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Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin, Plaintiffs, v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY DOCKET NO. L-5473-12 Civil Action **JONAH'S LEGAL MEMORANDUM IN SUPPORT OF ITS MOTION TO QUASH PLAINTIFFS' SUBPOENAS *DUCES TECUM* SERVED ON DAVID ROSENTHAL AND SHAMASH LISTSERV MAILING LIST MANAGER**

I.

INTRODUCTION.

Defendant JONAH (Jews Offering New Alternatives for Healing) moves to quash the identical subpoenas *duces tecum* (SDT) that plaintiffs have served on the Shamash Listserv Mailing List Manager for MyJewishLearning, Inc. and its owner David Rosenthal. MyJewishLearning, Inc. provided confidential list serve services to members and other

anonymous participants from 2001 to 2010. (Copies of those SDT's are attached to the certification of Arthur Goldberg, submitted in support of this motion, as Exhibits "1" and "2".) The JONAH list serve is for the exclusive, nonpublic use of men struggling with unwanted same-sex attractions and those friends and family members who support them in their efforts to improve their lives. Each list serve participant is pre-screened and approved by JONAH and promised that their participation will remain confidential. This confidentiality is essential because the matters discussed are deeply personal and private, often touching on issues of a sexual nature. (See Certification of Arthur Goldberg submitted in support of this motion.)

JONAH has already produced to plaintiffs all of the unredacted list serve communications (including complete e-mail strings) which were, at least in part, sent to or from the plaintiffs. Nevertheless, the plaintiffs have served SDT's seeking the "full archives" of JONAH's list serve from the provider. This effectively extends over the ten year period (2001-2010) that MyJewishLearning, Inc. served as JONAH's list serve provider. This would involve the production of thousands of e-mails, from hundreds of people, of a private and confidential nature. Therefore, what plaintiffs are now seeking through their SDT's are the additional private communications of third parties. This would be a violation of the right to privacy of personal and sexual matters that is guaranteed by the United States and New Jersey Constitutions. It would also call for the production of voluminous private documents that have no relevance to the issues involved in this lawsuit.

Besides calling for the production of confidential and irrelevant documents, the subject SDT's are harassing and harmful to the interests of JONAH and its clients. If the confidentiality of JONAH's list serve is breached, then clients and other participants will no longer have the

trust and confidence that is necessary to participate in this therapeutic and healing form of communication. Nor will they trust JONAH to be in a position to keep their most intimate secrets private and confidential. This would be devastating to JONAH as the absolute trust and confidence of its clients and potential clients is essential to its mission. For all of these reasons, JONAH respectfully requests that the Court grant its motion to quash the SDT's that plaintiffs have served on David Rosenthal and Shamash Listserv Mailing List Manager.

II.

FACTS.

JONAH was incorporated in New Jersey as a 501(c)(3) non-profit corporation in 2000. As set out in its mission statement, JONAH is a non-profit international organization dedicated to educating the world-wide Jewish community about the social, cultural and emotional factors which lead to same-sex attractions. JONAH works directly with those struggling with unwanted same-sex sexual attractions (SSA) and with families whose loved ones are involved in homosexuality. JONAH uses psychological and spiritual counseling, peer support, and self-empowerment, and seeks to reunify families, to heal the wounds surrounding homosexuality and other sexual conflicts, and to provide hope. JONAH has helped hundreds of men and women in their struggle to resolve their internal conflicts and rid themselves of their unwanted same-sex attractions. Many of their clients have realized their life-long dreams of having a spouse and family of their own. (JONAH's website may be accessed at http://jonahweb.org).)

Plaintiffs are four of JONAH's former clients, none of whom complained about the program while participating in it, and all of whom left on good terms even though they did not complete the program. Years after they left the JONAH program, and after they apparently came

under the influence of gay activists like Wayne Besen and the Southern Poverty Law Center (SPLC), they agreed to be named as plaintiffs in what the SPLC calls a "first of its kind" lawsuit to attack the entire "Ex-Gay" industry. In fact, the SPLC has targeted some seventy groups such as JONAH on its website that it intends to drive out of business with a nationwide litigation campaign if this case is successful. (See, www.splcenter.org/converson-therapy).

The gay activists that are orchestrating this lawsuit are currently openly trolling for plaintiffs to seek to bring more of these suits through various gay websites. One SPLC attorney on this case, lesbian activist Christine Sun, recently stated in a March 21, 2013 article entitled "The New Gay-Rights Frontier" that "If we're successful this case will be the death knell of conversion therapy." (A copy of that article is attached to the Certification of Charles LiMandri, submitted in support of this motion, as Exhibit "2.") What the SPLC erroneously refers to as "conversion therapy" is a form of counseling that has helped thousands of people leave the gay lifestyle or at least experience a significant relief of their unwanted same-sex attractions.

Based on the foregoing, the well-funded and staffed SPLC has pulled out all the stops in this lawsuit. As the Court is aware, it showed up at the first Case Management Conference with seven of the eight attorneys assigned to this case including its founder Morris Dees. It has already sent out SDT's similar to the ones at issue here to individuals and organizations in four states (New Jersey, New York, Virginia, and Tennessee). This is despite the fact that defendants have already produced hundreds of documents, including all of the list serve communications as to which the plaintiffs were senders or recipients. At the same time, the plaintiffs have served a new round of voluminous interrogatories on the defendants, bringing the combined total to the four defendants to well in excess of 300 interrogatories.

It is obvious that the SPLC wants to use this litigation to improperly send a message to the entire therapeutic and "Ex-Gay" communities that it will aggressively misuse state consumer fraud statutes to intimidate and distract them from their missions. This politically motivated campaign means using scorched earth litigation tactics that will threaten to bankrupt any charitable organization or therapist that dares to help willing homosexuals rid themselves of their unwanted same-sex attractions. Thus, the plaintiffs' grossly overbroad SDT's are not only harassing to JONAH but an abuse of process.

III.

LEGAL ARGUMENT.

A. The SDT's Seek Documents That Are Irrelevant.

In *Harmon v. Great Atlantic*, 273 N.J. Super. 552, 557 (1994), the court, citing Rule 4:10-2(a), stated: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party..." The court went on to state that: "Even taking this liberal view of the scope of discovery, we are convinced that, on balance, the circumstances in the present case do not warrant discovery of plaintiffs' checking and banking statements, or credit card receipts and bills. Less invasive means of obtaining facts to test objectively plaintiffs' allegations of harm appear to be adequate. The intrusions defendant seeks int to the personal records and documents of the plaintiffs are, on balance, unwarranted."

In the present case, the plaintiffs can make no showing that the documents that they have sought through their SDT's relate to the claim or defense of any party. Moreover, unlike the

documents at issue in *Harmon*, the plaintiffs are seeking records of nonparties rather than parties. Furthermore, the documents subject to the SDT's in this case are potentially far more personal than the financial records that were at issue in the *Harmon* case, particularly since many of them will necessarily relate to matters of a private sexual nature.

In *Serrano v. Underground Utilities Corp*., the court stated: "Relevancy under Rule 4:10-2(a) is congruent with relevancy pursuant to *N.J.R.E.* 401, namely, a tendency in reason to prove or disprove any fact of consequence to the determination of the action. However the parties' discovery rights are not unlimited." (407 N.J. Super 253, 267 (2009) [Internal quotes and citations omitted].) The present plaintiffs seek virtually unlimited discovery rights to irrelevant and confidential matters in their SDT's. This ill-intentioned effort to obtain thousands of irrelevant and confidential communications should not be permitted by this Court.

B. The Plaintiffs' SDT's Are Overbroad, Oppressive, and Harassing.

As set forth above, the SDT's at issue sweep within their scope thousands of communications of third parties that have nothing to do with the present litigation. They also seek to invade the constitutionally protected privacy interests of hundreds of third parties. In doing so, they are oppressive and harassing to the defendants because they seek to deal a devastating blow to the ability of JONAH to serve its clients. In *Serrano*, the appellate court noted that trial courts are authorized courts "to make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." (*Id*. [Internal quotes and citations omitted]; see also *K.S. v. ABC Professional Corp*., 165 N.J. 596 (2000) [prohibiting discovery of individual defendants' sexual relations with employees other than plaintiff].)

Defendants have already produced the complete e-mail strings containing any e-mail in which they were either a sender or recipient. Plaintiffs can make no showing as to why they should be entitled to receive the confidential e-mails of third parties that had no communication with them and

which contain personal and confidential material in which those third parties had a reasonable expectation of privacy. The fact that plaintiffs would even seek to invade the constitutionally protected privacy interests of third parties, so as to harm the interests of JONAH, and pursue the SPLC's political objectives, is an abuse of process.

C. The Plaintiffs' SDT's Violate the Privacy Interests of JONAH's Clients and Potential Clients.

It is appropriate for JONAH to assert the privacy rights of third parties, specifically that of former and current clients. First, it should go without saying that clients undergoing any kind of counseling or therapy do so with an expectation that the information they reveal will be kept private. Moreover, the service agreement that each JONAH client entered into contains a provision guaranteeing that his identity, client relationship, and the nature and content of his work with JONAH will remain private and confidential. Consequently, absent express waivers, defendants cannot reveal any information about clients other than plaintiffs without breaching their fiduciary and contractual obligations to those clients.

Furthermore, those other clients and potential clients have constitutionally protected rights to privacy. Under the United States Constitution, the protected "zone of privacy" includes the individual interest in avoiding disclosure of personal matters. (*Whalen v. Roe*, 429 U.S. 589,

598-99 (1977).) Courts of appeals "have interpreted *Whalen* to recognize a constitutional right to the privacy of medical, **sexual**, financial, and perhaps other categories of highly personal information – **information that most people are reluctant to disclose to strangers** – and have held that the right is defeasible only upon proof of a strong public interest in access to or dissemination of the information." (*Wolfe v. Schaefer*, 619 F.3d 782, 785 (7th Cir. 2010) [emphasis added].) Similarly, New Jersey courts have consistently recognized "a right to privacy implicit in article 1, paragraph 1 of the state's constitution." (See, e.g., *Lewis v. Harris*, 875 A.2d 259, 266 (N.J.Super. App. 2005).) While the present parties have entered into a confidentiality agreement, defendants have no legal right to waive any third party's constitutional right to privacy.

At the very least, these nonparties' private information should not be released until they have been notified that plaintiffs are seeking to discover it and have been given an opportunity to object to its production. (See, e.g., *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J.Super. 134, 141 (App. Div. 2001); see also *Gross v. Kennedy*, 15 N.J.Super. 118, 121 (Ch. Div. 1951) [in determining whether production of third party materials should be compelled, courts should consider: (a) whether good cause has been shown for the examination; (b) whether one not a party to the suit may be unduly affected by revelation of its private affairs; and (c) whether the materials are within the possession, custody or control of the other party].). However, in the present case, for the reasons previously mentioned, even this cumbersome and unnecessary procedure would be devastating to the defendants' legitimate business interests.

IV.

CONCLUSION.

Plaintiffs have served subpoenas duces tecum on persons and organizations in four states seeking many thousands of personal and confidential communications of third parties. These confidential e-mails and other correspondence are contractually and constitutionally protected from disclosure by the United States and New Jersey Constitutions. The documents sought are irrelevant,

and the requests to produce them oppressive and harassing inasmuch as production would severely harm the ability of JONAH to serve its clients and potential clients. Plaintiffs have made it clear that this lawsuit is but the opening salvo in a nationwide campaign attacking what SPLC misleading refers to as "conversion therapy" in the United States.[1]

According to an article that appeared in the March 21, 2013 issue of The American Prospect magazine (http://prospect.org/article/new-gay-rights-frontier) lead attorney Christine Sun of the SPLC, stated that the consumer-fraud case against conversion therapy represents the start of a grassroots, multistate effort to chip away at LGBT discrimination by subverting the notion that homosexuality is nothing more than a lifestyle choice. "Discrediting the idea that you can change your sexual orientation completely demolishes the number-one justification for denying gay people equal rights," she says. "If you look at the literature by some of the anti-gay groups, the first reason they have for not allowing a gay couple to be married or not providing

[1] Indeed, the Southern Poverty Law Center, which brands pro-family and religious groups that disagree with them as "Hate Groups," and lumping them in with violent NeoNazi groups and the KKK, boasts that this is a first of its kind lawsuit targeting the entire "Ex-Gay" industry. (See, http://www.splcenter.org/get-informed/news/splc-files-groundbreaking-lawsuit-accusing-conversion-therapy-organization-of-frau).

employment protections for gay employees, or not taking bullying against gay kids seriously is the idea that being gay is a mental disorder and it's something that needs to be treated."

Never mind that this community of counselors has helped many thousands of people rid themselves of their internal conflicts and unwanted same-sex attractions and pursue happier and healthier lives. The Court should not allow the SPLC to use legitimate court processes to serve illegitimate political objectives aimed at intimidating and preventing charitable organizations like JONAH from pursing their mission of helping people who desire their help. Therefore, JONAH respectfully requests that the Court quash plaintiffs' SDT's served on David Rosenthal and the Shamash Listserv Mailing List Manager of MyJewishLearning, Inc.

CERTIFICATION OF SERVICE

I hereby certify that copies of this motion, the accompanying certifications and the proposed order have been served upon all parties in this matter.

MESSINA LAW FIRM, P.C.

Dated: April ___, 2013

By: _____
Michael P. Laffey, Esq.
Attorneys for Defendants