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8 Attorneys for LDS and Donald C. Fossum

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

11 THOMAS A. WAITE,

12 Plaintiff,

13 vs.

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

23 Defendants.

Case No.: CV-05-399-EFS

DEFENDANT CHURCH'S AND
DONALD C. FOSSUM'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
COMPEL DOCUMENTS AND
ANSWERS

24 Defendants, Church of Jesus Christ of Latter-day Saints and Donald C.
25 Fossum ("Church Defendants"), through their attorney Brian T. Rekofke, submit
26 the following memorandum in support of Church Defendants' Motion to Compel
27 Discovery Responses.

28 **I. INTRODUCTION**

Church Defendants' motion for order compelling discovery under FRCP 37
and LR 37 should be granted because the interrogatories at issue seek
discoverable facts and Plaintiffs' failure to respond is in violation of Court Rules.

MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL DOCUMENTS - 1

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WITHERSPOON, KELLEY, DAVENPORT & TOOLE
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1 **II. FACTS**

2 1. On February 26, 2007, the Church Defendants issued to Plaintiff five
3 interrogatories concerning Plaintiff's attorney Nordstrom's contact with
4 missionaries or former missionaries of the LDS Church. Affidavit of Brian T.
5 Rekofke ¶ 2.

6 2. These interrogatories were issued because there had been an
7 agreement reached among counsel on or about November 8, 2006 that there
8 would be no contact by Plaintiff's counsel ex-parte with individuals affiliated with
9 the LDS Church, unless and until the contact issue was framed by the court.
10 Affidavit of Brian T. Rekofke ¶ 3.

11 3. Following the agreement referenced above, it became clear that
12 Plaintiff's counsel had in fact contacted former missionaries and conducted
13 interviews and/or obtained statements. Affidavit of Brian T. Rekofke ¶¶ 4 - 5.

14 4. Church Defendants Interrogatory Nos. 1 through 5 and Request for
15 Production No. 8 (attached as Exhibit A to Rekofke Affidavit) sought the names
16 of each individual affiliated with the Church who had been contacted by
17 Plaintiff's counsel as well as disclosure and production of the documents
18 generated as a result of those contacts. The questions and answers read as
19 follows:

20 **INTERROGATORY NO.1:** Identify each individual
21 affiliated with the Church of Jesus Christ of Latter-day
22 Saints who has been contacted and interviewed, or who
23 has attempted to be contacted by Stephen Nordstrom.

24 By "affiliated" defendants seek the identity of
25 each Mission President, each Assistant to the President,
26 and each current or former Missionary.

27
28 MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL DOCUMENTS - 2

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ANSWER:

OBJECTION. Attorney work product. Without waiving objection, Mr. Nordstrom's office has been in direct contact with Mark T. Ryan, James T. Ross, and Dillon Hansen. Information, statements or declarations from each have previously been provided to defendants.

STEPHEN L. NORDSTROM

INTERROGATORY NO. 2: Identify the date and location for each contact.

ANSWER: See answer to Interrogatory No. 1.

INTERROGATORY NO. 3: Identify the topic or topics of conversation for each contact.

ANSWER: See answer to Interrogatory No. 1.

INTERROGATORY NO. 4 : Identify whether each contact was in person, by phone, by email, or in writing.

ANSWER: See answer to Interrogatory No. 1.

INTERROGATORY NO. 5: Identify by date each document, affidavit, declaration, file memo or email that was created memorializing each

ANSWER: See answer to Interrogatory No. 1.

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REQUEST FOR PRODUCTION NO. 8 : Produce each document identified in Interrogatory No. 5.

ANSWER: See answer to Interrogatory No. 1.

5. Interrogatory Nos. 2 through 5 and Request for Production No. 8 were all answered with an identical response: "See answer to Interrogatory No. 1". Affidavit of Brian T. Rekofke, Exh. A.

6. Plaintiff has failed and refused and continues to fail and refuse to answer Church Defendants' Interrogatories No. 2 through No. 5 and Request for Production No. 8 by providing the facts surrounding Counsel Nordstrom's ex parte contact with former missionaries. Affidavit of Brian T. Rekofke ¶¶ 9-12.

III. ARGUMENT

1. Plaintiff's Counsel cannot refuse to provide relevant facts, even those concerning allegedly protected materials.

FRCP 26(5)(a) states that "When a party withholds information ... by claiming it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged and protected, will enable other parties to assess the applicability of the privilege or protection."

Contrary to the mandate of this FRCP, Plaintiff only objected to Church Defendants interrogatories 1 - 5 by making the simple objection: "Attorney work product." Aff. of Rekofke, Exh. A. Plaintiff wholly failed to describe the nature of any documents, communications, or things which he claims are protected. This violates the rules of Federal Civil Procedure and renders assessment of the privilege claim by Church' counsel impossible.

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2. Plaintiff's refusal to provide relevant information could lead to undue surprise and needless expense.

The purpose of interrogatories is to enable the opposing party to sufficiently prepare for trial and also to avoid surprise. Lampard v. Roth, 38 Wn.App. 198, 200 (1984). When information is not disclosed, the surprised party is placed at a serious disadvantage. Lampard, 38 Wn.App. at 200. Trial preparation under these terms is costly and creates a burden on the court. Id. at 201.

Compelling plaintiffs to answer defendants' interrogatories concerning the dates, locations and times of interviews conducted with witnesses will help to avoid surprise and prejudice. This in turn will prevent any burden on the Court's time as mutual knowledge of the relevant facts will assist the parties in preparing for litigation.

IV. CONCLUSION

Based upon the foregoing, Defendants' FRCP 37 motion for order compelling discovery should be granted.

DATED this 11th day of April, 2007.

**WITHERSPOON, KELLEY, DAVENPORT
& TOOLE**

By: /s/ Brian T. Rekofke
Brian T. Rekofke, WSBA No. 13260
Ross P. White, WSBA No. 12136
Attorneys for LDS and Donald Fossum

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CERTIFICATE OF SERVICE

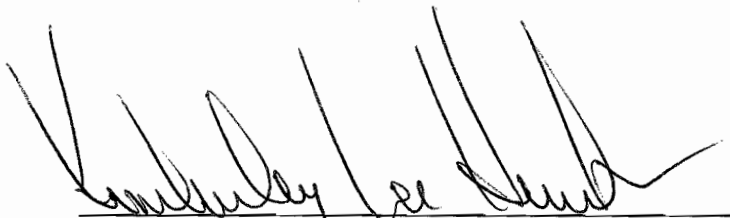
I hereby certify that on the 11th day of April, 2007:

- 1. I electronically filed the foregoing **DEFENDANT CHURCH'S AND DONALD C. FOSSUM'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DOCUMENTS AND ANSWERS** 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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MEMORANDUM IN SUPPORT OF
 MOTION TO COMPEL DOCUMENTS - 6

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