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6 UNITED STATES DISTRICT COURT
7 FOR THE CENTRAL DISTRICT OF CALIFORNIA

9 AARON BENAY, an individual,
10 MATTHEW BENAY, an individual

11 Plaintiffs,

12 vs.

13 WARNER BROS. ENTERTAINMENT,
INC., a Delaware corporation, RADAR
14 PICTURES, INC., a California corporation,
BEDFORD FALLS PRODUCTIONS, INC.,
15 a California corporation, EDWARD ZWICK,
an individual, MARSHALL HERSKOVITZ,
16 an individual, JOHN LOGAN, an individual,
and DOES 1 through 10.

17 Defendants.
18

Case No.: CV05-8508 PSG
(FMOx)

**EVIDENTIARY OBJECTION
TO DECLARATION OF
JULIE HOWENSTINE;
DECLARATION OF JOHN
MARDER**

Date: February 6, 2012
Time: 1:30 p.m.
Ctm: 880

Honorable Phillip S. Gutierrez

19 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

20 COME NOW PLAINTIFFS AARON BENAY and MATTHEW BENAY and
21 submit the following objection to Defendants' Declaration of Veterinarian Julie
22 Howesnstine.

- 23 1. The declaration or attachments fail to describe how any of the evidence was
24 gathered or kept sanitized from other sources of DNA. The report simply compares
25 samples of DNA allegedly belonging to the Plaintiffs to documents which there is
26 also no evidence in any way segregated or kept sterile from other sources of DNA.
27 The method of collection is described more fully in the attached John Marder.
28 2. The attachment to the Veterinarian's report also reflects that there was an attempt
to collect the DNA of Plaintiffs Counsel and his Paralegal.

- 1 3. The unscientific collection of DNA in this case was taken from the business cards
2 of the Plaintiffs' Counsel and his paralegal and items the threw in the trash, including
3 a Twixt candy wrapper, a diet coke can, plastic drinking cups and other items offered
4 to the Plaintiffs' counsel by Defendants' counsel as a trick to obtain their DNA.
- 5 4. The declaration does not describe whether there is any evidence linking Plaintiffs'
6 counsel to the suspect documents, thus leaving the conclusion no such opinion could
7 be reached.
- 8 5. Prior to June 13, 2011, the parties came before this Court and the Court set out a
9 specific order regarding what discovery each party was permitted to take. The
10 Plaintiffs volunteered swabs of the mouths of the Benays, but no where did the Court
11 authorize the secret collection of counsel's DNA. (Plaintiffs ask the Court to take
12 judicial notice of the file and the minute order of June 13, 2011)
- 13 6. The Defendants surreptitious collection of the Plaintiffs Counsel's DNA is a
14 violation of the Court's limited order regarding permitted discovery.
- 15 7. The California Civil Code strictly protects a persons DNA and other personal
16 medical information from being taken without their consent.
- 17 8. California Civil Code § 56.35 states:
18 In addition to any other remedies available at law, a patient whose medical
19 information has been used or disclosed in violation of Section 56.10 or 56.104 or
20 56.20 or subdivision (a) of Section 56.26 and who has sustained economic loss or
21 personal injury therefrom may recover compensatory damages, punitive damages not
22 to exceed three thousand dollars (\$3,000), attorneys' fees not to exceed one thousand
23 dollars (\$1,000), and the costs of litigation.
- 24 9. The right of privacy is protected by the penumbras of the Federal Constitution and
25 by Cal. Const. art. I, §
- 26 10. California Civil Code § 56 is entitled *the Confidentiality of Medical Information*
27 *Act*.
- 28 11. California Civil Code § 56.17 is entitled *Disclosure of genetic test results*

1 It states in section (c):

2 (c) Any person who willfully discloses the results of a test for a genetic characteristic
3 to any third party in a manner that identifies or provides identifying characteristics of
4 the person to whom the test results apply, except pursuant to a written authorization
5 as described in subdivision (g), shall be assessed a civil penalty in an amount not less
6 than one thousand dollars (\$1,000) and no more than five thousand dollars (\$5,000)
7 plus court costs, as determined by the court, which penalty and costs shall be paid to
8 the subject of the test.

9 (f) Each disclosure made in violation of this section is a separate and actionable
10 offense.

11 12. Code of Civil Procedure § 56.35 states:

12 In addition to any other remedies available at law, a patient whose medical
13 information has been used or disclosed in violation of Section 56.10 or 56.104 or
14 56.20 or subdivision (a) of Section 56.26 and who has sustained economic loss or
15 personal injury therefrom may recover compensatory damages, punitive damages not
16 to exceed three thousand dollars (\$3,000), attorneys' fees not to exceed one thousand
17 dollars (\$1,000), and the costs of litigation.

18 13. California Civil Code § 56.36 states:

19 (a) Any violation of the provisions of this part that results in economic loss or
20 personal injury to a patient is punishable as a misdemeanor.

21 (b) In addition to any other remedies available at law, any individual may bring an
22 action against any person or entity who has negligently released confidential
23 information or records concerning him or her in violation of this part, for either or
24 both of the following:

25 (1) Nominal damages of one thousand dollars (\$1,000). In order to recover under this
26 paragraph, it shall not be necessary that the plaintiff suffered or was threatened with
27 actual damages.

28 (2) The amount of actual damages, if any, sustained by the patient.

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(c)

(1) In addition, any person or entity that negligently discloses medical information in violation of the provisions of this part shall also be liable, irrespective of the amount of damages suffered by the patient as a result of that violation, for an administrative fine or civil penalty not to exceed two thousand five hundred dollars (\$2,500) per violation.

(2)

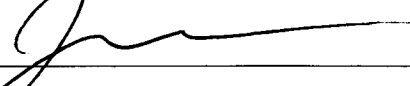
(A) Any person or entity, other than a licensed health care professional, who knowingly and willfully obtains, discloses, or uses medical information in violation of this part shall be liable for an administrative fine or civil penalty not to exceed twenty-five thousand dollars (\$25,000) per violation.

(3)

(A) Any person or entity, other than a licensed health care professional, who knowingly or willfully obtains or uses medical information in violation of this part for the purpose of financial gain shall be liable for an administrative fine or civil penalty not to exceed two hundred fifty thousand dollars (\$250,000) per violation and shall also be subject to disgorgement of any proceeds or other consideration obtained as a result of the violation.

(5) Any person or entity who is not permitted to receive medical information pursuant to this part and who knowingly and willfully obtains, discloses, or uses medical information without written authorization from the patient shall be liable for a civil penalty not to exceed two hundred fifty thousand dollars (\$250,000) per violation.

In conclusion, the Declaration of Julie Howerstine is not admissible and should not be consider as evidence for the reasons stated above.

By: 
John A. Marder, Esq.
Attorneys for Plaintiffs
Aaron and Matthew Benay

DECLARATION OF JOHN MARDER

I, John Marder, declare that:

1. I am an attorney at law licensed to practice before all of the courts of the State of California and am an attorney with the law firm of Marder, Zink & Karlzen LLP, attorneys for Plaintiffs Aaron and Matthew Benay. The matters contained in this declaration are known to me personally, and if called upon as a witness, I could and would testify competently to them.

2. I was present when the Benays mouths were swabbed. The task was done by Defendants' Counsel Brian Finkelstien and no where in the record is it stated he has any qualifications to collect DNA samples.

3. His method opened the samples to extensive exposure to contamination. He handed the Plaintiffs Q-Tips, which they put in their mouth and then Mr. Finkelstein took the Q-Tips with his hand and stuck them in dixie cups, open to the air sitting on the conference room table.

4. The swabs went by an unknown means to a sealed container which was shipped to the Defendants expert veterinarian. She compared them to samples of the anonymous documents.

5. There is no testimony where those documents had been stored or what contamination they were exposed to. They could have been opened and placed in redwells right next to documents produced by the Benays, as

far as the testimony shows.

6. Apparently in violation of the Court's order of discovery and in violation of my privacy and in violation of the California Civil Code, without informing me, asking me, or in other manner obtaining my consent, the Defendants stole my DNA from objects thrown in trash cans. These were items supposedly offered by the Defendants as snacks during a deposition, while harboring the secret intent of collecting my DNA illegally.

7. The Defendants have now filed with the Court reports which provide exhaustive personal information regarding my DNA, the most private medical information imaginable.

8. None of the reported results indicate that either of the Benays had anything to do with the documents in question and the haphazard collection method allegedly places them in a large percentile of individual who could be responsible and make no match that determines anything to a medical certainty.

9. For all the reasons stated above, the reports should be removed from the Court file, all copies should be returned to the Plaintiffs and no further circulation of the documents should be permitted.

10. The Court should also issue a stern sanction against the Defendants for their illegal collection and publication of my private DNA information.

11. The act of stealing opposing counsel's DNA, without his consent and in direct violation of this Court's discovery order is deserving of the most serious sanction the Court thinks is appropriate.

12. The Plaintiffs and I would recommend sanctions ranging from incarceration to money sanctions to issue preclusion.

13. In my 30 years of practice, I have never had opposing counsel violate my privacy to this degree and as it turns out, it yielded nothing of use.

14. I believe it would be appropriate to preclude Defendants from putting on any evidence that they obtained the Plaintiffs screenplay or used it.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 2nd day of February, 2012 at Culver City, California.



John Marder