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Attorneys for Plaintiffs

Michael Ferguson, Benjamin Unger, Chaim
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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
HUDSON COUNTY, LAW DIVISION

Docket No. L-5473-12

CIVIL ACTION

**NOTICE OF PLAINTIFFS' MOTION
IN LIMINE RE JOURNEY BEYOND
SCRIPT SPOILIATION**

To: Michael P. Laffey, Esq.
Messina Law Firm P.C.
961 Holmdel Road
Holmdel, NJ 07733-2103

Charles S. LiMandri, Esq.
Teresa L. Mendoza, Esq.
Freedom of Conscience
Defense Fund
P.O. Box 9520
Rancho Santa Fe, CA 92067

PLEASE TAKE NOTICE that Plaintiffs shall apply on short notice to the Honorable Peter F. Bariso, A.J.S.C. at the Superior Court of New Jersey located at 595 Newark Avenue, Jersey City on Monday, June 1, 2015 at 10:00 a.m. for an order regarding the Journey Beyond script.

A proposed form of Order is attached. In support of this motion, Plaintiffs will rely upon the brief submitted herewith.

ORAL ARGUMENT: Plaintiffs waive oral argument.

DISCOVERY END DATE: The discovery end date was December 29, 2014.

Dated: May 20, 2015

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Attorneys for Plaintiffs

CERTIFICATION OF SERVICE

On May 20, 2015, the original and two copies of the following documents were hand delivered to: Clerk, Superior Court of New Jersey, Hudson County Law Division, 595 Newark Avenue, Jersey City, NJ 07305

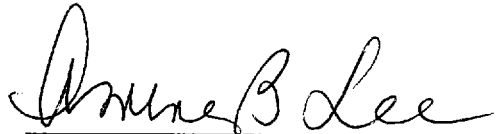
- Notice Of Plaintiffs' Motion In Limine Re Journey Beyond Script Spoliation;
- Letter brief;
- Certification of Lina Bensman in support thereof; and
- Proposed form of Order

and were served via electronic and regular mail upon:

Michael P. Laffey, Esq.
Messina Law Firm, P.C.
961 Holmdel Road
Holmdel, New Jersey 07733

Charles S. LiMandri, Esq.
Law Offices of Charles S. LiMandri, APC
P.O. Box 9120
Rancho Santa Fe, CA 92067

Attorneys for Defendants



Amina B. Lee



May 20, 2015

HAND DELIVERED

Honorable Peter F. Bariso, Jr., A.J.S.C.
Superior Court of New Jersey
Hudson County Courthouse
595 Newark Avenue
Jersey City, NJ 07305

Re: **Ferguson et. al. v. JONAH et. al., Docket No. L-5473-12**
Motion in Limine re Journey Beyond Script Spoliation

Dear Judge Bariso,

Together with our co-counsel, this firm represents Plaintiffs in this matter. Through this letter brief, we respectfully request that the Court grant an adverse inference against Defendants due to the admitted spoliation of the script for the Journey Beyond experiential weekend by Defendants Arthur Goldberg and Alan Downing, and also that the Court bar Defendants from offering testimony about Journey Beyond that, without the script, Plaintiffs cannot test.

More than two years ago, on April 29, 2013, Plaintiffs served requests for production of documents on all Defendants. See, e.g., Ex. 4.¹ In that set, Request For Production No. 23 (“RFP 23”) sought “Any and all documents relating to experiential weekends attended or facilitated by” Defendants. Id. at 10.² The script for Journey Beyond, an experiential weekend co-created by Alan Downing and run by People Can Change (“PCC”), is clearly called for by this request. However, the Journey Beyond script was never produced.

Following the Court’s rulings on the motions in limine, which made clear that no privilege or other protection prevents questioning on Journey Beyond, Plaintiffs have spent additional time reviewing PCC materials and Journey Beyond testimony.³ In doing so, it became

¹ All referenced exhibits are attached to the accompanying Bensman Certification.

² Equivalent requests were served on all Defendants.

³ Plaintiffs believe that the Journey Beyond script is substantially similar in structure to the Journey into Manhood script, which has been produced, and which exhaustively details every aspect of that weekend, including the actual scripted words that are said by specific members of staff. This confirms the importance of the Journey Beyond script to Plaintiffs’ case and to their ability to effectively cross-examine Mr. Goldberg, Mr. Downing, Mr. Wyler, and Defendants’ many “success story witnesses” who attended Journey Beyond.



clear that Mr. Downing and Mr. Goldberg both facilitated Journey Beyond weekends *after* their receipt of RFP 23 and that both were in possession of the Journey Beyond script at that time.⁴

On May 12, 2015, Plaintiffs requested that, consistent with N.J.R.Ct. 4:18-1(b)(3), Defendants comply with their continuing obligation to produce documents responsive to RFP 23, and specifically asked that Defendants supplement their production with the Journey Beyond script. Ex. 1. Defendants replied that they had already produced all documents responsive to RFP 23 and stated that they did not have a copy of the Journey Beyond script. Ex. 2.⁵ In a later communication, Defendants affirmatively stated that, since being served with RFP 23, they had had the Journey Beyond script in their possession, but that they had destroyed (or given away) their copies of that script. Ex. 3 (“As you may know, PCC’s policy is that all staff volunteers must return to PCC or destroy or give PCC any copies of the experiential-weekend scripts immediately after the event. *Our clients confirmed that they have complied with PCC’s policies with respect to the Journey Beyond script, and they therefore do not have a copy...*”). The destruction or giving away of the script constitutes spoliation of relevant and requested evidence in violation of the New Jersey Rules of Evidence. Plaintiffs are therefore left with no choice but to seek relief from the Court.⁶

There is no question that parties to a pending litigation have a duty to preserve relevant evidence. Cockerline v. Menendez, 411 N.J. Super. 596, 620 (App. Div. 2010) (citing Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 364 (App. Div. 1998)). In this case, Defendants literally held the Journey Beyond script in their hands and chose either to destroy it or to “return” it to PCC. Because there was a time when copies of the Journey Beyond script were in Defendants’ control, Defendants had a duty to preserve those copies regardless of

⁴ PCC provides staff with individual copies of the scripts in advance of each experiential weekend so that staff members can review the script and prepare. Ex. 8. According to PCC’s website, two Journey Beyond weekends have been held since the discovery request was served. Exs. 5, 6. The undisputed testimony of Defendants’ witness Jeddy Stailey confirms that, at a minimum, Mr. Downing staffed the August 2013 Journey Beyond weekends. Ex. 7, Stailey Tr. 48:10-13; 151:3-5.

⁵ Defendants’ reply came only two hours after Plaintiffs’ initial request was made. Plaintiffs find it not plausible that both Mr. Goldberg and Mr. Downing could have conducted an adequate search of all of their paper and digital files in that short time. Nor is it plausible that Mr. Downing, who co-created the Journey Beyond weekend, does not have a single paper or digital copy of any version of the Journey Beyond script.

⁶ Notably, the operation of an automated document deletion policy is not a defense to a spoliation claim even if the failure to suspend the policy was inadvertent. Mosaid Tech. Inc. v. Samsung Elecs. Co., Ltd, 348 F. Supp. 2d 332, 339 (D.N.J. 2004). PCC’s document destruction/return policy cannot shield Defendants’ spoliation of their personal copies of the script.



PCC's policies. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) (stating that “[i]f a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence” and finding that a party had spoliated evidence because, while “it is true that Silvestri did not own the vehicle, nor did he even control it in a legal sense,” he nevertheless “had access to the vehicle” and “took no steps to assure General Motors equal access to the evidence.”).

If Defendants believed that they had a valid basis to withhold the Journey Beyond script from discovery, they could have moved for a protective order.⁷ What they could not do, but did do, is engage in self-help by destroying the script or giving it to third parties. Defendants actively undertook to make it impossible for Plaintiffs to obtain the script. By failing to preserve it, they spoliated evidence.

New Jersey law prohibits spoliation of evidence, i.e., when “evidence pertinent to the action is destroyed, thereby interfering with the action’s proper administration and disposition.” Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 234 (Law Div. 1993)). When evidence is destroyed, “all things are presumed against the destroyer.” Rosenblit v. Zimmerman, 166 N.J. 391, 401 (2001) (quoting Hirsch, 266 N.J. Super. at 258). Specifically, “where an adversary has intentionally hidden or destroyed (spoliated) evidence necessary to a party’s cause of action and that misdeed is uncovered in time for trial, plaintiff is entitled to a spoliation inference that the missing evidence would be unfavorable to the wrongdoer.” Id. at 411; see also Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 117 (2008) (plaintiff was entitled to a spoliation inference where defendant destroyed documents relevant to her legal claims); Cockerline, 411 N.J. Super. 296 (same). Indeed, courts have found that when a party destroys evidence, “sanctions should be imposed and the nonspoliating defendant may even be entitled to counsel fees.” Aetna, 309 N.J. Super. at 365.

Defendants’ intentional spoliation of the Journey Beyond script is the latest in a long string of their efforts to conceal facts about Journey Beyond. Without the Journey Beyond script, the *only* evidence about Journey Beyond that has thus far been available to Plaintiffs is the videotaped deposition testimony of Jonathan Hoffman. Defendants should not be allowed to contradict that testimony by making assertions about Journey Beyond that, as a result of their spoliation of the script, Plaintiffs cannot test. Defendants’ decision to actively destroy or give away the Journey Beyond script merits the adverse inference that the contents of that document would have harmed their defense.

⁷ Plaintiffs note that it is now far too late for Defendants to raise objections to this years-old discovery request. Regardless, defense counsel’s May 12, 2015 email affirmatively states that Defendants “produced all documents responsive to the requests” and therefore confirms that Defendants’ withholding of this document from discovery is not based on an objection.



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May 20, 2015
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Plaintiffs therefore respectfully request that Defendants be barred from contradicting Mr. Hoffman's testimony about Journey Beyond and further request that the jury be instructed that they are permitted to infer that the Journey Beyond script would have been unfavorable to Defendants.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. D. Greenberg', written over the printed name.

Bruce D. Greenberg

BDG:al

cc: Charles S. LiMandri, Esq. (via email)
Michael P. Laffey, Esq. (via email)

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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY, LAW DIVISION

Docket No. L-5473-12

CIVIL ACTION

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION IN LIMINE RE
JOURNEY BEYOND SCRIPT
SPOILIATION**

This matter having been opened to the Court by Bruce D. Greenberg, Esq., of Lite DePalma Greenberg, LLC, attorneys for plaintiffs Michael Ferguson, Benjamin Unger, Chaim Levin, Bella Levin, and Jo Bruck, on motion returnable on short notice on June 1, 2015 for an order regarding the Journey Beyond script.

The Court having considered the motion and good cause appearing;

On this ____ day of _____ 20__, It is ORDERED that:

- Defendants are barred from offering testimony about Journey Beyond that contradicts the testimony of Jonathan Hoffman on that subject.
- The Court will instruct the jury that it may draw a negative inference from Defendants' destruction of the Journey Beyond script.

Honorable Peter F. Bariso, Jr., A.J.S.C.

___ opposed

___ unopposed