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May 28, 2014

HAND DELIVERED

Honorable Peter F. Bariso, Jr., A.J.S.C.
Superior Court of New Jersey
Hudson County Administration Building
595 Newark Avenue
Jersey City, NJ 07305

Re: *Ferguson et al. v. JONAH et al.*
Docket No. L-5473-12

Dear Judge Bariso:

This letter brief constitutes Plaintiffs' statement regarding the impact of *D'Agostino v. Maldonado*, 216 N.J. 168 (2013), on Defendants' motion for partial summary judgment. That motion was argued on May 9, 2014, and the Court at that time asked for the parties' positions regarding the effect of *D'Agostino*. Plaintiffs' position is that *D'Agostino* reaffirms that Defendants' motion should be denied.

Defendants' motion argued that Plaintiffs' purported request for "emotional damages" cannot constitute "ascertainable loss" under the New Jersey Consumer Fraud Act ("CFA"). Plaintiffs' response was twofold. First, Plaintiffs made clear that they do not seek compensation for "emotional damages," and do not allege that any such damages constitute the "ascertainable loss" required for standing to bring a private claim under the CFA. Second, Plaintiffs explained that, for nearly 20 years, New Jersey courts have recognized that "cost of repair" can constitute ascertainable loss for plaintiffs injured by services performed in violation of the CFA, and that is



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precisely what Plaintiffs here seek. *See generally* Plaintiffs' Opposition to Motion for Partial Summary Judgment, dated April 29, 2014; *see also Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 22-23 (1994). Either (or both) of these arguments is sufficient to deny Defendants' motion.

At the May 9 hearing, however, the Court asked whether Defendants' motion lacked significance because the Supreme Court made clear in *D'Agostino* that, so long as plaintiff can show an ascertainable loss, plaintiff can recover whatever damages result from the CFA violation. The Court was correct to question whether Defendants' motion, even if granted, would have any practical effect on the outcome of this trial or the amount of any judgment. This is because *D'Agostino* confirms that whether a plaintiff has suffered "ascertainable loss" is a question separate from, and antecedent to, the question of the amount of "damages sustained" he or she may recover. *D'Agostino* makes clear that Plaintiffs in this case may be able to recover the amounts they expended to fix the damage caused by Defendants' services as "damages sustained," even if those amounts do not constitute "ascertainable loss." *D'Agostino's* parsing of the statutory language is straightforward.

First, the statute "authorizes a statutory remedy for '[a]ny person who suffers any ascertainable loss . . . as a result of the use or employment . . . of any method, act, or practice declared unlawful.'" *See D'Agostino*, 216 N.J. at 184-85 (quoting N.J.S.A. 56:8-19). The Court noted that "ascertainable loss" therefore constitutes a "prerequisite for a private cause of action." *See id.* at 185 (quoting *Weinberg v. Sprint Corp.*, 173 N.J. 233, 251 (2002)).



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Second, the statute separately requires that the court award “threefold the damages sustained” to a plaintiff who has proven unlawful conduct that has caused an ascertainable loss. *See D’Agostino*, 216 N.J. at 185; *see also id.* at 192 (“There is no calculation of ‘damages sustained’ unless the ascertainable loss requirement is first satisfied.”). It is a basic principle of statutory interpretation that different terms are to be read as having distinct meanings; to read “damages sustained” as a mere synonym for “ascertainable loss” would render it a nullity.

Under *D’Agostino*, and assuming that Plaintiffs in this case can show ascertainable loss through, for example, proof of the amounts expended for JONAH’s services, it might not ever be necessary for the Court to resolve the question of whether amounts spent on subsequent therapy constitute ascertainable loss. Those amounts presumably will be recoverable as “damages sustained,” as the Court suggested at the hearing on Defendants’ motion.

But Plaintiffs continue to contend that this Court can, and should, deny Defendants’ motion on its own terms. Defendants filed a motion seeking a ruling that the amounts Plaintiffs expended to fix the harm caused by JONAH cannot constitute ascertainable loss; Plaintiffs responded with authority showing that cost of repair can be ascertainable loss. *D’Agostino* confirms only that the ruling on this question may not have any practical effect on the amount of damages Plaintiffs ultimately will recover. It does not alter the fact that the cost of repairing the



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damage caused by fraudulent or unconscionable services is an “ascertainable loss,” and the Court should so rule.¹

Respectfully,

A handwritten signature in blue ink, appearing to read "B.D. Greenberg", written over a light blue background.

Bruce D. Greenberg

BDG:al

cc: Michael P. Laffey, Esq. (w/enc.) (via electronic mail)
Charles S. LiMandri, Esq. (w/enc.) (via electronic mail)
Demetrios K. Stratis, Esq. (w/enc.) (via electronic mail)

¹ New Jersey Courts follow the doctrine of “constitutional avoidance,” declining to address constitutional questions not squarely and necessarily presented. *See, e.g., In re Wheeler*, 433 N.J. Super. 560, 596 (App. Div. 2013) (“We agree that the principle of ‘constitutional avoidance’ favors leaving constitutional issues that need not be decided for another day.”). But we are aware of no similar doctrine that counsels in favor of avoiding a statutory question, especially when that question is the *only* question a particular motion poses.