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Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin,

Plaintiffs,

v.

JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY, LAW DIVISION

Docket No. L-5473-12

CIVIL ACTION

**OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## I. INTRODUCTION

Defendants have filed a motion for partial summary judgment on the basis that "claims for emotional damages are not recoverable" under the Consumer Fraud Act ("CFA"). *See* Brief in Support of Motion for Partial Summary Judgment ("Motion") at 2. The Motion is fundamentally flawed, and should be denied.

First, Plaintiffs do not seek "emotional damages." Rather, Plaintiffs seek two distinct forms of "ascertainable loss": the money spent paying for Defendants' damaging and ineffective conversion therapy services, and the money spent paying legitimate therapists to repair the damage those services caused. Defendants' motion is directed at this second category – the money spent on post-JONAH therapy. But these are not emotional damages. They are *economic* damages in that they are sums of money plaintiffs actually paid on account of Defendants' violations of the CFA. "Emotional damages," by contrast, and by definition, are "non-economic," meaning they are intended to compensate for something *other* than the improper outlay of money caused by a wrongdoer. *See, e.g., Cole v. Laughrey Funeral Home*, 376 N.J. Super. 135, 145 (App. Div. 2005). Plaintiffs decidedly do not seek non-economic "emotional damages"; they seek ascertainable loss in the form of money actually spent. The motion should be denied on that basis alone.

Second, the money spent on post-JONAH therapy constitutes classic "cost of repair damages," recoverable as ascertainable loss under the CFA. This is the rule: when you violate the CFA in providing services that cause damage, you have to pay the cost of repairing the damage. This has been the law in New Jersey for nearly twenty years. *See, e.g., Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 22 (1994) (contractor who performs shoddy kitchen renovation services must pay the cost of repairing the damaged kitchen). Under *Cox* and its progeny, the

contractor who botches a kitchen must pay to repair it. Similarly, conversion therapists who damage young men must pay to repair them.

## II. BACKGROUND AND THE NATURE OF THE DAMAGES AT ISSUE[1]

Defendants provided "conversion therapy" services that were based on the misguided and erroneous belief that being gay is a mental disorder – a position rejected by the American Psychiatric Association four decades ago. Complaint ¶ 4. Conversion therapy has long been discredited and highly criticized by all mainstream mental health and medical professional organizations. *Id.* ¶ 5. One of the reasons that mainstream health organizations have rejected conversion therapy practices is that they pose the risk of significant harm to the person attempting to change his or her orientation. Indeed, the American Psychiatric Association has warned that "[t]he potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient." *Id.*

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[1] Although styled as a motion for "partial summary judgment," Defendants' Motion relies upon no evidence but is instead based entirely on Plaintiffs' allegations. Nor did Plaintiffs attach a statement of material facts which, under Rule 4:46-2(a), is in itself grounds to deny a motion for summary judgment. In fact, Defendants' Motion is in form and substance a motion to dismiss, and therefore the governing standard is that applicable to a motion to dismiss under Rule 4:6-2(e). New Jersey law directs trial courts to approach motions to dismiss "with great caution" and to grant such motions "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989). Motions to dismiss are especially disfavored in cases involving the New Jersey CFA. See, e.g., Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001) ("Where the applicable law is a statute, such as the Consumer Fraud Act, which our courts have consistently held should be given a liberal interpretation in favor of consumers, then the 'generous and hospitable' approach of a R. 4:6-2(e) analysis takes on an even greater significance."). Cf. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002) (in case alleging breach of duty of good faith and fair dealing, not NJCFA, Appellate Division reversed dismissal for failure to state a claim and said "when the legal basis for the claim emanates from a new or evolving legal doctrine, even greater hesitancy is warranted [in granting a motion to dismiss than is otherwise mandated by the cases cited in Seidenberg, which disfavor such motions]").

The services that Defendants provided to Plaintiffs in this case bear out those risks. For example, Defendants based their solicitation and treatment of Plaintiffs on the false premise that gay sexual orientation is a mental disorder or pathology, including representing that homosexuality is "a compulsive behavior" similar to other "sexual conflicts" such as sexual abuse, pedophilia, and incest. Complaint ¶ 39. Defendants' services also included instructions to (1) disrobe in group and private counseling sessions (*id.* ¶¶ 45-48); (2) relive past traumas (including child sexual abuse) (*id.* ¶¶ 50-51); (3) conform to stereotypical masculine characteristics (*id.* ¶ 53); (4) spend more time naked at gyms and bathhouses (*id.* ¶ 54); (5) beat an effigy of a mother (*id.* ¶ 59); and (6) participate in group cuddling sessions with older counselors (*id.* ¶ 60). As an additional part of their conversion therapy services, Defendants repeatedly misrepresented to Plaintiffs that being gay is loathsome and that gay people are more likely to be pedophiles, drug abusers, and alcoholics, and claimed that gay people are all generally lonely, suicidal, and have or will contract HIV/AIDS. *Id.* ¶¶ 61-62.

It is hardly surprising that the techniques Defendants employed took their toll on Plaintiffs. Each of the techniques described above reflects "therapist alignment with societal prejudices against homosexuality [that] may reinforce self-hatred already experienced by the patient." *Id.* ¶ 5 (quoting American Psychiatric Association). The damage resulting from use of these techniques on the Plaintiffs include the following:

- Plaintiff Unger became deeply depressed and suffered impaired ability to engage with men because he had been conditioned by JONAH's services to view such relations as unnatural and based on envy of other men. *Id.* ¶ 72.

- Plaintiff Levin, who had been urged in group session to re-enact his child sexual abuse by allowing a proxy to say things to him such as, "I won't love you anymore if you don't give me blow jobs," suffered distress and shame. *Id.* ¶ 51.
- Plaintiff Bruck was blamed by his counselor for not working hard enough to change, which contributed to feelings of depression, anxiety, and suicidal ideation. *Id.* ¶¶ 93, 95.
- Plaintiff Ferguson was urged in a weekend retreat to participate in a scenario in which he was directed to break through a chain of men in order to reach two oranges that represented his purportedly missing testicles, which reinforced the notion that he was not truly a man. *Id.* ¶ 55.

After Plaintiffs stopped receiving services from JONAH, each of them sought assistance from one or more legitimate counselors, in order to repair the damage done. *See Id.* ¶¶ 73, 85, 98, 108. It is that cost – the amounts paid to legitimate, post-JONAH counselors – that Plaintiffs seek to recover and that is at issue in this motion. *See Id.*,Prayer for Relief ¶ 112(e) (seeking an order "directing the assessment of restitution amounts to Plaintiffs for reasonable costs of repairing damage resulting from Defendants' unlawful acts").

## III. ARGUMENT

### A. "Ascertainable Loss" Includes the Cost of Repairing Damage Caused by Services That Violate the CFA

The Consumer Fraud Act prohibits the "use or employment . . . of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise . . . or with the subsequent performance . . . ." *See* N.J.S.A. § 56:8-2. "Merchandise" is defined to include "services." *See* N.J.S.A. § 56:8-1(c). Read together, and for purposes of this case, these provisions mean that it is illegal to make misrepresentations or engage in unconscionable

business practices in connection with the sale or subsequent provision of services. Although the Attorney General need not prove actual harm when he or she brings a CFA action, "[a] private party seeking to recover must demonstrate that he or she has suffered an 'ascertainable loss.'" *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 555 (2009) (citing *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472-473 (1988)).

There has been substantial litigation over the meaning of "ascertainable loss," a term that the CFA does not define. The Supreme Court first addressed the meaning of "ascertainable loss" in the context of a case about the provision of *services* – as opposed to a case involving the sale of *goods* – nearly twenty years ago. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994), arose out of a kitchen renovation gone bad. A homeowner engaged Sears to perform various services, including installing new cabinets and countertops, covering the exhaust fan, venting the microwave hood, and the like. *See Cox*, 138 N.J. at 7-8. The homeowner was not satisfied with the work. Trial evidence revealed much of it to have been substandard, incomplete, or completed but not permitted, in violation of regulations, and therefore in violation of the CFA. *See id.* at 8. The Supreme Court concluded there was a causal connection between the CFA violations and the substandard work, and approved a damage award equaling the amount necessary to repair the conditions caused by the shoddy work. *See id.* at 22-23.

The *Cox* holding – that a person who provides services that violate the CFA must pay costs of repair – was unremarkable. The contractor's services violated the CFA and caused damage to the kitchen; the owner's ascertainable loss was the cost of repair.[2] Courts have looked to this decision multiple times in determining what counts as "ascertainable loss" in cases in

[2] The closer question examined in *Cox* – whether the homeowner could recover costs of repair even if he had not in fact undertaken to repair his kitchen (*See Cox*, 138 N.J. at 22.) – is not present in this case. Plaintiffs allege that each of them did in fact expend money by paying for therapy to repair the damage done by JONAH. *See* Complaint ¶¶ 73, 85, 98, 108.

which services are alleged to have been provided in a manner that violates the CFA. *See, e.g.*, *Roberts v. Cowgill*, 316 N.J. Super. 33, 43 (App. Div. 1998) (relying on *Cox*; declining to award cost of repair where, despite CFA violations, home addition "was essentially constructed in a workmanlike manner"); *St. Louis, LLC v. Anthony & Sylvan Pools Corp.* , A-3754-04T3, 2006 WL 1585739, at *5-7 (App. Div. June 12, 2006) (relying on *Cox* to approve recovery of cost of repairs); *Petinga v. Sears, Roebuck & Co.*, No. 05-5166 (JBS/AMD), 2009 WL 1622807, at *9 (D.N.J. June 9, 2009) (relying on *Cox* to approve recovery of cost of repairing damage caused by HVAC installers as ascertainable loss).

Plaintiffs' post-JONAH "repair" costs fit squarely within the holdings of *Cox*, *Roberts*, *St. Louis*, and *Petinga*, the only difference being that Defendants here performed services on the Plaintiffs themselves, rather than on kitchens, home additions, or HVAC systems. Contractors in those case performed work on homes. When they damaged those homes, they had to pay to repair them. The same principle applies here. Defendants' services damaged Plaintiffs, and Defendants should bear the cost of repair.

### B. None of Defendants' Cases Undermines Plaintiffs' Entitlement to Costs of Repair

Defendants do not squarely discuss *Cox* or any of the other cases addressing cost of repair as ascertainable loss. Instead, they cite only a handful of cases, all of which are off-point or distinguishable.

Defendants first cite *Castro v. NYT Television*, 370 N.J. Super. 282, 294-295 (App. Div. 2004). The plaintiffs in that case were unknowingly videotaped in a hospital emergency room, allegedly in violation of the CFA. *See Castro*, 370 N.J. Super. at 287-88. None of them appears to have parted with any money as a result of the alleged CFA violation, or suffered any other monetary loss. Instead, the plaintiffs alleged invasion of their rights of

privacy and confidentiality – intangible rights the denial of which does not constitute ascertainable loss under settled New Jersey law. *See id.* at 295; *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 612 (1997) (noneconomic damages associated with denial of "enjoyment" of new home do not constitute ascertainable loss). The facts of the Castro case have nothing to do with the facts here, in which Plaintiffs paid ascertainable sums to legitimate therapists to repair the damage done by Defendants.

Defendants also place heavy reliance on *Gupta v. Asha Enter. LLC*, 422 N.J. Super. 136 (App. Div. 2011), a case in which a defendant restaurant delivered meat samosas to plaintiffs, who were Hindu vegetarians. *See Gupta*, 136 N.J. Super. at 141. Some plaintiffs ate some of the samosas. That had significant emotional and religious consequences for them. The plaintiffs sued, and sought "economic damages they would incur by virtue of having to participate in the required religious cleansing ceremony in India." *See id.* at 142. Plaintiffs argued that the cost of traveling to India to "cure" the spiritual damage caused by eating the meat samosas was akin to the repair cost damages approved in *Cox*.

The *Gupta* court, however, distinguished *Cox*, and said 'no,' the spiritual need to travel to India for cleansing is not an ascertainable loss. *See Gupta*, 422 N.J. Super. at 149. In particular, the court reasoned that in *Cox*, the "cost of cure . . . was the result of the loss of the value of property *that had been rendered unsafe and unsightly by the work of the contractor*." *Id.* (emphasis added). That is, and as explained above, if you render something unfit or damaged, in violation of the CFA, you have to pay to repair the damage and to make it right.[3]

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[3] This reading of *Gupta* is consistent with those cases arising under the CFA that address faulty *merchandise*, such as cars, rather than shoddy services. In *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234 (2005), for example, car owners sued Mercedes-Benz because certain cars contained faulty fuel gauges. *See Thiedemann*, 183 N.J. at 239. The court in that case *assumed* that if a consumer were to incur a necessary cost to fix the defect, that expenditure

Presumably, the *Cox*-style "repair costs" in the case of meat samosas made and delivered in violation of the CFA would be the cost of "repairing" the samosas by rendering them vegetarian – which the defendant effectively did, by preparing a new order of *vegetarian* samosas and delivering them without charge. *See id.* at 144.

Finally, Defendants cite *Billings v. Am. Express Co.*, No. 10-3487, 2011 WL 5599648 (D.N.J. Nov. 16 2011), a case in which a pro se plaintiff sought up to $700,000 in damages for mental anguish and psychiatric treatment after AMEX improperly, and in purported violation of the CFA, denied an attempted charge due to a processing error. *See Billings*, 2011 WL 5599648, at *2. Relying on *Gupta*, the court reasoned that psychiatric treatments were not compensable "cure" damages because AMEX's alleged CFA violation had not damaged anything, or caused plaintiff to lose money in any way. Just as the Indian restaurant's CFA violations had not damaged anything that needed repair (except the samosas themselves, which defendant replaced for free), AMEX's alleged CFA violation did not damage anyone or anything, physically or economically. There simply was nothing that was damaged as a result of the CFA violation that needed to be repaired. In that way, *Billings* also is consistent with *Cox*: if, in violating the CFA you damage the very thing you are working on, you have to fix it, but you do not have to fix anything you did not damage.

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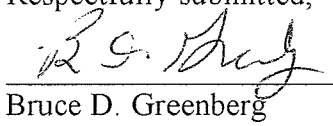
would constitute ascertainable loss (but found no such loss under the facts presented because all repairs were covered by warranty). *See id.* at 251. So too with defective samosas. If the *Gupta* plaintiffs had been required to *pay* to replace their samosas, that additional payment presumably would have been an ascertainable loss. But it would not transform the cost of a trip to India into a recoverable, ascertainable loss any more than if a car owner who had to pay for a new fuel gauge in his Mercedes found the experience to be so stressful as to require a trip to the spa.

## IV. CONCLUSION

For nearly twenty years, New Jersey courts have required defendants who provide services in violation of the CFA to pay to pay to fix the damage they cause. This case should be no different. For this, and for all the foregoing reasons, Defendants' motion should be denied.

Dated: April 29, 2014

Respectfully submitted,



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JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching LLC,

Defendants.

**CERTIFICATION OF SERVICE**

Amina B. Lee, of full age, hereby certifies:

1. On April 29, 2014, the original and two copies of the following documents were hand delivered to: Clerk, Superior Court of New Jersey, Hudson County Law Division, 595 Newark Avenue, Jersey City, NJ 07305

- Opposition To Motion For Partial Summary Judgment; and
- Certificate of Service

and were served via electronic mail upon:

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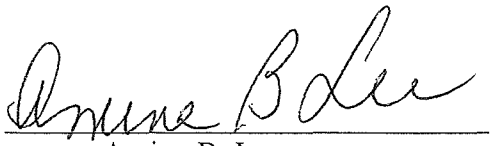

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