANCISCO

13 LANDMARK EDUCATION CORPORATION,

14 Plaintiff,

15 v.

16 STEVEN PRESSMAN,

17 Defendant.

CASE NO. 989890

REPLY MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF MOTION
 FOR CONTINUANCE OF HEARING OF
 DEMURRER AND MOTION TO STRIKE,
 UNTIL AFTER HEARING OF MOTION TO
 COMPEL, AND FOR RELIEF FROM STAY

Date: November 18, 1997
 Time: 9:30 a.m.
 Dept: 10, Room 414

Trial Date: Not Applicable

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 19
 20 I. INTRODUCTION

21 Defendant's singularly vituperative Opposition attempts to confuse the simple factual
 22 and legal reasons for this motion, underscoring the weakness of defendant's position. Those reasons
 23 are as follows. Plaintiff is conducting discovery in a case pending in Illinois state court, and
 24 plaintiff's only reason for bringing an action in the San Francisco Superior Court is to obtain an
 25 order compelling answers to some 34 questions asked in a deposition taken in connection with the
 26 Illinois action. The deposition was taken under subpoena from the San Francisco Superior Court

1 and commission from the Illinois court. Defendant refused to answer the questions on the basis of
2 the California newsman's shield. Plaintiff's motion to compel seeks to show that these questions
3 were outside any possible scope of the shield and that the objections made by defendant's counsel
4 were without legal justification, and were instead made in bad faith for the purpose of obstructing
5 and delaying the deposition.

6 Accordingly, plaintiff filed a complaint for the requested discovery order and a
7 motion to compel in the Discovery Department. The complaint is a procedural vehicle for the
8 motion to compel. Rather than responding to the merits of the motion to compel, defendant filed a
9 demurrer and anti-SLAPP motion to strike, both of which are substantively improper in that they are
10 based entirely on the unfounded assumption that the motion to compel has no merit and that the
11 deposition questions are indeed subject to the newsman's shield.

12 While, under these procedural circumstances, no useful purpose is served by hearing
13 motions that ostensibly attack the complaint, plaintiff's present request to continue the hearing of
14 these motions until after the hearing of the motion to compel allows the Discovery Department to
15 rule on the discovery matters that form the foundation for defendant's motions. Thereafter, should
16 defendant choose to proceed with his anti-SLAPP motion and thereby risk incurring liability for
17 plaintiff's attorney's fees, any issues to be resolved by Law and Motion would be greatly simplified.
18 In contrast to the expeditious approach requested by plaintiff, defendant would have Law and
19 Motion consider lengthy discovery matters as a prerequisite to hearing defendant's motions, only to
20 determine that plaintiff is indeed entitled to a hearing of these same matters in the Discovery
21 Department.

22 Defendant's Opposition advances straw man arguments, embellished by superfluous
23 authority for extraneous issues, serving no apparent purpose other than to attempt to mislead and
24 confuse the court. Specifically, these straw men consist of arguments that 1) Mr. Pressman has a
25 right to respond to the complaint; 2) section 425.16(g) of the Code of Civil Procedure ("section
26 425.16(g)") provides for a stay of discovery proceedings; and 3) the court in Law and Motion

1 cannot rely on the findings of the Discovery Commissioner.

2 As will be shown, defendant's straw men readily collapse because 1) defendant's right
3 to answer the complaint is irrelevant to the issue of granting priority to the hearing of plaintiff's
4 motion to compel, except that a determination of the motion to compel is a necessary predicate to
5 defendant's motions because they are premised on the assertion that the motion to compel has no
6 merit; 2) section 425.16(g) also provides that the court "may order that specified discovery be
7 conducted"; and 3) although defendant casts aspersions on the ability of the Discovery
8 Commissioner to comprehend the merit of his position, and expresses misgivings that the
9 Commissioner may even side with the plaintiff, the Discovery and Law and Motion departments are
10 components of a single court, pursuant to San Francisco Local Rule 1.1, and litigation could not be
11 conducted in San Francisco if the departments of the Superior Court did not rely on each other's
12 rulings.

13 As a preliminary matter, plaintiff joins in defendant's (albeit unnecessary) request that
14 the Court take judicial notice of its own files, including the complaint and motion to compel.

15 **II. THE COMPLAINT IS A PROCEDURAL VEHICLE**
16 **FOR THE MOTION TO COMPEL**

17 The background of this matter is that plaintiff Landmark Education Corporation
18 ("Landmark") is conducting discovery in an action filed in the Circuit Court of Cook County,
19 Illinois, *Landmark Education Corporation v. Cult Awareness Network, et al.*, Action No. 94-L-
20 11478 ("the Illinois action"). The deposition of Steven Pressman was taken as part of discovery in
21 the Illinois action, under commission from the Illinois court and subpoena from the San Francisco
22 Superior Court. Contrary to defendant's current theory that he is somehow being harassed,
23 defendant did not move for a protective order, and he appeared for his deposition on the agreed
24 date.

25 The deposition of Mr. Pressman was disrupted by his counsel's numerous objections
26 and instructions not to answer. Landmark contends that these objections and instructions were ill-

1 considered, arbitrary and legally unjustifiable. Accordingly, Landmark sought an order compelling
2 Mr. Pressman to answer these questions. The San Francisco Superior Court had jurisdiction over
3 Mr. Pressman, therefore Landmark filed the present complaint and motion to compel. The only
4 relief requested in the complaint is an order compelling Mr. Pressman to answer certain deposition
5 questions.

6 Defendant has made, and continues to make, elaborate efforts to derail or delay the
7 hearing of plaintiff's procedurally proper and substantively well founded discovery motion. Contrary
8 to defendant's fundamental assertion that the motion to compel has no merit, a cursory review of the
9 Separate Statement of Questions and Responses in Dispute, filed in support of the motion to compel,
10 indicates otherwise. For example, Mr. Pressman, who has interjected himself into litigation
11 involving Landmark, voluntarily issued a declaration supporting the defendant in the case of
12 *Landmark Education Corporation v. Margaret Singer et al.* (San Francisco Superior Court Case
13 No. 976037). During his deposition, however, Mr. Pressman refused to answer questions about
14 statements contained in that declaration.¹ As demonstrated in the motion to compel, defendant's
15 refusal to answer on the basis of the newsman's shield was improper because, even if the shield were
16 otherwise available to Mr. Pressman, where a newsman has voluntarily entered into the litigation
17 forum, the veracity of claims he has put before the court is subject to discovery. *Dalitz v. Penthouse*
18 *International, Ltd.* (1985) 168 Cal.App.3d 468, 480-481.

19 The complaint is plaintiff's procedural method of obtaining a hearing in the San
20 Francisco Superior Court for its discovery motion and is in the nature of a special proceeding. The
21 procedure itself is not challenged by defendant. Instead, defendant ostensibly attempts to attack the
22 content of the complaint. The complaint, however, is simple and straightforward, reciting the
23 procedural background that brought this matter to the San Francisco Superior Court (Complaint ¶¶
24 3, 5, 7, 8) and the relief requested (Complaint ¶ 10). Specifically, the complaint seeks, "An Order

25 ¹ In plaintiff's motion to compel, Mr. Pressman's declaration is Exh. G to the Declaration of
26 Carol P. LaPlant, and this matter is discussed in the Separate Statement of Questions and
Responses in Dispute, at 11:9-19.

1 compelling Mr. Pressman to answer all questions he has refused to answer that are outside the
2 proper scope of the asserted newsman's shield and are not subject to any privilege." (Complaint,
3 3:10-12.)

4 In attempting to challenge the substance of the vehicle for the motion to compel,
5 rather than responding to the motion itself, defendant is caught in a major contradiction. Defendant
6 argues that the discovery motion has sufficient merit that he, "could conceivably be subjected to an
7 order compelling further answers" (Defendant's Ex Parte Application for Stay of Discovery
8 Proceedings, 2:11-15) while stridently asserting that "Plaintiff cannot demonstrate a likelihood of
9 prevailing on its claim". (Notice of Motion to Strike Complaint, 1:25-2:2.)

10 This contradiction goes to the heart of the present conflict. Defendant's concession
11 that plaintiff *may* prevail on the discovery matters defeats the basic premise of his motions and
12 shows them to be a sham. In order to prevail on his anti-SLAPP motion to strike, plaintiff must
13 show that the complaint is meritless. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816-817.
14 This he admittedly cannot do, despite his bluster to the contrary.

15 Similarly, in order to prevail on the demurrer, defendant must show, pursuant to
16 section 430.30 of the Code of Civil Procedure, that the complaint, *on its face*, falls into the
17 categories for demurrer listed in section 430.10. Defendant's stated ground for demurrer is that the
18 relief sought in the complaint is barred by the federal and state Constitutions and by California law.
19 (Notice of Demurrer, 1:25-28.) The complaint, however, seeks an order "compelling Mr. Pressman
20 to answer deposition questions *that are not subject to the newsman's shield*". (Complaint, ¶ 10.
21 *Emphasis added.*) The complaint on its face, therefore, seeks relief that is exactly the opposite of
22 defendant's ground for demurrer.

23 A demurrer may also be based on matters that are subject to judicial notice, and
24 defendant's demurrer asks the court to take judicial notice of the complaint in the Illinois action and
25 various declarations filed in support of Mr. Pressman's unsuccessful anti-SLAPP motion in a
26 previous lawsuit. There is nothing whatsoever on the face of the documents for which judicial notice

1 is requested that could even remotely support the demurrer. Instead, the demurrer consists entirely
 2 of insinuation about plaintiff's purportedly ulterior motives for taking Mr. Pressman's deposition
 3 and, like the present anti-SLAPP motion, is founded on the extremely shaky assumption that the
 4 motion to compel has no merit. A speaking demurrer, based on extrinsic evidence, is improper and
 5 cannot be granted. *Ion Equipment Corporation v. Nelson* (1980) 110 Cal.App.3d 868, 881.

6 Resolution of the underlying discovery issues is the necessary predicate to the
 7 demurrer and the motion to strike. Defendant's reluctance to obtain a determination of the motion
 8 to compel on the merits underscores the fatal weaknesses of his motions and shows them to be sham
 9 motions brought for the improper purposes of delay and harassment. While plaintiff can, and will,
 10 request an award of attorney's fees in opposing the anti-SLAPP motion, pursuant to section
 11 425.16(c), that award alone will not fully compensate plaintiff for the irreparable harm done by
 12 further delaying the completion of this discovery matter.² That harm can only be avoided by
 13 granting plaintiff's request that the motion to compel be heard prior to defendant's motions.

14 **III. SECTION 425.16(G) DOES NOT PRECLUDE GRANTING PRIORITY**

15 The most disingenuous argument in defendant's Opposition is the assertion that
 16 subsection (g) of section 425.16 precludes the court from granting the relief requested. Relying on
 17 selected language from subsection (g) that imposes a stay, defendant ignores other language in the
 18 same subsection providing that the court, "for good cause shown, may order that specified discovery
 19 be conducted." Defendant then cites three inapposite cases holding that local rules must not conflict
 20 with statutes, a proposition that has no bearing on the issue of whether the court may exercise its
 21 statutory power under subsection (g) to order that a discovery proceeding take place. Equally
 22 inexplicable, defendant then cites additional inapposite authority for the proposition that the court
 23 may not issue an order that is prescribed by statute. Subsection (g), on its face, however, *permits*

24 ² The deposition was held on June 5, 1997. The hearing of the motion to compel was
 25 scheduled for November 10, but, at the request of Mr. Pressman's attorney, was re-
 26 scheduled to November 20. Now, pursuant to this court's order of November 18, 1997, all
 motions are off calendar.

1 the requested order.

2 After arguing at length that subsection (g) prohibits the requested relief, defendant
3 then grudgingly admits that the subsection indeed allows the court to order discovery, but defendant
4 still does not stop trying to mislead the court. Contrary to defendant's assertion that only one case
5 has construed the scope of the court's discretion under this section, the court in *Zhao v. Wong*
6 (1996) 48 Cal.App.4th 1114 held that injustice to the plaintiff can be "obviated by a liberal policy of
7 ordering continuances and allowing further discovery under subdivision (g)." *Zhao* at 1129-1130.

8 The case cited by defendant, *Lafayette Morehouse v. Chronicle Publishing Co.*
9 (1995) 37 Cal.App.4th 855, relied on in *Zhao*, held that due process for the plaintiff may require that
10 the court, "liberally exercise its discretion by authorizing reasonable and specified discovery" and
11 should continue the hearing of the anti-SLAPP motion, "so that the discovery it authorized can be
12 completed where a reasonable exercise of judicial discretion dictates the necessity therefor."
13 *Lafayette Morehouse* at 868. Here, the necessity is great.

14 There is no caselaw supporting defendant's notion that the court has discretion to
15 order discovery but not a discovery proceeding, such as a motion to compel. Here again, defendant
16 attempts to create the illusion of legal support by citing inapposite authority for a proposition that is
17 entirely extraneous to defendant's argument.³ Not surprisingly, there are no decisions applying an
18 anti-SLAPP motion to block the hearing of a motion to compel: there is no statutory basis
19 whatsoever under section 425.16 to allow defendant to bring an anti-SLAPP motion in this context.

20 "Under the plain terms of section 425.16, the motion to strike remedy
21 can be employed only where the plaintiff has launched litigation
22 stemming from 'any act ... in furtherance of the [defendant's] right of
23 petition or free speech ... in connection with a public issue.' (§
24 425.16(b).)" *Braun v. Chronicle Publishing Co.* (1997) 52
25 Cal.App.4th 1036, 1043.

26 The question of whether objections raised by defendant's counsel during a deposition

25 ³ Defendant cites two 50-year old decisions, *Dijkers v. Superior Court* (1948) 88 Cal.App.2d
26 816, and *Hubert v. Hubert* (1947) 78 Cal.App.2d 498, for the proposition that "jurisdiction
cannot be limited or enlarged by local rule." (Opposition, 6:1-3.)

1 were legally justified, is hardly a public issue involving a right of free speech. Defendant's self-
2 serving assertion that he intends to raise a free speech defense to the motion to compel – a defense
3 that depends upon the scope and applicability of the newsman's shield in regard to specific
4 deposition questions – does not automatically qualify him to bring an anti-SLAPP motion.

5 “[S]ection 425.16 does not apply in every case where the defendant
6 may be able to raise a First Amendment defense to a cause of action.
7 Rather, it is limited to exposing and dismissing SLAPP suits – lawsuits
8 ‘brought primarily to chill the valid exercise of the constitutional rights
9 of free speech and petition for the redress of grievances’ ‘in
10 connection with a public issue.’ (§ 425.16(a),(b).)” *Wilcox v.*
11 *Superior Court, supra, 27 Cal.App.4th 819.*

12 Mr. Pressman's refusal to answer questions during his deposition and his attorney's
13 inopportune objections are plainly not the free speech issues that can support an anti-SLAPP motion.
14 For the court to allow discovery to be stayed on the basis of this frivolous anti-SLAPP motion
15 would be an injustice, and relief from the stay is authorized “for good cause shown,” pursuant to
16 section 425.16(g). Accordingly, plaintiff requests that the court order relief from the stay, allowing
17 the discovery motion to be heard prior to the hearing, if any, on the anti-SLAPP motion. Any due
18 process right of defendant to argue his anti-SLAPP motion may be fully exercised at that time.

19 IV. THE REQUESTED PRIORITY PROMOTES JUDICIAL ECONOMY

20 Defendant feigns inability to understand how resolution of the discovery motion prior
21 to the demurrer and anti-SLAPP motion would obviate the need for duplicative hearings and
22 promote judicial economy. The explanation is that all three motions concern the same issue, namely
23 whether the newsman's shield is applicable to the 34 deposition questions that are the subject of the
24 motion to compel. That issue must be determined in order to rule on the merits of the demurrer and
25 anti-SLAPP motion, assuming these motions are not summarily rejected as improper. If defendant's
26 motions are heard first, the denial of these motions would only allow plaintiff's motion to compel to
27 proceed, after months of additional delay, requiring the Discovery Commissioner to then consider
28 the same discovery issue. Instead, if the motion to compel is heard first, this central issue will only
29 have to be considered once. Thereafter, should defendant wish to proceed with the hearings of his

1 motions, the key issue would already be resolved.

2 Defendant provides no authority for his bizarre assertion that the Discovery
3 Department and the Law and Motion Department are separate courts and that Law and Motion
4 cannot adopt the findings of the Discovery Commissioner. Defendant's concern that the
5 Commissioner will be unable to comprehend the Constitutional basis for the newsman's shield law -
6 as opposed to the actual issue of whether the shield is applicable to the specific deposition questions
7 - is a tacit concession that defendant may be unable to justify using the shield in the context of these
8 questions.

9 Defendant's final concern that he may be faced with a Hobson's choice between
10 obeying the discovery order to answer the subject questions, or, instead, proceeding with his
11 demurrer and anti-SLAPP motion, is illusory. If defendant loses the motion to compel, the
12 foundational issue of his motions will have been resolved against him, thereby precluding defendant
13 from prevailing on his motions.

14 V. CONCLUSION

15 The acrimonious tone of the Opposition underscores the weakness of defendant's
16 arguments. Defendant cannot establish that there is any legal or logical reason why the discovery
17 issue should not be heard first. The only purpose for filing this action in the San Francisco Superior
18 Court was to obtain an order allowing Landmark to complete the deposition of Steven Pressman,
19 begun on June 5, 1997. Rather than argue the merits of this discovery matter, defendant has further
20 delayed resolution by filing meritless motions and demanding that these be heard before this matter
21 can be heard in Discovery.

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If this request for priority is denied, Landmark will suffer further delay and be forced to litigate the same discovery issue twice. Unnecessary delay and expense can only be avoided by granting Landmark's request for relief from the stay and continuing the hearing of defendant's motion until after the hearing of the motion to compel. For all these reasons, Landmark respectfully requests that the court so order.

Dated: November 17, 1997

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