

CHURCH OF SCIENTOLOGY FLAG  
SERVICE ORGANIZATION, INC.,

Plaintiff,

v.

DEBRA J. BAUMGARTEN,  
AKA DEBBIE COOK BAUMGARTEN,  
AKA DEBBIE COOK, AND  
WAYNE BAUMGARTEN,

Defendants.

IN THE DISTRICT COURT

150<sup>th</sup> JUDICIAL DISTRICT

BY:

DEPUTY

BEXAR COUNTY, TEXAS

2012 MAR -2 P 3:01

FILED  
DISTRICT CLERK  
BEXAR CO. TEXAS

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Church of Scientology Flag Service Organization, Inc., Plaintiff, and files this its Motion for Summary Judgment against Debra J. Baumgarten, aka Debbie Cook Baumgarten, aka Debbie Cook, and Wayne Baumgarten, Defendants and Counter-Plaintiffs, and would show the Court as follows:

**INTRODUCTION**

This is a dispute regarding the enforcement of contracts. For substantial consideration the Defendants/Counter-Plaintiffs agreed not to disclose certain confidential and private information regarding the Plaintiff and not to issue disparaging statements regarding the Plaintiff and its officials. This Motion for Summary Judgment seeks enforcement of the agreements freely entered into but, in any case, fully ratified by the Defendants/Counter-Plaintiffs.

Plaintiff Church of Scientology Flag Service Organization, Inc., (hereinafter "the Church") is a not for profit religious organization incorporated in Florida. It conducts its activities primarily in and about Clearwater, Florida.

Defendants/Counter-Plaintiffs Debra J. Baumgarten, aka Debbie Cook Baumgarten, aka Debbie Cook (hereinafter "Cook"), and Wayne Baumgarten (hereinafter "Baumgarten") (collectively "Defendants") are former staff members of the Church in Florida. Cook was the "Captain" of the Church for seventeen years, which is one of the highest ranking ecclesiastical positions in Plaintiff Church.

On October 19, 2007, Defendants resigned their positions with the Church and entered into virtually identical Agreements with it. Under the terms of those Agreements the Defendants, among other things, agreed to maintain the confidentiality of information about and their experiences with the Scientology religion. They further agreed that they would refrain from disseminating either by word or by writing any disparaging statements about the Scientology religion or the organization, staff, and membership of Scientology organizations.

In the agreements the Defendants acknowledged the impracticality of measuring actual damages caused by any violations of the agreement, and therefore agreed to a schedule of liquidated damages, acknowledged to be reasonable, for breaches of the agreement.

In return, Cook and Baumgarten received immediate payments of \$50,000.00 each on October 19, 2007. Thereafter, as further consideration, the Church made payments for expenses associated with the Defendants' move from Florida to San Antonio, as well as for temporary housing in San Antonio upon their arrival. In 2009 Defendants requested and received further payment from the Church for certain tax liabilities assessed against them as a result of the initial payments.

After having benefitted by the agreements and the substantial consideration they received under the agreements for over four years, on December 31, 2011, Defendants sent to over 3,000 persons an email message that disclosed confidential and non-public purported information about Scientology churches, ecclesiastical leaders, practices, financial information, and parishioners and disparaged the Church and its leadership.

Based on that clear violation of the agreements, the Church brought this action for breach of contract seeking damages, injunctive relief and specific performance after Defendants refused to cease and desist.

Nonetheless, even after the issue was joined in this action, the Defendants made further public statements in breach of their agreements. At a press conference attended by various media representatives, further statements were made on camera for distribution and publication in media outlets in violation of the agreements. (Appendices M and N).

## MOTION FOR SUMMARY JUDGMENT

1. This Motion for Summary Judgment is based upon the pleadings on file, portions of the record of the hearing of February 9, 2012 on the Plaintiff's Application for Temporary Injunction, and the record of the February 10, 2012 press conference, all of which are filed in support of this motion. The relevant testimony and exhibits are included in the contemporaneously filed Appendix to this Motion. Those include the following:

- A. Portions of the testimony of Defendant Cook (Appendix A);
- B. Agreement and General Release of October 19, 2007, between Cook and the Church (Appendix B);
- C. Agreement and General Release of October 19, 2007, between Baumgarten and the Church (Appendix C);
- D. Checks of October 17, 2007, for \$50,000.00 each to Debbie Cook and Wayne Baumgarten (Appendix D);
- E. Email exchange of March, 2009, between Cook and Kathy True (Appendix E);
- F. Check of April 7, 2009, for \$6,502.40 (Appendix F);
- G. Email of January 1, 2012 from Cook to June and Eddie Camacho (Appendix G);
- H. Email of December 31, 2011 (Appendix H);
- I. Annotated version of Appendix H, for demonstrative purposes (Appendix I);
- J. Tampa Bay Times article of January 2, 2012 (Appendix J);

- K. USA Today article of January 3, 2012 (Appendix K);
- L. The Economist article of January 7, 2012 (Appendix L);
- M. Video as published on website of Village Voice publication (Appendix M);
- N. Transcript of video published by Village Voice (Appendix N); and
- O. Video of Defendants signing agreements of October 19, 2007 (Appendix O).

2. The pleadings and the summary judgment evidence demonstrate that there is no genuine issue of material fact with respect to Plaintiff's cause of action and/or certain elements of the causes of action at issue, with the exception of the amount of Plaintiff's reasonable and necessary attorneys' fees.

- a) The pleadings and the summary judgment evidence establish as a matter of law that the agreement of October 19, 2007, between Plaintiff and Defendant Cook is a valid and enforceable contract.
- b) The pleadings and the summary judgment evidence establish as a matter of law that the agreement of October 19, 2007, between Plaintiff and Defendant Baumgarten is a valid and enforceable contract.
- c) Defendants' affirmative defense of "duress, undue influence" at paragraph 3 of their original answer is without any conceivable merit as a matter of law. Assuming for purposes of this motion alone that the Defendants' claims of duress and coercion have any factual

basis, which is denied by the Plaintiff, such claims of duress and coercion are immaterial. As a matter of law the acts and conduct of the Defendants subsequent to October 19, 2007 (after all of the alleged duress and coercion admittedly ended) constitute ratification of the agreements. Defendants are estopped as a matter of law from prevailing on their affirmative defense that they were coerced into entering and signing their Agreements. As a matter of law, Defendants are estopped from denying the validity of their signed contracts as a result of their subsequent acts which constitute ratification of those contracts as a matter of law.

- d) As a matter of law, the conduct of the Defendants in circulating the email of December 31, 2011 and of Defendant Cook in making statements to the media on February 10, 2012 constitute violations of their contractual obligations.
- e) As a matter of law, and under the terms of each agreement, Plaintiff is entitled to liquidated damages in the amount of \$300,000.00.
- f) Alternatively, if summary judgment is not rendered on all issues before the Court, Plaintiff seeks an order under the terms of TRCP 166a(e) on those fact issues established as a matter of law.

- g) Additionally and as a matter of law, Defendants' counterclaim for declaratory relief should be dismissed as asserting no cause of action nor seeking any relief independent of that already before the Court as part of Plaintiff's claims.

## **ARGUMENT AND AUTHORITIES**

### **INTRODUCTION AND SUMMARY**

Plaintiff Church has moved for summary judgment adjudging that Defendants have breached their separate but virtually identical contracts with the Church whereby Plaintiff is entitled to an award of liquidated damages against each of the Defendants. In support of its motion, Plaintiff has submitted the transcript of the testimony of Defendant Cook in this court on February 9, 2012, and the exhibits introduced at that hearing<sup>1</sup>. Further, Plaintiff has submitted the video and a transcript of statements made by Defendant Cook to the press on February 10, 2012. The uncontroverted evidence, much of it from Cook's own testimony, shows that:

1. On October 19, 2007, Defendants each separately entered into contracts with Plaintiff Church pursuant to which Defendants released any claims they might have against Plaintiff Church or any other Scientology church, entity or official, and agreed to strict covenants of non-disclosure,

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<sup>1</sup> On February 9, 2012, this court held a hearing on Plaintiff's motion for preliminary injunction. When the court denied Plaintiff's motion in limine to restrict testimony relating to Defendants' alleged experiences in the Scientology religion, which was the very subject matter whose confidentiality was at issue, and after the court permitted television coverage inside the courtroom, Plaintiff withdrew its motion and has elected to go forward with its claim for liquidated damages.

confidentiality and non-disparagement with respect to their knowledge and experiences as ecclesiastical officials in the Scientology religion, as more fully set forth, *infra*. As consideration, FSO paid to each Defendant and each Defendant received \$50,000.00 on October 19, 2007. Seventeen months later Defendants requested and Plaintiff agreed to pay Defendants additional consideration of \$6,500.00 to mitigate the cost of taxes that were due for the receipt of the original consideration.

2. Defendants kept the money they received as consideration for their releases and covenants, did not offer to return it, spent it, did not seek to rescind their contracts, and thus have ratified the contracts.
3. On December 31, 2011, Defendant Cook, by her own admission aided and abetted by and in conspiracy with Defendant Baumgarten, published an email to over 3000 people whom she knew from her long involvement in the Scientology religion, in which Cook disclosed numerous matters whose disclosure was prohibited by the confidentiality and non-disclosure covenants of the contract and made numerous scandalous and disparaging attacks upon churches of Scientology and their ecclesiastical leadership.
4. On February 10, 2012, Cook conducted a news conference or press briefing in San Antonio in which she made further and repeated statements in



violation of her covenants of confidentiality, non-disclosure and non-disparagement.

The contracts between Plaintiff Church and the Defendants stated and explained that if Defendants were to breach any of their covenants it would be extremely difficult for Plaintiff Church to prove actual damages. Accordingly, the contracts provided for liquidated damages, as an approximation of damages and not as a penalty, for any such breaches, as well as for attorneys' fees and costs.

As set forth below, under the uncontroverted facts and as a matter of law, Plaintiff is entitled to summary judgment on its claim for liquidated damages against Defendants. The parties entered into valid contracts for which Defendants received valuable consideration. While the contracts restrict Defendants from speaking about certain matters concerning the Scientology religion, numerous courts, including the Supreme Court of the United States and courts in this State, unanimously have held that such agreements are valid and enforceable where consideration has been paid, as it was here in substantial amounts. Defendants' claims that they were induced to sign the contracts by undue influence or coercion<sup>2</sup> are immaterial and irrelevant because even in such circumstances a contract is merely voidable and not void *ab initio*. Where the party claiming undue influence or coercion takes no steps within a reasonable time to rescind the contract, and especially where, as here, such a party has ratified the contract by her

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<sup>2</sup> The Church vehemently denies Defendants' allegations of duress, coercion and undue influence but understands that for the purpose of this motion such allegations are assumed to be true.

actions such as by accepting, using and depleting the benefits of the contract, that party may not assert a defense of coercion. Finally, given that the amount of damages that result from breach of the covenants of non-disclosure, confidentiality and non-disparagement are extremely difficult to assess, not only at the time of entry into the contract but at the time of breach, liquidated damages are proper. The liquidated damages sought here of \$100,000.00 for each of two substantial breaches of the contracts by Cook and one by Baumgarten are reasonable under all the circumstances.

### FACTS

Plaintiff Church of Scientology Flag Service Organization is a church of the Scientology religion that provides advanced religious services and counseling to Scientologists from throughout the world. *Church of Scientology Flag Service Organization v. City of Clearwater*, 2 F.3d 1514, 1519-20 (11th Cir. 1993). It is located and conducts almost all its activities in Clearwater, Florida. The United States Internal Revenue Service has recognized Plaintiff as a "Church" within the meaning of 26 U.S.C. § 170(c), exempt from taxation under 26 U.S.C. § 501(c) (3).<sup>3</sup> The Flag Service Organization (Flag) is the largest Scientology Church in the world. (Tr<sup>3</sup> 63.)

Defendants are former staff members of the Church and the Sea Organization, the religious order of the Scientology religion. (Tr. 62-63). Defendant Cook served as a volunteer for 28 years as a member of the Sea Organization (Tr. 62, 68), which she

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<sup>3</sup>References to "Tr. \_\_\_" are to pages in the transcript of the court hearing of February 9.

characterized as "very, very good" years (Tr. 69). For seventeen years, she held the position of Captain of Plaintiff Church, which was one of the highest ecclesiastical positions in Plaintiff Church (Tr. 62). Her position was "prestigious" and "influential." (Tr. 63).

On October 19, 2007 Defendants voluntarily resigned their positions with the Church, "because of a medical condition that made it difficult for [Cook to] maintain the schedule [she] needed to maintain in the Sea Org" (Tr. 71-72). (Baumgarten left at the same time as his wife Cook.) Defendants entered into separate (and essentially identical) agreements with the Church. (Tr. 90-91, 102-103, Appendices B and C). As Cook testified, "I understood I signed and agreed to the agreement" (Tr. 75-76). Cook also testified that the signature on Wayne Baumgarten's agreement was her husband's. (Tr. 102-103.)

Pursuant to that Agreement, the Church paid Defendants \$50,000.00 each, plus other consideration referred to but not specified in the agreement,<sup>4</sup> for their promises and covenants and for their general releases. (Tr. 84-85, Appendix D). Defendants acknowledged at the time of signing that this consideration was "far more than generous." (Tr. 73). Cook understood at the time that "by signing [the contract] and initialing it [she was] creating legal obligations for all of the parties that are parties to the agreement" (Tr. 91-92), including that her promises and covenants required that she

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<sup>4</sup> Cook acknowledged in her testimony that the Church also "paid for like a room for us to stay in, which we stayed in for about four weeks before we got our own apartment," which she agreed cost "probably about" \$2,000.00 (Tr. 77), a form of assistance she understood would be provided prior to signing the agreement (Tr. 83).

“would not discuss the confidential matters that [she] learned during [her work for] the church.” (Tr. 74; also Tr. 83-84).

Defendants expressly promised to “*never* disclose any information, data, or knowledge [they] ... learned or will learn ... relating to any of the Releasees [*i.e., inter alia*, the Plaintiff Church and all other Scientology churches, or their officers, directors, trustees, staff members and agents], ... that has not been authorized for release to the general public. Such matters include, by way of example and not limitation ... financial information ... plans, programs, strategies ... or other information about any of the Releasees or the Scientology religion which are not specifically authorized to be disclosed ...” Appendices B and C; ¶ 6(B).

Defendants also expressly promised “*never* to create or electronically post or publish and/or assist another in any fashion to create for publication ... any writing or to broadcast any information ... concerning [their] experiences with, knowledge of, or information concerning, the Scientology religion, or any of the Releasees, or any of their respective staff.” *Id.*, ¶ 6(E).

Defendants further and specifically covenanted, agreed, and promised, *inter alia*, “*never* to utter, write, print, post, disseminate, circulate, quote or publish any kind of statement in any form, which is defamatory *or* disparaging against any of the Releasees, either directly or indirectly.” *Id.*, ¶ 6(H).

With respect to their covenants, Defendants agreed that “disclosure of such information could cause irreparable injury” to the Releasees. *Id.*, ¶ 6(B).

Defendants specifically understood and agreed that by entering into the contracts and accepting the significant consideration provided under them, they were “waiving ... rights under the California, Florida and United States Constitutions, specifically [their] First Amendment right to free speech and its California and Florida equivalent rights.” *Id.*, ¶ 6(F).

After entering into the contracts, Defendants left their staff positions with Scientology churches and lived in Texas. For over four years, Defendants never attempted to rescind their agreements or claimed in any way that they were unfair or burdensome. They spent the money they received “on things [they] needed or wanted” (Tr. 94). Indeed, in March 2009, nearly a year and one-half after executing the contracts, they requested the Church to resolve a government demand for taxes on the \$100,000.00 they had received, and they accepted from the Church an additional \$6,500.00 to help defray such taxes (Tr. 97, 100-101, Appendix F). Defendants concede that they never offered and never did return the original \$100,000.00 or the \$6,500.00 payments (Tr. 101-02). Indeed, as recently as February 9, 2012, Cook testified that Defendants “have no plans to return that money to the church” (Tr. 138), and that she was “going to keep

the money [she] and her husband got and in fact have spent, but continue to dispute in court the church's right to enforce the contracts" (Tr. 140-41).<sup>5</sup>

On December 31, 2011 Defendants published, circulated and distributed an email (Appendix H; *see* Tr. 105, 107) to more than three thousand Church members (Tr. 107-108). Although the email was sent under the name "Debbie Cook", Cook testified extensively that the email was a joint effort of both Defendants. To similar effect, Cook acknowledged in another email that "we" sent out the December 31, 2011 email. (Tr. 125-127, Appendix G).

Defendants represented in their email that Cook had special knowledge, services, experience and expertise concerning Scientology Scripture, policies, practices and information based on Cook's 28 years of service in the Sea Organization at the Church, seventeen as "Captain" of the Church (Appendix H, p. 1). Defendants disclosed their purported knowledge, information and data in direct violation of paragraphs 6(B), 6(D), 6(E), 6(H) and 7(A). The thrust of Defendants' entire December 31, 2011 email as well as specific statements therein disparage the Church and its officers, directors, staff and trustees in breach of paragraph 6(H). (Tr. 111-116, 127-128). For example, Cook

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<sup>5</sup> On February 20, 2012, long after the commencement of this action and in obvious contemplation of the filing of this motion, Defendants' counsel sent a letter to Plaintiff's counsel offering to return the \$100,000.00 at some unspecified time in the future in exchange for rescinding the contracts. Such an after-the-fact litigation ploy after over four years of ratification and after Defendants substantially breached the contract is obviously ineffective. As discussed more fully *post* at II, once a party ratifies a contract, it may not later withdraw its ratification and seek to avoid the contract, especially after it has breached the contract. *Lake Mabel Development Corp. v. Bird*, 99 Fla. 253, 258, 126 So. 356, 358 (Fla. 1930)(once party has ratified, he must "adhere to it. . . . *He is not permitted to play fast and loose. Delay and vacillation are fatal . . .*")(emphasis added); *Mo. Pac. R.R. Co. v. Lely Dev. Corp.*, 86 S.W.3d 787, 792 (Tex. App.—Austin 2002, pet. dism'd).

denounced Scientology's ecclesiastical leader as having improperly usurped leadership of the religion (Appendix I, #16<sup>6</sup>), and repeatedly disparaged Scientology churches and ecclesiastical leaders by accusing them, *inter alia*, of violating Church scripture ("LRH policy and tech") (*id.*, #3) and the basic tenets of the religion ("out-KSW")(*id.*, #1), including by improper fund raising activities (*id.*, #s 3, 7-9), misuse of church assets (*id.*, #s 5, 7), impeding the spiritual advancement of Scientology parishioners (*id.*, #s 12-15), and even of incorrectly and improperly providing religious services to parishioners ("out tech")(*id.*, #s 10, 11), thereby committing what Cook called a "High Crime" (*id.*, #12). Cook in fact urged Scientologists to discontinue donations to Scientology churches and organizations (*id.*, #s 3, 6), including the Scientology membership organization known as the International Association of Scientologists (*Id.*, #4). In so doing, Cook also repeatedly disclosed purported "information, data or knowledge" of a non-public nature concerning her purported "experiences with, knowledge of, or information concerning the Scientology religion," churches and religious officials, including the amount of church reserves (*id.*, #4), to what use or non-use they are being put (*id.*, #s 5, 7), and the activities of church staff members (*id.*, #s 8, 9).

Cook's own testimony concedes that the December 31, 2011 email violated the expressed covenants set forth in the October 19, 2007 agreements. Cook acknowledges that her email was "critical of the ... current leadership of the Church" (Tr. 124),

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<sup>6</sup> For demonstrative purposes and ease of reference, we have attached to the motion as Appendix I a version of the Cook email with numbered highlights to show specific violations of the contracts.

including that it made the “serious charge” (Tr. 112) that the Church and its ecclesiastical leaders have “adopted policies that are not appropriate and directly violate LRH policy and tech” (Tr. 111), which she described as Scientology “scriptures” (*id.*) that lie “at the center and the heart of the religion of Scientology” (Tr. 112). She openly admits that such criticism was “damaging to the reputation” of Scientology ecclesiastical officials: “I mean, I think it’s obvious that it would hurt their reputation” (Tr. 128). She concedes that she urged Scientologists to “stop supporting” such “off-policy” practices (Tr. 115-116). She further acknowledges that her email was “critical of ... fundraising actions that were being taken by the church” (Tr. 114) and that she urged the recipients of her email to “stop donating” to such “actions” (Tr. 116).

Cook further conceded that her email “discusses [her] knowledge of and information ... concerning the Scientology religion ... and its staff” (Tr. 127-128) and “discloses experiences that [she] had with the Scientology religion and its staff” (Tr. 128).

Defendants incited other parishioners to forward Cook’s email to “as many others as you can” (Appendix I, #17; Tr. 109), thereby breaching ¶ 6(D), which prohibits Defendants from voluntarily assisting any person, group or organization to harass or injure the Church, other Scientology churches, or their staff.

Defendants’ disparaging email was widely reported in local, national and international media including the *Tampa Bay Times*, *The Economist* and *USA Today*. (Tr.



116-117, 120-122, Appendices J, K, L). Cook admitted that such articles were based upon her email and were “unfavorable” (Tr. 120-21,123), that one newspaper characterized her email as “blast[ing]” church leadership (Tr. 123-124), and that another article in *The Economist* (Appendix L), which characterized her email as “explosive” and as accusing the ecclesiastical head of the religion of “mismanaging its finances and breaking its internal rules”, “definitely put the church in an unfavorable light” (Tr. 122-123).

Finally, on February 10, 2012, Cook held a press conference in which she made further disclosures about her experiences in and knowledge about Scientology, as well as additional scandalous allegations disparaging Scientology ecclesiastical leadership, including characterizing the ecclesiastical leader as a “tyrant”, claiming that under his leadership the Church has not followed the policies and Scripture as written by its Founder, L. Ron Hubbard, and calling for a “reformation” of the religion that would “oust” its “bad” ecclesiastical leadership. (Appendices M, N).

## **ARGUMENT**

### **I. Defendants Entered into Valid and Enforceable Contracts for Valuable Consideration**

Defendants and the Church entered into facially valid contracts pursuant to which the parties to the contracts exchanged mutual promises and consideration. As stated above, in exchange for releasing Plaintiff and other Scientology churches and officials from any claims and for entering into the various covenants of non-disclosure and non-

disparagement, Defendants each received \$50,000.00. That sum was supplemented by housing assistance in the amount of \$2,000.00, and subsequently by an additional payment of \$6,500.00 at Defendants' request.

Public policy favors enforcement of the agreements. Indeed, the agreements are indistinguishable from the kind of agreement often used to settle disputes or avoid future disputes. Such agreements typically contain provisions for confidentiality and no media contact such as that found here. Those provisions merely prohibit Defendants from acting *voluntarily*, i.e., not to do what they could *choose* not to do prior to entering into the contract. Numerous cases hold that such confidentiality agreements are consistent with public policy and enforce them. *See, e.g., Chuidian v. Philippine National Bank*, 734 F.Supp. 415 (C.D. Cal. 1990), where the court evaluated a provision requiring confidentiality about a prior litigation and held that, unless a party is obligated by law to disclose the information, he is free to bargain away his right to disclose it.

Many lawsuits are settled for the sole purpose of avoiding the public disclosure of embarrassing or private information. Such is not illegal because it does not call for the suppression of evidence at a trial or proceeding, but rather is merely a motive behind settling the dispute.

734 F.Supp. at 424. *See also Wakefield v. Church of Scientology of California*, 938 F.2d 1226 (11th Cir. 1991).

Defendants specifically and voluntarily waived their rights to speak out privately and publicly about the Church, its staff, its finances and practices in Paragraph 6 of the Agreement. That waiver is valid and enforceable.

It is well established in Florida<sup>7</sup> that “[a] party may waive any right to which she is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.” *Bellaire Sec. Corp. v. Brown*, 124 Fla. 47, 83, 168 So. 625, 639 (1936)(citations omitted). Florida courts have consistently ruled that: “[t]here is no doubt that parties may ‘waive fundamental constitutional rights that protect their liberty as well as their property.’” *Petersen v. Florida Bar*, 720 F. Supp. 2d 1351, 1359 (M.D. Fla. 2010), quoting *Hartwell v. Blasingame*, 564 So.2d 543, 545 (Fla. 2nd DCA 1990) (upholding waiver of constitutional homestead rights at inception of marriage); *See also Chames v. DeMayo*, 972 So.2d 850, 861 (Fla. 2007) (recognizing “trend toward allowing waivers of constitutional rights”; disallowing general waiver in an unsecured instrument because not seen as a knowing waiver).

The substantive law in Texas is in accord. The identical issue arose in a remarkably similar 2010 case from the Third District Court of Appeals in Austin – *Taylor v. DeRosa*, 2010 Tex. App. Lexis 2199 (Tex. App.—Austin 2010, no pet.).

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<sup>7</sup> Paragraph 10 of the Agreements state that “[t]his Agreement shall be construed, interpreted, governed and enforced in accordance with the laws of the State of Florida on behalf of CSFSO [the Plaintiff Church]...” Under Texas’ choice of law principles, such an agreement should be given effect under the so-called “party autonomy doctrine” unless the chosen state has no substantial relationship to the parties or the transaction, or the law of the chosen state is contrary to the fundamental policy of Texas and Texas has a materially greater interest in the determination of the disputed issues. *DeSantis v. Wackenhut Corp.*, 793 S.W. 2d 670, 677-78 (Tex.1990), adopting rule of RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187. Here, Plaintiff is a citizen of Florida, Defendants were citizens of Florida at the time of the agreements, Defendants performed services for Plaintiff for 28 years in Florida, the contract arose out of that and concerns matters relating to the Florida relationship. Florida therefore indisputably has a substantial relationship to the parties and the transaction. Second, not only is Florida law on the issues in this case not contrary to the fundamental policy of Texas, but, as we show in the text, *post*, the law of Texas is in accord with Florida law. Accordingly, the “party autonomy” doctrine applies, and the court should apply Florida law as chosen by the parties.

That court affirmed an arbitrator's injunction which enjoined respondent from publishing disparaging statements contrary to the terms of his settlement agreement with claimant.

The court's explanation and citation to authority is equally applicable here:

Moreover, the injunction in the present case merely serves to enforce a bargained-for provision of the parties' settlement contract--the non-disparagement clause. In essence, the injunction imposes specific performance on Taylor. The effect of the injunction here is simply to force Taylor to comply with the terms of a bargained-for agreement that provided him with substantial monetary compensation. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) ("The parties themselves ... determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed."); *Perricone v. Perricone*, 972 A.2d 666, 682 (Conn. 2009) ("We are persuaded by the weight of authority that an agreement that restricts speech, but that does not expressly refer to first amendment rights, constitutes a valid waiver of those rights, as long as the waiver was intelligent and voluntary."); *Pierce v. St. Vrain Valley Sch. Dist.*, 981 P.2d 600, 604 (Colo. 1999) ("Here, the parties imposed their own restrictions [by contract] on their ability to speak publicly .... Enforcement of the settlement agreement does not violate the First Amendment."); *Aultcare Corp. v. Roach*, No. 2007CA0009, 2007 WL 3088036, at \*3 (Ohio App.--5th Dist. Oct. 27, 2007) (upheld injunction enforcing non-disparagement clause over appellant's objection that it was prior restraint on speech because "the trial court only ordered the continuation of the restrictions entered into voluntarily by appellant").

The doctrine of contractual waiver of constitutional rights was set forth by the Supreme Court in *D.H. Overmeyer v. Frick Co.*, 405 U.S. 174 (1972), which involved a contractual provision in which one of the parties waived its right to notice and a hearing prior to entry of a judgment in the event it defaulted on its payments. The Court held that procedural due process rights could be waived and that Overmeyer had contractually waived its rights knowingly and intelligently.

The Supreme Court explicitly applied the *Overmeyer* rule to a contractual waiver of First Amendment rights in *Snepp v. United States*, 444 U.S. 507 (1980). Snepp, a former CIA agent, had violated his contract with the Agency not to publish *unclassified* information about the Agency or its activities without first submitting the proposed publication to the CIA for review and possible editing. The Court upheld the contractual waiver of Snepp's rights. Accord, *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991)(newspaper's breach of a promise of confidentiality to a news source, by publishing a newsworthy article identifying the source, was actionable on a state law promissory estoppel cause of action).

*Snepp* consistently has been followed by courts which have upheld contractual waivers of potential First Amendment rights. See, e.g., *Erie Telecommunications, Inc. v. City of Erie, Pa*, 853 F.2d 1084, 1094, 1101 (3rd Cir. 1988) (upholding settlement agreement waiving constitutional objections to the agreement; court engaged in a lengthy review of the doctrine of waiver of constitutional rights); *Soecon Industries v. American Stockman Tag Company*, 713 F.2d 1174 (5th Cir. 1983); *NCH Corporation v. Shane Corp.*, 757 F.2d 1540 (5th Cir. 1985).

Similar conclusions have been reached in state appellate courts. *In re Steinberg* 148 Cal.App.3d 14, 195 Cal.Rptr. 613 (1983)(enforcing a film maker's agreement to submit the final version of his documentary film on the justice system to the Superior Court for review and editing; reliance on *Snepp*). *ITT Telecom Products Corp. v. Dooley*

214 Cal.App.3d 307, 319, 262 Cal.Rptr. 773, 780 (1989) (holding that contract of confidentiality not barred by First Amendment or state law privileges: "... it is possible to waive even First Amendment free speech rights by contract"); *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148, 151 (1984)("parties . . . may stipulate away statutory, and even constitutional rights....")."

**II. Defendants Ratified the Contracts by Accepting their Benefits and Failing to Take Any Action to Rescind For Over Four Years.**

Defendants have asserted affirmative defenses of duress, coercion and undue influence, and will seek to submit evidence in support of those defenses. There is no justification for the submission of such evidence in violation of Defendants' covenants of non-disclosure since, Cook expressly admitted that all duress and coercion ended when she and her husband left Clearwater, Florida on October 19, 2007 and moved to Texas.

As shown below, however, the affirmative defenses of coercion, duress and undue influence must be rejected as a matter of law because the undisputable facts conclusively show that Defendants failed to rescind and in fact ratified the contracts by accepting and spending the funds, accepting more funds in 2009 to pay taxes, and remaining silent for more than four years. As we show below, a contract entered into under duress is considered not void, but merely voidable, and is capable of being ratified after the duress is removed, if the party entering into the contract under duress accepts the benefits growing out of it, or remains silent, or acquiesces in it for any considerable length of time after opportunity is afforded to avoid it or have it annulled, or recognizes its validity by

214 Cal.App.3d 307, 319, 262 Cal.Rptr. 773, 780 (1989) (holding that contract of confidentiality not barred by First Amendment or state law privileges: "... it is possible to waive even First Amendment free speech rights by contract"); *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148, 151 (1984)("parties . . . may stipulate away statutory, and even constitutional rights....")."

## **II. Defendants Ratified the Contracts by Accepting their Benefits and Failing to Take Any Action to Rescind For Over Four Years.**

Defendants have asserted affirmative defenses of duress, coercion and undue influence, and will seek to submit evidence in support of those defenses. There is no justification for the submission of such evidence in violation of Defendants' covenants of non-disclosure, since Cook expressly admitted that all duress and coercion ended when she and her husband left Clearwater, Florida on October 19, 2007 and moved to Texas.

As shown below, however, the affirmative defenses of coercion, duress and undue influence must be rejected as a matter of law because the undisputable facts conclusively show that Defendants failed to rescind and in fact ratified the contracts by accepting and spending the funds, accepting more funds in 2009 to pay taxes, and remaining silent for more than four years. As we show below, a contract entered into under duress is considered not void, but merely voidable, and is capable of being ratified after the duress is removed, if the party entering into the contract under duress accepts the benefits growing out of it, or remains silent, or acquiesces in it for any considerable length of time after opportunity is afforded to avoid it or have it annulled, or recognizes its validity by

benefits” of a transaction is “estopped” from “repudiating the accompanying or resulting obligation”)

*Mazzoni Farms, Inc. v. E.I. DuPont Demours & Co.*, 761 So.2d 306, 313 (Fla. 2000); *See also United Chemicals, Inc. v. Welch*, 460 So.2d 540 (Fla. 1st DCA 1984); *C.Q. Farms, Inc. v. Cargill Inc.*, 363 So.2d 379 (Fla. 1st DCA 1978); *Scocozzo v. General Dev. Corp.*, 191 So.2d 572 (Fla. 4th DCA 1966); 22 *Fla.Jur.2d* Estoppel and Waiver § 69 (1980).

Ratification is triggered not only by affirmative acts such as acceptance of the monetary or other benefits of the contract, but also by a failure to attempt to rescind or repudiate the contract over the passage of time. *Rood Co. v. Bd. of Pub. Instruction of Dade County*, 102 So. 2d at 142 (one must act to rescind “with reasonable promptness”); *Lake Mabel Development Corp. v. Bird*, 99 Fla. 253, 258, 126 So. 356, 358 (Fla. 1930)(“Delay and vacillation are fatal to the right” to rescind); *In re Frenz Entertainment*, 89 B.R. 220, 222 (M.D. Fla. 1988)(“The retention of the consideration by one *sui juris* with knowledge of the facts will amount to a ratification of a voidable release executed by him in the settlement of a claim, where the retention is for an unreasonable time under the circumstances of the case”). *Accord*, 10 *Fla.Jur.2d*, Compromise, Accord and Release, §60. Thus, as previously noted, once a party ratifies a contract, it may not later withdraw its ratification and seek to avoid the contract, *especially* after it has breached the contract. *Lake Mabel Development Corp. v. Bird*, 99 Fla. at 257-58, 126 So. at 358 (a party wishing to rescind must “at once announce his purpose and adhere to it. . . . He is not permitted to play fast and loose. Delay and vacillation are fatal . . .”); *Steinberg v.*



*Bay Terrace Apartment Hotel, Inc.*, 375 So.2d 1089, 1092-93 (Fla. 3d DCA 1979)(affirming dismissal of action to rescind contract, holding that where party seeking to rescind fails to act “with reasonable promptness, . . . he will be held to have waived his right to rescind”).

Texas law is identical. A party who has “accepted the benefits accruing to him as provided for in the agreement cannot accept that part of the contract beneficial to him and deny the application of other provisions of the contract which may be detrimental.” *Daniel v. Goesl*, 341 S.W.2d 892, 895 (Tex. 1960). An agreement is ratified when a person, allegedly induced by duress or fraud to enter into an agreement, “continues to accept benefits under that agreement after he becomes aware of the fraud or breach, or if he conducts himself so as to recognize the agreement as binding.” *Spangler v. Jones*, 797 S.W.2d 125, 131, (Tex.Civ.App.--Dallas 1990, writ denied). A party cannot avoid an agreement by claiming there was no intent to ratify after that party has accepted the benefits of the agreement. *See Oram v. Gen. Am. Oil Co. of Tex.*, 513 S.W.2d 533, 534 (Tex. 1974) (per curiam) (“Whatever her mental reservations have been, her acceptance of the payments are inconsistent with the intention to avoid the lease. . . . The effect is to waive or abandon any right of rescission or of attack upon the initial invalidity, if any, of the lease.”). *See also Johnson v. Smith*, 697 S.W.2d 625, 630 (Tex.Civ.App.—Houston [14<sup>th</sup>] 1985, no writ) citing *Sawyer v. Pierce*, 580 S.W.2d 117, 122 (Tex.Civ.App.—

Corpus Christi 1979, writ ref'd n.r.e.); *B & R Development, Inc. v. Rogers*, 561 S.W.2d 639, 642 (Tex.Civ.App.—Texarkana 1978, writ ref'd n.r.e.) and cases cited therein.

In Texas, as in Florida, ratification may occur not only by affirmative acts, including conduct that is inconsistent with an intention of avoiding the prior agreement, *Old Republic Ins. Co. v. Fuller*, 919 S.W.2d 726, 729 (Tex.App.—Texarkana 1996, writ denied); but also through inaction, silence or acquiescence. *Weddel v. State*, 756 S.W.2d 76, 79 (Tex.Civ.App.—El Paso 1988, no writ); *A.B.F. Freight Systems, Inc. v. Austrian Import Service, Inc.*, 798 S.W.2d 606, 610 (Tex.Civ.App.—Dallas 1990, writ denied) (noting “[a] party may ratify a transaction by silence or acquiescence when there is a duty to speak”), and accepting the funds as consideration. *In re Harco Energy, Inc.* 270 B.R. 658 (N.D.Tex. 2001). As in Florida, once a party to a contract has ratified it, she cannot then seek to rescind it, especially after having breached it. *Mo. Pac. R.R. Co. v. Lely Dev. Corp.*, 86 S.W.3d 787, 792 (Tex. App.—Austin 2002, pet. dismiss’d).

Where, as here, the evidence of ratification is incontrovertible, then the question of ratification is determined as a matter of law. *Wise v. Pena*, 552 S.W.2d 196, 200 (Tex.Civ.App.—Corpus Christi 1977, writ dismiss’d).

The Florida and Texas law is consistent with that of federal courts and various states. *Barnette v Wells Fargo Nevada Nat. Bank*, 270 U.S. 438 (1926); *Heskett v. Bryant*, 247 Ark. 790, 447 S.W.2d 849 (1969); *Slone v. Purina Mills, Inc.*, 927 S.W.2d 358 (Mo. Ct. App. W.D. 1996); *David v. American Tel. & Tel. Co.*, 160 A.D.2d 632, 559

N.Y.S.2d 505 (1st Dep't 1990); *Faske v. Gershman*, 215 N.Y.S.2d 144 (Mun. Ct. 1961); *Smith v. Jones*, 351 N.Y.S.2d 802 (N.Y. City Civ. Ct. 1973); *Wahsner v. American Motors Sales Corp.*, 597 F. Supp. 991 (E.D. Pa. 1984); *McGee v. Stone*, 522 A.2d 211 (R.I. 1987).

Accordingly, Defendants are precluded as a matter of law from asserting affirmative defenses of duress, coercion or undue influence to Plaintiff's breach of contract claims.

### **III. Plaintiff Should be Awarded Liquidated Damages from Each Defendant**

Under Florida law, the parties to a contract may stipulate in advance to an amount to be paid as liquidated damages in the event of a breach, provided that the damages resulting from the breach are not readily ascertainable, and that the sum so stipulated as damages is not so grossly disproportionate to any damages that might reasonably be expected to follow from a breach. *Coleman v. B.R. Chamberlain & Sons*, 766 So.2d 427 (Fla. 2000). The liquidated damages stipulated should be applied unless a court finds the amount to be "unconscionable" at the time of breach, *id.* at 429-30, or put otherwise, whether the amount "shocks the conscience of the court." *McNorton v. Pan American Board of Orlando*, 387 So.2d 393 (Fla. 1980).

Determination of the validity and reasonableness of liquidated damages is a matter of law to be determined by the court. *Public Health Trust of Dade County v. Romart Const., Inc.*, 577 So.2d 636, 637-38 (Fla.App. 3 Dist., 1991); *T.A.S. Heavy Equip., Inc. v.*

*Delint, Inc.*, 532 So.2d 23, 25 (Fla. 4th DCA 1988); *Concrete Equip. Co. v. U.S. Leasing Corp.*, 439 So.2d 224, 225, n. 1 (Fla. 3d DCA 1983); *See Nicholas v. Miami Burglar Alarm Co.*, 266 So.2d 64, 66 (Fla. 3d DCA 1972). This Court should uphold the provision of liquidated damages as sought by Plaintiff.

Here, the parties stipulated in the contracts that it would be extremely difficult to calculate damages for violations of the covenants of non-disclosure, confidentiality and non-disparagement, either at the time of the execution of the contracts or at the time of any breaches. Such a stipulation is eminently reasonable; it is almost impossible to calculate with any degree of precision or confidence the damages that might and did flow from such serious breaches of non-disclosure and confidentiality. *See, e.g., Snepp v. United States*, 444 U.S. at 514 (“No one disputes that the actual damages attributable to a publication such as *Snepp*’s generally are unquantifiable”).

Plaintiff seeks liquidated damages under Section 7(C) of the contract against each Defendant for the two most significant and damaging violations of their agreements: Cook’s email (with the participation of Baumgarten) to three thousand Scientologists on December 31, 2011, and Defendants’ press conference of February 10, 2012. Liquidated damages of \$100,000.00 against each Defendant for the first breach, transmission of the December 31, 2011 email, are appropriate under either of three sub-sections of section 7(C):

- (2) Causing, participating in, cooperating in, aiding or abetting the publication, broadcast or other public disclosure, transmission or repetition

of Confidential Information . . . \$100,000 for each disclosure, transmission or repetition;

or

(8) On the Internet or otherwise by means of wireless or similar devices: \$100,000 per posting;

or

(9) By other public disclosure, transmission or repetition: \$100,000 for each such disclosure or repetition.

Liquidated damages of an additional \$100,000.00 against Cook for the second breach, the February 10, 2012 press conference, are appropriate under sub-sections 2 and 9. Thus, under Section 7(C), Plaintiff should be awarded judgment of \$200,000.00 against Cook and \$100,000.00 against Baumgarten, plus Plaintiff's costs and attorneys' fees.

Such damages are relatively modest, given the immeasurable harm that Defendants concede their actions caused. Cook admits, *inter alia*, to "blasting" the entire leadership of the religion, to accusing of it of "High Crimes" (an allegation which is *per se* defamatory<sup>8</sup>), to severely criticizing its fund raising and dissemination activities, and to inciting thousands of Scientologists to abstain from making donations to Scientology churches and organizations. She openly states, indeed boasts, that "I think it's obvious that [my actions] would hurt their reputation" (Tr. 128). She sent her email to over three thousand Scientologists, and urged them to forward it to untold others. She

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<sup>8</sup> *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376, 390 (Fla. Dist. Ct. App. 1982), *approved*, 458 So. 2d 239 (Fla. 1984); *Scott v. Busch*, 907 So. 2d 662, 667 (Fla. Dist. Ct. App. 2005); *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

acknowledges that it was inevitable that her actions would be reported in the international press (Tr. 109:23-25), and concedes that, as a result, press accounts “definitely put the church in an unfavorable light” (Tr. 123). She then, *even after having given such testimony*, exacerbated her original breach by holding a press conference that also was reported in the media on a worldwide basis in which she repeated and expanded upon her breaches of the contract.

While, as the Supreme Court stated in *Snepp*, damages from such actions are “undeterminable,” it is not unreasonable to assume that, just in monetary terms, Scientology churches and organizations suffered and will suffer hundreds of thousands of dollars in foregone donations as a result of Defendants’ acts. In addition, damages to reputation and privacy truly are incalculable. An award of liquidated damages of \$100,000.00 against each Defendant for each of their breaches can in no sense be determined to be “grossly disproportionate to any damages that might reasonably” have been expected to follow from their breaches of their agreements, let alone that it would “shock the conscience of the court.”

A case very much on point is *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 422-23, 945 N.E.2d 1201, 1203 (2011), reh’g denied (2011). Dallas sued the Chicago Teachers Union and its officers alleging a conspiracy to damage his reputation and have him removed as vice president of the union. The parties entered into a settlement agreement that included confidentiality and non-disparagement clauses. Dallas

subsequently moved to enforce the agreement, asserting the union violated those provisions by publishing disparaging remarks in its newsletter, thereby damaging his efforts to obtain elected or appointed union office in the future. The trial level court granted the motion and ordered the union to pay Plaintiff \$100,000.00 in liquidated damages, the amount provided in the settlement agreement. The Illinois Court of Appeals affirmed, holding that “the \$100,000.00 liquidated damages figure is clearly related to the projected actual loss.” *Id.* at 1206. Other courts have upheld similar and even greater liquidated damage awards for breaches of confidentiality and non-disclosure agreements. *See, e.g., Baella-Silva v. Hulsey*, 454 F.3d 5, 8 (1<sup>st</sup> Cir. 2006)(affirming an award of \$50,000.00 in liquidated damages for violation of a confidentiality agreement that had been filed on the district court’s docket, even in the absence of proof that any third party actually viewed the information); *Harvey Barnett, Inc. v. Shidler*, 200 F. App’x 734, 749 (10th Cir. 2006) (affirming judgment of \$50,000.00 in liquidated damages each against each of two Defendants for breach of confidentiality and non-disclosure agreement, stating “the judgment against them for \$50,000.00 each in liquidated damages also serves as a strong incentive to comply with all the terms of the confidentiality provision”); *Biller v. Toyota Motor Corp.*, 2012 WL 336135 (9th Cir. Feb. 3, 2012)(affirming arbitral award of \$2.5 million in liquidated damages for multiple breaches of confidentiality agreement).

## **CONCLUSION**

The uncontroverted facts conclusively show that Defendants Cook and Baumgarten breached their contracts by sending the email of December 31, 2011, and that Defendant Cook committed a second breach on February 10, 2012 by holding a press conference at which she made statements prohibited by her contract. The uncontroverted facts further show, as a matter of law, that the contracts are valid and enforceable, that Defendants waived any rights to speak publicly about the matters set forth in the contracts, that Defendants failed to rescind and in fact ratified the contracts, and that Defendants agreed to reasonable liquidated damages in the event of their breach of the covenants set forth in the contracts. Accordingly, summary judgment should be granted against Defendant Cook in the amount of \$200,000.00 and against Defendant Baumgarten in the amount of \$100,000.00.

## **PRAYER**


WHEREFORE, PREMISES CONSIDERED, Plaintiff Church of Scientology Flag Service Organization, Inc., prays that this Motion be set for hearing and that, upon hearing, summary judgment should be granted. The Plaintiff prays for summary judgment on all of the following issues collectively, or in the alternative individually: (1) Defendants breached valid and enforceable October 19, 2007 contracts with the Plaintiff; (2) Defendants' affirmative defenses of duress, coercion and undue influence have no legal merit as a matter of law due to subsequent ratification of the agreements; and (3)



that Defendant Cook is liable to Plaintiff for liquidated damages in the amount of \$200,000.00 for her breaches of contract on December 31, 2011 and February 10, 2012; (4) that Defendant Baumgarten is liable to Plaintiff for liquidated damages in the amount of \$100,000.00 for his breach of contract on December 31, 2011.

Respectfully submitted,

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By:   
GEORGE H. SPENCER, JR.

State Bar No. 18921001

MARK J. CANNAN

State Bar No. 03743800

**ATTORNEYS FOR PLAINTIFF**

# FIAT

It is hereby ORDERED that Plaintiff's Motion for Summary Judgment is set for hearing on March 23, 2012, at 8:30 a.m., in the Presiding District Court of Bexar County, Texas.

Signed this 11 day of MAR - 2 2012, 2012.

KEAREN IL POZZA  
JUDGE, 40TH DISTRICT COURT

## JUDGE PRESIDING

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served *via Hand-Delivery* on this 2<sup>nd</sup> day of March, 2012, to:

Mr. Ray B. Jeffrey  
Jeffrey & Mitchell, P.C.  
2631 Bulverde Rd., Suite 105  
Bulverde, TX 78163

George H. Spencer  
GEORGE H. SPENCER, JR.