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September 27, 2006

Dianne Hill, Clerk
York County Superior Court
P.O. Box 160
Alfred, ME 04002

RE: The Gentle Wind Project, et al. v. Judy Garvey, et al.

Dear Ms. Hill:

I enclose for filing Memorandum of Defendants James Bergin and Judy Garvey in Opposition to Plaintiffs' Motion *In Limine* to Exclude Consent Decree.

Thank you for your attention to this matter.

Sincerely,


 Jerrold A. Crouter

Copies to:

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Contract Management

Kevin Chapman,
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Christopher J. O'Neil,
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* Admitted in Maine
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JAC/tu

cc: James Bergin
Judy Garvey
Mary Miller
Shelby Miller
Carol Miller
Juan Carreira
Pam Ranheim
John Miller

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-06-11

THE GENTLE WIND PROJECT,)
et al.,)
)
Plaintiffs,)
)
)
)
JUDY GARVEY, et al.,)
)
Defendants.)

MEMORANDUM OF DEFENDANTS JAMES BERGIN AND
JUDY GARVEY IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE*
TO EXCLUDE CONSENT DECREE

In their motion *in limine*, Plaintiffs seek to exclude any reference at trial – either by way of documentary or testimonial evidence – to the Consent Decree and Order dated August 15, 2006 in the case of *State of Maine, et al. v. Gentle Wind Project, et al.*, York County Superior Court Docket No. CV-06-221. The Consent Decree contains express admissions by Plaintiffs that they violated Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 207, by making false representations concerning the health benefits of "healing instruments" sold by Plaintiff Gentle Wind Project ("GWP") and concerning the scientific testing of such products. The Consent Decree and Order also contains express admissions that Plaintiffs breached their fiduciary duties relating to the record keeping and finances of GWP. Contrary to Plaintiff's argument that these admissions should be excluded either on the grounds of relevance or Me.R.Evid. 403, Plaintiffs admissions are directly related and, therefore, highly relevant to their claims against Defendants James

Bergin and Judy Garvey ("Bergin and Garvey") and the counterclaims of Bergin and Garvey against Plaintiffs. Although such evidence is indeed prejudicial to Plaintiff's case, the prejudicial effect of highly probative evidence is not grounds for exclusion. The motion *in limine* should be denied.

DISCUSSION

In this action, Plaintiffs assert claims against Bergin and Garvey for defamation, tortious interference with advantageous relationships, intentional and negligent infliction of emotional distress and invasion of privacy based on the publication by Bergin and Garvey of a number of statements, including that: (1) GWP is a "mind-control cult whose products are 'snake oil' at best, dangerous at worst ..."; (2) Plaintiffs are "intentionally misrepresenting the nature and/or effectiveness of Gentle Wind products for material gain"; and (3) Plaintiffs are "engaging in or causing the misappropriation of Gentle Wind funds." Amended Complaint at ¶ 1. Bergin and Garvey have asserted counterclaims for invasion of privacy and intentional infliction of emotional distress relating to false and defamatory statements made by Plaintiffs concerning Bergin and Garvey.

Plaintiffs' motion *in limine* correctly anticipates that, at trial, Bergin and Garvey will offer testimony and evidence relating to the Consent Decree, including the admissions made by Plaintiffs therein. The request for entry of the Consent Decree was signed by the State and by each of these Plaintiffs. Plaintiffs admit in the Consent Decree, and among other things, that it was they who misrepresented the health benefits of their healing instrument products, and it was they who misrepresented the nature and effectiveness of the products for material gain.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Me R. Evid. 401. It is difficult to conceive of evidence that is more highly relevant to this case than the admissions made by Plaintiffs that they violated Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 207, by making false representations concerning the health benefits of GWP products and concerning the scientific testing of such products. Such evidence directly contradicts GWP's claims against Bergin and Garvey in this case and tends to support the allegations made by Bergin and Garvey concerning GWP, specifically that GWP is a cult whose products are 'snake oil' and that Plaintiffs intentionally misrepresented the nature and/or effectiveness of Gentle Wind products for material gain. In addition, such evidence may also be relevant to Plaintiffs' credibility at trial in denying these and other allegations made by Bergin and Garvey concerning Plaintiffs and GWP.

The admissions by Plaintiffs that they breached their fiduciary duties relating to the record keeping and finances of GWP are highly relevant to the allegedly defamatory statements by Bergin and Garvey that Plaintiffs are "engaging in or causing the misappropriation of Gentle Wind funds." Evidence concerning the misappropriation of funds and faulty bookkeeping and record keeping is also highly relevant to Plaintiffs' damages. Likewise, such evidence may be relevant to Plaintiffs' credibility at trial in denying these and other allegations concerning Plaintiffs and GWP.

The crux of Plaintiffs' Rule 403 argument in this case is that the Consent Decree and admissions are prejudicial to Plaintiffs in this case. Although Plaintiffs are correct

that such evidence is in fact prejudicial to them, they completely misconstrue the purpose of Rule 403 in attempting to use it to exclude this evidence. Rule 403 provides for exclusion of relevant evidence only when the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." As the Law Court found in *State v. Har*, 360 A.2d 525, n.5 (Me. 1976):

It should be emphasized that prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.

See also Field & Murray, *Maine Evidence* at 102 (2000 Ed.). Plaintiff's admissions and the Consent Decree will certainly damage Plaintiff's cause, but there is no unfair prejudice from this highly probative evidence.

CONCLUSION

WHEREFORE, Plaintiff's motion *in limine* should be denied.

Dated: September 27, 2006


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