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Defendant and Cross-Complainant *pro se*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

KENDRICK MOXON Plaintiff, v. **GRAHAM BERRY**, Defendants.	Case No. BC429217 **DEFENDANT AND CROSS-COMPLAINANT'S APPENDIX NO. I OF EXHIBITS AND REQUEST FOR JUDICIAL NOTICE FILED AS PART OF THE UNVERIFIED ANSWER AND VERIFIED COMPULSARY CROSS-COMPLAINT HEREIN.** Action filed: January 5, 2010
GRAHAM E. BERRY, an individual; Cross-Complainant, v. **KENDRICK L. MOXON**, an individual; Cross-Defendant.	[Filed concurrently with: (1) Judicial Council of California Form MC-701 (C.C.P. §391.7; (2) Appendix No. II of Exhibits [Exhibits B-D]; (4) Appendix No. III of Exhibits [Exhibits E-J] ; Unverified answer and verified cross-complaint]

COMES NOW the defendant and cross-complainant **GRAHAM BERRY** and attaches hereto the exhibits expressly incorporated into and made a part of his concurrently filed answer and cross-complaint herein.

1. This Appendix No. I of Exhibits has been expressly incorporated as part of the concurrently filed unverified answer and verified cross-complaint herein.

2. This Appendix No. I of Exhibits is also filed in connection with defendant and cross-complainant's Judicial Council of California Form MC-701 (C.C.P. §391.7) filed concurrently herewith. Pursuant to the cross-complaint filed herein, defendant and cross-complainant alleges that the C.C.P. §391.7 order obtained in the underlying matters through, *inter alia*, plaintiff and cross-defendant herein was a product of the frauds upon the courts, unjust judgments and orders, irregular proceedings, a disqualified judge and other wrongful conduct and representations alleged in the answer and cross-complaint herein, and is clearly erroneous as appears on the face of the judgment roll and record, and it therefore should be vacated and set aside as requested herein.

3. Pursuant to: California Evidence Code sections 450, 452 (c), 452 (d) (1), 453, 454, 455, 459, 1530; Code of Civil Procedure sections 430.30 and 430.70; and the Court's own inherent discretion, defendant and cross-complainant Graham E. Berry hereby requests that the court take Judicial Notice of the document (s) listed hereunder for the limited purpose of the matters set forth in this cross-complaint and cross-complainant's concurrently filed Judicial Council Form MC-701.

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4. Attached hereto and made a part hereof are true and correct copies of the following documents and marked as follows:

A. Defendant Graham E. Berry's Brief Re Plaintiff's Claims of Privilege [crime fraud exception to the attorney client privilege] filed in the *Hurtado v. Berry* Superior Court proceeding (a duplicate case was filed and maintained in the Federal District Bankruptcy Court). Cross-defendant's client the plaintiff Hurtado voluntarily dismissed this case on the eve of trial after the Discovery Referee (Retired Superior Court Judge Stephen Lachs) recommended to the trial judge that the motion be granted and the crime-fraud exception invoked. Notwithstanding, cross-defendant maintained the Federal District Bankruptcy Court proceeding against cross-complainant for many months thereafter.

Respectfully submitted,

DATED: February 11, 2010

GRAHAM E. BERRY

Defendant and Cross-complainant *pro se*

EXHIBIT A

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MICHAEL HURTADO, Plaintiff, vs. GRAHAM E. BERRY, Defendant.	CASE NO. BC208227 [Hon. Ray L. Hart, Dept. 10] **DEFENDANT GRAHAM E. BERRY'S BRIEF RE PLAINTIFF'S CLAIMS OF PRIVILEGE** Case Filed: April 5, 1999 Trial: March 5, 2001

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INTRODUCTION

For six years Scientology has been engaged in a concerted effort to prosecute Graham Berry in the civil and criminal courts. (**Exh. 1, 17**.) Despite Mr. Berry's alleged blatantly illegal conduct on both coasts (**Exh. 2**.) Scientology's lawyer's investigator, Eugene Ingram, has come up with only three witnesses to the Mr. Berry's conduct: (1) Robert Cipriano, who has testified he was paid by Kendrick Moxon to give false testimony (**Exh. 1-11**); (2) Anthony Apodaca who testified he too was paid and pressured to give false testimony; and (3) Michael Hurtado who was given a verified complaint claiming he is entitled to $8 million in damages to sign and who has received substantial and valuable legal and investigative services in his several criminal cases in connection with his prosecution of this action. Under these facts, the attorney-client privilege, if it existed at all, does not apply.

1. THE CRIME FRAUD EXCEPTION TO THE ATTORNEY CLIENT PRIVILEGE APPLIES, WHEN, AS HERE, THERE IS *PRIMA FACIE* EVIDENCE THAT THE ATTORNEY'S SERVICES WERE SOUGHT TO PLAN OR COMMIT A CRIME OR FRAUD.

Evidence Code section 956 contains the crime fraud exception: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a *prima facie* showing that the lawyer's services were *sought or obtained* to enable or aid someone in committing or *planning to commit* a crime or fraud. (*State Farm Fire and Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 645; citing *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.)

The crime fraud exception turns on the client's intent. The lawyer does not have to be aware of the planned fraud. (*Freedom Trust v. Chubb Group of Insurance Companies* (C.D., 1999) 38 F.Supp.2d 1170, 1171.) A *prima facie* showing is "one

which will suffice for proof of a particular fact unless contradicted and overcome by other evidence. In other words, evidence from which reasonable inferences can be drawn to *establish the fact asserted, i.e., the fraud.* (***BP Alaska,*** 199 Cal.App.3d at 1240.) "Evidence Code §956 does not require a completed crime or fraud. It applies to attorney communications sought to enable the client to *plan to commit* a fraud, whether the fraud is successful or not." (*BP Alaska*, 199 Cal.App.3d at 1263.)

The exception is applied in a variety of ways. For example, in *BP Alaska*, BP Alaska Exploration, Inc. ("BPAE") asked both its in-house counsel and its outside counsel to assist in an investigation to respond to a letter from Nahama & Weagant Company ("NAWC") asking why Nahama had been cut out of an exploration agreement. NAWC filed suit and propounded discovery to BPAE regarding its investigation of NAWC's claim, including the reports and communications between BPAE and its counsel. NAWC argued that these attorney-client communications were used in the preparation of the letters sent to NAWC which contained misrepresentations. The Court of Appeal concluded that NAWC had made a *prima facie* showing that BP Alaska sought its attorneys' services to assist in the commission or planning of a fraud.

Here, just as in *BP Alaska*, the record contains ***prima facie*** evidence that the Church of Scientology retained the services of Moxon & Kobrin, Eugene Ingram and criminal counsel, including Donald Wager, as part and parcel of Scientology's continuing campaign to manufacture false statements to use against Graham Berry to destroy him, both personally and professionally.

A. Scientology and Berry.

The courts of this state have long recognized that Scientology employs its "fair game" doctrine and litigation to "bludgeon the opposition into submission." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 641 [42 Cal.Rptr.2d 620, 627]; *Wollersheim v. Church of Scientology* (1989) 212 Cal.App.3d 872, 888 [66 Cal.Rptr.2d 1, 12]; *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1067 [283 Cal.Rptr. 917, 920-921].)

Mr. Berry was first retained as the attorney of Scientology's adversaries in the early 1990's. While employed at Lewis, D'Amato, Mr. Berry successfully represented former Scientology lawyer Joseph A. Yanny against Scientology. Mr. Berry was also defense counsel in *Scientology v. Armstrong, Scientology v. Factnet*, and *Church of Scientology v. Geertz, et al.* The law firm of Moxon & Kobrin[1] (or their predecessors) were consistently Mr. Berry's adversaries in each of these cases.

B. Robert Cipriano.

By 1994, Moxon & Kobrin's investigator, Eugene Ingram, was seeking to discredit Mr. Berry. (**Exh. 1**, p. 61, 133; **Exh. 4**, p. 128:10-24) In May, 1994, Ingram appeared uninvited at the door of Robert J. Cipriano's secured New York high-rise. (**Exh. 1**, pp. 64-66.) Ingram said he was a detective with the Los Angeles Police Department and "intimidated" Mr. Cipriano into signing a declaration that Mr. Ingram had prepared. (**Exh. 1**, pp. 71-80.) The declaration contained a variety of statements falsely accusing Mr. Berry of reprehensible and illegal conduct. (**Exh. 1, 2, ¶¶** 5, 11.) The May 5, 1994 declaration has been widely circulated; it has even been published on the Internet.

In 1998, Mr. Berry sued Robert Cipriano[2] and others associated with the Church of Scientology for libel and slander as a result of such false statements as Mr. Berry was

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[1] Moxon & Kobrin was counsel of record for Church of Scientology and/or Scientology-related individuals and entities in *Church of Scientology of California v. Wollersheim* (1996) 42 Cal.App.4th 628, 49 Cal.Rptr.2d 620; *Rowe v. Superior Court (Church of Scientology of Orange County)* (1993) 15 Cal.App.4th 1711, 19 Cal.Rptr.2d 625; *Hart v. Cult Awareness Network* (1993) 13 Cal.App.4th 777, 16 Cal.Rptr.2d 705; *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 283, Cal.Rptr. 917; *Church of Scientology International v. United States Internal Revenue Service et al.* (9th Cir. 1993) 995 F.2d 916; *Church of Scientology v. Internal Revenue Service, et al.* (9th Cir. 1993) 991 F.2d 560; *Smith v. Brady* (9th Cir. 1992) 972 F.2d 1095; *Church of Scientology v. United States of America* (9th Cir. 1990) 920 F.2d 1481; *Church of Scientology International v. Koltz* (C.D.Cal. 1994) 846 F. Supp. 873; *Church of Scientology International v. Internal Revenue Service* (C.D. Cal., 1993) 845 F. Supp. 714; *Bridge Publications, Inc. v. Vien* (S.D. Cal. 1993) 827 F. Supp; *Church of Scientology v. Internal Revenue Service* (C.D.Cal. 1991) 769 F. Supp. 328.

[2] Plaintiff's counsel Kendrick Moxon again represented some defendants in the Cipriano/Barton litigation.

a cocaine abuser and a pedophile. Due to the stress associated with the *Cipriano* action and continued harassment by the Church of Scientology, Mr. Berry sought to be temporarily relieved as counsel of record in some of his active cases. Finally, Mr. Berry was driven into bankruptcy where Mr. Moxon again appeared as counsel for Mr. Berry's adversary.

A year after the Cipriano case was dismissed, Mr. Cipriano was deposed on June 12, 2000 and August 7, 8 and 12, 2000 in this action. Moxon repeatedly attempted to stop the Cipriano deposition by threatening a protective order suspending the deposition on June 12, 2000 and attempting to again suspend the deposition on August 7, 2000. Plaintiff and his attorneys repeatedly attempted to stop the deposition and "seal" Mr. Cipriano's testimony. In his deposition, Mr. Cipriano recanted all of the damaging statements contained in the May 5, 1994 declaration. (**Exh. 1**, pp. 94-105.) Mr. Cipriano testified he wanted to "truth" to come out. (**Exh. 1**, pp. 61-62.)

Mr. Cipriano also testified that Moxon provided him (and his girlfriend) with a variety of free legal services. Moxon paid Wasserman, Comden & Casselman to represent Cipriano in *Berry v. Cipriano* in exchange for his "cooperation" in litigation against Mr. Berry. (**Exh. 1**, pp.16-17, 20, 137:23-25, 138:1-3, 142:19-25.) Moxon provided him with an automobile not to say anything about the exaggerations in the May, 1994 declaration. (**Exh. 1**, pp.154:6-25, 155:1-25, 156:1-6, 167:6-25.) Moxon paid for Cipriano's condominium and leased a four bedroom house for Cipriano in Palm Springs. (**Exh. 1**, pp.156:13-18, 157:6-12, 158:25, 159:1-14, 21-23, 160:4-25, 161:1-8, 165:18-21, 166:8-14, 168, 169:1-9, 240:15-25, 241:1-17.) Moxon paid off a judgment against Cipriano in New Jersey and paid Cipriano's legal fees for handling that matter. (**Exh. 1**, pp. 169:10-25, 170:1-20, 251:10-20, 252:9-25, 253:1, 255, 256-259.) Moxon also gave Cipriano an allowance for living expenses for his "cooperation" in *Cipriano v. Berry*. (**Exh. 1**, pp.171:8-25, 172:1-17, 174:8-24, 175:2-14, 176:1-16, 244:5-25, 245:1-4.) Moxon even purchased a computer for Cipriano. (**Exh. 1**, pp.249:25, 250:1-18.) Moxon funded Cipriano's "non-profit" Day of the Child and performed or paid for all

the legal work and related fees for the business. (**Exh. 1**, pp.180:15-25, 189:1-15, 195:10-25, 196:1-6.) In fact, Cipriano testified under Moxon's cross-examination: "You were providing the funds to run a company so I would testify on your side." (**Exh. 1**, p. 317:17-25.)

In December, 1999, Cipriano was paid $800.00 to sign a settlement and a declaration which Cipriano now contends is inaccurate. The following testimony was elicited by Moxon on cross-examination:

> "Q: Did you make any representation to anyone when -- that you signed this declaration, it was inaccurate?
>
> A: That it was inaccurate . . . let me ask a question. If it was accurate, then why was I being paid $800.00?
>
> Q: Would you answer my question?
>
> A: It was understood. You don't pay people to write affidavits unless you're doing something. . . . I didn't have an intent one way or the other. You presented two documents to me, a settlement agreement and a affidavit, offered me $500 out of nowhere. I did not solicit it. That number settled at $800. I signed in return for the $800." (**Exh. 1**, p. 297, see also pp. 299:5-9, 300:2-13, 304:1-25.)

Again, under Moxon's cross-examination[3], Cipriano testified:

> "Well, you kept providing money. And based on the fact that our whole relationship started with your agent, Mr. Ingram, threatening and intimidating me to give the false declaration in 1994. It was just a continuation of all that, Sir." (**Exh. 1**, pp. 325:20-25, 326:1-8.)

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[3]Moxon's cross-examination of his former client was withering and abusive. (**Exh. 1**, pp. 462-488.)

Under further cross-examination, Cipriano told Moxon:

> "That is what you wanted to hear. That is what you coached me to do. That is what I was threatened and intimidated to do. And that's what I was paid to do." (**Exh. 1**, p. 359:16-23; *see also* pp. 333, 334, 341 and 352.)

Cipriano described the procedure Moxon used in preparing declarations in *Cipriano v. Berry*:

> "Every declaration that you prepared for me to sign was what you wanted to hear, and what you wanted written, and what you wanted to file in court, and what you wanted for everything. . . . I signed what you prepared with the commencement of the threat and intimidation and the payments thereafter. Almost every time you gave me something to sign, you look at the same date or day after and there is a payment of some sort." (**Exh. 1**, p. 362:9-21.)

Cipriano's claims that he was paid by Moxon, and that he received multiple items and services of value from Moxon, are documented. (**Exh. 3**, pp.3-11.) Put simply, why else would Mr. Cipriano make false statements about Mr. Berry? Mr. Cipriano was paid for perjury.

Cipriano also testified that Moxon and Ingram told him that they had located a person named Michael Hurtado who purportedly "had exchanged sexual favors for legal services by Mr. Berry." (**Exh. 1**, pp. 106-109.) Ingram told Cipriano that the information regarding Michael Hurtado would be used to file a State Bar complaint against Mr. Berry and to include in leaflets on cars around Mr. Berry's neighborhood. (**Exh. 1**, p. 110.) In fact, a State Bar complaint has been filed against Mr. Berry and leaflets have been left in his neighborhood identifying him as a child molester.

C. Scientology Attorneys Abelson and Moxon Recruit Hurtado.

In the *Cipriano* case, attorney Moxon deposed Mr. Berry over 12 days. On

November 25, 1998, Moxon questioned Mr. Berry about his sexual relationship with Michael Hurtado. (**Exh. 12.**) The deposition was videotaped.[4]

Less than one month later, in December, 1998, Elliot Abelson, a Scientology attorney first told Donald Wager about Michael Hurtado. (Wager Depo., pp. 18:23-25, 19:1-24, 20:1-8.) Wager opened his file on Michael Hurtado in December, 1998 and began billing even though he had never met Hurtado. (Wager Depo, p. 13:20-25.) Wager then spoke with Eugene Ingram about Michael Hurtado at least three times. (Wager Depo., p. 25:1-25.) Wager understood Ingram was working for Scientology because Ingram told him he was working for Moxon at the time. (Wager Depo., pp. 26-27, 32:7-14.) Moxon, acting as Scientology's counsel, also contacted Wager regarding Mr. Hurtado.[5] Wager had at least six conversations with Moxon before he ever met plaintiff Hurtado. (Wager Depo., pp. 27-28.)

In mid-January, 1999, Eugene Ingram appeared at the Hurtado's home, once again unannounced and uninvited. (**Exh. 13,** pp. 29:3-6, 27:7-25, 29:6-10, 25; **Exh. 14**, pp. 19-25.) Ana and Vanessa testified that Ingram told them that Mr. Berry was a child molester. (**Exh. 13**, pp. 10:3-6, 27:7-25, 29:6-10,-25; **Exh. 14,** pp. 19-25.) Mr. Ingram said he was investigating Mr. Berry from New York and had been investigating him for a long, long time. (**Exh. 13**, pp. 31:9-25, 32:1-25, 33:1-24, 38:18-25, 39:1-11; **Exh. 15**, pp. 131:16-25, 132:-13.) Ingram suggested to the Hurtados that Mr. Berry had **taken advantage of Michael Hurtado.**

When Ingram showed them the videotape of Mr. Berry's testimony regarding his sexual relationship with Michael Hurtado, Mrs. Hurtado did not want to see it, or look at it, and she refused to keep it, saying: "Forget it. Take it." (**Exh. 13**, pp.37:2-11, 20-

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[4]Ingram showed that videotape to plaintiff Michael Hurtado's parents, including his elderly father, who allegedly has a heart condition. As a result, ***Hurtado's parents*** hired attorneys Moxon and Wager to sue Mr. Berry.

[5] Moxon gave Wager photos of Mr. Berry and Mr. James McIntyre taken in Australia. (Wager Depo., pp. 89:17-25, 92:4-13, 95:13-17, 96:14-25, 97:1-9, 102:15-25.)

22, 25, 38:1-2.) The entire Hurtado family had long believed that homosexual conduct was inappropriate. (**Exh. 14**, pp.157-158.) ***Yet, Ingram showed them the Cipriano declaration,*** multiple other documents, and even told them that Mr. Berry liked to be defecated upon. (**Exh. 14**, pp. 46, 143.) Ingram wanted the Hurtados "to see a lawyer because of this matter," and suggested that there was a possibility that there could be a civil suit against Mr. Berry. (**Exh. 14**, pp. 123:2-14, 22, 130:24-25, 131:1-4.) Ingram then took Ana, Miguel, Vanessa and a Cuban writer friend to see Wager within a very few days. At Wager's office, they were introduced to Moxon. (**Exh. 13**, pp. 34:18-25, 35:1-25, 36:1-4, 11-25, 45:9, 46:1-25, 55:2-8, 59:1-17.)

Both Ana and Vanessa Hurtado thought the purpose of the meeting was to find a lawyer who would represent Michael in a lawsuit against Mr. Berry. Neither of them knew about the then pending drug paraphernalia charges. (**Exh. 14**, p. 49:15-25.) (**Exh. 13**, pp. 27:7-17, 29:6-24, 30:1-20, 31:14-25, 32:1-13, 33:4-11, 46:19-25, 47:1-6, 58:14-17, 59:12-17.) No one in the Hurtado family discussed Mr. Berry's relationship with Michael Hurtado at any time before they attended the meeting with Wager and Moxon. Instead, Vanessa, Ana and Miguel Hurtado -- without Michael Hurtado -- met with the attorneys and decided to file this lawsuit against Berry. (**Exh. 13**, pp. 35-41, 53-54.) ***After the meeting***, the elder Mr. Hurtado told Michael that Mr. Wager would now be representing him in the criminal matter.

The Hurtados went along with whatever the lawyers, Wager and Moxon, and investigator Ingram told them to do. (**Exh. 14**, pp. 40-44.) The Hurtados even went so far as to allow Ingram to tap their phone to entrap Mr. Berry. (**Exh 14**, pp. 59-85.) In fact, Michael Hurtado is not suing because of what was allegedly done to him. Instead, he is suing for "money" and because:

> "I figured, you know, a person like this, doesn't deserve anything good; so I just don't believe a person in a career that should be able to have sex with minors and do drugs and offer drugs to minors. I don't believe in that; so that is why I'm

suing." (**Exh. 15,** p. 131:2-15.)

Wager did not meet with Michael Hurtado until January 22, 1999, *after* Wager had met with Abelson, Ingram, Moxon and the Hurtado family. (Wager Depo., pp. 20:17-25, 21:1-23, 22:25, 23:1, 24:1-21.) Wager and plaintiff did not sign a retainer agreement until January 27, 1999.

D. Moxon, Wager and Ingram Seek Perjurious Statements from Apodaca.

This action was filed on April 5, 1999. Although Wager never represented him, on April 13, 1999, Wager visited Anthony Apodaca[6] in jail and left between $100 and $300 for him. Moxon reimbursed Wager. (Wager Depo., pp. 46:3-14; 53:10-25; 57:16-24, 59:20-22; 64:23-25.) Apodaca was not a witness to anything relating to the drug paraphernalia case. (Wager Depo., pp. 63:16-22, 64:11-25.) In fact, on April 13, 1999, ***"there was a real question in [Apodaca's] mind as to who Berry was."*** However, on April 22, 1999, Ingram, Moxon and Wager met with Apodaca and he was videotaped. (Wager Depo., pp. 48:7-22, 50:9-15, 58:5-19.) Mr. Apodaca may also have been given money on April 22, 1999. (Wager Depo., p. 60:9-25.) Mr. Apodaca was now able to identify Mr. Berry as a man he had been with four to five years earlier. (**Exh. 18.**) In the videotape, Mr. Apodaca said that while he was under age, he engaged in sadomasochistic activities with Mr. Berry (**Exh. 18.**) On April 26, 1999, Moxon noticed Mr. Apodaca's deposition in this action. (**Exh. 19.**)

However, at his deposition on May 3, 2000, Mr. Apodaca testified he was high at the time of the videotaping, had no recollection of it and he could not even recognize Mr. Berry. (**Exh. 16.**) Mr. Apodaca said he was pressured into giving his videotaped statement. According to Mr. Apodaca, some lawyer came to County Jail and gave him $200.00. He was given money, McDonald's food certificates and clothing to testify against Mr. Berry. He refused. According to Mr. Apodaca, "All this stuff about this plaintiff trying to bribe me to testifying -- okay? -- I don't go for that. (**Exh. 16**, p. 12.)

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[6] Mr. Apodaca had been addicted to heroin, and is sometimes a street walker.

E. Wager, Abelson and Ingram Approach Prosecutors and Berry is Reported to the State Bar.

In the spring of 1999, Wager, along with Scientology attorney Abelson, also met with Detective Detz and District Attorney Paul Turley to encourage them to prosecute Mr. Berry for pandering. (Wager Depo., pp. 101:13-16, 103:9-25, 104:13-25, 105-106.) During that meeting, Wager told Turley about his client's criminal history, the pending charges against Hurtado, and Hurtado's claims against Mr. Berry. (Wager Depo., pp. 105:10-25, 107:11-15, 22-25, 108:1-4, 21-25, 109:1-6, 112:17-25, 113:1-19.) Wager called Detective Detz several times to see if Berry would be prosecuted and was ultimately told no charges would be brought. (Wager Depo., p. 114.) Although Wager declined to represent Hurtado when still more criminal charges were brought against him, he did discuss the additional charges with both Abelson and Ingram. (Wager Depo., pp. 118:4-19, 119:13-17.)

Meanwhile, State Bar proceedings were brought against Mr. Berry arising out of Michael Hurtado's allegations. Scientology's representatives regularly contact the State Bar demanding that Mr. Berry be punished.

Abelson represents Wager for purposes of the deposition before this Court.[7] Abelson has spent years "*investigating*" Mr. Berry. By way of example, on September 13, 2000, Mr. Abelson wrote to an attorney in New Zealand,

> "I am writing to you in connection with an investigation I am conducting into Graham E. Berry. The purpose of my investigation is to uncover unethical or illegal conduct committed by Mr. Berry. I understand you may have data that may be of help in my investigation. Specifically, I would appreciate any information you can provide concerning Mr. Berry's motives for embarking upon a course of action which would seem, to any

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[7]Abelson has also represented Scientology related parties in multiple litigations. (See, e.g., *Religious Technology Center v. Netcom On-Line Communication Services* (ND Cal. 1995) 923 F.Supp. 1231; *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* (ND Cal. 1995) 907 F. Supp. 136.1)

objective observer, to be contrary to his own best interests, and a blatant attack on international religion." **(Exh. 17.)**

Mr. Abelson saw fit to copy this letter to everyone from Mr. Berry's elderly parents in New Zealand to the New York Disciplinary Committee (for discipline of attorneys) to the Department of Justice in New Zealand. Since bringing the action, Michael Hurtado has been arrested multiple times and is currently in jail for violation of probation -- five years for stalking. Ingram continues to provide substantial investigative services for Hurtado in these several criminal proceedings, attends court proceedings and takes Hurtado to AA meetings. Although Hurtado was represented by Public Defenders before this lawsuit, he has been consistently represented by private criminal defense attorneys since the day his family agreed to sue Mr. Berry.

Thus, there is strong evidence that Scientology and its lawyers have consistently either used or planned to use false statements both in civil and criminal actions and to foment legal proceedings against Mr. Berry. Michael Hurtado is now receiving substantial benefits for prosecuting this action. Accordingly, the crime-fraud exception applies and the attorney-client privilege has been waived. Mr. Wager must answer all questions posed, produce all of his billings and testify to and produce all information regarding how he was paid.

2. <u>WHEN, AS HERE, PLAINTIFF AND HIS ATTORNEYS HAVE DISCLOSED THE SO-CALLED PRIVILEGED INFORMATION, THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN WAIVED</u>.

The attorney-client privilege may be waived by either voluntarily abandoning the privilege by consenting to or disclosing a significant part of the privileged communication, or by conduct that impliedly abandons the privilege. California Evidence Code section 912(a); (*Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482, 492.)

Here, the Hurtados have testified regarding payment to Wager. The Hurtados have never been billed by or paid Mr. Wager for his services and, to Mrs. Hurtado's

knowledge, Michael Hurtado has not been billed for Mr. Wager's services. (**Exh. 13**, p. 47:7-19.) Vanessa Hurtado changed her testimony, testifying first that Wager never discussed his fees with the family and later "correcting" her testimony to say that he did. (**Exh. 14**, p. 40.) Then, despite the fact that Michael Hurtado has no regular employment or verifiable means of support, he testified that he was going to pay Wager in full, believes he did pay Wager but, in fact, does not recall. (**Exh. 15**, pp. 82-114; 140:22-25, 141:1-24.)

Since plaintiff and his family testified regarding how Wager was paid, any privilege has been waived and testimony and documents relating to payments for Wager's services should be compelled.

3. FINALLY, THE INFORMATION DEFENDANT SEEKS FROM MR. WAGER IS RELEVANT TO IMPEACH PLAINTIFF MICHAEL HURTADO AND THE WITNESSES AFFILIATED WITH HURTADO.

It has long been the law in California that impeachment evidence is always relevant. Evidence that is relevant to the credibility of a witness or a hearsay declarant is admissible even though that evidence may be irrelevant or inadmissible with respect to proving or disproving a disputed fact in the action. (*Jefferson, California Evidence Benchbook* (2d Ed.) §21.9 at p. 579.) Evidence relevant to the credibility of a witness is always relevant for impeachment purposes to determine the existence of nonexistence of any fact testified to by that witness. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Here, the testimony and evidence sought is directly relevant to defendant's contention that plaintiff has received substantial benefits for prosecuting this action. Thus, the evidence sought is patently relevant. Moreover, the Hurtados have offered varying testimony as to who, if anyone, paid attorney Wager. For this reason too, all documents should be compelled.

4. ATTORNEY BILLING RECORDS, CLIENT IDENTITY, PAYER AND AMOUNT PAID ARE NOT PRIVILEGED.

Attorney billing records are not protected by the attorney-client privilege. The

identity of the client, the amount of the fee, the identification of payment by case file name and the general purpose of the work performed are not protected from disclosure by the attorney-client privilege. (*U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189, 1194, citing *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir., 1992).) Accordingly, as in *Amlani*, defendant here has "an undisputed right to view these documents."

This legal proposition is supported by *Magill v. Superior Court* (filed January 10, 2001) 2001 DAR 432 cited to this Court by plaintiff's counsel. (Wager Depo.) The general rule is that the client's identity in fee arrangements is not privileged. The identity of the person or entity paying the fee only becomes privileged "where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought." (*Id.* at p. 448.) Only where "disclosure of the client's name might serve to make the client the subject of official investigation or expose him to criminal or civil liability" is the name protected by the privilege. (*Id.* at p. 447.) The court's determination of whether a client's name, address or fee arrangement is a privileged communication depends upon an analysis of the facts of the case, and the potential for harm to the client if the identification is compelled. "The court must weigh the competing policies of guaranteeing the right of every person to 'freely confer with and confide in his attorney in an atmosphere of trust and serenity while, on the other hand, protecting the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings.'" (*Ibid.*) Otherwise unprotected information does not become privileged merely because the information might provide evidence of a client's wrongdoing. "The terms 'confidential' and 'incriminating' are not synonymous." (*Id.* at p. 449, 452.) The "rule also does not apply where the client secured the attorney's representation in furtherance of present, intended, or continuing illegality." (*Magill v. Superior Court* (2001) DAR 432, 448.)

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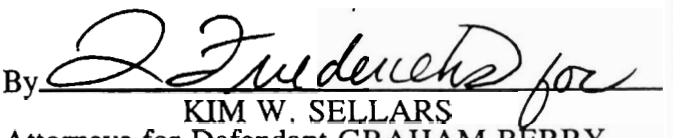
Here, there is no factual or legal basis for plaintiff or Scientology to assert a privilege with respect to Donald Wager's bills and who or what entity paid those bills. Accordingly, the Court should compel all testimony and documents related to Wager's billing and receipt of payment.

CONCLUSION

For all the foregoing reasons, defendant respectfully requests that this Court overrule each and every one of plaintiff's and the witness' objection and compel further testimony and production of documents.

DATED: January 26 2001

ROBIE & MATTHAI
A Professional Corporation

By 
KIM W. SELLARS
Attorneys for Defendant GRAHAM BERRY

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 500 South Grand Avenue, Suite 1500, Los Angeles, CA 90071.

On January 26, 2001, I served the foregoing document(s) described as: **DEFENDANT GRAHAM E. BERRY'S BREIF RE PLAINTIFF'S CLAIMS OF PRIVILEGE** on all interested parties in this action by placing a true copy of each document, enclosed in a sealed envelope addressed as follows:

Ava Paquette, Esq.
MOXON & KOBRIN
3055 Wilshire Boulevard, Suite 900
Los Angeles, CA 90010
(213) 487-4468
(213) 487-5385 Fax

Thomas S. Byrnes, Esq.
Law Offices of Thomas S. Byrnes
9465 Wilshire Blvd., Suite 330
Beverly Hills, CA 90212
(323) 852-0802
(323) 852-0820 Fax

( ) **BY MAIL:**

( ) I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

( ) As follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to that practice, the envelope was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. The envelope is sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Los Angeles, California.

(X) **BY PERSONAL SERVICE:**

(X) I delivered such envelope by hand to the above addressee(s) by leaving the document with the receptionist at the address listed above, during normal business hours.

( ) I delivered such envelope by hand to the above addressee(s).

( ) **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to an overnight courier service for delivery to the addressee(s) shown.

( ) **BY FACSIMILE TRANSMISSION:** I caused the above-referenced document(s) to be transmitted to the above-named person(s) at the above facsimile numbers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2001, at Los Angeles, California.

Ian Smith