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12  
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

15 LAURA ANN DeCRESCENZO,

16 Plaintiff,

17 v.

18 CHURCH OF SCIENTOLOGY  
19 INTERNATIONAL, a corporate entity,  
RELIGIOUS TECHNOLOGY CENTER,  
20 previously sued herein as Doe No. 1, a  
California Corporation, and DOES 2-20,  
21

22 Defendants.

Case No. BC411018

Assigned for All Purposes to the Hon. Ronald  
Sohigian, Dept. 41

**DEFENDANT CHURCH OF  
SCIENTOLOGY INTERNATIONAL'S  
OPPOSITION TO PLAINTIFF'S  
MOTION TO COMPEL OR FOR  
TERMINATING SANCTIONS**

Judge: Hon. Ronald Sohigian  
Dept.: 41  
Date: March 6, 2013  
Time: 1:30 P.M.

*Filed concurrently with Declaration of Warren  
McShane; Declaration of Allan Cartwright;  
Declaration of Nicholas F. Daum; Evidentiary  
Objections*

**FILED**  
Superior Court of California  
County of Los Angeles

**FEB 21 2013**

John A. Clarke, Executive Officer/Clerk  
By Moses Soto, Deputy  
MOSES SOTO

1 **INTRODUCTION**

2 Defendant Church of Scientology International (“CSI”) hereby opposes plaintiff’s motion  
3 to compel “compliance with the court’s discovery orders or alternatively for terminating  
4 sanctions.” The motion to compel should be denied for several reasons:

- 5 • CSI has complied with the January 7, 2013 Order, by producing a clear and compre-  
6 hensive log that specifically indicates each item of information required by the Court.
- 7 • The documents withheld from production are privileged, both under California’s Clergy-  
8 Penitent privilege (E.C. § 1032 & 1034) and the United States and California  
9 Constitutions. Each document withheld from production discloses a communication made  
10 by or to the plaintiff and a single clergy person in auditing, a confidential spiritual practice  
11 pursuant to Scientology scripture, and the documents were maintained in a segregated  
12 auditing file and nowhere else. Plaintiff’s unsubstantiated assertions that auditing records  
13 are not strictly confidential under Scientology scripture and practice, and that somehow the  
14 communications cannot be privileged simply because a large number of clergypersons  
15 (over a 14 year period) conducted auditing, have no merit and are unsupported by the  
16 record.
- 17 • Plaintiff’s argument that confidential communications made in Scientology auditing do not  
18 qualify for the privilege under Evidence Code §1032 because the communications are  
19 reviewed by a senior minister pursuant to mandatory religious doctrine is incorrect; the  
20 communications remain “secret” as required by the statute.
- 21 • A construction of the statute to require production of Scientology auditing records would  
22 render the statute unconstitutional under the Religion Clauses of the First Amendment.
- 23 • The records of plaintiff’s auditing are irrelevant to the issues raised in CSI’s pending  
24 motion for summary judgment. Moreover, there is no basis for “terminating” sanctions.

25 **I. CSI Has Complied With The Court’s January 7, 2013 Order**

26 Plaintiff’s primary contention in its motion, and sole basis for sanctions, is that CSI has not  
27 complied with the Court’s order of January 7, 2013. (Pl. Mem. at 3:1.) That premise is false. The

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1 Court's January 7 Order required CSI either (a) to produce documents responsive to certain disco-  
2 very requests (by January 25, 2013) or (b) if withholding documents on the basis of privilege, to  
3 provide, by January 18, 2013, a privilege log that identified each document withheld, and that, for  
4 each document, included information as to dates, time, place, preparation, to whom the  
5 communication went, and a clear statement of the basis for an assertion of privilege. Declaration  
6 of Nicholas Daum in Opposition to Plaintiff's *Ex Parte* Application ("Daum Declaration") at ¶ 2  
7 & Ex. A.

8 CSI did just that. First, pursuant to this court's order of January 7, 2013, CSI produced  
9 over 2,800 pages of documents, including the entirety of plaintiff's "ethics file," as well as several  
10 hundred documents that had been filed in plaintiff's "pc files," thereby substantially narrowing the  
11 matters in dispute. CSI produced those documents under the existing protective order on January  
12 25, 2013. Daum Decl. ¶ 5. CSI continued to maintain its claim of privilege with respect to the  
13 remaining documents contained in the pc files. On January 18, 2013, CSI produced a privilege log  
14 specifically identifying each document withheld from production on the basis of privilege. Daum  
15 Decl. ¶ 3-4. Currently, no documents responsive to the requests for which production was  
16 compelled by the January 7 Order are being withheld, save those specifically identified in detail on  
17 the privilege log. *Id.* ¶ 6. There can thus be no question of noncompliance with the order.

18 Plaintiff complains that the privilege log prepared by CSI was "wholly insufficient," and  
19 requests the court to compel CSI to file a more complete log. The privilege log, however, is much  
20 more than sufficient. It lists, for each document identified, the specific privilege claimed (which,  
21 in *all* cases, is the Clergy-Penitent Privilege and the First Amendment), the date and place of  
22 preparation, and the specific clergymen, identified by name, to whom the communication was  
23 made or who made the communication, and a brief description of the document (without, of  
24 course, revealing the content<sup>1</sup> of the protected communication). Daum Decl. ¶ 4.

25 \_\_\_\_\_  
26 <sup>1</sup> Plaintiff complains that CSI did not provide "any description of the actual contents of the  
27 documents themselves." (Pl.Mem. at 5:17.) Of course it did not; that is the purpose of the  
privilege. Plaintiff's suggestion that CSI must abandon the privilege in order to claim it is a  
logical absurdity.

1 A typical entry from the CSI privilege log appears as follows:

2

3 Document Number	Date	Nbr of pages	Location	Copies	Description	Privilege
4 005	Aug 20, 1995	51	Los Angeles	None	Record of confidential communication in spiritual counseling session between LD and her clergyman (TL).	Clergy Penitent (Ev. Code §1034); First Amendment Free Exercise Clause and Establishment Clause

5  
6  
7  
8

9 Daum Decl. ¶ 4. The log thus clearly complies with the Court's January 7, 2013 Order.

10 **II. The Documents Withheld From Production Constitute Strictly Confidential Records of "Auditing"**

11 Plaintiff also suggests that certain documents listed on the log are non-privileged because  
12 they do not disclose communications made in auditing. Plaintiff is wrong. The documents that  
13 CSI has withheld, all of which are specifically listed and individually identified in detail on the  
14 privilege log, consist *entirely* of documents that contain 1) communications plaintiff made in the  
15 course of auditing, the strictly confidential confessional practice that is the essence of the  
16 Scientology religion and its most important religious practice, or 2) communications, pursuant to  
17 Scientology religious practice as set forth in its Scriptures, to and from authorized clergymen  
18 concerning and/or describing communications Plaintiff made to an auditor. *See* Declaration of  
19 Allan Cartwright ("Cartwright Decl) at ¶¶ 6-11. Because CSI established preliminary facts to  
20 show that the relevant communications were made in the contest of a clergy-penitent  
21 communication, it is plaintiff's burden to rebut a presumption of confidentiality and demonstrate  
22 that the communications were non-privileged. *Story v. Superior Court*, 109 Cal. App. 4th 1007,  
23 1014 (2003); E.C. § 917(a); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th  
24 110, 123 (1997). Plaintiff has not met this burden.

25 As described in more detail in the attached declarations of Allan Cartwright and Warren  
26 McShane, the records withheld are simply documents that (as is standard in the Scientology  
27 religion) note or record confidential communications made in connection with the plaintiff's

1 formal auditing sessions. Cartwright Decl. ¶¶ 6-11; Declaration of Warren McShane (“McShane  
2 Decl.”) at ¶¶ 13-31. Auditing is the core religious practice of the Scientology religion; it is the  
3 spiritual practice, or “technology,” by which Scientology assists its adherents in their spiritual  
4 progress. McShane Decl. ¶¶ 13-31, 38. “Auditing” involves an ongoing, continuous series of  
5 strictly confidential communications between the communicant and specially-trained clergyman,  
6 the purpose of which is for the communicant to overcome barriers to spiritual enlightenment. *Id.*  
7 Within Church scripture and theology, auditing is a highly regulated and specific practice, and one  
8 that only specially trained clergy with a duty of confidentiality may perform. *Id.* ¶¶ 23-30.

9 To help the communicant overcome spiritual barriers on an ongoing basis, a confidential  
10 record of communications made in auditing is maintained. McShane Decl. ¶¶ 19-22. The  
11 content of such communications is kept secret, and is reviewed exclusively by specially-trained  
12 members of the clergy who oversee and determine the specific religious processes and  
13 communications to assist the auditor in helping the communicant overcome spiritual barriers, and  
14 who are equally bound to keep such communications confidential. *Id.* ¶¶ 23-30.

15 In support of her motion, plaintiff has submitted an affidavit claiming that she was told,  
16 without identifying by whom or when, that anyone senior to her in CSI could review her pc  
17 folders, and that she did not believe that the contents of her auditing communications would be  
18 kept confidential. This conclusory statement in a declaration is directly contradicted by the  
19 plaintiff’s prior testimony and manifestly insufficient to meet the plaintiff’s burden of  
20 demonstrating that the privilege does not apply. In her deposition, plaintiff testified that  
21 information which she told to one of her auditors “was considered confidential priest/penitent  
22 privileged information.” Cartwright Decl. ¶ 4 & Ex. A. Moreover, plaintiff’s statement is false;  
23 as the Cartwright declaration, the McShane Declaration, and the various Scientology Scriptures  
24 attached thereto demonstrate, communications made in auditing are secret and may not be  
25 disclosed to other Scientologists or senior staff members, other than to the specifically authorized  
26 clergymen who are responsible for the auditing process itself. McShane Decl. ¶¶ 19-21, 32-40. It  
27 is more than telling that other than her sweeping and unsupported statement, plaintiff has not

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1 identified a single instance in which a confidential communication she made in auditing was  
2 disclosed to anyone who was merely her “senior” or to anyone other than the clergy persons  
3 responsible for her auditing pursuant to Scientology Scripture. Moreover, plaintiff’s statement as  
4 to what she was told by some unknown person, at an unknown time and place, is plainly  
5 inadmissible hearsay. *See* Evidentiary Objections to Plaintiff’s Mot. to Compel.

6 Plaintiff also argues that the sheer number of persons whom CSI identifies as clergy is not  
7 credible, and submits an affidavit stating she does not remember the names of some and cannot  
8 identify others. But as Mr. Cartwright shows, plaintiff was a member of the Sea Org religious  
9 order and staff member of CSI for over ten years, and she often engaged in the practice of auditing  
10 on an intense basis, including every day for substantial periods of time. Cartwright Decl. ¶ 9. It  
11 hardly is surprising that over 200 individuals served as either auditors or case supervisors for  
12 plaintiff during that period, or that plaintiff does not remember the names of many of these  
13 individuals or even that she may not have known the names of her case supervisors, who  
14 communicate only with the auditors and not the parishioners directly. *Id.* In reality, as described  
15 in the attached Cartwright affidavit, each relevant individual identified in the privilege log who  
16 received or reviewed plaintiff’s auditing communications is, under clear Scientology doctrine, a  
17 clergy person responsible for a parishioner’s spiritual guidance, and the relevant parties identified  
18 in the privilege log were in fact Scientology clergy. Cartwright Decl. ¶¶ 6-8.

19 **III. Confidential Communications Made in the Course of Auditing Are Protected**  
20 **as Privileged under Evidence Code 1032 and the First Amendment**

21 Plaintiff argues that her communications to auditors or clergy are not protected by the  
22 statutory privilege because those communications may also be communicated to another  
23 Scientology minister called a “case supervisor” as part of the Scientology religious practice of  
24 auditing. But Plaintiff ignores the nature of auditing within the Scientology religion. A case  
25 supervisor is an essential part of the religious practice of auditing, as he or she determines which  
26 auditing the parishioner will receive, helps the auditor in reviewing the record of the  
27 parishioner’s spiritual progress, and assists the auditor in working further with the parishioner in  
28 obtaining spiritual progress and salvation. McShane Decl. ¶¶ 24-25; Cartwright Decl. ¶¶ 7-8. All

1 persons participating in auditing know the role of the case supervisor, and also know that the case  
2 supervisor is required to maintain the secrecy of the communications. McShane Decl. 24-25, 28-  
3 40. In fact, as explained in the McShane Declaration at ¶¶ 24-25, Scientology Scripture mandates  
4 that there can be no auditing without the ultimate participation of a Case Supervisor. Plaintiff  
5 nevertheless claims that the very fact of the communication between the case supervisor and the  
6 auditor defeats the privilege and destroys the confidentiality and privileged nature of the  
7 underlying communication. In essence, plaintiff argues that because Scientology structures  
8 auditing, its core penitential sacrament, differently than that of the traditional Catholic  
9 confessional by permitting auditing communications to be reviewed by at least two clergy  
10 members, an auditor and a case supervisor, as opposed to one clergyman, auditing  
11 communications are non-privileged.

12 This attempt to exclude Scientology practices from the scope of privilege is not consistent  
13 with the statute and, if accepted, fundamentally would violate both the Establishment and Free  
14 Exercise clauses of the First Amendment.

15 **A. Auditing Communications Are Protected Under The California Evidence Code**

16 The statutory privilege is set forth in Evidence Code 1032. The privilege applies to a  
17 communication made in confidence, in the presence of no third person so far as the  
18 penitent is aware, to a member of the clergy who, in the course of the discipline or  
19 practice of the clergy member's church, denomination, or organization, is authorized or  
20 accustomed to hear those communications and, under the discipline or tenets of his or  
21 her church, denomination, or organization, has a duty to keep those communications  
22 secret.  
23 E.C. § 1032; *see People v. Edwards*, 203 Cal. App. 3d 1358, 1362 (1988). Here, each of the  
24 elements of the privilege is met: each penitential communication at issue was disclosed *exclusively*  
25 to a single Scientology clergy person, who, under the discipline and practice of Scientology, was  
26 authorized to hear such communications, and had an obligation under Scientology tenets to keep  
27 them "secret." McShane Decl. ¶¶ 10, 20-21, 31-40; Cartwright Decl. ¶¶ 6-8. Thus, each element  
28 of the privilege is met and there was no waiver.

29 Accordingly, in *Funderberg v. United States*, No. C 02-05461 JW (RS)(2004), the United  
30 States District Court for the Northern District of California, applying California law, upheld the

1 claim of privilege of a Scientology church for the pc files of a parishioner and refused to enforce a  
2 subpoena for the files issued by the United States Justice Department. The court stated:

3 A review of the declaration submitted on behalf of the Church reveals, however, that (1)  
4 audits are deemed strictly confidential by the Church; (2) audits are conducted by trained  
5 auditors and occur only between such auditor and the preclear; and (3) the records from  
6 such audits are maintained in separate files which are marked "confidential" and stored in  
7 lock cabinets. . . . Accordingly, the Church has established that the statements made by  
8 plaintiffs during their audits are privileged and, therefore, entitled to protection under the  
9 clergy-penitent privilege. [Slip op. at 5-6.]

10 Plaintiff, however, argues that the fact that in Scientology a confidential communication  
11 between a communicant and an auditor is disclosed to another minister, the case supervisor, takes  
12 the communication entirely outside the orbit of protection of the statute and renders it non-  
13 privileged. Plaintiff's narrow and constricted construction of the privilege statute is unwarranted  
14 and must be rejected.

15 The statute requires confidentiality in two different respects. First, a communication must  
16 be made "in the presence of no third person." Second, the clergy person to whom the communi-  
17 cation is made must have "a duty to keep those communications secret." This distinction is highly  
18 significant and must be given effect. Secrecy has a broader scope and meaning than absolute ex-  
19 clusivity between two persons. The law recognizes the concept of secrecy in a variety of circum-  
20 stances, most notably in the concept of "trade secrets" and in the governmental classifications of  
21 documents as, *inter alia*, "secret" or "top secret." In no such instance has the concept of secrecy  
22 been construed to mean absolute exclusivity to one person; rather it has been applied to mean a  
23 strict limitation of disclosure of the secret to those authorized to know it and who have a need to  
24 know it to carry out the functions related to the existence of the secret itself. Evidence Code  
25 1032's use of the term "secret" should be construed in the same common sense manner.

26 Indeed, the court must, on the facts here, construe Evidence Code § 1032 to protect the  
27 privilege, in order to preserve the statute's constitutionality. As discussed in Point III(B), *post*, a  
28 narrow construction of the statute holding that it does not apply here would both create a denomi-  
29 national preference and substantially burden the free exercise of the core religious practice of  
30 Scientology, raising substantial issues of violation of the religion clauses of the First Amendment..



1 Courts must, if possible, interpret a statute to avoid constitutional infirmity and preference  
2 of one religious denomination over another. *Murray v The Charming Betsy*, 6 U.S. (2 Cranch) 64,  
3 118 (1804); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936)(Brandeis, J. concurring).  
4 Where, as here, there is significant risk of infringement on First Amendment rights, courts will  
5 require an “affirmative intention of the [legislature] clearly expressed.” *NLRB v. Catholic Bishop*  
6 *of Chicago*, 440 U.S. at 506 (interpreting National Labor Relations Act as not applicable to lay  
7 teachers in Catholic schools, despite absence of a specific exemption, so as to avoid potential  
8 conflict with Free Exercise and Establishment clauses); *United States v. Seeger*, 380 U.S. 163, 176  
9 (1964); *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (same). Thus, in the latter two cases  
10 the Court construed the conscientious objector exemptions of the draft laws to include non-theistic  
11 beliefs, despite the fact that the statutes appeared to exclude non-theistic beliefs from the ambit of  
12 the exemptions “This construction avoids imputing to Congress an intent to classify different  
13 religious beliefs, exempting some and excluding others.” *Seeger*, 380 U.S. at 165.

14 In this case, not only is there no evidence of such an affirmative intention, but, to the  
15 contrary, the evidence is that the legislature intended to leave the scope of secrecy of  
16 communications to each denomination according to its own doctrine and dogma. At the time of  
17 consideration and adoption of the statute, in commenting on the related Evidence Code § 1034  
18 (providing that the clergy also may invoke the privilege), the Law Revision Commission  
19 recognized that the scope of the “secret” nature of a communication should be left to the clergy:

20 The extent to which a clergyman should keep secret or reveal penitential  
21 communications is not an appropriate subject for legislation; the matter is better  
22 left to the discretion of the individual clergyman involved and the discipline of the  
23 religious body of which he is a member.

24 7 Cal.L.Rev.Comm. Reports 1 (1965).

25 Here, in the absence of any indication that by enacting Evidence Code 1032 the legislature  
26 clearly intended to limit the availability of the privilege only to those denominations that require  
27 that communications to clergy not be disclosed to any other person as opposed to denominations

1 that apply a somewhat broader concept of secrecy to further their own religious beliefs and  
2 practices, the Court should follow this fundamental rule of construction.

3 Plaintiff argues to the contrary, relying upon *Roman Catholic Archbishop of Los Angeles v.*  
4 *Superior Court*, 131 Cal. App. 4th 417, 443 (2005) (“*Catholic Archbishop*”). That case, which  
5 arose from a radically different set of facts, does not support plaintiff’s position.

6 *Catholic Archbishop* considered a claim by the Catholic Archdiocese that communi-  
7 cations made during an *investigation* by the Archdiocese into alleged sexual abuse of children  
8 were privileged under Evidence Code Section 1032. 131 Cal. App. 4th at 427. The  
9 communications at issue were not “confessional” communications or made as part of a religious  
10 sacrament; as such, they were not a religious practice of the Catholic Church, and their very  
11 purpose showed that they potentially could be used for disciplinary action outside the context of a  
12 confessional. Rather, they were made under a “policy” in which bishops of the Church  
13 investigated alleged misconduct by its employees and priests. *Id.* at 429 (noting that this was “the  
14 kind of routine investigation any employer would undertake upon learning a trusted employee had  
15 been accused of child molestation”). The Court of Appeal found on those facts that, despite the  
16 Archdiocese’s claim that such documents were confidential, there was a “compelling state  
17 interest” in disclosing them, largely because of the state’s interest in prosecuting crimes. *Id.* at  
18 438-439.

19 In so holding, the Court rejected the Archdiocese’s argument that the investigation  
20 documents were clergy-penitent privileged. The Court noted that the relevant communications  
21 were not kept strictly confidential; rather, a separate “vicar for clergy” “and sometimes other  
22 Archdiocese employees as well” reviewed the documents. *Id.* at 445. On those facts, the Court  
23 found that the communications were non-privileged. *Id.*

24 What *Catholic Archbishop* did not address, however, was a specific religious practice, such  
25 as that found in Scientology auditing, in which the penitential communication, under relevant  
26 Church scripture and mandatory religious practice, *must* be reviewed by another member of the  
27 clergy, who in turn is required to maintain the secrecy of the communication and assist with the

1 penitent's spiritual development. McShane Decl. ¶¶ 19-31. In Scientology auditing, and under  
2 Scientology scriptures, no "third person"<sup>2</sup> may hear an auditing communication and the  
3 communication is not less than "secret"—the communications are made in one-on-one sessions to  
4 an individual auditor, and then the written records of those communications are reviewed by the  
5 Case Supervisor, a trained clergyman who is an equally important part, doctrinally, of the auditing  
6 process and also bound to maintain the secrecy of the information. *Catholic Archbishop* cannot be  
7 stretched beyond its facts to establish a rule of law which would render non-privileged *any*  
8 penitential or confessional communication made in *any* religion that, under its doctrine, requires  
9 that a sacramental, confidential confession be disclosed to more than a single clergyman.

10 A contrary interpretation would violate the religion clauses of the First Amendment, both  
11 facially and certainly as applied to the practices at issue here, as discussed below.

12 **B. If E.C. §1032 Does Not Protect Communications Made in the Course of**  
13 **Scientology Auditing, It is Unconstitutionally Under-Inclusive**

14 The statute construed as plaintiff urges would permit the privilege to be applied only to  
15 denominations whose practices provide that communications to clergy may not be disclosed to any  
16 other clergy for any reason, as opposed to denominations that provide, as here, that such commu-  
17 nications may be disclosed to a senior clergy person, who like the auditor is bound by secrecy, for  
18 the very purpose of furthering the operation of the secret, penitential religious practice. Such a  
19 denominational preference is a core violation of the Establishment Clause. *See, e.g., Larson v.*  
20 *Valente*, 456 U.S. 228, 246-247 (1982) (rejecting "denominational preferences" and noting that  
21 "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be  
22 officially preferred over another"); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J.,  
23 concurring).

24  
25 \_\_\_\_\_  
26 <sup>2</sup> While not raised in this case because only one clergy person is present during auditing,  
27 the statute's "no third person" limitation may well be unconstitutional in a situation, for example,  
28 where a denomination conducts confessionals with two ministers present instead of one. See Point  
III(B), *post*.

1 For similar reasons, the statute would violate the Free Exercise Clause. The statute as so  
2 construed would seriously and perhaps fatally interfere with and burden the very practice of the  
3 Scientology religion, whose central religious practice is auditing. As set forth in the declaration of  
4 Allan Cartwright, a parishioner engaged in auditing may disclose various “overts,” consisting of  
5 wrongful or harmful acts comparable to the concept of sin. McShane Decl. ¶¶ 16-19. The auditor  
6 will do more than simply provide absolution for an overt, however; rather the auditor, with  
7 religiously necessary assistance of the case supervisor, and the parishioner will work to enable the  
8 parishioner to overcome both the cause and effect of the overt. *Id.* Only by confronting his or her  
9 overts through an ongoing auditing process may a Scientologist achieve spiritual progress and  
10 salvation. *Id.*

11 The very process, however, depends upon the guarantee that the disclosures will not dis-  
12 closed outside the auditing process, which includes the role of a case supervisor. McShane Decl.  
13 ¶¶ 16-19, 24-25. If a parishioner has committed a wrongful act such as, for example, an extra-  
14 marital affair or trading securities on inside information, he likely will not disclose such an act to  
15 an auditor if he knows that his spouse, the government, or a civil party may subpoena his auditing  
16 file and obtain his confessions or disclosures. *Id.* Pursuant to Scientology religion, that failure to  
17 disclose the act and to deal with its consequences through the auditing process will hinder his  
18 spiritual progress and even salvation. *Id.* Unless Scientology churches can assure parishioners of  
19 the inviolability of the auditing process and auditing files, the very practice of Scientology will be  
20 burdened and cannot proceed in the manner and with the openness required by religious doctrine.  
21 *Id.*

22 When a state adopts a statutory scheme that imposes a burden on the exercise of some  
23 religions while exempting others, its actions violate the Free Exercise Clause of the First  
24 Amendment, unless justified by the most compelling of government interests and achieved by the  
25 narrowest means available. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-  
26 32, 546 (1993) (“A law burdening religious practice that is not neutral or not of general  
27 application must undergo the most rigorous of scrutiny, . . . must advance ‘interests of the highest

1 order' and must be narrowly tailored in pursuit of those interests"). In applying its free exercise  
2 review, "The Court must survey meticulously the circumstances of governmental categories to  
3 eliminate, as it were, religious gerrymanders." *Id.* at 534, quoting *Walz v. Tax Comm'n*, 397 U.S.  
4 664, 696 (1970) (Harlan, J., concurring). *See also Fowler v. Rhode Island*, 345 U.S. 67, 69-70  
5 (1953) (unconstitutional to apply municipal ordinance to prohibit preaching in public park by  
6 Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant  
7 church service). Here, as in *Church of Lukumi Babalu Aye*, if Evidence Code §1032 is construed  
8 to permit assertion of the privilege in circumstances where penitential communications are not  
9 disclosed to another minister, but not to apply where such communications are disclosed to a  
10 senior supervising minister pursuant to religious doctrine, that statute by definition cannot be  
11 "neutral or of general application" and therefore "must undergo the most rigorous of scrutiny."

12 The statute cannot survive such strict scrutiny. Given that California recognizes and long  
13 has recognized the existence of the privilege, there can be no rational argument that it has a  
14 compelling interest in applying that privilege only to certain denominations or practices and not to  
15 others. Such an interest not only would not be compelling, it would be illegitimate: "To give  
16 exemption to some denominations and not to all offends the equality with which all men enter  
17 society." *Memorial and Remonstrance of James Madison* (as quoted in John T. Noonan, Jr., *The*  
18 *Lustre of Our Country: The American Experience of Religious Freedom* 73 (University of  
19 California Press 1998)), cited favorably in *Larson v. Valente, supra*.

20 Thus, to construe Evidence Code §1032 in a manner that it does not apply to the "secret"  
21 confidential disclosures of Scientology auditing would render the statute unconstitutional. Even  
22 were a court to reach such an extreme conclusion, however, the remedy would not be to strike the  
23 statute in its entirety, leaving no privilege at all for any church or denomination. Rather, "where a  
24 statute is defective because of under-inclusion . . . a court may . . . extend the coverage of the  
25 statute to include those who are aggrieved by exclusion." *Welsh*, 398 U.S. at 361 (Harlan J.,  
26 concurring on grounds that conscientious objector statute unconstitutionally contained a theistic  
27 requirement, thereby contravening the Establishment Clause, but that the statute could be saved by

1 an interpretation “that cures the defect of under-inclusion,” *id.* at 365, where history of  
2 congressional support for exemption demonstrated that Congress would so choose).<sup>3</sup> Here, given  
3 the longstanding history of the privilege, comparable to that of the exemption for conscientious  
4 objection to war, the court should “cure the defect of under-inclusion” by “extend[ing] the  
5 coverage of the statute to include those who are aggrieved by exclusion.”

6 **IV. The Contents of the PC Files Have no Relevance or Materiality to the Statute**  
7 **of Limitations Issue Raised in the Pending Motion for Summary Judgment**

8 As CSI demonstrates in its pending motion for summary judgment, it is uncontroverted  
9 and indeed the law of the case that plaintiff’s claims accrued no later than 2004 when she  
10 allegedly faked suicide and left her position at CSI. Plaintiff repeatedly has acknowledged both in  
11 this Court and the Court of Appeal that her allegation of delayed discovery of her injuries because  
12 she purportedly was “brainwashed” is relevant only to the pre-accrual period. *See* Daum Decl. Ex.  
13 C. Thus, plaintiff’s purported “state of mind” while she was undergoing auditing is not material,  
14 because she discovered her injuries after that period and was on notice that she had to bring a  
15 timely lawsuit.

16 It also is uncontroverted that plaintiff failed to file her lawsuit within the statute of  
17 limitations periods applicable to her claims. As plaintiff conceded, again both in this court and in  
18 the Court of Appeal, the only basis upon which she may defeat the statute of limitations defense is  
19 her allegation of equitable estoppel. Daum Decl. Ex. C. As the pending summary judgment  
20 details, plaintiff has alleged two, and only two, grounds for application of that doctrine: 1. That  
21 she relied on representations she alleges were made to her at the time she left CSI and executed a

22 \_\_\_\_\_  
23 <sup>3</sup> Other courts have rescued under-inclusive, and therefore potentially unconstitutional, religious  
24 exemptions in statutes by extending exemptions to persons the statutes seemed to exclude. *See,*  
25 *e.g., Lewis v. Sobol*, 710 F. Supp. 506, 516 (S.D.N.Y. 1989) (extending religious exemption from  
26 immunization statute to parents who protested vaccination based on personal religious beliefs);  
27 *Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81, 91 (E.D.N.Y.  
1987) (extending religious exemption from immunization statute to parents who were not  
members of any formal religious group); *Maier v. Besser*, 341 N.Y.S. 2d at 414 (Sup. Ct. 1972)  
(extending to a family not members of a recognized religion a statute exempting only children  
whose parents “are bona fide members of a recognized religious organization”).

1 release of all claims that by signing the release she gave up any legal basis to sue CSI; 2. That she  
2 did not sue during the period after she left CSI because of threats of harassment and “banishment.”

3 *Id.*

4 On her appeal, the Court of Appeal declined to find equitable estoppel on the basis of the  
5 alleged representations about the release, finding that such representations “amount to a denial of  
6 liability – which is not sufficient to support a claim of equitable estoppel.” Daum Decl. Ex. C.  
7 The *sole basis* for the Court of Appeal’s remand of the case to this Court was its holding that, on  
8 the face of the SAC, plaintiff’s allegations of “intimidation and threats of banishment and  
9 harassment, if true, may preclude defendants, in equity, from asserting the statute of limitations as  
10 a defense,” and were sufficient “for pleading purposes,” even though “plaintiff does not expressly  
11 allege that the threats caused her to delay filing her complaint.” *Id.*

12 CSI’s pending motion for summary judgment is premised on its showings that CSI did not  
13 make any threats of harassment or banishment to plaintiff (nor did it make the alleged  
14 representations about the release), plaintiff did not fail to file a timely lawsuit because she was put  
15 in fear by any such threats, plaintiff in fact never even considered filing a lawsuit until after the  
16 statute had run, and even after plaintiff had decided she was no longer a Scientologist, she waited  
17 nine months to file, which is too long as a matter of law.

18 It is readily apparent that the materials contained in plaintiff’s auditing files have no  
19 relevance to the pending motion. The auditing reflected in the folders took place while plaintiff  
20 was still in the church and actively participating in its practices. Daum Decl. ¶ 7. This was  
21 before, in most instances many years before, the latest date upon which plaintiff’s claims accrued.  
22 The question of equitable estoppel applies to the period *after* the claims have accrued.<sup>4</sup> Plaintiff  
23 has never claimed that while she was still a staff member of CSI and undergoing auditing, some

24 <sup>4</sup> Equitable estoppel is a doctrine that applies only to actions that would have prevented the  
25 plaintiff from filing suit after the accrual of the cause of action. *Lantzy v. Centex Homes*, 31 Cal.  
26 4th 363,383 (2003) (noting that equitable estoppel “comes into play only after the limitations  
27 period has run and addresses . . . the circumstances in which a party will be estopped from  
asserting the statute of limitations as a defense to an admittedly untimely action because his  
conduct has induced another into forbearing suit within the applicable limitations period.”).

1 auditor threatened her that if she ever left the church and brought a lawsuit, the church would  
2 harass and banish her. Moreover, if any such threat had been made, which of course it was not,  
3 plaintiff certainly would remember it, since the memory of any such purported threat would have  
4 been the alleged reason she delayed suing. Plaintiff cannot in good faith assert that she needs to  
5 review the auditing files to find out whether she had been threatened not to bring a lawsuit if she  
6 ever left CSI. If she could not remember the relevant threat or harassment, it obviously was  
7 ineffective.<sup>5</sup>

8 **IV. There Is No Legal Basis For Plaintiff's Requests For Terminating Sanctions**

9 Finally, plaintiff's request for terminating sanctions is improper. Terminating sanctions  
10 cannot be purely punitive, and must be linked to accomplishing the purpose of discovery.  
11 *Newland v. Superior Court*, 40 Cal. App. 4th 608, 614 (1995) (purely punitive sanctions  
12 "deprive[] the recalcitrant party of due process of law"). Moreover, terminating sanctions are only  
13 appropriate where the Court has considered and rejected lesser sanctions, such as issue related  
14 sanctions. *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486, 496 (1999). Here,  
15 plaintiff has not suggested *any* connection whatsoever between terminating sanctions and the  
16 discovery sought, nor *any* appropriate alternative sanction. It is apparent that plaintiff is utterly  
17 unable to identify what issue related to the auditing files might be material or relevant to the  
18 pending summary judgment. The reason is obvious. There is no such issue. The request for  
19 terminating sanctions is no more than an improper attempt to avoid having the summary judgment  
20 motion heard on the merits. The sanctions request must be rejected.

21 **CONCLUSION**


22 Plaintiff's motion to compel should be denied.

23  
24 <sup>5</sup> Indeed, for jurisprudential reasons, the Court need not even decide the privilege issues  
25 raised in this motion at this time, but may defer them until after it has decided the statute of  
26 limitations issue. Only if the case survives that defense need the court reach the issues raised here.  
27 *Cf., Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999)  
(noting that a "limited . . . inquiry, combined with the ability of the [] court to control discovery,  
can prevent a wide-ranging intrusion into sensitive religious matters.").



1 Dated: February 21, 2013

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