U.S. Department of Justice

Tax Division

Washington, D.C. 20530

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5-16-1419 CMN 8219610

November 4, 1983

HAND-DELIVERED

Honorable Charles R. Richey
United States District Judge
United States Courthouse
3d & Constitution Avenue, N.W.
Washington, D.C. 20001

Re: The Synanon Church v. United States,
Civil No. 82-2303 (USDC D. Columbia)

Dear Judge Richey:

We are writing to Your Honor to seek the Court's guidance.

As Your Honor will recall, on June 24, 1983, the United States sought to file with Your Honor, pursuant to Section 6001, et seq., Title 18, U.S.C., applications for grants of immunity to Bette Fleishman, Naya Arbiter, and Rodney Mullen so that their affidavits and, if necessary, testimony could be used by the United States in this case. Your Honor was on vacation and, after a telephone discussion between Your Honor and Mr. Radnor, Your Honor's former law clerk, Your Honor directed that the applications be presented to Chief Judge Robinson in Your Honor's absence. Chief Judge Robinson entered orders granting the immunity. All of these issues were discussed with the Court, and Synanon's counsel, at the hearing held on August 15, 1983.

On August 22, 1983, Synanon filed a motion for leave to serve Bette Fleishman with a subpoena duces tecum for the production of documents at her deposition which was ordered by this Court to take place on August 25, 1983. In its motion, Synanon sought leave to serve a subpoena on Ms. Fleishman requiring her to produce, among other things, "all documents in her possession related to her grant of immunity in this or any other court."

By Order, dated August 22, 1983, this Court directed that the Government respond in writing to Synanon's motion no later than 2 P.M. on August 23, 1983.

In its response, the Government argued that Synanon had no standing to obtain any information relating to the grant of immunity to Ms. Fleishman.

By Order of August 24, 1983, Your Honor permitted Synanon to serve the subpoena on Ms. Fleishman, but ruled that the--

> Order shall not be deemed to require the production of any information concerning the grant of immunity to Ms. Fleishman, and/or information concerning the existence or non-existence of any federal grand jury investigation or materials or documents and the criminal activities, being investigated by the United States Government * * *.

On August 25, 1983, the Court once again stated from the bench that Synanon was not entitled to any information concerning the grant of immunity or grand jury materials.

Nonetheless, on August 26, 1983, Synanon filed a motion for an order requiring the Government to produce documents subpoenaed from Ms. Fleishman by a federal grand jury. With reference to this motion, on August 26, 1983, the Court stated to Synanon:

> I might tell you that the memorandum that your group submitted to me today contains a multitude of incorrect citations. We can't find the cases because of the incorrectness of them, and it is duplicative because it asked essentially in large part some of the same questions you asked the Court to rule on before.
>
> And I would caution once again, not only you, but the other side, not to do this any more, because this Court, under the new rules, no matter who it is, will just have to pay the penalties for sanctions because I am not going to stand for it.

(Fleishman Dep. 534.)

On October 25, 1983, Your Honor entered another written Order denying Synanon's motion for the production of documents subpoenaed from Ms. Fleishman by the grand jury.

Synanon is now, once again, attempting to gain access to information pertaining to grants of immunity to potential witnesses in this case. In an apparent attempt to circumvent Your Honor's earlier Orders of both August 24, 1983 and August 26, 1983, Synanon has filed with Chief Judge Robinson a "Petition To Unseal Records Of Immunity Orders." The Government has filed an opposition to Synanon's petition, a copy of which is attached hereto.

Because it is the Government's view that Your Honor has already ordered, both on August 24th and August 26th, that Synanon is not entitled to any information concerning grants of immunity to Government witnesses, we are writing to inform Your Honor of Synanon's filing with Chief Judge Robinson.

Respectfully yours,

GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division

By: JOHN J. McCARTHY
Senior Litigation Counsel
Special Litigation

Attachment

cc: Honorable Aubrey E. Robinson, Jr.
Chief Judge
United States Courthouse
3d & Constitution Avenue, N.W.
Washington, D.C. 20001

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IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

IN THE MATTER OF THE GRANT OF IMMUNITY IN CONNECTION WITH THE PROCEEDINGS OF THE SYNANON CHURCH v. UNITED STATES OF AMERICA	)))))	MISC. _____ JUDGE ROBINSON (Related to CA No. 82-2303)

OPPOSITION OF THE UNITED STATES TO SYNANON'S PETITION TO UNSEAL RECORDS OF IMMUNITY ORDERS

After full briefing of the issue, in the Synanon Church v. United States, Civil Action No. 82-2303, Judge Charles R. Richey, by Order dated August 24, 1983, ruled that Synanon was not entitled to any immunity records or information pertaining to grants of immunity to Bette Fleishman. This ruling was reiterated to Synanon in open Court by Judge Richey on August 25, 1983. */

In a blatant attempt to "end run" Judge Richey's prior ruling that Synanon is not entitled to any information concerning grants of immunity, Synanon has now filed with Chief Judge Robinson a petition to obtain those immunity records.

The simple answer to Synanon's petition is that it is estopped from relitigating this issue in view of Judge Richey's prior orders denying Synanon access to the immunity material.

*/ Judge Richey's August 24, 1983, Order and a transcript of his Orders in open Court on August 25, 1983, are attached hereto as Exhibit 1 and Exhibit 2.

However, since Synanon's petition, like so many other pleadings it has filed in the case before Judge Richey, is so repleat with erroneous statements of law and fact, we will briefly address some of Synanon's erroneous statements.

As demonstrated in the attached brief of the United States, an application and grant of immunity is an ex parte proceeding requiring no notice or hearing, even to the witness to whom immunity was granted in a civil case.

The United States' basic position is that Synanon has no standing to obtain the immunity records of third parties.

Synanon has, once again, intentionally misstated the Government's position. Synanon would have the Court believe that "the Government's position regarding the sealing of the immunity orders is that the records are protected from disclosure under Federal Rules of Criminal Procedure, Rule 6(e)." (Synanon's Memorandum of Points and Authorities in Support of Petition to Unseal Records of Immunity Order, p. 6.) This has never been the position of the Government. Again, the Government's position has been, and is, simply, that Synanon has no standing to obtain any information concerning grants of immunity to third parties. (See the defendant's August 23, 1983, response to the Court's order of August 23, 1983, concerning service by plaintiff of a subpoena duces tecum on Bette Fleishman.) The position of the United States is fully set forth in the attached memorandum (Exhibit 3) which is hereby incorporated by reference.

In conclusion, Synanon's arguments are frivolous and they have already been rejected by Judge Richey. The principles of collateral estoppel and res judicata apply to bar Synanon from relitigating these same issues.

Respectfully submitted,

THOMAS M. LAWLER

FRANCIS G. HERTZ

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SYNANON CHURCH :

Plaintiff- : CA No. 82-2303

v. :

THE UNITED STATES OF AMERICA :

Defendant :

ORDER

Upon consideration of Plaintiff's Motion for Leave to Serve a Subpoena Duces Tecum on Bette Fleishman for the production of documents and other material at her deposition on August 25, 1983, in Courtroom 11 of this Courthouse, and in light of the Defendant's response thereto, it is by the Court this 24th day of August, 1983,

ORDERED that plaintiff is granted leave to serve a subpoena duces tecum on Ms. Fleishman for the production of any calendars, letters, notes, correspondence, loose files, personal notes, notebooks, tape transcripts, audio or video tape recordings which make reference to the Synanon Church, Synanon Foundation, Inc., (collectively referred to as "Synanon") or any of its past or present residents; all correspondence, documents, or other material in her possession with respect to or pertaining to Synanon; any documents or other material which relate to the matters alleged in her proffered declaration dated July 8, 1983, and

any Think Table or Morning Court Topic Summaries which she may have in her possession; and, it is

FURTHER ORDERED, that anything herein to the contrary notwithstanding, this Order shall not be deemed to require the production of any information concerning the grant of immunity to Ms. Fleishman, and/or information concerning the existence or nonexistence of any federal grand jury investigation or materials or documents and the criminal activities, if any, being investigated by the United States Government or any duly authorized law enforcement agency or official, including but not limited to their agents, servants, attorneys, or employees, without regard to whether they be employed by a federal, state, county, city or any other governmental unit.

Charles R. Richey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SYNANON CHURCH,)
PLAINTIFF,)
- v-) Civil Action
) 82-2303
THE UNITED STATES OF AMERICA,)
DEFENDANT.)
* * * * * * * * * *)

Thursday, August 25, 1983

Washington, D. C.

The above-entitled matter came on for Deposition in Courtroom No. 11, United States District Courthouse commencing at approximately 10:50 a.m.

APPEARANCES:

GEOFFREY P. GITNER, Esq.
PHILIP C. BOURDETTE, Esq
THOMAS A. WADDEN, JR., Esq.
On behalf of the Plaintiff

BRUCE BURKE, Esq.
On behalf of Ms.Fleishman

THOMAS M. LAWLER, Esq.
FRANCIS HERTZ, Esq.
On behalf of the Defendant

WARREN KAPLAN, Esq.
On behalf of
Stuart A. Bernstein

THIS TRANSCRIPT WAS PRODUCED BY C.A.T.
(COMPUTER AIDED TRANSCRIPTION)

MINDI L. COLCHICO
OFFICIAL COURT REPORTER
6808 U.S. COURTHOUSE
WASHINGTON, D. C. 20001

GOVERNMENT EXHIBIT 2

THE COURT: The Court wants to assist Judge Braman or anybody else that is involved in parallel judicial proceedings, but the main purpose in calling Ms. Fleishman to this court was for this case.

MR. LAWLER: Absolutely, Your Honor, yes.

THE COURT: I did not call here because of Judge Braman. If I had done that, I would have told my colleague over there in the other state court to do what I am doing.

What I am wondering about is, why can't you all proceed with this deposition without the Court, as long as the Court is readily available? Do you need me sitting up here?

MR. GITNER: No, Your Honor. That is perfectly agreeable to the plaintiff.

THE COURT: Do you need me?

MR. LAWLER: We don't believe we need the Court. If the Court is interested, we would encourage the Court to sit through this. But we understand the Court's position.

THE COURT: All right. Now, while I have you here, and before we begin, I assume this thing is not working yet, is it? There is no need for it to be, unless you want it to be. You keep perrering the Court with motions, and I wish you would stop it because I don't have time to be doing all of this.

I will tell you the first one to file a motion from here on in and to lose is going to have sanctions imposed

against him. You know, the new Federal Rules of Civil Procedure have been amended as of August 1st. I am talking to both sides. This business of filing motion after motion after motion on the same subject matter adds up, and I am just not going to tolerate it. And I hope everybody understands that.

Now, as to the parameters of this deposition, if I can find it, I had it before I came out on the bench but I don't know where it is now.

MR. GITNER: Do you need the Federal Rules, Your Honor?

THE COURT: No. Just let me look at one other thing. The Court feels it has cleared up, although I don't have the original of my order back from the clerk's office yet --

DEPUTY CLERK: Your Honor, I will see if I can find it.

THE COURT: That is all right. I have a rough copy of it. The documents to be produced, I think, are clear. You are not to get any of the criminal stuff in the criminal investigation, and you know that, from the last paragraph, right?

MR. GITNER: Your Honor, I understand your order, yes, sir.

THE COURT: You understand my order?

MR. GITNER: Correct, Your Honor.

THE COURT: I assume that counsel for both sides

understand that they may examine the witness and test her credibility and knowledge with respect to the subject matter of her declaration, as you call it, which term the Court has been hearing for the last about six weeks continuously, but I always thought it was affidavit, until recently.

But in any event, you may ask her to testify with respect to those matters growing out of her declaration, insofar as it does not interfere with or pertain to the grant of immunity, the matters pertaining to the alleged criminal proceeding in the event there is any in any other court.

MR. GITNER: Your Honor, may I get some clarification on that?

THE COURT: You said you understood the order. So I think that ends it. I am not going to give you an advisory opinion.

MR. GITNER: I am not asking for that, Your Honor.

THE COURT: All right.

MR. GITNER: I just want to make clear, we are going to ask what documents Ms. Fleishman has with her today, what documents she had with her at the time she executed the declaration. We don't intend --

THE COURT: As long as they do not include or disclose the matters excluded from the scope of the subpoena as ordered by this court, I see no reason why you can't have them. Is that right?

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

THE SYNANON CHURCH,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. 82-2303
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO SYNANON'S SUPPLEMENTAL MEMORANDUM TO SUPPRESS THE DECLARATIONS OF BETTE FLEISHMAN, RODNEY MULLEN AND NAYA ARBITER

Apparently because Synanon can no longer address the merits of this lawsuit, it seeks, once again, to attack Government counsel 1/ and to deflect the Court's attention from the only issue in this case: Is Synanon a tax-exempt organization dedicated to the public benefit and thus entitled to the support and subsidy of the American taxpayers?

In its most recent series of motions and briefs, Synanon does not, because it cannot, address any issue relevant to whether it

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1/ Synanon's first attack on Government counsel occurred when it moved to quash certain Internal Revenue Service summonses served on Synanon in California. Specifically, on or about April 26, 1983, Synanon filed a motion for an emergency status conference asking this Court for additional time to respond to the Government's motion for summary judgment filed on March 11, 1983, and to quash the Internal Revenue Service summonses. In that motion, Synanon accused Government counsel of having had the Internal Revenue Service issue administrative summonses for the purpose of discovery in this case and "as a tactical ploy" by the Department of Justice and the Internal Revenue Service to somehow impede Synanon's ability to respond to the Government's pending motion for summary judgment. The allegations were found to be frivolous, both by this Court and by Judge Robert P. Aguilar of the United States District Court for the Northern District of California.

is a tax-exempt organization. Rather, in these pleadings Synanon seeks, in the guise of this civil declaratory judgment case, to conduct criminal discovery against the Government.

Synanon persists in peppering this Court and Government counsel with meritless motions, many of which have already been ruled upon by this Court, 2/ and with brief-after-brief containing unsupported and unsupportable allegations, misrepresentations and outright falsehoods. The latest barrage includes 3/ a supplemental memorandum in support of a motion to suppress Bette Fleishman's declaration, which motion has already been denied by this Court. Even a cursory reading of Synanon's brief, containing as it does patent

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2/ Examples of this tactic are numerous and include the following:

(a) After this Court ruled in the Government's favor on Synanon's petition to quash the Internal Revenue Service summonses, Synanon nonetheless later litigated that exact question in the United States District Court for the Northern District of California;

(b) On August 24, 1983, this Court by Order allowed Synanon to serve a subpoena duces tecum on Bette Fleishman but denied Synanon access to grand jury records or immunity records. Nevertheless, on September 1, 1983, Synanon once again moved for production of those same grand jury materials;

(c) On October 28, 1983, Synanon again petitioned for access to the immunity records denied it by this Court's Order of August 24, 1983; and,

(d) On August 17, 1983, after a hearing, this Court entered an Order requiring Synanon to produce certain tape recordings and other materials. Synanon immediately moved to vacate this Order. The Court thereafter again ordered Synanon to produce these materials. Synanon has contumaciously refused to do so.

3/ In an attempt to "end run" this Court's August 24, 1983, Order denying Synanon access to immunity records, Synanon has once again filed an identical request with Chief Judge Robinson.

falsehoods, leads the Government to suspect that this brief, like so many others filed by Synanon in this case, must have been written, not by private counsel for Synanon, but by Synanon resident Attorney Philip Bourdette and the Synanon law department. 4/

Synanon's tack now to divert this Court's attention from whether it (Synanon) is a tax-exempt organization is probably a direct result of Judge Leonard Braman's opinion of October 12, 1983, in the case of Synanon Foundation, Inc. v. Stuart Bernstein, et al., Civil Action No. 7189-78, Superior Court of the District of Columbia. The Bernstein case involved the identical issue presented here--whether Synanon was a tax-exempt organization during 1977 and 1978. Pursuant to motions to dismiss filed by the defendants, Judge Braman dismissed that suit because Synanon had perpetrated a fraud upon his Court and, as he found, upon other courts. (Op. 44.) 5/ Judge Braman dismissed that case upon the following findings of fact: (1) that Synanon adopted and implemented, during 1977 and 1978, a corporate policy of violence, militancy and terror (Op. 5-11); (2) that, in order to cover-up its corporate policy of violence and other non-tax

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4/ Although Attorney Bourdette has been indicted for kidnapping by the State of California, he, nonetheless, filed an application to appear pro hac vice here without advising the Court or the Government of that fact and the pendency of an appeal of that case by the State of California. Bourdette, who is the head of the Synanon law department, has moved approximately 50 Synanon residents to the Washington, D.C. area to prosecute this case. Indeed, we are informed that the Synanon law department has approximately 120 employees and that as many as 200 Synanon residents worked on Synanon's opposition to the Government's motion for summary judgment filed on March 11, 1983.

5/ "Op." refers to Judge Braman's findings of fact and conclusions of law of October 12, 1983. A copy is attached hereto as Exhibit A.

exempt activities, including the diversion of Synanon's funds to the private use of certain individuals, Synanon's executives and its law department collaborated to and, in fact, did destroy a massive amount of evidence as to the true nature of Synanon's activities. (Op. 13-29); (3) that the destroyed evidence would have shown dispositively that Synanon was not a tax-exempt organization (Op. 42); and (4) that to fraudulently cover-up the destruction of this evidence, Synanon's executives, including its archivist, Steve Simon, had committed perjury; that Simon's perjury was suborned by Bourdette and the Synanon law department, and that Bourdette had also testified falsely. (Op. 15, 38-41.)

In light of Judge Braman's findings of fact, it is now indisputable that Synanon was not a tax-exempt organization for the periods involved in this case. Synanon's claim to tax-exempt status, however, is apparently no longer its principal concern in this litigation.

Synanon has repeatedly stated to this Court that its activities are under criminal investigation by the United States Department of Justice. In its latest brief, Synanon is very clearly on a "fishing expedition" for criminal discovery in the guise of this civil case. Among other things, it seeks to cross-examine Government trial counsel in this case at an evidentiary hearing on alleged Governmental improprieties. The Government will not take Synanon's "bait." The Government will demonstrate below the frivolity of Synanon's baseless and unsupported allegations contained in its latest submissions to this Court.

1. In a matter already ruled upon by this Court in its Order of August 24, 1983, Synanon once again claims that it was entitled to notice of the Government's interviews of witnesses to whom this Court granted immunity; was entitled to attend those interviews; and had the right to participate in the Attorney General's decision as to whether immunity should be granted these witnesses. In this regard, Synanon contends that there is no authority for granting immunity in a civil case. Merely stating Synanon's propositions suggests their total absurdity.

First, as Synanon itself knows, Sections 6002 and 6003 of Title 18 of the United States Code provide that immunity may be obtained by the Government whenever a witness may refuse to testify in a proceeding before any court of the United States or in any proceeding ancillary thereto. The statute itself does not draw any distinction whatsoever between the grant of immunity in civil and criminal proceedings. This is because the statute authorizes immunity grants in civil cases. For example, in a previous civil tax case immunity was granted by this District Court for use in the United States Tax Court without notice or hearing even to the witness to whom the immunity was given. The Court of Appeals for the Seventh Circuit held that the immunity was properly granted and that even the witness had no right to notice or to a hearing on the Government's application. Ryan v. Commissioner of Internal Revenue, 568 F. 2d 531 (7th Cir. 1977).

Moreover, an immunity hearing is ex parte in nature where the Court acts in a ministerial capacity. United States v. Pacilla, 622 F. 2d 640 (2d Cir. 1980); Licata v. United States, 429 F. 2d 1177 (9th Cir. 1970); Ryan v. Commissioner, supra; United States v. Leyva, 513 F. 2d 774 (10th Cir. 1975). It is well established that Synanon has no standing to challenge the grant of immunity to Ms. Fleishman, since a party to a lawsuit has no standing to challenge a grant of immunity to a witness testifying against that party. As stated in United States v. Hathaway, 534 F. 2d 386, 402 (1st Cir. 1976):

> [35] Defendants also seek to assert alleged improprieties in the grants of immunity to four Government witnesses. See 18 U.S.C. § 6003. The short answer is that a challenge to a grant of immunity, like assertion of the privilege against self-incrimination, is personal; defendants are without standing to contest the legal sufficiency of the granting of immunity by the Government to these witnesses. United States v. Lewis, 456 F. 2d 404, 408-10 (3d Cir. 1972); cf. Lopez v. Burke, 413 F. 2d 992, 994 (7th Cir. 1969). See also United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); United States v. LePera, 443 F. 2d 810, 812 (9th Cir.), cert. denied, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 274 (1971); Long v. United States, 124 U.S.App.D.C. 14, 360 F. 2d 829, 834 (1966); United States, ex rel. Berberian v. Cliff, 300 F.Supp. 8, 14 15 (E.D.Pa. 1969).

Of course, Synanon had no right to participate in the determination as to whether the grant of immunity was proper. Indeed, not even the District Court has authority to review the United States Attorney's determinations that immunity is appropriate. Ullmann v. United States, 350 U.S. 422, 432-434 (1956); In Re

Maury Santiago, 533 F. 2d 727 (1st Cir. 1976). The grant of immunity is essentially a ministerial act, in which the District Court has no discretion to deny a properly presented petition. In Re Kilgo, 484 F. 2d 1215 (4th Cir. 1973); In Re Grand Jury Investigation, 486 F. 2d 1013, 1016 (3d Cir. 1973), cert. denied, sub nom. Testa v. United States, 417 U.S. 919 (1974). Accordingly, there is no need to make a factual record in the District Court and witnesses are not entitled to know the basis of the United States Attorney's determinations. This, however, is precisely what Synanon seeks. Yet, it is clear that Synanon cannot now litigate that which is beyond the District Court's authority to review. Courts have implicitly recognized as much. For example, in In Re Bonk, 527 F. 2d 120, 127 (7th Cir. 1975), the Court ruled that a witness challenging a grant of immunity was not entitled to examine underlying documents relating to the grant of immunity.

Therefore, as this Court has already ruled on August 24, 1983, Synanon is not entitled to any information concerning this Court's grant of immunity to any witness.

2. Synanon's next, and equally, if not more absurd, argument is that the Government somehow violated this Court's order staying all discovery pending resolution of the Government's motion for summary judgment. As best we understand it, according to Synanon, the Government violated this Court's discovery order by interviewing Bette Fleishman, Rodney Mullen and Naya Arbiter and by tendering their affidavits to this Court. Obviously, interviews of potential

witnesses do not constitute discovery under the Federal Rules of Civil Procedure. Indeed, Synanon itself obtained and filed with this Court, after the stay of discovery, over 390 affidavits resulting from interviews at which Government counsel was not in attendance. If Synanon's wish were granted to suppress the affidavits of Fleishman, Mullen and Arbiter, then each of Synanon's 390 affidavits must likewise be suppressed, leaving the Government's motion for summary judgment unopposed.

All of Synanon's remaining arguments, which are discussed below, are completely unsupported by any affidavits or documents. They are based entirely on unsupported and bald assertions.

3. Synanon falsely alleges, without pointing to any fact or document, and unsupported by any testimony or affidavit that:

> * * * These * * * Government lawyers [Lawler and Hertz] have apparently been actively involved in one or more grand jury investigations of Synanon, as early of [sic] April 1983.

(Synanon's memorandum in opposition to United States' production motion ("OM", p. 9); Synanon's supplemental memorandum in support of plaintiff's motion to suppress. ("SM.", p. 2.))

Contrary to Synanon's unsupported and false allegations, undersigned Government counsel are defending this declaratory judgment action. Their duties are exclusively civil in nature. These attorneys are involved solely in the defense of this

declaratory judgment action instituted by Synanon against the United States. These attorneys are not engaged in a criminal investigation of Synanon or involved in any grand jury investigation of Synanon.

4. Synanon repeatedly cites United States v. Sells Engineering, Inc., 51 U.S.L.W. 5059 (June 30, 1983) and United States v. Baggott, 51 U.S.L.W. 5075 (June 30, 1983) in the false hope of supporting its position. Both Sells and Baggott, however, are completely distinquishable from the facts here. In Sells, the Supreme Court held that grand jury material may not be disclosed to Government attorneys without a court order issued under Rule 6(e)(3)(C)(i). United States v. Sells Engineering, Inc., supra at 5067. In Baggott, the Supreme Court held that an Internal Revenue Service civil tax audit was not "preliminary to or in connection with a judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i), and hence no disclosure was available under that rule to Internal Revenue Service civil tax auditors. Here, of course, no grand jury materials have been made available to the Government for use in this civil case. Accordingly, both Sells and Baggott have no application whatsoever in this case.

5. Synanon next urges, without support, that there is a prohibited "cross-polination" between the activities of the attorneys representing the Government in this civil proceeding and attorneys of the Criminal Division conducting alleged grand jury proceedings. Synanon merely asserts that this so-called

"cross-polination" consists of prohibited disclosure of grand jury information to the civil tax attorneys and an effort by the civil tax attorneys to use civil discovery solely for criminal purposes. (OM. 13; SM. 2,7.)

We state here, on brief, that no criminal investigation is being or has been undertaken for the benefit of this civil case. Indeed, no grand jury materials have been made available to the attorneys representing the Government in this civil action. Conversely, the Tax Division has not undertaken any civil discovery for the benefit of any criminal investigation and, in fact, the Government has not conducted any discovery at all in this case since the Court entered its order staying all discovery.

6. Synanon's next absurd and unsupported argument is that the Government filed its July 11, 1983, motion (a motion for an order requiring Synanon to produce evidence intentionally hidden and an accounting of all evidence Synanon intentionally destroyed) at the behest of the Criminal Division of the Department of Justice in an attempt to obtain a "road map" of Synanon's defenses in any subsequent criminal proceeding. (SM. 14, 15.) Nothing can be further from the truth.

The motion was filed in and solely for purposes of this civil case. As Judge Braman found, the information sought by that motion would have dispositively shown that Synanon was not a tax-exempt organization. (Op. 42.) The reason that the

United States sought this material by way of motion was that discovery with Synanon does not work. Synanon makes a "mockery of discovery." (Op. 40.) As found by Judge Braman, Synanon's law department replies to discovery by intentionally destroying evidence, by perjury and the subornation of perjury. Moreover, indicative of the Synanon law department's "obfuscation" (Op. 33) of discovery and "disingenuous discovery responses" (Op. 39) is the law department's frivolous and repeated objections to discovery in previous litigation, by the invocation of, among others, "priest/penitent and psychiatrist/patient privileges." (Op. 36.)

Synanon also alleges that the hearing in the Bernstein case was staged by the Government. (SM. 14.) However, the principal witness for the defendants in the Bernstein case was Bette Fleishman. Her video-taped deposition testimony was taken by Synanon in this case in order that it could be used by Synanon to defend against the Bernstein motions to dismiss. The Government opposed the taking of Bette Fleishman's deposition in the Bernstein case. The simple fact is, the hearing in the Bernstein case was not staged by the Government. Synanon created its own problem by taking the deposition of Ms. Fleishman where she testified so graphically about Synanon's illegal activities. Synanon has presented no evidence and can present no evidence that the Government, in any way, staged the Bernstein hearing.

7. Next, Synanon argues that George Farnsworth cooperated with the Government in, again using Synanon's words, staging the Bernstein proceedings only at the threat of criminal prosecution. Synanon also argues that the Criminal Division seized a calendar from Farnsworth, thus depriving it of a full and fair opportunity to cross-examine him in Bernstein.

Mr. Farnsworth, however, testified in Bernstein, in response to questioning by Synanon, that he was freely and willingly cooperating with the United States without being threatened or pressured in any way. Moreover, Mr. Farnsworth stated that Mr. Gitner, Synanon's counsel in the Bernstein case, reviewed and approved of the production of only those portions of his calendar relied upon by him to produce his declaration in this case. Mr. Farnsworth produced this information to Mr. Gitner during the course of his testimony. The relevant portion of Mr. Farnsworth's testimony in Bernstein is attached hereto as Appendix B.

8. Finally, and perhaps most egregiously of all, Synanon has intentionally misquoted, in its supplemental memorandum, a question posed by this Court to Government counsel. This was done in an

apparent effort to have this Court believe that Government counsel denied the existence of a criminal investigation of Synanon. In this respect, Synanon quotes the Court as asking counsel:

> THE COURT: Is there any cross-fertilization and any on going criminal investigation?
>
> MR. LAWLER: No, your honor.

(SM. 8.) The Court's question, however, has been altered. From this alteration, Synanon proceeds to argue that there is in fact a criminal investigation and that Mr. Lawler's remarks were "blatant misrepresentations, calculated to mislead the Court." (SM. 8.) The fact is, however, the question asked by the Court was quite a different question than Synanon represents in its intentionally altered colloguy. The question the Court actually asked was:

> THE COURT: Is there any cross-fertilization between this and any ongoing criminal investigation?
>
> MR. LAWLER: No, your honor

(August 15, 1983 transcript, p. 31.) (Emphasis added.)

Therefore, contrary to what Synanon would mislead this Court into believing by misquoting the Court's question, Government counsel did not deny the existence of any criminal investigation but, rather, denied, as it does again here, that there is any "cross-fertilization" between this case and any on-going criminal investigation.

Any doubt whatsoever that Government counsel ever denied to this Court the existence of a criminal investigation is conclusively resolved by the following colloguy which occurred later at the same hearing:

THE COURT: He [Mr. Lawler] says, in response to a direct question from the Court, and he is an officer of the Court, just as you are, that there is no criminal investigation or cross-fertilization going on. That is what he said this morning. I asked him the direct question.

Didn't you?

MR. LAWLER: Your Honor, I said there was no cross-fertilization going on, but as Your Honor knows well, I being a civil lawyer in the Tax Division, cannot either admit nor deny the existence--

THE COURT: I thought you said there was no criminal investigation going on.

MR. LAWLER: I apologize if that is what I said. I certainly didn't mean to state that. What I mean to say is that we are conducting ourselves in the Tax Division solely for civil purposes. What any other division of the Department of Justice may or may not be doing is something, as Your Honor knows, is in their dominion.

THE COURT: Pretty big.

MR. LAWLER: I cannot speak to that.

THE COURT: You don't know of any such activities?

MR. LAWLER: I am aware of the activities of Mr. Goodwin, as Mr. Wadden stated, Mr. Goodwin is with the Criminal Division. I would be happy to explain to the Court how Mr. Goodwin got involved in this particular case.

THE COURT: I do not think it is going to make any difference in the outcome. I would just as well leave well enough alone. Isn't that a good answer?

MR. WADDEN: For the time being, it certainly is, Judge. (Tr. 78-79.)

Lastly, in Synanon's response to the Government's reply to its motion to suppress, Synanon argues that Government counsel represented to the Court that they would file affidavits replying to Synanon's allegations of cross-fertilization. Synanon's ploy here is obvious--if any affidavits are filed by Government trial counsel, Synanon's next maneuver would be to attempt to cross-examine Government counsel on the content of the affidavits.

Contrary to how Synanon would have it, as we understood the Court's comments at the August 15, 1983, hearing, the Court stated that the oral representations made by Government counsel at that hearing were adequate and that there was no need to file affidavits. (Tr. 31.) Indeed, counsel for Synanon seemed to agree with the Court that Government counsel's oral representations were "certainly" adequate. (Tr. 79.) Accordingly, no affidavits have been filed.

In conclusion, Synanon's motion to suppress should be denied.

Respectfully submitted,

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SYNANON FOUNDATION, INC. :

v :

STUART A. BERNSTEIN, et al :

Civil Action No. 7189-78

Washington, D. C.

Wednesday, October 12, 1983

The above-entitled matter came on for hearing before the Honorable LEONARD BRAMAN, Retired Judge, in Courtroom No. 36, commencing at approximately 9:00 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF THE TESTIMONY AND PROCEEDINGS IN THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiff:

GEOFFREY GITNER, Esquire
PHILIP BOURDETTE, Esquire

On behalf of Defendants:

WARREN KAPLAN, Esquire
DANIEL SULLIVAN, Esquire
JOHN R. COPE, Esquire
ANNE FORMAN, Esquire
T. BURNS, Esquire
C. JOHNSON, Esquire

PATRICIA SANBORN, RPR
OFFICIAL COURT REPORTER

P R O C E E D I N G S

MR. GITNER: Good morning, Your Honor.

THE COURT: Good morning.

THE DEPUTY CLERK: Your Honor, the Court recalls the matter of Synanon Foundation versus Stuart A. Bernstein, et al., Civil Action Number 7189-78.

THE COURT: This is the twelfth and final day of our hearing on the defendants' motions to dismiss. There are two preliminary matters.

Following the last day, the last session, the plaintiff, Synanon, filed a motion for leave to file explanatory material. There having been no objection to the motion, it will be granted. Mr. Clerk, would you please distribute copies of the order?

The defendants, on yesterday, defendants Bernstein and Kushner filed a motion for leave to file explanatory materials. Since there is not a feasible opportunity to respond to the motion, that motion will be denied.

MR. KAPLAN: Your Honor, may I --

THE COURT: And an order will be issued in due course.

MR. KAPLAN: Your Honor, that motion was

filed last Friday and hand delivered last Friday, and delivered to Mr. Gitner.

THE COURT: I received it yesterday, Mr. Kaplan. In any event, I will deny the motion for the reason that I've stated.

I come now to the decision in this case. I will state my decision and I will further state the reasons which constrain me to reach the conclusion.

For ten days, beginning on September 12, 1983, the Court took evidence on identical motions to dismiss which charge the plaintiffs, Synanon Foundation, with first destroying evidence and discovery materials, and then covering this up by perjury, and the commission of a fraud upon the Court.

I have heard eleven witnesses, and have received 78 exhibits into evidence with approximately an equal number of sub-exhibits.

In reaching my decision, I have carefully considered the credibility of the witnesses, including their demeanor as they presented themselves before the Court.

I have further considered their motivations and their possible biases, their

opportunity to know the facts and the circumstances whereof they testified.

I have further considered the quality of their testimony and whether they were primary or secondary witnesses. By that I mean whether they were primary witnesses to an event in issue or whether they were peripheral witnesses or persons with respect to that event.

I have considered the exhibits and I have considered the pleadings.

Now in making my decision and explaining the reasons for it, I will follow the format of the hearing memorandum filed by Synanon with respect to the defendants' motion to dismiss. That hearing memorandum was filed on September 20, 1983. I will use this as my format, not because I necessarily agree with the substances of the law as stated therein, but because I find it a useful analytical tool, and the first issue which I will address is whether there was an actual destruction or alteration of evidence or discoverable materials.

Now the subject matter which is claimed to have been destroyed principally involves tapes and computer data. The reason which is claimed to have caused the destruction is said to be the felt

opinion or fear of Synanon that the materials would impact adversely to Synanon on two issues.

The first issue has to do with Synanon's status. That is whether, during the material times involved in this case, Synanon was a non-profit corporation. If it was not a non-profit corporation, then it would not, under the applicable zoning laws which applied at the time, be permitted to use the subject property for office purposes, as well as residential purposes. Since the zoning was predicated on the non-profit status of the organization in question, this is set out on pages two and three and five and six of the pretrial order of August 9, 1983, and whether Synanon was a non-profit corporation turned upon whether its corporate policy contravened fundamental public law policy.

This is the law as stated by the Supreme Court in its last term in Bob Jones University against the United States, reported at 103 Supreme Court 2017. In the context of this case, the claimed illegality of Synanon's corporate policy involved its resort to violence, that is, that as a matter of corporate policy, it availed itself of terror and violence.

It is further claimed that Synanon was not a non-profit corporation because the corporate monies were deflected to private usages as a matter of corporate policy, and it was furhter claimed that as a matter of policy again, Synanon's posture, corporate posture, contravened fundamental policies having to do with the state of marriage and with sexual practices.

This first issue having to do with Synanon's status applies to all the parties defendants since it inheres in the complaint. That is, it is an issue which is inextricably involved in the entitlement of Synanon to recover.

The materials also potentially impacted upon the counterclaim filed by the defendants Bernstein and Kushner, which among other things, claimed that Synanon, through its representatives, had made certain representations involving the peaceful, passive nature of the order, which representations are claimed to have been false and fraudulent.

In resolving those two issues, the expressions of the high echelons of Synanon are important. Those expressions would speak for policy. Especially important would be the

expressions of Charles Dederich, who was the founder of Synanon, and through the years, its unchallenged leader.

Now there is a threshold issue which is being raised in this case. It was raised during the discovery phase and it was ventilated at the hearing on the motions to dismiss. That threshold issue arises from expressions made in the course of what are called Synanon Games or Think Tables or Morning Court activities. These expressions would take into account utterances made by Dederich and made by other officers of Synanon, as well as residents or members of Synanon. Were these so-called Games or Think Table sessions simply therapeutic techniques, as Synanon claims, for the release of emotions and/or ideas which bore no relationship to truth, or were they, as the defendants argue, techniques for the enunciation of truth as the speaker saw it, and for the promulgation of policy?

The issue has been approached by the parties in terms of mutual -- mutually exclusive propositions, but I do not think that this is so. If I were required to reach a finding on this issue, I would find that these Games, so-called

Games or Think Table sessions, were used for both purposes by Dederich and others. I will allude to a few examples of where the content was serious.

And the first example is the Morantz episode. Paul Morantz was an attorney who represented litigants in a litigation against Synanon. On October 11, I believe, 1978, an attempt was made to murder Morantz by placing a rattlesnake in his mailbox. Joseph Musico and Lance Kenton, Synanon residents, were arrested and charged for attempted murder, and later, Dederich was also arrested and charged.

This felony was preceded by over a year by bitter denunciations and excoriations against the legal profession on the part of Dederich. For example, in the so-called New Religious Posture Think Table, he talked about breaking some lawyers' legs and if that was effective, breaking their wives' legs, and if that was not effective, cutting the kid's arm off, meaning the arm of the lawyer who was perceived to be an enemy of Synanon.

The substance of this is found on pages 12 and 13 of the transcript of the excerpt of the New Religious Posture Think Table, which is plaintiffs' five. The casette is defendants' 14, I

believe, and also plaintiffs' three and four.

These denunciations against lawyers who oppose Synanon in general, were particularized with regard to Paul Morantz, and there were expressions, as I will state later, which urged and exhorted physical injury to Morantz. And this occurred on multiple occasions.

Synanon's witnesses, and particularly Mr. Akey, its president, its current president, stated that these utterances were examples only of Dederich's flamboyance, his penchant for hyperbole, which were not taken seriously. This argument is suggestive of the circumstances which led to the assassination of Thomas of Beckett when Henry II, in exasperation, spoke in the presence of his barons, the thinly veiled exhotation, "Will no one rid me of this meddlesome priest?" whereupon several of them assassinated Beckett.

Dederich's reiterated incitements far exceeded Henry's words in wilfully instigating the felony. It is beyond coincidence that Musico, Kenton and Dederich entered please of nollo contendre, and while there is testimony that Dederich's plea was prompted solely by reasons of broken health, that does not explain the other

pleas nor does it meet the legal requirement which was imposed upon the Court that took the plea to satisfy itself that there was proof beyond a reasonable doubt that the Government could have made a prima facie case.

Utterances of this sort preceded the life-threatening attack on Ritter, a former Synanon resident, and in assessing whether Dederich's utterances against Morantz and others was serious, it is useful to look at the incident involving the so-called Dinuba punks, and also Cardino. The violence that was utilized there translated the policy of militancy against trespassers into action, and Dederich had spoken about militancy against trespassers and when the violence occurred, it was condoned and embraced by Dederich as being an altogether proper expression of his policy.

There is no reason which I can see for reaching a conclusion that the expressions of militancy against trespassers was serious and why the policy of militancy against attorneys was any less serious. There is no reason which I can see for that kind of selectivity. Also, the expressions with regard to changing partners, that obviously is serious, and we have that from the

testimony of Messakian, who was on the verge of quitting Synanon because of the constraints of that policy, but she finally accepted it. Also showing the serious nature of these Games or Think Table Sessions are the expressions of Dederich in his deposition in the Times case. The transcript is defendants' 36 in evidence.

He stated, under oath, that he used these sessions as vehicles for the promulgation of policy, and he said the same on other occasions in public. But it is not necessary that I conclude that these Games or sessions were serious, deadly serious matters. It suffices that Synanon perceived that the tapes and like material might be harmful and that a jury might find that their content was deadly serious, and therefore proceeded to destroy the materials and then cover up the destruction, and I find that this is so.

Now with respect to the alleged destruction, the destruction charged flows from the testimony of two principal witnesses, Fleishman and Farnsworth. The deposition of Kolb corroborates in certain respects the testimony, but the testimony of these three witnesses implicated specific persons and in the face of those personalized

charges, Dr. Steven Simon, the Director of Archives, took the Fifth Amendment, and the same privilege was invoked on behalf of Miriam Bourdette, a paralegal in Synanon's legal department. Also by Daniel Sorkin, and also by Michele Albano Benjamin, who was assistant to the Chairman. Also, Philip Bourdette, Synanon's secretary and present general counsel availaed himself of his Fifth Amendment rights, as respects the testimony of Fleishman, and also partially with respect to Farnsworth's testimony.

Previously, the Fifth Amendment was invoked by Dan Garrett, who was prior chief counsel for Synanon, by Jade Dederich, Chairman of Synanon, and by Ron Cooke, a past vice president of Synanon. While these persons may be entitled to avail themselves of the Fifth Amendment, and I draw no adverse inference from the invocation of the privilege, the fact remains that there has been no refutation of the defendant's testimony from primary sources. Further, no testimony has been offered from the following persons who are uniquely under Synanon's control, and whose testimony would have been material. And that is David Benz, who was treasurer of Synanon, and who was alleged to

have burned tapes. Terry Haberman did not testify, nor did Chris Haberman, who worked in the legal department and who was implicated in the destruction of tapes, nor did Dorothy Garrett testify, who was a director of Synanon, and who was mentioned specifically as being knowledgeable by Farnsworth. David Benjamin, an attorney of Synanon did not appear, nor did Walter Lubelle. And finally, Charles Dederich did not testify, by deposition or otherwise.

The persons who were produced were, relatively speaking, secondary witnesses -- Otto, Ross, even Messakian.

Just as in the case of the building of the ancient pyramids' inner chambers, it is quite likely that one group of workers was ignorant of what another group was accomplishing.

I find by clear and convincing evidence that there was a wilful destruction and alteration of materials, that this was accomplished under the aegis of Simon, and that the materials not only related to violence, but also to money, to sexual subjects, to guns, and to other matters. This destruction was set off by the attempted murder of Morantz on October 11, 1978. Later in the same

month, after the arrest of Musico and Kenton, Dan Garrett flew to the Synanon facility in Badger, California, so-called Home Place. There he, Simon, Sorkin, Chris Haberman, adjourned to a trailer, and during a period of approximately two weeks, a substantial number of tapes were destroyed.

I find that in the main, those tapes involved violence.

The next month, on November 21, 1978, the Los Angeles police raided Home Place and among other things, seized a casette of the New Religious Posture Think Table which took place -- that is, the Think Table took place on September 5, 1977. The raid was on November 21, 1978.

Following that, Simon and Dan Sorkin, who was a private pilot, flew several times with boxes of tapes. One time to Kerhunkson, New York, where a substantial number of boxes of tapes were left. Another time to Lake Havasu, where the tapes were stored in a rented basement. Later David Benz burned a number of tapes.

In December of 1978, Dederich was arrested on the Morantz charges. Simon and Philip Bourdette proceeded to gather up tapes, Think Table topic summaries and transcripts which were

scattered over the various facilities of Synanon.

This was more or less the end of what I perceive to be the first wave of the destruction of materials. Then in late March -- strike that. In March and April of 1979, Simon approached Farnsworth about the deletion of data from the computer's inventory and index of transcript and tape references. He did so with the knowledge and the approval of the legal department, and in about April of 1979, Farnsworth spoke with Bourdette and Bourdette evinced that he knew and approved of the project.

There's been testimony that Mr. Bourdette was occupied virtually the entire month in depositions and discovery in Los Angeles, and therefore, was not available for the claimed discussions with Farnsworth, but he was also at home -- that is, at the same facility with Farnsworth, which I believe was Tomales Bay, on certain weekends.

I find as a fact that such conversations did take place.

In the summer of 1979, the destruction continued, the erasing of tapes in the face of discovery in this case, the ABC case, and in the

Morantz case, which was, I believe, captioned Synanon Foundation against Meriwether, et al. Morantz had filed a cross complaint against Synanon in that case.

During the summer of 1979, Fleishman was working part time in the archives listening to and logging tapes. With her there were approximately 20 others working on the same project. The discovery in the three cases that I have mentioned was substantial, and thus the listening and logging project.

There is testimony from Fleishman that Albano, the assistant to the chairman, came in while Fleishman was working and stated in effect that it was a good thing that the erasing was going on. Soon after, Simon stated to Fleishman, "God, she's stupid. I have to tell her to shut up."

The Court has found that this was admissible, and not hearsay. Though Albano's statements may, arguendo, be inadmissible, Simon's expressions are not, and the words of Albano are admissible as the format or in order to explain the content of Simon's expressions in the nature -- which expressions were in the nature of presence -- present sense impression, which is covered by Rule

803, subdivision 1 of the Federal Rules of Evidence.

That was followed in September, 1979 with Simon coming to Farnsworth for a second purge of the computer, the first one having been done in early April, 1979.

The third purge of the computer occurred in January, 1980, when Simon again approached Farnsworth with the third request, which Farnsworth executed. In February, 1980, through September -- through -- excuse me -- summer of 1980, Farnsworth worked full time in the archives, engaged in a special and secret project for and with Simon in which tapes were erased and altered.

MR. KAPLAN: Excuse me, Your Honor. I don't mean to interrupt. I think you said Farnsworth. I think you meant Fleishman.

THE COURT: Yes. I meant Fleishman was working full time in archives on this project.

The erased tapes and altered tapes impacted upon this case, the ABC case and Morantz.

In the spring of 1980, Fleishman approached Ms. Bourdette, as she did on various occasions, to inquire whether a particular tape on violence should be erased in order to get Ms.

Bourdette's guidance where the content of the tape was arguably of an incriminatory nature, and Ms. Fleishman testified that when she did see Ms. Bourdette in the spring of 1980 on such a mission, Ms. Bourdette responded, yes, the tape should be erased.

In July or August of 1980, there was the automobile trip in which Fleishman was a passenger with Ms. Bourdette, with one Ross and with Bernstein. During that trip, Ms. Bourdette admitted that she had been involved in the erasure of a substantial number of tapes in the three cases. Mr. Bernstein's testimony does leave gaps in it when he was asleep, and I believe also where he was discharged as a passenger before -- before Fleishman and Ms. Bourdette separated.

This destruction which I have found was of an extensive nature, according to Fleishman. Over 100 tapes were erased and altered while she was involved in the project. Thirty -- approximately thirty by her. These included Think Table sessions and the destruction of Think Table transcripts from 1977 and 1978. Also, Board of Directors' meetings, and also, Board of Director Games. Also, there was erased Synanon Games which

Dederich participated in prior to 1977.

Farnsworth testified that a large amount of entries in the computer inventory and computer index involving transcript references were deleted. In late March and early April, 1979, he stated that 50 to 100 Think Table or Morning Court references were deleted and substantially more were deleted in the second and third purges of the computer in September, 1979 and January, 1980. This destruction of materials is corroborated by independent sources.

Firstly, Simon, in his deposition in the ABC case, which is defendants' 30, Roman Numeral I, testified on pages 108 and 109 that the subject matter index recorded the type of event involved and the facility location. This confirmed Farnsworth, who stated that the original format of the subject matter index, before it was altered, did have that information as part of the printout but the sanitized subject matter index, which is Court Exhibit 1, is without that information or data. The Farnsworth diagram of the content of the subject matter index before the purging is set forth in defendants' 11 and 12 in evidence.

Another piece of corroborating evidence

is that while Court Exhibit 1 has 9,143 entries, according to the reprot of Simon to the Board of Directors dated February 15, 1979, which is defendants' 32 in evidence, the Charles E. Dederich subject matter index had more than 20,000 entries. He called the index a monumental work of Sybil Schiff which stretched over a period of three years.

Thirdly, and further corroborating this destruction of materials is the chronological subject matter index, defendants' 33, which was never produced in any case, and this notwithstanding that Messakian admitted that the subject matter index was fairly called for in both the ABC and the Morantz cases. That chronological subject matter index shows gaps which are the vestiges of the deletions and those are set forth in defendants' 37, 38 and 39. They have not been sufficiently explained, in the opinion of the Court.

Further corroborating the destruction of materials is the Think Table excerpt of July 28, 1977, which is a sub-exhibit to the affidavit of Messakian. The affidavit of Messakian is plaintiffs' 16, and the sub-exhibit number is

E-Roman Numeral II. This excerpt was Synanon's -- was given by Synanon as a response to Morantz's request for production on October 19, 1979. It is labeled, and quote, CED on Morantz, unquote. Morantz, as will further state, is one of the missing key words from the computer.

Though the exhibit was apparently typed at the legal department on April 16, 1979, it is listed on the list of transcripts which is the second part of Court Exhibit Number 1, and it is listed as tape number 770728 on page 048732 of that exhibit, therefore, in the view of the Court, the transcript could have been retyped at the legal department.

Now Synanon argues that defendants are obliged to identify with specificity the materials which were destroyed, but Strothers Patent Corporation against Nestle Company, Incorporated, reported at 558 Federal Supplement 747, upon which Synanon relies, only speaks of, "identification with as much specificity as possible of the documents which were destroyed." That is at page 756 of the Opinion.

Since the nature of the destroyed evidence and the extent of the destruction both

determine the degree to which specificity of identification can be made, Strothers erects a variable standard, and that is, "as much specificity as possible."

Assuming arugendo that Strothers correctly states the law, a question which I need not decide, I find that this case sufficiently complies with Strothers. That conclusion is supported by the following:

One, 19 specific tapes listed in defendants' 35 were missing, not produced, including the original tape as distinguished from the casette, of the New Religious Posture.

I find that those missing tapes were destroyed. Each was requested in discovery here, and each is covered by a Think Table topic summary attached to the defendatns' 35 in evidence, which summary gave a general and accurate description of the subject matters involved.

In the ordinary course of business, each Think Table topic summary was backed by a tape.

Secondly, three more tapes were missing involving 1978 sessions. One was -- one was of March 13, 1978. Another on May 3, 1978. Another on October 19, 1978, the first dealing with

corporal punishment, the second with presenting a tough image, and the third with Morantz being greeted by a rattlesnake. Those tapes were requested, but were missing, and I find, destroyed.

Third, three tapes were produced, but significant portions were erased, though those erased portions appear on the Think Table topic summary, the first being on August 17, 1977 dealing with guns and security, the second being August 27, 1977, dealing with physical force, and the third, October 3, 1977 dealing with the so-called Holy War. The last two are not on the computer inventory.

Fleishman testified that not only were entire tapes erased, but portions of tapes were erased, the remainder having been left on the tape.

Four, I find that specific tapes were demanded by the defendants April, 1980 request for production. Response was made in May of 1980. Items six, eight and thirteen embraced 59 specific tapes which were not produced, though Think Table topic summaries were extant. This included 17 on the Boston House, which is the real property that is the subject matter of this case.

On the same request, 300 specific tapes,

whose existence is shown by their appearance on the wire program log, defendants' 19, were requested and not produced. This includes -- this request includes 99 wire broadcasts from the Boston House.

Synanon argues that the absence of these tapes was established in the ABC case long before the defendants here requested those tapes, and that the defendants seek only to exploit that which had been previously demonstrated to be missing, but this argument doesn't alter the fact of wilful destruction of tapes which I find to have occurred, nor does it prove that the defendants would not have called for these materials in the ordinary course of discovery. If there is any doubt as to whether they would have been called upon, that doubt should be resolved against the wrongdoer, who should not profit by the unresolved questions that are the aftermath of the wrong conduct.

Five, by way of the specific materials which were destroyed, the December 23, 1977 tape, the so-called Battle Cry tape, that tape is not on the Dederich inventory, the printout, which is exhibit 1 of defendants' 8, though a transcript of the Battle Cry is available as plaintiffs' 10 in evidence.

Six, after Formia, on August 28, 1978, there was a Think Table session. Dederich participated, as was the policy of Synanon to tape all of the Think Table sessions of Dederich, and although the policy was not 100 percent successful, in the vast majority of cases, they were taped -- virtually all. As I have stated, the August 28, 1978 Think Table session was taped. It was taped by Fleishman in part, and according to her testimony, the taping was further done -- she was helped, that is, by Irving Goldman, a Synanon resident, who was not brought to this hearing to testify contrary to Fleishman.

The contents of this session was also heard by Kolb, and is part of the transcript of his testimony which has been admitted into evidence in this case. During this session, Dederich exhorted the doing of injury upon Morantz, and he chided the Synanon resident by the name of Tickles for not proceeding to effectuate Dederich's wishes.

I find that in the ordinary course, it would have been the policy to preserve a tape of this session, but Dan Garrett, who was then general counsel for Synanon, ordered Fleishman to give up the tape and to put it on his desk, which she did.

I find that that tape was destroyed.

Later, on September 1, 1978, there was a Board of Directors' Game. Fleishman heard this. The existence of this Game, it seems to me, was virtually admitted by Mr. Akey, and virtually admitted that it was taped. Here again, Dederich directs the injury or Morantz and Ritter. That tape was destroyed.

There are not Formia tapes, although Farnsworth testified that on July 22, 1978, he taped a session.

I have catalogued specific instances of tapes which were destroyed and altered, but it seems to me that subject matter categories would be sufficient to satisfy Strothers requirement of specificity. The categories were delineated by Fleishman. Among others, they included violence, money, purchase of guns, legal terror tactics, Holy War, changing partners or love match. These subject matters were not destroyed in toto, but as Fleishman testified, the destruction was astutely refined to accommodate the practicalities which confronted Synanon, including the fact that Dederich had made certain public pronouncements on the same subject.

I say that identification by subject matter is sufficient in the context of this case and, as a matter of policy, Synanon should not be heard to claim that there is insufficient specificity, since it was the instrument, the very instrument of the destruction.

So much for the issue of whether there was a destruction of materials. Next I turn to whether or not there is a connection between the destroyed documents and the issues of this case, whether there is a nexus.

Fleishman's testimony establishes an explicit connection between the destruction, the subsequent cover up, and three cases -- this case, the ABC case and the Morantz case. When working with Simon on a discovery request in the course of which tapes were erased, Simon would mention the case that was involved, and the trilogy of cases were recurrent.

Further, Ms. Bourdette stated to Fleishman that the erasures related to the three cases.

Fleishman's epi -- excuse me. Fleishman's estimate of approximately 100 destroyed tapes during her employment with archives in 1980

was explicitly tied to the same trilogy of cases and in the summer of 1980, Simon stated to Fleishman that he had testified falsely when he gave testimony recently in Washington. He had, as a matter of fact, given a deposition in this case in March, 1980, and at that time, this case was the only piece of litigation that Synanon was involved in in the District of Columbia.

Lest there be any misunderstanding, I do not rest my finding on this issue of the motion on Farns -- excuse me -- on Fleishman's testimony at pages 529 to 530 of her transcript that some of the erased tapes involved discussions of the Boston House, including Dederich's assaulting a reporter and removing himself from this country with knowledge that an arrest warrant had issued for him. I do not make such a finding because Fleishman later testified that that destruction could have happened as distinguished from her testifying earlier that it had happened, but the connection between the destruction in the case at bar is implicit by subject matter, as well as explicit.

As I have stated and found previously, violence was an issue in this case and was

implicated as an issue by the complaint and by the counterclaim. Also, guns, siphoning of money, changing partners are issues, at least arguably for the purposes of motivating destruction. Further, destruction of materials in the ABC case probably impacted in this case. The issues were overlapping in the two cases, and it was merely a question of timing of discovery as to which litigant made the first request.

What was destroyed in ABC or Morantz was rendered unavailable for the instant case, and if there be doubt whether the defendants would have gotten at this discovery independently, it would be unthinkable of the Court -- for the Court to resovle that doubt in favor or the wrongdoer who perpetrates the absence of the evidence.

Next I turn to the question, was there a duty to preserve the documents in question. There is a duty to preserve not only documents that are presently requested, but also documents which are likely to be requested. That was admitted in the course of this hearing. Where the momentum of the litigation indicates that the discovery path will turn sooner or later to a class of materials, those materials may not be tampered with, and should not

be with impunity.

The cases cited by Synanon in the hearing memorandum which it filed on September 20, 1983 support this proposition.

The Allen Penn case, on page 27 of the memo. The Bomar Instrument case, on pages two and three of the memo, and Strothers, on pages five and six of the memo, all support this duty. In this case, suit was filed by Synanon on July 11, 1978, and the counterclaim was filed on December 15, 1978. The defendants' first interrogatories were propounded on February 6, 1979, the same month as Morantz propounded discovery in the Meriwether case. The first interrogatories by the defendants in this case opened up the matter of tapes, transcripts and indices and brought those subject matters within the zone of discovery. Even if the discovery did not target precisely the materials involved, they were within the zone which had been fairly demarcated.

I conclude that there was a duty to preserve these materials.

Next I turn to the issue of whether there are other sources of information or evidence which can do service for the destroyed materials.

Most of the destroyed tapes were tapes in which Dederich was involved. A substantial number of them also involved Board of Director activities, either in formal session or in so-called games. One of the issues in this case is whether high management of Synanon directed or condoned violence or other activities which contravened fundamental public law policy.

As the defendants have argued, the tapes contained the actual voices of the protagonists. They uniquely recorded the quality of the voice and the ambience of the situation which prevailed. They would help show whether the activity was merely gaming or whether the parties were bent upon deadly serious business. The tapes undoubtedly would be the best evidence.

Reconstruction by testimony -- that is, taking the testimony of the auditors would not be an equivalent. As a matter of fact, it has been tried but those efforts have been met by invocations of the Fifth Amendment.

This case is distinguishable from the Allen Penn case upon which Synanon relies on this issue of the case. That is, whether there is other serviceable evidence.

In Allen Penn, the destroyed materials did not prove up the element of the case. The element there involved was whether injury had occurred. Instead, the destroyed materials pointed to discovery from third parties and those third parties were still available to give testimony. Here the destroyed tapes were the ultimate evidence. To use the vernacular, they were the jackpot and it was the jackpot which was destroyed.

The computer data which was destroyed would have led in house to the tapes. It would not be a situation like Allen -- like Allen Penn, where the computer data merely pointed to third parties outside the litigants. Here the computer data would have pointed to in house tapes, but Synanon argues that it offered to open up the tape library so that the defendants could listen to all the tapes. That argument, of course, does not reach the proposition that tapes were destroyed. And further, the offer was an offer to open up a search for the proverbial needle in the haystack. Dan Garrett told Judge Thompson in the January, 1980 hearing that it would take -- it would take a couple of years to listen to all the tapes, and the defendants were welcome to do that, and there was

no way of abbreviating that search.

Thirdly, the offer to open up the complete library would have entailed an enterprise that would have been impossibly expensive and it was sure to receive a rejection.

The subject matter index would have helped in the search, however, Synanon first destroyed part of it and then obfuscated the existence on the emasculated index.

About this subject matter index, the tape library included approximately 4,000 tapes. For the purposes of this case, the heart of the library was Charles Dederich at the Think Table or the Morning Court. These activities commenced in 1977 and went through April, 1978, but there were also Games prior to 1977 in which Dederich participated.

Synanon's policy was to tape all of Dederich's activities at the Think Table or other exercise, and as a matter of fact, virtually all of his expressions at such sessions were taped. Sybil Schiff transcribed virtually all of Dederich's expressions at Think Table or Morning Court sessions. Her transcripts were detailed and accurate. As Simon stated in the exhibit which the

Court previously referred to, she had labored over three years on this project. For each transcript there was a tape. These materials were transposed to the computerized index by Sybil Schiff and by Farnsworth. Additionally, some tapes without transcripts were placed on the index. Apparently these did not number more than 25. The index was separate and distinct from the straight printout. The straight printout was like a table of contents and is exemplified by defendants' 8 for evidence, exhibit 1. The table of contents or straight printout was available alphabetically or chronologically.

The subject matter index had about 20,000 entries, according to defendants' 32 in evidence. Simon testified in deposition in this case at page 42 that there were over -- that there were approximately, rather, 400 to 500 key words. The subject matter index was available both in an alphabetical and chronological format.

Among other things, according to Farnsworth's testimony and his declaration, at paragraph 32, some of those key words were violence, Morantz, Holy War, Time, Inc., and probably William Crawford. Farnsworth testified

credibly that these and other key words were destroyed. He estimated that approximately 180 key words were destroyed. In fact, the subject matter index was the gateway to get at Dederich's pronouncements on these and a variety of other subjects, and Dederich's pronouncements would constitute pronouncements at the highest level of management. Without this index, a search for Dederich's utterances on any given subject would have indeed been like searching for a needle in a haystack.

This was the substance of Dan Garrett's representations to Judge Thompson.

That, the Dederich transcripts were only a fraction of the entire library is beside the point. They were of invaluable significance, and would have been -- and would have encompassed, rather, most of the then-current expressions of Dederich on the referable subjects, but as previously stated, hundreds of references from the inventory and the index were destroyed from the computer, and notwithstanding that Synanon had purged its computer, it was also disingenuous in responding to the defendants' request for production of April 16, 1980. Item 32 of that

request called for, and I quote, transcript index, paren, listing transcripts in Synanon's archives, unparen, unquote.

Attorney Weill was assigned to the response, and this is the same Weill who, with respect to ABCs' seventh request for all communications of Dederich in Formia, item 96 of the seventh request, lodged ten objections, including the priest/penitent, and psychiatrist/patient privileges. This is found in sub-exhibit D, Roman Numeral II to plaintiffs' 16. What Weill gave in response to the defendants' request in this case was eleven pages, constituting simply a listing of transcripts. It was a table of contents -- not a subject matter -- not even an index. It was certainly not the subject matter index which Simon, in his deposition at page 41 in this case, said was 300 and more pages.

The only index was the subject matter index, not the eleven pages. The subject matter index was also, incidentally, a listing, but the listing which Weill provided was in no event an index. Yet in the face of this, Weill sat on the subject matter index. Moreover, he says that he relied on Simon's deposition, yet Simon, in his

deposition, page 30, testified, and I quote, there is no listing of transcripts, unquote, therefore, if Weill was guided by Simon's deposition, it should have been clear to him that the defendants, being influenced by the same deposition, were seeking the index Simon referred to on pages 40 to 41 of his deposition. It is no answer, in my view, that the defendants could have followed up with a motion to compel. Yes, they could have, but there was an antecedent responsibility to respond fairly and candidly to discovery requests.

I next turn to the last issue or last requirement posed by Strothers, and that is whether there was actual prejudice. I doubt whether, in the light of the Hazel Atlas case, that requirement is sound, Hazel Atlas being reported at 322 U. S. 238, 1944. But assuming arguendo that it is sound, the Court makes the following findings and conclusions.

What I have said on the previous subject of alternative sources of evidence is basically dispositive of the issue of actual prejudice. Conduct contrary to public law or policy, whether consisting of violence, terror or the diversion of corporate monies for private purposes, would not be

of any consequence unless it was imputed to high management. Without this linkage, the conduct would be considered not policy, but only the random actions of individual and irresponsible members. It is this linkage, the direction and condonation of illegality, that was destroyed, and this destruction was of the very tapes which probably had captured the voices in flagrante delicto.

Where destruction of evidence, wilful destruction of evidence occurs, the inference is that the destruction was of materials adverse to the party who brings about the destruction, and this proposition has been settled in this jurisdiction since Washington Gas Light Company against Biancaniello, B-i-a-n-c-a-n-i-e-l-l-o, reported at 87 U. S. App. D. C. 164.

Accordingly, I conclude that the evidence clearly and convincingly shows that actual prejudice has occurred. I also conclude that all of the other -- all of the elements recited in the Strothers case have been established in this case, but there is more than the destruction.

There was a fraudulent cover up of the foregoing destruction of tapes and other materials. Firstly, it was covered up by perjury. Simon

testified falsely in his deposition on March 23, 1980. He so admitted to Fleishman in the summer of 1980. Simon also testified in the sanctions hearing before Judge Fauntleroy in November -- on November 5, 1981, and in doing so, he corrupted the decisional processes of the Court.

I further find that Simon's false testimony was the product of affirmative collaboration with the legal department.

Secondly, the cover up was aided and abetted by the disingenuous discovery responses of Synanon's legal department. Two examples will suffice. The first example is the one having to do with the transcript or the subject matter index, which I have already alluded to.

Secondly, the answers filed by Synanon on May 16, 1980, to the defendants' second interrogatories filed on April 16, 1980, and in particular to the fifth interrogatory, it seems to me reflects an attitude of cover up and not the required attitude and response to discovery. The fifth interrogatory that the plaintiff, quote, identify all persons who attended the Think Table session on September 5, 1977, unquote. This was the so-called New Religious Posture session.

It later developed, a month before trial, that the defendant knew who the key participants of this session were, and this came -- came out -- I believe it was August, 1983, when the Springer materials were filed.

MR. KAPLAN: Your Honor, you said defendants. I think you meant plaintiff.

THE COURT: I did mean the plaintiff, the -- Synanon.

At that time Synanon identified who the key participants of the session were, yet in response to the interrogatory in 1980, Synanon seized on a deceptive quibble with the interrogatories' use of the word, quote, all, unquote. Synanon evaded any substantive response to the interrogatory on the specious theory that the duty to disclose what is in fact known is excused because that information is less than all which could possibly be known.

That perspective makes a mockery of discovery and that device was employed as a gimmick on several occasions during discovery.

Thirdly, the cover up was assisted by misleading Judge Thompson at the January 18, 1980 hearing on the defendants' motion to compel further

further discovery. I have already alluded to that hearing previously.

And so we come to the final question, what is the appropriate remedy? The destruction in this case, as I have stated before, was done under the direct aegis of Simony, Director of Archives, but as I have also found, he acted in complicity with and under the direction of the legal department.

Ms. Fleishman has testified to her contacts with Ms. Bourdette. She testified that Simon admitted, against his interest, that he committed perjury and he testified -- and that he also stated that he had reviewed what his testimony would be with Mr. Bourdette and that his testimony was a product of that discussion.

That was, as I say, according to Fleishman, admitted by Simon. There's been no testimony to the contrary.

According to Farnsworth, he had discussions regarding the computer purge with Mr. Bourdette. Mr. Bourdette was -- is now general counsel for Synanon, and he was, since September 5, 1978, secretary of Synanon. That is demonstrated by plaintiffs' 16, sub-exhibit E, Roman Numeral II.

Chris Haberman, who was an investigator with legal, as I have already found, participated in the destruction of tapes which took place in the Sorkin trailer in October, 1978.

Other high officials of Synanon were in complicity with the destruction. As I have found, David Benz burned tapes. From February 8, 1975 to March 19, 1979, he was the treasurer of Synanon.

So we have destruction at the highest level of the archives, in complicity with legal -- that is, the legal department, and also, with high officers of Synanon.

Accordingly, I conclude that the evidence clearly and convincingly establishes a wilful, deliberate and purposeful scheme to, one, destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing upon Synanon's complaint, that is, its non-profit status, and also the defendants, Bernstein and Kushner's, counterclaim.

The scheme further had as its purpose to cover up and conceal this destruction of evidence and discoverable materials by giving false testimony in deposition and before this Court in the hearing before Judge Fauntleroy, and further,

to cover up and conceal the destruction by being disingenuous in the representations before this Court at the January, 1980 hearing before Judge Thompson, and in its responses to the defendants' discovery.

This constitutes a gross fraud upon the Court of the most grave and serious proportions. Synanon argues that the defendants had made -- had made prior motions to dismiss and that that -- those motions had been denied, but never before, in any motion, has this Court had the testimony of Fleishman and Farnsworth, which under any conservative standard, constitutes newly discovered evidence.

But even more importantly, Judge Fauntleroy's ruling was procured by false testimony and Synanon cannot benefit by this wrongdoing.

I am mindful that dismissal is a drastic remedy, but I am convinced that there is no intermediate relief or remedy sufficient in the circumstances of this case. From the standpoint of the equities of the litigants, dismissal is required. The defendants should not be put at risk because of the absence of testimony. It is not sufficient to say that the jury can listen to all

of this evidence and draw its own conclusions and make inferences. That puts the defendants, the victims of the wrongdoing at risk that it can come up with persuasive evidence to capture the minds of the jury.

As I say, it is not fair and equitable to subject the defendants to that jeopardy.

Further, beyond the equities of the litigants, from the standpoint of tampering with the judicial process, the Hazel Atlas case, it seems to me, warrants, indeed requires, dismissal.

I can take notice, and I do, that not only has there been a tampering of evidence in this case, but also in other cases, and it seems to me that that that also fortifies the Hazel Atlas approach to this case. There's been a fraud upon this Court, and regrettably, on others.

The motions to dismiss will be granted.

Mr. Kaplan, will you submit an order granting the motions? I don't wish findings to be made. I don't think they are necessary. Merely recite in the order that the Court has made findings and conclusions in open court, pursuant to the rules. I think that the -- well, actually, I don't think that findings are necessary in a motion

to dismiss, but even if findings are required, the rule -- I don't know whether it's 52 or whatever, states that findings in open court will suffice.

Please submit the order by the end of the day.

MR. KAPLAN: Yes, Your Honor.

(Thereupon, at approximately 10:55 a.m., the above-entitled matter was concluded.)

CERTIFICATE OF REPORTER

I, PATRICIA SANBORN, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I transcribed by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the hearing in the SYNANON FOUNDATION, INC. v. STUART A. BERNSTEIN, et al., CA NO. 7189-78, in said Court, on the 12 day of October, 1983.

I further certify that the foregoing 45 pages, constitute a transcript of said proceedings, taken from my machine shorthand notes.

In witness whereof, I have hereto signed my name, this the 12 day of October, 1983.

Patricia Sanborn

Official Court Reporter

FARNSWORTH II

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SYNANON FOUNDATION, INC. :

v :

STUART A. BERNSTEIN, et al : Civil Action No. 7189-78

Washington, D. C.

Thursday, September 15, 1983

The above-entitled matter came on for hearing before the Honorable LEONARD BRAMAN, Retired Judge, in Courtroom No. 36, commencing at approximately 9:00 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF THE TESTIMONY AND PROCEEDINGS IN THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiff:

GEOFFREY GITNER, Esquire
PHILIP BOURDETTE, Esquire

On behalf of Defendants:

WARREN KAPLAN, Esquire
DANIEL SULLIVAN, Esquire
JOHN R. COPE, Esquire
ANNE FORMAN, Esquire
T. BURNS, Esquire
T. JOHNSON, Esquire

PATRICIA SANBORN, RPR
OFFICIAL COURT REPORTER 727-1767

this marked, if I may, as plaintiffs' exhibit number one, I believe.

BY MR. GITNER:

Q Mr. Farnsworth, I would like you to look at what's been marked plaintiffs' exhibit number one and ask you if you can identify that?

A I don't recognize the first page. I recognize the first page of the affidavit, yes.

Q And that was the first affidavit that you signed, correct?

A Yes.

Q Mr. Farnsworth, also you testified from some notes, I believe, or some diaries that you have?

A Yes.

Q Do you have those with you at this time?

A I do. You have a copy.

Q Do you have the originals of your diary?

A I do not, no.

Q You don't have the originals of your diary?

A I gave them to Mr. Goodwin.

Q All right. This is a -- this is all you have left is --

A Yes. Well, you have a copy of that.

Q Also, that copy that you provided me does not have every page for every date?

A No. I brought only those pages -- I might say I consider those diaries to have quite a bit of information which I consider private and -- and personal, therefore, since the subpoena requested that I bring the few that I relied upon to produce the affidavit, I brought those parts of the diary or copies of those parts of the diary that were referred to in the affidavit.

THE COURT: What subpoena, sir?

THE WITNESS: The subpoena to come here. The subpoena that -- I don't know who issued it.

THE COURT: Mr. Kaplan, is that your subpoena?

MR. KAPLAN: Yes, Your Honor. That was my subpoena.

THE COURT: All right, sir.

THE WITNESS: And I -- I discussed with Mr. Gitner and with Mr. Kaplan, both, that I didn't think that -- did they think I would have to bring the whole diary and put it into the public record, and they said they felt that I didn't have to, and I therefore didn't.

BY MR. GITNER:

Q Excuse me, Mr. Farnsworth, are you recollecting a conversation that I had with you?

A Yes.

Q And you are saying that I told you you shouldn't bring your entire diary with you?

A No. You told me I didn't need to bring or put into the public record the entire diary of all the diaries.

Q Wasn't there some conversation that you should bring a copy with you and the original and the portion that you would like to have deleted? Wasn't that the conversation?

A I remember that you recommended that I bring the original, yes, but --

Q All right. And that you notified me at that time that you were going to bring the original?

A I did not, no.

Q You didn't?

A I recall specifically not telling you that I would bring the original because I had my doubts about whether I would.

Q Okay. Is this what you produced with you today that's been marked as plaintiffs' exhibit number two?

A Yes.

Q May I have that back, please, sir?

Now there are certain portions of this reproduction that appear to have been redacted, such as --

A Yes.

Q October 30, 1978.

A These are portions, again, which I considered to be private and personal and --

THE COURT: What was the date?

THE WITNESS: The date of the one that he mentioned is November 1, 1978.

BY MR. GITNER:

Q In this case, you don't have the original of this particular diary?

A No.

Q And it was this diary from which you testified you were able to reconstruct the specific dates that you testified to and that are contained with both versions of your declaration, is that correct?

A Yes.

Q And without this diary, I take it you would have been unable to recall those specific dates?

A That's correct.

Q And you would also have been unable to recall the specific individuals that you met with on those dates, is that correct?

A I probably would have been unable to remember which individuals on which specific dates. I certainly would have been able to remember meetings with named individuals.

Q Now when you met with Mr. Simon in March of 1979, I believe your testimony was that he told you that the intent of the project was to make it more difficult for litigants, correct? That was one of the reasons he gave you?

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SYNANON FOUNDATION, INC. :

v :

STUART A. BERNSTEIN, et al :

Civil Action No. 7189-78

Continuation of Farnsworth

Testimony, September 15, 1983

Q Certainly.

A It was on September 9th.

Q September 9th, sir?

A Yes. It was given to a person named Carlson representing Mr. Goodwin.

Q Was that after you had received the subpoena to appear in court today?

A Yes.

Q And was that calendar subpoenaed by Mr. Goodwin? Did you receive a subpoena for your calendar?

A No.

Q And what did that gentlemen tell you that asked for your calendar?

A He told me that it would be protected and that it would be extremely useful in his -- in the preparation of their criminal case.

Q Did you have any conversation with Mr. Lawler in which you informed him that you were going to testify in this proceeding?

A Yes. I informed him that I received a subpoena and I had a conversation with Mr. Kaplan and later on that I had a converation with you.

Q And was that conversation with Mr. Lawler before you received the request from Mr.

ways that it was made more difficult well -- I am not sure you testified to it. You testified that there was a date on the first page of the computer printout runs, correct?

A On all pages.

Q All right. On all pages.

THE COURT: You are now referring to defendants' exhibit --

MR. GITNER: Ten.

BY MT. GITNER:

Q And that would be the date of the printout, correct, or the date of the run?

A Yes.

Q And there would be a page number, correct?

A Um-hum. Normally when you began the day, you would have to tell the computer what day it was and -- that would be the date used.

Q Was your calendar, the calendar that you have based your recollection on -- I believe you testified this was given to Mr. Goodwin?

A Yes. It was given to another attorney to give to Mr. Goodwin.

Q When was that, sir?

A If I may consult my diary.

Goodwin to produce your calendar?

THE COURT: Repeat the question, please.

BY MR. GITNER:

Q Was his conversation with Mr. Lawler prior to the time this gentlemen who was representing Mr. Goodwin requested your calendar on September 9th, I believe?

A Mr. Carlson and Mr. Frank Hertz came together -- Frank Hertz representing Mr. Lawler, who was unavailable for some reason. I had a conversation with Mr. Hertz before I turned over the calendars. I had several conversations, yes.

Q And the request to turn over -- did you turn over any other documents to Mr. Goodwin or his representative, Mr. Carlson?

A I turned over some other documents to the group of three back in July or August.

Q What documents were those, sir?

A Documents such as tax returns -- if I may.

Q Your tax returns?

A Yes. Some information I had about a club called We Made It Rich, and a photograph.

Q Did you have a conversation with Mr. Lawler, Mr. Hertz, or Mr. Goodwin regarding your

employment at the Bureau of Census?

A I informed Mr. Hertz, I believe, that I worked -- had worked at the Bureau of Census, and I wanted him to know that there had been a -- a unfounded allegation against me shortly after I left the Bureau of Census that was investigated by the FBI and found to be unfounded, or at least resulted in no further action.

Q I take it, then, you had conversations with these gentlemen regarding allegations that had been made against you during your employment at the Bureau of Census?

A Well, the allegations were actually made, I believe, after I left the Bureau of Census.

Q Did you initiate these conversations or did they initiate these conversations?

A I initiated the conversations.

Q Can you tell me under what circumstances you initiated these conversations?

MR. KAPLAN: Your Honor, I am thinking we are going far beyond --

THE COURT: Yes. I am prepared to sustain the objection, Mr. Gitner, unless you can show me the materiality for this proceeding.

MR. GITNER: Well, Your Honor, what

triggered this was this gentleman's testimony that they had asked to take his tax returns. I knew about this information but frankly wasn't sure if it was relevant but it appears maybe there was some pressure put on this man.

THE COURT: Well, you can -- you can inquire on that, but I don't see the materiality of the -- the unfounded -- what the witness has called unfounded allegations.

MR. GITNER: Well, the materiality, I believe, Your Honor, is that Mr. Farnsworth had some concerns about some materials that were possibly taken from the Bureau of Census when he left there and possibly -- I don't know whether they are true or not, no information one way of the other that these materials were produced under the Government's auspices, and possibly Mr. Farnsworth -- I am not sure that this is accurate -- had used these for his personal benefit and if indeed this was true, there may of be quite a reason for Mr. Farnsworth to cooperate with the Government which subselentio is is just as much a part of producing this witness's testimony as the defendants.

THE COURT: Very well. You may inquire.

BY MR. GITNER:

Q Did they put any pressure on you, Mr. Farnsworth, regarding these allegations?

A They did not.

Q Were you concerned about these allegations?

A I expected they might come up. I thought they should know about them.

Q Did you tell them about your concern it might come up on their first visit on July 6?

A No.

Q Did you tell them about it on the second visit on July 7?

A No.

Q So I take it you told them sometime in August?

A Sometime in August.

Q You were worried about this allegation?

A No, I'm not worried about it.

Q Were you worried?

A No, I was not worried.

Q Why did you bring it up in August?

A I thought someone else would bring it up and I thought it would be good for them to know about it.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Memorandum For The United States In Response To Synanon's Supplemental Memorandum To Suppress The Declarations Of Bette Fleishman, Rodney Mullen And Naya Arbiter was this 4th day of November, 1983, hand-delivered to the following:

Geoffrey P. Gitner, Esq.
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Thomas M. Lawler

THOMAS M. LAWLER