SE 5

Allen D. Butler, Esq.
ALLEN D. BUTLER, P.C.
2342 South McClintock Drive
Tempe, Arizona 85282
(480) 921-0626
State Bar No: 005392
Attorney for Plaintiff

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WILMA FREEMAN, personally, and as Personal Representative for the Estate of John Barrow, Plaintiff, vs. THE CHURCH OF SCIENTOLOGY, And John and Jane Does A-D, and Corporations 1-9, and Partnerships I-X Defendants.	**CASE NO: CV 97-00750** **PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable B. Michael Dann)

Plaintiff WILMA FREEMAN ("Freeman" or "Plaintiff"), by and through her counsel undersigned, hereby replies to Defendant's Response to Plaintiff's Motion for Summary Judgment, and Responds to Defendant's Cross-Motion for Summary Judgment.

This Reply and Response is supported by the attached Memorandum of Points and Authorities, and "Plaintiff's Statement of Disputed Facts" filed and served herewith.

DATED this 18th day of January, 2000.

ALLEN D. BUTLER, P.C.

By Allen D. Butler
Allen D. Butler, Esq.
2342 South McClintock Drive
Tempe, Arizona 85282
Attorney for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Defendant has based its entire Response to the Plaintiff's Motion for Summary Judgment on six flawed propositions.

First, the Defendant claims that there was no consideration for Mr. De Nero's promise to pay the refund. However, the requirement of consideration was met by virtue of the Church's unfulfilled promise to provide services to Barrow in exchange for the money received. This antecedent debt, even if otherwise unenforceable, is valid consideration for a subsequent promise to issue a refund.

Second, the Defendant claims that the elements of A.R.S. § 12-508, which would operate as a statutory substitute for consideration, are not met here. However, the Church's signed writings attached to Plaintiff's Statement of Facts and cited in her Motion for Summary Judgment meet the requirements of A.R.S. § 12-508.

Third, Defendant claims, based again on A.R.S. § 12-508, that the deposition testimony of John De Nero, cited by Plaintiff in her Motion for Summary Judgment, is not admissible. However, the requirements of A.R.S. § 12-508 are met by the signed writings. On the other hand, the deposition testimony is offered as evidence of the meaning intended by the signed writings, and is admissible pursuant to Rule 32(a), Arizona Rules of Civil Procedure. In addition, even if Rule 32 does not apply, the portions of Mr. De Nero's deposition testimony cited by Plaintiff are admissible as non-hearsay evidence, pursuant to Rule 801(d)(2), Arizona Rules of

Evidence.

Fourth, Defendant claims that Mr. De Nero's testimony, even if admissible, does not show that the Church ever agreed to pay the refund. However, his testimony clearly shows that there was an objective meeting of the minds on the issue of the refund, in spite of his secret intentions to withhold payment, and that the Church agreed to pay the refund to Plaintiff.

Fifth, Defendant claims that its promise to pay the refund is subject to the Release language in the Enrollment Agreement, but Defendant has offered no new legal authority in support of its position, and instead the authorities it cites support Plaintiff's position that the Release does not apply to the subsequent agreement to issue the refund.

Sixth, Defendant claims that Plaintiff is not entitled to restitution on the theory of unjust enrichment, but again offers no support for this proposition. The legal authorities cited by Defendant show, instead, that restitution must be paid.

2. The Church's Promise to Issue a Refund Is Supported by Consideration.

A. The Underlying Debt, Even if Subject to the Release Clause, is Valid Consideration for the Subsequent Promise to Issue a Refund.

Arizona Courts have repeatedly held that a previously existing debt, even if otherwise barred by statute or agreement, is sufficient consideration to uphold a subsequent promise of the debtor to pay the debt.

In a case cited by Defendant in its Response and Cross-Motion,

the Court of Appeals stated:

> In order to recover in an action on a debt barred by the statute, the plaintiff must show both an acknowledgment of the debt and a new promise by the debtor to pay the debt. The action is founded on the new promise, with the obligation barred by statute furnishing the consideration.

Cheatham v. Sahuaro Collection Service, Inc., 118 Ariz. 452, 577 P.2d 738, 740 (App.1978) (Emphasis added).

This principle was explained over sixty years ago by the Arizona Supreme Court, which stated:

> Where a debtor, after his debt is barred, agrees to pay it notwithstanding and reduces such agreement to writing, it is such promise that gives the promisee the right to commence and prosecute an action to recover the debt. In other words, his action is upon the new promise, the barred debt being the consideration therefor.

Moore v. Diamond Dry Goods Co., 54 P.2d 553, 554 (Ariz.1936) (Emphasis added).

In short, this principle is well recognized and long-standing. The Defendant has even cited these very cases in its Response and Cross-Motion. It is somewhat suspect that Defendant would claim no consideration for its promise to pay the refund, when the very cases it has cited hold that the previously barred debt is itself the only consideration needed.

B. Plaintiff's reliance on the Church's promises, coupled with her forbearance from pursuing her valid legal claims, makes the promise to refund enforceable.

Although the Church's promise to issue a refund to Plaintiff is supported by consideration, the promise would be enforceable even if not supported by consideration, under the doctrine of

equitable estoppel. Defendant has cited Freeman v. Wilson, 107 Ariz. 271, 485 P.2d 1161 (Ariz.1971), as its principal authority on the issue of estoppel. The Freeman court stated:

> To invoke an estoppel argument against an adverse party's plea of limitations, a person must reasonably have relied to his detriment on the acts, promises or representations of the adverse party.
>
> 485 P.2d at 1167.

The combination of the payments to Plaintiff, the accompanying notes promising additional payments, and Defendant's intentional omission of any statement or act which would have alerted her to the Church's secret intention to withhold full payment, constitutes the promise or representation contemplated by the Freeman court.

Plaintiff's reliance is demonstrated by her forbearance from filing suit, which would have included all claims not barred by statute at the time the Church's payments and promises of future payments started. In other words, the validity of the claims Plaintiff refrained from filing is not judged at the time this suit was actually filed, but at the time the Church's representations to Plaintiff were initiated. Plaintiff's reliance on those promises and representations was reasonable, in light of the repeated assurances of future payments, the lingering repayment schedule, and the Church's well-known stance against attorney or court involvement in refund requests.

In short, the elements of estoppel are met here, and Defendant must not be allowed to argue that the statute of limitations bars this claim on a subsequent promise to issue a refund.

3. Even if No Consideration Exists, the Elements of A.R.S. § 12-508 Have Been Met, Making Consideration Unnecessary.

Defendant has cited A.R.S. § 12-508, which states:

> When an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged thereby.

A. A.R.S. § 12-508 Does Not Apply to This Case.

Initially, it should be noted that the claim currently before the Court on this Motion for Summary Judgment is not barred by statute, because it is based on the Defendant's promises, in writing, made subsequent to the original contract. These promises were subject to either the six-year statute of limitations for written contracts (A.R.S. § 12-548) or the three-year statute of limitations for verbal contracts (A.R.S. § 12-543). In either case, the Complaint in this action was filed before the statutory time limit expired.

Defendant has based most of its Response and Cross-Motion on the faulty notion that A.R.S. § 12-508 applies. Defendant's reliance on this statute is ill-founded. The Court has made no findings or given any indication that the remaining claim is barred by statute. In fact, the Court has made just the opposite finding in its July 24, 1997 Minute Entry:

> However, plaintiff's remaining claim-that the local Church of Scientology has failed to pay her all of a refund it agreed to pay-is not clearly barred by statute . . . Plaintiff has submitted written correspondence from defendant which could be read as acknowledging the obligation to make a refund. These, together with the published policies of the church regarding such refunds could amount to enough of a writing to permit plaintiff

to rely on the six-year statute of limitations, A.R.S. § 12-548.

July 24, 1997 Minute Entry at page 2.

It is difficult to imagine how Defendant could have simply assumed, as it did in its Response and Cross-Motion, that the Statute of Limitations does bar the remaining claim, when the Court has given every indication that the opposite is true. This claim is not barred by statute.

Defendants promises and payments which form the basis for the new agreement were made beginning on August 31, 1993, with the last payment made on August 23, 1994. (Plaintiff's Statement of Facts ¶7). Therefore, the Church's agreement to refund the monies was not breached until August 24, 1994 at the earliest, because up until that date, the Church was still making payments to fulfill its obligations. Because the statute of limitations for a contract action is calculated from the date of the breach, not from the date of execution, the date which must be used to determine if the statute expired in this case is August 24, 1994.

The Complaint in this action was filed on January 14, 1997. The three-year statute would have expired on August 24, 1997. Plaintiff's claim was filed with over six months to spare before the three year statute of limitations would have expired, and with over three and a half years before the six-year statute of limitations would have expired. A.R.S. § 12-508, therefore, does not apply, because it goes into effect only "when an action is barred by limitation."

B. The Elements of A.R.S. § 12-508 have been satisfied, even though they do not apply.

However, assuming arguendo that this action is otherwise barred by statute, and that the requirements of A.R.S. § 12-508 must be met, Defendants' arguments must fail, because Plaintiff's current claim is, in fact, based on a series of written communications from the Church to Plaintiff, which are signed by Mr. De Nero and other church officials, and which constitute an acknowledgment of the justness of the claim-all the elements required to satisfy the statute.

Defendant has devoted a significant portion of its Response and Cross-Motion to its attempts to convince the Court that the incriminating written statements signed by Mr. De Nero, as well as the incriminating statements made on the "Disbursement Vouchers" do not meet the requirements of A.R.S. § 12-508. In support of these arguments, Defendant variously claims that John De Nero may not have had the authority to bind the Church, or that the Disbursement Vouchers, which contain such statements as "Partial Repayment of Advance Payments of John Barrow's Account" and "Partial Repayment of Monies on Johns Barrow Account," are not signed, in spite of the fact that they are on the same sheet of paper as the signed checks which they accompanied. All these arguments are propounded for the purpose of convincing the Court that the requirements of A.R.S. § 12-508 have not been met, and specifically that the Church's statements do not constitute an acknowledgment of the justness of the claim and a promise to pay the claim. See Freeman v. Wilson, supra.

Although the Church argues that its statements in this case do not meet these requirements, it does not explain why, nor does it give an explanation of what language would satisfy the requirements of the statute. The Church would seemingly read into A.R.S. § 12-508 a requirement that the statement be so unambiguous that it would be impossible to obtain. Unfortunately, the Church's statements are not so clearly stated as they might have been.

In its Response and Cross-Motion, the Church goes through each of the documents attached to the Plaintiff's Statement of Facts (the very documents which show the promise to refund was made), and attempts to dismiss each of them by claiming that each document, by itself, does not contain a promise to refund the entire amount, is not signed, and does not acknowledge the justness of the claim.

In spite of the Church's contentions, no magic language is required to constitute the acknowledgment required by A.R.S. § 12-508. The Freeman court stated:

> Where a debtor acknowledges the "justness" of the debt and expresses a willingness to repay the obligation the law will imply from the acknowledgment a promise to pay the entire obligation. . . . and no precise form of words need be used to constitute a legally sufficient acknowledgment."
>
> Freeman, 485 P.2d at 1165 (Emphasis added).

Later, the Arizona Court of Appeals addressed the question of whether an acknowledgment similar to the Church's acknowledgment in this case satisfied the requirements of A.R.S. § 12-508. The court stated:

> Appellants concede that the requirements of a writing signed by the person to be charged and identification of the obligation as to appellant-husband are clearly met . . . They contend, however, that the statement in the letter "I am sure we can reach an

understanding in a satisfactory arrangement for the repayment of my note with you" constitutes no more than a conditional promise to pay. We do not agree.

Bainum v. Roundy, 21 Ariz.App. 534, 521 P.2d 633, 634 (App.1974) (Emphasis added).

The Bainum court held that the fairly ambiguous and noncommittal language cited, indicating a willingness to work out some arrangement for some future payment, constituted the acknowledgment required by A.R.S. § 12-508. If the letter considered by the Bainum court satisfied the requirements of the statute, certainly Defendants' actual payments and its promise of future payments to repay the money on John Barrow's account must also satisfy the requirements.

Defendant has simply ignored the obvious on this issue. Plaintiff, after demanding a full refund from the Church, received the following from the Church: Checks and a Disbursement Vouchers identifying the money as partial payments toward the monies on her late husband's account (which document was signed by the Church), and handwritten notes accompanying the checks and disbursement vouchers indicating that a lump sum would be coming, that the $500.00 was merely a drop in the bucket, and that the flow of payments would continue. Such actions on the part of the Church are a much stronger acknowledgement of the justness of Plaintiff's claim than was the acknowledgement upheld by the Bainum court. A.R.S. § 12-508 has been satisfied.

The Church has attempted to argue that the use of the words "partial payment" on the Disbursement Voucher proves that there was no promise to pay the entire amount. On the contrary, had the

Church wanted to terminate its obligations to repay the unused monies on John Barrow's account, it would have used such language as "Full Payment," or "In Full Satisfaction of Wilma Freeman's Demand for a Refund," or other similar phrasing.

By identifying the specific amount to be refunded (the amounts left on John Barrow's account), by denominating the payments as only a "partial payment," toward that amount, and by accompanying the payments with promises of future payments, the Church provided Plaintiff with all the acknowledgement needed to satisfy A.R.S. § 12-508. Therefore, the Church was obligated to pay the refund, and Summary Judgment must be granted.

4. <u>The Deposition Testimony of John De Nero is Admissible</u>.

Plaintiff has never pretended to rely solely on the deposition testimony of John De Nero to support the claimed refund. In fact, Mr. De Nero's deposition was taken only because he is the Church official who arranged for the partial refunds to be made, and who signed the various letters to Plaintiff in which a continuing obligation to make refund payments was acknowledged.

The point is that it is not Mr. De Nero's testimony that satisfies A.R.S. § 12-508-it is the checks, the Disbursement Vouchers, and the handwritten letters from Mr. De Nero. His testimony is admissible pursuant to Rule 32(a), Arizona Rules of Civil Procedure, which governs admissibility of deposition testimony. The Rule states:

> At the trial or at any hearing any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used . . . .

In other words, Plaintiff has made no claim that the deposition testimony of John De Nero is admissible under A.R.S. § 12-508. It is admissible under basic rules of discovery. In addition, the testimony is not being offered to overcome the Statute of Limitations. Instead, it is being offered simply for clarification of the documents supplied as exhibits to Plaintiff's Statement of Facts, and is clearly relevant on such issue, and is therefore admissible.

5. **Mr. De Nero's testimony clearly shows that the Church agreed to issue a refund.**

The question of whether the Church agreed to refund the monies paid for which no services were rendered is susceptible to judgment as a matter of law because any dispute as to the Church's intentions to issue a refund arose only after this lawsuit commenced. Plaintiff did not have the benefit of Mr. De Nero's contradictory deposition testimony when she was negotiating with him to obtain the refund. The agreement was based on Ms. Freeman's demands for a refund, and the Church's deliberate actions taken to confirm in her mind that a full refund was forthcoming.

Defendant now claims, based on the self-serving deposition testimony of Mr. De Nero, that a genuine issue of material fact exists, because Mr. De Nero alternately claimed in his deposition (depending on which attorney was asking the questions) that he did promise a refund or that he did not promise a refund. However, even with these contradictions in his subsequent testimony, there is no dispute that at the time he was sending the payments and letters promising more payments, Mr. De Nero intended that Ms.

Freeman believe that a full refund was forthcoming, and Ms. Freeman believed as he intended. These undisputed facts show that an agreement was reached for the Church to refund all monies paid for which no services were received. As set forth in Plaintiff's Motion for Summary Judgment, the secret intentions of Mr. De Nero cannot be considered when determining whether an agreement was reached.

6. **The Church's Subsequent Promise to Refund Is Not Subject to the Release Clause of the Enrollment Agreement.**

The only new legal authority cited by Defendant on this issue are certain comments and illustrations to Section 284 of the RESTATEMENT (SECOND) OF CONTRACTS, which state, in pertinent part:

> With respect to debts not yet in existence, the writing is not a release but a contract to discharge A. The subsequent inconsistent contract operates as a modification of this earlier contract, and A is under a duty to pay B.

Illustration 3 to Section 284 of the RESTATEMENT (SECOND) OF CONTRACTS, cited in Defendants Response/Cross Motion at 12-13.

In other words, the RESTATEMENT simply states that where, as here, a prospective release is included in the terms of the original contract, and the parties subsequently enter into a new contract that is inconsistent with the prior release, the terms of the new contract control, and the release is invalid.

In the present case, the application of this concept means that when the contract for a refund was formed between Plaintiff and the Church based on Mr. De Nero's promises, any effect that the release clause may have had was thereby nullified.

After citing this new legal authority which contradicts

Defendant's own arguments that the Release is applicable, Defendant's sole argument is that the present case is distinguishable from the illustration for one of two reasons: there is no consideration for Mr. De Nero's promises (which argument was addressed and refuted in Section 2, supra), and Mr. De Nero's promises are inadmissible pursuant to A.R.S. § 12-508 (which argument was addressed and refuted in Section 3, supra).

In short, Defendant's entire argument on the issue of applicability of the release clause is based on a rather feeble attempt to distinguish it from the RESTATEMENT, which indicates that Defendant should lose on this issue. Therefore, Defendant's claim that the promise to refund is covered by the Release clause must fail.

As a final point on this issue, which should already have been abundantly clear to Defendant, Plaintiff's claim for a refund is based on a subsequent contract for a refund, which contract was formed between Plaintiff (not her late husband) and Defendant. Plaintiff has never signed any Release of her claims.

7. <u>Defendant Was Unjustly Enriched by Withholding the Refund Payments, and Restitution is Appropriate</u>.

The Church's entire argument that it was not unjustly enriched is based on a two-step argument. First, the Restatement of Restitution § 107(1), states that no restitution is due unless the contract was rescinded, or unless the Church failed to perform its part of the bargain. Response and Cross-Motion at 13-14. The Church then states:

> The transaction here [was not] rescinded . . . Nor did the Church fail to perform its part of the bargain.

Response and Cross-Motion at 14.

The Church has failed to argue the facts here. Instead, it simply states its legal conclusion and hopes the Court will agree with it.

The Church appears to have forgotten that Plaintiff has sued personally, and in her capacity as the personal representative of the estate of John Barrow. The claim for unjust enrichment is based in large part on the fact that the Church agreed to perform certain services for Mr. Barrow in exchange for his payments, and that some of those services were never performed.[1] This fact is shown by the "Disbursement Vouchers" which refer to money remaining on John Barrow's account, and by the Letter/Disclosure Statement signed by Defendant's counsel, dated January 13, 1998 (Exhibit O to Plaintiff's Statement of Facts).[2] The letter states:

> Therefore, the total unused amount shown by the Church is $37,400.00.

In other words, Defendant did, in fact, fail to perform its

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[1] The claim of unjust enrichment is also legitimately based on the Church's failure to keep its part of the bargain with Plaintiff discussed at length, supra (i.e., the agreement to refund). Whether the claim is based on Defendant's failure to keep its part of its bargain with John Barrow, or whether it is based on its failure to keep its part of the bargain with Plaintiff, the factors justifying restitution to Plaintiff are met.

[2] Defendant has falsely claimed that this Disclosure Statement is covered by Rule 408, Arizona Rules of Evidence. The court should note that the letter makes no reference to Rule 408, contains no settlement offer, and is explicitly referred to by Defendants' counsel as "an updated disclosure statement pursuant to Rule 26.1."

part of the bargain. The exhibits previously supplied by Plaintiff support this proposition. Defendant has been unjustly enriched by keeping monies to which it was not entitled because it failed to perform the services promised, and failed to refund the monies on account, as promised. Under the Restatement of Restitution § 107(1), as cited by Defendant, Plaintiff is entitled to Restitution.

For the foregoing reasons, Plaintiff requests that its Motion for Summary Judgment be granted, and that Defendants' Cross-Motion be denied.

RESPECTFULLY SUBMITTED this 18 day of January, 2000.

ALLEN D. BUTLER, P.C.

By Allen D. Butler
Allen D. Butler, Esq.
2342 South McClintock Drive
Tempe, Arizona 85282
Attorney for Plaintiff

ORIGINAL filed and a **COPY** of the foregoing hand-delivered this 18 day of January, 2000, to:

Honorable B. Michael Dann
MARICOPA COUNTY SUPERIOR COURT
201 West Jefferson
Phoenix, Arizona 85003

COPY of the foregoing hand-delivered this 18 day of January, 2000, to:

Dennis I. Wilenchik, Esq.
WILENCHIK & BARTNESS, P.C.
2810 North Third Street
Phoenix, Arizona 85004
Attorneys for Defendant

Danielle Cutler