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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

World Wide Association of Specialty Programs, a Utah Corporation, Plaintiff, v. PURE, Inc., PURE Foundation, Inc. Sue Scheff, Jeff Berryman, Barbe Stamp, Donna Hedrick and Does I through 10, Defendants.	**REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE** Case Number:2:02-cv-00010PGC Judge Paul G. Cassell

COME NOW, Sue Scheff, Parents Universal Resource Experts, Inc. (PURE) and Jeff Berryman, by and through counsel and respectfully submit this Reply Memorandum to Plaintiff's Opposition to Defendants' Motions In Limine.

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ARGUMENT

I. IT IS PROPER FOR THE COURT TO ENTER AN ORDER PROHIBITING EVIDENCE OF INSURANCE UNLESS JUSTIFICATION FOR ANY SUCH EVIDENCE IS EXPLAINED BY THE PLAINTIFF.

The parties appear to be in agreement that evidence regarding insurance coverage should not be admitted at trial. However Defendants object to a blanket order. The Court should order that evidence of insurance should be excluded from trial and if the Plaintiff determines that there is a need for the introduction of this evidence they should request the Court's permission for the introduction of that evidence before it will be allowed.

II. PRIVATE DETAILS ABOUT SCHEFF'S PRIOR PERSONAL FAMILY HISTORY ARE HIGHLY PREJUDICIAL NOT RELEVANT AND SHOULD BE EXCLUDED.

The Plaintiff claims that because Sue Scheff published "A Parents True Story" that they are somehow entitled to delve into all of the details of Sue Scheff's personal family history including her relationship with her children. Sue Scheff does not dispute that she published her "True Story" but does dispute that disclosing select details about her experience with WWASP and her daughters experience at Carolina Springs Academy somehow makes her prior family history relevant to this case. WWASP points to Sue Scheff's stated opinions that after her daughter came home from Carolina Springs that she heard unspeakable stories that she was abused at Carolina Springs and she has been suffering from depression and nightmares from her stay at Carolina Springs. These statements are opinions and are not defamatory as a matter of law.

However, WWASP claims that they should be entitled to present evidence that Ashlyn Scheff has psychological problems from a number of causes, which lead to her enrollment at Carolina Springs Academy. The Plaintiff claims that it should be able to introduce specific evidence of her Sue Scheff's divorce, Ashlyn's separation from her father, Ashlyn's father's alcoholism, Ashlyn's experimentation with alcohol, Ashlyn's difficulty in school, suicidal thoughts and a strained relationship with her mother. The Plaintiff claims that these factors demonstrate that WWASP did not cause Ashlyn Scheff's problems. WWASP has never identified or named any psychologist or expert that would testify as to the causation of Ashlyn's Scheff's psychological problems. In fact the Plaintiff has never retained an expert witness that has reviewed all the relevant facts and that will state that Ashlyn Scheff's problems were not caused by Carolina Springs Academy. Therefore discussions of Ashlyn's parents divorce, her father's alcoholism, her experimentation with alcohol, trouble in school, depression, suicidal thoughts and fights with her mother are highly inflammatory and not probative and should be excluded from the trial.

Additionally, WWASP claims that it should be able to introduce similar information about Sue Scheff's son, who is currently attending a military academy. Once again WWASP does not have any expert testimony to testify as to any causation of any alleged problems. Additionally whether or not Sue Scheff's son had any kind of personal problems is not relevant to the issues in this case. The Plaintiff is attempting to interject expert

opinions regarding causation of claimed psychological problems of Scheff's children but does not have an appropriate expert witness to provide testimony to support its claims. Therefore this evidence is only designed to inflame and prejudice the jury against Sue Scheff because of her prior family history.

WWASP specifically points to a documents reportedly written by Ashlyn Scheff in which she reports that her mother hit her in the face and grabbed her by the neck. The document reportedly authored by Ashlyn Scheff is hearsay and highly inflammatory and prejudicial. It is not relevant and will only be used by the Plaintiff to improperly influence the passions of the jury.

Finally, WWASP claims that it should be allowed to introduce evidence about her son simply because he is enrolled in a program to which PURE refers. The fact that Sue Scheff refers to the Oak Ridge Military Academy is not disputed and is not an issue in this case. Furthermore, Oak Ridge is a very different school than the WWASP behavior modification and residential treatment centers. Oak Ridge accepts children based on academic testing and it seeks children with above average to average academic ability and does not modify its academic curriculum or behavioral standards for young people with special needs. (See Admissions and General Information, attached as Exhibit "A") Thus Oak Ridge is completely different from and not a competitor of WWASP schools. Any documents demonstrating that Sue Scheff referred parents to Oak Ridge or other programs are not relevant.

III. IRRELEVANT STATEMENTS MADE BY JEFF BERRYMAN MADE ABOUT HIS PAST HISTORY AND PERSONAL ACTIVITIES ARE NOT PROBATIVE AND SHOULD BE EXCLUDED.

The Plaintiff claims that it should be able to introduce statements that Jeff Berryman described himself as an activist. Jeff Berryman does not dispute that he made that description of himself but it is not relevant or probative to any issues in this case. WWASP does not claim that this statement is false or defamatory but merely attempts to inflame prejudices toward Jeff Berryman. In particular WWASP points to a document proportedly written by Jeff Berryman in which he states that he has FBI, CIA, and KGB files that are shocking and that he believed there was a possibility that he had some political influence in the closing of the Morova Academy. Jeff Berryman's beliefs about his political history and influence are not at issue in this case and are not relevant. WWASP suggests that these statements are tied to Jeff Berryman's mental health. The Plaintiff does not have an expert witness that will testify as to Mr. Berryman's mental health condition and these prejudicial statements do nothing to resolve any issues at dispute in this trial.

WWASP also claims that it should be able to show that Sue Scheff unreasonably relied upon Mr. Berryman. Yet WWASP has not pointed to anything that demonstrates that Sue Scheff relied upon Mr. Berryman in providing information about WWASP and its programs. Finally WWASP does not have any evidence to demonstrate that Sue Scheff knew that Mr. Berryman was unreliable.

WWASP claims that Jeff Berryman's past history is relevant to its claim of Civil Conspiracy. The fact that Jeff Berryman stated that he had a girlfriend who was a victim of institutional child abuse and that 30 years ago his father tried to put him in Provo Canyon School have nothing to do with WWASP's claims of Civil Conspiracy, instead these statements are prejudicial and should be excluded.

IV. DOCUMENTS PURPORTING TO HAVE INFORMATION RELATING TO WWASP CUSTOMERS ARE UNRELIABLE HEARSAY AND NOT RELEVANT AND SHOULD BE EXCLUDED.

The Plaintiff has identified as an exhibit a group of documents that have lost customer information. These documents include Emails and any of these documents that are Emails or that contain Emails are hearsay and are not admissible. These Emails do not fall within the business records exception claimed by WWASP. The next type of document WWASP claims is admissible are records from its DAQE database. WWASP claims that under Federal Rule of Evidence 803(6) these are admissible as routine business records. These records are not admissible under Rule 803(6) because the rule requires that the source of information or the method or circumstances of preparation be trustworthy and reliable. In this case any such records that state that someone decided not to go to a WWASP or Teen Help program because of PURE would equate to a self serving affidavit that lacks any indicia of reliability. Jean Foye admitted in her deposition that when someone states that they have seen any negative website, her representatives automatically include that person on the list of individuals who did not go to WWASP

because of PURE's efforts. (See First Deposition of Jean Foye, pg. 28 Ln. 9-14, attached as Exhibit "B".) Thus for any individual who saw any negative website and reported this to Teen Help, the Teen Help representative may record that the person decided not to attend WWASP because of PURE. This indicates that these records are unreliable and not trustworthy and cannot therefore be admitted under the business records exception to the hearsay rule. Finally any such records demonstrating lost customer information are not relevant because WWASP has dropped its claims for lost sales and lost profits and is not seeking to recover damages for those lost sales. (See Second Deposition of Kenneth Kay, pg. 39 Ln. 17 to pg. 40 Ln. 12, attached as Exhibit "C".)

V. EXPERT TESTIMONY FROM PLAINTIFF'S PROPOSED EXPERT WITNESSES SHOULD BE EXCLUDED BECAUSE THE DESIGNATION OF THESE WITNESSES IS UNTIMELY AND PREJUDICIAL TO THE DEFENDANTS.

WWASP provided no notice that it intended to call Kenneth Kay, Karr Farnsworth, Robert Litchfield, Wanda Jo Tuttle, Kevin Richey, Enid Brown, Jean Foye, Jane Hawley, Elaine Davis, Lauren Staudt, Lon Woodbury, Randy Cook and Lisa Irvin as potential expert witnesses until after discovering cutoff, expert discovery cutoff and after the deadline for the disclosure of witnesses. Although the Defendants took the depositions of all but two of the above named individuals, the Plaintiff did not disclose that it would seek to use these individuals to provide expert testimony and the foundation for that testimony and therefore

the Defendants had no opportunity to prepare for or question the proposed witnesses regarding any expert testimony that the individual may provide.

Furthermore the Plaintiff has not designated the subject matter of the proposed expert testimony that may be offered by these witnesses. The case cited by the Defendants Wreath v. United States, 161 FRD 448 (D. Kansas 1995) indicates that although in some cases a treating physician may not have to provide an expert report, the determinative issue is the scope of the proposed testimony. Id at 450. Additionally the case indicates that even if an expert witness is not required to provide a report under Rule 26(a)(2)(b) the deposition of any individual identified as an expert witness may be taken even if a report is not required. Id The case does not stand for the proposition that a Plaintiff may wait until after the discovery cutoff and the expert discovery cutoff to designate its expert witnesses. Because the Defendants do not have the opportunity to prepare for this proposed expert testimony these individuals should not be allowed to provide expert testimony.

VI. JACK WILLIAMS' EXPERT TESTIMONY CANNOT MEET THE REQUIREMENTS OF RULE 702 IN DAUBERT.

Plaintiffs agree that Mr. Williams should be precluded from testifying on the arguments listed as I -2 and 4 - 5 in Defendants' Memorandum in Support of Motion in Limine to Exclude Expert Witness Jack Williams. They attempt to show that Mr. Williams should be able to testify about Opinion 3 that youth and parents often bring allegations to

strike back at the program and that "false information of abuse or mistreatment published to parents concerning a program is most damaging at the point that parent is investigating programs for their child." Neither Opinion 3 nor this opinion meet the requirements of Rule 702 or Daubert.

Where a witness is relying primarily upon experience, that witness must "explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for that opinion, and how that experience is reliably applied to the facts." United States v. Fredette, 315 F.3d 1235, 1240 (10th Cir. 2003) (quoting Fed. R. Evid. 702 Advisory Committee's notes). Mr. Williams' testimony does not meet these requirements for his opinion that false information of abuse is most damaging at the point that a parent is investigating programs for their child. In his deposition, Mr. Williams admits there is no way to measure if false information of abuse is most damaging at the point the parent is investigating the school. (See Deposition of Jack Williams, p. 43, line 21 - p. 44, line 15, attached as Exhibit "D".) He also admits that this scenario has not happened to him at Cinnamon Hills. Id. Mr. Williams does not apply this opinion reliably to the facts of the case because he admitted that he is completely unaware of the facts of the case. "My knowledge of the case itself is about – as close to zero as you could imagine, I don't know anything about the case itself." (See Exhibit "D", Williams Depo. p. 6, lines 6-11, p. 14, lines 20-22.) In his deposition he admits he does not know if this scenario occurred in this case.

A: And if you were a parent and you just read People magazine and you called that program, you're an idiot. And if you're that much of an idiot, then I suppose you're going to ask, is this true? But I would think if -- where the devastation comes in is an unexpected way where you innocently call someone who appears to be a professional and then they say, Stay clear of this program because they're bad in this way. That's where it's devastating.
Q: Were you trying to relate that to this case? Do you know if that happened in this case –
A. If it happened, yeah.
Q. So you don't know whether that happened in this case.
A. No, I don't know.

(Exhibit "D", Williams Depo. p. 56, line 17 - p. 57, line 6.

Mr. Williams has no foundation for this opinion because he has no knowledge of the case, and he cannot apply his opinion properly to the facts of the case.

Plaintiff argues that Mr. Williams adequately explained his basis for Opinion No 3 that youth and parents often bring allegations to strike back at the program. However, this opinion still does not meet the standards of Rule 702 or Fredette because Mr. Williams does not know the facts of the case and he cannot reliable apply his experience to the facts of the case.

Plaintiff further argues that Mr. Williams should be allowed to testify under Rule 703. Plaintiff's interpretation of Fed. R. Evid. 703 would make Rule 702 and the United States Supreme Court's reliability requirements for expert testimony under Daubert superfluous and meaningless. It is "well established that Federal Rule of Evidence 702 imposes on a district court a gatekeeper obligation to 'ensure that any and all scientific testimony or

evidence admitted is not only relevant but reliable'." Dodge v. Cotter, 328 F.3d 1212, 1221 (10th Cir. 2003)(quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). Rule 702 and Daubert make it clear that a party proposing an expert needs to make a preliminary showing that the expert is qualified and has a reliable basis for his opinion. Mr. Williams' opinion cannot meet the standards of Rule 702 and Daubert and, therefore, all his opinions should be excluded.

VII. DR. GOLDSTEIN SHOULD BE PRECLUDED FROM TESTIFYING UNDER RULE 702 AND DAUBERT.

Plaintiff claims Dr. Goldstein clearly stated that he was not retained as an expert on specialty schools or programs themselves, but rather as an expert on the children enrolled in such schools. Plaintiff offers no citation to support the fact that Dr. Goldstein said he was an expert on children enrolled in specialty schools. Plaintiff also states that Dr. Goldstein is testifying as a clinician and not a forensic expert. This argument is inconsistent with Plaintiff's argument in its Memorandum seeking to exclude Defendants' expert Dr. Hall's testimony. The Plaintiff claimed Dr. Hall should not be allowed to testify as a clinical expert because his opinions were not scientific. The Plaintiff now inconsistently argues that Dr. Goldstein should be allowed to testify because he is giving clinical opinions. The facts remain the same that while Dr. Goldstein does have clinical experience with children with psychological problems, he still has had no contact or experience with children enrolled in specialty programs. (See Exhibit "E", Deposition of Dr.

Goldstein, p. 65, lines 8-16.) Plaintiff insinuates that Dr. Hall's testimony is unreliable because it was based on e-mails. As explained in Defendant's Memorandum in Opposition to Exclude Dr. Hall's Testimony, Dr. Hall had personal contact with many parents and children enrolled in WWASP schools, which included e-mails and telephone calls. Dr. Goldstein on the other hand has had no personal contact with children or parents enrolled at specialty schools through any means of communication.

Plaintiff attempts to rehabilitate Dr. Goldstein's testimony by stating that he is familiar with a number of long-term treatment programs and that he refers patients to two programs in Salt Lake, Turnabout and Lifeline. These programs are not specialty programs like WWASP, because they are non-profit and the staff in both of the programs are licensed. (See Exhibit "E", Deposition of Dr. Goldstein p. 15, line 1 - p. 16, line 1.) Dr. Goldstein testified that he does not have experience with nor does he refer to specialty programs because he doesn't believe that they have licensed people and that they are for profit which raises questions in his mind about their motives. (Id. p. 65, lines 8-16.)

Dr. Goldstein testified he **suspected** his patient population was similar to the patient population of Worldwide member schools. Speculation is not a relilable foundation under Daubert. Expert testimony must be based on "actual knowledge, not subjective believe or unsupported speculation." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993). Plaintiff improperly asserts Dr. Goldstein should be allowed to rely on testimony of principals of WWASP that Worldwide students manifest the same symptoms

of the children Dr. Goldstein treats. Dr. Goldstein had not reviewed any of these statements in preparation for his deposition. (Exhibit "E", Goldstein Depo., p. 4, lines 14-24.) Rule 26 of the Federal Rules of Civil Procedure requires a prior designation of expert witnesses, the expert to prepare a report and explain the foundation, and provide a summary of the grounds for their opinion. Allowing Dr. Goldstein to rely on this testimony would eviscerate the identification and notice requirement of Rule 26 in regard to expert witnesses. This foundation of expert testimony would be the equivalent of undue surprise and would severely prejudice the Defendants as they have not advance notice of his opinions and goes against our systems of Rules of Evidence and Procedure. If this type of testimony were allowed, the other party would not become aware until trial who or about what an expert was going to testify. By waiting until the trial to provide his foundation and his opinions, Dr. Goldstein's opinions will be substantially different than in his report and deposition. This would also preclude a party from deposing an expert to question the expert about the foundation for his testimony. Rule 702 and Daubert require an expert to disclose a foundation and summary of the grounds of their opinion in his report. Dr. Goldstein's testimony does not meet the requirements of Rule 702 and Daubert and, therefore, should be excluded.

DATED this 12 day of July, 2004.

Aaron W. Flater
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on this 12 day of July, 2004 a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION IN LIMINE,** was mailed, postage prepaid, to the following:

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