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10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 THOMAS A. WAITE,

13 Plaintiff,

14 vs.

15 CORPORATION OF THE PRESIDING BISHOP
16 OF THE CHURCH OF JESUS CHRIST OF
17 LATTER DAY SAINTS, a Utah corporation,
18 CORPORATION OF THE PRESIDENT OF THE
19 CHURCH OF JESUS CHRIST OF LATTER
20 DAY SAINTS, a Utah corporation; DONALD C.
21 FOSSUM; and STEVEN D. BRODHEAD,

22 Defendants.

Case No.: CV-05-399-EFS

CHURCH DEFENDANT AND
FOSSUM'S REPLY BRIEF IN
SUPPORT OF MOTION TO
COMPEL

23 **I. INTRODUCTION**

24 Plaintiff disavows an agreement between counsel yet acted in conformance
25 with it. As shown below, agreement or not, plaintiff has waived any work
26 product protection by divulging his work product in this case.

27 **II. FACTS**

28 Based on the declarations of all counsel involved, the following facts are
undisputed.

1. In depositions in Salt Lake City in November, 2006, an issue arose
concerning plaintiff's counsel's ability to inquire into meetings between defense

CHURCH DEFENDANT AND FOSSUM'S REPLY BRIEF
IN SUPPORT OF MOTION TO COMPEL - 1

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WITHERSPOON, KELLEY, DAVENPORT & TOOLE
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1 counsel and Church deponents as well as the ability to contact ex-missionaries ex-
2 parte.

3 2. The case of Wright v. Group Health entered the discussion.

4 3. Some type of understanding was reached.

5 4. Following the Salt Lake City discussions, plaintiff's counsel
6 refrained from inquiring into meetings between defense counsel and Church
7 deponents.

8 5. Since the Salt Lake City depositions, plaintiff has continued to
9 refrain from inquiring into the specifics of meetings between Church deponents
10 and defendants' counsel.

11 6. Mr. Eymann openly used work product at the deposition of Tyler
12 Ryan, quoted from it and offered it to counsel.

13 7. Mr. Nordstrom published additional work product in the Declaration
14 of James Ross.

15 **III. ARGUMENT**

16 **A. DEFENDANTS' MOTION TO COMPEL SHOULD BE GRANTED AS
17 POTENTIAL PROTECTION HAS BEEN WAIVED.**

18 1. Mr. Eymann Used Work Product.

19 Plaintiff's counsel are using their work product to support various positions
20 in this case but at the same time blocking any meaningful review of the so-called
21 work product.

22 This first occurred in Tyler Ryan's deposition. Mr. Eymann asked a
23 number of questions that were specifically taken from an interview plaintiff now
24 claims is protected. Mr. Eymann stated:

25 Q: I'll represent to you that one of the people who is not an
26 attorney but simply an investigator was JR Reese, who was
27 the son of Dale Reese, but JR Reese was just doing an
investigation, and it was done back in 2005, and I'd like to ask
you some questions and just see if you agree or disagree with

1 the answers that - - he had a set of questions he wanted to ask
2 you, and he went through and he put down your answers, and
3 I just want to see today if those answers are the same today as
4 you gave to him then.

5 A: Okay.

6 Mr. Eymann then asked question after question, for many pages of the
7 deposition, from the interview taken by Mr. Reese. In addition, Mr. Eymann
8 previously offered to show defense counsel the documents. (See Plaintiff's
9 Memorandum of Authorities in Opposition to Defendants' Motion to Compel at
10 paragraph 9, citing to the deposition of Mr. Ryan, p. 27, ll. 15-25, and p. 26, ll.
11 1.)

12 2. Mr. Nordstrom Used Work Product.

13 Mr. Nordstrom apparently interviewed James Ross. The date of the
14 interview is unknown but Mr. Nordstrom, as part of his FRCP 26(a)(1)
15 responsibility, has submitted Mr. Ross' Declaration. See, Exhibit A to Second
16 Rekofke Affidavit. In that Declaration, Mr. Ross states: "During a telephone
17 conversation with Mr. Nordstrom I was asked the following questions and
18 provided the following truthful answers:" and then he recites numerous questions
19 and answers.

20 Moreover, Mr. Nordstrom, believes the information had been previously
21 provided. At paragraph 12 of the fact section of Plaintiff's Memorandum of
22 Authorities in Opposition to Defendants' Motion to Compel, the plaintiff states:

23 12. On February 26, 2007, defendants served Interrogatories and
24 Requests for Production concerning Mr. Nordstrom's contacts
25 with missionaries. On March 27, 2007, plaintiff responded by
26 objecting to the request as "attorney work product."
27 However, plaintiff did indicate that "Mr. Nordstrom's office
28 has been in direct contact with Mark T. Ryan, James T. Ross,
and Dillon Hanson Information, Statements, or Declarations
from each have previously been provided."

For some reason within one week's time, Mr. Nordstrom changed his mind.

1 (See paragraph 14 of Plaintiff's Memorandum of Authorities.)

2 3. Use of Work Product Results In A Waiver.

3 The record reflects that plaintiff's counsel, as part of their strategy, have
4 used their so-called work product on the record, have offered to show defense
5 counsel that work product and believed that the work product had been produced.
6 Yet they now contend the defendants are not entitled to the information and
7 documents.

8 Based on the foregoing, plaintiff has waived any protection he may have
9 had:

10 . . . If documents otherwise protected by the work
11 product rule have been disclosed to others with an
12 actual intention that an opposing party may see the
13 documents, the party who made the disclosure should
14 not subsequently be able to claim protection for the
15 documents as work product.

16 Wright, Miller & Marcus, Federal Practice & Procedure: Civil 2d § 2024.

17 Here, the plaintiff's counsel has on multiple occasions injected their work
18 product into this case. There can be no clearer example of waiver.

19 **IV. CONCLUSION**

20 Plaintiff's counsel should be required to fully respond to defendants'
21 discovery requests.

22 DATED this 30th day of April, 2007

23 **WITHERSPOON, KELLEY, DAVENPORT
& TOOLE**

24 By: 

25 Brian T. Rekofke, WSBA No. 13260
26 Ross P. White, WSBA No. 12136
27 Attorneys for Corporation of the Presiding
28 Bishop, Corporation of the President and Donald
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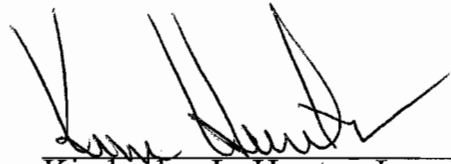
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2007:

1. I electronically filed the foregoing **CHURCH DEFENDANT AND FOSSUM'S REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

(for Waite) Richard C. Eymann and Stephen L. Nordstrom;
(for Brodhead) Andrew C. Smythe.
2. I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants at the address listed below: **None.**
3. I hereby certify that I have hand delivered the document to the following participants at the addresses listed below: **None.**



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