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

I.

INTRODUCTION.

Thaddeus Heffner, LMFT (Licensed Marriage and Family Therapist) and Defendant Jews Offering New Alternatives for Healing (JONAH) move to quash the subpoena duces tecum (SDT) that plaintiffs have served on Thaddeus Heffner. By their SDT plaintiffs seek to obtain all of Mr. Heffner's confidential client files relating to JONAH referrals and various other counselors and organizations listed in the subpoena. A copy of the SDT served on Mr. Heffner

by plaintiffs is attached to his certification filed in support of this motion as Exhibit 1. A sample copy of the Patient Consent to Treatment form signed by Mr. Heffner's clients, which each contain a broad confidentiality provision, is attached to his certification as Exhibit 2. This confidentiality is essential because the matters discussed are deeply personal and private, directly dealing with issues of a sexual nature. In fact these communications are also privileged pursuant to N.J.S.A. 45:8B-29 and 45:8B-2, and protected by federal patient privacy laws. See. HIPPA, 45 CFR 160, 162 and 164.

Mr. Heffner only counseled one plaintiff, Sheldon Bruck, and he only had an opportunity to do so (via Skype or telephone) on four occasions. Mr. Bruck discontinued his counseling services with Mr. Heffner in January 2010. Even so, neither Mr. Bruck nor any member of his family ever complained about any service provided to him by Mr. Heffner, who was referred to him by JONAH. Notwithstanding the foregoing, plaintiffs have sought production of literally thousands of e-mails involving dozens of people over almost a ten year period from 2004 through 2013. This would be a gross violation of the right to privacy of personal and sexual matters of these nonparties that is guaranteed by the United States and New Jersey Constitutions.

Plaintiffs' SDT would also call for the production of voluminous private documents that bear no relevance to the issues involved in this lawsuit. Thaddeus Heffner and JONAH have already produced to plaintiffs all of their own client files and documents that concern them. Besides their client files, 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. Therefore, what plaintiffs are now seeking through their SDT are the additional private communications and privileged counseling records of third parties.

Besides calling for the production of confidential and irrelevant documents of third parties, the subject SDT is further harassing and harmful to the legitimate interests of Thaddeus Heffner and JONAH. If the confidentiality of Mr. Heffner and JONAH's other clients is breached, then clients and potential clients will no longer have the trust and confidence that is necessary to participate in this therapeutic and healing form of communication and treatment. Nor will they trust Mr. Heffner and JONAH to be in a position to keep their most intimate secrets private and confidential. This would be devastating to Mr. Heffner's and JONAH's ability to serve their clients as the absolute trust and confidence of their clients and potential clients is essential to their mission. For all of these reasons, JONAH and Mr. Heffner respectfully request that the Court grant their motion to quash the SDT that plaintiffs have served on Mr. Heffner.

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.

Thaddeus Heffner is a licensed marriage and family therapist in the state of Tennessee to whom JONAH refers clients. Plaintiff Sheldon Bruck was referred to Mr. Heffner by JONAH. Like the other male plaintiffs, Mr. Bruck came to JONAH for assistance with issues relating to his sexual orientation. Like all of the clients of JONAH and Mr. Heffner, Mr. Bruck was promised complete confidentiality. And, like the other plaintiffs, Mr. Bruck never complained about the program when he was in it, and he left the service of JONAH and Mr. Heffner on good terms even though, in his case, he had barely begun the program. Then, like the other plaintiffs, years after they left JONAH, 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, SPLC has targeted some seventy groups and therapists such as JONAH and Thaddeus Heffner on its website, indicating that it intends to drive them out of business with a nationwide litigation campaign if this case is successful. (See, www.splcenter.org/conversion-therapy). The militant gay activists that are orchestrating this lawsuit are currently openly trolling for plaintiffs on various gay websites, to seek to bring more of these suits. 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 declaration 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 through the resolution of internal conflicts.

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 one 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 client files and list serve communications as to which the plaintiffs were the 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 and Mr. Heffner but an abuse of process.

III.

LEGAL ARGUMENT.

A. The SDT Seeks 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 into 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 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 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.*, 407 N.J. Super 253, 267 (2009), 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." [Internal quotes and citations omitted]. The present plaintiffs seek virtually unlimited discovery rights to irrelevant and confidential matters in their SDT. This ill-intentioned effort to obtain thousands of irrelevant and confidential communications should not be permitted by this Court.

B. The Plaintiffs' SDT is Overbroad, Burdensome, Oppressive, and Harassing.

As set forth above, the SDT at issue sweeps within its scope thousands of communications of third parties that have nothing to do with the present litigation. It also seeks to invade the constitutionally protected privacy interests of hundreds of third parties. In doing so, it is oppressive and harassing to the defendants because it seeks to deal a devastating blow to their ability to

function. 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).

Mr. Heffner estimates in his declaration, filed in support of this motion, that it would take him over 100 hours to go through thousands of e-mails in an attempt to respond to plaintiffs' overbroad SDT. This is clearly impermissibly burdensome and oppressive. 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 and client files of third parties that had no communication with them and which contain personal and confidential material to which they 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 defendants’ business interests, and pursue improper political objectives, is an abuse of process.

C. The Plaintiffs' SDT Violates Privilege as well as the Contractual and Constitutional

Privacy Interests of Mr. Heffner's and JONAH's Clients and Potential Clients.

As previously indicated, Mr. Heffner is a licensed marriage and family counselor and therapist. The state of New Jersey recognizes that any communications with such a family therapist and his or her clients is privileged. N.J.S.A. 45:8B-29. The privilege applies to the type of counseling services that Mr. Heffner uses to help his clients resolve the "psychological conflicts" presented by the clients which JONAH refers to him. N.J.S.A. 45:8B-2. The marriage and family therapist privilege is even broader than the psychologist-patient and attorney-client privileges. *Fitzgibbon v. Fitzgibbon*, 197 N.J. Super. 63, 67 (1984).

It is appropriate for JONAH and Thaddeus Heffner to assert the privilege and privacy rights of third parties, specifically that of former and current clients. 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 and Mr. Heffner will remain private and confidential. Consequently, absent express waivers, defendants and Mr. Heffner 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 privilege or 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)¹; 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' and their clients' legitimate interests.

IV.

¹ The Privacy rule under Federal HIPPA standards also requires that a person be given reasonable notice and an opportunity to object before their medical records are released for use in a legal proceeding. *In re Diet Drug Litigation*, 384 N.J. Super 546, 559, n.300 (2005).

CONCLUSION.

Plaintiffs have served subpoenas duces tecum (SDT's) 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. In the case of the documents subpoenaed from Mr. Heffner, many of them are also privileged and protected by federal law. The documents sought are irrelevant, oppressive and harassing inasmuch as production would and the requests to produce them are severely harm the legitimate interests of Mr. Heffner and JONAH. 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.²

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

² 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-fraud>).

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, and conscientious counselors like Thaddeus Heffner, from pursuing their mission of helping people who desire their help. Nor should plaintiffs be permitted to force the disclosure of the sensitive and confidential information of numerous third parties in order to pursue a political agenda. Therefore, Mr. Heffner and JONAH respectfully request that the Court quash plaintiffs' SDT served on Thaddeus Heffner.

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.

Respectfully Submitted,

MESSINA LAW FIRM, P.C.

Dated: April ____, 2013

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