

1 PETER D. KEISLER  
 Assistant Attorney General  
 2 KEVIN V. RYAN (CSBN 118321)  
 United States Attorney  
 3 JOANN M. SWANSON (CSBN 88143)  
 Chief, Civil Division  
 4 CLAIRE T. CORMIER (CSBN 154364)  
 Assistant United States Attorney  
 5 DEBRA D. FOWLER (VSB 30574)  
 Senior Aviation Counsel  
 6 ASHLEY E. DEMPSEY (CSBN 198791)  
 Trial Attorney  
 7 Civil Division, Torts Branch  
 U.S. Department of Justice  
 8 Post Office Box 14271  
 Washington, DC 20044-4271  
 9 Phone: (202) 616-4024  
 Fax: (202) 616-4159  
 10 email: [ashley.dempsey@usdoj.gov](mailto:ashley.dempsey@usdoj.gov)

11 Attorneys for United States of America

12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION - E-FILING

15 STEVE FUNDERBURG, et al.,  
 16  
 Plaintiff,  
 17 v.  
 18 UNITED STATES OF AMERICA, et  
 19 al.  
 20 Defendants.

CASE NO. C 02-05461 JW (RS)  
 (Consolidated W/ Case No. 03-04006)

**UNITED STATES' NOTICE OF  
 MOTION AND MOTION TO COMPEL  
 DOCUMENTS FROM NON-PARTY  
 CHURCH OF SCIENTOLOGY**

21 AND RELATED AND  
 CONSOLIDATED ACTIONS

[Filed concurrently with Declaration of  
 Ashley E. Dempsey and Proposed Order]

Date: Dec. 8, 2004  
 Time: 9:30 a.m.  
 Courtroom: 4

Hon. Magistrate Judge Richard Seeborg

26  
 27  
 28 Motion to Compel Re: Church of Scientology  
 Case No. C 02-05461JW  
 (Consolidated W/ Case No. 03-04006)

**NOTICE OF MOTION**

1 TO THE CHURCH OF SCIENTOLOGY, ALL PARTIES, AND THEIR  
2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on December 8, 2004, at 9:30 a.m., or as soon  
4 thereafter as the matter may be heard in Courtroom 4 of the above identified Court,  
5 located at 280 South First Street, San Jose, California, the United States will move for an  
6 Order compelling non-party, the Church of Scientology, to produce documents responsive  
7 to a subpoena.

8 This Motion is based upon this Notice, the following Memorandum of Points and  
9 Authorities, the concurrently filed Declaration of Ashley E. Dempsey and Exhibits, all  
10 pleadings and records on file with the Court in this action, and on such oral argument and  
11 additional evidence as the Court may permit.

**RELIEF SOUGHT BY DEFENDANT**

12 Defendant moves for an order compelling non-party, the Church of Scientology, to  
13 produce all documents and things responsive to category nos. 5-10 of the subpoena duly  
14 served upon it by Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

15 This case arises out of the crash of a single engine aircraft on August 5, 2001 near  
16 Weaverville, California. Plaintiff Mark Sajjadi, M.D. was the pilot of the aircraft at the  
17 time of the accident. On board with Dr. Sajjadi were his daughter, Dr. Susan Booth, her  
18 son, Plaintiff M.D.B., a minor, and Plaintiff Steve Funderburg, Dr. Booth's husband. Dr.  
19 Booth was killed and the other Plaintiffs were injured.

20 After the accident, Plaintiffs filed a Complaint against the United States under the  
21 Federal Tort Claims Act. In the Complaint, Plaintiffs seek economic damages related to  
22 the death of Dr. Booth, as well as damages for infliction of emotional distress.

1 Discovery has revealed that Dr. Booth and Mr. Funderburg contributed a large  
2 percentage of their income to non-party the Church of Scientology ("the Church") and  
3 that Mr. Funderburg received counseling from the Church following the accident. On  
4 July 12, 2004, Defendant United States of America issued a subpoena to the Church,  
5 which compelled production of, inter alia, documents relating to mental health counseling  
6 of Plaintiffs and financial contributions by Plaintiff Steve Funderburg and Susan Booth.  
7 (See Declaration of Ashley E. Dempsey, ¶ 1 and Ex. "A" thereto.) The subpoena  
8 requested production of responsive records on July 28, 2004. (Ex. "A.") The Church did  
9 not serve any objections to the subpoena upon Defendant United States at any time before  
10 or after July 28, 2004. (Dempsey Decl., ¶ 3.) The Church produced some initial  
11 documents on September 1, 2004, and a few additional documents on October 6, 2004.  
12 The Church has not produced any documents responsive to category nos. 5-10 of the  
13 subpoena which seek counseling records and records of donations.

14 Informal efforts to resolve the matter with the Church proved unfruitful.  
15 (Dempsey Decl., ¶¶ 2-6.) As such, Defendant brings this Motion to Compel the Church  
16 to provide all documents responsive to the subpoena. See Fed. R. Civ. P. 37 and  
17 45(c)(2)(B).

## 18 II. ARGUMENT

19 Parties are entitled to discovery of information regarding "any matter, not  
20 privileged, that is relevant to the claim or defense of any party" as well as matters  
21 "relevant to the subject matter involved in the litigation." Fed. R. Civ. P. 26(b)(1).  
22 Relevant evidence is defined as, "evidence having any tendency to make the existence of  
23 any fact that is of consequence to the determination of the action more probable than it  
24 would be without the evidence." Fed. R. Evid. 401. In addition, discovery of matters that  
25 are "reasonably calculated to lead to the discovery of admissible evidence" is permissible.  
26 See Fed. R. Civ. P. 26(b)(1). With regard to subpoenas, Rule 45(c)(2)(B) provides that  
27 "the party serving the subpoena may, upon notice to the person commanded to produce,

1 move at any time for an order to compel the production." Defendant has provided notice  
2 to the Church, and for the reasons set forth herein respectfully requests this Court enter an  
3 Order directing the Church to provide all documents responsive to the subpoena.

4 A. Good Cause Exists to Order the Church to Produce all Documents  
5 Responsive to Category Nos. 5-7.

6 1. *The Documents Are Discoverable*

7 Attachment "A" to the subpoena contained ten categories of documents. ( Ex.  
8 "A.") Categories five through seven describe documents reflecting payments and/or  
9 donations made by Plaintiff Steve Funderburg and/or the decedent Susan Booth to the  
10 Church, as well as payments made by the Church to Mr. Funderburg and/or Dr. Booth.  
11 (Ex. "A.") Specifically, the subpoena itemized the following categories:

- 12 5. Each and every WRITING pertaining to any payments made by Steve  
13 Funderburg to the Church of Scientology or any of its agents, subsidiaries  
14 or affiliates from January 1, 1999 to the present.
- 15 6. Each and every WRITING pertaining to any payments made by the Church  
16 of Scientology or any of its agents, subsidiaries or affiliates to Steve  
17 Funderburg and/or Susan Booth, D.D.S. from January 1, 1999 to the  
18 present.
- 19 7. All WRITINGS relating to any financial donations made by Susan Booth  
20 (aka Susan Funderburg) and/or Steve Funderburg to the Church of  
21 Scientology or any of its agents, subsidiaries or affiliates from January 1,  
22 1999 to the present.

23 (Ex. "A.") The Church has refused to provide any documents responsive to these  
24 categories of the subpoena.

25 These documents bear directly upon the claims of Steve Funderburg and M.D.B.  
26 for economic loss. Discovery has revealed that Dr. Booth and Mr. Funderburg  
27 contributed a large portion of their income to the Church.<sup>1</sup> In determining economic loss  
28

---

25 <sup>1</sup> For example, in 2001, the year of the accident, the annualized, charitable  
26 contribution for the Booth/Funderburg household is estimated by the United States'  
27 economic expert to be \$153,417.00, which constitutes roughly seventy percent of  
28 household income.

1 under California law, deductions are made for, *inter alia*, the decedent's consumption.  
 2 See, e.g., United States v. English, 521 F.2d 63 (9th Cir. 1975). Such contributions  
 3 substantially reduce the decedent's available funds and are relevant to Plaintiffs' claim for  
 4 economic loss. However, the records produced by the Plaintiffs concerning charitable  
 5 contributions were incomplete. Documents detailing financial contributions are  
 6 discoverable under Fed. R. Civ. P. 26(b)(1), and the Church should be compelled to  
 7 provide all documents responsive to categories five through seven of the subpoena.  
 8 See Fed. R. Civ. P. 37(a) and 45(c)(2)(B).

9           2.       *All Objections Have Been Waived for Failure to Object*

10           The Church apparently claims that documents responsive to categories five  
 11 through seven exist, but are being withheld on the grounds of privilege. (Dempsey Decl.,  
 12 ¶ 3.) However, the Church has waived all objections by failing to serve this Defendant  
 13 with objections. A party who objects to a subpoena for records must serve written  
 14 objections within 14 days of service of the subpoena, or, at any time prior to the time  
 15 specified for production, if the subpoena was served less than 14 days prior to the  
 16 deposition. See Fed. R. Civ. P. 45(c)(2)(B).

17           Here, the subpoena was served on July 12, 2004, and called for production of  
 18 documents on July 28, 2004. (Ex. "A.") The Church failed to serve objections upon the  
 19 United States at any time prior to, or at the time for production. (Dempsey Decl., ¶ 3.) In  
 20 fact, to this date, the Church has not served written objections upon Defendant.<sup>2</sup>  
 21 (Dempsey Decl., ¶ 3.) The Church's failure to object to the subpoena constitutes a  
 22 waiver of any and all objections, including any claims of privilege. See, e.g., In re DG  
 23 Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998) (waiver results where assertion of

---

24  
 25           <sup>2</sup> The United States is informed that the Church served objections to the subpoena  
 26 upon Plaintiff Trinity County on September 21, 2004, by facsimile. However, even  
 27 assuming, *arguendo*, that this can be considered service upon the United States, the  
 objections were two months late and are, therefore, untimely. Fed. R. Civ. P. 45(c)(2)(B).

1 privilege not asserted within 14 days); U.S. ex rel. Schwartz v. TRW, Inc., 211 F.R.D.  
2 388, 392 (C.D. Cal. 2002) (finding that “[f]ailure to serve timely objections waives all  
3 grounds for objection, including privilege”).

4 B. Good Cause Exists to Order the Church to Produce all Documents  
5 Responsive to Category Nos. 8-10.

6 Categories eight through ten describe documents pertaining to mental health  
7 counseling provided to Plaintiffs Steve Funderburg, M.D.B., and/or Plaintiffs' decedent  
8 Dr. Susan Booth:

- 9 8. All DOCUMENTS that evidence any mental health counseling (including  
10 but not limited to psychotherapy) provided to [M.D.B.] by, on behalf of or  
11 by arrangement or referral through the Church of Scientology from January  
12 1, 1999 to the present.
- 12 9. All DOCUMENTS that evidence mental health counseling (including but  
13 not limited to psychotherapy) provided to Steve Funderburg by, on behalf of  
14 or by arrangement or referral through the Church of Scientology from  
15 January 1, 1999 to the present.
- 14 10. All DOCUMENTS that evidence any mental health counseling (including  
15 but not limited to psychotherapy) provided to Susan Booth (a.k.a. Susan  
16 Funderburg) by, on behalf of or by arrangement or referral through the  
17 Church of Scientology from January 1, 1999 to August 5, 2001.

16 (Ex. "A.") The Church apparently claims that it has no documents responsive to these  
17 categories. (Ex. "C.")

18 Documents responsive to this request are highly relevant to Plaintiff Steve  
19 Funderburg and M.D.B.'s respective causes of action for infliction of emotional distress  
20 against the United States. Further, documents pertaining to counseling sought by Dr.  
21 Booth bear upon Plaintiffs' claim for loss of comfort, society and affection. The United  
22 States has been informally advised that the Church contends that it does not possess  
23 documents responsive to this request. (Ex. "C.") However, the United States requested  
24 the Church to perform an additional search for records in light of the deposition testimony  
25 of Steve Funderburg. (Ex. "C" and Dempsey Decl., ¶ 6.) The United States specifically  
26 advised the Church's counsel that Plaintiff Steve Funderburg testified that he received  
27

1 counseling and/or a process similar to counseling that the Church entitles "auditing" after  
2 the accident on August 5, 2001. (Ex. "C.") Moreover, Mr. Funderburg testified that the  
3 "auditor," the Church member who acts as the counselor, took notes during the auditing  
4 sessions. (Ex. "C.") The Church has not responded to Defendant's request that it conduct  
5 an additional search for additional documents described in the deposition of Mr.  
6 Funderburg. Notes and/or any other writings relating to any counseling or "auditing" are  
7 responsive to the subpoena and the Church waived any claim of privilege it may have had  
8 by failing to serve objections upon Defendant.

9       The requested documents cannot be obtained from Plaintiffs or any other source.  
10 Mr. Funderburg testified in his deposition that the Church's auditors/counselors are the  
11 only persons in possession of the records. As such, good cause exists to compel the  
12 Church to produce documents responsive to category nos. 8-10 of the subpoena, including  
13 any "auditor's" notes. See Fed. R. Civ. P. 37 and 45(c)(2)(B).

14

15 ///

16

17 ///

18

19 ///

20

21 ///

22

23 ///

24

25 ///

26

27

III.

CONCLUSION

For the reasons set forth above, the United States respectfully requests the Court enter an order directing the Church to produce all documents responsive to categories number five through 10 of the subpoena.

Dated: November 3, 2004

PETER D. KEISLER  
Assistant Attorney General

KEVIN V. RYAN  
United States Attorney

CLAIRE T. CORMIER  
Assistant United States Attorney

By: /s/  
DEBRA D. FOWLER  
Senior Aviation Counsel  
ASHLEY E. DEMPSEY  
Trial Attorney  
Civil Division, Torts Branch  
U.S. Department of Justice

Of Counsel:  
Mark Baylen, Esq.  
Litigation Division, AGC-400  
Office of the Chief Counsel  
Federal Aviation Administration



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the United States Motion to Compel directed to the Church of Scientology was dispatched for next day delivery with FedEx, charges to be billed to sender, on this 3rd day of November 2004 to the following person:

Leslie Holmes, Esq.  
Hogan, Holmes & Usoz, LLP  
333 West Santa Clara Street, Suite 800  
San Jose, CA 95113  
*Counsel for Non-Party The Church of Scientology*

/s/ \_\_\_\_\_  
Employee  
U.S. Department of Justice

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28