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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DIVISION OF CALIFORNIA  
10 SAN JOSE DIVISION - E-FILING

11 STEVE FUNDERBURG, et al., )

12 Plaintiffs, )

13 v. )

14 UNITED STATES OF AMERICA, et al., )

15 Defendants. )

16 AND RELATED AND  
17 CONSOLIDATED ACTIONS )

Case No. C 02-05461 JW (RS)  
(Consolidated w/Case No. 03-04006)

NON-PARTY CHURCH OF  
SCIENTOLOGY LOS GATOS'  
OPPOSITION TO MOTION TO  
COMPEL

Date: December 8, 2004  
Time: 9:30 a.m.

Dept: 4  
Hon. Magistrate Judge Richard Seeborg

18 Non-party Church of Scientology Los Gatos ("COS-LG") does hereby oppose the United  
19 States of America's ("United States") Motion to Compel Documents on the grounds that all  
20 records sought under the subpoena have either been produced or do not exist, or now the United  
21 States appears to want to modify the category of the requested documents. The new category of  
22 documents are subject to the priest-penitent privilege.

23 **BACKGROUND TO MOTION**

24 In mid-July, 2004, COS-LG was served with two (2) separate subpoenas purporting to  
25 seek relevant information relating to plaintiffs claims against defendants. One subpoena was  
26 issued out of this Court, while the other one was issued out of a Superior Court in California.  
27 Both subpoenas sought ten (10) categories of identical documents. Both subpoenas identified

1 Compex Legal Services, Inc. as the deposition officer (“Compex” or “Deposition Officer”).

2 After multiple conversations with Compex in July and August, 2004, COS-LG was able  
3 to confirm the dates of service and an extension of time to produce responsive records. The  
4 delay in producing the responsive records was due to COS-LG’s two moves within a relatively  
5 short period of time and the difficulty in locating documents some of which still were in boxes  
6 after the last move.

7 On August 26, 30, and 31, October 4, and most recently as today, November 17, 2004,  
8 COS-LG has advised of the availability and/or produced responsive records to the Deposition  
9 Officer.

10 COS-LG has produced all documents responsive to the subpoena which are in its  
11 possession, custody or control, even those which COS-LG had objected to based upon the fact  
12 that the records contained personal financial information of Steven Funderburg (“Funderburg”)  
13 after confirming with Funderburg’s counsel that Funderburg was waiving any objection to the  
14 production.

15 As to the remaining category of documents, COS-LG, in August, 2004, advised the  
16 Deposition Officer that “no such documents exist.”

17 **ARGUMENT**

18 **THE DEPONENT DOES NOT HAVE RECORDS RELATING TO**  
19 **MENTAL HEALTH COUNSELING (INCLUDING BUT NOT LIMITED**  
20 **TO PSYCHOTHERAPY).**

21 COS-LG is a non-profit religious organization. COS-LG provides religious services to its  
22 congregation. It does not provide mental health counseling, mental health therapy or  
23 psychotherapy and does not have any records relating to such activities pertaining to  
24 Funderburg, decedent Susan Booth or her son Mark Booth.

25 Requests Nos. 8, 9 and 10 of the two subpoenas seek:

26 All DOCUMENTS that evidence mental health counseling (including but not  
27 limited to psychotherapy) provided to [ ] by, on behalf of or by arrangement or  
28 referral through the Church of Scientology from January 1, 1999 to the present.

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1 COS-LG can not produce documents if no such documents exist. COS-LG has  
2 attempted to produce all responsive documents required under the subpoena.

3 On or about October 13, 2004, in a telephone conversation with counsel for the United  
4 States, COS-LG again advised that there were no responsive documents to categories 8, 9 and 10  
5 of the subpoena. During this conversation, counsel for the United States indicated that  
6 Funderburg had testified during his deposition, which COS-LG did not participate, that he  
7 received “counseling” from the Church and participated in auditing processes which were  
8 recorded. COS-LG requested that counsel provide the portions of the transcript that described  
9 what Funderburg testified to relating to the “counseling” or “auditing”.

10 Thereafter, counsel for the United States wrote a letter memorializing the gist of the  
11 telephonic conversation but did not include the relevant deposition testimony of Funderburg.

12 Based upon the information received, and what is a modification of the subpoena  
13 requests, COS-LG asserts that the records relating to “auditing” are privileged communications  
14 under the clergy-penitent privilege. COS-LG has advised counsel that it is asserting this  
15 privilege as to these records.

16 “Auditing” is the confessional processes of the Scientology religion. The communications  
17 between the parishioner and the auditor are strictly confidential. The records and/or notes of the  
18 communications are securely kept in locked cabinets outside of all other files and are placed in  
19 file folders entitled “clergy-penitent privileged communication.”

20 Federal Rule of Evidence 501 provides that “in civil actions . . . the privilege of a witness,  
21 person, . . . shall be determined in accordance with State law. Fed. Rule Evid. 501. California  
22 recognizes the Clergy Penitent Privilege. *See*, Evid. Code. Section 1030, *et seq.* The  
23 communications during “auditing” is a “penitential communication” as defined by Evidence Code  
24 Section 1032. Specifically, “auditing” is a means of communication between a church  
25 parishioner (“Penitent”) and the auditor (“Member of the Clergy”) in the course of the doctrine  
26 of the organization and the communications are confidential.

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1 COS-LG asserts this privilege relating to the notes and records of the auditing sessions  
2 between Funderburg and/or the Booths and the auditor(s) pursuant to Evidence Code Section  
3 1034. In communications between COS-LG and counsel for Funderburg, COS-LG understands  
4 that at no time has Funderburg waived any privilege that he may have relating to the notes  
5 and/or records of the auditing sessions. This has been confirmed in a writing COS-LG received  
6 from counsel for defendant State of California.

7 COS-LG will be available to answer any questions relating to the "auditing" process at  
8 the time of the hearing on this matter if necessary.

9 **CONCLUSION**

10 Based upon the foregoing, COS-LG respectfully submits that it has complied with all of  
11 the subpoena requests to which it had responsive documents. As to the remaining items sought,  
12 COS-LG asserts it does not have any documents. With regard to the modifications sought by the  
13 United States, COS-LG asserts that the documents relating to "auditing" are penitential  
14 communications and are privileged.

15  
16 Dated: November 17, 2004

HOGAN HOLMES & USOZ LLP

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