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May 26, 2015

Via Federal Express – Next Day

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
Opposition to Plaintiffs' Motion in Limine re Journey Beyond.

Dear Judge Bariso:

Together with our co-counsel, this firm represents Defendants in this matter. On May 20, 2015, less than two weeks before trial, Plaintiffs moved for an adverse inference against Defendants for an alleged spoliation of the Journey Beyond script, and to bar Defendants from offering testimony about Journey Beyond. Through this letter brief, we respectfully request that the Court deny Plaintiffs' motion.

On April 29, 2013, Plaintiffs served requests for production of documents on all Defendants. In those requests for production of documents, Plaintiffs did not ask for Journey Beyond materials, but only for materials on the "experiential weekends."¹ When Defendants received those requests, the only documents they had concerning experiential weekends were the Journey into Manhood materials and they were produced to Plaintiffs.

Defendants reasonably assumed that Plaintiffs were only seeking the Journey into Manhood materials, and were not interested in Journey Beyond materials because the complaint only mentions, and Plaintiffs only ever attended, Journey into Manhood and not Journey Beyond. In addition, Defendants and Plaintiffs had multiple meet and confer conferences and

¹ See Certification of Charles S. Limandri in support of Defendants' Opposition to Plaintiffs' Motion in Limine re Journey Beyond.

correspondence on discovery issues after the production of the Journey into Manhood materials and Plaintiffs never mentioned that they were interested in any Journey Beyond materials.

Plaintiffs also twice deposed Rich Wyler, the founder of People Can Change, the organization which runs both the Journey into Manhood and Journey Beyond experiential weekends, during which time he was represented by counsel for People Can Change. Mr. Wyler alone had the right to produce the Journey Beyond materials, but Plaintiffs did not subpoena them from him.

Even when the Court addressed the issue of Plaintiffs' right to ask Defendants' success-story witnesses about their experiences at Journey Beyond at the deposition of Jonathan Hoffman, Plaintiffs once again did not raise the issue of the Journey Beyond materials. Nor did Plaintiffs ever file a motion to compel concerning any Journey Beyond materials. Indeed, the only time that Plaintiffs ever indicated an interest in any Journey Beyond materials was on May 12, less than a month before trial.

Defendants are contractually obligated to return or discard all Journey Beyond materials after each weekend at which they participate or they risk having to pay \$5,000 in liquidated damages. Defendants had no reason to preserve Journey Beyond materials because Plaintiffs never asked for them even after they made Journey Beyond an issue in this case. Rather, Plaintiffs asked for the Journey Beyond materials for the first time when they were no longer in Defendants' possession.

Even if Defendants were required to preserve Journey Beyond materials, Plaintiffs' recounting of the facts misunderstands that neither Mr. Downing nor Mr. Goldberg had any Journey Beyond materials to preserve. Evident from its title, the Journey Beyond weekend is an advanced experiential weekend that takes individuals further down their path than the introductory Journey into Manhood. Since fewer individuals attend Journey Beyond, it is only held once a year in August. Consequently, only two Journey Beyond weekends have been held since Plaintiffs served their requests for production of documents, in August 2013, and August 2014. Plt. Ex. 5, Journey Beyond 2013 page; Plt. Ex. 6, Journey Beyond 2014 page. Mr. Goldberg did not attend either of those weekends and has no Journey Beyond materials in his possession. Def. Ex. 1, Email from Richard Wyler, May 22, 2015.

Concerning Mr. Downing, first Plaintiffs misunderstand his current business relationship with People Can Change and Journey Beyond. Mr. Downing is the co-author of the Journey Beyond script but, in 2012, Mr. Downing transferred all ownership interests in Journey Beyond to People Can Change. Def. Ex. 2, Irrevocable Assignment, Transfer and/or Gift. Consistent with People Can Change's privacy policies, Mr. Downing then also destroyed all Journey Beyond materials he had at that time. That was before he even had notice of this lawsuit.

Second, Plaintiffs misconstrue Mr. Downing's assistance at the Journey Beyond weekend in 2013 and 2014. When Mr. Downing participated in those years, he only did so in a counseling and leadership capacity, and consequently his role required very little use of select portions of

the Journey Beyond materials. Moreover, as Plaintiffs note, Mr. Downing was a co-author of the Journey Beyond script. Consequently, even when someone in his role would normally need to refer to the script, he did not need to do so because he was already very familiar with how the weekend should progress.

Spoliation requires bad faith and Plaintiffs ignore and twist the facts as much as they can in order to create the false inference that Defendants somehow acted in bad faith. The reality is the only bad faith is on the part of Plaintiffs for refusing to make any mention that they were interested in the Journey Beyond script until less than three weeks before trial. Defendants have repeatedly stated that they believe information about People Can Change is actually beneficial to their case; and this Court has repeatedly given Plaintiffs greater access to People Can Change's documents and policies. If Plaintiffs truly wanted the Journey Beyond script, they should have sought it before the eve of trial.

Plaintiffs also harp on the speed with which Defendants responded to their May 12 email requesting a copy of the Journey Beyond script. Defendants' counsel, however, simply aimed to act efficiently for the convenience of both Plaintiffs and the Court. Defendants' counsel called Defendants and determined that they do not have any relevant Journey Beyond materials and then promptly informed Plaintiffs' counsel of that fact.

Plaintiffs cite a federal case for the proposition that when Mr. Downing attended Journey Beyond, he should have endeavored to hide and keep any pages of the Journey Beyond script that were handed to him. *See Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001). This is absurd in the extreme and even a quick look to that case shows that its facts are very dissimilar to the present facts:

“[I]t is true that [the party] did not own the vehicle, nor did he even control it in a legal sense after the accident because the vehicle belonged to his landlady's husband. But it is apparent that [the party] had access to the vehicle, as his attorney . . . and his retained experts were given apparently unlimited access to the vehicle for inspection purposes. Moreover, the vehicle was preserved in its post-accident condition for perhaps two to three months, or more, a period during which [the party], his lawyer, and his experts recognized not only that they would be suing General Motors but also that General Motors should be given an opportunity to inspect the vehicle.

Id. Mr. Downing did not have unlimited access to the Journey Beyond script for months, but rather may have only had limited pages in his possession during a weekend. Moreover, Journey Beyond is collateral to this case and no aspect of this case turns on representations made by People Can Change or Defendants at a Journey Beyond weekend that Plaintiffs never attended.

Hon. Peter J. Bariso, Jr., A.J.S.C.

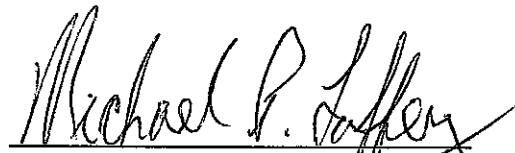
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The time for doing discovery and making motions in limine has long passed. Plaintiffs' request for an adverse evidentiary inference against Defendants based on this record is itself in bad faith and should be denied.

Respectfully submitted,

MESSINA LAW FIRM

A handwritten signature in cursive script that reads "Michael P. Laffey".

Michael P. Laffey, Esq.
Attorneys for Defendants

Handwritten initials in cursive script that appear to read "by ES2".

cc: Bruce Greenberg, Esq. (w/encl.)