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SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF LOS ANGELES

14 RANCHO LA COSTA, INC., a Nevada)
 15 corporation, et al.,)
 16 Plaintiffs,)
 17 vs.)
 18 PENTHOUSE INTERNATIONAL, LTD.,)
 19 a corporation, et al.,)
 20 Defendants.)
 21

C 124961

REPLY AFFIDAVIT OF
ALAN M. GELB

2/25/76
970

22 STATE OF NEW YORK)
 23 COUNTY OF NEW YORK) ss.:

ALAN M. GELB, being duly sworn, deposes and says that:

26 1. I am a member of the firm of Finley, Kumble, Wagner,
 27 Heine, Underberg & Grutman, attorneys for defendants and have per-
 28 sonal knowledge of the facts set forth herein. I submit this
 29 affidavit in reply to plaintiffs' answering papers and in support
 30 of defendants' motion for summary judgment dismissing this action.

31 2. Plaintiffs' answering papers confirm the accuracy
 32 of the admission in the testimony of La Costa's president Merv

1 Adelson that plaintiffs have no evidence of malice in the pub-
2 lication of the Penthouse Article (Adelson Tr. 493-501). They
3 further demonstrate additional bases for the dismissal of this
4 action. The absence of any material triable issue of fact, may be
5 gathered from the following:

- 6 a. there is no competent evidence that any of the
7 statements complained of in the Article were
8 false;
- 9 b. there is no evidence that the authors or publisher
10 of the Article actually knew any of the statements
11 complained of were false and fabricated them;
- 12 c. there is no evidence that the authors or the pub-
13 lisher of the Article had a "high degree of aware-
14 ness of the probable falsity," of any of the state-
15 ments complained of, or, indeed, any degree of
16 awareness.

17 In addition, plaintiffs have totally failed to explain
18 or excuse their obstinate refusal to comply with the order of
19 this Court directing that they produce their principal witness
20 plaintiff Dalitz for deposition as agreed, to permit access to
21 federal law enforcement files concerning them or to answer key
22 interrogatories probing their criminal involvements. The chilling
23 effect of all of such disclosure was material to defendants' cap-
24 acity to rebut plaintiffs' assertions that the Article contained
25 false statements, an essential element of proof of malice. For
26 plaintiffs to prlong the pendency of a \$630,000,000 libel case
27 by main force in refusing to submit relevant discovery has such a
28 necessarily chilling effect on defendants' First Amendment rights
29 as proves independent bases for dismissal of this action.

31 ...

32 ...

1 A. The Fatal Defects in Plaintiffs' Answering Papers

2 3. The purported opposition to the instant motion takes
3 the form of two affidavits, one by a plaintiff and the other by a
4 professor. The Adelson affidavit is crude and tasteless. Its
5 lurid preoccupation with the personal sexual activities of Pent-
6 house publisher Robert C. Guccione and the avowedly frank approach
7 of the defendant magazine to matters of human sexuality, consti-
8 tutes a naked attempt to prejudice this court into withholding
9 from defendants the protections of the First Amendment based upon
10 personal bias. It is to be remembered, however, that it is the
11 same Constitution which gives plaintiffs, who have reputations as
12 gangsters and as intimately involved with some of the nation's
13 most vile personalities and reprehensible activities, the right
14 to freely speak their opinions of two of the defendants in this
15 case, as gives Penthouse and its chief executive officer the
16 right to publish their views in their way.

17 Considering Adelson's punctilious attitude concerning
18 matters of sexual niceties, it is surprising that La Costa failed
19 to bring suit when Pinnacle Books published "Legacy of Doubt" by
20 Peter Noyes in 1973 charging that "prostitution flourished at La
21 Costa" (See Bergman Moving Affid., December 5, 1975, p. 21) or
22 when the Chicago Tribune published a similar allegation (Ex. G5).

23 Most importantly, however, for the purposes of this
24 motion, the Adelson affidavit is devoid of the "clear and convinc-
25 ing evidence", and indeed any evidence at all, of actual malice
26 necessary to prolong the agony and vast expense of this unwarrant-
27 ed litigation. The affidavit of author Lowell Bergman submitted
28 herewith details the flagrant misstatements by Adelson of the con-
29 tents of the record and exposes the bankrupt quality of their
30 protestations.

31 It should be observed that an Adelson affidavit is
32 a singularly inappropriate vehicle for presenting alleged evi-

1 dence of malice, when he refused to be deposed on that critical
2 issue after he admitted having no proof to support that charge
3 (See my moving affidavit, sworn to December 5, 1975; Adelson Tr.
4 493-501).

5 4. The Blakey affidavit is simply meaningless. There
6 is no room for so-called "expert opinion" on this motion. There
7 is but one determination to be made upon this court's review of
8 the record in this case, namely the presence or absence of facts
9 demonstrating "malice" in the constitutional sense, "clear and con-
10 vincing evidence" of either (i) deliberate falsification of state-
11 ments shown by plaintiffs to be both false and libelous, or of
12 (ii) reckless publication of such statements despite the publish-
13 er's high degree of awareness of their probable falsity. No self-
14 styled "expert" is competent to give proofs concerning the content
15 of the record which speaks for itself. That determination must if
16 at all emerge, upon "clear and convincing evidence" in the record
17 itself and from no other source. This effort at usurpation of the
18 court's role is accordingly not probative, competent or admissible
19 either on this proceeding or at any other juncture in the case.
20 Since the issue of malice is not susceptible of expert opinion,
21 this gratuitous intrusion must be disregarded.

22 5. Further, notwithstanding any qualifications the
23 professor may have to speak on the subject of organized crime, he
24 reveals no basis for claiming expertise in journalism generally
25 or in investigative reportage of organized crime in particular.
26 The absence of such expertise may explain why his affidavit is
27 singularly devoid of any suggestion concerning so much as a
28 single source which the authors failed to probe during the course
29 of their 18 month, nationwide, investigation, which might have re-
30 vealed that some statement in the article was false.

31 The professor appears to claim that had he been consult
32 ed, he could have told them that Moe Dalitz used to be a gangster

1 (Blakey Affid. pp. 13-14). Presumably he could further advise the
2 court as to when Dalitz stopped being a gangster. Why the authors
3 should have searched for professor Blakey under a mountain of in-
4 formation to the contrary is, however, unexplained.

5 6. The professor's principal criticism consists of a
6 series of charges of negligence which will be hereinafter examined
7 For the purposes of evaluating the quality of plaintiffs' opposi-
8 tion to these motions, the charge of negligence is of substantial
9 significance because the governing authorities uniformly hold
10 that negligence has been repudiated as a constitutional standard
11 for liability in libel cases involving public figures.

12 Of equal importance is the professor's total omission
13 to show either that a more careful approach would have produced
14 evidence contrary to the authors' substantially documented find-
15 ings or that any of the alleged assertions of lack of prudence
16 constitutes evidence of either deliberate falsification or of the
17 high degree of awareness of probable falsity, which are the con-
18 stitutional sine qua non for a finding of malice in this case.
19 Indeed, he expressly disclaims knowledge of the falsity of the
20 Article's contents (Affid. p. 13, L. 19-22). It thus necessarily
21 follows that he is without qualifications, expert or otherwise,
22 to opine upon the authors' state of mind as to whether they knew
23 any of their statements were untrue or had a high degree of aware-
24 ness that they were probably untrue.

25 (a) Penthouse is chided by the professor for what he
26 calls its "sensationalist and rather salacious attention to sex"
27 (P. 7, L. 1) as though the expression of that personal opinion
28 on his part could conceivably operate to create some species of
29 second class citizenship for Penthouse before the First Amendment
30 One might have expected a greater respect for the sanctity of its
31 protections from a professor of law.

32 This is not a proper forum in which to debate the pro-