

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
HUDSON COUNTY
DOCKET NO. HUD-L-5473-12
APP. DIV. NO. _____

MICHAEL FERGUSON, et al.,	:	
	:	TRANSCRIPT
Plaintiffs,	:	
vs.	:	OF
	:	
JONAH, ARTHUR GOLDBERG, ALAN	:	TRIAL
DOWNING and ALAN DOWNING LIFE	:	
COACHING, L.L.C.,	:	(CONFERENCE)
	:	
Defendants.	:	

Place: Hudson County Superior Court
Administration Building
595 Newark Avenue
Jersey City, N.J. 07306

Date: June 19, 2015
Volume 2 of 2
2:59 to 4:26

B E F O R E:

HONORABLE PETER F. BARISO, JR., A.J.S.C.,

TRANSCRIPT ORDERED BY:

JODI ERICKSON, ESQ.,
(Cleary, Gottlieb, Steen & Hamilton, L.L.P.)

Audio Recorded by: C. Ortiz

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I N D E X
June 19, 2015

ARGUMENT

By Mr. LiMandri 42, 60, 98, 101
By Mr. Bromley 49
By Ms. Bensman 99

THE COURT

Decision 46, 62, 103

EXHIBITS

	<u>Ident.</u>	<u>Evid.</u>
P-337 (e-mail/attachment re: Ferguson/Bennion)		85

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Colloquy

THE COURT: Let me see when we get to damages. I think you can argue that in summation just from what the language is for damages. Let me see what we have for the general statement for damages.

MR. MC COY: So, Your Honor, on the general statement of damages the first paragraph is from the model.

THE COURT: This is the model.

MR. MC COY: Right. And then we added a second paragraph because the defendants had proposed a special instruction about ascertainable loss. And the more we thought about it, we thought that that might be something that would be worthwhile.

So the paragraph that starts "to establish damages" is, is some of their stuff and some of our stuff. So I think we might need to just go through it.

THE COURT: All right.

MR. LI MANDRI: Your Honor, do you instruct before argument typically? Do you instruct the jury before the closing argument of counsel --

THE COURT: No, --

MR. LI MANDRI: -- or after? After?

THE COURT: -- no, it's after. That's why I want to agree on the charge, --

MR. LI MANDRI: Right.

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1 MR. MC COY: Uh-huh.

2 THE COURT: -- so that you, you can comment
3 on it. But I just caution you. I don't mind attorneys
4 commenting on the charge in their summation. --

5 MR. LI MANDRI: But we can't --

6 THE COURT: -- What I don't like is when you
7 start to tell them what the law is. It's easier to
8 simply say you will hear the judge charge. --

9 MR. LI MANDRI: Right.

10 THE COURT: -- Try not to get into too much
11 specifics --

12 MR. LI MANDRI: Well that's why I asked.
13 Because if we've preinstructed, then I'll actually show
14 a jury instruction and --

15 THE COURT: No, but you can --

16 MR. LI MANDRI: -- talk about it.

17 THE COURT: -- we don't do that. I mean, --

18 MR. LI MANDRI: Okay.

19 THE COURT: -- if you both consent, you want
20 to show them part of the charge, it's your trial. I
21 don't think it's reversible error, but I've never done
22 that.

23 MR. LI MANDRI: Okay.

24 THE COURT: You're certainly free to say to
25 the jury, you will hear the judge charge you on --

1 MR. LI MANDRI: Right.

2 THE COURT: -- whatever. Please listen
3 carefully because this is what you'll need. He's going
4 to instruct you on proximate cause. He's going to
5 instruct you on -- you can talk about some of the
6 language. But I'd be very careful to make sure that
7 you're precise. Otherwise you're going to get an
8 objection that's going to be sustained.

9 MR. LI MANDRI: I know. Well that's why I
10 prefer to read what --

11 THE COURT: Well if you want, you can have
12 the charge. What I'd like to do is get it finalized --

13 MR. LI MANDRI: Yeah, I understand.

14 THE COURT: -- so that everybody has the
15 charge before -- hopefully Wednesday we're going to
16 charge. --

17 MR. LI MANDRI: Right.

18 MR. MC COY: Right.

19 THE COURT: -- And you can have the charge.
20 And you could say in your summation, if you do it from
21 a podium or whatever, you will hear the judge tell you
22 about --

23 MR. LI MANDRI: By the way --

24 THE COURT: -- then it's precise and we don't
25 have to worry about it.

1 MR. LI MANDRI: In that regard, Dr. Berger
2 (phonetic) is trying to reach his clients to reschedule
3 the ones he moved from Monday to --

4 THE COURT: Okay.

5 MR. LI MANDRI: -- Wednesday. He hasn't been
6 able to reach them yet. Worst case scenario, he'll be
7 here first thing Wednesday morning. But he's trying to
8 move those Wednesday patients.

9 THE COURT: And try to come on Tuesday?

10 MR. LI MANDRI: So he can come on -- trying
11 to move his Tuesday patients to Monday or Wednesday, so
12 he can come on Tuesday.

13 THE COURT: All right.

14 MR. LI MANDRI: Okay. But he hasn't been
15 able to reach them yet.

16 THE COURT: But worst case scenario he would
17 --

18 MR. LI MANDRI: Wednesday morning first
19 thing.

20 THE COURT: -- the last person on Wednesday
21 morning.

22 MR. LI MANDRI: Morning, first thing.

23 THE COURT: Okay, all right. So what about
24 this language now that his a hybrid of yours and
25 theirs? Let's start with "to establish damages".

1 MR. MC COY: So the first line, Your Honor,
2 was taken from their proposed special instruction with
3 the exception that they started "to prevail on a CFA
4 claim". And I changed that to "to establish damages"
5 because I thought "to prevail on a CFA claim" was not
6 accurate.

7 MR. LI MANDRI: Well I don't have a problem
8 with the first sentence. I think -- I'm a little
9 concerned about "the oral testimony sufficient to
10 establish an ascertainable loss". It just seems we're
11 getting fact specific here. I mean, they want to argue
12 that because they have no documents. I want to argue
13 they have no documents. And in every perceived
14 weakness in their case they're building in a jury
15 instruction to weaken my arguments.

16 MR. MC COY: Well no, I, I want to make sure
17 that the jur -- you can argue that there are no
18 documents. But I don't want the jury to think that oh,
19 there are no documents. That means that they cannot
20 show ascertainable loss. The law is that oral
21 testimony by itself is sufficient to establish damages.
22 --

23 MR. LI MANDRI: And I won't say it's not.

24 MR. MC COY: -- It's the only thing that
25 we're trying to establish is otherwise, they're --

1 you're going to leave them with the impression that
2 legally --

3 THE COURT: They have to have documents.

4 MR. MC COY: -- they have to have documents.
5 And that is incorrect.

6 MR. LI MANDRI: I'm not going to say they
7 have to have. I'm just going to say they don't have --

8 THE COURT: Well why don't we say --

9 MR. LI MANDRI: -- them and they should have
10 them.

11 MR. MC COY: No, that's, that's irrep --
12 that's inference.

13 THE COURT: So why don't we say oral test --
14 you're concerned about -- what are you concerned about?

15 MR. LI MANDRI: Well it's just that I don't
16 think that's a standard part of the instruction. And I
17 don't think that they should be necessarily getting
18 language --

19 THE COURT: Well it's, it's not --

20 MR. LI MANDRI: -- in both of their
21 arguments.

22 THE COURT: -- it's not a standard part of
23 the instruction for, for a variety of reasons. --

24 MR. MC COY: Right. You offered --

25 THE COURT: -- There is a case --

1 MR. MC COY: -- a special instruction on
2 this.

3 THE COURT: -- there is a Supreme Court case
4 that says that. So now the question becomes you're
5 going to argue, and rightly so, and I would too if I
6 was in your position, that, you know, you've heard
7 whatever the testimony was about \$17,000. There's only
8 been one document assessed -- but I mean, they can't be
9 left with the understanding that no documents means no
10 damages. You certainly can argue that. But they have
11 to be told what the law is. And the law is that -- how
12 about oral testimony can be sufficient?

13 MR. LI MANDRI: That's right.

14 THE COURT: All right?

15 MR. MC COY: Okay.

16 MR. LI MANDRI: That's better.

17 THE COURT: Is that good enough?

18 MR. MC COY: That's --

19 MR. LI MANDRI: Yes, because that, that shows
20 that it's not categorical.

21 MR. MC COY: Yes.

22 MR. LI MANDRI: I never thought that I was an
23 editor. Okay.

24 MR. MC COY: Your Honor, that's fine with us.

25 THE COURT: All right. And then we have

1 "the ascertainable loss must be quantifiable and
2 measured". That I think is right from the -- right --

3 MR. MC COY: That is also from
4 their, their --

5 MR. LI MANDRI: I don't have a problem,
6 right.

7 MR. MC COY: Well that's your language of
8 your instruction, so --

9 THE COURT: All right. "An estimate of
10 damage --

11 MR. LI MANDRI: That sounds good.

12 THE COURT: -- is calculated within a
13 reasonable degree of certainty will suffice to
14 demonstrate an ascertainable loss." That's what we
15 said. --

16 MR. MC COY: That's from your -- judge's --

17 THE COURT: -- I think those were my words.

18 MR. MC COY: Yeah, that's --

19 THE COURT: Okay.

20 MR. MC COY: -- from your order previously in
21 this case.

22 THE COURT: And then "Ascertainable loss does
23 not include non-economic damages for pain and suffering
24 or emotional distress. And such damages are not
25 recoverable in an action brought under the Consumer

1 Fraud Act."

2 MR. MC COY: We agree with that as well, Your
3 Honor. We're not asking for those.

4 THE COURT: And in here where it says
5 "Ascertainable loss may include the cost of mental
6 health treatment received to repair harm done by the
7 JONAH program", with regard to -- we should specify --

8 MR. MC COY: Mr. Unger?

9 THE COURT: -- yeah, it should specify it
10 right there.

11 MR. MC COY: Do you want it at the end of the
12 sentence or the beginning?

13 THE COURT: Maybe in the beginning.

14 MR. MC COY: With regard to plaintiff,
15 Benjamin Unger?

16 THE COURT: Yeah, I think it has to be
17 limited to "With regard to the claim by Benjamin Unger,
18 ascertainable loss may include the cost of mental
19 health treatment received to repair any harm done by
20 the JONAH program."

21 MR. LI MANDRI: Yeah, we have no problem with
22 that addition. I mean, I'll -- just for the record,
23 I'll note our prior objection.

24 THE COURT: Well you've -- I mean, yeah, --

25 MR. LI MANDRI: Yeah.

1 THE COURT: -- you've disagreed and that's --
2 and for the record, it's -- that your objection is
3 preserved, that you don't believe that that is an
4 element of damages in this case.

5 MR. LI MANDRI: Thank you, Your Honor.

6 MR. MC COY: Correct.

7 THE COURT: Okay.

8 MR. MC COY: So then the next sentence --

9 THE COURT: And then you have the ultimate
10 outcome, which is required.

11 MR. MC COY: Yeah. Then that tracks the, the
12 model again. And then the last paragraph tracks the
13 model again. The only thing I will note and we haven't
14 talked about is whether or not we have seven jurors sit
15 or six jurors sit.

16 MR. LI MANDRI: I have something before we
17 get onto that. --

18 MR. MC COY: Oh, sure.

19 MR. LI MANDRI: -- Is the plaintiffs
20 mentioned in opening statement they won't be seeking
21 millions of dollars from the defendants, just they want
22 their money back. --

23 THE COURT: Right.

24 MR. LI MANDRI: -- Obviously if the
25 plaintiffs were to prevail, I presume they're going to

1 ask for millions of dollars in attorneys' fees. I
2 don't intend to argue that a specific amount of
3 attorneys' fees. In our trial brief we cited --

4 THE COURT: No.

5 MR. LI MANDRI: -- New Jersey Supreme Court
6 authority --

7 MR. MC COY: No.

8 MR. LI MANDRI: -- that -- well let me just
9 finish please.

10 MR. MC COY: Sorry.

11 THE COURT: Go ahead.

12 MR. LI MANDRI: Specific New Jersey Supreme
13 Court authority that the jury should know the
14 consequences of their conduct --

15 THE COURT: They do.

16 MR. LI MANDRI: -- with regard to that
17 particular issue of treble damages and attorneys' fees.

18 THE COURT: It says you will find -- if you
19 find that the defendants have violated -- it tells them
20 that I'm going to triple the amount of damages that the
21 jury awards. And it says, "In addition, if you find
22 that the defendants have violated the Consumer Fraud
23 Act, the law also requires me to compel the defendants
24 to pay whatever reasonable attorney fees the plaintiffs
25 incurred in this case. I will determine at a later

1 date ... I'm the one who's going to determine. It's
2 not what they ask for.

3 MR. LI MANDRI: I understand, but I don't
4 want to run afoul in closing argument, which is why I
5 have prudence. --

6 MR. MC COY: Yeah.

7 MR. LI MANDRI: I'm asking now. I won't --

8 THE COURT: We don't know -- Counsel.

9 MR. LI MANDRI: Yes.

10 THE COURT: You can't argue something that we
11 don't know in the future.

12 MR. LI MANDRI: I can't say they've got eight
13 attorneys here and --

14 THE COURT: Well you can say that.

15 MR. LI MANDRI: Yeah, that's what I mean.

16 THE COURT: I think that's pretty obvious. --

17 MR. LI MANDRI: Yeah, right.

18 THE COURT: -- They've been here.

19 What is he saying that the jury doesn't know?

20 MR. MC COY: Well, Your Honor, there's a
21 case, I'm getting the citation for you now, --

22 THE COURT: All right.

23 MR. MC COY: -- it's called Romond. And it
24 found reversible error where the attorney in closing
25 made any argument or offered any evidence about

1 attorneys' fees or treble damages, and suggested that
2 the purpose was --

3 THE COURT: All right. Well give, give us
4 the case. I understand. You know, I, I think --

5 MR. LI MANDRI: Where's the trial brief?

6 THE COURT: -- the language here is
7 sufficient. We're not talking about the charge now.
8 I'm not adding anything to the charge.

9 MR. LI MANDRI: No, I'm not asking you do
10 that. I don't want to get in trouble in closing
11 argument.

12 THE COURT: Well then, then let counsel give
13 you the case and --

14 MR. LI MANDRI: Okay.

15 THE COURT: -- me the case and we'll find
16 out.

17 MR. MC COY: Okay. The --

18 MR. LI MANDRI: But I did cite it, I think
19 Weinberg v Sprint (phonetic) I think was the New Jersey
20 Supreme Court case that said the jury's entitled to
21 know what the consequences are going to be --

22 MR. MC COY: Yes, you're right.

23 MR. LI MANDRI: -- of their, of their --

24 THE COURT: Yes, but they're not entitled to
25 know -- what you want to do, you have to be careful.

1 MR. LI MANDRI: Well they're going to put my
2 client out of business for sure. --
3 THE COURT: You can't tell them that.
4 MR. LI MANDRI: -- The jury tells them --
5 MR. MC COY: You can't tell the jury that.
6 MR. LI MANDRI: -- that's why I'm asking.
7 Why not? That's a conse --
8 MR. MC COY: So, Your Honor, --
9 THE COURT: Because it's not -- because you
10 can't tell them that. That invokes passion and
11 sympathy, which is exactly what you can't do. And the
12 analogy to that is in our tort actions. If you have an
13 uninsured defendant you cannot get up there and tell
14 the jury that if you give too much money, my client
15 will go, will go bankrupt. You can't do that. That --
16 all that does is give them an ingredient that has
17 nothing to do with the case. --
18 MR. LI MANDRI: It's just --
19 THE COURT: -- That's just like plaintiffs
20 saying to them that, you know, God forbid if somebody,
21 you know, somebody could commit suicide because of your
22 treatment or somebody did. Imagine if that got into
23 the case? You can't do that. That injects bias,
24 passion and sympathy.
25 MR. MC COY: Your Honor, the cite --

1 MR. LI MANDRI: They're also seeking an
2 injunction, which obviously would put my client out of
3 business.
4 THE COURT: Well the jury has nothing to do
5 with the injunction. That's up to me.
6 MR. LI MANDRI: All right.
7 THE COURT: The jury cannot issue an
8 injunction. That's an equitable power of the Court if
9 plaintiff prevails. They have to make a subsequent
10 application to me.
11 MR. LI MANDRI: All right.
12 MR. MC COY: The citation, Your Honor, --
13 THE COURT: Yes.
14 MR. MC COY: -- is Romond, R-O-M-O-N-D,
15 versus Valiant Home Remodelers. I just have the
16 Westlaw cite. It's 2007 Westlaw 2362853. It's from
17 the Appellate Division in 2007. And it mentions
18 Wanitick (phonetic), --
19 THE COURT: Yeah, no, I have that.
20 MR. MC COY: -- if I'm pronouncing that
21 right. That's the case --
22 THE COURT: Yes, that's the Supreme --
23 MR. MC COY: -- that establishes that you
24 have the ultimate outcome charge. --
25 THE COURT: Yes, yes.

1 MR. MC COY: -- But then it says that, "It
2 does not open the door to presentation of evidence
3 respecting counsel fees and arguments thereon." And
4 then finds that it's reversible error for any evidence
5 or argument in opening and closing to be presented.

6 And so we're fairly adamant about --

7 MR. LI MANDRI: We'll look at that --

8 THE COURT: I'll give you, I'll give you the
9 A cite, the appellate cite is A5140-0521.

10 MR. LI MANDRI: Okay.

11 MR. MC COY: Is that Watick or Wanitick?

12 THE COURT: That's for yours, Romond.

13 MR. MC COY: That's for ours, I'm sorry. I
14 apologize. Oh, I'm sorry. Oh, okay.

15 THE COURT: Okay.

16 MR. LI MANDRI: Well if it's in the
17 instruction I can certainly mention it. I can
18 certainly mention --

19 THE COURT: Well you can mention that,
20 because I'm going to tell them the ultimate outcome.
21 But you can't -- let me just see here. You've got to
22 be careful because the case says and I'm quoting, they
23 talk about "... evidence to be admissible it must
24 relevant, have a tendency and reason to prove or
25 disprove any fact of consequence to the determination

1 of the action." And they cite New Jersey evidence rule
2 401.

3 "Because the trebling of damages and the
4 award of counsel fees and costs under the CFA are
5 issues reserved to judge, NJSA 56:8-19, they have no
6 relevance to any issues to be determined by the jury."

7 So I don't think you can say anything about
8 it.

9 MR. LI MANDRI: Other than what's in the
10 instruction.

11 THE COURT: Well you can -- well that's the
12 instruction. They're just told that if they find for
13 the plaintiff the award will be tripled and counsel
14 fees will be awarded. --

15 MR. MC COY: Right.

16 THE COURT: -- I'm going to tell them that.

17 MR. MC COY: But you can't characterize the,
18 the --

19 THE COURT: You can't categorize eight
20 attorneys here --

21 MR. MC COY: -- amount of the award at all.

22 THE COURT: -- or the amount of the award. --

23 MR. LI MANDRI: Well --

24 THE COURT: -- You can't do that.

25 MR. LI MANDRI: -- they can't get up then and

1 say that they're only seeking treble -- \$3000 in
2 medical bills either. I mean, that's a bit misleading
3 too.

4 THE COURT: What they're seeking is an
5 ascertainable loss and harm under the Consumer Fraud
6 Act. The jury will be told that whatever damages they
7 award, I am required to triple. And there will be a
8 subsequent application for counsel fees to be
9 determined by me. The jury will be told that by me in
10 the instructions. And that's all that should be said
11 about it. Nothing else needs to be said.

12 MR. LI MANDRI: Okay. Just, just
13 (Indiscernible) words. The reason why I mention it, in
14 opening they said they will not be seeking millions of
15 dollars. And I just think that's a little misleading.

16 THE COURT: They're not seeking millions of
17 dollars.

18 MR. LI MANDRI: They -- well in opening --
19 well --

20 MR. MC COY: Mr. LiMandri, I --

21 THE COURT: They're not seeking millions of
22 dollars.

23 MR. LI MANDRI: There is a practical
24 consequence.

25 THE COURT: They will be told -- juries are

1 not -- were not born yesterday. They've been sitting
2 through four weeks of trial and they know how much
3 attorneys charge. They certainly know how much doctors
4 charge. I'm sure they know how much attorneys charge.
5 They're not naive. When they're told that if they
6 award for the plaintiff, I, as the statute requires,
7 must triple the award and make a ruling on an
8 application for counsel fees, reasonable counsel fees.
9 They're going to know that. Normally they're never
10 told that. This is the only time they will ever be
11 told that.

12 You try a labor employment case in New
13 Jersey, they're not told that if the plaintiff wins the
14 defendant pays counsel fees. They're not even told
15 that. It's irrelevant to the case. They have to
16 determine the case on the merits.

17 MR. LI MANDRI: I understand, Your Honor,
18 thank you.

19 MR. MC COY: Your Honor, we would also be
20 concerned if that was said, the judge will later
21 determine attorneys' fees, and Mr. LiMandri says you
22 can just imagine how much that will --

23 THE COURT: He can't say that. --

24 MR. LI MANDRI: Well he already said I can't
25 do it.

1 THE COURT: -- I'm telling him he can't do
2 that.
3 MR. MC COY: Okay, all right.
4 MR. LI MANDRI: I'm not in the habit of
5 violating his orders, as you've seen that by now I
6 hope.
7 THE COURT: All right. So then we have --
8 MR. LI MANDRI: So --
9 THE COURT: -- no prejudice --
10 MR. MC COY: This follows --
11 THE COURT: -- you decide whether you want
12 six or seven. You don't have to decide that today.
13 MR. MC COY: Right.
14 THE COURT: And then the prior conviction
15 we're going to move to the other section you said?
16 MR. MC COY: Well we just suggested that
17 perhaps --
18 THE COURT: I think, Counsel, you'd want it
19 -- do you want it in the -- where you mentioned?
20 MR. LI MANDRI: I don't want it to be the
21 last thing you say I don't think.
22 THE COURT: No, we're going to do it in the
23 --
24 MR. MC COY: Yeah.
25 MR. LI MANDRI: Right.

1 THE COURT: -- in the beginning when I talk
2 about stipulations. And then I say if there's been any
3 limiting instructions, and I'll give him that one right
4 in the beginning.
5 MR. LI MANDRI: That makes sense then.
6 MR. MC COY: Because as far as we know, Your
7 Honor, that's like --
8 THE COURT: That's perfect.
9 MR. MC COY: -- the only limiting instruction
10 other than what you said --
11 THE COURT: Yeah, I haven't said --
12 MR. MC COY: -- vaguely.
13 THE COURT: -- anything else yet.
14 MR. MC COY: Right. That's what we would --
15 THE COURT: All right.
16 MR. MC COY: -- suggest as well.
17 THE COURT: Okay. So can you scan what I
18 gave you from my charge and put it all together?
19 MR. MC COY: Certainly.
20 THE COURT: Okay. Now let's go to the
21 verdict sheet. I also got the revised verdict sheet.
22 Where did I put that?
23 MR. LI MANDRI: The plaintiffs and the
24 defendants are not light years apart fortunately
25 anymore, because they're not asking --

1 THE COURT: Listen, --
2 MR. LI MANDRI: -- for individual proffers.
3 THE COURT: -- the one thing I will say on
4 the record, I think I've said it already, I will
5 commend the attorneys, despite my chastising at times
6 for pretrial discovery and court rules, I will praise
7 the attorneys for -- when they've been asked to discuss
8 items, how the attorneys have resolved a lot of issues
9 that have been outstanding. So that should also be
10 noted.
11 MR. LI MANDRI: Thank you. Surprising how
12 well we can get along sometimes if it wasn't for
13 ideological differences. But the professionalism is --
14 THE COURT: Because it's a sign of
15 professionalism. It's one thing to be adversaries and
16 have disagreements over cases that we represent people
17 and try. It's another thing to be what we're supposed
18 to be and that's professional. We have roles and we
19 have jobs to do.
20 All right, now where did I put the revised
21 questions?
22 MR. MC COY: It should be behind a letter, at
23 least our, our proposal was behind a letter --
24 THE COURT: Yeah.
25 MR. MC COY: -- that I delivered earlier.

1 THE COURT: I have the revised jury
2 instructions. I probably left them on my --
3 MR. LI MANDRI: We've got a copy, extra
4 copies of each if you want.
5 THE COURT: I should have them right on my
6 desk. Oh, wait a minute, this is the --
7 MR. MC COY: It should have an A/B --
8 THE COURT: I got it, I got it.
9 MR. MC COY: -- tab on it.
10 MR. LI MANDRI: We also submitted a couple of
11 --
12 MR. MC COY: No, actually, Your Honor, that's
13 --
14 MR. LI MANDRI: -- specials to --
15 MR. MC COY: -- I don't think that's the
16 right one. --
17 THE COURT: 216?
18 MR. MC COY: -- This morning I sent a letter
19 and it has an A tab and a B tab. And it included --
20 that's the most recent one.
21 THE COURT: All right, wait a minute. I have
22 that.
23 (The judge leaves the bench and returns)
24 MR. LI MANDRI: Do you have those, Your
25 Honor?

1 THE COURT: Yes.
2 MR. LI MANDRI: Okay. We had two specials
3 that we submitted this morning which are very short as
4 well. Could we look at those first please?
5 THE COURT: Yeah, which, which ones?
6 MR. LI MANDRI: May I approach, Your Honor?
7 THE COURT: Sure. Didn't we talk about this?
8 MR. MC COY: Yeah, --
9 MR. LI MANDRI: Your Honor, I --
10 THE COURT: Didn't we add, didn't we add some
11 language to --
12 MR. MC COY: Yeah, Your Honor, I think, I
13 think what, what our position, what we talked about was
14 there -- so you have an instruction on circumstantial
15 evidence already and it's in your, in your charge. And
16 there's a portion where we talked about where we're
17 going to add some language. And so I think that
18 potentially will cover this issue.
19 THE COURT: We should, we should -- yeah,
20 this language should be added somewhere, not this
21 precise language, but something close to this should be
22 -- I thought we talked about this. We were going to
23 put this somewhere.
24 MR. LI MANDRI: Yeah, --
25 MR. MC COY: Yeah, I --

1 MR. LI MANDRI: -- we did.
2 (Mr. McCoy confers with counsel)
3 MR. MC COY: Right, you're right. Your
4 Honor, this is where we were talking about if it's a
5 representation made to others it's not a -- it's not
6 for the violation of the CFA, but it can --
7 THE COURT: Yes.
8 MR. MC COY: -- used for circumstantial
9 evidence --
10 THE COURT: You're going to put this in
11 there, okay.
12 MR. MC COY: -- and credibility and
13 believability. And we will work to find where --
14 THE COURT: All right.
15 MR. MC COY: -- to put that in.
16 THE COURT: And then number four, Counsel,
17 I'm not sure what that means. What, what, what do you
18 mean "statements of opinion"?
19 MR. LI MANDRI: Well something that's
20 supposed to be an objectively verifiable fact in order
21 to be a violation of the CFA.
22 THE COURT: Right. So what would be opinion?
23 What, what -- give me an example of what would be an
24 opinion that if the plaintiffs proved, it's only an
25 opinion and not a fact.

1 MR. LI MANDRI: Well whether a particular
2 modality, if we're going to get into the practices that
3 go outside the proffer, could provide benefit would be
4 an opinion, whether --

5 THE COURT: It doesn't matter. We're not
6 talking about whether a modality provides benefit.

7 MR. LI MANDRI: Well that's the problem that
8 I --

9 THE COURT: No one sugge --

10 MR. LI MANDRI: -- I had with the --

11 THE COURT: -- it's not, it's not -- this is
12 not a negligence case. This is not a standard of care
13 case. The question here is did they make material
14 misrepresentations about what their program can do. So
15 the fact that a modality might have helped someone
16 overcome, if you want to use "shame" as an example,
17 fine. But what does that have to do with the
18 representation about changing one's --

19 MR. LI MANDRI: Well we'll go to the proffers
20 --

21 THE COURT: -- sexual preference?

22 MR. LI MANDRI: -- we'll go to the proffers.
23 But that's -- we get back into the -- in the
24 performance -- to be a misrepresentation in the
25 performance of the particular service. So this --

1 THE COURT: Well yes, but what I'm saying is
2 the modality may help me with my shame, but do nothing
3 to change my sexual orientation. It's not a difference
4 of opinion. It's whether or not that modality was able
5 to change me from gay to straight or from same sex
6 attractions to opposite sex --

7 MR. LI MANDRI: Well there's testimony --

8 THE COURT: I --

9 MR. LI MANDRI: -- even from Dr. Beckstead
10 that lessening shame can lessen same sex attraction.

11 THE COURT: Well yes, but that's not, that's
12 not what --

13 MR. MC COY: That's --

14 THE COURT: -- they have to decide.

15 MR. MC COY: It's also not a
16 misrepresentation of the plaintiff.

17 THE COURT: They're not claiming that.
18 They're not --

19 MR. LI MANDRI: I just, I just, I guess, --

20 THE COURT: -- there's no claim here that
21 they got no help from your clients. In fact it's to
22 the contrary. Some of them took the stand and said how
23 much better they felt after a certain weekend.

24 MR. LI MANDRI: I guess what I -- the only
25 thing I need clarity on, why would it be relevant then

1 that there was an exercise like the -- this nudity
2 exercise, you take your shirt off, how would that be --
3 THE COURT: It's relevant because if they
4 prove you've made mis -- because the issue is you're
5 trying to address a mental or medical disorder. No one
6 in the medical field or mental field accepts that as
7 legitimate therapy. And, therefore, if it's not
8 accepted as legitimate therapy it's an unconscionable
9 practice --

10 MR. MC COY: And not scientific.

11 THE COURT: -- and out -- and unscientific.
12 That's the point, not whether it works or not. That's
13 the, that's the question, that's the question. That's
14 the way the case is being presented.

15 I'm sure they're going to argue -- I'm not
16 going to speak for them. I'm sure they're going to
17 argue to the jury that this is a -- that's the
18 unconscionable commercial practice. It's unscientific.
19 We haven't heard anybody here, come in here and tell
20 you that that's done in the medical profession or any
21 profession, I assume.

22 MR. LI MANDRI: Well it doesn't have to be.
23 My clients weren't using it in that context.

24 THE COURT: If they represented they had a
25 scientific program and they used medical words, then

1 they must provide that type --

2 MR. LI MANDRI: In each and every instance.
3 Well that's going to be the --

4 THE COURT: Well I'm not saying in each and
5 every -- I don't know what each and every incident. I
6 don't know what the jury is going to say the
7 unconscionable commercial practice is. But I -- I'm
8 not going to allow that because I don't know what that
9 means. Okay.

10 Now the revised questions. Have you reviewed
11 their revised questions?

12 MR. LI MANDRI: I've looked at theirs. I
13 assume they looked at ours. They're not that far
14 apart. They've combined -- excuse me. Do we -- the
15 Defense has combined in the questions, misrepresenta --
16 or unconscionable business practices and not split them
17 out into two separate questions for each plaintiff.

18 I think both sides agree, although the usual
19 procedure is to ask separate questions for each
20 defendant. We did that and it came out to like 30
21 pages of questions. So we both took the position of
22 having one question apply to all four defendants. On
23 our form --

24 THE COURT: Well now theirs is only eight
25 pages, the new one.

1 MR. MC COY: Right.
 2 MR. LI MANDRI: Yeah, and I think ours is
 3 about the same size. But we're willing to put Mr.
 4 Downing and Downing LLC as one.
 5 THE COURT: Well they took the, they took the
 6 LLC out. They just have --
 7 MR. LI MANDRI: Right. And we will too.
 8 THE COURT: -- Alan Downing. So --
 9 MR. MC COY: We asked, we asked, Your Honor,
 10 if they would stipulate that Alan Downing --
 11 THE COURT: Yeah, that he's the same.
 12 MR. LI MANDRI: Yeah.
 13 MR. MC COY: -- it was yes for Alan, and it
 14 was --
 15 THE COURT: I was going to ask you --
 16 MR. MC COY: -- yes for Downing LLC.
 17 THE COURT: -- the same thing.
 18 MR. LI MANDRI: We will.
 19 THE COURT: Okay, all right.
 20 MR. LI MANDRI: Just for -- the form that I
 21 got from my office, they hadn't done that. I thought
 22 they were going to do that and they didn't.
 23 THE COURT: All right.
 24 MR. LI MANDRI: But other -- there --
 25 THE COURT: Well what form are we going to

1 work off of? I can't -- right now I have the
 2 plaintiffs' --
 3 MR. MC COY: Your Honor, we, we took your
 4 guidance from ours, which is the one that is --
 5 THE COURT: Did you see plaintiffs' ?
 6 MR. MC COY: Yeah, I sent --
 7 MR. LI MANDRI: Yeah, I saw plaintiffs'. --
 8 MR. MC COY: -- it to him last night.
 9 MR. LI MANDRI: -- The differences are do we
 10 have separate questions for misrepresentations and
 11 unconscionable practices.
 12 THE COURT: I think you do because the charge
 13 breaks it down into two separate components. The
 14 charge lists them separately. They are -- they could,
 15 they could answer no to one, but yes to two.
 16 MR. LI MANDRI: All right. I don't have a
 17 major issue with that, just --
 18 THE COURT: And you saw their language. They
 19 took my language. "Did plaintiff, Benji Unger, prove
 20 by a preponderance of the credible evidence that any of
 21 the following defendants made any misrepresentations in
 22 connection with the advertisement, sale or subsequent
 23 performance of the JONAH program?"
 24 MR. MC COY: And we expected that Your Honor
 25 would explain, when you explain the form, that they're

1 expected to answer that question for each one of those
2 people.

3 THE COURT: Each one yes or no and write
4 their vote. And their vote has to be, depending on
5 what you tell me, either 5-1 or 6-1.

6 MR. MC COY: Right. And then the next
7 question is --

8 THE COURT: I'm sorry, 6-0 or 5-1, 7-0 --

9 MR. MC COY: Right. And then the next -- the
10 instruction says the next question is the causation
11 question and ascertainable loss question in one.

12 MR. LI MANDRI: Isn't -- are those, those
13 supposed to be two separate questions, did it cause
14 harm, did it cause ascertainable loss, and then the
15 third one re: damages? Is that how you did it?

16 THE COURT: Let me --

17 MR. MC COY: Right. So what we did is we
18 said if you look at number three, our question number
19 three, we say for those above --

20 THE COURT: "If you answered yes to question
21 one and/or two --

22 MR. MC COY: Right.

23 THE COURT: -- do you find by a preponderance
24 of the credible evidence that plaintiff, Benji Unger,
25 suffered an ascertainable loss as a result of the

1 defendants' misrepresentation or unconscionable
2 commercial practices?" And then "What was the total
3 amount of ascertainable loss?" Then the same thing for
4 Levin --

5 MR. MC COY: And then it repeats for every
6 one. The only difference, Your Honor, is for
7 plaintiff, Jo Bruck, the complaint did not allege
8 anything with respect to Jo Bruck and Alan Downing or
9 Alan Downing LLC. --

10 THE COURT: Oh, so you took him out.

11 MR. MC COY: -- We only, we only made
12 allegations with respect to Jo Bruck as to JONAH and
13 Arthur Goldberg. --

14 THE COURT: Okay.

15 MR. MC COY: -- And so for her you will see
16 that it doesn't include Alan Downing. Otherwise, the
17 -- it's exactly the same for all of the plaintiffs.

18 MR. LI MANDRI: You know, with Michael
19 Ferguson though theoretically, he was never a JONAH
20 client. He, he signed up with Alan Downing through JIM
21 and he never went through JONAH.

22 MR. DINIELLI: Your Honor, he testified that
23 he went to Alan Downing as a result of a conversation
24 with Arthur Goldberg.

25 MR. LI MANDRI: I don't think that that -- he

1 didn't --

2 MR. MC COY: And, Your Honor, he also
3 attended Alan Downing's --

4 THE COURT: Yeah.

5 MR. MC COY: -- sessions in the JONAH offices
6 --

7 THE COURT: In JONAH -- he said he was at the
8 --

9 MR. MC COY: -- and went to a group --

10 THE COURT: -- JONAH offices.

11 MR. MC COY: -- group exerci -- group
12 session.

13 MR. LI MANDRI: Because Alan Downing rented
14 -- I don't think it's a big deal, but I want to get it
15 right. And Alan Downing just rented space from, from
16 JONAH. And that was never looked at as a JONAH client.

17 MR. MC COY: Your Honor, that's a --

18 THE COURT: That's really a fact question for
19 them, Mr. LiMandri. I don't --

20 MR. MC COY: And it's a sufficiency of the
21 evidence question, not a -- whether or not we ask the
22 question of the jury I think.

23 THE COURT: Because they have a choice. They
24 have Arthur Goldberg, JONAH Inc. and Alan Downing. So
25 if they follow your argument, they could answer no,

1 conceivably could answer no for Goldberg, no for JONAH
2 and yes or Downing. They have their choice.

3 MR. LI MANDRI: I -- do we have conversion
4 therapy in this verdict form? --

5 MR. MC COY: No.

6 MR. LI MANDRI: -- That was an issue that we
7 had.

8 MR. MC COY: No.

9 THE COURT: I think he took it out. It's not
10 here.

11 MR. MC COY: We did take it out. We took it
12 out because now it only refers to, if you'll go back to
13 page one with the first, just as an example, of Benji
14 Unger. So now it refers to the JONAH program, not the
15 defendants' conversion therapy services, which is how
16 we had it before. We replaced that with the JONAH
17 program. And then under number two, we don't reference
18 conversion therapy. We just say that -- if whether or
19 not defendants engaged in unconscionable commercial
20 practices.

21 MR. LI MANDRI: Then unfortunately, I'm
22 sorry, I don't mean to backtrack. I had it in my notes
23 --

24 THE COURT: No, no, that's okay.

25 MR. LI MANDRI: -- to ask you, the conversion

1 therapy apparently was listed twice in the CFA
2 instructions.

3 THE COURT: No, they, they took it out --

4 MR. MC COY: Well no, no, --

5 MR. LI MANDRI: -- and changed it to JONAH
6 program.

7 MR. MC COY: Your Honor, Mr. LiMandri is
8 right, but this -- let's go back to the form, to the
9 jury instructions. The place that it remains is if you
10 look in the disease and disorder section and in the
11 statistics section, if you go back there. And then
12 also if you look at the language of your order on
13 partial summary judgment that I handed you.

14 THE COURT: Right, yeah.

15 MR. MC COY: We tracked the language exactly.

16 --

17 THE COURT: Yeah, from there?

18 MR. MC COY: -- In the language of the order
19 you used conversion therapy services.

20 MR. LI MANDRI: Now that we've had evidence
21 though that my clients' -- at that time that was not an
22 issue because we weren't arguing in front of a jury.
23 But now we've had evidence that my clients have never
24 used that term. And that evidence is undisputed.

25 So I want to make sure, if we're going to be

1 instructing the jury, that we're using the right
2 terminology. But the plaintiffs never said my clients
3 called it conversion therapy. And my client says --

4 MR. MC COY: That's fine, Your Honor, we can
5 change it to JONAH program there as well.

6 THE COURT: Yeah, why don't -- yeah, I was
7 just going to say why don't we be consistent and just
8 use JONAH program. So that way --

9 MR. MC COY: That's fine. We'll change in
10 disea -- in that section in disease and disorder and --

11 THE COURT: That way it's consistent through
12 the whole -- you can argue in your summations how you
13 want to reference it. And the witnesses have said --
14 some witnesses have said it means the same, others --
15 you know, so I think you can -- all right.

16 MR. MC COY: That's fine. But the verdict
17 form, it's not in the verdict form. --

18 MR. LI MANDRI: Okay.

19 THE COURT: No.

20 MR. MC COY: -- And we will make sure that
21 it's not in the instructions.

22 THE COURT: Well let me ask you a question
23 here. Who has the harm? Isn't there -- is that not
24 being --

25 MR. MC COY: No, Your Honor, that's not an,

1 that's not an element of the CFA claim.

2 MR. LI MANDRI: Wait -- yes, it is. You have
3 to have an ascertainable loss.

4 MR. MC COY: No, that's --

5 THE COURT: No, no, you have --

6 MR. MC COY: -- no.

7 THE COURT: -- ascertainable loss.

8 MR. MC COY: Right. That's all we're asking
9 for.

10 THE COURT: So you're going to argue in
11 regards to Unger that the ascertainable loss includes
12 --

13 MR. LI MANDRI: Is the harm.

14 MR. MC COY: Yeah, is as --

15 THE COURT: -- the harm. Okay.

16 MR. MC COY: -- consistent with your prior
17 ruling, that it's the cost of repair with Dr.
18 Phillipson. That's all we're seeking.

19 THE COURT: Okay. Oh, that's right, because
20 he didn't pay.

21 MR. MC COY: Right.

22 THE COURT: You're right. That's why he only
23 has one question. I'm sorry, I forgot that he doesn't
24 have the money -- because I thought they were -- got
25 it.

1 MR. MC COY: Right. And that's why we broke
2 him out in the instruction.

3 THE COURT: Yes, I got it.

4 MR. LI MANDRI: Who are we talking about now?

5 MR. MC COY: Mr. Unger. --

6 MR. LI MANDRI: Oh, okay.

7 MR. MC COY: -- So Mr. Unger has a special
8 ascertainable loss, which is the repair costs for, for
9 -- with Dr. Phillipson.

10 MR. LI MANDRI: And not --

11 THE COURT: He doesn't have -- he hasn't paid
12 anything.

13 MR. LI MANDRI: Not to JONAH, right.

14 MR. MC COY: Right.

15 MR. LI MANDRI: He's saying he paid
16 Phillipson, but not JONAH.

17 THE COURT: Right, --

18 MR. MC COY: Correct.

19 THE COURT: -- that's the only thing there.
20 Okay. Now attached to that -- are you okay then with
21 this -- these questions?

22 MR. LI MANDRI: Yeah, you know, if you don't
23 mind, I'm going to read --

24 THE COURT: Yeah.

25 MR. LI MANDRI: -- the whole thing over,

1 which I can't do now. But theoretically from my notes
2 --

3 THE COURT: All right. Well you'll --

4 MR. LI MANDRI: -- you've addressed my
5 concerns.

6 THE COURT: Okay. Then, then attached to
7 that at the end is a draft instruction on video
8 depositions.

9 MR. LI MANDRI: I did object to that --

10 MR. MC COY: Right.

11 MR. LI MANDRI: -- and we need to address
12 that. And we brought the e-mails in that I believe
13 does address --

14 THE COURT: You've handed them to me. I have
15 them.

16 MR. LI MANDRI: -- the issues. And, and --

17 MR. MC COY: And --

18 MR. LI MANDRI: -- what I wanted to point out
19 with no slight to opposing counsel, I always try to be
20 consistent, that if we're going to do depositions, the
21 defendant had to reserve its right to use those in lieu
22 of live testimony at trial.

23 There came a point when the plaintiffs said
24 that they didn't want to help share the cost -- first
25 of all, I wanted to do them by video conference. They,

1 they didn't want to do that. Then we talked about
2 bringing them to central locations. My understanding
3 is the plaintiffs didn't want to do that.

4 So then we had to go to the locations of the
5 witnesses all over the country. And as long as they
6 were going to share the costs, I was willing to do that
7 as long as I could preserve it for trial. And at some
8 point the plaintiffs said well we're not going to do
9 that.

10 I said well then I'm not going to pay twice
11 to preserve their testimony. I'll just bring them to
12 trial. There's no point for me to depose them in that
13 case because I know what they're going to say. And
14 then they decided -- then they wanted to take the
15 depositions.

16 But I always said in repeated e-mails "I'm
17 reserving my right to use these at trial" because I
18 didn't know when the trial would be. I didn't know who
19 would be available. And I couldn't subpoena them for
20 trial.

21 So out of an abundance of caution we always
22 looked at those, if we're going to depose them, it had
23 to be preservation of evidence for trial. And we said
24 that repeatedly throughout.

25 So -- and I think that's very important

1 because the plaintiffs are now trying to go back and
2 interpose a bunch of objections to Mr. Hoffman as non-
3 responsive when those were waived at the time. And,
4 Your Honor, they're chopping up that testimony of one
5 of our key witnesses with a bunch of new proposed
6 deletions we got this morning.

7 And we already withdrew one of our success
8 story witnesses, severely cut back the other, so now
9 the whole thing is down to an hour and seven minutes.
10 And they want to cut that back further with a bunch of
11 objections after we went through, as the Court knows, a
12 couple of weeks, fighting over the objections. And now
13 they want to interpose ones they never interposed at
14 the deposition.

15 And with Hoffman they want to cut out a large
16 amount of testimony based on objections we feel were
17 raised and based upon an assumed set of facts which is
18 just not accurate. Because I believe the e-mails will
19 point out that I never wanted to have to deal with the
20 issue of paying to depose them and then paying to bring
21 them here.

22 Now I know the plaintiffs did say at the eve
23 of trial they would pay to bring all the witnesses
24 here. But not all the witnesses are available. And I
25 didn't want to have to deal with the logistical

1 nightmare of trying to coordinate the schedules, like
2 I'm going through with Dr. Berger, of flying witnesses
3 in from all over, which is why we're basically using
4 four live witnesses and four videos.

5 I shouldn't be punished for that by letting
6 them make all these objections after the fact and
7 having to try to refocus our entire closure of our case
8 now on a key witness, Jonathan Hoffman. Because they
9 want us to knock out very large chunks of our direct
10 testimony.

11 THE COURT: Oh, I thought that was done
12 already.

13 MR. LI MANDRI: We did -- it was. But now
14 they want us to take out a bunch more because of the
15 comments the Court made --

16 THE COURT: Well my comments were not to
17 reopen what was agreed upon.

18 MR. LI MANDRI: Exactly. I didn't think they
19 were.

20 THE COURT: My comments were frustration.
21 They were not --

22 MR. LI MANDRI: Right.

23 THE COURT: -- they were not intended as an
24 advisory to have people change things. I asked you to
25 go back and revisit and agree on things.

1 MR. LI MANDRI: And we're doing that, and
2 we're eliminating stuff. But they want to raise a
3 whole bunch of new objections.

4 THE COURT: I didn't look at the e-mail. It
5 came this afternoon. Is that what it is? Are these
6 new -- I'm not ruling on it. You can put them in the
7 record and you can preserve them for appeal. --

8 MR. BROMLEY: Can I be heard?

9 THE COURT: -- I did not make those
10 suggestions to reopen the door on the eve of closing
11 this trial to make objections that should have been
12 made before when I told attorneys to talk to each
13 other. If you have a document, if you can put it in
14 and mark it and --

15 MR. BROMLEY: May I be heard, Your Honor?

16 THE COURT: Yeah.

17 MR. BROMLEY: Well first of all, it's almost
18 impossible to list all of the things that Mr. LiMandri
19 said that are wrong, but I'll try. --

20 THE COURT: Well I do have the e-mails.

21 MR. MC COY: Yeah, not all of them.

22 MR. BROMLEY: Well let me, let me try, Your
23 Honor, okay? First, there are two things that are at
24 issue, right? One is the draft instruction on video
25 depositions and the second are the designations with

1 respect to the Smith and Hoffman depositions. Those
2 are the only --

3 THE COURT: I don't have a problem with the
4 draft instruction on video deposition. --

5 MR. BROMLEY: Okay.

6 THE COURT: -- I understand Mr. LiMandri's
7 position. I think this is pretty much an ambiguous
8 instruction that I'm going to give the jury. --

9 MR. LI MANDRI: I don't understand it myself.
10 Like --

11 THE COURT: It's just --

12 MR. BROMLEY: Can you let the judge talk?

13 THE COURT: -- it's just simply to read to
14 them that they've got to give it the same weight, but
15 they shouldn't assume that because one party is asking
16 the questions on the tape -- you see, you've got to --
17 I got to -- you have to give them the full picture.

18 The full picture would be that the
19 depositions, while you're seeing some videotape
20 testimony, in order -- and I think the easiest way to
21 do it is in conforming with the Court's request, there
22 were hours and hours and hours of deposition on video.
23 And the Court asked the parties to try and scale them
24 back. They were taken more as a discovery deposition,
25 ladies and gentlemen, and remember what I told you

1 about depositions. So you should not infer from who's
2 asking the question, that that's, that party's
3 particular witness. That's really all they should be
4 told.

5 You can say what I said, that the sides were
6 allowed to select portions of the video, and that was
7 done by agreement. And that's why also I should
8 explain to them why there's --

9 MR. BROMLEY: Jumps.

10 THE COURT: -- the video is not as if they're
11 sitting here. Something like that I don't have a
12 problem telling them. But you should not assume that
13 simply because one party's attorney asked a question,
14 that party asked for that question and answer to be
15 included in the video shown to you at trial. I don't
16 know about that.

17 MR. BROMLEY: Well, Your Honor, we're willing
18 to attempt re-edit it in light of the comments that you
19 made.

20 THE COURT: I mean, what I just said, think
21 about something like that. I don't have a problem
22 telling them that. And I could start off rather
23 innocuously by saying ladies and gentlemen, I should
24 have given you this instruction before you saw the
25 first video. As you can tell from seeing the video, it

1 might have appeared disjointed. It was not in the
2 format of the testimony you've heard from witnesses on
3 the stand. Let me explain to you why.

4 There were hours and hours of depositions. I
5 have asked the attorneys to cull them and try to come
6 to some agreement because these were not taken in the
7 normal course of trial testimony, something like that.

8 And then say that you may hear attorneys
9 asking questions. Don't infer from who's asking the
10 question any particular -- there's nothing particular
11 about who's asking it. What's important is that you
12 should consider the questions and answers just as you
13 would, like you have here.

14 The testimony you hear should be given the
15 exact same consideration you would give a witness who
16 appeared live in this courtroom. And something like
17 that, just innocuous and close it with that.

18 MR. BROMLEY: We will work on that, Your
19 Honor, and circulate it.

20 THE COURT: But I'm not going to, I'm not
21 going to entertain objections now. That was not the
22 intent of my comments.

23 MR. BROMLEY: I, I understand that, Your
24 Honor. But I would, for the record want to put some
25 statements on the record --

1 THE COURT: Yes.

2 MR. BROMLEY: -- to preserve them --

3 THE COURT: Go ahead.

4 MR. BROMLEY: -- for appeal. First, Mr.
5 LiMandri's statements are completely disjointed. First
6 of all, there's no question that Mr. LiMandri did say
7 at one point in a very long, several-month sequence of
8 deposition -- of e-mails, that he suggested having a
9 deposition where there would be a discovery deposition
10 and then followed by a trial deposition. He suggested
11 that. That was in January of 2014.

12 There were three e-mails, the first one on
13 the 22nd of January. That was from Mr. LiMandri to Ms.
14 Bensman; a response from Ms. Bensman the next day, 24
15 hours later. And an e-mail from Mr. LiMandri a few
16 hours after that.

17 The first e-mail is the one that Mr. LiMandri
18 suggested this process. Ms. Bensman responded. The e-
19 mail that Mr. LiMandri cites as the one, the core of
20 all of this, was suggested in the context of taking
21 videotape depositions in lieu of actually sitting in
22 the same room. We're going to do this by videotape, by
23 teleconference across the country. It was in that
24 context that Mr. LiMandri sort of said that. We don't
25 want to travel around the country. Either did we. We

1 wanted to do them in one place and try to get it all
2 done.

3 Mr. LiMandri's view was we don't need to
4 bring these people to trial. I know what they're going
5 to say. You can ask them questions on the stand. Our
6 view was that's not the way it works. We need to take
7 discovery depositions of any witness who's going to sit
8 on the stand.

9 Mr. LiMandri said let's do it by
10 teleconference. We said no, let's do it in-person. In
11 the context of that conversation, when video is being
12 used in two contexts, do we take a video deposition and
13 use it for trial, which he suggested, and a video
14 conference in lieu of sitting in a room together, which
15 is what we were referring to, there was no meeting of
16 the minds at all.

17 And indeed, Mr. LiMandri's e-mail back to Ms.
18 Bensman, after she said we're -- we want to do it in-
19 person, makes no further comment about whether he wants
20 to do a trial deposition.

21 Then in February, a few weeks later, this is
22 an e-mail from February 6th, an e-mail from Mr.
23 LiMandri. "Since we no longer need to depose them to
24 preserve their testimony for trial, we are ... it says
25 -- I'm sorry. "... as previously agreed, we are

1 willing to produce the defendants' witnesses for
 2 depositions without a subpoena. However, we no longer
 3 need to depose them to preserve their testimony at
 4 trial."

5 So the point was they were going to bring
 6 these people to trial. There was a e-mail on the 6th
 7 of February from Paul Jonna that, "Defendants'
 8 remaining witnesses are willing to fly out for trial.
 9 Therefore, we do not need to depose them." --

10 MR. LI MANDRI: Of what year are we talking
 11 about?

12 MR. BROMLEY: February.

13 MR. LI MANDRI: Of what year?

14 MR. BROMLEY: 2014. This is three --

15 MR. LI MANDRI: Okay. --

16 MR. BROMLEY: -- No, no, let me finish,
 17 Chuck. You sit down until I'm finished. This is my
 18 record for appeal. --

19 MR. LI MANDRI: Your Honor, --

20 THE COURT: Counsel, counsel, one at a time.
 21 And I will direct people what to do please.

22 MR. LI MANDRI: Here's the last e-mail.

23 THE COURT: I don't have February 6th. I'm
 24 sorry.

25 MR. BROMLEY: Can I hand that up please?

1 THE COURT: Okay.

2 MR. BROMLEY: If you'll look on the second
 3 page, Your Honor, there's an e-mail from Mr. Jonna to
 4 me, Mr. Dinielli and others.

5 THE COURT: "Defendants' remaining witnesses
 6 set forth in my January 30 e-mail are willing to fly
 7 out for trial." Okay. I don't know if I have January
 8 the 30th.

9 MR. BROMLEY: Okay.

10 MR. LI MANDRI: What's the date of that e-
 11 mail?

12 MR. BROMLEY: February 6th 2014.

13 MR. LI MANDRI: Okay.

14 THE COURT: Okay, go ahead.

15 MR. BROMLEY: And then, Your Honor, about a
 16 week later, in the context of this, Mr. Jonna on the
 17 12th sends an e-mail saying, "Again, given that our
 18 witnesses are willing to appear for trial we have no
 19 need to depose them. However, we will take the
 20 opportunity to preserve their potential trial testimony
 21 if the plaintiffs do depose them."

22 There was no conversation about whether this
 23 is the deposition in lieu of testimony at trial.
 24 Indeed, the only way that we were inferring that this
 25 -- the only inference that we took from this was that

1 in the event that these witnesses somehow were
 2 unavailable, not at the choice of the defendants, but
 3 because of some issue like illness or the like, that
 4 they would not be able to appear, they would be
 5 preserving it for trial. That was on the 12th of
 6 February, Your Honor.

7 Two weeks later Mr. -- and this is the last
 8 e-mail. Mr. McCoy says, among other -- do you have the
 9 25th e-mail, Your Honor?

10 THE COURT: When was this? I'm, I'm just
 11 looking at -- I have the 12th, the conver -- this is
 12 the exchange between Sam Wolfe and Paul Jonna?

13 MR. BROMLEY: Yes, Your Honor.

14 THE COURT: It starts on the 11th and goes
 15 into the 12th.

16 MR. BROMLEY: Yeah.

17 THE COURT: Okay. And now you're on --

18 MR. LI MANDRI: The last one of the 25th.

19 THE COURT: -- the 25th, okay.

20 MR. LI MANDRI: The last one.

21 THE COURT: I have that.

22 MR. BROMLEY: Okay. You see that?

23 THE COURT: Yes.

24 MR. BROMLEY: Okay. And you can see the last
 25 sentence, Your Honor? "Please note that the foregoing

1 does not constitute an agreement or stipulation by
 2 plaintiffs the trial preservation testimony will be
 3 admitted at trial in lieu of live testimony by the
 4 witnesses." And the statement, "That for the avoidance
 5 of doubt, this agreement and stipulation is intended to
 6 obviate the need to make trial objections during the
 7 course of the trial preservation depositions and
 8 preserve them for later assertion by the parties."

9 Now the issue there, Your Honor, is we
 10 understand that the New Jersey rules say with respect
 11 to a trial preservation deposition that's designated as
 12 such, we're supposed to make objections 45 days prior.
 13 The parties agreed that there were no -- there was no
 14 obligation to do that. I understand the Court has
 15 ruled, but we did bring this before the Court in the
 16 motions in limine with the express purpose of dealing
 17 with all of those objections.

18 None of the objections that we've made, Your
 19 Honor, are ones that haven't previewed and also made
 20 before. But we understand the Court's ruling.

21 The other thing that needs to be mentioned,
 22 Your Honor, is that every one --

23 THE COURT: Well let me --

24 MR. BROMLEY: -- of the success stories --

25 THE COURT: -- well let me ask you -- wait.

1 --
2 MR. BROMLEY: Sorry.
3 THE COURT: -- Let me ask you a question,
4 what you just said. When I had them I did come out and
5 I made my rulings on one full deposition with all the
6 objections.
7 MR. BROMLEY: That's correct, Your Honor.
8 THE COURT: And then I said I want the
9 parties to work out the differences. And then you came
10 back and handed me a sheet with six, six areas that
11 couldn't be worked out, correct?
12 MR. LI MANDRI: Right. And we worked them
13 all -- and you've ruled on it.
14 THE COURT: And I addressed those six issues
15 and made my rulings. --
16 MR. LI MANDRI: Right.
17 THE COURT: -- So that everything else was
18 agreed upon.
19 MR. LI MANDRI: Right.
20 MR. BROMLEY: Yes, Your Honor.
21 THE COURT: No, I'm asking counsel who's
22 making the argument.
23 MR. LI MANDRI: Oh, I'm sorry.
24 THE COURT: And then I expressed my point of
25 view yesterday. Yesterday or the day before?

1 MR. BROMLEY: Yesterday, Your Honor.
2 THE COURT: I don't remember. I think it was
3 yesterday, but I'm losing --
4 MR. BROMLEY: It was yesterday.
5 THE COURT: -- track of things. I did not do
6 that as an opportunity to change what you agreed upon.
7 I did that simply to say please talk to each other and
8 see what can be cut down. --
9 MR. BROMLEY: And --
10 THE COURT: -- And I was told that one
11 witness will be taken away and that there will be a
12 withdrawal of requests for --
13 MR. LI MANDRI: Cross, our cross.
14 THE COURT: -- cross.
15 MR. BROMLEY: And, Your Honor, we've tried to
16 do that.
17 THE COURT: And then I got your letter this
18 afternoon. And quite frankly, I didn't even look at
19 it.
20 MR. BROMLEY: I, I understand, Your Honor.
21 THE COURT: It's on my computer.
22 MR. BROMLEY: What, what we did, Your Honor,
23 was take your comments yesterday. And particularly
24 your comment with respect to Floyd Gothrey (phonetic),
25 right? And we looked at the testimony with respect to

1 Mr. Smith and with Mr. Hoffman. And we tried to say
2 what here are materials that are clearly irrelevant and
3 are going to --

4 THE COURT: Well then I suggest you present
5 those to your adversary and see if he agrees.

6 MR. BROMLEY: And, and, Your Honor, we have
7 done so and they rejected them out of hand. So that's
8 where we are. --

9 THE COURT: Okay.

10 MR. BROMLEY: -- Now I would like to -- and I
11 understand where Your Honor's coming from. There's one
12 last piece of information that I think the Court needs
13 to know and we need to have on the record. Which is
14 every single one of the success story witnesses is
15 being proffered by the Defense as a result of an e-mail
16 solicitation by Mr. Wyler soliciting people to see if
17 they'd be willing to testify in this case. We've been
18 told --

19 THE COURT: Have you asked any of the
20 witnesses that, that were on the stand?

21 MR. BROMLEY: Mr. Wyler's not here yet.

22 THE COURT: No, no, have you asked any of the
23 witnesses who testified?

24 MR. BROMLEY: No, we haven't asked. We --

25 THE COURT: Okay. So I don't know any --

1 that's not in the record.

2 MR. BROMLEY: I assure you it will be in the
3 record, Your Honor.

4 THE COURT: Well I'm just saying you didn't
5 ask any of the people that -- there were questions, why
6 are you here, but I didn't hear anybody be confronted
7 with did you receive a solicitation from Mr. Wyler to
8 be here. But that's okay. So what is the point of
9 that?

10 MR. BROMLEY: It's just we want -- that, that
11 information was provided in our motion in limine, Your
12 Honor, and we wanted to just make it clear on the
13 record that the witnesses that we're talking about, who
14 were unavailable, who were represented to us as people
15 who were going to come and sit at trial, wasn't --

16 THE COURT: No, no, I'm asking what is the
17 significance of what you said about Mr. Wyler, what --
18 you started to tell me about Mr. Wyler --

19 MR. BROMLEY: Because when you're sitting
20 here, Your Honor, looking at questions of
21 unavailability, there's clear law that says that
22 unavailability is not something that's supposed to be
23 created by counsel in the context of trial strategy,
24 right? And that's exactly what's happening here.

25 THE COURT: I -- well I can't agree with that

1 because what I see is that e-mails going back and
2 forth. And I said right in the beginning, it didn't
3 sound like everybody was on the same page. I said
4 that.

5 MR. LI MANDRI: Let me say one last thing if
6 I may. I'm not representing they're all necessarily
7 unavailable. I didn't want the logistical nightmare of
8 having to coordinate bringing them all here.

9 And the one point I want to stress is in
10 every e-mail, including the very last one -- and this
11 refreshes my recollection when we first started the
12 conversation before I looked at the e-mails. That it
13 was with Mr. McCoy, who I have a lot of respect for.
14 But I remembered the conversation and he -- this was --
15 and it says right in the e-mail, we're preserving this
16 for trial. And he said why don't you go first. And
17 then we'll do our cross. And then you do your
18 redirect, which is exactly what we did.

19 And if it was a discovery deposition, we
20 wouldn't have done that. I wouldn't have done a direct
21 exam and then they do a cross and then I do a redirect.

22 THE COURT: Counsel, I understand. --

23 MR. LI MANDRI: Okay.

24 THE COURT: -- I said in the beginning and
25 I'll repeat. The difficulty was this was done in a

1 certain manner and it appeared to me and you just -- I
2 think both sides have solidified it -- that the parties
3 were not on the same page, which is what I said right
4 in the very beginning when I said how am I supposed to
5 rule on these objections.

6 I made the point initially that you're asking
7 me to strike questions that you asked, not you
8 personally, and you've explained to me that well we
9 wouldn't have asked those questions if we were at
10 trial. And then I said well then what was the purpose
11 of the deposition. And one side said for trial and the
12 other side said no. And that's why I have these e-
13 mails. And that's where we are now.

14 And I'll, I'll repeat what I said then, it's
15 a -- I don't know what's expected for me to do. On the
16 one hand, I'm trying to work with counsel. And I, and
17 I gave both sides an opportunity to review these. I
18 don't know why counsel waited until my comments to want
19 to strike additional testimony.

20 You could have done that in the beginning and
21 said we can't agree on it, Judge, you have to rule on
22 it. You guys made agreements on the testimony. I
23 questioned how this could be agreed to when I thought
24 two-thirds of it was irrelevant, was my, my opinion.
25 I'm not the jury.

1 MR. BROMLEY: I understand. And with all due
2 respect, Your Honor, one of the things that we were
3 reacting to were your comments when you said that we
4 weren't following the rules in terms of objecting to
5 testimony that was designated as trial testimony. And
6 we should have done it 45 days earlier. --

7 THE COURT: Yes, but I gave you the
8 opportunity -- all I did was say I will rule on one
9 deposition. And I asked the parties to go back and
10 work it out. And you did. And that's why I think it's
11 unfair now, after my comments, to ask me to strike
12 testimony. That's what I find unfair, because now to
13 have that person come in live would be very difficult
14 because no arrangements were made for him to be here.

15 So if I grant your application, what I have
16 then done is have you agree on certain testimony, have
17 you change your mind after the Court's position, and
18 then force defendant on two days to try to bring
19 somebody here.

20 Where does Hoffman live?

21 MR. LI MANDRI: Israel.

22 THE COURT: How's he going to do that?
23 That's not fair.

24 MR. BROMLEY: Your Honor, we -- first of all,
25 just to clarify, our letter is not a motion asking for

1 you to strike any testimony. It is a summary of the
2 discussions that we've had and the suggestions --

3 THE COURT: Right. But aren't you --

4 MR. BROMLEY: -- that we've made.

5 THE COURT: -- asking me to strike testimony?
6 Even though I didn't open it, I did see there were
7 different colors, what was irrelevant, what was
8 something else. Why are you bringing that to my
9 attention unless you want me to strike it? I think
10 we're being cute, but you tell me. Why did you
11 highlight them in color to tell me they're irrelevant,
12 something else and something else? What did you want
13 me to do with them?

14 MR. BROMLEY: We, we were not -- okay.

15 THE COURT: Tell me what you want me to do
16 with it. Why did you submit it to me?

17 MR. BROMLEY: Your Honor, we wanted to let
18 you know what we did last night and yesterday in light
19 of your instructions and what we provided to our
20 opponents and their response.

21 THE COURT: Okay.

22 MR. BROMLEY: Okay?

23 THE COURT: So you weren't asking me to make
24 any rulings.

25 MR. BROMLEY: The -- well, Your Honor, we're

1 not asking you to make any ruling. You made clear --

2 THE COURT: Okay.

3 MR. BROMLEY: -- you're not going to make
4 one. So --

5 THE COURT: No, but that doesn't mean your,
6 your -- it's your record. Were you intending for me to
7 make rulings? Because that's how I looked at it.

8 MR. BROMLEY: Okay. Your Honor, then for
9 clarity on the record, then we'd ask that you, you
10 strike the testimony.

11 THE COURT: All right. And I just told you
12 why I think that's unfair.

13 MR. BROMLEY: Okay.

14 THE COURT: Okay.

15 MR. BROMLEY: Thank you, Your Honor.

16 THE COURT: Lastly, I have your two letters
17 regarding the survey. I have a dilemma. Legally I
18 don't -- the law cited about surveys is correct.
19 However, as the defendant concedes, he's not seeking to
20 offer the truth of the matter asserted.

21 What we have to do in this situation I think,
22 because I'm confused over the survey and I'm not sure
23 exactly whether I would allow any of it or parts of it
24 or a summary of it. So I think the only way to get a
25 fair and impartial ruling is we're going to have to

1 have Mr. Wyler have a 104 hearing just on the issue of
2 the survey and make a record one way or the other. So
3 whichever say I rule, the other side has a record to
4 support whether I was correct or not.

5 I, I think it's too close of a call to make
6 on paper. I understand the arguments. And I just
7 think we're going to have to hear from Mr. Wyler about
8 this People Can Change survey outside the presence of
9 the jury.

10 MR. LI MANDRI: That's fine.

11 THE COURT: When is he scheduled to come in?

12 MR. JONNA: Tuesday.

13 MR. LI MANDRI: Tuesday at this time, yes,
14 Tuesday.

15 THE COURT: At what time on Tuesday?

16 MR. JONNA: I think in the morning.

17 THE COURT: So can we get him here at 9:00
18 and then maybe tell the jury we'll start at 10:00 on
19 Tuesday?

20 MR. LI MANDRI: Sure, or --

21 MR. JONNA: Sure.

22 MR. LI MANDRI: -- 8:30, whatever you prefer.

23 THE COURT: Or whatever. We'll talk about it
24 on Monday.

25 MR. LI MANDRI: I'll get him here.

1 THE COURT: All right. I think that's the --
2 MR. LI MANDRI: I did ask -- I'm sorry.
3 THE COURT: -- that's the only way I think to
4 handle it because --
5 MR. LI MANDRI: I asked him for some
6 background data and he sent me this last night, if that
7 will help the Court and counsel.
8 THE COURT: Well you can give it to counsel.
9 I'll -- when --
10 MR. LI MANDRI: So because it has been asked
11 for previously. --
12 THE COURT: They, they may want it --
13 MR. LI MANDRI: -- He's not my client.
14 THE COURT: -- for cross-examination on the
15 104 hearing.
16 MR. LI MANDRI: And I will just point out --
17 THE COURT: See, the -- let me, let me ask
18 you this before we even -- that's what I intend to do.
19 But let me ask you this. What specifically do you want
20 Wyler to testify to about the survey?
21 MR. LI MANDRI: I'll ask him --
22 THE COURT: Because remember, what you're
23 saying to me is this could be something I refer to as
24 anecdotal, --
25 MR. LI MANDRI: Right.

1 THE COURT: -- that if there's a survey on
2 PCC's website that says they have a success rate of 50
3 percent.
4 MR. LI MANDRI: Right.
5 THE COURT: Is that what you're trying to
6 elicit or are you -- do you want to elicit every
7 specific question, every --
8 MR. LI MANDRI: No, not at all.
9 THE COURT: -- because if you can tell us
10 what you're trying to elicit, it certainly can
11 streamline this.
12 MR. LI MANDRI: Sure. I started to ask Mr.
13 Ferguson, because he said he had seen the survey and he
14 saw success rates of 60 to 80 percent. And I was going
15 to follow-up more with him on what he had seen and what
16 he remembered. And then we got the objection. And the
17 Court indicated I might want to do this with Mr. Wyler.
18 And what I had in mind was just something
19 more along those lines, what were the general success
20 rates, how did you determine that. Now I will say he
21 said in his deposition he did customer surveys for 18
22 years in a corporate capacity. So it's not as if he's
23 never done a survey. But we're not representing him to
24 be --
25 THE COURT: No, I'm not, I'm not -- my

1 concern is not, my concern is -- right now is not with
2 his ability to -- you know, whether he's an expert in
3 statistics.

4 MR. LI MANDRI: He's not.

5 THE COURT: My concern is what is it you want
6 to proffer. Are you looking to proffer that PCC did a
7 client survey and as a result of that survey, clients
8 indicated a 50 percent whatever.

9 MR. LI MANDRI: Right. In a range of
10 potential success rates and I could ask him what were
11 themes --

12 THE COURT: All right, potential --

13 MR. LI MANDRI: -- generally you ask clients.

14 THE COURT: Potential success rates in what?
15 That's what my concern is because there's so many
16 different questions --

17 MR. LI MANDRI: Right.

18 THE COURT: -- there, what, what success --
19 success rates at what? Are we limiting it to reducing
20 same sex attraction? He has to -- from what I recall,
21 and I'll bring it up here, just to give you an idea of
22 what's confusing me -- it's what 303 I think?

23 MR. LI MANDRI: Yes, Your Honor.

24 THE COURT: When I was looking at the survey
25 -- okay. 56 percent say they experience significant

1 same sex attraction at the time they took JIM. So of
2 his sampling of 200 and some respondents, right?

3 MR. LI MANDRI: Yes.

4 THE COURT: Approximately only 56 percent say
5 they experience significant same sex attraction when
6 they went there. And then he says only 14 percent say
7 they experience it now. Now -- and this is something
8 he's going to have to tell us. Now meaning when?

9 MR. LI MANDRI: At the time that they
10 answered the question I'm sure.

11 MR. KESSLER: Your Honor, --

12 MR. LI MANDRI: After the, after the weekend.
13 That's the only I could -- I would reasonably interpret
14 --

15 THE COURT: Well I mean, that's what I don't
16 know. That's why I'm looking at this saying what did
17 -- are these the people who took the weekend two years
18 ago?

19 MR. LI MANDRI: Well he'll say who he
20 distributed it to, but --

21 THE COURT: Have -- they have any intervening
22 counseling or therapy?

23 MR. LI MANDRI: They may have. I'll have to
24 --

25 THE COURT: Well that's -- but, Counsel, do

1 you see what my difficulty is in, in -- it's not a
2 question of me backing off on what I said, that there
3 can be -- they can rely anecdotally on certain things
4 that are published. But is this what's published on
5 the website?

6 MR. LI MANDRI: Yes, and my clients --

7 THE COURT: This, this particular --

8 MR. LI MANDRI: This is -- my understanding
9 is this is on their website. And they have also kind
10 -- a bunch of studies summarized on the website as
11 well. And my client repeatedly refers people to, as we
12 see in correspondence, to the PCC website for both the
13 scientific basis and in this case some success rates,
14 as least as far as this type of, you know, anecdotal
15 survey that PCC prepared, which is, you know, got some
16 level of detail. And now I've given the back-up data.

17 THE COURT: Well no, there is some level.
18 But my concern is in looking at the questions, I'm not
19 so sure this has anything to do with success rates
20 because someone reporting a decrease in attraction
21 doesn't mean that the program was successful, because I
22 have no idea whether they went there, the reason that
23 plaintiffs went there, which was, which --

24 MR. KESSLER: I'll also note, Your Honor, at
25 the bottom of almost very slide --

1 THE COURT: You want to interrupt what you
2 want me to do?

3 MR. KESSLER: Oh, I'm sorry, I apologize.

4 THE COURT: That's all right. But if you
5 want to, go ahead.

6 MR. KESSLER: No, no, I don't.

7 THE COURT: I mean, it -- you know, we have,
8 we -- obviously the difficulty here, Counsel, is the
9 success rates. And I did say that there could be
10 anecdotal references to it. But I don't know how this
11 breakdown here, and perhaps Mr. Wyler will educate us,
12 how this -- these questions and this breakdown will
13 lead to the representation of a 60 to 80 percent
14 success rate, because I don't know what the success
15 rate is for.

16 MR. LI MANDRI: Yeah. Well that is what Mr.
17 Ferguson said. I'm not exactly sure Mr. Wyler will
18 characterize it in those terms. I was just saying I
19 would think he could give a range of a number of
20 factors that they would look at to determine --

21 THE COURT: Well --

22 MR. LI MANDRI: -- have reported their
23 response to having participated in this particular
24 program.

25 THE COURT: Well I know, but here, look at

1 this. 93 percent say JIM had a positive impact on
2 their efforts to diminish SSA and/or increase OSA.
3 Every plaintiff said that. Every plaintiff said when
4 they left the JIM weekend they felt whatever. --

5 MR. LI MANDRI: Except this --

6 THE COURT: -- So --

7 MR. LI MANDRI: -- was presumably
8 administered sometime afterwards.

9 THE COURT: -- what does that mean, 93
10 percent had a positive impact. They all said it was
11 positive. They were exhilarated, they had feelings,
12 and then they crashed.

13 MR. LI MANDRI: Yeah, but these people were
14 long after that crash period.

15 THE COURT: Well that's what we're going to
16 have to find out. I'm just bringing up to you what my
17 problems are with --

18 MR. LI MANDRI: That's fine.

19 THE COURT: -- these questions and answers.

20 MR. LI MANDRI: It seems to me in the cases
21 the opposition cited, I think support this, it really
22 goes to weight, not admissibility, you know, as to
23 whether or not this particular study answers
24 everybody's --

25 THE COURT: Here's the --

1 MR. LI MANDRI: -- question.

2 THE COURT: -- here's the problem with that.
3 I concede that, yes, it may, it may go to weight when I
4 hear what he has to say. I'm just -- I asked you for a
5 proffer of what you intend to do. And these type of
6 reports, a 79 percent decrease in feelings, in the
7 frequency or intensity of SSA feelings. I don't know
8 what --

9 MR. LI MANDRI: Your Honor, the --

10 THE COURT: -- I don't know what --

11 MR. LI MANDRI: -- in fairness, the
12 plaintiffs' experts got up and made wild claims and
13 accusations without any degree of specificity, using
14 very inflammatory --

15 THE COURT: Such as, such as?

16 MR. LI MANDRI: -- language. Well that
17 certain things are always harmful almost for anybody.

18 THE COURT: Well didn't they base it on their
19 expert opinion and their training and their experience
20 in the field? I don't think they made wild
21 accusations, Counsel. I think they came in and said
22 based on my training, my experience and my practice
23 this is my opinion. That's what's called an expert.

24 MR. LI MANDRI: Well --

25 THE COURT: Now you can tell the jury they're

1 wild accusations, but I don't think that that's fair,
2 insinuating that I allowed plaintiffs' witnesses to
3 make wild accusations and I'm not letting you to make
4 wild accusations.

5 MR. LI MANDRI: Mr., Mr. Wyler has been
6 running the program for 15 years as I understand it.
7 He certainly is in a position, even as a lay person,
8 with that kind of experience with these -- this
9 particular program, that he --

10 THE COURT: To say what? --

11 MR. LI MANDRI: -- operates.

12 THE COURT: -- He's going to testify about a
13 lot of things. What we're talking about right now is a
14 survey and how it correlates to success rates.

15 MR. LI MANDRI: And his experience dealing
16 with the people who filled it out, who he probably all
17 knows personally.

18 THE COURT: He knows all 220 some people
19 personally? Okay, you know what? --

20 MR. LI MANDRI: I don't want to overstate it.
21 I'm, I'm --

22 THE COURT: -- We'll wait until we hear --

23 MR. LI MANDRI: -- but I'm surmising.

24 THE COURT: -- we'll hear from Mr. Wyler.

25 MR. LI MANDRI: It just seems like the people

1 coming to testify, it's a community.

2 THE COURT: I'm just letting you know what --

3 MR. LI MANDRI: Yeah.

4 THE COURT: -- my concerns are. And that's
5 why, you know, we'll see what his answers are. You
6 gave them the back-up material?

7 MR. LI MANDRI: I did, what he sent me when I
8 asked him for back-up material.

9 THE COURT: All right, okay. And that's
10 Tuesday.

11 MR. LI MANDRI: Tuesday. I didn't --

12 THE COURT: What did you want to say,
13 Counsel?

14 MR. KESSLER: Oh, well first, I apologize for
15 interrupting. --

16 THE COURT: That's all right.

17 MR. KESSLER: -- Second, I think it's
18 obviously clear that we disagree with what Mr. Wyler
19 can and can't say, although --

20 THE COURT: I know you do. I --

21 MR. KESSLER: -- we all agree he's not an
22 expert.

23 THE COURT: Yes, I have your letter.

24 MR. KESSLER: Yeah, and I'm -- a 104 hearing
25 is great for the plaintiffs. I just wanted to note

1 that it's clear already from Mr. Wyler's deposition
2 that there's simply nothing he can add. He testified
3 that he doesn't know what the terms mean. They don't
4 have any specific meaning. They mean whatever they
5 meant to the individual. --

6 THE COURT: Well isn't that what we're --

7 MR. KESSLER: -- And the only question I have
8 -- I mean, --

9 THE COURT: -- isn't that, isn't that what
10 we're going to find out at the --

11 MR. KESSLER: Yeah, absolutely, I think
12 that's totally right.

13 THE COURT: Okay.

14 MR. KESSLER: I, I -- the Court is absolutely
15 correct. The only question I have was whether this is
16 the entirety of the back-up material that we have?

17 MR. LI MANDRI: That's the entirety of what I
18 was given.

19 MR. KESSLER: Okay, that's fine.

20 MR. LI MANDRI: I didn't, I didn't edit it.
21 I -- that's what I asked for --

22 MR. KESSLER: And so the question is if this
23 is the entirety of what the defendants intend to show
24 Mr. Wyler.

25 THE COURT: We --

1 MR. LI MANDRI: I don't know if he's got --

2 THE COURT: We'll find out on Tuesday. --

3 MR. LI MANDRI: -- individual questionnaires
4 from people or not.

5 MR. KESSLER: That's fine. I just want to --
6 if we can get whatever you guys have in advance.

7 MR. LI MANDRI: That's all I have.

8 MR. KESSLER: Okay.

9 THE COURT: So you've given him what you were
10 given.

11 MR. LI MANDRI: I've given him what I've been
12 given.

13 THE COURT: Okay.

14 MR. BROMLEY: And to the extent, Your Honor,
15 anything else that's delivered prior to Tuesday.

16 THE COURT: Counsel will provide it to you on
17 Monday --

18 MR. LI MANDRI: I'll provide you whatever I
19 get.

20 THE COURT: -- if he gets anything else.

21 MR. BROMLEY: Okay.

22 MR. KESSLER: That was my other question.

23 MR. BROMLEY: When you, when you get it.

24 MR. LI MANDRI: I'll give it to you
25 forthwithly (sic).

1 THE COURT: Yes, Mr. Dinielli.

2 MR. DINIELLI: Thank you, Your Honor. A few
3 very minor points. You mentioned earlier today that,
4 as we all know, if we do prevail in any of our claims
5 we will be seeking an injunction. We don't know how
6 you would want to proceed. And some of us would want
7 to be making travel plans if we're going to be leaving
8 after the verdict.

9 THE COURT: We're not going to do anything
10 immediately if that's what you're asking.

11 MR. DINIELLI: That's what we're asking.

12 THE COURT: I am not an immediacy person
13 except when I have to rule on objections.

14 MR. DINIELLI: Thank you.

15 THE COURT: I do not -- that is a, that is a
16 type of relief that is, is, is available under the
17 statute. I had two orders to show cause this morning,
18 just so you -- some, some insight. I have taken my law
19 school days very seriously, that when I'm asked to
20 enter injunctions I have never done -- well not that it
21 mat -- now certainly isn't the case, but I have never
22 done one ex parte. I've always insisted on notice and
23 due process.

24 That would be something that I think we will
25 perhaps digest the verdict, whatever it is, and see

1 where we go from there. I don't -- that is not
2 something that I'm inclined on the shoot from the hip
3 from, to grant.

4 MR. DINIELLI: Thank you.

5 THE COURT: You certainly are going to need
6 time, if there is -- if you do prevail, there will be
7 the issue of even determining what the actual judgment
8 will be, because I have to wait for a counsel fee
9 application in order to have a final -- that's the one
10 bad thing, by the way, is the appellate --

11 MR. LI MANDRI: I didn't catch --

12 THE COURT: -- the appellate court will not
13 consider a final judgment until all issues have been
14 decided. So you couldn't even appeal the verdict until
15 the counsel fee issue is done. And I may -- and I
16 don't know, I don't know what the jury is going to say.
17 I don't know what your application will be. But in
18 terms of scheduling --

19 MR. DINIELLI: That's the guidance we needed.

20 THE COURT: -- and vacation, it's not
21 something we will deal with immediately.

22 MR. DINIELLI: Thank you. The next issue has
23 to do with the playing of video deposition testimony
24 we're expecting on Monday. I wanted to confirm that
25 once that has been played in open court, that that

1 would no longer be subject, at least those lines that
2 were played in open court would no longer be subject to
3 a protective order and you could use those lines
4 essentially however we want.

5 THE COURT: I said that. I am not sealing
6 any testimony at trial. I think I made that very clear
7 in my pretrial rulings. I don't have the authority to
8 do that.

9 MR. DINIELLI: Specifically though, Your
10 Honor, we have a court reporter. I believe we will
11 have that court reporter here during the playing of the
12 video, you know, that the official transcript is the
13 audio. --

14 THE COURT: Well just --

15 MR. DINIELLI: -- What we want to confirm is
16 the lines that are played from the deposition, those
17 deposition testimony lines then will no longer be
18 subject to a protective order.

19 THE COURT: No.

20 MR. DINIELLI: Thank you.

21 THE COURT: Once they're -- I'm not telling
22 the jury they can't do that when the case is over,
23 they're not allowed to talk to anybody.

24 MR. DINIELLI: Thank you. Clarifying on Dr.
25 Berger, Mr. LiMandri, I know that you're trying your

1 best to figure out when he can get here. --

2 MR. LI MANDRI: I am.

3 MR. DINIELLI: -- I'd just like the assurance
4 that as soon as you know you can tell us because --

5 MR. LI MANDRI: Yeah.

6 MR. DINIELLI: -- there's a lot to do between
7 now and Wednesday.

8 MR. LI MANDRI: I understand. In -- I spoke
9 to him a half an hour before the court proceedings.
10 And he said he was trying to reach his clients and will
11 continue to do so. Right now he's still set to come in
12 first thing Wednesday morning. I am trying to get him
13 Tuesday. I'll let you know as soon as I --

14 MR. DINIELLI: And if you can, if you just
15 let us know, that would be fantastic.

16 MR. LI MANDRI: As soon as I know you'll
17 know.

18 MR. BROMLEY: Can I just ask whether the plan
19 is that he would fly down on Tuesday evening or
20 Wednesday morning?

21 MR. LI MANDRI: I believe, I want him to come
22 Tuesday evening.

23 MR. BROMLEY: I've, I've flown quite a bit up
24 to Toronto, Your Honor, and I would strongly advise
25 that they come down on Tuesday night rather than --

1 MR. LI MANDRI: Well, you know, I haven't --
2 MR. BROMLEY: -- fly in on Wednesday.
3 MR. LI MANDRI: -- that was my assumption.
4 But I didn't even ask him that when we spoke this
5 afternoon.
6 MR. BROMLEY: It's -- I've had --
7 MR. LI MANDRI: I assumed he had to do that.
8 MR. BROMLEY: -- people fly down in the
9 morning and not get here until 3:00. So --
10 MR. LI MANDRI: I -- to me, it's a foreign
11 country. I thought you had to come the day before.
12 Maybe it's not that far.
13 MR. DINIELLI: And then the last item, Your
14 Honor is I believe Ms. Bensman has some exhibits to be
15 offered into evidence.
16 MS. BENSMAN: Yes, Your Honor, we --
17 THE COURT: You updated the list or --
18 MS. BENSMAN: Yes, updated the list, and
19 there are also a couple of issues that we do need the
20 Court's assistance with. So I have copies --
21 Chuck, here's a hard copy of what I sent over
22 e-mail.
23 MR. LI MANDRI: Thank you.
24 MS. BENSMAN: I have copies that I can hand
25 up. The plaintiffs and the defendants have agreed on

1 an additional quantity of exhibits to be entered into
2 evidence. And that is on the second page.
3 THE COURT: Oh, you gave me two --
4 MS. BENSMAN: I gave you one copy for you and
5 one for your clerk.
6 THE COURT: So these are what have now --
7 MS. BENSMAN: So the first page is what is in
8 evidence as of right now, this minute. --
9 THE COURT: Okay.
10 MS. BENSMAN: -- The second page is a list of
11 exhibits that the parties jointly agree --
12 THE COURT: Okay.
13 MS. BENSMAN: -- should be entered into
14 evidence. On the third page are three exhibits that
15 plaintiffs move in -- would like to move into evidence.
16 Just before this hearing we understood from defendants
17 that they have no objection to entering plaintiffs' 433
18 into evidence. --
19 THE COURT: Okay.
20 MS. BENSMAN: -- And so we don't require the
21 Court's assistance with that. But the defendants do
22 object to plaintiffs' 337 on hearsay grounds. That
23 objection was made at trial and not sustained.
24 MR. LI MANDRI: Wait, if that's the Bruck
25 letter --

1 MS. BENSMAN: No, it's not.
2 THE COURT: All right. Wait, wait, let me --
3 let's bring it up. --
4 MR. LI MANDRI: What is it?
5 THE COURT: -- Let's not fight with each
6 other before we know that it is. P-337?
7 MS. BENSMAN: Yes, Your Honor.
8 MR. LI MANDRI: Right.
9 THE COURT: Let's see what it is.
10 MR. LI MANDRI: Neither are parties -- oh,
11 Ferguson is, but Mr. Bennion is not a party.
12 THE COURT: So this is Mr. Bennion's e-mail
13 to Mr. Ferguson.
14 MS. BENSMAN: Attaching the document about
15 the Brotherhood of Electrical Workers, Your Honor,
16 which goes to his credibility and also whether he is in
17 fact a success story.
18 THE COURT: Yes.
19 MR. LI MANDRI: Well -- but again, he's a
20 non-party and --
21 THE COURT: Well he's a non-party, --
22 MR. LI MANDRI: -- this was a preliminary --
23 THE COURT: -- but he testified. The jury
24 has the right to assess his credibility. And this is a
25 document that is contradictory to what he testified.

1 MR. LI MANDRI: I'm --
2 MS. BENSMAN: And it also goes against his
3 social interests, Your Honor, and would be an exception
4 to the hearsay rule and background as well.
5 MR. LI MANDRI: First of all, I'm not sure if
6 it's any of those things because, you know -- and
7 besides, it's a preliminary document. None of this
8 says he's not successful, my recollection from what you
9 read. But it, it was a draft.
10 MS. BENSMAN: Your Honor, he claimed it was a
11 draft and I believe that's a --
12 THE COURT: There's nothing on here that says
13 "draft". A jury can assess that.
14 MS. BENSMAN: Yes.
15 THE COURT: He mailed this out.
16 MR. LI MANDRI: To Mr. Ferguson for his
17 thoughts --
18 THE COURT: Yeah.
19 MR. LI MANDRI: -- at the time they were
20 friends.
21 THE COURT: Yes, I'll allow it. And what's
22 the other one, 434?
23 MS. BENSMAN: Plaintiffs' 434. And if I may
24 hand up, Your Honor, what this concerns is plaintiffs'
25 proposed redactions to Alan Downing's counseling notes

1 of Benjamin Unger. There are a few -- all of the
2 redactions are identified with red boxes on what I've
3 just handed you.

4 And there are a few that the defendants agree
5 to. They agree to the redactions of the cell phone
6 number on the first page and the cell phone number on
7 the second page, which is just to protect people's
8 privacy, obviously not relevant information.

9 But then on the second page we also proposed
10 a redaction to Mr. Downing's note of a conversation
11 with Mr. Unger's father, Leslie Unger, which happened
12 outside of the presence of Benji Unger. And this is
13 also not a page that was shown. There was no
14 questioning about this page. And we simply suggest
15 that this kind of information that is sensitive,
16 relates to people other than Mr. Unger himself, and was
17 not the subject of questioning at trial should be
18 redacted to protect the privacy of third parties, such
19 as Mr. Unger's father and mother.

20 The redactions on the other pages of this
21 document are of a similar nature. I just do want to
22 point out that the redaction on the page with the date,
23 May 14th, that is not a page of notes from Mr. Unger's
24 counseling with Mr. Downing. That is a page of notes
25 from a supervision session that Mr. Downing had with

1 Dr. McGreer (phonetic), who was supervising him at that
2 time, about Mr. Unger.

3 So this is notes of a conversation during
4 which Mr. Unger was not present. It can't possibly
5 reflect statements he made in that conversation. And
6 again, this page, like all of the pages in this packet,
7 was never shown at trial and was never the subject of
8 questioning. There's no evidence about it. And we
9 believe that is it potentially sensitive and
10 embarrassing for third parties. And so that is the
11 reason why we proposed these redactions.

12 MR. LI MANDRI: If I may briefly respond,
13 Your Honor. We've got no objection to redacting any
14 cell phone numbers or anything about that type of --
15 text message numbers. Nor do I object to the redaction
16 of the information received apparently from the
17 father's call, because we can't be sure if that came
18 from Mr. Unger on page 446. --

19 THE COURT: Okay.

20 MR. LI MANDRI: -- We do object to removing
21 the page 455, supervision of Unger, because the
22 information had to come from Mr. Unger that Mr. Downing
23 is conveying. It's in his notes, whether he wrote it
24 for his own benefit to look back or in this case he's
25 getting advice from a supervisor on how to deal with

1 it, it's still clearly information that only could have
2 come from Mr. Unger. That -- and it's prudent of him
3 to seek information from a supervisor. There's all
4 these allegations about him being unlicensed and
5 unqualified. And he was under the supervision of a
6 licensed therapist when problems arose. Now this
7 reflects that fact.

8 And I think it's important to show he's being
9 prudent in that regard. --

10 MS. BENSMAN: Your Honor, if I may to that
11 point, Mr. Downing --

12 THE COURT: Wait a minute, just --

13 MS. BENSMAN: -- didn't testify --

14 THE COURT: -- wait a minute. Was any of
15 this done at trial?

16 MS. BENSMAN: No, none of it.

17 THE COURT: Well how do I know what the
18 answer is?

19 MS. BENSMAN: Exactly.

20 MR. LI MANDRI: Well the -- we were against
21 putting the records into evidence as the --

22 THE COURT: Right.

23 MR. LI MANDRI: -- Court will remember, --

24 THE COURT: Yeah, but what I'm saying is how
25 do I know where -- where did, where did this come from?

1 MR. LI MANDRI: This was part of the notes
2 that were going to be admitted en masse.

3 THE COURT: What -- well what -- who's the
4 supervisor? I didn't hear any of this testimony.

5 MR. LI MANDRI: No, he said two people
6 supervised him. One was Dr. McGreer. And this one
7 apparently was Dr. McGreer. There was another one,
8 Connie someone.

9 THE COURT: So are you saying that this
10 message came from a doctor and not Unger?

11 MR. LI MANDRI: This is --

12 THE COURT: No, I'm asking counsel.

13 MS. BENSMAN: Your Honor, what I'm saying is
14 that I think it's perhaps possible that some of this
15 might reflect Alan Downing's thoughts about Benji
16 Unger. I think it's far more likely that Mr. Downing
17 is reporting his conversation with a supervisor, which
18 could be on general terms in this area. And frankly,
19 if the defendants wanted the fact to be in evidence,
20 that these statements came from Benji Unger, they
21 should have put that into evidence, which they did not.

22 MR. LI MANDRI: Well the plaintiffs did not
23 put a lot of information into evidence, but they -- all
24 the records are still going in. What we have is a
25 situation where they want stuff selectively removed

1 that they just don't happen to like. The stuff that I
2 don't like is going into evidence. And because I'm
3 accepting the Court's ruling on it. So --

4 THE COURT: I don't, I don't have a
5 sufficient reason to redact that. This is part of his
6 records and those that he keeps in the ordinary course
7 of business. I mean, we're putting his records in. I
8 don't have a sufficient record to bar what's here.

9 MS. BENSMAN: Your Honor, in the past this
10 Court has expressed concern for the privacy of third
11 parties. And that is simply --

12 THE COURT: Well but --

13 MS. BENSMAN: -- where we're coming from. We
14 believe we have a duty to our clients.

15 THE COURT: Well I don't know why -- why is
16 this a third party? It's listed at Unger. This
17 information could have come --

18 MS. BENSMAN: His mother is a third party,
19 Your Honor.

20 MR. LI MANDRI: The records are filled with
21 references to the plaintiff's relationship --

22 THE COURT: It's not anything --

23 MR. LI MANDRI: -- with his parents.

24 THE COURT: -- his mother said. It's did he
25 respond. It doesn't say what his mother did. Not a --

1 MS. BENSMAN: Understood, Your Honor.

2 THE COURT: I don't have a record to do that.
3 You don't have any problem with the father's
4 conversation you said.

5 MR. LI MANDRI: No, because --

6 THE COURT: Okay.

7 MR. LI MANDRI: -- I think the Court ruled on
8 that.

9 THE COURT: No, no, that's fine. And the
10 text message, this number is out, --

11 MR. LI MANDRI: Right.

12 THE COURT: -- 011.

13 MR. LI MANDRI: Right.

14 MS. BENSMAN: Your Honor, if I may, I believe
15 that the redactions we proposed on the pages with the
16 numbers 458 and 474 are of a different nature and
17 really --

18 THE COURT: All right. 458 is did she go
19 through postpartum depression, who, the mother?

20 MS. BENSMAN: His mother. It says mother at
21 the top with an underline. So --

22 MR. LI MANDRI: Well again, a family history
23 of depression when you have somebody making a claim.
24 And I specifically asked Dr. Phillipson was it
25 significant that the mother had OCD and anxiety and he

1 said it could be. --
2 THE COURT: Yeah, but that's not OCD.
3 That's, that's -- he's asking about postpartum
4 depression. I don't know why that's relevant.
5 MR. LI MANDRI: I don't know either. But
6 it's --
7 THE COURT: He's got here --
8 MS. BENSMAN: Your Honor, if counsel agrees
9 --
10 MR. LI MANDRI: -- part of the record.
11 MS. BENSMAN: -- that it's not relevant, I
12 don't understand why --
13 THE COURT: Yeah.
14 MS. BENSMAN: -- we can't redact it to
15 protect Mr. Unger's mother's privacy.
16 THE COURT: Why can't we protect the mother
17 from postpartum depression?
18 MR. LI MANDRI: Fine, that's fine.
19 THE COURT: Because you have the other stuff
20 here, where Ben's saying it was a horrible marriage.
21 You have all of the stuff you need. You don't need
22 postpartum depression.
23 MR. LI MANDRI: I'll accept that, Your Honor.
24 MS. BENSMAN: Thank you.
25 THE COURT: And then on 474.

1 MS. BENSMAN: Similar concerns, Your Honor.
2 MR. LI MANDRI: Well molested by uncle at age
3 five or six.
4 THE COURT: No, isn't that -- that's -- isn't
5 that Levin?
6 MS. BENSMAN: It's under mom Anita. And then
7 this information in the box is what we would say
8 doesn't --
9 THE COURT: Well then --
10 MS. BENSMAN: -- pertain to them.
11 THE COURT: -- why don't we redact "mom" and
12 "Anita".
13 MS. BENSMAN: That, that would misleading,
14 Your Honor. Then the jury might conclude that that
15 note refers to Mr. Unger.
16 THE COURT: Well isn't, isn't -- haven't we
17 testified that he was molested by an uncle at --
18 MS. BENSMAN: No, Your Honor, that's Chaim
19 Levin.
20 THE COURT: Oh, I'm sorry. Who's -- oh, this
21 is Ben Unger.
22 MS. BENSMAN: Yes, I'm sorry, this is
23 Benjamin Unger. --
24 THE COURT: Oh.
25 MS. BENSMAN: -- I apologize if I was

1 confusing.
2 THE COURT: Okay.
3 MR. LI MANDRI: No, I -- well who was
4 molested by --
5 MS. BENSMAN: His mother, that's --
6 THE COURT: Levin was. --
7 MS. BENSMAN: -- what the note says.
8 MR. LI MANDRI: Yeah, but --
9 THE COURT: -- This was mom and --
10 MR. LI MANDRI: So apparently he's saying the
11 mother was molested by the uncle at --
12 THE COURT: Yeah, --
13 MR. LI MANDRI: -- age five or six.
14 THE COURT: -- I don't think we should have
15 that there.
16 MR. LI MANDRI: I don't object.
17 THE COURT: You have what was testified to,
18 that the mom had OCD. That stays there. We'll take
19 out --
20 MS. BENSMAN: Yes, exactly.
21 THE COURT: -- we'll take out the post -- and
22 what's the last one?
23 MS. BENSMAN: The second box on this page is
24 also just information that's personal to Mr. Unger's
25 mother, aunt and grandmother. And again, not the

1 subject of questioning. We haven't redacted anything
2 that a witness was actually asked about.
3 THE COURT: (Indiscernible) towards Anita.
4 Anita is the mother?
5 MS. BENSMAN: Yes, Your Honor.
6 MR. LI MANDRI: I don't object.
7 THE COURT: Okay. And then 489 is --
8 MR. LI MANDRI: Well gee, this looks directly
9 relevant.
10 MS. BENSMAN: It's a different stepsister and
11 --
12 MR. LI MANDRI: So what?
13 MS. BENSMAN: Well it could potentially be
14 embarrassing to her.
15 MR. LI MANDRI: Your Honor, there has been --
16 THE COURT: I can't -- no, you don't -- I'm
17 not --
18 MS. BENSMAN: Okay.
19 THE COURT: -- going to redact that. That,
20 that's --
21 MS. BENSMAN: Understood.
22 THE COURT: -- that's not -- I can't --
23 that's not --
24 MS. BENSMAN: We will remove that redaction.
25 We thought it might be misleading because it was not

1 the same person.

2 THE COURT: Well I mean, it's a note that was
3 listed there. And I don't think there's -- I don't
4 think that's something that -- there's no names
5 mentioned in it, so it's not the same thing.

6 MS. BENSMAN: Understood, Your Honor.

7 THE COURT: All right.

8 MS. BENSMAN: Thank you very much. We will
9 revise our redactions accordingly.

10 THE COURT: Take care of them. Okay.

11 MS. BENSMAN: And submit a revised version of
12 that exhibit.

13 THE COURT: Please.

14 MS. BENSMAN: Separately that means that
15 nearly all of the exhibits that have been shown to a
16 witness so far have been ruled upon. --

17 THE COURT: All right.

18 MS. BENSMAN: -- There's a small set of
19 exhibits to which the parties are trying to work out
20 redactions --

21 THE COURT: Okay.

22 MS. BENSMAN: -- because portions of the
23 documents reflect hearsay and were not shown. But
24 apart from those, we're very close to being caught up.

25 THE COURT: Very good. All right, so what

1 did we say -- we told the jury 9:30 Monday?

2 MS. BENSMAN: Yes.

3 THE COURT: Do you want to come in at 9:00
4 and just finish up the charge and the verdict sheet?

5 Counsel, is that all right? Do you want to
6 come in at 9:00 and just give you an opportunity to
7 read the verdict sheet and try and see if we can finish
8 that on Monday at 9:00?

9 MR. LI MANDRI: 9:00, Your Honor. And Mr.
10 Wyler will be Tuesday at 9:00?

11 THE COURT: Yes.

12 MR. LI MANDRI: Okay. Did have an unresolved
13 issue regarding Sheldon Bruck, the letters from the
14 father or not?

15 MS. BENSMAN: Yes, thank you actually, thank
16 you, Mr. LiMandri for reminding me.

17 I'm sorry, Your Honor, I forgot that there is
18 one additional issue. Plaintiffs have suggested
19 redactions to two exhibits to which the defendants have
20 objected on hearsay grounds. We have attempted to
21 redact all of the portions of these two documents that
22 were not the subject of questioning. But the
23 defendants did not agree to those redactions.

24 Mr. LiMandri, I have a copy for you.

25 MR. LI MANDRI: Thank you. I believe Your --

1 correct me if I'm wrong. I believe Your Honor ruled
2 that these were hearsay and not admissible. And that
3 counsel was to confer as to whether or not we'd agree
4 to redactions.

5 And I'm sorry, I don't agree to the
6 redactions. Because what I most objected to in the --
7 as far as the hearsay goes was not redacted. That Mr.
8 Bruck wrote his father, saying that JONAH considers
9 homosexuality a psychological disorder. It's double
10 hearsay. It's the letter's hearsay and him telling his
11 father what he thinks my client thinks, is just fraught
12 with complications.

13 And my understanding was the Court ruled that
14 that was inadmissible hearsay unless I agree to the
15 redaction. And they left that in. So I don't agree to
16 -- they redacted everything but the one thing I most
17 objected to.

18 And the English composition, I had a problem
19 with them talking about how they would use -- again,
20 psychological illness shows up in Mr. Bruck's English
21 composition, which he said was not specifically related
22 to JONAH, because he also talked about people putting
23 ammonia in his nose when they tell him to close his
24 eyes and think about other men, which never happened.
25 And that is also left here. That's one of the things I

1 specifically objected to.

2 And again, they've redacted -- and I don't
3 mean to be saying it in an offensive manner. But it
4 seems to me they redacted everything except the things
5 I was most concerning (sic).

6 So no, I, I can't accept these, Your Honor.
7 I believe your prior ruling that they constitute
8 inadmissible hearsay, is just scant.

9 THE COURT: Well this composition was written
10 in 2010, October 20, 2010. So it's certainly not a
11 present sense impression. Why would this go -- how
12 does this get in under the hearsay rule? He's had much
13 time to think about this and write this composition
14 note in October 20, 2010. When did he leave JONAH?

15 MS. BENSMAN: I believe it was in January
16 2009. Your Honor, with respect to both of these
17 documents --

18 THE COURT: No, stay with one. How does, how
19 does the composition get around the hearsay rule?

20 MS. BENSMAN: With regard to the composition,
21 but also with both documents, the specific words that
22 are used are significant. And again, --

23 THE COURT: I agree they're significant.
24 That doesn't -- that's not an exception to the hearsay,
25 whether they're significant. How does this get around

1 the hearsay rule, this English composition?

2 MS. BENSMAN: Well --

3 THE COURT: You're offering it for the truth
4 of the matter asserted. There's no other reason to
5 offer this. It's not being offered to prove that he
6 wrote a composition. And he says in here JONAH claims
7 that homosexuality is psychological and that it can be
8 fixed through reparative therapy, therapy.

9 MS. BENSMAN: Yes, Your Honor, and his use of
10 those words is significant for two reasons. The first
11 is it's a prior consistent statement on an issue on
12 which the defendants attempted to impeach Mr. Bruck.

13 And second, the defendants have repeatedly
14 put into issue this idea that a gay activist conspiracy
15 has recruited and brainwashed the plaintiffs. This SSA
16 predates any contact that Mr. Bruck had with the puppet
17 masters. And so it reflects that he had already come
18 to certain conclusions and used certain language and
19 remembered things a certain way.

20 And by putting into issue this idea that the
21 plaintiffs were happy until somebody from Jewish Queer
22 Youth got their tendrils into their mind, this refutes
23 that.

24 MR. LI MANDRI: It's still hearsay, Your
25 Honor.

1 THE COURT: It's still hearsay. And I don't
2 think that that's an exception to the hearsay. I think
3 it's done too far after the fact. It's -- while I
4 understand your argument, I just think that it doesn't
5 to me fit an exception to the hearsay rule.

6 MS. BENSMAN: But, Your Honor, a prior
7 consistent statement is an exception to the hearsay
8 rule.

9 MR. LI MANDRI: It's, it's not --

10 THE COURT: Yeah, but it's not really a prior
11 consistent statement. It's a composition written two
12 and a half years later.

13 MS. BENSMAN: Yes, but the present sense
14 impression rule doesn't apply to the prior consistent
15 statement. It doesn't need to be --

16 THE COURT: No, but why, why -- you -- but a
17 prior consistent statement in and of itself isn't,
18 isn't automatically an exception to the hearsay rule.

19 MS. BENSMAN: I just wanted to impeach, Your
20 Honor.

21 MR. LI MANDRI: He also said that this was
22 not intended to be taken as accurate. He said it was a
23 composition and that's why -- what he --

24 THE COURT: Yeah, well apart from that, I
25 don't think -- I mean, I'll look at it. I don't, I

1 don't think so.

2 MR. LI MANDRI: It's, it's not -- besides,
3 it's not a prior consistent statement when they're
4 trying to use what he's saying my client said. That
5 would be a prior inconsistent statement by my client,
6 --

7 THE COURT: Okay.

8 MR. LI MANDRI: -- but my client didn't use
9 the words. So this is not even a prior consistent
10 statement. He's, he's trying to put words into my
11 client's mouth that my client --

12 THE COURT: All right, wait, wait, wait, can
13 I just --

14 MR. LI MANDRI: Sure.

15 THE COURT: All right. You're arguing then
16 under 803(a)(2), prior statement of a witness:

17 "A statement previously made by a person who
18 is a witness at a trial or hearing, providing it would
19 have been admissible if made by the declarant while
20 testifying."

21 And the statement in number three says -- in
22 number two "... is consistent with the witness'
23 testimony and is offered to rebut an express or implied
24 charge against the witness of recent fabrication or
25 improper influential motive."

1 Is that what you're saying on it?

2 MS. BENSMAN: Exactly, Your Honor.

3 THE COURT: Sounds good to me, Counsel.

4 MR. LI MANDRI: It's not even -- one, it's
5 not recent and two, --

6 THE COURT: It doesn't say recent. It just
7 says a statement previously made.

8 MR. LI MANDRI: There's two levels of hearsay
9 though. The letter itself is hearsay. And then you've
10 got to separately analyze the more problematic level of
11 hearsay, where he supposedly is, is saying JONAH
12 claimed --

13 THE COURT: Yes, but, Counsel, it's
14 consistent with the testimony and is offered to rebut
15 an express or implied charge against the witness of
16 recent fabrication or improper influence or motive.
17 And that's exactly what you've done in the case. --

18 MR. LI MANDRI: And we have a bigger --

19 THE COURT: -- And I'll allow it.

20 MR. LI MANDRI: -- problem, Your Honor. He
21 said it was not an accurate rendition of anything. It
22 was an English composition. When I asked him why did
23 you --

24 THE COURT: Well the jury will determine
25 that. I'll allow the document.

1 MS. BENSMAN: Thank you, Your Honor. As to
2 P-20, we would make the same argument.

3 THE COURT: The same argument. But also,
4 wasn't this done right about the --

5 MS. BENSMAN: Exactly. It's also much --

6 THE COURT: Yeah.

7 MS. BENSMAN: -- in time.

8 THE COURT: Yes.

9 MR. LI MANDRI: There -- but he's not even
10 attributing the statement to my client. He's saying
11 they believe.

12 THE COURT: Yeah, JONAH. "JONAH is an
13 organization for gay Jews who are struggling. They
14 believe --

15 MR. LI MANDRI: But there's --

16 THE COURT: -- that being gay is a
17 psychological order (sic). And they have helped many
18 people overcome this disorder."

19 MR. LI MANDRI: It's nowhere on their website
20 and nowhere in any e-mail that my clients have ever
21 said they call it a psy --

22 THE COURT: Counsel, it's not a question of
23 that. The question is Mr. Unger testified under oath
24 that this is what Goldberg told him. The jury is
25 either going to believe him or they're not going to

1 believe him. You've challenged his motives. He has a
2 right -- and I think I've read the rule. I agree with
3 them. Under that evidence rule they're admissible.

4 Please tell me that's it.

5 MS. BENSMAN: From our side, Your Honor.

6 THE COURT: Thank you. So Monday morning
7 we'll address the charge and the questions. Have a
8 nice weekend, everybody.

9 MR. LI MANDRI: Thank you, Your Honor.

10 MR. MC COY: Thank you, Your Honor, you too.

11 MR. BROMLEY: Thank you, Your Honor, you too.

12 MS. BENSMAN: Thank you, Your Honor.

13 (Proceedings adjourned to 6-22-15)
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CERTIFICATION

I, Mary Nelson, the assigned transcriber, do hereby certify the foregoing Transcript of Proceedings in the Hudson County Superior Court, Law Division, on June 19, 2015 and recorded on CD 6/19/15 from 3:59 to 4:26, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

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